District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80302 (303) 441-3750	DATE FILED: February 26, 2024 9:43 PM CASE NUMBER: 2023CV30652
KEEP AIRPORT ROAD ENVIRONMENTAL & SAFE; ERIC SCHERER; GWEN SCHERER; GREG PETROSKY; MICHELLE ROMEO; JAMES POTTER; and KELLY POTTER Plaintiffs, v. BOULDER COUNTY BOARD OF COMMISSIONERS, Defendant	▲ COURT USE ONLY ▲
	Case Number: 2023CV30652 Division 2 Courtroom I
ORDER RE MOTION TO DISMISS	

This matter is before the Court on Defendant's Motion to Dismiss, filed October 5, 2023 ("Motion" or "Motion to Dismiss"). Plaintiffs filed a Response on November 9, 2023, and Defendant filed a Reply on November 28, 2023.

Based on review of the briefing, exhibits, file herein, and pertinent legal authorities, the Court issues the following Order:

I. BACKGROUND

This litigation arises from the Defendant Boulder County Board of Commissioners' ("Boulder County" or "County") decision to conditionally terminate a conservation easement which Boulder County held on private property near Longmont, Colorado. Termination of the easement was required for the developer to pursue annexation with the City of Longmont and

subsequent development of an affordable housing development. Plaintiffs challenge the decision on several grounds and request an Order overturning the County's decision.

Plaintiffs are a neighborhood group (Keep Airport Road Environmental and Safe – "KARES") and five individual neighbors. The individual Plaintiffs live adjacent to or near the subject property. Plaintiffs allege that the County violated the express terms of the Kanemoto Estate Conservation Easement ("Conservation Easement") when it failed to determine that the termination would be consistent with the Boulder County Land Use Code. They also maintain that the County's conflict of interest provisions in the Personnel Policy were violated when the Parks and Open Space Department ("POS") negotiated a multi-million-dollar payment to the POS open space fund in return for the Conservation Easement termination. Through the Amended Complaint, Plaintiffs brought claims for relief against Defendant under (1) judicial relief of agency action under C.R.S. § 24-4-106; (2) declaratory judgment; (3) C.R.C.P. 106(a)(4); and (4) violation of Boulder County Personnel & Policy Manual (conflict of interest).

Through the Motion to Dismiss, Boulder County contends that the Amended Complaint must be dismissed under C.R.C.P. 12(b)(1) for lack of standing. The County argues that Plaintiffs have not suffered an injury in fact and have not suffered an injury to a legally protected interest. Boulder County also contends that the C.R.C.P. 106(a)(4) claim should be dismissed under Rule 12(b)(1) because the subject action was not quasi-judicial. Finally, in the alternative, Boulder County asserts that the first and second claims for relief should be dismissed under C.R.C.P. 12(b)(5). In particular, the County argues that it is not an "agency" for purposes of the State Administrative Procedures Act ("APA"), and that Rule 57 declaratory relief is not available if Rule 106(a)(4) relief is afforded to Plaintiffs.

Plaintiffs counter that they have standing to pursue all four claims, as their Declarations filed with their Response demonstrate that they have suffered an injury in fact, and that they have suffered an injury to a legally protected interest. Plaintiffs maintain that Boulder County's action was quasi-judicial entitling them to Rule 106(a)(4) review. As to the 12(b)(5) Motion, Plaintiffs urge that the County is an agency for purposes of the APA, and concede that if their Rule 106(a)(4) claim is permitted to go forward, Rule 57 declaratory relief is not available.

II. STANDARD OF REVIEW

Standing is treated as a question of subject matter jurisdiction under C.R.C.P. 12(b)(1). *Grand Valley Citizens' Alliance v. Colorado Oil & Gas Conservation Commission*, 298 P.3d 961, 964 (Colo. App. 2010), *rev'd on other grounds*, 279 P.3d 646 (Colo. 2012). Plaintiffs have the burden of proving jurisdiction. *Smith v. Town of Snowmass Village*, 919 P.2d 868, 871 (Colo. App. 1996). In making the required findings of fact and conclusions of law as to jurisdiction, the court may consider matters outside the complaint. *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 925 (Colo. 1993). If there is any dispute about the underlying jurisdictional facts, the court should allow the parties an opportunity to conduct discovery before ruling on a motion to dismiss. *Walton v. State*, 968 P.2d 636, 641 (Colo. 1998).

