DISTRICT COURT, TELLER COUNTY, COLORADO 101 W. Bennet Ave. P.O. Box 997 Cripple Creek, CO 80813 (719) 689-2574	DATE FILED: July 9, 2018 10:30 PM FILING ID: 46F01742C2211 CASE NUMBER: 2016CV30085
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

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY DEFENDANT

COMES NOW the Defendant, Woodland Park Downtown Development Authority, a body corporate of the State of Colorado ("WPDDA" or "DDA" or the "Authority"), and hereby submits its Proposed Findings of Fact and Conclusions of Law in the above captioned case:

DDA'S PROPOSED FINDINGS OF FACT

I. PROCEDURAL HISTORY AND PRIOR RULING IN FAVOR OF DEFENDANT'S MOTION FOR DETERMINATION OF QUESTION OF LAW

1. On December 21, 2017, Defendant filed a Motion for Determination of Question of Law regarding the issue of whether Plaintiff's Requested Remedy of Specific Performance of Conveyance of Unplatted Property is Unlawful and Illegal.

2. In Defendant's Motion, Defendant identified certain undisputed facts, including, without limitation, the following:

> "1. The Plaintiff, Woodland Park Beer Garden, LLC, signed an Agreement for Disposition and Development (the "Agreement") with the Defendant dated March 19, 2013 (hereafter the "2013 Agreement," a copy of which is attached hereto as **Exhibit 11**).
>
> 2. The Defendant, Woodland Park Downtown Development Authority, is a body corporate of the State of Colorado created pursuant to C.R.S. §31-25-801 et seq.
>
> 3. Upon information and belief, the managing member of Plaintiff is Arden Weatherford, who signed the Agreement. Plaintiff Woodland Park Beer Garden, LLC self-identifies as a "Developer" (Complaint, ¶ 1, et seq.; 2013 Agreement, p.19).
>
> 4. The Agreement does not describe any identifiable parcel of property to be conveyed. The First Parcel and other parcels were to be described subsequent to the Agreement as part of the platting process. (2013 Agreement, §4.17 and §4.22) …
>
> 11. Lot 2, Woodland Station Filing No. 1, has no legal description and has never been platted and subdivided.
>
> 12. The "First Parcel" of Lot 2 has no legal description and has never been platted and subdivided.
>
> 13. It is illegal and a violation of the Woodland Park City Code to convey any lot or parcel of land unless it has been platted and approved and recorded in the office of the clerk and recorder. The Woodland Park City Code states:
>
> > 17.56.020 - Sale of unapproved land prohibited.
> > It is unlawful to sell, trade, or otherwise convey any lot or parcel of land as a part of or in conformity with any plat, or replat of any subdivision within the area subject to application of this title unless said plat, or replat has been approved as prescribed by this title and filed and recorded in the office of the clerk and recorder. (Ord. 327 § 2 (Sec. 1(G)(2)), 1984)
> >
> > 17.56.030 - Violation—Penalty.
> > Any person, firm, co-partnership, association, or corporation violating any of the provisions of this title shall be guilty of a misdemeanor and shall upon conviction thereof be punished by a fine not to exceed three hundred dollars or by imprisonment not to exceed ninety days, or both, at the discretion of the municipal court. The sale of each and every lot sold in violation of this title shall be considered a separate violation. (Ord. 327 § 2 (Sec. 1(G)(3)), 1984) (See attached Exhibit 41)"

3. In its Motion, Defendant requested an Order of Determination of Law that the Plaintiff's requested remedy for conveyance of unplatted land by the DDA to Plaintiff is unlawful and illegal. Further, it was requested that the Court Order that the DDA cannot be liable for damages for failure to convey unplatted land to Plaintiff.

4. Plaintiff filed a Response on February 8, 2018.

5. Defendant's filed its Reply on February 22, 2018.

6. The Court advised on February 27, 2018, that it granted the Defendant's motion and stated that specific performance would not be available as a remedy at trial.

7. In a pretrial conference in this matter, it was settled that the Plaintiff is not making a standalone claim of bad faith; Plaintiff's bad faith claims relate to the duty of good faith and fair dealing in performance of a contract.

II. GENERAL OVERVIEW OF THE 2013 AGREEMENT

1. Plaintiff Woodland Park Beer Garden, LLC ("WPBG") is the Plaintiff in this case.

2. Defendant Woodland Park Downtown Development Authority ("WPDDA" or "DDA") is a body corporate of the State of Colorado.

3. This lawsuit involves the claim by Plaintiff that Defendant breached that certain Agreement for Disposition and Development dated March 19, 2013 by and between Plaintiff and Defendant (the "Agreement" or the "Original Agreement" or the "2013 Agreement").

4. There is a piece of property in downtown Woodland Park owned by the DDA which is known as "Woodland Station." The area has been shown on maps admitted in this case.

5. 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, identified as "Lot 2" of Woodland Station.

6. Arden Weatherford and the DDA negotiated an Agreement on the disposition and development of "Lot 2" of Woodland Station, which was signed between the DDA and a single member LLC ("WPBG") owned by Arden Weatherford dated March 19, 2013 (Exhibit 1 and also Exhibit 208). WPBG was denominated in the 2013 Agreement as the "Developer."

7. Plaintiff claims that Defendant DDA breached the 2013 Agreement by failing to convey a First Parcel upon completion of Section 5.0 of the 2013 Agreement. Complaint, Exhibit 339.

8. Although the Court has ruled on February 27, 2018, that specific performance will not be a remedy in this case, the Court allowed Plaintiff to introduce evidence at trial regarding its claim for breach of contract and any damages therefrom. (Order of February 27, 2018).

9. Defendant introduced evidence in opposition to the Plaintiff's claim of breach of contract regarding failure to convey, not only as it applies to Plaintiff's claim for specific performance, but also as it applies to Plaintiff's claim for breach of contract and alleged damages flowing therefrom.

10. By the time of the 2013 Agreement, Lot 1 of Woodland Station had been previously platted. However, "Lot 2" of Woodland Station had never been platted. No "Parcels" of Lot 2 mentioned in the Agreement had ever been platted. There was a Preliminary Plat which showed a drawing of a proposed future Lot 2. (Exhibit 3). There was no drawing of a proposed future "First Parcel" of Lot 2. (Arden Weatherford Cross-X and Tanner Coy Direct)

11. The 2013 Agreement (Section 5.0) required WPBG to purchase an adjoining parcel of property to Woodland Station known as the Amerigas Property and remove some propane tanks stored on the Amerigas Property by June 3, 2013. (Exhibit 208).

12. Pursuant to Sec. 6.0 of the 2013 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." (Exhibit 208).

13. 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 and all other applicable City requirements." (Exhibit 208).

14. The 2013 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." (Exhibit 208). There is no legal description of a "First Parcel."

15. 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 DDA. 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 in the same sentence as, and immediately prior to 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. (Exhibit 208).

16. Section 6.2.2. of the Agreement sets forth another express condition precedent to conveyance of the First Parcel. 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." (Exhibit 208).

17. In addition, 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. (Exhibit 208) (Paul Benedetti Direct).

III. THERE WAS NO MEETING OF THE MINDS IN FORMING THE 2103 AGREEMENT.

1. With regard to page 3 of the 2013 Agreement, Section 4.17 contained a definition of First Parcel as follows: "First Parcel means the first parcel of property to be conveyed to the Developer…" Mr. Weatherford admitted that there is no other definition of First Parcel in the contract. When asked what was the legal description of the First Parcel, Mr. Weatherford stated,

"I don't know." Mr. Weatherford stated from this Agreement we don't know the legal description of the First Parcel. (Arden Weatherford Cross – X)

2. Mr. Weatherford admitted that Lot 2 was never platted to this day, nor any First Parcel of Lot 2. Mr. Weatherford admitted that there was no legal description for the First Parcel, and Lot 2 did not exist because it had never been subdivided. (Arden Weatherford Cross – X)

3. The parties did not agree on all the essential terms of the contract to have a meeting of the minds to support the existence of a contract.

4. Further negotiations are required to come to agreement on essential terms of the contract.

5. The Court cannot reasonably write in the legal description of the First Parcel as a term of the 2013 Agreement.

IV. PLAINTIFF FAILED TO PERFORM UNDER THE CONTRACT AND ITS NON-PERFORMANCE WAS NOT JUSTIFIED.

A. Relevant Arden Weatherford Admissions of Non-Performance by WPBG.

1. With the regard to the Complaint filed in this case (Exhibit 339), Arden Weatherford admitted that there was no reference to the Agreement dated August 28, 2014 (the ("2014 Agreement" or "Replacement Agreement"). (Arden Weatherford Cross – X)

2. Mr. Weatherford stated that he is not a party to the 2014 Agreement. Mr. Weatherford stated that he did not sue under the 2014 Agreement. Mr. Weatherford admits that WPBG and Arden Weatherford have no claim under the 2014 Agreement. (Arden Weatherford Cross – X)

3. Mr. Weatherford admits that there is no claim for attorney fees in this Complaint. (Arden Weatherford Cross – X)

4. Mr. Weatherford testified that he wants fees for bad faith. (Arden Weatherford Cross – X)

5. At a pretrial conference in this matter, it was settled that the Plaintiff is not making a standalone claim of bad faith.

6. In Paragraph 17 of the Complaint, Mr. Weatherford was asked about the allegation that on "September 12, 2013, Developer completed the purchase of fee title to the Amerigas property ...." Mr. Weatherford admitted that WPBG did not purchase fee title to the Amerigas property. Mr. Weatherford admitted that Beer Garden Lane Development LLC (BGLD) purchased it. Mr. Weatherford admitted that the Developer did not take title to the Amerigas property. (Arden Weatherford Cross – X)

7. With regard to Exhibit 262, an email dated February 20, 2013, Mr. Weatherford admitted that there are many dates to plug in and change. He admitted that he had input on date changes. He admitted that a change in one of the dates of the contract allowed him to delay his performance under the contract for the Concept Plan and the Finance Plan for the First Parcel to October 1 2016. He admitted that, "At the same time as we proposed the project, we proposed to do the public improvements. And public improvements can be a profitable part of this." (Arden Weatherford Cross – X)

8. Mr. Weatherford admitted that he didn't think that DDA was going to do public improvements themselves. He admitted that he was involved in review of the contract. With regard to Exhibit 266, Mr. Weatherford stated on December 26, 2013 that he was negotiating with the attorney regarding the Master Developer Agreement. He also made comments that we want Fleer to tell the Board that, "Benedetti is okay with it," and then the Board takes that as "permission" or "approval". (Exhibit 266) (Arden Weatherford Cross – X)

9. With regard to Arden Weatherford's real estate experience, Mr. Weatherford admitted that he had not taken any raw land and built a building on it. Mr. Weatherford stated that he wouldn't describe himself as a real estate Developer. (Arden Weatherford Cross – X)

10. Mr. Weatherford stated that WPBG was the Developer under the 2013 Agreement (Exhibit 208). Mr. Weatherford admitted that the 2013 Agreement was for the development of the entirety of Lot 2. (Arden Weatherford Cross – X)

11. Mr. Weatherford testified that it was his intention to develop all of Lot 2. He testified that WPBG would develop all of Lot 2 through his partners. (Arden Weatherford Cross – X)

12. Mr. Weatherford admitted that he never even submitted personal financials. (Arden Weatherford Cross – X)

13. Mr. Weatherford said he never did get legal counsel to look over the Agreement. Mr. Weatherford says that he understood the Agreement. Mr. Weatherford agreed that the contract required that he would abide by the plan of development in the Agreement, State statutes, the City Council, the Foundation Plan, and the law as required in Section 6.1 of the 2013 Agreement. (Arden Weatherford Cross – X)

14. Mr. Weatherford agrees that Section 4.2 defines the Agreement as this Agreement as it may be amended or supplemented in writing. (Arden Weatherford Cross – X)

15. Mr. Weatherford agreed that the "Developer" in this Agreement means WPBG as set forth in Section 4.13. (Arden Weatherford Cross – X)

16. Mr. Weatherford admits that he did not provide a financing plan, as defined pursuant to Section 4.16 of the 2013 Agreement, by October 1, 2013 for Parcel 2. There were no plans for financing construction of the improvements in connection with the concept plan for

each parcel. There were no cost estimates for public improvements. (Arden Weatherford Cross – X)

17. Exhibit A of the 2013 Agreement provides that Developer will provide a concept plan and finance plan for the First Parcel as of October 1, 2016. (Arden Weatherford Cross – X)

18. With regard to the financing plan and concept plan for Parcel #2, which was required to be filed on October 1, 2013, a concept plan was submitted by Tim Seibert on November 5, 2013. (Arden Weatherford Cross – X)

19. Mr. Weatherford admitted he did not submit a financing plan as required by the 2013 Agreement. (Arden Weatherford Cross – X)

20. There was a date changed to 2016 in the agreement for Mr. Weatherford to provide a concept plan and financing plan for the First Parcel. Mr. Weatherford states that was a date chosen by agreement. Then he stated that he was not involved with that date change at the DDA meeting, but he say that before the public meeting with the DDA he did talk to Brian Fleer about dates. (Arden Weatherford Cross – X)

21. Mr. Weatherford stated this Agreement was not ambiguous. He did concede that he received a draft and it was fully negotiated. (Arden Weatherford Cross – X)

22. Mr. Weatherford admitted executing the 2013 Agreement. The Court stated that his testimony about prior business experience leads to the conclusion that Mr. Weatherford was a sophisticated businessman when he executed this Agreement. (Arden Weatherford Cross – X)

23. With regard to page 3 of the 2013 Agreement, Section 4.17 contained a definition of First Parcel as "First Parcel means the first parcel of property to be conveyed to the Developer…" Mr. Weatherford admitted that there is no other definition of First Parcel in the contract. When asked what was the legal description of the First Parcel, Mr. Weatherford stated,

"I don't know." Mr. Weatherford stated from this Agreement we don't know the legal description of the First Parcel. (Arden Weatherford Cross – X)

24. With regard to Section 4.19 of the 2013 Agreement, Mr. Weatherford said he did not do any private or public improvements. (Arden Weatherford Cross – X)

25. Section 4.24 of the 2013 Agreement states, "Plat" means each of the plats approved by the City in connection with resubdivision of the property into separate parcels as required by Section 6.1." (Arden Weatherford Cross – X)

26. Section 6.1 of the 2013 Agreement states that, "Property shall be subdivided into up to eight (8) separate parcels for redevelopment and improvements in accordance with the WS Flow Chart depicted on Exhibit A." It further states, "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." (Arden Weatherford Cross – X)

27. Section 6.0 of the 2103 Agreement provides that the Developer shall have sole responsibility for the design, development, and construction of the improvements, and that all such construction shall conform with all applicable laws, codes, ordinances, policies, and this Agreement. The Developer obligations include the statement that "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." (Arden Weatherford Cross – X)

28. Mr. Weatherford admits that he can plat a parcel without having to plat the whole Lot 2. He admits he never did file an application for a plat. (Arden Weatherford Cross – X)

29. With regard to Section 6.2.2 of the 2013 Agreement which stated, "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." When Mr. Weatherford was asked if he prepared the covenants, he said the covenants were the temporary use permits and restrictions. Mr. Weatherford denied that covenants were required. Mr. Weatherford did not answer the question if he knew what covenants are. (Arden Weatherford Cross – X) (See Sally Riley's Testimony in which she stated that Temporary Use Permits are not Covenants.)

30. Mr. Weatherford admitted that Section 6.2.2 of the 2013 Agreement is not ambiguous. (Arden Weatherford Cross – X)

31. Mr. Weatherford stated that he was in agreement with Brian Fleer that the temporary use was the covenants. Mr. Weatherford could point to no written evidence of such an agreement. The 2013 Agreement required all amendments to be in writing. (Arden Weatherford Cross – X)

32. Mr. Weatherford admitted that he never prepared a reconveyance deed.

33. Mr. Weatherford admitted he does not know whether Fleer can bind the DDA. (Arden Weatherford Cross – X)

34. Mr. Weatherford never did look at the preliminary plat prior to signing the Agreement. (Arden Weatherford Cross – X)

35. Mr. Weatherford did not review property records to see if Lot 2 had been platted prior to signing the 2013 Agreement. The legal description for Lot 2 in Section 7.1 of the Agreement was not correct. Lot 2 was to be subdivided into up to eight (8) parcels. Mr.

Weatherford admitted there was no description of the First Parcel in the 2013 Agreement. (Arden Weatherford Cross – X)

36. Mr. Weatherford admitted that the contract provided that the Developer was responsible for subdivision documents. (Arden Weatherford Cross – X)

37. Mr. Weatherford admitted that Lot 2 was never platted to this day, nor any First Parcel of Lot 2. Mr. Weatherford admitted that there was no legal description for First Parcel, and Lot 2 did not exist because it had never been subdivided. (Arden Weatherford Cross – X)

38. Section 6.3 of the 2013 Agreement provided for a concept plan and a financing plan to be submitted on the First Parcel on October 1, 2013. This date had been changed to 2016 at the DDA board meeting. (Arden Weatherford Cross – X). The DDA board members were told this was a typographical error (Tanner Coy testimony). Mr. Benedetti testified that it was not a typographical error. (Benedetti Direct testimony)

39. Section 6.3 provided that a concept plan and financing plan would be required for Parcel Two on or before October 1, 2013, and on or before each October 1 thereafter for the remaining parcels. Mr. Weatherford admitted that he did not submit a financing plan for Parcel 2 on or before October 1, 2013, and never ever submitted a financing plan for any parcel as required by the 2013 Agreement. (Arden Weatherford Cross – X)

40. Pursuant to Section 6.4 of the Agreement, Mr. Weatherford admitted that he did not submit Developer financing by April 1, 2014 on the second parcel or for any other parcel thereafter. (Arden Weatherford Cross – X)

41. Section 6.5 of the Agreement required that the Developer take title to the First Parcel on or before June 3, 2013 on the First Parcel and May 1, 2014 for the Second Parcel. This did not happen. (Arden Weatherford Cross – X)

42. With regard to Section 6.10 of the 2013 Agreement, the qualifications of and identify of the Developer of each parcel is of particular concern to the Authority. Section 6.10.1 required prior written approval of the Authority before the Developer could assign all or any part of any interest in this Agreement. The Developer did not obtain written approval of the Authority for BGLD to perform any obligations of WPBG under this contract. BGLD performed a Developer obligation under this contract to purchase the Amerigas property, without the written approval of the DDA. (Arden Weatherford Cross – X)

43. WPBG did not pay for any concept plan. Kip Unruh and the DDA shared the cost for the concept plan prepared by NES dated November 5, 2013. (Arden Weatherford Cross – X)

44. Mr. Weatherford admits that the 2013 Agreement does not provide conveyance for all of Lot 2 upon purchase of Amerigas property and the removal of the tanks. (Arden Weatherford Cross – X)

45. Mr. Weatherford admits that he doesn't know in this Agreement what the First Parcel is, but he asserts that it was understood by reference to "maps". Mr. Weatherford admits that said "maps" are not a part of this Agreement. (Arden Weatherford Cross – X)

46. Section 9.1.1 of the 2013 Agreement provides that it would be a default by the Developer if the Developer, in violation of this Agreement, assigns or attempts to assign all or any part of this Agreement, the private improvements or any part or parcel of the property, or any rights in the same;… (Exhibit 208).

47. Section 9.1.6 of the 2013 Agreement provides that other defaults by the Developer to materially perform any other obligation required of it under this Agreement or to make good faith effort to obtain the Developer financing shall be a default and a breach of this Agreement. (Arden Weatherford Cross – X)

48. Mr. Weatherford admitted that he never provided Developer financing as required by this Agreement. (Arden Weatherford Cross – X)

49. Mr. Weatherford stated that Kip Unruh provided some personal financial information to the DDA relative to Parcel 2, but Mr. Weatherford admitted that Kip Unruh is not WPBG. Mr. Weatherford admitted that the Developer is WPBG and the Developer is obligated to perform according to the timeline in Exhibit A. (Arden Weatherford Cross – X)

50. With regard to Parcel 2, there was no advance or Developer financing provided by WPBG. There was no commencement of construction of Parcel 2. There was no completion of construction on Parcel 2 in accordance with the deadlines of the 2013 Agreement. (Arden Weatherford Cross – X)

51. With regard to Parcel 3 of the 2013 Agreement, there was no Developer financing provided. There was no conveyance of Parcel 3. There was no commencement of construction. There was no completion of construction. (Arden Weatherford Cross – X)

52. With regard to Parcel 4 of the 2013 Agreement, WPBG failed to meet the obligation for Developer financing, conveyance, commencement of construction or completion of construction. (Arden Weatherford Cross – X)

53. With regard to Parcel 5 of the 2013 Agreement, WPBG failed to meet the obligation for Developer financing, conveyance, commencement of construction or completion of construction. (Arden Weatherford Cross – X)

B. Paul Benedetti's Relevant Testimony about the 2013 Agreement and Default by WPBG of the 2013 Agreement

1. Paul Benedetti is a private attorney who has represented the Woodland Park DDA since 2008. The City had turned over his attorney-client privileged emails to Arden Weatherford

without permission. Therefore the DDA has waived the attorney-client privilege for him to testify as to Lot 2 Agreements. (Benedetti direct exam)

2. Exhibit 367 was admitted Paul Benedetti's CV. It showed Mr. Benedetti's qualifications as an expert in urban redevelopment law, public-private partnerships, zoning and land use matters, and real estate transactions since 1963 to the present date. He is the co-author of the publication entitled, "Law of Planning and Land Use by the Colorado Chapter of the Planning Association." He has been the attorney for the Denver Urban Renewal Authority since 1970. Since 1966, 100% of his practice has been in urban renewal/DDA/TIF legal issues. He has authored articles for the *Colorado Lawyer*, the *Urban Renewal Handbook*, and other publications. (Benedetti direct exam)

3. He has been qualified and admitted to testify as an expert witness in redevelopment matters. He has been qualified to testify in redevelopment matters which included the Colorado DDA statute. He has specialized knowledge of disposition agreements and the requirements of fair value under the Colorado DDA statutes. (Benedetti direct exam)

4. The Court finds that Paul Benedetti is qualified to testify as an expert in this case with regard to the DDA statute and its requirement of fair value in any disposition of real estate by a DDA in Colorado. (Benedetti direct exam)

5. With regard to the original 2013 Agreement, Mr. Benedetti prepared the draft, but some information has been filled in. Woodland Park Beer Garden LLC was the signatory to this Agreement with the Woodland Park DDA. (Benedetti direct exam)

6. Mr. Benedetti testified that the 2013 Agreement was drafted to comply with the Colorado Constitution, the DDA statutes, and the City Agreements between the DDA and the City of Woodland Park and bond documents. (Benedetti direct exam)

7. Pursuant to the DDA statute, property has to be disposed of for fair value. It does not require market value. (Benedetti direct exam)

8. Pursuant to Article 11, Sections 1 and 2, of the Colorado Constitution, public property cannot be given away. (Benedetti direct exam)

9. Pursuant to C.R.S. 31-25-808, fair value is established by the DDA Board taking into account the factors as set forth in the statute. (Benedetti direct exam)

10. The DDA was required by its agreement with the City to transfer property for no cash consideration. The fair value in the 2013 Agreement would be permanent improvements in accordance with a schedule of performance. (Benedetti direct exam)

11. Mr. Benedetti's opinion is that the 2013 Agreement was not ambiguous. However there was an error in the Agreement. With regard to the legal description, Lot 2 of Woodland Station was not platted so the legal description was wrong. This is a mistake by both parties. (Benedetti direct exam)

12. The First Parcel of Lot 2 under this Agreement was never defined. The Agreement provided that up to eight (8) parcels would be created. There had to be a defined First Parcel before it could be conveyed. (Benedetti direct exam)

13. The First Parcel was not legally defined because the Developer is required to plat the lot and parcels. Pursuant to Section 6.1 of the Agreement, the Developer had to come up with parcels, the concept plan, and the finance plan. (Benedetti direct exam)

14. According to Mr. Benedetti, there is no difference between subdivision and resubdivision and platting and replatting. (Benedetti direct exam)

15. One of the most important provisions of the document was that the Developer had to provide a Deed in Escrow in case of no performance. Section 6.2.4. Pursuant to Section

