District Court, Jefferson County, Colorado 100 Jefferson County Parkway Golden, Colorado 80401-6002	DATE FILED: May 6, 2021 12:10 PM CASE NUMBER: 2019CV30887
Plaintiff: **BIG SKY METROPOLITAN DISTRICT NO. 1**; Plaintiff: **CDN RED ROCKS, LP**; Plaintiff: **STEAM REALTY ACQUISITIONS, LLC 1**; Plaintiff: **THREE DINOS LLC**; Plaintiff: **CARDEL HOMES US LIMITED PARTNERSHIP**; and v. Defendant: **GREEN MOUNTAIN WATER AND SANITATION DISTRICT**.	▲COURT USE ONLY▲ **Case Number:** 19CV30887 19CV31158 19CV31172 19CV31185 19CV31250 **Division:** 2 **Courtroom:** 4B
ORDER: CROSS MOTION FOR SUMMARY JUDGMENT	

THIS MATTER comes before the Court upon Defendant Green Mountain Water and Sanitation District's ("Green Mountain") January 21, 2021 Cross Motion for Summary Judgment against Plaintiff Big Sky Metropolitan District No. 1. On February 11, 2021, Plaintiff Big Sky Metropolitan District No. 1 ("Big Sky") filed a response. On February 25, 2021, Green Mountain filed a reply. After reviewing the briefs, case file, and applicable law, the Court **FINDS** and **ORDERS** as follows:

I. BACKGROUND

A. Complaint

This case revolves around an Intergovernmental Agreement ("IGA") formed between Big Sky and Green Mountain. Big Sky alleges the following. Big Sky originally formed under the Colorado Special District Act, granting it the powers of a quasi-municipal corporation and political

subdivision of Colorado.[1] As part of its service plan, Big Sky provides public improvements for its district.[2] Green Mountain was also formed as a quasi-municipal corporation and political subdivision under the Special District Act.[3] Both districts finance and construct sewer infrastructure—such as mains, pipelines, meters, and lift stations—to collect and transmit wastewater to a water treatment facility in the Denver district.[4]

In the fall of 2014, the parties allegedly negotiated for Big Sky to develop sanitary sewer services through Green Mountain as part of a development plan within Big Sky's boundaries, resulting in a "will serve" letter on September 8, 2015 and a Memorandum of Understanding on August 31, 2015.[5] Starting in January of 2015, before proceeding further with negotiations, Green Mountain entered into litigation with another district, Fossil Ridge, which had an existing IGA with Green Mountain.[6] Big Sky joined in the ligation.[7] The parties litigated over the costs associated with water system improvements from Big Sky and Green Mountain entering into an agreement.[8] The parties reached a settlement.[9] Big Sky and Fossil Ridge entered into their own IGA and a court entered judgment on April 5, 2018.[10]

Then on May 8, 2018, the parties entered into a IGA for Green Mountain to transport Big Sky's waste to Denver.[11] Green Mountain entered into the IGA by vote of its board of directors.[12] Later that day, Green Mountain held an election which replaced the board with three new board of

[1] § 32-1-101, et. seq., C.R.S; Compl. ¶ 1.
[2] Compl. ¶ 2.
[3] Compl. ¶ 5.
[4] Compl. ¶ 6.
[5] Compl. ¶¶ 24-25.
[6] Compl. ¶¶ 17-18; Cross-Mot. Ex. 1.
[7] Compl. ¶ 32.
[8] Compl. ¶ 28.
[9] Compl. ¶¶ 40-41.
[10] Compl. ¶¶ 40-41.
[11] Compl. ¶ 44; Resp. Ex. A.
[12] Comp. ¶ 42.

directors.[13] The new board reversed Green Mountain's position on the IGA on April 9, 2019 when the board enacted a resolution declaring the IGA invalid.[14]

As a result, and on June 6, 2019, Big Sky filed a complaint, claiming breach of contract, breach of covenant of good faith and fair dealing, violation of the Colorado Constitution's prohibition on retrospective laws, and promissory estoppel.[15]

B. Procedural Posture

After Big Sky filed its complaint, Plaintiffs CDN Red Rocks, LP; Stream Reality Acquisition, LLC 1; Three Dinos, LLC; and Cardel Homes U.S. Limited Partnership ("the Developers") each filed their own complaints seeking relief, claiming they were impacted by Green Mountain's invalidation of the IGA because each had made development plans based on the IGA.[16] On January 6, 2020, the Court ordered the cases consolidated under 19CV30887.

