Loehr, Rosemary Ann

From: Eric Sutherland <sutherix@yahoo.com>
Sent: Wednesday, May 01, 2019 2:30 PM
To: John Duval
Cc: Mill, John W.; Carrie Daggett; Loehr, Rosemary Ann; Cary Alton
Subject: Re: Sutherland v. City, et al. (Case No. 2018CV149, Larimer County District Court) - CRE Rule 408 Offer of Settlement

I am sorry for the delayed response. In addition to being under the weather, **I have now concluded that my understanding as to the tolling of time to file a Notice of Appeals was incorrect**. Very briefly,

1) I am in error with my "rule 59" motion regarding an amendment of the award of fees to the city. There is a distinction between a request to revisit an award that is packaged with a final judgment and and an award, like that granted to FC, that is requested after final judgment. Only the former may be addressed with a rule 59 motion and that is most likely to happen after a definite sum is arrived at by the court. I could be wrong, but that is what case law review seems to be saying. At least I did not put the case into hybernation during the pendency of appeal on my own motion.

2) In the absence of a rule 59 motion to toll the time for a notice of appeal, a notice of appeal is due Friday. (49 days from Order dismissing counterclaims on March 15) Neither the court's April 2nd order awarding fees or the April 16th filing of the errant Rule 59 motion tolls the time for an appeal. (As I had previously stated, the possibility that my rights to appeal would lapse prior to completion of the actions contemplated by the agreement was also pressing.)

3) I don't seem to have any choice but to proceed with a Notice of Appeal (and withdraw the motion regarding reconsideration of the fees). Brownstein will pounce at an opportunity to declare my appeal as untimely if I do not.

Unfortunately, this makes the structure of the agreement that has been proposed unworkable. In the absence of a significant change in the city's position, there does not seem to be a way to settle prior to filing the Notice of Appeal.

With that said, I am also uncertain about the probability that Judge Lammons or any other judicial official in the 8th district court would issue the Permanent Injunction. Anything, of course, can happen. I went to trial where I could loose everything I own three times over without a case management order, trial management order or compliance with any other requirement of rule 16. However, it seems odd that a court would issue an order without reviewing facts and making findings that supported the Order. This is not to say that I am hesitant at all to agree to the terms ... I just worry that the whole agreement as proposed is dependent upon the discretion of a judge .... and not just any judge, but one who has disregarded every single substantive argument and authority I have presented and may find reason to decline to issue the order.

So ... for the sake of considering possibilities, I will propose here that 1) I will refrain from listing any issues to be raised on appeal in the Notice of Apeal that concern the city of fort collins, and 2) agree to terms that will require liquidated damages in the amount of the judgement if I should ever violate any of the terms found in the agreement or the propossed permanent injunction ... if the City files a satisfaction of the judgment by tomorrow afternoon in concjunction with a signed agreement specifying these terms.

EXHIBIT S

Considering that this not highly likely, I will also propose that a post Notice of Appeal settlement be crafted to your satsifaction in which I agree to amend the Notice of Appeal concurrent with filing a satisfaction of the judgment.

For the time being, I will continue as I must with the operating understanding that the award of fees to the City will be reversed upon appeal and that new law will be created holding that a person who is faced with a non-claim statute (or statute of limitations) and an uncertian but not completely unlikely possibility of future injury may request a declaration as to his or her rights prior to the window of time available for inquiry closing.

I regret the complicated nature of this matter. I hope you will understand that I greatly appreciate the efforts made to settle and am proceeding in good faith and with due consideration for the interests of all.

Eric Sutherland

On Tuesday, April 30, 2019, 6:07:17 PM MDT, John Duval <jduval@fcgov.com> wrote:

Mr. Sutherland,

Thank you for your response.

It is not our intent in Section III.A. to foreclose you from appealing or otherwise challenging any of the orders and judgments entered in the lawsuit with regard to the Town of Timnath, the Timnath Development Authority or the County defendants. The Settlement Agreement is only intended to pertain to your claims against Fort Collins. So your point on this is well taken.

I also understand your concern of not wanting to agree in paragraph B of Section III to forego your right to appeal in this lawsuit with regard to the City while we wait to see if Judge Lammons enters the Permanent Injunction.

