DISTRICT COURT, EAGLE COUNTY, COLORADO 885 Chambers Ave.; P.O. Box 597 Eagle, CO 81631	FILED IN THE COMBINED CLERK'S OFFICE DATE FILED: February 21, 2024 10:59 AM CASE NUMBER: 2022CV30208 FEB 21 2024 EAGLE COUNTY, COLORADO BY: _____ ▲COURT USE ONLY▲
Plaintiff: BUCKHORN VALLEY METROPOLITAN DISTRICT NO. 2, a quasi-municipal corporation and political subdivision of the state of Colorado, v. **Defendants:** BUCKHORN VALLEY METROPOLITAN DISTRICT NO. 1, a quasi-municipal corporation and political subdivision of the state of Colorado; DAVID GARTON, JR, SANDE GARTON, ROBERT KINGSTON, MALLIE KINGSTON, SAMANTHA GALE, HERB EATON, STEPHEN KELLEY, SCOTT GREEN, JOHN HILL, GAYL HILL, ANNA MARIE RAY, MAXINE HEPFER, NICHOLAS RICHARDS, in their capacity as individuals.	Case No.: 2022CV30208 Division: 4

ORDER RE: PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

THIS MATTER came before the Court for hearing on Plaintiff's Motion for Preliminary Injunction on January 25, 2024. Plaintiff (also referred to as "Buckhorn 2") appeared through counsel Paul Rufien. Defendant (also referred to as "Buckhorn 1") appeared through counsel Davd McConaughy.[1]

The Court heard testimony from Angela Heuman, Charles Wolfersberger, Scott Forrester, Christaine Hepfer, and Sarah Sheppard.

The parties stipulated to the admission of Exhibits A-T. Exhibits U and V were also admitted into evidence.

[1] The other named Defendants were dismissed on July 13, 2023. *See* Order Re: Individual Defendants' Motion to Dismiss.

THE COURT, having heard the evidence and argument, reviewing the exhibits and the file, and being otherwise fully advised in the premises, makes the following findings of fact, conclusions of law and orders:

I. FINDING OF FACTS

A. Background

Buckhorn 1 and Buckhorn 2 are metropolitan districts located in the Town of Gypsum, Eagle County, Colorado. They are organized under the Colorado Special Districts Service Act, C.R.S. §§ 32-1-101, *et seq.* to provide certain designated public improvements and services to residents and taxpayers within the two districts, including water service.

On November 1, 2022, Buckhorn 2 initiated this action by filing the *Complaint and Jury Demand; Complaint Under C.R.C.P. 106* alleging six causes of action ("Complaint"). Relevant to this hearing are Buckhorn 2's Fifth Claim for Relief for Judicial Review under C.R.C.P. Rule 106 and Plaintiff's Sixth Claim for Relief for Injunctive Relief. *See* Plaintiff's Complaint and Jury Demand under C.R.C.P. 106, ¶¶ 218-232.

On May 11, 2023, Buckhorn 1 filed a Motion for Temporary Restraining Order and Preliminary Injunction (the "Motion"). Effectively, the argument in the Motion is that the Water Fee Dispute Letter Agreement between District 1 and BV Firewheel, as will be further described herein, resolved a fabricated dispute, and will require a new rate structure which results in a fee increase on District 2 residents.

The Motion sought the following temporary restraining order:

> A temporary restraining order .... Enjoining District 1 from conducting a hearing on May 16, 2023 for the purpose of implementing the rate increase established by the Water Fee Dispute Letter Agreement.

See Motion, p. 14.

The Motion sought the following preliminary injunction order:

> A preliminary injunction .... enjoining District 1 from taking any further action regarding the approval of the Water Fee Dispute Letter Agreement and beginning any implementation of a changed rate structure in violation of C.R.S. § 32-1-1001(2)(a).

See Motion, p. 15.

On May 16, 2023, the Court entered an Order Granting, in part, and Denying, in part, Plaintiff's Motion for Temporary Restraining Order. The Order was as follows:

- The Court denied Plaintiff's request to enjoin Defendant from conducting the hearing on May 16, 2023.
- The Court enjoined Defendant from implementing any rate increase approved at the public hearing pending further order of the Court.
- The Court ordered that the matter be set for hearing on the preliminary injunction.

See Order Granting, in part, and Denying, in part, Plaintiff's Motion for Temporary Restraining Order, p. 5.

