

<p>DISTRICT COURT, COUNTY OF LARIMER, STATE OF COLORADO Court Address: 201 LaPorte Avenue Fort Collins, CO 80521-2761 Phone Number: (970) 494-3500</p>	<p>DATE FILED: November 30, 2015 4:07 PM FILING ID: AB427BEEC8077 CASE NUMBER: 2015CV30938</p>
<p>BUCK 2ND, LLLP, a Colorado limited liability partnership,</p> <p>Plaintiff</p> <p>v.</p> <p>CITY OF LOVELAND, COLORADO, a municipal corporation,</p> <p>Defendant.</p>	<p>▲ FOR COURT USE ONLY ▲</p>
<p>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</p>	<p>Case Number: 15CV30938 Courtroom: 5B</p>
<p>MOTION TO DISMISS</p>	

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:

Certificate of Conferral:

Undersigned counsel conferred with Plaintiff's counsel and has been advised that Plaintiff opposes this Motion.

INTRODUCTION

The City of Loveland (hereafter “City”), a home rule municipal corporation, plans and regulates the use of land, including the building of streets. Plaintiff, a Limited Liability Partnership whose registered agent is John Giuliano, is a developer of various subdivisions in the City of Loveland. When Plaintiff developed the subdivisions identified in paragraph 6 of Plaintiff’s Complaint, the City entered into an Agreement to reimburse Plaintiff. *Plaintiff’s Exhibit A*. The Agreement says the Developer will be paid as money is appropriated. The Larimer County Urban Area Street Standards set out the process for payments, and since the subdivisions are not complete, payment is not due. In this case, the Complaint must be dismissed as it is premature and all conditions necessary for payment have not occurred. Alternatively, if the Agreement were to be construed as a simple contract, then the statute of limitations has run, and the Complaint must be dismissed.

BACKGROUND

1. The City of Loveland (the “City”) is a home rule city with all powers associated and granted in Article XX of the Colorado Constitution and as set forth by the adopted City Charter. Included among these is the power to acquire, maintain, and operate transportation systems, public ways, and streets.
2. The City, within its powers of local government, plans and regulates the use of land. C.R.S. § 29-20-104(1)(h) (2015). The City has established a planning commission to make and adopt a master plan for the development of the City. C.R.S. § 31-23-206(1) (2015) and Loveland Municipal Code¹ §2.60.210. The plan includes recommendations for the development of the City, including the location of proposed or projected streets, roads, rights-of-way, and any transportation plan. C.R.S. § 31-23-206(1)(a) (2015). The Loveland Planning Commission considers and recommends adoption of comprehensive plans for the physical development of the city and performs other duties required by state statutes. Loveland Municipal Code §2.60.210.
3. City Council is the governing body of the City. City Charter Section 3-1. Only City Council may make an appropriation. City Charter Section 4-7.
4. The City Manager submits a proposed budget to City Council each year. City Charter Section 11-2. As a part of the budget or as a separate report, the City Manager presents a program of proposed capital projects and methods of financing them. City Charter

¹ The entire Loveland Municipal Code and City Charter can be found at www.cityofloveland.org under City Government.

Section 11-3. The Council's adoption of the budget constitutes appropriations for the amounts specified therein as expenditures from the funds indicated. City Charter Section 11-5.

5. No City department may contract to expend any money which, by its terms, involves the expenditure of money in excess of the amounts appropriated by City Council. "Any contract, verbal or written, made in violation of this subsection shall be void, and no moneys shall be paid on such contract..." Section 11-6, Loveland City Charter. This prohibition is also enacted in the State Constitution at Article XI which forbids the City from pledging credit in any manner for any purpose or to become responsible for any debt or contract.
6. The City has defined "development standards and guidelines" as those plans and guidelines adopted by reference in the municipal code or as a part of the comprehensive plan, including the transportation plan. Loveland Municipal Code § 16.08.010. Various forms of streets are defined, including "arterial," "collector," "local," and "private." A "public street" is a public way for sidewalk, right-of-way and utility installations, the entire width from lot line to lot line. *Id.*
7. The "Larimer County Urban Area Street Standards" (hereafter "Standards") has been adopted in its entirety as the development standard of the City. The City of Loveland participated in the development of the Standards, and City Council adopted the Standards by resolution on January 2, 2001. **Exhibit 1:** Resolution R-2-01 and on February 20, 2007. **Exhibit 2:** Resolution R-13-2007.

