DISTRICT COURT, BOULDER COUNTY, COLORADO 1777 6th Street Boulder, Colorado 80302 **Plaintiffs:** LISA E. BATTAN; BRANDON T. WHITE; and VICTOR M. VARGAS **Defendants:** BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BOULDER, COLORADO	▲ COURT USE ONLY ▲
Attorneys for Plaintiffs: Karl F. Kumli, III, Atty. Reg. #11784 K.C. Cunilio, Atty. Reg. #51378 Rachel Bolt, Atty. Reg. #51266 Dietze and Davis, P.C. 2060 Broadway, Suite 400 Boulder, Colorado 80302 Phone: (303) 447-1375 E-mail: KarlK@dietzedavis.com	Case Number: 2020CV031049 Division: 3 Courtroom:
PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS	

COME NOW PLAINTIFFS, by and through undersigned Counsel, and respectfully submit this Response Brief in opposition to Defendant Board of County Commissioners of the County of Boulder, Colorado's (the "County") Motion to Dismiss ("Motion") pursuant to Rule 12(b)(1) and Rule 12(b)(5) of the Colorado Rules of Civil Procedure, dated February 5, 2021.

INTRODUCTION

Defendant County's Motion mischaracterizes the nature of this action. This action does not seek a decision about the merits of the Compost Factory. It is an action to determine, by way of declaratory judgment:

1. Whether the County may assert the doctrine of merger to strip the Property of its protection under a 1994 Conservation Easement. *See* Complaint at First Claim for Relief, ¶¶ 205-217.

2. Whether the County's action in purchasing a fee interest in the Property is ultra vires. *See* Complaint at Second Claim for Relief, ¶¶ 218-224.

3. Whether a preliminary injunction may issue, prohibiting the County from extinguishing the Conservation Easement, by use of the doctrine of merger. *See* Complaint at Third Claim for Relief, ¶¶ 225-231.

4. Whether Defendant has been unjustly enriched by its purported merger of the Conservation Easement and the fee interest in the Property and seeks the remedy of a constructive trust on the Property. *See* Complaint at Fourth Claim for Relief, ¶¶ 232-236.

5. Plaintiffs also assert a separate cause of action alleging the County violated the Taxpayer Bill of Rights ("TABOR") by unconstitutionally spending taxpayer funds. *See* Plaintiffs' First Amended Complaint, ¶¶ 237-252.

Nature of this Action:

This action does not seek any relief whatsoever regarding the merits of the County's pending Special Use Review proceeding (Boulder County Docket No. SU20-0006) ("Special Use Review").

The gravamen of the Complaint in this matter is that the County has taken actions and made assertions regarding its claimed merger of the Conservation Easement and the fee interest in the Property which are wrongful.[1] This purported merger, if allowed to stand, will extinguish the Conservation Easement. It will strip the Property of the protections of the Conservation Easement. If the Conservation Easement remains in place, it may be significantly more difficult

[1] It is noteworthy that the Plaintiffs' Complaint refers to the County's purported use of merger 25 times. The term "merger" – the central issue to be determined here - is never mentioned by County in its Motion to Dismiss.

for the County to develop its proposed Compost Factory on the Property. To avoid the provisions of the Conservation Easement, the County has attempted to terminate that document by asserting merger of the easement and the fee interests. If purported merger of the interests is allowed, it will effect a dramatic change in the *legal* status of the Property. This action therefore seeks judicial determination that the County's actions and assertions are contrary to law and that the Conservation Easement is still in place and in full effect on the Property.

Nowhere do Plaintiffs seek to supplant, prejudge, or attack the County's authority to determine the Special Use Review docket. Those actions are for another day, based on a future administrative record. The existence of the Special Use Review docket is part of the narrative of this case, but the substance of those future administrative proceedings is not part of Plaintiffs' action here. As a result, the County's assertions that Plaintiffs are entitled to relief only under Rule 106(a)(4) are inapposite.

