CAUSE NO. 2021-80180

AZAEL SEPULVEDA, *Plaintiff*, v. CITY OF PASADENA, TEXAS, et al., *Defendants.*	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 281st JUDICIAL DISTRICT

PLAINTIFF'S MOTION TO ENFORCE MEDIATED SETTLEMENT AGREEMENT AND INCORPORATED MEMORANDUM OF LAW

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff Azael Sepulveda respectfully moves this Court to enforce the mediated Rule 11 settlement agreement signed by both Plaintiff and Defendants (collectively, the City) on April 11, 2022.

In support of this Motion, Plaintiff would show all of the following:

INTRODUCTION

Azael Sepulveda, also known as Oz, just wants to open his small auto-mechanic shop at its new location. After the City insisted that he install more parking spots than would even fit on the property, this Court entered a temporary injunction that would allow Oz to open his business. The Court also ordered the parties to mediation, and it resulted in a settlement agreement (the "Agreement") that would also allow Oz to open his business. But that was almost a year ago, and the City's refusals to abide by the Agreement continue to prevent Oz from opening his business. Therefore, Oz respectfully asks this Court to enforce the Agreement.

FACTS

A. Azael Sepulveda and Oz Mechanics

As this Court found in its temporary-injunction order, Oz has been operating his business, Oz Mechanics, in Pasadena for about a decade. Temp. Inj. Order ¶¶ 3–4. Oz is a specialty mechanic that only diagnoses and repairs electrical issues—he does not do transmission or heavy auxiliary work. *Id.* ¶ 5. He is the sole mechanic at the shop and takes customers by appointment only. *Id.* ¶¶ 6–7.

After operating at a leased location for years, Oz finally had the opportunity to purchase his own shop space. *Id.* ¶¶ 9–10, 13–14. The space, located at 1615 Shaver Street (the Property), was previously used as an automotive machine shop that rebuilt engines, and it has two garage doors that open to allow four cars to park in the indoor bays. *Id.* ¶¶ 13, 17, 20. It is also surrounded by an automotive body shop. *Id.* ¶ 18. Oz purchased the property in July 2021, using his and his wife's home as collateral for the loan. *Id.* ¶¶ 14–15.

After Oz purchased the property, however, the City demanded that Oz provide twenty-eight parking spaces before he could obtain a certificate of occupancy and open his doors. *Id.* ¶¶ 25–26, 51. But "[e]ven if [Oz] were to fill every portion of the property . . . with parking spaces," twenty-eight spaces would not fit. *Id.* ¶ 27. Oz applied for a variance from the parking requirements, but his application was denied without any hearing or other public meeting. *Id.* ¶¶ 70–73. Oz then sued for violations of the due course of law and equal protection clauses of the Texas Constitution. *Id.* ¶ 1.

B. This Court Grants Oz a Temporary Injunction and Orders the Parties to Mediation.

Oz then moved for, and this Court granted, a temporary injunction that would allow him to open his shop at the Property without adding more parking spaces while the case was ongoing. *Id.* at 15. The Court specifically found that:

- "[P]roviding 28 outdoor parking spaces at the Property would be so burdensome on Mr. Sepulveda as to be not only oppressive, but impossible";
- "[T]he Property currently contains more than adequate parking for Oz Mechanics";
- "The record reveals no public interest in requiring 28 outdoor parking spaces at the Property"; and
- "[T]o the extent that Mr. Sepulveda complied with the City's demands and added parking spaces to the Property, those parking spaces would go unused."

Id. ¶¶ 84–87. The Court also found that the Property's prior use did "not materially differ from" Oz's planned use and that "[t]he Defendants' testimony" on that point "lack[ed] credibility." *Id.* ¶ 101. Finally, the Court found that Oz "face[d] dire financial harm" from not being able to open his shop and that the loss of use of the Property was "an irreparable injury." *Id.* ¶¶ 102–03.

Based on these and other findings, the Court held that Oz had pleaded a cause of action and probable right to relief under *Patel v. Texas Department of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015), and granted the temporary injunction. Temp. Inj. Order ¶¶ 96–98; *id.* at 15. The Court also denied the Defendants' plea to the jurisdiction and ordered the parties to engage in mediation. *Id.* at 16.

