<table>
<tr><td>DISTRICT COURT, LARIMER COUNTY, COLORADO
Court Address: 201 La Porte Avenue
Fort Collins, CO 80521
Phone Number: (970) 494-3500</td><td>DATE FILED: July 18, 2018 8:12 PM
FILING ID: BF0E70FBC34B1
CASE NUMBER: 2018CV149</td></tr>
<tr><td>Plaintiff: ERIC SUTHERLAND, pro se

v.

Defendants: THE CITY OF FORT COLLINS, a home rule municipality in the State of Colorado; STEVE MILLER, in his capacity as the Larimer County Assessor and all successors in this office; IRENE JOSEY, in her capacity as the Larimer County Treasurer and all successors to this office; and

Indispensable Parties: THE TIMNATH DEVELOPMENT AUTHORITY, an Urban Renewal Authority; and COMPASS MORTGAGE CORPORATION, an Alabama company doing business in Colorado.</td><td>▲COURT USE ONLY▲</td></tr>
<tr><td>Attorneys for Defendant City of Fort Collins:
John W. Mill (#22348)
Amanda Levin Milgrom (#47871)
Sherman & Howard L.L.C.
633 17th Street, Suite 3000
Denver, CO 80202
Phone Number: (303) 297-2900
Email: jmill@shermanhoward.com
amilgrom@shermanhoward.com</td><td>Case No.: 2018CV149

Courtroom/Division: 3C</td></tr>
<tr><td colspan="2">MOTION TO DISMISS OF THE CITY OF FORT COLLINS</td></tr>
</table>

The City of Fort Collins (the "City"), by and through its counsel, Sherman & Howard L.L.C., moves to dismiss all of Mr. Eric Sutherland's claims against the City for lack of standing, under C.R.S. § 11-57-210, and for failure to state a claim upon which relief may be granted.

Certificate of Conferral: Pursuant to C.R.C.P. 121, § 1-15(8), on July 17, 2018, the City's undersigned counsel sent an email to Plaintiff to confer regarding this Motion. As of the time of filing this Motion, Plaintiff had not responded so his position on this Motion is unknown.

I. BACKGROUND

Mr. Sutherland does not have standing to bring any of his claims against the City. Standing is a jurisdictional prerequisite and because it "involves a consideration of whether a plaintiff has asserted a legal basis on which a claim for relief can be predicated, the question of standing must be determined prior to a decision on the merits." *Hickenlooper v. Freedom from Religion Found., Inc.*, 338 P.2d 1002, 1005 (Colo. 2014). Mr. Sutherland has the burden of proving that he has standing, and he has failed to meet that burden. His alleged injury is too remote and too speculative and his claims must be dismissed pursuant to C.R.C.P. 12(b)(1). Second, C.R.S. § 11-57-210 provides that as a matter of law the bonds have been validly issued. Finally, Plaintiff's claims must be dismissed for failure to state a claim pursuant to Rule 12(b)(5).

II. LEGAL STANDARD

On a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), "the plaintiff has the burden to prove jurisdiction and the trial court is authorized to make appropriate factual findings." *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001) (citing *City of Lakewood v. Brace*, 919 P.2d 231, 244 (Colo. 1996)) (internal citations omitted); *see also Assoc. Gov'ts of Northwest Colo. v. Colo. Pub. Util. Com'n*, 275 P.3d 646, 648 (Colo. 2012). A court "need not treat the facts alleged by the non-moving party as true as it would under C.R.C.P. 12(b)(5)." *Id.* (quoting *Brace*, 919 P.2d 231).

The City's Electric Utility Enterprise issued the bonds being challenged by Plaintiff pursuant to the Supplemental Public Securities Act, C.R.S. §§ 11-57-201 *et seq*. Pursuant to § 11-57-210, as a matter of law the bonds were validly issued.

Under Rule 12(b)(5), a court "properly dismisses a claim if the factual allegations in the complaint, taken as true and viewed in the light most favorable to the plaintiff, do not present

plausible grounds for relief." *Begley v. Ireson*, 399 P.3d 777, 779 (Colo. App. 2017) (citing *Warne v. Hall*, 373 P.3d 588 (Colo. 2016)).

