DISTRICT COURT, GRAND COUNTY, COLORADO 307 Moffat Ave. Hot Sulphur Springs, CO 80451 (970) 725-3357	DATE FILED: August 13, 2021 8:27 AM FILING ID: CCC1785F8C3A5 CASE NUMBER: 2021CV30008
GRANBY RANCH METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado, Plaintiff, v. HEADWATERS METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado; GRAY JAY VENTURES, LLC.; REDWOOD CAPITAL FINANCE CO., LLC, GRANBY PTENTICE, LLC; and GR TERRA, LLC. Defendants.	**▲ COURT USE ONLY ▲** Case Number: 2021CV30008 Div.: 1
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DEFENDANT HEADWATERS METROPOLITAN DISTRICT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS THE SECOND AMENDED COMPLAINT PURSUANT TO C.R.C.P. 12(B)(1) & (5)

Defendant, Headwaters Metropolitan District ("Headwaters"), by and through its attorneys at Husch Blackwell LLP., submits this reply in support of Headwaters' Motion to Dismiss the Second Amended Complaint ("Am. Compl.") pursuant to C.R.C.P. 12(b)(1) & (5).

The response of plaintiff Granby Ranch Metropolitan District ("GRMD") to Headwaters' Motion to Dismiss ("Response") establishes Headwaters' right to the requested relief. Instead of citing to allegations in its own Complaint that would entitle GRMD to bring its claims, the Response invents allegations not previously made, misrepresents the documents attached to its Complaint, and asserts novel, unfounded theories to try to manufacture contract obligations that do not exist under contracts that GRMD has no right to enforce.

GRMD's Procedural Challenges To the Motion Fail.

GRMD's assertion that Headwaters did not distinguish the portions of its motion based upon C.R.C.P. 12(b)(1) or 12(b)(5) is belied by the clear introduction to Headwaters' motion. Headwaters asserted that Count II should be dismissed for failure to state a claim under C.R.C.P 12(b)(5). Motion, p. 3. With respect to Count VII, Headwaters asserted alternative grounds for relief: lack of subject matter jurisdiction under C.R.C.P 12(b)(1) and failure to state a claim for relief under C.R.C.P. 12(b)(5). Motion, p. 3. The balance of Headwaters' motion thoroughly delineates the facts and law that support dismissal of those claims on the requested grounds.

GRMD also argues that Headwaters' challenge to GRMD's claimed status as a third-party beneficiary to the LPA (Count VII) does not raise a jurisdictional issue, citing a case for the proposition that capacity to sue is not jurisdictional. *See Ashton Properties, Ltd. v. Overton*, 107 P.3d 1014 (Colo App. 2004). But Headwaters has challenged GRMD's standing to sue, not its capacity. As stated in Headwaters' Motion, lack of standing deprives the court of subject matter jurisdiction under C.R.C.P. 12(b)(1). *Hansen v. Barron's Oilfield Serv.*, 2018 COA 132, ¶ 7. This is so because "[s]tanding is a component of subject matter jurisdiction and is a

constitutional prerequisite to maintaining a lawsuit." *Id*. (quoting *Sandstrom v. Solen*, 2016 COA 29, ¶ 14).

Finally, GRMD asserts that this Court cannot determine this jurisdictional issue without an evidentiary hearing. Again, it is wrong. On a 12(b)(1) motion, the Court may consider evidence beyond the pleadings and may "hold an evidentiary hearing to resolve any factual dispute upon which the existence of jurisdiction may turn." *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). However, "if the relevant evidence is presented to the trial court, and the underlying facts are undisputed, the trial court may decide the jurisdictional issue as a matter of law." *Id.* In *Medina*, the Supreme Court reversed, in part, only because it found factual disputes on jurisdictional issues that could not be determined on the record before it. *Id*. at 462-63.

