DISTRICT COURT, TELLER COUNTY, COLORADO 101 W. Bennet Ave. P.O. Box 997 Cripple Creek, CO 80813 (719) 689-2574	
Plaintiff: **WOODLAND PARK BEER GARDEN, LLC,** a Colorado Limited Liability Company, **v.** **Defendant:** **WOODLAND PARK DOWNTOWN DEVELOPMENT AUTHORITY,** a Body Corporate of the State of Colorado.	**COURT USE ONLY**
KRAEMER KENDALL RUPP DEEN NEVILLE LLC Steven J. Rupp, #25100 David M. Neville, #36032 430 N. Tejon, Suite 300 Colorado Springs, CO 80903 Tel: (719) 471-3690 Fax: (719) 471-3696 Email: srupp@k2blaw.com dneville@k2blaw.com Attorneys for Defendant	Case No: 2016CV30085 Div. No.: 11

ANSWER AND COUNTERCLAIM OF DEFENDANT

Defendant Woodland Park Downtown Development Authority ("DDA" or "Authority"), by and through counsel, David M. Neville and Steven J. Rupp of KRAEMER KENDALL RUPP DEEN NEVILLE LLC, hereby answers the Complaint ("Complaint") of Plaintiff ("Plaintiff" or "Developer") and asserts its Counterclaim, as follows:

1. Defendant admits the allegations of Paragraph 1 as are set forth on the Colorado Secretary of State's records.

2. Defendant admits the allegations contained in Paragraph 2 of the Complaint, with the exception that Lot 2 does not legally exist, having never been platted and subdivided.

3. Defendant admits the allegations contained in Paragraph 3 of the Complaint.

4. Defendant admits the allegations contained in Paragraph 4 of the Complaint.

5. Defendant admits the quote in the allegations contained in Paragraph 5 of the Complaint is taken from the Bylaws attached as Exhibit A. The Bylaws speak for themselves and to the extent the allegations contained in Paragraph 5 are incomplete or inconsistent therewith, the allegations are denied.

6. With regard to Paragraph 6 of the Complaint, it is admitted that the attached Minutes of the Woodland Park City Council attached as Exhibit B do state in part that the City Council of Woodland Park, Colorado approved a Resolution adopting the Woodland Park Downtown Development Authority Foundation Plan. The attached Minutes of Exhibit B speak for themselves and to the extent the allegations contained in Paragraph 6 are incomplete or inconsistent therewith, the allegations are denied.

7. Defendant admits the quote in the allegations contained in Paragraph 7 of the Complaint is taken from the Foundation Plan attached as Exhibit C. The Foundation Plan speaks for itself and to the extent the allegations contained in Paragraph 7 are incomplete or inconsistent therewith, the allegations are denied.

8. Defendant admits the allegations contained in Paragraph 8 of the Complaint.

9. Defendant is without knowledge or information sufficient to form a belief as the truth of the allegations contained in Paragraph 9 of the Complaint.

10. Defendant is without knowledge or information sufficient to form a belief as the truth of the allegations contained in Paragraph 10 of the Complaint.

11. Defendant admits that the DDA entered into the Agreement attached as Exhibit D but denies the mischaracterization of the quote cited in Paragraph 11 of the Complaint as being out of context and not a complete quotation. The Document speaks for itself, and to the extent the allegations contained in Paragraph 11 are incomplete or inconsistent therewith, the allegations are denied.

12. Defendant denies the allegations contained in Paragraph 12 of the Complaint, except that it is admitted that the Authority and Arden Weatherford had discussions regarding the AmeriGas Property.

13. Defendant admits that it entered into an agreement with Plaintiff dated March 19, 2013, but denies the remainder of the allegations contained in Paragraph 13 of the Complaint. The Agreement speaks for itself. The Plaintiff in this matter was under obligation to perform certain conditions before any performance by the Authority, and the Plaintiff failed to perform those conditions and was not excused from performing those conditions. A condition precedent was that the Plaintiff had to **prepare all documents and instruments necessary to replat each Parcel in accordance with the WS Flow Chart and all other applicable City requirements. No parcel can be lawfully conveyed unless it has been subdivided and platted. Another condition precedent to any conveyance of any parcel is that the Plaintiff deliver executed Covenants. The Plaintiff failed in these conditions and other obligations** and the Authority was not obligated under the Agreement to perform any conveyance of a parcel of real estate to the Plaintiff.

