DISTRICT COURT, LARIMER COUNTY, COLORADO 201 LaPorte Avenue, Suite 210 Fort Collins, CO 80521 970-494-3500	
Plaintiff(s): LOVELAND EISENHOWER INVESTMENTS, LLC, a California limited liability company, **v.** **Defendant(s):** THE CITY OF LOVELAND, THE GREELEY AND LOVELAND IRRIGATION COMPANY, a Colorado non-profit corporation and JOHN DOES 1 through 50	**▲COURT USE ONLY▲**
Josh A. Marks, Atty. Reg. # 16953 David J. Goldfarb, Atty. Reg. # 44070 Mary Sue Greenleaf, Atty. Reg. # 47749 BERG HILL GREENLEAF RUSCITTI LLP 1712 Pearl Street Boulder, CO 80302 Tel: (303) 402-1600 Fax: (303) 402-1601 jam@bhgrlaw.com; djg@bhgrlaw.com; msg@bhgrlaw.com	Case Number: 2016CV30362 Div.: 4C Ctrm.:
DEFENDANT CITY OF LOVELAND'S MOTION FOR CERTIFICATION FOR INTERLOCUTORY APPEAL PURSUANT TO C.A.R. 4.2	

Defendant, the City of Loveland ("City"), by and through undersigned counsel and pursuant to C.A.R. 4.2, respectfully submits this Motion for Certification for Interlocutory Appeal (the "Motion"), and states as follows:

CONFERRAL PURSUANT TO C.R.C.P. 121 § 1-15(8)

Pursuant to C.R.C.P. 121, the undersigned counsel conferred with counsel for Plaintiff Loveland Eisenhower Investments, LLC ("LEI") and counsel for co-defendant the Greeley and Loveland Irrigation Company ("GLIC") regarding the relief sought in this Motion and the

possibility of a stipulation to the issues for appeal. Counsel for LEI advised that LEI opposes this Motion and the relief sought herein. GLIC has advised that it does not oppose this Motion.

INTRODUCTION & FACTUAL BACKGROUND

1. On April 11, 2016, LEI filed the above referenced action against the City and the Greeley and Loveland Irrigation Company ("GLIC"), setting forth the following claims against the City: (1) breach of contract; (2) breach of the duty of good faith and fair dealing; (3) declaratory relief; and (4) permanent injunction.

2. The City subsequently answered the suit on May 25, 2016.

3. Following the completion of discovery and mediation, on August 28, 2017, the City filed a fully dispositive motion in response to LEI's claims containing a motion to dismiss the breach of contract and breach of the duty of good faith and fair dealing claims (the "Contract Claims") as barred by the Colorado Governmental Immunity Act ("CGIA"), and a motion for summary judgment on the merits of all four claims (the "City MSJ").

4. Also on August 28, 2017, LEI filed a separate motion seeking partial summary judgment on liability for its Contract Claims and the declaratory and injunctive relief claims against the City (the "LEI MSJ").

5. On December 20, 2017, this Court denied the City's Motion to Dismiss or in the Alternative Motion for Summary Judgment in its entirety.

ISSUES FOR REVIEW

This Motion seeks certification of this Court's December 20, 2017 Order denying of the City's MSJ on the merits of Claims One, Two, and Three[1] as immediately appealable. Specifically, the City requests certification of the following three legal questions, which form the basis of the City's MSJ on the merits of those claims:

A. Whether an order from a district court invalidating a water court settlement agreement, which forms the basis of a water court decree, exceeds the district court's authority and jurisdiction;

B. Whether broad discretionary authority afforded to a municipal entity under the applicable city code to accept water rights in satisfaction of an applicant's water rights requirements is a legislative function; and

C. Whether a contractual agreement between a municipal entity and a developer must be read consistent with the provisions of the applicable local ordinances or code.

STANDARD FOR REVIEW

Pursuant to C.A.R. 4.2, "[u]pon certification by the trial court . . . the court of appeals may, in its discretion, allow an interlocutory appeal of an order in a civil action." C.A.R. 4.2(a). "The party seeking to appeal shall move for certification . . . within 14 days after the date of the order to be appealed, stating that the appeal is not being sought for the purpose of delay.." C.A.R. 4.2(c). Grounds for certifying and allowing an interlocutory appeal exist when: (1) immediate review may promote a more orderly disposition or establish a final disposition of the litigation; (2) the order from which appeal is sought involves a controlling question of law; and (3) the order from which appeal is sought involves an unresolved question of law. *Wahrman v.*

[1] Disposition of LEI's third claim would inevitably dispose of LEI's fourth claim for a permanent injunction against the City since it is derivative of the third claim for relief.

