<table>
<tr><td>DISTRICT COURT, GRAND COUNTY, COLORADO
307 Moffat Avenue
Hot Sulphur Springs, CO 80451</td><td rowspan="3">▲ COURT USE ONLY ▲</td></tr>
<tr><td>Plaintiff: GRANBY RANCH METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado,

v.

Defendants: 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 PRENTICE, LLC; and GR TERRA, LLC.</td></tr>
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<tr><td></td><td>Case No. 2021CV30008

Division 1</td></tr>
<tr><td colspan="2">RENEWED MOTION UNDER C.R.C.P. 12(B)(1) TO DISMISS FOR LACK OF STANDING FILED BY DEFENDANTS HEADWATERS AND GR TERRA</td></tr>
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Defendants Headwaters Metropolitan District ("Headwaters") and GR Terra LLC ("GR Terra") (collectively "Defendants") submit this Renewed Motion to Dismiss the Plaintiffs' Third Amended Complaint ("Amended Complaint") pursuant to C.R.C.P. 12(b)(1).

<u>Certification Pursuant to C.R.C.P. 121 § 1-15(8)</u>

The undersigned counsel has conferred with Plaintiff's counsel and Plaintiff opposes the

relief requested herein.

Introduction

Plaintiff Granby Ranch Metropolitan District ("GRMD") filed this action to enforce alleged rights under a lease purchase agreement entered in 2012 by Headwaters, as tenant, and GRH, the private owner of certain ski and golf amenities at the Granby Ranch development ("LPA"). GRMD claims that it has a right to enforce this agreement as a direct third-party beneficiary.

This Court previously denied Defendants' motion to dismiss earlier versions of GRMD's claims for lack of standing. In January of 2022, the Court found sufficient evidence – based upon the facts then before it – to conclude that GRMD had standing as a third-party beneficiary of the LPA. *See* Order on the Gray Jay et al.'s Motion to Dismiss dated January 28, 2022, p. 14 ("Order"). Based upon new facts and documents disclosed through discovery, these Defendants request that this Court revisit this jurisdictional issue. The record now before this Court does not prove that GRMD was an intended third-party beneficiary at the time the LPA was executed. And governing law defeats GRMD's argument that the parties intended to confer third-party rights to enforce a public body's contract. Moreover, if GRMD had any such rights in 2012, it waived and relinquished those rights years before this lawsuit was filed.

In addition, GRMD lacks standing to enforce the LPA because GRMD has not established any injury in fact to itself. It has not paid any of the Amenity Fees it claims as damages, and it does not use the LPA Amenities. At most, GRMD is seeking relief on behalf of GRMD property owners. But as a quasi-municipal corporation and political subdivision of the state, GRMD has no right to bring suit to enforce rights of other parties.

Statement of Undisputed Facts

Defendants have filed a joint statement of undisputed facts in support of this motion and their respective summary judgment motions (referred to herein as "DSOF").[1] These facts and exhibits are incorporated herein by this reference. In particular, the facts set forth in paragraphs 1-50, 75-79 of the DSOF are material to this motion.

Legal Standard

"Standing is a threshold jurisdictional question that must be determined before a case may be decided on the merits." *Defend Colo. v. Polis*, 482 P.3d 531, 542 (Colo. App. 2021). Lack of standing deprives the court of subject matter jurisdiction under C.R.C.P. 12(b)(1). *Tabor Found. v. Colo. Dep't of Health Care Pol'y & Fin.*, 487 P.3d 1277, 1280 fn.3 (Colo. App. 2020); *Hansen v. Barron's Oilfield Serv., Inc.*, 429 P.3d 101, 103 (Colo. App. 2018) (quoting *Sandstrom v. Solen*, 370 P.3d 669, 672 (Colo. App. 2016)). 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*, 370 P.3d at 672). A plaintiff must have standing at the time it files its lawsuit and at the time judgment is entered. *See Syfrett v. Pullen*, 209 P.3d 1167, 1169 (Colo. App. 2009).

