

District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80302 (303) 441-3744	DATE FILED: June 25, 2015 1:26 PM CASE NUMBER: 2014CV30681 ▲ COURT USE ONLY ▲
Plaintiff: PUBLIC SERVICE COMPANY OF COLORADO, a Colorado corporation, v. Defendant(s): THE CITY OF BOULDER, a Home Rule City and a Colorado Municipal Corporation.	
	Case Number: 14CV30681 Division 2 Courtroom Q
ORDER RE: DEFENDANT’S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION	

This Matter comes before the Court on The City of Boulder’s (“Defendant” or “Boulder”) June 26, 2014 Motion to Dismiss For Lack of Subject Matter Jurisdiction. Public Service Company of Colorado (“Plaintiff” or “Xcel”) filed a Response on July 17, 2014, to which Boulder filed a Reply on July 24, 2014. On July 1, 2014, Boulder filed a motion to join its June 26, 2014 Motion to Dismiss with its Brief in Support of the Motion to Dismiss (“Motion to Join”) in order to join its city council members in their individual official capacity. Boulder’s July 1, 2014 Motion to Join was granted on July 17, 2014. On October 16, 2014 this case was reassigned to Division 2 of the Twentieth Judicial District. On April 14, 2015, Xcel filed a Notice of Supplemental Authority to which Boulder filed a Response on April 17, 2015. On July 29, 2014 Xcel filed a request for oral arguments concerning Boulder’s June 26, 2014 Motion to Dismiss, which the Court denied on August 5, 2014. Having carefully considered the motion, file, and applicable law, the Court enters the following ruling and order:

I. BACKGROUND

At the election on November 1, 2011, the city of Boulder voters approved adding Article XIII, “Light and Power Utility,” to the Boulder Home Rule Charter. This article authorized the Boulder City Council (“City Council”) to establish a public utility, but only if it can demonstrate, with verification by a third-party independent expert that the utility could (1) acquire the electrical distribution system in Boulder, (2) charge rates that do not exceed those rates charged by Xcel at the time of acquisition, (3) charge rates that will produce revenues sufficient to pay

for operating expenses and debt payments, plus an amount equal to twenty-five percent (25%) of the debt payments, (4) maintain reliability comparable to Xcel, and (5) produce a plan for reduced greenhouse gas emissions and increased renewable energy. In November of 2013, the City of Boulder voters included a limit of \$214,000,000 in debt that could not be exceeded in the acquisition of Xcel's assets.

Charter section 178(a) also stated, "The city council, at such time as it deems appropriate, subject to the conditions herein, is authorized to establish by ordinance, a public utility under the authority in the state constitution and the city charter to create light plants, power plants, and any other utilities or works or ways local in use and extent for the provision of electric power."

On August 20, 2013, the Boulder City Council passed Ordinance 7917 which accepted the report of a third-party evaluator, concluding the conditions precedent to the creation of the utility had been met. The third-party evaluator, PowerServices, Inc., utilized initial modeling provided by the city that is frequently referred to as "Base Material(s)". In Ordinance 7917 the City Council recognized that revisions to the Base Materials might be necessary and instructed the city manager to continue refinement of the Base Materials. Additionally, in Ordinance 7917 the City Council expressly denied the creation of the utility, specifically stating, "This ordinance shall not be construed to create a light and power utility. In the event that council determines to create a light and power utility in the future, it intends to do so by subsequent legislative action."

On May 6, 2014, after a second reading, the City Council passed Ordinance 7969, wherein it made the decision to form the electric utility. Twenty-eight days later, Xcel filed a complaint seeking Declaratory Judgment under Colorado Rules of Civil Procedure Rule 57, or in the alternative Review under Colorado Rules of Civil Procedure 106(a)(4). Xcel claims the City Council exceeded its authority when it created the electric utility.

