District Court, Boulder County, Colorado 1777 6th St., Boulder, CO 80302 **Plaintiffs:** PEOPLE OF THE STATE OF COLORADO *ex rel.* CYNTHIA H. COFFMAN, in her official capacity as Colorado Attorney General; and THE STATE OF COLORADO, and **Plaintiff Intervenors:** COLORADO OIL AND GAS ASSOCIATION; AMERICAN PETROLEUM INSTITUTE v. **Defendants:** COUNTY OF BOULDER, COLORADO; and THE BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY.	▲ COURT USE ONLY ▲ Case Number: 2017 CV 30151 Div.: 3
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MOTION TO DISMISS STATE OF COLORADO'S COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Defendants, the County of Boulder, Colorado,[1] and the Board of County Commissioners of Boulder County (the "Board") (together "the County"), under C.R.C.P. 12(b)(1) and (5), request that the Court dismiss this case with prejudice. In support, the County states as follows:

CONFERRAL

Under C.R.C.P. 121 § 1-15, counsel for the County conferred with Plaintiffs' counsel and counsel for the Intervenors, both of whom oppose the motion.

OVERVIEW

The State of Colorado (the "State"), through the Colorado Attorney General, filed for injunctive and declaratory relief against the County regarding two of the County's legislative acts: (1) a moratorium on accepting and processing oil and gas development applications adopted in 2012 and terminated in May 2016 (the "Expired Moratorium") (*see* Resolution 2016-65, ¶ 1, attached as Ex. J to Complaint for Declaratory and Injunctive Relief ("Complaint" or "Compl.")); (2) a moratorium on accepting and processing oil and gas development applications enacted in May 2016 that expires by its own terms on May 1, 2017 (the "Current Moratorium") (*Id.* at ¶ 2 and Resolution 2016-137, Compl. Ex. L).

The State makes two critical but erroneous assertions in the Complaint: (1) that the County has had a single moratorium in place since 2012; and (2) that local governments across Colorado are forbidden by state law from enacting moratoria of any duration on oil and gas development. *See* Compl. ¶¶ 2, 7-8, 10, 26-27, and 38. Based on these errors, the State claims it

[1] The Court should dismiss all claims against "Boulder County" because a Colorado county may only be sued as the board of county commissioners and any attempt to sue a county under a different name is a nullity. *See* § 30-11-105, C.R.S.; *Calahan v. Jefferson County*, 429 P.2d 301, 302 (Colo. 1967).

is entitled to sue a local government when it enacts an oil and gas moratorium because of the State's "strong interest in efficient, equitable, and responsible development and production of oil and gas resources within the State." Compl. ¶ 18. But as the specifics of the Resolutions attached to the Complaint illustrate, and as shown below, the Court should dismiss this lawsuit for several reasons.

First, the State proposes to expend taxpayer resources on litigation over a moratorium the County terminated nearly a year ago, which does not present a live case or controversy. Therefore, this Court lacks subject matter jurisdiction over the Expired Moratorium because the issue is moot. Likewise, the State's challenge to the Current Moratorium likely will become moot upon its expiration on May 1, and it is unlikely that this litigation will have resolved the State's claims related to the Current Moratorium by that date.

Second, if the State truly believes that local governments are powerless to enact moratoria on oil and gas development, then it has unreasonably delayed the assertion of its remedies to the detriment of the County and other local governments. Accordingly, the State's claims are barred by laches. Third, the State's claims related to the Expired Moratorium are time-barred because the State filed beyond the applicable statute of limitations.

STATEMENT OF FACTS

This case is about extensive efforts by the County's elected officials to protect the health, safety, and welfare of County citizens from the harmful effects of oil and gas development and the State's unreasonably delayed attempt to thwart those efforts.

A. When reviewing how to regulate oil and gas development, the County must take into account the public health and environmental concerns related to oil and gas development.

