DISTRICT COURT, BOULDER COUNTY, COLORADO 1777 6th St., Boulder, Colorado 80302, (303) 441-1866 **Plaintiffs:** LISA E. BATTAN; BRANDON T. WHITE; and VICTOR M. VARGAS, v. **Defendant:** BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BOULDER, COLORADO.	▲ COURT USE ONLY ▲ Case Number: 2020CV31049 Div.: 3
Attorneys for Defendant: BOULDER COUNTY David Hughes, #24425 Deputy County Attorney Conrad Lattes, #24655 Senior Assistant County Attorney Boulder County Attorney's Office P.O. Box 471 Boulder, Colorado 80306 Phone: 303-441-3190 Fax: 303-441-4794 Email: dhughes@bouldercounty.org clattes@bouldercounty.org	

MOTION TO DISMISS

Defendant, Board of County Commissioners of the County of Boulder, Colorado (the "County") moves to dismiss Plaintiffs' Verified Complaint Under Rule 57 C.R.C.P. for Declaratory Judgment, for Injunctive Relief, for Imposition of a Constructive Trust and for Other and Further Relief (the "Complaint") and First Amendment to Complaint pursuant to C.R.C.P. 12(b)(1) and 12(b)(5). In support, the County states as follows:

Introduction

This is a lawsuit by landowners who object to the possibility that the County may, through a future public process, approve a compost processing facility on property near their own. When neighbors object to a county land use decision made through a quasi-judicial process, they are entitled to appeal under C.R.C.P. 106(a)(4). *Fedder v. McCurdy,* 768 P.2d 711, 713 (Colo. App. 1988). In a Rule 106(a)(4) action, the Court reviews the record of the county's decision for an abuse of discretion or a violation of the law. In this case, Plaintiffs Lisa E. Battan, Brandon T. White, and Victor M. Vargas (collectively, the "Landowners") filed a lawsuit before the Board of County Commissioners has set a hearing or made a decision about the compost facility. Because this action is not ripe for judicial review and Landowners lack standing, the Court should dismiss this case. Further, even if Landowners have standing, they have failed to state a claim under Art. X, § 20 of the Colorado Constitution ("TABOR") because the County has not imposed a tax increase without voter approval.

Conferral

On January 21, 2021, counsel for the County conferred with counsel for Landowners regarding a motion to dismiss the original complaint. Counsel for the County further conferred with counsel for Landowners on February 3, 2021. Plaintiffs object to the relief requested in this Motion.

Facts

In 1993, Boulder County voters approved a ballot measure authorizing a countywide sales and use tax for open space purposes (the "Open Space Tax"). (Am. Compl. ¶ 239.) Using revenue from the Open Space Tax, the County purchased a conservation easement over property

at 5762 North 107th Street in unincorporated Boulder County (the "Property"). (Compl. ¶¶ 1-2, 70-71 and Ex. B to Compl.) The Property is known as the Rainbow Nursery because, when the County purchased the easement in 1994, a commercial nursery operated on the Property and could continue to operate under the terms of the conservation easement. (Compl. Ex. B ¶ 3(a).) Vargas purchased an adjacent parcel in 1998, Battan purchased an adjacent parcel in 2016, and White purchased a parcel near the Rainbow Nursery in 2017. (Compl. ¶¶ 6, 27, 48 and Ex. E to Compl.) In 2018, the County purchased the Property in fee using funds from the Open Space Tax. (*Id*. ¶ 136 and Ex. O to Compl.; Am. Compl. ¶ 245.)

On October 12, 2020, County staff submitted an application to the Community Planning & Permitting Department for Special Review and Site Specific Development Plan for a compositing facility on the Property. (Compl. ¶ 192.) This process reviews the compatibility, services, and environmental impacts associated with the proposed use and includes hearings before the Boulder County Planning Commission and the Board of County Commissioners (*Id.*, including materials in the imbedded URL.) In December of 2020, the County informed counsel for the Landowners the earliest possible date for a planning commission hearing was January 20. (*See* Compl. Ex. V.) Since that time, the County has paused the review process. (Compl. ¶ 225.) Accordingly, the compost facility has not been approved or even scheduled for a public hearing. Today, the Property remains in essentially the same condition that is was when the County purchased the Conservation Easement.

