DISTRICT COURT, LARIMER COUNTY, COLORADO Court Address: 201 LA Porte Avenue Fort Collins, CO 80521 Phone Number: (970) 494-3500	
Plaintiff: ERIC SUTHERLAND, *pro se* **v.** **Defendant:** 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▲**
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 Carrie M. Daggett, #23316 John R. Duval, # 10185 Fort Collins City Attorney's Office 300 LaPorte Avenue Fort Collins, CO 80522-0580 970-221-6520 cddaggett@fcgov.com, jduval@fcgov.com	Case No.: 2018CV149 Courtroom/Division: 3C

RESPONSE TO MOTION FOR DETERMINATION OF QUESTIONS OF LAW UNDER RULE 56(h)

The City of Fort Collins (the "City"), by and through counsel, Sherman & Howard L.L.C. and the Fort Collins City Attorney's Office, responds to Plaintiff's motion as follows:

Plaintiff Eric Sutherland ("Mr. Sutherland" or "Plaintiff") filed his Motion for Determination of Questions of Law under Rule 56(h) ("Rule 56(h) Motion") outside of the parameters of the Colorado Rules of Civil Procedure. He has already filed a Notice of Appeal to appeal the Court's Order granting the City's Motion to Dismiss, which immediately divested the Court of jurisdiction to conduct further action related to the judgment that is now on appeal. Thus, this Court no longer has jurisdiction to hear the Rule 56(h) Motion. But even if it did have jurisdiction, this Court already has dismissed all claims against the City. Regardless of that fact, Mr. Sutherland persists by asking the Court essentially to reopen the case and rehash the same, or very similar, arguments. This is, of course, procedurally improper, particularly given the vehicle he chose is a motion under C.R.C.P. Rule 56(h). Even if his Rule 56(h) Motion were procedurally proper, Mr. Sutherland would still lose on the merits.

Mr. Sutherland asks this Court to answer three questions: (1) whether the City of Fort Collins Electric Utility Enterprise Board ("EUEB") constitutes an "issuing authority" for the purposes of the Supplemental Public Securities Act (the "SPSA"); (2) whether any part of the SPSA is applicable to the issuance of debt authorized by Ordinance 003; and (3) whether the EUEB knew or should have known that it was not an "issuing authority" under the SPSA. Rule 56(h) Motion at 2. He does so after the Court already granted the City's Motion to Dismiss and dismissed all claims against the City. To be clear, there are no pending claims remaining in this lawsuit. The only outstanding item is the City's Motion for Attorneys' Fees and Costs, filed on September 26, 2018. Nonetheless, Mr. Sutherland felt it was appropriate for him to set forth a

mixture of quasi-new, but related, and regurgitated arguments in his improper Rule 56(h) Motion.

This Court should deny the Rule 56(h) Motion for three reasons. First, the instant Mr. Sutherland filed his Notice of Appeal, this Court was divested of its jurisdiction to enter any orders that would alter the final order dismissing all claims against the City. Second, the Rule 56(h) Motion is procedurally improper. Parties only may employ Rule 56 motions—motions for summary judgment or for determinations of a question of law—when there are claims outstanding; particularly, when there are questions of law that can be decided without a factual record, and thus, can simplify the lawsuit. Here, there are no claims pending, and so the Rule 56(h) Motion is procedurally improper. And third, even if the Rule 56(h) Motion was procedurally proper, it would fail on the merits. The EUEB constitutes an "issuing authority" under the SPSA, mooting the remaining two questions raised by Mr. Sutherland in his Rule 56(h) Motion.

I. Plaintiff's Notice of Appeal Divests this Court of Jurisdiction to Consider the Motion.

Mr. Sutherland filed a Notice of Appeal on October 23, 2018, twenty days after filing Rule 56(h) Motion. By filing his Notice of Appeal, Mr. Sutherland divested this Court of jurisdiction to consider any motion that affects the judgment on appeal, i.e., this current Rule 56(h) Motion.