Boulder County is on the edge of one of the most active oil and gas formations along the Front Range. Compl. Ex. A ¶ B. Oil and gas operations have the potential for significant and immediate impacts on the health, safety, and welfare of County residents. *Id.* at ¶ C. These impacts include increased noise, dust, and traffic as well as the potential to impact air, water, soil, biological quality, geology, topography, plant ecosystems, wildlife habitat, wetlands, floodplains, stormwater and wastewater infrastructure, drainage and erosion control, parks and open space lands, transportation infrastructure, and emergency response plans. *Id.*

The public health effects of oil and gas development—especially if inadequately regulated—can be devastating. Oil and gas facilities generate numerous air pollutants, including volatile organic compounds ("VOCs"). Compl. Ex. F at 5. The United States Environmental Protection Agency ("EPA") recognized that the health effects of VOCs include: eye, nose, and throat irritation; headaches; loss of coordination; nausea; damage to the liver, kidneys, and the central nervous system; and cancer. *Id.* at 5-6. VOCs and nitrogen oxides combine in the presence of sunlight to form ground-level ozone, a cause of respiratory inflammation, a trigger for asthma symptoms, and cause of premature mortality. *Id.* at 6.

The EPA has designated Boulder County as a "nonattainment area" due to high levels of ozone, a designation for areas out of compliance with national health-based air quality standards. *Id.* In addition, the Colorado Department of Public Health and Environment ("CDPHE") determined in January 2013 that, in 2008, oil and gas sources accounted for 47% of all VOCs emitted statewide. *Id.*. Results from a study released in January of 2013 by the National Oceanic

and Atmospheric Administration ("NOAA") found nearly half of the ozone-forming pollutants in the Town of Erie, a substantial portion of which is in Boulder County, come from oil and gas drilling. *Id.*

In 2013, the Wyoming Department of Health (the "WDH") found a ten-parts-per-billion increase in ground-level ozone in a county where oil and gas development had increased dramatically. *Id.* at 6-7. The study noted a three-percent increase in local health clinic visits due to respiratory-related complaints. *Id.* at 7. The day after the WDH released the study, the EPA designated that county as a nonattainment area for ozone. *Id.*

Oil and gas facilities also produce harmful pollutants such as benzene. *Id*. at 5. The health effects associated with benzene include leukemia, anemia, and other blood disorders and immunological effects. *Id*. at 6.

Oil and gas facilities can also have soil and groundwater impacts. For example, in 2012, the Colorado Oil and Gas Conservation Commission ("COGCC") received approximately 400 reports of oil and gas spills associated with oil and gas wells. *Id.* at 7. Sixty six of these spills required ground or surface water remediation, 94 of them required evacuation of contaminated soil, and 32 required other soil remediation. *Id.*

B. The County adopted the Expired Moratorium in 2012 and extended it because of ongoing concerns about the sufficiency of its regulations in light of scientific studies regarding the potential harm of oil and gas facilities.

In February 2012, the County observed that oil and gas companies were expressing increased interest in drilling, and technological changes in drilling operations were causing increased impacts. Compl. Ex. A ¶ D. The County Comprehensive Plan regarding oil and gas activities had not been updated in many years, and the County's Land Use Code had not been

updated for ten years. *Id*. at ¶¶ L and Q. Accordingly, the County adopted a six-month moratorium on processing application for oil and gas drilling for the purpose of reviewing the adequacy of its Comprehensive Plan and Land Use Code. *Id.* at ¶ 2-4; *see* discussion on County authority to implement moratoria Section A(1) of the Argument below.

The County's work related to the Comprehensive Plan and the Code took longer than six months, and the County accordingly extended the moratorium through February 4, 2013. Compl. Ex. B ¶ 6. By December of 2012, the County completed an update to its Comprehensive Plan and its Code. Compl. Exs. C and D. However, after adopting these Regulations, the Board "received continually updated information regarding the potentially harmful effects of oil and gas development on public health, safety, and welfare that justif[ied] further study and consideration." Compl. Ex. F at 5. The Board determined that "while this new information indicates that the regulations recently adopted were a necessary step toward protecting the public health and the environment, it also indicates that the adopted regulations may not be sufficiently comprehensive or restrictive to adequately protect the public health and safety." *Id.*

The Board's concerns were bolstered by numerous ongoing local and national studies focused on the public health risks associated with hydraulic fracturing (or "fracking"). These included:

- An EPA analysis of fracking's potential impact on drinking water resources, including public water supplies;
- A National Science Foundation review, conducted in association with the University of Colorado, on the health impacts of fracking;
- A CDPHE study, in association with Colorado State University, on the health effects of oil and gas emission on the Front Range;

- The Geisinger Health System of Pennsylvania study on the health impacts of fracking; and
- A New York Department of Health study on the health impacts of fracking.

