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Denver, CO 80203

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<tr><td>Petitioner – Appellant: THE CITY OF LOVELAND

v.

Respondent - Appellee: LOVELAND EISENHOWER INVESTMENTS, LLC, a Colorado limited liability company</td></tr>
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Div.: Ctrm.:</td></tr>
<tr><td colspan="2">PETITION FOR INTERLOCUTORY APPEAL OF CERTIFIED QUESTIONS PURSUANT TO C.A.R. 4.2</td></tr>
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g), it contained 7,998 words.

For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review and citation to authority, and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

Respectfully submitted,

BERG HILL GREENLEAF RUSCITTI LLP

/s/ Josh A. Marks
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Original Signature on File with Petitioner-Appellant's Counsel

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Appendix 15: Defendant City of Loveland's Response in Opposition to Plaintiff's Motion for Partial Summary Judgment

Petitioner-Defendant, the City of Loveland ("City"), pursuant to C.A.R. 4.2 and Colo. Rev. Stat. § 13-4-102.1, petitions this Court to consider an interlocutory appeal of three certified questions of law from the trial court's December 20, 2017 Order denying the City's *Motion to Dismiss, or in the Alternative Motion for Summary Judgment*.

I. THE PARTIES

1. Petitioner is the City of Loveland ("City"), and is a defendant in the underlying lawsuit, Case No. 2016CV30362 Larimer County District Court ("Underlying Action"). Petitioner is represented by Josh A. Marks and Mary Sue Greenleaf of Berg Hill Greenleaf Ruscitti LLP, 1712 Pearl Street, Boulder, Colorado 80302, (303) 402-1600.

2. The proposed Respondent is the Plaintiff in the underlying lawsuit, Loveland Eisenhower Investments, LLC ("LEI"). LEI has asserted claims against the City for breach of contract, breach of the covenant of good faith and fair dealing, declaratory judgment and permanent injunction arising from alleged violations of a 2010 Annexation and Development Agreement (the "Annexation Agreement") entered between the City and LEI. *See generally,* Complaint, Appendix 1. LEI is represented by Kathryn Hopping and Darrell G. Waas of Waas Campbell Rivera Johnson & Velazquez LLP, 1350 17th Street, Suite 450, Denver, Colorado 80202, (720) 351-4700.

3. In the underlying case, LEI also asserted claims against the Greeley and Loveland Irrigation Company (“GLIC”). *See id*. Those claims and the Court’s ruling on those claims are not raised or at issue in this Petition for Interlocutory Review. GLIC is represented by Mark C. Overturf of Overturf McGath & Hull, P.C., 625 E. 16th Avenue, Suite 100, Denver, Colorado 80203, (303) 860-2848.

II. ORDER BEING APPEALED

The City appeals the Larimer County District Court’s December 20, 2017 written Order denying the City’s *Motion to Dismiss, or in the Alternative Motion for Summary Judgment* (*See* Appendix 2 (the “Order”)). That Order was certified for immediate appeal by the trial court by a second order dated January 5, 2018. (*See* Appendix (the “Certification Order”)).

III. REASONS WHY IMMEDIATE REVIEW IS APPROPRIATE

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). Grounds for allowing an interlocutory appeal exist when: (1) immediate review may promote a more orderly disposition or establish a final disposition of the litigation; and (2) the order from which the 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. Golden W. Realty, Inc.*, 313 P.3d 687, 688 (Colo. App. 2011); *see also* C.A.R. 4.2(b). The decision to

accept an appeal lies within the Court of Appeals sound discretion. *See Adams v. Corrections Corp. of Am.*, 264 P.3d 640, 646 n.8 (Colo. App. 2011).

Here, as set forth below, all three requirements are met and weigh strongly in favor of allowing this interlocutory appeal to proceed. First, immediate review of the issues raised herein could dispose of all of LEI's claims against the City, obviating the need for any trial between these Parties. Second, the certified issues 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. Immediate Review Will Promote a More Orderly Disposition of This Matter.

First, immediate review of the three issues certified by the trial court would provide the most expeditious resolution and disposition of this case because it would allow this Court to review all of LEI's claims against the City on an interlocutory basis and eliminate the need for a trial between these parties.

An interlocutory appeal pursuant to C.A.R. 4.2 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 the trial); *see also Tomar Dev., Inc. v. Bent Tree, LLC*, 264 P.3d 651, 653 (Colo. App. 2011) (same).

