8th DISTRICT COURT **LARIMER COUNTY JUSTICE CENTER** Court Address: 201 Laporte Avenue Fort Collins, CO 80521 Phone (970) 494-3500 **Plaintiff:** Eric Sutherland, *pro se* v. **Defendants :** THE CITY OF FORT COLLINS, a home rule municipality in the state of Colorado; BOB OVERSTEVE 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; And Indispensable Parties: THE TIMNATH DEVELOPMENT AUTHORITY, an Urban Renewal Authority; and COMPASS MORTGAGE CORPORATION, an Alabama company doing business in Colorado.	DATE FILED: March 6, 2019 FILING ID: D76A2ED5BB1BB CASE NUMBER: 2018CV149 ▲ COURT USE ONLY ▲
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	Case #: 2018CV149 Division:

MOTION TO VACATE ORDER GRANTING DEFENDNT'S MOTIONS TO DISMISS AS TO CITY OF FORT COLLINS, STEVE MILLER AND IRENE JOSEY PURSUANT TO RULE 60(B)

Plaintiff, Eric Sutherland, also referred to by personal pronouns, now files this Motion to Vacate this court's *Order* of September 5, 2018 granting the motions to Dismiss of Defendants City of Fort Collins, Steve Miller and Irene Josey. Steve Miller has now been replaced by Bob Overbeck as the Larimer County Assessor.

Certificate of Conferral: Pursuant to C.R.C.P. Rule 121 §1-15(8), Plaintiff sent an email to counsel for City of Fort Collins, the Assessor and Treasurer. As of the time of this filing, no response has been made.

EXHIBIT D

I. INTRODUCTION

A *Notice of Appeal* filed with the Court of Appeals in this matter on October 22, 2018. An *Opening Brief* was filed on February 14th, 2019. On February 27th, 2019, the Court of Appeals issued an *Order of Court* finding that not all parties and/or claims had been dismissed. See Exhibit 1 and issuing an order to show cause why the appeal should not be dismissed without prejudice. On February 28th, 2019, I filed a *Confession of Absence of Cause* with the Court of Appeals to indicate that the matter should be dismissed without prejudice.

It may be reasonably concluded at this time that jurisdiction of this matter will be returned to the trial court. As of the date of filing, March 6, 2019, is the last day that a motion requesting relief pursuant to C.R.C.P. Rule 60(b)(1) this *Motion to Vacate*, no order dismissing the appeal has been made. However, this date is 182 after the rendition of the judgment entered by this court that this motion seeks to vacate.

This *Motion to Vacate* asserts that the broad grant of standing found in the Colorado Open Meetings Law or "OML", C.R.S. §24-6-402(9), is applicable to both the claim made against the City of Fort Collins and the Assessor and Treasurer. C.R.S. §24-6-402(9) states:

> *(9) (a) Any person denied or threatened with denial of any of the rights that are conferred on the public by this part 4 has suffered an injury in fact and, therefore, has standing to challenge the violation of this part 4.*

The *Umanmended Complaint* that was filed to commence this action alleged denial of the rights conferred on the public by the OML.

Both of the requests for declaratory judgment that formed the essence of the two sufficiently pleaded claims of the *Unamended Complaint*, First and Twefth Claim, were supported by allegations sufficient to conclude that both the City of Fort Collins and the Timnath Development Authority had failed to comply with the requirements of the OML.

II. DISCUSSION OF THIS COURT'S ERRANT VIEW OF STANDING

Reliance on the grant of standing provided by the OML should not be necessary in this matter. For example, this court's refusal to acknowledge the relaxed standard for standing in declaratory judgment actions that exists in Colorado law, *Mt. Emmons Mining Co. v. Town of Crested Butte,* 690 P.2d 231 (Colo. 1984), and apply this standard to the declaratory judgment claims that were made was clear error. Fortunately for the citizens of the state of Colorado, a person need not actually suffer hurtful injury before he or she may request a declaration of his or her

rights under law from our courts. C.R.S. §13-51-101 *et seq* and C.R.C.P. Rule 57. Also fortunately, decisions in Colorado trial courts may be appealed.

