District Court, Boulder County, State of Colorado 1777 6th Street, Boulder, Colorado 80302 (303) 441-3750	
Plaintiffs: DAVID RECHBERGER, NICOLETTE MUNSON, ROLF MUNSON, LAUREL HYDE BONI, DINAH MCKAY, DONALD SHERWOOD, WILLIAM B. SWAFFORD, JR, MARILYN KEPES, DONALD WREGE, and DOUGLAS JOHNSON, **v.** **Defendants:** BOULDER COUNTY BOARD OF COUNTY COMMISSIONERS and BOULDER COUNTY HOUSING AUTHORITY.	**▲ COURT USE ONLY ▲**
Attorneys for Defendants: BOULDER COUNTY ATTORNEY David Hughes, #24425 Deputy County Attorney Catherine R. Ruhland, #42426 Assistant County Attorney Boulder County Attorney's Office P.O. Box 471 Boulder, Colorado 80306 Phone: 303-441-3190 Email: dhughes@bouldercounty.org truhland@bouldercounty.org	Case Number: 2017CV30818 Div: 2
REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS	

OVERVIEW

This lawsuit is based on allegations that, almost twenty-five years ago, the Board of County Commissioners entered into a binding and enforceable $1.9 million contract with the

Gunbarrel Public Improvement District (the "GPID").[1] However, the Complaint fails to identify any written contract signed or voted on either by the county commissioners or by the Board of Directors of the GPID, which has the specific power to "enter into contracts and agreements affecting the affairs of the district." § 30-20-512, C.R.S. Further, the Complaint fails to identify any benefit Boulder County allegedly received by allegedly making a $1.9 million commitment to the GPID. Although the Taxpayers allege they voted in favor of the Open Space Initiative and incurred higher taxes, all tax revenue from the Open Space Initiative went to the GPID—not Boulder County. (See Compl. ¶¶ 47, 48 and 55). In other words, the Taxpayers are attempting to enforce an undocumented $1.9 million dollar contract in which the GPID receives the benefit of additional public open space in exchange for nothing.

ARGUMENT

I. Taxpayers failed to prove injuries sufficient to establish standing.

a. Taxes incurred as a result of the Open Space Initiative do not constitute an injury in fact.

The Taxpayers argue that the County's alleged promise to purchase open space in the GPID with non-GPID funds "induced their assent to higher taxes." (Resp. at 5.) Although the Taxpayers, like all GPID property owners, paid higher taxes than they would have had the Open Space Initiative failed, the assessment of additional taxes does not establish an injury in fact absent an allegation of unlawful expenditures of those tax dollars. Plaintiffs who pay taxes have standing to seek to enjoin unlawful expenditure of government funds. *Hickenlooper v. Freedom*

[1] The Response refers to the "specific" group that the County allegedly made its contract with as "Gunbarrel property owners" but the Taxpayers do not draw any distinction between the GPID itself and the residents within the GPID. (Resp. at 2). The Complaint specifies that the GPID "encompasses the area of Gunbarrel, within Boulder County . . ." (Compl. ¶ 30).

from Religion Found., Inc., 338 P.3d 1002, 1007 (Colo. 2014). "The injury occur[s] by virtue of an *expenditure of funds* to which the taxpayers had contributed." *Hotaling v. Hickenlooper*, 275 P.3d 723, 726 (Colo. App. 2011) (emphasis added). However, where Taxpayers "do not assert any injury based on an unlawful expenditure of their taxpayer money, nor do they allege their tax dollars are being used in an unconstitutional manner" then the plaintiffs cannot establish taxpayer standing. *Hickenlooper*, 338 P.3d at 1008.

The Taxpayers have not alleged that GPID residents paid their taxes to the County rather than the GPID.[2] They are not asking that the taxes they paid into the GPID be spent differently by the GPID. Moreover, the Taxpayers do not allege that the GPID or the County authorized unlawful expenditures of public funds. Instead, they allege that the County must make *additional* public expenditures of non-GPID funds.[3] A plaintiff may not claim taxpayer standing in such circumstances. *See Hotaling*, 275 P.3d at 723 (state taxpayer does not have taxpayer standing to sue the state over the expenditure of federal funds).

b. The $600,000 match that the County allegedly must pay for additional open space in the GPID does not constitute an injury in fact.