C.R.C.P. 12(b)(5) provides for dismissal of a complaint for failure to state a claim upon which relief can be granted. Motions to dismiss under Rule 12(b)(5) are disfavored. *Verrier v. Colorado Department of Corrections*, 77 P.3d 875, 877 (Colo. App. 2003). The purpose of a motion under Rule 12(b)(5) is to test the formal sufficiency of the complaint. *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911 (Colo. 1996). When reviewing a motion to dismiss, the Court must accept the material factual allegations of the complaint as true and draw all inferences in favor of the plaintiff. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). To survive a C.R.C.P. 12(b)(5)

motion to dismiss, the complaint must state a plausible claim for relief by alleging facts sufficient "to raise the right to relief above the speculative level." *Warne v. Hall*, 2016 CO 50, ¶ 9. The plaintiff has the burden to frame a complaint with "sufficient factual matter, accepted as true" to suggest that the plaintiff is entitled to relief. *Id.* The complaint must be facially plausible in that it "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Barnes v. State Farm Mutual Automobile Insurance Co.*, 2021 COA 89, ¶ 24.

III. ANALYSIS

The Kanemoto Estates Subdivision was approved in 1982.[1] Motion, Exhibit A, pp. 1-2. This subdivision consisted of three parcels – Lot 1 (3.9 acres with one house), Lot 2 (5.6 acres with one house), and Outlot A (28.76 acres encumbered by the Conservation Easement). *Id.* The Conservation Easement was granted to the County by the applicant as a regulatory requirement of the subdivision process set forth in the County Land Use Code ("Code"). *Id.* In accordance with the Code, the Conservation Easement prohibited the construction of residential structures on Outlot A and required it to be used as a single agricultural unit. *Id.* at 3. Outlot A has since been held in private ownership and is not open to the public. *Id.* Outlot A is directly adjacent to the Clover Creek subdivision where most of KARES' members reside. Amended Complaint, ¶ 3. The individual Plaintiffs own properties abutting or near Outlot A. Amended Complaint, ¶¶ 6-8.

The Conservation Easement allows for termination where "the Boulder County Planning Commission and Boulder County Board of Commissioners have determined that the proposed

[1] The County has requested the Court take judicial notice of the Easement Termination Staff Packet because it is not reasonably subject to dispute and is available on the County website. Motion, p. 3, n.1. *Shook v. Pitkin County Board of County Commissioners*, 2015 COA 84, ¶ 12, n.4 (court could take judicial notice of County Attorney's website because the contents on a specific date and time are not subject to reasonable dispute). Plaintiffs have not opposed this request, and the Court therefore takes judicial notice of Exhibit A.

and/or allowed development and/or land use resulting from such termination or transfer is consistent with the current Boulder County Comprehensive Plan and Boulder County Land Use Regulations." *Id.* at 9-10.

The applicant seeking termination of the Conservation Easement proposed to annex the Kanemoto Estates Subdivision into the City of Longmont to develop a mixed-use residential community that included affordable housing. Following staff review and approval by the Planning Commission, the County Commissioners conditionally approved termination of the Conservation Easement, finding that the proposed development was consistent with the County Comprehensive Plan and Code. *Id.* at 6.

This action, on a 2-1 vote, followed public comment and public hearings. *Id.* Neither the Code nor County regulations required public hearings, and neither party has identified any provisions of the Code or County regulations that impose criteria on the termination of a conservation easement or procedures for doing so. The terms relied on by the County were therefore the termination terms included in the Conservation Easement. Motion, Exhibit B, ¶ 10.

