DISTRICT COURT, JEFFERSON COUNTY, COLORADO Court Address: 100 Jefferson County Parkway Golden, CO 80401 DATE FILED: September 5, 2019 11:05 AM FILING ID: A2DD448C5863B CASE NUMBER: 2019CV31158	
Plaintiff: CDN RED ROCKS, LP, a Colorado Limited Partnership, v. **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-031158 **Division**: 2 **Courtroom:** 4B
MOTION TO DISMISS	

Comes now, Defendant Green Mountain Water and Sanitation District ("Green Mountain"), through undersigned counsel, and files this Motion to Dismiss:

CERTIFICATION: Pursuant to C.R.C.P. 121, § 1-15(8), the undersigned hereby certifies she conferred with counsel for Plaintiffs who stated she would oppose the relief requested herein.

I. INTRODUCTION

This case is about whether Defendant Green Mountain Water and Sanitation District exceeded its jurisdiction, or abused its discretion, when it adopted a Resolution declaring an intergovernmental agreement between Big Sky Metropolitan District No. 1 and Green Mountain, void ("Big Sky IGA"). The Big Sky IGA contemplated the provision of sanitary sewer service by Green Mountain to the Big Sky service area. Complaint at ¶97. The IGA was signed by the former majority of the Green Mountain Board of Directors on May 8, 2018, the day such majority of directors were being voted out of office. Complaint at ¶89 and 104. The IGA never went into effect because shortly after the new majority of directors took office, Big Sky and Plaintiff CDN

Red Rocks LP ("CDN"), and others, were advised that the IGA was being suspended and being reviewed for irregularities and invalidity of the IGA under Colorado law.

This action is brought by CDN, a property owner whose property is located within the Big Sky service area. Complaint at ¶98. CDN is not a party to the IGA, and therefore is attempting to claim rights under the IGA derivatively through Big Sky. Complaint at ¶¶89, 247 and 248. All ten claims in the Complaint are based on the Green Mountain Board of Director's determination by Resolution, at a public meeting on April 9, 2019, that the Big Sky IGA was void from its inception, and therefore needed to be terminated. Complaint at ¶¶1 and 122. CDN asserts that the adoption of that Resolution was "improper, arbitrary and capricious." Complaint at ¶1.

This Court lacks subject matter jurisdiction over the state law claims in this case because Plaintiff failed to bring an action under C.R.C.P. 106(a)(4) within 28 days as required for review of the Green Mountain Board of Director's adoption of the Resolution. The Court lacks subject matter jurisdiction over the federal law claims because those claims are not ripe for review. Even if this Court had jurisdiction, a determination by this Court that the Big Sky IGA was void from its inception, as a matter of law, would result in dismissal of the claims in the Complaint for failure to state a claim upon which relief can be granted, and would resolve all claims.

II. MOTION TO DISMISS STATE LAW CLAIMS UNDER C.R.C.P. 12(b)(1)

Plaintiff's state law claims should be dismissed for lack of subject matter jurisdiction under C.R.C.P. 12(b)(1) because it 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, be it constitutional or statutory, 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 or officer has exceeded its jurisdiction or abused it discretion, based on the evidence in the record before the body or officer. 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 State Law 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 party to the IGA, and to CDN, 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 CDN and others, attached hereto as **Exhibit A**. Big Sky and CDN, through their counsel, were given the opportunity to be heard, and were 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.**

Therefore, CDN's exclusive remedy for review of the Board's Resolution is C.R.C.P. 106(a)(4), and CDN 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. CDN 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).

III. BIG SKY IGA VOID OR VOIDABLE AS A MATTER OF LAW AND ALL CLAIMS SHOULD BE DISMISSED UNDER C.R.C.P. 12(b)(5)

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 IGA is Unauthorized Material Modification of the Big Sky Service Plan.

The geographic boundary of the service area of Big Sky Metropolitan District No. 1, the party to the 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 IGA contains approximately 700 acres of land. See Boundary Map attached as Exhibit A to the Big Sky IGA, attached hereto as **Exhibit G.**[1] For illustration 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

[1] If a document is referred to in the complaint and is central to the plaintiff's claims, the defendant may submit a copy to the court attached to its motion to dismiss, and the court's consideration of the document does not require conversion of the motion to one for summary judgment. *Yadon v. Lowry,* 126 P. 3d 332, 336 (Colo. App. 2005).

