DATE FILED: February 27, 2023 9:45 PM
FILING ID: 59E0CDF70EA45
CASE NUMBER: 2021CV30008

DISTRICT COURT, GRAND COUNTY, COLORADO Court Address: Grand County Combined Courts 307 Moffat Ave Hot Sulphur Springs, CO 80451 Telephone No.: (970) 725-3357	
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.; GRANBY PRENTICE, LLC; and GR TERRA, LLC.	**▲COURT USE ONLY▲** Case No.: 2021CV030008 Div.: 1
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PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF HEADWATERS METROPOLITAN DISTRICT ON COUNTS II AND VI OF PLAINTIFF'S THIRD AMENDED COMPLAINT

Plaintiff, Granby Ranch Metropolitan District ("GRMD"), by and through its attorneys, Burg Simpson Eldredge Hersh & Jardine, P.C., respectfully submits this Response in Opposition Motion for Summary Judgment of Headwaters Metropolitan District ("HMD") on Counts II and

VI of the Third Amended Complaint ("Motion"). The Court should deny the Motion for the reasons set forth in this response brief.

I. INTRODUCTION

HMD's Motion involves only two narrow claims that GRMD asserts against HMD in the Third Amended Complaint. The two claims – breach of contract and declaratory judgment/injunctive relief – focus on HMD's actions as the nominal "tenant" under the LPA, siding with the landlord to deprive GRMD of its rights as a third-party beneficiary. [1]

The Second Claim for Relief, Breach of Contract, asserts a claim by GRMD as the third-party beneficiary of the LPA that HMD's conduct caused the loss of the benefits of the LPA. HMD, essentially acting in concert with the developer-property owner despite the purported landlord-tenant relationship, either caused the breach of the LPA or disregarded the rights under the LPA to allow the developer-property owner to "oust" it from possession. So long as the LPA remained in place and $10,000 per lot amenity fees pledged for the purpose of acquiring the property under the LPA continued to be transferred, the property would automatically be acquired

[1] Demonstrating the alignment between HMD as "tenant" under the LPA and the developer-property owner as "landlord," HMD (a government entity) is represented by the same attorneys as the developer-property owner GR Terra. HMD has taken the incredible position in this litigation that it (HMD) defaulted under the LPA by failing to operate the amenities for more than 30 days during the COVID pandemic and thus forfeited its rights (and GRMD's rights as a third-party beneficiary). HMD also takes the position that it lost its rights under the LPA because it did not "appropriate" any funds in a budget that it prepared October 15, 2021, well after this litigation commenced. Of course, HMD had no obligation under the LPA to appropriate any of its own funds other than amenity fees that it collected, which of course were expressly pledged and earmarked to be used for that purpose. Yet, HMD took this action to aid its developer-master in defeating the rights of the public, the citizens of Granby, and GRMD to keep the LPA in place.

by the public either when all amenity fee payments collectible by HMD were paid or at the end of 2062.

The Sixth Claim for Relief seeks a declaratory judgment and injunctive relief that the LPA is a covenant that runs with the land, was not terminated by the foreclosure, and continues in effect. GRMD is not seeking any type of "specific performance" in that claim. The two claims for relief are complementary to the extent that if the Court determines that the LPA remains in place, damages for breach of contract are reduced, while if the Court determines that Headwaters' conduct under the LPA caused a termination, damages caused by Headwaters' conduct would be increased.

GRMD's response brief responds to HMD's arguments raised as follows:

1) HMD repeats the argument made by GR Terra in its motion for summary judgment that the LPA was terminated by foreclosure. GRMD responded to those arguments in its response to GR Terra's motion for summary judgment.

2) HMD argues that the LPA has been terminated because HMD's Board did not appropriate rent payments for the years 2021-2023. Under the LPA, the only obligation of HMD is to appropriate and transfer whatever Amenity Fees that HMD collects each year. These Amenity Fees were previously pledged by HMD under its joint resolution with GRMD and the LPA to be used for the LPA payments. Therefore, HMD has absolutely no obligation to appropriate any of its own general funds. HMD appropriated $250,000 for LPA payments in 2020, before the breach of the LPA on August 31, 2020 by Gray Jay. HMD only used $10,000 of that authority. HMD did not adopt a 2021 budget until October 15, 2021, after this litigation commenced and after GR Terra acquired the property. That refusal to appropriate funds after this litigation began, in concert with

GR Terra, cannot excuse the performance or the breach. HMD also continued to collect Amenity Fees through 2022 – pledged for payments under the LPA – and still holds those funds. To the extent that HMD's "appropriation" of those pledged revenues that it holds is necessary, GRMD can enforce that ministerial act be performed, just as courts routinely order county clerks or municipalities to certify tax levies or special assessments to pay bonds.

