DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO Court Address: 1437 Bannock St., Denver, CO 80202	DATE FILED: February 10, 2022 5:11 PM CASE NUMBER: 2021CV31982
Plaintiffs, **SAVE OPEN SPACE DENVER; RAFAEL ESPINOZA; XOCHITL GAYTAN; JASON PAUL MCGLAUGHLIN; ANTHONY W. PIGFORD; LAURIE B. BOGUE; JOAN FITZ-GERALD; ANNE MCGIHON; PHEBE LASSITER; NANCY YOUNG; PENFIELD W. TATE III; JEFF FARD; YADIRA SANCHEZ; WELLINGTON W. WEBB; REGINA JACKSON; and GABRIEL LINDSAY** v. Defendants, **CITY AND COUNTY OF DENVER, a municipal corporation; MICHAEL B. HANCOCK in his official capacity as Mayor of the City and County of Denver; and LAURA ALDRETE in her official capacity as Executive Director of the City and County of Denver Community Planning and Development Department**	▲ COURT USE ONLY ▲ Case Number: 2021 CV 31982 Ctrm: 414

ORDER RE: DEFENDANTS' MOTION TO DISMISS

THIS MATTER is before the court on the Defendants' Motion to Dismiss, filed July 30, 2021 ("Motion"). The court, having reviewed the Motion, Plaintiffs Response thereto, filed September 1, 2021, and Defendants' Reply, filed September 15, 2021, all attachments to each, the court record, the applicable law, and being otherwise fully advised the premises, HEREBY FINDS and ORDERS as follows.

FACTUAL BACKGROUND

The following summary of the facts is taken directly from Plaintiffs' Complaint, the allegations of which the court must regard as true and view them in the light most favorable to the Plaintiffs for purposes of this Motion.

Plaintiffs are taxpaying residents of the City and County of Denver, some of whom have held elective office in the state and city governments, and their informal, non-profit, volunteer citizens group Save Open Space Denver, which is dedicated to preserving open spaces

throughout Denver and assuring that their taxpayer dollars are utilized by the City in a manner consistent with and required by laws and statues of the State of Colorado, including those regarding the protection and enforcement of conservation easements.

Defendants are the City and County of Denver, its mayor, Michael B. Hancock, and the Executive Director of the City's Community Planning and Development Department, Laura Aldrete (collectively "Denver" or "City"). Both Mayor Hancock and Ms. Aldrete are sued in their official capacities.

This case involves the Park Hill Golf Course ("PHGC") located in Northeast Denver. It occupies a parcel of approximately 155 acres, and is encumbered by a Conservation Easement granted to the City on July 11, 2019. A copy of the Conservation Easement is attached to the Complaint as Exhibit 1. On the same day that the City acquired the Conservation Easement from the George W. Clayton Trust, the Trust sold the PHGC itself to a subsidiary of Westside, which now owns the property encumbered by the 2019 Conservation Easement. Plaintiffs allege that Westside purchased the property with the intent to develop the land in a manner inconsistent with the conservation purposes of the 2019 Conservation Easement, Complaint, ¶ 58, which recites that its purpose is to "provide[] for the conservation of the Golf Course Land as open space and for the continued existence and operation of a regulation-length 18-hole daily fee public golf course…[and]… prohibit[] use of the real property which would be detrimental to the continued existence and operation of the Golf Course…" Complaint, Exhibit 1, ¶ 1, at 1.[1]

Plaintiffs allege that, shortly following the transaction of July 11, 2019, and continuing through the present, Defendants and other departments and employees of the City government have engaged in an extensive planning and development process regarding the PHGC Land in conjunction and cooperation with Westside. Plaintiffs allege that the City has conducted numerous meetings, contributed substantial time of at least 70 City employees from several agencies and departments, and entered into third-party contracts in connection with the planning and development process, all of which is funded by taxpayer dollars. Effective November 4, 2019, the City, Westside and others entered into a Settlement Agreement pertaining to related litigation, which recites that "[t]he City acknowledges that Westside intends to pursue a process to explore community support for a future use of [the PHGC land] that will include significant open space but will not be exclusively focused on golf-related activities as required by the [2019 Conservation Easement] and to obtain all approvals necessary for such a change in use." Complaint, Exhibit 2, ¶ 4, at 3. The City also agreed in that Settlement Agreement to "forbear from taking any action to enforce any and all affirmative covenants" under the Conservation Easement pertaining to restoring, operating, occupying, managing or using golf-related functions on the land. *Id.*

