IN THE IOWA DISTRICT COURT FOR POLK COUNTY

5TH AND WALNUT PARKING LLC; 5TH AND WALNUT TOWER LLC; 5TH AND COURT LLC; JUSTIN MANDELBAUM; and SEAN MANDELBAUM, Plaintiffs/Counterclaim Defendants, v. CITY OF DES MOINES, Defendant/Counterclaim Plaintiff. _____ CITY OF DES MOINES, Third-Party Plaintiff, v. JOHN MANDELBAUM, Third-Party Defendant.	Case No. EQCE086198 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT**

The claims in this case were presented to the court from October 17, 2022, through October 31, 2022. The plaintiffs/counterclaim defendants and the third-party defendants were represented by Attorneys Todd M. Lantz and Mark E. Weinhardt. The defendant/counterclaim plaintiff/third-party plaintiff was represented by Assistant City Attorney John O. Haraldson and Deputy City Attorney Thomas G. Fisher Jr. After considering the evidence presented at trial,

the parties' post-trial submissions, and final arguments the court makes the following findings and rulings and enters judgment in this case.

TABLE OF CONTENTS

PROCEDURAL BACKGROUND

Originally this case started as a foreclosure petition filed by Bankers Trust Company ("Bankers Trust") against 5th and Walnut Parking LLC ("Parking LLC"), Justin Mandelbaum, Sean Mandelbaum and the City of Des Moines ("City").[1] 5th and Walnut Tower LLC ("Tower LLC"), and 5th and Court LLC ("Court LLC") filed a motion to intervene and on the same day Parking LLC, Justin and Sean Mandelbaum, Parking LLC, Tower LLC, and Court LLC filed a cross-petition against the City.[2] The City asserted claims against Parking LLC, Tower LLC,

[1] Petition, (Polk Cty Dist. Ct. Sep. 14, 2020) (Dkt. No. D0001).
[2] 5th and Walnut Parking LLC, 5th and Walnut Tower LLC, 5th and Court LLC, Justin Mandelbaum, and Sean Mandelbaum's Cross-Claim Against City of Des

Court LLC, and the Mandelbaums.[3] The City purchased the garage owned by Parking LLC consequently Bankers Trust dismissed its petition without prejudice.[4] To avoid confusion after Bankers Trust dismissed its foreclosure, the court ordered the clerk to re-caption the case in its present form.[5]

At the beginning of the trial, the court and parties discussed the admission of evidence. This was discussed in conjunction with the case initially being filed in equity, since it started as a petition for foreclosure. The parties agreed, since it was a bench trial, that the court should take the evidence subject to the objection and address the objections and its admissibility in its ruling.[6]

Throughout its opinion the court will address the parties' objections as needed. If the court does not address any objections made at trial in this ruling it means the court did not consider the evidence objected to or the court felt it was not necessary to consider it for the purpose of this ruling.[7]

Moines, Motion to Intervene (Polk Cty Dist. Ct. Sep. 23, 2020) (Dkt. Nos. D011 D012).

[3] Answer and Affirmative Defenses and Counterclaims of Cross-Claim Defendant, City of Des Moines and Third-Party Claim of City of Des Moines Against John Mandelbaum, (Polk Cty Dist. Ct. Jan. 26, 2021) (Dkt. No. D0052).

[4] Dismissal Without Prejudice, (Polk Cty Dist. Ct. Mar. 10, 2021) (Dkt. No. D0073).

[5] Change in Party Designation and Trial Scheduling Order, (Polk Cty Dist. Ct. Apr. 19, 2021) (Dkt. No. D0086).

[6] Trial Tr. Vol. 1, 13:19-15:9.

[7] Trial Tr. Vol. 1, 7:19-9:10.

FINDINGS OF FACT

This case involves a development project in downtown Des Moines known as "The Fifth." The dispute involves real property located along Fifth Avenue between Court Avenue and Walnut Street in downtown Des Moines. The property at issue may be referred to as the "Property."[8] The developers of the project, brothers Justin Mandelbaum ("Justin") and Sean Mandelbaum ("Sean"), have educational backgrounds and professional experience in real estate development, finance, and accounting.[9] Justin and Sean Mandelbaum are associated with "Mandelbaum Properties" a family run real estate business.[10] The property prior to development was owned by the City. The development of the Property was to be in phases. To accomplish this, Justin and Sean incorporated the limited liability companies.

As part of the development agreement between Justin and Sean and the City, the limited liability company, Parking LLC, purchased the Property from the City. The City received a mortgage from Parking LLC.[11] In its final iteration, The Fifth had three anticipated components: a parking garage with 751 parking stalls and two retail spaces owned by Parking LLC; a 40-story tower containing 208

[8] Trial Ex. 3, at 1.
[9] Trial Ex. 330 & 331; Trial Tr. Vol. 1, 17-35, Vol. 5, p. 59-62, 71-80.
[10] Trial Tr. Vol. 1, p. 29:17-24.
[11] Trial Ex. 597.

residential units and a hotel with a contemporary art museum owned by Tower LLC; and a commercial building containing a dine-in movie theater and street-level retail space on Court Avenue owned by Court LLC. These components will be referred to as the garage, tower, and theater. Justin owned 70% and Sean owned 30% of each of these entities.[12] Justin, Sean, and their entities will be referred to as the "Developers."

The court provides a thorough review of the negotiations which led to the creation of the contract, its amendments, the development, and construction activities to provide insight into the complexity and magnitude of the project and the resulting litigation even though many of these facts may not bear on the court's decision.

Planning for The Fifth

The genesis of the project started in approximately 2009, when Justin began exploring opportunities for a development project in downtown Des Moines.[13] In 2014, Justin and Sean submitted a proposal to the City for the property on Court Avenue where a Hy-Vee was ultimately built.[14] Their proposal, which included a movie theater-anchored entertainment complex, generated

[12] Trial Tr. Vol. 1, p. 35-36.
[13] Trial Tr. Vol. 1, p. 28-30.
[14] Trial Tr. Vol. 1, p. 67-68.

interest from the City.[15] The City suggested that the Developers submit a "developer-initiated proposal" to purchase and redevelop a City-owned parcel across the street from the Hy-Vee – approximately 1.3 acres located between Court Avenue and Walnut Street, bounded by a City alley on the east and 5th Avenue on the west (the "Property").[16] As noted, the City owned this Property.[17] A deteriorating 620-stall parking garage sat on the Property.[18] The City recognized a demand for parking at this location, but it no longer wanted to own or operate a parking garage on the Property and instead wanted to shift the long-term maintenance responsibilities to private entities.[19]

In 2015, the Developers proposed to the City their first preliminary concept for the Property, which included a 27-story tower with residential housing, which would be above a five-story 560-stall parking garage, and a commercial building with a movie theater and entertainment complex.[20] In July 2015, the City Council allowed 90 days for other developers to submit a proposal to redevelop the

[15] Trial Tr. Vol. 1, p. 67-69.
[16] Trial Ex. 35; Trial Tr. Vol. 1, p. 67-69, Vol. 3, p. 111, 115:1-5.
[17] Trial Tr. Vol 1, p. 107:3-15.
[18] Trial Ex. 35, 40; Trial Tr. Vol. 1, p. 91, Vol. 2, p. 131-32, Vol. 3, p. 114-15, Vol. 4, p. 41, Vol. 8, p. 68-70, 145-46.
[19] Trial Tr. Vol. 1, p. 72, 82-83, Vol. 2, p. 132, 135-36; *see also* Trial Ex. 29 (p. 1); Trial Tr. Vol. 2, p. 123-24 (confirming the accuracy of Exhibit 29).
[20] Trial Ex. 35; Trial Tr. Vol. 1, p. 69-71.

Property, but no competing proposals were submitted.[21] Consequently, the City selected the Developers as the preferred developer to purchase and redevelop the Property, and City Council directed City staff to work with the Developers to refine their proposal and to present preliminary terms for a development agreement.[22] The initial deadline for the Developers and staff to present preliminary terms for the City Council's consideration was January 31, 2016.[23]

Preliminary Agreement and Negotiations for the Original Development Agreement

The Developers and the City did not agree on preliminary terms until April 2016.[24] At that time, the parties contemplated an estimated $106.7 million project consisting of a 32-story mixed-use tower with market rate residential units, lobbies, common area and amenities; a 78,000 square foot commercial building with an entertainment complex; and a 568-stall parking garage.[25] As noted above the three structures were allocated to three separate limited liability corporations: Parking, LLC; Tower, LLC; and Court, LLC.[26]

[21] Trial Ex. 35, 36; Trial Tr. Vol. 1, p. 71, Vol. 3, p. 120.
[22] Trial Ex. 36.
[23] *Id*.
[24] Trial Ex. 39; Trial Tr. Vol. 1, p. 75-76, Vol. 3, p. 122-23.
[25] Trial Ex. 39.
[26] Trial Tr. Vol. I, pp. 35:20-36:1.

A challenge, recognized by the Developers and the City, with building public parking in downtown Des Moines is that the expected parking revenue falls short of the amount required to service the debt associated with constructing a new parking structure. The low revenue is due to the low downtown parking rates set by the City. They are viewed as a public service provided for downtown Des Moines as a whole, and the parties understood this reality.[27]

The Developers designed a financial structure to allow for private ownership of a parking garage and worked with the City for approximately six months to reach an agreement on preliminary terms.[28] The preliminary terms outlined several forms of economic assistance from the City:

- The City agreed to provide a "shortfall loan" to the Developers in recognition of the fact that it is not profitable to build and operate a parking garage in downtown Des Moines.[29] The parties contemplated that the Developers would obtain permanent financing for the garage amortized over twenty years. The City would guarantee that financing by providing a "backstop" – that is, the City would pay an amount equal to the annual shortfall between the parking net operating

[27] Trial Tr. Vol. 1, p. 74-78, Vol. 2, p. 133, Vol. 8, p. 79-80; *see also* Trial Ex. 29 (p. 1).
[28] Trial Ex. 29 (p. 1); Trial Tr. Vol. 1, p. 75-76.
[29] Trial Ex. 29 (p. 1), 39; Trial Tr. Vol. 1, p. 74-78, Vol. 2, p. 133, Vol. 8, p. 79-80.

income and the debt service payments.[30] As the City made those payments, the "shortfall loan" would increase and accrue interest. In year 21, the City would forgive $10.4 million of the loan in recognition of development costs that the Developers would incur up front and that were unique to the project site.[31] The remainder of the loan would be repaid with interest at 1% by payment of 80% of the net operating income from the garage after reserves and repairs.[32] Once the shortfall loan was repaid, the Developers (specifically, Parking LLC) would own the garage free and clear.[33]

- The City and the Developers agreed that the Developers would purchase the Property from the City for $4 million, but there would not be a payment to the City. Instead, the City would provide a forgivable loan in the amount of $4 million, which allowed the City to provide the land to the Developers free.[34] As noted this purchase was made by Parking LLC.

[30] Trial Ex. 39; Trial Tr. Vol. 1, p. 77-80.
[31] This included costs for demolition of the old garage and construction of skywalk connections, which the City was willing to pay for but did not want to pay for up front. *See* Trial Tr. Vol. 1, p. 96-98; *see also* Trial Ex. 183.
[32] Trial Ex. 39; Trial Tr. Vol. 1, p. 77-80.
[33] Trial Tr. Vol. 1, p. 80.
[34] Trial Ex. 39; Trial Tr. Vol. 1, p. 76.

- The City agreed to provide economic assistance in the form of property tax abatement and tax increment rebates.[35]

In 2016, the Developers and the City representatives frequently met to finalize the agreement, which took approximately a year to complete.[36] Throughout these negotiations the City expressed concerns about the project:

- The City had a "huge concern" about the unknown total cost of demolishing the existing garage and then designing and constructing a new garage.[37] During these negotiations, the Developers only had preconceptual architectural drawings of the garage. Justin referred to these preconceptual drawings as a "glorified sketch."[38] The detail of the architectural drawings were not detailed enough for construction drawings or a determination of a guaranteed construction price.[39] The Developers received a preliminary cost estimate from The Weitz Company ("Weitz"),[40] which gave the City "major sticker shock."[41]

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[35] Trial Ex. 39.
[36] Trial Tr. Vol. 1, p. 81, Vol. 3, p. 122-23.
[37] Trial Ex. 29 (p. 1), 110, 126 (p. 2); Trial Tr. Vol. 1, p. 83-84, 86-87, 180-81, Vol. 3, p. 174-75, Vol. 8, p. 124-25. The City's relevance objection to Exhibit 110, *see* Trial Tr. Vol. 1, p. 81, is overruled and this exhibit is admitted.
[38] Trial Tr. Vol. 1, p. 84, 94.
[39] Trial Ex. 182 (p. 1); Trial Tr. Vol. 1, p. 84, Vol. 8, p. 82-83.
[40] The Developers retained Weitz as its general contractor for the project.
[41] Trial Ex. 182 (p. 2); Trial Tr. Vol. 1, p. 86.

Consequently, the Developers initially proposed a framework where they would proceed with the architectural drawings to determine if the garage cost was within a budgeted amount, but the City rejected that framework.[42] To alleviate this concern, the City ultimately demanded that the Developers agree to a guaranteed maximum price for the garage.[43]

- The City was also concerned about the risk of predevelopment expenses. The City did not want to pay for the costs that were necessary up front to determine the cost of the project – for example, architecture costs.[44]
- The City wanted the Developers to commit to a timeframe for all components of the project to commence and be complete.[45] The Developers initially wanted to construct all three components at the same time, but the City's preference was to physically separate the components and accelerate the construction of the garage.[46]

[42] Trial Ex. 42 (p. 2-3), 110 (p. 5-6), 126 (p. 1); Trial Tr. Vol. 1, p. 84-85, Vol. 8, p. 124-25.
[43] Trial Ex. 29 (p. 2), 126 (p. 1); Trial Tr. Vol. 1, p. 93.
[44] Trial Ex. 29 (p. 2), 182 (p. 2); Trial Tr. Vol. 1, p. 86, 138, Vol. 3, p. 173-74.
[45] Trial Ex. 182 (p. 2); Trial Tr. Vol. 1, p. 87.
[46] Trial Ex. 44 (p. 1), 126 (p. 3), 182 (p. 2); Trial Tr. Vol. 1, p. 87, 91, 181.

In December 2016, the Developers presented new terms that addressed the City's concerns by:

1. Creating a design that allowed the garage to be built separately,
2. Eliminating the City's risk of pre-development expenses,
3. Providing certainty of garage costs, and
4. Providing a definite timeframe for all buildings in the Project.[47]

Specifically, the Developers committed to paying for all the predevelopment costs.[48] They also agreed to guarantee an "all-in construction cost" for a 564-stall garage, which meant the Developers would "bear all exposure" if the actual costs were greater than a "Stipulated Price."[49] This also meant that, because the Developers were accepting the risk of cost overruns above the Stipulated Price, they would be entitled to keep any savings if the costs were below the Stipulated Price.[50] Recognizing the garage design was preliminary and the number of stalls would likely change, the Developers provided a price-per-stall dollar amount that would adjust the Stipulated Price up or down based on the final stall count.[51] Finally, the Developers proposed a timeline for phased construction of the project

[47] Trial Ex. 44 (p. 1); Trial Tr. Vol. 1, p. 87, 92.
[48] Trial Ex. 44 (p. 1-2); Trial Tr. Vol. 1, p. 92.
[49] Trial Ex. 44 (p. 1, 3), 126 (p. 2); Trial Tr. Vol. 1, p. 93, 199, Vol. 3, p. 124, 174-75, Vol. 8, p. 124-26.
[50] Trial Ex. 29 (p. 2), 44 (p. 2); Trial Tr. Vol. 1, p. 199, Vol. 3, p. 124, 174-75, Vol. 8, p. 124-26.
[51] Trial Ex. 29 (p. 2); Trial Tr. Vol. 1, p. 93. This framework was memorialized in the original development agreement and each successive version. *See* Trial Ex. 3 (p. 35), 49 (p. 27), 122 (p. 12), 123 (p. 3-4).

that mirrored the timeline that the City had used for a recent multi-phase development project involving City-owned land.[52] City staff was supportive of the Developers' new terms.[53]

At the time they proposed these new terms, the Developers knew that the tower would contain market rate residential units, but they were uncertain whether the lower floors would contain a hotel or office space.[54] City Manager Scott Sanders ("Sanders") required that the project have a hotel.[55] From that point forward, a hotel became a part of the tower.

In early 2017, the City's legal counsel, Roger Brown ("Brown"), and the Developers exchanged drafts of a development agreement.[56] At that time, the Developers and City staff agreed on a timeline, which was for the garage to be completed by August 19, 2020, for construction of the first building (either the tower or theater) to commence 18 months after garage completion, and for construction of the second building to commence within 18 months of the completion of the first building.[57] Under this timeline, the deadline for completing

[52] Trial Ex. 44 (p. 2), 126 (p. 3); Trial Tr. Vol. 1, p. 92.
[53] Trial Tr. Vol. 1, p. 92.
[54] Trial Ex. 44 (p. 2); Trial Tr. Vol. 1, p. 94-95.
[55] Trial Tr. Vol. 1, p. 95, Vol. 6, p. 175.
[56] Trial Tr. Vol. 1, p. 96, 100-01; *see also* Trial Ex. 357.
[57] Trial Exs. 29, at 2; 45, at 7; 361, at 6; Trial Tr. Vol. 1, p. 104-09. The City's relevance objection to Exhibit 361, *see* Trial Tr. Vol. 1, p. 108, is overruled. The court overrules this objection. The court finds the document is relevant because it

the second building would have been August 19, 2028.[58] City staff and the Developers concluded the timeline was reasonable and City staff recommended it.[59] Ultimately, City staff asked the Developers to sign, and Justin signed, a version of the development agreement containing the "final terms" before the agreement was submitted to City Council.[60] On February 13, 2017, the City Council approved a competitive process for the sale of the Property, in which other developers could submit a proposal within 30 days pursuant to Iowa law.[61] This process was required since the City can only "dispose of real property in an urban renewal area to private persons after following reasonable competitive bidding procedures."[62]

Blackbird's Competing Proposal and Consequences for The Fifth

On March 17, 2017, Blackbird Investments ("Blackbird") submitted a competing proposal to redevelop the Property.[63] Blackbird's proposal was larger (including a 700-stall parking garage) and was more expensive.[64] Blackbird's

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provides context to the parties' negotiations and agreement. Exhibit 361 is admitted.

[58] Trial Ex. 45 (p. 1, 7), 361 (p. 6).; *see also* Trial Tr. Vol. 1, p. 105-07, Vol. 4, p. 69-71.

[59] Trial Tr. Vol. 1, p. 104-07, Vol. 4, p. 70.

[60] Trial Ex. 60, 361 (p. 1); Trial Tr. Vol. 1, p. 108-09

[61] Trial Ex. 60.

[62] Iowa Code § 403.8; Trial Tr. Vol1, p. 107:3-15.

[63] Trial Ex. 48 (p. 2); Trial Tr. Vol. 1, p. 109-10.

[64] Trial Ex. 48 (p. 3-4, 10, 12-13, 19); Trial Tr. Vol. 2, p. 144, Vol. 8, p. 120-21.

timeline was more aggressive than the timeline that the Developers and City staff had agreed upon.[65] City staff did not investigate or research the viability of Blackbird's timeline.[66] City staff believed, based upon Blackbird's assurances, that its timeline was achievable.[67]

The Developers sent a detailed comparison of the proposals and met with City staff to persuade them to recommend The Fifth.[68] However, at a Council work session on March 24, 2017, City staff recommended that the City Council move forward with Blackbird's proposal.[69] Part of this recommendation was due to the aggressive start and finish deadlines Blackbird proposed.[70] Sanders was responsible for that recommendation.[71] City staff's recommendation surprised the Developers, since they had been working with City staff for approximately three years on their project.[72] After City staff's recommendation, the Developers

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[65] Trial Ex. 48 (p. 11, 17, 19-20); Trial Tr. Vol. 1, p. 113-14, Vol. 2, p. 139-40, Vol. 8, p. 121-22.
[66] Trial Tr. Vol. 2, p. 140-43, Vol. 3, p. 199, Vol. 8, p. 121-22.
[67] Trial Tr. Vol. 2, p. 140-43, Vol. 3, p. 199, Vol. 8, p. 121-22.
[68] Trial Ex. 47; Trial Tr. Vol. 1, p. 111-18. The City's relevance objection to Exhibit 47, *see* Trial Tr. Vol. 1, p. 110, is overruled.
[69] Trial Ex. 48 (p. 21); Trial Tr. Vol. 1, p. 118. A recording of the Council work session was introduced as Exhibit 598, and an excerpt of that work session was played during trial. That excerpt was from the March 17, 2017 meeting discussed below.
[70] Trial Tr. Vol. 2, pp. 137:11-17, 140:5-11.
[71] Trial Tr. Vol. 2, p. 145, Vol. 3, p. 199.
[72] Trial Tr. Vol. 1, p. 118-19.

delivered a presentation to the Urban Design Review Board and continued supplying information to City staff regarding potential capital providers who supported the financial viability of the Developers' project.[73]

On March 31, 2017, Justin and Rick Clark, the Developers' consultant and former Des Moines city manager, attended a meeting with Sanders and City Councilman Chris Coleman ("Coleman").[74] Coleman was acting as a liaison for the City Council, negotiating on the City's behalf along with Sanders.[75] During that meeting, Sanders proposed that October 31, 2019 be the completion date for the garage and the commencement date for the tower and theater.[76] Justin agreed to those dates but explained that this eliminated most of the "cushion for any

[73] Trial Ex. 188, 189; Trial Tr. Vol. 1, p. 119-23.
[74] Trial Tr. Vol. 1, p. 61, 124-25.
[75] Trial Tr. Vol. 1, p. 124, 128.
[76] Trial Ex. 363; Trial Tr. Vol. 1, p. 128-29. The City's hearsay objection to Exhibit 363 and the related testimony, *see* Trial Tr. Vol. 1, p. 125-28, 131-32, is overruled. Justin's notes in Exhibit 363 reflected statements by Sanders and Coleman, both of whom were negotiating on the City's behalf. *See* Trial Tr. Vol. 1, p. 128. There was testimony elicited from Justin regarding conversations during this meeting. The City objected to Exhibit 363 because it contained hearsay statements attributable to Coleman. The court finds those statements are hearsay and sustains the objection as to any statement attributed to Coleman. Likewise, the court sustains the objection to Exhibit 363 because of the hearsay statements attributed to Coleman. The court does not find the statements are admissible pursuant to rule 5.804(b)(4). The court does not find any statement attributed to Coleman is a statement against interest. Further his statement cannot bind the City. *City of Akron v. Akron Westfield Comm. Sch.,* 654 N.W.2d 223, 224-26 (Iowa 2003). Exhibit 363 is not admitted.

unknowns that might come up."[77] Justin further explained that the cushion was important because there could be penalties under the development agreement if deadlines were missed.[78] The Developers believed in order to obtain the City Council's approval and acceptance of their plan they needed to accept these deadlines.[79] At that time the Developers believed they could meet the deadline to commence construction of the tower and theater and complete construction of the garage by October 31, 2019.[80] The Developers were also aware that any contractual agreement with the City must be approved by a vote of the Des Moines City Council to be effective.[81]

Based upon the Developers' commitment to the new deadlines, on April 3, 2017, the City Council voted in a public meeting to move forward with the Developers' proposal.[82] Shortly before the meeting, Blackbird withdrew its proposal.[83] Following the City Council vote, the development agreement was updated and executed on April 13, 2017.[84]

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[77] Trial Tr. Vol. 1, p. 130, Vol. 2, p. 61-62, Vol. 6, p. 176; *see also* Trial Ex. 29 (p. 3), 126 (p. 3), 150 (p. 3).
[78] Trial Tr. Vol. 1, p. 130-31; *see also* Trial Ex. 126 (p. 3).
[79] Trial Tr. Vol. 1, p. 133:713, Vol 3. p. 199:24-200:5.
[80] Trial Tr. Vol. 1, p. 130:11-13; Trial Ex. 32, p. 6, 22-23.
[81] Trial Tr. Vol. 1, 136:16-18.
[82] Trial Ex. 49; Trial Tr. Vol. 1, p. 134, Vol. 2, p. 145:8-16.
[83] Trial Tr. Vol. 1, p. 133-34, Vol. 2, p. 145, Vol. 8, p. 75.
[84] Trial Ex. 49; Trial Tr. Vol. 1, p. 134.

Progress, Amendments, and Delays in 2017-2018

Within one week of signing the original development agreement, discussions began concerning an amendment to address an unexpected issue with a skywalk connection and to address an issue concerning the alley on the eastern border of the Property.[85] The issue concerned an approximately 6.5-feet-wide portion of the alley, which had not been properly vacated because of an inaccurate description in a 1969 City ordinance.[86] This issue was significant because it meant the Developers were not sure of the Property boundary or the amount of buildable space.[87] To rectify this issue the City conveyed the 6.5 feet in question.[88] Prior to this resolution, Justin informed the City's representatives multiple times that the uncertainty on the eastern boundary prevented the Developers from starting design work.[89] The architects were "pencils down, meaning that they could not move the design forward if they didn't know what property boundaries they were working

[85] Trial Ex. 190; Trial Tr. Vol. 1, p. 141-42.
[86] Trial Ex. 60 at 4; Trial Tr. Vol. 1, p. 150.
[87] Trial Tr. Vol. 1, p. 142-44.
[88] *Id*.
[89] Trial Ex. 191 at 1 ("That being said, please note we cannot begin design work until we know the site boundary and whether the ingress/egress plans are acceptable to the City. A timely resolution to these two issues will increase our chances of being able to start construction before the winter."), Tr. Ex. 192 ("We will need to resolve the eastern property boundary so we can proceed with our architecture."); Trial Tr. Vol. 1, p. 144-47.

with."[90] The resolution required the acceptance of the first amendment to the development agreement, which the City Council approved on July 17, 2017, which was approximately 3 ½ months after the original agreement was approved.[91]

The first amendment also provided for an increase in the number of parking stalls in the garage – from 564 stalls to 671 stalls.[92] The Developers believed a larger garage would be more economical for the City and would allow the Developers to build a larger hotel, which interested the City.[93] The City did not question or resist the proposal to increase the garage to 671 stalls.[94] Corresponding to the increased stall count, the Stipulated Price increased to $44,326,475 based on the price-per-stall adjustment provided in the original agreement.[95]

The first amendment also addressed an unexpected issue related to skywalk connections. The original development agreement did not include a provision for replacement of the skywalk connection (called a "node") between Capital Square and the Kirkwood Hotel.[96] After the original agreement was signed, it was discovered that a temporary skywalk connection needed to be designed and built,

[90] Trial Tr. Vol. 1, p. 145; *see also* Trial Ex. 29, at 3.
[91] Trial Ex. 62, 122, at 8; Trial Tr. Vol. 1, p. 149-50
[92] Trial Ex. 122 at 11.
[93] Trial Ex. 194 at 2; Trial Tr. Vol. 1, p. 147-49.
[94] Trial Tr. Vol. 1, p. 149.
[95] Trial Ex. 122 at 12; Trial Tr. Vol. 1, p. 150.
[96] Trial Tr. Vol. 1, p. 141-42.

as the existing connection would be demolished with the old garage.[97] The parties resolved this issue when the Developers agreed to build a temporary skywalk connection.[98]

The original agreement called for the Developers to propose a conceptual development plan for the garage by September 12, 2017, and a separate plan would be submitted later for the other two buildings.[99] As a practical matter, though, the conceptual development plan needed to be unified for the entire project.[100] Given that the architects were unable to proceed until the alley issue was resolved, the Developers prepared a conceptual development plan for the whole project in two months, while the original timeline allowed five months for the garage plan alone.[101] On September 12, 2017, the Developers submitted a conceptual development plan for The Fifth, which included a screen wall that wrapped around the project.[102]

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[97] *Id*.
[98] Trial Ex. 62, 190; Trial Tr. Vol. 1, p. 141-42.
[99] Trial Ex. 49 (p. 4); Trial Tr. Vol. 8, p. 131-32.
[100] Trial Tr. Vol. 1, p. 135-36, 152, Vol. 8, p. 133.
[101] The original timeline contemplated the architects working on the conceptual development plan from April 12, 2017 to September 12, 2017 (five months), but the architecture start date was delayed until July 17, 2017 when the first amendment was approved, leaving slightly less than two months to prepare the plan. Trial Ex. 49 at 4, 126 at 4; Trial Tr. Vol. 1, p. 152-53, 182-84.
[102] Trial Ex. 314 (p. 18); Trial Tr. Vol. 1, p. 152-53.

