

8th DISTRICT COURT
LARIMER COUNTY JUSTICE CENTER
Court Address: 201 Laporte Avenue
Fort Collins, CO 80521
Phone (970) 494-3500

RECEIVED

SEP 18 2017

CITY ATTORNEY

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:
2017CV219

Division:

5c

MOTION FOR POST-TRIAL RELIEF

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

Conference with opposing counsel on this motion was initiated pursuant to C.R.C.P Rule 121 section 1-15 as evidenced by attached email. (Attachment 4)

INTRODUCTION

On September, 4th, 2017, this Court filed its ORDER RE PETITION FOR A CONTEST CONCERNING THE FORM AND CONTENT OF THE CITY OF FORT COLLINS BROADBAND AUTHORIZATION ELECTION BALLOT QUESTION, "the Order".

The Order applies a standard for deciding the **FOUNDATIONS FOR THE CONTEST: PARTS 1, 2 and 3** that is completely inapplicable for this contest. This court is deprived of jurisdiction in a cause of action arising from the City Code or Charter of the City of Fort Collins. Legal Counsel for the Contestee, City of Fort Collins, are well aware of this, yet errantly urged this Court to consider a provision of the Fort Collins City Charter, Article X section 6, as the sole criteria for evaluating the sufficiency of a ballot question. By adopting this standard as the exclusive basis for evaluating the sufficiency of the ballot question that was contested, this Court has made a grave error in law that warrants post-trial relief pursuant to C.R.C.P. Rule 59(a)(3) and (4).

Additionally, many other errors of law are evident in the Order. In short, this court failed to recognize any argument or authority that the Contestor had brought forward to support his grounds for the contest. A treatment of the errors is found below.

I. An incorrect and unapplicable law was used to judge the merits of FOUNDATIONS 1, 2, and 3 of my petition.

Article VII section 1 of the Fort Collins City Charter reads, in relevant part:
There shall be a Municipal Court vested with original jurisdiction of all causes arising under the City's Charter and Ordinances.

The Colorado Supreme Court has interpreted provisions similar to Article VII section 1 to mean precisely what they say. A Home Rule municipality that claims original jurisdiction in its municipal court has original jurisdiction of all matters so claimed and the district courts are deprived of jurisdiction in all such matters. *See Town of Frisco v. Baum*, 90 P.3d 845 – Colo: 2004. (*When a municipality exercises jurisdiction to address local and municipal matters in its municipal court, the district court will consequently be denied original jurisdiction over those matters.*)

This legal premise is extremely well known to the legal counsel representing the City of Fort Collins. On August 8th, the Fort Collins City Council considered an Agenda Item titled *Items Relating to a Proposed Charter Amendment Regarding Municipal Court Functions*. See Attachment 1 to this Motion. This Agenda Item presented an Ordinance that would have presented the voters of Fort Collins with another Charter amendment in addition to the amendment challenged in this contest. This other amendment would have stripped original jurisdiction of matters arising from the City's ordinances and Charter from the Article VII section 1 of the Charter. The rationale presented for this Charter amendment can be found in the attachment, but may accurately be summarized by saying that original jurisdiction of the municipal court had proven to be extremely problematic when the first civil lawsuit was filed in the municipal court.

Consequently, there can be no doubt that legal counsel for the Contestee understood that they were completely without any sound basis in law when they urged this court to utilize a Charter provision, Article X section 6, as the basis for gauging the sufficiency of the ballot question contested in this case. Attorneys John Duval and Kim Schutt were the counsel of record for the defendant in Fort Collins Municipal Court case No. 2017CIVIL01.

At the urging of the Contestee, this Court was enticed to adopt Article X section 6 as the exclusive authority for deciding the sufficiency of the ballot question. See page 7 of the Order, which states:

“ This Court agrees with the City that the sufficiency of the submission clause should be determined by reference to the Charter based upon the above analysis.”

Yet the Charter is completely outside the jurisdiction of this Court based upon the guidance provided 13 years ago by the Colorado Supreme Court in the *Baum*

decision. This Court elected to utilize an authority that was completely inapplicable to the contest at the exclusion of C.R.S. §31-11-111, which was applicable.

Were this single bar to weighing the sufficiency of the ballot question against a Charter amendment not enough, several other arguments and authority would bar this Court from using any other authority than that proposed in the Petition to decide the allegations that the ballot question failed to avoid misleading language. These reasons are laid out in the following paragraphs.

The November election in which this ballot issue is to be decided by the electors is not a municipal election. The election is conducted by the County Clerk in compliance with state laws (UEC). As such, the state laws for conducting an election are applicable. C.R.S. §1-11-203.5 is a provision of the UEC. §1-11-203.5 clearly limits the jurisdiction of a district court hearing a contest to the determination of compliance with state law and the state constitution.¹ No jurisdiction is provided for determination of compliance with municipal code or charter provisions such as Article X section 6.

C.R.S. §31-11-111, which was proposed as the single authority for deciding the sufficiency of the ballot question, is a state law. The applicability of §31-11-111 is defined in C.R.S. 31-11-102: “*This article shall apply to municipal initiatives, referenda, and referred measures unless alternative procedures are provided by charter, ordinance, or resolution.*” This applicability is further reinforced by a provision of the UEC itself, C.R.S. 1-40-103 (2): “*The laws*

¹ See C.R.S. §1-11-203.5 (3) If the court finds that the order of the ballot or the form or content of the ballot title does not conform to **the requirements of the state constitution and statutes**, the court shall provide in its order the text of the corrected ballot title or the corrected order of the measures to be placed upon the ballot and shall award costs and reasonable attorneys fees to the contestor. (emphasis added)

pertaining to municipal initiatives, referenda, and referred measures are governed by the provisions of article 11 of title 31, C.R.S.” Since C.R.S. §31-11-111 is a state statute and is applicable to a co-ordinated election by direct citation of the UEC, only §31-11-111 controls whether or not the broadband ballot question challenged in this contest is passable.

