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DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street, Room 256 Denver, CO 80202 (720) 865-8301	
Plaintiff: EVERGREEN ALLIANCE GOLF LIMITED, L.P., a Delaware limited partnership, d/b/a ARCIS GOLF, v. **Defendants:** THE CITY AND COUNTY OF DENVER, COLORADO, a municipal corporation of the State of Colorado.	▲ **COURT USE ONLY** ▲ Case No.: 2019CV31165 Division: 424
Attorneys for Plaintiff Evergreen Alliance Golf Limited, L.P. d/b/a Arcis Golf Mikaela V. Rivera, #34085 Darrell G. Waas, #10003 Jennifer R. Lake, #53141 WAAS CAMPBELL RIVERA JOHNSON & VELASQUEZ LLP 1350 17th Street, Suite 450 Denver, CO 80202 Telephone: (720) 351-4700 Facsimile: (720) 351-4745 rivera@wcrlegal.com waas@wcrlegal.com lake@wcrlegal.com	

PLAINTIFF'S VERIFIED MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Pursuant to C.R.C.P. 65, Plaintiff Evergreen Alliance Golf Limited, L.P. d/b/a Arcis Golf ("Arcis") moves for a temporary restraining order and preliminary injunction against Defendant The City and County of Denver, Colorado ("City"), and in support thereof states as follows.

Certificate of Compliance C.R.C.P. 121 §1-15(8) Statement: Pursuant to C.R.C.P. 65(b), Arcis is aware that the City is represented by counsel and notified the City of the filing of this motion.

FACTUAL BACKGROUND

Arcis is the lessee and operator of the 18-hole Park Hill Golf Course. The George W. Clayton Trust ("Trust") is the Landlord. The Lease between Arcis and the Trust is still in effect and Arcis has exclusive possession of the property under the Lease. A copy of the Lease Agreement and assignment to Arcis is attached as **Exhibit 1.** The Lease was recorded on January 11, 1999 at reception number 199004985, in the real property records of the City.

On January 2, 2018, the City determined there was a need to acquire part of the Park Hill Golf Course for a storm water drainage detention pond. A copy of the Ordinance is attached as **Exhibit 2.** The City adopted an ordinance authorizing it to acquire up to 90 acres of the Park Hill Golf Course with its powers of eminent domain. However, the City never commenced condemnation proceedings. Instead, the City entered into an Agreement for Immediate Possession with the Trust ("Possession Agreement"), without Arcis's approval, consent or knowledge. A copy of the Possession Agreement between the Trust and the City is attached as **Exhibit 3.** Arcis did not learn of the Possession Agreement until after it was executed and it received a copy of the Possession Agreement in response to a Colorado Open Records Request.

The City has known for over a year that it needed to acquire up to 90 acres of the Park Hill Golf Course, but it has never attempted to negotiate in good faith with Arcis for the acquisition or compensate Arcis for the property being taken or the damages to Arcis's remaining interest. When Arcis learned of the acquisition, Arcis sent a Colorado Open Records Act Request to the City to learn more about the acquisition and the project. Upon receipt of the documents and learning of the Possession Agreement, Arcis requested that it be involved in discussions between the City and the Trust with respect to construction phasing, possession and

closure of the golf course. Arcis sent written requests on August 9, 2018, September 7, 2018, and October 30, 2018 to the City in attempt to discuss the terms of the City's possession of the property. Copies of written correspondence are attached as **Exhibit 4.** After several months of requests, the City finally met with Arcis on November 13, 2018. At all times and at that meeting the City has maintained that it has no obligation to secure Arcis's permission to occupy the property Arcis leases, even though Arcis is the tenant in possession of the property to the exclusion of all others.

Over Arcis's objection, around January 1, 2019, the City took possession of approximately 35 acres of the Park Hill Golf Course, fenced it off and began construction of its storm drainage project. The City still has not obtained Arcis's consent for occupation or construction of the project. The occupation, fencing and construction has blocked Arcis from at least 4 holes of the golf course and interfered with the operation of the entire golf course, clubhouse and driving range. In addition, the City is beginning demolition in the area it is occupying that will immediately damage and render useless the irrigation system for the whole property, which will make it impossible for Arcis to maintain the area of the leased premises not taken by the City. In the discussions prior to the City's possession, the Trust indicated to Arcis that it wanted the entire golf course closed during construction. Even though Arcis has been unable to operate the full golf course, the Trust continues to hold Arcis responsible for maintenance. And because the golf course is closed for play, Arcis is receiving no revenue from golf. Nevertheless, it continues to incur substantial expenses related to its lease of the course and its ongoing obligation to maintain the golf course. Contemporaneously with this motion, Arcis filed a complaint asserting inverse condemnation and declaratory and injunctive relief against the

City. Arcis also seeks a temporary restraining order and preliminary injunction against the City's occupation of any part of the Park Hill Golf Course because it has no legal right to exclude Arcis from any portion of the Park Hill Golf Course.

