

judgment for lack of standing and the OML claim for failure to state a claim.

Summary of the Parties' Arguments

Motion

There is no constitutional, statutory, regulatory, or other legal basis for Plaintiffs to seek a declaratory judgment. Therefore, Plaintiffs' declaratory judgment and C.R.C.P. 106(a)(4) claims must be dismissed for lack of standing. As well, Plaintiffs' OML claim and C.R.C.P. 106(a)(4) claims must be dismissed for failure to state a claim under C.R.C.P. 12(b)(5).

A court does not have jurisdiction over a claim unless the plaintiff has standing to bring it. When evaluating a subject matter jurisdiction challenge under C.R.C.P. 12(b)(1), the court does not accept the complaint allegations as true and view them in the non-movant's favor, as required under C.R.C.P. 12(b)(5). Instead, plaintiffs bear the burden of proving jurisdiction.

In order to establish standing, Plaintiffs must demonstrate that they suffered an injury in fact and the injury was to a legally protected interest. If Plaintiffs cannot establish both, the case should be dismissed for lack of standing. Whether injuries are to a legally protected interest is a question of whether a plaintiff has a private claim for relief or cause of action under the constitution, common law, statute, rule, or regulation. Where there is no express statutory private right of action, courts look to the statutory language to determine whether an implied right exists.

The first declaratory judgment claim must be dismissed with prejudice for lack of standing. The Declaratory Judgment Act does not itself create standing. To pursue this claim, a plaintiff must demonstrate an independent source of authority to establish standing. Here, the Operating Agreement ("OA") between Broomfield and Extraction does not create rights in third parties such as Plaintiffs. No private right of action exists under the Broomfield Charter, the Broomfield Municipal Code, or under the common law.

The second declaratory judgment claim must also be dismissed with prejudice for lack of standing. This claim fails for the same reasons the first declaratory judgment claim fails. As well, Plaintiffs lack standing to assert an abuse of discretion claim under C.R.C.P. 57 as they attempt to do in this claim.

The C.R.C.P. 106(a)(4) claim must be dismissed with prejudice for lack of standing, for the same reasons Plaintiffs lack standing for their declaratory judgment claims. C.R.C.P. 106(a)(4) also does not confer standing but rather establishes a procedure for seeking review of matters when standing otherwise independently exists.

The OML claim fails to state a claim for relief and must be dismissed with prejudice. First, this claim consists almost entirely of legal conclusions and is unsupported by facts. This claim is premised on C.R.S. § 24-6-402(1)(a)(I), which excludes "persons on the administrative staff of the local public body" from its definition of "local public body." Plaintiffs explicitly seek to overturn the City Manager's administrative approval of the CDP and Plaintiffs admit the City Manager is on Broomfield's administrative staff. Therefore Plaintiffs cannot bring a valid claim under C.R.S. § 24-6-402.

The C.R.C.P. 106(a)(4) claim must be dismissed with prejudice because it fails to state a claim for relief. C.R.C.P. 106(a)(4) applies to judicial or quasi-judicial functions. The City Manager's actions here are not quasi-judicial and are therefore not subject to C.R.C.P. 106(a)(4) review.

Response

Plaintiffs meet standing requirements for all of their claims. In determining whether a plaintiff has suffered harm to a legally protected interest, Colorado courts look to whether the interest sought to be protected is arguably within the zone of interests to be protected. The test for standing in Colorado has historically been relatively easy to satisfy.

Plaintiffs have a legally protected interest under the OA because they are direct intended beneficiaries of the OA. As well, Broomfield cannot bargain away its citizens' rights to enforce police power duties and any attempt to do so is unenforceable. Therefore, the 'no third party beneficiaries' provision in the OA cannot be applied to Plaintiffs.

Plaintiffs also have a private right of action to enforce the Charter because litigants may bring declaratory judgment actions challenging municipal ordinances as violating a city's charter. Plaintiffs' right to enforce the Charter is also based on the members of Plaintiff-organizations constitutional right of initiative. As well, no section of the Charter impairs Plaintiffs' vested rights under the OA.

Plaintiffs have a private right of action to challenge violations of the Broomfield Municipal Code ("Code"). The Code is intended to protect public health and safety and must therefore include the right of the public to enforce those protections.

The City Manager's approval of the CDP is not beyond review simply because it is administrative action.

Plaintiffs' allegation in its third claim for relief that the City Manager's approval of the CDP was arbitrary and capricious is clearly based on a substantive due process theory, even if it was not expressly raised as such. The court must look to the substance, rather than the form, of Plaintiffs' complaint.