Because standing is a jurisdictional prerequisite, it can be raised at any time during the proceedings; if there is no standing, the court must dismiss the case. *See People v. Shank*, 420 P.3d 240, 243 (Colo. 2018). It is the plaintiff's burden to prove subject matter jurisdiction and thus its standing to bring its claims. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001) (citing

[1] All defined terms used in this Motion shall have the meaning set forth in the DSOF.

Trinity Broad., Inc. v. City of Westminster, 848 P.2d 916, 925 (Colo. 1993)). To establish standing, a plaintiff must prove (1) that it "suffered an injury in fact" and (2) that the "injury was to a legally protected interest." *Hickenlooper v. Freedom from Religion Found. Inc.*, 338 P.3d 1002, 1006 (Colo. 2014) (emphasis omitted).

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*, 35 P.3d at 452. 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.*

Here, GRMD's claimed third-party beneficiary status is defeated by the terms of the LPA and the evidence before this Court. Contract interpretation presents a question of law. *People ex rel. Rein v. Jacob*, 465 P.3d 1, 11 (Colo. 2020). The courts' primary goal in contract interpretation is to give effect to the intent of the parties, determined primarily from the language of the instrument itself. *Id.* When a written contract is complete and free from ambiguity, the court will conclude that it expresses the intent of the parties and will enforce it according to its plain language. *Id.* The mere fact that the parties interpret the agreement differently does not establish an ambiguity in the agreement. *Id.* GRMD is not claiming any ambiguity in the documents that give rise to its claims. DSOF ¶ 75.

Under these circumstances, an evidentiary hearing would be an undue burden on this Court's time and resources because the jurisdictional issue can and should be resolved as a matter of law.

I. **<u>GRMD Lacks Standing To Bring Its Claims Against Defendants For Breach of The LPA In Counts II & IV And Its Claim For Declaratory Relief To Enforce The LPA In Counts V and VI Because GRMD Was Not An Intended Third Party Beneficiary Of The LPA.</u>**

Under Colorado law, a non-party lacks standing to enforce a contract unless it can establish that it is a direct third-party beneficiary of the contract. *Frisone v. Deane Auto. Ctr. Inc.*, 942 P.2d 1215, 1217 (Colo. App. 1996) (affirming dismissal of breach of contract claim for lack of standing). Direct third-party beneficiaries are created only if the contracting parties intend "to confer a benefit on the third party when contracting." *Everett v. Dickinson & Co. Inc.*, 929 P.2d 10, 12 (Colo. App. 1996). The "intent must appear from the contract itself or be shown by *necessary implication.*" *East Meadows Co., LLC v. Greenly Irr. Co*., 66 P.3d 214, 217 (Colo. App. 2003) (emphasis added).

The benefit must be direct, not merely incidental. *Harwig v. Downey*, 56 P.3d 1220, 1221 (Colo. App. 2002). *Accord 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"). "[I]t is not enough that some benefit incidental to the performance of the contract may accrue to the third party." *Everett*, 929 P.2d at 12. The contracting parties' intent to confer a direct benefit on a third party "must be apparent from the construction of the contract in light of all surrounding circumstances." *Id.*; *see also Harwig*, 56 P.3d at 1221 ("[I]ntent must be apparent from the terms of the agreement, the surrounding circumstances, or both."). The contract or surrounding circumstances must clearly demonstrate an intent to confer <u>enforceable rights</u> on third parties. *See Quigley v. Jobe*, 851 P.2d 236 (Colo. App. 1992).

A. GRMD Cannot Meet Its Burden of Proving That Headwaters And GRH Intended To Confer A Direct Benefit On GRMD When They Entered The LPA in 2012.