3) HMD argues that there can no breach of contract because HMD did not have a "contractual obligation to acquire specific amenities on GRMD's behalf." This argument misrepresents the nature of the relationship between GRMD and HMD, as well as their duties under each. GRMD's position is that because GRMD was a third party beneficiary of the LPA, in which HMD was acting as the nominal "tenant" party representative, HMD had an obligation not to take actions that would breach or terminate the LPA to GRMD's detriment which would prevent the acquisition of the amenities by a public entity (Town of Granby or HMD or GRMD) that would benefit GRMD and its taxpayers.

Between 2003-October 2016, as the "Service District," only HMD had the ability to provide services and own/acquire property for Granby Ranch. GRMD would merely impose taxes and fees and turn those taxes and fees over to HMD to perform the operations. During that time period, GRMD entered into a joint resolution with HMD for $10,000 per lot amenity fees to be paid to HMD for each lot in the district when the lot was sold or developed. Under the Joint Resolution and HMD's Amenity Fee Agreement imposed pursuant to that joint resolution, these amenity fees were paid to acquire the ski and golf facilities through the LPA. Accordingly, HMD was a conduit (as the Service District) to collect and transfer the fees collected from GRMD properties to the private property owner so that the ski and golf facilities would eventually be

acquired as public property. In 2016, the relationship between HMD and GRMD changed slightly in that GRMD could now own and operate facilities, and could perform services, and would no longer have to transfer all funds to HMD. The 2016 Granby IGA confirmed that, expressly stating that either the Town, or Headwaters, or GRMD could acquire, own, and operate the amenities. In 2017, HMD and GRMD entered into the Termination Agreement, but nothing in either that document or the Letter Agreement terminated or affected the LPA, the Amenities Fee, the Amenities Agreement or the Joint Fee Resolution. In fact, HMD continued to collect Amenity Fees from GRMD properties through 2022. HMD also continued to turn those Amenity Fees over to the landlord at least until 2020.

4) HMD's final argument, that GRMD cannot establish damages, fails because HMD has collected over $6.1 million of Amenity Fees while depriving GRMD of its ability to acquire the property as a public amenity. Recall, the LPA (read in conjunction with the 2016 Granby IGA) provides that the public (HMD, GRMD, or Town of Granby) can acquire the property at no cost other than payment of these amenity fees upon sale of the lots or construction of homes. Over $6.1 million of fees authorized by GRMD under the joint resolution would be lost if the LPA is terminated. In addition, HMD continues to hold Amenity Fees that it has collected from 2020-2022 that it now holds for an improper purpose. Those Amenity Fees could have been used by GRMD to purchase and acquire amenities consistent with its service plan and the 2016 Granby IGA. Those are real and significant damages.

Thus, numerous disputed material facts regarding GRMD's interest in the property preclude entry of summary judgment in favor of Defendant. HMD's Motion should be denied.

II. RESPONSE TO DEFENDANTS' STATEMENT OF FACTS

Several of Defendants' statement of facts are disputed, misleading, or incomplete. GRMD has provided a response to Defendants' Statement of Facts. *See Plaintiff's Response in Opposition to Defendants' Statement of Facts* incorporated herein by reference.

III. ADDITIONAL FACTS[2]

Plaintiff has filed with the Court "Plaintiff Granby Ranch Metropolitan District's Statement of Additional Material Facts" on February 26, 2023 at filing ID A8DF13761B2B1, which is incorporated by reference. All of the those facts are supported by the evidence and must be viewed in the light most favorable to the GRMD for purposes of evaluating the Motion.

For the purpose of this Response Brief, GRMD highlights the following facts:

Facts Regarding HMD Appropriations:

- Headwaters Metropolitan District's 2020 budget appropriated $250,000 from amenity fees collected for payments under the LPA. **Ex. 68**.
- Headwaters Metropolitan District did not adopt its 2021 budget until October 15, 2021. **Ex. 69**. The October 15, 2021 budget was the first Headwaters budget that failed to appropriate funds for payments under the LPA. In that submission, Headwaters indicated that it had only expended $10,000 of the $250,000 appropriated in the 2020 budget for LPA payments.
- At least as of September 2022, Headwaters continued to collect an Amenity Fee for properties sold within the district. **Ex. 65**; **Ex. 72**; **Ex. 66,** 114:8-115:20**.** In particular, Ex. 72 shows that $140,000 of Amenity Fees have been collected by HMD from 2021 through September 22, 2022.
- On or about September 1, 2020, Gray Jay, as the new owner of the leased premises, took possession of the Leased Premises, ousted Headwaters, and entered into a contract with GP Amenities as tenant to lease the Leased Premises and operate the Amenities. Ex. 38,

[2] To avoid duplication and reduce volume, Plaintiff will not submit exhibits that have already been filed with the Court. Plaintiff has prepared a Master Exhibit List for the summary judgment briefing.

