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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 RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant, the City of Loveland (the "**City**"), through its undersigned counsel, Berg Hill Greenleaf Ruscitti LLP, respectfully submits the following Response in Opposition to Plaintiff Loveland Eisenhower Investment, LLC's ("**LEI**") Motion for Partial Summary Judgment (the "**Motion**"), and states as follows:[1]

I. INTRODUCTION

Despite the volume of exhibits and extended legal discussion in the record, this dispute can be boiled down to very simple terms. A developer, like LEI, must contribute water to the

[1] This brief responds to the Motion for Partial Summary Judgment filed by LEI on August 28, 2017.

City as a prerequisite to getting the City to expand its water service to the developer's completed development. And, the City has complete discretion on accepting the specific kind of water gith that LEI has anticipated it would contribute to the City in meeting this requirement. LEI never obtained the City's consent to contribute its water rights, via contract or even some informal communication. Once it discovered that the City was no longer accepting the kind of water right it owner, LEI sued, wanting this Court to substitute LEI's interest for that of the City in determining what water rights are acceptable to it. For the reasons discussed below, there are a myriad of factual and legal impediments to LEI's claims that require the Court to deny LEI's Motion.

Essentially, LEI argues that the vested rights provision found in Section 2.3 of the Annexation Agreement entered into by the parties in 2010 ("**Annexation Agreement**") requires the City to acquire LEI's Chubbuck Ditch[2] rights and provide municipal credits to LEI in exchange, to be used by LEI in satisfaction of the City's water rights requirements for the Project. Because the City is prohibited from accepting or using Chubbuck Ditch rights and has accordingly refused to accept LEI's Chubbuck Ditch rights, LEI argues that the City has breached the Annexation Agreement and the implied covenant of good faith and fair dealing. LEI further argues that the City's 2010 Settlement Agreement ("**Settlement Agreement**") with the Greeley and Loveland Irrigation Company ("**GLIC**") to refrain from using or seeking to change or convert additional Chubbuck Ditch water rights should be invalidated by this Court as an unlawful delegation of the City's legislative authority.

[2] If not stated otherwise herein, capitalized terms are intended to have the same meaning as that set forth in the City's Motion to Dismiss or in the Alternative Motion for Summary Judgment, filed on August 28, 2017 (the "**City Motion**").

However, when the admissions in LEI's Motion are combined with other undisputed facts, it is clear that it is the City that is entitled to summary judgment as a matter of law, dismissing each of LEI's four claims against it. First, LEI's contractual claims focus on the City's alleged pre-contractual omissions concerning the City's ability and willingness to accept the Chubbuck Ditch rights, and thus could sound in tort. As such, those claims are plainly barred by the Colorado Governmental Immunity Act ("**CGIA**") and must be dismissed pursuant to C.R.C.P. 12(b)(1). Further, both LEI's breach of contract and breach of the implied covenant of good faith and fair dealing claims appear to be founded upon the inaccurate premise that the City was required to accept the Chubbuck Ditch rights under either the Annexation Agreement or the Loveland Municipal Code's ("**City Code**") provisions in existence at the time the Annexation Agreement was executed. Because it remains undisputed that the Annexation Agreement contains no requirements, or even mention of, the City's acceptance of water rights from LEI and because Title 19 of the City Code has always provided the Loveland Utilities Commission ("**LUC**") with discretionary authority to determine which ditch rights it is in the City's best interests to accept into the City's water portfolio – these claims are completely unsupportable and subject to dismissal pursuant to C.R.C.P. 56. Second, LEI's declaratory judgment claim has no support under Colorado law and borders on frivolous, as the City's discretionary authority to accept ditch rights is in no way legislative. Third, because LEI has not established a clear right to relief on any of its claims, nor any irreparable harm that LEI would suffer if the City was not ordered to accept LEI's Chubbuck Inches, LEI's claim for a permanent injunction similarly fails.

II. RESPONSE TO LEI'S STATEMENT OF MATERIAL UNDISPUTED FACTS AND STATEMENT OF ADDITIONAL FACTS

A. The City's Statement of Undisputed Facts[3]

While the City has responded to LEI's statement of facts below, there are additional facts that will aid the Court's review of the issues presented in the Motion. This section is meant to give the Court a more complete picture of the events surrounding the Annexation Agreement, the Settlement Agreement, and leading up to this lawsuit.

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. B**, G. Parker 30(b)(6) Depo. Tr. at 128:3-21.] This mixed use development shall be referred to herein as the "**Project**."