6.2.2, the Developer had to provide covenants agreeable to the DDA. Covenants govern use and restrictions. The Developer is to propose the covenants and negotiations, if any, would follow. (Benedetti direct exam)

16. It was up to the Developer to determine the number of parcels pursuant to the 2013 Agreement. It was up to the Developer to do the construction on each parcel pursuant to the deadlines contained in Exhibit A attached to the 2013 Agreement. (Benedetti direct exam)

17. These agreements are time sensitive. Fair value requires development. The development has to get done before conditions change. Complete construction has to happen in a reasonable time. (Benedetti direct exam)

18. The DDA provided support and cooperation. It even signed the application for plat. The plat conditions are a city requirement. (Benedetti direct exam)

19. Section 5.0 of the Agreement was not complied with because the Developer did not purchase the Amerigas property and move the tanks. The Amerigas property was purchased by BGLD and not the Developer. (Benedetti direct exam)

20. When asked what's the harm if someone else takes title to the Amerigas property besides the Developer, Mr. Benedetti said that the fair value requirements of the Agreement depend on the financial and legal ability of the Developer. That is why there are assignment restrictions in the 2013 Agreement. See Section 6.10.1. Mr. Benedetti said if you split up rights and responsibilities you lose control as to who is obligated on this Agreement. Someone could make an illegal profit from this Agreement for example. Having BGLD assume the responsibilities of WPBG violates this Agreement. (Benedetti direct exam)

21. The Developer, in attempting to assign its obligations under its 2013 Agreement to purchase the Amerigas property was in violation of this 2013 Agreement and this was a default by the Developer. (Tanner Coy Direct)

22. With regard to the BGLD, the DDA is not dealing with a party that it contracted with. This would be a violation of the fair value requirement. See Section 9.1.1 which states that any assignment of any part of this Agreement is a default. (Benedetti direct exam)

23. Section 9.4.3 is a damage limitation in the 2013 Agreement. Since there is no parcel and no reimbursement obligations, there cannot be any damages claimed for breach of the contract. Further, the damage limitation in this Agreement is required by TABOR because there has to be an appropriation every year. The damage limitation in this Agreement is that the DDA shall not be required to pay any amount for damages or any other award in excess of any amount that the DDA has appropriated for payment of its reimbursement obligations. Therefore any damages allegedly claimed by the Developer are limited to zero. (Benedetti direct exam)

24. Section 13.0 provides that no third party beneficiary rights are created in favor of any person not a party to this Agreement, except for lenders. (Benedetti direct exam)

25. Section 6.14 of the Agreement is an indemnification clause which contains broad language which makes the Developer liable for attorneys' fees and costs arising out of or in any manner caused by, connected with or resulting from performance or failure to perform this Agreement. In other words, if the Developer fails to perform, the Developer is liable to the DDA for attorneys' fees. (Benedetti direct exam)

26. Section 9.5 of the 2013 Agreement provides that any delay by a party in asserting rights under this Agreement shall not operate as a waiver of such rights, nor shall any waiver in

fact in respect to any specific default be treated as a waiver of rights to any other defaults unless it is specifically waived in writing. (Benedetti direct exam)

27. With regard to Exhibit 266, Mr. Benedetti testified that it bothers him if someone is misleading the Board as to what he said. (Benedetti direct exam)

28. With regard to Exhibit 35 which is an email from Arden Weatherford for an agenda for a meeting to replace the existing agreement, Mr. Benedetti testified that he had not performed to date so the 2013 Agreement was going to be replaced. Arden Weatherford (WPBG) had not complied with producing covenants, a concept plan, a finance plan, or a plat. (Benedetti direct exam)

29. Exhibit 209 is a draft of the AGREEMENT FOR DISPOSITION AND DEVELOPMENT (Lots 2, 3, 4, & 5 of Woodland Station), otherwise known as the "Master Developer Agreement" or "MDA." There was a signature line for Woodland Park Beer Garden LLC in this draft version. (Benedetti direct exam)

30. Exhibit 210 is the final version of the Master Developer Agreement to expand and replace the original Lot 2 Agreement. This was approved and signed by the DDA Board on April 1, 2014. This contained a signature line for Woodland Park Village LLC, but it was never signed. (Benedetti direct exam)

31. With regard to the AGREEMENT FOR DISPOSITION AND DEVELOPMENT (Lot 2 Woodland Station) REPLACING AGREEMENT DATED MARCH 19, 2013 with WOODLAND PARK BEER GARDEN, LLC, ("2014 Agreement" or "Replacement Agreement") dated August 28, 2014, Mr. Benedetti testified he had nothing to do with it. He didn't prepare this Agreement or review it. (See Exhibit 213). Mr. Benedetti does not recall being involved with the DDA sending notice of default on May 5, 2015. (Benedetti direct exam)

32. Mr. Benedetti found out about the existence of the Replacement Agreement in June of 2015. He drafted the Resolution 1-2015 to encompass everything and every possibility. (Benedetti direct exam)

33. At that time, Kip Unruh was walking away from the project. Mr. Unruh had instructed his group to stop working. The Resolution was to send a notice of default to everyone. Mr. Fleer did not carry out the Board's resolution. "I think I found out about it in January of 2016 and told him to send the notice of default immediately." (Benedetti direct exam)

34. Mr. Benedetti drafted the Notice of Default in Exhibit 232. (Benedetti direct exam) The Notice of Default was specifically directed "to the extent" that WPBG had any claims under any agreement, including the 2013 Agreement. This Notice of Default is written notice following the July 7, 2015 resolution that the Developer WPBG is in default of the 2013 Agreement and stated at least seven defaults of this Developer's obligations. (Exhibit 232) (Benedetti direct exam)

35. The Notice of Default was drafted because there was no performance of the Original Agreement. The January 6, 2014 meeting was to replace it. There was never any attempt to perform the Original Agreement. (Benedetti direct exam)

36. Section 5.0 is not consideration of conveyance of the First Parcel. You don't get to the rest of the contract until Section 5.0 is satisfied. (Benedetti direct exam)

37. Conveyance would have been impossible because the First Parcel wasn't subdivided. You need a subdivision plus compliance with the other provisions of the contract. (Benedetti direct exam)

38. The 2013 Agreement required that the Developer provide a Financing Plan. Parcel Two should have had a Concept Plan and a Financing Plan as of October 1, 2013. (Benedetti direct exam)

39. There was a change in the document to change the date for the Concept Plan and Financing Plan for the First Parcel to October 1, 2016. Mr. Benedetti does not know why they would make that change. (Benedetti direct exam)

40. The permanent improvements are the objective of the statute and 2013 Agreement. (Benedetti direct exam)

41. If there is no Concept Plan and Financing Plan by October 1 for Parcel Two, that would be a breach of this contract. (Benedetti direct exam)

(Benedetti Cross X)

42. The Original Agreement is valid and enforceable and complies with Section 808. Mr. Benedetti said he found out that the dates had been changed, but it is enforceable if it had been performed. (Benedetti Cross X)

43. The Developer had the responsibility to plat the property in this Agreement. Replat in this Agreement in Section 6.1 is the same as plat. (Benedetti Cross X)

44. There could be no conveyance until the First Parcel was created. With regard to Sally Riley's email in Exhibit 87, by 2014 the Developer has already abandoned the 2013 Agreement. Parties were talking about conveyance under another agreement. Mr. Benedetti knows conveyance wasn't under the 2013 Agreement. Conveyance was impossible regarding the First Parcel because it wasn't platted. Exhibit 87 is way after the fact. (Benedetti Cross X)

45. By February and March of 2014, Mr. Benedetti testified that we were talking about a Replacement Agreement. Any defaults in performance would have to be performed. (Benedetti Cross X)

46. Mr. Benedetti denies that moving tanks was compliance for conveyance under the 2013 Agreement. (Benedetti Cross X)

47. Mr. Benedetti was not consulted about the Replacement Agreement. Exhibit 213. His next action for the DDA was to assist the DDA after Unruh pulled out. (Benedetti Cross X)

48. With regard to the Memorandum of Understanding ("MOU") in Exhibit 48, Mr. Benedetti was not involved. (Benedetti Cross X)

49. He was concerned that it may have been represented that he had approved of the MOU and the Replacement Agreement. (Benedetti Cross X)

50. Resolution 1-2015 was to clean the slate and start over. (Exhibit 50 and 289) (Benedetti Cross X)

51. With regard to the letter from Arden Weatherford to Brian Fleer dated July 8, 2015, Mr. Benedetti was provided a copy of this letter. (Exhibit 51) Mr. Benedetti stated that the facts stated in Exhibit 51 are inaccurate. Complaints about DDA bad faith relate to performance by Mr. Unruh pursuant to the Replacement Agreement. Mr. Benedetti never communicated with Mr. Weatherford about the claims in Exhibit 51. (Benedetti Cross X)

52. With regard to the Notice of Default to Mr. Weatherford dated January 15, 2016, (Exhibit 54 and 232) Mr. Benedetti testified that it was his own experience and analysis that led to the conclusion that the Developer was in default. (Benedetti Cross X)

53. With regard to Exhibit 85, Arden Weatherford has not tried to subdivide Lot 2. Mr. Benedetti testified that the conditions precedent to conveyance were never satisfied. (Benedetti Cross X)

54. With regard to Exhibit 88, Arden Weatherford was claiming in an email dated May 21, 2015, an interest in Lot 2. Mr. Benedetti testified that you cannot convey all of Lot 2,

this would be a violation of the Constitution and the fair value requirements of Section 808. (Benedetti Cross X)

55. With regard to having Executive Session with Developers, this would be inconsistent with Mr. Benedetti's advice. However, there is no injury to Plaintiff, the Developer benefits from participating in this Executive Session. Nobody raised any objections to the Executive Session meetings with Developers. (Benedetti Cross X)

C. Relevant Testimony By Tanner Coy Regarding Notice Of Default To WPBG

1. Exhibit 232 was a Notice of Default delivered January 15, 2016 to Woodland Park Beer Garden LLC. In that letter, it was stated that "[T]o the extent that Woodland Park Beer Garden LLC (the "Developer") or any party claiming by or through or under the Developer, claims any right or interest under the Agreement for Disposition and Development (Lot 2 Woodland Station) dated March 19, 2013 by and between the Woodland Park Downtown Development Authority and Woodland Park Beer Garden LLC (the "Agreement") … this letter is notice that the Developer is in default under Section 9.0 under the Agreement with respect to the following Developer obligations:

1. Section 6.0 – failure to comply with the design, development, and construction of improvements provisions of Section 6.0, 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 A.

2. Section 6.1 – failure to comply with the subdivision requirements listed in Section 6.1, including, without limitation, failure to timely subdivide and replat the First Parcel (as defined in the Agreement) so that the Developer is able to comply with the requirements related to the Temporary Use (as defined in the Agreement) and the development and construction obligations set forth in Sections 6.3, 6.4, 6.5, and 6.6 of the Agreement.

3. Section 6.3 and Exhibit A – failure to comply with the requirements of Section 6.3 and Exhibit A with respect to submission of each Concept Plan (as defined in

the Agreement) and each Financing Plan (as defined in the Agreement) for each Parcel (as defined in the Agreement) as required by and in accordance with Section 6.3 and specified in Exhibit A.

4. Section 6.4 and Exhibit A – failure to comply with the requirements of Section 6.4 and Exhibit A with respect to submission of evidence of Developer Financing (as defined in the Agreement) and obtaining development approvals for each parcel (as defined in the Agreement) as required by Section 6.4, and specified in Exhibit A.

5. Section 6.5 and Exhibit A – failure to take title to parcels (other than and in addition to the First Parcel) as required by Section 6.5 and specified in Exhibit A.

6. Section 6.6 and Exhibit A – failure to Commence Construction on Parcels (other than the First Parcel) as required by Section 6.6 and specified in Exhibit A.

7. Section 9.1.6 – failure to make good faith efforts to obtain Developer Financing as required by Section 9.1.6.

2. Tanner Coy testified that he understood that the breaches of contract by Developer WPBG of the 2013 Agreement to be:

> No platting; Failure to comply with the City subdivision requirements;
> No covenants; Failure to provide covenants to the DDA;
> No Financing Plan; Failure to comply with the timelines for delivery of financing plan;
> No city approvals; Failure to comply with city requirements.
> (Tanner Coy 6/13/18 Re-direct)

3. The contract required purchase of Amerigas parcel and removal of the tanks thereon by June 3, 2013. The tanks were not removed until October 8, 2013. The Developer did not purchase the Amerigas property; the Amerigas property was purchased by Beer Garden Lane Development LLC instead. The DDA had not given its written permission for WPBG to assign any of its obligations under the 2013 Agreement to any other entity. An assignment of any interest under the 2013 Agreement without written approval by the DDA was prohibited by the contract itself. (Section 9.1.1.) (Tanner Coy 6/13/18 redirect)

4. The Developer, in attempting to assign its obligations under its 2013 Agreement to purchase the Amerigas property was a violation of this 2013 Agreement and a default by the Developer. (Tanner Coy Direct)

5. The last tank was removed on October 8, 2013. By then the Developer had breached the 2013 Agreement which required that a financing plan be provided for Parcel 2 on October 1, 2013. The DDA could not have conveyed First Parcel after removal of the tanks because:

a. First Parcel was not identified in the contract.
b. First Parcel did not exist in any subdivision or plat;
c. it would be illegal for the DDA to convey unplatted land;
d. The consideration for any conveyance under the 2013 Agreement was completion of the development's obligations; and
e. The condition precedent for deliverance of covenants and reconveyance deed by the Developer never occurred (as required by Section 6.2.2) of the 2013 Agreement.

6. After removal of the tanks, there was no performance by the Developer (WPBG) with the possible exception of obtaining a liquor license and a temporary use permit (which was not even required until after conveyance of the parcel) (Tanner Coy 6/13/18 redirect).

7. Tanner Coy testified that he believed that WPBG abandoned the 2013 Agreement because there was no performance of the 2013 Agreement, and Arden Weatherford and Kip Unruh were in negotiations with the DDA to form a new agreement to replace the 2013 Agreement. The new Agreement was to be a Master Developer Agreement for not only Lot 2, but Lots 3, 4, and 5 of the rest of Woodland Station. By email dated January 6, 2014, Arden Weatherford sent an agenda for a Woodland Station development meeting, the email stated, "Current Lot 2 Agreement needs to be expanded, amended, or replaced to include "Master Developer" of Lot 2 3, 4, & 5. (and perhaps AmeriGas parcel)." (Exhibit 334) The parties

negotiated and the DDA signed the Master Developer Agreement on April 1, 2014. (Exhibit 210) (Tanner Coy 6/13/18 redirect)

8. With regard to the Board Minutes of October 20, 2015, Benedetti had told the Board that the Board has to give consideration to any proposal including any new proposal from Arden Weatherford and Kip Unruh. (Tanner Coy Direct Exam)

9. Exhibit 231 is a letter terminating the Replacement Agreement and MOU with Woodland Park Village LLC. (Tanner Coy Direct Exam)

10. On January 15, 2016, Brian Fleer sent a Notice of Default letter to WPBG to the extent it was making any claims under the 2013 Agreement. See Exhibit 232. On March 7, 2016, Brian Fleer sent a letter to WPBG to advise that the 2013 Agreement has been declared null and void and of no effect. See Exhibit 236. (Tanner Coy Direct Exam)

11. On or about June 10, 2016, Tanner Coy had a conversation with Arden Weatherford in which Arden Weatherford threatened to F***ing get him. Arden Weatherford said he had friends in Chicago and they would teach him a lesson. (Tanner Coy Direct Exam)

12. Shortly thereafter, a large backhoe came onto the DDA property at Lot 2 and dug a large hole on the property. Tanner Coy viewed this as an unlawful destruction of public property and trespass. (Tanner Coy Direct Exam)

D. <u>Relevant Tanner Coy Testimony on Cross Examination regarding Default by WPBG.</u>

1. Infrastructure requirements are the Developers' obligation. (Tanner Coy 6-13-18 Cross-X)

2. Plaintiff's Exhibit 54 Notice of Default dated January 15, 2016 to WPBG. It is suggested that the letter provides opportunity to cure. (Arden Weatherford admitted no cure by WPBG.) (Tanner Coy 6-13-18 Cross-X)

3. Tanner came on the Board in early 2013. He doesn't know about prior discussions. Tanner was always looking for opportunities to develop Woodland Station. (Tanner Coy 6-13-18 Cross-X)

4. In the September 3, 2013 Board Minutes, it was stated that Arden hoped to open a beer garden. Arden Weatherford has group of partners. The Master Developer Agreement (MDA) was discussed. Tanner said that we had been told there would be partners for the MDA. Current agreement was to be replaced to include new partners and increase of scope of project to all of Woodland Station. (Tanner Coy 6-13-18 Cross-X)

5. In 2013 Tanner vaguely remembers that Lindholm suggested that he had a conflict of interest. Tanner testified that he never had a conflict. (Tanner Coy 6-13-18 Cross-X)

6. Plaintiff's Exhibit 104 dated March 21, 2016 termination notice for WPBG. The Agreement had been replaced in 2014. Regarding the resolution dated July 7, 2015, Fleer was insubordinate in not issuing default as directed by the Board. Plaintiff's Exhibit 78 dated May 6, 2016 Woodland Station Plan. Beer Garden was listed. Arden Weatherford had put forth another proposal. (Tanner Coy 6-13-18 Cross-X)

7. On May 21, 2015, Unruh pulled out of the Replacement Agreement and MOU. See also statement of June 9, 2015 (Unruh's Final Declaration). (Tanner Coy 6-13-18 Cross-X)

8. Actual Notice of Default was given on July 7, 2015 to WPBG and Woodland Park Village LLC. Arden Weatherford admitted receiving actual notice of the default. He admitted responding that day and by a letter the next day on July 8, 2015. (Arden Weatherford Cross-x). This time was after Kip Unruh walked away from the Replacement Agreement. There was no campaign to obtain the Amerigas parcel. Tanner said we are hoping we could draw Arden into a new agreement. (Tanner Coy 6-13-18 Cross-X)

9. The DDA Minutes of October 1, 2013 stated that an investor group has taken title of Amerigas as of September 30, 2013. WPBG was the Developer. WPBG was the only signatory. The Board was not advised that that WPBG was in breach of the agreement by having BGLD take title to the Amerigas parcel. (Tanner Coy 6-13-18 Cross-X)

10. As of October 1, 2013, there is no notice of default. The DDA continued to work in good faith. Tanner stated we knew we were going forward to replace the 2013 Agreement to increase the scope. (Tanner Coy 6-13-18 Cross-X)

11. Plaintiff's Exhibit 15 is a Carol Lindholm email dated October 8, 2013 stating that the "Tank is gone."

12. Plaintiff's Exhibit 16 Tanner email dated October 9, 2013 "A Victory for Woodland Park." BGLD removed the tank and the DDA Board did not know it was BGLD that removed the tank. (Tanner Coy 6-13-18 Cross-X)

13. With regard to removal of the tanks, Tanner said he is not sure that this makes Woodland Station more valuable. There was nothing stopping development of Woodland Station. (Tanner Coy 6-13-18 Cross-X)

14. DDA Minutes dated November 5, 2013, page 4. Fleer recorded tanks removed Fleer said owner was meeting a milestone. (BGLD was the owner at that time.) (Tanner Coy 6-13-18 Cross-X)

15. The DDA Minutes of May 21, 2015, show a discussion about design review process. There was a discussion which included possibly adding additional persons to the Design Review Committee ("DRC"). Tanner Coy stated that he did not resist that approach. The Design Review Committee was up to the Board. His opinion was that more members would not facilitate design review.

16. At the same meeting, Schnitker reviewed the ten (10) items by Sally Riley needed for the project. "Every single board member was working for the same goal in supporting Developers." The default notice had been given, the clock was ticking, and the way to cure was performance.

17. Tanner Coy said that he supported those agreements. Under the current contract they had been nothing but failures. The Developers had failed to meet the city requirements. The DDA can't move forward if the Developer does not meet the city requirements. (Tanner Coy 6-13-18 Cross-X) The Developer had agreed to comply with all city requirements, including infrastructure.

18. With regard to Plaintiff's Exhibit 2, the Indemnity Investment Agreement, Tanner testified that WPBG was the only party to the 2013 Agreement, and there would be no damages for taxes paid by BGLD. BGLD was not a party to any agreement with the DDA, so the DDA did not have to accept any performance from BGLD or be liable to BGLD for any damages. (Tanner Coy 5-30-18 Cross-X)

E. Relevant Testimony Of Noel Sawyer On Default By Developers.

1. Noel Sawyer testified in this matter. He is currently a member of the Woodland Park City Council. In April 2014 he was elected to the City Council and in March 2015 he came onto the DDA Board as the City Council liaison. He was not involved with the 2013 Agreement. (Noel Sawyer Direct)

2. When he was on the Board he had proposals in front of the board from the Development Group from Kip Unruh and Arden Weatherford, relative to a multi-use building on Lot 2. (Noel Sawyer Direct)

3. City planning was involved. The Board received reports from Sally Riley. He remembers that not all the requirements had been met by the Development Group. (Noel Sawyer Direct)

4. With regard to Exhibit 213 he says he has reviewed this Agreement. It is the Replacement Agreement. The Replacement Agreement was adopted by the Board at the Board's meeting on August 28, 2014. (See Defense Exhibit 214) (Noel Sawyer Direct)

5. With regard to the Replacement Agreement, the DDA was following the progress of this Agreement, waiting for Kip Unruh and his associates. He doesn't recall seeing the 2013 Agreement. He does recall that the Developer Group was not meeting deadlines. He also testified that the Board kept extending dates. It got to be ridiculous. Mr. Sawyer said we all wanted this development. (Noel Sawyer Direct)

6. On July 7, 2015, the DDA had a meeting. Mr. Sawyer was voted in as Vice-Chair. The Board got tired of extending timelines. The Board voted Nine to Nothing to cancel all contracts. (Noel Sawyer Direct)

7. Mr. Sawyer testified that the requirements were not met except tanks had been removed. Mr. Sawyer testified that city requirements were not met. Mr. Sawyer testified that financial requirements were not met. (Noel Sawyer Direct)

8. Mr. Sawyer testified that we all wanted this multi-use. We had given him every opportunity to produce. (Noel Sawyer Direct)

9. Mr. Sawyer doesn't ever recall Mr. Weatherford ever asking for a traffic study. Mr. Sawyer testified that the City would have had to do a traffic study. The Aquatic Center was a proposed project. The Aquatic Center was to be right above Lot 5, closer to Lot 3. Mr. Sawyer understands that CDOT would have required multiple entrances. (Noel Sawyer Direct)

10. With regard to Exhibit 217, Resolution 1-2015 was the Resolution passed by the Board on July 7, 2015. A default letter had been approved by the Board as shown in the Board minutes of May 5, 2015. Mr. Sawyer testified that as a Board we decided enough was enough. (Noel Sawyer Direct)

11. Resolution 1-2015 passed unanimously. It referred to both agreements, both LLCs to cancel all contracts. Fleer was to contact the parties. (Noel Sawyer Direct)

12. With regard to the prior contracts there was no performance at all. The parties were in default. We were told we can take new proposals. (Noel Sawyer Direct)

13. We were working on the Aquatic Center as a priority. Mr. Sawyer doesn't recall any new proposals. (Noel Sawyer Direct)

14. We knew that Brian Fleer sent a letter of termination. Mr. Sawyer thought it was sent to Mr. Weatherford. (Noel Sawyer Direct)

15. Mr. Sawyer testified that Kip Unruh disappeared. No one could get ahold of him. He backed out on his own. Weatherford was the only one left standing. I thought that the letter went to Weatherford. (Noel Sawyer Direct)

16. Mr. Sawyer testified that the letter by Arden dated July 8, 2015 in response to the Resolution was disingenuous. We gave him every opportunity. (Noel Sawyer Direct)

17. Mr. Sawyer testified that if we weren't here in Court, we would probably still be waiting on the building. Mr. Sawyer indicated that the Board really wanted that building. (Noel Sawyer Direct)

(Noel Sawyer Cross X)

18. With regard to Exhibit 213 and the title of the Replacement Agreement which stated that it was replacing Agreement dated March 19, 2013 with Woodland Park Beer Garden,

Mr. Sawyer testified that he relied on the title. He stated, "Why wouldn't I?" (Noel Sawyer Cross X)

19. He stated it was replacement agreement agreed by Fleer. He also understood it was agreed to by lawyers. That was the information presented to Mr. Sawyer. (Noel Sawyer Cross X)

20. Mr. Unruh is coming to the Council with beautiful buildings. Everything was going smoothly. Mr. Sawyer testified, "Why would I review an old agreement?" (Noel Sawyer Cross X)

21. Mr. Sawyer testified that we needed the buildings. Our design guideline required the roof designs in Exhibit 365. (Noel Sawyer Cross X)

22. Mr. Sawyer testified that in April 2015 he thought the City had to come first in approving the design. Later he learned we did it concurrently. I later learned that design guidelines required DRC approval first. Ms. Riley was accommodating by doing it concurrently. (Noel Sawyer Cross X)

23. Since we had a Design Review Committee, I was not involved. The DRC would bring a presentation to us and they would tell us how things were going with the Developer. (Noel Sawyer Cross X)

24. I was present at the May 5, 2015 meeting. We adjourned to Executive Session with the Development Team. There was a heated discussion at the Executive Session. (Noel Sawyer Cross X)

25. At the Board meeting on July 7, 2015, Resolution 1-2015 was passed. The idea was to start with a new agreement. The parties were in default. (Noel Sawyer Cross X)

26. Mr. Sawyer testified that he thought it was a beautiful building. With regard to Exhibit 108, Mr. Sawyer testified that he knew that Jan wasn't happy with the progress. The Development Group kept changing design. Her email doesn't mean that she didn't want the building. (Noel Sawyer Cross X)

27. With regard to Exhibit 95, there was a lot of misinformation around dirtgate. Mr. Sawyer signed the letter. There was no board meeting. There was no board action. It is just a request. (Noel Sawyer Cross X)

(Noel Sawyer Redirect)

28. Mr. Sawyer testified that Exhibit 95 was not a violation of the open meetings law. There is a complaint about how someone had taken a backhoe and started digging. Like digging up a front lawn. Someone dug a big hole in a place we were going to hold events. (Noel Sawyer Redirect)

29. Mr. Sawyer testified that with regard to the default resolution, no one told him how to vote. He said, "I can come to my own conclusion. Carol (Lindholm) emailed us every document to review." (Noel Sawyer Redirect)

30. Mr. Sawyer testified that the City and the DRC were working together. It was beneficial to the Developer to streamline the process. Mr. Sawyer testified we could have done it the other way but this way was more efficient.

