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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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Case #: 2018CV149
Division: 3C

REPLY IN SUPPORT OFPLAINTIFF'S MOTION FOR RECONSIDERATION OF GRANT OF ATTORNEYS' FEES AND BILL OF COSTS

Plaintiff, Eric Sutherland (also referred to here with 1st person pronouns) files this Reply Brief to support his Motion for Reconsideration of Grant of Attorneys' Fees. The Timnath Development Authority is hereafter referred to as the former TDA for simplicity sake. The complete refusal of the former Timnath Development Authority to accept the directive of the Colorado General Assembly to reform its Board in a manner consistent with statute renders that entity incapable of claiming to be a political sub-division of the state. To avoid non-compliance

with existing law, no recognition whatsoever will be extended to the former TDA as anything other than a public entity that used to exist, but no longer exists.

I. OVERVIEW OF COMPASS BANK AND THE FORMER TDA'S *RESPONSE to MOTION FOR RECONSIDERATION OF FEES*

Compass Bank and the former TDA continue to assert that my belief that I should have been granted standing in this matter is something that I know or should know to be false. Compass Bank and former TDA are incorrect.

Compass Bank and the former TDA are ducking the substantive elements of my case at every turn. Inconvenient facts pertaining to the nexus between the revenues received by the former TDA and higher tax rates paid by property owners in the Poudre School District, "PSD", have been disregarded or camouflaged with colorful language such as "highly attenuated". The misinterpretation of *Olson v. City of Golden* 53 P. 3d 747, 752 plays on and on like a broken record.

Most importantly, Compass Bank and the former TDA fail to recognize that a disagreement on applicable authority and the directness of claimed injury does not make for a frivolous lawsuit. There are disagreements here. In these disagreements, I have found absolutely no cause whatsoever to abandon my beliefs in favor of alternative theories of law or understanding of the facts. These disagreements will be reviewed by the Court of Appeals where application of ***proper*** authority and a finding of facts consistent with reality will determine the outcome.

II. ONLY THE ISSUE OF THE RATIONAL BASIS FOR THE LAWSUIT IS AT ISSUE BEFORE THIS COURT

Every element of my understanding of the case I presented has a rational basis. This Court's finding that my case was frivolous is an abuse of discretion. The character of the abuse of discretion was made clear by multiple statements

made by this Court in its *Order Granting Fees,* which was the sole instance where this Court engaged with the narrative I had presented in any way. The fact that I did not prevail in this matter is no surprise given the misapprehensions of this Court as evidenced by the *Order.* However, failure to prevail and frivolous are two entirely different findings that may not be equated. Only the finding that a frivolous lawsuit had been filed is at issue now before this Court.

III. *Olson v. City of Golden* DOES NOT CONTROL STANDING IN THIS MATTER; NO CONTRARY SHOWING HAS BEEN ATTEMPTED

The division of the Court of Appeals that issued its decision in *Olson* did not find for a bar to any and all inquiry of the activities and undertakings of Urban Renewal Authorities. (URAs). As I accurately described the situation in my *Motion for Reconsideration of Fees,* the URA statutes, C.R.S. §31-25-101 *et seq* contains neither a non-claim statute or a private cause of action.

This Court errantly found that a 'prohibition' exists the *Olson* and that this 'prohibition' precludes standing to any and all who would challenge noncompliance with the law. Such an absolute prohibition does not exist in *Olson.* This Court has misread the decision.

Ironically, there was a prohibition issued in the *Olson* decision, but that prohibition dealt only with whether or not a URA may be considered a district under the TABOR amendment. It is reasonable to speculate that it was this finding pertaining to TABOR and no other reason that motivated the division of the Court of Appeals that decided *Olson* to request publication and thus create binding precedent. Certainly, there is no matter of law regarding the standing of Marian Olson to pursue her non-TABOR related claims that was precedential or even noteworthy. The treatment of standing in that case can be seen to be

consistent with many other statements by our appellate courts since before and after the decision was published.

Compass Bank and the former TDA have made absolutely no attempt to deconstruct or debunk my understanding of the *Olson* case as either irrational or a knowing contrivance to forward a false belief. Indeed, my understanding of the *Olson* decision may be seen to be the most relevant and rational way to look at the meaning of this published opinion.

IV. OTHER AUTHORITIES DO CONTROL FOR STANDING IN THIS MATTER; NO CONTRARY SHOWING HAS BEEN ATTEMPTED

On five previous occasions in five separate pleadings, I have stated that the authorities that ***do*** control standing in this matter all grant broad standing in taxpayer lawsuits alleging impairment of rights under the Colorado Constitution. These citations have been disregarded by Compass Bank and the former TDA, and, of course, have not been examined by this Court.

