COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, Colorado 80203	
APPEAL FROM LARIMER COUNTY DISTRICT COURT, COLORADO District Court Judge: Susan Blanco Civil Action No. 2016 CV 30362	
Petitioner-Appellant: THE CITY OF LOVELAND, v. **Respondent-Appellee:** LOVELAND EISENHOWER INVESTMENTS, LLC, a Colorado limited liability company.	**▲COURT USE ONLY▲** Case No.: 2018 CA 121
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RESPONDENT-APPELLEE LOVELAND EISENHOWER INVESTMENTS, LLC'S ANSWER BRIEF

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 6,215 words (principal brief does not exceed 9,500 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 the party raising the issue:

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.

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It contains, 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 and C.A.R. 32.

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STATEMENT OF THE CASE

Defendant-Appellant City of Loveland (the "City") appeals an order from the Larimer County District Court denying the City's motion to dismiss certain of Plaintiff-Appellee Loveland Eisenhower Investment's ("LEI's") claims. LEI has sued the City and the Greeley and Loveland Irrigation Company ("GLIC") for various claims arising out of the development of a mixed-use project on land owned by LEI. As part of the project, LEI and the City entered into an Annexation and Development Agreement (the "Annexation Agreement"). LEI alleges that the City is in breach of various provisions of the Annexation Agreement, and has asserted claims for breach of contract, breach of the implied covenant of good faith and fair dealing, declaratory relief, and permanent injunction against the City. LEI has also alleged that GLIC intentionally interfered with the Annexation Agreement, and has asserted a claim for intentional interference with prospective business advantage against it.[1] Finally, LEI has asserted a claim of unjust enrichment against certain third parties.

This appeal solely concerns LEI's claims against the City for breach of contract and breach of the implied covenant of good faith and fair dealing (the

[1] LEI also asserted a claim for intentional interference with contractual relations against GLIC, but the District Court granted GLIC's motion for summary judgment with respect to that claim. Order, p. 14 (CF, p. 1779).

"Appealed Claims"). In the lower court proceedings, the City filed a Motion to Dismiss, or in the Alternative, Motion for Summary Judgment (the "Motion to Dismiss"), arguing in relevant part that the Appealed Claims should be dismissed for lack of subject matter jurisdiction because they are barred by the Colorado Governmental Immunity Act (the "CGIA"). The CGIA provides public entities with immunity from liability for "all claims for injury which lie in tort or could lie in tort," subject to certain exceptions that are not applicable here. Colo. Rev. Stat. § 24-10-106. The CGIA does not apply to actions for prospective relief from future injury. *Open Door Ministries v. Lipschuetz*, 373 P.3d 575, 579 (Colo. 2016). The District Court found that the injury alleged by LEI has not yet occurred, and that LEI's claims are rooted in contract rather than tort. Therefore, the District Court held that the Appealed Claims are not barred by the CGIA and denied that aspect of the City's Motion to Dismiss. The City has appealed this ruling.

STATEMENT OF FACTS

On November 1, 1877, Harrison Chubbuck entered into an agreement with shareholders in the Larimer County Irrigating and Manufacturing Company that parties to the agreement would receive first priority for deliveries of water under the Chubbuck Ditch system (the "Chubbuck Agreement") (CF, p. 125). *See*

Affidavit of Water Expert Brett Bovee (CF, p. 197). *See also* Bovee Expert Report (CF, p. 200) and Bovee Rebuttal Report (CF, p. 247); *see also* Exhibit A to Parker Affidavit at 7 (CF, p. 152). These contractual rights are specified in "Chubbuck Inches" and are to be delivered ahead of the company's regular shareholders. (CF, p. 126). GLIC eventually obtained all of the interests and obligations in the Chubbuck Ditch system, and continues to make deliveries to the successors of the Chubbuck Agreement to this day. (CF, pp. 126, 152, 199 and 204). In the 1980s, the City began acquiring Chubbuck Inches from parties to the Chubbuck Agreement and converting them through water court proceedings from irrigation to municipal use. (CF, p. 127). The City began withholding the remaining return flows, no longer providing them to GLIC or its shareholders. (CF, p. 127).

