DISTRICT COURT, LARIMER COUNTY, COLORADO 201 LaPorte Avenue, Suite 210 Fort Collins, CO 80521 970-494-3500	
Plaintiff(s): LOVELAND EISENHOWER INVESTMENTS, LLC, a California limited liability company, **v.** **Defendant(s):** THE CITY OF LOVELAND, THE GREELEY AND LOVELAND IRRIGATION COMPANY, a Colorado non-profit corporation and JOHN DOES 1 through 50	**▲COURT USE ONLY▲**
Josh A. Marks, Atty. Reg. # 16953 David J. Goldfarb, Atty. Reg. # 44070 Mary Sue Greenleaf, Atty. Reg. # 47749 BERG HILL GREENLEAF RUSCITTI LLP 1712 Pearl Street Boulder, CO 80302 Tel: (303) 402-1600 Fax: (303) 402-1601 jam@bhgrlaw.com; djg@bhgrlaw.com; msg@bhgrlaw.com	Case Number: 2016CV30362 Div.: 4C Ctrm.:

DEFENDANT CITY OF LOVELAND'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

Defendant, the City of Loveland (the "City"), through its undersigned counsel, and pursuant to C.R.C.P. 12(b)(1) and 56, moves this Court for the dismissal of Plaintiff Loveland Eisenhower Investment, LLC's ("LEI") first, second, third, and fourth claims for relief. In support of this Motion, the City states as follows:[1]

[1] **Rule 121 § 1-15 Certificate of Conferral:** The undersigned conferred with Kathryn I. Hopping, counsel for LEI, by email on August 28, 2017, by summarizing the arguments included herein. Ms. Hopping indicated LEI objects to the relief the City requests in this motion.

I. INTRODUCTION AND FACTUAL BACKGROUND

LEI, a developer which successfully annexed its development site into the City and obtained a mixed activity center zoning designation, sued the City and the Greeley and Loveland Irrigation Company ("GLIC") because of restrictions which do not allow it to use certain water rights to satisfy the City's water rights requirements for its development. The City, however, never promised or led LEI to believe that it would accept LEI's water rights. Rather, the City has complete discretion when it decides whether to accept ditch water rights, the exact type of water rights that LEI desires to contribute. Upon realizing that the City would not accept its water rights, LEI filed this lawsuit in hopes that this Court will force the City to accept water rights that the City cannot use and will not yield any municipal water supply to serve the development or other municipal customers, rather than LEI acquiring new, satisfactory water rights or paying the cash-in-lieu price to the City.

LEI's contemplated development envisions a mixed-use development, with multi-family housing and retail to be constructed in phases over a number of years. The development site was an assemblage of three land parcels (collectively the "Property"). The west seventeen acres was previously annexed by the City through a predecessor in interest. The easterly 41 acres was annexed and zoned in 2010, and forms the background for this lawsuit. LEI has been involved in modifying the zoning and obtaining subdivision and phased development approvals for portions of the development for the last six years. LEI is just now moving forward with the final land use approvals for its initial phase of development.

As is the case with most cities and municipalities along the water-scarce Front Range, new developments in the City must pay for or contribute water rights to the City in exchange for the City providing municipal water service to the new customers. Water rights must be contributed upon a final plat approval for commercial development or a building permit for residential development because both are points in the development process when water demands are adequately quantified. A developer, or any private citizen or entity, can also apply to the City to transfer or deed water rights in advance, which are held in the City's water bank and can be later credited to a developer when it is time to contribute water rights. A development can meet the water demand requirements in different ways, such as contributing native raw water rights, water bank credits, cash-in lieu of water rights, and Colorado Big-Thompson Project units. When agricultural ditch water rights are proposed for contribution, the City undertakes a process to consider the specific attributes of the water rights and may conditionally accept them, subject to successfully changing the water rights in Water Court from agricultural to municipal use so that the water rights may lawfully be used by the City to serve municipal customers. When it comes to contributing certain ditch rights, including Chubbuck Ditch water, the Loveland Utilities Commission has complete discretion in its review of the particular attributes of water rights and where it should accept these rights under the Loveland Municipal Code ("LMC"), specifically § 19.04.080. This requirement existed in 2008 and still exists today.

LEI's predecessor in interest contributed some water rights to the City's water bank for that portion of the development previously annexed to the City, but according to the calculations of the LMC, LEI must contribute additional water rights in order to meet the raw water needs for

its entire development. In the 2008-2009 timeframe, LEI and the City's staff were involved in a series of pre-annexation meetings surrounding the development, culminating in the zoning and annexation approvals for the entire project in January 2010. As will be discussed further in this motion, LEI's intended water rights contributions were never discussed with the City during this process. The April 20, 2010 Annexation Agreement ("Annexation Agreement") executed by the City and LEI contains some vested rights provisions, but it does not specifically address water rights LEI proposed to contribute or what water rights the City would accept.

