District Court, City and County, Colorado Denver City & County Building 1437 Bannock Street, Room 256 Denver, CO 80202 303-606-2300	DATE FILED: September 22, 2023 3:55 PM FILING ID: 29481474E0BA1 CASE NUMBER: 2023CV32212
EBERT METROPOLITAN DISTRICT, a Colorado Special District, Plaintiff, v. TOWN CENTER METROPOLITAN DISTRICT, a Colorado Special District, Defendant.	▲ **COURT USE ONLY** ▲ Case No.: 2023CV032212 Division: 280
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RESPONSE TO MOTION TO DISMISS

COMES NOW the Plaintiff, Ebert Metropolitan District ("**Ebert**") and for this Response to Defendant's Motion to Dismiss states as follows:

Defendant Town Center Metropolitan District's ("**Town Center**") Motion to Dismiss should be denied. Contrary to its claim, Defendant is not immune from being specifically compelled to perform its contractual obligations because Defendant explicitly contracted to be compelled to perform.

Defendant's Motion to Dismiss states generally that Ebert's Complaint does not state a claim upon which relief may be granted or alternatively the Court does not have jurisdiction to grant the relief requested. As support, Defendant argues that Colorado caselaw prevents award of specific performance against a governmental entity and that the jurisdiction of this Court to issue relief in the form of mandamus was abolished many decades ago. As shown below, the arguments fail because the caselaw upon which defendant relies is not applicable to the facts in this case. Additionally, the relief to be achieved by historical writs of mandamus is still a valid claim in Colorado district courts, but not county courts, and instead it was the "special form of pleadings in writ", the form of the pleading [writ] itself that has been abolished:

> "Special forms of pleadings and writs in . . . mandamus . . . as heretofore known, are hereby abolished in the district court. Any relief provided hereunder shall not be available in county courts."

Rule 106 - Forms of Writs Abolished, Colo. R. Civ. P. 106.

Ebert's allegations in its Complaint, accepted as true, are sufficient to support claims against Defendant that would entitle Ebert to its requested relief. As such, Defendant's Motion to Dismiss should be denied.

UNDISPUTED FACTS

Among the many undisputed facts recited in Plaintiff's Complaint, the following undisputed facts are relevant to this Response. Town Center and Ebert are duly created special districts and, as such, are political subdivisions of the State of Colorado. Compl. ¶¶2-3, 9; Ex. A - C to this Resp..[1] Green Valley Ranch North ("**GVRN**") is the descriptive name for a real

[1] **Exhibit A** hereto is a copy of the Denver County District Court Order, issued in Civil Action No. 83-CV-005862, authorizing the creation of the Town Center Metropolitan District. **Exhibit B** hereto is a copy of the Denver County District Court Order, issued in Civil Action No. 83-CV-005861, authorizing the creation of the First Creek Metropolitan District. **Exhibit C** hereto is a copy of the Denver County District Court Order, issued in Civil Action No. 83-CV-005861, authorizing the change of name of the First Creek Metropolitan District to Ebert Metropolitan District.

estate development project consisting of approximately 1,262 acres located in the City and County of Denver, Colorado, in which Plaintiff's and Defendant's legal boundaries are located. Compl. ¶7. Ebert was established as a residential taxing district over the majority of the GVRN territory, whereas Defendant was established as a non-residential control district over a minority of the GVRN territory with the contractual authority to manage expenditure of tax revenue raised in Ebert. Compl. ¶10.

On August 10, 2001, the Master Declaration of Covenants, Conditions, and Restrictions for GVRN (the "**Master Declaration**"), was recorded against the entire territory of Plaintiff. Compl. ¶¶ 12-13. The Master Declaration was executed, *inter alia*, to enhance and protect the quality, value, aesthetic nature, desirability, and attractiveness of Ebert's territory. Compl. ¶14.

