DATE FILED: April 17, 2023 11:21 AM
FILING ID: DF5D1814D4F59
CASE NUMBER: 2022CV31409

DISTRICT COURT, JEFFERSON COUNTY, STATE OF COLORADO
100 Jefferson County Parkway,
Golden, Colorado 80419

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.

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Case No. 2022 CV 31409

Division: 1

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PLAINTIFF'S RESPONSE TO DEFENDANT FOSSIL RIDGE METROPOLITAN DISTRICT NO. 1'S PARTIAL MOTION TO DISMISS

Plaintiff Solterra LLC ("Solterra"), through its undersigned counsel, responds to defendant Fossil Ridge Metropolitan District No. 1's Partial Motion to Dismiss ("Motion"), as follows:

INTRODUCTION AND BACKGROUND

Solterra is the developer for a planned residential community in Lakewood, Colorado. (First Am. Compl. ("FAC") ¶¶ 10, 27, 60). Defendants are three local metropolitan districts organized pursuant to C.R.S. § 32-1-101 *et. seq.* to provide public improvements within the community. (*Id*., ¶¶ 2-4, 9). Solterra brings this action as a result of Defendants' separate and joint failures to take steps necessary to timely reimburse Solterra's loans and expenditures incurred to construct such public improvements pursuant to Defendants' obligations and promises under the governing documents. Those documents are: (1) the Second Amended and Restated Service Plan ("Service Plan"); (2) the Master Intergovernmental District Facilities Construction and Service Agreement ("Master IGA"); and (3) the Reimbursement of Developer Loan and Public Infrastructure Acquisition Agreement ("Reimbursement Agreement").[1]

The Service Plan created a multiple-district structure with defendant FRMD No. 1 functioning as the "Service District," and defendants FRMD Nos. 2 & 3 functioning as the "Financing Districts." (FAC ¶¶ 18, 23; Service Plan pp. 8-9 at § I(C)). The Service Plan governs Defendants' related powers and obligations regarding financing public improvements within the development. (FAC ¶¶ 12, 15, 16). The Service Plan also contemplates Solterra advancing funds for public improvements and requires Defendants to repay Solterra up to $91,000,000 from general obligation debt or revenue debt. (*Id*., ¶ 24, 29-31).

[1] Solterra attached these documents to its FAC as **Exhibit A** (Service Plan), **Exhibit B** (Master IGA), and **Exhibit C** (Reimbursement Agreement). Defendants attach them to their respective motions in differing order and with differing exhibit numbers. For convenience and clarity, Solterra cites these documents by name rather than exhibit number.

To that end, the Service Plan authorized Defendants to enter into the Master IGA to coordinate financing for public improvements and repayment obligations—specifically, to "impose an obligation for the Financing Districts to pay revenues to the Service District sufficient to fund the financing . . . of the public improvements that serve the Districts." (*Id*., ¶¶ 19-21). The Service Plan similarly authorized the Service District to enter into the Reimbursement Agreement to "enable the Developer [Solterra] to be reimbursed for such costs [for public improvements] as assessed valuation increases and Debt is available to be issued to repay such obligation," and directs that "[a]t the time at which sufficient assessed valuation is developed within the Financing Districts, the Financing Districts will issue General Obligation Debt and/or Revenue Debt sufficient to repay the Developer under the [Reimbursement Agreement][.]" (*Id*., ¶¶ 24-27,).

The Master IGA, in turn, obligates Defendants to "work together and coordinate their efforts with respect to . . . financing . . . of public improvements" and mandates "the Financing Districts will pay all costs related to construction . . . of said facilities by the Service District" and "the Financing District will issue 'General Obligation Debt' or revenue 'Bonds' in the manner contemplated by the Service Plan in order to pay its obligations[.]" (*Id*., ¶¶ 33, 35).