Plaintiffs allege that the City's efforts have resulted in, among other things, two different proposed timelines for the development project, Complaint, Exhibits 3 and 4, significant third-party contracting, a Request for Proposal for an assessment of the Park Hill property, and a market analysis study report, including recommendations for the buildout of 950 to 1,900

[1] In analyzing a motion to dismiss, "a court may consider only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings, and matters of which the court may take judicial notice." *Walker v. Van Laningham*, 148 P.3d 391, 397 (Colo. App. 2006). *Yadon v. Lowry*, 126 P.3d 332, 336 (Colo. App. 2005).

ownership residential units, 225 units of rental housing, a grocery store, as well as 30,000 square feet of retail and up to 20,000 square feet of office and commercial space on the property. Complaint, ¶ 77.z, at 16. The Plaintiffs allege that the purpose of all of this activity is an "inevitable administrative outcome" that ignores the requirements of the Conservation Easement and the state statute governing it, and supports significant development on the PHGC land. Complaint, ¶ 70, at 11. Plaintiffs characterize the city-led process as "effectively a real estate development joint venture project between the City and Westside." Complaint, ¶ 72, at 12.

Plaintiffs assert claims in the nature of mandamus pursuant to C.R.C.P. 106(a)(2), and for a declaratory judgment pursuant to C.R.S. §13-51-101 and C.R.C.P. 57. They argue that Defendants have violated, and continue to violate, the Colorado statute governing conservation easements, C.R.S. §38-30.5-101 et seq., insofar as they have expended taxpayer dollars in the extensive planning and development of a mixed use project on the PHGC land which is prohibited by the terms of the Conservation Easement, all without first having sought and obtained, jointly with Westside, a court order terminating, releasing, extinguishing, or abandoning the Conservation Easement. C.R.S. §38-30.5-107.

Defendants' Motion argues that Plaintiffs lack standing to pursue their claims, and that they have failed to state a claim for either mandamus or a declaratory judgment.

STANDARD OF REVIEW

To survive a motion to dismiss, a complaint must state a claim that is plausible. *Warne v. Hall*, 373 P.3d 588, 591 (Colo. 2016) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). A plaintiff must therefore plead sufficient facts that "raise a right to relief 'above the speculative level.'" *Warne*, 373 P.3d at 591 (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007)).

Motions to dismiss under C.R.C.P. 12 are generally viewed with disfavor. A motion to dismiss must be decided solely on the basis of allegations stated in the complaint, *Dillinger v. N. Sterling Irr. Dist.*, 308 P.2d 608, 609 (1957), and courts must accept as true all averments of material fact and must view the allegations of the complaint in the light most favorable to the plaintiff. *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911 (Colo.1996). A motion to dismiss should be granted only where the plaintiff's factual allegations do not, as a matter of law, support the claim for relief. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). In assessing the viability of a complaint, all doubts must be resolved against the defendants. *Walsenburg Sand & Gravel Co., Inc. v. City Council of Walsenburg*, 160 P.3d 297 (Colo. App. 2007).

ANALYSIS

1. General Principles of the Law of Standing

Standing is a matter of subject matter jurisdiction, and this court does not have jurisdiction over the case unless the Plaintiffs have standing to bring it. *Hotaling v. Hickenlooper*, 275 P.3d 723, 725 (Colo. App. 2011). Thus, the court must determine the standing issue before reaching the merits. *Barber v. Ritter*, 196 P.3d 238, 245 (Colo. 2008); *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004).

