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DISTRICT COURT, JEFFERSON COUNTY, STATE OF COLORADO Court Address: 100 Jefferson County Parkway Golden, CO 80401 Telephone No.: (720) 772-2500	
Plaintiff: BIG SKY METROPOLITAN DISTRICT NO 1, a quasi-municipal corporation and political subdivision of the State of Colorado, **v.** **Defendant:** GREEN MOUNTAIN WATER AND SANITATION DISTRICT, a quasi-municipal corporation and subdivision of the State of Colorado.	▲**COURT USE ONLY**▲ Case No.: 2019CV030887 Div./Ctrm: 2
Counsel for Plaintiff: Charles E. Norton, #10633 NORTON & SMITH, P.C. 1331 17th Street, Suite 500 Denver, Colorado 80202 Phone Number: (303) 292-6400 FAX Number: (303) 292-6401 E-mail: CNorton@NortonSmithLaw.com	

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT UNDER C.R.C.P. 56(a)

Plaintiff Big Sky Metropolitan District No. 1 ("Big Sky"), by and through its counsel, Norton & Smith, P.C., and pursuant to the requirements set forth in C.R.C.P. 121, Section 1-15 (a) hereby submits this Motion for Partial Summary Judgement Under C.R.C.P. 56(a) as follows:

CERTIFICATION REGARDING CONFERRAL PURSUANT TO C.R.C.P. 121, SECTION 1-15(8)

The undersigned counsel hereby states that he has conferred in good faith with opposing counsel for the Green Mountain Water and Sanitation District ("Green Mountain"), Ms. Mary Joanne Deziel Timmins, by discussing with her the intention of both Big Sky and Green Mountain to file motions for summary judgment and motions to dismiss regarding claims for relief in this

action. These discussions took place both at the "meet and confer" pursuant to C.R.C.P. 16 (b)(3) held on August 2, 2019 and at the case status conference before this Court on August 28, 2019. Counsel also exchanged emails regarding their intentions on September 10, 2019 although Ms. Timmins did not directly state her position regarding this Motion in her email. Ms. Timmins has consistently indicated that Green Mountain will oppose this Motion and disagrees with the arguments stated herein.

MOTION

Introduction and Standard of Review

This action concerns the validity and enforceability of an "Intergovernmental Agreement for Extra-Territorial Sewer Service" between Green Mountain and Big Sky, dated May 8, 2018 (the "Big Sky IGA"). A fully executed copy of the Big Sky IGA is filed with this Motion as Exhibit 1. The Plaintiff Big Sky seeks to enforce its rights under the Big Sky IGA, which Green Mountain has attempted to terminate.

Big Sky brings this Motion for summary judgment with regard to Affirmative Defenses 1, 2, 3, 6, 8, and 11 set forth in Green Mountain's Answer filed on July 23, 2019. Big Sky submits that there are no genuine issues for trial with regard to these defenses and that it is entitled to judgment on them as a matter of law pursuant to C.R.C.P. 56 (a). *DiLeo v. Kultnow*, 200 Colo. 119, 613 P.2d 318 (1980).

The First Affirmative Defense alleges that Big Sky is not validly organized or existing as a special district. The Second and Third Affirmative Defenses allege that Big Sky is not authorized to act as a sanitation district or to collect wastewater either inside or outside its service area. In the Sixth Affirmative Defense, Green Mountain alleges that legislative acts are not binding on future

legislatures and therefore the Big Sky IGA was not binding on Green Mountain. The Eighth Affirmative Defense alleges that Big Sky's claims fail for a lack of consideration. The Eleventh Affirmative Defense states that Big Sky's claims are barred by the applicable statutes of limitations.

Big Sky believes that these affirmative defenses constitute the core of Green Mountain's defense of its repudiation of the Big Sky IGA. The other affirmative defenses (waiver, unclean hands, and laches among them) appear to simply be drawn from the list provided in C.R.C.P. 8(c) and have little or no support from the facts of this case. For this reason, if Big Sky prevails on this motion for summary judgment and the affirmative defenses going to the validity of the Big Sky IGA are dismissed, Big Sky intends to file a motion for summary judgment on its First Claim for Relief regarding breach of contract; if that is successful, this case will be greatly simplified and some remaining claims may in fact be moot, although that of course depends in large part on the specific contents of this Court's future orders.