Taxpayers also assert that an additional County expenditure of almost $600,000 on GPID open space constitutes "the source of Plaintiffs' damages." (Resp. at 14.) Contract damages are

[2] In particular, the Taxpayers allege that the GPID issued bonds based on the passage of the Open Space initiative and the GPID made $2.3 million in GPID open space purchases. (Compl. ¶¶ 47 and 56).

[3] Taxpayers claim the County misportrayed this case as an effort by disgruntled Taxpayers to control how the County spends public funds. (Resp. at 4.) The County never described the Taxpayers as "disgruntled." Further, the County's description of the Taxpayer's desired result comes directly from Taxpayer's Complaint. Taxpayers request that the Court order the County to "purchas[e]…the Twin Lakes Property" and for the Court to require the County to "purchase open space within the GPID, [sic] within one year." (Compl. ¶¶ D and E). The County could not take either of these actions without altering its budget to prioritize it in the manner the Taxpayers desire.

awarded "in order to make the injured party whole." *Ballow v. PHICO Ins. Co.*, 878 P.2d 672, 677 (Colo. 1994). "In other words, where a legal injury is of an economic character, legal redress in the form of compensation should be equal to the injury." *Id.* (quotations and ellipsis omitted). However, none of the plaintiffs—either individually or collectively—paid the County $600,000 and therefore there is no monetary loss to the plaintiffs, let alone a monetary loss that the court should make whole.

The Taxpayers argue that they and the rest of the GPID residents only got some of what the County allegedly promised and therefore suffered an injury because they have not yet gotten the rest. Their argument incorrectly equates a lack of an additional public benefit with incurring an injury in fact. As discussed in section IV below, because GPID never agreed to anything in exchange for a promise, it never lost anything by the County's alleged failure to keep its alleged promise. In other words, if X promises to pay Y $1.9 million, Y cannot claim an injury if Y receives only $1.3 million. Y has benefitted by $1.3 million; Y has not suffered a $600k injury. The Taxpayers suffered no injury and thus failed to meet their burden of proving standing.

The Taxpayers attempt to contrast this lawsuit from a generalized grievance by a group of taxpayers by arguing that the Complaint involves a "specific group of property owners"—i.e. the GPID—rather than all Boulder county residents. (Resp. at 6.) However, the Court in *Wibby* rejected a nearly identical argument. *Wibby v. Bd. of Cty, Comm'rs,* __ P.3d __, 2016 WL 3600291 (Colo. App. June 30, 2016), *cert. denied,* 16SC640, 2016 WL 7336782 (Colo. Dec. 19, 2016).

The plaintiffs in *Wibby* were property owners from "over 100 subdivisions in the unincorporated county." *Id.* at *1. The *Wibby* plaintiffs alleged they were separate and distinct

from the general public; "they alleged that '[b]y accepting the roads in each subdivision, [the] County entered into a contract with the developer of *each subdivision*.'" *Id.* at *2 (emphasis added). In other words, like the Taxpayers, the *Wibby* plaintiffs argued that residents in a subdivision were a specific group of property owners distinct from the whole county. Nonetheless, the Court concluded that:

> At bottom, the Owners disagree with the County's allocation of funds to road maintenance. But it is to be expected that many citizens disagree with how a county allocates its budget. That alone does not create a private judicial remedy. To conclude otherwise would improperly intrude on the County's budgetary discretion . . . . [and] subject the County to endless litigation.

Id. at *5. Like the property owners in *Wibby*, the Taxpayers disagree with the County's decision not to expend public funds in the timeframe and manner that they demand. Accordingly, the Taxpayers' lawsuit is an example of the endless litigation the Court was warning against. If Taxpayers have standing in these circumstances, then any residents who claim that government officials made promises or commitments in the course of election on any ballot initiative could file suit claiming they didn't get everything they thought they were promised.

c. Taxpayers have failed to meet their burden of demonstrating a legally protected interest.

