COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, Colorado 80203	
Boulder County District Court The Honorable Nancy W. Salomone Case Action No. 17CV30818	
Plaintiffs-Appeallants: David Rechberger, Nicollette Munson, Rolf Munson, Laurel Hyde Boni, Dinah McKay, Donald Sherwood, William B. Swafford, Jr., Marilyn Kepes, Donald Wrege, and Douglas Johnson, V. **Defendants-Appellees:** Boulder County Board of County Commissioners, and Boulder County Housing Authority.	**▲ COURT USE ONLY ▲**
Attorney for Appellees: David Hughes, #24425 Deputy County Attorney Catherine ('Trina") Ruhland, # 42426 Assistant County Attorney Boulder County Attorney P.O. Box 471, Boulder, CO 80306 Phone No.: 303-441-3190 Fax No.: 303-441-4794 Email: dhughes@bouldercounty.org truhland@bouldercounty.org	Court of Appeals Case No.: 18CA474
AMENDED ANSWER BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this Answer Brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This Answer Brief complies with the applicable word limit set forth in C.A.R. 28(g) because it contains 8,356 words.

This Answer Brief complies with the standard of review requirements set forth in C.A.R. 28(b) because it contains under a separate heading before discussion of the issue, a statement indicating whether appellee agrees with appellant's statement of the applicable standard of appellate review with citation to authority.

I acknowledge that my brief may be stricken if it fails to comply with the requirements of C.A.R. 28 and C.A.R. 32.

BOULDER COUNTY ATTORNEY

By: *S/ David Hughes*
David Hughes
Deputy County Attorney

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STATEMENT OF THE CASE

A. Nature of the Case

This case is an effort by a group of taxpayers to wrest a vacant parcel of land from a public housing authority and transform it into public open space. The plaintiffs/appellants are nine current property owners and one former property owner ("Taxpayers") within the Gunbarrel Public Improvement District ("GPID") in Boulder County. Taxpayers want the Boulder County Board of County Commissioners (the "Board" or the "County") to purchase a vacant parcel of land for open space rather than allowing the Boulder County Housing Authority (the "Housing Authority" or "BCHA") to develop the land for affordable public housing.

B. Procedural History and Order Presented for Review

Taxpayers filed a lawsuit claiming they were entitled to damages, specific performance, declaratory relief, injunctive relief, and mandamus because the Board did not comply with Taxpayers' demand that it purchase a specific parcel of land for open space. In particular, Taxpayers sought a court order requiring the Board to purchase the Twin Lakes Property with public, non-GPID funds and then dedicate the property as open space. In the alternative, Taxpayers sought unspecified damages.

The Board and the BCHA moved to dismiss Taxpayers' Complaint. The District Court granted the motion based on multiple, alternative, grounds, including: failure to demonstrate standing to bring a breach of contract claim, failure to state a breach of contract claim, failure to demonstrate standing under the Colorado Uniform Fraudulent Transfer Act, §§ 38-8-101 – 112, C.R.S ("UFTA"), immunity to the UFTA claim under the Colorado Governmental Immunity Act ("CGIA") *see* §§ 24-10-106, 108, and 118, C.R.S., failure to state a UFTA claim, failure to state a mandamus claim, failure to state a declaratory judgment claim, and sovereign immunity to the specific performance claim.

STATEMENT OF FACTS

In 1993, residents in an unincorporated area of Boulder County filed a petition with the Board for the organization of what became the GPID. (CF, p 4 ¶ 29; p 25). The purpose of the proposed district was to provide open space, public parks, and road improvements. (CF, p 25). The Board approved the formation of the district and placed on the ballot property tax increases to fund the district. (CF, p 6 ¶ 35; p 29). The November 1993 ballot contained a temporary property tax increase to fund bonds for the GPID (the "Open Space Initiative"). (CF, p 3 ¶¶ 19-20; p 6 ¶¶ 35-37; p 29). The Open Space Initiative stated:

> Shall Boulder County Gunbarrel General Improvement District debt be increased by not more than $2,535,000 in

> principal amount, with a repayment cost of not more than $3,695,115 total principal and interest by the issuance of negotiable interest bearing general obligation bonds for the purpose of financing and refinancing, if necessary or desirable, the acquisition, construction, and installation of open space areas and public parks, including improvements as determined to be appropriate for the accommodation of public recreational uses, together with all necessary, incidental and appurtenant properties, facilities, equipment and costs, such bonds to be payable from property taxes and any other legally available funds, to become due and payable within 12 years of the date or respective dates of such bonds, to bear interest at a net effective interest rate not exceeding 7% per annum, and to be callable for redemption with or without a premium not exceeding 3% of the principal thereof, as may later be determined by the Board of Directors, and in connection therewith shall Boulder County Gunbarrel General Improvement District property taxes be increased without regard to rate by not more than $356,118 annually to pay principal, interest and premium, if any, on such bonds, and in connection therewith shall Boulder County Gunbarrel General Improvement District be authorized to receive and expend the proceeds of such bonds and receive and expend such property taxes and other legally available funds to the extent required to pay principal, interest and premium, if any, on such bonds or provide for reserves or administrative costs of the district, notwithstanding any revenue or expenditure limitation?

(*Id.*at 29).

The Open Space Initiative contained no language related to the County acquiring parks and open space using non-GPID funds. (*Id*.) However, comments allegedly included in the 1993 Boulder County Election Notice accompanying the

Open Space Initiative included the following statement: "[t]he Boulder County Commissioners have indicated that, subject to the passage of this issue and the County Open Space tax, the County will provide a matching contribution toward open space purchase within the [GPID] up to a maximum amount of $1,900,000; this would potentially reduce significantly the net costs to property owners of the District." (CF, p 6 ¶ 38; p 30).

