DISTRICT COURT, COUNTY OF LARIMER, STATE OF COLORADO Court Address: 201 LaPorte Avenue Fort Collins, CO 80521-2761 Phone Number: (970) 494-3500	
BUCK 2ND, LLLP, a Colorado limited liability partnership, Plaintiff v. CITY OF LOVELAND, COLORADO, a municipal corporation**,** Defendant.	▲ FOR COURT USE ONLY ▲
Attorneys for Defendant City of Loveland, a Municipal Corporation: Alicia R. Calderón, #32296 Assistant City Attorney Laurie R. Stirman, #39393 Assistant City Attorney Loveland City Attorney's Office 500 E. Third Street, Suite 300 Loveland, CO 80537 (970) 962-2544 alicia.calderon@cityofloveland.org laurie.stirman@cityofloveland.org	Case Number: 15CV30938 Courtroom: 5B
REPLY TO RESPONSE IN OPPOSITION OF MOTION TO DISMISS	

COMES NOW the City of Loveland, a municipal home rule corporation, by and through undersigned counsel, and submits this Motion to Dismiss and in support states as follows:

REPLY TO INTRODUCTION:

1. **The City is not arguing that the Colorado Constitution, state statutes, and municipal ordinances prohibit repayment to Buck 2nd**. The City has consistently planned for and included the repayment obligations in its Capital Projects plan, and the plan has not changed substantively over time. The first payment has been planned for 2017, and Exhibit D is not the first time that Plaintiff was informed of the payment plan. See Defendant's Exhibit 1, Email dated February 13, 2014. The registered agent for the Limited Liability Partnership is John G. Giuliano, and he was informed of the payment plan. The City includes Capital Improvements planning in its budget

process for a period of at least five years. Loveland City Charter, Section 11-3. The City does not challenge the facts in the Complaint and accepts them as true for the purposes of the Motion to Dismiss only. However, the City argues that Plaintiff is premature in filing his complaint since the repayment obligation is not yet due. If the Oversizing Agreement is to be valid, then its terms must control. The document speaks for itself. It is a waste of judicial resources to litigate breach of contract claims where the contractual conditions have not been met yet.

2. **The City has made no request to delay repayment, and none of the allegations in the Complaint contain any such request because there is none**. The City did not "certify" that funds were appropriated since City Council did not appropriate $664,528.89. An employee cannot make an appropriation. As detailed in the City's Motion to Dismiss, only City Council may appropriate funds. This is a legal, not a factual issue. Even if Exhibit B did support an authorized appropriation, the plain language of the statement in Exhibit B would indicate that the funds were appropriated in the 2008 budget. If funds were appropriated, Plaintiff's own argument supports the move to dismiss. Plaintiff has long surpassed the statute of limitations. If the current budget in 2008 had funds appropriated for this repayment, the funds would have long since been re-appropriated for other purposes. The Exhibit is dated 9/08/08. Seven budget cycles have passed since that time. Budgets are set annually. Loveland City Charter, Section 11-2.

3. **The City is not arguing that there is a legislative prohibition to repayment**. The City has every intention of making repayments on an annual basis beginning in 2017, and Plaintiff has received this communication more than once. The City is arguing that the purchase order and the Streets Oversizing Agreement, Plaintiff's Exhibits A and B, cannot be construed to create a contractual obligation to make a payment in any year where there is not an appropriation nor can they be interpreted to create a debt. This is not a legislative prohibition but *rather a constitutional one*. No City shall become responsible for any debt, contract or liability. Colorado Constitution Article XI, Sections 1 and 6. This may be a byzantine application of the law, but it is the law in Colorado.

4. **The City has not repudiated the Oversizing Agreement**. Plaintiff's Exhibit D contains no denial of the agreement, but rather, it sets out the payment plan. This is an almost identical plan to that sent to Plaintiff one-and-one-half years earlier. *See* Defendant's Reply, Exhibit 1. Both emails to John Giuliano and to counsel for Plaintiff and the Oversizing Agreement itself contain language acknowledging that only City Council may make an appropriation, as is required by the State Constitution and Loveland City Charter. The City has not changed its position or intent to pay Plaintiff under the Oversizing Agreement, and the amount to be paid is not due in full until Plaintiff has completed its development. The development is not complete so payment is not yet due, and the City will begin to make annual payments in 2017.

