BEFORE THE OIL AND GAS CONSERVATION COMMISSION
OF THE STATE OF COLORADO

IN THE MATTER OF AN AMENDED APPLICATION BY 8 NORTH LLC FOR AN ORDER ESTABLISHING A 1,280-ACRE DRILLING AND SPACING UNIT FOR SECTIONS 35 AND 36, TOWNSHIP 1 NORTH, RANGE 69 WEST, 6TH P.M, FOR HORIZONTAL WELL DEVELOPMENT OF THE CODELL AND NIOBRARA FORMATIONS, WATTENBERG FIELD, BOULDER COUNTY, COLORADO	)	CAUSE NO. 407 DOCKET NO. 171000694 TYPE: SPACING

ORDER GRANTING 8 NORTH LLC'S MOTION TO DISMISS PROTEST

THIS MATTER is before the Hearing Officer on the *Motion to Dismiss Protest of Boulder County and City of Lafayette* ("Motion") filed by 8 North LLC's ("8 North"). The Motion is fully briefed and the Hearing Officer enters the following order.

PROCEDURAL HISTORY

1. On August 31, 2017, 8 North filed an *Application* in this matter seeking an order, among other things, establishing an approximate 1,280-acre drilling and spacing unit for Sections 35 and 36, Township 1 North, Range 69 West, 6th P.M., and authorizing the drilling of up to twenty (20) horizontal wells within the proposed unit, for the production of oil, gas, and associated hydrocarbons from the Codell and Niobrara Formations.

2. On September 19, 2017, 8 North modified the relief it was requesting by filing an *Amended Application* in this matter seeking an order, among other things, establishing an approximate 1,280-acre drilling and spacing unit for Sections 35 and 36, Township 1 North, Range 69 West, 6th P.M., and authorizing the drilling of one (1) horizontal well within the proposed unit, for the production of oil, gas, and associated hydrocarbons from the Codell and Niobrara Formations.

3. On September 21, 2017, the Commission issued a *Notice of Hearing* reflecting the request for one (1) well in the 1,280-acre drilling and spacing unit.

4. On October 16, 2017, the *Protest and Intervention by Boulder County and City of Lafayette* ("Protest") was filed.

5. On December 6, 2017, the Motion was filed pursuant to Commission Rule 519 and C.R.C. P. 12(b)(5).

6. On December 13, 2017, Boulder County and City of Lafayette ("Protestants") filed their *Response to Motion to Dismiss* ("Response").

7. On December 18, 2017, 8 North filed its *Reply in Support of Its Motion to Dismiss Protest of Boulder County and City of Lafayette* (Reply").

STANDARD OF REVIEW

8. The current standard in Colorado for ruling on C.R.C.P. 12(b)(5) motions to dismiss for failure to state a claim upon which relief can be granted is set out in *Warne v. Hall*, 373 P.3d 588 (Colo. 2016).

9. In *Warne*, the Colorado Supreme Court adopted the "plausible claim for relief" standard originally adopted by the United States Supreme Court in the cases of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). *Warne*, at ¶¶ 9 & 24. The tenant that a Hearing Officer must accept as true all of the allegations contained in the Application is inapplicable to legal conclusions and only an Application that alleges facts sufficient to show a plausible claim for relief survives a motion to dismiss. Id. at ¶ 9. While notice pleading is still the norm, and allegations can still be made on information and belief, the allegations must be factual. Id. at ¶¶ 21, 22 & 23. Conclusory allegations are not entitled to an assumption that they are true. Id. at ¶ 27.

10. A motion to dismiss for failure to state a claim under C.R.C.P. 12(b)(5) is disfavored. *Belinda A. Begley & Robert K. Hirsch Revocable Trust* v. *Ireson*, 399 P.3d 777, 779, ¶7 (Colo. App. 2017); *Rector v. City & County of Denver*, 122 P.3d 1010, 1013 (Colo. App. 2005). "A complaint need not express all facts that support the claim but need only serve notice of the claim asserted." *Adams v. Corrections Corp. of Am.*, 187 P.3d 1190, 1198 (Colo. App. 2008). Accordingly, motions to dismiss are "rarely granted under our notice pleadings." *Id.* In considering whether dismissal is appropriate, all factual allegations in a complaint must be accepted as true and viewed in the light most favorable to the plaintiff. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). In evaluating a C.R.C.P. 12(b)(5) motion, a court "may consider only those matters stated in the complaint." *Lambert v. Ritter Inaugural Committee, Inc.*, 218 P.3d 1115, 1119 (Colo. App. 2009) (citing *Coors Brewing Co. v. Floyd*, 978 P.2d 663, 665 (Colo.1999).

11. The Commission considers these standards to be applicable to motions to dismiss protests.

ANALYSIS

12. In their Protest, Protestants assert that:

a. Public issues raised by the Amended Application[1] reasonably relate to the public health, safety and welfare of their citizens, including environmental and wildlife resources, that are within the Commission's jurisdiction to remedy (Protest ¶3);

b. The potential impacts are not adequately addressed by the Amended Application (Protest ¶3);

[1] The Protest references both the Application and the Amended Application. However, the Application is no longer the operative pleading in this matter since it has been replaced by the Amended Application. The Hearing Officer interprets the Protest to apply to the Amended Application since it is the only pleading that the Commission's Notice of Hearing applied to.

c. The potential impacts are not adequately addressed by the Rules and Regulations of the Commission (Protest ¶3);

d. The Amended Application may pose significant adverse impacts to public health, safety and welfare that will not be addressed by the Commission's rules (Protest ¶7);

e. The lands to which the Amended Application apply are subject to a spacing order, Order No. 407-87, establishing 80-acre units for the Codell and Niobrara Formations, and 8 North has provided no evidence or argument to support either vacating Order No. 407-87 or establishing overriding spacing units (Protest ¶8); and

f. The Amended Application fails to allege facts that satisfy the health, safety and welfare standard set by the Colorado Court of Appeals in *Martinez, et. al. v. Colorado Oil and Conservation Commission, et. al.*, 2017 COA 37 (March 23, 2017) ("*Martinez*").[2]

APPLICABILITY OF C.R.C.P. 12(b)(5) TO A PROTEST:

13. As an initial matter, Protestants argue that C.R. C. P. 12(b)(5) is not applicable to a Protest and Intervention made as matter of right because Commission Rule 509.a., sets forth the specific requirements for a protest and intervention. Protestants acknowledge that Commission Rule 519.a., provides that, "The Colorado Rules of Civil Procedure apply to Commission proceedings unless they are inconsistent with Commission Rules or the Oil and Gas Conservation Act." However, Protestants argue that Commission Rule 509.a. does not require that a protestor "state a claim" or otherwise prove that the protestor is entitled to relief. Therefore, assert the Protestants, C.R.C.P. 12(b)(5) is not applicable because it conflicts with the specific provisions of Commission Rule 509.a. (Response, page 1).

14. Protestants are incorrect when they contend that compliance with Commission Rule 509.a., is all that is needed for a valid protest and intervention. Commission Rule 509.a., simply sets forth the specific requirements for who may file a protest and a requirement to include information showing that the party filing a protest and intervention has a right to do so. However, that is not all that must be included in a protest and intervention.

15. Protestants totally ignore the requirements of Commission Rule 509.a.(3)A. This portion of Rule 509 requires that the pleading also include "a general statement of the factual or legal basis for the protest or intervention." This is the essence of notice pleading.

16. C.R.C.P. 8 also requires notice pleading. Both Commission Rule 509.a.(3)A. and C.R.C.P. 8 require notice pleading. So, there is no conflict between Commission Rule and the Colorado Rules of Civil Procedure when it comes to what is required in a pleading. The Colorado Supreme Court has said that the plausibility standard set forth in *Warne*, applies to notice pleading under the Colorado Rules of Civil Procedure, and it therefore applies when evaluating the sufficiency of notice pleading in a protest and intervention.

[2] Protestants also alleged that they had filed a request that a Rule 508 local public forum be completed before the Amended Application is considered. Protestants now acknowledge that this request is moot. (Response, page 3). Therefore, the Hearing Officer does not consider this allegation.

PROTESTANTS FAILED TO COMPLY WITH *WARNE* WHEN RAISING ISSUES RELATED TO PUBLIC HEALTH, SAFETY, AND WELFARE:

17. The first four objections raised in the Protest can be categorized as health, safety, and welfare concerns.

18. Pursuant to the plane language of Commission Rule 509.a.(2)B, Protestants can intervene to raise issues concerning public health, safety, and welfare.

19. However, even a protest and intervention filed by a local government must also comply with the provisions of Commission Rule 509.a.(3)A., which requires "a general statement of the factual or legal basis for the protest or intervention."