C. The Parties Reach a Settlement Agreement.

On April 11, 2022, the parties attended mediation and signed the Agreement. Rule 11 Agreement Ex. A (redacted settlement agreement, previously filed with the Court on January 17, 2023) (hereinafter Ex. A). The Agreement states, in relevant part, that "[t]he City *will* approve [Oz's] application for a certificate of occupancy for Oz Mechanics to use" the Property "for automotive electrical repair upon the completion" on four conditions. Ex. A ¶ 1 (emphasis added). Those conditions are that Oz will:

a) Provide three parking spots in front of the shop building and four on the side of the building, with spots not backing out into the right-of-way;

b) Pave the area on the side of the building to the property line and remove fencing in that area;

c) Pave the floor area of an existing shed; and

d) Install bollards to block vehicle access to the area behind the shop building.

Id. ¶ 1.a–d. The Agreement also provides that Oz would "obtain and submit engineering drawings, construction permits[,] and other similar documents in order to obtain the City's approval of the certificate of occupancy." *Id.* ¶ 4.

D. The City Breaches the Agreement Even After Oz Provides the City Multiple Opportunities to Correct the Violations.

Two of the Agreement's conditions—paving the floor of the shed and installing bollards—are uncontested. And Oz has, in good faith, submitted the required drawings and application materials to obtain his certificate of occupancy, bending over backwards to try to accommodate the City's demands. However, just as the City initially demanded that Oz provide twenty-eight parking spots even though doing so was physically impossible, the City is now demanding that Oz make additional modifications to his property that are physically impossible under, and in direct conflict with, the Agreement.

Between the signing of the Agreement in April and the end of August 2022, Oz informally submitted multiple site plans to Natalie Herrera, of the City's Planning Department, for review. Ex. 1 (Sepulveda Decl.) ¶¶ 6–11; *see also* Exs. 2 & 3 (informally submitted site plans). Ms. Herrera is the same person whose indignant testimony this Court found "lack[ed] credibility." Temp. Inj. Order ¶ 101. She remains antagonistic towards Oz, and although the site plans complied with the

Agreement, Ms. Herrera told Oz that they would nonetheless be rejected. Ex. 1 (Sepulveda Decl.) ¶¶ 10–11.

Eventually, Ms. Herrera also sent an email to Oz stating that one of the site plans was not acceptable for various reasons. Ex. 1 (Sepulveda Decl.) ¶¶ 12–13; Ex. 4 (Herrera Email Chain & Markup). For instance, a marked-up site plan attached to the email stated that Oz could not pave to the property line on the side of the building because he needed a five-foot setback under the City Code, even though the Agreement expressly requires Oz to pave to the property line. Ex. 1 (Sepulveda Decl.) ¶ 13; Ex. A ¶ 1.b; Ex. 4 (Herrera Email Chain & Markup). Ms. Herrera asserted that Oz's site plan had to "meet[] the requirements of the settlement agreement and also meet[] the requirements of all city codes, excluding the landscape ordinance." Ex. 4 (Herrera Email Chain & Markup). The undersigned attorneys contacted the City's counsel about this development on August 29. Ex. 5 (Hargis Email Chain); Ex. 6 (Clark Decl.) ¶ 4.

On September 14, after counsel's discussions, City Attorney Jay Dale indicated via email that Oz needed to submit "engineered plans for the site layout and paving requirements." Exs. 7 (Dale Email Chain); Ex. 6 (Clark Decl.) ¶ 5. Undersigned counsel stated that Oz would have been glad to submit the requested plans but was understandably hesitant to incur the significant costs to finalize the plans with an engineer when Ms. Herrera had told him that it would be futile to do so. Ex. 7 (Dale Email Chain). The undersigned also explained to Attorney Dale that Oz needed to know which of the proposed plans to submit, as Oz was willing to do whichever one the City preferred. *Id.* When Mr. Dale did not respond, undersigned counsel indicated that Oz would move forward with finalizing and formally submitting one of the plans if Mr. Dale did not respond by September 23. Ex. 7 (Dale Email Chain). Neither Mr. Dale nor any other City representative responded. *Id.*; Ex. 6 (Clark Decl.) ¶ 5.

