

DISTRICT COURT, ELBERT COUNTY, STATE OF COLORADO  751 Ute Avenue Kiowa, CO 80117	DATE FILED December 17, 2024 8:34 AM CASE NUMBER: 2024CV30089
<b>Plaintiff(s): JILL DUVALL, JIM DUVALL, CHRISTOPHER N. HATTON, NIC MEYER, and ROBERT ROWLAND,</b>  v.  <b>Defendant(s): BOARD OF COUNTY COMMISSIONERS for ELBERT COUNTY, COLORADO; CHRIS RICHARDSON in his official capacity as a member thereof; DALLAS SCHROEDER in his official capacity as a member thereof; and GRANT THAYER in his official capacity as a member thereof</b>	<b>▲ COURT USE ONLY ▲</b>  Case Number: 24CV30089 Division: 1
<b>ORDER RE: DEFENDANTS' MOTION TO DISMISS</b>	

THIS MATTER comes before the Court on Defendants' Chris Richardson, Dallas Schroeder, and Grant Thayer ("Defendants'") Motion to Dismiss ("Motion"). Having reviewed the pleadings along with the file and being otherwise fully advised, the Court FINDS and ORDERS the following:

**I. FACTUAL AND PROCEDURAL BACKGROUND**

The following facts are drawn from Plaintiff's Complaint and Defendants' Motion; and are accepted as true for purposes of Defendants' Motion to Dismiss. Plaintiffs are citizens of Elbert County. Compl. at p. 3, ¶¶ 1-5. Defendants Richardson, Schroeder, and Thayer are members of the Board of County Commissioners ("BOCC") of Elbert County, with Richardson serving as the Chair. Id. at ¶¶ 7-9. Plaintiffs assert Defendants met and discussed employment contracts for the County Attorney and County Administrator outside of a noticed public meeting. Id. at p. 4, ¶ 12. During that discussion, Defendants agreed to enter into those contracts and authorized Richardson to sign the contracts. Id. Unnamed members of the public voiced concerns over the secret decisions regarding the contracts at a Town Hall meeting on July 17, 2024. Id. at ¶ 13. The agenda for the next public BOCC meeting on July 24, 2024 did not include discussion of the employment

contracts. Id. When the meeting began, one of the commissioners moved to amend the agenda to add a discussion topic regarding the contract decision. Id.

During the July 24 meeting, BOCC discussed the employment contracts. Id. at ¶ 14. The County Attorney, the subject of one of the contracts, stated that he believed the meeting regarding the contracts did not violate the Colorado Open Meetings Law (“COML”) because the employment decisions were exempt from COML’s notice requirement. Id. The BOCC then discussed the decisions they previously made and voted to ratify the decisions regarding the employment contracts. Id. at ¶ 15. Plaintiffs allege the value of the salaries included in the employment contracts exceeds the amount authorized for those positions. Id. at ¶ 16.

Plaintiffs filed a Complaint for Declaratory and Injunctive Relief on September 19, 2024, asserting the following claims:

- (1) For Declaratory Relief Recognizing Past Violations of the COML against Defendant BOCC;
- (2) For Declaratory Relief Recognizing Past Violations of the COML against Defendant BOCC; and
- (3) For Declaratory and Injunctive Relief for Violations of C.R.S. §30-25-103 against Defendants Richardson, Schroeder, and Thayer.

Defendant BOCC filed a Unified Answer to the Complaint on October 18, 2024. Simultaneously, Defendants filed the instant Motion to Dismiss Plaintiff’s Third Claim for Relief based on a lack of standing under C.R.C.P. Rule 12(b)(1). Plaintiffs filed a Response to the Motion to Dismiss on November 5, 2024 and Defendants filed a Reply on November 12, 2024.

## **II. STANDARD OF REVIEW**

Pursuant to Colorado Rule of Civil Procedure 12(b): “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;

- (2) Lack of jurisdiction over the person;
- (3) Insufficiency of process;
- (4) Insufficiency of service of process;
- (5) Failure to state a claim upon which relief can be granted; or
- (6) Failure to join a party under C.R.C.P. 19.

“[I]n considering a motion to dismiss for lack of subject matter jurisdiction pursuant to C.R.C.P. 12(b)(1), a district court examines the substance of the claim based on the facts alleged and the relief requested.” *Barry v. Bally Gaming, Inc.*, 320 P.3d 387, 390 (Colo. App. 2013). “A court does not have subject matter jurisdiction if a plaintiff lacks standing to invoke its judicial power.” *Pueblo Sch. Dist. No. 60 v. Colo. High Sch. Activities Ass’n.*, 30 P.3d 752, 753 (Colo. App. 2000). “In determining whether a plaintiff has asserted a sufficient injury to satisfy the test of standing, the court must accept the averments of the complaint as true and may consider other evidence supportive of standing.” *Colorado Gen. Assembly v. Lamm*, 700 P.2d 508, 516 (Colo. 1985).