In the hearing for this matter, the Contestee entered City Code section 7-156 into evidence. This provision of the City Code clearly contemplates that a ballot question contest may be brought before both the municipal and state courts.² There is no question that in a regular municipal election, which are held in April of odd numbered years, or in a special election, Article X section 6 of the City Charter would be an applicable authority for deciding the sufficiency of a ballot question. However, this is not such an election and the simple fact that the City Code contemplates both scenarios indicates that a contest brought before a state court is expected to consider only state law.

II. Although some deference was given to case law interpreting a statute that was substantially similar to C.R.S. §31-11-111, the Court failed to apply all controlling authorities to determine the sufficiency of the ballot question.

C.R.S. §31-11-111(3) states that a governing body *shall consider and shall, whenever practicable, avoid*. My petition alleged that City Council had failed to consider and failed to avoid. Based upon the plain and simple meaning of

² It is extremely peculiar that the City has cited C.R.S. §1-11-203.5 as the procedure that the municipal court would employ in a challenge of a ballot question in a municipal election rather than adopting procedures substantially similar to those found in §1-11-203.5 directly into its code in a manner that would eliminate any reference to the district court or to state statute and the constitution. However, this is amongst many deficiencies that visit the municipal court as it attempts to grapple with original jurisdiction.

the language used in 31-11-111(3), my allegations properly framed the issues before the court. Argument was given in my Petition and Pre-hearing Brief to the effect that the resulting ballot issue betrayed failure to consider and failure to avoid by virtue of the omissions of substantive language that was indispensable to the effect of a 'yes' or 'no' vote and a grammatical error.

In response, the City provided no evidence to state that City Council had considered and had avoided. Rather, the city argued that the plain and simple meaning of the language of §31-11-111 could be replaced wholesale with dicta that, although applicable, does not reproduce application of the plain and simple meaning of §31-11-111 to the ballot issue.

Although this Court did clearly state that only Article X section 6 of the City Charter was a controlling authority for deciding the sufficiency of the ballot question, the Court did also state that legal interpretations found in an authority cited by the Contestor³ applied to both Article X section 6 and §31-11-111. In so doing, this Court elected to reference only one of two authorities in supporting its decision on the sufficiency of the ballot question, the authority cited by the City. The authority ignored cited by the Contestor⁴ was ignored. The two authorities are not in conflict in any way. The authority cited by the petitioner can clearly be seen to be no less applicable and controlling than the authority cited by the City. Applying both the authorities clearly leads to a different result than applying only the authority proposed by the City.

³ In the Matter of the Title, Ballot Title and Submission Clause, and Summary Pertaining for 2013-2014 #89, 328 P.3d 172, 179 (Colo. 2014).

⁴ MATTER OF TITLE FOR 2015-2016# 156, 375 P. 3d 123 - Colo: Supreme Court 2016

Specifically, the authority cited by the Contestor in the Petition provides a means test for applying the clear title requirement:

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."

Applying this means test to the omissions of the source of repayment and the exemption from appropriations clearly militates for the reformation of the ballot question as I had proposed it in my petition. Similarly, the grammatical error of the missing comma must also be corrected in order to satisfy the clear title requirement.

III. Even if the authority cited by the Contestor were to be deemed inapplicable, and it is not, the criteria for overriding the City Council, only if the ballot question is "clearly misleading", can not be said to have been satisfied.

Substantive proof that the high bar of "clearly misleading" is surpassed by the language of the unreformed ballot question can be taken directly from the Order itself. This Court was misled by the ballot question. It is axiomatic that if the judge presiding over a contest to determine if a ballot question is misled by the language of the ballot question, then the ballot question is "clearly misleading."

In each of the GROUNDS FOR THE CONTEST: PARTS 1, 2 and 3, this court betrays that it has been misled. The evidence and argument supporting this conclusion is laid out in the following paragraphs.

GROUND 1): On pages 9-10 of the Order, this Court writes:

The court finds that whether the comma is inserted or not the plain and clear meaning of the clause is the same.

The meaning of the ballot question with and without the missing comma is completely different. In order to say that the meanings are the same, a reader must be able to ascertain the function of the word 'to' in the instance in which it precedes the enumerated list (1) through (5) in the question as proposed exactly the same with or without the missing comma.

Without the missing comma, the phrase '*and in exercising this authority*' is bookended by commas, thus rendering it a parenthetical element. The word 'to' that immediately precedes the ': (1)' can have no other meaning than the previous two instances of the word 'to' in the ballot question: '*to authorize*' ... '*to provide*'. In other words, the enumerated conditions (1) through (5) are descriptors that describe the effect of the master verb of the question, '*be amended*'.

With the missing comma, the function of the word 'to' in the instance in which it precedes the enumerated list (1) through (5) clearly becomes conjoined with the previous '*and*' in order to indicate that these provisions are additional and equal to '*to allow*', which was the first object of the master verb of the question.