In this case, the trial 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. In addition to the three certified questions raised in this Petition, the Order also addressed the City's argument below that governmental immunity under the Colorado Governmental Immunity Act ("CGIA") provides a separate and independent basis for dismissal of LEI's breach of contract and breach of the duty of good faith and fair dealing claims. *See* City MSJ at pp. 11 – 13, Appx. 3. That portion of the Order is immediately appealable under Colorado law as a matter of right. *See* Colo. Rev. Stat. § 24-10-118(2.5); Colo. Rev. Stat. § 24-10-108; *Richland Dev. Co., LLC v. East Cherry Creek Vall. Water and Sanitation Dist.*, 899 P.2d 371, 373 (Colo. App. 1995).[1] Accordingly, the City has already filed an interlocutory appeal with the Colorado Court of Appeals on that issue, seeking reversal of the trial court's denial of the motion to dismiss for lack of subject matter jurisdiction (the "CGIA Appeal").

[1] A Notice of Appeal appealing this portion of the Order was filed on January 19, 2018.

Importantly, the CGIA Appeal would only dispose of a *portion* of the issues and claims asserted by LEI, as the City's CGIA defense only applies to LEI's claims against the City for breach of contract and breach of the duty of good faith and fair dealing. Thus, even if the City's CGIA Appeal is successful and the Court concludes that LEI's first two claims lie in tort or could lie in tort, that appeal would not provide a basis for disposition of LEI's claims for declaratory relief or permanent injunction.

While the CGIA Appeal undoubtedly divests the trial court of jurisdiction with respect to the claims affected by governmental immunity, the trial court would retain jurisdiction to proceed with the other matters and claims not involved in that appeal. *See Christel v. EB Eng'g, Inc.*, 116 P.3d 1267, 1270 (Colo. App. 2005). Under the circumstances present in this case, that could result in one of two highly inefficient scenarios. First, the trial court could move forward with LEI's declaratory judgment and permanent injunction claims during the pendency of the CGIA Appeal, and then subsequently address the breach of contract and breach of the covenant of good faith and fair dealing claims in the event the CGIA Appeal results in an affirmance of the trial court's original Order denying the City's motion to dismiss. Or, the trial court could stay the remainder of the case against the City pending resolution of the CGIA Appeal but would necessarily have to resume the litigation and move forward towards trial following that appeal on the

declaratory relief and permanent injunction claims, regardless of the outcome. Either scenario results in piecemeal litigation and potentially separate trials as to the various claims asserted by LEI against the City. Thus, failing to immediately review the issues raised in this Petition, at the same time the CGIA issues are addressed on appeal, would be highly inefficient. This was implicitly recognized by the trial court in its Order of January 5, 2018, granting the City the necessary certification to seek this Petition for interlocutory review.

On the other hand, interlocutory review of 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 issues raised by 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 entirely.[2]

For these reasons, interlocutory review will promote a more orderly and final disposition of this matter.

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[2] Although the CGIA Appeal would serve to address the breach of contract and breach of the covenant of good faith and fair dealing 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 provides separate, stand-alone bases for disposition of those claims. These collectively would be most efficiently addressed by all Parties and the Court in a single appeal.

B. The Trial Court's Order Involves Controlling Questions of Law.

Although C.A.R. 4.2 does not define a "controlling question of law," this Court has noted several pertinent characteristics to consider: (1) widespread public interest; (2) parallel litigation that would be affected; (3) whether appellate guidance would be decisive in the parallel litigation; (4) whether the decision is case dispositive; and (5) whether resolution of the issues presented would avoid the risk of inconsistent results in different proceedings. *See Adams v. Corrections Corp. of Am.*, 264 P.3d 640, 645 – 46 (Colo. App. 2011); *Kowalchik v. Brohl*, 277 P.3d 865, 888 – 89 (Colo. App. 2012). Further, an issue of law is deemed 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).

Many of the pertinent characteristics of a controlling question of law are present with respect to each of the three issues certified by the trial court. First, resolution of the three legal issues certified by the trial court and presented in this Petition control the outcome of the case between LEI and the City. Again, this was acknowledged by the trial court in Judge Blanco's January 5, 2018 Certification Order.

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

First, an interlocutory appeal of the trial court's Order denying dismissal of LEI's declaratory relief claim and its derivative permanent injunction claim[3] involves the following controlling 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. *See* Complaint at ¶¶ 80 – 81, Appendix 1. As explained in the City's motion seeking summary judgment on these claims, the Settlement Agreement, and specifically its prohibition of the City's future acceptance and conversion of Chubbuck Inches, forms the basis for the stipulation filed by the parties and the subsequent water court decrees entered into water court Case Nos. 02CW392 and 00CW108/03CW354 (Water Div. 1) in February and May of 2010. Should this agreement be invalidated, it would effectively gut that stipulation and the basis for the water court decree that was entered.

If the district court lacks jurisdiction and hence, authority to enter such an order, it would lack jurisdiction to entertain LEI's collateral challenge to the water

[3] 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 an order enjoining its enforcement.

court settlement and stipulation, mandating dismissal of LEI's declaratory relief and permanent injunction claims. Accordingly, resolution of this issue would be potentially dispositive of those claims. A potentially dispositive ruling is a strong indicator of a "controlling" legal question. *See Pandy*, 383 P.3d at 66 (case-dispositive issues are "controlling" for purposes of interlocutory appeal).

