District Court, Boulder County, State of Colorado 1777 6th Street Boulder, CO 80302	
Plaintiffs: DAVID RECHBERGER, NICOLETTE MUNSON, ROLF MUNSON, LAUREL HYDE BONI, DINAH MCKAY, DONALD SHERWOOD, WILLIAM B. SWAFFORD, JR., MARILYN KEPES, DONALD WREGE, and DOUGLAS JOHNSON, v. **Defendants:** BOULDER COUNTY BOARD OF COUNTY COMMISSIONERS and BOULDER COUNTY HOUSING AUTHORITY.	▲ COURT USE ONLY ▲
David Chipman, No. 25784 John M. Bowlin, No. 42276 CHIPMAN GLASSER, LLC 2000 S. Colorado Blvd. Tower One, Suite 7500 Denver, CO 80222 Telephone: (303) 578-5780 Fax: (303) 578-5790 E-mail: dchipman@chipmanglasser.com E-mail: jbowlin@chipmanglasser.com *Attorneys for Plaintiffs*	Case No.: 17CV30818 Div.: 2
RESPONSE OPPOSING DEFENDANTS' MOTION TO DISMISS	

Plaintiffs respond in opposition to Defendant's Motion to Dismiss ("**Motion**"), stating as follows.

INTRODUCTION

Boulder County explicitly agreed that if the voters in the Gunbarrel Public Improvement District ("**GPID**") voted for higher taxes for open space purchases, Boulder County would

"provide a matching contribution towards open space purchase within [the GPID] up to a maximum amount of $1,900,000." Compl. ¶ 38. The County performed under this agreement for a time. But now—even though the County has not yet contributed $600,000 of the promised matching funds—the County seeks to disavow the agreement. Worse yet, the County has attempted to transfer to the Boulder County Housing Authority (which it also controls) what appears to be the last remaining open space available to satisfy the matching agreement. Plaintiffs brought this action to enforce the agreement and unwind the transfer of the open space the property.

Defendants' Motion makes two basic arguments, neither of which has merit. First, under C.R.C.P. 12(b)(1), Defendants argue that Plaintiffs lack standing. They misportray Plaintiffs as typical disgruntled members of the general public angry about how the government spends money. In so doing, Defendants ignore the Complaint's detailed allegations that the County unambiguously made *specific* promises (to provide $1.9 million of matching funds if the residents approved the new taxes) to a *specific* group (Gunbarrel property owners) for a *specific* purpose (to purchase open space within the GPID) and then breached that promise. Defendants also misstate and misapply the governing cases on standing. Plaintiffs easily satisfy both of Colorado's standing requirements: an "injury in fact" and a "legally protected interest."

Second, under C.R.C.P. 12(b)(5), Defendants assert that the Complaint fails to state a claim upon which relief can be granted. In so doing, Defendants simply ignore—again—the Complaint's 130 paragraphs of detailed allegations supporting each element of each claim, and misconstrue the governing cases.

Defendants' Motion should be denied.

BACKGROUND

Boulder County promised that if the voters in the GPID would agree to higher taxes for open space purchases, Boulder County would "provide a matching contribution towards open space purchase within [the GPID] up to a maximum amount of $1,900,000." Compl. ¶¶ 25-48. Boulder County initially complied with the agreement, contributing $1,305,634 of the agreed-upon match. *Id.* ¶¶ 49-56. But Boulder County promised the Gunbarrel residents $1,900,000, not $1,305,634.

Boulder County was offered the opportunity to purchase what appears to be the last remaining "open space" parcel in the GPID, and Boulder County had plenty of promised "match" funds to do it. *Id.* ¶¶ 60-64. Instead of complying with the match agreement, the Boulder County Board of County Commissioners ("**Board**") (who run the GPID also) sought to transfer the property to the Boulder County Housing Authority (run by the same Board members). *Id.* ¶¶ 60-73. When confronted about this breach, Boulder County at first acknowledged the match agreement. *Id.* ¶¶ 75-77. When confronted again, the county sought to disavow the agreement entirely. *Id.* ¶¶ 79-80.