Plaintiffs' OML claim and C.R.C.P. 106(a)(4) claim are both well pled and state claims for relief under C.R.C.P. 12(b)(5). Plaintiffs have alleged sufficient facts that, if taken as true, raise plausible grounds for finding a violation of the open meetings laws. The City Manager is not excluded from the purview of the open meetings laws because he is not mere administrative staff. Plaintiffs' C.R.C.P. 106(a)(4) claim sufficiently states a claim for relief because the CDP approval is not administrative action.

Reply

Plaintiffs misstate the inquiry the court must undertake. The question as to Plaintiffs' harm is not whether their interest is arguably within a zone of protection but rather whether the interest is entitled to legal protection.

Colorado law does not recognize general interest standing and indeed Colorado courts have explicitly declined to adopt the doctrine. Accepting Plaintiffs' theory of standing would directly contradict Colorado's standing jurisprudence. Virtually every local law is enacted to protect the public health, safety, and welfare; permitting Plaintiffs standing based on that would allow any citizen to challenge any governmental action.

The OA unambiguously does not create a third-party right of enforcement. A third-party beneficiary cannot be found in the face of an express intent to preclude that status. The OA also does not contract away Broomfield's police power. There is also no legally protected interest under the Charter or the Code.

Plaintiffs do not identify any constitution, statute, rule, or regulation creating a private right of action to assert a substantive due process claim. As well, Plaintiffs may not re-cast their claims in their Response here.

The Response further demonstrates that Plaintiffs' OML claim relies on speculation and guesswork. Plaintiffs have not alleged sufficient facts for their open meetings claim. Finally, the City Manager's decision is not quasi-judicial and Plaintiffs cannot state a claim for relief under C.R.C.P. 106(a)(4).

Issue

Whether Plaintiffs have standing for their declaratory judgment claims; and, standing exists, whether their C.R.C.P. 106(a)(4) claim and OML claim are sufficiently pled under C.R.C.P. 12(b)(5).

Standard of Review

A C.R.C.P. 12(b)(1) motion requests a court to dismiss a lawsuit for lack of subject matter jurisdiction. C.R.C.P. 12(b)(1) places the burden of proving jurisdiction upon the plaintiff and authorizes the trial court to make appropriate factual findings. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). C.R.C.P. 12(b)(1) permits the court "to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Trinity Broadcasting of Denver, Inc. v. Westminster*, 848 P.2d 916, 925 (Colo. 1993). Plaintiffs in this suit bear the burden of establishing jurisdiction. *Id.* at 925. The court is required to hold an evidentiary hearing in the event of factual disputes, but if there is no dispute as to the operative facts, the issue is one of law, and the court may rule without a hearing. *Padilla v. School Dist. No. 1*, 25 P.3d 1176, 1180 (Colo. 2001).

C.R.C.P. 12(b)(5) motions test the formal sufficiency of the complaint. *Barton v. Law Officers of John W. McKendree*, 126 P.3d 313, 314 (Colo. App. 2005). All averments of material fact in the complaint must be accepted as true and all allegations in the complaint must be viewed in the light most favorable to the plaintiff. *Walsenburg Sand & Gravel Co., Inc. v. City Council*, 160 P.3d 297 (Colo. App. 2007). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Warne v. Hall*, 373 P.3d 588 (Colo. 2016) (citing *Ashcroft v. Iqbal*,

556 U.S. 662, 679 (2009)).

Principles of Law

C.R.C.P. 12(b)(1), (5)

(b) How Presented. Every defense, in law or in fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by separate motion filed on or before the date the answer or reply to a pleading under C.R.C.P. 12(a) is due:

(1) lack of jurisdiction over the subject matter;

...

(5) failure to state a claim upon which relief can be granted

C.R.C.P. 57

(a) Power to Declare Rights, etc.; Force of Declaration. District and superior courts within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceedings shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

(b) Who May Obtain Declaration of Rights. 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.

...

(k) Rule is Remedial; Purpose. This Rule is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered.

C.R.C.P. 106(a)(4)

(a) Habeas Corpus, Mandamus, Quo Warranto, Certiorari, Prohibition, Scire Facias and Other Remedial Writs in the District Court. Special forms of pleadings and writs in habeas corpus, mandamus, quo warranto, certiorari, prohibition, scire facias, and proceedings for the issuance of other remedial writs, as heretofore known, are hereby abolished in the district court. Any relief provided hereunder shall not be available in the superior or county courts. 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:

...

