DISTRICT COURT, TELLER COUNTY, COLORADO Court Address: 101 W. Bennett Ave. PO Box 997 Cripple Creek, CO 80813 Telephone: (719) 689-2574	DATE FILED: March 2, 2018 12:06 PM FILING ID: F22E73D5B3508 CASE NUMBER: 2016CV30085
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 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	Case No.: 2016 CV 30085 Division: 11

PLAINTIFF'S TRIAL BRIEF

Plaintiff, WOODLAND PARK BEER GARDEN, LLC, (hereinafter "WPBG"), by and through its attorneys, Brewer Law Group, hereby submit their Trial Brief pursuant to C.R.C.P. 16(f)(3)(IV) as follows:

1. Breach of Contract

Plaintiffs' Complaint asserts a cause of action for breach of contract. For Plaintiffs to prevail on a breach of contract claim, it must prove, by a preponderance of the evidence: (1) the existence of a contract; (2) performance by the plaintiff or some justification for nonperformance; (3) failure to perform the contract by the defendant; and (4) resulting damages. *City of Westminster v. Centric-Jones Constructors,* 100 P.3d 472, 477 (Colo.App.2003)(*citing Western Distrib. Co. v. Diodosio,* 841 P.2d 1053 (Colo.1992)); and C.R.S. § 13-25-127(1). The burden of proving an affirmative defense rests upon the defendant asserting the defense. *Western Distrib. Co. v. Diodosio,* 841 P.2d 1053, 1057 (Colo.1992). *See also,* CJI – Civil, 30:1. Once Plaintiff proves Defendant DDA breached the contract, it must prove by a preponderance of the evidence that it sustained actual damages, which, in a breach of contract action, is the amount required to place Plaintiff in the same position it would have been in had Defendant DDA not breached the contract. *City of Westminster,* 100 P.3d at 477-78. *See also,* CJI, 4th – Civil, 30:37, and 30:38.

The performance element (2) by Plaintiff means "substantial performance," which 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 a strict performance. *Western Distrib. Co. v. Diodosio,* 841 P.2d 1053, 1058 (Colo.1992); *see also,* CJI – Civil, 30:7. Additionally, Plaintiff may be justified in nonperformance of certain contractual obligations due to Defendant DDA's prevention of performance or inducing a breach by words or conduct, as discussed below in (c) and (d).

A breach of contract is material if it goes to the essence of the contract and renders substantial performance of contract impossible with consideration given to the extent to which the injured party will obtain substantial benefit from the contract and the adequacy of compensation in damages. If a breach of the agreement is material, the non-breaching party is excused from further performance. *Kaiser v. Market Square Discount Liquors, Inc.*, 992 P.2d 636, 640 (Colo. App. 1999)(citing *Converse v. Zuke,* 635 P.2d 882, 887 (Colo. 1981)).

Application: The parties entered the Agreement. Plaintiff WPBG substantially performed its obligations to the extent possible to give rise to the Defendant DDA's obligation to convey the property, once replatted.

Plaintiff WPBG substantially performed its contractual obligations, namely: (1) the condition precedent required in Section 5.0 by purchase of the Amerigas Property and removal of the gas tanks; (2) the approval of a Temporary Use Permit, with conditions and covenants; and (3) the procurement of a Liquor License for operation of the temporary beer garden. Albeit delayed due to factors beyond Plaintiff WPBG's control, it facilitated the purchase of the Amerigas parcel taking title in another named entity formed by the known development investors, of which Defendant DDA was aware and, as such, any trivial breach in the named entity taking title to Amerigas was waived; and it procured the removal of the Amerigas propane tanks from the property. Plaintiff WPBG advised the Defendant DDA, in writing, of the entity taking title to the Amerigas Property, which was recorded in the Teller County real property records. Any trivial imperfection in the timing of or entity taking title were waived by the Defendant DDA by its knowledge of all relevant facts relating thereto, its failure to serve Plaintiff WPBG with any notice of default or provide it with any opportunity to cure, and acknowledging and celebrating these events as victories for Woodland Park and milestones in Plaintiff WPBG's performance.

