DISTRICT COURT, JEFFERSON COUNTY, COLORADO Court Address: 100 Jefferson County Parkway, Golden, CO 80401 Telephone: (303) 271-6154	DATE FILED: September 11, 2019 3:42 PM FILING ID: 109A778F1E3DC CASE NUMBER: 2019CV30887
Plaintiffs: BIG SKY METROPOLITAN DISTRICT NOS. 1-7, a quasi-municipal corporation and political subdivision of the State of Colorado **Defendant:** GREEN MOUNTAIN WATER AND SANITATION DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado	**▲COURT USE ONLY▲**
Attorneys For Defendant: Mary Joanne Deziel Timmins, #13859 DEZIEL TIMMINS LLC 450 East 17th Avenue, Suite 210 Denver, Colorado 80203 **Telephone:** (303) 592-4500 **Facsimile:** (303) 592-4515 **E-mail:** jt@timminslaw.com	**Case Number:** 2019-CV-030887 **Division: 2** **Courtroom: 4B**
MOTION FOR SUMMARY JUDGMENT	

Defendant Green Mountain Water and Sanitation District ("Green Mountain"), through its undersigned counsel, submits this Motion for Summary Judgment and in support states:

CERTIFICATION

Pursuant to C.R.C.P. 121, § 1-15(8), the undersigned hereby certifies that she conferred with counsel for Plaintiff regarding this Motion. Plaintiff's counsel stated that he would oppose the relief requested herein.

I. INTRODUCTION

This case is one of five cases recently filed by a group of real estate developers, and the metropolitan districts they organized, including the Plaintiff in this case, Big Sky Metropolitan District No. 1 ("Big Sky"). These developers are trying to force Green Mountain to provide sanitary sewer service to their properties, even though their properties are not located within Green Mountain's jurisdictional boundaries. Green Mountain is not required to provide such

service, and is not even permitted to do so without numerous public notices and hearings, and prior approvals from the county, city, and electorate. The developers are trying to get around the public notice and hearing requirements, inherent in the statutory process for setting up a sanitation district, or the statutory requirements for extending the boundaries of an existing sanitation district. For the reasons set forth herein, the claims in the Complaint should be dismissed for lack of subject matter jurisdiction under C.R.C.P. 12(b)(1). In the alternative, Defendant Green Mountain is entitled to judgment as a matter of law on all of the claims in the Complaint.

II. FACTUAL BACKGROUND

The facts in this case are undisputed. Big Sky, and the other plaintiff/developers in these related cases, own approximately 750 acres of land in Rooney Valley in western Lakewood, and unincorporated Jefferson County. Green Mountain was approached by Big Sky Metropolitan District No. 1 ("Big Sky") regarding Big Sky's desire to have Green Mountain provide sanitary sewer service to the Big Sky service area, which consists of approximately 166 acres of land, through an intergovernmental agreement instead of going through the inclusion process outlined in the Special District Act for including the Big Sky service area into Green Mountain's jurisdiction.

While the negotiations for this arrangement became more complicated and untenable, a prior majority of the Green Mountain Board of Directors prematurely signed an intergovernmental agreement with Big Sky ("Big Sky IGA" or "IGA") on May 8, 2018, the night such Board majority were being voted out of office. Complaint at ¶42 and Exhibit 6. The Big Sky IGA was incomplete and missing material components including a cost schedule, which was supposed to be attached as Exhibit C, which was not attached because the costs had

not been determined, and engineering studies to determine whether the Green Mountain pipes were even big enough to handle the system contemplated by the IGA, which was not completed. See Exhibit C and E to Big Sky IGA, attached to Complaint at Exhibit 6. In addition, the map of the "Big Sky service area," attached to the IGA when the IGA was signed, included approximately 750 acres of property, far more than the 166 acres authorized in the Big Sky service plan. See Exhibit A to Big Sky IGA, attached to Complaint at Exhibit 6.

As soon as the new Green Mountain Directors took office, on June 12, 2018, the new Board immediately advised Big Sky that the IGA was under review for its irregularities and possible illegality under Colorado law. Complaint at ¶49. On September 4, 2018, notice was given to Big Sky that the IGA was being suspended and was under review for its validity under Colorado law. Complaint at ¶51. At its Regular Board meeting held on April 9, 2019, the Green Mountain Board of Directors adopted a Resolution determining that the Big Sky IGA was void and unenforceable, and therefore needed to be terminated. Complaint at ¶69.