For whatever reason, this court has been diligent in its disregard for those circumstance in which plaintiffs that have not yet experienced a direct and tangible injury may access the courts. For example, in the *Order Granting Defendants' Motion to Dismiss* that is requested to be vacated with the instant motion, this court wrote:

> *" This Court follows settled law requiring that an injury be direct and palpable to sustain a claim."*

Order Granting Defendants' Motion to Dismiss, September 5, 2018, p. 3

Contrary to what this court has stated, Colorado law provides for a number of circumstances where a plaintiff that has not experienced tangible or economic loss has standing to bring suit. *Ainscough v. Owens*. 90 P.3d 851 Colo. 2004. For example, a taxpayer who believes that his rights under the Colorado constitution have been abridged has standing in a Colorado court. *Barber v. Ritter*, 196 P.3d 238 (Colo. 2008). This example was very much controlling of the claim made as to the Timnath Development Authority's improper authorization of debt repayable in part with revenues derived from higher tax rates that will absolutely, necessarily be levied on the property owners of the Poudre School District. This example was also completely ignored by this court.

The broad grant of standing of the OML that forms the basis for this *Motion to Vacate* is, of course, another example of a circumstance where a plaintiff may request that the authority of the Colorado courts may be brought to bear despite the absence of "direct and palpable" injury. Bringing this *Motion to Vacate* before this court now allows for this additional path to standing to be considered … even though past experience would indicate that this court is unreceptive to any allegation of injury except those of the direct and palpable variety.

Regretably, this court refused to consider the totality of circumstances of law when dismissing the claims that were made. Standing should have been granted in this matter and a determination of my rights on the basis of the merits should have been made. However, considering the fact that this case is now back in the jurisdiction of the trial court or soon will be, a further examination of the issue of the grant of standing under the OML will, at the bare minimum, properly preserve the issue for appeal. Review of Rule 60(b) motions on appeal is made for abuse of discretion. *Goodman Assocs., LLC v. WP Mountain Props.*, LLC, 222 P.3d 310, 314 (Colo. 2010).

III. MISTAKE, INADVERTENCE, SURPRISE, OR EXCUSABLE NEGLECT

I first became aware of the broad grant of standing of C.R.S. §24-6-402(9) at some shortly after filing the *Notice of Appeal* in this case on October 22, 2018. After researching the law, it became apparent that the grant of standing of the OML was applicable to this case and should operate to guaranty standing. That conclusion was reached sometime in mid November.

On October 29, 2018, this court issued its *Status Order Regarding Notice of Appeal* that stated that this court's jurisdiction over the matter would cease during the pendency of the appeal.

Consequently, filing this *Motion to Vacate* at this time is timely and proper to compensate for mistake, inadvertence, surprise or excusable neglect as contemplated by C.R.C.P. Rule 60(b). Under optimal circumstances, an Order of the Court of Appeals dismissing the appeal without prejudice would have issued at this time. However, even in the absence of such an order, this *Motion to Vacate* is timely filed and addresses the type of circumstances for which the Rule prescribes this court to consider.

III. LEGAL STANDARD

When reviewing a Rule 60(b) motion to vacate an order for dismissal, a trial court should consider (1) whether the neglect that resulted in entry of judgment by default was excusable; (2) whether the moving party has alleged a meritorious claim or defense; and (3) whether relief from the challenged order would be consistent with considerations of equity. *Buckmiller v. Safeway Stores, Inc.*, 727 P. 2d 1112 - Colo: 1986

The district court's consideration of these factors must be guided by the general rule that the requirements for vacating a judgment that is not based on the merits "should be liberally construed in favor of the movant, especially where the motion has been promptly made." *Craig v. Rider* 651 P.2d 397 at 402, Colo. 1982. This rule promotes the long-standing policy favoring resolution of disputes on their merits. *Taylor v. HCA-HEALTHONE LLC*, 417 P. 3d 943 - Colo App. 2018.

IV. ARGUMENT

The essence of the *Unamended Complaint* alleged deficiencies in the composition of the local governing body that are in conflict with the requirements of the OML. Under modern rules of pleading, courts look to the "essence of a claim regardless of how it is denominated." *Bainbridge, Inc. v. Travelers Casualty Co.*, 159 P.3d 748 (Colo.App.2006); see also *Hutchinson v. Hutchinson*, 149 Colo. 38, 41, 367 P.2d 594 (Colo.1961) ("The substance of the claim rather than the appellation applied to the pleading by the litigant is what controls."); *Sheffield Services Co. v. Trowbridge*, 211

P.3d 714 (Colo.App.2009) ("the claim's substance rather than [its] appellation ... controls"). (quoting from *Plains Metro District v. Ken Caryl Ranch*, 250 P.3d 697 (Colo.App.2010))