II. STANDARD OF REVIEW

Boulder's June 26, 2014 Motion to Dismiss for Lack of Subject Matter Jurisdiction is based on C.R.C.P. 12(b)(1) which grants a court the authority to determine if it has the jurisdiction to proceed. "Issues concerning subject-matter jurisdiction may be raised at any time." *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). "In response to a C.R.C.P. 12(b)(1) challenge, the plaintiff has the burden of proving subject matter jurisdiction." *Associated Government of Northwest Colorado v. Colorado Public Utilities Com'n*, 275 P.3d 646, 648 (Colo. 2012). When ruling on a motion pursuant to C.R.C.P. 12(b)(1), The Court "need not treat the facts alleged by the non-moving party as true as it would under C.R.C.P. 12(b)(5)." *Medina*, 35 P.3d at 452 (quoting *City of Lakewood v. Brace*, 919 P.2d 231, 244 (Colo. 1996)). "[T]he trial court is authorized to make appropriate factual findings." *Medina*, 35 P.3d at 452. "[E]vidence outside the pleadings may be considered to resolve a jurisdictional challenge." *City of Aspen v. Kinder Morgan, Inc.*, 143 P.3d 1076, 1078 (Colo. App. 2006). In contrast to Rule 12(b)(5), "Rule 12(b)(1) permits the court 'to weigh the evidence and satisfy itself as to the existence of its power to hear the case.'" *Medina*, 35 P.3d at 452 (quoting *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 925 (Colo. 1993)).

III. ANALYSIS

Defendant (“Boulder”) claims that this Court does not have subject matter jurisdiction because: (1) Plaintiff (“Xcel”) did not comply with the general rules of a Pleading as laid out in C.R.C.P. 8; (2) the only ordinance in question that is quasi-judicial in nature is Ordinance 7917 and Xcel has missed the strict 28 day filing deadline to challenge this ordinance based on C.R.C.P. 106(b); and (3) Xcel lacks standing to seek a Declaratory Judgement (C.R.C.P. 57) against the adoption of Ordinance 7969 and the Court lacks the authority to overturn this ordinance because it is legislative in nature.

C.R.C.P. 8

The purpose of the Pleading is to provide notice. *Bridges v. Ingram*, 223 P.2d 1051, 1054. When a party seeks no additional information and can respond with a full explanation of their rights it becomes clear that sufficient notice was given. *Id.* In Boulder’s Brief in Support of Dismissal, Boulder is able to make full legal arguments concerning Xcel’s requested relief under both rules C.R.C.P. 57 and C.R.C.P. 106, which indicates that Boulder was provided sufficient notice. Thus, the Court finds the Motion to Dismiss under C.R.C.P. 8 is denied.

C.R.C.P. 106(a)(4)

C.R.C.P. 106(A)(4) provides for relief where any governmental body exercising quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law. *Walsenburg Sand & Gravel Co., Inc. v. City Council of Walsenburg*, 160 P.3d 297, 300 (Colo. App. 2007).

Municipal governing bodies, such as city councils, not only perform legislative functions, they also perform activities that are quasi-judicial in nature. *Cherry Hills Resort Development Co. v City of Cherry Hills Village*, 757 P.2d 622, 625 (Colo. 1988) (*en banc*). It is important to distinguish legislative functions from quasi-judicial functions because the exercise of quasi-judicial authority, unlike legislative authority, requires observance of traditional safeguards, such as adequate notice and an opportunity to be heard prior to the governmental decision, so as to protect against arbitrary governmental action. *Id.* If a statute or ordinance authorizes the exercise of quasi-judicial authority but does not require an affected party be given notice or an opportunity to be heard, these requirements may be implied as a matter of fundamental fairness. *Id.* at 626.

There is no litmus-like test for identifying when an action is quasi-judicial; however, when (1) the governmental decision is likely to adversely affect the protected interests of specific individuals, and (2) that decision is going to be reached through the application of preexisting legal standards or policy considerations to present or past facts presented to the governmental body, then one can say with reasonable certainty that the governmental body is acting in a quasi-judicial capacity in making its determination. *Id.* at 627. The central focus in determining if a

matter is quasi-judicial should be on the nature of the governmental decision and the process by which the decision was reached. *Id.*