Plaintiffs, owners of Gunbarrel property, and the beneficiaries of the Board's $1.9 million match agreement, brought this case alleging claims for breach of contract (First Claim), the unwinding of the Boulder County Housing Authority transfer (Second Claim), promissory estoppel (Third Claim), declaratory judgment (Fourth Claim) and, alternatively, mandamus (Fifth Claim).

ARGUMENT

I. Rule 12(b)(1): Plaintiffs have standing under Colorado law to assert their claims.

Standing is a preliminary inquiry requiring the Court to determine whether a party has suffered an "injury in fact" to a "legally protected interest." *Romer v. Colo. Gen. Assembly*, 810 P.2d 215, 218 (Colo. 1991). The requirement of an "injury in fact" is a constitutional prerequisite to a legal action. *Id.* "Colorado courts provide for broad individual standing." *Hickenlooper v. Freedom From Religion Found., Inc.*, 2014 CO 77, ¶ 17. Indeed, Colorado courts turn away cases under the "injury in fact" prong only when the alleged injury is "indirect and incidental to the defendant's conduct." *Id.*; *see also Barber v. Ritter*, 196 P.3d 238, 245-46 (Colo. 2008) (same).

In contrast, the requirement of a "legally protected interest" is not constitutional—it is "a prudential rule of standing based on judicial self-restraint." *Wimberly v. Ettenberg*, 570 P.2d 535, 538 (Colo. 1977). In applying this prudential rule, courts analyze "whether the plaintiff has stated a claim for relief which should be entertained in the context of a trial on the merits." *Id.* at 539. This requirement is satisfied when a plaintiff articulates a legally-recognized theory of claim "under the constitution, the common law, a statute, or a rule or regulation." *Hickenlooper*, ¶ 10; *Barber*, 196 P.3d at 246.

A. Plaintiffs have suffered an "injury in fact."

Defendants employ a strategy to misportray Plaintiffs as nothing more than disgruntled members of the general public who dispute how the government spends money. Motion 6. To make this argument, Defendants must ignore the Complaint. That is *not* what the Complaint alleges, and it is *not* what this case is about.

As detailed in the Complaint, to induce their assent to higher taxes under the GPID, Boulder County made a specific promise to Gunbarrel property owners that if the owners approved the increased taxes, the County would *match* those tax dollars with county dollars (up to $1.9 million) and would dedicate the matching funds to the acquisition of open space. Compl. ¶¶ 25-48. The County performed the contract for a while, contributing $1,305,634 for open space acquisition. *Id.* ¶¶ 49-59. But the County breached the agreement when it failed to acquire what appears to be the last opportunity for open space in the GPID, even though it had plenty of "match" money in its coffers. *Id.* ¶¶ 60-73. When confronted about this breach, the County admitted the existence of the agreement then tried to disavow it entirely. *Id.* ¶¶ 76-77, 80.

Contrary to Defendants' misportrayal, Plaintiffs' claims are not about general discretionary decision-making regarding how, where, and when to purchase land for open space. Plaintiffs' claims are about Boulder County's breach of its specific promise *to Plaintiffs* to match GPID open space dollars, and Boulder County's breach of that specific promise. Plaintiffs didn't get what was mutually agreed on.

Furthering their elected litigation strategy, Defendants try to compare Plaintiffs' situation to the situation of the plaintiffs in *Hickenlooper*, ¶ 15. Defendants assert that Plaintiffs' claims are nothing more than a generalized complaint about "less open space," and argue allowing standing over such claims would mean "any and all members of the public would have standing to challenge literally any government action." Motion 6. The facts of *Hickenlooper* are not remotely close to this case. In *Hickenlooper*, some taxpayers challenged the Governor's annual proclamation of a state day of prayer. *Id.* Knowing that taxpayer standing requires a nexus between the claimant's status as a taxpayer and the challenged government action, the taxpayers

contended the Governor's use of tax money to pay for paper, hard-drive space, postage, and personnel necessary to issue the proclamation provided the nexus. *Id.* The court held that any such injuries were overly indirect.

