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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

RAMSEY COUNTY, MINNESOTA, Plaintiff/Counterclaim Defendant, v. THE CITY OF ARDEN HILLS, MINNESOTA, Defendant/Counterclaim Plaintiff.	Judge Edward T. Wahl Court File No. 62-CV-19-3490 **ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

INTRODUCTION

This case relates to a 2012 Joint Powers Agreement between the parties. The lawsuit is the result of disagreements in the management of a development process that was designed to foster cooperation between Plaintiff/Counterclaim Defendant Ramsey County and Defendant/Counterclaim Plaintiff the City of Arden Hills. During the process, the public policy goals the parties had for the development, as expressed by their political leaders, began to diverge. The Joint Powers Agreement ultimately could not bridge these increasingly divergent priorities. Each party asked the Court to find that the other breached the Joint Powers Agreement when it became obvious that their goals no longer aligned.

The Court held a remote hearing on the parties' cross-motions for summary judgment on March 19, 2021. At the hearing, Charles Nauen represented the County, and John Baker represented the City. The Housing Justice Center and Alliance for Metropolitan Stability requested leave to file an amici curiae brief in

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support of the County, which the City opposed.[1] John Cann represented amici at the hearing.

The Court considered the pleadings, evidence, and arguments of the parties. Based on the summary judgment record, the Court finds that it cannot grant any of the relief sought by either party. The Court cannot grant judgment for the County because the express and implied duties of good faith in the JPA and in Minnesota law cannot override the City's discretion to negotiate based on its political priorities. Nor can the Court terminate the JPA before the agreed-upon termination date. In addition, the Court cannot grant the City's requested relief in its counterclaim because the JPA does not require the County's appointed board members to attend or participate in board meetings, and the JPA does not require that the County to fund the Joint Development Authority at any minimum level.

Courts can adjudicate most contract disputes, but this dispute is unusual: it arose from conflicts in a land development process that is inherently political. The parties attempted to manage this process within the Joint Powers Agreement, which ultimately could not govern the development process. For the reasons set forth below, this Court cannot resolve this dispute using the parties' contract and standard principles of contract law.

[1] The Court grants the motion to file an amicus curiae brief.

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BACKGROUND

I. The parties sought to clean up and redevelop the TCAAP site.

This case is about the future of the former Twin Cities Army Ammunition Plant site (the "TCAAP Site"). "The TCAAP Site is located in the City of Arden Hills and Ramsey County." (AC at ¶ 14; AA at ¶ 14).

"TCAAP was constructed between 1941 and 1942 to manufacture munitions for American and Allied forces during World War II, and remained in full production until 1945. It remained active on an intermittent basis to produce arms and ammunition until 1976, when it became inactive." (Plaintiff's Amended Complaint ["AC"] at ¶ 14; Defendant's Counterclaim ["CC"] and Amended Answer to the AC ["AA"] at ¶ 14). Since becoming inactive, the TCAAP Site became the largest contaminated Superfund site in Minnesota. (AC at ¶ 17; AA at ¶ 17).

II. The parties agreed to a Joint Powers Agreement.

In 2012, the City of Arden Hills (the "City") and Ramsey County (the "County") "began discussing options for remediating and redeveloping the property." (AC at ¶ 19; AA at ¶ 19). On December 17, 2012, the County and the City entered into a joint powers agreement under Minn. Stat. § 471.59, subd. 1. (AC, Ex. 1 [the "JPA"]).

The purpose of the JPA was to remediate the environmental contamination at the TCAAP Site, to eliminate blighting conditions, and to create a mixed-use development on the property, also referred to as Rice Creek Commons. (JPA at § 2.2). To accomplish this purpose, the JPA created a new joint-powers authority, the

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Joint Development Authority (the "JDA"), to exercise the City and County's common powers to remediate the TCAAP site and eliminate blighted conditions. (JPA at ¶¶ A, B, E).

"The Parties recognize[d] that their cooperation and collaboration are critical for accomplishing the New Development[.]" (*Id.* at ¶ G). To facilitate "cooperation and collaboration," the parties included a dispute resolution provision that required each party to "use good faith to attempt to resolve any dispute. Upon agreement, the Parties may also use any available dispute resolution process." (*Id.* at § 2.3.11).

A. The Joint Development Authority is the governing authority under the JPA.

The JDA is the entity designated to exercise the City and County's common powers to accomplish the goals of the JPA. (*Id.* at § 2.3). The JDA exercises its powers through a five-member board—the City and County each appoint two members from their governing boards, and the City appoints a fifth non-elected official to serve as the chairperson of the JDA. (*Id.* at § 2.3.1).

The members "shall serve until their successor is appointed and qualified as provided by each party." (*Id.*). The JDA is empowered to adopt bylaws and rules of procedure, and it is required to meet monthly at a time and place of the JDA's choosing. (*Id.* at § 2.3.2(b)). The County agreed to fund the expenses of the JDA. (*Id.* at § 2.3.3). The City Administrator and the County Manager, or their designees, made up the JDA staff. (*Id.* at § 2.3.7).

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B. The parties agreed that the TCAAP Master Plan will guide the development.

The JPA required the City's staff to prepare and present a TCAAP Master Plan for approval by the City and the County. (*Id.* at § 3.1.2 and 3.2). The TCAAP Master Plan is "the plans, official controls and map guiding the density, location and timing of implementation of the components of the New Development on the TCAAP site[.]" (*Id.* at § 3.1.1).

The parties agreed to "work cooperatively to assure the City's development standards and goals expressed in its comprehensive plan and zoning code, as each may be amended, are incorporated into the TCAAP Master Plan to enable the JDA to proceed with timely development of the TCAAP Site." (*Id.*). "The Parties recognize[d] that the passage of time, market forces and other applicable, but unforeseen events may require future amendments to the TCAAP Master Plan." (*Id.* at § 3.3).

C. The parties' respective duties include those that would occur before and after approval of a development agreement.

The JPA contemplated a staged development that would occur over many years, requiring significant investment by the County and the City. (JPA at ¶ D). The County was required to acquire the TCAAP Site from the United States General Services Administration. (*Id.* at § 3.4.1). It was also "responsible for completing the County Remediation within the time period established in the [offer to purchase]." (*Id.* at §§ 3.4.1; 3.4.6). Then, the County was to "complete an initial survey and plat of the TCAAP Site." (*Id.* at §§ 3.4.1; 3.4.7).