LEI is the owner of 58 acres of land located in Larimer County, Colorado (the "LEI Land"), that it purchased in three main acquisitions from 2000 to 2007. (CF, pp. 125, 129). Along with the land, LEI acquired 31.25 Chubbuck Inches. (CF, p. 126) and Parker Affidavit at 1-6 (CF, p. 146). LEI purchased the parcels with the intent and purpose of developing them as a unified project for mixed uses (the "Project") (CF, p. 129). At the time of purchase, two of the parcels were located outside the boundaries of the City. *Id.* (CF, p. 129) and Exhibit A to Parker Affidavit at 9-11 (CF, p. 147). LEI submitted a concept Master Plan to the

City for development of the Project, which was approved in 2010 (CF, p. 129) *See* Exhibit A to Parker Affidavit at 12 (CF, p. 147). As part of the Master Plan approval, LEI was required to annex certain portions of its land into the City (CF, p. 129).

As noted in the City's Opening Brief, developers must contribute water to the City that the City can use or convert for municipal water service as a prerequisite to the City providing water service for a developer's completed development. *Opening Brief* at 3. In conjunction with the Master Plan Approval process, LEI provided the City with a "Water Adequacy Assessment Summary," which showed that, among other water rights, LEI had a contractual right to 31.25 Chubbuck Inches that could be used to satisfy its water contribution requirement. (CF, pp. 129-130). *See* Larry Owen Affidavit at 9 (CF, p. 315); *see also* Water Adequacy Assessment Summary (CF, p. 318). Without its Chubbuck Inches, LEI did not have sufficient water to serve the Project. *Id.* (CF, p. 130); *see* Owen Affidavit at 12 (CF, p. 315).

LEI understood that its Chubbuck Inches could be acquired and converted by the City for municipal use to satisfy its water contribution requirement for two primary reasons. First, the City had historically accepted and processed every application for conversion of Chubbuck Inches up to that point and had, in fact,

converted 88.8% of all Chubbuck Inches in existence (CF, p. 130). *See* City Depo (Dewey) at 46:16-47:6; 92:3-94:4 (CF, pp. 277, 279). Second, Title 19 of the Loveland Municipal Code in effect at the time of execution of the Annexation Agreement (the "2010 Code") specifically contemplated acquisition of Chubbuck Inches and repeatedly identified Chubbuck Inches as a source of water rights that the City would accept in exchange for municipal credits (CF, p. 130). *See* 2010 Code at Section 19 (CF, p. 319).

In April of 2010, the City and LEI entered into the Annexation Agreement, annexing the required portions of the LEI Land into the City (CF, p. 131). *See* Agreement at p. 2 (Recitals) (CF, p. 152). The Annexation Agreement expressly obligated the City to provide customary municipal services to the Project, including water service and facilities (CF, pp. 131-132). In addition, the Annexation Agreement conferred upon LEI a vested right to undertake development in a manner consistent with other developers both historically and in the future under a uniform, consistent, non-discriminatory application of water regulations and the 2010 Code (CF, pp. 132-133). Pursuant to the 2010 Code, the City has the obligation to calculate the water rights owed under the Annexation Agreement and as set forth in Water Adequacy Assessment Summary in accordance with the water rights provisions in effect in 2010, which specifically

provided that the City would and could acquire, convert and store LEI's Chubbuck Inches. *Id.* (CF, p. 133).

However, unbeknownst to LEI, GLIC and the City had entered into a settlement agreement in January of 2010 (the "Settlement Agreement") to settle objections that GLIC raised to the City's conversion of Chubbuck Inches from another party (CF, pp. 128-129). As part of the Settlement Agreement, the City committed that it would not apply for changes of any additional Chubbuck Inches and that no additional Chubbuck Inches would be converted to municipal use by the City, with certain exceptions not applicable to this case (CF, p. 128-129). S*ee also* Settlement Agreement at ¶ 6 (CF, p. 303); and City Depo (Dewey) at 146:3-11 (CF, p. 284). GLIC did not make any effort to notify the owners of unchanged Chubbuck Inches that the Settlement Agreement had been executed (CF, p. 128). *See also* Company Depo. (Kahn) at 175:24-176:7 (CF, p. 301). At 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, of its terms were finalized (CF, p. 134) and Parker Affidavit at 25-26 (CF, p. 148). Despite the fact that the City knew that LEI owned Chubbuck Inches and that LEI intended to dedicate them to satisfy its water contribution requirements for the Project, the City

did not notify LEI of the Settlement Agreement or its effect for nearly five years (CF, pp. 128-129).

