DISTRICT COURT, COUNTY OF LARIMER, STATE OF COLORADO Court Address: 201 LaPorte Avenue Fort Collins, CO 80521-2761 Phone Number: (970) 494-3500	
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.	▲ FOR COURT USE ONLY ▲
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: 3C

THE CITY OF LOVELAND'S SUPPLEMENT TO MOTION TO DISMISS COMPLAINT

COMES NOW the City of Loveland, a municipal home rule corporation, by and through undersigned counsel, and submits its Supplement to Motion to Dismiss Complaint amending and supplementing the Motion and in support states as follows:

Certificate of Conferral Pursuant to C.R.C.P. 121 § 1-15:

Plaintiffs opposed the original Motion to Dismiss, and have not changed their position.

Procedural Background

This case was filed on April 8, 2016. In the Complaint, the Plaintiffs asserted claims regarding two separate and distinct matters: (1) affordable housing requirements for certain of Plaintiffs' developments, and (2) a water booster station which serves some of Plaintiffs developments. The City moved to dismiss all claims on May 10, 2016, asserting that Plaintiffs had failed to state claims upon which relief may be granted and that the Court lacks subject matter jurisdiction as Plaintiffs' have failed to exhaust their administrative remedies. The parties finalized a settlement for claims one through four in the Complaint regarding affordable housing. These claims were dismissed by stipulation, filed on July 26, 2016, at which time Plaintiffs' filed a response to the City's Motion to Dismiss.

The City filed its Reply regarding the Motion to Dismiss on August 2, 2016, although inadvertently did not file two documents which were referenced as exhibits in the Reply. These documents were (1) a Public Improvement Construction Plans (PICP) Application submitted by John Giuliano for the Wilson Commons First Subdivision, and (2) a Development Review Team Report regarding the PICP Application, which had been provided to Mr. Giuliano by the City. These documents were thereafter filed with the Court when the City learned they had not been previously filed.

The Honorable Judge French entered the order dismissing the first four claims in the Complaint on August 29, 2016, and shortly thereafter recused himself from the case. The case was reassigned to the Honorable Judge Howard, who ordered the City to file its Answer to the Complaint and scheduled a case management conference for November 7, 2016. Before the case management conference, the parties began discussing facilitating meetings between the City and the Plaintiffs, including engineers for each of the parties, to discuss resolving Plaintiffs' remaining claims regarding the water booster station.

At the case management conference, Judge Howard did not enter a case management order or address the motion to dismiss other than to indicate that he would allow each side to supplement its brief regarding the motion to dismiss. The Court held these matters in abeyance until December 1, 2016 by which time the parties would have had a chance to meet and discuss possible settlement options. At the request of the parties, the case was stayed an additional 60 days until January 30, 2017, and another additional 45 days until March 16, 2017. As a result, the motion to dismiss and all other deadlines are still held in abeyance as of the date of this Supplement.

The City now submits this Supplement to the Motion to Dismiss Complaint to more narrowly discuss the remaining claims, to supplement with exhibits and affidavits, and to assert the statute of limitations as an additional basis for dismissal.

I. Factual Background

The claims remaining in this case relate solely to a water booster pump station known as the "Buck Pump Station" or "Pump House," as referred to in the Complaint. As discussed below, in order for Giuliano's Wilson Commons First Subdivision or the Giuliano Fourth Subdivision to move forward with development, Giuliano must either upgrade the regional pump station known as the "29th Street Pump Station" or modify the Buck Pump Station in order to serve the Wilson Commons First Subdivision. Giuliano's plans for public improvements in the Wilson Commons First Subdivision, which must include the water system, are currently under review with the City.

Plaintiffs in this case are Giuliano & Father Construction, Inc. and Giuliano Addition, LLLP. Giuliano is a developer and home builder. *Complaint, paragraph 1*. The City will refer to them interchangeably as Giuliano or Plaintiffs in this Motion. John Giuliano is a principal in each, and he has worked with the City on a number of construction and development projects. *Complaint, paragraph 5*.

