DISTRICT COURT CITY & COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: November 21, 2016 2:06 PM CASE NUMBER: 2016CV32126
Plaintiff: JOHN D. MACFARLANE v. **Defendant:** THE CITY AND COUNTY OF DENVER; MICHAEL B. HANCOCK, in his official capacity as Mayor of the city of Denver, JOSE M. CORNEJO, in his official capacity as Manager of Denver Department of Public Works; ALLEGRA HAYNES, in her official capacity as Executive Director of Denver Department of Parks and Recreation	▲ **COURT USE ONLY** ▲ Case Number: 2016CV32126 Courtroom: 409
ORDER	

This matter comes before the Court on Defendants' the City and County of Denver ("City"), Michael B. Hancock ("Hancock"), Jose Cornejo ("Cornejo"), and Allegra Haynes ("Haynes") (collectively "Defendants") Motion to Dismiss filed on July 8, 2016. Plaintiff John D. Macfarlane ("Macfarlane") filed a response on August 19, 2016. Defendants filed a reply on September 9, 2016. After reviewing the motions, responses, replies, exhibits, relevant portions of the court's file, and applicable law, the Court hereby finds and orders as follows:

I. Background

This case is premised around the alleged construction of an "industrial-level stormwater management project in designated parkland," specifically Denver's City Park Golf Course ("CPGC"). Compl. ¶1. Macfarlane argues that such management project (the "Project") is "designed specifically to protect a highly-controversial federal highway project and other new construction." *Id.* Macfarlane asserts that the Project: 1) violates Denver's zoning code; 2) violates Denver's Department of Parks and Recreation ("DPR") charge of the Denver City Charter; 3) without popular vote, would violate usage restrictions; and 4) is contrary to caselaw interpreting similar dispositions of parkland. *Id.* at ¶3(i)-(iv). Macfarlane seeks to enjoin Defendants from construction and declare that the Project's location in CPGC violates Denver Charter and/or Denver Zoning Code. Compl. ¶106.

Defendants file this Motion to Dismiss pursuant to C.R.C.P 12(b)(1) and 12(b)(5) arguing that: 1) the Court lacks subject matter jurisdiction because the claims are not ripe; 2) the Project does not violate Denver's Charter or Zoning Code; 3) Macfarlane's declaratory judgment and injunctive relief claim fails to state a claim.

II. Standard of Review

A. 12(b)(1) – Lack of Subject Matter Jurisdiction

Motions to dismiss for lack of subject matter jurisdiction pursuant to C.R.C.P. 12(b)(1), requires the trial court to examine 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 has the burden of proving jurisdiction, and evidence outside the pleadings may be considered to resolve a jurisdictional challenge." *Id.* A court lacks subject matter jurisdiction when the claims are not ripe for adjudication. *Stell v. Boulder County Dept. of Social Services*, 92 P.3d 910, 914 (Colo. 2004).

B. 12(b)(5) – Failure to State a Claim

The Colorado Supreme Court recently clarified the standard of review to be employed by a trial court when considering a motion to dismiss under C.R.C.P. 12(b)(5) in *Warne v. Hall*, 2016 CO 50, a case decided on June 27, 2016. In that case, the court held that motions to dismiss should be evaluated under the standards identified by the United States Supreme Court in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 554 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

As a general matter, when considering a Rule 12(b)(5) motion, the court must accept all well-pleaded allegations of the complaint as true, and must construe them in a light most favorable to the plaintiff. Under C.R.C.P 8(a), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to give the defendant fair notice of what the claim is and the grounds upon which it rests.

While a complaint need not contain detailed factual allegations, a plaintiff must identify the grounds on which he is entitled to relief, and cannot simply provide "labels and conclusions, and a formulaic recitation of the elements of the cause of action." *Twombly*, 550 U.S. at 555. A complaint is insufficient if it

provides only bald assertions without further factual enhancement. *Id.* at 557. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Id.* at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Iqbal*, 556 U.S. at 678. Facial plausibility requires that the plaintiff show "more than a sheer possibility that a defendant has acted unlawfully." *Id.* "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* The Tenth Circuit has stated that "plausibility" in this context refers "to the scope of the allegations in the complaint: if they are so general that they encompass a wide swatch of conduct, most of it innocent, then plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" *Robbins v. Okla.*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Twombly*, 550 U.S. at 569).