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

3. On January 25, 2010, the City and GLIC entered into the 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. C**, Settlement Agreement at ¶ 6.]

4. 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

[3] The City filed the City Motion, seeking dismissal of LEI's First, Second, Third and Fourth Claims for Relief. Therein, the City lays out similar, and additional undisputed facts. Although the relevant, undisputed facts are set forth again here, the City expressly incorporates the entirety of the City's motion for summary judgment, including the City's statement of undisputed facts included therein, as if set forth here.

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. D**, Findings of Fact, Conclusions of Law, Judgment and Decree in 02CW392; *see also* **Exh. E**, 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, as provided for in the Settlement Agreement. [*Id*.; *see also* **Exh. C** at ¶ 6.]

5. 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, including the GLIC's objection to the City's conversion and use of Chubbuck Inches, and did not file a Statement of Opposition in the City's Water Court cases that involved the dispute. [**Exh. B** at 31:14-21.]

6. LEI believed the City deliberately withheld the existence and impact of the Settlement Agreement during the course of the parties' negotiation of the Annexation Agreement. [*Id.* at 178:6-16.]

7. 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*. at 179:13-21.]

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

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

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

11. 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*.]

12. Under the City Code, LEI is required 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. G**, Loveland Municipal Code ("**City Code**") § 19.04.020 (2009); *see also* **Exh. H**, G Dewey 30(b)(6) Depo. Tr. at 50:4-13.]

13. 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. [City Code §§ 19.04.040, 19.04.041.]

14. 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. H** at 40:15-42:19.]

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

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

B. <u>Response to Facts Set Forth in LEI's Motion</u>

The City generally disputes the allegations contained in LEI's "Statement of Material Undisputed Facts" to the extent they attempt to characterize documents, opinions in expert reports, and deposition testimony that speak for themselves, and to the extent the allegations are contradicted by the evidence set forth in the City's "Argument" sections, below. Further, many of the allegations and statements set forth by LEI are immaterial to resolution of the Motion. *See Krane v. St. Anthony Hosp. Sys.*, 738 P.2d 75, 77 (Colo. App. 1987) ("In the context of a summary judgment proceeding, an issue of material fact is one, the resolution of which will affect the outcome of the case."). With that in mind, and in the interest of brevity, the City specifically responds only to those facts that the City deems material and applicable to the arguments raised by LEI in the Motion:

17. The City was unaware that LEI possessed, much less intended to contribute, its Chubbuck Ditch rights to the City in connection with the proposed development until December of 2014. [**Exh. H** at 16:3-10.] LEI and its representatives never discussed the possibility that LEI was going to contribute Chubbuck Ditch rights in connection with the Project until December of 2014. [*Id.* at 15:8 – 16:10, 32:9 – 33:18.]

18. The City has no record of receiving the Water Adequacy Assessment Summary from Larry Owen or any other representative of LEI. [*Id.* at 79:13 – 80:1.]

19. 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. [City Code § 19.04.080 (2009)(A) and (C); **Exh. H** at 41:12-16 (discussing the process for assessing an application to convert Chubbuck Ditch rights under City Code § 19.04.080), 165:12-16.]

20. This section of the City Code discusses the requirements for acceptance of water rights by the City, including the ditch water rights that could be accepted. [**Exh. H** at 165:2-15.] However, this provision also indicates that the City is only willing to accept the listed ditch rights, including Chubbuck Ditch water rights, "if the[] other requirements are met and it's approved and accepted by the Loveland Utilities Commission." [*Id.* at 165:24 – 166:8.]

21. While the City concedes that the Annexation Agreement's vested rights provision requires the City to apply the City Code, including Title 19, on a uniform and non-discriminatory basis, the City Code clearly does not require acceptance and conversion of Chubbuck Ditch rights by the City. [*See id.* at 158:25 – 159:17 (noting that "it rests solely with the Loveland Utilities Commission to decide whether those are actually accepted into the water bank and available for conversion for water rights dedications."); *see also* 164:20 – 166:13.]

22. "Any application that would come to the City would have to be approved by the Loveland Utility Commission anyway," and that just having Chubbuck Ditch rights mentioned in Section 19.04.080 "doesn't guarantee anybody that those rights are acceptable to the City." [*See id.* at 172:3 – 174:9 (emphasis added).]

23. The Settlement Agreement's terms did not change or alter that discretionary authority, and that authority has not been applied in a discriminatory manner. [*Id.* at 175:15-22.]