A. C.R.C.P. 12(b)(1) (Standing)

Standing is a threshold issue that must be met before a court can reach the merits. *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004); *Wibby v. Boulder County Board of County Commissioners*, 2016 COA 104, ¶ 9. Once standing is disputed, it must be determined before a decision on the merits. *Hickenlooper v. Freedom from Religious Foundation, Inc.*, 2014 CO 77, ¶ 7. If standing does not exist, the court must dismiss the case. *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977). Likewise, the determination of whether a court may hear a Rule 106(a)(4) claim also implicates the Court's subject matter jurisdiction under C.R.C.P. 12(b)(1). *Jafay v. Board of County Commissioners,* 848 P.2d 892, 895 (Colo. 1993).

Colorado plaintiffs benefit from relatively broad individual standing. *Ainscough,* 90 P.3d 851, 856 (Colo. 2004) (Colorado's test "has traditionally been relatively easy to satisfy"). A plaintiff's injury may be intangible. *Id.* To establish standing, a plaintiff must show both that (1) the plaintiff suffered an injury in fact, and (2) that the injury was to a legally protected interest. *Wimberly*, 570 P.2d at 539; *Reeves-Toney v. School District No. 1 in the City and County of Denver*, 2019 CO 40, ¶ 22. The first prong of the standing test prevents judicial intrusion into legislative and executive spheres by permitting only injured parties to seek redress in courts. *Reeves-Toney* ¶ 22; *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"). In contrast, the general public, whose interests are more remote, must address their grievances through the political process. *Reeves-Toney*, ¶ 22 (citations omitted). An injury "that is overly indirect and incidental to the defendant's action will not convey standing." *Hickenlooper*, ¶ 9.

The second prong of the standing test (legally protected interest requirement) promotes "judicial self-restraint" and "recognizes that unnecessary or premature decisions of constitutional questions should be avoided, and that parties actually protected by a statute or constitutional provision are generally best situated to vindicate their own rights." *Hickenlooper*, ¶ 10.

Here, the parties frame the issue quite differently. Boulder County maintains that Plaintiffs' claims are premised on speculation about what may or may not occur on Outlot A in the future. The County characterizes its decision to terminate the Conservation Easement as opening the possibility of Outlot A being developed. Before any housing can be constructed, the property will need to be annexed by the City of Longmont, and following annexation, any proposed

development must be approved by the City. (Motion, Exhibit A, pp. 2-3). Thus, the County reasons that Plaintiffs' claimed injuries are remote and speculative.

In contrast, Plaintiffs posit that nearly all challenges to land use decisions pre-date project development. They maintain that they have suffered injuries in fact, to legally protected interests (as neighboring property owners) as a result of the County's decision to conditionally terminate the Conservation Easement.

1. Injury in Fact

As noted above, the Colorado Supreme Court has observed that parties to lawsuits in Colorado benefit from a "relatively broad definition of standing." *Ainscough*, 90 P.3d at 855. In the land-use context, several appellate cases have recognized that landowners living adjacent to or near property that has been rezoned or on which a land use decision has been rendered have adequately alleged injury in fact. *See Rangeview, LLC v. City of Aurora*, 2016 COA 108, ¶ 13 (adjoining property owners had standing to challenge a site plan for a proposed convenience store and gas station that would result in a decrease in their home values); *Board of County Commissioners v. City of Thornton*, 629 P.2d 605, 608-09 (Colo. 1981) (Town of Thornton had injury in fact where modification of the Adams County comprehensive plan would eventually permit new development); *Friends of the Black Forest Regional Park, Inc. v. Board of County Commissioners*, 80 P.3d 871, 877 (Colo. App. 2003) (adjoining landowners had shown injury in fact due to proposed county road through an adjacent easement that would adversely affect the aesthetics of the park and decrease property values of adjoining landowners); *Reeves v. City of Fort Collins*, 170 P.3d 850, 851, 854 (Colo. App. 2007) (trial court reversed and standing recognized for a neighbor who claimed improper interpretation of height restrictions on development 8 blocks away would create injury to "aesthetic and recreational interests").