Here, all GRMD's claims are based upon the contracts and other documents provided to this Court with the dismissal briefing. The terms of the documents are before the Court, and as GRMD recognized in its briefing, "the interpretation of a written document is a question of law [and] must be enforced by the courts as written." *See* GRMD Response, p. 18 (citing *Shaw v. Sargent School District N. RE-33-J*, 21 P.3d 446, 449 (Colo App. 2001) and *Hudgeons v. Tenneco Oil Co*., 796 P.2d 21 (Colo. App. 1990)). An evidentiary hearing on Headwaters' Motion would consist of the parties submitting these same documents to the Court and arguing their interpretations of those documents – exactly what they have done in the Motion before this Court. GRMD has not identified any specific factual dispute that cannot be resolved on the record before this Court or any additional evidence it would present to the court at an evidentiary hearing. Under these circumstances, an evidentiary hearing would be undue burden on this

Court's time and resources because the jurisdictional issue can and should be resolved as a matter of law.

I. GRMD Has Not Met Its Burden of Proving That It Was A Direct Third-Party Beneficiary of the LPA.

GRMD does not dispute that a non-party lacks standing to enforce a contract unless the non-party can establish that it is a direct third-party beneficiary of the contract. *See Bear Creek Dev. Corp. v. Genesee Found.*, 919 P.2d 948, 952 (Colo. App. 1996) ("incidental third-party beneficiary to the option contract . . . lacks standing to exercise the option"); *Frisone v. Deane Auto. Ctr.*, 942 P.2d 1215, 1217 (Colo. App. 1996) (affirming dismissal of breach of contract claim for lack of standing). Since standing is jurisdictional, the question before this Court is not (as GRMD asserts) whether GRMD has pleaded a "plausible" claim to third-party beneficiary status. Rather, GRMD has the burden to produce facts to establish that it was an intended, direct third-party beneficiary of the LPA. It has not done so.[1]

GRMD agrees that contracting parties' intent to confer a benefit on a third party "must appear from the contract itself or be shown by necessary implication." Response, p. 15 (*citing E. Meadows Co., LLC v. Greeley Irr. Co*., 66 P.3d 214, 217 (Colo. App. 2003)). As set forth in Headwaters' motion, neither the terms of the LPA nor the surrounding circumstances establish in clear terms or by necessary implication that the owner of the Amenities at the time (GRH) and Headwaters intended to confer a direct benefit on GRMD when they entered the LPA giving

[1] GRMD's Response to Statement of Facts and arguments contain numerous factual statements that are devoid of any citation to the specific allegations of the petition or exhibits attached thereto. GRMD cannot expect this Court to scour the voluminous record before it for the cited allegations or relevant provisions of the documents. This omission by GRMD alone warrants the requested relief.

Headwaters the right to lease the Amenities and an option to purchase during the 50-year lease term.

A. The LPA does not make GRMD a direct third-party beneficiary.

GRMD's third-party beneficiary claim is primarily based upon a single reference to GRMD in a recital to the LPA. That recital merely acknowledges that GRMD and Headwaters had adopted the 2005 Fee Resolution[2] and that Headwaters had entered the 2005 Fee Agreement with GRH, and pursuant to that resolution and agreement (as well as another agreement with a different property owner), "Tenant [Headwaters] imposes Amenity Fees . . . on property within Granby Ranch development ("Granby Ranch") for use of the Leased Premises." Ex. 6, Recital B. As is the nature of a recital, this statement simply provides background for the lease obligations that follow, which involve Headwaters' use of the amenity fees to pay the rent. The recital is not made a part of the terms of the LPA, and it does not create any duty by Headwaters or GRH to perform any obligation for GRMD's direct benefit.

