

DISTRICT COURT, COUNTY OF LARIMER, STATE OF COLORADO Court Address: 201 La Porte Ave, Suite 100 Ft. Collins, CO 80521	<div style="text-align: center;">COURT USE ONLY</div>
Plaintiff: BUCK 2ND, LLLP, a Colorado limited liability partnership v. Defendant: CITY OF LOVELAND, COLORADO, a municipal corporation,	
Attorneys for Plaintiff: Erich L. Bethke, #17299 Charles E. Fuller, #43923 Senn Visciano Canges, P.C. 1700 Lincoln Street, #4500 Denver, CO 80203 303-298-1122 EBethke@sennlaw.com ; CFuller@sennlaw.com	Case Number: 2015CV30938 Division/Courtroom: 5B
<div style="text-align: center;">RESPONSE IN OPPOSITION TO DEFENDANT CITY OF LOVELAND'S MOTION TO DISMISS</div>	

Buck 2nd, LLLP ("Buck 2nd"), by its attorneys' Senn Visciano Canges P.C., respectfully submits its Response in Opposition to Defendant City of Loveland's (the "City") Motion to Dismiss, and states in support:

I. INTRODUCTION

1. This Court should deny the City's Motion to Dismiss wherein the City improperly inverts the fundamental principles of C.R.C.P. Rule 12(b)(5) by asking this Court to ignore Buck 2nd's well-pleaded allegations and to assume the truth of the City's erroneous facts. This Court should reject the City's arguments: a) that a convoluted application of the Colorado Constitution, state statutes and municipal ordinances (which the City grossly misconstrues) prohibits repayment to Buck 2nd and allows the City to avoid its contractual promises; and b) that Buck 2nd's claims are time-barred despite a host of factual disputes related to Buck 2nd's timely discovery and assertion of its claims.

2. As plaintiff, Buck 2nd's Complaint adequately alleges that under the parties' August 22, 2008 Streets Oversizing Agreement ("Oversizing Agreement" and Exhibit "A" to the Complaint), Buck 2nd: a) expended \$664,528.89 to timely and properly increase the size/width of West 43rd Street (which "street oversizing" was mandated by the City) (hereinafter the "Street Improvements"); b) properly requested the City's repayment, and reasonably accommodated the City's requests to delay such

repayment, after the City “certified” in writing “that the funds are appropriated in the current budget” sufficient to reimburse the \$664,528.89 (see Complaint, Exhibit “B” attaching the City’s signed Purchase Order for payment and with an “Expiration” of 12/31/12).

3. No Legislative Prohibitions: Contrary to the City’s arguments, Buck 2nd’s claims are not “premature” and there are no constitutional/legislative prohibitions to the City’s repayment of \$664,528.89 under the Oversizing Agreement. Rather, and as sufficiently alleged, Buck 2nd rightfully seeks repayment after it fully performed its contractual obligations and the City “certified” that the City had already “appropriated” sufficient funds for such repayment.

4. Buck 2nd’s claims for repayment are fully consistent with the Oversizing Agreement’s terms and all constitutional/legislative requirements for the payment of fully “appropriated” funds. The City errs when it argues that a byzantine application of constitutional/legislative provisions purportedly requires the City Council’s “budgetary approvals” and purportedly prohibits additional and multi-year “appropriations” for such repayment (see, e.g., Motion to Dismiss at 1-6). Buck 2nd alleges that the funds were already appropriated and need to be paid -- these facts are assumed to be true despite the City’s recent denials.

5. Not Time-Barred: Buck 2nd’s Complaint adequately alleges that the City has long admitted that it “owes” \$664,528.89 and only recently repudiated its promises to pay Buck 2nd such amount for the Street Improvements. Approximately 3 months ago, the City reneged upon its prior representations and now claims that it *currently owes nothing*, and *may only possibly pay \$664,528.89 by 2023 (without any definitive commitment)* for the “oversizing” work that was begun in 2008 (see Complaint, Exhibit “D” October 21, 2015 email from the City Attorneys’ Offices).

6. As set forth below, it is “hornbook law” that Buck 2nd’s breach of contract and quasi-contract claims only arise and ripen upon the City’s *repudiation* of the parties’ Oversizing Agreement and Buck 2nd’s discovery of the same. As alleged in the Complaint and acknowledged in the City’s Motion to Dismiss, the City has consistently admitted and assured Buck 2nd that the City “owes the full principal amount of \$664,528.89” (see Complaint, ¶14, and Motion to Dismiss at p. 9).

