

DISTRICT COURT, JEFFERSON COUNTY COLORADO 100 Jefferson County Parkway Golden, Colorado 80401	<p style="text-align: center;">▼ COURT USE ONLY ▲</p> <hr/> <p>Case No. 2011-CV-785</p> <p>Division: 9 Ctrm.:</p>
Plaintiff: THOMAS G. ATKINS, as an individual and THOMAS G. ATKINS, IN HIS CAPACITY AS REPRESENTATIVE OF THE PETITIONERS FOR THE FORMATION OF THE JEFFCO LIBRARY DISTRICT v. Defendant: THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JEFFERSON, a political subdivision of the State of Colorado	
Attorneys for Board of County Commissioners JEFFERSON COUNTY ATTORNEY ELLEN G. WAKEMAN, #12290 Eric T. Butler, #29997 Assistant County Attorney Jefferson County Attorney's Office 100 Jefferson County Parkway, #5500 Golden, CO 80419-5500 Phone: 303-271-8916 Fax: (303) 271-8901 Email: ebutler@co.jefferson.co.us	
DEFENDANT’S RESPONSE TO PLAINTIFF THOMAS G. ATKINS’ MOTION FOR SUMMARY JUDGMENT	

Defendant Board of County Commissioners of the County of Jefferson (“the Board”) respectfully submits this Response to Plaintiff Thomas G. Atkins’ Motion for Summary Judgment.¹

¹ Many of the arguments found in this Response are also found in Defendant’s own Motion for Summary Judgment, but are set forth again herein for the sake of clarity.

Plaintiff argues that the Board improperly opted out of a proposed library district (the “Proposed District”). He contends that upon receipt of the petition for approval of the Proposed District (the “Petition”) the Board had a duty to either form the Proposed District or refer the Petition to an election. Although Plaintiff lists this contention as an undisputed fact in his Brief, it is one of the central legal questions before the Court. The Court should deny Plaintiff’s Motion for Summary Judgment and determine that the Board need not refer the Petition for a vote because the Board’s actions were consistent with the Library Law, section 24-90-101, C.R.S., *et seq.*

ARGUMENT

A. The Library Law Does Not Require the Board to Refer the Petition to the Electors of Jefferson County.

In his Second Claim for Relief, Plaintiff requests declaratory relief finding that the Board cannot exclude itself from the Proposed District pursuant to section 24-90-106(1), C.R.S. (“Section 106”), but instead must refer the Petition to the electorate. Plaintiff relies on section 24-90-107, C.R.S. (“Section 107”), regarding the establishment of a library district. Section 107 provides that petitions to form a library district are addressed to the boards of county commissioners of each county having territory within the service area of the proposed district. Upon receipt of such a petition, the board of each such county “shall either establish the library by resolution or ordinance...or shall submit the question of the establishment of a public library to a vote of the registered electors residing in the proposed library’s legal service area.” § 24-90-107(d), C.R.S. (emphasis added).

Plaintiff argues that Section 107 imposes a mandatory duty on the Board to either approve the Proposed District or submit the Petition to an election. He asserts that the Board

chose to disregard the plain language of Section 107 when it elected not to participate in the Proposed District. However, the Board’s election not to participate in the Proposed District was proper because (1) the Board validly opted out of the Proposed District pursuant to Section 106, thereby removing all electors from the service area of the Proposed District; (2) the County Clerk did not approve the Petition; and (3) the Petition did not comply with the requirements of the Library Law, including the requirement for a bond.

1. Section 106 operates as an exception to Section 107.

Section 106 regards “Participation of existing libraries in the formation of new libraries.” It provides that, whenever a library district is proposed, the legislative body of any governmental unit that maintains a public library within the territory to be served by the proposed library district “shall decide, by resolution or ordinance, whether or not to participate in the ... library district.” “Governmental unit” expressly includes “any county...of the state of Colorado.” § 24-90-103(3), C.R.S. The Colorado Court of Appeals determined that the plain meaning of Section 106 is that a governmental entity may “exclude itself from the district *at the time of formation of the district.*” City of Westminster v. Board of County Com'rs of County of Jefferson, 771 P.2d 11, 12 (Colo. App. 1988) (emphasis in original).

