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
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 Kimberly B. Schutt, #25947 WICK & TRAUTWEIN, LLC P.O. Box 2166 Fort Collins, CO 80522 Phone: (970) 482-4011 Email: kschutt@wicklaw.com	Case Number: 2017 CV 219 Courtroom: 5C

CITY'S BRIEF IN OPPOSITION TO PLAINTIFF'S CONTEST TO FORM AND CONTENT OF BALLOT QUESTION PROPOSING AMENDMENT TO CHARTER PERTAINING TO TELECOMMUNICATION FACILITIES AND SERVICES

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 "Petition for a Contest Concerning the Form and Content of the City of Fort Collins Broadband Authorization Election Ballot Question" ("Petition") filed by the Plaintiff Eric Sutherland ("Plaintiff") in this action, states as follows:

I. INTRODUCTION

The Plaintiff has filed his Petition under C.R.S. § 1-11-203.5 to contest the form and content of a ballot question that the Fort Collins City Council (the "Council") submitted to the

City's electorate by its adoption of Ordinance No. 101, 2017 on August 15, 2017, a copy of which is attached as **Exhibit "A"** (the "Ballot Ordinance").[1] The Ballot Ordinance submits this ballot measure to the City's electorate at an upcoming special election on November 7, 2017, which election the Council called in Ordinance No. 096, 2017 on August 15, 2017, a copy of which is attached as **Exhibit "C"** (the "Election Ordinance"). As provided in the Election Ordinance, the City's November 7th election is being conducted as a coordinated election with the Larimer County Clerk and Recorder as authorized in the Colorado Uniform Election Code of 1992 (the "UEC").[2]

The Council is clear in the Ballot Ordinance that it is submitting to the electorate a proposed amendment to the Home Rule Charter of the City of Fort Collins, Colorado (the "Charter") [3] to add a new Section 7 to Charter Article XII. If approved by voters, Section 7 will grant to the Council the power and authority to provide telecommunication facilities and services, including high-speed broadband Internet services, to customers both within and outside of the City through the City's existing electric utility or through a new telecommunications utility. Section 7 also provides significant detail on how the Council might exercise this new power and authority if it chooses to do so in the future. This amendment, if approved by the voters, is not the exercise of this new power or authority, but rather the grant of it.

The process for amending the Charter is addressed in Section 8 of Charter Article IV, which provides that the Charter "may be amended at any time in the manner provided by the

[1] City Code Section 7-156 provides that challenges to the form or content of a ballot title or submission clause fixed by Council for an initiated or referred ballot measure are to be brought under C.R.S. § 1-11-203.5 and that this is the exclusive manner for such legal challenges. Attached as **Exhibit "B"** is copy of Code Section 7-156.
[2] Articles 1 to 13 of Title 1 of the Colorado Revised Statutes.
[3] Attached as **Exhibit "D"** is a complete copy of the Charter with amendments current through April 4, 2017.

laws of the State of Colorado." Section 9 of Article XX of the Colorado Constitution states that the "general assembly shall provide by statute procedures under which the registered electors of any . . . existing . . . city . . . may . . . amend . . . a municipal home rule charter." The General Assembly adopted these charter amendment procedures in the Colorado Municipal Home Rule Act of 1971 (the "Home Rule Act").[4]

The specific procedure for amending a home rule charter under the Home Rule Act, as applicable here, is found in C.R.S. § 31-2-210(1)(b), which provides that the Council can adopt an ordinance "submitting the proposed amendment to a vote of the registered electors . . . [and] [s]uch ordinance shall also adopt a *ballot title* for the proposed amendment" (emphasis added). A "ballot title" is defined in the Home Rule Act as having the same meaning as is given to it in C.R.S. § 31-11-103(1).[5]

Section 31-11-103(1) defines "ballot title" to mean "the language printed on the ballot that is comprised of the *submission clause* and the *title*" (emphasis added). "Submission clause" is defined in Section 31-11-103(4) to mean "the language that is attached to the title to form a question that can be answered by 'yes' or 'no'." "Title" is defined in Section 31-11-103(5) to mean "a brief statement that fairly and accurately represents the true intent and meaning of the proposed initiative, referendum, or referred measure."

The Petition contests only the form of the submission clause of the following ballot title submitted to the electors in the Ballot Ordinance:

CITY-INITIATED
PROPOSED CHARTER AMENDMENT NO. 1 ADDING A NEW SECTION 7 TO CHARTER ARTCLE XII TO AUTHORIZE, BUT NOT REQUIRE, THE CITY'S PROVISION OF TELECOMMUNICATION FACILITIES AND SERVICES AS A PUBLIC UTILITY, INCLUDING BROADBAND INTERNET SERVICES

[4] C.R.S. §§ 31-2-201, et seq.
[5] C.R.S. § 31-2-203(1).

