

DISTRICT COURT, LARIMER COUNTY, COLORADO 201 LaPorte Avenue, Suite 100 Fort Collins, CO 80521 Telephone: (970) 494-3500	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p> Case No.: 2016 CV 30362  Courtroom: 4C
<p><b>Plaintiff:</b></p> LOVELAND EISENHOWER INVESTMENTS, LLC, a California limited liability company,  v.  <p><b>Defendants:</b></p> THE CITY OF LOVELAND, THE GREELEY AND LOVELAND IRRIGATION COMPANY, a Colorado non-profit corporation and JOHN DOES 1 through 50.	
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<p><b>PLAINTIFF’S RESPONSE TO DEFENDANT CITY OF LOVELAND’S MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR STAY PURSUANT TO C.R.S. §24-10-108</b></p>	

Plaintiff Loveland Eisenhower Investments, LLC, (“LEI”), through undersigned counsel, submits this Response to Defendant City of Loveland’s (“Loveland”) Motion to Dismiss, or in the alternative, Motion for Summary Judgment (“Motion”) and Request for Stay Pursuant to C.R.S. §24-10-108:

**I. INTRODUCTION**

Contract claims are not barred by the Colorado Governmental Immunity Act (“CGIA”). Regardless, Loveland’s Motion seeks to dismiss LEI’s claims because they “lie or could lie” in

tort. Loveland’s analysis is flawed and the Motion cites no case which addresses facts similar to this case – where a negotiated, written contract exists between the parties and is breached. Because Loveland has raised sovereign immunity as a defense, all discovery must be stayed pursuant to C.R.S. §24-10-108.

Additionally, in an effort to obtain summary judgment on LEI’s contract claims, Loveland distorts and, in some cases, ignores express contract provisions and sections of its code establishing LEI’s vested right to include Chubbuck Inches in its water dedication requirements and requiring Loveland to apply its then-existing code provisions in a uniform, customary and non-discriminatory manner. Because Loveland has failed and refused to accept LEI’s Chubbuck Inches, Loveland has breached the parties’ contract. Finally, for the reasons below, LEI’s declaratory relief claim is also valid and the Motion should be denied.

## II. MATERIAL DISPUTED AND UNDISPUTED FACTS

LEI has set forth its Material Undisputed Facts in its Motion for Partial Summary Judgment (“LEI MSJ”), which are incorporated herein and will not be restated in total. LEI’s additional responses to Loveland’s enumerated Statement of Undisputed Material Facts (“SUMF”) is:

LEI admits the facts in SUMF 1 stating LEI submitted its Petition for Annexation to Loveland on January 18, 2010 (*see* Motion at 5) and further states Loveland was simultaneously negotiating the Settlement and the Agreement. *See* Affidavit of Greg Parker at ¶¶25-26 attached as **Exhibit A**; *see also* C.R.C.P. 30(b)(6) Deposition of Loveland (“Loveland Depo.”) (Barton) at 23:13-25:5, attached as **Exhibit B**<sup>1</sup>; C.R.C.P. 30(b)(6) Deposition of the Greeley and Loveland

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<sup>1</sup> Two City representatives provided testimony during the deposition of Loveland – Greg Dewey and Karl Barton. Both portions are collectively attached as **Exhibit B**; however, each citation identifies the representative providing the testimony.

Irrigation Company (“GLIC”) (“GLIC Depo.”) at 156:16-21, attached as **Exhibit C**. Indeed, by execution of the Settlement, Loveland 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. As set forth below, at the time Loveland executed the Settlement, Loveland knew LEI owned Chubbuck Inches through its purchase of the LEI Land and LEI intended to dedicate them to satisfy its water dedication requirements.

