DISTRICT COURT, GRAND COUNTY, COLORADO P.O. Box 192/307 Moffat Avenue Hot Sulphur Springs, CO 80451 970-725-3357	DATE FILED November 26, 2025 3:53 PM CASE NUMBER: 2021CV30027
Plaintiffs: CORNERSTONE WINTER PARK HOLDINGS LLC, a Colorado limited liability company; GRAND PARK DEVELOPMENT LLC, a Colorado limited liability company; GRAND PARK HOMES LLC, a Colorado limited liability company; ELK CREEK MULTI-FAMILY, LLC, a Colorado limited liability company; and GP WILLOWS APARTMENTS, LLC. a Colorado limited liability company, v. Defendants: TOWN OF FRASER, a Colorado municipal corporation; MICHAEL BRACK, in his capacity as the Town Manager for the Town of Fraser; KENT WHITMER, in his capacity as Town Attorney for the Town of Fraser; the BOARD OF TRUSTEES OF THE TOWN OF FRASER; and GARRETT SCOTT, in his capacity as Planning Director for the Town of Fraser, Counterclaim Plaintiff/Third-Party Plaintiff: TOWN OF FRASER v. Counterclaim Defendants: CORNERSTONE WINTER PARK HOLDINGS LLC and GRAND PARK DEVELOPMENT LLC; v. Third-Party Defendant: GRAND PARK OWNERS ASSOCIATION, INC., a Colorado nonprofit corporation.	
	▲ **Court Use Only** ▲
	Case No. 2021CV30027 Division: 1

JUDGMENT AND ORDER

This matter came before the Court on August 5, 2024 for an eleven-day trial to the Court. The Plaintiffs Cornerstone Winter Park Holdings, LLC, Grand Park Development, LLC, Grand Park Homes, LLC, Elk Creek Multi-Family, LLC, and GP Willows Apartments, LLC's (the "Plaintiffs" or "Cornerstone") appeared by Attorneys Katz and Albertson. The Defendants the

Town of Fraser (the "Town"), Michael Brack, Kent Whitmer, the Board of Trustees of the Town of Fraser (the "Town's Board" or the "Board"), and Garrett Scott (the "Defendants") appeared by Attorneys Hernandez-Schlagel, Whitmer, and Lemieux. The parties submitted their closing arguments on November 19, 2024 and their rebuttal closings and proposed findings of fact and conclusions of law on December 10, 2024. This matter became ripe for the Court to rule on December 11, 2024. The Court finds and rules as follows:

During the trial, the Court placed some findings and rulings on the record. The Court incorporates the findings and rulings it placed on the record into this order. This order contains rulings and findings in addition to those rulings and findings the Court placed on the record. If this order contradicts the Court's oral ruling, this written ruling will govern.

The Court approves and incorporates herein the parties' Undisputed Facts, found in the Trial Management Order, granted by the Court on July 30, 2024.

The parties came before the Court on the Plaintiffs' Amended Complaint, filed on April 20, 2022 (the "Amended Complaint").[1] In their Amended Complaint, the Plaintiffs asserted claims against the Defendants for (1) declaratory judgment, (2) permanent injunction,[2] (3) breach of contract (including anticipatory repudiation and breach of the covenant of good faith and fair dealing), (4) promissory estoppel, (5) unconstitutional taking, (6) relief under 42 U.S.C. § 1983 (related to Due Process, Equal Protection, and the right to petition[3]), (7) declaratory judgment, and (8 and 9) relief under C.R.C.P. 106(a)(2).

The Defendants came before the Court on the Defendants' Answer to the Amended Complaint with affirmative defenses and Amended Counterclaims (the "Amended Counterclaims") on March 2, 2023 (the "Amended Answer").[4] The Town's Amended Counterclaims, filed March 2, 2023, assert counterclaims for (1) declaratory judgment, (2) breach of contract, and (3) condemnation.

The Plaintiffs filed their Answer to the Town's Amended Counterclaims and Affirmative Defenses on March 23, 2023.

On the first day of the trial to the Court, pursuant to a stipulation of the parties, on the record and then as subsequently memorialized in a written order issued August 5, 2024, modified the caption in this matter to reflect, as the Court does in the Court's August 5, 2024 order, and in the caption above, that the Town of Fraser is a Third-Party Plaintiff and Grand Park Owners Association, Inc. is a Third-Party Defendant. Prior to the first day of trial, Grand Park Owners Association, Inc. was partially identified as a Third-Party Defendant in this matter with the Town of Fraser as the Third-Party Plaintiff, although the Court does not believe the Defendants or solely the Town properly filed a Third-Party Complaint in this matter. The Defendants, in the Defendants' original Answer, Jury Demand and Counterclaims, filed October 7, 2021, first identify Grand Park

[1] The Plaintiffs filed their original complaint, which started this action, on August 5, 2021.
[2] The Plaintiffs moved for a preliminary injunction and the Court, on September 4, 2021, following a two-day hearing, granted the Plaintiffs' request for a preliminary injunction. As of the date of this order, the preliminary injunction remained in place.
[3] The Plaintiffs characterize a portion of the 42 U.S.C. 1983 claim as their right to free speech, but the Court characterizes it as the right to petition the government under the First Amendment.
[4] Of the Defendants, only the Town filed Counterclaims against the Plaintiffs. On the second day of the trial, the parties stipulated that the Town filed the Town's initial counterclaims on October 7, 2021.

Owners Association, Inc. both in the caption and the body of the document as a Counterclaim Defendant, which cannot be since Grand Park Owners Association, Inc. was never a Plaintiff. The Defendants do so again in the Defendants' Answer to Plaintiffs' Amended Complaint, Jury Demand and Counterclaims filed on May 3, 2022. The Defendants, in the Defendants' Answer to Plaintiffs' Amended Complaint, Jury Demand and Amended Counterclaims, identify Grand Park Owners Association, Inc. as a Counterclaim Defendant and Third-Party Defendant in the caption, but as a Counterclaim Defendant in the body of the document. The Court could not find a Third-Party Complaint in the register of actions for this matter. The Defendants filed a return of service showing service of the Defendants' Answer to Plaintiffs' Amended Complaint, Jury Demand and Amended Counterclaims on Grand Park Owners Association, Inc. on March 14, 2023. Grand Park Owners Association, Inc. filed an Answer to the Amended Counterclaims and Affirmative Defenses on March 23, 2023.

Pursuant to a stipulation of the parties, the Court bifurcated the issue of the exact location, description, and terms of any easement the Court may order in this matter, stating that if the Court orders that the Plaintiffs owe the Defendant the Town of Fraser an easement, the Court will address the location and terms of that easement at separate hearing. The parties agreed on the record that the Third-Party Defendant the Grand Park Owners Association, Inc. will only appear in this matter if the Court orders the Plaintiffs owe the Defendant the Town of Fraser an easement.

At the beginning of this case, the Plaintiffs moved for a preliminary injunction and, following a two-day hearing, the Court, on September 4, 2021, nunc pro tunc September 3, 2021, granted the Plaintiffs' request for a preliminary injunction, stating "[a]s of September 3, 2021, while this lawsuit pends, the Defendants will no longer impose the sanctions the Defendants imposed against the Plaintiffs as set forth Exhibit Q. The default issued by the Defendants remains in place and in effect."

On May 5, 2024, the Court entered an order granting in part and denying in part the Defendants' Motion for Summary Judgment. In that order, the Court granted judgment to the Defendants on the Plaintiffs' fifth, part of the sixth (the Court entered judgment on the Plaintiffs' 42 U.S.C. § 1983 claim related to Due Process and Equal Protection Claim, but not the Plaintiffs' claim under the right to petition), and eighth claims for relief.

On the first day of the trial, the Court granted the Plaintiffs' oral motion to dismiss the Plaintiffs' ninth claim for relief. The Court dismissed without prejudice the Plaintiffs' ninth claim for relief.

On the fourth day of the trial, the Court granted the Plaintiffs' oral motion to dismiss the Plaintiffs' seventh claim for relief. The Court dismissed without prejudice the Plaintiffs' seventh claim for relief.

On January 2, 2025, nunc pro tunc August 8 and 12, 2024, the Court, pursuant to Colorado Rule of Civil Procedure ("C.R.C.P.") 41(b)(1), dismissed with prejudice, over the Plaintiffs' objection, the Plaintiffs' claim found in paragraph 50 of Plaintiffs' Amended Complaint because the Plaintiffs showed no right to relief on that portion of the Plaintiffs' first claim for relief. The Court also struck the word "conservation easement" from paragraphs 66, 67, and 68 of the Plaintiffs' Amended Complaint in the Plaintiffs' third claim for relief.

The Plaintiffs' claims in the Plaintiffs' Amended Complaint that remain for ruling are: (1) First Claim for Relief – Declaratory Judgment; (2) Second Claim for Relief – Permanent Injunction; (3) Third Claim for Relief – Breach of Contract Against the Town of Fraser (minus the phrase "conservation easement" found in paragraphs 66, 67, 68 – the Court struck the phrase from all three paragraphs); (4) Fourth Claim for Relief – Promissory Estoppel Against the Town of Fraser; and (5) Sixth Claim for Relief – 42 U.S.C. 1983 – Against the Town of Fraser, Town Manager, and Town Attorney only regarding the right to petition.

The Town's Amended Counterclaims in the Defendants' Answer to Plaintiffs' Amended Complaint, Jury Demand and Amended Counterclaims that remain for ruling are: (1) First Counterclaim for Relief – Declaratory Judgment; (2) Second Counterclaim for Relief – Breach of Contract; (3) Third Counterclaim for Relief – Condemnation.

Over the eleven-day trial to the Court, the Plaintiffs presented the testimony of Clark Lipscomb and Jack Bestall and rested. The Defendants presented the testimony of Jeff Durbin, expert witness Dominic Mauriello, Rodney McGowan, Catherine Trotter, Steven Sumrall, Fran Cook, Edward Cannon, and Garrett Scott. The Defendants rested. On rebuttal, the Plaintiffs presented the testimony of Clark Lipscomb and rested.

The parties had the recording of the trial to the Court transcribed and, on September 23, 2024, and October 31, 2024, filed the transcripts for each day of the trial with the Court. These are the official trial transcripts.

The Court admitted the Plaintiffs' Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 15 (only pages 1, 2, 3-10, and 99-109), 19, 20, 21, 22, 32, 48, 49, 53, 54, 55, 56, 62, 67, 69, 76, 78, 84, 86, 30-P Exhibit 6, 30-P Exhibit 7, 30-P Exhibit 8, 30-P Exhibit 9, 30-P Exhibit 10, 30-P Exhibit 11, 30-P Exhibit 12, 30-P Exhibit 13, 30-P Exhibit 14, 30-P Exhibit 15, Exhibit 30-D Exhibit G, Exhibit 30-D Exhibit H, Exhibit 30-D Exhibit I, Exhibit 30-D Exhibit J, Exhibit 30-D Exhibit K, Exhibit 30-D Exhibit L, Exhibit 30-D Exhibit M, Exhibit 30-D Exhibit N, Exhibit 30-D Exhibit O, Exhibit 30-D Exhibit P, Exhibit 30-D Exhibit Q, Exhibit 30-D Exhibit S, Exhibit 30-D Exhibit T, Exhibit 30-D Exhibit U, and Exhibit 30-D Exhibit V, and 67 and the Defendants' Exhibits F, G, H, K, Q, U, W, Z, FF, II, OO, and SS. The Plaintiffs offered, but the Court did not admit the Plaintiffs' Exhibit 15 in its entirety. The Defendants offered, but the Court did not admit the Defendants' Exhibit H.

For each day of the trial, the Court issued an order memorializing some of the events that took place at trial and reflecting the witnesses presented and the exhibits (1) admitted by the Court or (2) offered by a party, but not admitted by the Court. The Court incorporates those orders into this ruling.

This Court has jurisdiction over this matter pursuant to Colorado Revised Statute ("C.R.S.") 13-1-124.

Venue is properly before this Court pursuant to C.R.C.P. 98(c).

The Appendix attached to the Defendants' written closing argument, filed with the Court on November 19, 2024, reflects a list of witnesses who testified at the trial and the location of each witness' testimony in the trial transcript.

STIPULATED FACTS

The Court recites and includes and incorporates into this order in this section the parties' Undisputed Facts found in the parties' Trial Management Order, filed with the Court on July 8, 2024, and granted by the Court on July 30, 2024:

1. Rendezvous Colorado, LLC, which was owned by Cornerstone Winter Park Holdings, LLC and Koelbel Winter Park, LLC, and the Town of Fraser entered into the Amended and Restated Annexation Agreement on June 4, 2003 (the "2003 Annexation Agreement"[5]).

2. The Town of Fraser also approved the Rendezvous Planned Development District Plan PDD on June 4, 2003 (the "2003 PDD"[6]).

3. In May 2004, Cornerstone Winter Park Holdings LLC and Koelbel Winter Park LLC partitioned the Rendezvous Property and Cornerstone Winter Park Holdings LLC took ownership and the development rights for the property west of Highway 40.

4. On November 2, 2005, Rendezvous Colorado LLC, Cornerstone Winter Park Holdings LLC and the Town of Fraser entered into the First Amendment to the Annexation Agreement (the "First Amendment"[7]).

5. On November 2, 2005, a PDD entitled Grand Park Planned Development District Plan was approved and it was recorded on November 8, 2005 (the "2005 PDD"[8]).

FINDINGS OF FACT MADE BY THE COURT

The Court makes findings of fact below. The Court will also make findings of fact elsewhere in this order. While the Court cites specific exhibits below, the Court has chosen not to cite specific trial testimony, but the Court's findings of fact are supported by the evidence presented at the trial to the Court in this matter, whether the Court has provided specific citations in this order or not. The Court has made credibility determinations in the Court's findings of fact in this matter and those credibility determinations apply to the facts stated within this entire order.

1. This action involves a dispute between the Plaintiffs and the Defendants regarding Cornerstone's obligation, pursuant to an Annexation Agreement, to place in conservation easement two areas of Cornerstone's property known as: Elk Creek Meadow and Cozens Meadow.

2. The Plaintiffs are the property owners and/or developers of the Grand Park Development located within the Town of Fraser. The 2005 PDD for Grand Park Development consists of approximately 1310 acres. Exhibit 4, page 6. The Grand Park Development includes both Elk Creek Meadow and Cozens Meadow.

[5] The Court added the information in parentheses to the parties' Stipulated Facts for clarity.
[6] The Court added the information in parentheses to the parties' Stipulated Facts for clarity.
[7] The Court added the information in parentheses to the parties' Stipulated Facts for clarity.
[8] The Court added the information in parentheses to the parties' Stipulated Facts for clarity.

PARTIES AND WITNESSES

3. Clark Lispcomb ("Mr. Lipscomb") is the President of Cornerstone Winter Park Holdings, LLC and has held that position since 2001 or 2002. Mr. Lipscomb is also in charge of/operates Grand Park Development, LLC, Grand Park Homes, LLC, Elk Creek Multi-Family, LLC, and GP Willows Apartments, LLC. Mr. Lipscomb has been responsible for the development of the real estate owned by the Plaintiffs since 1999.

4. Jack Bestall ("Mr. Bestall") originally was the project manager for Koelbel Winter Park Holdings, LLC ("Koelbel"). Koelbel formed a partnership with Cornerstone that ultimately was called Rendezvous and Mr. Bestall was the project manager for that entity. When the Rendezvous partnership split up in approximately 2004, Mr. Bestall became the project manager for Cornerstone and held that position until 2007.

5. The Town is a municipality.

6. Jeff Durbin ("Mr. Durbin") became the Town Manager for the Town of Fraser in 2004 and held that position until 2020. Prior to holding that position, Mr. Durbin was the community development director for the Town from 2000 to 2004. A community development director is essentially a town planner.

7. Dominic Mauriello ("Mr. Mauriello") is a land use planning consultant. The Court qualified Mr. Mauriello as an expert in the areas of municipal land use planning, development, and entitlements.

8. Rodney McGowan ("Mr. McGowan") was the Town of Fraser's Attorney from 1990 until Mr. McGowan's retirement in 2021.

9. Catherine Trotter ("Ms. Trotter") was the Town of Fraser's Planner from 1995 to 1999 and again from 2004 until 2022.

10. Steven Sumrall ("Mr. Sumrall") owned a five-acre parcel of land in the Town of Fraser, adjacent to Elk Creek Meadow, that was surrounded by Cornerstone's Grand Park Development planning areas. Mr. Sumrall was a member of the Town's Board beginning approximately in December 2001 until approximately April of 2014. Mr. Sumrall was a member of the Town of Fraser's planning commission from approximately 1999 until approximately April of 2016.

11. Fran Cook ("Ms. Cook") lived in the Town of Fraser and served on the Town's Board beginning in 2003. Ms. Cook was named mayor by the Town's Board in 2005 to fulfill a mayoral vacancy. The residents of the Town of Fraser elected Ms. Cook mayor in 2008 and Ms. Cook served in that position until 2012.

12. Edward Cannon ("Mr. Cannon") served as the Town Manager of the Town of Fraser from approximately June 14, 2021 to April 1, 2023.

13. Garrett Scott ("Mr. Scott") is the current Planner for the Town of Fraser and has served in that role since August of 2023.

2003 Annexation Agreement and the 2003 PDD

14. In 1999, Maryvale Villages, LLC ("Maryvale") purchased approximately 964 acres of property in the Town of Fraser, which the parties at trial sometimes referred to as the Maryvale Property. The property was originally annexed to the Town of Fraser in 1986. Exhibit 30-P Exhibit 14, page 1. The original annexation included the property known as Cozens Meadow, but did not require any type of dedication for Cozens Meadow. Id. at pages 1 and 2. The property was included in a PDD with a PDD Plan, "as an alternative to traditional zoning." Id. In 1995 and 1998, Maryvale acquired additional acreage and the Town annexed that property as well. Id. at page 2. Mr. Lipscomb testified[9] that when Maryvale LLC purchased the property, the property was subject to a First Annexation Agreement and governed by a 1998 PDD. Exhibit 1, page 4[10]; Exhibit 30-P Exhibit 14, page 2. Planning Area 13W of the 1998 PDD encompassed Elk Creek Meadow and Cozens Meadow. Exhibit 30-P Exhibit 14, page 2. The 1998 PDD contained development in Cozens Meadow. Id. at pages 2-3; Exhibit 2, page 5.

15. By 2003, Rendezvous Colorado, LLC ("Rendezvous") had acquired Maryvale's property from Maryvale Village, LLC. Id. at p. 4. According to Mr. Lipscomb's testimony, Rendezvous acquired an additional two hundred acres from the Johns family and an additional 685 acres from the Denver Water Board sometime before 2003.

16. The acquisition of the additional 885 acres led Rendezvous to request the annexation of the 885 acres into the Town of Fraser, which led the Town of Fraser and Rendezvous to enter into the 2003 Annexation Agreement on June 4, 2003, and the 2003 PDD. Id.; Exhibit 1, page 4; Exhibit 2.

17. Prior to the 2003 PDD, there were two previous PDDS, one in 1986 and one in 1988, both of which included nine holes of golf and a driving range in the area known as Cozens Meadow.[11]

18. In the 2003 PDD, Planning Area 23W contains Cozens Meadow. Exhibit 2.

19. The 2003 Annexation Agreement and the 2003 PDD were the result of meetings and negotiations between the Town of Fraser and Rendezvous, which included, but were not limited to meetings with staff, outside agencies, and the Town of Fraser's Planning Commission before the documents and plans are heard and approved by the Town's Board.

20. When the Town approved the 2003 PDD, five holes of golf had been moved out of Cozens Meadow into other areas within Planning Area 23W and four golf holes remained in

[9] All references to testimony is a reference to testimony given at the trial to the Court in this matter, even if not specified as such.
[10] References to exhibit pages numbers are to the page number of the PDF that is the trial exhibit, not necessarily the page number on the document that constitutes the exhibit.
[11] Cozens Meadow is called such because it was owned, at one time, by Billy Cozens, a homesteader in the Fraser Valley in Grand County, Colorado, near the Town of Fraser.

Cozens Meadow. Exhibit 2, page 3. Mr. McGowan testified he believed the 1986 annexation agreement and planned development plan made Cozens Meadow part of a golf course.

21. Both the 2003 Annexation Agreement and the 2003 PDD were recorded with the Grand County Clerk and Recorder on December 30, 2004. Exhibit 1, page 1; Exhibit 2, page 1.

22. Section 10.10 of the 2003 Annexation Agreement states in relevant part

> Developer further agrees to place in a conservation easement the open space parcels designated on the 2003 PDD as Elk Creek Meadow and Cozens Meadow, subject to agreement with Fraser regarding the use and maintenance of said areas, the exact location and description of such open space parcels, consistent with the 2003 PDD. The conservation easement shall be completed upon approval of a FPDP or subdivision for each of the adjoining Planning Areas, or before October 31, 2007, whichever comes first.

Exhibit 1, pages 35-36. An FPDP is a Final Plan Development Plan ("FPDP").

23. The 2003 PDD designated the Cozens Meadow Area as "Cozens Meadow Open Space Area" and the Elk Creek Meadow Area as "Elk Creek Meadow Open Space Area." Exhibit 2, page 6. Note 2 on the 2003 PDD states: "Open Space Designated open space consists of areas like the Fraser River Park, Cozens and Elk Creek meadows (to be placed in a conservation easement) and Leland Creek. Additional open space is required within each planning area see Development Standards)." Id. at page 3. The 2003 PDD showed the development areas within Cozens Meadow were planning areas 1wa, 2w, 3wb, and 3wc. Id. at page 6. In the 2003 PDD, area 23W was 466.8 acres and included four holes of golf. Id. The 2003 PDD allowed the developer to build within development areas 1wa, 2w, 3wb, and 3wc the following: 620 residential units, 578 lodging units, and 280,000 square feet of commercial space. Id.

24. Mr. Lipscomb testified that if there is a conflict or inconsistency between the annexation agreement and the graphic depictions and writing approved as part of a Planned Development District Plan, the annexation agreement is the controlling document. The 2003 Annexation Agreement reflects this in paragraph 2.1.15, as does the 2005 First Amendment to Annexation Agreement in Paragraph 2.1.15. Exhibit 1, page 9; Exhibit 3, page 2.

25. As part of the consideration the Town of Fraser received for annexing Rendezvous' property in its boundaries, the 2003 Annexation Agreement required the developer to make various dedications. Exhibit 1, page 32.

26. The Town of Fraser did not require the dedications to take effect immediately. Section 14.1 of the 2003 Annexation Agreement states:

> Developer agrees that it would have granted or dedicated such property upon execution of this agreement without compensation if the location and legal description of those lands had been finally

> determined. Fraser is not requiring the grant or dedication of those lands at the time of annexation in consideration for the irrevocable agreement and obligation to grant or dedicate such property without compensation. Fraser would not have proceeded to annex the Rendezvous Property if at a later time it would be required to compensate the Developer, its predecessors or successors for any right-of-way, easement or park land that is to be granted or dedicated by Developer under this Agreement.

27. As part of the public dedications found in the 2003 Annexation Agreement, the

> Developer agrees to dedicate or convey to Fraser the open space parcel designated as Planning Area 4E on the 2003 PDD, for public use. Developer shall determine the exact location and description of such open space parcel, consistent with the 2003 PDD, and shall complete the dedication or conveyance thereof to Fraser upon approval of a FPDP or subdivision for each of the adjoining Planning Areas, or on or before October 31, 2005. Developer further agrees to place in a conservation easement the open space parcels designated on the 2003 PDD as Elk Creek Meadow and Cozens Meadow, subject to agreement with Fraser regarding the use and maintenance of said areas, the exact location and description of such open space parcels, consistent with the 2003 PDD. The conservation easement shall be completed upon approval of a FPDP or subdivision for each of the adjoining Planning Areas, or before October 31, 2007, whichever comes first.

28. Mr. McGowan testified the dedication of the conservation easements was delayed to allow Rendezvous, which was then the developer, flexibility to develop the planning areas before fully defining the easement.

