8th DISTRICT COURT **LARIMER COUNTY JUSTICE CENTER** Court Address: 201 Laporte Avenue Fort Collins, CO 80521 Phone (970) 494-3500	DATE FILED: January 30, 2020 CASE NUMBER: 2018CV149
Plaintiff: Eric Sutherland, *pro se* v. **Defendants :** THE CITY OF FORT COLLINS, a home rule municipality in the state of Colorado; BOB OVERBECK, 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.	▲ 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:
RESPONSE TO PLAINTIFF'S JANUARY 15TH, 2020 MOTION TO ISSUE WRIT OF EXECUTION	

I. BACKGROUND

On January 15th, 2020, Defendants Timnath Development Authority ("TDA") and Compass Mortgage Corporation ("Compass") filed their Motion to Issue Writ of Execution into this proceeding.

II. FACTORS THAT SIGNIFICANTLY CHANGE THE POSTURE OF THIS CASE

A. Second Appeal, 2019CA800, has been dismissed without prejudice

On Friday, January 17th, 2019, the Court of Appeals dismissed case no. 2019CA800 without prejudice. Ironically, the subterfuge that the Timnath Development Authority had perpetrated by entering counterclaims that it had no intention of prosecuting has anchored jurisdiction of this case in the trial court.

It is Sutherland's belief now, as it was back when he filed his Second Notice of Appeal, that all matters in this case have been finally decided and that this case was appealable no later than the day he filed his Second Notice of Appeal. Sutherland knows and understands the law regarding finality of judgments that allows for the Court of Appeals to maintain jurisdiction over appeals that are filed. After all, Sutherland had previously filed an appeal in this case, 2018CA1993, that was also dismissed without prejudice for reasons closely related to those underlying the Court of Appeals dismissal of case no 2019CA800.

In the first appeal, the Court of Appeals ruled that counterclaims entered by the Timnath Development Authority against Sutherland had not been dismissed by this court. Despite the fact that a motion to dismiss these counterclaims had been ripe for a decision for months prior to the filing of the first notice of appeal, this court had not ruled on the motion. Shortly after the first dismissal by the Court of Appeals, this court did issue an order dismissing the TDA counterclaims.

In the second appeal, the Court of Appeals noted that the dismissal of the TDA counterclaims by this court had been without prejudice. The Court of Appeals went on to rule that, in the absence of certification pursuant to Rule 54(b), the dismissal without prejudice of the TDA counterclaims did not finally resolve all issues before the trial court and, therefore, the Court of Appeals did not appear to have jurisdiction to continue the appeal. As it had done in the first appeal, the Court of Appeals issued an order directing Sutherland to show cause that the issues in the trial court had been finally decided. Sutherland responded with a showing of two separate grounds supporting his position that the issues in the trial court had been finally decided and could not be revived. First, the TDA counterclaims would be barred by the doctrine of *res judicata* and may not be revived. Second, the governing board of the TDA is not properly constituted now and also was not properly constituted at the time the counterclaims were filed. Consequently, the TDA has no capacity to come into court to revive the counterclaims.

The actions taken by the Court of Appeals in response to Sutherland's showing of cause was puzzling and has opened the possibility of review under the Supreme Court's powers of original jurisdiction. The Court of Appeals declined to rule on the grounds provided in the showing of cause. Instead, the Court of Appeals decided to offer Sutherland the opportunity to secure certification under C.R.C.P. Rule 54(b) and gave him 35 days to do so. During those 35 days, facts showing that Fort Collins' broadband business was failing became known. Also during those 35 days proof that Sutherland and all other property owners in the Poudre School District had suffered injury as a consequence of the TDA's improper incurrence of additional debt became known. At the end of the 35 days, Sutherland requested that the Court of Appeals refer the appeal to the Supreme Court to decide whether the grounds relied upon by Sutherland when filing his Second Notice of Appeal were conclusive of the finality of the case in the trial court pursuant to C.R.S. §13-4-110[1]. As mentioned, on January 17th, 2020, case no. 2019CA800 was dismissed without prejudice. This case now lies entirely within the jurisdiction of the trial court.

The transfer of jurisdiction back to the trial court is significant in many regards. As it pertains to the instant Motion, this court should be aware that one of two scenarios will play out going forward; 1) the parties will settle this matter in accordance with terms that have been agreed to in principle, or 2) Sutherland will file a motion pursuant to Rule 60(b) making a showing of injury-in-fact in the Fort Collins and TDA claims.

B. Evidence now exists to prove injury-in-fact in the Timnath claim

It is now possible to show that the injury that Sutherland had consistently held to be as certain as the sun coming up in the morning has been visited on himself and all other similarly situated taxpayers in the Poudre School District.