III. PLAINTIFF'S CLAIMS SHOULD BE DISMISSED UNDER C.R.C.P. 12(b)(1) FOR LACK OF SUBJECT MATTER JURISDICTION

Because Plaintiff's claims seek this Court's review of the Resolution adopted by the Green Mountain Board terminating the Big Sky IGA, the claims should be dismissed for lack of subject matter jurisdiction under C.R.C.P. 12(b)(1) because Plaintiff failed to file its claims within the 28-day time limit under C.R.C.P. 106(a)(4) and (b). C.R.C.P. 106(a)(4) provides the exclusive avenue for district court review of final, quasi-judicial decisions of a local governmental body. Such claims must be filed within 28 days after the challenged decision was rendered. C.R.C.P. 106(b). If the claims are not timely filed, the district court lacks jurisdiction to hear them. See C.R.C.P. 106(b); *Danielson v. Zoning Bd. of Adjustment*, 807 P. 2d 541, 543 (Colo. 1990).

A. Exclusive Remedy – Requires Joinder of All Claims Within 28 Days.

C.R.C.P. 106(a)(4) is the exclusive remedy for determining whether a local governmental body exercising a quasi-judicial function has abused its discretion or exceeded its jurisdiction. *Consol. Case v. City of Aspen,* 2018 Colo. Dist. LEXIS 574, ¶27 (Pitkin County) ("C.R.C.P. 106(a)(4) is exclusive remedy for determining whether governmental body exercising a quasi-judicial function has abused its discretion or exceeded its jurisdiction."); *Meyerstein v. City of Aspen,* 2009 Colo. Dist. LEXIS 624, ¶15 (Pitkin County) (If local governmental action is quasi-judicial, review by District Court is solely pursuant to Rule 106(a)(4)).

All claims that effectively seek judicial review (whether framed as claims under C.R.C.P. 106(a)(4) or not) are subject to the 28-day filing deadline of C.R.C.P. 106(b). See *Bd. of County Comm'rs v. Sundheim,* 926 P.2d 545, 548 (Colo. 1996) (Complaint under Rule 106(a)(4) must include all causes of action, including constitutional and statutory claims, in a single Rule 106(a)(4) action.) See also *JJR 1, LLC v. Mt. Crested Butte,* 160 P. 3d 365 (Colo. App. 2007).

Thus, claims for declaratory relief under C.R.C.P. 57 that seek review of quasi-judicial decisions must be filed within 28 days. *See Tri-State Generation & Transmission Co. v. City of Thornton,* 647 P.2d 670, 676-77 (Colo. 1982) (Party may not seek review of quasi-judicial decisions indirectly through a declaratory judgment if its claim under C.R.C.P. 106(a)(4) was time barred); *Danielson v. Zoning Bd. of Adjustment,* 807 P. 2d 541, 543 (Colo. 1990). This is true for constitutional and statutory challenges as well. See *Powers v. Board of County Comm'rs,* 651 P. 2d 463 (Colo. App. 1982) (Petitioner's constitutional and statutory challenges must be litigated in one action governed by the time limits of C.R.C.P. 106(b)). See also *Norby*

v. City of Boulder, 577 P. 2d 277 (Colo. 1978) (Under Rule 106, one "must prosecute all of his causes, including constitutionality, in one action, which must be brought within [28] days. . . .")

Important public policy considerations underlie the Rule 106 time limits and exclusivity. Where aggrieved parties have been given notice and an opportunity to be heard, "it is not unfair to require that they litigate their challenge. . . within the time limits established in Rule 106(b)." *Snyder v. Lakewood,* 542 P. 2d 371, 377 (Colo. 1975). Requiring local governmental bodies, and their citizens, to live under a cloud of uncertainty, and protracted litigation, is not compatible with modern governmental planning. *Id.*

B. Quasi-Judicial Action.

An action is quasi-judicial, and subject to exclusive review under Rule 106(a)(4), if the governmental decision is likely to adversely affect the interests of specific individuals, and the decision is reached through application of preexisting legal standards or policy considerations to present or past facts. *Cherry Hills Resort Dev. Co. v. Cherry Hills Village,* 757 P. 2d 622 (Colo. 1988); *Meyerstein, supra,* at ¶58. In the exercise of its judicial authority, it is incumbent on a governmental body to provide notice and an opportunity to be heard to those whose interests are likely to be affected by the governmental decision. *Cherry Hills, supra,* at 628.

