DISTRICT COURT, COUNTY OF LARIMER, STATE OF COLORADO Court Address: 201 LaPorte Avenue Fort Collins, CO 80521 970-494-3500	DATE FILED: April 12, 2021 4:19 PM CASE NUMBER: 2020CV30821 ▲ COURT USE ONLY ▲
Plaintiffs: **TODD A. JIRSA, WILLIAM G. VAN HORN, AND RICHARD K. GRIGSBY,** v. Defendant: **TOWN OF ESTES PARK.**	Case Number **2020CV30821** Div. **3B**

AMENDED ORDER GRANTING MOTIONS TO DISMISS

Defendant Town of Estes Park ("Town" or "Estes Park") filed a motion to dismiss pursuant to Colo. R. Civ. P. 12(b)(1) and 12(b)(5). The Town asserts that (1) plaintiffs have no standing and thus their claim must be dismissed for lack of subject-matter jurisdiction under Colo. R. Civ. Pro. 12(b)(1); (2) the claim is time barred by the statute of limitations and thus must be dismissed under Rule 12(b)(5); and (3) the complaint fails to state a claim upon which relief can be granted under TABOR and thus must be dismissed. Plaintiffs oppose this motion. For the reasons set forth below, the Court grants defendant's motion because plaintiffs lack taxpayer standing.

I. INTRODUCTION.

Plaintiffs' complaint isn't the paragon of clarity. In it, they allege the Town "violated (and is continuing to violate) the Taxpayer's Bill of Rights, Colo. Const. art. X, § 20," or "TABOR," by entering a multi-year fiscal obligation without first obtaining approval from Estes Park voters. Compl. ¶ 1. Plaintiffs are all long-time residents of Estes Park, *id.* ¶¶ 2–9, which is a municipal corporation operating as a statutory town. *Id.* ¶10.

Plaintiffs assert that Estes Park first violated TABOR in March 2014 when it entered into an Agreement with the Federal Highway Administration's Office of Federal lands for a road construction project referred to as the Estes Park Loop. Compl. ¶11. Under the terms of that Agreement, Estes Park is financially obligated to match at least 17.2% but not more than 24.4% of total project costs. Compl. ¶12. The Agreement states that matching funds from the Town of Estes Park shall not exceed $4.2 million. Ex. A to Motion, p. 12–13 (Federal Lands Access Program Project Memorandum Agreement). The Agreement further states that the Town's matching share will be through a Colorado Department of Transportation ("CDOT") award and is contingent on such an award from CDOT for $4.2 million. *Id.* at p. 12 (table 'Funding Source').

Following the creation of the March 2014 Federal Highway Agreement, the Town contracted for the referenced award in January 2015. Ex. B to Motion, p. 2 (CDOT Agreement). Under what's referred to as the Intergovernmental Agreement, Estes Park accepted ownership of a segment of Highway 34, via quitclaim deed, "in exchange for a payment of $4,200,000.00 from CDOT to be credited to a special fund to be used only for transportation-related expenditures." Ex. B to Motion, p. 2. The Town had authority to enter into such an agreement with CDOT by resolution approved in December of 2014. Ex. B to Motion, p. 20.

The Town's bank account statement shows a line entry for the $4.2 million award. In February 2015, that amount was deposited in the Town's general fund account. Ex. C to Motion, p. 2. Then, on December 8, 2015, the Town created a budget amendment to account for the $4.2 million award, creating a separate budget sheet for these funds. Ex. D to Motion ("FLAP Project Detail Analysis"). That budget sheet appropriately designates and segregates, through basic accounting practices, the $4.2 million received from CDOT.

Estes Park's finance director, Duane Hudson, states that all funds paid by the Town under the Federal Highway Agreement came from "this $4.2 million received from CDOT." Ex. 1 to

Motion, ¶ 7-9 (Aff. of Duane Hudson). The Town's budget sheet confirms that all funds used for the Federal Highway Agreement were expended through proper annual appropriations made in 2016, 2017, 2018, 2019, and 2020. Ex. D to Motion. Estes Park has thus far spent approximately $3.8 million under the Agreement. Compl. ¶ 13.