On October 26, 2020, the Court addressed Green Mountain's motions to dismiss the Developers for lack of standing as third-party beneficiaries.[17] The Court found sufficient allegations of facts establishing the Developers as plausible third-party beneficiaries.[18]

On January 21, 2021, Green Mountain filed a cross-motion for summary judgement. Green Mountain argues that the IGA requires—according to the IGA's plain language—Green Mountain to maintain lift stations, flow equalizations basins, and force mains, obligating Green Mountain to spend money on these structures and facilities.[19] Green Mountain claims it never appropriated funds for these ongoing costs, which Big Sky allegedly does not dispute.[20] Without appropriations, Green Mountain argues the IGA becomes void under the Local Government Budget Law ("LGBL") and the Taxpayer's Bill of Rights ("TABOR").[21] If the IGA is void, there remains no

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[13] Compl. ¶ 48.
[14] Comp. ¶ 69.
[15] Compl. pp. 12-16.
[16] *See* 19CV31158, 19CV31172, 19CV31185, and 19CV31250.
[17] Order, Oct. 26, 2020.
[18] *Id.* p. 3-5.
[19] Mot. pp. 4-5.
[20] Reply p. 3.
[21] Mot. pp. 6-10.

material dispute over the breach of contract and covenant of good faith and fair dealing claims. Green Mountain further asserts that case law establishes that Big Sky cannot bring its promissory estoppel claim if the IGA is found void.[22]

Big Sky responds by asserting that the IGA does not require Green Mountain to maintain lift stations, flow equalization basins, and force mains.[23] Because the IGA allegedly imposes no expenses on Green Mountain, LGBL and TABOR do not void the IGA, leaving genuine issues as to the claims of breach of contract, breach of covenant of good faith and fair dealing, and promissory estoppel.[24] In the alternative, Big Sky argues that—even if the law voided the IGA—case law allegedly still permits Big Sky to bring a claim for promissory estoppel.[25] Big Sky can bring the claim because the rule prohibiting equitable relief for voided government contracts contains an exception to the rule, which allegedly applies here.[26]

II. LEGAL STANDARDS

Summary judgment is appropriate when, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[27] A material fact is one that will affect the outcome of the case.[28] The nonmoving party is entitled to the benefit of all favorable inferences that may be drawn from the undisputed facts, and all doubts as to the existence of a triable issue of fact must be resolved against the moving party.[29]

The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact.[30] If the moving party meets its burden, the nonmoving party must demonstrate by relevant and specific facts that a real controversy exists.[31] The nonmoving party "must by affidavit

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[22] Mot. p. 11.

[23] Resp. pp. 4-9.

[24] Resp. pp. 9-11.

[25] Resp. pp. 11-14.

[26] *Id.*

[27] C.R.C.P. 56(c); *Martini v. Smith*, 42 P.3d 629, 632 (Colo. 2002).

[28] *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992).

[29] *Martini*, 42 P.3d at 632.

[30] *Cont'l Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987).

[31] *Knittle v. Miller*, 709 P.2d 32, 35 (Colo. App. 1985).

or otherwise set forth specific facts showing there is a genuine issue for trial."[32] Mere conclusory statements based upon unsubstantiated beliefs are insufficient to raise a genuine factual issue.[33] If the nonmoving party fails to establish a genuine issue for trial, then summary judgment may be entered in favor of the moving party if the moving party has met its ultimate burden of persuasion.[34]

III. ANALYSIS

A. Local Government Budget Law

1. Legal Standard for Contracts and LGBL

Contract interpretation is a question of law.[35] Rather than rewrite an unambiguous document, the Court must determine and effect the intent of the parties according to the language within the four corners of the contract itself.[36] The language is examined in "harmony with the plain and generally accepted meaning of the words employed."[37] If the language is not ambiguous—meaning not susceptible to more than one reasonable interpretation—the Court enforces the contract according to the parties' express intentions.[38] That parties differ on the interpretation of a contract does not automatically establish ambiguity.[39] Only when an ambiguity arises will the Court admit extraneous evidence to show the parties intentions.[40]

Regarding contracts with local governments, the LGBL states, pursuant to § 29-1-110, C.R.S.:

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[32] *Brown v. Teitelbaum*, 830 P.2d 1081, 1084-85 (Colo. App. 1991).

[33] *See Ellerman v. Kite*, 625 P.2d 1006, 1008 (Colo. 1981); s*ee also Ginter v. Palmer & Co.*, 585 P.2d 583, 585 (Colo. 1978).

[34] *Sanderson v. Am. Family Mut. Ins. Co.*, 251 P.3d 1213, 1216 (Colo. App. 2010).

[35] *Fed. Deposit Ins. Corp. v. Fisher*, 292 P.3d 934, 937 (Colo. 2013).