Further, this issue would have lasting impacts and precedence for water rights holders across the state, 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 a stipulation entered into in a water court case involving the use of water rights.

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

Next, an interlocutory appeal of the trial court's Order denying dismissal of LEI's declaratory relief claim and permanent injunction claim involves the following, separate and stand-alone controlling 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, Appendix 1. 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 be lawfully be delegated to third parties. *See* Complaint at ¶¶ 72 – 81, Appendix 1; *see also Bennett Bear Creek Farm Water & San. Dist. v. City & Cnty. of Denver*, 928 P.2d 1254, 1263 (Colo. 1996); *Cottrell v. City & 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. However, if exercise of discretionary authority afforded to the City under its Code to accept water rights in satisfaction of water rights requirements is *not* legislative, then LEI's claim seeking a declaratory judgment to invalidate a the provision of the Settlement Agreement as an unlawful delegation of legislative authority must fail as a matter of law.

Because resolution of this issue would be potentially dispositive of LEI's declaratory judgment and permanent injunction claims, it is a "controlling" legal question under Colorado law and subject to interlocutory appeal under C.A.R. 4.2. *See Pandy*, 383 P.3d at 66 (dispositive issues are "controlling" for purposes of interlocutory appeal).

3. **<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 breach of contract and breach of the covenant of good faith and fair dealing claims involves the additional controlling 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 the City erred in refusing to accept certain specific water rights – LEI's Chubbuck Inches – and that error is a breach of the parties' contractual Annexation Agreement, as well as the duty of good faith and fair dealing. *See* Complaint at ¶¶ 52 – 71, Appendix 1. Importantly, however, the Loveland Municipal Code provides that the City has absolute discretion in determining whether to accept a specific water right in satisfaction of development requirements, 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, Appendix 10.

If the provisions of the Annexation Agreement are read consistently 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 breach of contract and breach of the covenant of good faith and fair dealing claims should be dismissed as a matter of law. Accordingly, a resolution of

this third certified question and a determination that a contractual agreement between a developer and a municipality must be read consistent with the applicable code would result in a full and final disposition of LEI's first and second claims for relief against the City, and is thus a controlling question of law. *See Pandy*, 383 P.3d at 66 (dispositive issues are "controlling" for purposes of interlocutory appeal.

For these reasons, the trial court's Order involves controlling questions of law and satisfies the second requirement justifying interlocutory review under C.A.R. 4.2.

C. The Trial Court's Order Involves Unresolved Questions of Law.

As set forth in C.A.R. 4.2(b), a "unresolved question of law" is a "question that has not been resolved by the Colorado Supreme Court or determined in a published decision of the Colorado Court of Appeals . . . ." A matter of first impression is such an "unresolved question of law." *See Kowalchik*, 277 P.3d at 888 ("[W]hen legal issues are matters of first impression, they involve an unresolved question of law."). Here, all three legal issues certified by the trial court and presented for interlocutory appeal in this Petition are unresolved legal questions in Colorado.

First, whether a district court order invalidating a water court settlement agreement that serves as the building blocks for a water court decree exceeds that court's authority and jurisdiction is a matter of first impression in Colorado. While

the Colorado Supreme Court has provided guidance on what constitutes a "water matter" that falls within the water court's exclusive jurisdiction under Colo. Rev. Stat. § 37-92-203(1), *see In re Tonko*, 154 P.3d 397, 404 (Colo. 2007), the legal question as to the appropriate forum to assert collateral challenges to a water court settlement and stipulation remains unresolved.

Second, whether discretionary acceptance of water rights pursuant to the applicable city code is a legislative function is also a matter of first impression in Colorado. To that end, no Colorado Supreme Court or published Court of Appeals opinion has addressed or resolved this issue.

Third, the issue of whether a contractual agreement between a developer and a municipality must be read consistent with the applicable city code has not yet been addressed by the Colorado Supreme Court or a published opinion by the Colorado Court of Appeals. Accordingly, it is a matter of first impression in Colorado and is "unresolved," as that term is defined by C.A.R. 4.2.

Accordingly, all the issues presented for interlocutory appeal are controlling, unresolved legal questions, the resolution of which will effect a more orderly and final disposition of this matter. Accordingly, the City respectfully requests the Court to review this case pursuant to C.A.R. 4.2(b)(2).

IV. ISSUES PRESENTED

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 ordinances or code.

V. STATEMENT OF FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED

This case and the issues presented are simple. Under the Loveland Municipal Code, a developer, like LEI, must contribute water rights to the City that the City can legally use for municipal water service as a prerequisite to getting the City to provide water service for the developer's completed development. And, the City has complete discretion on analyzing and accepting the specific water right that a developer contributes to the City in meeting this requirement. Once LEI discovered that the City was no longer accepting the kind of water right it owned, LEI sued, seeking relief from the trial court to order the City to accept LEI's water rights, contrary to the City's discretion to determine which water rights are

acceptable for municipal use – a discretion that necessarily must consider water court orders, decrees, historical use of the proposed water rights, and other important water right-specific facts and considerations.