The Taxpayers claim that the "legally protected interest" portion of the *Wimberly* test is satisfied by identifying a legally recognized theory of recovery. (Resp. at 6-7.) If that were the case, then a plaintiff would satisfy the "legally protected interest" component simply by filing a complaint that complies with the rules of civil procedure. (See C.R.C.P. 7 and 8). Instead, "the conclusion that an injury is actionable rests on a normative judicial judgment derived from a determination that the substantive law invoked creates a *personal interest or right in the*

complainant that has been infringed by the challenged action." *Cloverleaf Kennel Club, Inc. v. Colorado Racing Comm'n*, 620 P.2d 1051, 1058 (Colo. 1980) (quotations and ellipsis omitted and emphasis added). The Taxpayers fail the legally protected interest component of the standing test because they do not have a personal interest or right arising out of a contract or a statute—this goes beyond a simple failure to state the elements of a tort or contract claim.[4]

Regarding their alleged contract interest, Taxpayers claim that a breach of contract claim is "recognized under common law" and therefore Taxpayers have a legally protected interest. However, just because X allegedly breached a contract with Y does not mean that Z has standing to bring a contract claim. Z must show that Z has a personal interest in the contract. *See, e.g. Cardi Materials Corp. v. Connecticut Landscaping Bruzzi Corp.*, 823 A.2d 1271, 1274 (App. Conn. Ct. 2003) (plaintiff that is not a party to the contract lacks personal and legal interest in the contract and therefore has no standing to sue); *see also Everett v. Dickinson & Co., Inc.*, 929 P.2d 10, 12 (Colo. App. 1996). Taxpayers failed to allege or come forward with any facts that show the County entered into a contract with Rechberger, Munson(s), Boni, McKay, Sherwood, Swafford, Kepes, Wrege or Johnson. *See Denver Parents Ass'n v. Denver Bd. of Educ.*, 10 P.3d 662, 665 (Colo. App. 2000) ("plaintiffs . . . consist of the general public. They have not individually bargained with the school district, or individually paid for specific educational services. As a result, they cannot assert legal claims for the alleged failure to provide those unbargained-for services.").

The Taxpayers face a similar problem with their claims arising from their alleged

[4] Taxpayers incorrectly claim that the County does not challenge their standing to bring a declaratory judgment or mandamus claim. Because a standing or declaratory judgment claim must derive from rights either under a statute or contract, separate arguments about the same rights under different theories or relief would have been redundant.

statutory interests. They assert that they fit within the UTFA's definition of "creditor" but have not alleged any facts or come forward with evidence showing that Rechberger, Munson(s), Boni, McKay, Sherwood, Swafford, Kepes, Wrege or Johnson loaned money to the County. The only money Taxpayers claim to have paid are property taxes collected as a result of the Open Space Initiative. This money (the benefit) went to the GPID, not the County and therefore could not be considered a loan to the County nor could the County be a debtor for money it was never paid. Moreover, the Taxpayers have failed to cite a case from any jurisdiction indicating that taxes can be construed as a loan to the government that make government a debtor and the taxpayer a creditor. In fact, under Colorado law, it works the other way. Property taxes constitute a debt payable to the County. *See* § 39-1-107, C.R.S.

Because the Taxpayers failed to come forward with proof that they have personal standing under a contract or under the UTFA, they have failed to meet their burden of proving standing and the Court should dismiss this case for lack of jurisdiction.

II. The County and BCHA are immune from Taxpayers' fraudulent transfer claim.

The Taxpayers argue that *Miller v. Kaiser*, 433 P.2d 772 (Colo. 1967) shows that a fraudulent transfer claim under the UTFA is an equitable action and therefore does not lie in tort. *Miller*, however, stands for the narrower proposition that the *remedy* of return of the property requested in that case, not the underlying claim of fraudulent transfer, is equitable in nature. *Id.* at 775. Under the CGIA, "neither the form of the claim itself *nor the relief requested* determines whether the claim is one which lies in tort or could lie in tort" *First Nat'l Bank of Durango v. Lyons*, 349 P.3d 1161, 1164 (Colo. App. 2015) (quotations omitted and emphasis added); *see also* § 24-10-118(2)(a), C.R.S. The Taxpayers' claims are premised on the allegation that the

County's transfer of the Twin Lakes property was based on the "intent to hinder, delay, or defraud." (Resp. at 8; Compl. ¶ 133.) Accordingly, "the major thrust of these claims is identical to that of a claim for common law fraud" and the County is entitled to immunity under the CGIA. *First Nat'l Bank*, 349 P.3d at 1164.

