

DISTRICT COURT, JEFFERSON COUNTY, STATE OF COLORADO 100 Jefferson County Parkway, Golden, Colorado 80419	
IN RE: THE ORGANIZATION OF FOSSIL RIDGE METROPOLITAN DISTRICT NO. 1, CITY OF LAKEWOOD, JEFFERSON COUNTY, COLORADO	
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UNOPPOSED FORTHWITH MOTION TO JOIN PARTY AND CONTINUE <u>EVIDENTIARY</u> HEARING	

Solterra LLC, (“Solterra”) hereby submits this Unopposed Forthwith Motion to Join Party and Continue Evidentiary Hearing (“Motion”) as follows:

Certificate Of Conferral Pursuant To C.R.C.P Rule 121 § 1-15(8)

The undersigned certifies he conferred with counsel for Fossil Ridge Metropolitan Districts Nos. 1, 2, and 3 (“FRMD”) regarding the relief requested herein. FRMD does **not**

oppose the relief requested by Solterra herein.¹ The undersigned certifies he conferred with counsel for Green Mountain Water and Sanitation District (“Green Mountain”), who is to be joined in this proceeding. Counsel for Green Mountain stated he currently did not have the authority to consent to the joinder.

INTRODUCTION

As established in Solterra’s Amended Motion Pursuant to C.R.S. § 32-1-207(3)(a) to Enjoin a Material Modification to the Service Plan and Enforce Mandatory Obligations of the Service Plan to Enforce (“Motion to Enforce”), as well as its Reply in support thereof (“Reply”), this Court has the power to grant the relief requested by Solterra in this proceeding. The Court’s power extends not only to FRMD, but also as to Green Mountain.

Nonetheless, for the reasons set forth below, Solterra submits this Motion to conclusively confirm this Court’s power, expressly join Green Mountain as a party herein, and to continue the upcoming evidentiary hearing—so there can be no question the Court’s order will be binding and enforceable against all interested parties.

Solterra seeks a forthwith ruling because the evidentiary hearing is next week—on June 28, 2023. This Motion will serve judicial economy, the parties’ interests, and will avoid or

¹ ~~FRMD currently takes no position as to Section III below, i.e. whether Green Mountain, by participating in this proceeding but failing to intervene as a party, has waived any right it may have had to object to the enforceability of the Court’s order against it. FRMD requested that the following statement be inserted with respect to its position: FRMD does not oppose this Motion because, as set forth in FRMD’s Response to the Motion to Enforce, FRMD’s position is that the relief requested by Solterra, if available, can only be provided by Green Mountain and will necessarily impact Green Mountain, making Green Mountain a necessary party to this proceeding. Outside of this concept, FRMD takes no position on any of the factual or legal arguments contained in this Motion, and FRMD’s non-opposition should not be construed as support for such factual and legal arguments.~~

streamline further expensive and unnecessary proceedings.

I. By Statute, The Court Has Power Over Green Mountain

Solterra need not repeat the arguments contained in its Motion to Enforce and Reply. However, for the Court’s convenience, by way of brief summary, Solterra notes as follows.

The Motion to Enforce was filed under the Special District Act to enforce the Service Plan and to enjoin a material modification thereof. Green Mountain is an interested party and has the right to participate in this matter.²

Section 32-1-207(3)(a) provides “[a]ny material departure from the service plan as originally approved [...] which constitutes a material departure thereof [...] ***may be enjoined*** by the [district approving] Court upon its own motion [...] or upon the motion of any interested party as defined in section 32-1-204(1).” (Emphasis supplied). Further, Colorado courts have held the Special District Act controls the extent to which courts can enforce service plans and the procedures set forth in Section 32-1-207(3) control over more general theories of enforcement. *See Plains Metro. Dist. v. Ken-Caryl Ranch Metro. Dist.*, 250 P.3d 697, 701 (Colo. App. 2010).

Section 32-1-207(1) provides “facilities, services, and financial arrangements of the special district shall conform so far as practicable to the approved service plan.” Section 32-1-207(3)(a) states the “any material departure from the service plan ... may be enjoined by the

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

Court.” The Service Plan at issue in this case requires the sanitary sewer service be provided to the entire Project and that such service be provided by Green Mountain and coordinated between FRMD No. 1 and Green Mountain. That is the relief Solterra is seeking herein, and the Court has the power to grant the relief under the Special District Act.

II. Green Mountain Has Received Notice and Actively Participated Herein

Solterra delivered copies of the original and amended motion to counsel for Green Mountain, who acknowledged receipt of both. Solterra also delivered a copy of the Reply on Green Mountain through its counsel. Green Mountain has also been served with all discovery.

