

**CITY OF CREEDE, COLORADO
RESOLUTION NO. 22-23**

**A RESOLUTION OF THE CITY OF CREEDE, COLORADO, APPROVING A
SETTLEMENT AGREEMENT WITH KIP'S GRILL IN MINERAL COUNTY
DISTRICT COURT CASE NO: 2020CV30002**

WHEREAS, the Board of Trustees has considered the proposed Mutual Release and Settlement Agreement between the City and Kip's Grill to resolve District Court Case No: 2020CV30002.

NOW THEREFORE, BE IT RESOLVED by the Board of Trustees of the City of Creede, Mineral County, Colorado, that:

Section 1. The Attached MUTUAL RELEASE AND SETTLEMENT AGREEMENT previously executed by Kip's Grill is approved.

Section 2. Effective Date. This resolution shall become effective immediately upon adoption.

Section 3. Repealer. All resolutions, or parts thereof, in conflict with this resolution are hereby repealed, provided that such repealer shall not repeal the repealer clauses of such resolution nor revive any resolution thereby.

Section 4. Certification. The City Clerk shall certify to the passage of this resolution and make not less than one copy of the adopted resolution available for inspection by the public during regular business hours.


INTRODUCED, READ, PASSED, AND ADOPTED THIS 3rd DAY OF JANUARY 2022.

ATTEST;



Sarah Eftim-Williamson, City Clerk

CITY OF CREEDE

By 

Jeffrey Larson, Mayor

MUTUAL RELEASE AND SETTLEMENT AGREEMENT

READ CAREFULLY BEFORE SIGNING

This Release (hereinafter “Release” or “Agreement”), made on the day indicated below, by and between the City of Creede (the “City”), and Kip’s Grill, LLC, including its owners/principals (collectively referred to as “Kip’s Grill” or “Kip’s”) (the City and Kip’s Grill referred to jointly as “Parties”), as follows, to wit:

WHEREAS, the Parties are desirous of resolving any issues between them related to the allegations which were raised or could have been raised in Civil Action 2020CV30002 filed in Mineral County District Court;

NOW, THEREFORE, the Parties for the following described consideration, the receipt and sufficiency of which is hereby acknowledged, do hereby **REMISE, RELEASE AND FOREVER DISCHARGE** as follows:

The City does hereby **REMISE, RELEASE AND FOREVER DISCHARGE** Kip’s Grill from any and all actions, claims and demands, which exist as of the date of this Release, and were pled or could have been pled in Civil Action 2020CV30002 filed in Mineral County District Court.

Kip’s Grill does hereby **REMISE, RELEASE AND FOREVER DISCHARGE** the City and its assigns, all current and former employees, servants, agents, contractors, current and former elected and appointed officials, members, successors, predecessors, attorneys, insurance carriers, third party administrators, and self-insurance pools (“Releasees”) from any and all actions, claims and demands, which exist as of the date of this Release, and were pled or could have been pled in Civil Action 2020CV30002 filed in Mineral County District Court.

I. CONSIDERATION TO KIP’S GRILL

The consideration to Kip’s Grill is as follows:

1. **Settlement Payment.** Subject to the terms set forth in this Release, including but not limited to that contained in the “Consideration to the City” section below, the City’s self-insurance pool shall cause to be paid to Kip’s Grill two hundred and seventy-five thousand dollars (\$275,000) (“settlement payment”), under the following schedule.

Payment 1. Within twenty-one (21) days of execution of this agreement by all Parties, the City’s self-insurance pool shall cause to be paid to Kip’s Grill \$75,000. This settlement payment shall be made payable to Kip’s Grill LLC and mailed to PO Box 547 Creede, CO 81130.

Payment 2. The remaining \$200,000, or whatever amount is left after the Reductions described in Section I.2 below, will not be paid until Kip’s Grill has completed the Remediation Work to be Completed as described in Section II below. Upon “final completion” as detailed in

Section II.b.3, payment shall be issued within twenty-one (21) days. This settlement payment shall be made payable to Kip's Grill LLC and mailed to PO Box 547 Creede, CO 81130 along with an accounting of any Reductions taken. Any payees to the settlement payment must provide an executed W-9 contemporaneously with their signatures on this Release.

