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CASE NUMBER: 2023CA1612

COLORADO COURT OF APPEALS 2 East 14th Avenue, Denver, Colorado 80203	
Appeal from: Grand County District Court, 2021CV030008, Hon. Judge Mary C. Hoak	
Plaintiff-Appellant: GRANBY RANCH METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado, v. **Defendants-Appellees:** HEADWATERS METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado; GRAY JAY VENTURES, LLC; GRANBY PRENTICE, LLC; GR TERRA, LLC.	▲ COURT USE ONLY ▲
Attorneys for Appellant: David K. TeSelle, Reg. No. 29648 dteselle@burgsimpson.com Lisa R. Marks, Reg. No. 31683 lmarks@burgsimpson.com D. Dean Batchelder, Reg. No. 38425 dbatchelder@burgsimpson.com BURG SIMPSON ELDREDGE HERSH & JARDINE, P.C. 40 Inverness Drive East Englewood, Colorado 80112 Tel.: (303) 792-5595	Case No.: _____

NOTICE OF APPEAL

Plaintiff-Appellant, Granby Ranch Metropolitan District ("GRMD"), submits this Notice of Appeal pursuant to C.A.R. 3 and 4.

Pursuant to C.A.R. 3(d), Appellant states:

1. Caption.

The caption complies with C.A.R. 32(d).

2. Nature of the Case.

A. General statement of the nature of the controversy.

GRMD and Headwaters are special districts in Grand County, organized as part of a dual-district structure with GRMD a taxing district (its property owners paid taxes and fees for public infrastructure and amenities) and Headwaters a service district (developer-controlled and responsible for services). They, along with the developer and property owner, entered into a series of related agreements and resolutions regarding financing amenities, where GRMD agreed to impose on GRMD property owners a one-time $10,000 per lot amenity fee, paid to Headwaters. Via a lease purchase agreement (LPA), Headwaters would acquire the amenities after all fees had been paid, or for $1 at the end of the LPA term. The LPA was recorded and GRMD understood that it ran with the land as a public interest in the amenities, acquired through

governmental funds. The district court concluded as a matter of law that the LPA ran with the land and GRMD was a third-party beneficiary, and ownership of the amenities would ultimately revert to a public entity which could include the Town of Granby, Headwaters, or GRMD.

After GRMD property owners paid approximately $6 million toward the amenities, defendants argued the LPA was terminated by foreclosure of a deed of trust and was no longer in effect. They sought to retain the amenities as private property without any reimbursement to GRMD or its taxpayers for the moneys paid. GRMD brought claims against defendants and defendants counterclaimed. Ultimately, on July 30, 2023, the district court reversed itself and held (1) that GRMD was not a third-party beneficiary and did not have standing and (2) entered summary judgment on certain of defendants' counterclaims. GMRD appeals.

B. The judgment, order or parts being appealed and a statement indicating the basis for the appellate court's jurisdiction.

GRMD provides this advisory notice that it appeals the following orders (while reserving its rights to fully identify the specific orders and issues presented on appeal in its opening brief): the July 30, 2023, Order

Granting the Defendants Headwater Metropolitan District and GR Terra's Renewed Motion under C.R.C.P. 12(b)(1) to Dismiss ("Order Granting Motion to Dismiss"); and the July 30, 2023, Order Denying the Plaintiff / Counterclaim Defendant GRMD's Renewed Motion for Summary Judgment on Counts I, II and III of Defendant / Counterclaim Plaintiff GR Terra's Counterclaims to GRMD's Third Amended Complaint; Order Granting the Defendant / Counterclaim Plaintiff GR Terra's Cross Motion for Summary Judgment on Counts I, II, and III of Defendant / Counterclaim Plaintiff GR Terra's Counterclaims to GRMD's Third Amended Complaint ("Order Granting Cross-Motion for Summary Judgment").[1]

[1] The district court also entered a July 30, 2023, Order Denying as Moot (1) GR Terra's Motion for Summary Judgment on to GRMD's Claims IV (Breach of Contract), V (Declaratory Judgment), and VI (Declaratory Judgment); (2) Headwaters' Motion for Summary Judgment on GRMD's Claim II (Breach of Contract against Headwaters) and VI (Declaratory Judgment); and (3) Gray Jay and Granby Prentice's Motion for Summary Judgment as to GRMD's Claim III (Breach of Contract) and VI (Declaratory Judgment) ("Order Denying Certain Motions as Moot").

Appellant includes this third order here for completeness (and includes it for the court's reference in the Appendix) but does not appeal from it.

C. Whether the judgment or order resolved all issues pending before the lower court including attorney fees and costs.

In an abundance of caution, given that the July 30, 2023, orders may operate as a final judgment for purposes of C.R.C.P. 54(a) and 58(a), and C.A.R. 4(a)(1) and (5), GRMD files this protective notice of appeal. GRMD anticipates filing a motion to clarify with the district court, and a status conference before the district court has been set for November 2, 2023.

No motion for attorney's fees or costs is pending in the district court.

D. Whether the judgment was made final for purposes of appeal pursuant to C.R.C.P. 54(b).

No.

E. The date the judgment or order was entered and the date the order was mailed to the parties or their counsel.

Final judgment was entered and electronically served, via CCE, on counsel Sunday July 30, 2023.

F. Whether the lower court granted any extensions to file any motion(s) for post-trial relief, and, if so, the date of the request, and the date to which filing was extended.

No.

G. The date any motion for post-trial relief was filed.

No motions for post-trial relief were filed.

H. The date any motion for post-trial relief was denied or deemed denied under C.R.C.P. 59(j).

No motions for post-trial relief were filed.

I. Whether an appellate court granted an extension to file any notice(s) of appeal, and, if so, the date of the request, and the date to which filing was extended.

No.

3. An advisory listing of the issues to be raised on appeal.

1. Whether the district court erred in its pre-trial rulings, including its orders interpreting the operative lease purchase agreement or other agreements or resolutions between the parties.

2. Whether the district court erred in its Order Granting Motion to Dismiss.

3. Whether the district court erred in its Order Granting Cross-Motion for Summary Judgment.

4. **Whether a transcript of any proceeding taken before the lower court is necessary to resolve the issues raised on appeal.**

At the time of this filing, Appellant does not believe any transcripts are necessary to resolve the issues raised on appeal, but if any are, Appellant will timely designate (and request, as necessary) them within seven days of this filing.

5. **Whether a magistrate issued the order on review, and if so, whether consent was necessary. If a magistrate issued the order on review and consent was not necessary, whether a petition for review of the order was filed in the district court and ruled upon by a district court judge pursuant to the Colorado Rules for Magistrates.**

No.

6. **The names of counsel for the parties, their addresses, telephone numbers, e-mail addresses, and registration numbers.**

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7. An appendix containing: the judgment or order being appealed; the findings of the court, if any; the motion for post-trial relief, if any; and the lower court's order granting or denying leave to proceed in forma pauperis if appellant is filing without paying the docket fee pursuant to C.A.R. 12(b).

GRMD provides this advisory identification of the issues and orders appealed from, reserving the right to fully identify the issues presented and the orders appealed from in its opening brief:

1. July 30, 2023, Order Granting Motion to Dismiss.

2. July 30, 2023, Order Granting Cross-Motion for Summary Judgment.

3. July 30, 2023, Order Denying Certain Motions as Moot.

Dated: September 15, 2023.

BURG SIMPSON
ELDREDGE HERSH & JARDINE, P.C.

(Signed Original on File)

/s/D. Dean Batchelder
David K. TeSelle, Reg. No. 29648
Lisa R. Marks, Reg. No. 31683
D. Dean Batchelder, Reg. No. 38425
Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that on September 15, 2023, I served a true and correct copy of the foregoing **NOTICE OF APPEAL**, via the Colorado Court E-Filing System, upon acounsel of record, and filed an advisory copy of the same in the District Court.

/s/D. Dean Batchelder
D. Dean Batchelder

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GRANBY RANCH METROPOLITAN DISTRICT

v.

HEADWATERS METROPOLITAN DISTRICT; GRAY JAY VENTURES, LLC; GRANBY PRENTICE, LLC; GR TERRA, LLC

NOTICE OF APPEAL
(C.A.R. 3(d)(8) APPENDIX)

ATTACHMENT #1

July 30, 2023, Order Granting the Defendants Headwater Metropolitan District and GR Terra's Renewed Motion under C.R.C.P. 12(b)(1) to Dismiss

DISTRICT COURT, GRAND COUNTY, COLORADO P.O. Box 192/307 Moffat Avenue Hot Sulphur Springs, CO 80451 970-725-3357	DATE FILED: July 30, 2023 CASE NUMBER: 2021CV30008
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. 2021CV30008 Division 1

ORDER GRANTING THE DEFENDANTS HEADWATER METROPOLITAN DISTRICT AND GR TERRA'S RENEWED MOTION UNDER C.R.C.P. 12(B)(1) TO DISMISS

This matter comes before the Court on the Defendant Headwaters Metropolitan District ("Headwaters") and GR Terra, LLC's ("GR Terra") Renewed Motion Under C.R.C.P. 12(b)(1) to Dismiss for Lack of Standing, filed January 25, 2023 (the "instant motion"). Headwaters and GR Terra separately filed a Statement of Uncontroverted Facts on January 25, 2023, relating to the instant motion and to their Motions for Summary Judgment. The Defendants Gray Jay Ventures, LLC ("Gray Jay") and Granby Prentice, LLC ("Granby Prentice) joined in the instant motion on January 26, 2023. The Court will refer to the Defendants Headwaters, GR Terra, Gray Jay, and Granby Prentice as the Defendants. The Plaintiff Granby Ranch Metropolitan District ("GRMD") filed a response to the Defendants' motion on February 27, 2023. GRMD filed a Response to Defendants' Statement of Uncontroverted Facts on February 26, 2023, and filed its own Statement of Additional Material Facts on February 26, 2023. Headwaters and GR Terra filed a reply on March 20, 2023, and a response to GRMD's Statement of Material Facts and Defendants' Statement of Additional Material Facts. Gray Jay and Granby Prentice joined in Headwaters and GR Terra's reply on March 20, 2023.

FACTS AND PROCEDURAL HISTORY

The Court set forth the facts of this case in two orders issued on January 28, 2022: (1) Order Granting in Part the Defendant Headwater Metropolitan District's Motion to Dismiss Second Amended Complaint Pursuant to C.R.C.P. 12(b)(1) & 5; and (2) Order Granting in Part Gray Jay Ventures, LLC, Granby Prentice, LLC, and GR Terra LLC's Motion to Dismiss Second Amended Complaint (the "Previous Orders"). The Court incorporates the Previous Orders herein. Additional facts relevant to the standing analysis herein are set forth in this Order.

In the Previous Orders, the Court determined GRMD was a third-party beneficiary to the Second Amended and Restated Lease Purchase Agreement (the "2012 LPA") between Granby Realty Holdings, LLC ("GRH") and Headwaters and GRMD, therefore, had standing. In the Previous Orders, the Court dismissed certain claims bought by GRMD against Headwaters, Gray Jay, Granby Prentice, and GR Terra. In a separate order, also issued January 28, 2022, the Court dismissed all GRMD's claims against the Defendant Redwood Capital Finance Co. ("Redwood") and the Court dismissed Redwood from this case.

On October 7, 2022, the Court granted GRMD leave to file a Third Amended Complaint. GRMD filed its Third Amended Complaint with the Court on October 13, 2022. In its Third Amended Complaint, GRMD brings breach of contract claims against Gray Jay, Headwaters, Granby Prentice, and GR Terra. GRMD also requests a declaratory judgment against Gray Jay and GR Terra that states the LPA is an installment land contract, should have been treated as a mortgage, and, therefore, could only have been terminated through a judicial foreclosure, and was not terminated through the public trustee foreclosure.[1] GRMD also requests a declaratory judgment against Headwaters, Gray Jay, GR Terra, and Granby Prentice stating the LPA is a covenant running with the land and was not terminated by foreclosure. The Defendants each filed an Answer to the Third Amended Complaint.

Headwaters brings counterclaims against GRMD for breach of the 2010 Exclusion Agreement, breach of the 2016 Letter Agreement and 2017 Master IGA[2] Termination, breach of the 2018 Waiver and Release Agreement, breach of GRMD's Service Plan or improper modification of the same, an alternative counterclaim for breach of the 2016 Second Granby IGA, and for a declaratory judgment against GRMD stating the 2012 LPA was terminated by foreclosure or, alternatively, through Gray Jay's notice of termination or, alternatively, due to Headwaters' failure to appropriate funds for rental payments for the calendar year 2021 or the ensuing years.

GR Terra brings counterclaims and requests declaratory judgment against GRMD stating the 2012 LPA was terminated by foreclosure or Gray Jay's notice of termination or Headwaters'

[1] GRMD states it brings this declaratory judgment claim solely to preserve any rights to appeal that it might have because the Court previously granted Gray Jay, Granby Prentice, and GR Terra's motion to dismiss this claim, which was fund in GRMD's Second Amended Complaint. Third Am. Compl. ¶ 79.
[2] IGA stands for intergovernmental agreement.

failure to appropriate rental payments. GR Terra also requests a declaratory judgment against GRMD stating the LPA and restrictive covenants were terminated and removed from the property. In addition, GR Terra brings counterclaims for quiet title (declaring the property is quieted in GR Terra free and clear of the LPA and any restrictive covenants therein), breach of the Service Plan or improper modification of the Service Plan, and breach of the 2018 Waiver and Release Agreement.

Through their present motion, the Defendants seek to dismiss GRMD's Third Amended Complaint.

RULING

A. Standard of Review

The Court is the trier of fact for a motion to dismiss under Colorado Rule of Civil Procedure (" C.R.C.P.") 12(b)(1) and the Court must weigh the evidence and make factual findings and conclusions of law as to its jurisdiction. Tabor Foundation v. Colorado Department. of Health Care Policy and Financing, 487 P.3d 1277, 1280 n. 3 (Colo. App. 2020); Medina v. State, 35 P.3d 443, 452 (Colo. 2001).

The Court will not hold an evidentiary hearing on the present motion. The Court declined to hold an evidentiary hearing on the third-party beneficiary status on Headwaters' initial C.R.C.P. 12(b)(1) motion and likewise declines to hold a hearing on the instant motion.

A plaintiff must satisfy two criteria to establish standing. First, the plaintiff must have suffered an injury in fact and, second, this harm must be to a legally protected interest. Ainscough v. Owens, 90 P.3d 851, 855 (Colo. 2004). A plaintiff establishes an injury in fact by alleging facts that show the defendant caused harm to the plaintiff's legally protected interest. Reeves v. City of Fort Collins, 170 P.3d 850, 851 (Colo. App. 2007). "An interest is legally protected if the constitution, common law, or statute, rule, or regulation provides the plaintiff with a claim for relief." Id. "Standing is conveyed by neither the remote possibility of a future injury nor an injury that is overly 'indirect and incidental' to the defendant's action. Ainscough, 90 P.3d at 856 (citing Brotman v. E. Lake Creek Ranch, L.L.P., 31 P.3d 886, 890-91 (Colo. 2001)). An injury that "is presently speculative and that cannot be determined until a remote time in the future, is not sufficiently direct and palpable to support a finding of injury in fact." Olson v. City of Golden, 53 P.3d 747, 752 (Colo. App. 2002).

Third-party beneficiaries may establish their standing to bring an action on a contract if (1) the parties to the agreement intended to benefit the third party, and (2) the benefit claimed is a direct and not merely incidental benefit of the agreement. SK Peightal Engineers, LTD v. Mid Valley Real Estate Solutions V, LLC, 342 P.3d 868, 872 (Colo. 2015). Intended third-party beneficiaries are those upon which the contracting parties intended to confer a benefit. Everett v. Dickinson & Co., Inc., 929 P.2d 10, 12 (Colo. App. 1996). Incidental beneficiaries are not

entitled to standing. Bear Creek Development Corp. v. Genessee Foundation, 919 P.2d 948, 952 (Colo. App. 1996).