Regarding SUMF 2, LEI admits the Petition for Annexation did not specifically reference water rights or Chubbuck Inches. See Motion at 6. However, LEI submitted a concept Master Plan to Loveland for development, which was approved in 2010. **Exhibit A**, Parker Affidavit at 12. As part of the Master Plan approval, LEI was required to annex portions of its land into Loveland. In conjunction with this process, LEI’s engineer, Larry Owen, provided Loveland a “Water Adequacy Assessment Summary,” (the “Water Summary”) which showed, among other water rights, LEI’s contractual right to 31.25 Chubbuck Inches to be used to satisfy its water requirements. See Affidavit of Larry Owen (“Owen Affidavit”) at 9, attached as **Exhibit D**; see also Water Adequacy Assessment Summary attached to **Exhibit D** as Attachment 1. Mr. Owen provided the Water Summary to Loveland representative Melissa Morin at a meeting in September/October of 2009. See Deposition of Larry Owen (“Owen Depo.”) at 50:6-11; 64:1-8; 67:16-23; 86:16-87:1, relevant portions attached as **Exhibit E**. Ms. Morin, in deposition, testified there could have been meetings discussing water rights, did not deny receiving the Water Summary and further testified she may have received it from Mr. Owen and then passed it on to the appropriate members of her team for review. See Deposition of Melissa Morin (“Morin Depo.”) at 31:15-34:3, relevant portions attached as **Exhibit F**. LEI provided the Water Summary for the

sole purpose of demonstrating 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 D**, Owen Affidavit at 9-11; *see also* **Exhibit A**, Parker Affidavit at 13.

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

The statements in SUMF 4 are denied. *See* Motion at 6. Section 19.04.080 of the 2010 Code did not provide Loveland with “broad discretion” to accept or reject Chubbuck Inches. Instead, Section 19.04.080 is titled “Requirements for acceptance of ditch water” and outlines three administrative steps to be met before water rights will be accepted: the applicant must establish ownership of the water rights, must execute a water bank agreement and must obtain a finding by the Loveland utilities commission that it is in Loveland’s best interest to accept the water rights. *See* 2010 Code at Section 19.04.080. A complete copy of Title 19 of the 2010 Code is attached to **Exhibit D**, Owen Affidavit as Attachment 2. Prior to entering into the Settlement, the Loveland Utilities Commission had approved, and Loveland historically had accepted and converted, each and every request for conversion of valid Chubbuck Inches upon satisfaction of the administrative requirements in Section 19.04.080. **Exhibit B**, Loveland Depo. (Dewey) at 46:4-47:6; 92:3-94:4. Over the years, Loveland had 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 Agreement was approved by City Ordinance on April 20, 2011. *See* Motion at 7. While the Agreement does not contain a specific reference to particular water right contributions,

it did not need to. Instead, the Agreement provided LEI a vested right to develop in accordance with the 2010 Code, which Loveland had to apply to LEI in a consistent, uniform, nondiscriminatory manner with other developers. The 2010 Code itself specifically identified Chubbuck Inches as an acceptable source of water rights by Loveland to meet a developer's water dedication requirements.

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 public facilities and **other administrative and utility services**.

**Exhibit A**, at Attachment 1, Agreement at §2.18 (emphasis added). Section 2.18 of the Agreement expressly obligated Loveland to provide customary municipal services to the Project, including water service and facilities. *See id.* Additionally, the cover page of the Agreement states “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 the “...Owner...shall have 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.* (emphasis added). Per the Agreement, LEI had a vested right to develop 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 D**, at Attachment 2, 2010 Code at §19.04.090 (emphasis added). Pursuant to the 2010 Code, Loveland is obligated to calculate water rights owed under the Agreement as set forth in the Water Summary in accordance with the water rights provisions in effect in 2010, which specifically provided Loveland would and could acquire, convert and store LEI's Chubbuck Inches. Loveland understood LEI was relying upon the Code and had a right to rely upon the Code, particularly Title 19, when determining what water rights would be acceptable. **Exhibit B**, Loveland Depo. (Dewey) at 26:21-23. Indeed, 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 Loveland to inquire how water rights were calculated in exchange for municipal credits. See *Id.* at 29:1-30:7. At that time, Loveland specifically informed Mr. Long its water right requirements for development are calculated based upon the requirements located in Title 19 of the Municipal Code. *Id.* Simply put, Loveland told LEI to rely upon its Code. *Id.* at 29:23-25.

Section 19.04.080(C) – the same section Loveland asserts provides it “broad discretion” - specifically defined the term “ditch water rights,” stating:

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 D** at Attachment 2 at Section 19.04.080(C). This section of the 2010 Code was specifically intended to identify and inform developers of the sources of water rights acceptable to Loveland. See **Exhibit B**, City Depo (Dewey) at 165:16-166:13. This provision of the Code was not changed until 2016. **Exhibit B**, Loveland Depo. (Dewey) at 177:8-10; 178:21-179:10;

*Compare 2012 Title 19 Code with 2016 Title 19 Code, attached to **Exhibit D** at Attachments 3 and 4.*

Loveland's SUMF 13 and 14 are misleading, as they imply Loveland was unaware of LEI's plans to dedicate its Chubbuck Inches in exchange for municipal credits. *See Motion at 8.* However, as set forth above, the Water Summary was provided to Loveland representative Ms. Morin and, according to her, was passed on to the appropriate persons within Loveland. Moreover, Loveland knew the 2010 Code specifically provided for use of Chubbuck Inches.