The Petition for the Proposed District specifies as its service area “[t]he boundaries of Jefferson County, Colorado as currently served by the Jefferson County Public Library.” See Petition, attached as Exhibit A. As the Petition itself indicates, the Board already maintains the Jefferson County Library (“County Library”) within unincorporated Jefferson County.

Assuming that the Petition were valid, Section 106 thus expressly required the Board to decide “whether or not to participate” in the Proposed District. In its January 25, 2011, Resolution, the

Board decided not to participate in the Proposed District. See Exhibit B, Resolution No. CC11-026.

Plaintiff argues that to allow the Board to opt out pursuant to Section 106 would render Section 107 meaningless, at least in this case. Citing People v. McIntier, 134 P.3d 467, 472 (Colo. App. 2005), Plaintiff argues that the Library Law must be read in such a way as to give effect to both statutes. Section 107, however, only requires that a board of county commissioners submit a petition to “the registered electors residing in the proposed library’s legal service area.” § 24-90-107(d), C.R.S. (emphasis added). Had the Board’s decision left Jefferson County land in the service area of the Proposed District, the Board could conceivably have gone forward with the election (had all other requirements been met). But because the County Library serves all of Jefferson County, the Board’s decision to opt out leaves no electors within the Proposed District to whom the Board could submit the Petition pursuant to Section 107. Such a reading harmonizes Sections 106 and 107 by leaving Section 107 intact and fully enforceable to the extent that any registered electors reside in the proposed legal service area after all applicable government units have decided whether to opt out pursuant to Section 106.

Plaintiff also argues that Sections 106 and 107 can be reconciled by reading Section 106 “as not applying to governmental units that are petitioned to form a new district.” (Plaintiff’s Brief in Support of Motion for Summary Judgment, p. 6.) Plaintiff suggests that, in enacting Section 106, the General Assembly was contemplating a situation where a municipality or county maintains a library within the area of a district that is proposed to be formed by another county or municipality, rather than situations where a library is proposed by petition. Id.

The Colorado Court of Appeals, however, has expressly recognized that a governmental unit may opt out of a library district that was proposed by petition. See Board of Trustees of Town of Wellington v. Board of Trustees of Fort Collins Regional Library Dist., 216 P.3d 611, 613 (Colo. App. 2009) (“before formation of the library district is submitted to voters, a governmental unit within the proposed district, if it currently maintains a public library, can elect not to participate in the proposed library district” (where library was proposed by petition)).

The Court of Appeals’ conclusion is supported by the text of Section 106, which does not differentiate between methods of library formation. Section 106 specifically provides that, “whenever a library district is proposed” – without qualification as to how it is proposed – “the legislative body of any governmental unit that maintains a public library within the territory to be served by the proposed library district “shall decide, by resolution or ordinance, whether or not to participate in the ... library district.” Even when the General Assembly originally enacted Section 106, a library district could be proposed by petition. See Exhibit C, 1979 Colo. Sess. Laws 983, 988-89 at § 24-90-110(1)(a). If the General Assembly had intended that Section 106 would only be effective when a municipality or county proposed a library, it could have limited the opt out language in Section 106. It did not.

Two principles of statutory construction assist the Court in resolving this dispute: (1) special provisions prevail over general provisions and (2) analysis of the consequences of a particular construction.

i. The special opt out provisions in Section 106 prevail over the general library formation provisions in Section 107.

Section 2-4-205, C.R.S., provides:

If a general provision conflicts with a special or local provision, it shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

Section 106 is a special provision with respect to Section 107. Section 107 is the general process for consideration and approval of proposed new libraries. Section 106, in contrast, deals with one specific circumstance that might arise in the course of consideration of a proposed library – whether an area already served by an existing library will take part in the proposed library district. Therefore, pursuant to section 2-4-205, Section 106 prevails as an exception to Section 107. That is, a board of county commissioners should be excepted from the general requirements of Section 107 with respect to a petition to form a new library where the board maintains a preexisting county-wide library within the proposed district and has opted not to participate in the proposed district. This interpretation leaves Section 107 fully enforceable to the extent that any registered electors reside in the remaining legal service area after all applicable government units have decided whether to opt out pursuant to Section 106.

