COLORADO COURT OF APPEALS **STATE OF COLORADO** 2 East 14th Avenue Denver, Colorado 80203	
Appeal from Jefferson County District Court Hon. Ryan P. Loewer Case No. 2005CV3044	
Plaintiff-Appellant: Solterra, LLC v. **Defendants-Appellees**: Fossil Ridge Metropolitan District No. 1, Fossil Ridge Metropolitan District No. 2, Fossil Ridge Metropolitan District No. 3, and Green Mountain Water and Sanitation District	▲**COURT USE ONLY**▲
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OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g):

It contains 6,123 words (principal brief does not exceed 9,500 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A):

> For each issue raised, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 32.

/s/ Chip G. Schoneberger

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This appeal involves a statutory special district and service provider failing to provide sewer service to a residential development, as required by the special district service plan. C.R.S. § 32-1-207(3)(a) authorizes injunctive relief requiring compliance with a service plan unless the non-compliant party establishes compliance is not "practicable." The trial court found the service plan obligated only the special district to provide sewer service but declined to enjoin the non-compliance. The issue on appeal is whether the court reversibly erred in doing so, subdivided as follows:

1. Whether failing to ensure timely certification and provision of sewer service to all residential units approved for the development constitutes a material departure from, or modification of, the service plan under C.R.S. § 32-1-207;

2. Whether the special district or provider proved that compliance with the service plan is not reasonably possible, under circumstances where: (a) the special district outsourced its obligation to the provider pursuant to the service plan and a related intergovernmental contract; (b) the provider gave no reason for its failure to provide service; and (c) the special district failed to take any steps to enforce the terms of its contract with the provider to ensure compliance with the service plan.

STATEMENT OF THE CASE

Background: The residential development and formation of the special districts

Solterra, LLC sought to develop a residential community in the City of Lakewood ("City") in an area now known as Fossil Ridge. (CF, pp. 3273, 3329-30). In 2005, Solterra began the process of forming metropolitan districts pursuant to the Special District Act, C.R.S. § 32-1-101 *et. seq*., to provide infrastructure for and to serve the development. (CF, pp. 3273, 3328-29). In August 2005, the City conditionally approved formation of three districts, Fossil Ridge Metropolitan District Nos. 1, 2, and 3 (collectively, the "Districts"). (CF, pp. 3273, 3328-29). Fossil Ridge Metropolitan District No. 1 ("FRMD") is designated as the service district and Nos. 2 and 3 are designated as financing districts. (CF, pp. 3274-75, 3329; Exs., pp. 887).

In the same 2005 time period, and while working with the City and other owners of undeveloped land, Solterra approached Green Mountain Water and Sanitation District ("Green Mountain") to investigate options for providing sanitary sewer service for the development. (CF, pp. 3272, 3331; Tr. 10/10/23, pp. 133-37).[1] Green Mountain provides both water and sanitation services in the City.

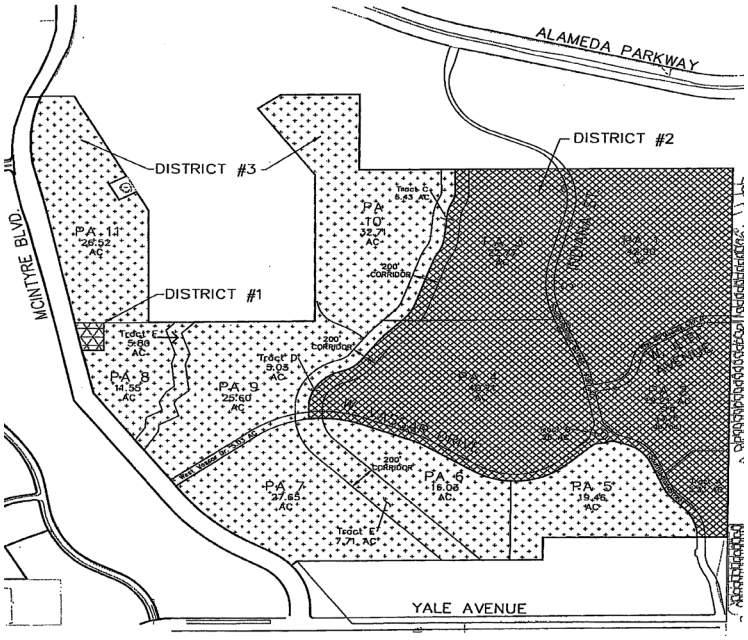
[1] Green Mountain is a separately organized special district providing sewer services in the City. (CF, pp. 3272, 3330).

