DISTRICT COURT, LARIMER COUNTY, COLORADO 201 LaPorte Avenue, Suite 100 Fort Collins, CO 80521 Telephone: (970) 494-3500	
Plaintiff: LOVELAND EISENHOWER INVESTMENTS, LLC, a California limited liability company, v. **Defendants:** THE CITY OF LOVELAND, THE GREELEY AND LOVELAND IRRIGATION COMPANY, a Colorado non-profit corporation and JOHN DOES 1 through 50.	▲ **COURT USE ONLY** ▲ Case No.: 2016 CV 30362 Courtroom: 4C
Darrell G. Waas, #10003 Kathryn I. Hopping, #35036 WAAS CAMPBELL RIVERA JOHNSON & VELASQUEZ LLP 1350 17th Street, Suite 450 Denver, CO 80202 Telephone: 720-351-4700 Facsimile: 720-351-4745 waas@wcrlegal.com hopping@wcrlegal.com	

PLAINTIFF'S PARTIAL MOTION FOR SUMMARY JUDGMENT

Plaintiff Loveland Eisenhower Investments, LLC, ("LEI") by and through its undersigned counsel, submits the following Partial Motion for Summary Judgment:

INTRODUCTION

In April of 2010, after years of planning, extensive negotiations and expenditure of hundreds of thousands of dollars, LEI entered into an agreement with The City of Loveland ("City") for annexation of portions of LEI's property into the City for development of a mixed-use project. LEI executed the agreement with the understanding that the City could and would acquire certain water rights owned by LEI, known as Chubbuck Inches, in exchange for municipal

credits that LEI could apply toward its water dedication requirements for its project. At the time, the City's municipal code specifically identified Chubbuck Inches as a source of water rights the City would accept in exchange for municipal credits and stipulated a value for the acquisition and conversion of Chubbuck Inches. LEI's right to develop its land consistent with then-existing code provisions became a vested property right at the time of execution. Moreover, the City had accepted Chubbuck Inches in exchange for municipal credits from every previous applicant – 88.8% of all Chubbuck Inches in existence.

Unbeknownst to LEI, just months before the execution of the agreement, the City had entered into a Settlement Agreement (the "Settlement") with the Greeley and Loveland Irrigation Company ("Company"), wherein the City committed it would no longer acquire and convert the last remaining Chubbuck Inches from irrigation to municipal use – including LEI's Chubbuck Inches. The City essentially bargained away LEI's vested water rights in exchange for valuable concessions it realized from the Company in the Settlement. Because LEI had no use for its Chubbuck Inches for irrigation purposes following annexation, the Settlement Agreement effectively and intentionally stranded LEI's Chubbuck Inches, which would now return to and benefit only the Company and its shareholders. Both Defendants were fully aware of the pending annexation and Agreement and that LEI acquired Chubbuck Inches with the purchase of its land and intended to use them for municipal purposes on its development. Neither Defendant informed LEI of the Settlement, nor did they inform LEI it could no longer convert its Chubbuck Inches - indeed, the City would not amend its municipal code to reflect this change and would not disclose the Settlement Agreement to LEI for five more years.

The City's refusal to acquire LEI's Chubbuck Inches and provide municipal credits towards development of LEI's project is a breach of the parties' Agreement. LEI is therefore entitled to summary judgment on its First and Second Claims for Relief for breach of contract and breach of the implied covenant of good faith and fair dealing. Additionally, by entering into Settlement, the City has unlawfully divested its legislative authority to purchase and deliver water, serve property located within its boundaries with water and set and charge rates for such water. As a result, summary judgment is appropriate on LEI's Third Claim for Relief for declaratory judgment. Because the Settlement violates Colorado law, LEI is entitled to summary judgment on its Fourth Claim Relief for permanent injunction.

MATERIAL UNDISPUTED FACTS

LEI is the owner of 58 acres of land located in Larimer County, Colorado (the "LEI Land"). The LEI Land was purchased in three main acquisitions. The first 17 acres were purchased in approximately 2001 (the "First Parcel"). In 2004, LEI purchased 31 acres of land (the "Second Parcel") and later acquired an adjacent 9 acres of land in 2007 (the "Third Parcel"). With the purchase of the Second Parcel and Third Parcel, LEI also acquired 31.25 "contractual inches" of Chubbuck water rights. *See* Affidavit of Greg Parker ("Parker Affidavit") at 1-6, attached hereto as **Exhibit A**.