Although a court must accept as true all of the allegations in a complaint, this requirement does not apply to legal conclusions. *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Stated differently, a court need not accept as true legal conclusions couched as factual allegations. *Id.* To determine whether a complaint states a plausible claim for relief, a court must engage in a "context-specific" analysis drawing on "judicial experience and common sense." *Id.* at 679. "But where the well-pleaded facts do not permit the court to infer more

than the mere possibility of misconduct, the complaint has alleged – but it has not shown that the pleader is entitled to relief. *Palisades Nat'l Bank v. Williams*, 816 P.2d 961, 963 (Colo. App. 1991).

When considering a motion to dismiss for failure to state a claim, a court may consider only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference, and matters proper for judicial notice. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011).

III. Analysis

The Court must determine, first, whether Plaintiff's claims are ripe for adjudication and, if so, the Court must determine whether Plaintiff has stated a claim upon which relief can be granted.

A. Ripeness

Defendants argue that Plaintiff's claims are not ripe because: 1) his claims are not present and cognizable and 2) he has failed to allege an injury in fact to a legally protected interest.

1. Present and Cognizable Claims

Defendants argue that, given the preliminary stage of the proposed Project, Macfarlane's declaratory judgment claim is not yet present and cognizable and thus such claim is not ripe for adjudication. Plaintiff argues that the Project will require an extended closure of CPGC regardless of what design Defendants ultimately select. Therefore, Plaintiff asserts that he has standing as there is a present and cognizable dispute that is ripe for adjudication.

To have standing to bring seek a declaratory judgment claim, the plaintiff must allege an injury in fact to a legally protected interest that can be effectively resolved by the declaratory judgment. *Farmers Ins. Exch. v. District Court*, 862 P.2d 944, 947 (Colo. 1993); *County Comm'rs v. Bowen/Edwards Assocs.*, 830 P.2d 1045, 1052 (Colo. 1992); *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (1977). One seeking declaratory relief must "demonstrate that the challenged [action] will likely cause tangible detriment to conduct or activities that are presently occurring or are likely to occur in the near future." *Mt. Emmons Mining Co. v. Crested Butte*, 690 P.2d 231, 240 (Colo. 1984).

"A declaratory judgment action is only appropriate when the rights asserted by the plaintiff are present and cognizable ones." *Farmers Ins. Exchange v. District Court for Fourth Judicial Dist.*, 862 P,2d 944, 947 (Colo. 1993). A present and cognizable claim is based upon present, established facts. *Id.* "[T]he requirement is that all relevant events have occurred, so that the court is addressing a present dispute." *Villa Sierra Condo. Ass'n v. Field Corp.*, 878 P.2d 161, 165 (Colo. 1994).

Defendants argue that declaratory judgment is not appropriate because they have yet to select a plan for the execution of the Project and, without a final plan, it would be impossible to determine the effects on CPGC. Thus, at this stage, Defendants argue, the Court could only review tentative plans and,

in essence, could only issue an advisory opinion.[1] While the Court acknowledges that declaratory judgment is not appropriate "where the dispute requires an interpretation in light of extrinsic facts which are not yet determinable," here, the Court determines that Plaintiff's declaratory judgment claim is not merely based on the hypothetical future construction and impacts to CPGC. *McDonald's Corp. v. Rocky Mountain McDonald's Inc.*, 590 P.2d 519, 521 (Colo. App. 1979). Rather, a site selection has been made for the Project and Defendants' own materials include a tentative redesign timeline indicating closure from late 2018 into 2019. Pl. Ex. 3; *see Burkett v. Amoco Prod. Co.*, 85 P.3d 576, 578 (Colo. App. 2003) (court ruled declaratory judgment claim was not ripe for adjudication because plaintiff had not selected site nor obtained permits or applications for drilling). Here, it does not appear to the Court that this is a mere possibility of a future controversy, but rather Defendants have selected CPGC for the site location, developed and distributed fact sheets concerning the Project, and advanced several plans for the Project which allegedly all require closure of the CPGC. *See Villa Sierra Condo Ass'n v. Field Corp.*, 878 P.2d 161 (Colo. 1994) (court upheld declaratory judgment claim despite the fact that defendant had made no final decision regarding the nature of improvements to be constructed.) Thus, in the Court's view, while such activity is not presently occurring, it is likely to occur in the near future. *See Mt. Emmons Mining*, 690 P.2d at 240.

[1] *See Board of County Com'rs of County of Archuleta v. County of Road Users Ass'n*, 11 P.3d 432, 439-10 (Colo. 2000) (courts cannot issue advisory opinions in cases that are not yet ripe); *Farmers Ins. Exch. V. Dist. Court for Fourth Judicial Dist.*, 862 P.2d 944, 947 (Colo. 1993) (declaratory claim calls "not for an advisory opinion upon a hypothetical basis, but for an adjudication of [a] present right upon established facts."