[36] *Ad Two, Inc. v. City & Cty. of Denver ex rel. Manager of Aviation,* 9 P.3d 373, 376 (Colo. 2000); *see USI Properties E., Inc. v. Simpson*, 938 P.2d 168, 173 (Colo. 1997); *see also Bd. of Cty. Comm'rs of Adams Cty. v. City & Cty. of Denver*, 40 P.3d 25, 29 (Colo. App. 2001) (applying general contract interpretation law to IGA).

[37] *Ad Two, Inc.*, 9 P.3d at 376.

[38] *Id.*

[39] *Id.*

[40] *Id.*

> During the fiscal year, no…spending agency[41] shall expend or contract to expend[42] any money, or incur any liability, or enter into any contract which, by its terms, involves the expenditures of money in excess of the amounts appropriated.[43] Any contract, verbal or written, made in violation of this section shall be void, and no moneys belonging to a local government[44] shall be paid on such contract.

Multiple-year contracts may be entered into where allowed by law or if subject to annual appropriation.[45]

The LGBL insures governmental subdivisions do not collapse for failing to appropriate funds.[46] The statutes means 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."[47]

Thus, the provision creates an "absolute prohibition against spending in excess of a appropriation."[48]

2. Application of LGBL

Here, the Court must consider if there is a material dispute over whether Green Mountain violated the LGBL by entering the IGA without appropriating necessary expenditures. Green Mountain presents evidence that when the board entered the IGA on May 18, 2020, the citizens had

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[41] "'Spending agency', as designated by the local government, means any office, unit, department, board, commission, or institution which is responsible for any particular expenditures or revenues." § 29-1-102(17), C.R.S.

[42] "'Expenditure' means any use of financial resources of the local government consistent with its basis of accounting for budget purposes for the provision or acquisition of goods and services for operations, debt service, capital outlay, transfers, or other financial uses." § 29-1-102(8)(a), C.R.S.

[43] "'Appropriation' means the authorization by ordinance or resolution of a spending limit for expenditures and obligations for specific purposes." § 29-1-102(1), C.R.S.

[44] "'Local government' means any authority, county, municipality, city and county, district, or other political subdivision of the state of Colorado; any institution, department, agency, or authority of any of the foregoing; and any other entity, organization, or corporation formed by intergovernmental agreement or other contract between or among any of the foregoing." § 29-1-102(13), C.R.S.

[45] § 29-1-110(1)-(2), C.R.S. (footnotes added).

[46] *Shannon Water & Sanitation Dist. v. Norris & Sons Drilling Co.*, 477 P.2d 476, 478-79 (Colo. App. 1970).

[47] *Id.* at 478.

[48] *Id.* at 479.

not voted on the alleged multi-fiscal year obligation, Green Mountain did not appropriate funds for construction and maintenance expenditures, and Green Mountain had not pledged any present cash reserves.[49] Although Big Sky disagrees whether the alleged maintenance costs are "substantial," Big Sky does not dispute Green Mountain's evidence that Green Mountain failed to hold votes or make appropriations regarding alleged maintenance expenditures.[50] Because Green Mountain meets its burden by presenting undisputed evidence, the Court finds there is no dispute of material fact that Green Mountain violated the LGBL if it agreed to multi-year expenditures.

However, Big Sky contests that the IGA imposes any expenditures on Green Mountain. Accordingly, the Court must examine the IGA to determine if the parties unambiguously intended to obligate Green Mountain to certain expenditures as part of the IGA.[51] The Court looks at the plain meaning of the terms of the IGA within the four corners of the agreement to see if Green Mountain must make expenditures for lift stations, flow equalizations basins, and force mains.[52]

The Court finds the IGA states such expenditures in the following:

> WHEREAS, Big Sky **desires that Green Mountain design and construct the facilities outside the Big Sky Service Area** and Big Sky Potential Expanded Service Area which are necessary to allow Green Mountain to provide sanitation services to the wastewater produced within the Big Sky Service Area and Big Sky Potential Expanded Service Area, and the lift station(s), flow equalization and force mains which arc in the Big Sky Service Area; and[53]
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> WHEREAS, Big Sky desires and intends to design and construct the facilities within the Big Sky Service Area and Big Sky Potential Expanded Service Area which are necessary to collect the wastewater within the Big Sky Service Area and Big Sky Potential Expanded Service Area, **with the exception of the lift station(s)**, **flow equalization and force mains** and deliver it to Green Mountain;[54]

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[49] Mot. Ex. 2, ¶¶ 6-10.

[50] Resp. p. 4.

