

<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: August 21, 2019 3:59 PM FILING ID: AB972FCA209B9 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 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 align="center">CITY OF FORT COLLINS' REPLY IN SUPPORT OF ITS SECOND MOTION FOR ATTORNEYS' FEES & COSTS</p>	

Mr. Sutherland unnecessarily expanded the scope of this action through his post-dismissal conduct. Pursuant to C.R.S. § 13-17-102(4), the City of Fort Collins (the “City”) is entitled to an award of attorneys’ fees against Mr. Sutherland to compensate the City for the fees and costs it incurred responding to Mr. Sutherland’s continued frivolous litigation tactics.

ARGUMENT

The City’s Second Motion for Attorneys’ Fees & Costs (the “Motion”) addressed how and why Mr. Sutherland’s post-dismissal conduct was frivolous. Those positions need not be reiterated here. This Reply addresses why the other issues identified in Mr. Sutherland’s response are unavailing.

I. The Court has Jurisdiction to Decide the City’s Motion

“A trial court has continuing jurisdiction to determine attorney fee issues after a notice of appeal is filed to review the merits judgment.” *A. Tenenbaum & Co. v. Colantuno*, 3 P.3d 456, 458 (Colo. App. 1999), *as modified on denial of reh’g* (Dec. 23, 1999), *aff’d*, 23 P.3d 708 (Colo. 2001). This Court has already recognized that trial courts have jurisdiction over attorneys’ fees motions even after a party has filed a notice of an appeal. *See* 12/6/18 Order Granting Motion for Reconsideration.

II. Mr. Sutherland’s Claims are Frivolous Despite the Alleged Novelty

Mr. Sutherland’s self-characterized “novel” theory of standing does not immunize him from sanctions. “Claims involving novel questions of law for which no determinative authority exists are not frivolous, groundless, or vexatious.” *M Life Ins. Co. v. Sapers & Wallack Ins. Agency, Inc.*, 962 P.2d 335, 338 (Colo. App. 1998) (emphasis added). “However, if a party fails to present plausible arguments in support of a novel claim, sanctions may be imposed . . .”

Sullivan v. Lutz, 827 P.2d 626, 628 (Colo. App. 1992) (emphasis added); *see also Nienke v. Naiman Grp., Ltd.*, 857 P.2d 446, 449 (Colo. App. 1992) (issue of first impression may be frivolous if the party fails to present a rational argument in support of it).

Substantial determinative authority exists on the constitutional requirement of a direct and palpable injury and Mr. Sutherland did not present any evidence, plausible or otherwise, to substantiate a legally cognizable injury. Even if Mr. Sutherland could advance some evidence of injury, his position would still have no rational basis. Mr. Sutherland's suit sought to jeopardize the City's largest bond offering so that he could "avoid paying higher electric bills." Response at 5. This Court has already heard and accepted sworn testimony from Mr. Michael Beckstead, the City's Chief Financial Officer, who testified at the previous fees hearing and in his affidavit that (1) it is highly unlikely electricity taxes will be impacted by the bond offering and (2) it would be at least five to eight years before any impact could be determined. *See* 7/18/18 Affidavit of Michael Beckstead at ¶ 16 ("Based on the statistically valid surveys, the election, construction costs, and other diligence conducted by the City, in my opinion the estimates are conservative and have a high degree of confidence there will be no impact on the electric rate payers. Furthermore, it will be 5 to 8 years before it can be determined whether there will be any impact on electric utility rates.") (Filing Id. BF0E70FBC34B1). There is no rational argument—and no evidence—to support any cognizable injury that Mr. Sutherland has or will suffer as a result of the City's bond offering.

Mr. Sutherland lacked standing to sue. He admitted he understood the requirements of standing at the fees hearing in February and he admitted that he filed suit notwithstanding his lack of injury. At no point during the fees hearing or the subsequent post-dismissal motions has

Mr. Sutherland established any sort of injury that could satisfy the requirement of standing. Instead, he simply re-litigated his “novel” theory at every opportunity. Mr. Sutherland’s frivolous post-dismissal conduct has significantly burdened the City and its taxpayers and the City’s Motion is proper to sanction that conduct and provide redress.

III. The Court Should Rule on the City’s Motion

The Court can and should rule on the City’s Motion. Mr. Sutherland asserts that at a minimum the Court should delay ruling on the City’s Motion until after the Court of Appeals has decided the current appeal. *See* Mr. Sutherland’s response at 5. But he presents no reason or authority for such a delay. There is none. The Court has jurisdiction over requests for attorneys’ fees even when an appeal is pending. Delaying a ruling on the City’s Motion will serve no purpose and will just delay the final resolution of the issues.

CONCLUSION

The City respectfully requests that the Court award additional attorneys’ fees and costs in favor of the City, and against Mr. Sutherland, as follows:

\$44,139.37 Attorneys' Fees
\$1,333.13 Costs
\$45,472.50 Total

The City also requests that the Court require Mr. Sutherland to pay interest on the amount of the award until paid in full. *See* C.R.S. § 5-12-102(1)(b).

Dated this 21st day of August, 2019.

SHERMAN & HOWARD L.L.C.

s/ John W. Mill

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Attorneys for the City of Fort Collins

CERTIFICATE OF SERVICE

I certify that on the 21st day of August, 2019, a true and correct copy of the foregoing **CITY OF FORT COLLINS' REPLY IN SUPPORT OF ITS SECOND MOTION FOR ATTORNEYS' FEES AND COSTS** was filed via Colorado Court's E-Filing system, and was served on the following:

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