> Shall Article XII of the City of Fort Collins Charter be amended to allow, but not require, City Council to authorize, by ordinance and without a vote of the electors, the City's electric utility or a separate telecommunications utility to provide telecommunication facilities and services, including the transmission of voice, data, graphics and video using broadband Internet facilities, to customers within and outside Fort Collins, whether directly or in whole or part through one or more third-party providers, and in exercising this authority, to: (1) issue securities and other debt, but in a total amount not to exceed $150,000,000; (2) set the customer charges for these facilities and services subject to the limitations in the Charter required for setting the customer charges of other City utilities; (3) go into executive session to consider matters pertaining to issues of competition in providing these facilities and services; (4) establish and delegate to a Council-appointed board or commission some or all of the Council's governing authority and powers granted in this Charter amendment, but not the power to issue securities and other debt; and (5) delegate to the City Manager some or all of Council's authority to set customer charges for telecommunication facilities and services?
>
> **_____Yes/For**
>
> **_____No/Against**

The Plaintiff proposes two alternatives to this submission clause. First, "no ballot question at all."[6] Or, rewrite the submission clause as here redlined (the highlighted provisions are explained in Section II below):[7]

> Shall City of Fort Collins Debt be increased by $150,000,000, with a repayment cost of $200,000,000, by the adoption of an amendment to Article XII of the City of Fort Collins Charter that shall allow, but not require, City Council to authorize, by ordinance and without a vote of the electors, the City's electric utility or a separate telecommunications utility to provide telecommunication facilities and services, including the transmission of voice, data, graphics and video using broadband Internet facilities, to customers within and outside Fort Collins, whether directly or in whole or part through one or more third-party providers, and, in exercising this authority, shall allow City Council to: (1) issue securities and other debt, but in a total amount not to exceed $150,000,000 repayable with revenue from any source including sales and use tax but not with property tax without appropriation by City Council; (2) set the customer charges for these facilities and services subject to the limitations in the Charter required for setting the customer charges of other City utilities; (3) go into executive session to consider matters pertaining to issues of competition in providing these facilities and services; (4) establish and delegate to a Council-appointed board or commission some or all of the Council's governing authority and powers granted in this Charter amendment, but not the power to issue securities and other debt; and (5) delegate to the City Manager some or all of

[6] Petition ¶ 38.
[7] Petition ¶ 39.

Council's authority to set customer charges for telecommunication facilities and services?

_____Yes/For

_____No/Against

For the reasons hereafter discussed, the City urges the Court not to order either of these alternatives, but instead find that the form and content of the submission clause set by Council in the Ballot Ordinance conforms to all applicable legal requirements.

II. SUMMARY OF PLAINTIFF'S GROUNDS FOR CONTEST

The Plaintiff asserts in his Petition the following five "Grounds for the Contest":

1. A comma should be added to the submission clause.[8] (This added comma is highlighted in green above in the Plaintiff's proposed submission clause.)

2. The submission clause fails to state that any "securities and other debt" issued to fund the telecommunication facilities and services could be repaid with sales and use tax.[9] (The language the Plaintiff has added to the submission clause above addressing this ground is highlighted in light blue.)

3. The submission clause fails to state that the last sentence of Section 7(b) in the proposed Charter amendment is in conflict with existing provisions in subsections (b) and (c) of Section 8 in Charter Article V relating to appropriations.[10] (The language added by Plaintiff to address this ground is highlighted above in gray.)

4. The submission clause fails to conform to the requirement in Article X, Section 20(3)(c) of the Colorado Constitution, the Taxpayer's Bill of Rights ("TABOR"), that ballot titles for "bonded debt increases" begin with "SHALL (DISTRICT) DEBT BE INCREASED (principal amount), WITH A REPAYMENT COST OF (maximum total district cost)."[11] (Plaintiff's added language to address this ground is highlighted above in yellow.)

5. The submission clause violates the TABOR's "anti-consolidation clause" found in Article X, Section 20(3)(a).[12] (The Plaintiff has not proposed any added language to the submission clause for this ground.)

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[8] Petition ¶¶ 17-20.
[9] Petition ¶¶ 21-24.
[10] Petition ¶¶ 25-28.
[11] Petition ¶¶ 29-33.
[12] Petition ¶¶ 34-36.

The Plaintiff does not explain in his Petition why he added to the submission clause the rest of the redlined language that is not highlighted above. It appears it was probably added by the Plaintiff to make the submission clause more readable in light of the Plaintiff's highlighted changes.

After discussing the standard of review the Court is to apply in this contest under Section 1-11-203.5, each of these five grounds will be addressed in turn.

III. STANDARD OF REVIEW

Section 1-11-203.5, found in the UEC, does not set a specific legal standard by which this Court is to review the ballot title for this ballot question, except that the Court is to generally determine whether the form and content of the ballot title conforms "to the requirements of the state constitution and statutes."[13] Therefore, the Court is to look to the Colorado's Constitution and its statutes for the specific controlling legal standard of review.

As a home rule municipality, the City derives its power to conduct its municipal elections from Article XX, Section 6.d., which provides that home rule municipalities:

> " . . . shall have the powers set out in sections 1, 4 and 5 of this article, and all other powers necessary, requisite or proper for the government and administration of its local and municipal matters, including power to legislate upon, provide, regulate, conduct and control:
>
> d. *All matters pertaining to municipal elections in such city or town, and to electoral votes therein on measures submitted under the charter or ordinances thereof, including* the calling or notice and the date of such election or vote, the registration of voters, nominations, nomination and election systems, judges and clerks of election, *the form of ballots*, balloting, *challenging*, canvassing, certifying the result, securing the purity of elections, guarding against abuses of the elective franchise, and tending to make such elections or electoral votes non-partisan in character; . . . . " (Emphasis added.)