The History Of Chubbuck Water Rights

In 1865, Harrison Chubbuck constructed a ditch, later known as the "Chubbuck Ditch" and made initial appropriations of water along the Big Thompson River. On November 1, 1877, Mr. Chubbuck entered into an agreement with shareholders in the Larimer County Irrigating and Manufacturing Company (the "Chubbuck Agreement"). *See* Affidavit of Water Expert Brett

Bovee ("Bovee Affidavit"), attached hereto as **Exhibit B**. *See also* Bovee Expert Report and Bovee Rebuttal Report ("Bovee Reports") at 5, collectively attached to **Exhibit B** as Attachment 1. Pursuant to the Chubbuck Agreement, individual parties to that agreement (the "Contract Users") received first priority for deliveries under the Chubbuck Ditch system. These contractual rights are specified in "Chubbuck inches" and are to be delivered ahead of the company's regular shareholders. Thereafter, any senior water not needed by the Contract Users is available for use by the Company's other shareholders who were not parties to the Chubbuck Agreement (the "Non-Party Shareholders"). Among the parties to the Chubbuck Agreement designated as "Contract Users" were predecessors in title to the Second and Third Parcel. *Id*. at 5; *see also* **Exhibit A**, Parker Affidavit at 7.

On November 17, 1877, Mr. Chubbuck sold his interest in the Chubbuck Ditch to Sarah Barnes. In 1881, Ms. Barnes conveyed all her interests and obligations in the Chubbuck Ditch to the Company's predecessor in interest. The Company, as successor, continues to make deliveries to the successors of the Chubbuck Agreement to this day, including LEI. **Exhibit B**, Bovee Affidavit at Attachment 1, Bovee Expert Report at 5; **Exhibit A**, Parker Affidavit at 7.

There is a total of 1590.4 contractual inches of water available to the Contract Users under the Chubbuck Agreement (the "Chubbuck Inches"). LEI, through its purchase of the Second and Third Parcels, has an interest in a total of 31.25 Chubbuck Inches, approximately 1.96% of the total Chubbuck Inches. **Exhibit B**, Bovee Affidavit at Attachment 1, Bovee Expert Report at 5; **Exhibit A**, Parker Affidavit at 8.

The City's Acquisition of Chubbuck Inches

Beginning in the 1980s, the City began acquiring Chubbuck Inches from Contract Users and converting them through water court proceedings from irrigation to municipal use. Once the City acquires the Contract Users' irrigation Chubbuck Inches, the City accepts these Inches, and delivers an equivalent amount of municipal water to the Contract User (based on the City's then-current exchange rate) through the City's delivery system. After it accumulates a substantial number of the Inches, the City historically has sought to convert them to municipal use. **Exhibit B**, Bovee Affidavit at Attachment 1, Bovee Expert Report at pp.14-15. *See also* C.R.C.P. 30(b)(6) Deposition of the City ("City Depo.") (Dewey) at 42:6-44:15; 46:16-47:6; 229:17-231:10, relevant portions of which are attached hereto as **Exhibit C**.[1]

Over the years, the City has obtained many decrees and has acquired and converted a cumulative total of 1411.58 Chubbuck Inches, or 88.8% of the total Chubbuck Inches. *Id*. at 91:13-92:12. The City makes conversion economically feasible by acquiring multiple Contract Users' irrigation Chubbuck Inches over time, which it banks as credit until it has enough to apply for conversion in water court. *Id*. at 42:6-44:15; 46:16-47:6; 229:17-231:10: **Exhibit B** at Attachment 1, Bovee Expert Report at 14.

Once the Chubbuck Inches were acquired and converted from irrigation to municipal use, return flows were held by the City and were no longer provided to the Company or its shareholders. *See* C.R.C.P. 30(b)(6) Deposition of the Company ("Company Depo.") at 112:7-24, relevant portions of which are attached hereto as **Exhibit D**. Because there were less unused portions of

[1] Two different City representatives provided testimony during the C.R.C.P. 30(b)(6) deposition of the City – Greg Dewey and Karl Barton. Both portions are collectively attached as **Exhibit C**; however, each citation identifies the representative providing the testimony.

the Chubbuck Inches available to them, the Non-Party Shareholders became increasingly upset with the City's decision to acquire more and more Chubbuck Inches and convert them to municipal use. Thus, the Company objected to the City's most recent change case of Chubbuck Inches involving a separate Contract User. *Id*. at 113:2-117:5; *see also* **Exhibit C**, City Depo. (Dewey) at 36:13-37:21; 74:16-21.