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, by Green Mountain, over a multi-year period, none of which were appropriated in the budget including: (1) Section 6.1B, Green Mountain to pay to Big Sky, over a ten-year period, an undetermined amount of fees; (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; (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. In addition, the IGA was not made subject to annual appropriation as required under C.R.S. §29-1-110.

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 entirely 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.

The Big Sky IGA is unenforceable because it is missing essential terms. The IGA has no contract termination date. 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 Exhibit C was never attached to the IGA. See Big Sky IGA attached as **Exhibit G.** 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 hereto as **Exhibit G.** 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.)

IV. CLAIMS SHOULD BE DISMISSED FOR ADDITIONAL REASONS

A. First Claim for Relief (Takings Clause) Dismissible Under C.R.C.P. 12(b)(1)

CDN asserts a "takings clause" claim against Green Mountain under the Colorado and U. S. Constitutions based on Green Mountain's termination of the Big Sky IGA which allegedly "has deprived CDN of sanitary sewer services." Complaint at ¶141.

A claim that a government regulation or action effects a taking of a property interest under the Takings Clause in the Colorado or U. S. Constitutions is an inverse condemnation claim. *Ossman v. Mountain States Tel & Tel Co.,* 520 P. 2d 738, 741 (Colo. 1974). Such inverse

condemnation claim is not ripe for review, and is dismissible for lack of subject matter jurisdiction, until the property owner has availed itself of all other opportunities for relief and until the property owner has sought compensation for its purported takings claim under the applicable state statutory procedures. *Williamson County Planning Comm'n v. Hamilton Bank*, 473 U. S. 172 (1985). (Seeking compensation under state eminent domain statute is jurisdictional prerequisite to filing constitutional takings claim). See also *Onyx Props. LLC v. Board of County Comm'rs Elbert County,* 2011 Colo. Dist. LEXIS 2173 (Elbert County) (Citing *Williamson County Planning Comm'n v. Hamilton Bank, supra,* with approval). If the state statutes provide an adequate process for obtaining compensation, and if resort to that process yields just compensation, then the property owner has no claim against the government for a taking. *Williamson County Planning Comm'n v. Hamilton Bank*, 473 U. S. 172, 194 (1985).

Under Colorado law, an inverse condemnation action must be tried as an eminent domain proceeding under the eminent domain statutes set forth at C.R.S. §38-1-101 *et seq. Jorgenson v. Aurora*, 767 P. 2d 756 (Colo. App. 1988) (Inverse condemnation action must be tried under the eminent domain statute.) Eminent domain proceedings are to be conducted strictly according to the procedures set out in the eminent domain statute. *Ossman, supra*, 520 P. 2d at 741.

The First Claim for Relief must be dismissed under C.R.C.P. 12(b)(1) for lack of subject matter jurisdiction because CDN's purported takings claim is not ripe for review. CDN has not alleged that it sought compensation for its purported takings claim under the applicable Colorado eminent domain statute. An eminent domain proceeding under C.R.S. §38-1-101 *et seq.* is a jurisdictional prerequisite to a "takings clause" claim under the Colorado or U. S. Constitutions. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U. S. 172 (1985) ("[T]he

taking claim is not yet ripe . . . respondent did not seek compensation through the procedures the State has provided for doing so.")

Moreover, the First Claim for Relief is not ripe for review because CDN has not alleged in its Complaint that it availed itself of other opportunities to obtain sanitary sewer service, as required to state a takings claim. For example, CDN owns property located within the boundaries of the Big Sky Metropolitan District No. 2 service area. Complaint at ¶ 98 and 99. Big Sky Metropolitan District No. 2 is authorized, and in fact *required*, to provide sanitary sewer service to the property owners within its boundaries, including CDN. Complaint at ¶14 ("Big Sky is authorized to finance and construct sewer mains and related pipelines . . . within its boundaries.") Therefore, CDN should have availed itself of the opportunity of getting sanitary sewer service from Big Sky Metropolitan District No. 2. CDN could also obtain sanitary sewer services by applying for inclusion of its property into another sanitation district under C.R.S. §32-1-401. See *Williamson County Planning Comm'n. v. Hamilton Bank, supra,* 473 U. S. at 187 (Takings claim dismissed because appellees failed to avail themselves of other opportunities). The First Claim for Relief should be dismissed under C.R.C.P. 12(b)(1).

