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Petitioner – Appellant: THE CITY OF LOVELAND **v.** **Respondent - Appellee:** LOVELAND EISENHOWER INVESTMENTS, LLC, a Colorado limited liability company	
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APPELLANT'S REPLY 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 5,484 words which is not more than the 5,700 word limit.

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).

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

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Defendant-Appellant, the City of Loveland ("**City**" or "**Appellant**"), by and through its undersigned counsel, submits this Appellant's Reply Brief in support of its Appellant's Opening Brief and to further address issues raised by Plaintiff-Appellee, Loveland Eisenhower Investments, LLC ("**LEI**") in its Answer Brief.

I. SUMMARY OF THE REPLY ARGUMENT

LEI's Answer Brief reinforces the conclusion that the City is immune from LEI's claims for breach of contract and breach of the duty of good faith and fair dealing (the "**Appealed Claims**") for two primary reasons.

First, LEI's own characterization of its claims provide significant indicia that LEI has suffered an injury. LEI's Answer Brief fails to refute this point, as it, like the District Court Order, merely conflates the "injury" alleged by LEI with the relief sought in this case. Colorado courts have made clear that once a public entity expresses its intention to act or not act, and that stated intention results in a change of circumstances for the plaintiff, an injury has occurred for purposes of the CGIA.[1] LEI's Appealed Claims are based upon the City's failure and refusal to accept LEI's Chubbuck Inches This has resulted in an alleged cessation of development at the project by LEI, rendering LEI's water rights worthless, and

[1] Defined terms in this Reply Brief have the same meaning as defined terms in the Opening Brief, unless otherwise defined herein.

causing LEI's need to obtain alternative water rights to contribute to the City in satisfaction of its water rights' contribution requirements for development.

Second, despite LEI's efforts to reiterate that it has stated a valid contract claim, its analysis of the CGIA's broad immunity provisions presents the same flaws present in the District Court's Order—that LEI's Appealed Claims *could* have been stated in tort. The CGIA acts as a general bar to claims against a public entity unless those claims arise solely in contract. LEI's Answer Brief fails to adequately address this standard, and indeed reinforces that LEI's claims could have been brought in tort and are accordingly barred by the CGIA.

II. REPLY ARGUMENT

A. LEI's Appealed Claims are Barred by the CGIA.

LEI's Answer Brief suffers from the same flaws found in the District Court's December 20, 2017 Order (the "**Order**") denying the City's motion to dismiss LEI's Appealed Claims for lack of subject matter jurisdiction. To that end, LEI's Answer Brief fails to refute that the applicable standards and precedent reveal that the claims asserted by LEI in support of the Appealed Claims could have been stated in tort, and are thus barred by the CGIA for lack of subject matter jurisdiction.

1. LEI has Already Suffered an Injury.

As the record below establishes, and LEI's Answer Brief fails to disprove, LEI's Appealed Claims are not analogous to those asserted by the claimant in *Open Door Ministries v. Lipschuetz*, 373 P.3d 575 (Colo. 2016) ("***Open Door Ministries***"). Rather, LEI's Complaint clearly alleges a present and continuing injury for which LEI seeks relief. Such an injury could support a claim for tortious conduct, necessitating analysis of whether LEI's claims lie, or could lie, in tort.

As discussed in the Opening Brief, the District Court's Order concluded that LEI's Appealed Claims could not lie in tort because they sought relief to "prevent future harm," relying solely on the Colorado Supreme Court's opinion in *Open Door Ministries*. (CF, pp 1771 – 1772.) LEI never characterized its injury as prospective only in <u>any</u> of the briefing below, nor in its Complaint. Nonetheless, LEI now recasts the nature of its injury to make the District Court's conclusion appear more plausible. In doing so, LEI, like the District Court in its Order, conflates and confuses the nature and existence of LEI's injury—an inability to contribute its Chubbuck Inches to the City—with quantifying the extent of its damages resulting from the injury.