29. Mr. Lipscomb testified he was never in favor of the conservation easement language in the 2003 PDD because Mr. Lipscomb had been part of four conservation easements in the past and had inherited the present conservation easements. Mr. Lipscomb stated he was not in favor of the conservation easements in the 2003 PDD because they lacked specificity, they did not provide a tax benefit, the terms and the use of the conservation easements were not defined in the 2003 Annexation Agreement, the exact location of the conservation easements was not defined, and the maintenance of the conservation easements was not defined. Mr. Lipscomb testified these terms are all crucial to a successful conservation easement.

30. Article 14.0 of the 2003 Annexation Agreement, under the "remedies" provision, states if Rendezvous defaults due to Rendezvous' failure to grant an easement, the Town may condemn the land in question and Rendezvous agrees the property in question to have a value of zero "since the property is subject to an irrevocable obligation to grant or dedicate it to" the Town of Fraser.

31. The 2003 Annexation Agreement does not require the Town to declare a default. The Town is required, if Rendezvous is in default under the 2003 Annexation Agreement, to allow Rendezvous to cure any default within thirty days following written notice from the Town or the Town may act on the remedies set forth in the remedies section of the 2003 Annexation Agreement. Exhibit 1, page 39.

32. The three remedies available to the Town if Rendezvous defaults, found in the remedies section of the 2003 Annexation Agreement, are: "(i) specific performance or mandatory or prohibitory injunction; (ii) withholding of any pending applications or approvals, including but not limited to FPDP's, subdivision applications, building permits or certificates of occupancy; or (ii) (sic) any remedies permitted under its Subdivision Regulations or its PDD Ordinance." Id.

33. Mr. Lipscomb testified the projected time frame of the development project at the heart of this matter, as of 2003, was twenty years.

2005 Amendment to the Annexation Agreement and the 2005 PDD

34. In May 2004, there was a split of the Rendezvous partnership. Mr. Lipscomb testified that, pursuant to a partition agreement, Rendezvous divided the Rendezvous property with Rendezvous Colorado keeping the land on the east side of United States Highway 40[12] ("Highway 40") and Cornerstone Winter Park Holdings taking the land on the west side of Highway 40. See Exhibit 2, page 6. Cornerstone's portion of the property contained both Elk Creek Meadow and Cozens Meadow. Id.

35. On November 22, 2004, Mr. Bestall emailed Mr. Durbin and Ms. Trotter asking for a meeting to discuss several plans Cornerstone was preparing to submit to the Town regarding, among other things, a revision to the 2003 PDD to remove the Leland Creek subdivision (Planning Area 22) and refinement of Planning Area 23 (golf course routing) as well discussing Final Plans for Planning Areas 5 and 1a. Exhibit SS. Part of Mr. Bestall's job duties was to meet with the Town staff regarding the development project. More specifically, Cornerstone, through Mr. Bestall, informed the Town that Cornerstone wanted to submit a revision to the PDD to "clean up" the PDD approved in June 2003. Id. The email communication from Mr. Bestall on November 22, 2024, did not include any mention of Cornerstone's conservation easement requirements in Elk Creek Meadow and Cozens Meadow.

36. Ms. Trotter testified that between Mr. Bestall's November 2, 2004, email and the beginning of January 2005, none of Ms. Trotter's meetings with Mr. Bestall included any conversations about Cornerstone wanting to eliminate or eliminating the conservation easements requirements in Elk Creek Meadow and Cozens Meadow. Mr. Durbin testified that in 2004 there were no negotiations between Cornerstone and the Town about removing the conservation easement requirement for Cozens Meadow and, if there had been such conversations, Mr. Durbin would have been aware of them.

[12] The Court takes judicial notice that United States Highway 40 is the main thoroughfare through Grand County, Colorado.

37. Ms. Trotter testified that on January 14, 2005, Cornerstone submitted its application to revise the 2003 PDD and Exhibit G was part of the application. See Exhibit G, page 3. Cornerstone's application to amend the 2003 PDD included a cover letter, a plan narrative, and a draft PDD which referred to the property covered by the PDD as "West Mountain." Id. at pages 3-13 and 22-32. Cornerstone's cover letter stated "The revision updates the PDD in the following manner. [(1)]Excludes Planning Area 22W (reducing the overall residential density by 73 units and land area from approximately 1,387 acres to 1,311 acres). [(2)] Relocates the golf course from the Cozens Meadow area based on more detailed site analysis conducted during the past year[.] Id. at page 3. Mr. Bestall testified he had conversations and meetings with the Town's staff throughout 2004 regarding certain parts of Exhibit G before Mr. Bestall submitted the letter to the Town found in Exhibit G at page 3, but the Town wouldn't give Cornerstone any official feedback until Cornerstone made its formal application with the proposed 2005 PDD. Cornerstone's formal application for the 2005 PDD is found in Exhibit G.

38. In the proposed 2005 PDD, Cornerstone proposed an increase in the size of the development areas within Cozens Meadow: increasing planning area 2w from 25.1 acres to 43.9 acres, increasing planning area 3wb from 5.4 acres to 21.5 acres and increasing planning area 3wc from 11.7 acres to 17.4 acres. Exhibit G, page 26. Due to the increase in the size of the development areas in Cozens Meadow in the proposed 2005 PDD, the open space in Cozens Meadow was decreased by approximately 60 acres. Id. at pages 2 and 26. The proposed 2005 PDD also removed the language in Note 2 regarding Cozens Meadow and Elk Creek Meadow being placed in a conservation easement. See Id. at pages 8 and 24.

39. Neither Cornerstone's cover letter nor Cornerstone's narrative describing the proposed amended PDD informed the Town of any intention Cornerstone had to eliminate the conservation easement requirement in Cozens Meadow or Elk Creek Meadow found in the 2003 Annexation Agreement. The proposed 2005 PDD, however, no longer contained the designations "Cozens Meadow Open Space" and "Elk Creek Meadow Open Space" and no longer contained the 23W label. See Exhibit G. Mr. Lipscomb testified Cornerstone intentionally eliminated the designations "Cozens Meadow Open Space" and "Elk Creek Meadow Open Space" on the proposed 2005 PDD and that this was a proposal to the Town from Cornerstone that there would not be conservation easements in Elk Creek Meadow and in Cozens Meadow. Mr. Lipscomb further testified that the four golf holes were removed from the area that was previously marked with the label 23W, which was the Cozens Meadow area. Mr. Bestall testified that Cornerstone's January 14, 2005 letter, which Mr. Bestall signed on behalf of Cornerstone, did not state the PDD revision involved the removal of the obligation to put Cozens Meadow into a conservation easement nor did it state that the Town and Cornerstone had agreed the Town would release Cornerstone from its obligation to put Cozens Meadow into a conservation easement in exchange for removing the golf course from Cozens Meadow. Mr. Bestall testified the two revision updates highlighted in Mr. Bestall's January 14, 2005, letter were the major items, which the Town and Cornerstone had been discussing for some twenty years. Mr. Bestall testified he was highlighting two key things in Mr. Bestall's January 14, 2005, letter, but there were a myriad of other things in the proposed amended PDD that were not in the January 14, 2005 letter, which was sent to start the process of amending the 2003 PDD.

40. Regarding the removal of the four holes of golf from the Cozens Meadow area, Mr. Lipscomb testified golf was important for Cornerstone's development because golf is an amenity that helps the sale of real estate. Mr. Lipscomb testified Cornerstone was trying to create a destination resort and golf was key to that effort. Mr. Lipscomb stated Cozens Meadow was a good place for golf holes because of the views and there was water on Cozens Meadow that was necessary for a golf course irrigation and Cozens Meadow was visible from Highway 40, which would show people driving by that Cornerstone was a resort community. Mr. Lipscomb testified it did not benefit Cornerstone to move the golf holes out of Cozens Meadow.

41. Mr. Bestall testified there would not be any language in the documents provided to the Town on January 14, 2005 about eliminating the conservation easement in Cozens Meadow because the documents provided to the Town are a summary and do not provide the level of detail that would show the elimination of the conservation easement in Cozens Meadow.

42. Mr. Bestall further testified it was the 2005 PDD that reflects the Town is no longer interested in placing Cozens Meadow in a conservation easement. In support of that statement Mr. Bestall relies on the absence of the label on the 2005 PDD reflecting the placement of Cozens Meadow in a conservation easement. Mr. Bestall testified this shows the parties agreed Cornerstone was no longer required to place Cozens Meadow in a conservation easement. While there is no longer a conservation easement in Cozens Meadow labeled in the 2005 PDD, Cozens Meadow is still labeled as open space in the 2005 PDD.

43. Ms. Trotter testified there was no representation to the Town in the narrative application of Cornerstone (Exhibit G) that Cornerstone was removing the conservation easement requirements in Cozens Meadow and Elk Creek Meadow, nor was either meadow designated as open space in the proposed 2005 PDD. Page 23 of Exhibit G, which is one page of the 2005 PDD that shows a map of the area, does not show the 23W Planning Area in Cozens Meadow, does not have any label showing Cozens Meadow is open space, and does not have any label showing Elk Creek Meadow is open space. Ms. Trotter testified she noted these differences. Ms. Trotter testified she discussed these differences, between the proposed 2005 PDD and the 2003 recorded PDD, at a February 9, 2005, meeting with Mr. Bestall and Mr. Durbin prior to the Planning Commission meeting in February 2005. This meeting was memorialized in a February 9, 2005 memorandum authored by Mr. Bestall. Exhibit F. The email transmitting Exhibit F was sent to Ms. Trotter on February 16, 2005. Exhibit F, page 1. Copied on the email were Mr. Durbin, Jeff Vogel, Mr. Lipscomb, Mary Kay Wary, Thomas D. McCloskey, and Munsey L. Ayers. Id. Ms. Trotter testified the Town, at the same time it was processing the 2005 PDD, was also processing the FPDP for planning area 3WB, which was the Cozens Meadow at Grand Park subdivision.

44. Regarding the conservation easements in Elk Creek Meadow and Cozens Meadow, Mr. Bestall's recap of the February 9, 2005 meeting stated in relevant part:

> Thanks for meeting with us today regarding the PDD and setting up next week's meeting. We believe that that type of work session can be very productive. The West Mountain PDD revision is in conformance with the approved 2003 Annexation Agreement and the approved 2003 PDD. It is our intention to reconfigure the golf

> course out of the Cozens Meadow area and remove PA22 from the Plan. These have caused land use reallocations and Planning Area reconfigurations to occur based on our improved knowledge of the West Mountain area.
>
> . . . . . .
>
> 5. Conservation Easements - We are committed to place the open space parcels designated as Elk Creek meadow (sic) and Cozens meadow (sic) in conservation upon approval of a Final Plan/subdivision for each of the adjoining Planning Areas, or before October 31 , 2007. It is our intention to consider development on the upland area identified as Planning Area 5Wb while still providing a conservation easement to a Trust; and we look forward to talking to you in more depth regarding that opportunity. It is premature to indicate the area of the conservation easement.

Exhibit F, pages 2 and 3.

45. Mr. Lipscomb testified regarding the section addressing conservation easements in paragraph 5 of Mr. Bestall's recap of the February 9, 2005 meeting. Mr. Lipscomb confirmed paragraph 5 of Mr. Bestall's recap states Cornerstone was committed to placing the open space parcels designated as Elk Creek Meadow and Cozens Meadow in a conservation easement and Mr. Lipscomb stated he informed Mr. Bestall that if the open parcels designated as Elk Creek Meadow and Cozens Meadow were going into a conservation easement then "we need to put golf back in there" because the Town also wanted to reduce the planning area bubbles. Mr. Lipscomb testified Cornerstone was only willing to remove the golf from Cozens Meadow if Cornerstone got something in return and the only benefit Cornerstone got from removing golf out of Cozens Meadow in the 2005 PDD was the definition of the Elk Creek conservation easement and the removal of the conservation easement in Cozens Meadow. Mr. Lipscomb testified he did not know if this was ever communicated to the Town, but then testified he personally communicated that information to Ms. Cook after February 9, 2005.[13] The only evidence of this communication comes from Mr. Lipscomb's trial testimony. There is no written communication that reflects this information was conveyed to the Town. Mr. Lipscomb further testified Ms. Cook told Mr. Lipscomb ". . . if you can get rid of that conservation - - or if you can get rid of the golf out of the meadow, we'll get rid of the conservation. It's open space anyway." Mr. Lipscomb testified that in January of 2005, Cornerstone proposed the 2005 PDD without golf in the meadow and without any conservation easements.

46. Mr. Lipscomb further testified that at some point after the submittal of the proposed 2005 PDD, the planning commission conditioned its approval of the 2005 PDD with the requirement that there be an easement actually drawn in Elk Creek Meadow, but not in Cozens Meadow. One of the conditions of the Planning Commission's approval of the 2005 PDD was to "indicate the approximate location of Elk Creek conservation easements." Exhibit 15, page 9. The

[13] Ms. Cook became the mayor of the Town of Fraser sometime in 2005.

Planning Commission's approval of the 2005 PDD was not conditioned on the designation of a conservation easement in Cozens Meadow. Mr. Lipscomb testified the proposed 2005 PDD reduced the planning area bubbles, took golf out of Cozens Meadow, put a conservation easement in Elk Creek Meadow, and eliminated the conservation easement in Cozens Meadow.

47. Ms. Cook testified she saw the golf course in Cozens Meadow as a "fait accompli" and a necessary evil because it was included in the 2003 Annexation Agreement and it appeared on the 2003 PDD, but Ms. Cook would have preferred not to have golf in Cozens Meadow. Ms. Cook testified she never told Mr. Lipscomb or Mr. Bestall that Ms. Cook wanted the golf course moved out of Cozens Meadow. Ms. Cook testified she never met privately with Mr. Lipscomb to discuss the business of the Town, nor did she ever meet privately with anyone affiliated with Cornerstone to discuss the business of the Town. Ms. Cook testified she never told Mr. Lipscomb or anyone else from Cornerstone or any of its affiliates that Ms. Cook would work to get the conservation easement requirement removed from Cozens Meadow. Ms. Cook testified she never had a private meeting with Mr. Lipscomb in which Ms. Cook discussed the elimination of the conservation easement in Cozens Meadow. Ms. Cook testified she would never have had any private conversations with Mr. Lipscomb or Mr. Bestall and Ms. Cook testified she never would have said she could remove the conservation easement requirement from Cozens Meadow. Ms. Cook testified that at no point during Ms. Cook's career with the Town did Ms. Cook have the authority to remove the conservation easement requirement from Cozens Meadow.

48. Ms. Trotter testified that in Exhibit 86, which was a memo from Mr. Bestall to Ms. Trotter, dated February 23, 2005, responding to the Town's and the extra-agency[14] comments on the proposed 2005 PDD, under number 12, planning area 5WB was a new area Cornerstone was proposing for development that was different from the 2003 PDD and could potentially affect the Elk Creek Meadow conservation easement. Exhibit 86, page 2. Exhibit G, page 26, shows Cornerstone proposed an additional 7.1 acres for development in the proposed 2005 PDD up from zero acres for development in 2003 PDD.

49. In Mr. Bestall's February 23, 2005 memorandum, in response to the comment "Open Space Conservation ~ Inclusion of Planning Area 5Wb in the Elk Creek area as it relates to a conservation easement required in the Annexation Agreement?" Mr. Bestall stated:

> Cornerstone remains committed to providing a conservation easement in the Elk Creek area at the time of Final Plan, as the Annexation Agreement requires. Having studied the West Mountain area more closely it is apparent that there is an upland in the Elk Creek area suitable for development that we have proposed be used as part of a unique residential neighborhood — providing more housing adjacent immediate services in Town. We are bringing that forward as an option in the PDD Revision because of its merit and would establish the conservation easement as part of the plan.

Exhibit 86, page 2. Mr. Bestall did not mention a conservation easement in Cozens Meadow in Mr. Bestall's February 23, 2005, memorandum. See Exhibit 86. It appears the Planning

[14] It is the Court's understanding from the evidence presented at trial that extra-agencies are agencies outside the Town that review a PDD for things such as infrastructure issues, for example, access if there should be a fire.

Commission saw Mr. Bestall's February 23, 2005, memorandum because the Planning Commission refers to Mr. Bestall's February 23, 2005, memorandum in the Planning Commissions conditions on approval of the 2005 PDD. Exhibit F, page 9.

50. Ms. Trotter testified that between February 9, 2005 and February 23, 2005, Ms. Trotter was unaware of any change in Cornerstone's commitment to placing Cozens Meadow into a conservation easement.

51. Mr. Bestall testified he is not aware of any document that specifically states that, in exchange for the removal of the golf course out of Cozens Meadow, the Town would agree to remove the conservation easement requirement in Cozens Meadow. In fact, when asked about this issue at trial, Mr. Bestall was interested to know from where the attorney cross examining Mr. Bestall had gotten this idea because, Mr. Bestall stated, "[f]rom what I've seen, we never postured or described it that way. So I am interested to know where you picked that up."

52. Mr. Bestall also testified that there was no significance in the removal of the "23W" label and the Cozens Meadow easement requirement on the 2005 PDD because this information would not normally appear in the 2005 PDD. Mr. Bestall testified there is a hierarchy of levels of description and it was not pivotal to include this information in the revisions to the PDD. Such information would be in a final plan or a development plan or a subdivision. Mr. Bestall also testified the document that states the Town is no longer interested in having Cozens Meadow placed in a conservation easement is the 2005 PDD and the absence of the labeling of the conservation easement in the 2005 PDD signified that because labels and descriptions are very important in a PDD.

53. There was a Town Planning Commission meeting on February 23, 2005 where the Planning Commission considered Cornerstone's revised 2005 PDD. Exhibit G, page 1. Ms. Trotter's briefing for that Planning Commission meeting is found in Exhibit G. Ms. Trotter testified that while the Planning Commission approved the revised PDD with conditions, there was no condition related to putting a label on sheet 6 of the PDD related to Cozens Meadow open space, nor did the Town's Planning Commission focus on this point because Cornerstone had indicated it was committed to placing Elk Creek Meadow and Cozens Meadow in conservation easement and that action was a requirement of the annexation agreement.

54. Mr. Sumrall testified at trial that, as a member of the Town's Planning Commission, he did not recall participating in any public discussion with the Town's Planning Commission in which the Town's Planning Commission understood the absence of a label in Cozens Meadow on the 2005 PDD indicated the Planning Commission agreed Cornerstone did not have to place Cozens Meadow in a conservation easement. Mr. Sumrall also testified he did not recall participating in any public discussion with the Town's Board regarding the same. Mr. Sumrall testified he would have remembered any such conversations. Mr. Sumrall testified he does not recall attending any Planning Commission or Town Board meetings where the elimination of the Cozens Meadow conservation easement was discussed. Mr. Sumrall stated he would not have voted to approve the 2005 PDD if Mr. Sumrall had known the omission of labels or omission of parenthetical language from a note on a PDD eliminated the conservation easement in Cozens Meadow. Mr. Sumrall also testified he did not recall either the Planning Commission or the Town's

Board being informed that the removal of golf from Cozens Meadow would eliminate the conservation easement requirement in Cozens Meadow.

55. The Planning Commission recommended approval of the 2005 PDD with ten conditions and no dissenting votes on February 23, 2005. Exhibit 22. Two of the conditions were that Cornerstone would add back in approximately sixty acres to 23W and that Cornerstone indicate the approximate location of the Elk Creek Meadow conservation easement. Id. at page 2. Mr. Sumrall testified that he personally wanted the definition of where the conservation easement would be in Elk Creek Meadow on the 2005 PDD because of Mr. Sumrall's concern about the expansion of planning area 5W affecting the hydrology in Elk Creek Meadow. Mr. Sumrall testified his concern was addressed by the specific labeling on the 2005 PDD of the conservation easement in Elk Creek Meadow.

56. After approval by the planning commission with conditions, Cornerstone's 2005 PDD and 2005 Annexation Agreement Amendment came before the Town's Board on May 18, 2005. Exhibit 15, page 1. The Town Manager's briefing for the May 18, 2005, Board meeting, found in Exhibit K, did not contain any information regarding the elimination of the conservation easement in Cozens Meadow. See Exhibit K. Mr. Durbin testified at trial that Mr. Durbin would have included it in his briefing if there had been an agreement or recommendation to remove Cozens Meadow from the conservation easement requirement. Mr. Durbin testified he also would have included in his briefing any agreement to remove the golf course from Cozens Meadow in exchange for removing the conservation easement requirement for Cozens Meadow. Mr. Durbin stated any such agreement would have merited inclusion in the annexation agreement amendment. Mr. Durbin testified that the fact that there was no language in Mr. Durbin's briefing to the Town's Board related to the Cozens Meadow conservation easement indicated this was not something that was being discussed or considered.

57. When the Town's Board approved the 2005 PDD on May 18, 2005, there was no formal proposal by Cornerstone to eliminate the Cozens Meadow conservation easement requirement and no discussion about the removal of such a requirement. Mr. Durbin testified the Town's Board did not vote on the removal of the conservation easement requirement in Cozens Meadow because the requirement to place a conservation easement in Cozens Meadow was still part of the annexation agreement.[15] Ms. Cook testified there was no representation from either Mr. Bestall or Mr. Lipscomb at any public meetings leading up to the approval of the 2005 PDD that the omission of a label on Cozens Meadow created a situation where there was no longer the requirement for a conservation easement in Cozens Meadow.

58. According to Ms. Trotter, although the Town's Board approved the 2005 PDD in May 2005, there were some notification errors, so the Planning Commission and the Town's Board had to re-hold their public hearings. Ms. Trotter testified that there were no significant changes to the 2005 PDD between May 2005 and November of 2005 when the Town Board re-approved the 2005 PDD.

59. Cornerstone recorded the 2005 First Amendment to the Annexation Agreement, dated November 2, 2005, on November 8, 2005. Exhibit 3, page 1. Cornerstone recorded the

[15] The 2003 PDD remained unmodified except as modified in the 2005 PDD. Exhibit 3, page 4, Section 3.

2005 PDD, approved by the Planning Commission and the Town's Board on November 2, 20025, on November 8, 2005, as well. Exhibit 4 at pages 1 and 2.

60. The 2005 First Amendment to the Annexation Agreement only modified Sections 2.1.5, 2.1.15, 17.6.1, 17.6.2, 17.6.3, and 17.9 of the 2003 Annexation Agreement. Exhibit 3. Section 17.9 of the First Amendment to the Annexation Agreement states the 2003 Annexation Agreement is not modified except as specifically modified by the 2005 First Amendment to the Annexation Agreement. Exhibit 3, page 4, paragraph 3. Paragraph 3 of the 2005 First Amendment to the Annexation Agreement also states "[i]f there is any inconsistency between the terms of the Agreement and the terms of this First Amendment, the provisions of this First Amendment will govern and control." Id. The 2005 First Amendment to the Annexation Agreement did not modify Section 10.10. of the 2003 Annexation Agreement. See Id. in general; Id. at page 4, Section 3.

61. Section 2(b) the 2005 First Amendment to the Annexation Agreement states

> (b) Section 2.1.15 is amended and restated to read in its entirety as follows:
>
> 2.1.15 2003 Planned Development District Plan, 2003 PDD Plan, or 2003 PDD.
>
> The graphic and written documentation comprising the Rendezvous Planned Development District Plan approved by the Town on June 4, 2003, pursuant to Ordinance No. 285, and recorded in the real property records of the Grand County Clerk and Recorder on December 30, 2003, at Reception No. 2003-016735, as amended from time to time in accordance with the terms of this Agreement, together with this Agreement as it may be amended from time to time. In case of any conflict or inconsistency between the provisions of this Agreement and the provisions of such other graphic and written documents approved as part of the 2003 PDD Plan, the provisions of this Agreement shall control.

Exhibit 3.

62. Section 2.1.15 of the 2003 Annexation Agreement states "[i]n case of any conflict or inconsistency between the provisions of this Agreement and the provisions of such other graphic and written documents approved as part of the 2003 PDD Plan, the provisions of this Agreement shall control." Exhibit 1, page 9.

63. The Court disagrees with expert witness Mr. Mauriello's testimony that the First Amendment to the Annexation Agreement means the Court substitutes the 2005 PDD for the 2003 PDD where the term 2003 PDD appears twice in section 10.10 of the 2003 Annexation Agreement because the parties did not amend Section 10.10 in the First Amendment to the Annexation Agreement and Section 3 of the First Amendment to the Annexation Agreement states "the 2003

Annexation Agreement is not modified except as specifically modified by the 2005 First Amendment to the Annexation Agreement."

