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Denver, CO 80203

Nature of proceeding: District Court Appeal

Appeal From:
Larimer County District Court
Judge Susan Blanco
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<tr><td>Petitioner – Appellant: THE CITY OF LOVELAND

v.

Respondent - Appellee: LOVELAND EISENHOWER INVESTMENTS, LLC, a Colorado limited liability company</td><td></td></tr>
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Div.: Ctrm.:</td></tr>
<tr><td colspan="2">APPELLANT’S OPENING BRIEF</td></tr>
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Certificate of Compliance

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

■ It contains 8,662 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

■ For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

□ In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

s/ Mary Sue Greenleaf

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II. STATEMENT OF THE CASE

A. Nature of the case, the course of proceedings, and the disposition of the court below.

This is an appeal from an interlocutory order denying Defendant-Appellant the City of Loveland's ("**City**") motion to dismiss Loveland Eisenhower Investment's ("**LEI**") first and second claims for relief for lack of subject matter jurisdiction, pursuant to Colo. R. Civ. P. 12(b)(1). (CF, pp 1766–1779.) Plaintiff below and appellee here, LEI, filed suit against the City and the Greeley Loveland Irrigation Company ("**GLIC**") in connection with a proposed mixed-use development in Loveland, Colorado (the "**Project**"). (CF, pp 4–15.) LEI asserted claims against the City for breach of contract, breach of the implied covenant of good faith and fair dealing (collectively, the "**Appealed Claims**"), declaratory relief, and permanent injunction. (CF, pp 11–13, ¶¶ 63–87.) Collectively, these claims seek a mandate for the City to accept certain water rights held by LEI to satisfy the City's water contribution requirements for the proposed development.

After the close of discovery, the City moved to dismiss the Appealed Claims for lack of subject matter jurisdiction under Colo. R. Civ. P. 12(b)(1), as barred by the Colorado Governmental Immunity Act ("**CGIA**") which grants public entities immunity from such claims, and also sought summary judgment on the merits of those claims under Colo. R. Civ. P. 56. (CF, pp 541–565.) The City contended, as relevant here, that because the underlying injury arose just as much from the breach of a general duty imposed by law as it did from the breach of an express term in the parties' contract, LEI's claims could have been stated *either* in tort or in contract and thus are barred by the provision of the CGIA granting public entities immunity from such claims. (CF, pp 551–553.)

On December 20, 2017, the Larimer County District Court (the "**District Court**") denied the City's motion for dismissal, concluding that the injury alleged by LEI was "prospective" in nature, and accordingly that LEI's Appealed Claims could not lie in tort. (CF, pp 1771–1772.) The District Court also found that LEI's claims "are rooted in contract and not tort," stating that "this situation falls under the 'breach of a promise detrimentally relied upon' class of cases rather than the negligent misrepresentation or fraud class of cases." (CF, pp 1772–1773.)

Although not central to this appeal, the District Court also concluded that dismissal of LEI's Appealed Claims on the merits was not warranted at this stage

of proceedings pursuant to Colo. R. Civ. P. 56. (CF, pp 1774–1775.) Specifically, the District Court found that disputed issues of fact regarding the parties' respective interpretations of the relevant provisions of the Annexation and Development Agreement (the "**Annexation Agreement**") precluded entry of summary judgment in either party's favor. (CF, p 1774–1775.)

The City filed a Notice of Appeal on January 19, 2018, challenging the District Court's denial of the City's Colo. R. Civ. P. 12(b)(1) motion to dismiss and ruling on the applicability of the CGIA to LEI's Appealed Claims against the City. (CF, p 1795–1802.)

III. STATEMENT OF FACTS

A. Factual Background.

This case and the issues presented are relatively straightforward. Under the Loveland Municipal Code, a developer, like LEI, must contribute water to the City that the City can legally use or convert for municipal water service as a prerequisite to providing water service for the developer's completed development. (CF, pp 701–702 (Loveland Municipal Code § 19.04.020); CF, pp 704–706 (Loveland Municipal Code §§19.04.040 – 19.04.085).)

While certain water rights are per se acceptable to the City, LEI owned "Chubbuck Inches," which are contractually delivered ditch water rights decreed

for agricultural use. If accepted, the City would eventually need to convert such rights through a water court adjudication in order to devote them for municipal uses. And, the City has complete discretion on analyzing and accepting the specific water right that LEI wished to contribute to the City in meeting this requirement. (CF, p 706 (Loveland Municipal Code § 19.04.080).) Based upon a settlement agreement reached in two water court cases with GLIC, the City could no longer accept the specific water right that LEI wished to contribute. (CF, p 578, ¶ 6.) Once LEI discovered that the City was no longer accepting the kind of water right it owned, LEI sued, seeking relief from the District Court to order the City to accept LEI's water rights, contrary to the City's discretion to determine which water rights are acceptable for municipal use – a discretion that necessarily must consider water court orders, decrees, historical use of the proposed water rights, and other important water right-specific facts and considerations. (CF, pp 11–13, ¶¶ 63–87.)

By way of background, LEI and the City's staff had been in informal meetings and discussions over LEI's proposed mixed-used development starting in 2007. LEI had acquired a mixed-use parcel with prior land use approval that lies within the City, as well as two additional parcels just outside of the City limits. (CF, pp 811–812, ¶¶ 3–5, 10–11; CF, p 654.) LEI sought to develop the parcels by assembling all three parcels into a series of buildings with commercial and retail

uses (previously defined as the "**Project**"). (CF, p 812, ¶ 9; CF, p 654.) LEI required the City's annexation of the two parcels that sat outside of the municipal boundaries into the City as part of LEI's proposal. (CF, p 813, ¶ 12.) On January 18, 2010, LEI submitted its Petition for Annexation to the City seeking annexation, establishment of the zoning, and approval for preliminary subdivision for the mixed use development. (CF, pp 566–576.) Later, on or about April 20, 2010, the City and LEI entered into an Annexation and Development Agreement (the "**Annexation Agreement**") concerning this Project. (CF, pp 653–697.) Neither the Petition for Annexation, nor the Annexation Agreement contain any direct language on the specific water rights that would be contributed to satisfy the water rights requirement. (CF, pp 566–576; CF, pp 653–697.)

