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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

DEFENDANT'S TRIAL BRIEF

COMES NOW, the Defendant, Woodland Park Downtown Development Authority, by and through counsel of record, Steven J. Rupp and David M. Neville of KRAEMER KENDALL RUPP DEEN NEVILLE LLC, and hereby submits its Trial Brief:

INTRODUCTION

Plaintiff Woodland Park Beer Garden, LLC ("Plaintiff" or "WPBG") is a single-member limited liability company, the sole member of which is Arden Weatherford. Arden Weatherford holds himself out to be a real estate developer and has had made many proposals over the years to the Woodland Park Downtown Development Authority ("DDA") to develop a beer garden on a portion of the property known as Lot 2, Woodland Station in downtown Woodland Park, Colorado. The DDA owns the subject property and maintains the defense of this frivolous lawsuit in the interest of the citizens of Woodland Park and makes its counterclaim for expenses and attorneys' fees in order to recover the public moneys expended for the benefit of Woodland Park.

Plaintiff alleges in its Complaint that it performed its obligations under the "Agreement for Disposition and Development (Lot 2)" dated March 19, 2013 (the "Agreement" or "Original Agreement") and that the DDA breached the Agreement by failing to convey "Parcel 1" of Lot 2 and other alleged breaches described in further detail below. The DDA will provide evidence that, among other things, (i) WPBG never performed its obligations under the Original Agreement and was in fact the party that breached the Original Agreement in 2013, (ii) no performance was ever offered or contemplated by Plaintiff under the Original Agreement after October 2013, at which time Kip Unruh became the lead developer for Lot 2 and the parties, including Arden Weatherford, began negotiating an agreement to develop not only Lot 2 but also Lots 3, 4 and 5 of Woodland Station (which agreement is defined below and referred to herein as the Master Developer Agreement), which concept was abandoned by the developers in the spring of 2014 and (iii) with full knowledge and participation of Arden Weatherford, the Original Agreement was renegotiated and replaced in August 2014 with a new agreement and a memorandum of understanding to develop Lot 2 between the DDA and a new development entity which is not a party to this lawsuit (referred to herein as the Replacement Agreement and the MOU, as further defined below). Most of the breach of contract allegations made by Plaintiff allegedly occurred, if at all, under the Replacement Agreement and the MOU. Plaintiff claims it was not a party to the Replacement Agreement and MOU. (See Trial Management Order, Plaintiff's Statement of Issues, Claims, #5). (Plaintiff tries to have it both ways, but if Plaintiff was not a part of the Replacement Agreement and MOU, then it has no claim for breach of the Replacement Agreement and MOU.)

In sharp contrast to Plaintiff's allegations of bad faith and breach of contract, evidence will show that the DDA worked with WPBG and the subsequent development entity notwithstanding their repeated delays in performance right up until the moment in May 2015 when the development entity at that time (which was not Plaintiff) abandoned the project and ceased any further development efforts on Lot 2. The DDA at all times acted reasonably and in good faith and it was only after Kip Unruh, Mr. Weatherford's erstwhile business partner, walked away from the deal and the DDA later refused to enter into yet another agreement with Mr. Weatherford, that he then raised the groundless claim that the Original Agreement was still in effect.

It is notable that in its Complaint, Plaintiff did not ever mention the existence of the Master Developer Agreement, the Replacement Agreement or the MOU. Plaintiff's claims ring hollow when viewed in the context of the intervening agreements and events that it would apparently rather not mention.

It is also notable that this lawsuit is funded primarily by an entity controlled by Steve Randolph, the former mayor of Woodland Park, at virtually no financial risk to Plaintiff. See the Investment/Indemnity Agreement attached hereto as **Exhibit A**. Most of the alleged damages in this lawsuit were incurred by that entity and not Plaintiff. That entity is not a party to any agreement with the DDA and has no claims in this case. Section 13.0 of the Agreement states:

13.0 **No Third-Party Beneficiaries.** Except for specific rights in favor of mortgagees, no third-party beneficiary rights are created in favor of any person not a party to the Agreement.

A brief timeline of the development agreements for Lot 2 over the years is shown as follows:

GROUND LEASE	ORIGINAL AGREEMENT	MASTER DEVELOPER AGREEMENT	REPLACEMENT AGREEMENT/MOU
(Howard Block, LLC) (Arden Weatherford, sole member) Apr. 2011 – Apr. 2013 April 1, 2011 April 1, 2013 Ground Lease lasts for two years without performance by Mr. Weatherford's entity and new agreement reached.	(Woodland Park Beer Garden, LLC) (Arden Weatherford, sole member) Mar. 2013 – Oct. 2013 March 19, 2013 October 2013 Plaintiff's attempted performance ends in October 2013. Parties begin negotiating Master Developer Agreement at that time. No further performance offered under Original Agreement by Plaintiff. Plaintiff is suing under this Agreement that was replaced by the Replacement Agreement/MOU with Arden Weatherford's full participation and knowledge.	(Woodland Park Village, LLC) (Development Teams' alleged entity) Nov. 2013 – Apr./May 2014 November 2013 April 2014 Developers negotiated agreement with DDA staff and board. Final agreement submitted to Board and approved. Signed by DDA but developers refused to sign. No development takes place during this time frame.	(Woodland Park Village, LLC) (Development Team's alleged entity) Aug. 2014 – May 2015 All performance offered by the parties from and after August 28, 2014 was pursuant to the Replacement Agreement and the MOU. Defendant owes no performance obligations under the Replacement Agreement or the MOU to Plaintiff. August 28, 2014 May 2015

FACTS OF THE CONTRACT AND BREACH ISSUES

Defendant incorporates its Answer and Counterclaim herein, as well as Defendant's Disclosures and Discovery Responses.

Plaintiff WPBG is a Colorado limited liability company. Arden Weatherford is the sole member of WPBG. Defendant DDA is a body corporate of the State of Colorado.

Arden Weatherford had been talking with DDA members about a piece of property known as "Woodland Station" in downtown Woodland Park since 2007. "Woodland Station" is a piece of property in downtown Woodland Park, which is owned by the DDA, subject to an agreement and deed from the City of Woodland Park (the "City") with certain conditions and a right of entry benefitting the City. He had a Ground Lease on a small portion of some land there for two years from April 1, 2011 to April 1, 2013 and never developed the property pursuant to the Ground Lease.

Arden Weatherford had no experience in being a commercial real estate developer. He had never done a successful commercial development project to subdivide land or bring a building out of the ground in his life.

Arden Weatherford entered into negotiations with the DDA to develop a piece of property drawn on a Preliminary Plat approved by the City on March 1, 2012, as "Lot 2" of Woodland Station.

Arden Weatherford negotiated an "Agreement for Disposition and Development (Lot 2 Woodland Station)" with the DDA on the disposition and development of "Lot 2" of Woodland Station, which was signed between the DDA and WPBG on March 19, 2013. WPBG was denominated in the Agreement as the "Developer." This is known as the "Original Agreement" or "Agreement." (See Attached **Exhibit B** - Original Agreement, Deposition Exhibit 11.)

Arden Weatherford represented at that time, and at many other times, that he was part of a development team which included a Kansas City "developer" named Kip Unruh. Kip Unruh was going to work with Arden Weatherford pursuant to the Original Agreement. See DDA Minutes of March 19, 2013. (Later, it was also revealed that Steve Randolph, former mayor of Woodland Park, was a member of the so-called "Development Team.")

Although the Court has ruled on February 27, 2018, that specific performance will not be a remedy in this case, Plaintiff continues to assert that it will ask the Court to reconsider the remedy of specific performance. Defendant feels obliged to address the issue of breach of contract regarding failure to convey, not only as it applies to Plaintiff's claim for specific performance which it hopes to resurrect, but also as it applies to Plaintiff's claim for breach of contract and alleged damages flowing therefrom.

By the time of the Original Agreement of March 19, 2013, Lot 1 of Woodland Station had been previously platted. However, "Lot 2" of Woodland Station had never been platted and obviously the eight smaller parcels of Lot 2 mentioned in the Agreement had never been created and platted. There was a Preliminary Plat which showed a drawing of a proposed future Lot 2. There was no drawing of a proposed future "First Parcel" of Lot 2.

The Original Agreement (Section 5.0) required WPBG to purchase an adjoining parcel of property to Woodland Station known in the Agreement as the "Amerigas Site" (sometimes referred to herein as the "Amerigas Parcel") and remove some propane tanks stored on the Amerigas Site by June 3, 2013. It is Plaintiff's position that merely doing this entitled Plaintiff to conveyance of the "First Parcel," which is undefined in the Agreement. [To the extent that Plaintiff apparently also claims he is entitled to conveyance of all of Lot 2, not just the "First Parcel," this is also denied as Plaintiff has failed to perform its obligations under this Original

Agreement nor did the developer perform under the Replacement Agreement (defined below).] <u>The major problem in this lawsuit is that Plaintiff is entirely mistaken about this being the only condition to conveyance of the "First Parcel</u>." <u>Plaintiff ignores the other conditions of the Agreement which it never performed</u>.