I have therefore made several changes to Section III. to address your concerns and these changes are redlined in the attached draft of the Settlement Agreement.

With these revisions, I think it is now clear in paragraphs A, B and D that you are only waiving your claims pertaining to Fort Collins.

Also, paragraphs B and C have been revised to allow you to timely file any appeal you think is needed until Judge Lammons issues the Permanent Injunction. However, once the Permanent Injunction is issued, you agree in paragraph C to file within 7 days of the issuance a notice to withdraw all of your filings regarding Fort Collins.

I hope this addresses all your concerns. If not, please let me know.

If these changes do address your concerns, please let me know and I will revise the Settlement Agreement and Stipulated Motion for signing and send them to you as soon as I can.

Thank you.

John Duval
Deputy City Attorney
City of Fort Collins
O: 970-416-2488
C: 970-290-4200

From: Eric Sutherland <sutherix@yahoo.com>
Sent: Tuesday, April 30, 2019 3:02 PM
To: John Duval <jduval@fcgov.com>
Cc: Carrie Daggett <CDAGGETT@fcgov.com>; Cary Alton <calton@fcgov.com>; Mill, John W. (JMILL@shermanhoward.com) <JMILL@shermanhoward.com>; Loehr, Rosemary Ann <RLoehr@shermanhoward.com>
Subject: Re: Sutherland v. City, et al. (Case No. 2018CV149, Larimer County District Court) - CRE Rule 408 Offer of Settlement

Mr. Duval,

Thank you for sending the settlement offer.

Paragraph III. A precludes an appeal of the judgment entered for attorneys fees and costs to the TDA. I am agreeable to a settlement that ends all litigation and appeals regarding the city. However, I am not agreeable to any terms that requires that I forfeit an appeal of this judgment.

As you know, Judge Lammons found my action to be frivolous without acknowledging A) the nature of the claim made and B) the basis I had asserted for standing. (avoidance of higher tax rates and *Barber v. Ritter* respectively) This happened despite multiple explanations in sworn testimony, an affidavit and at least 5 signed pleadings. *A claim or defense is frivolous if the proponent can present no rational argument based on the evidence or law in support of that claim or defense.*

As an alternative, an agreement in which I agree only to contest issues pertaining to the TDA is possible.

Similarly, I am not agreeable to any terms that might result in the lapse of rights to appeal issues involving the city. The time for taking an appeal has not yet yet tolled due to the Rule 59 motion I filed on April 16th. Withdrawal of that motion could mean that the time for taking an appeal would have begun on April 2nd. (There is no certainty as to whether an order granting a motion to withdraw a Rule 59 motion tolls the time for taking an appeal and I would not risk this.) Consequently, an expiration of the agreement after 30 days from the time the stipulated motion is filed puts things past a date for an appeal. Judge Lammons would likely simply wait until rights of appeal had lapsed.

On this subject, I was considering withdrawing my rule 59 motion anyway. I have found authority from another jurisdiction that supports my theory regarding first amendment rights requiring a private cause of action when future inquiry is barred by statute. I do not know how anyone could argue differently … but that was, of course the whole point of filing the Rule 59 motion. At this point, it is

reasonable to speculate that the city has put together whatever argument it might have i.e. Sutherland's new theory of law is a sham. I would be open to a discussion on this topic.

Finally, there is the issue of Judge Lammon's refusal to abide by the assignment of another judge to hear this case. I understand that there are arguments for and against the premise that the July 23 letter from OSCA divested Judge Lammons of authority. This is a situation where the courts should be asked to clear up any uncertainty that exists. As I have said before, I find it very hard to believe that an order from the chief justice made under constitutional authority will be deemed to be optional. I also note here again, that judge Stephen Jouard apparently concluded that the assignment made on July 23 divested him of authority in 2018CV030567 … he never issued an order of recusal.

A request for review of this issue is tantamount to a request for review of the entire collection of orders issued by Judge Lammons. I am willing to forego this and challenge the TDA directly on the facts and law associated with its award, but only if and when the city decides it can settle without any interference in the matters involving the TDA.