In December of 2014, the City finally provided LEI with a copy of the Settlement Agreement and informed LEI for the first time that 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). *See also* Owen Affidavit at 23 (CF, p. 316) and City Depo. (Dewey) at 32:17-33:2 (CF, pp. 273-274). LEI filed its Complaint and Jury Demand on April 11, 2016 (CF, p. 4), alleging that the City's refusal to accept its Chubbuck Inches was a breach of the Annexation Agreement, among other claims.

SUMMARY OF ARGUMENT

Pursuant to the CGIA, public entities are immune from "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." Colo. Rev. Stat. § 24-10-106(1). Thus, the CGIA applies if (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. These two prerequisites to applicability of the CGIA involve separate inquiries. *Id.*

With respect to the first prong, the District Court found that LEI has not experienced an injury because it has not yet had to pay for replacement water

rights to satisfy its contribution requirement for the Project. *Order* at 7 (CF, p. 1772). Since the CGIA only applies to claims that allege that an injury has already occurred, the District Court held that the CGIA does not bar the Appealed Claims. *Id.* at 6-7 (CF, p. 1771-1772). With respect to the second prong, the District Court concluded that the Appealed Claims allege a breach of a promise relating to future contribution of water rights and that LEI seeks specific performance under the Annexation Agreement, which is a contractual remedy. *Id.* at 8 (CF, p. 1773). Therefore, the District Court held that the Appealed Claims lie in contract rather than tort. *Id* (CF, p. 1773).

The District Court correctly concluded that neither prerequisite for immunity under the CGIA has been met in this case. LEI will address each of the District Court's findings in turn.

ARGUMENT

A. Standard of Review and Preservation for Appeal.

The issue of whether a plaintiff's claims are barred by the CGIA is a matter of statutory construction, and a lower court's decision is therefore subject to de novo review. *Robinson v. Colo. State Lottery Div.*, 179 P.3d 998 (Colo. 2008) (citing *City of Colo. Springs v. Conners*, 993 P.2d 1167, 1171 (Colo. 2000)). LEI

agrees with the City that the issues raised in its Opening Brief were properly preserved below.

B. The District Court correctly concluded that the CGIA is not applicable to the Appealed Claims because LEI has not yet suffered an injury.

1. The CGIA Does Not Apply to Future Injuries

The Colorado Supreme Court has recognized that the CGIA "clearly identifies the types of injuries that would support a claim under the CGIA – 'death, injury to a person, [and] damage to or loss of property, of whatsoever kind.'" *Open Door Ministries*, 373 P.3d at 579 (quoting Colo. Rev. Stat. § 24-10-103(2)). The Court has held that "[s]uch injuries are cognizable only after they occur; a person cannot pursue a tort claim for future death, future physical injury, or future property damage." *Id.* (citations omitted). Accordingly, the CGIA does not bar claims for relief from future injury. *Id.* at 580.

For example, in *Open Door Ministries,* 373 P.3d at 577, Lipschuetz filed an action seeking revocation of a permit that had been issued to *Open Door Ministries*. *Open Door Ministries* filed cross-claims against the City and County of Denver, requesting, among other things, a declaratory judgment that its permit would remain valid. *Id.* Since *Open Door Ministries'* permit was still valid at the time it filed suit and there were no allegations that *Open Door Ministries* had yet suffered any losses, the Court held that the cross-claims were not barred by the

CGIA. *Id.* at 580-81. Essentially, *Open Door Ministries* sought prospective relief to prevent future injury. *Id.* at 582.

2. LEI's Claims Seek Prospective Relief to Prevent Future Injury

The basis of the Appealed Claims is the fact that the City has refused to accept LEI's Chubbuck Inches because doing so would violate the Settlement Agreement. *See* Complaint ¶56 (CF, p. 10). The Complaint alleges that "[w]ithout conversion, LEI will be left with a substantially reduced project inconsistent with the concept plan approved by the City, or the need to acquire additional water rights on the open market at very substantial cost and expense." *Id*. ¶62 (emphasis added) (CF, p. 11). LEI asserts that the City's refusal to accept its Chubbuck Inches constitutes a breach of the Annexation Agreement. *See id.* ¶¶65, 70 (CF, pp. 11, 12). Accordingly, the Appealed Claims allege that "LEI is entitled to damages in an amount to be determined at trial or, in the alternative, to specific performance requiring the City to acquire and convert LEI's Chubbuck Inches from irrigation to municipal use, and for such other relief as the Court deems appropriate." Complaint ¶¶66, 71 (CF, pp. 11, 12).

