

DISTRICT COURT, EAGLE COUNTY, COLORADO 885 Chambers Ave.; P.O. Box 597 Eagle, Co 81631 Phone: (970) 328-6373	DATE FILED: March 20, 2017 CASE NUMBER: 2016CV30239
Plaintiff: CLEARWATER VENTURES LLC v. Defendant: GYPSUM TOWN COUNCIL, for the TOWN OF GYPSUM; and TOWN OF GYPSUM, COLORADO.	▲ COURT USE ONLY ▲ Case No.: 16 CV 30261 Div.: 4 Consolidated with cases: 2016 CV 30239, 16 CV 30315 Under 2016 CV 30239
ORDER GRANTING PLAINTIFF’S MOTION FOR DETERMINATION OF LAW PURSUANT TO C.R.C.P. 56(h).	

THIS MATTER is before the Court on Plaintiff Clearwater Ventures’ (the “Plaintiff”) Motion for a Determination of Law (the “Motion), filed on Jan. 9, 2017. The Defendant filed its Response to the Motion on Jan. 30, 2017. Plaintiff filed its Reply on Feb. 6, 2017.

Since this Motion relies on facts and issues issue raised in two other cases, 2016 CV 30239 and 16 CV 30315, both of those cases have been consolidated with the instant case.¹ The Court, having reviewed the record in all three cases, as well as the instant Motion, Response and Reply briefs, and being fully appraised of the merits, hereby GRANTS the Motion for the reasons set out below.

I. BACKGROUND

This dispute arises from the introduction, public hearing about, and subsequent adoption of Ordinance No. 08, Series 2016 – An Ordinance Approving Acquisition or Condemnation of Certain Property (the “Ordinance”) by the Town of Gypsum Council (the “Gypsum Council”) in July of 2016. The Ordinance purportedly authorizes the Gypsum Council to proceed with a condemnation action for public use over that portion of Plaintiff’s property (the “Condemnation Parcel”) lying within the Eagle River floodplain. The Condemnation Parcel is identified in the

¹ Consolidated case 2016CV30239 seeks to condemn a small floodplain portion of Plaintiff’s land, and remains an ongoing matter before this Court. The proposed condemning party in that case is Eagle Valley Clean Energy, LLC (EVCE), an entity related to Clearwater that involves the same principals. 2016CV315 is The Town Of Gypsum v. Clearwater Ventures LLC et al suit in condemnation.

Eagle River Area Plan as part of River Management Zone 3, and zoned Developing Resource District. As noted above, this case has been consolidated with two other actions that concern parts of the same parcel of land.

Plaintiff challenges the validity of Ordinance adopted by the Gypsum Council for the Town of Gypsum, Colorado (“Gypsum”)(Gypsum and Gypsum Council are henceforth collectively referred to as the “Defendants”) in their effort to condemn Plaintiff’s property without its consent. Plaintiff challenges the validity of the Ordinance on the grounds that Defendants did not sufficiently publish or post a notice that contained all the information required under Gypsum’s Charter (the “Charter”) before it held a Public Hearing on July 26, 2016, and subsequently adopted the Ordinance, sending notices to Plaintiff based on it.

Plaintiff requests the Court to Order that the Ordinance authorizing the Condemnation is void and of no force and effect as a matter of law pursuant to C.R.C.P. 57 and C.R.C.P. 106(a)(4) since: (a) the Gypsum Council and Gypsum acted illegally and ultra vires in approving the Ordinance without compliance with the procedural requirements of Section 8.4 of the Charter by failing to give sufficient notice regarding the Ordinance and the Public Hearing; and (b) in so doing, the Gypsum Council and Gypsum exceeded their authority.

Defendant argues that there is evidence that supports the town gave adequate and actual notice was in compliance with both the Charter and the Colorado Open Meetings Law. Defendant further argues/contends that the Plaintiff has no injury in fact since it had actual notice prior to the adoption of the ordinance and therefore Plaintiff has no standing to raise the alleged procedural irregularities.