After the Open Space Initiative passed, the Board, acting on behalf of the GPID and the County, authorized the expenditure of more than $3.6 million for 256 acres of public open space within the GPID. (CF, p 7 ¶ 45; p 8 ¶¶ 49-56). The County used approximately $2.3 million of GPID funds for these purchases and about $1.3 million of non-GPID funds. (*Id.* at 8 ¶56).

In 2016 and 2017, Taxpayers demanded that the Board use non-GPID open space funds to immediately acquire additional public open space within the GPID. (CF, p 10 ¶¶ 75, 79). In particular, Taxpayers asserted that the County has a legal obligation to match the amount of taxes raised by the 1993 Open Space Initiative and insisted that the County purchase a 10-acre property within the GPID known as the Twin Lakes property from BCHA. (CF, p 9 ¶¶ 60, 65; p 10).

In response, County staff explained that the Twin Lakes parcel did not meet the County's criteria for open space acquisition in the GPID. (CF, p 32).

Specifically, the intent of the GPID ballot initiative was to purchase property in rural areas surrounding Gunbarrel, not parcels in a developed area subject to annexation like the Twin Lakes Property. (*Id.*). Although the County refused Taxpayers' demand that the County purchase the Twin Lakes parcel and designate it as open space, it stated that "it is possible the county might invest additional funds to acquire open space properties within the GPID's targeted area." (*Id.*).

Taxpayers alleged that because they voted on the Open Space Initiative that they are entitled to a court order requiring the County to purchase the Twin Lakes Property and designate it as open space, a declaration that the Twin Lakes Property is dedicated open space, a writ requiring the County to purchase at least $594,366 of unspecified open space in the GPID within one year, or unspecified monetary damages. (*See* CF, p 15 ¶¶ A, C-F). The County filed a motion to dismiss Taxpayers' various claims, and the District Court granted the motion.

SUMMARY OF THE ARGUMENT

The District Court correctly determined that Taxpayers cannot use the court system to force the County's elected officials to make policy and budget decisions that further benefit current GPID property owners at the expense of affordable housing. The jurisdictional requirement of standing precludes the courts from stepping in simply because policy or budget decisions are contrary to the

preferences of certain members of the public. The court lacks jurisdiction over any of Taxpayers' claims because Taxpayers failed to establish an injury in fact or a legally protected interest. GPID residents voted to temporarily increase their property taxes in 1993, and, as a result, those residents benefited from $3.6 million worth of public open space purchases within the GPID. Neither the language of the Open Space Initiative, nor comments by the Board about the initiative, created a legislative contract or a basis for promissory estoppel that required the Board to provide additional benefits to the GPID. Likewise, the Open Space Initiative did not transform GPID residents into "creditors" and the Board into "debtors" such that GPID property owners have standing to sue the County on the UFTA.

Even assuming Taxpayers had standing, they failed to plead facts sufficient to support their claims. Specifically, comments about a ballot initiative are extrinsic to the initiative and therefore cannot be enforced contractually. Even if a court could consider such comments as a component of a legislative contract, a statement that the Board "indicated that" it intends to match funds raised by the Open Space Initiative does not establish a contract or a specific promise that can be the basis for promissory estoppel. Taxpayers do not claim that they, individually or collectively, negotiated and reached a meeting of the minds with the Board regarding the comments accompanying the initiative. Taxpayers' mandamus and

declaratory judgment are based on the underlying assumption of an enforceable contract, and are therefore flawed for the same standing and failure to state a claim reasons and Taxpayers' contract claim.

Even assuming Taxpayers have standing to pursue their UFTA claim, the claim arises out of a claim that the Board and the BCHA acted fraudulently. Because fraud is the underlying basis of Taxpayers' claim, their claim lies in tort or could lie in tort and therefore the County is entitled to immunity under the CGIA.

Finally, assuming Taxpayers have standing to pursue a contract claim and that they stated a contract claim, specific performance is not an available remedy. The purchase of property for public open space is a core governmental function. Taxpayers cannot use specific performance to force the County to exercise a core governmental function because it would intrude upon the County's sovereign functions.

ARGUMENT

I. Taxpayers do not have standing to bring a contract claim against the County.

A. Standard of Review

The County and the Housing Authority agree with Taxpayers' statements concerning the standard of review with citation to authority and preservation for appeal. Specifically, the County and the Housing Authority agree this Court

reviews *de novo* the District Court's determination that it lacked subject matter jurisdiction.

B. Discussion

The District Court correctly dismissed Taxpayers' breach of contract claim for lack of standing. Standing is a threshold jurisdictional prerequisite. *See Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004) *Wibby v. Boulder Cnty. Bd. of Cnty. Comm'rs,* 2016 COA 104 ¶ 9, *cert. denied*, 16SC640, 2016 WL 7336782 (Colo. Dec. 19, 2016). Once raised, standing must be determined prior to a decision on the merits. *Hickenlooper v. Freedom from Religion Found., Inc.*, 2014 CO 77, ¶ 7. If a court determines that standing does not exist, it must dismiss the case. *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977)

Taxpayers' contract claim arises from the Open Space Initiative that was subsequently passed by a majority vote. (CF, p 7 ¶ 45). Taxpayers argue that "as part of the ballot initiative" (Op. Br. at 3) the Board promised GPID voters that the County would spend up to $1.9 million of non-GPID funds on open space.