2. **Reductions.** Kip's Grill agrees to complete the Remediation Work to be Completed as described in Section II.c below within six (6) months of the City's approval of the permits, subject to any extension described in Sections II.c.1 and II.c.2 below. The Parties agree that for every month delay by Kip's Grill of meeting any required deadlines described in Section II for permit application submittal and/or remediation completion, the amount of **Payment 2** will be reduced by \$20,000 per month.

Should any of the Remediation Work to be Completed as described in Section II.c remain unfinished by January 1, 2024 (subject to any extensions or delays as contemplated in Sections II.c.1 and II.c.2), Kip's Grill hereby agrees that its actions constitute a breach of this Release and foreclose Kip's Grill from receipt of any of **Payment 2**. Kips also understands that the City will revoke its Certificate of Occupancy and Kip's will be required to immediately cease all operation. Kip's understands that the City may take any further lawful action necessary to enforce its rights with respect to this Agreement.

In no event should this paragraph or any of the reductions take effect if the parties are actively resolving their disputes in accordance with Section VIII of this Agreement, or review of the disagreement is ongoing by Steve Thomas.

3. **Dismissal of Action.** The City agrees to dismiss, with prejudice, each party to bear its own attorney's fees and costs, its claims in 2020CV30002.

4. **Controlling Agreement.** The City agrees that this Agreement supersedes and resolves any and all previously issued demands from the Building Inspector, including, but not limited to, Exhibit A to the Temporary Certificate of Occupancy ("TCO"), the Stipulation Regarding Continuance of Hearing on Renewal of Liquor License dated March 3, 2020, the April 1, 2020 Stop Work Order, the Notice of Violation dated May 15, 2020, the Revocation of Certificate of Occupancy dated September 2, 2020, or any other written enforcement document that has been issued by the City concerning Kip's Grill that has occurred as of the date of the mutual execution of this Agreement.

5. **Continued Operation.** So long as Kip's Grill remains in compliance with all requirements of this Agreement, the City will allow Kip's Grill to remain open.¹ The second floor of Kip's Grill will remain closed until the Remediation Work to be Completed has been completed and approved by the City.

6. **Disputes.** As to the pending permit and any future permits for work related to that set forth in this Agreement, should the City's Building Inspector not be able to reach an agreement with any licensed design professional hired by Kip's Grill certifying the permit application and required attachments, the City, at its own expense, will involve Steve Thomas to act as a

¹ Nothing in this Release shall restrict the City from engaging in its lawful police powers.

reviewer. If he is unable or unwilling to review the plans, the City will engage another Shums Coda Associate or similarly qualified building code expert to resolve the outstanding disputes. The decision of who to hire exclusively lies with the City.

7. **Execution of this Agreement.** The execution by the City of this Release and agreement to the provisions contained herein.

II. CONSIDERATION TO THE CITY²

a. **Dismissal of Action.** Kip's Grill agrees to dismiss, with prejudice, each party to bear its own attorney's fees and costs, its claims in 2020CV30002.

b. **Remediation Work Completed:**

As of the date of execution of this agreement, the Parties agree that Kip's has already made the following alterations or changes in response to the City's claims, requests, and various notices and that these remedies are one of the material inducements for Kip's entering into the instant settlement agreement:

- Installation of a code-compliant address marker on the exterior of the building;
- Installation of an appropriate system to secure CO2 cylinders in the restaurant.

The Parties agree that the items above have been completed and do not require further changes or inspections.

Remediation Work alleged by Kip's Grill to be Completed but not inspected:

- Removal of the outside patio as described in permit number 22-07;
- Provision of all permits from the State for the upper-level plumbing system;
- Provision of permits for upper-level electrical system;
- Provision of State Inspections for Kitchen systems;
- Installation of appropriate occupant load signs;
- Installation of code compliant exit signs;

Kip's avers that the items above have been completed. The City agrees to inspect these items once this Release has been executed at the next convenient time for the City's Building Inspector. If the items have been remediated consistent with building codes adopted by the City, the City will approve of these remediations.