Around this same time in January 2010, the City negotiated and executed an agreement to end a large water court case involving a number of objectors, including GLIC. One aspect of this water court case involved the City's change of use from irrigation to municipal use of Chubbuck contract water rights the City already held in its water bank. GLIC claimed, as an objector in the case, that the City's municipal use of the Chubbuck contract caused reduced return flows and impaired GLIC's historical ability to benefit from unused contract water. LEI did not enter the case as an objector to protect its Chubbuck contract water rights, or contact anyone involved in the case. Sufficiently concerned that GLIC could impair the City's ability to change or restrict the yield of the water rights in water court, the City negotiated the 2010 settlement (referred to herein as the "Settlement Agreement").

The Settlement Agreement allowed the City to proceed with the change of use of the Chubbuck Ditch contract rights that the City sought to change in the 02CW392 case and the 00CW108/03CW354 cases but restricted the City from using or changing in water court for municipal use any additional Chubbuck Ditch contract water rights in the future. With the Settlement Agreement, the City agreed that it would no longer acquire, purchase, or accept

additional Chubbuck Ditch contract water rights that were not decreed through water court and were not included in the pending water court cases. LEI's ownership of Chubbuck Ditch contract water rights and LEI's intent to contribute them to the City were unknown to the City's water engineers and attorneys at the time of the settlement.

In late 2014, LEI contacted the City's water engineers and advised them that it intended to contribute Chubbuck Ditch contract rights (also referred to as Chubbuck Inches). At that time, the City indicated that it could not accept these rights and provided a copy of the settlement agreement that restricted the City's ability to use the rights. Despite not informing the City of its intent to contribute Chubbuck Inches to satisfy the municipal water rights requirements for the development, or seeking to transfer those rights to the City prior to 2010, LEI now asserts claims for relief against the City for: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) unlawful delegation of the City's legislative authority; and (4) declaratory judgment. [*See* Complaint, ¶¶ 63-87.] The Colorado Governmental Immunity Act bars these claims because they are grounded in tort, not contract. Even assuming LEI has pled contract claims, the Annexation Agreement, which forms the basis for all of LEI's claims, is silent on the acceptance of water rights and because the City cannot be forced to accept water rights that it cannot use or change in water court for municipal use. This Court should dismiss LEI's claims, or in the alternative, grant summary judgment on LEI's claims in favor of the City.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

The following undisputed facts are applicable to the Court's resolution of this Motion:

1. LEI submitted its Petition for Annexation to the City on January 18, 2010. [**Exh. A**, Petition for Annexation.] LEI simultaneously sought to establish the zoning and receive

preliminary subdivision approval for a mixed use development on the proposed annexed property. [**Exh. E**, deposition transcript of LEI, 128:3-21.]

2. The Petition for Annexation had no terms regarding water rights, including whether the City would accept LEI's Chubbuck Ditch rights. [**Exh. A**.]

3. LEI had to contribute water rights to the City for its development, but not until building permit stage for commercial development or at final approval for residential development. [**Exh. D**, LMC § 19.04.020.]

4. As of January 18, 2010, LMC § 19.04.080 afforded the City complete discretion with respect to accepting, on a case-by-case basis, Chubbuck Ditch water rights. [**Exh. D**, LMC § 19.04.080 (2009)(A) and (C); **Exh. F**, Gregory Dewey deposition transcript, 41:12-16 (discussing the process for assessing an application to convert Chubbuck Ditch rights under LMC § 19.04.080) 165:12-16.]

5. On January 25, 2010, the City and GLIC entered into a settlement agreement resolving two water court actions, Case Nos. 02CW392 and 00CW108/03CW354 (Water Div. 1), in which GLIC stipulated to the City's proposed decrees in both cases, which included the conversion of the City's Chubbuck Inches for municipal use, but which also restricted the City from using and converting future Chubbuck Inches for any reason other than irrigation of open space or parks. [**Exh. B**, Settlement Agreement, ¶ 6.]

6. The Water Court entered its Decree in 02CW392 dealing with, in part, a change of Chubbuck Ditch rights on May 14, 2010 (a proposed decree was provided to the Water Court on February 22, 2010). The Water Court entered its Decree in 00CW108/03CW354 on February 23, 2012, also dealing with, in part, a change of Chubbuck Ditch rights. [*See* **Exh. G**, Findings of

Fact, Conclusions of Law, Judgment and Decree in 02CW392; *see also* **Exh. H**, Findings of Fact, Conclusions of Law, Judgment and Decree in 00CW108/03CW354.] The effect of the Decrees was to allow change in use of certain Chubbuck Inches owned by the City. [Id.]

7. The same day the Water Court signed them, the Decrees became a public record. [Id.]

8. The City and LEI entered into the Annexation Agreement on or about April 20, 2010. [**Exh. C**, Annexation Agreement.]