The mere fact that the LPA authorizes Headwaters to use the amenity fee for rent does not lead to the necessary conclusion that the parties intended to confer a direct benefit on GRMD. As set forth in Headwaters' motion, the terms of that contract demonstrate no intent to allow GRMD to force Headwaters to purchase the Amenities or to allow GRMD to sue GRH for return of rental paid. To the contrary, the LPA left the decision to purchase prior to the end of the 50-year term solely up to Headwaters. Ex. 6, §§ 2, 23. And Headwater was only required to purchase at the end of the term *if* the LPA had not been otherwise terminated at that time. Ex. 6, § 23 (c). Headwaters had the option to terminate the agreement at any time by choosing not to

[2] All defined terms shall have the meaning set forth in Headwaters' Motion to Dismiss, unless otherwise stated herein.

approve the rent payment to GRH. Ex. 6, §§ 2(a), 3(a), 3(c). Upon termination, Headwaters had no right to recoup rental previously paid thereunder. Ex. 6, §§ 2(a), 3(a), 3(c).

GRMD argues that this termination right is "illusory" because amenity fees could only be used to make payments under the LPA. Response, p. 19. That is simply not accurate. Both the 2005 Fee Resolution and 2005 Fee Agreement allowed the amenity fee to be used to finance the "acquisition, leasing, construction and replacement of Amenities." Ex. 4, § 6; Ex. 9, § 11. Thus, Headwaters had the option, at any time, to choose not to appropriate the amenity fee for rent payments and instead use those fees to finance the replacement of amenities or construction of new amenities. Headwaters' option, in its sole discretion, to terminate the LPA prior to acquiring the Amenities without return of the rental or any damages claim defeats GRMD's argument that it has a right to enforce the LPA to recover "equity" in the form of rental paid. If the parties did not give that right to Headwaters, they certainly did not intend to give it to GRMD – a stranger to the contract.

B. <u>The surrounding circumstances do not establish that the parties to the LPA intended to make GRMD a direct third-party beneficiary</u>.

Unable to prove the requisite third-party beneficiary status based upon the LPA, GRMD turns to the "surrounding circumstances." In particular, it asserts that the 2005 Fee Resolution creates an "inference" that the parties intended to confer a direct benefit on GRMD through the rental and acquisition of the Amenities. Response, p. 17. An inference does not prove, by necessary implication, the contracting parties' intent to confer a direct benefit on a nonparty. For that reason alone, GRMD's argument fails.

In any event, the language of the 2005 Fee Resolution defeats GRMD's claim. The Resolution recites that "the Districts," Headwaters and GRMD, "have determined that it is in the

best interest of the Districts to acquire, lease, finance, construct, maintain, provide, operate ***and/or*** administer certain recreational amenities benefiting the property within the Districts, . . . " Response, p. 17 (quoting Ex. 4, Recital 2) (emphasis added). This language only says the Amenities *themselves* will benefit the property within the Districts; it does not say that *Headwaters' use of the amenity fee to rent or acquire the property* is intended to specifically benefit GRMD. Nor does it require the amenity fees to be used solely to lease or acquire the amenities – the disjunctive makes clear that the fees could also be used to construct, maintain, operate ***or*** administer the Amenities. This is consistent with section 4 of that document, stating that the amenity fees shall be paid "to Headwaters" to be used "for the purpose of financing the acquisition, leasing, construction, and replacement of Amenities," including the issuance of bonds. Ex. 4, §§ 6, 10.

Moreover, the 2005 Fee Resolution specifically states that "Headwaters will impose and collect the Amenity Fee as set forth in the Amenity Fee Agreements . . . between Headwaters and Granby Ranch Holdings, LLC [GRH] or Aspen Meadows Condominiums, LLC, *which are incorporated herein by this reference*." Ex. 4, 7th Recital. Thus, the 2005 Fee Resolution must be construed in conjunction with the 2005 Fee Agreement. As the parties recognized, the Fee Agreement, not the Fee Resolution, governs the imposition and use of the Amenity Fee because the property owner, GRH, was not a party to the Resolution. In this scenario, only the property owner could agree to subject its property to the amenity fee, and it did that in the 2005 Fee Agreement.