To settle the matter, the Company and the City entered into an agreement in January of 2010 (the "Settlement Agreement"), in which the City committed that it shall not apply for changes of any additional Chubbuck Inches and that no additional Chubbuck Inches will be used by the City, with certain exceptions not applicable to this case. *See also* Settlement Agreement at ¶6, attached hereto as **Exhibit E**; *see also* **Exhibit C**, City Depo (Dewey) at 146:3-11. The Company did not make any effort to notify the owners of unchanged Chubbuck Inches that the Settlement Agreement had been executed. *See* **Exhibit D**, Company Depo. at 175:24-176:7. However, the Company knew that the LEI Land would soon be annexed into the City for development of the Project, knew that the LEI Land had attendant Chubbuck Inches that LEI would use for municipal purposes on the Project and knew that the City was accepting Chubbuck Inches in exchange for municipal credits. *See* **Exhibit D**, Company Depo. at 37:18-22; 40:15-45:24; *see also* Deposition of Ronald Brinkman ("Brinkman Depo.") at 12:3-17:16; 19:1-20:16; 26:11-28:24, relevant portions of which are attached hereto as **Exhibit F**. The Company entered into the Agreement to retain the benefit of the remaining unconverted Chubbuck Inches, which could not now be changed and would now flow to its Non-Party Shareholders. **Exhibit D**, Company Depo. at 64:7-19; 172:4-21. Further, the City knew the Settlement Agreement would affect the ability of holders of Chubbuck Inches to use those water rights for development in the City. **Exhibit C**, City Depo.

(Dewey) at 135:12-136:1. As set forth below, the City was aware that LEI had Chubbuck Inches at the time it entered into the Settlement Agreement, but would not notify LEI of the Settlement or its affect for nearly five more years.

Development and Annexation of the LEI Land

LEI purchased the parcels of the LEI Land from 2000 to 2007 with the intent and purpose of developing it as a unified project for mixed uses (the "Project"). At the time of purchase of the Second and Third Parcels, the First Parcel was already located within the City and was zoned PUD for high density residential development. At purchase, both the Second and Third Parcel were located outside the boundaries of the City. **Exhibit A**, Parker Affidavit at 9-11.

As early as 2003, in connection with LEI's acquisitions and knowing its intent to develop using its water rights, LEI representative Mike Long contacted the City to inquire regarding how water rights were calculated in exchange for municipal credits. *See* **Exhibit C**, City Depo. (Dewey) at 29:1-30:7. At that time, the City specifically informed Mr. Long that its water right requirements for development are calculated based upon the formula and requirements located in Title 19 of the Municipal Code. *Id*. Simply put, the City told LEI to rely upon its Code. *Id*. at 29:23-25.

LEI submitted a concept Master Plan to the City for development of the Project, which was approved in 2010. **Exhibit A**, Parker Affidavit at 12. As part of the Master Plan approval, LEI was required to annex certain portions of its land into the City. In conjunction with this process, LEI's engineer, Larry Owen, provided the City a "Water Adequacy Assessment Summary," which showed that, among other water rights, LEI had a contractual right to 31.25 Chubbuck Inches that could be used to satisfy its water requirements. *See* Affidavit of Larry Owen ("Owen Affidavit")

at 9, attached as **Exhibit G**; *see also* Water Adequacy Assessment Summary attached to **Exhibit G** as Attachment 1. LEI provided the Water Adequacy Assessment Summary for the sole purpose of demonstrating to the City how LEI intended to satisfy its water dedication requirements – including its intention to use its existing 31.25 Chubbuck Inches in exchange for municipal credits. *See* **Exhibit G**, Owen Affidavit at 9-11; *see also* **Exhibit A**, Parker Affidavit at 13.

As set forth in its Water Adequacy Assessment Summary, LEI's 31.25 Chubbuck Inches, together with its other available water rights, were more than sufficient to serve the Project and the City approved the Master Plan. Without LEI's Chubbuck Inches, LEI did not have sufficient water to serve the Project. **Exhibit G**, Owen Affidavit at 12.

LEI understood that its Chubbuck Inches could be acquired and converted by the City for municipal use on the Project for two primary reasons. First, the City had historically accepted and processed every application for conversion of Chubbuck Inches up to that point and had, in fact, converted 88.8% of all Chubbuck Inches in existence. *See* **Exhibit C**, City Depo (Dewey) at 46:16-47:6; 92:3-94:4. Secondly, Title 19 of the Loveland Municipal Code in effect at the time of execution of the Agreement (the "2010 Code") specifically contemplated acquisition of Chubbuck Inches and repeatedly identified Chubbuck Inches as a source of water rights that the City would accept in exchange for municipal credits. *See* 2010 Code at Section 19, relevant portions of which are attached as **Exhibit G**, at Attachment 2. For example, Section 19.04.018 specifically identified the value of water bank credits the City attributed to acceptable water rights, specifically including Chubbuck Inches. Section 19.04.045 identifies the native raw water storage fee assessed to water rights acceptable to the City in exchange for municipal credit and specifically identified Chubbuck

Inches as an acceptable source. Section 19.04.080 set forth the requirements for acceptance of ditch water and specifically defined the term "ditch water rights," stating that:

> As used herein, "ditch water rights" shall refer to and mean water rights from the following ditches or ditch companies, commonly referred to as: Barnes Ditch, big Thompson Ditch & Manufacturing Company; Buckingham Irrigation Company (George Rist Ditch); Chubbuck Ditch….

