SUMMARY
April 4, 2019

2019COA52

No. 18CA474, *Rechberger v Boulder Cnty* — Courts and Court Procedures — Jurisdiction of Courts — Standing

A division of the court of appeals considers whether taxpayer-voters have standing to enforce promises made by a governmental entity during a campaign for a proposed tax increase. Here, plaintiffs sued the Boulder County Board of County Commissioners and the Boulder County Housing Authority alleging that those entities failed to uphold promises made during a 1993 campaign to raise taxes to purchase and maintain "open space" land. The district court dismissed some of the plaintiffs' claims on the ground that they lacked standing and other claims for failure to state a claim upon which relief could be granted.

The division concludes that plaintiffs lack standing as taxpayers and voters because promises made during a political

campaign are not enforceable. Consequently, plaintiffs failed to allege an injury to a legally protected interest.

COLORADO COURT OF APPEALS **2019COA52**

Court of Appeals No. 18CA0474
Boulder County District Court No. 17CV30818
Honorable Nancy W. Salomone, Judge

David Rechberger; Nicollette Munson; Rolf Munson; Laurel Hyde Boni; Dinah McKay; Donald Sherwood; William Swafford, Jr.; Marilyn Kepes; Donald Wrege; and Douglas Johnson,

Plaintiffs-Appellants,

v.

Boulder County Board of County Commissioners and Boulder County Housing Authority,

Defendants-Appellees.

JUDGMENT AFFIRMED

Division II
Opinion by JUDGE DAILEY
Furman and Lipinsky, JJ., concur

Announced April 4, 2019

Chipman Glasser, LLC, David S. Chipman, John M. Bowlin, Denver, Colorado, for Plaintiffs-Appellants

Benjamin Pearlman, County Attorney, David Hughes, Deputy County Attorney, Catherine Ruhland, Assistant County Attorney, Boulder, Colorado, for Defendants-Appellees

¶ 1 Plaintiffs David Rechberger, Nicollette Munson, Rolf Munson, Laurel Hyde Boni, Dinah McKay, Donald Sherwood, William Swafford, Jr., Marilyn Kepes, Donald Wrege, and Douglas Johnson appeal the district court's order dismissing their complaint against defendants, the Boulder County Board of County Commissioners (the County) and the Boulder County Housing Authority (BCHA), for lack of jurisdiction and failure to state a claim upon which relief could be granted. We affirm.

I. Background

¶ 2 Plaintiffs alleged that the County reneged on promises it made in a 1993 campaign to solicit support for a referred ballot measure raising taxes for the purchase and maintenance of "open space" around their community.

¶ 3 In their complaint, plaintiffs alleged that

- They reside or resided on taxable real property they own or owned in the Gunbarrel Public Improvement District (GPID), which was created in 1993 via a County resolution for the purpose of "provid[ing] for the acquisition, construction, and installation of open space areas and public parks."

- The Board of Directors of the GPID — which comprises the same members as the County — called a special election in 1993 to raise, over eleven years, an additional $2.535 million in property taxes to purchase land and dedicate it as "open space" off limits to residential development.
- The 1993 Boulder County Election Notice accompanying the proposed tax increase included a statement that "[t]he Boulder County Commissioners have indicated that, subject to the passage of this issue and the County Open Space tax, the County will provide a matching contribution towards open space purchase within the [GPID] up to a maximum of $1,900,000."
- Similarly, a campaign flyer, authored by the County and others, noted, with respect to a proposed increase in the Boulder County Sales Tax, that the additional "funds would provide the 50% match that the County Commissioners have promised to support Gunbarrel's Open Space ballot item. If this item passes, Gunbarrel residents will directly see the benefits in open space

purchased within Gunbarrel — to the tune of or about $1.9 million dollars."

- By these statements, the County "induced electors to tax themselves by committing to match the funds generated by the Gunbarrel residents up to $1.9 million."
- After "GPID electors passed the proposed tax increases," the County authorized spending over $3.6 million for the purchase of 256 acres of public open space within the GPID.
- The County used approximately $2,300,340 of GPID funds and about $1,305,634 of non-GPID "matching" funds for these purchases.
- The County has not, then, used $1.9 million in matching funds; it is obliged to spend another $594,366 to purchase open space property.
- The County denies it has any remaining obligation.
- The County purchased for $470,000 a property (the Twin Lakes property) that had previously been offered for open space purposes; the County, however, refused to dedicate it as open space, transferring it, instead, to the BCHA.