7. It was not until October 21, 2015 that the City made known to Buck 2nd that it breached its promises by informing Buck 2nd that the City purportedly has no current obligation for repayment, and that repayment *might occur* by 2023 *if* such funds are appropriated by City Council in future years. Additionally, the City’s Purchase Order (Complaint, Exhibit “B”, that “certifies” that funds have been “appropriated”) provides that it “Expires”, and can be submitted by Buck 2nd for payment of \$664,528.89, on or before “12/31/12”.

8. Under these alleged facts, none of Buck 2nd’s claims are time-barred under any 3-year or 6-year statutes of limitation. Buck 2nd has timely asserted its

Complaint within 3 months of the City's repudiation of its promises under the Oversizing Agreement (and the City's subterfuge and repudiation of its prior assurances and "certifications" form a sound basis for an equitable tolling of any other time limitations). The Court should summarily reject the City's argument that instead of relying on the City's assurances, Buck 2nd should have immediately filed suit at some earlier date. In any event, the nature and reasonableness of Buck 2nd's actions in continuing to accommodate the City's delays pose clear questions of fact that must be decided at trial.

9. It is fundamentally wrong and financially harmful to Buck 2nd for the City to repudiate, and render illusory, its promises to pay the \$664,528.89 after the City's lengthy delays, excuses and requests that Buck 2nd be patient as it waits for repayment.

10. The City errs in claiming that Buck 2nd's claims are either constitutionally/statutorily prohibited or are time-barred. As set forth below, Buck 2nd urges this Court to deny the City's Motion to Dismiss and to properly allow the parties' legal and factual disputes to proceed to a determination on the merits.

II. LEGAL AUTHORITY

11. For purposes of a motion to dismiss, all factual allegations in the complaint are to be accepted as true and viewed in the light most favorable to the plaintiff. *Fry v. Lee*, 2013 COA 100, ¶17, --- P.3d ----. "A C.R.C.P. 12(b)(5) motion is looked upon with disfavor, and a complaint should not be dismissed unless it appears beyond a doubt that a claimant can prove no set of facts in support of his or her claim which would entitle him or her to relief." *Id.* ¶18 (citing *Pub. Serv. Co. v. Van Wyk*, 27 P.3d 377, 385-86 (Colo. 2001)). Not only are such motions viewed with disfavor, they "are rarely granted under our 'notice pleadings.'" *Dunlap v. Colo. Springs Cablevision, Inc.*, 829 P.2d 1286, 1291 (Colo. 1992) (quoting *Davidson v. Dill*, 503 P.2d 157, 162 (Colo. 1972)). "When considering a motion to dismiss for failure to state a claim, [a court] may consider only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference, and matters proper for judicial notice." *Fry, supra* ¶19.

12. If a disputed contract is ambiguous or contains unclear language when viewed in the light most favorable to the plaintiff, it must be construed in order to determine the intent of the parties, which is a question of fact permitting consideration of all relevant extraneous evidence. *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911-12 (Colo. 1996). 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 present relevant extrinsic evidence. *Id.* The City's Motion to Dismiss raises issues that implicate claimed ambiguities to the Oversizing Agreement.

13. Moreover, "a plaintiff has no obligation to anticipate an affirmative defense in the complaint and include allegations intended to negate it." *Bristol Bay Prods., LLC v. Lampack*, 2013 CO 60, ¶41, 312 P.3d 1155, 1163. "If the rule were otherwise, then it would run afoul of the pleading standard embodied by C.R.C.P. 8, which requires that a

plaintiff plead only a ‘short and plain statement of the claim showing that the pleader is entitled to relief.’ ” *Id.* (quoting C.R.C.P. 8(a)(2)).

14. Given that Buck 2nd is not required to anticipate the City’s affirmative defenses raised in its Motion to Dismiss (*i.e.*, that the City never “appropriated” the \$664,528.89 funds despite its “certification”), the Court should be even more reluctant to consider dismissing this action under Rule 12(b)(5). See *Bristol*, 2013 CO 60, ¶41 (explaining that to require a plaintiff to anticipate affirmative defenses and to include factual allegations to negate them would “place on the plaintiff the burden of pleading facts intended to negate anticipated affirmative defense as an essential element of the plaintiff’s claim”, which improperly creates an additional burden on plaintiff and is contrary to notice pleading standards).