In its prior Order, this Court found evidence that Plaintiff "used and benefitted" from the Leased Premises in the LPA. It cited to language in the LPA stating that, pursuant to Headwaters' Service Plan and the 2008 Granby IGA, "the Leased Premises are used by the taxpayers, residents, occupants, visitors and invitees of Granby Ranch" (Recital D) and "the Leased Premises are being used by Tenant for the enjoyment of the taxpayers, residents, occupants, visitors and invitees of Granby Ranch." *See* DSOF ¶ 25, Ex. 13 (Recital D and § ¶ 4(a)). The Court then accepted GRMD's allegation that GRMD contains the "overwhelming majority" of the "taxpayers, residents and occupants" of Granby Ranch. Order, p. 10. But as GRMD's corporate representative admitted at her deposition, that statement is not accurate.

The Granby Ranch development contains some 5,000 acres. DSOF ¶ 2. While GRMD originally included approximately 3,563 acres, GRMD reduced its size dramatically over the years. DSOF ¶ 3. When the LPA was executed in 2012, GRMD contained roughly 225 acres, virtually identical to its current size. *Id.* Thus, the property within GRMD's boundaries constituted a small minority (some **4.5%**) of the total Granby Ranch development. GRMD property owners cannot possibly pay a majority of the property taxes collected within the Granby Ranch development.

There is no evidence that GRMD contains an "overwhelming" majority of the occupants and residents of Granby Ranch; GRMD's corporate representative acknowledged at least one significant subdivision within the Granby Ranch development, Kicking Horse, not within GRMD boundaries. DSOF ¶ 77. The GRMD boundary map depicts hundreds of platted lots in the Granby Ranch development that are not within GRMD boundaries. DSOF ¶¶ 76-77, Ex. 27.

And there are thousands of acres of undeveloped land in Granby Ranch located outside GRMD. Ex. 27. As that development occurs, GRMD's claimed "overwhelming majority" will shrink.

Finally, the visitors and invitees of Granby Ranch referenced in the LPA could reside anywhere, and logically, would reside outside the Granby Ranch development. It is hard to conceive that Headwaters and GRH intended for any visitor or invitee to have a right to enforce the LPA.

Whether or not GRMD can establish a "majority" of current LPA users is not the issue. The LPA does not demonstrate an intent to directly benefit GRMD property owners over other property owners in Granby Ranch, or for that matter, over any member of the public that chooses to use the ski and golf facilities. The apparent purpose of the LPA was to give Headwaters possession and the right to operate the ski and golf amenities on the Leased Premises for the general public. Any benefits to the individuals in the broad categories identified in the LPA were purely incidental to this overall public purpose.

This Court also placed significant emphasis on the 2003 Master IGA in reaching its determination that GRMD was a third-party beneficiary of the LPA. Order, pp. 11-12. Based upon that agreement, the Court concluded that "it was never intended for Headwaters to permanently operate and maintain the infrastructure – the Plaintiff had an expectation to do so if services and facilities were not transferred to the Town of Granby or another public agency." Order, p. 12. The Court cited the 2003 Master IGA language that "upon receipt of notice and dissolution of the Service District in accordance with its Service Plan, the Service District shall transfer, and the Tax District shall accept responsibility for the operation and maintenance of any

Infrastructure located within the Tax District, which has not been transferred to the Town or another public agency." DSOF Exs. 1 & 2, Exhibit F, § 5.4.

The Court noted in its Order that it could not ascertain from the documents before it whether the 2017 Master IGA Termination "eliminated the interrelated duties between the Districts according to the 2003 Master IGA." Order, p. 11 n.16.[2] It is now undisputed that the 2003 Master IGA was terminated by the 2006 Master IGA, which was in effect when the LPA was entered. DSOF ¶ 10, 40.[3]