14. Defendant admits that it entered into an agreement with Plaintiff dated March 19, 2013, entitled Agreement for Disposition and Development ("Agreement" or "Beer Garden Agreement"). The document attached as Exhibit E speaks for itself, and to the extent the allegations contained in Paragraph 14 are incomplete or inconsistent therewith, the allegations are denied. Plaintiff did not fully perform under the Beer Garden Agreement and another Development group, which included Arden Weatherford, approached the DDA to negotiate a new agreement. Thereafter the Beer Garden Agreement was superseded by an AGREEMENT FOR DISPOSITION AND DEVELOPMENT (Lot 2 Woodland Station) REPLACING AGREEMENT DATED MARCH 19, 2013 WITH WOODLAND PARK BEER GARDEN ("Woodland Park Village Agreement" or "Replacement Agreement"). This Replacement Agreement was dated August 28, 2014. The Memorandum of Understanding (MOU) was also signed as of August 28, 2014, the same day as execution of the Replacement Agreement. According to the MOU, Parcel 1 of Lot 2 was to go to Woodland Park Village LLC once Zoning Development Permits have been issued for the first Phase of construction.

15. Defendant admits the allegations in Paragraph 15 of the Complaint, with the exception that there was no Lot 2 ever platted and the parties were referring to a First Parcel which was to be platted in a plat of Lot 2.

16. With regard to the allegations in Paragraph 16 of the Complaint, Defendant states that, although the Plaintiff did not actually comply with the condition precedent in Section 5.0, the Defendant viewed the Plaintiff's efforts to be in substantial compliance with Section 5.0, but Defendant also states that this Section 5.0 was not the only condition precedent to

conveyance required in the Agreement. Other conditions were required in the Agreement which Plaintiff did not perform.

17. With regard to Paragraph 16 of the Complaint, Defendant denies that Plaintiff obtained title to the AmeriGas Property as required under the Agreement. Beer Garden Land Development LLC took title to the AmeriGas Property. Arden Weatherford advised that he was involved with Beer Garden Land Development LLC. DDA did not exercise its right to cancel the Agreement for failure of Plaintiff to take title to the AmeriGas Property by the time required in the Agreement. DDA entered into the Replacement Agreement with a new development team which included Kip Unruh and Arden Weatherford.

18. Defendant accepts the allegations in Paragraph 18 of the Complaint that Plaintiff caused the removal of the propane tanks from the Amerigas Property on or before October 8, 2013.

19. Defendant denies the conclusory allegations of Paragraph 19 as to the DDA's "long desire," and "unsafe" propane tank, but admits the remainder of the allegations.

20. With regard to Paragraph 20, Defendant denies that Plaintiff satisfied the condition precedent in Sec 5.0 of the agreement by taking title to the AmeriGas Property by June 3, 2013, but Defendant viewed the Plaintiff's actions as being in substantial compliance and did not give Plaintiff a Notice of Default. Plaintiff failed to meet other conditions precedent in the Agreement. The Agreement was superseded by the Replacement Agreement on August 28, 2014.

21. Defendant is without knowledge or information sufficient to form a belief as the truth of the allegations contained in Paragraph 21 of the Complaint.

22. Defendant is without knowledge or information sufficient to form a belief as the truth of the allegations contained in Paragraph 22 of the Complaint as to the date stated therein.

23. With regard to Paragraph 23, Defendant admits the allegations, but Plaintiff violated Sec 6.2.3 of the Agreement by failing to have a beer garden open for business and continuous operation.

