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| DISTRICT COURT, JEFFERSON COUNTY, STATE OF COLORADO 100 Jefferson County Parkway, Golden, Colorado 80419 Telephone: 303-271-6215 | DATE FILED: April 7, 2023 2:29 PM FILING ID: B7753BA1F5C5C CASE NUMBER: 2005CV3044 |
| IN RE: THE ORGANIZATION OF FOSSIL RIDGE METROPOLITAN DISTRICT NO. 1, CITY OF LAKEWOOD, JEFFERSON COUNTY, COLORADO | ▲ COURT USE ONLY ▲ |
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| REPLY IN SUPPORT OF AMENDED MOTION PURSUANT TO C.R.S. § 32-1-207(3)(a) TO ENJOIN A MATERIAL MODIFICATION TO THE SERVICE PLAN AND ENFORCE MANDATORY OBLIGATIONS OF THE SERVICE PLAN | |

Solterra LLC, (“Solterra”) hereby submits the following reply in support of its motion to enjoin a material modification of the Service Plan and to enforce the mandatory obligations of the Service Plan regarding sanitary sewer:

I. INTRODUCTION

FRMD¹ filed two separate responses in an attempt to make Solterra's Motion into something it is not. The Motion sets forth a simple issue and requests simple relief. For over 14 years, FRMD and Green Mountain were committed to providing sanitary sewer service to the development within the boundaries of FRMD. In December 2022, Solterra first learned that FRMD and Green Mountain were negotiating a new intergovernmental agreement that would deny service for the remaining three Solterra subdivisions, namely Filings 18, 20, and 21. These were subdivisions for which FRMD and Green Mountain were fully aware. They reviewed and approved construction and site plans for Filings 18 and 20, which allowed Solterra to install all the necessary sanitary sewer infrastructure to service those two filings. (Urban Aff., ¶ 17(d).) Green Mountain also issued a total of 7 Certificates of Service and sanitary sewer permits for those two filings. (*Id.*) For Filing 21, Green Mountain went through six (6) rounds of reviewing the sanitary sewer service construction plans, starting in April 2019 and continuing through November 2022. So, Green Mountain has known of Filing 21 for at least 4 years, and based on the last review from November, Solterra was told that the plans were ready for signature by Green Mountain. FRMD also reviewed and provided comments to the Filing 21 sanitary sewer construction plans. (*Id.*)

Upon learning of the efforts to deny service to Filings 18, 20, and 21, Solterra (at the suggestion of Green Mountain's attorney) requested Certificates of Service for all remaining units (a total of 87) and paid the 2023 rate for sanitary sewer permits for those remaining units. Green Mountain has failed and refused to provide the Certificates of Service for the remaining units or to issue the paid for permits. (*Id.*, ¶¶ 19-26.) FRMD also has failed to take appropriate steps to ensure that Solterra would have sanitary sewer service through the FRMD Sewer System.

¹ The capitalized terms used in this Reply have the meanings and definitions set forth in the Motion.

Thus, Solterra is in the unfortunate position of seeking this Court's assistance to enforce the Service Plan and the mandatory obligation to provide sanitary sewer services under the Service Plan, an obligation that Solterra relied upon for the past 14 years as it progressed through phased development of the Solterra Community.

Despite being served with the original motion and the amended Motion, Green Mountain has consciously elected not to respond the Motion. Thus, Green Mountain has not provided any legal or factual argument as to why its obligation to provide sanitary sewer service to the Solterra Community should not be enforced, and it should be ordered to comply with mandatory requirements of the Service Plan and continue providing sanitary sewer service for the completion of the Project under the Service Plan. This Court should accept Green Mountain's nonresponse as an indication that it has no objection to the Court entering an order requiring that Green Mountain continue providing the service that it committed to provide sixteen years ago and has provided for the past 15 years.

FRMD's responses support this conclusion. Specifically, Exhibit 2 to the FRMD No. 1 Response is a "will serve" letter provided by counsel for Green Mountain in September 2007, in which Green Mountain confirms its commitment to provide "sanitary sewer services to the Proposed Service Area."

