DISTRICT COURT, JEFFERSON COUNTY, COLORADO 100 Jefferson County Parkway Golden, CO 80401	
Plaintiff: SOLTERRA LLC, a Colorado Limited Liability Company **v.** **Defendants:** FOSSIL RIDGE METROPOLITAN DISTRICT NO. 1, a quasi-municipal corporation and political subdivision of the State of Colorado; FOSSIL RIDGE METROPOLITAN DISTRICT NO. 2, a quasi-municipal corporation and political subdivision of the State of Colorado; and FOSSIL RIDGE METROPOLITAN DISTRICT NO. 3, a quasi-municipal corporation and political subdivision of the State of Colorado.	▲ COURT USE ONLY ▲ Case No.: 2022CV31409 Division: 1 Courtroom: 540
Attorneys for Defendants Fossil Ridge Metropolitan District Nos. 1-3: Kelley B. Duke, #35168 Benjamin J. Larson, #42540 IRELAND STAPLETON PRYOR & PASCOE, PC 717 17th Street, Suite 2800 Denver, Colorado 80202 Telephone: (303) 623-2700 Fax No.: (303) 623-2062 E-mail: kduke@irelandstapleton.com blarson@irelandstapleton.com	

FOSSIL RIDGE METROPOLITAN DISTRICT NO. 1'S PARTIAL MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(b)(5)

Defendant Fossil Ridge Metropolitan District No. 1 (the "Service District"), by and through undersigned counsel, files this Partial Motion to Dismiss Plaintiff's First Amended Complaint Pursuant to C.R.C.P. 12(b)(5) ("Motion"), stating as follows:

Certificate of Conferral: Plaintiff Solterra LLC ("Brookfield")[1] opposes this Motion. The Service District also conferred on a motion to exceed page limit to file a combined motion to dismiss on behalf of both the Service Districts and Fossil Ridge Metropolitan District Nos. 2 and 3 (the "Financing Districts", and with the Service District, the "Districts"), which Brookfield opposed. Consequently, the Districts are filing separate motions. This Motion provides the factual background of this dispute.

INTRODUCTION

As outlined in the Introduction to the Financing Districts' Motion (pp. 2-5 incorporated herein by reference), Brookfield lost control of the Districts in 2017 after causing all its Brookfield-affiliated directors to resign, which has resulted in years of strife between the parties. Specifically, Brookfield has repeatedly threatened to embroil the Districts in litigation if the Financing Districts do not immediately bond to their maximum debt limit to repay Brookfield back for alleged developer costs. But Brookfield has no contractual right to unilaterally force repayment ten years ahead of the schedule provided in the Districts' Service Plan. Accordingly, all of Brookfield's claims in the First Amended Complaint ("FAC") related to repayment should be dismissed.

NEW ALLEGATIONS IN THE FAC

The Service District incorporates the section titled "New Allegations in the FAC" in the Financing Districts' Motion (p. 5).

STATEMENT OF FACTS

A. The Controlling Documents Give the Financing Districts Sole Discretion to Determine If and When to Issue General Obligation Bonds.

[1] Solterra LLC is the developer and commonly known by its parent company, Brookfield Residential (Colorado) LLC. "Brookfield" is used to avoid confusion with the Solterra community.

The Service Plan

1. The Districts are governed by the August 27, 2007 Second Amended and Restated Service Plan (the "Service Plan"). FAC, Ex. A (highlighted copy attached as **Exhibit 1**). Carma, LLC, Brookfield's predecessor, prepared and submitted the Service Plan for approval by the City of Lakewood ("City") as part of the organization of these three local governments to fund certain parts of Brookfield's development of Solterra. *Id.* at 24. Brookfield is not a party to the Service Plan. Ex. 1 at 1, preamble.

2. The Service Plan set the limit for General Obligation Debt ("GO Debt") (the type of debt at issue in the FAC) at $70,000,000. FAC ¶ 30; Ex. 1, pp. 5-6 (defining the GO Debt Limitation as the "maximum amount" that the Districts "***may*** issue in aggregate") (emphasis added). GO Debt generally refers to bonds that are repaid through property taxes and which can be used to fund only the limited scope of "Public Improvements" identified in Exhibit B of the Service Plan. Ex. 1 at 5 (definition of the term).