- GR Terra purchased the property subject to the LPA from Gray Jay Ventures on or about May 5, 2021. **Ex. 77**. As of that date, this lawsuit had been filed. In addition, HMD had not entered any budget resolution declining to appropriate funds.
- After GR Terra and GRCO closed the sale of the Leased Premises as well as the remaining development property, Bob Glarner (the principal of GR Terra and GRCO) appointed Scott Johnson (an old friend of his) and Mr. Johnson's wife to the Board of Directors of Headwaters on or about June 23, 2021. **Ex. 79; Ex. 82**.
- On or about May 5, 2021, GR Terra entered into a 5-year lease with an affiliated entity, GR Operations, LLC, to lease the amenities. **Ex. 78**. GR Operations, LLC is managed by the same manager, Swiss, LLC, that manages GR Terra, and the same person (David Glarner) signed the lease on behalf of both GR Terra and GR Operations. Thus, GR Terra had prevented HMD from operating as a tenant before HMD decided not to appropriate funds on October 15, 2021.

Facts Regarding HMD Pledge of Amenity Fees:

- In Section 3a. of the Second LPA, HMD agreed to pay as rent the proceeds of "all amenity fees collected by the Tenant." **Ex. 13.** § 3a. As used in the Second LPA, the term "Amenity Fees shall mean and refer to any Amenity Fee imposed pursuant to the Fee Resolution and the Fee Agreements, as the same may be amended and restated from time to time, and any other resolution adopted or agreement entered into for the purpose of imposing fees related to the use of the Leased Premises." All Amenities Fees collected pursuant to the 2013 Fee Resolution and its predecessors were to be paid as rent to GRH and its successors as "Landlord." These Amenity Fees were to be the sole source of rent payments; it was entirely possible under the Second LPA that there could be no rent due in any fiscal year if no Amenity Fees were collected by HMD. Id.
- The Second LPA also provided in Section 23 that HMDs could acquire the Leased Premises for the lesser of the Adjusted Appraised Value, which was $18,949,226, subject to certain adjustments for inflation and capital improvements and the value of after-acquired equipment and machinery, or "all Amenity Fees collectable by Tenant under the Amenity Fee Agreements and the Fee Resolution." Id. HMD was also to acquire the Leased Premises on December 31, 2062 if the Lease had not otherwise been terminated in accordance with Section 2(a), (b), or (c). Id. This provision for "Acquisition by Tenant" allowed HMD to comply with its obligations under the IGA with the Town. Id.
- The Second LPA expressly provides that all amenity fees collected from any of the properties subject to amenity fees, regardless of whether or not the properties are in GRMD, GRMD 2-8, or otherwise, are to be applied toward the price of acquiring the amenities. Id.

Facts Regarding Relationship of GRMD and HMD and IGA Termination Agreement:

- HMD and GRMD were intended to operate together for the purpose of providing public infrastructure and facilities for the benefit of the Granby Ranch residents who would live within the boundaries of GRMD. HMD was the "Service District" and GRMD was the "Taxing District." **Exs. 1, 2**. GRMD, as the Taxing District, includes the residential lots that provide the revenue base. HMD, the Service District, does not provide a revenue base.
- The 2003 Master Intergovernmental Agreement attached to the Service Plans ("2003 Master IGA") describes the interrelationship between HMD and GRMD and their assumed roles and responsibilities. **Ex. 2.** GRMD was delegated "the power to finance public improvements, impose property taxes, and collect revenue or take other actions in cooperation with [HMD] that may be necessary to provide the services and facilities needed within the Service Area." Id. §§ 5.1, 5.2, 5.4. Upon dissolution of HMD, GRMD would be responsible for the operation and maintenance of any infrastructure located within the Taxing District. Id. HMD was responsible for the development, construction of infrastructure, financing, and was to "manage and administer all business affairs of the Districts." HMD was to own and operate the infrastructure until it was transferred to the Town or another public agency. Id., Part 4 §§ 4.2, 4.3.
- On November 17, 2017, HMD, GRMD, and GRMD 2-8 terminated the prior Master IGAs through the Termination of Intergovernmental Agreement ("Termination IGA"). **Ex. 19**. HMD continued to collect Amenity Fees from GRMD properties after this agreement. The Termination IGA did not provide for termination of any other agreements other than the Master IGAs.
- On November 8, 2016, the Town, HMD, GRMD, and GRMD 2-8 amended and restated the 2008 Granby IGA ("2016 Granby IGA"). Ex. 21. The 2016 Granby IGA expressly allowed GRMD to own and operate its own facilities, including the golf course and ski resort amenities, if the Town or HMD did not want to own or operate these facilities. Id. GRMD now was able to operate independently.
- The 2016 Granby IGA was not terminated nor was the authority that the Town of Granby had given to "the Districts" to purchase the Amenities ever taken away. The LPA was entered into in 2012 pursuant to the authority granted by the original Granby IGA, which was dated in 2008, and that authority was reaffirmed in the 2016 Granby IGA.

