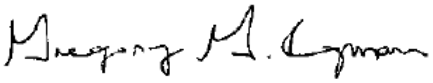
DISTRICT COURT, TELLER COUNTY, COLORADO Court Address: 101 West Bennett Ave., P.O. Box 997, Cripple Creek, CO, 80813	DATE FILED: May 7, 2018 3:01 PM CASE NUMBER: 2016CV30085
Plaintiff(s) WOODLAND PARK BEER GARDEN LLC v. **Defendant(s)** WOODLAND PARK CO DOWNTOWN DEV AUTHORITY	⚠ **COURT USE ONLY** ⚠ Case Number: 2016CV30085 Division: 11 Courtroom:

Order: Proposed Order - Trial Management

The motion/proposed order attached hereto: APPROVED.

Issue Date: 5/7/2018



GREGORY G LYMAN
Senior Judge

DISTRICT COURT, TELLER COUNTY, COLORADO Court Address: 101 W. Bennett Ave. PO Box 997 Cripple Creek, CO 80813 Telephone: (719) 689-2574	
Plaintiff: WOODLAND PARK BEER GARDEN, LLC, a Colorado limited liability company; v. **Defendant: WOODLAND PARK, COLORADO DOWNTOWN DEVELOPMENT AUTHORITY, a body corporate of the State of Colorado**	▲COURT USE ONLY▲
Attorneys for Plaintiff Woodland Park Beer Garden, LLC: Stephanie L. Brewer - #32588 BREWER LAW GROUP 18 East Willamette Avenue Colorado Springs, CO 80903 Phone Number: (719) 447-9794 E-mail: sbrewer@brewerlawgrp.com Attorneys for Defendant DDA: Steven J. Rupp - #25100 David M. Neville - #36032 430 N. Tejon, Ste 300 Colorado Springs, CO 80903 Phone Number: (719) 471-3690 Email: srupp@k2blaw.com dneville@k2blaw.com	Case No.: 2016 CV 30085 Division: 11

(PROPOSED) TRIAL MANAGEMENT ORDER

Pursuant to this Court's order, the parties hereby submit their (Proposed) Trial Management Order for trial scheduled to commence May 21, 2018, as follows:

I. STATEMENT OF ISSUES PRESENTED TO THE COURT:

A. Plaintiffs:

1. Claims:

1. Whether the parties entered an enforceable and binding Disposition and Development Agreement dated March 19, 2013.

2. Whether the Defendant DDA breached the Agreement when it, among other things:
    a. prepared an Agreement purporting to require Plaintiff Developer to replat "Lot 2, Woodland Station Filing No. 1," a property that did not yet exist pursuant to Woodland Station Filing No. 1 and which Defendant DDA failed and refused to remedy despite opportunity and obligation to do so;
    b. failed to provide support and cooperation in the subdivision process to create Lot 2, which would have enabled Plaintiff Developer to **replat** Lot 2, Woodland Station into separate parcels for purposes of the phased conveyance as anticipated in the Agreement;
    c. failed to commission an updated traffic study to mitigate the previously undisclosed Colorado Department of Transportation public infrastructure requirements placed upon the Woodland Station development;
    d. continued to erect barriers and further non-contractually due obligations to avoid conveyance of the Property;
    e. when it intentionally filibustered design review approval of the Second Parcel development further frustrating the conveyance of the First Parcel;
    f. ignored resolutions provided by the City of Woodland Park Director of Planning to remedy the platting and public infrastructure issues plaguing the Defendant DDA's conveyance of the First Parcel; and
    g. acted in bad faith and abused its power in the design review process associated with development of Parcel 2.

3. Whether the Defendant DDA exercised good faith and fair dealing in the administration of the Agreement.

4. Whether the Defendant DDA Design Review Committee acted in bad faith in withholding approval of the Parcel 2 design, which was a prerequisite to City approval, such that the DDA intentionally avoided issuance of a ZDP for Parcel 2, so that the event giving rise to the point in time for conveyance of Parcel 1 never occurred.

5. Whether Plaintiff Developer's claims arising under the Agreement dated March 19, 2013, are impacted by an Agreement dated August 28, 2014, to which Plaintiff Developer was **not** a party and did **not** ratify as a replacement agreement.

6. Whether Plaintiff Developer substantially performed the condition precedent contained in Section 5.0 of the Agreement relating to the purchase of Amerigas Property and removal of the gas tanks.

7. Whether the Defendant DDA waived any trivial imperfections in the Plaintiff Developer's performance of Section 5.0 of the Agreement when:

a. it was kept apprised of the delays in closing on the purchase of Amerigas and never objected;

b. received notice of the Amerigas closing and purchase and celebrated it as a milestone in Plaintiff Developer's performance;

c. was provided notice of the purchasing entity as Beer Garden Lane Development, LLC, to which it asserted no objection;

d. never issued a notice of default of any trivial imperfections in Plaintiff Developer's performance of Section 5.0 of the Agreement; and

e. proceeded to administer and accept further performance of Plaintiff Developer's contractual obligations thereafter without objection.

8. Whether Plaintiff Developer substantially complied with the contractual condition precedent contained in Section 5.0 and other obligations of the Agreement, thereby entitling Plaintiff Developer to conveyance of the First Parcel pursuant to the Agreement. But for the Defendant DDA's bad faith in performance of its contractual obligations, Plaintiff Developer would have received conveyance of the First Parcel and the Second Parcel would be under development.