"Generally, the filing of a notice of appeal shifts jurisdiction to the appellate court, thus divesting the trial court of jurisdiction to conduct further substantive action related to the judgment on appeal." *Musick v. Woznicki*, 136 P.3d 244, 246 (Colo. 2006); *see also id.* at 248 (citing *Moliter v. Anderson*, 795 P.2d 266, 268 (Colo. 1990)) ("Courts universally recognize the

general principle that once an appeal is perfected jurisdiction over the case is transferred from the trial court to the appellate court for all essential purposes with regard to the substantive issues that are the subject of the appeal."). This is because C.A.R. 3, which addresses appellate courts' jurisdiction generally, "must be read as requiring transfer of jurisdiction to the court of appeals *of a final judgment*." *Id.* at 248 (citations omitted) (alteration in original); *see also People v. Stewart*, 55 P.3d 107, 126 (Colo. 2002) ("[a] trial court retains jurisdiction to act on matters that are not relative to and do not affect the judgment on appeal.").

If the Court were to grant Mr. Sutherland's Rule 56(h) Motion, it would certainly affect the judgment that is currently on appeal. Mr. Sutherland has appealed the Court's order on the City's Motion to Dismiss. *See* Notice of Appeal at 3. Granting this Rule 56(h) Motion would effectively reverse the Court's prior Order granting the Motion to Dismiss. Therefore, the Court does not have jurisdiction to rule on this Rule 56(h) Motion and so should not consider it.

II. Plaintiff's Motion Should Be Denied Because It Is Procedurally Improper.

A. The Motion does not constitute a Rule 56(h) motion.

Mr. Sutherland's Rule 56(h) Motion does not satisfy the requirements for a Rule 56(h) motion. Rule 56(h) provides that

> [a]t any time after the last required pleading, with or without supporting affidavits, a party may move for determination of a question of law. If there is no genuine issue of any material fact necessary for the determination of the question of law, the court may enter an order deciding the question.

A motion for determination of a question of law is one type of summary judgment motion. *See, e.g.*, *Levine v. Katz*, 192 P.3d 1008, 1010 (Colo. App. 2006) (party filed "a motion for summary judgment under C.R.C.P. 56(h) (determination of question of law)."); *Concerning Application for Water Rights of Sedalia Water & Sanitation Dist. in Douglas Cnty.*, 343 P.3d 16,

21 (Colo. 2015) ("The court may also resolve issues of law in ruling on a motion for summary judgment. C.R.C.P. 56(h)."). This is evidenced by its location within Rule 56, which governs motions for summary judgment.

A Rule 56(h) motion fulfills a narrow purpose within the world of summary judgment motions. Specifically, the purpose of a Rule 56(h) motion is

> to allow the court to address issues of law which are not dispositive of a claim (thus warranting summary judgment) but which nonetheless will have a significant impact upon the manner in which the litigation proceeds. [Resolving such issues] will enhance the ability of the parties to prepare for and realistically evaluate their cases . . . and allow the parties and the court to eliminate significant uncertainties on the basis of briefs and argument, and to do so at a time when the determination is thought to be desirable by the parties.

Stapleton v. Pub. Employees Retirement Assoc., 412 P.3d 572, 576 (Colo. App. 2013) (quoting *Bd. of Cnty. Comm'rs v. United States*, 891 P.2d 952, 963 n.14 (Colo. 1995)) (alterations in original). As the Colorado Supreme Court explained above, the entire purpose of the rule is to provide the parties and the court with an opportunity to resolve issues of pure law, which do not resolve the entire case, so that they can focus on the factual disputes going forward in the case still being litigated in the trial court.

In this case, there is no lawsuit to simplify, no case for the parties to evaluate. The case is over—the Court dismissed all of Mr. Sutherland's claims against the City, and the only remaining issue is the question of attorneys' fees. Therefore, this Court should deny the Rule 56(h) Motion as procedurally improper.

B. The Rule 56(h) Motion does not meet the requirements for a Motion for Reconsideration.

To give Mr. Sutherland the benefit of the doubt, his Rule 56(h) Motion might be considered to be in the nature of a motion for reconsideration, as Mr. Sutherland seems to be

asking the Court to reconsider certain issues and to change its final order dismissing all of his claims. But even if this were considered a motion for reconsideration, the Court should deny it.