In contrast, this case is not about a claim that some taxpayers generally want more open space. Boulder County unambiguously promised a *specific* group of property owners to pay a *specific* dollar amount in matching money toward a *specific* goal—purchasing open space in the GPID. Boulder County's failure to pay almost $600,000 of this money, and its attempt to transfer away the last remaining open space option, is a direct injury to Plaintiffs. Here, unlike the allegations in *Hickenlooper*, the Complaint's allegations ensure the kind of "concrete adverseness" that supports standing and "sharpens the presentation of issues to the court." *Id.* at ¶ 9.

B. The injury is to a legally protected interest.

Although the parameters of the "legally protected interest" requirement—"a prudential rule . . . based on judicial self restraint"—appear somewhat (and, perhaps, necessarily) vague, some boundaries are identifiable. The requirement does not demand that a plaintiff to prove his case up front, because if that were the standard, any claim that was ultimately unsuccessful at trial would eliminate standing and deprive the court of jurisdiction. Nor should the "legally protected interest" requirement be conflated, as Defendants seek to do here, with Rule 12(b)(5)'s inquiry into whether the Complaint's allegations, taken as true, state a claim for which relief can be granted.

Rather, the "legally protected interest" inquiry asks whether—assuming Plaintiffs are right that a contract exists or that there was a fraudulent conveyance—the law protects that

interest in pursuing relief. Put another way, once "injury in fact" is established, the next step—identifying a "legally protected interest"—requires only that the plaintiff identify a legally-recognized theory (a claim for relief) through which the plaintiff seeks remedy for the injury. The Plaintiff need only articulate a claim under "the constitution, the common law, a statute, or a rule or regulation" that is recognized by the law and through which the plaintiff seeks a remedy. *Hickenlooper*, ¶¶ 10-11 (summarily concluding that the plaintiff's identification of a claim under the constitution "clearly satisfies" the "legally protected interest" requirement, thus rendering further inquiring into that issue unnecessary) (citation omitted).

Regarding the "legally protected interest" prong, Defendants attack only the contract and fraudulent conveyance claims (they do not dispute the existence of a "legally protected interest" for the promissory estoppel, declaratory judgment, or mandamus claims).

1. **Breach of Contract**. If Plaintiffs' can prove the alleged facts supporting their contract claim, it is undisputable that "breach of contract" is a claim recognized under Colorado common law and, therefore, that the breach of contract claim provides recognized legal protection to the Plaintiff's interest. Defendants' Rule 12(b)(5) attacks on the breach of contract claim do not address the "legally protected interest" prong and are rebutted below.

2. **Fraudulent Conveyance**. Defendants argue that the fraudulent conveyance claim is not available to Plaintiffs because, they say, Plaintiffs are not "creditors" under the Colorado Uniform Fraudulent Transfer Act, C.R.S. §§ 38-8-101 to -112 ("**UFTA**"). This is incorrect. The statute defines "creditors" as anyone who has a claim, whether or not that claim is reduced to judgment. Plaintiffs fit squarely within the "creditor" definition:

> A creditor is a "person who has a claim," and a claim is "a right to payment, whether or not the right is reduced to judgment, liquidated,

> unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."

Double Oak Constr., L.L.C. v. Cornerstone Dev. Int'l, L.L.C., 97 P.3d 140, 147 (Colo. App. 2003) (quoting C.R.S. § 38-8-102(3), (5)).

Defendants further argue that Plaintiffs cannot sue under UFTA because UFTA only applies if Boulder County is insolvent. Motion 7. Again, Defendants are incorrect. Insolvency considerations apply to only one of two alternative methods for proving fraudulent conveyance. A fraudulent conveyance occurs when a debtor makes a transfer, after the creditor's claim arises, if the debtor does so either:

> (a) With actual intent to hinder, delay, or defraud any creditor of the debtor; or
>
> (b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor: (I) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (II) Intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

C.R.S. § 38-8-105(1). Plaintiffs have pleaded a fraudulent conveyance with intent to hinder, delay, or defraud them under subsection (1)(a) (Compl. ¶ 113), and Defendants do not challenge those allegations for purposes of standing. For that reason alone, Defendants' contentions fail. Moreover, as to subsection (1)(b), Defendants are addressing the wrong kind of insolvency. The fraudulent conveyance claim here does not center on a recovery of *money* from a debtor whose transfer leaves insufficient funds to collect; the claim focuses on recovery of *real property* from Boulder County, because the Board's transfer of that property leaves no remaining real property for GPID to obtain for open space.