Standard of Review

I. Ripeness and standing under C.R.C.P. 12(b)(1)

Ripeness and standing implicate the Court's subject matter jurisdiction pursuant to C.R.C.P. 12(b)(1). Under C.R.C.P. 12(b)(1), a plaintiff has the burden of proving jurisdiction. *Smith v. Town of Snowmass Vill.*, 919 P.2d 868, 871 (Colo. App. 1996). If necessary, a court may make factual findings to resolve a jurisdictional issue, which will not be disturbed on appeal unless clearly erroneous. *Swieckowski by Swieckowski v. City of Ft. Collins*, 934 P.2d 1380, 1383-84 (Colo. 1997). If, as in this case, the underlying facts related to jurisdiction are undisputed, a court may resolve the issue as a matter of law, which is reviewed by an appellate court de novo. *See id*.

Ripeness and standing are threshold jurisdictional issues. *See Ainscough v. Owens,* 90 P.3d 851, 855 (Colo. 2004); *Wibby v. Boulder Cty. Bd. of Cty. Comm'rs*, 2016 COA 104, ¶ 9; *Stell v. Boulder Cty. Dep't of Soc. Servs.,* 92 P.3d 910, 914 (Colo. 2004). Once raised, standing must be determined prior to a decision on the merits. *Hickenlooper v. Freedom from Religion Found., Inc.,* 2014 CO 77, ¶ 7. If a court determines that standing does not exist, it must dismiss the case. *Wimberly v. Ettenberg,* 570 P.2d 535, 539 (Colo. 1977).

II. Failure to state a claim under C.R.C.P. 12(b)(5)

In ruling on a 12(b)(5) motion, a court must accept as true all factual allegations, but it is not required to accept legal conclusions as true. *Warne v. Hall*, 2016 CO 50, ¶ 9. A complaint only survives a motion to dismiss if it states a plausible claim for relief. *Id.* "In resolving a 12(b)(5) motion to dismiss, a court may consider only the facts alleged in the complaint, documents attached as exhibits or referenced in the complaint, and matters of which the court

may take judicial notice, such as public records." *Peña v. Am. Family Mut. Ins. Co.*, 2018 COA 56, ¶ 14.

Argument

I. Landowners' claims are not ripe.

This case is not ripe for consideration because Landowners' complaint is premised upon the "construction, operation and maintenance" of a compost facility on the Property—an event that has not occurred and may never occur. (Compl. 3.) Battan alleges that construction of the compost facility would negatively affect the use and value of her $2 million residence and horse farm. (Compl. ¶ 25 and Ex. C to Compl.) White similarly alleges the facility would negatively affect the use and value of his $2.6 million home. (Compl. ¶ 46 and Ex. D to Compl.) Vargas alleges an unspecified reduction in value of his farm and his daughter's residence due to the facility. (Compl. ¶¶ 49-51, 59-60.) Any future construction of a compost facility first requires approval through special review. (*See* Compl. ¶¶ 225-30.) In addition, if the Board of County Commissioners ultimately approves the facility, the Property is subject to the disposal of open space process, which also requires public hearings and, ultimately, approval by the commissioners. (*See* Compl. Ex. Q and Ex. H ¶ 11.) Because these processes have not taken place and the compost facility has not been approved, Landowners' claims are not ripe.

Ripeness is a jurisdictional issue that may be raised under C.R.C.P. 12(b)(1). *Timm v. Prudential Ins. Co.,* 259 P.3d 521, 528 (Colo. App. 2011). As with standing, discussed in section II below, ripeness is a jurisprudential doctrine that limits the court's exercise of its power to further the separation of powers design of Colorado government. *Bd. of Dirs. v. Nat'l Union Fire Ins. Co.,* 105 P.3d 653, 656 (Colo. 2005). Ripeness tests whether the issue is real, immediate, and

fit for adjudication. *Id.* As shown below, this Court should refuse to consider the matters raised by Landowners because they are uncertain and future contingent matters that suppose speculative injury that may never occur. *See id.*