The 2006 Master IGA did not contain the language from the 2003 Master IGA cited above. The 2006 Master IGA did not reference potential transfer of any property to GRMD. Instead, the 2006 document refers to certain "Facilities" to be financed from the proceeds of indebtedness to be issued by the Districts, payable from funds held or obtained by the Taxing District. DSOF ¶ 10, Ex. 5 (7th Whereas Clause). Section 2.1 of that document states that "'Facilities shall mean the public improvements, services and facilities generally described in the Service Plan, <u>but excluding the Amenities</u>." *Id*. at Ex 5, §2.1(u) (emphasis added). The Amenities were defined as the property and improvements subject to an earlier lease purchase agreement, generally defined as the ski area and golf course. *Id.* at Ex. 5, § 2.1(c). With respect to the Facilities financed with GRMD's debt obligations (which excluded the ski/golf amenities), Headwaters was broadly authorized to sell, transfer, lease, dedicate or otherwise convey those

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[2] Defendants apologize to the Court for any confusion in the prior briefing on this point. GRMD amended its complaint to add the claim under the 2003 Master IGA, and Defendants were still in the process of identifying and compiling all relevant documents in the complex history of this development at the time their responsive pleading was due.

[3] While the parties entered a 2008 Master IGA replacing the 2006 Master IGA, they terminated the 2008 Master IGA in 2010 and reinstated the 2006 Master IGA. DSOF ¶ 19.

improvements to another governmental, quasi-governmental or private entity. *Id*. at Ex. 5, §§ 2.1(u), 5.2.

Defendants will not reiterate the arguments they previously asserted with respect to the 2005 Fee Resolution and Agreement except to state that nothing in those documents requires Headwaters to acquire any particular amenities or provides any reasonable basis for GRMD to anticipate its future ownership of those amenities. Moreover, in 2010, GRMD executed the Exclusion Agreement, wherein it "acknowledges and agrees that the Amenity Fees are payable to HWMD [Headwaters] and *GRMD has no right, title or interest thereto*." DSOF ¶¶ 19-20 (emphasis added). The plain language of that Agreement defeats any claim by GRMD based upon payment of the Amenity Fees.

GRMD have never identified what specific provisions in the LPA accord it third-party beneficiary status or whose obligations it is seeking to enforce, seemingly asserting that it can enforce both sides of the contract without satisfying the performance of either. In other words, it seeks to enforce GR Terra's obligation to accept the purchase price and convey the Leased Premises, without tendering the purchase price required for that transfer. And it seeks to require Headwaters to pay rent and the purchase price, without providing the right to occupy and operate the LPA Amenities. Allowing GRMD to enforce the LPA is essentially unworkable, since it cannot be allowed to enforce performance without satisfying conditions of the contract and abide by contractual limitations therein (such as notices of default and damage limitations). This conclusion is reinforced by the fundamental principal that, as set forth below, third parties cannot force a public body to spend money in future years or compel its performance of a contract.

For these reasons, and the reasons set forth in Defendants' prior briefing on this issue, Defendants submit that GRMD was never an intended third-party beneficiary of the LPA.

B. <u>The Parties Could Not Have Intended To Grant Third Parties The Right To Enforce A Public Body's Performance Of A Contract.</u>

Granting third parties the right to enforce a public body's contract has ramifications not present in the context of private contracts for the simple reason that a government body cannot be compelled to spend money in future years or to specifically perform a contract. Headwaters and GRH, the contracting parties, were presumed to have entered the LPA with knowledge of that law. *McShane v. Stirling Ranch Prop. Owners Ass'n, Inc*., 393 P.3d 978, 984 (Colo. 2017). Contractual language is interpreted in light of existing law, the provisions of which are regarded as implied terms of the contract. *Id.* at 982 (internal citations omitted). *Accord Keeling v. City of Grand Junction*, 689 P.2d 679, 680 (Colo. App. 1984) (existing law at the time and place of the making of the contract becomes a part of the contract). For that reason, one who contracts with a municipality is charged with knowledge of its limitations and restrictions in making contracts. *Keeling*, 689 P.2d at 680. The restrictions on Headwaters' future performance under the LPA defeat any intent by the contracting parties to grant third parties enforceable rights thereunder.