II. FINDING OF FACTS

Gypsum Council introduced and held a public hearing on, and approved Ordinance No. 08 Series 2006 (the “Ordinance”) in July of 2016. The purpose of the Ordinance was to authorize Gypsum to proceed with a condemnation action to condemn for public use a portion of Plaintiff’s property (the “Condemnation Parcel”) lying within the Eagle River floodplain, identified in the Eagle River Area Plan as part of River Management Zone 3, and zoned Developing Resource District.

Defendants seek to take and condemn through its putative powers of eminent domain (“Gypsum’s Condemnation”) a portion of certain real property (the “Clearwater Property”) as described in the Ordinance. A true and correct copy of the Ordinance is part of the record and it

speaks for itself. Defendants have sent other correspondence to Plaintiff in connection with this matter.

Plaintiff is the owner of the Clearwater Property. The Clearwater Property is now devoted to the prior public use of electric power plant operation by nonparty Eagle Valley Clean Energy, LLC, as tenant under a ground lease between it and Plaintiff. Plaintiff has not and does not consent to Gypsum's efforts to condemn its property.

The Gypsum Council's authority to condemn property by ordinance is governed by its home rule Charter, which was approved by a special election on or about September 14, 1982, and given an effective date of on or about October 21, 1982. The Charter requires that any action placing any burden upon or limiting the use of private property without the consent of the owner, shall be by ordinance. *See* Charter § 8.2. A true and correct copy of Charter § 8.2 is part of the record.

To legally enact an ordinance certain procedural requirements are necessary for enactment of an ordinance, the Charter requires, in relevant part: "If the ordinance is approved on first reading, within 60 days it shall be posted and published in full or by title, unless otherwise provided in this Charter. The Council shall hold a public hearing on the ordinance not earlier than four days after first publication, and notice of said public hearing, specifying the day, hour and place of the same, shall be included in the posting and first publication." Charter, § 8.4(d).

The Defendants claim to be authorized to pursue Gypsum's Condemnation acting by and through action the Ordinance, and sent Plaintiff notice to that effect. The Ordinance affects Plaintiff's constitutionally-protected property rights, status and other legal relations. If Gypsum is allowed to proceed, Gypsum's Condemnation will take and limit the use of Plaintiff's private property without its consent. Defendants' first publication giving notice of a public hearing (the "Publication") on the Ordinance is also part of the record.

The Publication does not include notice of a public hearing to be held on the Ordinance. The Publication also does not include the hour, the date or the place of a public hearing to be held regarding the Ordinance. This is the only Publication caused to be made with regard to a public notice of a public hearing to be held on the Ordinance, other than the published ad in the Eagle Valley Enterprise on July 21, 2016, prior to the Gypsum Council's attempted adoption of the Ordinance on July 26, 2016

Plaintiff's action challenges the validity of Ordinance No. 08, Series 2016 – An Ordinance Approving Acquisition or Condemnation of Certain Property (the “Ordinance”) adopted by the Gypsum Council for Gypsum, Colorado in their effort to condemn Clearwater's property without its consent. It has now filed the instant Motion for Determination of a Question of Law.

III. STANDARD OF REVIEW

A. Standing is Present and Court has Subject Matter Jurisdiction

The question of whether a plaintiff has standing is a legal one, and a threshold matter for this Court to resolve. *See e.g. Hall v. Walter*, 969 P.2d 224 (Colo. 1998). In order for a court to have jurisdiction over a dispute, the plaintiff must have standing to bring the case. *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004). Standing requires a two-prong test 1) injury in fact and 2) injury to a legally protected interest. *Hickenlooper v. Freedom from Religious Foundation, Inc.*, 338 P.3d 1002, 1006 (Colo. 2014).

If the Court has jurisdiction it has the “power to declare rights, status and other legal relations [of parties]... whose rights, status and other legal relations are affected by a ... municipal ordinance...” C.R.C.P. 57(a), (b); see also C.R.S. § 13-51-106. Pursuant to this Rule and statute, this Court may review and determine the procedural prerequisites set forth in Section 8.4 of the Charter to determine the validity or invalidity of the Ordinance and grant such further relief as may be necessary or proper.