64. Mr. Durbin testified he was unaware of any conversation Cornerstone had with any of the Town's staff or members of the Town's Board regarding the removal of the conservation easement in Cozens Meadow and he would have been aware or informed of any such conversation with the Town's staff or the members of the Town's Board, if it had occurred. Mr. Durbin testified if Cornerstone wanted to take the conservation easement out of Cozens Meadow, it would have been in the annexation agreement amendment and that would have been a big policy decision for the Town's Board. Mr. Durbin further testified that if there would have been an agreement between the Town and Cornerstone about removing the golf course in Cozens Meadow in exchange for the removal of the conservation easement in Cozens Meadow, Mr. Durbin would have noted that for the Town's Board because it would have been a significant policy decision for the Board.

65. Ms. Trotter testified that in her meeting with Mr. Bestall on February 9, 2005, Mr. Bestall did not represent to Ms. Trotter that Cornerstone sought to remove the conservation easement obligation in either Elk Creek or Cozens Meadow or that in exchange for removing the golf course from Cozens Meadow that the Town should agree to remove the conservation easement in Cozens Meadow. Ms. Trotter testified she would remember a proposal to remove the conservation easement in Cozens Meadow because there was never any discussion about doing so, it was a requirement of the annexation agreement, and the conservation easement was very important to the Town and the community because Cozens Meadow is "the crown jewel of the Fraser Valley."

The October 31, 2007, Deadline Found in the 2003 PDD

66. Section 10.10 of the 2003 Annexation Agreement states as follows:

> Developer[16] agrees to dedicate or convey to Fraser the open space parcel designated as Planning Area 4E on the 2003 PDD, for public use. Developer shall determine the exact location and description of such open space parcel, consistent with the 2003 PDD, and shall complete the dedication or conveyance thereof to Fraser upon approval of a FPDP or subdivision for each of the adjoining Planning Areas, or on or before October 31, 2005. Developer further agrees to place in a conservation easement the open space parcels designated on the 2003 PDD as Elk Creek Meadow and Cozens Meadow, subject to agreement with Fraser regarding the use and maintenance of said areas, the exact location and description of such open space parcels, consistent with the 2003 PDD. The conservation easement shall be completed upon approval of a FPDP or subdivision for each of the adjoining Planning Areas, or before October 31, 2007, whichever comes first.

67. According to Mr. Lipscomb's and Mr. McGowan's trial testimony: An FPDP is a developer's final plan for a planning area and it sets the zoning for a planning area. It provides an

[16] Developer was originally Rendezvous Colorado, LLC, which sold its interests to Cornerstone.

exact description of what will happen on the property with lots and units and infrastructure. It is the precursor to the preliminary plat and the final plat.

68. Mr. McGowan testified the October 31, 2007, deadline was included in the 2003 Annexation Agreement because the Town wanted Cornerstone (then Rendezvous) to have a deadline by which to complete the conservation easements and the language about completion of the planning areas was included in the 2003 Annexation Agreement for Cornerstone (then Rendezvous) because the exact description and location of the conservation easements could not be determined until the adjacent planning areas were platted or had an FPDP. There was an objection to this testimony by Mr. McGowan.

69. The Court, in the Court's ruling at trial on the Town's motion for directed verdict, found the October 31, 2007, deadline solely benefits the Town of Fraser. The Court still agrees with that ruling and incorporates the Court's entire ruling on the Town's motion for directed verdict into the present order.

70. According to expert witness Mr. Mauriello, all the planning areas adjoining Elk Creek Meadow and Cozens Meadow did not have an approved FPDP by October 31, 2007.

71. Fran Cook, who was Mayor of the Town from 2005 to 2012, testified the Town did not enforce the October 31, 2007, deadline because Cornerstone "was struggling pretty hard in the economic downturn,"[17] but the Town did not waive its right to the conservation easement in Cozens Meadow.

72. Mr. McGowan testified that, in October 2008, Mr. McGowan informed Mr. Durbin by email, copying Ms. Trotter, Ms. Cook, Mr. Sumrall, and Allen Nordin, that Cornerstone had not granted the Town the conservation easements in Elk Creek Meadow and Cozens Meadow in compliance with Section 10.10 of the 2003 Annexation Agreement. Exhibit Q. Mr. McGowan suggested Mr. Durbin raise this issue with Mr. Lipscomb/Cornerstone. Id. At trial, Mr. Durbin could not recall any specific conversation with Mr. Lipscomb about this issue and neither could Mr. Lipscomb. There is no evidence that Mr. Durbin raised the issue with Mr. Lipscomb as suggested by Mr. McGowan.

73. On March 1, 2009, Mr. Lipscomb, as President of Grand Park Development, LLC, wrote to Ms. Cook, who was, at the time, the Town's Mayor, and asked for an extension of time for Grand Park Development, LLC to provide "a conservation easement" pursuant to Section 10.10 of the 2003 Annexation Agreement. Exhibit 67. Mr. Lipscomb proposed "the requirement of Section 10.10 be met upon the satisfaction of the U.S. Army Corps of Engineers conservation easement requirements." Id. Mr. Lipscomb stated in the letter that due to "the current economic economy" it may be some time before the FPDPs contemplated by Section 10.10 were finalized. Id. Mr. Lipscomb also request an extension of time because the "Army Corps of Engineers 404 Permit for the Grand Park property includes a requirement that Grand Park put property in a conservation easement. The Army Corps of Engineers has extended the Permit until December 13, 2013. The extended Permit requires the conservation easement by June 30, 2009. The

[17] The Court takes judicial notice that the "Great Recession," as it is now called, was the longest economic downturn since World War II, lasting from approximately December of 2007 to June of 2009.

requested extension of time will allow Grand Park to complete the projects and requirements set forth in the 404 Permit." Id.

74. Mr. McGowan testified Mr. McGowan was generally aware that the Army Corps of Engineers required Grand Park Development, LLC to perform some mitigation in the area of Cozens Meadow because of the impact of the development in that area. Mr. McGowan understood Cozens Meadow was the property affected by the Army Corps of Engineers 404 permits. Mr. McGowan testified an easement to the Army Corps of Engineers was granted in Cozens Meadow in 2021.

75. Mr. Lipscomb's request for an extension of time, made on March 1, 2009, only addressed one conservation easement, not two as indicated by Mr. Lipscomb's term "conservation easement" not "conservation easements." Id. Notwithstanding Mr. Lipscomb's language, both Mr. Durbin and (then Mayor) Cook testified they each understood Mr. Lipscomb was requesting an extension of time to provide two conservation easements, not just one.

76. The Town did not respond to Mr. Lipscomb's March 1, 2009, letter or formally grant Mr. Lipscomb's March 1, 2009 request for an extension of time. The Town did not enter into an agreement with Cornerstone for an extension of time or take any formal action through the Town's Board regarding Cornerstones' request, but the Town also did not act to enforce the October 31, 2007, deadline found in Section 10.10 of the 2003 Annexation Agreement because of the hardship Cornerstone was suffering due to the Great Recession of 2007-2008. Mr. McGowan testified he believed Cornerstone was in default under Section 10.10 of the 2003 Annexation Agreement, but defaulting Cornerstone would not have helped Cornerstone and the deadline was for the Town's benefit. Mr. Sumrall testified the Town did not enforce the deadline because it was the middle of a recession and nothing was selling and "it seemed like the thing to do." Ms. Cook, who was then the Town's Mayor, testified the Town did not enforce the October 31, 2007 deadline because the Town "did not want to put undue pressure on Cornerstone who was struggling pretty hard in the economic downturn."

77. The Town did not believe it had waived its right to a conservation easement in Cozens Meadow by failing to enforce the October 31, 2007 deadline.

Cornerstone's FPDPs Between 2005 and 2015

78. Beginning in May 2005 through August 2008, the Town approved four FPDPs. Exhibits 5, 6, 7, and 8.

79. In 2015, the Town approved an FPDP for Elk Creek at Grand Park, which included Planning Areas 5W, 4W.1, 4W.2, and a portion of 23W. Exhibit 10. Mr. McGowan testified the Town required, as condition of the approval of the FPDP for 5W, that the parties negotiate the Elk Creek Conservation Easement, even though not all of the FPDP's for the development areas adjoining Elk Creek Meadow had been approved (the October 31, 2007, deadline had passed). See Exhibit 11.

80. Ms. Trotter testified that in her experience as a Town Planner, FPDPs are read in conjunction with annexation agreements and, specifically, the FPDPs in this matter were read in conjunction with the 2003 Annexation Agreement. Ms. Trotter testified she has never "been part of" an FPDP that was intended to amend an annexation agreement and, if there is an inconsistency between and FPDP and an annexation agreement, the annexation agreement controls over the FPDP.

81. The FPDPs approved by the Town, through the Town's Planning Department and the Town's Board, after May 1, 2005, do not label a conservation easement in Cozens Meadow. See Exhibit 5, page 3, Exhibit 7, page 3, Exhibit 11, and Exhibit 12. Cozens Meadow is in planning area 23W in the 2005 PDD and is designated as open space in the 2005 PDD. Exhibit 4, page 3. Further, note 2 on the 2005 PDD is different from note 2 on the 2003 PDD, removing the language "to be placed in a conservation easement," from the 2003 PDD. Compare Exhibit 2, page 3 and Exhibit 4, page 3. Note 2 on the 2005 PDD now states

> 2. Open Space Designated open space consists of areas like the portions of the Cozens and Elk Creek meadows; Leland Creek and other appropriate open space. Additional open space is required within each planning area (see Development Standards). Minimize development disturbance and maintain hydrologic performance of the east and west fork of Elk Creek.

82. It is Cornerstone's position that the depictions on the 2005 PDD (Exhibit 6, page 4) removed the golf course and the Cozens Meadow conservation easement and the increase in the acreage in planning area 23w meant there was less development in planning area 23w.

a. The 2003 PDD shows planning area 23w is 466.8 acres and it includes a golf course. Exhibit 2, page 3 (see the note for planning area 23w). On the 2003 PDD, planning area 23w encompasses both Elk Creek Meadow and Cozens Meadow. Id. at page 6. On the 2003 PDD, there are four holes of golf in Cozens Meadow. Id.

b. The 2005 PDD shows planning area 23w is 468.1 acres. Exhibit 4, page 3 (see the note for planning area 23w). On the 2005 PDD there is still golf in Cozens Meadow, although there are no golf holes drawn on the map. Id. While there was no formal agreement, in February 2005, however, Mr. Bestall told the Town and the Town's Planning Commission that Cornerstone was planning to reconfigure the golf course out of Cozens Meadow. Exhibit F, page 2; Exhibit G, page 2.

83. The 2005 PDD reduced the amount of development within the planning areas surrounding Cozens Meadow, which were planning areas 1wa, 2w, 3wb, and 3wc by 40,000 square feet of commercial space. The 2003 PDD provided for 620 residential and 578 lodging units along with 280,000 square feet of commercial space. Exhibit 2, page 6, Site Data Chart. The 2005 PDD provided for 620 residential and 578 lodging units along with 240,000 square feet of commercial space. Exhibit 4, page 5, Site Data Chart.

84. Mr. McGowan testified it was his understanding that an FPDP should show the site being developed, the improvements or structures and uses on that site, and any infrastructure on that site. Mr. McGowan testified the Town's code does not require one who submits an FPDP to label property information on the FPDP that is outside the perimeter (planning area) of the FPDP. Mr. McGowan testified there might be offsite infrastructure shown on an FPDP, but that is not a requirement and anything written outside the perimeter of the FPDP on an FPDP would not affect property rights.

85. Mr. Durbin testified the planning area is the focus of an FPDP and an FPDP cannot change a PDD.

86. Mr. Scott testified that he does not believe any labelling outside the perimeter of the boundaries of the FPDP represents any promise or guarantee from anyone.

87. Ms. Trotter testified that she does not recall anyone from Cornerstone telling the Town that Cozens Meadow would not be placed in a conservation easement because of labelling on the FPDP found in Exhibit 5.

88. Expert witness Mr. Mauriello testified there was no need to put a note or outline of the conservation easement in Cozens Meadow on FPDPs because the conservation easement in Cozens Meadow was part of the 2003 Annexation Agreement. Expert witness Mr. Mauriello testified an FPDP is not an amendment to an annexation agreement.

89. Although Mr. Lipscomb testified the Town could have conditioned the Town's approval of an FPDP on depicting the conservation easement in Cozens Meadow, Cornerstone, through its counsel, on July 29, 2015, stated the Annexation Agreement does not provide for "conditioning" the approval of a development application/FPDP "on getting a conservation easement done." Exhibit 30-D Exhibit I.

90. Mr. Lipscomb testified Cornerstone relied on the lack of the conservation easement in Cozens Meadow and Cornerstone would have planned things differently regarding Cozens Meadow if the conservation easement was still in place.

2015 Conservation Easement Discussions

91. There is no evidence there was any further discussion between the Town and Cornerstone regarding the conservation easements in Elk Creek Meadow and Cozens Meadow after 2009 until 2015. Mr. McGowan also testified this was the case

92. Mr. McGowan testified the issue of the conservation easements arose again in 2015 when Cornerstone presented an FPDP for the Elk Creek Development in the area of Elk Creek Meadow. Ms. Trotter testified Cornerstone submitted the Elk Creek conservation easement with the Elk Creek FPDP. According to Mr. McGowan, the draft for the Elk Creek conservation easement was entitled "Elk Creek/Cozens Meadow Conservation Easement," but it only addressed the conservation easement in Elk Creek Meadow.

93. Exhibit 48 reflects emails between Mr. Lipscomb and Mr. McGowan regarding the conservation easements. Mr. McGowan, in an email dated May 29, 2015, noted issues related to the Elk Creek conservation easement and further stated "[i]n addition, Grand Park should address the inclusion of the Cozens Meadow open space parcel within the conservation easement." Id. at page 2. Mr. McGowan wrote that the conservation easement in Cozens Meadow was overdue and any further delay in creating that easement should be brought before the Board. Exhibit 30-D Exhibit G, page 1.

94. On July 24, 2015, Cornerstone's attorney, Scott Albertson ("Mr. Albertson"), sent the Town's attorney, Mr. McGowan, a memorandum regarding Grand Park Public Dedications. Exhibit 32, page 1. Mr. Albertson objected to Mr. McGowans' inclusion of a reference to a conservation easement in Cozens Meadow in a letter Mr. McGowan sent to Cornerstone on May 29, 2015. Id. at page 4. Mr. Albertson stated in the memorandum that there was no longer a conservation easement in Cozens Meadow and the only conservation easement Cornerstone owed to the Town was in Elk Creek Meadow based on page six of eleven of the 2005 PDD because the 2005 PDD is the operative or binding document and that document does not show a conservation easement in Cozens Meadow. Id. Mr. McGowan testified that, until he received Mr. Albertson's memorandum, Mr. McGowan was not aware this was Cornerstone's position regarding a conservation easement in Cozens Meadow and Mr. McGowan was surprised by this position by Cornerstone.

95. On July 28, 2015, Mr. McGowan responded to Mr. Albertson's memorandum via letter. Exhibit U. Mr. McGowan stated the letter was a response to Mr. Albertson's July 24, 2015 memorandum. Mr. McGowan, related to the topic of conservation easements, stated

> As to the conservation easement, we are in agreement that the current transaction relates to the Elk Creek meadow (sic) property only, and does not encompass the Cozens meadow (sic) area. However, the requirement to place a conservation easement on the Cozens meadow (sic) remains to be satisfied and we expect Grand Park to comply with that requirement in the near future. You are clearly mistaken in your assertion that Grand Park was somehow relieved of that requirement under the Grand Park PDD Plan. Section 10.10 of the Annexation Agreement specifically requires that a conservation easement be placed on "the open space parcels designated on the 2003 PDD as Elk Creek Meadow and Cozens Meadow, subject to agreement with Fraser regarding the use and maintenance of said areas, the exact location and description of such open space parcels, consistent with the 2003 PD(sic)". That provision was not changed or affected by the 2005 PDD Plan amendment for Grand Park, although certain other provisions of the Annexation Agreement were amended at that time. The two meadow areas, which were included in Planning Area 23 on the Rendezvous and Grand Park PDD Plans, are depicted essentially the same on both Plans. The fact that Grand Park put a "conservation easement" label in the area of Elk Creek, but not in Cozens meadow

> (sic), is of no consequence. Further, the Land Use Plan sheet of the Grand Park PDD Plan, to which you made reference in your memo, shows that no development was approved for any part of the 468 acres included in Planning Area 23W. In short, it is quite clear that the conservation easement requirement applies to the Cozens meadow (sic) area of Planning Area 23, as well as the Elk Creek meadow (sic) portion, and Fraser will expect that requirement to be satisfied. If Grand Park prefers to include both parcels in the same Deed, that would be acceptable, but my understanding is that the legal description for the Cozens Meadow parcel is not yet available.

Id. at page 2.

96. On July 29, 2015, in anticipation of a meeting of the Town's Board that evening, Mr. Albertson emailed Mr. McGowan and Mr. Durbin, copying Ms. Trotter, stating Mr. Albertson hoped the pending plans and plats could be approved without conditions unrelated to the pending plans and plats themselves. Exhibit 30-D Exhibit I, page 1. Regarding "the conservation easement," Mr. Albertson stated the following: "Condition 11---We are working on the conservation easement, but there are some disagreements on terms. The remedy process in the Annexation Agreement ought to govern in the event we can't reach agreement and that could theoretically include a notice of default, etc. per Article 14 of the Annexation Agreement, but we're not to that point yet and I certainly hope we don't get there. The Annexation Agreement does not provide for 'conditioning' approval of a development app. on getting a conservation easement done." Id.

97. At the July 29, 2015 meeting of the Town's Board, the Town's Board addressed Resolution 2015-07-03 (the "Resolution") to approve Elk Creek at Grand Park Final Plan and Final Plats Filing No. 1 and Filing no. 2, Planning Area 5W Grand Park. Exhibit 19, page 2. At the meeting, the Town's Board approved the Resolution with fourteen conditions. Id. Condition number 11 related to a conservation easement and stated: "The Board of Trustees authorizes the Town Manager and the Town Attorney to negotiate the final terms of the conservation easement and to authorize appropriate Town officials to accept and execute such easement upon approval of the terms thereof by the Town Manager and the Town Attorney." Id. Mr. McGowan testified that the conservation easement addressed at the meeting of the Town's Board on July 29, 2015, was the conservation easement in Elk Creek Meadow because the application before the Town's Board affected Elk Creek Meadow and the Town's Board did not address the conservation easement in Cozens Meadow at the July 29, 2015, meeting because the application in front of the Town's Board did not address Cozens Meadow.

98. Mr. McGowan testified that Mr. McGowan continued to negotiate with Mr. Albertson after July 29, 2015, regarding the finalization of the conservation easement in Elk Creek Meadow. During these negotiations, Cornerstone, through Mr. Albertson, continued to disagree that Cozens Meadow should be put into a conservation easement.

99. On August 25, 2015, Mr. Albertson sent Mr. Durbin and Mr. McGowan what Mr. Albertson termed the last draft of the conservation easement. Exhibit W, page 1. The title of the

document sent by Mr. Albertson was "Deed of Conservation Easement" and the first line of the document referred to the Elk Creek-Cozens Meadow Deed of Conservation Easement (the "Deed of Conservation Easement"). Id. Mr. McGowan testified he interpreted the words "Elk Creek-Cozens Meadow" to mean Cornerstone still owed the Town a conservation easement in Cozens Meadow, although the document did not address a conservation easement in Cozens Meadow.

100. On August 28, 2015, Mr. McGowan, in an email to Mr. Albertson, stated the Town rejects Cornerstone's position that the bulk of Planning Area 23W, which is where Cozens Meadow is found, "was somehow excluded from the conservation easement requirement." Exhibit 53, page 1. Mr. McGowan stated the Town's position is that the Annexation Agreement clearly states there is to be a conservation easement in both Elk Creek Meadow and Cozens Meadow and the Annexation Agreement was not modified in that respect. Id. Mr. McGowan wrote he was certain the Town's Board will insist that Cozens Meadow be placed in a conservation easement in accordance with the Annexation Agreement. Id. Mr. McGowan further stated "[w]e have not pressed Grand Park to conclude this part of the easement previously because all of the development areas adjacent to the meadow have not been precisely defined, making it difficult to create a final description of the area to be included in the conservation easement." Id. at pages 1-2. Mr. McGowan testified that he did not believe Mr. Albertson ever responded to Mr. McGowan's August 28, 2015, email.

101. Mr. McGowan testified that after Mr. McGowan's August 28, 2015, email, Mr. McGowan did not further negotiate the conservation easements, although Mr. McGowan believed Mr. Durbin and Mr. Lipscomb had further negotiations regarding the conservation easements at a later time.

2019-2021 Conservation Easement Discussions

102. The next communication between the Town and Cornerstone regarding conservation easements came from Mr. Lipscomb to Mr. Durbin and then Town of Fraser Mayor Philip Vandernail via email on December 30, 2019. Exhibit 55. With the email, Mr. Lipscomb attached "the conservation easement along with the legal description and associated maps covering the conservation easement area." Id. Mr. Lipscomb stated in the email that the Town had passed a resolution regarding the conservation easement "leaving staff to finalize [] it." Id. Mr. Lipscomb's email addressed the conservation easement in Elk Creek Meadow.

103. Mr. McGowan testified he received a copy of this email from Mr. Durbin. When Mr. McGowan received the copy of Mr. Lipscomb's December 30, 2019, email, Mr. McGowan sent Mr. Durbin an email from January 6, 2020, found in Exhibit Z. Exhibit Z (1) states the conservation easement Mr. Lipscomb sent to the Town on December 30, 2019 is unacceptable; and (2) forwards to Mr. Durbin, among other things, Mr. McGowan's email of August 28, 2015, to Mr. Albertson regarding conservation easements.

104. On March 3, 2020, Mayor Vandernail signed the Deed of Conservation Easement. Exhibit 30-D Exhibit M.[18]

[18] Exhibit 30-D Exhibit M and Exhibit 13, both admitted, are identical.

105. The Deed of Conservation Easement states "[t]e Grantor is making this grant in full satisfaction of the conservation easement requirements of the Amended and Restated Annexation Agreement for Grand Park, formerly known as the Rendezvous Property . . . recorded in the records of Grand County at reception no. 2003-0167333 on 12/30/2003, as amended." Id. at page 2. Based on this language in the deed, it became Cornerstone's position that Mayor Vandernail's signature on this Deed of Conservation Easement meant Cornerstone did not owe the Town a conservation easement in Cozens Meadow.

106. The Town Board, seven months later, on October 7, 2020, passed Resolution 2020-10-05 declaring the Deed of Conservation Easement signed by Mayor Vandernail invalid because the conservation easement purported to be in full satisfaction of Cornerstone's conservation easement obligation, but did not include a conservation easement in Cozens Meadow and because its terms were not approved by the Town's attorney and because its execution was not authorized by the Town's attorney (the "October 2020 Resolution"). Exhibit 30-D Exhibit N, page 1. On October 8, 2020, Mr. McGowan sent an email to Mr. Albertson and attached the October 2020 Resolution, which declared the March 3, 2020 Deed of Conservation Easement invalid. Exhibit FF. In the email, Mr. McGowan stated the Town was still willing to work with Cornerstone to conclude conservation easements in Elk Creek Meadow and Cozens Meadow. Id.

107. In an oral order issued on August 8, 2024 and placed in writing in orders issued on August 8, 2024 and on January 2, 2025, this Court found the Deed of Conservation Easement executed by Mayor Vandernail on March 3, 2020, void. The Court found the Deed of Conservation Easement was not a valid and binding agreement because the Town Attorney did not approve the Deed of Conservation Easement as required by the Resolution (2015-07-03).

108. Mr. McGowan testified the Town, after October 8, 2020, hired Melinda Beck, a consultant with experience in conservation easements, to assist with the conservation easement issue in this matter. Ms. Beck is also an attorney. Exhibit 62, page 1.