The intent to benefit a third party may be evidenced from the terms of the contract, the surrounding circumstances, or both. Villa Sierra Condominium Ass'n v. Field Corp., 878 P.2d 161, 166 (Colo. App. 1994). Intent is a question of fact that is to be determined from the terms of the contract taken as a whole and construed in the light of the circumstances under which it was made and the apparent purpose the parties were trying to accomplish. East Meadows Co. LLC v. Greeley Irr. Co., 66 P.3d 214, 217 (Colo. App. 2003) (citing Concrete Contractors, Inc. v. E.B. Roberts Construction Co., 664 P.2d 722, 725 (Colo. App. 1982)).

B. The Previous Orders

In the Previous Orders, the Court determined GRMD had standing as a third-party beneficiary under the 2012 LPA. The Court noted the 2012 LPA did not contain language either expressly creating or disavowing the existence of any third-party beneficiaries. The Court examined the circumstances surrounding the formation of the 2012 LPA to determine Headwaters and GRH's intent regarding GRMD's third-party beneficiary status. In the Previous Orders, the Court examined the 2012 LPA, the Service Plans and the 2003 Master IGA[3], the 2005 Fee Resolution, 2005 Fee Agreement, and the 2008 Granby IGA.

Several factors were relevant to the Court's prior conclusion regarding GRMD's third-party beneficiary standing. First, the Court noted the "symbiotic," "complex," and "interrelated" dual district structure and relationship between GRMD and Headwaters pursuant to the Service Plans and 2003 Master IGA, under which there was no indication the two districts were meant to operate independently. Second, the Court noted GRMD had an expectation to own the infrastructure if not transferred to the Town of Granby or another public agency upon Headwaters' dissolution under the 2003 Master IGA. Third, the Court noted the Leased Premises (as that term was defined in the Previous Orders) were for the use and enjoyment of Granby Ranch residents and taxpayers and GRMD, as alleged in the Second Amended Complaint, contained the "overwhelming majority" of such residents and taxpayers. Finally, the Court noted the Amenity Fees, imposed pursuant to the 2005 Fee Resolution and Fee Agreement, were especially relevant.

In the briefing on the instant motion, Headwaters and GR Terra advance four arguments regarding standing: first, new facts and evidence regarding the circumstances surrounding the formation of the 2012 LPA demonstrate that Headwaters and GRH did not intend to confer a direct benefit and third-party beneficiary status on GRMD; second, governing law defeats GRMD's argument that Headwaters and GRH intended to confer third-party rights to enforce a public body's contract; third, GRMD does not have rights to enforce the rights of its taxpayers

[3] Although the Court raised this issue in the Court's Order Granting in Part the Defendant Headwaters Metropolitan District's Motion to Dismiss the Second Amended Complaint, issued January 28, 2022, none of the parties to this matter has ever filed a signed or fully executed 2003 Master IGA.

and GRMD has not established an injury-in-fact to itself; and fourth, GRMD waived and relinquished any third-party rights that it had.

C. Headwater and GR Terra's Arguments regarding circumstances surrounding the formation of the 2012 LPA

The Court has reviewed Headwater and GR Terra's arguments regarding the formation of the 2012 LPA.

In the instant motion, Headwaters and GR Terra argue that additional facts and evidence disclosed or produced during discovery have bearing on the circumstances surrounding the formation of the 2012 LPA and demonstrate GRMD was not an intended third-party beneficiary. The Court finds the surrounding circumstances include both the documents considered in the Previous Orders—the original Service Plans, the 2003 Master IGA, the 2005 Fee Agreement, the 2005 Fee Resolution, and the 2008 Granby IGA—and also include documents not considered in the Previous Orders—the 2005 LPA, the 2005 Loan Agreement and Deed of Trust, the 2006 Master IGA, the 2010 Exclusion Agreement, and the 2012 Headwaters Resolution Authorizing the 2012 LPA.

This analysis necessarily involves examining several documents. In interpreting a contract, "[t]he primary goal of contract interpretation is to determine and effectuate the intent and reasonable expectations of the parties." Copper Mountain, Inc. v. Industrial Systems, Inc., 208 P.3d 692, 697 (Colo. 2009). The intent of the parties is determined primarily from the contractual language. People ex rel. Rein v. Jacobs, 465 P.3d 1, 11 (Colo. 2020). It may also be evidenced by the circumstances surrounding the contract. Vallagio at Inverness Residential Condominium Association, Inc. v. Metro. Homes, Inc., 412 P.3d 709, 718 (Colo. App. 2015). As to the contractual language, the court must give effect to the plain and generally accepted meaning of the contract terms and should be wary of "viewing clauses or phrases in isolation." Allstate Ins. Co. v. Huizar, 52 P.3d 816, 819 (Colo. 2002). Instead, the Court reads clauses in the context of the entire contract, "seeking to harmonize and to give effect to all provisions so that none will be rendered meaningless," Pepcol Mfg. Co. v. Denver Union Corp., 687 P.2d 1310, 1313 (Colo. 1984). When a contract is unambiguous and complete, courts may conclude that the contractual language expresses the parties' intent and will enforce the terms according to their plain meaning. Jacob, 465 P.3d at 11.[4]

i. The District Service Plans and the 2003 Master IGA

The Court re-examines the weight given to the 2003 Master IGA based on new evidence.

In its Previous Orders, the Court examined the original Service Plans and the 2003 Master IGA and placed significant emphasis on their provisions. The Court incorporates that

[4] Neither party raises an ambiguity issue and GRMD does not argue any document is ambiguous. Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts ¶ 75.

analysis here, but also re-examines the weight the Court gave to the 2003 Master IGA based on new evidence.

The Districts' Service Plans provide the why and how each district was to function. The plans directly relate to one another and, essentially, provide for the financing and operation of "community-wide infrastructure and public facilities and services that will service the [Granby Ranch] Development." (Sol Vista Metro. Dist. No. 1 Service Plan ¶ I(A)(1); Sol Vista Metro. Dist. No. 2 Service Plan ¶ I(A)(1)).[5] The Service Plans describe the dual district structure and detail the consolidated financial management and operation of the Districts. (Sol Vista Metro. Dist. No. 1 Service Plan ¶ I(A)(5); Sol Vista Metro. Dist. No. 2 Service Plan ¶ I(A)(5)). At the time they were created, the plans reflected a symbiotic relationship between the Districts. (Sol Vista Metro. Dist. No. 1 Service Plan ¶ IV(A); Sol Vista Metro. Dist. No. 2 Service Plan ¶ IV(A)).

The Taxing District, GRMD, taxed and financed the services and infrastructure that the Service District acquired, constructed, and operated. The Service District, Headwaters, was to construct, operate, and manage the public facilities. The Town of Granby authorized the Districts to provide the following services: streets, roadways and drainage, traffic and safety protection, parks and recreation, sanitation, water, transportation, and mosquito control. (Sol Vista Metro. Dist. No. 2 Service Plan ¶ II(B)).

At the time of the original Service Plans and the 2003 Master IGA, Headwaters was the only district authorized to own or acquire the infrastructure and GRMD was the only district authorized to raise taxes. Although the Service Plans were later amended, there is no indication from the original Service Plans that Headwaters and GRMD ever were meant to operate independently from one another.

GRMD was authorized to impose a mill levy and collect fees to provide services and facilities to the Districts. (2003 Master IGA ¶ 5.1, 5.2). Said services and facilities included "ski areas and/or ski lifts, golf courses…and other recreational facilities, together with all necessary, incidental and appurtenant facilities, land, and easements…" (Sol Vista Metro. Dist. No. 2 Service Plan ¶ III(C)). In the instant motion, Headwaters points out GRMD did not finance the construction of the ski facilities and golf facilities.[6]

The plans state the relationship between Headwaters and GRMD was governed by the 2003 Master IGA[7], which clarified the responsibilities, functions, and services provided by the Districts. (Sol Vista Metro. Dist. No. 1 Service Plan ¶¶ I(A)(5), VI(a); Sol Vista Metro. Dist. No. 2 Service Plan ¶¶ I(A)(5), VI(A)). The 2003 Master IGA provided Headwaters would

[5] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex.s. 1, 2; Plaintiff's Response to Defendants' Statement of Uncontroverted Facts, ¶¶ 1-2.
[6] Also, see Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 20.
[7] The Plaintiff's Response labels the 2003 Master IGA as Exhibit 56, but Exhibit 56 is the 2003 IGA between the Town of Granby, Headwaters, and GRMD. The 2003 Master IGA is attached as an exhibit to the Service Plans.

manage and control the construction and financing of the infrastructure and establish all necessary service charges for GRMD. (2003 Master IGA ¶ 4.2, 4.3).[8]

Headwaters would own and operate the infrastructure until it was transferred to the Town of Granby or another public agency. (2003 Master IGA ¶ 4.5). After the dissolution of Headwaters, the infrastructure would transfer and GRMD would "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." (2003 Master IGA ¶ 5.4).[9] In the Previous Orders, the Court found that under the 2003 Master IGA, Headwaters was not intended to permanently operate and maintain the infrastructure and GRMD intended to do so if services and facilities were not transferred to the Town of Granby or another public agency (the "Expectation Interest"). The Court, in the Previous Orders, found the Expectation Interest to be especially probative of GRH and Headwaters' intent regarding the 2012 LPA.

At the time of the Service Plans, GRMD constituted 3,563 acres of Granby Ranch's 5,000 acres.[10]

The parties do not dispute that the 2003 Master IGA was terminated by the 2006 Master IGA, which was the operative agreement between GRMD and Headwaters at the time the 2012 LPA was executed.[11] Thus, for the instant motion, the Court considers the 2003 Master IGA only to understand the context of the formation of the Districts, their original roles, and how those roles were changed by subsequent IGAs.

ii. 2005 LPA, Transfer to GRH, Loan Agreement and Deed of Trust

The Court examines the 2005 LPA, Transfer to GRH, Loan Agreement and Deed of Trust.

[8] GRMD admits that "Headwaters had no obligation under the 2003 Master IGA standing alone to acquire the Amenities" but states that when read together the with "Master IGA, Town IGA, LPA, Fee Agreements, and Fee Resolution, together with existing Colorado law, they had the obligation to act in accordance with the terms of the LPA and eventually either acquire the Amenities or allow them to be transferred to another public entity such as the Town of Granby or GRMD for public use." Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 20 (Admission 6).

[9] GRMD admits "Headwaters had no obligation under the Service Plans standing alone to acquire the Amenities" but states when read together with the "Master IGA, Town IGA, LPA, Fee Agreements, and Fee Resolutions, together with existing Colorado law, they had the obligation to act in accordance with the terms of the LPA and eventually either acquire the Amenities or allow them to be transferred to another public entity such as the Town of Granby or GRMD for public use." Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 20 (Admission 5).

[10] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, ¶ 3.

[11] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 5 ¶ 10.5; Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts ¶ 10; Plaintiff's Response to Statement of Uncontroverted Facts ¶ 10.

By 2005, Sol Vista, the original Granby Ranch developer, transferred its property to GRH, including the ski area and golf course.[12]

In 2005, Headwaters and GRH executed the first Lease Purchase Agreement (the "2005 LPA")[13], under which GRH leased to Headwaters the "ski area and golf course." (2005 LPA, ¶ 1). The 2005 LPA provided for a one year original term, with Headwaters having the option to renew for twenty-four additional one year terms. (2005 LPA ¶ 2). The 2005 LPA provided for termination based on several events, including Headwaters' failure to appropriate funds to continue leasing the Leased Premises. (2005 LPA ¶ 2(a)). It does not appear GRMD has ever asserted that it was a third-party beneficiary under the 2005 LPA.

At the same time, GRH executed a number of documents with respect to financing of Granby Ranch, including a Deed of Trust with Redwood Capital (the "2005 Deed of Trust").[14]

The parties did not attach or discuss the 2005 LPA or 2005 Deed of Trust to the Second Amended Complaint (other than relatively brief mentions of the latter) in the previous Motion to Dismiss briefing. The Court, therefore, did not consider those documents in its Previous Orders.

iii. The 2005 Fee Resolution between Headwaters and GRMD

In its Previous Orders, the Court examined the 2005 Fee Resolution between Headwaters and GRMD. The Court incorporates that analysis here.

The 2005 Fee Resolution[15] was executed "in the best interest of the Districts to acquire, lease, finance, construct, maintain, provide, operate, and/or administer" the Amenities "benefitting the property within the Districts," which included the golf course, ski area, river park and other improvements. (2005 Fee Resolution[16], p. 1). The 2005 Fee Resolution was deemed necessary "to provide for the prosperity and general welfare of the Districts and their inhabitants." (Id.).

The 2005 Fee Resolution established a $10,000 per lot fee (the "Amenity Fee") to Headwaters, to fund the Amenities for these purposes. (Id. at pp. 1-2). The revenue generated thereby was to be used "solely for the purpose of the financing the acquisition, leasing, construction, and replacement of the Amenities" and such "restriction on the use of the Amenity Fee revenues shall be absolute and without qualification." (Id. at p. 6). The resolution also detailed the priority access to the Amenities given to each residential dwelling unit for which the Amenity Fee had been paid. (Id. at p. 2).

[12] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts ¶ 11; Plaintiff's Response to Statement of Uncontroverted Facts ¶ 11.
[13] Plaintiff's Resp. to Motion for Summary Judgment on Claims IV, V, and VI, Ex. 59; also, the Plaintiff references Ex. 59 in the Plaintiff's Statement of Additional Material Facts, filed on February 26, 2023.
[14] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 6.
[15] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 7.
[16] The 2005 Fee Resolution is found in Exhibit 7 to Headwaters and GR Terra's Statement of Uncontroverted Facts.

In the Previous Orders, the Court found the 2005 Fee Resolution evidenced an intent to benefit GRMD for any acquisition, lease, and operation of the Amenities within both Districts. Headwaters was to impose and collect a fee to lease, acquire, construct, maintain, operate, or administer the Amenities and it was in the best interests of both districts to do so.

iv. The 2005 Amenity Fee Agreement between Headwaters and GRH

In the Previous Orders, the Court examined the 2005 Amenity Fee Agreement between Headwaters and GRH. The Court incorporates that analysis here.

In 2005, Headwaters and GRH executed the 2005 Amenity Fee Agreement[17], which imposed the one-time Amenity Fee per residential lot within the Districts. It provided that nothing obligated GRH to "convey, lease, or otherwise contract for any specific Amenities." (2005 Amenity Fee Agreement, Recital C).

v. 2006 Master IGA

The Court did not consider the 2006 Master IGA in its Previous Orders because the parties did not attach or discuss the 2006 Master IGA to the Second Amended Complaint or the previous Motion to Dismiss briefing. The Court now considers the 2006 Master IGA.

On June 1, 2006, Headwaters and GRMD entered into a new "District Facilities Construction and Service Agreement" ("2006 Master IGA").[18] The 2006 Master IGA specifically terminated the 2003 Master IGA (2006 Master IGA, ¶ 10.5). Paragraph 1.3 sets forth the purpose and scope of the 2006 Master IGA. The 2006 Master IGA stated, under the Service Plan, Headwaters would be responsible for the financing, construction, operation, and management of the "Facilities" for the benefit of the Districts and additionally stated its purpose was to set forth the obligation of GRMD to fully fund and Headwaters to ". . . construct, own, or transfer, and to operate and maintain, enhancements to the standard public infrastructure . . ." (2006 Master IGA, ¶ 1.3, (a), (e)).

