☐ Small Claims ☐ County Court ☒ District Court ☐ Probate Court ☐ Juvenile Court ☐ Water Court Larimer County, Colorado Larimer County Justice Center 201 La Porte Ave Suite 100 Ft. Collins, CO 80521	
Plaintiff: Virginia L.Farver v Defendant(s): City of Fort Collins, the Fort Collins Electric Utility; and Does 1 - 100	▲ COURT USE ONLY ▲ Case Number: 2016 CV 144
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Response to the Defendants' Motion for Summary Judgment

COMES NOW the Plaintiff and hereby respectfully submits the following Response to the Defendants' Motion for Summary Judgment.

#I Introduction

It is clear from the record before the Court that at some point around 2008 the City Council was considering several "strategies" to achieve its energy goals, such as reducing the City's greenhouse gas emissions. It is also clear that the city removed and replaced all Fort Collins residents' and businesses' analog electric meters with so called "smart" digital electric meters, which transmit wireless radiation into the home, known to be hazardous to human health, thousands of times per day. What is not clear is how the City got from Point A to Point B.

There is no resolution or ordinance from the City Council with a statement such as, "The Council hereby authorizes the Advanced Meter Fort Collins Project". Without such a document the Defendants have not shown that the City properly authorized the Project. Rather, the resolutions Defendants cite are full of qualifying words and phrases such as "proposed" measures, "will require significant decisions", "strategic planning guidance", a "mid-century vision", "four goals", "expected to have an increasing role in the electric system, and an "objective" to "create a smart grid roadmap by the end of 2009". Both of the key resolutions, containing the 2008 Climate Action Plan and the 2009 Energy Policy imply and / or state that final action on the proposed strategies including the Project is deferred to a later date.

The Council mentioned the Project in resolutions (among several other proposed strategies), thought about it, and made vague statements about it but never made a policy decision recognizable as such. Vague statements about goals, a mid-century vision and proposed strategies do not satisfy the Defendants' burden of proof. One must conclude that the Council never authorized the Project.

Although the Appropriations Ordinance mentions the Project in some detail, nothing in the City Charter or the law for local government budgets allows a City to use an appropriations ordinance to authorize a project.

The Fort Collins Electric Utility (FCEU) acted as if the council did make that final action, a final public policy decision. The "Appropriation Ordinance" appears to say that the Council had already authorized the Project and was only seeking to appropriate money to pay for it. Defendants claim that the Council delegated to the Fort Collins Electric Utility (FCEU) the power to make policy decisions such as authorizing the Project – a claim that is supported by the

record – but then claim that the Council subsequently exercised that same power which it had previously delegated away. More logical is that after the Council delegated the policy making power to FCEU, FCEU exercised that power by authorizing the Project, but did so behind closed doors.

By contrast with the purported authorization of the Project, the Council's actions and resolution authorizing the monthly manual meter reading charge appear to have been clear, open, transparent and not misleading. But as Plaintiff has argued that there cannot be a lawful charge associated with an unlawful Project (one not properly authorized). For these and other reasons described in this Response to the Defendants' Motion for Summary Judgment, the Defendants' Motion should be denied.

#II Aside on how this lawsuit could have been avoided

Plaintiff is frankly surprised that Defendants have identified certain resolutions and ordinances approved by the City Council and have argued across several pages of their Motion that the Council properly authorized the Project. This conflicts directly with the verbal and written information that Deputy City Manager Jeff Mihelich and City staff gave to Plaintiff in April 2015 in response to Plaintiff's Open Records Act request. Mr. Mihelich wrote, "In the end, we both understood that the City of Fort Collins does not have the document you described in your request, and as discussed in our conference call." Plaintiff had requested records such as resolutions or ordinances that, in effect, authorized the Project. The City gave Plaintiff no records in response to that part of her records request.

