

DISTRICT COURT, COUNTY OF LARIMER, STATE OF COLORADO Court Address: 201 LaPorte Avenue Fort Collins, CO 80521-2761 Phone Number: (970) 494-3500	<p style="text-align: center;">▲ FOR COURT USE ONLY ▲</p>
GIULIANO & FATHER CONSTRUCTION, INC., a Colorado corporation, and  GIULIANO ADDITION, LLLP, a Colorado limited liability partnership,  Plaintiffs,  v.  CITY OF LOVELAND, COLORADO, a municipal corporation,  Defendant.	
Attorneys for Defendant City of Loveland, a Municipal Corporation: Alicia R. Calderón, Assistant City Attorney, #32296 Laurie R. Stirman, Assistant City Attorney, #39393 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: 2016CV30358  Courtroom: 5C
<p style="text-align: center;"><b>REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS COMPLAINT</b></p>	

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

### **Summary of the Issues Remaining**

As noted by Plaintiffs Response to the Motion to Dismiss, only two claims remain: First, Plaintiffs seek a declaratory judgment as to 1) rights and obligations between the parties for infrastructure for new development in the City of Loveland and 2) amounts to be paid by Plaintiffs for such infrastructure. Second, Plaintiffs argue that a Revised Final Development Plan for the Giuliano First Subdivision<sup>1</sup> created a promise that building permits would not be withheld upon building the water booster pump station. The City's Motion to Dismiss seeks dismissal of these two remaining claims on the basis that Plaintiffs have failed to exhaust their administrative remedies with respect to the public improvement construction plans only very recently submitted to the City and subject to a pending administrative process. As a result of the Plaintiffs' failure to exhaust, this Court does not have subject matter jurisdiction to review Plaintiffs' claims.

### **Argument**

The City does not misunderstand the allegations in the Complaint. Rather, the City seeks dismissal of the Plaintiffs' claims regarding the water booster station as the evidence shows that this Court does not have subject matter jurisdiction over these claims where Plaintiffs have failed to exhaust their administrative remedies.

The City laid out the legal authority for dismissal of claims under C.R.C.P. 12(b)(1) in its Motion, but reasserts such authority here for clarity. As a general rule, a court does not have jurisdiction over a matter if the plaintiff has failed to exhaust its administrative remedies. "Colorado courts strictly adhere to the exhaustion of remedies doctrine, which requires parties to pursue statutory remedies before seeking relief in district court." Colorado Dept. of Public Health and Environment v. Bethell, 60 P.3d 779, 784 (Colo. App. 2002). "If complete, adequate, and speedy administrative remedies are available, a party must pursue these remedies before filing suit in district court." City and County of Denver v. United Air Lines, Inc., 8 P.3d 1206, 1212 (Colo. 2000). The purpose of the exhaustion doctrine is to permit the agency which has the expertise in the subject matter to review the matter first, as well as to conserve judicial resources. City and

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<sup>1</sup> Paragraph 6 of the Complaint defines the term "Plan", used throughout the document, as being a Revised Final Development Plan for the Giuliano First Subdivision.

County of Denver, 8 P.3d at 1212-13. In addition, the doctrine “protects against premature interference by the courts and piecemeal litigation.” Bethell, 60 P.3d at 784.

“Under C.R.C.P. 12(b)(1), a trial court determines subject matter jurisdiction by examining the substance of the claim based on the facts alleged and the relief requested . . . The plaintiff has the burden of proving jurisdiction, and evidence outside the pleadings may be considered to resolve a jurisdictional challenge.” City of Aspen v. Kinder Morgan, Inc., 143 P.3d 1076, 1078 (Colo. App. 2006).

As the City has raised the issue of jurisdiction, it is the Plaintiffs’ burden to prove jurisdiction, rather than hide behind their allegations and assertion that only discovery can address whether or not the Court has jurisdiction to hear Plaintiffs’ claims. Plaintiffs fail to present any evidence to address the status of the most current public improvement construction plans submitted and under review with the City.

As for the argument that the City failed to present any evidence, the relevant documentation is now attached to this Reply and available for review. However, Plaintiffs fail to address in any way whatsoever the administrative process and the public improvement construction plan application submitted by Mr. Giuliano. The Loveland Municipal Code speaks for itself as to the administrative process which is due Plaintiffs.

### ***City’s Administrative Process for Review of Plaintiffs’ Pending Public Improvement Construction Plans***

The background provided in the City’s Motion to Dismiss demonstrates how the City’s planning and development process is codified in the Loveland Municipal Code, and sets forth the specific administrative procedures and process that are required before disputes proceed to district court. As explained in the Motion to Dismiss, the process for approval of a subdivision requires approved public improvement construction plans. A developer is required to submit a complete plan for the design of all public and private improvements in a project. Public improvements include water distribution systems, and accordingly, Plaintiffs resubmitted their public

improvement construction plans after their previous public improvement construction plans expired. *See* Exhibit 1 – Public Improvement Construction Plans Application for Wilson Commons First Subdivision. These plans are dated March 2, 2016. These are recent plans, and staff comments were returned to Mr. Giuliano April 29, 2016. *See* Exhibit 2 – Development Review Team Report.