C.R.S. §13-51-106 provides that “[a]ny 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 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.”

Here the court is required to review the agency's interpretation of the Charter requisites. Construction of a Charter, like that of a statute, is a matter of law. *Id.* Pursuant to C.R.C.P. 106(a)(4), the court applies a de novo standard of review. *See City of Commerce City v. Enclave West, Inc.*, 185 P.3d 174, 178 (Colo. 2008)(the court “is not bound by the agency's construction because the court's review of the applicable law is de novo.”).

When the “interpretation [of a statute] is not uniform or consistent, [the reviewing court does] not extend deference and will look to other statutory construction aids.” *Lobato v. Industrial Claim Appeals Office*, 105 P.3d 220, 223 (Colo. 2005) “[C]ourts are not bound by agency interpretations misconstruing or misapplying the law”; “interpretations actually contravening legislative intent are not entitled to deference.” *Mile High Cab, Inc. v. PUC*, 302 P.3d 241, 245 (Colo. 2013); *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023, 1029 (Colo. 2004) (reviewing court sets aside agency legal “interpretations that are clearly erroneous, arbitrary, or otherwise not in accordance with the law.”). An agency’s reading of the law is arbitrary when it is otherwise not in accordance with the law.

Those other aids include: seeking to effectuate the intent and purpose of the legislative body, applying the plain, ordinary meaning, and determining the proper interpretation by examining the legislative goals underlying the provision, and the consequences of alternative constructions. *Id.* at 223-24.

IV. CONCLUSIONS OF LAW

Because standing must be resolved as a threshold matter in order for this Court to have jurisdiction over this dispute, the Court will first consider Defendants’ allegation that Plaintiff lacks standing. *See Hall v. Walter*, 969 P.2d 224 (Colo. 1998).

A. Plaintiff Has Standing As It Has Suffered An Injury In Fact.

Plaintiff claims that the Ordinance authorizing eminent domain by the Gypsum and its Council is invalid because the notice provided by Defendants for a Public Hearing to adopt the Ordinance held on July 26, 2016 did not meet the requirements of the Charter. Plaintiff contends that this alleged procedural defect voids the Ordinance. In deciding whether Plaintiff’s have standing to sue on this issue, the Court must determine whether the claim of an unlawful condemnation process satisfies the two prongs of Colorado’s test for standing: that the plaintiff suffered (1) an injury-in-fact, (2) to a legally protected interest. *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004).

Defendant argues that Plaintiff has no injury in fact because: 1) even if Gypsum failed to follow the requirements of its Charter in publishing and posting notice of the hearing at which the Ordinance was given public hearing prior to the Council’s adoption to begin the eminent

domain process, no condemnation of Plaintiff's property has occurred. Defendants contend that should Plaintiff's property be condemned, the required judicial proceeding and an award of damages as just compensation precludes any potential injury to Plaintiff. Additionally, Defendant points out that Plaintiff was present at the hearing on July 26, 2016 and participated. Defendant therefore argues that Plaintiff's allegations are actually a claim of insufficient notice, and under the circumstances here, this claim cannot constitute an injury in fact. The Court is not persuaded.

Defendant's argument apparently misperceives the issue. Plaintiff complains of injury because Gypsum and its Council approved an Ordinance without compliance with the procedural requirements of Section 8.4 of the Charter and in so doing, the Gypsum Council and Gypsum exceeded their authority. A condemnation proceeding that has not been properly instituted cannot be cured by a putative later award of "just compensation."² Plaintiff's alleged injury is the threat of condemnation without authority and Plaintiff asks the Court to declare the Ordinance void. Under Defendants' view the Court should free home rule municipalities from citizen-approved charter requirements for condemnation of private property. Such a result would violate Colorado law and our notions of constitutional due process. *Dep't of Transp. v. Amerco Real Estate Co.*, 380 P.3d 117, (Colo. 2016).

