FILED IN COMBINED COURTS
LARIMER COUNTY, CO

2017 AUG 21 PM 1:47

DATE FILED: August 21, 2017
FILING ID: B7E7B3C3C3B17
CASE NUMBER: 2017CV219

8th DISTRICT COURT **LARIMER COUNTY JUSTICE CENTER** Court Address: 201 Laporte Avenue Fort Collins, CO 80521 Phone (970) 494-3500	
Plaintiff/Contestor: Eric Sutherland, as an individual, pro se. v. **Defendant/Contestee:** City of Fort Collins **Indispensable Party:** Angela Myer, Larimer County Clerk and Recorder.	▲ **COURT USE ONLY** ▲
Party without attorney: Eric Sutherland, pro se 3520 Golden Currant Boulevard Fort Collins, CO 80521 Phone Number: (970) 224 4509 E-mail: sutherix@yahoo.com	Case Number: 17CV219 Division: SC

PETITION FOR A CONTEST CONCERNING THE FORM AND CONTENT OF THE CITY OF FORT COLLINS BROADBAND AUTHORIZATION ELECTION BALLOT QUESTION

Before the court, the Contestor, Eric Sutherland, a citizen of Larimer County, does file this timely, verified petition for review and amendment of the form and content of a Ballot Title by summary adjudication of the 8th District Court pursuant to rights and procedures established under law, Colorado Revised Statutes §1-11-203.5.

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

EXHIBIT 3

PAID
Amt. $224
Date 8-21-17

INTRODUCTION

1. A ballot title proposing an amendment to the City Charter of the City of Fort Collins was fixed by the City Council of the City of Fort Collins on August 15, 2017. The legislative action taken on that occasion was the passage, on 2nd reading, of Ordinance 101, 2017 by majority vote of Council. This action is the final action of the governing body settling or deciding the wording of the ballot title. *See Cacioppo v. Eagle County School District* 92 P. 3d 453 Colorado Supreme Court 2004.

2. The proposed Charter amendment includes several subjects. Generally, this amendment grants additional authorities to the Fort Collins City Council for the purposes of starting and operating a new service, connectivity to the Internet, to be organized as a city utility. This new service may be an addition to the service offerings of the City's electrical utility or may be operated as an independent utility service.

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

PARTIES, VENUE AND JURISDICTION

4. , Eric Sutherland, is a resident, elector and taxpayer of the City of Fort Collins and is a resident of Larimer County

5. Contestee, City of Fort Collins, is a Home Rule municipality in the state of Colorado.

6. Indispensable Party, Angela Myer, is the elected County Clerk of Larimer County. In her position of Clerk Ms. Myer is responsible for conducting the 2017 co-ordinated election. The Ballot Title contested here is to be voted in this election. Ms. Myer is an indispensable party to this action because any changes that are made to the text of the ballot title contested here may only be made part of the official ballot for the co-ordinated election by Ms. Myer if such changes are made by judicial order after September 8th, 2017, which is, pursuant to C.R.S. §1-5-203(3)(a), the last day that a political subdivision may certify the contents of a ballot

question to the county clerk. This court is urged to take note that the Contestor will not have adequate time to certify a new ballot question if a decision by this court is appealed to the Supreme Court pursuant to C.R.S. §1-11-203.5 (4). Only by joining the County Clerk in this action can the legislative intent of judicial review of a ballot title be assured.

7. This District Court, being the 8th of the State of Colorado, is the district court sitting for the political subdivision within which the contest arises prior to the election and has jurisdiction over the parties, claims and contest. The decisions and actions taken by Contestee occurred in Larimer County and all parties reside therein. This Court shall acquire jurisdiction over this matter and summarily adjudicate the contest pursuant to Colorado Revised Statutes §1-11-203.5, a statutorily defined judicial procedure.

EVENT LEADING TO THE CONTEST

8. On August 15th, 2017, the Contestee did take legislative action by affirmative vote to adopt an Ordinance setting the language for the ballot title contested here. A copy of Ordinance 101, 2017 as amended upon 2nd reading is Attached to this petition as Attachment 1. This copy of the Ordinance is not signed because it is the custom of the City of Fort Collins to refrain from signing Ordinances until the day that they become effective or 10 days after adoption by Council. This Ordinance contains the text of the ballot title as well as the proposed provisions that are intended to be added to the Fort Collins City Charter upon affirmative vote of the electors in the 2017 co-ordinated election.

