

LARIMER COUNTY COMBINED COURTS
LARIMER COUNTY COLORADO

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CASE NUMBER: 2018CV149

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

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 to 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.

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Party without attorney:
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Case #: 2018CV149
Division: 3C

PLAINTIFF'S RESPONSE TO DEFENDANTS STEVE MILLER AND IRENE JOSEY'S MOTION TO DISMISS

Plaintiff, Eric Sutherland (also referred to hear with 1st person pronouns files this *Response to the Defendants Steve Miller and Irene Josey's Motion to Dismiss the Complaint, the Defendant' MTD*, which was filed with this Court on August 3, 2018.

I. INTRODUCTION

In this *Response*, I state my agreement in part with the *Defendants' MTD* and note exceptions with my disagreement. There is no point belaboring this issue at this point. This Court has now twice been presented with the facts and argument that should, beyond any doubt, grant standing for declaratory judgment of the First Claim for relief. (See *Order Granting Indispensable Parties Motion to Dismiss* of July 11 and *Order Denying Motion for Reconsideration* of August 13, 2018) In the process, this Court has mischaracterized the nature of the claims and simply ignored the factual basis underlying the certainty of increased taxes that will be paid and thus injury attributable to the Timnath Development Authority's disregard of law. After two attempts¹ at establishing the basis for standing before this Court, a third can be reasonably predicted to produce the same result.

However, because not all arguments supporting standing have been stated in previous pleadings, remaining arguments are entered here for preservation and also for the extremely unlikely event that this Court will drop its bias long enough to look at the substantive arguments.

Because adjudication of the Second Claim for Relief is largely dependent upon the grant of declaratory judgment in the First Claim for Relief, there is no reason to expand or belabor this Claim. The Defendants have not made argument that the 2nd claim should be dismissed other than the reliance of the 2nd claim on the 1st and the lack of standing in the 1st. However, the underlying legal reasons that should grant standing for the Second Claim are briefly presented in this *Response* for the purposes of preserving the argument for appeal and also in the event that a request for an award is made.

II. EXCEPTIONS TAKEN TO THE SUBSTANCE OF *Defendant's MTD*

¹ The *Defendants' MTD* was filed prior to this Court issuing its August 13th Order denying relief upon my Motion for Reconsideration.

The Defendant's have characterized the claims against Josey and Miller as having to do with "*collecting the taxes necessary to repay the debt*". (See p. 3 *Defendants' MTD*) The actual relief requested would more accurately be described as enjoining the Defendants from; 1) the Assessor calculating the base amount used by the Poudre School District in the calculation of its tax levies for *voter approved FIXED AMOUNT* annual revenues and 2) the Treasurer making payment to the TDA for any amount to be used for payment of debt service of the subject loan. The combination of these two requests for relief may be viewed as an action to enjoin the *collection* of tax, but is more accurately described as an action to avert incorrect and unlawful tax rates and the improper disbursement of taxes.

On p. 5 of *Defendants' MTD*, a statement is made to the effect that I am not a resident of Timnath and that I do not allege being subject to the tax which I seek to enjoin. (*Defendants' MTD*). This statement is out of place and context in a couple different ways. I do not seek to enjoin any tax. I simply wish to pay no more tax than is required to meet the lawful revenue requirements of the *voter approved FIXED AMOUNT* mill levies that the Poudre School District calculates every year. I do not wish to pay additional tax made necessary solely because property in the Timnath Development Authority is exempted from paying its share to the school district so that an amount may be diverted to the TDA.

III. DISAGREEMENT WITH LACK OF STANDING FOR 1ST CLAIM

I have standing to bring this action. The arguments and facts supporting the grant of standing in this matter have been delivered twice. (See *Response to Indispensable Parties Motion to Dismiss* and also *Motion for Reconsideration*) If the useless hearing held on the Motion to Dismiss were to count, it would make three instances where a robust, unquestionable case for standing has been

presented. To the extent that the Defendants' are in agreement with the decision of this Court regarding standing, I disagree. This Court has erred.