[51] *Ad Two, Inc.*, 9 P.3d at 376.

[52] *Id.*

[53] Resp. Ex. A, IGA, p. 1 (emphasis added).

[54] *Id.* (emphasis added).

> 2.7 Cost Recovery…. [A]s a condition precedent to Green Mountain accepting Wastewater from any properties in the Big Sky Service Area or the Big Sky Potential Expanded Service Area…the property owner(s) and/or a title 32 special district of appropriate jurisdiction must enter into an agreement with Big Sky providing for: (1) equitable and proportionate cost recovery for all costs related to the construction and installation of the Big Sky Sewer System and bringing it into service, including without limitation…**the associated liftstation(s), flow equalization, and force main(s) that will be owned and maintained by Green Mountain**;[55]
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> 4.1 Design/Construction of GM Improvements. Big Sky recognizes and agrees that certain new public improvements and infrastructure, located both within the boundaries of Green Mountain and outside of those boundaries, may need to be acquired, installed, constructed, upgraded or upsized in order to accommodate the Wastewater flow from Big Sky (collectively the "Green Mountain Improvements"). In addition, because of the long detention time in the flow equalization basin and force main(s), Big Sky recognizes and agrees that there may be a potential for odors in the Green Mountain sewer system. Big Sky agrees to finance, at its sole cost, **the actual costs incurred by Green Mountain in planning, designing, constructing, acquiring, installing, upgrading or upsizing the GM Improvements** which Green Mountain reasonably determines are necessary to accept Big Sky's Wastewater and mitigate odors[56]

The plain terms of the IGA contemplate Green Mountain designing and constructing facilities outside of Big Sky, demonstrated by Big Sky's being exempt from designing plans for lift stations, flow equalization basin, and force mains. Furthermore, any parties serviced by Big Sky must pay for the cost recovery of the "liftstation(s), flow equalization, and force main(s) that will be owned and maintained by Green Mountain." This also applies to future costs for Green Mountain's upgrading infrastructure and mitigating odor. Not only does § 4.1 contemplate "actual costs" incurred by Green Mountain for infrastructure and mitigating order, it entails that Green Mountain would already be operating and maintaining structures which may require "upgrading or upsizing."

Therefore, the IGA unambiguously imposes expenditures on Green Mountain for construction, operation, and maintenance of life stations, flow equalization basins, and force mains. The Court notes that the initial billed costs for a lift station is invoiced at $1,875,000 and the force

[55] *Id.* p. 7, § 2.7 (emphasis added).

[56] *Id.* at p. 12, § 4.1 (emphasis added).

main at $231,000.[57] As stated, Big Sky does not dispute that Green Mountain failed to appropriate construction costs or future maintenance—in whole or in part. Although the IGA has many terms providing for reimbursement and cost recovery for Green Mountain, the narrow standard under the LGBL does not provide exceptions for reimbursements.[58]

Big Sky argues that the plain language of the IGA imposes no expenditures on Green Mountain. The Court disagrees. First, Big Sky alleges that § 3.7 of the IGA demonstrates that Big Sky must pay for the lift stations, flow equalization, and force main. The section reads:

> 3.7 Ownership of the Big Sky Sewer System. No part of the Big Sky Sewer System will be dedicated or conveyed to Green Mountain without the express written consent of Green Mountain. **The Big Sky Sewer System shall be owned and maintained by Big Sky.**[59]

But the Court must look for the meaning of the terms of the IGA in harmony with the document as a whole.[60] Section 3.7 falls under Article III of the IGA, titled "Design and Construction of the Big Sky Sewer System." Section 2.7 for cost recovery falls under Article II, titled "Wastewater Collection Service." And section 4.1 for "Design/Construction of Green Mountain Improvements" falls under Article IV, titled "Green Mountain Improvements."

The plain meaning the term "The Big Sky Sewer System shall be owned and maintained by Big Sky" applies to the Big Sky Sewer system. The lift stations, flow equalization, and force mains maintained outside of Big Sky by Green Mountain fall within the part of the agreement on wastewater collection. Likewise, the improvement costs for Green Mountain's structures fall under the Green Mountain improvement section. Therefore, interpreting § 3.7 as a catchall that overrides the other sections and terms of the IGA would amount to the Court setting aside the plain meaning and structure of the IGA, i.e. rewriting the document contrary.[61]

Second, Article III of the IGA assigns responsibility for design and construction of the lift stations, flow equalization basins, and force mains to Green Mountain. Section 3.2(A), under the

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[57] Resp. Ex. A, IGA, attachment Ex. D.