The Supreme Court has adopted a two-part test to determine whether a particular party has standing to bring a claim. The plaintiff must demonstrate that it has (1) incurred an injury-in-

fact, (2) to a legally protected interest, as contemplated by statutory or constitutional provisions. *Barber v. Ritter*, 196 P.3d 238, 245 (Colo. 2008) (citing *Wimberly v. Ettenberg*, 570 P.2d 535, 538 (Colo. 1977) and *Dodge v. Dept. of Soc. Servs.*, 600 P.2d 70, 71-72 (Colo. 1979)(applying the two-part *Wimberly* test in the context of taxpayer standing)).

Taxpayer standing is relatively broad in Colorado, although not unlimited. *Barber, supra*, 196 P.3d at 246 (citing *Ainscough, supra,* 90 P.3d at 856). In the case of an alleged constitutional violation, "[t]axpayers have standing to seek to enjoin an unlawful expenditure of public funds." *Barber, supra*, 196 P.3d at 246 (citing *Nicholl v. E-470 Pub. Highway Authority,* 896 P. 2d 859, 866 (Colo. 1995)). As the supreme court concluded in *Barber*, "Colorado case law requires us to hold that when a plaintiff-taxpayer alleges that government action violates a specific constitutional provision …such an averment satisfies the two-step standing analysis." 196 P.3d at 247 (citing *Dodge v. Dept. of Soc. Servs.*, 600 P.2d 70, 72 (Colo. 1979)).

More recently, our supreme court has qualified this rule by holding that "[t]o satisfy the injury-in-fact requirement, however, the plaintiff must demonstrate a clear nexus between his status as a taxpayer and the challenged government action." *Hickenlooper v. Freedom from Religion Foundation, Inc.*, 338 P.3d 1002, 1008 (Colo. 2014) (citing *Barber, supra*, 196 P.3d at 246). In *Hickenlooper, supra*, the court found that incidental overhead costs such as the paper, computer hard-drive space, postage, and personnel utilized by the Governor's office to issue an annual Day of Prayer proclamation "are not sufficiently related to Respondent's financial contributions as taxpayers to establish the requisite nexus for standing." 338 P.3d at 1008. *See also, Reeves-Toney v. School District No. 1*, 442 P.3d 81, 87 (Colo. 2019).

2. The Individual Taxpayer Plaintiffs Lack Standing

Because this case involves both individual and associational Plaintiffs, there are two different analyses which must be performed.

Assuming, without deciding, that the individual Plaintiffs can demonstrate an injury in fact, the court turns to the second prong of the *Wimberly* test, that is, whether that injury is to a legally protected interest, as contemplated by statutory or constitutional provisions. Although Plaintiffs contend that the City's activities exceed its constitutional powers, they rely upon no particular constitutional provision, but rather upon the above-quoted general language from *Barber v. Ritter*, 196 P.2d 238, 246 (Colo. 2008) to the effect that "taxpayers have standing to seek to enjoin an unlawful expenditure of public funds." Response, at 5, 8. However, *Barber* involved the legislature's transfer of money from several special cash funds to the state's General Fund, and its use of those funds to defray general governmental expenses rather than ones for which they were originally collected, allegedly in violation of the Taxpayers Bill of Rights (TABOR), Colo. Const, art X, Section 20, a constitutional provision. The same is true of the case upon which the *Barber* Court relied for that proposition, *Nicholl v. E-470 Public Highway Authority*, 896 P.2d 859, 866 (Colo. 1995). *See, Barber*, 196 P.3d at 246, n.10. The *Barber* Court even acknowledged that, in the case of an alleged constitutional violation, the *Wimberly* test is collapsed "into a single inquiry as to whether the plaintiff-taxpayer has averred a violation of a specific constitutional provision." 196 P.3d at 247.

Here, however, Plaintiff's rely upon the City's alleged "violation" of the conservation easement statute. Plaintiffs contend that Defendants are precluded from engaging in the types of

planning and development activities alleged without having obtained a court order terminating the Conservation Easement pursuant to the process described and grounds enumerated in the Colorado statute governing such easements, which provides as follows:

> If it is determined that conditions on or surrounding a property encumbered by a conservation easement in gross change so that it becomes impossible to fulfill its conservation purposes that are defined in the deed of conservation easement, a court with jurisdiction may, *at the joint request of both the owner of property encumbered by a conservation easement and the holder of the easement*, terminate, release, extinguish, or abandon the conservation easement.