20. As explained above, this is notice pleading and *Warne*, *supra*, applies. While notice pleading is still the norm, and allegations can still be made on information and belief, the allegations must be factual. Conclusory allegations are not entitled to an assumption that they are true.

21. There must be something more than a mere recitation of the Commission's Rules. There must be factual allegations of what harm plausibly might be caused by the granting of a spacing application. The Protest does not contain factual allegations of any type showing plausible claims of harm to the public health, safety, or welfare. Therefore, the *Warne* standard has not been met.

THE EXISTING SPACING ORDER

22. The existing spacing order is for vertical wells. At the time it was entered, the order states that the evidence showed that with existing technology, which did not include horizontal wells, a vertical well would drain 80 acres. The order simply did not take into account a future technology that did not exist at the time.

23. Drilling and spacing units for vertical wells can coexist with drilling and spacing units for horizontal wells. Horizontal wells can more efficiently drain a reservoir, but that does not mean that all vertical wells must first be plugged and abandoned before the drilling of horizontal wells. Plugging existing wells that are still operating and profitable would constitute economic waste.

24. Protestants do not point to any statutory or regulatory authority that prohibits overlapping drilling and spacing units for different types of wells, and Commission regulations specifically provide for overlapping spacing units. *See*, Commission Rule 318A.

25. However, the provisions of §34-60-116(2), C.R.S., allow the Commission to create drilling and spacing units of different sizes and shapes for various zones in a pool so that the pool as a whole will be efficiently and economically developed. This provision does lend credence to the idea that there can in fact be overlapping drilling and spacing units.

MARTINEZ IS NOT, AT THIS TIME, BINDING PRECEDENT

26. The parties do not dispute that *Martinez, supra,* is on appeal, and that no mandate has issued. Indeed, by its own terms, the *Martinez* decision is stayed pending any appeal.

27. Protestants apparently have a public policy disagreement with the Commission as to how the Commission should treat *Martinez.* But that is not grounds for denying the Amended Application in this matter, let alone grounds for staying all applications and bringing the entire oil and gas industry in the State to a halt pending Supreme Court review of the *Martinez* decision. See Response, page 2.

28. Protestants do not cite any authority for the proposition set out at page 2 of their Response that an order entered in accordance with binding precedent in effect at the time of entry of the order somehow renders the order invalid if a reported case that is not precedent at the time of entry of the order should happen to become binding precedent at a later date. Indeed, it settled law that the issuance of the mandate is what establishes the finality of the judgment upon which the parties can rely. *Garrett v. Garrett*, 30 Colo.App. 167, 505 P.2d 39 (1971).

CONCLUSION

29. For the foregoing reasons, the Protest fails to set out any plausible claim for relief as required by *Warne*, *supra*, and the Motion should be granted. Therefore it is hereby

ORDERED that 8 North LLC's *Motion to Dismiss Protest of Boulder County and City of Lafayette* is hereby GRANTED.

Dated: January 2, 2018

OIL AND GAS CONSERVATION COMMISSION
OF THE STATE OF COLORADO,

James P. House, Hearing Officer

CERTIFICATE OF SERVICE

On January 2, 2018, a true and correct copy of the foregoing *Order Granting 8 North LLC's Motion to Dismiss Protest* was sent by electronic mail to the following:

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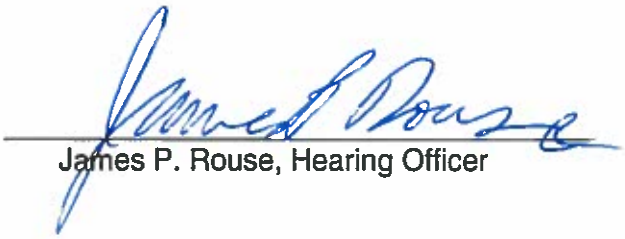

James P. Rouse, Hearing Officer

BEFORE THE OIL AND GAS CONSERVATION COMMISSION
OF THE STATE OF COLORADO

IN THE MATTER OF AN AMENDED APPLICATION BY 8 NORTH LLC FOR AN ORDER ESTABLISHING A 2,720-ACRE DRILLING AND SPACING UNIT FOR SECTIONS 13, 14, 23, AND 24, TOWNSHIP 2 NORTH, RANGE 69 WEST, 6TH P.M. AND SECTION 18, TOWNSHIP 2 NORTH, RANGE 68 WEST, 6TH P.M, FOR HORIZONTAL WELL DEVELOPMENT OF THE CODELL AND NIOBRARA FORMATIONS, WATTENBERG FIELD, BOULDER AND WELD COUNTIES, COLORADO	)	CAUSE NO. 407 DOCKET NO. 171000695 TYPE: SPACING

ORDER GRANTING 8 NORTH LLC'S MOTION TO DISMISS PROTEST

THIS MATTER is before the Hearing Officer on the *Motion to Dismiss Protest of Boulder County* ("Motion") filed by 8 North LLC's ("8 North"). The Motion is fully briefed and the Hearing Officer enters the following order.

PROCEDURAL HISTORY

1. On August 31, 2017, 8 North filed an *Application* in this matter seeking an order, among other things, establishing an approximate 2,720-acre drilling and spacing unit for Sections 13, 14, 23, and 24, Township 2 North, Range 69 West, 6th P.M., and Section 18, Township 2 North, Range 68 West, 6th P.M., and authorizing the drilling of up to thirty-two (32) horizontal wells within the proposed unit, for the production of oil, gas, and associated hydrocarbons from the Codell and Niobrara Formations.

2. On September 19, 2017, 8 North modified the relief it was requesting by filing an *Amended Application* in this matter seeking an order, among other things, establishing an approximate 2,720-acre drilling and spacing unit for Sections 13, 14, 23, and 24, Township 2 North, Range 69 West, 6th P.M., and Section 18, Township 2 North, Range 68 West, 6th P.M., and authorizing the drilling of one (1) horizontal well within the proposed unit, for the production of oil, gas, and associated hydrocarbons from the Codell and Niobrara Formations.

3. On September 21, 2017, the Commission issued a *Notice of Hearing* reflecting the request for one (1) well in the 1,201-acre drilling and spacing unit.

4. On October 16, 2017, the *Protest and Intervention by Boulder County* ("Protest") was filed.

5. Crestone Peak Resources Operating LLC ("Crestone") also filed a protest on October 16, 2017. Crestone then filed an amended protest on November 27, 2017.

6. On December 6, 2017, the Motion was filed pursuant to Commission Rule 519 and C.R.C. P. 12(b)(5).

7. On December 13, 2017, Boulder County ("Protestant") filed their *Response to Motion to Dismiss* ("Response").

8. On December 18, 2017, 8 North filed its *Reply in Support of Its Motion to Dismiss Protest of Boulder County* (Reply").

STANDARD OF REVIEW

9. The current standard in Colorado for ruling on C.R.C. P. 12(b)(5) motions to dismiss for failure to state a claim upon which relief can be granted is set out in *Warne v. Hall*, 373 P.3d 588 (Colo. 2016).

10. In *Warne*, the Colorado Supreme Court adopted the "plausible claim for relief" standard originally adopted by the United States Supreme Court in the cases of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). *Warne*, at ¶¶ 9 & 24. The tenant that a Hearing Officer must accept as true all of the allegations contained in the Application is inapplicable to legal conclusions and only an Application that alleges facts sufficient to show a plausible claim for relief survives a motion to dismiss. Id. at ¶ 9. While notice pleading is still the norm, and allegations can still be made on information and belief, the allegations must be factual. Id. at ¶¶ 21, 22 & 23. Conclusory allegations are not entitled to an assumption that they are true. Id. at ¶ 27.

11. A motion to dismiss for failure to state a claim under C.R.C.P. 12(b)(5) is disfavored. *Belinda A. Begley & Robert K. Hirsch Revocable Trust* v. *Ireson*, 399 P.3d 777, 779, ¶7 (Colo. App. 2017); *Rector v. City & County of Denver*, 122 P.3d 1010, 1013 (Colo. App. 2005). "A complaint need not express all facts that support the claim but need only serve notice of the claim asserted." *Adams v. Corrections Corp. of Am.*, 187 P.3d 1190, 1198 (Colo. App. 2008). Accordingly, motions to dismiss are "rarely granted under our notice pleadings." *Id.* In considering whether dismissal is appropriate, all factual allegations in a complaint must be accepted as true and viewed in the light most favorable to the plaintiff. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). In evaluating a C.R.C.P. 12(b)(5) motion, a court "may consider only those matters stated in the complaint." *Lambert v. Ritter Inaugural Committee, Inc.*, 218 P.3d 1115, 1119 (Colo. App. 2009) (citing *Coors Brewing Co. v. Floyd*, 978 P.2d 663, 665 (Colo.1999).