Pursuant to Section 6.0, the <u>Developer is solely responsible</u> for the design, development and improvements in conformance with the time schedules set forth in Sections 6.3 through 6.6 and the WS Flow Chart. (Underline emphasis supplied.)

One of the conditions to conveyance was in Section 6.1 of the Agreement which stated that **"[U]nless 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 <u>and all other applicable City requirements.</u>"** (Emphasis supplied.) No portion of the property can be conveyed unless this is done because it is against the law to convey property that has not been subdivided and platted (more on that below). The Agreement defines "Parcel" as "each of the subdivided lots of the Property resulting from the resubdivision and replatting of the Property described in Section 6.1." By the clear terms of the Agreement, there can be no "Parcel" until the subdivision process has occurred, thus there could have been no "First Parcel" to convey to Plaintiff until after Plaintiff had subdivided it. Despite its obligation, Plaintiff never subdivided the First Parcel or attempted to subdivide the First Parcel, and now alleges that the DDA prevented Plaintiff from accomplishing something it never attempted.

Plaintiff failed to comply with the condition precedent in Section 6.1 in preparing documents necessary to subdivide the property into up to eight parcels and 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.

The Agreement clearly contemplates that the First Parcel must be subdivided before it can be conveyed. Section 7.0 states, "The Authority shall convey title to each Parcel to the Developer in accordance with the following provisions." The Agreement then sets forth Sections 7.1 through 7.7 governing the conveyance by the Authority. Section 7.1 of the Agreement provides, in part, "The Property shall be subdivided into approximately eight (8) Parcels as provided in Section 6.1 and the Closing of the conveyance of the First Parcel of the Property and each subsequent conveyance shall take place on or before the dates set forth in Section 6.5." The requirement that the subdivision of the Parcels be accomplished in accordance with Section 6.1 is included <u>in the same sentence as, and immediately prior to</u> the agreement by the DDA to convey the Parcels. The plain language of the Agreement requires the subdivision of the First Parcel prior to conveyance. If WPBG failed to understand the requirements of the Agreement, it was a unilateral mistake on the part of WPBG.

Section 6.2.2. of the Agreement sets forth another express condition precedent to conveyance of the First Parcel that Plaintiff failed to satisfy. Section 6.2.2. of the Agreement states, "**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." No covenants were ever agreed by the DDA or presented to the DDA by Plaintiff for consideration or execution. In absence of any Covenants, Plaintiff now makes the groundless claim that the conditions of the Temporary Use Permit issued by the City constituted the Covenants under the Agreement. This frivolous claim was not made at the time of the Agreement and has no evidence to support it, nor does it satisfy the plain language of the Agreement that the Covenants would be agreed by the DDA, acceptable to the DDA, implement the provisions of the Agreement, executed by WPBG and recorded. The "conditions" of the Temporary Use Permit expired at the end of the season, merely constituted boilerplate event safety requirements for the most part and had nothing whatsoever to do with implementing the Agreement. Even the Temporary Use Permit was late. The Agreement required Plaintiff to obtain the Temporary Use Permit by June 3, 2013, but WPBG did not obtain the permit until the end of August 2013 and then only through October of that year.

The Plaintiff Developer never did purchase the Amerigas Parcel, but, unbeknownst to the DDA, a different development group comprised of Steve Randolph, Arden Weatherford, Kip Unruh and Brian Porter formed a new entity, Beer Garden Lane Development, LLC ("BGLD"), and purchased the Amerigas Parcel in September 2013 with that entity. The last of the propane tanks, the big tank, was moved on October 8, 2013.

Under Section 5 of the Agreement, the purchase of the Amerigas Parcel and removal of the tanks was to be accomplished by Plaintiff by June 3, 2013. The purchase of the Amerigas Parcel and removal of the tanks was completed on October 8, 2013, many months after the deadline. The DDA Board waived the default for the missed date, but the Board did not know that the Plaintiff had not purchased the Amerigas Parcel as required in the Agreement. Sometime in December 2013, Arden Weatherford advised Brian Fleer that BGLD had purchased the Amerigas Parcel. Because BGLD bought the Amerigas Parcel, Plaintiff breached the Agreement under Section 6.10.1 by not seeking written permission from the DDA to assign any of its interest in the Agreement or the Property. As a result, Plaintiff was not in compliance with this Section 5 condition precedent of the Agreement and had in fact breached Section 6.10.1 of the Agreement unbeknownst to the DDA.

WPBG's breach of Section 6.10.1 of the Agreement is a material point and not a "trivial imperfection," as WPBG argues. WPBG expressly agreed in Section 6.10 of the Original Agreement that "(b) the qualifications and identity of the Developer of each Parcel is of particular concern to the Authority." Section 6.10.1 provides further that, "...until Completion of Construction of all the Improvements required in connection with the conveyance of each Parcel, the Developer shall not assign all or any part of or any interest in this Agreement or the Property without the prior written approval of the Authority, which approval shall not be unreasonably withheld, conditioned or delayed...No voluntary or involuntary successor in interest of the Developer shall acquire any rights or powers under this Agreement except as expressly set forth herein." WPBG never sought or obtained the DDA's written approval for any assignment of rights under the Agreement, yet BGLD took title to the Amerigas Property and now BGLD is apparently claiming rights against the DDA under the Agreement but has not made itself a party to this lawsuit (See Defenses, below).

In any event, by the time the tanks were moved on October 8, 2013, Plaintiff was already in breach of the Agreement because it missed the deadline of October 1, 2013 to produce a concept plan and finance plan for development of Parcel 2 as set forth in the WS Flow Chart attached as Exhibit A to the Original Agreement. Further, the Plaintiff had not complied with the conditions precedent in Sections 6.1 and 6.2.2 as set forth above and conveyance of the First Parcel then, as now, would have been illegal because the First Parcel had not been subdivided. In addition, because of the nature of the Temporary Use and the necessity of the Covenants prior to the construction of permanent Improvements on the First Parcel, the DDA required in Section 6.2.4 of the Original Agreement that in connection with the conveyance of the First Parcel to WPBG, WPBG was required to contemporaneously execute and deliver into escrow a deed reconveying the First Parcel to the DDA. The DDA would have been authorized to record the reconveyance deed immediately upon a breach of the Covenants by WPBG (which Covenants were never produced or agreed). No reconveyance deed was ever offer or produced by Plaintiff.

In sum, without limiting any other breaches, Plaintiff failed to ever satisfy the following conditions precedent to conveyance of the First Parcel: (i) subdivision (Sections 6.1 and 7.1); (ii) Covenants (Section 6.2.2); (iii) reconveyance deed (Section 6.2.4). In addition, by the time the tanks were moved, Plaintiff was further in breach of the October 1, 2013 deadline to provide a concept plan and finance plan for Parcel 2 and the assignment restrictions in Section 6.10 (unbeknownst to the DDA, which constituted a separate default under Section 9.1.1).

Not only did the Plaintiff fail to perform on the conditions precedent listed above, the Plaintiff failed to perform on every other required obligation from October 2013 forward as set forth in the Original Agreement. Plaintiff missed ALL the dates and deadlines on the WS Flow Chart attached to the Agreement as Exhibit A – every single one. A concept plan was approved on November 5, 2013 (over one month late), but it had been commissioned and paid for by the DDA and Kip Unruh in anticipation of Mr. Unruh's development efforts for all of Woodland

Station pursuant to the Master Development Agreement (defined below). WPBG was not materially involved in the approval of that concept plan.

Plaintiff did not make a demand for conveyance of the "First Parcel" in October 2013.

In late 2013, the Development Team entered discussions with the Executive Director of the DDA regarding a Master Developer Agreement to supersede the Original Agreement. The Master Developer Agreement was proposed to include not only Lot 2 but also Lots 3, 4, and 5 of Woodland Station.

The parties negotiated an "Agreement for Disposition and Development (Lots 2, 3 4 and 5)" throughout the winter of 2013-2014, which was approved by the DDA Board in the presence of the development team on April 1, 2014 (the "Master Developer Agreement"). The parties negotiated this agreement to replace the Original Agreement of March 19, 2013. (See Section 2.4 of the Master Developer Agreement.) The original draft approved by the DDA Board contained a signature line for WPBG. The draft signed by the DDA did not contain a signature line for WPBG. The Development Team, consisting of Mr. Weatherford and Mr. Unruh, represented that the developer would be an entity named Woodland Park Village, LLC. This was a false representation. This entity was never organized and registered with the Colorado Secretary of State. The DDA relied on this false representation and signed the agreement on April 1, 2014.