Ripeness:

This action is ripe because the County has already completed the purchase of the fee interest in the Property (Complaint at ¶ 136) and has publicly declared that the doctrine of merger has operated to terminate the Conservation Easement in its entirety. Complaint at ¶¶ 146, 199. No further actions by any party are required, and there is a genuine controversy between parties with sharply differing interests. The fate of the Conservation Easement is squarely before this Court. *See* Complaint at ¶¶ 22, 136, 143, 146, 150, 151, 206-215.

Standing:

Plaintiffs are required to satisfy two elements of standing to confirm their entitlement to bring this action: injury in fact and that such injury be to a legally protected interest. Because this action seeks declaratory judgments, under both C.R.C.P. 57 and C.R.S. § 13-51-101 *et seq.*

the concepts of standing are liberalized. *Mt. Emmons Min. Co. v. Town of Crested Butte*, 690 P.2d 231, 240 (Colo. 1984).

Standing requires "an existing legal controversy that can be effectively resolved by a declaratory judgment." *City of Northglenn v. Bd. of Cnty. Comm'rs*, 411 P. 3d 1139, 1142 (Colo. App. 2016). "[T]he essential requirement is that all relevant events have occurred, so that the court is addressing a present dispute." *Villa Sierra Condo. Ass'n v. Field Corp.,* 878 P.2d 161, 165 (Colo. App. 1994). Here, all relevant facts have occurred due to the County's assertion of merger of the Conservation Easement and the fee title to the Property, its determination to develop the Compost Factory based upon that theory, and Plaintiffs' opposition to that assertion. Complaint at ¶¶ 146, 199, 200.

Plaintiffs satisfy the first prong of standing analysis by asserting injury to their interests because of the purported merger. Complaint at ¶ 22, 38, 54. This injury results, *inter alia*, from the County purporting to strip away the protections of the Conservation Easement from the Property. Complaint at ¶¶ 22, 70, 75, 76, 81-83, 151.

Plaintiffs meet the second prong of standing analysis by showing that their legally protected interests include rights of adjacent landowners to publicly owned lands and by asserting injury to environmental, aesthetic, and ecological interests. Complaint at ¶¶ 10-20, 29-38, 54. *Friends of the Black Forest Reg'l Park, Inc. v. Bd. of Cnty. Comm'rs*, 80 P.3d 871, 877 (Colo. App. 2003) ("*Black Forest*"); *Rocky Mtn. Animal Def. v. Colo. Div. of Wildlife*, 100 P.3d 508, 513 (Colo. App. 2004).

TABOR:

Likewise, Plaintiffs have taxpayer standing because they challenge the unconstitutional expenditures of public funds to which they have contributed by payment of taxes. In their First

Amended Complaint, Plaintiffs allege that the at the time the County purchased the Property with Open Space Tax revenue, the County had no intention of using the Property for any open space use authorized by the voters. Amended Complaint at ¶¶ 237-252. Plaintiffs' allegations that the County illegally spent taxpayer dollars on a purpose that was not authorized by the voters is sufficient to state a TABOR violation claim.

For these reasons, the Court should deny Defendant's Motion.

STANDARD OF REVIEW

I. Standing and Ripeness Under C.R.C.P. 12(b)(1)

Motions to dismiss for lack of subject matter jurisdiction are governed by C.R.C.P. 12(b)(1). In considering a motion to dismiss for lack of subject matter jurisdiction pursuant to C.R.C.P. 12(b)(1), a district court examines the substance of the claim based on the facts alleged and the relief requested. *Barry v. Bally Gaming, Inc*., 320 P.3d 387, 390 (Colo. App. 2013) (citing *City of Aspen v. Kinder Morgan, Inc.,* 143 P.3d 1076, 1078 (Colo. App. 2006)). "The plaintiff has the burden of proving jurisdiction, and evidence outside the pleadings may be considered to resolve a jurisdictional challenge." *Id.* (citing *City of Aspen*, 143 P.3d at 1078).