By way of background, LEI and the City had been in informal meetings and discussions over LEI's proposed mixed-used development starting in 2007. LEI required the City's annexation of a portion of its property as part of its proposal. On January 18, 2010, LEI submitted its Petition for Annexation to the City seeking annexation, establishment of the zoning, and approval for preliminary subdivision for a planned mixed-use development (the "Project"). (*See* Petition for Annexation, Appendix 4). Later, on or about April 20, 2010, the City and LEI entered into an Annexation and Development Agreement (the "Annexation Agreement") concerning this Project. (*See* Annexation Agreement, Appendix 5). Neither the Petition for Annexation, nor the Annexation Agreement contain any direct language on the specific water rights that would be contributed to satisfy the water rights requirement. (*See generally*, Appendix 4, Appendix 5).

Around this same time, on January 25, 2010, the City and GLIC entered into the Settlement Agreement resolving two long-standing water court actions, Case Nos. 02CW392 and 00CW108/03CW354 (Water Div. 1), that related to the use of Chubbuck Ditch contract water rights, among other water rights. (*See* Settlement Agreement ¶ 6, Appendix 6). This Settlement Agreement stipulated to the City's

proposed decrees, which included a change of water rights from irrigation to municipal use for the City's existing inventory of unchanged Chubbuck Inches, but which also restricted the City from using and changing future Chubbuck Inches to municipal use. (*See id.*)[4] GLIC opposed the proposed change. The water court subsequently entered decrees in each of these cases. In Case No. 02CW392, the water court entered its decree on May 14, 2010, concerning, in part, a change of Chubbuck Ditch rights. (*See* May 14, 2010 Water Court Decree, Appendix 7). In Case No. 00CW108/03CW354, the water court entered a separate decree on February 23, 2012, also dealing with, in part, a change of Chubbuck Ditch rights. (*See* February 23, 2012 Water Court Decree, Appendix 8). The effect of these Decrees was to allow change in use of certain Chubbuck Inches owned by the City, as provided for in the Settlement Agreement. (*See* Appendix 6, ¶ 6).

Prior to its issuance, and despite knowledge by LEI of the dispute between GLIC and the City, LEI failed to file any Statement of Opposition in the water court cases, or otherwise object to entry of the decrees. (*See* G. Parker 30(b)(6) Depo. Tr. at 31:14–21, Appendix 9).

Per § 2.3 of the Annexation Agreement, LEI had a vested property right to develop the Project. (Appendix 5, § 2.3.) However, this vested right was subject to:

[4] Chubbuck Inches are contractually-delivered ditch water rights that were originally decreed for agricultural use. These rights were largely accumulated by the City through prior developer contributions.

> 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.*)

The Annexation Agreement further provides that "the City shall have the responsibility to provide its customary municipal water services to the Project on an equivalent basis to those provided to any other area of the City on a uniform and non-discriminatory basis." (*Id.* § 2.18). But, the Annexation Agreement did not address, let alone commit the City, to acceptance of specific water rights held by LEI. (*See generally id.*)

The relevant provisions of the Loveland Municipal Code, however, require LEI to contribute water rights to the City for its development, but not until the building permit stage for commercial development or at final approval for residential development. (*See* Loveland Municipal Code § 19.04.020, Appendix 10; G. Dewey 30(b)(6) Depo. Tr. at 50:4–13, Appendix 11). LEI can fulfill these water rights requirements by contributing acceptable water rights to the City, applying water bank credit or paying the cash-in-lieu of the market price of Colorado-Big Thompson Project units (Loveland Municipal Code §§ 19.04.040, 19.04.041, Appendix 10).

Under the Loveland Municipal Code, and as of January 18, 2010, the City possessed complete discretion with respect to accepting, on a case-by-case basis, Chubbuck Ditch water rights. (Loveland Municipal Code § 19.04.080(A) and (C) (2009), Appendix 12; *see also* Dewey Depo. Tr. 41:12–16 (discussing the process for assessing an application to convert Chubbuck Ditch rights under the Loveland Municipal Code) and 165:12–16, Appendix 11). This section of the Loveland Municipal Code clearly provides the requirements for acceptance of water rights by the City, including the ditch water rights that could be accepted. (Dewey Tr. 165:2–15, Appendix 11). 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).

The Settlement Agreement's terms did not change or alter that discretionary authority under the Loveland Municipal Code in any way. (*Id.* at 175:15–22).