C. Standard of Review.

When a defendant raises a challenge under Rule 12(b)(1), the plaintiff has the burden of proving jurisdiction, and the trial court may make appropriate factual findings regarding the issue. *Consol. Case v. City of Aspen,* 2018 Colo. Dist. LEXIS 574 (Pitkin County). In a 12(b)(1) analysis, the allegations in the complaint are not entitled to any presumptions in favor of the non-moving party, and the court may conduct a hearing, and consider matters outside the pleadings, to resolve disputed jurisdictional facts. *Trinity Broadcasting of Denver, Inc. v. City*

of Westminster, 848 P. 2d 916, 924-5 (Colo. 1993). If the matter can be resolved based on undisputed facts, a trial court does not need to conduct a fact-finding hearing. *Seefried v. Hummel*, 148 P. 3d 184 (Colo. App. 2005).

Rule 106(a)(4) limits judicial review to a determination of whether the local governmental body has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the body. C.R.C.P. 106(a)(4)(I). A reviewing court must uphold the decision of the lower governmental body unless there is "no competent evidence in the record to support it." *Carney v. Civil Serv. Comm'n.,* 30 P. 3d 861, 863 (Colo. App. 2001). "No competent evidence" means that the governmental body's decision is "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Id.* See also *Board of County Comm'rs. v. O'Dell,* 920 P. 2d 48 (Colo. 1996).

D. No Subject Matter Jurisdiction over Claims in this Case.

The adoption of the Resolution determining the IGA was void was a quasi-judicial act of the Green Mountain Board of Directors. The Resolution affected the rights and duties of specific individuals, namely Big Sky Metropolitan District No. 1, the only other party to the IGA. The decision by the Board of Directors that the IGA was void was reached through the application of preexisting legal standards to present or past facts, including application of the Colorado Constitution and the Special District Act, among other statutes, to the terms of the IGA. Notice was given to Big Sky, the Plaintiff in this case, that the IGA was being suspended and was under review for its validity under Colorado law. See Letter Dated September 4, 2018, to Big Sky and others, attached hereto as **Exhibit A**. Big Sky, through its counsel, was given the opportunity to be heard, and was heard, at the Regular Meeting of the Board of Directors of Green Mountain Water and Sanitation District on January 8, 2019. Minutes of Regular

Meeting, at p. 3 "Public Comment," attached hereto as **Exhibit B.** Public notice of the April 9, 2019, Regular Meeting of the Green Mountain Water and Sanitation District was posted as required under the Special District Act. See Notice of Regular Meeting, dated April 9, 2019, attached hereto as **Exhibit C**. The Resolution was passed at a public meeting, after public notice, at which all members of the public were given an opportunity to be heard regarding the termination of the IGA. See Minutes of Regular Meeting of the Board of Directors of Green Mountain Water and Sanitation District, dated April 9, 2019, attached as **Exhibit D.** [1]

Big Sky's claims in the Complaint arise out of the Resolution of the Green Mountain Board of Directors' determination that the Big Sky IGA was void and unenforceable and needed to be terminated. Complaint at ¶69. Therefore, Big Sky's exclusive remedy for review of the Board's Resolution is C.R.C.P. 106(a)(4), and Big Sky was required to join all its claims in the Rule 106 action, within the 28-day time limit set forth in Rule 106(b), or by May 7, 2019. Big Sky failed to file its Complaint within the 28-day time limit under Rule 106(b) and therefore, this case is jurisdictionally barred and should be dismissed for lack of subject matter jurisdiction under C.R.C.P. 12(b)(1).

IV. BIG SKY IGA IS VOID OR VOIDABLE AS A MATTER OF LAW

The First and Second Claims for Relief (Breach of Contract and Breach of Covenant of Good Faith and Fair Dealing) are based on the validity of the Big Sky IGA. The Big Sky IGA was void, or voidable, as a matter of law, for several reasons set forth below, and therefore breach of contract claims based on the void agreement fail as a matter of law.

