

<p>DISTRICT COURT, LARIMER COUNTY, COLORADO Court Address: 201 La Porte Avenue Fort Collins, CO 80521 Phone Number: (970) 494-3500</p>	<p>DATE FILED: May 7, 2019 4:44 PM FILING ID: 45442E4AFF65E 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 in this office; IRENE JOSEY, in her capacity as the Larimer County Treasurer and all successors to this office; 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><i>Attorneys for Defendant City of Fort Collins:</i> John W. Mill (#22348) Rosemary A. Loehr (#52559) Sherman & Howard L.L.C. 633 17th Street, Suite 3000 Denver, CO 80202 Phone Number: (303) 297-2900 Email: jmill@shermanhoward.com rloehr@shermanhoward.com</p> <p>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</p>	<p>Case No.: 2018CV149</p> <p>Courtroom/Division: 5B</p>
<p style="text-align: center;">CITY OF FORT COLLINS'S RESPONSE TO PLAINTIFF'S MOTION TO WITHDRAW PLAINTIFF'S RULE 59 MOTION</p>	

The Defendant City of Fort Collins (the “City”), by and through its counsel, respectfully submits the following Response to Plaintiff’s Motion to Withdraw Plaintiff’s Rule 59 Motion.

I. The City does not object to the withdrawal of Mr. Sutherland’s Rule 59 Motion.

On May 2, 2019 Mr. Sutherland noticed counsel for the City of his intent to withdraw his Motion for Amendment of Judgment Granting City of Fort Collins’ Motion for Attorneys’ Fees and Bill of Costs Pursuant to C.R.C.P. 59 (“Rule 59 Motion”) (filed April 16, 2019) and requested the City’s position. Counsel for the City responded the next day confirming that it did not object to the withdrawal. The City still does not object to withdrawing the Rule 59 Motion. However, Mr. Sutherland’s Motion to Withdraw appears to request the Court to (1) permit him to withdraw the Rule 59 Motion and (2) to review and consider Mr. Sutherland’s arguments in the Rule 59 Motion. The City objects to Mr. Sutherland’s request that the Court review and consider the arguments in his Rule 59 Motion.

II. This Court should not review or consider Mr. Sutherland’s arguments in the withdrawn Rule 59 Motion.

As a matter of law, this Court should not consider arguments presented in a withdrawn motion. *See, e.g., Copar Pumice Co. v. Morris*, 639 F.3d 1025, 1030 (10th Cir. 2011) (noting that a withdrawn motion is treated "as though the motion had never been made" for purposes of appeal”). In his Motion to Withdraw, rather than simply requesting to withdrawal the Rule 59 Motion, Mr. Sutherland asks this Court to entertain his post-trial “novel theory” of standing. This Court has already rejected Mr. Sutherland’s attempts to present new arguments for the first time in post-trial motions. *See* 04/19/19 Order Denying Motion to Vacate Order Granting Motion to

Dismiss at p. 6. Mr. Sutherland's newfound arguments for standing in his Rule 59 Motion and Motion to Withdraw should be equally rejected.

This Court properly granted the City's award of attorneys' fees because Mr. Sutherland initiated a lawsuit against the City even though he knew he had not suffered any injury. Mr. Sutherland continually overlooks his lack of injury. Instead, he repeatedly states, in his Motion to Withdraw, his Rule 59 Motion, and his Rule 60 Motions, that his case was erroneously dismissed because the Court should have implied a private right of action. This argument, which Mr. Sutherland present failed to timely present in his Complaint or the Motion to Dismiss briefing, does not overcome his lack of standing.

What Mr. Sutherland refers to in his Motion to Withdraw as an abusive, rigid application of settled law is the Court properly requiring that Mr. Sutherland demonstrate that he has suffered an injury. An implied statutory cause of action is not the same as the constitutional requirement of standing. Suffering an injury in fact is a constitutional requirement. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (an injury in fact is an "irreducible constitutional minimum of standing"). Even if Mr. Sutherland could point to some statutory authority for an implied cause of action, whether through the Open Meetings Law, Declaratory Judgment Act, or the *Parfrey* test, he still cannot demonstrate that he has suffered an injury.

This Motion, like all of Mr. Sutherland's post-trial motions, attempts to resurrect his Complaint by burdening the City with excessive motions that do nothing more than rehash arguments this Court has repeatedly rejected. Mr. Sutherland has suffered no injury and "simply referencing a statutory cause of action is insufficient to demonstrate an injury in fact." *Weisfield v. City of Arvada*, 2015 COA 43, ¶ 33; see also 5A Colo. Prac., *Handbook on Civil Litigation* §

1:8 (2018 ed.) (“[E]ven if a statute ‘grants’ standing a plaintiff still must demonstrate an actual or imminently threatened injury.”). The constitutional requirement of standing is not abrogated by state statutes. *See, e.g., Mt. Emmons Mining Co. v. Crested Butte*, 690 P.2d 231, 240 (Colo. 1984) (“A party seeking declaratory relief, however, must still demonstrate that the challenged statute or ordinance will likely cause tangible detriment to conduct or activities that are presently occurring or are likely to occur in the near future.”). Mr. Sutherland had no standing to bring his suit against the City and the Court should not consider Mr. Sutherland’s arguments to the contrary.

Mr. Sutherland’s attempt to rehash the Court’s decisions to dismiss his Complaint and award attorneys’ fees to the City is part-and-parcel of his frivolous litigation tactics in this case that continue to burden the City and its taxpayers with attorneys’ fees and costs.

Dated this 7th day of May, 2019.

SHERMAN & HOWARD L.L.C.

s/ Rosemary A. Loehr
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CERTIFICATE OF SERVICE

I certify that on the 7th day of May, 2019, a true and correct copy of the foregoing **CITY OF FORT COLLINS'S RESPONSE TO PLAINTIFF'S MOTION TO WITHDRAW PLAINTIFF'S RULE 59 MOTION** was filed via Colorado Court's E-Filing system, and was served on the following:

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