8th DISTRICT COURT **LARIMER COUNTY JUSTICE CENTER** Court Address: 201 Laporte Avenue Fort Collins, CO 80521 Phone (970) 494-3500	RECEIVED OCT 16 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

CONTESTOR'S REPLY IN SUPPORT OF MOTION FOR POST-TRIAL RELIEF

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

INTRODUCTION

Regrettably, this court must now consider providing the relief originally requested in this matter and Order a change to the language of the submission clause of the ballot question contested here.

I say regrettably because this will have the effect of nullifying the results of the consideration of a ballot question by the electors of Fort Collins. They certainly deserve better from their city government than they were subjected to on

this occasion. To understand why, this court must view the overarching situation: rather than compromise on changes to the language of a ballot question and the underlying Charter provisions to be adopted on affirmative vote,The City of Fort Collins arrogantly dug in its heals and obstinately resisted common sense changes to the language that was proposed. Such changes in language were completely harmonious with the legislative intent of the changes to be adopted by a 'yes' vote. Such changes in language would not have skewed the results of the election in any meaningful way.

In other words, myopic stubbornness without any reasonable justification in defense of black letters on a white page sank this attempt to amend the Fort Collins City Charter. This scenario would seem implausible, save for the fact that it is not unlike many other things that happen at City Hall these days.

This unbelievable stubbornness, which is not beneficial in any regard to the public interest, was accompanied by erroneous and absurd statements by the City of Fort Collins in its Responsive pleading to my Rule 59 Motion. The quality of the legal work found here moves one to fear for the future of our community.

I. ERRONEOUS DENIALS OF NEW INFORMATION AND ARGUMENT MADE BY CONTESTEE

The Contestee would have this court believe that my Rule 59 Motion does nothing more than revisit the same arguments raised in the Petition and pre-trial brief. (See pp. 2 ¶ 2. and pp. 7 of City's Response.) To the contrary, the substance of argument presented in the Motion derived from the fact that this court, itself, had been misled about the effect of a 'yes' or 'no' vote on the ballot question. The crux here is that: *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." The Contestee City provided absolutely no refutation of the claim that this Court had been misled and that the natural conclusion that the ballot question was misleading. (*See* Section III. beginning on page 7 of the Motion for Post-Trial relief.) I offered proof that ballot question was misleading in accordance with each of my three Grounds for the Contest 1-3 that was presented in this Court's order. That proof was not questioned.

In particular, the proof that this court was misled in regard to my Grounds: Part 3 is especially noteworthy because I believe that this is the issue most likely to be decided against the City upon appeal to the Supreme Court if necessary. For reveiw, I had held that the absence of any language notifying a voter than debt service payments could be made without Council appropriation if the Charter amendment was adopted was clearly misleading. In response, the City argued, in effect, that the 'conflict' between this proposed language and other provisions of our Charter did not represent a possibility for misunderstanding because such 'conflicts' are the sole province of actions to be brought after the election when the attention of a court of may be focused on a dispute arising therefrom. In reality, I had never argued that there would be a 'conflict'. The proposed change to the Charter was unambiguous and absolute.

This is a significant issue with overtones that lead us straight to one of the most fundamental aspects of our system of representative government in these United States. We allow for the exclusive control of the strings of the public purse to be held by our elected representatives. We do this by requiring all public moneys be expended only upon appropriation made in accordance with due

process by representatives of the people. Such requirement is universally found in our Constitutions and Charters. Yet, the proposed Charter amendment considered by the voters in this election would create an exception to the universal rule … and it would do so without a single word in the submission clause itself that might indicate to the voters that this is, indeed, the effect of a 'yes' vote. To hold, as the City has since the beginning, that such a change is to unimportant to merit mention in the submission clause is nothing less than chiseling away at the foundations of our government.

Now, the fact that this Court was misled by the ballot question speaks for itself. However, this single issue also presents the case for why I argued that this Court had completely missed the criteria by which a ballot question should be judged. This argument was not simply a restatement of the Grounds that I originally presented as the City would have this Court believe. Rather, this was a new and important basis for requesting review pursuant to C.R.C.P. Rule 59.

The plain and simple meaning of the legal authority that I had petitioned this court to consider, C.R.S. §31-11-111, was completely ignored in favor of an imposter that had no place in the contest. 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. My Petition requested that my Grounds 1-3 be subjected to review in accordance with the single authority that is most directly applicable to §31-11-111, the clear title requirement:

> *In sum, the clear title requirement seeks to accomplish two overarching goals: prevent voterconfusion 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.)