24. Defendant admits that the Concept Plan was approved as alleged. It is denied that "DDA believed that a concept plan was one of the milestones in the Agreement for Disposition and Development." That was merely a statement of opinion by Executive Director Brian

Fleer. The Minutes attached as Exhibit F speak for themselves, and to the extent the allegations contained in Paragraph 24 are incomplete or inconsistent therewith, the allegations are denied.

25. Defendant admits the allegations in paragraph 25 that Plaintiff requested to bring the AmeriGas Property into the Woodland Station Overlay District, but denies that it was in furtherance of the Agreement. The Minutes attached as Exhibit G speak for themselves, and to the extent the allegations contained in Paragraph 25 are incomplete or inconsistent therewith, the allegations are denied.

26. Defendant denies the allegations in Paragraph 26. The Agreement of March 19, 2013, required the Plaintiff to subdivide and plat the Property into Parcels prior to the Conveyance of the First Parcel of the Property. Section 6.1 of the Agreement states the following:

> 6.1 Subdivision of Property. Unless the Parties agree otherwise in writing, the Property shall be subdivided into up to eight (8) separate Parcels for redevelopment and improvement in accordance with the WS Flow Chart depicted on Exhibit A. **The Developer, with the support and cooperation of the Authority, shall prepare all documents and instruments necessary to replat each Parcel in accordance with the WS Flow Chart and all other applicable City requirements.** The subdivision and replatting of the First Parcel of the Property shall be accomplished so that the Developer is able to comply with the requirements related to the Temporary Use on the First Parcel and the development and construction obligations set forth in Sections 6.3, 6.4, 6.5, and 6.6 of this Agreement. The Developer shall dedicate, as appropriate, all easements and rights of way indicated on each Plat. (Emphasis supplied.)

27. Defendant is without knowledge or information sufficient to form a belief as the truth of the allegations contained in Paragraph 27 of the Complaint. If Plaintiff did commence the subdivision process in April 2014 with the City, Plaintiff never did obtain the subdivision and replatting of the Property as required by Sec. 6.1 of the Agreement.

28. Defendant is without knowledge or information sufficient to form a belief as the truth of the allegations contained in Paragraph 28 of the Complaint as to what the City provided to Plaintiff. The letter attached as Exhibit G speaks for itself, and to the extent the allegations contained in Paragraph 28 are incomplete or inconsistent therewith, the allegations are denied.

29. Defendant is without knowledge or information sufficient to form a belief as the truth of the allegations contained in Paragraph 29 of the Complaint. Defendant understands that CDOT advised how much could be built before build out of street.

30. Defendant is without knowledge or information sufficient to form a belief as the truth of the allegations contained in Paragraph 30 of the Complaint. This is a public record available to all parties.

31. Defendant denies the allegations in Paragraph 31. There were discussions that the City was going to have to pay for the street if the Aquatic Center was constructed. The Agreement was superseded by the Replacement Agreement dated August 28, 2014.

32. Defendant admits the allegations in Paragraph 32 to the extent as set forth in the Memorandum of Understanding (MOU) dated August 28, 2014, the same day as execution of the Replacement Agreement. According to the MOU, Parcel 1 of Lot 2 was to go to Woodland Park Village LLC once Zoning Development Permits have been issued for the first Phase of construction.

33. With regard to Paragraph 33, Defendant denies the allegations as they allegedly relate to Plaintiff. The Replacement Agreement and the MOU addressed a development Schedule that did not include the Plaintiff. Plaintiff had no agreement with the DDA after the Replacement Agreement was signed.

34. Defendant denies the allegations in Paragraph 34. Plaintiff had no agreement with the DDA after the Replacement Agreement was signed. At the DDA Meeting of June 9, 2015, Arden Weatherford read a Memorandum from Kip Unruh to the DDA board that Woodland Park Village Development, LLC. *et al.*, was not going to perform. He stated, "I regret to inform you that I have directed all people involved in the proposed first building on Lot 2 to stop working." The DDA authorized Notice of Default letters to be sent to all parties to the Agreement and the Replacement Agreement on July 7, 2015.

