DISTRICT COURT, BOULDER COUNTY, COLORADO Boulder Justice Center 1777-6th Street Boulder, CO 80302	
Plaintiff: COLORADO OIL AND GAS CONSERVATION COMMISSION Defendant: CITY OF LONGMONT, COLORADO	▲ COURT USE ONLY ▲ Case No.: 2012cv702 Division: 3
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CITY OF LONGMONT'S MOTION TO DISMISS COMPLAINT FOR DECLARATORY RELIEF FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM

The City of Longmont ("City" or "Longmont") by and through its undersigned counsel, moves this Court for an order dismissing Plaintiff's Complaint for Declaratory Relief under C.R.C.P. 12(b)(1) and 12(b)(5).

C.R.C.P. 121 § 1-15(8) CERTIFICATION

Counsel for the City conferred with counsel for the Commission regarding this motion. Opposing counsel advised the City that the Commission opposes this motion.

INTRODUCTION

Longmont is a home rule city created in accordance with Article XX of the Colorado Constitution. A home-rule city derives its power from the Home-Rule Amendment of the Colorado Constitution, Colo. Const. art. XX, §6. *Voss v. Lundvall*, 830 P.2d 1061, 1064 (Colo. 1992). The Colorado Constitution gives home rule cities as much authority in municipal affairs as can be granted under a republican form of government. *Toll v. City & County of Denver*, 340 P.2d 862, 865 (Colo. 1959). Among other things home rule cities have legislative authority to adopt and implement zoning policies. *Voss v. Lundvall*, 830 P.2d at 1064. They have broad powers to legislate to protect the health, safety, or welfare of their citizens. *City and County of Denver v. Qwest Corp.*, 18 P.3d 748, 755 (Colo. 2001). The overall effect of the constitutional creation of a home rule city was two-fold: to grant home rule municipalities the same power the state legislature previously had in matters within the city's jurisdiction, and to limit the authority of the legislature with respect to local and municipal affairs in home rule cities. *Fraternal Order of Police, Lodge 27 v. Denver*, 926 P.2d 582, 587 (Colo. 1996). There is no question that a home rule city has an interest in land-use control within its municipal borders. *Id.*

On or about July 17, 2012 Longmont enacted Ordinance O-2012-25 ("Ordinance"), which revised the City's Land Development Code ("LDC") insofar as it concerned oil and gas operations within the City's jurisdiction. Prior to the passage of the Ordinance, the City had made a number of changes to the Ordinance in response to suggestions from Plaintiff Colorado Oil and Gas Conservation Commission ("Commission") and oil and gas operators and industry representatives. *See* Complaint Exhibit B. On the day that the revised LDC took effect, the Commission filed this lawsuit.

The sole issue raised by the Complaint for Declaratory Relief ("Complaint") is whether portions of the Ordinance are preempted by the Colorado Oil and Gas Conservation Act ("COGCA"), and its implementing regulations. Although the Complaint does not cite any authority for its request for declaratory relief, the right to declaratory judgment is governed by the Declaratory Judgment Act, C.R.S. §13-51-101, *et seq.*, and C.R.C.P. 57.

The Commission is an agency of the State of Colorado, created by the COGCA. The COGCA has been amended on numerous occasions since it was first enacted in 1951. The gravamen for all of the Commission's claims for relief is as follows:

> The development of oil and gas resources is a matter of statewide concern. Recent amendments to the [COGCA] and its implementing regulations preempt the City from regulating certain aspects of oil and gas operations. Further, the disputed provisions of the Ordinance are superseded by procedural and substantive standards supplied by the Commission's comprehensive regulatory structure.

Complaint, at 2. The Complaint is based upon the unsupported allegation that "[t]he 2007 Amendments to [the Act] preempt conflicting local regulations". Complaint, ¶ 21. As the City

demonstrates below, the 2007 Amendments did not enlarge the Commission's authority or standing to bring a suit such as this one.

This Motion does not address, and the City reserves all of its arguments to, the legal and factual merits of the Commission's "operational conflict" allegations. Instead, this Motion challenges the Commission's statutory authority to bring this suit, whether it has standing or injury sufficient to sue Longmont, and whether this suit is ripe.

APPLICABLE LEGAL STANDARD

A complaint must be dismissed when it fails to state a claim upon which relief may be granted. *See* C.R.C.P. 12(b)(5). "The purpose of a motion to dismiss for failure to state a claim is to test the formal sufficiency of the statement of the claim for relief." *Dunlap v. Colo. Springs Cablevision, Inc.*, 829 P.2d 1286, 1291 (Colo. 1992) (citing 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1356, at 294 (2d ed. 1990)). A trial court may dismiss a complaint for failure to state a claim when it appears that the plaintiff can prove no set of facts in support of the claim. *Id.* at 1291.