(Exs., pp. 3272, 3330). However, Green Mountain was precluded from providing water to the Districts and another entity (Consolidated Water) was in line to provide water service to the Project; thus, Green Mountain was needed only for sanitary sewer service to the Project. (Tr. 10/9/23, pp. 101-02; Tr. 10/10/23, pp. 145-46). As to sewer service, Green Mountain does not treat sewer waste; rather, it owns infrastructure in the City to collect and transport wastewater to a treatment facility (Metro Water Recovery). (CF, pp. 3272, 3330). In early 2006, Green Mountain undertook a feasibility study to ascertain its ability to provide sanitary sewer services to the development. (CF, pp. 3273, 3331; Exs., pp. 769-90; Tr. 10/10/23, pp. 137-38). Using an estimated build-out of the Solterra development to 1,350 residential units and a total wastewater volume capacity up to 2,800 residential units, measured as "EQRs" (equivalent residential units), the feasibility study concluded Green Mountain could service this number of EQRs with upgrades and increases to its existing sewer system. (Exs., pp. 772, 776-78).

The Service Plan contemplates a phased residential development as approved by the City and projected at 1,581 residential units

The City approved the initial service plan for the Districts in August 2006 and in August 2007 approved a Second Amended and Restated Service Plan for the Districts ("Service Plan"). (CF, pp. 3273-74, 3332-33; Exs., pp. 875-957). The Service Plan states the Districts were formed to serve the "Project," defined as "the

development of property within the District Boundaries" shown below:



(Exs., pp. 883-84, 929) (cropped image).

The Service Plan authorizes the Districts to provide necessary services and facilities for the Project. (Exs., p. 886 [§ I(C)]) ("in order to provide effective and efficient services to the area, the Districts . . . seek[] . . . to provide necessary services and facilities to the Project").

The Service Plan contemplates that "development of the Project will proceed in several phases." (Exs., p. 887). The plan's stated purpose is to assure timely construction of and services to each development phase of the Project, including build-out to its completion and all related site and sewer plans the City approves:

> A "multiple district" structure . . . is proposed to assure that the construction and operation of each phase of the Public

> Improvements will be administered . . . consistent with a long term construction and operations program and as required under . . . the Approved Development Plan[2] for the Project. Use of the Service District as the entity responsible for construction of each phase of Public Improvements and for management of operations in connection with the District Activities will facilitate a well-planned financing effort through all phases of construction and will assure that facilities and services needed for future build-out of the Project will be provided . . . when they are needed[.]

(Exs., p. 887). The Service Plan also incorporates a financial plan based on a projected Project build-out to 1,581 residential units. (Exs., pp. 940-46).

The Service Plan makes FRMD "responsible for administering and managing the construction and operation of the Public Improvements and all District Activities as necessary to serve the project," and to provide for "[t]he design, acquisition, installation, construction, operation and maintenance" of a sanitary sewer system. (CF, p. 3329; Exs., pp. 887, 991).[3] As to such sanitation sewer services, the Service Plan states Green Mountain "will" provide them to the Project and requires the Districts to fund construction of any improvements necessary to accomplish this:

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[2] The Service Plan defines "Approved Development Plan" to include the development agreement with the City as "amended from time to time, . . . as well as any site or construction plans approved by the City from time to time and water and sewer plans, as approved by appropriate utility providers." (Exs., p. 882).

[3] The financing districts are "responsible for providing the tax base needed" to fund FRMD's activities. (CF, pp. 3274-75, 3329; Exs., pp. 887).

> b. Sanitation. Sanitation services will be provided to the Project by Green Mountain Water and Sanitation District. . . . Sanitation facilities constructed by the Service District and/or funded by the Financing Districts are intended to be conveyed to Green Mountain . . . for ongoing operations and maintenance.

(Exs., p. 889 [§ I(C)(4)(b)]).

Green Mountain knew the Service Plan identified it as the sewer service provider and never objected to this at the public hearing the City held before approving the Service Plan. (Tr. 10/10/23, pp. 272-75).

The Service Plan thus requires FRMD and Green Mountain to provide sanitary sewer service to the Project and to coordinate such sanitation sewer services through an intergovernmental agreement. (Exs., p. 894 [§ IV(B)]) ("Sanitation services will be coordinated between the Service District and Green Mountain Water and Sanitation District and/or other appropriate entities pursuant to intergovernmental agreements or other arrangements").

The resulting IGA requires the Districts to upsize Green Mountain's system and Green Mountain to accept wastewater from Solterra up to 1,727 units

On August 14, 2007, FRMD and Green Mountain executed a memorandum of understanding. (Exs., pp. 873-74). The parties therein acknowledged the need for domestic wastewater services for the Solterra development, acknowledged Green Mountain's ability to provide such services with expanded capacity, and

acknowledged their mutual intent to create a "permanent legal structure for wastewater services to Fossil Ridge" for that purpose. (Exs., p. 873).