5. **If payment was due seven years ago, Plaintiff is time-barred**. Plaintiff claims that it only learned of the payment plan in October of 2015, and this is simply not true. Plaintiff's registered agent, who signed the Agreement, has been aware for at least the past two years of the details of the payment plan. Additionally, Plaintiff signed the agreement. It states that the City will make partial reimbursements as money is appropriated. If Plaintiff believed the Purchase Order was the appropriation, then Plaintiff should have sought payment in 2008 or 2009. Even the

Purchase Order, Plaintiff's Exhibit B, has since expired. The Purchase Order expired December 31, 2012.

REPLY TO PLAINTIFF'S LEGAL AUTHORITY

6. **The City does not argue that the Oversizing Agreement is ambiguous**. The Agreement is very clear. The Agreement says the Developer finds it necessary to provide for certain street improvements. The City has adopted a Capital Improvements Plan, and Plaintiff's Improvements are identified in the Capital Projects Plan as Project ENR029. A portion of the Improvements were needed to accommodate the City's requirements. The City has a policy to reimburse developers for that portion of public improvements that are required to be installed to meet City requirements when monies have been appropriated. *See* Plaintiff's Exhibit A, page 1, Whereas Clauses 1-4. The City "may make partial reimbursements"…as monies are appropriated from the Capital Improvements account. Partial payments will be made each year and no monies are due in any year in which funds have not been appropriated. The Capital Projects Budget Plan contains Project ENR029, and Buck 2nd will begin receiving payments in 2017. This is what the plain language of the Agreement says will happen.

7. **The City is not introducing evidence through its exhibits attached to the Motion to Dismiss**. Those exhibits are examples and City legislative actions provided only for the Court's convenience. The City's entire argument is that there are no disputed issues of fact. For purposes of the Motion to Dismiss, the City accepts the facts as true. The City disputes the conclusions of law and speculation contained in the complaint. Furthermore, even if the City's exhibits are considered evidence, they consist only of matters of which the Court may take judicial notice. In considering a motion to dismiss, "the general rule is that, although a court primarily considers the pleadings, certain matters of public record may also be taken into account, and matters which are properly the subject of judicial notice may be considered without converting the motion into one for summary judgment." Walker v. Laningham, 148 P.3d 391, 397 (Colo. App. 2006). Municipal legislative actions are public record. The hearings are public. All resolutions are public record. The Agreement says what it means, in the plain language, within the four corners of the document. "When a document is unambiguous, it cannot be varied by extrinsic evidence." Dorman v. Petrol Aspen, Inc., 914 P.2d 909, 911 (Colo. 1996). Plaintiff cites this case for the statement that "Under such circumstance, a trial court errs as a matter of law if it grants a motion to dismiss without first permitting discovery and the opportunity [to] present relevant extrinsic evidence." Dorman does **not** state that. The Agreement is not ambiguous. Plaintiff's project has been included in the City's planning, and the year to begin repayment has consistently been 2017. Plaintiff was notified of this in 2014, and Plaintiff's exhibit D, provides the same notification. Nothing in the Agreement or Exhibit D repudiates the amount owed.

REPLY TO PLAINTIFF'S BACKGROUND

8. Plaintiff introduces nothing new in this section except to restate the allegations found in the Complaint. Plaintiff has failed to state a claim for relief. The Agreement is clear and unambiguous that the City may make partial reimbursements as monies are appropriated from the Capital Improvements account. Plaintiff does not dispute that the payments are subject to appropriations, and relies on its allegations that the appropriation was made in 2008. Either

payment was due in 2008 when monies were appropriated and Plaintiff's claims are time-barred, or the City's repayment obligation has not yet come due as it is in the Capital Projects Plan to begin in 2017. Plaintiff cannot have it both ways.

REPLY TO PLAINTIFF'S ANALYSIS

9. Plaintiff argues that C.R.S. § 24-91-103 applies to the City's Oversizing Agreement. Article 91 of Title 24 of the Colorado Revised Statutes applies to Construction Contracts with Public Entities. This statute does not apply here as the City **did not** contract with Plaintiff for construction. The City agreed to partially reimburse Plaintiff for its construction costs, but the City did not enter into a construction contract with Plaintiff. Nowhere in the Agreement is there any reference to Plaintiff performing construction work for the City. The Agreement clearly states that Plaintiff found it necessary to construct the street improvements, not the City. It is an Agreement for reimbursement of money. A public entity awarding a construction contract must authorize payments monthly and must make a final settlement payment within 60 days after successful completion of the project. If this were a construction contract, Plaintiff would have been due monthly payments, and the entire contractual amount would have been due six years ago. Again, Plaintiff only reinforces that Plaintiff's contract claims are barred by the statute of limitations. This is an Agreement that is not yet ripe for repayment, and the City has consistently agreed that it will make payments until fully repaid. This is not a contract for construction. C.R.S. §24-91-103 is not applicable.