APPLICABLE LAW AND STANDARD OF REVIEW

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

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

> *In fixing the ballot title, the legislative body or its designee shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a 'yes' or 'no' vote would be unclear. The ballot title shall not conflict with those titles selected for any other measure that will appear on the municipal ballot in the same election. The ballot title shall correctly and fairly express the true intent and meaning of the measure.*

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

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

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

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

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

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

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

GROUNDS FOR THE CONTEST: Part 1

17. With the adoption of the Ordinance 101, the Contestee failed to consider the public confusion that might be caused by misleading language in the ballot question and failed to avoid referring a ballot question for which the general understanding of the effect of a 'yes' or 'no' answer would be unclear by omitting a comma in the submission clause.

18. There is a missing comma after the 'and' in the phrase "and in exercising this authority, to: (1)" . The phrase "in exercising this authority" is meant to be a paranthetical element. It should be offset with commas ... or else no comma should be used at all before the word "to" in order to embed the prepositional phrase within the sentence without distinction. Here is a skeleton of the question as it was adopted to demonstrate this point:

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

19. The impact of the missing comma can be more dramatically viewed when reducing the sentence even further:

> Shall Article XII of the City of Fort Collins Charter be amended to allow City Council to authorize the City's electric utility to provide telecommunication facilities to: (1) issue securities ...$150,000,000; (2) set the

20. Obviously, it is the legislative intent of the Council to request a series of authorizations. This can be construed by observing the multiple provisions, a) through f), that would be added to Article XII section 7 if the ballot question is approved. The first authorization is the creation of a new utility service and the remaining authorizations, (1) through (5) are additional in order to further advance and augment the first authorization. The

first authorization is not a means of effectuating the remaining authorizations as the proposed structure of the ballot question suggests.

GROUNDS FOR THE CONTEST: Part 2

21. With the adoption of the Ordinance 101, the Contestee failed to consider the public confusion that might be caused by misleading language in the ballot question and failed to avoid referring a ballot question for which the general understanding of the effect of a 'yes' or 'no' answer would be unclear by failing to state the revenues that would be made available or be pledged to repay the $150,000,000 of debt authorized by the ballot question.

22. Several inquiries were made of officials of the City of Fort Collins as to the source of funds that were planned to repay the debt. No clear answer was ever given. However, the proposed Charter amendment specifically cites Article V section 19.3 as an authorization for creating new debt.

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

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

> *Revenue Securities 19.3 (a) The city, by Council action and without an election, may issue securities made payable solely from revenues derived from the operation of the project or capital improvement acquired with the securities' proceeds, or from other projects or improvements, or from the proceeds of any sales tax, use tax or other excise tax, or solely from any source or sources or any combination thereof other than ad valorem taxes of the city.*

24. To a large extent, the confusion addressed by this GROUNDS:Part 2 stems from the archaic nature of defining a bond repayable with sales taxes as a Revenue Bond. This language is perhaps a holdover from a different era.

GROUNDS FOR THE CONTEST: Part 3

25. With the adoption of the Ordinance 101, the Contestee failed to consider the public confusion that might be caused by misleading language in the ballot question and failed to avoid referring a ballot question for which the general understanding of the effect of a 'yes' or 'no' answer would be unclear by omitting any mention of the legislative intent of adopting the Charter amendment to exempt all revenues used for repayment of debt from the requirements

of appropriation that would otherwise be prescribed by the Fort Collins City Charter and making this exemption dependent upon an nonsensical reference to the TABOR amendment.

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

27. In this case, the conflict arises from apparent discontinuity between the language proposed for Article XII section 7 (b),

> *The City's payment of and performance of covenants under the securities and other debt obligations issued under this subsection (b) and any other contract obligations of the City relating to the provision of telecommunication facilities and services under this Section, shall not be subject to annual appropriation so long as annual appropriation is not required under Article X, Section 20 of the Colorado Constitution.*

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

> *(b)It shall be unlawful for any service area, officer or agent of the city to incur or contract any expense or liability or make any expenditure for or on behalf of the city unless an appropriation therefor shall have been made by the Council. Any authorization of an expenditure or incurring of an obligation by any officer or employee of the city in violation of this provision shall be null and void from its inception.*
>
> *(c) Nothing herein shall apply to or limit the authority conferred by this Article in relation to bonded indebtedness, or to the collection of moneys by special assessments for local improvements; nor shall it be construed to prevent the making of any contract or lease providing for expenditures beyond the end of the fiscal year in which it is made, so long as such contract or lease is made subject to an appropriation of funds sufficient to meet the requirements of Section 8(b) above.*

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

GROUNDS FOR THE CONTEST: Part 4

29. The ballot title fails to conform to the form and content requirements of Article X section 20 (TABOR) (3) (c).

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

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

31. As previously explained in GROUNDS FOR THE CONTEST: Part 2 above, it can not be questioned that the City of Fort Collins is seeking approval for the creation of debt that is repayable with pledged revenues from taxes. This follows directly from the reference to City Charter Article V section 19.3 in the proposed charter provision (b) of Article XII section 7.

