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| DISTRICT COURT, LARIMER COUNTY, COLORADO<br>Larimer County Justice Center<br>201 Laporte Avenue, Suite 100<br>Fort Collins, CO 80521-2761<br>(970) 498-6100<br><br>**Plaintiff: ERIC SUTHERLAND,**<br><br>**v.**<br><br>**Defendant: THE CITY OF FORT COLLINS**<br><br>**Indispensable Party: Angela Myer [SIC], Larimer County Clerk and Recorder** | DATE FILED: October 9, 2017 3:28 PM<br>FILING ID: 9209C6001938E<br>CASE NUMBER: 2017CV219<br><br>COURT USE ONLY |
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**DEFENDANT CITY'S RESPONSE TO CONTESTOR'S MOTION FOR POST-TRIAL RELIEF**

**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 respectfully submits the following Response to the Contestor Eric Sutherland's ("Sutherland") Motion for Post-Trial Relief ("Motion"):

1. Sutherland filed a Petition pursuant to C.R.S. § 1-11-203.5 to contest the submission clause in a ballot question that the Fort Collins City Council submitted to the City's electorate by its adoption of Ordinance No. 101, 207 on August 15, 2017. The matter was

extensively briefed by the parties and the Court held a lengthy hearing on September 1, 2017, after which it issued on September 4, 2017, a seventeen-page order addressing in detail each of Sutherland's asserted grounds for challenging the submission clause of the ballot question ("Order"). In doing so, the Court found the submission clause to be proper, and denied the relief requested by Sutherland.

2. Sutherland now asserts in his Motion that this Court committed a "grave error in law" which requires amended findings and judgment. Sutherland in large part simply raises again all of the same arguments previously made in his Petition and/or at the hearing, and takes the Court to task for allegedly failing to recognize any argument or authority that he brought forward to support his grounds for the contest. Simply stated, the City disagrees with Sutherland's assertions, and believes the Court has thoroughly addressed and correctly rejected in its Order Sutherland's arguments and cited authority.

3. The primary purpose of a Rule 59 motion asking a court to amend its findings or judgment is to give the court an opportunity to correct any errors that it may have made. *In re Marriage of Jones*, 668 P.2d 980, 981 (Colo. App. 1983). Where, as here, a trial court has held a hearing on the issues at hand and issued extensive findings and conclusions, a trial court may properly conclude that those previous findings are proper and sufficient and simply deny a Rule 59 motion to amend without any further explanation. *U.S. Fax Law Ctr. v. Henry Schein, Inc.*, 205 P.3d 512, 519 (Colo. App. 2009). The City submits that, under these circumstances, this Court would be acting most properly in doing so here.

4. Even though the analysis could very well end here, the City will nevertheless – for the record -- address a few of the erroneous assertions made in Sutherland's Motion:

a) **Jurisdiction:** Beginning on page 2 of the Motion, Sutherland engages in a confusing and illogical discourse regarding the respective jurisdictions of state and municipal courts. Though Sutherland specifically chose to file his Petition in the District Court to challenge the form and content of the submission clause in the City's ballot issue under C.R.S. § 1-11-203.5, he now appears to question, for the first time, this Court's jurisdiction to review the submission clause under the form and content criteria found in Section 6(b) of City Charter Article X, but nevertheless contends that this Court does have the jurisdiction to review the submission clause under the criteria in C.R.S. § 31-11-111(3). For this new argument, Sutherland cites City Charter Article VII, Section 1 and *Town of Frisco v. Baum,* 90 P.3d 845 (Colo. 2004).

Sutherland correctly quotes the first sentence in Section 1 of Charter Article VII as stating: "There shall be a Municipal Court vested with ***original jurisdiction*** of all causes arising under the City's Charter and ordinances" (emphasis added). He argues that this grant of original jurisdiction to the City's Municipal Court means that the interpretation and application of the City's Charter "is completely outside the jurisdiction of this Court" based on the Colorado Supreme Court's decision in *Baum.* Sutherland is wrong in his reading of *Baum* and its application to this Court's jurisdiction in relationship to the Municipal Court's jurisdiction. This Court and the City's Municipal Court have ***concurrent jurisdiction*** to hear this matter and Sutherland chose this Court to hear it.[1]

In *Baum*, the Town of Frisco's charter expressly granted to its municipal court "***exclusive original jurisdiction*** over all matters arising under the Charter, the ordinances, and

[1] "Concurrent jurisdiction" is defined as "[j]urisdiction exercised simultaneously by more than one court over the same subject matter and within the same territory, with the litigant having the right to choose the court in which to file the action." *Black's Law Dictionary,* pg. 855 (1999, Seventh Edition).

other enactments of the Town" (emphasis added). *Baum, 90 P.3d at* 846. In applying this provision, the Supreme Court held that it was within Frisco's home rule powers under Article XX, Section 6.c. of the Colorado Constitution to define the jurisdiction of its municipal court with respect to matters of strictly local and municipal concern, but not for matters of statewide concern. *Id.,* at 849. The Court concluded in *Baum,* that since the subject matter of the action before it was of strictly local concern (a challenge to a city council land use decision), Frisco's grant of "exclusive original jurisdiction" to its municipal court required this action to be filed in the first instance in Frisco's municipal court. *Id.,* at 850.