III. PLAINTIFF DOES NOT HAVE STANDING TO BRING HIS CLAIMS

Mr. Sutherland does not have standing to bring his claims against the City because his alleged injury-in-fact is too speculative and remote in time to satisfy the first prong of the standing analysis. Mr. Sutherland argues that he has standing because he is a citizen of the City and "may reasonably be expected to pay electric bills to the City of Fort Collins and the amount paid on those bills as to rates or total charges will undoubtedly be increased by the repayment of unlawfully authorized debt as complained of here." (Cmplt., ¶ 8.) The "debt" Plaintiff refers to results from the City's Electric Utility Enterprise Board issuing Tax-Exempt Revenue Bonds, Series 2018A and Taxable Revenue Bonds, Series 2018B (collectively, the "2018 Bonds"), authorized pursuant to ordinance of the Board of Directors of the City's Electric Utility Enterprise (the "Board") adopted on April 3, 2018 (the "Bond Ordinance") (attached as **Exhibit 1**).[1]

A plaintiff may not bring a claim in court unless he has standing to sue. Standing is a component of subject matter jurisdiction and is a prerequisite to maintaining a lawsuit. *Maralex Res., Inc. v. Chamberlain*, 320 P.3d 399, 401 (Colo. App. 2014). To have standing, a plaintiff must show that he (1) was injured in fact, and (2) the injury was to a legally protected interest. *In*

[1] In considering a motion to dismiss, a Court may look not only to facts alleged in the pleading but also to "matters outside the pleading," such as documents attached as exhibits or incorporated by reference, and matters proper for judicial notice, without converting the motion to a motion for summary judgment. *Norton v. Rocky Mountain Planned Parenthood, Inc.*, 409 P.3d 331, 334 (Colo. 2018) (en banc). The Court may also consider documents "referred to" in the complaint and central to the plaintiff's claim, notwithstanding that the documents are not formally incorporated by reference or attached to the complaint. *Walker v. Van Laningham*, 148 P.3d 391, 397 (Colo. App. 2006) (*citing Yadon v. Lowry*, 126 P.3d 332, 336 (Colo. App. 2005)); *see also Dallasta v. Dep't of Highways of State of Colo.*, 387 P.2d 25, 27 (Colo. 1963) (taking judicial notice of the charter of the City and County of Denver); *Walker*, 148 P.3d at 397 (considering ordinance when plaintiff specifically referred to it in the complaint and defendant attached a copy of the Ordinance to its motion to dismiss).

re Estate Owen, 2017 WL 1404226, at *2 (Colo. App. 2017). Here, Mr. Sutherland does not meet the first prong of the standing test.

Under Colorado law, it is required that "the alleged injury be sufficiently direct and palpable to allow a court to say with fair assurance that there is an actual controversy proper for judicial resolution." *O'Bryant v. Pub. Util. Com'n of State of Colo.*, 778 P.2d 648, 653 (Colo. 1989). "[A]n injury that is overly 'indirect and incidental' to the defendant's action will not convey standing, nor will the remote possibility of a future injury." *Hickenlooper*, 338 P.3d at 1006 (quoting *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004)). "If from the allegations of the complaint it is speculative whether the harm complained of will result from the challenged governmental action, the complaint fails to satisfy the injury in fact requirement." *Opie v. Denver Classroom Teachers Ass'n*, 701 P.2d 872, 874 (Colo. App. 1985) (citing *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976)). Here, Mr. Sutherland's alleged injury—that he might have to pay higher electric bills—is speculative and too remote to confer standing to sue.

