

DISTRICT COURT, JEFFERSON COUNTY, COLORADO 100 Jefferson County Parkway , Golden, CO 80401	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
BIG SKY METROPOLITAN DISTRICT NO 1, Plaintiff v. GREEN MOUNTAIN WATER AND SANITATION DISTRICT, Defendant	
AMICUS CURIAE John Henderson. #50508 16 Shaw Road Westport Island, Maine 04578 Jkhjr1@gmail.com 207-607-1822	Case No. 19 CV 30887 Division 2
AMICUS CURIAE BRIEF	

Amicus respectfully provides the following in support of the defendant's motion for summary judgment.

The Court of Appeals in its decision in this case stated:

"Big Sky and Green Mountain executed the IGA in mid-2018. But less than a year later, the latter's Board of Directors approved a resolution terminating the IGA. **The resolution further declared the IGA void since its inception on a number of grounds (though none eventually advanced in the district court or on appeal).** (emphasis added) *Big Sky v. Green Mountain, Opinion 21 CA 1507, March 23, 2023* p. 2.

Although the motion of Green Mountain for summary judgment remains suppressed, it appears from the Cardel response that no parties have addressed the grounds for terminating the

Big Sky IGA set forth in the Resolution Terminating the Big Sky IGA dated April 9, 2019 ("Resolution") identified by the Court of Appeals in its decision. This brief addresses one set of grounds asserted by Green Mountain in the Termination Resolution which the Court of Appeals referenced but the parties, apparently, have not.

All of the reasons set forth in the Resolution (Exhibit A) support the termination. This brief will focus on the three findings by the Green Mountain Board listed as findings a, b and c on page 3 of the Resolution stating that Big Sky did not have authority under Title 29 to enter into the Big Sky IGA creating a new regional sanitation district for Rooney Valley which would provide sanitation services to other districts outside the boundaries of the Big Sky District:

- a. Big Sky is not "lawfully authorized" under C.R.S. 29-1-203(1) to enter into an IGA to be the "master meter" for Rooney Valley and provide the services enumerated in the Big Sky IGA; and,
- b. No "legislative body or other authority having the power to so approve", has approved the Big Sky IGA on behalf of Big Sky under C.R.S. 29-1-203(1); and,
- c. The Big Sky IGA is a material modification of the limitations in the Big Sky Service Plan pursuant to C.R.S. 32-1-102 (1), 32-1001 (1)(d)(1), 32-1-202(2), and 32-1-207(2), and Big Sky does not have authority from the City of Lakewood and Jefferson County to comply with the IGA

(Exhibit A Termination Resolution, p. 3)

There is a well recognized presumption that the Green Mountain board members “properly discharged their official duties” when they voted to terminate the IGA with Big Sky. *Pub. Util. Com. v. Dist. Ct.*, 431 P.2d 773, 776-77 (Colo. 1967) (“[i]n the absence of clear evidence to the contrary, courts presume that [governmental officials] have properly discharged their official duties”); *Schlager v. Greenwood*, 586 P.2d 248, 248 (1978). “It is not enough to prove facts from which an inference of irregularity may be drawn; in order to overcome the burden of proof, the evidence must be such as to exclude any reasonable presumption of regularity.” *Colpitts v. Fastenau*, 192 P.2d 524, 530 (Colo. 1948).

And from one of the few cases, and the leading case, that describes the characteristics of an IGA, *Durango Transp., Inc. v. City of Durango*, 824 P.2d 48, 52 (Colo. Ct. App. 1991), the Court defined intergovernmental agreements as acts which are by their very nature "subject to the control of the citizenry" and "since each respective group of citizenry in the City and County can effect change through the electoral process, it follows that if they are dissatisfied with an intergovernmental contract entered into by their responsible governing boards, they can also exercise their rights by recalling the elected officers who approved the contracts." *Durango Transp., Inc. v. City of Durango*, 824 P.2d 48, 52 (Colo. Ct. App. 1991).