(4) Where 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:

(I) Review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer.

C.R.S. 31-2-217

The adoption of any charter, charter amendment, or repeal thereof shall not be construed to destroy any property right, contract right, or right of action of any nature or kind, civil or criminal, vested in or against the municipality under and by virtue of any provision of law theretofore existing or otherwise accruing to the municipality; but all such rights shall vest in and inure to the municipality or to any persons asserting any such claims against the municipality as fully and as completely as though the charter, amendment, or repeal thereof had not been adopted. Such adoption shall never be construed to affect any such right existing between the municipality and any person.

Analysis

Whether a hearing must be held

Although the parties have factual disputes, neither party asserts that a factual dispute is essential to its argument, nor does either party request a hearing on this Motion. The court therefore finds that no hearing on the C.R.C.P. 12(b)(1) section of the Motion is necessary.

General standing principles

Broomfield defendants argue that in order to establish standing, Plaintiffs must point to a private claim for relief or cause of action under the constitution, common law, statute, rule, or regulation. Plaintiffs counter that the relevant inquiry is whether the interest a plaintiff seeks to protect is arguably within the zone of interests to be protected. The court agrees with Broomfield defendants. The test Plaintiffs wish to adopt has been actively rejected in Colorado. *See Cloverleaf Kennel Club, Inc. v. Colo. Racing Comm'n*, 620 P.2d 1051, 1055 (Colo. 1980). The court therefore agrees with Broomfield defendants that Plaintiffs must point to a private claim for relief or cause of action under the constitution, common law, statute, rule, or regulation to establish standing.

Legally protected interest under C.R.C.P. 57 or C.R.S. § 13-51-101

The parties agree that in order to establish standing, Plaintiffs must show that they suffered an injury in fact and that the injury was to a legally protected interest. *Wibby v. Boulder County Bd. of Com'rs*, 409 P.3d 516 (Colo. App. 2016). The parties also agree that their dispute centers on the second prong.

Broomfield defendants argue that C.R.C.P. 57 and C.R.S. § 13-51-101, both governing declaratory actions, do not themselves create independent grounds for standing; therefore, to pursue these claims, Plaintiffs must demonstrate some alternate source of standing. Plaintiffs counter that, per *Boulder v. Public Service*, a plaintiff may bring an action under C.R.C.P. 57 to challenge a municipal ordinance. The court agrees with Broomfield defendants.

A series of Colorado cases interpreting C.R.C.P. 57 are instructive. Plaintiffs rely primarily on *Boulder v. Public Service*. *Boulder v. Public Service Co.*, 420 P.3d 289 (Colo. 2018). In *Boulder*, a utility supplier sought a declaratory judgment against the city of Boulder finding that a certain ordinance violated a section of Boulder's City Charter. *Id.* at 291. Although the court did not undergo a standing analysis, it did note—as Plaintiffs assert—that “a litigant may properly bring a declaratory judgment action challenging a municipal ordinance as violative

of the city's charter." *Id.* at 295.

Similarly, in *Toncray v. Dolan*, a group of taxpayers sought a declaratory judgment finding that a regulation from the Colorado Department of Revenue was inconsistent with another statute. *Toncray v. Dolan*, 593 P.2d 956, 956 (Colo. 1979). The court did not address standing, but did address whether such a claim was appropriate for a declaratory judgment. *Id.* at 957. The court held that one whose rights are affected by a statute may have its construction or validity determined by declaratory judgment. *Id.* The court further found that the primary purpose of declaratory judgment procedure is to provide a speedy, inexpensive, and readily accessible means of determining actual controversies which depend on the validity or interpretation of some written instrument or law. *Id.*

Broomfield defendants, in turn, rely on *Romer v. Fountain*. *Romer v. Fountain Sanitation Dist.*, 898 P.2d 37 (Colo. 1995). There, a special district sought a declaration that certain revenue limitations established by the Colorado Constitution did not apply to its profits. *Id.* at 39. The court stated that C.R.C.P. 57 and the Declaratory Judgment Act did not expand any court's jurisdiction, but rather provided another remedy for courts to dispense when they already possess jurisdiction. *Id.* at 40-41. Therefore, plaintiffs were obligated to demonstrate an independent source of authority to establish standing. *Id.* at 41. The court reiterated that "the General Assembly did not expand the jurisdiction of the courts when it adopted the Uniform Declaratory Judgments Law" five years later in *Denver v. United Air Lines*. *Denver v. United Air Lines, Inc.*, 8 P.3d 1206, 1216 (Colo. 2000). The Court of Appeals similarly rejected the notion that the Declaratory Judgment Act conveys standing in *Dolores Huerto Preparatory High v. Colorado*. *Dolores Huerto Preparatory High v. Colo. State Bd. of Educ.*, 215 P.3d 1229, 1233 (Colo. App. 2009).