3. Under the Service Plan, control of government functions, including the Financing Districts' decision-making authority to issue tax-based bonds, remains with the Districts. Ex. 1 at 10, § I.C.2.c ("The . . . ***control of the timing of financing*** . . . and the ability of the Districts to obtain tax-exempt interest rates will benefit residents and property owners.")

4. This example is just one of many instances where the Service Plan provides that the Districts are charged with deciding when to issue tax-based GO Debt. For instance, Section V(A) of the Service Plan, titled "Financial Plan", provides: "All Debt of the Districts shall be permitted to be issued ***on a schedule and in such year or years as the Districts determine shall meet the needs of the of the Financial Plan and phased to serve development as it occurs***." Ex. 1 at 18, § 5.A (emphasis added). That "Financial Plan", which is attached as Exhibit D to the Service Plan, is

summarized as "issu[ing] an amount of Debt as the Districts can reasonably pay within the parameters of [the Service Plan]". *See id.*

The Master IGA

5. As part of their organization, Brookfield's predecessor caused the Districts to enter into a Master Intergovernmental District Facilities and Construction Agreement dated January 8, 2008 (the "Master IGA"), which governs the relationships between the Districts and provides the "means for . . . financing . . . the public services and improvements needed to serve the Project." Ex. 1, p. 16, § IV.A.

6. The Master IGA sets forth the relationship between the Districts, with the Service District responsible for managing the Solterra community and the Financing Districts responsible for issuing GO Debt to repay eligible development costs "in a manner consistent with the Service Plan." FAC, Ex. B, pp. 4-5, §§ I.1.3.b, I.1.3.e (highlighted copy attached as **Exhibit 2**).

7. Brookfield is not a party to the Master IGA, which provides there are no third-party beneficiaries to it. Ex. 2, pp. 5-6, § I.1.3(d), (e) & (j); p. 17, § III.3.8; p. 41, § X.10.14.

8. Article IV of the Master IGA provides that the ***Financing Districts***, as the Districts providing the tax base, "shall retain the discretion and authority to provide for and raise [funds for "Capital Costs"] in any manner lawfully available to the Financing District[s]," including the issuance of GO Debt, "***as the Financing District[s] shall in [their] sole discretion determine*** to issue or incur." Ex. 2, p. 20, § 4.4.c (emphasis added).

9. The Master IGA further provides that the Financing Districts "shall not be deemed to have surrendered or delegated ***any powers with respect to the determination of the manner in which the financial obligations imposed by this Agreement are to be satisfied and otherwise discharged***." Ex. 2, p. 20, § 4.4.c (emphasis added).

The Reimbursement Agreement

10. The only contract at issue to which Brookfield is a party is the Reimbursement Agreement, which is between Brookfield and the Service District. FAC, Ex. C, p. 1 at preamble (highlighted copy attached **Exhibit 3**). The Financing Districts ***are not parties to the Reimbursement Agreement***.

11. The Service District's reimbursement of Brookfield's eligible and documented development expenses is contingent on the ***Financing Districts*** issuing GO Bonds "at such time as it is reasonably feasible to do so, ***subject to the limitations of the Service Plan and the electoral authority of [the Financing Districts]***." Ex. 3 at "Whereas" clause on pp. 1-2; *see also id.* at 3, § 1 (providing that the Service District agrees to reimburse Brookfield for certain "District Eligible Costs," but only "***from the payment sources set forth herein***.") (emphasis added).

12. Further, with respect to "Terms of Repayment," the Reimbursement Agreement restricts the Service District to "repay[ing] any Repayment Obligations due hereunder ***solely from the proceeds of Bonds***, if any, provided to the [Service] District [by the Financing Districts] ***pursuant to the terms of the Master IGA***." Ex. 3, p. 5, § 5 (emphasis added). Brookfield admits that the Service District agreed to repay Brookfield only from bonds issued by the Financing Districts, if any. FAC ¶ 53.

13. Consequently, the Service District has no say under the Reimbursement Agreement as to if, when, or how Brookfield is repaid because repayment comes from bonds issued by the Financing Districts, which have sole discretion under the Master IGA to determine whether and when to do so. ***Importantly, the Reimbursement Agreement, which sets forth the only contract rights Brookfield has for reimbursement, provides no deadlines for the Service District to reimburse Brookfield.*** *See generally,* Ex. 3.