109. On May 13, 2021, the Town sent Cornerstone a Notice of Default alleging Cornerstone violated Section 10.10. of the Amended and Restated Annexation Agreement for the Rendezvous property for failure to convey a conservation easement in both Elk Creek Meadow and Cozens Meadow. Exhibit 30-D Exhibit O, page 1. The Town gave Cornerstone thirty (30) days to cure the default. Id.

110. On May 21, 2021, Ms. Beck sent Mr. Albertson a draft conservation easement. Exhibit 62, page 5. In a June 3, 2021, email to Ms. Beck, Mr. Albertson stated the draft conservation easement was a "complete non-starter." Id. at page 4. In a separate email on June 3, 2021 to Ms. Beck, Mr. Albertson stated there was no default on the annexation agreement by Cornerstone. Id. at page 3.

111. At trial, Mr. Lipscomb testified some of Cornerstone's issues with the proposed conservation easement provided to Cornerstone by Ms. Beck were that (1) the area for the conservation easement would be open to the public was an issue because Cornerstone had already sold homes to individuals who did not want to live next to a public park; (2) the area for the conservation easement stated agricultural uses were not permitted in the conservation easement

area and that was an issue because the annexation agreement allowed agriculture in the area; and (3) Cornerstone had to indemnify the Town for any claim anyone made for any loss, damage, cost, or expenses on the property protected by conservation easement. Mr. Lipscomb also testified it was an issue that the proposed conservation easement included, wrongly, the Sumrall property. Mr. McGowan admitted the inclusion of the Sumrall property in the proposed conservation easement was in error.

112. None of the issues in the proposed conservation easement noted above and testified to by Mr. Lipscomb and Mr. McGowan were part of the 2003 Annexation Agreement regarding conservation easements. The 2003 Annexation Agreement allowed Cornerstone to continue to use its property for agricultural, farm, and ranch purposes. Exhibit 1, page 45, section 17.1. The 2003 Annexation Agreement did not require Cornerstone to open to the public the areas in the conservation easement or require Cornerstone to indemnify the Town for any loss, damage, cost, or expenses on the property protected by conservation easement. Id. at pages 35-36, section 10.10. Additionally, as Mr. McGowan testified, the Sumrall property should not have been included in the proposed conservation easement.

113. Mr. Cannon took over as the Town's manager in June of 2021. Mr. Cannon testified that, prior to July 21, 2021, while Cornerstone did not ask to meet with Mr. Cannon to specifically discuss the conservation easement drafted by Ms. Beck, Mr. Lipscomb told Mr. Cannon that Mr. Lipscomb disagreed with the need to provide a conservation easement in Cozens Meadow and Mr. Lipscomb stated the draft conservation easement included land Cornerstone did not own. Mr. Cannon testified Mr. Cannon himself passed Mr. Lipscomb's disagreement with the proposed conservation easement on to the Town's Board and Mr. McGowan.

114. On July 21, 2021, the Town passed Resolution 2021-07-02, which stated Cornerstone had not cured the default declared by the Town and the Town authorized and directed the Town Attorney and the Town Manger to undertake remedies based on Cornerstone's default (the "July 2021 Resolution"). Exhibit 30-P Exhibit 6.

115. On July 22, 2021, Mr. Cannon and Mr. McGowan sent a letter to Cornerstone undertaking remedies against Cornerstone pursuant to Cornerstone's default under the annexation agreement as alleged by the Town for Cornerstone's failure to provide conservation easements in Elk Creek Meadow and Cozens Meadow. Exhibit 69[19], pages 1-2. These remedies included, but were not limited to, the Town withholding approval of any permits, development applications, certificates of occupancy, and certificates of completion. Id.

116. The enforcement of remedies by the Town against Cornerstone led to the lawsuit at hand.

Preliminary Injunction

117. In an order issued on September 4, 2021, this Court granted Cornerstone's request for a preliminary injunction, stating "while this lawsuit pends, the Defendants will no longer impose the sanctions the Defendants imposed against the Plaintiffs as set forth Exhibit Q. The

[19] Exhibit 30-D Exhibit Q and Exhibit 69, both admitted into evidence, are identical.

default issued by the Defendants remains in place and in effect." This preliminary injunction remains in place up to the date of this order.

118. There are further findings of fact in the Conclusions of Law section below.

STANDARD OF REVIEW

The burden of proof for each party on each party's claim or counterclaim or affirmative defense is that each party must prove a claim or a counterclaim or an affirmative defense by a preponderance of the evidence. The burden of proof in any civil action is preponderance of the evidence. C.R.S. 13-25-127(1).

CONCLUSIONS OF LAW

The Plaintiffs have five remaining claims in the Plaintiffs' Amended Complaint, filed with the Court on April 20, 2022, for the Court to resolve. These five claims are: (1) First Claim for Relief – Declaratory Judgment; (2) Second Claim for Relief – Permanent Injunction; (3) Third Claim for Relief – Breach of Contract - Against the Town of Fraser (minus the phrase "conservation easement" found in paragraphs 66, 67, 68 – the Court struck that phrase from all three paragraphs); (4) Fourth Claim for Relief – Promissory Estoppel Against the Town of Fraser; and (5) Sixth Claim for Relief – 42 U.S.C. 1983 – Against the Town of Fraser, Town Manager, and Town Attorney only regarding the right to petition. The Plaintiffs also seek an award of attorney fees and costs pursuant to the terms of the 2003 Annexation Agreement as well as 42 United States Code ("U.S.C.") 1983.

The Town's Amended Counterclaims found in the Defendants' Answer to Plaintiffs' Amended Complaint, Jury Demand and Amended Counterclaims, filed with the Court on March 2, 2023, that remain for ruling are: (1) First Counterclaim for Relief (Declaratory Judgment); (2) Second Counterclaim for Relief (Breach of Contract); and (3) Third Counterclaim for Relief (Condemnation). The Defendants seek an award of attorney fees and costs without a citation to authority and the Town seeks an award of attorney fees pursuant to the terms of the 2003 Annexation Agreement and the Town seeks an award of its costs. The Defendants also raised eighteen affirmative defenses to the Plaintiffs' Amended Complaint.

The Plaintiffs' Answer to the Amended Counterclaims and Affirmative Defenses, filed with the Court on March 23, 2203, raised sixteen affirmative defenses to the Town's Amended Counterclaims.

THE PLAINTIFFS' FIRST CLAIM FOR RELIEF – DECLARATORY JUDGMENT

The Court finds in favor of the Defendants and against the Plaintiffs on the Plaintiffs' First Claim for Relief – Declaratory Judgment – except for those portions of the Plaintiffs' First Claim for Relief bifurcated by the parties, as noted above (that is, the determination of the terms and boundaries of any conservation easement).

In their first claim for relief, the Plaintiffs seek a declaration 1) that the Deed of Conservation Easement executed by Mayor Vandernail on March 3, 2020 is valid and satisfies the conservation easement requirements of the Annexation Agreement and the October 2020 Resolution and the July 2021 Resolution are void; 2) that the Plaintiffs have fulfilled their obligations under the Annexation Agreement, the Town breached its obligations by refusing to

process applications and issue permits, and the Defendants have no right to enforce the Entitlement Exclusion; 3) alternatively, if the Court determines the Plaintiffs owe a conservation easement in Cozens Meadow, an order defining the terms and boundaries of any conservation easement; 4) if a conservation easement is owed by the Defendants in Cozens Meadow, the Defendants may move the golf course back to where it was originally located in the 2003 PDD; and 5) that the conservation easement in Elk Creek Meadow that was already recorded was valid or, if not valid, a declaration defining the terms and boundaries of any conservation easement owed. Amended Complaint ¶¶ 50-54. The Court addresses each request below.

Any person interested under a contract may have determined any question of interpretation of the contract and obtain a declaration of rights under the contract. C.R.C.P. 57(b). The purpose of the Uniform Declaratory Judgments Law is to settle and afford relief from uncertainty and insecurity with respect to rights and status. C.R.S. § 13-51-102. Courts have broad powers to enter a declaratory judgment to terminate uncertainty or controversy. Zab, Inc. v. Berenergy Corp., 136 P.3d 252, 255 (Colo. 2006). The statute is remedial and "is to be liberally construed and administered." C.R.S. § 13-51-102.

Annexation Agreements are contracts and must be construed using established rules of contract interpretation. See E-470 Public Highway Authority v. Jagow, 30 P.3d 798, 801 (Colo. App. 2001). When interpreting a contract, the Court's primary task is to determine and give effect to the parties' intent. Hess v. Hobart, 2020 COA 139M2, ¶ 13. The Court begins by primarily looking to the language of the contract itself to determine the parties' intent. Bledsoe Land Co. LLLP v. Forest Oil Corp., 277 P.3d 838, 842 (Colo. App. 2011). The Court is directed to consider the plain and generally accepted meaning of words used in the contract. Id. at 842-43. If the contract is unambiguous, the contract is deemed to express the parties' intent. Hess, 2020 COA 139M2 at ¶ 13. A contract's plain meaning must be enforced as written. Id. Courts cannot rewrite contract provisions that are clear and unambiguous. Bledsoe, 277 P.3d at 842. A contract is ambiguous if it is reasonably susceptible to more than one meaning. Id. at 843. Whether an ambiguity exists is a question of law. Id.

The claims and counterclaims in this matter concern the interpretation of the 2003 Annexation Agreement, the First Amendment, the 2003 PDD, and the 2005 PDD. The Court construes the 2003 Annexation and 2003 PDD as one contract and the First Amendment and the 2005 PDD as one contract because the 2003 Annexation Agreement and 2003 PDD were negotiated and executed together and the First Amendment and the 2005 PDD were negotiated and executed together and because the 2003 Annexation Agreement and the First Amendment refer to the 2003 PDD and 2005 PDD, respectively.

The parties both extensively presented and relied on extrinsic evidence related to the history, negotiation, approval, and performance of the 2003 Annexation Agreement, 2003 PDD, the First Amendment, the 2005 PDD, and the subsequent FPDPs. Neither party objected to the presentation or admission of such evidence. Although both parties briefed the standards for contractual interpretation, neither party argued any term or document was ambiguous. The Court considers the extrinsic evidence here because it is clear both parties intended the court to consider such evidence. If the Court errs in considering such evidence, the Court concludes that it is invited error by both parties. See Horton v. Suthers, 43 P.3d 611, 618-19 (Colo. 2002).

A. The Plaintiffs' request for a declaration that the Deed of Conservation Easement for Elk Creek Meadow is valid

The Court denies the Plaintiffs' request for a declaration from this Court that the Deed of Conservation Easement for Elk Creek meadow is valid. In previous oral and written orders, the Court found the Deed of Conservation Easement for Elk Creek Meadow, executed on March 3, 2020, was void and dismissed this portion of the Plaintiffs' claim.

B. Request for a declaration that the Plaintiffs have fulfilled their obligations under the Annexation Agreement, the Town breached its obligations by refusing to process applications and issue permits, and the Defendants have no right to enforce the Entitlement Exclusion

1. The Plaintiffs' obligations with respect to a conservation easements in Cozens Meadow and Elk Creek Meadow

The Plaintiffs have an obligation to provide a conservation easement to the Town in both Cozens Meadow and Elk Creek Meadow.

Cozens Meadow

As demonstrated both by the plain language of the 2005 PDD and First Amendment and by the conduct of the parties, the parties did not intend to remove the requirement for a conservation easement in Cozens Meadow and the parties did not intend for removal of the golf course from Cozens Meadow in exchange for removal of the conservation easement requirement in Cozens Meadow.

In the 2003 Annexation Agreement § 10.10, Cornerstone agreed to place "the open space parcels designated on the 2003 PDD as Elk Creek Meadow and Cozens Meadow" into a conservation easement. Exhibit 1 pp. 33-34[20] § 10.10.

At trial, several witnesses testified to the importance of Cozens Meadow to the Town and the Town's desire to permanently protect Cozens Meadow using a conservation easement rather than open space zoning. Mr. McGowan testified the preservation of Cozens Meadow was most definitely important to the Town and testified the Town wanted to preserve Elk Creek Meadow and Cozens Meadow in perpetuity by a conservation easement. Mr. McGowan testified the intent of § 10.10 was for permanent protection of the two meadows. Ms. Trotter testified Cozens Meadow and the conservation easement requirement in Cozens Meadow were very important to the Town and community. Ms. Cook testified open space zoning can be changed in the future and the Town wanted a conservation easement for perpetual protection for Cozens Meadow. Expert witness Mr. Mauriello testified a conservation easement provides additional layers of protection to a property and such protection would not be provided by an open space designation.

Section 14.1 of the 2003 Annexation Agreement reaffirms the agreement in § 10.10 and clarifies its nature and importance as consideration for the annexation. Id. § 14.1. Cornerstone

[20] The page numbers cited by the Court in this order are the page numbers of the exhibit, not the pages numbers of the PDF that contains the exhibit.

agreed "it would have granted…such property upon the execution of the [Annexation Agreement] without compensation if the location and legal description" had been finally determined. Id. The Town did not require the grant of land "at the time of annexation in consideration for the irrevocable agreement and obligations to grant" such land without compensation. Id. (emphasis added). The Town would not have annexed the property if at a later time it would be required to compensate the Developer for any easement to be granted under the Annexation Agreement. Id. (emphasis added).

Several witnesses testified the conservation easement was an important part of the consideration to the Town for the 2003 annexation. Mr. Durbin testified the public dedications in Article 10 of the 2003 Annexation Agreement were provided in consideration for the Town annexing the Rendezvous property into the Town and the public dedications were very important to the Town. Mr. McGowan testified § 10.10 was most definitely important to the Town and the Town was not willing to proceed with annexation if that provision was not included. He testified in an annexation agreement, a municipality can require things like public dedications. Mr. McGowan testified the § 14.1 remedies applied to any easement in the 2003 Annexation Agreement and were included to make it clear there was no way for the Developer to get out of the obligation to grant an easement. He testified the "irrevocable" language in § 14.1 was to make sure that the Town got that for which the Town bargained.

Cozens Meadow is "designated" as open space in three ways in the 2003 PDD. Exhibit 2. First, Note 2 "Open Space" states "[d]esignated open space consists of areas like the Fraser River Park, Cozens and Elk Creek meadows (to be placed in a conservation easement) and Leland Creek." Id. p. 3 (emphasis added). Second, the "Planning Area Character Description[]" for Planning Area 23W states it "includes approximately 466.8 acres of open space…" and "major natural features of the open space system include the Cozens Meadow…." Id. Finally, the 2003 PDD includes a map, with written labels for Planning Area 23W, which states "Cozens Meadow Open Space Area," and "Elk Creek Meadow Open Space Area." Id. p. 6.

Cornerstone argues: 1) the removal of the "Cozens Meadow Open Space Area" label on the 2005 PDD removed the obligation for Cornerstone to convey a conservation easement in Cozens Meadow; 2) as part of the 2005 PDD application and approval process, Cornerstone agreed to remove the golf course from Cozens Meadow "in exchange" for the Town agreeing to remove the conservation easement requirement from Cozens Meadow, and 3) the only benefit Cornerstone received from the 2005 PPD was removal of the conservation easement requirement in Cozens Meadow.

There is no evidence of any discussions or documentation regarding the proposed 2005 PDD prior to November 2004. The proposed 2005 PDD came about because the property owner changed, which the Town was not aware of until late fall 2004. The Town did not request or initiate the 2005 PDD.

Mr. Bestall's November 2004 email regarding the proposed 2005 PDD states Cornerstone would submit a PDD revision "to 'clean-up'" the 2003 PDD, including "removal of the Leland Creek subdivision (Planning Area 22)" and to refine "the Planning Area 23 (golf course routing)." Exhibit SS. This email does not indicate any intent to remove the requirement for a conservation easement in Cozens Meadow nor does Mr. Bestall's email indicate any intent to remove the golf course in Cozens Meadow in exchange for removal of the conservation easement in Cozens Meadow. Mr. Bestall's November 2004 email also does not indicate the

proposed 2005 PDD was to satisfy any desire by the Town to remove the golf course from Cozens Meadow.

Ms. Trotter testified she absolutely did not understand Mr. Bestall's November 2004 email to mean revisions to the 2003 PDD had anything do to with removal of the conservation easement requirement in Cozens Meadow or that moving the golf course out of Cozens Meadow was in exchange for removal of the conservation easement in Cozens Meadow. Ms. Trotter testified there were no discussions between November 2004 and January 2005 with Cornerstone that gave notice to the Town that Cornerstone wanted to remove the conservation easement requirement in Cozens Meadow.

The Court considers the cover letter and 2005 PPD application narrative to be especially probative of the parties' intent with respect to revisions to the 2003 PDD. Exhibit G beginning at page 3. The cover letter notes the 2005 "revision updates the [2003] PDD in the following manner: Excludes Planning Area 22W" and "[r]elocates the golf course from Cozens Meadow area based on more detailed site analysis conducted during the last year." Id. at p. 3. The cover letter states the 2005 revision would assist in "continued repositioning of the project to compete" with destination resorts "while allowing for conservation of open space," improved circulation, efficient infrastructure phasing, and greater opportunity economic development and community needs for the future. Id.

The "Project Overview" section of the narrative indicates the revisions to the 2003 PDD and the purpose of the revisions. Id. pp. 4-5. The "Plan Intent" subsection of the Project Overview states the revision reduces density by 73 units (Planning Area 22W) and "relocates [] the golf course from the Cozens Meadow area…" Id. at page 4. The "Land Use" subsection of the Project Overview section states the "revision includes…refinements in planning areas based on more detailed analysis during the past year in order to relocate the golf course from the Cozens Meadow area." Id. This subsection states the "changes allow for conservation of open space" among other benefits. Id. The "Market Related Planning and Development Implications" subsection of the Project Overview section states the "golf course has been reconfigured to enhance the golf experience" and "will also conserve the open space, mountain vistas, and the overall character of the community." Id. at page 5. The "PDD Conformance" subsection of the Project Overview section states the proposed 2005 PDD "conforms to the intent" of the 2003 PDD and the exclusion of Planning Area 22W "and relocation of the golf course from the Cozens Meadow area is a plan refinement that has environmental and community benefits." Id. In the "Plan Notes" section, the "Open Space" subsection states "[o]ver 30% of the open space is designated as an integrated open space system. Designated open space consists of areas like the portions of the Cozens and Elk Creek meadows…" Id. at page 8 (emphasis added). The "Golf Course" subsection of the Plan Notes section states the golf course shall meet Audubon Signature Bronze Program criteria. Id. The "Planning Area Character Description" subsection of the Plan Notes Section states in Planning Area 1Wa "Cozens Meadow will remain as open space and a recreation amenity." Id. at page 9. For Planning Area 23W, it additionally states that it "includes approximately 408.4 acres of open space and development, including the planned golf course, Cozens Meadow, Elk Creek Meadow…" Id. at page 12. The proposed 2005 PDD map did not include a label for "Cozens Meadow Open Space." See Exhibit 4.

The cover letter and narrative do not indicate any intent to remove the requirement for a conservation easement in Cozens Meadow nor do these documents indicate any intent to remove

the golf course from Cozens Meadow in exchange for removal of the conservation easement requirement in Cozens Meadow. These documents do not indicate any intent that the proposed 2005 PDD was to satisfy any desire by the Town to remove the golf course from Cozens Meadow. These documents do continue to refer to Cozens Meadow as "designated open space."

Mr. Durbin testified he thought removal of Planning Area 22W and moving the golf course out of Cozens Meadow were the two primary changes between the 2003 PDD and 2005 PDD and everything else was effectively the same between the two PDDs. Ms. Trotter testified the intent of the 2005 PDD was to conform to the 2003 PDD and the only difference between the two was removal of Planning Area 22 and rerouting the golf course.

Mr. Bestall's February 9, 2005, memo does not indicate any intent to remove the conservation easement requirement in Cozens Meadow and does not indicate any intent to remove the golf course from Cozens Meadow in exchange for removal of the conservation easement requirement in Cozens Meadow. Mr. Bestall's February 9, 2005, memo states the proposed 2005 PDD was "in conformance" with the 2003 Annexation Agreement and 2003 PDD. Exhibit F page 2. The February 9, 2005, memo specifically states Cornerstone's "intention" was to remove Planning Area 22 and "to reconfigure the golf course out of the Cozens Meadow area." Id. "These have caused land use allocations and Planning Area reconfigurations to occur based on [Cornerstone's] improved knowledge" of the property. Id. Mr. Bestall's February 9, 2005, memo states "[b]ecause of the conformity and benefits resulting in relocation of the golf course," Cornerstone wishes the proposed 2005 PDD to be reviewed by the Planning Commission. Id. In regard to a recap of discussion between Cornerstone and the Town regarding Planning Area 23, the memo states "[w]e discussed the revisions to the plan in the Cozens Meadow" from 1998, 2003, and the 2005 plan. Id. Regarding the discussion about conservation easements, Mr. Bestall's February 9, 2005, memo states Cornerstone is "committed to place the open space parcels designated as Elk Creek meadow and Cozens meadow in conservation . . ." Id. at page 3.

Ms. Trotter testified that, in the February 9, 2005, meeting, Mr. Bestall absolutely did not represent that Cornerstone was no longer willing to put Cozens Meadow into a conservation easement or that Cornerstone sought to remove the conservation easement requirement in exchange for moving the golf course.

Mr. Bestall's February 23, 2005 memo does not indicate any intent to remove the conservation easement requirement in Cozens Meadow and does not indicate any intent to remove the golf course from Cozens Meadow in exchange for removal of the conservation easement requirement in Cozens Meadow. In Mr. Bestall's February 23, 2005 memo, Cornerstone responded to the Town's comments on the proposed 2005 PDD "by major topic." Exhibit 86 page 1. Regarding open space conservation, Cornerstone states Cornerstone "remains committed to providing a conservation easement in the Elk Creek area…as the Annexation Agreement requires." Id. at page 2. The letter does not mention Cozens Meadow, the removal of the requirement for a conservation easement in Cozens Meadow, or removal of the golf course in Cozens Meadow in exchange for removal of the conservation easement requirement in Cozens Meadow.

Ms. Trotter testified that between the February 9, 2005, and the February 23, 2005, memos, there was no change to Cornerstone's commitment regarding Cozens Meadow. Ms. Trotter testified that in the February 23, 2005, meeting, there was no representation by

Cornerstone that Cozens Meadow would not be placed in a conservation easement in exchange for the golf course moving.

The briefing for the February 23, 2005, Planning Commission meeting states Cornerstone's stated intention with the proposed 2005 PDD was to reconfigure the golf course out of the Cozens Meadow and remove Planning Area 22. Exhibit G at page 2. The briefing does not reference the removal of the Cozens Meadow conservation easement or the removal of the golf course in Cozens Meadow in exchange for removal of the conservation easement requirement in Cozens Meadow.

The undisputed evidence is that removal of the Cozens Meadow conservation easement requirement was not discussed at the February 23, 2005, Planning Commission meeting. The minutes from the February 23, 2005, Planning Commission meeting show the Planning Commission approved the 2005 PPD with several conditions, including indicating the approximate location of the Elk Creek Meadow conservation easement. Exhibit 22 at page 2. The minutes do not reference the conservation easement requirement in Cozens Meadow.

The briefing for the May 18, 2005, Board meeting states "[s]ignificant items that merit consideration include: . . . "[s]ome of the golf course development area has been converted to planning areas for other development. The open space as provided by the 2003 PDD remains." Exhibit K at page 1. The briefing does not reference removal of the Cozens Meadow conservation easement or removal of the golf course in Cozens Meadow in exchange for removal of the conservation easement requirement in Cozens Meadow.

The Town's Board had no information at its May 2005 meeting that Cornerstone was not going to provide a conservation easement in Cozens Meadow. Ms. Trotter testified there was no discussion at the May 2005 Board meeting that Cornerstone would take the golf course out of Cozens Meadow if the Town would remove the conservation easement requirement in Cozens Meadow and there was no information provided that the lack of a label showing "Cozens Meadow Open Space" on the 2005 PDD indicated an intent to remove the conservation easement requirement in Cozens Meadow. Mr. Durbin testified there was no discussion at the May 2005 Board meeting in which the Board was informed that the conservation easement requirement in Cozens Meadow was being removed from the 2005 PDD.