35. With regard to Paragraph 35, Defendant denies the allegation that that DDA was in default of the Agreement. The Agreement had been replaced by the Replacement Agreement on August 28, 2014 and the MOU. Defendant is without knowledge as to when Plaintiff delivered a letter attached to the Complaint as Exhibit I to Brian Fleer.

ANSWER TO PLAINTIFF'S CLAIM FOR RELIEF
(Breach of Contract- Specific Performance)

36. Paragraph 36 of the Complaint states no allegations and no answer is required. Defendant incorporates all prior paragraphs as if fully set forth herein.

37. Defendant denies the allegations in Paragraph 37 of the Complaint.

38. Defendant denies the allegations in Paragraph 38 of the Complaint.

39. Defendant denies the allegations in Paragraph 39 of the Complaint.

40. Defendant denies that it has any obligation or authority to commission a traffic study. Upon information and belief the City of Woodland Park has obtained an updated traffic study and the remainder of the allegations in Paragraph 40 are admitted.

41. With Regard to Paragraph 41, Defendant denies that the Plaintiff has requested the DDA to approve a proposed preliminary plat for subdivision of the Property. The City of Woodland Park has the authority to issue requirements for the approval of subdivisions and plats. Plaintiff has the obligation to submit and comply with the City's requirements for this project and for approval of replat of the property, but has failed to do so.

42. Defendant admits the allegations of Paragraph 42 that DDA has not conveyed any portion of the Property to the Plaintiff since the Plaintiff has failed to perform under the Agreement.

43. Defendant denies the allegations in Paragraph 43 of the Complaint.

44. Defendant denies the allegations in Paragraph 44 of the Complaint.

45. Defendant denies the allegations in Paragraph 45 of the Complaint.

46. Defendant denies the allegations in Paragraph 46 of the Complaint, except that Plaintiff has requested conveyance of the "First Parcel."

47. Defendant denies the allegations in Paragraph 47 of the Complaint, except that Defendant has not conveyed the First Parcel or any other parcel to Plaintiff because Plaintiff has failed to comply with the Agreement.

48. Defendant admits that the Plaintiff has expended resources as alleged in Paragraph 48 of the Complaint, but Plaintiff has not been damaged in any way. Plaintiff owns the AmeriGas property that it purchased. The remaining allegations are denied.

GENERAL DENIAL

Defendant denies each and every allegation in the Complaint not specifically addressed above and denies that Plaintiff is entitled to the relief requested.

DEFENSES AND AFFIRMATIVE DEFENSES

Plaintiff's claims are barred in whole or in part by the following defenses and affirmative defenses:

49. Failure to state a claim upon which relief may be granted.

50. Plaintiff's claims under the Agreement are barred because the Agreement was superseded and replaced by the AGREEMENT FOR DISPOSITION AND DEVELOPMENT (Lot 2 Woodland Station) REPLACING AGREEMENT DATED MARCH 19, 2013 WITH WOODLAND PARK BEER GARDEN ("Replacement Agreement" or "Woodland Park Village Agreement"). This Replacement Agreement was dated August 28, 2014. The MOU changed the performance schedule and no conveyance of Parcel 1 was to be conveyed to Woodland Park Village LLC until the conditions of the MOU had been met. Plaintiff did not object to this Replacement Agreement and Arden Weatherford participated in the new entity under this Replacement Agreement.

51. Plaintiff's claims are barred due Plaintiff's waiver and ratification, including that fact that Plaintiff's manager, Arden Weatherford, participated in Board meetings regarding the "Master Developer" Agreement, and the Replacement Agreement, and the MOU, as part of a new development team. Plaintiff's failure to object to, and subsequent participation in, the Replacement Agreement is a waiver of Plaintiff's claims under the Agreement, and a ratification of the Replacement Agreement, which bars any of Plaintiff's claims under the Agreement.

52. Plaintiff's claims are barred by Plaintiff's own conduct in failing to comply with obligations under the Agreement.

53. Plaintiff's material breaches of the Agreement relieved the Defendant from any duty to perform under the Agreement, including any duty to convey property under the Agreement.