In December of 2014, the City first became aware of LEI's ownership and wish to contribute its Chubbuck Ditch rights to the City in connection with the proposed development. (*Id.* at 16:3–10). While the City will not accept LEI's Chubbuck Ditch rights because it is bound by the Settlement Agreement and cannot legally change those rights in water court to provide municipal water service, the City has not refused to provide water service to the Project. (Parker Tr.

172:20–173:2, Appendix 9). When LEI became aware that the City would not exercise its discretion in LEI's favor and accept LEI's Chubbuck Ditch rights, LEI commenced this lawsuit asserting claims for breach of contract, breach of the duty of good faith and fair dealing, a declaratory judgment that the Settlement Agreement was an unlawful delegation of the City's legislative authority, and a permanent injunction, seeking relief from the Court forcing the City to accept LEI's Chubbuck Inches and substituting LEI's interest for that of the City in determining what water rights are acceptable to it.

Following completion of discovery, both LEI and the City filed dispositive motions requesting summary judgment on the four claims asserted by LEI against the City. (*See* LEI's Motion for Partial Summary Judgment, Appendix 13; *see also* Appendix 2). On December 20, 2017 the trial court denied both motions, failing to address a number of the issues raised by the Parties.

VI. ARGUMENT

A. Standard of Review and Preservation

The Colorado Court of Appeals reviews the trial court's grant or denial of a motion for summary judgment *de novo*, mindful that summary judgment is appropriate "when the pleadings and supporting documents show there to be no genuine issues as to any material fact, and that the moving party is entitled to

summary judgment as a matter of law." *Rocky Mtn. Festivals, Inc. v. Parsons Corp.*, 242 P.3d 1067, 1074 (Colo. 2010).

The City preserved the arguments raised herein by filing its *Motion to Dismiss or, In the Alternative Motion for Summary Judgment* as well as its response to *LEI's Motion for Partial Summary Judgment*. (*See* Appendix 13 pp. 14–23 *see also* Defendant City of Loveland's Response to LEI's Motion for Partial Summary Judgment pp. 13–24, Appendix 14). The trial court's written Order denying the motions and the three unresolved questions raised in this Petition was certified by the trial court for interlocutory appeal pursuant to C.A.R. 4.2 and Colo. Rev. Stat. § 13-4-102.1 on January 5, 2018. (Appendix 2).

B. Does an Order from a District Court Invalidating a Water Court Settlement Agreement, Which Forms the Basis of a Water Court Decree, Exceed the District Court's Authority and Jurisdiction?

LEI's third claim for relief asserted in the underlying case seeks an order from the trial court declaring the Settlement Agreement's prohibition on the City's future use or attempt to convert Chubbuck Ditch rights as a void, unlawful delegation of legislative authority. Below, the City asserted numerous legal arguments warranting judgment as a matter of law dismissing this claim, and the derivative permanent injunction claim stemming from it. The trial court agreed that the acceptance and conversion of water rights under the Loveland Municipal Code was not akin to rate-making, as argued by LEI, but nonetheless denied the City's

request for summary judgment. Importantly, however, the trial court's Order on this issue was fatally flawed, in that it failed even address the existence of a jurisdictional bar to the relief LEI is seeking from the Court, as it would impermissibly intrude upon the exclusive jurisdiction of the water court where the Settlement Agreement arose.

1. The Water Court has Exclusive Jurisdiction Over the Water Court Decrees and the Underlying Settlement Agreement.

Under Colorado law, "water judges have exclusive jurisdiction over water matters within the division, and no judge other than the one designated as a water judge shall act with respect to water matters in that division." Colo. Rev. Stat. § 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 Dev. Co.*, 734 P.2d 637, 641 (Colo. 1987); *In re Tonko*, 154 P.3d at 404.

Further, the water court is the court tasked with "giv[ing] 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). In fact, the water court possesses exclusive jurisdiction to modify water court decrees associated with such stipulations, once entered. *See* Colo. Rev. Stat. § 37-92-203(1). Each stipulation and settlement listed forms an integral part of the decree that must be given effect by the water court. *See USI Props*, 938 P.2d at 173.

The Settlement Agreement at issue in LEI's third and fourth claims for relief forms the basis of two water court decrees entered by the Division 1 Water Court in Case Nos. 02CW392 and 00CW108/03CW354, and relates specifically to the City's *use* of any Chubbuck Ditch water rights acquired in the future. To that end, the Settlement Agreement was a negotiated settlement that allowed the City to change its contract water rights, including Chubbuck Ditch rights, in exchange for the City's agreement to refrain from future use or attempts to change additional Chubbuck Ditch rights. (*See* Appendix 6, ¶6). This agreement then formed the basis for the stipulations filed by GLIC and the City, which were accepted and which prompted issuance of the decrees. Importantly, the water court decrees and the Settlement Agreement involve contractually delivered Chubbuck Ditch rights. As noted previously, these water rights were originally decreed for agricultural use and were acquired by the City over time from various applicants and developers. Because they are contractual water rights delivered through a ditch owned by GLIC, there is no statutory right to change the use of those rights. *See Pub. Serv. Co. of Colo. v. Meadow Island Ditch Co. No. 2*, 132 P.3d 333, 340, 342 (Colo. 2006) (holding that a contract water right cannot be changed in water court absent the express permission of the delivering ditch company). Accordingly, the Settlement Agreement including GLIC's consent to the City's change of the City's existing Chubbuck Inches in the underlying water court cases. Absent the

Settlement Agreement, the City's change of use applications would not have been successful and the water court would not have entered the decrees.