¶ 4 Asserting claims for breach of contract, promissory estoppel, fraudulent conveyance of the Twin Lakes Property, and declaratory and mandamus relief, plaintiffs requested (1) declarations that the County has an obligation to "match up to $1.9 million of GPID residents' contribution," that the County has failed to do so, and that the Twin Lakes Property purchase was the purchase of "open space within the GPID boundaries on behalf of and for the benefit of the GPID"; and (2) specific performance of the County's contractual obligations by ordering it to "purchas[e] back the Twin Lakes Property [from the BCHA] with the remaining funds owed to GPID and dedicating it as open space"; or, in the alternative, (3) a writ of mandamus to be issued compelling the County to either (a) satisfy its remaining funding obligation to the GPID to purchase, within one year, open space within the GPID; or (b) pay damages for breach of contract.

¶ 5 The County and the BCHA moved to dismiss plaintiffs' complaint pursuant to C.R.C.P. 12(b)(1) (lack of jurisdiction) and C.R.C.P. 12(b)(5) (failing to state a claim upon which relief could be granted). The district court granted the County's motion, ruling that plaintiffs (1) lacked standing to pursue, and failed to state,

claims for breach of contract and fraudulent conveyance; (2) were barred by the Colorado Governmental Immunity Act (CGIA), sections 24-10-106, -108, and -118, C.R.S. 2018, from pursuing their fraudulent conveyance claim; and (3) otherwise failed to state claims upon which relief could be granted for promissory estoppel and declaratory or injunctive relief.

II. Analysis

¶ 6 Plaintiffs contend that the district court erred in dismissing their complaint. Because we conclude that plaintiffs lack standing to pursue *any* of their claims, we disagree. *See Laleh v. Johnson*, 2017 CO 93, ¶ 24 (an appellate court may affirm a judgment on any grounds that are supported by the record, even if not relied on or even considered by the trial court); *Steamboat Springs Rental & Leasing, Inc. v. City & Cty. of Denver*, 15 P.3d 785, 786 (Colo. App. 2000) ("An appellate court may affirm a correct judgment based on reasoning different from that relied on by the trial court.").

¶ 7 Standing is a threshold, jurisdictional issue that presents a question of law that we review de novo. *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004). "Whether a plaintiff has standing depends on whether the plaintiff has alleged an injury-in-fact and,

if so, whether the injury is to a legally protected or cognizable interest." *Rangeview, LLC v. City of Aurora*, 2016 COA 108, ¶ 8.

¶ 8 In determining whether a plaintiff has alleged an injury sufficient to confer standing, an appellate court considers the allegations in the complaint, as well as testimony and other documentary evidence in the record. *Id.* at ¶ 11; *see Marks v. Gessler*, 2013 COA 115, ¶ 88 ("[I]n conducting our de novo standing review, we may examine record evidence outside of the complaint.").

¶ 9 Initially, we note that plaintiffs' substantive claims — for breach of contract, promissory estoppel, and fraudulent conveyance — share one focal point, i.e., plaintiffs' asserted right to enforce a purported promise made to them by a governmental entity in the course of a campaign to effectuate a proposed tax increase.

¶ 10 Ordinarily, "to support standing, a plaintiff's complaint must establish that plaintiff has a personal stake in the alleged dispute and that the alleged injury is particularized as to the plaintiff." *Grossman v. Dean*, 80 P.3d 952, 959 (Colo. App. 2003). But

plaintiffs' asserted injuries here are no different than those suffered by other individuals who had voted for the proposed tax increases.[1]