LEI does not dispute that CGIA immunity applies when a complaint alleges an injury. *Open Door Ministries*, 373 P.3d at 579. This is a separate inquiry from whether the claim could lie in tort. *Id.* (citing *Robinson v. Colo. State Lottery Div.*, 179 P.3d 1003, 1005 (Colo. 2008) ("***Robinson***")). Important here, the CGIA is applicable "only to claims that allege that an injury has already occurred." *Id.* However, "[w]hen 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."' *Id.* (citing and quoting *Robinson*, 179 P.3d at 1005). Applying the first prong of this analysis to the allegations in the Complaint, it is evident that LEI has alleged an injury that has already occurred and that LEI's claims are thus covered by the CGIA.

a. LEI's Complaint and the record below establish that LEI has asserted the existence of a present and continuing injury, for which it seeks relief.

Fairly read, LEI's Complaint asserts that the City will not provide LEI's proposed development with water service because the City will not accept the water rights that LEI wishes to contribute in exchange for that water service. LEI's injuries, in the context of this case, are present and tangible—even if they are not yet fully quantified.

The injury alleged and continuously asserted by LEI throughout this case is economic. The City's refusal to accept LEI's water has the existing economic consequence of halting LEI's development, unless and until it can purchase replacement water rights or pay the City cash-in-lieu of the water rights required to meet the City's dedication requirements. *See* Answer Brief at p. 12 ("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." (Emphasis added.)). Now, LEI seizes upon the fact that its water rights do not need to be contributed to the City at the current time. Answer Brief at p. 12. But, the injury that gives rise to this lawsuit already exists as the result of the City's transparent and proactive communication that it will not accept LEI's water rights, irrespective of when LEI affirmatively asks the City to take them. Thus, LEI's knowledge that it cannot proceed to build out its development under the *status quo* creates a present, economic injury.

More specifically, LEI's Appealed Claims assert that LEI has suffered the following: a cessation of development of its project, Answer Brief at p.12 (noting that "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."); rendering LEI's Chubbuck Inches as worthless and "effectively stranded" (CF, p

135; CF, p 149, ¶ 33); and, absent an order from the District Court mandating the City's acceptance of water rights that the City has complete discretion to deny,[2] the need for LEI to expend resources to purchase alternative, acceptable water rights to satisfy the City's water rights contribution requirements. (CF, p 148, ¶¶ 16, 33 (noting that without the Chubbuck Inches "LEI did not have sufficient water to serve the Project and would be forced to purchase additional water from other sources" and that "LEI will be forced to purchase very expensive water to replace the stranded Chubbuck Inches that it cannot use on its Project in order to meet its water dedication requirements.").) To be sure, LEI has asserted a claim against the City for a present, alleged breach of the Annexation Agreement based upon "the City's [alleged] failure to accept and exchange LEI's Chubbuck Inches as the City had done" for other applicants, which "constitutes a breach of the Annexation Agreement." Answer Brief at p. 20. Tellingly, LEI has even gone so far as to provide a preliminary quantification of the potential monetary impact of its injury in a Colo. R. Civ. P. 26(a)(2) expert report—a fact which LEI does not dispute. Answer Brief at p. 11.

[2] *See* LMC § 19.04.080(C). (CF, p 893; CF, p 706.) This provision of the Loveland Municipal Code states and at all applicable times has stated that "[n]o ditch rights shall be accepted by the city unless first approved by the Loveland utilities commission" and that "[s]aid approval shall not be given without . . . [a] finding by the Loveland utilities commission that it is in the city's best interests to accept the ditch water rights." (CF, p 893; CF, p 706.)

This description of LEI's Appealed Claims and the impact of the City's actions on LEI readily establishes the existence of a present injury for purpose of the CGIA.

b. LEI's discussion of extraneous matters in the Answer Brief does not alter the fact that LEI has alleged an injury.

Additionally, LEI's Answer Brief misdirects the inquiry into the nature of its injury by pointing to extraneous aspects of its legal theories. These matters do not alter the fact that LEI has alleged a present and continuing injury for purposes of the CGIA.

i. The nature and existence of LEI's injury is independent of its final quantification of damages.