The development agreement required the City to approve the conceptual development plan within two months of its submission.[103] However, City Council did not approve the Developers' conceptual development plan until December 18, 2017, which was three months after the plan was submitted.[104]

Also on December 18, 2017, the City and the Developers executed a second amendment to the development agreement.[105] The second amendment increased the garage stall count from 671 to 690, increased the Stipulated Price for the garage, and extended the deadline for completion of the garage to February 28, 2020.[106] The City supported and approved these changes.[107] The second amendment also allowed for the Property to be divided into three building sites by a declaration of horizontal property regime rather than a plat of survey – a concept that was not discussed in the original negotiations.[108] This change required the three components of the project to be interconnected, and both the City and the Developers recognized that a horizontal property regime was more appropriate for this project.[109] The creation of the horizontal property regime was complicated,

[103] Trial Ex. 49 (p. 4); Trial Tr. Vol. 8, p. 134-36.
[104] Trial Ex. 3 (p. 21).
[105] Trial Ex. 63, 123; Trial Tr. Vol. 1, p. 154.
[106] Trial Exs. 63, 123 (p. 2); Trial Tr. Vol. 1, p. 154.
[107] Trial Ex. 123; Trial Tr. Vol 1, p. 154-55.
[108] Trial Ex. 123 (p. 3); Trial Tr. Vol. 1, p. 155.
[109] Trial Tr. Vol. 1, p. 155-56, Vol. 2, p. 153.

requiring the development of a significant legal document compared to a one-page plat.[110] Because of this change the City in March 2018 retained outside legal counsel to evaluate and develop the horizontal property regime for this project.[111]

On March 19, 2018, City staff reported to City Council that the Developers had made "[s]ignificant progress," including achievement of the following milestones: executed development agreement; completed traffic study; preliminary closing and sale of property; conceptual development plan approval by the City Council; schematic design set completed for the entire project; demolition substantially completed on the former parking structure; temporary pedestrian pathway constructed to re-establish connectivity of the skywalk system between the Kirkwood building and the Capitol Square building; preliminary submittal of full building permit sets on the parking structure to Permit and Development; signed commitment letter with the lender on the garage component; and draft submittal of the condominium document.[112] At the same time, City staff proposed a series of extensions for the garage due to the complexity of the project, the time needed to adequately review the condominium document, the time needed for the Developers to finalize various design elements for building plan submittals, and

[110] Trial Tr. Vol. 1, p. 156, 161, Vol. 2, p. 153, Vol 3, p. 37-38.
[111] Trial Ex. 64; Trial Tr. Vol. 2, p. 153.
[112] Trial Ex. 64 (p. 2); Trial Tr. Vol. 1, p. 158-59, Vol. 2, p. 155.

having adequate time for building permit review prior to issuing permits for footings and foundations to comply with the secondary closing requirements.[113]

In March 2018 the garage extensions were made by a City Council resolution versus an amendment to the development agreement.[114] During the discussions concerning the garage extensions, Justin asked Sanders if they should extend the deadlines for the tower and theater for similar reasons.[115] In response, Sanders asked if those components needed extensions at that point. The Developers still thought they could meet the deadline to commence construction of the tower and theater.[116] Sanders told Justin to come back when an extension for the tower and theater was needed and "we can take care of it at that time."[117] Justin testified he believed it would not be controversial if an extension was necessary.[118]

Negotiations Leading to the Third Amendment

The Developers submitted to the City's Permit and Development Center a set of construction drawings for the garage dated February 23, 2018.[119] After that

[113] Trial Ex. 64 at 1; Trial Tr. Vol. 1, p. 160-61.
[114] Trial Ex. 64 (p. 4-6); Trial Tr. Vol. 1, p. 162, Vol. 2, p. 154-55.
[115] Trial Tr. Vol. 1, p. 161.
[116] Trial Tr. Vol. 1, p. 161-62.
[117] Trial Tr. Vol. 1, p. 162.
[118] *Id*.
[119] Trial Ex. 371 (p. 3-4); Trial Tr. Vol. 7, p. 29-30.

submission, the Developers realized that they needed to move a stairwell within the northern half of the garage and a stairwell and the elevators within the southern half of the garage.[120] With those components moved, the parking stall count was expected to increase.[121] At a meeting with City staff, the Developers explained these changes and the expected increase in the stall count, and Brown responded that those changes would not be a problem.[122] According to Brown, the purpose of the price-per-stall adjustment formula was to accommodate this sort of change.[123] On April 24, 2018, Justin informed the City's economic development coordinator and point person on this project, Carrie Kruse ("Kruse"), that the stall count

[120] Trial Ex. 371; Trial Tr. Vol. 1, p. 165-67, 170-75.
[121] Trial Tr. Vol. 1, p. 165-67, 172-73.
[122] Trial Ex. 126 (p. 4) ("We fully informed City Staff of our resubmission plan to move the elevators and stairs to better accommodate the hotel restaurant, theater and office uses, and that it would create extra parking spaces (at that time preliminary estimates from our architects were 37 extra stalls). With our attorneys present, Roger Brown acknowledged at the time of our intent to re-submit that the Development Agreement had an adjuster/stall and that it was merely our bank that required confirmation of the total dollar amount of the Stipulated Price (i.e. the City gave no indication that there were any issues with adjusting the stall count)."); Trial Tr. Vol. 1, p. 165-67, 178, 183.
[123] Trial Tr. Vol. 1, p. 166-67, Vol. 2, p. 199-200; *see also* Trial Ex. 126 (p. 4). Notably, many City employees were present for this statement by Brown, and no City witness contradicted Justin's recollection of Brown's statement. Also, when Justin repeated Brown's statements in a detailed memorandum (Trial Ex. 126), Sanders and Kruse did not refute Justin's characterization. Trial Tr. Vol. 1, p. 180, 183, Vol. 8, p. 148-49. Kruse acknowledged that she would have wanted to correct Justin if something in his memorandum was factually incorrect. Trial Tr. Vol. 8, p. 148-49.

increased to 750 but could fluctuate by one stall.[124] Kruse stated that the amendment to update the stall count was needed only for the Developers' lender, causing Justin to believe that the amendment with an increased stall count and increased Stipulated Price would be uncontroversial.[125] Based on Brown's assurance and the price-per-stall adjustment formula, the Developers resubmitted their construction drawings for the garage for a permit review and circulated the drawings to contractors to obtain bids.[126]

Starting in May 2018, after the Developers had adjusted the design of the garage, the City, through Sanders, resisted the increase in parking stalls.[127] Over the course of several calls and meetings, Justin explained to Sanders and Kruse that it was critical to move the stairwells and elevator within the garage, as the location of the stairwells and elevators had ripple effects throughout the project architecture.[128] The Developers also sent information to Sanders and Kruse about how the City's own parking study supported a larger garage.[129] Yet Sanders stated

[124] Trial Ex. 206 (p. 2); Trial Tr. Vol. 1, p. 167-68.
[125] Trial Ex. 206; Trial Tr. Vol. 1, p. 167-68. Indeed, the Developers' counsel submitted an amendment that ratified the increased stall count and Stipulated Price. Trial Ex. 372; Trial Tr. Vol. 1, p. 176-77.
[126] Trial Ex. 126 (p. 4); Trial Tr. Vol. 1, p. 178.
[127] Trial Tr. Vol. 1, p. 168-69, 173, 178, 188.
[128] Trial Ex. 371 (p. 3-4); Trial Tr. Vol. 1, p. 173-75.
[129] Trial Ex. 60 (p. 2), 371 (p. 2); Trial Tr. Vol. 1, p. 175-76; *see also* Trial Ex. 126 (p. 6); Trial Tr. Vol. 2, p. 134-36, Vol. 8, p. 70, 88-89.

that the Developers could not move forward with the adjusted design.[130] To the Developers the uncertainty over the Garage design was a major roadblock moving forward with the architecture for the tower or theater, which Justin communicated to Sanders and Kruse.[131]

In June 2018, Sanders presented three new options to the Developers, but none of them allowed the Developers to build the garage with 751 stalls, as shown in the updated construction drawings, for a Stipulated Price derived from the price-per-stall adjustment formula in the development agreement.[132] Each option required the Developers to redesign their project or accept a lower Stipulated Price.[133] Justin believed this was a violation of the agreement and sent a lengthy memorandum to Sanders to communicate the Developers' concerns with Sanders' position and options.[134]

Justin's comments did not change Sanders' position. On June 19, 2018, Sanders communicated that he would not support an amendment that increased the stall count and Stipulated Price for the garage.[135] The Developers' believed this stalled the project requiring the architects to stop their work. The Developers

[130] Trial Tr. Vol. 1, p. 168-69, 173, 178, 188.
[131] Trial Tr. Vol. 1, p. 173-75.
[132] Trial Ex. 126 (p. 1).
[133] Trial Ex. 126 (p. 7-9); Trial Tr. Vol. 1, p. 179-81, 185-87.
[134] Trial Ex. 126.
[135] Trial Ex. 127 (p. 9); Trial Tr. Vol. 1, p. 187-88.

conveyed this to City staff.[136] During this time, the architecture for the project was stalled – "pencils down" once again – and City staff was aware of this.[137]

In an effort to resolve this dispute, the Developers attempted to negotiate with the City Council to determine what could be done to overcome Sanders' objections.[138] On June 27, 2018, Sanders in a letter agreed not to issue a notice of default which extended the Developers' deadlines related to the garage without City Council involvement.[139] After multiple meetings with City Council members and the Developers, Sanders demanded that the Developers agree to a series of "facility fees" in exchange for the City approving a 751-stall garage with a Stipulated Price of $48,050,235.[140] The facility fees were payments to the City from the parking revenue separate from the parking shortfall loan.[141] The Developers agreed to the facility fees because they wanted the project to "move forward" and the Developers felt "it was clear that the only way the City was going to vote on the 61-stall increase was to basically receive money from the project."[142]

[136] Trial Tr. Vol. 1, p. 188-89.
[137] Trial Tr. Vol. 1, p. 196-97; *see also* Trial Ex. 29 (p. 3).
[138] Trial Ex. 130, 374; Trial Tr. Vol. 1, p. 189-94.
[139] Trial Ex. 129; Trial Tr. Vol. 1, p. 207-09.
[140] Trial Ex. 3 (p. 35), 133 (p. 2); Trial Tr. Vol. 1, p. 200.
[141] Trial Tr. Vol. 1, p. 200-02.
[142] Trial Tr. Vol. 1, p. 202.

On September 10, 2018, the City Council unanimously approved the third amendment to the development agreement, titled the Amended and Restated Urban Renewal Agreement for Sale of Land for Private Redevelopment (hereinafter the "third amendment" or the "Development Agreement").[143] The third amendment updated the parties' agreement to reflect that every major aspect of this project had grown in size.[144] Parking LLC signed the development agreement and simultaneously transferred parts of the Property to Tower LLC and Court LLC, which assumed Parking LLC's obligations under the development agreement with respect to the tower and theater parcels.[145]

The third amendment allowed the Developers to finalize their construction loan with Bankers Trust for the garage, and consequently they began construction of the new garage.[146] The construction loan through Bankers Trust was for $48,050,235.[147] The loan included an amount which reimbursed the Developers for the cost of preconstruction which had been financed under a preconstruction loan from Lincoln Savings Bank.[148] The Bankers Trust construction loan satisfied the

[143] Trial Ex. 3, 65; Trial Tr. Vol. 1, 202-03.
[144] Trial Ex. 65 (p. 1); Trial Tr. Vol. 2, p. 156.
[145] Trial Exs. 300, 301, 65; Trial Tr. Vol. 1, p. 203-04.
[146] Trial Ex. 155; Trial Tr. Vol. 1, p. 203-04, Vol. 3, p. 9-12.
[147] Trial Ex. 155; Trial Tr. Vol 1, p. 140:14-21.
[148] Trial Tr. Vol. 1, p. 138-140.

Lincoln Savings Bank loan.[149] The loan also included $5.6 million for architectural fees for the various phases of the Project.[150] The total amount of the construction loan equaled the Stipulated Price in the Development Agreement.[151] As security for the construction loan, Parking LLC executed a mortgage and, more importantly, an assignment of its rights under the development agreement.[152] The mortgage executed in favor of Bankers Trust required the City's mortgage on the Property to be subordinated to Bankers Trust's.[153] The new deadline for completion of the garage construction was August 16, 2020, and maintained a one-year grace period for "minor delays."[154] Based on that timeline, the maturity date for the construction loan was August 31, 2020.[155]

The third amendment also allowed the Developers to move forward with the architecture for the tower and the theater.[156] The deadline to commence construction of the tower and theater remained October 31, 2019 in the third amendment.[157] The Developers knew that timeline was "tight but achievable,"

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[149] Trial Tr. Vol. 1, at 140-41.
[150] Trial Tr. Vol 1., pp. 46:47:4.
[151] Trial Ex. 155 (p. 11); Trial Tr. Vol. 3, p. 11-13.
[152] Trial Ex. 426, 589; Trial Tr. Vol. 1, p. 204-05, Vol. 3, p. 25-27.
[153] Trial Ex. 32 at 4, 20-22.
[154] Trial Ex. 3 (p. 5, 27, 55), 29 (p. 3); Trial Tr. Vol. 1, p. 228-29, Vol. 3, p. 79-80, 172.
[155] Trial Ex. 155; Trial Tr. Vol. 3, p. 51.
[156] Trial Tr. Vol. 1, p. 202-04.
[157] Trial Ex. 3 (p. 5)

because relying on Justin's earlier conversation where Sanders instructed that they could deal with an extension for the tower and theater when it became necessary.[158] Justin agreed that, at that time, he had no conversations about extending any other deadline than the completion date for the garage.[159]

By January 2018, the Developers began discussions about financing for the tower. Their discussions included obtaining a construction loan by working with Bill Barry ("Barry"), a mortgage broker who had financed nearly $35 billion in real estate transactions as head of the commercial finance group at Draper & Kramer, a leader in the mortgage brokerage industry.[160] Barry reviewed the Developers' financial model (called a "pro forma") and the independent market reports that the Developers relied upon in that model, and he provided input on their financing assumptions.[161] The Developers also planned to monetize tax incentives, contribute many items as equity themselves (including the savings from the garage), and partner with an equity investor.[162] However, the Developers had not reached any financing agreement with Barry or any equity investor in 2018.

[158] Trial Tr. Vol. 1, p. 211.
[159] Trial Tr. Vol. 1, p. 210:13-23.
[160] Trial Ex. 97, 98, 329A (p. 6); Trial Tr. Vol. 1, p. 57-58, 157-58, 219-20, Vol. 5, p. 5-9, 14-17.
[161] Trial Ex. 98, 101, 329A (p. 1-4, 6-8); Trial Tr. Vol. 1, p. 157-58, Vol. 5, p. 16-30.
[162] Trial Tr. Vol. 1, p. 212.

Progress and Delays in 2019

In early 2019, the Developers worked with their architect, Solomon Cordwell Buenz ("SCB"), their hotel interior design architect, Deborah Berke Partners ("Deborah Berke"), and their hotel company, 21c Museum Hotels ("21c"), to make improvements to the project design.[163] The Developers learned that the wrap-around screen wall design was a problem for 21c and essentially doubled the cost of the façade.[164] Therefore, the Developers reverted back to a screen wall concept that did not wrap around all three buildings.[165] The revised design included an artistic screen wall for the garage.[166] The Developers discussed the design changes with Kruse and Erin Olson-Douglas ("Olson-Douglas"), the City's Economic Development Director, whose response was positive.[167]

In May 2019, the Developers had concerns about the October 31, 2019 deadline for commencing construction of the tower and theater.[168] Justin believed "it was going to take more time to start construction of [the Tower and Theater/Commercial Building]."[169] They were concerned the City would not have

[163] Trial Ex. 315; Trial Tr. Vol. 1, p. 217; *see also* Trial Ex. 29 (p. 3); Trial Tr. Vol. 1, p. 43-55.
[164] Trial Tr. Vol. 1, p. 153-54.
[165] Trial Tr. Vol. 1, p. 217-18.
[166] Trial Ex. 315 (p. 2), 385; Trial Tr. Vol. 1, p. 61, 231-33.
[167] Trial Ex. 387; Trial Tr. Vol. 1, p. 217, 235-37, Vol. 2, p. 128.
[168] Trial Tr. Vol. 1, p. 215.
[169] Trial Tr. Vol 1, p. 215:15-21.

time to review the drawings and issue a permit before the end of October.[170] As for the theater, Weitz informed the Developers that they could not start the theater until certain work in the garage construction was complete (known as "post-tensioning"), which meant that the theater could not start until sometime in 2020 at the earliest.[171] Justin communicated these timeline issues to Kruse in meetings and by email, and Kruse appreciated the Developers' openness.[172]

In June 2019, SCB withheld an updated version of the tower architectural documents (construction drawings and specifications), demanding payment of about $300,000 for additional services.[173] The Developers repeatedly informed the City of SCB's actions, which were delaying the project.[174] The dispute with their architect took approximately five months to resolve.[175]

Extension Negotiations in 2019-2020

In August 2019, City staff asked the Developers to submit a written request to extend the deadlines for commencing the tower and theater.[176] City staff did not

[170] Trial Ex. 216 (p. 2); Trial Tr. Vol. 1, p. 215-16.
[171] Trial Tr. Vol. 1, p. 215-16.
[172] Trial Ex. 216; Trial Tr. Vol. 1, p. 216, Vol. 8, p. 138-40.
[173] Trial Tr. Vol. 1, p. 240, Vol. 6, p. 167-68, Vol. 9, p. 108-09.
[174] Trial Ex. 386 (p. 2, 4); Trial Tr. Vol 1, p. 240-41, 259.
[175] Trial Ex. 316, 421; Trial Tr. Vol. 1, p. 257-58, Vol. 2, p. 224-25, Vol. 8, p. 219, Vol. 9, p. 111.
[176] Trial Ex. 67; Trial Tr. Vol. 1, 218-19.

indicate that an extension would be controversial.[177] In fact, once the Developers submitted a written request, City staff agreed in writing they would recommend a 6-month extension for the Tower deadlines and a 12-month extension for the theater deadlines.[178] In response, the parties' lawyers circulated redline drafts of another proposed amendment.[179] The parties agreed in those redline drafts on an extension of deadlines for the tower and theater.[180]

On September 18, 2019, the Developers and their lawyer had a phone conversation with Brown and Kruse where they discussed several topics including the screen wall.[181] There was uncertainty as to which screen wall would be installed. [182] Following that meeting, at Kruse's request, Justin sent a proposed schedule for the alternate screen wall.[183]

The City tabled discussions about an amendment to the development agreement during October 2019 because Sanders did not want to take an

[177] Trial Tr. Vol. 1, p. 218, 222, 224-26, Vol. 2, p. 158-60.
[178] Trial Ex. 67, 68 (p. 2-3), 69 (p. 4), 373 (p. 2); Trial Tr. Vol. 1, p. 218-26, Vol. 2, p. 160-61, Vol. 8, p. 141-43. The City's relevance objection to Exhibit 68, *see* Trial Tr. Vol. 2, p. 162-63, is overruled. *See also* Trial Tr. Vol. 1, p. 224-25. Exhibit 68 is admitted.
[179] Trial Ex. 382, 383.
[180] Trial Ex. 382, 383; *see also* Trial Tr. Vol. 1, p. 225-26.
[181] Trial Ex. 384; Trial Tr. Vol. 1, p. 226-27.
[182] Trial Tr. Vol. 1, p. 227-28.
[183] Trial Ex. 324, 385; Trial Tr. Vol. 1, p. 230-31.

amendment to City Council during an election year.[184] According to Brown, the City would continue discussions about an amendment in November 2019.[185]

Meanwhile on October 14, 2019, Sanders sent a letter to Justin and to Bankers Trust's senior vice president and manager of commercial real estate, Jennifer Cooper ("Cooper"),[186] declaring that he could not support the Developers' proposed amendment terms without additional information regarding the financial and design impacts of the proposed design changes.[187] Sanders' letter stated that Justin had "admitted in conversations with City staff that [he] cannot complete the west façade of the Parking Garage by the August 16, 2020 deadline."[188] The Developers disagreed arguing that in September 2019, Justin had told Kruse and Brown that the screen wall (the west façade) could be installed in about 10 months.[189]

Sanders' letter noted that the Developers would fail to close on financing, qualify for issuance of a building permit, or commence construction of the tower

[184] Trial Tr. Vol. 1, p. 230, 233.
[185] Trial Ex. 384; Trial Tr. Vol 1, p. 230.
[186] Trial Tr. Vol. 3, p. 5.
[187] Trial Ex. 34.
[188] Trial Ex. 34 (p. 1).
[189] Trial Ex. 3 (p. 55); Trial Tr. Vol. 1, p. 228-29. Trial Ex. 384; Trial Tr. Vol. 1, p. 234.

and theater by October 31, 2019.[190] The letter, which was titled "Extension of deadlines," stated:

> To allow for continued discussions on the text of the proposed amendment, I agree that in the exercise of the authority delegated to me by the City Council to administer the Agreement, I will refrain from issuing any notice of default for the failure to timely satisfy the obligations listed above before December 18, 2019.[191]

However, Sanders added, "Nothing in this letter is intended to commit the City to any further extensions of the deadlines under the existing Agreement, except as may be hereafter formally approved in writing by the City in the City's sole discretion."[192] At trial both Sanders and Justin understood that this letter was an extension of the Developers' deadlines.[193]

In November 2019 the Developers and the City continued to discuss another amendment.[194] At that time, the proposed extensions were 12 months for the tower and 24 months for the theater (if the tower was started within 12 months), which Sanders and other City staff supported.[195] As of November 26, 2019, the

[190] Trial Ex. 34 (p. 1), 216 (p. 2).
[191] Trial Ex. 34 (p. 1).
[192] Trial Ex. 34.
[193] Trial Tr. Vol. 1, p. 234-35, Vol. 3, p. 207, Vol. 12, p. 121.
[194] Trial Tr. Vol. 1, p. 238.
[195] Trial Ex. 7 (p. 2), 386 (p. 2); Trial Tr. Vol. 1, p. 242-45, Vol. 2, p. 164-66, Vol. 8, p. 158-60.

Developers and City staff were in agreement on a set of proposed terms for an amendment.[196]

On December 1, 2019, the Developers submitted building permit applications for the tower and theater, which the City's permit department director had suggested to them.[197] The goal was to allow the Developers' project to be grandfathered into the building code applicable in 2019.[198] The permit applications for the tower and theater buildings did not contain building plans.[199] Consequently, on December 5, 2019, the City denied the building permits for both the tower and theater.[200]

On December 5, 2019, Justin, Sean, and their attorney, Michael Hayes, had a meeting with Sanders, Brown, Olson-Douglas, and Kruse.[201] Sanders told the Developers that there would not be any timeline extensions without "something significant in return," specifically setting $5 million aside in escrow and forfeiting that amount if the tower did not proceed by the extended deadline.[202] This was the first time in 2019 that any City representative had made such a demand. Justin

[196] Trial Ex. 7; Trial Tr. Vol. 1 p. 242-45.
[197] Trial Ex. 239; Trial Tr. Vol. 1, p. 247-48, Vol. 2, p. 66.
[198] Trial Tr. Vol. 1, p. 247-48.
[199] Trial Exs. 238, 239.
[200] Trial Ex. 239
[201] Trial Ex. 386 (p. 7).
[202] Trial Ex. 386 (p. 7); Trial Tr. Vol. 1, p. 248-49; *see also* Trial Ex. 139 (p. 1); Trial Tr. Vol. 3, p. 177-79.

described this in his contemporaneous notes as a "shakedown."[203] Justin also asserted that the City was responsible for seven months of delay in the project architecture, which Sanders did not want communicated to City Council.[204] Consequently, after that meeting, the Developers had frequent discussions directly with Sanders.[205]

Shortly after the meeting where Sanders demanded $5 million in escrow, SCB released the latest version of the construction documents for the tower.[206] The Developers paid about $800,000 to SCB.[207] Justin communicated this progress to City staff.[208] For the tower alone, the construction drawings were over 700 pages, and the construction specifications were over 3,500 pages.[209]

On December 18, 2019, Sanders sent a letter to Justin[210] in which he referred to the October 31, 2019, deadlines and stated:

> To allow for continued negotiations on an amendment to the existing Agreement, I agreed in my prior letter that I would refrain from issuing a notice of default before December 18, 2019, to allow an

[203] Trial Ex. 386 (p. 7); Trial Tr. Vol. 1, p. 249-51.
[204] Trial Ex. 386 (p. 7); Trial Tr. Vol. 1, p. 250-51.
[205] Trial Ex. 395; Trial Tr. Vol. 1, p. 251, 253, Vol. 8, p. 150-51.
[206] Trial Ex. 316, 423; Trial Tr. Vol. 1, p. 257-58.
[207] Trial Ex. 391 (p. 2); Trial Tr. Vol. 1, p. 257-58, Vol. 2, p. 224-25.
[208] Trial Ex. 422, 423; Trial Tr. Vol. 1, p. 257-59.
[209] Trial Ex. 316; Trial Tr. Vol. 1, p. 259-60.
[210] All of Sanders' letters to Justin from December 2019 through June 2020 were also sent to the Developers' lawyer (Nathan Barber), Cooper, Bankers Trust's lawyer (Jennifer Drake or Kara Sinnard), the Mayor, and Members of City Council.

> amendment to be negotiated for City Council approval at the December 16th meeting. No amendment has been negotiated, and the Developers continue to insist on new terms and design changes that are not acceptable to the City.[211]

Sanders' letter did not specify what "new terms and design changes" he was referring to, and he did not address his recent demand that the Developers place $5 million in escrow.[212]

Sanders' December 18 letter raised concerns with the proposed artistic screen wall and indicated no screen wall should be placed on the garage at this time:

> The City would prefer that no decorative facade be placed on the west wall of the Parking Garage, and that the estimated cost of the screen wall included in the approved Conceptual Development Plan be held in escrow until construction is commenced on the Residential Building, or whatever building might be constructed first on one of the adjoining parcels. A decision could be made at that time regarding the need and appropriate design for the garage screen-wall.[213]

Thus, it was clear to the Developers the City did not want the screen wall installed at that time.[214]

Regarding the status of the Development Agreement, Sanders' letter stated:

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[211] Trial Ex. 142 at 2.
[212] Trial Ex. 142; Trial Tr. Vol. 1, p. 255. Sanders' letter also proposed a new term requiring payment of monthly liquidated damages for reduced parking demand due to Tower construction not being complete. Trial Tr. Vol. 1, p. 256.
[213]Trial Ex. 142 (p. 3).
[214] Trial Tr. Vol. 1, p. 256-57.

