DISTRICT COURT, TELLER COUNTY, COLORADO Court Address: 101 W. Bennett Ave PO Box 997 Cripple Creek, Co 80813 Telephone: (719) 689-2574	DATE FILED: September 27, 2018 CASE NUMBER: 2016CV30085 ▲ COURT USE ONLY ▲
Woodland Park Beer Garden LLC, **Plaintiff** v **Woodland Park Downtown Development Authority,** **Defendant**	Case Number: 16 CV 30085
ORDER—TRIAL TO COURT	

The case was tried to the court on May 21, 22, 23, 24, 25, 29, 30 and June 13, 2018. Plaintiff appeared personally during the trial through its sole member Arden Weatherford and was represented by Attorney Stephanie Brewer. Defendant appeared personally during the trial through various members of its board of directors, primarily Tanner Coy, and was represented by Attorneys Stephen J. Rupp and David M. Neville. The Court heard the testimony of many witnesses, received hundreds of documents in evidence (including Exhibit 73, which the Court listened to by agreement of the parties), has read and reviewed the pleadings, and has considered the arguments made by counsel, both written and spoken. Being fully advised in the premises, the Court Finds, Concludes and Orders as follows:

Summary of Claims and Defenses

Plaintiff filed its Complaint on November 5, 2016, asserting that Defendant had breached a contract entered into by the parties on March 19, 2013 entitled Agreement For Disposition and Development (Pl. Ex 1, hereinafter referred to as the Agreement). In its prayer for relief the Plaintiff requested specific performance (conveyance of a parcel of real property), damages, and further relief deemed reasonable and just by the Court.

After filing a Motion to Dismiss, which was denied, Defendant filed its Answer and Counterclaim on March 28, 2017. In its answer Defendant denied breaching the Agreement in the manner alleged by Plaintiff, and asserting that Plaintiff's failure to perform certain conditions precedent relieved Defendant of its obligations under the Agreement. Defendant asserted several defenses and affirmative defenses, to wit:

a.) Failure to state a claim;

b.) That Plaintiff's claims are barred because the Agreement was superseded and replaced by a contract entitled Agreement In Disposition and Development (Lot 2 Woodland Station)

Replacing Agreement Dated March 19, 2013 with Woodland Park Beer Garden, dated August 28, 2014 (Def. Ex. 213), hereinafter referred to as the Replacement Agreement, although such reference by the Court should not be understood to be its ruling on the effect of the subsequent contract on the existence of the Agreement);

c.) Plaintiff's claims are barred by waiver and notification;

d.) Plaintiff's claims are barred by its own conduct on failing to comply with its obligations under the Agreement;

e.) Plaintiff's material breaches of the Agreement relieved Defendant of any duty to perform thereunder;

f.) The Agreement was terminated for cause;

g.) Plaintiff's claim for specific performance is barred by the by the doctrine of sovereign immunity and/or separation of powers;

h.) Plaintiff's claims are barred by law which prohibits a court from ordering specific performance by a governmental entity of core governmental powers;

i.) Plaintiff's claims are barred by the applicable statute of limitations, C.R.S. §13-80-101(1)(a);

j.) Plaintiff's claims are barred by laches;

k.) Plaintiff's claims are barred by its failure to satisfy one or more conditions precedent under the Agreement;

l.) Plaintiff's claims are barred for failure of consideration;

m.) 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 17-56-020 and 17-56-030);

n.) Plaintiff's claims are barred by its failure to join necessary or indispensable parties;

o.) Plaintiff's claims for damages are barred by its failure to mitigate damages;

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

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

r.) Plaintiff's claims against Defendant are substantially frivolous, substantially groundless, or substantially vexatious, entitling Defendant to its reasonable attorney fees pursuant to C.R.S. §13-17-101, et seq.

Defendant's Counterclaim alleges many breaches of the Agreement by Plaintiff, and seeks damages and attorney fees.