Additionally, Green Mountain has actively participated in this proceeding by, without limitation: (1) voluntarily attending and participating in the Court’s status conference regarding discovery and the setting of the evidentiary hearing; (2) being deposed; (3) producing documents (pursuant to CORA); and (4) coordinating as to its representative witnesses and otherwise in connection with the evidentiary hearing.

Thus, other than removing any doubt as to the ~~binding and~~ enforceable nature of the Court’s order (once handed down) against Green Mountain, these proceedings should be relatively unaffected by the requested joinder. Certainly, Green Mountain will suffer no prejudice as a result of being joined. On the contrary, if Green Mountain wishes to assert rights or otherwise object to the relief to be granted herein, it will be able to do so—instead of avoiding accountability only to make some sort of jurisdictional or collateral attack on the Court’s order after the fact.

III. Alternatively, The Court’s Order (Following The Evidentiary Hearing) Should Be Binding Upon And Enforceable Against Green Mountain Even If It Is Not Joined³

As set forth above, Green Mountain has actively participated in this proceeding. Nonetheless, Green Mountain has thus far submitted no briefing, chosen not to challenge the court’s jurisdiction or power, and has declined to intervene or otherwise assert any rights or objections—despite knowing the full scope, arguments, and implications of the Court’s prospective ruling in this matter on Green Mountain.

This constitutes a waiver by Green Mountain or will be collateral estoppel against it. *See, e.g. Briggs v. American Family Mutual Insurance Co.* 833 P.2d 859, 864 (Colo.App.1997) (where insurer had notice and opportunity to intervene but failed to do so, it was bound by resolution of issues in the related case); *see also Wilcox v. Sealey*, 346 N.W.2d 889, 892-94 (Mich.App.1984) (Where party “had actual notice the [issue] was being litigated and [could] easily have intervened, we hold that the doctrine of collateral estoppel prevents [the party] from being entitled to retrial[.]”); *Padgett v. Theus*, 484 P.2d 697, 704-5 (Alaska 1971) (“considerations of equity and good conscience do not require that the judgment be vacated [...] the [party] had ample, timely notice of the litigation and the implications it carried [and despite such knowledge] of the scope of the relief sought in the litigation and the importance of the litigation in regard to his [interests] [the party] chose not to intervene[.] In such circumstances we cannot ascribe significant weight to any interest of [the party] which would tend to militate

³-FRMD-Does

against preserving the fully litigated judgment which was obtained in the case[.]”).

Accordingly, in the event the Court does not allow Green Mountain to be joined as a party in this matter, it should rule that its order on the Motion to Enforce will be binding and enforceable on Green Mountain despite a lack of joinder.

IV. Granting This Motion Will Serve Judicial Economy and The Parties Interests

The granting of this Motion will significantly serve judicial economy and the parties’ interests in many ways—most prominently avoiding duplicative and appellate proceedings. Green Mountain has taken the position that, unless it is joined as a party herein, it will collaterally attack or pursue an appeal based upon on its lack of express joinder. Plainly, the Court and all parties should seek to moot otherwise avoid that issue on the front end.

This Motion is time sensitive and is also designed to avoid or mitigate what Solterra claims could be millions of dollars in damages if the sewer service to the new lots is not provided by FRMD and/or Green Mountain. Joining Green Mountain—or holding it has waived its rights to object to the relief to be ordered herein—can moot this procedural issue and expedite the relief to be granted (requiring issuance of the subject permits) when the time comes.

This is particularly true given it is undisputed the sewer system has been oversized, has capacity to serve the new homes, and is complete and in place and is ready to go—all that is needed is for FRMD and Green Mountain to consent to connecting the new homes to their respective systems. Solterra’s relief should not be hindered or delayed by a Green Mountain collateral challenge (on joinder) after the court rules.

FRMD has taken the position Green Mountain is an indispensable party herein.

Consequently, they must support—or cannot object—to Green Mountain’s joinder herein. Additionally, FRMD, through counsel, has agreed granting this Motion will serve judicial economy as well as the parties’ interests.

REQUESTED RELIEF

WHEREFORE, Solterra hereby requests: (1) Green Mountain be joined and made a party or other respondent in this proceeding; (2) the evidentiary hearing scheduled for June 28, 2023, be continued to the first available date on the Court's and parties' calendars; and (3) for such other and further relief in favor of Solterra as the Court deems just.

— DATED this 23rd day of June, 2023.

FOSTER GRAHAM MILSTEIN
& CALISHER LLP

/s/ Daniel K. Calisher
Daniel K. Calisher, Reg. No. 28196
Attorneys for Solterra LLC

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