Facts Regarding Damages:

- Over $6.1 million in amenity fees have been collected by HMD. **Ex. 72.** At least $140,000 of those payments have been made since 2021. *Id***.** at 11.

IV. LEGAL STANDARD

A. Summary Judgment Is A Drastic Remedy Proper Only On A Clear Showing That The Moving Party Is Entitled To Judgment As A Matter of Law.

To avoid repetition, Plaintiff incorporates herein by reference the Legal Standard from its *Response in Opposition to Defendant GR Terra's Motion for Summary Judgment On Counts IV, V and VI of the Third Amended Complaint*.

V. ARGUMENT

A. Disputed Issues of Material Fact, as Demonstrated by GRMD's Response to Point I of GR Terra's Motion for Summary Judgment, Preclude Summary Judgment as to Whether the 2020 Foreclosure Terminated the LPA Because the LPA is a Covenant that Runs with the Land.

HMD incorporates by reference GR Terra's argument in its Motion for Summary Judgment as to Argument Section I, arguing that the 2020 foreclosure terminated the LPA, regardless of whether the LPA constituted a covenant that ran with the land, Plaintiff incorporates herein by reference Argument Sections A (1) through (3) in its *Response in Opposition to Defendant GR Terra's Motion for Summary Judgment On Counts IV, V and VI of the Third Amended Complaint*. Plaintiff also incorporates its response to Defendants' Renewed Motion to Dismiss, which also addresses some of these same issues.

B. Headwaters Appropriated Amenity Fee Pledged Revenues for the LPA at Least Through October 15, 2021, After GRMD Filed This Action and Defendants Breached the LPA.

(Initially, HMD incorporates by reference GR Terra's argument that the LPA was terminated because HMD failed to appropriate funds for 2021-2023. In response to HMD's argument, Plaintiff incorporates herein by reference Argument Sections C (1) through (2) in its *Response in Opposition to Defendant GR Terra's Motion for Summary Judgment On Counts IV, V and VI of the Third Amended Complaint*.

HMD's 2020 budget expressly appropriated ALL of the amenity fees collected, up to $250,000, for payment under the LPA. *See* **Ex. 68**. HMD only collected $10,000 in amenity fees in 2020, but that budget and appropriation remained in effect until the next year's budget was adopted. HMD did not adopt a budget for 2021 until October 15, 2021. (see **Ex. 68** at p. 7 (labeled "Page 4 of 5"))(appropriating $250,000 for LEASE PURCHASE AGREEMENT FUND). Thus, there was ample appropriations through the end of 2020, after the initial breach of the LPA by the Lender Defendants on August 31, 2021.

HMD was late in formalizing a budget for 2021, and did not file one until October 15, 2021 **Ex. 69.** This delay was because the new owner of the foreclosed property, GR Terra and GRCO, did not choose and formally qualify a director to appoint until mid-2021. At that time, the principal of GR Terra, Bob Glarner, selected an old college friend, Scott Johnson, and his wife, Susie Johnson, to be on the HMD board, and qualified them through entering into an option contract with either GR Terra or GRCO. Glarner Depo., **Ex. 82,** 110:10-112:11.

The October 15, 2021 budget was the first HMD budget that failed to appropriate funds for payments under the LPA. In that submission, HMD indicated that it had only expended $10,000 of the $250,000 appropriated in the 2020 budget for LPA payments. **Ex. 69** at p. 11 (Bates label HWMD 0008177) By this time, this lawsuit was already filed and GR Terra also breached the LPA

by failing to honor it. HMD and GR Terra cannot excuse their failure to honor the LPA or their breach of it based on this post-facto decision by Bob Glarner's appointees not to appropriate funds.

With respect to the argument that GRMD cannot compel HMD to appropriate funds, this is inaccurate because of the nature of the Amenity Fees as pledged revenue specifically earmarked for payment under the LPA. HMD segregated those Amenity Fees in its own budget. *See* **Exhibits 68 and 69** (segregating the Amenity Fees as revenues in the Lease Purchase Agreement Fund.) The LPA specifically requires all amenity fees collected by HMD to be paid. The recorded Amenity Fee Agreement and the Joint Resolution authorizing the amenity fee requires the same. Therefore, HMD need not appropriate any funds other than pledged revenues that it was already obligated to use for the LPA.