54. All or part of the Plaintiff's claims of damages for breach of contract are barred by Plaintiff's material breach of contract which relieves Defendant of performance under the Agreement.

55. Plaintiff's Agreement and the Replacement Agreement were duly terminated for cause and Plaintiff is not entitled to any damages or injunctive relief under the Agreement.

56. Plaintiff's claim for specific performance is barred by the doctrines of sovereign immunity and/or separation of powers.

57. Plaintiff's claim for specific performance is barred by law which prohibits a court from ordering specific performance of a governmental entity of core governmental powers.

58. Plaintiff's claim for damages and/or specific performance are barred by the applicable 3 year statute of limitations for contracts, C.R.S. §13-80-101(1)(a).

59. Plaintiff's claims are barred by laches.

60. Plaintiff's claims are barred for failure to satisfy one or more conditions precedent under the Agreement.

61. Plaintiff's claims are barred by failure of consideration.

62. Plaintiff's claim for specific performance is barred by illegality, since it is a crime to convey property that has not been platted. Woodland Park City Code requires that a plat be approved and recorded before any conveyance of a parcel of land. (Woodland Park City Code 17.56.020 and 17.56.030.)

63. Plaintiff's claims are barred by failure to join necessary or indispensable parties.

64. Plaintiff's claim for damages, if any, are barred due to Plaintiff's failure to mitigate damages.

65. Plaintiff's claim for damages, if any, are limited by the provisions of §9.4.3 and §8.2 of the Agreement.

66. Plaintiff's claims for damages are barred or reduced by set-off from the damages claimed against Plaintiff as set forth in the Counterclaim.

67. Plaintiff's claims against Defendant have been substantially frivolous, substantially groundless, or substantially vexatious, and Defendant is entitled to reasonable attorney fees pursuant to C.R.S. §13-17-101, *et seq.*

68. Defendant asserts all other defenses which discovery may show to be applicable.

WHEREFORE, having answered Plaintiff's Complaint, Defendant respectfully requests that the Court enter Judgment in its favor and against Plaintiff, that the Court dismiss all of Plaintiff's claims for relief with Prejudice, that Defendant be awarded its attorneys' fees and costs incurred in defending this action, and for such other relief as this Court deems just and proper.

COUNTERCLAIM OF DEFENDANT

(Breach of Contract and Indemnification)

69. The Plaintiff, Woodland Park Beer Garden, LLC, signed an Agreement for Disposition and Development (the "Agreement" or "Beer Garden Agreement") with the Defendant dated March 19, 2013 (Complaint, Exhibit E).

70. The Defendant, Woodland Park Downtown Development Authority ("DDA" or "Authority"), is a body corporate of the State of Colorado created on August 2, 2001 by Ordinance No. 914, Series 2001 of the City of Woodland Park pursuant to C.R.S. §31-25-801 et seq.

71. Upon information and belief, the manager of Plaintiff is Arden Weatherford, who signed the Agreement. Plaintiff Woodland Park Beer Garden, LLC self-identifies as a "Developer" (Complaint, ¶ 1, et seq.; Agreement, p.19).

72. Jurisdiction and Venue are proper in this Court because this action involves a contract entered into in Teller County relating to property located in Teller County.

73. The Agreement stated that "[P]ursuant to the Act, the Plan, the policies of the Authority, and the requirements of the City, the Authority desires to convey the Parcels described herein to the Developer subject to the terms and conditions set forth in the Agreement." (Agreement, § 2.2)(Emphasis supplied.)

74. The Agreement in §7.1 stated in pertinent part:

> 7.1 Conveyance of Parcels. **Subject to the terms and conditions of this Agreement,** the Authority agrees to convey to the Developer each Parcel of the Property. The Property is described as Lot 2, Woodland Station Filing No 1…. The Property shall be subdivided into approximately 8 Parcels as provided in Section 6.1 and the Closing of the conveyance (sic) the First Parcel of the Property and each subsequent conveyance shall take place on or before the dates set forth in Section 6.5…. (Emphasis supplied.)

