SUPREME COURT, STATE OF COLORADO East Fourteenth Avenue Denver, Colorado 80203	
District Court for the Eighth Judicial District Honorable Thomas French Case No. 16CV230	
In Re: Petitioner-Contestor: Larry Sarner, an individual, v. Respondent-Contestee: City of Loveland, a home rule city in the State of Colorado; and Respondent-Indispensable Party: Angela Myers, in her official capacity as Larimer County Clerk and Recorder.	**▲ COURT USE ONLY ▲** Case No. 2016SA_____
Self-Represented Contestor: Larry Sarner, *pro se* 711 West Ninth Street Loveland, Colorado 80521 Telephone: 970-667-7313 larry.sarner@gmail.com	

PETITION FOR RULE TO SHOW CAUSE

Pursuant to Colorado Appellate Rule 21, Section 3 of Article VI of the Colorado Constitution, and CRS §1-11-203.5(4), Petitioner Larry Sarner, hereby petitions this Court to issue a rule that, in an election contest concerning ballot titles and sundry pertinent provisions of TABOR:

(1) that the judge below, for purposes of taking jurisdiction, abused his discretion by converting requiring a surety bond or bond substitute, against a failure to maintain a contest, in an amount which effectively prohibited the Petitioner from accessing the district court for the legitimate purpose of summarily adjudicating the contest;

(2) that the contestee, aided and abetted by its counsel, opposed the court below taking jurisdiction of the election contest, urging the judge to require a large surety bond from the contestor, and the opposition was interposed solely for the purposes of delay and interference, and so was *per se* frivolous and dilatory, worthy of sanction with an award of costs to the contestor;

(3) that the two ballot questions (titles) set by the Respondents for this November's election, which seek specific voter approvals under TABOR, are constitutionally infirm, and because of the frivolous and dilatory opposition of the contestee, it has become impractical to *alter* said ballot questions, the elections thereon need to be set aside as null and void.

Introduction

This is a TABOR enforcement action.

On August 16, 2016, the City Council of Loveland, called for two referenda for the purposes of gaining voter approval per TABOR, respectively, for a mill levy (ad valorem property tax) imposed on holders of property which lay within the Loveland DDA, and an increase in debt of the City of Loveland, to be repaid from tax "increments" following the state's DDA statutes. Both referenda also asked for voter approval to except the collection, retention and spending, of all revenues from the tax or tax increments, and of all bond proceeds, etc. (Exhibit 1)

At the same meeting, Council also passed a resolution approving an intergovernmental agreement with the county clerk—who is conducting the "coordinated" election held nominally on November 8, 2016—the terms of which restricted those who may vote upon these referenda to only those registered electors of the City of Loveland who reside within the boundaries of the DDA. (Exhibits 2,4) Yet provisions were still made that allowed other persons who are not registered electors—those who are residents of the DDA, regardless of citizenship or any other qualification, and persons who are not residents of the DDA, but are property-holders therein, as well as persons who are acting as proxies for corporate entities who are property-holders.

On August 25, 2016, I contested the ballot questions (titles) of both referenda, arguing (1) that the proposed ballot language is confusing and deliberately conceals multiple questions, especially regarding tax increments. I also argued: (2) that the requested exemptions to revenue and spending limitations in TABOR or "any other law" were unlawful or unconstitutional; (3) that the ballot questions ask voter approval from persons who cannot give that approval; (4) that the ballot questions ask for voter approval for increasing City debt without asking that approval from all persons who might give or withhold that approval; and (5) that the ballot question on increasing City debt asks approval for raising taxes of, or spending revenue from, taxpayers of other taxing entities without approval from those taxpayers. (Exhibit 5)

The district court judge never ruled on the merits of the case, dismissing it the day before its scheduled trial. He did so by inexplicably finding that I had not posted a sufficient costs-bond before he would accept jurisdiction, per CRS §1-11-203.5(3). He had previously indicated that a $10,000 bond or bond subsitute would be sufficient. As disclosed by the pertinent record of the case in the court below (Exhibits 9-15), there is no statutory authority for his imposition of a costs-bond in this contest. Instead, there is only authority for a bond which runs to "failure to maintain the contest"; in the case of TABOR enforcement actions, awards of costs and fees against non-frivolous contestors is disallowed altogether;

and in all cases, fees are not allowed against non-frivolous contestors who are *pro se*.