LEGAL STANDARD

A preliminary injunction is warranted if the moving party demonstrates that: (1) it has a reasonable probability of success on the merits; (2) there is a danger of real, immediate, and irreparable injury; (3) there is no plain, speedy, and adequate remedy at law; (4) injunctive relief will not disserve the public interest; (5) the balance of equities favors an injunction; and (6) an injunction will preserve the status quo pending a trial on the merits. *Rathke v. MacFarlane*, 648 P.2d 648, 653-54 (Colo. 1982) (citations omitted). Preliminary injunctions are typically available to enjoin occupation of property, such as in cases of trespass. *See Koch v. Story*, 107 P.1093, 1097 (Colo. 1910) ("where the single [trespass] is continuous in its nature, an injunction will lie"). While Arcis has not asserted a claim for trespass, the City's occupation similarly interferes with Arcis's property rights and should be enjoined. Of particular relevance here, the Colorado Court of Appeals has observed that,

> [I]t is not unusual for courts of equity to interfere by injunction in aid of possession of real property . . . where defendants attempt or threaten to take possession without right or authority of law, as, for instance . . . where, upon condemnation proceedings, compensation has been awarded, but not paid, ***or where no proceedings for awarding compensation have been taken***. In such cases, injunction is conditionally granted against the taking of possession until compensation is paid or condemnation proceedings instituted.

Larimer Cty. Canal No. 2 Irrigating Co. v. Larimer & Weld Reservoir Co., 143 P. 270, 272 (Colo. App. 1914) (emphasis added) (citations omitted).

ARGUMENT

1. Arcis is likely to prevail on the merits of its claims against the City.

With respect to the first *Rathke* factor, Arcis has a reasonable probability of success on the merits of its claims. Arcis has a recorded leasehold interest granting it exclusive possession of the property. The City is occupying the property without Arcis's permission. The City has the power of eminent domain but refuses to exercise it. None of these facts can be reasonably disputed. Accordingly, Arcis has a reasonable probability of success on the merits.

2. The City's occupation poses a danger of real, immediate, and irreparable injury for which there is no adequate remedy at law.

Irreparable harm is defined as "certain and imminent harm for which a monetary award does not adequately compensate." *Gitlitz v. Bellock*, 171 P.3d 1274, 1279 (Colo. App. 2007) (internal quotations and citations omitted). Colorado courts have held that a danger of irreparable harm exists when a party is being physically prevented from using its property. *See, e.g.*, *Koch*, 107 P. at 1097 (observing that injunctions are generally warranted in cases of continuing trespass); *Cody Park Property Owners Ass'n, Inc. v. Harder*, 251 P.3d 1, 7 (Colo. App. 2009) (upholding trial court's finding that a danger of irreparable harm existed because the defendant was physically preventing the plaintiffs from using their easement, which provided access to their property). In other words, destruction of, or interference with, a plaintiff's property rights constitutes a danger of irreparable harm in and of itself. *See Koch*, 107 P. at 1097 ("In its very nature [the trespass] was continuing, and unless prevented . . . would . . . be highly destructive of plaintiff's property rights."); *Larimer Cty. Canal*, 143 P. at 272 (holding that "the acts of defendants . . . if trespass, constituted a continuing trespass which threatened to ripen into a permanent easement, for which injunction will lie, although no actual substantial damage is

shown."). In addition to the significant interference with Arcis's property rights, a danger of irreparable harm exists because Arcis has been prevented from operating a significant portion of the Park Hill Golf Course and continues to incur maintenance costs. The City's demolition will also remove part of a looped irrigation system, substantially impacting Arcis's ability to water the remaining golf course.

