

<p>8th DISTRICT COURT LARIMER COUNTY JUSTICE CENTER Court Address: 201 Laporte Avenue Fort Collins, CO 80521 Phone (970) 494-3500</p>	<p>DATE FILED: October 31, 2018 CASE NUMBER: 2018CV149</p>
<p>Plaintiff: Eric Sutherland, <i>pro se</i></p> <p>v.</p> <p>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;</p> <p>And</p> <p>Indispensable Parties: THE TIMNATH DEVELOPMENT AUTHORITY, an Urban Renewal Authority; and COMPASS MORTGAGE CORPORATION, an Alabama company doing business in Colorado.</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Party without attorney: Eric Sutherland, pro se 3520 Golden Currant Boulevard Fort Collins, CO 80521 Phone Number: (970) 224 4509 E-mail: sutherix@yahoo.com</p>	<p>Case #: 2018CV149 Division:</p>
<p align="center">REPLY BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR DETERMINATION OF QUESTION OF LAW UNDER C.R.C.P. RULE 56(H)</p>	

Plaintiff, Eric Sutherland, also referred to by personal pronouns, now files this *Reply Brief in Support of Plaintiff's Motion for Determination of Questions of Law.*

BACKGROUND

The City of Fort Collins, (the “City”) has responded to my *Motion for Determination of Questions of Law Under Rule 56(h)*, the “*Motion*”. See *Response* filed October 24th. On the same date, the city also filed a *Motion to Strike Plaintiff’s Motion for Determination of Questions of Law Under Rule 56(h)*.

The City makes 3 arguments holding for denial of my *Motion*: 1.) the filing of an appeal divests this Court of jurisdiction, 2.) the *Motion* was procedurally improper because there are no claims outstanding, and 3.) the *Motion* would fail on its merits. See *Response* at p. 3.

REPLY

1.) the filing of an appeal divests this Court of jurisdiction

The first argument is relevant and holds weight in this situation. The counter argument exists that deciding a motion for fees and costs does not affect the appeal of the claims and the City’s *Motion for Fees should be decided*. However, any legitimacy this counter-argument has is most likely outweighed by the truth that a determination of the questions of law posed to this Court may have great bearing on the issues appealed. Indeed, the question of whether or not the City properly applied the Supplemental Public Securities Act (SPSA) is listed as a disputed issue in the Notice of Appeal that commenced case no. 2018CA1993.

2.) the Motion was procedurally improper because there are no claims outstanding

The second argument is a duplication of argument presented in the City’s *Motion to Strike*. Although, the question of whether or not my *Motion* is procedurally improper is better asked and answered in the *Motion to Strike*, a reply is provided here.

The second argument leads this Court into what is most likely a matter of first impression in Colorado courts. The City has provided no authority that would proscribe a Rule 56(h) motion in a circumstance where, as here, questions of law must be answered in order to decide a motion for attorneys fees. Similarly, no authority appears to exist that would establish the propriety of such a Motion.

The City's sole argument to support its second argument asserts that I am improperly attempting to open up consideration of issues that have been decided.¹ This fundamental presumption here is absurd. I have filed an appeal. I do not wish for this Court to review the issues raised on appeal.

3. the Motion would fail on its merits

The third argument is perplexing in its posture. A Rule 56(h) motion may not fail on its merits. Questions of law may be answered in a manner that does not agree with the position of the maker of the motion, but may not be equated to failure on its merits. Consequently, the City's third argument will be treated as an argument that question #'s 1 & 2 of the *Motion* should be answered in the affirmative.

Regarding the City's argument on question #1, there is no dispute that the Electric Utility Enterprise Board is a public entity. This point of law was stated in my *Motion*. However, the EUEB is not an issuing authority as that term is defined in C.R.S. §11-57-203(2). The City Council is unquestionably an issuing authority under Colorado state law. See Section 6.e of the Article XX of the Colorado constitution. However, the grant of authority made by Art. XX to the City to issue bonds of Section 6.e may not be construed to also grant the authority to the City, when acting through its governing body, to also grant authority to some agency of

¹ In the City's *Motion to Strike Plaintiff's Motion for Determination of Questions of Law*, the City does advance other arguments other than the propriety of reconsideration of decided issues. For example, the City is not able to give me a These arguments are not dealt with here.

the City. Rather, agencies of the City are authorized to be created in Section 6.a of Article XX. There is no inference or reason to believe that the electors of the State intended for a City or its electors to have the power to grant authority to issue bonds to an agency such as might be created in accordance with Section 6.a. §'s 6.a and 6.e are expressed on equal footing in Article XX. The plain and simple meaning of the language of the constitution simply does not allow for the conclusion that powers granted in §6.e to the City and its electors may also be granted to agencies created pursuant to §6.a.

