DISTRICT COURT, JEFFERSON COUNTY, COLORADO Court Address: 100 Jefferson County Parkway Golden, CO 80401	DATE FILED: September 5, 2019 11:01 AM FILING ID: 26BF14CEE7D36 CASE NUMBER: 2019CV31172
Plaintiff: STREAM REALTY ACQUISITION, LLC, a Texas limited liability company, 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-031172 **Division:** 2
MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION UNDER C.R.C.P. 12(b)(1) AND FOR FAILURE TO STATE A CLAIM UNDER C.R.C.P. 12(b)(5)	

Defendant Green Mountain Water and Sanitation District, through undersigned counsel, files this Motion to Dismiss for Lack of Subject Matter Jurisdiction under C.R.C.P. 12(b)(1) and for Failure to State a Claim under C.R.C.P. 12(b)(5), and in support states as follows:

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 about whether Defendant Green Mountain Water and Sanitation District ("Green Mountain") 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 ¶33-34. 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 ¶37 and 38. The IGA never went into effect because shortly after the new majority of directors took office, Big Sky, and others including Plaintiff Stream Realty, were advised that the IGA was being suspended and being reviewed for irregularities and invalidity of the IGA under Colorado law. Complaint at ¶38.

Plaintiff, Stream Realty Acquisition, LLC ("Stream"), is a Texas limited liability company, who filed this action seeking to enforce the Big Sky IGA against Green Mountain, as well as other "valid agreements and promises" between other parties and Green Mountain. Complaint at ¶¶ 6, 33. Plaintiff admits it does not own property in the Big Sky service area, or the Green Mountain service area. Complaint at ¶1-3. Plaintiff admits it does not own property in any of the geographic areas at issue in this case. Plaintiff bases its standing to sue in this case on the fact that it has been under contract to purchase property located in the Green Tree Metropolitan District since November 2017. Complaint at ¶1-3.

Plaintiff admits it is not a party to the Big Sky IGA, or any of the other "valid agreements" it seeks to enforce. Rather, Stream seeks to enforce its alleged rights as a third-party beneficiary to the Big Sky IGA, and the other agreements. Complaint at ¶6. In the Complaint, Plaintiff brings three claims for relief, including for declaratory relief, breach of contract and promissory estoppel. All three claims arise out of the Green Mountain Board of Director's adoption of a Resolution "declaring the Big Sky IGA to be invalid, and void since its inception, against public policy" which allegedly constituted a "repudiation of its obligations

under the Big Sky/Green Mountain IGA," which was done "without legal basis." Complaint at ¶39 and 49.

II. MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION UNDER C.R.C.P. 12(b)(1)

Plaintiff's 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 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 governmental action is quasi-judicial, review by District Court is solely under Rule 106(a)(4)).

Moreover, 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) (Complaint dismissed under 12(b)(1) for failure to file claims within 28-day time limit under Rule 106(b)). 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). 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 governmental body "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. <u>Quasi-Judicial Action.</u>

An action is quasi-judicial, and therefore subject to exclusive review under Rule 106(a)(4), if the governmental decision adversely affects 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 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 if necessary 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 its 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.; 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 Big Sky 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. *Cherry Hills Resort Dev. Co. v. Cherry Hills Village,* 757 P. 2d 622 (Colo. 1988)

Notice was given to Big Sky, the party to the IGA, and to Stream, the Plaintiff in this case, that the IGA was being suspended and was under review for its invalidity under Colorado law. See Letter Dated September 4, 2018, to Big Sky, Stream and others, attached hereto as **Exhibit A**. Big Sky and Stream, through their counsel, were given the opportunity to be 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 adopted 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, Stream's exclusive remedy for review of the Board's Resolution is C.R.C.P. 106(a)(4), and Stream 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. Stream 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. MOTION TO DISMISS ON ADDITIONAL GROUNDS

The claims in the Complaint are dismissible on other grounds as set forth below.

A. First Claim for Relief (Declaratory Judgment) Dismissible Under Rule 12(b)(1) For Lack of Standing

In its First Claim for Relief, Stream seeks a declaration by this Court that, pursuant to the Big Sky IGA, the Fossil Ridge IGA and the Green Tree Will Serve Letter, "Green Mountain is obligated to provide sanitary sewer service" to Stream properties because Stream is a third-party beneficiary of those alleged agreements and "other agreements" not specified. Complaint at ¶67.

1. Stream Lacks Standing to Sue Under Rule 57 Because It Is Not A Party, or Third-Party Beneficiary, to any Agreements.

C.R.C.P. 57(b) states:

> Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

To have standing to bring an action under Rule 57, a person must show it is "interested" under a contract, or has other "legal relations" that are affected by such contract. *Associated Master Barbers v. Journeyman Barbers, etc.,* 258 P. 2d 599 (Colo. 1955). A plaintiff who is not a party to a contract is without standing to obtain a declaratory judgment interpreting, or determining the validity of, the contract. *Id.* See also *Wibby v. Boulder County Bd.,* 409 P. 3d 516 (Colo. App. 2016) (Rule 57 action dismissed under Rule 12(b)(1) for lack of standing).

