

DISTRICT COURT, LARIMER COUNTY, COLORADO

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Court Address: 201 La Porte Avenue  
Fort Collins, CO 80521  
Phone Number: (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 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.

▲ COURT USE ONLY ▲

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Case No.: 2018CV149

Courtroom/Division: 3C

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**THE CITY OF FORT COLLINS' COMBINED MOTION FOR ATTORNEYS' FEES  
AND BILL OF COSTS**

The City of Fort Collins (the “City”), by and through its counsel, respectfully submits the following Combined Motion for Attorneys’ Fees and Bill of Costs pursuant to C.R.C.P. 121, § 1-22, and C.R.C.P. 54(d).

**Certificate of Conferral:** Pursuant to C.R.C.P. 121, § 1-15(8), the City’s undersigned counsel conferred with Plaintiff regarding the relief sought in this Motion. Plaintiff opposes the City’s Motion.

## **I. INTRODUCTION**

Plaintiff Eric Sutherland (“Mr. Sutherland”) filed a Complaint against the City that lacked substantial justification. *See* Complaint (April 26, 2018). The Complaint contained a total of nineteen claims. Claims 12 through 19 were directed at the City. On July 18, 2018, the City filed a Motion to Dismiss. On September 5, 2018, the Court dismissed all claims against the City. *See* Order Granting Defendants’ Motion to Dismiss (Sept. 5, 2018) at 4 (“Order”).

With respect to Claim 12, the Court in its Order held that Mr. Sutherland lacked standing to bring the claim and failed to sufficiently allege injury-in-fact. Order at 3. The Court also held that C.R.S. § 11-57-210 “conclusively establishes the validity of the bonds and bars Plaintiff’s twelfth claim from being brought.” *Id.* at 4. With respect to Claims 13-19, the Court held that they were “1) inapplicable to Defendants; 2) are insufficiently pled; or 3) moot.” *Id.*

## **II. MOTION FOR ATTORNEYS’ FEES**

Colorado law provides that “the court shall award . . . reasonable attorney fees against any . . . party who has brought or defended a civil action, either in whole or in part, that . . . lacked substantial justification.” C.R.S. § 13-17-102(2). Claims lack substantial justification if they are “substantially frivolous, substantially groundless, or substantially vexatious.” *Id.* § 13-17-102(4).

Here, Plaintiff's claims clearly lacked substantial justification, and the Court should award attorneys' fees in favor of the City and against Plaintiff.

A party seeking an award of attorneys' fees shall file a motion with the Court explaining (1) the basis upon which the fees are sought; (2) the amount of fees sought; and (3) the method by which those fees were calculated. *See* C.R.C.P. 121 § 1-22(2)(b). The moving party shall also provide supporting documents to demonstrate how the attorneys' time was spent and the reasonableness of the fees sought.

In evaluating a request for attorneys' fees, courts consider the following factors in assessing fees and the amount of fees against the offending party. *Id.* 13-17-103. These factors are:

- a) The extent of any effort made to determine the validity of any action or claim before said action or claim was asserted;
- b) The extent of any effort made after the commencement of an action to reduce the number of claims or defenses being asserted or to dismiss claims or defenses found not be valid within an action;
- c) The availability of facts to assist a party in determining the validity of a claim or defense;
- d) The relative financial positions of the parties involved;
- e) Whether or not the action was prosecuted or defended, in whole or in part, in bad faith;
- f) Whether or not issues of fact determinative of the validity of a party's claim or defense were reasonably in conflict;
- g) The extent to which the party prevailed with respect to the amount of and number of claims in controversy;
- h) The amount and conditions of any offer of judgment or settlement as related to the amount and conditions of the ultimate relief granted by the court.

*Id.*

**A. Mr. Sutherland's Claims Against the City Were Substantially Frivolous**

The City is entitled to attorneys' fees from Mr. Sutherland because his claims were substantially frivolous. *See* C.R.S. § 13-17-102(4). A claim is "frivolous" when the proponent of that claim can present no rational argument based on the evidence or law in support of that claim. *Collins v. Colo. Mountain Coll.*, 56 P.3d 1132, 1136 (Colo. App. 2002) (citing *W. United Realty, Inc. v. Isaacs*, 679 P.2d 1063 (Colo. 1984)). In this case, Mr. Sutherland's claims were frivolous for three reasons.