The Annexation Agreement did not address, let alone commit the City to, acceptance of the specific water rights held by LEI. (CF, pp 653–697.) While § 2.3 of the Annexation Agreement afforded LEI a vested property right to develop the Project, this vested right was explicitly made subject to:

> the Vested Property Rights Statute and Chapter 18.72 of the [City's] Municipal Code, and except as this Agreement expressly provides otherwise, the establishment of vested property rights pursuant to this Agreement will not preclude the application on a uniform and non-discriminatory basis of City regulations of general applicability (including, … water, … the Municipal Code, and other City rules and regulations) or the application of state and federal

regulations.

(CF, p 663, § 2.3.1.4.) The Annexation Agreement further provided that "the City shall have the responsibility to provide its customary municipal water services to the Project on an equivalent basis to those provided to any other area of the City on a uniform and non-discriminatory basis." (CF, p 668, § 2.18.)

The relevant provisions of the Loveland Municipal Code, however, require LEI to contribute water rights to the City for its development, but not until the building permit stage for commercial development or at final approval for residential development. (CF, pp 701–702 (Loveland Municipal Code § 19.04.020).) LEI can fulfill these water rights requirements by contributing acceptable water rights to the City, utilizing water bank credits or paying the equivalent of Colorado-Big Thompson Project units. (CF, pp 704–706 (Loveland Municipal Code §§ 19.040.040 – 19.04.085).)

Under the Loveland Municipal Code, the City has always possessed complete discretion with respect to accepting, on a case-by-case basis, Chubbuck Ditch water rights, including LEI's Chubbuck Inches. (CF, p 706 (Loveland Municipal Code § 19.04.080).) This section of the Loveland Municipal Code clearly provides that the Loveland Utilities Commission (the "**LUC**") must first approve the acceptance of ditch water rights. (CF, p 706 (Loveland Municipal

Code § 19.04.080).) However, the LUC can only do so after determining that it is in the City's "best interests to accept the ditch water rights." (CF, p 706 (Loveland Municipal Code § 19.04.080).)

As alluded to above, on January 25, 2010, the City and GLIC entered into a Settlement Agreement resolving two long-standing water court actions, Case Nos. 02CW392 and 00CW108/03CW354 (Water Div. 1), that related to the use of Chubbuck Ditch contract water rights, among other water rights. (CF, pp 577–582.) This Settlement Agreement stipulated to the City's proposed decrees, which included a change of water rights from irrigation to municipal use for the City's existing inventory of unchanged Chubbuck Inches, but which also restricted the City from using and changing future Chubbuck Inches to municipal use. (CF, p 578, ¶¶ 4–6.)[1] The water court subsequently entered decrees in each of these cases. (CF, pp 725–761; CF, pp 762–782.) In Case No. 02CW392, the water court entered its decree on May 14, 2010, concerning, in part, a change of Chubbuck Ditch rights. (CF, pp 725–761.) In Case No. 00CW108/03CW354, the water court entered a separate decree on February 23, 2012, also dealing with, in part, a change of Chubbuck Ditch rights. (CF, pp 762–782.) The effect of these decrees was to

[1] As stated above, Chubbuck Inches are contractually-delivered ditch water rights that were originally decreed for agricultural use. These rights were largely accumulated by the City through prior developer contributions.

allow a change in use of certain Chubbuck Inches owned by the City, as provided for in the Settlement Agreement.

In December of 2014, LEI advised the City's water department that it wished to contribute its Chubbuck Ditch rights. (CF, pp 1439, 16:3–10; CF, pp 1440–1441, 32:19–33:2.) The water department advised LEI that it could not accept LEI's Chubbuck Inches due to the Settlement Agreement stipulated as part of the water court cases. (CF, pp 1440–1441, 32:19–33:2.)

B. <u>The Record Below Pertaining to LEI's Appealed Claims.</u>

As noted above, this Appeal seeks reversal of the District Court's Order denying the City's motion to dismiss LEI's Appealed Claims for lack of subject matter jurisdiction. While the Annexation Agreement does not include any express contractual language committing the City to accepting or representing that it could accept LEI's Chubbuck Ditch rights, LEI asserted claims for breach of that contract, and breach of the implied covenant of good faith and fair dealing. Before the District Court, LEI was provided with numerous opportunities to set forth the basis of its claims against the City. LEI's characterization of its dispute with the City in those instances provides this Court with all it needs to discern the nature of LEI's claims, as they provide a clear summary and window, in LEI's own words, into what this case is really about.

LEI's briefing on its affirmative motion for summary judgment, and supporting affidavits from LEI representatives, characterized this case as follows:

- The City and LEI entered into the Annexation Agreement in April of 2010. (CF, p 148, ¶ 20.) LEI did so based upon the understanding and belief throughout negotiations that "the City would accept [LEI's] Chubbuck Inches in exchange for municipal credits." (CF, p 148, ¶ 17.)
- At the same time LEI was negotiating the Annexation Agreement with the City, the City was simultaneously negotiating and then entered into the Settlement Agreement. (CF, p 134; CF, pp 289–290, 23:13–25:5; CF, p 299, 156:16–21.) LEI was not a party to the Settlement Agreement and was unaware of it at the time of its execution. (CF, p 148, ¶ 24.)
- During negotiation of the Annexation Agreement, the City did not inform LEI of the Settlement Agreement or that acquiring and converting LEI's Chubbuck Inches would violate its terms and "might no longer be possible." (CF, p 149, ¶ 28.)
- "Despite this, the City <u>enticed LEI to enter into the [Annexation] Agreement and continue development of its Project</u> until December of

2014, when the City finally provided a copy of the Settlement Agreement." (CF, p 134.)