The Service District and Solterra entered into the Reimbursement Agreement to effectuate Defendants' repayment obligations under the Service Plan and Master IGA. (*Id*., ¶¶ 26, 41, 43). The Reimbursement Agreement thus obligates the Service District to reimburse Solterra for funding or constructing public infrastructure within the districts' territorial boundaries, referred to as "District Eligible Costs." (*Id*., ¶¶ 44, 52-55).

From 2005 to the present, Solterra loaned funds for and/or built substantial public improvements identified in the Service Plan, including onsite water, sanitary sewer, storm sewer,

roads, parks, and a recreation center. (*Id.*, ¶¶ 46, 60, 62, 68-69).

Though the Service District previously reimbursed a portion of those funds/costs, its own financial records *reflect a remaining payment obligation to Solterra* for unreimbursed District Eligible Costs *in the amount of $61,478.702*. (*Id.*, ¶¶ 57-58). The Service District have nonetheless failed to coordinate with the Financing Districts, and the Financing Districts failed to issue debt to fund the Service District's obligation to reimburse Solterra.

In their motions, Defendants never challenge these allegations supporting Solterra's claims. Indeed, they never deny Solterra funded all of the public infrastructure benefitting the districts' residents or that Solterra spent in excess of $80 million on such public infrastructure. They never deny the public infrastructure (including various regional improvements) is installed and currently being used by the districts' residents. Nor does the Service District deny its obligation under the Reimbursement Agreement to repay Solterra for public infrastructure up to $70 million (from general obligation debt). Defendants also do not deny they reimbursed Solterra only $36.9 million from $38.13 million in general obligation bonds previously issued, or that Solterra is owed up to $31.87 million under the Reimbursement Agreement.[2]

The main thrust of Defendants' arguments is that they do not "***yet***" owe the money, relying on a forecast attached to the Service Plan more than 15 years ago—which is clearly predicated on numerous assumptions which may vary over time, *i.e.*, that "[t]here is a high probability that the forecasted results will differ from realized tax base factors (either positively or negatively)."

[2] Defendants claim they are still investigating the amount owed to Solterra. However, Solterra previously shared its documents and expert calculations on the amount of public infrastructure for which it has not been reimbursed. Defendants have had that information for eight months and have never objected to Solterra's calculations nor provided their own calculation.

However, the Service Plan clearly states: "At the time which sufficient assessed valuation is developed within the Financing Districts, the Financing Districts **will issue** General Obligation Debt and/or Revenue Debt sufficient to repay the Developer under the [Reimbursement Agreement][.]" Solterra alleges the current assessed value of the property within the districts is more than sufficient to support the issuance of additional debt up to the $31.87 million remaining under the general obligation debt limit. Thus, Defendants have a current obligation to issue debt to repay amounts funded by Solterra, and Solterra merely seeks the Court's assistance in getting paid what is unquestionably owed.

In its partial motion to dismiss, the Service District also relies on two misplaced contentions, namely that: (1) it is powerless to honor its obligation under the Reimbursement Agreement because it is at the Financing Districts' discretion and mercy to decide whether and when to issue the debt necessary for reimbursement; and (2) this Court lacks authority to afford any remedy to Solterra. These arguments fail, as established below.

ARGUMENT

I. Motion to Dismiss Standard

"[A] motion to dismiss under C.R.C.P. 12(b)(5) is an assertion that the plaintiff's complaint is legally insufficient[.]" *Scott v. Scott*, 428 P.3d 626, 631 (Colo. App. 2018). In considering such a motion, courts must accept all factual allegations in the complaint as true and view them in the light most favorable to the plaintiff. *Norton v. Rocky Mtn. Planned Parenthood, Inc*., 409 P.3d 331, 334 (Colo. 2018). To avoid dismissal, the complaint must make "factual allegations . . . sufficient to raise a right to relief above the speculative level and provide plausible grounds for relief." *Houser v. CenturyLink, Inc.*, 513 P.3d 395, 399 (Colo. App. 2022). Dismissal

is appropriate only when the plaintiff's factual allegations do not, as a matter of law, support the claim for relief. *Id.*

