

<p>DISTRICT COURT, COUNTY OF LARIMER, STATE OF COLORADO Court Address: 201 La Porte Avenue Fort Collins, Colorado 80521-2761 Phone Number: (970) 494-3500</p> <hr/> <p>Plaintiff: CITY OF THORNTON, a home rule municipality of the State of Colorado,</p> <p>v.</p> <p>Defendant: THE BOARD OF COUNTY COMISSIONERS OF LARIMER COUNTY, State of Colorado; JOHN KEFALAS, in his official capacity, STEVE JOHNSON, in his official capacity, and TOM DONNELLY, in his official capacity,</p> <p>and</p> <p>Intervenors: NO PIPE DREAM CORPORATION and SAVE THE POUDRE.</p>	<p>DATE FILED: February 15, 2021 2:50 PM CASE NUMBER: 2019CV30339</p> <hr/> <p>▲ FOR COURT USE ▲</p> <hr/> <p>Case No. 2019 CV 30339</p> <p>Courtroom: 3C</p>
<p style="text-align: center;">ORDER DENYING PLAINTIFF’S MOTION FOR DECLARATORY RELIEF AND DETERMINATION OF QUESTIONS OF LAW</p>	

THIS MATTER is before the court on the Complaint of Plaintiff City of Thornton (“Thornton”) for declaratory relief under C.R.C.P. In addition to the filing of the Complaint in this matter, Thornton subsequently separately filed its Motion for Declaratory Relief and Determination of Questions of Law, seeking declaratory relief Colo. R. Civ. P. 57 and a determination of questions of law under Colo. R. Civ. P. 56(h). The Court has reviewed the Complaint, Motion for Declaratory Relief and Determination of Questions of Law and the briefing provided by the parties. Being otherwise fully informed in the premises, the Court finds, and orders as follows:

I. BACKGROUND AND PROCEDURAL HISTORY

Thornton initiated the present suit with the filing of its Complaint on March 16, 2019. In its Complaint for judicial review and for declaratory relief, Thornton asserts twelve separate

claims for relief against Defendant BOCC. The Complaint asserts claims under C.R.C.P. Rule 106(a)(4), alleging that the BOCC abused its discretion or exceeded its jurisdiction in denying Thornton's 1041 permit application. In addition, Thornton asserts a separate claim for declaratory relief under C.R.C.P. 57 with regard to the decision of the BOCC denying Thornton's 1041 permit application. The court is contemporaneously issuing its order with regard to Thornton's request for judicial review under C.R.C.P. Rule 106(a)(4). In its ruling on Thornton's C.R.C.P. Rule 106 complaint, the court has determined that there is competent evidence in the record to support the denial of Thornton's 1041 permit application.

In the context of its request for declaratory relief, Thornton requests that the court determine, as a matter of law, that BOCC cannot consider, condition or deny Thornton's 1041 application based on factors or alternatives to Thornton's proposals for the siting and design of the pipeline that would (1) deny or impair Thornton's constitutional rights relating to the right to exercise the power of eminent domain; (2) interfere with water matters decreed to Thornton by the Water Division No. 1, Water Court, or Thornton's 1986 contract with Water Supply and Storage Company ("WSSC"); or (3) violate the Areas and Activities of State Interest Act, Colo. Rev. Stat. § 24-65.1-101 ("1041 Statute"), or the Larimer County's Land Use Code ("Code").

The BOCC and Intervenors oppose Thornton's request for declaratory relief and argue that Thornton's request for declaratory relief should be denied because it is duplicative of its claim for relief under C.R.C.P. Rule 106. Further, the BOCC argues that declaratory relief under C.R.C.P. Rule 57 is not available where the judgment or decree would not terminate the controversy before the Court. Finally, the BOCC argues that the specific declaratory relief sought by Thornton would require the court to issue an advisory opinions, precluded under C.R.C.P. Rule 57. For the reasons set forth below, the court denies Thornton's request for declaratory relief.

II. LEGAL STANDARDS

A. Declaratory Relief under C.R.C.P. Rule 57

C.R.C.P. Rule 57 provides, in relevant part:

(a) Power to Declare Rights, etc.; Force of Declaration. District and superior courts within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceedings shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

(b) Who May Obtain Declaration of Rights. 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.