On April 18, 2017 Plaintiff filed its Reply To Counterclaim, responding to the factual allegations set forth therein and asserting the following defenses:

a. Defendant fails to state a claim upon which relief can be granted;

b. Defendant's counterclaims are barred by the doctrine of unclean hands and/or interference with Plaintiff's contracted performance;

c. Defendant's counterclaims are barred by the doctrines of waiver and/or estoppel;

d. Plaintiff materially and substantially satisfied its conditions precedent under the Agreement, thereby barring Defendant's Counterclaim;

e. Defendant's counterclaims are barred by its own breaches of contract;

f. Defendant's counterclaims may be barred or reduced as a result of its failure to mitigate; and

g. Defendant's counterclaims lack substantial justification under C.R.S. 13-17-101 et seq., thereby entitling Plaintiff to an award of attorney fees.

By subsequent pretrial order the Court has ruled as a matter of law that Plaintiff is not entitled to seek the remedy of specific performance.

For convenience the Court will hereinafter refer to the parties and other entities as follows:

1.) Woodland Park Beer Garden LLC will be referred to as "Plaintiff" or "Beer Garden LLC";

2.) Woodland Park Downtown Development Authority will be referred to as "Defendant" or "Development Authority";

3.) Beer Garden Lane Development LLC will be referred to as "Beer Garden Lane LLC".

Findings Of Fact

1. Beer Garden LLC is a Colorado Limited Liability Company in good standing with its principal address located at 1191 Rampart Range Rd., Woodland Park, Colorado 80863. Arden Weatherford is its sole member.

2. Development Authority is a downtown development authority created pursuant to C.R.S. 31-25-801, et seq., which owns property described as Lot 2, Woodland Station Filing No. 1, a subdivision located in Section 24, Township 12 South, Range 69 West of the 6th P.M., City of Woodland Park, Teller County, State of Colorado (hereinafter the "Property"). Lot 2 was one of several lots owned by Defendant, which together comprised the larger property known as Woodland Station.

3. This Court has jurisdiction over the claims asserted herein pursuant to C.R.S. 13-1-124, because the parties transact business within the State of Colorado and entered into a contract to be performed within the State of Colorado.

4. Venue is appropriate in Teller County pursuant to the parties' Agreement, section 14.0, and pursuant to C.R.C.P. 98(a) and 98(c).

5. On August 2, 2001 the City of Woodland Park, Colorado established a Downtown Development Authority known as the Woodland Park Downtown Development Authority. The purposes of the Development Authority include providing for the public health, safety, prosperity, security and welfare in order to halt or prevent deterioration of property values on structures within the central business district, to assist in the planning, development, and redevelopment of this district, and that it will be of special benefit to the property within the boundaries of this authority (Pl. Ex 74, Development Authority Bylaws).

6. On February 21, 2002, the City of Woodland Park adopted the Woodland Park Downtown Development Authority Foundation Plan.

7. The Development Authority Foundation Plan, among other things, places "top priority on supporting private enterprise, development and redevelopment," with the stated objective "to assist the City of Woodland Park in the development, redevelopment and planning of the economic and physical restoration and growth of the District." (Pl. Ex. 75)

8. The AmeriGas propane facility long occupied a prominent site in downtown Woodland Park adjacent to the Property and was generally a concern for safety and land use compatibility for the Development Authority.

9. On August 20, 2009 the City of Woodland Park and the Development Authority entered into the Woodland Station Disposition and Development Agreement, which was recorded in the Teller County real property records on August 26, 2009 at Reception No. 629482. The agreement provides in part that the Development Authority "will transfer the Property to a developer or developers for no cash consideration but for fair value in furtherance of the goals and objectives" of the Development Authority. (Ex. 248)

10. The Development Authority's concerns about the AmeriGas property lead to discussions with Arden Weatherford. These discussions culminated in the Development Authority and Beer Garden LLC entering into an Agreement For Disposition and Development (the Agreement, Pl. Ex. 1) on March 19, 2013. On that date the Development Authority approved the Agreement at a duly noticed meeting of its Board of Directors, with an amendment to the Agreement changing the date in Section 6.3 from October 1, 2013 to October 1, 2016. (Pl. Ex. 70, p. 162b).