In the alternative, Defendant DDA would like to point to the Plaintiff WPBG's failure to replat (as distinguished from plat) Lot 2 as the precipitating event giving rise to a breach; however, Lot 2 was never initially platted, as represented in the Agreement, and certain CDOT public infrastructure requirements related to the balance of planned development for Woodland Station (not just the subject Property), created conditions that required a remedy by Defendant DDA, as owner of Woodland Station as a whole including the subject Property, prior to a replat and conveyance, which it failed to do. Defendant DDA materially breached the parties' Agreement by failing and refusing to correct certain conditions of the Property to properly position it for replat and conveyance. Defendant DDA was the first to materially breach the Agreement by failing to posture the property for replat and conveyance as it had the ability and resources and promised to do throughout.

a. Modification of Written Agreement

A contract may be modified by oral or written agreement with the consent of all parties to the contract. *See* CJI – Civil, 30:6. Despite a provision requiring that all modifications of a written contract must be in writing, a contract may be orally modified between the parties. *Colorado Inv. Svcs., Inc. v. Hager,* 685 P.2d 1371, 1376-77 (Colo. App. 1984)(citations omitted). Additionally, contractual modifications extending the time for performance do not require additional consideration to be binding. *Id.* at 1377 (citations omitted).

Application: One modification of the parties' Agreement was the timing of conveyance. Once the time for conveyance arose, the Defendant DDA erected barriers to conveyance including the need to subdivide Woodland Station to create Lot 2 (which the property description of the Agreement presupposed had already been done) prior to replatting to create the referenced parcels and a further barrier that whoever was the next to subdivide and develop the subject Property was responsible for CDOT required public infrastructure pursuant to a letter dated 3/12/12 (pre-dating the parties' Agreement but which was not provided to Plaintiff WPBG until much later) amounting to several million dollars. Despite solutions to both of these issues proffered by the City of Woodland Park and despite the DDA's agreement to ameliorate the impact of these conditions upon the conveyance of the First Parcel to WPBG, it failed to ever remedy either issue and further used these very conditions as its excuse to avoid conveyance.

b. Interpretation of Unambiguous Contracts

The primary goal of interpreting a written contract is to determine and give effect to the intent of the parties. *USI Props. East, Inc. v. Simpson*, 938 P.2d 168, 173 (Colo. 1997); and CJI – Civil, 30:11. The intent of the parties is to be determined from the plain language of the contract, where possible. *Id.* The provisions of a contract are ambiguous when they are susceptible to more than one reasonable interpretation; however, parties who simply have different opinions about the interpretation of a contract does not create ambiguity. *Mashburn v. Wilson,* 701 P.2d 67 (Colo.App. 1984); and CJI – Civil, 30.11. When construing an unambiguous contract, the court may not rewrite its terms but must instead enforce it as written. *Kaiser v. Market Square Discount Liquors, Inc.*, 992 P.2d 636, 640 (Colo. App. 1999)(citing *USI Properties East, Inc. v. Simpson*, 938 P.2d 168 (Colo. 1997)).

Application: The plain terms of the Agreement did not require Plaintiff WPBG to subdivide Woodland Station to create Lot 2 – it only required Plaintiff WPBG to replat Lot 2 to create the referenced parcels with Lot 2. The subdivision of Woodland Station to create Lot 2 is a condition that could have been reasonably overcome through a 60 day minor subdivision process, coupled with public infrastructure conditions for the plat provided by the City of Woodland Park Planning Director, but Defendant DDA never took any action to plat; never shared the relevant information from the City of Woodland Park Planning Director relative to the remedy; and never updated the referenced Traffic Impact Study for CDOT reconsideration as it promised. Plaintiff WPBG Developers were entitled to the benefit of their bargain and to be placed in the same position they would have been in absent Defendant DDA's material breach.

c. Prevention of Performance

"He who prevents a thing from being done may not avail himself of the nonperformance which he has, himself, occasioned; or, if the performance of an obligation is prevented by one of the parties to a contract, the party thus prevented from discharging his part of the obligation is to be treated as though he had performed it." *Denver v. Midwest Plumbing & Heating Co.,* 125 P.2d 960, 961 (Colo. 1942)(citations omitted). Plaintiff is not legally responsible to defendant for an alleged breach of contract if plaintiff proves that defendant prevented or substantially interfered with the plaintiff's performance thereof. *See,* CJI – Civil, 30:22.

Application: To the extent the Defendant DDA alleges that Plaintiff WPBG breached its obligations because: (1) it did not replat the Property for conveyance; or (2) Parcel 2 failed to achieve design review approval, then Plaintiff WPBG should be regarded as performing these contractual obligations because Defendant DDA prevented or substantially interfered with the performance and completion thereof.

d. Inducing a Breach by Words or Conduct

A plaintiff is not legally responsible for an alleged breach of contract if the defendant induced the breach by words or conduct, or both, causing plaintiff not to perform its obligations as required by the contract; and defendant actually knew, or knew there was a substantial likelihood its words or conduct or both would have that result. *See* CJI – Civil 30:23. "A party who consents to or requests a postponement of performance by the other party of some stipulation for his benefit, cannot, after the other party has acted on such consent or request, avail himself of the default and treat the contract as forfeited, although performance of the stipulation at the time specified may have been of the essence of the contract." *Dreier v. Sherwood,* 238 P. 38, 40 (Colo. 1925)(citation omitted).

