

District Court El Paso County, State of Colorado 270 S. Tejon, P.O. Box 2980 Colorado Springs, CO 80901	
<u>Plaintiff:</u> LINDSAY E. FISCHER vs. <u>Defendants:</u> CITY OF COLORADO SPRINGS; and THE CITY OF COLORADO SPRINGS PUBLIC FACILITIES AUTHORITY	
Attorney for Plaintiff: LINDSAY E. FISCHER, #1768 6 S. Tejon St., #519 Colorado Springs, Colorado 80903 Ph: 719.473.4657 Fax: 719.471.7981 E-mail: Fischerlaw@Comcast.net	Case Number: _____ Division: _____
COMPLAINT	

COMES NOW Lindsay E. Fischer, plaintiff, by his attorney, Lindsay E. Fischer, attorney registration number 1768, admitted to the bar of the state of Colorado by its Supreme Court on February 25, 1959, and says the following:

Definitions

1. The plaintiff is an individual who resides in the City of Colorado Springs and has done so periodically since June 15, 1949, and continuously since July 5, 1967.
2. Defendant City of Colorado Springs (the "City") is a municipal corporation of the state of Colorado and is a home rule city.
3. Defendant The City of Colorado Springs Public Facilities Authority (the "PFA") is a nonprofit corporation organized under the law of Colorado on 02/14/1989 under the name of The City of Colorado Springs Recreation Facilities Authority with its name changed to The City of Colorado Springs Public Facilities Authority by an amendment adopted on July 5, 2000 filed with the Colorado Secretary of State on 07-13-2000.

4. The "City Charter" or "Charter" is the Charter of the City as amended to April 3,2007. The "Council" is the body described and enabled by Article III of the Charter. It is the City's governing body.

5. Michael Anderson, also called Mr. Anderson, also called Anderson, is an assistant city manager. He is an employee per section 13-10 of the Charter and works for the City Manager who is an administrative officer of the City and whose powers and duties are specified in section 4-20 of the Charter. Pursuant to section 4-20(c) the City Manager may delegate to personnel supervised and controlled by the City Manager but despite such delegation, the responsibility for the proper and effective administration of the City remains always with the City Manager and none other.

6. The USOC is the United State Olympic Committee. The USOC is a corporation created by an Act of Congress and is a Section 501(c)(3) entity.

7. The USOC Condos are the 2nd through 5th floors of a building at 27 S. Tejon Street, in the downtown of Colorado Springs, Colorado.

8. The POC is the Police Operations Center located at 705 S. Nevada Avenue in Colorado Springs, Colorado 80903. It is owned by the City and is used by its Police Department.

9. FS-8 is Fire Station Number 8, owned by the City and used by its Fire Department. It is the City's newest fire station. The location of FS-8 is at Airport and So. Academy Boulevard and its area of primary coverage is large covering a fire and medical sensitive area. The area requires and provides a high number of "runs." The fire stations provide emergency medical coverage and 85% or more of the time are first on scene with a paramedic and a full kit of emergency medicine gear before ambulance arrival. The number of medical runs far exceeds the number of runs on structural fires and the medical availability is central to the public's certainty that the fire service in Colorado Springs is a public safety essential and the availability of new and modern fire stations properly located is critical and a highest priority.

10. A COP is a certificate of participation. The COPs involved in this lawsuit are to be issued by the PFA with the proceeds taken by the City and used to buy the USOC Condos, which are to be leased by the City to the USOC for a base rent of \$1.00 per year.

11. The EDA is "The Economic Development Agreement Between The City of Colorado Springs and The United States Olympic Committee Regarding USOC Facilities in Colorado Springs" and is between the City and USOC. It is 24 pages plus Exhibits A through G. [Some exhibits are attached only by title.] The approximate page count including the exhibits and another settlement agreement (not with the USOC but somewhat integral) is a total of approximately 175 pages, not including the condominium declaration which runs to 55 pages.

Factual Basis
(History)

12. The USOC board of directors approved the EDA in July, 2009 (probably on July 24 or July 25) and advised the City that it must sign the EDA without changes by August 11, 2009.