The trial court must view the allegations of a complaint in the light most favorable to the plaintiff. *Grizzell v. Hartman Enters., Inc.*, 68 P.3d 551, 553 (Colo. App. 2003). When documents are attached to a complaint, however, the legal effect of the documents is determined by their contents rather than by allegations in the complaint. *Stauffer v. Stegemann*, 165 P.3d 713, 716 (Colo. App. 2006). However, a trial court is not required to accept legal conclusions or factual claims as true and in the light most favorable to the plaintiff, if they are at variance with the express terms of documents attached to the complaint or matters of public record. *Id.*

Where it is clear that plaintiffs have no standing to assert a claim upon which relief can be granted, the action is properly dismissed under C.R.C.P. 12(b)(1). *Kreft v. Adolph Coors Co.*, 170 P.3d 854, 857 (Colo. App. 2007) (motion to dismiss is properly granted when plaintiffs lack standing because the complaint does not show actual injury to a legally protected right).

"Under C.R.C.P. 12(b)(1), a trial court determines subject matter jurisdiction by examining the substance of the claim based on the facts alleged and the relief requested." *City of Aspen v. Kinder Morgan, Inc.*, 143 P.3d 1076, 1078 (Colo. App. 2006). The plaintiff bears the burden of proving jurisdiction, and evidence outside the pleadings may be considered to resolve a jurisdictional challenge. *Id; Smith v. Town of Snowmass Village*, 919 P.2d 868 (Colo. App. 1996). Ripeness presents an issue of subject matter jurisdiction, *DiCocco v. Nat'l Gen. Ins. Co.*, 140 P.3d 314, 316 (Colo. App. 2006), as does standing. *See, e.g., Lobato v. People*, 218 P.3d 358, 366 (Colo. 2009).

This Motion asserts three separate reasons why the Complaint must be dismissed: The Commission does not have the authority to sue Longmont; the Commission has not been injured by the Ordinance, and thus has no standing to sue; and the Court lacks jurisdiction since the Commission's challenge is unripe. Each of these grounds is addressed below.

SUMMARY OF THE ARGUMENT

The Commission does not have the required statutory authority to bring this action, for several reasons. The legislature has not endowed the Commission with the authority to sue except in certain specified situations which do not apply to this case. When the legislature intends to grant an agency a more general power to sue, it provides such power explicitly. Not only has the legislature elected not to confer such a power on the Commission, but the legislature

specifically *repealed* this Commission authority in 1981. The only reasonable interpretation of the legislature's actions according with the law of statutory construction is that the legislature did not grant the Commission the power to bring this type of lawsuit.

The only statute on which the Commission appears to rely for the authority to bring this action is a general, catch-all provision giving the Commission the authority to do whatever is reasonably necessary to fulfill its mandate. But, as the Colorado Supreme Court has explained in two cases, these catch-all provisions are not explicit enough to give an agency the power to sue in any and all circumstances. The agency may still only sue within the confines of its strict statutory framework. While the Commission does have authority to sue in important circumstances – notably, it has the authority to bring enforcement actions against oil and gas operators for violations of permits and rules – the Commission has no authority to bring suits against such entities as local governments on grounds such as preemption. Because the Commission's authority does not extend so far as to encompass the commencement of this lawsuit, the Commission lacks standing and this Court must dismiss this case for lack of subject matter jurisdiction.

The Commission also lacks standing because it has suffered no injury-in-fact. Neither the Commission nor any other entity has applied for, or been denied, a permit under the new Ordinance. As the Ordinance itself explains, it is designed to avoid any conflict with the Commission. The Commission's vague claims that the Ordinance impairs its functions are thus extremely speculative, and do not suffice to allege the requisite injury to the Commission's present or imminent activities. For this reason, the Commission lacks standing and this Court lacks subject matter jurisdiction. Relatedly, this case is unripe because no controversy has yet

occurred. As explained by the Colorado Court of Appeals, a case such as this does not ripen until the Commission grants an operator a permit to drill under Longmont's new Ordinance. Because this is not alleged to have occurred, this case is not justiciable and must be dismissed for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted.

ARGUMENT

I. The Commission Does Not Have the Authority to Bring This Suit

The constitutional doctrine of separation of powers mandates that agencies can act only within the scope of their delegated authority. *Hawes v. Colo. Div. of Ins.*, 65 P.3d 1008, 1016 (Colo. 2003). Agencies have no general, inherent, or common-law powers, but only those powers expressly conferred by the legislature or the Constitution, and implied powers reasonably necessary to carry out express powers. *Id.; see Bd. of Cnty. Comm'rs of Dolores Cnty. v. Love*, 172 Colo. 121, 125, 470 P.2d 861, 862 (1970). The power to sue, like other powers, is not a power inherently possessed by agencies of the State. An agency has this power *only* if the legislature expressly grants it. *See Romer v. Fountain Sanitation Dist.*, 898 P.2d 37, 42 (Colo. 1995); *Love*, 172 Colo. at 126, 470 P.2d at 863.