Loveland asserts LEI was of aware of water disputes between GLIC and Loveland involving Chubbuck Inches in 2009. *See Motion at SUMF 15.* This is incorrect.

In 2009, LEI was negotiating with GLIC and Loveland for approval of a recreational trail for its Project, to be located in GLIC's right-of-way. *See Affidavit of Keirstin Beck ("Beck Affidavit") at 5, attached as **Exhibit G**.* On August 20, 2009, GLIC's attorney, Jeffrey Kahn, sent Loveland Parks Planner, Janet Meisel-Burns, and LEI's counsel, Keirstin Beck, a letter (the "August 20<sup>th</sup> Letter") informing Loveland and LEI that GLIC would no longer work with Loveland on development issues until resolution of issues with a third party concerning "return flows after Loveland's use of the Barnes and Chubbuck water rights." *Id., see August 20<sup>th</sup> Letter attached to **Exhibit G**, Beck Affidavit as Attachment 1.* At that time, LEI had not yet dedicated its Chubbuck Inches and was not party to the dispute between Loveland and GLIC. Thus, Ms. Beck responded by letter dated August 26, 2009 (the "August 26<sup>th</sup> Letter") that neither LEI's recreational trail nor its Project involved "return flow" issues. ***Exhibit G**, Beck Affidavit at 6; see August 26<sup>th</sup> Letter attached to **Exhibit G**, Beck Affidavit as Attachment 2.* Ms. Beck sent a follow-up letter reiterating this position. *See September 1, 2009 letter attached to **Exhibit G**, Beck Affidavit as*



Attachment 3. Neither Loveland nor GLIC suggested these third-party “return flow issues” would impact development of LEI’s project or impede LEI’s use of Chubbuck Inches in the future. **Exhibit G**, Beck Affidavit at 7-8; *see also* C.R.C.P. 30(b)(6) Deposition of LEI (“LEI Depo.”) at 31:18-33:14; 62:17-64:9, relevant portions attached as **Exhibit H**. Mr. Kahn responded that GLIC put a “hold” on all actions concerning development within Loveland and would not consider the recreational trail easement. *See* Email from Jeff Kahn to Ms. Beck dated September 26, 2009 attached to **Exhibit G**, Beck Affidavit as Attachment 4. Later, Mr. Kahn informed LEI simply the matter was released from its “hold.” *See* emails dated October 8-9, 2009 between Ms. Beck and Mr. Kahn attached to **Exhibit G**, Beck Affidavit as Attachment 5; **Exhibit G**, Beck Affidavit at 9-10.

During this time, neither GLIC nor Loveland informed LEI the dispute between them could impact LEI’s use of Chubbuck Inches. Because the “hold” was simply lifted a month later, LEI was led to believe the issue was resolved and all parties agreed with LEI’s position – this dispute, and its resolution, would not impact LEI’s Chubbuck Inches. **Exhibit H**, LEI Depo. at 62:17-64:5; **Exhibit G**, Beck Affidavit at 11. Mr. Kahn testified there were numerous ways to resolve this dispute, including requiring Loveland to provide GLIC with return flows on Chubbuck Inches it converted, as opposed to keeping those return flows as Loveland had historically done. *See* **Exhibit C**, GLIC Depo. at 143:15-20. If GLIC and Loveland had elected to resolve the dispute in this manner, it would never have impacted LEI’s Chubbuck Inches. **Exhibit G**, Beck Affidavit at 12.

During these negotiations, LEI’s counsel, Ms. Beck, repeatedly informed GLIC that LEI was planning to develop its commercial project and required annexation. Despite these facts, at

no time did GLIC inform her it was negotiating a settlement with Loveland that would impact LEI's use of its Chubbuck Inches, nor did it inform her of the Settlement Agreement or its terms upon execution. **Exhibit G**, Beck Affidavit at 13-14. Loveland did not inform LEI of the Settlement until December 2014. **Exhibit D**, Owen Affidavit at 23; **Exhibit B**, Loveland Depo. (Dewey) at 32:17-33:2.

