DISTRICT COURT, JEFFERSON COUNTY, COLORADO 100 Jefferson County Parkway Golden, Colorado 80401-6002	
CDN RED ROCKS LP; **STREAM REALTY ACQUISITION LLC;** **THREE DINOS LLC;** **CARDEL HOMES U S LIMITED PARTNERSHIP;** **BIG SKY METROPOLITAN DISTRICT NO 1** Plaintiffs: v. **GREEN MOUNTAIN WATER AND SANITATION DISTRICT** Defendant	▲ COURT USE ONLY▲ **Case Numbers:** 19CV31158 19CV31172 19CV31185 19CV31250 19CV30887 **Division:** 2 **Courtroom:** 4B

ORDER RE: DEFENDANT'S MOTIONS TO DISMISS AND MOTION FOR SUMMARY JUDGMENT REGARDING APPLICABILITY OF COLO. R. CIV. P. 106

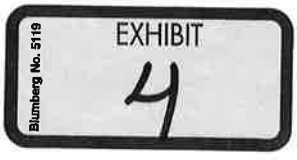
THIS MATTER comes before the Court on Defendant Green Mountain Water and Sanitation District's ("Green Mountain") *Motion to Dismiss* in cases 19CV31158, 19CV31172, 19CV31185, 19CV31250, and Green Mountain's *Motion for Summary Judgment* filed in 19CV30887 (collectively "Motions"). Plaintiffs filed Responses and Green Mountain filed Replies. Having reviewed the motions, affidavits, and all other relevant materials, THE COURT FINDS AND ORDERS AS FOLLOWS:

I. BACKGROUND

Green Mountain asserts Plaintiffs' claims should be dismissed pursuant to Colo. R. Civ. P. 12(b)(1). Rule 12(b)(1) provides a means for dismissing claims for lack of subject matter jurisdiction. Green Mountain claims its actions including a board resolution finding the Big Sky/Green Mountain Intergovernmental Agreement void were quasi-judicial in nature and so subject to the requirements of Colo. R. Civ. P. 106 ("Rule 106"). This Order addresses Green Mountain's Motions as they relate to Rule 106 only; the Court shall address Green Mountain's other arguments in separate orders.

II. STANDARD OF REVIEW AND LEGAL AUTHORITY

Colorado Rule of Civil Procedure 12(b)(1) permits dismissal of claims for "lack of jurisdiction over the subject matter." Although the defendant may invoke the lack of jurisdiction as a defense, the plaintiff bears the burden of establishing the trial court's jurisdiction. *Associated Gov'ts of Nw. Colo. v. Colo. Pub. Utils. Comm'n*, 2012 CO 28, ¶ 7, 275 P.3d 646; *Dev. Recovery Co., LLC v. Pub. Serv. Co. of Colorado*, 2017 COA 86, ¶ 13, 410 P.3d 1264, 1267. In determining a motion under Rule 12(b)(1), evidence outside the pleadings



may be considered. *Id.*; *City of Aspen v. Kinder Morgan, Inc.*, 143 P.3d 1076, 1078 (Colo. App. 2006). If a court's jurisdiction turns on disputed facts and the court cannot determine its jurisdiction on the face of the pleadings, it may instead hold an evidentiary hearing and make factual findings related to its jurisdiction. *Medina v. State*, 35 P.3d 443 (Colo. 2001). The court's consideration of evidence extraneous to the complaint does not convert a motion to dismiss for lack of subject matter jurisdiction to a motion for summary judgment. *Colorado Special Districts Prop. & Liab. Pool v. Lyons*, 2012 COA 18, 277 P.3d 874; cert. dismissed, (Mar. 2, 2012); *Lee v. Banner Health*, 214 P.3d 589 (Colo. App. 2009). In acting as the trier of fact for purposes of determining its jurisdiction, the Court need not accord any presumption in favor of the plaintiff, but instead is obligated "to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 925 (Colo. 1993).

III. ANALYSIS

Green Mountain argues its actions relating to the IGA were quasi-judicial in nature for which the exclusive avenue for review is to file a claim within 28 days of the decision under Colo. R. Civ. P. 106(a)(4). If true, Plaintiff's failure to file by the deadline results in this Court lacking subject matter jurisdiction pursuant to Colo. R. Civ. P. 106(b). *Maslak v. Town of Vail*, 2015 COA 2, 345 P.3d 972. Rule 106(a) states:

> Where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law . . . Review pursuant to this subsection (4) shall be commenced by the filing of a complaint.