Olson v. City of Golden, 53 P.3d 747, 750–52 (Colo. App. 2002), provides a useful analogy. The *Olson* court held that the plaintiff did not have standing because the possibility of the alleged future injury was too remote. The taxpayer had challenged the actions of an urban renewal authority when it conveyed property for less than fair value, resulting in an alleged reduction in the authority's revenue. *Id.* at 750. Plaintiff alleged that this decrease in revenue would in turn lead the city to spend a greater amount of tax revenue to pay its obligations, thereby depriving taxpayers of such tax revenue. *Id.* The court analyzed the sale of land and how it would affect taxes. It concluded that if redevelopment of the land was successful, the city could enhance tax revenues so that the loss of tax revenues caused by the transaction would not occur. *Id.* at

752. Or, if the redevelopment was not successful, the alleged tax loss may occur and may never be recovered. *Id.* But, the court held, "the outcome in either event will not be known until a remote time in the future, and therefore, plaintiff's claim of damage from lost tax revenues is mere speculation at this time." *Id. See also Friends of Richland Cty. v. Richland Cty.*, 727 N.W.2d 549, at *3 (Wis. Ct. App. Dec. 21, 2006) (concluding that plaintiff's "suggested pecuniary losses that its members may someday incur due to lost tax credits is simply too remote and speculative" for the court to conclude that the plaintiffs are likely to sustain damages due to the illegal zoning actions); *Manning v. Pioneer Sav. Bank*, 55 N.Y.S.3d 587, 593 (N.Y. Sup. Ct. 2016) ("allegations of injuries based on speculative future risks that Plaintiffs will be victims of identity theft" are "too remote" because plaintiffs have only alleged "potential exposure.").

Similarly, Plaintiff's alleged potential injury due to the Board's issuance of the 2018 Bonds is likewise merely speculative.[2] There are a myriad of variables that affect the analysis. Under the majority of scenarios, the City's electric utility enterprise will not have to raise electric rates at all. For example, if the "take rate"[3] of the city-offered internet service meets its expected take rate of 28.2% and meets its budgeted costs, then the City will not have to raise electric utility rates. The evidence suggests this is the most likely outcome. (*See* **Exhibit B** (S&P PowerPoint) attached to Ex. 2.) Even if the take rate is 15% and the costs are on budget, the City will not have

[2] The Court recently addressed the question of standing in its Order Granting Defendants Timnath Development Authority and Compass Mortgage Corporation's Joint Motion to Dismiss. (Timnath Order, July 11, 2018.) As against Timnath and Compass, Mr. Sutherland's "claimed injury centered on his belief that Poudre School District will raise taxes in the future due to lost revenue." (*Id.*, at 3.) This Court held that Mr. Sutherland did not have standing because his alleged injury "cannot be determined until a remote time in the future" and that is "not sufficiently direct and palpable to support a finding of injury-in-fact." (*Id.*) Mr. Sutherland's alleged injury against the City is equally remote and speculative, and the Court's analysis applies here as well.

[3] The "take rate" is one measure of success for municipal broadband projects. It is defined as the actual number of subscribers divided by the total potential subscribers. (**Exhibit A** (Broadband Business Plan) to **Exhibit 2** (Affidavit of Michael Beckstead), at 23.)

to raise electric rates. (*See* Ex. 2, ¶ 11.) Only in the unlikely scenario where the City completely builds out the broadband network and facilities *and* the take rate is less than 15%, could there be a potential impact on the rate payers. (*See* Ex. B.).

The fact that the City's electric utility enterprise has acknowledged to the public that there is a small risk that electric rates could go up as a result of the City-provided broadband facilities and services, (Ex. A at 66), does not change the analysis. *See In re Science Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig.*, 45 F. Supp. 3d 13, 28 (D.D.C. 2014) (holding that "increased risk of harm alone does not constitute injury in fact"). The City had a duty to inform the public of all possible outcomes, no matter how remote some of them might be. The Broadband Business Plan, which notified the public of all outcomes, and the assumptions in the S&P PowerPoint, show how unlikely the City is to reach the point at which the rate payers would be impacted. (*See* Exs. A, B to Ex. 2.)