II. Failure to State a Claim Under C.R.C.P. 12(b)(5)

Motions to dismiss for failure to state a claim under C.R.C.P. 12(b)(5) are viewed with disfavor. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). When reviewing a Rule 12(b)(5) motion, courts are required to accept all factual allegations in the complaint as true and view them in the light most favorable to the plaintiff. *Norton v. Rocky Mtn. Planned Parenthood, Inc.*, 409 P.3d 331, 334 (Colo. 2018). To survive a Rule 12(b)(5) motion, a complaint must only contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face. *Warne v. Hall*, 373 P.3d 588, 589-90 (Colo. 2016) (quoting *Ashcroft v.*

Iqbal, 556 U.S. 662, 678 (2009). A motion to dismiss is only properly granted when the plaintiff's factual allegations cannot support a claim as a matter of law. *Goldsworthy v. Am. Family Mut. Ins. Co.*, 209 P.3d 1108, 1113 (Colo. App. 2008).

ARGUMENT

I. Plaintiffs' Claims Regarding Merger are Ripe for Review

The ripeness doctrine "requires an actual case or controversy between the parties that is sufficiently immediate and real so as to warrant adjudication." *Jessee v. Farmers Ins. Exchange*, 147 P.3d 56, 59 (Colo. 2006) (internal quotations omitted)). "In deciding ripeness, courts look to the hardship of the parties of withholding court consideration and the fitness of the issues for judicial decision." *Stell v. Boulder Cnty. Dep't of Soc. Servs*., 92 P.3d 910, 914-15 (Colo. 2004).

Here, if the existence of the Conservation Easement is sustained the Property, and Plaintiffs' interests, will remain protected by the terms of the Conservation Easement. In that event, the County's present plans to site the Compost Factory on the Property will be subject to the terms of the Conservation Easement. Complaint at ¶ 70. This will afford Plaintiffs the protection of several of the terms of the Conservation Easement, as they work against development of the Compost Factory. Complaint at ¶¶ 70-83.

In a case which has procedural similarities to the instant action, *G & A Land v. Brighton*, the Colorado Court of Appeals held that notwithstanding the fact that the City of Brighton had not instituted formal condemnation proceedings, the landowners who brought suit had presented a controversy that was ripe for determination to the extent they allege past and continuing harm regardless of the City's ultimate institutional proceedings. *G & A Land, LLC v. City of Brighton*, 233 P.3d 701, 711-12 (Colo. App. 2010). The *G & A Land* Court concluded that the landowners claim was ripe because the "landowners have alleged that they have already been harmed and

continue to be harmed, regardless of how Brighton proceeds in the future, and we must accept as true their allegations and view them in the light most favorable to them." *Id.* at 712 (internal citation omitted).

Colorado's Uniform Declaratory Judgments Law provides that:

> 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.

C.R.S. § 13–51–106.

The Uniform Declaratory Judgment statute affords parties judicial relief from uncertainty and insecurity in legal relations, and it is to be liberally construed. *Mt. Emmons Min. Co.*, 690 P.2d at 240. The most basic requirement to invoke the court's power to enter a declaratory judgment is that the declaration must end some controversy or terminate some uncertainty as to the parties' rights and obligations. *Wainscott v. Centura Health Corp.*, 351 P.3d 513, 518-19 (Colo. App. 2014).

Here, Plaintiffs' Complaint establishes that "[a] current, actual and justiciable controversy exists as to the relative rights, duties, and obligations of the County and Plaintiffs with regard to whether the doctrine of merger operates to destroy the Conservation Easement." Complaint at ¶ 206. Irrespective of whether the Compost Factory will be approved, Plaintiffs are faced now with substantial uncertainty as to whether the doctrine of merger has operated to extinguish the Conservation Easement on their adjacent property. The Court has the power to enter an order to terminate this controversy given the County's unequivocal position that purported merger operated to terminate the Conservation Easement when the County exercised

its right of first refusal and acquired fee title to the Property in the spring of 2018. Complaint at ¶¶ 145-147, 199, 200.