IV. ADDITIONAL ARGUMENT SUPPORTING STANDING: 1st Claim

Because a salient argument regarding an element of error ("thinly veiled attack") in this Court's July 11 Order was not addressed in the *Motion for Reconsideration*, I will provide that here to further the argument for standing and preserve the argument. Also because my rights as a taxpayer to enforce the Colorado constitution in matters of taxation and government spending are concerned were not completely developed in earlier pleadings, argument will be presented here. Otherwise, all other argument and facts previously presented in the *Response* and *Motion for Reconsideration* are incorporated as if fully included herein.

A. Request for declaratory judgment is not a "thinly veiled attack".

In its July 11, 2018 Order, this Court mischaracterized a request for a declaration of rights under the Uniform Declaratory Judgment Law to be an attempt to enforce the provisions of the Urban Renewal Law, C.R.S. 31-25-101 *et seq.* My request for declaratory judgment as to the sufficiency of the authorization for additional debt to be contracted by the Timnath Development Authority was ***NOT***, as this Court erroneously concluded, an attempt to enforce the provisions of the Urban Renewal Law². My request for declaratory judgment was an attempt to have the legislative action that purported to authorize additional debt to be deemed invalid in advance of the closing of a time window created by the non-claim provision in 11-57-212 C.R.S. The difference between enforcement

² See *Response to Indispensable Parties Motion to Dismiss* p. 8. "This lawsuit does not attempt to enjoin the Indispensable Parties or bring them or their undertakings and activities under the control of the courts in any way, shape or form. Rather, this lawsuit attempts to enjoin the activities of the Assessor and Treasurer."

and declaration of rights is substantial. It is not a difference without a distinction. It definitely is not a “thinly veiled” attack on the TDA’s compliance with state law as this Court concluded. (See *Order* June 11, 2018, at p.3)

A request for declaratory judgment may not be confused with a request to order compliance³ with statute. This is an absolutely absurd notion. The TDA and Compass are free to do whatever they wish whenever they want to do it as far as I am concerned. However, if their actions should not comply with the law and also lead to higher taxes paid by myself and others, then I have a right under the UJDA to request judicial review of the legality of that action. If the declaration of rights finds that rights are implicated, then equitable relief through the courts may also be pursued.

B. Declaratory Judgment as requested would serve purposes outside the context of this lawsuit.

A declaratory judgment is timeless unless reversed by future judicial action. This is an important distinction that applies to a request for declaratory judgment in general and applies with even more urgency in a situation, such as this, where a party may be barred by law from making petition for declaration of rights at a later time. Although the specific relief that was targeted in this action was injunction to prevent calculation of higher tax rates and diversion of tax revenue to the TDA to repay the loan, that is not the only future situation where a declaration that the authorization was unlawful could be reasonably be expected to be at issue.

For example, the single most injurious disregard for rule of law present across the entire state of Colorado by URAs is the complete failure to maintain a special fund in accordance with the limitations of the special fund defined in C.R.S. §31-25-107. This situation was described in detail in my *Response to*

³ In this Court’s July 11th Order, the language “attack on Defendant TDA’s compliance with the URA” was used. Frankly, I have no idea what an “attack on compliance” could possibly mean.

Indispensable Parties Motion to Dismiss. In a nutshell, URAs view and spend property tax increment as though it were a source of general revenue and not as though it were a source of special revenue that may only be used for the specific purpose of retiring debts that are lawfully created in compliance with the provisions of the Urban Renewal Law. Ironically, the administrative remedy that should guard against this abuse already exists, but it is ignored. The failure of any URA to maintain and abide by the requirements for the special fund should be reported in the annual audits of URAs that are required by the Local Government Audit Law, C.R.S. § 29-1-601 *et seq.* Failure to properly report deficiencies such as ignoring the requirements of the special fund may result in the State Auditor enjoining the disbursement of property tax revenue to a URA. C.R.S. §29-1-606(1). In the event that, by administrative or legislative action, strict audits of Urban Renewal Authorities were to be required and actually performed, the issue of whether or not a specific debt obligation had been properly authorized and, thus, eligible to be repaid with property tax increment, would become an issue. Thus, a determination of the validity of the issuance and authorization of the debt proposed in this matter should have a practical current and future effect on ensuring compliance with law in a manner that is not directly contemplated in this lawsuit.

This is not merely speculation. After 5 years of monkeying around with the language of in the Urban Renewal Law including 3 years of successive ‘fixes’ to legislation adopted in 2015, there is a concensus building that the problem is not the language of the statute but the failure to comply with the requirements of the law.