The matter was set for hearing on July 11, 2023. This hearing was continued in part because there were pending motions to dismiss. It was rescheduled for August 9, 2023. This hearing was continued and rescheduled for January 25, 2024. The hearing was held on January 25, 2024. If successful, Buckhorn 2 would continue to pay irrigation water fees to Buckhorn 1 based upon the 2015 rate structure.

The issue before the Court for any preliminary injunction is whether the moving party can establish that grounds exist for the issuance of a preliminary injunction under *Rathke v. MacFarlane*, 648 P.2d 648, 653-654 (Colo. 1982). As part of this analysis, in this case, the Court

must determine whether action to be enjoined is quasi-judicial in nature or quasi-legislative. This finding is directly related to the first factor under *Rathke*, the reasonable probability of success on the merits. More specifically, whether the decision to settle the dispute between BV Firewheel was quasi-judicial or quasi-legislative. If the conduct is quasi-legislative and not quasi-judicial, the Court does not have the ability to review the decision under C.R.C.P.106. The relevant facts related to the Motion are limited and largely undisputed.

B. Factual Findings from Preliminary Injunction Hearing

Buckhorn 1 is the operating or service district. It operates the water irrigation system. Buckhorn 2 is the taxing or financing district. It receives the water irrigation and it pays taxes to Buckhorn 1 to operate the water irrigation system. Buckhorn 1 by statute and by the Service Agreement has the authority to implement water fee rates and to enter into Contracts. *See* 2009 Consolidated Service Plain for Buckhorn Metropolitan Districts Nos. 1 and 2, Exhibit B.

BV Firewheel, LLC ("BV Firewheel") is the current "developer" of a real estate development project within the boundaries of Buckhorn 2 which sits in the Town of Gypsum, County of Eagle, Colorado. It is the owner of the remaining undeveloped lots in Buckhorn 2. Christiane Hepfer is the President and Managing Partner of BV Firewheel. Ms. Hepfer is the owner of the sole lot in Buckhorn 1, 11 Bridger Lane. To serve on the Board of Buckhorn 1, a person must have an interest in the property at 11 Bridger Lane. It has been structured so that all Board Members of Buckhorn 1 have an option on 11 Bridge Lane. This option creates the property interest. People with a property interest include Ms. Hepfer's daughter and her business partner. While there are inherent and obvious conflicts in this structure, this is apparently not an uncommon structure. Between 2000 and May 2020, the Board Members of Buckhorn 1 and Buckhorn 2 were the same. In May 2020, the Board of Buckhorn 2 was recalled and new Board

Members were installed. The new Buckhorn 2 Board members were independent of Buckhorn 1 and BV Firewheel.

Prior to the issues addressed herein, water fees were based upon a 2015 Resolution. *See* Exhibit D. This was based upon a water fee study that indicated that irrigation benefits were shared equally whether lots were improved or not. Between 2015 and June, 2021, BV Firewheel was paying fees based upon the 2015 Resolution. In June, 2021, at a time that BV Firewheel no longer had control of Buckhorn 2, BV Firewheel notified Buckhorn 1 and Buckhorn 2 that it disputed the 2015 rate structure, would no longer be paying the fees going forward and was considering a claim for past fees paid. *See* Exhibit E. Buckhorn 1 contends that this was a legitimate dispute. Buckhorn 2 contends that this was a fabricated dispute to allow Buckhorn 1 and BV Firewheel to decrease the financial obligation of BV Firewheel and increase the financial obligations of Buckhorn 2 and its homeowners.

This dispute – whether fabricated or not – resulted in the Water Fee Dispute Letter Agreement between District 1 and BV Firewheel on October 23, 2022 (the "Water Fee Dispute Letter Agreement"). It should not go without notice that the signatories on this Agreement were Christiane Hepfer, the managing member of BV Firewheel, and Maxine Hepfer, the Treasurer of Buckhorn 1 and the daughter of Christiane Hepfer. In resolving the dispute between District 1 and BV Firewheel, there was an agreement on how much BV Firewheel would pay for back fees and an agreement that fees moving forward would be based upon a third party water fee study. Buckhorn 2 argues that the result of this fabricated dispute and Water Fee Dispute Letter Agreement would be a rate increase for Buckhorn 2.