[13] C.R.S. § 1-11-203.5(3).

In interpreting and applying this Section 6.d., the courts have long held that the regulation of municipal elections is a matter of local concern and not statewide concern.[14] Consequently, if a home rule city's election law conflicts with a state statute, the city's law is controlling and supersedes the state statute.[15] In addition to this grant of home rule authority over its elections, the City and all other municipalities are empowered in Article V, Section 1(9) of the Colorado Constitution to "provide for the manner of exercising the initiative and referendum powers as to their municipal elections."[16]

However, even with these constitutional grants of authority concerning municipal elections given to home rule cities in Article XX, Section 6 and in Article V, Section 1(9), the election provisions in TABOR, as constitutional provisions too, apply for the most part to home rule cities. TABOR Section 20(1) states that all of TABOR's provisions "supersede conflicting state constitutional, state statutory, charter, or other state or local provisions."[17] This is true, however, only to the extent that the express provisions of TABOR make them applicable to a particular municipal TABOR measure.[18]

The City's Charter assumes this grant of constitutional authority to control the City's elections in Charter Article VII, Section 1, which reads:

> "The Council shall provide by ordinance for the manner of holding city elections. All ordinances regarding elections shall be consistent with the provisions of this Charter and the state Constitution. Any matter regarding elections not covered by the state Constitution, this Charter or ordinance of the

[14] *People ex rel. Tate v. Prevost,* 134 P. 129, 134 (Colo. 1913); *May v. Town of Mt. Village,* 969 P.2d 790, 794 (Colo. App. 1998).
[15] *Gosliner v. Denver Election Commission,* 552 P.2d 1010, 1011-12 (Colo. 1976).
[16] *Mccarville v. City of Colorado Springs,* 338 P.3d 1033, 1036 (Colo. App. 2013); *Bruce v. City of Colorado Springs,* 252 P.3d 30, 33-34 (Colo. App. 2010).
[17] *See, Bickel v. City of Boulder,* 885 P.2d 215 (Colo. 1994).
[18] *Bruce v. City of Colorado Springs,* 129 P.3d 988 (Colo. 2006).

> Council shall be governed by the laws of the State of Colorado relating to municipal elections."

Relating to this authority, the following Section 6(b) in Charter Article X provides the specific criteria by which the Council is to set the ballot titles for the City's initiative and referendum measures:

> **"Ballots. Upon ordering an election on any initiative or referendum measure, the Council shall, after public hearing, adopt by resolution a ballot title and submission clause for each measure. The ballot title shall contain information identifying the measure as a city initiated or citizen initiated measure. *The submission clause shall be brief, shall not conflict with those selected for any petition previously filed for the same election, and shall unambiguously state the principle of the provision sought to be added.* The official ballot used when voting upon each proposed or referred measure shall have printed on it the ballot title and submission clause and shall contain the words, "Yes/For" and "No/Against" in response to each measure." (Emphasis added.)**

This Charter provision establishes the standard by which this Court should judge the sufficiency of the form and content of the submission clause contested here. Therefore, as relevant in this contest, the submission clause is to be "brief" and "unambiguously state the principle of the provision sought to be added."

In paragraphs 9 through 13 of his Petition, the Plaintiff argues for a different standard of review. The Plaintiff argues that the Court should apply the criteria in C.R.S. § 31-11-111(3), which reads:

> "In fixing the ballot title, the legislative body or its designee *shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a "yes" or "no" vote would be unclear.* The ballot title shall not conflict with those titles selected for any other measure that will appear on the municipal ballot in the same election. *The ballot title shall correctly and fairly express the true intent and meaning of the measure.*" (Emphasis added.)

However, C.R.S. 31-11-102 states that Article 11 of Title 31, the Article in which Section 31-11-111 is found, "shall apply to municipal initiatives, referenda and referred measures *unless*

alternative procedures are provided by charter, ordinance, or resolution" (emphasis added). Charter Article X, Section 6(b) provides these alternative procedures.

As relevant here, the criteria in Section 31-11-111(3) (C.R.S. "Section 111(3)") applicable to the submission clause differ from the criteria applicable to ballot titles in Charter Article X, Section 6(b) ("Charter Section 6(b)") in the following four respects.

1. Charter Section 6(b) requires that the submission clause be "brief," but C.R.S. Section 111(3) does not;

2. Charter Section 6(b) requires that the submission clause "unambiguously state the principle of the provision sought to be added," but Section C.R.S. 111(3) does not;

3. C.R.S. Section 111(3) requires that the ballot title should be fixed with consideration of "the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a "yes" or "no" vote would be unclear," but Charter Section 6(b) does not; and

4. C.R.S. Section 111(3) requires that the ballot title "correctly and fairly express the true intent and meaning of the measure," but Charter Section 6(b) does not.

Unfortunately, the City has been unable to find any reported Colorado appellate court decisions that would provide direct guidance as to how these differing criteria should be applied by this Court to the City's submission clause. There are, however, many Colorado Supreme Court decisions reviewing the ballot titles that have been set for statewide ballot initiatives and referendum by Colorado's Title Board established in C.R.S. § 1-40-106(1) (the "Title Board").