1. <u>The Open Space Initiative is not a contract because it does not show that the County clearly intended to create a binding contract through legislation.</u>

A ballot issue is, by definition, legislative. *Vagneur v. City of Aspen*, 232 P.3d 222, 227 (Colo. App. 2009), *aff'd*, 2013 CO 13 (power of initiative is an act of

legislative power); *Bd. of Cnty. Comm'rs of the Cnty. Of Archuleta v. Cnty. Rd. Users Ass'n*, 11 P.3d 432, 436 (Colo. 2000) (County's statutory authorization to place a sales tax on the ballot is a "grant of authority to initiate legislation . . .".). Because Taxpayers' contract claim arises from a legislative act, their claim must meet strict standing requirements. In particular, "[w]hen analyzing whether the government contracted by statute, it is presumed that the legislature did not intend to bind itself contractually and that the legislation was not intended to create a contractual right unless there is a clear indication of the legislature intent to be bound." *Justus v. State*, 2014 CO 75, ¶ 20 *see Colo. Springs Fire Fighters Ass'n Loc. 5 v. City of Colo. Springs*, 784 P.2d 766, 773 (Colo. 1989) (A city "ordinance will be considered a contract . . . only when its language and the surrounding circumstances manifest a legislative intent to create private contractual rights enforceable against the . . . municipality."). Under C.R.C.P. 12(b)(1), a plaintiff has the burden of proving jurisdiction. *Smith v. Town of Snowmass Vill.*, 919 P.2d 868, 871 (Colo. App. 1996)

Taxpayers' Complaint failed to allege facts to meet their burden and overcome the presumption that the County did not intend to bind itself contractually when, at the request of the GPID, the Board placed the Open Space Initiative on the ballot. The Open Space Initiative, by its plain language, did not

create a contract. Instead, it authorized the GPID to issue bonds "for the purpose of financing and refinancing, *if necessary or desirable*, the acquisition, construction, and installation of open space areas and public parks . . ." (CF, p 29) (emphasis added). The phrase "if necessary of desirable" means that the GPID's Board of Directors could make discretionary decisions whether and when the GPID would issue bonds to acquire open space. Providing such discretion made sense because property purchases depend on numerous factors, including willing sellers and asking price.

Significantly, the Open Space Initiative stated nothing about the County spending non-GPID funds to "match" money raised by the GPID, and it did not state or guarantee that the County or the GPID would purchase all available vacant parcels within or near the GPID for open space. Further, the initiative contained no "words of contract" that demonstrated the County intended to create a privately enforceable contract right. *See Justus*, ¶ 21. In short, the Open Space Initiative did not include language that rebuts the presumption that the Board did not intend to create a legislative contract, especially with regard to non-GPID funds.

2. Taxpayers cannot establish a legislative contract through extrinsic evidence.

Despite the lack of language indicating intent to be bound in the Open Space Initiative, Taxpayers maintain that, by voting on the initiative, they entered into a

contract with the County. They further argue that the contract terms were established outside of the initiative. In particular, Taxpayers rely on comments accompanying the Open Space Initiative, which contained the statement that "[t]he Boulder County Commissioners have indicated that, subject to the passage of this issue and the County Open Space tax, the County will provide a matching contribution toward open space purchase within the [GPID] up to a maximum amount of $1,900,000." (CF, p 30).

Using materials outside of the specific ballot language to bind the government is contrary to basic principles of Colorado law. Evidence of voter intent such as election notice language is "extrinsic evidence" that is "irrelevant" to determining the meaning of ballot language. *Mesa Cnty. Bd. of Cnty. Comm'rs v. State*, 203 P.3d 519, 533 (Colo. 2009) Specifically, "outside evidence cannot contradict and override the text of the ballot question." *Id.* Likewise, when interpreting a statute, a court "must start with the language of the statute. If the language is clear, [courts] interpret the statute according to its plan and ordinary meaning." *Davidson v. Indus. Claim Appeals Off. of State,* 84 P.3d 1023, 1029 (Colo. 2004)

A similar principle applies to contracts. Absent ambiguity, a court cannot look beyond the four corners of the agreement to determine the meaning intended

by the parties. *Am. Fam. Mutual Ins. Co. v. Hansen*, 2016 CO 46, ¶ 24. A party to a contract cannot point to extrinsic evidence to create a contract ambiguity. *Id. see Ft. Lyon Canal Co. v. High Plains A & M, LLC*, 167 P.3d 726, 729 (Colo. 2007) ("Extrinsic evidence of intent can never contradict or change the language of a contract or justify an interpretation not reasonably derivable from the contract itself."). Instead, extrinsic evidence "is an aid to ascertaining the intent of the parties once an ambiguity is found." *Am. Fam. Mutual*, ¶4. Taxpayers do not argue that terms of the Open Space Initiative are ambiguous. Instead, they attempt to use a comment accompanying the Open Space Initiative to bind the County to $1.9 million in expenditures.

In the absence of ambiguity that would allow a court to consider extrinsic evidence, Taxpayers' only possible claim is that the statements made about the Open Space Initiatives were misleading promises that induced the Taxpayers' vote in favor of the ballot initiative/contract. However, "there is an important distinction between failure to perform the contract itself, and promises that induce a party to enter a contract in the first place." *Van Rees v. Unleded Software, Inc.*, 2016 CO 51, ¶ 13. The contract itself is enforced through contract law and limited to the specific terms contained in the contract; the misleading promises that induce a party to enter into a contract may form the basis of a tort claim. *See Id.* Taxpayers

have not alleged a negligent or intentional misrepresentation claim, and, even if they had, the County would be immune under the Colorado Governmental Immunity Act ("CGIA"). *See* §§ 24-10-106, 108, and 118, C.R.S.