From September through November, Oz worked with an engineer to finalize a site plan for the Property. Ex. 1 (Sepulveda Decl.) ¶ 15. On December 1, Oz attended a Zoom meeting with City Planning Department officials Melissa Tamez, Denice Morales, and Ms. Herrera, as well as Andrew Pogue of the City Engineering Department and James Smith of the City Permit Department. Ex. 1 (Sepulveda Decl.) ¶ 17; Ex. 5 (Hargis Email Chain). At that meeting, Ms. Herrera again indicated that Oz's site plan would be rejected. Ex. 1 (Sepulveda Decl.) ¶ 18. Undersigned counsel again reached out to the City's attorney on December 6 and later spoke to counsel via telephone. Ex. 5 (Hargis Email Chain).

Based on these communications, Oz submitted a completed certificate of occupancy application, including a finalized site plan, on January 24, 2023. Ex. 1 (Sepulveda Decl.) ¶ 22; Ex. 8 (Formally Submitted Certificate of Occupancy Application). On February 13, Oz received a letter stating that his site plan was disapproved, along with marked-up site plans. Exs. 9–16. City employee Denice Morales orally told Oz that the City would not move forward with his certificate of occupancy application unless he corrected the alleged deficiencies with the site plan. Ex. 1 (Sepulveda Decl.) ¶ 25. Morales did not give any other reason for the City's disapproval and did not request any additional documents from Oz. *Id.* ¶ 26.

The disapproval letter specifically stated that the site plan was disapproved for two reasons, one of which conflicts with the Agreement:

1. "Bollards shall be installed at a maximum of 4ft between each bollard" (Oz is willing to resolve this with his engineer), and
2. "Drive aisle widths do not meet city requirements."

Ex. 9. Additionally, the marked-up site plans indicated the following alleged deficiencies:

3. "Provide drainage & restrictor calculations. Internal system must use Atlas 4" (Oz will fix this with his engineer), Ex. 11;
4. "6" curb req'd around all paving" & "Define driveways 6" curb," Exs. 4, 5;
5. "5ft setback req'd for grading & drainage[,] must be grass at natural ground elevation," Ex. 13; *see also* Ex. 6; and
6. "Cannot back into right of way," Ex. 15.

As explained in more detail below, demands 2, 5, and 6 conflict with the Agreement.

On March 1, undersigned counsel informed the City's attorneys of the City's violations and stated that Oz would move to enforce the Agreement if the violations were not corrected. Ex. 17 (Clark Email chain); Ex. 6 (Clark Decl.) ¶ 6. On March 9, counsel for all parties conferred via telephone, and counsel for the City assured the undersigned counsel that he would discuss the matter with his client. Ex. 17 (Clark Email chain). As a courtesy to the City's attorneys, undersigned counsel agreed to postpone the filing of the motion by an additional week until March 22, 2023. *Id.* However, after following up with the City's attorneys multiple times, the City still did not change its demands or provide any indication that it was willing to comply fully with the Agreement. *See id.* This motion followed.

In sum, the City is demanding that Oz make six modifications to the site plan, three of which violate the Agreement:

Demand	**Conflicts with Agreement?**
"Bollards shall be installed at a maximum of 4ft between each bollard"	No, Oz will fix.
"Drive aisle widths do not meet city requirements"	Yes
"Provide drainage & restrictor calculations. Internal system must use Atlas 4"	No, Oz will fix.

"6" curb req'd around all paving" & "Define driveways 6" curb"	No, Oz will fix if the City agrees that he will still be in compliance with the Agreement.[1]
"5ft setback req'd for grading & drainage"	Yes
"Cannot back into right of way"	Yes

ARGUMENT

The City has told Oz at least three different times, dating back to last summer, that it will not issue him a certificate of occupancy despite the fact that his site plan complies with the Agreement. The City is therefore in breach. Most recently, the City rejected Oz's formal certificate of occupancy application and demanded that he make changes to the site plan that are irreconcilable with the Agreement. In effect, the City has stated that it will not approve any site plan with three spots in front of the building, four spots on the side, and pavement extending to the property line, even though that is the configuration expressly agreed to by the parties in the Agreement. *See* Ex. A ¶ 1.a–b. Moreover, even though the City's demands violate the Agreement, Oz would meet them anyway if it were possible to do so, as he just wants to finally open his business. But the City's improper demands are literally impossible to meet.