Beyond that, FRMD's responses make absurd, baseless arguments in an attempt to avoid the obligation to provide sewer service to the remaining development within its boundaries.

First, it argues that it tried to amend the 2014 IGA to extend Green Mountain's reserve capacity and even asserts that it was Solterra's fault that the extension was needed and not obtained. This argument, however, is irrelevant. Solterra is not asking for an extension of the reserve capacity provision contained in the 2014 IGA. It is demanding that FRMD and Green Mountain provide sanitary sewer service to Filings 18, 20, and 21, for which FRMD and Green Mountain are fully aware

and for which Solterra demanded service in early January 2023, *i.e.*, before the reserve capacity provision in the 2014 IGA expired. Moreover, the 87 additional residential units will bring the total residential units to approximately 1,354 residential units; far less than the 1,727 that had been reserved under the 2014 IGA.

FRMD also argues that this Court lacks the power to enforce the Service Plan and enjoin a material modification of the service plan because Green Mountain is “not a party to this action.” That argument completely ignores the statutory rights granted to this Court to do exactly what is requested in the Motion. Green Mountain is clearly an interested party under the Special District Act and was provided notice of the Motion. Thus, simply because Green Mountain has elected not to respond to the Motion does not restrict this Court’s powers.

FRMD further argues that it is not authorized to provide sanitary sewer and thus is not responsible for providing the sewer service to Solterra. However, the evidence contradicts that argument. The Service Plan authorizes each of the FRMD districts to provide sewer service. (Service Plan, § II.B(5), p. 14.) The sanitary sewer system located within the Boundary of FRMD is owned by FRMD No. 1. (Urban Aff., ¶ 13, Ex. G.) Each of the FRMD Districts issued resolutions adopting sanitary sewer rules and regulations, and setting fees and charges for providing sanitary sewer service. (Supplement to Amended Affidavit of Anastasia Urban, (“Urban Supp. Aff.”), ¶¶ 10-12, Exs. K-M.) FRMD even promotes itself on the Solterra Community website as the owner and provider of sanitary sewer service within the Solterra Community. (Urban Supp. Aff., ¶ 6, Ex. H.) The City also lists FRMD as the provider of sanitary sewer service for the Solterra Community. (*Id.*, ¶ 7, Ex. I.)

The bottom line is that Green Mountain and FRMD should not be allowed to deny sewer service to Solterra Filings 18, 20, and 21 as required in the Service Plan and should be ordered to comply with the requirements of the Service Plan and provide the requested service for the remaining

87 residential units.

II. ARGUMENT

A. FRMD MISTAKENLY ARGUES THAT SOLTERRA IS SEEKING TO EXTEND THE RESERVE CAPACITY PROVISION OF THE 2014 IGA.

FRMD repeatedly suggests that Solterra is asking this Court to extend the reserve capacity provision contained in the 2014 IGA. However, nowhere in its Motion does Solterra request that relief. Consequently, the bulk of FRMD's arguments are irrelevant and should be disregarded.

The relief that Solterra requests is an order requiring that Green Mountain and FRMD continue providing sewer service as required by the Service Plan and the 2014 IGA, and that they specifically provide sanitary sewer service to Filings 18, 20, and 21. These are the last three subdivisions for the phased development within the Solterra Community. The number of remaining units is known, and Green Mountain and FRMD are fully aware of these remaining subdivisions and what is required to provide sanitary sewer service for each of them.

In fact, as outlined in detail in the Motion, Green Mountain reviewed and approved the sanitary sewer construction plans for Filing 18, which has 15 residential units, and Filing 20, which has 20 residential units. (Urban Aff., ¶ 17(d)(i-ii).) FRMD reviewed without objection the Master Site Plans showing the location of the sanitary sewer for both filings. (*Id.*) After receiving approvals from Green Mountain and no objections from FRMD, Solterra proceeded to install all sanitary sewer infrastructure for those two filings. (*Id.*) Solterra also previously obtained 3 Certificates of Service for Filing 18 and paid sewer tap fees for three of the fifteen units. Similarly, Solterra previously obtained 4 Certificates of Service and paid sewer tap fees for four of the twenty units. (*Id.*)

