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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

REPLY IN SUPPORT OF THE CITY'S MOTION FOR ATTORNEYS' FEES AND BILL OF COSTS

The City of Fort Collins (the "City"), by and through counsel, Sherman & Howard L.L.C. and the Fort Collins City Attorney's Office, submits this Reply in support of its Motion for Attorneys' Fees and Bill of Costs ("City's Motion for Fees") as follows:

Eric Sutherland ("Plaintiff" or "Mr. Sutherland") filed a rambling response to the City's Motion for Fees. *See* Amended Plaintiff's Response to the City of Fort Collins' Motion for Attorneys' Fees and Bill of Costs ("Response"). This Response fails to explain why his claims were not frivolous. Nor does it rebut the reasonableness of the amount of fees and cost incurred by the City for the work of its counsel, the Sherman & Howard attorneys ("S&H Counsel"). The Response also fails to challenge either S&H Counsels' rates or the bill of costs. Therefore, the Court should grant the City's Motion for Fees in full.

I. Mr. Sutherland's Claims Were Frivolous

A. Mr. Sutherland fails to rebut the City's valid arguments that his claims were frivolous.

Contrary to Ms. Sutherland's conclusory statements in his Response that his claims were not substantially frivolous,[1] the City's Motion for Fees demonstrated that his claims were, in fact, frivolous.

First, Mr. Sutherland was well aware that his injuries were speculative, yet did not hesitate to argue over and over again that he had standing to bring his claims. *See* Response to Motion to Dismiss (Aug. 8, 2018) at 6.

[1] For example, Mr. Sutherland attempts to persuade the Court that he made an effort to determine the validity of his claims before asserting them by informing the City of its "lawlessness." Response at 12. That is not, in fact, what is meant by making an effort to determine the validity of his claims and is not relevant to this analysis.

Second, Mr. Sutherland acknowledged, and continues to acknowledge, that Claims 14-19 were frivolous. *See* Response at 8–9 ("There is no dispute here that it would have been in good form to have requested leave of the Court to delete the placeholders."); *id.* at 12.

Third, despite his attempts, Mr. Sutherland has failed to demonstrate why section 11-57-110, C.R.S. does not conclusively establish the validity of the bonds, and thus, why his claims were not frivolous. In his Response, Mr. Sutherland contends that because the City sold the bonds after his Complaint was filed, the recital contained in the bond issuance cannot affect the legality of the issuance of the bonds. *See* Response at 9. This argument is irrelevant at this stage of litigation. The only question at issue is whether the City is entitled to its attorneys' fees and costs. This is not an opportunity for Mr. Sutherland to rehash old issues.

Even if he was not precluded from raising new arguments in his Response, Mr. Sutherland had the opportunity to make this argument regarding the applicability of § 11-57-210 in his response to the City's Motion to Dismiss in August 2018, well after the bonds had been sold. By not having raised the issue then, he has waived it. He cannot now clamor for relief from the Court because of evidence and facts he already knew at the time of his response to the Motion to Dismiss but failed to raise.

Finally, Mr. Sutherland fails to rebut the City's arguments that his claims were frivolous and the factors in § 13-17-103 weigh in favor of an award of attorneys' fees in this case.[2]

[2] Mr. Sutherland claims that the City "admits" that it violated the City Charter by failing to hold concurrent meetings of the Electric Utility Enterprise Board ("Board") and the City Council. *See* Response at 4. That statement is false and demonstrates Mr. Sutherland's attempt to misconstrue the City's prior motions. In its Motion to Dismiss, the City explained that it substantially complied with the City Charter by holding the Board meeting on the same day, in the exact same location, and immediately after the City Council meeting. *See* the City's Motion to Dismiss at 13–15. In addition, contrary to Mr. Sutherland's contention that the substantial compliance standard does not apply to city charters, *see* Response at 4, the Colorado Supreme Court has in fact held that it does. *See Miller v. City & Cty.*