The Commission cites no authority in the Complaint that gives it the power to bring this suit, and none exists. While statutes do grant the Commission the authority to pursue legal action in certain circumstances, the Commission does not cite those statutes in its Complaint, as those circumstances do not apply to this case. The statute on which the Commission does appear to rely, section 34-60-105, C.R.S. (2011), gives the Commission the power "to do whatever reasonably may be necessary to carry out the provisions of" article 60 of title 34, C.R.S. (2011).

The Complaint implies that this provision gives the Commission the authority to bring any suit relating to the Commission's statutory purposes.

To the contrary, this provision does not give the Commission the power to bring this suit, for five reasons. First, the provision is insufficient to empower the Commission to sue, because it does not *expressly* provide the Commission a power to sue, as the General Assembly does when it intends an agency to have such a general power. Second, the Colorado Supreme Court has held, twice, that catch-all provisions of authority such as the one on which the Commission appears to rely do not give an agency the power to sue, except as within the framework of specific circumstances, identified explicitly in statute, allowing the suit. The Commission does have an explicit statutory framework within which it may commence a suit, but this case does not fall within that framework. Therefore, under clear Supreme Court case law, the Commission does not have the authority to sue, and this case must be dismissed for lack of subject matter jurisdiction. Third, the General Assembly did at one point give the Commission the express, general power to sue, but it specifically *repealed* that power in 1981, proving its intent that the Commission not be so empowered. Fourth, the Declaratory Judgment Act does not itself give this Court jurisdiction over this case. And fifth, the burden to prove jurisdiction is on the Commission. Without any citation of authority granting subject matter jurisdiction, the Complaint must be dismissed under C.R.C.P. 12(b)(1) as insufficient to prove jurisdiction.

A. The Legislature Has Not Granted the Commission a General Power to Sue, in Contrast with Statutes Governing Other Political Entities.

When the legislature intends an agency to have a general power to sue, the legislature includes express language giving the agency such a power. This is true even when the legislature enacts language giving an agency the power to do everything reasonably necessary to

carry out its mandate. Even in such a case, the legislature includes separate language explicitly encompassing a general power to sue when it intends to delegate such a power. Because the legislature did not give the Commission the power to bring suit in §34-60-105 or elsewhere in the COGCA, the legislature did not intend the Commission to have a general power to sue.

For example, in §37-2-105(7), C.R.S. (2011), the legislature expressly granted water conservancy districts the power to do "all acts necessary and proper for the carrying out of the purposes for which the district was created." This language is very similar to §34-60-105, on which the Commission relies. In the same subsection, the legislature also expressly gave water conservancy districts the "power to sue." §37-2-105(7).

Courts shall avoid interpretations of statutes that "render any words or phrases superfluous." *People v. Null*, 233 P.3d 670, 679 (Colo. 2010); *see also, e.g., People v. Madden*, 111 P.3d 452, 457 (Colo. 2005) (holding courts are "not to adopt a construction that renders any term superfluous"). If, in the water conservancy district statute, "all acts necessary and proper" included the "power to sue," the legislature's express enumeration of the power to sue in that statute would be superfluous. Because an interpretation rendering the water conservancy district superfluous would be improper, the general "all acts necessary and proper" clause must not include the power to sue.

This analysis assists this Court in determining that the Commission's power "to do whatever reasonably may be necessary to carry out the provisions" does not include the general power to sue. One tool in interpreting an ambiguous statute is "the language of laws on the same or similar subjects." *Assoc. Gov'ts of Nw. Colo. v. Colo. Pub. Utils. Comm'n*, 2012 CO 28, at ¶11. When the legislature passes laws intended to give a public entity the power to sue, it

expressly provides for such power *separately*, notwithstanding the grant of general power to do what is reasonably necessary and proper. The water conservancy district statute is but one example.

Another example is the statute authorizing local governments to form regional planning commissions, §30-28-105, C.R.S. (2011), which gives such a regional planning commission "all powers necessary or incidental to exercise fully the powers and authority conferred in this section." §30-28-105(8). Yet the statute also expressly and separately provides that such a commission "shall be a body politic and corporate, with the power to sue or be sued." *Id.* §30-28-105(7).

Similarly, the legislature has granted the Colorado Insurance Guaranty Association the power to "[p]erform such other acts as are necessary and proper to effectuate the purposes of this part 5" of title 10, article 4, C.R.S. (2011). §10-4-508(2)(e), C.R.S. (2011). Yet the legislature expressly and separately granted the Association the power to "[s]ue or be sued." *Id.* §10-4-508(2)(c).

In contrast, the legislature did not separately include a generalized power to sue in the COGCA. Therefore, the legislature did not grant the Commission the general power to sue.

B. The Colorado Supreme Court Has Held in Analogous Cases that a General Grant of Power to an Agency, Like §34-60-105, Does Not Provide a Power to Sue.