Courts generally disfavor motions for reconsideration. C.R.C.P. 121 § 1-15(11). Such a motion will not be considered unless it presents newly discovered evidence or a change in the law. *See Blue Cross of Western N.Y. v. Bukulmez*, 736 P.2d 834, 838 (Colo. 1987); *Davidson v. McClellan*, 16 P.3d 233, 238 (Colo. 2001). Such motions must advance a factual or legal argument beyond what was or could have been presented in the original pleadings. *See Przekurat v. Torres*, 15CA1327, 2016 WL 7009134, at *9 (Colo. App. Dec. 1, 2016). Here, Mr. Sutherland has not put forth any new evidence. In fact, he admits that he could have brought these legal arguments in his Complaint, but he failed to do so because he only just thought of this legal issue. *See* Rule 56(h) Motion at 5 ("This most recent reference to § 11-57-210 in conjunction with a request for a large award of attorneys' fees lead [sic] to my discovery of the inapplicability of any and all parts of the SPSA to the bonds issued by the EUEB.").

C.R.C.P. 121 § 1-15(11) also required Mr. Sutherland to file any motion for reconsideration within 14 days after the Court's September 5, 2018 Order granting the City's Motion to Dismiss. He did not file his Rule 56(h) Motion until October 3, 2018—28 days after the Court's Order was issued. Thus, it was filed too late to be a proper motion for reconsideration, and can be denied on that basis as well.

Therefore, this Court should deny Mr. Sutherland's Rule 56(h) Motion as procedurally improper.[1]

[1] The City has contemporaneously filed a Motion to Strike Plaintiff's Motion for Determination of Questions of Law Under Rule 56(h) because it is procedurally improper.

III. Plaintiff's Rule 56(h) Motion Should Be Denied on the Merits Because the EUEB is a Public Entity and Issuing Authority under the SPSA.

The second, independent reason for denying Mr. Sutherland's Rule 56(h) Motion is that even if he could overcome his procedural deficiencies—which he cannot—his argument would still fail on the merits. Mr. Sutherland argues in his Rule 56(h) Motion that the EUEB is not an "issuing authority" under the SPSA, which means, he argues, that the EUEB did not have the authority to elect to issue the bonds under the provisions of the SPSA. *See* Rule 56(h) Motion at 10. Mr. Sutherland is wrong.

The SPSA applies to securities "issued by any *public entity* if the *issuing authority* of such public entity elects in an act of issuance to apply all or any of the provisions" of the SPSA to the issuance of the securities. Section 11-57-204(1), C.R.S. (emphasis added). In order for the SPSA to apply to the bonds, the City's Electric Utility Enterprise (the "Enterprise") must constitute a "public entity" and the EUEB must be an "issuing authority." Both criteria are satisfied, and thus the EUEB had the authority to issue the bonds under the SPSA.

A. The EUEB is a public entity.

The Enterprise, as an enterprise under the Taxpayer's Bill of Rights ("TABOR"),[2] is a public entity under the SPSA. The SPSA includes within the definition of a "public entity" any municipality, such as Fort Collins. Section 11-57-203(3)(d), C.R.S. While Mr. Sutherland appears to concede that the Enterprise is a public entity for the purposes of the SPSA, it is clearly so. The SPSA also defines "public entity" as "any other public entity as defined in section 24-75-601(1), C.R.S." *Id.* § 11-57-203(3)(j). Section 24-75-601(1) defines a "public entity" as "any

[2] Article X, Section 20 of the Colorado Constitution.

institution, agency, instrumentality, authority, county, ***municipality***, city and county, district, or other political subdivision of the state . . . [and] any institution, department, agency, ***instrumentality***, or authority of any of the foregoing . . . ." (emphasis added.) The Enterprise is clearly an instrumentality of the City. Moreover, a public entity includes "any entity that is created by the constitution." *Id.* § 11-57-203(3). The Enterprise is such an entity. It is an "enterprise" as defined in TABOR,[3] and it was created by the City under its home rule powers in Sections 1 and 6 of Article XX of the Colorado Constitution.[4] A TABOR enterprise does not exist independent of the government which "owns" it. Rather, it is simply part of the City, and municipalities are certainly in the list of public entities in the SPSA. Therefore, the bonds were clearly issued by a "public entity."