9. The Annexation Agreement contains no direct language on water rights contribution. [Id.]

10. As it relates to water services, § 2.18 of the Annexation Agreement states:

> Except as this Agreement expressly states otherwise, the City shall have the responsibility to provide its customary municipal water services to the Project on an equivalent basis to those provided to any other area of the City on a uniform and non-discriminatory basis, including, without limitation: sanitary sewer and potable and non-potable water service and facilities(including supplies, conveyance and treatment capacities) …. [Id.]

11. Per § 2.3 of the Annexation Agreement, LEI had a vested property right to develop the Property. [Id.]

12. However, LEI's vested right was subject to:

> the Vested Property Rights Statute and Chapter 18.72 of the [City's] Municipal Code, and except as this Agreement expressly provides otherwise, the establishment of vested property rights pursuant to this Agreement will not preclude the application on a uniform and non-discriminatory basis of City regulations of general applicability (including, … water, … the Municipal Code, and other City rules and regulations) or the application of state and federal regulations. [Id.]

13. The City's Water Department, and more specifically its water resource engineers, are responsible for assessing water rights requirements for new developments and for proposed contributions to the City's Water bank. [**Exh. F**, 40:15-42:19.]

14. The City's water resource engineers first became aware LEI intended to utilize Chubbuck water rights in late in December 2014. [**Exh. F**, 16:3-10.]

15. As early as 2009, LEI was aware of water disputes between GLIC and the City involving Chubbuck Ditch Water. [**Exh. E**, at 30:4-18.]

16. Despite LEI's knowledge of the dispute between GLIC and the City in the Water Court, LEI was not tracking any of the issues raised in that dispute and did not file a Statement of Opposition in the City's Water Court cases that involved the dispute, including objecting to the use of Chubbuck Inches. [Id. at 31:14-21.]

17. LEI believed the City deliberately withheld the Settlement Agreement during the course of the parties' negotiation of the Annexation Agreement. [Id. at 120:20-23 and 178:6-16.]

18. LEI felt the City's decision not to disclose how the Settlement Agreement would impact the use of its Chubbuck Ditch water rights "sold some people down the river in a discriminatory fashion, and [LEI is] half of those people…. [The City is] having us pay for the bargain, and that doesn't feel like we're being dealt with fairly for that purpose." [Id.]

19. LEI can fulfill its water rights requirements by applying water bank credit or cash-in-lieu of the market price of Colorado-Big Thompson Project units. [**Exh. D**, LMC §§ 19.04.040, 19.04.041.

20. While the City will not accept LEI's Chubbuck water, it has not refused to provide water service. [**Exh. E** at 172:20-173:2.]

III. STANDARD OF REVIEW

A. Standard of Review under Rule 12(b)(1).

Sovereign immunity issues concern subject matter jurisdiction and are determined consistent with the procedure for resolving jurisdiction under C.R.C.P. 12(b)(1). *Swieckowski v. City of Ft. Collins*, 934 P.2d 1380, 1383-1384 (Colo. 1997). Any factual dispute upon which the existence of jurisdiction may turn is for the trial court to resolve, and an appellate court will not disturb the factual findings of the trial court unless they are clearly erroneous. *Id*. at 1394. Because Rule 12(b)(1) permits a trial court to make its own factual findings in determining its subject-matter jurisdiction, it necessarily permits the trial court to hold an evidentiary hearing[2] to resolve any factual dispute upon which the existence of jurisdiction may turn. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). However, if the underlying facts are undisputed, the issue is one of law. *Swieckowski*, 934 P.2d at 1384. Similarly, sovereign immunity may be determined based on the allegations in a complaint. *See e.g., Larry Miller Corp. v. Urban Drainage and Flood Control Dist.*, 64 P.3d 941, 9411 (Colo. App. 2003).

Where a governmental entity interposes a motion to dismiss for lack of jurisdiction, the plaintiff has the burden of demonstrating that governmental immunity has been waived. *Tidwell*, 83 P.3d at 85. Since there is no presumption against state jurisdiction and because courts must construe statutes that grant governmental immunity narrowly, the plaintiff should be afforded the reasonable inferences of his evidence. *Id*. Trial courts should allow the parties latitude in

[2] Such a hearing is often referred to as a "*Trinity* hearing." *See, e.g., Tidwell ex rel. Tidwell v. City and County of Denver*, 83 P.3d 75, 86 (Colo. 2003).

discovering or introducing evidence tending to prove or disprove jurisdiction if necessary to the ultimate determination. *Id*. at 86.

B. Standard of Review under Rule 56.

Summary judgment must be entered "if the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." C.R.C.P. 56(c); *see also Ryder v. Mitchell*, 54 P.3d 885, 889 (Colo. 2002). Summary judgment permits the parties "to pierce the formal allegations of the pleadings and save the time and expense connected with trial." *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992).

