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Jefferson County Commissioners
Golden, Colorado

Lakewood City Council
Lakewood, Colorado

Via email

Re: First Supplement in Response to Arguments and Misleading Information from Counsel for Green Tree and Brookfield - Proposed C-470 Interchange Dinosaur Ridge Loan Settlement

Dear Commissioners and Councilors:

The hearing March 26, 2019 before the Jefferson County Commissioners was enlightening. It drew out into the open arena - for examination and debate - inaccurate information presented by the Jefferson County Attorney and attorneys for both Green Tree and Brookfield.

The following corrections are provided so that the Commissioners' decision will be based upon the most accurate information available.

Here are the primary issues raised by the Commissioners:

1. Is the proposed settlement 17.5 mill rate property tax a new tax. Answer - yes. Is the 17.5 mill rate levy part of the 40 mill levy already certified for the 2019 budget - no, it is an additional tax. P. 2

2. The Proposed Settlement Agreement has Jefferson County and Lakewood approving a new mega special district. P. 3

3. Repaying the Loan with Land is not only permitted, it is the most reasonable and logical outcome. P. 5

1. Is the proposed settlement 17.5 mill rate property tax a new tax. Answer - yes. Is the 17.5 mill rate levy part of the 40 mill levy already certified for the 2019 budget - no, it is an additional tax.

Answers from the Jefferson County, Green Tree and Brookfield attorneys (as well as Hank Brumley) - no, it is not a new tax; yes it is already part of the 40 mill levy. The 17.5 mill tax levy is included in the 40 mill tax levy already certified for the Green Tree district.

This is not accurate.

The Settlement Agreement, 2010 - 2019 Green Tree Budgets (and Audits) filed with the Colorado Department of Local Government and the 2007 Green Tree Service Plan all clearly establish that the 17.5 mill rate property tax is, in fact, an additional tax imposed upon the future residents, including homeowners.

It is not part of the 40 mill levy already assessed by the Green Tree district.

Adding it to the 40 mill level already imposed will exceed the 50 mills limit set forth in the 2007 Green Tree Service Plan.

A. The Proposed Settlement Agreement states the 17.5 mill levy is new and in addition to taxes already imposed:

". . . the Financing District under the Service Plan, agrees **to impose a 17.5-mill ad valorem property tax on all taxable property within the Green Tree Boundary and on Included Property** ("Pledged Revenue"). Green Tree, and specifically Green Tree Metropolitan District No. 2, as the Financing District under the Service Plan, irrevocably pledges 17.5 mills for payment of principal and interest on the Payment Obligations **and shall adopt a legislative measure in compliance with Article 11, Section 6 of the Colorado Constitution providing for the levy and payment of the Pledged Revenue as set forth in this Agreement".** (Settlement Agreement p. 2 -3 Section II C)

VI (G.) Green Tree **has not** and will not impose any ad valorem property tax mill levy **that will prevent it from levying taxes** outlined in Section II(C)

Obviously, if the 17.5 mill rate levy was already part of the 40 mill levy, there would be no need to "impose" the tax or "adopt a legislative measure . . . providing for the levy and payment" of this tax.

Section VI (G.) expressly states no prior tax was levied and nothing will prevent it from levying this new tax.

B. All of the Green Tree budgets and mill certifications available (2010 - 2019) and filed with the Colorado Department of Local Government show no mill levy for debt. Assessing the 17.5 mill levy would be the first time.

The Proposed Settlement Agreement provides that the 17.5 mill levy will repay the loan debt - debt service - "**principal and interest on the Payment Obligations**".

The mill rate has ranged from 50 mills (the maximum) for 2010, 2011, 2012, 2015,2016, 2017 and 2018 to 30 mills for 2014, 2013 and 40 mills for 2019.

Consistently for every year, the mill levy certification filing, including the filing for 2019, shows the mill levy <u>was assessed for operational expenses, not debt service</u>. The mill levy for debt service, including 2019, <u>has always been 0.00</u>.

At no time has Green Tree assessed a mill levy for debt service.

If it had, then those payments, even a few dollars, would have paid down the now almost $16 million debt to the taxpayers.

No payments were made because no mill levy to pay off debts was ever assessed.
This will be the first mill levy - property tax - to pay off the debt.