[1] Exhibits A, B, C, D and L to this Motion for Summary Judgment are public records under C.R.E. 803(8) as set forth in the Affidavit of Adrienne Hanagan attached as Exhibit M to this Motion.

A. Big Sky IGA is Void Under the Special District Act

The Big Sky IGA constituted an unauthorized material modification of the Big Sky service plan because Big Sky attempted to provide sanitary sewer service to hundreds of acres of property outside the boundary of its jurisdiction in violation of the Special District Act.

1. Special District Act and Material Modification of Service Plan. The Special District Act was enacted with the intent that special districts "promote the health, safety, prosperity, security, and general welfare" of their inhabitants. C.R.S. §32-1-102(1). Special districts are creatures of statute and possess only those powers expressly conferred on them. *Bill Barrett Corp. v. Sand Hills Metropolitan District*, 411 P. 3d 1086 (Colo. App. 2016). Once established, a special district is limited by, and must conform to, its service plan as was approved by the district court. C.R.S. §32-1-207(1). Any material modification to the service plan must be made by petition to, and approval of, the governing authority. C.R.S. §32-1-207(2)(a).

If a special district proposes to furnish sanitary sewer service to an unincorporated area of a county beyond the geographic boundary in its service plan, such modification constitutes a material modification under the Special District Act, by definition, and such material modification must be approved by the board of county commissioners after providing public notice. C.R.S. §32-1-207(2)(b) and (c).

Whether a special district's action constitutes a "material modification" of its service plan presents a question of law. *Bill Barrett Corp. v. Lembke,* 2018 COA 134, ¶17. A court looks to the language of the service plan and gives effect to its plain and ordinary meaning. *Todd Creek Vill. Metro. District v. Valley Bank & Trust Co.*, 2013 COA 154, ¶37.

2. "Safe Harbor" For Material Modification of Service Plan.

The Special District Act provides a "safe harbor" procedure for material modification of a district's service plan, which dispenses with the petition and public notice requirements of the Act. Under C.R.S. §32-1-207(3)(b), if a special district publishes notice, in a newspaper of general circulation within its district, and with the district court, of its intent to materially modify its service plan, and no objection or motion to enjoin such modification is filed within 45 days, then any objection to such material modification is barred thereafter. *Id.*

3. The Big Sky IGA is an Unauthorized Material Modification of the Big Sky Service Plan Rendering the Big Sky IGA Void.

The geographic boundary of the service area of Big Sky Metropolitan District No. 1, the party to the Big Sky IGA, is set forth in the Order and Decree Organizing the Big Sky Metropolitan District No. 1 entered by this Court on January 13, 2015, in Case No. 2014CV31904. See Order and Decree at Paragraph 8, attached hereto as **Exhibit E.** The combined service area for the Big Sky Metropolitan District Nos. 1-7 is set forth in Exhibit A to the Service Plan for Big Sky Metropolitan District Nos. 1-7, filed with this Court on September 29, 2014, in Case No. 2014CV31904, Filing ID# 5E9876F4F625F, attached hereto as **Exhibit F**. The service area in the Service Plan of the combined Big Sky Districts 1-7 contains approximately 166 acres of land.

Despite Big Sky's jurisdiction being limited to 166 acres of land, the map of the proposed "Big Sky Service Area" to be served under the Big Sky IGA contains approximately 700 acres of land. See Boundary Map attached as Exhibit A to the Big Sky IGA, attached to the Complaint as Exhibit 6, and attached hereto as **Exhibit G.** For demonstrative purposes, a map showing an overlay of the Big Sky service area as authorized in its Service Plan, and the proposed service area in the IGA, is attached hereto as **Exhibit H.** As can be seen from the

maps, and the map overlay at **Exhibit H,** the Big Sky IGA contemplated providing sanitary sewer service to approximately 550 acres of land, outside the Big Sky authorized service area, and outside the Green Mountain authorized service area, and therefore outside the jurisdictional boundaries of either Big Sky or Green Mountain. In addition, some of the additional acreage of land covered by the IGA is located in unincorporated Jefferson County.