III. The County is immune from the Taxpayers' specific performance claim.

The Taxpayers concede local governments are immune from specific performance claims under *Thompson Creek Townhomes, LLC v. Tabernash Meadows Water & Sanit. Dist.*, 240 P.3d 554 (Colo. App. 2010), but argue that the Court "should decline to follow *Thompson Creek.*"[5] (Resp. at 12). However, a published court of appeals decision is binding on a district court and must be followed. *Martin v. Dist. Ct. In and For Montrose County*, 550 P.2d 864, 865 (Colo. 1976); C.A.R. 35 ("Opinions designated for official publication must be followed as precedent by all lower court judges in the state of Colorado."). Accordingly, the Taxpayers' argument is frivolous. *See* C.R.C.P. 11. Notably, the County provided a citation to *Thompson Creek* prior to filing its Motion but Taxpayers' counsel indicated the Taxpayers would not withdraw their specific performance claim. (E-mail from Delanghe, Ex. 1).

IV. The Taxpayers failed to state a breach of contract claim.

The Taxpayers failed to allege the existence of any specific document voted on or signed by the Board of County Commissioners or the GPID that constitutes a contract obligating the County to purchase $1.9 worth of open space. Likewise, Rechberger, Munson(s), Boni, McKay,

[5] Although the Colorado Supreme Court has not specifically decided the availability of specific performance against the government, it has recognized that "the question of equitable relief for breach of contract, or specific performance, implicates an additional concern for the separation of governmental powers. As recognized by the Supreme Court, there are 'the strongest reasons of public policy' for the rule that specific performance cannot be had against the sovereign." *Wheat Ridge Urb. Renewal Auth. v. Cornerstone Group XXII, L.L.C.*, 176 P.3d 737, 745 (Colo. 2007).

Sherwood, Swafford, Kepes, Wrege do not allege that they signed or entered into a contract with the County—either individually or collectively.

Even the specific statements and documents the Taxpayers point to in their Complaint do not establish the basic elements of a contract. These documents and statements include:

- The statement in the Notice of Election[6] accompanying the Open Space Initiative that "The Boulder County Commissioners have *indicated that* . . . the County will provide a matching contribution towards open space purchase . . ." (Compl. Ex. 3) (emphasis added).

- A statement by a single county commissioner that "*I think it is very appropriate* that we put in half . . . for the purchase of the remainder of the [GPID] open space." (Compl. ¶ 40) (emphasis added).

- An article written by someone named Scott Dixon stating "the County will pay half the costs to acquire Gunbarrel Open Space!" (Compl. Ex. 4).

- A campaign flyer whose author is unidentified saying that County Open space funds "would provide the 50% match that the County Commissioners have promised to support Gunbarrel's Open Space ballot item. If this item passes, Gunbarrel residents will directly see the benefits in open space purchased within Gunbarrel – to the tune of about $1.9 million dollars." (Compl. ¶ 43).

- A November 4, 2016, letter from a County employee describing the Election Notice as a "statement that indicates Boulder County would match GPID funds up to a maximum amount of $1,900,000. The Election Notice states that the county agreed to match *up to* that amount."[7] (Compl. Ex. 5).

None of these facts, taken as true, show that the County entered into a contract with anyone. At most, the allegations indicate that, about twenty-five years ago, individual County commissioners and other supporters of the Open Space Initiative made statements of intent to spend public funds on unspecified open space in the future. A contract "must contain promises

[6] The Notice of Election must contain a 500 word summary of pro and con statements filed with the election officer. Colo. Const. Art. X Sec. 20(3); § 1-7-905, C.R.S.

[7] The Complaint and Response attempt to characterize this statement as an admission of the existence of a contract. Writing that "the *Election Notice states* . . ." that the County agreed to match open space funds is not same as an admission that the County entered into an agreement.

by *each party thereto*—the promise of one party is the consideration for the promise of another. If one party in fact promises nothing, there is not mutuality of contract." *United Press Intern., Inc. v. Sentinel Pub. Co.*, 441 P.2d 316, 319 (Colo. 1968) (emphasis added).