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The City also made significant investments. The City was responsible for developing and implementing the TCAAP Master Plan, (*id.* at § 3.1), and for preparing the required alternative urban areawide review (or, "AUAR"). (*Id.* at § 3.5.1).

After both parties approved the TCAAP Master Plan, the JDA would "review and finally approve all development agreements for a Development Site which are consistent with the TCAAP Master Plan." (*Id.* at § 3.2.5). The JPA required that, "[u]pon approval of a development agreement, the Parties shall consider such approval and take all actions necessary to implement the approved development agreement." (*Id.* at 3.2.6). Those necessary actions included in the JPA were the County's selling the land to the developer and the City approving processes identified by the JDA. (*Id.* at §§ 3.2.6.1 and 3.2.6.2).

Both sides agreed they would construct public improvements on the TCAAP Site. (*Id.* at §§ 3.4.3 and 3.5.2). That included the County's construction of the Spine Road and coordination of the relocation and installation of private utilities, (*id.* at § 3.4.2), as well as the City's construction of trunk and sub-trunk water mains, storm and sanitary sewers, and other public amenities. (*Id.* at § 3.5.2). But the parties conditioned their construction of the public improvements on the JDA's approval of a developer agreement. Specifically, the JPA states that, "[n]otwithstanding the schedule and goals stated in the TCAAP Master plan, unless otherwise agreed by the parties," the City and the County were only required to begin constructing their respective public improvements "when a development site is approved by the

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JDA[.]" (*Id.* at §§ 3.7.1 and 3.7.2.5). Both the City and the County required buy-in from the developer to recover their investments in the TCAAP Site—the County needed the developer to agree to purchase the site, (*id.* at § 3.7.1), and the City needed the developer to agree "to financially participate in the extension of the respective City Public Improvements." (*Id.* at §§ 3.7.2.1, 3.7.2.3, and 3.7.2.5).

The JDA's approval of a development agreement thus served as a linchpin between the pre-development and development phases of the project.

D. The JPA cannot be terminated before 2038 except by agreement of the parties; it contains a severability provision.

The JPA contemplates an extensive partnership between the County and the City. The initial term of the JPA ends on December 31, 2038, and it can only be terminated earlier than that by mutual agreement of the parties. (*Id.* at § 5.5). The JPA gives the City a one-year option to purchase any undeveloped land from the County at fair market value if the County is the terminating party. (*Id.* at § 5.6).

The parties also agreed that, if the Court declares any provision in the JPA invalid or unenforceable, the remainder of the JPA would not be affected and would remain in full force and effect. (*Id.* at § 6.6).

III. The County remediated the site and the City approved the AUAR.

After executing the JPA, the parties started down the long road towards its ultimate goal. On March 27, 2013, the GSA accepted the County's offer to purchase the TCAAP Site. (Nauen Decl., Ex. 1 at 13). That kicked off the County's obligation to remediate the site. (JPA at § 3.4.1). The City also moved forward with developing

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an AUAR and Mitigation Plan. "The final AUAR and Mitigation Plan was approved in July 2014." (AC at ¶ 36; AA at § 36).

The County's remediation took several years, but in 2016, the Minnesota Pollution Control Agency issued Ramsey County a Certificate of Completion. MPCA, *Partial delisting of Twin Cities Army Ammunition Plant from state Superfund list*, (May 1, 2020), https://www.pca.state.mn.us/news/partial-delisting-twin-cities-armyammunition-plant-state-superfund-list (copy on file with the Court). The County prepared and submitted its survey and plat of the site in 2018. (Nauen Decl., Ex. 3).

IV. The parties negotiated and approved a TCAAP Master Plan.

For years, the JDA Board held regular meetings and carried out the JDA's business. In 2013, the JDA adopted its bylaws. (CC, Ex. 26). The bylaws stated that the JDA board "shall be the body responsible for general governance of the Authority and shall conduct its official business at meetings thereof." (*Id.*). The JDA bylaws require that four members must be present at JDA meetings to constitute a quorum to conduct business and to exercise the JDA's powers. (*Id.*, Ex. 26 at § 5.3).

The parties worked together to craft a TCAAP Master Plan and Redevelopment Code (the "TRC"). On April 13, 2015, Ramsey County Commissioner Blake Huffman attended a special City council meeting and expressed the County's "concerns with the constraints within the TRC, which resulted in fewer people living and working within Rice Creek Commons than was originally planned." (Nauen Decl., Ex. 4 at 2). The proposal at the time was for a maximum density of

1,580 units. (*Id.*). Huffman encouraged the City to approve an option that "was approximately 100 units over the City's plan." (*Id.*, Ex. 4 at 3). But councilmembers expressed opposition to the County's proposed option to increase density. (*Id.*, Ex. 4 at 3–4). One City councilmember stated that "he did not see how the City could bridge the differences between [the County's preferred proposal] and the City's TRC." (*Id.*).

On May 26, 2015, the density issue came up again at another City Council meeting. (*Id.*, Ex. 5 at 9). A majority of councilmembers expressed questions or concerns about the County's push for greater density. (*Id.*). One member proposed decreasing the maximum density requirements from 1,476 units to 1,431. (*Id.*, Ex. 5 at 10). The City preliminarily approved the TRC with lower density requirements. (*Id.*, Ex. 5 at 10–11).

At a June 29, 2015 City council meeting, Ramsey County Commissioner Jim McDonough "requested that the Council consider densities that would allow for 1,700 units on the TCAAP site. He discussed the numerous benefits of this density level, noting that it would provide a greater return on investment." (*Id.*, Ex. 6 at 2).

At a July 13, 2015 public hearing, Huffman again appealed to the City to consider increasing density numbers. (*Id.*, Ex. 7 at 3). The City voted 4-1 to approve the plan without the increased density requested by the County. (*Id.*, Ex. 7 at 11).

On January 19, 2016, at a regular session of the Ramsey County Board of Commissioners, the County approved the TCAAP Master Plan. (*Id.*, Ex. 9 at 8). The

County's approval set in motion the JDA's implementation authority under the JPA. (AC, Ex. 1 at § 3.2.2).