C.R.S. §38-30.5-107 (emphasis supplied). Thus, such a request must come jointly from "the owner of the property encumbered by a conservation easement," in this case Westside, and "the holder of the easement," in this case Denver. No such request has ever been made or ruled upon. It is Plaintiffs' position that, as taxpayers whose tax dollars both support City governmental functions as well as fund the acquisition of the Conservation Easement, they have standing to seek a court order precluding the City from engaging in the subject planning and development activities in the absence of such an order.

In *Taxpayers for Public Education v. Douglas County School District*, 351 P.3d 461, 467 (Colo. 2015), the Supreme Court set forth the relevant analytical framework:

> In the statutory context, whether the plaintiff's alleged injury involves a legally protected interest turns on "whether the plaintiff has a claim for relief under" the statute at issue. *Ainscough*, 90 P.3d at 856. Generally, if the legislature "enact[s] a particular administrative remedy to redress a statutory violation," that decision "is consistent with the 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). But if the statute "is totally silent on the matter of remedy," then the court "must determine whether a private civil remedy reasonably may be implied." *Id*. To answer this question, the court must examine three factors: (1) "whether the plaintiff is within the class of persons intended to be benefited by the legislative enactment"; (2) "whether the legislature intended to create, albeit implicitly, a private right of action"; and (3) "whether an implied civil remedy would be consistent with the purposes of the legislative scheme." *Id.* at 911[footnote omitted].

Plaintiffs argue that they "are not seeking to invoke 'third-party' standing" under the conservation easement statute, but rather "are specifically asserting *taxpayer standing*." Response, at 2 (emphasis original). However, this argument suggests a dichotomy which simply does not exist under the Colorado law of standing. As the court observed in *Taxpayers for Public Education*:

> Generally speaking, taxpayer standing "flows from an 'economic interest in having [the taxpayer's] dollars spent in a constitutional manner.'" *Hickenlooper v. Freedom from Religion Found., Inc.*, 2014 CO 77, ¶ 11 n.10, 338 P.3d 1002, 1007 n. 10 (alteration in original) (quoting *Conrad v. City & Cnty. of Denver*, 656 P.2d 662, 668 (Colo. 1982)). Thus, although we have recognized that Colorado permits "broad taxpayer standing," *Ainscough*, 90 P.3d at 856, the doctrine typically applies when plaintiffs allege *constitutional* violations. *See, e.g.*, *Barber v. Ritter*, 196 P.3d 238, 247 (Colo. 2008) (holding that the plaintiffs had "taxpayer standing to challenge *the constitutionality* of [governmental] transfers of money" (emphasis added)); *Conrad*, 656 P.2d at 668 (recognizing taxpayer standing because "the plaintiffs [have] alleged injury flowing from governmental violations of *constitutional* provisions that specifically protect the legal interests involved" (emphasis added)). Expanding taxpayer standing to cases where a plaintiff alleges that the government violated a *statute* - as Petitioners seek to do here - would effectively nullify the enduring requirement that the statute actually authorizes a claim for relief. *See Ainscough*, 90 P.3d at 856. This in turn would render superfluous *Parfrey's* well-settled 3-factor test for divining whether the General Assembly intended to imply a private right of action into a statute. We thus decline to endorse Petitioners' broad and novel conception of taxpayer standing.

351 P.3d, at 469 (last italics original).

As noted, the only "remedy" expressly referred to in the statute is the optional mechanism whereby the owner and holder of the conservation easement may, but are not required to, jointly request a court with jurisdiction to terminate, release, extinguish, or abandon the easement upon a showing that it has become "impossible to fulfill its conservation purposes." C.R.S. § 38-30.5-107. The *Taxpayers for Public Education* Court noted that "where a statute features particular remedies, we will not imply additional remedies." 351 P.3d at 467 (citations omitted). Neither party has pointed to, nor has the court found any language in the statute indicating that the General Assembly expressly contemplated a private cause of action.