II. The Court Should Deny the Service District's Motion as to Solterra's Claim for Breach of Contract

A. The Service District controls whether and when to issue debt via its management authority and obligation to coordinate with the Financing Districts to fund the repayment due under the Reimbursement Agreement

The Service District declares Solterra "fails to identify any contractual obligation that has been breached" under the Reimbursement Agreement. (Mot., p. 11). This is false. Solterra plainly alleges: (1) "[t]he Reimbursement Agreement . . . incorporates the obligations . . . set forth in the Service Plan and Master IGA"; (2) "[t]he Reimbursement Agreement requires . . . that all three . . . districts cooperate and coordinate the financing . . . of the Public Infrastructure"; (3) the Service District "has failed and refused to cooperate and coordinate with [the Financing Districts] to issue new debt to repay Solterra"; and (4) "[the Service District] has breached the Reimbursement Agreement for failing to coordinate and cooperate with [the Financing Districts] to issue new debt and by failing to repay Solterra for District Eligible Costs." (FAC ¶¶ 47, 48, 116-17).

The Service District merely disputes these allegations based on its reading of the Reimbursement Agreement and Master IGA. More specifically, the Reimbursement Agreement requires the Service District to reimburse Solterra "from the proceeds of Bonds, if any, provided to the District pursuant to the terms of the Master IGA." (Reimb. Agmt. § 5).[3] But the Service District argues it possesses no control over issuance and receipt of such bond proceeds from the

[3] "Bonds" means "revenue and general obligation bonds . . . payable from certain ad valorem property taxes and other legal sources of revenue received by the [Financing Districts]." (Reimb. Agmt., p. 2 [Recitals]).

Financing Districts because, according to the Service District, the Master IGA "gives the Financing Districts sole discretion to determine whether and when to bond[.]" (Mot., pp. 11-12). On that premise the Service District concludes it could not have breached any repayment obligation under the Reimbursement Agreement because it is at the Financing Districts' mercy to issue bonds. (*Id*.)

The Service District predicates its argument on a single sentence in the Master IGA, which it declares (without analysis) establishes the Financing Districts' sole discretion. (*Id*., pp. 4-5 [SOF ¶¶ 8,9, 13], p. 11). However, the plain language of that provision only grants the Financing District discretion to determine *the manner* in which it issues debt to repay Solterra—not "whether and when" to issue such debt:

> It is anticipated that the funds for Capital Costs[4] *will be provided* through the issuance of General Obligation Debt by the Financing District in amounts sufficient to enable the Financing District to pay the Capital Costs . . .; provided, however, that the Financing Districts shall retain the discretion and authority to provide for and raise said funds *in any manner lawfully available* to the Financing Districts including but not limited to: (i) the issuance of Bonds (whether General Obligation Debt or Revenue Debt), debentures, notes, certificates, anticipation notes, and such other general or special obligations of the Financing District (including lines of credit) as the Financing District shall in its sole discretion determine to issue or incur; . . . The Financing District 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.

(Master IGA, Art. IV, § 4.4(c)) (emphasis added).

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[4] "Capital Costs" includes "those costs which are to be incurred by the Service District for the purpose of . . . constructing . . .the Facilities including . . . [a]ll costs attributable to the construction . . . of the Facilities[.]" (Master IGA, Art. II (1)(j)). "Facilities" means "the facilities and improvements generally described in the Service Plan." (*Id*., at Art. II (1)(y)).