The 2006 Master IGA consistently referred to the "Facilities" throughout. (2006 Master IGA, Recitals and ¶ 1.3). The 2006 Master IGA defined "Facilities" as "the public improvements, services and facilities generally described in the Service Plan, but excluding the Amenities." (2006 Master IGA, ¶ 2.1(u) (emphasis added)). The 2006 Master IGA defined "Amenities" as "the property and improvements which are the subject of" the 2005 LPA, "including generally the ski area and golf course…" (2006 Master IGA, ¶ 2.1(c)). The 2005 LPA defined the Leased Premises as "the premises, including the ski area and golf course…together will all improvements located thereon…"[19] (2005 LPA, ¶ 1).

[17] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 8.
[18] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 5.
[19] Exhibit A to the 2005 LPA more particularly describes the golf course and ski area.

Regarding the Amenities, the 2006 Master IGA provided GRMD was not obligated to fund the acquisition, operation, and maintenance of the Amenities, except as provided in the 2005 Fee Resolution. (2006 Master IGA, ¶ 3.10). The parties do not cite and the Court has not located a provision in the 2006 Master IGA regarding Headwaters' obligations to GRMD regarding the administration or operation or disposition of the Amenities or the 2005 LPA.

Regarding the Facilities, Headwaters "shall own all of the Facilities and shall be responsible for the operation and maintenance of all the Facilities." (2006 Master IGA, ¶ 5.1). Headwaters was authorized to sell, transfer, lease, dedicate, or convey the Facilities to another governmental or private entity. (2006 Master IGA ¶ 5.2).

In the instant motion, Headwaters contrasts the 2003 Master IGA and the 2006 Master IGA. Headwaters notes that in the Previous Orders, the Court placed significant emphasis on the language of the 2003 Master IGA that provided that upon dissolution of Headwaters, Headwaters would transfer and GRMD would accept responsibility for operation and maintenance of infrastructure located within GRMD that had not been transferred to the Town of Granby or to another public agency. Headwaters argues that, in contrast, the "2006 Master IGA did not contain the language from the 2003 Master IGA" regarding GRMD accepting responsibility for the operation and maintenance of infrastructure and the 2006 Master IGA "did not reference potential transfer of any property to GRMD." (Mot., p. 8).

GRMD does not address the differences between the 2003 Master IGA and the 2006 Master IGA or the impact of the 2006 Master IGA in its response. Instead, GRMD reiterates the language in the 2003 Master IGA that GRMD would take responsibility for operation and maintenance of infrastructure upon Headwaters' dissolution. (Resp., p. 7).

vi. The 2008 Granby IGA

In the Previous Orders, the Court examined the 2008 Granby IGA. The Court incorporates that analysis here.

The 2008 Granby IGA[20] was entered into by the Town of Granby, Headwaters, GRMD, and Granby Ranch Metro Districts 2-8. (2008 Granby IGA, p. 1). The 2008 Granby IGA reflects the relationship between the Districts, as well as the interplay between the Districts and the Town of Granby. The Districts were intended to act reciprocally and for one another's benefit. The Town and Districts "determined it to be in the best interests of their respective taxpayers, residents, and property owners to enter into this Agreement to promote the coordinated the coordinated development" of the property. (2008 Granby IGA, p. 2). Under the 2008 Granby IGA, 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

[20] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 21A.

maintenance facilities, fishing or 'river park' facilities and programs, and parks, trails and open space…" (2008 Granby IGA, ¶ 5(a)).

vii. The 2010 Exclusion Agreement

The Court now considers the 2010 Exclusion Agreement.[21] The Court did not consider the 2010 Exclusion Agreement in its Previous Orders because the parties did not attach or discuss the 2010 Exclusion Agreement to the Second Amended Complaint or the previous Motion to Dismiss briefing.

On April 21, 2010, Headwaters, GRMD and GRH entered into the Exclusion Agreement. (2010 Exclusion Agreement, p. 1). The Exclusion Agreement repudiated the 2008 Master IGA and reinstated the 2006 Master IGA. (2010 Exclusion Agreement, ¶ 4.1). The exclusion agreement stated under the 2006 Master IGA, Headwaters would own, operate, construct, and maintain the facilities, and GRMD would pay for costs related to construction, financing, acquisition, operation, and maintenance. (2010 Exclusion Agreement, Recitals G-H). The outstanding obligation of GRMD under the 2006 Master IGA was over $900,000 in Service Costs and over $14,000,000 in Capital Costs and an allocation reduced the Capital Costs to over $11,000,000. (2010 Exclusion Agreement, Recitals G-M). The parties agreed that on issuance of bonds in the amount of $11,119,000, "all debt obligations of GRMD to [Headwaters] under the 2006 Master IGA are hereby deeded paid in full." (2010 Exclusion Agreement, ¶ 4.2). The 2010 Exclusion Agreement provided GRMD acknowledged and agreed the Amenity Fees were payable to Headwaters and GRMD had "no right, title, or interest" to the Amenity Fees. (2010 Exclusion Agreement, ¶ 3.2.1).

viii. 2012 Headwaters Resolution

The Court now considers the 2012 Headwaters Resolution.[22] The Court did not consider the 2012 Headwaters Resolution in its Previous Orders because the parties did not attach or discuss the 2012 Headwaters Resolution to the Second Amended Complaint in the previous Motion to Dismiss briefing.

The Headwaters Board passed a Resolution Authorizing the 2012 LPA (the "2012 Headwaters Resolution"). The Headwaters Board determined the "rental amount under the Lease, the Purchase Price, or other terms of the Lease 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." (2012 Headwaters Resolution, ¶ 1). The 2012 Headwaters Resolution provided it shall not be construed as "creating or constituting a general obligation or multiple-fiscal year direct or indirect indebtedness or other financial obligation whatsoever of the District nor a mandatory payment obligation of the District in any ensuing fiscal year during with the Lease shall be in effect." (Id.

[21] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 11.
[22] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 12.

at ¶ 2). The 2012 Headwaters Resolution referenced the "expected eventual vesting of the fee title to the Leased Premises in the District," which was defined as Headwaters. (Id. at ¶ 1).

ix. 2012 LPA

In the Previous Orders, the Court examined the 2012 LPA. The Court incorporates that analysis here.

x. Other circumstances

GRMD argues the totality of the circumstances show Headwaters was never intended to permanently own and operate the Amenities and title would always vest in GRMD. (Resp., p. 8).

In the Previous Orders, the Court noted the Leased Premises were for the use and enjoyment of Granby Ranch residents and taxpayers and that GRMD constituted the "overwhelming majority" such residents and taxpayers, containing approximately 3,563 of Granby Ranch's 5,000 acres.[23] In the instant motion, Headwaters and GR Terra note that by the time the 2012 LPA was executed, GRMD contained 225 acres, a drastic reduction from its original size.[24] GRMD does not deny this, but states GRMD was divided into 8 separate districts, GRMD and Granby Ranch Metro. Districts 2-8 and the majority of the property in those new districts was originally in GRMD.[25] Headwaters and GR Terra note there is at least one significant subdivision within Granby Ranch that it is not within GRMD's boundaries and there are "hundreds of platted lots" not within GRMD's boundaries.[26]

Headwaters and GR Terra note that whether GRMD can establish a majority of current taxpayers is not the issue because the 2012 LPA "does not demonstrate an intent to directly benefit GRMD property owners over other property owners" or members of the public. (Mot., p. 7). Headwaters and GR Terra argue any individuals in the categories identified in the 2012 LPA were incidental to the LPA's purpose to give Headwater's the right to possess and operate the Leased Premises for the benefit of the general public. (Id.).

Although GRMD does not address the 2006 Master IGA, GRMD argues its expectation that title to infrastructure would eventually vest in GRMD was not solely evidenced by the 2003 Master IGA but was "reinforced several times through the action of the parties." (Resp., p. 7). GRMD points to statements in a 2005 meeting[27] of the Sol Vista Board, Headwaters, and GRMD reflecting the Amenities will be transferred to "the District through a lease purchase." (Ex. 57, p.

[23] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts ¶¶ 2-3; Plaintiff's Response to Statement of Uncontroverted Facts ¶ 3.
[24] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, ¶ 3.
[25] Plaintiff's Response to Statement of Uncontroverted Facts, ¶ 3; Plaintiff's Statement of Additional Material Facts, ¶ 18.
[26] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, ¶ 77.
[27] Plaintiff's Response labels this as Exhibit 4. The Court found this labeled as Plaintiff's Ex. 57.

3 of the document, p. 4 of the exhibit). "District" is not specifically defined in the meeting minutes as Headwaters or GRMD, but only Headwaters was a party with GRH to the 2005 LPA.

GRMD additionally points to a 2015 statement by the Headwaters' Director that the LPA would end in 2062 "to coincide with the anticipated conveyance of the Amenities (ski and golf facilities) from GRH to [Headwaters]."[28] This statement, however, was made several years after the formation of the 2012 LPA and the Court does not consider it a "surrounding circumstance" indicative of the parties' intent. GRMD argues the totality of the circumstances show Headwaters was never intended to permanently own and operate the Amenities and title would always vest in GRMD. (Resp., p. 8).

xi. Analysis

Dual District Structure and Interrelationship

At the time of the formation of the 2012 LPA, the Districts still had the complex and symbiotic relationship established by the original Service Plans. This factor is unchanged from the analysis in the Previous Orders.

GRMD Expectation of Eventual Ownership of the Amenities

GRMD's expectation interest was a significant factor in the Previous Orders, but the Court now concludes GRMD's expectation interests is not a factor supporting third-party beneficiary status for GRMD.

As discussed above, the Court previously found GRMD had an expectation of an eventual transfer of the Leased Premises and Amenities to it pursuant to the 2003 Master IGA. The 2003 Master IGA, relied on by GRMD in support of its expectation interest, was expressly superseded by the 2006 Master IGA.

The Court finds the 2006 Master IGA does not reflect GRMD's expectation interest. The 2006 Master IGA does not demonstrate any intent for Headwaters to transfer the Amenities to GRMD. The Court is not persuaded by the other documentation GRMD highlighted to support its contention that title to the Amenities would eventually vest in GRMD. GRMD has not identified any single document *actually requiring* Headwaters to acquire title to the Amenities or *actually requiring* Headwaters to transfer the Amenities to GRMD if or when titled vested.[29]

[28] Plaintiff's Response in Opposition to Defendant GR Terra's Motion for Summary Judgment on Counts IV, V and VI of the Third Amended Complaint, Ex. 64.

[29] GRMD admits Headwaters did not have an obligation to acquire the Amenities under either the 2003 Master IGA, the Service Plans, the 2016 Granby IGA "standing alone," but states when read together with the "Master IGA, Town IGA, LPA, Fee Agreements, and Fee Resolution, together with existing Colorado law, they had the obligation to act in accordance with the terms of the LPA and eventually either acquire the Amenities or allow them to be transferred to another public entity such as the Town of Granby or GRMD for public use." Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 20 (Admission 5, 6, 7).

Rather, the documents before the Court demonstrate Headwaters could pursue several courses of action with respect to the Amenities, broadly defined to include not only the ski area and golf course but other facilities and improvements, including acquisition, leasing, construction, and installation and the documents before the Court demonstrate title to the Amenities could eventually vest in *Headwaters*, without reference to GRMD.

GRMD Use and Enjoyment

The Court finds the factor of GRMD's use and enjoyment changed from the Court's analysis in the Previous Orders. Now, the Court finds the property within GRMD's boundaries at the time of the formation of the 2012 LPA was substantially reduced from its size at the time of the original Service Plan. This new finding supports a conclusion that GRMD and its residents were incidental beneficiaries of the 2012 LPA, which provided access to the Leased Premises to the general public.

Amenity Fees

The Court concludes the surrounding circumstances do not demonstrate an intent to confer benefits, other than incidental benefits, on GRMD under the 2012 LPA.

The Court finds this factor changed from the Court's analysis in the Previous Orders. Now, the Court finds the Amenity Fees were paid directly to Headwaters and never passed through GRMD's hands.[30] Headwaters and GR Terra also state the Amenity Fees collected under the 2005 and 2013 Fee Resolutions and Agreements were paid by the seller of lots, GRH, or a large homebuilder that sold lots to buyers and that the price of the lots was not impacted by the Amenity Fee.[31] The Amenity Fee was collected out of proceeds of the sale that would otherwise go to the seller, which was in almost all cases the developer.[32] The Court

[30] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts ¶78, Ex. 28, pp. 69-71, 72-73; Plaintiff's Response to Defendants' Statement of Uncontroverted Facts ¶¶ 76-77.

[31] Defendants Headwaters and GR Terra's Supplemental Statement of Undisputed Facts ¶ 88 (found in GR Terra's Cross-Motion and Opposition to Plaintiff's Renewed Motion for Summary Judgment on Counts I, II, and III of Defendant GR Terra's Counterclaims to Third Amended Complaint, filed February 8, 2023, p. 4); Ex. 35 to GR Terra's Cross-Motion and Opposition to Plaintiff's Renewed Motion for Summary Judgment on Counts I, II, and III of Defendant GR Terra's Counterclaims to Third Amended Complaint, filed February 8, 2023, p. 238-40; Plaintiff's Response to Defendant Headwaters and GR Terra's Supplemental Statement of Undisputed Facts, ¶¶88- 90 (found in the Plaintiff's Reply in Support of Renewed Motion for Summary Judgment on Counts 1, II, and II of Defendant GR Terra's Counterclaims and Opposition to Cross-Motion, filed March 8,2023); the Plaintiff also states: "It is undisputed the Amenity Fees were paid at the time of the purchase from purchase payments that were escrowed to the closing agent and then paid to Headwaters." (Plaintiff's Reply in Support of Renewed Motion for Summary Judgment on Counts I, II, and III of GR Terra's Counterclaims and Opposition to Cross-Motion, filed March 8, 2023, p. 6).

[32] Defendants Headwaters and GR Terra's Statement of Additional Facts ¶ 90 (found in GR Terra's Cross-Motion and Opposition to Plaintiff's Renewed Motion for Summary Judgment on Counts I, II, and III of Defendant GR Terra's Counterclaims to Third Amended Complaint, filed February 8, 2023); GR Terra's Cross-Motion and Opposition to Plaintiff's Renewed Motion for Summary Judgment on Counts I, II, and II of Defendant TR Terra's Counterclaims to Third Amended Complaint, Ex. 39, p. 214-16; ¶88, Plaintiff's Reply in Support of Renewed

acknowledges the Amenity Fees could not have been imposed without GRMD's cooperation and consent as the tax district, but GRMD expressly acknowledged that it did not have any right, title, or interest in the Amenity Fees.

The Amenity Fees were a significant factor in the Previous Orders. The Court now concludes the Amenity Fees are not a factor supporting third-party beneficiary status for GRMD.

D. GRMD is Not a Third-Party Beneficiary Under the 2012 LPA and GRMD Does Not Have Standing

The governing law regarding government contracts indicates GRMD was not a direct beneficiary of the 2012 LPA and the parties did not intend to give GRMD enforceable rights, which leads the Court to conclude GRMD is not a third-party beneficiary under the 2012 LPA and does not have standing.

Headwaters and GR Terra argue the governing law demonstrates Headwaters and GRH did not intend to provide GRMD with third-party rights to enforce a public body's contract.

In the instant motion, Headwaters and GR Terra argue "granting third parties the right to enforce a public body's contract has ramifications not present in the context of private contracts" because a "government body cannot be compelled to spend money in future years." Mot., p. 10. Headwaters and GR Terra argue the 2012 LPA could not confer rights on GRMD to enforce Headwaters' payment of rent or exercise of the purchase option, as a matter of Colorado law. Id. Headwaters and GR Terra cite to the Colorado Constitution and a statute that "prohibit a municipality from assuming a future debt without legislative discretion to elect not to appropriate funds for that purpose." Id. GRMD argues Headwaters confuses GRMD's "legal rights and interests in the property" with Headwaters' "contractual obligation to make the Amenity Fees payment." Resp., p. 11. GRMD argues GRMD is not seeking specific performance against Headwaters, "just declaratory judgment and injunctive relief" that its property rights in the LPA "remain in place and have not been foreclosed out." Id.