[58] *Shannon Water & Sanitation Dist.*, 477 P.2d at 479.

[59] Resp. Ex. A, IGA, p. 12, §3.7 (emphasis added).

[60] *Ad Two, Inc.*, 9 P.3d at 376.

[61] *Id.*

heading "Design of Big Sky Sewer System," states: "Big Sky shall submit preliminary and final design plans for the Big Sky Sewer System, with the exception of the lift station, flow equalization and force mains, and appurtenant facilities, which will be designed and constructed by Green Mountain."[62] The plain meaning is that even if Big Sky retains *ownership* of all the sewer system, Green Mountain agreed in the IGA to make expenditures for construction, design, operation, and maintenance of the lift stations, flow equalization basins, and force mains—which would exist on Green Mountain's property.

Third, Big Sky provides an affidavit to demonstrate that Big Sky and Green Mountain intended Big Sky to pay all maintenance expenditures. However, the Court finds the plain meaning of the IGA contains no ambiguity. Thus, it is improper to consider the affidavit indicating the parties' intentions outside the four corners of the agreement.[63]

Lastly, Blue Sky conflates the IGA's reimbursement provisions with the concept of appropriations in claiming Green Mountain undergoes no obligations. The LGBL precludes the use of financial resources expended in excess of appropriations.[64] The statute does not except excessive expenditures intended to be reimbursed. And to interpret the IGA to state that Green Mountain has no obligations for any expenditures would imply that Blue Sky would cover all expenditures. Such an interpretation would then make all the financing, cost recovery, and reimbursement provisions of the IGA to Green Mountain superfluous, violating the standards for contract interpretation.[65]

Therefore, even while making all favorable inferences for Big Sky, because there is no dispute of material fact that appropriations were not made for expenditures imposed by the IGA, the IGA between Big Sky and Green Mountain is void as a matter of law pursuant to § 29-1-102 (1), C.R.S.[66]

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[62] *Id.* at p. 9, § 3.2(A).

[63] *Ad Two, Inc.*, 9 P.3d at 376.

[64] § 29-1-110, C.R.S.; § 29-1-102(1),(8)(a), C.R.S.

[65] *Ad Two*, 9 P.3d at 376.

[66] C.R.C.P. 56(c); *Martini v. Smith*, 42 P.3d 629, 632 (Colo. 2002).

B. Taxpayer's Bill of Rights

1. Legal Standard for TABOR

Under TABOR, "districts must have voter approval in advance for . . .creation of any multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever without adequate present cash reserves pledged irrevocably and held for payments in all future fiscal years."[67] Such proscribed debt includes contracts to incur a debt which will require repayment with revenues from a general fund.[68] This is called constitutional debt, and is indicated by the following:

1) the obligation pledges future revenue;

2) the obligation requires use of revenue from a tax otherwise available for general purposes;

3) the obligation is a legally enforceable obligation against the state or subdivision in future years; or

4) appropriations in future years of funds to pay the obligation is nondiscretionary.[69]

The critical inquiry is whether the obligation will in fact create general debt.[70] The obligation cannot be discretionary, even though appropriations are expected through substantial social pressures.[71] Thus, the obligation must come from an affirmative agreement.[72]

2. Application of TABOR

A similar analysis to the LGBL applies to Green Mountain's claim under TABOR. There is no dispute that Green Mountain did not hold a popular vote or pledge cash reserves.[73] The plain reading of the IGA shows an agreement for "Green Mountain [to] design and construct the facilities

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[67] Colo. Const. Article X, Section 20 (4)(b).

[68] Fischer v. City of Colorado Springs, 260 P.3d 331, 335 (Colo. App. 2010).

[69] *Id.* at 335.

[70] *Gude v. City of Lakewood*, 636 P.2d 691, 697 (Colo. 1981).

[71] *Fischer*, 260 P.3d at 335; *City of Golden v. Parker*, 138 P.3d 285, 295 (Colo. 2006).

[72] *Fischer*, 260 P.3d at 335.

[73] Mot. Ex. 2, ¶¶ 6-10.

outside the Big Sky Service Area."[74] The agreement imposes financial obligations on Green Mountain for the construction, maintenance, and improvement of the lift stations, flow equalization basins, and force mains, as discussed in the section above.[75] Section 2.7 specifically requires as a condition of the IGA that new property owners who move to Big Sky enter into an agreement to provide pay for all costs related to the construction and installation for lift station, flow equalization, and force main to be owned and maintained by Green Mountain.[76]

Under these provisions, Green Mountain is affirmatively agreeing to construct, install, and indefinitely maintain these lift stations, flow equalization basins, and force mains. The plain language of the IGA makes Green Mountain affirmatively obligated to use revenue to pay for these obligations. Although Blue Sky agrees to reimburse Green Mountain, there is no evidence to suggest Green Mountain has pledged cash reserves or appropriated special funds to make the initial expenditures—necessitating the expenditure come from a general fund.

