STATE OF VERMONT

SUPERIOR COURT
CHITTENDEN UNIT

CIVIL DIVISION
DOCKET NO.: _____

CITY OF BURLINGTON,

Plaintiff,

v.

BTC MALL ASSOCIATES LLC,

Defendant.

HEARING REQUESTED

MOTION FOR PRELIMINARY INJUNCTION AND ORDER OF SPECIFIC PERFORMANCE

The City of Burlington ("City"), by and through its attorneys Downs Rachlin Martin PLLC, hereby moves pursuant to Vermont Rule of Civil Procedure 65(b) for the issuance of a preliminary injunction and order of specific performance ("Motion"). As the City alleges in its Complaint, which is adopted herein by reference, *see* Vt. R. Civ. P. 10(c),[1] Defendant BTC Mall Associates LLC ("BTC") has breached the Development Agreement it entered into with the City by failing to diligently continue construction of the downtown development known as CityPlace (the "Project") to completion and by failing to fund, construct, equip, and convey Public Improvements and Additional Public Improvements that would have restored connectivity of the urban grid, infilled downtown development, provided opportunities for active street-level commerce and cultural activities, and supported many important community objectives.

1 Capitalized terms used in this Motion contain the same definitions as in the Complaint and the Development Agreement. The exhibits referred to herein are the exhibits attached to the Complaint.

BTC commenced construction of the Project in November 2017 with a promise to complete all construction on the Public Improvements, Additional Public Improvements, and Private Improvements by August 1, 2020. It failed to do so. On September 4, 2020, BTC purported to unilaterally "terminate" the Development Agreement, and demanded that the City enter into a new agreement with respect to the Project.

With completion of the Project—in particular the Public Improvements and the Additional Public Improvements—nowhere in sight, and in light of BTC's outright attempt to repudiate its obligations, the City is left with no choice but to seek judicial intervention to enforce the Development Agreement and its contractual right to the equitable relief of specific performance set forth therein. The City therefore respectfully moves that this Court order BTC's specific performance of its obligations under the Development Agreement to fund, construct, and equip the Public Improvements and Additional Public Improvements without reimbursement from the City, and to convey unencumbered fee simple title of the restored segments of Pine Street and St. Paul Street to the City.[2]

For the reasons that follow, the Motion should be granted.

MEMORANDUM OF LAW

I. The City Is Entitled to Specific Performance

A. Legal Standard

Trial courts have broad discretion to award equitable relief. *Huard v. Henry*, 2010 VT 43, ¶ 8, 188 Vt. 540, 542, 999 A.2d 1264, 1268 (noting that trial courts have "wide discretion to fashion fair and just equitable relief"); *Richardson v. City of Rutland*, 164 Vt. 422, 427, 671 A.2d 1245, 1249 (1995) ("Courts have a wide range of discretion to mold equitable decrees to the

---

[2] The City does not seek specific performance of the construction of the balance of the Project elements, which the Development Agreement defines as "Private Improvements."

circumstances of the case before them." (quotation omitted)); *Lariviere v. Larocque*, 105 Vt. 460, 168 A. 559, 562 (1933) (finding that decision to grant equitable relief is determined by the "sound discretion of the court"); Restatement (Second) of Contracts § 357 cmt. 3 ("The granting of equitable relief has traditionally been regarded as within judicial discretion."). The decision whether to grant equitable relief is determined based on what is reasonable and proper given the circumstances of the individual case before the court. *Lariviere*, 168 A. at 562.

A preliminary injunction is an extraordinary remedy never awarded as of right, and the movant bears the burden of establishing that the relevant factors call for imposition of a preliminary injunction. *See Nat. Resources Defense Council*, 555 U.S. 7, 24 (2008); *Taylor v. Town of Cabot*, 2017 VT 92, ¶ 19, 205 Vt. 586, 596, 178 A.3d 313, 319. The court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Id.* A plaintiff seeking a preliminary injunction must establish that it is likely to succeed on the merits, that it is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in its favor, and that an injunction is in the public interest. *Id.*