First, LEI claims that it is not injured because it has yet to pay for replacement water rights. Importantly, however, for purposes of the CGIA analysis, only a present injury is required, not the complete quantification of damages. *See Open Door Ministries*, 373 P.3d at 579. However, a claimant does not have to finally quantify its monetary damages to suffer an "injury" for purposes of the CGIA. *Cf. City of Lafayette v. Barrack*, 847 P.2d 136, 139 (Colo. 1993) ("***Barrack***"). Rather, a stated change to the *status quo* or present policy of a public entity that impacts the claimant (there provision of water service which reduced the market value of the claimant's property) is sufficient to constitute a cognizable

"injury." *Id.* This is precisely the sort of "injury" that has been alleged by LEI in this lawsuit.

In the Answer Brief, LEI attempts for the first time to analogize the Appealed Claims to those of the claimants in *Open Door Ministries* to provide support for the District Court's holding. In light of the facts alleged in support of the Appealed Claims and the record below, LEI's arguments wholly miss the mark by similarly misdefining "injury," conflating it with final quantification of actual monetary damages. To that end, LEI argues that the Complaint "does not identify any injuries or specify any damages suffered by LEI," and that LEI has not yet been injured because it "has not yet had to purchase additional water rights to satisfy its contribution requirement." Answer Brief at pp. 10–11.

In LEI's own words, its Appealed Claims seek relief in the form of a mandate that the City accept LEI's Chubbuck Inches because "the City has refused" to do so, in light of the Settlement Agreement. Answer Brief at p. 10. Indeed, LEI's Answer Brief, like its pleadings and briefing in the District Court, is riddled with indicia that LEI has alleged that it suffered an injury, and seeks relief from the City for that injury in this lawsuit. For example, LEI's Answer Brief argues at length that the City has breached the Annexation Agreement by refusing to accept LEI's Chubbuck Inches. *See, e.g.*, Answer Brief at pp. 18–23. While this

is not dispositive of the City's position that LEI's Appealed Claims could lie in tort and are barred by the CGIA, as discussed below at pp. 14–22, LEI plainly asserts that LEI's claims are based upon the City's "failure to accept and exchange LEI's Chubbuck Inches . . . [which] constitutes a breach of the Annexation Agreement." Answer Brief at p. 20. LEI specifically stated in its Answer Brief that this breach already occurred, "when the City refused to accept LEI's Chubbuck Inches in satisfaction of LEI's water dedication requirements." Answer Brief at p. 21. The immediate impact of the City's refusal and inability to accept LEI's Chubbuck Inches is that the City will not provide LEI's proposed development with water service, as the rights LEI wishes to contribute in exchange for that water service are unacceptable to the City.[3]

Simply put, quantifying the extent of an injury is different from the existence of an injury. Much like a personal injury plaintiff who has suffered a back injury, the fact that the plaintiff has yet to incur the expense of back surgery does not negate the existence of the injury. Thus, the knowledge that LEI cannot proceed with its development without acquiring different water rights has inflicted the

[3] As noted above, the Loveland Municipal Code affords the City broad discretion to accept or reject a developer's ditch water rights. *See* LMC § 19.04.080(C) (CF, p 893; CF, p 706.)

economic injury. The fact that LEI has yet to spend its resources purchasing water rights or credits merely quantifies that injury.

ii. An analysis of contingent possibilities following a Court ruling is irrelevant to a determination of the nature and existence of LEI's injury.

Similarly, LEI's Answer Brief mistakenly attempts to point to future events. For example, LEI argues that if the City will continue its current position of acceptance of LEI's water, the City's refusal to extend LEI's vested rights, and the District Court's ability to remedy LEI's injury to help define whether LEI has been presently injured. *See* Answer Brief at pp. 12–13. As described by LEI's Complaint and discussed above, the *status quo* is that LEI cannot and will not receive City water service for its development. This creates a current impediment and economic injury to LEI's ability to complete its development. Pointing to something the City may or may not do to change the *status quo* of an injury is inconsequential for purposes of the present injury analysis.