V. PLAINTIFF HAS NO CLAIM FOR BREACH OF CONTRACT OF THE 2013 AGREEMENT BECAUSE THE 2013 AGREEMENT WAS REPLACED.

A. Relevant Testimony by Tanner Coy Regarding Replacement Agreement.

1. Exhibit 334 is an email from Arden Weatherford to the Chair of the DDA and the Executive Director dated January 6, 2014. It states in pertinent part that, "The current Lot 2

Agreement needs to be expanded, amended or replaced to include "Master Developer" of Lots 3, 4 & 5 (and perhaps AmeriGas parcel)." (Tanner Coy Direct Exam)

2. Tanner Coy said that there had been much talk about the Master Developer concept. By this point Woodland Park Beer Garden (WPBG) had little if any performance and there was talk about getting into a new timeline. Tanner Coy did not know that WPBG had not been the purchaser of the Amerigas parcel. That fact had never been represented to the Board. (Tanner Coy Direct Exam)

3. Kip Unruh wanted to invest some money in the project and he wanted an agreement. The Master Developer Agreement was negotiated and approved by the DDA Board on April 1, 2014. With regard to the DDA Board Minutes of April 1, 2014, "Weatherford said that now that we have the Agreement, we have to run some projects through the machinery right away." (Exhibit 269, page 5) Tanner Coy testified that it was his understanding that they had formed a partnership called Woodland Park Village LLC. It said they were partners. When Arden Weatherford said, "We have an agreement" it means they are part of one team. After that a couple of meetings later, the DDA Board was told the development team had changed its mind. The Developer wants to go back to just Lot 2 and do a new agreement with an updated timeline. (Tanner Coy Direct Exam)

4. Exhibit 280 is the email from Carol Lindholm to Kip Unruh with a forward to Arden Weatherford, in which she said, "Kip – Brian asked me to send you the new Lot 2 Agreement. This replaces the agreement that Arden signed in March of 2013." The title of the Agreement stated that it replaced the Agreement dated March 19, 2013 with Woodland Park Beer Garden. Tanner Coy stated that his understanding of this Agreement is that it replaced the

2013 Agreement. Woodland Park Beer Garden was not a party to this agreement, but Arden Weatherford said he was a partner of Kip Unruh in WPV LLC. (Tanner Coy Direct Exam)

5. Exhibit 215 is the MOU signed with the Replacement Agreement. There was never a final plat for Lot 2. Parcel 2 never did receive the ZDP as required in the MOU and the Replacement Agreement. (Tanner Coy Direct Exam)

6. At the meeting of the DDA Board meeting on August 28, 2014, Arden Weatherford, Steve Randolph, and Kip Unruh were present. The Motion to Approve the Disposition and Development Agreement Replacing the March 19, 2013 Agreement with Woodland Park Beer Garden was read into the record. (Exhibit 214) Tanner Coy stated that there was no objection by Arden Weatherford to the Replacement Agreement. No objection by Arden Weatherford is noted in the Minutes. (Tanner Coy Direct Exam)

7. The Replacement Agreement and the MOU dated August 28, 2014 required that a Zoning Development Permit (ZDP) be acquired for Parcel 2 by December 31, 2014. Between August 28, 2014 and December 31, 2014 Mr. Coy testified that there was a rendering submitted, concept plan might have changed a bit, but not much else. (Tanner Coy Direct Exam)

8. With regard to the 2013 Agreement, the responsible party under that agreement was WPBG. WPBG was a single member LLC and the sole member of that LLC was Arden Weatherford. (Tanner Coy 6/13/18 redirect)

9. BGLD was not a signatory under the 2013 Agreement. (Tanner Coy 6/13/18 redirect)

10. The DDA did not have any contract ever with BGLD. (Tanner Coy 6/13/18 redirect)

11. The DDA did not expect any performance by BGLD. The DDA does not owe anything to BGLD. Section 13.0 of the 2013 Agreement (Exhibit 208) provided that … no third-party beneficiary rights are created in favor of any person not a party to the agreement. (Tanner Coy 6/13/18 redirect)

12. The DDA did not expect any performance from Kip Unruh under the 2013 Agreement. The comments in the DDA minutes by Arden Weatherford on March 19, 2013, that Kip Unruh was "on board" are not material to the 2013 Agreement. Tanner Coy testified that Kip Unruh could have easily been "off board" the next day. He could have been an "on board" investor, at one point after signing the 2013 Agreement the DDA Board was advised there was a development team, which consisted of Steve Randolph, Kip Unruh, and Arden Weatherford. Tanner Coy testified that at one point he understood there was another member of the development team in Brian Porter. (Tanner Coy 6/13/18 redirect)

13. When the DDA board was told that Kip Unruh was on the development team, it was immaterial to the 2013 Agreement. Woodland Park Beer Garden LLC was a single member LLC with Arden Weatherford the sole member. Kip Unruh was not a signatory to the 2013 Agreement. Kip Unruh never said that he was performing under the 2013 Agreement. The DDA board did not expect performance from any other entity under the 2013 Agreement. (Tanner Coy 6/13/18 redirect)

14. By email dated April 17, 2014, Kip Unruh told Steve Randolph and Arden Weatherford that "[T]he DDA would like me to sign this representing myself and everyone else. Would you read it through and let me know your thoughts and approval?" (See Exhibit 272, page 2) On page 3 of Exhibit 272, Carol Lindholm advises that she is attaching the scan of Woodland Village LLC (sic) Agreement which has been signed by the DDA and a Woodland Village

signature page only – which can be signed and sent back. So that it could be inserted into the Agreement). The response from Steve Randolph is that we need a Memorandum of Understanding that characterizes intentions with future guidance for interpreting the agreement. (Tanner Coy 6/13/18 redirect)

15. The Master Developer Agreement signed on April 1, 2014 by the Chair of the DDA was never signed by any of the development team. (Tanner Coy 6/13/18 redirect)

16. The Development team claimed surprise at receiving a copy of a CDOT letter dated March 2, 2012 which contained road construction requirements for Phase 2 of any buildout of Woodland Station after the completion of Woodland Hardware on Lot 1. The requirements in the CDOT had been approved as conditions of the preliminary plat by the City Council of Woodland Park as of March 1, 2012. One of the development team members, Steve Randolph, was the mayor at the time and voted in favor of these conditions on the preliminary plat for Lot 2 of Woodland Station. (Ex. 259) (Tanner Coy 6/13/18 redirect)

17. Thereafter the parties continued in negotiations for a new agreement relating only to Lot 2. (Tanner Coy 6/13/18 redirect)

18. On July 30, 2014, Carol Lindholm, Staff Assistant to Brian Fleer, sent an email to Kip Unruh, which was forwarded to Arden Weatherford, in which she stated: "Kip – Brian asked me to send you the new Lot 2 Agreement. This replaces the agreement that Arden signed in March of 2013. The only substantive changes are the some of the dates, the Developer name and the updates to Exhibit A (same as Exhibit A in the MOU – which you already have). So, Brian says you have basically seen this agreement before (Arden's agreement), with just these few changes." (Exhibit 280). The attached agreement lists Woodland Park Village LLC as the

Developer as entering this agreement with the Woodland Park DDA. (Tanner Coy 6/13/18 redirect)

19. The Replacement Agreement with Woodland Park Village LLC was signed on August 28, 2014 (Exhibit 213). The title of the Agreement entered into as of August 28, 2014 between Woodland Park Downtown Development Authority and Woodland Park Village LLC is:

AGREEMENT FOR DISPOSITION AND DEVELOPMENT
(Lot 2 Woodland Station)
REPLACING AGREEMENT DATED MARCH 19, 2013
with WOODLAND PARK BEER GARDEN

20. The MOU was signed on the same day (Exhibit 215). The MOU did not require that all of Lot 2 be final platted. Pursuant to Sally Riley's suggestions, the MOU stated in Section 2(a): "Lot 2 of the preliminary plat shall be final platted into two separate parcels 1 and 2 as approximately shown in Exhibit B, with Parcel 2 projected to be developed first."

21. Section 6.1 of the Replacement Agreement stated in pertinent part: "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. "Pursuant to Section 1 of the MOU, the DDA agrees to commission and conduct an updated traffic study supporting the current Woodland Station design concept (See Exhibit C)." However, Section 2a of the MOU stated in pertinent part "if the building(s) footprint on Lot 2, Parcel 2 exceeds 4000 sq. ft. then the off-site improvements within Saddle Club Avenue from Center Street to the west property line of Lot 2 as shown in Exhibit C shall be completed prior to the issuance of a Certificate of Occupancy of any building(s) greater than 4000 sq. ft. footprint." In other words, there was no requirement for a

traffic study or off-site improvements unless the building footprint on Lot 2 Parcel 2 exceeded 4000 square feet. (Tanner Coy 6/13/18 redirect)

22. The 2014 Agreement not only stated that it was replacing the Agreement dated March 19, 2013 with Woodland Park Beer Garden, there were other indications that the 2013 Agreement had been abandoned and replaced. According to Tanner Coy, and according to the 2014 Agreement, there is no longer to be a conveyance to Woodland Park Beer Garden, all conveyances under this agreement were to Woodland Park Village LLC. (See MOU, Section 5) Further there would be no conveyance pursuant to this 2014 Agreement until there had been a zoning development permit (ZDP) issued for the first phase of construction. The MOU stated in Section 5:

> Conveyance of Lot 2, Parcels 1 and 2 to Woodland Park Village, LLC shall occur in the following sequence: A portion of Parcel 2 and all of Parcel 1 shall be conveyed once Zoning Development Permits have been issued for the first Phase of construction (i.e., up to 4,000 SF foot-print of mixed use development containing single or multiple buildings fronting Center Street). The remaining portion of Parcel 2 shall be conveyed as per the conveyance sequence shown in Exhibit A of the Lot 2 Disposition and Development Agreement, along with the development stipulations outlines in condition No. 2 above. (Exhibit 215) (Tanner Coy 6/13/18 redirect)

23. The deadline for obtaining the ZDP under the 2014 Agreement was December 31, 2014 (See Exhibit A to the MOU). (Tanner Coy 6/13/18 redirect). Woodland Park Village LLC never did obtain a ZDP from the City of Woodland Park.

24. WPBG was not a signatory to the 2014 Agreement or the MOU. The DDA owed no obligations to WPBG pursuant to the 2014 Agreement or the MOU. Woodland Park Beer Garden was not a beneficiary under the 2014 Agreement. Section 13.0 of the 2014 Agreement contained the same provision as the 2013 Agreement regarding no third-party beneficiaries. It 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." (Ex. 208) (Tanner Coy 6/13/18 redirect).

25. Any alleged breach by the DDA of the 2014 Agreement would not be a breach the 2013 Agreement. (Tanner Coy 6/13/18 redirect).

B. Relevant Arden Weatherford Testimony on Replacement Agreement.

1. Exhibit 334 is an email dated January 6, 2014 from Arden Weatherford to Dale Schnitker and Brian Fleer. Mr. Weatherford sets forth an agenda for the Woodland Station development meeting. In the email he states, "Current Lot 2 Agreement needs to be expanded, amended, or replaced to include "Master Developer" of Lots 3, 4, & 5 (and perhaps AmeriGas parcel)" (Arden Weatherford Cross – X)

2. A meeting was scheduled on January 28, 2014 to discuss the Master Developer Agreement for Woodland Station. (Exhibit 267) (Arden Weatherford Cross – X)

3. On March 25, 2014, final draft of the Master Developer Agreement was sent to Kip Unruh, Arden Weatherford, and Steve Randolph by Brian Fleer. Mr. Fleer was asking for the entity name for the contract. (Arden Weatherford Cross – X)

4. On April 1, 2014, Carol Lindholm sent an email to Kip Unruh, Arden Weatherford, Steve Randolph, and Brian Fleer saying the DDA Board unanimously approved the Master Development Agreement effective today, April 1, 2014. She was again requesting the company name and signers and title in relation to the company. (Exhibit 270) (Arden Weatherford Cross – X)

5. Brian Fleer sent an email on April 10, 2014 to Kip Unruh, Arden Weatherford, and Steve Randolph again asking for the name of the company and the signers and title for each signer. Section 2.4 provided that this Agreement replaces the 2013 Agreement. (Exhibit 271) (Arden Weatherford Cross – X)

6. On April 21, 2014, there is an email in which Kip Unruh, Steve Randolph, and Arden Weatherford are discussing the Master Developer Agreement for signature and a MOU regarding the Agreement. One of the comments is that Lot 2 is not final platted, what role will the DDA has owners/Developer play in completing the proposed Lot 2 plat prior to closing. (Exhibit 272)(Arden Weatherford Cross – X)

7. On April 25, 2014, Kip Unruh notes that "submittal of our first application will trigger city requirements for stormwater, sanitary sewer, treated water, electric power, telecom, gas, and paved street extensions (CDOT letter)…Steve has suggested we make a Memorandum of Understanding that characterizes intention between the parties." (Exhibit 275)

8. On July 25, 2014, Brian Fleer sent an email to Development Team that Steve Randolph and Fleer concluded a final draft of the Lot 2 MOU. (Exhibit 278). On July 30, 2014, Fleer sent an email stating, "I will also have the original Lot 2 amended to reflect the MOU…again it is important that we finalize and execute the MOU and the amended Lot 2 Agreement." (Exhibit 279) (Arden Weatherford Cross – X)

9. On July 30, 2014, Carol Lindholm sent an email to Kip Unruh, which was forwarded to Arden Weatherford with a new Lot 2 Agreement. Carol Lindholm stated, "Kip – Brian asked me to send you the new Lot 2 Agreement. This replaces the agreement that Arden signed in March of 2013. The only substantive changes are the dates, the Developer name and the updates to Exhibit A (same as Exhibit A in the MOU – which you already have" (Exhibit 280). The new Agreement was entitled, "Agreement for Disposition and Development (Lot 2 Woodland Station) replacing Agreement dated March 19, 2013 with Woodland Park Beer Garden." (Exhibit 280) (Arden Weatherford Cross – X)

10. Arden Weatherford testified that when he got this document, he talked to Kip. He stated that Kip and I understood that this was for Lot 2. (Arden Weatherford Cross – X)

11. On July 31, 2014, Arden Weatherford drafted an email to Steve Randolph and Kip Unruh with comments about the MOU. Arden Weatherford said, "I think we should make our own version of the MOU. (I will draft.)" (Exhibit 281) The Agreement replacing the 2013 Agreement was signed on August 28, 2014. The Agreement was between the DDA and Woodland Park Village LLC (WPV), the "Developer." The Agreement was signed by Kip Unruh for WPV. (Exhibit 284) (See also Exhibit 213) (Arden Weatherford Cross – X)

12. The Memorandum of Understanding between the DDA and Woodland Park Village LLC was also signed on August 28, 2014. (Exhibit 215) (Arden Weatherford Cross – X)

13. Mr. Weatherford admits that the conveyance of Parcel 1 and 2 under the Agreement would be to WPV when WPV obtained a ZDP for Parcel 2. (Arden Weatherford Cross – X)

14. Mr. Weatherford stated he was not a party to the Replacement Agreement or MOU. (Arden Weatherford Cross – X)

15. At the DDA meeting on August 28, 2014, Mr. Weatherford, Steve Randolph, and Kip Unruh were present. The DDA minutes reflect that Faber noted that the MOU doesn't have enforcement provisions; the Agreement has the enforcement. Then Fleer asked for approval of the MOU and the Agreement. Mr. Weatherford says he does not think the motion was read out loud. (Arden Weatherford Cross – X)

16. Carol Lindholm stated that the motion was read out loud just as it is stated in the minutes. (Lindholm Direct)

17. The minutes of the DDA meeting on August 28, 2014 stated:

> Motion: To approve the MEMORANDUM OF UNDERSTANDING REGARDING AGREEMENT FOR DISPOSITION AND DEVELOPMENT (LOT #2 WOODLAND STATION) BETWEEN WOODLAND PARK DOWNTOWN DEVELOPMENT AUTHORITY AND WOODLAND PARK VILLAGE, LLC, **AND THE** AGREEMENT FOR DISPOSITION AND DEVELOPMENT (Lot 2 Woodland Station) REPLACING AGREEMENT DATED MARCH 19, 2013 with WOODLAND PARK BEER GARDEN as written. Larsen/Wilson. Passed 8/0 (Exhibit 214, page 2) (Arden Weatherford Cross – X)

18. Mr. Weatherford stated that he gets copies of the minutes when they are distributed for the next meeting and he probably got them. Mr. Weatherford stated that he didn't hear anything that alarmed him. Replacement didn't alarm him. He did not sign it. (Arden Weatherford Cross – X)

C. Carol Lindholm Testimony on the Replacement Agreement

1. Carol Lindholm testified in this matter. She had previously been employed by the City of Woodland Park, Department of Economic Development. Two-thirds of her salary was paid for the city and one-third by the DDA. (Carol Lindholm Direct)

2. Ms. Lindholm's DDA duties were to keep minutes, be responsible for hard copies, prepare minutes and submit them back to the Board for approval. She was the DDA's administrative assistant for five years. She worked for (Beth) Kosely, (David) Buttery as interim ED, and then (Brian) Fleer. She stopped working for the DDA after Brian Fleer left in 2016. (Carol Lindholm Direct)

3. With regard to the original 2013 Agreement signed by Arden Weatherford, Carol Lindholm did not have any connection with putting this together. (Exhibit 208) (Carol Lindholm Direct)

4. With regard to Exhibit 209, the draft of the MDA, she doesn't really recognize it. She recognizes Exhibit 210, the Master Developer Agreement signed by the DDA Board. (Carol Lindholm Direct)

5. By email dated April 16, 2014 from Carol Lindholm to Kip Unruh, she sent a copy of the signed Master Development Agreement and said we are all excited that this agreement has come about. Mr. Unruh didn't sign the agreement. (Carol Lindholm Direct)

6. With regard to Exhibit 213, Ms. Lindholm testified that she added the title which stated that this agreement replaced the agreement dated March 19, 2013 with Woodland Park Beer Garden. (Exhibit 213) She stated that she added the title to differentiate it from the 2013 Agreement. She testified that she thought the 2013 Agreement was "dead, dead." She testified that deadlines had not been met on that agreement. (Carol Lindholm Direct)

7. She testified that the Replacement Agreement was between Kip Unruh and the DDA. She understood that Unruh and Weatherford were partners for a number of years, even before her time. (Carol Lindholm Direct)

8. Exhibit 312 was an email from Carol Lindholm to Kip Unruh done at Brian Fleer's direction sending the new Lot 2 Agreement. Exhibit 280 is the same email as Exhibit 312, but it shows that Kip forwarded it to Arden. Kip sent it immediately to Arden attaching the Lot 2 Agreement. The email states, "This replaces the agreement that Arden signed in March of 2013." (Exhibit 280) (Carol Lindholm Direct)

9. This e-mail contradicts the testimony of Arden Weatherford. Mr. Weatherford testified that he never heard a word about the Agreement dated August 28, 2014 being a replacement to the 2013 Agreement until after the lawsuit was filed. (Arden Weatherford Direct)

10. Mr. Weatherford testified that when WPV signed the 2014 Agreement, he did not get any sense from anyone that the 2014 Agreement affected the 2013 Agreement. (Arden Weatherford Direct)

11. This statement is contradicted by the email from Carol Lindholm dated July 30, 2014. (Exhibit 280) This email was sent from Carol Lindholm to Kip Unruh and forwarded to Arden Weatherford and stated: "Kip- Brian asked me to send you the new Lot 2 Agreement. This replaces the Agreement Arden signed in March of 2013." (Exhibit 280) The Court finds Carol Lindholm's testimony and Exhibit 280 as more believable than Mr. Weatherford on this issue of whether he was advised that the August 28, 2014 agreement was an agreement replacing the 2013 Agreement with WPBG.