24. In fact, "if anybody had come to [the City] between the 2010 settlement agreement and 2014, [the City] would have told them [it] could not accept [Chubbuck Ditch rights] because of the settlement agreement." [*Id.*].

III. STANDARD OF REVIEW

"Summary judgment is a drastic remedy appropriate only when the pleadings and

supporting documents show that no genuine issue as to any material facts exists, and the moving party is entitled to summary judgment as a matter of law." *Brodeur v. Am. Home Assurance Co.*, 169 P.3d 139, 146 (Colo. 2007). And, "the nonmoving party is entitled to the benefit of all favorable inferences reasonably drawn from the undisputed facts; all doubts must be resolved against the moving party." *Id.* Accordingly, "[t]o properly grant a motion for summary judgment, the trial court must find not only that the materials facts are undisputed but also that 'reasonable minds could draw but one inference from them' and that the moving party is entitled to judgment as a matter of law." *People in Interest of S.N. v. S.N.*, 329 P.3d 276, 282 (Colo. 2014).

IV. ARGUMENT

I. LEI's MOTION FOR SUMMARY JUDGMENT ON ITS FIRST AND SECOND CLAIMS FOR RELIEF MUST BE DENIED AS UNSUPPORTED BY THE TESTIMONY, CITY CODE, AND THE APPLICABLE LAW.

A. The CGIA Bars LEI's First and Second Claims for Relief.

Because LEI's First and Second Claims for Relief lie in tort, they are subject to the provisions of the Colorado Governmental Immunity Act ("**CGIA**") entitling the City, not LEI to summary judgment and dismissal of those claims pursuant to C.R.C.P. 12(b)(1). The City has affirmatively moved to dismiss on this basis in the City Motion. LEI's Motion reinforces the conclusion that this matter is tort based, despite the labels of LEI's claims.

Under the CGIA, public entities are entitled to immunity from liability on all claims that lie in tort or could lie in tort, absent a statutory exception to that immunity. *See* C.R.S. § 24-10-106. In determining whether a claim lies in tort or could lie in tort for purposes of CGIA immunity, "the form of the complaint is not determinative." *Robinson v. Colo. State. Lottery Div.*, 179 P.3d 998, 1003 (Colo. 2008). In determining whether the CGIA acts as a bar to a

plaintiff's claims, courts must "assess the nature of the injury underlying the claim to determine whether the injury arose out of tortious conduct of the breach of a duty arising in tort and thus whether the claim could lie in tort." *Id.* at 1005; *see also Adams v. City of Westminster*, 140 P.3d 8, 10 (Colo. App. 2006); *CAMAS Colo., Inc. v. Bd. of Cnty. Comm'rs*, 36 P.3d 135, 138 (Colo. App. 2001). Colorado cases construing the statutory CGIA immunity provision have established the following principles with regard to its application:

- There is immunity if the claim arises from a breach of a general duty of care, as distinguished from a breach of contract or other agreement.
- There is immunity if a claim could succeed only upon establishment of liability for tortious conduct.
- It is only where the claim *cannot* lie in tort that there is no immunity.
- Thus, even if a claim exists for breach of contract, it is barred if the allegations in the complaint would also support a tort claim; the claim is not barred only if it arises 'solely in contract.'

Foster v. Bd. of Governors of the Colo. State Univ., 342 P.3d 497, 501 (Colo. App. 2014).

Colorado courts have held that 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 that detrimentally relies on such misrepresentation. *Keller v. Smith Harvestore Prods.*, 819 P.2d 69, 72 (Colo. 1991) ("It is well established that in some circumstances a claim of negligent misrepresentation based on principles of tort law . . . may be available to a party to a contract."). Accordingly, a claim brought against a governmental entity based upon such a theory would be barred by the CGIA and subject to dismissal for lack of subject matter jurisdiction. *See, e.g.*, *Robinson*, 179 P.3d at 1004 – 1005 (holding that although plaintiff contended that "her underlying injury ar[ose] out of the Lottery's failure to deliver what

it offered . . . that "a review of the factual allegations supporting [her] claims for relief reveal[ed] that the underlying injury is based on the Lottery's alleged misrepresentations . . . regarding the available of the represented prizes, which induced the purchase of scratch tickets").

