8th DISTRICT COURT **LARIMER COUNTY JUSTICE CENTER** Court Address: 201 Laporte Avenue Fort Collins, CO 80521 Phone (970) 494-3500 **Plaintiff/Contestor:** Eric Sutherland, as an individual, pro se. v. **Defendant/Contestee:** City of Fort Collins **Indispensable Party:** Angela Myer, Larimer County Clerk and Recorder.	▲ **COURT USE ONLY** ▲
Party without attorney: Eric Sutherland, pro se 3520 Golden Currant Boulevard Fort Collins, CO 80521 Phone Number: (970) 224 4509 E-mail: sutherix@yahoo.com	Case Number: Division:
PREHEARING BRIEF IN SUPPORT OF THE PETITON	

For simplicity, personal pronouns I, me, myself, refer to the Contestor, Eric Sutherland.

INTRODUCTION

A PETITION FOR A CONTEST CONCERNING THE FORM AND CONTENT OF THE CITY OF FORT COLLINS BROADBAND AUTHORIZATION ELECTION BALLOT QUESTION (the Petition) has been filed with this court. Upon order of this court, the parties are allowed to submit briefs in support of their position to this court no later than 4:00 p.m. on August 31, 2017.

The Petition alleges that the ballot title does not conform to the requirements of state statue and the Constitution. Five deficiencies of the submission clause (ballot question) are alleged: (1) a grammatical error is present; (2) the submission clause fails to avoid public confusion by excluding any mention of the fact that the ballot title, if approved will exempt city revenues from the requirements of appropriations that would otherwise be required; (3) the submission clause fails to avoid public confusion by excluding any explanation of the sources of revenue that may be pledged or utilized to repay debt that is authorized; (4) the submission clause fails to conform to the form and content requirements of the TABOR amendment in that it does not begin with the wording prescribed by Article X section 20 (3); and (5) the submission clause does not conform with the anti-consolidation clause of the TABOR amendment (Article X section 20 (3) (a) because it combines the authorization of bonded debt with a Charter amendment.

Each of the 5 allegations described in the preceding paragraph was formed in the a GROUND FOR THE CONTEST. What follows here is a restatement of the applicable law and standard of review followed by a more thorough explanation of the argument supporting each GROUND.

APPLICABLE LAW AND STANDARD OF REVIEW

The City of Fort Collins has adopted the Municipal Election Code, Articles 10 and 11 of Title 31, by reference in Article VIII section 1 of the Fort Collins City Charter. (*Any matter regarding elections not cover by the state Consitution, this Charter or Ordinance of the Council shall be governed by the laws of the State of Colorado relating to municipal elections.)*

In law, Colorado Revised Statutes §31-11-111 does provide:

> *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.*

The requirements of Colorado Revised Statutes §31-11-111(3) are therefore applicable to this statutorily defined procedure.

There also exists Colorado Revised Statutes §1-40-106, which is the analog §31-11-111 for statewide ballot issues. Section 1-40-106 contains a requirement for the form, content and substance of a ballot title that is substantially similar to the §31-11-111 requirements for ballot questions. Local ballot questions are not accompanied by ballot titles in the same manner as statewide ballot questions. Nevertheless, the legislative intent for the criteria to be employed in determining if a local ballot question conforms to the requirements of statute is nearly identical to the criteria employed for a statewide ballot issue. Because statewide ballot titles are frequently challenged and because these challenges are frequently heard by the Colorado Supreme Court, a substantial body of case law exists to provide clarity to the meaning of §31-11-111(3) by way of application to statewide ballot issues. In the absence of other guidance to the contrary, this body of law is persuasive. In particular the standard that has been set by the General Assembly upon adopting §31-11-111(3) regarding avoidance of unclear ballot questions has been substantially defined.

The crux of the meaning of C.R.S. §31-11-111(3) may be accurately stated with the clear title requirement established by the Supreme Court.