The Master IGA as a whole and viewed in context of the Service Plan further makes plain the Service District's authority over the Financing Districts. *People ex rel. Rein v. Jacobs*, 465 P.3d 1, 11 (Colo. 2020) ("In construing a contract, we interpret the contract in its entirety, seeking to harmonize and give effect to all of its provisions so that none will be rendered meaningless"). The Master IGA expressly states "reference must also be made to the Service Plan for purposes of construing both this Agreement and the Districts' intent" and the Master IGA "shall, in all circumstances, be interpreted in accordance with the Service Plan and the intentions expressed therein regarding the role of each District." (Master IGA, Art. I, §§ 1.3, 1.3(e)).[5] The Service Plan creates the multiple district structure, defines their powers and authorities, and authorizes the Service District to enter into both the Master IGA and the Reimbursement Agreement. (Service Plan §§ I(A), IV(A) and (E)). The Service Plan makes clear the Service District administers and manages financing and reimbursement obligations whereas the Financing Districts exist simply as the vehicle to raise the funds necessary to fulfill those financing and reimbursement obligations:

- "Service District will be responsible for *administering and managing* . . . all District Activities as necessary to serve the Project." (*Id*., § I(C)(1)) (emphasis added).[6]

- "Use of the Service District as *the entity responsible for . . . management of operations* in connection with the District Activities will facilitate a well-planned financing effort[.]" (*Id*., § I(C)(2)(a)) (emphasis added).

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[5] Moreover, Colorado law makes clear "[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, 802 (Colo. App. 2001). "In this way each document can provide assistance in determining the meaning intended to be expressed by the 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 contracts 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).

[6] "District Activities" means "all functions undertaken by the Districts in accordance with the Service Plan to effectuate the purposes for which the Districts are organized." (*Id*., § I(B)).

- Various District IGAs [*e.g.*, the Master IGA] are expected to be executed by the Districts clarifying the nature of the functions and services to be provided by each District. . . . The establishment of District No. 1 as the Service District, and the establishment of District No. 2 and District No. 3 as the Financing Districts, will create several benefits for the Project and the City [including] . . . maintenance of a reasonable mill levy and tax burden in all areas of the Districts through *controlled management of the financing* and operation of the Public Improvements[.]" (*Id*., § I(C)(1)) (emphasis added).

- "The Financing Districts will be responsible for providing the tax base needed to pay the debt service associated with Debt to be issued to construct the Public Improvements and provide the District Activities described herein." (*Id*., § I(C)(1)).

- "In summary, the multiple district structure allows *the Service District to coordinate the timing and issuance of Revenue Debt and General Obligation Debt*, subject to the limitations set forth in this Service Plan, to assure that the Public Improvements and District Activities are constructed at the time and in the manner necessary at market rates. (*Id*., § I(C)(2)(c)) (emphasis added).

The Master IGA's provisions echo this structure, making the Service District the managing district *vis-à-vis* the decision to issue debt to pay (and reimburse) the cost of constructing Public Infrastructure:

- "The Service Plan: 1) states that the Service District will be responsible for managing the financing . . . of the 'Facilities' . . . for the Districts' benefit[.]" (Master IGA, Art. I, § 1.3(a)).

- "The Service District shall perform the following services for the Financing District: . . . Analysis of financial condition and alternative financial approaches, and coordination of bond issuances." (*Id*., Art. V, §5.3(k)).
- "[I]t is agreed that the conduct and control of the work required by this Agreement shall lie solely with the Service District which shall be free to exercise reasonable discretion in the performance of its duties under this Agreement." (*Id*., Art. X, § 10.1).

The Service District's assertion it cannot "force" the Financing Districts to issue bonds equally fails. The Master IGA lists any districts' failure to perform as an "event of default" and expressly authorizes the Service District to enforce the obligations of the Financing Districts under

the Master IGA, including seeking a writ of mandamus or injunctive relief from a court of competent jurisdiction. (*Id*., Art. VIII, §§ 8.1, 8.2).

Consequently, the Service District's predicate arguments—that the Financing Districts exclusively control whether and when to fund the Service District's repayment obligation and the Service District cannot "force" the Financing Districts to do so—fail under the Master IGA and incorporated Service Plan's express language.

B. The Service District's reliance on outdated and speculative projections cannot negate Solterra's allegation of current valuations sufficient to issue bonds

The Service Plan mandates: "[a]t the time at which sufficient assessed valuation is developed within the Financing Districts, the Financing Districts ***will issue*** General Obligation Debt and/or revenue Debt sufficient to repay [Solterra] under the [Reimbursement Agreement][.]" (FAC ¶ 37; Service Plan, § I(C)(2)(a) (emphasis added)). The only restriction on this mandate is the $70 million maximum debt limit for general obligation bonds.

