DISTRICT COURT, JEFFERSON COUNTY, COLORADO 100 Jefferson County Parkway Golden, CO 80401 Telephone: 303-271-6215	DATE FILED: April 14, 2023 4:01 PM FILING ID: B55657A878135 CASE NUMBER: 2005CV3044
IN RE: THE ORGANIZATION OF FOSSIL RIDGE METROPOLITAN DISTRICT NO. 1, CITY OF LAKEWOOD, JEFFERSON COUNTY, COLORADO	
Attorneys for Fossil Ridge Metropolitan District Nos. 1, 2 and 3 Kelley B. Duke, #35168 Benjamin J. Larson, #42540 IRELAND STAPLETON PRYOR & PASCOE, PC 1660 Lincoln Street, Suite 3000 Denver, Colorado 80264 Telephone: (303) 623-2700 Fax No.: (303) 623-2062 E-mail: kduke@irelandstapleton.com blarson@irelandstapleton.com	▲ COURT USE ONLY ▲ Case No. 2005 CV 003044 Division: 1

FOSSIL RIDGE METROPOLITAN DISTRICT NOS. 1, 2, AND 3'S SUR-REPLY IN OPPOSITION TO AMENDED MOTION TO ENJOIN A MATERIAL MODIFICATION OF SERVICE PLAN

Fossil Ridge Metropolitan District Nos. 1, 2, and 3, through counsel, submit this Sur-Reply in opposition to Solterra, LLC's Amended Motion, stating as follows:[1]

SUMMARY

Brookfield's Reply in Support of the Amended Motion ("Reply") attaches another affidavit and additional documents, all of which perpetuate the same misconceptions of the facts and the

[1] Capitalized terms not defined in this Sur-Reply have the meaning set forth in the Response.

law. In doing so, Brookfield repeatedly contradicts itself, further demonstrating the fundamental flaws with the Amended Motion.

First, because the Amended Motion glossed over Brookfield's failure to complete (or in some cases even start) construction before the expiration of the Reserved Capacity Term, Brookfield goes to great lengths to argue that the Reserved Capacity Term has nothing to do with its current predicament. That is nonsensical because the expiration of the Reserved Capacity Term is precisely why Green Mountain is refusing to provide service. If Brookfield wants to argue that its yet-to-be built residences somehow fall within the Reserved Capacity Term, that is a contractual dispute for Brookfield to raise under the Green Mountain IGA, not a matter of enforcing the Districts' Service Plan. The reality is that Brookfield neglected to appreciate that the Reserved Capacity Term was expiring. Then, when neither the Service District nor Brookfield could negotiate an extension of the term, Brookfield scrambled to tender advance payment to Green Mountain for future residences. Brookfield's refusal to acknowledge that the Reserved Capacity Term is at the center of its predicament is disingenuous.

Second, Brookfield disregards the physical realities of the situation and plain language of the Service Plan in presenting new "evidence" that all the Districts—including the Financing Districts—are the sewer service provider and thus can be enjoined from "denying" service.[2] That notion is contradicted by Brookfield's own words just paragraphs before, where it admits that Green Mountain is the service provider as expressly set forth in the Service Plan. While the Service District may own the sewer lines within the development, that has no bearing on whether the

[2] Brookfield continues to refer to all the Districts as simply "FRMD" and makes no effort in the Reply to explain why the Financing Districts, which provide no services whatsoever, are included in the Amended Motion.

Service District can be the actual sewer service provider. The Service District cannot dump sewage into a ditch—the actual collection for processing and treatment is completely dependent on Green Mountain and the terms of the Green Mountain IGA that Brookfield negotiated with Green Mountain, including the Reserved Capacity Term.

Finally, because the reality is that Green Mountain provides the sewer service, Brookfield must renew its argument that the Districts' Service Plan can be enforced against Green Mountain (which has its own service plan) in a proceeding to which Green Mountain is not a party. None of the authorities cited in the Reply support that theory, which defies common sense and violates basic principles of due process, where the only commitments Green Mountain made are in the Green Mountain IGA, not the Districts' Service Plan.

ARGUMENT

Ms. Urban's supplemental affidavit and exhibits are intended to support two arguments: (1) that the Reserved Capacity Term is irrelevant to Brookfield's current situation and (2) that the Districts are the service provider and thus can be enjoined from "denying" service. Each is addressed in turn.

First, in Section A of the Reply, Brookfield contends that the Reserved Capacity Term is irrelevant because Green Mountain and the Districts were aware of Brookfield's future development plans to bring residences "online" (i.e., constructed and connected to the sewer lines) ***after*** expiration of the Reserved Capacity Term. Specifically, new to the Reply is the argument that the Districts represented in 2020 bond documents that "there were 171 remaining residential units to be developed." Reply at 5 (citing Urban Supp. Aff. ¶ 13). As a preliminary matter—that is not true. The Official Statement merely states that there were 171 vacant lots in the development

and does not speak to whether Brookfield would develop them, which is something only Brookfield would have known. *Id.* at Ex. N thereto, pp. 2-3, 52-53. What the Official Statement does say is that Green Mountain's obligation to continue to reserve capacity to accept wastewater from the development was set to expire on January 15, 2023. *Id.* at 50. The Districts did not know if Brookfield was going to complete construction before the expiration of the Reserved Capacity Term. The fact is, Brookfield should have been tracking its development progress against the Reserved Capacity Term but failed to do so.