C.R.S. § 29-1-110(1) provides no agency "shall expend or contract to expend any money, or incur any liability which . . . involves the expenditure of money in excess of the amounts appropriated" and any contract made in violation of the statute "shall be void." C.R.S. § 29-1-110(2), however, provides "multi-year contracts may be entered into where allowed by law or if subjected to annual appropriation." Thus, the statute limits a "governmental entity's power to contract without a prior appropriation of funds." Falcon Broadband, Inc. v. Banning Lewis Ranch Metropolitan District No. 1, 474 P.3d 1231, 1240 (Colo. App. 2018); Town of Alma v.

Motion for Summary Judgment on Counts 1, II, and II of Defendant GR Terra's Counterclaims and Opposition to Cross-Motion, filed March 8,2023.

AZCO Const., Inc., 10 P.3d 1256, 1266 (Colo. 2000) (the statute prohibits governmental agencies "from spending money in excess of the amounts appropriated by budget").

The Colorado Constitution provides "no political subdivision of the state shall contract any general obligation debt by loan…except by adoption of a legislative measure . . ." Colo. Const. art. XI, § 6. One of the indications of debt in a constitutional sense is "that appropriation by future legislatures of monies in payment of the obligations is nondiscretionary." Glennon Heights, Inc. v. Central Bank & Trust, 658 P.2d 872, 878 (Colo. 1983). "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." Black v. First Federal Sav. and Loan Ass'n of Fargo, North Dakota, F.A., 830 P.2d 1103, 1110 (Colo. App. 1992). In Black, the Colorado Court of Appeals held a lease that created an obligation to pay the lessor regardless of whether revenue was available and the "appropriation of monies…to meet the rental obligation was nondiscretionary" violated "the constitutional prohibition against governmental debt by loan." Id. Likewise, the Colorado Court of Appeals held a lease that specifically tied renewal of each lease term to the appropriation of sufficient funds and allowed for termination if funds were not available without further obligation did not limit the legislature's discretion, so the lease was not constitutional debt. Glennon Heights, 658 P.2d at 878-879. Discretionary obligations, therefore, are not constitutional debt. Gude v. City of Lakewood, 636 P.2d 691, 699 (Colo. 1981).

In the 2012 Resolution, the Headwaters Board determined the "rental amount under the Lease, the Purchase Price and other terms of the Lease 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." (Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 12, 2012 Headwaters Resolution, ¶ 1(c)). The Resolution specifically provided the 2012 LPA did not create a financial obligation or mandatory payment obligation for Headwaters. (Id. at ¶ 2).

Likewise, the 2012 LPA[33] provided the obligation of Headwaters to pay rent "shall not in any be construed to be an indebtedness or multiple fiscal-year obligation of [Headwaters] within the meaning of any provision of any constitutional or statutory limitation or requirement applicable to [Headwaters]." (2012 LPA, ¶ 3(c)). Under the 2012 LPA, rent was "an amount equal to the proceeds of all Amenity Fees . . ." (2012 LPA, ¶ 3(a)). The 2012 LPA automatically renewed unless Headwaters "elects not to appropriate funds to pay amounts due under this Lease as set forth in Section 3.c." (2012 LPA, ¶ 2). The 2012 LPA would terminate based on Headwaters' failure "to appropriate Amenity Fees." (2012 LPA, ¶ 2(a)). If Headwaters requested funds "to be appropriated for payment" under the 2012 LPA and the Headwaters'

[33] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 13.

"governing body does not approve funds to be paid…the Lease shall not be renewed . . " (2012 LPA, ¶ 3(c)).[34]

In the instant motion, Headwaters argues that because Headwaters had "unfettered 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." Mot. p. 11. Headwaters argues Headwaters and GRH did not intend to create enforceable rights in GRMD. Mot. p 12.

Although GRMD seems to argue GRMD's property interests and Headwaters' contractual obligations are separate and distinct, Headwaters' discretion to appropriate the Amenity Fees as payment under the 2012 LPA *is* the basis for any property interest in the Leased Premises. If Headwaters chose not to appropriate such funds, the 2012 LPA would terminate and would not automatically renew. A third-party beneficiary has no greater rights than the parties to the agreement itself. Bloom v. National Collegiate Athletic Ass'n, 93 P.3d 621, 625 (Colo. App. 2004) (citing United Steelworkers v. Rawson, 495 U.S. 362, 363 (1990)). GRMD could not enforce Headwaters' obligations regarding rental payment under the 2012 LPA by paying the Amenity Fee as rent itself—GRMD acknowledged in the 2010 Exclusion Agreement that it had no "right, title, or interest in" the Amenity Fees and under statute and the Colorado Constitution, the contracting governmental entity must *itself* retain the discretion to appropriate or not appropriate funds.

The Court concludes the governing law regarding government contracts indicates GRMD was not a direct beneficiary of the 2012 LPA and the parties did not intend to give GRMD enforceable rights.

The Court, therefore, concludes GRMD is not a third-party beneficiary under the 2012 LPA and does not have standing.

E. Injury

GRMD has not established injury-in-fact to its own interests sufficient to establish standing.

i. GRMD's right to enforce rights of other parties

GRMD does not assert it is enforcing its taxpayers' rights.

[34] The appropriation of rental payments pursuant to the 2021 Headwaters' budget is disputed. See Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, ¶ 57; Plaintiff's Response to Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, ¶ 57. It is undisputed that the Headwaters Board adopted budgets in 2022 and 2023 that "did not include any appropriation of funds for the payment of rent under the LPA." Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, ¶¶ 58-59; Plaintiff's Response to Defendants' Statement of Uncontroverted Facts, ¶ 57.

As discussed above, the Leased Premises were for the use and enjoyment of Granby Ranch residents and taxpayers and the Court considered this a significant factor in the Court's standing analysis in the Previous Orders. In the instant motion, Headwaters and GR Terra argue 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. Mot., p. 16. Headwaters and GR Terra argue GRMD has the power to sue and be sued on its own behalf, but nothing in the Special Districts Act gives special districts the power to bring suit on behalf of their citizens. Id. Headwaters and GR Terra argue GRMD must establish harm to its own interests. Id.

"Special districts are creatures of statute, and may exercise only those powers that are expressly conferred by the constitution or statute or exist by necessary implication." Tarco, Inc. v. Conifer Metropolitan District, 316 P.3d 82, 89 (Colo. App. 2013) (citing South Fork Water & Sanitation Dist. v. Town of South Fork, 252 P.3d 465, 468 (Colo.2011). A special district's implied powers are interpreted narrowly. Id. (citing Romer v. Fountain Sanitation Dist., 898 P.2d 37, 41-42 (Colo.1995) ("no implied power to seek declaratory judgment relief against the state, despite express power to sue and be sued")); Steamboat Lake Water and Sanitation Dist. v. Halvorson, 252 P.3d 497, 502 (Colo. App. 2011) (district's express power to acquire and dispose of property interests does not mean it has implied power to condemn land interest through eminent domain)).

GRMD does not assert it is enforcing its taxpayers' rights. Although GRMD does not disagree or claim it has standing to sue on behalf of residents within its boundaries, Headwaters argues GRMD continues to merge its interests with those of its residents. Reply, p. 4-5.

ii. Injury-in-Fact

GRMD has not established injury-in-fact to its own interests sufficient to establish standing.

Headwaters and GR Terra argue GRMD has not established an injury-in-fact to its own interests. Mot., p. 16. In its Third Amended Complaint, GRMD alleges "[t]he termination of the LPA will prevent GRMD from collecting fees pursuant to the LPA and will lose approximately $6.05 million dollars in equity already paid…and terminate the right of the Districts to acquire the Amenities." Third Am. Compl., ¶ 42.

Headwaters and GR Terra, however, advance several arguments as to why GRMD has not suffered an injury-in-fact to its own interests. Headwaters and GR Terra argue the Amenity Fees were paid directly to Headwaters, GRMD itself has not paid an Amenity Fee and owns no property subject to the Amenity Fees, GRMD has acknowledged that it has no right, title, or interest in the Amenity Fees, [35] payment of rent under the LPA does not equate to equity, and

[35] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts ¶¶ 20, 78-79; Plaintiff's Response to Defendants' Statement of Uncontroverted Facts ¶¶ 20, 76-77.

GRMD cannot establish any benefit to itself under the 2012 LPA. Mot., p. 17-18; see Previous Orders concluding that the 2012 LPA was not an installment land contract.

The Court agrees with Headwaters and GR Terra that GRMD has not demonstrated an injury to its own interests through the Amenity Fees. GRMD expressly recognized it did not have any right, title, or interests in the Amenity Fees, so there can be no injury to GRMD's interest on that basis.

Regarding GRMD's expectation interest, Headwaters and GR Terra argue "[a]ny alleged injury to GRMD in this regard is too indirect, contingent, and incidental to establish an injury in fact." Mot., p. 18.

The Court agrees with Headwaters and GR Terra. As noted above, the 2006 Master IGA does not contain language regarding the disposition of the Amenities or eventual GRMD ownership. Even if GRMD did expect to eventually own the Amenities on some other basis, it could only do so after Headwaters continued to exercise its discretion to appropriate rent under the 2012 LPA for the next four decades (until December 2062) or paid the purchase price and Headwaters transferred title to the Amenities to it.

The Court finds any injury to an expectation interest, if one existed, is too remote and speculative to establish an injury-in-fact, that is, any injury "is not sufficiently direct and palpable." Olson, 53 P.3d at 752.

The Court concludes GRMD has not established injury-in-fact to its own interests sufficient to establish standing.

F. Waiver and Operative Documents after 2012

GRMD waived and relinquished any rights GRMD had against Headwaters related to the Master IGAs and formation, administration, and operation of the Districts, which includes the 2012 LPA.

Headwaters argues, based on several documents executed after the 2012 LPA, that GRMD waived and relinquished any third-party beneficiary rights it had under the 2012 LPA.

"Waiver is the intentional relinquishment of a known right." Avicaana Inc. v. Mewhinney, 487 P.3d 1110, 1115 (Colo. App. 2019). Waiver may be express or implied when a party manifests an intent to relinquish a right through their conduct. Id. at 1116. If the waiver is implied, the conduct should be "'free from ambiguity and clearly manifest'" the party's intent not to assert a right. Id. In general, waiver is a question of fact. Id. at 1115. Where the facts related to waiver are undisputed and the evidence is "entirely documentary," waiver is a question of law. Id.

i. 2013 Fee Resolution and 2013 Fee Agreement

In 2013, the 2005 Fee Agreement and 2005 Fee Resolution were superseded and replaced by the 2013 Fee Agreement[36] and 2013 Fee Resolution.[37] The 2013 Fee Resolution provided the Amenity Fees would be used ". . .solely for the purpose of financing the acquisition, construction, and installation of the Amenities . . ," (2013 Fee Resolution, ¶ 8). The 2013 Fee Agreement stated it created no third-party beneficiary rights, except for Granby Ranch Metropolitan District Nos. 3-7. (2013 Fee Agreement, ¶ 21(d)).

ii. 2016 Letter Agreement

The Court now considers the 2016 Letter Agreement. The Court did not consider the 2016 Letter Agreement in its Previous Orders because the parties did not attach to or discuss the 2016 Letter Agreement in the Second Amended Complaint or the previous Motion to Dismiss briefing.

On August 22, 2016, GRH, Headwaters, GRMD, and Granby Ranch Metro Districts 2-8 entered into an agreement[38] "regarding refunding of the GRMD 2006 and 2010 Bonds, operation and maintenance of the roads in Granby Ranch, and related issues . . ." (the "2016 Letter Agreement"). (2016 Letter Agreement, p.1). The 2016 Letter Agreement provided the 2006 Master IGA would be amended or replaced "to eliminate any obligations between the parties other than GRMD's funding of road operations, maintenance and minor repairs." (2016 Letter Agreement, ¶ 5). The 2016 Letter Agreement further provided that GRMD would amend its Service Plan to "terminate any financial obligations other than road operations, maintenance and minor repairs between GRMD and Headwaters Metropolitan District." (2016 Letter Agreement ¶ 6(b)).

iii. 2016 Amendments to GRMD and Headwaters' Service Plans

On October 11, 2016, the Town of Granby approved a second amendment to the GRMD Service Plan[39] (the "2016 Second Amendment to GRMD Service Plan"). The purpose of the amendment was to note the IGA between Headwaters and GRMD "will be terminated and replaced with a road maintenance and snow removal agreement, and to clarify that the relationship between GRMD and [Headwaters] as otherwise set forth in the Service Plan is terminated and rendered null and void." (2016 Second Amendment to GRMD Service Plan, ¶ I). The original Service Plan referred to the relationship between GRMD and Headwaters concerning their respective roles and the existence of an IGA between the Districts to further detail their relationship. (2016 Second Amendment to GRMD Service Plan, ¶ II(B)). The original Service Plan was amended as a whole to clarify that the IGA between GRMD and Headwaters "will be terminated," GRMD would provide its own maintenance and operation

[36] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 10.
[37] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 9.
[38] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 14.
[39] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 17.

functions, and that GRMD would enter into an agreement with Headwaters regarding road maintenance and snow removal funding. (2016 Second Amendment to GRMD Service Plan, ¶ II(B)). The original Service Plan was amended to clarify that any obligation of GRMD to provide funds to Headwaters, other than the road maintenance and snow removal agreement, or delegation of any power or delegation of approval authority to Headwaters was "repealed and rendered null and void with the intent that any role or relationship of GRMD as a 'Tax District' and [Headwaters] as a 'Service District' is terminated." (2016 Second Amendment to GRMD Service Plan, ¶ II(B)).

On November 8, 2016, the Town of Granby approved an amendment to the Headwaters Service Plan.[40] The amendment stated the Service Plan "is amended as whole to clarify that" the IGA between Headwaters and GRMD "will be terminated" and Headwaters and GRMD "will enter into an agreement regarding funding of road maintenance and snow removal…" (2016 Amendment to Headwaters Service Agreement, ¶ III(1)). The original Service Plan was amended to clarify that "any obligation of [GRMD], other than as set forth in the road maintenance and snow removal agreement, to provide funds to the District…[is] repealed and rendered null and void with the intent that any role or relationship of [Headwaters] (as the Service District) and [GRMD] (as the Tax District) is terminated." (2016 Amendment to Headwaters Service Agreement, ¶ III)(1)).

iv. 2016 Second Granby IGA

On November 8, 2016, the Town of Granby, Headwaters, GRMD, and Granby Ranch Metro Districts 2-8 entered into the 2016 Second Granby IGA[41], which superseded and replaced the 2008 Granby IGA. (2016 Second Granby IGA, ¶ 1). Under the 2016 Granby IGA, 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…" (2016 Granby IGA, ¶ 5(a)). [42]

Headwaters and GR Terra argue the 2016 Granby IGA distinguishes between "public improvements" that were contemplated to be dedicated to Headwaters, the Town, or another public agency, and the Amenities, which were not required to be conveyed or dedicated to public use.

[40] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 18.
[41] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 21.
[42] GRMD admits "Headwaters had no obligations under the Second Granby IGA standing alone to acquire the Amenities," but states that when read together the with "the Service Plan, Town IGA, LPA, Fee Agreements, and Fee Resolution, together with existing Colorado law, they had the obligation to act in accordance with the terms of the LPA and eventually either acquire the Amenities or allow them to be transferred to another public entity such as the Town of Granby or GRMD for public use." (Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 20, Admission 7, pp. 19-20).

v. 2017 Master IGA Termination

On November 17, 2017, Headwaters, GRMD, and Granby Ranch Metro. Dist. 2-8 entered into the Master IGA Termination.[43] The Master IGA Termination stated the parties intended for GRMD to operate independently from Headwaters and that, due to the amended service plans and intent for GRMD to operate independently, there was no further need for the Master IGAs (defined in the document as the 2006 Master IGA and 2008 Master IGA). (2017 Master IGA Termination, Recitals E-H).