The undisputed evidence is that removal of the Cozens Meadow conservation easement requirement was not discussed at the May 2005 Board meeting. The Board approved the 2005 PDD at the May 2005 meeting and, due to an error, again in November 2005. Between May and November 2005, there were no significant changes to the 2005 PDD and no discussions regarding removing the Cozens Meadow conservation easement requirement.

In the recorded 2005 PDD, Note 2 "Open Space" states "[d]esignated open space consists of areas like the portions of the Cozens and Elk Creek meadows…", but does not state in parentheticals that such areas were to be placed in conservation easements. Exhibit 4 at page 3 (emphasis added). The "Planning Area Character Description[]" for Planning Area 23W states Planning Area 23W "includes approximately 468.1 acres of open space and development, including…Cozens Meadow, Elk Creek Meadow…" Id. The 2005 PDD does not label "Cozens Meadow Open Space" on the maps. See Id. The 2005 PDD includes maps that do not have labels for Planning Area 23 or "Cozens Meadow Open Space Area." Id. at pages 4-11.

Mr. Durbin testified the First Amendment and the 2005 PDD were negotiated at the same time and were related. The First Amendment modifies specific portions of the 2003 Annexation Agreement. See Exhibit 3 § 2. The First Amendment provides "[e]xcept as expressly modified by this First Amendment, the [2003 Annexation Agreement] is unmodified, and is hereby ratified and affirmed, and will remain in full force and effect in accordance with its terms." Id. § 3. The First Amendment specifically modifies § 2.1.15 of the 2003 Annexation Agreement. Id. § 2(b). The amended and restated § 2.1.15, found in the First Amendment, provides "[i]n case of any conflict or inconsistency between the provisions of [the First Amendment] and the provisions of such other graphic and written documents approved as part of the 2003 PDD Plan, the provisions of this Agreement shall control." Id.

The First Amendment did not expressly modify either § 10.10 or § 14.1 of the 2003 Annexation Agreement, which leaves § 10.10 and § 14.1 of the 2003 Annexation Agreement as valid, unmodified, binding provisions on the parties.

Mr. Durbin testified removal of the conservation easement requirement in Cozens Meadow would have merited inclusion in the First Amendment. He testified that if there had been an agreement between the Town and Cornerstone to remove the conservation easement requirement in Cozens Meadow, he would have wanted to include that in the First Amendment. Mr. McGowan testified the removal of the conservation easement requirement in Cozens Meadow would have to be an amendment to the 2003 Annexation Agreement.

Testimonial evidence about conversations between Cornerstone and the Town regarding removal of the Cozens Meadow conservation easement requirement as part of the proposed 2005 PDD conflicts. Mr. Lipscomb testified Ms. Cook told Mr. Lipscomb that if Cornerstone would remove the golf holes from Cozens Meadow, the Town would eliminate the conservation easement requirement in Cozens Meadow. Ms. Cook, however, testified she never told Mr. Lipscomb or Mr. Bestall that she wanted the golf course out of Cozens Meadow. Ms. Cook testified she never told Cornerstone that if Cornerstone moved the golf course out of Cozens meadow, Ms. Cook would work to get the conservation easement requirement removed from Cozens Meadow. Ms. Cook testified she never would have said that, she never had private conversations with Mr. Lipscomb or Mr. Bestall, and she never had the authority to make such a deal. Ms. Cook testified the discussion Mr. Lipscomb claims to have had with Ms. Cook never happened.

Mr. McGowan testified there was no agreement between Cornerstone and the Town to remove the conservation easement requirement in Cozens Meadow in exchange for moving the golf course out of Cozens Meadow.

Mr. Durbin testified, with respect to the proposed 2005 PDD, there were no negotiations by Cornerstone with the Town's staff about removing the conservation easement requirement from Cozens Meadow. Mr. Durbin testified Cornerstone never presented an offer to the Town to remove the golf course in Cozens Meadow in exchange for removing the conservation easement requirement in Cozens Meadow and Cornerstone never represented to the Town that the "Cozens Meadow Open Space" label was removed on the 2005 PDD to remove the conservation easement requirement. Mr. Durbin testified he was not aware of any conversations with the Planning Commission or Board regarding removing the conservation easement requirement in Cozens Meadow and he would have been aware of any such conversations.

The Court concludes the parties did not intend to remove the requirement for a conservation easement in Cozens Meadow and the parties did not intend to remove the golf course from Cozens Meadow in exchange for removal of the conservation easement requirement in Cozens Meadow. This is demonstrated both by the plain language of the 2005 PDD and First Amendment and by the conduct of the parties.

Irrevocable Obligation

The 2003 Annexation Agreement § 14.1 establishes the "irrevocable agreement and obligation" to place Cozens Meadow in a conservation easement. Exhibit 1 § 14.1; see Exhibit 1 § 10.10. The plain language of the 2003 Annexation Agreement and the testimony indicate the irrevocable agreement to grant a conservation easement in Cozens Meadow was a fundamental part of the consideration by Cornerstone to the Town for annexation, and, without such a grant, the Town would not have agreed to the annexation. The undisputed testimony was that the "irrevocable" language was to ensure that the Town received the bargained-for agreement for the Developer to grant a conservation easement.

Modification or Removal of Obligation

The Court concludes if the parties had intended to remove the conservation easement requirement in Cozens Meadow, the parties would have expressly documented that change to the 2003 Annexation Agreement in the First Amendment. The First Amendment did not expressly modify § 10.10 of the 2003 Annexation Agreement. §10.10 of the 2003 Annexation Agreement was ratified and affirmed and, therefore, remained in full force and effect at the time of the 2005 PDD.

Discussions and Documentation Regarding Removal of Conservation Easement Obligation

The Court concludes the parties did not intend to modify or remove the requirement for a conservation easement in Cozens Meadow or to remove the golf course in Cozens Meadow in exchange for removal of the conservation easement requirement in Cozens Meadow by i) the removal of a reference to a conservation easement in Note 2 of the 2005 PDD or ii) removal of the "Cozens Meadow Open Space" label on the 2005 PDD.

The Court finds the lack of any documentation regarding removal of the conservation easement requirement or removal of the conservation easement requirement in exchange for moving the golf course to be especially indicative of the lack of mutual intent.

Witnesses for the defense credibly testified there would have been documentation if Cornerstone had raised the issue of removing Cozens Meadow from a conservation easement. Mr. Durbin testified any removal of the conservation easement requirement in Cozens Meadow would be a big policy decision for the Town and such a policy decision would have absolutely been documented. Expert witness Mr. Mauriello testified he expected any request to eliminate the conservation easement requirement would definitely have been documented by Town staff and Town Staff would have made it very clear that there was a request to change the Annexation Agreement. Mr. McGowan testified if there had been any discussion at the Board meeting that the absence of a label on 'Cozens Meadow Open Space' represented an amendment of § 10.10, Mr. McGowan would have absolutely expected that to be documented in the Board meeting minutes because § 10.10 was an important provision. Ms. Trotter testified there was no discussion at the Planning Commission meeting about removing the conservation easement

requirement and, if there had been such discussion, it would have definitely been documented in the meeting minutes. Ms. Trotter testified if Cornerstone had proposed the removal of the conservation easement requirement in Cozens Meadow in exchange for giving the Town something, Ms. Trotter would have noted that in the briefing.

Witnesses testified about the omission of the label regarding Cozens Meadow in the 2005 PDD. Mr. Lipscomb testified Cornerstone intentionally deleted the "Cozens Meadow Open Space" label off of the 2005 PDD in order to remove the conservation easement requirement in Cozens Meadow. Mr. McGowan testified if Cornerstone had proposed that they took the label off of "Cozens Meadow Open Space" on the 2005 PDD in order to show that the conservation easement requirement in Cozens Meadow was removed and the Town had accepted that proposal, Mr. McGowan would absolutely expect that to be expressly documented. Ms. Trotter testified there was no information from Cornerstone that omission of the "Cozens Meadow Open Space" label on page 6 of the 2005 PDD (Exhibit 4) represented an amendment or request for an amendment and, if there had been such a discussion, it would have been documented in the meeting minutes. Ms. Cook testified there were no discussions or representations that the omission of labels on the 2005 PDD removed the conservation easement requirement. Ms. Cook testified that if she had been told that a label on the 2005 PDD was necessary for the conservation easement requirement to remain, she would have absolutely ensured such a label was on the 2005 PDD.

Mr. Sumerall testified there was no representation by Cornerstone that it would remove the golf course from Cozens Meadow in exchange for removal of the conservation easement requirement.

Ms. Cook testified that in discussions regarding the proposed 2005 PDD, there was no discussion of the golf course being moved out of Cozens Meadow in exchange for eliminating the conservation easement requirement. Ms. Cook testified that when she voted to approve the 2005 PDD, she did not believe the Town was giving up rights under the 2003 Annexation Agreement to a conservation easement in Cozens Meadow and she would not have voted to approve the 2005 PDD if she had known that Cornerstone intended it did not owe a conservation easement.

Both the 2003 PDD and the 2005 PDD are consistent with § 10.10 of the 2003 Annexation Agreement in referring to Cozens Meadow as designated open space. § 10.10 of the 2003 Annexation Agreement refers to "the open space parcels designated on the 2003 PDD as Elk Creek Meadow and Cozens Meadow." Exhibit 1. The 2003 PDD refers to Cozens Meadow as "designated open space." Exhibit 2 page 3. The 2005 PDD continues to refer to Cozens Meadow as "designated open space." Exhibit 3 page 3.

The Court is not persuaded that the removal of the golf course from Cozens Meadow is only shown through a lack of a label on the 2005 PDD, which then means the lack of a label for Cozens Meadow Open Space indicates the parties' intent to remove the conservation easement requirement. Cornerstone's proposal and the parties' intent to remove the golf course from Cozens Meadow is extremely well documented, beginning with the very first communication from Cornerstone regarding the proposed 2005 PDD in November 2004 to the narrative and cover letter, to follow up communications, to briefing for the Planning Commission and the Town's Board.

The Court finds the testimony of the Town's witnesses to be persuasive and credible that there was no agreement to remove the conservation easement requirement from Cozens Meadow, by any means, and that there was no agreement to remove the golf course in Cozens Meadow in exchange for removal of the conservation easement requirement in Cozens Meadow.

FPDPs

The Court concludes the lack of a label for "Cozens Meadow Open Space" on simultaneously filed or subsequently filed FPDPs does not indicate an intent to remove the requirement for a conservation easement in Cozens Meadow.

Cornerstone points to several FPDPs approved between 2005 and 2015 that do not label "Cozens Meadow Open Space." These are FPDPs for Planning Areas 3wb.1, 3wb, 1wa.1, 1wa.2.

Ms. Trotter testified an FPDP is the site-specific area within the boundary of the final plan. Mr. Durbin testified the specific planning area at issue is the focus of an FPDP and labels outside of that specific planning area are not the focus of an FPDP. Mr. McGowan testified there was no requirement for information to be labeled on a FPDP outside the specific planning area.

Conclusion

The Court concludes the obligation for Cornerstone to grant a conservation easement in Cozens Meadow was established by § 10.10 of the 2003 Annexation Agreement and the requirement in § 10.10 of the 2003 Annexation Agreement was not modified or eliminated by the First Amendment and remained in full force and effect, and was not modified or eliminated by the 2005 PDD.

The Court, therefore, enters judgment against the Plaintiffs on the Plaintiffs' First Claim for Relief – Declaratory Judgment and declares the obligation to place Cozens Meadow in a conservation easement is a continuing and unfulfilled requirement for Cornerstone of the 2003 Annexation Agreement.

Elk Creek Meadow

The Court enters judgment against the Plaintiffs on the Plaintiffs' First Claim for Relief - Declaratory Judgment and declares the obligation of the Plaintiffs to place Elk Creek Meadow in a conservation easement is a continuing and unfulfilled requirement of the 2003 Annexation Agreement.

As to Elk Creek Meadow, the Plaintiffs state the 2005 PDD requires a conservation easement and the Plaintiffs negotiated that conservation easement in good faith between 2015 and 2020 and the Plaintiffs provided the town with the Deed of Conservation Easement. The Plaintiffs argue the fact that the Town declared the Deed of Conservation Easement invalid does not change the fact that Plaintiffs negotiated and agreed on the terms and there was no testimony that the location or terms of the conservation easement were unacceptable to the Town.

With respect to October 2020 Resolution , Mr. McGown, in an email to Cornerstone's counsel, told Cornerstone's counsel the Town would not accept a conservation easement "that does not satisfy the terms and intent of the applicable agreements." Exhibit FF. The October 2020 Resolution states the Deed of Conservation Easement purports "to be in 'full satisfaction'

of the conservation easement requirements of the 2003 Annexation Agreement, but the Cozens Meadow parcel was not included in such Deed." Exhibit 30-D Exhibit N page 1. The October 2020 Resolution further provides the terms of the Deed of Conservation Easement "did not comply with the requirements of the 2003 Annexation Agreement and the related PDD Plans . . ." and "the terms thereof were not approved." Id. The Board declared the Deed of Conservation Easement "does not satisfy the 2003 Annexation Agreement and related PDD Plans with respect to the Elk Creek-Cozens Meadow Conservation Easement, in whole or in part, nor does it fulfill the obligations of [Cornerstone] or [Grand Park Development, LLC] with regard to such requirements." Id. The Board declared the requirement of the Plaintiffs to grant a conservation easement was an unfulfilled obligation. Id. at pages 1-2.

The Court concludes the obligation for Cornerstone to grant a conservation easement in Elk Creek Meadow was established by § 10.10 of the 2003 Annexation Agreement, this requirement was not modified or eliminated by the First Amendment and this requirement remained in full force and effect and was not modified or eliminated by the 2005 PDD, and was not satisfied by the Deed of Conservation Easement.

2. The Town's refusal to process applications and issue permits

The Court enters judgment against the Plaintiffs and in favor of the Defendants on the portion of the Plaintiffs' declaratory judgment claim regarding the Town's refusal to process the Plaintiffs' applications and issue permits to the Plaintiffs.

The 2003 Annexation Agreement § 14.1 provides if the Developer is in default and does not cure the default within 30 days written notice from the Town, the Town is entitled to the cumulative remedies of "(i) specific performance or mandatory prohibitory injunction; (ii) withholding of any pending applications or approvals, including but not limited to FPDPs, subdivision applications, building permits or certificates of occupancy; or (iii) any remedies permitted under its Subdivision Regulations or its PDD Ordinance." Exhibit 1 § 14.1. It further provides that if the Developer's "default arises from the failure to grant any right-of-way, easement, park land or other property, then Developer agrees that [the Town] may condemn that land pursuant to C.R.S. 38-6-102." Id.

Cornerstone and the Town discussed the conservation easement requirement in Cozens Meadow in the fall of 2015, with the Town taking the position that a conservation easement was due and owing and with Cornerstone taking the position the obligation was removed. There were no further discussions between the parties from fall 2015 to late 2019.

On December 30, 2019, Mr. Lipscomb submitted a draft conservation easement to the Town. Exhibit 55. In previous oral and written orders, this Court has found that Deed of Conservation Easement, executed on March 3, 2020, by Mayor Vandernail is void.

On May 13, 2021, the Town provided Cornerstone with a Notice of Default for "failure to comply with the Conservation Easement Obligations in accordance with the Annexation Agreement." Exhibit 30-D Exhibit O page 1. The Notice provided that if the default was not cured within 30 days, the Town may "exercise some or all of its remedies" under the Annexation Agreement. Id.

The Town attempted to negotiate conservation easements with Cornerstone on May 21, 2021, by submitting a draft conservation easement to Cornerstone. Exhibit 62 page 5. Witnesses offered differing testimony as to whether the draft easement provided to Cornerstone was intended to be an initial "jumping off point" for negotiations or a "take it or leave it" proposition. The Plaintiffs presented testimony regarding Cornerstone's issues with the substance of the draft easement, such as indemnification, the property covered by the draft easement, and public use. In written communications to the Town, however, Cornerstone did not identify any these objections. Rather, Cornerstone responded that the draft conservation easement was a "complete non-starter." Id. at page 4. In response to the draft conservation easement and the Notice of Default, Cornerstone later stated that "there is no default. As such, there is nothing to cure." Id. at page 3. Mr. McGowan testified there was no unmistakable refusal by Cornerstone to comply with the conservation easement requirement until May 2021, after Ms. Beck tried to negotiate a draft conservation easement. In May 2021, Mr. McGowan testified, it became clear there was absolutely no possibility that Cornerstone would comply with the conservation easement requirements.

In July 2021, the Board adopted the July 2021 Resolution and authorized the Town Attorney and Town Manager to withhold approvals of pending applications or the issuance of any pending permits or certificates of occupancy. Exhibit 69 page 1. The Town provided notice to the Plaintiffs that: (1) the Town would not issue building permits until the Date of Cure and no new applications for building permits would be processed or issued until the Date of Cure; (2) the Town would not provide final approval for development applications until the Date of Cure and no new development applications would be processed or approved until the Date of Cure; and (3) the Town would not issue certificates of occupancy and certificates of completion until the Date of Cure. Id. at page 2.

The Court concludes the Plaintiffs were in default of the 2003 Annexation Agreement and did not cure such default within 30 days of the Notice of Default because the obligation to place Cozens Meadow and Elk Creek Meadow in a conservation easement is a continuing and unfulfilled requirement of the 2003 Annexation Agreement. Under § 14.1 of the 2003 Annexation Agreement, the Town was entitled to exercise remedies of specific performance entitled to exercise specific remedies, including the "(ii) withholding of any pending applications or approvals, including but not limited to FPDPs, subdivision applications, building permits or certificates of occupancy; or (ii) (sic) any remedies permitted under its Subdivision Regulations or its PDD Ordinance." Exhibit 1 § 14.1.

The Court concludes the Town did not breach its obligations by refusing to process applications and issue permits to the Plaintiffs.

3. The Defendants' right to enforce the Entitlement Exclusion

The Defendants have the right to enforce the Entitlement Exclusion.

The Court has concluded the obligation to place Cozens Meadow in a conservation easement is a continuing and unfulfilled requirement of the 2003 Annexation Agreement, the Court concludes the Plaintiffs were in default of the 2003 Annexation Agreement and the Plaintiffs did not cure such default within 30 days of the Notice of Default. Under § 14.1 of the 2003 Annexation Agreement, the Defendants were, therefore, entitled to exercise remedies of specific performance and entitled to exercise specific remedies, including the "(ii) withholding of

any pending applications or approvals, including but not limited to FPDPs, subdivision applications, building permits or certificates of occupancy; or (ii) (sic) any remedies permitted under its Subdivision Regulations or its PDD Ordinance." Exhibit 1 § 14.1.

The Court, therefore, enters judgment against the Plaintiffs on this portion of Plaintiffs' First Claim for Relief - Declaratory Judgment.

C. The Plaintiffs' request for a declaration defining the terms and boundaries of any conservation easement owed in Cozens Meadow

The Court reserves ruling on the portion of the Plaintiffs' declaratory judgment claim regarding the terms and location of any conservation easement owed by the Plaintiffs to the Town. At the outset of the trial, the parties agreed to bifurcate the proceedings and hold a separate hearing on the terms and location of any conservation easement owed by the Plaintiffs to the Town.

D. The Plaintiffs' request for a declaration that the Plaintiffs may move the golf course back to where it was originally in the 2003 PDD

There was no agreement amongst the Plaintiffs and the Town to remove the golf course from Cozens Meadow in exchange for removal of the conservation easement requirement in Cozens Meadow and the Plaintiffs are, therefore, not entitled to a declaration that the Plaintiffs may move the golf course back into Cozens Meadow.

The Court finds that there was not "no benefit" to Cornerstone in the 2005 PDD unless the golf course was removed from Cozens Meadow in exchange for removal of the conservation easement in Cozens Meadow. As noted above, Cornerstone repeatedly represented to the Town that Cornerstone's intent in the 2005 PDD was to remove golf from Cozens Meadow and Cornerstone did not indicate that the decision to relocate the golf course was related to removal of the conservation easement requirement in Cozens Meadow. Cornerstone stated to the Town that Cornerstone's proposal to remove the golf course from Cozens Meadow was "based on more detailed site analysis conducted during the last year;" the "golf course has been reconfigured to enhance the golf experience;" the reconfiguration "will also conserve the open space, mountain vistas and the overall character of the community;" and was based on Cornerstone's "improved knowledge" of the property. Exhibits F page 2 and G pages 4 and 5.

The Court, therefore, enters judgment against the Plaintiffs on this portion of Plaintiffs' First Claim for Relief - Declaratory Judgmen.

E. The Plaintiffs' request for a declaration that the conservation easement in Elk Creek already recorded was valid or, if not valid, request for a declaration defining the terms and boundaries of any conservation easement owed

The Court has ruled that the conservation easement in Elk Creek Meadow is void.

The Court reserves ruling on the terms of any conservation easement owed in Elk Creek Meadow because, at the outset of the trial, the parties agreed to bifurcate the proceedings and hold a separate hearing on the terms and location of any conservation easement owed.

THE PLAINTIFFS' SECOND CLAIM FOR RELIEF – PERMANENT INJUNCTION

The Court grants judgment in favor of the Town and against the Plaintiffs on the Plaintiffs' Second Claim for Relief – Permanent Injunction.

In their second claim for relief, the Plaintiffs allege that they are entitled to a mandatory permanent injunction in order to preserve the status quo and prevent future damages. Amended Complaint ¶¶ 56-64.

The "legal criteria and analytical process" for a preliminary and permanent injunction "are essentially the same." Dallman v. Ritter, 225 P.3d 610, 621 (Colo. 2010). A permanent injunction requires proof of the following by a preponderance of the evidence: "(1) the party has achieved actual success on the merits; (2) irreparable harm will result unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause to the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." Langlois v. Board of County Com'rs of El Paso, 78 P.3d 1154, 1158 (Colo. App. 2003). As to the first element, "the applicant must show actual success on the merits rather than merely a reasonable probability of success." Id. at 1157. To obtain a permanent injunction, the applicant must satisfy all four elements. Cronk v. Bowers, 2023 COA 68M, ¶ 29.

"The grant or denial of injunctive relief lies within the sound discretion of the trial court and will be reversed only upon a showing of an abuse of that discretion." Langlois, 78 P.3d at 1157.

The Court enters judgment against the Plaintiffs on the Plaintiffs' Plaintiffs' Second Claim for Relief – Permanent Injunction because the Court concludes the Plaintiffs have not achieved success on the merits on any of the Plaintiffs' claims against the Defendants so the Plaintiffs are not eligible for a permanent injunction since the Plaintiffs cannot meet one of the requirements for a permanent injunction.

THE PLAINTIFFS' THIRD CLAIM FOR RELIEF – BREACH OF CONTRACT AGAINST THE TOWN OF FRASER

The Court finds in favor of the Town and against the Plaintiffs on the Plaintiffs' Third Claim for Relief – Breach of Contract Against the Town of Fraser.

The Plaintiffs allege: 1) the conduct of the Board and Town in adopting the October 2020 Resolution and the July 2021 Resolution constitutes a breach of the Annexation Agreement and the 2005 PDD; and 2) the conduct of Mr. McGowan and Mr. Cannon in implementing the Entitlement Exclusion constitutes a breach of the Annexation Agreement. Amended Complaint ¶¶ 66-67. The Plaintiffs allege the Town breached the Annexation Agreement and the 2005 PDD "by anticipatory repudiation" by refusing to perform their obligations, including refusing to process applications, issue permits, and issue certificates of occupancy "unless Plaintiffs provide more consideration that Plaintiffs are obligated to provide." Id. at ¶ 70. The Plaintiffs allege, in the alternative, that if a conservation easement is required in Cozens Meadow or Elk Creek Meadow, the Town has breached the covenant of good faith and fair dealing by "demanding an agreement that contravenes the parties' reasonable expectations." Id. ¶ 71.

A. Breach of 2003 Annexation Agreement and 2005 PDD in adopting the July 2021 Resolution and implementing Entitlement Exclusions

The Court concludes the Town did not breach its obligations under the 2003 Annexation Agreement and the 2005 PDD by refusing to process applications and issue permits.

The Court reiterates the legal authority above regarding contract interpretation.