15. Nor can the Court consider the various exhibits and extraneous documents attached to the City’s Motion to Dismiss as facts that are assumed to be true. See *Fry*, *supra* ¶19. As is apparent from the Complaint’s allegations, Buck 2nd denies the content of the City’s exhibits, and such exhibits represent disputed facts.¹

III. BACKGROUND

16. The Oversizing Agreement required the City to pay and reimburse Buck 2nd in the principal amount of \$664,528.89 for the Street Improvements as funds “are appropriated”. The City concedes in its Motion to Dismiss that Buck 2nd fully performed the Street Improvements, and that the total due and owing to Buck 2nd from the City is in the agreed-upon amount of \$664,528.89. See Complaint, ¶14 and Motion to Dismiss, ¶16.

17. Buck 2nd alleged in the Complaint that the Street Improvements were completed “on or about November 2009”, which fact is confirmed in the “Notification of Public Improvement Final Acceptance” letter dated November 6, 2009 and signed by Jeff Keil, Public Works Inspector for the City. Buck 2nd attached the letter to the Complaint as Exhibit “C” and incorporated the letter into the Complaint. See Complaint ¶12.

18. Buck 2nd alleged in the Complaint that the City had “appropriated the funds for the payment and the reimbursement of Buck 2nd for the Street Improvements”. Buck 2nd also alleged that such fact was “shown by, among other things, the September 8, 2008 Purchase Order for the Street Improvements signed by Cynthia Scymanski, Purchasing Administrator, which “certifies”, in part, ‘that the funds are appropriated in the current budget’” Buck 2nd incorporated the September 8, 2008 Purchase Order into the Complaint. See Complaint ¶9.

¹ However and to the extent the Court is inclined to consider the myriad facts that are outside the pleadings and are posed by the City’s Motion to Dismiss, the Court must treat the Motion as one for summary judgment under Rule 56 and give the parties a reasonable opportunity for discovery and to present all relevant material. See C.R.C.P. 12(b).

19. The Street Improvements were “needed to accommodate *the City’s requirements* as set forth in the Capital Improvements Plan”. See Exhibit “A” to the Complaint, Recitals (emphasis added). It is “the policy of the City to reimburse developers for that portion of public improvements which *are required to be installed to meet City requirements* when monies have been so appropriated.” See *id.* (emphasis added).

20. Buck 2nd alleged in the Complaint that “[i]n the months and years following the completion of the Street Improvements by Buck 2nd, and following [the City’s] appropriation of the funds for payment, Buck 2nd has made multiple requests to Loveland for payment for the Street Improvements.” Buck 2nd then alleged that it was only “now” that the City first “propose[d] an unreasonable and alternative payment schedule.” Buck 2nd did not allege any facts it previously was aware of or had discovery the City’s revocation of its prior assurances that the \$664,528.89 amount was indeed “owed” and would be paid. Buck 2nd alleged that it first discovered the City’s repudiation and breach when the City sent its recent emails including the October 21, 2015 email. See Complaint, ¶14.

IV. ANALYSIS

21. The City’s promise under the Oversizing Agreement to reimburse Buck 2nd as funds “are appropriated” is fully consistent with Colorado law. As alleged in the Complaint, the \$664,528.89 was fully and completely funded.

22. It is important to note that the Colorado General Assembly specifically enacted statutes that are designed to prevent a municipality from attempting to escape contractual obligations by undue delay or subterfuge. See C.R.S. § 24-91-103, which provides (emphasis added):

(1)(a) A public entity awarding a contract exceeding one hundred fifty thousand dollars for the construction, alteration, or repair of any highway, public building, public work, or public improvement, structure, or system, including real property as defined in section 24-30-1301(15), shall authorize partial payments of the amount due under such contract at the end of each calendar month, or as soon thereafter as practicable, to the contractor, if the contractor is satisfactorily performing the contract. ***The public entity shall pay at least ninety-five percent of the calculated value of completed work. The withheld percentage of the contract price of any contracted work, improvement, or construction may be retained until the contract is completed satisfactorily and finally accepted by the public entity.***

23. The statute applies here to the City’s repayment obligation. A “public entity” under the statute is defined broadly as “the state or a county, city, city and county, town, or district, including any political subdivision thereof.” Moreover, it is

alleged and undisputed that the reimbursement obligation under the Oversizing Agreement exceeds \$150,000, and that the Street Improvements were completed and involve the construction, alteration, or repair of a highway/public improvement, structure, or system.