The Service Plan expressly allows debt to exceed 50% of the assessed valuation with a sufficient credit rating or if "the mill levy from which it is payable is limited to fifty (50) mills." (*Id*. § V(A)). Solterra alleges the current actual value of the residential units within the community exceeds $1 billion and the assessed value within the districts' boundaries is $73,802.900—which is 30% higher than projected in the Service Plan for the entire completed development. (FAC ¶¶ 64-65). Based on this, Solterra alleges the current assessed valuation supports issuance of general obligation debt up to the $70 million limit for purposes of repaying Solterra $31,870,000. (*Id*., ¶¶ 87, 94, 115).

The Service District urges the Court not to accept these allegations as true merely because in 2007 the Service Plan "projected" a higher assessed valuation by 2022 and never "projected" a

debt ratio exceeding 50% of the assessed valuation. (Mot., p. 13). However, the outdated, speculative, and qualified projections contained as an attachment to the Service Plan do not control. Instead, the Service Plan's express provisions control the districts' obligation to issue debt when assessed valuations support it. And the Court must accept Solterra's factual allegations in that regard as true. *Norton*, 409 P.3d at 334.

C. The Court can order affirmative relief against the Service District compelling performance of its obligations

Solterra requests multiple forms of relief against the Service District for breaching the Reimbursement Agreement, including: (1) "damages in an amount to be proved at trial, but not less than $31,870,000"; and (2) a mandatory injunction that the Service District immediately coordinate and cooperate with the Financing Districts to issue new general obligation debt up to $31,870,000 to repay Solterra. (FAC ¶¶ 119, 120; Ad damnum (b), (c)). The Service District challenges only the Court's ability to award mandatory injunctive relief, but recharacterizes that relief as a request for specific performance of the Reimbursement Agreement. (Mot., p. 14). From this the Service District argues sovereign immunity bars specific performance as an equitable remedy against a governmental entity for breach of contract. (*Id.*)

As a preliminary matter, Solterra notes it also requests mandatory injunctive relief against the Service District in Claim 4 (good faith and fair dealing), and against the Financing Districts in Claims 5 (unjust enrichment) and 6 (promissory estoppel). (FAC pp. 22-28). Neither the Service District nor the Financing Districts raise any challenge to such mandatory injunctive relief in those claims or contexts, which together would require the ultimate remedy sought in this case—that Defendants coordinate to issue the bonds necessary to repay Solterra. Nonetheless, the Service District's argument limited to injunctive relief in Claim 1 is incorrect for several reasons.

First, it is undisputed courts can grant mandatory injunctive relief against a governmental entity without implicating or violating sovereign immunity principles as codified under the Colorado Governmental Immunity Act, C.R.S. § 24-10-101 *et. seq.* *See CAMAS Colorado, Inc. v. Board of Cnty. Com'rs*, 36 P.3d 135, 139 (Colo. App. 2001) (claims for mandamus or injunctive relief are non-compensatory and thus not barred by the CGIA). Without discussion or analysis, the Service District cites *Snyder v. Sullivan*, 705 P.2d 510 (Colo. 1985) for the blanket proposition Solterra's request for mandatory injunction is really one for specific performance merely because it seeks affirmative action rather than to maintain the status quo. (Mot., p. 14). However, *Snyder* expressly recognizes one of the essential purposes of a mandatory injunctions is to prevent injury. *Id*., n.5. Solterra seeks such affirmative injunctive relief here to *prevent continuing injury* from the Service District's failure repay Solterra and perform its obligations under the interrelated Service Plan, Master IGA, and Reimbursement Agreement.