> This letter IS NOT a Notice of Default pursuant to Article 10 of the Agreement. This is instead a request to resolve and remedy the existing deficiencies under the Agreement by a negotiated settlement and amendment to the Agreement.[215]

Based on that language, Justin believed that the Developers were not in default and the deadlines in the development agreement were extended.[216] Sanders' letter also stated:

> If the Developers will formally request a continued deferral by the City of further enforcement action to allow negotiations to proceed on an amendment to the existing Agreement consistent with the terms outlined above, I will submit and support that request to the City Council at its next meeting on January 13, 2020. Such a request would be interpreted as demonstrating the Developers' confidence that the Residential Building will be completed on the delayed schedule.[217]

The Developers believed that if they asked for a continued deferral by the City, Sanders would continue to negotiate and to extend the agreement by refraining from attempting to enforce the original deadlines in the development agreement, as he had approved in June 2018 and October 2019 without City Council involvement.[218]

In early January 2020, after Justin mentioned that he was working on a letter that Sanders had requested, Sanders asked to see a draft of the letter before it was

[215] Trial Ex. 142 (p. 2).
[216] Trial Tr. Vol. 1, p. 255-56.
[217] Trial Ex. 142 (p. 3).
[218] Trial Tr. Vol. 2, p. 5-6.

sent.[219] Sanders had never previously requested to see a draft letter from Justin.[220] On January 11, 2020, Justin sent Sanders the draft letter as requested.[221] After explaining the Developers' diligent pursuit and continued investment in the project, Justin's draft letter stated: "This project is incredibly complicated, and like most projects of this size, has experienced delays beyond the developer's control."[222]

Justin's draft letter noted that the Developers were open to discussing ways to address Sanders' concern regarding parking revenue and that the Developers agreed to delay installation of the screen wall, as Sanders requested.[223] The draft letter then requested that the City "continue to not enforce the default provisions on the rest of the project provided that we continue to diligently pursue the project and work collaboratively with the City on an amendment."[224]

On January 15, 2020, Sanders emailed to Justin a revised draft of Justin's letter,[225] and then on January 16, 2020, Sanders emailed to Justin another revised

[219] Trial Tr. Vol. 2, p. 6-7.
[220] Trial Tr. Vol. 2, p. 7; *see also* Trial Tr. Vol. 4, p. 76 (Sanders acknowledging it was unusual for him to make edits to a letter addressed to himself).
[221] Trial Ex. 391; Trial Tr. Vol. 2, p. 7-8.
[222] Trial Ex. 391 (p. 2).
[223] Trial Ex. 391 (p. 2); Trial Tr. Vol. 2, p. 10-11.
[224] Trial Ex. 391 (p. 2).
[225] Trial Ex. 393; Trial Tr. Vol. 2, p. 14-15. The City's objections to Sanders' letters (Exhibits 392 and 393) and the Developers' redline (Exhibit 394), which seemed to be based on relevance, are overruled. The draft letters are probative of

draft of Justin's letter.[226] The revised drafts contained edits to Justin's letter that Sanders would support.[227] Since Sanders did not show his edits, the Developers created a redline to see Sanders' changes in the January 16 version compared to the original draft letter.[228] Several points related to Sanders' revisions were important to the Developers:

- Sanders did not change the sentence about the project having "experienced delays beyond the developer's control."[229]
- Sanders wrote that any decision on the screen wall design "should be delayed until more is known about the timing and design of the adjoining south building. The City's proposal to have Bankers Trust escrow the estimated cost to complete the west screen-wall to the original design until

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whether an extension was granted or owed to the Developers and as discussed more below, whether the development agreement required an opportunity to cure. The evidence shows the City's understanding and practical construction of its own agreement, which is relevant and contrary to its position in this lawsuit. Exhibits 392 and 393 are admitted.

[226] Trial Ex. 392; Trial Tr. Vol. 2, p. 14-15.

[227] Trial Tr. Vol. 2, p. 15-16, 22-23.

[228] Trial Ex. 394. The redline shows that Kruse made the changes to the draft letter. *Id*. (p. 4-5); *see also* Trial Tr. Vol. 2, p. 27-28, Vol. 4, p. 17-18. However, Sanders acknowledged that he would not have emailed the revised drafts without reviewing and approving. Trial Tr. Vol. 4, p. 17-18, 76. And when Kruse testified at trial, she did not explain these revisions. *See generally* Trial Tr. Vol. 8, p. 110-12. In fact, Kruse had no memory of the edits to the draft letter. *Id*.

[229] Trial Ex. 392 (p. 2), 393 (p. 2), 394 (p. 1).

the parties can agree upon a new design for the screen-wall is generally acceptable."[230]

- Sanders' revised draft proposed that the sum of $4 million be set aside from the proceeds of the permanent loan for the Garage and held in escrow until construction of the tower commenced.[231] That was similar to the $5 million escrow that Sanders demanded in December 2019, which the Developers rejected.[232] Up to that point, Sanders had not conveyed that demand in writing, and the revised draft would have made it appear that the Developers proposed the escrow.[233]
- Sanders asked that the Developers request an 18-month extension for the tower.[234] That extension came with a new receivership concept, which was first explained in the January 15 revised draft:

> If a construction contract and loan agreements for construction financing have not been executed by January 15, 2021, operations of the garage will move to a receivership until the earlier of commencement of construction on the tower or April 30, 2022. If construction of the tower commences prior to April 30, 2022, the garage operations will return to Fifth and Walnut Parking, LLC. If construction of the tower is not commenced by April 30, 2022, and such default is not timely remedied as allowed by the default provisions in the agreement, City may

[230] Trial Ex. 392, 393, 394 (p. 2).
[231] Trial Ex. 392 (p. 3).
[232] Trial Tr. Vol. 1, p. 249-50.
[233] Trial Tr. Vol. 2, p. 24-25.
[234] Trial Ex. 392 (p. 3), 393 (p. 3); Trial Tr. Vol. 2, p. 23-24.

> elect to recover ownership of the entire project and property as currently provided by the agreement, with the additional provision that all funds held in any of the escrow accounts shall be released to the City.[235]

The January 16 revised draft from Sanders included an edit to the final sentence of that paragraph:

> If construction of the tower is not commenced by April 30, 2022, and such default is not timely remedied ~~as allowed by the default provisions in the agreement~~, City may elect to recover ownership of the entire project and property as currently provided by the agreement, with the additional provision that all funds held in any of the escrow accounts shall be released to the City.[236]

Justin informed Sanders he would not accept Sanders' revisions and therefore did not send the rewritten letter. Sanders instructed Justin to hold off on sending the original version, and they agreed to continue discussions about an amendment.[237]

A few weeks later, on February 6, 2020, Sanders emailed Justin a draft letter he intended to send, which he said eliminated the need for Justin to send a letter.[238] Sanders noted that he was instructing Brown and Kruse to start drafting an amendment, which led Justin to expect that those documents would come shortly

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[235] Trial Ex. 393 (p. 3).
[236] *Compare* Trial Ex. 392 (p. 3) *with* Trial Ex. 393 (p. 3); *see also* Trial Tr. Vol. 2, p. 26-27.
[237] Trial Tr. Vol. 2, p. 28.
[238] Trial Ex. 145; Trial Tr. Vol. 2, p. 28-29.

and they would work through the draft.[239] Sanders then sent a letter on February 10.[240]

The February 10 letter from Sanders outlined terms for an amendment that would allow additional time for the Developers to perform their obligations.[241] Sanders identified the letter as "negotiated settlement agreement to resolve and remedy the Developers' ongoing noncompliance with their obligations under the Agreement."[242] Similar to earlier letters from Sanders, the February 10 letter also stated:

> This letter IS NOT a Notice of Default pursuant to Article 10 of the Agreement. This is instead a notice that the City will draft an amendment to the Development Agreement for City Council that is intended to operate as a negotiated settlement agreement to resolve and remedy the Developers' ongoing noncompliance with their obligations under the Agreement.[243]

The Developers understood the February 10 letter to mean the City was not declaring a default and therefore, Sanders was in effect continuing to extend the deadlines as he had for months prior.[244]

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[239] Trial Ex. 145 (p. 1); Trial Tr. Vol. 2, p. 29.
[240] Trial Ex. 146.
[241] Trial Ex. 146 (p. 2).
[242] Trial Ex. 146, at 1.
[243] Trial Ex. 146 (p. 1).
[244] Trial Tr. Vol. 2, p. 30.

Sanders closed his February 10 letter by stating that he expected to present an amendment to City Council on or before the March 23, 2020 City Council meeting.[245] He warned that in the event the City and the Developers could not agree on an amendment, "the City may immediately give formal notice of the existing defaults and seek to enforce its legal remedies under the Agreement."[246]

Covid-19 Pandemic and Enforced Delay

On March 11, 2020, the World Health Organization declared Covid-19 a pandemic, followed by declarations of states of emergency at the local, state, and national level.[247] On March 18, 2020, the Developers' lawyer emailed a letter to the City's lawyer and Bankers Trust's lawyer, providing formal notice that the Covid-19 pandemic qualified as an enforced delay under Section 10.4 of the development agreement.[248] The Developers contended that the Covid-19 pandemic had shut down financing for construction of hotels and entertainment properties.[249] Absent the Covid-19 pandemic, the Developers expected to start construction of

[245] Trial Ex. 146 (p. 2).
[246] *Id*.
[247] Trial Exs. 119 at 2020-1054, 576.
[248] Trial Ex. 119; Trial Tr. Vol. 2, p. 33-34.
[249] Trial Ex. 119 (p. 4); Trial Tr. Vol. 2, p. 33-34.

the tower in 2020, approximately four months after they went to market for construction bids and financing.[250]

As of March 10, 2020, prior to the onset of the Covid-19 pandemic, the following items had not been completed by the Developers. They had not completed the architectural design of the tower.[251] They had not submitted a complete permit application necessary to begin the construction of the tower.[252] They did not have a gross maximum price ("GMP") contract for the tower and theater with Weitz since they did not have architectural drawings and specifications which were needed in order for a contractor to compute a reasonable price and begin construction.[253] A GMP contract is a standard industry requirement before a contractor will begin construction.[254] They had not submitted a complete building permit application to the City.[255]

The Developers did not have financing secured for the tower. Likewise, they did not have the needed architectural design that would have provided for the

[250] Trial Tr. Vol. 2, p. 34-35, 66-67, Vol. 3, p. 212-13; *see also* Trial Ex. 221; Trial Tr. Vol. 8, p. 160-61.
[251] Trial Ex. 29, p. 4; Trial Tr. Vol. 1, pp. 259-60; Trial Ex. 1, pp. 12-14; Trial Tr. Vol. 8, p 204:14-24.
[252] Trial Exs. 580 to 582, 31 (Response to Requests for Admission No. 11); Trial Ex. 1, pp. 12-14; Trial Tr. Vol. 8, p. 204:14-24.
[253] Trial Tr. Vol. 1, pp. 64:3-18 and 43:1-20.
[254] Trial Tr. 28:5-19.
[255] Trial Exs. 580-82.

issuance of construction permits. As of that date, the Developers did not have a conceptual design, schematic design, design development, or final construction documents.[256] The Developers had not completed their architect revised architectural drawings related to the design development stage.[257]

By March 10, 2021, the Developers had not obtained commitment for construction financing for the project. They did not have this financing by October 31, 2019, March 10, 2020, June 24, 2020, or September 1, 2020.[258] They never obtained mezzanine financing.[259] They never obtained a commitment from Wanxiang to provide equity investment in the project.[260]

The Developers did not have a commitment from 21c Museum Hotels to occupy the tower by March 11, 2020 or the date of the default notices.[261] The Developers did not have a franchise agreement with Alamo Drafthouse Cinema to occupy the theater on either of those dates.[262] At the end of April 2020 the Developers were still reviewing the second of four stage architectural drawings.[263]

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[256] Trial Tr. Vol. 1, p. 159:12-16.
[257] Trial Tr. Vol, 2, pp. 34:24-25, 35:1-4.
[258] Trial Tr. Vol. 5, p. 40:2-19.
[259] Trial Tr. Vol. 6, pp. 160:18-25, 161:1-25.
[260] Trial Tr. Vol 1, pp. 215:11-15; Trial Ex. 327A at 1.
[261] Trial Exs. 121, 306. Trial Tr. Vol. 2, pp. 40:6-22; Trial Tr. Vol. 6, p. 20-24
[262] Trial Ex. 148.
[263] Trial Tr. Vol. 2, pp. 45:5-25, 46:1-7. Trial Ex. 397.

Likewise, the Developers did not have these tasks completed when the default notices were sent by the City.

On March 24, 2020, Sanders sent a letter responding to the enforced delay notice.[264] Sanders addressed the status of the development agreement: "As with the prior letters, this letter IS NOT a Notice of Default pursuant to Article 10 of the Agreement. However, pursuant to Section 10.6 of the Agreement, the City's delay in giving notice of default is not a waiver of that right, and the City reserves the right to give such notice at any time."[265] Justin interpreted this letter as an extension of the deadlines. Sanders' letter further indicated that in the new amendment the City was drafting, the deadline for commencing construction of the residential building (tower) was being extended.[266] Yet, he refused any extension of time for commencement of construction of the residential building.[267]

Responding to the enforced delay notice, Sanders refused to allow any additional time for commencement of the tower or theater based on the Covid-19 pandemic.[268] Sanders did grant a 3-day extension to complete the garage.[269] He further stated:

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[264] Trial Ex. 120.
[265] Trial Ex. 120, at 1.
[266] Trial Ex. 120, at 2.
[267] *Id.*
[268] Trial Ex. 120 at 2-3; Trial Tr. Vol. 2, p. 37-39.
[269] Trial Ex. 120 at 2.

> As of today, the financial markets have certainly not collapsed. A quick Google search for prime interest rates reveals that commercial lending and interbank lending is at lower rates than a year ago.[270]

However, Sanders' response was not based on any research into the Covid-19 pandemic.[271] Sanders and Justin agreed in their trial testimony that the status of the interest rates at that time were irrelevant to the availability of financing for this project.[272]

On April 6, 2020, Justin emailed a response to Sanders, providing further support for the enforced delay and correcting the City's misplaced reliance on published borrowing rates.[273] Included in this response was a letter from Barry stating "given the current volatility in the capital markets due to the Covid-19 virus, no new construction loans are being considered by lenders at this time. Construction lending aside no financing of any type is available for hospitality or entertainment (movie theaters) properties at this time."[274] Also included was an announcement by 21c that all nine of their properties were temporarily closed,[275] as well as two news articles detailing the unprecedented disruption in the hospitality

[270] Trial Ex. 120 at 2.
[271] Trial Tr. Vol. 3, p. 155-58.
[272] Trial Tr. Vol. 2, p. 37, 40, Vol. 3, p. 155-56; *see also* Trial Ex. 121.
[273] Trial Ex. 121; Trial Tr. Vol. 2, p. 39-40.
[274] Trial Ex. 121 at 4.
[275] Trial Ex. 121 at 5.

and movie theater industries.[276] Neither Sanders nor City staff responded formally to Justin's April 6th email or the information that he supplied.[277]

The City's Proposed Amendment and Further Negotiations

On April 10, 2020, Brown sent the Developers a draft amendment to the development agreement.[278] Brown said that he was retiring the next week and Assistant City Attorney Tom Fisher would be the assigned attorney for this project.[279] Brown also mentioned that the City was expecting a response to the proposed amendment within ten business days.[280] On April 21 and April 30, Justin told Sanders that the Developers were focused on reviewing the construction documents for the tower and then the Developers would focus on Brown's proposed amendment.[281] Sanders agreed the Developers could have more time to review the proposed amendment.[282]

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[276] Trial Ex. 121 (p. 7-12).
[277] Trial Tr. Vol. 2, p. 41, 64; *see also* Trial Ex. 150 (p. 3-4).
[278] Trial Ex. 396. The City's relevance objection to Exhibit 396, *see* Trial Tr. Vol. 2, p. 43, is overruled. The proposed amendment is relevant as it indicates the City's understanding of the meaning of Sections 10.1 and 10.4 of the Development Agreement. Exhibit 396 is admitted.
[279] Trial Ex. 396 (p. 2).
[280] *Id*.
[281] Trial Ex. 397, 398; Trial Tr. Vol 2, p. 44-45. The City's relevance objection to Exhibits 397 and 398 is overruled. These exhibits are relevant in response to Exhibit 149 regarding Sanders' comments about the Developers' actions. *E.g.*, Trial Ex. 149 at 1-2. Exhibits 397 and 398 are admitted.
[282] Trial Ex. 397, 398; Trial Tr. Vol. 2, p. 44-46.

The City's draft amendment included several revisions. One change required escrow commitments from the Developers. As noted previously, there were no escrow commitments in the development agreement. This change was not acceptable to the Developers.[283] The City's proposed amendment established a hard deadline for the Developers to start construction of the tower by April 2022, and if the Covid-19 pandemic did not allow them to move forward, the Developers contend they would have received nothing for building the garage and instead would have paid the City between approximately $850,000 and $1,300,000 out of pocket.[284] Under the City's proposed amendment, the first $4 million from the permanent loan would have been in an escrow fund, and the City was asking for between $2.25 and $2.7 million in an escrow for the screen wall. Because the remaining budget for the screen wall was only about $1.4 million, the Developers would have been required to pay the difference out of pocket, and all the escrowed funds would be forfeited to the City if the tower construction could not start by April 2022.[285]

On May 19, 2020, the Developers discussed their concerns with the proposed amendment with Sanders and then, on May 20, 2020, Justin emailed

[283] Trial Tr. Vol. 2, p. 50-51, Vol. 3, p. 179-80, Vol. 4, p. 83-84.
[284] Trial Tr. Vol. 2, p. 50-53.
[285] Id.; see also Trial Ex. 29, at 4.

Sanders a series of "discussion points" related to the proposed amendment.[286] Justin's email and the discussion points document reiterated that the Covid-19 pandemic had created an "unprecedented force majeure situation."[287]

On May 27, 2020, Sanders sent a letter to Justin, which focused on the new proposed amendment, sent by Brown, and which offered six additional changes to the amendment.[288] The letter closed by stating that the City would issue a notice of default unless certain deadlines were met in relation to the proposed amendment.[289] The May 27 letter was not a notice of default.[290] The letter also indicated that the Developers and Bankers Trust had to agree to an amendment with the City by June 5, 2020.[291]

On June 1, 2020, Justin, on behalf of the Developers contacted Terry Berk of the City of Des Moines. The latter handled building permit applications. Justin informed Berk that as of June 1, 2020, the Developers did not anticipate having final designs for the Tower structure for the purpose of obtaining a permit before November 1, 2020.[292] Justin further informed Berk on June 1, 2020, that the design

[286] Trial Ex. 148.
[287] Trial Ex. 148, at 1-2; *see also* Trial Tr. Vol. 2, p. 53-54.
[288] Trial Ex. 149 (p. 2)
[289] Trial Ex. 149 (p. 2-3).
[290] Trial Tr. Vol. 2, p. 59-60.
[291] Trial Ex. 149, at 2.
[292] Trial Ex. 240.

of the theater building was only about 50% finished.[293] Contrary to Justin's communication, Sean testified at trial that the Tower design plans on June 1, 2020 were sufficient for final submission to obtain a permit.[294]

On June 5, 2020, Justin sent a letter to Sanders, other City representatives including staff, the Mayor, and City Council, Bankers Trust's representatives, and counsel for all parties.[295] The June 5 letter reiterated the diligent efforts of the Developers and the progress made and then specifically addressed Sanders' threats to issue a notice of default.[296] The June 5 letter raised legal issues concerning enforced delay, the Developers' opportunity to cure, and the remedies available to the City.[297] The Developers, however, did not accept the City's proposed amendment.

On June 9, 2020, the Developers, Sanders, and Kruse held a videoconference meeting to discuss scenarios in which the City could financially support the tower in a different way and enable the tower to proceed immediately, despite the Covid-19 pandemic.[298] Sanders proposed that the City provide an additional incentive of $2,000,000 upon issuance of a certificate of completion of the tower, which would

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[293] *Id.*
[294] Trial Tr. Vol. 12, 122-124; Trial Exs. 240 and 583.
[295] Trial Ex. 150.
[296] Trial Ex. 150; Trial Tr. Vol. 2, p. 60-65.
[297] Trial Ex. 150 (p. 3-4).
[298] Trial Ex. 226; Trial Tr. Vol. 2, p. 67-68.

be financing offered by the City.[299] Alternative financing scenarios were the reasons for the June 9 conversation because the Covid-19 pandemic had collapsed traditional financing markets for a project like The Fifth.[300] Neither Sanders nor Kruse disputed the impact of the Covid-19 pandemic on this project during this virtual meeting or afterward.[301] This meeting was a turning point for Sanders. Sanders admitted that because of this meeting on June 9, which focused on the impact of the Covid-19 pandemic, he lost confidence that the Developers would be able to obtain financing for the tower.[302]

On June 19, 2020, Justin, Sean, and Sanders had another phone conversation about the status of the project.[303] Justin recapped the conversation in an email on June 22, 2020, which stated that the Developers' construction loan with Bankers Trust would mature on August 31, 2020, and further stated: "They [BTC] have to date been unwilling to discuss an extension while we are under threat of default by the City."[304] Justin asked Sanders to provide a letter to Bankers Trust stating that the garage was not in default, that the screen wall completion was not required for

[299] Trial Ex. 149 (p. 2); Trial Tr. Vol. 2, p. 13-14, 57-58, Vol. 3, p. 170, Vol. 4, p. 32-33, 81-82.
[300] Trial Tr. Vol. 2, p. 68-69.
[301] Trial Tr. Vol. 2, p. 69.
[302] Trial Tr. Vol. 2, p. 69, Vol. 3, p. 166-69.
[303] Trial Ex. 232 (referring to a phone conversation the previous Friday); Trial Tr. Vol. 2, p. 70, 108-09. *See also* Trial Ex. 118; Trial Tr. Vol. 3, p. 195-98.
[304] Trial Ex. 232.

conversion to permanent financing,[305] and that the City desired that Bankers Trust work with the Developers on a loan extension.[306] The June 22 email further explained that the Developers would seek financing for the garage from non-traditional sources.[307]

Default Notices

On June 24, 2020, two days after Sanders received Justin's email about the loan maturity and alternative financing,[308] Sanders signed three documents titled "Notice of Default, Election of Alternative Remedy, Demand for Payment" (the "Default Notices"), which were delivered promptly to the Developers and Bankers Trust.[309] The Default Notices were addressed to Parking LLC, Tower LLC, and Court LLC and alleged two defaults: (1) Court LLC was in default of Section 6.2(B) of the development agreement for failing to cause construction of the Theater to be commenced by October 31, 2019, and (2) Tower LLC was in default of Section 6.2(C) of the development agreement for failing to cause construction of

[305] This request was not controversial, as Sanders had already agreed that the cost of the screen wall could be placed in escrow and the screen wall could be installed after the garage was complete. *See* Trial Ex. 142, 392, 393.
[306] Trial Ex. 232.
[307] *Id.*; *see also* Trial Tr. Vol. 3, p. 196-97.
[308] Trial Tr. Vol. 4, p. 87-88 (Sanders acknowledging receipt of the email).
[309] Trial Ex. 164, 233; Trial Tr. Vol. 3, p. 47-48.

the tower to be commenced by October 31, 2019.[310] The Default Notices then contained an "Election of Alternate Remedy," which provided:

> The City of Des Moines hereby elects to acquire the Property and all Improvements, as provided in the Development Agreement pursuant to section 10.2(C) as an alternate remedy to the remedies allowed by sections 10(D) and (E) of the Development Agreement, without waiving any of its other available remedies. The City hereby notifies [Parking LLC, Tower LLC, and Court LLC] that each are obligated to convey Property as defined in the Development Agreement to the City in accordance with their respective obligations under section 10.2(C)(2) as agreed to or assumed.[311]

Finally, the Default Notices contained a "Demand for Payment":

> The City of Des Moines hereby declares the Forgivable Economic Development Loan provided pursuant to section 9.3 of the Development Agreement to be due and payable. The City demands repayment of the entire amount of the Forgivable Economic Development Loan within 30 days of the date of this notice, after which default interest shall begin to accrue. The City reserves its rights to pursue any remedies to assist in collection of this debt.[312]

Within days of the mailing of the Default Notices, Bankers Trust issued a default notice for the construction loan and Bankers Trust started charging default interest on the loan.[313] Justin testified the default notices "killed the project":

> A. Well, you can't go talk with potential lenders, capital providers if the City is saying that you're in default. And by these letters

[310] Trial Ex. 233. Parking LLC was not in violation of the development agreement in June 2020 because the deadline for completion of the garage had not passed. Trial Ex. 3; Trial Tr. Vol. 3, p. 171-73.
[311] Trial Ex. 233 (p. 2, 5, 8).
[312] Trial Ex. 233 (p. 3, 6, 9).
[313] Trial Tr. Vol. 2, p. 73; *see also* Trial Ex. 29 (p. 5).

> what they were effectively saying was that we had to give them the garage. They weren't offering to pay for it. We just had to give them the garage and we had to write them a check for $4 million.[314]

The Developers challenged the City's default notices. On June 30, 2020, their lawyer, Todd Lantz, sent a letter to Fisher, challenging the legality of the default notices for several reasons and demanding that the City immediately rescind them.[315] One month later, on July 31, 2020, Fisher sent a letter containing the City's only formal response to Lantz's June 30 letter.[316] In short, the City rebuked the Developers' complaints and refused to rescind the default notices.[317]

On August 6, 2020, Lantz sent a letter to Fisher, reminding the City of the maturity date of the Developers' construction loan for the garage (August 31) and stated:

> [The Default Notices] are preventing Parking LLC from obtaining an extension of the construction loan with BANKERS TRUST or any alternative financing as a bridge to complete the project. In short, the City's Notices of Default, which we believe are erroneous for the reasons stated in prior correspondence, are directly interfering with Parking LLC's ability to complete the Garage, and the Developer's ability to complete the overall project. The City's refusal to rescind those letters solidifies the interference.
>
> Absent an agreement this month between the City, the Developer, and BTC, the construction loan will come due, and BTC will likely

[314] Trial Tr. Vol. 2, p. 73-74.
[315] Trial Ex. 234; Trial Tr. Vol. 2, p. 74.
[316] Trial Ex. 235; Trial Tr. Vol. 2, p. 74-75.
[317] Trial Ex. 235.

