

<p>DISTRICT COURT, COUNTY OF LARIMER, STATE OF COLORADO</p> <p>Court Address: 201La Porte Ave, Suite 100 Ft. Collins, CO 80521</p>	<p>DATE FILED: November 3, 2015 4:28 PM FILING ID: 60C1D0F264737 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>COURT USE ONLY</p>
<p>Attorneys for Plaintiff: Erich L. Bethke, #17299 Senn Visciano Canges, P.C. 1700 Lincoln Street, #4500 Denver, CO 80203 303-298-1122 EBethke@Sennlaw.com</p>	<p>Case Number:</p> <p>Division/Courtroom:</p>
<p>COMPLAINT, INCLUDING FOR DECLARATORY RELIEF, AND JURY DEMAND</p>	

Plaintiff Buck 2nd LLLP (“Buck 2nd”), by its undersigned attorneys Senn Visciano Canges P.C., brings the following Complaint against Defendant City of Loveland, Colorado (“Loveland”).

PARTIES

1. Buck 2nd is a Colorado limited liability limited partnership, with its principal place of business located at 308 Commerce Drive, Suite A, Ft. Collins, CO 80524. Buck 2nd is a developer and home builder in Colorado.

2. Loveland is a municipality in Loveland County, Colorado located at 500 East 3rd Street, Loveland, CO 80537.

JURISDICTION AND VENUE

3. This Court has jurisdiction over Loveland because it is a municipality established by the State of Colorado, and this action arises from business conducted by Loveland in the State

of Colorado and pertaining to, among other things, Loveland's contractual relations with Buck 2nd.

4. Venue is proper pursuant to C.R.C.P. 98(c)(4) because this is an action upon a contract for services that were to be performed in the County of Larimer.

GENERAL ALLEGATIONS

5. On August 22, 2008 Buck 2nd and Loveland entered into a Streets Oversizing Agreement (the "Agreement"). A true and correct copy of the Agreement is incorporated into this Complaint and is **Exhibit A** hereto.

6. Pursuant to the Agreement, Buck 2nd agreed to install street improvements as requested by Loveland and to facilitate the development of lands known as Buck 1st thru 4th Subdivisions and Giuliano 1st thru 3rd Subdivisions (the "Street Improvements").

7. Pursuant to the Agreement, Loveland agreed to pay and reimburse Buck 2nd for the Street Improvements in the principal amount of \$664,528.89.

8. Loveland agreed to pay Buck 2nd for completed and accepted improvements "as they are appropriated." There are no further provisions of the Agreement with respect to the time for making payment of amounts that are due and owing.

9. Loveland has appropriated the funds for the payment and the reimbursement if Buck 2nd for the Street Improvements. Such appropriation of funds is shown by, among other things, the September 8, 2008 Purchase Order for the Street Improvements signed by Cynthia Scymanski, Purchasing Administrator, which states, in part, "that the funds are appropriated in the current budget" (the "Purchase Order") (emphasis added). A true and correct copy of the Purchase Order is incorporated into this Complaint and is **Exhibit B** hereto.

10. The Agreement contains a merger clause that provides: "This Agreement constitutes the entire Agreement of the parties, and may be altered, amended or revised only by written agreement of the parties hereto." There are no amendments, modifications, revisions or alterations to the Agreement.

11. The Agreement does not set forth specific provisions for interest, late payments or other accruals with respect to the principal amount owed by Loveland to Buck 2nd under the Agreement.

12. At significant cost and expense, Buck 2nd completed the street improvements on or about November, 6, 2009, as evidenced by the "Notification of Public Improvement Final Acceptance" (the "Final Acceptance Letter") letter dated the same and signed by Jeff Keil, Public Works Inspector. A true and correct copy of the Final Acceptance Letter is incorporated into this Complaint and is **Exhibit C** hereto.

13. In the months and years following the completion of the Street Improvements by Buck 2nd, and following Loveland's appropriation of the funds for payment, Buck 2nd has made multiple requests to Loveland for payment for the Street Improvements. However and contrary to the reimbursement and payment provisions of the Agreement, Loveland has delayed any payment to Buck 2nd and now proposes an unreasonable and alternative payment schedule.