11. In the Agreement the subject property is described as set forth above in Paragraph 2 (Pl. Ex. 1, Section 7.1). In the most general way, the Agreement called for Beer Garden LLC to perform certain conditions precedent, whereafter the Development Authority would convey the Property to it. Per the undisputed testimony of the Development Authority's attorney Paul Benedetti, the property was intended to have been platted by the Development Authority prior to the execution of the Agreement. Unbeknownst to Beer Garden LLC, and apparently overlooked by the Development Authority, the Property had not, in fact, been platted. As of the date of the trial the Property has still not been platted. Nonetheless, the Beer Garden LLC and the Development Authority had a meeting of the minds as to the identification of the Property, and as to all of the material elements of the Agreement.

12. The Agreement was negotiated between Arden Weatherford and the Development Authority's attorney Paul Benedetti. Arden Weatherford received and reviewed drafts of the Agreement, asked questions and submitted minor revisions, but the substantive drafting was done by Mr. Benedetti.

13. The Agreement contains a condition precedent to be performed by Beer Garden LLC prior to any obligation of the Development Authority under the Agreement being triggered. Section 5.0 of the Agreement (Ex. 1) provides as follows:

CONDITION PRECEDENT

On or before June 13, 2013, the Developer must purchase fee title to the AmeriGas Site and remove all of the propane gas tanks now located thereon or either Party may terminate the Agreement by written notice to the other Party. Upon delivery of such notice, this Agreement will terminate and become null and void and no action, claim or demand may be based on any term or provision of this Agreement. In addition, the Parties agree to execute a mutual release or other instruments reasonably required to effectuate and give notice of such termination.

14. Within weeks after entering into the Agreement, Plaintiff had entered into a contract to purchase the AmeriGas parcel. Prior to conveyance, all of the smaller propane tanks located on the parcel had been removed prior to June 4, 2013. Only the largest and most conspicuous propane tank remained in place.

15. As noted above in Paragraph 13, the Agreement called for Plaintiff to purchase the AmeriGas Site and remove all of the tanks by June 3, 2013. Negotiations with AmeriGas were slowed through no fault of Plaintiff. Plaintiff kept the Development Authority fully apprised of the delays in acquiring AmeriGas. Defendant never expressed any concern to Plaintiff about the slight delays in the acquisition of the AmeriGas parcel.

16. Arden Weatherford was affiliated with other investor/developers with an interest in development within Woodland Station, which included Lot 2. This group was comprised of Kip Unruh, Steve Randolph and Brian Porter. Together with Arden Weatherford, this group formed Beer Garden Lane LLC. Beer Garden Lane LLC was the entity which consummated the purchase of the AmeriGas parcel, and took fee title to the property on September 12, 2013. The large propane tank was removed from the AmeriGas parcel on October 8, 2013.

17. Plaintiff made Development Authority aware of the creation of Beer Garden Lane LLC and that title to the AmeriGas parcel would be held in its name. No complaint or objection to this was ever voiced by Defendant until it filed its Answer on March 28, 2017. Defendant's response to the acquisition of the AmeriGas parcel and removal of the propane tanks was overwhelmingly positive.

18. Plaintiff applied for, paid for and received liquor licenses from the City of Woodland Park beginning on December 6, 2011, and renewed annually thereafter on November 6, 2013, November 6, 2014, November 6, 2015, and November 6, 2016. Each was issued with conditions, with which Plaintiff complied.

19. Beer Garden LLC applied for a temporary use permit to operate a beer garden on Lot 2 on August 8, 2018. The Temporary Use Permit was issued on August 28, 2013 (Pl. Ex. 28). the Beer Garden opened for business on September 30, 2013, with some Development Authority board members in attendance.