Prior to the issuance of any partial building permit in any area within any annexation or subdivision, all preliminary improvements must be installed by the applicant in compliance with plans and specifications approved by the City. Loveland Municipal Code<sup>2</sup> (*L.M.C.*) § 16.40.10. Furthermore, adequate community facilities needed to service new development are required. *L.M.C.* § 16.41.010.

The City is not requiring that Plaintiffs correct any alleged mistake. Rather, the City is requiring that Plaintiffs provide adequate water facilities for the Plaintiffs’ Wilson Commons development (“Wilson Commons”), which is a **new** development for which the Plaintiffs seek to begin construction. Wilson Commons was proposed **after** the water booster pump station was constructed and accepted in 2002. Fifty-six (56) of the proposed homes in Wilson Commons are in a water booster pump station zone that will not have sufficient capacity if those homes are added. The City is not seeking any changes to the water booster pump station for existing residences or asking Plaintiffs to cure any alleged deficiencies in the existing water booster pump station. Assuming the facts in the Complaint as true for this Motion, the City did not ask Mr. Giuliano in 2005 to cure any deficiencies in the water infrastructure; the City only contacted Mr. Giuliano to inform him of improper designs and specifications. *Complaint*, p. 19. Plaintiffs are the ones who are seeking to build the new Wilson Commons development, and as a result of this new development by Plaintiffs, the City is requiring adequate water system infrastructure.

At this time, Plaintiffs are in the middle of an administrative process. Plaintiffs would ordinarily respond to the Staff Review Report, and if Plaintiffs are not satisfied after a back and forth process with the staff, the staff decision may be appealed in accordance with Chapter 18.80 of the Loveland Municipal Code. *L.M.C.* § 16.10.010. Thus, it is clear that Plaintiffs have not

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<sup>2</sup> Loveland Municipal Code (“L.M.C.”) is publicly available online at <http://www.cityofloveland.org/modules/showdocument.aspx?documentid=57>;

exhausted their administrative remedies with respect to the water booster station required for the newly submitted public improvement construction plans.

***Plaintiffs' System Impact Fee Argument Must Also Fail***

Plaintiffs conflate public infrastructure construction requirements with impact fees – they are not one and the same. C.R.S. § 29-20-104.5 addresses impact fees. A local government may impose an impact fee to fund expenditures by such local government on capital facilities needed to serve new development. For example, the City charges such fees for water service, and it is collected when a water tap application is submitted. *L.M.C. §13.04.030*. The fees are standardized and adopted after two readings by City Council. *Id.* The City does charge system impact fees, but these are different from the requirement that developers carry the burden for building infrastructure when developing parcels of land. Plaintiffs are not challenging a system impact fee, but rather trying to avoid their obligation to build public infrastructure for a new subdivision.

Plaintiffs are correct that system impact fees may not be used to remedy deficiencies in existing capital facilities. *C.R.S. § 29-20-104.5(2)*. However, the public improvement to the water distribution system is not a system impact fee. Practically speaking, the improvements to the water booster pump station will allow the addition of 56 **new** houses to receive adequate water pressure in their homes. These are new homes, not existing residences.

As for C.R.S. § 29-20-203, the City does place conditions on land use approvals and has adopted standards through the *Larimer County Urban Area Street Standards and Requirements for Electric Service* and others. *See L.M.C. §§ 16.24.011, 16.24.012, 16.24.013, 16.24.014.*

Plaintiffs incorrectly rely on the *Wolf Ranch* case because that involved a fee being charged. In that case, the Supreme Court upheld the fees being assessed because they were publicly promulgated and fell under the exception for legislatively formulated fees imposed on a broad class of property owners. In this case, Plaintiffs are not challenging a fee but rather a standard for public improvement construction. This is a requirement to provide adequate infrastructure for new development.

### **Conclusion**

Plaintiffs have failed to exhaust their administrative remedies. Plaintiffs are not challenging a system impact fee or any other City fee, so reliance on C.R.S. § 29-20-104.5 is misplaced. The City places conditions on land-use approvals pursuant to standards adopted in the municipal code, which is compliant with requirements found in C.R.S. § 29-20-203. Plaintiffs lack subject matter jurisdiction due to a failure to exhaust their administrative remedies. Plaintiffs failed to carry their burden to establish jurisdiction. Plaintiffs' response failed to even recognize the public improvement construction plans submitted that they submitted, and their application that began the administrative review process. Plaintiffs' denial that the water booster pump station is subject to an administrative process is not credible and belied by their own application.

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

Dated this 2nd day of August, 2016.

CITY OF LOVELAND

*Original signature on file*

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**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS COMPLAINT was served via ICCES e-Service on this 2nd day of August, 2016 to the following:

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/s/ Kayla Demmler  
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