"The test for specific performance is more flexible. It initially requires proof that (1) a valid contract exists between the parties, (2) the plaintiff has substantially performed its part of the contract, and (3) plaintiff and defendant are each able to continue performing their parts of the agreement." *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 433 (2d Cir. 1993) (reversing lower court for applying preliminary injunction analysis instead of specific performance analysis and remanding for issuance of order of specific performance). Specific performance is an equitable remedy which is ordinarily available only where the right to relief is clear and remedy at law is inadequate. *Campbell Inns, Inc. v. Banholzer, Turnure & Co.*, 148 Vt. 1, 4, 527 A.2d 1142, 1144 (1987) (affirming injunction decreeing specific performance, holding that plaintiffs properly sought specific performance by injunction under Rule 65 and that trial

court permissibly consolidated hearing on the merits with hearing on the application for preliminary injunction). Under Vermont law,[3] "[i]n order to grant specific performance of a contract, there must be a valid contract . . . and its terms must be specific and distinct and leave no reasonable doubt of meaning." *Reynolds v. Sullivan*, 136 Vt. 1, 3–4, 383 A.2d 609, 611 (1978). The granting of specific performance is not a matter of right, but instead rests in the discretion of the court. *Davis v. Hodgdon*, 133 Vt. 49, 53, 329 A.2d 669, 672 (1974).

In *Brower v. Hill,* 133 Vt. 599, 604, 349 A.2d 901, 905 (1975), the Vermont Supreme Court noted that an order for specific performance is "in effect" a mandatory injunction. Specific performance by injunction is appropriate " 'if this is the only practical mode of enforcement which its terms permit.' " *Campbell*, 527 A.2d at 1144 (quoting *Drew v. Socony-Vacuum Oil Co.,* 66 R.I. 170, 173, 18 A.2d 340, 341 (1941) (quoting 4 Pomeroy's Equity Jurisprudence § 1341, at 3214 (2d ed. 1919))). Where the right to relief is clear and a remedy at law is inadequate, specific performance by injunction is appropriate. *Id.*; *accord NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 261 (2d Cir. 2012) ("Specific performance may be ordered where no adequate monetary remedy is available and that relief is favored by the balance of equities, which may include the public interest."). In particular, specific performance is considered the appropriate remedy with respect to enforcement of contracts to convey land. *See* Section C, *infra*.

---

3 The Development Agreement, by its terms, is governed by Vermont law. *See* Complaint ¶ 7; Exhibit 1 at 34, § 7 (Governing Law; Venue). This Court should therefore apply Vermont law in adjudicating this Motion. *See Stamp Tech, Inc. ex rel. Blair v. Ludall/Thermal Acoustical, Inc.*, 2009 VT 91, ¶ 23, 186 Vt. 369, 380, 987 A.2d 292, 298 (2009) ("[I]t is well-settled that it would be contrary to the justified expectations of the parties for a court to interpret their agreement by the laws of any jurisdiction other than that specified in the contract.").

B. The City's Right to Relief Is Clear

1. The Development Agreement Remains in Effect and BTC's Purported "Termination" of the Development Agreement Is Invalid

BTC's purported termination of the Development Agreement on September 4, 2020 is invalid. BTC asserts that the contract was "mutually abandoned and terminated by the parties by virtue of the impossibility of performance, the parties' mutual abandonment of the project described therein and acknowledgment that it would not be constructed, their mutual inaction and waivers of performance by the other." Complaint ¶ 117. To begin with, the City has *never* "abandoned" the Project or "acknowledged" that it would not be constructed. Rather, the City has upheld its obligations under the Development Agreement, and all along demanded that BTC perform its obligations and continue construction to completion. *See, e.g., id.* ¶¶ 90-91, 107-08, 121, 123. The City has repeatedly attempted to engage BTC in discussions to amend the Development Agreement so long as doing so would further the City's interest to ensure the BTC performed its obligations and complete construction. *Id.* ¶¶ 99-101. It strains credulity to suggest, as BTC seems to be, that the City's good faith efforts to work with BTC to facilitate a path forward for the Project were somehow an "abandonment" or "termination" of the Development Agreement. Moreover, even if it were the case that there has been "mutual inaction" (there has not), BTC's assertion that "inaction" is grounds for termination is decisively refuted by Section 13 of the Development Agreement, which provides that:

> 13. Waiver. The failure of either Party to insist on strict performance of any of the provisions of this Agreement or to exercise any right it grants will not be construed as a relinquishment of any right or a waiver of any provision of this Agreement. No waiver of any provision or right shall be valid unless it is in writing and signed by a duly authorized representative of the Party granting the waiver.