V. The parties engaged a master developer.

On February 1, 2016, the JDA sent a solicitation for a master developer. (Nauen Decl., Ex. 10; AC, Ex. 1 at § 3.2.4). Attached to the RFP were statements about the County's and the City's respective goals for the project. (Nauen Decl., Exs. 11–13). The parties' goals were mostly complementary, with one notable exception: housing density. The County's goals included new tax revenues from the development "of approximately 1,600 units" of housing, as well as transit and mobility provided by high-frequency bus services that required "[h]ousing density of 10 to 15 units per acre." (*Id.*, Ex. 12). The City's goals, by contrast, included housing density that conformed to established parameters, "which allow a maximum of 1,431 residential units at an overall average density of no greater than 9.46 units per acre." (*Id.*, Ex. 13).

"On May 2, 2016, the JDA appointed Alatus as the Master Developer for the project, and directed staff to negotiate a Development Agreement with Alatus." (AC at ¶ 57; AA at ¶ 57). To develop its plan, Alatus's development team met with the City Council and identified proposed amendments to the TCAAP Master Plan. (Nauen Decl., Ex. 15 at AH0046980). "Over the course of the next several months, Alatus worked with the City to amend the Master Plan documents. … Ultimately, the Amended TCAAP Master Plan only increased density from 1,431 to 1,460 units." (AC at ¶ 61; AA at ¶ 61).

"On December 12, 2016, Arden Hills City Council approved the Amended TCAAP Master Plan and the accompanying 2030 Comprehensive Plan Amendment." (AC at ¶ 62; AA at ¶ 62). "On December 20, 2016, the County Board approved the Amended TCAAP Master Plan." (AC at ¶ 63; AA at ¶ 63).

VI. The parties began negotiating a Master Development Agreement.

The next step was for the parties to agree to a Master Development Agreement. On March 14, 2018, the County announced it agreed to "a proposed framework" for the Master Development Agreement. (Nauen Decl., Ex. 17). Over the following months, the City, the County, and Alatus held weekly negotiation sessions to create a Master Development Agreement. (*Id.*, Exs. 20–22).

Throughout the negotiations, the City emphasized mitigating its risk in the project. (*Id.*, Exs. 21, 24, 25). In particular, the City worried that the tax revenue would be insufficient to cover the City's costs for maintaining the new development and providing essential services. (*See*, *e.g.*, Ex. 36 at RC017968-69) The County accused the City of passing the financial responsibility for the project off onto the County and Alatus, while simultaneously refusing to consider options to increase revenue through higher density. (*See* AC at ¶¶ 72–79).

"[O]n June 26, 2018, the JDA's attorney circulated a draft of the Master Development Agreement to the Parties for their review and comment." (AC at ¶ 88; AA at ¶ 88). "On August 27, 2018, the Arden Hills City Council sent a letter to the Ramsey County Board asking that the Executive Summary of the MDA be pulled from the September 4, 2018 JDA meeting agenda." (AC at ¶ 92; AA at ¶ 92). The City listed three points of disagreement with the proposed Executive Summary: (1)

it stated that the City would not charge the developer a fee that the City did not agree to forego; (2) it omitted the City's requests to recover costs for staff and consultant time; and (3) it did not state the anticipated operating costs associated with the new development. (Nauen Decl., Ex. 34).

Despite the City's objections, "[a] draft of the full MDA was circulated on August 29, 2018." (AC at ¶ 90; AA at ¶ 90). On September 4, 2018, the JDA held a meeting and heard public comments about the draft MDA and Executive Summary. (Nauen Decl., Ex. 36). Most of the public comments addressed the need for higher density maximums or increased affordable housing options. (*Id.*). In particular, several entities wrote and spoke at the meeting to raise their concerns that the proposed MDA failed to meet the City's and the County's legal obligations under Minnesota's Land Use Planning Act, and that it presented potential liability issues for the County and the City under the federal Fair Housing Act. (*Id.*, Ex. 37).

A county-appointed JDA Board member moved to approve the MDA Executive Summary, and the motion passed 3-2 over the votes of the City-appointed members. (*Id.* at Ex. 36). But without the City's buy-in to a financing agreement, the final MDA could not move forward. (*Id.*, Ex. 36 at RC017970–71).

When the City decided to vote against the proposed MDA Summary in September 2018, one City Councilmember stated, "If we don't like the project and want to tank it we should have the balls to do it oursel[ves]." (*Id.*, Ex. 40).

After the public hearing, the County proposed resolving funding issues the City had with the proposed MDA through tax increment financing, "in exchange for

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higher density and more affordable housing[.]" (*Id.*, Ex. 38–41). The City Council discussed the County's and Alatus's proposed solutions at an October 24, 2018 special work session, but directed City staff that "[t]he City will not provide for extra density and make no commitments for future changes." (*Id.*, Exs. 42–44). The City's position on density was "a big stumbling block to consummating a MDA from the County's perspective." (*Id.*, Ex. 45).

VII. The Master Development Agreement talks fell apart.

On November 6, 2018, County Manager Ryan O'Connor and City Administrator David Perrault met to discuss the status of the project. (Perrault Decl. at ¶ 3). After that meeting, O'Connor handed Perrault a letter, stating that the County decided to "mov[e] staff resources away from the Rice Creek Commons project and toward other development opportunities that at this point appear better aligned with the County's vision to build a community in which all are valued and thrive." (*Id.*; Nauen Decl., Ex. 48).

"The JDA's regular meeting for December 2019 was canceled." (CC at ¶ 18; Answer to CC at ¶ 18). "[T]he County members of the JDA Board did not attend the January 7, 2019 meeting, and … their absence prevented a quorum." (CC at ¶ 19; Answer to CC at ¶ 19). "Actions regularly taken at the JDA's first meeting of a given year—including adopting a schedule of regular meetings and appointing its counsel—could not take place because the absences of the County's appointed members deprived the JDA Board of a quorum." (CC at ¶ 20; Ans. to CC at ¶ 20).