Irrespective of how the County proceeds with resumption of the Special Use Review, Plaintiffs have alleged injuries with respect to the purported extinguishment of the Conservation Easement (Complaint at ¶¶ 22, 199, 200) and therefore, a declaratory judgment action is presently appropriate. Complaint at ¶ 206. As such, this matter is ripe for adjudication because a declaration by this Court as to whether operation of the doctrine of merger has extinguished the Property's Conversation Easement will have the practical effect of terminating the controversy regarding whether the County may proceed with its current planning[2] while disregarding the protections which should be afforded by Conservation Easement, or whether it must make provision for the terms of the Conservation Easement in its effort to bulldoze the Property to develop the Compost Factory.

II. Plaintiffs' Declaratory Judgment Claims Satisfy Both Prongs of the Standing Test

Next, the County erroneously argues that Plaintiffs lack standing under the *Wimberly* standing test.

In general parties in Colorado "benefit from a relatively broad definition of standing." *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004) (explaining that Colorado's test for standing "has traditionally been relatively easy to satisfy."). To establish standing, an individual must satisfy a two-part test requiring (1) that the plaintiff suffered injury in fact, and (2) that the injury

[2] It must be noted that the County has merely paused its Special Use Review proceeding. It is also appropriate to reiterate that the County is the applicant, the reviewing staff and the governmental entity which will determine the Special Use Review docket. Given the County's actions to date, it is not appropriate to assume that the County can meaningfully and impartially rule on the issue of merger. That issue should be determined by the Court here. Complaint at Introduction; ¶ 225.

was to a legally protected or cognizable interest. *Rangeview, LLC v. City of Aurora*, 381 P.3d 445, 448 (Colo. App. 2016); *see also Wimberly v. Ettenberg*, 570 P.2d 535, 538 (Colo. 1977).

A. The Plaintiffs have alleged an injury-in-fact

Under the first prong of the *Wimberly* test, "[t]he injury may be tangible, such as physical damage or economic harm; however, it may also be intangible, such as aesthetic issues or the deprivation of civil liberties. Deprivations of many legally created rights, although themselves intangible, are nevertheless injuries-in-fact." *Ainscough*, 90 P.3d at 856 (citation omitted).

The purpose of the declaratory judgment law is to afford parties judicial relief from uncertainty and insecurity with respect to their legal relations. C.R.S. § 13–51–102. Because it is a remedial statute, it must be "liberally construed and administered" to accomplish its purpose. *Id.*; *see also Mt. Emmons,* 690 P.2d at 240. Thus, "the required showing of demonstrable injury is somewhat relaxed in declaratory judgment actions." *Mt. Emmons*, 690 P.2d at 240; *see also* § 13–51–105 (Courts "have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed."); C.R.C.P. 57(a) (same). "[T]he injury-in-fact element of standing is established [in a declaratory judgment action] when the allegations of the complaint, along with any other evidence submitted on the issue of standing, establishes that the regulatory scheme threatens to cause injury to the plaintiff's present or imminent activities." *Rangeview, LLC v. City of Aurora*, 381 P.3d 445, 448–49 (Colo. App. 2016) (citing *Bd. of Cnty. Comm'rs v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045, 1053 (Colo. 1992)).