Application: To the extent the Defendant DDA alleges that Plaintiff WPBG breached its contractual obligations because it did not replat the Property for conveyance, Plaintiff WPBG should not be legally responsible therefore because Defendant induced such breach by failing to subdivide Woodland Station to create Lot 2 and failed to mitigate the public infrastructure requirements that would arise therefrom knowing that its failure to perform would induce Plaintiff's breach and shield Defendant DDA from conveyance.

Additionally, to the extent Defendant DDA alleges later breaches of contract to support its non-conveyance of property, it cannot request a delay to conveyance of the subject Property to events certain and avoid conveyance by inducing events certain to never occur.

e. Termination of Contracts by Consent

A generally accepted principle of contract law is "that the termination of a contract occurs only by agreement of the parties." *Omni Dev. Corp. v. Atlas Assur. Co. of Am.*, 956 P.2d 665, 668 (Colo. App. 1998)(citing *Milbank Mut. Ins. Co. v. State Farm Fire & Casulaty Co.,* 294 N.W.2d 426 (S.D. 1980)).

Application: Plaintiff WPBG never agreed or consented to the cancellation, termination or rescission of the Agreement. Plaintiff WPBG was not a party to the Disposition and Development Agreement between the Defendant DDA and Woodland Park Village, LLC and, despite it being titled "Replacement Agreement" it was not intended to replace the Plaintiff WPBG Agreement nor was it intended to relinquish Plaintiff WPBG's vested right to receive conveyance of the First Parcel of the Property, both as evidenced by Plaintiff WPBG not being a signatory party thereto. Additionally, Plaintiff WPBG was not a party to the Memorandum of Understanding between the Defendant DDA and Woodland Park Village, LLC. Notwithstanding Plaintiff's knowledge of these Agreements, they were simply intended to further the Parcel 2 mixed use development project of Kip Unruh and provide a remedy to the new circumstances surrounding conveyance discussed in Paragraphs a and b, above, relating to the subdivision of Woodland Station to create Lot 2 and the mitigation of the CDOT requirements related thereto through an updated traffic study, both of which were going to be accomplished by virtue of the Parcel 2 development, but which never occurred. Plaintiff WPBG orally agreed to modify the timing of conveyance to coincide with the issuance of ZDP for Parcel 2 in order to allow the Defendant DDA reasonable opportunity to mitigate the two issues identified herein; however, Defendant DDA interfered with the issuance of ZDP for Parcel 2 and used it as a shield to conveyance of Parcel 1 to Plaintiff WPBG.

f. Conditions Precedent/Waiver

Pursuant to Colorado law, contract terms can be interpreted as either conditions precedent or promises to perform. *Main Elec., Ltd. v. Printz Servs. Corp.,* 980 P.2d 522, 526 (Colo. 1999)(citing *Charles Ilfeld Co. v. Taylor*, 156 Colo. 204, 209 (1964)). A condition precedent is not favored and will not be interpreted as such unless established by clear and unequivocal language. *Id.* In circumstances of doubt as to the parties' intention, a provision will be interpreted as a promise rather than a condition. *Id.* This is so because conditions precedent create a risk of forfeiture, which are frowned upon as a judicial policy of this state. *Id.* One manner in which a court determines a condition precedent from a promise to perform is whether the provision "goes to the root of the contract so that a failure to perform it would render the performance of the rest of the agreement by the plaintiff a thing different in substance from what the defendant has agreed to, or whether it merely partially affects it and may be compensated for in damages." *Charles Ilfeld Co.,* 156 Colo. at 210.