The city is being disingenuous to suggest otherwise. On page 9, the City states:

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.

The City is not so empowered by Article XX. Only the City and its electors have the power to issue bonds. Here, the City means the governing body of the City acting in accordance with its City Charter. The authority to issue bonds granted by Article XX §6.e may not be transferred or conveyed.

Regarding the City's argument on question #2, the City seems to be overlooking that it has already admitted that there was no "act of issuance". Here is a short compendium of the applicable law.

City Charter Article II section 6

Final passage of all ordinances except emergency ordinances shall be at a regular Council meeting.

City Charter Article II section 11

The Council shall hold regular meetings at such time and place as it may prescribe by ordinance and shall prescribe the manner in which special meetings may be called.

City Charter Article V section 19.3 (b)

Such revenue bonds or other obligations shall be issued by ordinance of the board of the enterprise, adopted in the same manner and subject to referendum to the same extent as ordinances of the Council.

CITY CODE PROVISIONS

City Code section 26-392

(a) The ordinance issuing any such revenue bonds or other obligations shall be adopted in the same manner and shall be subject to referendum to the same extent as ordinances of the City Council.

City Code section 2- 27 - Official Meetings

No formal action of the City Council shall be taken except at a regular or special meeting called and held in accordance with the provisions of this Division.

City Code section 2-28 - Regular Meetings

(a) Regular meetings of the City Council shall be held on the first and third Tuesdays of each month unless any such regularly scheduled meeting is canceled by a majority vote of the City Council. If any such meeting date falls on a national holiday or is in conflict with a significant community or City event, the City Council may by majority vote move the regular meeting to the preceding Monday or to the Wednesday, Thursday or Friday following the holiday or event. Except as otherwise determined in advance by majority vote of the City Council, each regular meeting shall commence at 6:00 p.m. The City Council may adjourn any regular meeting to a later date by majority vote of its members at such regular meeting. When reconvened at said later date, the reconvened meeting shall be considered a continuation of such regular meeting.

Because the City has already admitted that the ordinance that it purports to have adopted to authorize the issuance of debt was not finally adopted at a regular City Council meeting, no act of issuance occurred. See the City's *Motion to Dismiss*. It is folly to argue otherwise. C.R.S. § 11-57-203(1) defines "act of issuance" as:

(1) "Act of issuance" means an ordinance, resolution, or decision to issue a security pursuant to delegated authority adopted by the issuing authority or officer of a public entity for the purpose of issuing a security or an

amendment to such ordinance, resolution, or decision adopted by the issuing authority after the issuance of a security. (C.R.S. §11-57-203(1))

There was no Ordinance adopted in accordance with the laws of Fort Collins, consequently, there could have been no act of issuance.

Finally, because there was no act of issuance, there also could not have been a proper application of any part of the SPSA to the securities that were eventually sold. C.R.S. § 11-57-204(1) states:

This part 2 is applicable 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 this part 2 to the issuance of such securities.(C.R.S. §11-57-204(1)).


Any and all argument to the contrary offered by the City is contradicted by the plain and simple meaning of the statutes.

NO ARGUMENT ON QUESTION 3# WAS PRESENTED BY CITY.

It is noted here that the City of Fort Collins made no attempt to address question #3 dealing with whether or not it knew or should have known that no part of the SPSA had been properly applied. The omission of argument in light of the transparently erroneous argument forwarded by the City in its *Response* speaks for itself. It must be concluded that the City did know that it was not properly adopting any ordinance in accordance with its laws and, therefore, also knew that no part of the SPSA had been applied to the bonds that were subsequently sold.

CONCLUSION

The City's argument that the recital included in the bonds styled after C.R.S. §11-57-210 must fail. The City may not rely upon this recital as conclusive evidence that the bonds were validly issued in order to defeat my claim of standing in this matter.


Eric Sutherland

OCTOBER 31ST
Dated ~~August 28~~th, 2018

I hereby certify that on this 31st Day of Oct, 2018, a true and correct copy of the foregoing **Plaintiff's Response to Defendant City of Fort Collins' Motion to Dismiss** 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 Oct. 31st , 2018.

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