Plaintiffs allege that the Federal Highway Agreement violated § 20(4)(b) of TABOR, which requires districts to have voter approval in advance for the "creation of any multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever without adequate present cash reserves pledged irrevocably and held for payments in all future fiscal years." Colo. Const. art. X, § 20(4)(b). According to plaintiffs, because the Federal Highway Agreement constitutes a multiple-fiscal year financial obligation, it should've been submitted to the voters. Compl. ¶ 16. They also contend that Estes Park hasn't irrevocably pledged the necessary money from its cash reserves, and "on information and belief," the Town lacked sufficient cash reserves to be able to irrevocable pledge the necessary funds at the time of the Agreement. *Id.* ¶¶ 16–17.

Plaintiffs solely seek injunctive relief. Specifically, they request an order directing Estes Park that "revenue collected, kept, or spent illegally since four full fiscal years before a suit is filed shall be refunded with 10% annual simple interest from the initial conduct." Colo. Const. art. X, § 20(1).

Estes Park first argues that plaintiffs don't have standing and thus their claim must be dismissed for lack of subject-matter jurisdiction under Colo. R. Civ. Pro. 12(b)(1). The Court agrees. The applicable legal standards are discussed below.

II. APPLICABLE LEGAL STANDARDS.

A complaint may be dismissed under Colo. R. Civ. P. 12(b)(1) when the court lacks subject-matter jurisdiction over the claims alleged in the complaint. A challenge to the trial court's subject-matter jurisdiction can't be waived and may be raised at any stage of the proceedings. *Town of Carbondale v. GSS Properties, LLC*, 169 P.3d 675, 681 (Colo. 2007).

In considering a motion to dismiss for lack of subject-matter jurisdiction, 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). "The plaintiff has the burden of proving jurisdiction, and evidence outside the pleadings may be considered to resolve a jurisdictional challenge." *Id.* (quoting *City of Aspen v. Kinder Morgan, Inc.*, 143 P.3d 1076, 1078 (Colo. App. 2006)). When there is no evidentiary or underlying factual dispute, the court may decide the jurisdictional issue as a matter of law. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001).

A trial court may consider any competent evidence pertaining to a Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction without converting the motion to a summary judgment motion. *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 924 (Colo. 1993). Because dismissal for lack of subject-matter jurisdiction isn't an adjudication on the merits, but rather is the result of a court lacking the power to hear the claims asserted, such a dismissal is without prejudice. *Peabody Sage Creek Mining, LLC v. Colorado Dep't of Pub. Health and Env't, Water Quality Control Div.*, 2020 COA 127, ¶ 40.

III. DISCUSSION.

Subject-matter jurisdiction concerns the court's authority to deal with the class of cases in which it renders judgment. *Carrera v. People*, 449 P.3d 725, 728 n.4 (Colo. 2019). Here, plaintiffs assert in the complaint that this Court has jurisdiction pursuant to Colo. Const. art. VI § 9(1) (general jurisdiction) and Colo. Rev. Stat. § 13-1-124 (2020). Estes Park counters that there's no subject-matter jurisdiction because plaintiffs lack standing to bring their claim. Plaintiffs respond that they have taxpayer standing.

Whether plaintiffs have standing to sue is a question of law. *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004). In determining whether a plaintiff has established standing, the Court accepts as true all material allegations of fact in the complaint. *Reeves-Toney v. School Dist. No. 1 in Cty. of Denver*,

442 P.3d 81, 85 (Colo.2019). While Colorado lacks the explicit "case or controversy" requirement under Article III of the U.S. Constitution, *Conrad v. City & County of Denver*, 656 P.2d 662, 669 (Colo.1982), our standing doctrine has separation of power roots in Colorado Constitution Articles III and VI. *Ainscough*, 90 P.3d at 855–56.