Development Process in the City of Loveland

The City of Loveland (the "City") is a home rule municipality with all powers granted under the City Charter and the Colorado Constitution. This includes establishing regulations to assure coordinated and harmonious development of the City, accomplished through planning and zoning. Title 16 of the Loveland Municipal Code addresses subdivision of land, and Title 18 addresses zoning. Planning and zoning of new development requires consideration of present and future needs, health and safety, and adequate provision of public utilities and community facilities. *Loveland Municipal Code (hereafter the "Code" or "LMC") § 16.04.010.*[1]

Regardless of which of Giuliano's developments are at issue in the Complaint, the process for development of each is the same and set out in the Code. The developer initiates the City's review process by submitting proposed plans. *Affidavit of Troy Bliss*, attached hereto as "Exhibit 1." A developer will first annex land to the City. All of the Giuliano projects identified in paragraph 6 of the Complaint have been through the annexation process and are now within the City limits. Generally, the area annexed is known as an "addition." If the addition will be developed as a planned unit development zone district, meaning an area uniquely zoned and designed, then the project will be subject to a number of requirements and procedures set out in LMC § 18.41. A planned unit development with phases will require a general development plan ("GDP"), a preliminary development plan ("PDP"), and a final development plan ("FDP"), each of which must be approved by formal application with the City. *LMC §§ 18.41.050.A and C.*

[1] http://www.cityofloveland.org/government/municipal-code

Both the Giuliano Addition and Wilson Commons Addition are planned unit developments with several phases, including Giuliano First Subdivision and Wilson Commons First Subdivision. With each type of plan submitted for approval, City staff must consider whether the plan conforms to the City's master plans, how the plan impacts traffic and utilities, whether the plan is complementary to existing and future development plans for the area, and how the plan incorporates public facilities or infrastructure to assure the proposed development will not negatively impact the levels of City's services. *LMC § 18.41.050.D.4.* The GDP may be approved, approved with conditions, or denied at a public hearing before the Loveland Planning Commission. The application, the Commission's recommendations, minutes and exhibits are forwarded to the Loveland City Council. City Council may approve, approve with conditions, or deny the GDP. If approved, the property is zoned as a planned unit development district subject to the general development plan, including any conditions. *LMC § 18.41.050.*

Following approval of the GDP but before actual development begins for any phase, both the PDP and the FDP must be approved. The PDP must be submitted along with an affidavit that the applicant conducted a neighborhood meeting. *LMC § 18.41.050.E.1.* Within thirty days, the City's development review team will make a recommendation to the Loveland Planning Commission to approve, approve with conditions, or deny the PDP. The recommendation will include findings including whether the PDP conforms to the GDP, and whether it meets the intent and objectives of the Code and applicable land use and development regulations. The Loveland Planning Commission will hold a public hearing after notice on the PDP and make a final decision. *Id.* Any party in interest may file a notice of appeal of the Loveland Planning Commission's decision, and the appeal will be scheduled for a public hearing before the City Council. *LMC § 18.41.050.E.3.*

In addition to the development plans, an applicant must have approved public improvement construction plans ("PICP") before beginning any construction. *Affidavit of Melissa Morin*, attached hereto as "Exhibit 2." A developer is required to submit a complete plan for the design of all public and private improvements in a project. *Larimer County Urban Area Street Standards (hereafter "LCUASS") § 3.1.1.*[2] The "LCUASS" are adopted in the Code to establish standards for streets, street signs, electric and water distribution system improvements, sewer collection and other improvements to be constructed as public improvements within all developments within the City. *LMC § 16.24.011.* PICP are valid for a period of three years from the date of approval by the City's Engineer. *LCUASS § 3.1.4; Exhibit 2.* The PICP are reviewed by the City for concept and the review does not imply responsibility by the City for accuracy and correctness of the calculations, nor does review imply the quantities of items are the final quantities required. *LCUASS §3.3.1.E.* Any appeal of a final decision by a director or other staff decision maker regarding the subdivision application or the Planning Commission decision must be brought in accordance with the Code at Chapter 18.80. *LMC § 16.10.010.*