> *In sum, the clear title requirement seeks to accomplish two overarching goals: prevent voter confusion and ensure that the title adequately expresses the initiative's intended purpose. If a title accomplishes these goals, the end result is that voters, "whether or not they are familiar with the subject matter of a particular proposal," should be able to "determine intelligently whether to support or oppose the proposal."* (*In the matter OF BALLOT TITLE AND SUBMISSION CLAUSE for 2015-2016 #156, 375 P.3d 123 Colorado Supreme Court,* Citing *In re 2015-2016 #73*, 369 P. 3d at 568.)

Also by analogy, certain other important guidelines for judicial review of statewide ballot issues are applicable to this contest. The substitution of the

governing body, such as the Fort Collins City Council, in the present instance, for the Colorado Title Commission is appropriate. Consequently, it is reasonable to conclude the Fort Collins City Council is vested with considerable discretion in setting the ballot question. *(In re Title, Ballot Title & Submission Clause for 2015-2016 #73*, 2016 CO 24, 8, 369 P. 3d 565), in respecting that discretion, the court is obliged to employ all legitimate presumptions in favor of the propriety of the Fort Collins City Council's actions. (*In re Title, Ballot Title & Submission Clause for 2013-2014 #89*, 2014 CO 66, 8, 328 P. 3d 172), when reviewing ballot questions for clarity and accuracy, a District Court may only reverse the Title Board's decision if the ballot questions are insufficient, unfair, or misleading. (Id. quoting *In re 2009-2010 #45*, 234 P. 3d at 648), in making this determination, the court may employ the general rules of statutory construction and accord the language of the proposed ballot questions their plain meaning. (*In re Title, Ballot Title & Submission Clause for 2011-2012 #3*, 2012 CO 25, 8, 274 P. 3d 562, 565), and the role of the District Court is not to consider the merits, efficacy, construction, or future application of a proposed ballot question, but instead to determine whether the Fort Collins City Council fulfilled its duty of ensuring that the ballot question meets constitutional and statutory requirements. (Id.*; In re 2013-2014 #89*, 10, 328 P. 3d at 176.)

Relevant to this contest, the TABOR amendment also imposes minimal requirements for the form, content and substance of local ballot questions. In fact, the 1993 legislation that created the statutorily defined contest for ballot questions, §1-11-203.5 C.R.S. was motivated by the popular adoption of the TABOR amendment in November 1992 (*see Cacioppo v. EAGLE COUNTY SCHOOL DIST*. Supra)

Also relevant to this contest, TABOR requires: *Except for petitions, bonded debt, or charter or constitutional provisions, districts may consolidate ballot issues*. (Article X section 20 (3)(a)). Guidance on the meaning of this requirement was given in the landmark case of the Colorado Supreme court, *Bickel v. City of Boulder, 885 P. 2d 215- Colorado: Supreme Court (1994).* The findings of the Bickel court give clear meaning to what is and what is not an impermissible consolidation of issues based upon whether or not the issues are closely related and inseparable. See especially *Bickel* at 229.

GROUNDS FOR THE CONTEST: Part 1

GROUNDS: Part 1 alleged failure to avoid public confusion by omitting a necessary comma. The missing comma is alleged to be omitted after the 'and' in the phrase "and in exercising this authority, to: (1)" . The phrase "in exercising this authority" is meant to be a parenthetical element. It should be offset with commas ... or else no comma should be used at all before the word "to" in order to embed the prepositional phrase within the sentence without distinction. Here is a skeleton of the question as it was adopted to demonstrate this point:

> Shall Article XII of the City of Fort Collins Charter be amended to allow City Council to authorize the City's electric utility to provide telecommunication facilities and services to customers within and outside Fort Collins, and in exercising this authority, to: (1) issue securities ...$150,000,000; (2) set the customer charges

Here, we can see the entire phrase "and in exercising this authority" operating as a parenthetical element. In this context the word "to:" appears to mean 'in order to' because there is no conjunction to add the charter provisions paraphrased by (1) through (5) with the master charter provision stated in the opening clause of the question. The "and" has been appropriated to a parenthetical element.