For instance, the LPA could not confer rights on GRMD to enforce Headwaters' payment of rent or exercise of the purchase option. Any such provision would have violated the Colorado Constitution and statute that prohibit a municipality from assuming a future debt without legislative discretion to elect not to appropriate funds for that purpose, rendering the LPA void at the outset. *See* Colo. Const. art. X, § 20, cl. (4)(b); art. XI, § 6; C.R.S. § 29–1–110; *see, e.g., Glennon Heights, Inc. v. Cent. Bank & Tr.,* 658 P.2d 872, 879 (Colo. 1983) (lease-purchase agreement survived constitutional scrutiny because it did not require the State to appropriate

funds for future rent or to exercise option to purchase); *Gude v. City of Lakewood*, 636 P.2d 691 (Colo. 1981) (lease purchase agreement for new municipal office building survived constitutional scrutiny because funds were to be allocated annually at the city's discretion, and the future governing body was not obligated to appropriate funds to discharge the debt); *Black v. First Fed. Sav. and Loan Ass'n of Fargo, N.D., F.A*., 830 P.2d 1103 (Colo. App. 1992) ("Financing methods involving lease-purchase or multi-year lease agreements are constitutional ***if*** the local or state government annually can choose not to renew the lease agreement without further obligation. If nothing in the agreement limits the discretion of the legislative body, there is no debt by loan.") (emphasis added).

The LPA clearly states that it "shall not in any way be construed to be an indebtedness or multiple fiscal-year obligation of the Tenant within the meaning of the provision of any constitutional or statutory limitation or requirement applicable to Tenant." DSOF ¶ 23, Ex. 14, § 3(c). To comport with these requirements, Headwaters retained discretion to elect not to appropriate funds for payment of rent in the ensuing lease year, and its failure to do so terminates the LPA. DSOF ¶¶ 27, 29. As made clear in the Resolution of Headwaters' Board approving the LPA, its terms did not "place the District under an economic or practical compulsion to appropriate moneys to make payments under the Lease or to exercise its option to purchase the Leased Premises pursuant to the Lease." DSOF 24, Ex. 13, ¶ 1. Since Headwaters' Board had to retain retained unfettered legislative discretion with respect to its future performance for the LPA to be valid in the first place, the parties cannot have intended to grant third parties the right to compel Headwaters' future performance – and its future expenditure of funds – under the LPA. Granting such rights would have rendered the LPA void *ab initio*.

Similarly, the Colorado courts lack authority to compel a government body to specifically perform a contract. *Wheat Ridge Urban Renewal Auth. v. Cornerstone Grp. XXII, L.L.C*., 176 P.3d 737 (Colo. 2007) (principles of sovereign immunity, separation of powers and public policy concerns support the rule that "specific performance cannot be had against the sovereign." *Id*. (*quoting Larson v. Domestic & Foreign Commerce Corp*., 337 U.S. 682, 704 (1949)). This Court has applied that rule, granting a motion for summary judgment and holding that a developer could not assert a claim to compel a water and sanitation district to reserve and make water taps available. The Court of Appeals affirmed, noting the "overwhelming authority" prohibiting the enforcement of specific performance against the sovereign as a contractual remedy. *Thompson Creek Townhomes LLC, v. Tabernash Meadows Water and Sanitation Dist.*, 240 P.3d 554, 557 (Colo. App. 2010) (affirming decision of J. Mary C. Hoak).

These fundamental principles of Colorado law confirm that the parties to the LPA did not intent to create enforceable rights in third parties. At most, the homeowners and public were incidental beneficiaries of Headwaters' rights under the LPA.

C. Alternatively, If GRMD Was Ever An Intended Third-Party Beneficiary Of The LPA, It Waived And Relinquished Those Rights Years Before it Filed This Suit.

