

December 30, 2019

***Via Hand Delivery***

Christine Brock, Clerk of Court  
Vermont Superior Court  
Chittenden Civil Division  
175 Main Street, P.O. Box 187  
Burlington, VT 05401

**Re: Docket No. 118-2-19-Cncv McGrew et al. v. Devonwood Investors, LLC et al.**

Dear Ms. Brock,

Enclosed please find Devonwood Investors, LLC's and BTC Mall Associates, LLC's *Answer to Plaintiffs' Third Amended Complaint for Declaratory Relief and Counterclaim for Breach of the Implied Covenant of Good Faith and Fair Dealing* for filing in the above-captioned matter along with a check for \$120 for the counterclaim.

Please do not hesitate to contact us if you have any questions.

Sincerely,



Melinda Siel  
Paralegal

Enclosure  
Check# 15892

cc: Service List

STATE OF VERMONT

SUPERIOR COURT  
Chittenden Unit

CIVIL DIVISION  
Docket No. 118-2-19 Cncv

BARBARA MCGREW, LYNN MARTIN, )  
MICHAEL LONG, and STEVEN GOODKIND )  
Plaintiffs/Counterclaim Defendants, )

v. )

DEVONWOOD INVESTORS, LLC, and BTC )  
MALL ASSOCIATES, LLC, )  
Defendants, Counterclaim Plaintiffs, )

v. )

JOHN FRANCO, )  
Counterclaim Defendant. )

**CERTIFICATE OF SERVICE**

I, Melinda Siel, certify that on December 30, 2019, I forwarded copies of Devonwood Investors, LLC's and BTC Mall Associates, LLC's *Answer to Plaintiffs' Third Amended Complaint for Declaratory Relief and Counterclaim for Breach of the Implied Covenant of Good Faith and Fair Dealing* to the parties below by the delivery method noted:


**By Hand Delivery:**

Christine Brock, Clerk of Court  
Vermont Superior Court  
Chittenden Civil Division  
175 Main Street, P.O. Box 187  
Burlington, VT 05401

**By First Class Mail & Email**

John L. Franco, Jr.  
Law Offices of John F. Franco, Jr.  
110 Main Street  
Burlington, VT 05401  
johnfrancolaw@aol.com  
*Attorneys for Plaintiffs*

Dated at Burlington, Vermont this 30<sup>th</sup> day of December, 2019.

  
\_\_\_\_\_  
Melinda Siel, Paralegal

STATE OF VERMONT

SUPERIOR COURT  
Chittenden Unit

CIVIL DIVISION  
Docket No. 118-2-19 Cncv

BARBARA MCGREW, LYNN MARTIN, )  
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Plaintiffs/Counterclaim Defendants, )

v. )

DEVONWOOD INVESTORS, LLC, and BTC )  
MALL ASSOCIATES, LLC, )  
Defendants, Counterclaim Plaintiffs, )

v. )

JOHN FRANCO, )  
Counterclaim Defendant. )

**DEFENDANTS DEVONWOOD INVESTORS, LLC'S AND BTC MALL ASSOCIATES, LLC'S ANSWER TO PLAINTIFFS' THIRD AMENDED COMPLAINT FOR DECLARATORY RELIEF AND COUNTERCLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**

Defendants Devonwood Investors, LLC and BTC Mall Associates, LLC (collectively "BTC") answer Plaintiffs' Third Amended Complaint as follows:

**Introduction**

1. Admitted
2. Admitted that Mr. Goodkind, Mr. Long, and Ms. Martin participated in the cited challenge to TIF funding related to the Project in this Court, and that Count IV of that action challenged the denial of a public records request related to the Project. Otherwise denied.
3. Admitted
4. Admitted

5. Admitted that as a result of the Settlement Agreement, Plaintiffs Long, Martin, and Goodkind stipulated to the dismissal of the challenge to the TIF funding referenced in paragraph 2 above, and, as part of a group of interested persons, stipulated to entry of judgment in the zoning appeal referenced in paragraph 3. Further admitted that as a result of the Settlement Agreement, Ms. McGrew stipulated to entry of judgment in the Act 250 appeal referenced in paragraph 4. Further admitted that Mr. Goodkind and Ms. Martin withdrew as individual plaintiffs in the public records act challenge reference in paragraph 2 as a result of the Settlement Agreement. Otherwise denied.

**COUNT 1**

6. Admitted that in 2018, BTC did not individually notify Plaintiffs of project changes and zoning amendments. BTC is without knowledge or information sufficient to respond to the allegation that Plaintiffs did not receive “actual” notice of the changes and amendments, and therefore denies that allegation. Otherwise denied.

7. Admitted that BTC has updated Project development plans since receiving zoning permits in 2017 and 2018. Otherwise denied.