Id. ¶¶ 124-25; Exhibit 1 at 35, § 13. By the terms of the Development Agreement, the City has not relinquished or waived any of its rights, and any purported inaction on its part does not amount to waiver, much less "abandonment" or "termination."

BTC's claims of "impossibility" fare no better. For years, Donald F. Sinex, the Managing Director of Devonwood (at various times the controlling owner of BTC) has made repeated public representations that the Project is moving forward despite the evidence in plain sight to the contrary. With respect to financing, Mr. Sinex told the community in 2017, that BTC has "the funds are in hand" to finance "30 to 40 percent of the [P]roject." Complaint ¶¶ 43-44. On August 18, 2020, Brookfield (the successor-in-interest to Rouse Properties—the entity obligated to fund equity for the Project construction to $56 million) told the City in writing that it had invested $70 million in the Project. *Id.* ¶ 77. Nonetheless, the only construction performed on the Project was the initial structural demolition. It strains credulity that any amount close to $56 million—let alone $70 million—was expended on structural demolition. Accordingly, significant funds should remain in BTC to immediately complete construction of the Public Improvements and Additional Public Improvements without the need for financing. BTC's performance is not "impossible," in particular with respect to its obligation to construct the Public Improvements and Additional Public Improvements. *Agway, Inc. v. Marotti*, 149 Vt. 191, 193, 540 A.2d 1044, 1046 (1988) (impossibility "must consist in the nature of the thing to be done and not in the inability of the party to do it").

Finally, BTC contends its termination is valid under Section 19 of the Development Agreement because it has not "commenced construction of the Project." This assertion again rests on a fallacious interpretation of, and incomplete citation to, the Development Agreement. Under Section 19, BTC "may terminate this Agreement by formally abandoning, withdrawing and relinquishing the DRB Approval prior to commencing construction of the Project." Complaint ¶ 161; Exhibit 1 at 37, § 19. There can be no doubt, however, that BTC long ago commenced construction as defined in the Development Agreement, and thus, cannot now unilaterally terminate the Development Agreement. The Development Agreement makes it clear that construction commenced with the structural demolition BTC undertook in 2017. The first

sentence of Section 1(a) states specifically that commencement of construction includes structural demolition. Complaint ¶ 56; Exhibit 1 at 3, § 1(a) ("The Owner desires to commence construction of the Project (*including structural demolition* of the Burlington Town Center mall) on or before October 15, 2017[.]") (emphasis supplied)). The final sentence of Section 1(a) thereafter sets forth BTC's obligation that once it commences construction, it "shall diligently prosecute construction to completion, subject to any delays caused by a force majeure or other event outside the reasonable control of the owner." *Id.*

Section 3(b) of the Development Agreement reinforces the conclusion that construction commenced upon structural demolition by requiring BTC to provide "reassurance that construction of the Project will *continue* without interruption (subject to force majeure events) once [BTC] *commences structural demolition for the Project* and the release by the City of the relevant structural demolition permit[.]" Complaint ¶ 61; Exhibit 1 at 8, § 3(b) (emphasis supplied). As part of those reassurances, Section 3(b) sets forth the requirement for BTC to have provided (which BTC did) the Rouse Letter, stating the Project would commence construction in reliance on the letter (which BTC did). Complaint ¶¶ 62, 75-76, 79-80; Exhibit 1 at 8, § 3(b). When describing the requirements for what would come next in the progress of construction following structural demolition, Section 3(b) specifically references "commencement of foundation work for construction of the Project," not "commencement of construction" as BTC would presumably have the Development Agreement be rewritten to say. *Id.* at 9, § 3(b).