It is the water court, not the district court, that is tasked with "giv[ing] effect to the stipulation of the parties" in a water court case, and the stipulations and settlements listed in the decrees, including GLIC's settlement with the City regarding the City's use of Chubbuck Ditch rights, forms an integral part of those decrees and must be given effect. *See USI Props.*, 938 P.2d at 173. Because LEI's declaratory relief and permanent injunction claims effectively seek on order from the trial court nullifying the key provision and bargained-for settlement term in the Settlement Agreement that specifically concerns the City's *use* of specific water rights, those claims impermissibly intrude upon the exclusive jurisdiction of the water court. *See* Colo. Rev. Stat. § 37-92-203(1). Accordingly, the trial court lacks jurisdiction to order the relief sought by LEI in its declaratory relief and permanent injunction claims, and erred in failing to consider this issue below and enter summary judgment in the City's favor on those claims.

2. The District Court Lacks Jurisdiction to Collaterally Attack the Settlement Agreement.

As noted above, it is clear that the ability to change a water right is a "water matter" within the jurisdiction of the water court and that the water court is the tribunal tasked with giving effect to the Parties' stipulations, the question remains as to whether another court, namely a district court of general jurisdiction, can

enter an order collaterally attacking or invalidating the material provisions of a stipulation that formed the basis for a water court's judgment and decree.

It is axiomatic under Colorado law that a judgment, however obtained, is entitled to complete legal effect. *See DeBoer v. Dist. Ct. First Judicial Dist.*, 518 P.2d 942, 944 (Colo. 1974). Additionally, a final judgment entered with proper jurisdiction is not subject to collateral attack by another court. *See Closed Basin Landowners Ass'n v. Rio Grande Water Conservation Dist.*, 734 P.2d 627, 637 (Colo. 1987). Accordingly, "a judgment entered within the jurisdiction of the court, even [if] wrong, is not subject to collateral attack." *Id.* For example, in *Closed Basin Landowners Association v. Rio Grande Water Conservation District*, the Colorado Supreme Court upheld the lower court's entry of summary judgment dismissing a party's claims seeking to collaterally challenge a water court decree adjudicating a conditional water right. *See id.* 734 P.2d at 629. There, the water court entered an order Case No. W-3038, approving a conditional water right in favor of Rio Grande. *Id.* at 630. Subsequently, the action preceding the appeal was brought, seeking a determination that the decree entered in the previous water court case was void. *Id.* at 631. The water court entered summary judgment, dismissing those claims and the claimants appealed. *Id.* On appeal, the Colorado Supreme Court held that where a judgment is entered within the jurisdiction of the court, it is not subject to collateral attack in a separate proceeding. *Id.* at 636. Accordingly,

only where the challenge is to the jurisdiction of the tribunal in entering the original judgment or decree is it subject to a collateral attack. *See id.*

Here, LEI's declaratory relief claim and derivative permanent injunction claim seek an order from the trial court declaring void the material provisions of the Settlement Agreement concerning use of a water right, as an unlawful delegation of the City's legislative authority. As noted herein, the Settlement Agreement embodies a bargained-for agreement between the City and GLIC that forms the basis for the subsequently entered decrees in Case Nos. 02CW392 and 00CW108/03CW354. Because the water court clearly had jurisdiction to enter these decrees, *see* Colo. Rev. Stat. §37-92-203(1), *In re Tonko*, 154 P.3d at 404, the district court is not permitted to enter an order collaterally attacking them in this separate proceeding, voiding the most critical component of the underlying Settlement Agreement and stipulations giving rise to those decrees. *See Closed Basin Landowners Ass'n*, 734 P.2d at 636.

Furthermore, LEI has failed to provide any case law indicating that the district court *does* possess such authority to collaterally attack the water court decrees by entering an order effectively nullifying the Settlement Agreement. While the trial court wholly declined to discuss or even address this issue in the December 20, 2017 Order ruling on the Parties' motions for summary judgment, it is evident that the trial court lacks jurisdiction to order the relief sought, warranting

dismissal of those claims. Accordingly, the trial court erred in failing to enter summary judgment in the City's favor on those claims in the proceedings below.