A. Plaintiff Failed To Comply With Conditions Precedent In The Agreement.

75. Pursuant to Sec. 6.0 of the Agreement, the Developer is solely responsible for the design, development and Improvements in conformance with the time schedules set forth in 6.3 through 6.6 and the WS Flow Chart.

76. Pursuant to Sec. 6.1 of the Agreement, the Developer is responsible to prepare all documents and instruments necessary to replat each Parcel.

77. Section 6.1 of the Agreement states the following:

> 6.1 Subdivision of Property. Unless the Parties agree otherwise in writing, the Property shall be subdivided into up to eight (8) separate Parcels for redevelopment and improvement in accordance with the WS Flow Chart depicted on Exhibit A. **The Developer, with the support and cooperation of the Authority, shall prepare all documents and instruments necessary to replat each Parcel in accordance with the WS Flow Chart and all other applicable City requirements.** The subdivision and replatting of the First Parcel of the Property shall be accomplished so that the Developer is able to comply with the requirements related to the Temporary Use on the First Parcel and the development and construction obligations set forth in Sections 6.3, 6.4, 6.5, and 6.6 of this Agreement. The Developer shall dedicate, as appropriate, all easements and rights of way indicated on each Plat. (Emphasis supplied.)

78. Developer failed to comply with the condition precedent in 6.1 in preparing documents necessary to replat each parcel in accordance with the WS Flow Chart and did not comply with the applicable City requirements including compliance with the Subdivision process of the City.

79. Plaintiff never submitted the application for the Final Plat and did not obtain approval of a Final Plat by the City of Woodland Park, which is a condition precedent for the conveyance of the First Parcel under the Agreement.

80. Plaintiff did not comply with the condition precedent to provide Covenants as required in Sec. 6.2.2. This condition is an express condition precedent to the obligation of the Authority to convey the First Parcel. Sec 6.2.2 states:

> 6.2.2 Covenants. **Prior to the Closing** on the First Parcel the Parties shall agree to covenants acceptable to the Authority (the "Covenants") implementing the provisions of this Agreement with respect to the Temporary Use, which covenants (governing the Temporary Use only) shall not expire until Commencement of Construction of the permanent

Improvements. **The covenants shall be executed and delivered by the Developer** at the Closing of the First Parcel and shall be recorded prior to the Deed, provided, however, the Authority may elect to record this Agreement in place of the Covenants. (Emphasis supplied.)

81. This is clearly a condition precedent to closing on the First Parcel because it states "**Prior to the Closing on the First Parcel"** the Parties shall agree to covenants acceptable to the Authority.

82. Plaintiff did not produce the required Covenants for consideration by the Authority and so there were no covenants acceptable to the Authority.

83. Plaintiff failure to comply with §6.1 and §6.2.2 of the Agreement were failures to comply with conditions precedent in the Agreement.

B. Plaintiff Breached Other Material Obligations Of The Agreement.

84. The Developer Obligations begin in Section 6 of the Agreement and include the following:

6.0 DEVELOPER OBLIGATIONS. **The Developer shall have sole responsibility for the design, development and construction of the Improvements**, **including without limitation, design, construction, selection and supervision of any architects, engineers, contractors, and consultants in conformance with the time schedules set forth in Sections 6.3 through 6.6 and Exhibit B, attached to and made a part hereof.** All such construction shall conform with all applicable laws, codes, ordinances, policies, and this Agreement including, without limitation, the Materials Management Plan dated September, 2008 that outlines the procedures required for the management of contaminated soils, water and equipment encountered during intrusive activities associated with the development of the Property. The Developer shall pay all applicable fees and costs associated with the design and construction of the Improvements on each Parcel when and as due. The Developer agrees to assume the responsibility for obtaining and reviewing all information that the Developer deems necessary or desirable in connection with its obligations under this Agreement. (Emphasis supplied.) ("Exhibit B" is a typographical error as the only Exhibit attached to the Agreement is the WS Flow Chart of Exhibit A.)