Because the Big Sky IGA proposed furnishing sanitary sewer service to an area of unincorporated Jefferson County, beyond the geographic boundary in Big Sky's service plan, the IGA constituted a material modification of the Big Sky Service Plan, by definition, under the Special District Act. C.R.S. §32-1-207(2)(b) and (c). Such material modification needed to be approved by the Jefferson County Board of County Commissioners, after providing public notice. C.R.S. §32-1-207(2)(c). Such public notice needed to contain specific language as provided in the Special District Act. C.R.S. §32-1-207(c). It is undisputed that Big Sky did not obtain approval from the Jefferson County Board of County Commissioners and that such public notice was never given. Because the Big Sky IGA constituted an unauthorized material modification of the Big Sky Service Plan, the Big Sky IGA violates the Special District Act and is void.

4. Big Sky's Publication of Notice in *Lakewood Your Hub* Evidences its Intent to Materially Modify its Service Plan in the IGA

On April 11, 2019, Big Sky published a Notice in *Lakewood Your Hub,* a newspaper of general circulation within the Big Sky district. Such Notice was also filed on April 11, 2019, with this Court in Case No. 2014CV31904. See Notice of Intent to Undertake Certain Actions Pursuant to Section 32-1-207(3)(b), filed in Case No. 2014CV31904 at Filing ID# B94461ACAE5E2, attached hereto as **Exhibit I.** The Notice outlined Big Sky's intention to materially modify its service plan by expanding its boundary to include the area included in the

Big Sky IGA. Green Mountain filed a Motion to Enjoin the intended material modification. See Motion to Enjoin filed in 2014CV31904 at Filing ID#44B17CA5A007A. Big Sky's publication of the Notice evidenced its intention to materially modify its service plan without complying with the petition and public notice requirements of the Special District Act.

B. Big Sky IGA Is Void Under the Local Government Budget Law

Long term agreements involving expenditures of municipal funds are looked upon with disfavor. *Falcon Broadband, Inc. v. Banning Lewis Ranch Metro Dis. No. 1,* 2018 COA 92 at ¶30. To limit the power of a governmental entity to enter into such agreements, the Colorado General Assembly enacted the Local Government Budget Law of Colorado. C.R.S. § 29-1-101 *et seq.* The purposes of these statutes are to protect the taxpayer against improvident use of tax revenue, to encourage citizen participation and debate prior to the institution of public projects, to insure public disclosure of proposed spending, and to encourage prudence and thrift by those elected to direct expenditure of public funds. *Falcon Broadband, supra,* at ¶36. See also *Shannon Water & Sanitation Dist. v. Norris & Sons Drilling Co.,* 477 P. 2d 476, 478 (Colo. App. 1970).

C.R.S. §29-1-110 provides that no municipal corporation shall enter into a contract which involves the expenditure of money in excess of the amounts appropriated in the previously approved budget for the fiscal year. It also provides that multiple-year contracts must be made subject to annual appropriation. C.R.S. §29-1-110 ("Multiple-year contracts may be entered into where allowed by law or if subject to annual appropriation.") The provisions of the statute are mandatory and any contract made in violation of this section is void. C.R.S. §29-1-110 ("Any contract, verbal or written, made in violation of this section shall be void…."). See also *Englewood v. Ripple & Howe, Inc.,* 374 P. 2d 360 (Colo. 1962) (Contract between

engineering company and city to complete master study of city storm sewer system held void, and amount owed uncollectible, because no prior appropriation was made in city annual budget for such expenditures); *Falcon Broadband, supra,* (Contract with metropolitan district for cable and internet service void because payment of fees under contract could exceed annual appropriations).

While the results are harsh, persons dealing with municipal corporations do so at their peril and must take notice, not only of the powers vested in the corporation, but also of the mode by which its powers are to be exercised. *Id.*, at 363. See also *Shannon Water & Sanitation District v. Norris & Sons Drilling Co.,* 477 P. 2d 476 (1970) (Contract void in suit by drilling company against sanitation district when expenditures were not appropriated in budget).