Finally, even if GRMD could establish it was an intended third-party beneficiary when the LPA was entered, it has since relinquished those rights. Waiver "is the intentional relinquishment of a known right or privilege." *Harper Hofer & Assocs., LLC v. Nw. Direct Mktg., Inc.*, 412 P.3d 659, 663 (Colo. App. 2014) (quoting *Dep't of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984). "A waiver may be explicit, as when a party orally or in writing abandons an existing right or privilege; or it may be implied, as for example, when a party engages in conduct which manifests an intent to relinquish the right or privilege, or acts inconsistently with

its assertion." *Id*. A third-party beneficiary may voluntarily relinquish their contractual rights through subsequent agreements. *See Airstar Corp. v. Keystone Aviation LLC*, 514 P.3d 568 (Utah Ct. App. 2022) (holding sublessee waived its third-party beneficiary right by signing a new sublease that was incompatible with its third-party rights).

In assessing GRMD's third-party beneficiary status, the Court considered the Service Plans for Headwaters and GRMD, the 2003 Master IGA, the 2005 Fee Resolution, the 2005 Fee Agreement, and the 2008 Granby IGA. *See* Order, p. 9. All those documents were terminated or amended after the LPA was entered and before this lawsuit was filed in 2021.

First, as set forth above the 2003 Master IGA was terminated in 2006. Then, in 2016, in consideration for GRH's forgiveness of some $11 million in outstanding GRMD bonds and other agreements, Headwaters, GRMD No. 8, and GRH entered into the Letter Agreement and agreed to eliminate any obligations between the parties (other than limited road operations) and to terminate any other financial obligations between them. DSOF ¶ 32. As contemplated in the Letter Agreement, they entered the Master IGA Termination which expressly terminated both the 2006 Master IGA and already terminated 2008 Master IGA. DSOF ¶ 39. The Master IGA Termination provided that "[t]he Parties intend for certain of the Granby Ranch Districts, specifically GRMD, to operate independently from [Headwaters]," and that "[d]ue to the amended service plans and the intention of certain of the Parties to operate independently from each other, there is no further need for the Master IGAs." DSOF ¶¶ 38-41. It further provided that Headwaters, GRMD, and GRMD Nos. 2-8 have "fully satisfied their obligations under the Master IGAs" and "are released from any further obligations thereunder." DSOF ¶ 42.

Second, the Service Plans for Headwaters and for GRMD were amended to terminate any relationship between them. On October 11, 2016, the Town of Granby approved a second amendment to the Service Plan for GRMD to, among other things, "clarify that the relationship between GRMD and Headwaters as otherwise set forth in the Service Plan is terminated and rendered null and void." DSOF ¶ 34. The 2016 Amendment to the GRMD Service Plan stated:

> The Original Service Plan is amended as a whole to clarify that the District IGA between GRMD and HMD will be terminated [and] GRMD will provide all its own operation and maintenance functions . . . ***with the intent that any role or relationship of GRMD as a "Tax District" and HMD as a "Service District" is terminated.***

DSOF ¶ 35. On November 8, 2016, the Town approved an amendment to Headwaters' Service Plan "to clarify" that the IGA between GRMD and Headwaters would be terminated and that GRMD would thereafter provide all of its own operation and maintenance functions. DSOF ¶¶ 36-37.

Third, in 2016, the Town, Headwaters, GRMD, and the GRMD Nos. 2-8 entered into a Second Granby IGA that superseded and replaced the 2008 Granby IGA. DSOF ¶ 43. The Second Granby IGA distinguishes between the "Public Improvements" contemplated to be dedicated to Headwaters, the Town or another appropriate jurisdiction (with no specific reference to GRMD), and the "Amenities," that are not required to be conveyed or dedicated for public use. DSOF 43, Ex. 21, §§ 4-5. With respect to the latter, the agreement simply contemplates that such authorization *will be* provided to "the Districts" in the future. DSOF 44. That permissive language does not establish any intent by Headwaters or GRH (who was not a party to the Second Granby IGA) to confer any rights on GRMD to enforce the LPA. *Indian Mountain Corp. v. Indian Mountain Metro. Dist*., 412 P.3d 881, 893 (Colo. App. 2016) ("[T]he

language of the service plan is permissive and did not require IMMD to manage the [facility].”). Moreover, the Second Granby IGA affirms that the Amenities are not required to be dedicated or conveyed by the Developer for public use, Ex. 21, § 5, again defeating any claim by GRMD to expectation of future ownership of the Amenities.