It is my belief, and contention here, that the record shows that the district court judge acted as a gate-keeper to prevent anyone of modest means ever to bring a TABOR enforcement action. In this he was complying with the request of the City of Loveland and its counsel to judicially re-write the statute and turn the bond it requires to insure against what would be my "failure to maintain the contest" into an insurance policy for the City against my "failure to win the contest." He went along with the City's frivolous and dilatory request, ignoring my plain arguments not only about my maintenance of the contest, but also about the fact that my *pro se* contest was a non-frivolous TABOR enforcement action that precluded any lawful award by him of any costs and fees to the City. By setting the bond amount to $10,000, the judge was choosing sides and attempting to chill this contestee from *continuing* the contest. He was signalling that he thought it more likely than not that his ultimate ruling would be against me, and the security necessarily would be forfeit. By dismissing the case (instead of granting my motion to deem sufficient my submitted bond), the judge converted his intentions into a deliberate denial of due process.

A. Identity of the Parties.

Petitioner is Larry Sarner, a registered elector residing within the City of Loveland, but not residing within the boundaries of the Downtown Development Authority of the City of Loveland.

The proposed Respondents are the City of Loveland, a home-rule city in the State of Colorado; and Angela Myers, in her official capacity as Clerk and Recorder of Larimer County.

B. Identity of the Court Below.

The court below is the District Court for the Eighth Judicial District, the Honorable Thomas French presiding (Courtroom 5C). The underlying proceeding was captioned as follows: *Larry Sarner, Contestor, v. City of Loveland, Contestee; Angela Myers, Larimer County Clerk and Recorder, Indispensable Party*. The case number of the underlying matter was 16CV230.

C. Identity of the Persons Against Whom Relief is Sought.

Petitioner seeks relief against both Respondents. However, the County Clerk was joined as an indispensable party for the sole purpose of carrying out the Court's orders with respect to nullifying and voiding the referenda on Respondent City's ballot questions.

Relief is also sought against counsel for Respondent City, Thomas Snyder, #33106, who was complicit with his client in interposing frivolous and dilatory opposition, and thereby not discharging his duty as an officer of the court not to allow such actions to be taken by his client.

D. Rulings Complained of and Relief Sought.

Petitioner seeks relief from the district court's order for dismissal of the case. The lower court erred in dismissing the case for not following a previous order, when that order had indeed been followed on the very day that it had been entered. Moreover, the district court abused its discretion by ignoring Petitioner's bond that had been filed, and also by ignoring the associated motion to deem sufficient, the court failed to address the arguments therein.

Second, Petitioner seeks relief from the Respondent City, and its counsel, Thomas Snyder, who interposed a frivolous opposition to the contest solely for the purposes of delay, so that the matter would become moot by the progression of the ballot preparation process. Petitioner should be awarded costs, jointly and severally, from the Respondent City, and its counsel, for the wrongful dismissal of an election contest, and Petitioner's bond should be released and returned to Petitioner.

Third, Petitioner seeks relief from the failure of the district court to summarily adjudicate a pre-election contest it had before it. Respondent City stands to gain from unlawful and unconstitutional ballot questions proceeding with to an electoral conclusion. Because the City interposed frivolous and dilatory opposition, sufficient time has passed in the ballot preparation process to result in a practical inability of this Court to alter the November ballot in any meaningful way. The Petitioner therefore seeks not a remand to the court below, but instead seeks a rule from this Court cancelling the elections on both ballot titles (questions) and directing the City Council of Respondent City to withdraw both from the coordinated election ballot, pursuant to CRS §1-5-208(2), or if the statutory time has passed when the City Council may withdraw a ballot issue, then a rule directing the Respondent Clerk either not to count the votes cast on the ballot issues, or deem those votes cast as invalid, as circumstances warrant.

Fourth, since this is a TABOR enforcement action, and the provisions of TABOR allows an award of fees and costs to successful petitioners, Petitioner requests an award of costs from Respondent City.

E. Reasons Why No Other Adequate Remedy is Available.

In consequence of the passage of TABOR, the General Assembly adopted §1-11-203.5 C.R.S. as a means of giving practical effect to TABOR's clear requirements of voter approval for new or increased taxes. In order to give finality to taxing decisions made by the public, disputes ("contests") over the form and content of TABOR issues are to be decided in district court before the election in an expedited process. If the court fails to do its duty, or rules erroneously, the losing party is mandated to come here to the Supreme Court, CRS §1-11-203.5(4):

> "Notwithstanding any other provision of law, any appeal from an order of the district court entered pursuant to this section shall be taken directly to the supreme court, which shall decide the appeal as expeditiously as possible."