Golden W. Realty, Inc., 313 P.3d 687, 688 (Colo. App. 2011); *see also* C.A.R. 4.2(b). For the purposes of C.A.R. 4.2, an issue of law is considered "unresolved" if it has not been resolved by the Colorado Supreme Court or determined in a published decision of the Colorado Court of Appeals. *See* C.A.R. 4.2(b)(2).

LEGAL ANALYSIS

The circumstances and posture of this case present precisely the circumstances that warrant an interlocutory appeal. All three factors necessary for certifying an interlocutory appeal exist. First, certifying the Order as immediately appealable and permitting the City to proceed with an interlocutory appeal on the issues raised herein could dispose of all of LEI's claims against the City, obviating the need for a trial between these parties. Second, the issues to be raised on appeal are controlling and unresolved legal questions because their incorrect disposition would require reversal of a final judgment for further proceedings in the district court and those issues have not been resolved by the Colorado Supreme Court or a published decision of the Colorado Court of Appeals.

A. An Interlocutory Appeal of the Order Would Result in a More Expeditious Resolution of this Case.

First, certification of the Order as immediately appealable by this Court would assist in the most expeditious resolution and disposition of this case because it would allow the Court of Appeals to review all of LEI's claims against the City on an interlocutory basis and, if successful, the appeal would eliminate the trial between these parties.

The Colorado Court of Appeals has explained that certification may be appropriate where resolution of the question presented would avoid a trial. *See Wahrman*, 313 P.3d at 688. If, on

the other hand, resolution would *not* avoid the need for a trial but would merely determine which claims the case would be tried upon, certification pursuant to C.A.R. 4.2 is not appropriate. *See id.* (holding that interlocutory review of trial court ruling on economic loss doctrine "would not 'promote a more orderly disposition' of th[e] litigation" because it would not avoid a trial).

In this case, the Court's Order and the competing motions for summary judgment filed by the City and LEI addressed numerous questions of law, the resolution of which could have disposed of LEI's four claims against the City in their entirety. Importantly, resolution of the three key legal issues outlined above would provide stand-alone bases for final disposition of the entire case between the City and LEI. However, the City's MSJ also raised governmental immunity under the CGIA as a separate and independent basis for dismissal of LEI's Contract Claims. *See* City MSJ at pp. 11 – 13. This portion of the Order is immediately appealable under Colorado law. *See* C.R.S. § 24-10-118(2.5).[2] Accordingly, the City intends to file an interlocutory appeal with the Colorado Court of Appeals seeking reversal of the trial court's denial of the motion to dismiss for lack of subject matter jurisdiction (the "CGIA Appeal"). However, the CGIA Appeal would only dispose of a *portion* of the claims asserted by LEI – as it only pertains to LEI's Contract Claims and does not provide a basis for disposition of LEI's claims for declaratory relief or permanent injunction. The remainder of the case, however, would be stayed pending resolution of the CGIA Appeal and would necessarily be resumed and move forward towards trial following that appeal, regardless of the outcome.

[2] The deadline to file that appeal is 49 days from the Court's order, so an appeal has not yet been filed to allow the Court to consider first this request for certification.

Under this set of circumstances, certifying as immediately appealable the full Order as to LEI's claims against the City would result in the most expeditious resolution of the proceedings and a final disposition of the case. To that end, an appeal of the arguments asserted by the City as to the merits of LEI's declaratory relief claim, when paired with the arguments the City intends to assert in the CGIA Appeal, would serve as the only means to resolve and dispose of all four of LEI's claims against the City on interlocutory appeal, obviating the need for a trial.[3] Not certifying an interlocutory appeal on these issues, on the other hand, would stall the proceedings on LEI's declaratory relief and permanent injunction claims completely and result in piecemeal litigation and appellate review of the controlling legal issues raised in the City's MSJ.

B. The Issues to be Raised are Controlling Legal Questions, Unresolved Under Colorado Law.

Second, the issues to be certified are controlling and unresolved questions of law that readily satisfy the second prong of the C.A.R. 4.2 analysis.