The 2005 Fee Agreement provides that the "intended purpose of the Amenity Fee is to entitle certain minimum use and enjoyment of the Amenities *to the owners and purchasers of*

homes and homesites within the Property, and certain persons not resident within the Property." Ex. 9, Recital E (emphasis added). The "Property" subject to the Fee Agreement was not all located within the boundaries of GRMD; the amenity fee was imposed on other property as well. Exs. 1 & 2, Ex. 9, Schedule 1. In fact, following GRMD's action in December of 2005 to exclude significant portions of the property previously included in its boundaries, only 813 of the approximately 4,937 acres subject to the amenity fee under the Fee Agreement were located within GRMD. Ex. 9, Schedule 1 and Ex. 12.

In addition, the 2005 Fee Agreement specifically provides that "[n]othing herein obligates the Developer to convey, lease, or otherwise contract for any specific Amenities." Ex. 9, Recital C. Thus, GRH – the owner of the Amenities – expressly disclaimed any obligation to convey any specific amenities to Headwaters or any other District. It simply left open the option that GRH might chose to do so, which it did when GRH granted Headwaters a lease and option to purchase the Amenities described therein under the terms of that agreement.

Finally, GRMD's Response wholly ignores the critical fact that the parties amended the 2005 Fee Agreement in 2013 and the amended Agreement specifically disclaims any intent to benefit third parties other than Granby Ranch Metropolitan Districts 3-7, which are separate and distinct districts from GRMD. *See* Ex. 10, § 21(d).

GRMD also tries, without success, to infer an intent to benefit GRMD in the LPA based upon the Granby IGA. GRMD asserts, without citation, that the "LPA was the consummation of this vision in the Granby IGA that the Amenities would be under public ownership." Response, p. 7. A "vision" is hardly an enforceable agreement. Moreover, the Granby IGA, like the 2005 Fee Agreement, acknowledged that the Amenities are not required to be dedicated or conveyed

by the Developer for public use. Am. Compl., Ex. 5, ¶ 5(b) – (d). While GRMD asserts that the Town of Granby authorized the "Districts" to purchase the Amenities, GRH was not a party to the Granby IGA and thus it could not create any enforceable rights in Headwaters, or any other District, to acquire the Amenities. GRMD has no response to that indisputable conclusion.

These "surrounding circumstances," even if relevant to determine the intent of the parties to the LPA, flatly defeat GRMD's claim that Headwaters and GRH intended to directly benefit GRMD when they entered the LPA. At most, these documents evidence a broad concept for Headwaters to collect amenity fees to defray the costs of acquisition, construction, and installation of the amenities to be developed at Granby Ranch and for the property owners subject to those fees, in return, to obtain priority access and discounts to the amenities. GRMD does not dispute that the residents within its boundaries have received those benefits.

While the documents contemplated that one or more of the metropolitan districts might eventually acquire the Amenities, they created no enforceable rights in any such District to do so. Nor do they obligate Headwaters to acquire the Amenities on GRMD's behalf or entitle GRMD to return of the Amenity Fees paid. To the contrary, the 2016 Termination Agreement acknowledges the intent of Headwaters and GRMD that those entities would thereafter "operate independently from" each other. Ex. 8, Recitals F & G.

GRMD asserts that upon Headwaters' dissolution, GRMD would accept responsibility for the operation and maintenance of any infrastructure located with GRMD. Response, p. 19. GRMD cites paragraph 16 of the Second Amended Complaint for this proposition, which in turn refers only to the 2005 Fee Resolution. Neither Paragraph 16 nor the 2005 Fee Resolution contain any reference to GRMD's assumption of these duties. In fact, while GRMD's

assumption of these responsibilities is referenced in the Master IGA, *see* Ex. 1 & 2 and MGA IGA attached thereto, § 5.4, the Master IGA has been terminated. Ex. 8. So GRMD's claim is pure speculation.