First, the evidence shows that any alleged injury is speculative. According to the City's Broadband Business Plan, the City estimates that the residential take rate will be 28.2%. (Ex. A, at 25, 57.) It arrived at these numbers after conducting a statistically-valid phone survey, which the City's consultants have since updated the results of twice in light of changing variables. (*Id.* at 19, 23.) The City estimates that commercial subscribers will reach a take rate of 45%. (*Id.* at 25.) The City's projections illustrate that the take rate should be sufficient to pay for the broadband facilities and services. (*See* Ex. 2, ¶¶ 7, 8, 16.) The City's Chief Financial Officer has "a high degree of confidence there will be no impact on electric rate payers." (Ex. 2, ¶ 16.) The evidence also shows that costs appear to be low. As of the date of this filing, the construction costs of the

network are lower than the City had estimated, which further supports the City's projections and makes any impact to the rate payers even more unlikely. (*See* Ex. 2, ¶ 14.)

Second, the evidence shows that any potential injury is too remote in time. Construction is estimated to begin in November, 2018 and expected to be done by the end of 2021. (*See* Ex. 2, ¶ 13.) Thus, the network will not be completed for at least three years. Also contributing to the remoteness in time is the timing of when the debt on the bonds becomes due. For the first thirty months, the City does not have to make any payments from operations. (Ex. 2, ¶¶ 10, 11.) This means that the first bond payment is not due until January 2021—2.5 years in the future. Moreover, "[i]t will be 5 to 8 years before it can be determined whether there will be any impact on electric utility rates." (Ex. 2, ¶ 16.) Any risk of increased electric rates is highly speculative, and any possible injury will not be known until a remote time in the future. Thus, Plaintiff's alleged injury is too remote and speculative to provide him with standing, and this Court does not have subject matter jurisdiction.

IV. C.R.S § 11-57-110 BARS PLAINTIFF FROM CHALLENGING THE VALIDITY OF THE BONDS AFTER THEIR DELIVERY

Mr. Sutherland is barred from raising any of his claims because C.R.S. § 11-57-210 bars any challenge to the bonds after their delivery. Section 11-57-210 provides:

> An act of issuance providing for the issuance of public securities or an indenture may provide that the securities shall contain a recital that they are issued pursuant to the supplemental public securities act. Such recital shall be conclusive evidence of the validity and the regularity of the issuance of such public securities after their delivery for value.

Here, the Bond Ordinance satisfies the statute. First, "an act of issuance" as defined in section 11-57-203 "means an ordinance." Thus, the Bond Ordinance constitutes an "act of issuance." Second, the Bond Ordinance contains a recital stating that it is issued pursuant to the supplemental

public securities act. (*See* Ex. 1, at A-2.) This recital acts as "conclusive evidence of the validity" of the issuance of the 2018 Bonds after their delivery for value. Third, the 2018 Bonds have been "deliver[ed] for value." On June 14, 2018, the City issued the bonds and received the proceeds. (*See* Ex. 2, ¶ 15.) Thus, as a matter of law, the 2018 Bonds have been issued validly.

V. CLAIMS 13-19 MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM

In addition, all of Plaintiff's claims against the City must be dismissed for failure to state a claim upon which relief may be granted. This section V addresses claims 13-19 and the following section VI addresses claim 12.[4] Pursuant to Rule 12(b)(5), Plaintiff fails to state a claim upon which relief may be granted for claims 13-19. He fails to articulate any legal claims and he fails to provide a single factual allegation to support these non-existent legal claims.

The Colorado Supreme Court adopted the plausibility standard as set forth by the U.S. Supreme Court. *See N.M. by and through Lopez v. Trujillo*, 397 P.3d 370, 373 (Colo. 2017) (citing *Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016)). Under the plausibility standard, a complaint may be dismissed if the plaintiff's allegations do not, as a matter of law, support a claim for relief. *Pena v. Am. Family Mut. Ins. Co.*, --P.3d--, 2018 WL 1959600, at *3 (Colo. App. April 19, 2018) (citing *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011)).