Here, LEI's Motion makes clear that its breach of contract and breach of the implied covenant of good faith and fair dealing claims are founded upon allegations that "could be alternatively pleaded in tort. . . ." *Robinson*, 179 P.3d at 1006. As explained in the Citys Motion, LEI's factual allegations as well as testimony from LEI's corporate representative reveal that LEI believes that the City misrepresented or concealed its ability to accept Chubbuck Ditch water rights prior to entering into the Annexation Agreement. [City's Statement of Undisputed Facts ("**City SOF**") at ¶¶ 6–7; *see also* Complaint, ¶¶ 52–62.] In fact, LEI's corporate representative Greg Parker testified that LEI felt that it "didn't know things we should have if we were being dealt with in a good faith and fair dealing manner. . . ." because of the City's failure to disclose the existence of the Settlement Agreement and its prohibition on the City's ability to accept and change additional Chubbuck Ditch water rights to municipal use in water court. [**Exh. B** at 178:6-16.] LEI's Motion further confirms that this is the theory upon which LEI seeks relief in this lawsuit. Specifically, LEI explains its position as follows: "the City enticed LEI to enter into the [Annexation] Agreement and continue development of its Project until December of 2014, when the City finally provided a copy of the Settlement Agreement." [Motion at 12.] Additionally, LEI claims that it "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 . . . providing for acquisition and conversion of Chubbuck Inches." [Motion at 9.]

Additionally, LEI has not pointed to any contractual provision in the Annexation Agreement between the City and LEI requiring or promising the City's acceptance of Chubbuck Ditch water rights. [*See generally* Motion at 8 – 9.] In fact, LEI even states in the Motion that "[t]he [Annexation] 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." [Motion at 18.] Importantly, Colorado courts have held that contract obligations, as compared to tort obligations "arise from promises made between parties. Contract law is intended to enforce the expectancy interests created by the parties' promises so that they can allocate risks and costs during their bargaining." *Town of Alma v. Azco Constr., Inc.*, 10 P.3d 1256, 1262 (Colo. 2000); *see also Adams v. City of Westminster*, 140 P.3d 8, 11 (Colo. App. 2005). LEI has in fact alleged that it only "understood that its Chubbuck Inches could be acquired and converted by the City of municipal use" because the City had historically accepted and processed applications for conversion of Chubbuck Inches and because Title 19 of the City Code identified the value of water bank credits attributed to Chubbuck Ditch rights as well as the native raw water storage fees assessed to Chubbuck Ditch rights deposited into the City's water bank and failed to disclose the existence of the Settlement Agreement and its prohibition on continued acceptance and future changes of those rights. [*See* Motion at 8–9; *see also* **Exh. B** at 178:6-16.]

In sum, because the LEI's First and Second Claims for relief focus on the City's alleged pre-contractual misrepresentations or omissions concerning the existence of the Settlement Agreement and the City's inability to accept and convert Chubbuck Ditch rights to municipal use in water court, those claims could lie in tort and are thus barred by the CGIA. For that reason

alone, LEI's Motion should be denied and summary judgment should enter in the City's favor on those claims.

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

Further, although LEI's breach of contract claim could sound in tort and as such is barred by the CGIA it similarly fails because, as the Motion confirms, the City has not breached any terms of the Annexation Agreement.

A party attempting to recover on a claim for breach of contract must prove the following: (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. *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992). Accordingly, in order to prevail on a breach of contract claim "a party must show a contract was in existence and that the other party failed to perform some term of the contract." *Coors v. Sec. Life of Denver Ins. Co.*, 91 P.3d 393, 402 (Colo. App. 2003) (emphasis added), *rev'd on other grounds*, 112 P.3d 59 (Colo. 2005).

LEI's analysis in arguing that it has a vested right to dedicate its Chubbuck Ditch rights to the City to satisfy LEI's water dedication requirements, and that the City has breached the Annexation Agreement by its failure to allow LEI to do so, misstates the applicable provisions of the Annexation Agreement, the City Code, and the testimony in this case. As explained above and in the City's MSJ, it is undisputed that LEI has no right to contribute its Chubbuck Ditch rights under either the City Code or the Annexation Agreement. [City SOF at ¶¶ 9, 19–22.] In the Motion, LEI argues that it is entitled to summary judgment on its breach of contract claim because "LEI has a vested right to dedicate its Chubbuck Inches to meet its water dedication

requirement . . . and the City must accept such dedication." [Motion at 16.] Notably, however, the Motion goes on to explain, accurately, that "the [Annexation] Agreement does not explicitly mention or require acceptance and conversion of LEI's Chubbuck Inches to municipal credits to satisfy LEI's water dedication requirements." [Motion at 18.]