The Development Team refused to sign the Agreement. Their excuse was a letter from the Colorado Department of Transportation ("CDOT") dated March 2, 2012, which they claimed was a surprise revelation to them in April 2014. This letter required certain traffic improvements, including building an access road on Depot Avenue to West Street in connection with the development of Lot 2. The Conditions on the Preliminary Plat dated March 1, 2012, contained virtually identical requirements. Steve Randolph of the Development Team was the

Mayor of the City of Woodland Park at the Public Hearing at the time the Preliminary Plat was presented to City Council and City Council unanimously approved the Preliminary Plat with those conditions. Steve Randolph voted to approve those conditions. The Development Team had actual knowledge of the Conditions of the Preliminary Plat, which included all the conditions in the letter from CDOT. Further, this was a matter of public record and all the Development Team was on Notice of the Conditions of the Preliminary Plat. Any competent developer would have known about the Preliminary Plat's conditions. WPBG agreed in the Original Agreement to comply with all City requirements, and the street improvements were a City requirement.

By that time, April 1, 2014, over a year had gone by since the signing of the Original Agreement and no development had been done as required by the Original Agreement.

After the refusal to sign the Master Developer Agreement, the Development Team came to the DDA and wanted to do another new agreement, but this time again limited to "Lot 2" of Woodland Station. The Development Team also wanted to do a Memorandum of Understanding ("MOU") in conjunction with the new agreement. It appears from certain e-mails that Steve Randolph and/or Arden Weatherford of the Development Team were involved as a drafter of the language for the MOU.

On July 30, 2014, Carol Lindholm, administrative assistant to the DDA, sent a draft of the new Lot 2 agreement to Kip Unruh. It was explicitly stated in the e-mail transmission that **"This replaces the agreement that Arden signed in March of 2013. The only substantive changes are some of the dates, the developer name and the updates to Exhibit A (same as Exhibit A in the MOU - which you already have."** Arden Weatherford received a copy of the e-mail on July 30, 2014. The developer name was again the non-existent entity of Woodland Park Village, LLC, not WPBG. The Agreement was titled:

Agreement for Disposition & Development (Lot 2 Woodland Station)
Replacing Agreement Dated March 19, 2013 with Woodland Park Beer Garden

The MOU was entered into in conjunction with the Replacement Agreement. The first sentence of the MOU provides, "The purpose of the Memorandum of Understanding (MOU) is to set the framework for the amendment of the previously executed Agreement for Disposition and Development of Lot 2, Woodland Station Preliminary Plat with an updated timeline and development scenario (see Exhibit A)." Note that the MOU uses the correct description of Lot 2 by referring to "<u>Lot 2, Woodland Station Preliminary Plat</u>." To the extent there was a mistake in the legal description of the Property in the Original Agreement, the MOU recognizes that the mistake was mutual.

The development schedule of the MOU and the Replacement Agreement provided that Lot 2 of the Preliminary Plat be Final Platted into Parcel 1 and Parcel 2. The MOU recognized that there was no need to final Plat Lot 2 prior to platting Parcel 1 and Parcel 2, contrary to Plaintiff's assertions. Parcel 2 was to include an initial construction of a mixed use building of 4,000 sf. Parcel 1 was to be the beer garden parcel. The MOU provided that the CDOT Requirements (which were merely the equivalent of the City Requirements) would not be triggered for a building that was below a 4,000 sf footprint. The MOU also provided that an updated traffic study be done at some unspecified time. (Around this time, there was a proposal for an Aquatic Center to be built by the City of Woodland Park at Woodland Station. The City was going to do a Traffic Study for the Aquatic Center.)

On August 28, 2014, the Board met and approved the Replacement Agreement and MOU. Arden Weatherford and Kip Unruh were present. Arden Weatherford did not raise any objection to this Replacement Agreement and MOU between the DDA and Woodland Park Village, LLC which replaced the Original Agreement with WPBG.

The MOU with the Replacement Agreement provided that the first portion of Parcel 2 and Parcel 1 would be conveyed to Woodland Park Village, LLC (not WPBG) when the zoning development permit ("ZDP") was issued by the City for the first phase of construction on Parcel 2. The deadline for obtaining the ZDP was December 31, 2014. There were other deadlines for the same date. The Replacement Agreement also provided that the beer garden parcel (Parcel 1) would by conveyed to Woodland Park Village LLC, and not Plaintiff WPBG. Arden Weatherford did not object to any of this. If he had any objection to the replacement of the Original Agreement, he had the obligation to raise that objection at that point. Instead, he went on with the Replacement Agreement and Kip Unruh.

The Development Team, including Arden Weatherford, did not meet the requirements of the City or the DDA and came into default on the Replacement Agreement as of December 31, 2014. The DDA continued to try to work with the Development Team. On May 5, 2015, the DDA rejected a final request for an extension of time by the Development Team and directed that a notice of default with right to cure be given. The DDA provided a notice of default dated May 5, 2015, to Kip Unruh of the Development Team. The DDA continued to work with the Development Team so the Development Team could cure the default.

Arden Weatherford drafted an application for a General Plat and took it to Dale Schnitker, the Chair of the DDA, who signed it on May 12, 2015. Arden Weatherford never did file the Plat Application with Sally Riley at City Planning. This was the first and only effort to subdivide any portion of Lot 2 ever undertaken by any party during the course of any of the various development agreements for Lot 2.

Kip Unruh, who was the "project manager" for the mixed use parcel, decided to walk away from the project on May 21, 2015, and confirmed same with a letter on June 9, 2015, so there was never was any ZDP issued for the mixed-use property of Parcel 2. Therefore, the Development Team never met the condition precedent for the DDA to convey any portion of Parcel 2 or Parcel 1 of Lot 2.

The statements of Sally Riley, City Planning Director, as to the failure of the Developer to meet City Requirements are contained in several letters, including (1) the Sally Riley Memo dated May 10, 2015 with Unruh comments and DDA Design Review Committee ("DRC") comments, (2) the Sally Riley letter dated April 14, 2015, and (3) the Sally Riley Status document dated May 20, 2014. In her letter of May 14, 2015, Sally Riley had stated that City Staff agreed with the DRC comments of March 20.

As stated above, the Developer decided to stop work and abandoned the project. See letter on May 21, 2015 and June 9, 2015. The only reason given was an unspecific complaint against the DRC. Sally Riley stated that the DRC acted reasonably. There was no problem raised at the time as to a lack of a traffic study or any complaint against the City, even though the Developer failed to satisfy the City's requirements for submittals.

In mid-2015, more than two years after the Original Agreement, after Kip Unruh repudiated the Replacement Agreement, Arden Weatherford then alleged that the Original Agreement was still in force, even though there had been no performance as required by the Original Agreement since October 2013 and the conditions for transfer of the First Parcel had never been satisfied.

On July 7, 2015, the DDA adopted Resolution 1-2015 which resolved that the Original Agreement, the MOU, and the Replacement Agreement are in default and ordered appropriate notices to the defaulting parties and termination notices if no cure. Arden Weatherford was at this DDA Board meeting and he had actual notice of the default motion directed to Plaintiff WPBG. In fact he responded to the motion that day, July 7, 2015 and again on July 8, 2015. On July 7, 2015, he did not address his WPBG default under the Original Agreement but admitted pursuant to the Replacement Agreement that he "agreed to delay conveyance to be in conjunction with the first building on Parcel 2 in good faith because he every intention of working in tandem with Kip Unruh."

Arden Weatherford essentially took the position that the Original Agreement was still in force and that he was entitled to conveyance of a "First Parcel," even after he failed to complete the conditions precedent in 5.0 and 6.1 and 6.2.2., and every other deadline of the Original Agreement for over two years, as well as the deadlines in the Replacement Agreement. This constitutes laches in addition to breach of contract. Other defenses are listed below.

Arden Weatherford and Brian Fleer, Executive Director of the DDA, continued to work on a new "go forward agreement" after July 7, 2015, but that never came to fruition. Arden Weatherford requested that he not be sent a default notice. (He had already been given actual notice on July 7, 2015.)

Fleer sent a Termination Notice to Woodland Park Village LLC on September 30, 2015. Fleer sent a Default Notice to WPBG on January 15, 2016 after Arden Weatherford had sent one to the DDA. A Termination Notice was sent to WPBG on March 7, 2016.

This lawsuit for Breach of Contract was filed on November 5, 2016. This date raises a statute of limitations defense, since WPBG's claim for conveyance is that a First Parcel should have been conveyed upon the removal of the tanks from the Amerigas Parcel on October 8, 2013, more than three years earlier.

Not only had Arden Weatherford and his development team agreed to a Replacement Agreement for the Original Agreement on August 28, 2014, but even if there had been no such Replacement Agreement, the Plaintiff was still in material breach of the Original Agreement all as set forth in detail below.