Fourth, both the Fee Agreement and Fee Resolution were amended in 2013. DSOF ¶ 17. The 2013 Fee Agreement specifically stated that it “creates no third-party beneficiary rights in favor of any person not a Party to this Agreement unless the Parties mutually agree otherwise in writing . . . .” DSOF ¶ 18.

Finally, in April of 2018, in consideration of the agreements in the 2016 Letter Agreement and other agreements made to resolve disputes between them, GRH, Headwaters, GRMD, and GRMD No. 8 entered into the 2018 Waiver. DSOF ¶ 46. It acknowledges that due to the status of development within Granby Ranch and the amendment of the services plans, the Master IGAs “are no longer necessary.” DSOF ¶ 47. Pursuant to that agreement, the parties broadly released each other and their successor and assigns:

> [F]rom and against any and all claims, demands, obligations, duties, liabilities, damages, expenses, breaches of contract, acts, omissions, causes of action, promises, damages, costs, and remedies therefor of every kind, description, character or nature whatsoever now or in the future, whether known or unknown, raised or which could have been raised, which may otherwise exist or which may arise in relation to . . . the Master IGA, . . . or any other matter related to the formation, administration, and operation of the Districts (the “Claims”) existing as of the Release Date.

DSOF ¶ 48. The Release Date for all included claims occurred prior to GRMD’s commencement of its lawsuit. DSOF ¶¶ 49-50.

This sequence of documents makes clear that between 2016 and 2018, Headwaters and GRMD ended any symbiotic relationship created under the original Service Plans and terminated

any obligations between them. Those rights were not modified without GRMD's consent; it was a party to the above-described agreements and contracted for the terms therein in exchange for valuation consideration, including GRH's forgiveness of some $11.1 in outstanding bonds. DSOF ¶¶ 32, 46. GRMD itself recommended the amendment of its Service Plan to the Town in 2016. DSOF ¶ 34. These undisputed facts establish that GRMD expressed its intent to operate independently from Headwaters and relinquished whatever third-party rights it may have had as the former Taxing District against Headwaters, the former Service District, including any alleged rights under the LPA.

II. In Addition, GRMD Lacks Standing To Bring Its Claims For Breach or Enforcement Of The LPA Because GRMD Has Not Established Injury In Fact To Itself, As Opposed To Individual Property Owners.

GRMD, as a quasi-municipal corporation and political subdivision of the state, does not have standing to maintain a suit on behalf of its citizens. The Colorado Supreme Court has held that counties, unlike states, cannot maintain a suit on behalf of their citizens to protect their citizens' rights. *Arapahoe Cty. Comm'rs v. Denver Bd. of Water Comm'rs*, 718 P.2d 235 (Colo. 1986). Counties are not independent governmental entities existing by reason of any inherent sovereign authority of their residents; they are political subdivisions of the state with only such powers as the state delegates to them. *Id.* Special Districts, such as GRMD, are also political subdivisions of the state, and the powers delegated to them are found in Title 32 – The Special Districts Act. Special Districts have the power to sue and be sued on their own behalf; however, nothing in the Special Districts Act delegates power to special districts to maintain suit <u>on behalf of their citizens</u>. *See* C.R.S. § 32-1-1001. Thus, to maintain this suit, GRMD must establish harm to its own interests.