The only circumstance in which this rule of statutory construction does not apply is where the general provision is both later adopted and manifestly intended to prevail over the special provision. § 2-4-205, C.R.S. Although the General Assembly has amended the Library Law several times, it has always allowed a county to opt out of a proposed library district. The provisions regarding establishment of a library district by petition and the opt-out of a county with an existing library were originally enacted in the same 1979 bill, Senate Bill 303 (attached

as Exhibit C). (The provisions regarding establishment of library districts were initially found in section 24-90-110, C.R.S., also enacted by Senate Bill 303. Id.) The original bill contained a provision stating that “the legislative body of any government unit which maintains a public library within the territory to be served by a county library or a library district may decide not to participate in said county library or library district.” That language is substantively the same as the current language, except that the current language actually requires the legislative body to make such a decision, rather than merely authorizing it to do so. (The mandatory requirement was added in 1990 by Senate Bill 54 (attached as Exhibit D).)

The Library Law provisions regarding establishment of a library district, as originally enacted in 1979 in section 24-90-110, C.R.S., and as worded when moved to Section 107 in 1990 have never addressed the exception provided in Section 106, let alone indicated any manifest intent to prevail over it. See, e.g., Exhibits C and D. That is understandable, as Section 106 was simultaneously enacted and has always stood as an exception to the library district formation process. Given their simultaneous enactment, the presumption is that the opt-out provisions in Section 106 prevail as an exception to the procedures described in Section 107.

ii. The negative consequences of forcing the Board to participate in the Proposed District weigh in favor of allowing it to opt out.

Two alternative negative consequences could result from forcing the Board to participate in the Proposed District. First, if the Petition could validly require the elimination of the County Library, then requiring the Board to form the Proposed District would allow the City of Westminster to opt out of the Proposed District, and would thereby cause the same financial havoc as allowing the City of Westminster to withdraw from the County Library would have caused. The Court of Appeals addressed that issue in City of Westminster v. Board of County

Com'rs of County of Jefferson, supra. The Court of Appeals held that Westminster could not withdraw from the County Library in part because it would jeopardize the financial stability of the County Library. 771 P.2d at 12. This remains true. If Jefferson County were required to participate in formation of a new Proposed District under terms that eliminate the County Library, the remaining library system could lose funding from that portion of the Proposed District that is in Westminster. The County Library relies on nearly \$1.8 million in revenue from property in Westminster. (See Affidavit of Patricia Weber, Exhibit E, regarding library taxes billed on property in the City of Westminster.) Requiring the County to participate in creation of the Proposed District under the terms of the Petition would jeopardize that funding. In holding that Westminster could not withdraw from the County Library, the Court of Appeals held:

Our interpretation is further buttressed by considering the financial difficulties that could be created if we were to interpret the statute as allowing a city to withdraw after the county library is operating. If a county has an existing library providing services to its residents, to allow part of the district to withdraw could create economic and budgetary chaos in that fixed expenses would thereafter have to be paid by the remaining portions of the district. We cannot attribute to the General Assembly an intention to allow such consequences. *See* § 2-4-101, C.R.S.

City of Westminster v. Board of County Com'rs of County of Jefferson, 771 P.2d at 12. The Board has the right to make the legislative decision to avoid loss of revenues that support libraries in Jefferson County.

Second, if the Court agrees with the Board that the Petition cannot require the dissolution of the County Library, then the County's ability to exclude itself at formation of a new district allows Jefferson County residents to avoid paying for duplicate services. If the Board could not opt out of the Proposed District, residents of Westminster could find themselves taxed to support their Municipal Library, the County Library, and a Library District. Section 106 exists to provide

local governments with a means to avoid duplicate service while preserving the expectations of existing library systems.