The impact of the missing comma can be more dramatically viewed when omitting the intended parenthetical element, “in exercising this authority”, from the question all together. This is an appropriate test due to the fact that “in exercising this authority” is a descriptive rather than substantive component of the question.

> Shall Article XII of the City of Fort Collins Charter be amended to allow City Council to authorize the City’s electric utility to provide telecommunication facilities and services to customers within and outside Fort Collins, and, to: (1) issue securities …$150,000,000; (2) set the customer charges….

Here, we see the absurd result of the word “and” bookended by commas.

Obviously, it is the legislative intent of the Council to request a series of authorizations. This can be construed by observing the multiple provisions, a) through f), that would be added to Article XII section 7 if the ballot question is approved. See Ordinance No. 101, 2017. The first authorization is the creation of a new utility service and the remaining authorizations, (1) through (5) are additional in order to further advance and augment the first authorization. The first authorization is not a means of effectuating a list of actions intended to be taken as the proposed structure of the ballot question currently suggests.

The difference between the ballot questions with and without the missing comma is night and day. There can be no doubt that including the comma in the ballot question avoids public confusion.

GROUNDS FOR THE CONTEST: Part 2

GROUNDS:Part 2 alleges that the ballot question fails to state the revenues that would be made available or be pledged to repay the $150,000,000 of debt authorized by the ballot question.

Several inquiries were made of officials of the City of Fort Collins as to the source of funds that were planned to repay the debt. No clear answer was ever

given. However, the proposed Charter amendment specifically cites Article V section 19.3 as an authorization for creating new debt.

> *The Council, acting as itself, the board of the electric utility enterprise or as the board of the telecommunications utility enterprise, shall have the power to issue revenue and refunding securities and other debt obligations as authorized in Sections 19.3 and 19.4 of Article V of this Charter to fund the provision of the telecommunication facilities and services authorized in this Section.* (Proposed section (b) of Article XII section 7)

Article V section 19.3 lists a wide range of sources for repayment, including sales and use taxes.

> ***Revenue Securities 19.3*** *(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.* (City Charter of the City of Fort Collins, Article V section 19.3)

There can be no doubt that the electors who will decide this question are better informed and less confused if they are made aware, in the ballot question itself, of the possible sources of repayment of $150,000,000 in debt. Absent this information, a voter may only guess what the City of Fort Collins is up to. The use of different sources of revenue can unquestionably be construed to impact individual voters differently.

Although there are many elements of the proposed Charter amendment that are not reflected or indicated in the submission clause, this particular omission rises above the standard of review that must be applied in conjunction with C.R.S. §31-11-111. Information about how a debt is to be repaid is indispensable to the understanding of the change being legislated.

Because a change to the ballot question consistent with the observations made in GROUNDS:Part 3 is not only practicable, but also very easy, this court

should not fail to avoid public confusion by adopting a modification to the question in its Order to better inform voters of the source of repayment.

GROUNDS FOR THE CONTEST: Part 3

GROUNDS:Part 3 alleges that ballot question fails to avoid public confusion by omitting any mention of the legislative intent of adopting the Charter amendment to exempt all revenues used for repayment of debt to finance broadband services from the requirements of appropriation that would otherwise be prescribed by the Fort Collins City Charter. This omission is complicated by the fact that the enacting provision of the City Charter that purports to make this exemption is dependent upon a nonsensical reference to the TABOR amendment.