The Colorado Supreme Court has twice held that a general power to do what is reasonably necessary to implement an article of code does *not* encompass a broad power to sue. As such, the Commission's power "to do whatever reasonably may be necessary to carry out the provisions of" article 60 of title 34, C.R.S. (2011), does not include the power to sue absent further statutes authorizing suits. While other statutes do authorize the Commission to sue, those

statutes are limited to circumstances inapplicable to this case. This section of this Motion first addresses the Supreme Court case law, and then explains the inapplicability of the Commission's lawsuit-authorizing statutes.

1. *Board of County Commissioners of Dolores County v. Love*

The Colorado Supreme Court held in 1970 that even Colorado *counties* did not have a general power to sue. *Bd. of Cnty. Comm'rs of Dolores Cnty. v. Love*, 172 Colo. 121, 126, 470 P.2d 861, 863 (1970), *superseded in part by statute, Bd. of Cnty. Comm'rs of Cnty. of Pueblo v. Romer*, 931 P.2d 504, 508 (Colo. App. 1996), *rev'd*, 956 P.2d 566 (Colo. 1998). In that case, Dolores County sued the State, alleging that the State Board of Equalization and the Colorado Tax Commission had abused their discretion. *Id.* at 124, 862. The State challenged the County's standing and authority to maintain the action. *Id.*

In response, the County argued that its power and standing to sue the State was encompassed within two statutes: one giving it the power "to sue and be sued," and another giving it the power "to represent the county and have the care of the county property and the management of the business and concerns of the county, in all cases where no other provisions are made by law." *Id.* at 125-26, 863 (citing §36-1-1(b), C.R.S. (1963) (now codified at 30-11-101(1)(a), C.R.S. (2011)); and §36-1-7(6), C.R.S. (1963) (now codified at §30-11-107(e), C.R.S. (2011)).

The Supreme Court first explained the applicable standard of review to determine the extent of a county's authority; it held that political subdivisions of the state, such as counties and state agencies, "possess only such powers as are expressly conferred upon them by the constitution and statutes, and such incidental implied powers as are reasonably necessary to carry

out such express powers." *Id.* at 125, 862. The court then characterized the County's statutory right "to sue" as a right that may "only be exercised within the framework of the specific powers granted counties." *Id.* at 126, 863. It did not, as the County argued, "grant a general power to sue in any and all situations." *Id.* Neither did the general provisions giving the County board of commissioners the power to "represent the county" and, extremely broadly, to manage "the business and concerns of the county, in all cases *where no other provisions are made by law*," give the County the general power to file lawsuits. *Id.* (emphasis added). The Supreme Court emphatically held:

> Since the legislature has not seen fit to grant such power and authority, we necessarily conclude that the commissioners were without standing to bring the instant action.

Id. at 126-27, 863.

2. *Romer v. Fountain Sanitation District*

The Supreme Court reaffirmed its *Love* holding in *Romer v. Fountain Sanitation Dist.*, 898 P.2d 37 (Colo. 1995). There, a sanitation district brought suit against the State under the Declaratory Judgment Act. *Id.* at 39. When the trial court denied the State's motion to dismiss for lack of standing and failure to state a claim, the State initiated an original proceeding to the Colorado Supreme Court. *Id.* The Supreme Court issued a rule to show cause, and made the rule absolute, holding that the sanitation district "lack[ed] standing to seek a declaratory judgment against the state in this action." *Id.* at 39-40.

As in *Love* and in the instant case, the plaintiff sanitation district in *Romer* relied on its general grant of power:

> To have and exercise all rights and powers necessary or incidental to or implied from the specific powers granted to special districts by this article. Such specific

> powers shall not be considered as a limitation upon any power necessary or appropriate to carry out the purposes and intent of this article.

Id. at 42 (citing §32-1-1001(1)(n), 13 C.R.S. (1994 Supp.)). As in *Love*, the plaintiff in *Romer* also relied on its general statutory power "to sue and be sued." *Id.* (emphasis omitted) (citing § 32-1-1001(1)(c), 13 C.R.S. (1994 Supp.)).

The Supreme Court rejected the district's claim of general authority to sue, stating simply, "Our decision in *Love* is controlling here." *Id.* The general grant of power to do whatever reasonably may be necessary to carry out the provisions of the sanitation district article, even combined with an express power to sue and be sued, was insufficient to give the sanitation district power and standing to sue except "as an incident of the exercise of specific authority granted to it by the Special District Act." *Id.* As the Court summed up, "The district has no greater inherent authority in this area than it has express authority." *Id.*