B. The Financing Districts Are on Schedule with the Bond Schedule in the Service Plan.

14. The Financial Plan (also called the "Financing Plan") in the Service Plan sets forth the timeline and financial model for completion of development and possible issuance of debt by the Financing Districts to reimburse eligible developer costs. Ex. 1 at Exhibit D thereto (p. 60 of the PDF). The Financial Plan was prepared at the request of the developer. *Id.* at p. i.

15. The Financial Plan the developer drafted projected that the development of Solterra would be completed by 2017, but Brookfield has now admitted that development will not be completed until 2026. *Id.* at Schedule 1, page 2A (p. 71 of PDF); FAC ¶ 67.

16. The Financial Plan models the issuance of GO Debt in the total amount of $64.15M by the Financing Districts in phases through 2032. *See* Ex. 1, Financial Plan, p. ii.

17. Although the development is not completed, the Financing Districts are on schedule with bond issuances, with $38,130,000 issued to date. FAC ¶ 84. The most recent bond issuance was projected to occur in 2020 for $8 million. Instead, in 2020 the Financing Districts issued $10 million in bonds, with $9,811,962 paid to Brookfield. Ex. 1, Financial Plan, p. ii; FAC ¶ 85.d. The next bond issuance is not set to occur until 2025, with the final round of bonds issued in 2032. Ex. 1, Financial Plan, p. ii.

18. Additionally, the Financial Plan identifies several factors***, in addition to assessed property value***, that will impact the amount and timing of bonds that the Financing Districts determine in their sole discretion may be issued, including: Brookfield's buildout schedule, inflation, assessment ratios, interest rates, debt service coverage requirements, infrastructure, and administrative and operating costs of the Districts. *Id.* at p. ii, v.

19. Instead of identifying these factors, Brookfield fails to mention them in the FAC and instead focuses exclusively on assessed value and falsely alleges that the total assessed value

of the property within the Districts ($73,802,900 for 2022) "is 30% higher than projected in the Service Plan for the entire completed development." FAC ¶ 65.

20. This allegation egregiously mischaracterizes the Financial Plan. The Financial Plan provides that assessed value should be $83,201,787 by year-end 2022, ***which is nearly $10 million more than current assessed value***.[2] Ex. 1, Financial Plan, Exhibit I, Cashflow Forecast, p. 2. By the time the Financing Districts are supposed to issue the last round of bonds ***as scheduled in 2032***, assessed value is projected to be almost $40 million more than now ($111,342,759). *Id.* at p. 1B, line 9. Actual assessed values are significantly lower than projected because Brookfield has built out the development much slower and with fewer homes than anticipated. FAC ¶ 60, 67 (admitting Brookfield will only complete 1,237 residential units by 2026 when the Financial Plan projected 1,581 by 2017 (Ex. 1, Financial Plan, Schedule 1)).

21. Moreover, the Financial Plan provides that the Financing Districts' total outstanding bonds at the time of any bond issuance will be less than 50% of the total assessed valuation for the Districts in conformance with Colorado law. Ex. 1, Financial Plan, p. ii; *see also id.* at § V.A, p. 18. Thus, as of 2022, the Financing Districts' total outstanding bonds should be less than half of $73,802,900 in assessed value, which is $36,901,450. Yet, as Brookfield admits, to date the Financing Districts have issued $38,130,000 in bonds. FAC ¶ 87.

[2] Brookfield's allegation that current assessed value is higher than projected appears to be based on the ***uninflated*** projected assessed value of the development ($55,333,940), which assumes no increases in property values over the life of the development. Ex. 1, Financial Plan, Schedule 1, p. 2B. Brookfield's use of the uninflated figure is nonsensical because the Financial Plan's model of the Districts' bonding capacity ***is based on inflated assessed values that assume increases in property values over the years***. *Id.* at p. iv and Cashflow Forecast, line 9.

22. Accordingly, Brookfield's demand that the Financing Districts ***immediately*** bond to the $70 million debt limit would result in nearly a one-to-one bond-to-assessed-value ratio, which would be a material modification of the Service Plan requiring the City's approval.