Ripeness requires that "there be an actual case or controversy between the parties that is sufficiently immediate and real so as to warrant adjudication." *Beauprez v. Avalos*, 42 P.3d 642, 648 (Colo. 2002). Landowners' claims are not sufficiently immediate because they depend on county land use and open spaces processes that have not occurred. When a board of county commissioners does not have the opportunity to consider development plans for a property, the conditions of approval are not known to a reasonable degree of certainty. *Quaker Court LLC v. Bd. of Cty. Comm'rs,* 109 P.3d 1027, 1034-35 (Colo. App. 2004). This is because "[t]he final zoning or land use regulations may not adversely affect a landowner, or the impact may be mild because . . . changes favorable to the landowner are made during the adoption process." *G&A Land, LLC v. City of Brighton*, 233 P.3d 701, 712 (Colo. App. 2010). "Therefore, in the zoning and land use context, it is appropriate for a court to defer review until a final decision is made." *Id.*

The Board of County Commissioners is entitled to exercise its quasi-judicial function of determining whether to permit the proposed compost facility. During the process, the Landowners can present their position on the applicability of the conservation easement, the impacts the facility will have on their properties, and why they believe the County should deny the application. The commissioners can decide to approve or deny the application and may impose conditions to any approval to mitigate its impacts. If the Board approves the application, the Landowners can appeal the final decision under C.R.C.P. 106(a)(4). Landowners may have a

further opportunity for input in the disposition of open space process, if that process is necessary. Accordingly, under the ripeness doctrine, the Court should dismiss for lack of jurisdiction.

II. Landowners failed to establish standing.

In addition to ripeness, the Court lacks jurisdiction based on lack of standing. Landowners suffered no injury in fact because their injuries are premised on an event that has not occurred. Further, Landowners do not have a legally protected interest in a conservation easement that they do not own. Finally, TABOR does not create a legally protected interest in how tax revenues received through a legal, voter-approved tax measure are subsequently spent. Thus, the Court should dismiss Landowners' claims for lack of standing.

To demonstrate standing, Landowners are required to establish that (1) they suffered an injury in fact and (2) their injury was to a legally protected interest. *See Wimberly,* 570 P.2d at 538; *Ainscough,* 90 P.3d at 856. The first prong of the test, the injury-in-fact requirement, "maintains the separation of powers mandated by article III of the Colorado Constitution by preventing courts from invading legislative and executive spheres." *Hickenlooper*, ¶ 9. "Because judicial determination of an issue may result in disapproval of legislative or executive acts, this constitutional basis for standing ensures that judicial 'determination may not be had at the suit of any and all members of the public.'" *Id.* (quoting *Wimberly,* 570 P.2d at 538). Thus, "an injury that is overly indirect and incidental to the defendant's action will not convey standing." *Id.* (quotations omitted). The second prong, the legally-protected-interest requirement, promotes judicial self-restraint. *Id.* at ¶ 10. Landowners' claims fail both prongs of the *Wimberly* test.

A. Landowners have not suffered an injury in fact.

The only injury claimed by the Landowners personally—as opposed to a generalized injury to the public[1]—is the potential reduction in the value of their property. (Compl. ¶¶ 23, 25, 44, 46, 60; *see id.* at 3 ("The construction, operation and maintenance of the Compost Factory on the Property, if permitted, will injure property interests of the Plaintiffs.").) Landowners cannot establish an injury in fact premised on an act that has not occurred and may never occur. "[T]he possibility of alleged future injury is too remote to establish standing." *Anderson,* ¶ 15; *Olsen v. City of Golden,* 53 P.3d 747, 752 (Colo. App. 2002) ("A claimed injury that . . . cannot be determined until a remote time in the future, is not sufficiently direct and palpable to support a finding of injury in fact.").

The Landowners' reliance on TABOR in their fifth claim for relief does not cure their failure to articulate an injury in fact. Taxpayers asserting a TABOR claim may establish an injury in fact if they can show a clear nexus between their status as taxpayers and the constitutional violation they allege. *Reeves-Toney v. Sch. Dist. No. 1,* 2019 CO 40, ¶ 28. Although Landowners likely paid the Open Space Tax in Boulder County, they have not articulated a theory under which the County's expenditure of those taxes caused them injury. Landowners do not dispute that the Property has been used for an open space purpose since the County's acquisition of the Conservation easement in 1994 and continues to be managed as open space to this day. Landowners' theory of injury is premised on the construction of the compost facility, which Landowners correctly allege would convert the property into a non-open space

[1] Colorado has not adopted general public interest standing. *Anderson v. Suthers*, 2013 COA 148, ¶ 17.

use, but this conversion is an event that has not occurred and cannot occur without a quasi-judicial approval from the County acting in its governmental capacity. Thus, Landowners failed to establish an injury in fact sufficient to establish standing under any theory of relief.