3. Application of *Love* and *Romer* to the Commission's Complaint

Love and *Romer* preclude the Commission from bringing suit in this case. The powers of state agencies are limited to those expressly conferred by the legislature or the Constitution, as well as implied powers reasonably necessary to carry out express powers. *See Hawes*, 65 P.3d at 1016. As this is the same principle that applies to counties and special districts, the Supreme Court has applied the holdings of *Love* and *Romer* to state agencies as well. *See, e.g., State Dep't of Pers. v. Colo. State Pers. Bd.*, 722 P.2d 1012, 1016 (Colo. 1986) (holding under *Love* that a state agency has no authority to seek judicial review).[1]

[1] "Municipal corporations" like Longmont, on the other hand, do have a broad corporate power to sue and be sued. *See Sch. Dist. No. 1 v. Faker*, 106 Colo. 356, 359, 105 P.2d 406, 407 (1940); *City of Goldfield v. MacDonald*, 52 Colo. 143, 148, 119 P. 1069, 1070 (1911); 17 *McQuillin Mun. Corp.* § 49:2 (3d ed. 1999).

The same limitations on litigative authority found in *Love* and *Romer* apply even more forcefully to the Commission, which has even less statutory basis to bring this lawsuit than did the plaintiffs in *Love* and *Romer*. Unlike the plaintiffs in those cases, the Commission has no general power to sue and be sued. *See supra* section I.A. In its Complaint, ¶ 8, the Commission apparently based its right to sue Longmont on an even more general "whatever reasonably may be necessary" provision. §34-60-105. The Supreme Court has now *twice*, in *Love* and *Romer*, held that such provisions do not grant an authority to sue, except "within the framework of specific powers granted." *Id.*

The General Assembly has provided a framework of specific powers for the Commission. This framework includes the power to sue, but only in certain circumstances delineated in section 34-60-109, C.R.S. (2011). Under that section, when the Commission has reasonable cause to believe an operator[2] has violated a rule, order, or permit of the Commission, the Commission must give the operator written notice that an alleged violation of the Act or a Commission "rule, regulation or order" has occurred. § 34-60-121(4). If the operator fails to take corrective action, the Commission may then issue a cease-and-desist order. *Id.* § 34-60-121(5)(a). If the operator fails to comply with a cease-and-desist order, then, and only then, the Commission may request the attorney general to bring suit for injunctive relief under § 34-60-109. *Id.* § 34-60-121(5)(c). The lawsuit shall be brought in the name of the State, not the Commission. §34-60-109. Section 34-60-109 also provides for appellate review of judgments entered by district courts on Commission orders, permits, etc. *Id.* Appellate review is not at issue in this case.

[2] An "operator" means a person with the right to conduct oil and gas operations. § 34-60-103, C.R.S. (2011).

Section 34-60-109 notably does not vest the Commission with the general power to sue in other circumstances, such as bringing an action which is not based on its enforcement powers. Nor do any other sections of code give the Commission the authority to file a complaint outside of the enforcement context.[3] The Commission cannot sue the City any more than the Commission can sue an operator without going through the process of passing a rule, regulation or order, giving the operator notice of a violation, sending a cease-and-desist order, etc.

Furthermore, the provision on which the Commission seems to rely -- section 34-60-105, *see* Complaint ¶8 – does nothing more than restate a rule of statutory construction. As the section merely reiterates, "a political subdivision of the state necessarily possesses implied authority to carry out powers expressly conferred upon it by the Colorado Constitution or by statute." *Romer*, 898 P.2d at 40. Applying this rule, the Supreme Court found in both *Love* and *Romer* that the plaintiff still had "no greater inherent authority" to sue than the statutory framework explicitly provided. *Id.* at 42.

The sum of the Supreme Court's holdings is that a state agency, such as the Commission, may not sue absent *express* legislative authorization. The Commission cites no such authorization, and none exists. Without express power to sue in a case such as this, the Commission has no authority to bring this action and it has no standing to sue the City. *Id.*

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[3] Another section, section 24-3-102, C.R.S. (2011), gives all agencies in the executive branch of state government certain litigative powers. They may institute original actions before the Colorado Supreme Court and the United States Supreme Court. § 24-3-102(a). And, as section 34-60-109 concomitantly allows, an agency may pursue appeals in cases in which the agency is a party. Like section 34-60-109, section 24-3-102 grants no power to agencies to initiate proceedings via a complaint filed with a district court.

The only other tangentially relevant section, section 34-60-110(2), C.R.S. (2012), is also inapposite: it allows the Commission to sue a witness who refuses to testify before the Commission.

("[T]he district lacks standing to file this declaratory judgment action . . . ."). Because the plaintiff has no standing, this Court must dismiss this action for lack of jurisdiction. *Id.* (dismissing the case for lack of jurisdiction).

C. In Fact, the Legislature Has Specifically Repealed the Commission's General Power to Sue.

The legislature at one time did vest the Commission with a general power to sue, but it repealed that power in 1981. The repeal proves that the legislature does not intend the Commission to have the general power to sue.