Plaintiff argues that the Board's position demonstrates that it does not care what the electorate (actually, only a small contingent of the Jefferson County electorate) has to say about the subject. But that argument misrepresents the system that the General Assembly created. The General Assembly gave the legislative body responsible for an existing library the power to decide whether to participate in a proposed library district. The Court should deny Plaintiff's Motion for Summary Judgment.

2. The Petition was never approved by the County Clerk.

Even if the Court were to determine that Section 106 is inoperative in this case, Plaintiff's Complaint fails because the petitioners did not comply with laws requiring that the Petition be approved by the County Clerk. Section 30-11-103.5, C.R.S., provides:

The procedures for placing an issue or question on the ballot by a petition of the electors of a county that is pursuant to statute or the state constitution or that a board of county commissioners may refer to a vote of the electors pursuant to statute or the state constitution shall, to the extent no such procedures are prescribed by statute, charter, or the state constitution, follow as nearly as practicable the procedures for municipal initiatives and referred measures under part 1 of article 11 of title 31, C.R.S. The county clerk and recorder shall resolve any questions about the applicability of the procedures in part 1 of article 11 of title 31, C.R.S.

Because the library district petition process described in the Library Law falls within the category describe above, such a petition must comply with the provisions of section 31-11-101, C.R.S., *et seq.*

Section 31-11-104(1), C.R.S., provides that a petition shall be submitted to the legislative body (in this case, the Board), by filing it with the clerk. Section 31-11-106(1), C.R.S., further

provides that “no petition section shall be printed or circulated unless the form and the first printer’s proof of the petition section have first been approved by the clerk.” This is to assure that a petition is correctly formatted and includes required precautionary language set forth in the statute. The Petition was not submitted for the approval of the Jefferson County Clerk. See Exhibit F, Affidavit of Joshua Liss. The Petition lacks the precautionary language set forth in section 31-11-106, C.R.S. See Exhibit A. Therefore, the Petition is invalid. § 31-11-106(5), C.R.S. (“Any petition section that fails to conform to the requirements of this article or that is circulated in a manner other than that permitted by this article shall be invalid”). The Court should deny Plaintiff’s Motion for Summary Judgment because the petitioners did not submit the Petition to the Jefferson County Clerk as required by law.

3. The Petition did not comply with the requirements of the Library Law.

Even putting aside the Board’s right to opt out of the Proposed District and the failure to obtain approval of the form of the Petition from the Clerk, the Board still has the authority to decline to refer the Petition to the voters because the Petition fails to comply with the Library Law in several respects and is therefore unlawful.

The Colorado Constitution does not provide any initiative power to the electorate for countywide matters. Board of County Com’rs of the County of Archuleta v. County Road Users Ass’n, 11 P.3d 432, 436 (Colo. 2000). In the case of a legislatively-created countywide initiative process, a purported proposal that does not contain the provisions set forth by the General Assembly is not to be treated as a valid proposal at all.

For instance, in County Road Users Ass'n, the proponents of a petition to alter a county sales tax requested that the court force the board of county commissioners to refer their proposal

for a vote. 11 P.3d at 434-35. The county commissioners had refused to refer the proposal, finding that it was unlawful. Id. at 435 n.7. While recognizing that constitutionally guaranteed rights to petition may not be challenged as unlawful prior to enactment, the Colorado Supreme Court distinguished statutory petition rights. Id. at 436. It further found that a proposal that does not contain the provisions required by the statutes that created the statutory petition right is not a valid proposal at all. Id. at 438. The Supreme Court found that a board of county commissioners has the right to determine whether a proposal complies with statutory requirements, and to decline to refer the matter to the electorate if it does not. Id. It further found that the courts may resolve issues regarding compliance with the requirements for such a petition prior to an election. Id. at 439.

The Petition in this case does not comply with the provisions set forth by the General Assembly in the Library Law, as discussed in detail below. Therefore, the Board has no duty to refer the Petition to the electorate.

i. The Petition unlawfully attempts to take a mill levy previously approved by the voters for the County Library.