To decide the appeal in this case, this Court will take up the case on original jurisdiction. Moreover, since the issues in this case involve multiple interpretations of TABOR, these are questions of law subject to *de novo* review. *Lobato v. State*, 304 P2d 1350, 1353 (Colo. 1984). These are also questions of first impression, as related to pre-election contests are long overdue of precedential adjudication.

A post-election challenge to the ballot questions, through trial and the conventional appellate process, could be long, expensive, and fraught with uncertainty. On the one hand, if the post-election challenge is unsuccessful, then major projects may have been interrupted or delayed. On the other hand, a successful post-election challenge could mean a costly unwinding of an unlawfully

approved project. Either way, an expedited *pre*-election appellate decision, on original jurisdiction, is preferable.

F. Issues Presented.

Six issues in chief are presented to this Court for resolution, all of which are matters of first impression.

First, is it an abuse of discretion for a district judge to change the requirement of posting a bond for "failure to maintain a contest," pursuant to CRS §1-11-203.5(1), into a cost bond that chills access to the courts, by persons of ordinary means, for summary adjudication of pre-election contests brought as TABOR enforcement action, and consequently deprives a contestor of a liberty interest without due process of law as guaranteed by the Fourteenth Amendment to the U.S. Constitution, and by Article II, Section 25 of the Colorado Constitution?

Second, given the provisions of TABOR which favor pre-election contests brought by persons of ordinary means, is a contestee's opposition to modest amounts for a bond against a "failure to maintain a contest" in an expedited proceeding necessarily interposed frivously and dilatorily, and is contestee's counsel jointly and severally liable therefor?

Third, may a home-rule city set a ballot question seeking voter approval under TABOR, which contains provisions which except the spending and other limitations of TABOR, or other limitations found in "any other law"?

Fourth, may a home-rule city set a ballot question seeking voter approval for increasing the debt of the city by a vote of just a few of the registered electors of the city, the 14th Amendment assurance of equal protection of the laws notwithstanding?

Fifth, may a home-rule city set a ballot question seeking voter approval for increasing the debt of the city while persons not constitutionally permitted to vote in TABOR elections—such as non-citizens, non-resident land-holders, and proxies for corporate land-holders—*are* being allowed to vote thereon, even if otherwise allowed by law?

Sixth, may a home-rule city set a ballot question where tax revenues are diverted from other taxing entities (districts)—and in some cases automatically raised—and those voting are not informed by the ballot question itself of the source and amount of these diverted revenues?

G. Facts Necessary to Understand the Issues Presented.

City-Wide Debt. In its ordinance calling for a city election to decide the two ballot questions at issue here, the Respondent City confesses that the purpose

of the ballot questions is to gain voter approval meeting the requirements of TABOR. (Exhibit 1, 6th Whereas clause) The Respondent City also confesses, with the ballot question posed, that the debt of the entire municipal entity is what is being increased, when the question begins with the words, "Shall City of Loveland debt be increased $75,000,000…"

Exclusion of Electorate. There is no full accounting of those whom the Respondent City accepts as eligible to decide the ballot questions at issue here. With same-day registration registration, it may not even be possible to definitively enumerate those thought eligible. However, estimates of that number range from 500 to 1,500. Meantime, the number of registered electors in Loveland likewise varies, expected to be upwards of 53,900 by election day. Just from these estimates, it can be seen that at least 52,400—or over 97%—of Lovelanders registered to vote cannot participate in the decision to increase their city's debt, or to authorize the DDA to share in the property tax revenues from other taxing entities, most notably the Thompson School District R2-J.

Inclusion of Unqualified Electors. Several classes of people are being allowed to participate in voter approvals: unregistered electors, non-citizen residents, non-resident land-holders, and proxies for corporate land-holders.

Spending Plans. The Respondent City plans on issuing bonds, in a total amount of $75 million, immediately upon receiving voter approval in the instant

election. (Exhibit 3) The City expects property development, or contracts for such, can begin promptly after receiving voter approval. (Exhibit 16) It will be difficult unringing the bell on actions taken with such post-election haste, even if they can be unwound at all.