Here, the individual Plaintiffs have submitted declarations, outlining certain aesthetic injuries they have suffered by the Conservation Easement termination, including concern about losing "an incredible view" and viewing wildlife that are seen in Outlot A. *See* Petrosky Declaration, ¶¶ 6 & 10; Scherer Declaration, ¶¶ 5, 7 & 12. Additionally, the individual Plaintiffs' declarations identify financial injuries they contend they have suffered as a result of the challenged action, including but not limited to decreased property values. Petrosky Declaration, ¶¶ 7 & 9; Gee Declaration, ¶ 13; Scherer Declaration, ¶¶ 5 & 11. For instance, Mr. Petrosky has stated that he paid a premium for his home because it abutted the Conservation Easement, which he estimated to be in the range of $30,000 to $50,000. Likewise, the Scherers have declared that they purchased their home due in part to its location backing up to the Conservation Easement. Individual Plaintiffs also cite health and safety concerns relating to development (Scherer Declaration, ¶ 9; Gee Declaration, ¶¶ 14-15) and spiritual harm (Scherer Declaration, ¶ 13).

The Court therefore concludes that the Individual Plaintiffs have adequately alleged injury in fact to satisfy the first prong of the *Wimberly* test. In particular, the alleged harms identified in their Declarations are sufficient to qualify as aesthetic harm and financial harm under the relatively broad standing inquiry.

In its Motion, the County primarily relied on *Anderson v. Suthers*, 2013 COA 148 and *Olson v. City of Golden*, 53 P.3d 747 (Colo. App. 2002). These cases are distinguishable. First, neither case involved land use decisions. *Anderson* featured a challenge to the sale of an interest in a health care system where plaintiffs "have not alleged any direct or indirect injury to themselves personally." ¶ 15. *Olson* involved a taxpayer's challenge to an urban renewal law in which the Court determined it was not possible to determine whether the challenged action would increase or decrease tax revenues, and any injury was therefore speculative.

Boulder County urges that these authorities are relevant because like the alleged injuries in *Anderson* and *Olson*, any injury Plaintiffs may suffer here has not yet occurred because the conditional termination of the Conservation Easement did not result in any development. The County reasons that any development will occur only after Kanemoto Estates is annexed and the City of Longmont approves development. While this argument holds superficial appeal, the Court concludes that the injuries alleged by Plaintiffs are not speculative. Like the land use decisions in which plaintiffs have been determined to have suffered injury in fact, the County took concrete action in conditionally terminating the Conservation Easement, rendering Outlot A one step closer to development. The Conservation Easement was a "draw" and "selling point" for some of the Plaintiffs (*see* Gwen Scherer Declaration, ¶ 11), and Plaintiffs have alleged that its elimination has resulted in financial harm. Further, as Plaintiffs note, all challenged land use decisions pre-date the actual development. *See, e.g., City of Thornton*, 629 P.2d at 608-09 (modification of County comprehensive plan). Additionally, due to individual Plaintiffs' proximity to the Conservation Easement, any injury suffered by Plaintiffs is greater and different in kind than that incurred by members of the general public.

As to KARES' standing, it is unnecessary to determine whether KARES has separate, organizational standing. Because standing represents a challenge to the court's subject matter jurisdiction, "it is not necessary to address the standing of parties bringing the same claims as parties with standing." *Lobato v. People*, 218 P.3d 358, 368 (Colo. 2009). In *Lobato*, the Colorado Supreme Court reversed the trial court's ruling that plaintiff school districts lacked the standing to sue, reasoning that because there was no dispute that plaintiff parents had standing and the plaintiff groups' claims overlapped, the Court need not evaluate the school districts' standing. The school districts were therefore permitted to continue as plaintiffs in the case. *Id.* at 367-68. Here, KARES

maintains the same claims as the individual Plaintiffs. Amended Complaint, Prayer for Relief. Accordingly, like the school districts in *Lobato*, KARES may continue as plaintiff because its role is similar to the role of permissive intervenors and does not require standing independent of the Plaintiffs that have standing. *Lobato*, 218 P.3d at 368.