B. The EUEB and City Council are an issuing authority.

The bonds were also issued by an issuing authority of that public entity for two reasons. First, the City Council, whether acting as itself or as the board of the EUEB, is an "issuing authority" under the SPSA. The SPSA defines an "issuing authority" as "the governing body of any public entity in which the laws of this state vest the authority to issue securities through an act of issuance." Section 11-57-203(2), C.R.S. The City Council is vested with the home rule authority to issue bonds, and this includes the power "to legislate upon, provide, regulate, conduct and control" the issuance of those bonds. *See* Section 6.e of Article XX of the Colorado

[3] Under Article X, Section 20(2)(d) of the Colorado Constitution, an "enterprise" is defined as "a government-owned business authorized to issue its own revenue bonds and receiving under 10% of its annual revenue in grants from all Colorado state and local governments combined." There is no dispute that the Enterprise is an "enterprise" under TABOR.

[4] *See Bd. of Cnty. Comm'rs v. Fixed Based Operators, Inc.*, 939 P.2d 464, 468 (Colo. App. 1997) (county had power under TABOR to create an enterprise to construct and operate on the county's behalf a new commercial passenger terminal at the county's airport).

Constitution; City Code § 26-392 (Exhibit 12 to Motion to Dismiss). Thus, the City Council is an issuing authority.

Second, the EUEB itself is an "issuing authority" under the Colorado Constitution. Section 6.e of Article XX of the Colorado Constitution, which constitutes a law of this state, empowers the City, as a home rule municipality, to delegate to the Enterprise the authority to issue revenue bonds. Here, the City issued bonds through the EUEB under Section 7(b) of Article XII of its Charter.[5] *See* Ex. 10 to Motion to Dismiss. This authority is then exercised by the City Council pursuant to the City Code § 26-398(a).[6] In City Code § 26-392, the Council has made itself the governing board of the enterprise when issuing revenue bonds.[7] *See* Ex. 12 to Motion to Dismiss.

In sum, the ordinance issuing the bonds was an "an act of issuance" under the SPSA since it was "an ordinance . . . to issue a security pursuant to delegated authority adopted by the issuing authority . . ." Section 11-57-203(1), C.R.S. The Council, acting *ex officio* as the board of the Enterprise, was a proper "issuing authority" under the SPSA because it is the governing body of a public entity in which the "laws of this state vest the authority to issue securities through an act of issuance." *Id.* § 11-57-203(2).

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[5] "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."

[6] "The City's electric utility enterprise is also authorized to issue revenue and refunding securities and other debt obligations in the manner and to the full extent authorized in Section 7(b) of Charter Article XII and in Code § 26-392 to fund the electric utility's provision of telecommunication facilities and services."

[7] "The utility shall constitute an enterprise of the City which may, by ordinance of the City Council, acting ex officio as the board of such enterprise, issue its own revenue bonds or other obligations (including refunding securities) on behalf of the City . . . ."

Therefore, the SPSA clearly applies, the City can rely on § 11-57-210, and the Court was correct to dismiss Mr. Sutherland's claims based on that statute.

IV. Conclusion

The City respectfully requests that this Court deny Plaintiff's Motion for Determination of Questions of Law Under Rule 56(h) on the grounds that Mr. Sutherland's Notice of Appeal divested the Court of jurisdiction to hear this Rule 56(h) Motion, it is procedurally improper, and because it fails on the merits.

Dated this 24th day of October, 2018.

SHERMAN & HOWARD L.L.C.

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CERTIFICATE OF SERVICE

I hereby certify on the 24th day of October, 2018, that a true and correct copy of the foregoing pleading, entitled, **RESPONSE TO MOTION FOR DETERMINATION OF QUESTIONS OF LAW UNDER RULE 56(h)**, was served via ICCES e-filing system, upon the following:

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