For the reasons explained above in determining the Plaintiffs' declaratory judgment claim, the Court concludes the obligation to place Cozens Meadow in a conservation easement is a continuing and unfulfilled requirement of the 2003 Annexation Agreement, the Plaintiffs were in default of and breached the 2003 Annexation Agreement and the Plaintiffs did not cure this default within 30 days of the Notice of Default, and the Town was entitled to exercise remedies under the 2003 Annexation Agreement, including the "withholding of any pending applications or approvals, including but not limited to FPDPs, subdivision applications, building permits or certificates of occupancy." Exhibit 1 § 14.1.

The Court, therefore, enters judgment against the Plaintiffs on this portion of the Plaintiffs' breach of contract claim.

B. Anticipatory Repudiation

The Court concludes the Town did not anticipatorily repudiate by refusing to process applications and issue permits.

"An anticipatory repudiation of a contract may occur upon a party's definite and unequivocal manifestation of its intention that it will not perform as required by the contract." Highlands Ranch University Park, LLC v. Uno of Highlands Ranch, Inc., 129 P.3d 1020, 1023 (Colo. App. 2005).

For the reasons explained above in the Court's ruling on the Plaintiffs' declaratory judgment claim, the Court concludes the obligation to place Cozens Meadow in a conservation easement is a continuing and unfulfilled requirement of the 2003 Annexation Agreement. In May and June of 2021, the Town attempted to negotiate a draft conservation easement. Exhibit 62. Cornerstone responded that the draft conservation easement was a "complete non-starter." Id. at page 4. In response to the draft conservation easement and the Notice of Default, Cornerstone stated "there is no default. As such, there is nothing to cure." Id. at page 3. Mr. McGowan testified there was no unmistakable refusal by Cornerstone to comply with the conservation easement requirement until May and June of 2021, after Ms. Beck tried to negotiate a draft conservation easement. At that point, Mr. McGown testified, it became clear there was absolutely no possibility that Cornerstone would comply.

After Cornerstone indicated it would not cure (based on its position that there was nothing to cure), the Board adopted the July 2021 Resolution and authorized the Town Attorney and Town Manager to withhold approval of pending applications or the issuance of any pending permits or certificates of occupancy. Exhibit 30-P Exhibit 6.

The Court concludes the Plaintiffs were in default of and breached the 2003 Annexation Agreement and did not cure such default within 30 days of the Notice of Default.

The Court, therefore, enters judgment against the Plaintiffs on this portion of the Plaintiffs' breach of contract claim.

C. Breach of Covenant of Good Faith and Fair Dealing

The Court enters judgment against the Plaintiffs on the Plaintiffs' breach of contract claim against the Town of Fraser related to the breach of the covenant of good faith and fair dealing.

In Colorado, every contract contains an implied duty of good faith and fair dealing. Amoco Oil Co. v. Ervin, 908 P.2d 493, 498 (Colo. 1995). This doctrine is used to give effect to the parties' intent and reasonable expectations. Id. Performance of a contract in good faith requires " 'faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.' " Id. (quoting Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc., 872 P.2d 1359, 1363 (Colo.App.1994)). The covenant of good faith and fair dealing only applies where one party has the discretion to determine the manner of performance of certain contractual terms, such as "quantity, price, or time." Id. Thus, the covenant of good faith and fair dealing "may be relied upon only when the manner of performance under a specific contract term allows for discretion on the part of either party." Id. Discretionary performance means one party has the power after the formation of the contract to control or dictate the terms or manner of performance because the parties deferred such a decision. Id. When one party has the power to control or determine the terms of performance after contract formation, the other party justifiably expects that the other will act reasonably and in good faith. McDonald v. Zions First National 10 Bank, N.A., 348 P.3d 957, 967 (Colo. App. 2015). When one party uses such discretion regarding performance to "'act dishonestly or outside of accepted commercial practices to deprive the other party of the benefit of the contract, the contract is breached.'" Id. Stated another way, a party's justified and reasonable expectations regarding performance are violated if the party would not have entered into the contract if it had known of the way the other party would determine "open terms" in its discretion. ADT Security Services, Inc. v. Premier Home Protection, Inc., 181 P.3d 288, 293 (Colo. App. 2007).

In the 2003 Annexation Agreement § 10.10 Cornerstone agreed to place Cozens Meadow in a conservation easement "subject to agreement with [the Town] regarding the use and maintenance of such areas, the exact location and description of such open space parcels, consistent with the 2003 PDD." Exhibit 1.

The Town attempted to negotiate conservation easements with Cornerstone in May of 2021, by submitting a draft conservation easement to Cornerstone. Exhibit 62. Witnesses offered differing testimony at trial as to whether the draft easement provided to Cornerstone was presented or intended to be an initial "jumping off point" for negotiations or a "take it or leave it" proposition. When Ms. Beck provided the draft conservation easement, she indicated the parties should discuss it. Id. at page 5. After Cornerstone responded that the draft conservation easement was a "complete non-starter" (without identifying any specific objections to the terms of the draft conservation easement), Ms. Beck stated she was reaching out "at the request of the Town to negotiate" a conservation easement. Id. at page 4. Mr. Lipscomb testified at trial that when Cornerstone responded and explained problems with specific terms of the easement, the Town's position was that it was "their way or the highway." Mr. McGowan testified the draft conservation easement was a good faith starting point for negotiations and Mr. McGowan was

unaware of any specific objections by Cornerstone to the terms of the draft conservation easement. Mr. McGowan testified the draft conservation easement was the first step and the 2003 Annexation Agreement allowed for negotiation of the terms and conditions of the conservation easement.

The Court finds the testimony of Mr. McGowan and the language of Ms. Beck's emails demonstrates the Town was willing to discuss and negotiate the terms of a draft conservation easement.

At trial, the Plaintiffs presented testimony regarding Cornerstone's issues with the substance of the draft easement—indemnification, the property would be subject to the conservation easement, agricultural use, and a public trail. In written communications to the Town in response to the draft conservation easement, however, Cornerstone did not identify any such objections. Rather, Cornerstone responded that the draft conservation easement was a "complete non-starter." Id. at page 4. In response to the draft conservation easement and the Notice of Default, Cornerstone later stated that "there is no default. As such, there is nothing to cure." Id. at page 3.

As to the subject lands, Mr. McGowan testified that although he reviewed the draft conservation easement, Mr. McGowan was not aware the draft easement included lands that Cornerstone did not own and, if he was made aware of that, he would have "of course" corrected it, and would never have insisted that Cornerstone convey a conservation easement on lands it did not own because that would be "an impossibility."

The Court finds the inclusion of lands not owned by Cornerstone in the draft conservation easement was an error. The Court finds the erroneous inclusion of this land does not constitute an exercise of the Town's discretion to deprive Cornerstone of the benefit of the 2003 Annexation Agreement or 2005 PDD and the erroneous inclusion does not constitute a breach of the covenant of good faith and fair dealing.

As to the indemnification clause, Mr. McGowan testified he was not aware the Plaintiffs ever objected to the indemnification clause in the draft conservation easement. Mr. McGowan testified previous draft easements had indemnification clauses and a previous draft easement from Cornerstone's counsel had a "hold harmless clause." Mr. McGowan testified an indemnification clause was not contrary to the 2003 Annexation Agreement because there was nothing in the 2003 Annexation Agreement that a conservation easement couldn't include an indemnification clause.

As to the agricultural provision, the 2003 Annexation Agreement says, among other things, Cornerstone may continue to use property for agricultural, farm, and ranch purposes. Exhibit 1 § 17.1. Mr. McGowan testified the provision of the draft conservation easement pertaining to agricultural uses was not an absolute prohibition against agricultural uses. He testified the proposed easement provision regarding agriculture did not violate the 2003 Annexation Agreement because § 10.10 of the 2003 Annexation Agreement contemplated agreements regarding use and maintenance, so the Town had the opportunity to address uses and negotiate terms of the conservation easement.

Regarding public trails, Mr. McGowan testified the provision in the draft conservation easement regarding a public trail was not contrary to the 2003 Annexation Agreement and parts of the PDD referred to open space and recreation in Cozens Meadow.

As to the indemnification, agricultural use, and public trail provisions in the draft conservation easement, the Court concludes the inclusion of these terms do not constitute a breach of the covenant of good faith and fair dealing. Although those terms were included in the draft conservation easement, the Court finds that the Town was willing to discuss and negotiate the terms of the conservation easement.

The Court will address the terms, scope, and location of owed conservation easements at a later hearing. The Court will consider the parties' intent as expressed by the 2003 Annexation Agreement and as stated in paragraph 112 of the Findings of Fact.

THE PLAINTIFFS' FOURTH CLAIM FOR RELIEF – PROMISSORY ESTOPPEL AGAINST THE TOWN OF FRASER

The Court finds against the Plaintiffs on the Plaintiffs' Fourth Claim for Relief – Promissory Estoppel – Against the Town of Fraser.

The Plaintiffs allege that by approving the 2005 PDD, the Town made a promise to Cornerstone that the boundaries and location of the conservation easement which was to be granted would be reviewed and approved in compliance with the zoning; that by approving FPDPs and subdivision plans for various planning areas, the Town made promises to the Plaintiffs that building permits and certificates of occupancy would be issued; that the Town should have reasonably expected such promises would induce the Plaintiffs to prepare and submit development applications, prepare building plans, construct and sell improvements because the promises were made as Plaintiffs' plan to develop and the Town's desire for development; the Plaintiffs reasonably relied on such promises; the promises must be enforced to prevent injustice; and the enactment of the Entitlement Exclusions violates the promises and damaged Plaintiffs. Amended Complaint ¶¶ 74-81.

After the close of the trial, on September 25, 2024, the Court entered an Order Approving and Making an Order of the Court the Parties' Stipulations Regarding Closing Arguments and Proposed Findings of Fact and Conclusions of Law. The Court ordered the parties to file and set deadlines for initial closing arguments, rebuttal closing arguments, and conclusions of law.

The Plaintiffs do not address the Plaintiffs' promissory estoppel claim in the Plaintiffs' proposed conclusions of law, closing argument, or rebuttal closing.

A court has discretion to dismiss a claim for failure to prosecute with due diligence and the decision to dismiss is reviewed for abuse of discretion, which occurs when the decision is manifestly arbitrary, unreasonable, or unfair. Hudak v. Medical Lien Management, Inc., 2013 COA 83, ¶ 7 (citing C.R.C.P. 41(b)(2)). The burden is on the plaintiff to prosecute a claim in due course without unusual or reasonable delay. Id. ¶ 10.

The Plaintiffs have failed to show a right to relief on the Plaintiffs' fourth claim for relief so the Court dismisses without prejudice the Plaintiffs' promissory estoppel claim. The Court concludes the Plaintiffs failed to prosecute their fourth claim by failing to address their fourth

claim in their closing argument and by failing to provide legal authority or argument for their fourth claim in their proposed conclusions of law.

The Court, however, in an abundance of caution, still considers the Plaintiffs' promissory estoppel claim.

"Promissory estoppel provides relief to those without an enforceable contract who were harmed because they relied on another's promise." Ruybalid v. Board of County Commissioners of Cnty of Las Animas County, 2017 COA 113, ¶ 24.

First, the Court concludes the Plaintiffs' promissory estoppel claim fails because the claim is based on express contracts: the 2003 Annexation Agreement, the 2005 PDD, and subsequent FPDPs. In Colorado, recovery "on a theory of promissory estoppel is permissible when there is no enforceable contract." Marquardt v. Perry, 200 P.3d 1126, 1129 (Colo. App. 2008); see also Wheat Ridge Urban Renewal Authority v. Cornerstone Group XXII, L.L.C., 176 P.3d 737, 741 (Colo. 2007) ("[r]ecovery on a theory of promissory estoppel is compatible with the existence of an enforceable contract").

"A claim for promissory estoppel consists of four elements: (1) a promise; (2) that the promisor reasonably should have expected would induce action or forbearance by the promisee or a third party; (3) on which the promisee or third party reasonably and detrimentally relied; and (4) that must be enforced in order to prevent injustice." Pinnacol Assurance v. Hoff, 2016 CO 53, ¶ 32.

As to the first element, "a promise is 'a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.'" G & A Land, LLC v. City of Brighton, 233 P.3d 701, 703-04 (Colo. App. 2010) (quoting Restatement (Second) of Contracts § 2(1)). A promise made be stated in words or inferred from conduct, but "it must be 'clear and unambiguous.'" Id. at 704 (quoting Hansen v. GAB Bus. Servs., Inc., 876 P.2d 112, 114 (Colo. App. 1994). "It must also be sufficiently definite to allow a court to understand the nature of the obligation." Id. (citing cases).

As to the alleged promise in the 2005 PDD, the Court has concluded the 2005 PDD did not remove the requirement for a conservation easement in Cozens Meadow. As to the alleged promises in the FPDPs, the Court concludes the 2003 Annexation Agreement provides the Town with certain remedies for default, including the withholding of permits.

The Court enters judgment against the Plaintiffs on the Plaintiffs' promissory estoppel claim.

THE PLAINTIFFS' SIXTH CLAIM FOR RELIEF – 42 U.S.C. 1983 – AGAINST THE TOWN OF FRASER, TOWN MANAGER, AND TOWN ATTORNEY REGARDING THE RIGHT TO PETITION GOVERNMENT

The Court finds against the Plaintiffs on the Plaintiffs' Sixth Claim for Relief – 42 U.S.C. 1983 – Against the Town of Fraser, Town Manager, and Town Attorney regarding the right to petition government.

The Plaintiffs allege the right to submit applications to the Town constitutes a right to petition the government under the First Amendment; the Defendants violated this right by

refusing to process Plaintiffs' applications; and the Town's actions deprive the Plaintiffs of their constitutional rights and were taken under color of law. Amended Complaint ¶¶ 104-107, 111.

The First Amendment to the United States Constitution provides Congress shall make no law abridging the right of the people to petition the government for the redress of grievances. U.S. Const. amend. I. Under the Fourteenth Amendment to the United States Constitution, the First Amendment right to petition cannot be infringed upon by states. In re Foster, 253 P.3d 1244, 1250 (Colo. 2011).

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured...." 42 U.S.C. § 1983.

The Plaintiffs argue the Town did not have a contractual right to refuse to process applications and to refuse to issue permits and certificates of occupancy because the Plaintiffs had performed the Plaintiffs' obligations under the 2003 Annexation Agreement and First Amendment. Amended Complaint ¶¶ 92-114.

The Court disagrees with Plaintiffs that the Plaintiffs performed their obligation to grant a conservation easement. For the reasons explained above in the Plaintiffs' declaratory judgment claim, the Court concludes the Plaintiffs' obligation to place Cozens Meadow and Elk Creek Meadow in a conservation easement is a continuing and unfulfilled requirement of the 2003 Annexation Agreement, the Plaintiffs were in default of and breached the 2003 Annexation Agreement, the Plaintiffs did not cure such default within 30 days of the Notice of Default, and the Town was entitled to exercise its remedies under the 2003 Annexation Agreement.

"It is well recognized that the First Amendment will not protect people who have contracted away their First Amendment rights. The United States Supreme Court, other courts, and [the Colorado Supreme Court] have concluded that First Amendment rights are not absolute, and may be limited by contract." Krystkowiak v. W.O. Brisben Companies, Inc., 90 P.3d 859, 865 (Colo. 2004). Parties can specifically contract away their First Amendment right to petition. Id. at 866.

Under the 2003 Annexation Agreement, the parties agreed that, should the Developer default, the Town was entitled to remedies "withholding of any pending applications or approvals, including but not limited to FPDPs, subdivision applications, building permits or certificates of occupancy." Exhibit 1 § 14.1.

The Court finds the Plaintiffs explicitly contracted away their right to petition in the case of a default.

The Court concludes the Town did not violate the Plaintiffs' First Amendment right to petition because the Court concludes Cornerstone was in default of its obligation to grant a conservation easement and because the Court concludes § 14.1 of the 2003 Annexation Agreement constitutes a waiver of Cornerstone's right to petition.

The Court enters judgment against the Plaintiffs on the Plaintiffs'42 U.S.C. 1983 claim.

THE TOWN'S FIRST COUNTERCLAIM FOR RELIEF – DECLARATORY JUDGMENT

The Court finds in favor of the Town the Town's First Counterclaim for Relief – Declaratory Judgment.

The remaining Counterclaim Defendants in this matter are Cornerstone Winter Park Holdings, LLC ("CWPH") and Grand Park Development ("GPD").

The Town alleges it is entitled to a declaration against CWPH and GPD that 1) the obligation to place Elk Creek Meadows and Cozens Meadow in a conservation easement is a continuing and unfulfilled requirement of the 2003 Annexation Agreement; 2) the Board properly declared the 2020 conservation easement for Elk Creek Meadow null and void as outside the limited authority granted by the October 2020 Resolution; and 3) the 2020 conservation easement for Elk Creek Meadow does not fulfill the conservation easement requirement of the 2003 Annexation Agreement. Amended Counterclaims ¶¶ 50-52.

The Court reiterates the legal authority above regarding contract interpretation.

A. Request for a declaration that the obligation to place Elk Creek Meadow and Cozens Meadow in a conservation easement is a continuing and unfulfilled requirement of the 2003 Annexation Agreement

The Court enters judgment in favor of Town on the portion of the Town's declaratory judgment claim requesting a declaratory judgment that the obligation to place Elk Creek Meadow and Cozens Meadow in a conservation easement is a continuing and unfulfilled requirement by CWPH and GPD of the 2003 Annexation Agreement. The Court declares the obligation to place Cozens Meadow and Elk Creek Meadow in a conservation easement is a continuing and unfulfilled requirement of the 2003 Annexation Agreement. The Court reiterates its analysis set forth in section above regarding the Plaintiffs' declaratory judgment claim.

B. Request for a declaration that the Fraser Board of Trustees properly declared the 2020 conservation easement for Elk Creek Meadow null and void as outside the limited authority granted by the Resolution

The Court enters judgment in favor of the Town on the portion of the Town's declaratory judgment claim pursuant to which the Town seeks a declaration that the Fraser Board of Trustees properly declared the conservation easement for Elk Creek Meadow null and void as outside the limited authority granted by the Resolution. In previous oral and written orders, the Court found the Deed of Conservation Easement executed by the Town's Mayor on March 3, 2020, void.

C. Request for a declaration that the conservation easement for Elk Creek Meadow Deed does not fulfill the conservation easement requirement of the 2003 Annexation Agreement

The Court enters judgment in favor of the Town on the portion of the Town's declaratory judgment claim in which the Town requests a declaration that the conservation easement for Elk Creek Meadow does not fulfill the conservation easement requirement of the 2003 Annexation Agreement. Given that the Court has declared the conservation easement in Elk Creek Meadow

void, the Court concludes the Plaintiffs did not fulfill the conservation easement requirement of the 2003 Annexation Agreement for Elk Creek Meadow.

THE TOWN'S SECOND COUNTERCLAIM FOR RELIEF – BREACH OF CONTRACT

The Court enters judgment in favor of the Town on the Town's Second Counterclaim for Relief - Breach of Contract.

The Town alleges CWPH and GPD breached the 2003 Annexation Agreement by failing and refusing to put Elk Creek Meadow and Cozens Meadow in a conservation easement and the Town, therefore, is entitled to specific performance of the contractual obligation to place Elk Creek Meadow and Cozens Meadow in conservation easements. Amended Counterclaims ¶¶ 56-57.

The Court reiterates the legal authority above regarding contract interpretation.

The Court concludes the 2003 Annexation Agreement is a valid contract and the Town performed under that contract. For the reasons explained above, the Court concludes the obligation to place Cozens Meadow and Elk Creek Meadow in a conservation easement is a continuing and unfulfilled requirement by CWPH and GPD under the 2003 Annexation Agreement. The Court concludes CWPH and GPD were in default of and breached the 2003 Annexation Agreement and did not cure such default within 30 days of the Notice of Default.

The right to specific performance is not absolute and whether the remedy should be granted depends on the equities of the case and rests in the sound discretion of the trial court. Schreck v. T & C Sanderson Farms, Inc., 37 P.3d 510, 514 (Colo. App. 2001). Specific performance must be accomplished according to the terms of the parties' contract. Cox v. Bertsch, 730 P.2d 889, 892 (Colo. App. 1986), rejected in part by Mortgage Finance, Inc. V. Podleski, 730 P.2d 889.

The Court concludes the Town was entitled to exercise remedies under the 2003 Annexation Agreement, including specific performance. Exhibit 1 § 14.1.

THE TOWN'S THIRD COUNTERCLAIM FOR RELIEF – CONDEMNATION

The Court finds in favor of the Town on the Town's Third Counterclaim for Relief – Condemnation.

The Town alleges it is entitled under the 2003 Annexation Agreement to a judgment condemning a conservation easement over the subject property, that the fair market value of the conservation easement is zero dollars, and that, following condemnation, the interests of the Counterclaim Defendants U.S. Bank National Association, the Public Trustee of Grand County, Grand Park Owners Association, Inc., Cozens Pointe LLC, U 9200, and Mountain Parks Electric, Inc. will be junior and subordinate to the conservation easement benefitting the Town. Amended Counterclaims ¶¶ 60-62. All of the aforementioned Counterclaim Defendants resolved the litigation brought against them by the Town, except the Public Trustee of Grand County, which disclaimed any interest in this matter, and, regarding the Counterclaim Defendant Grand Park Owners Association, Inc., the Court bifurcated the issue of the exact location, description, and terms of any easement the Court may order in this matter, stating that if the Court orders that the Plaintiffs owe the Defendant the Town of Fraser an easement, the Court will hold a further

hearing on this issue, which would include the Counterclaim Defendant Grand Park Owners Association, Inc.

§ 14.1 of the 2003 Annexation Agreement provides "[i]f Developer's default arises from the failure to grant any right-of-way, easement, park land, or other property, the Developer agrees that Fraser may condemn that land pursuant to C.R.S. 38-6-102. Developer agrees that the fair and actual cash market value of all such property is zero since the property is subject to an irrevocable obligation to grant or dedicate it to Fraser pursuant to this Agreement." Exhibit 1 § 14.1.

On page nine of the Court's June 16, 2024, "Order on Motion for Determination of Questions of Law," the Court determined "the 2003 Annexation Agreement entitles the Town to condemn conservation easements on Elk Creek Meadow and/or Cozens Meadow without compensation to the Plaintiffs." The Court stated "if the Plaintiffs fail to grant any easement, the Town may condemn that land and that the fair and actual cash market value of that land is zero. The Plaintiffs are, therefore, not entitled to any monetary compensation in the event that the Town is successful in its condemnation counterclaim as to either of the conservation easements." Id. at page 10.

CWPH and GPD did not address the condemnation counterclaim in their closing argument or rebuttal closing argument, other than in their argument in their closing regarding the statute of limitations. CWPH and GPD did not address the substance of this counterclaim in their proposed conclusions of law, but, instead, argued the statute of limitations bars all of the Town's counterclaims, the Town's counterclaims fail because the conservation easement requirement is unenforceable, and the Town's counterclaims fail because a conservation easement was not owed in Cozens Meadow and CWPH and GPD performed their obligation with respect to the Elk Creek Meadow conservation easement.

The Court addresses the statute of limitations and unenforceability arguments below.

The Town argues, in its closing argument, that CWPH and GPD's obligation to place Cozens Meadow and Elk Creek Meadow in a conservation easement remains intact and, if CWPH and GPD fail to place Cozens Meadow and Elk Creek Meadow in a conservation easement acceptable to the Town by a "date certain as determined by this Court," the Town has demonstrated the Town is entitled to judgment on the Town's Third Claim for Relief. The Town, in its proposed conclusions of law, states if the Court determines the Town is entitled to conservation easements in Cozens Meadow and Elk Creek Meadow that CWPH and GPD have not yet conveyed to the Town, the Town is entitled to condemnation.

As stated above, the Court concludes the obligation to place Cozens Meadow and Elk Creek Meadow in a conservation easement is a continuing and unfulfilled requirement of the 2003 Annexation Agreement. The Court concludes CWPH and GPD were in default of and breached the 2003 Annexation Agreement and did not cure such default within 30 days of the Notice of Default. The Court concludes the Town was entitled to exercise remedies under the 2003 Annexation Agreement.