Later, in Section 3(c), where the parties actually intended for structural demolition *not* to be considered part of "construction," Development Agreement plainly says so. In addressing plan approvals for the Public Improvements, Section 3(c)(iv)(A) provides that "[BTC] shall not commence construction (*for purposes of this paragraph, commencement of construction shall not be construed to include demolition)* of any Work until the City shall have approved the plans and specifications..." *Id.* at 12-13, § 3(c)(iv)(A) (emphasis supplied). The parties' decision to

exclude demolition from the definition of "construction" in Section 3(c)(iv)(A) represents a limited and specific exception in the Development Agreement to the otherwise general rule that construction commenced with the demolition work.[4] Because BTC has already performed this structural demolition, Complaint ¶¶ 79-80, it cannot validly terminate the Development Agreement pursuant to Section 19, which does not exclude structural demolition from the definition of "construction" as Section 3(c)(iv)(A) does. BTC's assertion that construction on the Project has not commenced is contrary to the plain language of the Development Agreement and it is contrary to common sense.

The Development Agreement therefore remains in full effect, and the City is entitled to enforce its rights thereunder, including its contractual right to specific performance.

2. <u>BTC Has Breached the Development Agreement</u>

The City can establish that BTC has breached the Development Agreement and that it is entitled to relief thereunder, including specific performance. In Section 1(a) of the Development Agreement, BTC agreed "that once construction of the Project has commenced, [BTC] shall diligently prosecute construction to completion, subject to any delays caused by a force majeure or other event outside the reasonable control of [BTC]." Complaint ¶ 56. BTC commenced construction when it engaged in structural demolition. *Id.* ¶¶ 79-80. But nearly four years after City voters approved amendments to the Zoning Ordinance and authorized TIF funding for the Project and nearly three years after the Parties entered in the Development Agreement and BTC commenced construction, BTC has failed to diligently complete any aspect of the construction of the Project beyond the structural demolition of the Burlington Town Center mall. Its breach of Section 1(a) of the Development Agreement is manifest.

---

[4] Moreover, this carve-out made perfect sense in the context of Section 3(c)(iv)(A), as doing so allowed BTC to engage in demolition while plans for later work were being finalized.

In addition to this failure, BTC repeatedly committed to fund, construct, and equip the Public Improvements and Additional Public Improvements. In Section 1(b), BTC committed "to complete the Public Improvements in sufficient time to be eligible for reimbursement in accordance with Section 4 of this Agreement." *Id.* ¶ 56. Similarly, Section 3(b) of the Development Agreement provides that BTC "shall, subject to the application of the Public Improvements reimbursement provisions described in Section 4 of this Agreement, construct the Public Improvements as a component of the Project." *Id.* ¶ 59. BTC's commitment to construct these improvements is memorialized for a third time in Section 4(c), providing in relevant part "… Owner [i.e., BTC] shall construct and equip the Public Improvements and any Additional Public Improvements in accordance with mutually agreed upon plans and specifications and in accordance with the Project Schedule." *Id.* ¶ 66. Despite BTC's clear and unambiguous commitment to construct the Public Improvements and Additional Public Improvements, it has failed to do so in accordance with the Project Schedule incorporated by reference in the Development Agreement, and, moreover, BTC has failed to present any meaningful updated timeline to the City to suggest that BTC's obligations will ever be completed.

Indeed, on or about September 4, 2020, BTC improperly purported to "terminate" the Development Agreement and demanded that the Parties return to the drawing board and negotiate a new agreement, dispelling all doubt that BTC will ever willingly comply with the Development Agreement. *Id.* ¶¶ 117-18. *See Lapoint v. Dumont Construction Co.*, 128 Vt. 8, 10, 258 A.2d 570, 571 (1969) ("In the obligation assumed by a party to a contract is found his duty, and his failure to comply with the duty constitutes a breach."). Because BTC has failed to construct these improvements, it has also failed to convey unencumbered fee simple title to the not-yet-restored segments of Pine Street and St. Paul Street, further denying the City the benefit of what it bargained for in entering into the Development Agreement. As shown in Section C, *infra*, BTC also agreed that the City would be entitled to injunctive relief and specific

performance for a breach of Section 3(b) of the Agreement. Complaint ¶¶ 111-13. The City is therefore entitled to relief and likely to succeed on the merits.