9. Whether Plaintiff Developer is entitled to an award of specific performance requiring the Defendant DDA to create Lot 2, Woodland Station, in accordance with applicable law to allow Developer to proceed with **re**platting and conveyance in accordance with the Agreement, with all remaining contractual obligations and stacking consecutive deadlines flowing therefrom being adjusted accordingly. Plaintiff relies upon its briefing in relation to Defendant's Motion to Dismiss and the Court's Order denying Defendant's Motion issued March 14, 2017, stating, "the DDA waived immunity when it agreed in Paragraph 9.4.3 of the Agreement that either party could sue for specific performance in the event the Agreement is breached."

10. Whether Plaintiff Developer is entitled to an award of damages arising out of Defendant DDA's breach of contract and failure to exercise good faith and fair dealing, with or without an award of specific performance.

11. Whether Plaintiff Developer is entitled to an award of attorney fees and costs resulting from Defendant's bad faith actions, and posturing groundless and frivolous defenses pursuant to C.R.S. § 13-17-101, et seq. and C.R.C.P. 121.

2. Defenses to Counterclaims: Plaintiff Developer incorporates its Reply to Counterclaim and the parties briefing on Defendant's Motion to Dismiss and Defendant's Motion for Determination of Law and any trial brief filed in this matter to further articulate Plaintiff's defense to counterclaims and rebuttal to defenses as set forth herein.

1. Defendant DDA fails to state a claim against WPBG upon which relief can be granted.

2. Defendant DDA's counterclaim against WPBG is barred by the doctrines of bad faith, unclean hands and/or interference with WPBG's contractual performance.

3. Defendant DDA's counterclaim against WPBG may be barred by the doctrines of waiver and/or estoppel.

4. WPBG's condition precedent was materially and substantially satisfied thereby barring Defendant DDA's counterclaim.

5. Defendant DDA's counterclaim is barred by its own breaches of contract.

6. Defendant DDA's counterclaim is barred by its bad faith actions and its failure to mitigate.

7. Defendant DDA's counterclaim against WPBG lacks substantial justification under C.R.S. § 13-17-101, *et seq.*, thereby entitling WPBG to an award of its attorney fees, costs and expenses in defense thereof.

Note: Plaintiff Developer disputes that Defendant's recitation of alleged facts as set forth below are accurate or will be supported by the evidence. Additionally, Defendant fails to properly articulate Plaintiff's claims and factual assertions in this matter. Plaintiff Developer hereby requests the Court to rely upon Plaintiff's statement of claims set forth above, pleadings and presentation of issues, claims and evidence at the time of trial to define Plaintiff's legal and factual position.

B. Defendant's Statement of Defenses and Counterclaims Remaining for Trial:

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

Defendant denies Plaintiff's Claims. Defendant addresses those claims specifically in the Defenses below.

Plaintiff Woodland Park Beer Garden, LLC (WPBG) is a single member LLC. Arden Weatherford is the sole member of WPBG. Defendant Woodland Park Downtown Development Authority ("WPDDA" or "DDA") is a body corporate of the State of Colorado.

Arden Weatherford had been talking with DDA members about a piece of property known as "Woodland Station" in Downtown Woodland Park since 2007. "Woodland Station" is a piece of property in downtown Woodland Park, which is owned by the DDA, subject to an agreement and deed from the City of Woodland Park with certain conditions. He had a Ground Lease on a small portion of some land there for approximately 2 years from March 24, 2011 to April 1, 2013.

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

ground in his life.

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

Arden Weatherford negotiated an Agreement with the DDA on the disposition and development of "Lot 2" of Woodland Station, which was signed between the DDA and a single member LLC (Plaintiff Woodland Park Beer Garden) owned by Arden Weatherford dated 3-19-13. WPBG was denominated in the Agreement as the "Developer." This is known as the "Original Agreement" or "Agreement."

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

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

By the time of the Original Agreement of March 19, 2013, Lot 1 of Woodland Station had been previously platted. However, "Lot 2" of Woodland Station had never been platted and obviously the 8 parcels of Lot 2 mentioned in the Agreement had never been platted. There was a Preliminary Plat which showed a drawing of a proposed future Lot 2. There was no drawing of

a proposed future "First Parcel" of Lot 2.

The Original Agreement (Section 5.0) required Plaintiff (WPBG) to purchase an adjoining parcel of Property to Woodland Station known as the Amerigas Property and remove some propane tanks stored on the Property by June 3, 2013. It is Plaintiff's position that merely doing this entitled Plaintiff to conveyance of the "First Parcel," which is undefined in the Contract. (To the extent that Plaintiff apparently also claims he is entitled to conveyance of all of Lot 2, not just the "First Parcel," this is also denied as Plaintiff has failed to perform its obligations under this Original Agreement or the Replacement Agreement of August 28, 2014.) The major problem in this lawsuit is that Plaintiff is mistaken about this being the only condition to conveyance of the "First Parcel". Plaintiff ignores the other conditions of the contract which have to be considered.

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

One of the conditions to conveyance was in Sec. 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."** (Emphasis supplied.) The property cannot be conveyed unless this is done because it is against the law to convey property that has not been subdivided and platted (more on that below).