The Court reserves ruling on the condemnation counterclaim as the definition of the land the Town will condemn is premature at this time and the partis agreed to bifurcate this issue from

the trial. The Court will determine the terms, scope, and location of the owed conservation easements at or after a later hearing.

THE DEFENDANTS' AFFIRMATIVE DEFENSES TO THE PLAINTIFFS' CLAIMS

In their Amended Answer, the Defendants raised eighteen affirmative defenses. The eighteen affirmative defenses raised by the Defendants are: (1) Some or all of the Plaintiffs' claims may fail to state a claim upon which relief may be granted against Defendants; (2) To the extent the Plaintiffs have or are entitled to claim damages, the Plaintiffs may have failed to mitigate their damages, if any, as required by law; (3) the Plaintiffs' requested relief, if any, may be barred and/or limited by the provisions of the Colorado Governmental Immunity Act, C.R.S. § 24-10-101 et seq as some of the Plaintiffs' claims are torts or could lie in tort; (4) Insofar as the Plaintiffs seek equitable relief, the Defendants assert the following affirmative defenses: laches, unclean hands, and estoppel; (5) the Plaintiffs' claims may be barred based on waiver and/or estoppel; (6) the Plaintiffs' claims may be barred notwithstanding their efforts to circumvent the rights of the Town and the directions of its Board of Trustees by attempting to have the Mayor waive rights without authority; (7) the Plaintiffs' claims for damages are barred and/or reduced by virtue of the applicable agreements and contracts; (8) the Plaintiffs' claims are barred and/or limited based on the Plaintiffs' failure to perform their obligations pursuant to applicable agreements and contracts; (9) the Plaintiffs' claims may be barred and/or limited on the basis that the relief sought is against public policy; (10) the Plaintiffs' claims may be barred by the Plaintiffs' course of conduct; (11) the Plaintiffs' claims may be barred and/or limited based upon excuse of nonperformance; (12) the Plaintiffs' claims may be barred as the Deed of Conservation Easement was void; (13) the Plaintiffs' alleged conduct is not protected by the First Amendment of the United Statement Constitution; (14) the Plaintiffs cannot prove a diminution in the reasonable market value of their property; (15) the Plaintiffs' alleged damages, if any, may have been caused by their own acts or failures to act, and not by any reason or improper conduct by the Defendants; (16) The Town and its officials and employees at all times acted in good faith; (17) Certain of the Plaintiffs' claims are moot; and (18) the Defendants reserve the right to assert other defenses which may be disclosed as discovery and investigation are accomplished and hereby request leave of court to amend the within Answer, if necessary, at a later date.

In the Trial Management Order, issued by the Court on July 30, 2024, the Defendants[21] asserted the following eight affirmative defenses remained for trial: (1) the Plaintiffs' requested relief, if any, may be barred and/or limited by the provisions of the Colorado Governmental Immunity Act, C.R.S. § 24-10-101 et seq., as certain of the Plaintiffs' claim(s) are torts or could lie in tort; (2) the Plaintiffs' equitable relief is barred by waiver**,** laches, unclean hands and/or estoppel; (3) the Plaintiffs' claims are barred as the Town's Mayor cannot act without authority and/or waive the Town's rights without authority; (4) the Plaintiffs' claims are barred and/or limited based on the Plaintiffs' failure to perform their obligations pursuant to applicable contracts; (5) the Plaintiffs' claims may be barred and/or limited on the basis that the relief sought is against public policy; (6) the Plaintiffs' claims may be barred and/or limited based upon excuse of nonperformance; (7) the Plaintiffs' claims are barred as its alleged conduct is not

[21] It is unclear if it is all the Defendants or just the Town set forth affirmative defenses in the Defendants' portion of the Trial Management Order. Since all the Defendants raised affirmative defenses initially, the Court will treat the affirmative defenses (other than those raised by the Plaintiffs) in the Trial Management Order as raised by all the Defendants, but, if that is not true, it does not change the Court's analysis.

protected by the First Amendment of the United States Constitution; and (8) the Plaintiffs' claims are barred as the Town and its officials and employees at all times acted in good faith.

The Court determines the Defendants abandoned all of these previously raised affirmative defenses because the Defendants did not raise or argue any of these affirmative defenses as affirmative defenses to the Plaintiffs' claims in the Defendants' closing argument or proposed conclusions of law.

THE PLAINTIFFS' AFFIRMATIVE DEFENSES TO THE TOWN'S COUNTERCLAIMS

In the Plaintiffs/Counterclaim Defendants' Answer to the Town's Amended Counterclaims and the Defendants' Affirmative Defenses[22], the Plaintiffs raised sixteen affirmative defenses. The sixteen affirmative defenses raised by the Plaintiffs are: (1) The Counterclaims fail to state a claim upon which relief may be granted; (2) The Counterclaims are barred by the doctrines of waiver, ratification, laches, release, estoppel, equitable estoppel, accord and satisfaction, payment, unclean hands, in pari delicto; (3) The Counterclaims are barred or reduced by the Defendants' failure to take reasonable steps to avoid or mitigate its damages, if any damages exist; (4) The Counterclaims are barred or reduced by set-off; (5) The Counterclaims are barred or reduced by Defendants' assumption of risk; (6) The Counterclaims are barred because the Defendants did not suffer any damages; (7) The Counterclaims are barred by Defendants' prior breaches of the contract; (8) The Counterclaims are barred by the statute of frauds and/or statutes of limitation; (9) The Counterclaims are barred by lack of or failure of consideration; (10) The Counterclaims are barred by the express provisions of the 2005 PDD; (11) The Counterclaims are barred by the 2020 Elk Creek Meadow conservation easement; (12) The Counterclaims are barred by the Defendants' inactions, actions, and course of conduct with respect to the Grand Park development and the final development plans and final plats approved by Fraser and recorded in the Grand County records; (13) The Counterclaims are barred by the passage of time; (14) The Counterclaims are barred by the actions of Fraser's employees and officials, including but not limited to the Town Manager and Mayor; (15) The Counterclaims are barred by Fraser's failure to comport with and fulfill its obligations under its agreements and its obligation of good faith and fair dealing; (16) the Plaintiffs reserve the right to assert additional affirmative defenses which may come to light during the course of disclosures and discovery in this action.

In the Trial Management Order, issued by the Court on July 30, 2024, the Plaintiffs asserted the following fifteen affirmative defenses remained for trial: (1) The Counterclaims fail to state a claim upon which relief may be granted; (2) The Counterclaims are barred by the doctrines of waiver, ratification, laches, release, estoppel, equitable estoppel, accord and satisfaction, payment, unclean hands, in pari delicto; (3) The Counterclaims are barred or reduced by Defendants' failure to take reasonable steps to avoid or mitigate its damages, if any damages exist; (4) The Counterclaims are barred or reduced by set-off; (5) The Counterclaims are barred or reduced by Defendants' assumption of risk; (6) The Counterclaims are barred because the Defendants did not suffer any damages; (7) The Counterclaims are barred by the Defendants' prior breaches of the contract; (8) The Counterclaims are barred by the statute of

[22] Throughout the Plaintiffs' affirmative defenses to the Town's amended counterclaims, the Plaintiffs refer to the Defendants' counterclaims, but the amended counterclaims were brought solely by the Town. Defendants' Answer to Plaintiffs' Amended Complaint, Jury Demand and Amended Counterclaims, page 24. This is also true in the Trial Management Order.

frauds and/or statutes of limitation; (9) The Counterclaims are barred by lack of or failure of consideration; (10) The Counterclaims are barred by the express provisions of the 2005 PDD; (11) The Counterclaims are barred by the 2020 Elk Creek Meadow conservation easement; (12) The Counterclaims are barred by the Defendants' inactions, actions, and course of conduct with respect to the Grand Park development and the final development plans and final plats approved by the Town and recorded in the Grand County records; (13) The Counterclaims are barred by the passage of time; (14) The Counterclaims are barred by the actions of Fraser's employees and officials, including but not limited to the Town Manager and Mayor; (15) The Counterclaims are barred by Fraser's failure to comport with and fulfill its obligations under its agreements and its obligations of good faith and fair dealing.

Aside from the affirmative defenses addressed below, the Court determines the Plaintiffs have abandoned all of these previously raised affirmative defenses because the Plaintiffs did not raise or argue any of these affirmative defenses to the Town's counterclaims in the Plaintiffs' closing argument or proposed conclusions of law.

In their closing argument and proposed conclusions of law, the Plaintiffs argue the Town's counterclaims are barred by the statute of limitations, barred by laches (the Plaintiffs argued laches in their rebuttal closing argument and proposed conclusions of law), the October 2007 deadline was not waived, and § 10.10 of the 2003 Annexation Agreement is unenforceable. The Court considers addresses each of the Plaintiffs' affirmative defenses in turn.

A. Statute of Limitations

The Town's counterclaims are not barred by the statute of limitations.

The Plaintiffs argue the Defendants' counterclaims are time-barred by the applicable statute of limitations because, even if a conservation easement in Cozens Meadow was required, it was required no later than October 31, 2007, and the Defendants had only until October 31, 2010, (using the three year statute of limitations for breach of contract under C.R.S. § 13-80-101) by which to declare a default, exercise their remedies, and file suit. Plaintiffs' Initial Closing page 18; Plaintiffs' Rebuttal Closing page 9.

1. Revival Statute

The revival statute revived the Town's counterclaims.

The Town asserts its counterclaims are timely under the C.R.S. § 13-80-109 (the "Revival Statute"). Defendants' Initial Closing page 17; Town and Defendants' Rebuttal Closing page 14.

The Plaintiffs argue 1) the Revival Statute does not apply to declaratory judgment claims, citing Tidwell v. Bevan Properties Ltd., 262 P.3d 964, 966-967 (Colo. App. 2011); 2) the Plaintiffs' claims and Defendants' counterclaims do not arise out of the same transaction; and 3) the Revival Statute does not apply to laches. Plaintiffs' Rebuttal Closing page 13.

After discussing the Revival Statute in general, the Court addresses each of the Plaintiffs arguments in turn.

The Revival Statute provides "[a] counterclaim or setoff arising out the transaction or occurrence which is the subject matter of the opposing party's claims shall be commenced within one year after service of the complaint by the opposing party not thereafter." C.R.S. § 13-80-

109. The Revival Statute "permits otherwise time-barred claims to be filed as counterclaims, if compulsory, within one year of service of the complaint that includes the claim that gives rise to the counterclaims." Makeen v. Hailey, 2015 COA 181, ¶ 9 (citing E-21 Eng'g, Inc. v. Steve Stock & Assocs., Inc., 252 P.3d 36, 40 (Colo. App. 2010)). The purpose of the Revival Statute "'is to allow a party against whom a claim has initially been asserted to plead a stale claim' as a counterclaim in certain circumstances." Plains Metropolitan Dist. v. Ken-Caryl Ranch Metropolitan Dist., 250 P.3d 697, 702 (Colo. App. 2010) (quoting Duell v. United Bank, 892 P.2d 336, 340-41 (Colo. App. 1994)); see also Skyland Metropolitan Dist. v. Mountain West Enterprises, LLC, 184 P.3d 106, 124 (Colo. App. 2007) (the purpose of the revival statute is to limit noncompulsory counterclaims to the applicable statute of limitations period, but to provide a different limitation period for compulsory counterclaims).

Compulsory counterclaims

The revival of a stale counterclaim turns on whether the counterclaim was compulsory. Plains Metropolitan Dist., 250 P.3d at 702. A trial court's determination regarding a compulsory counterclaim is reviewed de novo. E-21 Eng'g, 252 P.3d at 40. **"**A compulsory counterclaim is one that arises out of the same transaction or occurrence as the opposing party's claim." Id. (citing Allen v. Martin, 203 P.3d 546, 555 (Colo. App. 2008)); see also C.R.C.P. 13(a). The test for determining whether a claim arises out of the same transaction or occurrence as the first claim "'is the logical relationship test: whether the subject matter of the counterclaim is logically related to the subject matter of the initial claim.'" E-21 Eng'g, 252 P.3d at 40 (citing Allen, 203 P.3d at 555-556). Logical relationship "'is a broad, flexible, and practical standard which….encourages the resolution of all disputes arising out of a common factual matrix in a single lawsuit.'" Plains Metropolitan Dist., 250 P.3d at 702 (quoting Allen, 203 P.3d at 556). Thus, a counterclaim may be compulsory if the factual and legal issues in both the counterclaim and the complaint are "offshoots" of the same controversy. Id.

The Court concludes the Town's original and Amended Counterclaims are compulsory. The Town's counterclaims arise out of the same transaction or sets of transactions and a "common factual matrix" as the Plaintiffs' claims and the Town's counterclaims are logically related to the Plaintiffs' claims. In the Amended Complaint, the Plaintiffs generally assert the Plaintiffs are not obligated to place Cozens Meadow in a conservation easement pursuant to the 2003 Annexation Agreement, 2003 PDD, First Amendment, and 2005 PDD and the Defendants were not entitled to exercise remedies under the 2003 Annexation Agreement (among other factual and legal issues). In both the original and Amended Counterclaims, the Town asserts the Plaintiffs are obligated to place Cozens Meadow in a conservation easement under the 2003 Annexation Agreement, 2003 PDD, First Amendment, and 2005 PDD and the Town was entitled to exercise remedies under the 2003 Annexation Agreement. A comparison of the factual allegations of all the pleadings in this case show the Plaintiffs' claims and the Defendants' counterclaims arise from the same set of transactions.

Declaratory judgment claim

The Plaintiffs' declaratory judgment claim is a "claim" that triggers the counterclaim revival statute.

The Court is not persuaded by the Plaintiffs' argument that the revival statute does not apply to a declaratory judgment claim. In Tidwell, BLT Consulting executed a promissory note

in favor of Bevan Properties and the Tidwells personally guaranteed the note. 262 P.3d at 965. The note was due on October 1, 1998, and was secured by a recorded deed of trust on property owned by the Tidwells. Id. at 966. "No payment was ever made on the note." Id. In 2010, almost twelve years after the note became due, BLT Consulting and the Tidwells filed an action for declaratory relief requesting that the note, personal guarantees, and deed of trust were unenforceable. Id. The Tidwells argued that by operation of statute, the statute of limitations had run and the lien created by the deed of trust was extinguished. Id. The lender filed a counterclaim seeking enforcement of the note and foreclosure of the deed of trust. Id.

The Colorado Court of Appeals held the six-year statute of limitations for promissory notes applied and barred suit on the note after October 2, 2004, because if a creditor fails to sue to enforce a note within the six-year period, the creditor's right to foreclose on lien is extinguished by C.R.S. § 38-39-207. Id. at 967. The Colorado Court of Appeals held "an action for declaratory judgment of nonliability on statute of limitations grounds is not a claim within the coverage of the counterclaim revival statute." Id. (emphasis added). It noted "an action for declaratory judgment of nonliability on statute of limitations grounds seeks only a declaration of existing rights between the parties and does not seek any future relief." Id. at 968. (emphasis added). The Colorado Court of Appeals noted the revival statute "contemplates a plaintiff making a claim seeking relief which alters the existing relationship between the parties, not merely declaring what that relationship is." Id. Thus, an action for declaratory judgment of nonliability on statute of limitations grounds was not a "claim" that triggered the counterclaim revival statute. Id. The Colorado Court of Appeals emphasized the declaratory judgment claim in Tidwell was "based on expiration of expiration of the statute of limitations." Id. at 966. Tidwell does not stand for the broad principle that the revival statute does not revive stale declaratory judgment claims. Tidwell's holding was limited to the specific grounds found in that case.

The Plaintiffs' declaratory judgment claim is not based on the expiration of a statute of limitations. In the both the original and amended declaratory judgment claim, the Plaintiffs allege they are entitled to a declaration that the Deed of Conservation easement was valid and satisfied the conservation easement requirement in the 2003 Annexation Agreement and the October 2020 and the July 2021 Resolutions were void; the Plaintiffs additionally allege they were entitled to a declaration that the Plaintiffs fulfilled their obligations under the 2003 Annexation Agreement, the Town breached its obligations by refusing to issue permits, and the Defendants had no right to enforce the Entitlement Exclusion. In the amended declaratory judgment claim, the Plaintiffs additionally allege, in the alternative, the Plaintiffs are entitled to a declaration that the Plaintiffs may move the golf course back to the golf course's original location in the 2003 PDD and a declaration that the already recorded conservation easement in Elk Creek Meadow is valid, or, if not, a the Plaintiffs seek a declaration defining the terms and boundaries of any conservation easement owed.

The Court concludes the Plaintiffs' declaratory judgment claim is a "claim" that triggers the counterclaim revival statute. Even if it were not such a claim, the Court notes the Plaintiffs brought eight other claims that trigger the revival statute.

Relation back

The Court treats the Town's Amended Counterclaims as if they were filed on the date of the original counterclaims.

Whenever the claim or defense asserted in the amended pleading arises out of the same conduct, transaction, or occurrence set forth in the original pleading, the amendment relates back to the date of the original pleading. C.R.C.P. 15(c). "An amended pleading that meets the requirements of [C.R.C.P.] 15(c) is treated as if it were filed on the date of the original pleading." Makeen, 2015 COA 181, ¶ 14.

The Plaintiffs filed their Complaint on August 5, 2021. The Town filed its Counterclaims on October 7, 2021. The original counterclaims included a declaratory judgment claim regarding the obligation to place Elk Creek Meadow and Cozens Meadow in a conservation easement, a breach of contract claim regarding breach of the 2003 Annexation Agreement by failing to place Elk Creek Meadow and Cozens Meadow in a conservation easement, and a condemnation claim pursuant to the 2003 Annexation Agreement. See Defendants' Answer, Jury Demand and Counterclaims. The Plaintiffs filed their Amended Complaint on April 20, 2022. The Town filed its Amended Counterclaims on March 2, 2023, with counterclaims for declaratory judgment, breach of contract, and condemnation.

The Court concludes the Amended Counterclaims arise out of the same transaction, as set forth in the original counterclaims. Pursuant to C.R.C.P. 15(c), the Court treats the Amended Counterclaims as if they were filed on the date of the original counterclaims. The original counterclaims were filed well within one year of the service of the Complaint. See Makeen, 2015 COA 181, ¶¶ 12-14 (the period to bring a stale counterclaim runs from the date of service the first complaint containing the claims giving rise to the compulsory counterclaims and amended pleadings may relate back to the date of original pleadings).

Conclusion

The Amended Counterclaims are not time-barred under C.R.S. § 13-80-109 because the Amended Counterclaims are compulsory and they relate back to the date of filing of the original counterclaims and the original counterclaims were brought within one year of the service of the Complaint.

2. Waiver

The Town waived enforcement of the October 31, 2007, deadline from October 31, 2007, to May 2021.

§ 10.10 of the 2003 Annexation Agreement provides "[t]he conservation easement shall be completed upon approval of a FPDP or subdivision for each of the adjoining Planning Areas, or before October 31, 2007, whichever comes first." Exhibit 1 § 10.10.

The waiver argument relates to whether the Town's counterclaims are time-barred. The Plaintiffs argue the Town did not waive the October 31, 2007, deadline and the Town's claims had to be filed by November 1, 2010. Plaintiffs' Initial Closing page 19. The Plaintiffs also argue if the Town did waive the October 31, 2007, deadline, the waiver ended in May 2015, the statute of limitations began running in May 2015, the three year statute of limitations ran in May 2018, and the Town filed its claims more than three years after the statute of limitations ran. Id. at pages 24-25; Plaintiffs' Rebuttal Closing, page 13.

The Court concludes whether or not the town waived enforcement of the October 31, 2007, deadline or how long that waiver was effective is moot based on the Court's conclusion

regarding the application of the revival statute. The Plaintiffs have not cited and the Court has not located any authority stating a claim is "too stale" to be revived under C.R.S. § 13-80-109. Whether the Town's claims were time-barred in 2010 (assuming that there was no waiver of the October 31, 2007, deadline and using the October 31, 2007, date as the date of accrual for purposes of the statute of limitations) or time-barred in 2018 (assuming waiver of the October 31, 2007 deadline was effective until May 2015 and using May 2015 as the date of accrual for purposes of the statute of limitations) is of no significance because the revival statute permits otherwise time-barred claims to be filed as counterclaims, if they are compulsory, within one year of service of the complaint asserting the claims that that gave rise to the counterclaims. As explained above, the Court concludes the Town's counterclaims are not time-barred.

Notwithstanding the above conclusion, the Court considers the waiver argument out of an abundance of caution.

"Waiver is the intentional relinquishment of a known right." Avicanna v. Mewhinney, 2019 COA 129, ¶ 25. "A party waives a contractual right…if the party acts inconsistently with the right and prejudice accrues to the other parties to the contract." Id. **"**'Waiver may be express, or it may be implied when a party's actions manifest an intent to relinquish a right or privilege.'" Id. To establish an implied waiver by conduct, "'the conduct itself should be free from ambiguity and clearly manifest the intention not to assert the benefit.'" Id.

First, the Court concludes the Town could unilaterally waive enforcement of the October 31, 2007, deadline. Cornerstone argues the Town cannot unilaterally waive the October 31, 2007, deadline. Plaintiffs' Initial Closing Argument page 19; Plaintiffs' Rebuttal Closing Argument page 9. "It is well-settled that a party may waive a provision that was included in a contract for that party's sole benefit." Avicanna v. Mewhinney, 2019 COA 129, ¶ 13. The Court previously determined that the October 31, 2007, deadline solely benefits the Town and reiterates that conclusion here.

Second, the Court concludes the Town intentionally relinquished the right to enforce the October 31, 2007, deadline and the Town's conduct constituted an implied waiver of that deadline.

The Court is not persuaded by Cornerstone's argument that the Town did not waive the deadline. Plaintiffs' Initial Closing page 20; Plaintiffs' Rebuttal Closing page 9. Mr. Lipscomb testified Cornerstone was not financially struggling during the Great Recession. Several witnesses, however, testified that Town did not enforce the deadline because of the impacts of the recession and concern for Cornerstone's finances as a result of the Great Recession. The Town certainly believed Cornerstone was struggling during the Great Recession.

Third, the Court is not persuaded that a waiver of a term solely for the Town's benefit constitutes an amendment of the 2003 Annexation Agreement. Cornerstone argues only the Board could waive the deadline and there was no evidence that the Board did so. Plaintiffs' Initial Closing page 21; Plaintiffs' Rebuttal Closing page 10. Cornerstone argues a waiver of the October 31, 2007, deadline was effectively an amendment of the 2003 Annexation Agreement and there was no evidence the Board approved such an amendment of the 2003 Annexation Agreement. Plaintiffs' Initial Closing page 21. Waiver, however, is functionally and analytically distinct from modification or amendment. Moreover, a party can impliedly waive a right through its conduct as discussed below.

Fourth, the Court concludes the Town did not impliedly waive the October 31, 2007, deadline. Cornerstone argues the Town did not impliedly waive the October 31, 2007, deadline because the Town's conduct was inconsistent with waiver. Plaintiffs' Initial Closing page 22; Plaintiffs' Rebuttal Closing page 11. Waiver may be implied by conduct if the conduct "is inconsistent with the assertion of the right." NationsBank of Georgia v. Conifer Asset Management Ltd., 928 P.2d 760, 763 (Colo. App. 1996). In NationsBank, a debtor defaulted on a promissory note secured by a deed of trust. Id. at 762. The trial court appointed a receiver for the subject property, who began making the required monthly payments. Id. On appeal, the Colorado Court of Appeals held waiver of the right to foreclose could not be inferred from the acceptance of payments from the receiver because such conduct was not inconsistent with its right to foreclose on the deed and note. Id. at 763-764. Cornerstone argues that in October 2008, Mr. Gowan noted the October 31, 2007, deadline had not been extended. Plaintiffs' Initial Closing page 23; Plaintiffs' Rebuttal Closing page 12. The Court weighs this against the evidence presented at trial that the Town did not enforce the deadline because of the Great Recession and the fact that the Town believed Cornerstone was struggling financially. Cornerstone next argues the Town's failure to respond to the March 1, 2009, letter requesting an extension of a conservation easement (in the singular) can be interpreted as evidence that the Town agreed the Cozens Meadow conservation easement requirement had been removed. Plaintiffs' Initial Closing page 23; Plaintiffs' Rebuttal Closing page 12. Ms. Cook, however, testified she thought the March 2009 request for an extension was a commitment by Cornerstone to still grant a conservation easement in Elk Creek Meadow and Cozens Meadow.