Pursuant to the memorandum of understanding and Service Plan, FRMD and Green Mountain entered into an intergovernmental agreement on January 15, 2008. (CF, pp. 3277, 3333; Exs., pp. 738-811). The parties later amended their agreement in 2014 solely as to issues not relevant to this appeal; all relevant provisions of the 2008 agreement carried over into the 2014 agreement (the "IGA"). (CF, p. 3279; Exs., pp. 995-1057 [Ex. 18]).

In the IGA, Green Mountain "agree[]d to accept [w]astewater from Fossil Ridge, which is collected from and generated within the Service Area and does not exceed 1,727 equivalent residential units ('EQRs')[.]" (Exs., p. 741). Pursuant to the 2006 feasibility study and Service Plan, the IGA required the Districts to upsize both their own sewer system and Green Mountain's facilities to accommodate 2,925 units/EQRs. (CF, p. 1459; Exs., p. 1004; Tr. 10/9/23, pp. 39, 70-72; Tr. 10/10/23, pp. 196-99).[4] The Districts completed the required upsizing with financial assistance from Solterra (subject to reimbursement from the Districts). (CF, p. 1459; Tr. 10/9/23, pp. 39, 70-72; Tr. 10/10/23, pp. 196-99).

The IGA also contains a "reserved capacity" provision requiring Green

[4] The IGA contemplates service to additional developments in the area other than the Solterra development. (Exs., pp. 997, 999, 1025).

Mountain to "reserve sufficient capacity in its . . . [s]ystem to accommodate 1,727 EQRs received from Fossil Ridge" until January 15, 2023, subject to extension upon mutual agreement. (Exs., p. 998). Nothing in the IGA establishes a method for requesting or accepting reservations in Green Mountain's system. (Exs., pp. 995-1057; Tr. 10/10/23, p. 122). However, before connecting any building to the main sewer system, the IGA requires FRMD to obtain a certificate of availability of service from Green Mountain and pay a fee (commonly called "certificate of service" and "tap fee", respectively). (Exs., pp. 998-99).

Green Mountain's refusal to accept the last 87 units in the Project

Solterra phased the Project over twenty-one filings, each representing a subdivision plat approved by the City, as shown below:

(CF, pp. 3280, 3335; Exs., p. 1773 (cropped); Tr. 10/9/23, p. 33).

Solterra began delivering residential units in 2008 and the development is now complete except for Filing Nos. 18, 20, and 21. (Tr. 10/9/23, p. 33; Tr. 10/10/23, pp. 133-35). Sewer service from Green Mountain is in place for filings 1-17 and 19. (CF, pp. 3280-81, 3335-36; Tr. 10/9/23, p. 34). The Districts own the sewer mains in the development and Green Mountain maintains and operates them. (CF, pp. 3278-79, 3339; Tr. 10/9/23, p. 34). Those sewer mains discharge wastewater into Green Mountain's system, which system then sends it to the treatment facility. (CF, p. 3330; Tr. 10/9/23, pp. 34-35). The filings already receiving service from Green Mountain represent 1,258 EQRs. (CF, pp. 3284, 3330, 3337; Tr. 10/9/23, p. 35). The remaining filings, Nos. 18, 20, and 21, consist of 94 total residential units. (CF, pp. 3283-84, 3336-37; Tr. 10/9/23, p. 35). Therefore, upon completion of the remaining Solterra filings, the total number of residential units in the development will be 1,352. (CF, pp. 3284, 3338; Tr. 10/9/23, pp. 60-61).

By the end of 2022, Green Mountain had already approved construction plans for sanitary service to all three remaining filings. (CF, p. 3336). For Filing Nos. 18 and 20, sewer main lines are installed up to the lots lines, inspected and approved by Green Mountain, and connected to Green Mountain's system. (CF,

pp. 3336-37). Filing No. 21 is prepared to connect through a "stub out" into the system serving Filing No. 19. (Tr. 10/9/23, pp. 50-53; Tr. 10/10/23, pp. 205, 226).

However, Solterra has not yet obtained building permits to construct all residential units in Filing Nos. 18, 20, and 21. (Tr. 10/9/23, pp. 37, 44). This is because before issuing a building permit to construct any residential unit, the City requires a certificate of service confirming availability of sewer service to that unit. (CF, p. 3338, Tr. 10/9/23, p. 77; Tr. 10/10/23, pp. 160-61). Of the 94 certificates of service needed, Green Mountain has issued seven; therefore, another 87 certificates are required to obtain building permits to complete construction of the Project pursuant to the Service Plan and City-approved filings. (CF, pp. 3336-37; Tr. 10/9/23, p. 35).