Id. at 7. Given the ongoing critical work in these areas, the Board noted that "further delay in accepting applications for oil and gas operations is reasonable, appropriate, and necessary given the complexity of technical information critical for the Board to make informed decisions to protect the public and the environment . . ." *Id*. at 8. Of particular concern were "uses of property that are hazardous and injurious to the health, safety, and welfare . . . and conditions that create an unreasonable risk of harm to others, a concern that has been expressed by numerous county citizens through testimony and written correspondence." *Id*. Accordingly, the County extended the moratorium until January 1, 2015, pending the results of scientific studies and the County's own reviews. *Id*. at 10.

On November 10, 2014, the Board held a public hearing to consider the status of the moratorium. Compl. Ex. G ¶ C. County staff provided a synopsis of recent scientific study results and the status of ongoing studies, most of which focused on air and water quality impacts of drilling and production. *Id*. at ¶ D. Nearly 80 members of the public testified and more than 1,200 sent in written comments, the overwhelming majority supporting a moratorium extension. *Id*. at ¶ E.

On November 13, 2014, the Board considered the substantial public comment emphasizing County residents' serious concerns about the potential health, environmental, and safety hazards presented by future oil and gas development in the County. *Id.* at ¶ F. The Board further considered additional health, environmental, and safety information that would become available in the future. *Id.* Most significantly, the Board pointed to the AirWaterGas study by the

University of Colorado, NOAA, the National Renewable Energy Laboratory, and the University Center for Atmospheric Research. The study focused on the effect of natural gas development on water and air resources; the impacts of natural gas extraction on drinking water aquifers; and assessing of health risks posed by water and air exposure. *Id*. at ¶ G. To allow for this and other studies to be completed, the Board extended the Expired Moratorium until July 1, 2018. *Id*. at ¶ 1.

C. After the *Longmont* and *Fort Collins* rulings, the County terminated the Expired Moratorium and enacted the Current Moratorium.

On May 2, 2016, the regulatory landscape for local government oil and gas regulation changed. In *Longmont v. Colo. Oil & Gas Ass'n,* 369 P.3d 573 (Colo. 2016), the Colorado Supreme Court invalidated Longmont's permanent ban on hydraulic fracturing. In *Fort Collins v. Colo. Oil & Gas Ass'n,* 369 P.3d 586 (Colo. 2016), the Court invalidated Fort Collins' five-year fracking moratorium. In both cases, the Court relied on preemption principles to reach its decision.

The County reacted quickly to these legal developments. On May 19, 2016, the County terminated Expired Moratorium, which was set to expire on July 1, 2018. Compl. Ex. J ¶ 1. ("The temporary moratorium first enacted by Resolution 2012-16, as extended and amended . . . is hereby terminated.") The Board acknowledged that the *Fort Collins* decision made "the legal status of Boulder County's current moratorium . . . uncertain." *Id*. at ¶ A.

Although the Board terminated the lengthier moratorium, it determined that it needed to update its 2012 oil and gas regulations prior to processing new oil and gas development applications. *Id.* at ¶ D. Part of the Board's concerns arose from COGCC's failure to adequately address the impacts that oil and gas development has on homes, schools, and natural resources.

Id. at ¶ B. In addition, the Board observed that "since the County last considered its temporary moratorium [four years prior], industry technologies and practices have evolved significantly, including in ways of great concern to local residents. . . ." *Id.* at ¶ C. In particular, "the average number of wells per pad is increasing dramatically, creating large scale facilities generating land use and environmental impacts on neighbors significantly different . . . than when [the Board] last updated [its] regulations." *Id*. The Board further noted that the County needed to update its regulations to ensure that they did not conflict with new state laws and industry practices. *Id.* at ¶ D.

For these reasons, the County adopted a new six-month moratorium, the purpose of which was to "allow time to formulate and publicly review necessary amendments to current County Land use and environmental regulations governing oil and gas development . . ." *Id*. at ¶ 2.