The City agrees with the Plaintiff that these Supreme Court decisions provide helpful guidance to this Court in its review of the submission clause Council adopted in the Ballot Ordinance.[19] This seems particularly appropriate considering that that the standard of review the Supreme Court applies in reviewing the Title Board's ballot titles is found in the following

[19] *See*, Petition ¶ 14.

C.R.S. § 1-40-106(3)(b), and it essentially contains a combination of the relevant criteria found in C.R.S. Section 111(3) and Charter Section 6(b):

> "*In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a "yes/for" or "no/against" vote will be unclear. The title for the proposed law or constitutional amendment, which shall correctly and fairly express the true intent and meaning thereof,* together with the ballot title and submission clause, shall be completed, except as otherwise required by section 1-40-107, within two weeks after the first meeting of the title board. Immediately upon completion, the secretary of state shall deliver the same with the original to the designated representatives of the proponents, keeping the copy with a record of the action taken thereon. *Ballot titles shall be brief,* shall not conflict with those selected for any petition previously filed for the same election, and, shall be in the form of a question which may be answered "yes/for" (to vote in favor of the proposed law or constitutional amendment) or "no/against" (to vote against the proposed law or constitutional amendment) and *which shall unambiguously state the principle of the provision sought to be added, amended, or repealed*." (Emphasis added.)

In applying the standard of review in this statute, the Supreme Court has followed several rules of construction and presumptions.

The Supreme Court has long held and frequently stated that its review of the titles and submission clauses in the ballot titles set by the Title Board for statewide initiatives and referenda is limited in scope.[20] It has variously described this review, including as follows:

> "In reviewing the [Title] Board's title setting process, the law is settled that this court should not address the merits of the proposed initiative and should not interpret the meaning of proposed language or suggest how it will be applied if adopted by the electorate; we should resolve all legitimate presumptions in favor of the Board; and we will not interfere with the Board's choice of language if the language is not clearly misleading. Our duty is to ensure that the title, ballot title, submission clause, and summary fairly reflect the proposed initiative so that

[20] *In the Matter of the Title, Ballot Title and Submission Clause for 2013-2014 #85,* 328 P.3d 136, 143 (Colo. 2014); *In the Matter of the Title, Ballot Title and Submission Clause, and Summary Pertaining to the Proposed Initiative on School Pilot Program,* 874 P.2d 1066, 1070 (Colo. 1994).

petition signers and voters will not be misled into support for or against a proposition by reason of the words employed by the Board."[21]

The Supreme Court has also said:

> "We have interpreted this statute to impose on the Title Board the job of set[ting] fair, clear, and accurate titles that do not mislead the voters through a material omission or misrepresentation. This requirement, however, does not mean that the Titles need to contain every detail of the proposal. The Titles also are not required to explain every possible effect of enacting the initiative. Furthermore, as noted above, the Title Board has broad discretion in drafting the Titles, and as a result, when we review the Titles, we grant great deference to the Title Board's decisions. As such, we only reverse the Titles where the language is clearly misleading.
>
> . . . .
>
> Furthermore, the fact that the Titles do not discuss all of the potential impacts of the initiative is not improper, as the Title Board may not speculate on the potential effects of the initiative if enacted."[22] (Cites and internal quotes omitted.)

Finally, as relevant here, the Supreme Court has said:

> "The Title Board is given discretion in resolving interrelated problems of length, complexity, and clarity in setting a title and ballot title and submission clause. The Title Board's duty in setting a title is to summarize the central features of a proposed initiative; in so doing, the Title Board is not required to explain the meaning or potential effects of the proposed initiative on the current statutory scheme.
>
> When reviewing a challenge to the title and ballot title and submission clause, we employ all legitimate presumptions in favor of the propriety of the Title Board's actions. *We will not consider whether the Title Board set the best possible title*. Rather, the title must fairly reflect the proposed initiative such that voters will not be misled into supporting or opposing the initiative because of the words employed by the Title Board." (Emphasis added and cites omitted.)

[21] *In the Matter of the Title, Ballot Title and Submission Clause, and Summary Pertaining to the Workers Comp Initiative Adopted on January 6, 1993,* 850 P.2d 144, 146 (Colo. 1993).

[22] *In the Matter of the Title, Ballot Title, and Submission Clause for 2013-2014 #89,* 328 P.3d 172, 179 (Colo. 2014) (the Court defines "Titles" in this decision as collectively the ballot initiative's "title, and its ballot title and submission clause," 328 P.3d at 174).

After applying these standards of review to the Council's submission clause here challenged and for the other reasons hereafter discussed, this Court should deny the Plaintiff's contest in all respects.

III. ARGUMENT

A. *The Submission Clause is Fair, Clear, Accurate and not Misleading without the Comma*

The Plaintiff contends in paragraphs 17 through 20 of the Petition that a comma is needed in the submission clause right after the "and" that is just before the phrase "in exercising this authority." The Plaintiff appears to claim that without this comma, the submission clause is not grammatically correct which results in a submission clause that will be misleading and unclear to the voters. The Plaintiff presents two edited versions of the submission clause which he argues demonstrates this. However, these two versions do not accurately reflect what the question is asking.