[1] The City is demanding that Oz install six-inch curbs that would render various parts of the lot unusable—even though installing additional curbs was not one of the four preconditions needed for approval under the Agreement. For example, the City is requiring Oz to place a U-shaped curb behind the three parking spots in the front of the building, despite the fact that this would render at least one of them unusable. *See* Ex. 15; *see also* Ex. 18 (Diaz Decl.) ¶¶ 11–12. This Court has already found that "the Property currently contains more than adequate parking for Oz Mechanics." Temp. Inj. Order ¶ 86. Oz is only adding more parking spots as part of the compromise reached at the mediation in response to the City's insistence that he do so. It is nonsensical for the City to insist on Oz adding more parking spaces than he needs and then demand that Oz make additional modifications that would prevent him from using those spaces. Nonetheless, Oz is willing to add the curbs as long as the City agrees that doing so will not render him noncompliant with the Agreement by blocking off some of the required parking spaces.

"If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract." Tex. Civ. Prac. & Rem. Code § 154.071(a). Settlement agreements are enforceable under Rule 11 of the Texas Rules of Civil Procedure "so long as the agreement is filed before it is sought to be enforced." *Padilla v. LaFrance*, 907 S.W.2d 454, 461 (Tex. 1995); *see also* Andrew S. Hanen & Jeffrey M. Benton, *The Enforceability of Settlement Agreements*, 40 Advoc. (St. B. Tex. Litig. Sec. Rep.) 69, 72–73 (Fall 2007). Oz filed the Agreement, which is in writing and signed, with the Court under Rule 11 on January 17, 2023, in accordance with the Agreement's express terms. Ex. A ¶ 8; *see also* Tex. R. Civ. P. 11. This Court therefore has a "ministerial duty to grant relief in strict accordance with the parties' agreement."[2] *Fed. Lanes, Inc. v. City of Houston*, 905 S.W.2d 686, 690 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *see also* Hanen & Benton, *supra*, at 72.

I. The City's Demands Violate the Agreement.

"The elements of a breach-of-contract action are (1) the existence of a valid contract, (2) performance or tendered performance by the plaintiff, (3) breach of the contract by the defendants, and (4) damages sustained by the plaintiff as a result of the breach." *Tamasy v. Lone Star Coll. Sys.*, 635 S.W.3d 702, 708 (Tex. App.—Hous. [14th Dist.] 2021, no pet.) (quoting *Mays v. Pierce*, 203 S.W.3d 564, 575 (Tex. App.—Houston [14th Dist.] 2006, pet. denied)). Each of these elements is present here.

[2] This Court may enforce the motion because it presently has jurisdiction over the underlying action. *See Mantas v. Fifth Ct. of Appeals*, 925 S.W.2d 656, 658 (Tex. 1996) ("Where the settlement dispute arises while the trial court has jurisdiction over the underlying action, a claim to enforce the settlement agreement should, if possible, be asserted in that court under the original cause number."). And "a motion to enforce an agreement may be treated as a motion for summary judgment so long as the motion gives the nonmovant notice of the claim asserted and an opportunity to defend itself." *Am. Fisheries, Inc. v. Nat'l Honey, Inc.*, 585 S.W.3d 491, 502 (Tex. App.—Hous. [1st Dist.] 2018, pet. denied) (cleaned up); *see also Neasbitt v. Warren*, 105 S.W.3d 113, 117–18 (Tex. App.—Fort Worth 2003, no pet.) (motion to enforce is sufficient to plead a claim for breach of settlement agreement); *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 663 (Tex. 2009) (accepting motion to enforce as sufficient pleading). In other words, Oz can enforce the Agreement in this Court via a motion to enforce.

i. The Agreement is a Valid Contract.

First, the Agreement is a valid contract between Oz and the City. Again, settlement agreements are "enforceable in the same manner as any other written contract." Tex. Civ. Prac. & Rem. Code § 154.071(a). "To be enforceable, a contract must address all of its essential and material terms with a reasonable degree of certainty and definiteness." *Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231, 237 (Tex. 2016) (internal quotation marks omitted). The Texas Supreme Court has identified at least three requirements for such a contract: that it (1) "be sufficiently definite to confirm that both parties actually intended to be contractually bound," (2) "be sufficiently definite to enable a court to understand the parties' obligations," and (3) "give an appropriate remedy if they are breached." *Id.* (internal citations and quotation marks omitted).