Colorado courts have routinely held that in cases of denying use of one's real property, there is no adequate remedy at law. *See, e.g.*, *Cody Park*, 251 P.3d at 7 (upholding trial court's finding that "there was no plain, speedy, and adequate remedy at law because [defendant] was denying the [plaintiffs] the right to use specific real property."); *Cobai v. Young*, 679 P.2d 121, 124 (Colo. App. 1984) ("Since defendants' trespass is continuous, the [plaintiffs'] only remedy at law would involve a multiplicity of suits for each recurrence of the trespass. As such, the remedy at law is inadequate."); *Boglino v. Giorgetta*, 78 P. 612, 614 (Colo. App. 1904) (holding that there was no adequate remedy at law in case of continuous trespass). The City's occupation has unquestionably denied Arcis the use of its property. Thus, an injunction is the only relief available to Arcis at this juncture.

3. Injunctive relieve will not disserve the public interest and the balance of the equities favors the injunction, which will preserve the status quo.

Awarding Arcis injunctive relief will not disserve the public interest. Although "courts have generally been reluctant" to enjoin the executive and legislative branches of the government, such relief is available where property rights are being threatened or destroyed. *See Rathke*, 648 P.2d at 651-52. Moreover, it is in the public's interest to ensure that the government follows the well-established restraints on the exercise of its power of eminent domain. Denver

should not be permitted to simply take private property in blatant disregard of its obligations to negotiate with and compensate those with an interest in the property.

Arcis made multiple attempts to negotiate the terms of the City's occupation of the golf course and to work with the City to minimize the effects of the City's occupation on the golf course. The City was aware of Arcis's leasehold interest, and was required to negotiate with Arcis in good faith. *See* C.R.S. § 38-1-121; *cf. City and Cty. of Denver v. Eat out Inc.*, 75 P.3d 1141, 1143-44 (Colo. App. 2003) (interpreting C.R.S. § 38-1-121 to require that the government notify a tenant with a recorded leasehold interest of its intention to condemn and enter into good faith negotiations with such tenant). Nevertheless, rather than negotiate with Arcis and/or commence condemnation proceedings, the City simply took possession of the property. Therefore, equitable considerations weigh in favor of an injunction. *Cf. Cody Park*, 251 P.3d at 7 (upholding trial court's finding that equitable considerations weighed in favor of an injunction because defendant was aware of plaintiffs' easement and did not object before later deciding to physically block plaintiffs' access to the easement).

Finally, an injunction will preserve the status quo pending a trial on the merits. Requiring the City to vacate the golf course until the proper procedures are followed will restore the parties to the positions they were in prior to the City's occupation, and will preserve the status quo pending the payment of compensation or the institution of condemnation proceedings. *See Larimer Cty. Canal*, 143 P. at 272 ("In such cases, injunction is conditionally granted against the taking of possession until compensation is paid or condemnation proceedings instituted.").

4. No bond is necessary because the City can commence construction and occupation as soon as it complies with the eminent domain statutes and fulfills the legal requirements for possession of the property.

The City has a legal avenue to obtain possession and build its project - it can exercise its powers of eminent domain. The eminent domain statutes allow for immediate possession of the property, upon the satisfying of certain prerequisites, such as good faith negotiations. While the City has refused to do this so far, it can do so at any time. Moreover, enjoining the City at this juncture will not harm the City because it has merely fenced the property, it has not yet undergone substantial construction activities. Even if the City were to prevail in this action, which is highly unlikely, it can continue its project. Thus, the City will not have been harmed by an injunction. Thus, no bond should be required. If the Court is inclined to require a bond, a nominal bond will satisfy the requirements of Rule 65.

CONCLUSION

For the reasons set forth above, Arcis respectfully requests that the Court enter Plaintiff's proposed temporary restraining order and schedule a hearing on whether a preliminary injunction should issue.

Respectfully submitted this 26th day of March, 2019.

WAAS CAMPBELL RIVERA JOHNSON & VELASQUEZ LLP

By: */s/ Mikaela V. Rivera*

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VERIFICATION

The undersigned certifies that the foregoing **PLAINTIFF'S VERIFIED MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION** is true and correct to the best of his knowledge, information and belief.

ARCIS GOLF

By: _____
Scott Siddons

STATE OF ~~COLORADO~~ Texas)
) ss.
COUNTY OF Dallas)

The foregoing instrument was acknowledged before me this 26th day of March, 2019, by Scott Siddons of Arcis Golf.

Witness my hand and official seal.

My commission expires: 08/10/19

NOTARY PUBLIC STATE OF TEXAS
PEGGY BUREAU
My Commission Expires
August 10, 2019

/s/ Peggy Bureau
Notary Public