On November 1, 2018, Ebert and Defendant entered into a Second Amended and Restated District Facilities Construction, Funding and Service Agreement (the "**Service Agreement**"). Compl. ¶25. Paragraph 3.6 of the Service Agreement states that "[t]his Agreement and the actions taken to approve its adoption shall constitute a contract between [Ebert and Defendant], and shall be and remain irrepealable unless and until terminated in accordance with their terms." Compl. ¶26. Paragraph 5.5 of the Service Agreement requires that Defendant, for itself and on behalf of Plaintiff,

> "shall have the authority, duty and power to enforce the Master Declaration . . . [Defendant] shall also have the right to delegate any of aforesaid activities and duties to committees of its choosing in consultation with the Ebert Board." [2]

Paragraph 6.2 of the Service Agreement provides,

> "In the event of breach of any provision of this Agreement, in addition to contractual remedies, either District may ask a court of competent jurisdiction to **enter a writ of mandamus** to compel the Board of Directors of the defaulting District to perform its duties under this Agreement, and either District may seek

[2] As noted by Defendant's Motion to Dismiss, the Service Agreement contains two Sections 5.5. Here we refer to the first of the two contained in the Service Agreement.

> from a court of competent jurisdiction **temporary and/or permanent restraining orders**, **or orders of specific performance**, to compel the other to perform in accordance with the obligations set forth under this Agreement." [Emphasis added]

Compl. ¶51, Ex. C, Sections 5.5 and 6.2.

ARGUMENT

Defendant argues that the Court lacks authority to compel Defendant to specifically perform the obligations that Defendant willingly agreed to perform under the Service Agreement. Defendant relies exclusively upon *Thompson Creek Townhomes, LLC, v. Tabernash Meadows Water and Sanitation Dist*., 240 P.3d 554 (Colo. App. 2010) and *Wheat Ridge Urban Renewal Auth. v. Cornerstone Grp. XXII, L.L.C.*, 176 P.3d 737 (Colo. 2007), without correct analyses of how these cases apply to the matter before this Court. A reading of the cases shows that they are both factually and legally dissimilar to this matter.

1. Specific Performance.

In its Motion to Dismiss, Defendant relies exclusively on the argument that pursuant to *Thompson Creek*, specific performance may not be ordered against a governmental entity in a contractual matter, and that *Wheat Ridge* determined that the separation of powers doctrine prevented compelling the performance of a core governmental power like eminent domain.

Colorado has long held that when a public entity enters into a contract, it waives immunity from suit. *Thompson Creek Townhomes, LLC*, 240 P.3d at 556; *Ace Flying Serv., Inc. v. Colo. Dep't. of Agric.*, 314 P.2d 278, 280 (1957). The Colorado Supreme Court in *Ace Flying Service* cited the Supreme Court of Indiana in explaining this principle:

> "In entering into the contract it laid aside its attributes as a sovereign, and bound itself substantially as one of its citizens does when he enters into a contract. Its contracts are interpreted as the contracts of individuals are, and the law which measures individual rights and responsibilities measures, with few exceptions, those of a state whenever it enters into an ordinary business contract. The principle that a state, in entering into a contract, binds itself substantially as an

> individual does under similar circumstances, necessarily carries with it the inseparable and subsidiary rule that it abrogates the power to annul or impair its own contract. It cannot be true that a state is bound by a contract, and yet be true that it has power to cast off its obligation and break its faith, since that would invoke the manifest contradiction that a state is bound and yet not bound by its obligation . . ."

See also Ace Flying Serv., Inc., 314 P.2d at 280(citing *Carr v. State*, 127 Ind. 204, 26 N.E. 778) (also quoting, *Regents of University System v. Blanton*, 49 Ga. App. 602, 176 S.E. 673 ("A state or any of its departments entering into contracts lays aside its attributes of sovereignty, and binds itself substantially as one of its citizens does when he enters into a contract, and, in general, its contracts are interpreted as the contracts of individuals are, and are controlled by the same laws."). Where a public entity enters into a contract, the courts have power to enforce the contract against the public entity. *Ace Flying Serv., Inc.*, 314 P.2d at 280 (citing *Carr v. State*, 127 Ind. 204, 26 N.E. 778).