The Agreement is crystal clear that the parties intended to be contractually bound. *See* Ex. A (stating that Oz and the City "*agree* to resolve *all issues* in dispute between them . . . according to the following terms and conditions" (emphases added)). The parties attended court-ordered mediation for the express purpose of arriving at a binding agreement that would end the case. The City cannot credibly argue otherwise.

Likewise, the Agreement's material terms[3] are detailed and concrete—and are therefore more than sufficient to enable a court to understand the parties' obligations. The Agreement states that "[t]he City *will* approve [Oz's] application for a certificate of occupancy . . . upon the completion of the following conditions." Ex. A ¶ 1 (emphasis added). As for Oz, the Agreement states that he will complete the four specific conditions listed, *id.* at ¶1.a–d, and "obtain and submit engineering drawings, construction permits[,] and other similar documents in order to obtain the

[3] This discussion is based only on the unredacted material terms of the Agreement, which are the only ones necessary to resolve this dispute.

City's approval of the certificate of occupancy," *id.* ¶ 4. These terms straightforwardly lay out the parties' obligations for the Court.[4]

Finally, because the parties' obligations are so clearly laid out, the Agreement enables the Court to give an appropriate remedy for breach. *See Fischer*, 479 S.W.3d at 239 ("[I]f the parties clearly intended to agree and a reasonably certain basis for granting a remedy exists, we will find the contract terms definite enough to provide that remedy." (internal quotation marks omitted)). The Court need only order the specific performance of the Agreement's terms. *See infra* Sec. II. As discussed next, Oz has completed all of his obligations under the Agreement. That means the Court should simply grant Oz the remedy the Agreement expressly contemplates by ordering the City to issue Oz a certificate of occupancy based on one of the Agreement-compliant site plans he has provided. Ex. A ¶ 1.

ii. Oz Has Performed His Obligations Under the Agreement.

The Agreement requires Oz to complete four specific conditions relating to the improvement of his property, Ex. A ¶1.a–d, as well as "obtain and submit engineering drawings, construction permits[,] and other similar documents in order to obtain the City's approval of the certificate of occupancy," *id.* ¶ 4. Oz has done all of these things.

First, Oz has submitted multiple site plans to the City for review that meet all four of the conditions of the Agreement. *See* Ex. 1 (Sepulveda Decl.) ¶¶ 9–10, 22; Exs. 2 & 3 (Informally Submitted Site Plans); Ex. 8 (Formally Submitted Application). Each of these plans reflect Oz's intent to: (a) provide three parking spots in front of the shop building and four on the side of the

[4] If, however, there is any doubt as to the sufficiency of terms, courts must still "find terms to be sufficiently definite whenever the language is reasonable susceptible to that interpretation" and "imply terms that can reasonably be implied." *Fischer*, 479 S.W.3d at 239. In other words, the Court must enforce the Agreement if there is any reasonable way to construe it as definite—even if some terms must be implied. *See id.* (citing *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 841 (Tex. 2010), and *REO Indus., Inc. v. Nat. Gas Pipeline Co. of Am.*, 932 F.2d 447, 454 (5th Cir. 1991), for the proposition that "Texas courts will not construe a contract to result in a forfeiture [of a contract] unless it cannot be construed in any other way").

building, with spots not backing out into the right-of-way; (b) pave the area on the side of the building to the property line and remove fencing in that area; (c) pave the floor area of an existing shed; and (d) install bollards to block vehicle access to the area behind the shop building. *See* Ex. A ¶1.a–d. As explained in more detail in the next subsection, the City only actually disputes Oz's compliance with provision (a)—but he is in full compliance under any reasonable reading of the provision. And although Oz has not yet actually made the required improvements to the Property, this is only because the City has refused to approve any of his proposed layouts.

Second, Oz has "obtain[ed] and submit[ted] engineering drawings, construction permits[,] and other similar documents in order to obtain the City's approval of the certificate of occupancy." Ex. A ¶ 4. In addition to his multiple attempts to submit these documents informally, Oz also submitted a completed certificate of occupancy application to the City on January 24, 2023. Ex. 1 (Sepulveda Decl.) ¶¶ 9, 22; Ex. 8 (Formally Submitted Application). Thus, Oz has held up his end of the deal.

iii. The City Has Breached the Agreement by Informing Oz It Will Not Approve Any Site Plan that Complies with the Agreement.