Summary of Material Facts

The facts that are material to resolution of the affirmative defenses at issue in this Motion are as follows. Big Sky will refer to supporting exhibits and to allegations in the Complaint and Answer.

In the Big Sky IGA, Green Mountain agreed to accept a peak flow of 1.267 million gallons per day of Wastewater from Big Sky, which is collected from and generated within the Big Sky Service Area and the Big Sky Expanded Service. *See* Big Sky IGA, page 5, Section 2.2. The Big Sky Service Area and Big Sky Expanded Service Area are depicted on Exhibit A to the Big Sky IGA. These areas include separate properties that are owned by CDN Red Rocks LP, Cardel Homes, and 3 Dinos LLC.

The Big Sky IGA contains a termination clause on page 21, Section 10.2. This section permitted termination of the Big Sky IGA by Green Mountain if a defined "Event of Default" took place and was not cured within 30 days by Big Sky. Section 10.2 permitted termination by Green Mountain in the event that Big Sky failed to pay costs, fees, or charges due under the IGA, if Big Sky failed to issue a Notice of Violation or enforce a violation of applicable regulations, or if the "Special Connector's Agreement" between Green Mountain and Metro Wastewater was terminated or Metro refused to accept Wastewater from within the Big Sky Service Area and Big Sky Potential Expanded Service Area.

None of these events allowing termination by Green Mountain ever took place. Since Green Mountain refused to honor its contract and eventually repudiated it, Big Sky was never allowed to connect to the Green Mountain Sanitary Sewer System and so no regulatory violation was even possible.

Further, Metro never terminated the Special Connector's Agreement or refused to accept Wastewater from Big Sky. As is recited on page 1 of the Big Sky IGA, Green Mountain does not treat wastewater, but rather delivers it to Metro for disposal under the terms of the Special Connector's Agreement. The Big Sky IGA simply provides that Big Sky may transmit wastewater to the Green Mountain system and that Green Mountain will send that wastewater, along with wastewater generated within Green Mountain, to Metro for treatment and disposal.

Finally, Big Sky never failed to pay any cost, fee, or charge demanded by Green Mountain. In one of its few efforts to directly respond to the allegations of Big Sky's Complaint under the standard required by C.R.C.P. 8(b), Green Mountain admitted that it entered into a Memorandum of Understanding ("MOU") with Big Sky, attached as Exhibit 4 to the Complaint, and that Big Sky

deposited certain of Green Mountain's costs pursuant to that MOU. *See* Answer, para. 26. Green Mountain further admitted that it participated in litigation against Fossil Ridge Metropolitan District No. 1 and that "in order to facilitate Green Mountain's participation, Big Sky agreed to, and did, pay all of Green Mountain's legal fees." *See* Answer, para. 31. It is not disputed that up to the time of Green Mountain's repudiation of the Big Sky IGA, Big Sky paid all costs, fees, or charges required of it.

In contravention of the termination provisions in Section 10.2 of the Big Sky IGA, on April 9, 2019, the Green Mountain Board of Directors enacted "A Resolution of the Green Mountain Water and Sanitation District Terminating the Intergovernmental Agreement for Extra-Territorial Sewer Service with Big Sky Metropolitan District No. 1" (the "Termination Resolution"). A copy of the Termination Resolution is attached to this Motion as Exhibit 2. As recited on the final page of the Termination Resolution, page 4,

> Be it Resolved by the Board of Directors of the Green Mountain Water and Sanitation District, that in the exercise of its legislative authority guided by the best interests of the public, including residents of the district, customers of the district, potential future customers of the district and property owners inside and outside the district boundaries, the Green Mountain Water and Sanitation District hereby finds the Big Sky IGA to be invalid, and void since its inception, against public policy, and therefor terminates the Big Sky IGA effective immediately this 9th day of April, 2019.