The Court finds the Town's conduct was not inconsistent with waiver. The evidence establishes the Town intentionally did not enforce the October 31, 2007 deadline.

Finally, Cornerstone argues any possible waiver ended in 2015. Plaintiffs' Initial Closing page 24; Plaintiffs' Rebuttal Closing page 12. In the summer of 2015, Cornerstone and the Town expressed their positions to each other regarding whether Cornerstone owed a conservation easement in Cozens Meadow. The undisputed evidence at trial was that there was no further discussion of either the Elk Creek Meadow or Cozens Meadow conservation easements from late August 2015 to late December 2019. On December 30, 2019, Mr. Lipscomb submitted a draft conservation easement to the Town. Exhibit 55. That easement stated Cornerstone "is making this grant in full satisfaction of the conservation easement requirements" of the 2003 Annexation Agreement. Exhibit 30-D Exhibit M page 2.

May of 2021 is the date when the Town's waiver of the deadline expired because it was in May of 2021 when the Town definitively knew Cornerstone was not going to provide a conservation easement for Cozens Meadow. As evidenced by the Town's conduct in 2020 and 2021 in voiding the Deed of Conservation Easement, passing the October 2020 Resolution and the July 2021 Resolution, and providing the Notice of Default, the Town made it clear to Cornerstone that the Town was insisting on an easement in Cozens Meadow. Mr. McGowan testified there was no unmistakable refusal by Cornerstone to comply with the conservation easement requirement until May 2021, after Ms. Beck tried to negotiate a draft conservation easement. At that point, Mr. McGowan testified, it became clear there was absolutely no possibility Cornerstone would comply with the requirement for the two conservation easements.

The Court concludes the Town waived enforcement of the October 31, 2007, deadline from October 31, 2007, to May 2021.

B. Laches

The Town's counterclaims are not barred by laches.

The Plaintiffs argue the Town's counterclaims are barred by laches. Plaintiffs' Rebuttal Closing page 13.

As a preliminary matter, the revival statute does not apply to laches. The Court has not located any authority nor have the Plaintiffs cited any authority applying the revival statute to claims barred by laches.

Laches is an equitable doctrine that may be asserted to deny relief to a party whose unconscionable delay in enforcing his rights prejudices the party against whom relief is sought. Johnson v. Johnson, 2016 CO 67, ¶ 16. There are three elements to laches: "1) full knowledge of the facts by the party against whom the defense is asserted, 2) unreasonable delay by the party against whom the defense is asserted in pursuing an available remedy, and 3) intervening reliance by and prejudice to the party asserting the defense. Id. Equitable remedies can be applied to legal claims if the facts of the case demonstrate the elements of prejudice, injury, and reliance. Hickerson v. Vessels, 2014 CO 2, ¶ 6 n. 3. Laches "involves a weighing of equities and depends on the trial court's evaluation of the circumstances." Bristol Co., LP v. Osman, 190 P.3d 752, 755 (Colo. App. 2007).

As the party asserting the affirmative defense of laches, the Plaintiffs bear the burden of proving laches by a preponderance of the evidence. See C.R.C.P. 8(c). As an equitable defense, a determination of laches is within the sound discretion of the trial court and the trial court's decision regarding laches is reviewed for abuse of discretion. Bristol Co., 190 P.3d at 755.

1. Full Knowledge

It was not until 2021 that the Town had full knowledge that Cornerstone was refusing to comply with the conservation easement requirement.

The Plaintiffs argue the Town knew of the October 31, 2007, deadline and knew Cornerstone had not provided an easement by that deadline. Plaintiffs' Rebuttal Closing page 14. Mr. McGowan testified July of 2015 was the first time he was aware of Cornerstone's position that no conservation easement was required in Cozens Meadow. Mr. McGowan also testified there was no unmistakable refusal by Cornerstone to comply with the conservation easement requirement until May 2021, after Ms. Beck tried to negotiate a draft conservation easement. At that point, Mr. McGowan testified, it became clear there was absolutely no possibility Cornerstone would comply with the conservation easement requirement.

The Court finds this element weighs against a finding of laches because Cornerstone did not affirmatively state its position that no easement was required in Cozens Meadow until ten years after the approval of the 2005 PDD, which was the document serving as the basis of Cornerstone's position. Further, the parties apparently tabled discussions and negotiations of the conservation easements from late 2015 to late 2019 and it was only in 2021 that the Town had full knowledge that Cornerstone was refusing to comply with the conservation easement requirement.

2. Unreasonable Delay

The Town's delay in the assertion of the Town's rights is not so unreasonable as to constitute in equity and good conscience a bar to the Town's recovery under the total circumstances of the case.

The Plaintiffs argue the Town's delay until October 7, 2021, nearly 14 years after the October 31, 2007, deadline was unreasonable and there is no evidence suggesting the Town should have delayed asserting its claims in 2021. Plaintiffs' Rebuttal Closing page 14. The Plaintiffs argue that, even if there was a waiver, the waiver was over by 2015. Id.

The Town argues the parties communicated regarding the completion of contractual obligations throughout the development process, which was anticipated to take 20 years or more, so the Town's assertion of its rights in 2021 does not amount to an unreasonable delay. Defendants' Initial Closing Argument page 17.

The term "unreasonable delay" means "so unreasonable a delay in the assertion of and attempt to secure equitable rights as to constitute in equity and good conscience a bar to recovery." Johnson, 2016 CO 67, ¶ 17. Unreasonable delay depends on the circumstances of each case and what might be inexcusable delay in one case will not be inconsistent with diligence in another case. In re Marriage of Kahn and Kahn, 2017 COA 94, ¶ 42. In determining whether a delay is unreasonable, courts should weigh the length of the delay and the attendant circumstances, including the acts and conduct indicating assent or acquiesce in the acts of the opposing party of which he now complains, waiver of his rights, and the nature and character of the property rights involved and affected. Id. at ¶ 43.

The Court finds the Town's delay in the assertion of the Town's rights is not so unreasonable as to constitute in equity and good conscience a bar to recovery under the total circumstances of the case.

Independent of waiver, the Court concludes any delay on the part of the Town of the enforcement of the Town's rights was not unreasonable from 2007 to 2015.

First, the Court considers the length of any delay in light of the entire timeline for the development process and the desire for some flexibility therein. The unrebutted testimony at trial establishes that the Town did not require the grant of conservation easements at the time of annexation to allow Cornerstone flexibility to develop the planning areas before fully defining the easement. Mr. Lipscomb testified the projected timeframe for the development project was 20 years as of 2003.

Second, witnesses at trial testified the Town did not enforce the October 31, 2007, deadline because the Town believed Cornerstone was struggling during the Great Recession and the Town did not want to put undue pressure on Cornerstone at that time. The Court finds this explanation for any delay in enforcement by the Town to be reasonable.

Third, Cornerstone itself requested a delay. In a March 1, 2009, letter, Mr. Lipscomb stated, due to economic conditions, it would be some time before the FPDPs contemplated by § 10.10 were finalized. Exhibit 67. Although the letter mentions a conservation easement in the singular, Ms. Cook and Mr. Durbin testified they understood Mr. Lipscomb's March 1, 2009, letter to be a request for an extension of time with respect to a conservation easement in both

Cozens Meadow and Elk Creek Meadow. There was no evidence of any discussions regarding conservation easements between 2009 and 2015.

Fourth, when the conservation easement discussion resumed in 2015, the parties communicated their differing positions on the requirement for a conservation easement in Cozens Meadow. Mr. McGowan testified July 2015, was the first time he was first aware of Cornerstone's position that no conservation easement was required in Cozens Meadow.

With respect to the period of time between 2015 and 2021, the Court further finds that delay was not unreasonable.

First, in the summer and fall of 2015, when the parties communicated their respective positions regarding the conservation easement requirement, Cornerstone stated the parties were not at the point of a Notice of Default under the 2003 Annexation Agreement. This issue appears to have not been raised again by either party until 2019.

Second, in very late 2019, Cornerstone submitted the draft conservation easement for Elk Creek Meadow, but that conservation easement did not include Cozens Meadow. Throughout 2020 and 2021, the Town was considering the validity of the signed Deed of Conservation Easement in Elk Creek Meadow, taking official action to void that Deed, and providing a Notice of Default to Cornerstone.

Finally, in May 2021, the Town attempted to negotiate a conservation easement covering Cozens Meadow, which Cornerstone rejected. In May 2021, the Town sent Cornerstone a Notice of Default based on a violation of § 10.10. In July 2021, the Town passed the July 2021 Resolution that Cornerstone had not cured the default and authorized remedies.

3. Reliance and Prejudice

The Town's counterclaims are not barred by laches

For laches, prejudice must result from justifiable reliance on the actions of the opposing party based on the totality of the circumstances. In re Marriage of Kahn and Kahn, 2017 COA 94, ¶ 45. The prejudice may be either economic or evidentiary. Bristol Co., 190 P.3d at 755. "Economic prejudice…may include liability for greater damages or the loss of monetary investment that an earlier lawsuit would likely have prevented." Id. "A trial court must balance, on the one hand, the length of the delay in filing the [] suit and the [] explanation for the delay, against, on the other hand, the prejudice [] resulting from the delay." Id.

The Plaintiffs argue both evidentiary and economic delay. The Plaintiffs argue "one critical document was lost," the letter from Mr. McGowan about the 2005 PDD needing to depict Cozens Meadow Open Space. Plaintiffs' Rebuttal Closing page 14. The Plaintiffs also argue the Plaintiffs relied "on their belief that no easement was owed in Cozens Meadow" and the Plaintiffs would have developed the property differently "had they known that the Town was requiring an easement." Id.

The Town argues Cornerstone cannot establish prejudice considering that Cornerstone initiated the lawsuit based on the same or similar set of facts as the counterclaims. Defendants' Initial Closing page 17.

The Court finds Cornerstone, rather than being prejudiced by any delay after 2007, actually benefitted from the delay. Ms. Cook testified the Town did not enforce the October 31, 2007, deadline because Cornerstone was struggling during the economic downturn and the Town did not want to put undue pressure on Cornerstone at that time. Mr. Sumrall testified the Town did not enforce the deadline because the deadline fell in the middle of a recession and real estate was not selling. Mr. Lipscomb requested a delay in 2009.

As to the evidentiary prejudice argument, the Court finds the missing document is far outweighed by the abundant evidence of discussions regarding the proposed 2005 PDD and the First Amendment in which no party directedly stated or even implied the conservation easement requirement for Cozens Meadow was going to be removed or was removed.

Finally, the Court is not persuaded that Cornerstone would have changed its development plans if it had known that the Town was going to require a conservation easement in Cozens Meadow, or, if Cornerstone did have knowledge, that this factor would weigh in favor of laches. For the reasons outlined below in the substantive analysis of the claims and counterclaims, the Court finds Cornerstone was not justified in a belief that the requirement for a conservation easement in Cozens Meadow was removed. Further, Cornerstone knew in 2015 that the Town believed that the conservation easement requirement was not removed and Cornerstone hasn't submitted evidence of a change in its development plans based on that knowledge.

The Court concludes that Town's counterclaims are not barred by laches.

C. 2003 Annexation Agreement § 10.10 Enforceability

1. Waiver of the Affirmative Defense of Unenforceability

The Plaintiffs waived the affirmative defense of unenforceability.

The argument that § 10.10 is unenforceable based on the Plaintiffs' arguments (set forth below) is an affirmative defense. An affirmative defense is one that "justifies or negates liability for conduct that would otherwise result in liability"—it is a legal argument that a party "'may assert to require the dismissal of a claim or to prevail at trial.'" Mosley v. Daves, 2025 COA 80, ¶ 15.

The Plaintiffs otherwise allege that the 2003 Annexation Agreement constitutes a valid and binding contract. Amended Complaint ¶ 68.

In a "pleading to a preceding pleading, a party shall set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense." C.R.C.P. 8(c). Affirmative defenses must be pleaded timely, and if a defense is not raised in a pleading or through successful amendment of a pleading, the affirmative defense is waived. Town of Carbondale v. GSS Properties, LLC, 169 P.3d 675, 681 (Colo. 2007). "When a party seeks to assert a new affirmative defense, which in effect amends the answer, the analysis is governed by" C.R.C.P. 15. Kuney v. Franklin, 2022 WL 22928095, *4 (Colo. App. 2022) (citing Ajay Sports, Inc. v. Casazza, 1 P.3d 267, 273 (Colo. App. 2000)). A party may amend a party's pleading only by leave of the court or by written consent of the adverse party and leave shall be freely given when justice so requires. C.R.C.P.15(a).

The Colorado Supreme Court expressly rejected the proposition that asserting an affirmative defense in a summary judgment motion is sufficient, in and of itself, to amend

pleadings. Town of Carbondale, 169 P.3d at 680 (stating allowing such a proposition would create a new way to amend pleadings that would bypass C.R.C.P. 8, requiring affirmative defenses to be set forth in pleadings, and C.R.C.P. 15, if the time for amending pleadings as a matter of course has expired, amendment can occur with consent of the adverse party, with leave of the court, or when issues not raised by the pleadings are tried by express or implied consent of the parties). If the opposing party objects to the untimely assertion of an affirmative defense, "the trial court has discretion to disregard the objection and allow amendment of the pleadings," but "prejudice to the opposing party is a reason to deny amendment." Id. at 681 (citing C.R.C.P. 15(a); Polk v. Denver Dist. Court, 849 P.2d 23, 26 (Colo. 1993); Bebo Const. Co. v. Mattox & O'Brien, P.C., 990 P.2d 78, 84 (Colo. 1999)). The decision of whether to grant a party leave to amend is within the discretion of the trial court and the Court's decision is reviewed for an abuse of discretion. Id. Trial courts may permit an amendment to the pleadings at any stage in the litigation so long as undue delay and prejudice to the other parties does not result. Marso v. Homeowners Realty, Inc., 2018 COA 15M, ¶10.

If a defense is not pled or intentionally and actually tried, a court cannot render a judgment thereon. Dinosaur Park Investments, LLC v. Tello, 192 P.3d 513, 518 (Colo. App. 2008) (citing cases). "This rule cannot be circumvented by allowing a party to amend his answer after trial where the defense or claim was not tried by express or implied consent." Id. A party must object to the improper assertion of an affirmative defense or such defect is waived. Alien, Inc. v. Futterman, 924 P.2d 1063, 1068 (Colo. App. 1995).

The Plaintiffs filed both a reply to the original counterclaims and a reply to the Amended Counterclaims. See C.R.C.P. 7(a) (providing for a reply to a counterclaim). The Plaintiffs did not assert unenforceability as an affirmative defense in the Plaintiffs' October 27, 2021, reply to the original counterclaims or in the March 23, 2023, reply to the Amended Counterclaims. The Plaintiffs did not move to amend their replies to assert additional affirmative defenses.

The Plaintiffs raise unenforceability in their closing argument and rebuttal closing, but not expressly as an affirmative defense (it appears after the analysis of statute of limitations and waiver). Plaintiffs' Initial Closing page 25; Plaintiffs' Rebuttal Closing page 14. The Plaintiffs also raise the unenforceability of § 10.10 in their proposed conclusions of law, seemingly as an affirmative defense, although it is not expressly denominated therein as such (it appears after the analysis of statute of limitations and waiver). Plaintiffs' Proposed Findings of Fact and Conclusions of Law, page 43.

The Defendants address the unenforceability argument in their Rebuttal Closing Argument and proposed conclusions of law and argue the Plaintiffs failed to plead the argument as an affirmative defense in the pleadings or TMO, which renders it waived. Defendants' Rebuttal Closing, page 14; Defendants' Proposed Findings of Fact and Conclusions of Law, page 1.

The Court concludes the Plaintiffs waived the affirmative defense of unenforceability because the Plaintiffs did not assert this affirmative defense in their replies to the Town's counterclaims. The Plaintiffs raised the affirmative defense of unenforceability in writing after the conclusion of the trial and the Town objected. To the extent that assertion of the defense in the Plaintiffs' closing argument and proposed conclusions of law constituted a request to amend, the Court denies that request.

2. Merits

The Plaintiffs have not proven their affirmative defense that § 10.10 of the 2003 Annexation Agreement is unenforceable on the grounds that the parties did not agree upon the material terms of the conservation easements.

The Plaintiffs argue the conservation easement requirement in § 10.10 of the 2003 Annexation Agreement is unenforceable because the parties did not agree on the material terms of the conservation easement. Plaintiffs' Initial Closing, page 25; Plaintiffs' Rebuttal Closing, page 14. The Plaintiffs argue § 10.10 still requires the parties to agree in the future as to 1) the location of the conservation easement, 2) the permitted and prohibited uses of the conservation easement, and 3) maintenance of the conservation easement. Id. The Plaintiffs argue these agreements to agree are unenforceable, citing DiFrancesco v. Particle Interconnect Corp., 39 P.3d 1243 (Colo. App. 2001). Id. In DiFrancesco, the Colorado Court of Appeals held "there can be no binding contract if it appears that further negotiations are required to work out important and essential terms" and "[a]greements to agree in the future are generally unenforceable because the court cannot force the parties to come to an agreement." Id. at 1248.

The Court is not persuaded by the Plaintiffs' argument.

First, the Plaintiffs do not cite and the Court has not located any authority to suggest a condition to annexation, such as the grant or dedication of land, must be completed at the time of annexation. A municipality may impose conditions on the party seeking annexation and the municipality is under no legal obligation to annex property. City of Colorado Springs v. Kitty Hawk Development Co., 392 P.2d 467, 544-45 (Colo. 1994). A party is free to withdraw a request for a petition for annexation if the party seeking annexation does not wish to annex under the proposed conditions because annexation is solely in a municipality's discretion – a municipality can impose conditions "as it sees fit." Id. at 545. "Annexation can take place only when the minds of the city and the owners of the land…agree that the property shall be annexed and upon the terms upon which annexation can be accomplished." Id.

Second, the Plaintiffs agreed not only to grant conservation easements, subject to certain outstanding agreements, but the Plaintiffs agreed to several additional matters in connection with the granting of the conservation easements. The Plaintiffs agreed 1) if its default arose from its failure to grant any easement, the Town could condemn the land; 2) the fair market value of the land the Town condemned was zero since it was subject to the "irrevocable obligation" to grant the easement, 3) the Plaintiffs would have granted the easement at the time of annexation if the legal description had been fully determined; and 4) the Town did not require the grant at the time of annexation in consideration for the "irrevocable agreement and obligation" to grant without compensation and the Town would not have annexed the property if it was required to compensate the Plaintiffs for any easement. Exhibit 1 § 14.1.

The Court concludes that Plaintiffs have not met their burden to prove the affirmative defense of unenforceability. The Court concludes § 10.10 was imposed as condition to annexation and the Plaintiffs agreed to this condition.

DAMAGES

Although the Town has prevailed in this matter, the Court awards the Town no monetary damages. The Town requests a declaratory judgment, for a judgment condemning a conservation

easement, and a judgment for breach of contract and specific performance of the obligation to place Elk Creek Meadow and Cozens Meadow in conservation easements. In their Amended Counterclaims, the Defendants do not request monetary damages on any of their counterclaims. See Amended Counterclaims ¶¶ 50-51, 57, and 60. The Town does not seek monetary damage in the Town's proposed conclusions of law, closing argument, or rebuttal closing argument.

THE TOWN'S CLAIM FOR ATTORNEY FEES PURSUANT TO THE ANNEXATION AGREEMENT

In the Town's Amended Counterclaim's Prayer for Relief, the Town requests an award of the Town's attorney fees and costs pursuant to the 2003 Annexation Agreement. The Town also requests its costs and attorney fees in the Defendants' proposed conclusions of law (pages 18 and 32) and the Defendants request the Town be found as the prevailing party under the 2003 Annexation Agreement in their closing argument (page 25).

§ 14.4 of the 2003 Annexation Agreement provides "[i]n the event of any litigation relating to this Agreement, the arbitrator or court shall award to the prevailing party all reasonable costs and expenses, including attorney fees." Exhibit 1 § 14.4.

The general rule is that a prevailing party in a contract or tort action cannot recover attorney fees from the other party. Western Stone & Metal Corp. v. DIG HP1, LLC, 2020 COA 58, ¶ 7. Parties to a contract may agree, however, to a fee-shifting provision that allocates attorney fees and costs to the prevailing party. Id. The determination of which party is the prevailing party under a fee-shifting provision is reviewed for an abuse of discretion. 23 LTD v. Herman, 2019 COA 113, ¶ 51.

The 2003 Annexation Agreement does not define the term "prevailing party." Where a contract awards fees and costs to the "prevailing party," but does not define that term for the purposes of the contract, the "Colorado Supreme Court has furnished a test" to determine the prevailing party. Western Stone, 2020 COA 58, ¶ 8. "The test provides that, for the purposes of attorney fees, the prevailing party is the one who received a favorable ruling on the question of liability." Id. (citing Dennis I. Spencer Contractor, Inc. v. City of Aurora, 884 P.2d 326, 332 (Colo. 1994)). In a breach of contract case, "'where a claim exists for a violation of a contractual obligation, the party in whose favor the decision or verdict on liability was rendered is the prevailing party for purposes of awarding attorney fees.'" 23 LTD, 2019 COA 113, ¶ 56 (quoting Dennis I. Spencer, 884 P.2d at 327). This Court is in the best position to observe the course of the litigation and determine which party prevailed. Anderson v. Pursell, 244 P.3d 1188, 1194 (Colo. 2010).

In this order and judgment, the Court enters judgment against the Plaintiffs on all of the Plaintiffs' claims (except those on which the Court reserved ruling pending a hearing to determine the terms, scope, and location of owed conservation easements) and the Court enters judgment in favor of the Defendants on all of the Defendants' counterclaims (except those on which the Court reserved ruling, pending a hearing to determine the terms, scope, and location of owed conservation easements).

The Court, therefore, determines the Defendants are the prevailing party in this matter because the Defendants received the favorable ruling on the question of liability, namely, that the obligation to place Cozens Meadow and Elk Creek Meadow is a continuing and unfulfilled

obligation by Cornerstone of the 2003 Annexation Agreement and the Court determines the Town was entitled to exercise its remedies under the 2003 Annexation Agreement.

The Court awards the Defendants their reasonable costs pursuant to C.R.C.P. 54(d) and the Court awards the Defendants their costs and reasonable attorney fees pursuant to the 2003 Annexation Agreement.

The Court orders the Defendants to file a Bill of Costs and an Affidavit of Attorney Fees within 21 days of the date of this Order with a corresponding proposed order[23]. The Court will hold the Defendants' Bill of Costs and the Affidavit of Attorney Fees for 21 days for a response or an objection and 7 days for a reply, if any, before ruling.

THE PLAINTIFFS' CLAIM FOR ATTORNEY FEES AND COSTS PURSUANT TO THE ANNEXATION AGREEMENT AND 42 U.S.C. 1983

The Court denies the Plaintiffs' request for attorney fees and costs. The Court concludes that Plaintiffs are not the prevailing party under the 2003 Annexation Agreement so the Court denies the Plaintiffs' request for attorney fees and costs. The Court enters judgment against the Plaintiffs on the Plaintiffs' 42 U.S.C. 1983 claim and denies the Plaintiffs' request for attorney fees and costs pursuant to 42 U.S.C. 1983.

The Court vacate the preliminary injunction entered by this Court on September 4, 2021.

The Court directs the Town, within thirty (30) days of the date of this order, to file a Notice to Set for a scheduling conference with the Court to set a hearing for the Court to determine the location, description, and terms of the conservation easements in Elk Creek Meadow and Cozens Meadow and the procedure the parties will follow before and during the hearing. The Court will also order the parties to attend mediation on this issue prior to the hearing. The Third-Party Defendant the Grand Park Owners Association, Inc. must also appear at the scheduling conference.

Dated this 26th day of November, 2025. BY THE COURT:

Mary C. Hoak

Mary C. Hoak, District Court Judge

[23] Absent a corresponding proposed order this Court is never prompted to rule.