Accordingly, the court must apply the three-factor *Parfrey* test to determine whether a private cause of action may be implied.

First, the court has no trouble finding that Plaintiffs are certainly within the class of persons intended to be benefited by the Conservation Easement statute. The explicit legislative intent includes the finding that "it is in the public interest to determine who may receive such easements and for what purposes such easements may be received." C.R.S. § 38-30.5-101. The statutory definition of a conservation easement refers to the right to "prohibit or require a limitation upon or an obligation to perform acts on or with respect to [land] appropriate to the retaining or maintaining of such land… predominantly in a natural, scenic, or open condition, or for… recreational… use or condition consistent with the protection of open land, environmental quality or life-sustaining ecological diversity…" C.R.S. §38-30.5-102. Along these lines,

Plaintiffs allege that they "desire to preserve the 2019 Conservation Easement for the critical purpose of protecting public health, the environment, and recreational benefits provided by the [PHGC] land to Denver and its citizens," noting that the City's population has increased while its land has become increasingly "paved over or built up," that the portions of the City used for parks and recreation are significantly below the national median, and that such open space combats "heat island" effects and ozone pollution, and helps "clean the air we breathe and provide cooling shade." Complaint, ¶ ¶ 27-30.

However, the court finds that the Plaintiffs are unable to satisfy the last two prongs of the *Parfrey* test. As to the second prong, the court cannot find that the legislature "intended to create, albeit implicitly, a private right of action" in the conservation easement statute. The only "remedy" set forth in C.R.S. §38-30.5-107 and upon which the parties focus is a joint request by the owner of the encumbered property and holder of the easement to seek to make the required demonstration of impossibility so that a court with jurisdiction may terminate, release, extinguish or abandon the conservation easement. That language was added by amendment to the statute in 2019, and became effective shortly before the granting of the Conservation Easement at issue here. *Compare* Complaint, Exhibit 1, at 1 (Conservation Easement granted July 11, 2019) *with* HB19-1264, 2019 *Colo Session Laws*, ch. 420, p.3768, §7(effective June 30, 2019).[2] The overall effect of the 2019 amendment appears to have been to severely constrict the grounds upon which a conservation easement can be terminated, released, extinguished or abandoned, and to create the requirement of a court order to that effect. Specifically, the 2019 legislation deleted "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," as means by which a conservation easement could be terminated. *Id.* As to this language deleted from the previous statute, one knowledgeable commentator had noted that

> Under Colorado law, easements may be terminated, released, extinguished or abandoned by (1) a binding agreement to vacate an easement, (2) termination in accordance with the provisions of the easement itself, (3) a change of circumstances, (4) abandonment, and (5) adverse possession. Easements can also be terminated by merger. Merger occurs when the owner of the dominant estate acquires the servient state, or vice versa, so that both the estates are under common ownership. Lastly, an easement may be terminated directly by the exercise of eminent domain.

Walter J. Downing, Terminating and Amending Conservation Easements in Colorado, 45 *Colo. Law*. 47 (August, 2016) (footnotes citing case law omitted). Several of these common law approaches would appear to have been effectively eliminated by the 2019 legislation.

In any event, there is no indication in the language of the amended statute itself, nor have Plaintiffs pointed to any other authority, indicating that the legislature intended that taxpayers of

[2] The amended statute also provides for the termination of a conservation easement in the context of condemnation proceedings, based upon a similar showing of impossibility. C.R.S. §38-30.5-107. Although a predecessor conservation easement apparently grew out of an earlier condemnation action by the City, the parties have not argued that this provision of the statute is applicable, and for present purposes, it certainly does not suggest a legislative intention to create a private right of action.

a governmental holder of a conservation easement would have a private right of action to require the governmental entity to seek such an order if it was disinclined to do so.[3] In addition, the Conservation Easement itself limits its enforcement and remedies to those sought by the Grantor (Westside, as successor in interest to the George W. Clayton Trust) and Grantee (the City), and "the benefits of this Easement shall run exclusively to Grantee…and no… third parties shall have any claims or rights to enforce this Easement." Motion, Exhibit 1, ¶ 11(c), at 4.