Plaintiff described this in her First Amended Complaint in paragraphs 68-87 on pages 22–25. If the City had provided to Plaintiff the resolutions and ordinances Defendants attach to their Motion as exhibits at the time of Plaintiff's records request, Plaintiff might not have sued. Those resolutions and ordinances were responsive to Plaintiff's records request and as such Plaintiff had a right to see them and Defendants had a duty to disclose them, which they failed to do. However this is not an admission that said resolutions and ordinances authorized the Project. They did not.

#III Standard of Review

The issue here is not the implementation of the Project (Motion, page 5) but its authorization or lack thereof by proper procedures.

Plaintiff adds to Defendants' statement on the standard of review that the Court should evaluate the City Council's resolutions and ordinances on the matter of the Project and the requirements of the City Charter, the Sunshine Act, and the Colorado Constitution's section on due process for public policy making, quoted in the Plaintiff's First Amended Complaint.

If the Court finds there is insufficient evidence to demonstrate that Defendants complied with said requirements and / or that the resolutions and ordinances cited did not actually authorize the Project, the Court should deny the Defendants' Motion.

Defendants cite the case *Crested Butte South Metropolitan District v Hoffman* in support of their argument that " . . . the courts presume the validity and regularity of official acts of public officials and entities . . . ." That excerpt begs the question of what is meant by "official acts".

Cities make mistakes by failing to follow the requirements of the Open Meeting Law or by taking action not actually authorized by the governing body with the power to make policy. Not every act of a public entity is an "official act" within the meaning of *Crested Butte*.

Also, an overly broad interpretation of this excerpt from *Crested Butte*, such as presuming that every act of a public entity is valid, would eviscerate the Sunshine Act and City Charters of cities across the State of Colorado. It would effectively prevent courts from reviewing a City's compliance with said Act and City Charters in the City's policy making process. That cannot be what the Legislature or the court in *Crested Butte* intended.

Also, one generally only presumes until one knows better. One presumes only when one does not have the facts that enable one to know one way or another. Even a presumption of validity can be rebutted as is the case here.

#IV Statement of undisputed facts

Defendants' statement of undisputed facts is incomplete because it omits the facts from Plaintiff's Open Records Act request in early 2015, the conference call, statements the City staff made during that conference call, and the letter from Deputy City Manager Jeff Mihelich to Plaintiff about that conference call dated April 21, 2015 (Exhibit 9 in the First Amended Complaint). Plaintiff incorporates by reference paragraphs 68-87 on pages 22-25 from her First Amended Complaint as additional undisputed facts.

#V Argument

Defendants say on page 26 of their Motion, "When the Climate Action Plan, the 2009 Energy Plan, the Appropriation Ordinance and the DOE Grant Resolution are read together, there is only one reasonable conclusion. Acting in accordance with the City Charter and Code, the Council directly, clearly and sufficiently authorized and approved the Project . . . ." In fact none of them contains a policy decision to authorize the Project. The Resolutions cited defer an actual policy decision on all strategies including the Project until later. The Appropriation Ordinance only appropriated money; it did not authorize the Project.

#A Resolutions 2008-122 (the 2008 Climate Action Plan) and 2009-002 (the 2009 Energy Policy) did not authorize the Project

#1 The City Charter required a resolution authorizing the Project to be by Ordinance

Defendants argue (on page 3 of their Motion) that the 2008 Climate Action Plan (Exhibit G, Resolution 2008-122) and / or the 2009 Energy Policy (Exhibit H, Resolution 2009-002) were the City's authorization of the Project. However, neither Resolution satisfies the requirements of the Charter of the City of Fort Collins, Article II, Section 6:

> "All legislative enactments and every act creating, altering, or abolishing any agency or office, fixing compensation, making an appropriation, authorizing the borrowing of money, levying a tax, establishing any rule or regulation for the violation of which a penalty is imposed, or placing any burden upon or limiting the use of private property, *shall be by ordinance*, which shall not be so altered or amended on the final passage as to change the original purpose." (emphasis added)

Plaintiff argued in her First Amended Complaint that the Project was such an act. (First Amended Complaint, paragraphs 116–118, pages 30-31). The fact that FCEU did not shut off Plaintiff's electricity or have her arrested doesn't change the fact that those were both possible as a direct result of the Project. Defendants have not shown why Section 6 does not apply to the Project.