8. Admitted that representatives of Defendant BTC Mall Associates, LLC provided an update on Project development to the Burlington City Council at its October 28, 2019 meeting, and that the representatives discussed an updated development plan under which construction is anticipated to commence in 2020. Further admitted that a video of that update is available on the internet. Otherwise denied.

9. Admitted that Plaintiffs seek the relief described. Denied that Plaintiffs are entitled to that relief.

10. Denied.

11. Denied.

12. Denied.

13. Admitted that Plaintiffs seek the relief described in this paragraph. Denied that Plaintiffs are entitled to the requested relief.

## COUNT II

14. Admitted that paragraph 6(d) of the Settlement Agreement states in part that “Appellants, with the approval of the Applicant, will establish a fund at the Vermont Community Foundation, or similar existing Vermont non-profit organization with 501(c)(3) status,” and that the Agreement contemplated two payments of \$200,000 and \$300,000 respectively. Otherwise denied.

15. BTC is without knowledge or information sufficient to form a belief as to whether “plaintiffs concluded that the Vermont Community Foundation was not a good fit,” and therefore denies this averment. Admitted that Plaintiffs proposed that BTC designate an alleged organization called the “Caroline Fund” as the charitable organization to administer the “fund” under paragraph 6(d) of the Settlement Agreement. Otherwise denied.

16. Without knowledge or information sufficient to form a belief as to the truth of the matter, therefore denied.

17. Admitted that in November of 2018 Plaintiffs and Attorney Norman Blais (as counsel for the “Caroline Fund”) wrote to request that BTC designate an alleged organization called the “Caroline Fund” as the charitable organization to administer the “fund” under paragraph 6(d) of the Settlement Agreement. Otherwise denied.

18. Admitted that BTC has taken the position in this proceeding that BTC is not obligated to make the donation described in paragraph 6(d) of the Settlement Agreement because Plaintiffs failed to establish a “fund” by the agreed deadline, and an appeal was taken by the Coalition for a Livable City in the underlying Public Records Act claim. Otherwise denied.

21 [sic]. Denied.

22 [sic]. Admitted that BTC commenced the demolition phase of project construction in December of 2017. Otherwise denied.

23 [sic]. Admitted that Plaintiffs seek a declaratory judgment as described in this paragraph. Denied that Plaintiffs are entitled to the requested relief.

24 [sic]. Admitted that Plaintiffs seek an award of attorneys' fees and costs as referenced in this paragraph. Denied that Plaintiffs are entitled to such relief.

WHEREFORE BTC demands that the Third Amended Complaint be dismissed and that BTC be awarded its costs, together with interest and such other relief as the Court deems just.

#### **AFFIRMATIVE DEFENSES**

1. Failure to state a claim upon which relief may be granted.
2. BTC's performance is excused by Plaintiffs' material breach.
3. BTC's performance is excused by failure of consideration.
4. BTC's performance is excused by frustration of purpose.
5. Plaintiffs are equitably estopped from claiming breach of contract.
6. Plaintiffs have waived their claims.
7. Plaintiffs' own bad faith conduct excuses BTC's performance.
8. BTC reserves the right to add additional affirmative defenses.

#### **JURY DEMAND**

BTC hereby demand trial by jury on all claims so triable.

#### **COUNTERCLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**

Defendants/Counterclaim Plaintiffs BTC Mall Associates, LLC and Devonwood Investors, LLC ("BTC") counterclaim against Plaintiffs/Counterclaim Defendants Barbara

McGrew, Lynn Martin, Michael Long, and Steven Goodkind, and additional Counterclaim Defendant John Franco (collectively “Counterclaim Defendants”) as follows:

1. In June 2017, BTC, Counterclaim Defendants Goodkind (for himself and on behalf of a group of petitioners, which included John Franco, pursuant to 24 V.S.A. § 4465(b)(4)<sup>1</sup>), McGrew, Long, Martin, and John Franco, entered into a Settlement Agreement resolving certain legal actions brought by Counterclaim Defendants Goodkind (for himself and on behalf of a group of petitioners including John Franco), McGrew, Martin, and Long related to the Burlington CityPlace downtown redevelopment project (the “Project”) being developed by BTC.

2. The Settlement Agreement contemplated generally that, among other things, the Counterclaim Defendants would (1) stipulate to a final judgment in challenges to the Project’s zoning and Act 250 authorizations pending at the Vermont Superior Court, Environmental Division (the “Environmental Cases”) and (2) cease their pursuit of a lawsuit, captioned *Long et al. v. City of Burlington et al.*, Docket No. 996-11-16 Cncv (the “TIF/PRA Litigation”), brought by Counterclaim Defendants and an unincorporated association known as the Coalition for a Livable City (the “Coalition”) challenging the Project’s Tax Increment Financing and the City of Burlington’s denial of a Vermont Public Records Act request for proprietary information related to the Project that was shared confidentially with a City consultant by BTC.