To have standing, “the plaintiff must have suffered an injury-in-fact, and second, this harm must have been to a legally protected interest.” *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004), citing the test set forth in *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (1977). “Injury in fact exists if ‘the action complained of has caused or has threatened to cause injury.’” *Kreft*, 170 P.3d at 857 (quoting *Lamm*, 700 P.2d at 516).

### III. ANALYSIS

Defendants move to dismiss only the third claim for relief, arguing that Plaintiffs lack standing to bring a claim because they have not suffered an injury in fact to a legally protected interest. Motion at pp. 3-7. Further, Defendants assert Plaintiffs do not have standing because the statute regarding budget expenditures, C.R.S. § 30-25-103, shifts the budgetary liability to the commissioners, not taxpayers, in the event appropriations do not cover the cost. Motion at p. 4. Plaintiffs do not identify any injury in the Complaint, but assert in the first and second claims for relief that their injury-in-fact and standing is statutorily authorized by C.R.S. § 26-6-402(9)(a). Compl. at ¶¶ 26, 32. In the Response, Plaintiffs argue their standing to bring the third claim is based on their status as taxpayers. Resp. at pp. 6-10.

Although Colorado law has traditionally permitted a broad class of plaintiffs to have standing through their status as taxpayers, the courts have also applied the injury-in-fact requirement to “provide conceptual limits to the doctrine when plaintiffs challenge an allegedly unlawful government action” because of the interest in maintaining the separation of powers. *Hickenlooper v. Freedom from Religion Found., Inc.*, 338 P.3d 1002, 1006-07 (Colo. 2014). Setting a requirement for the constitutional basis for standing ensures that judicial “determination may not be had at the suit of any and all members of the public.” *Id.*, citing *Wimberly*, 194 Colo. at 167, 570 P.2d at 538 (quoting *Ex-Cell-O Corp. v. City of Chicago*, 115 F.2d 627, 629 (7th Cir. 1940)); see also *Ainscough*, 90 P.3d at 855–56; *Conrad v. City & Cnty. of Denver*, 656 P.2d 662, 668 (Colo. 1982). Plaintiffs argue that Colorado law bestows standing upon taxpayers, but they do not overcome the constitutional requirement of explaining an injury-in-fact to meet the first prong of the *Wimberly* test.

Plaintiffs rely on language like “Colorado case law requires us to hold that when a plaintiff-taxpayer alleges that a government action violates a specific constitutional provision such as Amendment 1, such an averment satisfies the two-step standing analysis,” found in *Barber v. Ritter*, 196 P.3d 238, 247 (Colo. 2008) and “taxpayers have standing to seek to enjoin an unlawful expenditure of public funds,” in *Nicholl v. E-470 Pub. Highway Auth.*, 896 P. 2d 859, 866 (Colo. 1995). However, Plaintiff fails to analyze their claim against those in their long list of citations, missing the distinction that the successful cases centered on alleged improper expenditures of taxpayer dollars. The statute Plaintiffs are explicitly concerned about, C.R.S. § 30-25-103, does not contemplate a misuse of taxpayer funds – nor does the County – in the event Defendant BOCC did not appropriate funds for the contracts about which Plaintiff complains. Section 30-25-103 shifts the financial burden to the commissioners themselves, not to the taxpayers. Plaintiffs do not explain how the Board’s failure to appropriate funds for employee contracts triggers the unlawful use of taxpayer dollars to remedy the shortfall.

To satisfy the injury-in-fact requirement, the plaintiff must demonstrate a *clear nexus* between his status as a taxpayer and the challenged government action.” *Hickenlooper*, 338 P.3d at 1008; citing *Barber*, 196 P.3d at 246 (explaining that an injury that is “overly indirect and incidental” to the challenged government action will not convey taxpayer standing (internal quotation marks

omitted)) *Emphasis added*. On point with *Hickenlooper*, Plaintiffs allege they have standing based on their status as taxpayers in the County but “do not assert any injury based on an unlawful expenditure of their taxpayer money, nor do they allege their tax dollars are being used in an unconstitutional manner.” *Id.*

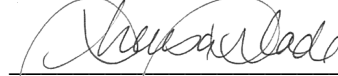
Likewise, Plaintiffs contend their legally protected interest is “their right to ensure that their local government ... complies with non-discretionary restrictions on their power to expend Plaintiffs’ tax dollars.” Resp. at p. 9. Plaintiffs do not argue they have standing on any other basis. Because Plaintiffs have not shown that Defendants’ alleged action is an unlawful expenditure of their tax dollars, Plaintiffs fail to satisfy both prongs of the *Wimberly* test, and the Court finds that Plaintiffs lack standing to bring the third claim for relief against Defendants.

#### IV. CONCLUSION

Based on the foregoing, the Court finds that the Plaintiffs do not have standing, and therefore **GRANTS** Defendants’ Motion to Dismiss Plaintiffs’ Third Claim for Relief.

**SO ORDERED** December 17, 2024.

BY THE COURT:



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Theresa M. Slade  
District Court Judge