> commence foreclosure proceedings. In such an event, the tower, in which millions of dollars have already been invested which is nearly shovel ready, will be dead. At best, the City will inherit a partially constructed garage. Additionally, BTC will likely charge default interest that will be assumed by the City and that would consume much of the savings that our clients hope to realize.
>
> In such a scenario, the Developer will have no choice but to litigate with the City.[318]

The Developers attempted to continue negotiating with the City and Bankers Trust throughout August 2020.[319] The Developers even agreed with the City's proposal to resolve the only sticking point – that is, they would escrow $3.6 million of savings from the Garage – in order to avoid litigation and the death of The Fifth.[320] However, Sanders' response was that the City was "done negotiating."[321] Justin understood the City had no obligation to negotiate a new or

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[318] Trial Ex. 586; *see also* Trial Tr. Vol. 2, p. 83-86.
[319] Trial Tr. Vol. 2, p. 86; *see also* Trial Ex. 29 (p. 6).
[320] Trial Tr. Vol. 2, p. 86-87, 97-98; *see also* Trial Ex. 29 (p. 6-7), 401, 405; Trial Tr. Vol. 2, p. 92-93, Vol. 3, p. 183, Vol. 4, p. 60-62, 91-94. The Developers did not convey their acceptance of the City's demand directly to Sanders, Trial Tr. Vol. 4, p. 62, because Sanders refused to communicate directly with the Developers after he signed the default notices, Trial Tr. Vol. 2, p. 74, Vol. 3, p. 183-84. The City's relevance objection to Exhibit 405, *see* Trial Tr. Vol. 2, p. 94-95, is overruled. Exhibit 404 is admitted.
[321] Trial Tr. Vol. 2, p. 86-87, Vol. 3, p. 184, Vol. 4, p. 94; *see also* Trial Ex. 29 (p. 6-7). There was some uncertainty as to whether Sanders was aware that the Developers had agreed to the escrow proposal, as Sanders initially stated in his deposition that he was not aware of that, but he testified at trial he was informed. Trial Tr. Vol. 2, p. 98, Vol. 3, p. 183. Regardless, the evidence demonstrated that the City decided to terminate negotiations for an amendment even after the Developers showed they were willing to compromise to avoid litigation.

amended agreement with the Developer.[322] Justin and Sean understood that neither Scott Sanders nor a single councilmember, could bind the City to an Agreement. Rather, any agreement or amendment could only be approved by the City Council.[323]

On August 31, 2020, the maturity date of the construction loan, Cooper asked for a conversation with the City's representatives without the Developers involved, and the Developers agreed.[324] Up to that point, the Developers had asked to be included when the City and Bankers Trust communicated about this project.[325] When Cooper requested that conversation, Bankers Trust's decision was to either foreclose on the construction loan or extend the maturity date.[326] Cooper had a telephone conversation that day with Sanders and possibly Kruse or Olson-Douglas.[327] Bankers Trust was able to exercise some patience if the City's issues with the Developers could be resolved, but Sanders said "there was no

[322] Trial Tr. Vol. 2, 203:22-204:4.
[323] Trial Tr. Vol. 2, 222:10-25; Vol. 2, 182:3-13; Trial Ex. 7.
[324] Trial Ex. 167; Trial Tr. Vol. 2, p. 114.
[325] Trial Tr. Vol. 2, p. 113-14, Vol. 8, p. 157.
[326] Trial Ex. 167; Trial Tr. Vol. 3, p. 64.
[327] Trial Ex. 168; Trial Tr. Vol. 3, p. 64-65, 72. There was uncertainty in the trial testimony as to how many members of City staff spoke with Cooper on August 31. Sanders did not remember the conversation. Trial Tr. Vol. 3, p. 194-95. Kruse testified that she had a two-minute conversation with Cooper on her own, but she also speculated that Cooper and Sanders may have had a separate conversation. Trial Tr. Vol. 8, p. 94-97, 163-65.

resolution forthcoming."[328] That statement cemented Bankers Trust's decision to foreclose.[329]

After this conversation, Cooper emailed Bankers Trust senior management to report her conversation with Sanders.[330] In her email, Cooper explained that Sanders told her the City planned to but the garage from the bank, and the City was willing to pay up to the Stipulated Price in the development agreement.[331] Cooper then added that the City's finance manager was already working on bonding, and the City hoped t save $3 million, which was the estimated savings owed to the Developers if they had been allowed to complete the garage.[332]

From Bankers Trust's perspective, the fact that the City of Des Moines would provide a financial backstop to the construction loan for the garage in case the Developers failed to repay the loan was a significant factor in the loan being approved.[333] The construction loan provided to the Developers was not without dissent at Bankers Trust, in fact it had been the only loan where Cooper, received a negative vote.[334] Bankers Trust acknowledged there were a number of delays that

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[328] Trial Tr. Vol. 3, p. 65-66, 70; *see also* Trial Ex. 168.
[329] Trial Tr. Vol. 3, p. 65-66, 72, Vol. 8, p. 168-69; *see also* Trial Ex. 70.
[330] Trial Ex. 168.
[331] Trial Ex. 168; Trial Tr. Vol. 3, p. 69-71.
[332] Trial Ex. 168; Trial Tr. Vol. 3, p. 70-72. This savings was after a deduction for a $1 million claim related to additional expenses for the jump ramps in the garage.
[333] Trial Tr. Vol. 2, p. 100:9-21; Vol. 3, p. 24:1-5.
[334] Trial Tr. Vol. 3, p. 85:11-17.

occurred in the project that involved issues within the Developers' control. They were responsible for getting the design and the conceptual design plans for the project done in a timely manner. Bankers Trust believed there were a number of issues above and beyond the fact the Developers missed their various deadlines to avoid the circumstances that led to their default.[335] These delays in design and the delays in the project due to the actions of the Developers were apparent to Bankers Trust before the advent of Covid in March 2020.[336] From Bankers Trust's viewpoint, the Developers had months to try to cure the issues between it and the City. Bankers Trust learned that the City and the Developers were unable to work those issues out.[337] Knowing these issues between the City and the Developers, Bankers Trust communicated to the Developers that due to the project progressing at a pace behind the requirements of the development agreement they ran a risk of default.[338] In late 2019 or early 2020 Bankers Trust informed the Developers that the development agreement issues had to be resolved to consider permanent financing or an extended loan agreement.[339]

[335] Trial Tr. Vol. 3, p. 58:13-59:10.
[336] Trial Tr. Vol. 3, pp. 81:20-82:15.
[337] Trial Tr. Vol. 3, p. 58:13-59:10.
[338] Trial Tr. Vol. 3, p. 35:15-25.
[339] Trial Tr. Vol. 3, p. 46:23-47:3.

Cooper informed the Developers on May 28, 2020, that Bankers Trust's construction loan was due to mature on September 1, 2020 and that no extension would be offered if the Developers were unable to work through their problems with the City. She informed the Developers that if the City issued a notice of default on the development agreement they would surely follow with a default of the bank's loan agreement.[340] If the City and the Developers reached an informal agreement to extend the deadlines, Bankers Trust would have required an amendment to the development agreement.[341] If the City rescinded the notices of default it issued on June 23, 2020, if there was no amended agreement between the parties Bankers Trust would not have extended the note and its maturity date of September 1, 2020.[342] Conversely, had the City and Developers reached an amended agreement Bankers Trust would have extended the loan.[343]

Bankers Trust's Foreclosure Action

When the City and the Developers were unable to resolve their differences, Bankers Trust refused to extend the construction loan.[344] On September 1, 2020,

[340] Trial Ex. 163.
[341] Trial Tr. Vol. 3, p.80:21-81:l.
[342] Trial Tr. Vol. 3, p. 84:10-14.
[343] Trial Tr. Vol. 3, pp. 51:20-21:1; 52:19-53:8; 60:11-16; 80:9-20.
[344] Trial Tr. Vol. 2, p. 111-12, 115-16.

Bankers Trust sent a notice of default due to nonpayment of the construction loan at maturity.[345]

On September 14, 2020, Bankers Trust filed a petition for money judgment based on the construction loan and foreclosure of Bankers Trust's mortgage for the garage. Bankers Trust immediately notified the City, SCB, and Weitz that it was assuming Parking LLC's rights under its contracts. Bankers Trust sought appointment of a receiver to manage the completion of the garage, which at that time was anticipated in December 2020, just three months after the foreclosure petition was filed.[346] After Bankers Trust's initial filings, the Developers were excluded from the management and coordination of the garage construction.[347] The court appointed a receiver, Christensen Development 1, LLC (the "Receiver"), pursuant to an order dated October 1, 2020.

City Purchase of the Garage

Just as Sanders forecasted to Cooper on August 31, 2020, City staff expected that the City would purchase the garage after Bankers Trust's foreclosure, although

[345] Trial Ex. 171; Trial Tr. Vol. 2, p. 115, Vol. 3, p. 50, 91.
[346] Motion for Appointment of Receiver (Polk Cty Dist. Ct. Sep. 14, 2020) (Dkt. No. D0006).
[347] Trial Ex. 92 (p. 4).

City Council approval was required.[348] After Bankers Trust assumed Parking LLC's rights and the Receiver was appointed, the City was involved in decision making to complete the Garage.[349] Bankers Trust wanted the City to make decisions about how to complete the garage because, as Cooper put it, "it was their garage, their money."[350] The garage was substantially complete within a few months of the August 2020 completion target, although the screen wall was installed later.[351]

In January 2021, the City formally agreed to purchase the garage parcel (including the completed garage) from the Receiver, subject to court approval. The City's purchase price was the full amount of the construction debt (approximately $44 million), which was substantially above the fair market value of the garage.[352] According to Justin, this was not surprising because "the City was on the hook for that one way or another," meaning the City was obligated to indemnify the Developers for the construction debt even without the garage

[348] Trial Ex. 70, 168, 229; Trial Tr. Vol. 3, p. 69-72, 101, Vol. 8, p. 166-68; *see also* Trial Ex. 174; Trial Tr. Vol. 3, p. 74-75. The City's relevance objection to Exhibit 174 is overruled. Exhibit 174 is admitted.
[349] Trial Tr. Vol. 3, p. 73-74, Vol. 4, p. 111-19, 151; *see also* Trial Ex. 92 (p. 4).
[350] Trial Tr. Vol. 3, p. 74-75.
[351] Trial Tr. Vol. 3, p. 36-37, Vol. 4, p. 126-27, Vol. 7, p. 38-39, 44-45; *see also* Trial Ex. 237, 329A (p. 14).
[352] Trial Tr. Vol. 2, p. 118, Vol. 3, p. 92-93, 102.

purchase.[353] As a consequence of the City's purchase of the garage, the Developers' debt to Bankers Trust was extinguished, and Bankers Trust dismissed its petition to foreclose.[354]

CONCLUSIONS OF LAW

The burden of proof for all fact issues in this case is measured by the test of preponderance of the evidence.[355] "A preponderance of the evidence is the evidence 'that is more convincing than opposing evidence' or 'more likely true than not true.' It is evidence superior in weight, influence, or force."[356]

Count I – Breach of Contract

The parties agree that the Amended and Restated Urban Renewal Agreement for Sale of Land for Private Redevelopment (the "Development Agreement")[357] is a valid and enforceable contract and the operative agreement here.[358] Both the

[353] Trial Tr. Vol. 2, p. 117-20, Vol. 3, p. 103-04.
[354] Trial Tr. Vol. 2, p. 119; *see also* Dismissal Without Prejudice of Bankers Trust Company's petition for Money Judgment, Foreclosure, of Real Estate Mortgage, Partial Collateral Assignment of Development Agreement, Assignment of Construction Contract, and Assignment of Design Contract (Polk Cty Dist. Ct. Mar. 10, 2021) (Dkt. No. D0073).
[355] Iowa R. App. P. 6.904(3)(f).
[356] *Martinek v. Belmond-Klemme Cmty. Sch. Dist.*, 772 N.W.2d 758, 761 (Iowa 2009).
[357] Trial Ex. 3.
[358] *E.g.*, Trial Tr. Vol. 2, p. 222.

Developers and the City contend the other breached the development agreement. To establish a claim for breach of contract, either party must show the following:

> (1) the existence of a contract; (2) the terms and conditions of the contract; (3) that it has performed all the terms and conditions required under the contract; (4) the defendant's breach of the contract in some particular way; and (5) that plaintiff has suffered damages as a result of the breach.[359]

Summarizing generally the claims of the parties, the Developers allege that the City breached the development agreement in multiple particulars.[360] In essence, the Developers allege that the City's sending of the default notices, and its refusal to rescind them (along with an illegal election of remedies), derailed The Fifth development and set in motion the events that deprived the Developers of the benefit of what they built and destroyed what they were poised to build.

The City responds that the Developers were the ones who breached the development agreement because they failed to obtain a building permit, secure necessary financing, and commence construction of the tower and theater by October 31, 2019. The Developers never contested that the tower and theater were not permitted, financed, or under construction as of October 31, 2019.[361] The

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[359] *Iowa Arboretum, Inc. v. Iowa 4-H Found.*, 886 N.W.2d 695, 706 (Iowa 2016) (internal citations omitted).
[360] *See also* 5th and Walnut Parking LLC, 5th and Walnut Tower LLC, 5th and Court LLC, Justin Mandelbaum, and Sean Mandelbaum's Cross-Claim Against City of Des Moines, at 20-21 (Polk Cty Dist. Ct. Sp. 23, 2020) (Dkt. No. D0011).
[361] Trial Tr. Vol. 2, p. 221-24.

fighting issue in this case from the perspective of the Developers is whether the City was allowed under the contract to declare a default when it did, in the manner it did, and to demand a special remedy to obtain all of the Property. The City contends they proceeded properly because the Developers breached the agreement by not having permitting, financing, or construction for the tower and theater as of October 31, 2019.

The liability issues turn on the interpretation of the development agreement. The court acknowledges and sets forth the following rules of contract interpretation which will guide it:

> The cardinal rule of contract interpretation is to determine what the intent of the parties was at the time they entered into the contract. *Walsh v. Nelson*, 622 N.W.2d 499, 503 (Iowa 2001). "Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight." *Fausel v. JRJ Enters., Inc*., 603 N.W.2d 612, 618 (Iowa 1999) (quoting Restatement (Second) of Contracts § 202(1) (1979)). Another relevant rule of contract interpretation requires that "[w]herever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other and with any relevant course of performance, course of dealing, or usage of trade." Restatement (Second) of Contracts § 202(5) (1979).
>
> These rules of interpretation are general in character and only serve as guides in the process of interpretation. Restatement (Second) of Contracts § 202 cmt. a (1979). The rules do not depend on a determination that there is an ambiguity, but we use them to determine "what meanings are reasonably possible as well as in choosing among possible meanings." *Fausel*, 603 N.W.2d at 618 (quoting Restatement (Second) of Contracts § 202 cmt. a (1979)).

Long ago we abandoned the rule that extrinsic evidence cannot change the plain meaning of a contract. *Hamilton v. Wosepka*, 154 N.W.2d 164, 171–72 (Iowa 1967). We now recognize the rule in the Restatement (Second) of Contracts that states the meaning of a contract "can almost never be plain except in a context." *Id.*; Restatement (Second) of Contracts § 212 cmt. b (1979). Accordingly,

> "[a]ny determination of meaning or ambiguity should only be made in the light of relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties. But after the transaction has been shown in all its length and breadth, the words of an integrated agreement remain the most important evidence of intention."

Fausel, 603 N.W.2d at 618 (quoting Restatement (Second) of Contracts § 212 cmt. b (1979)) (emphasis in original).[362]

Contract interpretation can involve somewhat of a paradox. Extrinsic evidence may be used to interpret an integrated agreement but not to alter its terms. As a practical matter, this means that an agreement first needs to be examined by the court in light of relevant extrinsic evidence before such evidence is turned away on the ground that it contradicts the agreement's terms. This approach sounds counterintuitive, but it is supported by our caselaw and the Restatement (Second) of Contracts. Context may not be "king," *Des Moines Flying Serv., Inc. v. Aerial Servs. Inc.*, 880 N.W.2d 212, 221 (Iowa 2016) (using that expression with regard to statutory interpretation), but it is at least part of the royal family, and a court should not ignore context before it determines the unambiguous meaning of an agreement.[363]

It was the function of the trial court to ascertain the true intent and meaning of the parties to the contract as revealed by the language used there; 'not by showing that the parties meant something other than

[362] *Pillsbury Co. v. Wells Dairy, Inc.,* 752 N.W.2d 430, 436 (Iowa 2008).
[363] *U.S. Bank v. Bittner*, 986 N.W.2d 840, 842 (Iowa 2023).

> what they said, but by showing what they meant by what they said.' *Central Heights Imp. Co. v. Memorial Parks, Inc*., 40 Cal. App. 2d 591, 105 P.2d 596, 605, and citations. It is not what the parties meant to say but what they meant by what they did say. *Bankers Trust Co. v. Allen*, 257 Iowa 938, 944, 135 N.W.2d 607, 610-611.[364]
>
> We construe a contract in its entirety by considering all of its pertinent provisions. *Dickson v. Hubbell Realty Co*., 567 N.W.2d 427, 430 (Iowa 1997). We assume no part of the contract is superfluous or of no effect and a construction giving meaning to all its clauses is preferred. *Kerndt v. Rolling Hills Nat'l Bank*, 558 N.W.2d 410, 416 (Iowa 1997).[365]

Enforced Delay

A contested issue in this case is the effect of Section 10.4 of the development agreement, which states:

> Sec. 10.4. Enforced Delay in Performance. Except for an obligation to pay money to the other pursuant to this Agreement, neither City nor Developer shall be considered in breach of, or in default of, its obligations with respect to this Agreement, or any portion thereof, including redevelopment, or the beginning and completion of construction of the Improvements, in the event of an enforced delay in the performance of such obligations due to unforeseeable causes beyond its control and without its fault or negligence, including, but not restricted to, temporary injunctions, acts of God, acts of the public enemy, war or terrorism, acts of government (provided City may not rely upon its own acts as reason for delay), acts of the other party, fires, floods, epidemics, quarantine restrictions, strikes or other labor disruptions, freight embargoes, economic or financial market collapse causing a national loss of available financing upon commercially reasonable terms, and unusually severe weather or delays of subcontractors due to such causes; it being the purpose and intent of this provision that in the event of the occurrence of any such enforced

[364] *Hamilton v. Wosepka,* 154 N.W.2d 164, 167 (Iowa 1967).
[365] *Est. of Pearson ex rel. Latta v. Interstate Power & Light Co.,* 700 N.W.2d 333, 343 (Iowa 2005).

> delay, the time or times for performance of the obligations of City or of Developer, as the case may be, shall be extended for the period of the enforced delay: Provided, that the party seeking the benefit of the provisions of this article shall: i) within twenty (20) days after the beginning of any such enforced delay, have notified the other party thereof in writing, and of the cause or causes thereof, and setting forth the anticipated extension required as a result of the enforced delay; and, ii) exercise reasonable diligence to mitigate the event and the impact thereof.[366]

This is a force majeure clause.

> "A 'force-majeure clause' is a clause 'allocating the risk if performance becomes impossible or impracticable as a result of an event or effect that the parties could not have anticipated or controlled.' *Id.* A force-majeure clause is not intended to shield a party from the normal risks associated with an agreement. 30 Richard A. Lord, Williston on Contracts § 77:6, at 299 (4th ed. 2004).[367]

It is a clause commonly found in construction contracts. Here the City originally drafted this provision,[368] and it was common to find this language in City development agreements.[369]

The court finds the Covid-19 pandemic created a period of enforced delay. The evidence proved that once the Covid-19 pandemic was declared the

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[366] Trial Ex. 3 (p. 56).
[367] Pillsbury Co. v. Wells Dairy, Inc., 752 N.W.2d 430, 440 (Iowa 2008).
[368] Trial Ex. 357 (p. 39); Trial Tr. Vol. 1, p. 103.
[369] *E.g.*, Trial Ex. 349 (p. 4), 350 (p. 4-5), 351 (p. 4), 353 (p. 4-5), 354 (p. 4), 355 (p. 5), 356 (p. 4-5); Trial Tr. Vol. 3, p. 161. The City's objection on relevance ground is overruled. These agreements are relevant for the reasons stated by the Developers' counsel on the record. Trial Tr. Vol. 3, p. 162-64. Exhibits 349, 350, 351, 353, 354, 355, and 356 are admitted.

Developers' ability to obtain financing for the tower and theater was adversely impacted.[370] While initially the City questioned whether the pandemic negatively impacted the development, at trial no witness questioned the impact of the Covid-19 pandemic on The Fifth. Likewise, the parties agree that the pandemic was declared on March 11, 2020.

The Covid-19 pandemic was an unforeseeable cause of delay beyond the Developers' control and without their fault or negligence. The City does not dispute the Developers' evidence of enforced delay. Instead, the City's position is that the enforced delay does not matter because the Developers missed the October 31, 2019, deadline before the Covid-19 pandemic. However, the City never declared a default prior to March 11, 2020, the onset of the pandemic. The evidence establishes the City did not declare a default until June 24, 2020.

The City's position on the applicability of the enforced delay clause is predicated on its claim that a default occurred before March 11, 2020. The City's default notices specified the alleged default was Tower LLC's and Court LLC's failure to commence construction of the tower and theater, respectively, by October 31, 2019.[371] The Developers' contention is that there can be no default

[370] Trial Ex. 106, 119 (p. 3-4), 121 (p. 2-12), 148 (p. 1), 150 (p. 3-4), 232; Trial Tr. Vol. 2, p. 33-42, 68-69, Vol. 3, p. 131, Vol. 4, p. 139-40, Vol. 5, p. 32-36, Vol. 8, p. 170, Vol. 9, p. 188-90, 205-06, Vol. 10, p. 97-99, 101, Vol. 12, p. 143.
[371] Trial Ex. 233 (p. 2, 5, 8).

under the development agreement until it is declared. At trial, the City agreed. Sanders testified that a default exists only when it is declared.

> Q. In a situation where there has not been a notice of default issued but a deadline in an agreement has passed, there's no default at that time; would you agree?
>
> [*Witness asks for question to be repeated, and court reporter read it back*.]
>
> A. Yes.
>
> Q. So here the City of Des Moines issued, and you signed, notices of default on June 24, 2020?
>
> A. That is my recollection, yes.
>
> * * *
>
> Q. Right. There were three different notices to three different LLCs. Is that what you're – You're nodding your head?
>
> A. Yes.
>
> Q. Okay. But aside from those three, that was the one instance in which the City issued a notice of default?
>
> A. Yes.
>
> Q. So, until that point the developers here were not in default; you would agree?
>
> A. Yes.[372]

[372] Trial Tr. Vol. 3, p. 142-43; *see also* Trial Tr. Vol. 2, p. 175, Vol. 4, p. 100-01, Vol. 9, p. 129-30, Vol. 12, p. 199.

This testimony is also consistent with the City's actions in the summer of 2018, when two deadlines related to the garage passed but there was no default because the City did not declare one.[373]

Sander's October 14, 2019, letter suggests that he was willing to extend the October 31, 2019 deadlines if an agreement could be reached. He also noted that he was not declaring a default at that time.[374] Sanders continued to inform the Developers he was willing to work towards a continuation of the deadlines when he refrained from issuing a notice of default before December 18, 2019.[375]

After December 2019, the parties continued to negotiate with no formal default notice being issued. The negotiations between Sanders and Justin continued from December 2019 through May 2020.[376] Sanders actions and his statements indicate he had the authority to grant such extensions of these deadlines based

[373] Trial Tr. Vol. 1, p. 208-10.
[374] Trial Ex. 34 (p. 1); Trial Tr. Vol. 3, p. 207-08.
[375] This action was an exercise of Sanders' authority to administer the Development Agreement, which the City Council expressly delegated to the City Manager. Trial Ex. 34 (p. 1), 63 (p. 5), 65 (p. 6); Trial Tr. Vol. 3, p. 203-04, 206-07.
[376] Trial Tr. Vol. 1, p. 255-56, Vol. 2, p. 19-20. Tellingly, in the three days that Sanders testified during trial, he *never* refuted Justin's testimony that the deadlines were effectively extended during their negotiations. At most, Sanders distinguished between a "formal extension" and other extensions in communications, Trial Tr. Vol. 4, p. 99-100, but Sanders unequivocally agreed that he had the authority to extend deadlines on a project.

upon his ability to administer and enforce the agreement.[377] The negotiations ended on June 24, 2020, the first date the City declared the Developers to be in default.

This evidence establishes that from the City's perspective a missed deadline is not automatically a default for the purpose of exercising a contractual remedy.[378] The default must first be declared. The evidence established that Sanders had the authority as the administrator of the development agreement to declare a default and it was not done until June 24, 2020.[379] The effect of not declaring a default when the construction of the tower and theater did not commence on October 31, 2019, was a practical extension of that deadline. Accordingly, the court finds June 24, 2020, is the first time the City declared a default. On this date the enforced delay clause was in force evidenced by the declaration of emergency of March 11, 2020 caused by Covid-19.

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[377] Trial Ex. 129 (p. 2); Trial Tr. Vol. 1, p. 208-09, Vol. 3, p. 202-08.
[378] *Id*. Angie Pfannkuch provided similar testimony about a project she was helping to develop at 2525 Grand Avenue – that is, a deadline in the development agreement passed but there was no default in the absence of a notice from the City. Trial Tr. Vol. 4, p. 140-41.
[379] *See generally City* of Des Moines' Reply to Plaintiffs' Proposed Order, at 13 (Polk Cty Dist. Ct. Jul. 19, 2023) (Dkt. No. D0716) ("In informing the Plaintiffs that they had effectively defaulted but that he would not issue a formal declaration of default, Sanders was merely refraining from doing something that he had the legal right to do and give the Plaintiffs a further opportunity to perform before such right was exercised.").

Here, the City takes the position that it could reject and ignore the enforced delay resulting from the Covid-19 pandemic because the Developers defaulted on the original deadline to commence construction of the tower and theater by October 31, 2019 which was prior to March 11, 2020. The court concludes that the City's position misconstrues Section 10.4 of the Development Agreement.

The first sentence of Section 10.4 is unambiguous – it protects both parties from being

> considered in breach of, or in default of, its obligations with respect to this Agreement, or any portion thereof, including redevelopment, or the beginning and completion of construction of the Improvements, in the event of an enforced delay in the performance of such obligations due to unforeseeable causes beyond its control and without its fault or negligence.[380]

By its plain language, Section 10.4 provides protection to each party from being declared in default or in breach of the development agreement when there is a qualifying enforced delay in performance. Sanders confirmed this same understanding in his trial testimony.[381]

As noted earlier, Section 10.4 is a force majeure provision.[382] The language in the parties' agreement controls the interpretation of the provision:

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[380] Trial Ex. 3 (p. 56).
[381] Trial Tr. Vol. 3, p. 150-51.
[382] *See Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 440 (Iowa 2008) (defining a force majeure clause). *See also* 30 Williston on Contracts § 77:31 (4th ed.) ("A 'force majeure' is an event or effect that can be neither anticipated nor

> Historically, the theory of force majeure embodied the concept that parties could be relieved of performance of their contractual obligations when the performance was prevented by causes beyond their control, such as an act of God. *Sun Operating Ltd. P'ship v. Holt,* 984 S.W.2d 277, 282 (Tex.App.1998). However, much of the theory's "historic underpinnings have fallen by the wayside" with the result that force majeure is now "little more than a descriptive phrase without much inherent substance." *Id.* at 283. Indeed, the scope and effect of a force majeure clause depends on the specific contract language, and not on any traditional definition of the term. In other words, when the parties have defined the nature of force majeure in their agreement, that nature dictates the application, effect, and scope of force majeure with regard to that agreement and those parties, and reviewing courts are not at liberty to rewrite the contract or interpret it in a manner which the parties never intended. *Sun,* 984 S.W.2d at 283. The party seeking to excuse its performance under a force majeure clause bears the burden of proof of establishing that defense. *Va. Power,* 297 S.W.3d at 402.[383]

"When the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure and not on any traditional definition of the term."[384]

Determining whether the enforced delay provision excuses the Developers' performance the court must also consider another provision of the development agreement. That provision is section 10.3. That provision provides:

> 1. City and Developer shall have the right to institute such actions or proceedings as each may deem desirable for effectuating the

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controlled; especially an unexpected event that prevents someone from doing or completing something that a person had agreed or officially planned to do.").