Green Mountain's sudden turnabout was driven by the election of three new Green Mountain Board members at the May 8, 2018 election. These individuals were Alex Plotkin, Jeff Baker, and Adrienne Hanagan (the "New Directors"). The New Directors took office on June 12, 2018. *See* Answer, paras. 48 and 49. Minutes of the May 8, 2018 and April 9, 2019 Green Mountain Board of Directors meetings are attached hereto as Exhibits 3 and 4. A comparison of the documents shows that while the original approval of the Big Sky IGA by the Green Mountain Directors was unanimous, the vote

in favor of the Termination Resolution was the three New Directors in favor and the two carry over directors abstaining.

Big Sky contends that these undisputed facts lead to the conclusion that it is entitled to judgment as a matter of law on Green Mountain's Affirmative Defenses 1, 2, 3, 6, 8, and 11.

Outline of Statutory Provisions Regarding Title 32 Special District Organization and Service Plans

Because the Affirmative Defenses put at issue by this Motion concern Big Sky's authority to enter into the Big Sky IGA, Big Sky believes it may be useful for the Court to have a summary and outline of the key provisions of the Special District Act, sections 32-1-101 et seq., C.R.S. which govern Big Sky.

The process for organizing a Title 32 special district begins with filing a petition for organization pursuant to section 32-1-301, C.R.S. The petition is to be signed by thirty percent or two hundred of the taxpaying electors of the special district, whichever number is smaller. "Taxpaying electors" of the district are individuals registered to vote under the Uniform Election Code of 1992, articles 1 to 13 of title 1, C.R.S., and who or whose spouse owns taxable real or personal property within the district or who is obligated to pay taxes under a contract to purchase taxable property within the district. *See* section 32-1-103 (5)(a), (22), 23(a), and 23(b), C.R.S.

The petition for organization is filed with the district court in the County in which the district is to be situated. It must be accompanied by a resolution approving the special district's service plan as provided in section 32-1-301 (3), C.R.S. Because the boundaries of Big Sky are entirely within the City of Lakewood, the Big Sky Service Plan was approved by the Lakewood City Council pursuant to section 32-1-204.5, C.R.S. A copy of this approved Service Plan for Big Sky Metropolitan

District Nos. 1-7 from the files of the Division of Local Government is submitted herewith as Exhibit 5.

Once the petition is filed, the district court must hold a hearing on the petition pursuant to section 32-1-305, C.R.S. If the court finds that the requisite number of signatures has been obtained and that the other elements of the petition are legally sufficient, it shall order an election on the question of organization of the special district. *See* section 32-1-305 (4), C.R.S.

If the majority of the votes cast are in favor of the organization and the court determines that the election was properly held, the court shall declare the district organized, and shall designate the first board elected. Thereupon the special district shall be a quasi-municipal corporation and a political subdivision of the state of Colorado with all the powers thereof. *See* section 32-1-305 (6), C.R.S.

ARGUMENT

Green Mountain's First Affirmative Defense

In its first affirmative defense, Green Mountain contends that "Big Sky is not validly organized or existing as a special district pursuant to the provisions of the Special District Act, and therefore was not authorized to enter into the Big Sky IGA, rendering the Big Sky IGA void from its inception." This defense is contrary to the express language of the Special District Act, section 32-1-305(7), C.R.S., and Green Mountain is barred from litigating the organization of Big Sky by that same provision.

Section 32-1-305(7) provides as follows:

> If an order is entered declaring the special district organized, such order shall be deemed final, and no appeal or other remedy shall lie therefrom. The entry of such order shall finally and conclusively establish the regular organization of the special

> district against all persons except the state of Colorado in an action in the nature of quo warranto commenced by the attorney general within thirty-five days after entry of such order declaring such special district organized and not otherwise. The organization of said special district shall not be directly or collaterally questioned in any suit, action, or proceeding except as expressly authorized in this subsection (7).