GRMD has cited no facts or law to support its claimed third-party beneficiary status. GRMD's reliance on *E.B. Roberts Const. Co. v. Concrete Constructors, Inc*., 704 P.2d 859 (Colo. 1985) is misplaced. In that case, Roberts, a general contractor, entered a contract with CCI to perform certain work as subcontractor. The contract required CCI to furnish a performance bond. When CCI could not obtain the bond, Roberts, CCI and Ideal entered a contract amendment that substituted CCI as the subcontractor. *Id*. at 861. The court determined that CCI was a direct third-party beneficiary of the contract between Ideal and Roberts[3] because all parties understood that Ideal would secure the performance bond but that CCI would perform the work and receive the compensation under the contract, an understanding confirmed by the parties' course of performance and the progress payments made to CCI. *Id*. at 865-66. The benefit to CCI was direct, because "the sole purpose" of the amendment was to enable CCI to go forward with the work. *Id*. at 866.

The facts before this Court are very different. GRMD has not even tried to argue that the sole purpose of the LPA was to provide a benefit to GRMD. Nor has GRMD cited any facts to establish that the parties intended to confer a direct benefit on GRMD when they entered the LPA. GRMD lacks standing to sue to enforce the LPA, and for that reason Count VII should be dismissed for lack of subject matter jurisdiction.

[3] The court's factual recitation indicates that CCI was actually a party to the amended contract. *Id*. at 861.

II. Alternatively, GRMD Failed To State A Claim For Breach Of the Duty Of Good Faith and Fair Dealing Under The LPA.

GRMD's Response confirms that even if it had standing, it has not pleaded facts to state a claim for breach of the LPA. Though not entirely clear, GRMD's claim appears to assert that the duty of good faith and fair dealing compelled Headwaters to assert its rights against GPGH (now Gray Jay) to acquire the Amenities on behalf of GRMD. Am. Compl. ¶83, Response. 22. As set forth in Headwaters' motion, even assuming the truth of the pleaded facts, this claim fails for several reasons.

GRMD recognizes that the purpose of the good faith and fair dealing doctrine is to ensure that both parties' *reasonable expectations* that they will benefit from the contract are not frustrated by the actions of one party. Response, p. 21. The Colorado courts will not imply a duty of good faith and fair dealing that contradicts the terms or conditions for which a party has bargained. *McDonald v. Zions First Nat'l Bank, N.A.*, 348 P.3d 957, 967 (Colo. App. 2015). "Nor does the duty ... inject substantive terms into the parties' contract." *Id*. (internal quotations omitted).

As a case cited by GRMD confirms, a third-party beneficiary's rights are no greater than those of the parties to the contract itself. *See Bloom v. National Collegiate Athletic Assn*., 93 P.3d 621, 625 (Colo. App. 2004). Thus, GRMD can only succeed on its claim if the Landlord under the LPA could have invoked the duty of good faith and fair dealing to force Headwaters to acquire the Amenities following the foreclosure. The pleaded facts establish that it could not.

First, as a matter of law, the foreclosure terminated the LPA. That conclusion is set forth in the Private Defendants' motion to dismiss, which is incorporated in Headwaters' Motion to

Dismiss. Because the LPA was terminated before Gray Jay took title, no party could force Headwaters' acquisition of the Amenities.

Second, even if the LPA survived the foreclosure, Headwaters had no obligation to acquire the Amenities either before or following the 2020 foreclosure. The LPA is clear that Headwaters was not required to acquire the Amenities until December 31, 2062. Ex. 6, § 23. Even then, the acquisition was only required if the LPA had not been otherwise terminated pursuant to the termination options therein, which included Headwaters' option to choose not to appropriate rent in any year. *Id.* Thus, the Landlord could not have had any reasonable expectation that Headwaters would purchase the Amenities before the foreclosure in 2020. Imposition of such a duty under the principles of good faith and fair dealing would contradict the plain terms of the LPA in violation of Colorado law.[4]

GRMD's Response essentially argues that Headwaters had an obligation to assert claims against Gray Jay following foreclosure (inevitably leading to litigation) "to protect the Districts opportunity to purchase the Amenities." Response, p. 22. GRMD does not cite any case for the proposition that the duty of good faith and fair dealing requires a party to a contract to sue to protect the alleged rights of a third party that are disputed by the other party to the contract. Since Headwaters, a public body with limited resources, had the right to walk away from the LPA at any time and chose not to challenge the termination of the LPA on its own behalf, the law cannot imply a duty that would require Headwaters to bring claims for the sole benefit of a third party.