- Because LEI "has no use for the Chubbuck Inches for crop irrigation purposes . . . and it is prohibitively expensive to utilize the Chubbuck Inches for water associated with landscaping of the Project," LEI's inability to dedicate its Chubbuck Inches for municipal credits has rendered LEI's water rights essentially worthless. (CF, p 149, ¶¶ 32–33, 35.)

Tellingly, at LEI's Colo. R. Civ. P. 30(b)(6) deposition, when directly asked about the basis of LEI's claims, LEI's corporate representative revealed the following:

- LEI believes that the City deliberately withheld the existence and impact of the Settlement Agreement during the course of the parties' negotiation of the Annexation Agreement. (CF, p 1312, 178:6–16.) Specifically, the representative testified that the "obligation" that LEI thinks the City was required but failed to perform, giving rise to LEI's Appealed Claims against the City, was, in essence, the City's failure to disclose the Settlement Agreement at an earlier time, as follows:

> I think the covenant of good faith and fair dealing is related to . . . treated LEI in a nondiscriminatory manner. So I think that having an understanding of what it was giving up in the [S]ettlement [A]greement and having an understanding of what that is I think was important. I think not disclosing the [S]ettlement [A]greement when it happened was important. I mean, not amending the code for years after that is important. So we feel – we feel that we didn't know things we should have known if we were being dealt with in a good faith and fair dealing manner, yes.

(CF, p 1312, 178:3–16).

- LEI felt that the City's decision not to disclose how the Settlement Agreement would impact the use of its Chubbuck Ditch water rights "sold some people down the river in a discriminatory fashion, and [LEI is] half of those people . . . [The City is] having us pay for the bargain, and that doesn't feel like we're being dealt with fairly for that purpose." (CF, p 1313, 179:7–21.)

IV. SUMMARY OF THE ARGUMENT

The District Court erred in failing to dismiss LEI's Appealed Claims pursuant to Colo. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. Each of LEI's Appealed Claims lie in tort or could lie in tort and thus are barred by the CGIA. Moreover, LEI seeks relief for an existing injury.

The purpose of the CGIA is to protect governmental entities and, by extension, taxpayers from "the consequences of unlimited liability." Colo. Rev. Stat. § 24-10-102; *Open Door Ministries v. Lipschuetz*, 373 P.3d 575 (Colo. 2016) ("***Open Door Ministries***"). Simply put, the immunity afforded by the CGIA applies when: (1) the complaint alleges an injury, and (2) the claim lies in tort or could lie in tort. *Open Door Ministries*, 373 P.3d at 579. In finding that the immunity afforded to public entities under the CGIA was inapplicable to LEI's Appealed Claims against the City, the District Court erred in its analysis and conclusions on both of these points.

First, the Appealed Claims set forth in LEI's Complaint allege present and ongoing injury by LEI. Indeed, LEI's own description of the dispute alleges that the City's inability to accept LEI's Chubbuck Inches has resulted in quantifiable damages, rendered those water rights worthless, and has resulted in a substantial reduction in LEI's development, causing needless expenditure of money and resources by LEI in the master planning phase of the Project. While the CGIA has been deemed to be inapplicable to claims seeking to prevent future harm, *see Open Door Ministries*, 323 P.3d at 577, the District Court's analysis and finding that this opinion justified denial of the City's motion to dismiss the Appealed Claims for lack of subject matter jurisdiction is an improper expansion and application of the

narrow exception carved out by that opinion. Because LEI has alleged and the Appealed Claims seek to remedy a present injury, *Open Door Ministries* is wholly distinguishable, and the CGIA applies to those claims.

Second, the record below in this matter is full of indicia that the operative facts underlying LEI's first and second claims for relief, while stated as contract claims, would clearly support tort claims for negligent or fraudulent misrepresentation. As such, those claims *could* lie in tort, and are barred by the CGIA. The District Court erred in failing to complete its analysis on this point by looking only at whether a valid contract claim had been stated, not whether the facts alleged could have alternatively stated a claim that lies in tort. Had the District Court completed this analysis, looking at the source of the duty and obligation that LEI alleged was owed by the City, it would have concluded that these claims could lie in tort, and are subject to dismissal for lack of subject matter jurisdiction pursuant to Colo. R. Civ. P. 12(b)(1).

V. ARGUMENT

A. Standard of Review and Preservation for Appeal.

Whether a public entity is entitled to sovereign immunity under the CGIA is a question of subject matter jurisdiction. *Henry-Hobbs v. City of Longmont,* 26 P.3d 533, 535 (Colo. App. 2001) (citing *Fogg v. Macaluso*, 892 P.2d 271 (Colo.

1995)). Whether a trial court has subject matter jurisdiction over a claim under the CGIA is a question of statutory construction that is reviewed *de novo*. *Robinson v. Colo. State Lottery Div.*, 179 P.3d 998, 1003 (Colo. 2008) ("***Robinson***"). More specifically, this Court's review of the two issues presented in this appeal is *de novo*, and the Court is not bound by the lower court's determination. *See Open Door Ministries*, 373 P.3d at 578 (holding that court's determination of whether CGIA applies to claims for prospective relief is reviewed *de novo*); *see also Robinson*, 179 P.3d at 1003 (holding that court's determination of whether particular claims lie in tort is reviewed *de novo*).

While subject matter jurisdiction can be raised at any time, *see* Colo. R. Civ. P. 12(b)(1), the City raised its sovereign immunity defense in the City's Motion (CF, pp 551–553), and also in the City's response to LEI's motion for partial summary judgment ("**LEI Motion**") (CF, pp 1277–1281).

B. <u>The District Court erred in concluding that the CGIA is not applicable to LEI's Appealed Claims, which seek relief for present injury.</u>

As demonstrated below, the facts and circumstances surrounding LEI's Appealed Claims plainly show that the injury LEI seeks to redress in this case has already occurred. Thus, the District Court's determination that the CGIA is inapplicable to these claims and reliance on *Open Door Ministries* as its basis to

deny the City's Colo. R. Civ. P. 12(b)(1) motion to dismiss LEI's Appealed Claims was in error.