[383] *Specialty Foods of Indiana, Inc. v. City of S. Bend*, 997 N.E.2d 23, 27 (Ind. Ct. App. 2013).

[384] 30 Williston on Contracts § 77:31 (4th ed.).

> purposes of this article. Provided, that any delay by City or Developer in instituting or prosecuting any such actions or proceedings or otherwise asserting its rights shall not operate as a waiver of such rights or to deprive either City or Developer of or limit such rights in any way; it being the intent of this provision that City and Developer should not be constrained to exercise such remedies at a time when such party may still hope otherwise to resolve the problems created by the default involved so as to avoid the risk of being deprived of or limited in the exercise of such remedies because of concepts of waiver, laches, or otherwise. No waiver in fact made by City or Developer with respect to any specific default by the other party shall be considered or treated as a waiver of the rights of City or Developer with respect to any other defaults by the other parties or with respect to the particular default, as the case may be, except to the extent specifically waived in writing by City or Developer.[385]

The City argues that the Developers cannot rely on the enforced delay provision because "the *only* reason the *force majeure* clause can come into play is that the Plaintiffs did not *'commence construction'* of the Tower or Theater by October 31, 2019."[386] This delay was caused by the Developers' fault or negligence not the pandemic.

The Developers argue that while they did not commence construction by October 31, 2019, the City never declared a default. Instead, on multiple occasions after that date the City indicated it was not declaring a default. The Developers

[385] Tr. Ex. 3, Sec. 10.3, at 56.
[386] City of Des Moines' Proposed Statements of Fact, Conclusions of Law and Order, at 48 (Polk Cty Dist. Ct. June 19, 2023) (Dkt. No. D0712).

argue the court must consider not only sections 10.3 and 10.4 but also section 10.1(B) & (C) which requires that before a breach can be declared there must first be a declaration of a default and an opportunity to cure. In this instance the City chose not to declare a default when it had the right to do so. But the development agreement prohibited the City from declaring a default and/or a breach once the enforced delay provision became effective.

The court finds that the enforced delay provision did prevent the City from sending a notice of default on June 24, 2020. The court finds the enforce delay began when the Covid pandemic was declared in March 2020. The court finds the language of Section 10.3 unambiguous, and the court's determination is based upon a reading of the language in the development agreement.

While the Developers did not commence construction of the tower and theater by October 31, 2019, they were in default of that provision as the term "default" is understood to be; a failure to perform a duty or fulfill an obligation.[387] However, the language of the enforced delay must be construed based upon the language utilized by the parties.

Here the parties agreed that if there was an enforced delay neither party "shall be considered in breach of, or in default of, its obligations with respect to

[387] Black's Law Dictionary (5th Ed. 1979).

this Agreement."[388] Sanders' testimony illustrated that the City did not believe a party could be in default until the default was declared. Prior to March 11, 2020, the City never declared the Developers in default. Once the Developers invoked the enforced delay provision, a party could not be considered in default. While the Developers did not commence construction by October 31, 2019, the City never declared them in default, and they could not do so once the enforced delay was invoked.

This conclusion is not contrary or inconsistent with Section 10.3 because the happening of an event under a force majeure clause acts as an affirmative defense to performance.[389] Here the City did not declare the Developers in default prior to March 11, 2020. They could have done so up to March 10, 2020, and Section 10.3 would have protected the City's right to do so since Section 10.3 prevented the Developers from arguing the City waived their rights to declare a default on November 1, 2019. However, once the enforced delay provision becomes effective the City loses that opportunity for at least the duration of the enforced delay.[390] The

[388] Trial Exhibit 3, §10.4 at 56.
[389] 30 Williston on Contracts, § 77.31 (4th ed.).
[390] Trial Exhibit 3, at §10.4 at 56 ("it being the purpose and intent of this provision that in the event of the occurrence of any such enforced delay, the time or times for performance of the obligations of City or of Developer, . . . shall be extended for the period of the enforced delay.").

notices of default should not have been issued and their issuance was a breach of Section 10.4.

Even if the City could send the notices of default that does not preclude the court finding the City in breach of the development agreement. The Agreement provides that once a party provides a notice of default the defaulting party has a right to cure the default and be given a reasonable time to cure.[391] Here the City failed to provide a reasonable time to cure after it declared a default. When a contracting party is not given the opportunity to cure their default pursuant to the parties' contract, the default cannot be declared a breach of contract.[392]

The City's declaration of a breach prior to giving the Developers an opportunity to cure was also a breach of the development agreement. First, the City could not declare a breach without giving the Developers an opportunity to cure. Second, the enforced delay provision was invoked at the time the City declared a breach and that provision precludes a declaration of a breach at that time. Thus, the City's election of the remedy under Section 10.2(C)(2) was a violation of the development agreement. The language of Section 10.4 allows the court to reach these conclusions. The actions of the parties also demonstrated that a party had a right to cure before any breach could be declared.

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[391] Trial Exhibit 3, at 52, Sections 10.1(B) and (C).
[392] *Vicorp Rests., Inc. v. Bader,* 590 N.W.2d 518, 524 (Iowa 1999).

In his trial testimony, Sanders admitted that the Developers were entitled to an opportunity to cure a default under Section 10.1(B), including a default for failing to start construction of the tower.[393] On January 15, 2020, Sanders sent Justin a draft letter (intending for Justin to send the letter to Sanders), in which Sanders proposed a new deadline to commence construction. Sanders wrote: "If construction of the tower is not commenced by April 30, 2022, *and such default is not timely remedied as allowed by the default provisions in the agreement*, City may elect to recover ownership of the entire project and property as currently provided by the agreement..."[394] Kruse and Brown also reviewed that letter.[395] The emphasized language demonstrates initially the City's understanding that the development agreement gave the Developers the right to cure a default – in this instance the failure to commence construction of the tower.[396] The court also notes

[393] Trial Tr. Vol. 3, p. 144, 148-49. Trial Tr. Vol. 3, p. 141, Vol. 4, p. 66-67. Trial Tr. Vol. 3, p. 219-20.
[394] Trial Ex. 393 (p. 3) (emphasis added). Trial Exs. 392 at 3, 393 at 3; Trial Tr. Vol. 2, p. 14-15.
[395] Trial Tr. Vol. 8, p. 112.
[396] Sanders had no explanation or recollection of what he wrote in the draft letter, although he would have intended the letter to be accurate and truthful. Trial Tr. Vol. 3, p. 145-48. Kruse was deeply involved in drafting and reviewing each iteration of the development agreement, and it appears she authored the edits to the draft letter at Sanders' request, but Kruse also had no explanation or recollection of the draft letters. Trial Tr. Vol. 8, p. 65, 110-13.

that Sanders' revised letter of January 16, 2022 removed this emphasized language further indicating Sanders understood its effect.[397]

In addition, during the March 24, 2017 workshop with City Council, which was attended by Justin, Sanders, Kruse, and Brown among others, Councilwoman Christine Hensley asked directly if the Developers would have a period of time to cure the issue if they were in default.[398] Brown replied that the Developers would have an opportunity to cure if they are in default for failure to build the tower.[399] Further, Brown revised the document containing Bankers Trust's assignment of the development agreement to explicitly provide Bankers Trust with an opportunity to cure a default by the Developers. He explained that his edit was meant to "acknowledge that the Bank has the same rights as the Developer upon timely commencing action to cure a default, shall be allowed to diligently [pursue] such cure to completion."[400] Brown explained that his language gave Bankers Trust additional days "to act before the City Manager exercises his right to call an un-

[397] Trial Ex. 392 (p. 3), 393 (p. 3); Trial Tr. Vol. 2, p. 14-15.
[398] Trial Ex. 598 (recording at 1:01:45); Trial Tr. Vol. 8, p. 105-07.
[399] Trial Ex. 598 (recording at 1:01:45); Trial Tr. Vol. 8, p. 105-08. Brown answered this question in the context of Blackbird's commitment to build a Tower, but the default and remedies provisions were the same for the Developers. Trial Ex. 47 (p. 52-53).
[400] Trial Ex. 377 (p. 9); *see also* Trial Ex. 426 (p. 8-9).

remedied default a breach of the Development Agreement."[401] Brown's comments make sense only if the development agreement required an opportunity to cure.[402]

Additionally, the failure to commence construction of the tower and theater by October 31, 2029 was a non-monetary default. Under Section 10.1(B), the opportunity to cure is 45 days unless the default reasonably requires more than 45 days to cure. More than 45 days was needed to commence construction of the tower and theater. The evidence demonstrated it would take several months to complete the necessary permitting, financing, and contracting stages.[403] The City presented no evidence that the Developers reasonably could have commenced construction of the tower or theater (i.e., cured the identified default) within 45 days. As such, Section 10.1(B) provided that the default would not constitute a breach of the development agreement if the Developers "commence[d] to cure the default promptly upon receipt of the notice of the default and with due diligence thereafter continuously prosecute[d] such cure to completion."[404]

The court concludes that even though the City failed to give the Developers an opportunity to cure and refused to acknowledge that the development agreement

[401] Trial Ex. 377 (p. 1).
[402] Trial Tr. Vol. 1, p. 204-07.
[403] Trial Tr. Vol. 2, p. 34-35, Vol. 3, p. 212-13; *see also* Trial Ex. 221; Trial Tr. Vol. 8, p. 160-61.
[404] Trial Ex. 3 (p. 52).

provided the Developers that right, the Developers continued to pursue avenues that would facilitate the construction and completion of the project.

Summary of Contractual Liability

The Developers have proven by a preponderance of evidence that the City's default notices declaring the Developers in default of its obligations under the Agreement on June 24, 2020, was a breach of Section 10.4 by declaring a default after the enforced delay provision was invoked.

Likewise, the Developers proved by a preponderance of the evidence that the City's declaration in the default notices that the Developers breached the development agreement was a breach of Section 10.4 by declaring a breach after the enforced delay provision was invoked.

Additionally, the Developers proved by a preponderance of the evidence that the City breached the development agreement by declaring a breach of the development agreement prior to giving the Developers an opportunity to cure the default. The City was warned of these contractual problems before[405] it issued the default notices and immediately afterward,[406] but the City refused to change course. The City's exercise of the remedy under Section 10.2(C) was a breach of the Development Agreement since that remedy could not be exercised until the

[405] Trial Ex. 150.
[406] Trial Ex. 234.

Developers were in breach of the agreement. This remedy could not be exercised until the Developers were "in breach of their individual obligation to cause construction of their respective Buildings to be timely commenced pursuant to Section 6.2."[407] The court finds that the Developers proved the elements of breach of contract against the City in count I of their cross-petition.

Count II - Tortious Interference With Parking LLC'S Construction Loan

In count II of their cross-petition against the City the Developers alleged that the City tortiously interfered with their existing contract. The elements of tortious interference with an existing business or contractual relationship are the following:

> (1) plaintiff had a contract with a third-party; (2) defendant knew of the contract; (3) defendant intentionally and improperly interfered with the contract; (4) the interference caused the third-party not to perform or made performance more burdensome or expensive; and (5) damage to the plaintiff resulted.[408]

For tortious interference to exist, a party's interference must be intentional and improper.[409] However, a party's "intent to interfere with a contract does not make the interference improper."[410] To determine whether a party's conduct was improper, a court may consider the following factors: (1) nature of the conduct; (2)

[407] Trial Exhibit 3, at 53, Sec. 10.2(C).
[408] *Green v. Racing Ass'n of Cent. Iowa*, 713 N.W.2d 234, 243 (Iowa 2006).
[409] *Id.* at 244.
[410] *Id.*

defendant's motive; (3) interests of the party with which conduct interferes; (4) defendant's interests to be advanced by conduct; (5) "social interests in protecting the freedom of action of the [d]efendant and the contractual interests of the other party;" (6) proximity of the defendant's conduct to the interference; (7) parties' relationship.[411] A defendant's conduct is also "not improper if it was merely a consequence of actions taken for a purpose other than to interfere with a contract."[412] Accordingly, "a party does not improperly interfere with another's contract by exercising its own legal rights in protection of its own financial interests."[413]

The Developers had a construction loan agreement with Bankers Trust, and the City knew about the construction loan. Bankers Trust did declare Parking LLC in default after the Developers and the City could not reach an agreement during negotiations on another amended development agreement. Bankers Trust had the legal right to foreclose the loan. As noted above, the court found the City breached the development agreement. Their breach was their erroneous interpretation of their rights under the development agreement. The court finds that the City's

[411] *Id.*
[412] *Id.*
[413] *Berger v. Cas' Feed Store, Inc.*, 543 N.W.2d 597, 599 (Iowa 1996).

notices of default exacerbated Bankers Trust's concerns surrounding the maturity of the construction loan and whether it should be extended.

The evidence establishes the City was warned prior to the issuance of the default notices and afterwards that they would trigger a default under the Bankers Trust loan. The City almost immediately upon the issuance of default by Bankers Trust moved to purchase the garage. The parties continued to negotiate and prior to Bankers Trust issuance of its default notice, the Developers agreed to escrow the funds sought by the City, the last sticking point in their negotiations. However, for no apparent reason, Sanders rejected this offer.

There is no question the City's actions in issuing its default notices and its refusal to accept the Developers' agreement to escrow the funds directly and immediately interfered with the Bankers Trust construction loan. Once Bankers Trust was told by Sanders that there would be no resolution with the Developers, Bankers Trust issued its default notice.

The City's argument that it was trying to protect its own interests in issuing the default notices is not credible. From the evidence presented the court cannot determine how the delay in starting the construction of the tower or theater endangered the City's interests. This is particularly the case when Sanders acknowledged that Covid greatly impacted development projects throughout the City and in every instance but this project the City negotiated time extensions.

This interference made it impossible for the Developers to perform under the construction loan either by getting the maturity date extended or finding alternative financing. The City's default notices were a fatal blow to the project. They led directly to Bankers Trust issuance of its default notice and foreclosure. Once this occurred there was no ability to finance the project.

Count V - Tortious Interference with Existing and Prospective Economic Advantage

In count V of their cross-petition against the City the Developers alleged that the City interfered with prospective economic advantages. The elements of tortious interference with a prospective business or contractual relationship are the following: (1) prospective contractual or business relationship; (2) defendant's knowledge of the prospective relationship; (3) defendant intentionally and improperly interfered with the prospective relationship; (4) defendant's interference caused the relationship to fail to materialize; and (5) an amount of resulting damages to the plaintiff.[414] The third element requires proof that "the defendant acted with the sole or predominant purpose to injure or financially destroy the plaintiff."[415] "There must be substantial evidence of a predominant

[414] *Blumenthal Inv. Trusts v. City of W. Des Moines*, 636 N.W.2d 255, 269 (Iowa 2001).
[415] *Compiano v. Hawkeye Bank & Trust of Des Moines*, 588 N.W.2d 462, 464 (Iowa 1999).

motive by the defendant to terminate the [prospective] contract for improper reasons."[416] In a development project, when the prospective business advantage is to result in the completion of the project, there must be evidence that the defendant had reason to know that the prospective contracts or business relationships were necessary for the plaintiff's completion of the project.[417]

The Developers had a prospective business relationship with Bankers Trust because Bankers Trust committed to providing the permanent financing on the garage upon its completion. The Developers had prospective business relationships with 21C for the hotel and Alamo Drafthouse Cinemas for the theater.[418] The Developers were also in discussions with Wanxiang America for financing a portion of the project, and there was credible testimony that Wanxiang America investing in the project could have helped the Developers eventually obtain other investors. The City was aware of the prospective relationships with Bankers Trust, 21C, and Alamo Drafthouse Cinemas. It is not clear if the City was aware of the discussions between the Developers and Wanxiang America. However, the

[416] *RTL Distrib., Inc. v. Double S Batteries, Inc.*, 545 N.W.2d 587, 590 (Iowa Ct. App. 1996).
[417] *Nesler v. Fisher and Co.*, 452 N.W.2d 191, 195–96 (Iowa 1990).
[418] Trial Exs. 305, 319. Likewise, it is debatable whether the Developers' relationships with 21C and Alamo Drafthouse Cinemas should be considered prospective or existing economic advantage because of the nature of the relationships.

Developers have not presented substantial evidence that the City acted with the sole or predominant purpose to financially injure or destroy the Developers. Therefore, the Developers failed to establish that the City tortiously interfered with their prospective business relationships.

Discretionary Function Immunity

The City asserted as a defense to the tortious interference claims, (counts II and V) the discretionary function immunity defense set forth under section 670.4. Since the court found the Developers established their claim that the City tortiously interfered with Parking LLC's construction loan, count II, the court addresses whether the City had discretionary function immunity.

Discretionary function immunity for a municipality is provided in Iowa Code § 670.4(1)(c). The purpose of discretionary function immunity is to "prevent judicial second guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."[419] It is applied if a judgment "embodies a professional assessment" and a "fully discretionary judgment" on the part of the official.[420]

[419] *Id.*
[420] *Id.*

The court must first determine if there was an element of judgment or discretion involved in the City's decision.[421] If there was then the court must determine if this is the kind of judgment the discretionary function immunity was designed to shield liability.[422]

Previously the court in its ruling on the City's motion for summary judgment set forth the legal requirements for this immunity.[423]

> The Iowa Municipal Tort Claims Act "expressly dictates immunities for defendant municipalities." *Baldwin v. City of Estherville*, 929 N.W.2d 691, 697 (Iowa 2019). However, "liability under tort claims acts is the rule and immunity is the exception." *Schmitz v. City of Dubuque*, 682 N.W.2d 70, 74 (Iowa 2004). Under section 670.4 of the Iowa Code,
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> > [A] municipality shall be liable only to the extent liability may be imposed by the express statute dealing with such claims and, in the absence of such express statute, the municipality shall be immune from liability…[from]… [a]ny claim based upon an act or omission of an officer or employee of the municipality, exercising due care, in the execution of a statute, ordinance, or regulation whether the statute, ordinance or regulation is valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the municipality or an officer or employee of the municipality, whether or not the discretion is abused.
>
> Iowa Code § 670.4(1)(c) (2022). The city has the burden to establish that it is "entitled to the shield of discretionary function immunity."

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[421] *Graber v. City of Ankeny,* 656 N.W.2d at 161.
[422] *Id.*
[423] Order Re: Defendant City of Des Moines' Motion for Summary Judgment, at 4-7 (Polk Cty Dist. Ct. Oct. 6, 2022) (Dkt. No. D0678).

Doe v. Cedar Rapids Cmty. Sch. Dist., 652 N.W.2d 439, 446 (Iowa 2002).

The court "narrowly construe[s] the discretionary function exception." *Madden v. City of Eldridge*, 661 N.W.2d 134, 138 (Iowa 2003). In determining whether discretionary function immunity applies to a municipality, the court applies a two-pronged test. *Graber v. City of Ankeny*, 656 N.W.2d 157, 160–61 (Iowa 2003). Under the first prong, the court inquires "whether the challenged conduct was a matter of choice for the acting employee." *Doe*, 652 N.W.2d at 443. However, on its own, "the mere exercise of judgment is not sufficient to establish discretionary-function immunity because some form of judgment is exercised in virtually all human endeavors." *Schmitz*, 682 N.W.2d at 73. Therefore, if the court finds "an element of judgment is involved in the challenged conduct," under the second prong, the court "must determine whether the judgment is of the kind the discretionary function exception was designed to shield." *Doe*, 652 N.W.2d at 443. The second "prong of the test protects governmental actions and decisions based on considerations of public policy grounded on social, economic, and political reasons." *Id*. The record must show that the municipality "based its actions on the required policy considerations, as distinguished from an action arising out of the day-to-day activities" of the municipality's business. *Anderson v. State*, 692 N.W.2d 360, 366 (Iowa 2005).

> In other words, an immune governmental action is one that weighs competing ideals in order to promote those concerns of paramount importance over the less essential, opposing values. Whether or not the city actually made its decision with policy considerations in mind is not determinative. Instead, the city's actions…must be amenable to a policy-based analysis. The circumstances must show the city legitimately could have considered social, economic, or political policies when making judgments as to [serving the Plaintiffs with the default notices].

Graber, 656 N.W.2d at 165; *e.g.*, *Walker v. State*, 801 N.W.2d 548, 561–62 (Iowa 2011).[424]

[424] *Id*.

The City first argues that Sanders made a choice to issue the default notices, just as he had made a choice previously not to declare a default.[425] However, Iowa law is clear that "not all actions involving discretion are immune from liability."[426] Also, just because Sanders made a choice does not mean that he acted within his lawful discretion.

The City claims that Sanders decided to issue the default notices after he "gradually lost confidence the Plaintiffs would ever be able to undertake the tower or theater."[427] The City specifically refers to the June 9, 2020 conversation in which the Developers and Sanders discussed new scenarios to increase the City's assistance for the Tower.[428] The City's characterization is not consistent with Sanders' sworn testimony, as he said in his deposition that the June 9, 2020 conversation was a turning point, not that his confidence eroded gradually,[429] and he also testified at trial that he issued the default notices because he did not want the Developers to receive the savings on the garage.[430] But most concerning here is the City omission that Sanders lost confidence in the Tower financing about

[425] City's Proposed Ruling at 39.
[426] *Graber v. City of Ankeny*, 656 N.W.2d 157, 164 (Iowa 2003).
[427] City's Proposed Ruling at 40.
[428] *Id.*; *see also* Developers' Proposed Ruling at 48 (addressing the June 9, 2020 conversation)
[429] Trial Tr. Vol. 3, p. 167-69.
[430] Trial Tr. Vol. 3, p. 176-82; *see also* Trial Ex. 168; Trial Tr. Vol. 3, p. 70-72.

three months into the Covid-19 pandemic.[431] Indeed, the underlying point of the discussion on June 9, 2020 concerned new financing scenarios since the Covid-19 pandemic precluded any construction financing for the tower and theater at that time.[432] As the court noted Section 10.4 prevented the City from taking adverse action against the Developers based on the Covid-19 pandemic. The City's position is that it should be immune from tort liability because Sanders made a discretionary function decision that was contrary to Section 10.4. The court finds this is not what the legislature contemplated when the discretionary function immunity statute was enacted.

The City does not enjoy immunity for actions taken in violation of its contracts because neither Sanders nor any other City employee has the lawful discretion to violate the terms of the City's contracts. The City produced no authority where our appellate courts in construing this statute determined that a city employee is protected from tort immunity for violating a contract. This is supported by federal decisions construing the discretionary immunity under federal law.[433] Indeed, Sanders admitted he does not have discretion to deviate from the

[431] Trial Tr. Vol. 3, p. 169.
[432] Trial Tr. Vol. 2, p. 67-69; *see also* Trial Ex. 121.
[433] *See Bell v. United States*, 127 F.3d 1226, 1229 (10th Cir. 1997) ("[C]onduct cannot be discretionary unless it involves an element of judgment or choice. Thus, the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to

City's contracts.[434] His refusal to acknowledge the plain language of the agreement that precluded the declaration of a default or breach during a period of enforced delay and which provided time to cure the default before declaring a breach were not reasonable in light of the evidence of other city officials acknowledging that the developers had a right to cure the defaults before the City could demand the property be returned in the fashion they did. The court finds that Sanders could not have been operating within his lawful discretion when he issued the improper default notices.

The City also failed to establish the second element of discretionary function immunity. The City did not prove that the default notices arose from considerations of public policy grounded on social, economic, or political reasons. Without citation to the record, the City asserts that Sanders "weighed the issues and decided

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follow…. Courts have recognized that the government's voluntarily assumed contractual obligations can impose nondiscretionary duties on government employees." (quotations omitted)); *Spotts v. United States*, 613 F.3d 559, 567-68 (5th Cir. 2010) ("[T]he discretionary function exception does not apply if the challenged actions in fact violated a federal statute, regulation, or policy. As the circuits have concluded, the reason for this rule is obvious—a federal employee cannot be operating within his discretion if he is in fact violating a nondiscretionary policy."); *see also Goodman v. City of Le Claire*, 587 N.W.2d 232, 236 (Iowa 1998) ("Because the municipal, state, and federal immunity provisions are almost identical in language, we think relevant federal decisions interpreting the federal immunity provision are persuasive authority in our interpretation of the municipal immunity provision.").

[434] Trial Tr. Vol. 4, p. 86.

to provide notice of default based on economic policy."[435] However, the court could not find in the record a coherent economic policy consideration, or how the default notices served that economic policy considerations. Sanders' testimony on that topic demonstrated that the default notices were counterproductive to the City's economic policy:

> Q. The default notices' only relationship to any economic policy was because of the fact that this development intended to provide private taxable valuation?
> A. It did.
> Q. So the default notices here actually would have had an economic impact in that they would have removed the garage from the path it was on in order to generate tax revenue?
> A. Yes.
> Q. So that's the economic policymaking consideration that played into the default notices?
> A. Yes.
> Q. Now, aside from that, these default notices were not otherwise motivated by any economic policymaking considerations?
> A. None that I can think of.[436]

Additionally, the record established that the City's economic policy was to get out of the parking business. The City concedes this point in its proposed

[435] City's Proposed Ruling at 42. Sanders admitted that the Default Notices were not motivated by social or political policy considerations. Trial Tr. Vol. 3, p. 186-87.
[436] Trial Tr. Vol. 3, p. 187-88.

ruling.[437] The default notices contradict that policy. For these reasons, the court finds the City failed to prove either element of discretionary function immunity.

Count III – Indemnity

In count III of the Developers' cross-petition they seek indemnity requesting the court order the City to assume the construction loan obligations and to indemnify Parking LLC and the Mandelbaums from any claims by Bankers Trust for a default on the construction loan. The City indemnified the Developers' construction loan obligations when the City purchased the parking garage in the foreclosure action filed by Bankers Trust. This claim was made moot by the City's actions and this claim is dismissed.

Count IV – Declaratory Relief

The claim asserted here was also made moot by the City's actions in acquiring the garage from Bankers Trust. The court dismisses this claim.

Counts VI and VII – Injunctive Relief

These claims were made moot by the City's actions in acquiring the garage from Bankers Trust. The court dismisses these claims.

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[437] City's Proposed Ruling at 74 ("[T]he evidence demonstrated that the City did not want to be in the parking business"); Developers' Proposed Ruling at 5 (citing evidence for the proposition that "[t]he City recognized a demand for parking at this location, but it no longer wanted to own or operate a parking garage on the Property and instead wanted to shift the long-term maintenance responsibilities to private entities.").

CITY'S COUNTERCLAIMS

Count I - Fraud in the Inducement and Count V – Fraudulent Inducement of Negligent Misrepresentation

The City during trial moved to dismiss these claims and the court on the record granted those motions. These claims are dismissed.

Count II - Breach of Contract, Failure to Perform

The City claimed that the Developers failed to perform multiple required elements under the development agreement. The court found that the City breached the development agreement. The Developers were unable to perform as asserted by the City due to the City's breach of the development agreement. The Developers did not breach the development agreement. This claim is dismissed.

Count III - Breach of Contract (Default, Failure to Repay Loan)

The City claimed that the Developers failed to obtain permanent financing to repay the Bankers Trust construction loan and have not repaid this loan. The Developers were unable to obtain permanent financing to repay the Bankers Trust construction loan due to the City's breach of the development agreement. The court found that the City breached the development agreement. The Developers did not breach the development agreement. This claim is dismissed.

Counter IV - Breach of Contract (Specific Performance)

The City claimed that the Developers failed to commence construction of the tower or the theater. The Developers were unable to commence construction on the tower and the theater due to the City's breach of the development agreement. The court found that the City breached the development agreement. The Developers did not breach the development agreement. This claim is dismissed.