Because the City is refusing to approve any site plan that complies with the Agreement's express terms, it is in breach. "A breach [of contract] occurs when a party fails or refuses to do something he has promised to do." *Atrium Med. Ctr., LP v. Hous. Red C LLC*, 546 S.W.3d 305, 311 (Tex. App.—Houston [14th Dist.] 2017, *aff'd*, 595 S.W.3d 188 (Tex. 2020)). In the Agreement, the City promised that it "*will* approve" Oz's certificate-of-occupancy application based on the completion of the four specified improvements to the Property. Ex. A ¶ 1 (emphasis added). Oz has done everything he can to obtain the City's approval to move forward with completing the four specified improvements. Nonetheless, the City has denied Oz's certificate-of-occupancy application. As the basis for the denial, the City maintains that it will only approve Oz's application

if he does things that are mutually exclusive with the terms of the Agreement. The City is therefore in breach.[5]

The Court cannot accept the City's interpretation of the Agreement if that interpretation would render the agreement invalid unless there is no other reasonable interpretation. "In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument." *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003). "It is a rule universally recognized that if an instrument admits of two constructions, one of which would make it valid and the other invalid, the former must prevail." *Fischer*, 479 S.W.3d at 239 (quoting *Dahlberg v. Holden*, 238 S.W.2d 699, 701 (Tex. 1951)) (cleaned up).

Here, the City maintains that the City Code requires the things it is demanding and that Oz must comply with the Code under the Agreement. Ex. 5 (Herrera Email Chain); Ex. 7 (Dale Email Chain). But, as the City is aware, Oz is more than willing to comply with the portions of the Code that were not superseded by the Agreement. The City cannot, however, require Oz to comply with those parts of the Code that conflict with the express terms of the Agreement. Yet that is precisely what the City is doing. To allow the City to continue this behavior would render the Agreement invalid and unenforceable, even though the most reasonable reading of the Agreement would not require Oz to comply with conflicting Code provisions. *See Fischer*, 479 S.W.3d at 239.

Specifically, the City's following demands violate the Agreement:

a. Drive-Aisle Width

First, the City states that Oz cannot have four parking spaces on the side of the building because doing so would render Oz "[n]oncompliant" with the City's drive-aisle width

[5] The Agreement does not state that Oz will make any improvements other than the four specified. Nonetheless, Oz is willing to provide additional, reasonable improvements that do not conflict with the express provisions of the Agreement. Ex. 1 (Sepulveda Decl.) ¶¶ 46–48; *see also id.* at ¶ 40 (explaining that he has already obtained other health-and-safety-related inspections).

requirements. Ex. 16 (Site Plan Notation); *see also* Ex. 9 (Disapproval Letter); Ex. A ¶ 1.a (requiring "four [parking spots] on the western side of the building"). But the City has already expressly agreed that Oz can have four parking spaces on the side of the building, and the City is required to comply with the compromise that it willingly entered into and memorialized in the Agreement.

Oz has submitted multiple possible layouts for the parking spots on this side of the property, but the City indicated to him that it would not approve any of them. Exs. 2 & 3 (Informally Submitted Site Plans); Ex. 1 (Sepulveda Decl.) ¶ 9. Oz's site-plan designer cannot reconfigure the parking spots to make the drive aisle any wider. Ex. 18 (Diaz Decl.) ¶¶ 8–9. The City has had ample time to provide its own suggestions as to how Oz could reconfigure the spots while still complying with the Agreement, but it has not done so. *See* Ex. 17 (Clark Email Chain). Thus the City has effectively told Oz that it will not approve *any* site plan that has four parking spots on the side of the building. That violates the Agreement.

There is nothing Oz can do to make his property wider than it currently is. He is stuck with the finite space between his building and the property line. The City knew this at the time of mediation and expressly agreed that Oz could—and indeed must—provide four parking spots on that side of the building. Ex. A ¶ 1.a. The City cannot back out now because it no longer likes the deal it made.

b. Five-Foot Setback

The City is also demanding that Oz provide a five-foot setback, covered in grass, from the property line that runs along the side of the building with the four parking spots. Exs. 13 & 16. However, this demand directly conflicts with another provision of the Agreement, which expressly requires Oz to pave this part of the Property "from the Property line to the shed." Ex. A ¶ 1.b. Thus

Oz would actually be violating the Agreement by providing a five-foot grass setback in this location. The City cannot demand that he violate the Agreement to obtain a certificate of occupancy.