The order declaring Big Sky organized was entered by the Jefferson County District Court on January 13, 2015. A copy of this order is attached to this Motion as Exhibit 6. No quo warranto action was ever filed by the state of Colorado. The entry of the order by this Court conclusively established the regular organization of Big Sky. Further, Green Mountain is barred from directly or collaterally questioning the organization of Big Sky by the express language of section 32-1-305(7), C.R.S. Green Mountain's first affirmative defense fails as a matter of law.

This reading of the plain and unambiguous language of section 32-1-305(7) was upheld by the Colorado Court of Appeals in *Marin Metro. Dist. v. Landmark Towers Ass'n, Inc.*, 2014 COA 40, 412 P.3d 620. In *Marin*, the Court of Appeals concluded that a challenge to the organization of a metropolitan district was barred, even if it was based on a theory of fraud upon the court. [1] *Id.* at 626-27.

Citing the decision of the Colorado Supreme Court in *Burns v. Dist. Court*, 144 Colo. 259, 268, 356 P.2d 245, 251 (1960), the *Marin* court discussed the reasons why a challenge of the type mounted by Green Mountain to the organization of Big Sky was barred by the General Assembly. First, as the *Burns* court noted, "[c]learly, the General Assembly was endeavoring to expedite the procedure contemplated by the entire act, and to that end the limitation relative to judicial review was made a feature of the law." *Id.* at 267, 356 P.2d at 250. Second, the court emphasized

[1] Unlike the plaintiffs in *Marin*, Green Mountain can make no good faith claim of fraud upon the court.

"the purpose of the General Assembly to work expedition in the determination of questions arising out of the administration of the act." *Id.* Third, the court determined that the thirty-day limitation was not unreasonably short "in view of the need for accelerating contract negotiations and the taking of other action looking to accomplish[ ] the purposes of the district, free of the fear of subsequent attack on the district's legal existence." *Id.* at 268, 356 P.2d at 250.

Green Mountain is seeking to accomplish precisely what was prohibited by the General Assembly as discussed in the third prong of the *Burns* and *Marin* analysis: destroying Big Sky's contractual arrangements through an after the fact attack on Big Sky's legal existence. The first affirmative defense fails as a matter of law.

Green Mountain's Second and Third Affirmative Defenses

Green Mountain's second and third affirmative defenses read as follow:

> 2. Big Sky is not authorized to act or exist as a sanitation district under either the Special District Act or the Big Sky Service Plan and therefore was not authorized to enter into the Big Sky IGA, rendering the Big Sky IGA void from its inception.
> 3. Big Sky is not authorized to collect wastewater inside or outside its service area, as defined in its Service Plan and the Special District Act, and therefore was not authorized to enter into the Big Sky IGA, rendering the Big Sky IGA void from its inception.

Once again, Green Mountain's contentions are contrary to the plain language of the Special District Act and the Big Sky Service Plan.

As the organizational decree for Big Sky, Exhibit 6, expressly provides in paragraph 13, "the District shall be a metropolitan district, as defined in section 32-1-103(1), C.R.S., and quasi-municipal corporation and political subdivision of the State of Colorado with all the powers of a metropolitan district available under law and in conformity with the Service Plan, as may be amended, and all powers and authorities as may hereafter be conferred by law." Pursuant to section 32-1-1004, C.R.S.,

a metropolitan district shall provide two or more listed services, including "sanitation services as specified in section 32-1-103(18), C.R.S." *See* section 32-1-1004(2)(e), C.R.S.

When a metropolitan district provides the services specified in section 32-1-1004(2) (a), (c), (e), (i), or (j), C.R.S., it "shall have all the duties, powers, and authority granted to a fire protection, park and recreation, sanitation, water and sanitation, or water district by this article." For this reason, when Big Sky provides sanitation services as defined in section 32-1-103(18), C.R.S., it exercises all the powers of a sanitation district or water and sanitation district under section 32-1-1006, C.R.S. Under section 32-1-103(18), C.R.S., those services include providing storm and sanitary sewers, treatment and disposal works and facilities, and all necessary or proper equipment and appurtenances incident thereto.