20. Beginning in March of 2013, and continuing through the middle of 2015, the investor group described above, lead by Mr. Unruh, was in discussion with the Development Authority about a larger role in the development of Woodland Station. After acquisition of the AmeriGas parcel

and removal of the propane tanks, Plaintiff was required by Section 6.3 of the Agreement to submit a Concept Plan and a Financing Plan for the permanent improvements to be constructed on the First Parcel on or before October 1, 2016 and for the remaining parcels on or before October 1, 2013. It was Beer Garden LLC's intention to build a permanent commercial beer garden/pavilion on Parcel 1 of Lot 2. It was the intention of the investment group, lead by Kip Unruh to pursue development of a mixed use residential/commercial development on Parcel 2 of Lot 2. On July 23, 2013 Unruh contracted with an organization called NES to assist in the preparation of a concept plan for Lot 2 (Def. Ex. 206). This plan was submitted to Defendant, which approved it on November 5, 2013. It was presented to the Woodland Park City Council on December 5, 2013.

21. Unruh provided Defendant with a financial statement and a $1,000,000 letter of credit on February 10, 2014.

22. Defendant never made any request of Beer Garden LLC to provide any covenants concerning temporary use of Parcel 1 of Lot 2. It never requested a Concept Plan or Financing Plan from Beer Garden LLC, because none was due from Plaintiff until 2016.

23. The investor/developer group continued discussion with Defendant concerning a master developer agreement encompassing Woodland Station and the AmeriGas parcel. Arden Weatherford was aware of and involved in those discussions. Ultimately these discussions did not materialize and no master developer agreement was reached.

24. Kip Unruh continued to negotiate with Development Authority concerning his mixed use proposal for Parcel 2, Lot 2. Through Woodland Park Village LLC, of which Unruh was the sole member, an agreement was reached with Development Authority concerning the development of Lot 2 through a proposed mixed use project. On August 28, 2014 a contract entitled "Agreement for Disposition And Development (Lot 2 Woodland Station) Replacing Agreement Dated March 19, 2013 with Woodland Park Beergarden" (Def. Ex. 213). The document was executed by Development Authority and by Kip Unruh on behalf of Woodland Park Village LLC.[1]

25. Arden Weatherford was aware of the August 18, 2014 agreement, referred to by Defendant as the Replacement Agreement. He had no legal involvement in Woodland Park Village LLC. He did not sign the 2014 agreement personally or on behalf of Beer Garden LLC. He did not believe it affected his or Beer Garden LLC's rights under the Agreement.

26. Carol Lindholm was the administrative assistance to the Development Authority. It was her unrebutted testimony, which the Court finds credible, that without input from the parties thereto, she unilaterally modified the title of the August 28, 2014 agreement to include the words "Replacing Agreement Dated March 19, 2013 with Woodland Park Beergarden", and did so for the sole purpose of being able to distinguish the two agreements from each other. There is no

[1] It appears that Woodland Park Village LLC never actually came into existence, but that the name was reserved by Unruh with the Secretary of State, and that it was his intent to register it prior to conveyance. The Court does not consider the issue of what, if any, effect this may have had on the August 28, 2014 agreement to be germane to a resolution of the issues between Beer Garden LLC and Development Authority.

other mention in the so-called replacement agreement of the Agreement between Plaintiff and Defendant.

27. Section 12.0 of the August 28, 2014 Agreement provides as follows: "Any titles of the several parts and sections of the Agreement are inserted for convenience of reference only, and shall be disregarded in construing or interpreting any of its provisions."

28. Also on August 28, 2014 Woodland Park Village LLC and Development Authority entered into a Memorandum of Understanding, each committing themselves to certain conduct in furtherance of their development agreement. Neither Arden Weatherford nor Beer Garden LLC were a party or signatory to the MOU.

29. Mr. Unruh as Woodland Park Village LLC and the Development Authority pursued their development agreement for most of the next year. Both parties put extensive effort and argument into the reasons why the agreement fell through in the summer of 2015. Neigher Kip Unruh nor Woodland Park Village LLC nor Beer Garden Lane LLC are parties to this action. Beer Garden LLC maintained its separation from these entities and was neither bound nor injured by the conduct of either party relative to the August, 2014 development agreement or the MOU. Other than to note the following: a.) Mr. Weatherford agrees that the Agreement would have been superseded had he or a related entity entered into a master developer agreement, which did not occur; b.) although Mr. Weatherford was supportive of the mixed use project sought by Mr. Unruh and Woodland Park Village LLC, abandonment of that agreement did nothing to diminish his rights, or his desire to pursue them, under the Agreement; and c.) the Court finds Mr. Weatherford's testimony to be credible that he did not push harder for conveyance of his parcel partly because Defendant had worked with him when the AmeriGas parcel was acquired and the tanks removed outside of the timeline of their agreement, and partly because there were ongoing discussions regarding the Woodland Station and Lot 2 which may have changed the parties' Agreement had they come to fruition, the Court makes no further findings concerning the difficulties between Woodland Park Village LLC and the Development Authority.