A more accurate way to edit the submission clause to determine the effect of having or not having this comma is to eliminate all the parenthetical clauses that precede the "and" in question. To accomplish this, the submission clause is edited as follows:

> Shall Article XII of the City of Fort Collins Charter be amended to allow City Council to authorize the City's electric utility or a separate telecommunications utility to provide telecommunication facilities and services to customers within and outside Fort Collins and in exercising this authority, to: (1) issue securities and other debt, but in a total amount not to exceed $150,000,000; (2) set the customer charges for these facilities and services subject to the limitations in the Charter required for setting the customer charges of other City utilities; (3) go into executive session to consider matters pertaining to issues of competition in providing these facilities and services; (4) establish and delegate to a Council-appointed board or commission some or all of the Council's governing authority and powers granted in this Charter amendment, but not the power to issue securities and other debt; and (5) delegate to the City Manager some or all of Council's authority to set customer charges for telecommunication facilities and services?

These edits removing the parenthetical clauses result in the following question:

> Shall Article XII of the City of Fort Collins Charter be amended to allow City Council to authorize the City's electric utility or a separate telecommunications utility to provide telecommunication facilities and services to customers within and outside Fort Collins and in exercising this authority, to: (1) issue securities and other debt, but in a total amount not to exceed $150,000,000; (2) set the customer charges for these facilities and services subject to the limitations in the Charter required for setting the customer charges of other City utilities; (3) go into executive session to consider matters pertaining to issues of competition in providing these facilities and services; (4) establish and delegate to a Council-appointed board or commission some or all of the Council's governing authority and powers granted in this Charter amendment, but not the power to issue securities and other debt; and (5) delegate to the City Manager some or all of Council's authority to set customer charges for telecommunication facilities and services?

Elimination of the parenthetical clauses reveals a question which clearly asks if the Charter can be amended to grant to Council the authority to provide telecommunication facilities and services to customers "and in exercising this authority, to" do the things described in subparagraphs (1) through (5).

Viewed this way, whether a comma is included or not after the "and" does not change this clear meaning of the question and it is certainly not something that will "mislead voters through a material omission or misrepresentation."[23] The Plaintiff is making a hyper-technical grammatical point which, if judged by the Supreme Court's standards of review discussed above, falls far short of causing a submission clause that is not clear, fair or accurate or that will mislead voters into supporting or opposing this ballot measure. And isn't even correct necessarily.

The Court should therefore not rewrite the submission clause to add the comma proposed by the Plaintiff.

B. *A Reference to Revenue Sources Available to Pay Securities and other Debt Issued Not Required*

[23] 328 P.3d at 179.

Plaintiff contends in paragraphs 21 through 24 of the Petition that wording should be added to subsection (1) of the submission clause to state what revenues might be used to repay any securities or other debt issued in the future to fund telecommunication facilities and services. The Plaintiff argues that this added wording should read: "repayable with revenue from any source including sales and use tax but not with property tax."

In support of this, the Plaintiff quotes in Petition paragraph 22 the first sentence from Section 7(b) of the proposed Charter amendment,[24] which would authorize the Council acting as itself or as the board of the City's existing electric utility *enterprise* or as the board of a new telecommunications utility *enterprise* to issue revenue securities and other debt obligations as currently authorized in Sections 19.3 and 19.4 of Charter Article V.[25] In Petition paragraph 23 he quotes Section 19.3(a) in Charter Article V, which does currently authorize the City to pay its issued revenue securities from a variety of revenue sources, including sales and use taxes, but not ad valorem taxes.

Based on this, the Plaintiff appears to argue that failing to state in the submission clause the possible sources of revenue that might be used to repay any revenue securities or other debt obligation issued to fund telecommunication facilities and services renders the submission clause "misleading" and "unclear."

In many of its decisions, the Supreme Court addresses claims that the submission clause fails to include certain details found in the proposed initiative and, as result, the Court should rewrite the clause to include these details. The Supreme Court has declined to do so unless the

[24] See Section 2 of the Ballot Ordinance.

[25] An "enterprise" is defined in Section 20(2)(d) of TABOR as a "government-owned business authorized to issue its own revenue bonds and receiving under 10% of annual revenues in grants from all Colorado state and local governments combined." An enterprise is not considered a "district" under TABOR and is, therefore, not subject to any of TABOR's requirements when it issues securities or other debt. *TABOR Foundation v. Colorado Bridge Enterprise*, 353 P.3d 896 (Colo. App. 2014).

submission clause contains a significant and material omission.[26] It has also suggested that if the language of the submission clause informs voters of the possibility of the missing detail, that this is sufficient because:

> "This alerts concerned voters that they should read the complete language of the summary or of the initiative in order to determine what these priorities are. The Board need not and often cannot describe every feature of a proposed initiative in a title or ballot title and submission clause and simultaneously heed the mandate that such documents be concise. To require such would be to transform what the General Assembly intended—a relatively brief and plain statement by the Board setting forth the central features of the initiative for the voters—into an item-by-item paraphrase of the proposed constitutional amendment or statutory provision."[27] (Cites and internal quotes omitted.)

Here, the Council's submission clause informs the voters that securities and other debt are likely to be issued to fund the telecommunication facilities and services and that these will naturally be repaid with some category of City revenues. By reviewing the proposed Charter language, a concerned voter will see what revenues can be used for such repayment. Failure to include this detail in the submission clause is clearly not a significant and material omission under these standards.

The Court should therefore not add the following phrase to subsection (1) of the submission clause: "repayable with revenue from any source including sales and use tax but not with property tax."