The burden of establishing the nonexistence of a genuine issue of material fact[3] is on the party moving for summary judgment. *Cont'l Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987). When "a party moves for summary judgment on an issue on which [that party] would not bear the burden of persuasion at trial, his initial burden of production may be satisfied by showing the court that there is an absence of evidence in the record to support the nonmoving party's case." *Id.* Once the moving party meets this initial burden, the opposing party is required to "adequately demonstrate by relevant and specific facts that a real controversy exists." *Ginter v. Palmer*, 585 P.2d 583, 585 (Colo. 1978). It follows, that "when a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of the opposing party's pleadings, but the opposing party's response by affidavits or otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial." C.R.C.P. 56(e).

[3] "[A]n issue of material fact is one, the resolution of which will affect the outcome of the case." *Krane v. St. Anthony Hosp. Sys.*, 738 P.2d 75, 77 (Colo. App. 1987).

IV. ARGUMENT

A. The Colorado Governmental Immunity Act bars LEI's claims against the City because they lie in tort, not contract.

LEI's tort claims are subject to the provisions of the Colorado Governmental Immunity Act ("CGIA"). Under the CGIA, public entitles are immune from liability on all claims for injury that lie in tort or could lie in tort, unless the claim falls within a statutory exception to that immunity. *See* C.R.S. § 24-10-106. Section 24-10-106(1), C.R.S. provides: "A public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant except as provided otherwise in this section."

"[T]he form of the complaint is not determinative of the claims basis in tort or contract." *Robinson v. Colorado State Lottery Div.*, 179 P.3d 998, 1003 (Colo. 2008). Instead, the court must consider the nature of the injury and the relief sought. *Id*. When the alleged injury arises from conduct that is tortious in nature "or out of the breach of a duty recognized in tort law," *id*., and where the requested relief seeks to compensate the plaintiff for that injury, the claim likely lies in tort or could lie in tort for purposes of the CGIA. *See Adams v. City of Westminster*, 140 P.3d 8. 10 (holding the CGIA was intended to apply when the claimant seeks redress from injuries that result from tortious conduct); *CAMAS Colo., Inc. v. Bd. of County Comm'rs*, 36 P.3d 135, 138 (Colo. App. 2001) (a court must examine the source from which the alleged breached duty arises).

Common law tort claims which are meant to remedy economic loss, such as fraud or negligent misrepresentation, can exist independent of or in conjunction with a contractual claim. *Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256, 1263 (Colo. 2000). But these claims sound

in tort. *Id*. A contracting party's negligent misrepresentation of material facts prior to the execution of an agreement may provide the basis for a tort claim asserted by the party which detrimentally relies on such misrepresentations. *Keller v. Smith Harvestore Prods.*, 819 P.2d 69, 72 (Colo. 1991). Thus, a plaintiff who has been fraudulently induced to enter into a contract may either sue to rescind the contract or affirm the contract and sue in tort for the damages caused by the fraudulent act. *W. Cities Broad., Inc. v. Schueller*, 849 P.2d 44, 48 (Colo. 1993). Where such overlap exists, the CGIA bars claims that could arise in both tort and contract, while those which arise solely in contract are not subject to the CGIA. *Robinson*, 179 P.3d at 1004.

A claim supported by allegations of misrepresentation or fraud likely lies in tort for purposes of applying the CGIA's immunity provisions. In *Robinson*, the Colorado Supreme Court addressed whether the plaintiff's particular claims for breach of express contract, breach of UCC express warranties, breach of UCC implied warranties, and breach of implied covenant of good faith and fair dealing could alternatively be pleaded in tort. *Id*. at 1006. There, the plaintiff alleged the Lottery knowingly sold instant scratch game tickets to players even after all represented and advertised prizes were awarded, meaning players had no chance of winning the prizes. *Id*. at 1005. Because the alleged injury arose out of the Lottery's misrepresentations regarding the availability of the prizes, which induced ticket sales, the factual allegations "appear[ed] to support a tort claim." *Id*. Thus, the court held that "regardless of whether the Lottery breached any contractual duties, the essence of the injury here is tortious in nature and would support a claim for the breach of a duty arising in tort." *Id*.

Here, as in *Robinson*, regardless of whether LEI has presented valid claims for breach of contract or breach of implied covenant of good faith and fair dealing, the "pleaded allegations

underlying the contract claims could be alternatively pleaded in tort …." *Id*. at 1006. A careful review of the factual allegations reveals that LEI believes the City, prior to entering into the Annexation Agreement, misrepresented, or even concealed, its ability to accept Chubbuck Ditch water rights. [Statement of Undisputed Material Facts ("SUMF"), ¶¶ 17 and 18; *see also* Complaint, ¶¶ 52-62.] LEI alleges: (1) it was unaware of the settlement agreement between GLIC and the City; (2) the City did not inform LEI of the terms of the Settlement Agreement and its impact on the City's ability to accept Chubbuck Ditch water rights; (3) "the City allowed LEI to enter into the Annexation Agreement and continue development of its project until 2015…"; and (4) the City knew LEI entered into the Annexation Agreement "based on the expectation that Chubbuck Inches could and would be converted." [*Id*. 53-57.] In discovery, Gregory J. Parker, LEI's representative and Rule 30(b)(6) designee, reinforced the tortious nature of its claims in this lawsuit by stating:

> I think not disclosing the settlement agreement when it happened was important. I mean, not amending the [municipal] code for years after that is important. So we feel – that we didn't know things we should have known if we were being dealt with in good faith and fair dealing manner…. [**Exh. E** at 178:6-16.] (Emphasis added.)