12. The Commission considers these standards to be applicable to motions to dismiss protests.

ANALYSIS

13. In its Protest, Protestant assert that:

a. Public issues raised by the Amended Application[1] reasonably relate to the public health, safety and welfare of their citizens, including environmental and wildlife resources, that are within the Commission's jurisdiction to remedy (Protest ¶2);

[1] The Protest references both the Application and Amended Application. However, the Application is no longer the operative pleading in this matter since it has been replaced by the Amended Application. The Hearing Officer interprets the Protest to apply to the Amended Application since it is the only pleading that the Commission's Notice of Hearing applied to.

b. The potential impacts are not adequately addressed by the Amended Application (Protest ¶2);

c. The potential impacts are not adequately addressed by the Rules and Regulations of the Commission (Protest ¶2);

d. The Amended Application may pose significant adverse impacts to public health, safety and welfare that will not be addressed by the Commission's rules (Protest ¶6);

e. The lands to which the Amended Application applies are subject to two spacing orders. Order No. 407-87 established 80-acre units for the Codell and Niobrara Formations. Order No. 407-405 established a drilling and spacing unit covering Section 18, Township 2 North, Range 68 West. Protestant then contends that 8 North has provided no evidence or argument to support either vacating Order No. 407-87 or establishing overriding spacing units (Protest ¶7);

f. The Amended Application fails to allege facts that satisfy the health, safety and welfare standard set by the Colorado Court of Appeals in *Martinez, et. al. v. Colorado Oil and Conservation Commission, et. al.*, 2017 COA 37 (March 23, 2017) ("*Martinez*") (Protest ¶8); and

g. Current market conditions are not favorable to the owner of mineral interests, and Protestant does not find it economically beneficial to move forward with development of its mineral interests at this time (Protest ¶9).[2]

APPLICABILITY OF C.R.C.P. 12(b)(5) to a PROTEST:

14. As an initial matter, Protestant argues that C.R. C. P. 12(b)(5) is not applicable to a Protest and Intervention made as matter of right because Commission Rule 509.a. sets forth the specific requirements for a protest and intervention. Protestant acknowledges that Commission Rule 519.a. provides that, "The Colorado Rules of Civil Procedure apply to Commission proceedings unless they are inconsistent with Commission Rules or the Oil and Gas Conservation Act." (emphasis added). However, Protestant argues that Commission Rule 509.a. does not require that a protestor "state a claim" or otherwise prove that the protestor is entitled to relief. Therefore, asserts the Protestant, C.R.C.P. 12(b)(5) is not applicable because it conflicts with the specific provisions of Commission Rule 509.a. (Response, page 1).

15. Protestant is incorrect when it contends that compliance with Commission Rule 509.a., is all that is needed for a valid protest and intervention. Commission Rule 509.a., simply sets forth the specific requirements for who may file a protest and a requirement to include information showing that the party filing a protest and intervention has a right to do so. However, that is not all that must be included in a protest and intervention.

[2] Protestant also alleged that it had filed a request that a Rule 508 local public forum be completed before the Amended Application is considered. Protestant now acknowledges that this request is moot. (Response, page 3). Therefore, the Hearing Officer does not consider this allegation.

16. Protestant totally ignores the requirements of Commission Rule 509.a.(3)A. This portion of Rule 509 requires that the pleading also include "a general statement of the factual or legal basis for the protest or intervention." This is the essence of notice pleading.

17. C.R.C.P. 8 also requires notice pleading. Both Commission Rule 509.a.(3)A. and C.R.C.P. 8 require notice pleading. So, there is no conflict between Commission Rule and the Colorado Rules of Civil Procedure when it comes to what is required in a pleading. The Colorado Supreme Court has said that the plausibility standard set forth in *Warne*, applies to notice pleading under the Colorado Rules of Civil Procedure, and it therefore applies when evaluating the sufficiency of notice pleading in a protest and intervention.

PROTESTANT FAILED TO COMPLY WITH *WARNE* WHEN RAISING ISSUES RELATED TO PUBLIC HEALTH, SAFETY, AND WELFARE:

18. The first four objections raised in the Protest can be categorized as health, safety, and welfare concerns.

19. Pursuant to the plane language of Commission Rule 509.a.(2)B, Protestants can intervene to raise issues concerning public health, safety, and welfare.

20. However, even a protest and intervention filed by a local government must also comply with the provisions of Commission Rule 509.a.(3)A., which requires "a general statement of the factual or legal basis for the protest or intervention."

21. As explained above, this is notice pleading and *Warne*, *supra*, applies. While notice pleading is still the norm, and allegations can still be made on information and belief, the allegations must be factual. Conclusory allegations are not entitled to an assumption that they are true.

22. There must be something more than a mere recitation of the Commission's Rules. There must be factual allegations of what harm plausibly might be caused by the granting of a spacing application. The Protest does not contain factual allegations of any type showing plausible claims of harm to the public health, safety, or welfare. Therefore, the *Warne* standard has not been met.

THE EXISTING SPACING ORDERS

23. One of the existing spacing orders, Order No. 407-87, is for vertical wells. At the time it was entered, Order No. 407-87 states that the evidence showed that with existing technology, which did not include horizontal wells, a vertical well would drain 80 acres. The order simply did not take into account a future technology that did not exist at the time.

24. Drilling and spacing units for vertical wells can coexist with drilling and spacing units for horizontal wells. Horizontal wells can more efficiently drain a reservoir, but that does not mean that all vertical wells must first be plugged and abandoned before the drilling of horizontal wells. Plugging existing wells that are still operating and profitable would constitute economic waste.

25. Protestant do not point to any statutory or regulatory authority that prohibits overlapping drilling and spacing units for different types of wells, and Commission regulations specifically provide for overlapping spacing units. *See*, Commission Rule 318A.

26. However, the provision of §34-60-116(2), C.R.S., that allows the Commission to create drilling and spacing units of different sizes and shapes for various zones in a pool so that the pool as a whole will be efficiently and economically developed does lend credence to the idea that there can in fact be overlapping drilling and spacing units.

27. While the other spacing order, Order No. 407-405, is for a horizontal well, the same legal principles apply.

MARTINEZ IS NOT, AT THIS TIME, BINDING PRECEDENT

28. The parties do not dispute that *Martinez, supra,* is on appeal, and that no mandate has issued. Indeed, by its own terms, the *Martinez* decision is stayed pending any appeal.

29. Protestant apparently has a public policy disagreement with the Commission as to how the Commission should treat *Martinez*. But that is not grounds for denying the Amended Application in this matter, let alone grounds for staying all applications and bringing the entire oil and gas industry in the State to a halt pending Supreme Court review of the *Martinez* decision. See Response, page 2.

30. Protestant does not cite any authority for their proposition set out at page 2 of their Response that an order entered in accordance with binding precedent in effect at the time of entry of the order somehow renders the order invalid if a reported case that is not precedent at the time of entry of the order should happen to become binding precedent at a later date. Indeed, it settled law that the issuance of the mandate is what establishes the finality of the judgment upon which the parties can rely. *Garrett v. Garrett*, 30 Colo.App. 167, 505 P.2d 39 (1971).

PROTESTANT'S DESIRE TO NOT DEVELOP ITS MINERALS IS NOT A PROPER CONSIDERATION WHEN EVALUATING A SPACING APPLICATION

31. The economic desires of the mineral owner, or a lessor, are not considered when establishing a drilling and spacing order. What is to be considered is whether or not the pool can be developed in an efficient and economical manner. *See*, §34-60-116, C.R.S. The Commission evaluates the economics of a proposed well by looking at the cost of the drilling the well in comparison to the dollar value of production anticipated from the well. If the value of production exceeds the cost of drilling and completing the well, and will pay a profit over operating expenses, the proposed well is deemed economic. The price of the product is relevant only in establishing whether or not the value of production exceeds the cost of drilling and completing the well, and paying a profit over operating expenses.

32. Further, the Commission does not, and may not, distribute production of oil and gas in Colorado based on market demand. §34-60-102(b), C.R.S. ("It is not the intent nor the purpose of this article to require or permit the proration or distribution of oil and gas among the fields and pools of Colorado on the basis of market demand.")

33. In any event, it appears Protestant has abandoned this argument since it does not address the argument in its Response. *See, Muntzing v. Harwood*, 25 Colo.App. 292, 137 P. 71, 72 (1913) (failure to raise issue in brief may be considered as abandonment of the issue); *See also*, *People v. Czemerynski*, 786 P.2d 1100, 1107 (Colo. 1990) (court would not address an argument raised for the first time on a reply brief).

CONCLUSION

34. For the foregoing reasons, the Protest fails to set out any plausible claim for relief as required by *Warne*, *supra*, and the Motion should be granted. Therefore it is hereby

ORDERED that 8 North LLC's *Motion to Dismiss Protest of Boulder County* is hereby GRANTED.