C. The Service District Has Not Refused to Reimburse Brookfield.

23. In its FAC, Brookfield attaches its one-sided correspondence demanding that the Financing Districts issue bonds on Brookfield's accelerated timeline. For instance, Brookfield's December 16, 2021 letter demands that the Districts agree within less than 30 days to bond to the maximum remaining debt limit of $32,058,038 that Brookfield alleged theoretically could ever be owed it. FAC, Ex. F, p. 2. Absent from this letter is any explanation as to why the Districts are obligated to repay Brookfield by its artificial deadlines, nor does this letter provide notice of any "Default" by the Service District as defined in the Reimbursement Agreement.[3] *See id.*

24. While the FAC references the parties' communications regarding bonding and falsely asserts that the Districts have "refused to issue new debt or to repay [Brookfield]," Brookfield fails to attach the Districts' responsive correspondence to the FAC. FAC ¶¶ 89, 127.[4]

25. The referenced correspondence demonstrates that the Districts have never "refused" to reimburse developer costs, so long as those costs are properly documented and eligible for repayment. For instance, the Districts responded to Brookfield's December 16, 2021 letter on January 4, 2022, requesting documentation of the purported $32,058,038 still allegedly owed and an accounting of project costs and how prior bond proceeds have been applied, including a

[3] Originally, Brookfield did not allege that these letters provided notice of default under the Reimbursement Agreement. *See* **Exhibit 4**, Complaint Compare, ¶ 91. Brookfield attempts to recast these letters as providing notice of default in the FAC. FAC ¶ 91.

[4] By referencing the parties' correspondence, which is integral to Brookfield's allegation that the Districts have "refused to issue new debt," this Court can consider the Districts' responsive correspondence that was omitted. *See* Financing Districts' Motion at 6.

calculation of the purported interest amounts paid. **Exhibit 5**, Jan. 4, 2022 letter from K. Duke to N. Arney.

26. Over the course of the next several months, the Districts' counsel worked with Brookfield's counsel in an attempt to obtain the requested information so that the Financing Districts could assess what, if anything, remains to be owed and when it would be appropriate to bond. *See, e.g.,* **Exhibit 6**, Apr. 1, 2022 letter from K. Duke to N. Arney; **Exhibit 7**, Jul. 11, 2022 letter from K. Duke to N. Arney.

27. The parties' back-and-forth on the threshold question of how much more, if any, Brookfield is owed continued into the fall of 2022. *See* **Exhibit 8**, Oct. 19, 2022 email chain between K. Duke and N. Arney. At no point, however, did the Service District refuse to repay Brookfield for eligible costs that are properly documented when the Financing Districts determine in their discretion it is appropriate to further bond.[5]

28. Nevertheless, Brookfield filed this lawsuit demanding that the Service District be Court ordered to cause the Financing Districts to immediately issue tax-based bonds of not less than $31,870,000 to repay Brookfield up to 10 years ahead of the schedule in the Service Plan.

MOTION TO DISMISS STANDARDS

The Service District incorporates by reference the Motion to Dismiss Standards set forth in the Financing Districts' Motion (pp. 5-6).

[5] These communications also demonstrate that the Service District has never "admitted" to owing the full remaining debt limit as Brookfield alleges. FAC ¶ 96. That allegation is disingenuous on its face because it ignores that the Districts' statements were as to amounts "***the Developer believes*** qualif[y] as District Eligible Costs" or amounts Brookfield unilaterally booked as "advances" when it controlled the Service District. *See id.* at 96.d and 96.e.

ARGUMENT

I. Claim 1 Should Be Dismissed Because Brookfield Fails to Plausibly Plead a Breach of the Reimbursement Agreement; Regardless, Brookfield's Claim for Specific Performance Is Barred by Sovereign Immunity.