The newly elected Green Mountain Water and Sanitation District Board decided, after 8 months of public hearing and debate that the Big Sky IGA was void, in part because Big Sky did not have authority to author, sign and enter into the IGA establishing Big Sky as the new "master meter" for all of Rooney Valley. For the same reasons, Green Mountain is entitled summary judgment on Big Sky/CDN and Cardel's claims in this action. The Big Sky IGA is void because, as a matter of law, Big Sky had no authority to enter into the Big Sky IGA.

Facts

1. The Big Sky IGA attempted to create a new regional sanitation district for all of Rooney Valley.
2. The Big Sky IGA was very different from the Solterra IGA which was limited to providing sanitation service within the boundaries of the Solterra district.
3. In the Fossil Ridge (Solterra) IGA dated November 11, 2014, Green Mountain stated in two separate sections of the IGA that **it was not agreeing to provide any sanitation service beyond the Solterra development.** (Exhibit B, Solterra IGA, p. 5, section 2.4 and 2.6)

"Green Mountain **does not** by this Agreement [Solterra IGA] agree to accept any Wastewater which is produced or collected **outside of the [Solterra] Service Area.** (Section 2.4)

"Green Mountain **does not, by this Agreement, agree or represent that it will accept Wastewater from any property within the Future Development Area.** The Parties recognize and agree that Green Mountain may be required to obtain the consent of the City of Lakewood, the Town of Morrison, and/or the Mount Carbon Metropolitan District before providing sanitary sewer service to any portions of the Future Development Area which are not located within the boundaries of the City of Lakewood as of the date of this Agreement [2014]." (emphasis added) (Section 2.6).

4. Compare this express statement in the Solterra IGA about NOT providing service outside the Solterra Service Plan Service Area with the opposite construction created by the Big Sky IGA in 2018.

5. Exhibit C1 is the map of the Big Sky Service Area approved by the City of Lakewood when the Big Sky Metro District was created in 2014. Exhibit C2 is the Big Sky Service Area unilaterally created in 2018 in the Big Sky IGA by Big Sky **without approval of** the City of Lakewood. Exhibit C3 is an overlay (black boundary) of the Service Area for the Big Sky Metro District approved in the Service Plan by the City of Lakewood onto the "Service Area" not approved by anyone with authority and simply asserted by Big Sky in the Big Sky IGA as its new "Service Area".

6. The Big Sky IGA unilaterally enlarged the Big Sky Service Area to include other properties and districts **outside the Big Sky Metro District boundary. This fact was admitted by counsel for Big Sky.**

The New "Master Meter" for All of Rooney Valley Including Property Outside the Big Sky District Approved Service Area

7. In the course of litigating whether or not Big Sky needed permission from the Lakewood City Council to create this new regional sanitation district, counsel for Big Sky stated to

the Lakewood City Council in their brief in 2018, Big Sky ". . . will essentially act as a **master meter** for the properties it serves both **within the Districts' boundaries and *without*** . . . ". (emphasis added) "Enabling development within the Rooney Valley has the potential to increase property values of the future residents of the Districts". "The [Big Sky] IGA provides a streamlined approach to sewer service in the Rooney Valley which has the added benefit of avoiding duplication of facilities and services, and makes sewer facility construction and transmission of wastewater to Green Mountain the most efficient and economical solution, **which is all intended to benefit the Districts, the *properties serviced* and Green Mountain**". (emphasis added) (Exhibit D Memorandum White Bear to Cox, October 15, 2018, p. 6)

8. The IGA service to Solterra was limited to service for the Solterra residents.

9. The Big Sky IGA expanded the Big Sky Service Area beyond just the residents of the Big Sky District to include all of Rooney Valley, creating Big Sky as the new service provider - a new sanitation district - the "master meter" - to properties outside the Big Sky district, including other metro districts and property outside the City of Lakewood.

Law

I. IGAs are Statutory Creatures Which Require Authority from the City and County in this Context

10. CRS 29-1-203 provides for intergovernmental agreements:

"1) **Governments** may cooperate or contract with one another to provide any function, service, or facility **lawfully authorized to each** of the cooperating or contracting units, including the sharing of costs, the imposition of taxes, or the incurring of debt, **only if such cooperation or contracts are authorized by each party thereto with the approval of its legislative body or other authority having the power to so approve**. Any such contract providing for the sharing of costs or the imposition of taxes may be entered into **for any period**, notwithstanding any provision of law limiting the length of any financial contracts or obligations of governments.