Applying many of the principles set forth above, courts outside of Colorado generally do not consider statements made during a campaign legally binding. *May v. Kennard Indep. Sch. Dist*., No. 9:96-CV-256, 1996 WL 768039, at *7 (E.D. Tex. Nov. 22, 1996; *Russell v. D.C*., 747 F. Supp. 72, 80 (D.D.C. 1990), *aff'd*, 984 F.2d 1255 (D.C. Cir. 1993); *Berg v. Obama*, 574 F. Supp. 2d 509, 529 (E.D. Pa. 2008), *aff'd*, 586 F.3d 234 (3d Cir. 2009; *see Minehan v. U.S.*, 75 Fed. Cl. 249, 260 (Fed. Cl. 2007) (A "statement of intention" from the government "which receives the concurrence of the party to whom it is addressed[] dos not constitute a contract."). The District Court, in ruling in favor of the County, noted in particular the reasoning in *Berg:* "promises that are statements of principle and intent in the political realm . . . are not enforceable promises under contract law . . . our political system could not function if every political message articulated by a campaign could be characterized as . . . legally binding . . ." (CF, pp 122-123 *citing Berg*, 574 F. Supp. 2d at 529).[1]

[1] Taxpayers argue that the statements at issue in *Berg* bear no resemblance to comments they rely upon. (Op. Br. at 15). Regardless of the specifics of the

Taxpayers fail to point to any case that holds a government entity is contractually bound by statements made about a pending ballot measure.[2] The absence of such authority is not surprising, considering implications of a court accepting such a theory. A viable claim under these circumstances would create a disincentive for the state or local governments to propose new ballot measures. It would also generate the potential for litigation arising from most ballot measures. Elected officials and lawmakers often make statements or promises about pending legislation or ballot measures, and summaries of pro and con statements may be required by law. *See* Colo. Const. art. X, § 20(3)(b)(v). Voters could point to any of those claims or promises, assert that their vote was "induced" by such claims, and, if those claims fall through, file a lawsuit. *See Wibby,* ¶ 30 (claims by residents against a county based on how it allocates its budget could "subject the County to endless litigation."). This Court should refuse Taxpayers' invitation to become the first court in the country to allow such a claim.

3. The extrinsic evidence Taxpayers rely on failed to clearly establish a legislative contract.

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underlying campaign statements at issue, the legal and policy concerns raised by *Berg* apply to Taxpayers' claims.

[2] Even *City of San Diego v. Perrigo*, 318 P.2d 542, 545 (Cal. Ct. App. 1957), cited by Taxpayers for the proposition that a ballot issue can create a contract, states "[t]he terms of the contract are contained in the ballot proposal approved by the electors . . ."

Even assuming comments accompanying an initiative can create a legally binding legislative contract with the government, the language relied on by Taxpayers fails to rebut the presumption against the existence of a contract. *See Justus*, ¶ 20. The comment relied upon by Taxpayers states: "[t]he Boulder County Commissioners have *indicated that*, the County *will provide* a matching contribution toward open space purchase within the [GPID] up to a maximum amount of $1,900,000." (CF, p 30) (emphasis added). The District Court held that this statement was a "campaign statement[] regarding the County's potential future intentions for the expenditure of public funds at the time the Open Space Initiative was on the ballot in 1993." (CF, p 124). Taxpayers argue that the words "matching" and "up to" in the comments were unambiguous (Op. Br. at 17) but ignore the phrase "indicated that."[3] An "indication" from government officials regarding their future intentions for the expenditure of public funds does not establish that the County clearly intended to contract with Taxpayers. Therefore, Taxpayers failed to demonstrate standing.

Taxpayers point to additional extrinsic evidence in arguing that the County "admitted the contract's existence" when a County employee responded to a letter

[3] The District Court emphasized the phrase "indicated that" in finding that the comments were "statements of non-specific future intention, and therefore insufficient to form a contract." (CF, p 123).

from plaintiff Munson in 2016. However, Taxpayers fail to cite authority indicating that a statement made by a government employee twenty years after the alleged formation of the contract is relevant to proving the existence or terms of a contract. Even assuming such evidence is relevant, the 2016 letter only repeats what is stated in the comments accompanying the Open Space Initiative, explaining that Munson's letter "highlights a statement that was in the Election Notice for the GPID initiative that indicates Boulder County would match GPID funds up to a maximum of $1,900,000." (CF, p 32). The letter further said that the County had provided $1,305,604 in matching funds, meeting "the commitment that was made in the Election Notice." (*Id.*). Summarizing the comments and stating that the County acted consistently with them is not an admission that the comments were a binding and enforceable contract. Accordingly, Taxpayers failed to allege facts in their Complaint demonstrating that they had standing to pursue a legislative contract claim against the County.

II. Taxpayers failed to state a breach of contract claim.

A. Standard of Review

The County and the Housing Authority agree with Taxpayers' statements concerning the standard of review with citation to authority and preservation for appeal. Specifically, the County and the Housing Authority agree this Court

reviews the District Court's determination that Taxpayers failed to state a breach of contract claim on a *de novo* basis.

B. Discussion

This Court need only address whether Taxpayers stated a breach a contract claim if the Court finds Taxpayers had standing. *See Ainscough*, 90 P.3d at 855. To prove a breach of contract, Taxpayers must prove (1) the existence of a contract; (2) performance by the plaintiffs or a justification for nonperformance; (3) failure to perform the contract by the defendants; and (4) resulting damages to the plaintiffs. *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992) The District Court correctly determined that Taxpayers failed to allege facts supporting the first element of a contract claim, existence of a contract.