Exhibit G at Attachment 2 at Section 19.04.080(C). This section of the 2010 Code was specfically intended to identify the sources of water rights acceptable to the City. *See* **Exhibit C**, City Depo (Dewey) at 165:16-166:13. This provision of the Code would not be changed in the Code until 2016. **Exhibit C**, City Depo. (Dewey) at 177:8-10; 178:21-179:10; *Compare* 2012 Title 19 City Code provisions *with* 2016 Title 19 City Code provisions attached as **Exhibit G** at Attachments 3 and 4 respectfully.

In April of 2010, the City and LEI entered into an Annexation and Development Agreement (the "Agreement") annexing the Second and Third Parcel into the City. *See* Agreement at p.2 (Recitals), attached hereto to **Exhibit A**, at Attachment 1. LEI entered into the Agreement based upon the understanding that the City would apply its 2010 Code and regulations in a consistent, uniform, non-discriminatory manner consistent with other developers – including the sections of Title 19 providing for acquisition and conversion of Chubbuck Inches. **Exhibit A**, Parker Affidavit at 20-21.

Section 2.18 of the Agreement states as follows:

> Except as this Agreement expressly states otherwise, the City shall have the responsibility to provide its customary municipal 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), police and fire protection, snow removal and road maintenance and repair of public streets, building code enforcement, maintenance of such facilities and other administrative and utility services.

Exhibit A, at Attachment 1, Agreement at §2.18. Thus, Section 2.18 of the Agreement expressly obligated the City to provide customary municipal services to the Project, including water service and facilities. *See id*. Additionally, the cover page of the Agreement states that "Approval of this Agreement constitutes a vested property right pursuant to Article 68 of Title 24, C.R.S., as amended." *Id*. at p.1. C.R.S. §24-68-103 is titled "Vested property right – establishment – waiver" and states in relevant part as follows:

> (c) A vested property right shall attach to and run with the applicable property and shall confer upon the landowner the right to undertake and complete the development and use of said property under the terms and conditions of the site specific development plan including any amendments thereto….

See C.R.S. §24-68-103(c). Section 2.3 of the Agreement is titled "Vested Property Rights" and provides, in relevant part that the "…Owner…shall have the vested property rights to undertake and complete the development…" including:

> 2.3.1.2. The right to commence and complete development of the Project (including without limitation, the right to receive all City approvals, permits and taps necessary for the 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.
>
> 2.3.1.3. The right to apply for and, upon compliance with the terms and conditions of this Agreement and the Municipal Code, to receive, building permits, water taps, sewer taps, certificates of occupancy, and other permits necessary for development, construction and occupancy of improvements within the Project.

> 2.3.1.4. …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 but not limited to, building fire, natural gas, housing, water…the Municipal Code, and other City rules and regulations) or the application of state or federal regulations.

Id. By operation of the Agreement, LEI had a vested right to undertake development in a manner consistent with other developers both historically and in the future under a uniform, consistent, non-discriminatory application of water regulations and the 2010 Code.

Section 19.04.090 of the 2010 Code concerns "Vested rights concerning water rights owed" and provides:

> The water rights owed by an applicant for a development for which the applicant has obtained and possesses a vested right to undertake and compete [sic] the development pursuant to Article 68 of Title 24… shall be calculated in accordance with the water rights provisions in effect on the date applicant's right to develop was vested….

See **Exhibit G**, at Attachment 2, 2010 Code at §19.04.090. Pursuant to the 2010 Code, the City has the obligation to calculate the water rights owed under the Agreement and as set forth in Water Adequacy Assessment Summary in accordance with the water rights provisions in effect in 2010, which specifically provided that the City would and could acquire, convert and store LEI's Chubbuck Inches. The City understood that LEI was relying upon the Code and had a right to rely upon the Code, particularly Title 19, when assessing and determining what water rights would be acceptable to the City for satisfaction of LEI's water dedication requirements. **Exhibit C**, City Depo. (Dewey) at 26:21-23.