C. *The Submission Clause Should Not be Rewritten to Address an Alleged Conflict between the Proposed Charter Amendment and Existing Charter Provisions*

In Petition paragraphs 25 through 28, the Plaintiff argues that the phrase "without appropriation by City Council" should be also be added to subsection (1) of the submission clause. He contends that the following sentence in the proposed Section 7(b) of the Charter

[26] *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1997-98 #62*, 961 P.2d 1077, 1082 (Colo. 1998).
[27] *Id.* at 1083.

amendment is being "added or amended in such a way as to create a conflict with or an exemption from current requirements of the Charter"[28]:

> "The City's payment of and performance of covenants under the securities and other debt obligations issued under this subsection (b) and any other contract obligations of the City relating to the provision of telecommunication facilities and services under this Section, shall not be subject to annual appropriation so long as annual appropriation is not required under Article X, Section 20 of the Colorado Constitution."[29]

He contends that this "conflict" or "exemption" "must be explicitly approved by including" his proposed language in the submission clause. The existing Charter provisions he cites as being in conflict with the above-quoted provision are found in Sections 8(b) and 8(c) of Charter Article V.[30]

This kind of argument is one that the Supreme Court has addressed many times as well. These arguments have usually arisen in the context of a claim that an initiative proposing an amendment to the Colorado Constitution will amend or otherwise be in conflict with some existing provision in the Constitution or some other state or federal law. The Supreme Court has consistently refused to rewrite submission clauses to address such conflict claims. The Court has said:

> "As we discussed above, however, the potential effect of a proposed initiative on other constitutional or statutory provisions need not be included in the title or submission

[28] Petition ¶ 26.
[29] See Section 2 of the Ballot Ordinance.
[30] These Sections 8(b) and 8(c) read:

> (b) It shall be unlawful for any service area, officer or agent of the city to incur or contract any expense or liability or make any expenditure for or on behalf of the city unless an appropriation therefor shall have been made by the Council. Any authorization of an expenditure or incurring of an obligation by any officer or employee of the city in violation of this provision shall be null and void from its inception.
>
> (c) Nothing herein shall apply to or limit the authority conferred by this Article in relation to bonded indebtedness, or to the collection of moneys by special assessments for local improvements; nor shall it be construed to prevent the making of any contract or lease providing for expenditures beyond the end of the fiscal year in which it is made, so long as such contract or lease is made subject to an appropriation of funds sufficient to meet the requirements of Section 8(b) above.

> clause. In performing its title-setting function, the Board may not speculate on how a potential amendment would be interpreted and, if possible, harmonized with other relevant provisions. <u>*Such considerations are far beyond the scope of our review of the titles and summary of an initiative petition*</u>."[31] (Emphasis added.)

More recently, the Supreme Court stated:

> "However, the legal interpretation or potential effect of the Proposed Initiatives is beyond our scope of review here. *See Blake v. King*, 185 P.3d 142, 145 (Colo.2008) ("At this stage, we do not address the merits of a proposed measure, interpret it, or *construe its future legal effects.*").
> . . . .
>
> Moreover, a title is not unclear or misleading simply because it does 'not refer to the initiative's possible interplay with existing state and federal laws.'"[32] (Emphasis in original.)

Clearly, the Plaintiff is asking the Court here to add wording to the submission clause set by Council to address what Plaintiff alleges is a potential legal conflict with or divergence between the proposed Charter amendment and existing Charter provisions. This is exactly what the Supreme Court has said should not be done in the judicial review of a ballot title's submission clause.

The Court should therefore not add the following phrase to subsection (1) of the submission clause: "without appropriation by City Council."

D. <u>*The Proposed Charter Amendment and its Ballot Title are Not Subject to TABOR*</u>

In Petition paragraphs 29 through 33, the Plaintiff argues that the proposed Charter

[31] *In the Matter of the Title, Ballot Title and Submission Clause, and Summary Approved January 19, 19914 and February 2, 1994,* 873 P.2d 718, 721 (Colo. 1994). *See also, In the Matter of the Title, Ballot Title and Submission Clause, and Summary Pertaining to the Proposed Initiative on School Pilot Program,* 874 P.2d 1066, 1071 (Colo. 1994) ("As we have indicated, it is not our province in this statutory proceeding to address the possible interaction between the proposed amendment and any current or future provision of the Colorado Constitution").
[32] *In the Matter of the Title, Ballot Title and Submission Clause for 2013-2014 #85,* 328 P.3d 136, 144-45 (Colo. 2014).

Amendment and its ballot title is a TABOR "ballot issue"[33] subject to the election requirements of TABOR Section 20(3)(c) and, therefore, the submission clause must begin with the phrase: "Shall City of Fort Collins Debt be increased by $150,000,000, with a repayment cost of $200,000,000."

There are two flaws in the Plaintiff's reasoning on this issue. First, the proposed Charter amendment is not the kind of "ballot issue" that is subject to TABOR because it does not contain a proposal for the "creation of any multiple-year year direct or indirect debt or other financial obligation" as contemplated in TABOR Section 20(4)(b). Second, even if this Charter amendment could be construed to include a proposal to create debt, it is not a proposal for a "bonded debt" increase as contemplated in TABOR Section 20(3)(c), the provision the Plaintiff relies on in arguing for the wording he proposes be added to the submission clause.