[4] GRMD does not allege that Headwaters was even capable of acquiring the Amenities in 2020. The LPA required payment of a substantial purchase price upon acquisition. Ex. 6, § 23. GRMD cannot seek to impose this obligation upon a public body with limited resources, which is why the LPA gave Headwaters the option the terminate the LPA before it was required to purchase.

GRMD's argument that Headwaters participated in "sham terminations" to make it appear that Headwaters was not operating the Amenities is similarly flawed. Again, the LPA had already been terminated via foreclosure at the time of these alleged activities. And again, termination of the lease by Headwaters was always an option under the LPA, whether based upon a voluntary decision not to appropriate rent or a failure to operate the Amenities. Ex. 6, §§ 2, 3, 10. If terminated for failure to operate, the LPA provides that Headwaters is released from all obligations thereunder; it does not allow the Landlord to compel performance or seek damages. Ex. 6, § 10. GRMD cannot – through an implied duty of good faith – obtain greater rights than the Landlord. GRMD has not pleaded any facts that state a claim for breach of the duty of good faith and fair dealing under the LPA.

III. GRMD Failed To State A Claim For Breach Of The Intergovernmental Agreements.

Count II, asserting breach of the Master IGA, Granby IGA, and Second Granby IGA must be dismissed under C.R.C.P. 12(b)(5) for failure to state a claim for relief. In the Second Amended Petition, GRMD asserts that Headwaters breached a duty under the intergovernmental agreements to manage the affairs of GRMD, which included acquiring the Amenities on behalf of GRMD. Second Amended Complaint, ¶ 54. Headwaters' Motion established that none of these agreements imposed any obligation upon Headwaters to acquire the Amenities, much less to have acquired the Amenities by any specific timeframe.

GRMD's response is significant for what it does not do. Response, p. 20. GRMD does not identify a specific provision of any of the intergovernmental agreements that imposed an obligation on Headwaters to acquire the Amenities. GRMD does not address Headwaters' argument that the intergovernmental agreements could not impose such an obligation on

Headwaters since the owner of the Amenities was not a party. GRMD does not acknowledge that the Master IGA and Granby IGA were terminated; instead, it continues to try to invoke those agreement to support its claim. GRMD does not acknowledge that in conjunction with the termination of the Master IGA, GRMD provided a broad release of all claims against Headwaters, a release that bars its claims in this action.

Unable to overcome these fatal flaws to its claim, GRMD pivots and argues that Headwaters somehow breached the intergovernmental agreements when it ceased to operate the Amenities. Response, p. 20. That is not the claim in its petition, and GRMD cannot amend its pleading through its Response. In any event, GRMD has failed to identify any provision of the Second Granby IGA (the only surviving intergovernmental agreement) that requires it to manage and maintain the Amenities because no such provision exists. The Second Granby IGA merely says that the "Districts," defined as Headwaters, GRMD and GRMD No 2-8, "*will be* authorized to acquire, construct, own, operate and maintain" the Amenities. Ex. 7, § 5(a) (emphasis added). That document imposed no enforceable duty on Headwaters to maintain the Amenities, any more than it imposed such an obligation on GRMD.

GRMD has not and cannot plead any facts supporting a plausible claim for breach of the intergovernmental agreements

CONCLUSION

For the reasons set forth in Headwaters' Motion and this Reply, Headwaters respectfully requests that this Court dismiss GRMD's claims against Headwaters, with prejudice, under C.R.C.P. 12(b)(1) and (5).

Dated this 13th day of August, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of August, 2021, a true and correct copy of the foregoing **DEFENDANT HEADWATERS METROPOLITAN DISTRICT'S REPLY IN SUPPORT OF MOTION TO DISMISS THE SECOND AMENDED COMPLAINT PURSUANT TO C.R.C.P. 12(B)(1) & (5)** was served via the Colorado's Courts e-filing system upon the following:.

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