"Both County-appointed members of the JDA Board appeared at the February 4, 2019 meeting." (CC at ¶ 21; Answer to CC at ¶ 21). Huffman read a

prepared statement and suggested mediation. (Nauen Decl., Ex. 51). "Discussions ensued, but the City councilmembers did not indicate any willingness to commit to mediation." (AC at ¶ 121; AA at ¶ 121). The County-appointed commissioners have not attended JDA meetings since that date. (CC at ¶ 24; Answer to CC at ¶ 24).

On February 8, 2019, County Board Chair McDonough wrote a letter to the City noting the differences between the City and the County on density, affordability, and financing for the project, and the County declared the parties were at an impasse. (Nauen Decl., Ex. 52). The County requested that the City agree to mediation under section 2.3.11 of the JPA. (*Id.*).

In a February 25, 2019 letter, the City denied that the parties were at an impasse and declined to agree to mediate the dispute. (*Id.*, Ex. 54).

In a March 6, 2019 letter, the County claimed that the parties' "cooperative relationship contemplated by the [JPA] is no longer functioning and the JPA has failed in its essential purpose." (*Id.*, Ex. 55). The County proposed a voluntary termination of the JPA and dissolution of the JDA under section 5.5 of the JPA. (*Id.*). In a March 20, 2019 letter, the City declined to agree to voluntarily terminate the JPA. (*Id.*, Ex. 56).

VIII. The parties commenced litigation.

The County filed its lawsuit on May 10, 2019. (Compl., Index No. 2). The County alleged two claims: first, it claimed the City breached the JPA's good-faith requirement in section 2.3.11; and second, it claimed that the City breached the implied covenant of good faith and fair dealing. (*Id.* at ¶¶ 128–144). The County asked to rescind the JPA based on these alleged breaches. (*Id.* at ¶¶ 137, 144).

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The City ultimately agreed to mediate the dispute. (CC at ¶¶ 27; Ans. to CC at ¶¶ 27). Between August 2019 and January 2020, the parties participated in nine mediation sessions with the Honorable Arthur Boylan. (CC at ¶¶ 28–36; Ans. to CC at ¶¶ 28–36).

After mediation failed, the City moved for judgment on the pleadings, arguing that there were no facts in the pleadings that show it breached the dispute resolution procedures in the JPA, or that it breached its duty of good faith. Judge Burke denied the motion. Judge Burke also granted the County's motion to amend its complaint, and the County added a claim for declaratory judgment, seeking a declaration that the remaining obligations are unenforceable "agreements to agree" and that the mutual-termination provision unlawfully restricts the County's ability to make public policy decisions.

In October 2020, the City filed a counterclaim, alleging the County breached the JPA when its representatives on the JDA Board refused to continue participating in the monthly meetings, denied the board the quorum it needed to conduct its business, and diverted staff resources and project investment away from the partnership.

Now, the parties are back, this time seeking summary judgment. The City moved for summary judgment seeking a judgment declaring that the County breached the JPA, and an order directing the County to cause its appointees to the JDA Board to attend JDA Board meetings. The County seeks partial summary

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judgment declaring the JPA void and of no further purpose or effect, and releasing the parties from any remaining obligations under the JPA.

DISCUSSION

The parties presented several issues to the Court in their cross-motions for summary judgment. They are:

1. Are there disputed facts to show that the County breached its obligations under the JPA to appoint board members to serve on the JDA Board and attend, fund, and staff JDA meetings?

2. Are there disputed facts to show that the City breached its obligations under the JPA to use good faith to attempt to resolve disputes between the parties, or breached its implied duty of good faith and fair dealing?

3. Should the JPA be terminated because the only remaining unfulfilled obligations under the JPA are unenforceable conditional agreements, or agreements to agree? Or, alternatively, should the JPA be nullified because it purports to constraint the County's governmental functions and discretion?

I. The summary-judgment standard requires the Court to resolve all doubts and inferences in favor of the non-moving party.

The summary judgment standard is a familiar one. Minn. R. Civ. P. 56. "[R]ule 56 provides that summary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, submitted 'show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.'" *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quoting Minn. R. Civ. P. 56.03).

The moving party bears the initial burden of proving the absence of any fact dispute. *Anderson v. State Dept. of Natural Resources*, 693 N.W.2d 181, 191 (Minn. 2005). The Court must view the disputed facts and resolve all doubt and conflicting

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inferences in favor of the non-moving party. *J.E.B. v. Danks*, 785 N.W.2d 741, 751 (Minn. 2010). But the non-moving party may not rest on conclusory allegations or denials in the pleadings. *Nicollet Restorations, Inc. v. City of St. Paul*, 533 N.W.2d 845, 847 (Minn. 1995).

II. The City's motion for summary judgment should be granted in part and denied in part.

The Court first addresses the City's motion for summary judgment. In its motion, the City sought summary judgment on its breach-of-contract counterclaim against the County and the County's breach-of-contract and implied-duty-of-good-faith claims against the City.

A. The County did not breach its duty to appoint members of the JDA to serve on the JDA Board.

The Court begins its analysis of the City's motion with its breach-of-contract counterclaim. The City claimed that the County breached its contractual duties under the JPA when it refused to take part in JDA Board meetings. A breach-of-contract claim requires it to show: "(1) formation of a contract, (2) performance by [the City] of any conditions precedent to [its] right to demand performance by the [County], and (3) breach of the contract by [the County]." *Park Nicollet Clinic v. Hamann*, 808 N.W.2d 828, 833 (Minn. 2011). The Court is responsible for interpreting a contract's unambiguous terms as a matter of law. *Staffing Specifix, Inc. v. TempWorks Management Services, Inc.*, 913 N.W.2d 687, 692 (Minn. 2018).

The City argued that the County's boycott of JDA meetings violated the JPA's requirement that "[e]ach member [of the JDA Board] shall serve until their successor is appointed and qualified as provided by each Party." (JPA at § 2.3.1).

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The City also points to the provisions in the JPA stating that the "County shall fund the expenses of the JDA," (*id.* at § 2.3.3), and that the County Manager "shall be" on the JDA staff. (*Id.* at § 2.3.7). The City claims that the County breached these provisions when the County-appointed members of the JDA Board refused to attend JDA Board meetings since February 4, 2019.