14. Among other things, Loveland admits that Buck 2nd is owed the full principal amount of \$664,528.89 specified in the Agreement plus various other accruals. However, Loveland improperly claims that installment payments to Buck 2nd for the Street Improvements will not commence until 2017, and with a final installment not to occur until 2023. *See*, the October 21, 2015 email of Loveland's agents (the "October Email"). A true and correct copy of the October Email is incorporated into this Complaint and is **Exhibit D** hereto.

15. To date, Loveland has not made any payments or reimbursements to Buck 2nd for the completed Street Improvements. All conditions necessary for bringing this Complaint have occurred or have been waived, excused, or are otherwise satisfied.

FIRST CLAIM FOR RELIEF (Breach of Contract)

16. Buck 2nd hereby incorporates by reference the allegations in the preceding paragraphs of this Complaint as if fully incorporated herein.

17. The Agreement is a binding contract between Buck 2nd and Loveland.

18. Buck 2nd preformed all of its obligations under the parties' Agreement, including by completing the Street Improvements.

19. Loveland breached the Agreement by, among other things, failing to pay to Buck 2nd the principal amount of \$664,528.89 from the appropriated funds, and all other fees, interest, and expenses due on that amount.

20. Such breaches are material.

21. As a direct and proximate result of Loveland's material breaches of the Agreement, Buck 2nd has been damaged in an amount to be proven at trial.

SECOND CLAIM FOR RELIEF (BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING)

22. Buck 2nd hereby incorporates by reference the allegations in the preceding paragraphs of this Complaint as if fully incorporated herein.

23. The Agreement requires that Loveland to make payments on amounts due and owing once funds are appropriated. The time for making such payments after appropriation is not specified in the contract. There is an implied covenant of good faith and fair dealing with

respect to, among other things, the time for making payment of any such amounts that are due and owing under the Agreement.

24. Loveland breached the implied covenant by, among other things, unreasonably delaying in paying amounts due and owing under the Agreement, and in attempting to structure payments over time and well into the future.

25. Such breaches are material.

26. As a direct and proximate result Loveland's material breaches of the implied covenant of good faith and fair dealing, Loveland has damaged Buck 2nd in an amount to be proven at trial.

THIRD CLAIM FOR RELIEF (Promissory Estoppel)

27. Buck 2nd hereby incorporates by reference the allegations in the preceding paragraphs of this Complaint as if fully incorporated herein.

28. Loveland promised to provide payments and reimbursements to Buck 2nd for the completed Street Improvements.

29. Buck 2nd reasonably relied upon such promises to its detriment, by, among other things, constructing the Street Improvements.

30. Loveland subsequently failed to abide by, and perform in accordance with, such promises and is estopped to deny its obligations and promises to Buck 2nd. Buck 2nd has incurred damages with respect to the same in an amount to be proven at trial.

FOURTH CLAIM FOR RELIEF (Unjust Enrichment)

31. Buck 2nd hereby incorporates by reference the allegations in the preceding paragraphs of this Complaint as if fully incorporated herein.

32. As set forth herein, Buck 2nd conferred significant benefits upon Loveland including, without limitation, constructing the Street Improvements.

33. Loveland has appreciated and realized the benefits of the same, and to date has made no payment, reimbursement or other exchange of value to Buck 2nd concerning the Street Improvements.

34. It would be unfair and inequitable for Loveland to retain the benefits of the Street Improvements without payment of their value and as set forth herein.

35. Loveland has been unjustly enriched, and is liable to Buck 2nd in amounts necessary to prevent such unjust enrichment and to redress the damage and harm to Buck 2nd, in an amount to be proven at trial.

FOURTH CLAIM FOR RELIEF
(Account Stated)

36. Buck 2nd hereby incorporates by reference the allegations in the preceding paragraphs of this Complaint as if fully incorporated herein.