There exists a huge difference, not zero difference, in the meaning of the original and reformed versions of the ballot question with and without the missing comma. This Court was clearly misled.

GROUND 2.) On page 11 of the Order, this Court has written:

"As such, The Court finds that the submission clause is proper ... because it describes sources for payment of any debt authorized and incurred."
(emphasis added)

Of course, the submission clause does not discuss the sources for payment of the debt. That was the entire substance of the GROUND: Part 2. Knowledge of the

sources of payment is critical to understanding the effect of a 'yes' or 'no' vote. This Court was misled.

GROUNDS 3) On pages 11-13 of the Order, this Court has completely misinterpreted the allegation underlying the request to amend the submission clause to illustrate for the voter that expenditures for debt payments will not be subject to appropriations as is every expenditure of city funds under the Charter as it currently exists. This Court mistakenly refers to the potential for conflict between what is proposed by the ballot question and what exists in the Charter at the present time. **However, there is no such conflict.** There can be no doubt that the proposed Charter amendment, if passed will supercede and control over the existing provisions of the Charter. No guesswork regarding the possible interplay between two contradictory provisions of the Charter is called for or required.

There can be no questioning the validity of the authorities cited in this section of the Order, but these authorities are simply are not applicable. Rather, the truth is much simpler to understand. The proposed charter provision would allow expenditures without appropriations to make payments on debt. This is unambiguous and clear. It's meaning can only be construed to be superior to any other section of the Charter that might prescribe otherwise. (It is presumed that the drafters of legislation understand all other laws.) Yet, that is precisely why omission of a direct request to allow such expenditures without appropriation is clearly misleading. Without inclusion of language informing the voters that expenditures may be made without appropriations, a voter would automatically presume that expenditures will still be subject to appropriations and that a check on the system will be available by virtue of scrutiny by elected representatives who may influenced by petition or remonstrations. The voter would be wrong.

It goes without saying that if the Judge reviewing a ballot question is misled, the voters will be misled and that the ballot question rises above and beyond the "clearly misleading" standard.

IV. The Court failed to take measure of the singular criteria that must be weighed when deciding whether or not TABOR applies and, instead, relied upon intent and a faulty understanding of what TABOR requires.

TABOR requires voter approval in advance for certain types of tax and debt increases, Article X section 20 (4).

The petition alleged in GROUNDS: PART 4 that the ballot question, by its unambiguous plain and simple language, could be construed at a later date as having provided voter approval in advance of the creation of debt repayable with taxes without future voter approval. Nothing in the hearing that was held or the brief submitted by the City contradicts or refutes this allegation. Instead, the City relied upon, and the court agreed with, three arguments that are simply incorrect in substance and applicability.

ARGUMENT 1): The city argued and the court agreed that the city did not intend to issue debt subject to voter approval in advance because the ballot question, if approved will approve creation of utility enterprises. Yet, utility enterprises do not finance their activities with sales taxes. Sales taxes are specifically implicated as a source of repayment for the debt in the underlying Charter amendments reference to Article V section 19.3 (a). There can be no question that the plain and simple language of the ballot question, the underlying proposed amendments to the charter and the existing charter must be relied upon by both the Court and the voter when drawing an understanding of the ballot question. Intent is only a factor in construing ballot questions, statutes and the

Constitution when an ambiguity in the plain and simple language exists. No ambiguity has been alleged here or could possibly be found to exist. Indeed, if ***intent*** is found to be meaningful over the plain and simple language, then every voter must necessarily have access to an interview or cross-examination of the CFO of the city to ascertain the effect of a 'yes' or 'no' vote.

ARGUMENT 2) The City argued and the Court agreed that the proposed Charter amendment does not contain a proposal for the "creation of any multiple year direct or indirect debt or other financial obligation." This is true. The proposed Charter amendment does not do this. Rather, the proposed Charter amendment creates voter approval in advance for the creation of debt. There has never been a TABOR ballot question that contracted debt or specifically proposed the contract of debt. TABOR ballot questions are requests for voter approval in advance of contracting for debt. According to the logic employed by the City and the Court here, no ballot question need ever conform to the form and content requirements of TABOR because no question seeking authorization for creation of debt is actually a proposal for the creation of debt.

ARGUMENT 3): The City argued and the Court agreed that the city has no ***intention*** of issuing debt subject to TABOR's requirement for voter approval in advance. This is similar to ARGUMENT 1) except that the topic of 'revenue bonds' is discussed. Bonds repayable with taxes are not revenue bonds. If bonds repayable with taxes are revenue bonds, then a great void in the cosmos exists in place of an explanation of what "bonded debt" actually means. Just because the Fort Collins City Charter might label Section 19.3 of Article V "REVENUE BONDS", does not mean that debt repayable with the general fund revenues derived from sales and use taxes may be construed to be revenue bonds and, thus, not subject to the requirement of voter approval in advance made by the TABOR amendment.

V. The proof of the applicability of TABOR's form and content requirements to the ballot question can be clearly seen in the City's refusal to harmonize the plain and simple meaning of the ballot question and underlying proposed charter amendment with the intent of the city as it was expressed it in sworn testimony and other places.

Harmonizing the ballot question with what the City has declared to be the effect of a 'yes' vote requires the addition of just three characters '(' - 'b' - ') or '(b)' to a single provision of the proposed Charter amendment. The addition of these three characters to the reference to Article V section 19.3 in the proposed Art. XII section 7 (b) would eliminate the offensive reference to section 19.3 (a), which clearly states that bonds may be issued and repaid with tax. However, the city will not so amend the proposed Charter amendment.