Because these authorities have not been discussed in much depth in any pleading, I will provide a more expansive treatment in this *Reply* brief. This treatment is not provided to argue the failure of this Court to grant standing. Rather, this treatment is provided to show the manifest error of law that his Court has made by finding my case to be frivolous. Also, this treatment better preserves issues that have already been preserved for appeal.

Colorado case law provides for broad taxpayer standing. *Ainscough v. Owens* 90 P.3d 851 (Colo. 2004) at 856. "Taxpayers have standing to seek to enjoin an unlawful expenditure of public funds" and "even where no direct economic harm is implicated, a citizen has standing to pursue his or her interest in ensuring that governmental units conform to the state constitution." *Barber v.*

Ritter, 196 P. 3d 238 at (Colo. 2008) at 246 (quoting *Nicholl v. E-470 Pub. Highway Auth.* 896 P.2d 859 (Colo 1995).

Our supreme court has said that a plaintiff-taxpayer has standing when he or she "argues that a governmental action that harms him is unconstitutional" and that "when a plaintiff-taxpayer alleges that a governmental action violates a specific constitutitional provision ..., such averment satisfies the two-step standing analysis." *Id.* at 246, 247 (quoting *Ainscough, 90 P.3d at 856* and citing *Dodge v. Dep't of Social Services, 198 Colo.* 379, P.2d 70 (Colo. 1979).[1]

In *Hotaling v. Hickenlooper,* 275 P.3d 723 Colo. Court of Appeals (2011), a division of the Court of Appeals reviewed several different appellate court cases in which plaintiffs that had averred injury under the broad grant of standing in Colorado were either granted or denied standing. See *Hotaling* at 726. In the four cases reviewed in which the plaintiff-taxpayer had been granted standing, *Dodge* supra, *Conrad v. City and County of Denber,* 656 P.2d 662 (Colo. 1982), *Barber* supra, and *Nicholl* supra, the Court of Appeals concluded *"there was some connection, albeit perhaps slight, between the plaintiffs status as taxpayers and the challenged government actions."*

Here, the connection between my status as a taxpayer and the challenged governmental action is direct and palpable. If the former TDA borrows more money, all property owners in the Poudre School District will pay higher tax rates in future years to repay part of the debt. Compass Bank and former TDA have had ample opportunity to challenge the facts that I have presented that document the directness of this connection, but they have never done so.

Furthermore, those cases reviewed by the *Hotaling* court where the plaintiff failed to attain standing are also instructive for review on this occasion. Those

[1] The preceding two paragraphs are lifted directly from *Hotaling v. Hickenlooper,* 275 P.3d 723. Colo. Court of Appeals, (2011).

cases included *Hotaling* supra itself as well as *Brotman v. East Lake Creek Ranch, L.L.P.,* 31 P.3d 886 (Colo. 2001). Although not reviewed in *Hotaling, Hickenlooper v. Freedom From Religion,* 338 P. 3d 1002 – (Colo. 2014), also belongs to the collection of cases where a plaintiff was not granted standing. Each of these three cases shows a plaintiff stretching beyond any possible hope of connecting the dots between their circumstance and a constitutional guaranty of rights. Such a stretch has not been attempted in the instant case. Rather, my perceived injury as a taxpayer was direct and has never been refuted with anything other than conjecture and misstatements.

V. AVERMENT OF FACT WAS SUFFICIENT TO CROSS THRESHOLD OF STANDING FOR A TAXPAYER LAWSUIT; NO CONTRARY SHOWING HAS BEEN ATTEMPTED.

Although it is not immediately intuitive to someone new to the subject of tax increment financing, it is unquestionable that actions taken by a URA in the Poudre School District or any other school district that relies upon ***FIXED AMOUNT*** property tax components for revenue, have effect on the tax rates paid by property owners. See *Plaintiff's Response to MTD.* This effect is a result of a law, C.R.S. §39-5-128, that requires school districts to use only the 'net' amount of assessed valuation when calculating mill levies. (See *Motion for Reconsideration of Grant of Fees* at p. 12, never addressed or refuted.) Whether this effect was intentional or otherwise, it is the reality today and may be presumed to be the controlling law going forward as there has been no discussion at any time of changing this law or the methodology by which the Poudre School District calculates the tax rates certified for the collection of ***voter approved FIXED AMOUNT*** component taxes.