13. The EDA provides for issuance of COPs not later than 45 days after the EDA becomes an agreement and this date is now September 25, 2009.

14. A copy of the EDA, indicating that it is a "DRAFT JULY 23, 2009" was made available to the Colorado Springs public shortly thereafter and the Council announced a special meeting of Council to review the EDA on Friday, July 31, 2009.

15. At the special meeting on July 31, Anderson reviewed the EDA and, at the end of his presentation, said that originally the collateral for the COPs was to be the USOC Condos.

16. The documents made available to the public including leases indicated that the USOC Condos would be owned by the PFA and leased to the City and subleased to the USOC. The PFA would then mortgage the USOC Condos to the COP buyers (presumably by a mortgage to the COP trustee).

17. But, said Anderson, the COP buyers (investors) now require better collateral, namely "essentialities." And he said in this case it is particularly true because money from the sale of the COPs goes to other purposes than just the USOC Condos. Anderson was quoted in The Gazette (see exhibit A attached) as saying "We have to show that the assets that we're pledging are assets that we are never going to walk from. We are suggesting the Police Operations Center as one asset and possibly one fire station, depending upon the sizing of the COPs, how much is necessary." He also said that the City was getting appraisals on these properties.

18. When Mr. Anderson said the foregoing on Friday, July 31 to Council the plaintiff (present at the meeting) leaned over to the Gazette reporter sitting one vacant seat to plaintiff's right and said "that's a game changer, now we have the equivalent of a bond and an election will be necessary."

19. Plaintiff then submitted a brief to the City Council and the City Attorney . This document advises that the COPs now need approval by an election prior to valid issuance if, in fact, the POC and a fire station (which we now know will be FS-8) are to be pledged to secure the COPs.

20. Council then called a "town meeting" on the evening of Thursday, August 6. At this meeting Anderson again presented very similarly to the presentation on July 31, but now did not mention collateral in his presentation.

21. However a question was asked by plaintiff and, in response, Anderson advised the town meeting (7 of the 9 council persons present) that there would be a mortgage on "essentialities."

22. On Friday, August 7, 2009 plaintiff sent exhibit B to Council. For purposes of this civil action disregard all parts of the exhibit except the part with the heading "Essentialities and the election."

23. On Monday, August 10, 2009, plaintiff was advised by the City Attorney that the procedure was changed and that there would be a sale of the POC and of a fire station to the PFA and that the City would leaseback the POC and the fire station and that the rent would be pledged and the POC and the fire station would be mortgaged by the PFA to further collateralize the COPs of the PFA.

24. On Tuesday, August 11, 2009, the Council voted to execute and deliver the EDA.

25. At this point in time there was no change in paperwork made available to the public. But now the deal apparently is different in that the City will buy and lease the USOC Condos so there is no PFA lease to the City and no City sublease to the USOC. Instead we have the City owning the USOC Condos and no PFA involvement with the USOC Condos. The City will own and directly lease to the USOC for \$1.00 per year for 30 years, when the USOC Condos will be given to the USOC.

26. On Thursday, August 13, 2009 the City published a notice indicating that there will be a public hearing at the Council meeting to be held on Friday, August 28, 2009, "concerning the approval of the issuance by The City of Colorado Springs Public Facilities Authority ... of Certificates of Participation in an aggregate principal amount of \$38,000,000 ("COPs"). Proceeds of the COPs will be used by the Authority to acquire the Police Operations Center and Fire Station No. 8 from the City, which the Authority will lease to the City on a year to year basis subject to annual appropriation." Not stated in the notice, but a matter of fact, the annual rentals under the City leaseback will equal the annual interest and principal payments on the COPs, and the City will pay all other occupancy costs of retaining use of the POC and FS-8.

26. Prior to this notice Mr. Anderson in discussing the principal amount of COPs had used a number lower by at least several million dollars.

27. The notice is required by the Internal Revenue Code. The public is invited to attend and present comments. There is no requirement that the Council give any force or effect to the public comments. The said notice is exhibit C and is incorporated herein in full text by this reference.