Tax Increment Financing. With regard to the ballot question increasing City debt for capital improvements, this debt is not repaid in the way such debt is typically repaid—through a voter-approved *ad valorem* tax affecting only the property taxpayers who have the direct benefit of the improvements. Instead, these are *revenue* bonds, secured by tax-increment financing (TIF). (Exhibit 1, Section 1(b)) Through a complicated formula administered and calculated by the County Assessor, revenues from property taxes on the improvements of overlapping taxing entities are diverted to the DDA so that it may be used to repay the debt incurred to make the improvements. The end-result of any TIF scheme is that taxpayers with improvements pay exactly the same property tax they would if there was no debt repayment, while the actual cost of repayment is spread out among all taxpayers in each of the overlapping taxing entities. In the instant case, Thompson School District R2-J ("TSD") encompasses the DDA, and a proportionate cost of the DDA's revenue bonds will be shared by TSD taxpayers, in part through the mechanism of increasing the floating mill levy for its bond repayment, and in part by reducing the revenue received by TSD from its taxpayers from its fixed mill

levies, of which the general-fund mill levy is one. The revenue lost to TSD from its general-fund mill levy may be recovered—"back-filled"—from increased equalization funds provided by the state. Unfortunately, fiscal difficulties of its own may cause the state not to backfill completely. Any backfilling means that the cost of DDA repayment is borne by the state's taxpayers, too.

It is worth noting that the authority for TIF derives from a 1976 state statute (CRS §31-25-801 *et seq*) that precedes TABOR by sixteen years. And TABOR, as a constitutional provision, is of course superior law.

H. Reasons to Issue a Rule to Show Cause and Grant Relief.

> "The principal purpose of [TABOR], according to the express language approved by the electorate, is to require that the voters decide for themselves the necessity for imposing new tax burdens. Accordingly, that constitutional provision, through various procedural requirements, acts to limit the discretion of government officials to take certain actions pertaining to taxing, revenue, and spending in the absence of voter approval." *Property Tax Adjustment Specialists, Inc. v. Mesa County Board of Commissioners*, 956 P2d 1277, 1280 (Colo App 1998).
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> "[T]he consent of the voters…is the axis around which TABOR spins." *HCA-Healthone, LLC v. City of Lone Tree*, 197 P3d 236, 244 (Colo App 2008).

The above appellate recognition of the fundamental purpose of TABOR is key to a cogent understanding of the operation of TABOR in all cases, including the instant matters.

Appeal from District Court's Dismissal of Underlying Action

The court below denied the Petitioners' request to waive the bond required by (Exhibit 14), saying that,

> The Court finds that security in this case helps insure that a groundless action is not maintained, and helps insure that Plaintiff [sic] is able to pay any costs or fees that may be ordered paid by Plaintiff.

The court then went on to order a cash deposit or surety bond, and agreeing with the Respondent-Contestee's allegations that attorney's fees for the Contestee potentially could exceed $10,000, that the court pre-approved that amount as "sufficient security" under the statute, or else the court would decline to take jurisdiction.

Yet, the statute (CRS §1-11-203.5(1)) cited by the court—and even quoted earlier in the order—does *not* require (for taking jurisdiction) security to insure that a groundless action is *not* maintained, but rather is apposite to the court's finding, namely that (for taking jurisdiction only) a sufficient bond be posted against a *failure* to maintain the contest (groundless or otherwise).

On the very same day, I (as Contestor) submitted a cash bond to the clerk of court in the amount of $50. (Exhibit 11) Simultaneously, I moved the court to deem this bond sufficient. (Exhibit 12) The court below took no notice of either, and dismissed the case (Exhibit 15) simply "because Plaintiff [sic] did not file the bond or bond substitute ordered by the date ordered." My first complaint is that I

was not *ordered* to file a bond of a specific amount, but with "sufficient security" and the statute says that "[t]he judge shall determine the sufficiency of the bond and, if sufficient, approve it." It does not say that the judge can *pre*-determine what is sufficient, and use that pre-determination as a barrier to entry to his court.

As revealed by the order for dismissal, the judge never determined the sufficiency of the actual bond submitted. He did not acknowledge the submission of the bond actually submitted, and did not acknowledge, much less dispute, the arguments made in my motion to deem the bond sufficient. He made no attempt to determine whether the allegations made in the Contestee's about possible attorney's fees were reasonable in this, an *expedited* case. He did not consider his position as being apposite to the provisions of the statute. He could have begun considering the sufficiency of the bond on the very day of his initial order, and if he was determined to do so, deny my motion the very next day. Instead, he vacated the hearing date, scheduled a hearing in another civil case for the time set for this one, then ordered a dismissal after his deadline had passed. It is hard to imagine how this was not an abuse of discretion and a violation of due process required by Art. II, sec. 25, of Colorado's Constitution, and by the 14th Amendment to the U.S. Constitution.

