DISTRICT COURT, COUNTY OF BOULDER, STATE OF COLORADO 1777 Sixth Street P.O. Box 4249 Boulder, CO 80306	DATE FILED: March 22, 2021 1:13 PM CASE NUMBER: 2020CV31049
LISA BATTAN, et al., **Plaintiffs,** **v.** **BOARD OF COUNTY COMMISSIONERS OF BOULDER,** **Defendant.**	**COURT USE ONLY**
	Case Number: **20 CV 31049** Division: **3** Courtroom: **K**

ORDER RE MOTION TO DISMISS

BACKGROUND

On December 23, 2020, Plaintiffs filed a 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") against Defendant.

The Complaint involves approximately forty acres of land in Boulder County, Colorado. The County, through the Defendant Board of County Commissioners ("County"), filed a Special Use Review application to construct, operate and maintain a commercial, industrial-scale composting facility on the property ("Compost Facility").

Plaintiffs are owners of real property adjacent to or within 1500 feet of the property. On December 19, 1994, the County bought a conservation easement on the property. At the time the property was described as "prime agricultural land." Sales and Use tax money were used to purchase the conservation easement. The County recorded a Notice of Property Restriction on February 8, 1995. That Notice states, in pertinent part, "[t]he Property was purchased with money acquired from a sales and use tax for acquisition of Open Space Land, approved by the voters of Boulder County on November 2, 1993." The Complaint alleges that the Sales and Use Tax monies used in the purchase restrict the use that can be made of the Conservation Easement property to solely passive recreational purposes, agricultural purposes, or environmental preservation purposes.

The Conservation Easement also included a "first right to purchase" the Property. In April 2018 Boulder County exercised its first right to purchase and purchased a fee interest in the property from private owners. The County used restricted funds, raised from sales and use tax revenues pursuant to Boulder County Resolution 93-174, to purchase the fee interest in the Property. Plaintiffs allege the County purchased the Property with the intent of converting the Property to a Compost Facility.

Plaintiffs contend that immediately after the purchase of the fee interest in the Property, the County began to publicize its position that by utilizing the real property doctrine of merger, its purchase of the fee interest in the Property terminated the Conservation Easement. As a result, none of the requirements of the Conservation Easement, nor the conservation values to be promoted by the easement, have any further force or effect.

After a meeting with property owners on October 6, 2020, the County filed a fully-formed application for Special Use Review approval of construction, operation, and maintenance of a Compost Facility on the Property on October 12, 2020. Plaintiffs contend that because the application was filed with Boulder County, the County is both the applicant and reviewing governmental agency.

Plaintiffs further contend that construction, operation, and maintenance of a Compost Facility on the Property will destroy the values that were to be conserved by the Conservation Easement and will injure the property interests of the Plaintiffs.

The Complaint requests the Court enter the following Orders: (1) there is no merger of the Conservation Easement and the fee interest purchased by the County; (2) the County's action in purchasing the Property with intent to construct, operate and maintain the Compost Factory on the Property is in violation of Boulder County Resolution 93-174 and is ultra vires; (3) the conduct of the County in purchasing the fee interest in the property in order to extinguish the Conservation Easement with the goal of constructing, operating and maintaining the Compost Factory is wrongful, and if permitted would unjustly enrich the county, at the expense of those who relied upon the perpetual nature of the Conservation Easement, and the citizens of Boulder County.

Plaintiffs filed a First Amendment to Complaint ("Amendment") on January 26, 2021. Plaintiffs added a fifth claim for relief under TABOR. Plaintiffs request the Court find that the County's use of Open Space Tax revenue to purchase the Property for an industrial use – the Compost Facility – is an illegal use of restricted funds. Plaintiffs request the Court enter a declaratory judgment that such illegal use of restricted funds voids the purchase contract for the Property; and that the County should refund all revenues spent to purchase the Property.

