DISTRICT COURT, LARIMER COUNTY, COLORADO Larimer County Justice Center 201 Laporte Avenue, Suite 100 Fort Collins, CO 80521-2761 (970) 498-6100 **Plaintiff: ERIC SUTHERLAND,** **v.** **Defendant: THE CITY OF FORT COLLINS** **Indispensable Party: Angela Myer, Larimer County Clerk and Recorder**	COURT USE ONLY
Kimberly B. Schutt, #25947 WICK & TRAUTWEIN, LLC P.O. Box 2166 Fort Collins, CO 80522 Phone: (970) 482-4011 Email: kschutt@wicklaw.com John R. Duval, #10185 FORT COLLINS CITY ATTORNEY'S OFFICE P.O. Box 580 Fort Collins, CO 80522 Phone: (970) 221-6520 Email: jduval@fcgov.com	Case Number: 2017 CV 219 Courtroom: 5C

Defendant's Objection to Plaintiff Filing with the Court only a $20 Personal Check Instead of the Bond Required under C.R.S. Section 1-11-203.5(1)

COMES NOW, the Defendant City of Fort Collins ("City"), by and through its counsel, the Fort Collins City Attorney's Office and Wick & Trautwein, LLC, and in response to the "Brief" titled "Filing with the Clerk of the Court a Bond, with Sureties, Running to the Contestee and Conditioned to Pay all Costs, Including Attorney Fees, in Case of Failure to Maintain the Contest" that the Plaintiff /Contestor Eric Sutherland ("Contestor") filed with Court Clerk on August 24, 2017, along with Contestor's personal $20 check payable to the Court Clerk (the "Check"), states as follows:

1. The Contestor has filed the Check with the Court Clerk as his purported satisfaction of the "bond, with sureties" that this Court may require before accepting jurisdiction over this ballot question contest as provided in C.R.S. Section 1-11-203.5(1). However, as discussed below, the Check does not satisfy the bond requirements under this statute and the Plaintiff's arguments to the contrary are without merit.

2. As this Court knows, the Colorado Supreme Court issued an "Order of Court" dated October 27, 2016, in *Sarner v. Myers and City of Loveland,* Case No. 2016SA261, a copy of which order is attached as Exhibit "A" and incorporated by reference (the "Order"). In the Order the Supreme Court addressed the bond requirement under Section 1-11-203.5, stating:

> "The bond requirement of section 1-11-203.5(1) is 'a bond . . . running to the contestee and conditioned to pay all costs, including attorney['s fees, in case of failure to maintain the contest.'" The bond requirement ensures that the contestee (sic) 'maintains the contest' through the summary adjudicative hearing. *The amount of the bond, therefore, should reflect the costs and attorney's fees that may reasonably be expended through the summary proceeding*." (Emphasis added.)

The Supreme Court has considered similar bond language in other statutes related to election contests as granting to district courts the authority to require such bonds from the contestor for the benefit of the contestee to ensure that the constestor "maintains the contest" through the adjudicative proceedings. *Mahaffey v. Barnhill,* 855 P.2d 847, 849 (Colo. 1993); *Amaya v. District Court*, 590 P.2d 506, 507 (Colo. 1979); *Nicholls v. Barrick*, 62 P. 202 (Colo. 1900).

3. Attached as Exhibit "B" and incorporated by reference is an "Attorney Verification of Costs and Fees to be Incurred Through Summary Adjudicative Hearing Pursuant to C.R.C. 1-11-203.5" that has been prepared and signed by attorney Kimberly Schutt, who the City has retained as outside legal counsel to represent it in these proceedings. Ms. Schutt conservatively estimates that the City will incur with her and her firm in this matter attorney fees of at least $3,325 and that it will likely incur costs of at least $175, for total costs and attorney fees of at least $3,500. Therefore, pursuant to Section 1-11-203.5(1), the Constestor should be required to file with the Court a surety bond in the amount of $3,500 for the benefit of the City in the event the Contestor fails to maintain this contest.

4. In the Brief that he filed with his Check, the Constestor presents four "Grounds for Sufficiency" based on which he argues this Court should deem the Check as satisfying the bond requirement in Section 1-11-203.5(1).

5. In his first "Grounds for Sufficiency," the Contestor states: "With the filing of this bond, I can not, hereafter, fail to maintain the contest . . . . This possibility is wholly absent in this matter." The Contestor therefore seems to argue that a bond is only needed if there is the possibility that he will not maintain this contest, and he wishes this Court to agree that there is no such possibility based upon his assertions of subjective intent. He also seems to argue that once he filed his petition in this matter, that these proceedings will go on whether he continues to be involved in them or not. The Contestor cites no legal authority for either of these propositions. Certainly the first of these arguments ignores the realities of human existence. People die, become incapacitated and, yes, change their mind all the time. The Colorado General Assembly no doubt recognized these realities in requiring a contestor to provide a bond under Section 1-11-203.5(1). And, if the General Assembly had thought that once a petition is filed by the contestor

that the contest will somehow be maintained without any further involvement by the contestor, the General Assembly would have logically concluded that once the petition is filed, no bond is needed. It clearly has not done this in the statute.