Most notably, Green Mountain's reimbursement in Section 2.7 depends on repayment of expenses by new owners agreeing to pay a proportion of the costs over time.[77] This section of the IGA entails that Green Mountain will in fact incur debt for its material performance (building and maintaining the lift stations, flow equalization basins, and force mains). But Green Mountain's debt will be reimbursed only after Blue Sky has finished development and as new owners purchase property.[78] Green Mountain will then have constitutional debt through an affirmative obligation without advanced voter approval, violating TABOR.[79]

Therefore, there is no genuine dispute of material fact that the IGA is also unenforceable because it violates TABOR, voiding the IGA.

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[74] Resp. Ex. A, IGA, p. 1.

[75] *See* Resp. Ex. A, IGA, p. 1; p. 7, § 2.7; p. 12, § 4.1.

[76] *Id.* p. 7, § 2.7.

[77] Resp. Ex. A, IGA, p. 7, § 2.7.

[78] Resp. Ex. A, IGA, p. 7, § 2.7.

[79] *Fischer*, 260 P.3d at 335.

C. Promissory Estoppel

1. Legal Standard

Promissory estoppel is a quasi-contractual cause of action for a party who relied on a promise from another not contained in a contract.[80] A promissory estoppel claim has four elements:

1) a promise;

2) that the promisor reasonably should have expected would induce action or forbearance by the promisee or a third party;

3) on which the promisee or third party reasonably and detrimentally relied; and

4) that must be enforced in order to prevent injustice.[81]

If these elements are proven, a promise becomes binding and enforceable under normal contract law remedies.[82]

Regarding a void contract under § 29-1-102, C.R.S. "a party contracting with a governmental entity has the duty to ascertain whether the contract complies with the constitution, statutes, charters, and ordinances so far as they are applicable."[83] The party contracting with the government bears the risk of being denied all recovery for a void contract, including recovery for promissory estoppel.[84] For example, the court in *Falcon Broadband* found an agreement void for violating § 29-1-102, C.R.S., and the court ruled "[a]nd so neither the [agreement] itself nor the District's actions in connection therewith can support a cause of action for either promissory estoppel or unjust enrichment against the District."[85]

Normandy Estates Metro. Recreation Dist. v. Normandy Estates, Ltd. established an exception for recovery under a void contract. "[If] property is furnished to a municipal corporation under an

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[80] *Pinnacol Assurance v. Hoff*, 375 P.3d 1214, 1221 (Colo. 2016).

[81] *Id.*

[82] *Id.*

[83] *Falcon Broadband, Inc. v. Banning Lewis Ranch Metro. Dist. No. 1*, 474 P.3d 1231, 1242 (Colo. App. 2018)(citations omitted).

[84] *Id.* (citing *Normandy Estates Metro. Recreation Dist. v. Normandy Estates, Ltd.*, 553 P.2d 386, 388–89 (1976)).

[85] *Falcon Broadband, Inc.*, 474 P.3d at 1243.

unenforceable contract, and the municipality has not paid for the property, then the seller or person supplying the property may, upon equitable terms, recover it in specie."[86]

Normandy Estate's exception is limited though.[87] First, the party dealing with the government must have (1) acted in good faith and (2) the contract must be not positively condemned by law—as opposed to being invalid because of want of power to contract or because failure to follow statutory procedure. Second, there is no recovery for nonexistent property or recovery would seriously damage other property if restored.[88]

2. Application

Big Sky claims promissory estoppel because it alleges having detrimentally relied on Green Mountain's promises, causing loses from engineering costs, legal costs, the Fossil Ridge litigation, and reimbursement to Fossil Ridge.[89]

No matter what types of costs Big Sky incurred based on alleged promises, the standard for contracts voided by the LGBL is strict: "the party contracting with a governmental entity bears the risk that 'all recovery, including quantum meruit, [will be] denied' if the contract isn't valid.'"[90] The *Normandy Estates* exception does not apply here because the parties did not exchange property, so there is no property to return in specie.[91] "This rule can produce 'harsh results,' but it protects the taxpayers against improper expenditures."[92]

Big Sky argues that the case law permits the Court to fashion an equitable remedy under *Normandy Estates*. Big Sky argues that "*Normandy*, *La Plata Medical*, and *Falcon Broadband* all hold that a governmental entity can be held liable for equitable relief despite the claims being based on a void

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[86] *Id.* at 389.