B. Landowners have not suffered an injury to a legally protected interest.

Even assuming the possibility that a compost facility on neighboring property establishes an injury in fact that meets the first prong of the *Wimberly* test, Landowners lack standing because they cannot meet the second prong. Specifically, Landowners must establish a legal interest in protecting against their injury that arises from the Colorado constitution, the common law, a statute, or a rule or regulation. *Ainscough,* 90 P.3d at 856. For their first four claims for relief, Landowners' claimed legal interest arises from a conservation easement the County purchased in 1994. Landowners do not have a legally protected interest in a conservation easement they do not own. For their fifth claim for relief, Landowners claim a legal interest arising from TABOR, but TABOR does not protect the interests that Landowners raise in this lawsuit.

In their first and second claims for relief,[2] Landowners request declarations from this Court related to the County's conservation easement. Likewise, in their fourth claim for relief, Landowners claim the County will be unjustly enriched if it is permitted to develop the compost facility in a manner that violates the conservation easement. To have standing to bring a declaratory judgment action, a plaintiff must assert a legal basis on which a claim for relief can be grounded. *Wibby*, ¶ 33. An unjust enrichment claim can arise in tort or contract, but in this

[2] Landowners label their request for an injunction as a third claim for relief, but an injunction is a remedy not a cause of action. *See* C.R.C.P. 65.

case Landowners' allegations arise out of the conservation easement, a contract. *See Robinson v. Colo. State Lottery Div.*, 179 P.3d 998 (Colo. 2008).[3] Thus, Landowners must have a legally enforceable interest in the conservation easement to have standing to pursue their first four claims.

The Landowners do not have a legally enforceable interest in the conservation easement. Landowners are not parties to the easement, nor do they own the land that is subject to the easement. (*See* Compl. Ex. B.) Because they are not parties to the easement, Landowners lack standing to enforce it through a declaration or otherwise. *Title Guar. Co. v. Harmer,* 430 P.2d 78, 80 (Colo. 1967) ("Strangers to the instrument creating an easement over real estate for a specific purpose cannot interfere with the right of the owner of the land to exercise full dominion over his property."); *see Denver Parents Ass'n v. Denver Bd. of Educ.,* 10 P.3d 662, 665 (Colo. App. 2000). Other states that have examined the issue have found third parties do not have standing to enforce conservation easements. *See Schwartz v. Chester Cty. Agric. Land Pres. Bd.,* 180 A.3d 510 (Pa. Commw. Ct. 2018); *Estate of Robbins v. Chebeague & Cumberland Land Tr.,* 2017 ME 17, 154 A.3d 1185; *Zagrans v. Elek*, 2009-Ohio-2942 (Ct. App.); *Town of Oyster Bay v. Doremus*, 942 N.Y.S.2d 546, 548-49 (N.Y. App. Div. 2012); *La Barbera v. Town of Woodstock*, 814 N.Y.S.2d 376, 378-79 (N.Y. App. Div. 2006).

In Colorado, conservation easements are enforceable through an action seeking injunctive relief or damages initiated by the grantor or owner/holder of the conservation easement. § 38-30.5-108, C.R.S. If the legislature enacts a particular administrative remedy to redress a statutory

[3] The County is immune from any unjust enrichment claim that arises in tort. *See Robinson,* 179 P.3d at 1008.

violation, that decision is consistent with a legislative intent to preclude a private civil remedy for breach of the statutory duty. *Allstate Ins. Co. v. Parfrey,* 830 P.2d 905, 910 (Colo. 1992).