Therefore the requirement of Article II, Section 6 applies the Project and the City could only authorize the Project by ordinance. Neither Resolution was an ordinance. Both were resolutions. Therefore neither resolution properly approved the Project.

#2 Response to Defendants' claim on this matter

Under IV Argument, A, Council – Manager Form of Government (Motion for Summary Judgment, pages 20-22) Defendants have not provided sufficient detail. Defendants just quote selectively from the City Charter and then state, without any sort of analysis, that the Project was properly adopted and implemented. That is just the Defendants' opinion. Plaintiff disputes the propriety and legality of the process by which the Project was approved.

#3 The Council did not have the authority to authorize the Project after 2007

The question is what entity has the authority to make policy decisions regarding Utility Services? According to Defendants, both in their Motion and their Answer, the Council had delegated that power to FCEU through City Code section 2-504 in 2007. From that date forward only the FCEU, and not the Council, could exercise such power. A public entity cannot legally exercise a power that it does not have. Therefore Resolutions 2008-122 and 2009-002 could not authorize the Project.

Defendants contradict themselves on this issue in their Motion. On the one hand Defendants write, "Clearly, under the Charter the Council sets the City's policy through its formal actions

and the City Manager and his staff carry out that policy in the exercise of their administrative authority." (Motion at page 21)

On the other hand Defendants write, "When Code Sections 2-504 and 26-396 and Electric Regulation 8.1.2 are read together, the Council has clearly delegated to the City Manager and the Utility Services Director, both expressly and impliedly, the authority to direct the Electric Utility to replace the meters it uses to measure the energy consumption of its customers without further Council authorization." (Motion at page 23)

The City Manager is an executive, not a legislative body nor a legislative agent of the City. Therefore Plaintiff disagrees with Defendants' claim that the Council had delegated policy making power to the City Manager. Plaintiff agrees that by Code Section 2-504 the Council has clearly delegated to Utility Services "the authority to direct the Electric Utility to replace the meters . . . ."

Code Section 2-504, which Defendants cite on page 22 of their Motion, does give to Utility Services, in the charge of its Director, very broad powers over "the functions and duties of Utility Services . . . to provide for the design, construction, reconstruction, addition, repair, replacement, operation and maintenance of the City's electric . . . services . . . ."

Code Section 26-396 and Section 8.1.2 of the Electric Regulations which Defendants cite on page 22 of their Motion, do not shed any light on whether the Council or the Electric Utility has policy making power.

The "authority to direct the Electric Utility to replace the meters it uses . . . ." is the authority to make policy decisions regarding Utility Services such as authorizing the Project. The removal and replacement of the electric meters was the key component of the Project. The Project, and indeed any smart grid in any city, requires the removal and replacement of the safe, reliable, time-tested analog electric meters with digital smart meters.

When the City Charter was written the Council had that authority but the Council delegated that authority to Utility Services in City Code section 2-504 in 2007. This resolves the apparent contradiction. In conclusion on this point, despite the fact that the Council approved Resolutions 2008-122 and 2009-002, the Climate Action Plan and the Energy Policy, respectively, the Council at those times did not have the authority to make policy for the Electric Utility, having delegated it away in 2007. Therefore those Resolutions did not authorize the Project.

#4 Without copies of the notices of the December 2, 2008 and January 6, 2009 Council meetings, key facts are missing which might establish whether the public notice was "full".

The Sunshine Act of 1972 and Colorado Open Meetings Law (COML) apply to the City Council and its meetings. The COML requires "full and timely" notice to the public prior to the meeting of the matters to be considered at the meeting. Plaintiff takes Defendants' quotations from the COML and applicable case law to be accurate. However Defendants' conclusions, in the 2nd paragraph of page 28 of its Motion, that the City provided adequate public notice, is lacking in facts. It is only Defendants' opinion.