Whether an issue of law is deemed "controlling" depends on the nature and circumstances of the order being appealed. *See Adams v. Corr. Corp. of Am.*, 264 P. 3d 640, 645 n.8 (Colo. App. 2011). An issue of law is considered controlling if "its incorrect disposition would require reversal of a final judgment, either for further proceedings or for dismissal that might have been ordered without the ensuing district court proceedings." *See Independent Bank v. Pandy*, 383 P.3d 64, 66 (Colo. App. 2015); *see also Triple Crown at Observatory Vill. Ass'n, Inc. v. Vill. Homes of Colo., Inc.*, 389 P.3d 888, 893 (Colo. App. 2013). Additional factors the Court looks at in ascertaining whether an issue is controlling are: (1) whether appellate guidance

[3] Although the CGIA Appeal would serve to address the Contract Claims, an interlocutory appeal of the legal questions raised by the City as to the merits of those claims is also warranted under C.A.R. 4.2 as resolution of those issues provide separate, stand-alone bases for final disposition of the Contract Claims. These collective issues would be most efficiently addressed by all Parties and the Court in a single appeal.

in resolving the issues would control the ultimate outcome of identical issues in related cases; and (2) whether resolution of the issues would avoid the risk of inconsistent results in many different proceedings. *See Kowalchick v. Brohl*, 277 P.3d 885, 888 (Colo. App. 2012).

a. <u>Jurisdiction of the District Court:</u>

An interlocutory appeal of the trial court's Order denying dismissal of LEI's declaratory relief claim and permanent injunction claim[4] involves the following controlling and unresolved question of law:

> Whether an order from a district court invalidating a water court settlement agreement, which forms the basis of a water court decree, exceeds the district court's authority and jurisdiction.

The relief sought by LEI on its third claim for relief is invalidation of the provision in the 2010 Settlement Agreement between the City and GLIC prohibiting the City from accepting or using Chubbuck Inches for municipal use. *See* Complaint at ¶¶ 80 – 81. As explained in the City MSJ, the Settlement Agreement, and specifically its prohibition of the City's future acceptance of Chubbuck Inches and subsequent conversion in water court from irrigation to municipal use, forms the basis for the stipulation of the parties filed and subsequent water court decrees entered in water court Case Nos. 02CW392 and 00CW108/03CW354 (Water Div. 1) in February and May of 2010. Should this agreement be invalidated by order of this Court, the ruling would effectively gut those stipulations and the basis for the water court decrees that were entered and the ruling would force the City to accept a water right that it cannot use or change to municipal use due to stipulation approved by the water court.

[4] As mentioned above in note 1, resolution of LEI's permanent injunction claim is tied to resolution of its declaratory relief claim. If LEI has no valid claim for declaratory relief that the Settlement Agreement is void, it cannot maintain its permanent injunction claim seeking and order enjoining its enforcement.

Under Colorado law, water courts have exclusive jurisdiction over all water matters. *See* C.R.S. § 37-92-203(1); *see also In re Tonko*, 154 P.3d 397, 404 (Colo. 2007). The Colorado Supreme Court has articulated that water matters are those that involve the *use* of water, including the right to change a water right. *See Humphrey v. Southwestern Development Co*., 734 P.2d 637, 641 (Colo. 1987); *In re Tonko*, 154 P.3d at 404. However, the legal question as to the appropriate forum to assert collateral challenges to terms of a water court-approved settlement and stipulation remains unresolved, as it has not been addressed by the Colorado Supreme Court nor in a published opinion of the Colorado Court of Appeals. Resolution of this issue would have lasting impacts and precedence for water rights holders and municipalities across the state that accept and change in water court ditch water rights to satisfy raw water development requirements, as it would further define the bounds of the water courts' and the district courts' jurisdiction over matters affecting water rights, as well as the process by which an entity or water rights holder could seek to challenge the terms of a stipulation relating to use and conversation of a water right entered into in a water court case.

For those reasons, interlocutory review of this issue is appropriate under C.A.R. 4.2, and this Court should certify the Order denying the City's MSJ on LEI's third and fourth claims for relief as immediately appealable.

b. <u>Acceptance of Water Rights as a Legislative Function</u>:

Second, an interlocutory appeal of this Court's Order denying dismissal of LEI's declaratory relief claim and permanent injunction claim involves the following, separate controlling and unresolved question of law:

Whether broad discretionary authority afforded to a municipal entity under the applicable city code to accept water rights in satisfaction of an applicant's water rights requirements is a legislative function