In that same vein, LEI's claim that the District Court could remedy its injury provides a poor guidepost for discerning the existence of a present or future injury. Indeed, nearly every claim brought by a claimant seeks judicial relief to remedy an injury. This case presents nothing different. LEI's Answer Brief argues that a successful lawsuit by LEI remedies LEI's troubles by forcing the City to accept

LEI's water rights. Answer Brief at p. 15–16. This is no different than a judge or jury awarding full damages to compensate a plaintiff for an injury. In this case, however, the Annexation Agreement limits LEI to pursuit of specific performance, injunctive, or declaratory relief only. (CF, p 165, § 2.25.) Whether the relief is legal or equitable, this Court should disregard the fact that the District Court can remedy LEI's injury as it is poor indicia of a present or future injury.

c. Prior application of the CGIA reinforces the present nature of the injury alleged by LEI in the Appealed Claims.

Contrary to LEI's characterization, *Open Door Ministries* creates a very narrow, circumstance-specific exception to the applicability of the CGIA for claims against public entities based upon equitable estoppel theories, where the relief sought by the claimant is a declaration from the court preventing a change from the *status quo*. *Open Door Ministries*, 373 P.3d at 579. In that case, the Colorado Supreme Court addressed the narrow issue of "whether the CGIA applies to claims based on a threatened or future injury." *Id.* In short, the Court there held that because the claims asserted by *Open Door Ministries* sought to prevent the Denver Zoning Authority from taking an action in the future that would alter the *status quo* and result in injury by revoking a permit held by the claimant that had already been issued, that no present injury had been alleged by *Open Door Ministries* and the CGIA did not apply. *Id.* at 581. At the time the claims were

asserted, *Open Door Ministries* held a valid permit to operate the subject property for its intended purpose, and was so operating. *Id.* Thus, the Court held that it had not yet been injured because no revocation had yet occurred. *Id.*

In reaching this conclusion, the Colorado Supreme Court discussed and analyzed the Court's prior opinion in *Barrack*, as instructive to the question of when Open Door Ministries' injury had occurred. In *Barrack*, the Court held that claims for estoppel and declaratory judgment *did* allege a present injury because Lafayette had already "adopted a resolution stating its intent to terminate water service" and notified residents of such. *See id.* at 580 (citing *Barrack,* 847 P.2d at 137. There, Lafayette had determined it must terminate water service to certain residences in Eldorado Springs, and adopted a resolution stating its intent to terminate water service. *Id.* The Court there held that the "injury" to the claimants, for the purposes of the CGIA, was deemed to have been triggered "when they received notice of the resolution of the city council terminating their water service," causing a decrease in their property values. *Id*. The claims asserted by the claimants there sought to prevent Lafayette from terminating water service, arguing that the threat of termination rendered their properties unmarketable. *Id.* at 137. Thus, the "injury" was not Lafayette's actual termination of water service, but

rather its stated intent to terminate water service which had "a direct and immediate impact on the value of [the claimants'] property." *Id.*

Extrapolating from this opinion and applying it to the question of whether the CGIA applies to claims for prospective injury, the Court in *Open Door Ministries* explained that the plaintiffs in *Barrack* "were injured by [] Lafayette's resolution to terminate water service," whereas "Open Door [Ministries] was not immediately injured by the possibility that" the litigation would result in a change to the *status quo,* and revocation of its permit. *Open Door Ministries*, 373 P.3d at 580.

Like the claimants in *Barrack,* LEI's claims were filed after the City had already informed LEI that it could not and would not accept LEI's Chubbuck Inches as a pre-condition to provide water service. (CF, p 149, ¶ 32; CF, p 1439, 16:3-10; CF, pp 1440–1441, 32:19-33:2.) This notice by the City of its inability to accept LEI's Chubbuck Inches operates much like the notice received by the claimants in *Barrack*, notifying the claimants of Lafayette's intent to stop providing water service. This present injury forms the basis for LEI's Appealed Claims, even though the time to contribute has not yet occurred, as the City has advised that it will not accept the water rights LEI wishes to contribute

d. LEI's allegations in support of its claims against GLIC further evidence a present and continuing injury.