12. Carol Lindholm did not see any objection to any characterization of the 2014 Agreement as replacing the agreement that Arden signed in 2013. (Carol Lindholm Direct)

13. Carol Lindholm testified that the Replacement Agreement went to the DDA. She testified that the Regular Meeting Minutes on August 28, 2014 were prepared by her. She was at the meeting. The Minutes are recorded and she takes notes and types them up. The DDA approves the Minutes and she signs as Secretary. (Carol Lindholm Direct)

14. With regard to the MOU and the Replacement Agreement, that was discussed on August 28, 2014 at pages 1 and 2. The Motion to Approve the MOU and Agreement for Disposition and Development (Lot 2 Woodland Station) Replacing Agreement Dated March 19, 2013 with Woodland Park Beer Garden as written was approved and passed 8/0. The Motion was read into the record as stated in the Minutes:

> Motion: To approve the MEMORANDUM OF UNDERSTANDING REGARDING AGREEMENT FOR DISPOSITION AND DEVELOPMENT (LOT #2 WOODLAND STATION) BETWEEN WOODLAND PARK DOWNTOWN DEVELOPMENT AUTHORITY AND WOODLAND PARK VILLAGE, LLC, **AND THE** AGREEMENT FOR DISPOSITION AND DEVELOPMENT (Lot 2 Woodland Station) REPLACING AGREEMENT DATED MARCH 19, 2013 with WOODLAND PARK BEER GARDEN as written. Larsen/Wilson. Passed 8/0 (Exhibit 214, page 2). (Carol Lindholm Direct)

15. Mr. Weatherford did not object to this Motion. Carol Lindholm said she would have heard it in the recording, and put it in the Minutes. (Carol Lindholm Direct)

16. With regard to the title of the Replacement Agreement, she had discussed that specific title which stated it was replacing the 2013 Agreement with Fleer. It was understood that it would replace the 2013 Agreement. Fleer told her to use that title for the 2014 Agreement. (Carol Lindholm Redirect)

D. Kip Unruh Testimony on the MDA and Replacement Agreement and MOU.

1. Kip Unruh testified on behalf of the Plaintiff in this case. Kip Unruh stated he was not a member of WPBG. (Kip Unruh Direct)

2. Kip Unruh testified we reserved the name Woodland Park Village LLC (WPV). He stated we would have to register it with the Secretary of State before we took conveyance. (Kip Unruh Direct)

3. Kip Unruh testified that Arden Weatherford was not a member of WPV. There were no other members of WPV. (Kip Unruh Direct)

4. Kip Unruh testified that the Replacement Agreement had nothing to do with the 2013 Agreement. He testified that WPBG was not affected. (Kip Unruh Direct)

5. Kip Unruh testified that WPBG did not sign the MOU (Ex. 48). (Kip Unruh Direct)

6. Kip Unruh testified that the Replacement Agreement and MOU stated that WPV would obtain conveyance of Parcel 1 (Beer Garden Parcel) and Parcel 2 (Multi-use Building) upon WPV obtaining a ZDP on the Multi-Use Building by December 31, 2014. (Kip Unruh Direct)

7. Kip Unruh admitted that he did not obtain a ZDP. He stated that he could not get past the DRC. (Kip Unruh Direct)

8. Kip Unruh testified that he submitted renderings on November 24, 2014. He testified as to his discussions with the DRC. He testified that he received Langley design comments and agreed to go forward with Langley's design comments. (See Ex. 342 e-mail dated February 25, 2015). Exhibit 365 is an updated rendering with Langley design comments. (Kip Unruh Direct)

9. Kip Unruh testified that he was going through with a contemporaneous review with the City and the DRC. The City review comments of April 14, 2015 were interpreted by Kip Unruh that we were moving forward. (Kip Unruh Direct)

10. Kip Unruh stated he pushed back on the City's comments for rear entry for tenants. (Ex 323) He eventually agreed. Kip was getting frustrated (Ex. 117). (Kip Unruh Direct)

11. Kip Unruh testified that he had spent money to purchase Amerigas. He said he spent $50,000. (Kip Unruh Direct)

12. On May 5, 2015, Kip was given a Notice of Default by the DDA. He testified that he did not take it seriously. (Kip Unruh Direct)

13. Kip Unruh testified that he was an experienced Developer. He testified that he did due diligence. He testified that his experience taught him to poke into every place. (Kip Unruh Direct)

14. Kip Unruh testified that the Default letter was a surprise. He took it personally. (See Ex. 313 on the last page of the May 5, 2015 DDA Minutes).

15. He said he submitted personal financials on February 10, 2014. (Ex. 116). He said he thought that it complied.

(Kip Unruh 6/13/18 Cross X)

16. Ex. 334 is an email from Arden Weatherford dated January 6, 2014 to Dale Schnitker, Chair of the DDA Board, and Brian Fleer, Executive Director. The email is a meeting outline for the Developers to regroup with the DDA and City. It states in pertinent part, "Current Lot 2 Agreement needs to be expanded, amended, or replaced to include "Master Developer" of Lots 3, 4, & 5 (and perhaps Amerigas parcel)." The DDA Board unanimously approved the Master Developer Agreement on April 1, 2014. Carol Lindholm requested the company name and the signers' name and their title in relation to the company. (See Defendant's Exhibit 270). On April 10, 2014 Brian Fleer sent an email to Kip Unruh following up on request from Carol Lindholm for the entity name and a signature. (Defendant's Exhibit 271). On April 17, 2014 Kip Unruh sent an email to Arden Weatherford and Steve Randolph and stated: "The DDA would like me to sign this representing myself and everyone else. Would you read it through and let me know your thoughts and approval?" (Exhibit 272) Kip Unruh provided the name of the Developer to be Woodland Park Village LLC. (Kip Unruh Cross X)

17. Kip Unruh did not sign the Master Developer Agreement. The principal reason was the CDOT letter of March 2, 2012, Exhibit 243, which required certain road and traffic infrastructure improvements in Woodland Station. (Kip Unruh Cross X)

18. The preliminary plat approved by the City Council in its Minutes dated March 1, 2012 had the same condition as the CDOT letter. (See Exhibit 259). (Kip Unruh Cross X)

19. Exhibit 259 shows that Steve Randolph was the mayor and voted for the conditions for the preliminary plat for Woodland Station. Kip Unruh testified that his partner Steve Randolph did not tell him that the preliminary plat for Woodland Station had the same conditions as the CDOT letter. (Kip Unruh Cross X)

20. Unruh admitted that those conditions were a matter of public record. (Kip Unruh Cross X)

21. Unruh admitted that his due diligence did not result in him finding these conditions of the preliminary plat which are a matter of public record. (Kip Unruh Cross X)

22. The DDA and the Development Team negotiated a new Lot 2 Agreement and a Memorandum of Understanding ("MOU"). On July 25, 2014, Brian Fleer sent an email to Kip Unruh, Steve Randolph, Arden Weatherford, Dale Schnitker, and Carol Lindholm. In it he stated: "Kip, just wanted to touch base and let you know that Steve Randolph and I met today and concluded we have a final draft of the Lot 2 MOU that I would like to get to the DDA Board for approval on August 5. Please review and we can discuss next week and if you see anything we need to change or amend. Carol has sent you the MOU in a separate email. Again it is important that we finalize and execute the MOU and the amended Lot 2 Agreement." (See Exhibit 278) In a follow-up email dated July 30, 2014, Brian Fleer stated, "I will also have the original Lot 2 Agreement amended to reflect the MOU." (Exhibit 279)

23. On July 30, 2014, Carol Lindholm sent an email to Kip Unruh that stated:

> "Kip – Brian asked me to send you the new Lot 2 Agreement.
>
> 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).
>
> So Brian says you've basically seen this agreement before (Arden's agreement) with just these few changes." (See Exhibit 280) (Kip Unruh Cross X)

24. On August 28, 2014, Kip Unruh signed an Agreement between Woodland Park Village LLC (the "Developers") and Woodland Park Downtown Development Authority entitled "Agreement for Disposition and Development (Lot 2 Woodland Station) Replacing Agreement

Dated March 19, 2013 with Woodland Park Beer Garden" (Defendant's Exhibit 213). (Kip Unruh Cross X)

25. Also on August 28, 2014, the Woodland Park Downtown Development Authority and Woodland Park Village LLC entered into a Memorandum of Understanding regarding the Agreement signed that day. Kip Unruh signed on behalf of Woodland Park Village LLC. (Kip Unruh Cross X)

26. The records of the Colorado Secretary of State showed that, on April 14, 2014, that Mr. Unruh filed to reserve the name Woodland Park Village LLC. Arden Weatherford caused the document to be filed. This is for a 120-day period. The records of the Colorado Secretary of State show that the reservation of the name Woodland Park Village LLC expired after the 120-day period on August 12, 2014. (Kip Unruh Cross X)

27. Mr. Unruh admitted that Woodland Park Village LLC was never organized with the Secretary of State's office and that it is not registered entity with the Colorado Secretary of State and does not lawfully exist in Colorado. The Court takes judicial notice of the records of the Colorado Secretary of State. (Kip Unruh Cross X)

28. On cross examination, Mr. Unruh admitted that, on August 28, 2014, he signed the Replacement Agreement and the MOU on behalf of Woodland Park Village LLC. As of August 28, 2014, Mr. Unruh and Arden Weatherford failed to disclose that the fact that Woodland Park Village LLC did not lawfully exist. (Kip Unruh Cross X)

29. Mr. Unruh admitted that, as of August 28, 2014, he made a false representation to the DDA on the replacement contract that Woodland Park Village LLC was an entity that existed and that could legally enter into a contract. (Kip Unruh Cross X)

30. As of August 28, 2014, Mr. Unruh admitted that he concealed the fact from the DDA that Woodland Park Village LLC did not exist, and that he had a duty to disclose that fact because the DDA was entering into a contract with Woodland Park Village LLC a non-existent entity. (Kip Unruh Cross X)

31. Mr. Unruh admitted that he would consider it to be a material fact to know that the entity he was signing a contract with does not exist under law. (Kip Unruh Cross X)

32. Mr. Unruh has had a lot of experience with signing contracts. He would not sign a contract with the DDA or any entity that is not lawfully formed in Colorado. Therefore, Mr. Unruh agreed that the DDA would consider it to be a material fact that it was signing an agreement with an entity that lawfully existed. (Kip Unruh Cross X)

33. Mr. Unruh admitted that the DDA had the right to rely on his representation that Woodland Park Village LLC existed and legal authority to enter into a contract with the DDA. (Kip Unruh Cross X)

34. Mr. Unruh admitted that the DDA entered into a Replacement Agreement relying on the fact that Woodland Park Village LLC actually existed. (Kip Unruh Cross X)

35. Mr. Unruh admitted that the DDA was justified on in relying upon his signature that he was signing for an entity that lawfully existed. (Kip Unruh Cross X)

36. Mr. Unruh admitted that Woodland Park Beer Garden, LLC was not a party to the MOU and Replacement Agreement and that Woodland Park Beer Garden, LLC has no rights under the MOU and the Replacement Agreement. Exhibit A to both the MOU and the Replacement Agreement were the same. Both parcels were to be conveyed to Woodland Park Village LLC. There was no conveyance in the Agreement to Woodland Park Beer Garden, LLC.

Conveyance was to take place only after a ZDP was issued to Woodland Park Village for Parcel 2. The deadline for WPV to obtain a ZDP was December 31, 2014. (Kip Unruh Cross X)

37. Mr. Unruh does not recall Arden Weatherford ever saying that he objected to the Replacement Agreement of August 28, 2014. (Exhibit 215 – MOU, Exhibit 213 – Replacement Agreement). (Kip Unruh Cross X)

38. At the DDA meeting on August 28, 2014, the DDA minutes (Exhibit 214) reflect that Kip Unruh and Arden Weatherford were both there, and Arden Weatherford made no objection to the motion to enter into the Agreement for Disposition and Development (Lot 2 Woodland Station) Replacing Agreement dated March 19, 2013 with Woodland Park Beer Garden. Mr. Unruh confirms that he does not remember Arden Weatherford making any objection to the motion to enter into the Replacement Agreement. (Kip Unruh Cross X)

39. The Court finds Carol Lindholm to be a credible witness and the Court adopts her testimony over any contrary testimony by Arden Weatherford or Kip Unruh.

40. The Court finds that the Plaintiff had knowledge of the 2014 Agreement which stated that it was replacing the Agreement for Disposition and Development (Lot 2 Woodland Station) Replacing Agreement dated March 19, 2013 with Woodland Park Beer Garden. This is not a section title of a contract which can be ignored. This is a Title of a Contract.

41. The actions of Plaintiff in failing to object to the Replacement Agreement and performing under the Replacement Agreement constitute abandonment of the 2013 Agreement and assent to the Replacement Agreement.

42. Further, Plaintiff should have made an objection to preserve any claims it might have had against the DDA under the 2013 Agreement if the Plaintiff thought it was still an active contract. The Court finds that the DDA was proceeding under the Replacement Agreement.

43. The Court finds the facts support application of the legal doctrine of laches and/or equitable estoppel.

VI. DEFENDANT DID NOT FAIL TO PERFORM UNDER THE CONTRACT.

A. Tanner Coy's Relevant Testimony regarding the DDA Requirements for the 2013 Agreement.

1. Tanner Coy is the owner of a business in downtown Woodland Park called Tweeds Fine Furnishings. In January 2013 he came on the board of the Woodland Park DDA. The DDA is a quasi-governmental organization funded by tax increment financing. There is a nine-member board that is appointed by the City Council of Woodland Park. One member must be a City Council member. (Tanner Coy Direct Exam)

2. He came to be on the Board after Jeanette Brown resigned. She thought Tanner could bring a youthful perspective. It seemed a natural appointment. His business is interior design. (Tanner Coy Direct Exam)

3. Exhibit 202 is the Resolution of the Woodland Park City Council ratifying the Woodland Station Design Guidelines. The design guidelines were adopted on April 19, 2007, and attached as Exhibit B thereto. (Tanner Coy Direct Exam)

4. Exhibit 204 is the Foundation Plan adopted by City of Woodland Park DDA on February 21, 2002. See also Exhibit 307 (City Council Meeting Minutes for February 21, 2002 adopting the DDA Foundation Plan). (Tanner Coy Direct Exam)

5. On August 2, 2001, the City of Woodland Park Colorado established the Downtown Development Authority. The Bylaws of the DDA stated that pursuant to Ordinance 914, Series 2001 of the City of Woodland Park the Board shall have all of the powers now or hereafter authorized by Part 8 of Article 25 of Title 31, Colorado Revised Statutes, and all

additional and supplemental powers necessary or convenient to carry out and effectuate the purposes and provisions of said Part 8. (Ex. 201, page 1)

6. In Article 6, Section 6 of the Bylaws of the DDA states: "Property. The WP DDA may hold, sell, trade, or lease property in its name as directed by resolution of the Board and as permitted by Section 31-25-808, et. seq., C.R.S., as amended." (Ex. 201, page 4).

7. On February 21, 2002, the Woodland Park City Council approved Resolution 571 adopting the Woodland Park Downtown Development Authority Foundation Plan… (Ex. 307, page 3).

8. The Foundation Plan of the DDA had several objectives and purposes. The primary objectives and purposes of the Woodland Park Downtown Development Authority ("DDA") are to promote the safety, prosperity, security and general welfare of the District and its inhabitants, to prevent deterioration or property values and structures within the District, to prevent the growth of blighted areas within the District, to assist the City of Woodland Park in the development, redevelopment and planning of the economic and physical restoration and growth of the District, to improve the overall appearance, condition and function of the District, to encourage a variety of uses, to sustain and improve the economic vitality of the district, to relieve traffic congestion, to encourage pedestrian traffic and security in the District, and to preserve and create green spaces, parks and pedestrian walkways. (Ex. 204, page 6)

9. Some of the more specific objectives of the DDA were stated as follows:

> F. To increase, equal to the need, the net supply of accessible parking spaces within the District. (Ex. 204, page 6)
>
> O. To improve the visual attractiveness of the District including, but not limited to, improving public streets, public parking lots and alleys by the installation of new surfacing, curbs, gutters, sidewalks and the placing of visually integrated street furniture, lighting systems and landscaping, and to coordinate with the City, the careful maintenance of the downtown streetscape. (Ex. 204, page 7).

10. The major sections of the priorities of the plan include the support of private developments to encourage all planning to be compatible with its surroundings and encourage mixed use developments; to develop a traffic system to maximize the convenience of driving to and walking in the District, and to improve the variety and attractiveness of the District. (Ex. 204, pages 10 and 11).

11. One of the priorities of the Project with regard to traffic circulation stated, "Encourage commercial/retail uses on street frontages with parking located behind buildings. All parking should be well designed with attractive landscaping, lighting and pedestrian access. Encourage surface parking in areas that are the most likely sites for future private development." (Ex. 204, Section B.2., page 11).

12. The methods of financing projects by the DDA included utilizing the proceeds of tax exempt bonds issued by the City of Woodland Park secured by the pledge of tax revenues for the maximum period of time authorized by C.R.S. 31-25-807(3), which included property tax increments and such other sources of revenues for repayment of debt as maybe authorized by law. (Ex. 204, page 12).

13. The DDA created a Design Review Committee and the Design Review Committee developed certain Design Guidelines applicable to the area identified as Woodland Station in downtown Woodland Park. DDA approved the Design Guidelines on January 9, 2007. City Council ratified the Design Guidelines by Resolution dated April 19, 2007. (Ex. 202, Resolution No. 667, page 1).

14. With regard to the Design guidelines, the preface of the Design Guidelines of Woodland Station stated in part:

> The Design Review Committee shall have the right to disapprove any proposed development/improvement that is not in accordance with the Design Guidelines adopted if it is not suitable or desirable in the Design Review Committee's opinion for aesthetic or other reasons. In passing upon the development/improvement, the Design Review Committee shall have the right to take in consideration the suitability of the proposed development/improvement and of the materials of which it is to be built, the color scheme, the site upon which it is proposed to erect the same, the harmony thereof with the surroundings, the effect of the development/improvement as planned on the outlook from the adjacent or neighboring properties, and if it is in accordance with all of the provisions of these Design Guidelines. (underline emphasis supplied)

(Ex. 202, Design Guidelines, pages i-ii).

15. The design approaches in the Design Guidelines are set forth in Ex. 202, Design Guidelines, pages ii-iv.

16. The design elements of the Design Guidelines are set forth in Ex. 202, Design Guidelines, pages iv–v.

17. The Design Review Committee may permit variances or adjustments from these design guidelines. It states "[S]uch variances or adjustments (1) may be granted only in if they are not detrimental or injurious to other property or development or improvements in the neighborhood; (2) they do not violate the general intent and purpose of these Design Guidelines; and (3) they do not set a precedent for other applicants." (Ex. 202, Design Guidelines, pages vi-vii)

18. On May 21, 2009, the City of Woodland Park, Colorado passed an ordinance which amended a 2008 Ordinance to now state:

> (e) The City and the Authority covenant and agree that the City will transfer the Saddle Club Property to the Authority for cash consideration or for no cash consideration (as the City Council shall determine later), and the Authority will thereafter transfer the Saddle Club Property for no cash consideration, but only for fair value, to a Developer chosen by the Authority at the time the Authority chooses to make the transfer, which time shall be when the Authority determines the Developer is able to complete the development of the Saddle Club Property in a manner which results in fair value as determined by the City and the Authority and in furtherance of the goals and objectives

of the Authority under the Foundation Plan and in accordance with the Design Guidelines. (Ex. 247, pages 2-3)

19. On August 20, 2009, the City of Woodland Park entered into an agreement to transfer the property known as Woodland Station to the DDA. The DDA was required to have every Developer comply with all zoning, subdivision, site plan, engineering and design requirements of the City and the DDA, including specifically the Design Guidelines. (Ex. 248, pages 8-9).

20. The Special Warranty Deed between the City of Woodland Park and the DDA included certain provisions that if the DDA refused or failed to cure certain conditions of default, the City had the right reenter and take possession of the property and to revest in the City the estate conveyed by this Deed subject only to any mortgage or other security given by the DDA for the purposes of financing the construction of improvements on the Property (the Right of Re-Entry). (Ex. 249, Special Warranty Deed)

21. All new developments in the DDA jurisdiction are subject to the Design Guidelines. Developers must also submit materials to the Design Review Committee. Design Review Committee members can be removed by the DDA Board at any time if the Board does not approve of what the DRC member is doing. (Tanner Coy Direct Exam)

22. The Design Guidelines have various design approaches. The designers need to avoid rigid 90-degree patterns. There are Design Guidelines for lighting to establish mood. There are Design Guidelines for service and delivery areas. Sloped roofs are a requirement. Archway and arches are encouraged. Bay windows, awnings, shutters, and window displays are strongly encouraged. (Tanner Coy Direct Exam)

23. City of Woodland Park had its own design guidelines in the City Code. The DDA guidelines are only applicable in Woodland Station. (Tanner Coy Direct Exam)

24. Any Developer would have to be familiar and comply with these design guidelines. (Tanner Coy Direct Exam)

25. Exhibit 247 is a copy of a 2009 Bond Ordinance. Article 1 provides that DDA will transfer the Saddle Club property for no cash consideration, but only for fair value. (page 2). (Tanner Coy Direct Exam)

26. Exhibit 248 is the Disposition and Development Agreement between the DDA and the City of Woodland Park effective August 20, 2009. The City conveyed 9.3 acres known as Woodland Station to the DDA. The obligations of the DDA require the Developer of all or part of the property to comply with all zoning, subdivision, site plan, engineering and design requirements of the City and the DDA, without limitation ….. the design guidelines…. and any and all applicable laws, ordinances, and regulations. (page 8 of 20) (Tanner Coy Direct Exam) Exhibit 249 is the Special Warranty Deed from the City of Woodland Park to the Woodland Park DDA, signed by Mayor Randolph on December 29, 2009. Section 7 of the Special Warranty Deed gives the City the right to re-enter and take possession of the Property and to revest in the City the real estate conveyed by this Deed. (Tanner Coy Direct Exam)

27. Exhibit 205 is a copy of a Ground Lease dated March 24, 2011 between the City of Woodland Park DDA and Howard Block LLC. Howard Block LLC was an entity owned by Arden Weatherford. Arden Weatherford agreed to pay rent under Section 9.0 of the Lease. Arden Weatherford's entity never did pay any rent under this Lease. (Tanner Coy Direct Exam)

28. Exhibit 259 are the City Council Meeting Minutes dated March 1, 2012. The City Council approved the preliminary plat of Woodland Station with six conditions and two variances. Phase One was the development of Lot 1, the Hardware Store. Phase Two required roadway improvements be triggered when the second parcel of the subdivision was developed.

The improvements included Depot Avenue connection made to West Street. (page 9) The conditions for Phase Two were the same conditions as set forth in the CDOT letter dated March 2, 2012. On page 10, Mayor Randolph discussed the view corridor and the potential to block that view. Also on page 10, the Motion to Approve Preliminary Plat for Woodland Station subject to six conditions and two variances contained in the staff report passed 6-0. (page 10) (Tanner Coy Direct Exam)

29. Exhibit 262 is an email from Arden Weatherford to Kip Unruh. Mr. Weatherford addressed that a certain amount of public improvements will be needed including sidewalks, streets, utilities. Mr. Weatherford stated at the same time we proposed the project we can propose to do the public improvements….the DDA is in no position to get other bids….they would much prefer we handle everything … the public improvements can be a profitable part of this, the payback being the TIF agreement. Exhibit 208 is the agreement between the DDA and WPBG dated March 19, 2013 ("Original Agreement" or "2013 Agreement"). Tanner Coy stated that the ground lease was expiring so this was the follow up to the ground lease. To him, this appeared to be a viable mechanism to develop Lot 2. (Tanner Coy Direct Exam)

30. Tanner Coy testified that Arden Weatherford was a friend. They used to hang out at Bierworks and talk. We talked about a beer garden. When this came to the board, Arden Weatherford presented photos. (Tanner Coy Direct Exam)

31. The 2013 Agreement is not just about a beer garden. The beer garden is only part of a bigger development. Tanner Coy said he did not draft it. Paul Benedetti drafted it. (Tanner Coy Direct Exam)

32. Exhibit 265 is an invoice showing that the DDA paid $3,600.00 to NES as half of the cost of preparing the Concept Plan in 2013. (Tanner Coy Direct Exam)

33. With regard to Exhibit 266, this is an email which shows how Arden Weatherford has gone about his business with the DDA. Arden Weatherford says, "It still seems a little odd to be negotiating with the attorney. Be that as it may, I think it is too our advantage." Weatherford wanted Fleer to tell the Board that "Benedetti is okay with it." (Tanner Coy Direct Exam)

34. On January 9, 2015, the Design Review Committee submitted a memorandum to Arden Weatherford and Sally Riley approving Weatherford's Beer Garden Pavilion with a few conditions. The Developer never did receive final approval from the City, so the conditions never came into play. (Tanner Coy Direct Exam)

35. Plaintiff's Exhibit 82 shows that the Design Review Committee approved the beer garden Pavilion on January 9, 2015. The approval had recommendations which included a site plan as required by the City and the DRC would review rock veneer. The Pavilion was submitted by Woodland Park Village (WPV) for members under WPV. (Tanner Coy Cross-X 5-30-18).

36. Tanner Coy received a copy of an application for Zoning Development Permit from Sally Riley on May 9, 2015. It was submitted on March 5, 2015 by Woodland Park Beer Garden. Incredibly, the application listed the property owner's name as Woodland Park Beer Gardens/DDA. (Exhibit 285). Attached to Exhibit 285 is a letter dated March 17, 2015 to Arden Weatherford in response to the application for the Zoning Development Permit. In that letter Sally Riley informed Mr. Weatherford that the City Planning Department is unable to approve his application because staff has many questions and unknowns regarding this proposal. She asked for additional information regarding comments from staff. (Ex. 285). Mr. Coy testified that Mr. Weatherford never addressed these items in Sally Riley's letter. The DRC did not

hinder him from addressing these items. The DRC supported and cooperated with him in approval of his proposal for a Beer Garden Pavilion. Mr. Coy testified that our DDA approval was intended to help him move forward. (Tanner Coy Direct Exam)

B. DDA's Actions Regarding Design Review Of Multi-Use Building/Kip Unruh Were Pursuant To The 2014 Agreement And Did Not Breach The 2013 Agreement.