If you have not done so, you may want to look at how the TDA and Timnath are attempting to amend the judgment in 2018CV030567 even though they failed to file a Rule 59 motion. Here, as elsewhere, Woodward and Burris have filed pleadings filled with inapposite authority. Judge Lowenbach was given every opportunity to avoid yet another failure to abide by the Rules of Civil Procedure and he refused. This case presents an almost unbelievable disregard for rule of law.

Eric Sutherland

On Monday, April 29, 2019, 2:30:05 PM CDT, John Duval <jduval@fcgov.com> wrote:

Mr. Sutherland,

In your email below you suggest that the City of Fort Collins settle this lawsuit with you separately from the Town of Timnath (see yellow highlight). Fort Collins is willing to do this under the terms and conditions of the attached Settlement Agreement.

We have attempted to revise the Settlement Agreement to address some of your objections to the settlement agreement that Timnath and Fort Collins jointly presented to you on April 18, 2019. For example, the "Non-Disparagement" section has been eliminated.

However, please note that one of the conditions in the Settlement Agreement is that you also agree to and sign the attached Stipulated Motion for the Issuance of a Permanent Injunction (Stipulated Motion). This Permanent Injunction applies only to lawsuits against Fort Collins and its officials, employees and agents filed in Larimer County's state courts and the Fort Collins Municipal Court.

If you are willing to settle as here proposed, please sign the Settlement Agreement with your signature notarized and sign the Stipulated Motion. You must deliver both of your signed originals to the Fort Collins City Attorney's Office by Noon this Thursday (May 2). Once both documents have been fully signed by the City, we will promptly email you copies of them.

If we do not receive the signed Settlement Agreement and Stipulated Motion by this deadline, Fort Collins will proceed with its own efforts to collect its current $40,243.27 judgment against you and the 8% interest that is accruing on it.

In addition, if settlement is not reached by the May 2nd deadline and Fort Collins is required to respond to the two motions you currently have pending before the Court and any new ones you file, Fort Collins will ask the Court to award it the additional attorney fees and costs it has already incurred and those it will incur in responding to your motions.

If you have any questions concerning this proposed settlement, please let me know.

John Duval
Deputy City Attorney
City of Fort Collins
O: 970-416-2488
C: 970-290-4200

From: Eric Sutherland <sutherix@yahoo.com>
Sent: Monday, April 22, 2019 8:16 PM
To: Wade Troxell <WTroxell@fcgov.com>
Cc: City Leaders <CityLeaders@fcgov.com>; John Duval <jduval@fcgov.com>
Subject: Settlement agreement was a blatant sham.

Wade,

The settlement agreement offered up by Timnath's attorneys was a blatant sham. The provisions of the agreement were radically different from what was originally proposed and agreed to. The agreement would have me affirming multiple materially false statements. Etc.

More importantly, Wade, this development sets me on a path to appeal. There is absolutely nothing good that could come out of this for the citizens of Fort Collins. I asked for a simple review of the city council's apparent failure to abide by the Charter and the city's attorneys turned it into an ever escalating circus.

You need to realize a few things:
1) The city's attorneys have already stated that the City Council did not comply with the Charter ... twice ... in two different pleadings. The case was dismissed for lack of subject matter jurisdiction (standing) ... not on the merits.

2) My argument for standing is a new theory of law. This means it is something that the courts have not decided before. The trial court refused to entertain the theory of law, which is grounds for a reversal by itself. I am very confident that the appellate courts will decide the issue in my favor. It all boils down to a very, very simple concept: either I have standing or no one has First Amendment rights to petition government when a failure to properly authorize public debt occurs.

3) On appeal, the City's position is going to be weighed down by Timnath's unbelievable failure to follow a simple law and reform its URA board followed by systematic disregard for the Rules of Civil Procedure and established legal doctrine.

I have no doubt that the best course of action to be taken here would be a settlement between myself and the city. This could be easily done. Otherwise, I have to put my own personal interests in front of the public interest.

Eric Sutherland

From: Wade Troxell <WTroxell@fcgov.com>
To: Eric Sutherland <sutherix@yahoo.com>
Cc: City Leaders <CityLeaders@fcgov.com>; Kevin Brinkman <kevin.brinkman@brinkmanpartners.com>; John Duval <jduval@fcgov.com>
Sent: Saturday, April 13, 2019 4:54 PM
Subject: Re: City/URA sales tax pledge looks dumber every time I look at it.