In two actions, an email to City Council and an address to City Council during public participation of the Sept. 5th Council meeting, I offered to suspend all legal activity associated with this ballot question contest if City Council would amend the underlying Ordinance to remove any implication of sales tax as a source of repayment for debt from the proposed Charter amendments. During citizen participation follow up at the Sept. 5th meeting, Mayor Wade Troxell succinctly stated "thanks, but no thanks." See Attachment 2, the email to Council. Unexpectedly, no draft of the minutes of the Sept. 5th meeting are available at this time to document Mayor Wade Troxell's response during the meeting. However, both the address to Council and the Mayors's response may be viewed at:

<https://fortcollinstv.viebit.com/player.php?hash=aPemUqnfYS6r>
by clicking on Citizen Participation (I am the second of two speakers) which is followed immediately by Citizen Participation followup.

The failure of the Contestee to take an action that would harmonize the ballot question with what it had testified was the intent of the ballot question is

perplexing and persuasive. Eliminating any implication that sales tax would be used for repayment would, with one stroke, eliminate any conflict with TABOR and create the result it was declaring it was pursuing.

VI. Because the Court incorrectly found in GROUNDS 4, it did not reach a conclusion on GROUNDS 5. This leaves this subject open to interpretation by the Supreme Court.

The City's argument that the nullification of the ballot question would be a result inconsistent with the legislative intent of 1-11-203.5 is not persuasive when viewed in the context of the constitutional and statutory requirements of single subject. See Article V section 1 (5.5) Admittedly, this is unsettled law, but a reasonable argument exists to support that the ballot question should be nullified on appeal.

WHEREFOR, in accordance with C.R.C.P. Rule 59 (a) I have stated the grounds for post-trial relief and request that this Court provide relief in the form of amended findings and judgment commensurate with the grounds stated here to include, at the minimum, a finding that the ballot title does not conform to the requirements of the statutes and the constitution and the text of the ballot question must be reformed as proposed.

Respectfully submitted on this 18th day of September, 2017

Eric Sutherland

I hereby certify that a true and correct copy of this Motion for Post-trial Relief and attachments was served by delivering a paper copy to the office of the city attorney at Fort Collins City Hall on September 18, 2017.

Eric Sutherland

A ATTACHMENT 1

2017 CV 219

Agenda Item 3

AGENDA ITEM SUMMARY

August 8, 2017

City Council

STAFF

Carrie Daggett, City Attorney
Judge Kathleen M. Lane, Municipal Judge

SUBJECT

Items Relating to a Proposed Charter Amendment Regarding Municipal Court Functions.

EXECUTIVE SUMMARY

- A. Possible Public Hearing and Motions Regarding Protest(s) of Ballot Language.
- B. First Reading of Ordinance No. 102, 2017, Submitting to a Vote of the Electors of the City of Fort Collins a Proposed Amendment to Section 1 of Article VII of the City Charter Pertaining to the Jurisdiction of the Municipal Court to Hear Civil Cases.

This item sets a ballot question that would modify the jurisdiction of Municipal Court to eliminate the Municipal Court's jurisdiction over civil cases while retaining the Court's jurisdiction to hear and try all proceedings initiated by the City alleging violations of the Charter and ordinances of the City. The Ordinance submits the question to Fort Collins voters at the November 7, 2017, Special Municipal Election. The Charter Amendment has been proposed in order to prevent future appeals to Municipal Court of civil actions that are more appropriately heard in Larimer County District Court and that the Municipal Court is not well situated to hear.

Any protest of the proposed ballot language must be received no later than Monday, August 7, 2017, at noon. The protest(s) shall be heard, considered, and resolved by Council prior to adoption of Ordinance No. 102, 2017. If protest(s) are received, copies will be included in Council's "Read-before" packet.

STAFF RECOMMENDATION

The City Manager, City Attorney and Municipal Judge recommend adoption of the Ordinance on First Reading.

BACKGROUND / DISCUSSION

Article VII, Section 1 of the City Charter provides that there shall be a Municipal Court *vested with original jurisdiction of all causes arising under the City's Charter and ordinances*. This means that the Municipal Court has jurisdiction to hear cases other than criminal offenses, traffic or civil infractions or other enforcement of Code violations. Prior to 1989, the City Charter gave the Municipal Court "exclusive jurisdiction" over these matters, meaning that other courts, such as the Larimer County District Court, were arguably precluded from hearing those cases. This provision of the City Charter was changed in 1989 to eliminate the reference to Municipal Court's jurisdiction over matters arising under the City Charter and Code as "exclusive," "thereby clarifying that City Ordinances can create civil remedies in other courts of competent jurisdiction" (Ordinance No. 5, 1989).

The Fort Collins Municipal Court's caseload has traditionally included violations of the City Code, including codes adopted therein such as the City's Traffic Code and uniform codes. Most of the caseload is traffic-related and the majority of those cases are decriminalized traffic infractions. The balance of the caseload is non-traffic misdemeanors and civil infractions. Though there are some differences in rights and options based

Agenda Item 3

on the nature of the charge, the process relating to all defendants is governed by the Colorado Municipal Court Rules of Procedures and state statutes applicable to Municipal Courts, as well as City Code and Charter provisions.