On February 5, 2021, the County filed a Motion to Dismiss the Complaint ("Motion to Dismiss") pursuant to C.R.C.P. 12(b)(1) and 12(b)(5). In essence, Defendant County asserted that Plaintiffs' Complaint is premature because the Plaintiffs filed a lawsuit before the County had set a hearing or made a decision about the Compost Facility. The County asserts the action is not ripe for judicial review, the Plaintiff landowners lack standing, and therefore, the case should be dismissed.

In a Response to the Motion to Dismiss ("Response") filed on February 26, 2021, Plaintiffs argue that the County mischaracterizes the nature of this action. Plaintiffs argue that this case is not about the merits of the Compost Facility. Rather, 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.
2. Whether the County's action in purchasing a fee interest in the Property is ultra vires. See Complaint at Second Claim for Relief,
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,
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.
5. Plaintiffs also assert a separate cause of action alleging the County violated the Taxpayer Bill of Rights ("TABOR") by unconstitutionally spending taxpayer funds.

Plaintiffs assert they do meet the requirements of standing, and that their claims are ripe for review.

On March 19, 2021, the County filed a Reply in Support of Motion to Dismiss ("Reply"). In their Reply, the County noted the Board of County Commissioners requested the special use application for the Compost Facility be withdrawn. (Reply, Ex. A).

STANDARD OF REVIEW

For a motion to dismiss to be sustained the court must find that the complaint does not contain sufficient factual matter to state a claim to relief that is plausible on its face. *See Warne v. Hall*, 373 P.3d 588 (Colo. 2016).

With "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*., 463 P.3d 879, 882 (Colo. App. 2018). 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).

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 v. City of Ft. Collins*, 934 P.2d 1380, 1384 (Colo. 1997).

ANALYSIS

A. Whether the Action is Ripe

Courts "generally do not consider cases involving uncertain or contingent future matters." *Beauprez v. Avalos*, 42 P.3d 642, 648 (Colo. 2002). A court will not entertain such matters if "the injury is speculative and may never occur." *Metal Mgmt. West, Inc. v. State*, 251 P.3d 1164, 1174 (Colo. App. 2010). A court may only exercise jurisdiction when there is an "actual case of controversy between the parties that is sufficiently immediate and real so as to warrant adjudication." *Beauprez*, 42 P.3d at 648. But a court may find a conflict is ripe, even in the context of uncertain future facts, if there is "no uncertainty regarding the facts relevant to the dispute, and no pending actions that might resolve the issue prior to the court's determination." *Metal Mgmt. West, Inc*. 251 P.3d at 1175 (citing *Stell v. Boulder County Dept. of Soc. Serv.*, 92 P.3d 910, 915 n. 6 (Colo. 2004)).

The County purchased the Conservation Easement in 1994. (Compl., Ex. B). The Deed for the Conservation Easement included a "first right to purchase the Property." (Compl. ¶ 84; Ex. B at 3 ¶ (f)). In April 2018, the County exercised this first right to purchase the Property. Therefore, the County became the owner of the Conservation Easement and the servient estate – the Property. Under § 38-30.5-107, C.R.S (2019), in effect at the time of the County's purchase,

> "Conservation easements in gross may, in whole or in part, be released, terminated, extinguished, or abandoned by merger with the underlying fee interest in the servient land…or in any other manner in which easements may be lawfully terminated, released, extinguished or abandoned."

C.R.S. § 38-30.5-107. Additionally, Colorado has determined, "when the dominant and servient estates come under common ownership, the need for the easement is destroyed." *Salazar v. Terry*, 911 P.2d 1086, 1091 (Colo. 1996). There are no other ownership interests in the Property.

The Court cannot find based on the facts alleged by Plaintiffs that an actual case of controversy between the parties is immediate and real. The Court cannot find that the County violated any statute or term of the Deed of the Conservation Easement by exercising their first right to purchase the fee interest in the Property.

Therefore, the Court finds the action is not ripe for review.

B. Whether Plaintiffs Have Standing

Even if the Plaintiffs' action was ripe for review, the Court cannot find the Plaintiffs have standing for this action.