(a) <u>Defendant Waived Immunity from Lawsuit</u>.

Defendant attempts to misdirect the Court by arguing:

> "the legal principle underlying the decisions in *Wheat Ridge* and *Thompson Creek Townhomes* is that fundamental separation of powers principles dictate the conclusion that, at least without express legislative authorization, courts may not interfere with governmental decision-making by compelling performance of governmental contracts through the use of equitable remedies."

See Def ['s] Mot. to Dismiss at 8-9.

In fact, a correct reading of *Wheat Ridge*, defeats Defendant's Motion to Dismiss:

> "**Apart from any implied waiver of sovereign immunity, or consent to be sued in court**, the question of equitable relief for breach of contract, or specific performance, implicates an additional concern for the separation of governmental powers." (Emphasis added)

Wheat Ridge Urban Renewal Auth., 176 P.3d at 745.

Wheat Ridge is distinguishable from the current matter because Defendant and Plaintiff explicitly waived any defense to lawsuit and affirmatively consented to be sued by the plain meaning of Paragraph 6.2 of the Service Agreement. Further, these Parties chose the specific methods for compelling performance of the contractual obligations in event of a breach: mandamus, temporary and/or permanent restraining orders, or orders of specific performance. *See* Compl., Ex. C. In Paragraph 6.2 of the Service Agreement, Defendant gave its consent to be sued in the manner Plaintiff has outlined in its Complaint.

(b) Thompson Creek Precedent was not Based on a Contract.

Thompson Creek is distinguishable from the current matter. In *Thompson Creek*, the alleged claims for breach of contract, promissory estoppel, seeking specific performance and money damages was based on a change in policy by Tabernash Meadows Water and Sanitation District ("**Tabernash District**"), not a written contract. In *Thompson Creek*, the Tabernash District established a policy of reserving water and sewer taps for landowners who paid availability of service charges on a quarterly basis. *Thompson Creek Townhomes, LLC*, 240 P.3d at 555. Prior to Thompson Creek Townhomes, LLC purchasing the property at issue in that case, Tabernash District announced a change to its policy of reserving taps in exchange for availability of service payments and instead, no longer reserve taps. *Id.* After purchasing the property, Thompson Creek Townhomes, LLC attempted to tender payment for the unpaid availability of service charges at closing, but payment was rejected by the Tabernash District. *Id.*

Defendant provides no case law or statute holding that a governmental policy constitutes a contract, or even an implied contract. Policy changes are completely at the unilateral discretion of the governmental entity. The change in policy by the Tabernash District in *Thompson Creek* is very different from breach of the express written contract between Defendant and Plaintiff.

Thompson Creek, involved a public entity that did not explicitly consent to be sued nor waive immunity for specific performance in a written agreement, and the court correctly found no equitable remedy of specific performance. In this matter however, the Parties expressly consented to specific performance in a written contract as a means to enforce the contract (Service Agreement) in the event of a breach. Defendant provides no Colorado or Federal caselaw to suggest that a change in stated policy as occurred in *Thompson Creek* is enforceable, or not, in the same manner as an express contract stating terms of enforcement like the Service Agreement in this case.

Special districts are quasi-municipalities under Colorado law and may enter into contracts. Section 32–1–1001(d)(1), C.R.S. (2022). Further, no specific restrictions exist in statute that bear on the right of a municipality to contract, and a municipality has the same right to contract as a natural person. *Bruce v. City of Colorado Springs*, 131 P.3d 1187, 1192 (Colo. App. 2005). Here, unlike the *Thompson Creek* case, Defendant explicitly consented to actions for specific performance, injunctive relieve, or mandamus in a written contract. *See* Service Agreement, § 6.2, attached to Plaintiff's Compl. as Ex. C. *Thompson Creek* is not controlling caselaw in this matter.

(c) <u>Plaintiff Not Seeking Performance of a Core Governmental Power</u>.