(f) When Court May Refuse to Declare Right. The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

A claim for declaratory relief under C.R.C.P. 57 may be properly sought where review under C.R.C.P. 106(a)(4) may be ineffective in addressing the issues raised by the petitioner. *Denver Center for the Performing Arts v. Briggs*, 696 P.2d 299, 305 (Colo. 1985); *Collopy v. Wildlife Commission*, 625 P.2d 994, 1004 (Colo.1981); *Grant v. District Court*, 635 P.2d 201, 202 (Colo.1981); *Norby v. City of Boulder*, 195 Colo. 231, 236, 577 P.2d 277, 280 (1978). In particular, a declaratory judgment claim may be appropriate to address constitutional questions and challenges to the overall validity of a statute because C.R.C.P. 106(a)(4) allows only a limited review of whether an inferior tribunal exceeded its jurisdiction or abused its discretion. *Native American Rights Fund, Inc. v. City of Boulder*, 97 P.3d 283 (Colo.App. 2004); *Sullivan v. Board of County Commissioners*, 692 P.2d 1106 (Colo.1984); *Two G's v. Kalbin*, 666 P.2d 129, 133 (Colo.1983). A declaratory judgment claim may include a facial constitutional challenge because review under C.R.C.P. 106(a)(4) is limited to the issue of whether a decisionmaker

exceeded its jurisdiction or abused its discretion. *Briggs*, 696 P.2d at 305. By contrast, a constitutional challenge to an ordinance as applied “is generally a quasi-judicial act subject only to [C.R.C.P. 106(a)(4)] review.” *Tri-State Generation*, 647 P.2d at 681 no. 7.

III. DISCUSSION AND ANALYSIS

Thornton’s C.R.C.P. Rule 57 Request for Declaratory Judgment

Thornton requests that the court declare or conclude as a matter of law that the BOCC cannot consider, condition or deny Thornton’s 1041 application based on certain factors or alternatives to Thornton’s proposals for siting and design of its proposed pipeline. *See* Pl.’s Mot. for Declaratory Relief and Determination of Questions of Law 14–36. The BOCC and No Pipe Dream contend in their respective responses to Thornton’s motion that the thirteenth claim for relief in Thornton’s complaint, brought under C.R.C.P. 57, should be dismissed because it is duplicative of the remaining twelve claims for relief brought under C.R.C.P. Rule 106. Defs.’ Combined Answer Br. and Resp. to Mot. for Declaratory J. 42; Def. Intervenor’s Resp. in Opp’n to Pl.’s Mot. for Declaratory Relief and Determination of Questions of Law 12–13.

In its C.R.C.P. 57 claim for relief Thornton “incorporates into this claim for relief all of the allegations in the preceding paragraphs;” and further alleges that the BOCC “misconstrued its criteria and the scope of its powers under the 1041 Act in denying Thornton’s 1041 application.” Accordingly, Thornton alleges that it is “entitled to the court’s determinations and declarations that Thornton complied with the 1041 criteria.” Complaint ¶¶ 182–84. Thornton’s claims under C.R.C.P. 106(a)(4) ask the court to declare that the BOCC either “acted arbitrarily and capriciously” or “exceeded its jurisdiction” in denying Thornton’s 1041 application. *Id.* at ¶¶ 30–31.

Here, Thornton’s declaratory judgment claim does not assert a facial constitutional challenge to the 1041 Statute, C.R.S. § 24-65.1-101, or to the Larimer County Land Use Code § 14.4(J). Nor does Thornton’s claim alleged that either the 1041 Statute or the LUC is unconstitutional, as applied. Further, Thornton’s request for declaratory relief is based upon the record before the court and does not rely on evidence which was not before the BOCC. Accordingly, it appears to the court that judicial review under C.R.C.P. 106(a)(4) provides the

appropriate and exclusive remedy to review the BOCC's determination denying Thornton's 1041 permit application. *Board of County Commissioners of Douglas County v. Sundheim*, 926 P.2d 545 (Colo. 1996). The court has made specific detailed findings regarding Thornton's request for review under C.R.C.P. Rule 106(a)(4). Review under C.R.C.P. 57 would be duplicative of the court's review under C.R.C.P. Rule 106(a)(4).¹

The BOCC, and to some extent, No Pipe Dream, also contend that the declaratory relief Thornton seeks in its motion pursuant to C.R.C.P. 56(h) and 57 would require the Court to render advisory opinions and should therefore be denied on that ground. Defs.' Combined Answer Br. and Resp. to Mot. for Declaratory J. 44–48; Def. Intervenor's Resp. in Opp'n to Pl.'s Mot. for Declaratory Relief and Determination of Questions of Law 14–15, 21, 23. The Court agrees with the BOCC and No Pipe Dream.

A court has the power to declare the rights, status and other legal relations of the parties affected by, among other things, a statute, municipal ordinance or contract, pursuant to C.R.C.P. 57 and the Uniform Declaratory Judgments Law. C.R.C.P. 57(b); C.R.S. § 13-51-106. The purpose of the declaratory judgment statute is to “provide a ready and speedy remedy, in cases of *actual controversy*, for determining issues and adjudicating legal rights, duties, or status of the respective parties, before controversies with regard thereto lead to the repudiation of obligations, the invasion of rights, and the commission of wrongs.” *Ahern v. Baker*, 366 P.2d 366, 411–12 (Colo. 1961) (emphasis added). However, a court may refuse to render or enter a declaratory judgment or decree if doing so “would not terminate the uncertainty or controversy giving rise to the proceeding.” C.R.C.P. 57(f); C.R.S. § 13-51-110.