In the dispute with Timnath, this court refused to acknowledge, let alone consider, facts that clearly showed that Plaintiff and all other property owners in the Poudre School District would be subject to higher tax rates as a consequence of the activities of the Timnath Development Authority. The imminent risk of injury proven by Sutherland, but systematically disregarded by this court, was

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[1] Sutherland also suggested that the Supreme court could, at its discretion, take up the question of whether or not this court is coram non judice once the case had been referred by the Court of Appeals.

sufficient to establish injury-in-fact would be suffered by Sutherland and all others in the Poudre School District in the absence of the declaratory relief Sutherland had sought.[2]

To the extent that this court engaged at all with the subject of Plaintiff's assertion of standing, the writings of the trial court were ridiculously erroneous. For example, this court wrote "*Mr. Sutherland brought this action knowing that he has not suffered an injury and may never suffer an injury as a result of Defendant's alleged actions*" . See *Order Granting Defendants Motions to Dismiss as to Defendants City of Fort Collins, Steve Miller and Irene Josey* at p.3. To the contrary, Sutherland had described the likelihood of injury resulting from higher tax rates to be as certain as the sun coming up tomorrow morning. See *Reply In Support Of Plaintiffs Motion For Reconsideration of Order Granting Indispensable Parties Motion to Dismiss* at p. 6. Ample factual evidence had been provided to support this conclusion. There is simply no way that the Timnath Development Authority could have ever expected to repay the loan without higher tax rates being imposed on PSD property owners. All facts and argument supporting this assertion were intentionally ignored by this court.

As Sutherland's arguments predicted, higher tax rates are now being paid by property owners in the Poudre School District for the purposes of repaying the improperly authorized debt that was purportedly approved by people pretending to be commissioners of a the Board of Commissioners of the Timnath Development Authority. This should not be a surprise to anyone. Proof of this fact is as simple as understanding a handful of duly created and authorized public records. A C.R.C.P. Rule 60(b) motion is being prepared.

C. Evidence now exists to prove injury-in-fact in the Fort Collins claim

It is now possible to show imminent risk of injury sufficient to gain standing for declaratory judgment in the matter of the loan authorization that was purportedly made by the Fort Collins City Council. Here, the evidence is complex but persuasive. An imminent risk of injury in the absence of judicial relief may be seen to exist as a consequence of the combined effects of; 1) a failure of the city broadband utility to launch, 2) rapid evolution of the competitive landscape the utility expected to enter, and 3) the failure of those who have failed (city officials) to recognize their failure and take

[2] This court also refused to acknowledge the long line of decisions of the Colorado appellate courts that have resulted in a broad grant of standing to taxpayers who allege abridgment of constitutional rights. For example Barber v. Ritter, 196 P. 3d 238 Colo. 2008.

actions to reduce the injury that the electric rate paying public will endure in the absence of judicial relief.

The evidence is overwhelming. It is not premature or overreaching to say that Fort Collins attempt to enter the marketplace for data service will soon become the largest public policy failure in Colorado municipal history. Revenues and subscription levels are less than 5% of what the voters of the city were told that they could expect in a business plan published prior to the November 2017 election. More importantly, costs, revenues and other metrics are far behind what other community wide Fiber To The Premises projects had accomplished on a comparable time scale and far below what is necessary to meet future operational and debt service expenses.

Here, as in the Timnath claim, this court's stubborn disregard for Sutherland's prior arguments and authorities is objectionable. Here, as in the Timnath claim, the same C.R.C.P. Rule 60(b) motion will assert grounds necessary for this court to grant standing on the basis of injury-in-fact. Here, as it was also in the Timnath claim although not argued there because it was unnecessary, the non-claim statute of C.R.S. §11-57-212 and the recital provisions of C.R.S. §11-57-210 may not be seen as an obstacle to the justice the people of Fort Collins deserve because this action was timely filed before any debt had been issued.

The City of Fort Collins is, at this time, frustrating the preparation of a sound Rule 60(b) motion by withholding public records in violation of the Colorado Open Records Act. The City of Fort Collins City Council is also threatening hold secret meetings to discuss matters pertaining to the Colorado Open Meetings law. These two violations of state law go hand in hand with a general secrecy about many substantive details of the broadband utility. Consequently, it is highly likely that the next activity that this court will see in this case will be CORA and OML enforcement actions as allowed by Colorado statute.

III. ISSUANCE OF WRIT OF EXECUTION SHOULD BE DELAYED

This court should consider the posture of this with some humility. Sutherland is now in a position to accomplish that which he set out to do nearly 2 years ago to do and would have already accomplished save for this court's unmistakable disregard for the truth and the law; deliver himself and the good people of his community from the financial injury that would otherwise be delivered as a consequence of unlawful and imprudent activities of two local governments. The only reason that Sutherland is engaged in pursuit of settlement at this time is because he is cognizant of negative outcomes that will be experienced by the same community that he sought to benefit by entering the

next phase of this proceeding. The situation is complex and beyond the scope of this *Response*, but settlement does rise to the top of the available options.

This court has accused Sutherland of pursuing harassment and delay. This court has accused Sutherland of saying that he did not expect injury when he had proven that his injury and the injury of others was as certain as the Earth's rotation about its axis. Now that the injury that Sutherland sought to immunize himself and others is direct and palpable, this court should, in the interest of justice, delay the issuance of *Writ of Execution* in this case until no earlier than the facts pertaining to the imminent risk of injury in the Fort Collins claim and the sustained and ongoing injury in the TDA claim can be understood.

VIII. CONCLUSION

This court should delay any order disposing of Defendant's *Motion To Issue Writ Of Execution* until such time as this case has been settled by agreement of the parties or a showing of facts demonstrating injury and imminent risk of injury may be made by Sutherland in the C.R.C.P. Rule 60(b) motion he is preparing.

W. E Sutherland

Dated January 30th, 2020

Eric Sutherland

I hereby certify that on this 30th day of January, 2020, a true and correct copy of the foregoing *Response to Plaintiff's January 15th, 2020 Motion to Issue Writ of Execution* Also, a true and correct copy of the foregoing will be served via email to the following no later than January 30th, 2020

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By W. C. Austin