The Court begins, as it must, with the language of the contract. The plain and ordinary meaning of the word "serve" as used in the JPA is "[t]o do a term of duty; … [t]o act in a particular capacity." *Serve*, Am. Heritage Dict. (5th ed. 2020). The JPA does not expressly state that a JDA Board member's "serv[ice]" requires her attendance at all, or even any, meetings of the JDA Board. Rather, the meaning of the word "serve" is limited by the clause immediately following it—"until their successor is appointed and qualified as provided by each Party." (AC, Ex. 1 at § 2.3.1). The plain language of the JPA shows that the word "serve" is used only to express the length of the official's term of duty; that is, that she will be a JDA Board member until her successor is appointed.

The City proposed a definition of "serve" that would require active participation—*i.e.*, attendance at JDA Board meetings. *See Service*, Black's Law Dict. (11th ed. 2019). The City pointed to cases in which courts have determined that a public employee or a juror failed to "serve" in that capacity by failing to appear and actively participate in the functions of that role. *See Norfolk S. Ry. Co. v. Johnson*, 740 So.2d 392, 397 (Ala. 1999) (determining whether an employee was entitled to workplace protections under an Alabama statute for serving on a jury);

State v. Dalton, 116 N.W.2d 451, 452 (Iowa 1962) (determining whether jurors were disqualified from jury service, despite being summoned for jury duty the previous month without actively serving on a jury); *Wessel v. City of Lincoln*, 16 N.W.2d 476, 479 (Neb. 1944) (finding a firefighter was not entitled to pension benefits because he had not been actively serving as a firefighter). In those cases, the courts required "active service" or performance of specifically defined legal duties and responsibilities.

The cases cited by the City are distinguishable. In all three cases, the courts applied statutory service requirements in light of their specific purposes, like providing earned benefits to public employees, protecting jurors from adverse employment action, and protecting jurors from repeat service requirements. An elected official's service on a governmental body is fundamentally different.

Elected officials can and have strategically refused to attend meetings for the sole purpose of denying the existence of a quorum and frustrating the business of the government. By way of a recent example, members of the Texas House of Representatives left the state capitol building and hid in a nearby church to deny the majority party the quorum it needed to pass controversial election-reform legislation. Paul J. Weber, *'Leave the building': Texas walkout escalates voting battles*, The Star Tribune (May 31, 2021), https://www.startribune.com/leave-the-building-texas-walkout-escalates-voting-battles/600063162/. State legislators in

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Oregon[2], Wisconsin[3], and Indiana[4] have also successfully delayed, or even defeated, their opposition's legislative proposals using this tactic in recent years. The County's appointed commissioners' absence does not mean they failed to serve; indeed, to them, service included absence, as it did with the state legislators cited herein.[5]

As the City points out, "[a] public official who purposely stays away from a meeting with the expressed intent of denying the governing body and the public the right to meet and discuss a critical public issue, disserves that public trust." *Smith v. Ghigliotty*, 530 A.2d 68, 73 (N.J. Super. Ct. Law. Div. 1987) (quotation omitted). But whether the County's elected officials served or disserved the public by refusing to attend meetings is not a question for the Court. *See State ex rel. Gopher Sales Co. v. City of Austin*, 75 N.W.2d 780, 783–84 (Minn. 1956) ("This court has repeatedly held, as have other courts, that mandamus will not lie to control the exercise of discretion of municipal and other governmental bodies or boards having the duty of making decisions involving judgment and discretion but that such remedy will lie in

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[2] Mike Baker, *Oregon Republicans Disappear for Another Climate Vote*, N.Y. Times (Feb. 24, 2020), https://www.nytimes.com/2020/02/24/us/republicans-oregon-climate.html.

[3] NPR Staff, *Wis. Democrats Flee To Prevent Vote On Union Bill*, Nat. Pub. Radio (Feb. 17, 2011), https://www.npr.org/2011/02/17/133847336/wis-democratic-lawmakers-flee-to-prevent-vote.

[4] Frank James, *Indiana's Democratic Lawmakers Imitate Wisconsin, Flee State*, Nat. Pub. Radio (Feb. 22, 2011), https://www.npr.org/sections/itsallpolitics/2011/02/22/133966237/indiana-democratic-lawmakers-imitate-wisconsin-flee-state.

[5] In a slightly different context, John Milton wrote, "They also serve who only stand and wait." John Milton, "On His Blindness," 1673.

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those cases, among others, where such boards or bodies have acted arbitrarily, capriciously, or unreasonably."); *Hanson v. Woolston*, 701 N.W.2d 257, 262 (Minn. Ct. App. 2005) ("Prudential limitations on standing additionally require courts to refrain from adjudicating 'abstract questions of wide public significance' that amount to 'generalized grievances' and are most appropriately addressed by the representative branches[.]").

The County's duty to appoint two elected officials who must "serve" on the JDA Board does not require those members to attend all, or even any, meetings. Rather, it limits the length of each member's term of duty. Any duty the officials had to attend JDA Board meetings and actively participate in the business of the JDA is a generalized duty, the breach of which must be remedied by voters, not courts. And without a functioning JDA to direct the staff and pass the budget, the County did not breach any duty to provide a minimum level of funding or staff resources. The City's motion for summary judgment on its breach-of-contract claim should be denied.

B. The good-faith provision in the JPA is an unenforceable agreement-to-negotiate, and the County's breach-of-contract claim should be dismissed.

Next, the Court turns to the City's motion for summary judgment on Count I of the County's amended complaint—its breach-of-contract claim. The County's breach-of-contract claim was based on its allegation that the City violated section 2.3.11 of the JPA, which required that "[t]he Parties shall use good faith to attempt to resolve any dispute. Upon agreement, the Parties may also use any available dispute resolution process." (AC at ¶¶ 131–140; JPA at § 2.3.11).

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"Under Minnesota law, agreements to negotiate in good faith in the future are unenforceable as a matter of law." *C & S Acquisitions Corp. v. Nw. Aircraft, Inc.*, 153 F.3d 622, 626 (8th Cir. 1998); *Mohrenweiser v. Blomer,* 573 N.W.2d 704, 706 (Minn. Ct. App. 1998). "Such agreements generally are deemed unenforceable because they provide neither a basis for determining the existence of a breach nor for giving an appropriate remedy." *Ohio Calculating, Inc. v. CPT Corp.*, 846 F.2d 497, 501 (8th Cir. 1988).