<u>LEGAL ARGUMENT</u>

I. PLAINTIFF FAILS TO PROVE THE REQUISITE ELEMENTS OF BREACH OF CONTRACT, OR ANY ONE OF THEM.

The elements of breach of contract are as follows:

> It has long been the law in Colorado that a party attempting to recover on a claim for breach of contract must prove the following elements: (1) the existence of a contract, *Denver & Rio Grande R.R. Co. v. Iles*, 25 Colo. 19, 25, 53 P. 222, 224 (1898); (2) performance by the plaintiff or some justification for nonperformance, *Lombard v. Overland Ditch & Reservoir Co.*, 41 Colo. 253, 255, 92 P. 695, 696 (1907); *Walling v. Warren*, 2 Colo. 434, 438–39 (1874); *McGonigle v. Klein*, 6 Colo. App. 306, 309, 40 P. 465, 467 (1895); (3) failure to perform the contract by the defendant, *Denver & Rio Grande R.R. Co.*, 25 Colo. at 21, 53 P. at 223; and (4) resulting damages to the plaintiff, *Western Union Tel. Co. v. Trinidad Bean & Elevator Co.*, 84 Colo. 93, 96–97, 267 P. 1068, 1069 (1928). The "performance" element in a breach of contract action means "substantial" performance. Substantial performance occurs when, "although the conditions of the contract have been deviated from in trifling particulars not materially detracting from the benefit the other party would derive from a literal performance, [the defendant] has received substantially the benefit he expected, and is, therefore, bound to pay." *Newcomb v. Schaeffler*, 131 Colo. 56, 62, 279 P.2d 409, 412 (1955).

W. Distrib. Co. v. Diodosio, 841 P.2d 1053, 1058 (Colo. 1992)

A. <u>No Contract Existed Between WPBG and the DDA.</u>

> A contract is an agreement between two or more persons or entities. A contract consists of an offer and an acceptance of that offer, and must be supported by consideration. If any one of these three elements is missing, there is no contract.

Colo. Jury Instr., Civil 30:1

1. The Plaintiff's allegations demonstrate a lack of meeting of the minds to support the existence of a contract.

> “The general rule is that when parties to a contract ascribe different meanings to a material term of a contract, the parties have not manifested mutual assent, no meeting of the minds has occurred, and there is no valid contract. However, an exception to the general rule is observed when the meaning that either party gives to the document's language was the only reasonable meaning under the circumstances. In such cases, both parties are bound to the reasonable meaning of the contract's terms.” **Sunshine v. M. R. Mansfield Realty, Inc.,** 195 Colo. 95, 98, 575 P.2d 847, 849 (1978) (citation omitted). Moreover, when the parties to a bargain, sufficiently defined to be a contract, have not agreed to an essential term, the court may supply a term that is reasonable under the circumstances. **Costello v. Cook**, 852 P.2d 1330 (Colo. App. 1993). Also, a contract will not fail for indefiniteness if missing terms can be supplied by law, presumption, or custom. **Winston Fin. Group, Inc. v. Fults Mgmt. Inc.,** 872 P.2d 1356 (Colo. App. 1994). And, a contract is not fatally vague or indefinite simply because the parties disagree as to its meaning. **Hauser v. Rose Health Care Sys.**, 857 P.2d 524 (Colo. App. 1993); *see* **In re May**, 756 P.2d 362, 369 (Colo. 1988) (“The fact that the parties have different opinions about the interpretation of the contract does not of itself create an ambiguity.”). However, where a mistake is made by one party on the basic nature of a material contract provision, a resulting unconscionable contract may be avoided. **Sumerel v. Goodyear Tire & Rubber Co.,** 232 P.3d 128 (Colo. App. 2009) (where one party knew arithmetical calculation of damages was erroneous, risk of mistake did not rest with other party, and the agreement made based on that calculation was unconscionable, agreement was unenforceable (citing Restatement (Second) of Contracts §§ 153–54 (1981)).

Colo. Jury Instr., Civil 30:1, Source Note 2.

Plaintiff’s claims are barred by failure of consideration and/or mutual mistake. There is evidence that there was no meeting of the minds on material terms of the Agreement, e.g. the legal description of the “First Parcel.” Further, Plaintiff has alleged a mistake in the property name of “Lot 2, Woodland Station Filing No. 1” in Section 7.1 of the Original Agreement. Woodland Station Filing No. 1 is filed of public record. Lot 2 does not exist on that filing. Therefore this constitutes a mutual mistake and the contract is voidable.

Because the parties would have to agree in the future as to what constitute the First Parcel and Lot 2, the Agreement lacks terms that cannot be reasonably inserted by the Court.

Agreements to agree in the future are generally unenforceable because the Court cannot force parties to come to an agreement on essential terms of the contract.

There is no binding contract if further negotiations are required to come to agreement on essential terms of the contract, e.g. First Parcel, Parcels 1-8 and Lot 2.

> Generally, there can be no binding contract if further negotiations are required to come to an agreement as to important and essential terms of the contract. **Sumerel**, 232 P.3d at 136–37 (discussion to resolve dispute did not include offer sufficiently definite to be capable of acceptance); **DiFrancesco v. Particle Interconnect Corp.,** 39 P.3d 1243, 1248 (Colo. App. 2001) ("Agreements to agree in the future are generally unenforceable because the court cannot force parties to come to an agreement.").

Colo. Jury Instr., Civil 30:1, Source Note 3.

2. Plaintiff's Claim for Breach of Contract is Barred because the Original Agreement was Replaced.

Plaintiff's claims under the Agreement are barred because the Agreement was 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 Replacement Agreement and 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 Replacement Agreement and MOU had been met. Plaintiff's sole member Arden Weatherford was a part of the Development Team with Kip Unruh that negotiated and signed the Replacement Agreement. Plaintiff never did object to this Replacement Agreement and MOU and Arden Weatherford participated in the Replacement Agreement. The development entity under the Replacement Agreement and MOU is not a party to this lawsuit.

The DDA did not issue any notice of default on the Original Agreement in October 2013 due to the representation that the parties would enter into a Master Developer Agreement on April 1, 2014, and then later, a Replacement Agreement for Lot 2 on August 28, 2014. Arden Weatherford was advised by Carol Lindholm on July 30, 2014, in circulating this Replacement Agreement that this agreement replaces the March 19, 2013 agreement. Arden Weatherford was present at the DDA Board Meeting on August 28, 2014, when the DDA board voted to enter into the Agreement entitled:

> Agreement for Disposition & Development (Lot 2 Woodland Station) <u>Replacing Agreement Dated March 19, 2013 with Woodland Park Beer Garden.</u> (Emphasis supplied)

Arden Weatherford never objected to the Replacement Agreement. He went forward with it with his Development Team. The Development Team ultimately did not perform under the Replacement Agreement and abandoned it as of May 21, 2015, confirmed on June 9, 2015. Then Arden Weatherford made claims that the Original Agreement was still in force. Plaintiff sent a Notice of Default in January 2016. His claim is barred by laches. Further, it was filed outside the statute of limitations as shown herein. See Defenses, below.

3. To the extent the Original Agreement requires the DDA to perform an illegal act, e.g., convey property that has not been subdivided pursuant to City code, the Original Agreement is void and/or *ultra vires*. No damages can be had for failure to perform an illegal contract.

B. <u>The Plaintiff Has Failed To Perform Under the Alleged Contract(s) and Has No Justifiable Excuse For Failure To Perform, and Plaintiff's Material Breaches Relieve the Defendant From Any Duty to Perform.</u>

1. Plaintiff's claims are barred by Plaintiff's own conduct in failing to comply with obligations under the Agreement. A material breach of contract has been defined as follows:

> Whether there has been a material breach of contract turns upon the importance or seriousness of the breach and the likelihood that the injured party nonetheless received, or will receive, substantial performance under the contract.
>
> Indeed, a breach that is material "goes to the root of the matter or essence of the contract," 6 W. Jaeger, *Williston on Contracts* § 842 at 165 (3d ed.1962); *see also Gibson v. City of Cranston,* 37 F.3d 731 (1st Cir.1994), and renders substantial performance under the contract impossible. *See* J. Calamari & J. Perillo, *Contracts* § 11-18 at 461-62 (3d ed. 1987) ("Substantial performance is the antithesis of material breach. If it [is] determined that a breach is material, it follows that substantial performance has not been rendered."). *See also Reynolds v. Armstead,* 166 Colo. 372, 443 P.2d 990 (1968).
>
> In deciding whether a breach is material, the extent to which an injured party would still obtain substantial benefit from the contract, and the adequacy of compensation in damages for the breach, should be considered. *Kaiser v. Market Square Discount Liquors, Inc.,* 992 P.2d 636 (Colo.App.1999). The importance or materiality of contract terms must be assessed in context and in light of the expectations of the parties at the time the original contract was formed. *Phoenix Power Partners, L.P. v. Colorado Public Utilities Commission,* 952 P.2d 359 (Colo.1998).