The conflict between the existing Charter language and what is proposed arises from apparent discontinuity between the language proposed for Article XII section 7 (b),

> *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.* (Proposed section (b) of proposed Article XII section 7)

and the requirements of Article V section 8 (b) and (c) as they currently exist,

> *(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.(Article V section 8 of the Fort Collins City Charter)

This conflict is complicated by the fact that the TABOR amendment places no requirements whatsoever on appropriations as the proposed Charter amendment would indicate. In short, the inclusion of the exemption from appropriations of expenditures is for debt service that is proposed in the third sentence of proposed charter amendment (b) is A) not captured in the ballot question, B) contrary to the existing requirements of the Charter and thus required to be included in the ballot question, but only if C) there is any meaning whatsoever that may be attributable to the language that allows the exemption only if the TABOR amendment does not require annual appropriations, which it does not. The effect of this complication of perplexing language on the form and content of the ballot question is to guaranty that all expenditures for debt service are exempt from Council appropriation.

Although there are many elements of the proposed Charter amendment that are not reflected or indicated in the submission clause, this particular omission rises above the standard of review that must be applied in conjunction with C.R.S. §31-11-111. It is axiomatic that any time a section of the Charter is added or amended in such a way as to create law superior to existing provisons of the Charter or an exemption from current requirements of the Charter, it must be explicitly approved by including language in the submission clause that explicitly informs the voter of this intent.

Because a change to the ballot question consistent with the observations made in GROUNDS:Part 3 is not only practicable, but also very easy, this court should not fail to avoid public confusion by adopting a modification to the question

in its Order to better inform voters of the exemption from appropriations so authorized by the proposed charter amendment.

GROUNDS FOR THE CONTEST: Part 4

GROUNDS:Part 4 allegest that the ballot title fails to conform to the form and content requirements of Article X section 20 (TABOR) (3) (c).

Article X section 20 (3) (c) states, in relevant part,:

> *Ballot titles for .. bonded debt increases shall begin, "SHALL (DISTRICT) DEBT BE INCREASED (principal amount), WITH A REPAYMENT COST OF (maximum total district cost), ...?"*

In GROUNDS: Part 2 above, it was demonstrated that the contestee is seeking approval for the creation of debt that is repayable with pledged revenues from taxes. This follows directly from the reference to City Charter Article V section 19.3 in the proposed charter provision (b) of Article XII section 7.

City officials may well state that they do not 'expect' to issue debt repayable with taxes, but that does not affect the current situation. The fact is that the ballot question and associated Charter amendment purport to create debt repayable with taxes. Indeed, if this ballot question is not challenged, only the simple administrative step of mailing a Notice conforming with the requirements of Article X section (3)(b) would be necessary in order to, thereafter, issue debt with a pledge of tax revenues for repayment without risk of legal challenge. Since we do not know, at this time, whether or not the city will be providing Notice, the only reasonable action is the allegation made here in this pre-election contest. Certainly, a failure to contest this matter at this time will result in a bar against any future judicial review. *See Cacioppo,* supra.

The preceding argument may be construed to be a new theory of law. We do not, at this time, have guidance from authority that explains *when* a ballot issue must conform to the form and requirements of TABOR. To fill this void, a theory of law has been presented in this Contest that holds as follows: *If a ballot issue may be relied upon, after affirmative vote of the electors, to have authorized the creation of new debt repayable with tax revenues, it must comply with the form and content requirements of Article X section 20.*[1] The rational for adoption of this theory of law is pretty straightforward due to the 5 day statute of limitations imposed by C.R.S. §1-11-203.5. A lesser criteria would allow for district to evade the requirements of TABOR by "changing its mind".

It can not escape notice that the Contestee has, in this contest, maintained that intent is not meaningful in certain circumstances. This was part and parcel of the Contestee's argument that this contest be dismissed if a significant costs bond were not imposed. In that circumstance, the Contestee argued that my "intent" to maintain the contest was of no consequence. I agree. The same standard must be applied here. The City of Fort Collins "intent" to refrain from a repayment of new debt with tax revenues is of no consequence in this matter. The facts clearly evidence that the city purports to authorize the repayment of new debt with this subject ballot issue.