The Complaint establishes, and LEI does not dispute, that it has also asserted tort claims against GLIC in this matter based upon the City and GLIC's entry into the Settlement Agreement and the resulting impacts upon LEI, and that LEI seeks monetary damages for those claims. (CF, pp 13–14, ¶¶ 88–96; Answer Brief at pp 14–16.) LEI's Answer Brief unpersuasively argues that no "injury" for purposes of the CGIA has yet occurred, despite the existence of these claims and the asserted damages. In an attempt to sell this argument, LEI merely states the Colorado Rules of Civil Procedure permit claimants to plead inconsistently, insinuating that LEI has "inconsistently" pled that it was injured by GLIC such that it has suffered monetary damage in support of its claims against GLIC, but that no injury has yet been alleged or occurred for purposes of the CGIA and the Appealed Claims. *See* Answer Brief at pp. 14–15 (citing Colo. R. Civ. P. 8(e)). Tellingly, LEI has cited to *no* case law supporting this argument or establishing that a claimant may inconsistently allege, on the basis of the same operative facts,[4] that an injury has occurred as to one defendant but not as to another.

[4] LEI also argues that the claims do not arise out of the same "operative facts," citing the District Court's statement each of LEI's claims "require different facts to either fail or succeed as a matter of law." Answer Brief at p. 16. However, this wholly ignores that the allegations giving rise to LEI's Appealed Claims, like its

Indeed, what LEI really asserts is that if the District Court were to provide it with the relief sought against the City, it would be made whole for the injury that it has suffered (an inability to contribute its Chubbuck Inches), and that it would no longer require or seek monetary damages from GLIC for that injury. *See* Answer Brief at pp. 15–16. LEI's efforts in pointing to the possibility that its alleged injury may or could be remedied should the relief sought in this lawsuit be awarded does not compel the conclusion that no injury has yet occurred. Indeed, it reinforces that a present injury exists.

2. LEI's Appealed Claims Are Barred by the CGIA Because the Could Have Been Pled in Tort.

Additionally, LEI's analysis in its Answer Brief suffers from the same fundamental flaw and misunderstanding as that of the District Court: principally focusing on what *was* asserted by LEI in the Complaint. Yet, LEI wholly fails to articulate or establish that the Appealed Claims could not also have been pled in tort. Because the alleged facts giving rise to LEI's Appealed Claims *could* have established a claim or claims that lie in tort, those claims are barred by the CGIA and subject to dismissal for lack of subject matter jurisdiction.

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tort claims against GLIC, center around the City and GLIC's entry into the Settlement Agreement and the City's subsequent refusal and inability to accept LEI's Chubbuck Inches. (CF, pp 8–12, ¶¶ 41–42, 49–51, 52–71.)

a. The CGIA bars all claims that could lie in tort.

Colorado courts have repeatedly explained, and LEI does not dispute, that "[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)). Thus, the statutory language itself makes clear that the CGIA bars not only tort claims, but also claims which are not, but could be stated as claims for tortious conduct against a public entity. *See Berg v. State Bd. of Agric.*, 919 P.3d 254 (Colo. 1996).

In applying this standard and determining whether a plaintiff's stated claims against a public entity are barred by the CGIA, the form of the complaint and the claims alleged are not determinative. *Colo. Dep't of Transp. v. Brown Grp. Retail*, 182 P.3d 687, 690 (Colo. 2008). Rather, the dispositive question is whether the claim is, or even could be, a tort claim. *Patzer v. City of Loveland*, 80 P.3d 908, 910 (Colo. App. 2003).

b. Whether LEI has stated a valid claim for breach of the Annexation Agreement is irrelevant to the Court's CGIA analysis.

Notwithstanding the flaws inherent in LEI's Appealed Claims on the merits, the existence of a valid claim for breach of contract does not overcome the basic

premise that the CGIA operates as a bar to all claims that lie, or could lie, in tort. *Robinson*, 179 P.3d at 1005.