For an enforceable contract to exist, there must be mutual assent to an exchange between competent parties, legal consideration, and sufficient certainty with respect to the subject matter and essential terms of the agreement. *Indus. Products, Int'l, Inc. v. Emo Trans, Inc.*, 962 P.2d 983, 988 (Colo. App. 1997). Taxpayers failed to allege facts that support any of the elements indicating the existence of an express contract. As discussed in section I above, Taxpayers allege that they became parties to a contract when they voted in favor the Open Space Initiative. The initiative contains no words of contract, and, even if it did,

Taxpayers do not contend that the County breached any of the express terms of the initiative.

Taxpayers attempt to avoid this flaw in their Complaint by making arguments about the terms in the comments accompanying the initiative.[4] However, the Court cannot infer that the comments constitute a contract and then begin analyzing its terms as if it were. *See Wibby*, ¶ 20 (A court "is not at liberty to infer the existence of a contract or its terms."). Taxpayers failed to plead facts demonstrating that they or the GPID voters were "parties" to the comments or that the comments were an "agreement." Taxpayers do not allege that they (either individually or collectively) negotiated the terms of or signed off on the comments, nor do they allege that the Board voted to adopt the comments. *See* § 31-16-108, C.R.S.

Further, Taxpayers failed to allege facts that show the County entered into a contract with any of the named plaintiffs: 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

[4] Although the District Court correctly found that the terms "match" and "up to" in the comments were subject to multiple interpretations, the court need not have reached this issue because Taxpayers failed to allege facts demonstrating that those terms were a part of an express contract.

individually paid for specific educational services. As a result, they cannot assert legal claims for the alleged failure to provide those unbargained-for services."). Accordingly, the district court correctly determined that Taxpayers failed to meet the 12(b)(5) standard because they cannot "provide plausible grounds to infer an agreement" arising from the comments. *Warne v. Hall,* 2016 CO 50, ¶ 9, quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

III. Taxpayers do not have standing to bring promissory estoppel, mandamus, or declaratory judgment claims.

A. Standard of Review

Taxpayers do not address whether they have standing to bring a promissory estoppel, mandamus, or declaratory judgment claim against the County. The District Court did not rule on Taxpayers' standing to bring those claims in its Order dismissing the case. (CF, pp 131-134). The County raised standing regarding all of Taxpayers' claims based on failure to allege facts showing an injury at (CF, pp 40-43). Standing is a jurisdictional prerequisite that can be raised any time. *See Ainscough,* 90 P.3d at 855. Because standing is a question of law, courts review questions of standing *de novo*. *See id.* at 856.

B. Discussion

To establish standing for any of their claims, Taxpayers must establish (1) that they suffered an injury in fact; and (2) that their injury was to a legally

protected interest. *Wimberly*, 570 P.2d at 539. The first prong of the test, the injury-in-fact requirement, "maintains the separation of powers mandated by Article III of the Colorado Constitution by preventing courts from invading legislative and executive spheres." *Hickenlooper*, ¶ 9. "Because judicial determination of an issue may result in disapproval of legislative or executive acts, this constitutional basis for standing ensures that judicial 'determination may not be had at the suit of any and all members of the public.'" *Id.* quoting *Wimberly,* 570 P.2d at 538. Thus, "an injury that is overly indirect and incidental to the defendant's action will not convey standing." *Id.* at 1007 (quotations omitted). Taxpayers promissory estoppel claim fails the first part of the *Wimberly* test.

Taxpayers did not suffer an injury in fact as a result of voting in favor of the Open Space Initiative. Had the Open Space Initiative failed, no GPID taxes would have been collected and no public open space would have been purchased. In addition, no "matching" funds would have been spent on GPID open space because there would be nothing to match. In contrast, by passing the initiative, Taxpayers, property owners within the GPID, and the public has a whole, *benefited* from the Open Space Initiative through the purchase of public open space in the area. In particular, "[b]y the end of 2007, . . . six (6) open space properties within the GPIDS totaling $3,606,974 in open space acquisitions had been purchased by the

GPID and the County pursuant to the Open Space Initiative." (CF, p 8 ¶ 55). The County spent roughly $1.3 of non-GPID funds toward these purchases, which taxpayers also benefited from. (*Id*. at ¶ 56). Taxpayers do not argue in their Opening Brief property taxes paid to the GPID caused an injury,[5] that the subsequent public open space purchases caused an injury, that the expenditure of GPID funds caused an injury, or that the expenditure of non-GPID funds caused an injury.

Taxpayers' goal is to force the County to use public funds to purchase the Twin Lakes parcel and preserve it as open space. (CF, p 15 ¶¶ A, C). However, the inability for Taxpayers and the general public to use and enjoy a new open space parcel is not an injury in fact.[6] The Board—and elected officials across the country—frequently make decisions about how to budget public funds, including spending on parks and open space. *See* §§ 29-1-107 and 108, C.R.S.; *see also City of Aurora v. Bd. of Cnty. Comm'rs of Adams*, 902 P.2d 375, 378 (Colo. App.

[5] Taxpayers argued below that the County induced their ascent to higher taxes. 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*, ¶ 14.

[6] Taxpayers attempt to contrast their claim from a generalized grievance by arguing their claims involve "a specific promise to a specific audience to induce specific action on a specific subject matter." (Op. Br. at 7, 15). However, this Court in *Wibby* rejected a nearly identical argument. *Wibby*, ¶¶ 19-20.

1994), *aff'd,* 919 P.2d 198 (Colo. 1996). Each of these decisions has some effect on the public at large. If injuries to the public such as "not buying parcel X for public open space" gave rise to a cause of action then "any and all members of the public would have standing to challenge literally any government action . . ." *See Hickenlooper*, ¶ 15. Because an injury claim based on a local government decision not to expend public funds on open space is exactly the type of generalized injury that gives rise to separation of powers problems, Taxpayers cannot establish standing based on their desire for more open space.