30. After the demise of the development agreement between Woodland Park Village LLC and the Development Authority, Defendant issued Resolution No. 1-2015 (Pl. Ex. 50). The resolution referred to the Agreement and the "replacement agreement", alleged that Kip Unruh was the representative of both Woodland Park Village LLC and Beer Garden LLC, declared that both were in default of their obligations under the two agreements, and directed and authorized its Executive Director to consult counsel and prepare notices of default to the two LLCs.

31. Mr. Weatherford thereafter continued to seek conveyance of a parcel of Lot 2, and the parties had subsequent discussions. Again the discussions failed and on January 8, 2016 Mr. Weatherford, on behalf of Beer Garden LLC, delivered Notice of Default to the Development Authority (Pl. Ex. 53). Shortly thereafter, on or about January 15, 2016, the Development Authority delivered its Notice of Default to Plaintiff (Pl. Ex. 54), alleging violations of Sections 6.0, 6.1, 6.3, 6.4, 6.5, 6.6 and 9.1.6 of the Agreement. On November 5, 2016 this litigation ensued.

32. Plaintiff provided the expert testimony of appraiser Bill Parks concerning the effect upon the value of Lot 2 caused by the removal of the adjacent propane tanks (Pl. Ex. 69). It was Mr.

Parks's opinion that the removal of the tanks increased the value of Lot 2 by 50%, that the current value of Lot 2 is $254,000, and that removal of the tanks increased Lot 2's value by $127,000. Undoubtedly the other lots comprising Woodland Station increased in value as well.

33. Defendant presented the testimony of its appraisal expert Gregory Baker. Mr. Baker acknowledged that while it was logical that the removal of the tanks increased Lot 2's value, he was critical of Mr. Parks's methods and opined that Parks's opinion is unreliable. Mr. Baker offered no opinion as to what an increase or decrease in value of Lot 2 might have been and he did not rebut Mr. Parks's opinion that the value of Lot 2 was $254,000 after removal of the tanks.

34. The Court finds to a reasonable degree of appraisal and accounting certainty that the acquisition of the AmeriGas parcel and removal of the propane tanks located thereon caused the value of Lot 2, the property of Defendant, to increase by $127,000.

35. The Court finds that acquisition of the parcel and removal of the tank was brought about by Plaintiff acting through its sole member Arden Weatherford, regardless of the entity which acquired title.

36. Property taxes paid on the AmeriGas property and interest on the AmeriGas loan were incurred by Beer Garden Lane LLC. For whatever reason Beer Garden Lane LLC is not a party to this lawsuit. Electrical expenses paid to FREA in the amount of $1,112.52 were paid by Woodland Park Brewing Company, which also is not a party to this lawsuit.

37. Plaintiff paid Rocky Mountain Materials for grade and gravel at its proposed location on Lot 2. Plaintiff incurred $2,582.54 for these materials and service.

38. Plaintiff paid Andy's Plumbing $1,117.00 for installation of a water tap on Lot 2.

39. Plaintiff paid for surveying work on Lot 2 in the amount of $737.00.

40. Plaintiff paid liquor license fees, pursuant to its obligations under the Agreement in the amount of $2,250.00.

41. Any loss on the AmeriGas purchase price was suffered by Beer Garden Lane LLC, which is not a party to this lawsuit.

42. 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 in 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.

43. Section 9.4.3 of the Agreement provides as follows:

> 9.4.3 Other. Take whatever legal or administrative action or institute such proceedings as may be necessary or desirable in its opinion to enforce observance or performance of this Agreement, including, without limitation, specific performance or to seek any other right or remedy at law or in equity, including damages; provided, however, 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.