B. Green Mountain is Not a Public Utility

In its Second Claim for Relief, CDN asserts that "Green Mountain is a public utility" as defined under C.R.S. §40-1-103(1)(a)(I). Complaint at ¶162. CDN further asserts that Green Mountain violated state law by abandoning service under C.R.S. §40-7-102. Complaint at ¶164.

Title 40 of the Colorado Revised Statutes, C.R.S. §40-1-101 *et seq.*, sets forth the jurisdiction of the Public Utilities Commission of the state of Colorado ("PUC"). The purpose of the PUC was to protect the interest of the public in the regulation of utilities. *Id.* The PUC has no jurisdiction to regulate or control the operation of a utility that operates wholly within the

boundaries of a home rule city. *Denver v. Public Utilities Commission,* 507 P. 2d 871 (Colo. 1973). The rationale behind not giving the PUC authority to regulate a municipally owned utility is that, since the municipal government is chosen by the people, they need no protection by an outside body. *Id.*, 507 P. 2d 871, 873. If the rates or services are not satisfactory to a majority of the citizens, they can easily effect change either at a regular election or by the exercise of the right of recall. *Id.* See also *Matthews v. Tri-County Water Conservancy District,* 613 P. 2d 889 (Colo. 1980) (A quasi-municipal corporation which limits its services to the inhabitants of the municipality is not subject to PUC regulation.) If, on the other hand, a utility service operates outside the boundaries of a municipality, those receiving the service do not have a similar recourse on election day, and thus are accorded protection of the PUC. *K. C. Electric Assoc. v. Public Utilities Comm'n,* 550 P. 2d 871 (Colo. 1976).

Because a sanitation district is organized as a municipal corporation to serve the inhabitants of its district, whose board of directors is elected at regularly held elections, a sanitation district is not a "public utility" regulated by the PUC under C.R.S. §40-1-101 *et seq.* See *Schlarb v. North Suburban Sanitation District,* 357 P. 2d 647, 648 (Colo. 1960) ("Suffice it to say that a sanitation district does not fall within the definition of a public utility.") See also *Matthews v. Tri-County Water Conservancy District,* 613 P. 2d 889 (Colo. 1980) (Water district).

Green Mountain is a quasi-municipal corporation, operating wholly within the boundaries of the City of Lakewood, a home rule city, and is authorized to collect wastewater generated by properties within its boundaries. Complaint at ¶¶5 and 15. The Board of Directors of Green Mountain are elected at regular elections by the citizens residing within the boundaries of the Green Mountain service area. Complaint at ¶104. As a water and sanitation district operating within the boundaries of a home rule city, and having regular elections to determine the members

of its Board of Directors, Green Mountain is not a "public utility" regulated by the Public Utilities Commission under C.R.S. §40-1-101 *et seq.* See *Schlarb v. North Suburban Sanitation District,* 357 P. 2d 647, 648 (Colo. 1960); *Matthews v. Tri-County Water Conservancy District,* 613 P. 2d 889 (Colo. 1980); *Denver v. Public Utilities Commission,* 507 P. 2d 871 (Colo. 1973). Therefore, CDN's claim that Green Mountain is a "public utility" subject to the jurisdiction of the PUC, and violated C.R.S. §40-7-102, fails to state a claim and should be dismissed.

C. Vested Property Rights Claim Must Be Dismissed under C.R.C.P. 12(b)(5)

In its Third Claim for Relief, CDN asserts that "Green Mountain has impaired and diminished CDN's vested property rights" entitling CDN to "remedies available" under the Vested Property Rights Act. Complaint at ¶175. In support of this claim, CDN attached a "Development Agreement" between CDN, Teefam Colorado Land Company, L.P., a California limited partnership, and the City of Lakewood, Colorado, dated December 10, 2009.