Dated: January 2, 2018

OIL AND GAS CONSERVATION COMMISSION
OF THE STATE OF COLORADO,

James P. Rouse, Hearing Officer

CERTIFICATE OF SERVICE

On January 2, 2018, a true and correct copy of the foregoing Order Granting 8 North LLC's Motion to Dismiss Protest was sent by electronic mail to the following:

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James P. Rouse, Hearing Officer

BEFORE THE OIL AND GAS CONSERVATION COMMISSION
OF THE STATE OF COLORADO

IN THE MATTER OF AN APPLICATION BY 8 NORTH LLC FOR AN ORDER AUTHORIZING NINETEEN (19) ADDITIONAL HORIZONTAL WELLS, FOR A TOTAL OF TWENTY (20) HORIZONTAL WELLS, FOR PRODUCTION FROM THE CODELL AND NIOBRARA FORMATIONS IN AN APPROXIMATE 1,280-ACRE DRILLING AND SPACING UNIT PROPOSED FOR SECTIONS 35 AND 36, TOWNSHIP 1 NORTH, RANGE 69 WEST, 6TH P.M, WATTENBERG FIELD, BOULDER COUNTY, COLORADO	)	CAUSE NO. 407 DOCKET NO. 171200773 TYPE: ADDITIONAL WELLS

ORDER RE: MOTIONS TO DISMISS

THIS MATTER is before the Hearing Officer on the *Motion to Dismiss Protest of Boulder County and City of Lafayette* filed by 8 North LLC ("8 North") (which motion is hereinafter referred to as the "8 North Motion"), and the *Motion to Dismiss for Lack of Subject Matter Jurisdiction* filed by Boulder County and the City of Lafayette (which motion is hereinafter referred to as the "Boulder Motion"). The 8 North Motion and the Boulder Motion are hereinafter referred to jointly as the "Motions". The Motions are fully briefed and the Hearing Officer enters the following order.

PROCEDURAL HISTORY

1. On September 19, 2017, 8 North filed an Application in this matter seeking an order, among other things, authorizing an additional 19 horizontal wells, for a total of up to 20 horizontal wells, in an approximate 1,280-acre drilling and spacing unit proposed for Sections 35 and 36, Township 1 North, Range 69 West, 6th P.M., for the production of oil, gas, and associated hydrocarbons from the Codell and Niobrara Formations.

2. On November 2, 2017, the Commission issued a *Notice of Hearing* for the *Application* for the Commission's December 11-13, 2017 hearing.

3. On November 15, 2017, the *Protest and Intervention by Boulder County and City of Lafayette* ("Protest") was filed.

4. On December 5, 2017 a *Protest to 8 North LLC's Application* was filed by the Town of Erie.[1]

5. On December 6, 2017, the 8 North Motion was filed pursuant to Commission Rule 519 and C.R.C.P. 12(b)(5).

[1] The protest filed by the Town of Erie states that it was filed pursuant to Commission Rule 509. Commission Rule 509.a.(1) requires protests to be filed 14 days before the hearing date. For the December 11-12, 2017 hearing, that would have been on or before November 27, 2017. However, §34-60-108(7), C.R.S., provides for a protest to be filed at least three days before the hearing.

6. On December 13, 2017, Boulder County and City of Lafayette ("Protestants") filed their *Response to Motion to Dismiss* ("Response to 8 North Motion").

7. On December 18, 2017, 8 North filed its *Reply in Support of Its Motion to Dismiss Protest of Boulder County and City of Lafayette* ("Reply for 8 North Motion").

8. On December 6, 2017, Boulder County and the City of Lafayette filed the Boulder Motion pursuant to Commission Rule 519 and C.R.C.P. 12(b)(1).

9. On December 13, 2017, 8 North filed its *Response to Motion to Dismiss for Lack of Subject Matter Jurisdiction* ("Response to Boulder Motion").

10. On December 18, 2017, Boulder County and the City of Lafayette filed their *Reply in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction* ("Reply for Boulder Motion").

STANDARD OF REVIEW

11. The current standard in Colorado for ruling on C.R.C.P. 12(b)(5) motions to dismiss for failure to state a claim upon which relief can be granted is set out in *Warne v. Hall*, 373 P.3d 588 (Colo. 2016).

12. In *Warne*, the Colorado Supreme Court adopted the "plausible claim for relief" standard originally adopted by the United States Supreme Court in the cases of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). *Warne*, at ¶¶ 9 & 24. The tenant that a Hearing Officer must accept as true all of the allegations contained in the Application is inapplicable to legal conclusions and only an Application that alleges facts sufficient to show a plausible claim for relief survives a motion to dismiss. Id. at ¶ 9. While notice pleading is still the norm, and allegations can still be made on information and belief, the allegations must be factual. Id. at ¶¶ 21, 22 & 23. Conclusory allegations are not entitled to an assumption that they are true. Id. at ¶ 27.

13. A motion to dismiss for failure to state a claim under C.R.C.P. 12(b)(5) is disfavored. *Belinda A. Begley & Robert K. Hirsch Revocable Trust* v. *Ireson*, 399 P.3d 777, 779, ¶7 (Colo. App. 2017); *Rector v. City & County of Denver*, 122 P.3d 1010, 1013 (Colo. App. 2005). "A complaint need not express all facts that support the claim but need only serve notice of the claim asserted." *Adams v. Corrections Corp. of Am.*, 187 P.3d 1190, 1198 (Colo. App. 2008). Accordingly, motions to dismiss are "rarely granted under our notice pleadings." *Id.* In considering whether dismissal is appropriate, all factual allegations in a complaint must be accepted as true and viewed in the light most favorable to the plaintiff. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). In evaluating a C.R.C.P. 12(b)(5) motion, a court "may consider only those matters stated in the complaint." *Lambert v. Ritter Inaugural Committee, Inc.*, 218 P.3d 1115, 1119 (Colo. App. 2009) (citing *Coors Brewing Co. v. Floyd*, 978 P.2d 663, 665 (Colo.1999).

14. With respect to a motion to dismiss for lack of subject matter jurisdiction, the applicant has the burden to prove jurisdiction. *See, Bazemore v. Colo. State Lottery Div.*, 64 P.3d 876, 878 (Colo. App. 2002).

15. The Hearing Officer may determine a jurisdictional issue without an evidentiary hearing if the Hearing Officer accepts all of applicant's assertions of fact as true. In such cases, the jurisdictional issue may be determined as a matter of law. *Hansen v. Long*, 166 P.3d 248, 250-251 (Colo. App. 2007); *Asphalt Specialties, Co., Inc. v. City of Commerce City*, 218 P.3d 741, 744 (Colo. App. 2009).

16. The Commission considers these standards to be applicable to the motions to dismiss protests pursuant to C.R.C.P. 12(b)(5) and motions to dismiss applications for lack of subject matter jurisdiction filed pursuant to C.R.C.P. 12(b)(1).

ANALYSIS

17. In their Protest, Boulder County and the City of Lafayette assert that:

a. Public issues raised by the Application reasonably relate to the public health, safety and welfare of their citizens, including environmental and wildlife resources, that are within the Commission's jurisdiction to remedy (Protest ¶3);

b. The potential impacts are not adequately addressed by the Application (Protest ¶3);

c. The potential impacts are not adequately addressed by the Rules and Regulations of the Commission (Protest ¶3);

d. The potential impacts may adversely affect public health, safety and welfare, damage private and public mineral and surface rights, allow the drilling of unnecessary and uneconomic wells, damage important environmental and agricultural resources, and create waste and damage correlative rights (Protest ¶3);

e. The spacing unit for which that Application seeks additional wells has not yet been created, no Form 2 or Form 2A permits have been issued to 8 North for that unit, and no resulting well has been drilled by 8 North (Protest ¶¶6&9);

f. 8 North has not submitted a Proposed Plan as contemplated by Commission Rule 503.c., and

g. The Application fails to allege facts that satisfy the health, safety and welfare standard set by the Colorado Court of Appeals in *Martinez, et. al. v. Colorado Oil and Conservation Commission, et. al.*, 2017 COA 37 (March 23, 2017) ("*Martinez*").[2]

[2] Boulder County and the City of Lafayette also alleged that they had filed a request that a Rule 508 local public forum be completed before the Amended Application is considered. Boulder County and the City of Lafayette now acknowledge that this request is moot. (Response to 8 North Motion, page 3). Also, since the allegation in the Protest that 8 North has failed to file a Proposed Plan as contemplated by Rule 503.c., relates to applications subject to Rule 508.a., that issue is also now moot. Therefore, the Hearing Officer does not consider either of these allegations.