24. Importantly and fatal to the City's Motion, Buck 2nd specifically alleged in the Complaint that funds were "appropriated" by the City. Such allegation must be accepted as true for purposes of this Motion to Dismiss. Thus, under both the Oversizing Agreement and C.R.S. § 24-91-103, the City was obligated to pay Buck 2nd upon completion of the Street Improvements (or reasonably thereafter) because the funds had already been appropriated.

25. The City's central arguments all rest upon the City's factual contention/assumption that funds have not been appropriated (and therefore can be paid at some point in the future when appropriated). At best, the issue regarding if and when the \$664,528.89 funds were appropriated are hotly disputed questions of fact precluding the Court from granting the Motion to Dismiss.

A. The City's Arguments Concerning the Larimer County Urban Area Street Standards Are Either Irrelevant Because Sufficient Funds Were Previously and Fully Appropriated or Such Standards Are Incorrectly Applied and Raise Issues of Disputed Fact.

26. The City completely ignores the Oversizing Agreement and C.R.S. § 24-91-103 and instead argues that Section 1.9.3(2)(c) of the Larimer County Urban Area Street Standards ("LCUASS") permits it to pay "over time" and thereby delay (until 2023 at the earliest) repaying Buck 2nd (see Motion to Dismiss, ¶¶9-11). Setting aside the fact that C.R.S. § 24-91-103 trumps any contrary provisions under LCUASS, *see, e.g., City & County of Denver v. Qwest Corp.*, 18 P.3d 748, 755-56 (Colo. 2001), the City's arguments regarding Section 1.9.3(2)(c) are incorrect, misleading and raise disputed issues of fact (or mixed questions of law and fact).

27. It is Buck 2nd's position that Section 1.9.3(2)(c) is simply irrelevant given the Complaint's well-pled allegations and for purposes of Rule 12(b)(5).

28. The City incorrectly contends that Section 1.9.3(2)(c) is pertinent and controlling with respect to setting the timing and criteria for repayment to Buck 2nd. However, Section 1.9.3(2)(c) would only be relevant if the "appropriation" of \$664,528.89 was to be made *in the future*.

29. Contrary to the City's arguments, Buck 2nd alleged in the Complaint, and the City certified in the September 8, 2008 Purchase Order, that \$664,528.89 funds *had already been appropriated*. Accordingly and for purposes of an inquiry under Rule 12(b)(5), Section 1.9.3(2)(c), and the plethora of other legislative provisions cited by the City, are simply inapposite.

30. If and when the \$664,528.89 of funds were appropriated are questions of fact that the Court need not decide because, at this stage, Buck 2nd's well-pleaded allegations that funds *were previously and fully appropriated* are sufficient to withstand the City's Motion to Dismiss. See *Fry, supra*, ¶17.

31. It also bears noting that the City's misleading and self-serving interpretation of Section 1.9.3(2)(c) *et seq.* does not comport with any plausible interpretation of these provisions. Section 1.9.3(2)(c) contains three possible repayment scenarios when funds have not been previously and fully appropriated (moreover each scenario implicates a number of disputed facts which the City cannot properly assume to be true). For example, one such scenario requires payment "as soon as street capital improvement plan funds are sufficient" on a "first completed, first reimbursed" basis if funds were not previously appropriated. Another scenario, applies only where the street improvements are part of the "Capital Expansion Fee (CEF) Program"² and, as a result, the City receives CEF revenue and elects to use the same to make reimbursement payments "over time". Under this scenario and notwithstanding the fact that payments may be made "over time", reimbursements are still to be made "once a year, unless otherwise determined by the director, until the development is completed or until the full reimbursement is made."

32. Assuming *arguendo* that the \$664,528.89 funds are not yet appropriated, there are a number of questions of fact (or mixed questions of law and fact) with regard to when the City should have reimbursed Buck 2nd, including the following non-exhaustive list of questions: (1) at what time were the funds sufficient to begin paying on a "first completed, first reimbursed" basis; (2) what was the "que" for payment for those contractors/vendors on the "first completed, first reimbursed" basis; (3) were the street improvements part of a CEF Program and, if so, did the City receive CEF revenue and elect to use the same to reimburse Buck 2nd; (4) when did the City first receive CEF revenue and why has it not made payments "once a year"; (5) was there director approval such that the City was not required to make payments "once a year"; (6) when was the development completed (or when will the development be completed); etc.

33. Fortunately the Court need not travel down that proverbial "rabbit hole" because the Complaint's allegations clearly state that \$664,528.89 of funds have already been appropriated, and under the Oversizing Agreement, C.R.S. § 24-91-103, and even Section 1.9.3(2)(c), the reimbursement obligation arose reasonably after the completion of the Street Improvements and consistent with the Purchase Order (Complaint at Exhibit "B").