Taxpayers point to the "existence of a contract" and the "clear duty to fulfill its contractual obligation" as their basis for their declaratory judgment and mandamus claims. (Op. Br. at 30). In their breach of contract claim, they argue that the injury in fact is the County's alleged breach of a contractual obligation. (Op. Br. at 23). As discussed in Section I above, Taxpayers lack standing to bring a breach of contract claim and therefore lack standing to bring declaratory judgment or mandamus claim based on the same alleged contract.

Likewise, an alleged breach of contract injury cannot serve as the injury in fact for Taxpayers' promissory estoppel claim. This is because promissory estoppel is premised on the absence of an express contract. *See Wheat Ridge Urb. Renewal Auth. v. Cornerstone Group XXII, L.L.C.*, 176 P.3d 737, 741 (Colo. 2007). As

discussed in more detail in Section IV below, Taxpayers have not suffered a "detriment" upon which they can base an injury claim. Accordingly, Taxpayers have suffered no injury in fact that gives them standing to pursue a declaratory judgment, mandamus, or promissory estoppel claim.

IV. Taxpayers failed to state a promissory estoppel claim.

A. Standard of Review

The County and the Housing Authority agree with Taxpayers' statements concerning the standard of review with citation to authority and preservation for appeal. Specifically, the County and the Housing Authority agree this Court reviews the District Court's determination that Taxpayers failed to state a promissory estoppel claim on a *de novo* basis.

B. Discussion

The District Court correctly determined that Taxpayers failed to state a promissory estoppel claim. A claim for promissory estoppel consists of four elements: (1) a promise; (2) that the promisor reasonably should have expected would induce action or forbearance by the promisee or a third party; (3) on which the promisee or third party reasonably and detrimentally relied; and (4) that must be enforced in order to prevent injustice. *Pinnacol Assurance v. Hoff*, 2016 CO 53, ¶ 32.

Regarding the first element, Taxpayers failed to allege facts demonstrating that the County commissioners made a "promise." As discussed in section I(B)(3) above, the comments simply state that the commissions "indicated that" they would match up to $1.9 million for open space purchases. Neither the word "promise" nor any words of contract appear in the statement.

Even assuming that the comments can be construed as a "promise," Taxpayers failed to alleges facts demonstrating their claimed reliance of the promise was reasonable. Taxpayers claimed they would not have voted in favor of the Open Space initiative had they not been induced to do so by campaign promises to spend non-GPID open space funds in acquiring open space. (CF, p 14 ¶¶ 119-121).[7] However, as discussed in Section I(B)(1) above, the express provision that Taxpayers voted on contained no commitments or promises regarding non-GPID funds. Taxpayers failed to point to any case that finds voters may bring a promissory estoppel claim arising out of comments made about an initiative. Courts generally do not consider statements made during a campaign

[7] None of the Taxpayers affirmatively alleged that they voted in favor of the Open Space Initiative, that the Open Space Initiative would not have passed without their votes, or even that the Open Space Initiative would not have passed absent the challenged campaign promises. Further, Plaintiffs Rechberger, Kepes, Wrege, and Sherwood acquired their property after the initiative passed and therefore it is unlikely they voted on the issue at all. (CF, p 2 ¶¶ 2, 7, 8, 11.)

legally binding. *May*, at *7; *Russell*, 747 F. Supp. at 80; *Berg*, 574 F. Supp. 2d at 529.

Moreover, Taxpayers failed to plead facts showing detrimental reliance. The action that the comments about the ballot initiative allegedly induced was a vote in favor the Open Space Initiative. Thus, to state a promissory estoppel claim, Taxpayers must show that their vote in favor of the Open Space Initiative resulted in a detriment. However, as explained in Section III(B) above, Taxpayers were not injured as a result of voting for the Open Space Initiative—they benefited from it.

Nonetheless, Taxpayers argue that their alleged failure to receive "full performance of [the County's] promise" constitutes detrimental reliance. (Op. Br. at 27-28). Taxpayers' argument comes from *Bd. of Cnty. Comm'rs v. DeLozier* 917 P.2d 714, 716 (Colo. 1996), which states "a promise that is binding pursuant to the doctrine of promissory estoppel is a contract, and full-scale enforcement by normal remedies is appropriate." *Id. (citing* § 90 Restatement (Second) of Contracts (1981) (emphasis added)).[8] This quote from *DeLozier* only addresses available remedies once a plaintiff has successfully proven the elements of promissory estoppel. In

[8] The restatement clarifies the issue by stating: "full-scale enforcement by normal remedies is *often* appropriate. But the same factors which bear on whether any relief should be granted also bear on the character and extent of the remedy . . ." § 90 Restatement of (Contracts) (1981) (emphasis added).

does not, as Taxpayers imply, allow a plaintiff to establish detrimental reliance based on failure to fully perform a contract.

Taxpayers' argument that they suffered a detriment as a result of the County's alleged failure to fully perform conflates breach of contract claims with promissory estoppel claims. "[P]romissory estoppel is incompatible with the existence of an enforceable contract." *Wheat Ridge*, 176 P.3d at 741; *see Marquardt .v Perry*, 200 P.3d 1126, 1131 (Colo. App. 2008) ("promissory estoppel is available as a theory of recovery when breach of contract fails.") Accordingly, the proper remedy in a promissory estoppel claim is "an amount sufficient to compensate for the actual loss sustained . . ." *Zick v. Krob*, 872 P.2d 1290, 1295 (Colo. App. 1993) *compare with Kaiser v. Mkt. Square Disc. Liquors, Inc*., 992 P.2d 636, 640 (Colo. App. 1999) (A material breach of an express contract occurs when a party does not receive the benefit they expect under a contract). For example, if Bob promises Ann that he will give her ten popsicles but then gives her only nine, Anne received the benefit of nine popsicles, not a "detriment" of one popsicle.[9] The inability to enjoy of the full benefits of a non-existent contract is not a loss or a detriment. Thus, Taxpayers failed to allege facts supporting a promissory estoppel claim.