In *Cherry Hill*, a developer was granted preliminary approval from the village to develop property; however, the village passed a resolution placing several conditions on the approval of the permit. *Id.* at 623. The developer brought suit seeking judicial review. The District Court modified some of the conditions placed on the developer; however, because the statute governing the adoption of the resolution did not require notice or an opportunity to be heard the court of appeals held the resolution was not quasi-judicial or judicial and thus was not reviewable and dismissed the case. *Id.* at 624. The Colorado Supreme Court reversed the court of appeals' decision and held the village's actions were quasi-judicial in nature because: (1) the resolution adversely affected the developers interest in making an economic and beneficial use of the developers property interest, (2) the resolution pertained only to the use of the particular site and was not a decision effecting future land use on a city-wide basis, (3) the city code set forth criteria by which a proposed development was to be judged, (4) in adopting the resolution the city applied these criteria, (5) the resolution itself was clearly the type of governmental decision that is traditionally associated with quasi-judicial activity, and (6) the village, while not required to do so, provided adequate notice to the developer and other interested persons and gave them an opportunity to present their views on the development. *Id.* at 628.

The factors used by the Court in *Cherry Hill* are analogous to the events that have transpired in the current case. (1) When the City Council passed August 2013 Ordinance 7917 Xcel's interests became adversely affected because Ordinance 7917 created an uncertainty regarding Xcel's future in providing electricity to the residents of Boulder and to those residents in unincorporated Boulder County. (2) The actions taken by the City Council when it passed Ordinance 7917 affected Xcel's property interest and not the future property interests of others on a city-wide basis. (3) Article XIII of the Boulder Home Rule Charter established a specific set of criteria that had to be met prior to the City Council making a decision concerning the creation of a utility. On November 15, 2012, the City Council held public hearings to determine how best to measure the requirements of Article XIII. On February 26, 2013 the City Council held a public study session concerning Boulder's ability to meet the required criteria based on metrics established in the prior meeting. The Amendment and subsequent meetings were all conducted in order to establish the specific criteria by which to make the determination that the conditions precedent to the creation of the utility had been met. (4) Boulder asserts, and the Court concurs, that when the Boulder City Council passed August 2013 Ordinance 7917 it utilized the previously established criteria to declare the conditions precedent to the creation of the utility had been met. (5) Boulder asserts, and the Court concurs, that the criteria and process established by Article XIII of the Boulder Home Rule Charter clearly involved the type of governmental decisions that are traditionally associated with quasi-judicial activity. (6) As in *Cherry Hill*, the Boulder City Council provided notice and an opportunity to be heard during the process, regardless of whether it was required or not.

For example: on November 15, 2012, the City Council *held public hearings* to determine how best to measure the requirements of Article XIII; on February 26, 2013 the City Council held a *public study session* concerning Boulder's ability to meet the required criteria based on

metrics established in the prior meeting; on April 16, 2013, *after providing notice*, the City Council conducted *a public hearing at which 44 people testified, including one of Xcel's employees*; and on August 20, 2013, *after notice and public hearing*, the City Council accepted the report of the third party evaluator and passed Ordinance 7919. *See City of Boulder's Brief in Support of its Motion to Dismiss*, 4-5.

“Legislative action is usually reflective of some public policy relating to matters of a general character, is usually prospective in nature, and is not normally restricted to identifiable persons or groups.” *Condiotti v. Board of County Com'rs of County of La Plata*, 983 P.2d 184 at 186 (Colo. App. 1999) (citing *Cherry Hills Resort Development Co. v. City of Cherry Hills Village*, 757 P.2d 622 (Colo. 1988)). In *Condiotti*, the court of appeals held a property owner could not seek review of a master land use plan through C.R.C.P. 106(a) because the action was legislative in nature. The appeals court found the master plan at issue established land use policies for the whole county, was prospective in nature, general in character, and was not applied to the property owner's property on a site specific basis. *Id.*

Utilizing the rationale in *Condiotti* the Court finds the act of actually creating the utility itself to be legislative. Boulder's decision to actually establish a utility is a matter of public policy that is prospective in nature and is related to matters of a general character because it impacts all city residents. Additionally, both Boulder and Xcel admit the May 2014 Ordinance 7969 was a legislative act.