In April, the Council adopted Ordinance No. 052, 2017, adopting Rules of Civil Procedure for the Municipal Court. The need for these rules was precipitated by the first-ever filing in Municipal Court of a civil case, which case seeks review of a City Council land use decision. In the past, plaintiffs have sought judicial review of these types of decisions in Larimer County District Court under Rule 106 of the Colorado Rules of Civil Procedure.

Civil cases, such as the civil case now pending in Municipal Court, involve an entirely different process governed by an extensive set of procedural rules relating to civil cases. The Fort Collins Municipal Court is not staffed, in terms of judicial or administrative positions, to handle complex civil cases such as this. Instead, such cases have in the past been filed by plaintiffs in Larimer County District Court as actions under Rule 106 of the Colorado Rules of Civil Procedure. In that way, such cases are handled by judges who regularly hear these kinds of cases. The District Court has been the path chosen for review of City decisions in all cases other than the one pending currently, and the review of this case would continue in Municipal Court even if the almost never-used option of Municipal Court review for these civil cases is eliminated.

Municipal Court does not have the capacity to handle civil cases in addition to its existing caseload. Budgeting for additional staff for such cases would be difficult since they are rare but very time-intensive when filed. Also hearing these civil cases in Municipal Court places Municipal Judges hired, evaluated, and reappointed by City Council in the position of reviewing City Council decisions which may give the appearance of a conflict of interest for the Judge. Referring such cases to Municipal Judges from other jurisdictions under an intergovernmental agreement for judicial services imposes an unfair burden on the other city's resources and is not a realistic, long-term option. Revising the City's Charter to clearly remove this jurisdiction from the Municipal Court - so that such cases would instead be filed in Larimer County District Court - is the preferred option.

The use of Municipal Court for review of City land use and other types of decisions and actions is proving problematic. There are challenges in having the City's own court review the City's decisions, and there is a risk of abuse by plaintiffs that could result in substantial delays and expense in these civil cases for little gain. Review in District Court would continue to be available and this has been the course of review in all cases other than the currently pending civil case in Municipal Court. Although there has been only one case filed to date seeking review of a civil claim by Municipal Court, there is potential for abuse of the Municipal Court process that creates a significant potential burden for little gain in light of the fully adequate and appropriate review already available in Larimer County District Court.

While a few jurisdictions have adopted civil court rules for use in these kinds of civil cases (as the City did in April), others have modified their charters to eliminate their municipal court's jurisdiction over civil matters and to limit their court's jurisdiction to just hearing the prosecution of violations of the municipality's charter and ordinances.

Based on the information available from other municipalities, including Denver, Aurora and Broomfield, many of these cities' charters grant their municipal courts broad jurisdiction similar to that granted to Fort Collins' Municipal Court. However, their recent experience has been that few, if any, civil actions have been filed by citizen plaintiffs in their courts, so they have not had to address this problem.

The proposed Charter amendment language is as follows:

**Article VII.
Municipal Court
Section 1. Municipal court.**

~~There shall be a Municipal Court vested with original jurisdiction of all causes arising under the City's Charter and ordinances. There shall be a Municipal Court with the jurisdiction to hear and try all proceedings initiated by the City alleging violations of the Charter and ordinances of the City.~~ The Council shall appoint the judge or judges of Municipal Court for two (2) year terms. Council shall designate a Chief Judge to carry out related duties as adopted by the Council by ordinance, and shall fix the compensation of the Municipal Judges. Such compensation shall in no manner be contingent upon the amount of fees, fines or costs imposed or collected. Each Municipal Judge shall be licensed to practice law in the State of Colorado during his or her tenure in office, but need not be so licensed prior to appointment. As Council determines necessary, the Council may designate one (1) or more reputable and qualified attorneys to serve as temporary judge. The Council may remove a Municipal Judge for cause.

Rules of procedure, costs and fees shall be enacted by the Council upon recommendation of the Chief Municipal Judge.

PUBLIC OUTREACH

Staff distributed and posted a news release and an FAQ document regarding the proposed Charter change. This information was also provided to the Home Builders Associations and was posted at the Development Review counter.

ORDINANCE NO. 102, 2017
OF THE COUNCIL OF THE CITY OF FORT COLLINS
SUBMITTING TO A VOTE OF THE REGISTERED ELECTORS OF
THE CITY OF FORT COLLINS A PROPOSED AMENDMENT TO
SECTION 1 OF ARTICLE VII OF THE CITY CHARTER PERTAINING
TO THE JURISDICTION OF MUNICIPAL COURT TO HEAR CIVIL CASES

WHEREAS, Article IV, Section 8 of the Charter of the City of Fort Collins (“Charter”) provides that the Charter may be amended as provided by the laws of the State of Colorado; and

WHEREAS, as provided in Article XX, Section 9 of the Colorado Constitution and Section 31-2-210(1)(b), Colorado Revised Statutes, Charter amendments may be initiated by the City Council’s adoption of an ordinance submitting a proposed amendment to a vote of the City’s registered electors and Council must adopt in that ordinance a ballot title for the amendment; and

WHEREAS, the Council has determined that the Municipal Court is not well situated to hear civil cases in addition to the City Charter and City ordinance violations that have traditionally been heard there; and

WHEREAS, historically such civil cases have been filed not in Municipal Court but in Larimer County District Court, with one recent exception, and the District Court is an appropriate and practical forum for review of these cases; and

WHEREAS, the right of persons to seek redress and review in Larimer County District Court will continue unimpeded with the amendment of the Charter as proposed.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF FORT COLLINS as follows:

Section 1. That the City Council hereby makes and adopts the determinations and findings contained in the recitals set forth above.