Interbank Investments, L.L.C. V. Vail Valley Consolidated Water District, 12 P.3d 1224, 1228-1229 (Colo. App., Div. II 2000)

2. Plaintiff's material breaches are a defense to allegations of breach by the Defendant since Plaintiff's material breaches relieve the Defendant of any duty to perform.

> Proof of a material failure of consideration may excuse a party from performing its duties under a contract. If one party has failed to perform the bargained for exchange, the other party may be relieved of a duty to continue its own performance, where the failure is material and unexcused. However, an incomplete performance may not amount to a material failure which would fully excuse a duty to return performance, when the performance given may be considered an equivalent to the performance owed. See Restatement (Second) of Contracts, ss 237 and 240 (1981). The extent to which an injured party will obtain substantial benefit from the contract, as well as the adequacy of compensation in damages, should be considered in determining the materiality of failure of performance. Restatement (Second) of Contracts, s 241 (1981).

Converse v. Zinke, 635 P.2d 882, 887 (Colo. 1981).

3. The Plaintiff's Material Breaches are as follows:

(a) Pursuant to Section 6.0 of the Original 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 attached as Exhibit A to the Original Agreement.

(b) Pursuant to Section 6.1 of the Agreement, the Developer is responsible to prepare all documents and instruments necessary to replat each Parcel.

(c) 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.)

(d) 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.

(e) 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.

(f) Plaintiff did not comply with the condition precedent to provide Covenants as required in Section 6.2.2. This condition is an express condition precedent to the obligation of the Authority to convey the First Parcel. Section 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.)

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

(h) Plaintiff did not comply with Section 5.0 of the Agreement in that Plaintiff did not take title to the Amerigas Parcel. Section 6.10.1 prohibits assignment of rights without DDA consent. Plaintiff never sought permission from the DDA to assign rights under the contract

(i) Plaintiff's failure to comply with Section 5.0, Section 6.1 and Section 6.2.2 of the Agreement were failures to comply with conditions precedent in the Agreement.

(j) Plaintiff breached other material obligations of the Agreement, including the following breaches set forth herein.

(k) Pursuant to Section 6.0 of the Original Agreement, the Developer is solely responsible for the design, development and Improvements in conformance with the time schedules set forth in Sections 6.3 through 6.6 and the WS Flow Chart.

(l) Developer failed to provide a Concept Plan (as defined in the Agreement) and each Financing Plan on October 1, 2013 and each October 1 thereafter for each of the respective parcels as required in Section 6.3 and the WS Flow Chart in Exhibit A attached to the Agreement.

(m) Developer failed to comply with Section 6.4 of the Agreement and Exhibit A which requires Developer to submit evidence of Developer Financing (as defined in the Agreement) and obtain Development Approvals for each of the parcels on the WS Flow chart beginning April 1, 2014, and thereafter.

(n) With regard to Section 6.5 of the Agreement, because of the above enumerated failures by Developer to comply with condition precedents and other obligations in Sections 6.1 through 6.5, the developer failed to meet the deadlines required for conveyances under this Agreement. Because Developer defaulted on the subdivision and platting conditions of the agreement, there was no parcel platted which could legally be conveyed. Because Developer did not submit plans in timely fashion as required by the Agreement, Developer failed to timely commence construction.

(o) Developer did not operate a beer garden in continuous operation as required by Section 6.2.3.

(p) Plaintiff did not take title to the Amerigas Parcel and did not advise the Board that title had been taken by another entity other than Plaintiff Woodland Park Beer Garden, LLC, on or about October 8, 2013. By then, Plaintiff had missed deadlines of October 1, 2013, relating to Parcel 2 under the WS Flow Chart in Exhibit A. Plaintiff advised staff of DDA on December 4, 2013 that BGLD had purchased Amerigas Parcel on September 23, 2013. There is no record of the DDA Board being advised.

(q) Arden Weatherford of Woodland Park Beer Garden was a part of a partnership Development Team which entered into an agreement dated August 28, 2014 entitled "Agreement for Disposition & Development (Lot 2 Woodland Station) Replacing Agreement Dated March 19, 2013 with Woodland Park Beer Garden"

(“Replacement Agreement”). The partnership Development Team breached the Replacement Agreement and stopped work and failed to cure its default.

(r) Plaintiff has not indemnified the Authority for the Authority’s expenses arising out of the Developer’s performance and/or failure to perform the Agreement as required by Section 6.14 of the Original Agreement.

C. Defendant DDA Performed Its Obligations under the Agreement.

See Paragraph II.C., “Plaintiff’s claims of material breaches are denied, including:” below.

D. WPBG Has No Damages.

See DEFENSES, Paragraph II.F., “Plaintiff Is Not Entitled To Any Damages:” and Paragraph II.G., “Plaintiff’s Claimed Damages are not Damages of Plaintiff at all, but from a Third Party, namely BGLD, and Should be Disallowed” below.

II. DEFENSES

A. The Actions of Plaintiff In Failing To Object To The Replacement Agreement And Acting Under The Replacement Agreement Constitute A Manifestation of Assent To The Replacement Agreement, or waiver and ratification.

1. The actions of Plaintiff in failing to object to the Replacement Agreement and performing under the Replacement Agreement constitute assent to the Replacement Agreement. If Plaintiff had any objection to the Replacement Agreement, he had a duty to respond:

> The Restatement (Second) of Contracts, section 19, contains the following observations regarding conduct as a manifestation of assent:
>
> (1) The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act.
>
> (2) The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.
>
> (3) The conduct of a party may manifest assent even though he does not in fact assent. In such cases a resulting contract may be voidable because of fraud, duress, mistake, or other invalidating cause.
> Restatement (Second) of Contracts § 19(1)-(3) (1979). *See also id.* at § 69 cmt. a. (“Acceptance by silence is exceptional” and “[t]he mere receipt of an unsolicited offer does not impair the offeree’s freedom of action or inaction or impose on him any duty to

> speak”). Typically, silence or inaction will be deemed acceptance of an offer only when the relationship between the parties is such that an offeror is justified in expecting a reply or the offeree is under a duty to respond. *Brooks Towers Corp. v. Hunkin-Conkey Constr. Co.,* 454 F.2d 1203, 1207 (10th Cir.1972); *Western Insulation Servs., Inc. v. Central Nat’l Ins. Co. of Omaha*, 460 N.W.2d 355, 358 (Minn.App.1990).

Haberl v. Bigelow, 855 P.2d 1368, 1374 (Colo. 1993)

2. Alternatively, 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 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.

B. <u>Plaintiff’s Claims are barred by Laches and/or Equitable Estoppel.</u>

1. Plaintiff’s claims are barred by laches and/or equitable estoppel.

> The elements of laches are: “ ‘(1) full knowledge of the facts; (2) unreasonable delay in the assertion of available remedy; and (3) intervening reliance by and prejudice to another.’ ” *Manor Vail Condominium Ass’n v. Town of Vail*, 199 Colo. 62, 64, 604 P.2d 1168, 1170 (1980) (quoting *Herald Co. v. Seawell,* 472 F.2d 1081 (10th Cir.1972)).
> ***
> Furthermore, the prejudice required to establish the defense of laches, as a form of estoppel, must necessarily result from reliance on the actions of the opposing party that is justifiable under the circumstances of the case considered as a whole. *Simineo v. Kelling,* 199 Colo. 225, 228, 607 P.2d 1289, 1291 (1980).

City of Thornton v. Bijou Irrig. Co., 926 P.2d 1, 73-74 (Colo. 1996) [(*Accord: Keller Cattle Co. v. Allison*, 55 P.3d 257, 260 (Colo. App. 2002)]

This is a textbook case of laches. The Plaintiff signed the Original Agreement on March 19, 2013. Plaintiff never performed under the contract. Plaintiff violated the contract by having a third party buy the Amerigas Parcel and remove the tanks by October 8, 2013. Plaintiff never claimed it was entitled to conveyance of a First Parcel in 2013. The Plaintiff presented a development team and entered into negotiations for a Master Developer Agreement for

Woodland Station, including Lot 2, which was signed on April 1, 2014. Plaintiff's and his team refused to sign the Master Developer Agreement. Another agreement was negotiated for Lot 2 and signed on August 28, 2014 (the Replacement Agreement and MOU). Then the development team abandoned the project and went into contract default in May 2015, and was duly terminated thereafter. It was in 2015 that the Plaintiff raised its claim that it had rights to conveyance under the Original Agreement signed more than two years earlier. This lawsuit was filed in November 2016.