To the extent that LEI's argument rests upon its assertion that the City is not applying the discretionary authority afforded to it under Section 19.04.080 of the City Code in a "uniform and non-discriminatory manner" in violation of the vested rights provision of the Annexation Agreement, LEI misreads the City Code and ignores key testimony from the City. Section 19.04.080 affords the City absolute discretion to accept the transfer of ditch water rights to the City. [City Code § 19.04.080(A); City SOF at ¶ 19.] This provision explains that no water rights shall be accepted "unless first approved by the Loveland utilities commission" upon satisfaction of three requirements, including "[a] finding by the Loveland utilities commission that **it is in the city's best interests** to accept the ditch water rights." [City Code § 19.04.080(A) (emphasis added).] While the City concedes that the Annexation Agreement's vested rights provision requires the City to provide water services on a uniform and non-discriminatory basis under Section 2.18 of the Annexation Agreement, neither it nor the City Code clearly requires acceptance and conversion of Chubbuck Ditch rights by the City. [*See* City SOF at ¶¶ 19–24; *see also* **Exh. H** at 158:25 – 159:17.] As indicated and more fully discussed in the City's affirmative motion at pages 14 – 18, the non-discrimination language simply does not, and cannot, apply to the discretionary acceptance of ditch water rights under the City Code. [*See* City Motion at 14–18, incorporated by reference as if fully set forth here.]

The City's C.R.C.P. 30(b)(6) representative Greg Dewey explicitly testified that the City

Code did not allow conversion of Chubbuck Ditch rights, but rather that "it rests solely with the Loveland Utilities Commission to decide whether those are actually accepted into the water bank and available for conversion for water rights dedications." [City SOF at ¶ 21 (citing **Exh. H** at 159:6-17, 164:20 – 166:13).] To that end, Mr. Dewey testified that "any application that would come to the City would have to be approved by the Loveland Utility Commission anyway," and that just having Chubbuck Ditch rights mentioned in Section 19.04.080 "doesn't guarantee anybody that those rights are acceptable to the City." [City SOF at ¶ 22 (citing **Exh. H** at 172:3 – 174:9 (emphasis added)).] Rather, none of the ditch rights listed in Section 19.04.080 "will be accepted unless first approved by the Loveland Utilities Commission," which requires a finding that acceptance of the water rights would be in the City's best interests. [**Exh. H** at 174:7-9; City Code § 19.04.080(A).] The Settlement Agreement's terms did not change or alter that discretionary authority, and that authority has not been applied against LEI in a discriminatory manner. [City SOF at ¶¶ 23-24 (citing **Exh. H** at 175:15-22.] In fact, "if anybody had come to [the City] between the 2010 settlement agreement and 2014, [the City] would have told them [it] could not accept [Chubbuck Ditch rights] because of the settlement agreement." [*Id.*] Accordingly, LEI has no basis to claim that the City Code, and specifically the discretionary authority to accept ditch water rights, has been applied to it in a discriminatory fashion.

As a result, LEI is not entitled to summary judgment on its breach of contract claim, as it cannot meet the necessary third element required to establish a breach of contract claim – that the City failed to perform under the terms of the Annexation Agreement.

C. LEI's Second Claim for Relief ignores the City's ability to exercise its discretion under Section 19.04.080 of the City Code as it relates to accepting ditch water rights.

Due to the fundamental flaws and mischaracterization of the legal foundation and testimony upon which LEI's contract claims rest, its Second Claim for Relief also fails. Notably, the allegations and theory upon which LEI's breach of the implied covenant of good faith and fair dealing claim rest mirror those of its breach of contract claim. [*See* Motion at 14–18; *see also* Complaint at ¶¶ 63–71.] While every contract in Colorado includes an implied duty of good faith and fair dealing, a plaintiff may only rely upon it "when the manner of performance under a specific contract term allows for discretion on the part of either party." *McDonald v. Zions First Nat'l Bank, N.A.*, 348 P.3d 957, 967 (Colo. 2015). "When one party uses discretion conferred by the contract to act dishonestly or to act outside of accepted commercial practices to deprive the other party of the benefit of the contract, the contract is breached." *Id.*

Here, LEI's breach of the good faith and fair dealing claims essentially asks that the Court mandate that the City exercise discretion afforded to it under the City Code in a different way – by forcing the City to accept LEI's Chubbuck Ditch water rights. In arguing that this is an appropriate remedy, LEI requests that the City be forced to exercise its discretion under Section 19.04.080 of the City Code, not the Annexation Agreement, in a new way and accept water rights that the City cannot use or convert to municipal use as a result of the Settlement Agreement, and, therefore, deems unacceptable. [*See* Motion at 17–18.]