Thus, LEI claims it was not "being dealt with fairly" because the City, during the course of negotiating the terms of the Annexation Agreement, did not disclose the existence of the Settlement Agreement and its prohibition on the City's ability to accept and change any additional Chubbuck Ditch water rights to municipal use in water court. [Id.] Since LEI's claims actually focus on the City's alleged duty to make pre-contractual disclosures, LEI's breach of contract and breach of implied covenant of good faith and fair dealing lie in tort or could lie in tort and are thus barred by the CGIA.

B. The City has not breached any terms of the Annexation Agreement.

Even assuming LEI's claims lie in contract, the City has not breached any explicit terms of the Annexation Agreement, nor did it breach any of the agreement's implied terms because the City is not contractually bound to accept LEI's Chubbuck Ditch water rights.

i. LEI's breach of contract claim is premature since the City has not refused to provide "water services" to the Project.

To prevail on its claim for breach of contract, LEI must demonstrate: (1) the existence of a contract; (2) performance under the contract by the plaintiff or justification for nonperformance; (3) defendant's failure to perform under the contract; and (4) resulting damages to the plaintiff. *W. Distributing Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992). Thus, "[t]o prevail on a claim for breach of contract, a party must show a contract was in existence and that the other party failed to perform some term of the contract." *McDonald v. Zions First Nat'l Bank, N.A.*, 348 P.3d 957, 965 (Colo. App. 2015).

However, LEI cannot satisfy the third element[4] – that the City failed to perform under the Annexation Agreement – since the Annexation Agreement does not address the City's acceptance of LEI's water rights. [SUMF, ¶ 9.] The performance element in a breach of contract action means substantial performance. *W. Distributing Co.*, 841 P.2d at 1058. A party has substantially performed when "the other party has substantially received the expected benefit

[4] The City also notes that LEI has no damages in this case. The Annexation Agreement makes clear that "the Parties agree that in case of default by any of the Parties hereto, the other Parties shall be entitled to specific performance from the defaulting parties hereunder…." [**Exh. C**, ¶ 2.25.] Moreover, the parties agreed that "any default by the City under this Agreement shall not give rise to any monetary damages against the City in favor of [LEI]." [Id.] The City, per the LMC had complete discretion to accept or reject Chubbuck Ditch water rights at the time the parties entered into this agreement, meaning LEI cannot force the City to accept its Chubbuck water rights. [SUMF, ¶ 4.] LEI also is unable to obtain monetary damages in this action. As a result, LEI cannot prove it suffered any damages if the City did in fact breach any term of the Annexation Agreement.

of the contract." *Stan Clauson Assoc., Inc. v. Coleman Bros. Constr., LLC*, 297 P.3d 1042, 1045 (Colo. App. 2013). "Deviation from contract duties in trifling particulars that do not materially detract from the benefits the obligee would have derived from literal performance does not constitute a material breach." *Id.*

Here, LEI's claim that the City breached an express term of the Annexation Agreement is premature, at best, by conflating the requirement that it provide the Project with water services with accepting LEI's Chubbuck Ditch rights. Section 2.18 of the Annexation Agreement only requires that the City "provide its customary municipal services to the Project … including … sanitary sewer and potable and non-potable water service." [SUMF, ¶ 10.] But neither § 2.18 nor any other paragraph in the Annexation Agreement speaks to the preliminary step of providing water rights contributions to the City. [SUMF, ¶¶ 9 and 10.] Similarly, the Petition for Annexation does not discuss water rights contributions. [SUMF, ¶¶ 1-3.] And the City's water engineers only first became aware that LEI intended to use Chubbuck water rights in December 2014, nearly four years after the parties entered into the Annexation Agreement. [SUMF, ¶ 14.]

Although the City will not accept LEI's Chubbuck Ditch water rights, to date, the City has not refused to supply the project with any customary water service. [SUMF, ¶ 20.] If LEI came forward with water rights from some other acceptable source which the City could change in water court to municipal use or paid cash in lieu of donating water rights, the City would provide the services contemplated by § 2.18. [*See* SUMF, ¶ 19.] Unless and until the City refuses to provide the water services outlined in the Annexation Agreement, any claim for express breach of contract is unwarranted and premature.

ii. Section 19.04.080, LMC permits the City to exercise its discretion as it relates to accepting ditch water rights.