44. No public improvements were ever constructed by Plaintiff because Defendant never conveyed any parcel of Lot 2. Defendant never made a budget request for funds to make such reimbursement.

CONCLUSIONS OF LAW

1.) There is no credible evidence that the March 19, 2013 Agreement For Disposition and Development is ambiguous or unenforceable. It is a valid, binding and enforceable contract between the parties to this case.

2.) Defendant breached its obligations under the Agreement by failing to ever plat Lot 2. Lot 2 could never be re-platted as contemplated in the Agreement without Defendant complying with this most basic of its obligations thereunder.

> "In deciding whether a breach is material, the extent to which an injured party would still obtain substantial benefit form the contract, and the adequacy of compensation in damages for the breach, should be considered. Kaiser v Market Square Discount Liquors 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).

Defendant persuaded this Court in a pretrial motion that specific performance was not available as a remedy to Plaintiff because it is illegal to convey an unplatted parcel (Woodland

Park City Code 17.56.020). By failing to plat Lot 2 Defendant rendered its own performance under the Agreement impossible. The breach is material and caused Plaintiff to incur damages.

3.) Plaintiff substantially performed its material obligations under the Agreement. "Substantial performance of material obligations occurs even if conditions of the agreement have been deviated from in trifling particulars not materially detracting from the benefit the other party would derive from strict performance." Western Distrib. Co. v Diodosio 841 P. 2d 1053, 1058 (Colo. 1992).

A. Plaintiff substantially performed the Condition Precedent set forth in Section 5.0 of the Agreement. the fact that performance could not be accomplished within the time frames set out, which was the fault of neither party did not detract from the benefit received by Defendant by removal of the propane tanks and acquisition of the AmeriGas parcel by a developer entity. Defendant was kept fully advised of the progress made in completing the Condition Precedent, made no objection to the slight delay, and was jubilant when the tanks were removed. This was never asserted by Defendant to be a problem until litigation was initiated. Any breach is immaterial.

B. Plaintiff complied with its obligations pursuant to Sections s.2 through 6.2.4 of the Agreement relating to Temporary Use prior to conveyance. Plaintiff obtained all necessary liquor licenses to operate, which was issued with conditions with which Plaintiff complied. Plaintiff obtained the required Temporary Use Permit prior to conveyance. No covenants beyond the requirements of the liquor licenses and Temporary Use Permit was ever requested by Defendant. If there was a technical breach by Plaintiff's not filing anything called "covenants" it was immaterial. Additionally Section 6.2.2 requires that such covenants be agreed to prior to closing. Closing never occurred due to the breach by Defendant described above. As to Plaintiff's obligation to execute a reconveyance deed at the closing, again the closing never occurred due to Defendant's breach. Plaintiff did not breach its duty to provide a reconveyance deed.

C. Plaintiff did not breach its duty to provide a Concept Plan for the Second Parcel after completing the Condition Precedent. A concept plan was commissioned and provided by Kip Unruh. The fact that a related developer provided the plan did not impair Defendant's expectations under the Agreement. Defendant approved the Plan on November 5, 2013. Additionally pursuant to Section 6.3 of the Agreement Plaintiff had no obligation to provide a Concept Plan or Financing Plan until October 1, 2016.

4.) Plaintiff did not default on its obligations under the Agreement as alleged in Defendant's Notice of Default. There is no evidence to suggest that Plaintiff failed to perform its obligations set forth in Section 6.0 of the Agreement.

Plaintiff could not perform its obligations under Section 6.1 of the Agreement, and was prevented from doing so by the failure of Defendant to plat Lot 2.

Plaintiff was not required to provide a Concept Plan or Financing Plan until October 1, 2016 per Section 6.3 of the Agreement.

Plaintiff did not breach Section 6.4 of the Agreement. Kip Unruh filed a financial statement and letter of credit on February 10, 2014. Plaintiff had no obligation under this section until late in 2016, well after Notice of Default was given by Defendant.