A review of Plaintiffs' Complaint makes clear that Plaintiffs' have adequately alleged an injury to their property and aesthetic interest sufficient to satisfy the injury-in-fact prong of the *Wimberly* test. *See Black Forest*, 80 P.3d at 877 (finding that landowner-plaintiffs alleged an injury-in-fact where they claimed that a road easement on a neighboring property would

adversely affect the aesthetics of the property and would erode the property values of the adjoining landowners). Specifically, Plaintiffs allege that they own homes adjacent to the Property (Complaint at ¶¶ 22, 38, 48); that they relied on the existence of the Conservation Easement when they purchased or developed their respective properties (Complaint at ¶¶ 17, 31, 38, 54); and that their properties would be negatively impacted by the extinguishment of the Conservation Easement (Complaint at ¶¶ 22, 70, 83). Likewise, Plaintiffs contend that the County's unlawful extinguishment of the Easement will have negative ecological impacts on the land, soil, and water resources of the Property. Complaint at ¶¶ 10-22, 31, 38). Contrary to the County's assertions, Plaintiffs' injuries are not grounded in a remote possibility of a future injury nor are they injuries that are overly speculative.[3] They occurred the moment the County unlawfully asserted the extinguishment of the Conservation Easement by the inapposite use of the doctrine of merger. Accordingly, Plaintiffs have alleged an injury in fact which is sufficient to establish standing.

B. Plaintiffs have satisfied the legally protected interest prong

The second prong requires that the plaintiff demonstrate a "legal interest protecting against the alleged injury." *Ainscough*, 90 P.3d at 856; *see also City of Greenwood Vill. v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 437 (Colo. 2000). A legally protected interest "may rest in property, arise out of contract, lie in tort, or be conferred by statute." *Barber v. Ritter*, 196 P.3d 238, 246 (Colo. 2008). "The proper inquiry is simply whether the interest sought to be protected by the complainant is *arguably* within the zone of interest to be protected .

[3] The County again attempts to mischaracterize the nature of the case as one challenging the development of the Compost Factory even though all of Plaintiffs' claims actually challenge the County's purported merger of the Conservation Easement with the fee interest in the property purchased by the County.

. . ." *Black Forest*, 80 P.3d at 877 (quoting *NCUA. v. First Nat'l Bank & Tr. Co.*, 522 U.S. 479, 492 (1998) (internal quotations omitted). It is well settled that legally protected interests include property interests. *Maralex Resources, Inc., v. Chamberlain*, 320 P.3d 399, 402 (Colo. App. 2014).

Black Forest is an important statement of the law where the easement is on public, rather than private, land. The *Black Forest* Court resolved a standing issue in favor of individual plaintiffs in El Paso County who were owners of property adjoining a park. The *Black Forest* plaintiffs alleged that if the County allowed a road to go through the public park property, the road would adversely affect the aesthetics of a park and erode the property values of adjoining landowners. *Black Forest*, 80 P.3d at 877. That situation is directly analogous to the facts here, where Plaintiffs seek to protect a Conservation Easement which the County wrongfully claims to have destroyed. In both *Black Forest* and the present case, the Plaintiffs claim interests which are, or will be, injured by County actions on public lands which are adjacent to properties the Plaintiffs own. As the Court wrote in *Black Forest*:

> The United States Supreme Court has held that aesthetic and ecological interests are sufficient to grant standing to a plaintiff. *Sierra Club v. Morton,* 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); *see also Desert Citizens Against Pollution v. Bisson,* 231 F.3d 1172 (9th Cir.2000) (finding that plaintiffs asserting environmental and aesthetic interests in public lands had standing to challenge an anticipated land exchange under the Federal Land Policy and Management Act, even before the exchange occurred). The Colorado Supreme Court has also recognized aesthetic and ecological interests as sufficient to for standing purposes. *See Greenwood Village v. Petitioners for Proposed City of Centennial, supra.*

Id.

Contrary to the County's contentions, Plaintiffs do have a legally protected interest in protecting their property from adverse effects caused by legally deficient determinations of rights on adjacent property and have standing to challenge such governmental actions. *Condiotti v. Bd. of Cnty. Comm'rs*, 983 P.2d 184, 187 (Colo. App. 1999) (citing *Bd. of Cnty. Comm'rs v. City of*

Thornton, 629 P.2d 605 (Colo. 1981); *Dillon Co., Inc. v. City of Boulder*, 183 Colo. 117, 515 P.2d 627 (1973); *Wells v. Lodge Properties, Inc.*, 976 P.2d 321 (Colo. App. 1998); *Fedder v. McCurdy*, 768 P.2d 711 (Colo. App. 1988) (if adjoining landowner's interest in its property is adversely affected by rezoning decision, landowner has right to seek judicial relief); *City of Thornton v. Bd. of Cnty. Comm'rs*, 595 P.2d 264 (Colo. App. 1979)).