### III. ARGUMENT

LEI asserted four claims for relief against Loveland: breach of contract, breach of the implied covenant of good faith and fair dealing, declaratory relief and permanent injunction. None of these claims are barred by the CGIA. Additionally, for the reasons below, LEI's contract claims and claim for declaratory relief are proper and the Motion should be denied.

#### A. **Standard of Review.**

Motions to dismiss are viewed with disfavor. *Bly v. Story*, 241 P.3d 529, 533 (Colo. 2010). A motion may be granted only where there is no doubt the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Western Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1157-58 (Colo. App. 2008). All averments of material fact must be accepted as true and all of the allegations in the complaint must be reviewed in the light most favorable to the plaintiff. *Public Service Co. v. Van Wyk*, 27 P.3d 377, 386 (Colo. 2001). The Colorado Supreme Court has recently adopted the "refined" pleading standard of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). See *Warne v. Hall*, 373 P.3d 588, 591 (Colo. 2016). A plaintiff must "nudge his claims across the line from conceivable to plausible" but the complaint need not include all facts necessary to carry the plaintiff's burden. *Khalik v. United Airlines*, 678 F.3d 1188, 1190-92 (10th Cir. 2012) (citations omitted).

**B. The CGIA Does Not Apply.**

Public entities are not immune under the CGIA from actions for damages arising in contract. *CAMAS Colorado, Inc. v. Board of County Commr's*, 36 P.3d 135, (Colo. App. 2001). Despite the existence of a clear, enforceable contract, Loveland argues LEI's contract claims are barred because they could also be claims for misrepresentation or fraud. Motion, pp. 11-13. This is false.

When determining whether a claim has a basis in contract or tort, the court must consider the nature of the injury and the relief sought - a determination made on a case by case basis. *See CAMAS*, 36 P.3d at 138. A court should examine whether the claim and the duty allegedly breached arise from the terms of the contract itself. *Id.* By contrast, certain common law tort claims that are expressly intended to remedy economic loss such as fraud or misrepresentation exist independent of a contractual claim. *Robinson v. Colorado State Lottery Div.*, 179 P.3d 998, 1004 (Colo. 2008).

Here, LEI and Loveland entered into a negotiated, direct contract that imposed upon Loveland specific duties and obligations that do not exist in tort law, which could only be breached once the Agreement was executed and for which the remedies available are solely contractual. Section 2.18 of the Agreement obligated Loveland to provide customary municipal services to the Project on an equivalent, 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. Further, under Section 2.3, LEI has a vested right to dedicate its Chubbuck Inches to meet its water dedication requirements under the 2010 Code. *Id.* at §2.3. Under this section, Loveland is obligated to apply the 2010 Code on a uniform and non-discriminatory basis and must

allow LEI to satisfy its water dedication requirements with conditions, standards and dedications no more onerous than imposed by Loveland on other developers under the 2010 Code. *Id.* These duties and obligations do not exist in tort law – they arise solely and exclusively out of the Agreement.

Under Section 2.2.19 of the Agreement, LEI’s rights to development were vested under the 2010 Code:

The requirements, standards and specifications for every application, permit or plan submitted by Owner shall be those in effect as of the Effective Date, unless otherwise agreed to by Owner.

**Exhibit A**, Parker Affidavit at **Attachment 1**, Agreement at Section 2.2.19. Thus, LEI has a vested right to develop under the 2010 Code.

Section 19.04.080 of the 2010 Code specifically identified Chubbuck Inches as a source of ditch water rights acceptable to Loveland at the time the Agreement was executed. **Exhibit D** at **Attachment 2** at Section 19.04.080(C). According to Loveland, this section was intended to identify the sources of water Loveland would accept. See **Exhibit B**, City Depo (Dewey) at 165:16-166:13, 177:8-10, 178:21-179:10; *Compare* 2012 Code with 2016 Code attached to **Exhibit D**, Owen Affidavit at **Attachments 3** and **4** respectfully. Finally, Section 19.04.090 of the 2010 Code provided *water rights owed* by an applicant who has obtained and possesses a vested right to undertake and complete development “shall be calculated in accordance with the water rights provisions in effect on the date the applicant’s right to develop was vested...” See **Exhibit D**, at **Attachment 2**, 2010 Code at §19.04.090.