A review of claims 13-19 shows that Plaintiff has failed to plead any cognizable legal claims or any facts supporting those claims. For example, in claim 13, Mr. Sutherland alleges only: "Electric Utility Enterprise Board has no power to defease existing revenue bonds. It may only issue revenue bonds and other obligations pursuant to Article V section 19.3." (Cmplt, ¶ 40.) This is merely a statement of the Board's authority. Plaintiff has alleged no cognizable legal

[4] The Court has dismissed claims 1-11 against Timnath and Compass. *See* Timnath Order at 3-4. The only claims against the City are claims 12-19.

claim, and even if the Court were to infer a legal claim, Plaintiff did not include a single factual allegation to support his claim. The same is true for claims 14 through 19.[5] For example, claim 14 complains of "[t]he absence of a comma." In claims 16 and 17, Plaintiff tacks a proper noun on the end of each claim with not a word of explanation. (*See* Cmplt, at ¶¶ 43, 44.) For example, claim 16 states: "Council violated a prohibition of the City Charter by appropriating money to a private industrial organization; Woodward." (*Id.* ¶ 43.) Again, this claim is deficient; it fails to allege a cognizable legal claim. Moreover, for claims 13-19 there are no factual allegations supporting these vague claims that could put the City on notice of what it is defending against. *See Scott v. Scott*, --P.3d--, 2018 WL 1007957, at *4 (Colo. App. Feb. 22, 2018). Therefore, claims 13-19 of the Complaint must be dismissed under Rule 12(b)(5) for failure to state a claim.

VI. CLAIM 12 MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM

The meat of Plaintiff's Complaint against the City is the 12th Claim. Mr. Sutherland alleges that the City:

- Failed to comply with various provisions in the City's Home Rule Charter ("City Charter") and the Municipal Code of the City (the "City Code") authorizing the City to adopt the Bond Ordinance. (Cmplt., ¶¶ 36–37).
- Illegally obligated the City to a multiple-fiscal year direct or indirect debt without adequate present cash reserves. (*Id.* ¶ 37).

[5] Claims 14 and 15 also are barred by res judicata because Mr. Sutherland already litigated these claims against the City in Larimer County District Court Case No. 17cv219 in which he challenged the ballot question presented by City Council to the voters in Ordinance No. 101, 2017. (*See* **Ex. 3**, (Petition for a Contest Concerning the Form and Content of the City of Fort Collins Broadband Authorization Election Ballot Question.) The Court denied Mr. Sutherland's petition and ruled against him on the merits. (*See* **Ex. 4**, (Order re Petition for a Contest Concerning the Form and Content of the City of Fort Collins Broadband Authorization Election Ballot Question, at 9–11, 17, (Sept. 4, 2017), French, J.).) The Court also denied Mr. Sutherland's Motion for Post-Trial Relief. (*See* **Ex. 5**, (Order Denying Motion for Post-Trial Relief (Oct. 24, 2017).) The Court issued a final judgment on these claims; therefore, claims 14 and 15 are barred by res judicata. Moreover, as the Court explicitly provided in its Order, challenges to the form or content of a ballot title or submission clause fixed by the City Council for an initiated or referred ballot measure are to be brought under C.R.S. § 1-11-203.5 and "this is the exclusive manner for such legal challenges." (Ex. 4, at 2.) Thus, even if these claims were not barred by res judicata, Mr. Sutherland cannot raise them here.

- Failed to hold the Enterprise Board meeting concurrently with the City Council meeting. (*Id.* ¶ 37).
- Violated the Colorado Constitution by not electing someone president of the Board. (*Id.* ¶ 38).

Dispositive of this claim is that the Court is not required to accept as true legal conclusions or factual claims that are "at variance" with the express terms of documents referenced in the Complaint. *See Stauffer v. Stegemann*, 165 P.3d 713, 716 (Colo. App. 2006). In other words, the legal effect of documents referred to in a complaint is determined by their contents rather than by allegations in the complaint. *Id.*