C. The City Lacks an Adequate Remedy at Law

The appropriate remedy for BTC's breaches of the Development Agreement is specific performance because the City lacks an adequate remedy at law. BTC has failed to construct the Public Improvements and Additional Public Improvements in accordance with the Project Schedule. Its concomitant failure to diligently complete construction of the Private Improvements has, moreover, failed thus far to generate the tax revenue increment that would be the funding source for the City to pay the debt service on bonds that were anticipated to be issued to fund reimbursement to BTC for the construction of the Public Improvements and Additional Public Improvements. In light of BTC's unequivocal repudiation of its obligations under the Development Agreement, in the absence of a court order, the City will be denied the improvements it is owed, as well as unencumbered title to the restored segments of Pine Street and St. Paul Street. The harm to the City as a result of BTC's conduct is immediate and non-speculative.

Monetary damages cannot adequately compensate the City. The City bargained for the conveyance of the constructed segments of Pine Street and St. Paul Street, which would realize the City's years-long aspiration to restore the connectivity of the urban grid. This land, located in the heart of the City's downtown, is inherently unique, and the City's bargained-for expectation cannot be adequately redressed at law. *See Kissell v. Kissell*, 131 Vt. 77, 82, 300 A.2d 551, 554 (1973) ("What the plaintiff here sought was the specific performance of a contract to convey land. An action to recover for the value of the services rendered the defendant by the plaintiff would not have afforded the relief sought, and, hence, the plaintiff has no adequate remedy at law."); *see also* Restatement (Second) of Contracts § 360, cmt. *e* ("Contracts for the sale of land have traditionally been accorded a special place in the law of specific performance.

A specific tract of land has long been regarded as unique and impossible of duplication by the use of any amount of money. Furthermore, the value of land is to some extent speculative. Damages have therefore been regarded as inadequate to enforce a duty to transfer an interest in land[.]"). The City is entitled to BTC's specific performance of these obligations because specific performance is the only remedy that provides full and complete relief to the City and vindicates its expectations under the Development Agreement. *Mullins v. City of New York*, 634 F. Supp. 2d 373, 386–87 (S.D.N.Y. 2009) ("irreparable harm by definition cannot be remedied by an award of monetary damages" (internal quotation marks omitted)), *aff'd*, 626 F.3d 47 (2d Cir. 2010).

Such an order does not exceed this Court's discretion. The City is *not* requesting that the Court order BTC to construct a 10- or 14-story mixed-use development project or any of the other Project elements that comprise the Private Improvements. The City is, however, requesting that the Court order BTC to fund, construct, and equip the Public Improvements and Additional Public Improvements, including sixty-foot segments of Pine Street and St. Paul Street between Bank Street and Cherry Street, and to convey unencumbered fee simple title to that real property to the City. Decrees of specific performance ordering the conveyance of title to real property are mainstays of this Court's equity jurisdiction and are firmly rooted in precedent. *Vaughan v. Tetzlaff*, 141 Vt. 150, 154, 446 A.2d 356, 358 (1982) stating that "[s]pecific performance is available for valid contracts with specific terms that leave no reasonable doubt as to their meaning" and reversing trial court's order with instructions to issue decree requiring defendant to tender a deed describing right of way as provided for in contract); *Gove v. Armstrong*, 88 Vt. 115, 92 A. 10, 12 (1914) ("Whenever a contract concerning real property . . . is in its nature and incidents entirely unobjectionable—when it possesses none of those features which, in ordinary language, influence the discretion of the court—it is as much a matter of course for a court of equity to decree specific performance as it is for a court of law to give damages for its breach."

(quoting 4 Pom. Eq. § 1402)); *accord Fowler v. Sands*, 73 Vt. 236, 50 A. 1067, 1067 (1901) ("When equity decrees specific performance, it is upon the ground that the remedy at law is inadequate; but when the contract is for the sale of land it is considered that damages are necessarily inadequate[.]").

An order granting specific performance of BTC's obligations to fund, construct, and equip the Public Improvements and Additional Public Improvements also lies within the Court's discretion. No less an authority than Justice Holmes, then serving on the Massachusetts Supreme Judicial Court, commented that "[t]here is no universal rule that courts of equity never will enforce a contract which requires some building to be done. They have enforced such contracts from the earliest days to the present time." *Jones v. Parker*, 163 Mass. 564, 567, 40 N.E. 1044, 1045 (1895); *accord Union Pac. Ry. Co. v. Chicago, R.I. & P. Ry. Co.*, 163 U.S. 564, 600–01 (1896) ("It must not be forgotten that, in the increasing complexities of modern business relations, equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them.").