[87] *F. J. Kent Corp. v. Town of Dillon*, 648 P.2d 669, 670 (Colo. App. 1982); *Normandy Estates*, 553 P.2d at 390.

[88] *F. J. Kent Corp.*, 648 P.2d at 670.

[89] Compl. ¶ 89.

[90] *Falcon Broadband*, 474 P.3d at 1242 (citing *Normandy Estates*, 553 P.2d at 390).

[91] *Normandy Estates*, 553 P.2d at 390.

[92] *Falcon Broadband, Inc.*, 474 P.3d at 1242.

or flawed contract where a benefit was conferred onto the other party and was not paid for by that party."[93]

The Court is not persuaded. The case law establishes a preclusion of equitable remedies with a narrow exception, rather than establishing the exception as the rule.

Normandy Estates involved a metropolitan district approving a bond for purchasing recreational facilities, followed by the district agreeing to purchase a pool by the plaintiff (Normandy Estates, Ltd.).[94] The plaintiff conveyed four acres after executing the agreement for the pool with the district. The district later refused to make payments on its debt because the agreement was void for failure to follow the statute. The Colorado Supreme Court noted the "harsh" nature of the law prohibiting recovery were justified to protect the taxpayers.[95] But the court in *Normandy Estates* carved out the exception to the rule based on the specific facts of that case: when the government received property (acres of land) through a void contract which the government did not pay for, the seller could recover the property on equitable terms.

In *Falcon Broadband*, where plaintiff, Falcon Broadband, contracted with the defendant, a District, and later invalidated the contract, the court found that "[e]ven though the [agreement] didn't require the District to pay anything during the fiscal year in which it was signed, it did require expenditures without appropriation in the following fiscal years in violation of section 29–1–110."[96] The plaintiff's potential equitable recovery was limited to the recovery of any "tangible property" (infrastructure and wiring) it had transferred to the District.[97] "The [agreement] was a contract for services; the only tangible property transferred was the infrastructure and wiring required to provide the services. Falcon asked for recovery for its provision of services, not for its provision of infrastructure. And, even if it had asked, the infrastructure couldn't be returned without serious damage to the District's property."[98] The court thus denied equitable relief.

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[93] Resp. p. 13.

[94] *Normandy Ests.*, 553 P.2d at 387.

[95] *Id.* at 389.

[96] *Falcon Broadband, Inc.*, 474 P.3d at 1241-42.

[97] *Id.*

[98] *Id.*

La Plata Med. Ctr. Assocs., Ltd. v. United Bank of Durango involved a complicated lease deal with a hospital and multiple private parties.[99] There the district court found the limited partnership agreement at issue was void as to binding the hospital district. But because the hospital district received benefits from the agreement through use of a medical office building, the building had depreciated in value, and the district court previously awarded one of the private parties judgment, the district court fashioned an equitable remedy by adjusting the value of the building with options for the hospital to purchase or convey it.[100] The Colorado Supreme Court affirmed because in "*Normandy Estates,* we approved of an equitable remedy which permitted the **private corporation** to recover either that which it contracted for under the second purchase agreement, the balance of the purchase price owed plus interest, or to have **title to the property** returned to it; the recreation district, however, received the power to choose between options."[101]

Here the two quasi-municipal corporations and political subdivisions conducted negotiations to enter into the IGA. Big Sky incurred costs as part of those negotiations relating to accounting, engineering, and the Fossil Ridge litigation. As a result, the parties then entered into the IGA. Big Sky simply spent money. The narrow exception of *Normandy Estates* does not apply because here there is no exchange of title to tangible property.

Unlike in *Normandy Estates*, Green Mountain did not receive real property (such as acres) from Big Sky for which Green Mountain never paid. Unlike *La Planta*, Green Mountain did not use Big Sky's property or depreciate a buildings value through use. Like *Falcon Broadband*, no "tangible property" was transferred.

Therefore, equity does not call for relief. "Persons dealing with a municipal corporation must at their peril take notice, not only of the powers vested in the corporation, but of the mode by which its powers are to be exercised."[102] When such person is itself a "municipal corporation" then it follows they should be more cognizant of the peril, not less responsible for it.

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[99] *La Plata Med. Ctr. Assocs., Ltd. v. United Bank of Durango*, 857 P.2d 410, 420 (Colo. 1993).

[100] *Id.* at 418.

[101] *Id.* (emphasis added).

[102] *Normandy Estates*, 553 P.2d at 388.

