

<p>DISTRICT COURT, COUNTY OF LARIMER, STATE OF COLORADO Court Address: 201 La Porte Ave, Suite 100 Ft. Collins, CO 80521</p>	
<p>GIULIANO & FATHER CONSTRUCTION, INC., a Colorado corporation and GIULIANO ADDITION, LLLP, a Colorado limited liability limited partnership Plaintiffs, v. CITY OF LOVELAND, COLORADO, a municipal corporation, Defendant.</p>	COURT USE ONLY
<p>Attorneys for Plaintiffs 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</p>	<p>Case No.: 2016CV30358 Courtroom/Division: 5C</p>
PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS COMPLAINT	

Plaintiffs Giuliano & Father Construction, Inc. and Giuliano Addition, LLLP (the “Giuliano Plaintiffs”), by their attorneys, Senn Visciano Canges P.C., respectfully submit this Opposition to Plaintiff City of Loveland, Colorado’s (the “City”) Motion to Dismiss (“Motion”) pursuant to Rule 12(b)(1) and Rule 12(b)(5) of the Colorado Rules of Civil Procedure.

The parties recently executed a Development Agreement that resolves Claims 1-4 of the Complaint (the “Affordable Housing Claims”). As such, the Giuliano Plaintiffs filed a Stipulated

Notice of Dismissal with respect to the Affordable Housing Claims. This Opposition is therefore directed to the remaining claims (Claims 5-6, referred to herein as the “Pump House Claims”).

I. INTRODUCTION

The City’s Motion must fail under C.R.C.P. 12(b)(5) and 12(b)(1), because the City fundamentally misunderstands the nature and well-pleaded allegations in the Giuliano Plaintiffs’ Complaint. The claims therein arise principally from the City’s improper attempts to impose an unlawful impact fee, *see Wolf Ranch LLC, infra* and C.R.S. §§ 29-20-104.5 and 29-20-203(1), by attempting to force the Giuliano Plaintiffs to fund the correction of decade-old mistakes the City made with respect to the original specifications for the construction of the Pump House in 2002.

The Giuliano Plaintiffs’ Complaint and its proper allegations arise from prior administrative proceedings which were complete and final over a decade ago. The City is recently and improperly extorting and forcing the Giuliano Plaintiffs to pay to correct the City’s long-standing mistakes by impermissibly denying building permits until the Giuliano Plaintiffs acquiesce in the City’s improper and unlawful demands.

Moreover and although the Giuliano Plaintiffs vigorously deny that the Pump House Claims are subject to any current administrative process, as the well-pleaded claims arise from an administrative process that was concluded over a decade ago, the City has failed to present any evidence to support its erroneous contentions. The City instead relies on the mere conclusory and legal conclusions of counsel, contained in only a few sentences in the Motion. Furthermore and at a minimum, the City’s misplaced and erroneous arguments necessarily involve a number of disputed facts on which no discovery has yet occurred. The City cannot succeed under C.R.C.P. 12(b)(5) or 12(b)(1) at this stage, and it would be reversible error for the Court to grant the Motion.

II. STANDARD OF REVIEW

Under C.R.C.P. 12(b)(5), a trial court may not dismiss a complaint that states a plausible claim for relief. *Warne v. Hall*, 2016 CO 50, ¶9, --- P.3d ----. A claim is plausible where the factual allegations are “enough to raise a right to relief ‘above the speculative level’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Although trial courts are no longer required to accept “legal conclusions” as true, they must still accept a plaintiff’s averments of fact as true in determining as an initial matter whether the claims pleaded are plausible. *See id.*, ¶¶9, 27-28. Under the well-pleaded allegations in the Complaint, the Giuliano Plaintiffs pleaded many, specific and non-conclusory factual allegations that show the Pump House Claims arose under an administrative process that was complete and final over a decade ago. There is no basis to dismiss any of the Pump House claims under C.R.C.P. 12(b)(5).

To the extent the City brought its Motion under C.R.C.P. 12(b)(1) instead, there is, at a minimum, a host of presently unanswered jurisdictional and other factual issues that necessarily preclude the granting of the Motion. If there is any dispute regarding the underlying jurisdictional facts, the court should allow the parties an opportunity to conduct discovery before ruling on a motion to dismiss under C.R.C.P. 12(b)(1). *See Trinity Broad. of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 924 (Colo. 1993). *See also Walton v. State*, 968 P.2d 636, 641 (Colo. 1998) (explaining that “factual development of the case through discovery in the course of trial preparation may aid a more informed jurisdiction determination [under C.R.C.P. 26(a)(1)] at a later state of pre-trial proceedings”).