Thus, the Court finds when Boulder declared that the conditions precedent for the creation of the utility had been met in Ordinance 7917 it was acting in a quasi-judicial manner.¹ The Court, further finds the act of creating the utility in Ordinance 7967 was legislative in nature.

Because the passing of Ordinance 7917 on August 20, 2013 was the final quasi-judicial decision made by the City Council as it relates to the determination of the conditions precedent, Xcel was required to file any complaint concerning this issue on or before September 17, 2013. Xcel's complaint was not filed until June 3, 2014 well past the 28 day deadline established by C.R.C.P. 106(b).

C.R.C.P. 57

C.R.C.P. 57(b) provides that:

Any person ... whose rights, status, or other legal relations are affected by a ... municipal ordinance ... may have determined any question of construction or validity arising under the ... ordinance... and obtain a declaration of rights, status, or other legal relations thereunder.

Quasi-judicial decisions may be challenged under C.R.C.P. 57; however, if a party is seeking relief of a quasi-judicial decision through C.R.C.P. 57 they must do so within the 28 day

¹ The Court makes no findings regarding the accuracy of Boulder's determination that the conditions precedent had been met.

filing deadline that is set out in C.R.C.P. 106(b). *JJR I, LLC v. Mt. Crested Butte*, 160 P.3d 365 (Colo. App. 2007). Xcel failed to meet this deadline.

The issue before the court is whether or not Xcel may challenge the creation of the utility in May 2014 Ordinance 7969 for either being in conflict with or outside the scope of the powers granted to the City Council by Boulder's Charter.

The charter of a home rule municipality is effectively the municipality's constitution, and ordinances may not conflict with the charter. *Glenwood Post, a div. of Stauffer Commc'ns, Inc. v. City of Glenwood Springs*, 731 P.2d 761 at 762 (Colo. App. 1986). Additionally, legislative actions of a municipality are constrained by the authority granted the municipality in its charter. *E.g., Berman v. Denver*, 209 P.2d 754, 765 (Colo. 1949) (scope of legislative power prescribed by municipal charter "must be followed" and "constitutes the measure of power"); *People ex rel. v. Pickens*, 12 P.2d 349, 351 (Colo. 1932) ("the powers vested in home-rule cities, not specifically limited by constitution or charter, may be exercised through their legislative authority"); *Kruse v Town of Castle Rock*, 192 P.3d 591, 596 (Colo. App. 2008) ("a municipality, like an administrative agency, must comply strictly with its enabling legislation, such as a charter or code). Thus, when a municipality acts legislatively in the passing of an ordinance that does not comply or conflicts with the powers granted in its charter, a person whose rights, status or other legal relations are affected by the ordinance may bring an action under C.R.C.P. 57.

Article XIII of the Boulder City Charter granted the City Council the power to create a utility if the City Council demonstrated certain conditions could be met through the assessment by a third party independent expert. On August 20, 2013, the City Council, made a final quasi-judicial decision and determined that the conditions precedent had been met. On September, 18, 2013, the 28 day time period by which a quasi-judicial decision could be challenged had elapsed and the City Council's August 20, 2013 decision became final and unreviewable.

Once the August 2013 Ordinance 7917 became final and unreviewable the Boulder City charter granted the City Council the power to create the utility. The action of creating the utility did not conflict with the city charter.

Articles XX §1 and §6 of the Colorado Constitution grants Boulder, a home rule city, the constitutional right to create a utility if it so chooses. The Boulder voters chose to create a quasi-judicial proceeding before granting the City Council the power to create the utility. Once the quasi-judicial proceeding was complete, the City Council's decision to actually create the utility became an act of legislative power authorized by Boulder City Charter Article XIII. The Court finds there is no conflict between Ordinance 7969 and Article XIII.

Thus, the Court finds it does not have subject matter jurisdiction over Xcel's C.R.C.P 57 claim.

IV. CONCLUSION

In accordance with the foregoing analysis, Defendant's Motion to Dismiss is hereby **GRANTED**.

DATED: June 25, 2015

BY THE COURT



Judith L. LaBuda
District Court Judge