2. The defense of laches is not precluded even if a Plaintiff files within the statute of limitations period. In the case of *Hickerson v. Vessels*, 316 P.3d 620 (Colo. 2014), which was a case for breach of a contract of Promissory Note, the Colorado Supreme Court held that the equitable defense of laches is applicable even if lawsuit was filed within the applicable 6 years limitations period applicable to Promissory Notes. The Court stated:

> "The essential element of laches is unconscionable delay in enforcing a right under the circumstances, usually involving a prejudice to the one against whom the claim is asserted."[4] *Loveland Camp No. 83 v. Woodmen Bldg & Benevolent Ass'n,* 108 Colo. 297, 116 P.2d 195, 199 (1941); *see also Calvat v. Juhan*, 119 Colo. 561, 206 P.2d 600, 604 (1949); *Robbins v. People,* 107 P.3d 384, 388 (Colo.2005). "The elements of laches are: (1) full knowledge of the facts; (2) unreasonable delay in the assertion of available remedy; and (3) intervening reliance by and prejudice to another." *City of Thornton v. Bijou Irr. Co.,* 926 P.2d 1, 73 (Colo.1996) (internal quotations omitted). laches requires "such unreasonable delay in the assertion of and attempted securing of equitable rights as to constitute in equity and good conscience a bar to recovery." *Loveland Camp No. 83,* 116 P.2d at 199; *see also Keller Cattle Co. v. Allison*, 55 P.3d 257, 260 (Colo.App.2002) ("The doctrine of laches permits a court to deny a party equitable relief.").
>
> 316 P.3d at 623.
>
> Since the early days of statehood, we have recognized that laches is available as a defense in some circumstances to shorten the period for filing a claim, even though the claim has been timely filed within a legislatively prescribed statute of limitations period. *Great W. Mining Co. v. Woodmas of Alston Mining Co.,* 14 Colo. 90, 23 P. 908, 911 (1890); *Dunne v. Stotesbury*, 16 Colo. 89, 26 P. 333, 334 (1891); *O'Byrne v. Scofield,* 120 Colo. 572, 212 P.2d 867, 871 (1949).
>
> ***

> In *Great West Mining Co.*, the relevant statute of limitations required that fraud claims be filed within three years after the discovery of the fraud. 23 P. at 911. Despite that statute of limitations, we held that laches was still available as a defense. *Id.* In justifying use of laches, we explained that "[w]e cannot ... give this statute such a construction as will permit a party in all cases to stand idly by until the limitation of the statute has nearly run, and then claim that, by virtue of the statute, he is excused from the laches." *Id.* As explained in *O'Byrne*, "[p]articularly is this true where witnesses have died or their memories become dim or time and long acquiescence have obscured the nature and character of the [claim] or the acts of the parties or other circumstances give rise to presumptions unfavorable to its continuance." 212 P.2d at 871. *Great West Mining Co.* and its progeny demonstrate that, under Colorado's merger of law and equity, legislatively prescribed limitations periods do not ordinarily preclude a laches defense.

316 P.3d at 624-625.

C. Plaintiff's claims of material breaches are denied, including:

1. Defendant did not breach the Original Agreement by preparing the Original Agreement with a designation of "Lot 2, Woodland Station Filing No. 1." Woodland Station Filing No. 1 was filed of public record. This is an admission of a mutual mistake. Defendant never failed to provide support and cooperation in the subdivision process to Plaintiff. Defendant's chair even signed an application for Final Plat at Arden Weatherford's request for Plaintiff on May 12, 2015. Defendant never had the obligation to subdivide and plat Woodland Station. Plaintiff had that obligation under 6.0 and 6.1. The MOU recognizes that it is not necessary to final plat Lot 2 before subsequent parcels can be created.

2. The traffic study provision was not in the Original Agreement. It was in the Memorandum of Understanding. There was no breach of a traffic study provision in the Replacement Agreement. There was no timeline for a traffic study. Riley Depo, p. 60. At the time, it was expected that the City would have done the Traffic Study due to the proposed Aquatic Center. Riley depo, p. 48-49.

3. Defendant never continued "to erect barriers and further non-contractually due obligations to avoid conveyance of the property," whatever that means. Pursuant to the

Replacement Agreement, the DDA Design Review Committee approved the Beer Garden Pavilion with only a few conditions relating to City approval. Sally Riley of the City Planning Department stated that the DDA Design Review Committee's approval of the Beer Garden Pavilion with conditions was reasonable. Riley depo p. 38.

4. Defendant never intentionally filibustered a non-contractual obligation of Design Review of the Second Parcel Development. The Plaintiff Development Team had a problem in complying with City of Woodland Park Requirements. See Sally Riley Letters above, especially April 14, 2015, in which she said that staff agrees with the Design Review Committee's comments set forth on March 20 in Exhibit 34. Sally Riley said the DDA Design Review recommendations were reasonable and in conformance with the design review guidelines. See Riley Depo, p. 73-76.

5. Sally Riley testified that conveyance of unplatted property is not legal. Riley depo, p. 113. Defendant never ignored resolutions provided by Sally Riley, the City of Woodland Park Director of Planning. Sally Riley testified as to a possible hypothetical minor subdivision which would have required the Plaintiff to meet certain City requirements which Plaintiff never did meet or even try to meet. If anything, Plaintiff ignored Sally Riley and the City Planning Department.

6. Defendant's Design Review Committee never acted in bad faith or abused its power. The Design Review Committee approved the Beer Garden Pavilion plan. Sally Riley agreed with the Design Review Committee's approval and testified that it was reasonable. Riley, p. 36-38. Sally Riley agreed with the Design Review Committee's Comments of March 20, 2015 and thought they were reasonable. Riley Depo, p. 73-76. Sally Riley saw nothing out of

line with Design Guidelines with the Design Review Committee's Comments on May 21, 2015. Riley Depo, p. 91-92.

7. Plaintiff's assertion that the Original Agreement is to be construed against the drafter is not applicable, because the Plaintiff participated in review of the drafts of the contract and inserting terms to be included in the contract.

> Any dispute over the meaning of any unclear terms must be decided against the party who prepared the contract if the other party had no opportunity to select the words written in the contract.

Colo. Jury Instr., Civil 30:35.

D. Plaintiff's Claims of Waiver By The DDA Are Disputed With One Exception.

1. Plaintiff's claims of waiver by the DDA are without basis in fact and law, with the exception that the DDA did not deem it a default when the Plaintiff failed to remove the tanks off the Amerigas Parcel by June 3, 2013. As to other issues of waiver, Defendant responds as follows:

2. Section 9.5 of the Original Agreement provides: "

> "Delays; Waivers. Any delay by either Party in instituting or prosecuting any actions or proceedings or otherwise asserting its right under the Agreement shall not operate as a waiver of such rights or deprive it of or limit such rights in any way; nor shall any waiver in fact made by such Party with respect to any specific Default by the other Party under the Agreement be considered or treated as a waiver of the rights with respect to any other Defaults by the other Party under the Agreement or with respect to the particular Default except to the extent specifically waived in writing. It is the intent of the Parties that this provision will enable each Party to avoid the risk of being limited in the exercise of the remedy provided in the Agreement by waiver, laches or otherwise in the exercise of such remedy at a time when it may still hope to resolve the problems created by the Default involved."

3. The DDA never waived any breach or default in writing, as required by the plain language of the contract provision. In keeping with the intent of that provision, the DDA

continued to work with the Plaintiff in hope to resolve the problems. Now the Plaintiff is attempting to take advantage of the DDA's good faith by making groundless claims of waiver.

4. As for the DDA not deciding to issue an immediate notice of default and termination in late 2013, Arden Weatherford and WPBG staved off a default notice in 2013 by requesting the negotiation of the Master Developer Agreement for all of Woodland Station with his Development Team to replace the Original Agreement. This Master Developer Agreement was negotiated by the parties over several months and signed by the DDA on April 1, 2014, but the Development Team refused to sign. Then the Development Team asked for a new agreement for only Lot 2 which would replace the Original Agreement of March 19, 2013. This was signed on August 28, 2014, together with the MOU, with a new development entity that is not a party to this lawsuit. After the Development Team defaulted in May, 2015, Mr. Weatherford again tried to stave off a default notice by continued negotiations.

5. A third party, Beer Garden Lane Development LLC, took title to the Amerigas parcel, which actually constitutes a breach of the Agreement because Plaintiff was required by the terms of the Agreement to take title to the Amerigas parcel and did not perform. Any assignment of rights in the Agreement was prohibited by Section 6.10.1 of the Agreement, which requires the DDA's prior written consent to any assignment of rights under the Agreement, and Section 9.1.1, which declares such an assignment to be a default of the Agreement. Plaintiff never requested any approval of any such assignment and the DDA Board only learned of the nonperformance as a result of this litigation. DDA Board members who have testified do not recall being advised that BGLD took title to the Amerigas Parcel. Brian Fleer was advised in an e-mail on December 4, 2013, that BGLD took title to the Amerigas Parcel. In any event, notice to Fleer does not constitute notice to the DDA Board or written approval or waiver. Brian Fleer

only reported to the Board on November 5, 2013, that the Amerigas tank had been removed. In any event, Mr. Weatherford, with Mr. Unruh, sought a new Master Developer Agreement to replace his Original Agreement.