Recognizing that there is no direct language in the Annexation Agreement concerning any water rights contribution, LEI believes the vested rights provisions of the Annexation Agreement requires the City to accept its Chubbuck Ditch water rights. Section 2.3 of the Annexation Agreement specifically refers to and incorporates the Municipal Code by stating, "the establishment of vested property rights pursuant to this Agreement will not preclude application … of City regulations of general applicability (including, … the Municipal Code …)." [SUMF, ¶ 12.]

At the time the parties entered into the Annexation Agreement, the LMC permitted the City to exercise broad discretion when it came to accepting ditch water rights, including Chubbuck Ditch rights. [SUMF, ¶ 9.] Specifically, § 19.04.080(A), LMC (2009) prevented the City from accepting any ditch water rights unless; (1) the applicant provided satisfactory proof of ownership of the ditch water rights; (2) there was a water bank agreement in place; and (3) the Loveland utilities commission made a specific finding that "it [was] in the city's best interest to accept the ditch water rights." [*See* SUMF, ¶¶ 4 and 13.] By law, this discretion to accept or reject Chubbuck Inches was incorporated into the Annexation Agreement. *See Colorado Inv. Servs., Inc. v. City of Westminster*, 636 P.2d 1316, 1318 (Colo. App. 1981) (a party which contracts with a municipality is charged with knowledge of its limitations and restrictions in making contracts). While a new factor emerged in how the City would exercise its discretion by virtue of the Settlement Agreement, the City's criteria for acceptance of a ditch water right remained unchanged at the time the parties entered into the Annexation Agreement on April 20, 2010. [*See* SUMF, ¶¶ 5 and 8.]

Additionally, the vested rights provision of the Annexation Agreement cannot be read or interpreted to alter the City's discretion set forth in LMC § 19.04.080. LEI agreed "that except as otherwise provided in this [Annexation] Agreement, that all other applicable Municipal Code provisions … in effect at the time of development shall apply to any future development of the Property." [**Exh. C**, ¶¶ 2.28, 2.29, and 2.33; *see also* SUMF, ¶¶ 11 and 12 (subjecting LEI's vested right to develop the Property to the provisions of the Municipal Code.)] Not only did the LMC give the City complete discretion to accept or reject LEI's Chubbuck Ditch rights at the time the parties entered into the Annexation Agreement, but this discretion was never altered by the agreement between the parties. [*See* SUMF, ¶ 9.] Therefore, LEI cannot claim that the City changed its rules by indicating that it would not accept LEI's Chubbuck water rights after executing the Settlement Agreement.

Finally, the vested rights provisions of the Annexation Agreement[5] cannot be read or interpreted to modify the City's requirements for accepting Chubbuck Ditch water since the agreement does not alter or waive the applicability of the municipal code. [SUMF, ¶¶ 11 and 12.] Rather, these provisions must be read in connection with and give due consideration to the applicable provisions of the LMC. *See Fibreglas Fabricators, Inc. v. Kylberg*, 799 P.2d 371, 374 (Colo. 1990) (the language of a contract must be examined and construed "in harmony with the plain and generally accepted meaning of the words used, and reference must be made to all the agreement's provisions.") [*See also* Exh**. C** referring to and incorporating the LMC, § 2.29 ("The Parties recognize that there are legal restraints imposed upon the City by the City Charter

[5] Section 19.04.090, LMC sets forth a vested rights provision "concerning water rights owned." But this provision relates only to the calculation applicable to the water rights, and does not speak to whether the City must accept specific water rights.

and Code …); § 2.33 (recognizing that "except as otherwise provided in this Agreement, that all other applicable Municipal Code provisions … in effect at the time of development shall apply to any future development of the Property.").]. For example, LEI had "The right to commence and complete development of the Project … with conditions, standards and dedications which are no more onerous than those imposed by the City upon other developers in the City on a uniform, non-discriminatory and consistent basis," meaning that the City's decision to no longer accept Chubbuck Ditch water rights applied to any and all developers, not just LEI. [Id. § 2.3.1.2.] LEI also had "The right to apply for and, upon compliance with the terms and conditions of the Agreement and the Municipal Code, to receive … water taps, sewer taps, … and other permits necessary for development construction and occupancy of improvements within the Project. [Id. § 2.3.1.3.] Thus, the Annexation Agreement, when read together with the applicable portions of the LMC, permits the City to utilize its discretion with respect to accepting or rejecting Chubbuck Ditch water rights.

iii. LEI cannot use the implied duty of good faith and fair dealing to force the City to exercise its discretion with respect to accepting Chubbuck Ditch rights.

The City's refusal to accept LEI's Chubbuck Ditch rights is not a breach of the implied duty of good faith and fair dealing. The good faith performance doctrine is generally used to effectuate the intentions of the parties or to honor their reasonable expectations. *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1995). Good faith performance of a contract involves "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." *Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc.*, 872 P.2d 1359, 1362 (Colo. App. 1994). However, the implied duty of good faith and fair dealing cannot contradict

terms or conditions for which a party has bargained, nor can it inject substantive terms into the parties' contract. *ADT Security Servs., Inc. v. Premier Home Protection, Inc.*, 181 P.3d 288, 293 (Colo.App.2007); *see also Amoco Oil Co.*, 908 P.2d at 507 n. 6 (Vollack, C.J., concurring in part and dissenting in part) ("Rather, it requires only that the parties perform in good faith the obligations imposed by their agreement.").