However, even without alleging a direct economic injury, a litigant may still have standing if he or she alleges a constitutional infringement. *Pueblo Sch. Dist. No. 60 v. Colorado High Sch. Activities Ass'n*, 30 P.3d 752, 753–54 (Colo. App. 2000); *See Dodge v. Department of Social Services*, 198 Colo. 379, 600 P.2d 70 (1979). Here, unlike complaints of noncompliance with the Open Meeting Act, the Gypsum Charter was not enacted merely to ensure that the formation of public policy is public business is conducted openly. Charter, §§ 8.2 and 8.4. Importantly these provisions describe the requisites for valid passage of a viable condemnation Ordinance, without which a condemnation action cannot proceed. *Id.*

Plaintiff is owner of the Clearwater property, and has a legally vested interest in its property valuation. Clearly to have property operations under a cloud of potential or definite condemnation negatively impacts the property's market value and imposes uncertainty, whether or not the actual condemnation has already taken place. Such diminution in value may not be

² The Court recognizes Defendant may re-initiate the relief sought in 2016CV30315 by properly noticing and subsequently enacting approved charter requirements for condemnation of private property.

precisely compensated by an invalidly commenced eminent domain process. Importantly, the Plaintiff has not consented to the condemnation. This suggests an actual, rather than illusory, injury in fact. Therefore, Plaintiff has standing to test whether the condemnation process that took place is valid.

Further, even though plaintiffs do not claim they did not have notice of the Gypsum meetings, and in fact attended and spoke, the potential loss of his property by means of an ordinance promulgated without strict compliance with the Charter also ameliorates public trust in the process as Plaintiff has no reason to believe any of the process will meet constitutional muster. Plaintiff's injury has constitutional due process contours far beyond the right to hearing and an opportunity to be heard interests addressed in cases cited by Defendants. *See, e.g. Dodge v. Department of Social Services, id.; Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

Here, Plaintiffs rely on Rule 57 which states:

(b) any person interested under a deed contract or other writings constituting a contract or whose rights status or other legal relations are affected by a ...municipal ordinance... may have determined [by the District court within their respective jurisdiction] any question of ...validity arising under the ...ordinance...

While this rule may purport to grant a cause of action to a large group of persons, where, as here, the plaintiff alleges that he suffers an injury in fact, its relief is available. *See Hall v. Walter, id.*, 969 P.2d at 230. An invalid ordinance, permitted to stand unchallenged, “would cause injury in fact to the Plaintiffs’ legally protected right to participate in a validly initiated eminent domain proceeding.

That said, the Court finds Plaintiff has standing and proceeds to consider each of Plaintiff's two arguments regarding the invalidity of the Ordinance below.

B. Ordinance Is Void Because Defendants Failed To Meet The Procedural Requisites Of Public Notice Required By The Charter.

As previously stated, this Court has the “power to declare rights, status and other legal relations [of parties]... whose rights, status and other legal relations are affected by a ... municipal ordinance...” pursuant to C.R.C.P. 57(a), (b) and C.R.S. § 13-51-106. These legal provisions empower the Court to review and determine whether the procedural prerequisites set

forth in Section 8.4 of the Charter were met, whether the Ordinance was validly enacted, and to grant such further relief as may be necessary. Plaintiff first argues that the Ordinance is void because it fails to strictly comply with the form required by the Gypsum Charter. For the reasons below the Court agrees.

1. Charter Requires Gypsum’s Council to Strictly Comply With Publication And Posting Requirements to Enact Valid Ordinance.