APPLICABILITY OF C.R.C.P. 12(b)(5) TO A PROTEST

18. As an initial matter, Boulder County and the City of Lafayette argue that C.R.C.P. 12(b)(5) is not applicable to a Protest and Intervention made as matter of right because Commission Rule 509.a., sets forth the specific requirements for a protest and intervention. Boulder County and the City of Lafayette acknowledge that Commission Rule 519.a., provides that, "The Colorado Rules of Civil Procedure apply to Commission proceedings unless they are inconsistent with Commission Rules or the Oil and Gas Conservation Act." However, Boulder County and the City of Lafayette argue that Commission Rule 509.a. does not require that a protestor "state a claim" or otherwise prove that the protestor is entitled to relief. Therefore, assert the Boulder County and the City of Lafayette, C.R.C.P. 12(b)(5) is not applicable because it conflicts with the specific provisions of Commission Rule 509.a. (Response to 8north Motion, page 1).

19. Boulder County and the City of Lafayette are incorrect when they contend that compliance with Commission Rule 509.a., is all that is needed for a valid protest and intervention. Commission Rule 509.a., simply sets forth the specific requirements for who may file a protest and a requirement to include information showing that the party filing a protest and intervention has a right to do so. However, that is not all that must be included in a protest and intervention.

20. Boulder County and the City of Lafayette totally ignore the requirements of Commission Rule 509.a.(3)A. This portion of Rule 509 requires that the pleading also include "a general statement of the factual or legal basis for the protest or intervention." This is the essence of notice pleading.

21. C.R.C.P. 8 also requires notice pleading. Both Commission Rule 509.a.(3)A. and C.R.C.P. 8 require notice pleading. So, there is no conflict between Commission Rule and the Colorado Rules of Civil Procedure when it comes to what is required in a pleading. The Colorado Supreme Court has said that the plausibility standard set forth in *Warne*, applies to notice pleading under the Colorado Rules of Civil Procedure, and it therefore applies when evaluating the sufficiency of notice pleading in a protest and intervention.

BOULDER COUNTY AND THE CITY OF LAFAYETTE FAILED TO COMPLY WITH *WARNE* WHEN RAISING ISSUES RELATED TO PUBLIC HEALTH, SAFETY, AND WELFARE, ETC.

22. The first three objections raised in the Protest can be categorized as health, safety, and welfare concerns. In addition to health, safety, and welfare concerns, the fourth objection alleges damage to private and public mineral and surface rights, the drilling of unnecessary and uneconomic wells, damage to important environmental and agricultural resources, and creation of waste and damage to correlative rights.

23. Pursuant to the plane language of Commission Rule 509.a.(2)B, Boulder County and the City of Lafayette can intervene to raise issues concerning public health, safety, and welfare.

24. However, even a protest and intervention filed by a local government must also comply with the provisions of Commission Rule 509.a.(3)A., which requires "a general statement of the factual or legal basis for the protest or intervention."

25. As explained above, this is notice pleading and *Warne*, *supra*, applies. While notice pleading is still the norm, and allegations can still be made on information and belief, the allegations must be factual. Conclusory allegations are not entitled to an assumption that they are true.

26. There must be something more than a mere recitation of the Commission's Rules. There must be factual allegations of what harm plausibly might be caused by the granting of an application for additional wells. The Protest does not contain factual allegations of any type showing plausible claims of harm to the public health, safety, or welfare. Therefore, the *Warne* standard has not been met.

27. As regards the allegations of damage to private and public mineral and surface rights, the drilling of unnecessary and uneconomic wells, damage to important environmental and agricultural resources, and creation of waste and damage to correlative rights, these are merely speculative and conclusory allegations. There are no factual allegations or explanation of how these alleged injuries might be caused by the granting of the Application. Again, the *Warne* standard has not been met.

THE LACK OF AN EXISITING DRILLING AND SPACING UNIT AT THE TIME THE APPLICATION WAS FILED

28. Boulder County and the City of Lafayette allege in paragraph 6 of the Protest that the spacing unit for which that Application seeks additional wells has not yet been created, no Form 2 or Form 2A permits have been issued to 8 North for that unit, and no resulting well has been drilled by 8 North. In the Boulder Motion, Boulder County and the City of Lafayette argue that the Commission lacks subject matter jurisdiction over the Application because § 34-60-116(4) requires that first be an existing drilling and spacing unit with one approved well that is actually drilled and producing before the Commission can enter an order approving the drilling of additional wells. (Boulder Motion, pages 3 & 4).

29. The parties do not suggest that the Boulder Motion requires an evidentiary hearing on the issue of subject matter jurisdiction. And, the Hearing Officer finds that, accepting all of 8 North's assertions of fact as being true, resolution of the subject-matter-jurisdiction issue can be resolved as a matter of law by reviewing the applicable statutes governing the Commission. *See, Hansen v. Long*, *supra*; *Asphalt Specialties, supra*.

30. When interpreting a statute, the Hearing Officer must first look to its language, which the Hearing Officer must construe as written if that language is clear and unambiguous. *City of Aurora v. Bd. of County Comm'rs,* 919 P.2d 198, 200 (Colo. 1996). The Hearing Officer must construe statutory provisions in their entirety, giving effect to every word and term contained therein, whenever possible. *Bd. of County Comm'rs v. Vail Assocs., Inc.,* 19 P.3d 1263, 1273 (Colo. 2001).

31. Section 34-60-116(3), C.R.S., states that "[T]he order establishing drilling units shall permit only one well to be drilled and produced from the common source of supply on a drilling unit . . . ."

32. Section 34-60-116(4), C.R.S., states that "[T]he commission, upon application, notice, and hearing, may . . . permit additional wells to be drilled within the established units in order to prevent or assist in preventing waste or to avoid the drilling of unnecessary wells, or to protect correlative rights . . . ."

33. The Hearing Officer finds that the language of §34-60-116(3), C.R.S., and §34-60-116(4), C.R.S., is clear and unambiguous.

34. While §34-60-116(3), C.R.S., does contain the words relied upon by Boulder County and the City of Lafayette, they misinterpret the statute. This statutory provision simply states what an operator can and cannot do under the spacing order, which is drill and produce only one well. Section 34-60-116(3), C.R.S., does not in any way address the timing of the filing of an application for additional wells, which is the issue before the Hearing Officer.

35. Boulder County and the City of Lafayette are correct when they argue that §34-60-116(4), C.R.S., requires there to be an existing drilling and spacing unit before the Commission can enter an order for additional wells.

36. However, nothing in §34-60-116(4), C.R.S., addresses the timing of the filing of an application for additional wells, as opposed to the entry of the order approving the additional wells. Nothing in the statute requires that there be an actual well and actual production in order for the Commission to approve additional wells. The only requirement for entry of an order pursuant to §34-60-116(4), C.R.S., is a previously existing drilling and spacing unit. Nothing in the statute prohibits the Commission from first entering the order approving the drilling and spacing unit with its one well, and then shortly thereafter, at the same hearing even, entering an order approving additional wells in the same drilling and spacing unit.

37. In addition, courts "give deference to an agency's reasonable interpretation of its statute that will assist in lightening the agency's workload and making its decision-making process more efficient, provided that its interpretation is consistent with the intent and purpose of the General Assembly in enacting the statute." *Colorado State Pers. Bd. v. Dep't of Corr., Div. of Adult Parole Supervision*, 988 P.2d 1147, 1151 (Colo. 1999).

38. The Commission has determined in the past that allowing an application for additional wells to be filed prior to the hearing where the original spacing application is considered, with the application for additional wells being approved after entry of the order for the creation of the drilling and spacing unit, even if the orders are entered at the same hearing, assists in lightening the agency's workload and making its decision-making process more efficient.

39. For these reasons, interpreting the statutes as written and giving effect to every word and term, the Hearing Officer finds that as a matter of law the Commission does have jurisdiction to enter an order approving the additional wells requested in the Application, but only after first entering an order approving the creation of the drilling and spacing unit.

MARTINEZ IS NOT, AT THIS TIME, BINDING PRECEDENT

40. The parties do not dispute that *Martinez, supra,* is on appeal, and that no mandate has issued. Indeed, by its own terms, the *Martinez* decision is stayed pending any appeal.

41. Protestants apparently have a public policy disagreement with the Commission as to how the Commission should treat *Martinez.* But that is not grounds for denying the Amended Application in this matter, let alone grounds for staying all applications and bringing the entire oil and gas industry in the State to a halt pending Supreme Court review of the *Martinez* decision. See Response to 8 North Motion, page 2.

42. Protestants do not cite any authority for the proposition set out at page 2 of their Response to 8 North Motion that an order entered in accordance with binding precedent in effect at the time of entry of the order somehow renders the order invalid if a reported case that is not precedent at the time of entry of the order should happen to become binding precedent at a later date. Indeed, it settled law that the issuance of the mandate is what establishes the finality of the judgment upon which the parties can rely. *Garrett v. Garrett*, 30 Colo.App. 167, 505 P.2d 39 (1971).