C. Defendants are not immune from the fraudulent conveyance claim.

Defendants also argue that they are immune from the fraudulent conveyance claim under the Colorado Governmental Immunity Act, C.R.S. §24-10-101 et seq. ("**CGIA**"). Defendants argue that because UFTA uses the word "fraudulent," the claim arises in tort. Motion 8. This argument also is wrong. No Colorado court has found that a claim for fraudulent conveyance lies in tort or could lie in tort.

Nonetheless, without analyzing the elements of the claim, Defendants say fraudulent conveyance *could* lie in tort because "[a] claim that is supported by allegations of . . . fraud is likely a claim that could lie in tort." *Id.* (quoting *Robinson v. Colo. State Lottery Div.*, 179 P.3d 998, 1005 (Colo. 2008) (alterations in Motion)). But fraudulent conveyance claims are not supported by allegations of fraud. Deceit based on fraud consists of knowing misrepresentations, omissions, and concealments that induce reliance by the party who was defrauded. *See* CJI-Civ. 19:1, 19:2. Though the word "fraud" can be found in the term fraudulent conveyance, the elements of the claim are entirely different. Fraudulent conveyance involves showing a below-market-value transfer that makes the debtor insolvent or a transfer intended to obstruct collection by a creditor. C.R.S. § 38-8-105(1). The difference between fraud and fraudulent conveyance is illustrated by the word that Defendants carved out of the quotation reproduced above. The *Robinson* court said, "a claim that is supported by allegations of *misrepresentation or* fraud is likely a claim that could lie in tort." 179 P.3d at 1005 (emphasis added).

Furthermore, Colorado decisions addressing whether exemplary damages can be had for fraudulent conveyance suggest that the claim does *not* lie in tort. Colorado's exemplary damages statute allows punitive damages "for a wrong done to [a] person" or property, where the injury is

attended "by circumstances of fraud, malice, or willful and wanton conduct." C.R.S. § 13-21-102. The Colorado Supreme Court has held that exemplary damages may not be awarded for a fraudulent conveyance because fraudulent conveyance is an "equitable action" not like the wrongful or tortious claims encompassed by the punitive damages statute. *Miller v. Kaiser*, 433 P.2d 772, 777 (Colo. 1967). Accordingly, a claim for fraudulent conveyance does not lie in tort and could not lie in tort, and thus Defendants are not immune from it.

Defendants' standing arguments under Rule 12(b)(1) are unfounded and their Motion under that rule should be denied.

II. Rule 12(b)(5): Plaintiffs have stated claims for which relief can be granted.

A. Plaintiffs are entitled to specific performance.

Citing *Thompson Creek Townhomes, LLC v. Tabernash Meadows Water & Sanitation District*, 240 P.3d 554, 556 (Colo. App. 2010), Defendants argue that Plaintiffs cannot seek specific performance as a remedy to its contract claim. Motion 9. Although it is true that the court of appeals in *Thompson Creek* ruled that a court cannot order specific performance by the government, there is more to this issue.

The Colorado Supreme Court has not addressed the *Thompson Creek* holding.[1] Instead, the supreme court has held that a court cannot order specific performance "to compel the exercise of core governmental powers that rest within the discretion of a coordinate branch of government." *Wheat Ridge Urban Renewal Auth. v. Cornerstone Grp. XXII, L.L.C.*, 176 P.3d 737, 745 (Colo. 2007). This decision rests on concerns over the separation of powers, not on any

[1] No petition for writ of certiorari was filed in the *Thompson Creek* case.

historical conception of sovereign immunity from suit. *See id.* The *Thompson Creek* court failed to recognize this distinction.