Eric:

Wow. That's a nonanswer. Let me ask you again. Are you going to stop your boorish, non constructive attacks and sign the agreement?

Mayor Wade Troxell
City of Fort Collins, Colorado

2017 Malcolm Baldrige Award - City of Fort Collins recognized for "an unceasing drive for radical innovation, thoughtful leadership, and operational excellence."

With limited exceptions, emails and any files transmitted with them are subject to public disclosure under the Colorado Open Records Act (CORA). To promote transparency, emails will be visible in an online archive, unless the sender puts ***#PRIVATE*** in the subject line of the email. However, the City of Fort Collins can't guarantee that any email to or from Council will remain private under CORA.

Sent from my iPhone

On Apr 13, 2019, at 4:15 PM, Eric Sutherland <sutherix@yahoo.com> wrote:

> Wade:
>
> Do you think that you may sign a resolution and ... bingo ... the taxpayers are obligated to fork over millions of dollars in future years?
>
> A resolution is not even subject to referendum under the Charter. I would have to look to state law to exercise rights reserved under the constitution.
>
> The annual tax reciepts of the city are the fiduciary responsibility of the council empowered by the Charter pursuant to the terms of the Charter. Has anyone, in the past, made commitments of the tax revenues that you now have authority to appropriate? I don't think so. Why do you think you may now deprive future councils and mayors of the authority over how future tax reveues are spent.

When the Foothills Mall deal went through, it was generally accepted that the annual expenditure of sales tax revenues into the deal were subject to annual appropriation by Council. If the next Council or any future council should elect not make such appropriations, the only thing the metor district and its investors can do is pound sand.

Do you understand this? I really think you have trouble with these things. The metro district and its bondholders have absolutely zero options in terms of a legal remedy in the event that sales tax "increment" is not paid. Under TABOR, the only means by which an irrevocable, legally enforeceable pledge of tax revenues may be made is after voter approval.

The exact same thing is true with this URA BS. Council does not have authority to make multiple year financial obligations without permission of the electorate. If you really, wanted this URA deal to go through, you should have put something on the ballot. It would have failed miserably and it might have given voters pause to consider whether or not to support extension of KFCG.

On the subject of the language in the agreement, I was being kind. Here is the statutory language. See if you can figure it out.

> **11-57-204. Election of applicability.**
>
> (1) 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. If a public entity elects to apply a provision of this part 2 and such provision conflicts with a provision of another statutory law, the provision of this part 2 shall control. No provision of this part 2 shall be interpreted to modify or limit the rights and powers conferred on such public entity by any other provision of state law, unless the public entity elects to use such provisions in the issuance of its securities. This part 2 shall not modify or limit any provisions of articles 51 and 59 of this title.
>
> (2) Nothing in this part 2 authorizes an issuing authority to waive an election otherwise required under section 20 of article X or article XI of the Colorado constitution or to hold an election inconsistent with the election requirements in section 20 of article X.

C.R.S. 11-57-204 (section 20 of article X is TABOR)

Now, the URA is not issueing securities. Why would the URA elect to apply the SPSA? Technically, the City is not issueing securities either, but if it were, Council would need to act by Ordinance pursuant to Article II section 6 of the Charter.

This is just as dumb ... or dishonest ... as anything I have ever seen. But hey ... if someone else buys it and loans the URA a bunch of money or builds a bunch of stuff expecting future payment, that's just great in my book. Future councils will always have the unquestionable right to refuse to appropriate money for this purpose.

Which is why I have no reservation about telling you that the applicants are shining you all on. The play for TIF is just a play for gravy. Any one that knows anything about

this knows that future revenues are not certain or enforceable. This is especially true were sales tax TIF is concerned. The language in the statute regarding sales tax is absolutely meaningless. It was superceded by TABOR and it really only had any meaning at all back when the DOR was still doing sales tax collections for municipalities.