3. Counterclaim Defendants also agreed to “take all reasonable actions necessary to implement the terms of this Settlement Agreement and will not oppose any other permits or regulatory or legislative approval that may be required to implement the Project . . . .”

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<sup>1</sup> See also 10 V.S.A. § 8504(b)(1) (allowing for appeal of zoning decision to the Vermont Superior Court, Environmental Division, by an “interested person” as defined in 24 V.S.A. § 4465).

4. For its part, BTC would (1) make certain changes to the Project to mitigate Counterclaim Defendants' concerns about parking (2) pay certain of Counterclaim Defendants' legal fees, and (3) make donations to a fund established by Counterclaim Defendants "with the approval of [BTC]," at the Vermont Community Foundation or a "similar" non-profit organization to support "a mission and purpose to retain the essential character of Burlington."

5. The first donation to the fund was to be made "within ninety (90) days after final judgment is entered in [the Environmental Cases and the TIF/PRA Litigation], and no appeal is filed."

6. Notwithstanding the Settlement Agreement, however, Counterclaim Defendants continued to actively pursue relief against BTC in the TIF/PRA Litigation through the Coalition, which was represented in the TIF/PRA Litigation by John Franco (who also signed the Settlement Agreement).

7. In fact, after the Court issued final judgment in the TIF/PRA Litigation in favor of BTC and the City of Burlington (the "City"), Counterclaim Defendants – again, acting through the Coalition, and represented by John Franco – appealed the Court's ruling on their Public Records Act claim to the Vermont Supreme Court.

8. That appeal was not finally resolved until September 2018, when the Vermont Supreme Court affirmed the judgment in favor of the City and BTC.

**COUNT I – BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**

9. By continuing to pursue the TIF/PRA Litigation after execution of the Settlement Agreement, Counterclaim Defendants interfered with BTC's right to enjoy the benefit of the Settlement Agreement and broke implicit promises that made the Settlement Agreement possible in the first place.



10. Counterclaim Defendants' conduct further interfered with BTC's ability to perform its obligations under the Settlement Agreement.

11. As a result of the Counterclaim Defendants' conduct, BTC was forced to incur substantial costs, expenses, and other damages – including attorney's fees – in continuing to defend the TIF/PRA Litigation.

12. Counterclaim Defendants' conduct constitutes a breach of the implied covenant of good faith and fair dealing.

13. As a result of Counterclaim Defendants' breach, BTC is entitled to recovery of its damages and costs, including its reasonable attorney's fees incurred as a result of Counterclaim Defendants' conduct.

14. As a result of Counterclaim Defendants' breach, BTC is entitled to a declaratory judgment that it is not obligated to make the donations to an approved fund as contemplated by paragraph 6(d) of the Settlement Agreement.

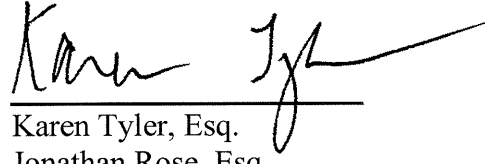
WHEREFORE, BTC respectfully requests that the Court:

1. Issue judgment in its favor;
2. Award BTC damages incurred – including reasonable attorney's fees – as a result of Counterclaim Defendants' breach, in an amount to be determined at trial;
3. Issue a declaratory judgment that BTC is excused from any obligation it had to donate money to a fund established pursuant to paragraph 6(d) of the Settlement Agreement; and
4. Award BTC such other relief as it deems just and appropriate.

Dated at Burlington, Vermont this 30<sup>th</sup> day of December, 2019

DUNKIEL SAUNDERS ELLIOTT  
RAUBVOGEL & HAND PLLC

By:

A handwritten signature in black ink, appearing to read "Karen Tyler", written over a horizontal line.

Karen Tyler, Esq.

Jonathan Rose, Esq.

91 College Street

Burlington, Vermont 05401

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ktyler@dunkielsaunders.com

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Attorneys for Defendants BTC Mall  
Associates, LLC and Devonwood Investors,  
LLC

**Dunkiel Saunders**

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Burlington, VT 05401

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BO341  
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TRADE PROTECTION

12/30/2019

PAY TO THE ORDER OF Vermont Superior Court

\$ \*\*120.00

One hundred twenty and 00/100\*\*\*\*\* DOLLARS

Vermont Superior Court  
174 Main Street  
Burlington, VT 05401

*[Handwritten Signature]*  
AUTHORIZED SIGNATURE

MEMO Vermont Superior Court - : BTC Mall - City Place Proj



Dunkiel Saunders	Elliott Raubvogel & Hand PLLC	15892
12/30/2019	Vermont Superior Court	
	Vermont Superior Court - : BTC Mall - City Place Proj	120.00

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