1. Exhibit 283 is one of the first submittals submitted by Kip Unruh. When Tanner Coy first saw these renderings, he said that at a glance, they were not consistent with the design guidelines. After some discussions with Unruh, Tanner Coy testified that he realized that it was probably best to reach out to a professional. (Tanner Coy Direct Exam)

2. Mr. Coy incorporated notes from Langley into the DRC's first set of comments. The design of the building was urban/industrial and did not fit into the mountain west architecture of the City of Woodland Park. Tanner Coy said he was authorized to work with David Langley by the DDA. This shows that comments by the DRC were not just the subjective opinions of the DRC's members. (Tanner Coy Direct Exam)

3. When David Langley first saw the concept he pulled out an onion skin. He made some drawings to send to Mr. Unruh to comply with design guidelines. (Tanner Coy Direct Exam)

4. The Design Review recommendations of March 20 (2015) in Defendant's Exhibit 310 incorporated Mr. Langley's drawing. (Exhibit 310). Tanner Coy testified that he prepared this with Jan (Wilson). Tanner Coy testified that it was clear that whoever was doing these renderings had no idea what they were doing with regard to design guidelines. Sally had told us to be specific. (Tanner Coy Direct Exam)

5. On April 14, 2015, Sally Riley sent a letter to Kip Unruh regarding Kip Unruh's submittal being incomplete. Sally Riley had five pages of comments. On page 5, Sally Riley

stated that staff agrees with the DDA Design Review Committee's comments provided to Mr. Unruh on March 20, 2015. Sally also wrote about the need to evaluate the impacts to the view corridor of Pikes Peak from the Cowhand. (Exhibit 220). Exhibit 321 is an email dated April 13, 2015 from Tanner Coy to Brian Fleer requesting copies of the latest site plan. DDA did not want to be seen as holding up the process. (Exhibit 321). This further shows the DRC was not trying to torpedo Unruh's project. At the May 5, 2015 DDA meeting, Brian Fleer handed us a letter that was a notice of default to Kip Unruh. Tanner Coy said we went through the letter point by point. Significant discussion ensued. The letter proposed a 90-day cure period to August 3, a financing plan by July 3, and conveyance by August 3. See Exhibit 221 and 313. (Tanner Coy Direct Exam)

6. Exhibit 287 is a Memorandum that includes the Design Review Committee's comments of May 10, Kip Unruh's reply of May 13, and Design Review Committee's reply on May 21, 2015. With regard to this Memo, Tanner Coy testified that with regard to the construction drawing comments this was not a major issue. Tanner Coy testified that we were past the structural element, this was cupcake stuff. Sally was most opposed to the cattle fences. With regard to the gutters, we felt that they needed that level of help. (Tanner Coy Direct Exam)

7. We addressed the comments on trash enclosures and other external elements. With regard to the comments on parking, Tanner Coy did not consider it to be show stopper. With regard to the comments on landscaping, the DRC was trying to help them. With regard to the walking path, this was cupcake stuff, wider or narrower. With regard to the benches, this was exciting and we asked where would they go. With regard to the drainage, this is part of the design documents. We are also available to review color and material when ready. It was

Tanner Coy's overall impression that we were making progress but it was a challenge and it was hard. (Tanner Coy Direct Exam)

8. At the board meeting of May 21, 2015 there was quite a bit of discussion about design review. The Developer was adverse to the DRC. Sally Riley gave an update of the city's review process. In Exhibit 224, Sally Riley set forth the status of Kip's project. Their submittals were incomplete, she stated that progress was being made but she needed submittal by mid-June to make the August 1 deadline. (Tanner Coy Direct Exam)

9. Kip Unruh stepped back from the project on May 21, 2015. (Exhibit 314, Exhibit 286.) On July 7, 2015, the DDA Board adopted a resolution authorizing and directing the Executive Director to issue a Notice of Default. (Ex. 227) The DDA Board passed Resolution 1-2015. (Exhibit 217, 289). (Tanner Coy Direct Exam)

10. The Design Review Committee was doing its duty of design review for the multi-use building under the 2014 Agreement. (Tanner Coy 6/13/18 redirect)

11. Kip Unruh signed the 2014 Agreement for Woodland Park Village, LLC. (Tanner Coy 6/13/18 redirect)

12. Woodland Park Beer Garden LLC had no rights under the 2014 Agreement. (Tanner Coy 6/13/18 redirect)

13. The DRC had no obligations to WPBG for design review under the 2014 Agreement. (Tanner Coy 6/13/18 redirect)

14. The DRC acted in good faith in dealing with Kip Unruh under the 2014 Agreement, which include the following: the initial drawings shown in Exhibit 283 were not close to complying to design guidelines. After various discussions with Kip Unruh, the Design Review committee engaged architect David Langley. David Langley submitted some changes to

the initial drawings to show how the building could meet design guidelines. The Design Review Committee engaged in numerous discussions with Kip Unruh about the requirements of the design guidelines. The Design Review Committee agreed to a concurrent review with the City of Woodland Park to benefit the Developer. Basic concepts submitted by the Developer had gone on for months, from November 24, 2014 until May 13, 2015. The Developer was to obtain a ZDP for Parcel 2 by December 31, 2014. DRC was trying to provide help to the Developer to understand the design guidelines. (Tanner Coy 6/13/18 redirect)

15. Exhibit 287 is the May 10 memo with the May 13 response and the May 21 comments. WPV was close to approval. Context for this memo goes back to the DDA's comments on March 20, 2015. (Tanner Coy 6/13/18 redirect)

16. WPV was having problems meeting city requirements. Exhibit 220 is a letter dated April 14, 2015, detailing the Developer's failure to comply with city requirements for a submittal for site plan review. On page 5 of that letter, Sally Riley stated, "Staff agrees with the DDA Design Review Committee's comments provided to Mr. Unruh on March 20, 2015." (Tanner Coy 6/13/18 redirect)

17. At the DDA Special Meeting on May 21, 2015, Sally Riley distributed a report entitled Status of Kip Unruh's Project as of May 20, 2015. The Developer was still missing information for ten (10) items from the April 14, 2015 letter. (Exhibit 224) (2a-j) (Tanner Coy 6/13/18 redirect)

18. With regard to the letter of April 14, 2015 (Exhibit 224), it stated in pertinent part:

> "2. April 14, 2015- Preliminary Staff Review completed- Missing information identified and Staff provided feedback to the applicant:
>
> a. Floor plans needed – showing rear entry for apartments
> b. Updated Elevations (all 4 sides) and Architectural Renderings

c. Revised Site Plan (incl. snow storage, dumpster location, lighting, easements, pathways & more)
d. Revised landscape Plan and Irrigation Plan
e. Revised Grading and utilities plan (incl. erosion control)
f. Drainage and Detention Plan
g. Trip Generation Letter with CDOT coordination
h. Alternate Parking Plan – justification/narrative
i. Construction Staging Plan
j. View Corridor Impact Analysis (Tanner Coy 6/13/18 redirect)"

19. Despite language to the contrary in documents, the DDA Board provided that the Design Review Committee was not the absolute authority over design review but that the Design Review Committee will bring its recommendation to the Board for final decision. See DDA Minutes November 9, 2013 and May 21, 2015. The DDA Board discussed whether to add more members to the Design Review Committee and decided not to do that on May 21, 2015, on that date the DDA Board commended Tanner Coy and Jan Wilson for doing a good job. If the Board did not approve of the members on the Design Review Committee it had the power to remove Tanner Coy and Jan Wilson at any time. (Tanner Coy 6/13/18 redirect)

20. With regard to the design guidelines, Developers are allowed to use creativity. The guidelines are not absolute. Kip Unruh's building renderings were not mountain-west style. They were not compatible with Woodland Park initially. (Tanner Coy Cross-X 5-30-18).

21. The Design Review Committee (DRC) is not a gatekeeper. Woodland Station Developers must go through the DRC. The DRC tried to be fair and consistent to the extent possible. Exhibit 283 Renderings by Kip dated November 24, 2014. Exhibit 342 email re recent design comments by Langley dated February 25, 2015. (Tanner Coy Cross-X 5-30-18).

22. The DRC submitted comments March 20, 2015. (Exhibit 310) With regard to the parking issue, the city was satisfied and we would sign off together. Tanner Coy said "I would not have required something that the City would not have approved. Tanner said parking was on

the Concept Plan at one time. With regard to drainage, the design guidelines require the DRC to pass on improvements of any kind. (Design Guidelines, page i) Engineers were working on the drainage issue at the time. (Tanner Coy Cross-X 5-30-18).

23. Parking issues relating to service and delivery is a must in the guidelines. (Tanner Coy Cross-X 5-30-18).

24. Exhibit 325 is a request for an extension of time by Kip Unruh dated April 22, 2015. City had requested to rear load tenants. (Tanner Coy Cross-X 5-30-18).

25. Exhibit 221 is a letter of default to Woodland Park Village LLC dated May 4, 2015. Kip accommodated Langley. Kip eventually agreed to rear loaded residential. See Exhibit 328 dated May 8, 2015. Riley parking letter subject to conditions. (Tanner Coy Cross-X 5-30-18).

26. The May 10 DRC memo includes Langley comments. (Exhibit 330) Drainage comments were a DRC preference for underground tanks. (Tanner Coy Cross-X 5-30-18).

27. Exhibit 222 (same as 287) new plans received April 24, 2015. DRC was trying to help him. Kip was very agreeable. DRC was trying to hold the hand of the Developer. With regard to parking and underground drainage, this was being reviewed by engineers. (Tanner Coy Cross-X 5-30-18).

28. At the DDA board meeting on May 5, 2015, the letter of default was given to Woodland Park Village LLC. Exhibit 221 (letter dated May 4, 2015). The reasons for the letter of default were discussed with Kip Unruh and Arden Weatherford in Executive Session on the date of May 5, 2015. (Tanner Coy 6/13/18 redirect)

29. The Executive Session was thereafter made public when the Developers wanted to receive a copy of the recording of the Executive Session. (Tanner Coy 6/13/18 redirect)

30. On July 7, 2015, the DDA Board unanimously passed Resolution 1-2015 (Exhibit 217) authorizing and directing Brian Fleer, the Executive Director of the DDA to send default notices to Woodland Park Beer Garden LLC and Woodland Park Village LLC. (Tanner Coy 6/13/18 redirect)

31. In a letter dated September 30, 2015, to WPV, the contract with Woodland Park Village was terminated. (See Exhibit 231) (Tanner Coy 6/13/18 redirect)

32. About that time, Tanner Coy and the DDA board were advised that Woodland Park Village LLC was a non-existent entity as set forth in the termination notice. Tanner Coy testified that when he found out the WPV was an entity that had never been organized and registered Secretary of State of Colorado, that he was infuriated to work that long and hard with that party to the contract. He testified that he felt lied to and misled and defrauded. (Tanner Coy 6/13/18 redirect)

33. Tanner Coy noted that there had been changes in the Concept Plan approved by the DDA (Ex. 33), compared to the Concept Plan submitted by the Developer that was approved by the City. (Ex. 34). May 21, 2015 Tanner Coy said that the Developer was closer to approval by the DDA than by the City. (Tanner Coy 6/13/18 redirect)

34. Tanner Coy stated that he was surprised when he heard on May 21, 2015 that Kip was stepping back from the project. (Tanner Coy 6/13/18 redirect)

VII. RELEVANT TESTIMONY OF SALLY RILEY ON CITY SUBDIVISION AND PERMITTING, WOODLAND STATION PRELIMINARY PLAT WITH CONDITIONS, DESIGN REVIEW COMMITTEE REVIEW OF THE PAVILION AND MULTI USE BUILDING.

A. Sally Riley Testimony Relevant to Adoption of Woodland Station Preliminary Plat with Conditions.

1. Sally Riley testified in this case. She is currently the Planning Director for the City of Woodland Park after being appointed to that job in 2007. Prior to that time, she was a city planner for Woodland Park from 1999 to 2007. (Sally Riley Direct Examination)

2. Her job duties include administrating city zoning regulations, subdivision regulations, flood plain, PPRBD [Pikes Peak Regional Building Department], code enforcement, city planning requirements, and historic preservation. (Sally Riley Direct Examination)

3. She testified that she has specialized knowledge in Woodland Park requirements for land use, zoning regulations and subdivision regulations. She was offered as an expert witness in this case and the Court determined she was qualified to be an expert in these areas. (Sally Riley Direct Examination)

4. In her job duties, she was required to attend meetings of the Woodland Park City Council, Planning Commission, BOA, BOR, DDA, and historic preservation meetings. (Sally Riley Direct Examination)

5. She testified that she has familiarity with the Woodland Park DDA. She said she was knowledgeable about the preliminary plat for Woodland Station, which was prepared for initial development of Lot 1 of Woodland Station. (Sally Riley Direct Examination)

6. When the DDA was formed in 2001 Woodland Station was acquired from the City, which acquired it from Saddle Club. (Sally Riley Direct Examination)

7. Sally Riley testified that there were conditions associated with the preliminary plat for Woodland Station. (Sally Riley Direct Examination)

8. She identified Exhibit 244 as the Woodland Station Traffic Impact Study dated February 6, 2012 prepared by the Matrix Design Group. The findings and recommendations

section on page 38 of the traffic study included Phase 1 improvements with development of the hardware store on Lot 1. Phase 2 of the project will be triggered when the second parcel is developed. Phase 2 improvements to the roadway system include Depot Avenue extension made to West Street and other roadway improvements. (Sally Riley Direct Examination)

9. Exhibit 256 is the Woodland Park City Council agenda packet for a meeting March 1, 2012. Agenda Item 9A was a report by Sally Riley regarding consideration for approval of a preliminary plat for Woodland Station to subdivide a 9.3-acre parcel into five commercial/mixed use lots. The property is unplatted and located to the south of U.S. Hwy 24, west of Park Street, east of Amerigas, and north of the Ute Chief Mobile Home Park in Woodland Park, Colorado. (Sally Riley Direct Examination)

10. She testified that any contract to develop Lot 2 would trigger Phase 2. She testified that there was a deal in principle to establish an easement across the Vectra Bank property. The Depot Avenue connection comes from the traffic study. The Staff report attached to the Planning Commission minutes included the recommended conditions for the preliminary plat (See Staff Report in Exhibit 256, pages 1-3). (Sally Riley Direct Examination)

11. The Staff Report for Woodland Station preliminary plat/#SUB 11-004 was attached to the City Council agenda item 9.A. It was included the City Council meeting minutes for March 1, 2012, in which the City Council moved to approved SUB11-004 for Woodland Station preliminary plat. (Minutes, page 4). (Sally Riley Direct Examination)

12. Exhibit 257 is the Staff Report to Mayor Randolph. (Sally Riley Direct Examination)

13. Exhibit 258 is the power point presentation made to the City Council for the Woodland Station preliminary plat. (Sally Riley Direct Examination)

14. Exhibit 259 is the City Council Minutes for March 1, 2012. Steve Randolph was the mayor of Woodland Park and was present at the meeting. In the public hearing to consider approval of the preliminary plat for Woodland Station, the staff report and the power point presentation was discussed in great detail. The Planning Commission, per Mr. Woodford, reviewed this preliminary plat and recommends approval of the preliminary plat subject to six conditions contained in the Staff Report. Section 3B of the Staff Report included Phase 2 road improvements as conditions which would be triggered when the second parcel of the subdivision is developed. The conditions included the Depot Avenue connection to West Street and three other improvements. (Exhibit 259, Minutes, page 9) (Sally Riley Direct Examination)

15. In discussions over this preliminary plat, Mayor Randolph discussed the view corridor and the potential to block that view. (Exhibit 259, Minutes, page 10) (Sally Riley Direct Examination)

16. A motion was made to approve the preliminary plat for Woodland Station subject to the six conditions and two variances contained in the Staff Report, the motion carried 6-0. Steve Randolph voted for the preliminary plat with the six conditions. He also approved the minutes as mayor. (Exhibit 259, Minutes, page 12). (Sally Riley Direct Examination)

17. The preliminary plat that was approved was good for three years. (Exhibit 239). (Sally Riley Direct Examination)

18. In April of 2014, Sally Riley was at a meeting in which Bill Alspach provided the development team with a copy of the CDOT letter dated March 2, 2012. Steve Randolph expressed surprise. Sally Riley testified that she was surprised that he was surprised.

19. Sally Riley specifically testified in redirect examination that the CDOT conditions in the CDOT letter of March 2, 2012, are the same ones that Mayor Randolph voted for in the preliminary plat. (Sally Riley Re-direct)

B. WPBG Request for Plat.

1. Sally Riley testified as to her experience as Planning Director with Arden Weatherford. He had done a conservation easement on his house and Sally Riley had worked with his attorney David Conley. The Bierworks building was a change in use. Earlier he had been involved with proposing the grandiose plan. (Sally Riley Direct Examination)

2. It was a series of concepts but nothing ever came from it. (Sally Riley Direct Examination)

3. In 2011 Arden Weatherford submitted a temporary use permit for a beer garden. It was a nice idea but not very feasible because there was not enough pedestrian traffic for an outdoor venue like that. (Sally Riley Direct Examination)

4. With regard to the original 2013 Agreement, Sally Riley testified that you can plat segments of Lot 2. Every development of raw land is case by case. It may make sense to plat a smaller parcel. You don't have to do a final plat for the entire lot in every case. (Sally Riley Direct Examination)

5. The process for platting is that the Developer can be the applicant with the property owner's signature. The Developer is typically at the helm moving forward. (Sally Riley Direct Examination)

6. With regard to Exhibit 223, this was a general application for final plat dated May 12, 2015, with a legal description of Woodland Station Filing No. 2. There is no Woodland Station Filing No. 2. The applicant was the DDA. The project coordinator is listed as Arden Weatherford. Sally Riley testified this was never submitted. It is incomplete in that it does not

have a survey. Dale Schnitker, the chair of the DDA, signed the Certification of Ownership. (Exhibit 223)(Sally Riley Direct Examination)

7. The Certification from Applicant line lists a title "Executive Director." The original form for the Applicant line has no such title. (See Exhibit 317) Exhibit 223 could have been signed by Dale Schnitker or it could have been signed by the project coordinator. According to Sally Riley, it was not necessary to have the Executive Director sign it. (Sally Riley Direct Examination)

C. Site Plan Review.

1. With regard for an agreement for disposition, Sally Riley testified that the Developer meets the schedule of performance and her office works to enforce the regulations. She never received the subdivision application from Arden Weatherford in Exhibit 223. (Sally Riley Direct Examination)

2. She first met Kip Unruh at a SMART meeting in October of 2014 to discuss elements of site plan review. She prepared Exhibit 218, which was a task list. (Sally Riley Direct Examination)

3. Exhibit 316 is an email from Sally Riley to Steve Randolph dated January 27, 2015, in which she again provided the development task spread sheet. (Sally Riley Direct Examination)

4. When asked why she sent the email to Randolph, Sally Riley testified that the Developers were showing signs of being inexperienced and not moving through the process in expeditious ways. Kip Unruh was moving to development areas that savvy Developers would not get into yet. Unruh brought in a contractor, before an engineer or architect. They were addressing construction issues and not the entitlement process. Sally Riley said she was trying to help them. She said my job is to move projects through. (Sally Riley Direct Examination)

5. Exhibit 216 is an email which shows what Sally Riley was talking about. The email from Sally Riley dated December 18, 2014 to Kip Unruh. Sally Riley said that Kip Unruh was getting the cart before the horse and was not very far through the entitlement process. It was unusual for a Developer to be doing building details at this point in time. Kip Unruh did not understand the process and there was no realistic site plan from Lloyd or Unruh. (Sally Riley Direct Examination)

6. Sally Riley's opinion was that: "I felt like he needed a lot of hand holding because he was inexperienced. The first design submitted by Kip Unruh was an ugly building. It didn't fit the design standards of the overlay district. I was not directly involved in the Design Review Committee so I was hands off initially until I started seeing things needing more assistance." (Sally Riley Direct Examination)

D. <u>WPBG Approval of Pavilion Design and WPBG Application for ZDP.</u>

1. With regard to the DRC memo dated January 9, 2015 in which the Weatherford Beer Garden Pavilion was approved with conditions, Sally Riley characterized these conditions as very standard conditions. It was the normal process. New development has to be consistent with surrounding development. She received an application from Arden Weatherford and there were a number of conditions in response to his application. No ZDP was ever issued, no construction drawings were ever received, and no construction of this pavilion was ever done. (Sally Riley Direct Examination)

2. Sally Riley sent an email to Arden Weatherford dated March 17, 2015, with her attached comment letter on the Pavilion ZDP application. She had four pages of comments, including traffic requirements. Arden Weatherford never addressed these comments and the ZDP was never approved. Although Arden Weatherford never responded to the letter, he complained it was a lengthy list of comments. (Sally Riley Direct Examination)

E. Kip Unruh Site Plan Application Deemed Incomplete by City Planning

1. The development team never did complete the task list set forth in Exhibit 316 dated January 27, 2015. (Sally Riley Direct Examination)

2. On February 13, 2015 Sally Riley communicated with Andrew Mullett who was taking over on the getting the site plan completed. Sally Riley sent him the 2015 site plan review submittal requirements. (Sally Riley Direct Examination)

3. Sally Riley identified the DRC memo of March 20 (2015) in Exhibit 310. (Sally Riley Direct Examination)

4. On April 14, 2015, Sally Riley sent a letter with comments to Kip Unruh regarding the site plan review submittal was deemed to be incomplete. The five-page letter discussed the major items missing from the application. On page five, Sally Riley stated that staff agrees with the Design Review Committee comments provided to Mr. Unruh on March 20, 2015. In her opinion, the DRC comments were reasonable. In her opinion the March 20 comments were totally appropriate. (Ex. 220) (Sally Riley Direct Examination)

5. There came a time when she was involved with the Design Review Committee. Mr. Coy and Jan Wilson are lay people. Mr. Fleer was not providing adequate guidance. She got involved in March or April to assist the Design Review Committee with communication with the Developer. (Sally Riley Direct Examination)

6. In comparing the DRC comments of March 20, 2015 to the City comments of April 14, 2015, the DRC has a narrow focus and the city is wide. The City is not more difficult but more comprehensive. (Sally Riley Direct Examination)

7. Sally Riley testified that she never received a written response to the April 14, 2015 letter. (Sally Riley Direct Examination)

8. On April 15, 2015 (Exhibit 322), Sally Riley sent an email to Andrew Mullett and Kip Unruh memorializing a meeting of the previous day regarding the comments in the letter of April 14, 2015. She stated that this was a unique project that must be defensible through the public notice process and that the variations in the standards but must be solidly justified to negate potential appeals. She also stated that rear-entry to the apartment units is strongly encouraged. She also stated that a finished parking lot for apartment dwellers west of the building is strongly recommended. (Sally Riley Direct Examination)

9. On April 18, 2015, Kip Unruh sent an email back to Sally Riley. Kip Unruh told her that with regard to the rear-entry to apartment units, this feels a bit like "crossing the line" as to city involvement. (Exhibit 323) Sally wrote back to Kip Unruh on April 20, 2015 and said she was not going to rebut your comments via email. She suggested a conference call or meeting to continue the discussion. (Exhibit 324) (Sally Riley Direct Examination)

10. On or about April 22, 2015 Kip Unruh sent an email to Brian Fleer and a copy to Sally Riley requesting an extension of the contract dates. In that email, he said I believe we are truly getting to 'starting gate' where we can receive design approval and a variance for no parking. (The ZDP deadline in the Replacement Agreement was December 31, 2014.) (Sally Riley Direct Examination)

11. On April 23, 2015 Sally Riley replied back to Kip Unruh expressing Staff's support for his parking proposal with eight conditions (Exhibit 326). There is nothing said about a traffic study in Exhibit 326. (Sally Riley Direct Examination)

12. By letter dated May 4, 2015, Kip Unruh was given a notice of agreement default from the DDA. (Exhibit 221) (Sally Riley Direct Examination)

13. Sally Riley was in the Executive Session at the DDA meeting on May 5, 2015. She remembers that the staff was working hard and there seemed to be a lot of pressure to keep on going with the project. To her recollection nothing was said that was out of line. (Sally Riley Direct Examination)

14. On May 8, 2015, Sally Riley sent an email to Andrew Mullett and Kip Unruh. She is responding Andrew Mullet's email regarding the architect's elevation perspective and that Robin is working on the material samples. Also the architect is working on getting the flip done of the building with residential entrances to the west elevation. He is also waiting on hearing a clear response from Bill regarding drainage. (Exhibit 328) (Sally Riley Direct Examination)

F. Design Review Committee comments in May 2015.

1. On May 10, 2015, DRC sent its comments on the initial site plan to Kip Unruh. Exhibit 330. (Sally Riley Direct Examination)

2. On May 12, 2015 Sally Riley sent an email to Andrew Mullett and Kip Unruh regarding the DRC has completed its comments for the preliminary site plan in a Memo dated May 10, 2015. (See Exhibit 329) (Sally Riley Direct Examination)

3. Sally Riley stated that she was supportive of the concerns stated by the DRC in the May 10, 2015 memorandum. (Exhibit 330). In her opinion the DRC was still concerned about the parking but was otherwise supportive of the design and the project. In Sally Riley's opinion, the DRC issues could be addressed fairly easily by Kip Unruh. (Sally Riley Direct Examination)

4. At the DDA meeting on May 21, 2015, Sally Riley presented a page of comments entitled Status of Kip Unruh's Project as of May 20, 2015. (Exhibit 224) She believed that the remaining items could feasibly be addressed to meet the August 1 deadline for issuance of a Zoning Development Permit. (Sally Riley Direct Examination)

5. In her opinion design review was getting close. The City Planning department was getting close. (Sally Riley Direct Examination)

G. Kip Unruh Abandoning the Project.

1. On May 21, 2015 at 10:38 a.m., Sally Riley sent an email to Kip Unruh with a copy of her status report on the project. Kip Unruh replied back at 12:45 p.m., "At this time I have stepped back from proceeding with the project. I am getting counsel as to the viability project (*sic*) and what my actions might need to be considering my experience(s) with the city officials and the DDA." (Exhibit 225). Sally Riley testified that upon receiving the email from Kip Unruh, "I was taken aback. We had been working pretty hard to meet the deadline. I was fairly surprised and disappointed." (Sally Riley Direct Examination)

2. Kip Unruh never had any objection to the status memo. (Sally Riley Direct Examination)

3. Exhibit 287 is an email dated May 21, 2015 from Sally Riley to Kip Unruh at 5:58 p.m. regarding the DRC's reply comments. (See also Defense Exhibit 222). Sally Riley was asked what she thought of the DRC's comments on May 21, 2015. She said "I believe they were in the guidelines and they were trying to get to the best project. We go back and forth. It is an iterative process." (Sally Riley Direct Examination)

4. On June 9, 2015, Kip Unruh sent another email in which 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.
>
> Even after the May 5th meeting, I was still of the mind to keep charging forward.
>
> However, in light of the memorandum I received from the Design Review Committee on May 21st I have determined that the requirements make the building no longer viable." (Exhibit 226) (Sally Riley Direct Examination)

5. It appears from the e-mails that Mr. Unruh had not even seen the Design Review Committee's comments on May 21st when he advised on that date that he was stepping back from the project. In his May 21st memo, he complained about his experience with the City and the DDA. In the June 9, 2015 memo, he only complained about Design Review comments on May 21st that he had not even seen when he stepped away from the project.