6. The request for the Amerigas Parcel to be added to the Woodland Station Overlay District came from the Development Team as part of the negotiation to replace the Original Agreement with the Master Developer Agreement.

7. The DDA Board was obligated to consider any new agreement with any developer, including Arden Weatherford, after the default of the Development Team. It properly considered that proposal, but the parties could not agree.

E. Plaintiff Is Not Entitled To The Remedy Of Specific Performance of Conveyance of Any Parcel Under The Original Agreement.

1. Plaintiff's claim for specific performance is barred by illegality, since it is a crime to convey property that has not been platted. Plaintiff's claim for specific performance has been addressed and the Court has advised on February 27, 2018 that specific performance will not be a remedy in this case at trial.

F. Plaintiff Is Not Entitled To Any Damages.

1. The burden is on the plaintiff to prove that general damages resulted from the breach and, as to their amount, to prove facts that provide a reasonable basis for their calculation. *Tull v. Gundersons, Inc.*, 709 P.2d 940 (Colo. 1985).

2. The burden is on the plaintiff to prove that general damages resulted from the breach and, as to their amount, to prove facts that provide a reasonable basis for their calculation.

3. The amount of damages is limited to Zero Dollars ($0.00) by the terms of the Original Agreement. Section 9.4.3 of the Agreement states in regard to damages that "with respect to any Default by the Authority, the Authority shall not be required to pay any amount

for damages or any other award in excess of the amount that the Authority has appropriated for payment of its reimbursement obligation as required and limited by Section 8.2." The DDA never appropriated any funds for payment of any reimbursement obligation under the Agreement and therefore the amount of damages is limited to Zero Dollars ($0.00). For further reference, Section 8.2 of the Agreement provides as follows:

> "8.2 Reimbursement Obligation Subject to Annual Appropriation. The reimbursement obligation of the Authority under this Agreement shall not constitute the creation of indebtedness or authorize borrowing of money by the Authority or the City within the meaning of any constitutional or statutory limitation or provision. Such obligation of the Authority under this Agreement shall be from year to year only and shall not constitute a mandatory payment obligation of the Authority in any fiscal year beyond the present fiscal year from revenue available to the Authority in accordance with this Agreement. Payments from such available revenue shall be made in accordance with Section 6.16.2. This Agreement shall not directly or indirectly obligate the Authority or the City to make any payments beyond those appropriated by the Authority for any fiscal year in which this Agreement shall be in effect. The Executive Director (or any other officer or employee at the time charged with the responsibility of formulating budget proposals) is hereby directed to include in the budget proposals submitted to the City and the Board of Directors of the Authority, in each year that this Agreement is in effect, amounts sufficient to meet its obligations hereunder, it being the intent, however, that the decision as to whether to appropriate such amounts shall be at the discretion of the Board of Directors of the Authority."

4. The purpose of Section 8.2 is to comply with the Colorado Constitution, Article X, Section 20, i.e., the Taxpayers Bill of Rights ("TABOR") with regard to multiple fiscal year appropriations. The DDA is a "district" subject to the provisions of TABOR and appropriations can be only from year to year. The DDA's reimbursement obligation, as provided in Section 8.0 of the Agreement, is tied to certified costs of Public Improvements constructed pursuant to a Financing Plan approved by the DDA. No Financing Plan was ever submitted under the Agreement (which is one of the breaches by Plaintiff under the Agreement) and no Public Improvements were ever constructed, so there was never money appropriated for a reimbursement obligation. As such, the Agreement limits damages for a Default by the DDA to Zero Dollars ($0.00) by operation of its terms.

G. Plaintiff's Claimed Damages are not Damages of Plaintiff at all, but from a Third Party, namely BGLD, and Should be Disallowed.

1. Any and all damages claimed or incurred by a party other than Plaintiff and should be disallowed in their entirety.

(a) An analysis of Plaintiff's claimed damages reveals that the bulk of the damages are claimed by Beer Garden Lane Development, LLC ("BGLD"), which has no contractual relationship with the DDA and is not a party to this case. BGLD took title to the Amerigas parcel, which actually constitutes a breach of the Agreement because Plaintiff was required by the terms of the Agreement to take title to the Amerigas parcel and did not perform. Any assignment of rights in the Agreement was prohibited by Section 6.10.1 of the Agreement, which requires the DDA's prior written consent to any assignment of rights under the Agreement. Plaintiff never requested any approval of any such assignment and the DDA only learned of the nonperformance as a result of this litigation. While the effects of this breach are analyzed elsewhere in this brief, the effect is that BGLD has no claim for damages by and through Plaintiff or the Agreement. There is no privity of contract between BGLD and the DDA and this is strictly a breach of contract case. Specifically:

(i) Plaintiff claims $24,583.39 in property taxes paid on the Amerigas parcel. The tax receipts provided are in the name of BGLD, which owns the parcel.

(ii) Plaintiff claims $24,173.67 in interest paid on the Amerigas property loan. The supporting documentation for this claim shows BGLD as the obligor on the loan.

(iii) Plaintiff claims $64,382.60 in loss on the purchase price of the Amerigas parcel based on the difference paid in 2013 less the 2013 appraised value. Any loss was incurred by BGLD, not Plaintiff. In addition, the claimed loss is speculative insofar as it has not been realized, the appraised value at the time of purchase would not have recognized the value of the parcel after the removal of the tanks and, most importantly, Plaintiff's counsel has admitted that the appraised value for its most recent refinancing in February 2018 was $236,000. Far from being a loss, there is actually a gain of $16,000.

(iv) Plaintiff claims an alleged increase in $127,000 in value of Woodland Station "inequitably imparted" as damages. Although DDA received no benefit from any alleged increase in value, as discussed below in greater detail, if there were any inequitable benefit to the DDA it would have been as a result of BGLD's actions, not Plaintiff's.

(v) In addition to the property taxes and interest paid, the Investment/Indemnity Agreement by and between Plaintiff and BGLD attached hereto as Exhibit A describes the alleged damages incurred by BGLD to also include the claimed damages for IREA electrical, Woodland Park Water and Grade & Gravel. These damages, and the others alleged by BGLD should be disallowed without consideration as there is no privity of contract between BGLD and the DDA.

(vi) When the damages claimed by Plaintiff are reduced by deducting the amounts demonstrably incurred by parties who are not parties to this action or the Agreement, Plaintiff at best is left with a claim for damages in the amount of $4,104, which amounts are also questionable.

(vii) The claimed damages for liquor license fees in the amount of $2,250 were incurred not by Plaintiff but by Woodland Park Brewing Company, LLC. In addition, cancelled checks show that Plaintiff is claiming some of those amounts for January 2013, prior to the date of the Agreement, and from and after October 2015, after Plaintiff had abandoned performance. Further, one liquor license application renewal submitted as evidence is dated November 13, 2017, well after this litigation was filed.

(viii) The DDA has insufficient information to determine the party that incurred the other claimed costs, such as Andy's Plumbing, etc. The DDA denies those claims are damages under the Agreement.

H. The DDA Received No Inequitable Benefit as Alleged.

1. The DDA received no financial benefit from any alleged increase in value of Woodland Station. In addition, the DDA's evidence shows the alleged increase is non-existent.

2. The DDA received no economic benefit from any alleged increase in market value of Woodland Station as a result of removal of tanks from the Amerigas parcel. The DDA

is prohibited from transferring any part of Woodland Station for cash consideration by the express terms of (i) the Woodland Station Disposition and Development Agreement by and between the DDA and the City of Woodland Park and (ii) the Tax Increment Revenue Refunding Bonds, Series 2012 issued by the City of Woodland Park on behalf of the DDA. Plaintiff admitted this restriction on the DDA in its Complaint. See Paragraph 11 of the Complaint. The market value of the Woodland Station property is irrelevant to the DDA. Plaintiff's alleged $127,000 in damages arise at equity, but there is no equitable benefit to the DDA like there might be to a private party that is not subject to the DDA's limitations.

3. Further, the $127,000 damages are not valid because the appraisal is fundamentally flawed. This will be addressed at trial by Defendant's Appraisal expert, Greg Baker.

4. Plaintiff can show no actual damages from the alleged breach it claims for buying the Amerigas Parcel. Plaintiff has not been damaged by buying the Amerigas property. It never bought the property. BGLD still owes the Amerigas Parcel and its value has increased from $206,000 to approximately $236,000. WPBG cannot assert claims of alleged damages for BGLD. To the extent Plaintiff claims and assignment of BGLD's claims against the DDA, there are no damages because BGLD had no contract claims to assign.

I. <u>Plaintiff failed to mitigate its damages by failing to perform the Original Agreement or Replacement Agreement.</u>

1. See facts above regarding Plaintiff's failure to perform.

J. Plaintiff's claim for breach of contract and damages is barred by the applicable three-year statute of limitations for contracts, C.R.S. §13-80-101(1)(a).