2 http://www.larimer.org/engineering/gmardstds/urbanst.htm

No development approval, subdivision approval or building permits may be approved if they will cause a reduction in the levels of service for any community facilities below the adopted level of service established by the City. *LMC §16.41.010*. The City's development review team evaluates a proposed development or subdivision and makes recommendations regarding adequacy. The review team may make a positive recommendation of adequacy with any reasonable condition to ensure that all community facilities will be adequate and available or with the condition that the applicant provide the community facility necessary to provide capacity to accommodate the proposed development at the adopted level of service. *LMC § 16.41.050.* A determination of adequacy shall expire the earlier of 1) expiration, lapse, or revocation of the development approval or 2) failure by the applicant to timely comply with the conditions attached to a positive determination of adequacy or 3) two years following the date of issuance of a positive determination of adequacy. *LMC § 16.41.070.* Water facilities and services must be made available prior to issuance of the first building permit within the proposed development. *LMC § 16.41.120.* Again, any appeal of a final decision by the director or staff decision make shall be brought in accordance with Chapter 18.80 of the Code. *LMC § 16.10.010.*

Throughout the City's planning and development process, there are rights of appeal and procedures for such appeal. The City Council has established standards and provides due process for decisions made by staff and by Planning Commission. All developers are subject to the same standards and requirements found in the Code.

Status of the Giuliano Projects At Issue

The Giuliano subdivisions that are relevant to the remaining claims in this case are Giuliano First or Fourth Subdivision (hereafter "Giuliano First" or "Giuliano Fourth") and Wilson Commons Subdivision ("Wilson Commons"). A map setting forth the various Giuliano projects and subdivisions, and showing which portions are developed and undeveloped is attached as "Exhibit 3.[3]"

As Exhibit 3 reflects, Giuliano First is nearly completely developed with exception of the furthest west portion of the development at Fife Court and a small portion south of Wilson Commons. Giuliano First has an approved PDP, FDP, and PICP. *See "Exhibit 1"*. (As a condition of approval of the Giuliano First PDP, the City required that "*At no cost to the City, the Developer shall design and install a public water booster station. The station shall be installed prior to issuance of any building permit within that portion of the PDP situate west of Florence Drive. At a minimum, the station shall be sized to accommodate all proposed lots west of Florence Drive as well as the entire adjacent neighborhood known as the Buck 2nd Subdivision. The specific location of the water booster station shall be shown on the final development plan." Giuliano First*

[3] The far west portion of Giuliano First reflected on "Exhibit 3" that is undeveloped has been proposed by Giuliano as Giuliano Fourth Subdivision. The proposed Giuliano Fourth Subdivision would double the number of lots, and it has not received final approval. New plans were submitted, reviewed and have not been resubmitted. It is pending, and if Giuliano wants to double the number of lots, this would trigger the need for water booster pump improvements similar to Wilson Commons.

Subdivision Final Development Plan, page 8, paragraph 2 of PDP Conditions of Approval, attached hereto as "Exhibit 4;" see also Complaint at paragraph 16. The water booster station built to meet this condition is the Buck Pump Station.

Wilson Commons also has an approved PDP and FDP. Giuliano previously submitted PICP for Wilson Commons, but because no construction was commenced within three years, the PICP expired in 2007. *Exhibit 2.* Wilson Commons currently straddles two pressure zones within the City. The map attached as "Exhibit 5" shows the location of pressure zone one ("P1") on the east side of the developments and pressure zone two ("P2") on the west side of the developments. The Buck Pump Station serves P2. *See Exhibit 2.*

Giuliano submitted new PICP for Wilson Commons on April 5, 2016. *Application for Public Improvement Construction Plans,* attached hereto as "Exhibit 6;" *Exhibit 2.* In reviewing the proposed PICP, City staff determined that the northwestern portion of the subdivision containing 58 units could not be adequately served by the 29th Street Pump Station that currently serves P1. The City's Development Review Team provided Giuliano with a staff report dated April 29, 2016 that offered two options to address this issue: upgrade the 29th Street Pump station or modify the Buck Pump Station. *Staff Report,* attached hereto as "Exhibit 7;" *Exhibit 2; Exhibit 1.* As of the date of this Motion, PICP for Wilson Commons have not been approved and are currently in the City's development review process. *Exhibit 2; Exhibit 1.* No building permits for Wilson Commons can be issued because there are no approved PICP for the subdivision. Similarly, if Giuliano wants to obtain approval for Giuliano Fourth Subdivision, updated PICP will be needed. The increase in lots will also require upgrading or modifying of one of the existing water booster pump stations.

I. Legal Argument

As the detailed description of the City's process for approving developments demonstrates, there are multiple steps of approval which involve several levels of review and feedback, from City staff to Planning Commission to City Council. The Code provides appeal and review rights for these various decisions, generally up to a final decision by City Council. The City is best-suited to make decisions about its land use planning and public improvements. If a party objects to a decision by the City, the proper claim is one under C.R.C.P. 106 filed with the Larimer County District Court.