Under the Agreement and 2010 Code, LEI has a vested right to calculate its water rights owed under the 2010 Code, which expressly allowed for dedication and conversion of Chubbuck

Inches. Prior to the Settlement, every other developer holding Chubbuck Inches was permitted to dedicate their Chubbuck Inches for municipal credits under the 2010 Code. Indeed, Loveland had previously accepted and converted almost 90% of all Chubbuck Inches in existence. Loveland's failure to accept and exchange LEI's Chubbuck Inches, as Loveland had done for every applicant before LEI, fails to apply the 2010 Code to LEI on a uniform, consistent, nondiscriminatory basis with other applicants and developers, requires LEI to commence and complete development with more onerous water dedication requirements than other developers and constitutes a breach of the Agreement.

This breach did not occur prior to the Agreement and is not related to Loveland's failure to inform LEI of the Settlement prior to the Agreement. Instead, this breach *could only occur once LEI's rights to develop under the 2010 Code were vested*. The breach occurred after the Agreement was executed when Loveland refused to accept LEI's valid Chubbuck Inches in satisfaction of the LEI's water dedication requirements.

The only remedies for breach of the Agreement are contractual – they cannot be found in tort law. Under the Agreement, LEI's only legal remedies for claims against Loveland are non-monetary forms of relief such as specific performance. See **Exhibit A**, Parker Affidavit at Attachment 1, Agreement at Section 2.25. By contrast, a plaintiff fraudulently induced into entering into a contract has available to it a different set of remedies altogether – rescind the contract or affirm the contract and seek damages. *W. Cities Broad., Inc. v. Schindler*, 849 P.2d 44, 48 (Colo. 1993). Because the only remedies available to LEI are non-economic and based solely in contract, the CGIA does not bar the claims.

Loveland's reliance upon *Robinson* is misplaced. In *Robinson*, the plaintiffs were alleging their injury – and resulting damages – were the direct result of the Lottery's misrepresentations concerning the availability of prizes which induced people to purchase scratch game tickets that had no chance of winning. *Robinson*, 179 P.3d at 1002. This is in stark contrast to the specific terms of the negotiated Agreement imposing upon Loveland specific duties and obligations that do not exist in tort law. As set forth above, the injury complained of in LEI's Complaint could not occur prior to vesting, which only occurred after the contract was formed. Because LEI's sole remedies are non-economic contractual remedies, LEI's contract claims could not lie in tort.

Because Loveland has raised the CGIA as a defense in this matter, all discovery must be stayed pursuant to C.R.S. §24-10-108.

**C. Loveland has Breached the Agreement**

For the reasons in LEI's MSJ, which is fully incorporated herein, Loveland has breached the Agreement. Specific arguments raised in Loveland's Motion not otherwise addressed in LEI's MSJ are addressed below.

1. LEI's Breach of Contract Claim is not Premature.

Loveland argues LEI's contract claim is premature because Loveland has not refused to provide water services – it has only refused to accept Chubbuck Inches. Motion at pp. 14-15. This argument improperly limits the term “water services,” which is undefined in the Agreement, and misconstrues the basis of LEI's claim.

The term “water services” is not defined in the Agreement and, even if the term was limited to mean actual delivery of water, Section 2.18 encompasses all “*customary municipal services*,” including not only “potable and non-potable water service,” but also “code enforcement,” and

“other administrative and utility services.” See **Exhibit A**, Parker Affidavit at Attachment 1, Agreement at Section 2.18. Without question, one of the “services” Loveland provides is accepting and applying water ditch rights in exchange for municipal water credits in order to meet a developer’s water dedication requirements, which Loveland later converts in water court. Such service involves code enforcement and administrative services that fall squarely within Loveland’s obligations outlined in Section 2.18. Failure to provide these services to the Project on “an equivalent” and “uniform and non-discriminatory” basis is a breach of Section 2.18.

Loveland’s argument misconstrues and ignores key sections of the Agreement concerning LEI’s vested rights, which outline further duties and obligations of Loveland. See Section B, *supra*; see generally LEI’s MSJ. For the reasons set forth in Section B, above, and in LEI’s MSJ, Loveland has breached Sections 2.18 and 2.3 of the Agreement and has failed to apply the 2010 Code to as required by Section 2.2.19.