When the General Assembly created the Commission in 1951, it expressly granted the Commission the power to sue and be sued:

> The Commission *may sue and be sued* in its administration of this Act in any State or Federal District Court in the State of Colorado having jurisdiction of the parties or of the subject matter. (emphasis added)

Ch. 230, sec. 7(b), 1951 Colo. Sess. Laws 651, 655 (attached as Exhibit 1). This is the type of power that the legislature has expressly granted to other agencies, as shown in section I.A of this Motion. The provision that granted the Commission the general power to sue and be sued was codified at §34-60-105(2), C.R.S. (1973). A copy of the 1973 codified statute is attached hereto as Exhibit 2.

The General Assembly specifically *repealed* this provision in 1981. The 1981 provision reads, "**Repeal**. 34-60-105 (2), Colorado Revised Statutes 1973, is repealed." Ch. 405, sec. 3, 1981 Colo. Sess. Laws 1689, 1690 (attached as Exhibit 3).[4] The legislature has not amended the

[4] Attorneys for the City attempted to conduct further research into the legislative history of this repealing act. Specifically, we contacted the Colorado State Archives for a copy of the audio recordings of legislative hearings on the act. However, as the Archives has informed us, their essential audio playback equipment is inoperative, and it is impossible to access any legislative

section, titled "Powers of commission," since 1981. As such, §34-60-105(2), C.R.S. (2011), reads simply, "Repealed."

The repeal of a statute without any reservation takes away all rights and remedies given by the repealed statute.[5] *Miller v. Brannon*, 207 P.3d 923, 929 (Colo. App. 2009) (citing *Sutherland Statutory Construction* §§ 23:7, :34). Further, it is presumed that when the legislature amends the law, it intends to change it. *City of Colo. Springs v. Powell*, 156 P.3d 461, 465 (Colo. 2007). In specifically retracting from the Commission its power to sue, the legislature prevented the Commission from filing suits, except those suits which the legislature continued to expressly authorize, such as enforcement actions and appeals, as explained above. Notwithstanding the Commission's power to do what is reasonably necessary, the legislature has explicitly eliminated and repealed the Commission's general power to sue. Without the power to sue in this case, the Complaint must be dismissed for lack of subject matter jurisdiction.

D. The Declaratory Judgment Act Does Not Give the Commission the Power to Sue

Neither does the Declaratory Judgment Act give the Commission the power to sue for declaratory judgment, for two reasons.

1. The Declaratory Judgment Act Does Not Broaden Jurisdiction, Only Remedies

The Declaratory Judgment Act, § 13-51-106, C.R.S. (2011) ("DJA"), gives "[a]ny person" the right to seek a "declaration of rights, status, or other legal relations" under a statute, municipal ordinance, contract, or franchise. The Colorado Supreme Court has held that the DJA

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audio recordings between the years of 1973 and 1981. This problem has been ongoing since May 2012.

[5] The 1981 version of the Act also set up a process for judicial review of Commission actions, allowing the Commission to be sued under the procedure. But no parallel process was set up at the time, or afterward, giving the Commission a general means to sue for declaratory judgment.

creates a "new remedy," but it "neither expands nor contracts the jurisdiction of Colorado's courts." *Romer*, 898 P.2d at 40. Specifically, the DJA does not vest agencies with the right to sue. *Id.* at 41. This principle is all the more applicable to this case, where the legislature has *repealed* the Commission's general power to sue.

The Commission cannot bootstrap jurisdiction by means of the DJA; it "must demonstrate an independent source of authority to establish standing to sue." *Id.* As shown above, the Commission cannot meet this burden. Accordingly, this case must be dismissed for lack of subject matter jurisdiction.

2. The Commission Is Not a "Person" under the Act

The DJA states in part:

> **Who may obtain declaration.** *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.

C.R.S. §13-51-106; *accord*, C.R.C.P. 57(b) (emphasis added). "Person" is defined by the DJA as, "any person, partnership, joint stock company, unincorporated association, or society, or municipal or other corporation of any character whatsoever." C.R.S. § 13-51-103. This definition of "person" does not include an agency of the state government. Therefore, the Commission does not qualify as a "person" able to sue for a declaratory judgment under the DJA or C.R.C.P. 57, and the case must be dismissed for lack of standing. *See, e.g.*, *Romer*, 898 P.2d at 41 (holding that "[i]n creating a new remedy the General Assembly did not by implication grant political subdivisions of the state the right to sue the state").