This judge's actions here were consistent with a jurist acting as a gate-keeper of the Halls of Justice to bar litigants who are presumed not to be serious with an

election contest. If allowed to stand, the utility of CRS §1-11-203.5 is at an end. Citizens of ordinary means will have no access to the courts to check the abuses and pretenses of local governments; officials can do what they will—to place anything they want on the ballot, to have it say anything they want, and have it ballot question authorize anything they want—unless they run afoul of interests which do have the money to stand up for their interests.

If the judge in the court below had read my motion to deem the bond sufficient (Exhibit 12), made four days before his deadline, he could have seen the arguments I now make before *this* Court—that a $50 bond was indeed sufficient for accepting jurisdiction and allowed this contest to proceed in his court. In summary these arguments were, and are, that: (a) the very act of filing a contest for an expedited summary adjudication under CRS §1-11-203.5 moots the question of "failure to maintain a contest"; (b) as a TABOR enforcement action, no award of costs or attorney's fees is possible, unless the action be frivolous; (c) as a *pro se* contestor, no award of attorney's fees is possible, unless the action be substantially frivolous, groundless or vexatious; and (d) all of the challenges made in the election contest are matters of first impression with respect to CRS §1-11-203.5, *i.e.*, are attempts to establish new theories of law in Colorado.

CRS §1-11-203.5 provides for a statutorily defined judicial procedure that is paced by conditions in the statute. An immediate consequence of that pacing is

that the very filing of the petition launches an expedited proceeding with very short time frames for answer, hearing, and decision. Since the matter is to be *summarily adjudicated*, the parties' pleadings can be *all* of their participation. Thus, *maintenance* of the contest by the contestor is necessarily accomplished with the initial act of petitioning, and is not dependent upon subsequent responses, motions or other actions. The position of the court below to turn the statutory bond requirement into a general cost bond is legislating from the bench.

The ballot issues being contested in this action are TABOR elections, and this contest is a TABOR enforcement action. TABOR itself declares that its provisions are self-executing, and anticipates citizen enforcement through the courts with:

> Individual or class action enforcement suits may be filed and shall have the highest civil priority of resolution. Successful plaintiffs are allowed costs and reasonable attorney fees, but a district is not unless a suit against it be ruled frivolous. (TABOR, §1)

In *Cerveny v. Wheatridge*, 913 P2d 1110 at 1119 (Colo. 1996), the Court declared:

> The attorney fees provision of Amendment 1 [TABOR] apparently was intended to enable citizens of ordinary means to enforce Amendment 1.

Thus, absent frivolity, no award of costs or fees is constitutionally allowed in this case. Even though, for some cases, a cost bond may be required by CRS §1-11-203(1), in a case such as this, which is a non-frivolous TABOR enforcement

action, no such award can be made constitutionally, and a nominal amount (such as $50) would be sufficient for the bond (or indeed, it could even be waived).

CRS §1-11-203.5(3) was adopted specifically to implement the provisions of TABOR in election contests such as the present one. The language of that subsection makes that plain:

> If the court finds that the order of the ballot or the form or content of the ballot title does not conform to the requirements of the state constitution and statutes, the court shall provide in its order the text of the corrected ballot title or the corrected order of the measures to be placed upon the ballot and shall award costs and reasonable attorneys fees to the contestor. If the court finds that the order of the ballot and the form and content of the ballot title conform to the requirements of the state constitution and statutes and further finds that the suit was frivolous as provided in article 17 of title 13, C.R.S., the court shall provide in its order an award of costs and reasonable attorneys fees to the contestee state or political subdivision and to the proponent of an initiated measure.

The Respondent-Contestee also chose to place these referenda on the coordinated election ballot for this November, thereby making CRS §1-11-203 the operative law here, which in turn gives the district court subject-matter jurisdiction. Consequently, CRS §13-17-102(6) therefore applies:

> No party who is appearing without an attorney shall be assessed attorney fees unless the court finds that the party clearly knew or reasonably should have known that his action or defense, or any part thereof, was substantially frivolous, substantially groundless, or substantially vexatious; …

So, by TABOR and by statute, the likelihood of an award hinges on the question of frivolousness. It is well-established that 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, though this test does not apply to meritorious actions that prove unsuccessful, legitimate attempts to establish a new theory of law, or good-faith efforts to extend, modify, or reverse existing law. *Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063 (Colo. 1984). Once again, statute also applies here with CRS §13-17-102(7):

> No attorney or party shall be assessed attorney fees as to any claim or defense which the court determines was asserted by said attorney or party in a good faith attempt to establish a new theory of law in Colorado.