In *Wheat Ridge*, the court stated "certain core governmental powers, like the power of eminent domain and the police power, are reserved to the sovereign and cannot be abdicated or surrendered by contract." 176 P.3d 742. Accordingly, the *Wheat Ridge* Court held that it could not compel specific performance of the power of eminent domain because "the courts in this jurisdiction lack the authority to compel the exercise of core governmental powers that rest within the discretion of a coordinate branch of government, regardless of binding contractual obligations to do so." Id. at 743.

In contrast to *Wheat Ridge*, Plaintiff is not requesting the Court compel specific performance of a "core governmental power" such as eminent domain, rather it is seeking performance of the requirements of the Master Declaration and the contracted obligations agreed to by Defendant, by way of a remedy specifically agreed to in the plain terms of the Service Agreement. Typically, covenant enforcement is performed by property owner associations. In this case, Defendant chose to enforce in lieu of delegating enforcement to a property owner association. See Exhibit D hereto. Defendant provides no Colorado or Federal caselaw to suggest that covenant enforcement is a core governing power or that consent in a contract to do so is otherwise limited.

(d) Plaintiff is a Governmental Entity, Not a Private Party.

Likewise, in both of the cases relied upon by Defendant (*Thompson Creek* and *Wheat Ridge*), the disputes involved private parties in alleged contract with governmental entities, not two governmental entities with identical rights and immunities. The right of parties to contract freely is well developed in Colorado. *See Parrish Chiropractic Ctrs. v. Progressive Cas. Ins. Co.*, 874 P.2d 1049, 1053 (Colo. 1994) (citing Colorado cases recognizing a "strong policy of freedom of contract"). The right of parties to contract encompasses the correlative power to agree to a specific alternative dispute resolution (ADR) procedures for resolving disputes. *City & Cnty. of Denver v. Dist. Ct. In & For City & Cnty. of Denver*, 939 P.2d 1353, 1361 (Colo. 1997). As a general rule, courts should follow state law principles governing contract formation to determine whether the parties agreed to resolve disputes by specific methods—in this case the methods specified in Paragraph 6.2 of the Service Agreement.

Thus, to decide whether Plaintiff's claims should be resolved by the procedures set forth in the Service Agreement, the court must construe the terms of the agreement to which the parties committed themselves in a manner that best effectuates the intent of the parties and

allows each party to receive the benefit of the bargain. *City & Cnty. of Denver*, 939 P.2d at 1357.

(e) Service Agreement Should be Construed Against its Drafter.

The Service Agreement was approved on November 1, 2018. It was drafted by attorneys on behalf of the Defendant, Town Center Metropolitan District. Two well-established principles governing the interpretation of contracts must be borne in mind: (1) in case of doubt, a contract is construed most strongly against he who drafted it, and (2) where a doubt exists as to the proper construction of a given clause, it should be construed in favor of him for whose protection it was obviously inserted. *Christmas v. Cooley*, 406 P.2d 333, 336 (1965). The Service Agreement was drafted by Defendant and should be interpreted against Defendant for this reason. Defendant apparently intended to be bound by the remedies recited in Paragraph 6.2 of the Service Agreement and should not now be allowed to avoid an attempt to enforce its own breach of the Service Agreement.

(f) Summary of Arguments Favoring a Grant of Specific Performance in this Matter.

The Service Agreement should be enforced as written and Defendant should not be allowed to shirk its duties by asserting immunity from specific performance or other defenses raised in Defendant's Motion to Dismiss. The Defendant's arguments fail because:

(1) Defendant, as a special district, has "bound itself substantially as one of its citizens does when he enters into a contract." *Ace Flying Serv., Inc.*, 314 P.2d at 280;

(2) *Wheat Ridge* is inapplicable—correctly applying the rule from *Wheat Ridge* favors Plaintiff because of the "consent to be sued in court" caveat prefacing the rule upon which defendant relies. *Wheat Ridge Urban Renewal Auth.*, 176 P.3d at 745;

(3) there was no written or implied contract in the *Thompson Creek* facts, merely a governmental policy change. *Thompson Creek Townhomes, LLC*, 240 P.3d at 555;

(4) enforcement of covenants is not a core governmental power;

(5) the contract dispute in this case is between similarly situated governmental entities, not between private and governmental entities as in both *Wheat Ridge* and *Thompson Creek*; and

(6) Defendant drafted the Service Agreement and therefore should be affirmatively bound to its terms governing enforcement. *Christmas*, 406 P.2d at 336.