Ultimately *Romer*, *United Air Lines*, and *Dolores* are more persuasive than *Boulder* and *Toncray*. Although Plaintiffs are technically correct that the plain language of *Boulder* indicates C.R.C.P. 57 independently conveys standing, *Boulder* contained no standing discussion and it is not entirely clear whether the court intended its statement to bear on standing at all, or rather simply to state an available remedy. Similarly, although *Toncray* on its face labels this action appropriate, the case contains no broader standing discussion. As well, it is highly unlikely that the court would have let *Romer* effectively overrule *Toncray*, without stating as much. It is more likely that *Toncray* and *Boulder* are simply cases that were not intended to address standing. Therefore, the court finds Plaintiffs here must demonstrate an alternate source of standing in order to bring their declaratory judgment claims.

Legally protected interest under the OA

Broomfield Defendants argue that Plaintiffs cannot assert that the CDP violates the OA (as they do in part of their first declaratory judgment claim) because Plaintiffs are not parties to or beneficiaries of the OA. Broomfield Defendants further assert that no case voids a no-third-party beneficiary clause in a public contract on public policy grounds and that Broomfield delegated, rather than bargained away, its police power in the OA. Plaintiffs counter that the OA is intended to protect public health and safety and Plaintiffs' members are therefore direct intended beneficiaries. Plaintiffs also argue that even if the OA precludes the public from enforcing its provisions, that is void as against public policy because Broomfield may not bargain away the

people's benefits from the police powers that the people have conveyed to the city. Broomfield Defendants are correct.

A person who is not a party to a contract can bring an action under the contract if the parties to the agreement intended to benefit the non-party and the benefit is a direct and not incidental benefit of the contract. *Parrish Chiropractic Ctrs, P.C. v. Progressive Cas. Ins. Co.*, 874 P.2d 1049, 1056 (Colo. 1994). The intent must be apparent from the terms of the agreement, the surrounding circumstances, or both. *Id.* As well, the primary goal of contract interpretation is to determine and give effect to the intent of the parties. *Ad Two, Inc. v. Denver*, 9 P.3d 373, 376 (Colo. 2000).

Plaintiffs are correct that a sovereign's police power cannot be bargained away. *Wheat Ridge Urban Renewal Authority v. Cornerstone Group XXII, L.L.C.*, 176 P.3d 727, 742 (Colo. 2007). However, this doctrine rests on the fundamental inability of sovereign governments to contract away essential attributes of their sovereignty. *Id.* at 743. It does not limit the ability of governments to otherwise enter into contracts involving the exercise of their sovereign powers. *Id.* Denying states the power to bind themselves as a condition of commercially beneficial transactions would be in fact counterproductive. *Id.* at 744.

Here, the OA clearly states that Broomfield may enforce violations of the OA. *See* Complaint, Ex. 1, pg. 11, ¶ 27. Broomfield therefore did not give up any police power or impermissibly contract it away. Notably, Plaintiffs do not identify a specific provision in the OA that they believe constitutes an impermissible contract. Therefore Broomfield Defendants are correct that Broomfield did not impermissibly contract away its police power.

The plain language of the OA—which the parties do not dispute at this stage—states: “Except for the rights of enforcement by the COGCC with respect to the BMPs, this Agreement is not intended to, and does not create, any right, benefit, responsibility or obligation that may be enforced by any non-party. Additionally, nothing in the Agreement shall entitle any third party to any claims, rights or remedies of any kind.” It is therefore clear that Extraction and Broomfield did not intend to create any enforceable benefit. Plaintiffs are correct that, having been entered into for protection of public health and safety, the OA confers a benefit on a non-party. But it is clear from the plain text of the OA that no party intended to make claiming a violation of the OA a viable third-party claim. Plaintiffs also do not offer a compelling reason as to why the plain language of a contract between two sophisticated parties should be ignored. Finally, Broomfield Defendants' assertion that virtually all contracts Broomfield enters into are concerned with residents' health and safety is persuasive; finding an action here could open all contracts Broomfield enters into to litigation. Therefore Plaintiffs do not have standing for the assertion in Paragraph 131 of the Complaint.