Thompson Creek correctly notes that the historical common-law doctrine of sovereign immunity was abrogated in Colorado in 1971, and that only a limited form of immunity—solely for tort and tort-like claims—was enacted by the General Assembly. 240 P.3d at 555. But then *Thompson Creek* goes on to reason, incorrectly, that *Wheat Ridge* suggested the General Assembly could determine the availability of specific performance of non-core governmental powers. *Id.* at 556. It then concludes that because the General Assembly has not expressly allowed a suit for specific performance of non-core governmental powers, no such relief can be granted. *Id.*

This reasoning has the law backwards. When the old doctrine was abrogated, no sovereign immunity remained. Then, when the General Assembly enacted the Colorado Governmental Immunity Act, only the immunity provided in the act came to exist. The Act does not immunize the government from a suit for specific performance of non-core governmental powers, so there is no such immunity. And, the reasoning of *Wheat Ridge* strongly suggests the supreme court would not find that any separation-of-powers concern prohibits such a suit either.

Moreover, *Thompson Creek* failed to account for other instances in which the supreme court has allowed a court to require the government to honor its promises. In *People v. Manning*, 672 P.2d 499, 512 (Colo. 1983), the supreme court held that detrimental reliance on a government promise in the criminal context permitted the court there to fashion the appropriate remedy of specific performance of the promise, noting that such powers are "the essence of equity jurisdiction." And, in *Wheat Ridge*, the supreme court expressly noted that it had allowed

a court to order specific performance of promises under an equitable estoppel theory. 176 P.3d at 745 n.4. *Wheat Ridge* did not overrule these precedents. For all of these reasons, this Court should decline to follow *Thompson Creek*. And, in any event, following clear supreme court precedent, the Court should hold that specific performance of the promise is available as an equitable remedy under Plaintiffs' claim for promissory estoppel.

B. The Complaint alleges a claim for breach of contract.

The Complaint is replete with allegations supporting the creation of a contract (¶¶ 25-48, 76-77, 85-88), partial performance of the contract (¶¶ 49-59, 89), and breach of the contract and damages (¶¶ 60-83, 90-95).

Defendants quote *Wibby v. Boulder County Board*, 2016 COA 104, ¶ 20 for the proposition that courts "are not at liberty to infer the existence of a contract or its terms." Motion 10. But Defendants take this quote out of context. *Wibby* recognizes a presumption that "the legislature did not intend to bind itself contractually and that the legislation was not intended to create a contractual right unless there is a clear indication of the legislature's intent to be bound." *Id.* at ¶ 17. Without so-called "words of contract," or some other indication of intent, the Wibby court cannot "infer the existence of a contract or its terms." *Id.* at ¶¶ 18-20. But *Wibby* also recognizes that a legislative body *can* bind itself contractually if it uses "words of contract" like "covenant and agree." *Id.* at ¶ 18 (quoting *Colo. Springs Fire Fighters Asso., Local 5 v. Colo. Springs*, 784 P.2d 766, 773 (Colo. 1989), and *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 18 (1977)).

Here, the Complaint expressly alleges that Boulder County used "words of contract," such as when Boulder County stated in a letter that "the county agreed to match up to [$1.9

million]." Compl. ¶ 76; *see also id.* ¶ 38 ("[T]he *County will provide a matching contribution*"), ¶ 42 ("*if* the County Sale Tax passes in November, the County *will pay* half of the costs to acquire the Gunbarrel Open Space!"), ¶ 43 ("For Gunbarrel, those funds would provide the 50% match that the County Commissioners *have promised* to support Gunbarrel's Open Space ballot item.") (emphasis added in all of these quotations). These allegations well exceed the standard set forth in *Wibby*.

Moreover, *Wibby* does not state that a Court cannot infer the existence of a contract implied-in-fact from the presence of circumstantial evidence alleged in the Complaint. *Cf. Agritrack, Inc. v. DeJohn Housemoving, Inc.*, 25 P.3d 1187, 1193 (Colo. 2001) (explaining that a contract implied-in-fact is enforceable, and is a contract "proved by circumstantial evidence" instead of by an "explicit set of words."). Rather, *Wibby* meant that the Court will not infer *facts* supporting a contract that are not well-pleaded in the complaint:

> In an attempt to overcome this deficiency, the Owners contend that their contract claim is not just based on the subdivision statutes but is also *based on documents they believe exist that will establish a road maintenance contract* with the County. And they ask us to "infer that the County entered into road maintenance agreements in connection with the approval process" and to "*assume[] that . . . the record of the subdivision approval [process] would contain the information necessary to establish a contract*."
>
> This argument is unavailing for two reasons. First, it is not alleged in the complaint. Second, we are not at liberty to infer the existence of a contract or its terms. It is for the Owners to plead the existence of a legally protected interest—here a contract—and they did not do so.