In concluding that the CGIA did *not* bar LEI's Appealed Claims against the City, the District Court focused on the first prong of this analysis – finding that LEI's claims could not lie in tort because "LEI has not yet experienced an injury." (CF, pp 1771–1772.) In reaching this conclusion, the District Court relied primarily on its erroneous expansion and application of *Open Door Ministries*, which was not raised by either the City or LEI in their, ignored numerous allegations referring to LEI's alleged present and ongoing injury, and confused LEI's request for specific enforcement of an alleged existing breach of the Annexation Agreement with a claim seeking to avoid a prospective injury.

1. Applicability of the CGIA.

In analyzing the applicability of the CGIA to LEI's Appealed Claims, a review of the statutory framework addressing applicability of the CGIA to claims against public entities, such as the City, is necessary.

Pursuant to the CGIA, public entities are immune from liability in all claims for injury that lie in tort or could lie in tort. *Robinson*, 179 P.3d at 1003. Whether the public entity is immune is a question of subject matter jurisdiction, and the party asserting subject matter jurisdiction bears the burden of establishing that it

exists. *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 925 (Colo. 1993). In ascertaining applicability of the CGIA, Colorado courts have articulated a test that first looks to the nature of the injury underlying the claim for relief. *See Robinson*, 179 P.3d at 1005; *Open Door Ministries*, 373 P.3d at 579. "The nature of the injury alleged – not the relief requested – is the primary inquiry to determine whether the CGIA applies to the claim." *Open Door Ministries*, 373 P.3d at 579 (citing *Robinson*, 179 P.3d at 1006). All other questions, "such as whether the claim could lie in tort and the type of relief sought – follow this initial injury analysis." *Id.*

The Colorado Supreme Court has concluded that "the CGIA applies only to claims that allege that an injury has already occurred." *Id.* The term "injury" is defined, for purposes of the CGIA, as "death, injury to a person, damage to or loss of property, of whatsoever kind, which, if inflicted by a private person, would 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 a claimant." *See* Colo. Rev. Stat. § 24-10-103(2). Thus, "injury," for the purposes of the CGIA, includes a list of injuries which "are cognizable only after they occur." *Open Door Ministries*, 373 P.3d at 579. "[A] person cannot pursue a tort claim for a future death, future physical injury, or

future property damage," so claims alleging such prospective injury cannot lie in tort and do not fall within the CGIA. *Id.* at 579.

In applying this logic, the Colorado Supreme Court in *Open Door Ministries*, held that the CGIA did not apply to a company's equitable estoppel claims against the City and County of Denver, seeking to prevent revocation of an existing permit. 373 P.3d at 576 – 577. In that case, a homeowner, Lipschuetz, asserted a claim seeking judicial review of the Denver Zoning Authority's issuance of a use permit to Open Door Ministries. *Id.* at 577. Lipschuetz sought administrative, and then judicial, review and revocation of the Denver Zoning Authority's issuance of the permit, arguing that it was improperly issued. *Id.*

The trial court ultimately found that the use permit was improperly issued, and ordered that the City and County of Denver revoke it. *Id.* Open Door Ministries filed cross-claims against the City and County of Denver for promissory estoppel and equitable estoppel to preemptively prevent revocation of the existing use permit. *Id.* On appeal, Lipschuetz argued that Open Door Ministries' cross-claims were barred by the CGIA because they "amounted to a [tort-based]

equitable estoppel claim based on Open Door's reliance on the City's 'misrepresentation' that the permit was valid." *Id.*[2]

Ultimately, the Colorado Supreme Court concluded that Open Door Ministries' cross-claims against the City were *not* barred by the CGIA. *Id.* at 582. To that end, it held that the CGIA was wholly inapplicable to Open Door Ministries' claims because Open Door Ministries had not yet been injured, and the CGIA does not apply to claims for prospective relief to prevent future injury. *Id.* This decision was bolstered by the CGIA's definition of "injury" under Colo. Rev. Stat. § 24-10-103(2), which includes a list of injuries that "are cognizable only after they occur," noting that "a person cannot pursue a tort claim for a future death, future physical injury, or future property damage." *Id.* at 579. Open Door Ministries' estoppel claims sought to preemptively avoid a future injury because at the time it asserted these claims it was presently providing housing under the issued permit. *Id.* at 580 – 82. The Court further noted that Open Door Ministries was not injured by the "possibility that [the] suit could result in the revocation of the permit," and that no injury had yet occurred at the time the cross-claims were

[2] Based upon issuance of the Denver Zoning Authority's permit, Open Door Ministries purchased the property, made improvements to it and started to provide housing. *Open Door Ministries*, 323 P.3d at 577.

filed by Open Door Ministries because they were filed prior to any determination that the City had issued the permit improperly. *Id.* at 582.

Thus, *Open Door Ministries* creates a very narrow exception to the general applicability of the CGIA to claims against public entities for equitable estoppel theories. In essence, Open Door Ministries asserted that the City and County of Denver should have been equitably estopped from revoking a permit as a defense to Lipschuetz's judicial review claim. Their defense, which was asserted in the underlying matter as a cross-claim, argued that if the permit they held was later determined to be invalid, that the City and County of Denver nonetheless should be estopped from revoking it on equitable grounds, ensuring that even if the judicial review claim was successful, Open Door Ministries would continue to operate as it had been. Accordingly, the take-away from *Open Door Ministries* is that the CGIA does not apply where a claim seeks to prevent future harm. *Cf. id* at 852.