**PLAINTIFF FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE
GRANTED: PAYMENTS ARE SCHEDULED AND ARE NOT DUE UNTIL THE
DEVELOPMENT IS COMPLETE**

8. Street layout and width of streets is based upon the transportation master plan and must comply with state statutes found in Article 2 of Title 43. Loveland Municipal Code § 16.24.040. City streets are defined at C.R.S. § 43-2-124.
9. The responsibility for the design and construction of all new streets and the widening of existing streets necessary to provide adequate transportation service to, or within, a development rests exclusively with the Developer. Standards § 1.9.2.A. Certain portions of these street improvements may be eligible for reimbursement. *Id.*

10. The Standards were adopted January 2, 2001 and have since been repealed and reenacted twice. **Exhibit 3**: Larimer County Urban Area Street Standards, Chapter 1. The City of Loveland is one of three local entities covered by the Standards. When a developer is obligated to pay any of the street capital expansion fees, upon budget appropriation and approval by the director, such person may receive a reimbursement against a portion of the amounts paid for public improvements installed and paid for by the developer. Standards §1.9.3.2
11. Where streets as planned must be oversized due to the development, the City will reimburse the Developer for approved construction costs related to the oversizing. Standards § 1.9.3.2.b. If the oversizing improvements are necessary to safely serve the development, as determined by the City, and the improvements are part of the street capital improvement plan, the City will reimburse the Developer for approved costs. *Id.* Reimbursement will be made at such time that the improvements are scheduled for construction based on the most recently adopted street capital improvement plan. Standards § 1.9.3.2.c. The City shall reimburse the Developer over time as the City receives the street capital expansion fee revenue from the project. “The reimbursement shall be made once a year...until the development is completed or until the full reimbursement is made.” *Id.*
12. Oversizing is a term of art or technical term used to identify the portion of a public improvement larger than that required for the development of the property alone. The calculation involves the public improvement as identified in the Capital Plan and the “oversize” or additional requirements needed for the street and sidewalk due to the development. **Exhibit 4**: Sample Drawing of Oversizing
13. The Streets Oversizing Agreement attached to the Complaint as Plaintiff’s Exhibit A, notes that the Developer finds it necessary to provide for the installation of street improvements for lands known as Buck 1st thru 4th Subdivisions and Giuliano 1st thru 3rd Subdivisions.
14. The improvements are identified in the City’s Capital Improvements Plan as Project ENR029. This project has not yet arrived to the date where the City would have begun the street improvements. These are not streets the City would have needed otherwise, and were improved and oversized due entirely to the development of these subdivisions.
15. The Agreement also notes that the City **may** make **partial** reimbursements “as they are appropriated from the Capital Improvements account.” Payments will be made subject to the annual City Council budget and appropriation. No monies are due in any year in which funds have not been appropriated. Plaintiff’s Exhibit A.

16. There is no dispute that the Agreement sets forth the amount eligible to be reimbursed is \$664,528.89.
17. In a Motion to Dismiss under C.R.C.P. 12(b)(5), the Court must accept all facts as true. Assuming all facts as pled are true, if the Oversizing Agreement is to be a valid agreement, then Plaintiff accepted that partial payments would be made over time as appropriated. The City has consistently indicated it will make payments totaling the \$664,528.89. The City has included project number ENR029 in its plan for payments from the Capital Expansion Fees fund to begin payments in 2017 and provided Plaintiff with that information. See Plaintiff's Exhibit D.
18. The Agreement itself sets no fixed date for payment and makes it contingent upon appropriation of the funds. Once the public improvement has been accepted, the Standards set out that payments will not be due in full until the development is complete. The attached map shows the proposed development, and the area colored in orange is the portion that has yet to be developed. **Exhibit 5: Map of Development Projects**
19. Plaintiff fails to state a claim upon which relief can be granted. C.R.C.P. 12(b)(5). The Agreement would be void if it were to be interpreted as a contractual obligation to pay the amount in full since only City Council may make an appropriation, and no appropriation has yet been made. The City Charter makes any contractual obligation void if no appropriation is made. No individual city employee has the authority to make an appropriation, and the argument that a purchase order creates an appropriation is contrary to law. Only City Council has such power. Whereas, if the agreement is accepted as the promise to pay within the context of the Municipal Code and the Standards, then it would not be void. This project has been included in the ten year plan for a number of years, and payments are scheduled to begin in 2017. Payment is not due to be completed until the development is complete. There is a process, and the City is following it.
20. Furthermore, payments become due as the streets come up for development on the City's master plan and transportation plan. This project was not scheduled for development in the Capital Improvement Plan, so these streets would not have been built before this time had the development not been built. The primary beneficiary of the public improvements is the development of Buck 1st thru 4th and Giuliano 1st thru 3rd Subdivisions.
21. The Complaint should be dismissed for failure to state a claim. The Agreement has not been breached in any way. The City has this project in the Capital Improvement Plan and has it scheduled for payments for the amount noted in the Agreement. If the development is due to be completed prior to the schedule, Plaintiff has failed to notify the City of this and included no allegation in the Complaint that the development will soon be complete. Plaintiff has sought Court intervention prematurely and without any basis for its claims.