A breach of contract claim requires: (1) the existence of a contract; (2) performance by the plaintiff or some justification for nonperformance; (3) failure to perform the contract by the defendant; and (4) resulting damages to the plaintiff. *Western Distributing Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992). "Contract interpretation is a question of law for the court to decide." *Copper Mountain, Inc. v. Indus. Sys., Inc.*, 208 P.3d 692, 696 (Colo. 2009). "The primary goal of contract interpretation is to determine and effectuate the intent and reasonable expectations of the parties" by "giv[ing] effect to the plain and generally accepted meaning of the contractual language." *Id.* at 697. Courts "hold no authority to rewrite contracts and must enforce unambiguous documents in accordance with their terms." *McShane v. Stirling Ranch Prop. Owners Ass'n, Inc.,* 393 P.3d 978, 982 (Colo. 2017). Additionally, "[o]n a motion to dismiss, allegations in a complaint do not overcome contradictory statements in the text of a contract attached to [the] complaint." *Spring Creek Expl. & Prod. Co., LLC v. Hess Bakken Inv., II, LLC*, 887 F.3d 1003, 1018 (10th Cir. 2018) (internal citations omitted) (applying Colorado law).

Here, Claim 1 fails because: (A) Brookfield does not plead that the Service District is in breach of any repayment obligation set forth in the Reimbursement Agreement; (B) Brookfield tries to overcome this deficiency by morphing Claim 1 into an anticipatory repudiation claim, but Brookfield does not satisfy the elements of repudiation; (C) Brookfield's allegations regarding the Districts' purported bonding capacity are implausible; and (D) Claim 1 is effectively one for specific performance, which cannot be ordered against special districts as governmental entities.

A. Claim 1 Fails to Identify any Contractual Obligation that Has Been Breached.

Brookfield alleges that the Service District breached the Reimbursement Agreement by not causing the Financing Districts to issue new debt to repay Brookfield on its accelerated schedule, which accelerated schedule violates the Financial Plan set forth in the Service Plan. FAC ¶¶ 117, 118. Glaringly absent from Claim 1 is a citation to or analysis of any provision of the Reimbursement Agreement that requires the Service District to cause the Financing Districts to bond to their maximum capacity and then repay Brookfield on its accelerated timeline. No such provision exists.[6]

The terms of the Service District's payment obligations are addressed in section 5 of the Reimbursement Agreement, which Brookfield fails to address anywhere in its FAC. SoF ¶¶ 11-13. Those repayment terms unambiguously provide that the Service District is obligated to repay Brookfield ***only when it receives bond proceeds from the Financing Districts***. FAC, Ex. C, p. 5, § 5 (providing that the Service District will repay eligible developer costs "***solely from the proceeds of Bonds***, if any, provided to the [Service] District [by the Financing Districts] pursuant to the terms of the Master IGA"). Brookfield does not—and cannot—allege that the Service District has failed to pay over any bond proceeds it has received from the Financing Districts.

Moreover, because the Master IGA gives the Financing Districts sole discretion to determine whether and when to bond (SoF ¶ 13), the Reimbursement Agreement contains no

[6] In its FAC, Brookfield now contends that it can also enforce the Service Plan's provisions related to repayment. FAC ¶ 27 (alleging that Brookfield is an interested party under the Service Plan). Even if that were the case, like the Reimbursement Agreement, the Service Plan does not include a provision authorizing the developer to force repayment on an accelerated timeline. Regardless, Brookfield does not bring a claim to enforce the Service Plan because such relief is only available to enjoin a "material modification" of the Service Plan. C.R.S. § 32-1-207(3)(a). In fact, the relief Brookfield seeks—forcing repayment 10 years ahead of schedule at double the debt-to-assessed value ratio contemplated by the Service Plan—would be a material modification.

contractual deadline by which the Service District must fully repay Brookfield. *See generally*, FAC, Ex. C. Brookfield cannot inject an artificial payment deadline requirement into the Reimbursement Agreement simply based on its own self-serving demands that it be paid now, particularly when Brookfield has missed buildout goals by seven years and hundreds of units.

Faced with this reality in the initial Motion to Dismiss, Brookfield added a new allegation to its FAC that an "immediate Repayment Obligation exists" up to the full debt limit. FAC ¶¶ 55, 113. However, the referenced section of the Reimbursement Agreement addresses when a purported obligation is "***incurred***" such that interest begins to accrue, not when an obligation must be ***repaid***. Ex. 3, p. 4, § 3.a. To the extent Brookfield is trying to suggest this section requires obligations to be ***repaid*** immediately when incurred, that novel interpretation would render the entire repayment structure in the Service Plan and Financial Plan meaningless. Brookfield contradicts itself in the next paragraph of the FAC, recognizing that the timing of repayment is an entirely different inquiry. FAC ¶ 114.