- (2) Any such contract shall set forth fully the purposes, powers, rights, obligations, and the responsibilities, financial and otherwise, of the contracting parties.
- (3) Where other provisions of law provide requirements for special types of intergovernmental contracting or cooperation, those special provisions shall control.
- (4) Any such contract may provide for the joint exercise of the function, service, or facility, including the establishment of a separate legal entity to do so. . . ." CRS 29-1-203 (emphasis added)

Big Sky had to have authority to enter into the Big Sky IGA from the legislative body or other authority that had the power to approve establishing Big Sky as the regional "master meter" for all of Rooney Valley. The only authority with the power to approve that change was the City of Lakewood through a modification of the Big Sky Service Plan Lakewood approved in 2014.

II. The Service Plan is the Only Authority Which Can Authorize the Big Sky IGA

11. Title 32 creates special districts. And, consistent with this country's governing principles, the statute limits the powers of these new local governments and holds them accountable. Title 32 does not give these local governments a blank check.

12. Under Title 32, the city or the county creates a special district. CRS 32-1-202. In the case of Big Sky, it was created by the City of Lakewood. (Exhibit D Big Sky Service Plan).

13. Under Title 32, the process begins with a developer filing a proposed Service Plan. CRS 32-202. The City contributes to the content of the Service Plan and must approve the content of the Service Plan. CRS 32-1-202(2) and 203(2). The Service Plan is like a charter, prescribing the limits of the power given to this new government. Id.

14. There are three critical elements to the Service Plan. **First and foremost is the purpose** - "a description of the proposed services". CRS 32-1-202(2). The proposed services for the Big Sky District was financing construction "of all the Public Improvements for the use and

benefit of all **anticipated inhabitants and taxpayers of the District**" . . . "The primary purpose is to provide for the Public Improvements associated with the development of the project [homes and commercial construction]". (Exhibit D Big Sky Service Plan, p. 1).

15. The Big Sky Service Plan itself emphasized its limited purpose: "[t]his Service Plan is intended to establish a limited purpose for the Districts and explicit financial constraints that are not to be violated under any circumstances." (Exhibit E, Big Sky Service Plan p. 1).

16. The **second critical element is the Service Area** of the district. The purpose is limited to serving the residents of that **Service Area**. CRS 32-1-102(1)

17. The Big Sky Service Plan itself emphasized this limitation: "The Districts shall not include within any of their boundaries any property **outside of their Service Area without the prior written consent of the City**". (Exhibit E, Big Sky Service Plan p. 6 - 7).

18. As noted above in paragraphs 5 through 9, the Big Sky IGA unilaterally and in violation of Title 32 and Big Sky's own Service Plan expanded Big Sky's purpose and territory from financing the infrastructure construction of a new residential development within a defined boundary to establishing itself as the new "master meter" sanitation district for all of Rooney Valley, including territory outside its Service Plan Service Area and territory outside the City of Lakewood.

III. The Budget for Providing Sanitation Service to Its Own Residents was Significantly Smaller than Providing Sanitation Services to All of Rooney Valley

19. The **third critical element of the Service Plan is the financial plan**. The Big Sky Service Plan prepared in 2014 provided that the cost of providing sanitation services to its inhabitants was \$415,924.00. (Exhibit E, Big Sky Service Plan, p. 32 "Exhibit D Cost Estimates")

20. In contrast, the cost of the new "Big Sky Sewer System" proposed by the Big Sky IGA to distribute sanitation services to all of Rooney Valley as the new "master meter" sanitation district was \$3,846,528.00. This is more than nine times the budget for installing sewer pipes in the original Big Sky development. (Exhibit F, Big Sky IGA, p. 71 "Exhibit D Big Sky Sewer System")

IV. The Statutes and Caselaw Reinforce the Limiting Language of the Big Sky Service Plan

21. Once established, a special district must conform to its service plan "so far as practicable." CRS 32-1-207(1).

22. These limiting principles were embraced and repeated by the Court of Appeals in *Bill Barrett Corp. v. Lembke*, 2019 COA 134:

"The General Assembly enacted the Special District Act (the Act) with the intent that special districts 'promote the health, safety, prosperity, security, and general welfare' of their inhabitants and of the State of Colorado. 32-1-102(1), C.R.S. 2017; see also *Sand Hills*, para.15 [*Bill Barrett Corp. v. Sand Hills Metropolitan District*, 2016 COA 144, 411 P.3d 1086]; *Todd Creek Vill. Metro. Dist. V. Valley Band & Tr. Co.*, 2013 COA 154, para. 37. . . .