In 1996, the Colorado Supreme Court addressed in *Zaner v. City of Brighton*[34] the question of what local ballot questions, like the City's proposed Charter amendment, are considered "ballot issues" under TABOR and, therefore, subject to TABOR's election requirements. In *Zaner*, the Court was specifically asked to decide whether the ballot measure that Brighton's city council submitted to its electorate at a special election seeking approval of the transfer of the city's electric utility franchise from Public Service to United Power was subject to TABOR's election requirements in Section 20(3)(a)-(c). More specifically, the requirement in Section 20(3)(a) that TABOR ballot-issue elections can only be held on certain dates. The Court rejected a broad interpretation of the term "ballot issue" as defined in TABOR Section 20(2)(a), holding:

[33] TABOR Section 20(2)(a) defines a "ballot issue" as "a non-recall petition or referred measure in an election." However, the Colorado Supreme Court has interpreted this term as not applying to ballot issues that are "non-fiscal matters." *Zaner v. City of Brighton*, 917 P.2d 280 (Colo. 1996).
[34] 917 P.2d 280 (Colo. 1996).

> "We have determined that article X, section 20(3)(a), applies only to issues of government financing, spending, and taxation governed by article X, section 20, and not to all issues regardless of subject matter *nor even to all issues which can be characterized as fiscal*. In our view, the transfer of a utility franchise from one utility company to another is not an issue of government financing, spending, or taxation governed by article X, section 20."[35] (Emphasis added.)

In so holding, the Supreme Court took a practical approach and looked to the true intent of the ballot measure, even though the plaintiffs had argued that the transfer of utility franchise does constitute a financial issue.[36]

The true intent and purpose of the City's proposed Charter amendment is not to create any debt, but to ask the voters whether in the future the Council can, in the exercise of the powers and authority granted to it in this amendment, use the City's electric utility or a new telecommunications utility to begin providing telecommunication facilities and services to the customers in and out of the City. And yes, the powers that the Council might exercise in the future to do this might include issuing revenue securities or other debt obligations to fund such facilities and services, as Council is already authorized to do under Section 19.3 of Charter Article V for its existing utilities and for other proper municipal purposes. And, if in issuing such revenue securities TABOR requires another election, the City will be required to comply with all applicable TABOR election requirements.[37] However, this is not is what is happening in this proposed Charter amendment.

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[35] *Id.* at 288.

[36] *Id. See also, Bicklel v. City of Boulder*, 885 P.2d 215, 234-35 (Colo. 1994) (**"**The primary purpose and effect of City Question B is to grant a franchise to Public Service to furnish gas and electricity to the City and its residents. Although the ballot title also seeks authorization for a contingent tax increase of up to $8 million annually, such an increase would only be implemented if a highly unlikely event were to occur, that is, that the City were somehow unable to collect from Public Service.[20] *In our view, City Question B is thus more properly viewed as a ballot issue for the granting of a franchise, rather than one "for tax or bonded debt increases" for purposes of subdivision 3(c). Therefore, the City was not required to begin the ballot title for that measure with the language "SHALL CITY TAXES BE INCREASED BY UP TO 8 MILLION DOLLARS* ...?" [emphasis added]).

[37] As explained in footnote 25 above, if the Council issues revenue securities as the board of the City's electric utility *enterprise* or as the board of a new telecommunications utility *enterprise*, compliance with TABOR's election requirements would not be required.

This proposed Charter amendment only seeks voter approval to grant to Council certain new, specific powers related to providing telecommunication facilities and services and it does not constitute or represent the exercise of these newly granted powers. Again, if and when the Council seeks to exercises these powers, it will be required to comply with all applicable laws, including TABOR.

However, even if it were the case that the proposed Charter amendment constitutes a TABOR ballot issue for the creation of new debt because it authorizes the Council to issue revenue securities under Section 19.3 of Charter V, such revenue securities are not considered "bonded debt" as this term is used in TABOR Section 20(3)(c). Therefore, the language required in Section 20(3)(c) is not required in the Council's submission clause.

In *Bickel v. City of Boulder*,[38] the Supreme Court considered the meaning of "bonded debt" as this term is used in the "anti-consolidation" provision found in TABOR Section 20(3)(a). This provision reads: "Except for petitions, *bonded debt*, or charter or constitutional provisions, districts may consolidate ballot issues . . . . " (Emphasis added.) In construing the meaning of "bonded debt" in Section 20(3)(a), the Court said:

> "Furthermore, even if we were to agree with plaintiffs that the ballot issues in question each involved a 'consolidation' for purposes of subdivision 3(a) of Amendment 1, it cannot be said that the governmental entities impermissibly consolidated ballot issues involving 'bonded debt.' Rather, the consolidation, if any, in School District Question 1 and City Question C is of a 'bonded debt' issue and a related *tax* issue. *In the case of County Question A, because the district sought approval of 'revenue bonds' as those are defined in subdivision 29–2–112(1), 12A C.R.S. (1986), that ballot issue did not involve 'bonded debt' at all. See § 29–2–112(9) ("The revenue bonds shall not constitute an indebtedness of the county, city or incorporated town within the meaning of constitutional or statutory debt limitation or provision.*")." (Emphasis added.)