Private right of action to enforce the Charter

Broomfield defendants argue that Plaintiffs cannot assert that the CDP approval violates the Charter because the Charter does not confer a general private civil remedy so that Broomfield city residents can challenge an administrative decision made by the City Manager. Broomfield defendants also argue that implying such a right would be inconsistent with the broad grants of authority given to the City Manager via the Charter. In addition to the generalized standing

argument addressed above, Plaintiffs state that their right to enforce the Charter is based on their members' constitutional right of initiative. However, Plaintiffs do draw a connection between their right to legislate by local initiative and their standing in the present action. Instead, the Response states only that Plaintiffs have that right. This argument is unpersuasive and the court therefore agrees with Broomfield defendants.

Private right of action under the Code

Broomfield defendants next argue that there is no express procedure under the Broomfield Municipal Code for Plaintiffs to challenge administrative approval of the CDP. The Code provides only applicants the right to appeal a denial or the conditions of approval and therefore leaves no room to imply a private right of action in favor of Broomfield's constituents. Plaintiffs counter that the Code is enacted for their health and safety and therefore the public may enforce it. Broomfield Defendants are correct.

As Broomfield Defendants point out in their Reply, virtually every provision of the Code is enacted for the health and safety of Broomfield residents. To read a private right of action into that language would effectively create hundreds of private rights of action Broomfield did not intend and effectively contradictions those provisions of the Code that *do* create private rights of action.

Due process argument

Plaintiffs argue that their second declaratory judgment claim should be viewed as a substantive due process claim. This argument is utterly unsupported by anything in the Complaint and Plaintiffs may not rewrite their Complaint via this Response. This argument is therefore unpersuasive.

Therefore, Plaintiffs do not have standing to bring their claims for declaratory judgment (Claims One and Three in the Complaint).

C.R.C.P. 106(a)(4) Claim

Broomfield defendants argue that, much like C.R.C.P. 57, C.R.C.P. 106(a)(4) does not independently confer standing and, because Plaintiffs do not demonstrate any alternate source of standing for this claim, it must be dismissed for lack of standing. In response, Plaintiffs rely on the same arguments addressed above. Therefore the court agrees with Broomfield defendants and this claim (Claim Four in the Complaint) must also be dismissed for lack of standing.

Open Meetings Law Claim

Finally, Broomfield defendants argue that Plaintiffs have not sufficiently pled the OML claim under C.R.C.P. 12(b)(5) because Plaintiffs have not alleged sufficient facts in its support and because it is premised on an inapplicable legal remedy that has no bearing here. Plaintiffs counter that in Paragraphs 63, 68, 69, and 145 of the Complaint, they allege sufficient facts. Plaintiffs further counter that C.R.S. § 24-6-402(9)(a) permits them to bring this claim. The court agrees with Broomfield defendants.

Paragraphs 63, 68, 69, and 145 of the Complaint are primarily unsupported legal or factual conclusions. In Paragraph 68, Plaintiffs state that "it is apparent" secret executive

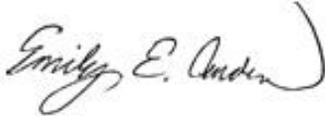
sessions occurred, but offer no meaningful support for that assertion. Paragraph 69, despite Plaintiffs' reliance on it, does not in any way support its OML claim. Paragraph 145 simply concludes that improper secret meetings occurred. Paragraph 63 states that "there were reports" of secret meetings, but nowhere in the Complaint is it clear where these reports occurred, when they occurred, or who made them. Even taken as true, such a vague statement does not create plausible grounds to support a claim for relief. Therefore Plaintiffs' OML claim is insufficiently pled.

Conclusion

For the reasons stated above, the Broomfield defendants' Motion to Dismiss Complaint for Declaratory Judgment is **GRANTED**. All of Plaintiffs' claims are dismissed. Plaintiffs' First, Third, and Fourth Claims for Relief are dismissed for lack of standing. Plaintiffs' Second Claim for Relief is dismissed for failure to state a claim.

SO ORDERED THIS 7th DAY OF MAY, 2019.

BY THE COURT:

A handwritten signature in cursive script, reading "Emily E. Anderson". The signature is written in black ink and is positioned to the left of the judge's title.

DISTRICT COURT JUDGE