C.R.C.P. 106(a)(4). Subsection (b) provides that "[i]f no time within which review may be sought is provided by any statute, a complaint seeking review under subsection (a)(4) of this Rule shall be filed in the district court not later than 28 days after the final decision of the body or officer." C.R.C.P. 106(b). Failure to file by the deadline divests the reviewing court of subject-matter jurisdiction. *Citizens for Responsible Growth v. RCI Dev. Partners*, 252 P.3d 1104, 1106 (Colo. 2011); *Maslak v. Town of Vail*, 2015 COA 2, 345 P.3d 972.

I. Rule 106 is inapplicable because Plaintiff has an adequate remedy at law.

Rule 106 only applies if there is no available remedy for challenging the actions of an inferior tribunal. The plain language of the rule supports this conclusion: "Where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has *exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law*. . . (emphasis added). C.R.C.P. 106(a)(4).

Plaintiffs are not challenging any abuse of discretion by Green Mountain, rather, Plaintiffs oppose Green Mountain's actions as breaches of contract, among other related claims. The availability of a breach of contract action is a sufficiently adequate remedy making Rule 106 inapplicable. This principle was upheld by the Colorado Court of Appeals in *Ebke v. Julesburg School District No. Re–1*, 37 Colo.App. 349, 550 P.2d 355 (1976), *aff'd*, 193 Colo. 40, 562 P.2d 419 (1977). In *Ebke*, a group of teachers sued to challenge a school board's decision to limit salary increases. The suit was initiated as a breach of contract action, based upon

the statutory contract between the teachers and the school district. The trial court dismissed the suit because the teachers failed to proceed under Rule 106(a)(4). The court of appeals reversed stating:

> C.R.C.P. (a)(4), review in the nature of certiorari, is applicable where a party is attacking an action taken by a board. However, that section is directed to an action against the Board for exceeding its jurisdiction or abusing its discretion, *but permits relief only when there is no 'plain, speedy and adequate remedy,' and thus does not apply to the first claim where, as here, the plaintiffs allege a breach of a pre-existing contract.* (citations omitted) (emphasis added)

Ebke, 550 P.2d at 357. Thus, a plaintiff is barred from seeking relief under Rule 106 when a breach of contract action is available, as plaintiffs here claim.

II. Rule 106 is inapplicable because Green Mountain's actions were not quasi-judicial.

Rule 106 is inapplicable here because Green Mountain was not acting in a "quasi-judicial" capacity when it adopted the resolution. C.R.C.P. 106(a)(4) provides for district court review when an inferior tribunal exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion. To determine whether the action was quasi-judicial, the Court looks to the following factors:

> (1) a state or local law requiring that the body give adequate notice to the community before acting; (2) a state or local law requiring that the body conduct a public hearing, pursuant to notice, at which time concerned citizens must be given an opportunity to be heard and present evidence; and (3) a state or local law requiring the body to make a determination by applying the facts of a specific case to certain criteria established by law.

Montez v. Bd. of Cty. Comm'rs of Pueblo Cty., 674 P.2d 973, 975, *citing* (Colo. App. 1983) *Snyder v. Lakewood*, 189 Colo. 421, 542 P.2d 371 (1975). "There is no 'litmus test' for whether a particular action is quasi-judicial; instead, [the court] must look to the nature of the decision being made, the scope of those affected by it, and the procedure used to make it." *Prairie Dog Advocates v. City of Lakewood*, 20 P.3d 1203, 1207 (Colo. App. 2000), *as modified on denial of reh'g* (July 20, 2000) (*citing Cherry Hills Resort Development Co. v. City of Cherry Hills Village*, 757 P.2d 622 (Colo.1988)). Where a statute requires notice to affected persons and a hearing before an impartial decision-maker, the action is almost certainly quasi-judicial. *Snyder v. City of Lakewood,* 189 Colo. 421, 542 P.2d 371 (1975); *Chellsen v. Peña,* 857 P.2d 472 (Colo.App.1992). However, in the absence of a statutory requirement for notice and a hearing, an action may still be quasi-judicial in character if "the governmental decision is likely to adversely affect the protected interests of specific individuals, and if a decision is to be reached through the application of preexisting legal standards or policy considerations to present or past facts." *Cherry Hills Resort Development Co.*, 757 P.2d at 627.