Additionally, as previously discussed, the City is also demanding that Oz provide a wider drive aisle on that part of the property than will physically fit there. He cannot provide an additional five-foot setback, plus the wider drive aisle, plus the four parking spaces required by the Agreement. It is a physical impossibility.

c. Backing into Right-of-Way

Finally, the City improperly conflates the property line with the right-of-way in its refusal to allow Oz to have three parking spaces in the front of the building—even though those three spaces are expressly required by the Agreement. Ex. 15 (Site Plan Markup).

While it is true that the Agreement states that "[n]o cars parked on the property may back out on to the right of way," Ex. A ¶ 1.a., the City is incorrect to contend that this means cars cannot back across the property line. *See* Ex. 15 (Site Plan Markup). As the City was well aware during the mediation, there is a substantial paved area between the property line and the road. *See id.* (notation that states "EXISTING CONC. DRIVE") The City knew that any parking spots in front of the building would back across the property line, and the City entered into the Agreement anyway. *See* Ex. 17 (Clark Email Chain); *see also* Temp. Inj. Plfs. Ex. 6 (October 2021 Variance Application to the City) (providing, in Exhibit B to the application, a photo and survey of the property).

The City's decision to compromise in this fashion was entirely reasonable because neither the current nor proposed spots in that area back out into the street. As the site plan indicates, the area behind the three spots—even across the property line—is currently paved with concrete and practically functions as an extension of the existing parking lot. Ex. 15 (Site Plan Markup); *see*

also Ex. 19 (Current Photo of Front of Property). Even the City's own demands acknowledge this, as one of the curbs the City is requiring Oz to install is mostly located across the property line in the area it now claims as the right-of-way. *See* Ex. 15 (Site Plan Markup). The City cannot have it both ways by demanding that Oz improve an area adjacent to his property but then denying him the use of that same area.

The most reasonable interpretation of the Agreement is that "cars cannot back out on to the road," rather than "cars cannot back out across the property line." The generally accepted meaning of the term "right-of-way" includes the land on which a public road is built—not publicly owned land generally. *See Right-of-way*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/right-of-way (last visited March 20, 2023); *see also Pharr-San Juan-Alamo Indep. Sch. Dist. v. Tex. Pol. Subdivisions Prop./Cas. Joint Self Ins. Fund*, 642 S.W.3d 466, 474 (Tex. 2022) ("To determine the common, ordinary meaning of undefined terms used in contracts . . . we typically look first to their dictionary definitions and then consider the term's usage in other states, court decisions, and similar authorities." (internal quotation marks omitted)). At the very least, interpreting "right-of-way" to mean "road" is a reasonable reading that leaves the Agreement's enforceability intact.

In contrast, the City's interpretation of "right-of-way" is not only a contortion of the term's generally accepted meaning but, more importantly, renders the Agreement unenforceable. Even if, *arguendo*, the area across the property line were a right-of-way in some technical sense of the term, courts cannot interpret contracts to require impossibilities. *Fischer*, 479 S.W.3d at 239. Relevant here, courts must construe the contract as a whole and interpret words differently from even their ordinary meaning if the contract shows that the parties intended a different meaning. *Plains Expl. & Prod. Co. v. Torch Energy Advisors, Inc.*, 473 S.W.3d 296, 305 (Tex. 2015); *see also id.*

(stating that courts must attempt to harmonize all contractual provisions rather than interpreting them in isolation). Given the City's knowledge of the site plan at mediation, including the fact that there is no possible configuration of the three spots that would not cross the property line, and the Agreement's express requirement of the three spaces, the parties' intent could not have been to treat the paved areas as a "right-of-way." *See Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 841 (Tex. 2010) (providing that courts "must evaluate the overall agreement to determine what purposes the parties had in mind at the time they signed" a contract). Otherwise, the Agreement will be invalid—and Paragraph 1.a will be internally conflicting—because there is no possible way for Oz to put three parking spaces in front of the building that will not back out into the contested area. *See* Ex. A ¶ 1.a. That cannot be what the parties had in mind when they signed the Agreement.