A meeting was noticed and held by Buckhorn 1 on May 16, 2023. Water fee rates were discussed at that meeting. Board Member of Buckhorn 2 were present at that meeting but were there in their personal capacity and not as Board Members. Buckhorn 1 approved a new water fee structure at this meeting. This water fee structure was different than the water fee structure referenced in the Water Fee Letter Dispute Agreement. While some residences in Buckhorn 2 will not see an increase in water fees, for purpose of this hearing, the Court accepts that the overall impact is a decrease in water fees for BV Firewheel and increase in water fees for Buckhorn 2 and the homeowners in Buckhorn 2.

It is under these limited and relatively undisputed facts that the Court addresses whether a preliminary injunction should be issued or not.

II. CONCLUSIONS OF LAW

A. Rathke Factors

A preliminary injunction may be issued pursuant to C.R.C.P. 65 upon establishing:

(a) a reasonable probability of success on the merits;

(b) danger of real, immediate, and irreparable harm;

(c) the plaintiff has no plain, speedy, and adequate remedy at law;

(d) that an injunction will disserve the public interest;

(e) the balance of equities favor an injunction; and

(f) that the injunction will preserve the status quo.

Rathke v. MacFarlane, 648 P.2d 648, 653-654 (Colo. 1982).

B. Reasonable Probability of Success on the Merits

As stated above, a critical issue for the Court is whether the Water Fee Dispute Letter Agreement executed on October 23, 2022 constitutes a quasi-judicial or quasi-legislative action. If the Court finds the action of Buckhorn 1 in entering in this Water Fee Dispute Letter

Agreement was quasi-legislative, it cannot find that Buckhorn 2 has a reasonable probability of success on the Rule 106 claim for relief.

1. The distinction between quasi-judicial and quasi-legislative actions.

"It is important to distinguish a legislative from a quasi-judicial function because the exercise of quasi-judicial authority, unlike legislative authority, is conditioned upon the observance of traditional procedural safeguards against arbitrary governmental action." *Cherry Hills Resort Dev. Co. v. City of Cherry Hills Village*, 757 P.2d 622, 625 (Colo. 1988). "These safeguards basically consist of providing adequate notice to those individuals whose protected interests are likely to be adversely affected by the governmental action, and giving to such persons a fair opportunity to be heard prior to the governmental decision." *Id.* (internal citations omitted).

"Quasi-judicial action decides rights and liabilities based upon past or present facts." *City & County of Denver v. Eggert,* 647 P.2d 216, 222 (Colo.1982) (citing *Talbott Farms, Inc. v. Board of County Commissioners*, 602 P.2d 886 (1979)). It involves adjudication which "operates concretely upon individuals in their individual capacity." *Colorado Ground Water Comm'n*, 919 P.2d at 217 (internal citations omitted). Where adjudicative facts are involved, "the parties must be afforded a hearing to allow them an opportunity to meet and to present evidence." *Eggert*, 647 P.2d at 222 (quoting *Association of National Advertisers, Inc. v. Federal Trade Commission*, 627 F.2d 1151, 1162 (D.C.Cir.1979), cert. den. 447 U.S. 921, 100 S.Ct. 3011, 65 L.Ed.2d 1113 (1980)).

Before a litigant can file an action or a court can review a claim pursuant to C.R.C.P. 106, there must first be a final decision rendered by the governmental entity. C.R.C.P. 106(b) ("a complaint seeking review under subsection (a)(4) of this Rule shall be filed in the district court

not later than 28 days after the final decision of the body or officer."); *Moss v. Bd. of Cnty. Commissioners for Boulder Cnty.*, 411 P.3d 918, 926 (Colo. App. 2015) ("Plaintiffs concede that they have not asserted and cannot assert a claim under C.R.C.P. 106(a)(4) because there has been no final agency action in this case"). "In both judicial and quasi-judicial contexts, [courts] have characterized a final judgment or decision generally as one that ends the particular action in which it is entered, leaving nothing further to be done to completely determine the rights of the parties." *1405 Hotel, LLC v. Colorado Econ. Dev. Comm'n*, 370 P.3d 309, 313 (Colo. App. 2015) (quoting *Citizens for Responsible Growth v. RCI Dev. Partners, Inc.*, 252 P.3d 1104, 1106–07 (Colo. 2011)). A final decision must be easily discernable, made before the public, and have no conditions to be completed or further action needed to become effective. *Id.* at 313-14.