C. Is the 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 a Legislative Function?

Next, the trial court's Order erred in failing to conclude that the City's exercise of its discretionary authority under Section 19.04.080 of the Loveland Municipal Code in determining which water rights to accept is *not* legislative. In the Order, the trial court denies the City's request for summary judgment on LEI's declaratory relief claim in a conclusory fashion, stating that "the conversion process involves both legislative and judicial aspects." (Appendix 2 at p. 12).

Importantly, the process at issue here and the conduct that LEI seeks to force the City to engage in, claiming that the Settlement Agreement's prohibition of this action is legislative in nature, is actually the City's *acceptance* of ditch water rights into its water rights portfolio, such as LEI's Chubbuck Inches. (*See* Complaint at ¶¶ 71, 72–81, 82–87 Appendix 1). Under the Loveland Municipal Code, this acceptance of ditch water rights is a discretionary right of the City, delegated to the Loveland Utilities Commission. (*See* Loveland Municipal Code § 19.04.080(A), Appendix 10).

This exercise of discretion under the Code, and the Loveland Utilities Commission's ability to determine which ditch rights to accept on a case-by-case

basis is more akin to a quasi-judicial action or function than a legislative one. "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). On the other hand, actions that are legislative in nature are "usually reflective of some public policy relating to matter 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.

As noted above, in determining whether to accept a particular applicant's ditch rights, the City, through the Loveland Utilities Commission, is required to make the discretionary determination, on a case-by-case basis, that it is "in the city's best interests to accept" the particular rights from the specific individuals at issue. (*See* Loveland Municipal Code § 19.04.080(A), Appendix 10). As with acquisition of any particular property to serve its citizens, the City alone has discretion to determine if acceptance of a particular water right is in the City's best interests. This discretion can only be exercised with a clear understanding of a

water right's specific and documented history of beneficial use, chain of title, and other crucial historical facts relevant to whether the City can actually use the water right or if it would be accepting a useless or risky asset. The nature of this decision and the process by which it is reached, *see Cherry Hills Resort Dev. Co.*, 757 P.2d at 626, is clearly quasi-judicial in nature, not legislative.

D. Must a Contractual Agreement Between a Municipal Entity and a Developer be Read Consistent with the Provisions of the Applicable Ordinances and Code?

As set forth in the underlying briefing, LEI cannot prevail on its breach of contract and breach of the covenant of good faith and fair dealing claims for one simple reason – when viewed in connection with the applicable provisions of the Loveland Municipal Code, the undisputed facts do not establish that the City failed to perform under the terms of the Annexation Agreement. (*See* Appendix pp. 13–18). The trial court's Order denying the City's motion for summary judgment as to LEI's first and second claims for relief for breach of contract and breach of the duty of good faith and fair dealing rests upon two key flaws: (1) it failed to address the key provisions of the Annexation Agreement indicating that the contract's terms were not intended to alter or displace the Loveland Municipal Code; and (2) it refused to consider or address the implications of the provisions Loveland Municipal Code on the City's obligations under the Annexation Agreement as required under Colorado law. To that end, the trial court found, in essence, that

because LEI and the City "disagree about inferences that can be drawn from [Section 2.18 of the Annexation Agreement] and their intentions in regard to that term," that summary judgment was precluded. (*See* Appendix 2 pp. 9–10). While the trial court noted that the parties appeared to have different interpretations of Section 2.18 of the Annexation Agreement, it wholly failed to address or discuss whether an interpretation of that agreement which contradicts the plain language of the municipal code is permissible and, further, whether the Annexation Agreement must be read consistent with the provisions of the Loveland Municipal Code.

1. The Trial Court Erred in Failing to Address all References in the Annexation Agreement Indicating that It Was Not Meant to Alter or Displace the Loveland Municipal Code.

As it relates to the precise terms of the Annexation Agreement, the trial court erred in failing to address the multiple references in that agreement indicating that it was not meant to alter or displace the applicable provisions of the Loveland Municipal Code.

Under Colorado law, it is axiomatic that a plaintiff asserting a claim for breach of contract must establish the existence of a contract and that the opposing party failed to perform by showing the following in order to prevail: (1) the existence of a contract; (2) performance under the contract by the plaintiff or justification for nonperformance; (3) the defendant's failure to perform under the contract; and (4) resulting damages to the plaintiff. *W. Distributing Co. v Diodosio*,

841 P.2d 1053, 1058 (Colo. App. 2015); *McDonald v. Zion First Nat'l Bank, N.A.*, 348 P.3d 957, 965 (Colo. App. 2015). Contracts in Colorado also contain an implied covenant of good faith and fair dealing, requiring the parties to effectuate the intentions of the parties under the contract or to honor their reasonable expectations. *See Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1995).