Plaintiff has been advised of the payment schedule and that the City intends to pay the agreed upon amount by the time the development is complete, as required by the Standards.

IN THE ALTERNATIVE, THE CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

22. In the alternative, Plaintiff's claims should be dismissed in their entirety as each claim is barred by the applicable statute of limitations. "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). As discussed in detail below, the Plaintiff's own Complaint demonstrates that each of its claims are barred by the applicable statutes of limitations.

First Claim for Relief – Breach of Contract

23. Plaintiff's first claim for breach of contract is barred by the statute of limitations for contract actions set forth in C.R.S. § 13-80-101(1)(a), which requires commencement of an action on a contract within three years after the cause of action accrues. As set forth in Plaintiff's Complaint, Plaintiff asserts that it completed the street improvements and such improvements were finally accepted by the City on November 6, 2009. *See* Complaint at ¶ 12. Taking such allegations as true for purposes of this Motion, Plaintiff's breach of contract cause of action accrued on November 6, 2009 when Plaintiff alleges that payment would have been due by the City. As more than three years have passed since November 6, 2009, Plaintiff's first claim for relief should be barred.

24. C.R.S. § 13-80-101(1)(a) sets forth an exception to the three-year statute of limitations for contract actions for "actions to recover a liquidated debt or an unliquidated, determinable amount of money . . ." At first blush, it may appear that Plaintiff's breach of contract claim regarding the Street Oversizing Agreement may be subject to the exception and may fall under the six year statute of limitations. The Colorado Supreme Court has held that "a 'liquidated debt' may be ascertained either by reference to the agreement, or by simple computation using extrinsic evidence if necessary." Portercare Adventist Health System v. Lego, 286 P.3d 525, 528 (2012).

25. However, the Agreement in fact does not represent a "liquidated debt" owed by the City of Loveland because the City is not absolutely obligated to pay the reimbursable costs set forth in the Agreement. The Agreement provides that "partial reimbursements" will be made by the City as monies are appropriated; "[p]artial Streets Oversizing Agreement payments will be made to the Developer each year . . . subject to appropriations." Plaintiff's Exhibit A to Complaint at ¶ 2. As discussed in detail above, the City as a

governmental entity may not expend money that has not been appropriated by City Council in its annual budget. As reflected throughout the Agreement, all monies contemplated to be paid by the City to Plaintiff are subject to appropriations and Plaintiff entered into the agreement with this knowledge. The City is prohibited by the Colorado Constitution and by its City Charter from promising to pay the entire amount set forth in the Agreement except if such promise is subject to appropriations. This Agreement cannot be interpreted as a liquidated debt or it will be void *ab initio*.

26. As such, Plaintiff's breach of contract claim is not be a claim to recover a liquidated debt, and is thus subject to the three-year statute of limitations for contract actions set forth in C.R.S. § 13-80-101(1)(a). Such claim is therefore barred as untimely brought.

Second, Third, and Fourth Claims for Relief – Breach of Implied Covenant of Good Faith and Fair Dealing, Promissory Estoppel, and Unjust Enrichment