For the reasons stated above, it was patent error of this Court to refuse standing for declaratory judgment in regard to the TDA on the basis of a failure to differentiate between a request for declaratory judgment and an attack on

compliance. (not quite sure what an attack on compliance means.) Although the same error is expected to be made in the Defendants' request for Motion to Dismiss, it is none the less error.

C. Standing to avoid deprivation of property under the Colorado constitution should be granted.

Colorado courts have granted broad standing to taxpayers to enforce the provisions of the Colorado constitution in matters pertaining to taxation and expenditure of tax funds. *Dodge v. Department of Social Services*, 600 P.2d 70 Colo. 1979, *Barber v. Ritter*, 196 P.3d 238 Colo. 2008. In this matter, my rights under the due process provision of the Colorado constitution, Article II section 25, are jeopardized by the actions of the TDA. In the most basic sense, every Colorado taxpayer enjoys the right to not be taxed unless the tax is applied in a manner consistent with all aspects of law.

The TDA failed to follow the law and reform its Board prior to authorizing the creation of debt. The creation of debt by the TDA unquestionably requires that tax rates paid by property owners in the Poudre School District will be higher. This injury is a certainty and not speculative. Ergo, I have a legally protected right under the Colorado constitution to be free of the additional tax burden that will result from the TDA's incurrence of improperly authorized debt.

This argument is further supported by authority that hold that disputes regarding the legitimacy of the taxation must be decided in favor of taxpayers. *Associated Dry Goods v. City of Arvada*, 593 P. 2d 1375 Colo. 1979 (*Taxing powers and taxing acts will not be extended beyond the clear import of the language used.*) In this circumstance, the Poudre School District has received several voter approvals to apply a tax to all real property in the district for the purposes of collecting **FIXED AMOUNTS** of revenue every year. See Exhibits to

this pleading detailed below. The same tax rate is required by law to be applied to all taxable property. There can be no question that exempting any part of the totality of taxable property is an exception to the general rule of taxation as approved by the voters and consistent with state law. There also can be no question that since exemptions are the exception and not the rule, any dispute as to whether or not any part of the total assessed valuation within the district may be exempted from paying into the ***FIXED AMOUNT*** of revenues that are legally allowed to be raised, that any ambiguity or uncertainty regarding the validity of an exemption must be decided in favor of the taxpayer.

Thus, this sub-section C presents one more argument in favor of granting standing in this matter. Should there be any doubt as to whether my due process rights are impaired or abridged by the failure of the TDA to properly authorize the creation of new debt after first reforming its Board, that doubt must necessarily be decided in my favor and standing must be granted in this matter.

V. ARGUMENT FOR STANDING : 2ND CLAIM

As noted in the Introduction, there is agreement on the relevance of the 2nd Claim for Relief if the 1st Claim is not granted. Only a brief explanation of the basis for standing on the 2nd Claim will be presented here.

The process for ultimately calculating the rate of taxation that will be certified by the Poudre School District on its ***voter approved FIXED AMOUNT*** levies begins every year with the County Assessor certifying, no later than August 30th of every year, the total assessed value within the school district. This certification is comprised of the gross total, which is all taxable property, and the net total, which is the gross less all the assessed valuation that has been deemed to be “increment” and is to be exempted from paying the ***voter approved FIXED AMOUNT*** levies. C.R.S. §39-5-128.

C.R.S. §31-25-107 (10) (b) states :

The municipality in which an urban renewal authority has been established pursuant to the provisions of this part 1 shall timely notify the assessor of the county in which such authority has been established when:

(b) Any outstanding obligation incurred by such authority pursuant to the provisions of subsection (9) of this section has been paid off; and

The meaning of this provision of statute is clear.⁴ The Assessor is to be informed of any occasion when the obligation of a URA has been paid off and there is no longer need of disbursement of property tax increment to the special fund for the purposes of debt service as authorized under C.R.S. § 31-25-107 (9)(a)(II). Of course, this is one more of those inconvenient laws that is routinely ignored. As a general rule, URAs believe that they are to be blessed with property tax increment for a period of 25 years, whether or not there are existing debts to be paid. Indeed, URAs frequently cash finance projects with 'surplus' revenues that are not needed in any given year for the purposes of debt service.