The Vested Property Rights Act creates a vested property right in a landowner when a local government approves a PUD plan. C.R.S. §24-68-101 *et seq.* A vested property right, once established under the statute and applicable common law, precludes any *zoning or land use action* by the *approving local government* which would alter, impair or otherwise delay the development or use of the property as set forth in the approved development plan. C.R.S. §24-68-105 (emphasis added). A vested property right is enforceable against local governments which assert jurisdiction over the property within the site-specific development plan. C.R.S. §24-68-106(2).

Green Mountain is not a party to the Development Agreement attached to the Complaint. Complaint at Exhibit 1. Moreover, Green Mountain has no jurisdiction over any property owned by CDN, and CDN does not allege in the Complaint that Green Mountain has such jurisdiction. Therefore, the Act is not enforceable against Green Mountain. C.R.S. §24-68-106(2) ("A vested

property right . . . shall be effective against any other local government which may subsequently obtain or assert jurisdiction over such property.") Green Mountain's jurisdiction is limited under the Special District Act to the property contained within its service area. C.R.S. §32-1-202.

Moreover, the Vested Property Rights Act restricts future *zoning or land use* actions by the City of Lakewood, the governmental entity that is a party to the Vested Rights Agreement asserted by CDN. Complaint at ¶¶167, 168 and Development Agreement at Exhibit 1. Special districts, such as Green Mountain, do not make zoning or land use decisions. Even if special districts were permitted to make zoning or land use decisions, such decisions would not be limited by the Vested Property Rights Act because a special district is permitted to overrule or disregard the restrictions imposed by county or municipal zoning rules or regulations. *Reber v. South Lakewood Sanitation District,* 362 P. 2d. 877 (Colo. 1961) (Sanitation district authorized to overrule Planning Commission and locate disposal plant in residential zone despite restrictions of zoning regulations). Therefore, Green Mountain is not bound by the terms of the Development Agreement, or the Vested Rights Act. The Third Claim for Relief should be dismissed under C.R.C.P. 12 (b)(5) for failure to state a claim upon which relief can be granted.

D. Claims Under 42 U.S.C. §1983 Must Be Dismissed for Failure to State a Claim and for Lack of Subject Matter Jurisdiction

To state a substantive due process claim under 42 U.S.C. §1983, a plaintiff must first allege sufficient facts to show a property or liberty interest warranting due process protection. *Lehman v. City of Louisville,* 967 F. 2d 1474 (10th Cir. 1992). Fundamental property or liberty interests that are accorded due process protections include "matters relating to marriage, family, procreation, and the right to bodily integrity." *Williams v. Berney,* 519 F. 3d 1216 (10th Cir. 2008); *Onyx Properties LLC v. Board of County Comm'rs of Elbert County,* 2011 Colo. Dist. LEXIS 2173 (Elbert County). To have a protected property interest, a person must have more

than an "expectation" and more than an "abstract need or desire." *Schultz v. City of Longmont,* 465 F. 3d 433, 443 (10th Cir. 2006). A benefit derived from a municipal contract is not a protected property interest if the municipality has discretion to grant or deny the contract. *Id.* (Section 1983 claim based on city's breach of employment contract dismissed because granting of contract was discretionary). See also *Hillside Cmty. Church v.Olson,* 58 P. 3d 1021, 1025 (Colo. 2002); *Brannan Sand & Gravel Co. LLC v. County of Gilpin,* 2011 Colo. Dist. LEXIS 2127 (Gilpin County).

If the protected interest requirement is met, the plaintiff must then allege facts sufficient to show that the challenged governmental action was "arbitrary and capricious." *Crider v. Board of County Comm'rs of Boulder County,* 246 F. 3d 1285 (10th Cir. 2001). To show that an action is arbitrary and capricious, a plaintiff must show that the governmental action bears no rational relationship to the exercise of the governmental body's judicial or legislative action. *Id.*

When a plaintiff alleges that he was denied a property interest without due process, and the loss of that property interest is the same loss upon which the plaintiff's constitutional takings claim is based, the ripeness principles in *Williamson County v. Hamilton Bank* apply. *Bateman v. City of West Bountiful,* 89 F. 3d 704, 709 (10th Cir. 1996) (Dismissing action for lack of subject matter jurisdiction court held "the ripeness requirement of *Williamson* applies to due process and equal protection claims that rest upon the same facts as a concomitant takings claim.")