After the County enacted the Current Moratorium, County staff worked hard to prepare oil and gas regulations to meet the County's current needs. Compl. Ex. N. Staff conducted multiple meetings with the COGCC and industry, received input from the public, and wrote complex and detailed draft regulations. *Id*. The County presented draft regulations to the Boulder County Planning Commission at two public hearings in October 2016. *Id.* Staff presented a new version incorporating the Planning Commission's recommendations to the Board at a public hearing on November 15, 2016, three days before the original expiration of the Current Moratorium. *Id.*

Based on the extensive public testimony at the November 15 hearing, the Board determined that it needed further work on the regulations. *Id.* To complete work on the

regulations and allow time for the significant coordination involved in internal implementation of those regulations after adoption, the Board extended the Current Moratorium through May 1, 2017. Compl. Ex. L ¶ 1. The Board scheduled a public hearing to consider a final draft of the regulations on March 14, 2017, at 2 p.m.[2] and the Current Moratorium is still set to expire on May 1 after staff has time to coordinate all County departments to implement the new regulations. *Id*. at ¶ 3.

D. Despite the County's extensive public process related to the Expired Moratorium and the Current Moratorium, the State waited until late January 2017 to undertake enforcement of its asserted interests.

On January 26, 2017, nearly five years after the County enacted the Expired Moratorium and nearly nine months after the County enacted the Current Moratorium, Attorney General Coffman sent the County a letter demanding that the County rescind the Current Moratorium by February 10 or face "legal action." Compl. Ex. M. County Attorney Ben Pearlman responded to the letter the following day with a detailed explanation of the County's position. Compl. Ex. N. Mr. Pearlman requested that the Attorney General reconsider her position so that County "residents are not deprived of reasonable and necessary local regulatory protections enacted by their elected officials." *Id.* This lawsuit from the Attorney General followed.

STANDARD OF REVIEW

The County seeks to dismiss the State's claims for lack of subject matter jurisdiction under C.R.C.P. 12(b)(1), for failure to state a claim under C.R.C.P. 12(b)(5), or both. Under C.R.C.P. 12(b)(1), the plaintiff has the burden to prove jurisdiction and the standard of appellate review is highly deferential. *Trinity Broad. of Denver, Inc. v. Westminster*, 848 P.2d 916, 925

[2] Although not specified in the exhibits to the Complaint, the Board has also scheduled a public meeting on the regulations for March 23, 2017.

(Colo. 1993). The court is "free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id.*

Under C.R.C.P. 12(b)(5), the Court must accept all well-pleaded facts as true, and the allegations of the complaint must be viewed in the light most favorable to the plaintiff. *Hemmann Mgmt. Servs. v. Mediacelli, Inc.*, 176 P.3d 856, 857 (Colo. App. 2007). "However, the court is not required to accept as true legal conclusions couched as factual allegations." *Western Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. 2008) (citing *Bell Atl. Corp., v. Twombly*, 550 U.S. 544, 557-58 (2007)); *see also Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016) (adopting the *Twombly* standard for testing the viability of a claim for relief). Further, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Warne*, 373 P.3d at 591 (internal citation omitted).

ARGUMENT

A. The Court lacks subject matter jurisdiction because the State's challenges to the Expired Moratorium are moot and its challenges to the Current Moratorium are likely to be moot on May 2, 2017.

1. The County enacted two separate moratoria under different legal landscapes, and the Court should consider them separately.

The State characterizes the County's two moratoria on oil and gas permit applications as a single moratorium (allegedly a "ban") lasting five years. However, as demonstrated by the exhibits attached to the Complaint, the County imposed the two separate moratoria under different legal authority.

The County terminated the Expired Moratorium because the legal framework changed on May 2, 2016 with release of the *Fort Collins* opinion. Prior to that date, a significant body of law supported the propriety of the Expired Moratorium, a fact borne out by the State's inaction

throughout the duration of the Expired Moratorium. *See Droste v. Bd. of Cty. Comm'rs of County of Pitkin*, 141 P.3d 852, 855-856 (Colo. App. 2005), *aff'd,* 159 P.3d 601 (Colo. 2007) (upholding a county's power to enact and extend a moratorium while it conducted a study on zoning and development); *Williams v. Central,* 907 P.2d 701, 706 (Colo. App. 1995) (temporary moratoria are "generally…upheld so long as the duration is reasonable under the circumstances and the enactment was made in good faith without discrimination"); *see also Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 337-38 (2002) ("[M]oratoria [. . .] are used widely among land use planners to preserve the status quo while formulating a more permanent development strategy. In fact, the consensus in the planning community appears to be that moratoria, or 'interim development controls' as they are often called, are an essential tool of successful development.").