First, Mr. Sutherland had no standing to bring this action pursuant to well-established principles of law. He goes so far as to acknowledge that his injuries are speculative and may not actually occur. *See* Response to Motion to Dismiss (Aug. 8, 2018) at 6; Order at 3. It is evident from both the Complaint and Mr. Sutherland's Response to the Motion to Dismiss that Mr. Sutherland knew he lacked standing to bring his claims because his potential injuries were too speculative.

Second, by his own admission, Mr. Sutherland did not sufficiently plead claims 13-19. *See* Response to Motion to Dismiss at 2 ("The City correctly states that Claims numbered Fourteen through Nineteen . . . were not sufficiently expressed and should be dismissed pursuant to C.R.C.P. Rule 12(b)(5)."); *id.* at 4 ("As a practical matter, [the Thirteenth] Claim is now moot."). It is readily apparent that he spent virtually no time drafting these claims, given that many of them lacked even one complete sentence. He knew that the vast majority of his claims were not sufficiently pled.

Third, C.R.S. § 11-57-110, which conclusively establishes the validity and regularity of the issuance of bonds when they comply with the statute, has been the law in Colorado since 2000 and

has not changed substantially since that time. Mr. Sutherland presented no reason why this statute should not apply and presented no evidence to rebut its conclusive effect on the bonds' validity and regularity of issuance.

Furthermore, the factors in C.R.S. § 13-17-103 weigh in favor of an award of attorneys' fees in this case. Mr. Sutherland made no effort to determine the validity of any of his claims. Once he had commenced his action, the City informed Mr. Sutherland that his claims lacked substantial justification, and yet, Mr. Sutherland made no effort to reduce the number of claims he had asserted. Mr. Sutherland also ignored that there were no issues of fact in dispute between the parties. Finally, the City prevailed on all of Mr. Sutherland's claims against the City, a total of eight claims, and all of those claims against the City were dismissed pursuant to the Court's Order. In light of these facts, an award of attorneys' fees in favor of the City is appropriate under the law.

**B. The Amount of Fees Sought**

The City was represented in this matter by Sherman & Howard L.L.C. ("S&H"). The City seeks \$34,754.95 in attorneys' fees for the work performed by S&H in responding to Mr. Sutherland's Complaint. The fees and costs are summarized in the following chart:

<b>SUMMARY OF FEES AND COSTS</b>				
<b>Invoice Number</b>	<b>Date</b>	<b>Fees</b>	<b>Costs</b>	<b>Total</b>
731069	June 29, 2018	\$2,410.87	--	\$2,410.87
734168	Aug. 13, 2018	\$15,742.12	\$267.58	\$16,009.70
735911	Aug. 29, 2018	\$13,219.87	\$935.92	\$14,155.79
737567	Sept. 20, 2018	\$1,911.37	\$266.92	\$2,178.29
Totals:		\$33,284.23	\$1,470.42	\$34,754.65

**C. The City's Attorneys' Fees and Costs Are Reasonable**

The amount of attorneys' fees and costs incurred by the City is reasonable.

The determination of what constitutes a reasonable award of attorneys' fees is a question of fact for the trial judge and will not be disturbed unless it is "patently erroneous and unsupported by the evidence." *Stuart v. North Shore Water & Sanitation Dist.*, 211 P.3d 59, 63 (Colo. App. 2009). The proper starting point to determine the amount of reasonable fees is by calculating the lodestar amount. *Am. Water Development, Inc. v. City of Alamosa*, 874 P.2d 352, 386 (Colo. 1994). The "lodestar" amount represents "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *City of Wheat Ridge v. Cerveny*, 913 P.2d 1110, 1127 n.5 (Colo. 1996) (quoting *Hensely v. Eckerhart*, 461 U.S. 424, 433 (1983)); *see also Mercantile Adjustment Bureau, L.L.C. v. Flood*, 287 P.3d 348, 352 (Colo. 2012) ("Under the lodestar method, the court calculates the reasonable amount of attorneys' fees by determining the number of hours reasonably expended on litigation and then multiplying that number by a reasonable hourly rate."). This amount may then be adjusted based on several factors, "including the amount in controversy, the length of time required to represent the client effectively, the complexity of the case, the value of the legal services to the client, awards in similar cases, and the degree of success achieved." *Stuart*, 211 P.3d at 63. Courts have previously held that attorneys are entitled to an award of reasonable fees at market rates for attorneys of comparable skill, experience and reputation. *City of Alamosa*, 874 P.2d at 386.