Counter VI – Unjust Enrichment

The court in its ruling on the Developers' partial motion for summary judgment granted their motion and dismissed this claim.[438] The court reaffirms that decision here.

Counter VII – Breach of Contract

In this claim the City seeks an order requiring the Developers to repay the $4,000,000 forgivable loan. In its ruling on the Developers' partial motion for summary judgment the court granted the Developers' motion.[439] The court reaffirms that decision here. The Developers have no obligation to repay this loan to the City.

[438] Order re: Plaintiffs' Partial Motion for Summary Judgment, at 29-30 of 34 (Polk Cty Dist. Ct. Sep. 24, 2021) (Dkt. No. D0104).
[439] *Id.* at 26-27 of 34 (Dkt. No. D0104).

Third Party Claim against John Mandelbaum

The City during trial moved to dismiss this claim and the court on the record granted this motion. This claim is dismissed.

DAMAGES

Default on Bankers Trust Construction Loan

While the court determined that the City breached the development agreement, The Developers must establish the breach caused their damages. The City asserts that the end of The Fifth was due to the Developers' inability to meet the conditions of their construction loan with Bankers Trust not any breach of the development agreement. The damages now sought by the Developers were caused by their to repay the construction loan that was due on August 31, 2021. It was their failure that caused the Bankers Trust to foreclose on the garage parcel, not the City's actions.

In addition, the City contends that Bankers Trust would not extend the construction loan absent an amendment to resolve all disputes between the Developers and the City, which the City was not legally obligated to approve. Put another way, the City argues that it was the failure to reach an amendment, rather than the default notices, that led to Bankers Trust's foreclosure.

The court addresses some of these issues earlier, however, the court will address these issues in the context of the City's arguments that the causes of the

Developers' damages were their failure to pay the construction loan and their refusal to meet the conditions of the City during negotiations on the terms of the development agreement.

The Developers allege that the default notices prevented them obtaining an extension of the construction loan through Bankers Trust or, in the alternative, obtaining alternative financing through another lender. As a result, the construction loan became due and payable on August 31, 2020. The Developers did not have the amount required to pay off the loan which was more than $33 million.[440] When the Developers could not satisfy the loan, Bankers Trust foreclosed on the garage parcel. The Developers assert the default notices and resulting foreclosure put an end to The Fifth.

The Developers contend that the default notices eliminated the Developers ability to get Bankers Trust to extend the construction loan or obtain refinancing with another lender.[441] The Developers warned the City that Bankers Trust would foreclose on the garage, which would end the project, and force the matter into

[440] Trial Ex. 166 (p. 1); Trial Tr. Vol. 2, p. 116, Vol. 3, p. 24; *see also* Dkt. #1, Petition for Money Judgment, Foreclosure of Real Estate, Mortgage, Partial Collateral Assignment of Development Agreement, Assignment of Construction Contract, and Assignment of Design Contract (9/14/2020), ¶ 16. The City's relevance objection to Exhibit 166, *see* Trial Tr. Vol. 2, p. 112-13, is overruled. Exhibit 166 is admitted.

[441] Trial Tr. Vol. 2, p. 73-74, 111-12, 116, Vol. 5, p. 36-37.

litigation regarding the validity of the City's default notices.[442] Multiple witnesses, including City staff and Cooper the Bankers Trust employee supervising the construction loan, acknowledged that fact, and no one testified that any financing was reasonably possible after the default notices.[443] Thus, without an extension from Bankers Trust or alternative financing, the construction loan reached maturity on August 31, 2020 and the Developers could not pay the outstanding balance, which resulted in Bankers Trust filing its foreclosure action.

The Developers must prove under its breach of contract claim that the City's action caused their damages. As noted above, the court finds that the City breached the terms of the Development Agreement by declaring a default during the enforced delay, by declaring a breach during the enforced delay, and by seeking a remedy they were not entitled to since the City failed to give the Developers an opportunity to cure.

The question the court must answer is whether the evidence established that Bankers Trust would have extended the construction loan had the City complied with the terms of the development agreement or was it simply the Developers inability to satisfy the loan on August 31, 2020 that led to the foreclosure. The

[442] Trial Exs. 232, 405, 586.
[443] Trial Tr. Vol. 2, p. 169, Vol. 3, p. 49, 81, 185, Vol. 6, p. 163, 180-81.

court finds Bankers Trust would have extended the loan if the City had not issued its default notices. Bankers Trust's decision to foreclose was caused by the City's issuance of its invalid default notices. The court relies on the following in reaching this conclusion.

Bankers Trust's primary and overriding concern was whether the City would comply with the development agreement. According to Cooper, the City's commitment in the development agreement to pay the parking shortfall loan was considered the primary source of repayment for the garage. It would have covered any operating shortfalls as well as any debt service for the permanent loan…. In the parking shortfall loan, the City of Des Moines was providing hundred percent financing and backing for the repayment of this term loan.[444] In other words, the parking shortfall loan was the primary collateral for Bankers Trust's loan.[445] The City's backstop made this "an incredibly safe loan" for Bankers Trust.[446]

At the loan maturity date, Bankers Trust was at a fork in the road – it could either extend its loan to the Developers or it could foreclose on the loan.[447] Bankers Trust would have taken the path that would have maximized its ability to

[444] Trial Tr. Vol. 3, p. 21; *see also* Trial Ex. 163; Trial Tr. Vol. 2, 100-01, Vol. 3, p. 24.
[445] Trial Tr. Vol. 3, p. 30.
[446] Trial Tr. Vol. 2, p. 100-01.
[447] Trial Tr. Vol. 3, p. 53.

be repaid, even if that meant extending the maturity date.[448] Cooper explained, "No bank wants to go through foreclosure if it can be avoided."[449]

Prior to foreclosing, Cooper asked to speak privately with Sanders before Bankers Trust decided how to proceed, because the bank's path was not certain. But after that conversation, Bankers Trust decided to foreclose. In that conversation, Sanders testified he informed Cooper that there would be no amendment with the Developers (or no further negotiations). Bankers Trust was concerned after the default notices were issued that the City would not fulfill the shortfall loan commitment (the primary collateral) if the Developers were involved in the project.[450] And once the Developers lost the City's financial backing, the project was "not financeable."[451] Cooper testified that she was confident the City would stand behind its commitment for the shortfall loan after the Bankers Trust foreclosure was filed.[452] It was this commitment that protected Bankers Trust.

The Developers established that if the City had never declared the Developers to be in default or had recognized the Developers' ability to cure the alleged default with reasonable diligence – i.e., if the City had followed the parties'

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[448] Trial Tr. Vol. 3, p. 60-61.
[449] Trial Tr. Vol. 3, p. 61.
[450] Trial Tr. Vol. 3, p. 46-47, 49, 52-53, 81; *see also* Trial Tr. Vol. 2, p. 115-16 (describing Cooper's statements in September 2020).
[451] Trial Tr. Vol. 3, p. 47.
[452] Trial Tr. Vol. 3, p. 46-47, 98-99.

contract –Bankers Trust would have taken the path that extended the loan and not foreclosure. Cooper testified:

> Q. … Let's talk about the counterfactual world where there are not default notices. If the City had been willing to extend the deadline to complete the garage, Bankers Trust would have been willing to extend the maturity date on the construction loan?
> A. Theoretically, yes. Yes.
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> * * *
>
> Q. And so to go back to my earlier question: It wasn't merely that the maturity date happened that you decided to foreclose, because maturity dates arrive on all sorts of not yet completed projects and you don't foreclose, you extend; right?
> A. Correct.
> Q. It was the City default notices that was the reason why the bank foreclosed.
> A. It was the risk of the development agreement not being in place or being in default, yes, that – the risk of not having that repayment source was the primary reason for needing to foreclose because we could not continue on without knowing that that was behind the garage.
> Q. Well, let me put it this way: The bank's decision not to extend the maturity date and instead proceed with a payment default was a consequence of the default notices and the failure to resolve the issues in the default notices. Would you agree with that proposition?
> A. Yes.
> * * *
>
> Q. In the world where the default notices had not been issued and if the bank believed that the developers were in compliance with the development agreement, the bank certainly would have considered an extension of the construction loan; right?
> A. Yes.
> * * *

A. So you're asking me if the development agreement was not going to be in default, would we have extended?
Q. Yes.
A. Yes.[453]

This testimony establishes that Bankers Trusts' concern was ensuring that the City would repay Bankers Trust by agreeing to continue the City's shortfall loan commitment. Absent the default notices, the best path to repayment for Bankers Trust would have been to collaborate with the Developers on an extension of the construction loan.[454] Otherwise, foreclosure on the construction loan could have jeopardized the development agreement. The court finds that Bankers Trust would have extended the maturity date if the City had complied with the development agreement.

The history of Bankers Trust's commitment to this project further reinforces the court's finding that Bankers Trust would have collaborated with the Developers on an extension of the construction loan but for the default notices. Bankers Trust could have caused other lenders to shoulder more of the construction loan, but it chose to hold more of the loan itself because Cooper did not think there was a repayment risk.[455] Bankers Trust issued two commitment letters for the permanent

[453] Trial Tr. Vol. 3, p. 51-53, 80
[454] *See* Trial Ex. 166; Trial Tr. Vol. 2, p. 106, Vol. 12, p. 203-04.
[455]Trial Ex. 156; Trial Tr. Vol. 3, p. 30-33.

financing on the garage, meaning that it promised to issue a permanent loan upon completion of the garage.[456] Bankers Trust was flexible with escrow requests.[457] The Developers and Bankers Trust had a "positive working relationship" before the City's default notices.[458] Prior to the default notices, Bankers Trust had not done anything internally or communicated anything that suggested it would deny a relatively short extension.[459] Even after the default notices, Bankers Trust requested direct communication with the City to receive definitive direction on whether to proceed with the foreclosure, with Cooper testifying that the bank could "exercise some patience."[460] All these facts suggest that Bankers Trust would have tried to work with the Developers to extend the construction loan if the City had not issued the default notices.

Additionally, and more importantly, even if Bankers Trust was unwilling to extend financing, the Developers could have obtained a new loan from a different lender to pay off the construction debt for the garage (absent the default notices).

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[456] Trial Ex. 152, 154; Trial Tr. Vol. 2, p. 98-99, Vol. 3, p. 10-11, 20-21.
[457] Trial Tr. Vol. 1, p. 224-25.
[458] Trial Tr. Vol. 2, p. 105. Notably, the Developers submitted monthly requests to BTC for payment drawn from the construction loan, and there was never any problem with those requests. Trial Tr. Vol. 3, p. 16, 86, Vol. 4, p. 108-11. Indeed, even the City's expert validated the accuracy of all the bank draws. Trial Tr. Vol. 11, p. 122-23; *see also* Trial Ex. 16, 17.
[459] Trial Tr. Vol. 2, p. 105-06.
[460] Trial Tr. Vol. 3, p. 65-66.

Bankers Trust was not the only possible lender for this project. The loan with the City's guarantee would have been attractive to other firms, such as firms that the Developers had worked with in their careers, and the trial record was uncontroverted that the Developers could have obtained alternative financing to pay off the outstanding construction debt by Bankers Trust's maturity date.[461] In fact, Justin explained to Sanders the plan to obtain alternative financing just days before the default notices, which corroborates the Developers' claim that they would have immediately sought and eventually obtained such financing.[462] The default notices "killed any opportunity to get alternative financing" because the City exercised the remedy under section 10.2(C) requiring the property be returned so there was nothing to refinance.[463] The City presented no evidence that casted doubt on the Developers' belief that they would have obtained alternative financing absent an extension from Bankers Trust.

Likewise, if the Developers and the City had finalized an amendment in August 2020, then it is doubtful that Bankers Trust would have foreclosed. But that does not mean it was the failure to reach an amendment that caused Bankers Trust to refuse an extension and instead to foreclose. The amendment discussions

[461] Trial Tr. Vol. 2, p. 109-11.
[462] Trial Ex. 232; Trial Tr. Vol. 2, p. 108-11.
[463] Trial Tr. Vol. 2, p. 111, Vol. 3, p. 185.

mattered to Bankers Trust because the City threatened to declare a default and then issued the default notices.[464] Prior to those notices, Bankers Trust never declared a default. And if those default notices had never been issued or had been rescinded, Bankers Trust would have taken a different path. The default notices and the resulting foreclosure ended The Fifth.

Ultimately, the City purchased the garage for the entire amount of the construction debt, even though it had refused to assume the Developers' construction debt in June 2020 when it issued the default notices.[465] Thus, the Bankers Trust foreclosure allowed the City to purchase the garage without following the proper contractual action to enforce the development agreement.[466] In fact, Sanders admitted that it was highly likely that the City would acquire the garage from the day the default notices were issued.[467] By triggering a foreclosure, the City caused the project to end.

Had the City followed the terms of the development agreement the City would have had to work with the Developers to keep the project moving forward. An extension of the deadlines would have been necessary, so Bankers Trust was

[464] Trial Tr. Vol. 3, p. 52-53; *see also* Trial Ex. 163.
[465] Trial Tr. Vol. 3, p. 102.
[466] Trial Tr. Vol. 2, p. 73.
[467] Trial Tr. Vol. 3, p. 191.

convinced that the City was giving the Developers the opportunity to complete the garage and explore other methods to finance the next phases – construction of the tower and the theater under the financial conditions created by the Covid pandemic. Thus, the court finds that had the City not issued the invalid default notices Bankers Trust would have granted an extension of the construction loan. The developers proved by a preponderance of the evidence that the damages the Developers suffered were caused by the issuance of the default notices and the City's refusal to give the Developers an opportunity to cure.

Damages recoverable for Breach of Contract and Tortious Interference

In evaluating the Developers' claimed damages, the court finds that the damages are the same under either the breach of contract theory or the tortious interference with the construction loan theory. The Developers in their proposed findings did not seek different damages under the two theories. The court's decision discusses the damages in conjunction with the breach of contract claim. However, these same damages would be recoverable under the tortious interference claim.

Standards for Determining Damages

The purpose of damages in a breach of contract action is "to place the injured party in the same position he or she would have occupied if the contract

had been performed."[468] To determine if the Developers proved they suffered damages and the amount, the court considers the following standards.

> In Iowa, the plaintiff bears the burden of establishing a claim for damages with some reasonable certainty and for demonstrating a rational basis for determining their amount. *Conley v. Warne*, 236 N.W.2d 682, 687 (Iowa 1975). However, Iowa courts "take a broad view in determining the sufficiency of evidence of damages." *Westway Trading Corp. v. River Terminal Corp*., 314 N.W.2d 398, 403 (Iowa 1982). Iowa also recognizes a distinction between proof of the fact that damages have been sustained and proof of the amount of those damages. *Olson v. Nieman's Ltd*., 579 N.W.2d 299, 309 (Iowa 1998). As the Iowa Supreme Court noted in *Northrup v. Miles Homes, Inc*., 204 N.W.2d 850, 857 (Iowa 1973):
>
> > If it is speculative and uncertain whether damages have been sustained, recovery is denied. If the uncertainty lies only in the amount of damages, recovery may be had if there is proof of a reasonable basis from which the amount can be inferred or approximated.
>
> Thus, some speculation is acceptable. *Olson*, 579 N.W.2d at 309. Consequently, while a loss may be hard to ascertain "with preciseness and certainty, the wronged party should not be penalized because of that difficulty." *Id*.[469]
>
> In fixing the appropriate measure of recovery, it is incumbent upon the court to keep in mind 'that the principle underlying allowance of damages is that of compensation, the ultimate purpose being to place the injured party in as favorable a position as though no wrong had been committed.' While it may be hard to ascertain such a loss with preciseness and certainty, the wronged parties should not be penalized because of that difficulty. Difficulty in ascertaining the amount of damages does not alone constitute a reason for denying recovery or for substituting an inappropriate method." (citation omitted)); *Metropolitan Transfer Station, Inc. v. Design Structures, Inc*., 328

[468] *Flom v. Stahly*, 569 N.W.2d 135, 142 (Iowa 1997).
[469] *Hammes v. JCLB Properties, LLC*, 764 N.W.2d 552, 558 (Iowa Ct. App. 2008).

N.W.2d 532, 538 (Iowa Ct. App. 1982) (stating that the defendants "should not escape liability on the ground that the measure of damages attributable to them is uncertain" and holding that damages should be awarded for lost revenue even if the district court was hesitant as to the apportionment of damages).[470]

Damages Claimed by the Developers

The Developers summarized the damages they are claiming in Exhibits 325 and 327A. Exhibit 327A is a printout of an Excel spreadsheet the Developers utilized throughout the development of the project and for the calculation of damages. This document was referred to as the pro forma. Exhibit 328 is a working copy of the pro forma as found on a flash drive admitting this exhibit.

The Developers grouped their damages into four categories. Category 1 is identified as Garage Completion Damages. There are four components within this category. They are: 1-A Development Fee on Garage; 1-B Savings on Garage. After Development Fee and Before Interest Savings; 1-C Interest Savings on Garage. Before Default Interest; and 1-D Jump Ramp Insurance Claim on Garage. Net of Anticipated Legal Fees.

Category 2 is identified as Lost Profit from Garage Operation and Ownership (Net Present Value and Sales Approach Methods). This category consists of four components. They are: 2-A Net Present Value of Residual Equity

[470] *Bangert v. Osceola Cnty.*, 456 N.W.2d 183, 190 (Iowa 1990)

Value of Garage; 2-B Net Present Value of Garage Management Fee; 2-C Net Present Value of Environmental Expenses Incentive Payment; and 2-D Market Value of Restaurant and Retail Space in Garage (Sales Approach).

Category 3 has two alternatives for the court to consider. The first alternative is identified as Lost Development Opportunity for the Tower (Reconciliation of Net Present Value and Sales Approach Methods). The first alternative consists of two components. They are: Reconciled Profit Calculation on Residential Development Equity Investment and Reconciled Profit Calculation on Hotel Development Equity Investment.

The second alternative is identified as Alternative Claims – Losses Suffered Regardless of Developers' Equity Interest in Tower. This alternative consists of four components. They are: 3-A Architecture on Tower Paid by Developer; 3-B Predevelopment Expenses on Tower Paid by Developer; 3-C Tower Hard Costs Funded by Developer in Garage (Excluding Restaurant); and 3-D Development Fee on Tower.

Category 4 is identified as Lost Development Opportunity for the Theater Building. This category has four components. They are: 4-A Architecture on Theater Paid by Developer; 4-B Predevelopment Expense on Theater Paid by Developer; 4-C Theater Hard Costs Funded by Developer in Garage; and Development Fee on Theater.

The Developers also seek an award for the defense costs they incurred during the Bankers Trust foreclosure proceeding. Finally, they seek an Income Tax Effect True Up on some of the components in each category of damages. Exhibit 325 identifies the four categories without the income tax true ups and the foreclosure defense costs. Ex. 327A has the same information as found in Exhibit 325 but identifies the income tax true ups and the foreclosure defense costs.

The category 1 damages represent the money that the Developers would have received if they had been allowed to complete the garage, regardless of their long-term ownership and operation of the garage. These are the damages the Developers claim they suffered by not being able to complete the garage.[471]

Category 2 damages represent the Developers' economic loss from not being able to operate and own the garage, which the Developers would have done long-term absent the City's breach. They "represent [the] lost value to the developer from owning the garage long-term after the permanent financing and after the parking shortfall loan has been repaid."[472]

Category 3 damages represent the economic loss the Developers suffered by losing the equity interest they would have held in the Tower after it was built. These are the opportunity damages the Developers lost when they were deprived of

[471] Trial Tr. Vol. 6, 53:12-22.
[472] Trial Tr. Vol. 6, p. 54:8-16.

the opportunity to build the tower at 5th and Walnut.[473] The first alternative labeled "Lost Development Opportunity for the Tower," is the projected profit the Developers would have received if the tower had been completed.[474] The alternative calculation are the costs the Developers incurred while building the garage that were incurred because they were necessary for the completion of the tower.[475]

Category 4 damages represent the economic loss from the Developers' inability to pursue and develop the theater building on the southern parcel (adjacent to Court Avenue). They are based upon the amount of the developer fee that they would have earned by building the theater.[476]

In determining the amount of damages, the Developers rely on the pro forma they created at the outset of the project. The pro forma provided financial information and analysis which provided the Developers information regarding the feasibility and viability of the project. It projected revenue and expenses and identified the funding plan. The pro forma was provided to the City to demonstrate their idea for the project had financial viability. It was provided to prospective lenders and investors to convince them project was financially viable. It also

[473] Trial Tr. Vol. 6, p. 54:20-24.
[474] Trial Tr. Vol. 6, pp.54-56.
[475] Trial Tr. Vol. 6, p. 56.
[476] Trial Tr. Vol. 6, 56:2-14.

operated as a check on the Developers regarding the continued viability of the project. Everyone agreed that the pro forma was an elaborate and often referred to as "robust" document which provided financial information for the development of the project.

A major point of contention between the parties is whether the pro forma can be used as a reliable and credible measurement of the Developer's damages. The Developers assert that it can, and the City asserts it cannot.

The Developers relied upon the pro forma to project the value of the business opportunity the Developers lost by the City's breach of the development agreement. The Developers' argument is that the inputs, assumptions, calculations, costs, and revenue they relied upon in developing the pro forma, can be used to determine their damages for their lost opportunity or lost profits. In other words, if the projections they made in the pro forma for purposes of developing the project were accurate, then when they lost the opportunity to develop the property the same projections should be accurate to determine that value subject to their net present value. They assert the document identifies and quantifies what they lost.

City's Criticisms of Developers' Claimed Damages

The City asserts that the court should deny any damages to the Developers on several grounds. One, the Developers suffered no damage because when the City purchased the parking garage from Bankers Trust any money owed by the

Developers to Bankers Trust was satisfied. In other words, there was no deficiency judgment that Bankers Trust had against the Developers. Any costs associated with the development and construction of the garage were financed and paid initially by the Bankers Trust loan. When the City purchased the garage from Bankers Trust all those costs were satisfied by the purchase price thus there was no money owed to Bankers Trust by the Developers.

Second, the City argues that the court cannot rely on the pro forma in determining damages. It asserts that the use of the pro forma is too speculative to establish any economic losses since it was created by the Developers without any expert testimony verifying the accuracy or reasonableness of the data relied upon by the Developers.[477]

Third, the City relies on the new business rule to preclude the economic losses claimed by the Developers.

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[477] *See generally, Lucarell v. Nationwide Mut. Ins. Co*., 2018-Ohio-15, 152 Ohio St. 3d 453, 468, 97 N.E.3d 458, 473 (2018) ("Lucarell therefore could not reasonably rely on the pro forma because predictions of future financial performance are speculative and subject to changing economic conditions.); *See Bye v. Nationwide Mut. Ins. Co*., 733 F. Supp. 2d 805, 822 (E.D. Mich. 2010)] at 822 (fraud claim based on pro forma projections "is ultimately foreclosed by the fact that any reliance * * * on such representations * * * was unreasonable"). *But see G& H Soybean Oil, Inc. v. Diamond Crystal Specialty Foods, Inc.,* 796 F. Supp. 1214, 1217 (S.D. Iowa 1992) (denying defendant's motion for summary judgment based on new business rule; "the fact Plaintiff's data stems from their own business plan does not in and of itself discredit the data." Court further noted the plaintiff had sold thousands of bottles of product.).

Fourth, although not completely clear the City seems to suggest that the Developers are not entitled to damages because the development agreement specifically provides that the obligations under the agreement "shall not constitute a general obligation of the City."[478] The City also stated the funding for the development agreement was subject to non-appropriation. But in the same breath, the City indicated it historically has never decided "to non-appropriate an urban renewal development in the past. Exhibit 3 §9.9(A-E)."[479] Likewise, the City concludes that "[e]ven if liability were found, these would both constitute limitations on liability by specifying the source of funds and the availability of non-appropriation." However, the City makes no further argument concerning these two points suggesting they may not be asserting these as defenses to the Developers' claims.

In addressing the issues surrounding damages the court initially will address the general obligation/non-appropriation clause, the new business rule, and the use of the pro forma.

[478] *See* Exhibit 3 at §9.8 (emphasis added). City's Proposed Ruling, at 68 (Dkt. No. D0712).
[479] City's Proposed Ruling, at 68 (Dkt. No. D0712).

General Obligation/Non-Appropriation Clauses

This issue arises from sections 9.8 and 9.9 of the development agreement. Section 9.8 provides that the:

> advances to be paid by the City on the Parking Grant, the South Building Grant, Residential Grant, and the Parking Shortfall Loan, and all deposits to the Sinking Fund (collectively the **"Deferred Grants"**) shall be paid by the City solely from the special fund financed by the division of revenue pursuant to Iowa Code §403.19(2) from taxes levied on the Metro Center Urban Renewal Project Area. The obligations of City under this Agreement shall not constitute a general obligation of the City.[480]

This section, by its plain language, indicates that the funding the City promised to provide under the development agreement comes from the taxes levied on the Metro Center Urban Renewal Project Area. This means the parties agreed that if the tax revenue was not sufficient to fund the Deferred Grants the City was not obligated to make payments from its general fund to the Deferred Grants. It did not limit the City's payment of damages for a breach of the development agreement.

The non-appropriation clause in section 9.9 simply allows the City to determine on an annual basis whether they will make the installment payments

[480] Trial Ex. 3, at §9.8.

required under the development agreement during any fiscal year. By its plain language section 9.9(D) identifies this section's intent.

> The right of non-appropriation reserved to the City in this section is intended by the parties, and shall be construed at all times, so as to ensure that the City's obligation to pay future installments on the Deferred Grants shall not constitute a legal indebtedness of the City within the meaning of any applicable constitutional or statutory debt limitation prior to the adoption of a budget which appropriates funds for the payment of that installment or amount.[481]

This provision does not limit any damage a court may award against the City for a breach of the development agreement. It simply limits where the funds to pay the yearly installment payments on the Deferred Grants are to be derived.

To the extent the City is arguing that these provisions limit where funds could be obtained to satisfy a judgment against the City these provisions are not applicable. Further the development agreement specifically provides under section 10.1(C) that "[i]n any claim, action or civil proceeding wherein damages are sought for breach of this Agreement, *City shall have the same rights and liabilities as a private non-governmental party for any breach of this Agreement*."[482] This provision further supports the conclusion that sections 9.8 and 9.9 were not limitation of damages provisions. Furthermore, and more importantly, if the City

[481] Trial Ex. 3, at §9.9(D).
[482] Trial Ex. 3, at 10.1(C) (emphasis added).

contends that these provisions limit where the funds could be obtained to satisfy a judgment the City waived this argument by never asserting it as an affirmative defense. For all these reasons the court finds that sections 9.8 and 9.9 are inapplicable to the issues before the court and specifically they do not limit any damages the court may award the Developers.