² Section 1.7 of LCUASS defines "Capital Expansion Fee (CEF) Program" as: "A program that has been established by the Local Entity for the purpose of funding certain transportation improvements. The streets funded by a CEF Program primarily serve the overall transportation system, not just a single development."

B. The Statute of Limitations Did Not Begin to Accrue Until Buck 2nd Repudiated Its Repayment Obligation in October 2015

34. “Issues such as when a cause of action accrues, whether a claim is barred by a statute of limitations, and whether a statute of limitations should be equitably tolled, are issues of fact.” *Olson v. State Farm Mut. Auto. Ins. Co.*, 174 P.3d 849, 853 (Colo. App. 2007) (citing *Mastro v. Brodie*, 682 P.2d 1162, 1169 (Colo. 1984)). It is only “if the undisputed facts show that a plaintiff discovered the existence of a claim as of a particular date, that a statute of limitations bars the filing of a claim, or that a plaintiff is not entitled to rely on the doctrine of equitable tolling,” *Id.* See also *Deutsche Bank Trust Co. Ams. v. Samora*, 2013 COA 81, ¶20, 321 P.3d 590, 594.

35. It is well-established that a claim for breach does not begin to accrue when the breach occurs or payment becomes due, but when the facts giving rise to the breach (such as the first clear repudiation) become known or discoverable. See C.R.S. § 13-80-108(6). See also *Hannon Law Firm, LLC v. Melat, Pressman & Higbie, LLP*, 293 P.3d 55, 58 (Colo. App. 2011) (explaining that the statute of limitations does not begin to accrue until “a person discovers, or through the exercise of reasonable diligence should discover, that *all elements of the claim are present*” (emphasis added)).

36. Buck 2nd alleged that at several times after completing the Street Improvements it inquired with the City regarding payment, and that it was not until October 21, 2015 that the City made known to Buck 2nd that it breached its promises by informing Buck 2nd that even though it acknowledges that the full amount is “owed”, that the City purportedly has no current obligation for repayment, and that repayment *might occur* by 2023 *if* such funds are appropriated by City Council in future years. (See Complaint, ¶¶13-14, and Exhibit D thereto.)

37. Those allegations must be accepted as true. At best, the City’s argument is that instead of relying on the City’s repeated assurances, Buck 2nd should have immediately filed suit the day it completed the Street Improvements. Buck 2nd’s allegations, however, are sufficient to survive a Motion to Dismiss under Rule 12(b)(5), and the reasonableness of Buck 2nd’s actions in accommodating the City’s requests to delay such repayment is a question of fact that should be decided at trial.

38. Buck 2nd was not required to anticipate that the City would assert a statute of limitations defense and plead allegations in the Complaint to negate it. *Bristol Bay Prods., LLC*, *supra*, ¶41. Liberal notice pleading standards under C.R.C.P. 8 apply. Buck 2nd was not therefore required to plead each and every instance of its diligent efforts to follow up on payment and its reliance on the City’s promises to make good on its reimbursement obligation.

39. Moreover, the City’s subterfuges warrant an equitable tolling of any purported applications of statutes of limitation.

40. The City repeatedly mislead Buck 2nd by: a) certifying that the \$664,528.89 of funds had been appropriated; b) previously and repeatedly promising to make good on its reimbursement obligations; c) hiding until October 21, 2015 the purported fact (now claimed by the City) that such funds had not actually been appropriated; d) waiting until October 21, 2015 to inform Buck 2nd that any repayment will not occur until beginning in 2017 and may not be completed by 2023 if/when the City Council may choose to appropriate funds.

41. Equitable tolling is a principle used "to prevent a defendant from asserting a statute of limitations defense where the defendant's wrongful actions have prevented the plaintiff from asserting a timely claim." *Vessels v. Hickerson*, 2012 COA 28, ¶56, 327 P.3d 277, 288. Equitable tolling requires that:

(1) [T]he party to be estopped must know the relevant facts; (2) the party to be estopped must intend that his or her conduct be acted on, or act in a manner that the party asserting estoppel believes the party to be estopped has such intent; (3) the party asserting estoppel must be ignorant of the relevant facts; and (4) the party asserting estoppel must rely on the other party's conduct to his or her detriment.