"[Special Districts] possess only those powers expressly conferred on them." *Sand Hills*, para. 15. . . .

"Once established, a special district must conform to its service plan 'so far as practicable' 32-1-207(1)" . . .

"Any material modifications to the service plan must be approved by the appropriate governing authority. 32-1-207(2)(a)"

Bill Barrett Corp. v. Lembke, 2019 COA 134, p. 6 - 7.

23. In a case with direct application to the Big Sky circumstances, *Sand Hills* case [411 P3d 1086, 1091 - 1092 (Court of Appeals 2016, cert. den. 2017):

"First, the district's shift in purpose, reflected in the 2013 plan, from a localized district providing for residential and commercial development in Lochbuie to a regional district reaching

beyond Lochbuie and providing regional benefits to the county constituted a change to the basic and essential nature of the 2004 plan". *Id.*

"Sand Hills argues that the inclusion or exclusion of property within a district cannot impair or affect its organization and that once formed, the district's status as a legal entity cannot be challenged.

This sort of unbounded power is not contemplated by the Act. The Act is clear that material modifications of a district's service plan can be challenged. See 32-1-207(2)(a); see also 32-1-209 (requiring districts to report to the board of county commissioners and allowing the county treasurer to withhold moneys).

To hold otherwise would lead to an absurd result, which we must avoid." *Id.*

24. The Sand Hills case held that the expanded service required a formal modification of the service plan approved by the appropriate legislative body. That same conclusion is warranted in this case. Applying the appropriate summary judgment elements, the Big Sky IGA was void because Big Sky did not have authority to unilaterally expand its purpose and territory; did not have authority to write, sign and enter Big Sky IGA; did not have authority to crown itself the "master meter" sanitation district for all of Rooney Valley.

V. Big Sky's Admission that the Big Sky IGA Presented a Significant Issue Regarding Approval from the City of Lakewood and Jefferson County

25. Green Mountain terminated the Big Sky IGA on April 9, 2019. On April 11, 2019, two days later, Big Sky published a notice regarding a modification to their Service Plan to allow the Big Sky IGA.

26. CRS 32-1-207 (3)(b) provides a mechanism for obtaining approval of a modification of a Service Plan through publication of a notice of a proposed action which constitutes a modification of the Service Plan:

"Compliance-modification-enforcement [of Service Plans]

(2)(a) After the organization of a special district . . . modifications . . . may be made . . . only by petition to and approval by the [city] that has adopted a resolution of approval of the special district. . . .

(3)(b) No action may be brought to enjoin the construction of any facility, the issuance of bonds or other financial obligations, the levy of taxes . . . unless such action is commenced within forty-five days after the special district **has published notice of its intention to undertake such activity. . . .**

27. This provision is essentially a "work around" making a formal application for a modification through notice and publication placing the authorizing city on notice of the modification and that failure to object "authorizes" the action by default.

28. On April 11, 2019, two days after Green Mountain terminated the Big Sky IGA, Big Sky published a notice pursuant to CRS 32-1-207 (3)(b) seeking to obtain authority for the Big Sky IGA modification of the Service Plan. (Exhibit G, "Notice of Intent to Take Action Pursuant to CRS 32-1-207 93)(b)");

". . . Accordingly, the District hereby gives notice that it intends to exercise those powers afforded by the Special District Act and the Service Plan by entering into one or more extraterritorial service agreements to provide the Sanitation Services.

In this regard, the Big Sky Metropolitan District No. 1 ("District No. 1") has entered into an Intergovernmental Agreement with Green Mountain Water and Sanitation District, dated May 8, 2018 (the "Agreement") relating to the provision of the Sanitation Services outside of the boundaries of the Districts.