CONCLUSION

43. For the foregoing reasons, the Protest fails to set out any plausible claim for relief as required by *Warne, supra,* and the 8 North Motion should be granted and the Boulder Motion should be denied. Therefore it is hereby

ORDERED that 8 North LLC's *Motion to Dismiss Protest of Boulder County and City of Lafayette* is hereby GRANTED, and it is hereby

FURTHER ORDERED that the *Motion to Dismiss for Lack of Subject Matter Jurisdiction* filed by Boulder County and the City of Lafayette is DENIED.

Dated: January 4, 2018

OIL AND GAS CONSERVATION COMMISSION
OF THE STATE OF COLORADO,

James P. Rouse, Hearing Officer

CERTIFICATE OF SERVICE

On January 4, 2018, a true and correct copy of the foregoing *Order Re: Motions to Dismiss* was sent by electronic mail to the following:

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James P. Rouse, Hearing Officer

BEFORE THE OIL AND GAS CONSERVATION COMMISSION
OF THE STATE OF COLORADO

IN THE MATTER OF AN APPLICATION BY 8 NORTH LLC FOR AN ORDER AUTHORIZING AN ADDITIONAL THIRTY-ONE (31) HORIZONTAL WELLS, FOR A TOTAL OF THIRTY-TWO (32) HORIZONTAL WELLS, FOR PRODUCTION FROM THE CODELL AND NIOBRARA FORMATIONS IN AN APPROXIMATE 2,720-ACRE DRILLING AND SPACING UNIT PROPOSED FOR SECTIONS 13, 14, 23, AND 24, TOWNSHIP 2 NORTH, RANGE 69 WEST, 6TH P.M. AND SECTION 18, TOWNSHIP 2 NORTH, RANGE 68 WEST, 6TH P.M., WATTENBERG FIELD, BOULDER AND WELD COUNTIES, COLORADO	)	CAUSE NO. 407 DOCKET NO. 171200774 TYPE: ADDITIONAL WELLS

ORDER RE: MOTIONS TO DISMISS

THIS MATTER is before the Hearing Officer on the *Motion to Dismiss Protests of Boulder County and City of Longmont* filed by 8 North LLC ("8 North") (which motion is hereinafter referred to as the "8 North Motion"), and the *Motion to Dismiss for Lack of Subject Matter Jurisdiction* filed by Boulder County (which motion is hereinafter referred to as the "Boulder Motion"). The 8 North Motion and the Boulder Motion are hereinafter referred to jointly as the "Motions". The Motions are fully briefed and the Hearing Officer enters the following order.

PROCEDURAL HISTORY

1. On September 19, 2017, 8 North filed an Application in this matter seeking an order, among other things, authorizing an additional 31 horizontal wells, for a total of up to 32 horizontal wells, in an approximate 2,720-acre drilling and spacing unit proposed for Sections 13, 14, 23, and 24, Township 2 North, Range 69 West, 6th P.M., and Section 18, Township 2 North, Range 68 West, 6th P.M., for the production of oil, gas, and associated hydrocarbons from the Codell and Niobrara Formations.

2. On November 2, 2017, the Commission issued a *Notice of Hearing* for the Application for the Commission's December 11-13, 2017 hearing.

3. On November 14, 2017, the Commission issued an *Amended Notice of Hearing* for the Application for the Commission's December 11-13, 2017 hearing.

4. On November 15, 2017, the *Protest and Intervention by Boulder County and City of Longmont* ("Boulder Protest") was filed.

5. On November 27, 2017 the *Protest and Intervention by City of Longmont* ("Longmont Protest") was filed.

6. On November 27, 2017, Crestone Peak Resources Operating LLC ("Crestone") filed its *Protest to 8 North LLC's Application.*

7. On December 6, 2017, the 8 North Motion was filed pursuant to Commission Rule 519 and C.R.C.P. 12(b)(5).

8. On December 13, 2017, Boulder County and City of Longmont filed their *Response to Motion to Dismiss* ("Response to 8 North Motion").

9. On December 18, 2017, 8 North filed its *Reply in Support of Its Motion to Dismiss Protests of Boulder County and City of Longmont* ("Reply for 8 North Motion").

10. On December 6, 2017, Boulder County filed the Boulder Motion pursuant to Commission Rule 519 and C.R.C.P. 12(b)(1).

11. On December 13, 2017, 8 North filed its *Response to Motion to Dismiss for Lack of Subject Matter Jurisdiction* ("Response to Boulder Motion").

12. On December 15, 2017, Crestone filed a *Statement in Support of 8 North LLC's Response to Boulder County's Motion to Dismiss.*

13. On December 18, 2017, Boulder County filed its *Reply in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction* ("Reply for Boulder Motion").

STANDARD OF REVIEW

14. The current standard in Colorado for ruling on C.R.C.P. 12(b)(5) motions to dismiss for failure to state a claim upon which relief can be granted is set out in *Warne v. Hall*, 373 P.3d 588 (Colo. 2016).

15. In *Warne*, the Colorado Supreme Court adopted the "plausible claim for relief" standard originally adopted by the United States Supreme Court in the cases of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). *Warne*, at ¶¶ 9 & 24. The tenant that a Hearing Officer must accept as true all of the allegations contained in the Application is inapplicable to legal conclusions and only an Application that alleges facts sufficient to show a plausible claim for relief survives a motion to dismiss. Id. at ¶ 9. While notice pleading is still the norm, and allegations can still be made on information and belief, the allegations must be factual. Id. at ¶¶ 21, 22 & 23. Conclusory allegations are not entitled to an assumption that they are true. Id. at ¶ 27.

16. A motion to dismiss for failure to state a claim under C.R.C.P. 12(b)(5) is disfavored. *Belinda A. Begley & Robert K. Hirsch Revocable Trust* v. *Ireson*, 399 P.3d 777, 779, ¶7 (Colo. App. 2017); *Rector v. City & County of Denver*, 122 P.3d 1010, 1013 (Colo. App. 2005). "A complaint need not express all facts that support the claim but need only serve notice of the claim asserted." *Adams v. Corrections Corp. of Am.*, 187 P.3d 1190, 1198 (Colo. App. 2008). Accordingly, motions to dismiss are "rarely granted under our notice pleadings." *Id.* In considering whether dismissal is appropriate, all factual allegations in a complaint must be accepted as true and viewed in the light most favorable to the plaintiff. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). In evaluating a C.R.C.P. 12(b)(5) motion, a court "may consider only those matters stated in the complaint." *Lambert v. Ritter Inaugural*

Committee, Inc., 218 P.3d 1115, 1119 (Colo. App. 2009) (citing *Coors Brewing Co. v. Floyd*, 978 P.2d 663, 665 (Colo.1999).

17. With respect to a motion to dismiss for lack of subject matter jurisdiction, the applicant has the burden to prove jurisdiction. *See, Bazemore v. Colo. State Lottery Div.*, 64 P.3d 876, 878 (Colo. App. 2002).

18. The Hearing Officer may determine a jurisdictional issue without an evidentiary hearing if the Hearing Officer accepts all of applicant's assertions of fact as true. In such cases, the jurisdictional issue may be determined as a matter of law. *Hansen v. Long*, 166 P.3d 248, 250-251 (Colo. App. 2007); *Asphalt Specialties, Co., Inc. v. City of Commerce City*, 218 P.3d 741, 744 (Colo. App. 2009).

19. The Commission considers these standards to be applicable to the motions to dismiss protests pursuant to C.R.C.P. 12(b)(5) and motions to dismiss applications for lack of subject matter jurisdiction filed pursuant to C.R.C.P. 12(b)(1).

ANALYSIS

20. In the Boulder Protest, Boulder County assert that:

a. Public issues raised by the Application reasonably relate to significant adverse impacts to the public health, safety and welfare of its citizens, including environmental and wildlife resources, that are within the Commission's jurisdiction to remedy (Boulder Protest ¶2);

b. The potential impacts are not adequately addressed by the Application (Boulder Protest ¶2);

c. The potential impacts are not adequately addressed by the Rules and Regulations of the Commission (Boulder Protest ¶2);

d. The potential impacts may adversely affect public health, safety and welfare, damage private and public mineral and surface rights, allow the drilling of unnecessary and uneconomic wells, damage important environmental and agricultural resources, and create waste and damage correlative rights (Boulder Protest ¶2);

e. The spacing unit for which that Application seeks additional wells has not yet been created, no Form 2 or Form 2A permits have been issued to 8 North for that unit, and no resulting well has been drilled by 8 North (Boulder Protest ¶¶5&8);

f. The Application fails to allege facts that satisfy the health, safety and welfare standard set by the Colorado Court of Appeals in *Martinez, et. al. v. Colorado Oil and Conservation Commission, et. al.*, 2017 COA 37 (March 23, 2017) ("*Martinez*") (Boulder Protest, ¶9),

g. Current market conditions are not favorable to the owner of mineral interests, and Protestant does not find it economically beneficial to move forward with development of its mineral interests at this time (Boulder Protest ¶10), and

h. The Application may lead to a taking of its mineral rights in without due process in violation of the United States and Colorado Constitutions and Article XI, Sec. 1 (No Pledge of Credit) of the Colorado Constitution.[1]

21. The Longmont Protest, at paragraph 4, joins in the Boulder Protest, adopts the reasoning of the Boulder Protest, and requests the same relief as the Boulder Protest.