There are two fundamental problems with LEI's analysis. First, it inserts new terms into the Annexation Agreement. Under Colorado law, the duty of good faith and fair dealing cannot be used to "assume obligations that vary or contradict the contract's express provisions," nor to "inject substantive terms into the parties' contract." *Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc.*, 872 P.2d 1359, 1363 (Colo. App. 1994). "Rather, it requires only that the parties

perform in good faith the obligations imposed by their agreement." *Id.* Notably, LEI concedes that "[t]he 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." [Motion at 18.] In fact, the only basis that LEI sets forth in support of its argument that the duty of good faith and fair dealing has been breached is that the vested rights provision of the Annexation Agreement afforded LEI the "reasonable expectation that the City would process its request [to contribute its Chubbuck Ditch rights] consistent with the 2010 Code and previous applicants and accept its Chubbuck Inches in exchange for municipal credits." [Motion at 18; *see also* City SOF at ¶¶ 10–11; *see also* **Exh. F** at ¶ 2.3.] As noted above, the 2010 version of the City Code afforded the Loveland Utilities Commission the absolute discretion to decide whether to accept Chubbuck Ditch rights if it was "is in the best interests of the City." [City Code § 19.04.080(A) (emphasis added); *see also* City SOF at ¶¶ 19–22.] This in no way imputes or implies any obligation to exercise that discretion in the best interests of the developer attempting to contribute its ditch water rights to the City or to act in a manner that complies with the commercially reasonable expectations of that developer. In fact, the City Code explicitly provides that the rights may only be accepted if doing so is in the best interests of the City. [City Code § 19.04.080(A); *see also* City SOF at ¶¶ 19–22] This is wholly inconsistent with LEI's position and interpretation of the City Code and Annexation Agreement. Accordingly, LEI's good faith and fair dealing claim seeks to inject new, substantive and inconsistent terms and obligations into the Annexation Agreement in violation of Colorado law because it disregards the requirement that the City has to evaluate the acceptance of LEI's Chubbuck Ditch rights based upon what is most beneficial to the City. LEI does not dispute that the City's interest, instead it

seeks to reverse this requirement and elevate its interests above the City's. Because the implied covenant of good faith and fair dealing cannot be used in this manner, LEI's Second Claim for Relief must fail.

Second, this Court does not have jurisdiction to grant summary judgment in favor of LEI on LEI's good faith and fair dealing claim. To that end, Colorado courts have routinely held that a court cannot compel a municipality such as the City, to exercise its discretion in a particular way, as that "implicates an additional concern for the separation of governmental powers." *Wheat Ridge Urban Renewal v. Cornerstone Grp. XXII, L.L.C.*, 176 P.3d 737, 745 (Colo. 2007); *see also Thompson Creek Townhomes, LLC v. Tabernash Meadows Water & Sanitation Dist.*, 240 P.3d 554, 556 (Colo. App. 2010) (denying developer's efforts to compel sanitation district to reserve and make available a specific number of water taps). As a result, this Court does not have jurisdiction to wade into issues concerning the propriety of the City's exercise of its statutory discretion due to the necessary separation of powers in granting the relief sought by LEI. Accordingly, this Court should dismiss LEI's claim for breach of the implied covenant of good faith and fair dealing on that basis as well.

II. LEI'S THIRD CLAIM FOR RELIEF SEEKING TO INVALIDATE THE SETTLEMENT AGREEMENT IS UNSUPPORTED BY COLORADO LAW.

Next, LEI's Motion seeks summary judgment on its declaratory judgment claim, which asks the Court to invalidate the portion of the Settlement Agreement prohibiting the City from using or attempting to convert additional Chubbuck Ditch water rights as an unlawful delegation of the City's legislative authority.

In arguing that summary judgment is appropriate, LEI relies solely on Colorado case law addressing the rate-setting powers of Colorado municipalities. [*See* Motion at 19–20.] At the

time the parties entered into the Annexation Agreement, the City Code afforded the City broad discretion in determining whether to accept ditch water rights, including Chubbuck Ditch rights. [City SOF at ¶¶ 19–20.] In fact, Section 19.04.080(A) of the City Code in effect in 2009 prevented the City from accepting *any* ditch rights unless: (1) the applicant provided satisfactory proof of ownership; (2) there was a water bank agreement in place; and (3) the Loveland Utilities Commission found that "it [was] in the city's best interest to accept the ditch water rights." To equate "rate-making" with the City's, and specifically the Loveland Utilities Commission's, discretionary authority to determine which ditch rights to accept into the City's water portfolio in satisfaction of a developer's water rights obligations defies the applicable case law and borders on frivolous.