32. GROUNDS: Part 2 made note of the misleading nature of authorizing debt without providing any disclosure of the source of repayment. In this GROUNDS: Part 4, the allegation is made that the Contestee is seeking to evade the form and content requirements of TABOR (3) (c).

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

GROUNDS FOR THE CONTEST: Part 5

34. The ballot title fails to conform to the form and content requirements of Article X section 20 (TABOR) (3)(a), also known as the anti-consolidation clause. : *Except for petitions, bonded debt, or charter or constitutional provisions, districts may consolidate ballot issues*

35. In the landmark Supreme Court case, *Bickel v. City of Boulder,* Supra, a clear standard for interpreting the anti-consolidation clause was created. This standard may be stated succinctly as holding that no two issues that are not inseperable in their operation toward a desired effect may not be consolidated. Certainly, an authorization for the creation of debt and the amendment of the Fort Collins City Charter are two wholly separable requests.

In fact, it is extremely atypical and quite possibly without precedent to utilize a Charter provision for the purposes of creating debt for a specific purpose and specific amount.

36. In the alternative, no authorization for the creation of debt would be necessary at all if the new utility service created conformed to the Enterprise requirements of TABOR, see Article X section 20 (2), and the requirements of the City Charter for the creation of utility debt already found in Artice XII section 1. (*Such public utilities acquired by the city ... shall be paid for from revenue derived from the public utility.)* However, in the present context, there can be no doubt that the Contestee is seeking to evade the anti-consolidation clause by combining a charter amendment with an authorization to create debt.

PROPOSED ALTERNATIVE TO THE BALLOT TITLE SUBMISSION CLAUSE

37. The specific situation posed by GROUNDS: Part 5 makes the creation of a proposed alternative ballot title extremely problematic. On the one hand, the statute is clear that a proposed alternative is a requirement of the statutorily defined procedure of C.R.S. §1-11-203.5. On the other hand, there is no allowance in statute for breaking a single ballot question that impermissibly contains two subjects that may not be consolidated into two separate questions.

38. Consequently, my first and favored proposed alternative is ***no ballot question at all.*** I submit this alternative in consideration of the fact that there is no way of capturing the legislative intent of the proposed charter amendments, (a) through (f), and also remaining in compliance with the anti-consolidation clause. It is reasonable to presume that I am proscribed from departing from the legislative intent of the proposed charter amendments because making changes to the language of those provisions is not within the jurisdiction of this court in this proceeding. It is also reasonable to presume that a finding that two ballot questions may adequately capture the legislative intent of the charter amendments is outside the jurisdiction of this court.

39. As an alternative and as a second and disfavored proposed alternative, I make note here that the allegation contained in GROUNDS: Part 5 may be decided in the favor of the Contestee. That is to say that it may so happen that this court finds the anti-consolidation clause does not proscribe the authorization of debt repayable with taxes ***in*** a charter amendment. I would not agree to this conclusion and would likely find such a decision worthy of appeal to the Supreme Court. However, for the purposes of complying with the statutory requirements of pre-election ballot question contest I submit the following proposed alternative with the understanding that the numerical values for debt and repayment are subject to judicial review:

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 City of Fort Collins Debt be increased by $150,000,000, with a repayment cost of $200,000,000, by the adoption of an amendment to Article XII of the City of Fort Collins Charter that shall 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

I, Eric Sutherland, being first duly sworn upon my oath that I am over the age of eighteen years, that I am a registered elector and citizen of the City of Fort Collins, have prepared and read the foregoing **PETITION FOR A CONTEST CONCERNING THE FORM AND CONTENT OF THE CITY OF FORT COLLINS BROADBAND AUTHORIZATION ELECTION BALLOT QUESTION** and the facts stated therein and exhibits added in appendage thereto are true and accurate to the best of my knowledge and belief.

Eric Sutherland

STATE OF COLORADO)
COUNTY OF LARIMER) SS.

Subscribed and sworn to before me this 21ST day of AUG, 2017 by Eric Sutherland.

DEPUTY CLERK Notary Public

My Commission expires: _____

Witness my and hand and official seal

COMBINED COURT SEAL LARIMER COUNTY COLORADO