This is similar to general obligation bonds supported by property taxes or revenue bonds supported by special assessment liens. It is well established in Colorado that government entities such as cities or county clerks may be compelled to levy taxes or enforce special assessment liens via foreclosure and turn those funds over to the bondholders. *Victor v. Halstead*, 217 P. 185, 186 (Colo. 1928) (compelling levy of tax where the bond contract requires the city to collect annual taxes sufficient to pay the principal and interest on the bonds); *In re: Special Assessments for Paving Dist.*, 95 P.2d 806, 807 (Colo. 1939) (county treasurer required to sell property subject to special assessment lien where the property owner failed to pay the assessment).

HMD's obligation to "appropriate funds" in future years is merely ministerial, where it only must appropriate pledged Amenity Fee revenues it actually collects and which it contractually agreed to transfer. The cases cited by HMD are readily distinguishable because they involve core government functions that are not merely ministerial and do not involve pledged revenues.

HMD cannot, in good will, terminate the Second LPA at will by refusing to appropriate the Amenities Fees that it has collected. This is particularly true in this case where HMD's Board is controlled by individuals specifically selected by Bob Glarner, the principal of GR Terra, to do his bidding. In *City of Golden v. Parker*, 138 P.3d 285, 288-89 (Colo. 2006), the Colorado Supreme Court dealt with certain economic incentive agreements entered into between Golden and private developers. The incentive agreements were subject to annual appropriation under certain restrictions. The Court held that while the agreements complied with Article X, Section 20 of the Colorado Constitution, since they were subject to annual appropriation, they also vested contractual rights in the developers. *Id*. at 294-96. The Second LPA created vested contractual rights that would terminate only under the conditions set forth in Sections 2 and 3. GRMD may enforce these rights as a third-party beneficiary of the LPA.

C Disputed Issues of Material Fact Regarding HMD's Breach of Contract Preclude Entry of Summary Judgment in Favor of Defendant.

HMD had a duty under the LPA, the Master IGA, Granby Ranch IGA, and the Second Granby IGA to manage the affairs of GRMD and Granby Ranch Metropolitan Districts Nos. 2-8, which included acquiring the Amenities on behalf of GRMD. Although it is true that HMD only had an option to purchase the Leased Premises under the LPA (and given authority to collect a fee to do so through the Master IGA and the Granby Ranch IGA), it was required to manage and maintain the Amenities during the term of its lease. As discussed in further detail below, HMD ceased to operate the Amenities when it no longer wanted to be bound by the terms of the LPA. To prevail on a claim for breach of contract, a plaintiff must prove: (1) the existence of a contract, (2) that it performed their contractual duties or a justification for nonperformance of contractual duties, (3) that the other party to the contract failed to perform, and (4) damages resulted. *Long v.*

Cordain, 343 P.3d 1061, 1067 (Colo. App. 2014). At a minimum, there exist disputed issues of material fact that prevent entry of summary judgment as a matter of law.

(a) HMD Failed to Recognize GRMD's Interest in the Property and Abide by the LPA.

HMD did nothing to assert its rights and thereby protect the Districts' opportunity to purchase the Amenities. Instead, HMD participated in a series of sham terminations and retention agreements with operators for the ski area and golf course, all so GPGH could argue that the LPA had been terminated since HMD had not operated the Amenities for a thirty-day period. As a third-party beneficiary to the LPA, GRMD was no longer able to benefit under the LPA because of HMD's failure to perform its obligations in good faith. GRMD's reasonable expectations were frustrated by HMD refusal to assert its rights under the LPA and instead participating in the series of sham agreements so that the LPA would be terminated.

(i) **The Service Plans**

The case revolves around a simple principle of Colorado law: public funds cannot be used to subsidize purely private property without public benefit. Colorado Constitution, Article XI Sections 1 and 2, Article X Section 20 (TABOR), Title 32 of the Colorado Revised Statutes (the Special District Act) governing metropolitan districts, and the District's service plans all prohibit public funds from being used to solely benefit private property. Granby Realty Holdings, LLC ("GRH"), formerly called Sol Vista Corporation, was the developer of Granby Ranch. In 2003 GRH sought the organization of two metropolitan districts within Granby Ranch. **Exs. 1, 2** [Service Plans]

In March 2003, the Town approved the Service Plans for Sol Vista Metropolitan District 1, later named HMD, and Sol Vista Metropolitan District 2, later named GRMD. PSOF ¶2. The

Districts were intended to operate together for the purpose of providing public infrastructure and facilities for the benefit of the Granby Ranch residents who would live within the boundaries of GRMD. HMD was the "Service District" and GRMD was the "Taxing District." GRMD, as the Taxing District, includes the residential lots that provide the revenue base. HMD, the Service District, does not provide a revenue base. PSOF ¶3.