[9] If Bob and Ann entered into a valid contract for the popsicles, Ann could still bring a breach of contract if Bob delivered nine out of ten popsicles.

V. Taxpayers failed to state a mandamus or declaratory judgment claim.

A. Standard of Review

The County and the Housing Authority agree with Taxpayers' statements concerning the standard of review with citation to authority and preservation for appeal. Specifically, the County and the Housing Authority agree this Court reviews the District Court's determination that Taxpayers failed to state a mandamus or declaratory judgment claim on a *de novo* basis.

B. Discussion

This Court need only address whether Taxpayers stated a claim for mandamus or declaratory judgment if the Court finds Taxpayers had standing. *See Ainscough*, 90 P.3d at 855. The District Court correctly determined that Taxpayers failed to state claims for mandamus or declaratory judgment. Mandamus relief is available when (1) the plaintiff has a clear right to the relief sought; (2) the defendant has a clear duty to perform the act requested; (3) no other adequate remedy is available to plaintiff. *Gramiger v. Crowley*, 660 P.2d 1279, 1281 (Colo. 1983); *see Bd. of Cnty. Comm'rs of Cnty. of Archuleta v. Cnty. Rd. Users Ass'n*, 11 P.3d 432, 437 (Colo. 2000). Taxpayers argue that the County had a "clear legal duty to fulfill its contractual obligation to match to $1.9 million." (Op. Br. at 30). As discussed in Sections I and II above, the County had no legal duty arising out of

a contract and therefore Taxpayers failed to state a basis for a mandamus claim. Further, if the County did have a legal duty arising from a contract, mandamus would not be an available form of relief because breach of contract would be an adequate remedy.

Along the same lines, Taxpayers argue that they stated a declaratory judgment claim because they alleged the "existence of a contract (or, alternatively, grounds for promissory estoppel) . . ." (*Id.*). Plaintiffs seeking declaratory judgment must allege facts sufficient to demonstrate that they have an interest in a contract in order for a court to issue a declaration regarding rights, status, or other legal relations under that contract. *See* § 13-51-106, C.R.S.[10] As shown in Sections I and II above, Taxpayers are not parties to a contract under which they may seek a declaration. Thus, they failed to state a declaratory judgment claim.

VI. The District Court lacked jurisdiction over Taxpayer's UFTA against the County.

A. Standard of Review

The County and the Housing Authority agree with Taxpayers' statements concerning the standard of review with citation to authority and preservation for appeal. The District Court determined that Taxpayers failed to establish an injury

[10] The County and the Housing Authority cannot imagine a scenario where a court could "declare rights" under promissory estoppel.

in fact to a statutorily protected interest regarding their UFTA claim (CF, pp 127-128), and the District Court further determined that the County was immune to the UFTA claim under the CGIA. (CF, p 130). County and the Housing Authority agree this Court reviews the District Court's determination that it lacked jurisdiction over Taxpayers' UFTA on a *de novo* basis.

B. Discussion

The District Court correctly dismissed Taxpayer's UFTA claim. Specifically, the Court lacked jurisdiction because (1) Taxpayers failed to allege facts establishing standing; (2) the County is immune from the claim under the CGIA.

1. Taxpayers failed to establish standing to bring a fraudulent transfer claim.

To establish standing, Taxpayers must establish (1) that they suffered an injury in fact; and (2) that their injury was to a legally protected interest. *Wimberly*, 570 P.2d at 539. As discussed in Section III above, Taxpayers failed to allege an injury in fact for any of their claims because they have benefited from the open space purchases made by the GPID and the County. Taxpayers' allegation that the County fraudulently transferred the Twin Lakes property to the Housing Authority does not establish an injury in fact. Taxpayers do not claim they had an ownership interest in the Twin Lakes property or that they may be able to acquire an

ownership interest by collecting on an alleged debt. Thus, Taxpayers failed to establish an injury in fact that arises from the transfer of property from one government entity to another.

Likewise, Taxpayers cannot show a statutorily protected interest arising from the UFTA. To establish standing under the UFTA, Taxpayers must demonstrate that the legislature, in enacting the UFTA, intended to "confer a legal right on persons such as the plaintiff[s] . . . to bring suit to redress the type of harm they allege." *Dunlap v. Colo. Springs Cablevision, Inc.*, 829 P.2d 1286, 1290 (Colo. 1992). The UFTA addresses harms to creditors by insolvent debtors transferring assets. *See* § 38-8-105, C.R.S. Accordingly, actions under the UFTA apply only to creditors and are only available when then the "remaining assets of the debtor are unreasonably small in relation to the business transaction" or the debtor should have believed that he would incur "debts beyond his ability to pay as they become due." *Id.*

Taxpayers 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 (or, for that matter, any GPID property owner) loaned money to the County. Instead, Taxpayers assert that "as GPID property owners" they have a

"right to a payment from the County." (Op. Br. 32). As discussed in Section I above, under the Open Space Initiative GPID property owners paid taxes to the GPID, and the Board of the GPID could use that money to issue bonds for the purpose of acquiring open space. (CF, p 29). Nothing in the initiative indicates GPID or the County would become indebted to the Taxpayers if the initiative passed. (*Id*.).