The New Business Rule

Under the new business rule damages are precluded if "potential profits from an untried business" are too speculative to be recoverable.[483] "The rationale underlying the new business rule is that '[e]xpected profits from a new commercial enterprise [are] too remote and speculative to warrant judgment for their loss because there are no available data of past business from which the fact of anticipated profits could have been established.'"[484] Thus, when "a proffered business plan is full of projections, but lacks any link to past experience or a comparable business" the court must determine whether there is evidence of "available data of past business from which anticipated profits could be

[483] *Harsha v. State Sav. Bank*, 346 N.W.2d 791, 797 (Iowa 1984) (citing *City of Corning v. Iowa-Nebraska Light & Power Co.,* 225 Iowa 1380, 282 N.W. 791 (1938); *Creamery Package Manufacturing Co. v. Benton County Creamery Co.,* 120 Iowa 584, 95 N.W. 188 (1903); *United States v. Dura-Lux International Corp.,* 529 F.2d 659, 663 (8th Cir.1976); *Lakota Girl Scout Council v. Havey Fund-Raising,* 519 F.2d 634, 640 (8th Cir.1975)).
[484] *Harsha,* 346 N.W.2d at 797 (quoting *City of Corning v. Iowa-Nebraska Light & Power Co.,* 225 Iowa 1380, 1389, 282 N.W. 791, 796 (1938)).

established."[485] However the rule is not absolute. "If factual data are presented which furnish a basis for compilation of probable loss of profits, evidence of future profits should be admitted and its weight, if any, should be left to the jury."[486] "Thus as we see it a sharp line of distinction should not be drawn between old and new businesses, but recourse should be had in both situations to the basic question whether a prospective loss of net profits has been shown with reasonable certainty."[487]

The new business rule and the use of the pro forma are intertwined since the new business rule requires the court to determine whether there is evidence of "available data of past business from which anticipated profits could be established."[488] The pro forma was developed with inputs from third parties that the Developers contacted relative to market research on expected revenue and costs of the garage, tower, and theater, data relative to the viability of the tower and theater in the Des Moines metro, financing projections, sources and availability, projections, assumptions, and appropriate discount rates for determining net

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[485] *Mid-American Bio AG, Ltd. V. Wieland & Sons Lumber Co.,* 791 N.W.2d 428 (Table), 2010 WL 3662305, at *9 (Iowa Ct. App. Sep. 22, 2010).
[486] *Stammer v. Kruse,* 690 N.W.2d 700 (Table), 2004 WL 1898489, at *1 (Iowa Ct. App. Aug. 26, 2004) (quoting *Harsha,* 346 N.W.2d. at 798).
[487] *Standard Machinery Co. v. Duncan Shaw Corp.,* 208 F.2d 61, 64 (1st Cir. 1953) (cited approvingly in *Harsha,* 346 N.W.2d at 798-99).
[488] *Mid-American Bio AG, Ltd. V. Wieland & Sons Lumber Co.,* 791 N.W.2d 428 (Table), 2010 WL 3662305, at *9 (Iowa Ct. App. Sep. 22, 2010).

present value. Some of the inputs and assumptions built into the pro forma were also derived from Justin and Sean Mandelbaum's experiences and research and their expert witness, Habibi. The court will address the new business rule and the use of the pro forma when the court discusses each component of the Developers' categories of damages.

Objections to John Farrell's Testimony

Before addressing the damages, the court will address several objections the Developers raised during trial and specifically in their proposed findings. The Developers objected on the basis that several of John Farrell's opinions at trial were beyond the scope of his report as found in Exhibit 19.[489] The court will address the objections to Farrell's testimony as raised by the Developers and found on pages 112-113 of their proposed findings. The Developers in their proposed findings cited in their footnotes the specific pages of Farrell's testimony to which they were objecting. The court will discuss the objections using those footnotes.

The first objection found in footnote 512 involves Farrell's critique of the Developers' financial model. The court, after reviewing Farrell's report overrules that objection. There are instances in his report where Farrell states the "model

[489] Farrell's report was never admitted subject to a hearsay objection as an exhibit. The court refers to the report since the objection was that Farrell's testimony was beyond the scope of his disclosed opinions.

contains foundational flaws," analysis is flawed and unreliable," "analysis is fundamentally flawed, unreliable, and results cannot be replicated." These all indicate critiques of the model used by the Developers. The court finds these references are a critique of the financial model relied upon by the Developers.

In footnote 513 the Developers objected to how Farrell's discount rates were determined. In his report on page 11 he stated:

> As an example, the damages model is extremely sensitive to a slight change in inputs, such as the capitalization rates. Even using the Plaintiffs own underlying assumptions, a mere 100-basis point increase in the capitalization rate of either the hotel or the apartment components essentially eliminate financial feasibility (i.e., the cost would be greater than the resulting value).

The court finds his report addresses the testimony objected to and the objection is overruled.

Footnote 514 the Developers objected to Farrell's use of the term "reality check" regarding Farrell's estimation of the value of the property upon which the garage sat and the other surrounding parcels. Farrell is a commercial real estate appraiser. However, he did not conduct an appraisal of the disputed property.[490] He critiques the use of the discounted cash flow analysis for the property.[491] The question posed was whether Farrell believed it was worth $33 million. His report

[490] Trial Tr. Vol. 9 at 159:24-160:2.
[491] Trial Tr. Vol. 9, at 151.

does not indicate that he was appraising the property. However, the court viewed his answer as a general criticism of the financial model not an appraisal opinion of the property. The court did not construe this testimony as an opinion on whether the property was worth $33 million particularly with his statement in the report and at trial that he did not appraise the property. Thus, the objection is overruled.

In footnote 515 the objection is his criticism of using the pro forma. That objection is overruled since it is a criticism of the model.

In footnote 515 the Developers argue that his testimony about the use of a pro forma was not disclosed. However, as noted in the court's discussion of footnote 512 his report criticizes the model used. This objection is overruled.

The City offered Farrell's report as an exhibit. The Developers objected because it was hearsay. The court sustains this objection.

Category 1

The Garage Completion Damages found in Category 1,[492] which are Items 1-A, 1-B, and 1-C, are the savings the Developers claim they were entitled to receive had they been allowed to complete the garage. The Developers assert these damages are not future economic losses subject to the new business rule. Also,

[492] Any damages awarded under this category would be to 5th and Walnut Parking, LLC since this was the entity that was responsible for the development and construction of the garage.

they do not rely on the forecasting of future revenue or costs from the pro forma to determine their damages under this category.

The development agreement explicitly provides that the Developers were entitled to any savings that were realized upon completion of the garage because the Developers assumed the risk of any costs over the stipulated price.[493]

> Developer agrees that if the costs of constructing the Parking Garage exceed the Stipulated Price due to no fault of the City, then Developer shall be responsible for the increase in costs associated with completing construction of the Parking Garage. City acknowledges that City is not entitled to participate in any savings realized by Developer in the acquisition, construction or development of the Parking Garage or Parking Parcel, and that any savings or benefits realized shall accrue 100% to Developer.[494]

Item 1-A is the development fee the Developers claim they are entitled to receive for their efforts in developing the parking garage. This claim does not arise directly from the development agreement since there is no language in the agreement that provides for payment of a development fee to the Developers. The Developers argue they are entitled to this fee since it was explicitly noted in the pro forma they prepared and presented to the City as this project was being developed. Specifically Exhibit 37 references a developer's fee of 5% or $2,316,461.00. The Developers testified that the pro forma was provided to the City and no one ever

[493] Trial Exhibit 3, at 35, Art. 8, §8.2(E).
[494] *Id.*

objected to the Developers receiving a 5% developer fee.[495] In fact, City employees testified that savings from the stipulated price functioned as a development fee.[496] Further, the Developers assert that no one proposed a different fee, a different rate, or that the Developers should not receive a fee.[497] In addition, Jennifer Cooper, senior vice president at Bankers Trust who supervised the construction loan, felt that the savings from the garage construction constituted a developer's fee.[498] It was anticipated under the development agreement the Developers would receive this money when construction on the garage was completed and permanent financing was in place.[499] Justin Mandelbaum testified these savings would have been captured when the construction loan was converted to the permanent loan. All the savings would be considered at the end to be the development fee.[500]

1-B and 1-A are intertwined. Specifically, the Developers demonstrate that the savings on the garage, 1-B, were derived after the amount of the development

[495] D0714, Plaintiff's Proposed Ruling Following Trial and Judgment, at 115 & n.532 (Polk Cty Dist. Ct. July 17, 2023).
[496] Trial Tr., Vol. 2, at 146:17-147:6; Vol. 3, at 16:24-17:20.
[497] *Id.,* at 115, n.533 & 534.
[498] Trial Tr. Vol. 3 at 16:24-17:17.
[499] Trial Tr. Vol. 3 at 71-72. There was also testimony that the Developers could use these savings as their equity contribution to the financing of the tower and/or theater.
[500] Trial Tr. Vol. 12 at 152-53.

fee, 1-A, was subtracted from the savings. If this had not been done the savings under 1-B would have been higher.[501]

1-C demonstrates the savings the Developers would have had if the foreclosure would not have occurred since this amount is the additional interest charged for default interest.[502] Had there been no foreclosure there would not have been default interest applied to the Bankers Trust construction loan and the savings over the stipulated price would have been higher. The Developers argue they are entitled to these damages since it would make them whole as to the garage had they been allowed to complete the garage construction. The court finds that the Developers established that had the City not violated the terms of the development agreement they would have completed the garage and would have received the savings as provided in section 8.2(E).

The evidence established that the Developers were close to completing construction when Bankers Trust filed its foreclosure action. Dan Solem, one of the project managers for the Weitz testified that in September 2020 the substantial completion date for the garage was December 18, 2020.[503] Thus, at the time of the Bankers Trust foreclosure the Developers were approximately four months from

[501] *Id.,* at 115-16 n.535, 536.
[502] Trial Ex. 327A, at 214.
[503] Trial Tr. Vol. 7 at 39.

substantial completion of the garage. A temporary permit of occupancy was issued for the garage on January 25, 2021.[504] The court finds that the Developers proved by a preponderance of the evidence they were entitled to the developer fee, the savings from the construction, and there would not have been default interest assessed if the City had not breached the development agreement or interfered with the contract between the Developers and Bankers Trust.

Hadley criticized that the Developers provided no evidence that a 5% developer's fee was not reasonable. The court finds that the parties involved, Bankers Trust, the City and the Developers knew that the Developers expensed a development fee of 5% and no one urged that was improper. The court finds a 5% developer fee was reasonable. Accordingly, the court finds the Developers proved with reasonable certainty the category 1 damages identified by 1-A, 1-B, and 1-C are $4,353,677.

The court finds that these damages are not subject to the new business rule since they constitute contractual payments provided for and contemplated under the development agreement and do not constitute lost profits. Likewise, these damage calculations are not subject to the forecasting of revenue or costs and the assumptions and inputs related to those forecasts contained in the pro forma.

[504] Trial Tr. Vol. 7 at 43-44.

Regarding 1-D the Developers seek payment for the jump ramp insurance claim. This is the claim the Developers assert they were entitled to receive because of an error in design during construction of the garage. This error caused a change in the construction of the garage and added $1,306,010 to the costs of construction.

Once Bankers Trust foreclosed the receiver appointed by the court initially made a demand on the architect and their insurance company for these damages.[505] However once the City purchased the garage that claim became the City's and it did not pursue the claim.[506]

The court finds that the Developers failed to prove that they had a claim for these damages, and they failed to prove with reasonable certainty the amount of those damages. The evidence presented demonstrates that while the receiver attempted to obtain satisfaction of this claim they were not successful.[507] The receiver initiated no litigation either in court or by arbitration. There was no evidence that the architect or its insurance carrier ever responded to the demand letter sent by the receiver. The architect and/or its insurance company never acknowledged they were liable for this claim. There was no evidence that the architect made an offer to settle the dispute with the receiver. Once the claim

[505] Trial Ex. 15
[506] Trial Tr. Vol. 4 at 137-38.
[507] Trial Tr. Vol. 4 at 135-38.

became the City's there was no evidence that the City initiated any attempt to enforce this claim. There is no evidence that proves the Developers would have been successful in recovering on this claim or the amount of that recovery. Thus, the court finds the Developers did not provide sufficient evidence to establish they would have recovered or the amount. The court finds the Developers are not entitled to receive as damages $1,030,010 for the jump ramp claim.

Income Tax Effect True Up

The Developers seek an income tax effect true-up on several components of their identified damages. Under the category 1 damages, they seek a true up as to 1-A, 1-B, and 1-C. They contend that they should be awarded additional money to neutralize the income tax liability they will incur by receiving payment in a lump sum judgment. Awarding the true up places them in "the same position [they] would have occupied if the contract had been performed."[508]

Federal courts allow "tax gross-up" awards to account for tax consequences from a lump-sum damage award:

> The Federal Circuit allows plaintiffs to seek a "tax gross up" to ensure that damages awarded effectively compensate plaintiffs for the harm caused by defendant's action. Damages awarded by this court are taxable. Therefore, to make plaintiff whole, it is appropriate for the court to "adjust[ ] the damages awarded to reflect tax consequences." *Home Sav. of America, FSB v. United States,* 399 F.3d 1341, 1356 (Fed.Cir.2005). To the extent that the government's action deprived

[508] *Flom*, 569 N.W.2d at 142.

> plaintiff of "monies that would not have been taxable," plaintiff is entitled to an additional award to "zero out" the ultimate tax liability.[509]

Courts allow gross-up damage awards to offset the effect of taxes where a taxable award compensates a plaintiff for lost monies that would not have been taxable.[510]

In a recent federal decision in Iowa an individual wage-earner, was awarded a tax gross-up due to the "make whole-remedy under the FRSA (Federal Railroad Safety Act)."[511] The court surveyed the circuit courts and determined the majority of the circuits allow a tax gross-up when they "make victims of unlawful employment practices whole."[512] The court did recognize that a tax gross-up may not be appropriate in every case, "such as when it is difficult to determine the amount, 'or the negligibility of the amount at issue.'"[513] The court noted the plaintiff bears the burden to prove the damage. Further, the court recognized that a

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[509] *Anchor Sav. Bank, FSB v. United States*, 123 Fed. Cl. 180, 183 (2015).
[510] *O'Toole v. Northrop Grumman Corp.,* 499 F.3d at 1227 (quoting *Home Sav. Of Am. v. U.S.,* 399 F.3d 1341, 1356 (Fed. Cir. 2005)).
[511] *Monohan v. BNSF Railway Co.,* 623 F.Supp.3d 990, 1004-05 (S.D. Iowa 2022). *But see King v. CVS Health Corp.,* 198 F.Supp.3d 1277, 1291 (N.D. Ala. 2016) (The court refused to delay entry of judgment to open the record for discovery and presentation of evidence on the tax consequences of the court's wage award. "The court, in its discretion, refuses to award this novel, though appealing, item of damages without evidentiary support of it, and refuses to delay entry of judgment any longer to allow the obtaining of such evidentiary support.").
[512] *Monohan,* 623 F.Supp.3d at 1002.
[513] *Id.* at 1003.

"district court must be able to 'show their work' on how they arrived at the tax gross-up amount."[514]

Tax gross-up payments were awarded in a breach of contract case where the lender refused the plaintiff's request to prepay the balance of its loan. Here the award was for past and future loss of net income.[515] The court allowed the award on the basis that it effectively compensated the plaintiffs for the harm caused by defendant's actions.[516] Here the court recognized that "[t]he purpose of a tax gross-up payment in a breach-of-contract suit is to 'ensure that damages awarded effectively compensate plaintiffs for the harm caused by defendant's action.'"[517] However, they "do not increase a damages award to compensate for the expected increase in tax liability resulting from the award unless the award was meant to compensate for tax-free income."[518]

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[514] *Id.* (citing *Hukkanen v. Internat'l Union of Operating Eng'rs, Hoisting & Portable Loc. No. 101,* 3 F.3d 281, 287 (8th Cir. 1993) ("plaintiff failed to present evidence of the enhancement's amount or a convenient way for the court to calculate the amount at the time the court announced its judgment.").
[515] *Sonoma Apartment Assocs. v. United States,* 127 Fed. Cl. 721, 723 (2016).
[516] *Sonoma Apartment Assocs. v. United States,* 127 Fed. Cl. at 732; *O'Toole v. Northrop Grumman Corp.,* 499 F.3d 1218, 1220-21 (10th Cir. 2007) (principle of tax gross-up acknowledged but remanded to establish basis for recovery).
[517] *Sonoma Apartment,* 127 Fed. Cl. at 732 (quoting *Anchor Sav. Bank, FSB v. United States*, 123 Fed. Cl. at 183).
[518] *Sonoma Apartment*, 127 Fed. Cl. at 732.

In another case before the Court of Claims, where the parties agreed that the capital loans the plaintiff would have received absent the breach would have been tax-free and the damages award plaintiff is to receive is taxable plaintiff sought an increase in its award to offset the taxes it would now be required to pay.[519] The court denied the increase, finding that the plaintiff was not being compensated for the loss of untaxable funds.[520]

Other federal courts, however, refuse to provide a tax gross-up payment asserting that such an award is not appropriate because it requires the court to speculate as to the post-judgment consequences.[521] The Seventh Circuit in denying a tax gross-up in a breach of contract case stated:

> Generally courts do not increase damages to compensate for expected tax liability on the damage award. When damages place a plaintiff in the position he would have occupied had the defendant's obligation been fulfilled, the amount recovered would (but for the breach) have been income, and thus taxable. Since the plaintiff would have paid taxes even absent the breach, he should not be compensated for the taxes he will have to pay on the damage award he receives as a result of the breach.[522]

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[519] *Carabetta Enterprises, Inc. v. U.S.,* 482 F.3d 1360, 1366-67 (Fed. Cl. 2007).
[520] *Id.* at 1367.
[521] *Medcom Holding Co. v. Baxter Travenol Labs, Inc.,* 106 F.3d 1388, 1404 (7th Cir. 1977); *Oddi v. Ayco Corp.,* 947 F.2d 257, 2167 (7th Cir. 1991) (legal error for court to provide tax gross-up)
[522] *Oddi v. Ayco Corp.,* 947 F.2d at 267.

The Second Circuit in a breach of contract case rejected a tax gross-up payment stating:

> To calculate such an item of damages permits of wide speculation. If such damages are awarded, the amount of tax differential will depend on the method by which [the plaintiff] has kept his books—cash or accrual basis. Damages would vary in each instance. Another consideration would be the taxpayer's financial position and other earnings of the year which would enter into the calculations so that it would be highly speculative to find the amount of the damages due to [the defendant's] breach of contract. Such variation of tax is not a consequential damage flowing from the breach of contract.[523]

In *Anchor Savings* and *Monohan* the courts allowed tax gross-ups after being provided evidence as to the tax consequences the plaintiffs would incur due to the lump sum payments they would receive. As noted above, the *Monohan* court stated that "a tax gross-up may not be appropriate in every case, such as when it is difficult to determine the amount, 'or the negligibility of the amount at issue.'"[524] Plaintiffs must show the extent of the injury they have suffered.[525] Further, district courts awarding tax gross-ups "must be able to 'show their work' on how they arrive at the tax gross-up amount."[526]

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[523] *Paris v. Remington Rand, Inc.,* 101 F.2d 64, 65 (2d Cir. 1939).
[524] *Monohan,* 623 F.Supp.3d at 1003 (citing *Clemens v. Centurylink Inc.,* 874 F.3d 1113, 1117 (9th Cir. 2017)).
[525] *Id.* at 1003.
[526] *Id. See also Hukkanen v. Internat'l Union of Operating Eng'rs, Hoisting & Portable Loc. No. 101,* 3 F.3d 281, 287 (8th Cir. 1993).

In *Anchor Savings* the court indicated that a tax gross-up will be awarded "if it is reasonably certain about the rate at which plaintiffs will pay income tax on the compensatory damages.[527] If the court is uncertain whether the plaintiff's award will be taxed, the court can deny the gross up and invite plaintiff to reopen the judgment pursuant to RCFC 60(b) if the Internal Revenue Service taxes the award.[528] This court finds that our appellate courts may allow a tax gross-up if the plaintiff can establish the award results in an adverse tax consequence.

Here the Developers explained their reason for the tax true up.

> We had various different types of damages that we're claiming in this lawsuit. Some of those damages represent cash that would come to us on an after-tax basis. Some of those damages represent cash that would come to us on a pretax basis.
>
> If we were to receive an award in this litigation, that entire award would be subject to income taxes. So we feel it is appropriate that in order for us to truly be made whole for this development opportunity, we would need to be made whole on an after-tax basis.
>
> So we've identified here the categories of damages that would be subject to income taxes and then trued those damages up so that we would receive a pretax award that would put us in the same place as we would have been in on an after-tax basis for those particular categories.[529]

Had the development agreement not been breached or the construction loan interfered with, the developers' fee/savings could have been received via a loan;

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[527] *Anchor Savings,* 123 Fed. Cl. at 183.
[528] *Id.*
[529] Trial Tr. Vol. 6, at 149:13-24.

the permanent loan financing. In that event they were borrowing money which would not have created a taxable event. The award of damages for the developer's fee/savings is money paid to them in a lump sum which creates a taxable event.[530]

The Developers calculated the tax true up by assuming a tax rate of 40% because that is the tax rate they assumed for the project and what their pro forma provided. To explain their formula, they used this example:

> Say you get a hundred dollars in a pretax award. That is then subject to tax and we're assuming a 40 percent tax rate, which is the tax rate that we've assumed throughout this entire project as shown in communications with the City.
>
> So if we receive a hundred dollars on a pretax basis, pay taxes of 40 percent or $40, we would be left with $60 on an after-tax basis. If you want to make a formula out of this, you would say -- you'd multiply the hundred dollars times 1, minus the tax rate, and that would get us $60; tax rate being 40 percent. And that's the basic formula. A hundred times 1 minus T equals 60.
>
> So the math that we need to do is get us from $60 to a hundred dollars. The way we do that is we divide both sides by 1 minus the tax rate, which is a hundred dollars, equals $60 divided by 1 minus the tax rate. That's the basic calculation.
>
> So if we know what our after-tax damage award should be, we have to divide that by 1 minus the tax rate to get to our pretax award.
>
> Q. And so in that example, in order to actually get an award of a hundred dollars after taxes, you'd have to be paid, if you did the math --
> A. Well, the idea is, if we wanted to get an award of $60 on an after-tax basis, we would need to be paid a hundred dollars in product damages.
> Q. I see.
> A. So this 60-dollar number would be equivalent to some of the

[530] *Id.* at 149:25-151:3

> numbers in that first category of damages there.
> Q. So if you only got an award of $60, you would be taxed on that 40 percent, so you would only be left with 36?
> A. Correct.
> Q. So to get an award of your 60 after-tax dollars, you would need a hundred and then it would get taxed and then it would take you back to where you were?
> A. Exactly. [531]

This is the only calculation that the Developers provided the court to establish the tax consequences they would suffer.

While not specifically addressing the development fee/savings for the garage, the City's expert witness, Sam Hadley, criticized the tax true-up on the development fee for the tower. Her criticism was that the payment of a development fee to the developer would have been income to the developer and subject to tax. If the development fee comes by way of a judgment, it is still subject to tax. In either scenario the developer would have had to pay taxes.[532] She specifically noted that the claimed true-up for the tower development fee was an increase of 67%, which should not result in a 67% increase in damages.[533]

The Developers objected to Hadley's testimony on the basis that it exceeded the scope of her report. The court took the evidence subject to the objection. While

[531] Trial Tr. Vol. 6 at 151:4-152:16.
[532] Trial Tr. Vol. 11, at 37-41.
[533] *Id.* at 40:11-20.

the Developers acknowledge they did not disclose the tax true up calculations until June 9, 2022, this was four months prior to trial and the City did not have Hadley update her report to identify the criticisms of the tax true up prior to trial. The Developers assert this testimony is not admissible due to the untimely disclosure of this evidence at trial.[534]

The court finds that the City failed to timely supplement Hadley's opinions on the tax true up issue on this point. The rules require that the offering party has a duty to supplement the opinions of their expert witnesses and the disclosure of the tax true up claim for damages was disclosed to the City more than four months prior to trial, ample time for the City to supplement Hadley's opinion on this issue. Accordingly, the court finds Hadley's testimony on this issue was not admissible and the court does not consider it. Further, Hadley's testimony did not address the tax true up issue with regard to the category 1 damages so the court does not consider it on these damages.

The court is concerned, however, with what appears on its face to be simplistic proof of this claim. The Internal Revenue's statutes and regulations are complex. The determination of an entity's tax liability is more involved than the example utilized by the Developers. The complexity of the process is exemplified

[534] See Trial Tr. Vol. 11, at 4:13-5:9; 37:15-18; 39:13-25.

when the entity to receive the award is Parking, LLC which is a limited liability company.[535]

Parking LLC has two members, Justin and Sean Mandelbaum. An LLC with multiple members is taxed as a partnership unless the LLC elects to be treated as a corporation.[536] If Parking, LLC elected to be taxed as a partnership, (which is unknown), the entity is not taxed, instead its income and losses pass through to the members, who report them on their individual tax returns.[537] The Developers presented no evidence as to how Parking, LLC is classified for tax purposes.[538] If it chose to be taxed as a partnership the Developers provided no information how the award of category 1 damages would impact the tax liability of either Justin or Sean Mandelbaum. Likewise, if Parking, LLC chose to be taxed as a corporation the

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[535] *See* Trial Ex. 3 at 6 (5th and Walnut Parking LLC, an Iowa limited liability company); Trial Ex. 32, 5th and Walnut Parking LLC, 5th and Walnut Tower LLC, 5th and Court LLC, et al., Cross-Claim against City of Des Moines, ¶ 7 (Polk Cty Dist. Ct. Sep. 23, 2020) (Cross-Claimant 5th and Walnut Parking LLC is an Iowa limited liability company). *See also* Certificate of Organization of 5th and Walnut Parking LLC (January 26, 2017) (copy found on the Iowa Secretary of State's website). The court may take judicial notice of adjudicative facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *See* Iowa R. Evid. 5.201(a)-(b).

[536] *Frazier v. Comm'er of the Int. Rev.,* T.C. Memo. 2024-2, 2024 WL 1756144, at *51 (2024) (citing Treas. Reg. § 301.7701-3(a) and (b)(1)(i)).

[537] *Thompson v. U.S.,* 87 Fed. Cl. 728, 729-30 (2009).

[538] *Id.* at 730 (most LLC's elect partnership taxation to avoid the two-tier system of corporate taxation).

Developers provided no evidence how the award would impact its corporate tax liability.

The court's statements in *Paris* denying a tax gross up in a breach of contract case are applicable here.

> To calculate such an item of damages permits of wide speculation. If such damages are awarded, the amount of tax differential will depend on the method by which [the plaintiff] has kept his books—cash or accrual basis. Damages would vary in each instance. Another consideration would be the taxpayer's financial position and other earnings of the year which would enter into the calculations so that it would be highly speculative to find the amount of the damages due to [the defendant's] breach of contract.[539]

The court finds that the Developers failed to prove they would be damaged by adverse tax consequences by a court award of the damages sought under 1-A, 1-B, and 1-C. Further, even if there was an adverse tax consequence the Developers have not shown specifically how the award for 1-A, 1-B, and 1-C damages would adversely impact, Parking LLC's, Justin's or Sean Mandelbaum's tax liability. Accordingly, the court denies the income tax effect true up sought for the 1-A, 1-B, and 1-C damages.

[539] *Paris v. Remington Rand, Inc.,* 101 F.2d 64, 65 (2d Cir. 1939).

Category 3

The court will address category 3 damages next since the court's decision impacts the court's analysis of category 2 and 4 damages. The court analyzes these categories of damages considering the standards the court must apply under the new business rule and the arguments surrounding the use of the pro forma as a method to calculate damages.

The category 3 damage titled "Lost Development Opportunity for the Tower" is a reconciliation of the net present value of the tower reconciled with a sales approach method for valuing the tower. The Reconciled Profit Calculation on Residential Development Equity Investment is the amount of the reconciliation of the net present value and the sales approach method for the residential portion of the tower.