As further described in the sub-sections below, *A. & B.*, the essence of the *Unamended Complaint* complained of a failure of two purported local governing bodies to be properly constituted and take action in accordance with the requirements of OML. The OML defines a local public body to be any "*formally constituted body of any political subdivision of the state*". C.R.S. §24-6-402(1)(a)(I). The OML then applies various requirements for minutes, notice and quorums that must be met by local public bodies. C.R.S. §24-6-402(2). The OML also requires that actions be deemed null and void if the specific requirements of subsection §-402(2) are not met. See C.R.S. §24-406-2(8) (*No resolution, rule, regulation, ordinance, or formal action of a state or local public body shall be valid unless taken or made at a meeting that meets the requirements of subsection (2) of this section.*) The essence of my complaint sought relief that was substantially similar to that authorized by §-402(8) in the claim concerning the City of Fort Collins. Also, the essence of the *Unamended Complaint* relied upon the substance and effect of the invalidity of non-conforming actions of §-402(8) in the claim concerning the Timnath Development Authority.[1]

Thus, it is reasonable and proper for this court to conclude that the OML does provide for standing in the dispute I have brought to court.

Furthermore, the grant of standing in C.R.S. §24-6-402(9)(a) is extremely broad. The specific language employed by the Colorado General Assembly when amending subsection §-402(9) with HB14-1390 is unambiguous. A person denied of rights has suffered an injury in fact and has standing. The injury in fact is a guaranty and is not dependent upon appellation. This extraordinarily broad grant of standing was reinforced by unanimous passage of HB14-1390 in both houses of the legislature.

A. <u>First Claim for Relief Alleged Denial of Rights Conferred by the OML.</u>

When read together, ¶'s 14, 18 and 19 of the *Unamended Complaint* sufficiently allege that the 5 persons that purported to act as the Board of Commissioners of the Timnath Development Authority or "TDA", did not act as a formally constituted body of a political sub-division when

[1] Rather than simply requesting declaratory judgment that Resolution No. TDA 04 2018 was invalid, the *Unamended Complaint* requested declaratory judgment that repayment of the loan purported to have been authorized by the Resolution with property tax increment was unlawful.

purporting to authorize a loan of $20 million[2]. As a consequence, no requirement of sub-section (2) of §24-6-402 could have been met. Thus, subsection (8) prescribes that no valid action may be concluded to have taken place on March 27, 2018. Furthermore, the broad grant of standing found in subsection (9) guaranties standing to any person who is denied the rights conferred subsection (8).

This is especially true where, as here, property owners of the Poudre School District are unquestionably, absolutely expected to repay part of the loan amount by virtue of higher taxes as a consequence of the way that PSD must calculate its mill levy rates in accordance with state law as described to the point of exhaustion in previous filings in this court and also by testimony under oath. The higher tax rates is not a matter of speculation. It is a documented matter of fact. There is no way for the TDA to receive revenues attributable to PSD's voter approved, fixed amount levies unless PSD raises tax rates in order to make that revenue available, which PSD must do in order to comply with state law.

Admittedly, the question of whether or not the requirements of the OML are applicable in a situation where, as here, the governing body of the political subdivision of the state is improperly constituted is a question of law that is not addressed by decisions of the Colorado courts. This question must be answered in the affirmative. Otherwise, a subdivision might evade the requirements of the OML simply by improperly constituting its governing body leading to an absurd result. (In construing a statute, we must seek to avoid an interpretation that leads to an absurd result. *Ingram v. Cooper*, 698 P.2d 1314, 1315 (Colo.1985); see also § 2-4-201(1)(c) ("A just and reasonable result is intended."); AviComm, Inc. v. Colorado Pub. Utils. Comm'n, 955 P.2d 1023, 1031 (Colo.1998) ("[T]he intention of the legislature will prevail over a literal interpretation of the statute that leads to an absurd result."). Statutory interpretation leading to an absurd result will not be followed. See Hall v. Walter, 969 P.2d 224, 229 (Colo.1998).

Even though it is unstated, it is axiomatic that the rare circumstances where a formal action is taken by the improperly constituted public body of a political subdivision must immediately fall within those circumstances contemplated by §24-6-402(8) and be deemed null and void. The Colorado General Assembly has bestowed an extraordinary grant of standing upon individuals who

[2] The *Unamended Complaint* errantly described the principle amount of the loan as $25 million.

reasonably consider themselves to be denied the rights conferred by the OML, §24-6-402(9)(a), and the rights conferred by§-402(8) are unquestionably amongst the rights conferred by the OML.