A. Bond Ordinance Background.

In 1993, the City Council passed Ordinance No. 60, 1993 establishing the electric utility as an enterprise. (**Exhibit 6**, (Ordinance No. 60, 1993).) In 2010, the City Council passed Ordinance No. 38, 2010, which established that any ordinance authorizing revenue bonds of the electric utility enterprise shall be adopted in the same manner as an ordinance of the City Council. (**Exhibit 7**, (Ordinance No. 38, 2010).) On November 3, 2015, the City voters approved a ballot question giving the City authority to provide telecommunication facilities and services, including broadband internet. (**Exhibit 8**, (Ballot Item Approved by Voters, Nov. 3, 2015).) On August 15, 2017, the City Council adopted Ordinance No. 096, 2017, which called for a special municipal election for November 7, 2017. (**Exhibit 9**, (Ordinance No. 96, 2017).) It also adopted Ordinance No. 101, 2017, which submitted to voters Charter Amendment No. 1 adding a new Section 7 to Article XII of the City Charter regarding telecommunication facilities and services. (**Exhibit 10**, (Ordinance No. 101, 2017).) This new Section 7, which the voters approved, granted the City Council the authority to provide various kinds of telecommunications facilities and services, including broadband Internet, and to issue revenue and other debt, not to exceed $150 million, to

fund these facilities and services. (*Id.*) As evidenced by this history, the citizens of Fort Collins approved the City's Electric Utility Enterprise Board offering broadband internet service and issuing the 2018 Bonds. Mr. Sutherland seeks to invalidate the will of the voters, but he has suffered no injury and failed to state any valid legal claim.

B. The City complied with various provisions of the City Charter and the City Code.

Section 19.3(b) of the City Charter Article V provides that the City Council may, by ordinance, authorize the Electric Utility Enterprise, "acting by and through the Council, sitting as the board of the enterprise," to issue its own revenue bonds and, in doing so, those bonds "shall be issued by ordinance of the board of the enterprise, adopted in the same manner as . . . ordinances of the City Council." (**Exhibit 11** (City Charter, Art. V, §19.3).) Consistent with these Charter provisions, City Code Section 26-392 provides that the Enterprise "may, by ordinance of the City Council, acting ex officio as the board of the enterprise, issue its own revenue bonds" and that such ordinance "shall be adopted in the same manner . . . as ordinances of the City Council." (*See* **Exhibit 12** (City Code, § 26-392).) Accordingly, the Bond Ordinance was required to be adopted by the City Council *acting* as the Board of the Electric Utility Enterprise and to be adopted in the "same manner . . . as ordinances of the City Council," so it is the Board that is to adopt an ordinance issuing revenue bonds for the Electric Utility Enterprise, and this is what occurred.

First, Article II, Section 6 of the City Charter requires that ordinances be formally introduced at a regular or special council meeting in written or printed form by any member of the council and considered on first reading and action taken thereon. (**Exhibit 13**, (City Charter, Art. II, § 6).) In this case, the Bond Ordinance was formally introduced in printed form at a regular meeting of the Board held on March 20, 2018, and it was considered on first reading and adopted by a vote of 6-0. (**Exhibit 14**, (March 20, 2018 Minutes of the Board).)

Second, Article II, Section 6 of the City Charter requires that second reading or final passage of ordinances shall be at a regular council meeting. (Ex. 13.) In this case and in accordance with Section 19.3(b) of Charter Article V and City Code Section 26-392, final passage of the Bond Ordinance occurred at a regular meeting of the Board held on April 3, 2018, by a vote of 7-0. (**Exhibit 15**, (April 3, 2018 Minutes of the Board).)

Third, Article II, Section 7 of the City Charter requires that proposed ordinances be published in a newspaper of general circulation. ((**Exhibit 16** (City Charter, Art. II, § 7).) The Bond Ordinance was published in the *Fort Collins Coloradoan* on March 25, 2018, and again on April 8, 2018. (**Exhibit 17** (Affidavits of the Fort Collins Coloradoan).)