Here, Green Mountain argues its adoption of a resolution finding the IGA was void was a quasi-judicial act. In support of this, Green Mountain argues (1) the resolution affected the rights and duties of

specific individuals, namely Big Sky Metropolitan District No. 1, (2) the decision was reached through the application of preexisting legal standards to present or past facts, including the Colorado Constitution and the Special District Act to the terms of the IGA, (3) notice was given that the IGA was being suspended and was under review, (4) public notice of the meeting was posted as required by the Special District Act, and (5) the plaintiffs were given the opportunity to be heard at the Regular Meeting of the Board of Directors when the resolution was adopted.

No state or local law requires notice to be given before a municipal entity terminates a contract. Instead, Colorado courts have consistently ruled that the terms for termination of a contract are governed by the contract itself. *See e.g. City of Fort Collins v. Park View Pipe Line*, 139 Colo. 119, 336 P.2d 716 (1959)(where city was under no obligation as a matter of law to furnish services to plaintiff, the relationship between the parties was purely contractual in nature and city could not terminate contract by resolution except by following the express provisions for termination within the contract); *Bennett Bear Creek Farm Water & Sanitation Dist. v. City & Cty. of Denver By & Through Bd. of Water Comm'rs*, 928 P.2d 1254, 1266 (Colo. 1996) ("a governmental entity may engage in contracting functions which we have described as being proprietary. Contracts cannot simply be abrogated, or ignored, and must be given effect in light of their essential purpose and effect.") There is also no law requiring Green Mountain to hold an evidentiary hearing and the Court is not persuaded that a regular monthly meeting of the board qualifies as such a hearing. While Green Mountain attempts to justify its actions by applying law to the contract, no law so requires Green Mountain to act in that judicial capacity. Green Mountain has essentially attempted to substitute its board of directors for the Court without any law requiring it to do so. The Court therefore finds Green Mountain was not acting in a quasi-judicial capacity.

III. Green Mountain's acts were not quasi-judicial because Green Mountain would be ruling on the validity of its own contracts in derogation of the fundamental requirement of impartiality for those serving in quasi-judicial capacities.

Quasi-judicial decision-making "bears similarities to the adjudicatory functions performed by courts." *Cherry Hills Resort Dev. Co. v. City of Cherry Hills Vill.*, 757 P.2d 622, 626 (Colo. 1988). Green Mountain has cited to no case, and the Court in its own search has found none, where a quasi-municipal corporation is given the authority to judge the validity of its own, previously entered contracts. It appears to the Court that such action would be beyond the scope of the powers entrusted to Green Mountain. Cases like *Soon Yee Scott v. City of Englewood*, while relating to the review of quasi-judicial decisions after jurisdiction is found, are nonetheless instructive in determining that Green Mountain was not acting in a quasi-judicial capacity here. *See Soon Yee Scott v. City of Englewood*, 672 P.2d 225, 227 (Colo. App. 1983) ("There is a presumption of integrity, honesty, and impartiality in favor of those serving in quasi-judicial capacities.") In particular, the requirements of impartiality and avoiding conflicts of interest in quasi-judicial actions show how strained Green Mountain's attempt to apply C.R.C.P. 106 in this situation is. Green Mountain is asking the Court to find that it was acting in a quasi-judicial capacity in "ruling" on the validity of its own contract. The Court finds the notion that a party to a contract could also act impartially as the arbiter of that contract's validity unpersuasive. By Green Mountain's logic, it could enter into any number of contracts on any topic and could then later repudiate those contracts claiming them to be subject to its "quasi-judicial" decision-

making authority. Such powers are not entrusted to Green Mountain but are instead the proper province of the courts.

Green Mountain cites to *Ad Two, Inc. v. City & Cty. of Denver ex rel. Manager of Aviation*, 9 P.3d 373 (Colo. 2000), ("*Ad Two*") claiming it stands for the proposition that "when a governmental entity interprets a contract to which it is a party . . . even if the governmental entity finds the [other party to the contract] to be in breach, such interpretation is a judicial action subject to exclusive review under Rule 106(a)(4)." Green Mountain's assertion is based upon a faulty reading of the facts in *Ad Two*. Green Mountain incorrectly claims the City Manager's determination that airport concessionaires were in breach of their contract with the city was a judicial action reviewable under Rule 106. In reality, the City Manager was simply the representative of the city, a party to the case, whose view the hearing officer, at an administrative hearing, adopted. It was the *hearing officer's* determination, not the City Manager's, that was reviewed under Rule 106. In fact, *Ad Two* was decided precisely in line with *City of Fort Collins v. Park View Pipe Line*, *supra*.; the determination of the parties' dispute was governed by the contract itself. In *Ad Two*, the terms of the contract provided for disputes to be submitted to an administrative hearing before a hearing officer. *Ad Two, Inc. v. City & Cty. of Denver ex rel. Manager of Aviation*, 9 P.3d 373, 375 (Colo. 2000). A two-day hearing was held after which the hearing officer agreed with the City Manager, and the concessionaires appealed the hearing officer's determination pursuant to Rule 106. *Id.*