The Court needs to know the content of that notice to determine whether the City provided "full" notice. Although the Court in *Benson* did not define the content of the required notice it would

seem to be elementary for notice to state whether the Council was considering authorizing a proposed $32 million project to remove and replace every electric meter in the city or considering stating its energy goals, a mid-century vision, and identifying a list of proposed strategies that might help the City achieve its goals depending on which of those strategies the Council chose later to act on.

Defendants cite the City Clerk's affidavit, attached to the Motion as Exhibit V. The City Clerk was Ms. Wanda Winkelmann. Ms. Winkelmann's affidavit describes, in paragraphs 5-8 on page 2, the City's Ordinance Record and says that, "An Ordinance is not included in the Ordinance Record unless and until those notice requirements have been met." The components of a notice that Ms. Winkelmann attests to do not include whether the notice informed the public that the Council was considering authorizing the Project or considering proposing a list of strategies, including the Project, to be chosen by the Council at a later date.

Accepting Ms. Winkelmann's Affidavit as true, it still does not demonstrate that the City provided "full" notice.

The *Benson* case cited by Defendants goes on to say:

> In determining whether the notice at issue is "full," we apply an objective standard, meaning that a notice should be interpreted in light of the knowledge of an ordinary member of the community to whom it is directed. This standard is warranted by the OML's stated purpose, which is to provide fair notice of public meetings to members of the community. See §§ 24-6-401 & -402(2)(c); *Benson*, 195 Colo. at 383, 578 P.2d at 652; see also *Hallmark Builders & Realty v. City of Gunnison*, 650 P.2d 556, 560 (Colo. 1982) (applying objective standard to notice of a public hearing on a zoning ordinance).

There is a big difference between the Council saying, in an ordinance or resolution, "We will do X" and saying, "We might do Y." In other words, "The Council is hereby authorizing the

Project", versus "The Council might choose to do the Project and / or any of the other proposed strategies we have identified herein, but significant decisions will have to be made." In this example "X" represents the Project and "Y" represents a set of proposed strategies including the Project.

Conspicuously absent from both the Climate Action Plan and the Energy Policy is any statement that the Council was making a policy decision to authorize the Project – or any of the other strategies. This is because of the qualifying words and phrases in the two resolutions quoted in the introduction to this pleading. How is an ordinary member of the community supposed to know that the Council is considering authorizing an expensive and far ranging project if the notice doesn't say so?

The question here is what the notices told the public the Council was considering doing or deciding. Although Defendants claim that both of the above cited resolutions authorized the Project, on their face both resolutions appear not to. Rather, both resolutions identify a list of several proposed strategies from which the Council could choose at a later date, including the Project, and using other qualifying terms defer the policy decision on all the strategies, including the Project, to an uncertain future date.

It may be that the notices for these two meetings clarified the Council's intentions to make a final policy decision to authorize the Project. We do not know, however, because Defendants have not provided copies of the notices. Even if the notices made that point clearly, those notices would conflict with the plain language of both Resolutions, leaving no clear legal basis for a Court order granting summary judgment.

#5 By their terms both Resolutions deferred a final policy decision on the Project

#a The Council could have made it clear, and would have done so, if it had been authorizing the Project or any of the other proposed strategies

In either Resolution the Council could have, but didn't, made a firm commitment to the Project or any of the other proposed strategies. But the Council never made a clear policy decision regarding any of the proposed strategies.

