

**ORDINANCE 3, SERIES 2024
TOWN OF KIOWA, COLORADO**

**AN ORDINANCE REAFFIRMING THE RESCISSION OF THE KIOWA
CREEK MEADOWS DEVELOPMENT AGREEMENT AND WELL
DEVELOPMENT AGREEMENT AND FURTHER ESTABLISHING
THE DISQUALIFICATION OF THE APPOINTMENT OF BOARD
MEMBER TO THE KIOWA WATER & WASTEWATER AUTHORITY**

WHEREAS, the Town of Kiowa ("Town") is a legal and political subdivision of the State of Colorado for which the Board of Trustees ("Board") is authorized to act; and

WHEREAS, the Town entered into the Kiowa Creek Meadows Development Agreement ("Development Agreement") with the Owner, Digby Properties, LLC, a Colorado limited liability company, its successors and assigns, and the Developer, CB KIOWA HOLDING COMPANY, LLC, a Colorado limited liability company, its successors and assigns, on December 15, 2021 (collectively referred to as "Applicant"), and recorded in the real property records of Elbert County, Colorado, on December 15, 2021, at Reception No. 615104, Book 823, Page 533; and

WHEREAS, the requirements for an ordinance restricting property; no compliance with the adoption procedures of an ordinance, Charter 6.03; and the Town Clerk having no record of any Ordinance, public meetings, or publication, the Board was not authorized to approve the Development Agreement and any purported action to restrict property under the Development Agreement never took effect; and

WHEREAS, the Applicant failed to comply with the requirements of C.R.S. 24-68-103(l)(c) of the Vested Rights Statute to publish an ordinance constituting Town of Kiowa legal action approving the Agreement within fourteen (14) days following the approval by the Town; and Development Agreement and any purported action to restrict property under the Development Agreement never took effect; and

WHEREAS, the Applicant failed to comply with the requirements of C.R.S. 24-68-103(l)(c) of the Vested Rights Statute to publish an ordinance constituting Town of Kiowa legal action approving the Agreement within fourteen (14) days following the approval by the Town; and

WHEREAS, the Town approved Ordinance No. 1, Series 2023, an Ordinance Rescinding the Kiowa Creek Meadows Development Agreement and Vested Property Rights Pursuant to Article 68 of Title 24, C.R.S. as Amended, and Chapter 16, Article XII of the Kiowa Municipal Code as Amended on April 23, 2023, recorded with the Elbert County Clerk & Recorder on May 10, 2023, at Reception No. 626663, Book 835, Page 37; and

WHEREAS, Paragraph 8 of the Development Agreement, Water and Sanitary Sewer, included a condition of the Developer to enter into a separate Well Development Agreement ("Well Agreement") with the Kiowa Water and Wastewater Authority ("Water Authority") to address the water and wastewater provisions related to the Development Agreement.

WHEREAS, the Well Agreement was filed with the Development Agreement, also dated December 15, 2021, recorded together on December 15, 2021, with the Elbert County Clerk & Recorder at Reception No. 615105, Book 823, Page 534. The Development Agreement and Well Agreement are attached hereto as Exhibit “A” and incorporated herein;

WHEREAS, Paragraph 8 of the Development Agreement, states in part:

“(i) such Water Agreement will be deemed a part of this Agreement and incorporated herein by this reference.”

WHEREAS, the approval by the Town of Ordinance 1, Series 2023, rescinding the Development Agreement and Vested Property Rights on the Property, included the rescission of the Well Agreement as the terms and conditions were incorporated as a condition of the Development Agreement to provide water and wastewater facilities for the development of the Property; and

WHEREAS, the Development Agreement and Well Development Agreement are both executed by the Developer and Owner incorporating the terms and conditions of the Well Agreement into the Development Agreement. The voiding of the Development Agreement clearly rescinds the Well Agreement - a well-established legal principle of contracts; and

WHEREAS, as the Development Agreement failed to follow any formal approval requirements; there is no record of the Water Authority approving the Well Agreement in *any* manner. There are no minutes, resolutions, or motions to approve the Well Development Agreement by the Water Authority; and

WHEREAS, the Water Authority is a political subdivision of the State of Colorado and as defined in Section 29-1-204.2, C.R.S. and required to comply with Board requirements when approving agreements and contracts; and

WHEREAS, the rescission of the Development Agreement also terminated the appointment of a representative by the Developer to the Water Board:

Paragraph 8, (ii) if at any time the Board of the Kiowa Water and Wastewater Authority has a vacancy due to the expiration of a term of an existing Board member, resignation of an existing Board member, or for any other reason, the Town will provide the Developer a reasonable opportunity to appoint an individual to such vacant position prior to selecting any other new Board member; provided, however, such obligation shall not be required if, at the time of such vacancy, at least one member of the Board of Kiowa Water and Wastewater Authority is a representative of Developer appointed pursuant to this Section 8; further provided, however, that such obligation shall remain in effect for the period commencing on the effective date of the Water Agreement and terminating upon the earlier to occur of (i) the issuance of certificate of occupancy for the last dwelling unit within the

Project; (ii) termination of this Agreement (emphasis added); or (iii) Developer's written notice to the Town of its termination of such period."