28. Anderson indicated on July 31, 2009 that appraisals would be needed to support the mortgage of the POC and "possibly" a fire station. No appraisals have been made available to the public.

29. The ability of the public to comment on August 28 is totally defeated by lack of knowledge of the value of the POC and FS-8. Accordingly the public notice is a sham and of no force and effect for the required purpose.

30. The COPs are not being used for a governmental purpose.

31. The COPs are being used for a public purpose.

32. The POC and FS-8 are essential City facilities.

33. The highest duty of the City and of its Council is to provide for public safety. This duty has the highest priority.

34. City Council persons and City documents have routinely stated that public safety and the provision thereof and the funding thereof is the highest priority.

35. The highest priority is the same as saying "essential."

36. The POC and FS-8 are public safety assets. This makes them essential assets. In fact both the POC and FS-8 are in buildings which are irreplaceable in the short term and this means that the failure to fund would be a municipal disaster that Council must and would avoid at virtually all costs.

37. Necessarily using general revenues, the failure to fund the leases from the PFA to the City on the POC and FS-8 (the "leasebacks") would terminate the rights of the City to use, occupy and operate these essential public safety assets.

38. Loss of said rights would endanger the public of Colorado Springs.

39. The public of Colorado Springs will not permit any future Council to fail to fund the leasebacks.

40. Any future Council will be required to fund the leasebacks annually from general fund revenues.

41. At the August 11 Council meeting Councilman Darryl Glen said "If there is a shortfall, I guarantee you we'll be looking at the general fund to make up the difference." See Exhibit A, page 3. He also said that, basically, the rent on the POC and FS-8 are an annual obligation automatically to the top of the list for annual appropriations and that the spirit of the COP is violated. [He also said it was not only important to do the right thing but also to do it the right way and called for a vote and said the Council was moving too fast and that it should take more time.]

42. The said requirement on any future Council will be at least equal to the requirement if the COPs were considered the same as City general revenue bonds.

43. The said COPs are in fact the same as City general revenue bonds.

44. City general revenue bonds can be issued only if authorized by a City election.

45. Unless these leasebacks are authorized by a general election they must either not occur or, if they do occur, be cancelled by a court.

46. The COPs may not be legal without an election even if not secured by essential city facilities (or perhaps just any city facilities) because the purpose is public rather than governmental, but this is not a point in litigation in this civil action.

47. The form is alleged to be a COP. The substance is a bond. The statement in the IRS notice that the leaseback will be "on a year to year basis subject to annual appropriation" may be correct but only in terms of the legal statement but not in terms of reality.

48. The above quoted statement is fundamentally misleading and is intellectually dishonest. Form does not trump substance.

49. The City's bond counsel (introduced as such) at the Council meeting on August 11, 2009 stated that the use of a mortgage or a sale and leaseback were really the same because they are just different "forms" for the same purpose, namely to collateralize an obligation. If true this undercuts the City because it proposed a mortgage and then shifted to a leaseback, The shift was an admission that the mortgage would create a bond which would create an election. So if the leaseback is purpose equivalent, then there is an election requirement. [Conclusion: the leaseback must be dropped if the COPs are to be issued without an authorizing election.]

50. The PFA is entirely an alter ego of the City.

51. The reason for the foregoing statement is its membership (all City Council or City officers or senior City employees) as stated in its Articles of Incorporation.

Causes of Action

The PFA:

52. Pursuant to Article IX of the Articles of Incorporation of the PFA "financing arrangements" between the City and the PFA must be "consistent with the limitations of the Colorado Constitution and the home rule Charter of the City."

53. The COPs are not consistent with said limitations because the City is limited to using COPs without an election only where the COP does not inhibit the

power of future Councils to terminate the funding of the COP from future general revenues.

54. Also, the purposes of the Authority (Article III) focus on facilities (see the name) for public use, but here the facilities in question are not the POC and FS-8 but the USOC Condos and the idea, as stated time and again by Council members, is to help downtown Colorado Springs as a location needing economic development. This is why the agreement with the USOC includes the word "Development."