Landowners are not entitled to standing because they enjoy the public benefits provided by public open space in general or the conservation easement in particular. "Ordinarily, to support standing, a plaintiff's complaint must establish that plaintiff has a personal stake in the alleged dispute and that the alleged injury is particularized as to the plaintiff." *Rechberger v. Boulder Cty. Bd. of Cty. Comm'rs,* 2019 COA 52, ¶ 10 (quotations omitted). Colorado courts reject standing when a plaintiff's interests are not sufficiently distinct from those of the general public. *See id.* at ¶ 18; *Kolwicz v. City of Boulder*, 538 P.2d 482, 483 (Colo. App. 1975) (Boulder citizen lacked standing to compel action by public officials when "she has no special interest in the subject matter of [the] lawsuit which is different from a general interest theoretically shared by the tens of thousands of other residents of Boulder"). The fact that Landowners own property abutting or in the vicinity of the Property does not make their claimed injury distinct from other members of the public. *See Lakewood v. De Roos*, 631 P.2d 1140, 1143 (Colo. App. 1981).

Regarding the Landowners' TABOR claim, the provisions of TABOR itself allow taxpayers to file suit to enforce the provisions of TABOR. If the Landowners were alleging that the County had enacted or extended the Open Space Tax without voter approval, then there would be no question about Landowners' legally protected interest. However, as further explained in section III below, Landowners' fifth claim for relief does not enforce TABOR, and therefore Landowners cannot rely on TABOR to establish a legally protected interest. Because Landowners cannot meet either prong of the *Wimberly* standing test, the Court should dismiss this case for lack of standing.

III. TABOR does not prohibit the County from spending tax revenue generated through voter-approved ballot measures.

If the Court finds that Landowners' TABOR claim is ripe and Landowners have standing, the Court should dismiss it for failure to state a claim. Landowners' fifth claim for relief argues that the County violated § 4(a) of TABOR (Am. Compl. ¶ 251), which states in pertinent part, "districts must have 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."[4] Colo. Const. Art. X, § 20(4). "TABOR doesn't apply to all taxing, revenue, and spending actions—because it is prospective, it only applies to any 'new taxes,' 'tax rate increases,' or 'tax policy changes' directly causing a net revenue gain . . ." *Griswold v. Nat'l Fed'n of Indep. Bus.,* 2019 CO 79 ¶ 31. Put more succinctly, the purpose of section 4 of TABOR is to "constrain tax hikes." *Id.* at ¶ 34.

Landowners fail to allege that the County did not have voter approval compliant with TABOR in advance of passing the Open Space Tax. In fact, Landowners admit that the County's original Open Space Tax in 1993 and the extensions of the tax in 1999 and 2016, were approved through ballot issue under TABOR. (Am. Compl. ¶¶ 239, 241.) Although Landowners claim that the County's purchase of the Property in 2018 violated County Resolution 93-174 (Am. Compl. ¶ 246), a violation of a county resolution is not a violation of TABOR. Nothing in TABOR limits the County expenditure of revenue to open space purposes, nor does TABOR include a provision for the enforcement of county resolutions by taxpayers.[5] Because Landowners failed to allege

[4] Under TABOR, a "district" includes a local government. Colo. Const. Art. X, § 20(2)(b).
[5] If the County decides to dispose of the Property because of a future approval of a compost facility on the Property, the Landowners have a remedy under Resolution 93-174 by seeking a referendum to stop the disposal. (Compl. Ex. H ¶ 11.)

facts that establish the County violated TABOR by imposing a tax without voter approval, they failed to state a claim.

Conclusion

The County requests that the Court dismiss this case without prejudice under C.R.C.P. 12(b)(1) and enter final judgment in favor of the County. *See Schaden v. DIA Brewing Co., LLC*, 2021 CO 4. Alternatively, the County requests that the Court dismiss Landowners' fifth claim for relief with prejudice under C.R.C.P. 12(b)(5).

Respectfully submitted this 5th day of February 2021.

BOULDER COUNTY ATTORNEY

By: */s/ David Hughes*
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ATTORNEYS FOR DEFENDANT BOULDER COUNTY

CERTIFICATE OF SERVICE

I certify that on February 5, 2021, I electronically filed the foregoing **MOTION TO DISMISS** via Colorado Courts E-Filing (CCEF), which will either serve the same via e-mail or United States mail to the following:

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