However, prior to a decision becoming ripe for review by the District Court under Rule 106, a party is required to exhaust its administrative remedies. As will be discussed in detail below, neither Giuliano plaintiff (both are confusingly lumped together in the Complaint) has exhausted its administrative remedies, and therefore, this Court does not have subject matter jurisdiction to review their claims. Furthermore, Giuliano has tried to shoehorn issues that should be addressed within the City's process into various contract and other claims in an attempt to circumvent the process, and has thus failed to state claims upon which relief may be granted. Finally, even if Giuliano had a valid claim to assert regarding the Buck Pump Station, the statute of limitations

bars any claims as they would have arisen in 2005 when Giuliano alleges he was notified about a mistake made by the City. As a result, each of Plaintiffs' claims should be dismissed under C.R.C.P. 12(b)(1) or 12(b)(5), or by the applicable statute of limitations.

1. **The Court does not have subject matter jurisdiction to hear Plaintiffs' claims regarding the "Pump House" as Plaintiffs have failed to exhaust their administrative remedies within the City.**

Although couched in terms of contract or declaratory judgment claims for relief, Plaintiffs' Complaint ignores the City's process of approving land developments and seeks relief for contractual allegations that are not ripe for review. Thus, for the reasons discussed below, Plaintiffs' remaining fifth and sixth claims regarding the "Pump House" should be dismissed pursuant to C.R.C.P. 12(b)(1) as Plaintiffs have failed to exhaust their administrative remedies.

As discussed above, before construction can begin in an approved development, the developer must submit PICP and have the PICP approved by the City. Giuliano's previously approved PICP for Wilson Commons expired in 2007 because no construction began in the three-year expiration window. Giuliano submitted new PICP in April of 2016, which plans required review by the City to determine whether the proposed public improvements meet current City standards. The City's development review team determined and advised Giuliano that existing water facilities do not exist to provide adequate water pressure to the northwest 58 lots in Wilson Commons. The staff report included as a condition for approval of the PICP (among many comments and conditions) that Giuliano either upgrade the 29th Street Pump Station or modify the Buck Pump Station. As of the date of this Motion, the PICP are still proceeding through the City's development review process. When a final decision is made by the City regarding the PICPs, Giuliano will have a right to seek review of the decision pursuant to *LMC § 18.80*.

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 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).

The purpose of the exhaustion of remedies requirement is clearly exemplified in this case. The City has its own specific and unique zoning and planning processes set out in its Code, with rights for public hearings, review, appeal, and amendment. Exhaustion of remedies permits the City, as the party most knowledgeable about these processes, to address any disputes first, before utilizing judicial resources to resolve the dispute. It is for these reasons that until Plaintiffs have exhausted their administrative remedies, made available by the City, this Court does not have subject matter jurisdiction to consider the case. As a result, Plaintiffs' claims related to the Buck Pump Station must be dismissed pursuant to C.R.C.P. 12(b)(1).

2. Plaintiffs have failed to state any claims upon which relief may be granted with respect to the "Pump House," and such claims should be dismissed pursuant to C.R.C.P. 12(b)(5).

A motion to dismiss under C.R.C.P. 12(b)(5) "tests the sufficiency of a plaintiff's complaint." Sweeney v. United Artists Theater Circuit, Inc., 119 P.3d 538 (Colo. App. 2005). A court must accept all allegations of material fact as true and view such facts in the light most favorable to the plaintiff. Id.

Plaintiffs' very general allegations regarding the "Pump House" fail to state any claim upon which relief may be granted. Each allegation relates to various steps in the City's development approval process, but fails to specify which development, document, or even which Plaintiff entity is involved. Even in viewing Plaintiffs' allegations in the light most favorable to the Plaintiffs, no claim for relief has been stated.

a. Declaratory Judgment

Plaintiffs' fifth claim for relief is for declaratory judgment. C.R.C.P. 57 sets forth the power of courts to issue declaratory relief. Rule 57(b) provides that "[a]ny person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder."