To arrive at the Reconciled Profit Calculation on the Residential component the Developers used two methods. The first method is the net present value calculation.[540] To arrive at this amount they took the income statement from the pro forma and projected it out ten years.[541] The income is derived from the lease of the apartments in the residential component. They subtracted expenses to obtain

[540] *Id.* at 106, 119.
[541] *Id.* at 107.

net operating income.[542] The income and expenses are obtained from the projections the Developers made from the Tracy Cross data. Once they obtained this projection they arrived at the net present value using a 15% discount rate. A rate they received from their expert witness, Habibi. In this calculation they also assumed a sale in year ten.[543] They arrived at a net present value of $21,000,876 utilizing this methodology.[544]

The second method of valuation is the sale to developer approach where the Developers assume the opportunity to develop the project is sold to a third-party developer to build. This method does not require the assumption that the Developers built the project. This valuation approach was suggested by Habibi.[545]

In the sale to developer approach, they used their projected income stream from the first analysis and a cap rate for the residential component.[546] This gives them the projected market value of the tower if it were built.[547] The cap rate for the residential portion was determined to be 5% from a comparison of apartment sales in the Des Moines market.[548]

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[542] *Id.* at 108.
[543] *Id.* at 120.
[544] *Id.* at 119.
[545] *Id.* at 122.
[546] *Id.* (they also used this methodology for the hotel component).
[547] *Id.*
[548] *Id.* Vol. 6 at 124-25. Trial Ex. 24.

The net operating income of the apartment component, as noted above, was based upon their projections in the pro forma and the information they relied upon from Tracy Cross.[549] They capitalized the net operating income and subtracted the hard and soft costs to construct the building and assumed a 15% profit margin for the developer.[550] The project or this portion would be sold at that price to a third-party developer. What the Developers would receive would be the difference between the market value of the opportunity and the total value required by a third-party developer to purchase the development opportunity.[551] They averaged the damages between the net present value approach of $21,876,641 (found in Tab 24 of Exhibit 327A which is also found in Tab 17), and $25,000,827[552] which is the profit if the development opportunity was sold to a third-party developer. From that average they arrive at damages of $23,852, 291.

They followed the same approach for the hotel component of the tower. Tab 14 of Exhibit 327A provides net operating income for the hotel based upon projections from HVS.[553] This method includes revenue and expense assumptions.[554] The revenue from the hotel comes from six different sources with

[549] Trial Tr. Vol. 6 at 126.
[550] *Id.*
[551] *Id.* Vol. 6 at 128
[552] *Id.* at 127.
[553] *Id.* Vol. 6 at 129.
[554] *Id.*

various levels of expenses.[555] The net present value is $11,295,561 and they used a discount rate of 22% which came from Habibi.[556] They compare this number to the sale to developer approach found in Tab 24 of Exhibit 327A.[557]

They took the stabilized net operating income and applied a cap rate of 7%.[558] Exhibit 25 demonstrates how they arrived at the 7% cap rate.[559] This method predicts a market value for the hotel component at $66 million.[560] Averaging the two methods they arrived at $9,494,634.[561]

In each of these methods the revenue inputs assume profits from hotel revenue and residential revenue. The revenue is based upon the projections the Developers set forth in their pro forma. This revenue, however, does not exist because the tower was never built. The Developers are relying on the pro forma's projections of revenue to determine the amount of these category 3 damages. There is no past business experiences, no past business revenue, or no past business expenses that support the projections made by the Developers. The pro

[555] *Id.* Vol. 6 at 1320.
[556] *Id.* at 131.
[557] *Id.* at 132.
[558] *Id.* at 132.
[559] *Id.*at 133.
[560] *Id.*
[561] *Id.*

forma simply projects what the Developers believe could be earned from the tower.

The evidence established the tower was a unique development and a first for Des Moines. Farrell agreed with Tracy Cross' assessment that the project's features and qualities currently do not exist in Des Moines.[562] In considering the Developers' methodology for determining damages by use of the pro forma the court must determine if the projected income and expenses primarily, and the other inputs and assumptions in the pro forma, are reliable enough to establish reasonably certain lost profits or value.

The City's expert witnesses, primarily Hadley and Farrell, criticized the use of the pro forma generally as a method to determine damages.[563] Hadley's overarching criticism is that the pro forma is not the proper method for determining damages. She testified that there is a difference between the value of an opportunity and claimed damages, both in amount and how you calculate each.[564] She further testified that valuing an opportunity that you are trying to market to lenders, investors, and others for various purposes, is a "different

[562] Trial Tr. Vol. 10 at 42, 85 ("The Fifth is unlike any in the history of the Des Moines market?").
[563] The court highlights a number of criticisms these expert witnesses expressed but does not include all of them.
[564] Trial Tr. Vol. 10 at 206; Vol. 11, 113-14.

animal" from calculating losses in order to make a plaintiff whole.[565] The latter calculation requires the inputs (i.e., revenue and expenses) to be verifiable.[566] Specifically, as to the development fee damages (3-C and 4-D), she testified that the construction of the tower and theater never occurred and thus no costs were incurred and there was no risk taken to build the tower or theater. In discussing this point, she posed the question whether a developer fee is a reasonable award of damages for a risk that never occurred.[567] Regarding the payment of a management fee to the Developers as an item of damage (2-B), she questioned whether this was a proper measure of damages on an income stream for which there were no expenses because the Developers never operated the garage. She further opined that to award the Developers damages for not operating the garage is a windfall and not an item of damage.[568] She summarized her overall criticism of the use of the pro forma as a methodology to determine damages as follows:

> The conclusion in the report was that the support provided for the amount being claimed as damages was not reliable because the amounts that were being claimed could not be verified, in fact, did not have opinions as to the reasonableness of the inputs and assumptions and didn't have an overall assessment of the reasonableness of how that amount would make the developer whole, which would need to take into account those other things that are outside of the valuing of an opportunity process, like the out-of-pocket expenses that the plaintiff

[565] Trial Tr. Vol. 11 at 10.
[566] Trial Tr. Vol. 11, at 12-13.
[567] Trial Tr. Vol. 11 at 18-19.
[568] Trial Tr. Vol. 11 at 26-27.

> has still not been paid for, if any, the mitigation efforts, and all of those other things that need to be accounted for when assessing the reasonableness of damages versus an opportunity.[569]

The court understood Hadley's overall criticism of the pro forma as a model to measure damages was that it was not verifiable because the pro forma relied on projections of income and expenses and other critical inputs not market driven data from existing verifiable business experiences.

Farrells' criticisms are similar. He testified that the pro forma was extremely sensitive to change. If one input varied from what was in the pro forma the Developers' claims of damages could disappear.[570] The pro forma is used to measure investment value not a market value.[571] He believes it is a speculative way to estimate market value.[572] It is speculative because the pro forma requires many inputs and if any one of them is changed the values and conclusions can change considerably.[573] The pro forma is a cash flow analysis to represent investment value and to do that accurately, for instance, you need to know the cost of capital. Here that is not known because the Developers never obtained capital

[569] Trial Tr. Vol. 11 at 41:2-15.
[570] Trial Tr. Vol. 9 at 177-79.
[571] Trial Tr. Vol. 9 at 196-97.
[572] *Id.* at 196.
[573] *Id.*

for the tower or theater.[574] He also criticized its use because the pro forma is not based on market derived inputs.[575]

He further opined that the discounted cash flow used in the pro forma is not appropriate for the "task at hand."[576] It is very easy to manipulate and the more inputs there are the easier it is to manipulate.[577] The discounted cash flow analysis is used by a developer to assist them in determining their rate of return on an investment based on projected income and estimate whether they can afford to pay for a property based upon their return requirements.[578] The pro forma is a useful tool in that regard. Such a use is very specific to the investor and if their rate of return is low then the damages would be much higher because they would be willing to pay more for the present dollars.[579] Thus the rates of return affect the value of the damages significantly and the rate of return is a significant input and arbitrary.[580]

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[574] *Id.* at 197.
[575] *Id.*
[576] *Id.* at 200.
[577] *Id.* (His comments about manipulation were not meant in a sisnter manner but simply from a sensitivity perspective. A market driven change in an input can have a significant impact on the conclusions.)
[578] *Id.*
[579] *Id.* at 201.
[580] *Id.*

He also questioned whether there would be any damages because he was not certain the project was financially feasible.[581] If you accept the date of the breach as June 24, 2020, the date the default notices were sent, the project was extraordinarily risky because of Covid.[582] The hotel was marginally feasible prior to Covid and questioned whether you would want to develop it because it was not a good time for the hotel industry.[583] At that time the Developers did not have any capital for the tower.

He acknowledged that Covid was very disruptive, it slowed construction, the costs of construction increased, and financial markets were disrupted. And because of Covid's disruption the increase in construction costs makes the value of the project less and makes it harder to finance.[584] He testified Covid also impacted the financial viability of hotels and its effects are still present.[585]

He believed the real question for determining damages is what the site would have sold for on the date of trigger date.[586] To solve the speculation he sees

[581] Trial Tr. Vol. 10 at 122-23.
[582] *Id.* at 205-06. *See also* Trial Tr. Vol. 7 at 124, 130-31 (Krueger indicated this was a deal they would did if interest rates got back to pre-Covid levels. Without the parking the risk if the project was not viable.).
[583] *Id.* at 188-90.
[584] *Id.* 10 at 97-98.
[585] *Id.* Vol. 10 at 98-99.
[586] *Id.* Vol. 10 at 120.

in the pro forma he would value the land.[587] He would look at the value of the land on the date of breach.[588]

Furthermore, he was not sure there were any damages. If the project was not financially feasible it would not be built and thus the lost profit calculations would not come into play. The pro forma does not produce a credible result.[589] The pro forma did not take into account the effects of Covid because the Developers used March 2020 as the trigger date for calculating their damages.[590] The pro forma is not designed for the purpose of submitting damages.[591] A lender would not use it solely to issue a loan. The lender would hire an appraiser to value the land.[592] If he were hired to appraise the project for a lender he would look at the value of the land prior to the date of damage, June 23, 2020, and what it was worth on the day of the damage, June 24, 2020.[593]

In addition, the court considered the testimony of Bill Barry, the mortgage broker the Developers retained for obtaining financing. He conceded that Covid was negatively impacting the ability to finance the tower at the time of trial.[594] He

[587] *Id.* Vol. 10 at 120.
[588] *Id.* Vol. 10 at 134-35.
[589] *Id.* Vol. 10 at 144.
[590] *Id.* Vol. 10 at 145.
[591] *Id.* Vol. 10 at 146.
[592] *Id.* Vol. 10 at 146-47.
[593] *Id.* Vol. 10 at 148.
[594] Trial Tr. Vol. 5 at 33.

further testified that that it was still very difficult to build a hotel or movie theater in the market conditions at the time of trial.[595]

The court weighed the pro forma and the data generated by the Developers. The court weighed the criticisms asserted by the City's expert witnesses as to the credibility and reasonableness of the pro forma as a method to calculate damages. The court considered that a rise in interest rates could adversely impact the financial feasibility of the project. The court weighed the lack of committed capital financing prior to Covid and the evidence from Barry that is still difficult to finance this kind of project. The lack of an equity investor at the time the development agreement was breached. The impact of Covid at the time of the breach and its impact on the likelihood of whether the project would be built. The court agrees with the City's expert witnesses' criticism that the pro forma while appropriate for its use as a tool to assist lenders and equity investors in determining whether a project has financial feasibility or viability and to provide an analysis of the potential profits of the project these calculations are all based upon projections but no past experience for a project like this one in Des Moines. The court finds the Developers had the enthusiasm, optimism, and willingness to see this project through. The court also finds the Developers appeared to be

[595] Trial Tr. Vol. 5 at 35.

conservative in several of their assumptions. However, they are asking the court to award damages, not based on past experiences, but on projected financing, projected construction costs, projected income and costs, and projected future profits of a project that was not built and there is credible evidence it would not have been built. As a result, the court finds that the Developers have not established their damages with reasonable certainty. Thus, the court finds that the category 3 damages of $23,852,291 for reconciled profit calculation on residential development equity investment and $9,494,634 for reconciled profit calculation on hotel development equity investment should not be awarded.

Category 2

Category 2 damages consist of four components. 2-A damages "represent [the] lost value to the developer from owning the garage long-term after the permanent financing and after the parking shortfall loan had been repaid."[596] The Developers view this as a loss because they expected to make money by owning the garage.[597] The Developers seek an award of $4,367,750 for these damages.

The 2-A damages were calculated by examining the way the garage was to be financed under the development agreement. The garage financing contained a parking shortfall loan which provided that upon completion of the garage

[596] Trial Tr. Vol. 6 54:11-13.
[597] Trial Tr. Vol. 6 54:24-16.

construction Parking LLC would obtain permanent financing. The permanent loan would be repaid over twenty years, and the City would provide a backstop through the parking shortfall loan. In other words, the City paid for any shortfall the Developers had during this period by paying the amount due under the permanent financing if revenue was not sufficient to service the debt. This was a loan to the Developers from the City. This parking shortfall loan would be repaid by the Developers starting in year 21 by an 80% cash sweep of the cash flow from the garage going to the City and the remaining 20% would flow to the developer, to pay the income tax the developers would experience from the garage revenue. Once the Developers paid the parking shortfall loan then 100% of the cash flow from the garage went to the developer. The Developers assumed they would own the parking garage for 100 years and then discounted that by 8.5%.[598] It was projected that the parking shortfall loan would be repaid in year 21.[599] It was the stream of income that flowed to the Developers after year 21 that was used to calculate a net present value.[600] The net present value of that profit is $4,357,750 and the damages sought by the Developers.[601]

[598] Trial Tr. Vol. 6 at 79-80.
[599] Trial Tr. Vol. 6 at 81.
[600] Trial Tr. Vol. 6 at 81.
[601] Trial Tr. Vol. 6 at 82.

The Developers in the pro forma specifically Tab 28 of Exhibit 327A demonstrated the revenue assumptions for the garage.[602] The revenue assumptions showed the Developers projected revenue from the rental of exclusive stalls and non-exclusive stalls. The exclusive stalls had two separate monthly residential rates; general and premium. These stalls would be rented by the tenants of the residential portion of the tower. The non-exclusive stalls showed revenue from monthly court rentals, monthly commercial rentals, the hotel, and daily parking. There was also a revenue forecast for the weekend Farmers Market and night/weekend (non-theater parking). These revenue assumptions projected annual income at $1,650,656. This income was transferred to Tab 30 of Exhibit 327A[603] for the year 1 total parking revenue. Annual income was projected to rise throughout the one hundred years. Tab 30 demonstrated the Developers' income and costs projected forward for operating the garage over a 100-year period.

These revenue calculations appear to include revenue from potentially past operations, such as monthly commercial rentals, monthly court rentals, daily parking, Farmers Market, and night/weekend. A parking garage existed on this site and was operated for years with revenue that could have come from these

[602] Trial Ex. 327A at 220.
[603] Trial Ex. 327A at 224.

sources. However, there was no testimony regarding the revenue from these past operations. Thus, the evidence established that the revenue projected to be generated from the tower and theater are projections with no link to past experience or comparable business. In addition, while the Developers testified they intended to keep the garage in the family for 100 years there was no testimony that the garage had a useful life of 100 years.

It is clear the Developers relied on projected revenue from patrons of the residential portion of the tower and patrons of the hotel to establish their income stream. In reaching their claimed damages, the Developers relied on the pro forma's projections of revenue to determine the amount of the 2-A damages. However, this is projected revenue it does not exist and there are no past experiences and suffers the same criticism as the category 3 damages. The Developers are asking the court to award damages on projected estimates not data that is verifiable and reliable. The Developers failed to prove with reasonable certainty these damages.

The damages sought under 2-B is the net present value of the garage management fee. The Developers assert that the City's expert witnesses do not address this claim for damages and that here was no specific criticism of items 2A

and 2D.[604] No alternative calculation for any of the items in Exhibit 325 were provided by the City.[605] They further assert these damages do not depend on the tower or theater being built. The Developers assert that the amount sought should be granted.

Justin Mandelbaum testified that the garage management fee was separate from the expenses of operating the garage.[606] The management fee was accounted for separately. The five percent (5%) management fee was on top of or net of the expenses of the garage.[607] However, the management fee is based upon a percentage of the projected garage revenue and expenses.[608] The net present value of that is $3,299,859.[609] Because the management fee relies on the projected garage revenue and expenses the court finds net present value has not been established with any reasonable certainty for 2-B.

The third element of damage, category 2-C, was the net present value of the environmental expense incentive payment. This is found in section 8.3(2)(b) of the development agreement.[610] The damage claim arises from the Developers

[604] Trial Tr. Vol. 12 at 142.
[605] *Id.*
[606] Trial Tr. Vol. 12 at 161, 162, 163
[607] Trial Tr. Vol. 12 at 161-62.
[608] Trial Ex. 327A, Tab 28 ("Management Fee (% of Revenue)").
[609] Trial Ex. 325
[610] Trial Tr. Vol. 12 at 165; Exhibit 3.

agreeing to remediate asbestos that was underground on the site. Most of the asbestos was located on the property where the theater was to be constructed (south of the garage), however there was also asbestos in the garage.[611] This incentive payment was to be paid to the Developers as part of the garage project once construction commenced on the tower and theater. They did not receive it because their ownership of the garage was eliminated when the City breached the development agreement. The net present value of that payment is $822,000.

This damage claim is contingent on starting construction of the tower and theater buildings. As noted, construction never commenced so the Developers have not been damaged. They were not entitled to this incentive payment unless they commenced construction of the tower and theater. The court finds the Developers suffered no damage by the breach of the development agreement for the environmental expense incentive payment.

The final element of damage, 2-D, was the market value of the restaurant and retail space in the garage. On the floor level of the garage, space for restaurant and retail operations was provided. The Developers projected what the capitalized earnings of this income stream from the net rent from both of those spaces. That net present value was $3,381,702. The calculations relied upon projections of

[611] Trial Tr. Vol. 12 at 166.

revenue and expenses with no past background data or experience. The court finds the Developers did not prove the 2-D damages with reasonable certainty.

Category 3 Alternative Claims

As an alternative to the lost development opportunity damages, the Developers provided four other damage categories. The Developers assert these damages do not require any assumptions about the future profitability of either the hotel or residential components of the tower and if they had been built these numbers represent the value that the Developers created in this project at its completion.[612] The assumption that has to be made is that the Developers get the tower built.[613] They presented these alternatives if it was determined the calculations for determining the future profit of the tower was too uncertain.[614]

The alternative claims are: 3-A Architecture on Tower paid by Developer; 3-B Predevelopment Expenses on Tower Paid by Developer; Tower Hard Costs Funded by Developer in Garage (Excluding Restaurant); and Development Fee on Tower. 3-A, 3-B, and 3-C are included as developer equity in the capital stack of

[612] *Id.* Vol. 6 at 134.
[613] *Id.* Vol. 6 at 134-35.
[614] *Id.* at 135.

the tower.[615] These amounts constitute the Developers' equity contributions.[616] These are items that were spent not projections.[617]

The 3-A and 3-B calculations can be found in Tab 6 page 13 of Exhibit 327A. The amount of $5,187,959 is the combination of the 3-A damage of $3,237,129 and 3-B of $1,950,830.[618] The Developers assert they incurred these expenses for the tower, thus any investor who would come in does not need to pay for these expenses since they have been paid for by the Developers.[619]

3-C damages were the tower hard costs funded by the Developers in the garage excluding the restaurant.[620] These are costs included in the construction of the garage that were for the benefit of the tower.[621]

3-D damages are the alternative calculation for the development fee on the tower. This is 5% of the hard and soft costs for the tower.[622] This is included because if they had been allowed to build the tower this is the developer fee they would have been entitled to receive.[623] "It's a way to compensate developers for

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[615] *Id.* at 135.
[616] *Id.* at 136.
[617] *Id.* at 137. *See* Trial Ex. 327A, Tabs 6, 7.
[618] *Id.* at 138.
[619] *Id.* at 136.
[620] *Id.* at 140.
[621] *Id.* at 141-43. *See also* Trial Ex. 327A, Tab 5.
[622] *Id.* at 144. *See also* Trial Ex. 327A, Tab 2 at 2.
[623] *Id.* at 143-44.

their time, their effort, their ideas, and the value that they've created for doing development."[624]

Regarding 3-A, 3-B, and 3-C, these costs were all paid by the construction loan provided by Bankers Trust. The Developers only paid these costs through the construction loan. When the City purchased the garage from Bankers Trust all these costs were included in the purchase price. In addition, the Developers had no liability for any of these costs. Thus, they have suffered no damage from the breach of the development agreement. Thus, the court finds the Developers are not entitled to these damages.

Regarding 3-D, the development fee on the tower, the tower was never built, thus it was not developed. Accordingly, the Developers are not entitled to any developer fee.

Category 4

4-A, 4-B, and 4-C represent the costs the Developers claim they incurred when they were developing the garage. These incurred costs inured to the benefit of the theater. As the court previously discussed, these costs were paid by the construction loan. The Developers did not pay for these costs other than through

[624] *Id.* at 144:9-11.

the construction loan for which they have no liability. Consequently, the Developers have suffered no damages.

4-D is the value they calculated for the lost development opportunity for the theater.[625] They did not make the dual calculation of net present value or sale to developer approach because they had not advanced far enough to have sufficient specificity to be able to predict profit numbers and expenses.[626] This calculation is similar to the calculation for 3-D. It also is what they would have earned once the theater was constructed.[627] The theater has not been developed or built. The Developers are not entitled to any fee for theater development.

Foreclosure Defense Costs

These are the costs associated with the defense of the Bankers Trust foreclosure. The Developers view this as a loss they would not have incurred if the City had not breached the development agreement. The development agreement does not provide attorney fees for the prevailing party. While the Developers assert that these expenses were for the foreclosure proceedings, they do not delineate the services provided by their counsel. The foreclosure action was filed on September 14, 2020, by Bankers Trust. On September 23, 2020, the Developers filed their

[625] *Id*. at 145.
[626] *Id.* at 146.
[627] *Id.* at 148.

cross-petition against the City for the claims litigated in this matter and the subject of the trial. The Developers began litigating these claims against the City immediately upon being served with the foreclosure petition. The court finds the Developers have failed to establish the amount claimed was solely for the defense of the foreclosure action since that defense entailed the immediate filing of a cross-petition against the City on the issues presently before the court.

Titles to the Tower and Theater Parcels

At the outset of the development the land upon which the garage, tower, and theater were to be constructed was owned by the City.[628] Title to the property passed to 5th and Walnut Parking LLC on September 17, 2017.[629]

Here the land where the tower and theater were to be constructed was assigned to Tower LLC and Court LLC.[630] This was done pursuant to the terms of the development agreement. The City was granted a mortgage against all the property by Parking LLC.[631] The mortgage secured the loans and obligations of Parking LLC which were to repay the "Forgivable Loan" and the "Parking Shortfall Loan."[632] Parking LLC no longer has those obligations, and thus neither

[628] Trial Ex. 3 at 7.
[629] *Id.*
[630] Trial Exs. 301and 300.
[631] Trial Ex. 597.
[632] *Id.* at 2.

would Tower LLC or Court LLC. This mortgage was subordinate to the $4,300,000 loan to Lincoln Savings Bank and this loan was paid from the proceeds of the Bankers Trust construction loan. Thus, Parking LLC no longer has any obligation under that loan.

The development agreement provided that if the construction of the theater was not timely commenced the City could require the owner to convey the south parcel to the City by special warranty deed.[633] The same was to occur if construction of the tower was not timely commenced for the tower.[634]

The court understands that the City has title to the property upon which the garage was constructed because it purchased the garage. It is unclear what property was included in that purchase, but the court assumes it is the land the garage sets on and other portions of the property appurtenant to the garage.[635] Based upon the City's request for title to the tower and theater parcels the court assumes this property was not included in the purchase of the garage.

[633] Trial Ex. 3, at 54, Art. 10, Sec. 10.2(D)(1).
[634] *Id.* at 55, Art. 10, Sec. 10.2(E)(1).
[635] Ex. A as an attachment to the Purchase Agreement to the Joint Motion to Authorize Receiver to Sell Real Estate Free and Clear of Liens and Interests, Motion (Polk Cty Dist. Ct. Jan. 8, 2021). (Dkt. No. D0045)

The court denied the breach of contract counterclaim asserted by the City under which they seek the return of these parcels. Further, the court's ruling here determined that the Developers did not breach the agreement as provided in section 10.2(D)(1). Consequently, the City is not entitled to the remedy provided under that section which is the return of the title to the theater parcel by special warranty deed. The same result would occur under section 10.2(E)(1) as it pertains to the title to the tower parcel. Because the court determined that the Developers did not breach the development agreement the City's claim is not supported by any provision of the development agreement. There is no basis for the court to order a return of the titles to these parcels to the City. Accordingly, the court leaves title to the tower and theater parcels with Tower LLC and Court LLC, respectively.

JUDGMENT

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the City breached the development agreement under count I.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the City tortiously interfered with the existing construction loan between Parking LLC and Bankers Trust under count II.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Parking LLC's and Justin and Sean Mandelbaum's claim for indemnity under count III is moot and this count is dismissed.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Parking LLC's, Tower LLC's, Court LLC's, and Justin and Sean Mandelbaum's claims for declaratory relief are moot under count IV and this count is dismissed.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Parking LLC, Tower LLC, Court LLC, Justin and Sean Mandelbaum failed to prove that the City tortiously interfered with their prospective business advantages under count V. This count is dismissed.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Parking LLC's, Tower LLC's, Court LLC's, and Justin and Sean Mandelbaum's claims for injunctive relief under counts VI and VII are moot and these counts are dismissed.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Parking LLC is entitled to a judgment of $4,353,677 against the City under either the breach of contract under count I or the tortious interference claim under count II. Parking LLC is entitled to interest on the judgment as provided in Iowa Code section 668.13(1) at the rate of 6.24% from September 23, 2020.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the other claimed damages sought by Parking LLC, Tower, LLC, Court LLC, and Justin and Sean Mandelbaum are denied for the reasons stated in the court's ruling.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that title to the parcel of land upon which the tower was to be constructed shall remain with Tower LLC.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that title to the parcel of land upon which the theater was to be constructed shall remain with Court LLC.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Parking LLC, Tower LLC, Court LLC, Justin and Sean Mandelbaum are entitled to judgment in their favor on the City's claim for breach of contract on count II of their counterclaim. This count is dismissed.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Parking LLC, Tower LLC, Court LLC, Justin and Sean Mandelbaum are entitled to judgment in their favor on the City's claim for breach of contract on count III of their counterclaim. This count is dismissed.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Parking LLC, Tower LLC, Court LLC, Justin and Sean Mandelbaum are entitled

to judgment in their favor on the City's claims for breach of contract on count IV of their counterclaim. This count is dismissed.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the City's counterclaims under counts I and V are dismissed since the City dismissed those counts during trial.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the court reaffirms its grant of summary judgment to Parking LLC on count VI of the City's counterclaim.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the court reaffirms its grant of summary judgment to Parking LLC on count VII of the City's counterclaim.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the court costs are taxed against the City.

State of Iowa Courts

Case Number	**Case Title**
EQCE086198	5TH AND WALNUT PARKING LLC ET AL VS CITY OF DES MOINES
Type:	OTHER ORDER

So Ordered

L. P. McLellan

Lawrence P. McLellan, District Court Judge,
Fifth Judicial District of Iowa

Electronically signed on 2024-11-12 08:21:12