The crazy thing about all this is ... I would not mind seeing Drake and College fixed up. I don't even mind the expenditure of some tax reveneus to grease the skids. Honestly. All development gets subsidized. Some more than others. Sometimes the least desirable development gets subsidized the most. There is nothing wrong with tilting the playing field slightly towards objectives that serve public interest goals.

But you have to do it lawfully. As the law stands right now, there is no lawful way to use PSD mill levy dollars. I first tried to explain this back in 2014 when the first URA reform bill was vetoed by Hickenlooper. The school board has no discretion to commit MLO and bond dollars. I think people realize that. But PSD also may not lawfully commit its general fund levy dollars either. It's consitutional law. People like Kevin Bommer and the rest of the CML mafia have no clue. The only reason that TIF worked before is because school boards had no discretion. (and also no standing *DURA v. Byrne)*

Why don't you wake up and start looking at ways to make desirable objectives happen ... without attempts to violate the law? There are ways.

Eric Sutherland

On Saturday, April 13, 2019, 2:06:04 PM MDT, Wade Troxell <WTroxell@fcgov.com> wrote:

Eric:

Are you going to stop your boorish, non constructive attacks and sign the agreement?

Mayor Wade Troxell
City of Fort Collins, Colorado

2017 Malcolm Baldrige Award - City of Fort Collins recognized for “an unceasing drive for radical innovation, thoughtful leadership, and operational excellence.”

With limited exceptions, emails and any files transmitted with them are subject to public disclosure under the Colorado Open Records Act (CORA). To promote transparency, emails will be visible in an online archive, unless the sender puts ***#PRIVATE*** in the subject line of the email. However, the City of Fort Collins can’t guarantee that any email to or from Council will remain private under CORA.

Sent from my iPhone

On Apr 13, 2019, at 12:53 PM, Eric Sutherland <sutherix@yahoo.com> wrote:

> The following phrase appears in the IGA for the sales tax giveaway being presented to council.
>
> > *The Authority has elected to apply the provisions of Colorado’s Supplemental Public Securities Act in Part 2 of Article 57 in Title 11*

of the Colorado Revised Statutes (the "Public Securities Act") to the issuance of this Agreement.

How much dumber can things get? The URA is not the issuing authority. The City is. The city is the party that is making the obligation.

The URA can't apply the SPSA to anything in this agreement, and, of course, it has not elected to do so. And even then, were the URA to issue debt, it could not do so by authorizing the execution of an IGA.

Under the SPSA, if the City were going to make an obligation, then Council would have to elect to apply the SPSA in an act of issuance. Authorizing an IGA is not an act of issuance.

The citizens of Fort Collins can't trust John Duval further than they can throw him.

https://citydocs.fcgov.com/?cmd=convert&vid=72&docid=3330893&dt=AGENDA+ITEM&doc_download_date=APR-16-2019&ITEM_NUMBER=19

The City of Fort Collins needs voter approval to make an irrevocable obligation of sales tax revenue to the URA.

See the TABOR amendment

(4) ***Required elections.*** *Starting November 4, 1992, districts must have voter approval in advance for:*

....

(b) Except for refinancing district bonded debt at a lower interest rate or adding new employees to existing district pension plans, creation of any multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever without adequate present cash reserves pledged irrevocably and held for payments in all future fiscal years.

There are no exceptions to this provision of TABOR that would apply to the IGA that is proposed.

City sales tax is exclusively a matter of local control. Any reference to obligations of city sales tax in the URA law are 1) pre-TABOR by at least 12 years, and 2) completely inapplicable because the state may not legislate in an area of local control.

Just as a historical note: The sales tax provisions added to both the URA and DDA law were legislated back when the City and County of Denver still had the state Department of Revenue collecting its Home Rule tax. The language was added to provide authorization to the DOR to divert sales tax directly to DURA .... just like Assessors/Treasurers divert property tax directly to URAs/DDAs today.

Prior to TABOR, City Council could make obligations of sales tax under the Charter. After TABOR, voter approval is required.

The intended recipients of this money know that it may not be relied upon. No one will loan money with the expectation of being repaid (besides the City Government itself).

Of course, the whole resolution is just as dumb as anything that comes out of City Hall these days. What is the point of pledging the sales tax increment before the plan area is even approved? This is is idiotic.

Eric