In contrast, legislation "affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it." *Colorado Ground Water Comm'n v. Eagle Peak Farms, Ltd.,* 919 P.2d 212, 217 (Colo. 1996). "Quasi-legislative action is prospective in nature, is of general application, and requires the balancing of questions of judgment and discretion." *City & County of Denver v. Eggert,* 647 P.2d 216, 222 (Colo.1982) (citing *Cottrell v. City and County of Denver, Colo.*, 636 P.2d 703 (1981)). Pertinent here, "rate setting is a legislative governmental function, involving many questions of judgment and discretion." *See Krupp v. Breckenridge Sanitation Dist.*, 1 P.3d 178, 184 (Colo. App. 1999), *aff'd,* 19 P.3d 687 (Colo. 2001) (rate setting "is inherently a legislative governmental function").

Distinct from quasi-judicial actions, legislative facts "do not usually concern the immediate parties." *Eggert*, 647 P.2d at 222 (quoting 2 K. Davis, Administrative Law Treatise s 12:3 at 413 (2d ed. 1979)). Further, legislative facts involve empirical observations and "need

not be developed through evidentiary hearings." *Eggert*, 647 P.2d at 222 (quoting *Association of National Advertisers, Inc. v. Federal Trade Commission*, 627 F.2d 1151, 1162 (D.C.Cir.1979), cert. den. 447 U.S. 921, 100 S.Ct. 3011, 65 L.Ed.2d 1113 (1980)). The essence of a legislative decision is in the "nature of the decision itself and the process by which that decision is reached." *Dill v. Bd. of Cnty Comm'rs of Lincoln County*, 928 P.2d 809, 812 (Colo. App. 1996) (citing *Cherry Hills Resort Dev. Co. v. City of Cherry Hills Village,* 757 P.2d 622, 626 (Colo. 1988)). "Legislative and administrative actions are not reviewable pursuant to C.R.C.P. 106(a)(4)." *Verrier v. Colorado Dept. of Corrections,* 77 P.3d 875, 879 (Colo. App. 2003) (citing *Prairie Dog Advocates v. City of Lakewood,* 20 P.3d 1203 (Colo. App. 2000)).

2. The Agreement constitutes a quasi-legislative action

Buckhorn 2 argues that the Agreement constitutes a quasi-judicial action subject to judicial review under C.R.C.P. 106(a)(4). It argues that the Agreement was a quasi-judicial act to "settle" the dispute relating to the account of BV Firewheel and Buckhorn 1.

In support of its position, Buckhorn 2 argues that consideration of the settlement of a "dispute" was an agenda item at a public meeting that was preceded by formal notice. At the meeting, the Buckhorn 1 Board specifically addressed the "settlement" of the issue unique to BV Firewheel. Buckhorn 2 maintains that in approving the Water Fee Dispute Letter Agreement, Buckhorn 1 misapplied the law while acting in a quasi-judicial capacity in which it exceeded its jurisdiction, abused its discretion, and acted arbitrarily and capriciously. Therefore Buckhorn 2 argues that it has a reasonable probability to prevail on its C.R.C.P. 106 claim and the decisions of Defendant District 1 to enter into the Water Fee Dispute Letter Agreement will be overturned.

In its Complaint, as to the Rule 106 and the injunction Buckhorn 2 set forth in its prayer for relief the following:

1. An order determining that Defendant D1, through its board of directors, exceeded its jurisdiction and abused its discretion, and acted arbitrarily and capriciously by misconstruing or misapplying the law in the conducting of the October 4, 2022 public meeting, approving the Water Fee Dispute Letter Agreement, and beginning any implementation of a changed rate structure in violation of C.R.S. § 32-1-1001(2)(a);

2. An order preliminarily and permanently enjoining Defendant D1 from taking any further action regarding the approval of the Water Fee Dispute Letter Agreement and beginning any implementation of a changed rate structure in violation of C.R.S. § 32-1-1001(2)(a).[2]

Buckhorn 1 generally argues that the Agreement constituted the settlement of a dispute and the rate settings within were not illegal. Further, it asserts that the Agreement and the rate settings within in it were a legislative action not subject to review under C.R.C.P. 106(a)(4).