The City argues that its alleged obligation to agree to mediation and to attempt to resolve the parties' differences in good faith is an unenforceable agreement to negotiate. Once again, the Court looks to the plain language of the contract. The JPA does not require the parties to submit disputes to mediation whenever one party demands it. To the contrary, it expressly requires that, "[u]pon agreement, the Parties may also use any available dispute." (JPA at § 2.3.11). By requiring the agreement of both parties, the JPA necessarily contemplates that one party may refuse. Nor does the JPA place any judicially cognizable restrictions on the City's right to negotiate as it sees fit. The Court has no ability to distinguish between legitimate sharp elbows and a lack of good faith because the JPA does not provide any meaningful restrictions on the City's discretion to negotiate a resolution.

Because it is undisputed that the JPA does not require the parties to agree to mediate their dispute, and places no other restrictions on the parties' discretion to negotiate a development agreement, the Court cannot find the City's refusal to

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mediate or its negotiating position violated its duty to use good faith to attempt to resolve the dispute. The City's motion for summary judgment on Count I should be granted.

C. The County's implied-duty-of-good-faith claim fails because the City maintains discretion under the JPA to bargain on issues like density and affordable housing and discretion to refuse to mediate.

Next, the Court turns to the City's motion for summary judgment on Count II of the County's amended complaint: its claim for breach of the implied duty of good faith and fair dealing. The County alleged in its amended complaint that the City "demonstrated that it had no intention of working cooperatively to reach an agreement regarding density of residential units, the amount of affordable housing, and the financial contributions of the Parties." (AC at ¶ 144). The County claimed that the City's position on these issues "hindered the County in its ability to consummate a deal with respect to the Master Development Agreement between the JDA, the County, and the Developer, the Cooperative Financing Agreement between the City and the County, and the Purchase Agreement between the County and the Developer." (*Id.* at ¶ 145). The County also pointed to the City's initial refusal to voluntarily mediate their dispute. (*Id.* at ¶ 146).

"Under Minnesota law, every contract includes an implied covenant of good faith and fair dealing requiring that one party not 'unjustifiably hinder' the other party's performance of the contract." *In re Hennepin County 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502 (Minn. 1995). To overcome summary judgment on this claim, the County must show evidence "that the adverse party has an ulterior

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motive for its refusal to perform a contractual duty." *Minnwest Bank Central v. Flagship Properties, LLC*, 689 N.W.2d 295, 303 (Minn *Sterling Capital Advisors, Inc. v. Herzog,* 575 N.W.2d 121, 125 (Minn.App.1998). The duty allows courts to enforce existing contractual duties, not to create new ones. *Watkins Inc. v. Chilkoot Distrib., Inc.*, 719 N.W.2d 987, 994 (8th Cir. 2013).

In support of its claim, the County points to evidence that the City refused to increase density requirements on four occasions, including by reducing density once. (Nauen Decl. Exs. 4–8). When the City decided to vote against the MDA Executive Summary proposed in September 2018, one City Councilmember stated, "If we don't like the project and want to tank it we should have the balls to do it oursel[ves]." (*Id.*, Ex. 40). The County also pointed to two emails from City Councilmember Brenda Holden, in which she tried to convince Arden Hills residents to speak out against higher density and affordable housing. (Nauen Decl., Ex. 63, 67). The County argued that, even though it offered "compromise after compromise, the City made no meaningful concessions, and to the extent it dropped its demand for certain items, it simply raised new demands in their place, and ultimately, indicated that it was unwilling to even consider increasing density or contributing to affordable housing—two issues crucial for the project's success." (County's Combined Mem. at 9).

The City argued that it had the discretion under the JPA to decline mediation and to take the positions it did on density, affordable housing, and project financing. The County doesn't dispute that interpretation, and argued in its own

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brief that "the JPA places no constraints on the City or the County's exercise of their discretion in the process of negotiating, approving, or rejecting a development plan, beyond a statement that the Parties should attempt to resolve disputes in good faith." (County's Mem. in Support of Mot. For Partial Summary Judgment at 21

Although the County agrees that the Court cannot constrain the City's discretion to negotiate, that is what it asks the Court to do in its implied-duty-of-good-faith claim: to enforce a constraint on the City's ability to negotiate a resolution of the dispute. The County's claim relies on the premise that the City failed to make sufficiently substantial concessions in the negotiating process. But, as discussed in the previous section, the Court cannot enforce an implied duty to negotiate in good faith any more than it can enforce an express duty to negotiate in good faith. *Ohio Calculating, Inc. v. CPT Corp.*, 846 F.2d 497, 501 (8th Cir. 1988) ("Such agreements generally are deemed unenforceable because they provide neither a basis for determining the existence of a breach nor for giving an appropriate remedy.").

The County's claim for breach of the implied duty of good faith and fair dealing fails as a matter of law.

III. The County's motion for partial summary judgment should be denied.

Next, the Court turns to the County's motion for partial summary judgment. In its motion, the County asked the Court to invalidate the JPA. It relies on the premise that its future obligations under the JPA are unenforceable because they

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are contingent upon the JDA approving a development agreement, which requires agreement between the County, the City, and Alatus. In its motion, the County seeks partial summary judgment on its claim for declaratory judgment that the JPA is unenforceable.

The City opposed the motion. It argued that the JPA places sufficiently definite obligations on the County that remain unperformed, and argued that termination is not appropriate.

A. The parties' remaining obligations are conditioned on approval of a Master Development Agreement.

The Court agrees with the County's premise: its remaining obligations are unenforceable without an approved development agreement. The County breaks the parties' obligations under the JPA into three categories: "(1) pre-development deal obligations; (2) post-development deal obligations; and (3) obligations related to the Parties' agreement to agree." (County's Mem. in Support of Mot. For Partial Summary Judgment at 19). It argues that the pre-development deal obligations are completed and the agreement to agree is unenforceable, leaving only contingent post-development deal obligations.