B. Because Brookfield Cannot Plead a Breach by the Service District, Brookfield Tries—But Fails—to Plead Anticipatory Repudiation.

Knowing it cannot plead a breach, Brookfield attempts to morph its breach of contract claim into an anticipatory repudiation claim by insinuating that the Service District has refused to ***ever*** pay Brookfield back. FAC ¶ 116 (alleging that the Service District has refused to cause the Financing Districts to issue any additional debt to repay Brookfield). Aside from the fact that the Service District has no contractual obligation or authority to force the Financing Districts to issue debt to repay Brookfield, this bare allegation fails on its face to satisfy the elements of a repudiation claim. *Johnson v. Benson,* 725 P.2d 21, 25 (Colo. App. 1986) (requiring a definite and unequivocal manifestation of intention on the part of the repudiator not to perform when performance is due to sustain a repudiation claim). Regardless, the conclusory allegation that the Service District has

refused to repay Brookfield is implausible when considering the contradictory correspondence Brookfield references in, but fails to attach to, its FAC. SoF ¶¶ 24-27. The Financing Districts have never refused to issue bonds when appropriate, so long as the purported developer costs are eligible for reimbursement and properly documented. *Id.*

C. Brookfield's Allegations Regarding the Districts' Bonding Capacity Are Implausible.

The Reimbursement Agreement does not give Brookfield a contractual right to dictate the timing of repayment. But even if it did, the foundation of Brookfield's breach claim is the false allegation that "assessed value as of 2022 is 30% higher than projected in the Service Plan for the entire completed development," and thus can support "immediately" bonding to the Districts' $70 million debt limit. FAC ¶¶ 65, 115; *see* SoF ¶¶ 19-20. Current assessed value is about ***$10 million less than projected in the Service Plan for year-end 2022***. SoF ¶ 20. To be on track to pay Brookfield back ***by 2032*** as scheduled in the Service Plan, assessed value should be $83,201,787 as of now and $111 million when the last round of bonds are issued. *Id.*

Nevertheless, Brookfield demands that the Districts "***immediately***" bond to the full $70,000,000 debt limit, which would put the Districts at a ratio of almost 100% debt-to-assessed-value in contravention of the Financial Plan attached to the Service Plan. SoF ¶¶ 21-22. Not once does the Financial Plan project that the Districts will exceed a 50% debt ratio over the life of repayment. Ex. 1, Financial Plan, Cashflow Forecast, Line 41. In short, Brookfield's allegation that current assessed value will support bonding to the $70 million debt limit is contradicted by the Service Plan attached to the FAC. Consequently, the Court should not accept this allegation as true, which presents an independent basis for dismissing Claim 1. *Spring Creek,* 887 F.3d at 1018.

D. Claim 1 Is for Specific Performance, Which Is Barred by Sovereign Immunity.

Even if Brookfield could plead a breach of contract, the thrust of Claim 1 is Brookfield's demand that the Court order the Service District to force the Financing Districts to issue bonds. FAC, pp. 21-22 ("WHEREFORE" clause). Setting aside Brookfield's misconception that the Service District can somehow force the Financing Districts to issue debt, Brookfield's claim, while couched as a "mandatory injunction," is one for specific performance. Brookfield is demanding that the Court compel the Service District to perform a purported contractual requirement (***specific performance***), as opposed to requiring an affirmative act not required by any contract but is necessary to maintain the status quo ***(mandatory injunction***). *Snyder v. Sullivan*, 705 P.2d 510, 514, n. 5 (Colo. 1985) (explaining the difference between the two).

The doctrine of sovereign immunity precludes claims for specific performance against governmental entities, including special districts. *Thompson Creek Townhomes, LLC v. Tabernash Meadows Water & Sanitation Dist.*, 240 P.3d 554, 556 (Colo. App. 2010) (dismissing developer's claim for specific performance against special district). The impossibility of Brookfield's requested relief provides yet another grounds for dismissal of Claim 1.

II. Claim 2 for Declaratory Judgment Should Be Dismissed Because It Asks the Court to Declare the Districts Must Perform Alleged Contractual Obligations.