The Developer failed to comply with the condition precedent in 6.1 in preparing documents necessary to subdivide the property into up to 8 parcels and replat each parcel in

accordance with the WS Flow Chart and did not comply with the applicable City requirements, including compliance with the Subdivision process of the City.

There was also a requirement that Developer would obtain a temporary use permit and operate a beer garden continuously. Plaintiff only operated an 8' by 15' "beer box" for a few sporadic events in the summer of 2013.

There was **another condition precedent** to conveyance in Section 6.2.2. of the Agreement, which provided that "**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 Developer never did comply with this condition precedent for a closing to provide any covenants to the DDA for its review.

The Plaintiff never did purchase the Amerigas Property, but, unbeknownst to the DDA, a Development Group of Arden Weatherford, Kip Unruh, Steve Randolph and Brian Porter formed a new entity, Beer Garden Lane Development, LLC, and purchased the Amerigas Property in September 2013. The last of the propane tanks, the big tank, was moved on October 8, 2013.

Under Sec. 5 of the contract, the purchase and removal of the tanks was to be accomplished by Developer by June 3, 2013. The purchase and removal of the tanks was completed on October 8, 2013. The DDA Board waived the default for the missed date, but the Board did not know that the Plaintiff had not purchased the Amerigas Property as required in the Original Contract. Sometime in December 2013, Arden Weatherford advised Brian Fleer that Beer Garden Lane Development LLC had purchased the Amerigas Property. Since BLGD bought the Amerigas Parcel and had the tanks removed on October 8, 2013. Plaintiff breached the contract under Sec 6.10.1 by not seeking written permission from the DDA to assign any of

its interest in this agreement of the Property. So the Plaintiff was not in compliance with this Sec 5 condition precedent of the Agreement.

In any event, by October 8, 2013, Plaintiff had missed the deadline of October 1, 2013, to produce a concept plan and finance plan for development of Parcel 2 of the Original Agreement WS Flow Chart set forth in Exhibit A to the Original Agreement. Further the Plaintiff had not complied with the conditions precedent in § 6.1 and §6.2.2 as set forth above. Not only did the Plaintiff fail to perform on the conditions precedent listed above, the Plaintiff failed to perform on every other required obligation set forth in the Original Agreement.

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

In late 2013, the Development Team entered discussions with the Executive Director of the DDA regarding a Master Developer Agreement to supersede the Original Agreement for development of Lot 2. The Master Developer Agreement was proposed to include "Lots 2, 3, 4, and 5" of Woodland Station.

The Parties negotiated a Master Developer Agreement throughout the winter of 2013-2014, which was approved by the DDA on April 1, 2014. The parties negotiated this agreement to replace the Original Agreement of March 19, 2013. (See § 2.4.) The original draft contained a signature line for Woodland Park Beer Garden (WPGB). The draft signed by the DDA did not contain a signature line for WPBG. The Development Team represented that it was an entity named Woodland Park Village, LLC. This was a false representation. This entity was never organized and registered with the Colorado Secretary of State. The DDA relied on this false representation and signed the agreement on April 1, 2014.

The Development Team refused to sign the Agreement. Their excuse was a CDOT letter dated March 2, 2012, which they claimed was a surprise revelation to them in April 2014. This letter required certain traffic improvements, including building an access road on Depot Avenue

to West Street. The Conditions on the Preliminary Plat dated March 1, 2012, contained the same requirements. Steve Randolph of the Development Team was the Mayor of the City of Woodland Park at the Public Hearing at the time the Preliminary Plat was approved and he voted to approve those conditions, so the Development Team had actual knowledge of the Conditions of the Preliminary Plat. Further, this was a matter of public record and all the Development Team was on Notice of the Conditions of the Preliminary Plat. Any competent developer would have known about the Preliminary Plat's conditions.

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

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

On July 30, 2014, Carol Lindholm, Admin assistant to the DDA, sent a draft of the new Lot 2 agreement to Kip Unruh. It was explicitly stated that **"This replaces the agreement that Arden signed in March of 2013. The only substantive changes are some of the dates, the developer name and the updates to Exhibit A (same as Exhibit A in the MOU - which you already have."** Arden Weatherford received a copy of the e-mail on July 30, 2014. The developer name was again the non-existent entity of Woodland Park Village, LLC. The Agreement was titled:

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

The development schedule of the MOU and the Replacement Agreement provided that

Lot 2 of the Preliminary Plat be Final Platted into Parcel 1 and Parcel 2. Parcel 2 was to include an initial construction of a mixed use building of 4,000 sf. Parcel 1 was to be the beer garden parcel. (The MOU provided that the CDOT Requirements would not be triggered for a building that was below a 4,000 sf footprint. The MOU also provided that an updated traffic study be done at some unspecified time. (Around this time, there was a proposal for an Aquatic Center to be built by the City of Woodland Park at Woodland Station. The City was going to do a Traffic Study for the Aquatic Center.)

On August 28, 2014, the Board met and approved the above Agreement. Arden Weatherford and Kip Unruh were present. Arden Weatherford did not raise any objection to this Agreement which replaced the Agreement dated March 19, 2013 with Woodland Park Beer Garden.