The Master IGA Termination terminated the operative 2006 Master IGA and the 2008 Master IGA.[44] (2017 Master IGA Termination, ¶¶ 2 and 3). The 2017 Master Termination IGA stated the Districts had "fully satisfied their obligations under the Master IGAs" and were "released from any further obligations" under the Master IGAs. (2017 Master IGA Termination, ¶¶ 4 and 5). Each District "waives the right to recover from and generally, unconditionally, fully and irrevocably releases, waives, acquits and forever discharges each of the other Districts . . . from and against any and all costs, losses, claims, liabilities, damages, expenses, demands, debts, controversies, actions or causes of action, agreement, agreements, and promises…which has been raised or could have been raised, whether arising before, on or after the date hereof." (2017 Master IGA Termination, ¶ 5). Each provision of the 2017 Master IGA Termination was "independently, separately and freely negotiated by the Districts . . ." 2017 Master IGA Termination, ¶ 6(c)).

vi. 2018 Waiver and Release Agreement

On April 11, 2018, GRH, Headwaters, GRMD, and Granby Ranch Metro Dist. 8 entered into an agreement regarding the waiver and release of claims.[45] The agreement states GRMD issued $14.7 million in bonds in 2006 (the "Senior Bonds") and issued $11.1 million in bonds in 2010 (the "Subordinate Bonds") related to the cost of constructing public improvements. (2018 Waiver, Recital F and G). GRMD, since 2010, had not generated revenue from property taxes sufficient to pay the principal and interest payments owed on the Senior Bonds, had not made any payments on the Subordinate Bonds (owned solely by GRH), and GRH "provided for the costs of administration and operation of GRMD, [Headwaters], and [Granby Ranch Metro Dist. 8]." (2018 Waiver, Recital K, L, and M). GRH agreed to discharge the Subordinate Bonds in full. (2018 Waiver, Recital P). The agreement acknowledged, due to the status of development within GRMD and the 2016 Service Plan amendments, the Master IGAs were "no longer necessary." (2018 Waiver, Recital S).

[43] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex.19.
[44] In the Previous Orders, the Court noted it was unclear whether the 2017 Master IGA Termination terminated the 2003 Master IGA. It is now undisputed that the 2006 Master IGA terminated the 2003 Master IGA, that the operative IGA between Headwaters and GRMD was the 2006 Master IGA, and the 2017 Master IGA Termination terminated the 2006 Master IGA.
[45] Defendants Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 22.

In the 2018 Waiver and Release Agreement, each party to the 2018 waiver "fully and forever irrevocably releases, waives, relinquishes and discharges the other Parties . . . from 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 . . . 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 Senior Bonds, the Subordinate Bonds, the Master IGA, the repair and operation and maintenance of roads within Granby Ranch or any other matter related to the formation, administration, and operation of the Districts…" (2018 Waiver, ¶ 1) (emphasis added). The release did not apply to the obligations in the amended Letter Agreement as amended as defined in the 2018 Waiver. (2018 Waiver, ¶ 1). The release of claims related to the formation, administration, and operation of the Districts was effective "upon the refinancing of the Senior Bonds, release and discharge of the Subordinate Bonds, and Termination of the Master IGAs." (2018 Waiver, ¶ 3(e)).

vii. Analysis

GRMD waived and relinquished any rights it had against Headwaters related to the Master IGAs and formation, administration, and operation of the Districts, which includes the 2012 LPA.

Headwaters and GR Terra argue that between 2016 and 2018, Headwaters and GRMD "ended any symbiotic relationship created under the Service Plans and terminated any obligations between them." Mot., p. 15-16. Headwaters and GR Terra state such rights were modified by agreements that GRMD was a party to and that GRMD contracted for the terms in the agreements "in exchange for valuable consideration, including GRH's forgiveness of some $11.1 [million] in outstanding bonds." Mot., p. 16.

GRMD argues the 2016 Letter Agreement, the 2017 Master IGA Termination, and the 2018 Waiver did not relate to or reference the 2012 LPA, Amenities, or the Amenity Fees. Resp., p. 12. GRMD argues from 2016 to 2018, Headwaters and its relationship changed, so Headwaters could eventually be dissolved and GRMD would independently own and operate the Amenities. Resp., p. 12-13.

The complex, symbiotic, and interrelated relationship between GRMD and Headwaters that existed as of the 2012 LPA was terminated by 2017 by operation of the 2017 Master IGA Termination and Service Plan amendments. The Districts expressly acknowledged they had fully satisfied their obligations under the Master IGAs.

The parties, by their express terms, agreed to release each other for claims arising from the administration and operation of the Districts. The Court must determine the intent of the parties by reference to the plain and ordinary language of the contract. Neither party argues the language "operation or administration of the Districts" is ambiguous. The Court finds "operation

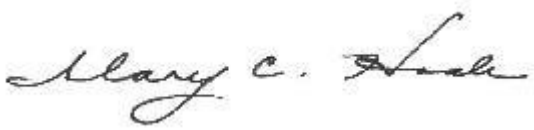
and administration of the Districts" would necessarily include Headwaters' obligations, performance, and rights under the 2012 LPA.

The Court concludes GRMD waived and relinquished any rights it had against Headwaters related to the Master IGAs and formation, administration, and operation of the Districts, which includes the 2012 LPA.

CONCLUSION

The Court GRANTS Headwaters Metropolitan District and GR Terra's Motion to Dismiss pursuant to C.R.C.P. 12(b)(1). The Court dismisses without prejudice GRMD's Third Amended Complaint in this matter.

SO ORDERED this the 30th day of July, 2023.



Mary C. Hoak, District Court Judge

DATE FILED: September 15, 2023 8:57 PM
FILING ID: 42C092581CBC7
CASE NUMBER: 2023CA1612

GRANBY RANCH METROPOLITAN DISTRICT

v.

HEADWATERS METROPOLITAN DISTRICT; GRAY JAY VENTURES, LLC; GRANBY PRENTICE, LLC; GR TERRA, LLC

NOTICE OF APPEAL
(C.A.R. 3(d)(8) APPENDIX)

ATTACHMENT #2

July 30, 2023, Order Denying the Plaintiff / Counterclaim Defendant GRMD's Renewed Motion for Summary Judgment on Counts I, II and III of Defendant / Counterclaim Plaintiff GR Terra's Counterclaims to GRMD's Third Amended Complaint; Order Granting the Defendant / Counterclaim Plaintiff GR Terra's Cross Motion for Summary Judgment on Counts I, II, and III of Defendant / Counterclaim Plaintiff GR Terra's Counterclaims to GRMD's Third Amended Complaint

DISTRICT COURT, GRAND COUNTY, COLORADO 307 Moffat Avenue/P.O. Box 192 Hot Sulphur Springs, CO 80451 970-725-3357 _____ **Plaintiff:** GRANBY RANCH METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado, vs. **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.; GR TERRA, LLC.	DATE FILED: July 30, 2023 CASE NUMBER: 2021CV30008 **COURT USE ONLY**
	Case No: 2021CV30008
ORDER DENYING THE PLAINTIFF/COUNTERCLAIM DEFENDANT GRMD'S RENEWED MOTION FOR SUMMARY JUDGMENT ON COUNTS I, II, AND III OF DEFENDANT/COUNTERCLAIM PLAINTIFF GR TERRA'S COUNTERCLAIMS	

TO GRMD'S THIRD AMENDED COMPLAINT; ORDER GRANTING THE DEFENDANT/COUNTERCLAIM PLAINTIFF GR TERRA'S CROSS MOTION FOR SUMMARY JUDGMENT ON COUNTS I, II, AND III OF DEFENDANT/COUNTERCLAIM PLAINTIFF GR TERRA'S COUNTERCLAIMS TO GRMD'S THIRD AMENDED COMPLAINT

This matter comes before the Court on the Plaintiff/Counterclaim Defendant Granby Ranch Metropolitan District's ("Plaintiff" or "GRMD") Renewed Motion for Summary Judgment on Counts I, II, and III of Defendant GR Terra's Counterclaims, filed on January 23, 2023. On February 8, 2023, the Defendant/Counterclaim Plaintiff GR Terra LLC ("GR Terra") filed a Cross-Motion and Opposition to Plaintiff's Renewed Motion for Summary Judgment on Counts 1, II, and III of Defendant GR Terra's Counterclaims to Third Amended Complaint. On January 25, 2023, GR Terra[1] filed a Statement of Uncontroverted Facts. GR Terra also supplemented the Statement of Uncontroverted Facts with additional facts contained within its Cross-Motion. On February 26, 2023, GRMD filed a Response to Statement of Uncontroverted Facts and its own Statement of Additional Material Facts. On March 8, 2023, GRMD filed its Reply in Support of Renwed Motion for Summary Judgment on Counts 1, II, and III of Defendant GR Terra' Counterclaims and Opposition to Cross-Motion. On March 20, 2023, Headwaters Metropolitan District ("Headwaters") and GR Terra filed a Response to Plaintiff's Statement of Material Facts and Defendants' Statement of Additional Material Facts. On March 22, 2023, GR Terra filed a Reply in Support of its Cross-Motion for Summary Judgment on Counts 1, II, and III of Defendant's GR Terra's Counterclaims, in which GR Terra included a response to GRMD's Supplemental Statement of Facts.

Upon being fully apprised of the facts and law, the Court finds and rules as follows:

PROCEDURAL BACKGROUND

The Court addressed the facts of this case in its three Orders dated January 28, 2022.[2] The defined terms contained therein have the same meaning here. Since that time and on February 11, 2022, GR Terra filed an Answer, Affirmative Defenses, Jury Demand and Counterclaims to GRMD's Second Amended Complaint. On March 4, 2022, GRMD filed a Reply to GR Terra's Counterclaims.

On March 15, 2022, GRMD filed a Motion for Summary Judgment on to GR Terra's Counterclaims I, II, and III. On April 2, 2022, the Court granted GR Terra's Motion to Continue or Stay Response to Motion for Partial Summary Judgment Pending Discovery Pursuant to C.R.C.P. 56(f).

[1] The Defendant Headwaters Metropolitan District and GR Terra filed the Statement of Uncontroverted Facts jointly, GR Terra did not do so solely.

[2] These Orders effectively dismissed (1) GRMD's breach of contract claim against Headwaters for breach of the 2008 Granby IGA (but the Court did not dismiss the breach of contract claims against Headwaters for breach of the 2003 Master IGA and the 2016 IGA) (Claim II); (2) GRMD's claim of breach of covenant of good faith and fair dealing against Headwaters and Gray Jay (Claim VII); (3) GRMD's tortious interference with contract claim against Gray Jay and Granby Prentice (Claim VI); and (4) GRMD's breach of contract claim (Claim III) and tortious interference with contract claim against Redwood Capital (Claim VI).

On October 13, 2022, GRMD filed a Third Amended Complaint.[3] On November 3, 2022, Gray Jay Ventures, LLC ("Gray Jay") and Granby Prentice, LLC ("Granby Prentice") filed their Answer to GRMD's Third Amended Complaint, but Gray Jay and Granby Prentice did not file any counterclaims against GRMD. On the same day, GR Terra and Headwaters each filed a separate Answer, Affirmative Defenses, Jury Demand and Counterclaims to the Third Amended Complaint. On November 25, 2022, GRMD filed its separate replies to GR Terra's and Headwaters' Counterclaims.

GR Terra's Counterclaims against GRMD are as follows: (I) Declaratory Judgment "[d]eclaring that the LPA was terminated in its entirety through foreclosure of the Leased Premises, or alternatively, through Gray Jay's notice of termination, or alternatively, due to Headwaters' failure to appropriate funds for rental payments for the 2021 calendar year or the ensuring (sic) calendar years"; (II) Declaratory Judgment "[d]eclaring that the LPA and any restrictive covenants therein are terminated, removed and canceled from the property"; (III) Quieting Title "in GR Terra to the Leased Premises, free and clear of the LPA and any restrictive covenants, including any covenants in favor of GRMD, and declaring that GRMD has no rights to or interests in the Leased Premises . . ."; (IV) Breach of GRMD's 2016 Service Plan or Improper modification thereof; and (V) Breach of the 2018 Waiver and Release Agreement.

On January 23, 2023, GRMD renewed, and, presumably amended, its March 15, 2022, Motion for Summary Judgment because the present motion was filed with the Court.[4] The Court, therefore, deems GRMD abandoned its March 15, 2022, Motion for Summary Judgment.

STANDARD OF REVIEW

The Court shall enter summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Colorado Rule of Civil Procedure ("C.R.C.P.") 56(c); see Condo v. Conners, 266 P.3d 1110, 1114 (Colo. 2011). The moving party "has the burden of establishing the nonexistence of any genuine issue of material fact." Graven v. Vail Associates, Inc., 909 P.2d 514, 516 (Colo. 1995). Such showing must be by convincing evidence. A-1 Auto Repair &

[3] The Third Amended Complaint added allegations "to the Breach of Contract claims against Gray Jay, Headwaters, Granby Prentice, and GR Terra to include specific allegations that each of these entities had actual and constructive knowledge that the LPA existed and that it was bound by its provisions as a covenant running with the land" and "to include a separate claim for declaratory and injunctive relief to enforce the covenant." The Third Amended Compliant also removed Redwood Capital Finance Company, LLC as a party and removed the breach of contract claims against it; removed the tortious interference with contract claim against Gray Jay, Granby Prentice, and Redwood Capital; and removed the breach of the covenant of good faith and fair dealing against Headwaters and Gray Jay.

[4] The following motions and claims/counterclaims have been deemed moot by this Court's Order dated July 30, 2023 in which the Court found GRMD lacks standing to pursue its claims: GR Terra's motion for summary judgment as to GRMD's claims IV (Breach of Contract), V (Declaratory Judgment), and VI (Declaratory Judgment); Headwaters' Motion for Summary Judgment on GRMD's Claim II (Breach of Contract against Headwaters) and VI (Declaratory Judgment); and Gray Jay's and Granby Prentice's Motion for Summary Judgment as to GRMD's Claim III (Breach of Contract) and VI (Declaratory Judgment).

Detail, Inc. V. Bilunas-Hardy, 93 P.3d 598, 603 (Colo. App. 2004). "In determining the propriety of summary judgment, the nonmoving party is entitled to all favorable inferences that may reasonably be drawn from the undisputed facts, and all doubts as to whether a triable issue of fact exists must be resolved against the moving party." Graven v. Vail Associates, Inc., 909 P.2d 514, 516 (Colo. 1995).