The Big Sky IGA includes four categories of expenditures, or liabilities, to be incurred by Green Mountain, over a multi-year period, none of which were appropriated in the 2018 budget including: (1) Section 6.1B, Green Mountain to pay fees to Big Sky, over a ten-year period; (2) Section 4.5, certain "soft costs" to be incurred by Green Mountain; (3) Section 4.6 B, Green Mountain to become liable for construction cost overruns; and (4) Section 9.6, Green Mountain liable for costs of enforcement of the IGA against future Big Sky residents. None of these items were appropriated in the Green Mountain annual budget. See Green Mountain 2018 Annual Budget, attached hereto as **Exhibit L.** In addition, the IGA was not made subject to annual appropriation as required under C.R.S. §29-1-110. See Big Sky IGA, attached to Complaint at Exhibit 6.

C. Big Sky IGA is Void Under C.R.S. §29-1-203 and Colo. Const XIV 18(2)(a)

Article XIV, Section 18(2), of the Colorado Constitution authorizes local governmental bodies to enter into intergovernmental agreements. This authorization is codified in C.R.S. §29-1-203(1). Each of these sections provides that local governmental bodies may enter into intergovernmental agreements provided that the functions or services delegated under the intergovernmental agreement are "lawfully authorized to each." The phrase "lawfully authorized to each" has been held to mean that each entity subject to the intergovernmental agreement must have the authority to perform the subject activity within its own boundaries. *Durango Transp. Inc. v. City of Durango,* 824 P. 2d 48 (Colo. App. 1991).

The geographic area subject to the Big Sky IGA includes over 550 acres of land that is outside the jurisdiction of either Big Sky or Green Mountain. Map attached as Exhibit A to IGA, attached hereto as **Exhibit G.** Therefore, neither Big Sky nor Green Mountain is lawfully authorized to provide sanitary sewer service to that 550 acres of land. The IGA is void under C.R.S. §29-1-203 and Colo. Const. XIV, Section 18(2)(a) because the entities subject to the Big Sky IGA do not have authority to furnish sanitary sewer service in the geographic area subject to the IGA that is outside the Big Sky and Green Mountain jurisdictional boundaries.

D. Big Sky IGA Is Missing Material Terms and Therefore No Contract was Formed

A valid contract is created when there is a "meeting of the minds" between the parties as to all essential terms of the agreement. *Brush Creek Airport, L.L.C. v. Avion Park, L.L.C.,* 57 P. 3d 738, 745 (Colo. App. 2002) (A contract exists only when there was mutual assent to all essential terms.). If the parties omit an essential term, there is no contract. *Jorgensen v. Colo. Rural Props., LLC,* 226 P. 3d 1255 (Colo. App. 2010). The terms defining the contract price, and how payments are to be made under a contract, are an essential term of a contract. *Miller v.*

Quorum Orthopedics, 2015 Colo. Dist. LEXIS 1731 (Larimer County). The term of years, or duration of the parties' obligation to perform, under a contract is also an essential term. *Cytogenix, Inc. v. Waldroff,* 213 S.W. 3d 479, 486 (Tex. App. 2006).

The Big Sky IGA is unenforceable because it is missing essential terms. The IGA has no contract termination date. *Cytogenix, Inc. v. Waldroff,* 213 S.W. 3d 479, 486 (Tex. App. 2006) (Contract duration is essential to determination of contract performance.) The lack of a contract termination date is especially problematic because Green Mountain's "early" termination of the IGA is the very source of Big Sky's alleged breach. In addition, the amount Green Mountain was obligated to pay Big Sky under the IGA, which amount was supposed to be set forth in Exhibit C to the IGA, is missing because the costs had not been determined. See Big Sky IGA attached to Complaint as Exhibit 6. Finally, the amount Green Mountain was obligated to incur in making necessary improvements to its own infrastructure to accommodate the extra flow from Big Sky was never determined. See Big Sky IGA at Exhibit E, attached to Complaint at Exhibit 6. Because material terms of the IGA are missing, the IGA is not enforceable. *Falcon, supra,* 2018 COA 92 ¶38 (When contract is missing essential terms a party is under no obligation to perform.)