Ironically, the mode of governance that the TDA employed prior to the adoption of HB15-1348 referenced in ¶ 11 of the *Unamended Complaint* was equally violative of the OML, although that is not at issue in this case because that mode of governance was superceded by the legislative enactment of HB15-1348. Very briefly, at the time that the TDA had been created, the Town Board of Trustees of the Town of Timnath had elected, pursuant to C.R.S. § 31-25-115, to designate itself as the urban renewal authority. Since that time, the TDA has operated as though that election had allowed the ***members*** of the Town Board (and later the Town Council) to act as commissioners. Thus, for years a "Board of Commissioners" has been holding meetings separate and distinct from the meetings of the Town Council in which "commissioners" who have never been appointed pretend to transact the business of the authority. As crazy as it sounds, the TDA has never once held a meeting that complies with the requirements of the OML because the only way that could happen under the OML and URA law is if the Town Council had acted as the authority in the process of conducting a public meeting of the Town Council.

B. Twefth Claim for Relief Alleged Denial of Rights Conferred by OML.

When read together, ¶'s 35, 36 & 37 of the *Unamended Complaint* sufficiently allege that the persons purporting to be the Electric Utility Enterprise Board or "EUEB" did not take action as the Fort Collins City Council in a properly noticed Fort Collins City Council meeting. Defendant City of Fort Collins has admitted to all necessary facts that this is, in fact, what happened. See *Defendant City of Fort Collins' Motion to Dismiss* at p. 11,12. Also all matters of law are unambiguous and are not questioned or disputed. Only the Fort Collins City Council may act as the EUEB. See citations of City charter and City code in *Defendant City of Fort Collins' Motion to Dismiss.* Yet the City Council did take action in a City Council meeting. Rather, in a bizarre and still unexplainable act, the EUEB conducted its own meeting separate and distinct from any City Council meeting.

Because only a formal action taken in a regular City Council meeting could be deemed to comply with the requirements of subsection (2) of C.R.S. §24-6-402, the proscription of subsection (8) denies as to any validity of the 'ordinance' that the EUEB purported to have adopted. In this circumstance, the broad grant of standing of subsection (9) (a) is of full effect.

The City may be tempted to argue that the EUEB is a local public entity as that term is a

defined in the OML. However, the EUEB is only formally constituted when it acts "by and through" the City Council. Article V section 19.3 of Fort Collins City Charter as cited in *Defendant City of Fort Collins' Motion to Dismiss* at p.11.

V. BALANCE OF THE EQUITIES

The first two of the three "Craig" factors cited in section **III.** above have been treated in the previous section. The third factor also merits mention here. On whole, the balance of the equities favors vacating the order dismissing the First and Twelfth Claim.

The City of Fort Collins' bonds were sold to investors sometime in June or July. This ongoing litigation was properly disclosed. Thus, the investors who purchased the bonds knew or should have known of the possibility that the 'ordinance' adopted to authorize the debt could be invalidated.

The debt of the TDA that was authorized by 5 people, none of whom had ever been appointed to the position of commissioner of the Board of Commissioners has also now been contracted. Here again, the realities of this litigation were known to the lender, Compass) Mortgage Corporation. Compass has stated that it relied upon unsigned and likely fraudulent 'opinion letters' when deciding to fund the $20 million loan to the TDA.

Suffice it to say that both situations represent a situation where sophisticated investors lent money with full knowledge of the ongoing litigation of these matters and the underlying facts and matters of law. In this situation, the balance of the equities favors granting the relief requested here and allowing the case to be decided on its merits. See *Landmark Towers Association, Inc. v. UMB Bank, NA* Colo. App. 2018 at ¶ 39(reporter citation unavailable.)

I. CONCLUSION

For the foregoing reasons, this Court should VACATE its Order of September 5, 2018 granting the Defendant City of Fort Collins' and Defendant Larimer County Assessor and Tresaurer's Motions to Dismiss for lack of standing. The broad grant of standing provided by the Colorado Open Meetings law is applicable to the First and Twelfth Claim for relief in the *Unamended Complaint* and these claims should not have been dismissed for lack of subject matter jurisdiction.

It is recognized here that the September 5, 2018 order did include confusing language that appears to hold that "*claim twelve is a challenge to the order issuing the contested bonds*" and that

this grounds for dismissal of the action may not have been intended to be for lack of subject matter jurisdiction. However, this grounds for dismissal is otherwise assailed and preserved for appeal. Furhtermore, as a practical matter, the very same deficiency of procedure that invalidates the legislative enactment that purports to authorize the issuance of the bonds also invalidates the application of any part of the Supplemental Public Securities Act or C.R.S. §11-57-101 *et seq* to the issuance of the bonds because the authorization and application were part of the same "ordinance". Thus,

Dated March 6, 2019

Eric Sutherland

I hereby certify that on this 6th Day of March, 2019, a true and correct copy of the foregoing Motion to Vacate Order Granting Defendnt's Motions to Dismiss as to City of Fort Collins, Steve Miller and Irene Josey Pursuant to Rule 60(b) 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 Aug 8th , 2018.

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By _____