In December 2022, Solterra learned that Green Mountain was not planning to provide service for the remaining 87 units. (Exs., p. 313; Tr. 10/9/23, pp. 56-57). Solterra ultimately discovered that starting in October 2022, FRMD and Green Mountain began negotiating an extension of the IGA's reserved capacity term set to expire on January 15, 2023, and that during those negotiations Green Mountain also proposed limiting its acceptance of wastewater from the Solterra development to only those units/EQRs already in service or for which the City had issued a building permit as of January 15, 2023. (CF, pp. 3284-85; Exs., p. 1123;

Tr. 10/9/23, pp. 59-60).

Solterra quickly (by January 6, 2023) submitted certificate of service forms to Green Mountain to execute for the 87 remaining units and delivered a roughly $420,000 check for the related tap fees required under the IGA. (CF, pp. 3285, 3339; Tr. 10/9/23, pp. 61-63; Tr. 10/10/23, pp. 227-28). The negotiations between FRMD and Green Mountain to amend the IGA and extend the reserve capacity expiration date soon broke down and the existing IGA remained in effect. (CF, pp. 3285, 3339). As of 10 months later (October 2023) Green Mountain had taken no action on the requested certificates of service but retained possession of Solterra's check for the tap fees. (CF, p. 3285; Tr. 10/10/23, p. 252).

FRMD's failure to enforce the IGA

Solterra reiterated its request for Green Mountain to issue certificates of service for the 87 remaining units in a written statement. (Exs., pp. 1-3). FRMD co-signed that statement solely to say it "has no objection to this request." (Exs., p. 3). Though FRMD representatives attended Green Mountain board meetings, provided Green Mountain with build-out information for the Project, and instructed its attorneys to attempt to negotiate a resolution with Green Mountain, FRMD made no effort to enforce the IGA's terms requiring Green Mountain to accept up to 1,727 EQRs from the Project. (Tr. 10/10/23, pp. 319-20). FRMD never

formally demanded that Green Mountain issue the certificates of service necessary for Solterra to obtain building permits to complete construction of the Project and to provide the sewer services to those units pursuant to the IGA. (Tr. 10/10/23, p. 328). FRMD never considered enforcing the IGA through legal means simply because it did not want to be in a legal dispute and saw no benefit to such a dispute. (Tr. 10/10/23, pp. 328-29).

The District Court's ruling

Pursuant to C.R.S. § 32-1-207(3)(a), in February 2023 Solterra filed a motion in district court seeking an order permanently enjoining FRMD and Green Mountain's efforts to materially modify the Service Plan by denying sanitary sewer service to Filing Nos. 18, 20, and 21 and seeking mandatory injunctive relief requiring FRMD and Green Mountain to issue the 87 certificates of service and accept payment for the tap fees. (CF, pp. 2024-40, 2234-50). The district court held a hearing in October 2023, at which time Green Mountain still had not issued the certificates of service but retained Solterra's check for the tap fees. (CF, pp. 3285; Tr. 10/10/23, p. 252).

The district court denied Solterra's motion. (CF, p. 3345). In doing so, the court ruled the Service Plan makes FRMD (not Green Mountain) "solely responsible for providing sanitation services throughout its geographic boundaries"

and "requires [FRMD] to ensure that sanitation services are in place and working[.]" (CF, pp. 3342-44). However, the court ruled "[n]othing in the Service Plan indicates that [FRMD] needs to provide sanitation services for a specific number of units." (CF, p. 3344). Alternatively, the court ruled that even if the Service Plan obligated FRMD to provide services to a specific number of units, "the current buildout of the sanitation system under Fossil Ridge makes it nearly impossible for anyone besides Green Mountain to provide sanitation services[;] [a]ccordingly, it would be impracticable for [FRMD] to provide sanitation services to new units without the willing participation of Green Mountain." (CF, p. 3344). The court concluded its order stating, "[f]or all of these reasons, the Court finds that there has been no material modification of the Service Plan." (CF, p. 3334). This appeal ensued. (CF, pp. 3346-56).

SUMMARY OF ARGUMENT

It is undisputed that FRMD and Green Mountain are providing sewer service only to the first 1,258 residential units in the Project but failed to timely ensure service for the remaining 87 units the City approved for development in the special district. The trial court's ruling – that failing to certify and provide sewer service to the remaining Project filings is not a material departure from the Service Plan – effectively renders the Service Plan meaningless and unenforceable, contrary to

C.R.S. § 32-1-207(3)(a). In ruling as such and thus declining to enjoin a clear material modification of the Service Plan, the trial court erred as a matter of law in several respects.