Allowing the Defendant to now abrogate its self-imposed obligation to fulfill some of the purposes of the Parties' Service Agreement would render the contract unenforceable as to all purposes. Accepting the Defendant's arguments and granting a summary dismissal as requested would have the absurd result of undermining enforceability of all contractual agreements entered into by governmental entities.

2. Injunctive Relief.

Defendant argues that the *Thompson Creek* and *Wheat Ridge* precedents also defeat Plaintiff's claims for injunctive relief. Defendant's reliance on those cases fails for the same reasons and distinctions as described above. Plaintiff asserts that by Paragraph 6.2 of the Service Agreement, Defendant has agreed to subject itself to performance of its contractual obligations by injunction, mandamus, specific performance, or a combination of those if need be.

(a) Mandatory Injunction to Perform.

As described in Plaintiff's Complaint, a mandatory injunction's purpose is to preserve the status quo and prevent injury. Compl. ¶44, citing *Snyder v. Sullivan*, 705 P.2d 510 (Colo. 1985). Plaintiff's intention in requesting a mandatory injunction is to cause Defendant to enforce the covenants contained in the Master Declaration. As Defendant's Motion points out, " . . . a mandatory injunction prescribes conduct that has not been defined by contract." *Snyder*, 705 P.2d at 513, 514 n.5. Note 5 from *Snyder* goes on to describe that mandatory injunction "requires the court to choose from a wide range of possibilities" and "mandatory injunctions thus involve significantly different considerations than decrees of specific performance . . ." Because

the Parties chose to include "temporary and/or permanent restraining orders, . . ., to compel the other to perform . . .", Plaintiff is asking this court to employ all tools available to it to rectify the breach of contract. Service Agreement ¶6.2. The basic facts of this case demonstrate that Defendant is not performing its obligations to the injury of Plaintiff's constituents. Plaintiff is asking the court to employ any and all remedies available to restore the status quo and preserve it into the future.

In its first claim, Plaintiff seeks enforcement of the covenants contained in the Master Declaration. A recent opinion sheds light on the nature of covenants with respect to contractual obligations. In *N. Range Vill. Metro. Dist. v. Commerce City Leased Hous. Assocs. I, LLLP*, (Colo. App. No. 17CA1982, Oct. 18, 2018) (unpublished), the Colorado Court of Appeals affirmed that the conventions of contract law should be used for interpreting covenants, "in the absence of contrary equitable or legal considerations, covenants that are clear on their face must be enforced as written." *Id. at* ¶12 (citing *Holiday Acres Prop. Owners Ass'n v. Wise*, 998 P.2d 1106, 1108 (Colo. App. 2000)). As detailed in Plaintiff's Complaint, Defendant has failed to perform its covenant enforcement duties as required by the Master Declaration.

Not being an actual contract however, the Master Declaration must be enforceable by some means, and Plaintiff suggests mandatory injunction as a means to achieve its desired outcome. As the caselaw suggests, use of mandatory injunction is different than specific performance, and might be the appropriate remedy in situations with "different considerations than decrees of specific performance." *Snyder*, 705 P.2d at 514 n. 5. Defendant's attempt to equate specific performance and mandatory injunction is not persuasive in light of the distinctions made in *Snyder* between the remedies of specific performance (contractual) and mandatory injunctions (different considerations than contractual specific performance).

(b) Injunction to Prevent Alienation of Property.