The Dispute

LEI was not a party to the Settlement Agreement and was unaware of the Settlement Agreement and its terms at the time it executed the Agreement. **Exhibit A**, Parker Affidavit at 24-28. **Exhibit G**, Owen Affidavit at 22; **Exhibit C**, City Depo. (Dewey) at 32:17-33:2. However, the City was simultaneously negotiating the Settlement Agreement and the Agreement. *Id*. at 25-26; *see also* **Exhibit C**, City Depo. (Barton) at 23:13-25:5; **Exhibit D**, Company Depo. at 156:16-21. Indeed, by the time the Settlement Agreement was executed, the City and LEI had been negotiating the Agreement for over a year and most, if not all its terms were finalized. *See* **Exhibit A**, Parker Affidavit at 25-26. However, the City knew LEI owned Chubbuck Inches as part of its purchase of the LEI Land and that LEI intended to dedicate these water rights to satisfy it water dedication requirements on the Project. Not only was the City provided the Water Adequacy Assessment Summary, but as part of the Annexation to ensure what property was being annexed, the City had received title work from LEI documenting the legal description of the LEI Land, including its attendant Chubbuck Inches. **Exhibit C**, City Depo. (Dewey) at 18:5-20:2; *see also* LEI's title work provided to the City, relevant portions of which are attached hereto as **Exhibit H**. Moreover, the City was aware that the LEI Land abutted the Chubbuck Ditch and that all properties surrounding the LEI Land were historically irrigated using Chubbuck Inches. *Id*. at 138:22-138:7; 140:3-10.

Despite this, the City enticed LEI to enter into the Agreement and continue development of its Project until December of 2014, when the City finally provided a copy of the Settlement Agreement. At that time, the City first informed LEI the City would not acquire and convert LEI's

Chubbuck Inches because doing so would be a violation of the Settlement Agreement. **Exhibit G**, Owen Affidavit at 23; **Exhibit C**, City Depo. (Dewey) at 32:17-33:2.

Following annexation, LEI had no use for Chubbuck Inches for irrigation purposes on the Project. Without the ability to dedicate them to the City in exchange for municipal credits, LEI's Chubbuck Inches are effectively stranded. LEI is therefore forced to purchase very expensive water to replace the stranded Chubbuck Inches to meet its water dedication requirements. Moreover, LEI cannot convert its Chubbuck Inches to municipal use on its own. Conversion in water court by LEI alone is cost prohibitive, would take an extremely long time and would require LEI to fund construction of additional infrastructure to make the water potable. Further, LEI cannot use its Chubbuck Inches on site for irrigation because the construction of a separate water storage, treatment and pressurization system would be cost prohibitive. Thus, without the City's agreement to acquire the Chubbuck Inches and provide LEI with municipal credits, LEI is effectively prevented from using its water rights. Without municipal credits, LEI is left with either a substantially reduced project inconsistent with the approved master plan, or the need to acquire additional water rights at substantial cost and expense. **Exhibit A**, Parker Affidavit at 32-36; **Exhibit B** at Attachment 1, Bovee Expert Report at pp. 16-23; *see also* Bovee Rebuttal Report at pp. 1-10.

LEI filed its Complaint and Jury Demand on April 11, 2016. LEI now seeks summary judgment on its First, Second, Third and Fourth Claims for Relief.

ARGUMENT

1. Standard of Review

Summary judgment is appropriate if the pleadings, admissions and affidavits establish that there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Kaiser Found. Health Plan of Colorado v. Sharp*, 741 P.2d 714, 718 (Colo. 1987). Summary judgment allows the parties to pierce the formal allegations of the pleadings and save the time and expense of trial when, based on the undisputed facts, one party could not prevail. *Pueblo West Metro. Dist. v. Se. Colorado Water Conservancy Dist.*, 689 P.2d 594, 601 (Colo. 1984) (citations omitted).

As set forth below, summary judgment is appropriate on LEI's First, Second, Third and Fourth Claims for Relief. To first make this determination, however, the Court is required to determine as a matter of law what LEI's vested rights were under the Agreement as governed by Colorado statutes and the 2010 Code in effect at the time. Once these vested rights are determined, this Court can then consider LEI's claims for breach of contract claim, breach of the covenant of good faith and fair dealing, declaratory judgment and request for permanent injunction.

a. LEI has a vested right to dedicate its Chubbuck Inches to meet its water dedication requirements as provided by the 2010 Code.

By the plain language of the Agreement, Colorado law and the City Code, LEI has a vested right to develop its Project in accordance with the terms outlined in the Agreement and as set forth in Title 19 of the 2010 Code in effect as of the date of execution of the Agreement.