The Big Sky IGA contemplated that Big Sky would exercise such powers by constructing sewer mains that will collect and transmit wastewater from within the boundaries of Big Sky and transmit wastewater that is introduced from adjoining properties owned by 3 Dinos. Green Mountain's contention that Big Sky was not organized as a sanitation district and so could not enter into the Big Sky IGA lacks any substantial merit.

Big Sky's exercising sanitary sewer powers and providing such services conforms to the Big Sky Service Plan, Exhibit 5. On page 5 of the Service Plan as approved by the Lakewood City Council, it is stated that "The Districts shall have the power and authority to provide the Public Improvements and related operation and maintenance services within and without the boundaries of the Districts as such power and authority is described in the Special District Act." The term "Public Improvements" is defined on page 4 of the Service Plan as "a part or all of the improvements authorized to be planned, designed, acquired, constructed, installed, relocated, redeveloped and

financed as generally described in the Special District Act…". The power of a metropolitan district to provide sanitary sewer services is outlined in sections 32-1-1004 and 32-1-103(18), C.R.S. as discussed above. In addition to this specific authority, the Special District Act empowers special districts to "furnish services and facilities without the boundaries of the special district and to establish fees, rates, tolls, penalties, or charges for such services or facilities." *See* section 32-1-1001(k), C.R.S. The Service Plan therefore authorizes Big Sky to provide sanitary sewer services both inside and outside its boundaries.

This conclusion is reinforced by reading the Service Plan as a whole. In Section V, it is provided that "The (Big Sky) Districts shall not be authorized to operate and maintain any part or all of the Public Improvements, other than park and recreation, **sewer** and landscape improvements and other improvements owned by the Districts, unless the provision of such operation and maintenance is pursuant to an intergovernmental agreement with the City (of Lakewood)." (Emphasis supplied). Exhibit D to the Service Plan is entitled "Big Sky Metropolitan District Nos. 1-7 Public Improvement Cost Estimate;" it includes a line item of $415,424 for "Sanitary Sewer," thus expressly defining the term "Public Improvements" as used in the Service Plan as including "sanitary sewer."

This analysis is supported by *Todd Creek Village Metropolitan District v. Valley Bank & Trust Company*, 2013 COA 154, 325 P.3d 591. That case involved an effort by a metropolitan district to evade its obligations under a loan agreement with a bank by arguing that entry into general obligation debt was not authorized by its service plan. *Id.* The Court of Appeals rejected this argument, reasoning that the service plan did not prohibit general obligation debt and that the Special District Act provided authority to enter into promissory notes and issue bonds. *Id.* In the case of the

Big Sky Service Plan, the statement is much more direct and affirmative; the District is authorized to finance and construct any Public Improvements that are authorized by the Special District Act.[2]

Green Mountain's second and third affirmative defenses fail as a matter of law.

Green Mountain's Sixth Affirmative Defense

Green Mountain's Sixth Affirmative Defense states that "Legislative Acts are not binding on future legislatures and therefore the Big Sky IGA was not binding on Green Mountain." However, similar or identical theories have been raised and rejected in a number of appellate decisions in Colorado, and the Sixth Affirmative Defense fails as a matter of law.

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. *Perl-Mack Enterprises Co. v. City and County of Denver*, 194 Colo. 4, 9, 568 P.2d 468, 472 (1977). For this reason, the fact that such a contract binds the municipality for a period in the future does not make it objectionable as a surrender of legislative or police powers, since those powers are not involved. *Id.* (Citations omitted). For this reason, the relationship between Green Mountain and Big Sky is purely contractual, and the conditions and limitations imposed by the parties are valid. *Id.* These include the conditions for termination contained in Section 10.2 of the Big Sky IGA, none of which existed in this case.