To the best of my knowledge, there has been no appellate review of any matter brought under CRS §1-11-203.5. Therefore, all of the challenges I make with this contest are matters of "first impression" and hence are brought, in good faith, to establish a new theory of law—and of course to correct abuses by the Respondent-Contestee under those new theories.

Thus, even on first blush during a pre-determination by the district court judge of the likelihood of an award against me, the likelihood of an award of costs is very nearly zero, and the likelihood of an award of attorney's fees is even closer to zero. The judge's determination that the threshold for sufficiency of the bond is $10,000 is an abuse of discretion and should not only be reversed, but it is a duty for *this* Court to prevent a similar abuse of discretion effectively barring petitioners from enforcing the election provisions of TABOR. And the Court below should be ordered to release and return the $50 bond to the Petitioner-Contestor.

Award of Costs to Petitioner-Contestor

As mentioned *supra*, in setting his threshold for bond sufficiency, the district court judge relied upon the Respondent Contestee's allegations, prepared by its lead counsel, that Contestee's costs and attorney's fees for the contest in the court below would amount to at least $10,000. This estimate was itself frivolous and interposed for the purpose of delay or for chilling the Contestor. What else could it be, since they estimated that amount based in part on the expense of "expert witness fees"—in an action to be *summarily adjudicated*?

The Contestee, being advised by counsel, should have known that an award in this amount would never have been made. Regardless, the claim for it was made at least in four places on behalf of the Contestee: its Answer (Exhibit 8), Motion to Dismiss for Lack of Subject Matter Jurisdiction (Exhibit 7), Opposition to Motion to Waive Bond Requirement (Exhibit 9), and Opposition to Motion to Deem Bond Sufficient (Exhibit 13).

This steady drumbeat of opposition to what could have been a minor procedural matter at every opportunity—about which the City knew or should have known that it was wrong, even as it was suborning the judge serendipitously to agree with its position—suggests strongly that it was committed to interposing opposition to a reasonable bond amount for strategic reasons. Rather than allowing the case to be heard on its merits, it interposed frivolous and dilatory opposition to

Contestor's bond for the sole purpose of interference with the my right to a speedy resolution of the underlying dispute in the district court. It obviously believed this strategy to be the best for assuring that their ballot questions appear on the ballot exactly as desired. If they really believed in their case, and also for their costs at the end of the day, they should have ignored the matter of sufficiency of the bond and gone straight to trial on the merits.

If the City did not know of its error in the matter of the bond, its lead counsel knew or should have known. As an officer of the court, Mr Snyder should have advised his client that it was being frivolous and dilatory. If the City persisted, he should have refused to participate and withdraw from representation. He did neither. So, he was complicit in their actions, and as a result, an injustice occurred on a potentially important matter regarding public affairs. He and the City should be individually liable for the costs that I incurred from them.

Therefore, I ask for a rule requiring that the City and Mr Snyder be jointly and severally liable for my costs in the action below and here in this Court. I also ask that the matter of Mr Snyder's actions, or inactions, be referred to the Office of Attorney Regulation Counsel.

Disregarding Most District Voters

The Respondent City has set at least one referendum for the upcoming general-election ballot that disregards at least 97% of the registered electors in the city from voting thereon. There is no authority whatever which establishes that TABOR requirements for voter approval permit a home-rule city to disenfranchise any of its registered electors from voting on either an increase in City taxes or City debt. Indeed, given the centrality of voter approval to all provisions in TABOR, disregarding the participation of at least 97% of eligible voters on any question would be an absurd outcome.

The Court has previously held that TABOR authorizes all municipal voters to participate in elections held under its provisions: "Amendment 1 [*i.e.*, TABOR] provides that 'all registered voters' within a local governmental district are able to vote on taxing and spending increases." *Campbell v. Orchard Mesa Irrigation District*, 972 P2d 1037, 1040-1041 (Colo. 1998). The Court goes on to further clarify just what precisely are the qualifications for participation in a TABOR referendum:

> Amendment 1 elections invoke the voter eligibility provisions of Colorado Constitution Artticle VII, Section 1. An Amendment 1 voter *must be* a citizen of the United States, eighteen years of age or older, a resident of the state for thirty days immediately preceding the election, a current resident of the precinct [district] in which the election takes place, and a registered elector in the precinct [district]. *Id*., at 1040.