The facts and argument I have presented over and over again in this proceeding have averred a concrete and unquestionable nexus between my status and rights as a taxpayer and the unlawful behavior of the former TDA complained of. This nexus is more than sufficient for a grant of standing in a taxpayer lawsuit alleging a failure of due process of constitutional dimension pursuant to the decisions of our appellate courts. Compass Bank and the former TDA have never argued otherwise.[2] Ever since an amendment to the URA statutes was signed by the Governor in 2015, all URAs were directed to reform the governing bodies that hold all legislative and administrative powers of a URA. The former TDA refused this directive. Consequently, any action that an unreformed Board of the former TDA may take that effects the tax rates of property owners in the Poudre School District is a patent failure of due process in a matter that threatens to deprive all property owners by virtue of higher tax rates. Our Constitution guards against this result. See Article II section 25. The broad grant of standing that taxpayers enjoy to enforce the provisions of the Constitution guaranties access to our courts for the purposes of avoiding deprivation of property without due process. My lawsuit was not frivolous. It may have been misunderstood, but it was not frivolous.

To put this another way, the property owners of the Poudre School District have a legally protected right that ***every*** action taken by ***every*** governmental entity that will affect the tax rates they pay will be taken in accordance with ***every*** law in existence. In this case, every property owner has a legal expectation under the

[2] All the whining about 'highly attenuated', 'indirect', 'speculative' and 'indistinct' is not accurate in this case because of the direct link between diversions of property tax and higher tax rates paid is unquestionable. Furthermore, this whining was all forwarded without any recognition or acknowledgement that my case brought taxpayer claims of constitutional dimension which must be treated differently by the courts pursuant to *Barber* supra, *Dodge* supra, *Conrad* supra, *Nicholl* supra ... . Etc.

Constitution that only a reformed board may contemplate and approve the creation of more debt. It was the legislature's intent, as directly stated in C.R.S. §31-25-104(2.5), that a broader base of perspectives and representation of the public finance paradigm be brought into being in the governing body of a URA. Without the benefit of that broader representation, taxpayers that are affected by URA Board decisions are deprived of their due process rights. Because the former TDA failed to reform its Board prior to the attempted increase of debt originally complained of, that action was a failure of due process. The constitution protects against any person suffering deprivation of property in the form of higher tax rates and the broad standing enjoyed by taxpayers guaranties access to the courts.

Furthermore, as has been mentioned several times in previous filings, this was a declaratory judgment action. It was taken to request judicial review of my rights as a taxpayer under the Colorado Constitution. Neither I nor any other person need not have suffered an injury in order to obtain standing in a declaratory judgment action. Rather, the standard for standing requires a direct and palpable threat of future injury and that standard is satisfied. There is absolutely nothing speculative about the direct relationship between an increase in indebtedness by a URA within the Poudre School District and higher tax rates. Compass Bank and the former TDA are simply chasing their tales with their argument in this regard.

VI. ARGUMENT AVERRING '*SPECULATIVE*' INJURY FALLS APART UPON EXAMINATION.

Throughout this entire proceeding, Compass Bank and the former TDA have argued that any fear of higher tax rates levied by PSD to backfill for diversion of tax revenues is "speculative". See *Response In Opposition to Plaintiff's Motion for Reconsideration of Grant of Attorneys Fees* at p. 6 and 7.

The absurdity of Compass Bank and the former former TDA's position in this regard can be easily demonstrated by asking just one question. *"How, exactly, does Compass Bank expect the additional debt to be repaid?"* Where is the money that the former TDA will use to pay principle and interest to Compass Bank going to come from?

These questions connote a sense of hilarity when considered from any perspective. Apparently, Compass Bank and the former TDA must believe that the money is going to materialize out of thin air. However, basic reality must intrude on this delusion. The money comes from property taxes. In some cases, other government agencies are simply deprived of the money, but in the case of the tax revenue attributed to the ***voter approved FIXED AMOUNT*** component levies, which make up more than 25% of all the expected property tax revenues, the money comes from property owners paying higher tax rates.

Throughout this entire proceeding, Compass Bank and the former TDA have ducked away from any examination of the practical mechanics and origins of the money that they enjoy the use of. As an alternative to the 'materializing out of thin air' school of thought, Compass and the former TDA have continually suggested that somehow the Poudre School District enjoys some sort of discretion as to how it certifies mill levies in order to obtain the ***FIXED AMOUNTS*** of revenues that the ***voters*** have ***approved.*** This is fanciful delusion on their part. In reality, the methodology for calculating tax rates is controlled by law and the Poudre School District follows the law in this regard. In the alternative, Compass Bank and the former TDA seem to be suggesting that revenues attributable to PSD tax levies will not make up any part of the repayment scheme that Compass Bank is relying upon. This is also an absurd position to take.

The actual effect of the former TDA's activities on public finance may be better understood by examining the two exhibits submitted with this Reply.

VI. EVERY SINGLE ASPECT OF THE MECHANICS OF TAXATION RELIED UPON FOR DEBT REPAYMENT WAS KNOWN TO COMPASS AND THE former TDA; OPPOSITION WAS FRIVOLOUS.

Compass Bank and the former TDA knew about every single aspect of the mechanics of taxation that have been at issue in this lawsuit. The opposition that has been interposed has been groundless and frivolous. The direct connection between the status of every single property owner in the Poudre School District and the former TDA's attempt to borrow more money could not possibly have been unknown.