The Colorado Supreme Court dealt with the enforceability of a long-term contract to treat sewage in *National Food Stores, Inc. v. North Washington Street Water and Sanitation District*, 163 Colo. 178, 429 P.2d 283 (1967). National operated a packing plant that was originally served by the South Adams Water and Sewage District. North Washington was subsequently organized and

[2] The issue of extraterritorial service has been extensively briefed by the parties in connection with Green Mountain's Response to Notice and Motion to Enjoin in Case No. 2014CV031904.

solicited National to be included in North Washington. As an inducement, National and North Washington entered into an agreement whereby National would pay North Washington the sum of $46,500, which would be about one-fourth of the cost of new treatment facilities being constructed by North Washington. In return, North Washington agreed to treat sewage generated by the National plant at a fixed rate of $100 per million gallons for a period of 20 years.

Much like Green Mountain, North Washington sought to renege on its agreement, in North Washington's case by attempting to impose an increase in treatment charges far in excess of the amount specified in the agreement, arguing that this was a governmental decision and hence North Washington could not be bound by its agreement. The Colorado Supreme Court rejected this theory, reasoning that "the District is no different than any other water and sanitation district, and since the services it renders are proprietary in nature they may be contracted for as is provided by pertinent statutes dealing with the powers of the board created to administer the district." 178 Colo. at 180, 429 P.2d at 284-85. The Court emphasized that the applicable statutes granting powers to water and sanitation districts authorized them to enter into contracts and agreements affecting the affairs of the district, and "that no restrictions are placed upon boards as to the types of contracts into which they may enter." *Id.*

The Special District Act still provides that districts like Green Mountain may "enter into contracts and agreements affecting the affairs of the special district" and that the district may furnish facilities and services without the boundaries of the special district. *See* section 32-1-1001 (1)(d)(I) and (k), C.R.S. In *National Food Stores*, the Court concluded that the contract had been entered into as part of the proprietary functions of North Washington and that it was fully enforceable. The trial

court was directed to enter a declaratory judgment holding the contract enforceable according to its terms and decreeing specific performance by the parties. An identical result should be reached here.

Among the terms and conditions of the Big Sky IGA that must be honored by Green Mountain and Big Sky are the termination provisions of Section 10.2. In *City of Fort Collins v. Park View Pipe Line*, 139 Colo. 119, 336 P.2d 716 (1959), the Colorado Supreme Court considered a resolution of the Fort Collins City Council terminating most contracts for the sale of City water outside the boundaries of Fort Collins. The Court held that the City was selling water under the contracts in its proprietary capacity and in contracting could impose "such conditions and limitations as the parties by their contract may agree upon." *Id.* at 123; 336 P.2d at 719. The Court further held that the City could not terminate service to the plaintiff Betz, since his contract provided that the City could terminate water service only when in the judgment of the City Council "the interests of the City of Fort Collins require the discontinuance of such service in order to better serve the inhabitants of the City of Fort Collins." *Id.* at 125, 336 P.2d at 720. No such showing had been made, and in fact the record indicated that there was a surplus of water at the time the City Council made the decision to terminate the supply contracts. *Id.* For this reason, the Court held that "it is a law of contracts applicable here that the grounds for termination of a contract under express provisions therein are controlled by such provisions, which will ordinarily be enforced according to their terms."

Green Mountain agreed in Section 2.2 of the Big Sky IGA to accept wastewater from Big Sky collected within the Big Sky Service Area and the Big Sky Expanded Service Area that does not exceed a peak flow of 1.267 million gallons per day. In doing so, Green Mountain acted in its proprietary capacity, and so the doctrine that one legislature may not bind future legislatures does not apply. Green Mountain was bound by an obligation under Section 10.2 not to terminate the Big Sky

IGA except upon an Event of Default, including the failure of Big Sky to pay any costs, fees, or charges, or enforce a regulatory violation, or in the event the Special Connector's Agreement between Green Mountain and Metro was terminated. None of those events happened here, and Green Mountain is bound by its contract.

The Sixth Affirmative Defense fails as a matter of law.