First, the Service Plan expressly defines the "Project" as the residential development within the district boundaries, which necessarily includes the entire residential development as approved by the City. The Service Plan also expressly anticipates up to 1,581 residential units with a commensurate population of residents. The plan further requires FRMD and Green Mountain to execute the IGA for sewer service, which they did, and Green Mountain therein agreed to service to the Project up to 1,727 residential units. Therefore, the Service Plan required sewer service to all City-approved residential units in the development Project. FRMD's and Green Mountain's failure to certify and provide that service constitutes a material modification of the Service Plan.

Second, the trial court misconstrued the practicability standard in C.R.S. 32-1-207 as a factor in determining the existence of a material modification in the first instance. Practicability, however, relates only to the scope of injunctive relief the trial court may enter to enjoin a material modification.

Third, the trial court misconstrued the practicability standard as governed by Green Mountain's willingness to comply with its obligations under the Service

Plan and IGA. However, "practicable" means reasonably possible. Therefore, to avoid injunctive relief against them, FRMD and Green Mountain bore the burden to prove that compliance with the Service Plan is not reasonably possible. FRMD and Green Mountain failed to meet that burden and the undisputed facts establish their compliance is, in fact, reasonably possible. Indeed, the Districts upsized Green Mountain's system to accommodate nearly twice the number of residential units in the Project and Green Mountain is currently providing service to all but 87 of them. Green Mountain provided no excuse for refusing to certify service to those last 87 units, much less proved that doing so is not reasonably possible. And for FRMD's part, it has done nothing to enforce Green Mountain's obligations under the Service Plan or contractual obligations under the IGA. Therefore, neither FRMD nor Green Mountain established the impracticability of compliance required to avoid injunctive relief under C.R.S. § 32-1-207(3)(a). This Court should reverse the trial court's ruling and grant the relief requested below.

ARGUMENT

I. Failing to Ensure Timely Certification and Provision of Sewer Service to All City-Approved Residential Units for the Project Materially Departs from the Service Plan: The Trial Court Erroneously Ruled Otherwise

A. Standard of review and preservation

Whether circumstances constitute a material departure from, or modification of, a special district service plan presents a legal question reviewed *de novo*. *Indian Mtn. Corp. v. Indian Mtn. Metro. Dist.*, 412 P.3d 881, 893 (Colo. App. 2016) ("whether IMMD's failure to operate the Plan constitutes a 'material modification' involves a question of law that we review de novo"). This Court also reviews a trial court's interpretation of a service plan *de novo*. *Id*. at 892. The Court reviews a trial court's factual findings for clear error. *S. Fork Water and Sanitation Dist. v. Town of S. Fork*, 252 P.3d 465, 468 (Colo. 2011).

Solterra preserved the issues presented on appeal in its motion to enjoin a material modification of the Service Plan and at the hearing thereon. (CF, pp. 2234-50; Tr. 10/9-10/10/23, pp. 1-397). The trial court ruled on those issues in its order denying Solterra's motion. (CF, pp. 3328-45).

B. Failure to timely certify and provide sewer service to the entire Project – including all units in City-approved Filing Nos. 18, 20, and 21 – constitutes a material modification of the Service Plan

Special districts are quasi-municipal corporations and political subdivisions

organized and acting under the Special District Act ("Act"), C.R.S. § 32-1-101 *et. seq*. C.R.S. § 32-1-103(20). "The General Assembly enacted the [] Act with the intent that special districts would promote the health, safety, prosperity, security, and general welfare of their inhabitants and of the state of Colorado." *South Fork Water*, 252 P.3d at 468 (citing C.R.S. § 32–1–102(1)).

The Act requires a service plan approved by the municipality in which the special district lies, which plan essentially constitutes the district's charter. C.R.S. §§ 32-1-202, 204.5, 205; 33-APR Colo. Law. 63. Once a service plan is approved, the Act mandates that "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. "A special district's governing body may make material modifications . . . to its previously approved service plan only by petition to and approval by . . . the municipality." *Bill Barrett Corp. v. Sand Hills Metro. Dist.*, 411 P.3d 1086, 1090 (Colo. App. 2016).

Under the Act, "[a]ny material departure from the service plan . . . which constitutes a material modification thereof . . . may be enjoined by the court." C.R.S. § 32-1-207(3)(a).[5] Material modification includes "changes of a basic or

[5] The Act permits an "interested party" to seek enjoinment of a material modification, including property owners in the district. C.R.S. §§ 32-1-204(1), 207(3)(a). Solterra qualifies as such an interested party. (CF, pp. 3275, 3333).

essential nature, including but not limited to . . . a decrease in the level of services[.]" C.R.S. § 32-1-207(2)(a); *Bill Barrett*, 411 P.3d at 1090.

The Service Plan here establishes the services for the Districts and thus controls whether circumstances constitute a change in the basic or essential nature of such services. Because a service plan is a district's governing instrument, courts apply a variety of principles to interpret it. Courts "look to the language of the service plan and give effect to its plain and ordinary meaning." *Indian Mountain*, 412 P.3d at 893. The rationale underlying the plan is also relevant. *Id.* at 892.