Instead, he sets forth a series of arguments that are intended to persuade the Court that his claims were not frivolous. *See* Response at 2–12. These arguments are not persuasive. For example, he argues (again) that the parties have a difference of opinion over the likelihood of whether the City's broadband initiative will fail. *See* Response at 5–6. That is true—Mr. Sutherland believes the risk is high, and the City has presented evidence that the risk of impact on electric rate payers is low. *See* Affidavit of Mike Beckstead (Ex. 2 to Motion to Dismiss). However, that does not affect the fact that Mr. Sutherland's injuries are speculative, as he himself admits. *See* Plaintiff's Response to the City's Motion to Dismiss at 9. In addition, he sets forth conclusory arguments based on the supposed rationality of his arguments, the First Amendment, his claims were "rushed," other parties somehow prevented him from amending his complaint to delete the frivolous claims, his claims were mere "placeholders," separation of powers, due process, local control, and on and on. *See* Response at 7–12. None of these arguments alter the fact that his claims were frivolous, as laid out in detail in the City's Motion for Fees.

B. Mr. Sutherland did not set forth a novel theory of law.

Mr. Sutherland contends that he set forth a novel theory of law, one of first impression. Response at 6. He states that Uniform Declaratory Judgment Act "must be liberally construed" to allow for judicial review of declaratory actions "regardless of the indirectness of potential injury in any situation where, as here, such inquiry would be barred by statute in the future." *Id.* As a preliminary matter, the City disagrees with his contention that this is a novel theory of law. The question of standing is well established and courts have thought long and hard about the

of Denver, 5 P.2d 875 (Colo. 1931) (applying the substantial compliance standard to determine whether the city had complied with its charter for the purpose of the required notice of hearing).

injury prong of the analysis. It is not a novel theory of law, but rather, it is his attempt to avoid an award of attorneys' fees because his claims were frivolous.

However, even if the Court were to consider it a novel theory of law, that does not automatically mean that Mr. Sutherland is protected from a claim for attorney fees. The Colorado Supreme Court has explained that novel theories of law that are without merit and can only result in delay, or are not supported by rational argument, may still be considered frivolous. *See Layton Construction Co. v. Shaw Contract Flooring Services, Inc.*, 409 P.3d 602, 611 (Colo. 2016). The Colorado Court of Appeals has further stated: "The statutory reference to 'a good faith attempt to establish a new theory of law' presumes that, in addition to filing a novel claim, the party will attempt to advance a plausible theory and argument for the adoption of the new legal principle." *Sullivan v. Lutz*, 827 P.2d 626, 628 (Colo. App. 1992). Mr. Sutherland did not timely raise his allegedly-new theory. And he presented no rational argument to support his allegedly-new legal principle. For example, he did not cite any supporting case law from other jurisdictions that would support his argument, nor did he adequately explain why years of case law analyzing standing should be overturned.

Therefore, he cannot escape the fact that his claims are frivolous.

II. <u>The Amount of Fees Sought Are Reasonable</u>

A. Mr. Sutherland did not challenge the attorneys' rates and so the Court can accept them.

The City set forth its attorney rates clearly in the City's Motion for Fees. Thus, the Court can (and should) accept those rates as reasonable, particularly in light of the 10% discount provided to the City across all of the fees.

B. The amount of time expended was reasonable.

Mr. Sutherland contends that the City spent more time than is reasonable litigating his claims. *See* Response at 14–16. He contends that "[o]nly two filings were made by the City." *Id.* at 15. Mr. Sutherland fails to understand the breadth of tasks the City and S&H Counsel were forced to undertake in its defense, as well as the measured approach that they took, resulting in lower fees.