Plaintiff did not breach Section 6.5 of the Agreement. The fact that Plaintiff did not take title to any parcel in Lot 2 was caused by Defendant's failure to plat Lot 2 in the first place.

Plaintiff did not breach Section 6.6 of the Agreement. Plaintiff's obligation to commence construction on improvements was not due until after conveyance, which never occurred due to Defendant's breach.

Plaintiff did not breach Section 9.1.6 of the Agreement. As the Court has concluded above, Plaintiff did not materially breach any of its obligations under the Agreement, and no showing has been made that any of its obligations as to developer financing were not performed.

5.) The March 19, 2013 Agreement was never terminated, abandoned or replaced. The so-called replacement agreement of August 28, 2014 was not signed by Plaintiff. The fact that the title of the document indicates that it replaces the March 19, 2013 Agreement was caused by an administrative assistant to clarify the difference between the two agreements. It was not contemplated by either party to the agreement, and the document by its own terms directs that titles contained therein are not to be considered in construing or interpreting it.

6.) Defendant asserts that a limitation on any damages it might owe is created by Section 9.4.3 of the Agreement, and that because it never budgeted funds for reimbursement of public improvements as provided in Section 8.2, it owes no damages for any default in its performance. The Court concludes that such a limitation is inapplicable. Defendant's own breach prevented Plaintiff from constructing anything, or making any contribution to public improvements. The obligation of Defendant to seek a budgetary appropriation was never triggered, again due to its own defaut. Any constitutional requirement that Defendant receive fair value for the conveyance of public property was more than satisfied by the removal of the propane tanks from the AmeriGas site and its upward effect on the value and development potential of Woodland Station. Fair value was received, but no conveyance occurred. Section 9.4.3 does not operate to protect Defendant from paying damages for its default.

7.) Plaintiff filed the Complaint in this action within the applicable three year statute of limitations. Plaintiff had satisfied its obligations under the Condition Precedent no earlier than November 5, 2013, and did not even become aware of Defendant's failure to plat Lot 2 until well thereafter. The filing date of November 5, 2016 was well within three years of Plaintiff's learning of Defendant's breach.

8.) Defendant has failed to show that Defendant is precluded from recovery due to laches. See Findings of Fact Paragraph 29 above.

9.) The Court concludes that neither party breached any duty of good faith and fair dealing it owed to the other. Whether the Court might rule differently if it were Woodland Park Village LLC making the assertion is a matter on which the Court will not opine. Plaintiff is not entitled to compensation for any injury to Woodland Park Village LLC.

Likewise the Court concludes that neither party prosecuted or defended the case in a manner that lacked substantial justification, or was frivolous, groundless or vexatious. Both

parties were represented aggressively, thoroughly and competently, and the fact that the Court has ruled for or against either party on a particular issue does not give rise, in and of itself, to an award of attorney fees.

Because the Court has ruled substantially in favor of Plaintiff, the Court concludes that Plaintiff is entitled to at least a partial award of its costs.

10.) To the extent that the Court has not specifically ruled on one or more of the defenses asserted by Defendant, the Court finds them to be inapplicable and without merit.

11.) For all of the reasons set forth herein the Court concludes that Defendant has failed to prove its Counterclaims.

12.) The Court concludes that Plaintiff is entitled to an award of damages consistent with the findings set forth above in Paragraphs 34–41.

13.) All findings herein are made by a preponderance of the evidence.

ORDER AND JUDGMENT

It is therefore ORDERED that judgment enter in favor of Plaintiff Woodland Park Beer Garden LLCand against Defendant. Woodland Park Downtown Development Authority in the principal amount of $133,586.54, plus pre-judgment interest from May 20, 2018 through the date of judgment at the statutory rate of 8% per annum, plus post-judgment interest from the date of judgment at the statutory rate of 8% per annum until paid in full. Plaintiffs is directed to submit its Bill of Costs within 15 days of this Order. Defendant may file its objections to the Bill of Costs within 15 days thereafter, whereafter Plaintiff will have 5 days to file its Response to any objections.

Done and signed this 27 day of September, 2018

By the Court:

Gregory G. Lyman
District Judge