The MOU with the Replacement Agreement provided that the first portion of Parcel 2 and Parcel 1 would be conveyed when the ZDP was issued by the City for the first phase of construction on Parcel 2. The Deadline for obtaining the ZDP was 12/31/14. There were other deadlines for the same date. The Replacement Agreement also provided that the beer garden parcel (Parcel 1) would by conveyed to Woodland Park Village LLC, and not Plaintiff WPBG. Arden Weatherford did not object to any of this. If he had any objection to the replacement of the original agreement with Plaintiff dated March 19, 2013, he had the obligation to raise that objection at that point. Instead, he went on with the Replacement Agreement and Kip Unruh.

The Development Team, including Arden Weatherford, did not meet the requirements of the City of Woodland Park or the DDA and came into default on the Replacement Agreement as of 12/31/14. The DDA continued to try to work with the Development Team. The DDA rejected a final request for an extension of time by the Development Team and directed that a notice of default with right to cure be given. The DDA provided a Notice of default dated May 4, 2015, to

Kip Unruh of the Development Team.

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

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

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

In mid-2015, more than two years after the Original Agreement, Arden Weatherford then alleged that the Original Agreement was still in force, even though there had been no performance as required by the Agreement for a transfer of Lot 2. Arden Weatherford drafted an application for a General Plat and took it to Dale Schnitker, the Chair of the DDA, who signed it on May 12, 2015. Arden Weatherford never did file the Plat Application with Sally Riley at City Planning.

On July 7, 2015, the DDA adopted Resolution 1-2015 which resolved that the Original

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

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

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

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

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

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

DEFENDANT'S DEFENSES

Summary of Defenses (See Detailed Defenses below)

1. The Plaintiff's Allegations Demonstrate a Lack of Meeting of the Minds To Support The Existence of a Contract. Plaintiff's claims are barred by failure of consideration.

2. The Plaintiff Has Failed To Perform Under the Alleged Contract(s) and Has No Justifiable Excuse For Failure To Perform, and Plaintiff has materially breached the Contract.

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

4. The Plaintiff's Material Breaches of the Original Agreement Relieve the Defendant From Any Duty to Perform.

5. Plaintiff's Claim for Breach of Contract is barred because the Original Contract was replaced. WPBG's Original Agreement of 3-19-13 replaced by AGREEMENT FOR DISPOSITION AND DEVELOPMENT (Lot 2 Woodland Station) REPLACING AGREEMENT DATED MARCH 19, 2013 WITH WOODLAND PARK BEER GARDEN.

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

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

8. Defendant Has Not Breached The Contract.

9. All But One of Plaintiff's Claims Of Waiver By The DDA Are Disputed. Defendant only agreed to waive the deadline date of performance of removal of tanks. Defendant never waived the requirement that Plaintiff was to purchase the Amerigas Property.

10. Plaintiff Is Not Entitled To Any Damages. The amount of damages is limited to Zero Dollars ($0.00) by the terms of the Original Agreement. Plaintiff's claim for damages, if any, are limited by the provisions of §9.4.3 and §8.2 of the Agreement. Regarding the Remedies on Default contained in §9.4, §9.4.3. provides that 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 §8.2.

Because the DDA has not appropriated any money for reimbursement of Public Improvements, there is no remedy for money damages available as a remedy to Plaintiff.

11. Plaintiff's Claimed Damages are not Damages of Plaintiff at all, but alleged damages from other parties, namely Beer Garden Lane Development (BGLD), and or Arden Weatherford's Bierwerks entity, and the Defendant is not in privity with either BGLD or Bierwerks. BLDG has not suffered any damages since the property has an appraised value of at least $236,000, which is more than it paid for the Amerigas property.

12. The DDA Received No Equitable Benefit as alleged.

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

14. Plaintiff's claim for breach of contract and damages is barred by the applicable 3 year statute of limitations for contracts, C.R.S. §13-80-101(1)(a).

15. Plaintiff is not entitled to attorneys' fees under C.R.S. § 13-17-101, et seq. or C.R.C.P. 121. Plaintiff's claim for attorney fees under C.R.S. § 13-17-101 is limited to whether Plaintiff can show that Defendant's Counterclaim is frivolous. Plaintiff has never made a claim for attorney fees for breach of contract or Defendant's defenses. Absent a contract or statute, attorney fees are not recoverable in a contract action.

16. DDA is not bound by any ultra vires acts by its Board, its Executive Director or its past Chair. Certain actions by the Board or its Executive Director if alleged by Plaintiff may be barred by the ultra vires doctrine.

17. Plaintiff Is Not Entitled to the Remedy Of Specific Performance of Conveyance of Any Parcel under the Original Agreement pursuant to the Court's Decision on February 27, 2018. Plaintiff's claim for specific performance is barred by illegality, since it is a crime to convey property that has not been platted. Woodland Park City Code requires that a plat be approved and recorded before any conveyance of a parcel of land. (Woodland Park City Code 17.56.020 and 17.56.030.) The Court ruled on February 27, 2018, that specific performance would not be available as a remedy at trial. Should plaintiff move for reconsideration of the Court's ruling, Defendant would also ask the court to reconsider a previous judge's ruling regarding whether Plaintiff's claim for specific performance is barred by the Colorado Constitution, Art. 11, § 2 and the DDA Statute due to lack of Fair Value. Plaintiff's claim for specific performance is barred by Separation of Powers doctrine case law which prohibits a court in Colorado from ordering specific performance of a governmental entity, including specifically the exercise of core governmental powers. There can be no injunctive relief for specific performance against DDA under the doctrine of sovereign immunity.