IV. Rule 106 is inapplicable because Green Mountain's actions were proprietary in nature.

The Court finds Green Mountain was acting in a proprietary capacity when it entered into the IGA and when it adopted the resolution claiming the contract to be void. Green Mountain is not set up as an adjudicator of the validity of contracts. This supposed quasi-judicial action is beyond the scope of Green Mountain's role as a water and sanitation district. When a governmental body enters into a contract, it does so by exercising "its contractual, its private, proprietary, or business powers, so to speak, and not of its governmental or delegated legislative powers." *City of Denver v. Hubbard*, 68 P. 993 (Colo. App. 1902); *Perl-Mack Enterprises Co. v. City & Cty. of Denver*, 194 Colo. 4, 568 P.2d 468 (1977) ("Contracts providing for sanitation services and the fees to be charged for those services are within the proper scope of the proprietary powers of a municipal corporation.") Furthermore, Green Mountain does not point to any provision of the statute that gives it powers requiring it to either review its own contracts or base its review on the application of preexisting legal standards or policy considerations to present or past facts. Green Mountain essentially argues that it can act in the role of the courts in determining the validity of its own contracts. The Court is not so persuaded. *See e.g. Chellsen v. Pena*, 857 P.2d 472 (Colo. App. 1992) (No provision giving Commission authority to conduct hearing, and "Such *ex parte* decisions are not quasi-judicial. Judicial decisions ordinarily resolve disputes between parties"). *See also Montez v. Bd. of Cty. Comm'rs of Pueblo Cty.*, 674 P.2d 973, 974 (Colo. App. 1983) (County board of commissioners was not acting as quasi-judicial tribunal, so that complaint by county employees, laid off from their jobs, for breach of contract should not have been dismissed on grounds that trial court was without jurisdiction).

Green Mountain argues the "proprietary" distinction only applies when there are contracts between a government entity and a private party, and that "proprietary" contracts are subject to Rule 106. Green

Mountain's argument is incorrect. The "proprietary" distinction relates not to the kind of party or kind of contract, but to the source of the entity's power to act. The case Green Mountain cites to, *Bennett*, is a perfect illustration of this distinction as in that case the government entity had entered into a contract in its proprietary capacity but had set rates according to its governmental legislative capacity. In *Bennett*, the Colorado Supreme Court expressly declined to eliminate the government/proprietary distinction:

> Despite the Water Board's urging in this case, we find no occasion here to extinguish all reference to a governmental versus proprietary distinction. When operating a utility a governmental entity may engage in contracting functions which we have described as being proprietary. Contracts cannot simply be abrogated, or ignored, and must be given effect in light of their essential purpose and effect.

Bennett Bear Creek Farm Water & Sanitation Dist. v. City & Cty. of Denver By & Through Bd. of Water Comm'rs, 928 P.2d 1254, 1266 (Colo. 1996). The Court in *Bennett* found the Water Board's power to determine rates was legislative in nature, not proprietary or quasi-judicial, by relying on statutes expressly authorizing governmental entities to set rates for their water service, the same power traditionally given to public utilities commissions. The Water Board's ability to set rates was not determined by contract but was instead statutorily granted legislative authority under section 31-35-402(1)(f). As the Court explained, "we used the "proprietary" description to distinguish a contractual service, in circumstances where a city is under no duty to serve yet decides to do so, from in-city service which is owed to consumers because of their resident status." *Id.* The Water Board's ability to contract with those not entitled to service was within its proprietary powers, and those relationships were governed by the contracts. The Water Board's ability to set rates was a separate power entrusted to the Water Board by the legislature through statute. As the Court in *Bennett* noted, where the relationship between the parties is not established by a statutory grant of legislative or quasi-judicial authority, the "governmental entity may engage in contracting functions which we have described as being proprietary. Contracts cannot simply be abrogated, or ignored, and must be given effect in light of their essential purpose and effect." *Id.*

V. CONCLUSION

Therefore, the Court finds Colo. R. Civ. P. 106 is inapplicable here and the Motions, as to the Rule 106 jurisdictional issue, are **DENIED**.

SO ORDERED this 29th day of January, 2020.

BY THE COURT:

Christie A. Bachmeyer
District Court Judge