The Court consults Gypsum’s enabling statute to determine whether an ordinance that purports to exercise the power of eminent domain is valid. Since the Defendant Gypsum is a home rule town, its enabling “statute” is the Gypsum Charter, which describes the proper process for exercising eminent domain authority and power. Gypsum’s Charter has expressly delimited Gypsum’s powers to condemn private property in two ways: 1) the Gypsum Council must act by ordinance; and 2) the Gypsum Council must duly adopt such an ordinance through certain procedural steps. With respect to the first requirement, the Charter provides:

In addition to such acts of the Council as are required by other provisions of this Charter to be by ordinance, **every act** making an appropriation, creating an indebtedness, authorizing borrowing of money, levying a tax, establishing any rule or regulation for the violation of which a penalty is imposed, or **placing any burden upon or limiting the use of private property without the consent of the owner, shall be by ordinance.** Charter § 8.2. (emphasis added).

In turn, to be validly adopted, an ordinance must adhere to the following:

If the ordinance is approved on first reading, within 60 days it shall be **posted and published in full or by title**, unless otherwise provided in this Charter. The **Council shall hold a public hearing** on the ordinance not earlier than four days after first publication, and **notice of said public hearing, specifying the day, hour and place of the same, shall be included** in the **posting and first publication.** Charter § 8.4(d)(emphasis added).

The Court finds § 8.2 and 8.4(d) of the Charter unambiguous and clear. In order to condemn private property without the consent of its owner, the town must validly enact an ordinance. To validly enact an ordinance, language approved by the Gypsum Council regarding condemnation must be given a public hearing. The public hearing must be noticed to the public by Publication and Posting at least four day prior to a public meeting. The Publication and the Posting must be must contain four specific pieces of information:

- (a) notice that a public hearing will be held;
- (b) notice of the day of the public hearing;

- (c) notice of the hour of the public hearing; and
- (d) notice of the place where the public hearing will take place.

The constitutional protection against the taking of private property by government without due process imposes on the condemning governmental entity a requirement of strict compliance with, and strict interpretation of, their pertinent condemnation provisions. *Dep't of Transp. v. Amerco Real Estate Co.*, 380 P.3d 117, 120 (Colo. 2016), citing *Dep't of Transp. v. Gypsum Ranch Co.*, 244 P.3d 127, 129 (Colo. 2010) (emphasis added). “A municipality, like an administrative agency, must comply strictly with its enabling legislation, such as a charter.” *Kruse v. Town of Castle Rock*, 192 P.3d 591, 596 (Colo. App. 2008). Strict compliance with the requisites of a municipal charter is what gives the ordinance its legal force. It follows that failure to strictly comply with charter requirements renders the ordinance invalid to condemn property. If a municipality's officers or agents act outside the scope of their authority, their “actions are void and can be collaterally attacked at any time.” *Kruse, id.*; *See also Glenwood Post v. City of Glenwood Springs*, 731 P.2d 761 (Colo. App. 1986).

Here, the Defendants posted a Publication about the Ordinance that failed to comply with three of the four charter-mandated elements. In its entirety, the Publication provides:

TOWN OF GYPSUM

P.O. Box 130 50
Lundgren Boulevard Gypsum, CO 81637

PUBLIC NOTICE

This is to give notice that the following Ordinance was approved July 12, 2016 and is scheduled for adoption on July 26, 2016.

ORDINANCE 2016-08 AN ORDINANCE APPROVING ACQUISITION OR CONDEMNATION OF CERTAIN PROPERTY

The text of this Ordinance is available for public inspection at the office of the Town Clerk, 50 Lundgren Blvd., Gypsum Colorado, Monday through Friday between the hours of 8:00 a.m. and 5:00 p.m. /ss: Danette Schlegel Town Clerk. *See* First Publication of Notice.

This Publication didn't announce that a public hearing was being convened. Likewise this notice didn't contain a hearing time or day, and it didn't reveal the place of the public hearing. Instead, the Publication misleadingly announced that an Ordinance to “condemn certain property” was “approved” and “is scheduled for adoption.” This is in dereliction of the Gypsum's Charter mandate and easily gives the false impression that the “approved” ordinance had already been enacted, without any opportunity for a public hearing or public address. This completely violates the words and spirit of the Charter.