The 2003 Master Intergovernmental Agreement attached to the Service Plans ("2003 Master IGA") describes the interrelationship between HMD and GRMD and their assumed roles and responsibilities. **Ex. 2** [Service Plan] GRMD was delegated "the power to finance public improvements, impose property taxes, and collect revenue or take other actions in cooperation with [HMD] that may be necessary to provide the services and facilities needed within the Service Area." *Id*. §§ 5.1, 5.2, 5.4. Upon dissolution of HMD, GRMD would be responsible for the operation and maintenance of any infrastructure located within the Taxing District. *Id*. HMD was responsible for the development, construction of infrastructure, financing, and was to "manage and administer all business affairs of the Districts." HMD was to own and operate the infrastructure until it was transferred to the Town or another public agency. *Id*., Part 4 §§ 4.2, 4.3. PSOF ¶4.

On September 25, 2007, a new Consolidated Service Plan was approved by the Town, creating Granby Ranch Metropolitan Districts 2-8 ("GRMD 2-8"). **Ex. 13**. The property in these districts were subject to the terms of the Amenity Fee Agreement and were considered Taxing Districts with GRMD. *Id*. PSOF ¶19.

On February 26, 2008, HMD GRMD, and GRMD 2-8 entered into an Intergovernmental Agreement with the Town ("2008 IGA"). **Ex. 14**. This document provided that "In addition to the types of park and recreation services and facilities referred to or reflected in the Service Plans...the

Districts will be authorized to acquire, construct, own, operate and maintain the ski area and lifts, ski lodge, golf courses and appurtenant clubhouse and maintenance facilities, fishing or "river park" facilities and programs, and parks, trails, and open space for various recreational purposes as more fully described on Exhibit A, attached hereto and incorporated herein by reference, collectively called the "Amenities." *Id*. PSOF ¶ 20.

The 2008 IGA was replaced by an Amended and Restated IGA on November 8, 2016 (the "2016 IGA"). **Ex. 21**. The 2016 IGA had identical language that authorized the Districts to acquire the Amenities. *Id*., ¶ 5 a., p. 3. "Districts" was a defined term under both agreements, and included HMD, GRMD, and GRMD 2-8. The 2016 IGA also authorized the Districts to impose and collect "a one-time, front-end Amenities Fee, in an amount not to exceed $10,000.00 per lot or equivalent dwelling unit in the Districts...." PSOF ¶ 22.

On November 17, 2017, HMD, GRMD, and GRMD 2-8 terminated the prior Master IGAs through the Termination of Intergovernmental Agreement ("Termination IGA"). **Ex. 15**. HMD continued to collect Amenity Fees from GRMD after this agreement. The Termination IGA did not provide for termination of any other agreements other than the Master IGAs. PSOF ¶ 35. However, the Second Granby IGA was not terminated nor was the authority that the Town of Granby had given to "the Districts" to purchase the Amenities ever taken away. The LPA was entered into in 2012 pursuant to the authority granted by the original Granby IGA, which was dated in 2008, and that authority was reaffirmed in the Second Granby IGA in 2016. PSOF ¶ 36.

Given the history and structure of the Service Plans. Loan Documents, Resolutions, and Agreements, including the Second LPA, as well as the symbiotic relationship between HMD and GRMD, and assessing the Amenity Fees, the assertion that HMD had a unilateral power to

terminate the Second LPA without regard to the interests of intended third-party beneficiaries is without merit. The historical documents demonstrate that HMD has contractual obligations and does not have unlimited discretion with respect to the annual appropriation of funds to pay rent under the LPA. **Exs. 1-20**.

(ii) **LPA**

HMD argues that GRMD lacks standing to enforce the LPA and because the LPA terminated in 2020; however, this power to terminate is illusory, and it sheds no light on the status of GRMD as a third-party beneficiary. When the Defendants refused to enforce the LPA in 2020, GRMD brought this action as a third-party beneficiary that was entitled to acquire and operate the ski resort and golf course amenities on behalf of its taxpayers and residents. Significantly, the Court has already ruled as a matter of law that GRMD is a third-party beneficiary entitled to enforce the terms of the LPA and the LPA is a covenant running with the land. *See Order Granting in Part Gray Jay Ventures, LLC, Granby Prentice, LLC, and GR Terra LLC's Motion to Dismiss Second Amended Complaint* dated January 28, 2022, *and Order Granting in Part the Defendant Headwater Metropolitan District's Motion to Dismiss the Second Amended Complaint Pursuant to C.R.C.P. 12(b)(1) & 5* dated January 28, 2022 (collectively "January 28, 2022 Orders").

The original 2005 LPA and the Second LPA were structured to comply with TABOR and included provisions for one-year renewal periods and annual appropriations. **Ex. 16**, ¶¶ 2 a, 3 c. In addition to standard TABOR language, the Second LPA contains other provisions which demonstrate the LPA was to establish a public interest in the Amenities. Without a public interest, there would be no valid basis for HMD and GRMD to impose the Amenity Fee. Second LPA ¶ 4 pertains to the public use and enjoyment of the Amenities for the "taxpayers, residents, occupants,

visitors, and invitees of Granby Ranch." *Id*., ¶ 4 a. Second LPA ¶¶ 4(a) and 23 provided HMD would acquire the Amenities at the end of the last Renewal Term, 2062, or earlier by payment of a predetermined Purchase Price. *Id*., ¶¶ 4(a), 23. Without HMD's purchase of the Amenities under the agreement, it would be making Amenity Fee payments to a private developer for it to own private assets. This outcome is unlawful.