Again, the Annexation Agreement includes no terms which require the City to accept any of LEI's water rights, including its Chubbuck Ditch water rights. *See supra* Section B(i). And LEI cannot use this legal theory to force the City to exercise its discretion under the LMC in LEI's favor. *See supra* Section B(ii) and (iii). Moreover, the expectations of the parties, as detailed in § 2.18 of the Annexation Agreement, were that the City would provide municipal water services, not accept specific water rights. [*See* SUMF, ¶¶ 10.] Also, § 2.23 makes clear that the Annexation Agreement, as written, "contains the entire understanding and agreement between the Parties" and that "no other terms, conditions, promises, understandings, statements or representations, express or implied" exist unless the parties amend the agreement in writing. Consequently, the fact that the Annexation Agreement is silent on the City's acceptance of LEI's Chubbuck water rights indicates that there is no agreement between the parties regarding accepting any specific water rights. As a result, LEI cannot utilize an implied covenant theory to graft an entirely new obligation in to the Annexation Agreement.

Moreover, the specific performance remedy requested by LEI for a breach is not an available remedy to LEI under these circumstances, even if it had a valid claim for breach of an implied covenant. An action for specific performance against a municipality "implicates an additional concern for the separation of governmental powers." *Wheat Ridge Urban Renewal*

Auth. v. Cornerstone Group XXII, L.L.C., 176 P.3d 737, 745 (Colo. 2007). The Colorado Supreme Court, in *Wheat Ridge*, explained, "the interference of the Courts with the performance of the ordinary duties of executive departments of the government would be productive of nothing more than mischief." *Id*. (internal quotations omitted). Based on this principle, the Colorado Court of Appeals denied a real estate developer's efforts to compel a sanitation district to reserve and make available a specific number of water taps. *See Thompson Creek Townhomes. LLC v. Tabernash Meadows Water and Sanitation Dist.*, 240 P.3d 554, 556 (Colo. App. 2010) (finding that the General Assembly "may determine the availability of equitable relief for governmental breach of contract" and that it has not "permitted an action for specific performance to lie against the sovereign as a contractual remedy.").

Here, LEI's effort to compel the City to accept its Chubbuck Ditch rights is no different. LEI is asking this court to invade the City's decision making process and compel it to exercise the discretion permitted to it by LMC § 19.04.080(A). This, the fact that the remedy sought by LEI is expressly prohibited, reinforces the conclusion that the Annexation Agreement or any implied covenant cannot be read to obligate the City to accept LEI's Chubbuck water. *Id*. at 557.[6]

C. Declaratory relief is unwarranted since the City had the power to enter into the Settlement Agreement.

LEI's declaratory relief action fails for three reasons. First, it is an impermissible attempt to avoid the exclusive jurisdiction of the Division 1 Water Court over all matters involving

[6] The City does not suggest that a court must always deny a request for specific performance under a contract with a municipal entity. However, as the Colorado Court of Appeals in *Thompson Creek Townhomes. LLC* noted, "the General Assembly may determine the availability of equitable relief for governmental breach of contract in cases not involving eminent domain…." *Thompson Creek Townhomes. LLC*, 240 P.3d at 556. "The General Assembly has not done so." *Id*.

water. *See* C.R.S. § 37-92-203(1). Second, LEI misreads and misapplies *Bennett Bear Creek Farm Water and San. Dist. v. City & County of Denver*, 928 P.2d 1254 (Colo. 1996) related to its claim that the City's decision to enter into the Settlement Agreement was an unlawful delegation of its legislative authority. [*See* Complaint, ¶¶ 74-80.] Third, LEI's claim for declaratory relief is barred by the applicable two year statute of limitations, C.R.S. § 13-80-102(1)(f).

i. Water Court Division I has exclusive jurisdiction over water matters.

LEI's declaratory judgment claim seeks to bypass the authority of the Water Court and to interfere with the stipulation between GLIC and the City. "[W]ater judges have exclusive jurisdiction of water matters within the division, and no judge other than the one designated as a water judge shall act with respect to water matters in that division." C.R.S. § 37-92-203(1). This means that the authority to acquire and deliver water is within the jurisdiction of the Water Court; it is not a legislative function of the City. Moreover, the terms and conditions of water court decrees bind the City concerning the water rights it owns and uses for municipal use, including the decrees entered in Case Nos. 02CW392 and 00CW108/03CW354. [*See* SUMF, ¶¶ 5-7.]