As one of the busiest commercial courts in the world, the Appellate Division, First Department, recently held, "[t]here is no blanket prohibition against a court ordering the equitable relief of specific performance in a case involving breach of a construction contract. At most, courts are vested with discretion to refuse such relief." *Granite Broadway Dev. LLC v. 1711 LLC*, 845 N.Y.S.2d 10, 11, 44 A.D.3d 594, 594 (1st Dep't 2007) (affirming trial court's order of specific performance and liquidated damages in action involving breach of construction contract). Decrees of specific performance in the construction context have a long pedigree and are hardly unprecedented. *See Easton Theatres, Inc. v. Wells Fargo Land & Mortg. Co.*, 265 Pa. Super. 334, 355–356, 401 A.2d 1333, 1344 (1979) (affirming chancellor's order of specific performance to commence construction of a theater building and concluding that money damages were inadequate); *City Stores Co. v. Ammerman*, 266 F. Supp. 766, 776 (D.D.C 1967)

(granting specific performance and stating that "the better view" is that contracts for construction of buildings "should be specifically enforced unless the difficulties of supervision outweigh the importance of specific performance to the plaintiff"), *aff'd*, 394 F.2d 950 (D.C. Cir. 1968). The Court should therefore order specific performance of BTC's obligations since there the City lacks an adequate remedy at law.

This conclusion is buttressed by Section 3(b) of the Development Agreement, in which BTC "agreed that the City will not have an adequate remedy at law for [BTC's] noncompliance with the provisions of this Section 3(b) and, therefore, the City shall have the right to equitable remedies, such as, without limitation, injunctive relief and specific performance, to enforce the foregoing covenant and agreement." Complaint ¶¶ 64, 153. This provision in the Development Agreement constitutes an admission by BTC that the City has no adequate remedy at law and will suffer irreparable harm in the absence of an injunction. As this Court recently recognized, in issuing a preliminary injunction to enforce a non-competition agreement, such a provision, while not necessarily determinative, "is certainly one more piece of evidence relevant to the analysis." *Blackberry Corp. v. Coulter*, Docket No. 953-10-19 Cncv, slip op. at 25 n.8 (Vt. Super. Ct. Apr. 17, 2020) (Toor, *J.*).[5] One federal judge in the District of Vermont concluded that such a contractual stipulation to the irreparable nature of any violation was sufficient to establish irreparable harm. *See Majestic Corp. of Am. v. Crepeau*, No. CIV. 1:06CV35, 2007 WL 922267,

---

5 *See Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 896 (2d Cir. 2015) (stating that such an "irreparable harm" provision in the parties' agreement, while not controlling, is "relevant evidence that can help support a finding of irreparable injury"); *Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 69 (2d Cir. 1999) (observing that the provision in the employment contract, which indicated that in the event of "breach of the post-employment competition provision, Ticor shall be entitled to injunctive relief, because it would cause irreparable injury," "might arguably be viewed as an admission by Cohen that plaintiff will suffer irreparable harm were he to breach the contract's non-compete provision"); *New Horizons Educ. Corp. v. Krolak Tech. Mgmt. of Syracuse, LLC*, No. 518CV01223BKSDEP, 2018 WL 5253070, at *8 (N.D.N.Yp. Oct. 22, 2018) (citing injunction clause as one factor, among others, supporting finding of irreparable harm and issuance of temporary restraining order).

at *4 (D. Vt. Mar. 23, 2007) ("The parties themselves essentially have agreed that, in the event of a violation of the Agreement, money damages are insufficient to compensate Majestic. . . . Accordingly, Mr. Crepeau's potential use of Majestic's confidential information, and his solicitation of Majestic's clients, constitutes irreparable harm for the purpose of enforcing the Agreement.").

Under such circumstances, BTC can hardly be heard to deny that the City is entitled to the remedies of injunctive relief and specific performance.

D. The Balance of the Equities Supports the Issuance of Relief

The balance of the equities similarly militates in favor of equitable relief. An order of specific performance would simply require that BTC comply with the Development Agreement and undertake action that it has already contractually committed to do. This is not an insurmountable or unduly burdensome task. BTC has commenced construction by performing structural demolition, which it was permitted to do only after Rouse Properties, Inc. provided a written assurances to the City of an equity commitment by Rouse to fund equity "for Project construction" up to $56,000,000.00 , which commitment was reconfirmed by Brookfield as recently as August 18, 2020. Complaint ¶¶ 76-77. There is no justification for BTC's continued failure to diligently prosecute construction to completion, including its failure to fund, construct, equip, and convey the Public Improvements and Additional Public Improvements.