The Posting suffers from the same deficiencies. It was deficient as it lacked the same three of the four required Charter informational elements required by the Charter as the Publication. While the parties disagree whether Gypsum even literally posted any notice of the Ordinance prior to the Gypsum Council's attempted adoption on July 26, 2016, it is undisputed that the putative Posting, contained in the record exhibit and known henceforth as the "Posting," failed to comply with the Charter for the same reasons described in the Publication section above. Even assuming, *arguendo*, without deciding, that the Posting message was properly posted, the Posting is also deficient on its face.

2. The Failure to Satisfy Charter Requirements Invalidates Ordinance.

Defendants apparently admit that the Charter requisites were not complied with in the formal Publication and Posting. Instead, Defendants respond that Gypsum substantially complied, by having the actual proposed ordinance on their website and available at the hearing, and sending other portions of the required information to certain members of the public by email. Defendants argue that in any case, Plaintiff had actual notice and like others, was present and spoke at the public hearing on July 26, 2016. Defendants therefore contend their non-compliance with notice provisions isn't fatal. The Court disagrees.

Contrary to Defendant's argument, failure to adhere to the charter Publication and Posting requirements "cannot be regarded as an unsubstantial or innocuous." *Anderson v. Judd*, 404 P.2d 553, 558 (Colo. 1965). A municipality, like an administrative agency, must comply strictly with enabling legislation, such as a charter. *See Martinez v. Colorado Dep't of Human Servs.*, 97 P.3d 152, 157 (Colo. App. 2003). While there is a presumption of agency regularity, an agency's interpretation of its actions to enact an ordinance that "actually contravenes legislative intent [as discerned from its language] is not entitled to deference." *Mile High Cab, Inc. v. PUC*, 302 P.3d 241, 245 (Colo. 2013). Courts are not bound by agency interpretations that misconstrue or misapply the law. *Id.*

Colorado courts have held that the valid adoption of an ordinance requires that the public be given proper and sufficient prior notice. *Russell v. City of Central*, 892 P.2d 432 (Colo. App. 1995). Eminent domain legislation is generally strictly construed against the government. *Colorado Fuel & Iron Co. v. Four Mile Rwy. Co.*, 29 Colo. 90, 101, 66 P. 902 (Colo. 1901). The constitutional protection against the taking of private property by government without due

process imposes on the condemning governmental entity a requirement of strict compliance with and interpretation of the pertinent condemnation provisions. *Kruse, id.* Courts invalidate actions that don't strictly comply. *Id.* Invalidation is especially compelled here where Defendants attempt to use an invalidly adopted ordinance to condemn private property.

Here the record supports Plaintiff's allegation that the Gypsum Council's adoption of the ordinance did not contain the information required by the Charter. Review of Gypsum's own documents that are part of the record reveals that the Gypsum Council failed to include three of the four required elements in its Publication and Posting prior to the Ordinance's putative adoption, despite the Charter requirement. *See Platte River Power Auth. v. Nelson*, 775 P.2d 82, 83 (Colo.App.1989).

Legally, the Court is not persuaded that Defendants arguments that "substantial compliance" with either the Charter's Posting or Publication requirements suffice, or that Plaintiff's actual notice excuses a municipality's strict compliance with the Charter. Factually, Defendants' defensive assertions, fail rise to the level of material factual disputes. That the missing information appeared later on the website or can be gleaned from the ordinance itself available at the July 12 and 26 2016 meetings doesn't excuse this insufficiency. The initial failure to comply rendered the Ordinance void. *Dep't of Transp. v. Amerco Real Estate Co.*, 380 P.3d 117, at 120 (Colo. 2016); *Dep't of Transp. v. Gypsum Ranch Co.*, 244 P.3d 127, 129 (Colo. 2010).