A condition precedent is any fact or event "except mere lapse of time which must exist or occur before a duty of immediate performance by the promisor can arise." *Carl Bolander & Sons, Inc. v. United Stockyards Corp.*, 215 N.W.2d 473, 476 (Minn. 1974). "Whether a particular agreement is subject to a condition precedent or, rather, a promise depends on the words employed by the parties in their contract, properly interpreted or construed by a court." 13 Williston on Contracts §

38:16 (4th ed.). "[W]ords and phrases, including 'when,' 'while,' 'after,' or 'as soon as,' have been deemed to indicate that the promise is conditional and not to be performed until the event referred to is performed or occurs." *Id.*

The City argues that the County already agreed to and approved the TCAAP Master Plan, and concludes that nothing remains to negotiate. It points to section 3.4 of the JPA, which states that the "County will complete its obligations and responsibilities to assist in the implementation of the TCAAP Master Plan as described in this Section 3.4." (JPA at § 3.4). Those obligations under section 3.4 include acquiring the TCAAP site, obtaining site clearance, and completing the "County Public Improvements," such as constructing the Spine Road and coordinating relocation and installation of utilities. (JPA at § 3.4.3). The JPA stated that the TCAAP Master Plan would "provide further specificity as to the desired schedule and goals for completing" the public improvements. (*Id.*).

But the City ignores plain language elsewhere in the JPA. First, the JPA states that, "[u]pon approval of a development agreement, the Parties shall consider such approval and take all actions necessary to implement the approved development agreement[,]" including, most importantly, that the "County will take all actions necessary and convenient to sell the respective parcel of land with good and marketable title." (*Id.* at § 3.2.6). Then, in section 3.7.1, it states that "[n]otwithstanding the schedule and goals stated in the TCAAP Master Plan, unless otherwise agreed to by the Parties, the County Public Improvements [in section § 3.4.3] shall be constructed when a Development Site is approved by the JDA, sold

by the County to the selected Developer, and the selected Developer agrees to financially participate in the extension of the respective County Public Improvements." (*Id.* at 3.7.1). The City similarly is not required to construct its public improvements until a developer agrees to participate financially in those improvements. (*Id.* at § 3.7.2).

The language used in the JPA conditions material obligations on the approval of a development agreement. *Comprehensive Care Corp. v. RehabCare Corp.*, 98 F.3d 1063, 1066 (8th Cir. 1996) (citing *Standefer v. Thompson*, 939 F.2d 161, 164 (4th Cir. 1991)) ("phrases such as 'if,' 'provided that,' 'when,' 'after,' 'as soon as,' or 'subject to,' … traditionally indicate conditions[.]"). In *Comprehensive Care Corp.*, the Eighth Circuit found that the words "if within 12 months of the closing date" created a condition precedent to the obligations that followed. *Id.* So too here. Words and phrases like "*when* a Development Site is approved by the JDA," and "*[u]pon* approval of a development agreement," in the JPA indicate conditional promises. Those phrases indicate that the parties' performance of the obligations that follow—such as the County selling the land or constructing the County Public Improvements—need not happen until the condition has occurred.

Without a development agreement, the JPA does not require the County to sell the property to a developer, and it does not require the County to begin making the public improvements it was charged with under the JPA. Without a development agreement in place, the parties' obligations conditioned on approval of

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that agreement are not immediately enforceable. Rather, they may only be enforced once the condition has occurred.

B. The County is not entitled to terminate the JPA.

So where does that leave the JPA? The County argues that the Court should declare the JPA null and void because performance of substantial material obligations depends on reaching a development agreement, and the JPA is an unenforceable agreement to agree. It also claimed that the mutual termination requirement in the JPA restricts its discretion to make public policy.

The Court declines to invalidate the entire contract for several reasons. First, the non-occurrence of a condition precedent does not make the JPA an unenforceable agreement to agree. Second, the plain language of the JPA provides that the Court should not invalidate the entire agreement based on the unenforceability of individual provisions. Third, the parties have substantially performed all of their enforceable obligations under the JPA. And fourth, the JPA does not unlawfully constrain the County's authority.

1. The non-occurrence of a condition precedent does not require termination of the JPA.

As discussed above, the approval of a development agreement is a condition precedent to the post-development deal obligations in the JPA. The JDA has not approved a development deal, but that does not render the JPA unenforceable as an agreement to agree. The parties agreed that the JPA would remain in place until the end of 2038, unless they mutually agreed to terminate it earlier. (JPA at § 5.5).

The condition precedent could still occur and trigger the parties' post-development deal obligations.

The non-occurrence of a condition precedent only relieves a party of its duty to perform its conditional promise "when the condition can no longer occur." *Seman v. First State Bank of Eden Prairie*, 394 N.W.2d 557, 560 (Minn. Ct. App. 1986) (quoting Restatement (Second) of Contracts § 225(2) (Am. Law Inst. 1981)). An agreement to agree is unenforceable because it leaves necessary terms out of the agreement or open to future negotiation, and the Court has no ability to determine the precise obligations the parties agreed to take on when they created the contract. *Mohrenweiser v. Blomer*, 573 N.W.2d 704, 706 (Minn. Ct. App. 1998). A condition precedent—even one that requires agreement of the parties—is different than an agreement-to-agree. *See King v. Dalton Motors, Inc.*, 109 N.W.2d 51, 53 (Minn. 1961) (holding that option contracts are not too indefinite to be enforced). A condition precedent to an otherwise enforceable contractual obligation does not require the Court to interpret or enforce indefinite terms; it requires only that the Court determine whether the condition has occurred.

Such is the case here. The County's post-development deal obligations are described in detail in the JPA. For example, once a development agreement is approved, the County's duty to "take all actions necessary and convenient to sell the respective parcel of land with good and marketable title" becomes immediately enforceable. (JPA at § 3.2.6.1). Similarly, the City's obligation to "conduct and complete any additional approval process identified by the JDA as necessary or

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appropriate to implement the development agreement" becomes enforceable. (*Id.* at § 3.2.6.2). Approval of Development Site by the JDA also triggers the parties' duties to construct their respective public improvements. (*Id.* at §§ 3.7.1, 3.7.2.5).

The Court does not need to fill in any blanks, but instead must only determine whether the condition has occurred to enforce the agreement. The fact that the County's post-development deal obligations are contingent means they are not immediately enforceable, but it does not render those obligations forever unenforceable until the condition precedent can no longer occur. *Seman*, 394 N.W.2d at 560.