37. By virtue of the Agreement, Loveland established an account for purposes of payment and reimbursement of Buck 2nd with respect to the construction of the Street Improvements (the “Account”).

38. Pursuant to the Account, Buck 2nd has requested payment pursuant to the Agreement in the principal amount of \$664,528.89, together with any and all accruals on such principal amount as may be properly due and owing under the Agreement or otherwise.

39. The Account balance is currently in the amount of \$664,528.89 (the “Agreed Balance”), not including accrued interest or other accruals upon such Agreed Balance.

40. Most recently and on October 30, 2015, Buck 2nd demanded that Loveland pay the entire Agreed Balance and to pay any and all accruals with respect to the same.

41. Loveland has not ever objected to the amount of the Agreed Balance that is due owing to Buck 2nd.

42. In fact and on August 22, 2008, Loveland, acting through its authorized agents, acknowledged, admitted and reaffirmed its liability to Buck 2nd for the Agreed Balance.

43. Moreover, Loveland has admitted and acknowledged its obligation to Buck 2nd for the Agreed Balance under the terms of the Agreement, and reaffirmed its liability for the Account in the September 8, 2008 Purchase Order and again in the November 6, 2009 Final Acceptance Letter.

44. As of the date of this Complaint, Loveland has failed to pay any of the amounts due and owing on the Account to Buck 2nd. Accordingly, there is now due, owing and unpaid from Loveland to Buck 2nd, the sum of \$664,528.89, plus other applicable accruals thereon, as may be provided by law, and attorney's fees and costs.

FIFTH CLAIM FOR RELIEF
(Declaratory Judgment)

45. Buck 2nd hereby incorporates by reference the allegations in the preceding paragraphs of this Complaint as if fully incorporated herein.

46. Disputes now exist between the parties for which Buck 2nd requests declaratory relief from this Court. Such disputes cause uncertainty in the relationships and dealings between the parties and hazard further breaches and wrongful conduct with respect to the parties' continuing business transactions and relationships unless such rights and duties are declared and clarified by this Court.

47. Among other things, Buck 2nd requests a declaratory judgment from the Court determining the parties' respective rights and obligations, including pursuant to the terms of the Agreement and under applicable principals of law and equity.

48. Among other things, Buck 2nd respectfully seeks a declaration as to the controlling interpretation and enforcement of the Agreement consistent with its claims as set forth herein. Buck 2nd seeks a declaration as to the proper and full accruals of interest, or other amounts, that may pertain to the principal amount of \$664,528.89 owed by Loveland to Buck 2nd under the Agreement. Buck 2nd additionally seeks, without limitation, a declaration as to the validity of Loveland's alternative claims and admissions as to Loveland's liability for payment and reimbursement to Buck 2nd for the Street Improvements under the Agreement.

49. Buck 2nd respectfully reserves the right to request that the Court conduct "a speedy hearing of [this] action for a declaratory judgment and . . . advance it on the calendar." *See, e.g.* C.R.C.P. Rule 57(m). *See also,* C.R.S. §13-51-101 *et seq.*, Uniform Declaratory Judgments Law.

DEMAND FOR JURY TRIAL

Buck 2nd requests a trial by jury for all of its claims that may be tried to a jury.

WHEREFORE, Buck 2nd prays as follows on the claims of its Complaint:

- A. For entry of judgment in favor of Buck 2nd and against Loveland, in an amount to be determined at trial, including interest;
- B. For damages in an amount to be proven at trial including, without limitation, actual, direct, compensatory, consequential, and other damages as may be available under law and equity, and for declaratory judgments as set forth herein;
- C. For pre-judgment interest, post-judgment interest and moratory interest;
- D. For its reasonable attorney's fees, costs, and expenses as may be available under law and equity; and
- E. For such other and further relief as the Court deems just and proper.

Dated and respectfully submitted: November 3, 2015

Senn Visciano Canges, P.C.

s/ Erich L. Bethke [Original Signature on File]
Erich L. Bethke, #17299
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Denver, CO 80203

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