² The Release is expressly conditioned on City Council review and an affirming vote by majority of the Council. Prior to a City Council meeting being held for such review and vote, the City must receive Kip's Grill and its attorneys' signatures on this Release by 2 pm on December 30, 2022, to allow for a special meeting which can take place on the evening of December 30, 2022. Further, this Release must be fully agreed to on or before December 30, 2022 and the Court advised of such by that date.

c. Remediation Work to Be Completed:

In addition to the Remediation Work Completed in Section II.b above, Kip's agrees to complete the following remediation work as a material inducement to the City entering into this Agreement:

i. Structural and Egress Remediation. Kips agrees to engage Summit Engineering Co., whose offices are at 1317 State Ave. Alamosa, CO 81101, to submit and obtain any necessary permits to redress the following issues identified by the City, referred to hereinafter as "Structural/Egress Items:"

- Structural support for opening between laundromat and the bar;
- Structural support for the upper level and enclosed patio;³
- Installation of an additional exit from Kip's Grill on the first floor;
- To the extent necessary following the completion of the work in permit 22-07, make necessary changes to Kip's north wall to a one-hour fire-resistant rated wall assembly;
- Bring the Northwest Door that will be installed pursuant to this Agreement, and the main entrance/exit door to code, including ensuring correct door swing and hardware (Kip's agrees that whatever solution is adopted, overall egress must be compliant with the 2003 IBC);
- Level the floor and landing on each side of the door in the northwest corner of the building;
- Redress the following issues identified by the City with respect to the stairwell:
 - "The code requires the enclosed stairways to provide the protection for people trying to get out of the building during a fire or emergency event from the upper level. Since the stairway is the only stair serving the upper level, this increases the hazard level to the people trying to egress that area."
 - "The enclosed exit stair protection must continue to the street by the construction of an exit passageway. An exit passageway is a tunnel with the walls and ceiling constructed as one-hour fire-resistant rated construction. The enclosed stairway noted above is not permitted to discharge inside the building."
 - "The glass at the top of the stairs needs to be replaced with safety glazing."

As is necessary, Summit Engineering will work with Thomas Meyers to ensure compliance with the 2003 IBC and all other relevant codes adopted by the City.

Kip's agrees to submit permits for the Structural/Egress Items no later than January 20, 2023, and work expeditiously with the Building Inspector on any required follow up or revisions. Upon approval of those permits, Kip's will complete all work described in the permits within 6

³ A portion of this work has been permitted in permit number 22-07.

months. Should the permits require additional work not initially contemplated in the original Structural/Egress permits, Kips will promptly advise the City of additional time it may need to complete that related work. The City agrees to extend any deadlines by at least an additional 3 months should the scope of work in the permits require a change at the discretion of the City and Steve Thomas.

2. **Electrical and Plumbing Remediation.** Engage a State-licensed electrician and plumber to work with Summit Engineering to determine if any safety hazards exist with respect to the following Electrical and Plumbing issues (hereinafter “Electric and Plumbing”):
 - Venting of the laundromat gas dryer;
 - The installation of the grease hood and fire suppression system; and
 - Any obvious and inherently dangerous conditions in the upper level electrical and plumbing systems.

If any work is identified in the aforementioned items that needs to be remediated, Kip’s will pull the necessary permits from the State and any work will be inspected by state-licensed inspectors. Should the contractors engaged by Kip’s find no work is necessary, they will provide a report or document noting the same to the City. At that point, the City may ask John Hindes and Tim McAvoy, or their successors (“state-inspectors”), to confirm the findings of the contractors hired by Kip’s at the sole discretion of the state-inspectors. Should the state-inspectors decline to inspect Kip’s, no further measures will be necessary. The City must copy Kip’s or Kip’s counsel on any communication to the state-inspectors. Kip’s agrees to remedy, with proper permitting, any specifically identified noncompliance with the aforementioned items no later than three (3) months after the issues are identified. If no compliance issues are present, Kip’s will present the City with the inspection report/summary from the Colorado state-licensed inspector and the City agrees that no further repairs will be necessary.

All remediation set forth in this Release shall be completed to meet or exceed the standards in the 2003 International Building Code and all other relevant codes adopted by the City.