Filing 21 is not quite at the same stage as Filings 18 and 20. However, Green Mountain and FRMD are fully aware of the filing. Filing 21 has 59 residential units. (Urban Aff., ¶ 17(d)(iii).) Green Mountain was first presented with sewer construction plans for Filing 21 in April 2019, and

those plans have gone through six (6) reviews by Green Mountain, with the final set of plans being presented on November 20, 2022. (*Id.*) Solterra was informed in December 2022 that the Filing 21 sanitary sewer construction plans were ready for signature by Green Mountain, but despite repeated requests, Green Mountain has not returned signed plans to Solterra. FRMD also reviewed and provided comments to the sanitary construction plans for Filing 21. (*Id.*, ¶ 28.) Moreover, in 2020 FRMD issued general obligation bonds. In the Official Statement disclosing the status of the “Development,” FRMD represents that as of September 2020 there were 171 remaining residential units to be developed for a total of 1,353 residential units. That is nearly identical to the 1,354 units that Solterra identified in the Motion, and certainly includes the units for Filings 18, 20, and 21. (Urban Supp. Aff., ¶ 13, Ex. N.)

Despite having detailed knowledge of development within the Solterra Community and Solterra Filings 18, 20, and 21 for several years, and despite reviewing and approving construction plans and site plans for those filings, **at no time** did FRMD or Green Mountain indicate to Solterra that sanitary sewer would not be available to those Filings. Just the opposite, until Solterra was advised otherwise on December 9, 2022, all interactions with FRMD and Green Mountain indicated that they would continue providing sanitary sewer service as required under the Service Plan.

After receiving notice on December 9, 2022 that a new agreement was being negotiated that would deny sanitary sewer service to Filings 18, 20, and 21, Solterra (at the suggestion of Green Mountain’s attorney) requested Certificates of Service for the remaining 87 residential units. Solterra also tendered payment for sewer tap fees for those 87 residential units. The request for Certificates of Service and the tender of payment were made prior to the termination of the reserve capacity agreement reflected in the 2014 IGA. (Urban Aff., ¶¶ 19-23.)

Green Mountain has failed and refused to deliver the Certificates of Service or to confirm

payment of the tap fees even though the entirety of the FRMD property, including Filings 18, 20, and 21, are listed by Green Mountain as part of its service area. (Urban Supp. Aff., ¶ 10.) FRMD also has failed to take any action to ensure that sewer service is provided to Solterra Filings 18, 20, and 21. (Urban Aff., ¶¶ 24-25.)

B. THIS COURT HAS THE POWER TO ENFORCE THE SERVICE PLAN AND PREVENT MATERIAL MODIFICATIONS OF THE SERVICE PLAN.

FRMD argues that the Motion cannot be decided without Green Mountain because it purportedly is an indispensable party. That argument completely misses the mark. The Motion was filed under the Special District Act to enforce the Service Plan and to enjoin a material modification of the Service Plan. This Court unquestionably has the power to so act. As explained below, Green Mountain is an interested party and as such has the right to appear and be heard in this matter. Solterra in fact delivered copies of the original motion and amended motion to counsel for Green Mountain, who acknowledged receipt of both. Solterra also has served a copy of this Reply on counsel for Green Mountain. Simply because Green Mountain has voluntarily elected not to file a response to the Motion does not cause this Court to lose its statutory power to enforce the requirements of the Service Plan and to enjoin material modifications of the Service Plan.²

Section 32-1-207(1) of the Special District Act provides that: “Upon final approval by the court for the organization of the special district, the facilities, services, and financial arrangements of the special district **shall conform so far as practicable to the approved service plan.**” C.R.S. §32-1-207(1).

Section 32-1-207(2) provides that any material modification of a service plan must be approved in substantially the same manner as the service plan was originally approved. This section

² Even if FRMD’s indispensable party argument were applicable here, FRMD fails to satisfy its burden of showing that Green Mountain cannot be joined or that the Court lacks the power to add Green Mountain as a party to this Motion.

also provides a description of what may constitute a material modification of a service plan, including a decrease in the level of services. C.R.S. § 32-1-207(2)(a).