The County cannot prove that it is entitled to be relieved of its obligations under the JPA as an unenforceable agreement to agree. The Court will not prematurely terminate the JPA while there is still an opportunity for the parties to compromise and carry out their obligations under it.

2. The termination and severability provisions prevent the Court from voiding the parties' obligations until the JPA expires or is terminated.

The Court's decision not to terminate the JPA for unoccurred conditions precedent is further supported by the plain language of the JPA and the Joint Powers Act. The JPA plainly states that it cannot be terminated before 2038, except by agreement of the parties. There is still time for the parties to agree upon and approve a development agreement within the terms of the JPA, and termination would therefore be premature.

The Joint Powers Act states that a joint powers "agreement may be continued for a definite term or until rescinded or terminated in accordance with its terms."

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Minn. Stat. § 471.59, subd. 4. The parties agreed in the JPA that, "[i]f any of the terms or provisions contained herein shall be declared … unenforceable by a court of competent jurisdiction, then the remaining provisions and conditions of this Joint Agreement … shall not be affected thereby and shall remain in full force and effect and shall be valid and enforceable to the fullest extent permitted by law." (*Id.* at § 6.6). The JPA does not require a development agreement be approved by a date certain. It does not require any of the obligations conditioned on approval of a development agreement be completed by a date certain. The parties established this timeline in the JPA and the Court cannot cast it aside more than a decade and a half early because one party believes the negotiations are at an impasse.

What's more, the severability provision shows that the parties' intent was for their partnership to remain intact, regardless of the enforceability of particular provisions. *See Staffing Specifix, Inc.*, 913 N.W.2d at 692 (stating that the primary goal of contract interpretation is to enforce the intent of the parties). The JPA states that it should remain intact until 2038, even if a court may find certain obligations under it are unenforceable.

3. The parties' substantial performance under the JPA prevents the Court from terminating it.

The Court is also persuaded that it cannot invalidate the JPA because of both parties' substantial performance since executing the JPA almost ten years ago. As discussed in detail earlier in this ruling, the City completed all of its pre-development deal obligations, such as completing the AUAR and developing the TCAAP Master Plan. The County also completed its pre-development deal

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obligations, such as purchasing the TCAAP Site, conducting the remediation, obtaining site clearance, and preparing the site survey and plat.

"The law does not favor destruction of a contract for indefiniteness. That maxim is especially true where, as here, there has been such extensive performance on the part of both parties." *Hill v. Okay Construction Co., Inc.*, 252 N.W.2d 107, 114 (Minn. 1977). The law also disfavors forfeitures. *Capistrant v. Lifetouch National School Studios, Inc.*, 916 N.W.2d 23, 28 (Minn. 2018).

Based on the parties' extensive performance under the JPA since 2012, the Court cannot invalidate the JPA. To do so would amount to a forfeiture by the City of its contributions to the parties' partnership—particularly the money, time, and effort expended developing the TCAAP Master Plan and the AUAR, as required by the JPA. Terminating the JPA prematurely would leave the City without the means to recover its investments. The parties bargained for the mechanisms by which each could recover their respective investments in the JPA. (JPA at § 3.7.2). While the County could recover its investments by selling the land to a developer, the City's bargained-for right to recover its investment would be lost.

Because the Court cannot terminate the JPA earlier than contemplated by the parties, and because termination would amount to a forfeiture, the Court declines to terminate the JPA.

4. The JPA does not unlawfully constrain the County's authority.

Finally, the Court addresses the County's alternative argument that the JPA should be terminated because it unlawfully constrains the County's discretion as a

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governmental entity and a landowner. The County argues that the JPA unlawfully constrains its power to dictate the future of the TCAAP Site. The Court disagrees.

The County is "a creature of the state deriving its sovereignty from the state[.]" *Freeborn County by Tuveson v. Bryson*, 243 N.W.2d 316, 321 (Minn. 1976). Its sovereign authority can be expanded and contracted by statute. Power sharing agreements like the JPA are expressly authorized by statute in the Joint Powers Act. *See* Minn. Stat. § 471.59, subd. 1(a). Section 471.59 allows "governmental units," including cities and counties, to enter power sharing agreements and to exercise their common powers by one or more of them on behalf of the others. *Id.* The County's ability to delegate authority to the JDA Board is a feature of the statute, not a bug. The County's authority as a landowner to guide the development and the City's municipal planning authority is a common power that may be delegated to the JDA Board.

Because the County's delegation of authority to the JDA Board is permissible under the statute, it lawfully ceded its governmental authority to the extent provided in the JPA. The Court will not terminate the JPA as an unlawful constraint on the County's power.

CONCLUSION

Both parties' claims fail as a matter of law. First, the City's counterclaim against the County must be dismissed because the terms of the JPA do not require the County to appoint members who must attend all meetings. Rather, the JPA requires the County to appoint two members to the JPA, and requires that those

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members "serve" until their successors are appointed. The term "serve" does not place an enforceable obligation upon those members to participate actively in JDA Board meetings.

Second, the County's claims must be dismissed. Its breach-of-contract and breach-of-implied-covenant claims fail because they are based on the City's alleged obligation to "to use good faith to attempt to resolve any dispute"—an obligation that is unenforceable and irremediable under Minnesota law. The County's declaratory relief claim seeking to terminate the JPA also must be dismissed because, although many of the County's material obligations require the occurrence of a condition precedent, the non-occurrence of that condition precedent does not entitle the County to terminate the JPA unilaterally before the agreed-upon termination date.

The parties' remedy for their disagreements lie in the political process. The Court cannot tell these governmental entities that their negotiations were unfair or out of bounds. The Court cannot make the judgments about the development that the parties must make. The Court cannot intervene in that inherently political process.

ORDER

1. The Housing Justice Center and Alliance for Metropolitan Stability's motion for leave to file an amici curiae brief is granted.

2. The City's motion for summary judgment is granted in part and denied in part, and the County's claims are DISMISSED.

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3. The County's motion for summary judgment is granted in part and denied in part, and the City's counterclaim is DISMISSED with prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: June 17, 2021

BY THE COURT:

Edward T. Wahl
Judge of District Court

Clerk:
Luke Draisey
Lucas.Draisey@courts.state.mn.us