"Once a movant makes a convincing showing that genuine issues are lacking, C.R.C.P. 56(e) requires that the opposing party adequately demonstrate by relevant and specific facts that a real controversy exists." Ginter v. Palmer and Co., 585 P.2d 583, 585 (Colo. 1978). In responding to a motion for summary judgment, by affidavit or otherwise, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." C.R.C.P. 56(e); McDaniels v. Laub, 186 P.3d 86, 87 (Colo. App. 2008); Brown v. Teitelbaum, 830 P.2d 1081, 1084-1085 (Colo. App. 1991). Any doubts as to the existence of a triable issue of fact are to be resolved against the moving party and all inferences must be made in favor of the non-moving party. A.C. Excavating v. Yacht Club II Homeowners Ass'n, Inc., 114 P.3d 862, 865 (Colo. 2005). "Even if it is extremely doubtful that a genuine issue of fact exists, summary judgment is not appropriate." Woodward v. Board Of Directors of Tamarron Ass'n of Condominium Owners, Inc., 155 P.3d 621, 624 (Colo. App. 2007).[5]

RULING

The Court denies the Plaintiff/Counterclaim Defendant GRMD's Renewed Motion for Summary Judgment on Counts I, II, and III of Defendant GR Terra's Counterclaims to GRMD's Third Amended Complaint and grants the Defendant/Counterclaim Plaintiff GR Terra's Cross Motion For Summary Judgment on Counts I, II, and III of Defendant GR Terra's Counterclaims to GRMD's Third Amended Complaint

GRMD contends GR Terra's Counterclaims I (claim for Declaratory Judgment that the 2012 LPA was terminated in its entirety through foreclosure of the Leased Premises or, alternatively, through Gray Jay's notice of termination or, alternatively, due to Headwaters'

[5] Neither party objects to the others' exhibits so the Court deems any such argument waived and considers all of the exhibits on both sides. "A court must disregard documents referred to in a motion for summary judgment that are not sworn or certified." Cody Park Prop. Owners' Ass'n, Inc. v. Harder, 251 P.3d 1, 4 (Colo. App. 2009); D.R. Horton, Inc.-Denver v. D & S Landscaping, LLC, 215 P.3d 1163, 1166 (Colo. App. 2008) ("'Unsworn expert witness reports are not admissible to support or oppose a motion for summary judgment.'"). "Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." C.R.C.P. 56(e). "A party [asserting or] opposing a motion for summary judgment must 'set forth such facts as would be admissible in evidence.'" Glover v. Innis, 252 P.3d 1204, 1208 (Colo. App. 2011). "Failure to authenticate a document or otherwise submit evidence establishing its admissibility precludes consideration of the document for purposes of summary judgment." St. Croix v. University of Colorado Health Sciences Center, 166 P.3d 230, 244 (Colo. App. 2007). A party, however, can waive objection to the lack of certification or affidavit by their reliance on such exhibits. Johnson v. Mountain Sav. & Loan Ass'n, 426 P2.d 962, 963 (Colo. 1967). "When neither party disputes the competence or admissibility of evidence offered in support of and in opposition to the summary motion, we may consider all this record evidence in our analysis." Woodward, 155 P.3d at 624; People v. Gargano, 306 P.3d 109, 111, fn.2, fn.3 (Colo. O.P.D.J. 2012) (stating that where parties do not object to the sufficiency of exhibits in summary judgment motions and responses, objections are deemed waived and the court can take such exhibits into account when making a ruling)).

failure to appropriate funds for rental payments for the 2021 calendar year or the ensuing calendar years), II (claim for decaratory judgment that, to the extent the 2012 LPA created restrictive covenants, those terminated covenants are terminated, removed and canceled from the property), and III (a claim for quiet title pursuan to C.R.C.P. § 105(a) quieting title of the Leased Premises in GR Terra free and clear of any right, title or interest under the 2012 LPA), fail as a matter of law because the 2012 LPA has not been terminated by its own terms and the 2020 Foreclosure did not extinguish the 2012 LPA. Specifically, GRMD maintains that (1) Headwaters did not fail to appropriate rent pursuant to sections 2 and 3 of the LPA; (2) Headwaters did not fail to operate for more than 30 days; and (3) Redwood Capital Finance Co. ("Redwood") 2020 Foreclosure did not extinguish the LPA.[6]

GR Terra's Cross-Motion for Summary Judgment argues the same underlying facts demonstrate that the 2012 LPA was terminated and/or extinguished for these same reasons – i.e. Headwaters did not appropriate rent, Headwaters failed to operate for more than 30 days, and the 2020 Foreclosure extinguished the LPA. GR Terra moves for judgment as a matter of law on these same three counterclaims.[7]

The Court separates the parties' arguments into two sections: one section addressing the 2020 Foreclosure and the others section addressing the terms of the 2012 LPA.

A. The 2020 Foreclosure Extinguished the 2012 LPA

The 2020 foreclosure extinguished the 2012 LPA.

1. GRMD's Motion

[6] In 2005, Redwood Capital Finance Co. entered into a Loan Agreement with Granby Ranch Holdings (the "GRH Loan"), which granted Redwood various deeds of trust on property owned by Granby Ranch Holdings (the "2005 Deed of Trust"). (Defendants Headwaters and GR Terra's Uncontroverted Statement of Facts, ¶ 12). Granby Prentice became the holder of the 2005 Deed of Trust by the spring of 2020. (Id. at ¶ 52). Granby Ranch Holdings defaulted on the GRH Loan. (Id. at ¶ 51). In the spring of 2020, Granby Prentice initiated non-judicial foreclosure proceeding on the Leased Premises. (Id. at ¶ 52). On August 14, 2020, the Grand County Public Trustee held a public sale of the property and Granby Prentice was the successful bid. (Id. at ¶ 53). The Public Trustee issued it a Certificate of Purchase and Granby Prentice then assigned that certificate to Gray Jay. (Id. at ¶ 53). On May 5, 2021, GR Terra and its affiliate, GRCO, LLC, purchased the property from Gray Jay. (Id. at ¶ 68).

[7] The Court need not address GRMD's Claim V in GRMD's Third Amended Complaint. GRMD's Claim V in GRMD's Third Amended Complaint was pled as Claim VIII in GRMD's Second Amended Complaint. In the Court's January 28, 2022, Order, the Court granted Gray Jay, Granby Prentice, and GR Terra's motion to dismiss the claim that the LPA survives because it is an installment land contract. According to GRMD, Claim V "is pled solely to preserve any rights to appeal that Plaintiff may have and is governed by the doctrine of law of the case." (Third Am. Complaint, ¶ 79).

a. GRMD has not Demonstrated the 2012 LPA was a Covenant Running with the Land or, if it was, that it would Survive Foreclosure as a Matter of Law.

GRMD has not not demonstrated the 2012 LPA was a convenant running with the land or, if it was, that it would survive foreclosure as a matter of law.

GRMD contends that the 2012 LPA survives any non-judicial foreclosure because this Court has already determined that the 2012 LPA is a covenant running with the land. (Mot., p. 13). GRMD also cites to Section 28.f of the 2012 LPA which provides

> f. This instrument shall also bind and benefit, as the case may require, the heirs, legal representatives, assigns and successors of the respective Parties, and all covenants, conditions and agreements herein contained shall be construed as covenants running with the land…

(Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 13, ¶ 28f.).

GRMD has not specified how or why the 2012 LPA touches and concerns the land.[8] See Cloud v. Association of Owners, Satellite Apartment Bldg., Inc., 857 P.2d 435, 440 (Colo. App. 1992) (a covenant "must closely relate to the land, its use, or its enjoyment."). GRMD does not address the fundamental elements necessary to establish a covenant running with the land. The parties must intend to create a covenant running with the land and the covenant must touch and concern the land with which it runs. Reishus v. Bullmasters, LLC, 409 P.3d 435, 440 (Colo. App. 2016). Additionally, there must be privity of estate between the original parties at the time of the covenant's creation. Taylor v. Melton, 274 P.2d 977, 982 (Colo. 1954) (requiring privity of estate between the covenanting parties). A covenant cannot run with the land, as a matter of law, if there is a failure to satisfy these elements. See Cloud, 857 P.2d at 440 ("Even if there is an intent to make a covenant run with the land, the covenant must still 'touch and concern' the land, that is, it must closely relate to the land, its use, or its enjoyment."). In other words, an agreement alone cannot create a covenant running with the land; the covenant must touch and concern the land. In re Extraction Oil & Gas, Inc., 627 B.R. 199, 221 (Bankr. D. Del. 2020). GRMD makes no attempt at arguing or demonstrating these essential factors.

GRMD instead repeatedly states the Court, in its January 2022 Orders, determined the 2012 LPA was a covenant running with the land, as a matter of law. To be clear, the Court did not determine, as a matter of law, that all covenants running with the land survive foreclosure or that the 2012 LPA was a covenant running with the land. Rather, in its January 2022 Orders, the Court held covenants running with the land are "not necessarily extinguished by a foreclosure" and therefore GRMD had properly stated a claim for relief. (1/28/2022, Order

[8] This Court has already found the 2012 LPA was not an installment land contract, and, even if it could be interpreted as such, it was extinguished by the 2020 Foreclosure. (January 28, 2022, Order Granting in Part Gray Jay Ventures, LLC, Granby Prentice, LLC, and GR Terra LLC's Motion to Dismiss Second Amended Complaint, at pp. 19-21).

Granting in Part Gray Jay Ventures, LLC, Granby Prentice, LLC, and GR Terra LLC's Motion to Dismiss Second Amended Complaint, at p. 18).

Furthermore, the Court agrees with GR Terra that the procedural posture and standards for motions to dismiss for failure to state a claim and motions for summary judgment are materially different. "Although a determination of a Motion to Dismiss affects what claims are considered at the summary judgment stage, specific findings that a claim is plausible has no effect on the determination of a Motion for Summary Judgment." Gibson v. Brown, 2020 WL 1815911, at *3 (D. Colo., Apr. 9, 2020). Although the issues and facts are largely the same, the standards of review are substantitally different. The Court based its January 28, 2022, Order Granting in Part Gray Jay Ventures, LLC, Granby Prentice, LLC, and GR Terra LLC's Motion to Dismiss Second Amended Complaint, in part, on GR Terra's lack of legal authority. ("The Private Defendants … have not cited any cases involving foreclosure under Section 501 and the extinguishment of covenant that runs with the land"). (Order, p. 18.) The Court was not in a procedural position to dismiss the case for failure to state a claim, because it was plausible that GRMD could support its argument that the LPA survived the 2020 Foreclosure because GR Terra had not met its burden and there were potentially sound legal arguments to support GRMD's claim.

Here, however, the standard is whether there is a genuine issue as to any material fact and whether the moving party is entitled to a judgment as a matter of law. C.R.C.P. 56(c). "[A] Motion for Summary Judgment focuses on whether there is enough evidence to proceed to trial." Gibson, 2020 WL 1815911, at *2. To obtain summary judgment, the burden is on GRMD, the moving party, to demonstrate both that the 2012 LPA is a covenant running with the land and that a covenant that runs with land survives foreclosure under C.R.S. § 38-38-501, as a matter of law.

The Court finds GRMD has not demonstrated the 2012 LPA survives foreclosure. First, GRMD cites Top Rail Ranch Estates, LLC v. Walker, 2014 COA 9 and Schwab v. Martin, 441 P.2d 17 (Colo. 1968), two cases that this Court relied upon in its January 2022, Order Granting in Part Gray Jay Ventures, LLC, Granby Prentice, LLC, and GR Terra LLC's Motion to Dismiss Second Amended Complaint. Under Top Rail, 2014 COA 9, ¶ 21, certain covenants running with the land may survive foreclosure. Top Rail had purchased a subdivision of platted lots from Walker Development, executed a promissory note to Walker Development, and secured the note with a deed of trust. Id. at ¶ 5. A provision of the deed of trust allowed Walker Development to pay off any liens encumbering the property, and that if it did so, the paid off lien amounts would become part of Top Rail's debt to which Walker Development would become entitled. Id. at ¶ 20. Later, Top Rail obtained a bank loan for improvements in the subdivision, also secured by a deed of trust. Id. at ¶ 6. Walker Development subordinated its deed of trust to the bank's lien on most of the subdivision lots. Id. After Top Rail's default, the bank foreclosed on its deed of trust and Walker Development redeemed and took title. Id. at ¶ 8. The foreclosed property was subject to a superior lien of a water district for unpaid water tap fees. Id. at ¶ 9. After the foreclosure, Walker Development paid off that lien. Id. The Colorado Court of Appeals held that because Top Rail had assigned to Walker Development the right to cure the water tap lien and covenanted to pay Walker Development the cost of such cure, the contractual rights were not extinguished even though the security interest had been extinguished. Id. at ¶ 22 (the

"contractual rights did not depend on the continued vitality of Walker Development's security interest in the property"). Id.; See also Schwab, 441 P.2d 17 at 19 (despite foreclosure, the right to appoint a receiver under a deed of trust remains operative as a contract between the parties).

GR Terra, however, has persuaded the Court that these holdings are limited to instances in which the surviving contractual obligations were detailed within the foreclosed deed of trust, agreed upon by the borrowers (the same borrowers foreclosed upon) for the lender's benefit, and were then sought to be enforced against the borrowers. While there is disputed evidence that the 2005 LPA was incorporated in the 2005 Loan Agreement,[9] there is no evidence that either the 2005 LPA or the 2012 LPA were for the benefit of Redwood and its successors. These cases also do not involve junior property interests, which is at issue here. As the Court discusses later in this order, the 2005 LPA was superseded and GRMD has not cited any facts or evidence that GRMD somehow maintains its seniority position despite being integrated into the 2006 LPA, which was then integrated into the 2012 LPA. GRMD does not address these critical distinctions and instead states that "[a]s in Schwab and Top Rail, the obligations and covenants contained in the Deeds of Trust, Loan Documents, and Agreements, including the LPA and Amenity Fee Agreement, remain operative contracts separate from the debt and were not extinguished by the foreclosure." (Reply, p. 10). It was incumbent upon GRMD to cite to the specific sections within each document reflecting a contractual obligation intended to survive foreclosure.

The only other case cited by GRMD, as to the foreclosure issue, is Schmelzle v. Key, Inc., 452 P.2d 41 (Colo. 1969). In Schmelze, the Colorado Supreme Court held the plaintiffs had an equitable interest in specific lots, subject to a prior deed of trust, because the plaintiffs had an expectation in the reconveyance of the lots, if the lots were not sold to third-parties. Here, GRMD had no similar expectation, and, therefore, GRMD lacks an equitable interest that could possibly survive foreclosure. The Court finds Schmelze distinguishable and not sufficient to establish that the 2012 LPA survives foreclosure.

Second, GRMD has not demonstrated, as a matter of law, that junior interests/covenants survive statutory foreclosure. The Court addresses the junior encumbrance issue more thoroughly under subsection 2 below regarding GR Terra's Cross Motion. For purposes of this subsection, however, GRMD has not cited any legal authority that a junior interest/covenant survives foreclosure in any instance.

On the other hand, GR Terra cites to numerous cases in which a foreclosure extinguished various types of covenants junior to the foreclosed deed of trust.[10] In Town of Grand Lake v.

[9] The 2005 LPA was not identified as a "Loan Document" in the 2005 Loan Agreement [conditions for financing which were incorporated into the Loan Agreement.] (Statement of Uncontroverted Facts, Ex. 60 Articles 1.1, 1.41, and Ex. A). The 2005 LPA was described, however, within one of the Loan Documents: the "Subordination Agreement executed by Headwaters Metropolitan District in favor of Lender relating to the Lease Purchase Agreement between Borrower [GRH] and Headwaters Metropolitan District." (Id., Article 3.1(a)(xv), Ex. A). It is also disputable whether the "Assignment of District Agreements (and the Consent to Assignment of the District Agreements executed by Headwaters Metropolitan District and the SolVista Metropolitan District" included the 2005 LPA. (Id.).