Patterson v. BP Am. Prod. Co., 240 P.3d 456, 465 (Colo. App. 2010) (citations omitted). These elements are present in the case and have been alleged by Buck 2nd in the Complaint: in the years following completion of the Street Improvements Buck 2nd continued to diligently inquire about the status of reimbursement, and it was not until very recently that the City took a completely contrary position. Given that Buck 2nd's claims are timely under any statute of limitations (*i.e.*, 6 year, 3 year, or 2 year), the Court should deny the City's Motion to Dismiss.

42. Finally, the City erroneously argues that Buck 2nd's breach of contract and quasi contract claims are barred by the general, three-year statute of limitations and the six-year statute of limitations.

43. The three-year statute of limitation under C.R.S. § 13-80-101(1)(a) does not bar Buck 2nd's breach of contract claim. The breach of contract claim is governed by the six-year statute of limitations under C.R.S. § 13-80-103.5, which is an "exception" to C.R.S. § 13-80-101(1)(a) and applies to contract claims involving either a "liquidated debt" or "an unliquidated determinable amount of money due." *Pound v. Fletter*, 39 P.3d 1241, 1243 (Colo. App. 2001); see also *Davis v. King*, 560 Fed. App'x 756, 760 (10th Cir. 2014).f

44. The test for whether the three-year or the six-year statute of limitations applies, is whether the amount sought for breach of contract is either a "liquidated debt" or "an unliquidated determinable amount of money due." If the breach of contract claim is for either, then the six-year statute governs. "An amount is liquidated or determinable for purposes of section 13-80-103.5(1)(a) if the amount due is ascertainable by reference to an agreement or by simple computation, even if reference must be made to

facts external to the agreement.” *Neuromonitoring Assocs. v. Centura Health Corp.*, 2012 COA 136, ¶16, 351 P.3d 486, 489.

45. The six-year statute of limitations clearly applies to Buck 2nd’s First Claim for Relief for Breach of Contract because the amount owed is “ascertainable by reference to [the] agreement”. The amount due -- \$664,528.89 -- is set forth specifically in the Oversizing Agreement. Because the Street Improvements were completed less than 6 years before the filing of the Complaint, there are no grounds whatsoever on which the Court could dismiss Buck 2nd’s First Claim for Relief for Breach of Contract.

46. To the extent a three-year statute of limitations under C.R.S. § 13-80-101(1)(a) might apply to the remaining quasi-contract claims and claim for Declaratory Judgment,³ there are questions of fact as to when the statute of limitations first began to accrue (for the reasons explained above – *i.e.*, such claims arose in 2015 when the City repudiated its prior representations and certifications) such that the Court should not, at this early stage and without the benefit of any development of the underlying facts and evidence, dismiss any of the remaining claims.

WHEREFORE, Buck 2nd respectfully requests that the Court deny Plaintiff’s Motion to Dismiss in its entirety.

Dated: January 8, 2016.

SENN VISCIANO CANGES P.C.

s/ Erich L. Bethke*

Erich L. Bethke, #17299

Charles E. Fuller, #43923

Attorneys for Plaintiff

³ Buck 2nd’s Fifth Claim for Relief for Declaratory Judgment is also subject to the three-year statute of limitations for contract actions under C.R.S. § 13-80-101(1)(a). Well-established Colorado authority recognizes that the applicable limitations period is determined based upon the “legal theory of recovery” pleaded in the Complaint, and that it is only where no other legal theory is pleaded that a claim for Declaratory Judgment is subject to the two-year catch-all statute of limitations under C.R.S. §13-80-102(1)(i). *See Harrison v. Pinnacol Assur.*, 107 P.3d 969, 972 (Colo. App. 2004). *See also Molleck v. City of Golden*, 884 P.2d 725 (Colo. 1994). Nevertheless, Buck 2nd’s Declaratory Judgment claim would be timely even under the two-year catch-all statute of limitations because it was not until October 21, 2015 when the City repudiated and breached its reimbursement obligation under the Oversizing Agreement.

CERTIFICATE OF SERVICE

This will certify that on this 8th day of January, 2016, a true and correct copy of the foregoing was served via ICCES on the following:

Alicia R. Calderón, Esq.
Laurie R. Stirman, Esq.
Loveland City Attorney's Office
500 E. Third Street, Suite 300
Loveland, CO 80537

**s/ Charles E. Fuller*

Charles E. Fuller

**In accordance with C.R.C.P. 121 § 1-26(7), a printed copy of this document with original signatures is being maintained by filing party and will be made available to inspection by other parties or the court upon request.*