Pursuant to Sections 2.18 and 2.3 of the Agreement, the City is obligated to apply its Code and water regulations in a consistent and non-discriminatory manner and provide its customary municipal services to the Project on an equivalent, consistent, uniform and non-discriminatory

basis with conditions, standards and dedications that are no more onerous than those imposed by the City upon other developers. *See id*. It is undisputed that, under the 2010 Code, the City converted 88.8% of all existing Chubbuck Inches and, until the Settlement, the City ***had never*** denied a request for dedication and conversion of Chubbuck Inches for municipal credits. *See* **Exhibit C**, City Depo (Dewey) at 46:16-47:6. Upon entering into the Agreement, LEI expected to be treated consistent with other applicants for dedication of Chubbuck Inches under the 2010 Code – no more and no less. *See* **Exhibit A**, Parker Affidavit at 21. Indeed, LEI had a vested right to such treatment.

The cover page of the Agreement establishes that approval of the Agreement constituted a vested property right pursuant C.R.S. §24-68-103; therefore, the right to undertake development in accordance with the Agreement is a vested property right. *See* C.R.S. §24-68-103(c). Further, pursuant to Section 19.04.090 of the 2010 Code, LEI has a vested right to have its ***water rights owed*** calculated in accordance with the water rights provisions in effect on the date LEI's right to develop was vested - i.e., the 2010 Code. *See* **Exhibit G** at Attachment 2, 2010 Code at Section 19-04.090. In order to determine and calculate the water rights owed, a developer must know what water rights are acceptable to the City, as well as their conversion rate and other applicable fees. Section 19.04.080(C) identifies the "ditch water rights" acceptable to the City and lists Chubbuck Inches as one of many water rights the City will accept in exchange for municipal credit. *Id*. at Section 19.04.080(C); *see also* **Exhibit C,** City Depo (Dewey) at 165:16-166:13. Still other Title 19 sections set forth the value given to the Chubbuck Inches and the rates for its storage fees. *See* **Exhibit G**, at Attachment 2, 2010 Code at §§19.04.018 and 19.04.045. As a matter of law, LEI has a vested right to dedicate, and the City must accept and process, LEI's application for

dedication of its Chubbuck Inches in exchange for municipal credits to meet its water dedication requirements for the Project consistent with the 2010 Code and consistent with other developers before it.

b. The City has breached the Agreement

Summary judgment is appropriate on LEI's First Claim for Relief because the City has breached the Agreement. To recover on a claim for breach of contract, a party must prove the following elements: (1) the existence of a contract; (2) performance by the plaintiff or some justification for nonperformance; (3) failure to perform the contract by the defendant; and (4) resulting damages to the plaintiff. *Saturn Systems, Inc. v. Militare*, 252 P.516, 529 (Colo. App. 2011).

Here, all the elements establishing the City's breach of the Agreement have been met. Under Section 2.3 of the Agreement, LEI has a vested right to dedicate its Chubbuck Inches to meet its water dedication requirements as provided by the 2010 Code and the City must accept such dedication. The City's failure to abide by the vested rights provisions of its Agreement constitutes a breach of Section 2.3 of the Agreement. Additionally, under Section 2.18 of the Agreement and as set forth above, the City is contractually obligated to provide customary municipal services to the Project on an equivalent basis and on a uniform and non-discriminatory basis, including sanitary sewer and potable and non-potable water service and facilities. *See* **Exhibit A**, at Attachment 1, Agreement at Section 2.18. It is undisputed that, until the execution of the Settlement, the City accepted and provided municipal credits to every legitimate applicant for conversion of Chubbuck Inches and converted almost 90% of all Chubbuck Inches in existence. The City's act of bargaining away LEI's water rights by stranding them in exchange for other

benefits achieved under the Settlement discriminated against LEI by treating it differently than every single other developer holding Chubbuck Inches. The City's failure to accept and exchange LEI's Chubbuck Inches for municipal credits on the Project is a breach of Section 2.18 of the Agreement. Summary judgment is appropriate on LEI's First Claim for Relief and LEI is entitled to the remedy of specific performance requiring the City to accept LEI's Chubbuck Inches in exchange for municipal credits.

Under the Agreement, LEI's only legal remedies available to it for claims against the City are non-monetary forms of relief such as permanent injunction and specific performance. *See* **Exhibit A**, at Attachment 1, Agreement at Section 2.25. Importantly, the City can provide this non-monetary relief by acquiring LEI's Chubbuck Inches in exchange for municipal credits without violating the Settlement Agreement. The Settlement Agreement requires only that the City refrain from applying for changes of any additional Chubbuck Inches. *See* **Exhibit E**, Settlement Agreement at ¶6. It does not prevent the City from *acquiring* Chubbuck Inches, but not converting them. Consequently, the City can acquire LEI's Chubbuck Inches, use them for irrigation purposes if it can, and simply grant LEI municipal credits in exchange but without converting those inches to municipal use in water court. *See* **Exhibit C**, City Depo. (Dewey) at 141:18-142:13. This is an appropriate solution since the City already has received the benefit of LEI's water rights when it bargained them away as part of the Settlement

c. The City has breached the covenant of good faith and fair dealing.