Like its requests for a "mandatory injunction," Brookfield's declaration requests are, in essence, requests for specific performance because they ask the Court to order that the Districts are obligated to take certain actions Brookfield believes are required by contract. *See, e.g.,* FAC ¶ 128 (seeking order that the Service District "is obligated to cooperate and coordinate with [the Financing Districts] to issue general obligation or revenue bonds" and the Financing Districts are "obligated to issue" such bonds). The Court cannot order specific performance, and thus

Brookfield's requested declarations at paragraph 128.c-e should be dismissed. *Taylor v. State Pers. Bd*., 228 P.3d 273, 277 (Colo. App. 2010) (dismissing declaratory judgment claims where relief requested was unavailable).

III. Claim 4 for Breach of the Covenant of Good Faith and Fair Dealing Should Be Dismissed Because the Service District Does Not Have the Obligation or Authority to Force the Financing Districts to Issue Bonds.

Claim 4 for breach of the Reimbursement Agreement's implied covenant of good faith and fair dealing is effectively two separate claims. The first relates to the Service District allegedly not coordinating to cause repayment bonds to be issued and is a repeat of Claim 1 for Breach of the Reimbursement Agreement for Failure to Repay Brookfield. FAC ¶ 139. The second relates to the maintenance of public improvements and is a repeat of Claim 3 for Breach of the Reimbursement Agreement Regarding Overpayment of Maintenance. *Id.* The Service District moves on Claim 4 as it relates to the alleged failure to repay Brookfield.

The contractual "duty of good faith and fair dealing does not obligate a party . . . to assume obligations that vary or contradict the contract's express provisions. Nor does the duty of good faith and fair dealing inject substantive terms into the parties' contract. Rather, it requires only that the parties perform in good faith the obligations imposed by their agreement." *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 507 (Colo. 1995) (Vollack, J., concurring).

Here, Brookfield alleges that the Service District breached its covenant of good faith and fair dealing by failing to "coordinate and cooperate" with the Financing Districts to cause them to issue repayment bonds when demanded by Brookfield. FAC ¶ 142. However, the FAC fails to identify any contractual obligation in the Reimbursement Agreement that requires the Service District to force the Financing Districts to issue bonds. No such provision exists. Again,

Brookfield ignores Section 5 of the Reimbursement Agreement, which provides that the Service District is only required to pay Brookfield bond proceeds, ***if any,*** received from the Financing Districts pursuant to the Maser IGA. FAC, Ex. C, § 5. There is no allegation that the Service District has failed to repay Brookfield with the bond proceeds it received from the Financing Districts.

Moreover, Brookfield's "good faith" claim falsely assumes that through "coordination and cooperation" the Service District can force the Financing Districts to bond at Brookfield's behest. When Brookfield controlled the Boards of the three Districts it routinely treated them as one entity that Brookfield directed for its benefit. However, as a matter of law, they are separate governmental entities with their own elected Boards that are now governed by the community's residents. Additionally, under the Master IGA, the Financing Districts' decision as to whether and when to issue bonds is within their sole discretion, not the Service District's. SoF ¶¶ 8-9. Accordingly, Brookfield's invocation of the covenant of good faith and fair dealing is a naked attempt to inject contractual requirements into the Reimbursement Agreement that do not exist because Brookfield is now dissatisfied with the contracts the developer drafted to take advantage of public tax dollars.

WHEREFORE, the Service District respectfully requests that Claim 1 for Breach of the Reimbursement Agreement, Claim 2 for Declaratory Judgment (declarations located at ¶ 128.c-e), and Claim 4 for Breach of the Duty of Good Faith and Fair Dealing (as it relates to repayment) be dismissed with prejudice as set forth above.

Respectfully submitted this 8th day of March, 2023.

IRELAND STAPLETON PRYOR & PASCOE, PC

/s/ Kelley B. Duke
Kelley B. Duke, #35168
Benjamin J. Larson, #42540
Attorneys for the Districts

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2023, a true and correct copy of the foregoing **FOSSIL RIDGE METROPOLITAN DISTRICT NO. 1'S PARTIAL MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(b)(5)** was filed and served via CCEF on all counsel of record.

/s/ Dawn A. Brazier
Dawn A. Brazier