Likewise, the Colorado Supreme Court has clearly articulated that a legally protected interest includes aesthetic and ecological interests (*City of Greenwood Village*, 3 P.3d at 437) and this view has been implemented by the Colorado Court of Appeals, finding that hikers and wildlife enthusiasts have an interest in protecting prairie dogs from extinction and from unlawful diminution in numbers. *Rocky Mtn. Animal Def.*, 100 P.3d at 513.

Citing to extra-jurisdictional cases, the County erroneously attempts to argue that Plaintiffs do not have standing because they do not have a legally enforceable interest in the Conservation Easement, as they are not parties to the Easement. However, this rationale has been rejected by Colorado Courts. *See Black Forest*, 80 P.3d at 877 (finding that the Court's holding in *Title Guar. Co. v. Hammer*, 430 P.2d 78 (Colo. 1967) does not apply when the easement at issue is on public, rather than private, land).

The County also cites to an inapposite case, arguing that Plaintiffs do not have standing because they have not claimed an injury that is distinct from the general publics. *See Lakewood v. De Roos*, 631 P.2d 1140, 1143 (Colo. App. 1981) (applying the standard for determining whether a plaintiff was entitled to damages in a *condemnation* case). Not only does this case have no applicability here, but the County's assertions also find no support in the Complaint, as Plaintiffs have adequately alleged specific injury to their property and aesthetic interests.

Complaint at ¶¶ 22, 38, 54. Based on the weight of the authority cited above, Plaintiffs have established an injury to their legally protected interest.

C. *Plaintiffs have Taxpayer Standing*

Plaintiffs have also adequately established that they have taxpayer standing to assert their TABOR claim. Colorado Courts have consistently permitted broad taxpayer standing. *Hickenlooper v. Freedom from Religion Found. Inc.*, 338 P.3d 1002, 1007 (Colo. 2014). To meet the injury-in-fact requirement, a plaintiff must demonstrate a clear nexus between their status as a taxpayer and the challenged government action. *Id.* at 1008. The interest of a taxpayer who challenges the constitutionality of a government action is their economic interest in having their tax dollars spent in a constitutional manner. *Reeves-Toney v. School Dist. No. 1 in City and Cnty. of Denver*, 442 P.3d 81, 86 (Colo. 2019). Thus, when a plaintiff- taxpayer alleges that a government action violates a specific constitutional provision such as TABOR, such an averment satisfies the two-step standing analysis. *Barber*, 196 P.3d at 247.

Here, Plaintiffs have alleged an injury in fact to a legally protected interest because they challenge the unconstitutional expenditures of public funds to which they have contributed by payment of taxes. *See Reeves-Toney*, 442 P.3d at 86. Specifically, Plaintiffs have alleged that they are Boulder County taxpayers, and this is not a fact that is or should be in dispute. Complaint, at ¶¶ 9, 53; Amended Complaint at ¶ 253. Plaintiffs have also alleged that the County unconstitutionally spent restricted open space tax revenues to purchase the Property for industrial purposes — a use that was never approved by the voters and as such, is a direct violation of TABOR. Amended Complaint at ¶¶ 237-255.