This limited holding, however, is wholly distinguishable from claims seeking to remedy or otherwise prevent present or ongoing injury, by forcing or compelling a governmental entity to act or cease from acting in accordance with its alleged prior representations. In fact, Colorado courts have routinely held that the CGIA can and does apply to such claims. *See Lehman v. City of Louisville*, 857 P.2d 455, 457 (Colo. App. 1992) (holding that CGIA barred plaintiffs' promissory

estoppel claim where claim was based upon a city official's alleged misrepresentation that the plaintiffs' intended use of a building was permitted under the existing zoning code that was relied upon by the plaintiffs to their detriment); *Robinson*, 179 P.3d at 1001 (holding that CGIA barred plaintiff's claims "arguing that she bought scratch tickets with the belief, based on the Lottery's representations, that she had a chance to win certain represented prizes and that she [was injured] by not receiving the chance to win, "for which she had contracted"); *Patzer v. City of Loveland*, 80 P.3d 908, 912 (Colo. App. 2003) (holding that CGIA barred plaintiff's promissory estoppel and breach of contract claims where claims were based upon City's failure and refusal to issue certificate of occupancy which prevented plaintiff from marketing its property).

2. The CGIA applies to LEI's Appealed Claims, which seek relief for present, pecuniary injury.

Here, the CGIA is applicable to the Appealed Claims irrespective of the Colorado Supreme Court's holding in *Open Door Ministries*, as LEI has pled and the record below supports the conclusion that LEI's claims are based on and seek to remedy present injury. In concluding that the injury alleged by LEI was one for future or prospective harm, similar to that alleged by the claimants in *Open Door Ministries*, the District Court confused the nature and existence of LEI's injury with the final quantification of its damages. (CF, pp 1771–1772.) Importantly, the

Court failed to recognize or address the significant indicia in the record that LEI sustained an injury.

First, the District Court conflates the issue of "injury" with that of "damages," by finding that because LEI has not yet paid for alternative water rights – it has not yet suffered any injury. (CF, p 1772.) In making this connection, the Court appeared to confuse the nature of LEI's injury with a final quantification of its damages. The mere fact that LEI has not yet expended monetary resources in obtaining alternative water rights does not alter the fact that LEI has already suffered and continues to suffer the injury it has alleged – i.e. an inability to contribute its Chubbuck Inches, preventing LEI from proceeding with its development under the Annexation Agreement as planned. Indeed, LEI has already quantified its injury and submitted an expert report pursuant to Colo. R. Civ. P. 26(a)(2) demonstrating what it would allegedly cost LEI to obtain replacement water rights to contribute to the City. (CF, pp 199–246 (the "**Bovee Report**").) To that end, the Bovee Report states, in sum, that LEI's Chubbuck Inches "could have been used to satisfy 33.1 acre-feet of the City's raw water dedication requirement," but "[s]ince the City is no longer accepting donations of Chubbuck inches, LEI will need to purchase credits in the Loveland water bank at a cost of $765,835." (CF, p 199.) The Bovee Report goes on to state that because LEI would have been

assessed a dedication fee in the amount of $244,940, the net difference between the necessary water bank credit purchase and that baseline fee payment "is $520,895. This is my estimate of damages . . . " "associated with LEI not being able to utilize its Chubbuck Water rights for meeting the City of Loveland raw water dedication requirements for the LEI development." (CF, pp 199, 203.)

Second, LEI repeatedly asserts in the record below that LEI has been injured by the City's failure and inability to accept the Chubbuck Inches, which has essentially rendered those water rights worthless. (*See, e.g.*, CF, p 149, ¶¶ 32–36.) This, again, signals the existence of a present and ongoing injury. Tellingly, LEI's claims were filed *after* the City had already informed LEI that it could not and would not accept LEI's Chubbuck Inches. (CF, p 149, ¶ 32; CF, p 1439, 16:3–10; CF, pp 1440–1441, 32:19–33:2.) In the Complaint itself LEI states that the basis of the dispute underlying this lawsuit is that:

> [T]he City allowed LEI to enter into the Annexation Agreement and continue development of its Project until 2015, when LEI finally learned of the Settlement Agreement. At that time, the City informed LEI for the first time <u>that it would not acquire and convert LEI's Chubbuck Inches because doing so would be a violation of the Settlement Agreement</u>.

(CF, p 10, ¶ 56 (emphasis added).) LEI goes on to allege that the City breached the Annexation Agreement and the covenant of good faith and fair dealing by "failing to provide the Project with water for municipal use," and "acting contrary to the

agreed common purpose and the parties' reasonable expectations with respect to the City's acquisition and conversion of LEI's Chubbuck Inches from irrigation to municipal use." (CF, pp 11–12, ¶¶ 63–71.)

The record below demonstrates that "LEI has no use for the Chubbuck Inches" and that its present inability "to dedicate them to the City in exchange for municipal credits" leaves those water rights "effectively stranded" and worthless. (CF, p 149, ¶ 33.) Further, LEI's description of the "dispute" in its motion for partial summary judgment states that "[f]ollowing annexation, LEI had no use for the Chubbuck Inches," and that "without the City's agreement to acquire the Chubbuck Inches and provide LEI with municipal credits, LEI is effectively prevented from using its water rights." (CF, p 135.) Accordingly, the actual *injury* that LEI seeks to redress in its Appealed Claims is a present and ongoing one – the City's inability and refusal to acquire LEI's Chubbuck Inches, which LEI alleges had rendered its water rights worthless. This injury, by LEI's own admission, has already occurred.

Third, LEI has expressly alleged additional "injury" resulting from the City's supposed misrepresentations in the form of a substantial reduction in its development, along with allegedly wasted money and resources. To that end, LEI has alleged that it "expended in excess of half a million dollars on its concept

master plan for the entire project" in direct reliance of the City's representations that it could and would acquire LEI's Chubbuck Inches. (CF, p 8, ¶ 39.) LEI further alleged that the extensive land use planning work done by LEI at an early stage in the planning process, "is not normally done prior to the master plan submission, but was completed early by LEI with the understanding that LEI would be able to obtain the necessary municipal water for its Project and streamline the process for expedient approvals later on." (CF, p 8, ¶ 40.) Because the Settlement Agreement prohibits the City's acceptance of LEI's Chubbuck Inches, LEI is unable to dedicate them to the City in exchange for municipal credits. (CF, p 149, ¶¶ 27–28, 31; CF, pp 1440–1441, 32:19–33:2.) "Without municipal credits, LEI is left with [] a substantially reduced project inconsistent with the approved master plan . . . ." (CF, p 135; CF, p 149, ¶ 36.) This too, indicates an injury that has already occurred.