Thus, what is significant about Sutherland's misreading of *Baum* and its application to the jurisdiction vested in the City's Municipal Court, is that *Baum* involved, as well as the subsequent cases relying on it,[2] a municipal charter expressly defining the municipal court's jurisdiction as "exclusive original jurisdiction" over certain matters, and the City's Charter does not vest the City's Municipal Court with "exclusive original jurisdiction," only "original jurisdiction."

In fact, prior to the City's March 7, 1989, election, the first sentence of Section 1 in Charter Article VII read: "There shall be a Municipal Court vested with ***exclusive original jurisdiction*** of all causes arising under the Charter and the ordinances of the city" (emphasis

[2] *See, North Avenue Center, LLC v. City of Grand Junction,* 140 P.3d 308, 310 (Colo. App. 2006) ("In Colorado, district courts are courts of general jurisdiction authorized to hear all civil matters, unless otherwise excepted in the state constitution. [Cites omitted.] One such exception allows for home rule cities to create municipal courts and to vest them with ***exclusive jurisdiction*** over matters of local and municipal concern. [Emphasis added and cites omitted.]); *Olson v. Hillside Community Church SBC,* 124 P.3d 874, 880 (Colo. App. 2005) ("We therefore conclude that because, in its charter, Golden exercised its authority to address local and municipal matters in municipal court and granted that court ***exclusive original jurisdiction*** over claims arising under its ordinances, the district court was without jurisdiction to hear plaintiffs' claims relating to the application and enforcement of Golden's municipal ordinances." [Emphasis added.]).

added).[3] At this 1989 City election the voters considered and approved the following ballot title to amend Section 1 in Charter Article VII:

"PROPOSED CHARTER AMENDMENT NO. 10

> An amendment to Article VII, Section 1 of the City Charter, eliminating reference to the Municipal Court's jurisdiction as being "exclusive," thereby clarifying that City Ordinances can create civil remedies in other courts of competent jurisdiction.
>
> FOR THE AMENDMENT _____
>
> AGAINST THE AMENDMENT _____"[4]

Clearly, the intent of the current Section 1 in Article VII is to only vest in the City's Municipal Court ***concurrent*** original jurisdiction over matters arising under the City's Charter and ordinances that are of strictly local and municipal concern and not ***exclusive*** original jurisdiction over such matters.

The existence of concurrent original jurisdiction between Colorado's state and municipal courts has long been recognized by the courts. In *Wigent v. Shinsato*, 601 P.2d 653 (Colo. App. 1979), the Court of Appeals considered whether the Children's Code granting state juvenile courts "exclusive original jurisdiction" in proceedings concerning any child violating a non-traffic municipal offense, the penalty for which may be a jail sentence, divested Northglenn's municipal court of jurisdiction to hear cases where juveniles were charged with shoplifting under Northglenn's code, the maximum penalty for which was only a fine and not a jail sentence. In deciding that the municipal court was not divested of jurisdiction, the Court of Appeals stated: "we conclude that where a violation charged is of municipal ordinance that does

[3] Attached as Exhibit "A" is a certified copy of Section 1 of Charter Article VII as it read prior to March 7, 1989.

[4] Attached as Exhibit "B" is a certified copy of Ordinance No. 5, 1989, which submitted this ballot title to the voters. Also attached as Exhibit "C" is a certified copy of the City Clerk's certification of the election results for this ballot title.

not carry a jail sentence, the General Assembly has not intended by the Children's Code to give sole and exclusive jurisdiction to the juvenile court." 601 P.2d at 654.

Thirteen years later, the Colorado Supreme Court addressed this same jurisdictional issue in *R.E.N. v. City of Colorado Springs,* 823 P,2d 1359, fn. 2 (Colo. 1992), and confirmed the concurrent jurisdiction recognized in *Wigent*, stating:

> "When a juvenile defendant is charged under a municipal ordinance which does not carry a jail sentence, 'the General Assembly has not intended by the Children's Code to give sole and exclusive jurisdiction to the juvenile court.' *Wigent*, . . . 601 P.2d at 654. By not retaining exclusive jurisdiction over municipal ordinances, the penalty for which may *not* be a jail sentence, the State Code implicitly recognizes that municipal courts retain ***concurrent jurisdiction*** over such offenses. *Cf. City and County of Denver v. District Court*, 675 P.2d 312, 314 (Colo.1984) ('juvenile and district courts may exercise concurrent jurisdiction over cases affecting the interests of a particular child'); *see also Quintana v. Edgewater Mun. Court*, 179 Colo. 90, 92, 498 P.2d 931, 932 (1972)." (Some emphasis added.)