H. Resolution 1-2005.

1. Sally Riley was at the July 7, 2015 meeting (Defense Exhibit 227). She remembers Resolution 1-2015 regarding the default. The default resolution included the 2013 Agreement. (Sally Riley Direct Examination)

2. Sally Riley personally viewed the pavilion and mixed use building as important to Woodland Park. (Sally Riley Direct Examination)

I. Traffic Study.

1. Exhibit 291 is an email chain which includes an email from Sally Riley dated October 20, 2015 in which she responded to an email from David Buttery regarding the improvements required in the CDOT letter and a question of whether CDOT is giving 4,000 square foot development a grace project. Sally Riley stated that she has no document that memorializes the grace period up to 4000 sf from CDOT. She states that, "I did not route Kip Unruh's site plan to CDOT last April since it was an incomplete application and did not include a trip generation letter." Brian Fleer then responded to Sally Riley as follows: "I spoke to Valerie Sword directly in a phone call regarding the 4000 sq. ft threshold for the Kip Unruh project. She was comfortable with not requiring the conditions so stated in the CDOT letter as long as it was under 4000 sq. ft. Valerie was not going to require a new traffic study for Kip's project. However before final sign-off she did want to see a copy of the site plan with proposed land uses. Sally never received an acceptable site plan from Kip and we did not move forward

with any further requests from Valerie or CDOT." (Exhibit 291) (Sally Riley Direct Examination)

2. Sally Riley testified there were a lot of proposed plans for Amerigas and Lot 2. She testified that the City would have initiated a traffic study at the time of the Aquatic Center decision. Sally Riley Direct Examination)

3. With regard to the MOU, Sally Riley reviewed it and said she provided some input. The documents say that the DDA will commission a traffic study. The traffic study should be submitted after a site plan. And as Sally testified, Kip Unruh's site plan of April 2015 was an incomplete application and did not include a trip generation letter. (See Exhibit 291) There is no deadline for submitting a request for a traffic study in the MOU. (Sally Riley Direct Examination)

J. Illegality Of Conveying Unplatted Real Property.

1. Sally Riley testified that final plat needs to be processed before ZDP. She stated that it is not technically legal to do a metes and bounds conveyance. (Sally Riley Cross X)

K. Beer Garden Project and Arden Weatherford

1. Sally Riley testified that Arden Weatherford had a successful conservation easement. She also testified that he had a successful change in use regarding the remodel of Bierworks. The remodel was not really that hard. Arden Weatherford worked on other proposals that didn't pan out. (Sally Riley Cross X)

2. Her relationship with Arden Weatherford was mostly professional but there had been disagreements. Arden Weatherford has a short fuse, but she tries always to be very tactful. (Sally Riley Cross X)

3. With regard to the City Council Minutes for March 1, 2012 in Exhibit 259, the conditions on the preliminary plat regarding phase 2 improvements shall be triggered when the

second parcel of the subdivision is developed, which includes the Depot Avenue connection to West Street. (Exhibit 259, page 9) (Sally Riley Cross X)

4. Steve Randolph has completed one residential development of thirty (30) units.

5. The preliminary plat expired March 1, 2015. A minor subdivision does not require preliminary plat. (Sally Riley Cross X)

6. Sally Riley testified that it is not her job to administer DDA agreements. She testified that Woodland Station is in the overlay district of downtown Woodland Park. It has a unique set of guidelines. Some conditional uses are eliminated but there tougher guidelines. (Sally Riley Cross X)

7. Sally Riley testified that she didn't receive an application from Arden Weatherford for the beer garden until 2015. (Sally Riley Cross X)

8. With regard to a status report on May 20, 2015, Sally Riley said it was a stone's throw from site plan approval. There was no final plat and no traffic study. Section number 4 of the status report states that Arden Weatherford gave Rampart Surveys notice to proceed with drawing the final plat which should be submitted soon for Planning Commission and City Council hearings. (Exhibit 224). She understands that Fleer may have been speaking with CDOT about no need for a traffic study. (Sally Riley Cross X)

9. She testified that the Beer Garden was not viable in her opinion. She remembers one event, by invitation in four years that the beer box sat on the property.

L. <u>DRC Memo of May 10, 2015.</u>

1. With regard to the May 10 memo from the DRC, Unruh was mostly agreeable (Exhibit 222). (Sally Riley Cross X) With regard to the issue regarding drainage, Sally Riley does not agree that drainage was a holdup of project by DRC.

2. Sally Riley stated, "I do not believe the DDA was the cause of delays." (Sally Riley Cross X)

3. Sally Riley stated, "The Developers were inexperienced and I tried to help the DDA communicate with them with use of a compliment sandwich. The Developers had a thin skin, easily defensive, point fingers, and blame other people." (Sally Riley Cross X)

4. With regard to the May 21 memo, Sally Riley said that we could have worked through the drainage and parking issues. The cattle fencing was definitely not appropriate. (Sally Riley Cross X)

5. Arden complained that "Design review causing hard feelings – too subjective. Dial it in." (Exhibit 106) (Sally Riley Cross X)

6. The DRC was dealing with Unruh and not Arden. Exhibit 86 was Sally Riley's notes regarding meetings with Arden Weatherford and Brian Fleer on June 19, 2014. (Sally Riley Re-Direct)

7. In Exhibit 86, Brian said the Lot 2 Timeline is no longer relevant. Her notes also state either Brian Fleer or Arden Weatherford said that it's impossible to meet the dates in current (agreement).

M. CDOT Letter conditions the same as the conditions in the Preliminary Plat.

1. Sally Riley testified that the CDOT conditions are the same ones that Steve Randolph voted for in the acceptance of the preliminary plat. (Sally Riley Cross X)

N. Temporary Use Permits are not Covenants.

1. Sally Riley also testified that Temporary Use Permits by Arden Weatherford and TUP requirements are not covenants. (Sally Riley Cross X)

O. Status of Kip Unruh's Project as of May 20, 2015.

1. Regarding Defendant's Exhibit 224, the status of Kip Unruh's project as of May 20, 2015, the applicant was close to having a complete site package. The DRC was close to being satisfied. (Sally Riley Cross X)

2. Sally Riley testified that there was no need for a traffic study for a minor subdivision. (Sally Riley Cross X)

3. The Court finds Sally Riley to be a credible and persuasive witness and adopts the facts of her testimony and accepts her testimony over any contradictory testimony of Arden Weatherford and Kip Unruh.

VIII. KIP UNRUH RELEVANT TESTIMONY ON DESIGN REVIEW COMMITTEE

1. On November 24, 2014, Kip Unruh admitted submitting renderings of a proposed multi-use building on Parcel 2 (See Exhibit 283). Mr. Unruh admits that he did not follow the design guidelines for his first submittal. (Kip Unruh Cross X)

2. Mr. Unruh admits receiving drawings from David Langley who was hired by the Design Review Committee to help Mr. Unruh comply with the DDA Design Guidelines. (Kip Unruh Cross X)

3. Mr. Unruh admits that he had never brought a building "out of the ground" like the building he was proposing for Parcel 2. He had no design and construction experience for the building he was proposing. (Kip Unruh Cross X)

4. Kip Unruh's lack of construction experience is shown by an email dated December 18, 2014 from Sally Riley to Kip regarding the status of the ZDP (See Exhibit 216). She had not received a site plan application and noted that he was out of order in designing the details of the building before he has approval of the site design. (Kip Unruh Cross X)

5. On January 27, 2015, Sally Riley sent an email with the development task spreadsheet for Kip Unruh's project (See Exhibit 316). (Kip Unruh Cross X)

6. On February 13, 2015, Sally Riley sent a site plan submittal checklist to Kip Unruh's representative, Andy Mullett. (See Exhibit 319). The Design Review Committee ("DRC"), sent a letter March 20 (2015) to Kip Unruh regarding comments on the status of the project (Exhibit 310). (Kip Unruh Cross X)

7. On April 14, 2015, Sally Riley sent a letter to Kip Unruh regarding the status of the project and that the site plan review submittal was deemed incomplete. (Kip Unruh Cross X)

8. Sally Riley stated that staff agrees with the DRC comments of March 20 (Exhibit 220).

9. Kip Unruh received a Notice of Default letter from the DDA dated May 4, 2015 (Exhibit 221). The Notice of Default was discussed at the DDA meeting on May 5, 2015 in Executive Session. That meeting was later released as a public record. On May 8, 2015, Sally Riley sent an email to Kip Unruh regarding the DRC and the City to complete comments for a preliminary site plan (Exhibit 329). The DRC comments on the initial site plan were sent to Mr. Unruh on May 10, 2015 (Exhibit 330). (Kip Unruh Cross X)

10. Mr. Unruh's response was May 13, 2015. (Kip Unruh Cross X) As of May 13, 2015, Kip Unruh was still proceeding with the project despite receiving a Notice of Default at the DDA meeting on May 5, 2015. (Kip Unruh Cross X)

11. Sally Riley distributed a memo regarding the status of the project dated May 20, 2015 (Exhibit 224) at the DDA Board meeting on May 21, 2015 (Exhibit 314). (Kip Unruh Cross X)

12. On May 21, 2015 at 10:38 a.m., Sally Riley sent an email to Kip with the attached copy of the status report on his project. Kip Unruh responded back to Sally Riley and Brian Fleer at 12:44 p.m. saying, "At this time I have stepped back from the project. I am getting counsel as to the viability project (*sic)* and what my actions might be considering experience(s) with the city official and the DDA." (Exhibit 286) From the documents in this case, the immediate preceding action to Mr. Unruh's email to Sally Riley saying he was stepping back from the project, was an email he received two hours earlier from Sally Riley with her memo of the current status of the project. (See Exhibit 286) (Kip Unruh Cross X)

13. On May 21, 2015 at 5:58 p.m., Sally Riley sent an email to Kip Unruh with the DRC May 10 memo and his reply comments in Caps and DRC reply comments in a brown font. (Exhibit 287) DRC's comments on May 21st were not received prior to the Kip Unruh's decision to step back from the project. (See Exhibit 287). (Kip Unruh Cross X)

14. With regard to the DRC comments, Mr. Unruh admitted that the DRC had the right to make comments pursuant to the DDA Foundation Plan and the DDA Design Guidelines. (Kip Unruh Cross X)

15. Mr. Unruh admitted that all design review was related to the multi-use building of the Replacement Agreement. It had nothing to do with the Beer Garden Agreement. Woodland Park Beer Garden LLC was not even a party to the 2014 Agreement. (Kip Unruh Cross X)

16. (Tim Seibert submitted another site plan on May 14, 2015.)

17. The records show that the DRC and Mr. Unruh were in substantial agreement with a few concerns to be worked out. (Kip Unruh Cross X)

18. Mr. Unruh provided no response to Sally Riley's status report of May 20, 2015. (Exhibit 224). In comparing the Design Review Committee's comments in Exhibit 330, to Sally

Riley's status report in Exhibit 224, it appears that Kip Unruh had more requirements to satisfy for the City of Woodland Park than he did for the Design Review Committee. (Kip Unruh Cross X)

19. On July 7, 2015, the DDA Board passed Resolution 1-2015 declaring all agreements in default and authorizing and directing Brian Fleer to send Notices of Default to all parties. (Resolution - Exhibit 281 and 289) (Exhibit 227) (Kip Unruh Cross X)

20. Kip Unruh admitted that he never responded to the Notice of Default dated May 4, 2015 (Exhibit 221). On September 30, 2015 a termination letter was sent to Mr. Unruh terminating the 2014 Agreement and MOU, further because Woodland Park Village LLC was a non-existent entity, the termination agreement stated that all agreements are null and void. (Exhibit 231) (Kip Unruh Cross X)

IX. DAVID LANGLEY RELEVANT TESTIMONY ON DESIGN REVIEW COMMITTEE

1. David A. Langley testified in this matter. He is an architect licensed in Colorado since 1979. He graduated with a Masters in 1976. He has been a resident of Woodland Park since 1981. He has done commercial property since 1983 in Woodland Park and Colorado Springs. Today he has projects in seven jurisdictions. He is familiar with the Woodland Park Municipal Code and the design guidelines of the DDA. Based upon his, education, experience and specialized knowledge the Court finds him qualified an expert witness. (David Langley Direct)

2. He first became involved with the review of the multi-use project after being contacted by Tanner Coy. Brian Fleer then asked Mr. Langley if he could advise with regard to the design guidelines. Exhibit 202 is a copy of the Woodland Station resolution and design guidelines. (David Langley Direct)

3. Kip Unruh provided renderings and pictures. Pictures that were submitted were photographs of mountain design that were within the character of Woodland Park. The renderings did not match that. (David Langley Direct)

4. Mr. Langley provided an overlay sketch that would include some design elements as required by the design guidelines. Exhibit 110 was one of the early renderings. (David Langley Direct)

5. Exhibit 366 was Mr. Langley's sketch with notes. Exhibit 365 was provided in response to Mr. Langley's sketch overlay. Mr. Langley provided the overlay sketch because Exhibit 110 needed design elements. (David Langley Direct)

6. Mr. Langley observed the Design Review Committee in this process. Communications were with Tanner Coy and Jan Cummer and then Brian Fleer who authorized his work. (David Langley Direct)

7. The parties were not in an adversarial relationship and Mr. Langley was pleased about that. There was a negative tone in emails from Kip Unruh but the responses from his architects were positive and responsive. Tanner Coy indicated some level of moving on and requested materials and color samples. (David Langley Direct)

8. In April 2014, I was made aware of additional construction documents. I was not asked to review. The Design Review Committee actions were reasonable and consistent with the design guidelines. The timing and response of emails between the parties was timely. (David Langley Direct)

(David Langley Cross X)

9. The design guidelines do not depend on Exhibit A for their design elements. (David Langley Cross X)

10. With regard to Exhibit 77 the guidelines are not subjective. (David Langley Cross X)

11. The DRC has the right to disapprove in accordance with their opinions. The design guidelines are clear. (David Langley Cross X)

12. There are no specific criteria for parking and no specific criteria for drainage in the design guidelines. Mr. Langley said he made no comments relative to parking or drainage or to exterior furnishings. (David Langley Cross X)

(David Langley Redirect)

13. With regard to the DRC memo in Exhibit 287, it appears consistent with the design guidelines. (David Langley Redirect)

14. Mr. Langley was asked were DRC's comments with regard to lighting plans proper and within its authority, he answered yes. In Exhibit 110 there are no lighting elements shown. (David Langley Redirect)

15. The DRC's comments with regard to gutters was also reasonable. Mr. Langley said he did not address gutters because it was not yet a design element or the concept. It is expected to address details as you get further in the process. Comment number 7 regarding trash enclosures was within the DRC's authority. (David Langley Redirect)

16. Plans were submitted to the city concurrently. Mr. Langley said it would not be unusual to go back and forth between the City and the DRC. It is very much a standard practice. (David Langley Redirect)

17. The Concept Plan was not part of Mr. Langley's review. When asked if the DRC was a hindrance, Mr. Langley replied, "Not at all, we were engaged to present a quality project." (David Langley Redirect)

(David Langley ReCross X)

18. In Exhibit 366 is dated mid to late February 2015. (David Langley ReCross X)

19. There was no follow up on balcony materials. Mr. Langley testified that parking was not a part of design guidelines. (David Langley Re-Cross X)

20. However, Mr. Coy had testified that parking was a part of design layout of service and delivery areas which are part of the design guidelines. Also the Foundation Plan of the DDA required it to work with the City to develop parking facilities with parking behind retail buildings. All parking should be well designed, with attractive landscaping, lighting and pedestrian access. (Exhibit 204, page 11). (Tanner Coy Direct and Re-Direct)

X. RELEVANT TESTIMONY BY JAN WILSON REGARDING THE DESIGN REVIEW COMMITTEE

(Jan Wilson Direct)

1. Janice (Jan) Wilson testified in this case she had been a DDA board member about six years. She was born in Jersey City, New Jersey and moved to Colorado in 1972. She has a Bachelor's Degree in Criminal Justice and worked for the public defender's office in Boulder. She worked for the public defender in Brighton as an investigator for 15 years. From 2001 to 2018 she operated a business known as Curves in Woodland Park. (Jan Wilson Direct)

2. Beth Kosley encouraged Jan Wilson to apply for the DDA. She filed the application and got appointed by the City Council. She was appointed to the Design Review Committee about the same time as Tanner Coy by the other board members. (Jan Wilson Direct)

3. The DRC did not have absolute authority. The final decisions were to be made by the Board. She is familiar with the design guidelines (Exhibit 202). (Jan Wilson Direct)

4. Jan Wilson testified that Arden wanted to go a German beer garden. He had a couple of pictures. She testified that she thought it was great. He talked about having a carousel. (Jan Wilson Direct)

5. With regard to the 2013 Agreement, the parties to the Agreement were Woodland Park Beer Garden LLC and the DDA. WPBG is Arden Weatherford. (Jan Wilson Direct)

6. She never heard of Beer Garden Lane Development at the time. BGLD is not a party to this Agreement. Kip Unruh is not a party to this Agreement. (Jan Wilson Direct)

7. Jan Wilson testified that with regard to Exhibit 213, it is the Replacement Agreement to Arden Weatherford's agreement. Jan Wilson stated it says right in the title it is replacing the WPBG agreement. Jan Wilson testified that she never heard Arden Weatherford object to this 2014 Agreement replacing his agreement. (Jan Wilson Direct)

8. Jan Wilson testified that Exhibit 283 are renderings of a building four retail establishments with residential on top. Arden Weatherford sent those to Jan Wilson. The DDA had an agreement with Woodland Park Village at the time. (Jan Wilson Direct)

9. Jan Wilson testified that we went through the design guidelines in reviewing the drawings. The drawings did not comply with the design guidelines. Specifically there were skimpy uprights, there were coverings that did not meet the design guidelines. The roof requires peaks. The railings were a metal cable that doesn't fit with Woodland Park. The building had rigid right angles and the design guidelines say to avoid rigid right angles. (Jan Wilson Direct)

10. Jan Wilson testified that we made some comments with suggested changes. We had a phone conversation with Kip Unruh and the architect. The architect had never been to Woodland Park. She testified that it did not appear that he understood what we were saying. He did not apply what we were telling him. (Jan Wilson Direct)

11. Jan Wilson testified this went back and forth several times and we brought in David Langley. He did an onion skin drawing if they do these things they would comply. This

went on for a few months. At one point there was no communication from Kip for a long time. (Jan Wilson Direct)

12. With regard to the DRC comments of March 20 (2015) (See Exhibit 222), Jan Wilson did not send this to Sally Riley. Tanner drafted it and sent it to her. (Jan Wilson Direct)

13. With regard to Exhibit 220, the letter from Sally Riley dated April 14, 2015, Jan Wilson testified that Sally Riley stated in the letter that staff agrees with the DDA design review comments of March 20, 2015. (Jan Wilson Direct)

14. Jan Wilson testified that the DRC was working with Sally and she agreed with the DRC's comments. All design review is being done under the 2014 Agreement. Jan Wilson testified that we were working in conjunction with the City to save Developer time. (Jan Wilson Direct)

15. Jan Wilson was asked if she was trying to block the project. She testified, "No I was in favor of the project, still am." (Jan Wilson Direct)

16. Jan Wilson was asked if she had any personal animus towards Kip. Jan Wilson testified, "No, I don't know him." (Jan Wilson Direct)

17. Jan Wilson was asked if she had any personal animus towards Arden Weatherford. She answered, "No, I don't know him well." (Jan Wilson Direct)

18. Jan Wilson was asked if Tanner Coy had any animus personal against Arden. She testified that Tanner Coy never had any personal animus against Arden Weatherford. (Jan Wilson Direct)

19. When asked how did the DDA requirements stack up with the City, Jan Wilson testified that "the City definitely has more, no question." (Jan Wilson Direct)

20. With regard to the Notice of Default in Exhibit 221, dated May 4, 2015, Jan Wilson testified that she was in favor of the letter. There was a list of dates that weren't met. The dates were ignored as if they didn't matter. Jan Wilson testified that the dates in the 2013 Agreement didn't matter because it was replaced. (Jan Wilson Direct)

21. With regard to the DRC comments memo in Exhibit 287, Jan Wilson testified that Tanner Coy and she generally discuss, then he drafts, then he calls her back. This memo was sent after the default notice. Kip Unruh responded to the DRC comments. Jan Wilson testified that, "We were getting closer. I don't recall any deal breakers." (Jan Wilson Direct)

22. When Jan Wilson was asked whether she heard that Kip blamed the DRC in his decision to walk away from the project, she responded that yes she had heard that but she didn't understand. (Jan Wilson Direct)

23. When asked what she thought of Kip Unruh as a Developer, Jan Wilson stated, "Totally incompetent. He didn't seem to understand. Or he was unwilling to comply." (Jan Wilson Direct)

24. With regard to an email from Jan Wilson in Exhibit 108, she testified that is was her personal email. She testified that it was total frustration. She testified, "How many times do you have to tell someone?" When asked if she meant anything by her reference to, "Idiots," she said that, "They didn't seem to get it." When asked if at the time she intended to still approve the project, she said, "Yes. I still support the concept." (Jan Wilson Direct)

(Jan Wilson Cross)

25. With regard to the October 2013 Agreement Jan Wilson was asked about a single condition precedent regarding removal of tanks. She testified that was part of it and she wouldn't say that it was critical. (Jan Wilson Cross)