Regardless, Brookfield's position is that prior knowledge of its future development plans somehow requires Green Mountain to serve residences that were not online — and in the case of Filing 21 were not even under construction — prior to expiration of the Reserved Capacity Term. That is a contractual dispute between Brookfield and Green Mountain under the Green Mountain IGA, and that makes the Reserved Capacity Term not only relevant, but fatal to Brookfield's Amended Motion. Brookfield's contention otherwise is disingenuous because the Reserved Capacity Term is Green Mountain's stated reason for not providing service. Resp., Ex. 13 (Green Mountain's counsel explaining that the obligation to reserve additional capacity to serve future development "sunset" on January 15, 2023).

Brookfield's new position that the Reserved Capacity Term is irrelevant also contradicts its own actions. When Brookfield realized the implication of the expiration (after the Service District put them on notice of it) Brookfield scrambled to try to negotiate an amendment to the Green Mountain IGA. Resp., Ex. 12, pp. 1-2. The amendment Brookfield proposed would have eliminated the Reserve Capacity Term and expressly provided that Green Mountain would serve Brookfield's remaining buildout despite it not being online by the expiration date. Green

Mountain's board declined to adopt the proposed amendment (because the Green Mountain IGA Brookfield negotiated allows the board to do so) and the existing Green Mountain IGA, with the expired Reserve Capacity Term, remains in place. If Brookfield nevertheless believes Green Mountain remains obligated to serve Brookfield's unfinished development under the existing IGA or for equitable reasons, its remedy is to pursue civil claims against Green Mountain, not to move to enforce the service plan for another special district that is not the sewer service provider.

Second, in Section C of the Reply, Brookfield argues that the Districts are, in fact, the sewer service provider and therefore can be enjoined from "denying" service to Brookfield. Reply at 8-10. For instance, Brookfield attaches a District web page where "FRMD [purportedly] even holds itself out as . . . the sanitary service provider." *Id.* at 9 (citing Reply, Ex. H). That is misleading because the cited web page explains that sewer service is provided through an IGA with Green Mountain and that, pursuant to the Green Mountain IGA, the Service District is required to pass through Green Mountain's fees to the residents. *See id.* Similarly, the newly cited resolutions regarding sewer rules and fee schedules all acknowledge that Green Mountain provides the sewer service pursuant to the Green Mountain IGA, that Green Mountain's rules and regulations apply, and the Service District passes Green Mountain's fees on to the residents. Reply, Exs. K-M.

These new exhibits reiterate exactly what the Service Plan says: "sanitation services will be provided to the Project by Green Mountain Water and Sanitation District." Am. Mot, Urban Aff., Ex. A, § I.C(4)(b), p. 12. In fact, Brookfield contradicts itself just paragraphs before where it admits that Green Mountain is the sewer service provider. Reply at 7-8 (incorrectly arguing that

the Special District Acts permits a court to enforce one special district's service plan against "another service provider in the plan [i.e., Green Mountain]").[3]

Brookfield's contradictory argument conflates the Service District's ownership of sewer lines within the development with the ability to provide sewer service, i.e., the ability to collect sewage for processing and treatment, which none of the Districts can do. This distinction is why, under the Green Mountain IGA, no new residence can be connected to the sewer system unless Green Mountain approves and issues a permit. Am. Mot., Ex. C, § 2.3, p. 4. The Service District cannot bring sewage onto the system without anywhere to put it. Brookfield cannot square its position that the Districts are the sewer service provider against the fact that all its requests and payments for Certificates of Service and tap permits—both past and present—have been to Green Mountain.

Finally, Brookfield argues that because metropolitan districts can have a broad sweep of authority to offer various potential services, including sewer service, the Districts are therefore "authorized" to be the actual sewer service provider to the development. Reply pp. 8-9. Brookfield misses the point. It is physically impossible for the Districts to be the actual sewer service provider. As expressly provided in the Service Plan, Green Mountain is the actual sewer service provider pursuant to an agreement Brookfield negotiated for its proposed development. The fact that it now regrets the agreement it negotiated does not create an obligation under the Districts' Service Plan that simply does not exist.

[3] The statutory definition of "interested party" Brookfield relies upon for this argument concerns who may enforce a service plan against the subject district, ***not who a service plan can be enforced against***. None of the authorities Brookfield cites—and no Colorado case the Districts are aware of—allow for one district's service plan to be enforced against a separate district that is not the subject of the service plan.

Consequently, none of the Districts have denied Brookfield sewer service and there is nothing for the Court to enjoin. Rather, Brookfield needs to seek relief against Green Mountain in an action to which Green Mountain is a party. The Amended Motion should be denied.

DATED: April 14, 2023

IRELAND STAPLETON PRYOR & PASCOE, PC

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

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April, 2023, a true and correct copy of the foregoing **FOSSIL RIDGE METROPOLITAN DISTRICT NOS, 1, 2, AND 3'S SUR-REPLY IN OPPOSITION TO AMENDED MOTION TO ENJOIN A MATERIAL MODIFICATION OF SERVICE PLAN** was filed and served via CCEF on all counsel of record.

/s/ Dawn A. Brazier
Dawn A. Brazier