LEI's declaratory relief claim rests upon the theory that the Settlement Agreement's prohibition of the City's future acceptance and conversion of Chubbuck Inches unlawfully delegated the City's legislative authority. *See* Complaint at ¶¶ 72 – 81. In support of this argument, LEI cited solely to a line of Colorado appellate opinions concluding that a municipality's rate-making authority is legislative in nature and could not lawfully be delegated to third parties. *See* Complaint at ¶¶ 72 – 81; LEI MSJ at pp. 19 – 21; *see also Bennett Bear Creek Farm Water and San. Dist. v. City & Cnty. of Denver*, 928 P.2d 1254, 1263 (Colo. 1996); *Cottrell v. City and Cnty. of Denver*, 636 P.2d 703 (Colo. 1981). The Order concluded that this line of cases was inapplicable, but nonetheless declined to grant summary judgment on this claim. Thus, the remaining, controlling legal question that would resolve LEI's claim that the City unlawfully delegated its legislative authority by entering into the Settlement Agreement is whether the discretionary authority afforded to the City under its Code to accept water rights in satisfaction of water rights requirements involves a legislative function at all.

Resolution of this legal issue would dispose of the entirety of LEI's declaratory relief and permanent injunction claims, as no claim for declaratory relief can lie if the functions exercised by the City in determining which water right to accept under the discretionary authority provided by the City Code are not legislative. An appellate opinion on this issue would further serve to inform future developers seeking to dedicate water rights to municipalities of the municipalities' powers to determine which water rights are or are not acceptable and can be converted to municipal use. This would provide invaluable guidance to municipalities regarding the limits of

their ability to contractually delegate or limit their discretion through settlements entered into in water court cases. This issue is wholly unresolved under Colorado law, as it has not been addressed by the Colorado Supreme Court nor in a published opinion of the Colorado Court of Appeals.

For those reasons, interlocutory review of this issue is appropriate under C.A.R. 4.2, and this Court should certify the Order denying the City's MSJ on LEI's third and fourth claims for relief as immediately appealable.

c. <u>Incorporation of City Code Into Municipality-Developer Contracts</u>:

Third, an interlocutory appeal of the trial court's Order denying the dismissal of LEI's Contract Claims on the merits involves the following controlling and unresolved question of law:

> Whether a contractual agreement between a municipal entity and a developer must be read consistent with the provisions of the applicable local ordinances or code.

LEI's Contract Claims rest upon the theory that the City erred in refusing to accept LEI's Chubbuck Inches, and that failure is a breach of the Parties' contractual Annexation Agreement as well as the duty of good faith and fair dealing implied in that contract. *See* Complaint at ¶¶ 52 – 71. Importantly, however, the Loveland Municipal Code provides that the City has absolute discretion in determining whether to accept any ditch water rights, which includes Chubbuck Inches, and further that such acceptance is only appropriate upon a finding that it is in the City's best interests. *See* Loveland Municipal Code § 19.040.080. If the provisions of the Annexation Agreement are read in connection with the authority and discretion afforded under the Loveland Municipal Code, the undisputed facts establish that no claim for any breach of that agreement can lie, and that LEI's Contract Claims should be dismissed as a matter of law.

Accordingly, a determination of how a contractual agreement between a municipal entity and a developer is affected by the provisions of the applicable local ordinances and code would result in a full and final disposition of these claims. Further, appellate review on this legal question would provide beneficial guidance to future developers and municipalities entering into contractual agreements, like an annexation agreement or a development agreement, as it would define the legal framework within which the provisions of those agreements must be read. This issue is unresolved under Colorado law, as it has not been addressed by the Colorado Supreme Court nor in a published opinion of the Colorado Court of Appeals.

For those reasons, interlocutory review of this issue is appropriate under C.A.R. 4.2, and this Court should certify the Order denying the City's MSJ on LEI's first and second claims for relief as immediately appealable.

CONCLUSION

The City certifies that this appeal is not being sought for purposes of delay, and would in fact, as noted above, serve to expedite the resolution of the issues raised herein and the issues that the City intends to assert in the CGIA Appeal.

WHEREFORE, the City respectfully requests that this Court certify an interlocutory appeal in this case pursuant to C.A.R. 4.2.

Respectfully submitted this 3rd day of January, 2018.

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

Josh A. Marks

DJ Goldfarb
Mary Sue Greenleaf
Attorneys for Defendant the City of Loveland

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January, 2018, a true and correct copy of the foregoing **DEFENDANT CITY OF LOVELAND'S MOTION FOR CERTIFICATION FOR INTERLOCUTORY APPEAL PURSUANT TO C.A.R. 4.2** 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/ Mary Sue Greenleaf

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