85. Pursuant to Sec. 6.0, the Developer is solely responsible for the design, development and Improvements in conformance with the time schedules set forth in 6.3 through 6.6 and the WS Flow Chart.

86. Developer was required to comply with the WS Flow Chart attached as Exhibit A to the Agreement. Developer failed to meet the deadlines of the WS Flow Chart pursuant to Sections 6.0 and 6.1.

87. Pursuant to Sec. 6.1, the Developer is responsible to prepare all documents and instruments necessary to replat each Parcel. Developer failed to comply with the condition precedent in 6.1 in preparing documents necessary to replat each parcel in accordance with the WS Flow Chart and did not comply with the applicable City requirements including compliance with the Subdivision process of the City.

88. Plaintiff failed to comply with the development and construction obligations set forth in § 6.3 and §6.4 and §6.5 of the Agreement.

89. Plaintiff failed to meet the obligations of Section 6.2.3 of the Agreement, which requires that the beer garden shall be open for business and continuous operation.

90. Section 6.2.3 of the Agreement states the following:

> 6.2.3 Temporary Use; Approved Plans; Permits and Licenses. Prior to June 3, 2013, the Developer shall have obtained the approval of the Authority and the City of all applicable plans and specifications (including, without limitation, all required liquor licenses and building permits) related to the Temporary Use on the First Parcel **so that the beer garden shall open for business and continuous operation**, including retail sales to the public, in accordance with such licenses and permits, on or before ten (10) days following the Closing on the First Parcel. (Emphasis Supplied).

91. Developer failed to comply with the conditions precedent in Sections 6.1 and 6.2.2. Developer failed to comply with the subdivision and platting conditions and no parcel can be conveyed unless it has been platted in the subdivision process. Developer failed to comply with the requirement for covenants. Developer defaulted on the Concept plan. Developer defaulted on the Financing plan. Because Developer did not comply with the terms of the Agreement, Developer failed to obtain any parcels and timely commence construction.

92. Developer's failure to comply with conditions precedent relieves the DDA from its obligations under the Agreement, including the obligation of conveyance of a First Parcel to Defendant.

93. Developer's breaches of material obligations under the Agreement relieves the DDA from its obligations under the Agreement, including the obligation of conveyance of a First Parcel to Defendant.

94. The Agreement provides that uncured breaches of Developer's obligations under the Agreement allow the DDA to rescind the Agreement as to any parcel that has not been conveyed to the Developer, as stated in §9.1.6 and § 9.4.2 of the Agreement.

95. Sec. 9.1.6 of the Agreement states:

> 9.1.6 Other Default. The Developer fails to materially observe or perform any other covenant, obligation or agreement required of it under this Agreement or to make good faith efforts to obtain the Developer Financing;
>
> and if any Default is not cured within the time provided in Section 9.3 then the Authority may exercise any remedy available under this Agreement.

96. The applicable grace period under Section 9.3 is 30 days. Plaintiff failed to cure its breaches of the Agreement.

97. Due to the default of the Developer, the Authority has the right to cancel the Agreement.

98. Section 9.4.2 of the Agreement states:

> 9.4.2 Rescind Agreement. In case of a Default by the Developer, the Authority may cancel and rescind the Agreement as to any Parcel that has not been conveyed to the Developer;

99. The Regular Meeting Minutes dated July 7, 2015, of the Defendant Woodland Park Downtown Development Authority Board of Directors, included a Motion to approve Resolution No. 1-2015 adopted at such meeting. The Board approved Resolution No. 1-2015 by a vote of 9-0.