In sum, the City's interpretation of "right-of-way" as encompassing the area just across the property line is unreasonable and could not have been what the parties agreed to at mediation, especially considering that it directly contradicts the Agreement's express provision for the three spaces. The City is demanding four modifications to Oz's site plan that are impossible under the Agreement. The City's assertions that they are acting in accordance with the Agreement, while demanding things that directly conflict with it, are baseless. The City's refusal to issue Oz a certificate of occupancy based on these impossible demands is a breach of the Agreement.

iv. The City's Breach Has Harmed Oz.

The City's continued refusal to issue Oz a certificate of occupancy based on impossible demands has caused Oz significant harm. Most obviously, Oz has been unable to open his shop at the Property, which means that he has been forced to continue to pay rent at his old location while also paying the Property's mortgage. Ex. 1 (Sepulveda Decl.) ¶¶ 41–42. Oz has spent significant

amounts of time and money personally renovating the Property and obtaining other necessary inspections and approvals while simultaneously being deprived of the use of those investments. *Id.* ¶¶ 39–41. This harm is ongoing, as Oz still is not able to use the Property for his business nearly a year after the parties signed the Agreement. *See id.* ¶¶ 41–42. As this Court previously found, Oz faces "dire financial harm" from not being able to open his shop. Temp. Inj. Order ¶ 102.

II. Oz Is Entitled to Specific Performance.

Because the City has breached the Agreement, Oz respectfully requests that the Court grant him specific performance of the Agreement. "Specific performance is an equitable remedy that may be awarded upon a showing of breach of contract . . . when [] damages would not be adequate." *Maxey v. Maxey*, 617 S.W.3d 207, 225 (Tex. App.—Houston [1st Dist.] 2020, no pet.). And "damages are generally believed to be inadequate in connection with real property." *Rus-Ann Dev., Inc. v. ECGC, Inc.*, 222 S.W.3d 921, 927 (Tex. App.—Tyler 2007, no pet.); *see also* 67 Tex. Jur. 3d Specific Performance § 9 ("The legal remedy of an action for damages for breach of contract is generally regarded as inadequate in land cases."). Damages therefore would not be an adequate remedy here because they could not sufficiently compensate Oz for loss of use of this specific property.

A plaintiff seeking specific performance must also typically show that he first complied with the contract. *DiGiuseppe v. Lawler*, 269 S.W.3d 588, 594 (Tex. 2008). However, actual performance is not required "when a defendant refuses to perform or repudiates a contract." *Id.* In that instance, the plaintiff "may simply plead that performance would have been tendered but for the defendant's breach or repudiation." *Id.* Here, as previously discussed, Oz has performed his obligations under the Agreement to the best of his ability by submitting a certificate-of-occupancy application and multiple proposed site plans that conform with the Agreement. *See infra* Sec. I.ii.

To the extent the Agreement requires Oz to actually make the required improvements, Oz is ready and willing to do so as soon as the City approves his site plan and grants him a certificate of occupancy. Ex. 1 (Sepulveda Decl.) ¶ 46. He would have already completed them but for the City's refusal to grant him a certificate. *Id.* Oz is also ready, willing, and able to complete any other tasks related to improving his land or submitting required documents that this Court finds are required under the Agreement. *Id.* ¶ 48; *see DiGiuseppe*, 269 S.W.3d at 593.

CONCLUSION

Oz has worked in good faith for nearly a year, spending significant time and resources, in an attempt to convince the City to do the thing it is contractually obligated to do. All Oz wants to do is open his shop at the Property in accordance with the Agreement. Instead, the City has stymied and delayed him at every turn before ultimately demanding, yet again, that he make improvements to the Property that are physically impossible. Because the City is refusing to honor its obligations, Oz respectfully requests that this Court order specific performance of the Agreement, including requiring the City to issue him a certificate of occupancy for the Property, and grant any other relief to which he may be entitled.

DATED: March 22, 2023

Respectfully submitted,

/s/ Victoria Clark

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CERTIFICATE OF CONFERENCE

As required by Harris County Local Rule 3.3.6, I certify to this Court that Plaintiff's counsel conferred by phone with Defendants' counsel on March 20, 2023. Defendants' counsel advised that the City is opposed to the motion.

/s/ Victoria Clark
Victoria Clark
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March, 2023, a true and correct copy the foregoing was filed with the Clerk of the Court and served via the Court's e-filing system upon counsel of record for the Defendants.

/s/ Victoria Clark
Victoria Clark
Counsel for Plaintiff