Undersigned counsel calculated the reasonable attorneys' fees in this matter using the lodestar method. *See Exhibit A* (Affidavit of John W. Mill), ¶ 18. The hourly rates for S&H attorneys who worked on this matter are reasonable. *Id.* ¶ 19. S&H billed the City at its standard rates, which are as follows: (1) \$545 per hour for John Mill, a member with 26 years of experience in complex civil litigation; and (2) \$360 per hour for Amanda Milgrom, a fourth-year

associate. *Id.* ¶ 17. For the City of Fort Collins, S&H then discounted its fees by 10%. *Id.* Thus, the net hourly rates after the discount were \$490.50 for Mr. Mill and \$324 for Ms. Milgrom. *Id.*

These hourly rates are consistent with the billing rates of attorneys in similar-sized firms with similar levels of expertise and experience in the local legal community. *Id.* ¶ 18; *see also Anderson v. Pursell*, 244 P.3d 1188, 1197 (Colo. 2010) (holding that water court located in Steamboat Springs “appropriate[ly] . . . chose Denver as the relevant community and” appropriately honored “rate charged by a Denver attorney” when case originated in Steamboat Springs water court and dealt with ditch located near Estes Park). Given the nature of this litigation, involving municipal, bond and complex civil litigation issues, it was reasonable and appropriate for the City to retain a Denver law firm like S&H to represent the City in this case. The rates charged by S&H are also consistent with attorneys of similar expertise in these specialized areas. *See, e.g., Republican Party of Minn. v. White*, 456 F.3d 912, 920–21 (8th Cir. 2006) (concluding that attorneys’ expertise justified their rates); *Traditionalist Am. Knights of Ku Klux Klan v. City of Deslodge, Mo.*, No. 4:12-cv-2085 AGF, 2013 WL 6068895, at \*2 (E.D. Mo. Nov. 18, 2013) (concluding hourly rates were reasonable given the specialized and complex area of law at hand). Contrary to the run-of-the-mill breach of contract or tort claim, this litigation involving municipal issues, bonds and complex civil litigation issues required attorneys with substantial experience and expertise in these areas.

The number of hours defending this matter by S&H was reasonable. Mill Affidavit ¶ 20. Among other things, S&H attorneys were required to review and analyze Mr. Sutherland’s Complaint, identify its legal and procedural deficiencies, research those deficiencies, draft a Motion to Dismiss requesting appropriate relief, research and draft a reply to Mr. Sutherland’s

response, and communicate with and draft two affidavits from City employees in order to establish Mr. Sutherland's lack of standing. *Id.* ¶¶ 10-13, 20.

It is also the case that the Plaintiff's twelfth claim sought to invalidate \$150 million of bonds that had been issued by the City to implement its initiative to make high-speed Internet services available to the entire community. This was an initiative authorized by the City's voters and implemented by the City Council that the Plaintiff sought to prevent from happening. Given this, it was critically important that the City retain legal counsel with significant expertise and experience in municipal litigation, election issues and complex civil litigation to protect the viability of that initiative.

Defense of this case required a review of and experience with municipal procedures such as municipal charter and codes, municipal ordinances, city council meetings and minutes, and with municipal enterprises (e.g., the Fort Collins Electrical Utility Enterprise). It also required a review of and experience relating to ballot measures.

In addition, the nature of Mr. Sutherland's claims gave rise to the issue of standing. Standing is a question of jurisdiction that required substantial time to research and prepare appropriate written arguments, and evidence including two affidavits from City employees regarding jurisdictional facts. The standing argument expanded the scope of legal research and analysis necessary to draft the Motion to Dismiss.

Moreover, the City achieved complete success in this matter by the Court's dismissal of all of the Plaintiff's claims brought against the City.