A motion to dismiss under C.R.C.P. 12(b)(1) may be granted only if supported by uncontested, “competent evidence pertaining to the motion.” *Trinity*, 848 P.2d at 924; *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). A trial court therefore commits reversible error if it grants a

motion to dismiss under C.R.C.P. 12(b)(1) based on mere conclusory statements of counsel as opposed to competent and admissible evidence. *See id.* Because the City's arguments regarding the Pump House Claims are no more than conclusory assertions of counsel, the Motion must be denied.

III. ARGUMENT

A. The City's Motion Must Fail under C.R.C.P. 12(b)(5) 12(b)(1) Because the Pump House Was Built, Approved, and Assumed by the City in the Early 2000s, and the Pump House Claims Arise Out of a Decade-Old Complete and Final Administrative Process

The Giuliano Plaintiffs adequately and clearly alleged that the Pump House Claims are not subject to any current or pending administrative review. Instead, the City, in an unsupported and conclusory fashion, argues the Pump House Claims are subject to a current and unspecified administrative process, and is attempting to bootstrap the Pump House Claims into such non-existent administrative proceedings. The Giuliano Plaintiffs have more than adequately alleged that the City's recent and wrongful attempts to force the Giuliano Plaintiffs to pay to correct decade-old mistakes by the City is an impermissible attempt to impose an impact fee that is contrary to the Giuliano Plaintiffs' vested property rights, and is in violation of Colorado statutes, *see* C.R.S. §§ 29-20-104.5 and 29-20-203(1), and common law.

The Giuliano Plaintiffs alleged that “[o]n or about January 15, 2003 the City approved a Revised Final Development Plan (the ‘Plan’) for the Giuliano First Subdivision.” (Cmplt., ¶6.) The Plan required the Giuliano Plaintiffs to “‘install a public water booster station’ and that the ‘station shall be installed prior to issuance of any building permit’ (the ‘Pump House’).” (*Id.*, ¶16.) The Giuliano Plaintiffs then alleged that “[i]n or about 2001, the City provided Giuliano with the final designs and specifications for the Pump House, issued permits to Giuliano for constructing the same, and Giuliano thereafter constructed the Pump House in or about 2002.” (*Id.*, ¶17.) Finally, the Giuliano Plaintiffs alleged that “[r]easonably thereafter, the Pump House went into operation and

the City submitted its final acceptance notice and assumed ownership and responsibility for the Pump House.” (*Id.*, ¶18.)¹ As alleged, the administrative process involved was complete and final over a decade ago.

The Giuliano Plaintiffs then alleged (Cmplt., ¶19) that sometime “on or about March 7, 2005”, after the Pump House had been accepted by the City and the City had assumed ownership and responsibility for it, “the City emailed Giuliano stating, in part, that the City had improperly designed, provided specifications for, and approved the water infrastructure built in the Giuliano Projects such that, among other things, the Pump House was inadequate for servicing the then existing development usage in the Giuliano Projects.”

The City essentially concluded in 2005 that the specifications that it gave to the Giuliano Plaintiffs were inadequate.² The City waited until “the fall of 2015”, more than a decade after the underlying administrative process was complete and final, before demanding that the Giuliano Plaintiffs pay to correct the City’s mistaken specifications, and is now denying building permits to attempt to coerce the Giuliano Plaintiffs to fix the City’s decade-old mistakes. (*See* Cmplt., ¶¶22-26.)

The allegations in the Complaint therefore plainly show that there is no current and unexhausted administrative proceeding; the Pump House Claims arise from administrative proceedings that were complete and final over a decade ago. *See, e.g., Wolf Ranch, LLC v. City of Colorado Springs*, 220 P.3d 559, 561-62 (Colo. 2009) (petition for review to the district court following prior exhaustion of administrative procedures is appropriate in impact fee cases under the

¹ The City did not dispute in its Motion that it accepted and assumed ownership and responsibility for the Pump House in the early 2000s, thus effectively completing the underlying administrative review process.

² The Giuliano Plaintiffs did nothing wrong in building the Pump House according to the City’s specifications, and expressly relied on the City to get the specifications correct.

Regulatory Impairment of Property Rights Act, C.R.S. §§ 29-20-201, *et seq.*; petition was not brought under C.R.C.P. 106).

The Giuliano Plaintiffs respectfully submit that the City may not, as a matter of law, condition building permits on the fixing of the City's decade-old mistaken specifications. The issues of law relating to impact fees, *see Wolf Ranch*, 220 P.3d at 561-62 and C.R.S. C.R.S. §§ 29-20-104.5 and 29-20-203(1), are necessarily intertwined with a host of facts and are not appropriate for, or subject to, administrative review. *See Horrell v. Dep't of Admin.*, 861 P.2d 1194, 1197 (Colo. 1993) ("The policies of avoiding fragmented adjudication of issues concerning judicial resources support the requirement of exhaustion of administrative remedies are not furthered, however, when available administrative remedies are ill-suited for providing the relief sought and when the matters in controversy consist of questions of law rather than issues committed to administrative discretion and expertise."). The City has not met the standards for dismissal under C.R.C.P. 12(b)(5) and/or 12(b)(1).