Fort Collins held for the first time that a five-year moratorium on oil and gas processing was invalid due to an operational conflict with state statutes, but stated "no view as to the propriety of a moratorium of materially shorter duration." 369 P.3d at 594. With its holding, *Fort Collins* drew a line between the propriety of moratoria in the oil and gas context before May 2, 2016 and after that date.

Applying *Fort Collins* to actions taken before the Court issued the opinion would give it improper retroactive effect. Nothing in *Fort Collins* suggests an intent to apply its holdings retroactively. *See* 369 P.3d 586. Colorado courts do not lightly give judicial opinions retroactive effect; a court must conduct a careful analysis before doing so. *Marinez v. Indus. Comm'n of State of Colo.,* 746 P.2d 552, 556-57 (Colo. 1987) (explaining three-factor test that must be satisfied before applying a judicial opinion retroactively). For these reasons, the Expired

Moratorium must be evaluated separately from the Current Moratorium based on the law in existence during each term.

The initial term of Current Moratorium was six months, a "materially shorter duration" than the Expired Moratorium. *Fort Collins*, 369 P.3d at 594; s*ee also Droste,* 141 P.3d at 855; §29-20-104(1)(h), C.R.S. (giving local government to the power to, among other land use functions, "plan[] for and regulat[e] the use of land so as to provide planned and orderly use of land and protection of the environment"). Last December, the County enacted a short extension of the Current Moratorium for an additional five months to allow staff to complete its work on the regulations. *See* Compl. Ex. K; *see also Droste,* 141 P.3d at 855-56 (approving moratoria imposed to carry out studies and efforts to improve land use regulations).

Because the County enacted the Expired Moratorium under one set of legal authority and terminated it when such authority changed, the Court should consider it separately from the Current Moratorium, which was properly enacted under the rule of *Fort Collins* and statutory and judicial authority establishing counties' broad land use powers.

2. This Court lacks subject matter jurisdiction over the State's claims related to the Expired Moratorium because they are moot.

Mootness is a threshold jurisdictional matter. "Where there is no live controversy between the parties, the trial court lacks subject matter jurisdiction to proceed." *Robertson v. Westminster Mall Co.*, 43 P.3d 622, 628 (Colo. App. 2001). No live controversy exists where the claims raised are moot and the court's ruling can have no practical legal effect. *See Energy Research Found. v. Foote,* 628 P.2d 173, 175 (Colo. App. 1981) ("'A case is moot when a judgment, if rendered, will have no practical legal effect upon an existing controversy ....'") (*quoting Crowe v. Wheeler,* 165 Colo. 289, 439 P.2d 50 (1968)); *see also Freedom from Religion*

Found., Inc., v. Romer, 921 P.2d 84, 88 (Colo. App. 1996) ("neither a declaration or injunction as to . . . past events will have any practical legal effect on the dispute").

Claims involving legislative acts are moot when the enactments they challenge have expired or been repealed. *Energy Research Found.*, 628 P.2d at 175 (there is no practical effect to issuing a declaratory judgment regarding legislation that has been repealed); *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1116 (10th Cir. 2010) ("ordinarily an amendment or repeal of [an ordinance or statute] moots a case challenging the ordinance or statute"); *Rosnick v. Zoning Comm'n of Town of Southbury*, 374 A.2d 245, 247 (Conn. 1977) (decision on zoning regulations that had terminated would "entitle [plaintiff] only to the invalidation of a regulation which has already expired"). This is true of challenges to moratoria in the land use context. *Lenape Res., Inc., v. Avon,* 994 N.Y.S.2d 495, 496 (N.Y. App. Div. 2014) (challenge to one-year moratorium on oil and gas activities deemed moot when moratorium expired before court could rule); *Tra-Jo Corp. v. Town Clerk of Methuen,* 317 N.E.2d 822 (Mass. 1974) (challenge to moratorium for purpose of revising zoning regulations held moot where court determined it could not rule before the moratorium would expire); *Schulz v. Lake George Park Comm'n,* 579 N.Y.S.2d 761, 763 (N.Y. Div. 1992) (challenge to moratorium on wastewater facility development deemed moot where plaintiff waited 18 months to challenge rule and moratorium expired during litigation).