Mandatory injunctive relief is also appropriate to help prevent continuing and future injury to Solterra if either: (1) the Service District lacks the ability to otherwise pay a damages judgment against it thus effectively depriving Solterra of the benefit of such a judgment;[7] or (2) the Court

[7] The Service District never challenges the Court's authority to award damages against it for breach of contract, nor does it suggest it has or could have the ability to pay such a judgment without essentially implementing the very payment mechanism prescribed by the Service Plan and interrelated Master IGA and Reimbursement Agreement. And it is well-settled sovereign immunity does not bar a suit for damages against a governmental entity for breaching an authorized contract. *See, e.g., Ace Flying Serv., Inc. v. Colo. Dept. of Agric.*, 314 P.2d 278, 280 (Colo. 1957) ("when a state enters into authorized contractual relations it thereby waives immunity from suit"); *Thompson Creek Townhomes, LLC v. Tabernash Meadows Water & San. Dist.*, 240 P.3d 554 (Colo. App. 2010) ("The question whether a state or governmental entity waives immunity from being compelled to specifically perform contractual duties—as opposed to being liable for damages sustained as a result of the government's breach—lay dormant until the decision in *Wheat Ridge* . . . explained that 'neither *Ace* nor any subsequent reliance on it by this court involved a[n] [equitable] claim of specific performance for breach of contract").

determines the Service District cannot compel the Financing Districts to issue debt where a mandatory injunction would still require the Service District to act in good faith to coordinate and cooperate with the Financing Districts to do so, as further established in Part B below.

Moreover, in the present scenario, Solterra is limited as to the amount it can receive due to the debt limitation. Even though the Reimbursement Agreement allows for the recovery of interest on advanced funds at a rate of 6%, Solterra will not recover any interest on the unrepaid advances because of the debt limitation. (Reimb. Agmt., § 4.) Thus, ordering repayment now through a mandatory injunction is the only way to avoid future harm to Solterra. If the Service District is allowed to continue its undue delay in repaying Solterra, there are no consequences to any of the districts, which will continue to enjoy the public infrastructure funded by Solterra without having to pay for the delay—at the same time Solterra will not have access to over $30 million in funds it is clearly owed and will not receive any interest on those funds.

But even if the Court views the requested injunctive relief as specific performance, the Service District's argument still fails. The Service District relies entirely on one case—*Thompson Creek Townhomes, LLC v. Tabernash Meadows Water & Sanitation District*, 240 P.3d 554 (Colo. App. 2010). *Thompson Creek* relied on principles the Colorado Supreme Court espoused in *Wheat Ridge Urban Renewal Authority v. Cornerstone Group XXII, L.L.C.*, 176 P.3d 737 (Colo. 2007).

Wheat Ridge involved a developer's request for specific performance compelling a municipality to perform a contractual promise to exercise its power of eminent domain. *Id*. at 739-40. Despite acknowledging a government's authority to contractually bind itself in commercial and financial matters subject to damages for breach, the Colorado Supreme Court reasoned the equitable remedy of specific performance can implicate concerns about interfering with a

government's ability to effectively govern for the public good, contrary to public policy and doctrines precluding governmental entities from contracting away their core governmental powers such as condemnation. *Id*. at 745. As such, *Wheat Ridge* held specific performance unavailable to enforce a contractual promise involving core governmental powers, but expressly left open the question of whether such a remedy is available for "governmental breach of other kinds of contractual obligations." *Id*.

Thompson Creek extended the reasoning in *Wheat Ridge* to prevent the enforcement of some non-core governmental powers that would equally impede the ability to govern for the public good. 240 P.3d at 556. The plaintiff in *Thompson Creek* sought to enforce a water district's prior contractual promise to allow advance reservation of water taps, notwithstanding the water district had since generally decided to eliminate that reservation option. *Id*. Though this was a non-core governmental power, the appellate court applied the same concern expressed in *Wheat Ridge* over "interference of the courts with the performance of the ordinary duties of the executive departments of government[.]" *Id*. As such, *Thompson Creek* held specific performance unavailable to force a water district to act contrary to its governance decision. *Id*.