[10] See Gray v. Shepard, 505 S.W.3d 317, 319-320 (Mo. App. 2016) (foreclosure of a senior deed of trust extinguishes junior covenants and equitable servitudes burdening the real property because purchaser at foreclosure

Lanzi, 937 P.2d 785 (Colo. App. 1996), for instance, a parking agreement, executed after two deeds of trust, was deemed extinguished upon foreclosure of those deeds of trust because of the parking agreement's junior position. In Town of Grand Lake, owners of a village center entered into a parking agreement with the Town in which the owners would provide parking for the Village Center on a nearby lot. Id. at 788. The parking agreement was recorded and stated that it was a covenant appurtenant to both the Village Center and the nearby lot. Id. at 786. At the time of the recording of the parking agreement, Village Center and the nearby lot were both subject to separate deeds of trust. Id. Upon the owners' default, the lenders foreclosed. Id. The Colorado Court of Appeals held the junior encumbrance created by the parking agreement was extinguished by foreclosure, was no longer appurtenant to the Village Center, and was not binding on the subsequent owners of the Village Center. Id. at 788 (citing C.R.S. §§ 38-39-110, 38-38-501, and First Interstate Bank v. Tanktech, Inc., 864 P.2d 116, 119 (Colo. App. 1993)).

b. GRMD Has not Demonstrated the 2012 LPA Survives Foreclosure Because it Serves a Public Purpose.

The Court denies GRMD's Renewed Motion for Summary Judgment on Counts I, II, and III of Defendant GR Terra's Counterclaims because GRMD has not demonstrated the 2012 LPA survives foreclosure because it serves a public purpose.

GRMD contends the 2012 LPA cannot be extinguished by foreclosure because the 2012 LPA serves a public purpose. GRMD encourages the Court to view the 2012 LPA not as a "junior lien but instead more like a 'common element' in a common interest community." (GRMD reply, p. 2). "Just as a public right-of-way in a site plan or a common element of a condominium declaration is not terminated by foreclosure, public rights in the Leased Premises under the LPA cannot be terminated by foreclosure. The LPA reflects the dedication of the premises to public use, and the clear intent is that it will survive foreclosure." (Id., p. 7). GRMD's argument is confusing, especially because it was not raised in its original motion and only within GRMD's reply. The Court interprets GRMD's argument as follows: the 2012 LPA is subject to TABOR;[11] TABOR prohibits the co-mingling of public and private funds;[12] and the

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sale acquires title as it existed on the date the foreclosed deed of trust was recorded); Prestwood v. Weissinger, 945 So.2d 458, 461-62 (Ala. Civ. App. 2005) (foreclosure of senior mortgage extinguished later-created restrictive covenant); Legacy Hills Residential Ass'n, Inc. v. Colonial Bank, 564 S.E.2d 550, 552 (Ga. App. 2002) (title acquired by bank via foreclosure of recorded deed of trust had priority over subsequently recorded protective covenants); Sun Valley Hot Springs Ranch, Inc. v. Kelsey, 962 P.2d 1041, 1045 (Idaho 1998) (foreclosing lender not subject to restrictive covenants because mortgage was recorded before the covenants); Mortgage Investors of Washington v. Moore, 493 So.2d 6, 8-9 (Fla. Dist. Ct. App. 1986) (foreclosure rendered property free of restrictive covenants not in existence when the mortgage was recorded); Sain v. Silvestre, 144 Cal. Rptr. 478, 485 (Cal. App. 1978) (foreclosure of lender's senior deed of trust extinguished later-recorded restrictive covenants); Vernon v. Allphin, 98 So.2d 280, 283-84 (La. App. 1957) (purchaser at foreclosure sale is not subject to restrictions not in existence on the date the mortgage was executed); Talles v. Rifman, 53 A.2d 396, 398 (Md. 1947) (foreclosure of mortgage put to an end any binding effect of later-filed restrictions on the property); Magnolia Petroleum Co. v. Drauver, 83 P.2d 840, 843-44 (Okla. 1938) (foreclosure of prior mortgage destroys later-filed restrictions).

[11] "TABOR" is also known as Article X Section 20 of the Colorado Constitution and it "imposes limits on government spending, revenue gathering and accumulation, and indebtedness." Landmark Towers Association, Inc. by EWG-GV, LLC v. UMB Bank, N.A., 2018 COA 100, ¶ 62.

extinguishment of the 2012 LPA would result in a TABOR violation because the 2012 LPA furthered the collection "of fees from residents (public funds) to subsidize purely private property without public benefit…" (GRMD Response in Opposition to Defendant GR Terra's Motion for Summary Judgment on Counts IV, V and VI, p. 8, incorporated into GRMD Reply at 7-8).

The Court is not convinced.

First, Headwaters is a special district pursuant to C.R.S. § 32-1-101 et seq. A special district, by law, "is a quasi-municipal corporation and political subdivision, solely responsible for its own debts." Landmark Towers Association, Inc. by EWG-GV, LLC v. UMB Bank, N.A., 2018 COA 100, ¶ 66. Colo. Const. Art. XI §§ 1 and 2 specificially do not apply to special districts. Id. (citing N. Colo. Water Conservancy Dist. v. Witwer, 108 Colo. 307, 310, 116 P.2d 200, 201 (1941) ("water conservancy district was a quasi-municipal corporation not subject to sections 1 and 2"); and Milheim v. Moffat Tunnel Improvement Dist., 72 Colo. 268, 280, 211 P. 649, 654 (1922) ("tunnel improvement district wasn't subject to article XI, section 8, which applied, before its 1969 repeal, only to cities and towns")). As a special district, Headwaters is authorized by statute "[t]o acquire, dispose of, and encumber real and personal property including, without limitation, rights and interests in property, leases, and easements necessary to the functions or the operation of the special district…" C.R.S. § 32-1-1001(1)(f). Headwaters is also authorized to provide various services, including those related to parks and recreation. C.R.S. § 32-1-1004(2)(c). As such, Headwaters is authorized to acquire leasehold interests related to recreational services.

Second, GRMD does not cite any legal authority that property interests, let alone junior property interests, utilized in furtherance of a project designed for a public purpose, can survive foreclosure.[13] The opposite appears to be true. Special district property interests may be extinguished by foreclosure upon expiration of the redemption period. Mount Carbon Metropolitan Dist. v. Lake George Co., 847 P.2d 254, 257 (Colo. App. 1993); see also Town of Grand Lake, 937 P.2d at 785. Municipalities are not entitled to "superpriority liens" absent statutory authority. Gold Vain Ltd. Liability Co. v. City of Cripple Creek, 973 P.2d 1286, 1289 (Colo. App. 1999).

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[12] GRMD cites to Colo. Const. Art. XI, §§ 1, 2 and In re Interrogatories by Colo. State Senate (Senate Resolution No. 13) Concerning House Bill No. 1247, 566 P.2d 350, 356 (Colo. 1977).

[13] Similarly, GRMD does not cite to any case in which a public purpose-type development is subject to foreclosure or a special district's property interest survives foreclosure, or to any case involving the intersection of TABOR and statutory foreclosure at all. In fact, GRMD does not define public purpose or cite to any cases involving a public purpose. See Ginsberg v. City and County of Denver, 436 P.2d 685, 688 (Colo. 1968) (citing City and County of Denver v. Hallett, 34 Colo. 393, 83 P. 1066 (Colo. 1905)) ("The test is whether the power, if exercised, will promote the general objects and purposes of the municipality, and of this the legislature is the judge in the first instance…"). The Court is not in a position to do the legal research on these issues for GRMD or to piece together support for an argument offered in a motion. See Gravina Siding and Windows Company v. Gravina, 516 P.3d 37, 50 (Colo. App. 2022) (citation omitted) (it is not the court's "proper function to make or develop a party's argument when that party has not endeavored to do so itself"); see also Redden v. Clear Creek Skiing Corp., 2020 COA 176, ¶ 21, 490 P.3d 1063, 1070 (quoting CSX Transp., Inc. v. Miller, 159 Md.App. 123, 858 A.2d 1025, 1083 (2004) for the proposition that "If [the party] wanted a weightier resolution of the issue, it should have mounted a weightier contention. Gravitas begets gravitas").

> If the General Assembly had wanted to grant municipalities broad authority to collect all nuisance abatement charges with a priority lien . . ., it could have done so . . . Absent statutory authority, a 'superpriority lien' will not be inferred. Rather, if such a 'superpriority lien' is to be imposed, it must be done expressly by the General assembly.

Id. (affirming extinguishment of nuisance abatement lien upon foreclosure of senior deed of trust). GRMD has not identified a statute that grants the 2012 LPA any "superpriority lien" status or gives the 2012 LPA priority (due to its "public purpose") over a security interest recorded over a decade earlier.

For the same reason, the Court is not persuaded by GRMD's argument that GR Terra is subject to the 2012 LPA because GR Terra "had notice of the historical and public nature of the Granby Ranch property and GRMD's interest." (GRMD, Reply in Support of Renewed Motion for Summary Judgment on Counts I, II, and III, p. 11). GRMD cites to Ragsdale Bros. Roofing, Inc. v. United Bank of Denver, N.A., 744 P.2d 750, 753 (Colo. App. 1987), which states a "purchaser is bound by the record. If it indicates the existence of some outside interest by which the title may be affected, a purchaser is bound to investigate and is charged with knowledge of the facts to which the investigation would have led." Ragsdale Bros., however, involved the intersection of C.R.S. §§ 38-22-103(2) (mechanic's lien statute) and C.R.S. § 38–39–110 (predecessor to C.R.S. § 38-38-501). Id. at 752. A search of the chain of title "would have disclosed the existence of the superior mechanic's lien" prior to the sale because a mechanics lien is granted priority over previously recorded interests under certain circumstances per C.R.S.§ 38–22–103(2) and "when a lien is filed later in time than a deed of trust, yet is superior to the deed of trust, the title acquired pursuant to the public trustee's sale and deed is subject to the superior lien." Id. at 753. As such, two mechanics' liens that were filed after the deed of trust was recorded, but before the public trustee sale, were deemed to have survived foreclosure. Here, GRMD has not identified a statute that gives the 2012 LPA priority over a security interest recorded a decade earlier.

Third, the Court rejects GRMD's argument that the 2012 LPA cannot be extinguished because it would violate Colorado law to collect fees from residents to subsidize private property without a public benefit. According to GRMD, the entire scheme of the 2012 LPA was to further Headwaters' or GRMD's eventual acquisition of the Amenities, and any extinguishment of the 2012 LPA removes the public purpose upon which the collection of fees was based.

GRMD has not cited any authority that the public purpose served by the 2012 LPA depended upon Headwaters' or GRMD's ultimate acquisition of the Amenities or that Headwaters was even required to purchase the Amenities. Instead, GRMD cites to a myriad of documents and agreements it contends demonstrate the public purpose of the project. (GRMD's Response in Opposition to Defendant GR Terra's Motion for Summary Judgment on Counts IV, V and VI of the Third Amended Complaint (incorporated into its reply herein, pp. 7-8)). GRMD does not explain the interrelationship between these documents or their legal significance. This Court examined these documents in its Order issued July 30, 2023, and concluded GRMD lacks standing to enforce their terms. As such, even if GRMD had provided

legal authority demonstrating property interests with a public purpose cannot be extinguished by foreclosure, GRMD does not have the right to enforce that public purpose interest here.

Moreover, it would have been contrary to Colorado law for the 2012 LPA to require Headwaters to pay rent or to exercise the option to purchase for future fiscal years. See Glennon Heights, Inc. v. Central Bank & Trust, 658 P.2d 872, 878-879 (Colo. 1983); Gude v. City of Lakewood, 636 P.2d 691 (Colo. 1981). Any such provision would have violated the Colorado Constitution and C.R.S. § 29–1–110 which prohibits a municipality from assuming future debt without legislative discretion to elect not to appropriate funds for that purpose. See Colo. Const. art. X, § 20, cl. (4)(b) (Voter approval is required in advance for the "creation of any multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever without adequate present cash reserves pledged irrevocably and held for payments in all future fiscal years."); art. XI, § 6. "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 agreement without further obligation." Black v. First Federal Sav. and Loan Ass'n of Fargo, North Dakota, F.A., 830 P.2d 1103, 1110 (Colo. App. 1992) (underline added).

Lastly, GRMD argues "[a]t a minimum, disputed material facts exist regarding GRMD's interest which preclude entry of summary judgment as a matter of law[14]" but fails to specify what those disputed facts are and instead, provides a synopsis of the various documents and agreements involved in this case, without any analysis or discussion as to how they demonstrate that they survive foreclosure. "The party requesting summary judgment has the initial burden to demonstrate the absence of evidence in the record that supports the nonmoving party's case." Todd v. Hause, 2015 COA 105, ¶ 12. "In determining the propriety of summary judgment, the nonmoving party is entitled to all favorable inferences that may reasonably be drawn from the undisputed facts, and all doubts as to whether a triable issue of fact exists must be resolved against the moving party." Graven, 909 P.2d at 516 (underline added).

The Court finds GRMD has not met its burden to demonstrate the 2012 LPA survived foreclosure merely because it facilitated a public purpose; that it cannot be foreclosed simply because a public body contemplates eventually taking title to the property. The Court makes this conclusion with the principle in mind that Colorado courts lack the authority to compel a government body to specifically perform a contract. Wheat Ridge Urban Renewal Authority v. Cornerstone Group XXII, L.L.C., 176 P.3d 737, 744 (Colo. 2007).

In reaching this findings, the Court further concludes GRMD has not met its burden to demonstrate, as a matter of law, that any covenant or interest contained within the 2012 LPA, survives statutory foreclosure.

As such, the Court denies GRMD's Renewed Motion for Summary Judgment on Counts I, II, and III of Defendant GR Terra's Counterclaims as to the 2020 Foreclosure.

[14] GRMD's Response in Opposition to Defendant GR Terra's Motion for summary Judgment on Counts IV, V and VI of the Third Amended Complaint, pp. 16-17.

2. GR Terra's Cross Motion

The Court grants judgment in favor of GR Terra on Counts I, II, and III of GR Terra's counterclaims.

GR Terra argues the 2020 Foreclosure extinguished the 2012 LPA, as a junior encumbrance, by operation of C.R.S. § 38-38-501(1) (following a foreclosure sale, and expiration of redemption periods to lienors entitled to redeem, title to the foreclosed property vests in the holder of the certificate of purchase "free and clear of all liens and encumbrances junior to the lien foreclosed"); see First Interstate Bank, 864 P.2d at 119. "[U]pon foreclosure of a senior security interest, any subordinate leases, liens or encumbrances are extinguished once the redemption period has expired under [C.R.S. § 38-38-501]." First Interstate Bank, 864 P.2d at 119; see also Town of Grand Lake, 937 P.2d at 788.

Up to this point, the Court would have agreed with GR Terra. Neither party had provided the June 1, 2005 LPA (the "2005 LPA") or the 2005 Deed of Trust to the Court (See GRMD Statement of Additional Facts, Exs. 59 and 61). In every iteration of its complaint, GRMD makes no reference to the 2005 LPA and, instead, GRMD based all of its claims on the 2012 LPA. This is true, as well, for GR Terra's Counterclaims.

GRMD has now presented the 2005 LPA and a copy of the 2005 Deed of Trust for the Court's review. The Court turns to these documents.

The 2005 LPA granted Headwaters the right to use and acquire the Leased Premises, including the golf course, ski facilities, and improvements thereon, much like the 2012 LPA. (GRMD Statement of Additional Facts, Ex. 59). The 2005 LPA was executed contemporaneously with the 2005 Deed of Trust; the 2005 Loan Agreement between Granby Ranch Holdings ("GRH") and Redwood; the 2005 Promissory Note between GRH and Redwood; the June 2005 Amenity Fee Agreement between GRH and Headwaters; and the June 2005 Capital Facilities Fee Agreement between GRH and Headwaters. (Headwaters' Answer and Affirmative Defenses to Third Amended Complaint, Jury Demand and Counterclaims, Ex. B; GR Terra's Statement of Uncontroverted Facts, Ex. 8). The May 2005 Joint Resolution to Establish an Amenity Fee between Headwaters and GRMD was executed one month before. (GR Terra's Statement of Uncontroverted Facts, Ex. 7).