To that end, in *Bennett Bear Creek Farm Water and Sanitation District v. City & County of Denver*, the Colorado Supreme Court concluded that rate setting, or rate making, is legislative in nature. 928 P.2d 1254, 1267 (Colo. 1996). The court there explained that "[l]egislative rate-setting authority conferred by the legislature cannot be alienated or delegated to another by governmental entities which have been granted that authority." *Id.* Similarly, in *Cottrell v. City and County of Denver*, the Colorado Supreme Court held that a municipality's acts and authority in setting rate schedules for future city-wide application was legislative in nature. 636 P.2d 703, 710 (Colo. 1981). This authority is set forth in C.R.S. § 31-35-402(1)(f) as follows:

> (f) To prescribe, revise, and collect in advance or otherwise, from any consumer or any owner or occupant of any real property connected therewith or receiving service therefrom, rates, fees, tolls, and charges or and combination thereof for the services furnished by, or the direct or indirect connection with, or the use of, or any commodity from such water facilities or sewerage facilities . . . ."

Because rate making concerns only the "rates, fees, tolls and charges" to be assessed by a municipality providing water service, it has absolutely no bearing on which water rights a municipality may choose to accept into that municipality's water portfolio in satisfaction of its legislative water rights requirements. *See* C.R.S. §31-35-402(f).

Further, the City's exercise of discretion in determining which ditch rights to accept on a case-by-case basis, as provided for in Section 19.04.080(A) of the City Code is more akin to a quasi-judicial action or function. "Quasi-judicial actions generally involve a determination of the rights, duties, or obligations of specific individuals based on the application of presently existing legal standards or policy considerations to past or present facts developed at a hearing for the purpose of resolving the particular interests in question." *Cherry Hills Resort Dev. Co. v. City of Cherry Hills Vill.*, 757 P.2d 622, 625 (Colo. 1988). Legislative actions, on the other hand, are "usually reflective of some public policy relating to matters of a permanent or general character, is not normally restricted to identifiable persons or groups and is usually prospective in nature." *Id.* "[T]he essence of quasi-judicial action lies not so much in the specific characteristics of the decision-making body as in the nature of the decision itself and the process by which that decision is reached." *Id.* at 626. Applicable here, the LUC's discretionary determination of which water rights it is "in the city's best interests to accept" is a determination made by the Loveland Utilities Commission on a case-by-case basis with respect to specific individuals and water rights. [*See* City Code § 19.04.080(A); *see also* City SOF at ¶¶ 19–24. Thus, the functions of the Loveland Utilities Commission in making this determination are much more akin to quasi-judicial action than legislative.

Accordingly, Colorado case law offers no legal support for LEI's position that the Settlement Agreement's prohibition on the acceptance and future use or attempt to change Chubbuck Ditch right is legislative in nature and LEI's Motion seeking summary judgment on its Third Claim for Relief must be denied.

In addition, the relief sought in connection with LEI's declaratory judgment claim seeks to bypass the authority of the Water Court and interfere with the stipulation and settlement between the GLIC and the City. The water court, which has exclusive jurisdiction over water matters within the division, C.R.S. § 37-92-203(1), must "give effect to the stipulations of the parties" in a water court case. *See USI Props. E., Inc. v. Simpson*, 938 P.2d 168, 173 (Colo. 1997). Each stipulation and settlement listed in the decrees at issue in this case, 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. 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.[4]

III. LEI'S HAS NOT ESTABLISHED A CLEAR RIGHT TO RELIEF ON THE MERITS OF ITS CLAIMS OR ANY IRREPARABLE HARM, WARRANTING DISMISSAL OF LEI'S CLAIM FOR A PERMANENT INJUNCTION.

Because LEI has failed to establish a right to relief on its First, Second and Third Claims and has further failed to set forth any admissible evidence of irreparable harm, LEI's request for summary judgment on its Fourth Claim seeking a permanent injunction must also be denied.

[4] This argument is more fully articulated in the City Motion at pages 20 through 23.