Further, the Colorado Constitution declares all water of natural streams to be the "property of the public," with use of such water subject to appropriation as defined by law. Colo. Const. art. XVI sec. 5. The use and change of use of LEI's contract water rights—and the other Chubbuck Ditch contract rights the City previously acquired on the open market—are limited by legal principles established by Colorado courts and the General Assembly. *See, e.g.*, *Public Service Co. of Colo. v. Meadow Island Ditch Co. No. 2*, 132 P.3d 333, 340 (Colo. 2006). As contractually-delivered water rights, LEI's Chubbuck Ditch rights "are not water rights with a

statutory right to change the use." *Id.* The City's negotiated settlement with GLIC allowed the City to change its contract water rights in exchange for the City's agreement to never accept or change additional Chubbuck Inches. The water court must "give effect to the stipulations of the parties" in a water court case and LEI's claims here seek to interfere with the court-approved stipulation between GLIC and the City. *See USI Properties East, Inc. v. Simpson*, 938 P.2d 168, 173 (Colo. 1997).

The Water Court, in Case Nos. 02CW392 and 00CW108/03CW354, approved the City's change to municipal use of numerous water rights only after objectors, such as GLIC, withdrew their opposition to the City's application. [SUMF, ¶ 6.] Each stipulation and settlement listed in the decrees, including GLIC's settlement with the City regarding changing Chubbuck Inches, forms an integral part of the decree and must be given effect by the water court. *See USI Properties*, 938 P.2d at 173. Without these settlements, the City's application likely would not have moved forward and the Water Court would not have entered its decree. The General Assembly has provided for a "resume notice" procedure for water court applications, which serves as notice to all interested and potentially interested parties that the judicial water court determination sought may affect their vested rights. *Monaghan Farms, Inc. v. City and County of Denver*, 807 P.2d 9, 15 (Colo. 1991). LEI was generally aware of the Water Court cases and did nothing to seek to intervene to protect its own interests. [SUMF, ¶¶ 7, 15, and 16.] The published water court resume served as legal notice to the entire world that the City's water court cases involved Chubbuck Ditch contract water rights and a change in use of those rights. *See Monaghan Farms*, 807 P.2d at 15. LEI could have entered either or both cases by filing a statement of opposition or asserting injury, but it chose not to do so.

LEI cannot now come to this court and request that it alter a water court decree. Exclusive jurisdiction to modify the City's 2011 or 2012 decrees and the associated Settlement Agreement resides in water court. *See* C.R.S. § 37-92-203(1). As a result, this Court does not have jurisdiction to hear a challenge to the Settlement Agreement approved by the water court, and should dismiss this claim for lack of subject matter jurisdiction.

ii. Setting rates involves municipal legislative authority, but accepting water rights and changing water rights for municipal use lies solely with the water courts in Colorado.

Next, in *Bennett Bear Creek Farm Water and San. Dist.*, water distributers, water districts, and municipalities brought a breach of contract and declaratory judgment action against the City and County of Denver and its board of water commissioners related to the board's determination of rates and charges for extraterritorial service. *Id*. at 1258. This decision analyzed rate-making powers, not whether a municipality improperly delegates its legislative authority by entering into an agreement to resolve any kind of legal dispute. *Id*. at 1264-74. At issue here is not the City's rate-making authority, but rather its decision to enter into a water court settlement. Further, there is no allegation that challenges the water rate structure. Thus, the *Bennett Bear* decision and its holdings are inapplicable to LEI's claims against the City.

iii. The claims should be dismissed for failing to meeting the applicable two-year statute of limitations period.

Finally, the two-year limitations period applicable to claims against governmental entities bars LEI's claim. C.R.S. § 13-80-102(1)(f). LEI was generally aware of the dispute between GLIC and the City as early as 2009. [SUMF, ¶¶ 15 and 16.] But it learned of the City's agreement not to use or accept Chubbuck Ditch water in January of 2014. [SUMF, ¶ 13.] However, LEI waited until April 11, 2016 to file its complaint. As a result, the two-year

limitations period ran two to three months before LEI asserted its claim for declaratory relief. Thus, the claim for declaratory relief should be dismissed.

V. CONCLUSION

The Annexation Agreement does not require the City to accept specific water rights. It merely states that the City has agreed to provide municipal water service to the Project. Once LEI is able to submit acceptable water rights or pays cash-in-lieu to the City, the City will provide the bargained for service. The Annexation Agreement cannot be read to require anything more of the City. Thus, for all the reasons above, the City respectfully requests that this Court enter an Order dismissing with prejudice LEI's first, second, third, and fourth claims for relief against the City or, in the alternative, grant summary judgment in favor of the City on those claims.

Respectfully submitted this 28th day of August, 2017.

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[Pursuant to Rule 121, the signed original is on file at Berg Hill Greenleaf & Ruscitti LLP]

s/ Josh A. Marks

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of August, 2017, a true and correct copy of the foregoing **DEFENDANT CITY OF LOVELAND'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT** was served electronically via ICCES and/or by depositing same in the U.S. Mail, postage prepaid, addressed to the following:

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s/ Cheryl Stasiak

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