Based on the foregoing, this Court clearly has jurisdiction to hear this matter and decide it on the basis of any law it deems applicable, including provisions of the City's Charter.

b) **Standard of Review**. Beginning at the bottom of page 3 of his Motion, Sutherland again argues that the Court erred in applying the form and content criteria in Article X, Section 6(b) of the City Charter, instead of the criteria of C.R.S. § 31-11-111(3), as the exclusive authority for deciding the sufficiency of the ballot question here. However, this assertion is also without merit and ignores the actual analysis applied by the Court.

The applicable standard for determining the sufficiency of the submission clause was addressed at length in both the City's hearing brief (pages 6-9) and in the Court's Order (pages 6-8), and that extensive analysis will not be repeated here. Both the City and the Court acknowledged that, while Article X, Section 6(b) of the City Charter governs the analysis, and the criteria articulated in the Charter differ slightly from the criteria found in C.R.S. § 31-11-

111(3), the body of case law from the Supreme Court decisions which have interpreted C.R.S. § 1-40-106(3), which contains a combination of both criteria, provide useful guidance in reviewing the validity of the submission clause. It was within the framework of these decisions, also acknowledged as helpful by Sutherland in his Petition and brief, that the Court reviewed the submission clause and rejected the first three meritless grounds for objection raised by Sutherland. The Court acted properly in doing so.

Significantly, Sutherland fails to establish in his Motion how the submission clause allegedly fails meet the slightly different criteria of C.R.S. § 31-11-111(3), particularly given the case law applied by the Court and cited by all of the parties. Further, in urging that this state statute allegedly takes precedence over the City's Charter provision setting forth a specific standard, he ignores the express language of C.R.S. §31-11-102, which states that Article 31 "shall apply to municipal elections, initiatives, referenda, and referred measures unless alternative procedures are provided by charter, ordinance, or resolution." Clearly we have a City Charter provision that provides an alternative, controlling procedure here.

In short, Sutherland does nothing more than revisit the same arguments raised in the first three grounds of his challenge, all of which were properly rejected by the Court under the standards discussed in the extensive legal authority reviewed by the Court. He also cites inapplicable legal authority (see footnotes 3 and 4 on page 6 of his Motion) that reviewed challenges to the title of state ballot measures, as opposed to any useful analysis of a submission clause under the pertinent standards of review. Accordingly, Sutherland's Motion fails to demonstrate any actual error of law requiring amendment of the Court's very sound judgment.

c) **TABOR Arguments**: On page 10 of the Motion, Sutherland spends several pages largely rehashing his previous meritless arguments that the ballot question implicates TABOR.

This issue was addressed in detail in the City's legal brief and at the hearing, and the Court's findings that the TABOR requirements are not applicable here are set forth at length in its Order. Those findings are correct based upon the evidence presented at the hearing and the governing legal authority, particularly *Bickel v. City of Boulder*, 885 P.2d 215, 230 (Colo. 1994) ("revenue bonds" are not "bonded debt" under TABOR). Simply stated, this ballot measure does not propose the creation of any debt that is subject to TABOR. Accordingly, those findings do not require any alteration or amendment.

d) **Single-Subject Requirement:** In the last section on page 13 of Sutherland's motion, he ends by making another new argument which suggests that this particular ballot question somehow violates the single subject requirement in Article V, § 1(5.5) of the State Constitution. To the extent this argument is even properly made at this post-trial stage of the proceedings, it is wholly without merit. This State Constitutional requirement referenced by Sutherland only applies to statewide ballot measures, not to municipal ballot questions such as this one. *Bruce v. City of Colo. Springs*, 200 P.3d 1140, 1145 (Colo. App. 2008); Art. V, §1(9). In addition, the City has no single-subject requirement in its own Charter or Code for initiatives, referendums and referred ballot issues.

WHEREFORE, for the reasons set forth above, this Court's Order is legally sound and does not require any amendment, such that the Court should summarily deny Sutherland's Motion for Post-Trial Relief.

DATED this 9th day of October, 2017.

WICK & TRAUTWEIN, LLC

By: *s/Kimberly B. Schutt*
Kimberly B. Schutt, #25947
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And

FORT COLLINS CITY ATTORNEY'S OFFICE

By: *s/John R. Duval*
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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]*

**CERTIFICATE OF ELECTRONIC FILING**

The undersigned hereby certifies that a true and correct copy of the foregoing **DEFENDANT CITY'S RESPONSE TO MOTION FOR POST-TRIAL RELIEF** was filed via Integrated Colorado Courts E-Filing System (ICCES) and served this 9th day of October, 2017, on the following:

Eric Sutherland
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A courtesy copy was also emailed to Mr. Sutherland at *sutherix@yahoo.com*

*s/ Jody M. Minch*

*[The original certificate of electronic filing signed by Jody M. Minch is on file at the office of Wick & Trautwein, LLC]*