Section 2. That the following proposed changes to Section 1 of Article VII of the City Charter shall be submitted to the registered electors of the City as “Proposed Charter Amendment No. 2” at the special municipal election to be held on November 7, 2017:

**ARTICLE VII.
MUNICIPAL COURT**

Section 1. Municipal court.

~~There shall be a Municipal Court vested with original jurisdiction of all causes arising under the City’s Charter and ordinances.~~ There shall be a Municipal Court with the jurisdiction to hear and try all proceedings initiated by the City alleging violations of the

Charter and ordinances of the City. The Council shall appoint the judge or judges of Municipal Court for two (2) year terms. Council shall designate a Chief Judge to carry out related duties as adopted by the Council by ordinance, and shall fix the compensation of the Municipal Judges. Such compensation shall in no manner be contingent upon the amount of fees, fines or costs imposed or collected. Each Municipal Judge shall be licensed to practice law in the State of Colorado during his or her tenure in office, but need not be so licensed prior to appointment. As Council determines necessary, the Council may designate one (1) or more reputable and qualified attorneys to serve as temporary judge. The Council may remove a Municipal Judge for cause.

Rules of procedure, costs and fees shall be enacted by the Council upon recommendation of the Chief Municipal Judge.

Section 3. That the following ballot title, with its title and submission clause, is hereby adopted for submitting Proposed Charter Amendment No. 2 to the voters at said election:

**CITY-INITIATED
PROPOSED CHARTER AMENDMENT NO. 2
AMENDING SECTION 1 OF CHARTER ARTICLE VII TO
MODIFY THE MUNICIPAL COURT'S JURISDICTION**

Shall Section 1 of Article VII of the Charter of the City of Fort Collins, pertaining to Municipal Court, be amended to eliminate the Municipal Court's jurisdiction over civil cases while retaining the Court's jurisdiction to hear and try all proceedings initiated by the City alleging violations of the Charter and ordinances of the City?

_____ Yes/For
_____ No/Against

Introduced, considered favorably on first reading, and ordered published this 8th day of August, A.D. 2017, and to be presented for final passage on the 15th day of August, A.D. 2017.

Mayor

ATTEST:

City Clerk

Passed and adopted on final reading on the 15th day of August, A.D. 2017.

Mayor

ATTEST:

Interim City Clerk

ATTACHMENT
2
2017 CV 219

Subject: Opportunity to move forward without doubt
From: Eric Sutherland (sutherix@yahoo.com)
To: cityleaders@fcgov.com;
Cc: mbeckstead@fcgov.com;
Bcc: ktmglenn@glenakins.com; colln.garfield@gmail.com; kevin.duggan@coloradoan.com; rcunniff@fcgov.com;
Date: Monday, September 4, 2017 1:52 PM

The only way to ensure that the election moves forward without doubts of its legitimacy is if the proposed charter amendments are refined to exclude any mention of repayment of sales tax. This can be done by replacing the reference to Article V section 19.3 with 19.3(b). Problem solved.

I doubt that the Supreme Court will be interested in fostering an interpretation of the Colorado constitution that allows intent to trump reality. If Judge French's decision should stand, it would mean that the form and content requirements of TABOR are meaningless unless a district confesses to the intent of actually repaying debt with tax without an election. I just don't see that happening.

Considering the small change necessary, it is almost unthinkable that City Council would not make this change. Notice posted today of an addition of an emergency ordinance would allow the addition of the three characters '(', 'b' and ')') to the proposed Article XII section 7 (b) at the regular meeting of the city council on September 5th. The refusal to do this strongly suggests an attempt to evade the requirements of TABOR. Alternatively, doing this completely negates any possibility of an appeal of this decision.

Please keep in mind that for three years and for 5 election contests, the 8th District court refused to hear a contest without an \$8,000 or \$10,000 costs bond. That unlawful practice was ended by a successful appeal to the Supreme Court in which it was determined that Judge Thomas French had abused his discretion.* Our appellate courts do uphold the law. In the attached decision, Judge French has made at least one significant error of fact and one significant error of law. Both were prompted, like the bond demands, by erroneous statements made by Contesee's attorneys.

About the comma ... the ability of petroleum companies to condemn rights of way for oil and gas pipelines hinged on the presence of a comma. Regardless of the legal implications in the current matter, there can be no doubt that the original ballot question was not grammatically correct.

Eric Sutherland

* Judge French has now adjudged 3 contests, including the instant matter, with token amounts filed as bond with the clerk of the courts. In this matter, a protest of the amount of bond I filed was made by the City's attorneys, but was disregarded.

----- Forwarded Message -----

From: "french, thomas" <thomas.french@judicial.state.co.us>
To: "sutherix@yahoo.com" <sutherix@yahoo.com>; "kschutt@wicklaw.com" <kschutt@wicklaw.com>
Sent: Monday, September 4, 2017 12:06 PM
Subject: 17 CV 219

Mr. Sutherland and Ms. Schutt:

I have attached a copy of the Order which I filed this date on the above referenced matter.

Thank you,

Judge French

Attachments

- 17CV219 Final Order Filed.pdf (51.90KB)

2017 CV 219

ATTACHMENT 3

MINUTES OF SEPT. 5TH
COUNCIL MEETING

M. I. A.

(MINUTES ARE APPROVED AT
THE FOLLOWING COUNCIL MEETING
DRAFT MINUTES ARE USUALLY
AVAILABLE PRIOR TO SUCH
MEETINGS.)