Therefore, Plaintiff's declaratory judgment claim is present and cognizable as Plaintiff alleges, and the Court accepts as true at this juncture, that regardless of the plan selected, the Project will require an extended closure of CPGC.

2. Injury in Fact

Defendants argue that Plaintiff has not suffered an injury in fact to a legally protected interest and therefore lacks standing to bring his declaratory judgment claim and thus such claim is not ripe for adjudication.

An injury in fact is established when the plaintiff demonstrates that a regulatory scheme threatens to cause injury to the plaintiff's present or imminent activities. *Bowen/Edwards*, 830 P.2d at 1053. Once an injury in fact is established, the plaintiff must then show that the injury is to a legally protected interest, one which "emanates from a constitutional, statutory or judicially created rule of law that entitles the plaintiff to some form of relief." *Id.* An injury in fact "must be 'direct and palpable,' not indirect, remote, or uncertain." *Kreft v. Adolph Coors Co.*, 170 P.3d 854, 857 (Colo. App. 2007).

Largely in line with Defendants prior argument, Defendants argue that "Plaintiff has not alleged, nor can he given the preliminary stage of the proposed project at City Park Gold Course, that he suffered an injury in fact to a legally protected interest." Mot. to Dismiss p. 7. Without final plans, Defendants argue, impacts to CPGC are merely speculative. However, Plaintiff alleges that Defendants "have announced an unequivocal intention to proceed

with the Project at CPGC," thus making the impacts neither speculative nor hypothetical. Resp. p. 9; *See also* Compl. ¶84. In accordance with the Court's above determination, the Court finds that Defendants' proposed Project threatens to cause injury to Plaintiff's legally protected interest.

Therefore, the Court determines that Plaintiff has stated a present and cognizable claim which threatens injury to a legally cognizable interest and, thus, Plaintiff's claims are ripe for adjudication.

B. Failure to State a Claim

Defendants argue that, pursuant to C.R.C.P. 12(b)(5) and the *Warne v. Hall* plausibility standard for pleadings, Plaintiff fails to state a claim upon which relief can be granted as to both his declaratory relief and injunctive relief claims. Specifically, regarding Plaintiff's declaratory judgment claim, Defendants assert that the Project does not violate the Denver Charter and therefore Plaintiff's declaratory judgment claim must fail. Plaintiff argues, on the other hand, that the Project's location in CPGC is inconsistent with public park purposes in violation of the Denver Charter.

Sections 2.4.4(A), 2.4.5, and 2.4.6 of the Denver Charter establishes the powers and duties of DPR. Section 2.4.5 states that DPR may not lease or sell park land without voter approval unless such lease is "*for park purposes* to concessionaires, to charitable or nonprofit organizations, or to governmental jurisdictions." (emphasis added). Here, Plaintiff essentially alleges that the Project violates the Denver Charter because it is not a park purpose.

Specifically, Plaintiff alleges that the Colorado Department of Transportation ("CDOT") needs a location to put storm water in order to protect its I-70 project. Plaintiff asserts that I-70 is in need of a drainage system to accommodate the 100 year flood protection plan. Plaintiff in turn argues that "[r]ather than CDOT constructing its own drainage system . . . CDOT proposes to construction [sic] through impoverished north Denver neighborhoods," in violation of the Denver Charter because such actions are akin to a sale or lease of a portion of CPGC. Resp. p. 13. While Defendants argue that Plaintiff's claim fails to allege any facts that a sale or lease of any portion of CPGC is underway or even contemplated, the Court does not agree. Plaintiff clearly asserts and cites factual allegations indicating that the Project would require closure of the CPGC despite what plan Defendants ultimately select. At this stage in the proceedings Plaintiff must only provide a short and plain statement of the claim showing that he is entitled to relief and is not required, as Defendants suggest, to provide "specifics describing how the contemplated project would transact away or otherwise remove a portion of the golf course for a non-park purpose." Mot. to Dismiss p. 9. Here, the Court finds that Plaintiff has stated a claim upon which relief can be granted.

Defendants also argue that Plaintiff's injunctive relief claim simply recites the elements for injunctive relief and therefore the Complaint fails to plead with sufficient plausibility. Plaintiff, however, incorporates all prior allegations in this Complaint into the claim for injunctive relief. At the pleading stage, Plaintiff must allege fact that indicate the danger or real, immediate, or

irreparable injury. Here, the Court finds that Plaintiff's allegations in the Complaint are sufficient to maintain a claim for injunctive relief.

IV. Conclusion

Accordingly, the Court DENIES Defendants' Motion to Dismiss.

DATED this 21st day of November, 2016.

SO ORDERED.

MICHAEL J. VALLEJOS
Denver District Court Judge