In its Sixth Claim for Relief, CDN asserts a "42 U.S.C. §1983 Takings Violation," alleging the same facts that supported its takings clause claims in its First Claim for Relief. Complaint at ¶¶ 198-210. This claim must be dismissed for lack of subject matter jurisdiction under C.R.C.P. 12(b)(1), for the reasons set forth above, which include the fact that CDN has not alleged that it availed itself of other opportunities to obtain sanitary sewer service, nor has it

previously filed an inverse condemnation claim under Colorado's eminent domain statutes. *Bateman v. City of West Bountiful*, 89 F. 3d 704, 709 (10th Cir. 1996) (Dismissal of Section 1983 "takings" claim for lack of subject matter jurisdiction affirmed).

In its Fifth Claim for Relief, CDN asserts that Green Mountain "deprived CDN of its vested property rights in its property" by "refusing to provide sanitary sewer services to CDN's property." Complaint at ¶¶ 187-189. CDN further alleges that "it had a legitimate expectation that it would receive sanitary sewer services from Green Mountain." Complaint at ¶136. It is not clear from the allegations in the Complaint whether the "protected property right" at issue in the §1983 claim is the "right to receive sanitary sewer service to CDN's property," Complaint at ¶187, or its alleged "vested property right to develop its property," Complaint at ¶¶184 and 198. Either way, CDN has failed to state a §1983 claim as a matter of law because either of these alleged property rights do not involve fundamental property or liberty interests that are accorded due process protections.

First, the Big Sky IGA, the termination of which supports all the claims in the Complaint, was considered and terminated by Green Mountain as a matter within its sound discretion. Green Mountain has no obligation to deliver sanitary sewer service to CDN's property, and in fact is not permitted to do so under the Green Mountain service plan approved by the Jefferson County District Court in 1951. Because delivery of sanitary sewer service to CDN's property would be a matter within the discretion of Green Mountain, conditioned on numerous additional future approvals from the courts, the electorate, and other governmental bodies, it is not a constitutionally "protected property interest" for purposes of §1983 as a matter of law, and the Fifth Claim for Relief should be dismissed for failure to state a claim. *Schultz v.*

City of Longmont, 465 F. 3d 433, 443 (10th Cir. 2006). See also *Brannan Sand & Gravel Co. LLC v. County of Gilpin,* 2011 Colo. Dist. LEXIS 2127 (Gilpin County).

Moreover, nowhere in the Complaint does CDN assert a *physical* taking of its property. Rather, CDN claims that "it had a legitimate expectation that it would receive sanitary sewer services from Green Mountain." Complaint at ¶136. An "expectation" does not form the basis for a constitutionally protected property right. See *Schultz v. City of Longmont, supra,* 465 F. 3d 433, 443 ("To have a property interest . . . a person clearly must have more than an abstract need or desire and more than a unilateral expectation of it.") Also, the expectation of receiving sanitary sewer service to a development project is not a matter relating to marriage, family, procreation, and the right to bodily integrity. See *Williams v. Berney,* 519 F. 3d 1216 (10th Cir. 2008); *Onyx Properties LLC v. Board of County Comm'rs of Elbert County,* 2011 Colo. Dist. LEXIS 2173 (Elbert County).

CDN's Sixth Claim for Relief based on a 42 U.S.C. §1983 "Takings Violation" should be dismissed under C.R.C.P. 12(b)(1) for lack of subject matter jurisdiction because it is not ripe for review. CDN's Fifth Claim for Relief based on a 42 U.S.C. §1983 "Due Process Violation" should be dismissed under C.R.C.P. 12(b)(5) for failure to state a claim.

E. Promissory Estoppel Cannot Be Based on a Void Contract

In its Fourth Claim for Relief, based on promissory estoppel, CDN asserts Green Mountain made promises to Big Sky in the Big Sky IGA, which CDN "reasonably and substantially relied to its detriment" requiring the "promise to be enforced." Complaint at ¶¶176-180. CDN fails to state a claim for relief under the doctrine of promissory estoppel, requiring dismissal of this claim as a matter of law.

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.