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

19. Defendant is entitled to Judgment against Plaintiff and a dismissal of the Complaint and an Order Releasing the Lis Pendens filed by the Plaintiff.

20. 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.

DETAILED DEFENSES

1. 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 MOU changed the performance schedule and no conveyance of Parcel 1 was to be conveyed to Woodland Park Village LLC until the conditions of the MOU had been met. Plaintiff'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.

2. 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 manifestation of consent and/or waiver of Plaintiff's claims under the Agreement, and a ratification of the Replacement Agreement, which bars any of Plaintiff's claims under the Original Agreement.

3. Plaintiff's claims are barred by Plaintiff's own conduct in failing to comply with obligations under the Agreement. Plaintiff's material breaches of the Agreement relieved the Defendant from any duty to perform under the Agreement, including any duty to convey property under the Agreement.

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

a. Defendant did not breach the original agreement by preparing the original agreement with a designation of "Lot 2, Woodland Station Filing No. 1." It is not a breach to prepare an Agreement. Woodland Station Filing No. 1 was filed of public record. If anything, this is an admission of a mutual mistake and the contract shows no meeting of the minds..

b. Defendant never failed to provide support and cooperation in the subdivision process to Plaintiff. Defendant paid half of the concept plan. Defendant's Chair even

signed an application for Final Plat for Plaintiff on May 12, 2015. Defendant never had the obligation to subdivide and plat Woodland Station. Plaintiff had that obligation.

c. The traffic study provision mentioned was not in Plaintiff's 2013 Original Agreement. It was in the 2014 Memorandum of Understanding, which was not a self-executing contract. There was no breach of the traffic study provision in the Replacement Agreement. There was no timeline for a traffic study. Riley Depo, p. 60. At the time, it was expected that the City would have done the Traffic Study due to the proposed Aquatic Center. Riley depo, p. 48-49.

d. Defendant never continued to erect barriers and further non-contractually due obligations to avoid conveyance of the property, whatever that means. The DDA Design Review Committee approved Plaintiff's Beer Garden Pavilion with a few conditions relating to City approval. Sally Riley of the City Planning Department stated that the DDA Design Review Committee's approval of the Beer Garden Pavilion with conditions was reasonable. Riley depo p. 38.

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

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

g. Plaintiff should not be allowed to raise a claim of bad faith as set forth in ¶2 and ¶4 and ¶ 8 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.

Nevertheless, Defendant's Design Review Committee never acted in bad faith or abused its power. The Design Review Committee even hired an architect, David Langley to advise on compliance with Design Guidelines adopted by the City. The Design Review Committee approved the Beer Garden Pavilion plan. Sally Riley agreed with the Design Review

Committee's approval and testified that it was reasonable. Riley, p. 36-38. Plaintiff never complied with City Requirements. Sally Riley agreed with the Design Review Committee's Comments of March 20, 2015 and thought they were reasonable. Riley Depo, p. 73-76. Sally Riley saw nothing out of line with Design Guidelines with the Design Review Committee's Comments on May 21, 2015. Riley Depo, p. 91-92.

Not only does Plaintiff claim he is not a party to the 2014 Replacement Agreement, but the 2014 contract is not identified in the complaint and Plaintiff has not pled a claim for breach of that contract. So all these claims about the DDA breached the contract in the Design Review process and failed to do a traffic study refers to an alleged breach of the 2014 Replacement Agreement, which Plaintiff claims does not apply to it because he never signed it nor ratified it. The Plaintiff's only claim for breach is the claim for conveyance after removal of the tanks.

5. The Plaintiff's material breaches of the Original Agreement and the Replacement Agreement include:

a. Pursuant to Sec. 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 Sec. 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, such as a Final Plat, 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 Sec. 6.2.2. This condition is an express condition precedent to the obligation of the Authority to convey the First Parcel. Sec 6.2.2 states:

> 6.2.2 Covenants. Prior to the Closing on the First Parcel the Parties shall agree to covenants acceptable to the Authority (the "Covenants") implementing the provisions of this Agreement with respect to the Temporary Use, which covenants (governing the Temporary Use only) shall not expire until Commencement of Construction of the permanent Improvements. The covenants shall be executed and delivered by the Developer at the Closing of the First Parcel and shall be recorded prior to the Deed, provided, however, the Authority may elect to record this Agreement in place of the Covenants. (Emphasis supplied.)

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 §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 to assign rights from the DDA.

i. Plaintiff's failure to comply with § 5.0, §6.1 and §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 Sec. 6.0, the Developer is solely responsible for the design, development and Improvements in conformance with the time schedules set forth in 6.3 through 6.6 and the WS Flow Chart.

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 Sec. 6.3 and the WS Flow Chart in Exhibit A attached to the Agreement.

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

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

p. Plaintiff did not take title to the Amerigas Property 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 was already in breach of other agreement deadlines, including the missed deadlines of October 1, 2013, relating to "Parcel 2" under the WS Flow Chart in Exhibit A.

q. Plaintiff failed to provide a Re-conveyance Deed to the DDA.

r. All further performance was offered in the context of the MDA and then the 2014 agreement. Plaintiff never performed any other obligation of the 2013 agreement.

s. Arden Weatherford of Woodland Park Beer Garden was a part of a partnership Development Team which entered into an agreement dated 8-28-14 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.

t. 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.