#b Resolutions 2008-122 (on the 2008 Climate Action Plan) did not authorize the Project

Exhibit G is Resolution 2008-122 approving and adopting the 2008 Fort Collins Climate Action Plan. Defendants' description of this Resolution, in paragraph 7 on page 9 of their Motion, is accurate. However their interpretation is not. Although the 2008 Climate Action Plan mentioned a smart grid and advanced metering infrastructure (AMI) the plan did not authorize the City to implement either one. A careful reading of Resolution 2008-122 shows this. The Policy mentions smart grid and AMI on page 17 and again on page 26, but there is no authorization in the policy for the City to develop and put in place either one. The key is the two paragraphs on page 16 under the heading "New Measures". These two paragraphs contain the following statements:

> "The strategies listed in Table 4 are identified to help Fort Collins achieve progress toward the 2020 reduction goal. If fully implemented, the existing and new measures combined sum up to 1,212,000 tons of CO2 avoided in the year 2020, or approximately 90% of the reductions needed to meet the 2020 goal. . . . Through the biennial review process the list of strategies can be updated to incorporate changes in the carbon market and technology opportunities, as well as citizen support for climate protection and City budget priorities."

There were several "new measures", each of which was a "strategy". Notice the phrase "If fully implemented". This tells us that the Council was not committing to fully implementing all of the "new measures". The Council might implement 1 or 2 of the new measures, all of them or none of them. It was up to the Council or FCEU to make the decisions at a later date whether and how to implement the new measures.

The 2nd paragraph says, "Many of the strategies presented *will require significant decisions* about City budget priorities and trade-offs between community costs and benefits. However the list of strategies *proposed* here is sound and will move Fort Collins towards its carbon reduction goals." (Emphasis added)

The statement about "will require significant decisions" means decisions in the future.
The use of the phrase "strategies proposed here" means that there would have to be a decision on decisions in the future on those strategies.
The statement about updating the list of strategies through the biennial review process means that the City might choose to delete or remove any of the proposed strategies, including the Project, from the list.

This Resolution doesn't say or mean, "If and when the City gets the money (approximately $32 million) we will build a smart grid or do the Project." The Affidavit of Dennis Sumner, paragraph 9 on page 2, suggests that this is what the Council had decided in this Resolution. The Council could have said so but it chose not to.

Overall the qualifying words and phrases identified above show that Resolution 2008-122

identified several proposed strategies or policy options but did not make a final policy decision to act on any of them.

#c Resolution 2009-002 (on the 2009 Energy Policy) did not authorize the Project

Exhibit H is Resolution 2009-002 of the Council of the City of Fort Collins adopting an updated energy policy. Attached to that Resolution and part of it was Attachment A, the Fort Collins Utilities Energy Policy 2009 or 2009 Energy Policy (as Attachment A is titled).

The Defendants' description of that Resolution, in paragraph 8 on pages 9-10 of their Motion, is mostly accurate. As described by the Defendants the Policy says, "The purpose of this policy is to provide strategic planning guidance for Fort Collins Utilities' Light and Power Service Unit, the Energy Services Group and the entire city government. The policy describes a mid-century vision and four goals with associated objectives and metrics."

This is very vague. This is not authorization for the Project or any of the other strategies.

What is strategic planning guidance? Most likely it was the Council's guidance for the Electric Utility to use as it, the Electric Utility, made the policy decisions on which of the proposed strategies to do, if any. Strategic planning guidance is not a commitment.

The smart grid is only mentioned on page 2 of that policy: "Smart grid innovations are expected to have an increasing role in the electric system. Smart grid is the integration of an electric transmission or distribution system, a communications network, software and hardware to

monitor, control and manage the reliability and overall system efficiency of the generation, distribution, storage and consumption of energy."

So what?! This is not a policy decision. It is a general statement about smart grid innovations. At the time many cities across the United States were considering whether and how to offer smart electric meters to their customers.

Once again this policy is general and not a specific policy decision to do anything regarding the electric meters in the City. It speaks in terms of a mid-century vision, the City's four goals, objectives and metrics.

The reference under Goal #1: Objectives and metrics, says "Create a smart grid roadmap by the end of 2009, defining specific objectives and implementation plans".
In other words the Energy Policy 2009 was a preliminary document stating the need for more information (the road map) before a policy decision could be made. This resolution deferred a policy decision until at least after the completion of the road map.