It is a brand new tax that did not exist before - and it is in addition to the mill levy already assessed for operational expenses. (See Budgets, Mill Certifications filed with Colorado Department of Local Government)

C. The Green Tree Service Plan (2007) authorizes a total mill levy for operational and debt service taxes to be 50 mills. The current mill levy for 2019 for operational expenses (not debt service) is 40 mills.

17.5 mills added to the 40 mills will exceed the combined authorized limit of 50 mills, requiring a modification of the Service Plan with a public hearing. (CRS 32-01-207)

The facts establish that the 17.5 mill levy for debt service to pay the principal and interest on the loan will be a <u>new tax</u> in addition to any mill levy already authorized. In fact, it is not included in the 40 mill levy certified for 2019.

2. <u>The Proposed Settlement Agreement has Jefferson County and Lakewood approving a new mega special district</u>.

Throughout the hearing before the Jefferson County Commissioners, counsel for the County and the Commissioners repeatedly asserted that the Proposed Settlement Agreement was for the payment of money only. And that it only applied to the land inside the current Green Tree boundary. That simply ignores the express provisions of the Proposed Settlement Agreement which state the contrary.

A. The very first section of the Proposed Settlement Agreement states:

"I. Green Tree **<u>Boundary Expansion</u>**. Within one year of this Agreement's full execution, Green Tree **will make a single written request to owners of the Potential <u>Inclusion</u>**

Property to submit a petition to include such property within the boundaries of Green Tree Metropolitan District No. 2, except for any property owned or previously developed by Solterra. **Any property that is included into Green Tree is hereinafter referred to as "Included Property."**

Section II (C) provides that the 17.5 mill rate will be imposed upon the "**included property**": "the Financing District under the Service Plan, agrees **to impose a 17.5-mill ad valorem property tax on all taxable property within the Green Tree Boundary and on Included Property** ("Pledged Revenue") (Proposed Settlement Agreement pages 2 - 3)

Section VI (B) provides that this material change in the Service Plan will not be a material modification - which under CRS 32-1-207 would require a public hearing and separate approval:

"VI (B). The Service Plan does not prevent Green Tree from adopting the Authorizing Resolutions and issuing the notes, **and adopting the Authorizing Resolutions and issuance of the notes will not constitute a material modification to or departure from the Service Plan. The County agrees that the above actions do not constitute a material modification of the Service Plan.**" (Proposed Settlement Agreement page 3)

The simple point is, if this settlement agreement was just about the payment of money and applied to only the current boundary of the Green Tree district, none of the above provisions, including the very first section of the Agreement would be written. There would be no point. It is completely irrelevant language, if and only if, as the Commissioners and attorneys of the parties assert, the Proposed Settlement Agreement is only about money and the current Green Tree District.

In fact, as set forth in the provisions quoted above, the parties intend to subvert CRS 32-1-601 and 602 (Consolidation) and CRS 32-1-207 (Modifications) by approving the inclusion of additional property outlined in Exhibit C of the Settlement Agreement and agreeing that the agreement to expand Green Tree district is not a material modification, which it most certainly is (adding a new tax and expanding the boundaries for the purpose of paying the settlement).

The Commissioners' and attorneys deliberate effort to ignore these express provisions of the Proposed Settlement Agreement suggests that they are not genuine in their efforts to communicate and disclose the true elements of the agreement in order to fairly educate the public as well as address obvious concerns about these provisions expressed by the citizens.

Ignoring or hiding these provisions does not change the express terms of the Proposed Settlement Agreement.

B. The "Included Property" to be included in the new mega special district are primarily residential - including all of the Big Sky District.

Exhibit C - the "**Included Property**" - to the Proposed Settlement Agreement includes all of Rooney Valley except Bandimere into the new and expanded Green Tree district. This area

is undeveloped and scheduled for primarily residential development, including Big Sky district.

The future residents of this proposed mega special district will be paying the bulk of this 17.5 mill rate on their property taxes.

Therefore, contrary to representations by the Commissioners and party attorneys, the tax is not only an additional tax, it is a tax that will ultimately be paid by residents. A tax on future residents to repay a tax already paid by residents.

Taxpayer once. Taxpayer twice. No payment at anytime by the people who profited from the taxpayer loan.

At no time nowhere in the Proposed Settlement Agreement does anyone assert that the loan will be repaid by those who received the benefit of the loan - the Three Dinos and property owners of the land in the Green Tree District.

Why aren't the developers paying the money back to the taxpayers.