Named after the case in which it was first articulated, the Colorado Supreme Court routinely applies the two-prong *Wimberly* test to determine standing. *E.g., Hickenlooper v. Freedom from religion Foundation, Inc.*, 338 P.3d 1002, 1006 (Colo. 2014); *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977). Under the *Wimberly* test, a plaintiff must show both (1) that she "suffered an injury in fact," and (2) that the injury was to a "legally protected interest." *Hickenlooper*, 338 P.3d at 1006. If a court determines that standing doesn't exist, it must dismiss the case. *Id.*

The legally-protected-interest requirement promotes judicial self-restraint. *Id.* This prudential consideration recognizes "that unnecessary or premature decisions or constitutional questions should be avoided, and that parties actually protected by a statue or constitutional provision are generally best situated to vindicate their own rights." *Id.* (cleaned up). Claims for relief under the Constitution, the common law, a statute, or a rule or regulation satisfy the legally-protected-interest requirement. *Ainscough*, 90 P.3d at 856. Thus, plaintiffs here satisfy the legally-protected-interest requirement because they seek relief under Colo. Const. art. X, § 20(1).

But Estes Park contends that plaintiffs haven't suffered an injury in fact and thus lack standing. The Court agrees.

The purpose of the 'injury in fact' is to uphold the Article III separation of powers doctrine and permit only injured parties—not the general public—to seek redress in the courts. *Hickenlooper*, 338 P.3d at 1006. Thus, although both tangible injuries and intangible injuries can satisfy the injury-in-fact prong, "an injury that is overly indirect and incidental to the defendant's action will not convey standing." *Id.* at 1007 (cleaned up).

To establish taxpayer standing, plaintiffs' grievance must directly concern unconstitutional expenditures or use of taxpayer funds with a "clear nexus" to their status as a taxpayer. *Reeves-Toney v. School Dist. No. 1 in City and County of Denver*, 442 P.3d 81, 87–88 (Colo. 2019). The clear-nexus requirement has been articulated over a series of Supreme Court decisions. Initially, the Supreme Court held that taxpayers had standing to challenge unconstitutional money transfers from special cash funds to the General Fund and the expenditure of that money to defray general government debts. *Barber v. Ritter,* 196 P.3d 238, 241 (Colo. 2008) (claim brought under Colo. Const. art. X, § 20). The petitioners there were said to have suffered an injury in fact because they alleged unlawful government expenditure contrary to TABOR. *Id.* at 246. In acknowledging that "this reasoning may appear to collapse the *Wimberly* two-part test into a single inquiry," the Court noted that "when a plaintiff-taxpayer alleges that a government action violates a specific constitutional provision … such an averment satisfies the two-step standing analysis." *Id.* at 247.

Noting that its intent wasn't to abolish the injury requirement by its holding in *Barber*, the Supreme Court later clarified that "the plaintiff must demonstrate a clear nexus between his status as a taxpayer and the challenged government action" to establish taxpayer standing. *Hickenlooper,* 338 P.3d at 1008. In doing so, it relied on *Brotman v. East Lake Creek Ranch, LLP*, 31 P.3d 886, 888–89 (Colo. 2001). There, the Supreme Court considered whether an adjacent landowner had taxpayer standing to challenge the State Board of Land Commissioners' decision to sell a parcel of school land. *Id.* Emphasizing that "income generated from the Land Board's management of school lands was distinct from and in addition to income generated through taxation for schools"—and thus didn't affect the amount of tax revenue spent on schools—the Land Board's decision to sell the school land had "no effect" on the landowner *as a taxpayer*. *Id.* at 892. Because there was no effect on the landowner as a taxpayer, the required nexus to establish taxpayer standing didn't exist. *Id.*

Applying that analysis articulated in *Brotman*, the Supreme Court in *Hickenlooper* emphasized that while the respondents alleged in their complaint to be Colorado taxpayers, they didn't assert "any injury based on an unlawful expenditure of their taxpayer money, nor [did] they allege that their tax dollars [were] being used in an unconstitutional manner." *Hickenlooper*, 338 P.3d at 1008. (cleaned up). Because the complaint didn't concern the expenditure of their tax dollars, no nexus existed between the alleged constitutional violation and their status as taxpayers. *Id.* So, there wasn't an injury sufficient to establish taxpayer standing. *Id.*