Summary judgment is appropriate on LEI's Second Claim for Relief for Breach of the implied covenant of good faith and fair dealing. Every contract contains an implied covenant of good faith and fair dealing. *City of Boulder v. Public Service Co. of Colorado*, 996 P.2d 198, 204

(Colo. App. 1999). "The implied covenant of good faith and fair dealing does not inject new substantive terms or conditions into a contract…but rather it is invoked only to give effect to the intentions of the parties or to honor their reasonable expectations in entering into a contract." *Id*. (citations omitted). The doctrine is applied only when "one party has discretionary authority to determine certain terms of the contract, such as quantity, price or time." *Id*. (*citing Amoco Oil Co. v. Ervin*, 908 P. 2d 493, 498 (Colo. 1995)).

The Agreement does not explicitly mention or require acceptance and conversion of LEI's Chubbuck Inches for municipal credits to satisfy LEI's water dedication requirements. It instead requires the City to consistently and uniformly apply the 2010 Code and provide its customary municipal services to the Project on an equivalent basis with other developers. These sections of the Agreement necessarily require the City to process and accept LEI's application for conversion of its Chubbuck Inches in satisfaction of its water dedication requirements consistently and uniformly with previous applicants under the City's 2010 Code.

Because the 2010 Code provided that Chubbuck Inches were an acceptable source of water for the City, and because the City had never denied an application for dedication and conversion of such water, LEI had a reasonable expectation that the City would process its requests consistent with the 2010 Code and previous applicants and accept its Chubbuck Inches in exchange for municipal credits. The City's failure to accept and convert LEI's Chubbuck Inches for this purpose is a breach of the implied covenant of good faith and fair dealing and summary judgment is appropriate on this claim for relief.

d. Summary Judgment is appropriate on LEI's Third Claim for Relief for Declaratory Relief.

LEI's Third Claim for Relief seeks declaratory judgment that the section of the Settlement requiring that the City not change any more Chubbuck Inches and that no additional Chubbuck Inches will be used by the City for any purpose is an unlawful delegation of the City's legislative authority and is invalid.

The Colorado Supreme Court in *Bennett Bear* interpreted C.R.S. §31-35-402 to allow "municipalities" to set rates for water services as part of a municipality's governmental legislative power. *Bennett Bear Creek Farm Water and San. Dist. v. City & County of Denver*, 928 P.2d 1254, 1263 (Colo. 1996). Where rate-making concerns the setting of rate schedules for future city-wide application and requires the balancing of questions of judgment and discretion, the activity is legislative in nature. *Cottrell v. City and County of Denver*, 636 P.2d 703 (Colo. 1981)

C.R.S. §31-35-401(4) defines a "'municipality" as "a city or town" and "any city or town or city and county which has chosen to adopt a home rule charter…." *Id*. Consequently, the City qualifies as a "municipality" and its provision of municipal water services, its sale and delivery of municipal water and the rates it sets for such sale and delivery are all legislative functions. *See e.g. Bennett Bear*, 928 P.2d at 1261, 1268; *Krupp v. Breckenridge Sanitation Dist*., 19 P.3d 687, 693 (Colo. 2001) (holding that a municipality acts legislatively when it sets rates and charges for its services.).

Historically, Colorado courts held that municipalities were free to contract away their legislative rate-setting powers. *Cherokee Water Dist. v. Colo. Springs*, 519 P.2d 339, 340 (Colo. 1974) (superseded by statute). However, it is now well established that they may not. *Bennett*

Bear, 928 P.2d at 1269-70. Indeed, the court in *Bennett Bear* concluded that a municipality *cannot* "divest its legislative powers" through contracts. *Id*.

The City has the legislative right to set rates and charges for its services, including the ability to calculate and set rates and charges for water rights owed under Title 19 of the City Code. Part of this calculation and rate setting authority is the City's legislative authority to decide what types of water rights it will accept and their value in exchange for water credit. By entering into the Settlement, the City unlawfully abrogated its legislative authority. LEI is entitled to declaratory judgment that the Settlement's requirement that the City refrain from applying for changes of any additional Chubbuck Inches and that no additional Chubbuck Inches will be used by the City for any purpose is an unlawful delegation of the City's legislative authority and is invalid.

e. Summary judgment is appropriate on LEI's Fourth Claim for Relief for Permanent Injunction.

Because the section of the Settlement Agreement prohibiting the City from changing and using Chubbuck Inches is invalid, enforcement of this provision of the Settlement is a violation of Colorado. As a result, LEI is entitled to a permanent mandatory injunction requiring the City to accept LEI's Chubbuck Inches in exchange for municipal credits and/or preventing the Company from enforcing the provision of the Settlement prohibiting future conversion and use of Chubbuck Inches.