In sum, the promissory estoppel claim according the circumstances of this case—even when viewed with all favorable inferences made for Big Sky—is barred pursuant to case law because the IGA is void according to § 29-1-102 (1), C.R.S. Therefore, there is not genuine issue of material fact to the claim.

D. Illegal Retroactive Legislation

As a matter of efficiency and because the issue arises as a matter of law, the Court addresses the effect the void IGA has on the claim of retroactive legislation. "To determine whether a statute is impermissibly retrospective, the court considers: 1) whether the general assembly intended the statute to operate retroactively; and 2) if the challenged statute reveals clear legislative intent of retroactivity, whether it is nonetheless unconstitutionally retrospective in application."[103] "A law is retrospective if it either: 1) impairs a vested right; or 2) creates a new obligation, imposes a new duty, or attaches a new disability."[104]

Big Sky claims that the board violated the law by declaring the IGA invalid. Even granting all inferences in Big Sky's favor, because the Court has found the IGA void, the board could not invalidate a void contract. Thus, as a matter of law, there was no retrospective action. Therefore, the claim should be dismissed as moot.

IV. CONCLUSION

A. Order on Cross-Motion for Summary Judgment

In conclusion, the Court has received the IGA and the affidavit of Adrienne Hanagan as evidence demonstrating that there is no material dispute that the IGA violates the LBGL, violates TABOR, and precludes a promissory estoppel claim.[105] In response, Blue Sky provides improper evidence of an interpretation of the IGA that contradicts its plain meaning.[106] As such, even when

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[103] *City of Greenwood Vill. v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 445 (Colo. 2000) (internal citations omitted).
[104] *Id.*
[105] *Cont'l Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987); *see* Mot. Ex. 2, Resp. Ex. A.
[106] *Knittle v. Miller*, 709 P.2d 32, 35 (Colo. App. 1985).

making all inferences in its favor, Blue Sky fails to meet its burden of demonstrating a genuine dispute of material fact for trial.[107]

Ultimately, one set of taxpayers in this scenario will have to bear the effect of the void IGA. According to LGBL and TABOR, the law primarily focusses on protecting the taxpayer's right to vote and participate in the budget process. Because the IGA denied the taxpayers of Green Mountain their right to vote, the law shifts the harm to Blue Sky—a consequence of the burden and risk they accepted in contracting with another government entity.[108] Although this unfortunately forces the taxpayers of Blue Sky to suffer a monetary loss, the strictness of the law makes little to no exceptions to the rules when protecting the right to vote.

Therefore, the Court **GRANTS** the Cross Motion for Summary Judgment.[109] The Court enters **JUDGMENT** in favor of Defendant Green Mountain and **DISMISSES** all of Plaintiff Big Sky's claims.

B. Effects on Developers

The Court, *sue sponte*, reviews the effects this Order has on the claims of the Developers who are the remaining Plaintiffs in this case. The Developers brought claims related to breach of contract. Breach of contract and breach of the implied covenant of good faith and fair dealing claims "require a valid contract."[110] Because the Court found the IGA void as a matter of law, it follows that all claims brought by the Developers as third-party beneficiaries for breach of contract and breach of covenant of good faith and fair dealing are dismissed as a matter of law.

The Court also reviews the issue of standing. "Standing is a jurisdictional prerequisite that can be raised any time during the proceedings."[111] On October 26, 2020, the Court ruled on a motion to dismiss brought by Green Mountain against Developers, stating "the factual allegations of Developers' complaints along with the language of the Big Sky IGA create an issue of fact regarding Developers' status as third-party beneficiaries of the Big Sky IGA, and therefore the Court cannot

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[107] *Sanderson v. Am. Family Mut. Ins. Co.*, 251 P.3d 1213, 1216 (Colo. App. 2010).

[108] *Falcon Broadband, Inc.*, 474 P.3d at 1241-42; *Normandy Ests.*, 553 P.2d at 388-989.

[109] C.R.C.P. 56.

[110] *Falcon Broadband,* 474 P.3d at 1241-42.

[111] *Hickenlooper v. Freedom from Religion Found., Inc.*, 338 P.3d 1002, 1006 (Colo. 1993).

grant Green Mountain's Motions to Dismiss as to the standing of Developers." Without the IGA, the Court concludes that the developer Plaintiffs lack standing against Green Mountain.

However, because Green Mountain brought this cross motion against Big Sky specifically, the Court **ORDERS** that the Developers have **21 days to file a response** to this ruling should they wish to argue for their standing in the case. Green Mountain will then have 14 days to file any replies.

SO ORDERED in Golden, Colorado on May 6, 2021.

BY THE COURT:

Jason D. Carrithers
District Court Judge