55. This reason by a stretch may be a public good but it is not a public use.

56. Accordingly the Articles of Incorporation of the PFA preclude its use in this scheme (i) to subsidize the USOC and its selected 150 (more or less) athletes and (ii) to obtain for the City some branding rights claimed to be valuable now and significant for the future quality of life in the Pikes Peak Area.

The State Constitution
Article XI, Section 2

57. Article XI, section 2, of the State Constitution prohibits a donation or grant to, or in aid of, any private corporation.

58. The USOC is a private corporation.

59. The provision of free rent for 30 years followed by donation of the property (the USOC Condos) to USOC, is both in aid of and a grant to, a private corporation.

60. The deal with the USOC is unconstitutional.

61. On this basis it should be cancelled.

Article XI, Section 6

61. Article XI, section 6 provides that no city shall contract a general obligation debt "by loan in any form," except by a resolution irrevocable until the debt is paid in full and providing a tax which shall be sufficient to pay the principal and interest. And there must be an election to authorize the debt (unless otherwise provided by the home rule charter, which is not the case in Colorado Springs).

62. With the PFA being an alter ego [specifically otherwise in the case of Gude vs. City of Lakewood, 636 P.2d 691 (Colo. 1981)] and with the lease of an "essentiality" of the highest priority, we are dealing with a loan, the leaseback is irrevocable until the COPs are paid in full in 30 years, and there has been no election.

63. Until there is an election the deal with the USOC is unconstitutional.

64. On this basis it should be cancelled.

The City Charter
Section 7-80

65. Section 7-80(a) says that "No bonds or other evidences of indebtedness, payable in whole or in part from the proceeds of ad valorem property taxes" shall be issued except pursuant to ordinance and unless the question of the issuance of the bonds (presumably including other evidence of indebtedness) shall be submitted to election and approved.

66. Given that the COPs are evidences of indebtedness, and are City issued because the PFA is an alter ego of the City and Article IX of the PFA articles state that the PFA is an "instrumentality of the City" and that the City has a beneficial interest in the Authority, and that, in this case the COPs are in truth and in fact bonds, Section 7-80(a) requires an election and electoral approval.

67. Until there is an election the deal with the USOC contravenes the City Charter.

68. On this basis unless and until there is an approving election, it should be prevented if not done and should be cancelled if already done.

Section 7-90

69. Section 7-90(d) of the Charter requires voter approval in advance of "City creation of a direct or indirect City debt or other financial obligation whatsoever that extends, or causes a penalty if not extended, past the fiscal year incurred without adequate present cash reserves irrevocably pledged and held for all future payments."

70. The COPs are indirect City debt or other financial obligation which contain a penalty if the City does not pay the money which provides the annual payment of interest and principal on the COPs.

71. There has been no voter approval in advance.

72. Until there is voter approval this deal with the PFA and the USOC is a contravention of the City Charter.

73. If the deal is done prior to voter approval, it should be cancelled. If the deal is not done prior to judicial action and if there is no voter approval, it should be prevented.

General Law

74. All cases where the ability to issue a COP without an election has been litigated and no election has been required:

a. have involved financing of a property for a governmental purpose;

b. have used an authority which was not the alter ego of the governmental unit which was to be benefitted by the issuance of the COPs; and

c. the collateral for the COPs was limited to the improvement upon which the COP money was being spent.

75. Until now the City and the county in which it is located (El Paso County) have conformed to the following limitations when issuing COPs (except the City has used an alter ego authority).

76. Now the City proposes to use COPs for a non-governmental purpose, to use a completely alter ego authority, and to secure the COPs with essential governmental property which has not been and will not be connected with the purpose of the COPs (unless there is a default and the governmental property is foreclosed upon by the COP trustee).

77. The USOC deal goes beyond the use of COPs by the courts in creating a dodge around election requirements.

78. The fundamental rule is that no current legislature can commit a future legislature to a specified appropriation for general funds. Today's incumbents can't dictate to tomorrow's incumbents. But there is an exception. Today can commit and bind tomorrow if the population of the jurisdiction hold an election and at the election approve the future commitment.