2. Loveland has breached the Agreement because LEI has a vested right to consistent, uniform application of the 2010 Code.

Loveland sets forth various arguments in an attempt to avoid or limit LEI’s vested right to develop in accordance with the 2010 Code. Motion at 16-18. These arguments are nothing more than straw-men – and fail as a result.

First, Loveland argues it had “broad discretion” under Section 19.04.080 of the 2010 Code to accept an application for dedication of particular ditch rights. *Id.* at 16. However, a cursory review of the Section 19.04.080 belies this assertion. Moreover, the Agreement does not provide Loveland discretion to apply the 2010 Code inconsistently – it cannot.

Section 19.04.080 sets forth three criteria that must be met before Loveland will accept the water rights. **Exhibit D**, Owens Affidavit at Attachment 2, 2010 Code at Section 19.04.080.

Subsection (C) of this section specifically identifies Chubbuck Inches as an acceptable source of water rights. *See id.* Therefore, Section 19.04.080 does not provide Loveland “broad discretion” to accept Chubbuck Inches – it provides Loveland will accept Chubbuck Inches once these administrative steps are met. And, historically, these steps have always been met. **Exhibit B**, Loveland Depo. (Dewey) at 46:4-47:6; 91:13-94:4.

Moreover, the Agreement does not provide Loveland discretion in applying the 2010 Code – it must apply it in a consistent, uniform and non-discriminatory manner with other developers. And the history of Loveland’s acceptance of Chubbuck Inches under the 2010 Code prior to the Settlement demonstrates Loveland consistently and uniformly accepted Chubbuck Inches. LEI’s breach of contract claim seeks specific performance requiring Loveland to process and accept LEI’s Chubbuck Inches consist with every other previous application for dedication of Chubbuck Inches under the 2010 Code. No more, no less. Requiring Loveland to apply the 2010 Code in a uniform, non-discriminatory manner as required by the Annexation Agreement simply means that Loveland is required to treat LEI in the same manner as it treated 100% of prior owners of Chubbuck Inches seeking conversion for municipal credits.

Next, Loveland argues the “vested rights provisions of the Agreement cannot be read or interpreted to modify Loveland’s requirements for accepting Chubbuck Ditch water since the agreement does not alter or waive the applicability of the municipal code.” Motion at 17. This is a blatant misrepresentation. The Settlement *required* Loveland to “alter or waive the applicability of the municipal code” to a certain set of applicants – holders of Chubbuck Inches - *despite the fact the Code provisions remained unchanged until 2016*. The fact Loveland did not amend the Code to reflect this change until years later is irrelevant. Both the Agreement and Code establish



LEI has a vested right to calculate its water rights under the 2010 Code – and here Loveland almost entirely ignores the very provision of its Code that also establishes this vested right.

In its Motion, Loveland dedicates merely a footnote to Section 19.04.090, which provides **water rights owed** be calculated in accordance with **all code provisions** in existence as of the date of vesting. See Motion at 17, fn. 5; **Exhibit D**, Owens Affidavit at Attachment 2, 2010 Code at Section 19.04.090. Loveland’s cursory treatment of this section is purposeful – it establishes the very thing Loveland wants to ignore – LEI’s right to use its Chubbuck Inches to satisfy its water dedication requirements *is a vested right*. Loveland excuses this cursory treatment by simply stating this vested right only concerns “calculation” and not “whether the City must accept specific water rights.” Motion at 17, fn. 1. However, Section 19.04.080 specifically references “water rights owed” – a defined term in Section 19.04.080 that, in 2010, included Chubbuck Inches. Moreover, Section 19.04.090 specifically states an applicant has the vested right to calculate its water rights owed under *all* “water rights provisions in effect” as of the date vesting. **Exhibit D**, Owens Affidavit at Attachment 2, 2010 Code at Section 19.04.090. Not just select provisions and not every water rights provision except those outlining which water rights were acceptable. *All* provisions. This interpretation is logical because a developer must know which water rights Loveland will accept in order to calculate the water rights owed. Thus, under the 2010 Code and the Agreement, LEI has a vested right to dedicate it Chubbuck Inches.

3. Loveland has Breached the Implied Covenant of Good Faith and Fair Dealing.

Loveland argues because the implied duty of good faith and fair dealing cannot contradict express terms of an agreement, and because the Agreement does not specifically require Loveland to accept Chubbuck Inches, LEI “cannot use this legal theory to force the City to exercise its

discretion under the [2010 Code] in LEI's favor." Motion at 18-19. This argument misinterprets the Agreement.