TABOR Section 20(3)(c) uses the term "bonded debt" too and it reads in relevant part: "Ballot titles for . . . *bonded debt* increases shall begin, . . . **SHALL (DISTRICT) DEBT BE**

[38] 885 P.2d 215 (Colo. 1994).

INCREASED (principal amount), WITH REPAYMENT COST OF (maximum total district cost), ..."

Here, the power to be granted to the Council to issue securities is to issue revenue securities as authorized in Section 19.3(a) of Charter Article V and it is the grant of this power that the Plaintiff argues triggers the need for the language quoted above from TABOR Section 20(3)(c). However, the revenue securities authorized in Section 19.3(a) are the type of revenue bonds that are contemplated in C.R.S. Section 29-2-112(1) and (9), the statutes referred to above in *Bickle* and pursuant to which the Court concluded that such revenue bonds are not "bonded debt" under TABOR.

These statutes read:

> (1) Any county, city, or incorporated town which has pledged sales or use tax revenue, or both, solely for capital improvement purposes and has created a sales and use tax capital improvement fund may, in anticipation of collection of sales or use tax revenues, issue revenue bonds payable solely from the fund for the purpose of financing capital improvements.
>
> (9) The revenue bonds shall not constitute an indebtedness of the county, city, or incorporated town within the meaning of any constitutional or statutory debt limitation or provision. Each bond issue under this section shall recite in substance that said bonds, including the interest thereon, are payable solely from a special fund and that said bonds do not constitute a debt within the meaning of any constitutional or statutory limitation.

Section 19.3(a) reads:

> (a)The city, by Council action and without an election, may issue securities made payable solely from revenues derived from the operation of the project or capital improvement acquired with the securities' proceeds, or from other projects or improvements, or from the proceeds of any sales tax, use tax or other excise tax, or solely from any source or sources or any combination thereof other than ad valorem taxes of the city.

Clearly, the revenue securities to be issued under Section 19.3(a) are the same as the revenue bonds contemplated under Section 29-1-112.[39] As such, revenue securities are not "bonded

[39] *See, Leek v. City of Golden*, 870 P.2d 580, 588 (Colo. App. 1993).

debt" under TABOR Section 20(3)(a). Consequently, Council's submission clause is not subject to the language requirement of Section 20(3)(a) even if it could be construed as a TABOR ballot issue.

The Court should therefore not add the following language to the beginning of the submission clause: "Shall City of Fort Collins Debt be increased by $150,000,000, with a repayment cost of $200,000,000."

E. *The Proposed Charter Amendment and its Ballot Title are Not Subject to TABOR's "Anti-Consolidation Clause"*

In Petition paragraphs 34 through 36, the Plaintiff argues that the Charter amendment and its ballot title consolidate two different issues in violation of the "anti-consolidation clause" of TABOR Section 20(3)(a), which reads: "Except for petitions, *bonded debt*, or *charter* or constitutional provisions, districts may consolidate ballot issues." (Emphasis added.) The Plaintiff contends that the Charter amendment and its ballot title present a TABOR question for the creation of debt, as indicated in Section III.D. above, and a charter amendment and so combining these two issues violates TABOR Section 20(3)(a).

For the same reasons explained in Section III.D. above, the proposed Charter amendment is not seeking authorization for the creation of new debt, so it is not a TABOR ballot issue. And, even if it could be considered a TABOR issue, the so-called new debt created would be revenue bonds which, for the reasons also discussed in Section III.D., is not "bonded debt" under TABOR Section 20(3)(A), so the "anti-consolidation clause" in Section 20(3)(a) is not applicable here. The only thing the proposed Charter amendment is doing is amending the Charter.

It is unclear what the Plaintiff is asking this Court to do in response to this ground of his contest. In Petition paragraph 38 he appears to be asking the Court to allow "no ballot question

at all." However, it is clear that Section 1-11-203.5(3) requires this Court to fix any defects in the ballot title by rewriting it to conform to applicable law. If the Court is unable to do this, the Supreme Court has made it clear in *Cacioppo v. Eagle County School District*[40] that the challenge to the ballot title is not a form and content challenge, but a substantive challenge to the ballot measure that cannot be addressed in the summary proceedings provided under Section 1-11-203.5.

The Court should therefore not make any changes to the submission clause on the basis that it violates the "anti-consolidation clause" in TABOR Section 20(3)(a).

WHEREFORE, for all the reasons stated above, the Court should deny in all respects the Plaintiff's contest as presented in the Petition and find that the form and content of the Council's ballot title is in conformity with all applicable legal requirements.

DATED this 31st day of August, 2017.

FORT COLLINS CITY ATTORNEY'S OFFICE

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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]

[40] 92 P.3d 453, 465 (Colo. 2004).

CERTIFICATE OF ELECTRONIC FILING

The undersigned hereby certifies that a true and correct copy of the foregoing **CITY'S BRIEF IN OPPOSITION TO PLAINTIFF'S CONTEST TO FORM AND CONTENT OF BALLOT QUESTION PROPOSING AMENDMENT TO CHARTER PERTAINING TO TELECOMMUNICATION FACILITIES AND SERVICES** was filed via Integrated Colorado Courts E-Filing System (ICCES) and served this 24th day of August, 2017, on the following:

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Via Electronic Mail: *sutherix@yahoo.com*

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]