6. In addition to the Court's ruling that Plaintiff will not be entitled to specific performance as a remedy at trial, Plaintiff's claim for specific performance is barred by the Colorado Constitution, Art. 11, § 2 and the DDA Statute due to lack of Fair Value.

7. In addition to the Court's ruling that Plaintiff will not be entitled to specific performance as a remedy at trial, Plaintiff's claim for specific performance is barred by law which prohibits a court from ordering specific performance of a governmental entity of core governmental powers. To the extent that Plaintiff is requesting specific performance to order the DDA to convey land that has not been platted is unenforceable because it is illegal and would require the DDA to commit a crime.

Plaintiff's claim for Specific Performance of the Agreement is barred by the doctrine of Sovereign Immunity. See *Thompson Creek Townhomes, LLC v. Tabernash Meadows Water and San. Dist*., 240 P.3d 554 (Colo. App, 2010), in which the Court held that specific performance may not be ordered against a governmental entity in a contractual matter as it would be a violation of the doctrine of Sovereign Immunity. (Following: *Wheat Ridge Urban Renewal Authority v. Cornerstone Group*, 176 P.3d 737 (Colo. 2007).

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

9. Plaintiff's claims are barred by laches.

The March 19, 2013, Agreement with Woodland Park Beer Garden was replaced by an agreement dated 8-28-14 entitled Agreement for Disposition & Development (Lot 2 Woodland Station) Replacing Agreement Dated March 19, 2013 with Woodland Park Beer Garden ("Replacement Agreement").

The Development Team did not perform under the Replacement Agreement and abandoned it as of June 9, 2015.

Then Arden Weatherford made claims that his agreement of March 19, 2013, was still in force. He sent a Notice of Default in January 2016. His claim is barred by failure to perform and laches.

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

The First Parcel does not exist. Before it can be conveyed, it has to be identified, agreed, and platted.

Section 4.22 of the Agreement states the definition of a Parcel as follows:

"Parcel" means each of the subdivided lots of the Property resulting from the resubdivision and replatting of the Property described in Section 6.1.

Section 4.24 defines "Plat" as follows:

"Plat" means each of the plats approved by the City in connection with the resubdivision of the Property into separate parcels as required by Section 6.1.

Developer did not comply with the applicable City requirements including compliance with the Subdivision process of the City and 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.

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 (or any other Parcel) under the Agreement.

Plaintiff failed to satisfy the condition precedent in Sec 5.0 of the agreement which required Defendant to take title to the AmeriGas Property by June 3, 2013, but Defendant viewed the removal of the tanks by October 8, 2013, as being in substantial compliance with the removal date and did not give Plaintiff a Notice of Default. Nothing else in the Original Agreement was excused. The fact that Plaintiff did not take Title to the Amerigas Property was not revealed to the DDA Board at the time and was not excused by any action of the DDA Board.

The Developer did not purchase the Amerigas parcel as required by Sec 5.0. BLGD bought the Amerigas Parcel and had the tanks removed on October 8, 2013. Plaintiff breached the contract under Sec 6.10.1 by not seeking written permission from the DDA to assign any of its interest in this Agreement or the Property.

By October 8, 2013, Plaintiff was also in breach of other requirements of the 2013 Agreement, including deadlines of October 1, 2013, for Parcel 2 as set forth in the WS Flow Chart in Exhibit A. Plaintiff continued to miss all the other deadlines of the Original Agreement. No other missed deadlines by Plaintiff were excused. No missed deadlines in the Replacement Agreement were excused.

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

Further, it is illegal for the WPDDA to convey a parcel of land that has not been platted. (See Woodland Park City Code provisions in Exhibit 303, 304 and 305 and Depo Exh 41 and C.R.S. § 31-23-201 *et seq*.) The Court advised on February 27, 2018, that the Court had granted the Defendant's motion on this legal question and stated that specific performance would not be available as a remedy at trial.

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

There is no meeting of the minds on material terms of the Agreement, e.g. the legal description of Lot 2 and the "First Parcel." Further, Plaintiff has alleged a mutual mistake in the property name of "Lot 2, Woodland Station Filing No. 1." Plaintiff claims that he mistakenly thought Lot 2 had been platted at the time of the Original Agreement.

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

Agreements to agree in the future are generally unenforceable because the Court cannot force parties to come to an agreement.

Further, the Plaintiff has 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. This property in Woodland cannot be legally conveyed under the agreement until Plaintiff meets the conditions of Sec. 6.1 and 6.2.2 of the Agreement. Because Plaintiff failed to meet those conditions, the Agreement seeking to be enforced is an illegal contract.

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

The "First Parcel" of Lot 2 has no legal description and no plat and no subdivision and it also may not be conveyed by the Authority pursuant to the applicable Woodland Park City Code. Conveyance of any lot or parcel of land that has not been duly platted or replatted is illegal and would require the DDA to commit a crime.

The Court Advised on February 27, 2018, that the Court had granted the Motion for Determination of Legal Question and stated that specific performance would not be available as a remedy at trial.

13. The DDA is not bound by any ultra vires acts by its Board, its Executive Director or its past Chair. Plaintiff claims the DDA did not comply with the Original Agreement to convey property merely upon the removal of the tanks from the Amerigas parcel. The Court has ruled that specific performance will not be a remedy in this case. Nevertheless, given the assertion that Plaintiff will file a motion for reconsideration, Defendant is compelled to point out that the DDA has to comply with the Colorado DDA statute regarding fair value. Plaintiff claims that Defendant breached the agreement by not approving the design of the Developer for the multi-use building. It is not within the power of the DDA Board to promise future approval. The DDA has discretionary functions and is not estopped from denying permission to develop property that does not meet the contract or design guidelines. Such a contract would be an ultra vires contract. (The Developer never met the requirements of the City of Woodland Park either.)