F. Impairment of Contract Claim Fails to State a Claim

The Contract Clause of the U.S. and Colorado Constitutions are identical and prevent legislatures from passing laws that impair contractual obligations. *Justus v. State,* 336 P. 3d 202 (Colo. 2014). The contract clause balancing test adopted by the Colorado Supreme Court requires that: (1) a contractual obligation exists; (2) the change in the law impairs that contractual relationship; and if so (3) the impairment is substantial. *Id.* Under the "reserved powers doctrine" of the Contract Clause, contracts which purport to bind a local governmental body with regard to the exercise of its core powers, notably its police powers, do not constitute a contractual obligation for purposes of the first inquiry in the contract clause balancing test. *U. S. v. Winstar Corp.,* 518 U. S. 839, 888 (1996) (State governmental body may not contract away an essential attribute of its sovereignty for purposes of Contract Clause analysis). See also *Wheat Ridge*

Renewal Auth. V. Cornerstone Group XXII, L.L.C., 176 P. 3d 737, 743 (Colo. 2007) (Contract Clause does not require a state governmental body to adhere to a contract that surrenders an essential attribute of its sovereignty.) Moreover, the power of a state governmental body to adopt regulations to secure the health, safety, and general welfare of the community cannot be contracted away. *Atlantic Coast Line R. Co. v. Goldsboro,* 232 U. S. 548, 558 (1914).

Plaintiff's Seventh Claim for Relief (Impairment of Contract) under the Contract Clause seeks to enforce its "Vested Rights Agreement" under which Green Mountain allegedly contracted to "receive wastewater from the [Plaintiff's] property." Complaint at ¶216. This claim fails to state a Contract Clause claim because Plaintiff fails to satisfy the first inquiry of the Contract Clause test. Nowhere in the Vested Rights Agreement did Green Mountain agree to accept wastewater from CDN. See Complaint at Exhibit 1. Therefore, no such contractual obligation exists under the Vested Rights Agreement. Even if such an agreement was made between Green Mountain and CDN in the Vested Rights Agreement, under the reserved powers doctrine such agreement cannot be enforced under the Contract Clause because accepting wastewater is Green Mountain's core governmental function which is performed for the health, safety and general welfare of its citizens in the community. C.R.S. §32-1-102(1) (special districts are created to "promote the health, safety, prosperity, security, and general welfare" of their inhabitants.) Therefore, this claim must be dismissed under C.R.C.P. 12(b)(5).

G. Rule 57 Claim in Eighth Claim For Relief Dismissible under CRCP 12(b)(1)

Plaintiff brings its Eighth Claim for Relief (Improper Retrospective Government Action), under C.R.C.P. 57 and C.R.S. §13-51-101 seeking declaratory relief, requesting a declaration that Green Mountain's adoption of the Resolution was improper. Complaint at ¶¶228-231. This claim should be dismissed for lack of subject matter jurisdiction because claims for declaratory relief

under C.R.C.P. 57 that seek review of quasi-judicial decisions of a local governmental body 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). 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) (One challenging quasi-judicial decision of a lower governmental body "must prosecute all of his causes, including constitutionality, in one action, which must be brought within [28] days. . . .")

H. Breach of Contract Action Fails to State a Claim

CDN alleges "Green Mountain and Big Sky entered into an Intergovernmental Agreement" dated May 8, 2018. Complaint at ¶89. The Complaint does not allege CDN is a party to the Big Sky IGA. Rather, CDN alleges that "CDN is a third party beneficiary of the . . . Green Mountain/Big Sky IGA. . . ." Complaint at ¶247. CDN alleges third-party beneficiary status to other agreements, not attached to the Complaint, including the "Green Mountain/Fossil Ridge IGA," the "Green Mountain/Big Sky MOU" and the Big Sky Will Serve Letter. Complaint at ¶247 and 248.

A party must have privity of contract to sue for breach of contract. *Bewley v. Semler,* 432 P. 3d 582, 586-87 (Colo. 2018). Moreover, one must be a party to a contract to enforce any terms in the contract. *Forest City Stapleton Inc., v. Rogers,* 393 P. 3d 487, 490 (Colo. 2017). CDN is not a party to the Big Sky IGA, the Fossil Ridge IGA, the MOU or the Will Serve Letter.

Therefore, CDN cannot assert a breach of contract claim against Green Mountain or enforce the terms of these agreements.