The County terminated the Expired Moratorium on May 19, 2016. *See* Compl. Ex. J ¶ 1. Therefore, any ruling by this Court regarding the Expired Moratorium can have no practical legal effect and all such issues are moot. *See Energy Research Found.*, 628 P.2d at 175; *Freedom from*

Religion Found., 921 P.2d at 88. For these reasons, the County requests that the Court dismiss the State's claims regarding the Expired Moratorium for lack of subject matter jurisdiction.

3. The State's claims related to the Current Moratorium will likely be moot before this litigation can resolve them.

The Current Moratorium expires by its own terms on May 1, 2017. Upon the moratorium's expiration, the mootness authority cited above will apply with equal force to the Current Moratorium. In particular, the injunction requested by the State ordering the County to process oil and gas applications will have no effect.[3] *See Energy Research Found.*, 628 P.2d at 175 (repeal of statutes at issue rendered case moot).

In response to the likelihood that this case will become moot on May 1, the State will likely point out that the County extended the length of the Expired Moratorium and the Current Moratorium, and the County may extend the Current Moratorium once again. However, the State cannot presume to know the County's future legislative actions, and the Court has no jurisdiction over matters that concern speculative injury—especially where parties seek declaratory relief. *Bd of County Comm'rs of County of San Miguel v. Roberts*, 159 P.3d 800, 810 (Colo. App. 2006).

Therefore, to preserve judicial resources and economy, this Court should dismiss claims against the Current Moratorium because they are not capable of resolution before they become moot.[4] *See Tra-Jo*, 317 N.E.2d at 823 (court dismissed claims when it determined that they would be moot before it could rule). Alternatively, if, after May 1, 2017, the Court has not

[3] This timing issue would not have arisen if the State had not waited eight months before challenging the Current Moratorium.

[4] As a practical matter, the Court should resolve the C.R.C.P. 12(b) issues raised in this motion prior to requiring the County to brief and argue any substantive issue raised by the State and the Intervenors. Even if the Court required the County to brief substantive issues in response to an early summary judgment motion filed by the State or the Intervenors, it is unlikely the Court would have sufficient time to adequately consider those issues prior to May 1, 2017.

rendered an opinion on the Current Moratorium and the State does not agree with the County that this case is entirely moot, then the County would file an additional motion to dismiss on that basis. *See, e.g., Lenape Res., Inc.*, 944 N.Y.S.2d 495; *Tra-Jo Corp.*, 317 N.E.2d 822; *see also Pierce v. Francis*, 194 P.3d 505, 508 (Colo. App. 2008) ("A court's subject matter jurisdiction is an issue that may be raised at any time.").

B. Laches bars the State's claims.

The State's criticism of the combined length of the Expired Moratorium and the Current Moratorium is undermined by its unconscionable delay in taking any action to protect its claimed interests. Despite the State's claim that "even a temporary ban" on oil and gas development is deleterious and impedes the State's goals, the State informed the County of its position on January 26, 2017—nearly five years after the County's allegedly "illegal" act of adopting the Expired Moratorium and eight months after the County adopted the Current Moratorium. Compl. ¶¶ 42 and 53;Compl. Ex. M. This constitutes an unconscionable delay that has prejudiced the County. Accordingly, the Court should dismiss the case based on laches.

1. The State's claims against the Expired Moratorium are barred by laches.

Laches is an affirmative defense normally subject to resolution on the facts. *Superior Const. Co. Inc. v. Bentley*, 104 P.3d 331, 334 (Colo. App. 2004); C.R.C.P. 8(c). However, an affirmative defense may be raised in a motion to dismiss if the applicability of the defense appears on the face of the pleading and the defense will bar the award of any remedy. *Williams v. Rock-Tenn Servs., Inc.*, 370 P.3d 638, 642. "The elements of laches are: (1) full knowledge of the facts; (2) unreasonable delay in the assertion of available remedy; and (3) intervening reliance by and prejudice to another." *Thornton v. Bijou Irr. Co.*, 926 P.2d 1, 73 (Colo. 1996). Laches allows

a court to deny equitable relief, and its application is committed to the sound discretion of the trial court. *Miller v. Curry*, 203 P.3d 626, 632 (Colo. App. 2009); *See State ex. rel. Doran v. Preble Cty. Bd. of Commr's.*, 995 N.E.2d 239, 245 (Ohio Ct. App. 2013) ("The doctrine of laches may be imputed upon a unit of government serving one public constituency which is suing another unit of government serving a different public constituency, as both parties have a duty to enforce the law and preserve the public rights, revenues, and property from injury and loss.").