For years, from 2003-2020, the Town, HMD, GRMD, and GRH intended and agreed that the conveyance of the Amenities from GRH to HMD to the Town or GRMD would occur by 2062. **Exs. 1-2, 6-8, 21-22, 32, 56-64**. Furthermore, the June 1, 2005, LPA was included in the original Loan Documents and the LPA remains the operative contract. **Exs. 1-2, 6-8, 56-62**. Under Colorado law, the terms of the LPA are separate from any lien for the debt secured by the Deed of Trust. *Supra*.

There is no evidence that HMD met any of the prerequisites to terminating the Second LPA, and disputed issues of material fact preclude summary judgment in favor of Defendant. In fact, HMD did not terminate the LPA by failing to appropriate Amenity Fees and has continued to demand the collection of an Amenity Fee at closings in Granby Ranch. **Ex. 22.** The emails prove that HMD was taking this position as recently as January 25, 2022. All these Amenity Fees should have been appropriated to make rent payments under the Second LPA, which clearly states in Section 3c. that "If actual Amenity Fees collected during and fiscal year exceed the amount budgeted for Rental Payments for such year, the Board shall amend its budget during such fiscal year to allow for payment of such additional Amenity Fees." **Ex. 16**, ¶ 3 c.

No general fund monies would ever be needed to provide funding under the Second LPA, since the rental payments consisted entirely of the Amenity Fees and those Fees could only be used

to make payments under the Second LPA. Pursuant to section 3 b. of the LPA, the chair and president of the Tenant is obligated to request the required appropriation for each renewal term, which requests were to be "made in good faith" "and in accordance with appropriate procedures." *Id.*, ¶ 3 b. HMD, of course, does not assert that any of this happened, precisely because it intended in bad faith to try to terminate the Second LPA to benefit Granby Prentice and the purchaser of the Amenities, GR Terra. Given the history and structure of the Service Plans. Loan Documents, Resolutions, and Agreements, including the Second LPA, as well as the symbiotic relationship between HMD and GRMD, and assessing the Amenity Fees, the assertion that HMD had a unilateral power to terminate the Second LPA without regard to the interests of intended third-party beneficiaries is without merit. The historical documents demonstrate that HMD has contractual obligations and does not have unlimited discretion with respect to the annual appropriation of funds to pay rent under the LPA. **Exs. 1-20**.

(iii) **November 8, 2016 Granby IGA**

Importantly, after GR Terra purchased the property, it immediately appointed its own Board members, the Johnsons, to the HMD Board of Directors. The Johnsons were long-time friends of Bob Glarner, one of the principals of GR Terra. So, GR Terra cannot claim that HMD committed a breach excusing its performance when the HMD Board was hand-picked by Bob Glarner to do his bidding.

The reason why HMD has not performed as a tenant was because GR Terra immediately leased the premises to GR Operations under a 5-year lease, preventing HMD from taking possession. At least until October 15, 2021, HMD continued to collect amenity fees and its then-current budget contained appropriations for rental payments. **Ex. 68**. It would be absurd for a

landlord to claim that a tenant did not perform because the landlord's own actions prevented the tenant from performing. At a minimum, there exist disputed issues of material fact that prevent entry of summary judgment as a matter of law.

Section 3.c of the LPA (Second LPA) states that the Rental Payments are "a current obligation of the Tenant." **Ex. 32** § 3.c. In section 3a. of the LPA, HMD agreed to pay as rent the proceeds of "all amenity fees collected by the Tenant." As used in the LPA, the term "Amenity Fees shall mean and refer to any Amenity Fee imposed pursuant to the Fee Resolution and the Fee Agreements, as the same may be amended and restated from time to time, and any other resolution adopted or agreement entered into for the purpose of imposing fees related to the use of the Leased Premises." *Id*., § 3.a. All Amenity Fees collected pursuant to the 2013 Fee Resolution and its predecessors were thus to be paid as rent to GRH ***and its successors*** as "Landlord." These Amenity Fees were to be the sole source of rent payments; it was entirely possible under the LPA that there could be no rent due in any fiscal year if no Amenity Fees were collected by HMD. *Id*.