The Complaint does not identify any injuries or specify any damages suffered by LEI. This is because LEI has not yet had to purchase additional water rights to satisfy its contribution requirement, a fact which both the District Court

and the City have acknowledged. Indeed, in its Opening Brief the City described the development process as follows: "[t]he relevant provisions of the Loveland Municipal Code . . . 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." *Opening Brief* at 6 (emphasis added). Moreover, pursuant to Section 2.25 of the Annexation Agreement, the only remedies available to LEI in the event of a breach are forms of non-monetary relief such as specific performance, declaratory judgment and injunctive relief (CF, p. 143). *See also* Agreement at Section 2.25 (CF, p. 165). Accordingly, LEI has not yet acquired water from another source to meet the contribution requirement because it could not have recovered those amounts as damages (CF, p. 144).

Notwithstanding the foregoing, the City faults the District Court for failing "to recognize or address the significant indicia in the record that LEI sustained an injury." *Opening Brief* at 20-21. Yet the only concrete evidence of an injury that the City references is an expert report submitted by LEI. *Id.* at 21. The City explains that the expert report demonstrates "what it *would* allegedly cost LEI to obtain replacement water rights to contribute to the City." *Id.* (emphasis added). The City does not claim that the expert report details losses already incurred by

LEI, and the City has pointed to no other evidence that LEI has sustained any injuries.

The City also argues that "[t]he 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." *Opening Brief* at 21. Although the City describes the injury as "the City's inability and refusal to acquire LEI's Chubbuck Inches," *Opening Brief* at 23, as set forth above, this refusal will not actually injure LEI until such time as LEI is required to purchase alternative water rights to satisfy its contribution requirement. Thus, the City has conflated the issue of whether it has breached the Annexation Agreement with the issue of whether LEI has suffered an injury due to that breach.

The City is correct that LEI has had to cease development of the project in order to resolve the issues concerning its water contribution requirements (CF, p. 144). However, neither LEI nor the City have identified any injuries sustained from the temporary cessation of development. Under Section 2.3 of the Annexation Agreement, LEI has vested property rights to undertake and complete the development and use of the property as provided in the Annexation Agreement

for an initial period of eight years from the effective date of the Agreement (the "Initial Term") (CF, p. 143). *See also* Agreement at Section 2.3 (CF, p. 160). However, if LEI constructs 100,000 square feet of "Primary Workplace Uses" within the Project and the City conducts a corresponding final inspection prior to the expiration of the Initial Term, then the term of vested property rights provided in the Agreement extends to fifteen years. *See id* (CF, p. 143). In briefing before the District Court, LEI explained that due to the City's breach of the Annexation Agreement, it will not be able to complete construction of 100,000 square feet of Primary Workplace Uses prior to the expiration of the Initial Term. *Id.* at 21 (CF, p. 143). However, LEI is in the process of negotiating an extension of the Initial Term. *Id.* at 21 n.2 (CF, p. 143). Thus, LEI will suffer injuries only *if* this lawsuit is unsuccessful and the City continues to refuse to honor LEI's Chubbuck Inches, and only *if* LEI is unable to obtain an extension of its vested property rights. By contrast, if this lawsuit is successful and if LEI is able to obtain an extension of its vested property rights, LEI will not suffer any injury.

Through this lawsuit, LEI seeks to prevent future injury from the City's continued refusal to accept its Chubbuck Inches. The District Court correctly found that this case is similar to *Open Door Ministries* because LEI seeks relief to prevent future injuries because LEI has not yet suffered an injury. *Order* at 7. As

observed by the District Court, "LEI's injury *would* occur if it has to pay for some other water rights contribution in exchange for municipal water." *Id.* (emphasis added). Indeed, the *City's Opening Brief* describes LEI's claims as seeking "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." *Id.* at 1. It is telling that this description does not include any mention of compensation for damages or injuries sustained by LEI. Since LEI has not yet had to pay for additional water rights to satisfy its water contribution requirement or lost its vested property rights under the Annexation Agreement, this Court should affirm the District Court's holding that the CGIA does not bar the Appealed Claims.