Contrary to what the City has stated, this standard is completely different from that presented by the imposter, Article X section 6(b), that was interjected by the City. The plain and simple language is the first and most important element of interpreting a statute and it was ignored in the findings of this Court. Turning also to authority to assist in the interpretation of the plain and simple meaning of the state law, the clear title requirement sensibly harmonizes the legitimacy and need to respond affirmatively to my Grounds 1-3. If the plain and simple meaning of the state law and the proper interpreting authority are both applied in conjunction with the proof that this Court was, itself, clearly misled, then no other conclusion may be made except to hold that the language of the ballot question must be reformed by Order of this Court.

JURISDICTION OF THIS COURT OVER MATTERS ARISING FROM THE CITY CHARTER IS NOT RELEVANT TO THIS PROCEEDING

The majority of the Response offered by the City to my Rule 59 motion deals with the jurisdiction of the court to decide a contest in accordance with the City's desire that a provision of our Charter, not the state law I had cited and relied upon in the Grounds I had brought. The City's argument here is completely erroneous and is another of those things that simply makes one wonder how in the world things could have come to this.

I did not petition this court for review of a submission clause according to the legal standard found in our City Charter. I petitioned this court for review according to state law. It boggles my mind that the City would have implored this

court to substitute the exclusive standard of my claims found in my petition with a different standard. This is analogous to a defendant that has been indicted for grand theft suggesting to the judge hearing his trial that everyone simply agree to hold a trial for obstructing a peace officer instead. It is absurd.

It should be noted here that the City was not arguing that this court lacked subject matter jurisdiction (or maybe a failure to state a claim upon which relief could be granted) as a consequence of my reliance upon and petitioning for relief under C.R.S. § 31-11-111. That is what one would have expected the city to do if, indeed, I had requested that the wrong standard be applied, but that is not what happened and it would not have been appropriate to make such an argument. Rather, the City simply stated, in effect, '*don't use his standard, use ours.*' I could not make this up.

C.R.S. § 1-11-203.5(2) clearly states: *Every such contest shall be commenced by verified petition filed by the contestor to the proper court, setting forth the grounds for the contest.* The statute does allow for the grounds for the contest that have been set forth by the Contestor to be replaced with alternate grounds that are more to the liking of the Contestee. Indeed, if I had wished to petition a court of law for judicial review in accordance with Article X section 6 of the City Charter, I would have so petitioned and it would have been the municipal court not the district court.

I wish to state honestly here that, this whole change-up/substitution was so unexpected and befuddling that I do not think I responded in the manner I now wished I had. I certainly should have said something in the hearing to object to this argument and litigation tactic. I did not. I regret this omission. I should have known better, but was honestly perplexed but also comforted by the rational that

no Court could possibly contemplate the radical re-definition of a contest that had been properly brought before it.

I also wish to state here that I do not believe that this change-up/substitution was brought in bad faith as a tactic to influence the outcome of this court. Sadly, I have to conclude that the Office of the City Attorney of the City of Fort Collins is simply inept and prone to this type of mistake. Many other examples influence this conclusion. At the same time, this sort of tactic, if purposefully mounted in litigation, could be viewed as subterfuge.

DEFENDANT CITY IS COMPLETELY INCORRECT ABOUT JURISDICTIONS OF THE MUNICIPAL AND STATE COURTS

The observation of the most salient details of the *Town of Frisco v. Baum* case is all that is necessary to deem the City's belief in concurrent jurisdiction to be in error. The dispute between Baum and Frisco had three acts. The trial court held for Baum. The Court of Appeals reversed the trial court. The Supreme Court reversed the Court of Appeals and established our law in this area.

Most notably, the Court of Appeals held for a system of concurrent jurisdiction that is similar in nature to what the City errantly believes exists today whereby both a state and municipal court might have jurisdiction of a matter arising from the code or charter of a home rule city. The Supreme Court then reversed the Court of Appeals in a manner that can only be construed to have eliminated the entire premise of concurrent jurisdiction such as the City believes to exist. *See Baum v. Town of Frisco,* 74 P.3d 427 Colo: Court of Appeals 2003. *Town of Frisco v. Baum,* 90 P. 3d 845 – Colo: Supreme Court 2004.

The Supreme Court ruled thus for good cause. It is a horrible idea to afford plaintiffs the ability to 'shop' for a court of law. The general rule in our law is that there be a one-for-one correspondency between a cause of action and a court that will hear the dispute. Dissatisfaction with concurrent jurisdiction and its myriad problems may be read in the dicta of the *Town of Frisco v. Baum* decision, even though the Office of the City Attorney may have reasons not to find it there.