2. Legally Protected Interest

The second prong of the *Wimberly* test requires Plaintiffs to 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. To determine whether Plaintiffs have met this test, each claim is addressed individually below.

a. First Claim for Relief (State Administrative Procedures Act)

As set forth below in section (B)(1), Plaintiffs have not stated a claim upon which relief can be granted under the State Administrative Procedures Act. Therefore, as to the first claim for relief, they have not established a legal interest in protecting against the injury that arises from statute.

b. Second Claim for Relief (Declaratory Relief)

As set forth below in sections (A)(2)(c) and (B)(2), the Court concludes that the County's action was quasi-judicial, and Plaintiffs have standing to pursue their C.R.C.P. 106(a)(4) judicial review claim. In the Response, Plaintiffs acknowledge that should the Court decide that Plaintiffs possess standing to maintain their claims under Rule 106(a)(4), Plaintiffs do not oppose the Court's dismissal of their declaratory judgment claim. Therefore, it is unnecessary to address whether Plaintiffs have established a legal interest protecting against their interest that arises from common law.

c. Third Claim for Relief (C.R.C.P. 106(a)(4) Claim)

C.R.C.P. 106(a)(4) provides in pertinent part:

> In the following cases relief may be obtained in the district court by appropriate action under the practice prescribed in the Colorado Rules of Civil Procedure: . . . Where, in any civil matter, any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law. . .

By its terms, Rule 106(a)(4) is limited to review of judicial or quasi-judicial functions exercised by a governmental body. A quasi-judicial action is generally characterized by the following factors: (1) a local or state law requiring that notice be given before the action is taken; (2) a local or state law requiring that a hearing be conducted before the action is taken; and (3) a local or state law directing that the action results from the application of prescribed criteria to the individual facts of the case. *Snyder v. City of Lakewood,* 542 P.2d 371, 374 (Colo. 1975), *overruled on other grounds by Margolis v. District Court*, 638 P.2d 297 (Colo. 1981); *Baldauf v. Roberts*, 37 P.3d 483, 484 (Colo. App. 2001). Put differently, quasi-judicial actions are those that bear a similarity to judicial action in that they involve a determination of the rights of specific individuals by applying existing legal standards to past or present facts developed at a hearing guaranteeing due process protection. *Widder v. Durango School District No. 9-R*, 85 P.3d 518, 527 (Colo. 2004); *Native American Rights Fund v. City of Boulder*, 97 P.3d 283, 287 (Colo. App. 2004). There is no "litmus-like test" for identifying quasi-judicial action, and the central focus "should be on the nature of the governmental decision and the process by which that decision was reached." *Jafay v. Board of County Commissioners*, 848 P.2d 892, 898 (Colo. 1993) (citations omitted); *Prairie Dog Advocates v. City of Lakewood*, 20 P.3d 1203, 1207 (Colo. App. 2000).

In *Cherry Hills Resort Development Co. v. Cherry Hills Village*, 757 P.2d 622, 627 (Colo. 1988), the Colorado Supreme Court observed that whether a governmental action is quasi-judicial should focus on "the nature of the governmental decision and the process by which that decision is reached." Under this formulation of the quasi-judicial test, if the decision is "likely to adversely affect the protected interests of specific individuals, and if a decision is to be reached through the application of preexisting legal standards or policy considerations to present or past facts presented to the governmental body, then one can say with reasonable certainty that the governmental body is acting in a quasi-judicial capacity in making its determination." *Id.*

The absence of a legislatively mandated notice and hearing is not determinative of the status of the decision. *Id.* at 625-26; *Carpenter v. Civil Service Commission*, 813 P.2d 773, 776 (Colo. App. 1990). When a city's decisions do not involve "generally applicable performance standards or criteria or adequate procedural safeguards to protect future parties" but instead "pertains only to the immediate parties claiming an interest" the decision is deemed quasi-judicial. *City and County of Denver v. Eggert*, 647 P.2d 216, 222-23 (Colo. 1982).

In contrast, legislative action involves public policy matters that are permanent or general in nature, and generally prospective in nature. Legislative action is not normally restricted to identifiable persons or groups. *Cherry Hills Village*, 757 P.2d at 625; *Native American Rights Fund*, 97 P.3d at 287.