26. When asked if she had an understanding that WPBG was entitled after conveyance after the purchase of Amerigas, Jan Wilson said that she couldn't say yes or no to that. We had a list of timelines and none of the dates had been met. She relied upon Fleer and peers (after discussions). She testified that she did not rely heavily on Tanner Coy. She relied on the Replacement Agreement. (Jan Wilson Cross)

27. The 2014 Agreement was with Woodland Park Village LLC. WPV is the only signatory. WPBG is not a signatory. (Jan Wilson Cross)

28. Jan Wilson stated that she reviewed it prior to approving it. She stated it says in the title that it replaced the 2013 Agreement. (Jan Wilson Cross)

29. Jan Wilson testified that she had no experience in the design other than personal design experience. Langley was hired because we wanted to be sure of our interpretation so that we engaged a third party. (Jan Wilson Cross)

30. As of May 5, 2015 she testified she was still supportive. (Jan Wilson Cross)

31. With regard to the inadvertent meeting, Jan remembers coming upon other board members. She doesn't recall seeing Buttery. She said that he and the other board member left immediately. (Jan Wilson Cross)

32. At the May 21, 2015, the Board had discussions about adding members to the DRC. The Board decided not to do it. (Jan Wilson Cross)

33. Jan Wilson testified that she was disappointed that the Developers walked away from the project. She testified that they were not complying, but she still supports the project. (Jan Wilson Cross)

34. Jan Wilson admits calling Arden an idiot. (Jan Wilson Cross)

(Jan Wilson Redirect)

35. None of these emails with her comments about Kip Unruh and Arden Weatherford had anything to do with the 2013 Agreement. (Jan Wilson Redirect)

36. No design review was relevant to the 2013 Agreement. With regard to the dirtgate letter (Exhibit 95), there was no attempt to avoid the open meeting law. (Jan Wilson Redirect)

37. With regard to the Fleer memo in Exhibit 93, Jan Wilson testified that she went in for a different reason and left immediately. (Jan Wilson Redirect)

38. Jan Wilson testified that Arden Weatherford once stated that she was Tanner Coy's lap dog. (Jan Wilson Redirect)

XI. TIM SEIBERT TESTIMONY ON CONCEPT PLAN CHANGES BY DEVELOPERS

1. The concept plan was presented to the DDA Board and approved on November 5, 2013 (Exhibit 33). A few days later on November 7, 2013, Kip Unruh requested changes to the concept plan, which included adding another building, removing a road, and inserting references to the beer garden and beer garden grounds. (See Exhibit 353) The concept plan to the City Council on December 5, 2013 did not include the same Concept Plan to the DDA (See Exhibit 354). Seibert does not recall that the DDA approved Concept Plan was presented to the City Council in Exhibit 354. (Tim Seibert Cross X)

2. There was a wholesale revision of the concept plan in 2014. This included the Aquatic Center in the design. (See Exhibits 355, 356, and 357). (Tim Seibert Cross X)

3. There was a meeting with Buttery and Fleer on January 16, 2015. The traffic study issue was discussed. (Exhibit 359, page 3). The DDA could commission a traffic study. The City was to do a traffic study for the Aquatic Center. (Tim Seibert Cross X)

4. On February 17, 2015 there was an email to Buttery regarding a new site plan. Lot 2 was still a departure from concept plan approved by the DDA. (See Exhibit 360). In February 2015 Seibert reengaged with Kip Unruh. On April 20, 2015, there was another revision to the concept plan. This was significantly different from the original concept. (See Exhibit 361). (Tim Seibert Cross X)

5. On May 8, 2015, Tim Siebert testified that he was still working on a site plan. (See Exhibit 362). (Tim Seibert Cross X)

6. On May 12, 2015, Sally Riley was still waiting on a response from Bill Alspach. (See Exhibit 328, See also Exhibit 329). (Tim Seibert Cross X)

7. On May 14, 2015, NES prepared another version of the site plan. (See Exhibit 363) (Tim Seibert Cross X)

8. Tim Seibert testified that there were lots of ways to do a traffic study. He was aware of CDOT issues. (Tim Seibert Cross X)

9. As to the site plan presented on May 15, 2015, Lot 2 does not look like the one presented to the DDA. There are changes. (Tim Seibert Cross X)

10. Unruh called and told him to hold off on further work. (Tim Seibert Cross X)

11. The additional work provided by NES was a rough estimate. NES sent no bills to Woodland Park Beer Garden LLC. (Tim Seibert Cross X)

XII. TESTIMONY OF DAVID BUTTERY RELEVANT TO 2013 AGREEMENT, REMOVAL OF DIRT FROM WOODLAND STATION BY ARDEN WEATHERFORD, OPEN MEETINGS ISSUES.

A. David Buttery Testimony on Complaint for Removal of Dirt.

(David Buttery Direct)

1. David Buttery, former city manager of Woodland Park, testified on behalf of the Plaintiff.

2. With regard to the 2013 Agreement he remembers reading it in a cursory way. He does not recall specific details. (David Buttery Direct)

3. With regard to moving the tank on the Amerigas property on October 8, 2013, he cannot testify to whether it improved the value of Lot 2. He is not a property appraiser. (David Buttery Direct)

4. He does not agree that the DDA endured criticism about development of the hardware store. The hardware store was met with general support. He would not say that the budget was blown. (David Buttery Direct)

5. With regard to Exhibit 95, the DDA request for a complaint to be filed for removal of dirt from DDA property, David Buttery did not regard it as a trespass. He did not cause a complaint to be filed. (David Buttery Direct)

6. On June 10, Brian Fleer resigned as Executive Director of DDA. David Buttery took over as interim Executive Director. He states that he received the complaint letter in Exhibit 95 on June 17. (David Buttery Direct) Mr. Buttery testified that he signed a permit for the excavation work after becoming the interim Executive Director of the DDA.

7. There was a DDA Board meeting on June 20, 2016. The Board discussed the trespass. In his opinion, the Board had the ability to discuss this in Executive Session. He testified he signed permit on behalf of the DDA after the Executive Session. (David Buttery Direct)

8. He received a copy of a letter from David Neville dated August 31, 2016. (Exhibit 98). He said the letter did not change his position. (David Buttery Direct)

9. David Buttery testified that he can't deny that Arden Weatherford was removing dirt from the DDA property. (Buttery Cross X)

10. Tanner Coy had testified that the hole was 7 feet deep and more than a hundred feet long. (Tanner Coy Testimony). Arden Weatherford claimed he was just removing topsoil. (Exhibit 96)

11. On July 12, 2016, there was discussion about the Executive Director. Buttery recommended that there be an Executive Director. David Buttery was not retained as interim executive director. It was upsetting and surprising. He testified that "I understand the role of the Board. I don't have to agree with the decision." (David Buttery Direct)

B. Relevant David Buttery Testimony on 2013 Agreement

1. He testified that at times Arden Weatherford was not diligent in the process. Arden Weatherford has frustrations. He testified that Arden Weatherford was treated differently. There was an impression that the Board was not acting in good faith. (David Buttery Direct)

2. David Buttery testified that he had known Arden Weatherford fifteen to eighteen years. When asked if Arden acted for the good of the community, David Buttery said Arden is a businessman. (David Buttery Direct)

3. David Buttery had testified that Arden Weatherford did not have thin skin and was not quick to anger. He admitted that there were times when he was stubborn and not willing to follow regulations. (Buttery Cross X)

(Buttery Cross X)

4. David Buttery testified that he didn't know the distinction between the ownership groups. (WPBG, BGLD, and WPV). (Buttery Cross X)

5. With regard to the 2013 Agreement, David Buttery does not remember reviewing the Agreements. (Buttery Cross X)

6. David Buttery has no specific recollections of Concept Plans. (Buttery Cross X)

C. Subdivision Required before Conveyance.

1. David Buttery admits that there must be a subdivision before conveyance. (Buttery Cross X)

D. CDOT Letter Should Not Be A Surprise To The Developers.

1. David Buttery does not recall that the CDOT letter is the same conditions as the preliminary plat. He understood that there were traffic requirements. He was surprised that the CDOT letter had been recently discovered. Highway 24 improvements were discussed for a long time, years. There was a general understanding that there would need to be an extension of Saddle Club Drive. That makes sense to distribute traffic. David Buttery admitted that he was surprised that Weatherford and Randolph would be surprised about the CDOT letter. (Buttery Cross X)

2. David Buttery is not representing that there has been a breach of contract. In his deposition he stated, "No breach by DDA and no breach by Arden Weatherford." (Buttery Cross X)

3. David Buttery agreed that the Replacement Agreement (Exhibit 213) Exhibit A provides that there would be a conveyance of Parcel One and Two after the ZDP was issued for Parcel Two. (Buttery Cross X)

E. David Buttery Testimony On No Open Meetings Violations By DDA

1. When asked about noncompliance with the Sunshine Laws, David Buttery said he once saw three cars of Board members at a location. He once saw four Board members in a conference room. Fleer had filed a memo about an inadvertent meeting on March 3, 2016. (See Exhibit 93). (David Buttery Direct)

2. David Buttery testified that he attended DDA meetings. He did not object to Executive Sessions of the DDA which included persons other than the Board members. (Buttery Cross X)

3. With regard to August 28, 2014 DDA meeting minutes, he has no recollection of Weatherford objecting to the Motion to pass the Replacement Agreement. He knows of no violations of the open meetings laws at DDA meetings. (Buttery Cross X)

4. Mr. Buttery stated in DDA Board minutes, "I can get consensus from Council one member at a time to move forward." Mr. Buttery admitted that he never stated that the meeting as set forth in Exhibit 95 was an illegal meeting. The Complaint in Exhibit 95 is not evidence of an illegal meeting. (Buttery Cross X)

5. David Buttery testified that the DDA from 2014 on was not dysfunctional. Dysfunction might be too strong a word. There was healthy debate, but less respectful. The DDA doesn't step on itself. (Buttery Cross X)

XIII. VERA EGBERT TESTIMONY REGARDING DEVELOPERS IN DEFAULT

1. Vera Egbert, a former member of the Board of Directors, testified that she was unhappy with the way the Board discussed things and left the Board after her term. (Vera Egbert Direct)

2. Vera Egbert testified that she didn't believe that the DRC was fair. She gave no facts in support of this statement. (Vera Egbert Direct)

3. Vera Egbert admitted that she doesn't know what "fair value" means. (Vera Egbert Direct)

4. Vera Egbert voted for the default Resolution 1-2015. (Vera Egbert Cross X)

XIV. WHETHER DEFENDANT'S ALLEGED NON-PERFORMANCE RESULTED IN DAMAGES TO PLAINTIFF.

1. Even if the DDA had breached the 2013 Agreement, WPBG has shown no evidence that it suffered any damages from any alleged breach by the DDA. All damages claimed by WPBG were for funds expended by other parties, such as Beer Garden Lane Development, LLC, which was not in privity of contract with the DDA. (Tanner Coy 6/13/18 redirect)

2. Tanner Coy testified that the documents submitted as proof of damages by WPBG in Exhibits 56 through 65 showed no payments by WPBG, no damages by WPBG. (Tanner Coy Direct Exam)

3. Because the claims for breach of contract and damages asserted by Woodland Park Beer Garden are without any reasonable basis in fact or law, are substantially frivolous, substantially groundless, or substantially vexatious, and Defendant DDA is entitled to reasonable attorney fees pursuant to C.R.S. Section 13-17-101, *et. seq.* Plaintiff has not presented a rational argument for specific performance given the law cited by the Defendant. Plaintiff presents no rational argument for breach of contract or damages for breach of contract. Plaintiff has not alleged a set of facts that would constitute that it performed under the original 2013 Agreement. (Tanner Coy 6/13/18 redirect)

4. Mr. Weatherford admitted that property taxes and interest were paid for by BGLD. He admits other claims for damages were paid for by Woodland Park Brewing Company. He admits McCracken was paid by BGLD. (Arden Weatherford Direct)

5. Section 9.4.3 is a damage limitation in this contract. Since there is no parcel, there cannot be any damages claimed for breach of the contract. Further, the damage limitation this contract is required by TABOR and there has to be an appropriation every year. The damage limitation in this contract is that the Authority shall not be required to pay any amount for

damages or any other award in excess of any amount that the Authority has appropriated for payment of its reimbursement obligations. Therefore, any damages allegedly claimed by the Developer are limited to zero. (Benedetti direct exam)

6. The Investment Indemnity Agreement signed on November 30, 2017 requires WPBG to pay BGLD if it is awarded any damages. If no damages are awarded to BGLD then it owes no duty to indemnify BGLD. BGLD assigned all its rights, assigned any and all claims and damages it may possess or have suffered out of the Woodland Station project to WPBG. He states that WPBG has signed an Indemnity Agreement with BGLD. (Exhibit 72) (Arden Weatherford Direct). Exhibit 72 shows the Indemnity Agreement is only signed by Steve Randolph and Arden Weatherford. It is not signed by other members of BGLD.

7. The DDA did not give any written permission for WPBG to assign any rights under the 2013 Agreement to BGLD. Arden Weatherford testified that WPBG did not assign any rights to BGLD. (Arden Weatherford Testimony)

8. With regard to Plaintiff's Exhibit 2, the Indemnity Investment Agreement, Tanner Coy testified that WPBG was the only party to the 2013 Agreement, and there would be no damages for taxes paid by Beer Garden Lane Development. Beer Garden Lane Development was not a party to any agreement with the DDA, so the DDA did not have to accept any performance from BGLD or be liable to BGLD for any damages. (Tanner Coy 5-30-18 Cross-X)

9. It is undisputed by all the parties and witnesses in this case that BGLD was not in privity of contract with the DDA. (Arden Weatherford Direct)

10. It is undisputed by the witnesses in this case and by the exhibits, that BGLD was not a signatory to any agreement with the DDA.

11. Section 13.0 provides that no third-party beneficiary rights are created in favor of any person not a party to this Agreement, except for lenders. (Benedetti direct exam)

XV. THE ISSUE AS TO PLAINTIFF'S CLAIM FOR $127,000 IN DAMAGES FOR INCREASE IN VALUE TO DDA'S PROPERTY.

A. W.D. Park Testimony Excerpts

(Park Direct)

1. W.D. Park was an appraisal expert by the Plaintiff. He testified that he had an SRA residential and MAI commercial certification. He was found to be qualified as an expert appraiser.

2. The scope of his work was to give the estimated market value change to Lot 2 in Woodland Station by virtue of the removal of the propane tank from the Amerigas parcel. Appraisals of the property were given at two different points in time, before removal of the tank and after removal of the tank. The appraisal date was November 14, 2017. (Park Direct)

3. Exhibit 68 was an appraisal report dated December 15, 2017. (Park Direct)

4. Mr. Park issued a "rebuttal" report dated February 22, 2018. (Exhibit 69). Mr. Park admitted there were clerical errors in his original report. He stated the adjustment grid on page 50 had math errors. He included a new table in his rebuttal report to replace the grid on page of his original report. (Park Direct)

5. It was his opinion that the differential increase in market value as of November 15, 2017 was $105,000.00. In his rebuttal report, his opinion of the estimated market value change to Lot 2 in Woodland Station was $127,000.00. (Park Direct)

(Park Cross X)

6. Upon cross examination, Mr. Park admitted that he was making an assumption that the propane tank was an environmental issue that needed an adjustment. See Exhibit 68,

page 50 (Comparable Land Sales Adjustment Grid, Lot 2 "Before Removal of Propane Tank"). (Park Cross X)

7. The same adjustment grid in Park's rebuttal report also had an adjustment for an environmental issue (Exhibit 69). (Park Cross X)

8. Comp 1 on the Adjustment Grid was a property located at 100 Saddle Club Avenue. The sales date was September 17, 2012. Mr. Park stated an environmental issue adjustment of minus 50 % (-.50). Mr. Park admitted that since the removal of the tanks took place on October 8, 2013, Comp 1 was sold when the tanks were there, there should not have been a 50% reduction for the environmental issue since the sale took place while the environmental issue was present. (Park Cross X)

9. With regard to the comparable land sale adjustment grid, Lot 2 "after removal of propane tank", Mr. Park was asked if Comp 1 should be shown as a plus .50 (+.50) because it was sold while the tanks were still present. (Park Cross X)

10. Mr. Park said "It could be. What you are saying makes sense." (Park Cross X)

11. Mr. Park was asked what authority he reviewed to determine the 50% adjustment for the environmental issue, he stated he couldn't find any data, that it was just an assumption based on his experience. He admitted there was no data to support the assumption of a 50% adjustment. (Park Cross X)

12. Mr. Park agreed that the same changes apply to his adjustment grids in Exhibit 69. Mr. Park stated that he can't tell the Court that the appraisal value is $127,000.00. He stated that I am not prepared to revise my report now. (Park Cross X)

13. When asked if he could tell the Court that based on this report that the change in value was $127,000.00, he asked if he could consult his notes. (Park Cross X)

14. After a period of time he came back and stated that he has done the calculations, and if that adjustment should remain, it would definitely drop the value down. He stated that the valuation was based on a hypothetical condition, but he had to agree on the date of value, for Comp 1, the tanks were there. According to Mr. Park, Comp 1 is not based on fact, it is based on a hypothetical. With regard to Exhibit 69 and Comp 2, Mr. Park admitted that the square foot price of $17.66 seemed high compared to the other square foot prices of 3.19 and 3.96 on the other comparables. Mr. Park said he checked but he couldn't find any reason for this difference. (Park Cross X)

15. He said Comp 2 was one parcel of vacant land. With regard to Mr. Park's Comparable Land Sale Map contained in Exhibit 69, page 46, which pointed to Comp 2 at 255 East U.S. 24 next to Lot 2, Mr. Park admitted that his map was wrong on the arrow pointing to the location of Comparable Sale 2. (Park Cross X)

16. He stated that Comp 2 was one parcel of vacant land. (Park Cross X)

17. Mr. Baker testified that there were 3 parcels in the sale of Comp 2, not just the one that Mr. Park identified.

18. With regard to the Amerigas tanks having a negative effect on building of commercial property, Mr. Park admitted that the Amerigas parcel had the Vectra Bank building next door. (Park Cross X)

19. Mr. Park agreed that there is no adjustment on Comp 1 because it sold with the tanks. (Park Cross X)

20. Mr. Park admitted that there was no data to support a 50% adjustment of an environmental issue. (Park Cross X)

21. He admitted that Comp 3 was farther away and was not impacted by the "environmental issue." (Exhibit 68, page 48). (Park Cross X)

B. Greg Baker Testimony Excerpts

(Baker Direct)

1. Greg Baker testified on behalf of the Defendant in this matter. Mr. Baker was qualified by the Court as an expert appraiser. Mr. Baker has the MAI certification. This is the highest level of certification for commercial real estate. He also has the highest Colorado state certification and eleven (11) years of experience in appraisals. He has appraised property in the Woodland Park area. He was hired by the Woodland Park School District to appraise the land for the Aquatic Center in Woodland Park. He was hired by Wal-Mart to appraise the land for Wal-Mart in Woodland Park. He has appraised office buildings and industrial buildings. He estimates that he has done approximately 20 to 30 appraisals in Woodland Park over the years. He has testified previously as an expert witness in the El Paso County Court in two foreclosure cases. He has testified as an expert in Pueblo County Court. He is a fee appraiser, as opposed to a staff appraiser or a government appraiser. The Court finds he is qualified as an expert on appraisal of property in this matter. The Court finds that he is qualified by his education, training, and experience to give testimony as an expert in this case. He issued an expert report which was filed with Defendant's Expert Disclosures on August 2, 2016.

2. Mr. Baker was retained to do a review and an analysis of Mr. Park's original appraisal report. Exhibit 370 is the appraisal review report by Mr. Baker. (Baker Direct)

3. It is Mr. Baker's opinion that Park's report is incomplete, has errors, is misleading, and shouldn't be relied upon. (Baker Direct)

4. Mr. Baker testified that Park's appraisal report contained deficiencies in not following the USPAP and the Appraisal Institute. (Baker Direct)

5. With regard to the question of highest and best use, the highest and best use could be more than what Mr. Park suggested. (Baker Direct)

6. Mr. Park used the sales comparison approach for vacant land. The use of the approach was proper. The development of how it was put together was not proper. For example, Comp 2 had bad math and was not a fully confirmed sale. The deed on Comp 2 included three parcels. The property sales price of $17.66 is the wrong number. Comp 2 was placed in the wrong place on the map. Mr. Park has it in the wrong place in Woodland Park. This is due to the fact that Mr. Park solely relied on Google Maps, which put its location in the wrong place. (Baker Direct)

7. With regard to Exhibit 68, page 48, the Comp 2 property is actually around the corner and further down on Highway 24. The "as is versus as was" would be greatly affected. With regard to Park's rebuttal report in Exhibit 69, the Land Adjustment Chart showed that Park corrected a map problem but not the location or multiple sale issue. Mr. Baker testified that if Park had put in the other two parcels Comp 2, the number would be $5.89 a square foot. (Baker Direct)

8. Mr. Baker testified when you use the $17.66 per square foot that is a 300% error. Garbage in, garbage out. Mr. Park missed the 3 parcels in Comp 2. (Baker Direct)

9. When Mr. Baker saw the price of $17.66 a square foot, he said it sticks out like a sore thumb and he wanted more explanation. He says he went looking for an explanation. Park did not look for an explanation or include an explanation. A prudent appraiser would have included an explanation. (Baker Direct)

10. With regard to the environmental issue adjustment of 50% by Park, Mr. Baker testified that Mr. Park did not explain this adjustment. Mr. Park gave no data supporting the 50% adjustment. (Baker Direct)

11. Mr. Baker's grid on page 10 is a recreation of the Park grid on page 50, but he eliminated some lines and took out zeros to make it clearer. He also used 10% for the location adjustment. (Baker Direct)

12. Mr. Baker testified that the entire premise of Park's report comes down to his environmental adjustment assumption. He submitted his report with an environmental condition adjustment of minus 50%. There is no support for that number. (Baker Direct)

13. Looking at Mr. Park's grid on page 50 of Exhibit 68, Comp 1 should not have had an adjustment. There is no need for an environmental adjustment because the environmental issue is built into the price. The environmental issue was there when the property was sold. Generally applying adjustments wrong make the bottom line wrong. (Baker Direct)

14. There is no support for 50% adjustment. Comp 1 did not need a negative 50% adjustment. Comp 2 is wrong because it is in the wrong location and did not include all three parcels. Comp 3 needs no adjustment due to the distance. Mr. Baker testified that you can't rely on Mr. Park's numbers. (Baker Direct)

15. The Comp 2 size is wrong, plus it fronts Highway 24. A 300% adjustment in any appraisal is huge. (Baker Direct)

16. Mr. Baker's conclusions are on page 12 of his report. (Baker Direct)

17. Mr. Baker testified that you can't rely on Mr. Park's report as presented. There are math errors. There is no support for Mr. Park's environmental adjustment. Mr. Park used his environmental adjustment incorrectly. Comp 2 is incomplete and incorrect. (Baker Direct)

18. There are compound errors. Park's report borders on negligence. Park's report demonstrates carelessness and there should be no reliance on Mr. Park's report. All the errors would have to be fixed in this report before it could be useful. (Baker Direct)

19. The value difference of Lot 2 could be zero, positive, or negative. Park's conclusions have no soundness. (Baker Direct)

20. In Mr. Baker's opinion, Park's report does not give an accurate value estimate. Park's report should not be used. His report should be rejected. There are errors, missing pieces, and no data. There is not enough information to believe it. (Baker Direct)

21. Mr. Baker testified, if it's all wrong, we can't really use it. Park's data does not support his conclusion. The rebuttal report is a letter and not a new report. It does not comply with the USPAP standard. You can't just replace pages. This is a USPAP violation. New value and new math requires a new report. The rebuttal is not an appraisal report. (Baker Direct)

22. In the supporting documents to Exhibit 370, Mr. Baker has a Teller County parcel map. It shows that Sale 2 was a multiple parcel sale far away from the propane tank as shown in the attached county records in Mr. Baker's report. The deed is for three (3) lots. Having three lots instead of one lot changes the acreage. Mr. Park listed the wrong reception number. (Baker Direct)

(Baker Cross X)

23. Mr. Baker testified that he can't say that the tanks affect the value. It is not necessarily true that the tanks affect the value of Lot 2. Mr. Baker testified that he can't say the tanks are a hazard. (Baker Cross X)

24. Mr. Parks had stated at page 38 that his highest and best use was based on a concept plan. Mr. Baker testified that appraisals should be based on intended use. (Baker Cross X)

25. Mr. Baker testified that Mr. Parks assignment is not terribly difficult, not terribly complicated. The value comes from the comps. The property could be developed as mixed use with or without the tanks. (Baker Cross X)

26. With regard to Park's report about an environmental condition, Mr. Baker said conceptually there could be an adjustment. There are books that exist with data to support adjustment for environmental condition. There is no evidence presented in the report there is an adjustment needed or what the number was. (Baker Cross X)

27. Comp 2 has the facts wrong. Comp 3 sold when there were no tanks in its vicinity. Comp 1 is the closest property to Lot 2. There should be no adjustment for Comp 1. (Baker Cross X)

28. Counsel suggested that Mr. Baker increased Comp 1 by 50%. Mr. Baker did not increase Comp 1 by 50%. (Baker Cross X)

(Baker Redirect)

29. When asked if you can do an appraisal on just one comp, Mr. Baker said not usually. Mr. Baker again testified there is no evidence for the 50% adjustment for an environmental issue. Regarding all the numbers discussed in his testimony, his conclusion is that you can't rely on Park's report. (Baker Redirect)

C. Findings Of Fact Regarding The Claim For $127,000 By Plaintiff.

1. WPBG did not own the Amerigas parcel. WPBG did not remove the tanks from the Amerigas parcel. WPBG did nothing which would increase the value of Lot 2 of Woodland Station.