E. The Commission Has Not Met Its Burden of Proving Subject Matter Jurisdiction

"Under C.R.C.P. 12(b)(1), the plaintiff has the burden to prove jurisdiction." *Capra v. Tucker*, 857 P.2d 1346, 1348 (Colo. App. 1993). However, in the Commission's lone paragraph on jurisdiction, Complaint ¶ 3, it states only that subject matter jurisdiction exists "because the events complained of occurred in Colorado and the resolution of this dispute requires the application of Colorado law." This statement is insufficient to demonstrate subject matter jurisdiction, as *Love*, *Romer*, and *Hawes* amply illustrate. Although it seeks declaratory judgment, the Complaint does not cite the DJA, nor any other statute, in an attempt to prove standing and jurisdiction. While this Motion shows that this Court does not have subject matter jurisdiction to decide this case, it is critical to recognize that the burden is not on the City to disprove jurisdiction, but on the Commission to prove it. Without any citation of authority giving the Commission the power to sue, and thereby giving it standing and giving this Court subject matter jurisdiction, this Court must dismiss the Commission's Complaint.

II. Because the Commission Has Not Suffered "Injury-In-Fact", It Does Not Have Standing to Sue Longmont.

Whether the COGCC had standing to bring this action must be analyzed under the two-pronged test adopted by the Colorado Supreme Court in *Wimberly v. Ettenberg,* 194 Colo. 163, 570 P.2d 535 (1977). As a threshold matter, a court must determine whether the plaintiff has suffered injury in fact, and whether that injury is to a legally cognizable interest. *Community Tele-Communications, Inc. v. Heather Corp.*, 677 P.2d 330, 334-35 (Colo. 1984). "In the context of a declaratory judgment action, the first prong indicates whether the party has been 'adversely affected'; the second prong establishes the existence of a right." *Id.* Unless the

plaintiff has alleged that it has suffered injury from the defendant's action or inaction, standing does not exist, and the case must be dismissed. *Wimberly v. Ettenberg, supra.*

The injury-in-fact element of standing is jurisdictional and established only if a regulatory scheme "threatens to cause injury to the plaintiff's *present or imminent activities*." *Bd. of County Comm'rs v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045, 1053 (Colo. 1992) (emphasis added); *Villa Sierra Condominium Ass'n v. Field Corp.*, 878 P.2d 161 (Colo. App. 1994). An injury must be sufficiently direct and palpable in order for a court to determine with some assurance that there is an actual controversy proper for judicial resolution. *O'Bryant v. Pub. Utils. Comm'n*, 778 P.2d 648 (Colo. 1989). The fact that some controversy may arise in the future is not sufficient to allow a party to invoke court's declaratory jurisdiction. *See also City of Greenwood Village v. Petitioners for Proposed City of Centennial*, 3 P.3d 427 (Colo. 2000).

The Complaint does not allege that the Commission has suffered an injury-in-fact. The Complaint simply asserts that provisions of the Ordinance "usurp the Commission's authority" and impair its "institutional interests" and ability "to fulfill its statutory mandate." Complaint at ¶ 17. Notably, the Complaint does not allege that the Ordinance harms the Commission's "present or imminent activities" in the City. In fact, the purpose of the Ordinance is "to facilitate the exploration and production of oil and gas resources within the City in a responsible manner," and to protect the health, safety and welfare of the City's residents. Complaint, Ex. B at 2, sec. 2, § 32(a)(i). The Purpose Statement continues by stating that the City's intent is to use its zoning and land use authority in a manner that does not hinder the achievement of the state's interest in fostering the efficient development, production, and utilization of oil and gas resources in the state, and that the City's goal is to "work cooperatively with oil and gas

applicants and . . . the Colorado Oil and Gas Conservation Commission." *Id.* § 32(a)(ii). The Ordinance specifically recognizes the lawful role of the Commission in cooperative management of land use conflicts. *Id.*

Injury-in-fact requires more than fear that the Commission will suffer a future injury; it requires allegations and proof that an injury is "'direct and palpable,' not indirect, remote, or uncertain." *Kreft*, 170 P.3d at 857. It must be based upon allegations that injury has occurred. On its face, the Ordinance does not interfere with the Commission's authority. Nor does the Complaint allege any facts showing that the Commission's activities in Longmont have been affected in any way.

The mere allegation that Longmont's Ordinance may "infringe[] on the Commission's authority to regulate," *e.g.*, Complaint ¶ 43, through hypothetical action in the future, is speculative and insufficient. At this time, no actual injury to the COGCC or interference with its regulations has occurred or been alleged. Therefore, the Complaint does not satisfy the injury-in-fact requirement.

III. The Complaint Is Unripe

The primary purpose of a declaratory judgment is to settle controversies and to afford parties relief from uncertainty and insecurity with respect to their rights, status and other legal relations. C.R.S. § 13-51-102; *see also* C.R.C.P. 57(b). Yet, "[t]he doctrine of ripeness requires 'an actual case or controversy between the parties that is sufficiently immediate and real so as to warrant adjudication.'" *Jessee v. Farmers Ins. Exchange*, 147 P.3d 56, 59 (Colo. 2006) (quoting *Beauprez v. Avalos*, 42 P.3d 642, 648 (Colo. 2002)). Regardless of statutory provisions such as the DJA, "[c]ourts should refuse to consider uncertain or contingent future matters that suppose