Stream does not dispute that it is not a party to the Big Sky IGA, the Fossil Ridge IGA, or the Green Tree Will Serve Letter, or that it did not own property in Green Tree Metro District at the time of the Will Serve Letter in 2016, or the Fossil Ridge IGA in 2008. Stream

claims rights under the IGA's and the Will Serve Letter to Green Tree as a third-party beneficiary. Complaint at ¶61.

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 at ¶12.4 attached to Complaint as **Exhibit 2**. See Fossil Ridge IGA attached hereto as **Exhibit J.**[1] Therefore, the parties to the Big Sky IGA and Fossil Ridge IGA explicitly disclaimed any intent to confer a benefit on any third party via the Big Sky IGA or the Fossil Ridge IGA. As a matter of law, Stream is not a third-party beneficiary under either IGA.

Stream has not attached the Green Tree Will Serve Letter to its Complaint. However, Stream alleges in the Complaint that the Will Serve Letter was dated November 2016, and was given to Green Tree Metropolitan District No. 1 from Green Mountain. Complaint at ¶40. Stream also alleges that it does not now own property in the Green Tree Metropolitan District, but that it is "under contract" to buy property in the Green Tree Metro District, which contract

[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).

was dated November 2017, and recently amended in May 2019. Complaint at ¶¶ 1-3. Therefore, Stream could not have been a third-party beneficiary to a Will Serve Letter dated November 2016, if Stream had no legal interest to any property in the Green Tree Metropolitan District until November 2017. Moreover, the Fossil Ridge IGA is dated in 2008, nine years before Stream allegedly went under contract to purchase property in the Green Tree area, and therefore, Stream could not have been an intended beneficiary under that agreement in 2008.

Therefore, Stream lacks standing to seek declaratory relief under Rule 57 based on the IGA's or the Will Serve Letter because it has no rights under the IGA's or the Will Serve Letter either as a party or a third-party beneficiary, and the First Claim for Relief must be dismissed under Rule 12(b)(1) for lack of standing. *Wibby v. Boulder County Bd.,* 409 P. 3d 516 (Colo. App. 2016) (Rule 57 action dismissed under Rule 12(b)(1) for lack of standing).

2. <u>Dismissal Under Rule 12(b)(5) Failure to Join Indispensible Parties</u>

Rule 57(f), C.R.C.P. provides that the court may refuse to render or enter a declaratory judgment or decree where such judgment would not terminate the uncertainty or controversy giving rise to the proceeding. C.R.C.P. 57(f). Rule 57(j) provides that when declaratory relief is sought, "all persons shall be made parties who have or claim any interest which would be affected by the declaration. . . ." C.R.C.P. 57(j). Courts have held that failure of a Rule 57 action to join all parties who would be affected by the declaratory relief requires dismissal of the action for failure to state a claim. *People ex rel. Inter-Church Temperance Movement v. Baker,* 297 P. 2d 273 (Colo. 1956); *Ahern v. Baker,* 366 P. 2d 366 (Colo. 1961).

In this case, Stream seeks a declaration that "Stream is a third-party beneficiary of the Big Sky/Green Mountain IGA, the November 2016 Green Tree will serve letter, the Green Mountain/Fossil Ridge IGA" and that "Green Mountain is obligated to provide sanitary sewer

service" under such IGA's and Will Serve Letter. Complaint at ¶61. A declaration of rights under the IGA's and Will Serve Letter requires joinder of Big Sky, Fossil Ridge, and Green Tree to this action because Big Sky is a party to the Big Sky IGA, Fossil Ridge is a party to the Fossil Ridge IGA, and Green Tree is a party to the Will Serve Letter. Because the Complaint failed to join Big Sky, Fossil Ridge, and Green Tree, the Rule 57 action must be dismissed. *People ex rel. Inter-Church Temperance Movement v. Baker,* 297 P. 2d 273 (Colo. 1956) (Judgment of dismissal affirmed because Rule 57 action failed to join all interested parties); *Ahern v. Baker,* 366 P. 2d 366 (Colo. 1961) (Dismissal of Rule 57 action for failure to join interested parties affirmed).

B. Second Claim for Relief (Breach of Contract) Fails to State a Claim

In the Complaint, Plaintiff alleges that on May 8, 2018, "an Intergovernmental Agreement for Extraterritorial Service was entered into by Big Sky and Green Mountain." Complaint at ¶33. Plaintiff also alleges that Green Mountain and Fossil Ridge Metropolitan District No. 1 entered into the "Green Mountain/Fossil Ridge IGA." Complaint at ¶15. Plaintiff also alleges that the Green Tree Will Serve Letter is dated November 2016, prior to Stream having any legal interest to property located in the Green Tree Metro District. Complaint at ¶¶1-3, and 40. Nowhere in the Complaint does Stream allege that it is a party to either of the IGA's or a recipient of the Will Serve Letter. Rather, Stream alleges in the Complaint that "Stream brings this action to enforce, as a third-party beneficiary, its rights arising under" the IGA's and the Will Serve Letter. Complaint at ¶6 and 69.