3. <u>Repaying the Loan with Land is not only permitted, it is the most reasonable and logical outcome.</u>

During the course of the hearing, the Commissioners mockingly dismissed the idea that repayment of the taxpayer loans could be in land. The Attorneys shortsightedly and inaccurately dismissed the idea as outside the scope of what the Court could decide.

In fact, repayment of the loan in land is just as likely as a judgment and 10 mill tax to pay the judgment.

The Commissioners put themselves into a tiny box limiting the settlement options to only what they believe the Court could decide and the 10 mill rate authorized by statute to pay for any judgment against a quasi municipality like a special district.

Here is why this approach is factually and legally incorrect. Here is why they need to, literally, think outside of that tiny box:

A. **Most settlements have little to do with the legal limitations on damages.** I managed a mediation program for the federal court in Hartford Connecticut in the late 70's and early 80's. I have been a trial and arbitration attorney for 35 years. I have had formal training as a mediator and serve as a volunteer mediator with the Jefferson County Mediation Service. I have negotiated and settled thousands of disputes. Based upon 40 years of experience, most settlements have little to do with legal limitations on damages.

Simple example: A fence separates two neighbors' yards. It is broken by one neighbor. The other neighbor offers to settle the dispute with tickets to the Garth Brooks Concert. Settled. A court did not have the power to force one neighbor to give concert tickets to the other

neighbor to settle the dispute. But it settled the dispute.

In our case, one acre of land from the Three Dinos to Jefferson County and Lakewood to settle the loan repayment - would settle the case. In a heartbeat. Two acres - they wouldn't think twice. Five acres - done deal. How about 10 acres, 20 acres, 30 acres. What is a fair payment of land in order to settle the $15 million owed to the City and County.

The fact is that no one has asked. The fact is that the Commissioners refuse to even consider the possibility. The fact is that this is tantamount to a breach of the fiduciary duty to the public - arbitrarily or purposefully refusing to try to settle the dispute with the exchange of land.

B. The Three Dinos and the Land are, in fact, part of the lawsuit. The Court could enter judgment against the Three Dinos - and their individual members - and their land.

The defendants to the lawsuit for the repayment of the loan includes the Three Dinos and the individual members of that development group. They are named, were served and appeared through counsel. The same attorneys representing the Green Tree District represent the Three Dinos and the individual members. They are before the Court and must defend against the claim.

The Three Dinos tried to get the claims against them dismissed, arguing that Brookfield brought the claims too late. The Judge denied that motion. Here is what he said:

"The elements of a claim of unjust enrichment [filed against the Three Dinos] are that (1) at plaintiff's expense, (2) defendant received a benefit, (3) under circumstances that would make it unjust for defendant to retain the benefit without paying. DCB Const. Co., Inc. v. C. City Dev. Co., 965 P.2d 115, 119-20 (Colo. 1998).

The parties agree that Three Dinos benefitted from the increased value of the Three Dinos Parcels, that such benefit was the result of the construction of the interchange, and that the interchange was partially financed by Carma and Solterra) [Brookfield]. [The rest of the financing came from Lakewood and Jefferson County]

Given the parties' admissions concerning the first two elements of an unjust enrichment claim, the question before the court is when (if at all) Solterra [Brookfield] knew, or reasonably should have known, that Three Dinos's enrichment was unjust.
The first amended complaint [filed by Brookfield against the Three Dinos and the actual named persons who are the Three Dinos] raises many questions in the court's mind. . . . . The court also has no information **concerning the extent to which (if at all) defendants Jenkins and Mullins, who hold ownership interests in Three Dinos and are involved in the governance of the Districts, are responsible for the Districts' failure to issue Reimbursement Obligations, to issue bonds, or to otherwise repay Carma and Solterra [Brookfield]**. It is alleged that Carma made demand upon the Districts to issue the Reimbursement Obligations (Amended Complaint, par. 35); why (and, most importantly, when) these requests were refused is not alleged. (Court Ruling Denying Motion to Dismiss Claim Against Three Dinos based on Statute of Limitations dated February 1, 2019,

p. 5).

Therefore, if a judgment is awarded by a jury against the Three Dinos, the judgment may be collected by placing an lien on their land and selling their land to pay the judgment. No immunity that may be claimed by the Green Tree district will prevent a judgment against the Three Dinos or their individual members.