3. LEI's Claims Against GLIC do not Demonstrate that it has Suffered an Injury.

LEI's claim against GLIC alleges that GLIC's intentional interference with LEI's prospective business advantage has caused damages "in an amount to be determined at trial." Complaint ¶96 (CF, p. 14). The City faults the District Court for failing to explain how LEI could claim damages against GLIC while at the same time claiming that damages have not yet been incurred with respect to the City. *Opening Brief* at 25-26. The City argues that the fact that LEI seeks monetary damages from GLIC demonstrates that LEI has suffered damage from the City's conduct as well. *Id.* This argument fails for three reasons.

First, "[a] party may . . . state as many separate claims or defenses as he has regardless of consistency . . . ." Colo. R. Civ. P. 8(e). Thus, the District Court was not required to explain how LEI could claim that it had not yet suffered an injury with respect to the City but could claim monetary damages against GLIC. Any inconsistency in LEI's claims is permissible and is not proof that LEI has suffered an injury as a result of the City's breach of the Annexation Agreement, particularly in light of the City's failure to once again identify any actual injuries or damages suffered by LEI.

Second, the types of relief sought by LEI against the City and GLIC are not inherently inconsistent because LEI's claim against GLIC is essentially an alternative claim, which is a permissible form of pleading. Colo. R. Civ. P. 8(a). ("Relief in the alternative or of several different types may be demanded."). In the event that the District Court finds in favor of LEI on its claims against the City, then, as explained above, there will be no damages for LEI to recover from GLIC. However, in the event that the District Court finds in favor of the City but finds that GLIC did intentionally interfere in LEI's prospective business advantage, LEI will seek to recover the damages it incurs in purchasing additional water rights, as well as any other damages suffered, from GLIC. Therefore, the mere fact that LEI

seeks damages from GLIC in the Complaint does not establish that an injury has yet been suffered.

Finally, in order to support its argument that LEI's claims against GLIC prove that it has suffered an injury at the hands of the City, the City relies on an assertion that "the claims raise out of the same set of operative facts." *Opening Brief* at 26. This is simply not true. By its very nature, LEI's claim of intentional interference with prospective business advantage relies on allegations concerning GLIC's knowledge and conduct, not the City's knowledge and conduct. As the District Court recognized, "[e]ach of the plaintiff's claims require different facts to either fail or succeed as a matter of law." *Order* at 8 (CF, p. 1773).

C. The District Court correctly concluded that the CGIA is not applicable to LEI's Appealed Claims because the claims arise in contract.

1. The CGIA does not Bar Claims that Arise in Contract.

The CGIA does not apply to claims that arise in contract. *Carothers v. Archuleta Cty. Sheriff*, 159 P.3d 647, 655 (Colo. App. 2006). When determining whether a claim has a basis in contract or tort, the court must consider the nature of the injury and the relief sought - a determination that is made on a case-by-case basis. *See CAMAS Colorado, Inc. v. Board of Cty. Com'rs*, 36 P.3d 135, 138 (Colo. App. 2001). "The nature of the injury alleged – not the relief requested – is the primary inquiry to determine whether the CGIA applies to the claim. Other

questions – such as whether the claim could lie in tort and the type of relief sought – follow this initial injury analysis." *Open Door Ministries*, 373 P.3d at 579 (citing *Robinson*, 179 P.3d at 1006).

The Colorado Court of Appeals has explained that "[t]he essential difference between a tort obligation and a contract obligation is the source of the parties' duties. Contract obligations arise from promises made between parties. Tort obligations generally arise from duties imposed by law . . . ." *Carothers*, 159 P.3d at 655-56; *see also Robinson*, 179 P.3d at 1003 (if the injury arises out of a breach of a duty recognized in tort law, the claim likely lies in tort or could lie in tort); *Town of Alma v. AZCO Const., Inc.*, 10 P.3d 1256, 1262 (Colo. 2000); *CAMAS*, 36 P.3d at 138 (courts should examine whether the claim and the duty allegedly breached arise from the terms of the contract itself). Duties that arise in tort protect against the risk of physical harm to persons or property. *Foster v. Bd. of Governors of the Colo. State Univ. Sys.*, 342 P.3d 497, 501 (Colo. App. 2014) (citations omitted).