Green Mountain's Eleventh Affirmative Defense

In its Eleventh Affirmative Defense, Green Mountain contends that "Plaintiff's claims are barred by the applicable statute of limitations." At first reading, this defense is puzzling. The Big Sky IGA was approved by the Green Mountain Board of Directors on May 8, 2018. The Termination Resolution repudiating the IGA was enacted by the Board on April 9, 2019. Big Sky commenced this lawsuit by filing a complaint on June 6, 2019. Under section 13-80-101(a), C.R.S. all contract actions are governed by a three-year statute of limitation, which would mean that the action had to be commenced by April 9, 2022. If the statute governing "all actions against any public or governmental entity" in section 13-80-102(1)(h) C.R.S. is applied, Big Sky still had until April 9, 2021 to file its suit.[3]

However, in its motion to dismiss the complaint filed by CDN Red Rocks LP in a related case, Green Mountain has unveiled its new theory about the statute of limitations. It now contends that the Termination Resolution could only be reviewed under C.R.C.P. 106 (a)(4), and so Big Sky's action should have been brought within 28 days of the April 9, 2019 Termination Resolution. What is more,

[3] In *Fishburn v. City of Colo. Springs*, 919 P.2d 847 (Colo. App. 1995), the Court of Appeals concluded that the shorter two-year limitation period of § 13–80–102(1)(h) was not applicable to the contract claims brought by plaintiffs against the city.

Green Mountain now contends that if the suit had been "timely" filed, its decision to terminate its own contract should be upheld if there is any competent evidence to support it.

However, Green Mountain's theory fails by its own admission. Relief may be had under C.R.C.P. 106(a)(4) "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." It is of the essence of the rule that it pertains only to governmental bodies or officers exercising judicial or quasi-judicial functions. *Baldauf v. Roberts*, 37 P.3d 483, 484 (Colo. App. 2001).

However, in the Termination Resolution of April 9, 2019, Green Mountain expressly said as follows:

> Be it Resolved by the Board of Directors of the Green Mountain Water and Sanitation District, that **in the exercise of its <u>legislative authority</u> guided by the best interests of the public, including residents of the district, customers of the district, potential future customers of the district and property owners inside and outside the district boundaries**, the Green Mountain Water and Sanitation District hereby **finds the Big Sky IGA to be invalid, and void since its inception, against public policy,** and therefor terminates the Big Sky IGA effective immediately this 9th day of April, 2019.

Green Mountain invoked its legislative power, not any nebulous grant of quasi-judicial jurisdiction. It further adhered to the position that the April 9, 2019 Termination Resolution was a legislative act in its Sixth Affirmative Defense, when it contended that "legislative acts are not binding on future legislatures and therefore the Big Sky IGA was not binding on Green Mountain." Rule 106 review was not available to Big Sky.

As argued previously, when it entered into the Big Sky IGA, Green Mountain was not acting pursuant to any legislative police powers granted to it, but rather was acting in a proprietary capacity. The Termination Resolution was legislative in form (a resolution) and was intended by Green

Mountain to be legislative; at no time did Green Mountain announce that it "really" intended to act as a quasi-judicial body. At the time that the Green Mountain Board enacted the Termination Resolution, it believed and expressly stated that it had enacted legislation in its governmental capacity; it now apparently believes that it was acting in a governmental capacity as a quasi-judicial tribunal. Green Mountain was mistaken both times.

Colorado courts have recognized in several contexts the distinction between the actions of a city in its governmental, or legislative capacity, in which it is a sovereign and governs its citizens, and the actions of a city in its proprietary capacity, in which it acts for the private advantage of its residents and for itself as a legal entity. *Colowyo Coal Co. v. City of Colorado Springs*, 879 P.2d 438, 441 (Colo. App.1994) *citing City of Denver v. Hubbard,* 17 Colo. App. 346, 68 P. 993 (1902). "The governmental functions of a municipal corporation are those functions exercised ... for the public good generally, whereas proprietary functions are those exercised for the peculiar benefit and advantage of the citizens of the municipality." *Id*., (citations omitted). This proprietary role as a contracting entity is incompatible with the governmental role of a quasi-judicial body judging the validity of its own contract.