Pursuant to Colorado law, the failure to fulfill a condition precedent excuses further performance by the other party; however, the condition, or strict satisfaction thereof, may be waived by words or unequivocal acts. *Kaiser v. Market Square Discount Liquors, Inc.,* 992 P.2d 636, 641 (Colo. App. 1999). Waiver is the intentional relinquishment of a known right, whether by expression or clear implication. *Duran v. Housing Authority,* 761 P.2d 180, 183 (Colo. 1988)(citation omitted). When a party engages in conduct that manifests an intent to relinquish the right to terminate for failure to comply with a condition precedent or it acts inconsistently with the assertion of the right to terminate, the party will have waived that right. *Id.* "Waiver may be demonstrated by a course of conduct signifying a purpose not to stand on a right, one leading, by reasonable inference, to a conclusion that the right in question will not be insisted upon." *Id.* Plaintiff is not legally responsible to defendant for an alleged breach of contract if: (1) defendant knew Plaintiff had not performed; (2) defendant knew that this failure of plaintiff gave it the right to issue a notice of default and terminate the agreement; (3) defendant intended

to give up the right to claim default and terminate; and (4) defendant voluntarily gave up that right. *See,* CJI – Civil, 30:24.

Application: Defendant DDA alleges that Plaintiff WPBG failed to fulfill the terms of the condition precedent contained in Paragraph 5.0 of the Agreement because: (1) it failed to complete the purchase of the Amerigas Property and remove the tanks **"on or before June 3, 2013;"** and (2) an entity created by Developer for such purpose, in lieu of the Developer entity, took title to the Amerigas Property. In addition to Plaintiff Developer's substantial compliance with the condition precedent to purchase the Amerigas Property, Defendant DDA also waived any trifle imperfections with Plaintiff Developer's performance of this condition precedent and acknowledged material compliance with Paragraph 5.0 when:

(1) It failed to issue a notice of termination for failure to complete the condition precedent;
(2) It failed to object to Plaintiff Developer's separate entity, Beer Garden Lane Development, LLC, taking title to the Amerigas Property, after receiving knowledge of such information in December 2013;
(3) It accepted Plaintiff Developer's purchase of the Amerigas Property and removal of the propane tanks and acknowledged performance of the condition precedent in its November 5, 2013, Regular Meeting and acknowledged this accomplishment again in its Winter 2014 Newsletter;
(4) In December 2013, it approved the Concept Plan for Woodland Station, to which Plaintiff Developer contributed, and which incorporated both the Property (Lot 2 of Woodland Station) and the Amerigas Property acknowledging Plaintiff Developer was thereby "meeting a milestone in the Agreement for Disposition and Development";
(5) In February 2014, it recommended approval from City Council to incorporate the Amerigas Property into the Woodland Station Overlay District since it was integrated into the larger Woodland Station Concept Plan; and
(6) In October 2015, the DDA acknowledged that it could not legally ignore Weatherford's desire to move forward with the Disposition and Development Agreement.

Even after completion of the Amerigas purchase and removal of the tanks, Defendant DDA proceeded with the parties' Agreement as if the condition precedent had been satisfied thereby manifesting an intent to relinquish the right to terminate for failure to comply with the condition precedent by the established date or taking title to the Amerigas parcel in a different developer entity. Such trivial imperfections in Plaintiff's performance were effectively waived.

2. Breach of Express Covenant of Good Faith & Fair Dealing

Colorado recognizes that every contract contains an implied duty of good faith and fair dealing. *Amoco Oil Co. v. Ervin,* 908 P.2d 493, 498 (Colo. 1995). Additionally, pursuant to the parties' Agreement in this matter, the Defendant DDA was expressly required to provide the Plaintiff Developer with support and cooperation; act in good faith; and not act unreasonably, arbitrarily, capriciously, or unreasonably withhold any approval required by the Agreement. *See* Agreement, Plaintiff's Trial Exhibit 1, §§ 6.1 and 20.0. This doctrine is generally implemented to effectuate the intentions of the parties and to honor their reasonable expectations. *Id.*

(citations omitted). Good faith performance requires "faithfulness to an agreed common prupose and consistency with the justified expectations of the other party." *Id.* (citing *Wells Fargo Realty Advisory Funding, Inc. v. Uioli, Inc.,* 872 P.2d 1359 (Colo. App. 1994) and *Restatement (Second) of Contracts § 205 cmt. A (1981)).* The application of this doctrine is especially applicable when one party to the transaction has discretionary authority to make determinations or issue approvals. *Id. see also* CJI – Civil, 30:1A.

Application: Defendant DDA abused its power, acted outside the scope of its discretion and usurped the benefits of the Agreement by: failing to subdivide Woodland Station to create Lot 2 as was represented in and contemplated by the Agreement; failing to mitigate the public infrastructure requirements in force from CDOT based upon Defendant DDA's representations to CDOT that development included a hotel, an event center, two office buildings and a bowling alley, non of which related to Plaintiff WPBG's development plan for Lot 2 so the intended Lot 2 development could proceed without the onerous requirements; refusing to create a conveyable and developable Lot 2 despite resources and authority to do so; abusing its discretion in the design review process stalling design review approval for over six months in bad faith; as well as other manners that will be developed by the evidence.