While the Court had previously determined that TABOR does not create "a new substantive voting right" on tax matters (*Bickel v. City of Boulder*, 885 P2d 215, 225, 226; Colo. 1994), TABOR actually did not need to do so, as the fundamental right to vote was already an unquestioned right of every voter. *Meyer v. Lamm*, 846 P2d 862, 872 (Colo. 1993). "[C]itizens have the right to be free from restrictions that deny the franchise or render its exercise so difficult and inconvenient as to amount to the denial of the right to vote." *Bickel*, *supra*, at 225.

Especially with the authorization of debt, it cannot be avoided knowing that the DDA cannot of its own accord issue debt in any form. Even though the proceeds of the indebtedness may be spent exclusively for improvements within the DDA, the Ordinance calling for the TABOR election itself acknowledges the DDA's powerlessness to make plans or issue debt in furtherance of any plan, and the Respondent City has to act on behalf of the DDA. (Exhibit 1) And when a home-rule city issues debt, Section 4 of TABOR requires there be prior voter approval thereon, and Art. VII, Sec. 1, of the state consitution requires that every registered elector residing within the City may participate in that prior voter approval, and a home-rule city which denies that fundamental right to any registered voter runs headlong into the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. *Kramer v. Union Free School Dist. No. 15*, 395 US 621, 629 (1969).

Participation by Persons Not District Voters under TABOR

Meantime, the expansion of the franchise to voters who are not qualified to be registered electors dilutes the votes of those with a genuine interest in the outcome. Nevertheless, the Court of Appeals has held, with respect to Art. II, Sec. 1, of the Colorado constitution—

> [N]othing in that provision prohibits a home rule municipality from exercising its powers under Colo. Const. art XX, §6, to **expand** the franchise to non-resident property owners. *May v. Town of Mountain Village*, 962 P2d 790, 795 (Colo. App. 1998) (emphasis in original).

However, the expansion recognized by the Court of Appeals in *May* is not in complete consonance with *Campbell,* which came later from the Supreme Court and specifically applies to TABOR matters. Even so, the reasoning in *May* was applied in a matter where only property taxes were being increased and individual property owners might have interests that were either positively or adversely affected by the outcome of the election. But in the immediate instance, the revenues here come not from the imposition of a new tax, but from tax 'increments' which principally affect a larger pool of taxpayers outside the DDA, who in general are not being allowed to vote. TIF changes everything from the *May* circumstances to the matter before the Court here. The proceeds from the TIF will be used to repay public debt incurred for the direct benefit of a number of property owners being allowed to vote on authorizing the debt. By allowing

absentee landlords and proxies for corporate land-holders, and others beside, to participate in this referendum, the DDA is effectively stuffing the ballot box.

Out-of-District Effects from TIF

Meanwhile, the TIF source of the repayment of the City indebtedness is a complication for the voter approval anticipated in this referendum. Like the TABOR requirement to allow participation by all registered electors of the city in the approval of increasing City debt, the effects of diverting property-tax revenues from other taxing entities, and the possible impairment thereby of the functioning of those entities, could well be a concern to some or all voters on the referendum. It could well affect their decision that money is being drawn away from schools, or county services, for a project that has a lower, or no, priority for them; others may have objections to the increased taxes they automatically pay because of the revenue diversion by TIF. Some voters may specifically object to the tax policy, inherent in TIF, that avoids some voter control over tax policy. Still others may have no objection at all, except for the lack of disclosure as to what is really going on.

The ballot question on the City debt increase mentions that repayment occurs through TIF revenues, but it does not mention either how that happens or from whom, much less quantify those effects. This lack of disclosure *within the*

ballot question is fatal to the legitimacy of the TABOR approval being sought. In the case of TIF-backed revenue bonds, simple voter approval is not enough; it should be *informed* voter approval. Later revelations about the effects of TIF engenders voter distrust, as well as public confusion about whether they understood what they were voting on in the first place.

Prior Exceptions to TABOR Spending Limitations

Both referenda at issue here contain a provision that asks voters to approve *in advance* an exception to the spending limitations of TABOR. This is not something that voters may do under TABOR. Section 3(c) is explicit in saying, "Except by *later* voter approval, if a tax increase or fiscal year spending exceeds any estimate…" (emphasis added) Coupled to the pre-approval of all revenue changes, the provision effectively nullifies TABOR's provisions for *all* future voter control over taxes and spending. TABOR does not empower present voters to preclude the options of voters in the future.