Further, Big Sky also has an "adequate remedy at law" through a breach of contract suit, which precludes the exercise of jurisdiction under C.R.C.P. 106(a)(4). In *Wilson v. Town of Avon*, 749 P.2d 990, 992 (Colo. App. 1987), the plaintiffs had pled that published personnel policies and procedures codified an employment agreement between the parties, and that termination of plaintiffs' employment violated this agreement. As the Court held, "Such an allegation constitutes a claim of breach of contract, and, if proven, provides the basis for a 'plain, speedy and adequate remedy.' Thus, review of this issue was unavailable to plaintiffs under C.R.C.P. 106(a)(4), and it was error

to dismiss their complaint as untimely filed under the limitations in C.R.C.P. 106(b)." *Id*.

Because Green Mountain's Termination Resolution was by its own admission a legislative act, and Big Sky has a "plain, speedy, and adequate remedy at law" through a breach of contract suit, C.R.C.P. 106 (a)(4) and the 28 day limitations period in paragraph (b) of the Rule do not apply. The Eleventh Affirmative Defense fails as a matter of law.

Green Mountain's Eighth Affirmative Defense

Green Mountain's Eight Affirmative Defense states simply that "Plaintiff's claims fail for lack of consideration." This defense is completely without support in the law.

Colorado has long adhered to the rule that "consideration" is a benefit received or something given up as agreed upon by the parties. CJI-Civ 30:7; *Compass Bank v. Kone*, 134 P.3d 500, 502 (Colo. App. 2006) (citing CJI 30:7 with approval). It is consideration if the promise, in return for a promise, does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do, even though there is not actual loss or detriment to him or actual benefit to the promisor. *Troutman v. Webster*, 82 Colo. 93, 96, 257 P. 262, 263-64 (1927).

Both sides benefit from the Big Sky IGA. Big Sky receives the treatment of wastewater generated within its boundaries and service area. Green Mountain receives tap fees from property owners in Big Sky and the Big Sky Expanded Service Area who will also pay user charges to Green Mountain. Big Sky pays over the expenses that are required to construct the facilities used to provide it with sanitary sewer service; some of these facilities will be owned by Green Mountain.

In various settings, Green Mountain has attempted to poor mouth this consideration; it makes much of the term in Section 6.1.B of the Big Sky IGA that Green Mountain will rebate 50 percent of the System Development Fees (SDF) paid by Green Mountain until the earlier of ten

years from the date the first SDF is paid or Big Sky is reimbursed for the improvements that it will fund and that Green Mountain will own. This of course conveniently ignores the fact that Green Mountain would not have any tap fees from this area without the Big Sky IGA, that it will retain 100 percent of them once the rebate provisions of Section 6.1 have expired, and that Green Mountain would not have the facilities that Big Sky will fund without the Big Sky IGA.

For the purposes of summary judgment, it is important to note that a court will generally not look at the adequacy of consideration. *Meyer v. Nelson*, 69 Colo. 56, 168 P. 1175 (1917). Further, the Big Sky IGA recites under "TERMS AND CONDITIONS" on page 3 that "in consideration of the foregoing recitals, which are incorporated herein, and the mutual promises and covenants contained herein, as well as other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the Parties, the Parties agree as follows:". A statement of consideration is conclusive proof of that fact unless evidence to the contrary is introduced. *Burch v. Burch*, 145 Colo. 125, 358 P.2d 1011 (1960).

Green Mountain's Eighth Affirmative Defense fails as a matter of law.

CONCLUSION

For all of the foregoing reasons, Big Sky moves this Court for judgment in its favor and against Green Mountain, dismissing affirmative defenses 1, 2, 3, 6, 8, and 11. Further, Big Sky asks the Court to consider the propriety of an award of attorney's fees under section 13-17-102(4), C.R.S. on the grounds that some or all of these defenses lacked substantial justification.

Dated this 11th day of September, 2019.

NORTON & SMITH, P.C.

s/ Charles E. Norton
Charles E. Norton, #10633
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I certify that on the 11th day of September, 2019, a true and correct copy of the foregoing **PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT UNDER C.R.C.P. 56(a)** was served electronically and/or sent via U.S. Mail, postage prepaid to the following:

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