It is undisputed that HMD continued to demand the collection of an Amenity Fee through at least January of 2022 – long after this lawsuit was filed and eight months after GR Terra purchased the property. In two emails sent to Mylea Draper, an Escrow Officer at Title Company of the Rockies, both Diane Rodriguez, accounting manager at Community Resource Services of Colorado, which manages HMD, and Clint Waldron, Esq., of White Bear Tanaka & Waldron, P.C., General Counsel to HMD, affirm that the Amenity Fee of $10,000 is still to be collected per each lot sold at Granby Ranch. **Ex. 65.** Mr. Waldron states that the Amenity Fees were not wiped out by the private foreclosure action and that it can still be used "to finance the acquisition, construction and installation of Amenities." *Id*.

D. GRMD Has Suffered Damages By the Loss of Its Valuable Asset and Fees Paid.

Initially, GRMD notes that nominal damages are available in breach of contract actions, so summary judgment as to the breach of contract action would not be appropriate even if there were no damages. However, GRMD has suffered significant damages if the LPA is terminated and the over $6.1 million of Amenity Fees that were used as partial payment to acquire the Leased Premises as a public amenity are forfeited.

The 2016 Granby IGA provided that GRMD or the Town of Granby were authorized to acquire, own and operate the amenities, in addition to HMD. Thus, the 2016 Granby IGA clearly demonstrates an intent that one of these public entities would do so, even if HMD did not choose to retain the amenities. The LPA provided that the Leased Premises could be acquired as public property at no cost other than payment of these amenity fees (when and if collected), or by 2062 even if all fees are not collected. Over $6.1 million of fees authorized by GRMD under the joint resolution would be lost if the LPA is terminated. In addition, HMD continues to hold Amenity Fees that it has collected from 2020-2022 that it now holds for an improper purpose. **Ex. 72** at 11 of 11 (reflecting 14 amenity fee payments of $10,000 each for a total of $140,000 collected by HMD in 2021-2022 through September 22, 2022). Those Amenity Fees could have been used by GRMD to purchase and acquire amenities consistent with its service plan and the 2016 Granby IGA. Those are real and significant damages.

The factual history of this case illustrates that from at least early 2005, the Leased Premises were always intended for public ownership as an amenity benefitting the Granby Ranch development and its property owners, residents, and taxpayers. This was not a "speculative" event. This certainty is evident as early as February 2, 2005, when counsel for the Districts stated that the

amenities will be transferred to the District through a lease purchase. **Ex. 57**, p. 3. This intent is reiterated by former Town Manager for the Town, Tom Hale, who stated that it was the Town's position that "the amenities are a valuable asset to the County and their loss would be a loss to the community as a whole and it is important their use stays public." **Ex. 58**, p. 4.

This intent remains evident through the years and despite various amendments and restatements to the agreements. In approving the 2012 Resolution Authorizing a Second Amended and Restated Lease Purchase Agreement and a Leased Premises Management Agreement, HMD's Board of Directors clearly states that consideration was given for "the cost and use of the Amenities and the Leased Premises, and their benefits to the District and the enjoyment by the taxpayers, residents, occupants, visitors and invitees of Granby Ranch, and the ***expected eventual vesting of the fee title to the Leased Premises in the District.***" **Ex. 67**, ¶ 1 (emphasis added). In 2015, HMD Director Kyle Harris asserted that "[t]he term of the lease and sublease will end in 2062, to coincide with the ***anticipated conveyance of the Amenities (ski and golf facilities) from GRH to HMD."*** **Ex. 64** (emphasis added). Upon apparently not receiving a response from Counsel, Harris followed up on his previous correspondence, stressing the time-sensitive nature of the agreements and further stating that he thought language was needed "in both of the leases stating ***when and how the facilities will ultimately transfer to HMD.***" *Id*. (emphasis added).

These facts relate contractual obligations and are certain. It wasn't until Granby Prentice, then Gray Jay and GR Terra, who purchased the property as a private party and intends the Amenities to be private, argued that the LPA was extinguished. GRMD's damages for the loss of the valuable Amenities and fees paid to date are "neither uncertain, unnatural, nor remote as to cause, or speculative and conjectural in effect." *Vanderbeek v. Vernon Corp.*, 50 P.3d 866, 870-71

(Colo. 2002). At a minimum, material facts are in dispute which preclude entry of summary judgment in favor of Defendant. Defendant's Motion should be denied in its entirety.

Based on the lengthy case history and facts, there are genuine issues of fact that preclude summary judgment and the Motion should be denied.

VI. CONCLUSION

For all of the reasons set forth herein, and for any other reasons the Court finds just, GRMD respectfully requests that Defendant's Motion be denied in its entirety.

Respectfully submitted this 27th day of February 2023.

BURG SIMPSON
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(Original signature on file)

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of February 2023, a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF HEADWATERS METROPOLITAN DISTRICT ON COUNTS II AND VI OF PLAINTIFF'S THE THIRD AMENDED COMPLAINT** was filed and served via Colorado Courts E-Filing on all Counsel of Record.

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