V. THIRD CLAIM SHOULD BE DISMISSED FOR LACK OF JURISDICTION

As set forth above, claims for declaratory relief under C.R.C.P. 57 that seek review of quasi-judicial decisions must be filed within 28 days. *See Tri-State Generation & Transmission Co. v. City of Thornton*, 647 P.2d 670, 676-77 (Colo. 1982) (Party may not seek review of quasi-judicial decisions indirectly through a declaratory judgment if its claim under C.R.C.P. 106(a)(4) was time barred); *Danielson v. Zoning Bd. of Adjustment,* 807 P. 2d 541, 543 (Colo. 1990). This is true for constitutional and statutory challenges as well. See *Powers v. Board of County*

Comm'rs, 651 P. 2d 463 (Colo. App. 1982) (Petitioner's constitutional and statutory challenges must be litigated in one action governed by the time limits of C.R.C.P. 106(b)). See also *Norby v. City of Boulder,* 577 P. 2d 277 (Colo. 1978) (Under Rule 106, one "must prosecute all of his causes, including constitutionality, in one action, which must be brought within [28] days. . . .")

In its Third Claim for Relief, Big Sky seeks "a declaration of this Court that the Green Mountain Board Resolution of April 9, 2019 is unconstitutional. . . ." Complaint at ¶84. As set forth more fully above, this Court's jurisdiction to review the appropriateness and constitutionality of the Resolution, which was a quasi-judicial action of the Green Mountain Board of Directors, is limited by Rule 106(a)(4) and (b), which require that this claim be brought within 28 days from the adoption of the Resolution. Failure to bring the Rule 106 action within 28 days is jurisdictional. *Tri-State Generation & Transmission Co. v. City of Thornton*, 647 P.2d 670, 676-77 (Colo. 1982). The Resolution was adopted on April 9, 2018. See Complaint at Exhibit 8. This claim needed to be filed by May 7, 2018. Therefore, this Court lacks subject matter jurisdiction to grant the relief requested in the Third Claim for Relief and that claim should be dismissed under C.R.C.P. 12(b)(1).

VI. PROMISSORY ESTOPPEL DAMAGES CANNOT BE BASED ON A VOID CONTRACT, ON NEGOTIATIONS, OR ON PROMISES THAT PREDATE THE CONTRACT

In its Fourth Claim for Relief, based on promissory estoppel, Big Sky asserts that Green Mountain "promised Big Sky that it would provide sanitary sewer collection service to properties within the Big Sky Service Area." Complaint at ¶87.

A party contracting with a governmental entity has the duty to ascertain whether the contract complies with the statutes, charters, and other rules that are applicable. *Falcon Broadband, Inc. v. Banning Lewis Ranch Metro Dist. No. 1,* 2018 Colo. App. LEXIS 952. The

party contracting with a governmental entity bears the risk that all recovery, including equitable relief, will be denied if the contract is not valid. *Normandy Estates Metro. Recreation Dist. v. Normandy Estates, Ltd.,* 553 P. 2d 386 (Colo. 1976). Where a contract is void because it is not within a municipal corporation's power to make, the municipal corporation cannot be estopped to deny the validity of the contract. *Id.,* at 388-389. See also *Rocky Mountain Nat. Gas, LLC v. Colo. Mountain Junior Coll. District,* 385 P. 3d 848 (Colo. App. 2014). The fiction of an implied promise or agreement cannot be substituted for an express contract which is void for noncompliance with mandatory terms of the statutes. *Falcon, supra,* citing 10A McQuillin, §29:117, at 160-62.

In addition, negotiations leading up to the formation of a contract do not constitute an enforceable promise under the doctrine of promissory estoppel. *G&A Land, LLC v. City of Brighton,* 233 P. 3d 701, 703 (Colo. App. 2010) (Negotiations contemplate future bargaining and do not create the type of obligation required to support a promissory estoppel claim.)

The Big Sky IGA is void, and voidable, for the various reasons set forth above, including illegality of the agreement under the Special District Act, the Local Government Budget Law, and the Colorado Constitution. Therefore, Big Sky's reliance on alleged promises made by Green Mountain in connection with the content of, or negotiations leading up to, the Big Sky IGA cannot form the basis for a claim of promissory estoppel. *Falcon Broadband, Inc. v. Banning Lewis Ranch Metro Dist. No. 1,* 2018 Colo. App. LEXIS 952 (The fiction of an implied promise or agreement cannot be substituted for an express contract which is void for noncompliance with mandatory terms of the statutes.) Moreover, the negotiations leading up to the signing of the IGA do not form the basis for a claim of promissory estoppel. *G&A Land, LLC v. City of Brighton,* 233 P. 3d 701, 703 (Colo. App. 2010)