1. See facts above regarding the statute of limitations. The tanks were removed on October 8, 2013. Plaintiff alleges breach of contract as of date tanks were removed. Plaintiff filed this action on November 5, 2016.

K. Plaintiff is not entitled to attorneys' fees under any contract or statute, or pursuant to C.R.S. § 13-17-101, et seq. or C.R.C.P. 121.

1. Plaintiff should not be allowed to raise a claim of bad faith as set forth in ¶2 and ¶4 and ¶11 of Plaintiff's Claims in the TMO. No such claim has been pled in the Complaint, or in the Case Management Order, or identified in Plaintiff's Disclosures or in Plaintiff's Discovery Requests.

2. Further, no claim for attorney fees for breach of contract should be allowed as a part of Plaintiff's claims. Such a claim is not supported by any contractual provision or any statute or case law.

3. Also, Plaintiff has not raised a claim for attorney fees in its Complaint. No claim for attorney fees was raised in the prayer for relief of the Complaint. No claim for attorney fees was raised in Case Management Order, or raised in Disclosures or Discovery responses. No claim for attorney fees was raised as element of damages in Damage Disclosures filed by Plaintiff on June 23, 2017.

4. No attorney fees are allowed as a remedy for any claim of breach of the covenant of good faith and fair dealing, which is a contract claim.

> Absent a statute or contract providing for an award of attorney fees, such fees are generally not recoverable by the prevailing party. *Bunnett v. Smallwood*, 793 P.2d 157 (Colo. 1990) (attorney fees not recoverable as damages for breach of covenant not to sue). The partnership agreement did not provide for an award of attorney fees, and Colorado courts have not yet recognized an exception for cases, such as this, involving a wilful or bad faith breach of contract that does not have the effect of causing litigation with a third party. *See Wilson & Co. v. Walsenburg Sand & Gravel, Co.*, 779 P.2d 1386

> (Colo. App. 1989). Therefore, because there was no basis for an award of fees in this case, the trial court did not err by vacating its previous award of such fees.
>
> The parts of the judgment granting the decree of specific performance in favor of plaintiff, dismissing plaintiff's claims for consequential damages and for breach of the covenant of good faith and fair dealing, and denying plaintiff's claim for attorney fees are affirmed.

Friedman v. Colorado Nat. Bank of Denver, 825 P.2d 1033, 1044 (Colo. App. 1991), aff'd in part, rev'd in part, 846 P.2d 159 (Colo. 1993)

5. Plaintiff only raised a claim for Attorney Fees under C.R.S. § 13-17-101, relating to replying to the alleged frivolous Counterclaim in its Reply to Defendant's Counterclaim.

6. "A claim or defense is frivolous if the proponent can present no rational argument based on the evidence or law in support of that claim or defense." *Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069 (Colo. 1984). Defendant has provided in this brief below, and will provide at trial, rational arguments based on Section 6.14 of the contract for its claim for damages in its counterclaim. With regard to other defenses by Defendant, the Court has already ruled that Plaintiff's claim of specific performance will not be a remedy in this case.

L. DDA is not bound by any ultra vires acts by its Board, its Executive Director or its past Chair.

1. Plaintiff claims the DDA did not comply with the Original Agreement to convey property merely upon the removal of the tanks from the Amerigas parcel. The Court has ruled that specific performance will not be a remedy in this case. Nevertheless, the Plaintiff states it will file a motion for consideration and the Defendant feels obliged to state that the DDA has to comply with the Colorado DDA statute regarding fair value. Plaintiff claims that Defendant breached the agreement by not approving the design of the Developer for the multi-use building. It is not within the power of the DDA Board to promise future approval. The DDA has discretionary functions and is not estopped from denying permission to develop property that does not meet the contract or design guidelines. (The Developer never met the requirements of

the City of Woodland Park either.) Such a contract would be an ultra vires contract as stated in the *Meyer* case:

> Buffalo Park first alleges that the Board is estopped to deny subdivision approval. As a basis for this estoppel, it alleges that over the course of the relationship between the Boulder County Planning Commission and Buffalo Park, the Planning Commission repeatedly requested that Buffalo Park prove that it could meet certain conditions set out by the Planning Commission. It further asserts that the Planning Commission requested numerous changes in the concept of the subdivision in order that a favorable ruling on the subdivision might be forthcoming, and it maintains *54 that it complied with all such requests of the Planning Commission. We find no estoppel.
>
> Buffalo Park concedes that there was no express agreement between the parties but nevertheless asserts that the doctrine of promissory estoppel is applicable because the Board and the Planning Commission should not be permitted to confer, negotiate, and work with a subdivision developer in a continuing relationship and then finally deny him permission to develop the subdivision. We disagree.
>
> To hold so would usurp the discretionary functions of the Board and the Planning Commission. See Ford Leasing Development Co. v. Board of County Commissioners, 186 Colo. 418, 528 P.2d 237 (1974). Thus, as a matter of law, it was not within the power of the Board or the Planning Commission to act in such a way as to promise future approval of Buffalo Park's subdivision approval request.
>
> Moreover, Buffalo Park could not have prevailed even if it were to show an ultra vires agreement with the Board since such an agreement cannot be enforced against county or municipal entities. See Normandy Estates Metropolitan Recreation District v. Normandy Estates, Ltd., 191 Colo. 292, 553 P.2d 386 (1976); People ex rel. Mine Owners' Ass'n v. White, 81 Colo. 315, 255 P. 453 (1927). Hence, the trial court correctly ruled that, as a matter of law, Buffalo Park could not show that the Board was estopped to deny subdivision approval.

<u>Meyer v. Buffalo Park Dev. Co.</u>, 44 Colo. App. 52, 53–54, 607 P.2d 401, 402 (1980)

M. <u>Plaintiff's claim for attorney fees as damages for breach of contract were never pled and Plaintiff is not entitled to attorney fees in a contract action where there is not statute or provision in the contract.</u>

1. Plaintiff has not raised a claim for attorney fees in its Complaint. No claim for attorney fees was raised in the prayer for relief of the Complaint. No claim for attorney fees was raised in Case Management Order, or raised in Disclosures or Discovery responses. No claim

for attorney fees was raised as element of damages in Damage Disclosures filed by Plaintiff on 6-23-17.

2. Further, no claim for attorney fees for breach of contract should be allowed as a part of Plaintiff's claims for damages flowing from an alleged breach of the Original Agreement dated 3-19-13. Such a claim is not supported by any contractual provision or any statute or case law.

3. Also, no attorney fees are allowed as a remedy for any claim of breach of the covenant of good faith and fair dealing, which is a contract claim.

4. 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*.

5. 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. "A claim or defense is frivolous if the proponent can present no rational argument based on the evidence or law in support of that claim or defense." Western United Realty, Inc. v. Isaacs, 679 P.2d 1063, 1069 (Colo. 1984). Plaintiff has not presented a rational argument for specific performance given the laws cited by the Defendant. Plaintiff can present no rational argument for breach of contract or damages for breach of contract. Plaintiff has not alleged a set of facts that would constitute performance under the Original Agreement.

CONCLUSION

For the reasons above, Plaintiff fails to state a claim upon which relief can be granted and Judgment should be granted for the Defendant against the Plaintiff and this case dismissed with prejudice, with an Order releasing the Lis Pendens on DDA's property filed by the Plaintiff.

COUNTERCLAIM OF DEFENDANT WPDDA

III. THE DDA IS ENTITLED TO INDEMNIFICATION FROM THE PLAINTIFF FOR THE DDA'S EXPENSES IN CONNECTION WITH THIS LAWSUIT, INCLUDING ATTORNEY FEES AND COSTS.

1. Section 6.14 of the Original Agreement provides:

> 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.

2. Plaintiff agreed pursuant to this provision to indemnify the DDA from all suits, claims, losses, liabilities and expenses, including attorneys' fees and costs, arising out of or in any manner caused by, connected with or resulting from performance or failure to perform the Original Agreement. This lawsuit arises out of, is caused by, is connected with and results from performance or failure to perform the Original Agreement. The DDA is entitled to an award of attorneys' fees and costs arising out of this lawsuit based on this provision of the Original Agreement. This claim is particularly compelling given that this lawsuit is funded by, and the amounts of alleged damages largely incurred by, BGLD, which is not a party to the Original Agreement.

3. Plaintiff's claims for damages are barred or reduced by set-off from the damages claimed against Plaintiff as set forth in the Counterclaim pursuant to the Indemnification clauses of Section 6.14.

4. DDA's Costs and Attorney fees as of this date are in excess of $150,000, and continue to accrue through trial. The DDA paid $3,200 to NES for DDA's share of a Design Concept Plan. There may be other DDA costs which will be disclosed in testimony.

Dated this date: May 16, 2018.

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.

Certificate of Service

I CERTIFY that I requested service by Colorado Courts E-Filing of a true and complete copy of this document to all parties' counsel of record who have entered their appearance herein with Colorado Courts E-Filing on May 16, 2018.

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.