LEI's Answer Brief discusses at length the theory behind LEI's Appealed Claims and the alleged facts supporting those claims, in an apparent attempt to establish that LEI has stated valid claims for breach of the Annexation Agreement. *See* Answer Brief at pp. 18–23. But the Answer Brief disregards the Colorado Supreme Court's instruction that "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 v. Bd. of Governors of the Colo. State Univ.*, 342 P.3d 497, 501 (Colo. App. 2014) ("***Foster***") (citing *Robinson*, 179 P.3d at 1004–1005). Thus, "the 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, the claim is not barred only if it arises "solely in contract," and could in no way give rise to a claim for tortious conduct. *Foster*, 342 P.3d at 501.

For example, the Colorado Supreme Court in *Robinson* held that the plaintiff's claims were barred by the CGIA, despite the fact that they had been pled or could be stated as contract claims. *Robinson*, 179 P.3d at 1005. Because the claims there "ar[ose] out of the [defendant's] misrepresentations" regarding the

availability of what was allegedly promised, which induced the plaintiff to enter into the agreement she sued on, the Court held that those claims were barred by the CGIA. *Id.* The Court reached this holding irrespective of the fact that the plaintiff urged that her injury arose out of the defendant's failure to deliver what was offered, and irrespective of whether the facts could have supported a claim for breach of any contractual duties. *Id.* Thus, whether the facts alleged by LEI support a valid breach of contract claim is wholly irrelevant to the CGIA analysis required in this case.

Further, while the flaws in the merits of the claims pled by LEI are not dispositive of the CGIA analysis, it is noteworthy that LEI has not pointed to any contractual provision in the Annexation Agreement expressly requiring or promising the City's acceptance of LEI's Chubbuck Ditch water rights. *See* Answer Brief at pp. 18–20. Indeed, no such provision exists. LEI's own briefing in the District Court reinforced this fact, arguing that "[t]he [Annexation] Agreement does not explicitly mention or require acceptance and conversion of LEI's Chubbuck Inches for municipal credits to satisfy LEI's water dedication requirements." (CF, p 140.) Neither does any applicable provision of the Loveland Municipal Code. (*See generally*, CF, pp 699–712; CF, pp 885–894.) Rather, the City's ability to accept ditch water rights under the Loveland Municipal Code is

and has always been completely discretionary. (CF, p 893; CF, p 706 (LMC § 19.04.080(C).) Thus, the only source for such a requirement or obligation, should one exist, would have to arise or be based upon a duty outside of the parties' contractual relationship.

c. LEI's Appealed Claims could have been stated in tort.

Irrespective of whether LEI has asserted or could assert a valid claim for breach of the Annexation Agreement, LEI's own description of this case and the facts giving rise to its claims continue to indicate that the facts alleged by LEI in the Complaint and as evidenced in the record below could have supported unasserted claims for tortious conduct against the City. This unequivocally acts as a bar to LEI's Appealed Claims, warranting their dismissal for lack of subject matter jurisdiction.

As ample precedent analyzing the provisions of the CGIA makes clear, if a plaintiff's claim *could* have been stated in tort—it is barred. *See, e.g.*, *Robinson*, 179 P.3d at 1003. Indeed, "[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). 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. Thus, 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 – regardless of the allegations pled or the cause of action chosen by the claimant. *Foster*, 342 P.3d at 501.

Here, it is evident from the pleadings and the record in the proceedings below that LEI has alleged facts and circumstances to exist that LEI *could* have asserted in support of a claim for tortious conduct against the City. (CF, pp 134–135 (noting that "the City enticed LEI to enter into the [Annexation] Agreement and continue development of its Project"); CF, p 140, ¶ 20 (LEI entered into the Settlement Agreement based upon the understanding and belief throughout contract negotiations that "the City would accept [LEI's] Chubbuck Inches in exchange for municipal credits."); CF, p 1312, 178:3-16 (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 and that because of the City's failure to disclose the Settlement Agreement at an earlier time, LEI "didn't know things we should have known if we were being dealt with in a good faith and fair dealing manner"). LEI's allegations and the record below readily show that LEI could have set forth a claim for negligent or fraudulent

misrepresentation on the same facts as those allegedly supporting its Appealed Claims. Consequently, LEI could have plausibly claimed that the City's duty to accept its Chubbuck Inches arose by virtue of the Parties' pre-contractual relationship and not under the terms of the Annexation Agreement.