Subject: Conference request: Motion for post-trial relief

From: Eric Sutherland (sutherix@yahoo.com)

To: jduval@fcgov.com; kschutt@wicklaw.com;

Cc: cityleaders@fcgov.com; cdaggett@fcgov.com; rknoll@fcgov.com; mbeckstead@fcgov.com; datteberry@fcgov.com;

Bcc: jon_lehmann@comcast.com; kevinduggan@coloradoan.com; colin.garfield@gmail.com;

Date: Tuesday, September 12, 2017 1:21 PM

ATTACHMENT 4:
2017 CIV 219

Not unexpectedly, Judge Thomas French has delivered an Order with incorrect findings of law. I am considering a motion for post-trial relief pursuant to Rule 59 (a) (3) and (4) and this email is my initiation of conference on such a motion.

The grounds for the motion are as follows:

I. An incorrect and unapplicable law was used to judge the merits of GROUNDS 1, GROUNDS 2 and GROUNDS 3 of my petition.

A.) As you both know from your experience with Fort Collins Municipal Court case No. 2017CIVIL01, the district courts are deprived of jurisdiction of any matter arising from the code or charter provisions of a Colorado Home Rule municipality that claims original jurisdiction of such matters in its Charter. Fort Collins is such a Home Rule City. Thus, any cause of action that asserted failure to comply with Article X section 6 of the City Charter must be brought to the municipal court.

I did not claim failure to comply with Article X section 6 of the City Charter. I know better. Rather Judge French was enticed to adopt this law as the controlling authority for determining whether or not a ballot question was passable/sufficient entirely due to argument from the City. This was error of the court and you know it. The proposed charter amendment to eliminate original jurisdiction from the charter is proof.

B.) The November election in which this ballot issue is to be decided by the electors is a not a municipal election. The election is conducted by the County Clerk in compliance with state laws (UEC). As such, the state laws for conducting an election are applicable. C.R.S. 1-11-203.5 is a provision of the UEC. 1-11-203.5 clearly limits the jurisdiction of a district court hearing a contest to the determination of compliance with state law and the state constitution. No jurisdiction is provided for determination of compliance with municipal code or charter provisions. such as Article X section 6.

C.R.S. 31-11-111 is a state law. The applicability of 31-11-111 is defined in C.R.S. 31-11-102: This article shall apply to municipal initiatives, referenda, and referred measures unless alternative procedures are provided by charter, ordinance, or resolution. This applicability is further reinforced by a provision of the UEC itself, C.R.S. 1-40-103: (2) The laws pertaining to municipal initiatives, referenda, and referred measures are governed by the provisions of article 11 of title 31, C.R.S.

Since C.R.S. 31-11-111 is a state statute and is applicable to a co-ordinated election by direct citation of the UEC, only 31-11-111 controls whether or not the broadband issue is passable.

C.) On page 7, Judge French has written: " This Court agrees with the City that the sufficiency of the submission clause should be determined by reference to the Charter based upon the above analysis." Thus, the Court has selected an authority that is not controlling and ignored an authority that is controlling.

D.) An argument appears by inference that the City Charter, having its roots in the state constitution, is the sort of state law that 1-11-203.5 contemplates being incorporated into a ballot question contest.

This argument would fail based upon I. A) above, which also creates a clear demarkation between state and local law.

E.) City Code section 7-156 (admitted as evidence) clearly contemplates that a ballot question contest may be brought before both the municipal and state courts. Certainly, in a municipal election (April of odd # year or special election), Article X section 6 would be applicable and a ballot question contest alleging failure to comply with the Charter would necessarily be brought to the municipal court.

II. Although some deference was given to case law interpreting a statute that was substantially similar to 31-11-111, the Court failed to apply all controlling authorities to determine the sufficiency of the ballot question.

A.) 31-11-111 states that a governing body ***shall consider*** and ***shall, whenever practicable, avoid***. My petition alleged that City Council had failed to consider and failed to avoid. Based upon the plain and simple meaning of the language used in 31-11-111(3), my allegations properly framed the issues before the court.

In response, the City provided no evidence to state that City Council had not failed to consider and had not failed to avoid. Rather, the city argued that the plain and simple meaning of the language of 31-11-111 could be replaced wholesale with dicta that, although applicable, does not reproduce application of the plain and simple meaning of 31-11-111 to the ballot issue. Alternatively, argument was given in my petition and brief to the effect that the resulting ballot issue betrayed failure to consider and failure to avoid by virtue of the omissions and grammatical error.

B.) The Court elected to reference only one of two authorities in supporting its decision on the sufficiency of the ballot question. The authority cited was presented by the City. The authority ignored was cited by the petitioner. The two authorities are not in conflict in any way. The authority cited by the petitioner can clearly be seen to be no less applicable and controlling than the authority cited by the City. Applying both the authorities clearly leads to a different result than applying only the authority proposed by the City.

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."

C.) However, even if the authority cited by the petitioner were to be deemed inapplicable, and it is not, the criteria for overriding the City Council, only if the ballot question is "clearly misleading", can not be said to have been satisfied. Proof of this comes from the language of the decision itself. In each of the 3 GROUNDS, Judge French betrays that he has, himself, been misled. The evidence is such:

GROUNDS 1.) The meaning of the ballot question with and without the missing comma is completely different. In order to say that the meanings are the same, a reader must be able to ascertain the function of the word "to" in the instance in which it precedes the enumerated list (1) through (5) in the question as proposed. Without the missing comma, the only possible meaning of the word "to" is 'in order to'. This is so basic that I can't figure out why anyone would argue the point.