Colorado courts have explained that an injunction is "an extraordinary and discretionary equitable remedy which is available when there is no adequate remedy at law or when it is expressly authorized by statute." *Bd. of Cnty. Comm'rs of Cnty. of Logan v. Vandemoer*, 205 P.3d 423, 430 (Colo. App. 2008). A party seeking a permanent injunction must establish that:

> (1) the party has achieved actual success on the merits; (2) irreparable harm will result unless the 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. *Id.*

First, LEI's request for summary judgment on its Fourth Claim for Relief must be denied because LEI has not established a right to, much less achieved, actual success on the merits of any of its claims. In the Motion, it appears that LEI argues it is entitled to the issuance of a permanent injunction against the City "requiring the City to accept LEI's Chubbuck Inches in exchange for municipal credits" as a result of the City's breach of the Annexation Agreement and unlawful delegation of authority in entering into the Settlement Agreement. [*See* Motion at 20–21.] For the reasons set forth in the City's Motion for Summary Judgment and in this Response, each of LEI's claims against the City are fundamentally flawed and subject to dismissal pursuant to C.R.C.P. 12(b)(1) and C.R.C.P. 56. Accordingly, LEI cannot establish that the City has breached the Annexation Agreement, nor that the City has unlawfully delegated its legislative authority. Thus, LEI is unable to satisfy even the first requisite for the Court's issuance of a permanent injunction.

Second, LEI has set forth no evidence of any "irreparable harm" that will result absent issuance of the permanent injunction sought. An irreparable harm or injury has been defined by Colorado courts as "certain and imminent harm for which a monetary award does not adequately compensate," "where monetary damages are difficult to ascertain or where there exists no certain

pecuniary standard for the measurement of damages." *Gitlitz v. Bellock*, 171 P.3d 1274, 1278 – 1279 (Colo. App. 2007). Here, it is undisputed that LEI's injury can be remedied by money. [*See* Motion at Ex. B, Attachment 1, pg. 1.] But, it bargained away its ability to obtain monetary damages or relief from the City under the Annexation Agreement. [*See* Motion at 17; *see also* **Exh. F** at ¶ 2.25.] However, LEI has not set forth any evidence supporting its position that the City's actions in not accepting LEI's Chubbuck Ditch rights prevent LEI from moving forward with its development on the Project. The City Code provides that a developer, such as LEI, may meet its water rights requirements in various ways. [*See* City SOF at ¶¶ 14–16.] Thus, notwithstanding the City's inability to accept LEI's Chubbuck Ditch rights, LEI could have, and still can, move forward with its development of the Project by acquiring and contributing alternative water sources to the City in satisfaction of its water rights requirements, or paying the cash-in-lieu price. [*Id.*] While this may result in additional costs to LEI, LEI has failed to establish why those costs alone create certain and imminent harm requiring an injunction. LEI can purchase and contribute other sources of water or pay cash to meet its water rights requirement and can easily recoup any added costs from end users of the Project.

Third, any harm to LEI occasioned by the City's inability to accept LEI's Chubbuck Ditch rights cannot be cured by forcing the City to accept those water rights. As explained above, the City has complete discretion to accept or reject Chubbuck Ditch water rights, and has had such discretion since before the parties entered into the Annexation Agreement. [City SOF at ¶¶ 19–24]. As explained above, a court cannot compel a municipality to exercise its discretion in a particular way due to concerns for the separation of governmental powers" *Wheat Ridge Urban Renewal*, 176 P.3d at 745 (Colo. 2007); *see also Thompson Creek Townhomes, LLC*, 240 P.3d at

556. Accordingly, LEI cannot force the City to accept its Chubbuck Ditch rights as it requests.

Finally, the public interest would be harmed by granting the injunction sought by LEI. It would require the City to accept agricultural water rights that it cannot convert to municipal use and would effectively make the City taxpayers subsidize LEI's commercial development. LEI fails to explain how this scenario serves the public's, as opposed to LEI's, interest.

For these reasons, summary judgment in favor of LEI on its Fourth Claim for Relief is inappropriate. Indeed, the undisputed facts establish that LEI is not entitled to relief on any of its claims against the City, warranting dismissal of those claims in their entirety pursuant to C.R.C.P. 12(b)(1) and 56.

IV. CONCLUSION

For the reasons set forth above, the Motion should be denied in its entirety as LEI has not met its burden to establish the absence of a genuine issue of material fact as to LEI's First, Second, Third and Fourth claims for relief. Further, for the reasons laid out in the City's Motion and restated above, summary judgment should enter in the City's favor and LEI's claims should be dismissed in their entirety.

Respectfully submitted this 21st day of September, 2017.

BERG HILL GREENLEAF RUSCITTI LLP

[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 21st day of September, 2017, a true and correct copy of the foregoing **DEFENDANT CITY OF LOVELAND'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL 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 D. Stasiak

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