The trial court here ruled FRMD (and not Green Mountain) is responsible for ensuring sanitation services in the service district. (CF, pp. 3342-43). Solterra agrees, in part. Under the Service Plan, FRMD certainly must provide sanitation sewer services to the Project – but so too must Green Mountain: "Sanitation services *will* be provided to the Project by Green Mountain[.]" (Exs., p. 890) (emphasis added). Use of the term "will" in a service plan creates a mandatory obligation. *Plains Metro. Dist. v. Ken-Caryl Ranch Metro. Dist.*, 250 P.3d 697, 700 (Colo. App. 2010). The trial court erroneously declined to ascribe this term its plain meaning based upon a different provision of the Service Plan directing FRMD to coordinate sanitation services with "Green Mountain . . . and/or other appropriate entities pursuant to intergovernmental agreements or other

arrangements." (CF, pp. 3342,43; Exs., p. 894 [§ IV(B)]). However, this provision does not negate the mandatory nature of the Service Plan's directive that Green Mountain "will" provide sewer services to the Project. Coordinating sewer services necessarily requires a water source in the first place, which the Service Plan required FRMD to obtain from another entity (Consolidated Water) also through an intergovernmental agreement. (Exs., p. 890 [§ 4(a)]). Taken together, then, these provisions merely recognize the need for multiple providers to complete the cycle of water and sewer service. But this does not somehow negate the mandate as to each identified provider's obligation to provide its respective service under the Service Plan.

Also contrary to the trial court's interpretation, the Service Plan does not merely require FRMD and Green Mountain to provide sewer services within the Districts' boundaries irrespective of the actual residential units planned and approved for the Project. (CF, p. 3374). Instead, FRMD and Green Mountain must provide necessary services to *all residential units* within the Project's City-approved scope of development. The Service Plan makes this clear by expressly seeking to provide "necessary services and facilities to the Project," defined as "the *development of property* within the District Boundaries." (Exs., pp. 884, 886 at § I(C)) (emphasis added). That development includes residential units, with an

expected build-out to 1,581 dwellings and "an anticipated combined population of 3,220 persons[.]" (Exs., pp. 888 at § I(C)(3), 944, 957).[6] The Service Plan expressly seeks to "assure that facilities and services needed for future build-out of the Project *will be provided . . . when they are needed*[.]" (Exs., p. 887) (emphasis added). The Service Plan further contemplates the Districts funding construction of such sanitation sewer facilities as are necessary to accommodate the Project. (Exs., p. 889 at § I(C)(4)(b)). Therefore, the Service Plan expressly seeks to assure construction and necessary sewer services to all City-approved residential units in the development. (Exs., p. 887).

The Service Plan's requirement that the Districts enter into the IGA to provide sanitation services, and the IGA's terms, further make this clear. Indeed, "[i]n appropriate circumstances, the parties' intent may be determined by construing together separate documents that pertain to the same subject matter, even if the documents are not executed by the same parties." *E-470 Pub. Hwy. Auth. v. Jagow*, 30 P.3d 798, 801 (Colo. App. 2001). "In this way each document can provide assistance in determining the meaning intended to be expressed by the

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[6] The Act requires a service plan to include "an estimate of the population . . . of the proposed special district" and a financial plan projecting revenue in the district. C.R.S. §§ 32-1-202(2)(b), (d). Therefore, as Solterra's project manager testified at the hearing, there is a known quantity when service plans are originally established. (Tr. 10/9/23, p. 110).

others." *In re Town of Estes Park v. N. Colo. Water Conservancy Dist*., 677 P.2d 320, 327 (Colo. 1984). This is particularly true where the documents involve a common governmental party furthering a common public purpose. *Id*.; *Jagow*, 30 P.3d at 802; *In re Aristocrat, Inc*., 973 P.2d 727, 731 (Colo. App. 1999). For example, in *Town of Estes Park* the Colorado Supreme Court interpreted Estes Park's water rights under a federal contract by referring to the terms of a separate federal contract involving the Northern Colorado Water Conservancy District. 677 P.2d at 323-28.

The IGA thus further informs the intent underlying the Service Plan *vis-à-vis* FRMD's and Green Mountain's obligation to provide sewer service to the Project, *i.e.,* all City-approved residential units in the Solterra development. Indeed, the IGA requires Green Mountain to "accept Wastewater from Fossil Ridge, which is collected from and generated within the Service Area and does not exceed 1,727 equivalent residential units[.]" (Exs., pp. 995-98 [Ex. 18]).