GROUNDS 2.) On page 11, Judge French writes "As such, The Court finds that the submission clause is proper ... because it discusses the kind of debt which may be authorized to pay for the new services." (ignoring grammatical mistakes ... which for that, capitalization of The.) Of course the submission clause does not discuss the kind of debt that may be used.

The primary question that went unresolved during the setting of the ballot language was whether or not the debt would be revenue bonds or general obligation bonds. The underlying dispute here derives, as explained in my brief, on the inclusion of sales tax as a source of repayment by reference to Article V section 19.3..

GROUNDS 3) On pages 11-13, Judge French has completely misinterpreted the allegation underlying the request to amend the submission clause. In doing so, he refers to the potential for conflict between what is proposed by the ballot question and what exists in the Charter at the present time. **However, there is no such conflict.** There can be no questioning the validity of the authorities cited in this section of the Order or their effect, but they simply are not applicable. Rather, the truth is much simpler to understand. The proposed charter provision that would allow expenditures without appropriations to make payments on debt. This is unambiguous and clear. Its meaning can only be construed to be superior to any other section of the Charter that might prescribe otherwise. (It is presumed that the drafters of legislation understand all other laws.) Yet, that is precisely why omission of a direct request to allow such expenditures without appropriation is clearly misleading. Without inclusion of language informing the voters that expenditures may be made without appropriations, a voter would automatically presume that expenditures will still be subject to appropriations and that a check on the system will be available by virtue of scrutiny by elected representatives who may be influenced by petition or remonstrance.

It goes without saying that if the Judge reviewing a ballot question is misled, the voters will be misled and that the ballot question rises above and beyond the "clearly misleading" standard.

(whether or not Grounds 4 and 5 are included in the motion for post-trial review is still undecided, but are presented here.)

III. The Court failed to take measure of the singular criteria that must be weighed when deciding whether or not TABOR applies and, instead, relied upon ***intent*** and a faulty understanding of what TABOR requires.

A.) TABOR requires voter approval in advance for tax and debt increases that can be seen to be included in enumerated lists for both.

B.) The petition alleged in GROUND 4 that the ballot question, by its unambiguous plain and simple language, could be construed at a later date as having provided voter approval in advance of the creation of debt repayable with taxes without future voter approval. Nothing in the hearing that was held or the brief submitted by the City contradicts or refutes this allegation. Instead, the City relied upon, and the court agreed with, three arguments that are simply incorrect in substance and applicability.

ARGUMENT 1) The city held and the court agreed that the city did not ***intend*** to issue debt subject to voter approval in advance because the ballot question, if approved will approve creation of utility enterprises. Yet, utility enterprises do not finance their activities with sales taxes. Sales taxes are specifically implicated as a source of repayment for the debt. There can be no question that the plain and simple language of the ballot question, the underlying proposed amendments to the charter and the existing charter must be relied upon by both the Court and the voter when drawing an understanding of the ballot question. ***Intent*** is only a factor in construing ballot questions, statutes and the Constitution when an ambiguity in the plain and simple language exists. No ambiguity has been alleged here or could possibly be found to exist.

ARGUMENT 2) The City held and the Court agreed that the proposed Charter amendment does not contain a proposal for the "creation of any multiple year direct or indirect debt or other financial obligation." This is true. The proposed Charter amendment does not do this. Rather, the proposed Charter amendment creates voter approval in advance for the creation of debt. Good grief. There has never been a TABOR ballot question that contracted debt of specifically proposed the contract of debt. TABOR ballot questions are requests for voter approval in advance of contracting for debt. According to the logic employed by the City and the Court here, no ballot question need ever conform to the form and content requirements of TABOR because no question seeking authorization for creation of debt is actually a proposal for the creation of debt.

ARGUMENT 3) The City argued and the Court agreed that the city has no ***intention*** of issuing debt subject to TABOR's requirement for voter approval in advance. This is similar to ARGUMENT 1 except that the topic of 'revenue bonds' is discussed. Bonds repayable with taxes are not revenue bonds. If bonds repayable with taxes are revenue bonds, then a great void in the cosmos exists in place of an explanation of what "bonded debt" actually means.

C.) The proof of the applicability of TABOR's form and content requirements to the ballot question can be clearly seen in the City's refusal to harmonize the plain and simple meaning of the ballot question and underlying proposed charter amendment with the ***intent*** of the city as it was expressed in sworn testimony and other places. Harmonizing requires the addition of just three characters '(', 'b' and ')' to a single provision of the proposed Charter amendment, but the city will not so amend the proposed charter amendment. (Public participation, Sept. 5 Council meeting.)

IV. Because the Court incorrectly found in GROUNDS 4, it did not reach a conclusion on GROUNDS 5. This leaves this subject open to interpretation by the Supreme Court.

A.) The city's argument that the nullification of the ballot question would be a result inconsistent with the legislative intent of 1-11-203.5 is not persuasive when viewed in the context of the constitutional and statutory requirements of single subject. See Article V section 1 (5.5) Admittedly, this is unsettled law, but a reasonable argument exists to support that the ballot question should be nullified on appeal.

If there are any questions please let me know. Otherwise please let me know how you view a motion presenting argument substantially similar to the above.

Eric Sutherland

Attachments

- 17CV219 Final Order Filed.pdf (51.90KB)