Nevertheless, the County argues that Plaintiffs have not sufficiently demonstrated an injury in fact because the Property remains open space and has not yet been converted to a

Compost Factory.[4] Again, however, the County misrepresents Plaintiffs' argument. Plaintiffs assert that the County violated TABOR at the time the County purchased the Property with Open Space Tax revenue because the County had no intention of using the Property for any open space purpose as authorized by the voter-approved resolutions. *See* Amended Complaint at ¶¶ 244-246. It is well settled that Plaintiffs have taxpayer standing in circumstances where, as here, they allege misappropriation of taxpayer money. *See e.g., Barber*, 196 P.3d at 253 (finding the plaintiffs established taxpayer standing where they alleged that the legislature had transferred money from certain cash funds to the state's General Fund to be used for general government expenses without voter approval in violation of TABOR). Indeed, TABOR itself specifically grants Plaintiffs a right to challenge the unconstitutional expenditure of public funds. *See* Colo. Const. Art. X § 20(1) ("Individual or class action enforcement suits may be filed and shall have the highest civil priority of resolution.").

III. Plaintiffs have Stated a Claim because TABOR Prohibits the County from Spending Tax Revenue for a Purpose that was not Authorized by its Voters.

Remarkably, the County argues that Plaintiffs failed to state a TABOR claim because the County does not have any obligations to its taxpayers under TABOR to spend taxpayer money consistent with the ballot issue approved by its voters. According to the County, it is not a violation of TABOR for the County to seek voter approval for a specific tax increase and then use the voter tax revenues for a completely unrelated (and completely contrary) purpose. However, this is the very type of illegal spending that TABOR seeks to prevent. *See* Colo. Const. Art. X § 20(1) ("Revenue collected, kept, or *spent illegally* since four full fiscal years

[4] The County also argues that Plaintiffs fail to satisfy the legally protected interest prong because Plaintiffs have not alleged a TABOR violation. However, for the reasons discussed below, this argument too must fail.

before a suit is filed shall be refunded with 10% annual simple interest from the initial conduct.") (emphasis added).

Section 4(a) of TABOR requires that the County receive voter approval in advance for "any new tax, tax rate increase . . . or a tax policy change directly causing a net tax revenue gain to any district." A "tax" as used in this section must mean not only the numeric tax rate that voters agree to pay, but also the purpose for which those tax funds will ultimately be dedicated. Indeed, the Colorado Supreme Court has recognized that Section 4 of TABOR imposes taxing and spending limits on districts like the County. *See Nicholl v. E-470 Pub. Highway Auth.*, 896 P.2d 859, 867 (Colo. 1995) (finding pursuant to Section 4 of TABOR, districts are required "to hold elections to obtain voter approval in advance for *increases in taxes and spending* and direct or indirect debt increases.") (emphasis added).

Here, the County's ballot issue asked voters to approve a tax that would generate revenue to be used for purchasing and maintaining open space. Nowhere in the Open Space tax ballot issue or the County's resolution imposing the Open Space Tax is there an allowance to use those tax funds to purchase industrial property. Open space uses and industrial uses are diametrically opposed to one another.

The expressly stated purpose of TABOR is to "reasonably restrain most the growth of government." TABOR, § (1). Allowing the County to ask the voters for a specific tax increase, only to turn around and use those funds for a completely different purpose, would not restrict the growth of government at all. Such a ruse would completely undermine the purposes of TABOR.

CONCLUSION

Plaintiffs have established the ripeness of their causes of action and that they have standing to bring this action. This Court has subject matter jurisdiction over Plaintiffs' Complaint. Likewise, Plaintiffs have adequately stated a TABOR violation claim.

WHEREFORE, for the reasons above, Plaintiffs respectively request that the Court deny Defendant's Motion to Dismiss.

Respectfully submitted this 26th day of February, 2021.

DIETZE AND DAVIS, P.C.

Pursuant to Rule 121, the signed original is on file in the Office of Dietze and Davis, P.C.

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of February, 2021, I caused a true and correct copy of the foregoing **PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS** to be served via the *Colorado Courts E-Filing System,* Email and/or First Class U.S. Mail, upon the following:

David E. Hughes, Esq.
Conrad R. Lattes, Esq.
Office of the County Attorney

/s/Julie A. Wolfe
Julie A. Wolfe, Paralegal