Green Mountain performed under the Service Plan for 15 years, providing sewer service to Filing Nos. 1 through 17 and 19 (or 1,258 units) of the phased Project. (CF, pp. 3280-81, 3335-36; Tr. 10/9/23, p. 34). At the hearing, Green Mountain's representative testified it has not stopped serving those filings and units (Tr. 10/10/23, pp. 290-93). Notwithstanding this, it is undisputed that 15 years into

development of the Project and nearing its completion, Green Mountain suddenly sought to limit its sewer service to less than the entire Project and units contemplated by the Service Plan and required under the IGA. (Exs., p. 1123; Tr. 10/9/23, pp. 58-61). It is equally undisputed that Green Mountain has not certified available sewer service to the remaining City-approved 87 units in Filing Nos. 18, 20, and 21, as required for Solterra to build those units and complete the Project as the Service Plan requires.

Therefore, FRMD's and Green Mountain's failure to assure certification and provision of sewer service to the entire Project constitutes a material modification of the Service Plan.

C. The trial court misconstrued practicability: Green Mountain offered no excuse for its non-compliance and FRMD never tried to enforce its rights under the IGA

1. FRMD and Green Mountain bear the burden to prove compliance with the service plan is not reasonably possible

The Act requires "conform[ance] so far as practicable to the approved service plan" and authorizes courts to enjoin material departures from the plan, *i.e.,* material modifications. C.R.S. § 32–1–207(1). The trial court treated practicability as a factor in determining a material modification in the first instance. (CF, p. 3374) (finding "it would be impracticable for [FRMD] to provide sanitation services to new units" and concluding that "for all of these reasons, the

Court finds that there has been no material modification of the Service Plan"). This was error. Practicability only concerns the trial court's authority to enjoin a material modification. *Plains*, 250 P.3d at 700. To avoid such an injunction, the obligated entities under the Service Plan (FRMD and Green Mountain) bear the burden to prove compliance is not practicable. *Id*. at 698.

Plains illustrates the point. There, the appellate division held a special district's failure to build recreational facilities was a material departure from the service plan. *Id*. at 699-700. The division then addressed the trial court's authority to enjoin the modification and enter a mandatory injunction requiring the district to build the facilities. *Id*. at 700. The division held that, in cases of inaction, the Act allows mandatory injunctions to compel compliance "unless [the district] can demonstrate that compliance with the plan is no longer practicable." *Id*. at 698, 700. But because the trial court never reached the practicability question in that case and the parties disagreed on it, the division remanded to the trial court to decide the issue in the first instance. *Id*. at 700.

Under the *Plains* framework, then, impracticability is essentially a defense to injunctive relief and presents a mixed question of law and fact. The meaning of "practicable" the Act is a legal question reviewed *de novo*. *South Fork*, 252 P.3d at 468. And whether the facts meet that legal standard is a fact issue. *Plains*, 250

P.3d at 700 ("The trial court, after hearing any further evidence on this point that it may deem necessary, should issue findings and conclusions as to the practicability of Plains' building the recreational facilities provided for in the [] service plan").

"When construing a statute, [courts] effectuate the intent of the General Assembly; [they] look to the plain meaning of the statutory language and consider it within the context of the statute as a whole." *South Fork*, 252 P.3d at 468. Courts "construe the entire statutory scheme to give consistent, harmonious, and sensible effect to all parts. *Id*. "If the statutory language is clear, [courts] apply it." *Id*. As used in the Act, the plain meaning of "practicable" is "reasonably capable of being accomplished; feasible in a particular situation." Black's Law Dictionary (11th ed. 2019). *See also Tinnin v. Modot & Patrol Emp. Ret. Sys.*, 647 S.W.3d 26, 36 (Mo. App. 2022) (noting "practicable" means "possible" or "capable of being put into practice, done, or accomplished"). Accordingly, to avoid injunctive relief, FRMD and Green Mountain bore the burden to prove that compliance with the Service Plan is not reasonably possible.

2. FRMD and Green Mountain failed to establish impossibility of compliance where Green Mountain offered no excuse and FRMD never attempted to enforce Green Mountain's contractual obligation to service up to 1,727 units

The trial court here never overtly ascribed any definition to the Act's practicability standard. The court only found it "nearly impossible" for anyone

other than Green Mountain to provide sanitation services to the Project because the Districts constructed and expanded the entire system specifically for Green Mountain. (CF, p. 3374). Solterra agrees with this. But the trial court found impracticability solely based upon Green Mountain's current stonewalling and apparent unwillingness to service 87 units in the remaining filings for the Project. (CF, p. 3374). This misconstrues the inquiry and erroneously makes Green Mountain the unchecked arbiter of practicability.