GROUNDS FOR THE CONTEST: Part 5

The ballot title fails to conform to the form and content requirements of Article X section 20 (TABOR) (3)(a), also known as the anti-consolidation clause.

[1] I hold that this theory of law is true even in cases where an enterprise as defined by TABOR is seeking authorization to create debt if any part of the 10% of revenues allowed to grants from state or local governments is to be comprised of tax revenues. However, this would not be at issue in this contest because the ballot question clearly purports to authorize the repayment of debt with tax revenues.

: *Except for petitions, bonded debt, or charter or constitutional provisions, districts may consolidate ballot issues*

In the landmark Supreme Court case, *Bickel v. City of Boulder,* Supra, a clear standard for interpreting the anti-consolidation clause was created. This standard may be stated succinctly as holding that no two issues that are not inseparable in their operation toward a desired effect may not be consolidated if such issues belong to the classes enumerated in the clause.

Certainly, an authorization for the creation of debt and the amendment of the Fort Collins City Charter are two wholly separable requests. In fact, it is extremely atypical and quite possibly without precedent to utilize a Charter provision for the purposes of creating debt for a specific purpose and specific amount. Furthermore, no authorization for the creation of debt would be necessary at all if the new utility service created conformed to the enterprise requirements of TABOR, see Article X section 20 (2), and the requirements of the City Charter for the creation of utility debt already found in Artice XII section 1. (*Such public utilities acquired by the city … shall be paid for from revenue derived from the public utility.)* However, in the present context, there can be no doubt that the Contestee is seeking to evade the anti-consolidation clause by combining a charter amendment with an authorization to create debt.

Since the filling of the Petiton, I have had great pause to reflect on the possibility that the concern raised in this GROUNDS:Part 5 is substantive in nature. See *Cacioppo v. Eagle County School District*, supra). The Cacioppo court held for a simply applied standard to differentiate between a contest of the form and content of ballot issue and what is properly viewed as a substantive issue arising from the legislative intent of a ballot issue. The standard prescribed by the

Cacioppo court holds that if a challenge to the legality of a ballot issue may not be resolved by reforming the question, then the challenge is that of substance, not form and content.

In this contest, I have provided a first and favored alternative proposal for reforming the ballot question that simply does not allow for a ballot question at all.[2] This first and favored alternative and the underlying legal reasoning derived directly from the findings of the Colorado Supreme court in *Busse v. City of Golden,* 73 P.3d 660 Colo 2003. The *Busse* court found that the single subject limitation of Colorado law when applied to ballot questions is a matter of form and content. Because the single subject limitation and the anti-consolidation clause of TABOR were tightly coupled in drawing the conclusions of permissible and impermissible consolidations in *Bickel,* supra, it is reasonable and appropriate to draw the same conclusions about the applicability of C.R.S. §1-11-203.5 to ballot questions that flirt with the anti-consolidation clause.

As mentioned, I have had pause to consider whether this was an error on my part, but have concluded that I had proceeded correctly. To justify my choice and to guide this court in adjudicating this matter, I submit here another new theory of law. This theory holds that the *Busse* decision trumps the *Cacioppo* standard. Anti-consolidation is form and content, rather than substance.

This theory is supported by two basic observations. 1) I am limited from proposing an alternative ballot question that does not conflict with the anti-consolidation clause merely because any alternative must stay faithful to the proposed Charter amendment, which neither I or this court have any control over.

[2] I also provided for a second and disfavored alternative form of the ballot question in the even that I failed to persuade this court on my GROUNDS:Part 5.

2) The *Busse* court provided a direct interpretation of constitutional law where as the *Cacioppo* standard is a contrivance provided for the assistance of interpreting statutory law.

Given the argument here, it would appear that this court is obliged to reform the ballot question to the only lawful alternative, a null question. However, if this court should determine against my proposed theory of law, it should be mindful that a substantive question is not subject to the statue of limitations and may be challenged at any time.

Respectfully submitted on this 31st day of August, 2017

Eric Sutherland