#B The Ordinances appropriating money did not authorize the Project

Without actually saying it, Defendants suggest that the City Council authorized the Project through Ordinance No. 043, 2010, the "Appropriation Ordinance" and Resolution 2010-030, the "Assistance Agreement" or "DOE Grant Resolution". This is not true.

#1 The Sunshine Act discourages stealth policy making

The Sunshine Act says that public policy should not be made in secret. It would not be proper for the Council to attempt to sneak a major, $32 million project affecting every electric meter in the City (and exposing all Fort Collins residents to harmful wireless radiation) past the public and into public policy on the back of an "Appropriation Ordinance".

#2 The City Charter, Article II, Section 6, says that an Ordinance should have a single purpose which shall be clearly described in the title of the Ordinance

> "All ordinances, except the annual appropriation ordinance and any ordinance making a general codification of ordinances, shall be confined to one (1) subject which shall be clearly expressed in the title." (Article II, Section 6 of the City Charter)

Defendants argue that the Ordinances cited contained not one but two subjects: appropriating money for the Project and authorizing the Project. It would be illegal (contrary to the City Charter) for an Ordinance to have two subjects.

Ordinance No. 043, 2010 was an Appropriation Ordinance as the Defendants correctly describe it. The Council has two basic functions: policy making and budgetary. An Appropriation Ordinance is a budgetary function. Both the City Charter, Article V, Section 9 and C.R.S. 29-1-109, the PART 1. LOCAL GOVERNMENT BUDGET LAW OF COLORADO required the Council to pass an Appropriation Ordinance for the unanticipated revenue, the SGIG grant from the Department of Energy. But neither the Charter nor said law says that a City can use an Appropriation Ordinance to authorize a Project. Therefore Defendants' claim that Ordinance No. 043, 2010 authorized the Project is incorrect as a matter of law.

#3 Copies of the notice for the meeting of May 18, 2010 are needed to determine whether notice was "full"

We do not know the content of the notice provided to the public for Ordinance No. 043, 2010 and Resolution 2010-303. The COML requires "full" notice of what was to be decided during each such Council meeting. Did the notice say that the Council had already authorized the Project or did it say that the Council was considering whether to authorize the Project? The text of Ordinance No. 043, 2010 suggests, but doesn't explicitly say, that the Council had already authorized the Project and the only question / matter to be decided by the Council at that point was supplemental appropriation.

The notice needed to tell the public what matters were to be considered at the meeting. It makes a difference whether the Council had already authorized the Project. There is a big difference between a public notice that says or suggests that the Council has already authorized this Project and is now considering appropriating money for it and one that suggests the Council has not yet authorized this Project and is now considering both authorizing it and appropriating money for it. As stated earlier Defendants have failed to provide copies of said notices and the Affidavit of Ms. Wanda Winkelmann does not address this issue. Without this information the Court cannot tell whether the City provided the full notice required by the Sunshine Act and COML.

#C The Council violated the Sunshine Act by delegating to FCEU the authority to make policy decisions regarding Utility Services because FCEU operates as a black box

The Sunshine Act applies to the FCEU, which is a "local public body" within the meaning of the Act. C.R.S. 24-6-402 says in relevant part:

(1) For the purposes of this section:

> (a) (I) "Local public body" means any board, committee, commission, authority, or other advisory, policy-making, rule-making, or formally constituted body of any political subdivision of the state and any public or private entity to which a political subdivision, or an official thereof, has delegated a governmental decision-making function but does not include persons on the administrative staff of the local public body.

FCEU is "public . . . entity to which a political subdivision, or an official thereof, has delegated a governmental decision-making function" according to Defendants' Motion, previously cited on page 23. The City of Fort Collins is a political subdivision: (c) "Political subdivision of the state" includes, but is not limited to, any county, city, city and county, town, home rule city, ..." C.R.S. 24-6-402 (1) (c)

The Defendants claim on page 23 of their Motion that, ". . . the Council has clearly delegated to the City Manager and the Utility Services Director, both expressly and impliedly, the authority to direct the Electric Utility to replace the meters it uses to measure the energy consumption of its customers without further Council authorization."