Plaintiff also seeks a temporary injunction against Defendant's alienation of property until such time as the status quo is restored. Complaint ¶55. As the control district with complete control of Plaintiff's discretionary tax revenue expenditures and covenant enforcement powers through the Service Agreement, Defendant controls all the means of enforcement of the Master Declaration. Other than streets and other types of property that have been dedicated to the City of Denver, Defendant also owns all community property that remains in governmental ownership ("Common Area" as defined in the Master Declaration § 2.10.). It is expected by both Parties that at some future time, some or all of the Common Area will be conveyed to Plaintiff for Plaintiff's management and covenant enforcement. The Parties have attempted to discuss a transition of properties, funding, and enforcement duties but without progress to date. Plaintiff's Complaint requests an injunction that restrains conveyance of the Common Area these properties, funding, and enforcement duties until agreement is reached for the full transition to Plaintiff control.

A preliminary injunction is designed to preserve the status quo or protect a party's rights pending the final determination of a matter. *City of Golden v. Simpson*, 83 P.3d 87, 96 (Colo. 2004). A temporary restraining order is meant to prevent "immediate and irreparable harm." *Id.* (quoting *Mile High Kennel Club v. Colo. Greyhound Breeders Ass'n*, 559 P.2d 1120, 1121 (Colo. App. 1977)). "The party moving for a preliminary injunction has no obligation to present his entire case in the hearing, and, because the scope of the hearing does not encompass a decision on the ultimate merits of the case." *Governor's Ranch Professional Center, Ltd. v. Mercy of Colorado, Inc.*, 793 P.2d 648 (Colo. App. 1990).

The standard the Court must apply to grant a preliminary injunction is to make the following findings: (1) there is a reasonable probability of success on the merits; (2) there is a

danger of real, immediate and irreparable injury which may be prevented by injunctive relief; (3) there is no plain, speedy and adequate remedy at law; (4) the granting of the preliminary injunction will not disserve the public interest; (5) the balance of the equities favors entering an injunction; and (6) the injunction will preserve the status quo pending a trial on the merits. *Rathke v. MacFarlane*, 648 P.2d 648, 653-54 (Colo. 1982); *see also Gitlitz v. Bellock*, 171 P.3d 1274, 1278 (Colo. App. 2007).

Town Center has failed to maintain the status quo of "enhance and protect the quality, value, aesthetic nature, desirability, and attractiveness of the Community Area," Ex. A to Compl., ¶1.2(b). This failure will be obvious by the evidence presented by Plaintiff in the trial for this matter. If Defendant is not prevented from the transfer of Common Area properties before acting to restore the status quo condition required by the Master Declaration, Plaintiff's transferred revenues for such use will be wasted or diverted to other purposes. Additionally, such properties might not come into the possession of Plaintiff for perpetual maintenance and enhancement. Plaintiff has no other way to ensure that the Common Area properties remain available for transfer to Plaintiff and in a condition that is satisfactory to Plaintiff. Because it is a control district, Town Center contains no constituent voters. Ebert's constituents cannot effect action by Town Center through political means such as the ballot box and therefore, Plaintiff has no other plain, speedy, or adequate remedy at law other than the Complaint and this injunction. The granting of the requested preliminary injunction will not disserve the public interest, the balance of the equities favors the injunction, and the injunction will preserve the status quo pending a trial on the merits.

3. <u>Writ of Mandamus</u>.

Defendant argues that Ebert's request for issuance of a writ of mandamus is unattainable based on a literal recitation that the "availability of Colorado district courts to issue writs of

mandamus in Colorado district courts was abolished many decades ago." *See* Def ['s] Mot. to Dismiss, p. 9. C.R.C.P. 106 states: "[s]pecial forms of pleadings and writs . . . mandamus, as heretofore known, are hereby abolished in the district court. Any relief provided hereunder shall not be available in county courts." The form of using antiquated writs as the form of pleading has been abolished by this rule and, in the county courts, the availability of relief in the form of mandamus has been abolished.