Under Colorado law a "person not a party to an express contract may bring an action on such contract if the parties to the agreement intended to benefit the non-party, provided that the benefit claimed is a direct and not merely an incidental benefit of the contract." *E. B. Roberts Constr. Co. v. Concrete Contractors, Inc.*, 704 P. 2d 859, 865 (Colo. 1985). A third-party beneficiary to a contract may generally sue to enforce its terms. *Bewley v. Semler,* 432 P. 3d 582, 587 (Colo. 2018). The key question in determining the status of a party as a third-party beneficiary is the intent of the parties to the actual contract. *Concrete Contractors, Inc. v. E.B. Roberts Constr. Co.,* 664 P. 2d 722, 725 (Colo. App. 1983).

Paragraph 12.4 of the Big Sky IGA, and paragraph 12.4 of the Fossil Ridge IGA, titled "No Third-Party Beneficiaries," state: "No third-party beneficiary rights are created in favor of any person not a Party to this Agreement." See Big Sky IGA, attached hereto as **Exhibit G**. See Fossil Ridge IGA, attached hereto as **Exhibit J.** Therefore, the parties to the Big Sky and Fossil Ridge IGA's explicitly disclaimed any intent to confer a benefit on any third party. CDN fails to state a claim for breach of contract on a third-party beneficiary theory. By its terms, the MOU states that it "does not legally bind the parties," and that Green Mountain has "no obligation to provide service" under the MOU. See MOU attached hereto as **Exhibit K.** Therefore, CDN fails to state a claim for breach of the MOU as well.

CDN alleges it is a third-party beneficiary of the "Big Sky Will Serve Letter" attached as Exhibit 2 to the Complaint, and that Green Mountain breached the Will Serve Letter by adopting the Resolution. Complaint at ¶¶248 and 249. CDN is not a party to the Big Sky Will Serve Letter and therefore cannot enforce the terms of such letter. *Forest City Stapleton Inc., v. Rogers,* 393

P. 3d 487, 490 (Colo. 2017). In addition, by its terms, the Will Serve Letter was "subject to and conditioned upon" numerous items which were never satisfied. Complaint at Exhibit 2. CDN failed to allege such conditions were satisfied as required under C.R.C.P. 9(c) to state a claim. Therefore, CDN's breach of contract claim based on the Will Serve Letter should be dismissed.

I. Request for Mandamus Should Be Dismissed

The writ of mandamus will issue only where the duty to be performed is ministerial and the obligation to act peremptory and plainly defined. C.R.C.P. 106(a)(2). See also *United States ex rel McClennan v. Wilbur*, 239 U. S. 414, 420 (1931). The law must not only authorize the demanded action, but require it. *Id.* Mandamus is awarded not as matter of right but in the exercise of the court's discretion. *Rocky Mountain Animal Defense v. Colorado Div. of Wildlife*, 100 P. 3d 508, 517 (Colo. App. 2004). A mandamus claim is maintainable only when there is no other clear remedy. *Julesberg Sch. Dist. No. Re-1 v. Ebke*, 562 P. 2d 419 (Colo. 1977).

In its Tenth Claim for Relief, CDN claims that Green Mountain "as a public utility, has an obligation to provide [sanitary sewer] services to CDN." See Complaint at ¶256. As set forth above, Green Mountain is not a public utility, as a matter of law. Therefore, CDN's mandamus claim based on the laws relating to public utilities does not apply to Green Mountain, and fails to state a claim for relief upon which relief can be granted.

V. CONCLUSION

For the reasons set forth above, Defendant requests that the claims in this action be dismissed for lack of subject matter jurisdiction under C.R.C.P. 12(b)(1) or in the alternative for failure to state claims for relief under C.R.C.P. 12(b)(5).

Dated this 4th day of September, 2019

DEZIEL TIMMINS LLC
/s/ Mary Joanne Deziel Timmins
Mary Joanne Deziel Timmins #13859
Attorneys for Defendant Green Mountain Water and Sanitation District

CERTIFICATE OF SERVICE

I certify that, on September 4, 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:

Marsha M. Piccone
Caleb Durling
FOX ROTHSCHILD LLP
1225 17th Street, Suite 2200
Denver, CO 80202

/s/ Mary Joanne Deziel Timmins
Mary Joanne Deziel Timmins