27. Plaintiff's second, third and fourth claims for relief stated in its Complaint are likewise contract claims subject to the three-year statute of limitations set forth in C.R.S. § 13-80-101(1)(a).
28. Plaintiff's claim is for breach of the implied duty of good faith and fair dealing, which, under Colorado law, is contained in every contract. C.R.S. § 4-1-302, (2015); Amoco Oil Co. v. Ervin, 908 P.2d 493, 498 (Colo. 1995). A violation of the duty of good faith and fair dealing gives rise to a claim for breach of contract. Cary v. United of Omaha Life Ins., 68 P.3d 462, 466 (Colo. 2003). Thus, Plaintiff's claim for breach of implied covenant of good faith and fair dealing is simply a contract claim subject to the three-year statute of limitations for contract actions.
29. Similarly, Plaintiff's third promissory estoppel claim is also a contract claim for purposes of the three-year statute of limitations. *See Bank of America, N.A. v. Dakota Homestead Title Ins. Co.*, 553. Fed.Appx. 764, 766-767 (10th Cir. App. 2013). "Promissory estoppel and breach of contract are related concepts . . . recovery in Colorado on a theory of promissory estoppel is permissible when there is no enforceable contract." Marquardt v. Perry, 200 P.3d 1126, 1129 (Colo. App. 2008).
30. Next, Plaintiff's fourth unjust enrichment claim is subject to the three-year statute of limitations for contract actions. "[B]ecause unjust enrichment is a form of relief in quasi-contract or contract implied in law . . . the time within which to assert such a claim ordinarily is assessed under the three-year statute of limitations for contract actions." Sterenbuch v. Goss, 266 P.3d 428, 436 (Colo. App. 2011).

Fifth Claim for Relief – Account Stated

31. Plaintiff's Fifth Claim for Relief is an account stated claim, which again is a contract claim. “An account stated is an agreement that the balance and all items of an account representing the previous monetary transactions of the parties thereto are correct, together with a promise to pay such balance. It must show a balance due, the amount thereof, and from whom it's due” (*emphasis added*). Mace v. Spaulding, 130 P.2d 89 (Colo. 1942). Plaintiff alleges in its Complaint that the City “acknowledged, admitted and reaffirmed its liability” on August 22, 2008, on September 8, 2008 and on November 6, 2009. *Complaint* at ¶¶ 42-43. Plaintiff's claim for account stated again ties to the Agreement and the amount set forth therein. For the reasons set forth in Paragraph 1 above, the City simply could not promise to pay the entire amount except where an appropriation for the full amount had been made by City Council, and, as a result, the claim is simply a contract claim subject to the three-year statute of limitations. A City employee does not have the authority to establish an appropriation. As more than three years have passed since either 2008 or 2009, Plaintiff's claim is barred.

Sixth Claim for Relief – Declaratory Judgment

32. Plaintiff's sixth claim for relief seeks declaratory judgment. No specific statute of limitations applies to an action for a declaratory judgment under C.R.S. § 13-80-101 *et seq.* Therefore, the general two-year statute of limitations for actions against public or governmental entities should apply. C.R.S. § 13-80-102(1)(h).

33. In the alternative, Colorado courts have held that the “catch-all” two-year statute of limitations applies to declaratory judgment actions. Harrison v. Pinnacol Assur., 107 P.3d 969, 972 (Colo. App. 2004).

34. On either basis, Plaintiff's claim for declaratory judgment is time-barred. Plaintiff alleges in its Complaint that “Buck 2nd² completed the street improvements on or about November 6, 2009.” *Complaint* at ¶ 12. At a minimum, based on its own allegations, a cause of action for declaratory relief accrued on November 6, 2009. As more than two years have passed since that date, Plaintiff's claim is barred by the statute of limitations.

CONCLUSION

Either the Agreement is subject to the Standards requiring that payment be completed when the development is complete, making the Complaint premature, or it is a Contract subject

² The Exhibit attached by Plaintiff to demonstrate acceptance of the Public Improvements is not addressed to Buck 2nd, and Plaintiff has failed to demonstrate the relationship of the corporation who received the acceptance notice to tie this acceptance to the Oversizing Agreement with Buck 2nd.

to appropriation and the statute of limitations. Plaintiff has received no payments to date and could have brought the action at any time within the statute of limitations. If Plaintiff believed payment was due when the public improvements were accepted (accepting the allegations in the Complaint as true only for the purpose of this Motion), then Plaintiff failed to timely bring its claims. If the Agreement is to be valid under the Colorado Constitution and the City Charter, then the City must be allowed to continue with the process set out in the Standards and schedule payments as they are appropriated by City Council. In this case, the case must be dismissed and the City be allowed the opportunity to follow the process and pay the amount set forth in the Agreement prior to the development being completed.

WHEREFORE, the City respectfully requests that the Court dismiss the Complaint. If the Court denies this Motion, the City respectfully requests the opportunity to Answer the Complaint within 14 days of entry of any such Order.

Dated this 30th day of November, 2015.

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 MOTION TO DISMISS was served by ICCES e-Service on this 30th day of November, 2015 to the following:

Erich L. Bethke
Senn Visciano Canges P.C.
1700 Lincoln Street, #4500
Denver, CO 80203

/s/ Kayla Demmler
Original signature on file