As to the third prong of the *Parfrey* test, the court also finds that a private right of action would not be consistent with the purposes of legislative scheme. First of all, it bears repeating that the statutory mechanism for terminating a conservation easement is optional, not mandatory. Although Plaintiffs characterize the City's failure to seek the court order contemplated by C.R.S. §13-30.5-107 as a "violation" of the statute, Plaintiffs fail to plead any facts from which the court could conclude that it is any such thing. Similarly, seeking injunctive relief or damages for injury to the easement are optional, not mandatory. C.R.S. §38-30.5-108(2) and (3). Most importantly, the right to invoke any of these remedies is confined to the holder and owner of the easement, and nothing about the language of the statute suggests the legislature's intent that individual constituents, or even a group of constituents, of a governmental holder of a conservation easement, no matter how noble their cause, should have a private cause of action to force the governmental entity to either seek to terminate or enforce the easement. For this court to conclude that the executive branch of the City government must terminate certain activities unless they seek a court order which the legislature has plainly stated is optional would constitute a serious violation of the principle of separation of powers. As the court noted in *Taxpayers for Public Education,*

> [i]t is inevitable that some members of the public will disapprove of any given government action. But that disapproval does not justify allowing private parties to sue the [responsible governmental entities] for every perceived violation of [a statute]. Were that the case, these agencies would be paralyzed with litigation from dissatisfied constituents, crippling their effectiveness.

351 P.3d at 469. *See also, Reeves-Toney v. School District No. 1*, 442 P.3d 81, 86 (Colo. 2019)("The standing doctrine is rooted in the separation of the judicial, legislative and executive powers mandated by article III of the Colorado Constitution. It prevents judicial intrusion into legislative and executive spheres by permitting only injured parties - not the public in general - to seek redress in the courts," citing *Barber*, 196 P.3d at 254-55 (Eid, J., concurring in the judgment).

For all of the foregoing reasons, the court concludes that the individual Plaintiffs lack standing to pursue the relief requested in their Complaint .

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[3] *Cf., Taxpayers for Public Education*, 351 P.2d at 468 and n. 11 (Petitioners asserted that the State Board of Education colluded with County School Board which created taxpayer-funded scholarship program, by abdicating its statutorily-delegated responsibility to enforce the Public School Finance Act, "meaning it now falls to them to force the Board to properly execute its duties [but] Petitioners cite no authority suggesting that the State Board's hypothetical failure would automatically confer standing on private parties.")

3. Save Open Space Denver also Lacks Standing

The supreme court has recently clarified that "an organization has associational standing when (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit." *Colorado Union of Taxpayers Foundation v. City of Aspen* , 418 P.3d 506, 510 (Colo. 2018) (citing *Buffalo Park Dev. Co. v. Mountain Mut. Reservoir Co.*, 195 P.3d 674, 687-88 (Colo. 2008), as modified on denial of reh'g (Nov. 24, 2008)); *see also Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 344, 97 S.Ct. 2434, 53 L. Ed.2d 383 (1977).

Once again, the Plaintiffs voluntary, non-profit organization is unable to satisfy the first prong of this test. Specifically, and for the reasons set forth above, the individual Plaintiffs do not have standing to sue in their own right. While the benefits of the Conservation Easement are no doubt germane to Save Open Space Denver's purpose, this alone is not enough to give the Association itself standing.

4. Even If the Plaintiffs Had Standing, Neither Mandamus nor a Declaratory Judgment Would Lie.

Although not necessary to the disposition of Defendants' Motion, the court notes that neither of the species of relief sought by Plaintiffs would be available under the facts as pled in the Complaint.

With respect to Plaintiff's request for mandamus,

> [t]here is a three-part test which must be satisfied by a plaintiff before mandamus will be issued by the court. One, the plaintiff must have a clear right to the relief sought. Two, the defendant must have a clear duty to perform the act requested. Three, there must be no other available remedy.