With respect to the "Pump House," the only document Plaintiffs reference is the "Plan" or the Revised Final Development Plan for the Giuliano First Subdivision. The "Plan" is an approved final document, and if Plaintiff chooses to make no further changes, Plaintiff may build his remaining eighteen (18) lots. The City is not challenging his right to do so. The PICP for Wilson Commons are under review and building cannot begin until those are finalized. Plaintiff appears to be challenging the City's Municipal Code and requirements that developers bear the cost of their development. The Complaint alleges a violation of C.R.S. §29-20-104.5 and C.R.S. 29-20-

203(1). 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.

Wilson Commons is a new development and the developer (Giuliano) is responsible for the infrastructure needed to serve the development. This includes streets, sewer lines, water lines, and any other infrastructure needed to connect the subdivision to city services and to provide adequate services. In this case, Plaintiff is challenging conditions being placed on a land use approval. The system impact fees for this development are not even mentioned in the factual allegations of the complaint and are not at issue. Those legislative fees are found throughout the utilities section of the municipal code and explained at *L.M.C. §13.04.031*; Various impact fees exist: *L.M.C. §§ 13.04.034, 13.04.030, 13.04.038, 13.08.030, 13.08.040*. Plaintiff has not included any system impact fee in the factual allegations, and none of those fees are at issue. Plaintiff has failed to state any basis for a claim against the City's system impact fees.

The other allegation in the Fifth Claim for Relief alleges that the cost of upgrading the water booster pump station violates C.R.S. § 29-20-203(1). This statute prohibits paying money or providing services to a public entity in an amount that is determined "on an individual and discretionary basis, **unless there is an essential nexus between the dedication or payment and a legitimate local government interest, and the dedication or payment is roughly proportional both in nature and extent to the impact of the proposed use or development of such property." *Id.*** There are no facts alleged to indicate that the upgrades are not roughly proportional to the additional development of roughly seventy homes to the City's water system. Additionally, due to the premature filing of this complaint and the failure to exhaust administrative remedies, it is unlikely that such a determination could be made at this time. It is a waste of judicial resources to make such a determination when the City is still reviewing plans and working with Giuliano to develop what upgrades are needed. Plaintiff fails to state any factual basis to support this allegation and there is no relief to be granted at this time.

b. Promissory estoppel elements

Plaintiffs seek promissory estoppel relief in their sixth claim for relief. In order to assert a claim for promissory estoppel, Plaintiffs must allege facts to support the following elements: "(1) a promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promise; (2) action or forbearance induced by that promise; and (3) the existence of circumstances such that injustice can be avoided only by

enforcement of the promise." Nelson v. Elway, 908 P.2d 102, 110 (Colo. 1995). Plaintiff has failed to identify any specific promise or contract to support this claim. Plaintiff's complaint only references "The Plan." *Complaint at paragraph 16.*

c. If any review by this Court is appropriate, the exclusive remedy to review approval of the development plans at issue is under C.R.C.P. 106(a)(4), not by promissory estoppel and/or declaratory relief claims.

The Plan and the other development plans are approved through a quasi-judicial process within the City. "C.R.C.P. 106(a)(4) is the exclusive remedy for reviewing quasi-judicial decisions . . ." JJR 1, LLC v. Mt. Crested Butte, 160 P.3d 365, 369 (Colo. App. 2007); *see also* Grant v. District Court In and For Fremont County, 635 P.2d 201 (Colo. 1981).

As described above, the various development plans at issue in the Plaintiffs' Complaint went through a quasi-judicial process, including public hearing. Relief under C.R.C.P. 106(a)(4) is Plaintiffs' exclusive remedy to seek review (to the extent it were appropriate based on exhaustion of remedies), and therefore all of Plaintiffs' claims should be dismissed.

3. Plaintiffs' claims are each barred by the applicable statute of limitations.

In the alternative, Plaintiffs' 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.