6. In the second "Grounds for Sufficiency," the Contestor argues that Section 1-11-203.5 "does not authorize the payment of costs and fees for a failure to maintain a contest," but only the payment of costs and fees if the contest is frivolous. The Contestor is arguing, in effect, that the General Assembly has required in Section 1-11-203.5 the posting of a bond that can never be drawn upon for the benefit of the contestee if the contestor fails to maintain the contest. Stated differently, the General Assembly has adopted a law it intends to have no effect. The standard rules of statutory construction that Colorado's courts follow are clear and reflect that courts are to avoid interpreting statutes in a way that "would render any words or phrases superfluous or lead to illogical or absurd results." *Johnson v. People*, 379 P.23d 323, 327 (Colo. 2016). The Contestor's interpretation that Section 1-11-203.5 requires the constestor to post a bond from which the contestee can never recover its costs and attorney fees if the contestor fails to maintain the contest, renders the bond requirement in the statute superfluous and without any effect. It is also surely an illogical and absurd result to conclude that it was the General Assembly's intention to give no effect to this language.

7. In the third "Grounds for Sufficiency," the Contestor seems to argue that he cannot be required to post a bond under Section 1-11-203.5 because he cannot be required to pay the City its costs and attorney fees if he fails to maintain this contest. He argues that as a pro se party he can only be required to pay the City's costs and attorney fees if this contest is determined by the court to be frivolous under the "substantially frivolous" standard for assessing attorney fees applied to pro se parties in C.R.S. Section 13-17-102(6) or under the frivolous standard in Article X, Section 20(1) of the Colorado Constitution, the Taxpayer's Bill of Rights ("TABOR"). As the Supreme Court noted in its Order (attached as Exhibit "A"), the reason the bond is required under Section 1-11-203.5(1) is not tied to whether the contest might later be determined to be frivolous, but rather tied "to the fees and costs that would result from a failure to maintain the contest." There is no conflict between Section 1-11-203.5 and Section 13-17-102(6) or TABOR Section 20(1) that prohibits this Court from requiring the Contestor to post the bond required under Section 1-11-203.5(1).

8. In the fourth "Grounds for Sufficiency," the Contestor asserts that this contest is a "TABOR enforcement action" and that requiring him to post a bond under Section 1-11-203.5 is an abridgment of his constitutional rights under TABOR. This is not a TABOR enforcement action. In *Cacioppo v. Eagle County School District,* 92 P.3d 453 (Colo. 2004), the Supreme Court found that there is a clear distinction between an action brought under Section 1-11-203.5 to contest the form or order of the ballot questions and an action to challenge the substance of the ballot question under TABOR. The former is constitutionally addressed under the requirements of Section 1-11-203.5, while the latter is addressed directly under TABOR's enforcement provisions. In *Cacioppo,* the Supreme Court found that the distinction between these two challenges depends on whether the court is able to rewrite the wording of the challenged ballot question so that it conforms to all applicable laws. If so, then it is a ballot form contest that is properly considered in the expedited proceedings under Section 1-11-203.5. If the ballot

question cannot be rewritten by the court to comply with all applicable laws, then the challenge is to the substance of the ballot question that is not addressed in Section 1-11-203.5, but in a direct TABOR enforcement action. At this point, the Contestor is clearly pursuing a contest to the form of the ballot question and is, therefore, subject to the requirements of Section 1-11-203.5. As this Court knows, statutes enacted by the General Assembly are presumed to be constitutional, entitled to deference by the courts and in this matter the burden is on the Contestor to prove beyond a reasonable doubt that the bond requirement as applied to him in Section 1-11-203.5 is unconstitutional under TABOR. *Cacioppo,* 92 P.3d at 462-63. The Contestor's Brief falls far short of meeting his burden of rebutting this presumption of constitutionality.

WHEREFORE, for all the reasons stated above, the City requests that the Court reject the Contestor's filing of the Check and to order him to promptly file a $3,500 surety bond with the Court Clerk that runs to the City and is conditioned to pay all of the City's costs and attorney fees in the event the Contestor fails to maintain this contest.

DATED this 25th day of August, 2017.

WICK & TRAUTWEIN, LLC

By: *s/Kimberly B. Schutt*
Kimberly B. Schutt, #25947
Attorneys for Defendant

And

FORT COLLINS CITY ATTORNEY'S OFFICE

By: *s/John R. Duval*
John R. Duval, #10185
Attorneys for Defendant

[This document was served electronically pursuant to C.R.C.P. 121 §1-26. The original pleading signed by defense counsel is on file at the offices of Wick & Trautwein, LLC and the Fort Collins City Attorney's Office]

CERTIFICATE OF ELECTRONIC FILING

The undersigned hereby certifies that a true and correct copy of the foregoing **DEFENDANT CITY'S MOTION FOR LEAVE TO FILE LEGAL BRIEF** was filed via Integrated Colorado Courts E-Filing System (ICCES) and served this 24th day of August, 2017, on the following:

Eric Sutherland
3520 Golden Current Blvd. Via Electronic Mail: *sutherix@yahoo.com*
Fort Collins, CO 80521

s/ Cary C. Alton

[The original certificate of electronic filing signed by Cary C. Alton is on file at the Fort Collins City Attorney's Office]