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 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)).

Here, Loveland is correct – the Agreement does not explicitly mention Chubbuck Inches. However, it requires Loveland 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 Loveland 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 Loveland's 2010 Code. *See also* LEI's MSJ at 18.

Loveland asserts it has discretion under the 2010 Code to accept LEI's Chubbuck Inches if LEI does not meet the administrative requirements in Section 19.04.080. Motion at 16. However, under the 2010 Code, these requirements were always met by holders of valid Chubbuck Inches seeking to convert them. Thus, under the implied covenant of good faith and fair dealing, Loveland must accept LEI's Chubbuck Inches because: (1) they are an acceptable source of ditch water rights under the 2010 Code; (2) Loveland had historically accepted *all* such applications;

and (3) LEI has a *vested right* in this consistent and uniform application of the Code. Loveland's failure to accept and convert LEI's Chubbuck Inches is a breach.

Loveland also argues this claim fails because specific performance is not an available remedy. Motion at 19. However, Section 2.25 of the Agreement provides such remedies are the only available forms of relief. See **Exhibit A**, Parker Affidavit at Attachment 1, Agreement at Section 2.25. Moreover, neither case cited by Loveland in support of its argument involved a contract that expressly required specific performance be the sole remedy. See Motion at 20; see also *Wheat Ridge Urban Renewal Authority v. Cornerstone Group XX11, LLC*, 176 P.3d 737 (Colo. 2007); *Thompson Creek Townhomes, LLC v. Tabernash Meadows Water and San. Dist.*, 240 P.3d 554 (Colo. App. 2010). Indeed, the Colorado Supreme Court in *Wheat Ridge* acknowledged specific performance is a potential remedy in cases not involving eminent domain. *Wheat Ridge*, 176 P.3d at 745.

However, in the event the Court determines specific performance is not an available remedy, then Section 2.25 is void. Pursuant to Section 2.22 of the Agreement:

If any term, provision, covenant or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions of this Agreement shall, unless amended or modified by mutual consent of the parties, continue in full force and effect so long as enforcement of the remaining provisions would not be *inequitable* to the party against whom they are being enforced under the facts and circumstances then pertaining.

See **Exhibit A**, Parker Affidavit at Attachment 1, Agreement at Section 2.22 (emphasis added).

Here, if Section 2.25 is void, then equity would require damages as the remedy. LEI has already disclosed expert opinions of Brett Bovee. See Affidavit of Brett Bovee attached as **Exhibit I**, at Attachment 1. Mr. Bovee has calculated damages based on the costs to replace LEI Chubbuck

Inches in order to meet LEI's water dedication requirements. *See id.* In the event specific performance is not an available remedy, LEI is entitled to seek these amounts as damages against Loveland.

**D. LEI's Third Claim for Relief for Declaratory Relief is proper.**

Loveland argues LEI's claim for declaratory judgment fails because the Water Court has exclusive jurisdiction over water matters and LEI did not file a statement of opposition in Loveland's Water Court cases. Motion at 21-23. However, LEI's request for declaratory judgment does not seek a change in use of the Chubbuck Inches, it seeks a declaration concerning ownership of LEI's contractual rights to Chubbuck Inches and Loveland's obligation to provide municipal credits in exchange.

A dispute over ownership of decreed water rights does not constitute a "water matter" within the exclusive jurisdiction of the water court; therefore, other district courts have the power to adjudicate such disputes. *Humphrey v. Southwestern Development Co.*, 734 P.2d 637, (Colo. 1987); *see also Kobobel v. State Dept. of Natural Res.*, 215 P.3d 1221 (Colo. App. 2009) (finding a claim involving the right to use water, not the ownership of it, is a water matter). Here, LEI is not seeking to change the use of its Chubbuck Inches, it is seeking to enforce the provisions of its Agreement and the 2010 Code. It is undisputed Loveland can acquire LEI's Chubbuck Inches in exchange for municipal credits without violating the Settlement, which requires only Loveland refrain from applying for additional changes of Chubbuck Inches. *See Settlement at ¶6*, attached as **Exhibit J**. Thus, Loveland 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 B, Loveland Depo. (Dewey) at 141:18-142:13.