Section 32-1-207(3)(a) provides that “Any material departure from the service plan as originally approved ... which constitutes a material departure thereof as set forth in subsection (2) of this section, **may be enjoined** by the Court approving the organization of such special district upon its own motion, ... or upon the motion of any interested party as defined in section 32-1-204(1).” C.R.S. § 32-1-207(3)(a).

Section 32-1-204(1) defines interested parties and discusses the need to provide notice to interested parties as part of the approval process for a service plan. The reference back to Section 32-1-204(1) found in Section 32-1-207(3)(a) suggests that interested parties have a right to receive notice of and participate in any proceeding to enjoin actions contrary to the service plan. *State Farm v. City of Lakewood*, 788 P.2d 808, 812 (Colo. App. 1990) (discussing service plan approval process and notice to interested parties). Colorado courts have indicated that the list of persons in Section 32-1-204(1) is not an exhaustive list of interested parties. *Todd Creek Village Metro. Dist. v. Valley Bank & Trust Co.*, 325 P.3d 591, 597 (Colo. App. 2013) (statute does not limit interested parties).

Further, Colorado courts have held that the Special District Act controls the extent to which courts can enforce service plans and the procedures set forth in Section 32-1-207(3) control over more general theories of enforcement. *Plains Metro. Dist. v. Ken-Caryl Ranch Metro. Dist.*, 250 P.3d 697, 701 (Colo. App. 2010).

Section 32-1-207(1) provides that “facilities, services, and financial arrangements of the special district shall conform so far as practicable to the approved service plan.” Section 32-1-207(3)(a) states that the “any material departure from the service plan ... may be enjoined by the Court.” The Service Plan here requires that the sanitary sewer service be provided to the entire Project

and that such service be provided by Green Mountain and coordinated between FRMD No. 1 and Green Mountain. That is the relief Solterra is seeking, and this Court has the power to grant that relief under the clear language of Special District Act.

FRMD argues that the cases cited by Solterra do not support enforcing the Service Plan against Green Mountain. Solterra disagrees with that assertion. The cases cited in the Motion, and specifically *Plains Metro.*, clearly provide that mandatory obligations in a Service Plan are enforceable. The cases are not restricted beyond that. There are no cases, and FRMD, cites none, that preclude enforcement of a Service Plan that names another service provider in the plan.

Moreover, the language in the Service Plan that sanitary sewer service will be provided by Green Mountain is not just some random statement. Green Mountain committed to that in 2007 (*see* Exhibit 2 to Response), FRMD committed to that in 2007, and the City approved that requirement after public hearings in 2007. (Service Plan, Ex. A to Urban Aff.) The Service Plan also is not just some document outlining the wishes of the developer. It was reviewed and approved by the City after public hearing with notice to all interested parties, as is required in the Special District Act. *See* C.R.S. §§ 32-1-204, 204.5 (requiring public hearing for approval of Service Plan). Thus, the requirement that Green Mountain provide sanitary sewer service and that FRMD coordinate such service should be enforced.

C. FRMD MISREPRESENTS ITS OBLIGATION TO PROVIDE SANITARY SEWER SERVICE FOR SOLTERRA’S LAST THREE FILINGS.

FRMD makes several misstatements regarding requirements in the Service Plan to provide sanitary sewer service. First, FRMD states that it is not authorized to provide sanitary sewer service. However, the Service Plan clearly provides otherwise. Section II.B of the Service Plan states: “Each District will have the power and authority to provide the services and facilities described in this Section II.B.” (Service Plan, p. 13.) Section II.B(5) states that each of the FRMD Districts has the

following powers regarding sewer services: “The design, acquisition, installation, construction, operation, and maintenance of storm or sanitary sewers, or both, flood and surface drainage, treatment and disposal works and facilities, and all necessary or proper equipment and appurtenances incident thereto, together with all necessary, incidental and appurtenant facilities, land and easements, and all necessary extensions of and improvements to said facilities or systems.” Thus, contrary to the assertions of FRMD, each of the FRMD districts has the authority to provide sanitary sewer services.