Green Mountain presented no evidence of impracticability at the hearing. The facts adduced at the hearing establish Green Mountain is already servicing 1,258 units in the Solterra development and its system is built to accommodate 2,925 units. (CF, p. 3337; Tr. 10/9/23, pp. 35, 39, 103). No other builders have reserved capacity in Green Mountain's system. (Tr. 10/10/23, p. 277). Green Mountain has already approved construction plans for service to all three remaining filings. (CF, pp. 3336-38). And for Filing Nos. 18 and 20, sewer main lines are installed up to the lots lines, inspected and approved by Green Mountain, and connected to Green Mountain's system. (CF, pp. 3336-37). Green Mountain offered no excuse for its non-compliance and merely elicited vague testimony that it has neither accepted nor denied Solterra's request for certificates of service; that development in the Lakewood area has increased since 2006; that the current

Green Mountain board expressed concern about assumptions made in the 2006 feasibility study; and that its inaction could be attributable to reasons other than capacity. (Tr. 10/10/23, pp. 217-21, 239-40, 248-52). However, these vague comments fail to establish impossibility of compliance as the Act requires.

Moreover, and notwithstanding Green Mountain's unjustified inaction, the Act, Service Plan, IGA, and existing circumstances also make it reasonably possible and feasible for FRMD to comply with its obligation to ensure certification and provision of sewer service for the remaining Project filings. The Act authorized the Districts to enter into contracts. C.R.S. § 32-1-1001(1)(D)(I). The Service Plan required FRMD to outsource its sewer service obligation to Green Mountain by contract and to construct any sewer systems necessary for that purpose. (Exs., pp. 889, 894). FRMD thus executed the IGA with Green Mountain and built out Green Mountain's system specifically to provide that service to the Project. The IGA unambiguously requires Green Mountain "to accept [w]astewater from Fossil Ridge . . . [that] does not exceed 1,727 equivalent residential units[.]" (Exs., p. 741). And the IGA also expressly allows specific performance as a remedy for breach. (Exs., p. 1012 [§ 10.1]).

FRMD presented no evidence of any effort to enforce Green Mountain's promise under the IGA to accept up to 1,727 EQRs from the Solterra development.

FRMD never made a demand on Green Mountain to issue the 87 certificates of service needed to complete construction of the Project's 1,352 City-approved residential units and provide sewer services to those units, which is still far below the 1,727 units Green Mountain contractually agreed to service. (Tr. 10/10/23, pp. 328). FRMD never even considered enforcing the IGA through legal means simply because it did not want to be in a legal dispute and saw no benefit to such a dispute. (Tr. 10/10/23, pp. 328-29).

As a political subdivision of the state, FRMD possesses powers conferred by statute, including implied powers necessary to carry out those express powers. *SDI, Inc. v. Pivotal Parker Commercial, LLC*, 339 P.3d 672, 676 (Colo. 2014); *S. Fork Water and Sanitation Dist. v. Town of S. Fork*, 252 P.3d 465, 468 (Colo. 2011) (citing C.R.S. § 32–1–102(1)). Under the Act, FRMD has the power "[t]o sue and be sued and to be a party to suits, actions, and proceedings[.]" C.R.S. § 32-1-1001(c). FRMD thus has tools at its disposal to enforce Green Mountain's obligations under the IGA in order for FRMD to comply with the Service Plan and its obligation to ensure certification and provision of sewer service to the entire Project, including the remaining City-approved 87 units in Filing Nos. 18, 20, and 21. Consequently, FRMD failed to prove that compliance with the Service Plan is not reasonable possible, as the Act requires to avoid injunctive relief.

CONCLUSION

Solterra requests this Court reverse the trial court's ruling and hold that FRMD's and Green Mountain's failure to assure certification and provision of sewer services to the entire Project, including Filing Nos. 18, 20, and 21, constitutes a material modification of the Service Plan. Solterra further requests the Court reverse the trial court's impracticability ruling and enjoin FRMD's and Green Mountain's material modification of the Service Plan by ordering FRMD and Green Mountain to provide sewer service to the entire Project.

Alternatively, if the Court holds the Service Plan obligates only FRMD (and not Green Mountain) to provide sewer service to the entire Project, then Solterra requests the Court enjoin FRMD by ordering it provide sewer service to the entire Project through all reasonably available means, including formally demanding Green Mountain's compliance with the IGA, and, if necessary, enforcing the IGA through appropriate legal means.

Respectfully submitted this 7th day of May 2024.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **OPENING BRIEF** was electronically filed via Colorado Courts E-Filing System this 7th day of May, 2024 and served upon all counsel of record.

s/Rita Sanders

Pursuant to C.A.R. 30(f), a printed or printable copy of this document with original, electronic, or scanned signatures is on file at the office of Foster Graham Milstein & Calisher, LLC, and will be made available for inspection by other parties or the court upon request.