Pursuant to the Agreement, the District intends to enter into one or more extraterritorial service agreements with other special districts or property owners in order to provide Sanitation Services to any and all properties located in the Big Sky Service Area as defined in Section 1.6 of the Agreement and depicted on the map attached to this Notice as Exhibit A. In accordance with the Agreement, wastewater generated from within the Big Sky Service Area shall be transmitted through sanitary sewer infrastructure owned and maintained by District No. 1 and then transmitted to the sanitary sewer system owned and maintained by the Green Mountain Water and Sanitation District for delivery to the Metro Wastewater Reclamation District for treatment and disposal. The sanitary sewer service contemplated by the Agreement is not a change in the Service Plan of a basic or essential nature as defined in section 32-1-207 (2)(a), C.R.S.

Pursuant to Colorado law, any action to enjoin the above-described actions as a material departure from the Service Plan must be brought by an interested party as defined in section 32-1-207 (3)(a) and 32-1-204 (1), C.R.S. within forty-five (45) days from publication of this notice or such an action shall be forever barred. . . ." (Exhibit G, Notice pages 3 - 4).

29. For the better part of the period between August, 2018 and April 9, 2019, Green Mountain had worked to persuade Big Sky to obtain permission from the City of Lakewood for the Big Sky IGA because the IGA was a significant departure from what had been approved in the Big Sky Service Plan. Big Sky made no such effort, until two days **after** the Big Sky IGA was terminated. Their CRS 32-1-207 (3)(b) Notice was late. There was no longer an IGA to implement.

30. Big Sky's tardy filing of the notice is undisputed evidence that they knew there was a significant issue as to whether or not the Big Sky IGA was valid without permissive authority from the City of Lakewood (after a public hearing). Green Mountain, by operation of the Resolution Terminating the Big Sky IGA, decided permission from Lakewood was necessary and in the absence of such permission, after 8 months of asking Big Sky and Lakewood to provide that authority, appropriately terminated the Big Sky IGA.

VI. After Eight Months of Public Hearings and Debate Green Mountain Terminated the Big Sky IGA and for the Same Reasons Green Mountain is Entitled to Summary Judgment in this Case.

30. Beginning in September through April 9, 2019, Amicus filed and published numerous public briefs (not representing a party but simply speaking as an interested Solterra resident in Lakewood and Green Mountain rate payer) before the Lakewood City Council and Green Mountain Board arguing that there was no authority for the Big Sky IGA without a modification of the Big Sky Service Plan. (Exhibits H, I, J and K)

31. Big Sky responded in collaboration with the City of Lakewood. (Exhibits L, M and N)

32. Ultimately, in the face of Big Sky's refusal to seek modification the Service Plan (which required a public hearing) as requested by the Green Mountain Board, and after hearing 8 months of public debate regarding the issue, including vigorous debate by counsel for Big Sky, Green Mountain terminated the Big Sky IGA, citing as three of its reasons:

- a. Big Sky is not "lawfully authorized" under C.R.S. 29-1-203(1) to enter into an IGA to be the "master meter" for Rooney Valley and provide the services enumerated in the Big Sky IGA; and,
- b. No "legislative body or other authority having the power to so approve", has approved the Big Sky IGA on behalf of Big Sky under C.R.S. 29-1-203(1); and,
- c. The Big Sky IGA is a material modification of the limitations in the Big Sky Service Plan pursuant to C.R.S. 32-1-102 (1), 32-1001 (1)(d)(l), 32-1-202(2), and 32-1-207(2), and Big Sky does not have authority from the City of Lakewood and Jefferson County to comply with the IGA

(Exhibit A, Resolution p. 3)

33. For all the reasons set forth in this brief and attachments, the Court should also conclude that Big Sky did not have authority under CRS 29-1-203 to enter into the Big Sky IGA and become the new "master meter" for all of Rooney Valley without express authority from the City of Lakewood in the form of an approved modification to the Big Sky Service Plan, following a public hearing.

_____/s/_____
John Henderson #50508
Amicus Curiae

Dated: January 28, 2024

Certificate of Service
I certify that on January 28, 2024, I served the foregoing document by electronic mail through the electronic filing system /s/