Another way of stating the obvious here; although the voters in the 1989 election may have removed the word "*exclusive*" from "*exclusive original jurisdiction*", the Supreme court effectively put the word back in 2004.

The case law that the City presents to support its theory of concurrent jurisdiction is absolutely misleading and probably intentionally so. Both *R.E.N. v. City of Colorado Springs*, 823 P. 2d 1359 (Colo 1992) and the *Wigent* case referenced therein presented the courts with situations where the Ordinance scheme of a municipality must be reviewed to determine if it was in conflict with state law. The situation tried in *R.E.N.* is, of course, completely different from the instant situation. It goes without saying that a municipal ordinance is not used to convict someone in state court or the other way around. In this sense, the words 'concurrent jurisdiction' has a completely different meaning.

The propensity of the duo of Deputy City Attorney John Duval and Kim Schutt of Wick & Trautwein, LLC to cite authority that has no bearing on the case being litigated has been seen before. They have been called on this foul, but continue to commit it. In this situation, I am not at all reserved in stating that the citations of the *R.E.N.* and *Wigent* cases were made in bad faith with the hope of continuing the happy history of misleading this court noted above. There is absolutely no way that anyone with a cursory understanding of law could construe

the acceptance of 'concurrent jurisdiction' found in those cases to have bearing on the instant matter. The state courts do not have jurisdiction to try a person on the allegation of violation of a Colorado Springs or Fort Collins ordinance. Similarly, the municipal courts of either city have no jurisdiction to try someone on an allegation of violating a Title 18 criminal statute. Yet, both state and local courts have 'concurrent jurisdiction' to try a person for a crime that is proscribed by both state and local laws. Good grief.

TABOR ARGUMENTS

For review, it should be remembered that my petition to this court did assert two Grounds that dealt specifically with TABOR form and content issues. At this time, the TABOR notice for the coordinated election has been mailed to voters and this publication does not contain a notice from the City of Fort Collins pertaining to this ballot issue. To a large extent, the absence of a TABOR notice makes the concerns raised in the original petition moot in many, but not all, respects. If the City of Fort Collins does, in the future, issue debt repayable with tax, it does so in violation of the requirements of TABOR. Such a situation is most likely to be encountered if the City pledges to support the broadband enterprise with tax revenue up to but not exceeding the 10% of annual revenue maximum established by TABOR. However, at the time the contest was filed with this court, the City still had the option of issuing a TABOR notice to comply with the requirements of TABOR and the contest brought was well advised and appropriate. It should also be noted here that the City could have easily eliminated any and all possibility of conflict with the TABOR amendment by eliminating the reference to repayment of debt with sales tax that is still found in the underlying Charter amendment.

That said, an appeal that would allow the Supreme Court to better clarify when the form and content requirements of the TABOR amendment must be followed when setting the language of a ballot issue would not be moot and the instant case would handily place that question before the higher court.

CONCLUSION

When viewed as a whole, this court must accept that the Petition for judicial review of this ballot question held merit and should have been met with an Order reforming the language of the submission clause. The stubbornness of the City to compromise despite the modest and reasoned requests for reformation made of this Court is the only reason why the dramatic relief that must now be provided was ever necessary. It cannot be disputed that local government agencies have come to rely upon the 8th district court for favorable decisions. I do not doubt that the public interest does prescribe for some deference to be shown to governmental agencies, but it has gone to far.

Finally, there must be some recognition here that the statutory procedure for judicial review of local ballot questions has a serious temporal flaw in its procedures. If the City of Fort Collins had not waited until the 11th hour to fix the language of the ballot question, the opportunity provided by Rule 59 would not have left this court in the unenviable position of reforming a ballot question that has already been printed on ballots and will soon be voted. As noted in the hearing, I am working with a local legislator to see what might be done in the General Assembly to improve this procedure. Review of ballot question to ensure compliance with law is an incredibly important safeguard on our democratic process and it would be prudent to make some changes as soon as possible.

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 or as this Court finds appropriate.

Respectfully submitted on this 16th day of October, 2017

Eric Sutherland

I hereby certify that a true and correct copy of this Reply in Motion for Post-trial Relief and attachements was served by delivering a paper copy to the office of the city attorney at Fort Collins City Hall on October 16, 2017.

Eric Sutherland

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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:
Proposed Order :	

I hereby Order that, pursuant to C.R.S. §1-11-203.5, the ballot title shall be reformed to read as follows.

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

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

_____Yes/For

_____No/Against

District Court Judge _____