The Taxpayers' Complaint contains no allegation of promises by the Taxpayers, the GPID, or the voters in the GPID to the County. At most, Taxpayers can claim that certain GPID residents decided to vote in favor of the GPID in exchange for the alleged promise to purchase open space with non-GPID funds. However, the County could not enforce a return promise by one, some, or all voters in the GPID to cast a vote in favor of the ballot measure. *See Jones v. Samora*, 318 P.3d 462, 471 (Colo. 2014) (a secret ballot "ensures the right to vote one's conscience without fear of retaliation.") (quotation omitted). Thus, any voter could have decided not to perform on his or her alleged promise to vote for the ballot measure with impunity. "If one party to an executory contract has no legally enforceable obligations or an unlimited right to determine the nature and extent of his performance, the contract lacks mutuality of consideration and may be unenforceable." *Hause v. Rose Health Care Sys.*, 857 P.2d 524, 528 (Colo. App. 1993).

Moreover, even the revenue conditioned on the affirmative vote for the GPID cannot be described as a promise or commitment that would benefit the County. The County and the GPID are separate entities. *See* § 30-20-512, C.R.S. While the GPID (and the residents of the GPID) benefited from the passage of the Open Space Initiative, the County did not receive a single cent of that revenue. Thus, the County's alleged promise to purchase open space was made without any possibility of the County receiving a direct benefit. Accordingly, the Taxpayers have failed to state a contract claim.

V. The Taxpayers have failed to state a promissory estoppel claim.

The Taxpayers claim their lawsuit is different than the cases cited on p. 11 of the County's Motion because the Taxpayers are attempting to enforce a "specific promise" and those cases involved "generalized statements of intent during a political campaign." (Resp. at 14.) However, the cited case law does not make this distinction between a "generalized" and "specific" promise during a campaign, and Taxpayers offer no principled test. Language about the ballot measure necessarily reflects multiple, divergent viewpoints, *see* footnote 5, *supra*, and would require this court to make a political decision about the weight of various campaign statements. Even if this Court were to rely on the language *in* the ballot measure, nothing in the Open Space Initiative committed the County to spending non-GPID funds. (Compl. Ex. 2). The Taxpayers voted for higher taxes that would allow the GPID issue bonds to finance the acquisition of open space, and that is what the GPID delivered.

Likewise, in response to the County's argument that the Taxpayers did not rely on a promise to their detriment, the Taxpayers simply assert that they "relied" on the alleged promise of $1.9 million worth of open space and that they were "entitled" to rely on it. (Resp. at 14.) This response fails to address how the Taxpayers *detrimentally* relied on this promise. The only change of position the Taxpayers could point to is the taxes imposed by the Open Space initiative. However, the alleged detriment cannot be the GPID taxes because the GPID spent the revenue generated from the GPID on open space for the benefit of the GPID. GPID residents received the benefit of GPID open space as a result of their payment of GPID taxes and thus voting for and paying those taxes was not detrimental to their interests. Any additional open space purchased out of non-GPID funds is an additional benefit beyond what GPID residents

voted for and paid additional taxes to support. Thus, the Taxpayers have failed to plead facts to support the detrimental reliance element of a promissory estoppel claim.

VI. The Taxpayers failed to state a mandamus or declaratory judgment claim.

The Taxpayers argue that if the Court dismisses the Taxpayers' promissory estoppel claim, then they will have no adequate remedy at law and therefore a mandamus remedy is appropriate.[8] Whether the Taxpayers have an adequate remedy at law does not respond to the argument raised in the County's Motion. The County argued that the Complaint failed to show the Taxpayers were attempting to enforce a clear legal duty, which is a required element of a mandamus claim. Regardless of the adequacy of the remedy, the Taxpayers must still plead the elements of a mandamus claim, and they have failed to do.

[8] The Taxpayers offer no substantive argument regarding their declaratory judgment claim.

Respectfully submitted on this 19th day of October 2017.

BOULDER COUNTY ATTORNEY'S OFFICE

By: /s/ *David Hughes*

David Hughes, #24425
Deputy County Attorney
Catherine R. Ruhland, #42426
Assistant County Attorney

Attorneys for Defendants

CERTIFICATE OF SERVICE

I certify that on October 19, 2017, I electronically filed the foregoing **REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS** via Colorado Courts E-Filing System, which will serve the same via email or U.S. Mail, to the following:

David Chipman, #25784
John M. Bowlin, #42276
CHIPMAN GLASSER, LLC
2000 S. Colorado Blvd.
Tower One, Suite 7500
Denver, CO 80222

/s/ *Cathy Peterson*
Cathy Peterson