100. Resolution No. 1-2015 refers to the "Original Agreement" with the Defendant (dated March 19, 2013), and a "Replacement Agreement" with Woodland Park Village dated August 28, 2014. The Resolution recited in pertinent part that:

> "…it is necessary to establish that Original Developer [Defendant] and Woodland Park Village LLC (collective, the "Defaulting Parties") and any parties claiming any interest in the Property by reason of the Original Agreement , the MOU, the Replacement Agreement (collectively, the DDA Agreements") are in default under each of the DDA Agreements and to further clarify the intention of the DDA to terminate any and all rights

arising under the DDA Agreements or in any related agreements with respect to the Property, and unless such defaults are cured in accordance with the provisions of the Original Agreement and the Replacement Agreement, the Authority shall have the option to exercise any and all rights listed in the DDA Agreements,

NOW, THEREFORE, BE IT RESOLVED BY THE WOODLAND PARK DOWNTOWN DEVELOPMENT AUTHORITY:

Section 1. The Executive Director is authorized and directed to consult with legal counsel and prepare such notices to each of the Defaulting Parties as may be required to declare that such parties are in default, specifying the default, and stating that unless there is compliance with the applicable cure provisions of the DDA Agreements such agreements will be terminated and the Authority shall have the option to exercise any and all rights listed in the DDA Agreements."

101. The Executive Director of the DDA issued a Notice of Default dated January 15, 2016.

102. On March 7, 2016, the Executive Director of the DDA hand-delivered and mailed a letter to the Plaintiff to the attention of Arden Weatherford, in which the Agreement dated March 19, 2013, "has been and is declared null and void and of no effect…."

103. Thus, the Developer in this matter was under obligation to perform certain conditions before any performance by the Authority, and the Developer failed to perform those conditions and was not excused from performing those conditions. Further, the Developer failed to perform other material obligations of the Agreement. Therefore, the Authority was not obligated under the Agreement to perform any conveyance of a parcel of real estate to the Developer.

104. The Authority is entitled to Indemnification from the Developer for the Authority's expenses arising out of the Developer's performance or failure to perform the Agreement pursuant to Section 6.14 of the Agreement which states:

6.14 Indemnification. The Developer shall defend, indemnify, assume all responsibility for and hold harmless the Authority and the City, their council persons, directors, officers, employees, and agents (including, without limitation, for attorney fees and costs) from all suits, claims, losses, liabilities and expenses arising out of or in any manner caused by, connected with or resulting from performance or failure to perform this Agreement or activities contemplated by this Agreement, whether such activities are undertaken directly or indirectly by the Developer or by persons or entities employed by or under contract to the Developer and whether such damage shall accrue or be discovered before or after the termination of this Agreement or Completion of Construction on any Parcel.

105. Plaintiff's breach of the Beer Garden Agreement dated March 19, 2013, caused damages to Defendant DDA for which Defendant is entitled to Indemnification.

106. Further, Plaintiff's claims against Defendant have been substantially frivolous, substantially groundless, or substantially vexatious, and Defendant is entitled to reasonable attorney fees pursuant to C.R.S. §13-17-101, *et seq*.

WHEREFORE, having answered the Plaintiff's Complaint, Defendant respectfully requests that the Court enter Judgment in its favor and against Plaintiff, that the Court dismiss all of Plaintiff's claims for relief with Prejudice, and for Defendant to be granted judgment against the Plaintiff for damages in an amount established at the trial of this matter on its Counterclaim against Plaintiff for all its costs pursuant to Section 6.14 of the Agreement, including Defendant's attorneys' fees and costs, including all court costs, interest as provided by law, Defendant's expert witness fees, and such other and further relief as the Court deems just and proper.

Dated this date: March 28, 2017.

KRAEMER KENDALL RUPP DEEN NEVILLE LLC

/S/Steven J. Rupp

Steven J. Rupp, #25100

/S/ David M. Neville

David M. Neville, #36032

Original Signature on file at Kraemer Kendall Rupp Deen Neville, LLC.

Address of Defendant:
Woodland Park Downtown Development Authority
711 Midland Ave.
Woodland Park, CO 80863

Certificate of Service

I CERTIFY that I filed this document with ICCES on March 28, 2017, and requested service by ICCES of a true and complete copy of this document to all parties' counsel of record who have entered their appearance herein with ICCES.

S/ Steven J. Rupp

_____

Steven J. Rupp

This document has been served electronically in accordance with C.R.C.P. 121, Section 1-26. A copy of this document containing an original signature is on file at the offices of counsel in the above case.

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