Upon answering my *Unamended Complaint* in this lawsuit, Compass Bank and the former TDA also filed a *Motion for Injunctive Relief Pursuant to C.R.C.P. 65(g)*. See filings of June 5, 2018. In this *Motion,* Compass and the former TDA reviewed a series of legal actions between myself and the Poudre School District. See p. 7 of *Motion for Injunctive Relief Pursuant to C.R.C.P. 65(g)*. The status of this *Motion* is still a matter for this Court to decide at the present time. Compass and the former TDA have motioned this court for withdrawal of this *Motion,* but this Court has not yet granted or denied withdrawal.

Compass and the former TDA have professed to understand the proceedings of the legal actions between myself and PSD well enough to declare that they were frivolous and vexatious. For example, "*Finally, he claimed that the ballot question's language was misleading because it did not mention or adequately describe Colorado's tax increment financing (TIF) mechanism, established at Colo. Rev. Stat. § 31-25-107.*" See p. 7 *Motion for Injunctive Relief Pursuant to C.R.C.P. 65(g)*.

Such an understanding as has been professed would necessarily be complete enough to understand that the root cause of all the litigation between myself and the school district. That root cause was the higher tax rates that are paid by property owners in PSD in order to fund the undertakings and activities of the former TDA and other public entities that receive property tax increment attributable to PSD's mill levies.

Thus, Compass Bank and the former TDA knew perfectly well of all aspects of the higher taxes paid by property owners in PSD on ***voter approved FIXED AMOUNT*** component tax levies before waiving service and filing into this case. The entire basis for the opposition to the relief I had requested was frivolous and groundless. Compass Bank and the former TDA knew perfectly well of the direct connection between the attempted increase in debt and the injury of higher tax rates to be paid long into the future. The *Motion for Injunctive Relief* filed by Compass and the former TDA proves knowledge of this beyond a shadow of a doubt.

The irony present here may not be mistaken. Compass Bank and the former TDA knew that their opposition to my request for relief was frivolous, yet they did not fear any allegation to that effect because the law does not provide any reason for a *pro se* litigant to aver for a frivolous opposition when there are no attorney fees to collect. Compass Bank and the former TDA also know that the entire premise for their allegation that my lawsuit was frivolous is, itself, groundless and vexatious.

VII. REGARDING THE '*PLACEHOLDER*' CLAIMS

If indeed it is true that, as Compass Bank and the former TDA have stated, that this Court did not err when it determined that claims 4-11 and 14-19 were

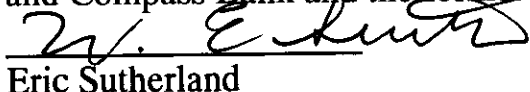
frivolous, then the award of fees should only reflect the time spent by counsel in dealing with these claims. That time, of course, is almost negligible in as much as all parties and this Court are in agreement that the verbage included in those 'claims' could not be construed to be a properly plead claim.

V. CONCLUSION

Once again, I have presented a totality of facts and legal conclusions based upon evidence and rational thought to support the conclusion that I should have been granted standing in this matter. Of course, that is not at issue in this *Motion.* Rather, this Court's errant finding that I had no rational basis whatsoever for bringing this lawsuit is at issue here. In that regard, there can be no doubt that I did not know nor could I have known that I would not prevail. Indeed, I am still certain enough in the facts and basis underlying my case that an appeal is imminent.

This Court's grant of Fees and Costs in this matter is a manifest error of law and must be reversed by this Court. This Court applied the wrong authority, *Olson v. City of Golden.* This Court failed to recognize this action as a taxpayer lawsuit brought under the due process provision of the Colorado constitution. This Court failed to apply the proper authority to that controls for taxpayer standing in such matters. This Court mischaracterized the basic nature of the lawsuit as a 'thinly veiled attempt to enforce the provisions of the URA law when that was never the primary objective. And, finally, this Court, refused to acknowledge the rational basis underlying every single element of my case and found, instead, that it was frivolous.

WHEREFORE, Plaintiff requests that that this Court vacate the *Order Granting Fees* and issue an Order consistent with a finding that this case was not frivolous and Compass Bank and the former TDA are not entitled to fees and costs.



Dated October, 12, 2018

Eric Sutherland

I hereby certify that on this 12th Day of October, 2018, a true and correct copy of the foregoing *Reply in Support of Plaintiff's Motion for Reconsideration of Grant of Attorneys' Fees and Bill of Costs* was filed with the Court. Also, a true and correct copy of the foregoing and an accompanying Proposed Order and affidavit in Support of the Motion will be served via email to the following no later than October 11th, 2018.

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By W. E. Lee [signature]