Here the Parties undoubtedly had an express contract, the Annexation Agreement, which laid out their respective obligations. (*See* Appendix 5). That contract contained no terms referencing or requiring the City's acceptance of water rights from LEI. (*See id.*) However, the Annexation Agreement *did* expressly refer to and incorporate the Loveland Municipal Code. (*See id.* at § 2.29 ("The Parties recognize that there are are legal restraints imposed upon the City by the City Charter and Code . . . "); § 2.33 (recognizing that "except as otherwise provided in this Agreement, that all other applicable Municipal Code provisions . . . in effect at the time of development shall apply to any future development of the Property."); and § 2.3.1.3 (providing LEI with the "right to apply for and, upon compliance with the terms and conditions of the [Annexation] Agreement and the Municipal Code, to receive . . . water taps, sewer taps, . . . and other permits necessary for development construction and occupancy of improvements within the Project.").

The Annexation Agreement's provisions must be read in connection with and give due consideration to all of the agreement's provisions, including those

express references to and incorporation of the Loveland Municipal Code. *See Fibreglas Fabricators, Inc. v. Kylberg*, 799 P.2d 371, 374 (Colo. 1990). When read together, the Annexation Agreement and the applicable portions of the Loveland Municipal Code provide the City with broad discretion in determining whether to accept or reject LEI's Chubbuck Ditch rights. (*See* Loveland Municipal Code § 19.04.080(A) (2009), Appendix 12; *see also* Loveland Municipal Code § 19.04.080(A), Appendix 10). Further, the code actually requires that that the City, through the Loveland Utilities Commission, affirmatively make the determination that it "is in the best interests of the City" to accept an applicant's water rights before doing so. (*See id.*) LEI's read of the Annexation Agreement ignores this most critical component of the Loveland Municipal Code, arguing to the contrary, that the code provisions are constrained by or subject to the Annexation Agreement. However, a plain read of the Annexation Agreement establishes that the Loveland Municipal Code does apply, and that the contract's terms are subject to that code. Thus, the trial court erred in ignoring the applicable provisions of the code in addressing the City's motion for summary judgment and in failing to read the provisions of the Annexation Agreement consistent with the provisions of the Loveland Municipal Code, effectively stripping the City of its discretionary authority altogether.

2. The Trial Court's Order Fails to Acknowledge that Contracts with Municipalities Must be Construed Alongside the Applicable City Code.

In addition, Colorado courts have expressly determined that municipal law, such as a city charter or municipal code, existing at the time the municipality enters into a contract, becomes a part of that contract. *See Colo. Investment Servs., Inc. v. City of Westminster*, 636 P.2d 1316, 1318 (Colo. App. 1981). For example, in *Colorado Investment Services, Inc. v. City of Westminster*, the Colorado Court of Appeals held that the Westminster City Charter in effect at the time of execution of a contract between the city and Colorado Investment Services became "a part of the contract." *Id.* at 1318. The Court further explained that not only did those provisions of municipal law become a part of the contract, but that the party contracting with the municipality "is charged with knowledge of its limitation and restrictions in making contracts." *Id.*

Here, the Loveland Municipal Code clearly affords the City discretion in determining whether to accept particular ditch rights, such as the Chubbuck Ditch rights owned by LEI. (*See* Loveland Municipal Code § 19.04.080(A) (2009), Appendix 12; *see also* Loveland Municipal Code § 19.04.080(A), Appendix 10). Accordingly, the trial court erred in refusing to read and consider the provisions of the Annexation Agreement consistently with the provisions of the Loveland Municipal Code in addressing the City's motion for summary judgment on the

merits of LEI's contract claims. Accordingly, under Colorado law, the Annexation Agreement cannot be construed to limit that discretion.

VII. CONCLUSION

For the foregoing reasons, the City respectfully requests the Court grant this Petition for Interlocutory Appeal, pursuant to C.A.R. 4.2. The City also respectfully requests the Court hold that the district court lacks jurisdiction to enter an order invalidating a prior water court settlement agreement, mandating dismissal of LEI's declaratory relief and permanent injunction claims. Additionally, the City respectfully requests that the Court hold that a city's discretionary acceptance of water rights in satisfaction of a developer's water rights requirements is not a legislative function, providing a separate basis for dismissal of LEI's declaratory relief and permanent injunction claims. Finally, the City respectfully requests that the Court hold a contract between a municipality and a developer must be read consistent with the applicable city code, and that as a result any language in the Annexation Agreement cannot contradict the discretion afforded to the City under Section 19.04.080 of the Loveland Municipal Code. Based on the foregoing, the Court should reverse the trial court's Order denying the City's *Motion to Dismiss, or in the Alternative Motion for Summary Judgment*, and remand to the trial court with instructions to enter summary judgment in the

City’s favor dismissing LEI’s first, second, third, and fourth claims for relief against the City as a matter of law.

Respectfully submitted: January 19, 2018.

BERG HILL GREENLEAF RUSCITTI LLP

[Pursuant to C.A.R. 30(f) 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 this 19th day of January, 2018, a true and correct copy of the foregoing **PETITION FOR INTERLOCUTORY APPEAL OF CERTIFIED QUESTIONS 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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