On its face, the facts alleged in the Complaint meet each of the elements of laches regarding the Expired Moratorium. The State had full knowledge of the Expired Moratorium because it was enacted, amended, and extended after public hearings and memorialized by official resolutions of the Board. *See* Compl. Ex. A- through L. For example, as specified in Resolutions 2012-16 and 2012-46, the County held a public hearing on the Expired Moratorium on March 1, 2012. Compl. Exs. A and B. The Court may presume that all of these meetings were properly noticed and that the Resolutions were publicly available. *See Colorado Springs v. Dist. Ct. In and For El Paso County*, 519 P.2d 325, 327 (Colo. 1974) (A presumption of validity and regularity supports the official acts of public officials…'"). Thus, the State—and the general public—had full knowledge of the Expired Moratorium since at least March of 2012. *See Cendant Corp. & Subsidiaries v. Dept. of Revenue*, 226 P.3d 1102, 1108 (Colo. App. 2009), *as modified on denial of reh'g* (July 2, 2009) ("Every person is presumed to have constructive notice of the law and what it requires.").

The Complaint also demonstrates that the State unreasonably delayed asserting an available remedy. The Complaint shows that the Expired Moratorium was in place for a full four

years without the State taking any legal action against the County. Moreover, on November 25, 2014, the County extended the Expired Moratorium through July 1, 2018. Compl. ¶ 34. Thus, the State was well aware of the anticipated length of the Expired Moratorium for over two years before filing this litigation and yet took no action.

Moreover, despite the State's position that all local government moratoria are illegal, this is the first case the State has filed against *any* Colorado local government regarding a moratorium. This is true despite the Fort Collins' highly publicized five-year moratorium. *See Fort Collins*, 369 P.3d 586, 588-89. In *Fort Collins*, the oil and gas industry—through the Colorado Oil and Gas Association—filed suit against Fort Collins. Neither the State nor the COGCC submitted an amicus brief. *Id.* The State has been fully aware of the Expired Moratorium since March 2012 but did not challenge it until January 2017, and thus the State's more than five-year delay in asserting the illegality of local government moratoria is unreasonable. *See Western Motor Rebuilders, Inc. v. Carlson*, 335 P.2d 272, 280 (Colo. 1959) (even a delay of a few months or weeks will suffice for a laches defense if the facts and circumstances so warrant).

Given the State's extensive and unjustifiable delay, the Court may assume that the County suffered prejudice as a result. *Perry v. Judd*, 840 F. Supp. 2d 945, 954 (E.D. Va. 2012), *aff'd*, 471 Fed. Appx. 219 (4th Cir. 2012)(unpublished) ("Prejudice can be inferred simply from the plaintiff's delay [. . .] the greater the delay, the less the prejudice required to show laches."); *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 807 (8th Cir. 1979) ("if the delay is lengthy, prejudice is more likely to have occurred and less proof of prejudice will be required."). Moreover, because the State unreasonably failed to take action during the entire term of the

Expired Moratorium, the County has no way of remedying the State's alleged violation of law. The County already terminated the Expired Moratorium, so this Court cannot provide any relief with regard to it. Likewise, the State's request that the Court invalidate the Current Moratorium would do nothing to alter the existence or length of the Expired Moratorium and would prejudice the County in a different way. *See* Section(B)(2) below. Accordingly, the State's belated effort to obtain an after-the-fact declaration appears to be an effort to retaliate against the County regarding legislative acts the State now regards as repugnant. Such a declaration is improper: "A public declaration that the defendant violated the law does little other than label the defendants as wrongdoers." *Securities and Exchange Comm'n v. Graham*, 823 F.3d 1357, 1362 (11th Cir. 2016); *Freedom from Religion Found.*, 921 P.2d at 88 (declaration or injunction as to past events will have no practical legal effect).

Accordingly, the State's claims against the Expired Moratorium are barred by laches and should be dismissed.