In order to represent the City in this case, S&H Counsel undertook the following tasks:

- Reviewed the pleadings;
- Reviewed the briefing between Mr. Sutherland and Timnath Development Authority and Mr. Sutherland and Larimer County to stay apprised of the interplay between the related claims;
- Communicated, by phone and email, with the City to discuss strategy and keep the City informed about the status of the case;
- Received extensive email correspondence from Mr. Sutherland regarding his claims and arguments;
- Researched legal issues on standing, public bond securities, and other related matters;
- Analyzed provisions of the City Charter and the City Code related to the lawsuit;
- Drafted the Motion to Dismiss and Reply in Support of the Motion to Dismiss.

As evidenced above, drafting the two pleadings was just one of many tasks that S&H Counsel performed in its representation of the City.

Significantly, Mr. Sutherland challenged the issuance of over $100 million in bonds, which represented a critical issue to the City. The City hired S&H Counsel to protect that critical interest and S&H Counsel took that responsibility seriously. Even so, S&H Counsel took a measured, reasonable and appropriate response to Mr. Sutherland's claims. In contrast, Timnath Development Authority took an aggressive approach, including filing counterclaims and a

motion for injunctive relief against Mr. Sutherland. The City did not undertake such aggressive efforts, instead choosing only to respond to Mr. Sutherland's claims and move to dismiss them. This helped to keep down the fees and costs incurred by the City.

C. Mr. Sutherland did not challenge the Bill of Costs.

The City requested its costs as related to this matter, and it set forth its bill of costs in detail. Mr. Sutherland does not challenge those costs in any way. Therefore, the Court can (and should) order Mr. Sutherland to reimburse the City for its costs incurred in this litigation.

III. Mr. Sutherland's Arguments from his Rule 56(h) Motion Are Not Relevant to This Motion and Are Dealt with in the City's Response.

The first five pages of Mr. Sutherland's Response have practically nothing to do with the issue of whether the City is entitled to its attorneys' fees and costs. Rather, they rehash the arguments already made in Mr. Sutherland's Motion for Determination of Questions of Law Under Rule 56(h) as well as in his Response to the Motion to Dismiss. These issues are unrelated to the City's Motion for Fees and the City will not repeat the City's responses to those arguments. Instead, the City incorporates by reference its Response to Plaintiff's Motion for Determination of Questions of Law Under Rule 56(h).

IV. Conclusion

In conclusion, nothing in Mr. Sutherland's Response sufficiently counters the overwhelming evidence that his claims against the City were frivolous. Mr. Sutherland's actions have caused the City, and therefore the taxpayers of Fort Collins, to incur significant costs in defending against these frivolous claims. Mr. Sutherland's acts have burdened the judicial system and consumed substantial judicial resources. Well after the Court dismissed all of his claims, Mr. Sutherland has continued to file motion after motion, forcing the City to continue its

defense of this case that it has already won.[3] This is despite the fact that Mr. Sutherland has always known that he has not suffered an injury and may never suffer an injury as a result of the City's issuance of the bonds. An award of attorneys' fees and costs against Mr. Sutherland would be reasonable and appropriate. In addition, such an award may deter Mr. Sutherland and others from engaging in such frivolous lawsuits in the future. *See Wood Bros. Homes, Inc. v. Howard*, 862 P.2d 925, 935–36 (Colo. 1993) ("the purpose underlying the award of attorney fees and costs is to deter egregious conduct" but not to discourage well-founded claims that may be novel).

Therefore, the City is entitled to its attorneys' fees and costs.

Dated this 25th day of October, 2018.

SHERMAN & HOWARD L.L.C.

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CITY OF FORT COLLINS

[3] Since the City first filed its Motion for Attorneys' Fees and Bill of Costs, Mr. Sutherland has filed numerous motions, which the City has been forced to respond to. As a result, its total attorneys' fees are now up to $42,572.98.

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CERTIFICATE OF SERVICE

I hereby certify on the 25th day of October, 2018, that a true and correct copy of the foregoing pleading, entitled, **REPLY IN SUPPORT OF THE CITY'S MOTION FOR ATTORNEYS' FEES AND BILL OF COSTS**, was served via ICCES e-filing system, upon the following:

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