22. The Longmont Protest, at paragraph 3, does add another argument and request for relief not contained in the Boulder Protest. Longmont alleges that it has received and is processing a petition for annexation by the St. Vrain Valley School District "for land within the Application, which is planned to become the sites of two schools."

23. The Longmont Protest then states, in paragraph 5, that any surface operations contemplated in connection with the Application should be located as far as possible from the planned school sites and park, which are located in the NW¼ of Section 14, Township 2 North, Range 69 West.

APPLICABILITY OF C.R.C.P. 12(b)(5) TO A PROTEST

24. As an initial matter, Boulder County and the City of Longmont argue that C.R.C.P. 12(b)(5) is not applicable to a Protest and Intervention made as matter of right because Commission Rule 509.a., sets forth the specific requirements for a protest and intervention. Boulder County and the City of Longmont acknowledge that Commission Rule 519.a., provides that, "The Colorado Rules of Civil Procedure apply to Commission proceedings unless they are inconsistent with Commission Rules or the Oil and Gas Conservation Act." However, Boulder County and the City of Longmont argue that Commission Rule 509.a. does not require that a protestor "state a claim" or otherwise prove that the protestor is entitled to relief. Therefore, assert the Boulder County and the City of Longmont, C.R.C.P. 12(b)(5) is not applicable because it conflicts with the specific provisions of Commission Rule 509.a. (Response to 8north Motion, page 1).

25. Boulder County and the City of Longmont are incorrect when they contend that compliance with Commission Rule 509.a., is all that is needed for a valid protest and intervention. Commission Rule 509.a., simply sets forth the specific requirements for who may file a protest and a requirement to include information showing that the party filing a protest and intervention has a right to do so. However, that is not all that must be included in a protest and intervention.

[1] Boulder County and the City of Longmont also alleged that they had filed a request that a Rule 508 local public forum be completed before the Amended Application is considered. Boulder County and the City of Longmont now acknowledge that this request is moot. (Response to 8 North Motion, page 3). Also, since the allegation in the Protest that 8 North has failed to file a Proposed Plan as contemplated by Rule 503.c., relates to applications subject to Rule 508.a., that issue is also now moot. Therefore, the Hearing Officer does not consider either of these allegations.

26. Boulder County and the City of Longmont totally ignore the requirements of Commission Rule 509.a.(3)A. This portion of Rule 509 requires that the pleading also include "a general statement of the factual or legal basis for the protest or intervention." This is the essence of notice pleading.

27. C.R.C.P. 8 also requires notice pleading. Both Commission Rule 509.a.(3)A. and C.R.C.P. 8 require notice pleading. So, there is no conflict between Commission Rule and the Colorado Rules of Civil Procedure when it comes to what is required in a pleading. The Colorado Supreme Court has said that the plausibility standard set forth in *Warne*, applies to notice pleading under the Colorado Rules of Civil Procedure, and it therefore applies when evaluating the sufficiency of notice pleading in a protest and intervention.

BOULDER COUNTY AND THE CITY OF LONGMONT FAILED TO COMPLY WITH *WARNE* WHEN RAISING ISSUES RELATED TO PUBLIC HEALTH, SAFETY, AND WELFARE, ETC.

28. The first three objections raised in the Boulder Protest, and adopted in the Longmont Protest, can be categorized as health, safety, and welfare concerns. In addition to health, safety, and welfare concerns, the fourth objection alleges damage to private and public mineral and surface rights, the drilling of unnecessary and uneconomic wells, damage to important environmental and agricultural resources, and creation of waste and damage to correlative rights.

29. Pursuant to the plain language of Commission Rule 509.a.(2)B, Boulder County and the City of Longmont can intervene to raise issues concerning public health, safety, and welfare.

30. However, even a protest and intervention filed by a local government must also comply with the provisions of Commission Rule 509.a.(3)A., which requires "a general statement of the factual or legal basis for the protest or intervention."

31. As explained above, this is notice pleading and *Warne*, *supra*, applies. While notice pleading is still the norm, and allegations can still be made on information and belief, the allegations must be factual. Conclusory allegations are not entitled to an assumption that they are true.

32. There must be something more than a mere recitation of the Commission's Rules. There must be factual allegations of what harm plausibly might be caused by the granting of an application for additional wells. The Boulder Protest, and the Longmont Protest to the extent it adopts the arguments of the Boulder Protest, do not contain factual allegations of any type showing plausible claims of harm to the public health, safety, or welfare. Therefore, the *Warne* standard has not been met.

33. As regards the allegations of damage to private and public mineral and surface rights, the drilling of unnecessary and uneconomic wells, damage to important environmental and agricultural resources, and creation of waste and damage to correlative rights, these are merely speculative and conclusory allegations. There are no factual allegations or explanation of how these alleged injuries might be caused by the granting of the Application. Again, the *Warne* standard has not been met.

THE LACK OF AN EXISITING DRILLING AND SPACING UNIT AT THE TIME THE APPLICATION WAS FILED

34. Boulder County and the City of Longmont, to the extent that the City of Longmont adopts the Boulder Protest, allege in paragraph 6 of the Boulder Protest that the spacing unit for which that Application seeks additional wells has not yet been created, no Form 2 or Form 2A permits have been issued to 8 North for that unit, and no resulting well has been drilled by 8 North. In the Boulder Motion, Boulder County and the City of Longmont argue that the Commission lacks subject matter jurisdiction over the Application because § 34-60-116(4) requires that first be an existing drilling and spacing unit with one approved well that is actually drilled and producing before the Commission can enter an order approving the drilling of additional wells. (Boulder Motion, pages 3 & 4).

35. The parties do not suggest that the Boulder Motion requires an evidentiary hearing on the issue of subject matter jurisdiction. And, the Hearing Officer finds that, accepting all of 8 North's assertions of fact as being true, resolution of the subject-matter-jurisdiction issue can be resolved as a matter of law by reviewing the applicable statutes governing the Commission. *See, Hansen v. Long, supra*; *Asphalt Specialties, supra.*

36. When interpreting a statute, the Hearing Officer must first look to its language, which the Hearing Officer must construe as written if that language is clear and unambiguous. *City of Aurora v. Bd. of County Comm'rs,* 919 P.2d 198, 200 (Colo. 1996). The Hearing Officer must construe statutory provisions in their entirety, giving effect to every word and term contained therein, whenever possible. *Bd. of County Comm'rs v. Vail Assocs., Inc.,* 19 P.3d 1263, 1273 (Colo. 2001).

37. Section 34-60-116(3), C.R.S., states that "[T]he order establishing drilling units shall permit only one well to be drilled and produced from the common source of supply on a drilling unit . . . ."

38. Section 34-60-116(4), C.R.S., states that "[T]he commission, upon application, notice, and hearing, may . . . permit additional wells to be drilled within the established units in order to prevent or assist in preventing waste or to avoid the drilling of unnecessary wells, or to protect correlative rights . . . ."

39. The Hearing Officer finds that the language of §34-60-116(3), C.R.S., and §34-60-116(4), C.R.S., is clear and unambiguous.

40. While §34-60-116(3), C.R.S., does contain the words relied upon by Boulder County and the City of Longmont, they misinterpret the statute. This statutory provision simply states what an operator can and cannot do under the spacing order, which is drill and produce only one well. Section 34-60-116(3), C.R.S., does not in any way address the timing of the filing of an application for additional wells, which is the issue before the Hearing Officer.

41. Boulder County and the City of Longmont are correct when they argue that §34-60-116(4), C.R.S., requires there to be an existing drilling and spacing unit before the Commission can enter an order for additional wells.

42. However, nothing in §34-60-116(4), C.R.S., addresses the timing of the filing of an application for additional wells, as opposed to the entry of the order approving the additional wells. Nothing in the statute requires that there be an actual well and actual production in order for the Commission to approve additional wells. The only requirement for entry of an order pursuant to §34-60-116(4), C.R.S., is a previously existing drilling and spacing unit. Nothing in the statute prohibits the Commission from first entering the order approving the drilling and spacing unit with its one well, and then shortly thereafter, at the same hearing even, entering an order approving additional wells in the same drilling and spacing unit.