In addition, Big Sky fails to allege the existence of any promise(s) made by Green Mountain to Big Sky regarding the provision of sanitary sewer services prior to the date of the Big Sky IGA. The Big Sky Will Serve Letter (Complaint at ¶25) does not constitute a promise, and therefore cannot form the basis of a promissory estoppel claim. *Alf Equinox Todd Creek Vill. N. v. Todd,* 2014 Colo. Dist. LEXIS 2584 (Weld County) *5 (Will serve letter from sanitation district is not a promise to provide sewer service, but rather an offer of a unilateral contract). Therefore, any alleged damages incurred by Big Sky prior to the date of the Big Sky IGA, cannot form the basis of detrimental reliance damages under a claim for promissory estoppel. *Skanchy v. Calcados Ortope SA,* 952 P. 2d 1071, 1077-8 (Utah 1998) (Promissory estoppel damages not proper if plaintiff fails to allege reliance on a promise which predated the contract.)

VII. GREEN MOUNTAIN SEEKS A DETERMINATION THAT SPECIFIC PERFORMANCE IS NOT AN AVAILABLE REMEDY

Specific performance is an equitable remedy for breach of contract. *Setchell v. Dellacroce,* 454 P. 2d 804 (Colo. 1969). However, courts of equity do not have authority to order specific relief against a governmental entity for breach of contract. *Wheat Ridge Urban Renewal Auth. V. Cornerstone Group XXII, L.L.C.,* 176 P. 3d 737, 745 (Colo. 2007). Strong public policy reasons exist for the rule that specific performance cannot be ordered against a sovereign. *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 704 (1949) ("The interference of the Courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief.") The primary purposes of the policy decisions of a governmental body are the general well-being of the community they are elected to represent. *Hunt v. Virgin Islands,* 382 F. 2d 38, 44 (3d Cir. 1967). Therefore, Colorado courts have held that specific performance is not allowed as a remedy for

alleged breach of contract against a governmental entity. *Thompson Creek Townhomes, LLC v. Tabernash Meadows Water and Sanitation District,* 240 P. 3d 554, 557 (Colo. App. 2010) (Overwhelming authority prohibits the enforcement of specific performance against the sovereign as a contractual remedy). See also *Rocky Mt. Natural Gas v. Cikirado Mt. Junior College Dist.,* 2013 Colo. Dist. LEXIS 1118 *6 (Jefferson County) ("[A]s a matter of law, the remedy of specific performance of a contract is not available against a public entity. . . .") Specific performance, even if awardable, cannot require a party to perform a continuous series of acts, extending through a long period of time, over which the court exercises its supervision. *Cytogenix, Inc. v. Waldroff,* 213 S.W. 3d 479, 488 (Tex. App. 2006).

In the Complaint, Big Sky seeks "a decree of specific performance" ordering Green Mountain to provide sanitary sewer services specified in the Big Sky IGA, and that "this Court maintain jurisdiction of this case for the purpose of ensuring compliance" with the terms of the IGA. First Claim for Relief at ¶74, and prayer for relief. This form of relief, which would require court supervision over a sanitation district for an undeterminable amount of time, is not available as a remedy for Big Sky's breach of contract claims, as a matter of law.

To the extent any of the claims in the Complaint survive the cross motions for summary judgment filed by the parties, Green Mountain seeks a determination by the Court that specific performance is not an available remedy and that an order requiring Green Mountain to provide sanitary sewer services as outlined in the Big Sky IGA, will not be an outcome of this litigation.

VIII. CONCLUSION

For the reasons set forth above, the claims in the Complaint should be dismissed for lack of subject matter jurisdiction under C.R.C.P. 12(b)(1). In the alternative, Defendant Green

Mountain seeks judgement as a matter of law on the claims in the Complaint in conformance with the Proposed Order filed herewith.

Respectfully filed with the Court this 11th day of September 2019.

DEZIEL TIMMINS LLC

/s/ Mary Joanne Deziel Timmins
Mary Joanne Deziel Timmins #13859

CERTIFICATE OF SERVICE

I certify that, on September 11, 2019, a true and correct copy of the foregoing was served on the following via the Colorado Courts E-Filing System and/or by email:

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/s/ Mary Joanne Deziel Timmins
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