B. The City Has Failed to Present Any Evidence Substantiating its Assertion that the Pump House Claims Are Subject to Any Pending and Unexhausted Administrative Proceedings; at the Very Least, a Number of Jurisdictional and Other Facts are Disputed Such that Dismissal at this Time Would Constitute Reversible Error.

The City's Motion provides virtually nothing more than two unsubstantiated and conclusory sentences with respect to their erroneous contention that the Pump House Claims are subject to

pending and unexhausted administrative proceedings.³ The City's limited argument consists of the following two assertions:

1. that "this Court does not have subject matter jurisdiction to adjudicate Plaintiffs' 'pump house' claims as Plaintiffs have failed to exhaust their administrative remedies" (Motion at 10); and
2. that the "new Public Improvement Construction Plans have only recently been submitted and are under review by the City" (*Id.*)

The City then summarily concludes that "Plaintiffs are required by law to permit the City's process [to] move forward, and to exhaust all of their remedies prior to seeking judicial review." (*Id.*)

The City's arguments are really the mere assertions of counsel. They are entitled to no weight, and are not grounds on which the Court may grant the Motion. *See Trinity Broad.*, 848 P.2d at 924 (party contesting jurisdiction must present "competent evidence"). Further, those conclusory statements are not substantiated by any admissible documentary exhibits or affidavit testimony, and they are not evidence that the Pump House Claims are subject to an exhaustion of remedies defense.

Further, the City utterly fails to link the Pump House Claims to the purported Public

³ In fact, the City's primary reference to the Pump House Claims is in the Background section of the Motion:

The public improvement construction plans for the Wilson Commons Addition expired and new plans were recently submitted to the City. The staff comments on those plans were provided back to Giuliano April 29, 2016 [sic]. The plans are on first review. The need for a water booster pump station is directly at issue in the administrative process currently proceeding at the City. Giuliano attempts to circumvent the administrative process by presenting this as a contract dispute when the administrative process has not even concluded.

Those background statements, which are conclusory and unsupported, are wholly inadequate under C.R.C.P. 12(b)(1) and 12(b)(5).

Improvement Construction Plans that are purportedly under review, or to any other unidentified but alleged pending administrative proceedings. The City likewise failed to attach any “public improvement construction plans”, “staff comments”, or any other City documents referenced in the Background section of the Motion (*see* footnote 3, *supra*).

Instead and contrary to the standards of review for a motion to dismiss under either C.R.C.P. 26(a)(5) or 26(a)(1), the City essentially presents a tome summarizing the local Zoning Code and procedures, and asks the Court to assume, without any competent and admissible evidentiary support or argument, that the Pump House Claims fall within the some as yet unidentified current and unexhausted administrative review process. The City failed to provide any description, let alone sufficient competent evidence and argument, regarding any details concerning a pending administrative review process. The Motion therefore fails to meet the strict standards and requirements for dismissal under C.R.C.P. 12(b)(5) and 12(b)(1).

The Giuliano Plaintiffs vigorously deny that the Pump House and/or the Pump House Claims are subject to any unidentified (and nonexistent) pending administrative process. However and to the extent the Court is willing to entertain the City’s unsupported and erroneous argument, there are a host of jurisdictional and other facts that are disputed. For example and among other disputed issues of facts, discovery would be required to determine the nature and scope of the unidentified pending administrative process; the current state of the review process and whether such review process has been exhausted; and the nexus between the said pending administrative process and the decade-old completed and final administrative process by which the Pump House was built, approved, and ownership was transferred to, and assumed by, the City.

There are also well-established exceptions to the exhaustion of administrative remedies doctrine that the Giuliano Plaintiffs maintain would apply if the Court were to conclude the Pump

House Claims are subject to some pending and unexhausted administrative process. *See City & Cnty. of Denver v. United Air Lines, Inc.*, 8 P.3d 1206, 1213 (Colo. 2000); *New Design Constr. Co. v. Hamon Contractors, Inc.*, 215 P.3d 1172, 1178 (Colo. App. 2008); *see also Horrell*, 861 P.2d at 1197.

Given that the City has failed to come forward with any jurisdictional facts or evidence, it would be reversible error for the Court to grant the Motion without, at the very least, permitting discovery to determine these and other disputed issues of fact. *See Trinity Broad.*, 848 P.2d at 924; *see also Walton*, 968 at 641.

WHEREFORE, the Giuliano Plaintiffs respectfully request that the Court deny the City's Motion in its entirety.

Dated: July 26, 2016.

SENN VISCIANO CANGES P.C.

*s/ Erich L. Bethke**

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Charles E. Fuller, #43923

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

This will certify that on this 26th day of July, 2016, a true and correct copy of the foregoing was served via ICCES on the following:

Alicia R. Calderon, Esq.
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**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.*