14. Plaintiff's claim for damages, if any, are barred due to Plaintiff's failure to mitigate damages. For example, Plaintiff should have complied with the provisions of the contract.

15. Plaintiff's claims for damages are not to the nature and extent as alleged. For example, Plaintiff has not been damaged by the purchase of the Amerigas Property since Plaintiff did not purchase it.

16. Plaintiff never claimed a breach of Contract under the Replacement Agreement.

17. Plaintiff never performed under the Original Agreement. BLGD bought the Amerigas Parcel and had the tanks removed on October 8, 2013. Plaintiff breached the contract under Sec 6.10.1 by not seeking written permission from the DDA to assign any of its interest in this agreement of the Property.

18. Plaintiff's claims are not damages allegedly suffered by the Plaintiff, but by other third parties.

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

In Section 8 of the Agreement, the DDA had the obligation to reimburse the Developer for approved certified costs of the Public Improvements that the Developer was obligated to provide. § 8.2 provided that the DDA obligation to reimburse the Developer cannot exceed any payments appropriated beyond a single fiscal year in which the appropriations were authorized. This is due to TABOR. Regarding the Remedies on Default contained in §9.4, §9.4.3. provides that 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 §8.2. Because the DDA has not appropriated any money for reimbursement of Public Improvements, there is no remedy for money damages available as a remedy to Plaintiff.

20. Plaintiff claims it is entitled to an award of attorney fees and costs resulting from Defendant's bad faith actions, and posturing groundless and frivolous defenses pursuant to C.R.S. § 13-17-101, et seq. and C.R.C.P. 121. Plaintiff should not be allowed to raise a claim of bad faith as set forth in ¶2 and ¶4 ¶ 8 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.

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.

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 6-23-17.

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.

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.

"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, and will provide at trial, rational arguments based on § 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.

21. Defendant requests Judgment for Defendant and an Order of Dismissal of Plaintiff's Claims, and an Order Releasing the Lis Pendens filed by the Plaintiff.

22. 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.*

COUNTERCLAIM OF DEFENDANT WPDDA

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

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

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

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

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.*

II. STIPULATED FACTS

The parties are unable to stipulate to any facts at this time.

III. PRETRIAL MOTIONS

1. Defendant's Motion for Determination of Question of Law. Plaintiff's filed a Response on February 8, 2018. Defendant's Reply was filed on February 22, 2018. The Court advised on February 27, 2018, that it granted the motion and stated that specific performance would not be available as a remedy at trial.

Plaintiff's position: The Court has not yet issued a reasoned or written order; however, upon receipt of such, Plaintiff anticipates filing a motion for reconsideration following.

Defendant's Position: Defendant opposes a motion for reconsideration at this late date.

2. Plaintiff's Motion to Preclude Expert Testimony re Legal Opinions. Plaintiff's Motion was filed on March 2, 2018; Defendant's Response was filed on March 13, 2018.

Plaintiff's position: Plaintiff will file a Reply on or before Friday, April 27, 2018. IN light of the trial continuance and the parties' anticipated settlement discussion, this reply was tabled. There is no prejudice for Plaintiff to file a reply.

Defendant's position: Plaintiff's Reply was due on March 20, 2018. C.R.C.P. §121, Sec. 1-15(1)(c). Plaintiff has shown no good cause for a motion to file a Reply out of time. Defendant opposes any filing of a Reply Brief by the Plaintiff.

IV. TRIAL BRIEFS

The parties shall file any initial or supplemental trial briefs on or before **May 15, 2018**.

V. DAMAGES

A. Plaintiffs:

1. Pursuant to Plaintiff's First Claim for Relief for Breach of Contract and its request for specific performance, if granted, Plaintiff sustained undue delay in Defendant's performance of the Agreement and, as a direct result thereof, suffered the following damages:

Property taxes paid (Amerigas Property)	$24,583.39	
Interest paid on Amerigas Property Loan	$24,173.67	thru 2-23-2018, plus $13.56 per day

IREA electrical	$1,112.52	
Woodland Park Water	$68.46	
Grade & Gravel provided to site in furtherance of development but which the DDA has removed	$2,582.54	
Atty Fees & Costs incurred in Litigation pursuant to C.R.C.P. 121	TBD	
TOTAL DAMAGES (with award of specific performance)	**$52,520.58**	Plus attorney fees, costs and continuing interest

2. Pursuant to Plaintiff's First Claim for Relief, but in the event that specific performance is not awarded by the Court, in the alternative to Section 1, above, Plaintiff claims damages associated with its performance of the Agreement, as follows:

All those damages identified pursuant to Section 1, above	$52,520.58	
Plumber install water tap	$1,117.00	Andy's Plumbing
Surveyor services	$737.00	WPBG 000312
Liquor License Application Fees (2013 – present)	$2,250.00	
Beer Garden structure design	$1,650.00	McCracken
Amerigas Loss on Purchase Price (Cost Basis of $220,382.60 less Appraised Value at time of purchase $156,000.00)	$64,382.60	This included the cost of tank removal
Increased Property Value of Woodland Station inequitably imparted upon Defendant by virtue of removal of Amerigas propane tanks	$127,000.00	Per B. Parks expert report
TOTAL DAMAGES (w/o award of specific performance)	**$249,657.18**	Plus attorney fees, costs and continuing interest

Plaintiffs further seek an award of attorney fees and costs incurred in prosecution of its claims in this litigation arising out of Defendant DDA's breach of contract, failure to act in good faith, failure to deal fairly and posturing defenses that are substantially groundless, frivolous, vexatious pursuant to C.R.S. § 13-17-101, et seq., which will be submitted when appropriate pursuant to C.R.C.P. 121, § 1-22, but which will exceed $150,000.