The Library Law provides that a petition shall set forth “[s]pecification of the mill levy to be imposed or other type and amount of funding and that the electors must approve any amount of tax levy not previously established by resolution or ordinance nor previously approved by the electors.” § 24-90-107(3)(a)(V), C.R.S. The Petition unlawfully proposes to use the mill levy approved in 1986 for the County Library to support the Proposed District. See Exhibit A (providing that “up to 3.5 mills property tax” would support the proposed District “as approved by the voters of Jefferson County, Colorado in 1986”).

In 1986, the electors of Jefferson County established the current funding framework for the County Library by approving a provision authorizing the legislative body of Jefferson County (the Board) to “increase the maximum tax levy from 1.5 mills to not more than 3.5 mills for the establishment and maintenance of public libraries.” See Exhibit G, Resolution No. CC86-760 referring the measure to the general election, and Exhibit H, Certified Abstract of Votes Cast in the November 4, 1986, General Election, under “Jefferson County Question No. 1.”

The source of funding for the Proposed District described in the Petition has already been approved for use by the County Library, which the Board intends to continue to operate. Nowhere does Section 107 allow petitioners to usurp the funding approved by the voters for the County Library and use it instead for the Proposed District. Rather, the petitioners must offer an independent source of funding for the Proposed District, whether by tax levy or some other sort of funding, such as bonds. See id.

ii. The Petition may not require that 3.5 mills be provided to the Proposed District retroactively including amounts levied in 2010 and 2011.

Even if Section 107 did allow petitioners to take the County Library’s funding for use by the Proposed District, the Petition impermissibly proposes to use 2010 and 2011 taxes for the Proposed District. See Exhibit A (providing that “up to 3.5 mills property tax” would support the proposed District, “with an initial levy for the year 2010 payable in 2011 of 3.5 mills”). The Library Law provides that a responsible governmental entity shall provide for financial support of an approved library district by “January 1 of the year following the election.” § 24-90-107(g), C.R.S. Therefore, the Library Law dictates that the Petition could only provide that taxes for the

tax years 2012 and thereafter be applied to support the Proposed District. Petitioner's request to take taxes from 2010 forward violates this provision.

iii. The Petition may not require a specified mill levy to be changed.

The current funding framework for the County Library allows the Board to impose a levy of "not more than 3.5 mills for the establishment and maintenance of public libraries." See Exhibit G. The authorization therefore provides a ceiling of 3.5 mills for the tax but allows for a lesser levy. On December 8, 2009, the Board set the County Library mill levy at 3.225 for the 2010 tax year. Exhibit I, Resolution No. CC09-423. On December 7, 2010, the Board set the County Library mill levy at 3.225 for the 2011 tax year. Exhibit J, Resolution No. CC10-381.

The 2010 and 2011 taxes have already been levied. Petitioners have no authority to require the Board to retroactively levy taxes at a rate exceeding 3.225 mills, which imposes new taxes for prior tax years in violation of § 24-90-107(g), C.R.S. Additionally, such a retroactive change in tax rate is contrary to Article X, Section 20(4)(a) of the Colorado Constitution, which requires "voter approval in advance" for any "tax rate increase" or "mill levy above that for the prior year."

iv. The Petition improperly requires transfer of ownership of the County Library's assets to the Proposed District.

The Petition language asks whether the Proposed District "should be established from the existing Jefferson County Public Library...by use of the assets and subject to the obligations of the [County Library]." Exhibit A, first page. The Petition provides that the Proposed District succeed to the assets of the County Library. That proposal is contrary to the provisions of the Library Law. Section 24-90-107, C.R.S., requires that, if a library district is approved by the voters, a library board must first be appointed and then the Board and library board must enter

into a written agreement setting forth the financial responsibilities, including any transition in ownership of property. The statute describes the transition of ownership of property as a possibility, but a matter subject to the consideration and agreement of the Board and the Proposed District. The Library Law does not allow the Petition to require a transfer of such assets.

v. Plaintiff failed to submit a bond with the Petition.