The governmental interference concerns underlying *Wheat Ridge* and *Thompson Creek* are wholly absent here. As the Service Plan makes clear, the Service District exists primarily to provide for and finance necessary public improvements. (Service Plan, pp. -10). But this dispute is not about whether or how to provide public improvements—***here the improvements are already installed and in use***. This case is solely about paying for those improvements when and how the Service Plan requires. Therefore, nothing about this dispute implicates the type of general governance decisions and duties for the public good, such as the decisions to exercise eminent

domain powers or abolish the ability to reserve water taps at issue in *Wheat Ridge* or *Thompson Creek*, respectively. Accordingly, the limited holdings and concerns in those cases have no application here.[8]

II. The Court Should Deny the Service District's Motion as to Solterra's Claim for Breaching of the Covenant of Good Faith and Fair Dealing

Solterra alleges the Service District breached the covenant of good faith and fair dealing under the Reimbursement Agreement in two ways: (1) failing to coordinate with and cause the Financing Districts to issue new debt to repay Solterra for District Eligible Costs; and (2) failing to maintain and/or take possession of and maintain various public improvements funded or built by Solterra. (FAC ¶ 142). The Service District only challenges the former. (Mot., pp. 15-16).

The Service District predicates its argument on the notion the covenant of good faith and fair dealing "requires only that the parties perform in good faith the obligations imposed by their agreement." (*Id*., p. 15) (citing *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1995)). Solterra agrees with this. Here, however, the Service District merely parrots its erroneous argument Solterra "fails to identify any contractual obligation in the Reimbursement Agreement that requires the Service District to force the Financing Districts to issue bonds." (*Id*.) Solterra thus adopts its arguments *supra* that the Service Plan and Master I7GA make the Service District the managing district with authority to compel the Financing Districts to issue debt to repay Solterra under the

[8] The Service District's challenge to declaratory judgment—similarly arguing such a claim really seeks the unavailable remedy of specific performance—fails for the same reasons addressed above. (Mot., pp. 14-15). Separate and apart from the Service District's obligations to coordinate with the Financing Districts to compel the latter to issue bonds, Solterra is still entitled to declarations regarding the existence and amount of the Service District's repayment obligation under the Reimbursement Agreement, even if the Financing Districts determine the timing of bond issuance. (FAC ¶¶ 128 (a)-(c)). The Service District does not contest this.

Reimbursement Agreement and the Reimbursement Agreement obligates the Service District to coordinate with the Financing District to do so. (*See infra* pp. 6-10).

Moreover, to the extent the Reimbursement Agreement's "coordination" requirement affords the Service District any discretion, the covenant of good faith and fair dealing applies to Solterra's allegation the Service District failed to fulfill its contractual obligation in good faith. *Amoco,* 908 P.2d at 498 ("The duty of good faith and fair dealing applies when one party has discretionary authority to determine certain terms of the contract, such as quantity, price, or time"; "[t]he covenant may be relied upon only when the manner of performance under a specific contract term allows for discretion on the part of either party"); *McDonald v. Zions First Nat'l Bank, N.A.*, 348 P.3d 957, 967 (Colo. App. 2015) ("When one party uses discretion conferred by the contract to act dishonestly or to act outside of accepted commercial practices to deprive the other party of the benefit of the contract, the contract is breached").

CONCLUSION

WHEREFORE, Solterra respectfully requests this Court deny Fossil Ridge Metropolitan District No. 1's partial motion to dismiss in its entirety.

DATED this 17th day of April, 2023.

FOSTER GRAHAM MILSTEIN
& CALISHER LLP

/s/ Daniel K. Calisher
Daniel K. Calisher, #28196
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 17th day of April, 2023, a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE TO DEFENDANT FOSSIL RIDGE METROPOLITAN DISTRICT NO. 1'S PARTIAL MOTION TO DISMISS** was served via the *Colorado Courts E-filing System* upon all parties/counsel of record.

/s/ Tiffany Noel
Tiffany Noel