A plaintiff must show that: (1) they were injured in fact; and (2) the injury was to a legally protected interest. *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977). For declaratory judgments, an injury in fact "is established 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 Cty. Comm'rs v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045, 1053 (Colo. 1992)). An injury "may be tangible, such as physical damage or economic harm," but it may also be "intangible, such as aesthetic issues or the deprivation of civil liberties." *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004). Once raised, standing must be determined prior to a decision on the merits. *Hickenlooper v. Freedom from Religion Fund, Inc.*, 338 P.3d 1002, 1006 (Colo. 2014). If a court determines that standing does not exist, it must dismiss the case. *Wimberly v. Ettenberg*, 570 P.2d at 539.

The County contends that Plaintiffs cannot establish an injury in fact premised on an act that has not occurred and may never occur. *Olson 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.").

Regarding an injury to a legally protected interest, the County contends that Plaintiffs do not have a legally protected interest in a conservation easement they do not own. The County also argues that the Plaintiffs 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*, 454 P.3d 355, 357 (Colo. App. 2019).

Plaintiffs contend they can satisfy the two elements of standing. Plaintiffs argue that they satisfy the first prong of standing by the County purporting to strip away the protections of the Conservation Easement from the Property. As to the second prong of standing, Plaintiffs argue that their legally protected interests include rights of adjacent landowners to publicly owned lands and by asserting injury to environmental, aesthetic and ecological interests.

The Court cannot find – especially now that the Compost Facility application has been withdrawn – that Plaintiffs have alleged a sufficient injury in fact. Plaintiffs have failed to allege specifically how the merger of the Conservation Easement will negatively impact the land, soil, and water resources of the Property. The Property is currently being operated as open space. Plaintiffs' allegations are premised on a future event, and do not support a finding of injury in fact. Further, the Court finds Plaintiffs do not have a legally protected interest in the conservation easement. Plaintiffs have failed to allege sufficient facts to show how the termination of a conservation easement results in an injury particularized to them.

3. Plaintiffs' TABOR Claim

The Court finds Plaintiffs similarly do not have standing for their TABOR claim.

For TABOR claims, to establish an injury in fact, the plaintiff must show a clear nexus between their status as a taxpayer and the challenged government action. *Reeves-Toney v. Sch. Dist. No. 1 in City and Cty. of Denver*, 442 P.3d 81, 86 (Colo. 2019) (citing *Hickenlooper v.*

Freedom from Religion Fund, Inc., 338 P.3d 1002, 1008 (Colo. 2014)). The interest is the economic interest in having tax dollars spent in a constitutional manner. *Id*.

The County asserts that TABOR does not create a legally protected interest in how tax revenues received through a legal, voter-approved tax measure are subsequently spent. Plaintiffs argue that they are challenging the unconstitutional expenditures of public funds to which they have contributed by payment of taxes.

The Court cannot find Plaintiffs have alleged sufficient facts to establish standing under TABOR. Plaintiffs assert the County purchased the Property with Open Space Tax with no intention of using the Property for any open space purpose. The Court finds there currently are no plans regarding how to use this Property. Any claimed injury in fact by the Plaintiffs is speculative. Additionally, the Court finds the ballot issue established an Open Space Tax. Plaintiffs assert the County's ballot issue "asked voters to approve a tax that would generate revenue to be used for purchasing and maintaining open space." (Response at 15). The Court finds the County purchased the Property, which is operated as open space, with Open Space Tax revenue. Plaintiffs have failed to sufficiently allege how the County violated TABOR by purchasing the Property. Therefore, the Court finds Plaintiffs lack standing for their TABOR claim and have also failed to sufficiently allege a claim under TABOR.

CONCLUSION

Based on the foregoing analysis, the Court **GRANTS** Defendant's February 5, 2021 Motion to Dismiss.

SO ORDERED: March 22, 2021

BY THE COURT:

P. Butler

Patrick Butler
District Court Judge