One acre to dismiss the case. In a heartbeat. Two acres. Done Deal. Five acres. Don't even have to think about it. Ten acres, twenty acres, thirty acres. How much will it take. This is how the case will settle, not in the tiny box the Commissioners put themselves in. They need to, literally, think outside of their tiny box.

C. <u>Green Tree district is also subject to paying a judgment in land.</u>

Since the Three Dinos are defendants and we can collect a judgment against them in land, it is not necessary to go any further. But the Commissioners and party attorneys also took the position that Green Tree is immune from a judgment against the land and this assertion deserves a response.

The entire history of the Green Tree district, the Three Dinos and the Interchange make clear that the sole purpose for creating the Green Tree District was financing the construction of the Interchange for the benefit of the developers - the Three Dinos.

The Audits and Budgets filed with the Colorado Department of Local Government make clear that the developer, the Three Dinos, made advances in order to finance the operation of the district. The same documents make clear that proceeds from the loans that were not used to pay for the Interchange went to offset financing the operation of the district. The district and the developer are one in the same. The directors of the district are the Three Dinos.

In a recent case involving an eminent domain action, the Court of Appeals pierced the special district shield and held that a developer may not insulate himself by hiding behind a special district:

"Second, the evidence of bad faith is substantial. We recognize, as the District has pointed out, that in the early stages, **special district boards are generally made up of the developer's representatives. But the representatives, when serving in their capacities as board members, may not take actions based on their own self-interests as the developer**. See Geudner, 786 P.2d at 436-37. At oral argument, counsel for the District conceded that the District's directors, all employees of the Developer, **operated under a conflict of interest** in pursuing condemnation of Parcel C. Under these circumstances, **we must carefully scrutinize the District's decision to take Parcel C to ensure that it was not tainted by "bad faith.**" Id. at 436." *Carousel Farms Metro District v. Woodcrest Homes, Inc*. 2017 COA 149, cert granted July 2, 2018.

The Court held that the developer acted in bad faith.

Similarly in this case, the developers acted in bad faith in setting up the district to obtain the loans which they did not intend to repay and then hiding behind the district to obstruct a judgment against them - and the land. This is the land which increased in value as a result of building the interchange with money loaned by the taxpayers.

The taxpayers may obtain payment of the judgment from the land through two independent claims
- one against the Three Dinos who are already part of the case
- two, in addition and separately, against the Green Tree district, eliminating the Three Dinos' effort to use the district as a shield against accountability for their actions.

Either way or both, the Three Dinos obtained the benefit of the loan. They profited from the increased value in the land and will profit from selling the land. They, not the taxpayers, are liable to repay the loan out of those profits. And the taxpayers can take their land as repayment for the loans through a judgment lien on the land.

A decision by the Commissioners ignoring this option is equal to a breach of their fiduciary duty to the citizens.

4. Conclusion

A. Policing special district abuse begins with the City and County. The state legislature has already enacted legislation to prevent abuse. They can do more. But it is also true that what we already have just needs to be enforced by the City and County.

B. The Commissioners spoke earnestly in favor of making a decision that is in the best interest of the citizens. They spoke about the facts.

The facts are that the 17.5 mill levy is a tax increase that did not exist before this agreement.

The facts are that this 17.5 mill levy will tax the future residents of the new mega special district that the City and County will authorize by signing this agreement.

The facts are that the County is purposefully placing itself into a tiny box, deliberately ignoring the obvious settlement - repay the loan with land. This option is already available if we obtain a judgment in this case against the Three Dinos and Green Tree - both defendants in the case.

The County owes a fiduciary duty to the citizens to aggressively litigate and negotiate a settlement in this case and obtain a fair exchange of land for repayment of the loan. That is just, it is fair and it is right.

All we need are public officials willing to in fact represent the citizens instead of going along to get along with the developers - who until now have provided the only leadership on these issues.

Think about it. The City and County have, until now, expressly in writing and in court taken a purely passive role. They have just followed along with Brookfield and are now trying to sell Brookfield's settlement.

But there is a conflict of interest.

Brookfield is not interested in obtaining repayment of the loan in land to the City and County. They have their own agenda - becoming the sanitation district for Rooney Valley and controlling, through the mega special district, development of Rooney Valley.

The interests of the City and County are, or should be, very different from the interests of Brookfield.

It is time to act in the interests of the citizens, for a change.

Respectfully,

John Henderson