The Supreme Court further explicated the clear-nexus test in *Reeves-Toney*. There, the Supreme Court explained the "interest of the taxpayer who challenges the constitutionality of government action is her economic interest in having her tax dollars spent in a constitutional manner." *Reeves-Toney*, 442 P.3d at 86 (cleaned up). Taxpayer standing doesn't flow from "every allegedly unlawful government action that has a cost." *Id.* at 87–88. Instead, "to establish standing as a taxpayer, a plaintiff must establish an injury relevant to her status as a taxpayer—*that is, to the use of her tax dollars*." *Id.* at 87. The Supreme Court held that because the plaintiff there alleged "no unconstitutional expenditure of public funds to which she has contributed by her payment of taxes," she failed to demonstrate a clear nexus between her status as a taxpayer and the alleged constitutional violation. *Id.* at 88 (pointing out that her complaint asserted "neither an alleged expenditure nor transfer of taxpayer funds"). Thus, she didn't establish taxpayer standing. *Id.* ("she does not allege any direct fiscal impact on taxpayers tethered to [the alleged violation]").

Here, plaintiffs have failed to satisfy the injury-in-fact prong for taxpayer standing because they've failed to allege—or show—a clear nexus between their status as Town taxpayers and the Town's alleged TABOR violation. The evidence provided by the Town shows that no funds implicated by the Federal Highway Agreement are funds collected from Estes Park taxpayers. It's all

CDOT funds. And they're state funds that, in any event, were appropriately accounted for by the Town.

The purpose of the injury-in-fact prong is to ensure that the plaintiff has actually been harmed in a manner proper for judicial resolution. *Ainscough*, 90 P.3d at 855–56. In the context of taxpayer standing, the clear nexus test ensures that only injured taxpayers—not the general public—have an avenue for redress when their "economic interest in having their tax dollars spent in a constitutional manner" has been violated. *Conrad*, 656 P.2d 662, 668 (cleaned up).

Plaintiffs' alleged injury is that the Town didn't follow the TABOR procedure when it created a multiple-year financial obligation with the Federal Highway Agreement. But they premise their injury solely on their status as *Town* taxpayers. Yet, only *state* funds are implicated here. Under the Federal Highway Agreement, Estes Park's matching funds won't exceed $4.2 million—in fact, its matching obligation was made contingent on CDOT awarding Estes Park $4.2 million. Ex. A to Motion, p. 12. In accordance with the Federal Highway Agreement and the Intergovernmental Agreement, Estes Park received that money from CDOT. Because all funds at issue are state funds, plaintiffs have failed to allege or show that their tax dollars paid to Estes Park have been spent at all.

Relying entirely on *Barber*, plaintiffs argue that once the Town expends funds from the general fund, any citizen of the town has taxpayer standing. Response at 2–4. Plaintiffs' assertion proves too much and misstates *Barber*'s holding.

In *Barber*, the state transferred money from special funds into the state general fund during a recession to defray general government expenses. *Barber*, 196 P.3d at 247. The Supreme Court concluded that plaintiffs had asserted an injury in fact because the government used money from special funds, funneled them to the general fund, and used those funneled funds to defray government expenses unrelated to the purposes for which taxes were collected into those special

funds. That, in turn, created a loss in those special funds to be born later by the taxpayers. *Id.* at 245–47. It was the pecuniary effect on plaintiffs as state taxpayers that created the injury.

Unlike the government expenditures in *Barber*, Estes Park hasn't touched funds collected from *Town* taxpayers. As the undisputed evidence shows, all funds came from CDOT and were properly accounted for. The Town didn't funnel any funds from one special Town fund to pay for the Federal Highway Agreement, nor did it create a debt affecting Estes Park taxpayers.