79. The dodge is that the courts have closed their eyes to the lack of realism if the need is governmental, the use is governmental, the collateral is connected to the improvement, and the deal involves a statement that the appropriation can be skipped or stopped in any future year by the future legislature.

80. But there is an end to any dodge. If taken too far, the courts find a way to limit the dodge.

81. In this case, the dodge goes too far. The court is obliged to say this COP does not dodge the election requirement.

82. Accordingly the USOC deal may be fatally flawed.

83. Accordingly the USOC deal without an approving election is fatally flawed, certainly unless and until the security/collateral using unconnected essential governmental assets is removed.

84. Therefore, unless and until there is an approval election, the issuance of COPs for the USOC deal must be stopped if it has not yet occurred before judicial action, or if it has occurred, then the court must cancel the sale and leaseback, returning the POC and FS-8 to the City and cancelling the lease payments. (However, in fairness, the City should transfer the USOC Condos which it bought with PFA/COPs money over to the PFA and then, as originally intended, lease the USOC Condos from the PFA for the same lease payments. Then the PFA

would mortgage the USO Condos to the COP trustee, and that property would be the collateral and the whole deal would be as originally intended and explained to the Council and to the citizens of Colorado Springs.)

Facilitation of the Disposition
of This Case

85. The USOC has required the City to approve the Economic Development Agreement on or before August 11, 2009 and that the certificates of participation be sold at or before 45 days from August 11. That deadline date is September 25, 2009.

86. The plaintiff has no knowledge, information or belief as to whether the USOC may agree to move (extend) the deadline for good cause shown if so requested by the City.

87. The plaintiff desires to accommodate the City in any reasonable way to accelerate the disposition of this case. The purpose of the plaintiff is to obtain a judicial determination of whether this intended collateralization of the COP obligation requires a favorable vote to be permitted.

88. If it does the alternatives are a favorable election or sale without City collateral. That sale might be "naked," with payment of additional interest to compensate for additional risk, or a guarantee from a private entity with sufficient financial strength (insurance or perhaps from a large foundation).

89. In any event, the plaintiff is open to an extremely expedited disposition if City agrees that the leaseback transaction results in a vanishingly small likelihood that the City in any future year would decide not to and then would fail to pay the rent and would allow an appropriate length of time (which should be a rather short time) to brief the issues.

90. This issue would simply be: Does the scheme, however labeled and documented, in fact require appropriations from the general fund by future councils. If it does, is election approval required. Or does the scheme create a COP which is within the protection from election created by case law.

91. The plaintiff will promptly follow with a proposed findings of fact, conclusions of law, and order of court.

92. The bottom line for the plaintiff is, of course, that these COPs represent form over substance and that substance controls and therefore an election is required. For this issue the plaintiff wants a judge's decision. Neither more nor less.

Request for Relief

The plaintiff prays that the Court enter an order as follows:

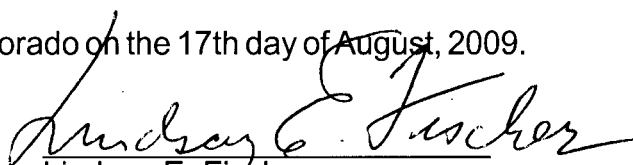
A. If there is no favorable election, the City shall not lease the POC and FS-8 to the PFA.

B. If there is no favorable election, and the City does lease the POC and FS-8 [this happens before the Court can decide this case], the PFA will return the POC and FS-8 to the City and the City will transfer the USOC Condos to the PFA, lease the USOC Condos from the PFA and pay the same lease money to the PFA (and then sublease to the USOC for \$1.00 per year).

C. In the order a reference to the POC and FS-8 will include any other property which the City may add or substitute.

D. The order will award court costs to the plaintiff, to be paid by the City.

DONE at Colorado Springs, Colorado on the 17th day of August, 2009.


Lindsay E. Fischer
Attorney Reg. No. 1768
Attorney for Plaintiff

Address of Plaintiff:

55 Marland Road
Colorado Springs,
Colorado 80906-4329
Residence Phone 719.634.1787