10. The City's reliance on the Larimer County Urban Area Street Standards is simply to provide the Court with the background for the Agreement. The Oversizing Agreement itself, within the four corners of the document, already sets out that repayment will be made in installments when appropriated. Budget appropriations are legislative actions performed by City Council. Where no appropriation exists, no employee can sign a contract binding the City to make a payment. The City can enter into Oversizing Agreements only with the understanding that the City Council must make an appropriation. The Agreement is for partial payments as money is appropriated. This was clearly stated in the Agreement and most recently communicated via email to Plaintiff. Plaintiff's allegation that funds have been appropriated in the Complaint does not make this so, and if true, the Complaint is time-barred.

11. Plaintiff argues that it should not be required to anticipate the defense of statute of limitations, and cites Bristol Bay Productions, LLC v. Lampack, 312 P.3d 1155, 1163 (Colo. 2013) in support of such argument. However, Bristol Bay addressed the defense of *issue preclusion*, not statute of limitations. As set forth in the City's Motion, "The defense of limitations may be raised by a motion to dismiss when the time alleged in the complaint shows the action was not brought within the statutory period." Wasinger v. Reid, 705 P.2d 533, 534 (Colo. App. 1985). Plaintiff alleges that the City "certified" that funds were appropriated for payment in 2008. If such allegations are true, the Plaintiff's claims began to run in 2008, and are each time-barred based on its own Complaint. Equitable tolling is only applicable "if a party fails to disclose information that he or she is required to reveal and the other party is prejudiced." Olson v. State Farm Mut. Auto. Ins. Co., 174 P.3d 849, 853 (Colo. App. 2007). The City annual budget and appropriation process is all public record. If Plaintiff believed payment was due in any specific year, it had access, like every citizen, to City Council meetings and the budget process. Plaintiff could have participated

in the City Council budget hearing. Loveland City Charter Section 11-4. It is open to the public and live-streamed via the internet. Plaintiff has alleged no fact to explain the delay in alleging a breach of contract because it has none. Plaintiff's Exhibit D does not repudiate the Agreement or the payment. It only restates the condition found in the Agreement itself that payments are subject to appropriation. Plaintiff's Claims are time-barred if the facts as alleged are accepted as true.

12. Plaintiff may not have anticipated a statute of limitations argument; however, this is only an issue if this Agreement is not read as written. The plain language of the Agreement contains the terms, including that partial payments will be made as money is appropriated from the Capital Improvements account. All communications provided to Plaintiff support the plain language of the Agreement. The City will begin payments in 2017. Plaintiff is demanding full payment now, and that argument is prohibited by the statute of limitations. The Agreement always contained the condition that payment would be in the future, in installments, as appropriated.

CONCLUSION

The City has planned to meet the obligations of the Oversizing Agreement and included the payments in its five-year capital improvements plan. Repayments will begin in 2017. There are no facts in dispute for purposes of the Motion to Dismiss, despite Plaintiff's attempts to create confusion and complexity. The Agreement's plain language sets forth the expectations, including that repayment will occur as money is appropriated. Plaintiff signed the Agreement and has been informed in at least two emails of the repayment plan. The City will make partial reimbursements as monies are appropriated, and these will begin in 2017. The complaint should be dismissed.

WHEREFORE, the City respectfully requests that the Court GRANT the Motion to Dismiss.

Dated this 15th day of January, 2016.

CITY OF LOVELAND

Original signature on file

By: /s/ *Alicia R. Calderón*
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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing REPLY TO RESPONSE IN OPPOSITION OF MOTION TO DISMISS was served by ICCES e-Service on this 15th day of January, 2016 to the following:

Erich L. Bethke
Senn Visciano Canges P.C.
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Denver, CO 80203

/s/ Kayla Demmler
Original signature on file