LEI fails to refute this in any concrete way and merely repeats its refrain that it has pled contract-based claims. Answer Brief at p. 24. However, as noted herein above, what LEI alleges in the Appealed Claims is not dispositive of the CGIA inquiry. Rather, the key consideration is what LEI *could* have alleged and asserted—and whether those claims would lie in tort. *Robinson*, 179 P.3d at 1005 (citing *Berg*, 919 P.2d at 258).

In an attempt to overcome the deficiencies in the claims asserted by LEI under the CGIA, LEI merely attempts to distinguish the case law cited in the City's Opening Brief without analyzing the nature of and allegations asserted in support of its own claims. *See* Answer Brief at pp. 24–27. Each of LEI's attempts, however, falls short—as the Answer Brief further mischaracterizes their applicability to the circumstances presented here on appeal and the nature of LEI's stated claims. *See* Answer Brief at pp. 24–27 (citing *Robinson*, 179 P.3d at 1005; *Berg*, 919 P.2d at 259; *Lehman v. City of Louisville*, 847 P.2d 455, 456–457 (Colo. App. 1992); *Foster*, 342 P.3d at 499–503).

To that end, the case law cited by LEI in its Answer Brief indeed strengthens the City's position that LEI's claims are barred by the CGIA. In *Robinson*, Colorado Supreme Court held that the claims were barred by the CGIA despite being stated in contract and presents facts analogous to those present here. *See Robinson*, 179 P.3d at 1005. There, the claims arose from alleged false representations regarding the availability of prizes that induced the purchase of scratch tickets (*i.e.* entry into the alleged contractual agreement). *Id.* Likewise in *Lehman v. City of Louisville* the claims asserted were based upon alleged representations made prior to the purchase of property, that the plaintiff asserted induced such purchase. 847 P.2d 455, 456 (Colo. App. 1992).

In a similar vein, the Appealed Claims could have been couched as alleged misrepresentations concerning the City's ability and willingness to accept LEI's Chubbuck Inches. (CF, p 149, ¶ 27.) LEI's own characterization of the facts underlying this action and the Appealed Claims are that the City knew that LEI intended to utilize its Chubbuck Inches, 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 them, enticing LEI to enter into the Annexation Agreement. (CF, p 134.) These allegations fit squarely within the Court's analyses in *Robinson* and *Lehman*, further supporting the conclusion that

the Appealed Claims could have been pled in tort and are accordingly barred by the CGIA.

Additionally, the allegations made by LEI in this case and the construction of its claims are a stark contrast to the facts present in *Berg*. In that case, the Court concluded that the plaintiff's claims based upon the alleged facts that a promise was made to provide a certain service pursuant to the terms of a contract, and that service was not then provided, was a claim arising solely in contract and not barred by the CGIA. 919 P.2d at 259. LEI's efforts to analogize its claims to those brought by the plaintiff in *Berg* center around its statement that the "promises" upon which LEI is suing "did not exist until the execution of the Annexation Agreement." Answer Brief at p. 25. This inexplicably ignores LEI's own stated characterization of its claims and the facts allegedly supporting them in the record of the proceedings below.

Accordingly, LEI's Appealed Claims could have just as easily been pled in tort, subjecting them to dismissal for lack of subject matter jurisdiction under the CGIA.

III. CONCLUSION

The District Court's Order denying the City's Motion to Dismiss should be reversed, and this Court should hold as a matter of law that LEI's Appealed Claims could sound in tort and are thus barred by the CGIA.

Respectfully submitted: July 19, 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 19th day of July, 2018, a true and correct copy of the foregoing **APPELLANT'S REPLY 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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