Also, City Attorney Carrie Daggett and Deputy City Attorney John Duval each entered their appearance in this matter and devoted significant time to the City's defense of it along with

their paralegal Cary Alton. Their involvement reduced the amount of time S&H attorneys and paralegals would have otherwise needed to devote to this case. Yet, the City is not requesting in this Motion any of the time they devoted here to the City's defense. *See Balkind v. Telluride Mountain Title Company*, 8 P.3d 581, 587–89 (Colo. App. 2000) (award of attorneys' fees for town's attorney employed as salaried employee should be determined under lodestar method and not based on the salary paid to the town attorney). This further supports the reasonableness of S&H's fees being claimed in this Motion.

**D. Materials Evidencing Time Spent and Reasonableness of Fees**

The Affidavit of John W. Mill (**Exhibit A**) sets forth the amount and reasonableness of fees incurred by the City in defending against Mr. Sutherland's claims. Mill Affidavit ¶¶ 16-20. Also, attached as **Exhibit A** to the Mill Affidavit are copies of S&H's invoices in this matter.<sup>1</sup> These include itemized summaries of the tasks performed by each S&H attorney involved in the case, along with the amount of time spent on each task, during the five months that this case has been pending.

The Mill Affidavit also explains why the City's fees are reasonable under the circumstances. The hourly rates charged for work performed by S&H attorneys are consistent with market rates for lawyers of similar background and experience. *Id.* ¶ 18. The hourly rates on the invoices reflect S&H standard rates, less a ten percent discount that reduced all of the S&H attorneys' fees in this matter. *Id.* ¶ 17.

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<sup>1</sup> The invoices have been redacted in certain places to protect the attorney-client privilege.

### III. Bill of Costs

“[R]easonable costs shall be allowed as of course to the prevailing party.” C.R.C.P. 54(d). This Court entered judgment in favor of the City and against Plaintiff on *all* of Plaintiff’s claims against the City. *See Order*. The City is indisputably the prevailing party.

C.R.S. § 13-16-122 outlines items which “may” be included as costs. This list is merely illustrative; it is neither mandatory nor exhaustive. *Welch v. George*, 19 P.3d 675, 679 (Colo. 2000). Recoverable costs are those which were reasonably necessary for the development of the case. *Cherry Creek Sch. Dist. No. 5 v. Voelker*, 859 P.2d 805, 813 (Colo. 1993). Recoverable costs include legal research costs. *See Morris v. Belfor USA Grp., Inc.*, 201 P.3d 1253, 1264 (Colo. App. 2008) (“the court found that plaintiff’s computerized research costs were compensable”).

The City is seeking costs that it has incurred in responding to Mr. Sutherland’s Complaint in the amount of \$1,470.42. Mill Affidavit ¶ 21. The summary attached to the Mill Affidavit as **Exhibit B** includes itemization of the litigation costs and expenses that have been incurred in this matter by the City. The costs are limited to filing fees and legal research costs.<sup>2</sup> S&H attorneys researched legal issues primarily related to standing, statutes addressing government bonds and bond validity, and substantial compliance, as these issues are set forth in the Motion to Dismiss and Reply. As set forth in the Mill Affidavit, the City was billed for these costs separately from the attorneys’ fees and all of the costs were both reasonable and necessary. *Id.* ¶¶ 22-23.

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<sup>2</sup> Postage and copying costs comprised less than \$10.00 worth of the total costs.

#### IV. CONCLUSION

Wherefore, the City respectfully requests that this Court award attorneys' fees and costs in favor of the City, and against Mr. Sutherland, as follows:

\$33,284.23	attorneys' fees
<u>1,470.42</u>	costs
\$34,754.65	total

The City also requests that the Court require Mr. Sutherland to pay interest on the amount of the award until paid in full. *See* 5-12-102(1)(b), C.R.S.

Dated this 26<sup>th</sup> day of September, 2018.

SHERMAN & HOWARD L.L.C.

By: /s/ John W. Mill

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ATTORNEYS FOR DEFENDANT

CITY OF FORT COLLINS

**CERTIFICATE OF SERVICE**

I hereby certify on the 26<sup>th</sup> day of September, 2018, that a true and correct copy of the foregoing **THE CITY OF FORT COLLINS' COMBINED MOTION FOR ATTORNEYS' FEES AND BILL OF COSTS** was served via ICCES e-filing system, upon the following:

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*/s/ Stephanie Hendrickson*  
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Stephanie Hendrickson