For example, in *Patzer v. City of Loveland*, 80 P.3d 908 (Colo. App. 2003), the Colorado Supreme Court determined whether the plaintiffs' claims sounded in tort or contract by looking at whether the plaintiffs cited any specific contractual language in their complaint, and whether the building permit at issue contained a

promise that was breached by the defendant. 80 P.3d 908, 911-12 (Colo. 2003). Because the plaintiffs had not cited to any contractual language in their complaint, and because the permit at issue did not contain a promise by the defendant, the Court held that the plaintiffs' claims did not sound in contract. *Id.*

2. The City's Obligation Arises from the Terms of the Contract.

Contrary to the City's claim that the District Court "wholly failed to analyze" whether the facts alleged in the Complaint could support a claim that lies in tort, the District Court did conduct such an analysis. The District Court held as follows:

> LEI alleges breach of a promise relating to future contribution of water rights in exchange for municipal water supply. It does not allege that the City expressly promised to accept Chubbuck Inches with the intent to lure LEI into the Annexation Agreement. Therefore, 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.

Order at 8 (CF, p. 1773).

In order to fully understand the District Court's holding, it is necessary to re-examine the allegations supporting LEI's claims. As set forth in LEI's response to the City's Motion to Dismiss, Section 2.18 of the Annexation Agreement obligated the City to provide customary municipal services to the Project on an equivalent, uniform and non-discriminatory basis, including sanitary sewer and potable and

non-potable water service and facilities (CF, p. 797). *See* Agreement at Section 2.18 (CF, p. 829). Further, under Section 2.3, LEI has a vested right to dedicate its Chubbuck Inches to meet its water dedication requirements under the 2010 Code. *Id*. at §2.3 (CF, p. 825). Under this section, the City is obligated to apply the 2010 Code on a uniform and non-discriminatory basis and must allow LEI to satisfy its water dedication requirement with conditions, standards and dedications no more onerous than imposed by the City on other developers under the 2010 Code. *Id*. at 11-12 (CF, pp. 797-798). These duties and obligations do not exist in tort law – they arise solely and exclusively out of the Annexation Agreement.

Under Section 2.2.19 of the Annexation Agreement, LEI's rights to development were vested under the 2010 Code:

> The requirements, standards and specifications for every application, permit or plan submitted by Owner shall be those in effect as of the Effective Date, unless otherwise agreed to by Owner.

(CF, p. 798). *See also* Parker Affidavit at Attachment 1, Agreement at Section 2.2.19 (CF, p. 816). Thus, LEI has a vested right to develop under the 2010 Code.

Section 19.04.080 of the 2010 Code specifically identified Chubbuck Inches as a source of ditch water rights acceptable to the City at the time the Annexation Agreement was executed (CF, p. 798). *See also* Section 19.04.080(C) (CF, p. 893). According to the City, this section was intended to identify the sources of

water that the City would accept. *See id.* at 12 (CF, p. 798); City Depo (Dewey) at 165:16-166:13, 177:8-10, 178:21-179:10 (CF, pp. 873-874); and *Compare* 2012 Code (CF, p. 899) *with* 2016 Code (CF, p. 910), Owen Affidavit. Finally, Section 19.04.090 of the 2010 Code provided *water rights owed* by an applicant who has obtained and possesses a vested right to undertake and complete development "shall be calculated in accordance with the water rights provisions in effect on the date the applicant's right to develop was vested…." *See id.* at 12 (CF, p. 798), Exhibit D, at Attachment 2, 2010 Code at §19.04.090 (CF, p. 894).

Under the Annexation Agreement and 2010 Code, LEI has a vested right to calculate its water rights owed under the 2010 Code, which expressly allowed for dedication and conversion of Chubbuck Inches (CF, pp. 798-799). Prior to the Settlement Agreement, every other developer holding Chubbuck Inches was permitted to dedicate their Chubbuck Inches for municipal credits under the 2010 Code. *Id.* at 13 (CF, p. 799). Indeed, the City had previously accepted and converted almost 90% of all Chubbuck Inches in existence. *Id.* (CF, pp. 798-799). LEI asserts that the City's failure to accept and exchange LEI's Chubbuck Inches, as the City had done for every applicant before LEI, fails to apply the 2010 Code to LEI on a uniform, consistent, nondiscriminatory basis with other applicants and developers constitutes a breach of the Annexation Agreement.