2. The State's claims against the Current Moratorium are barred by laches.

The State is also unreasonable in its delay in litigating the validity of the Current Moratorium, which was put in effect to allow the County sufficient time to enact regulations that appropriately addressed the rapidly changing industry. The State had full knowledge of the Current Moratorium because it was enacted and extended after public hearings and memorialized by official resolutions of the Board. *See* Compl. Ex. J and K.

Nonetheless, the State waited approximately eight months before informing the County that it intended to take legal action against the Current Moratorium. *See* Compl. Ex. M; *Goodman*, 606 F.2d at 809 (failure of a government agency to promptly initiate litigation after it

changed its interpretation of the law constituted prejudice for purposes of laches). Not until January 27 did the State demand that the County rescind the Current Moratorium in only two weeks, by February 10, putting the County in an impossible situation. *See id.* To comply with the State's demand, the County would have had to immediately accept oil and gas applications using outdated and technologically inadequate regulations with no opportunity for staff to plan for the implementation of those untried regulations. Moreover, the County's elected officials would have been forced to take actions contrary to reasonable expectations of Boulder County residents, who had participated in numerous public hearings and meetings during the regulatory process and knew the County had further public hearings scheduled in March, all with the understanding that the Current Moratorium was set to expire in May. In contrast, had the State made its position known during the term of the Expired Moratorium, or even at the outset of the Current Moratorium last May, the public would have been aware of the dispute and the County could have met its public notice and input obligations while the parties might have worked toward a solution within a reasonable timeframe. *See Goodman*, 606 F.2d at 809.

Because the State, having full knowledge of the facts, unreasonably delayed the assertion of an available remedy for the Expired Moratorium and the Current Moratorium to the County's detriment, the Court should dismiss this case based on laches.

C. The State's claims regarding the Expired Moratorium are barred by the statute of limitations.

Whether a particular claim is time-barred is decided as a matter of law when "the undisputed facts clearly show that the plaintiff had, or should have had the requisite information as of a particular date." *Wagner v. Grange Ins. Ass'n*, 166 P.3d 304, 307 (Colo. App. 2007). Dismissal under C.R.C.P. 12(b)(5) can be based on a failure to comply with a statute of

limitations if such failure will bar the award of any remedy and the issue "appear[s] on the face of the pleading." *Williams*, 370 P.3d at 642. (describing when affirmative defenses can be raised in motions to dismiss).

Claims against governmental entities must be brought within two years after the cause of action accrues, regardless of the theory on which they depend. § 13-80-102(1)(h), C.R.S.; *Shootman v. Dep't of Transp.*, 926 P.2d 1200, 1206-07 (Colo. 1996) (abrogating *nullum tempus occurrit regi* doctrine to hold that state is subject to statutes of limitations); *Reg'l Transp. Dist. v. Voss*, 890 P.2d 663, 667 (Colo. 1995) ("[t]he government entity limitations statute applies to all actions involving governmental entities").

The statute of limitations bars any award of relief related to the Expired Moratorium. The necessary facts are undisputed. The Expired Moratorium was enacted on February 2, 2012. Compl. Ex. A. It was extended several times, most recently on November 25, 2014, when it was extended for three-and-a-half additional years. *See* Compl. Ex. G. If the State believed the Expired Moratorium was outside the County's authority, it needed to bring its claim within two years of its enactment or, possibly, its final extension. The State filed this action on February 14, 2017, more than two years after any action related to the Expired Moratorium, other than its termination.

The State's failure to act timely bars its claims regarding the Expired Moratorium. For these reasons, if not dismissed on the other grounds set forth in this motion, the County requests that the Court dismiss the State's claims as they related to the Expired Moratorium for failure to state a claim upon which relief can be granted. *See* C.R.C.P. 12(b)(5).

CONCLUSION

If the Court dismisses this Complaint as requested by the County, the County's elected officials will be able to focus on fulfilling their legislative function by enacting regulations that will protect the health, safety, and welfare of the County's residents. The State will suffer no discernable harm to its interests by the Court allowing the County to proceed without Court intervention. Accordingly, the Court should dismiss this case because of the significant jurisdictional and equitable problems with the State's Complaint.

Respectfully submitted this 7th day of March 2017.

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CERTIFICATE OF SERVICE

I certify that on March 7, 2017, I electronically filed the foregoing **MOTION TO DISMISS STATE OF COLORADO'S COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** via Colorado Courts E-Filing System, who will either serve the same via e-mail or United States mail to the following:

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