

DISTRICT COURT, DELTA COUNTY, COLORADO 501 Palmer St., #338 Delta, Colorado 81416	
ERIK GILBERTSON, Plaintiff, v. TOWN OF PAONIA & STEFEN WYNN, Defendants.	<div style="text-align: right; color: blue;"> DATE FILED June 11, 2025 4:25 PM CASE NUMBER: 2024CV1 </div> <div style="text-align: center; margin-top: 100px;"> COURT USE ONLY </div>
	Case Number: 24CV1 Division: 5
ORDER RE: MOTION FOR JUDGMENT ON THE PLEADINGS	

This matter is before the Court on Defendants’ motion for judgment on the pleadings. Having reviewed the parties’ briefs, the file and relevant authorities, the Court enters this order.

I. FACTS & HISTORY

Plaintiff has filed this action against the Town of Paonia (“Town”) and Stefen Wynn (“Wynn”) in his capacity as the Town Administrator. The complaint alleges that Plaintiff’s property has received water service from the Town for many years even though the property is outside the Town’s boundaries. The property consists of two residences and the water meter is located within the primary residence and cannot be read without entering the home. Plaintiff resides in the main residence and the other residence is rented to a tenant. Before Plaintiff

purchased the property, the Town allowed the prior owner to report water usage but there was a period in which usage was not being reported.

Plaintiff did not report water usage after purchasing the property and the Town charged him for *de minimis* usage. The Town later notified Plaintiff that the amount of water being used greatly exceeded the *de minimis* charges, so the Town requested permission to install a radio meter on the property that would allow the Town to remotely track actual water usage. Plaintiff refused to allow the Town to install the radio meter. In January 2024, the Town notified Plaintiff that water service would be discontinued until a radio meter could be installed.

In his pleadings, Plaintiff moves for the following relief: (1) an order directing the Town to reinstate his water service; (2) damages in the amount of \$3,000 per day of water service disconnection and \$6,000 for cistern installation; (3) reimbursement of his legal expenses; (4) removal of Wynn from office; and (5) a letter of apology. The Court has dismissed Plaintiff's claims for damages and legal fees under the Colorado Governmental Immunity Act, and that dismissal was affirmed on appeal.

II. STANDARD OF REVIEW

Defendants now move to dismiss the remaining claims under C.R.C.P. 12(c): "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 and all parties shall be given reasonable

opportunity to present all material made pertinent to such a motion by Rule 56.” The standard of review for a motion for judgment on the pleadings is the same as for a motion to dismiss for failure to state a claim. *Humphrey v. O’Connor*, 940 P.2d 1015, 1021 (Colo. App. 1996).

A complaint may survive a motion to dismiss only if it states a plausible claim for relief. *Paradine v. Goei*, 463 P.3d 868, 869 (Colo. App. 2018). This means that a party must plead facts that, “if taken as true, suggest plausible grounds to support a claim for relief.” *Id.* When deciding a motion to dismiss a court may only consider the facts alleged in the pleadings and any exhibits incorporated by reference in the pleadings; no other extrinsic materials may be considered. *Fry v. Lee*, 408 P.3d 843, 848 (Colo. App. 2013).

III. ANALYSIS

The Court will first address Plaintiff’s claims to remove Wynn from office and for a letter of apology. Defendants move to dismiss these claims because there is no legal authority to support them. The Court agrees with this argument because the claims are not plausible. The removal of a town officer from office is governed by section 31-4-307, C.R.S., which authorizes removal from office “[b]y a majority vote of all members of the board of trustees[.]”. This statute does not provide a cause of action to a private citizen to compel an officer to be removed from office. Likewise, there is no legal remedy that could compel Defendants to write a letter of apology. As such, the Court will dismiss these claims with prejudice for failure to state a claim.

The Court will next address Plaintiff's claim to compel the Town to reinstate his water service. He first alleges that the Town violated due process by terminating his water service without proper notice and a hearing. He cites *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-2, 98 S. Ct. 1554, 1561 (1978), for the proposition that a municipality cannot discontinue a utility service without providing due process. Even so, Plaintiff's due process argument is not plausible because he seeks to compel the Town to reinstate his water service without having access to a meter that would enable the Town to track his water usage. Under section 13-1-90 of the Paonia Town Code, a property owner must either relocate the water meter or install a radio meter if the meter is in a place where regular access is prevented. Plaintiff refuses to comply with this requirement. He does not have a constitutional right to receive unmetered water service. Therefore, the due process claim lacks merit.

Plaintiff also alleges in his pleadings that the Town violated Article XVI, sec. 6 of the Colorado Constitution, which states that "[t]he right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied." Plaintiff has no right to relief under this provision because he was not receiving unappropriated water from a natural stream. He was receiving public water from a municipality. Plaintiff's constitutional claims are not plausible and will be dismissed.

The Town discontinued Plaintiff's water service under Section 13-1-80(d) because Plaintiff refused to allow the Town access to his water meter or to allow installation of a radio meter and the Town concluded, based upon their records,

that Plaintiff's use of water was not *de minimis* and there was theft of water. Section 13-1-90 requires that regular access to the water meter is required. The Court cannot find that there is a private right of action pursuant to the either of these Town Code Sections which would require the Town to reinstate water service. Plaintiff has refused to comply with the Town Code for water metering. In order to support a claim for a private right of action under the Town Code:

Three factors must be considered in determining whether a private cause of action is impliedly authorized in a statute or ordinance that does not expressly create a civil remedy. First, the plaintiff must be within the class of persons intended to be benefitted by the legislative enactment. Second, the legislative body must have intended to create, either explicitly or implicitly, a private right of action. And third, an implied civil remedy must be consistent with the purposes of the legislative scheme. *Minnick v. City & Cnty. of Denver*, 784 P.2d 810, 812–13 (Colo. App. 1989) (citing *Holter v. Moore & Co.*, 681 P.2d 962 (Colo. App. 1983)).

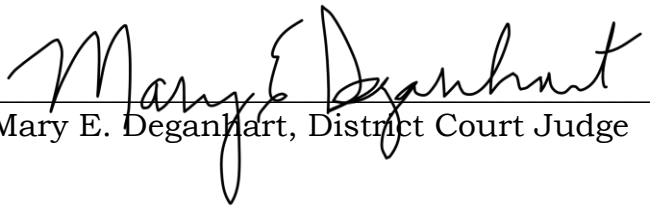
The Plaintiff has not supported any of the three elements necessary for a private right of action under the provisions of the Town Code. Plaintiff's statutory claim for reinstatement of water service is not plausible and will be dismissed.

Finally, Plaintiff asks the Court to grant him leave to amend his pleadings under C.R.C.P. 15 to cure any deficiencies in his amended complaint. The Court declines to address this argument because Plaintiff has not filed a proper motion to amend under Rule 15.

Based on the foregoing, IT IS ORDERED that Defendants' Motion for Judgment on the Pleadings is granted and Plaintiff's remaining claims are dismissed with prejudice.

Done this __11th__ day of June, 2025

BY THE COURT:



Mary E. Deganhart, District Court Judge