Fourth, the Bond Ordinance was signed by the Board President of the Enterprise. Plaintiff alleges that the Bond Ordinance did not comply with the City Charter because it was not signed by the Mayor. However, the Mayor is also the President of the Enterprise. (**Exhibit 18** (Affidavit of Rita Knoll, ¶ 6).) As discussed above, Section 19.3(b) in Article V of the City Charter provides that revenue bonds shall be issued by ordinance of the Board, adopted in the same manner as ordinances of the Council. (Ex. 11.) Accordingly, the Board must adopt the ordinance, not the Council. Article II, Section 7 of the City Charter requires that City Council ordinances be signed by the Mayor. (Ex. 16.) In order for the Board to adopt the Bond Ordinance in the same manner as ordinances adopted by the City Council, the President of the Enterprise (as the presiding officer of the Board) rather than the Mayor (as the presiding officer of the Council) is the appropriate person to sign the Bond Ordinance. Here, the President of the Board, who is also the Mayor, signed the Bond Ordinance, in compliance with all legal requirements.

C. The City Code does not prohibit the City from issuing the 2018 Bonds because they are an obligation of the Enterprise and not the City.

Plaintiff alleges that the Bond Ordinance "purported to bind the City to perform an obligation relating to the electrical utility system that is a multiple-fiscal year direct or indirect debt or other financial obligation of the City without adequate present cash reserves pledged irrevocably and held for payments in all future years, which is specifically prohibited by the Code." (Cmplt., ¶ 37.) Section 26-392(c) of the City Code provides that:

> the enterprise shall also be authorized to . . . bind the City to perform an obligation relating to the electrical utility system other than any multiple-fiscal year direct or indirect debt or other financial obligation *of the City* without adequate present cash reserves pledged irrevocably and held for payments in all future years.

(Ex. 12 (emphasis added).)

The critical distinction here is that the 2018 Bonds are *not* a debt or other obligation of the City. The 2018 Bonds are only an obligation of the Electric Utility Enterprise. Section 203 of the Bond Ordinance specifically states that "the Bonds shall *not* constitute a debt or indebtedness within the meaning of any constitutional, charter, or statutory provision or limitation; and the Bonds shall *not* be considered or held to be general obligations of the Enterprise or the City but shall constitute special obligations of the Enterprise." (Ex. 1 (emphasis added).) The Bond Ordinance further provides in Section 204 that "no such covenant of the Enterprise on behalf of the City that would constitute such a direct or indirect debt or other financial obligation of the City may be enforced against the City." (*Id.*) Therefore, the Bond Ordinance clearly does not fall within the prohibition cited in City Code section 26-392.

D. The City substantially complied with the City Charter and the City Code by holding the Board meeting the same day and immediately after the City Council meeting.

Plaintiff alleges that the City violated the City Code because "the meeting of the Electric Utility Enterprise Board was not held concurrent with a regular or special City Council meeting."

(Cmplt, ¶ 37.) The City Code provides that "the enterprise shall also be authorized to have and exercise the following powers in furtherance of its purposes: to hold meetings concurrently with regular or special meetings of the City Council." (Ex. 12.)

In this case, the Bond Ordinance was formally introduced at a regular meeting of the Board held on March 20, 2018, which was held at the same date and location as the regular meeting of the City Council meeting. (*Compare* Ex. 14 (Board Minutes) *with* **Exhibit 19** (City Council Minutes).) Similarly, the Bond Ordinance was finally passed at a regular meeting of the Board held on April 3, 2018, which was held at the same date and location as the regular meeting of the City Council meeting. (*Compare* Ex. 15 (Board Minutes) *with* **Exhibit 20** (City Council Minutes).) While it is true that the meetings did not happen at *the exact same time*, but rather back-to-back, the intent of the City Code was substantially complied with.

To determine whether there has been substantial compliance with a statute, the court considers whether the complained-of acts fulfilled the statute's purpose. *Grandote Golf & Country Club, LLC v. Town of La Veta*, 252 P.3d 1196, 1203 (Colo. App. 2011); *see also People v. Stanley*, 169 P.3d 335, 337–38 (1977) ("substantial compliance is actual compliance in respect to the substance essential to every reasonable objective of the statute, as distinguished from mere technical imperfections of form") (citations omitted). In *Miller v. City & Cty. of Denver*, 5 P.2d 875 (Colo. 1931), the court applied the substantial compliance standard to determine whether the city had complied with its charter for the purposes of the required notice of hearing. *Id.* at 877. And in *Board of County Comm'rs, Adams County v. City & County of Denver*, 548 P.2d 922, 927 (Colo. App. 1976), the court held that there was substantial compliance with the pertinent provisions of the statute because all persons affected by the annexation had notice and the

resolution of intent describing the area to be annexed was published. Any variance in the notice was immaterial.