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).

Plaintiff Stream is not a party to the Big Sky IGA or the Fossil Ridge IGA, and was not a recipient of the Will Serve Letter. Therefore, Plaintiff cannot assert a breach of contract claim against Green Mountain and cannot enforce any of the terms in the IGA's or the Will Serve Letter. Plaintiff's Second Claim for Relief, for breach of contract, fails to state a claim upon which relief can be granted and must be dismissed.

Moreover, Stream cannot claim rights under the IGA's as a third-party beneficiary as set forth above. 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." Therefore, Stream was not intended to benefit as a non-party to the IGA's and cannot claim rights under the IGA as a matter of law." *E. B. Roberts Constr. Co. v. Concrete Contractors, Inc.,* 704 P. 2d 859, 865 (Colo. 1985); *Concrete Contractors, Inc. v. E.B. Roberts Constr. Co.,* 664 P. 2d 722, 725 (Colo. App. 1983). The Will Serve Letter is dated November 2016, before Stream had any interest in property within the Green Tree Metro District.

C. Third Claim for Relief – Promissory Estoppel – Fails to State a Claim

In its Third Claim for Relief, based on promissory estoppel, Stream asserts Green Mountain made promises which "Green Mountain expected, or reasonably should have expected, that Stream would rely on." Complaint at ¶79. Stream fails to state a claim for relief under the doctrine of promissory estoppel for several reasons, requiring dismissal of this claim as a matter of law.

1. <u>The Void Big Sky IGA Cannot Form the Basis for Promissory Estoppel Claim.</u>

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.

The Big Sky IGA, upon which Stream relies for the alleged promise of sewer service, is void, or voidable, for various reasons set forth in the Motion to Dismiss the Complaint filed in *CDN Red Rocks LP v. Green Mountain Water and Sanitation District,* Case No. 2019CV31158, currently pending before this court, including the following:

a. The Big Sky IGA was Void Because it Violated 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.

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).

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 of the combined Big Sky Districts 1-7 contains approximately 166 acres of land as defined by their Service Plan.

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 to the Complaint as **Exhibit 2,** and attached hereto as **Exhibit G.** 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, including the property allegedly under contract by Stream, 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.

b. <u>The Big Sky IGA is Void under the Local Government Budget Law.</u>

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 by Green Mountain, or liabilities to be incurred by Green Mountain, over a multi-year period, none of which were appropriated in the 2018 Green Mountain Annual Budget, including: (1) Section 6.1B, Green Mountain to pay to Big Sky, over a ten-year period, an undetermined amount of fees on an annual basis; (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. See Big Sky IGA, attached hereto as **Exhibit G.**

c. The Big Sky IGA is Void Under C.R.C. §29-1-203 and Colo. Const. XIV

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. See Map attached as Exhibit A to Big Sky IGA, 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.

2. Promissory Estoppel Cannot Be Based on Promises to Others.

In order to assert a claim for promissory estoppel, a plaintiff must allege facts setting forth a promise made by the defendant, to the plaintiff, on which the defendant reasonably relied to its detriment. *L&M Enter. V. City of Golden,* 852 P. 2d 1337,1340 (Colo. App. 1993)

Stream fails to allege the existence of promises made by Green Mountain to Stream. The documents identified in the Complaint consist of agreements between Green Mountain and third parties, not Stream. Stream fails to state a claim for promissory estoppel because it fails to allege promises made by Green Mountain to Stream. *L&M Enter. V. City of Golden,* 852 P. 2d 1337,1340 (Colo. App. 1993)(To state claim for promissory estopppel, plaintiff must allege facts showing promise made by plaintiff to defendant.)

To the extent Stream relies on its status as a purported third-party beneficiary to the promises it allegedly relied on, as set forth above, Stream cannot claim third party beneficiary status under any of the alleged agreements at issue in this case.

IV. CONCLUSION

For the reasons set forth herein, Defendant respectfully requests that the claims in the Complaint be dismissed for lack of jurisdiction under C.R.C.P. 12(b)(1), or in the alternative for failure to state a claim 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 correct copy of the foregoing was served on the following via the Colorado Courts E-Filing System and/or by email:

Frank W. Visciano
Charles E. Fuller
Senn Visciano Canges P.C.
1700 Lincoln Street, Suite 4300
Denver, CO 80203

/s/ Mary Joanne Deziel Timmins
Mary Joanne Deziel Timmins