For all of these reasons, this case and LEI's Appealed Claims are readily distinguishable from the narrow set of circumstances addressed by *Open Door Ministries*. Indeed, LEI's Appealed Claims are typical civil claims where a party seeks redress for an alleged present injury.

3. LEI's tort claims against GLIC allege the same damages as that set forth in the Appealed Claims.

Further, LEI has asserted separate tort claims against GLIC, alleging the *same* injury as that set forth in LEI's Appealed Claims against the City. LEI's assertion of an existing tort claim seeking monetary damages from GLIC is a clear cut indication that a present injury exists. To that end, LEI alleged in its Complaint that GLIC "entered into the Settlement Agreement with the purpose and intent of interfering with the Annexation Agreement and to prevent conversion of LEI's Chubbuck Inches," and further that GLIC "intentionally interfered with the Annexation Agreement and has attempted to prevent the lawful conversion of LEI's Chubbuck Inches," asserting claims for intentional interference with contractual relations and intentional interference with prospective business advantage. (CF, pp 10–11, ¶ 60; CF, pp 13–14, ¶¶ 88–96.) LEI claims that GLIC's interference "has induced or otherwise cause[d] the City not to perform its duties or responsibilities" under the Annexation Agreement and "caused the City to breach the Annexation Agreement and expectancy that the City would convert LEI's Chubbuck Inches." (CF, pp 13–14, ¶¶ 90, 95.)

LEI further alleged that GLIC's interference resulted in damages. (CF, pp 13–14, ¶¶ 91, 96.) These "injuries" are essentially the same injuries asserted by LEI against the City, as they involve and seek to redress the same exact actions and conduct. In finding that no present injury was alleged by LEI, barring applicability

of the CGIA, the District Court failed to articulate how LEI could seek tort damages against one co-defendant, but also effectively disaffirm the existence of a present injury as to the other co-defendant, where the claims arise out of the same set of operative facts. Indeed, LEI cannot do so. Thus, LEI's assertion of tort claims against GLIC, and allegation of damages for tortious conduct, further reinforces the conclusion that LEI has alleged a present injury.

C. The District Court erred in denying the City's Motion to dismiss LEI's Appealed Claims, as those claims could lie in tort and are thus barred by the Colorado Governmental Immunity Act.

Additionally, the District Court fundamentally erred by focusing on the nature of LEI's asserted claims in its CGIA analysis, rather than analyzing whether the claims could be pursued in tort. The District Court wholly failed to analyze whether those same facts *could* have established a claim or claims that lie in tort, as required by binding precedent. Had the District Court completed the necessary analysis and looked at whether the facts could support an alternative tort claim, the District Court would have reached that conclusion.

1. If a plaintiff's contract claims could also be asserted as a tort, the action is barred by the CGIA.

Importantly, "[t]he CGIA applies to 'all claims for injury which 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 the claimant." *Open Door Ministries*, 373 P.3d at 579 (quoting

Colo. Rev. Stat. § 24-10-106(1)). "Because the meanings of 'tort' and 'could lie in tort' are vague, the inquiry into whether a public entity is immune under the CGIA" is a difficult standard to apply. *Foster v. Bd. of Gov'rs of the Colo. State Univ. Sys.*, 342 P.3d 497 (Colo. App. 2014) ("***Foster***"). In general, Colorado courts look to "the nature of the injury and the relief sought, though neither is determinative," with keen focus on "the source and nature of the government's liability, or the nature of the duty from the breach of which liability arises." *Id.* (quoting *Colo. Dep't of Transp. v. Brown Grp. Retail*, 182 P.3d 687, 690 (Colo. 2008)).

In assessing whether a stated claim against a public entity falls outside of the broad grant of immunity afforded by the CGIA, the form of the complaint and the claims alleged is not determinative of whether the claim is based in tort or in contract. *Brown Grp. Retail, Inc.*, 182 P.3d at 690; *Patzer*, 80 P.3d at 910. Rather, the dispositive question is whether the claim is, or even could be, a tort claim. *Patzer*, 80 P.3d at 910. In barring not only tort claims but also claims which *could* lie in tort, the CGIA mandates close examination of the pleadings and undisputed evidence. *Berg v. State Bd. of Agric.*, 919 P.2d 254 (Colo. 1996). In conducting this examination, the court must look at the nature of the alleged injury and the relief sought, and determine whether the injury arises exclusively from the terms of

a contract, or could also arise by operation of a general duty under tort law. *Open Door Ministries*, 373 P.3d at 579 ("When a plaintiff alleges that he or she was injured by a governmental entity, the court 'must assess the nature of the injury underlying the claim to determine . . . whether the claim *could* lie in tort."' (emphasis added) (quoting *Robinson.*, 179 P.3d at 1003)). This must be done on a case-by-case basis, looking closely at the facts alleged by the claimant, because the same conduct that arguably or allegedly violates a contract or statute "could also form the basis of a common-law suit for injuries in tort." *See City of Colorado Springs v. Conners*, 983 P.2d 1167, 1176 (Colo. 2000); *see also Robinson*, 179 P.3d at 1005.

Put another way, "[i]t is only where the [plaintiff's] claim cannot lie in tort that there is no immunity" under the CGIA. *Foster*, 342 P.3d at 501 (citing *Berg*, 919 P.2d at 258). "[T]he CGIA is less concerned with what the plaintiff is arguing and more concerned with what the plaintiff *could* argue." *Robinson*, 179 P.3d at 1005 (citing *Berg*, 919 P.2d at 258) (emphasis added). "Thus, even if a claim exists for breach of contract, it is barred if the allegations in the complaint would also support a tort claim." *Foster*, 342 P.3d at 501 (citing *Robinson*, 179 P.3d at 1004 – 05). Courts must look beyond the allegations in the complaint "to whether the 'essence' of the injury is tortious in nature – that is, whether the allegations of the

complaint could support a claim sounding in tort." *Id.* at 503. In areas where there is an overlap between tort and contract, "claims that could arise in both [] are barred by the CGIA," leaving only those claims arising solely in contract outside of the CGIA's broad grant of immunity. *Robinson*, 179 P.3d at 1003.