The City argues that "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." *Opening Brief* at 32. As set forth above, this is simply not true. LEI's claims against the City arise out of the obligations set forth in the Annexation Agreement. Complaint ¶¶64-65, 68-70 (CF, pp. 11-12). The obligations and duties described above did not exist prior to execution of the Annexation Agreement, and the City's breach of those obligations and duties is not related to the City's failure to inform LEI of the Settlement Agreement prior to the execution of the Annexation Agreement. Instead, the breach occurred after the Annexation Agreement was executed when the City refused to accept LEI's Chubbuck Inches in satisfaction of LEI's water dedication requirements.

The City makes much of LEI's allegations that LEI was unaware of the Settlement Agreement and that the City simultaneously negotiated the Settlement Agreement and the Annexation Agreement. Despite the City's selective quoting of LEI in the "Record Below Pertaining to LEI's Appealed Claims" section of its Opening Brief, the fact that LEI included allegations in the Complaint demonstrating the City's knowledge of both the Settlement Agreement and the Annexation Agreement does not mean that LEI's claims *arise out of* those

allegations. Such allegations may ultimately serve to demonstrate that the City's conduct was especially egregious, and that its breach of the Annexation Agreement was intentional and knowing. However, the inclusion of those allegations does not change the nature of LEI's claims, which arise out of the City's breach of the promises contained in the Annexation Agreement. It is the Annexation Agreement, and only the Annexation Agreement, that sets forth the City's obligations to LEI. Those obligations are not recognized in tort law.

The City also confusingly faults the District Court for its consideration of the remedy sought by LEI. *Opening Brief* at 35-36. Specifically, the City argues that "[t]he 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." *Id*. at 36. However, the City correctly states elsewhere in its brief that Colorado courts "must look at the nature of the alleged injury and the relief sought . . . ." *Opening Brief* at 27-28 (citing *Open Door Ministries*, 373 P.3d at 579). In *Robinson*, the Colorado Supreme Court specifically stated that "[a]lthough the nature of the relief requested is not dispositive on the question of whether a claim lies in tort, the relief requested informs our understanding of the nature of the injury and the duty allegedly breached." 179 P.3d at 1003-04 (citing *City of Colo. Springs*, 993 P.2d at 1170-76); *see also Open Door Ministries*, 373 P.3d at 579

(noting that an inquiry into the type of relief sought follows the initial inquiry into the nature of the injury alleged). Therefore, it was proper for the District Court to consider that "LEI seeks specific performance under the Annexation Agreement, a contractual remedy."

Generally, actions seeking compensatory damages for personal injuries lie in tort, whereas equitable and non-compensatory claims lie in contract. *See City of Colo. Springs*, 993 P.2d at 1174. The Appealed Claims request that the City be compelled to honor LEI's Chubbuck Inches. Complaint ¶¶66, 71 (CF, pp. 11-12). Indeed, pursuant to the terms of the Annexation Agreement, the *only* legal remedies that LEI may seek against the City are non-monetary forms of relief such as specific performance. *See* Parker Affidavit at Attachment 1, Agreement at Section 2.25 (CF, p. 830). By contrast, a plaintiff fraudulently induced into entering into a contract has available to it a different set of remedies altogether – rescind the contract or affirm the contract and seek damages. *W. Cities Broad., Inc. v. Schindler*, 849 P.2d 44, 48 (Colo. 1993). LEI seeks neither. The fact that the only remedies available to LEI are non-economic and equitable in nature, and are based solely on the terms of the Annexation Agreement, precluded any possibility that LEI could have asserted these contractual claims as tort claims. It could not.