As stated earlier the Council cannot delegate policy making power to the City Manager but it can delegate it to Utility Services. That is what the Council did. That was 2007. In 2008 and 2009, the Council no longer had policy making power over the FCEU. Therefore FCEU is the entity that must have approved the Project. It is the only entity that had the power to do so.

Did FCEU comply with the open meeting requirements of the COML? Plaintiff quoted the requirements for meetings in paragraph 17, pages 7-8 of her First Amended Complaint.
The Council knew or should have known that FCEU does not make its meetings open to the public or provided notice of their meetings. Therefore the delegation of policy making power from the Council to FCEU, which presumably would exercise said power, created a situation

where FCEU made policy in secret and without complying with the COML. This is illegal. We do not know the date of the meeting at which FCEU authorized the Project but we do know that they must have done it because only FCEU had that power after the Council amended Code section 2-504 in 2007. We know that some entity or other in the City authorized the Project, and FCEU spent the money and pulled out the analog meters and installed smart meters.

There is nothing in the record before the Court to show that FCEU complied with the requirements for meetings in the Open Meetings Law when it made the policy decision to authorize the Project. A trial will give the Defendants the opportunity to so demonstrate. According to the OML:

> "(8) No resolution, rule, regulation, ordinance, or formal action of a state or local public body shall be valid unless taken or made at a meeting that meets the requirements of subsection (2) of this section."

Defendants provided to Plaintiff its supplemental disclosures and requested disclosures, which Plaintiff had requested in late October and late November, 2016, respectively, on December 30, 2016. These disclosures were hundreds of pages of bate-stamped documents. In any case these disclosures included "Executive Team Notes" of several meetings in 2010 through 2015.

In 2010 alone there were meetings of the "SGIG Executive Team" or the "Fort Collins Executive Team" on April 27, May 11, July 20, July 27, August 3, October 5, October 12, November 2, November 23, November 30, December 7 and December 14. The notes for each meeting list the attendees. In every case there were no members of the public listed as an attendee. Nor is there any document among the 861 pages of disclosures claiming that FCEU or the City provided "full and timely notice" of any of these meetings.

The affidavit of Ms. Wanda Winkelmann applies to the Council's meetings and work sessions but not to FCEU's meetings.

FCEU's meetings were supposed to be open to the public because, "(b) All meetings of a quorum or three or more members of any local public body, whichever is fewer, at which any public business is discussed or at which any formal action may be taken are declared to be public meetings open to the public at all times." (C.R.S. 24-6-402 (2) (b))

The Executive Team Notes in Defendants' disclosures list the attendees at each meeting. For a meeting on April 27, 2010 the attendees were Kraig B., Dennis S., Steve C., and Angel A. There were three or more members of FCEU in attendance at many of the Executive Team meetings from 2010 through 2015 according to Defendants' disclosures. Public business, namely the AMFC Project, was discussed at every one of those meetings. Thus those meetings were covered by 24-6-402(b). The public had a right to attend the FCEU meetings and to be notified prior to the meeting about what proposed decisions or projects FCEU was going to consider. FCEU violated that right.

To recap, the Council delegated to FCEU in 2007 the authority to make a policy decision to authorize the Project, when the Council knew or should have known that FCEU held closed meetings not noticed, FCEU then made that policy decision, but FCEU failed to comply with the requirements of the COML in so doing. Defendants have not provided any evidence to the Court showing that FCEU complied with those requirements. Therefore Plaintiff's 5th cause of action, is supported with a factual and legal basis.

Therefore the Court should not grant summary judgment and Defendants' Motion should be denied.

WHEREFORE, the Plaintiff respectfully requests the Court to deny Defendants' Motion for Summary Judgment and for whatever further relief the Court deems just and proper.

DATED this 26th day of January, 2017

Respectfully submitted,

Virginia Farver

Virginia Farver
Plaintiff