The parties agree that for purposes of this Agreement, any delays in the remediation caused by third-parties, including but not limited to, construction contractors, will not be deemed to render compliance untimely so long as Kip’s makes a good faith effort to effect implementation as soon as reasonably possible thereafter and seeks an extension from the City at least 14 days in advance of a deadline, to the extent circumstances permit. To the extent Kip’s seeks an extension on these grounds, it will voluntarily provide to the City documentation demonstrating its good faith and due diligence in attempting to complete the remediation work in a timely manner. Failure to meet any of these terms or for Kip’s to have engaged in good faith attempts will permit the City to deny any extension.

3. **Final Completion.** To satisfy its obligations under this Agreement, Kip’s agrees that it must perform the work described above in Sections II.c.1 and II.c.2 (and II.b to the extent the City’s inspection reveals any noncompliance), to “**Final Completion.**” Final completion refers to the date when all work is completed and the City has fully and finally inspected the same, with the City’s Building Inspector closing all permits. The

City's Building Inspector shall not unreasonably deny or delay final approval of the permits underlying this Agreement. To the extent a dispute arises as to whether permits should be closed out, the City will engage Steve Thomas to assist in resolving such dispute. Upon Final Completion, the City will issue a Certificate of Occupancy with no further outstanding requirements for Kip's to complete.

During any inspection, the City retains the right to identify and require remediation of any unsafe conditions within Kip's Grill as contemplated in Section 115 of the 2003 IBC.⁴ The City agrees to provide the notice of the unsafe condition required by Section 115.3 to Kip's within 14 days of discovering the condition. The City agrees that the Section 115.3 notice will include a separate verification that a Shums Coda Associate or similarly qualified building code expert acknowledges that he has reviewed the City's identification of an unsafe condition. The acknowledgement will state whether the building code expert agrees with the City, although ultimate enforcement remains within the City's police powers. Kip's shall have 14 days from receipt of the notice to respond and clarify the scope of necessary "repairs or improvements" required to abate the unsafe condition. The reductions in payment contemplated in section I.2 of this Release will not apply to any conditions identified as in violation of Section 115, but Kip's will not be entitled to receive a final Certificate of Occupancy until remediation of such conditions has occurred. The parties agree to follow the process outlined in Section 115 for remediation of an unsafe condition.

4. **Use as Evidence in Future Proceedings.** Kip's Grill and its owners agree to treat this agreement as protected under Rule 408 for purposes of any future use in Court.
5. **Sale of Kips.** Should Kip's Grill be sold before **Final Completion** as described in Section II.3, Kip's Grill will advise the buyer of this Release and the requirements therein, as well as require compliance by the buyer with the terms of this Release as part of the sale. Further, the City shall have the right, at its own expense, to record with the County Clerk a copy of this Release as to the Kip's Grill property.
6. **Execution.** The execution by Kip's Grill of this Release and agreement to the provisions contained herein.

III. WARRANTY OF PARTIES CONCERNING CONSIDERATION RECEIVED

The Parties warrant as follows:

No promise or agreement not herein expressed has been made to the Parties; that in executing this Release the Parties are not relying upon any statement or representation made by the other Parties hereby released or said Parties' agents and servants concerning any matter or thing, but are relying solely upon their own judgment and knowledge and that of their attorneys; that the above mentioned consideration is received by the Parties in full settlement and satisfaction of all the aforesaid claims and demands, whatsoever, whether said claims be in tort, contract, by statute or otherwise; that this Release was arrived at in good faith, at arms length and after negotiation; that the above mentioned consideration is received by the Parties in full

⁴ The City has asserted that its police powers cannot be reduced or altered by contract.

settlement and satisfaction of any claims which the Parties may have for attorney's fees or costs; that the representatives executing this Release on behalf of the Parties are over the age of 18 years and legally competent and authorized to execute, appreciate and fully understand this Release; AND THAT BEFORE SIGNING AND SEALING THIS RELEASE, THE PARTIES' AUTHORIZED REPRESENTATIVES HAVE FULLY INFORMED THEMSELVES OF ITS CONTENT AND MEANING, HAVE BEEN INSTRUCTED TO CONSULT WITH LEGAL COUNSEL, HAVE SO CONSULTED AND HAD THEIR LEGAL COUNSEL EXPLAIN THE MEANING AND LEGAL SIGNIFICANCE OF EACH AND EVERY PROVISION HEREOF AND HAVE EXECUTED THIS RELEASE WITH FULL KNOWLEDGE AND UNDERSTANDING THEREOF.