Although the style of writ has been abolished, the Colorado Supreme Court in 2022 noted that the relief previously obtainable using a writ of mandamus was still available: "C.R.C.P. 106(a)(2) permits a person to petition the district court for an order to compel a . . . governmental body . . . to perform an act which the law specially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such . . . governmental body." *Owens v. Carlson,* 511 P.3d 637, 642 (Colo. 2022). Additionally, in 2021 the Colorado Court of Appeals stated the "court will grant mandamus relief when (1) the plaintiff has a clear right to the relief sought; (2) the defendant government agency or official has a clear duty to perform the act requested; and (3) no other adequate remedy is available to the plaintiff." *Winston v. Polis,* 2021 COA 90, ¶ 25, 496 P.3d 813, 821.

Defendant argues that Ebert's request for mandamus relief "does not ask the Court to enforce a duty imposed on an official by virtue of the office held, a trust, or a statute." Defendant is responsible for the enforcement of the Master Declaration as the only governmental entity with authority to do so given the restrictions imposed by the Service Agreement. Defendant sought the authority to enforce the Master Declaration through its Service Plan by passing a Resolution to amend its Service Plan for that express purpose. *See* Ex. D to this Resp.

at the 5th and 10th Recitals therein.[3] Further, Defendant contracted with Plaintiff (in the Service Agreement) to ensure that Defendant was the only entity with authority to enforce the Master Declaration. *See* Service Agreement at Section 5.5. Defendant holds this responsibility by nature of its organizational legal structure and by its contractual promises.

Plaintiff's Service Plan, attached to this Response as Exhibit E,[4] does not give Plaintiff the authority to enforce the Master Declaration. Plaintiff's authority as granted by its Service Plan is described as provision of "the following services and/or facilities: water, sanitary sewer, storm sewer and drainage, streets, parks and recreation, safety protection and transportation." Ex. E, Service Plan, pgs. 1 and 4-8. As entities created under Title 32, C.R.S., special district powers are limited by their respective enabling Service Plans, as such plans are amended with consent from the governing municipality or county that issued such service plan.

Defendant argues in its Motion that Defendant cannot be compelled by mandamus to perform discretionary acts. *See* Def ['s] Mot. to Dismiss at 10-11. This does not give Defendant the discretion to not act at all. Section 1.2 of the Master Declaration (Exhibit A to Complaint) states that the purpose of the Master Declaration is to, among other things, "enhance and protect the quality, value, aesthetic nature, desirability, and attractiveness of the Community Area," and "provide a mechanism for the enforcement of the provisions of this Master Declaration," Exhibit A to Compl. ¶1.2(b) and (d). The means of enforcement is discretionary to the enforcer, but enforcement that maintains the quality, value, aesthetic nature, desirability, and attractiveness is not discretionary. Plaintiff's Complaint seeks to compel enforcement to return to the status

[3] **Exhibit D** hereto is a copy of the Resolution passed on October 9, 2002 by Town Center Metropolitan District that in effect amended the District's Service Plan to expressly authorize the enforcement of the Master Declaration within Plaintiff's territory.

[4] **Exhibit E** hereto is a copy of the Service Plan for First Creek Metropolitan District, *nka* Ebert Metropolitan District.

quo to the level of quality that the Master Declaration demands. Town Center is simply not performing its duty under the Master Declaration.

Defendant relies upon *Rocky Mtn. Animal Def. v. Colo. Div. of Wildlife*, 100 P.3d. 508 (Colo. App. 2004) to support its theory that Plaintiff's mandamus is intended to meddle in the discretionary acts of Town Center. Plaintiff maintains that instead, it seeks to force Town Center to act in a way to achieve the stated expectations of the Master Declaration. Caselaw cited in the *Rocky Mountain* opinion recognized this difference. "While mandamus relief will lie to compel an administrative body to exercise its discretion, a court may not through mandamus relief direct *how* the discretion of an executive agency is to be exercised. Thus, mandamus can only command that an agency act, thereby setting it in motion." *Rocky Mtn. Animal Def.*, 100 P.3d at 517, citing *Lamm v. Barber*, 192 Colo. 511, 517, *Van De Vegt v. Bd. of Comm'rs*, 55 P.2d 703 (1936), *Peoples Natural Gas Div. v. Pub. Utils. Comm'n*, 626 P.2d 159 (Colo. 1981), and *Wicks v. City & County of Denver*, 156 P. 1100 (1916). Defendant has failed to act to maintain the status quo required under the Master Declaration to the injury of Plaintiff and its constituents, property owners directly affected by the failure to act. Because Town Center is a control district, it contains no constituent voters. Ebert's constituents cannot effect action by Town Center through political means such as the ballot box. Ebert is left with only the option of seeking Town Center's action through the Complaint filed in this matter.