Gramiger v. Crowley, 660 P. 2d 1279, 1281 (Colo. 1983)(citations omitted); *State v. Board of County Comm'rs of Mesa Cty.*, 897 P.2d 788, 791 (Colo. 1995).

Plaintiffs' Complaint fails at least the first two prongs of this test, and perhaps also the third. As noted with respect to the standing issue, the mechanism for terminating a conservation easement belongs exclusively to the owner (Westside) and holder (City), and therefore Plaintiffs have no "clear right to the relief sought." In addition, the statutory mechanism is optional, and therefore there is no "clear duty to perform the act requested" on the part of the City. *Board of County Comm'rs v. County Road Users Assoc*., 11 P.3d 432, 437 (Colo. 2000) ("Mandamus lies to compel the performance of a purely ministerial duty involving no discretionary right and not requiring the exercise of judgment. It does not lie where the performance of a trust is sought which is discretionary or involves the exercise of judgment."). Finally, since the Motion was filed and briefed, the voters of Denver have adopted Initiated Ordinance 301 at the election held on November 2, 2021, which Ordinance provides that "(1) Construction of any commercial or residential building on land designated as a city park or protected by a City-owned conservation easement and (2) any partial or complete termination, release, extinguishment or abandonment of a city-owned conservation easement are prohibited without the approval of a majority of the

registered electors voting in a regular scheduled or special municipal election." Reply, Exhibit C, at 4; DRMC §39-193(a)(1).[4] Thus, as it turns out, under the newly adopted Ordinance, there is another available remedy separate from an order of this court, i.e., putting the question to the voters in a municipal election.[5] Accordingly, on the basis of the facts pled, Plaintiffs would not be entitled to a writ in the nature of mandamus.

A trial court has jurisdiction to hear a declaratory judgment action only if: (1) the controversy contains a currently justiciable issue or existing legal controversy rather than the mere possibility of a future claim; (2) it will fully and finally resolve the uncertainty and controversy as to all parties with a substantial interest in the matter that could be affected by the judgment; and (3) it is independent of and separable from the underlying action. *Constitution Associates v. New Hampshire Insurance Co.*, 930 P.2d 556, 561 (Colo.1997).

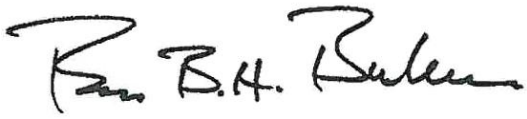
Once again, given that neither the City, Westside, nor the Plaintiffs have sought a court order pursuant to the conservation easement statute, there is currently no justiciable issue or existing legal controversy as to whether such a remedy is available under the statute, and the effect, if any, that such a court order would have upon the City's allegedly improper activities. Given the passage of Initiated Ordinance 301, it is now unlikely that there ever will be a joint request for such an order. Furthermore, with respect to the second prong of this test, in its Motion, the City attempted to reserve the issue of whether the conservation easement statute applies to it at all, in view of its Home Rule status, as well as the applicability of the 2019 amendments to the conservation easement statute to this case. See Response, at 11, n. 3. The existence of those issues strongly suggest that this court's declaration would not fully and finally resolve the uncertainty and controversy as to all the parties with a substantial interest that could be affected by such a judgment. Accordingly, Plaintiffs would not be entitled to a declaratory judgment in this case.

CONCLUSION

For all the foregoing reasons, Defendants' Motion to Dismiss is GRANTED. This case is DISMISSED.

DATED this 10th day of February, 2022.

BY THE COURT:



Ross B.H. Buchanan
Denver District Court Judge

[4] City and Cty. of Denver, Final Official Results, 2021 Denver Coordinated Election, Nov. 2, 2021, https://www.denvergov.org/media/denverapps/electionresults/pdfs/20211102/Summary_Report_Denver_FinalOfficialResults.pdf.

[5] By noting that the passage of the Ordinance may preclude Plaintiffs from satisfying the third prong of the *Gramiger* test, this court does not mean to, nor does it, determine that the Conservation Easement at issue is governed by the new Ordinance.