Standing in Colorado requires injury in fact to a legally protected interest. *Wimberly v. Ettenberg*, 570 P.2d 535 (1977). An injury in fact is a tangible or intangible injury, such as physical damage or economic harm. *Am. Fam. Mut. Ins. Co. v. Am. Nat'l Prop. & Cas. Co.,* 370 P.3d 319, 325 (citing *Barber v. Ritter*, 196 P.3d 238, 245-46 (Colo. 2008)). Standing does not exist when the alleged injury is indirect and incidental to the defendant's conduct. *Wimberly*, 570 P.2d at 539.

GRMD has not itself suffered a tangible or intangible injury from the Defendants' alleged conduct. The Amended Complaint alleges GRMD "will lose approximately $6.05 million dollars in equity already paid (out of a purchase price of $18 million) subject to the LPA from fees collected from its residents and members and terminate the right of the Districts to acquire the Amenities." Third Am. Compl. ¶ 42. The facts do not establish any harm to GRMD as opposed to alleged harm to its property owners.

First, despite GRMD's initial allegation to the contrary, as set forth in the 2005 & 2013 Resolutions and Agreements, Amenity Fees were paid directly to Headwaters. DSOF ¶ 78. See Also Ex. 7, 8, 9, 10. They never passed through GRMD's hands. DSOF ¶ 78.

Second, GRMD has not ever paid an Amenity Fee, and it owns no property subject to the Amenity Fees. DSOF ¶ 79. GRMD cannot have standing to seek refunds of fees it never paid. *See Washington Plaza v. State Bd. of Assessment*, 620 P.2d 52 (Colo. App. 1980) (holding plaintiff has no standing to contest a tax when it did not own the taxed property and did not bear the financial burden of the tax).[4]

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[4] The evidence to date indicates that, despite the language in the 2005 Fee Resolution and Agreement, the seller (usually GRH or a homebuilder) paid the Amenity Fees at closing and the

Third, GRMD explicitly recognized that it has no right or interest in those fees. Under § 3.2.1 of the Exclusion Agreement, "GRMD acknowledges and agrees that the Amenity Fees are payable to HWMD [Headwaters] and GRMD has *no right, title or interest thereto*." DSOF ¶ 20 (emphasis added). GRMD cannot claim any personal loss when it had no right or interest in the fees.

Fourth, this Court has already concluded that payment of rent does not equate to equity in the premises – even to Headwaters who paid the rent and had the option to purchase. *See* Order, p. 19 (concluding that the LPA is not an installment contract). The LPA was not a security transaction. *See Strauss v. Boatright*, 418 P.2d 878, 880 (1966). It was nothing more than a lease with an unexercised option to purchase. *Id.* at 879-80 (holding that the tenant was in default of the lease and option agreement and has no right, title and interest in the property).

Finally, GRMD cannot establish any benefit to itself under the LPA. GRMD did not itself use the ski and golf amenities. Any benefit conferred by payment of the Amenity Fees, such as priority access to amenities and discounts, ran to the successive owners of the lots for which an Amenity Fee had been paid, not GRMD. DSOF ¶¶ 13-15, Exs. 7 & 8. As set forth above, GRMD had reasonable or enforceable expectation to eventual ownership of the LPA Amenities. Any alleged injury to GRMD in this regard is too indirect, contingent, and incidental to establish an injury in fact. For this additional reason, GRMD's claims against these Defendants for breach or enforcement of the LPA must be dismissed for lack of subject matter jurisdiction pursuant to C.R.C.P. 12(b)(1).

2013 Fee Resolution and Agreement were amended to reflect that. In any event, the fee was not paid by GRMD.

Dated this 25th day of January, 2023.

HUSCH BLACKWELL LLP

s/ Jamie H. Steiner
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **RENEWED MOTION UNDER C.R.C.P. 12(b)(1) TO DISMISS FOR LACK OF STANDING FILED BY DEFENDANTS HEADWATERS METROPOLITAN DISTRICT AND GR TERRA LLC** was served via the Colorado Courts e-filing system on January 25, 2023, addressed to the following:

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