To the extent BTC regards complying with its obligations under the Development Agreement as too economically oppressive a remedy, this contention is unavailing as a matter of fact and law. Based on representations made by BTC's Managing Member, funding the Public Improvements and Additional Improvements up to the Not to Exceed TIF Funding Amount should be eminently financially viable. As reflected in the Rouse Letter, as of October 26, 2017, Rouse had a GAAP net worth of at least $750,000,000 (seven hundred fifty million dollars) and had entered into a joint venture agreement with Mr. Sinex's special purpose entity that required

Rouse to invest equity in BTC, which could use this equity financing as needed to fund construction until BTC secures debt financing for the Project. *Id.* ¶ 76. As recently as August 18, 2020, Rouse's successor-in-interest represented to the City that it had invested "almost $70 million" in development of the Project. *Id.* ¶ 77. That investment is more than sufficient for BTC to fund construction of the Public Improvements and Additional Public Improvements up to approximately $22 million, without the need to secure debt financing. While the City has not been given an accounting of this investment (as it has requested), it strains credulity that this $70 million investment has been depleted to such an extent that sufficient equity financing no longer exists to fund construction of the Public Improvements and Additional Public Improvements as required under the Development Agreement. Those representations notwithstanding, BTC's contractual obligation remains the same: to fund, construct, equip, and convey the Public Improvements and the Additional Public Improvements.

As a matter of law, it is not inequitable for BTC to be ordered to uphold its end of the bargain because such a decree places no burden on BTC that did not already exist under the Development Agreement. "[R]equiring a party to comply with its contractual obligations does not constitute harm." *XL Specialty Ins. Co. v. Truland*, No. 1:14CV1058 JCC/JFA, 2014 WL 4230388, at *4 (E.D. Va. Aug. 21, 2014) (granting plaintiff's motion for temporary restraining order compelling defendant to provide collateral to indemnify plaintiffs' liability under performance bonds pursuant to indemnity agreement). BTC can identify no harm that would result from its own compliance with the Development Agreement, whereas the City lacks an adequate remedy at law if no injunction issues. The balance of the equities therefore favors the grant of specific performance.

E. Specific Performance Is in the Public Interest

Finally, the public interest factor militates in favor of issuing equitable relief. The City's efforts to realize the redevelopment of the Burlington Town Center have been years in the

making, beginning with the multi-year community planning process that culminated in PlanBTV in 2013. PlanBTV contemplated redevelopment of the Property in a manner that would utilize the Property more intensively in order to infill downtown development and provide more active street-level uses, would include a mix of affordable and market rate downtown housing, retail and services, and would also restore and/or improve connectivity to the urban grid along Pine Street and St. Paul Street. Complaint ¶ 15.

The City thereafter engaged in a multi-year pre-development process, working with BTC and its principals, which had developed plans to redevelop the Property in a manner that aligned with the City's goals and vision, as set forth in PlanBTV. *Id.* ¶¶ 17-29. That vision included the reestablishment of Pine Street and St. Paul Street between Bank Street and Cherry Street, together with the activation of Bank Street and Cherry Street, collectively defined in the Development Agreement as the "Public Improvements." *Id.* ¶ 55. One of the reasons that the City supported redevelopment of the Property, as provided in the Development Agreement, was that the agreement contractually required that once BTC commenced construction, it would diligently prosecute construction of the Project to competition, *id.* ¶ 56, including by funding, equipping, and constructing the Public Improvements and Additional Public Improvements, and conveying unencumbered fee simple title to the restored segments of Pine Street and St. Paul Street to the City. *Id.* ¶ 68 (Section 4(c)(v)).