The aforementioned provisions also ask voters to approve in advance an exception to all limitations, revenue or spending, found in "any other law" than TABOR. Section 1 of TABOR prohibits this: "Other limits on district revenue, spending, and debt may be weakened only by *future* voter approval." (emphasis added)

Substantial Compliance with TABOR

The test for TABOR compliance is "substantial compliance," based on three factors set forth in *Bickel*, *supra*, at 227:

> (1) the extent of the district's noncompliance with respect to the challenged ballot issue, that is, a court should distinguish between isolated examples of district oversight and what is more properly viewed as systematic disregard of Amendment 1 [TABOR] requirements, (2) the purpose of the provision violated and whether that purpose is substantially achieved despite the district's noncompliance, and (3) whether it can reasonably be inferred that the district made a good faith effort to comply or whether the district's noncompliance is more properly viewed as the product of an intent to mislead the electorate.

Under the first factor, the Respondent City's actions can only be viewed as systematic disregard for TABOR. Indeed, their actions appear as part of a deliberate effort to work around the citizen-control provisions of TABOR. The City does not merely overlook a few voters, but disregards at least 97% of them, and it seeks to dilute the influence of the remainder by figuratively stuffing the ballot box with the votes of non-registered/non-resident/non-citizen/proxy voters who likely have a direct financial interest in the outcome of the election.

As to the second factor, the overarching purpose of TABOR is allowing the registered electors of a taxing entity to decide for themselves the necessity for imposing new tax and debt burdens. The choices of the Respondent City with respect to (a) limiting and diluting the participation of the registered electors of the city, and (b) utilization of tax-increment financing without fully informing voters

of its operation and fiscal implications on other districts, cannot be fairly characterized as in any way fulfilling the overarching purpose of TABOR.

As to the third factor, there has been no good faith effort on the part of the Respondent City in any way to comply with even the most rudimentary concepts of citizen control over tax policy, but rather it has been gaming the system at every stage. At every decision point, the City's choice has been to maximize the flow of tax revenues into the DDA while simultaneously minimizing the opportunity of voters to decide the contrary. The request to have present-day voters unconstitutionally cede the rights of future voters to control debt and spending by the DDA creates voter confusion, as well as being misleading, and possibly deceitful. The failure to disclose to the electorate the full meaning of the TIF revenues is deliberately misleading to those few voters left to decide the bond referendum.

Whether the Court relies on one or all of the criteria established by *Bickel*, the Respondent City has not substantially complied with TABOR's election requirements. The totality of the aforementioned flaws in the ballot questions—each of them fatal in themselves—leads to only one practical judicial outcome: granting the relief requested for a rule setting aside the ballot questions and declaring the elections upon them to be null and void.

I. List of Supporting Documents.

Exhibit 1. Ordinance #6037, City of Loveland.

Exhibit 2. Resolution #R-76-2016, City Council of Loveland.

Exhibit 3. City Update, August 2016, City of Loveland.

Exhibit 4. Intergovernmental Agreement Between Loveland and Larimer.

Exhibit 5. Contestor's Petition.

Exhibit 6. Contestor's Motion for Waiver of Bond Requirement.

Exhibit 7. Contestee's Response to Motion for Waiver of Bond.

Exhibit 8. Contestee's Answer.

Exhibit 9. Contestee's Motion to Dismiss.

Exhibit 10. Contestor's Withdrawal of Motion for Waiver.

Exhibit 11. Contestor's Bond Submission.

Exhibit 12. Contestor's Motion to Deem Bond Sufficient.

Exhibit 13. Contestee's Response to Motion to Deem Sufficient.

Exhibit 14. District Court Order Denying Bond Waiver.

Exhibit 15. District Court Order of Dismissal.

Exhibit 16. Timeline for Immediate Development Project.

WHEREFORE, Petitioner asks this Court to ask this Court to exercise its original jurisdiction and issue a rule to show cause as requested in this petition, to wit: to the court below, reversing orders of 1st and 7th September last,

respectively, as an abuse of discretion, and for not finding the contestor's bond sufficient, then for not proceeding to a trial on the merits; to the Respondent County Clerk, declaring null and void the elections for both Respondent City's referenda set for the November election, and ordering that the ballots cast thereon not be counted; to the Respondent City and its counsel, Thomas Snyder, a finding that interposing opposition in the court below to Contestor's bond submission was frivolous and dilatory, and awarding costs to Petitioner.

DATED this 27th day of September, 2016.

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Larry Sarner, Petitioner *pro se*

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of September, 2016, the foregoing **Petition for Rule to Show Cause**, with associated exhibits, was filed via hand-delivery to the Court, and served via U.S. Mail, first-class postage prepaid, and by electronic mail, as follows:

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