Plaintiffs' argument also ignores post-*Barber* decisions, which explicitly require that they demonstrate "a direct fiscal impact on taxpayers tethered to" the alleged TABOR violation to establish taxpayer standing. *See Reeves-Toney*, 442 P.3d at 88. Because CDOT provided all funds implicated under the Federal Highway Agreement, there's *no* fiscal impact on plaintiffs as Town taxpayers tethered to that Agreement. Like the income generated from the Land Board's sale of school land in *Brotman*, the income generated from CDOT is distinct from and in addition to income generation through Estes Park's taxation—and thus doesn't affect the amount of tax revenue available for all other Town matters. Because the Town's expenditure of the CDOT funds has no effect on the plaintiffs as Town taxpayers, plaintiffs have failed to establish a clear nexus between their status as taxpayers and the alleged TABOR violation.

Plaintiffs' commingling of funds' argument is equally unpersuasive. They contend that because the CDOT funds were "comingled" with the general fund, "it is impossible to say with any precision what the ultimate funding source of any particular expenditure was." Response at 3. That may be so, if the Town didn't follow basic accounting practices. But, like most other Colorado municipalities, Estes Park uses one bank account under which it segregates and designates different funds through proper accounting practices in compliance with Colo. Rev. Stat. § 29-1-101 (Local Government Budget Law) and § 29-1-501 (Local Government Accounting Law). The Town

received the $4.2 million from CDOT and accounted for those funds in a special line entry by creating a separate budget sheet solely for expenditures of those funds. Ex. D.

On that budget sheet, the Town has scrupulously kept track of all the CDOT funds. The budget sheet shows the (1) incremental increase, (2) rolled over in budget resolution, (3) total in budget resolutions, (4) actuals, and (5) amount to roll over. Ex. D. The spreadsheet also shows the revenue year, the transaction or expenditure date, a description of the transaction, and the account number, in addition to total revenues and total expenditures. *Id.*

The information there is the equivalent of a statement of cash flow for the "FLAP Project" or the Town's cash receipts and payments pertaining to the Federal Highway Agreement. On the budget sheet, the Town properly appropriated from this line item annually from 2016 to 2020. It hasn't expended in excess of the $4.2 million disbursement and lists no liabilities. Ex. D; *see also* Ex. 1, ¶¶ 6–9. No Town taxpayer contributions will ever be implicated under the Federal Highway Agreement, as the Town isn't obligated to match beyond $4.2 million and that amount has been entirely provided by CDOT, the state.

Plaintiffs' commingling argument is as red a herring as it gets. The facts boil down to this: Plaintiffs allege Estes Park violated TABOR, and to fund the financial obligation created by that violation, the Town uses revenue from the same account into which plaintiffs contribute tax dollars. While the Town only has this one bank account, all funding for this challenged financial obligation came from the state, not Town taxpayers. There's simply no evidence to establish an injury to plaintiffs relevant to their status as a taxpayer—that is, *to the use of their tax dollars*. As such, there's no clear nexus between plaintiffs' interest as taxpayers and the alleged TABOR violation and thus no injury in fact. Because there's no injury in fact, plaintiffs don't have taxpayer standing.

In a last-ditch effort, plaintiffs assert they have standing as *state* taxpayers, or that they have "voter standing." To the extent plaintiffs claim taxpayer standing as state taxpayers, they haven't

named the state as a party nor have they alleged any wrongdoing by the state. This argument fails. As for so called "voter standing," the Court won't address that argument because there are no allegations in the complaint to support it.

In sum, because plaintiffs lack standing, the Court doesn't have subject-matter jurisdiction over plaintiffs' claim.

IV. CONCLUSION.

For the reasons stated above, this Court doesn't have subject-matter jurisdiction and Estes Park's motion to dismiss is **granted**. Plaintiffs' complaint is dismissed without prejudice.

SO ORDERED on April 12, 2021, *nunc pro tunc* April 1, 2021.

BY THE COURT:

JUAN G. VILLASEÑOR
District Court Judge