Ultimately, whether a claim lies in tort or could lie in tort "turns on the source and nature of the government's liability, or the nature of the duty from the breach of which liability arises." *Brown Grp. Retail*, 182 P.3d at 690. "The essential difference between a tort obligation and a contract obligation is the source of the parties' duties." *Carothers v. Archuleta Cnty. Sheriff*, 159 P.3d 647, 655 (Colo. App. 2006). Tort duties are those protecting against the risk of harm to persons or property, and are implied by law without regard to any contract. *Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256, 1262 (Colo. 2000); *Adams v. City of Westminster*, 140 P.3d 8, 11 (Colo. App. 2005).

Colorado courts have explained that claims based on an alleged misrepresentation of facts, as opposed to claims based on a failure to perform as promised, are fundamentally *tort* claims. *See Patzer*, 80 P.3d at 912 (emphasis added). For example, the Colorado Court of Appeals in *Lehman* held that the plaintiffs' claim that "they relied to their detriment upon a misrepresentation made by a city official" as to their intended use of a property, *could* lie in tort, as those

facts could support a claim for negligent or intentional misrepresentation. 857 P.2d at 457.

For example, in *Foster*, the Colorado Court of Appeals held that the plaintiff's claims against Colorado State University for destruction to the plaintiff's property, stated as a claim for breach of an oral contract of bailment, were barred by the CGIA because the facts *could* have supported an alternative tort claim. 342 P.3d at 499 – 500, 503 – 506. The court explained that "[n]either the fact that Ms. Foster pled her bailment claim as one for breach of contract nor the fact that a bailment claim may be pled is dispositive." *Id.* at 503. Rather, because her claim could have alternatively been pled in tort, the Colorado Court of Appeals held that it was barred by the CGIA. *Id.* at 504.

Likewise, the Colorado Supreme Court in *Robinson* held that the plaintiff's claims were barred by the CGIA. *Robinson*, 179 P.3d at 1005 In that case, the plaintiff's claims were, in essence, based on the Lottery's alleged misrepresentations, and were accordingly barred under the CGIA because they *could* have been pled in tort. *Robinson*, 179 P.3d at 1005. In essence, the plaintiff in *Robinson* alleged that she was induced to buy scratch tickets upon a representation made by the Lottery that she could win a prize, and that the public entity made such representation knowing that no such prize remained available. *Id.*

at 1002, 1005. This claim, according to the Colorado Supreme Court, *could* have been pled in tort and was, as a result, barred by the CGIA. *Id.* at 1006. Indeed, the plaintiff there "contend[ed] that her underlying injury ar[ose] out of the Lottery's failure to deliver what it offered," and that she was "*not* arguing that the Lottery wrongfully induced her to enter into an unfavorable contract." *Id.* at 1005. However, the court disagreed, concluding that the plaintiff's injury, purchase of the scratch tickets without the ability to win the prizes advertised, "ar[ose] out of the Lottery's misrepresentations regarding the availability of the represented prizes, which induced the purchase of" those tickets. *Id.* at 1005. As a result, those claims were barred by the CGIA, irrespective of whether the facts would have supported a claim that the Lottery breached any contractual duties. *Id.*

2. The nature of the City's alleged obligation to LEI lies in tort.

As indicated by *Foster*, the ultimate objective of the court's CGIA analysis is to determine if the obligation underlying the claims against the public entity lie solely in contract, or could indeed lie in tort. 342 P.3d at 501. The analysis "turns on the source and nature of the government's liability, or the nature of the duty from the breach of which liability arises." *Id.* (quoting *Brown Grp. Retail*, 182 P.3d at 690).

Here, LEI has asserted claims against the City arising out of the City's alleged obligation to inform LEI of the City's ability and/or intention with respect to its acceptance of LEI's Chubbuck Inches. (CF, pp 11–13, ¶¶ 63–87.) This obligation, which is at the heart of this dispute and LEI's Appealed Claims, arose by virtue of LEI and the City's relationship to each other. To that end, the City and LEI were in the process of negotiating with each other the terms of LEI's planned Project and the proposed annexation of land into the City and development thereof at the time the Settlement Agreement was executed. (CF, pp 134; CF, pp 147–148, ¶¶ 9–12, 17, 20–21, 24; CF, pp 289–290, 23:13–25:5; CF, p 299, 156:16–21.) LEI's own description of the dispute before the District Court boiled the matter down to its tortious essence:

> **The Dispute**
>
> LEI was not a party to the Settlement Agreement and was unaware of the Settlement Agreement and its terms at the time it executed the [Annexation] Agreement. However, the City was simultaneously negotiating the Settlement Agreement and the [Annexation] Agreement. Indeed, by the time the Settlement Agreement was executed, the City and LEI had been negotiating the [Annexation] Agreement for over a year and most, if not all its terms were finalized.
>
> [. . . .]
>
> Despite this, the City enticed LEI to enter into the [Annexation] Agreement and continue development of its Project until December of 2014, when the City finally provided a copy of the Settlement Agreement. At that time, the City first informed LEI the City would

> not acquire and convert LEI's Chubbuck Inches because doing so would be a violation of the Settlement Agreement.

(CF, pp 134–135 (citations omitted) (emphasis added).) Accordingly, LEI's own description of the dispute and the obligation allegedly owed to LEI and breached by the City shows that it does not arise from any writing, but from the City's alleged "enticement" of LEI to enter into the Annexation Agreement and continue its development work with the City.

3. The CGIA bars LEI's Appealed Claims, as the facts alleged and the relief requested could have been alternatively pled as tort claims.