2. DDA did not gain any pecuniary benefit from the removal of the tanks. In the Woodland Park City Ordinance No. 1117, the City and the Authority agreed that the "City will transfer the Saddle Club property (Woodland Station) to the Authority for cash consideration or

for no cash consideration (as the City Council shall determine later), and the Authority will thereafter transfer the Saddle Club property for no cash consideration, but only for fair value, to a Developer chosen by the Authority at the time the Authority chooses to make the transfer, which time shall be when the Authority determines the Developer is able to complete the development of the Saddle Club property in a manner that results in fair value as determined by the City and the Authority and in furtherance of the goals and objectives of the Authority under the Foundation Plan and in accordance with the design guidelines." (Exhibit 247, pages 2-3) (underline emphasis applied). Therefore no increased value in Lot 2 can be imputed to the DDA, because the DDA is required to dispose of the property for no cash consideration except for fair value.

3. Finally, the Court does not find the opinion of Mr. Park to be supported by sufficient and reliable evidence. The Court finds the testimony of Mr. Baker to be persuasive on this issue.

XVI. PLAINTIFF DEVELOPER IS LIABLE FOR DEFENDANT'S ATTORNEY FEES AND COSTS UNDER THE CONTRACT PROVISION IN SECTION 6.14.

1. Section 6.14 of the Agreement is an indemnification clause which contains broad language which makes the Developer liable for attorneys' fees and costs arising out of or in any manner caused by, connected with or resulting from performance or failure to perform this Agreement. In other words, if the Developer fails to perform, the Developer is liable to the DDA for attorneys' fees. (Benedetti direct exam)

XVII. PLAINTIFF'S COMPLAINT FOR BREACH OF CONTRACT AND DAMAGES WAS FILED MORE THAN THREE YEARS AFTER THE ALLEGED BREACH OF THE CONTRACT BY DDA.

1. At the regular meeting of the DDA on July 7, 2015, Fleer reported that Arden Weatherford brought some comments that he would like read into the record. Fleer then read

Weatherford's comments into the record: He stated "Original conveyance of the beer garden lot was tied to removal of the gas tank." (Exhibit 227).

2. On July 7, 2015, the DDA adopted Resolution 1-2015 to submit a letter of default based on the dates of the last default letter dated May 5, 2015, and at some point a letter of termination. The Resolution also included that the Executive Director was directed and authorized to send a notice of default to Arden Weatherford. At the meeting on July 7, 2015, Fleer reported that Weatherford had brought some comments that he would like to have read into the record:

> "After much negotiation with the DDA, we made an agreement to deal with the Amerigas property…
>
> After locations was finally determined, we then had vastly different appraisals and a complicated closing…
>
> That being done, the tank moved in October 2013.
>
> Original conveyance of the Beer Garden Lot was tied to removal of the gas tank. Months went by without conveyance so I agreed to delay conveyance to be in conjunction on with the first building on Parcel 2 in good faith because I had every intention of working in tandem with Kip Unruh. The unraveling of that deal was unfortunate, and none of my doing. " (underline emphasis added)

3. Mr. Weatherford admitted that his belief is that original conveyance of the beer garden was tied to the removal of the gas tank in October of 2013. He admitted those were his words. (Exhibit 227, page 4) (Arden Weatherford Cross – X)

4. On July 8, 2015, Arden Weatherford sent a copy of his comments read into the record at the DDA Board meeting on July 7, 2015 to Carol Lindholm. (Exhibit 228) (Arden Weatherford Cross – X)

5. The tank from the AmeriGas property was moved on October 8, 2013. Arden Weatherford Cross, Tanner Coy Direct, Exhibit 15)

6. In an email dated January 9, 2015 from Arden Weatherford to David Buttery, Arden Weatherford stated the following:

> "We were late getting the parcel purchased, and the tank moved, because of conflicting appraisals but we kept the DDA informed as the process unfolded. We bought the property in September 2013 and the tank moved in October 2013 and the DDA noted it in its newsletter. We were never noticed that we had breached the contract and there was never any talk that we had.
> I never got an explanation to why the DDA did nothing regarding conveyance after that. In fact, the lot was never even created. I guess I could have noticed the DDA that they had breached the contract at that point, but that would have created a wedge and we were starting to discuss Kip taking a bigger role." (Exhibit 336) (underline emphasis added)

7. Mr. Weatherford testified that all WPBG had to do to get the First Parcel was to purchase Amerigas and remove the tanks. (Arden Weatherford Direct).

8. Mr. Weatherford testified that he was entitled to conveyance upon purchase and tank removal. He stated, "I had satisfied what I had to do." (Arden Weatherford Cross – X)

9. When asked what was the trigger under the 2013 Agreement for conveyance of the First Parcel, Mr. Weatherford said removing tanks and getting the liquor license. (Arden Weatherford Cross – X)

10. When Mr. Weatherford was asked if he entitled to conveyance on October 8, 2013, Mr. Weatherford stated, "I would say so." (Arden Weatherford Cross – X)

11. Mr. Weatherford also testified to other dates that the DDA failed to convey the "First Parcel" in accordance with 7.1. But Mr. Weatherford also testified that May 5, 2015, was the date the First Parcel was supposed to be conveyed. Mr. Weatherford testified the date that the DDA was in default was May 5, 2015. Mr. Weatherford testified that it went south on May

5, 2015. (Arden Weatherford Cross – X); Mr. Weatherford also testified on redirect that the date the First Parcel was supposed to be conveyed was November 5, 2013.

12. Arden Weatherford testified that the Complaint was filed on November 5, 2016. The Court takes judicial notice of the Complaint filing date in the Court file. (Exhibit 339)

13. The Court finds that Mr. Weatherford's statements in 2015 in which he stated he was entitled to conveyance upon removal of the Amerigas tank in October 2013 are more persuasive that his testimony at trial about default being November 5, 2013 or May 5, 2015. He also admitted at trial on more than one occasion that he was entitled to conveyance as of October 8, 2013. Therefore the Plaintiff's claim is that the DDA was in alleged breach as of October 8, 2013.

14. The Court finds that the last Amerigas tank was removed on October 8, 2013. Plaintiff alleges Defendant breached the contract by failing to convey the First Parcel of Lot 2 as of the date the tanks were removed. Plaintiff filed its Complaint on November 5, 2016. The Court finds that Plaintiff's Complaint was filed more than three (3) years after the alleged breach by the DDA.

XVIII. **RELEVANT TANNER COY TESTIMONY REGARDING DAVID BUTTERY, OPEN MEETINGS ISSUES.**

A. Relevant Tanner Coy Testimony on Cross Examination Regarding David Buttery Issues.

1. Fleer's last day of work was June 10, 2015. Buttery attempted to act as interim executive director. (Tanner Coy 5-30-18 Cross-X)

2. With regard to the "get in line" memo (Plaintiff's Exhibit 105), Tanner was quoting a previous communication from Buttery in which he told Tanner to "get in line" (Tanner Coy 5-30-18 Cross-X).

3. Tanner Coy said we disagreed that David Buttery was the executive director of the DDA board. I tried to explain that he had not been voted as executive director. He said that he had been appointed as executive director by head nods in executive session. So on July 12, 2016, the Board had a motion to appoint him as executive director. It failed. (See Plaintiff's Exhibit 70, page 447). Coy said Buttery was acting as interim executive director, but he was not the interim executive director. The City attorney said the law did not require an executive director.

4. Exhibit 121 is a copy of C.R.S. 31-25-815 relating to the DDA having an executive director. (Cf. 31-25-807, which states that the board may appoint an executive director.)

B. Relevant Tanner Coy Testimony Regarding Open Meetings questions.

1. Tanner Coy signed the Complaint in Exhibit 95 after talking with Merry Jo Larsen. (Coy Cross)

2. With regard to whether the executive session of May 5, 2015 was in violation of laws, Tanner Coy stated that he trusted Buttery, Schnitker, and Randolph. It was attended by Arden Weatherford and Kip Unruh. Tanner relied on other members for open meetings acts requirements. Tanner testified that we left the meeting with the consensus we were moving forward, we were going to advance. (Coy Cross)

3. Tanner Coy stated it is no longer my understanding that Developers can attend an executive session. The Developers' presence in the meeting nullified the executive session. (Coy Cross)

4. With regard to Exhibit 223, Schnitker had signed the final plat reportedly after the meeting on May 12, 2015. Fleer's signature is irrelevant to general application for plat. Schnitker signed it. Riley said Fleer did not have to sign it. (Tanner Coy Cross-X 6-13-18).

C. Relevant Tanner Coy Testimony regarding alleged notes at 5-5-15 DDA meeting.

1. Plaintiff's Exhibit 80 dated December 17, 2013 regarding Woodland Station signage. Exhibit 99, CORA request for Tanner's notes for which he read from the tablet on May 5, 2015 Executive Session.

2. Exhibit 100 is an Email from Tanner to Jan about notes he made. It shows an incomplete document. Tanner said I do not believe I read this. I may have read from a different version. This is the only version that he could find.

3. Exhibit 101 is an Email dated December 21, 2016. Tanner Coy responded that there is no way to determine what he read at the meeting. This is not the document that was being asked for in a CORA request. "I could not verify if I read from it at the May 5, 2015 meeting."

4. Regarding Plaintiff's Exhibit 73 Executive Meeting audio file, Tanner Coy said if you compare, you will see that they are not verbatim, but there may be a sentence or two that is.

5. Plaintiff's Exhibit 100 is identified as Tanner's notes. He doesn't know if they were read at the May 5, 2015 executive session.

6. This meeting followed a notice of default and there was every reason to rescind the contract.

7. Tanner did not commiserate with Jan regarding the email where she said she wished the Developers would go away. Tanner says she does not mean it literally. She was just frustrated.

8. There was a service and delivery access problem. Concept plan had originally a road and parking.

9. Riley said 99% to completion of city requirements at executive session. Sally was probably speaking to encourage the Developer.

D. Tanner Coy Relevant Testimony about inadvertent meeting memo.

1. Regarding Plaintiff's Exhibit 93, a Fleer memo of inadvertent meeting dated March 31, 2016, Tanner Coy does not remember being present. He remembers talking to Burgess and Riley does not remember others being present.

DEFENDANT'S PROPOSED CONCLUSIONS OF LAW

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. No Contract Existed Between WPBG and the DDA.

> 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 constitutes 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 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. A Master Development Agreement was negotiated and signed by the DDA on April 1, 2014. The Development Team refused to sign, claiming surprise by a CDOT letter dated March 2, 2012.

This CDOT letter had the same conditions that the City approved when it voted to approve the Preliminary Plat on March 1, 2012. Mayor Steve Randolph was present and voted to approve the Preliminary Plat with the same conditions that are contained in the CDOT letter. The Development Team of Arden Weatherford and Kip Unruh and Steve Randolph, negotiated and signed 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) Replacing Agreement Dated March 19, 2013 with Woodland Park Beer Garden. (Emphasis supplied)(hereafter "Replacement Agreement") (See attached **Exhibit 3**).

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 his agreement of March 19, 2013, was still in force. The Original Agreement was abandoned by Plaintiff as more fully explained below. 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.

B. 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.

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 Agreement dated March 19, 2013, 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 2013 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 conditions precedent 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, which required WPBG to submit a Concept Plan and Financing Plan 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.

(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 2013 Agreement.

C. The Actions of Plaintiff In Failing To Object To The Replacement Agreement And Acting Under The Replacement Agreement Constitute Abandonment of the Original Agreement and 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 abandonment of the Original Agreement and assent to the Replacement Agreement.

2. Plaintiff abandoned the 2013 Agreement. In Colorado, "It is the settled and general rule that a contract may be abandoned by mutual consent and that such consent may be implied from the acts and conduct of the parties. A contract will be treated as abandoned when the acts of one party, inconsistent with its existence, are acquiesced in by another. Where acts and conduct are relied upon to constitute abandonment, however, they must be positive, unequivocal, and inconsistent with intent to be further bound by the contract." *H. T. C. Corp. v. Olds*, 486 P.2d 463, 466 (Colo. App. 1971) (citations omitted). In the *H.T.C. Corp*. case, the Court cited *Baerveldt & Honig Const. Co. v. Dye Candy Co*., 212 S.W.2d 65 (Mo. 1948), which noted:

> "We hold that the original contract was abandoned by the conduct of the parties. We mention a few of the changes: The raising of both floors, the enlarging of the office space, the enlarging of the opening for the elevator, changing the construction of the toilet and substituting or changing materials. All of these changes were authorized and ordered by the defendant. It certainly would be unjust for defendant to have advantage of all these changes and plaintiff be restricted to his original contract price." (underline emphasis supplied)

3. In this case, the acts of WPDDA in openly negotiating, adopting and performing the Replacement Agreement, which clearly indicates that it replaced the Original Agreement, constituted positive, unequivocal acts that were inconsistent with being further bound by the Original Agreement. Most notably, in the Replacement Agreement the Property, including the First Parcel, is to be conveyed to Woodland Park Village, LLC and not to Plaintiff, which is utterly inconsistent with being further bound to convey the Property to Plaintiff as required in the Original Agreement. Plaintiff acquiesced in such acts by, among other things, representing he was part of the Development Team, via Woodland Park Village, LLC, under the Replacement Agreement and performing and accepting performance as a member of the Development Team, under the Replacement Agreement, as well as failing to object to the Replacement Agreement. Arden Weatherford admitted that he agreed to delay conveyance until issuance of a ZDP for Parcel 2 as provided in the Replacement Agreement. (Exhibit 227). Plaintiff, via its association with Woodland Park Village, LLC, enjoyed the benefit of the extended timelines in the Replacement Agreement. It would be unjust for Plaintiff to have the advantages of the Replacement Agreement while holding the WPDDA to the Original Agreement.

4. If Plaintiff had any objection to the Replacement Agreement, it 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)

5. 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.

D. Plaintiff's Claims are barred by Laches and/or Equitable Estoppel.

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 that 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 MDA. Another agreement was negotiated for Lot 2 and signed on August 28, 2014. (Replacement Agreement). 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.

E. 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, Dale Schnitker, 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.

2. The traffic study provision was not in the Original Agreement. It was in the Memorandum of Understanding of August 28, 2014. There was no breach of a traffic study provision in the Replacement Agreement. WPBG asserts that it was not a party to the Replacement Agreement or MOU, so the DDA owes no duty to WPBG under those Agreements. There was no timeline for a traffic study. (Riley Testimony Direct). At the time, it was expected

that the City would have done the Traffic Study due to the proposed Aquatic Center. (Riley Testimony Direct).

3. Defendant never continued "to erect barriers and further non-contractually due obligations to avoid conveyance of the property," as alleged by WPBG. The DDA Design Review Committee approved Plaintiff's 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 Testimony Direct).

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, 2015. Sally Riley said the DDA Design Review recommendations were reasonable and in conformance with the design review guidelines. (Riley Testimony Direct).

5. Sally Riley testified that conveyance of unplatted property is not legal. (Riley Testimony Direct). 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 had trouble complying with the requirements of 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. Sally Riley agreed with the Design Review Committee's Comments of March 20, 2015 and thought they were reasonable. Sally Riley saw nothing out of line with Design Guidelines with the Design Review Committee's Comments on May 10, 2015 and May 21, 2015. (Riley Testimony Direct).

7. WPBG has no standing to assert any complaints of Design Review by the DRC pursuant to the Replacement Agreement since WPBG was not a signatory to that Replacement Agreement. Kip Unruh's complaints about the Design Guidelines are groundless and not relevant to the 2013 Agreement. The Design Review Committee showed the utmost in good faith by hiring an architect to advise as whether Kip Unruh's proposed building complied with Design Guidelines. The DDA comments were approved by City Planning. (Sally Riley Direct).

8. Kip Unruh signed the Replacement Agreement on behalf of Woodland Park Village, LLC, under false pretenses, Woodland Park Village, LLC did not exist. He had more trouble complying with the City's Requirements than with the DDA. On May 21, 2015, Sally Riley presented the Status of Kip Unruh's project to the DDA Board. (Exhibit 224, See Minutes in Exhibit 314). By 12:24 p.m., Kip Unruh sent an e-mail that he was stepping back from the project. He was complaining about the City and the DDA. (Exhibit 286) This was before the DDA's comments were sent to him at 5:58 p.m. that evening. (Exhibit 287) Both Sally Riley and the DDA were surprised that he had walked away from the Replacement Agreement.

9. 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. Plaintiff asserted a number of times that the Original Agreement is not ambiguous.

> 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.

F. 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 was told by Fleer that Benedetti said it was okay to give the Developer extra time to remove the tanks off the Amerigas Parcel later than the original deadline of 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. The Plaintiff abandoned the 2013 Agreement and now makes the claim that Defendant waived the 2013 Agreement's requirements with no written waiver to be found.

4. As for the DDA not deciding to issue an immediate notice of default and termination in late 2013, Arden Weatherford and WPBG entered into negotiation of the Master Developer Agreement for all of Woodland Station with his Development Team to replace the

Original Agreement. As a result, no notice of default was necessary. 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, Woodland Park Village LLC, that is not a party to this lawsuit. After the Development Team defaulted in May, 2015, Mr. Weatherford again tried to delay a default notice by negotiations for a new agreement.

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 it did not do so. 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 at the time of default. DDA Board members who have testified do not recall being advised that BGLD took title to the Amerigas Parcel. There was no written waiver signed by the DDA Board. Brian Fleer only reported to the Board on November 5, 2013, that the Amerigas tank had been removed. In any event, Weatherford 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.

G. 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 by Defendant's Motion for Determination of a Legal Question, and the Court has advised on February 27, 2018 that specific performance will not be a remedy in this case at trial. Further, Plaintiff is not entitled to damages for any failure by DDA to perform and illegal contract.

H. 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 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."

3. 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.

I. <u>Plaintiff's Claimed Damages are not Damages of Plaintiff at all, but from a Third Party, namely BGLD, and Should be Disallowed.</u>

1. Any and all damages claimed or incurred by a party other than Plaintiff will 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, 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 (Exhibit 2) 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.

J. The DDA Received No Inequitable Benefit as Alleged.

1. The DDA received no financial benefit from any alleged increase in value of Lot 2 in Woodland Station due to the removal of tanks by BGLD.

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 alleged increase of value to DDA of $127,000 are not valid due to the fact that Plaintiff's appraisal is fundamentally flawed, because Mr. Park's appraisal is unreliable due to math mistakes, errors as to comparable sales and failure to provide supporting data for his environmental adjustment. See Testimony of 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 owns the Amerigas Parcel. WPBG cannot assert claims of alleged damages for BGLD. Plaintiff has not alleged any damages actually incurred by Plaintiff.

K. Plaintiff failed to mitigate its damages by failing to perform the Original Agreement or Replacement Agreement.

1. See facts above regarding Plaintiff's failure to perform. Plaintiff had a duty to mitigate its damages by performing the Original Agreement. Plaintiff did not perform its obligations under the 2013 Agreement and undertook actions to participate in the 2014 Agreement.

L. 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. The tanks were removed on October 8, 2013. Plaintiff alleges breach of contract as of the date the tanks were removed. Plaintiff filed this action on November 5, 2016.

2. At the regular meeting of the DDA on July 7, 2015, Fleer reported that Arden Weatherford brought some comments that he would like read into the record. Fleer then read Weatherford's comments into the record: He stated "Original conveyance of the Beer Garden Lot was tied to removal of the gas tank." (Exhibit 227).

3. The tank from the AmeriGas property was moved on October 8, 2013. (Arden Weatherford Cross, Tanner Coy Direct)

4. In an email dated January 9, 2015 from Arden Weatherford to David Buttery, Arden Weatherford stated the following:

> "We were late getting the parcel purchased, and the tank moved, because of conflicting appraisals but we kept the DDA informed as the process unfolded. We bought the property in September 2013 and the tank moved in October 2013 and the DDA noted it in its newsletter. We never noticed that we had breached the contract and there was never any talk that we had. I never got an explanation to why the DDA did nothing regarding conveyance after that. In fact, the lot was never even created. I guess I could have noticed the DDA that they had breached the contract at that point, but that would have created a wedge and we were starting to discuss Kip taking a bigger role." (Exhibit 336)

5. Contrary to the above cited statements by Arden Weatherford in 2015 before this lawsuit was filed, Arden Weatherford testified at trial that he believes conveyance was due on November 5, 2013. The Court finds the 2015 statements by Arden Weatherford to be more persuasive on this issue that he believed that the DDA was in breach as of the date that conveyance was due, October 8, 2013, when the tanks were completely removed.

6. The Court takes judicial notice of the Complaint filing date in the Court file. (See Exhibit 339).

7. Plaintiff stated in 2015 that DDA breached the contract by failing to convey the First Parcel of Lot 2 as of the date the tanks were removed. The Court finds that the last Amerigas tank was removed on October 8, 2013. Plaintiff filed its Complaint on November 5, 2016. Plaintiff's claim for breach of contract and damages is barred by the applicable three (3) year statute of limitation for contract in C.R.S. § 13-80-101(1)(a).

M. 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 is not 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. The counsel for Plaintiff stipulated in a Pretrial conference that Plaintiff has no standalone claim of bad faith.

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 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.

N. 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. The Plaintiff did not ask the Court to order specific performance at the trial. The Plaintiff has stated that it will file a motion for reconsideration and the Defendant provided testimony from Paul Benedetti that the DDA has to comply with Article 11 of the Colorado Constitution, the City contracts and laws, and 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. The Multi-use building was under the Replacement Agreement. In any event, 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.

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

O. 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.*

1. 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 and authorities cited by the Defendant in its Motion. Plaintiff can present no rational argument for breach of contract. Plaintiff can present no rational argument for damages for breach of contract.

COUNTERCLAIM OF DEFENDANT WPDDA

A. 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 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 agreement.

3. DDA has incurred Costs and Attorney fees in the litigation and trial. The DDA paid $3,200 to NES for DDA's share of a Design Concept Plan.

4. Plaintiff's defenses against Defendant's Counterclaim 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. The DDA is entitled to Costs and Attorney Fees and Expert Witness Fees. Defendant is granted judgment for its Attorney Fees and Costs, including Expert Witness Fees. Defendant shall file a motion for Attorney Fees and Costs pursuant to C.R.C.P. 121, Sec 1-22.

CONCLUSION

For the reasons above, IT IS HEREBY ORDERED that Plaintiff fails to state a claim upon which relief can be granted and Judgment is hereby 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. The DDA is entitled Judgment for its Costs and Attorney Fees and Expert Witness Fees. Defendant shall file a motion for Attorney Fees and Costs pursuant to C.R.C.P. 121, Sec 1-22.

End of Proposed Findings of Fact and Conclusions of Law.

Submitted this date: July 9, 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 July 9 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.