The Parties further warrant that there are no assignees, subrogees or other third parties who have a right to participate in this settlement or receive any of the consideration provided hereunder.

IV. INCOME TAX CONSEQUENCES

Kip's Grill warrants that no opinions or statements have been made to it by any Releasee, or any Releasee's agents or employees, relating to any income tax consequences of the consideration provided under this Release. Kip's Grill agrees to indemnify, defend and hold harmless the Releasees from any and all claims with respect to the income tax consequences of the consideration provided under this Release asserted by any taxing authority, including the United States Government or its Internal Revenue Service.

V. NO ADMISSION OF LIABILITY

The Parties acknowledge that they each strongly deny liability or wrongdoing on their part and that this Release is not to be construed, in any way, as an admission of liability, but is only a settlement done for economic and other non-monetary reasons. The City further expressly denies any waiver of immunity under the Colorado Governmental Immunity Act.

VI. FEES AND COSTS

Each of the Parties shall be responsible to pay its respective attorneys' fees incurred in connection with the negotiation and drafting of this Agreement.

VII. CHOICE OF LAW

This Release shall be construed and interpreted in accordance with the laws of the State of Colorado, without regard to its choice of law rules or principles. Should it be necessary to enforce this agreement, the Parties agree that venue is proper in Mineral County, Colorado.

VIII. NOTICE

If the Parties encounter a dispute relating to this Agreement or any of the terms described herein, and the dispute cannot be resolved by mutual discussions or the other mechanisms

described throughout this Agreement, the Parties agree to comply with the following procedures prior to bringing suit or resorting to other enforcement mechanisms:

- The Party raising the dispute agrees to provide notice in writing at the following addresses before bringing the action to Court:
 - For Kip's Grill: Vikrama Chandrashekar, 1400 16th Street, 6th Floor, Denver, Colorado 80202 or vika.chandrashekar@moyewhite.com
 - For the City: Louis Fineberg, 2223 North Main Street, Creede CO, 81130
- If the parties have not agreed to a resolution within sixty (60) days, the party raising the dispute may seek relief through a court of competent jurisdiction or other enforcement mechanism.

IX. MISCELLANEOUS PROVISIONS

Entire Agreement. This Release contains the entire understanding of the parties hereto with respect to its subject matter and supersedes all prior oral and written understandings and agreements between the parties.


Successors. This Release shall be binding upon the Kip's Grill, its owners, administrators, personal representatives, assigns and subrogees, if any, as well as all other persons, firms or corporations acting on Claimant's behalf or asserting a derivative claim. This Release shall be binding upon the City to the extent permitted by law.

Construction. The Parties have participated and had an equal opportunity to participate in the drafting of this Release. No ambiguity shall be construed against any party based upon a claim that either party was a drafter.


Signatory's Authority; All Necessary Consents. Each Party expressly represents that such Party does not require any third party's consent to enter into this Agreement, including the consent of any spouse, insurer, assignee, licensee, secured lender, or regulatory agency.

Electronic copies and counterparts shall suffice as originals.

[Release continues on next page]

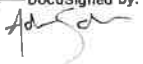
DocuSigned by:

Kevin Nagy as owner, member, manager and/or
authorized representative of Kip's Grill, LLC

Form approved by:

DocuSigned by:

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Moya White

-AND-

DocuSigned by:

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Burns Figa & Will
Counsel for Kip's Grill, LLC

Jeffrey Larson as Mayor of the City of Creede

STATE OF COLORADO)
) SS.
COUNTY OF MINERAL)

Subscribed and sworn to before me on this _____ day of _____, 2022.

Witness my hand and official seal.

My Commission expires _____.

Notary Public

Form approved by:

Nathan Dumm & Mayer P.C.
Counsel for the City of Creede

MUTUAL RELEASE AND SETTLEMENT AGREEMENT dated December 30, 2022

signature page for of City Creede

ATTEST;



Sarah Efthim-Williamson, City Clerk

CITY OF CREEDE

By 

Jeffrey Larson, Mayor