Further, the only money Taxpayers claim to have paid is property taxes collected as a result of the Open Space Initiative. (CF, p 11 ¶ 87). Under the Open Space Initiative,[11] property taxes went to the GPID, not the County. (CF, p 6 ¶¶ 36-37; p 29. Therefore, the property taxes could not be considered a loan to the County nor could the County be a debtor for money it never collected. Even assuming GPID taxes were paid to the County, property taxes are not loans 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. Taxpayers failed to allege facts showing that the County became indebted to Taxpayers as a result of Taxpayers paying their property taxes to the GPID. Similarly, Taxpayers failed to show that,

[11] Even assuming the Court could consider the extrinsic comments about the County matching GPID funds, none of those comments stated that the County would become indebted to GPID property owners.

even if such a debt were created, that the County would have been unable to pay any such debt following the sale of the Twin Lakes property to BCHA. Accordingly, Taxpayers failed to allege a statutory legal interest arising from the UFTA.

2. Taxpayers' UFTA claim is barred by the CGIA.

Even assuming Taxpayers have standing, the District Court correctly found that they cannot bring a claim against the County or BCHA arising from the UFTA. The County and the BCHA are generally entitled to immunity from state law tort claims. *See* §§ 24-10-106, 108, and 118, C.R.S. In addition, the County and BCHA are immune from all claims that "lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by claimant . . . .", § 24-10-106(1), C.R.S. Whether governmental immunity bars a suit is a question of jurisdiction for the trial court to address under C.R.C.P. 12(b)(1). *Tidwell ex rel. Tidwell v. City & Cnty. of Denver*, 83 P.3d 75, 81 (Colo. 2003).

Taxpayers' UFTA claim was based on allegations that Board's transfer of the Twin Lakes Property to the BCHA was "improper" and constituted "a fraudulent transfer" that was "intended to hinder, delay, or defraud . . ." (CF, p 13 ¶¶ 109, 113, 114). "A claim that is supported by allegations of . . . fraud is likely a

claim that could lie in tort." *Robinson v. Colo. State Lottery Div.*, 179 P.3d 998, 1005 (Colo. 2008); *see First Nat'l Bank of Durango v. Lyons*, 2015 COA 19 (Claim under the Colorado Securities Act lies in tort.). Taxpayers, citing *City of Colo. Springs v. Conners*, 993 P.2d 1167 (Colo. 2000), argue that because their UFTA claims are equitable in nature,[12] their claims do not lie and tort and therefore the CGIA does not apply. However, the Colorado Supreme Court rejected a nearly identical argument in *Robinson*, stating "*Conners* does not stand for the proposition that the CGIA will never bar claims for equitable relief because they are not claims for compensatory relief." *Robinson*, 179 P.3d at 1006. Because "the major thrust of [this] claim[] is identical to that of a claim for common law fraud," the claim lies in tort and the CGIA applies. Accordingly, and the County is entitled to immunity. *First Nat'l Bank*, ¶ 15.

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

A. Standard of Review

The County and the Housing Authority agree with Taxpayers' statements concerning the standard of review with citation to authority and preservation for

[12] Taxpayers' Complaint did not specify the nature of the relief they were requesting arising out of their UFTA claim. (CF, p 15). A plaintiff under the UFTA may seek "a judgment for one and one-half the value of the asset transferred . . ." § 38-8-108(1)(c), C.R.S.

appeal and preservation for appeal. Specifically, the County and the Housing Authority agree this Court reviews the District Court's determination that Taxpayers failed to state a mandamus or declaratory judgment claim on a *de novo* basis.

B. Discussion

This Court need only address whether Taxpayers may seek specific performance as a remedy if the Court finds Taxpayers had standing to pursue a contract claim and pled facts sufficient to establish such a claim. The District Court correctly determined that 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). Taxpayers argue that this panel should diverge from *Thompson Creek*, but Taxpayers' argument is based on an argument considered and rejected by the *Thompson Creek* panel. Specifically, Taxpayers argue that the holding in *Wheat Ridge* allows a contracting party to seek specific performance against the sovereign if the performance it seeks involves a non-core governmental power. The *Thompson Creek* panel rejected that argument, stating that the Court's concern in *Wheat Ridge* was "the interference of the [c]ourt with the performance of the ordinary duties of the executive

departments of the government." *Thompson Creek*, 240 P.3d at 556 *citing Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 704 (1949).

Moreover, even assuming the decision in *Thompson Creek* was overly broad and that immunity under *Wheat Ridge* only applies to core government powers, the specific performance sought by Taxpayers *is* the exercise of a core government power and therefore the immunity establish in *Wheat Ridge* would apply regardless of *Thompson Creek.* Specifically, Taxpayers sought specific performance requiring that the County "purchas[e] back the Twin Lakes Property . . . and *dedicate[] it as open space*." (CF, p 15 ¶ D) (emphasis added). "[L]and planning for open space and parks is a local government function." *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161, 169 (Colo. 2008). Thus, the District Court correctly determined it could not compel the county to exercise its core function of dedicating open space.

CONCLUSION

This Court should reject Taxpayers' invitation to become the first court in the country to recognize a claim for relief based upon public officials' comments about a pending ballot issue. Public officials who are simply attempting to raise revenue at the request of—and for the benefit of—their residents should not be subject a lawsuit when, twenty-five years later, residents have a policy

disagreement about how public funds should be used. Instead, the Court should affirm the District Court's dismissal of Taxpayers' Complaint on jurisdictional, or alternatively, non-jurisdictional grounds.

Respectfully submitted this 7th day of August 2018.

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CERTIFICATE OF SERVICE

I certify that on August 7th, 2018, I electronically filed the foregoing **AMENDED ANSWER BRIEF** via Colorado Courts E-Filing, which will serve a true and correct copy thereof via electronic mail or United States Mail, postage prepaid, to the following:

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