Paragraph 17 of the Complaint alleges that in 2001, the "City provided Giuliano with the final designs and specifications for the Pump House . . . Giuliano thereafter constructed the Pump House in or about 2002." *Complaint at paragraph 17.* Plaintiff further alleges in paragraph 19 of its Complaint that "[s]everal years after its operation of the Pump House, **on or about March 7, 2005**, the City emailed Giuliano stating, in part, that the City had improperly designed, provided specifications for, and approved the water infrastructure building in the Giuliano Projects such that, among other things, the Pump House was inadequate for servicing the then existing development and usage in the Giuliano Projects" (emphasis added). *Complaint at paragraph 19.*

Taking such allegations as true for purposes of this Motion, Plaintiffs' claims arose in 2005 when Plaintiffs were informed of the City's alleged error regarding the Buck Pump Station. If the City admitted fault in the specifications for the Buck Pump Station, Giuliano knew or should have known that this would impact his developments. This knowledge is referred to as the "discovery rule." Colorado courts have held that "[t]he discovery rule generally involves an inquiry into when the party bringing the action acquired knowledge of or should have reasonably discovered the essential facts, rather than the applicable legal theory." Harrison v. Pinnacol Assur., 107 P.3d 969, 972-973 (Colo. App. 2004); *see also* In re Marriage of Smith, 7 P.3d 1012 (Colo. App. 1999).

a. Plaintiffs' declaratory judgment claim is time-barred

Plaintiffs' fifth claim for relief seeks declaratory judgment. A cause of action for declaratory judgment generally arises "when the injury, loss, damage, or conduct giving rise to the cause of action is discovered or should have been discovered by the exercise of due diligence." *C.R.S. § 13-80-108(8);* Harrison, 107 P.3d at 973. Again, Giuliano knew or should have known that the alleged erroneous specifications for the Buck Pump Station would give rise to a cause of action when he received the email from the City in 2005 referenced in Paragraph 19 of the Complaint, and therefore the statute of limitations for his cause of action for declaratory relief began to run in 2005.

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). In the alternative, Colorado courts have held that the "catch-all" two-year statute of limitations applies to declaratory judgment actions. Harrison, 107 P.3d at 972. On either basis, Plaintiff's claim for declaratory judgment is time-barred as the statute of limitations expired in 2007.

b. Plaintiffs' Claim for Promissory Estoppel and Vested Rights is Time-Barred

Plaintiffs' sixth claim for promissory estoppel is considered a contract claim for purposes of the three-year statute of limitations applicable to contract-type claims. *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).

C.R.S. § 13-80-108(6) provides that "[a] cause of action for breach of any express or implied contract, agreement, warranty, or trust shall be considered to accrue on the date the breach is discovered or should have been discovered by the exercise of reasonable diligence." Again, Giuliano learned of the City's alleged erroneous specifications for the Buck Pump Station in 2005, and knew or should have known that such error would impact his various developments. Therefore, the statute of limitations for Giuliano's promissory estoppel and vested rights claim began to run in 2005 and expired in 2008, and such claim is time-barred.

III. Conclusion

The City respectfully submits the above supplement and continues to assert the remaining two claims should be dismissed. First, Plaintiffs have failed to exhaust their administrative remedies. The water booster pump station, whether the 29th Street Pump Station or Buck Pump Station, will need modifications or upgrades if 56 or 72 additional residences are developed. The upgrades are the direct result of new development. The PICP for the Wilson Commons development are under review and discussion with the City, and the pump station upgrades are part of that review. There has been no final decision from the City making this ripe for judicial

review. Thus, the Court lacks subject matter jurisdiction to issue a declaratory judgment. Second, Plaintiffs fail to state a claim for which relief may be granted. There are no factual allegations to support the relief requested for declaratory judgment. There is no contract or specific promise identified to support a promissory estoppel argument, and there are no factual allegations sufficient to support a vested property right claim. Plaintiffs fail to carry their burden to establish jurisdiction or to present sufficient facts to support either of the remaining claims. Finally, Plaintiffs' remaining claims must be dismissed because under any theory of the case they fail to meet the statute of limitations. Assuming, for purposes of this Motion only, that the facts alleged in the Complaint are true, Plaintiffs knew of any inadequacies in the Buck Pump Station design in March of 2005 - twelve years ago. Plaintiffs failed to timely file suit when the cause of action accrued, and Claims Five and Six must be dismissed.

WHEREFORE, the City respectfully requests that the Court dismiss the Complaint.

Dated this 16th day of March, 2017.

CITY OF LOVELAND

Original signature on file

By: /s/ *Alicia R. Calderón*
Alicia R. Calderón, #32296
Assistant City Attorney

By: /s/ *Laurie R. Stirman*
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

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing SUPPLEMENT TO MOTION TO DISMISS COMPLAINT was served via ICCES e-Service on this 16th day of March, 2017 to the following:

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

/s/ Kayla Demmler
Original signature on file