3. Parol Evidence Rule

Parol evidence is only admissible when the contract between the parties is so ambiguous that their intent is unclear. *Boyer v. Karakehian,* 915 P.2d 1295, 1299 (Colo. 1996)(citing *Cheyenne Mtn. School Dist. No. 12 v. Thompson,* 861 P.2d 711, 715 (Colo. 1993)). "In the absence of allegations of fraud, accident or mistake in the formation of the contract, parol evidence may not be admitted to add to, subtract from, vary, contradict, change or modify an unambiguous integrated contract." *Id.* (citations omitted). When a provisions of an agreement are clear and unambiguous, "the intent of the parties is determined from the plain language of the instrument itself, and extrinsic evidence is not admissible to reveal the intent." *Fire Ins. Exch. V. Rael by Rael,* 895 P.2d 1139, 1142 (Colo.App. 1995).

Notwithstanding, the parol evidence rule does not bar the admission of oral representations that are not inconsistent with the terms of the final written agreement. *Id.*

In cases involving ambiguity in a written contract, the court should determine the intention of the parties as a question of fact through admission of parol and extrinsic evidence. *Fire Ins. Exch. V. Rael by Rael,* 895 P.2d 1139, 1142 (Colo.App. 1995)(citing *Cheyenne Mtn. School Dist. No. 12 v. Thompson,* 861 P.2d 711, 715 (Colo. 1993)). To determine what the parties intended the terms of the contract to mean, the court should consider the language of the written agreement, the parties' negotiations of the contract, any earlier dealings between the parties, any reasonable expectations the parties may have had because of the promises or conduct of the other party, and any other factors and circumstances that existed at the time that the contract was formed. *See* CJI – Civil, 30:12.

4. Construction Against One Who Drafted Contract

Any dispute over the meaning of any unclear terms must be decided against the party who drafted the contract. *Christmas v. Cooley,* 406 P.2d 333, 335 (Colo. 1965); and CJI – Civil,

30:13.

Application: Defendant DDA and/or its counsel drafted the agreements referenced in this litigation.

5. No Expert Opinion relative to the ultimate legal issue in the matter

An expert may not usurp the function of the court by expressing an opinion of the applicable law or legal standards. *Quintana v. City of Westminster,* 8 P.3d 527, 530 (Colo.App. 2000)(citing *People v. Lesslie,* 939 P.2d 443 (Colo.App. 1996)). Testimony on ultimate issues of law by the legal expert is inadmissible because it is detrimental to the trial process – it is within the ultimate province of the court to determine questions of law. *Grogan v. Taylor,* 877 P.2d 1374, 1384 (Colo.App. 1993)(citation omitted).

6. Exculpatory Clause Unenforceable as Written - No Limitation of Damages

Any argument that Section 9.4.3 of the Agreement acts as a bar to damages is without merit. Section 9.4.3 suggests a limitation upon damages by reference to a contingency in Section 8.2 of the Agreement relating to the amoutn appropriated to public infrastructure. Since Defendant failed to perform such contingency, then the limitation is simply inapplicable. More particularly, Section 8.2 of the Agreement contemplates the Executive Director to include within budget proposals amounts necessary to reimburse the Plaintiff for Public Improvements required by virtue of the Lot 2 development and constructed in accordance with the Agreement. As a result of Defendant's breaches and failure to convey the subject Property, Plaintiff was never afforded the opportunity to construct the Public Improvements, and thus the Executive Director's obligation to make a budget proposal to be approved was not triggered. Since no appropriation for public improvements was triggered or proposed, the language in Section 9.4.3 does not act as a bar or impose a limitation to the assessment of damages against the Defendant DDA.

Plaintiff hereby reserves its right to supplement this trial brief with any additional legal issues that may arise prior to or during trial in this matter.

DATED this 2nd day of March 2018.

BREWER LAW GROUP

By: */s/ Stephanie L. Brewer* **
Stephanie L. Brewer # 32588
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March 2018, a true and correct copy of the foregoing was provided via ICCES to:

Steven J. Rupp
David M. Neville
430 N. Tejon, Ste 300
Colorado Springs, CO 80903
Attorneys for Defendant

By: */s/ Dawn M. Eckelberry* **
Dawn M. Eckelberry

** An electronic copy of signatures is on file at BREWER LAW GROUP pursuant to C.R.C.P. 121, §1-26(7).