¶ 11 Although Colorado permits "broad taxpayer standing," this doctrine typically applies when plaintiffs allege *constitutional* violations. *See Ainscough*, 90 P.3d at 856 (discussing cases in which taxpayer standing has been extended to plaintiffs alleging constitutional violations); *see also Hickenlooper v. Freedom from Religion Found., Inc.*, 2014 CO 77, ¶ 11 n.10 ("'[T]axpayer standing' . . . flows from an 'economic interest in having [the taxpayer's] tax dollars spent in a constitutional manner.'" (quoting *Conrad v. City & Cty. of Denver*, 656 P.2d 662, 668 (Colo. 1982))); *Barber v. Ritter*, 196 P.3d 238, 247 (Colo. 2008) (holding that the plaintiffs had "taxpayer standing to challenge *the constitutionality* of [governmental] transfers of money") (emphasis added). Plaintiffs alleged no constitutional violations;[2] consequently, they do not have "taxpayer standing" to sue.

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[1] At oral argument, plaintiffs' counsel said that there are approximately 10,000 residents within GPID.

[2] They did not, for instance, make a claim under the state constitution's Taxpayer's Bill of Rights, Colo. Const. art. X, § 20.

¶ 12 Nor do plaintiffs have standing as voters. They do not allege that they were denied the right to vote, that their votes were diluted, or that their right to vote was otherwise infringed upon, apart from having unfulfilled expectations regarding the consequences flowing from their votes.

¶ 13 Plaintiffs may have alleged an injury in fact. But they have not alleged an injury to "a legally protected or cognizable interest." *Rangeview*, ¶ 8. In *Berg v. Obama*, 574 F. Supp. 2d 509, 529 (E.D. Pa. 2008), *aff'd*, 586 F.3d 234 (3d Cir. 2009), the federal District Court for the Eastern District of Pennsylvania held that certain "campaign promises" were not legally

> enforceable promises under contract law. Indeed, our political system could not function if every political message articulated by a campaign could be characterized as a legally binding contract enforceable by individual voters. Of course, voters are free to vote out of office those politicians seen to have breached campaign promises.

¶ 14 On appeal, plaintiffs correctly point out that *Berg* is different, factually, from the present case. In *Berg*, a political donor sued then-candidate Barack Obama and the Democratic National Committee for the enforcement of various nonspecific "promises"

embedded in the Democratic Party's national platform. *Id.* at 528. In contrast, plaintiffs alleged that

> the County made a specific promise (to match the tax increase up to $1.9 million dollars) to a specific group (GPID property owners) for a specific purpose (to acquire open space within the GPID) for specific consideration (if GPID electors approved the tax increase).

¶ 15 Despite the factual dissimilarities, we nonetheless find the reasoning of *Berg* persuasive. Courts are reluctant to infer that legislative bodies intend to bind themselves contractually via statute, *School Dist. No. 1 v. Masters*, 2018 CO 18, ¶ 17; *Wibby v. Boulder Cty. Bd. of Cty. Comm'rs*, 2016 COA 104, ¶ 17, and that should be even more the case with respect to statements attributed to legislative bodies (like the County) in campaign materials.

¶ 16 The County argues, correctly in our view, that

> [e]lected officials and lawmakers often make statements or promises about pending legislation or ballot measures, and summaries of pros and con statements may be required by law. *See* Colo. Const., art. X, § 20(3)(b)(v). Voters could point to any of those claims or promises, assert that their vote was "induced" by such claims, and, if those claims fall through, file a lawsuit.

¶ 17 "Successful" lawsuits interfere with the County's discretion to make and implement budgetary decisions, *see Tihonovich v. Williams*, 196 Colo. 144, 148, 582 P.2d 1051, 1053 (1978) (explaining that budgetary decisions of the board of county commissioners are discretionary), and, in the end, result in additional taxpayer expense. We conclude that these consequences should not be imposed on governmental entities because of campaign statements or promises.

¶ 18 Because plaintiffs' claims were predicated on unfulfilled expectations arising from campaign promises and because such expectations are not, in our view, legally protected or cognizable interests, we conclude that plaintiffs lacked standing to pursue any of their claims.

¶ 19 Consequently, the district court properly dismissed plaintiffs' complaint.

III. Disposition

¶ 20 The judgment is affirmed.

JUDGE FURMAN and JUDGE LIPINSKY concur.