WHEREAS, the appointment of a representative to the Water Board fails to comply with the legal requirements and agreements of the Water Authority. There is an Establishing Agreement and three (3) amendments governing the Kiowa Water and Wastewater Authority, hereinafter referred to as "Water Authority Agreements". The Designation of Representative is attached hereto as Exhibit "B" and incorporated herein.

WHEREAS, the Amended and Restated Kiowa Water and Wastewater Authority Establishing Agreement dated June 4, 2013, Article I, Section 104, Board of Directors-Membership, Section 2, states in part that:

"Every member of the Board shall be a person, Subsection c., who is the natural person designated by the owner of real property within the boundaries of the Town... Such designation must be in writing and filed with the Secretary of the Authority and the Town Clerk. The designation by the owner does not require that the person be appointed to the Board.

WHEREAS, the Designation of Representative dated January 10, 2022, fails for the following reasons:

- (1) It is required to be executed by the Owner of the real property within the Town, who is James Digby, et al;
- (2) Must appoint a natural person – neither CB Kiowa Holding Company, LLC nor Craft Kiowa Acquisition Company, LLC is a natural person;
- (3) Appointment is signed by Tim Craft, as managing member of CB Kiowa Holding Company, LLC appointing himself and not by the owner of the real property;
- (4) Craft Kiowa Acquisition Company, LLC designates Tim Craft as its representative as beneficial owner (a contract to purchase real property does not constitute beneficial ownership); and
- (5) The designation is not the same entity as the signatory, CB Kiowa Holding Company, LLC.

WHEREAS, a person becomes disqualified to serve on the Water Board as set forth in the Amended and Restated Kiowa Water and Wastewater Authority Establishing Agreement dated June 14, 2013, Section 105, Board of Directors- Organization, Subsection 5(e) if the "person ceases to be qualified under Section 104(2)"; and

WHEREAS, the Designation of Representative is invalid, and the "person" is no longer qualified to serve on the Water Board; and

WHEREAS, the Town retains the right to fill the vacancy on the Water Board as set forth in First Amendment to Amended and Restated Kiowa Water and Wastewater Authority Establishing Agreement, dated March 11, 2014, Section I, C.

NOW THEREFORE, BE IT ORDAINED BY THE BOARD OF TRUSTEES OF THE TOWN OF KIOWA, COLORADO

SECTION 1. The foregoing recitals are incorporated herein as if set forth in full.

SECTION 2. The Board of Trustees for the Town of Kiowa hereby affirms that the Well Agreement was rescinded by the adoption and approval of Ordinance 1, Series 2023, An Ordinance Rescinding the Kiowa Creek Meadows Development Agreement.

SECTION 3. The Board of Trustees further affirms that the appointment of the Developer's Representative was terminated by the adoption and approval of Ordinance 1, Series 2023.

SECTION 4. The Board of Trustees will proceed with the appointment of a replacement Water Board member in compliance with the Water Authority Agreements in full force and effect.

SECTION 5. The Town shall publish this Ordinance in accordance with the Town Charter, Article VI for ten (10) days and then promptly record this Ordinance with the Elbert County Clerk and Recorder.

SECTION 6. If any section, subsection, clause, phrase, or provision of this ordinance, or the application thereof to any person or circumstance shall to may extent be held by a court of competent jurisdiction to be invalid, void, or unconstitutional, the remaining sections, subsections, clauses, phrases and provisions of this ordinance, or the application thereof to any person or circumstance, shall remain in full force and shall in no way be affected, impaired or invalidated.

INTRODUCED, READ BY TITLE, POSTED ON THE OFFICIAL TOWN WEBSITE MARCH 8, 2024, AND TOWN HALL. A PUBLIC HEARING ON THIS ORDINANCE WAS HELD AT A SPECIAL MEETING OF THE BOARD OF TRUSTEES FOR THE TOWN OF KIOWA ON MARCH 11, 2024, AT 7 PM AT THE TOWN OF KIOWA TOWN HALL, 404 COMMANCHE STREET, TOWN OF KIOWA COLORADO 80117 AND APPROVED.

DATED:

TOWN:

TOWN OF KIOWA,

a Colorado Home Rule Municipality

By: _____
Richard D. Kolm, Mayor

ATTEST:

_____, Town Clerk