Plaintiff has relied upon Defendant's performance of the duties entrusted to it by the Master Declaration, and Plaintiff has levied property tax against its residents and caused all tax revenues to be transferred immediately to Defendant for the purposes set forth in the Service Agreement, including enforcement of the Master Declaration. By the plain meaning of the Service Agreement, Plaintiff and Defendant entered into the Service Agreement to transfer tax

revenue from Plaintiff to Defendant to fund Defendant's performance of its duties, including enforcement of the Master Declaration, as the authorized governmental entity for such purposes. Service Agreement, Article 5

4. Fees.

Defendant argues that that it is entitled to attorney's fees on the basis that its claims are frivolous and vexatious. As argued in the sections above, Plaintiff's claims are neither.

Plaintiff's request for specific performance under the Service Agreement is fully justified because Defendant agreed that such a remedy was an appropriate remedy and willingly agreed to be bound to enforcement by that means. Service Agreement ¶6.2. *Thompson Creek* precedent concerning the unavailability of the specific performance to reinstate a changed policy of a governmental entity is inapplicable to the circumstances of this case.

Plaintiff's request that mandamus ordering Defendant to enforce the covenants so as to achieve the goals of the Master Declaration does not violate Defendant's discretion in enforcement measures, it would merely cause the Defendant to act. Plaintiff does not seek to interfere with the means that Defendant employs to achieve the result, as stated in the Master Declaration, to "enhance and protect the quality, value, aesthetic nature, desirability, and attractiveness of the Community Area." Master Declaration §1.2(b). These qualities are the ends, not the means.

An award of attorney's fees as requested by Defendant is in fact, meaningless in this situation. Per the terms of the Service Agreement, all of Ebert's tax revenue currently flows to Defendant for Defendant's use to achieve the goals of the Service Agreement. An allocation of a portion of those revenues to pay Defendant's legal fees only changes the allocation of revenues, the allocation of which is already at Defendant's discretion. Plaintiff brings its claims in good faith to achieve the standards within its community that are mandated by the Master Declaration

and promised in the Service Agreement—and that have not occurred to date. Plaintiff's evidence at trial will demonstrate that these qualities have not been produced by Defendant's enforcement activities. Plaintiff has no other method at law beyond the subject Complaint to engage Defendant for performing its duty.

CONCLUSION

For the reasons set forth herein, Defendant's Motion to Dismiss/Summary Judgment must be denied. Defendant is not immune from being specifically compelled to perform its contractual obligations by mandamus, mandatory injunction, or specific performance because it expressly consented to the use of such methods in the Service Agreement. Defendant, acting in its official capacity as the only authorized governmental entity to enforce covenants, is subject to an order of mandamus for performance of its duties as set out in its enabling Service Plan. An injunction preventing transfer or alienation of the Common Area properties is necessary to preserve the property values of the Plaintiff's constituents. Defendant should be required to answer the Complaint and allow this case to proceed toward discovery, and trial, if necessary. Plaintiff's Complaint is neither frivolous or vexatious—it is simply the only remedy available to Ebert for restoring and preserving the quality and value of its neighborhoods in light of inaction by Town Center.

Respectfully submitted this 22nd day of September 2023.

E-filed per C.R.C.P. Rule 121

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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2023, a copy of the foregoing **RESPONSE TO MOTION TO DISMISS** was filed and served via the Colorado Courts E-filing system on the following:

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/s/ *Charlotte Rabadi*