Here, a City Council meeting was held on March 20, 2018 from 6:00 p.m. to 9:00 p.m., and immediately thereafter the Board meeting began at 9:00 p.m. (*See* Exs. 19, 14.) The meetings were held in the same location on the same date, so that any person at the City Council meeting would automatically be in attendance at the beginning of the Board meeting. The same occurred on April 3, 2018 for the final passage of the bond ordinance. (*See* Exs. 20, 15.) Therefore, the City substantially complied with the City Code provision regarding "concurrent" meetings.

E. Neither the Colorado Constitution, the City Charter, nor the City Code requires that a person be elected president of the Board.

Plaintiff's final allegation in the 12th Claim is that the City violated the Colorado Constitution because "no person has ever been duly elected or appointed to the position of 'president' of the Electric Utility Enterprise Board." (Cmplt., ¶ 38.)

The mayor of the City *is the president of the Enterprise* as provided by the Bond Ordinance. (Ex. 1, at § 101(A), at 12.; *see also* Ex. 18, ¶¶ 6, 7.) Moreover, the Colorado Constitution does not require that a person be elected or appointed as "president" of the Enterprise.

Even if the Bond Ordinance did not appoint the Mayor as President of the Enterprise, under Colorado law the Mayor would be considered to be the de facto President of the Enterprise. For all of the City's enterprises as established in 1993 by separate ordinances of the City Council, the Mayor has acted as President for each of the City's enterprises, including the City's Electric Utility Enterprise. (Ex. 18, ¶ 7.) This consistent course of conduct for twenty-five years has clearly established that the Mayor is acting as the de facto President of the Enterprise. In *People v Sherrod*, the Colorado Supreme Court stated that "[t]he de facto officer doctrine confers validity

upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient." 204 P.3d 466, 471 (Colo. 2009) (*quoting Ryder v. U.S.*, 515 U.S. 177, 180 (1995)); *see also Butler v. Phillips*, 88. P. 480, 481 (Colo. 1906).

Therefore, the City did not violate the Colorado Constitution because the Constitution does not require that the President be elected or appointed to the Enterprise. Further, the City did appoint the Mayor as the President of the Enterprise. And finally, even if the foregoing had not occurred, a court would uphold the Mayor's acts as President of the Enterprise under the de facto officer doctrine.

VII. CONCLUSION

For the foregoing reasons, the Court must dismiss all of Plaintiff's claims against the City for lack of standing or, alternatively, for failure to state a claim upon which relief may be granted.

Dated this 18th day of July, 2018.

SHERMAN & HOWARD L.L.C.

By:*/s/ John W. Mill*

John W. Mill (#22348)
Amanda Levin Milgrom (#47871)
633 17th Street, Suite 3000
Denver, CO 80202
Telephone: (303) 297-2900
Email: jmill@shermanhoward.com
amilgrom@shermanhoward.com
ATTORNEYS FOR CITY OF FORT COLLINS

CERTIFICATE OF SERVICE

I hereby certify on the 18th day of July, 2018, that a true and correct copy of the foregoing **MOTION TO DISMISS OF THE CITY OF FORT COLLINS** was served via ICCES e-filing system, upon the following:

Eric Sutherland, *pro se*
3520 Golden Currant Boulevard
Fort Collins, CO 80521
(By email and US Mail)

Eric R. Burris, Esq., *pro hac vice*
Cole J. Woodward, Esq.
Brownstein Hyatt Farber Schreck, LLP
410 Seventeenth Street, Suite 2200
Denver, CO 80202

Jeannine S. Haag, Esq.
George H. Hass, Esq.
Larimer County Attorney's Office
224 Canyon Ave., Suite 200
Post Office Box 1606
Fort Collins, Colorado 80522

/s/ Stephanie Hendrickson
Stephanie Hendrickson, Legal Assistant