Therefore the Court rules that, if the pleadings, affidavits, and other supporting documents demonstrate that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law, a declaration of law is proper. *Cf., Pueblo Sch. Dist. No. 60 v. Colorado High Sch. Activities Ass'n*, 30 P.3d 752, 753–54 (Colo. App. 2000); *But see, Gibbons v. Ludlow*, 2013 CO 49, ¶ 11; *Walcott v. Total Petroleum, Inc.*, 964 P.2d 609, 611 (Colo. App. 1998). While a nonmoving party is entitled to the benefit of all favorable inferences that may reasonably be drawn from the evidence, there is nothing in Defendants' allegations from which to infer the existence of a material dispute of facts. *Amos v. Aspen Alps 123, LLC*, 2012 CO 46, ¶ 13.

A material dispute of fact here would be one that makes it more likely than not that Gypsum complied with the Charter requirements. Danette Schlegal's Affidavit regarding Plaintiff's independent attempts to participate in the hearings and find out what was happening,

Council email of the ordinance to certain citizens, or that Dean Rostum or his attorney Sarah Baker were present at the hearing on July 26, 2016, are not sufficient to raise genuine factual disputes about Gypsum's non-compliance with the Charter. *Walter v. City & County of Denver*, 983 P.2d 88, 90 (Colo. App.1998); *Ellerman v. Kite*, 625 P.2d 1006, 1008 (Colo.1981). The Publication and the Posting are part of the record and they speak for themselves.

Accordingly the Court declares that adoption of the Ordinance is invalid pursuant to C.R.C.P. 57 and **GRANTS** Plaintiff's Motion on this issue.

C. Court Is Authorized To Vacate An Invalid Ordinance Pursuant to Rule 106.

This Court may, and does, vacate the invalid Ordinance pursuant to C.R.C.P. 106. Rule 106 empowers Courts to issue relief through appropriate action “[w]here any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion.” C.R.C.P. 106(a)(4). Pursuant to this Rule, the Court may vacate an enabling decision of a governmental body that abuses its discretion or exceeds its authority.

In the instant case, the Gypsum and its Council could exercise its power of eminent domain only as that authority was granted to them by the voter-approved Charter as discussed above. *See Flanders v. City of Pueblo*, 160 P.2d 980 (Colo. 1945). As a home rule city the Defendant's Charter serves as the vehicle through which such authority is granted and “to which its ordinances must conform.” Its ordinance must be formulated as set out there. Anything less is invalid. *Dep't of Transp. v. Amerco Real Estate Co.*, 380 P.3d 117, at 120 (Colo. 2016).

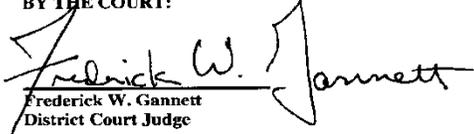
The Gypsum Council's was exercising quasi-judicial functions as it decided to enact an ordinance to begin the condemnation process. Since Gypsum and its Council failed to meet the procedural requirements of the Gypsum Charter, any subsequent actions by the Gypsum Council to try and enact the Ordinance or send notices pursuant to the invalid Ordinance *per se*, exceeded their authority, and constituted arbitrary and capricious acts. *See Nixon v. City and County of Denver*, 343 P.3d 1051 (Colo. App. 2014). Such actions were therefore void. Therefore, pursuant to C.R.C.P. 106 the Court **GRANTS** Plaintiff's Motion to vacate the Ordinance.

V. ORDER

Accordingly, for the reasons stated above, the Court GRANTS Plaintiff's Motion for Determination of a Question of Law and finds the Ordinance void. The Court Orders the Ordinance vacated since Defendants failed to meet the procedural requisites of public notice required by Sections 8.2 and 8.4 of their Charter, and acted arbitrarily and took actions beyond their authority. Further, the Court awards costs in favor of Plaintiff as set forth in C.R.S. §13-51-114. Plaintiff is to file its Bill of Costs with the Division Clerk of the court within 14 days.

IT IS SO ORDERED on this 20th day of March, 2017.

BY THE COURT:


Frederick W. Gannett
District Court Judge

SERVED ON ALL PARTIES VIA THE COURTS E-FILE SERVICE.