Wibby, ¶ 20 (citing *Denver Parents Ass'n v. Denver Bd. of Educ.*, 10 P.3d 662, 665 (Colo. App. 2000)). Plaintiffs have pleaded that there was a contract, and have described its terms. Neither *Wibby* nor any other authority requires more.

Defendants' damages argument makes no sense. They contend that Plaintiffs benefitted from the $1.3 million the County paid, so there are no damages. Under Defendants' approach, there would be no damages even if the County paid only $1 of the promised $1.9 million. The contract was for $1.9 million. The County remains almost $600,000 short of the promised amount, and now seeks to disavow the contract's existence. That is the source of Plaintiffs' damages. The Complaint states a claim for breach of contract.

C. The Complaint alleges a claim for promissory estoppel.

The Court should also reject Defendants' arguments about reasonable and detrimental reliance on Boulder County's promise. *See* Motion 10-11. Just like Defendants' authority concerning the contract claim discussed above, their authorities about campaign statements are off point. Those cases contain the common-sense holding that generalized statements of intent during a political campaign are not promises that "justify a promisee in understanding that a commitment has been made." *Berg v. Obama*, 574 F. Supp. 2d 509, 528-29 (E.D. Pa. 2008). The cases discuss statements that a candidate intends to "use technology to make government more transparent, accountable, and inclusive" or "work fully to protect and enforce the fundamental Constitutional right of every American vote." *Id.* The specific promise of Boulder County to match up to $1.9 million is unlike any of the aspirational statements in Defendants' authorities.

As with the contract claim, Defendants assert that because the County paid some of the promised $1.9 million, Plaintiffs were not damaged to their detriment. Motion 11. This argument makes no more sense in the context of promissory estoppel. If Plaintiffs' relied on the County's promise to contribute up to $1.9 million, the County cannot defeat a finding of detrimental reliance just because Plaintiff's received *some* of the benefit. Plaintiffs are entitled to justifiably

rely on the County's full performance of its promise. Any failure to fulfill that promise, be it full or partial, creates detrimental reliance.

D. The Complaint alleges a claim for fraudulent conveyance.

Defendants restate their arguments from the standing section of the Motion in support of their contention that the complaint fails to allege fraudulent conveyance under Rule 12(b)(5). Motion 11. Plaintiffs incorporate their response to those arguments herein.

E. The Complaint alleges claims for mandamus and declaratory judgment.

Finally, Defendants contend that the claims for mandamus and declaratory judgment fail because the Complaint does not identify the source of the legal duty to pay $1.9 million. Motion 12. Plaintiffs allege mandamus in the alternative, in the event there is no other adequate remedy under law for the vindication of their rights. Compl. ¶ 129. The adequate remedy here is transfer of the real property in question, because no other adequate real property can be purchased with the funds Boulder County wrongfully withheld.

Defendants argue on the one hand that the law bars the specific performance of the contract, and then assert on the other hand that if there is a contract claim, mandamus must fail because the contract claim is an adequate remedy. Not so. As an equitable remedy, mandamus is available only if there is no adequate remedy at law. If Plaintiffs cannot obtain specific performance for the contract claim, the real property should be transferred through the Court's powers in mandamus.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court deny the Motion. To the extent any of Defendants' arguments concern failures to plead discrete facts to

sufficiently state a claim, if the Court is inclined to grant any portion of the Motion, in any such respect, Plaintiffs request leave to amend the complaint to cure any such deficiencies.

Dated: October 5, 2017.

CHIPMAN GLASSER, LLC

/s/ David Chipman
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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2017, I served a true and correct copy of the foregoing **RESPONSE OPPOSING DEFENDANT'S MOTION TO DISMISS** via Colorado Courts E-Filing on the following:

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