speculative injury that may never occur." *Bd. of Directors, Metro Wastewater Reclamation Dist. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA,* 105 P.3d 653, 656 (Colo. 2005). Although the DJA is to be liberally construed and administered, "[a] proceeding for declaratory judgment must be based upon an actual controversy and not be merely a request for an advisory opinion." *Beacom v. Board of County Commissioners,* 657 P.2d 440, 447 (Colo. 1983); *Farmers Elevator Co. v. First National Bank,* 176 Colo. 168, 489 P.2d 318 (1971). A request for declaratory judgment cannot be used to obtain advisory opinions based upon the mere possibility of a future controversy. Accordingly, this Court's proper action is to dismiss this case as unripe. *See, e.g., Bd. of Directors v. Nat'l Union,* 105 P.3d at 658.

The case of *Burkett v. Amoco Prod. Co.*, 85 P.3d 576, 578 (Colo. App. 2003), is on point. *Burkett* involved a dispute concerning possible sites for gas wells. The plaintiffs, who were landowners, filed a complaint seeking a declaratory judgment and related injunctive relief asking that the court rule that the oil company did not have the right to conduct operations on their property. The oil company filed a motion to dismiss the complaint for failure to state a claim for relief on the grounds that there was no "actual dispute" because the oil company had not yet asked the Commission for a permit to drill on the plaintiffs' lands, known as an Application for Permit to Drill ("APD"). The court of appeals upheld the dismissal of the complaint, stating:

> Defendant argues that plaintiffs' request [for declaratory relief] is premature and would result in an advisory opinion because defendant has not yet submitted an APD for any proposed well. Defendant does not dispute that it has a duty to act reasonably, but argues that there is no existing controversy because it may never seek drilling permits, and if it does, the details of those permits have not yet been determined and may be satisfactory to both parties. Defendant further argues that if it does file an APD without reaching a surface use agreement, a declaratory judgment will not resolve any controversy because the trial court cannot determine whether any future plans are in fact reasonable, as such plans have not yet been devised. . . . Moreover, while it may be likely that defendant will submit

> an APD to COGCC at some time in the future, **until it actually obtains the permit and the local approvals required before drilling can begin, there is no present conflict between the parties. Absent a present conflict, a declaratory judgment claim under C.R.C.P. 57 is not justiciable.** (emphasis added)

Id. at 579.

This case stands in the same posture as *Burkett*, in that the Commission does not – and cannot – allege that an operator has applied for or secured an APD from the Commission to conduct operations under Longmont's new Ordinance. Therefore, "there is no present conflict between the parties". *Cacioppo v. Eagle County Sch. Dist. Re-50J*, 92 P.3d 453, 467 (Colo. 2004).

The declaration sought by the Commission – that portions of Longmont's Ordinance are preempted by the Act – is not available because it is based on a speculative dispute, and not grounded upon any actual controversy. *See, e.g., Sullivan v. Board of County Comm'rs*, 692 P.2d 1106, 1110 (Colo. 1984) (requested declaration that the board and sheriff have general powers to control personnel and budgetary matters in the sheriff's department was unavailable because it is not grounded upon any actual controversy concerning those matters). As *Burkett* notes, before an operator has the right to commence drilling operations in Longmont, the operator must first apply to the Commission for an APD. *See* COGCC, 300 Series Rules, Drilling, Development, Production and Abandonment; *see also Berenergy Corp. v. Zab, Inc.*, 94 P.3d 1232, 1235 (Colo. App. 2004), *aff'd*, 136 P.3d 252 (Colo. 2006) (noting that a court may refuse to render a declaratory judgment when it would not terminate the uncertainty or controversy giving rise to the proceeding, and stating that a court should not render a declaratory judgment unless it will fully and finally resolve the uncertainty or controversy as to all parties with a substantial interest who could be affected by the judgment). Until the Commission issues

an APD to an operator to conduct oil and gas exploration in the City, the case is unripe and there is no actual case or controversy. *See, e.g., Denver ex rel. Bd. of Water Comm'rs v. Bd. of County Comm'rs*, 782 P.2d 753, 766 (Colo. 1989) (refusing to address claims where municipality had not submitted to the permit application process established by regulations).

CONCLUSION

The Complaint must be dismissed.

Dated this 7th day of September, 2012.

Respectfully submitted,

CITY OF LONGMONT, COLORADO

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By: _____
Dan Kramer, Assistant City Attorney

PHILLIP D. BARBER, P.C.

By: _____
Phillip D. Barber

ATTORNEYS FOR THE DEFENDANT

This document was filed electronically pursuant to C.R.C.P. §1-26. The original signed document is on file at the offices of Phillip D. Barber, P.C.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing **CITY OF LONGMONT'S MOTION TO DISMISS COMPLAINT FOR DECLARATORY RELIEF FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM**, was served this 7th day of September, 2012, by LEXIS/NEXIS File and Serve on the following:

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