Against this backdrop, it is clear that the CGIA bars LEI's Appealed Claims, as they could have been stated in tort. LEI's own description of the dispute with the City, as discussed above, signaled to the District Court in the proceedings below that the operative facts here gave rise to claims for tortious conduct against the City, whether asserted or not.

While the District Court properly stated the key holding in *Robinson*, namely that the factual allegations underlying the plaintiff's claims in *Robinson* "revealed that her injury was really based on the Lottery's misrepresentations regarding the availability of the represented prizes which induced purchase of the lottery tickets," (CF, p 1772 (citing *Robinson*, 179 P.3d at 1005)), the District Court failed to appreciate the bearing of that holding on the facts present in this

action. Whether LEI did or could have asserted valid claims for breach of contract, breach of the covenant of good faith and fair dealing, or promissory estoppel, is wholly irrelevant in ascertaining whether the CGIA acts as a bar to LEI's first and second claims for relief.

Like the plaintiff in *Robinson*, here, LEI has alleged that its injury stems from the City's pre-contractual misrepresentation and material omissions – in this case, the City's ability and willingness to accept LEI's Chubbuck Inches. Indeed, LEI has acknowledged that at the time the Annexation Agreement was executed, the City had already committed itself to cease from further acceptance, conversion or use of *any* Chubbuck Ditch rights. (CF, p 149, ¶ 27.) In support of its Appealed Claims, LEI has alleged that the City *knew* that LEI intended to utilize its Chubbuck Inches to satisfy the City's water dedication requirements, *knew* that the Settlement Agreement restricted the City's ability to accept those Chubbuck Inches, but nonetheless represented that the City could and would acquire those inches "entic[ing] LEI to enter into the" Annexation Agreement and continue development of its Project." (CF, p 134.) These facts, if proven true, would plainly support a claim for tortious misrepresentation of fact and/or negligent inducement.[3]

[3] Under Colorado law, to establish a claim for negligent misrepresentation, a claimant must establish the following: (1) one in the course of his or her business, profession or employment; (2) makes a misrepresentation of a material fact,

Importantly, LEI has not alleged that the City promised to perform an act (such as accept their Chubbuck Inches) and then failed to do so, causing LEI to lose the benefit of its bargain. Rather, the essence of LEI's Appealed Claims stem from the City's alleged misrepresentation and omission of the material and existing fact that, by virtue of the Settlement Agreement, the City could not and would no longer accept Chubbuck Ditch rights into the City's water bank. (CF, pp 134–135; CF, pp 148–149, ¶¶ 17–31.) It was this representation that LEI alleges induced LEI to enter into the Annexation Agreement and expend resources developing the Project, and it is this representation that would plainly support a tort claim for negligent or intentional misrepresentation. (CF, p 134.)

Additionally, the District Court's finding that its conclusion as to the contractual nature of LEI's claims is supported by the fact that "LEI seeks specific performance under the Annexation Agreement, a contractual remedy," is similarly

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without reasonable care; (3) for the guidance of others in their business transactions; (4) with knowledge that his or her representations will be relied upon by the injured party; and (5) the injured party justifiably relied on the misrepresentation to his or her detriment. *Allen v. Steele*, 252 P.3d 476, 482 (Colo. 2011).

Additionally, a claim for fraud based upon omission or concealment are: (1) the concealment of a material existing fact that in equity and good conscience should be disclosed; (2) knowledge on the part of the party against whom the claim is asserted that such a fact is being concealed; (3) ignorance of that fact on the part of the one from whom the fact is concealed; (4) the intention that the concealment be acted upon; and (5) action on the concealment resulting in damages. *Ackmann v. Merchants Mortg. & Trust Corp.*, 645 P.2d 7, 13 (Colo. 1982).

flawed. (CF, p 1773.) The District Court's focus on the form of relief sought by the articulated claims is unhelpful to an analysis of whether the plaintiff could pursue a suit in tort. *Cf. Conners*, 993 P.3d at 1176 (noting that some tort claims may involve equitable forms of relief and that "the form of relief alone, whether damages or equitable relief, does not govern the categorization of a claim as a tort or other type of action"). The District Court's reliance on the remedy sought by LEI further contributed to its flawed and incomplete analysis. This is reinforced by Colo. Rev. Stat. § 24-10-105(1), which states, in pertinent part, that the intent of the CGIA is to cover all actions that lie in tort or could lie in tort, "regardless of whether that may be the type of action or form of relief chosen" by the claimant. *See also* Colo. Rev. Stat. § 24-10-106(1) (same); Colo. Rev. Stat. § 24-10-108.

Thus, the mere fact that LEI has allegedly sought specific performance under the Annexation Agreement does not mandate or even support the conclusion that the Appealed Claims could not lie in tort, and are not barred by the CGIA.

Accordingly, because the essence of LEI's claims is a tortious misrepresentation of fact, LEI's claims could have alternatively been pled in tort and are barred by the CGIA, subjecting them to dismissal for lack of subject matter jurisdiction.

VI. CONCLUSION

The CGIA acts as a bar to all claims against a public entity which lie, or could lie in tort. Here, despite LEI's characterization of its claims as claims for breach of contract and breach of the implied covenant of good faith and fair dealing, LEI's Appealed Claims allege present injury and the operative facts underlying those claims could have been stated as claims for tortious misrepresentation of fact. For those reasons, the City requests that the Court reverse the District Court's findings and hold that the CGIA is applicable to the Appealed Claims, and remand to the District Court with instructions to dismiss the Appealed Claims pursuant to Colo. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.

Respectfully submitted: May 23, 2018.

BERG HILL GREENLEAF RUSCITTI LLP

[Pursuant to C.A.R. 30(f) the signed original is on file at Berg Hill Greenleaf Ruscitti LLP]

s/ Josh A. Marks

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May, 2018, a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF** was served electronically via ICCES and/or by depositing same in the U.S. Mail, postage prepaid, addressed to the following:

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