Accordingly, a proceeding for declaratory judgment “must be based upon an actual controversy and not be merely a request for an advisory opinion.” *Beacom v. Board of County Com'rs of Adams County*, 657 P.2d 440, 447 (Colo. 1983). Courts “exist for the purpose of deciding live disputes involving ‘flesh-and-blood’ legal problems with data ‘relevant and adequate to an informed judgment’ and should therefore “avoid an advisory opinion on an

¹ In ruling on Thornton's request for review under C.R.C.P. Rule 106(a)(4) the court has issued specific factual findings as to each of the review criteria and whether there is competent evidence in the record to support the BOCC's findings or whether the BOCC acted arbitrarily or in excess of its jurisdiction in denying the permit with regard to specific criteria.

abstract proposition of law.” *City and County of Denver v. Consolidated Ditches Co. of Dist. No. 2*, 807 P.2d 23, 38 (Colo. 1991) (quoting *People v. Lybarger*, 700 P.2d 919, 915 (Colo. 1985)). Courts must refrain from determining “those questions which have not yet arisen and which may never arise” or answering “speculative inquiries,” *Gabriel v. Board of Regents of University of Colorado*, 267 P. 407, 586 (Colo. 1928), and from rendering an opinion based “upon a hypothetical basis.” *Farmers Ins. Exchange v. District Court*, 862 P.2d 944, 947 (Colo. 1993). An actual legal controversy is “a current one rather than one that may arise at some future time.” *Three Bells Ranch Associates v. Cache La Poudre Water Users Ass’n*, 758 P.2d 164, 168 (Colo. 1988) (citing *Heron v. City & County of Denver*, 411 P.2d 314, 315 (Colo. 1966)). Similarly, a declaratory judgment proceeding “may not be invoked to resolve a question which is non-existent, even though it can be assumed that at some future time such question may arise.” *Taylor v. Tinsley*, 330 P.2d 954, 955 (Colo. 1958).

Here, resolution of the issues upon which Thornton seeks declaratory relief would not finally resolve the ultimate determination as to whether the BOCC improperly denied Thornton’s 1041 permit application or whether the record contains competent evidence to support such denial. Accordingly, under C.R.C.P. Rule 57(f) this court may properly refuse to render or enter a declaratory judgment or decree where such judgment or decree if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding. The court declines Thornton’s request for declaratory relief which would not resolve the controversy before the court.

Finally, to the extent that Thornton requests a declaration that the BOCC determination regarding Thornton’s permit application may not interfere with water matters decreed to Thornton by the Water Division No. 1, Water Court, or Thornton’s 1986 contract with Water Supply and Storage Company (“WSSC”), the court finds that this court does not have jurisdiction to interpret and issue declaratory relief as to Thornton’s decreed water rights or with regard to the 1986 contract with WSSC.

A water court has exclusive jurisdiction in “an action for determination of a water right or a change of water right, each of which concerns the right to use of water.” *Crystal Lakes Water*

and Sewer Ass'n v. Backlund, 908 P.2d 534, 540 (Colo. 1996). Such actions “include matters concerning the scope of previously decreed water rights.” *Allen v. State*, 433 P.3d 581, 583–84 (Colo. 2019). A water court also has jurisdiction over “ancillary issues that directly impact water rights, such as private contractual agreements affecting the use of water rights.” *Archuleta v. Gomez*, 140 P.3d 281, 284 (Colo. App. 2006). Further, water courts “retain exclusive jurisdiction over all water matters” including “determinations regarding...the quantification of a water right.” *In re Tonko*, 154 P.3d 397, 404 (Colo. 2007). However, “an action to determine ownership of a water right falls within the general jurisdiction of the district courts.” *Backlund*, 908 P.2d at 540.


Thornton’s motion for declaratory relief would necessarily require this court to make a determination regarding decreed water rights and issue an order enforcing those rights. This court does not have jurisdiction to do so, as this power is reserved exclusively to the water courts. This would also extend to any interpretation or declaration regarding any legal determination regarding the 1986 Agreement with WSSC. Finally, even if the court had jurisdiction to enter the declaration that Thornton seeks, all necessary parties must be joined in order to afford appropriate relief. All necessary parties are not joined in this request for declaratory relief and therefore the court is without power to issue the declaration that Thornton seeks.

ORDER

For the reasons set forth, the court denies Thornton’s request for declaratory relief under C.R.C.P. Rule 57.

SO ORDERED this 15th day of February 2021.

BY THE COURT:



District Court Judge