Here, according to the facts pled in the Amended Complaint, the current owner of Kanemoto Estates is Lefthand Ranch, LLC. Amended Complaint, ¶ 22. On August 15, 2023, following a public hearing, the County Commissioners voted 2-1 to terminate the Conservation Easement on Outlot A to facilitate a proposed housing development on Kanemoto Estates. Amended Complaint, ¶ 20. Although neither statute nor the County's regulations required notice

and hearing (see Motion, Exhibit B, ¶ 8), the County identified specific parties with an interest in the decision by mailing nearby property owners notice of each of three County meetings related to the issue. Gee Declaration, ¶ 16, Exhibit B. The County chose to notify the public in the interest of transparency and to receive and consider public feedback. *Id.* at ¶ 9. At the August 15 public meeting, the County Commissioners applied pre-existing policy considerations, as outlined in the Boulder County Comprehensive Plan and the Code, to facts outlined in the Planning and Permitting Department memorandum. Motion, Exhibit 1, pp. 4-6.

Based on the facts alleged in the Amended Complaint, which must be accepted as true with reasonable inferences drawn in Plaintiffs' favor for purposes of deciding the Motion to Dismiss, and the Exhibits attached to the briefing, the Court concludes that the challenged action was quasi-judicial in nature. To be sure, there is no information to suggest that either state law or local regulation required the County to provide notice or a public hearing. The original *Snyder* formulation has been modified and refined by more recent authorities, however. These authorities provide that the absence of a requirement to provide a notice and hearing does not defeat a claim that the action is quasi-judicial. *See Cherry Hills Village*, 757 P.2d at 625-26.

Here, to its credit, Boulder County opted to provide notice to certain nearby property owners and to hold public hearings. The process actually employed by the County is consistent with quasi-judicial actions. In conditionally terminating the Conservation Easement on August 15, 2023, the County determined the rights of a specific party – Lefthand Ranch, LLC, the landowner of Kanemoto Estates. Boulder County applied pre-existing policy considerations, as outlined in the Comprehensive Plan and Code, to facts outlined in the Staff memorandum. The challenged action therefore has the hallmarks of quasi-judicial action. In contrast, the action was not general and prospective in nature, which would indicate a legislative action.

As the subject action is quasi-judicial in nature, Plaintiffs have shown that they have a legal interest in protecting against their injury that arises from a Rule (C.R.C.P. 106(a)(4)).

Further, the Court notes that caselaw provides that property owners engaged in disputes involving neighboring zoning and other land use decisions have a legally protected interest to protect their properties under common law. *See City of Thornton*, 629 P.2d at 609 (a property owner has a legally protected interest in insulating its property from adverse effects caused the legally deficient zoning of adjacent property); *Wells v. Lodge Properties, Inc.*, 976 P.2d 321, 324 (Colo. App. 1998) (same); *Condiotti v. Board of County Commissioners*, 983 P.2d 184, 187 (Colo. App. 1999) (a property owner has a legally protected interest in in protecting property from adverse effects caused by adoption of an amendment to land use system); *Rangeview*, ¶ 12 (adjoining property owners had standing to challenge a site plan for proposed development that would result in a decrease in home values).

d. Fourth Claim for Relief (Conflict of Interest)

Plaintiffs' final claim for relief alleges a conflict of interest based on the fact that the landowner was represented by Sean Stewart, the son of Ron Stewart, a former County Commissioner and former Director of the Parks and Open Space Department for 17 years. Amended Complaint, ¶¶ 52-71. This claim is premised on the Boulder County Personnel & Policy Manual. *Id.* at ¶ 65.

While Boulder County employees may have a legally protected interest arising from the Personnel & Policy Manual ("Manual"), the Court concludes that Plaintiffs do not have a legally protected interest arising from the Manual. Courts have found that policies contained in an employee manual may serve as a basis for claims for breach of implied contract or promissory estoppel asserted by employees. *Cummings v. Arapahoe County Sheriff's Department*, 2018 COA

136, ¶ 21. Here, however, Plaintiffs are not employees of the County. In general, a party must have privity of contract to sue for breach of that contract. *Bewley v. Semler*, 2018 CO 79, ¶ 16.

Plaintiffs therefore do not have a legally protected interest arising from the Manual, and they have not identified any other legal basis that would support the conflict-of-interest claim. They have therefore not satisfied the second prong of the *Wimberly* standing test as to their fourth claim for relief.