First, the parties do not dispute that the Agreement includes a rate setting. As discussed *supra*, rate setting is a legislative function. *See Krupp, supra.*[3] Second, though Buckhorn 2 argues that the rate setting was illegal and in violation of C.R.S. § 32-1-1001(2)(a), it does not provide sufficient evidence or legal support for its position. C.R.S. § 32-1-1001(2)(a) provides that the governing body of any special district furnishing domestic water may fix or increase fees, rates, or charges after providing public notice at least thirty days prior to the meeting. As such, Buckhorn 1 was permitted by statute to set the rates for the domestic water services. Third, and most importantly, while Buckhorn 2 argues that the Agreement was a quasi-judicial act to

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[2] C.R.S. § 32-1-1001(2)(a) provides, in pertinent part:

> The governing body of any special district furnishing domestic water or sanitary sewer services directly to residents and property owners within or outside the district may fix or increase fees, rates, tolls, penalties, or charges for domestic water or sanitary sewer services only after consideration of the action at a public meeting held at least thirty days after providing notice stating that the action is being considered and stating the date, time, and place of the meeting at which the action is being considered.

[3] The Court notes that the plain language of the Agreement includes BV Firewheel's recognition of Defendant D1's "legislative authority to set rates and fees to be dispositive" of the present issue. However, as this is a term of the Agreement, the Court does not find it necessarily dispositive of the issue.

settle the account of BV Firewheel, the Court does not find it persuasive. There was no adjudicatory process resolving a third-party dispute which resulted in a final decision. Rather, the Agreement was simply a contract between two parties, BV Firewheel and Buckhorn 1, which provided a rate setting for the future. Further, though the statute includes a requirement of public notice of a hearing that is consistent with quasi-judicial actions, it is not axiomatic that the Agreement was then quasi-judicial.

The Water Fee Dispute Letter Agreement satisfies the requirements of a quasi-legislative action. It is prospective in its application because it will apply in the future to domestic water rates in the Districts. It also does not just apply to the immediate parties to this action; rather, it is of general application and will apply to all current and future owners of lots in the Districts.

Based upon the finding that action of Buckhorn 1 in entering into the Water Fee Dispute Letter Agreement with BV Firewheel was quasi-legislative, the Court finds that Buckhorn 2 does not have a reasonable probability of success on the merits on its Rule 106 claim.

C. Real, Immediate and Irreparable Harm

While the findings above are sufficient to deny the Motion for Preliminary Injunction, the Court further finds that there is not a danger of real, immediate, and irreparable harm if a preliminary injunction is not entered. "'Irreparable harm' is a pliant term adaptable to the unique circumstances that an individual case may present." *Gitlitz v. Bellock,* 171 P.3d 1274, 1278-1279 (Colo. App. 2007). "Irreparable harm can be defined 'certain and imminent harm for which a monetary award does not adequately compensate.'" *Id.* (quoting *Wisdom Import Sales Co. v. Labatt Brewing Co.*, 339 F.3d 101, 113 (2nd Cir.2003). An injury may be irreparable if monetary damages are difficult to ascertain or where there is no pecuniary standard to measure damages. *Id.*

This case is about monetary damages. The overall increase in fees for Buckhorn 2, though not fully developed at hearing, is not so oppressive that equity demands action. If water fees paid by Buckhorn 2 are reduced, the monetary damages can easily be calculated and reimbursed and/or collected upon judgment. Further, the Court cannot find that Buckhorn 1 will be unable to satisfy a judgment if entered.

III. ORDER

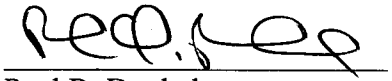
IT IS HEREBY ORDERED that Plaintiff's Motion for Preliminary Injunction is **DENIED.**

In denying the Plaintiff's Motion for Preliminary Injunction, the Court does find that Plaintiff has not established a reasonable probability of success on the merits of C.R.C.P. Rule 106 claims; however, this ruling is not a finding on the merits of that claim. This is a preliminary finding following hearing. While this may give significant direction to the parties, the issue may still be developed as the case proceeds.

The Court finds that the true issue for this hearing and perhaps the case is the legality of this dual special district structure. While not pre-judging the issues before it, it seems unlikely that there is a judicial answer to this question.

SO ORDERED this 21st day of February, 2024.

BY THE COURT:



Paul R. Dunkelman
District Court Judge