43. In addition, courts "give deference to an agency's reasonable interpretation of its statute that will assist in lightening the agency's workload and making its decision-making process more efficient, provided that its interpretation is consistent with the intent and purpose of the General Assembly in enacting the statute." *Colorado State Pers. Bd. v. Dep't of Corr., Div. of Adult Parole Supervision*, 988 P.2d 1147, 1151 (Colo. 1999).

44. The Commission has determined in the past that allowing an application for additional wells to be filed prior to the hearing where the original spacing application is considered, with the application for additional wells being approved after entry of the order for the creation of the drilling and spacing unit, even if the orders are entered at the same hearing, assists in lightening the agency's workload and making its decision-making process more efficient.

45. For these reasons, interpreting the statutes as written and giving effect to every word and term, the Hearing Officer finds that as a matter of law the Commission does have jurisdiction to enter an order approving the additional wells requested in the Application, but only after first entering an order approving the creation of the drilling and spacing unit.

MARTINEZ IS NOT, AT THIS TIME, BINDING PRECEDENT

46. The parties do not dispute that *Martinez, supra,* is on appeal, and that no mandate has issued. Indeed, by its own terms, the *Martinez* decision is stayed pending any appeal.

47. Protestants apparently have a public policy disagreement with the Commission as to how the Commission should treat *Martinez.* But that is not grounds for denying the Amended Application in this matter, let alone grounds for staying all applications and bringing the entire oil and gas industry in the State to a halt pending Supreme Court review of the *Martinez* decision. See Response to 8 North Motion, page 2.

48. Boulder County and the City of Longmont do not cite any authority for the proposition set out at page 2 of their Response to 8 North Motion that an order entered in accordance with binding precedent in effect at the time of entry of the order somehow renders the order invalid if a reported case that is not precedent at the time of entry of the order should happen to become binding precedent at a later date. Indeed, it settled law that the issuance of the mandate is what establishes the finality of the judgment upon which the parties can rely. *Garrett v. Garrett*, 30 Colo.App. 167, 505 P.2d 39 (1971).

PROTESTANT'S DESIRE TO NOT DEVELOP ITS MINERALS IS NOT A PROPER CONSIDERATION WHEN EVALUATING A SPACING APPLICATION

49. 8 North contends that the argument that current market conditions do not warrant development of the minerals at this time is not a valid basis for a protest. (8 North Motion, page 9).

50. The economic desires of the mineral owner, or a lessor, are not considered when establishing a drilling and spacing order. What is to be considered is whether or not the pool can be developed in an efficient and economical manner. *See*, §34-60-116, C.R.S. The Commission evaluates the economics of a proposed well by looking at the cost of the drilling the well in comparison to the dollar value of production anticipated from the well. If the value of production exceeds the cost of drilling and completing the well, and will pay a profit over operating expenses, the proposed well is deemed economic. The price of the product is relevant only in establishing whether or not the value of production exceeds the cost of drilling and completing the well, and paying a profit over operating expenses.

51. Further, the Commission does not, and may not, distribute production of oil and gas in Colorado based on market demand. §34-60-102(b), C.R.S. ("It is not the intent nor the purpose of this article to require or permit the proration or distribution of oil and gas among the fields and pools of Colorado on the basis of market demand.")

52. In any event, it appears Boulder County and the City of Longmont have abandoned this argument since they does not address the argument in it's the Response to 8 North Motion. *See, Muntzing v. Harwood*, 25 Colo.App. 292, 137 P. 71, 72 (1913) (failure to raise issue in brief may be considered as abandonment of the issue.).

THE COMMISSION LACKS JURISDICTION TO CONSIDER THE CONSTITUTIONAL ARGUMENTS RAISED BY BOULDER COUNTY AND THE CITY OF LONGMONT

53. 8 North does not address the constitutional arguments raised by Boulder County and the City of Longmont. However, since the Commission lacks authority to rule on constitutional issue, as explained below, the Hearing Officer raises the issue on his own motion.

54. Colorado appellate courts have consistently held that administrative agencies do not have authority to pass on the constitutionality of statutes or ordinances. *Arapahoe Roofing and Sheet Metal, Inc. v. City and County of Denver*, 831 P.2d 451, 454 (Colo. 1992). Neither do Hearing Officers. *Expedia, Inc. v. City and County of Denver*, 2014 COA 87, ¶ 52, n. 7 (2014). Where the constitutionality of a statute under which an administrative agency acts is challenged, the administrative agency cannot pass upon its constitutionality. *Kinterknecht v. Industrial Commission*, 485 P.2d 721, 724 (Colo.1971); *Lucchesi v. State*, 807 P.2d 1185, 1191 (Colo.App. 1990). The issue of the constitutionality of a statute under which an administrative agency acts must be raised before the district court. *Id.*

55. The constitutional arguments raised by Boulder County and the City of Longmont should therefore be dismissed for lack of Commission Jurisdiction.

CITY OF LONGMONT'S WELL LOCATION ISSUES

56. 8 North addresses the issue of the surface location of the proposed wells in relation to the park and school sites raised by the City of Longmont by stating that nothing in the Commission's regulations and the controlling statutes requires the Application to specify the location of the wells. Rather, 8 North contends, it is the order approving the Application that "specifies the location of the permitted well." (8 North Motion, page 9). 8 North then states that "orders authorizing additional wells are not required to include exact legal descriptions for or establish surface locations for wells planned within the unit," citing as authority several orders entered by the Commission at its October 30-31, 2017 hearing. ((8 North Motion, page 10).

57. The Commission orders cited by 8 North arose from multiple applications filed by Extraction Oil and Gas, Inc. ("Extraction") affecting lands within the City and County of Broomfield "Broomfield"). Extraction and Broomfield had entered into a settlement agreement that specified locations for wells in each order. The Commission, citing concerns about the agreed upon language preempting the Form 2A process, reworded the well-location provisions of the proposed orders to state:

> The wells will be drilled from surface locations within the unit or at legal locations on adjacent lands. Any applications for Permits to Drill (Form 2) or Oil and Gas Location Assessments (Form 2A) filed by Extraction Oil & Gas, Inc. in the unit on surface lands within the City and County of Broomfield will comport with the October 24, 2017 Amended and Restated Oil and Gas Operator Agreement between Applicant and the City and County of Broomfield.

58. Because of the settlement between Extraction and Broomfield, the orders cited by 8 North arose from a somewhat unique situation, and do in fact, in a fashion, address the location of the wells approved by the orders.

59. 8 North overlooks the fact that the Longmont Protest is also an intervention as a matter of right by a local government to address public health, safety and public welfare concerns. The Longmont Protest, as opposed to the Boulder Protest, specifies particular lands that are of concern to the City of Longmont.

60. The allegation regarding annexation of land for school sites is factual. The statement as to where the wells should be located specifies particular lands that are of concern to the City of Longmont.

61. This is not unlike the settlement agreement at issue in the orders cited by 8 North.

62. 8 North does not raise a *Warne* challenge to this portion of the Longmont Protest.

63. And, since pursuant to the plain language of Commission Rule 509.a.(2)B, the City of Longmont can intervene to raise issues concerning public health, safety, and welfare, the Hearing Officer declines to dismiss the Longmont Protest in its entirety.

64. The City of Longmont should therefore be allowed to maintain its protest and intervention as to the issue of location of wells in relation to the planned schools and park and make a presentation to the Commission.

CONCLUSION

65. For the foregoing reasons, the Boulder Protest fails to set out any plausible claim for relief as required by *Warne*, *supra*, and the 8 North Motion should be granted as to the Boulder Protest and as to the Longmont Protest in so far as the Longmont Protest adopts the arguments and requests for relief contained in the Boulder Protest.

66. For the foregoing reasons, the Boulder Motion should be denied.

67. As to the Longmont Protest, the City of Longmont should be able to present its case to the Commission regarding the location of wells in relation to the planned schools and park.

Therefore it is hereby

ORDERED that 8 North LLC's *Motion to Dismiss Protest of Boulder County and City of Longmont* is hereby GRANTED as to the Boulder Protest in its entirety and as to the Longmont Protest in so far as the Longmont Protest adopts the arguments and requests for relief contained in the Boulder Protest; and it is hereby

FURTHER ORDERED that the City of Longmont may present its case to the Commission concerning the location of the proposed wells in relation to the planned schools and park; and it is hereby

FURTHER ORDERED that the *Motion to Dismiss for Lack of Subject Matter Jurisdiction* filed by Boulder County is DENIED.

Dated: January 4, 2018

OIL AND GAS CONSERVATION COMMISSION
OF THE STATE OF COLORADO,

James P. Rouse

James P. Rouse, Hearing Officer

CERTIFICATE OF SERVICE

On January 4, 2018, a true and correct copy of the foregoing *Order Re: Motions to Dismiss* was sent by electronic mail to the following:

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