Next, Loveland argues *Bennett Bear Creek Farm Water and San. Dist. v. City & County of Denver*, 928 P.2d 1254 (Colo. 1996) is inapplicable to this case. Motion at 19. However, the 2010 Code provides Loveland may acquire certain water rights, including Chubbuck Inches, and sets a rate schedule for conversion of those water rights into municipal credits. Exhibit D, Owens Affidavit at Attachment 2, 2010 Code at Section 19.04.018. This activity implicates Loveland's legislative rate-making powers under *Bennett Bear*, which 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. *Id.* at 1263. Indeed, 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). Loveland has admitted it exercises its discretion when it determines these rates and which water rights it will acquire. See Motion at 16. By entering into the Settlement, Loveland has improperly divested these powers through contract. *Bennett Bear*, 928 P.2d at 1269-70.

Finally, Loveland argues the two-year statute of limitations period applicable to claims against governmental entities bars LEI's declaratory judgment claim. Motion at 23. This is untrue.

C.R.S. §13-80-108(1) establishes a cause of action accrues on the date both the injury and its cause are "known or should have been known by the exercise of reasonable diligence." See *id.* A claim for relief in actions arising out of nonperformance of contract obligations accrues at the time of failure to perform the act required under the contract. *Goeddel v. Aircraft Fin., Inc.*, 382 P.2d 812 (Colo. 1963). Moreover, the determination of when a plaintiff discovered or should have

discovered the seriousness and character of his injuries and the circumstances giving rise to a cause of action is an unresolved question of fact and, therefore, a question for the jury to determine and summary judgment is improper. *DiChellis v. Peterson Chiropractic Clinic*, 630 P.2d 103 (Colo. App. 1981); *Phillips v. Beethe*, 679 P.2d 126 (Colo. App. 1984); *Mastro v. Brodie*, 682 P.2d 1162 (Colo. 1984).

First, Loveland argues LEI was “generally aware of the dispute between GLIC and Loveland as early as 2009. Motion at 23. However, as set forth in Section II, *supra*, the dispute in 2009 did not alert LEI to any dispute concerning, or potential impact upon, its Chubbuck Inches. See **Exhibit G**, Beck Affidavit at 5-14; **Exhibit H**, LEI Depo. at 31:18-33:14; 62:17-64:9. Instead, conversations in 2009 led LEI to believe that the dispute between GLIC and Loveland would not affect LEI’s use of Chubbuck Inches. See Section II, *supra*. LEI repeatedly informed GLIC and City its Project did not have return flow issues. No party disputed this assertion and the hold was lifted. *Id.*

Next, Loveland argues LEI learned “of the City’s agreement not to use or accept Chubbuck Ditch water in January of 2014.” Motion at 23. In support of this allegation, Loveland cites to its own SUMF 13. See Motion at 23. However, SUMF 13 concerns an unrelated matter and nothing in the Motion’s SUMF mentions the January 2014 timeframe. See Motion at SUMF. As set forth in LEI’s MSJ, Loveland did not inform LEI of the Settlement until December 2014, when it refused to accept LEI’s Chubbuck Inches. See LEI’s MSJ at 12-14. Moreover, while a verbal comment to LEI’s engineer, Larry Owen, was made in passing by a GLIC representative suggesting Chubbuck Inches were no longer convertible in January of 2014, Mr. Owen did not believe this comment affected LEI’s rights under the Agreement, which had vested four years earlier. See

**Exhibit D**, Owen Affidavit at ¶23. Further, Loveland had not yet changed its code, which permitted Loveland to acquire and convert Chubbuck Inches, and had not informed LEI it would refuse to acquire Chubbuck Inches despite the fact the 2010 Code allowed it. *Id.* At a minimum, questions of fact exist concerning when LEI knew or should have known Loveland would breach its Agreement. For these reasons, summary judgment should be denied.

### **CONCLUSION**

For the reasons above, the Motion should be denied. Because Loveland has raised the CGIA as a defense in this matter, all discovery must be stayed.

Respectfully submitted this 21<sup>st</sup> day of September, 2017.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 21<sup>st</sup> day of September, 2017, a true and correct copy of **PLAINTIFF'S RESPONSE TO DEFENDANT CITY OF LOVELAND'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR STAY PURSUANT TO C.R.S. §24-10-108** was filed and/or served electronically via Colorado Courts E-Filing and/or sent via U.S. Mail, postage prepaid as follows:

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***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.***