Thus, enjoining the County Assessor is simply a means to an end that is already established as a requirement in the Urban Renewal Law, but which is simply not followed. Equitable relief in this form is consistent in all ways with established law. The request for injunction is justified and may easily be seen to be required in order to avoid future injury.

⁴ See also C.R.S. §31-25-107 (9) (a) (II) "When such bonds, loans, advances, and indebtedness, if any, including interest thereon and any premiums due in connection therewith, have been paid, all taxes upon the taxable property or the total municipal sales tax collections, or both, in such urban renewal area must be paid into the funds of the respective public bodies, and all moneys remaining in the special fund established pursuant to this subparagraph (II) that have not previously been rebated and that originated as property tax increment generated based on the mill levy of a taxing body, other than the municipality, within the boundaries of the urban renewal area must be repaid to each taxing body based on the pro rata share of the prior year's property tax increment attributable to each taxing body's current mill levy in which property taxes were divided pursuant to this subsection (9)."

VI. ADDITIONAL EVIDENCE TO SUPPLEMENT THE RECORD

The following Exhibits are submitted with this *Response* to further supplement the record of this proceeding. Other Exhibits were submitted with the previous *Response to Indispensable Parties Timnath Development Authority and Compass Mortgage Corporations' Joint Motion to Dismiss*. In some cases, these Exhibits are similar to those previously submitted.

Exhibit 1 – Signed copy of the Mill levy Resolution of the Poudre School District Board of Education for tax year 2016. This Exhibit clearly shows how the exemption of property from the total assessed valuation used to calculate the rate for each of the *voter approved FIXED AMOUNT* levies results in an increase in the tax rate applied to all taxable property. (1988, 1996, 2000 and 2010 Override Election Levies and Bond Redemption levy.) The larger the TIF amount, the greater the tax rate that must be applied.

Exhibit 2 - Signed copy of the Mill levy Resolution of the Poudre School District Board of Education for tax year 2016. This Exhibit clearly shows how the exemption of property from the total assessed valuation used to calculate the rate for each of the *voter approved FIXED AMOUNT* levies results in an increase in the tax rate applied to all taxable property. (1988, 1996, 2000, 2010 and 2016 Override Election Levies and Bond Redemption levy.) The larger the TIF amount, the greater the tax rate that must be applied.

Exhibit 3- Resolution of the Poudre School District Board of Education Authorizing an election for November 2010. This Exhibit clearly shows the ballot question that was voted by the electors in November 2010 (approved) that created a lawful revenue expectation of the district for *voter approved FIXED AMOUNT* levy in the amount \$16 million/year, the 2010 Override Election Levy.

Exhibit 4- Resolution of the Poudre School District Board of Education Authorizing an election for November 2016. This Exhibit clearly shows the ballot question that was voted by the electors in November 2016 (approved) that created a lawful revenue expectation of the district for *voter approved FIXED AMOUNT* levy in the amount \$ 8 million/year, the 2016 Override Election Levy.

Exhibit 5 – TIF Increment Report and Preliminary TIF Tax Warrant of the Larimer County Assessor’s Office for the 2018 tax year. This Exhibit shows the amount of assessed valuation within the Timnath Development Authority that contributes to paying the *voter approved FIXED AMOUNT* levies of the Poudre School District and how much is exempted for the 2017 tax year. This Exhibit shows that for the 2018 tax year, the Timnath Urban Renewal Authority (TDA) contained property with a total assessed value of \$75, 504,616. Of that total, only \$2,586,044 of assessed value goes toward the *voter approved FIXED AMOUNT* levies that are calculated as shown in Exhibits 1 and 2. The remainder of the assessed value, \$72,918,572, is not included in the amount that will be used to calculate the tax rates in the 2018 tax year.

WHEREFORE, Plaintiff requests that that this Court deny the *Plaintiff’s Response to Defendants Steve Miller and Irene Josey’s Motion to Dismiss* in this matter.


Eric Sutherland

Dated August 24, 2018

I hereby certify that on this 24th Day of August, 2018, a true and correct copy of the foregoing *Plaintiff's Response to Indispensable Parties Timnath Development Authority and Compass Mortgage Corporations Combined Motion for Attorneys' Fees and Bill of Costs* was filed with the Court. Also, a true and correct copy of the foregoing will be served via email to the following no later than August 24th, 2018.

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