3. LEI's Claims could not have been Alternatively Pled as Tort Claims.

The City argues that its "alleged misrepresentation and omission of the material and existing fact that . . . the City could not and would no longer accept Chubbuck Ditch rights into the City's water bank . . . would plainly support a tort claim for negligent or intentional misrepresentation." *Opening Brief* at 35. However, as the District Court recognized, LEI has not alleged that the City "expressly promised to accept Chubbuck Inches with the intent to lure LEI into the Annexation Agreement." *Order* at 8 (CF, p. 1773). Rather, LEI alleges that the City has failed to uphold its promise to provide customary municipal services on a uniform and non-discriminatory basis and to apply the 2010 Code in a uniform and non-discriminatory manner.

The City cites to several cases in support of its argument that LEI's claims could have been alternatively pled as tort claims. However, none of these cases involve facts similar to those presented here. The City argues that, similar to the plaintiff in *Robinson*, LEI "has alleged that its injury stems from the City's pre-contractual misrepresentation and material omissions." *Opening Brief* at 34. In *Robinson*, the Court ultimately concluded that the plaintiff's injury "[arose] out of the Lottery's misrepresentations regarding the availability of the represented prizes, which induced the purchase of scratch tickets." *Robinson*, 179 P.3d at

1005. Thus, the "essence of the injury [was] tortious in nature." *Id.* By contrast, in *Berg v. State Bd. of Agriculture*, the Colorado Supreme Court found that the plaintiff's claims were "premised specifically on the alleged facts that defendants (1) promised to provide health care coverage . . . and (2) failed to provide such coverage." 919 P.2d 254, 259 (Colo. 1996).

Although the City strains to compare this case to *Robinson,* it is much more similar to *Berg* because LEI's claims are premised on the obligations set forth in the Annexation Agreement. Complaint ¶¶63-71 (CF, pp. 11-12). The City promised to provide municipal services to LEI on a uniform and nondiscriminatory basis, and promised to apply the 2010 Code on a uniform and non-discriminatory basis. The City has thus far failed to honor these promises, which did not exist until the execution of the Annexation Agreement. Therefore, the District Court correctly found that LEI's claims arise out of a breach of a promise detrimentally relied upon, rather than a negligent or fraudulent misrepresentation made by the City.

The City also erroneously relies on *Lehman v. City of Louisville*, 847 P.2d 455 (Colo. App. 1992). Opening Brief at 29-30. However, the plaintiffs' claim in *Lehman* rested entirely on the defendant's misrepresentation to the plaintiffs prior to the plaintiffs' purchase of a property. *Id.* at 456. Unlike this case, it does not

appear that the *Lehman* plaintiffs cited to any obligation created by the purchase contract or made any allegations that the defendant breached any provisions of the purchase contract. *See id.* at 456-57. Therefore, despite the fact that the plaintiffs characterized their claim as one of estoppel, the *Lehman* court held that the essence of the claim was either a negligent or intentional misrepresentation and sounded in tort. *Id.* at 457.

Finally, the City relies on *Foster v. Bd. of Governors of the Colo. State Univ*, in which the plaintiff's property was destroyed by a fire at a Colorado State University's laboratory. The plaintiff subsequently sued the university for breach of an oral bailment contract. *Id.* at 499. The court held that the plaintiff's claim actually sounded in tort because (1) the university's liability would depend on proof of negligence, i.e. tortious conduct; (2) the duty that the university allegedly breached was imposed by law (the duty to act with reasonable care), not from a promise between the parties; and (3) a claim for damage to bailed property can be pled alternatively in contract or in tort. *Id.* at 503. None of these factors are present here.

This is not a case that involves physical harm to persons or property. Nor is it a case in which the plaintiff claims that the defendant has breached a duty imposed by the law. This is a case in which the City has failed to adhere to the

terms of a contract it entered into with LEI. Therefore, LEI's claims lie in contract, not tort.

CONCLUSION

For the reasons set forth above, LEI respectfully requests that this Court affirm the District Court's order holding that the Appealed Claims are not barred by the CGIA.

Respectfully submitted this 27th day of June, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June, 2018, a true and correct copy of **RESPONDENT-APPELLEE LOVELAND EISENHOWER INVESTMENTS, LLC'S ANSWER BRIEF** was filed and/or served electronically via Colorado Courts E-Filing and/or sent via U.S. Mail, postage prepaid as follows:

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In accordance with C.R.C.P. 121 §1-26(9), a printed copy of this document with original signature(s) is maintained by Waas Campbell Rivera Johnson & Velasquez LLP, and will be made available for inspection by other parties or the Court upon request.