B. Defendants:

1. Defendant's OBJECTION- Plaintiff claims it is entitled to an award of attorney fees and costs resulting from Defendant's bad faith actions, and posturing groundless and frivolous defenses pursuant to C.R.S. § 13-17-101, et seq. and C.R.C.P. 121. Plaintiff should not be allowed to raise a claim of bad faith as set forth in ¶2 and ¶4 and ¶ 8 and ¶11 of Plaintiff's Claims in the TMO. No such claim has been pled in the Complaint, or in the Case Management Order, or identified in Plaintiff's Disclosures or in Plaintiff's Discovery Requests.

2. Plaintiff has not raised a claim for attorney fees in its Complaint. No claim for attorney fees was raised in the prayer for relief of the Complaint. No claim for attorney fees was raised in Case Management Order, or raised in Disclosures or Discovery responses. No claim for attorney fees was raised as element of damages in Damage Disclosures filed by Plaintiff on 6-23-17.

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

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

3. Plaintiff never made a claim for breach of the Replacement Agreement dated 8-24-14, so no claim for damages related to breach of that agreement should be allowed.

4. 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.

5. DDA's Costs and Attorney fees are in excess of $150,000, and continue to accrue through trial. The DDA paid $3,200 to NES for DDA's share of a Design Concept Plan. If Defendant prevails on its counterclaim for indemnification for costs, including attorney fees, Defendant intends to file the motion for attorney fees and costs after trial. See Counterclaim statement above.

VI. WITNESSES

A. Plaintiffs:

See Plaintiffs' List of Trial Witnesses attached hereto as **EXHIBIT A-1.**

B. Defendants:

See Defendants' List of Witnesses attached hereto as **EXHIBIT A-2.**

VII. EXHIBITS

A. Plaintiffs:

See Plaintiffs' List of Exhibits attached hereto as **EXHIBIT B-1.**
Defendant shall assert any objections as to authenticity within two weeks of the parties filing of the Trial Management Order.

B. Defendants:

See Defendants' List of Exhibits attached hereto as **EXHIBIT B-2**
Plaintiff shall assert any objections as to authenticity within two weeks of the parties filing of the Trial Management Order.

The Parties reserve the right to add exhibits to these lists. Additionally, the parties may introduce additional exhibits at the time of trial for impeachment and/or rebuttal. Finally, the parties will endeavor to stipulate to as many exhibits as possible no later than May 14, 2018. In light of the sheer volume of exhibits, the parties herby reserve any and all objections to the admissibility of exhibits, unless stipulated to admissibility.

VIII. TRIAL EFFICIENCIES AND OTHER MATTERS

1. This case is set for a seven-day Court trial on May 21 through 25, 29, and 30.

2. On May 14, 2018, the Plaintiff's counsel shall provide to Defendant's counsel a good faith anticipated order of witness testimony with an anticipated schedule relating thereto. On May 16, 2018, the Defendant's counsel shall provide to Plaintiff's counsel a good faith anticipated order of witness testimony with an anticipated schedule relating thereto.

3. The parties confirm that they have considered ways in which the use of technology can simplify the case and make it more understandable.

4. *Expert Witnesses*. Expert Witness Disclosures of Plaintiff have been previously submitted. Defendant has no objection to the qualifications of Plaintiff's retained expert, but does not stipulate to the opinions of Plaintiff's retained expert. Expert Disclosures of Defendant have been previously submitted. Plaintiff does not object to the qualifications of Defendant's retained expert, but reserves the right to object to the opinions of Defendant's non-retained experts. Defendant objects to the Plaintiff's Rebuttal Expert Disclosures as not being true rebuttal, but a supplement to his original report.

5. *Presentation of Testimony*. At this time neither party is aware of any witness not available for trial and does not intend at this time to offer the testimony of any witness by deposition due to his/her unavailability for trial.

Respectfully submitted by the undersigned parties this 25th day of April, 2018.

BREWER LAW GROUP

By: */s/ Stephanie L. Brewer* *
Stephanie L. Brewer # 32588
Attorney for Plaintiff Woodland Park Beer Garden, LLC

KRAEMER KENDALL RUPP DEEN NEVILLE LLC

By: */s/ Steven J. Rupp / David M. Neville**
Steven J. Rupp, # 25100
David M. Neville, #36032
Attorneys for Defendant Woodland Park Downtown Development Authority

* An electronic copy of signatures is on file at Brewer Law Group and KKRDN, respectively, pursuant to C.R.C.P. 121, §1-26(7).

ORDERED this _____ of _____, 2018.

BY THE COURT:

_____
District Court Judge