A party seeking permanent injunction must show that: (1) the party has achieved actual success on the merits; (2) irreparable harm will result unless the permanent injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause to the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest. *Langlois v. Bd. of County Com'rs of County of El Paso*, 78 P.3d 1154, 1158 (Colo. App. 2003).

Here, irreparable harm will result unless the permanent injunction is issued. Under Section 2.3 of the Agreement, LEI has vested property rights to undertake and complete the development and use of the Property as provided in the Agreement for an initial period of eight years from the effective date of the Agreement (the "Initial Term"). However, if LEI constructs 100,000 square feet of "Primary Workplace Uses" within the Project and the City conducts a corresponding final inspection prior to the expiration of the Initial Term, then the term of vested property rights provided in the Agreement extends to fifteen years. *See* **Exhibit A**, at Attachment 1, Agreement at Section 2.3. Pursuant to Section 2.25 of the Agreement, LEI's ***only*** remedies available to it for breach of the Agreement are forms of non-monetary relief such as specific performance, declaratory judgment and injunctive relief. LEI is specifically prohibited from asserting any claim for monetary damages. *See id.* at Section 2.25.

Due to the City's breach of the Agreement and is unlawful delegation of authority, LEI will not have 100,000 square feet of Primary Workplace Uses constructed before expiration of the Initial Term and, therefore, will not receive the extension of its vested property rights. LEI has requested an amendment to the Agreement extending the vested rights period in light of this litigation, but the City has declined to process that request. Expiration of the vested property rights period will result in irreparable harm to LEI, who would be forced to revise its entire development plan and proceed with construction under current City Code provisions at current rates.[2] Further,

[2] As mentioned, LEI is in the process of negotiating an extension of the vesting period but, to date, no such extension has been granted. If no resolution is achieved, LEI intends to assert a claim for declaratory judgment seeking an equitable extension of the vesting period in light of the City's breach of the Agreement, either as part of this lawsuit or in a separate action.

through concessions it received under the Settlement, the City has already received the benefit of LEI" s Chubbuck Inches.

LEI was forced to cease development on the Project and file the instant lawsuit to resolve issues concerning its water rights dedication requirements on the Project. LEI could not have simply acquired water from another source to meet these requirements to continue development because it could not have recovered these amounts as damages. Had LEI acquired such water, it would have effectively forfeited all claims against the City.

The City's actions are in violation of Colorado law, have robbed LEI of its vested property rights and have prevented LEI from moving forward with development. These injuries outweigh the harm that the injunction may cause to the City, who would simply have to comply with the terms of the Agreement and the 2010 Code. Moreover, the injunction will not adversely affect the public interest, which would be greatly served by the development of the Project. LEI is entitled to summary judgment on its Fourth Claim for Relief for permanent injunction preventing the City and Company from enforcing the Settlement against LEI and requiring the City to process LEI's application for dedication of Chubbuck Inches consistent with the 2010 Code and previous applicants and developers.

CONCLUSION

LEI is entitled to a determination that it has a vested property right to dedicate its Chubbuck Inches in exchange for municipal credits to satisfy its water dedication requirements on the Project. Additionally, for the reasons set forth above, LEI is entitled to summary judgment on its First, Second, Third and Fourth Claims for Relief.

Respectfully submitted this 28th day of August, 2017.

WAAS CAMPBELL RIVERA JOHNSON & VELASQUEZ LLP

By: */s/ Kathryn I. Hopping*
Darrell G. Waas
Kathryn I. Hopping

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 2017, a true and correct copy of **PLAINTIFF'S PARTIAL MOTION FOR SUMMARY JUDGMENT** was filed and/or served electronically via Colorado Courts E-Filing and/or sent via U.S. Mail, postage prepaid as follows:

Josh A. Marks
Mary Sue Greenleaf
Berg Hill Greenleaf Ruscitti LLP
1712 Pearl Street
Boulder, CO 80302

jam@bhgrlaw.com
msg@bhgrlaw.com

Attorneys for Defendant City of Loveland

Mark C. Overturf
Overturf McGath & Hull, P.C.
625 E. 16th Avenue, Suite 100
Denver, CO 80203

mco@omhlaw.com

Attorney for Defendant The Greeley and Loveland Irrigation Company

/s/ Sherrie A. Winkel
Sherrie A. Winkel

In accordance with C.R.C.P. 121 §1-26(9), a printed copy of this document with original signature(s) is maintained by Waas Campbell Rivera Johnson & Velasquez LLP, and will be made available for inspection by other parties or the Court upon request.