Pursuant to section 24-90-107(3)(c)(I), C.R.S., “at the time of filing the petition for the establishment of a library district, a bond shall be filed with the county or counties sufficient to pay all expenses connected with the organization of the library district if such organization is not affected.” Plaintiff failed to submit any bond with the Petition. See “Plaintiff’s Answer to the Board of County Commissioners of the County of Jefferson’s Counterclaim,” ¶ 7. The only exception to the bond requirement is that the Board could waive the requirement. § 24-90-107(3)(c)(II), C.R.S. The Board expressly declined to waive the requirement of a bond. See Exhibit B. Therefore, Plaintiff’s submission cannot constitute a valid petition and, pursuant to the rule announced in County Road Users, 77 P.3d 793, the Board may decline to refer the Petition to the voters.

For the various reasons set forth above, the Court should deny Plaintiff’s Motion for Summary Judgment.

B. The Board Is Not Required to Dedicate the County Library Mill Levy to the Proposed District.

The Plaintiff devotes a short, separate section to a discussion of funding. The funding issue is, of course, moot if the Court determines that the Board validly declined to refer the Petition to the electorate. Even if the Board were required to submit the Petition to a vote of the

electorate and the electorate approved the Proposed District, however, the Board could not be required to dedicate the County Library mill levy to the Proposed District.

As discussed above, a petition is required to set forth “[s]pecification of the mill levy to be imposed or other type and amount of funding and that the electors must approve any amount of tax levy not previously established by resolution or ordinance nor previously approved by the electors.” § 24-90-107(3)(a)(V), C.R.S. The Petition does not appropriately do this. Instead, it provides that the Proposed District be funded by the mill levy approved for the County Library, which library the Board intends to continue to operate. Section 107 does not allow petitioners to usurp funding that was approved by the voters for the use of the County Library.

Plaintiff argues that section 24-90-112(1)(a)(II), C.R.S., would require the Board to dedicate the County Library mill levy to the Proposed District. All that law does, however, is authorize the Board to collect any new tax that was approved as part of a petition for a library district. The problem with the Petition is that it does not include any proposal for such a tax.

Plaintiff also argues that section 24-90-107(3)(g), C.R.S., would require the Board to dedicate the County Library mill levy to the Proposed District, if approved. However, that statute merely requires that the legislative body of an establishing governmental unit provide whatever funding was validly approved pursuant to the petition, as required by subsection (3)(a)(V) of Section 107 (the petition must include “specification of the mill levy to be imposed or other type and amount of funding”). Again, the problem with the Petition in this case is that it does not specify a valid source of funding or propose any new tax.

Finally, Plaintiff urges that section 24-90-112(b)(I)(A), C.R.S., would require the Board to come up with funding for the Proposed District, in any event. Such is not the purpose of that

provision. Section 112(b)(I)(A) prohibits the Board from levying a new tax to support a library without voter approval. It is not intended to authorize the funding of a proposed district in an alternative fashion to the requirements of subsection (3)(a)(V) of Section 107.

The Petition is unlawful because it fails to provide a valid source of funding for the Proposed District.

C. Rule 106(a)(2) Relief Is Not Available.

Plaintiff's Third Claim for Relief requests that, pursuant to C.R.C.P. 106(a)(2), the Court compel the Board to submit the question of formation of the Proposed District to a popular vote. Rule 106(a)(2) relief is appropriate upon the satisfaction of a three-part test: (1) the plaintiff must have a clear right to the relief sought, (2) the defendant must have a clear duty to perform the act requested, and (3) there must be no other available remedy. County Road Users Ass'n, 11 P.3d at 437 (Colo. 2000).

As in County Road Users, the key issue in this case is "whether, under the facts presented, the County had a clear, non-discretionary duty to submit the proposal to the electorate." Id. The Board had no such duty for each of the reasons discussed above: (1) the fact that the Board validly opted out of the Proposed District, (2) the failure to obtain the approval of the County Clerk, and (3) the failure of the Petition to comply with the Library Law, including the failure to post a bond. For any of these reasons, the Rule 106(a)(2) claim fails.

D. Plaintiff's Due Process Claims Fail.

Plaintiff's Fourth Claim for Relief alleges that the Board denied Plaintiff's procedural and substantive due process rights under the United States Constitution when the Board voted to

exclude Jefferson County from the Proposed District, thereby preventing him from voting on the Petition. The Board's vote did not violate Plaintiff's constitutional rights.