B. C.R.C.P. 12(b)(5)

1. First Claim for Relief (APA Violation)

Through their first claim for relief, Plaintiffs seek judicial relief under C.R.S. § 24-4-106 of the State Administrative Procedures Act (APA). Section 24-4-106 allows for review of agency action which is arbitrary, capricious, or otherwise contrary to law. C.R.S. § 24-4-106(7). The issue in dispute here is whether Boulder County is an "agency" for purposes of the APA.

The Colorado Court of Appeals has determined that a board of county commissioners is not an agency as defined in C.R.S. § 24-4-102(3). *Cottonwood Farms v. Board of County Commissioners*, 725 P.2d 57, 59 (Colo. App. 1986). Moreover, C.R.S. § 24-4-107 provides that the APA "applies to every agency of the state having statewide territorial jurisdiction except those in the legislative or judicial branches, courts-martial, military commissions, and arbitration and mediation functions." Boulder County does not have statewide territorial jurisdiction. The APA therefore does not apply to it.

In Response, Plaintiffs primarily rely on *Board of County Commissioners v. Love*, 470 P.2d 861 (1970), *superseded by statute* as stated in *Board of County Commissioners v. Romer*, 931 P.2d 504 (Colo. App. 1996) for the proposition that the County is an agency subject to the APA. Both *Love* and most of the cases cited by Plaintiffs predate the current version of the APA. Indeed, as

pointed out by the County, the Colorado Court of Appeals has considered and rejected the same argument advanced by Plaintiffs. In *Moss v. Board of County Commissioners*, 2015 COA 35, ¶¶ 51-52, the Court of Appeals noted that in *Love*, the Colorado Supreme Court held that the board of county commissioners did not have standing as a plaintiff and did not consider whether the board was subject to suit under the APA. In deciding that issue, *Moss* held that it "is undisputed that the [board of county commissioners] does not have statewide territorial jurisdiction, and plaintiffs have not cited any statute explicitly stating that APA requirements apply to the County Board." *Id.* at ¶¶ 47, 52.

Thus, in interpreting the current version of the APA, the Colorado Court of Appeals has held on multiple occasions that a board of county commissioners is not a state agency for purposes of being sued under the APA. Further, boards of county commissioners do not have statewide jurisdiction. Therefore, the Court concludes that the APA is not applicable to Boulder County's action, and Plaintiffs' first claim for relief fails to state a claim upon which relief can be granted.

2. Second Claim for Relief (Declaratory Relief – C.R.C.P. 57)

In the Response, Plaintiffs acknowledge that should the Court decide that Plaintiffs possess standing to maintain their claims under Rule 106(a)(4), Plaintiffs do not oppose the Court's dismissal of their declaratory judgment claim under Rule 12(b)(5). The Court has determined that Plaintiffs have standing to maintain their Rule 106(a)(4) claim. Therefore, the Court dismisses Plaintiff's second claim for relief (declaratory judgment) under C.R.C.P. 12(b)(5).

IV. CONCLUSION

For the foregoing reasons, Defendant's Rule 12(b)(1) Motion is GRANTED IN PART and DENIED IN PART. Defendant's Rule 12(b)(5) Motion is GRANTED.

In particular, Defendant's Motion is GRANTED as to Plaintiff's First, Second, and Fourth Claims as set forth below:

(1) Plaintiffs' First Claim for Relief (APA) is dismissed under both C.R.C.P. 12(b)(1) and 12(b)(5);

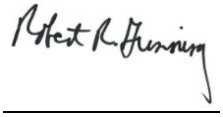
(2) Plaintiffs' Second Claim for Relief (Declaratory Judgment) is dismissed based the ruling as to the Third Claim for Relief and at Plaintiffs' request; and

(3) Plaintiffs' Fourth Claim for Relief (Conflict of Interest) is dismissed under C.R.C.P. 12(b)(1).

Defendant's Motion is DENIED as to Plaintiffs' Third Claim for Relief (C.R.C.P. 106(a)(4) Review).

SO ORDERED this 26th day of February, 2024.

BY THE COURT



Robert R. Gunning
District Court Judge