Second, FRMD states that it cannot provide sanitary sewer service and that it has no responsibility for providing sanitary sewer services. Again, that is simply not true. The Service Plan requires that FRMD coordinate with Green Mountain for the provision of sanitary sewer services. In this situation, coordination is obligatory because FRMD No. 1 owns the sanitary sewer system within the boundaries of FRMD. (Urban Aff., ¶ 13, Ex. G (stating that FRMD No. 1 owns the FRMD Sewer System.) FRMD also has adopted rules and regulations and issued resolutions for fees and charges regarding the provision of sanitary sewer service to property owners within its boundaries. (Urban Supp. Aff., ¶¶ 10-12, Exs. K-M.)

FRMD even holds itself out as the owner of the sanitary sewer system and the sanitary service provider. (Urban Supp. Aff., ¶ 7, Ex. H.) Specifically, under the “District” section of the Solterra Community website, FRMD makes the following statements: “all of the waste waterlines in Solterra are owned by FRMD and are contracted with [Green Mountain] to maintain.”; “Waste water service is provided by FRMD through an inter-governmental agreement with [Green Mountain].” (*Id.*) FRMD made similar representations in the 2020 Official Statement. (*Id.*, ¶ 13, Ex. N.) The City also identifies FRMD as the sanitary sewer provider for the Solterra Community. (*Id.* ¶ 7, Ex. I.)

The way the sanitary sewer service works for the Solterra Community is that Solterra installed/installs the public infrastructure for the sewer system for its developments within the

boundaries of FRMD and complies with any requirements of FRMD and Green Mountain for wastewater to flow from the FRMD system into the Green Mountain system. Once installed, FRMD No. 1 owns the system within the FRMD boundaries. Solterra connects its residential units to the FRMD sewer system which in turn is connected to the Green Mountain system. Green Mountain collects the wastewater and then conveys the wastewater to Metropolitan Denver Wastewater Reclamation District (“MDWRD”) for processing. (Urban Supp. Aff., ¶ 9.)

Thus, FRMD is more than a simple bystander to the sanitary sewer service. It owns the system that collects wastewater from the FRMD property owners. It is responsible for coordinating with Green Mountain to ensure that wastewater is conveyed from the FRMD system to the Green Mountain system for further collection and then conveyed to MDWRD for processing. FRMD has failed to act to ensure that sanitary sewer service is provided to Solterra Filings 18, 20, and 21.

Third, FRMD argues that Green Mountain’s obligation to provide sanitary sewer service is subject to an intergovernmental agreement. However, that is not what the Service Plan says. It provides that “Sanitation services **will be provided** to the Project by Green Mountain Water & Sanitation District.” (Service Plan, p. 12.) Nonetheless, the 2014 IGA was in place at the time Solterra requested the final 87 Certificates of Service and the paid the sewer tap fees. (Urban Aff., ¶¶ 19-23.) Moreover, the 2014 IGA remains in place today, except for the provision dealing with reserved capacity. (*Id.*, ¶ 11, Ex. C, § 2.2.)

III. CONCLUSION

Based on the Motion and the foregoing, Solterra requests that this Court enjoin Green Mountain and FRMD from materially modifying the Service Plan by denying sanitary sewer service to Solterra’s Filings 18, 20, and 21 and ordering that 87 Certificates of Service and tap permits be issued to allow Solterra to proceed with Filings 18, 20, and 21.

Respectfully submitted this 7th day of April, 2023.

KUTAK ROCK, LLP

s/ Neil L. Arney

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Attorneys for Plaintiff Solterra LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April, 2023, the foregoing **REPLY IN SUPPORT OF AMENDED MOTION PURSUANT TO C.R.S. § 32-1-207(3)(a) TO ENJOIN A MATERIAL MODIFICATION TO THE SERVICE PLAN AND ENFORCE MANDATORY OBLIGATIONS OF SERVICE PLAN** was filed and electronically served upon all counsel of record via Colorado Courts E-Filing and

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