As the Court has already determined, the Board's action in opting out of the Proposed District was a prospective policy decision of general application and therefore quasi-legislative. See June 3, 2011, Order, p. 3; see also State Farm Mut. Ins. Co. v. City of Lakewood, 788 P.2d 808, 813 (Colo. 1990) (holding that quasi-legislative action is usually reflective of some public policy relating to matters of a permanent or general character, is not normally restricted to identifiable persons or groups, and is usually prospective in nature). "While procedural due process requires that an agency acting in a quasi-judicial capacity give notice and afford a hearing to every affected individual, notice and a hearing is not required where an administrative agency is acting in a quasi-legislative capacity." Johns v. Miller, 42 Colo. App. 97, 100, 594 P.2d 590, 593 (1979), citing Shoenberg Farms, Inc. v. People ex rel. Swisher, 166 Colo. 199, 209-10, 444 P.2d 277, 282 (1968). Because the Board's actions were quasi-legislative, no procedural due process is required.

Plaintiff also argues that his substantive due process rights were violated by the Board's decision not to participate in the Proposed District. In order to demonstrate a denial of substantive due process, Plaintiff must show that the Board's action deprived him of some protected liberty or property interest. Whatley v. Summit County Bd. of County Com'rs, 77 P.3d 793, 798 (Colo. App. 2003). Here, Plaintiff contends that the protected right in question is his right to vote on the Proposed District.

Plaintiff is correct that the right to vote, when it exists, is a fundamental right, see Davidson v. Sandstrom, 83 P.3d 648, 659 (Colo. 2004). Such a right, when it exists, generally

cannot be substantially infringed except to serve a compelling state interest. Jarmel v. Putnam, 179 Colo. 215, 217, 499 P.2d 603, 604 (Colo. 1972). That analysis does not apply in this case, however, because – unlike in the cases cited by Plaintiff – Plaintiff has never had a right to vote on the Petition under any law, whether state or federal.

First, as discussed above, the law that created the library district petition process also allows a county to opt out of a proposed district. Both Plaintiff and the Board agree that when a governmental unit that maintains a library opts out of a proposed library, the registered electors within the service area of the governmental unit that opted out may no longer vote on the proposal. See, e.g., Complaint ¶32. Assuming that the Board lawfully opted out, Plaintiff has no right to vote on the Petition.

Additionally, even if the Board had not properly opted out, Plaintiff would have no right to vote on the Petition because the Clerk has not approved it. See § 31-11-106(5), C.R.S. (“Any petition section that fails to conform to the requirements of this article or that is circulated in a manner other than that permitted by this article shall be invalid”). Finally, Plaintiff has no right to vote on the Petition because it does not comply with the Library Law. A board of county commissioners may properly refuse to refer a petition for a vote when the petition does not comply with legal requirements. County Road Users Ass'n, 11 P.3d at 437. As described above, the Petition in this instance fails in numerous ways to comply with that statute. Therefore, Plaintiff has no right to vote in this instance and the Court should enter judgment in the Board’s favor on Plaintiff’s Fourth Claim for Relief.

CONCLUSION

For the reasons stated above, the Board respectfully requests that the Court deny Plaintiff's Motion for Summary Judgment.

Dated this 31st day of October 2011.

ELLEN G. WAKEMAN, #12290
JEFFERSON COUNTY ATTORNEY

/s/ Eric T. Butler

Eric T. Butler, #29997

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of October 2011, the foregoing **DEFENDANT'S RESPONSE TO PLAINTIFF THOMAS G. ATKINS' MOTION FOR SUMMARY JUDGMENT** was filed via Lexis/Nexis File and Serve and served as follows:

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/s/ Teri Garrod

Teri Garrod, Paralegal

Pursuant to C.R.C.P. 121 § 1-26, the original of this document with the original signatures will be maintained in the office of the Jefferson County Attorney, 100 Jefferson County Parkway, Ste. 5500; Golden, Colorado 80419, and will be made available for inspection by other parties or the Court upon request.