It is axiomatic that BTC's specific performance of its obligations to fund, construct, equip, and convey Public Improvements and Additional Public Improvements will provide enormous benefits to the public. For decades, the Property represented a barrier to north-south connectivity on Pine Street and St. Paul Street and precluded the growth of vibrant street life on Bank Street and Cherry Street. *Id.* ¶ 14. BTC's specific performance of its contractual obligations would, once and for all, return these thoroughfares to the public for the use and

enjoyment of pedestrians, cyclists, and motorists, would restore the City grid, and would make the City's downtown more inclusive and interconnected.

By contrast, BTC's continued failure to construct the Public Improvements and Additional Public Improvements would disserve public interest. On behalf of the public, the City bargained for, and expected to receive these improvements. Yet for too long, the Property remains undeveloped, *id.* ¶ 109, a construction site in which little to no construction is taking place. This unfortunate state of affairs—which is the result of BTC's breaches of the Development Agreement—benefits no one, least of all the public. A judicial decree ordering BTC to uphold and perform the contractual commitments it made to the City would therefore vindicate the public interest.

Finally, it is in the public interest that the Development Agreement be enforced and that BTC be held to its contractual obligations, rather than be permitted to repudiate and skirt those obligations. *See Bank of Am. v. Won Sam Yi*, 294 F. Supp. 3d 62, 81 (W.D.N.Y. 2018) (identifying a "well-recognized public interest in enforcing contracts and upholding the rule of law" and concluding "that the issuance of this injunction would serve the public interest by holding Defendants to their contractual obligations"); *Rex Med. L.P. v. Angiotech Pharm. (US), Inc.*, 754 F. Supp. 2d 616, 626 (S.D.N.Y. 2010) ("The public has an interest in seeing that parties oblige by their contractual obligations and are not allowed to skirt such obligations at another's expense."). For this additional reason, the public-interest factor supports the City's request for equitable relief.

Because all of the relevant factors favor the issuance of injunctive relief and because specific performance is warranted, the Motion should be granted.

II. No Security Is Required Under the Circumstances

Vermont Rule of Civil Procedure 65(c) provides that:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such

> costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained, provided, however, that for good cause shown and recited in the order, the court may waive the giving of security. No such security shall be required of the State of Vermont or an officer or agency thereof.

Vt. R. Civ. P. 65(c).

Good cause exists to waive any requirement of giving security that may run to the City. It would be inequitable to require security where the City, through public referendum, has already pledged the credit of the City to reimburse BTC up to the Not to Exceed TIF Funding Amount, in the event it performed under the Development Agreement. No security should be required, moreover, where the City is asking that BTC perform its obligations under the Development Agreement, for which (based on representations made by Rouse and its successor-in-interest Brookfield) adequate equity financing should already be available to fund the construction and equipping of the Public Improvements and Additional Public Improvements. The City is a municipality in the State of Vermont, not a for-profit entity and certainly not one that stands on similar financial footing as BTC, which has been backed by enormously well-capitalized partners such as Rouse and Brookfield. While it may not be an "officer or agency" of the State of Vermont, similar considerations concerning the respect due to the City's assets and solvency militate against the requirement of security.

Furthermore, the Court can prophylactically address any prejudice to BTC that could result from its being "wrongfully enjoined" by consolidating a hearing on the City's request for preliminary relief with a final hearing on the merits. *See* Vt. R. Civ. P. 65(b)(2) (stating that "the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application" for a preliminary injunction"). Such consolidation would not only promote efficiency and judicial economy, but would also eliminate the risk of prejudice that Rule 65(c) was designed to protect against. For these reasons, the giving of security should be waived.

CONCLUSION

WHEREFORE, for the foregoing reasons, the City of Burlington respectfully requests that this Court GRANT the instant Motion for a Preliminary Injunction. The City further requests a hearing on the Motion at the Court's earliest convenience.

Burlington, Vermont.

September 8, 2020

DOWNS RACHLIN MARTIN PLLC

By: _____

Marc B. Heath, Esq.
Timothy S. Sampson, Esq.
Jennifer E. McDonald, Esq.
Evan J. O'Brien, Esq.
199 Main Street, PO Box 190
Burlington, VT 05402-0190
Telephone: 802-863-2375
Fax: 802-862-7512
E-Mail: mheath@drm.com
E-Mail: tsampson@drm.com
E-Mail: jmcdonald@drm.com
E-Mail: eobrien@drm.com

ATTORNEYS FOR PLAINTIFF THE CITY OF BURLINGTON