In 2006, however, GRH and Headwaters amended and restated the 2005 LPA. The 2006 LPA stated Headwaters and GRH intented to "amend, restate and supersede the Original Lease in its entirety." (Headwaters and GR Terra's Responses to GRMD's Statement of Additional Material Facts and Headwaters and GR Terra's Statement of Additional Material Facts, Ex. 40 Fourth Recital). The 2006 LPA also contained an integration clause: "This instrument shall merge all undertakings, representations, understandings, and agreements whether oral or written, between the parties hereto with respect to the Leased Premises and the provisions of this Lease, and shall constitute the entire Lease unless otherwise hereafter modified by both parties in writing." (Id. at ¶28.e.).

The 2012 LPA described the 2006 LPA as the "Prior Lease." (Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 13, Recital A). The 2012 LPA similarly states tthe parties (GRH and Headwaters) "enter into this Lease to amend, restate and supersede the Prior Lease in its entirety." (Id. Ex. 13, Recital E). The 2012 LPA also contained an identical integration clause as the one in the 2006 LPA. (Id. Ex. 13, ¶28e.).

Where a contract is unambiguous "and contains an integration clause stating that the writing constitutes the entire agreement of the parties, it must be enforced according to its terms." Moore v. Georgeson, 679 P.2d 1099, 1101 (Colo. App. 1983). "A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope." Restatement (Second) of Contracts § 213(2) (1981). Indeed,

> The general rule is that where the parties enter into a written contract, all prior and contemporaneous negotiations, understandings, and verbal agreements on the same subject are merged in the written contract and extinguished. In particular, where the contract contains an integration or merger clause, the law conclusively presumes all prior and contemporaneous agreements have been merged into a written contract. Also, upon the execution of a valid substituted agreement, the original agreement becomes merged into it and is extinguished.

17A Am. Jur. 2d Contracts § 516.

Additionally, "the word 'supersede' means to 'be superior to,' 'to make obsolete, inferior, or outmoded,' 'to make void,' 'to make superfluous or unnecessary,' 'to take the place of,' or 'to cause to be supplanted in a position or function.'" Board of County Com'rs of County of San Miguel v. Roberts, 159 P.3d 800, 804 (Colo. App. 2006) (citing Webster's Third New International Dictionary at 2295 (1986)). While GRMD contends the 2005 LPA, the 2006 LPA, and the 2012 LPA are basically the same, the Court notes there are material differences between the documents; namely the 2005 LPA contained a 25-year term extending until 2030 as opposed to the 50-year term in the 2012 LPA that extended until 2062 and markedly different formulas for calculating the purchase price in the event Headwaters exercised its option to purchase. (Headwaters and GR Terra's Statement of Uncontroverted Facts, Ex. 13, ¶2; GRMD's Response in Opposition to GR Terra's Motion for Summary Judgment on Counts IV, V and VI of the Third Amended Complaint, Ex. 59, ¶2).

The 2006 and the 2012 LPA's use of the word supersede, combined with both integration clauses and the material differences in the documents, leads the Court to conclude the 2005 LPA was extinguished, with no force or effect.

GRMD contends the 2005 LPA "was an integral part of the original Loan Documents and is not, as Defendants contend, a junior lien or encumbrance. The fact that the LPA was later amended and restated does not relegate it to a junior lien." (GRMD's Reply in Support of Renewed Motion for Summary Judgment, p. 10.) GRMD does not cite any legal authority for this position. The Court performed its own legal research and did not locate any auyhority to support this premised either.

Lastly, the 2012 LPA clearly states that the 2005 Deed of Trust was prior and superior.[15]

In light of these undisputed facts, the Court finds the 2012 LPA effectively extinguished the 2006 LPA (which had extinguished the 2005 LPA). Thus, the 2012 LPA was a junior encumbrance to the 2005 Deed of Trust.

As a matter of law, the 2012 LPA was extinguished by the 2020 Foreclosure. C.R.S. § 38-38-501; see also First Interstate Bank, 864 P.2d at 119; Town of Grand Lake, 937 P.2d at 787-788.

Having concluded the 2012 LPA was extinguished by the 2020 Foreclosure, the Court need not address whether Headwaters terminated the 2012 LPA by failing to appropriate rent, by failing to operate the Amenities for more than 30 days, or whether changed circumstances justifies removal or termination of the 2012 LPA.

B. The 2012 LPA Terminated Per its Own Terms.

Even if the 2020 Foreclosure did not extinguish the 2012 LPA, the Court finds that the 2012 LPA terminated by operation of its own language.

GRMD and GR Terra argue each is entitled to summary judgment based on Sections 2 and 3 of the 2012 LPA involving the initial term, renewal terms, termination and rental amounts.

In interpreting a contract, "the primary goal of contract interpretation is to determine and effectuate the intent and reasonable expectations of the parties." Copper Mountain, Inc. v. Industrial Systems, Inc., 208 P.3d 692, 697 (Colo. 2009). The intent of the parties is determined primarily from the contractual language. People ex rel. Rein v. Jacob, 465 P.3d 1, 11 (Colo. 2020). The intent of the parties may also be evidenced by the circumstances surrounding the contract. Vallagio at Inverness Residential Condominium Association, Inc. v. Metropolitan Homes, Inc., 412 P.3d 709, 718 (Colo. App. 2015). The Court reads clauses in the context of the entire contract, "seeking to harmonize and to give effect to all provisions so that none will be rendered meaningless." Pepcol Mfg. Co. v. Denver Union Corp., 687 P.2d 1310, 1313 (Colo. 1984). When a contract is unambiguous and complete, courts may conclude that the contractual language expresses the parties' intent and will enforce the terms according to their plain meaning. People ex rel. Rein, 465 P.3d at 11.

Section 2 of the 2012 LPA states in full that:

[15] The Court has previously addressed the issue of the Subordination, Non-Disturbance and Attornment Agreement in its January 2022, "Order Granting in Park Gray Jay Ventures, LLC, Granby Prentice, LLC, and GR Terra LLC's Motion to Dismiss Second Amended Complaint." In its January 2022 Order, the Court stated that because the agreement is an unrecorded document, it cannot, as a matter of law, bind successors thereto, and "would have bound only Headwaters and GRH . . ." C.R.S. § 38-35-108.

> The initial term of this Lease with respect to the Leased Premises shall begin on the date set forth in the introductory paragraph to this Lease, and shall terminate at the end of the current fiscal year (the "Original Term"). This Lease shall automatically renew for 49 additional one-year terms coinciding with the fiscal year of the Tenant (each a "Renewal Term"), at the end of the Original Term and each Renewal Term unless the Tenant elects not to appropriate funds to pay amounts due under this Lease as set forth in Section 3.c.
>
> This Lease will terminate upon the earliest of any of the following events:
>
> a. The expiration of the Original Term or any Renewal Term due to the failure of Tenant to appropriate Amenity Fees to be paid pursuant to the terms of this Lease to continue leasing the Leased Premises for the ensuing Renewal Term;
>
> b. Default by Tenant and Landlord's election to terminate this Lease as provided herein;
>
> c. All Amenity Fees collectable under the Amenity Fee Agreements and the Fee Resolution have been collected in full;
>
> d. Payment of the Purchase Price exclusively from Amenity Fees;
>
> e. With Landlord's prior written consent, payment of the Purchase Price from sources other than Amenity Fees; or
>
> f. December 31, 2062.

(underline added). Section 3 states in full that:

> 3. a. Tenant shall pay as rent for the Original Term and all of the Renewal Terms of this Lease, upon receipt, an amount equal to the proceeds of all Amenity Fees collected by Tenant (the "Rental Payments"). Except as specifically provided herein, the Rental Payments will be absolute and unconditional in all events and will not be subject to any set-off, defense, counterclaim or recoupment for any reason whatsoever.
>
> b. As used herein, "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 or 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. Notwithstanding the foregoing, "Amenity Fees" shall not include any fee imposed solely for the purposes of funding operational costs related to the Leased Premises. The Parties acknowledge that, due to the nature of the due dates of the Amenity Fees, as set forth in the Fee Resolution and the Fee Agreement, the amount of Amenity Fees received by the Tenant may

fluctuate greatly from month to month and year to year. Tenant hereby covenants that it will do all things lawfully within its power to obtain, maintain and properly request and pursue the Amenity Fees.

c. The Tenant and the Landlord acknowledge and agree that the obligation of the Tenant to pay Rental Payments hereunder constitutes a current obligation of the Tenant payable exclusively from current and legally available funds and 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 the Tenant. The Tenant has not hereby pledged the credit of the Tenant to the payment of the Rental Payments, which amounts are payable solely from the Amenity Fees, if and when received. During the Original Term and each Renewal Term, the chairman or president of the Tenant shall request the required appropriation from Tenant's board of directors (the "Board") for the ensuing Renewal Term and exhaust all available administrative reviews and appeals in the event such portion of the budget is not approved. If actual Amenity Fees collected during any 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. If the chairman or president of the Tenant periodically requests from its governing body funds to be appropriated for payment to Landlord under this Lease and, notwithstanding the making in good faith of such request in accordance with appropriate procedures and with the exercise of reasonable care and diligence, such governing body does not approve funds to be paid to Landlord for the Leased Premises, the Lease shall not be renewed and Tenant shall return the Leased Premises to Landlord in the condition, repair, appearance and working order required herein in the following manner:

i. By delivering the Leased Premises to Landlord in good condition, normal wear and tear accepted (sic); and

ii. By executing such documents as may be necessary to clear title of the encumbrances (other than the Permitted Exceptions) to the Leased Premises.

Tenant agrees to give Landlord at least 60 days' notice of non-renewal, provided that failure to give such notice shall not affect Tenant's right not to renew this Lease as herein provided.

Lastly, Section 10 sets forth circumstances in which GRH may terminate the 2012 LPA:

Notwithstanding anything to the contrary, if Tenant ever ceases to operate the Amenities on the Leased Premises for 30 days or longer, subject to damage, destruction, condemnation and eminent domain, Landlord may, in its sole discretion and after at least 10 days advance notice to Tenant (which notice may be given within 10 days after the Tenant ceases operation of the Amenities), elect

> to terminate this Lease as of such future date designated by Landlord in such notice in which event Tenant will be released of any further liability as of the date of termination; provided after receiving such notice, but prior to the termination date of the Lease, Tenant has the option of providing a notice to pay the Purchase Price within six months of the date of such notice.

GRMD contends Headwaters did not fail to appropriate rent or operate for more than 30 days, while GR Terra contends Headwaters did indeed fail in both regards. The Court addresses each argument separately.

1. Headwaters Failed to Appropriate Rent and Terminated the 2012 LPA

Headwaters failed to appropriate rent and thereby terminated the 2012 LPA.

GR Terra argues a failure to appropriate rent is within Headwaters' discretion and Headwaters has effectively done so and, therefore, Headwaters terminated the 2012 LPA.

GRMD's arguments for summary judgment are, again, confusing and the Court has done its best to understand them. GRMD essentially contends that because Headwaters continued and continues to collect Amenity Fees the 2012 LPA has not terminated because there has not been a failure to appropriate. GRMD also maintains the President of the Board of Headwaters failed to adhere to the procedural requirements set forth in Section 3 of the 2012 LPA somehow caused the 2012 LPA to remain "in full force and effect by operation of law." (GRMD Mot. Summ. J., p. 10).

The Court agrees with GR Terra.

First, as mentioned above, "[f]inancing methods involving lease-purchase or multi-year lease agreements are constitutional if the local or state government annually can choose not to renew the agreement without further obligation." Black, 830 P.2d at 1110; see also Glennon Heights, 658 P.2d at 878-879; Gude, 636 P.2d at 695. This is because Colo. Const. art. XI, § 6 states "[n]o political subdivision of the state shall contract any general obligation debt by loan in any form ... except by adoption of a legislative measure.... [N]o such debt shall be created unless the question of incurring the same be submitted to and approved by a majority of the qualified taxpaying electors voting thereon...." See also Black, 830 P.2d at 1110 ("[c]onstitutionally prohibited debt is created when 'one legislature, in effect, …obligate[s] a future legislature to appropriate funds to discharge the debt created by the first legislature").

These principles are reflected in 2012 LPA:

> This Lease shall automatically renew for 49 additional one-year terms coinciding with the fiscal year of the Tenant (each a "Renewal Term"), at the end of the Original Term and each Renewal Term unless the Tenant elects not to appropriate funds to pay amounts due under this Lease as set forth in Section 3.c.

(Headwaters and GR Terra's Stmt. of Uncotroverted Facts, Ex. 13, Sec. 2.a.). The 2012 LPA further provides

> The Tenant and the Landlord acknowledge and agree that the obligation of the Tenant to pay Rental Payments hereunder constitutes a current obligation of the Tenant payable exclusively from current and legally available funds and 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 the Tenant.

(Id. at 3.c.). Thus, as a matter of law, Headwaters retained annual discretion not to appropriate rent. As such, per Section 2.a of the 2012 LPA, Headwaters could exercise that discretion to terminate the 2012 LPA. GRMD does not address the discretion argument in its reply and, therefore, GRMD has not met its burden in demonstrating Headwaters lacked the discretion not to appropriate the amenity rental fees.

Second, there are no genuine issues of material fact as to whether Headwaters failed to appropriate rent. GR Terra has established that Headwaters failed to appropriate Amenity Fees for payment of rent for calendar years 2021, 2022, and 2023. GR Terra cites to the adopted budgets for 2021, 2022, and 2023 in which there were no appropriations by Headwaters for the Lease Purchase Agreement Amenity Fees. (Headwaters and Gr Terra's Statement of Uncontroverted Facts, ¶¶ 58-64, Ex. 24).

GRMD argues that, while there might not have been any appropriations, Headwaters continued to collect Amenity Fees from lot owners in 2022[16], but GRMD has not demonstrated that collection of the fee equates to an appropriation for payment of rent under the LPA. Appropriating is to "take exclusive possession of" or "to set apart for or assign to a particular purpose or use" or "to take or make use of without authority or right." (Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/appropriating - accessed 7/26/23).[17] Here, Headwaters never had the power to take exclusive possession of the Amenity Fees and was also taking it with authority and right, therefore, only the second definition applies – to set apart for or assign to a particular purpose of use. GRMD has not provided the Court with any evidence that Headwaters collected the fees and then set them aside for a particular purpose. GRMD not provided any evidence that the Amenity Fees collected in 2022 were collected or paid by GRMD or its residents. GRMD has not argued that, as a matter of law, "collection" is synonymous with "appropriation."

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[16] GRMD cites to two 2022 emails from Diane Rodriguez, accounting manager for Headwaters at Community Resource Services of Colorado, and Clint Waldron, Esq., of White Bear Tanaka & Waldron, P.C., general counsel to Headwaters, to Mylea Draper, an Escrow Officer at Title Company of the Rockies in which Mr. Waldron acknowledges that the Amenity Fee is still being collected for each new lot sale within Headwaters Metro District. (GRMD Mot. Summ. J., Ex. C). It also cites to an unaudited table reflecting "Amenity Fees Received & Deposited in Headwaters Metro District and Paid to GRH." (GRMD Statement of Additional Material Facts, Ex. 72). GRMD has not stated what this document is or where GRMD obtained the document.

[17] Colorado's "Local Government Budget Law of Colorado" C.R.S. § 29-1-102(1) defines "appropriation" as "the authorization by ordinance or resolution of a spending limit for expenditures and obligations for specific purposes."

Instead, GRMD merely argues that "these Amenity Fees should have been appropriated to make rent payments under the 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.'" (GRMD Mot. Summ. J., p. 10).

The Board, however, chose not to budget for Rental Payments in 2021, 2022, and 2023.

The Court rejects GRMD's last, strained, argument that certain "defects" made by the President of the Headwaters' Board, related to adoption of the 2021, 2022 and 2023 budgets somehow negate the decision to not appropriate the fees.[18] GRMD fails to provide any legal authority to support this argument – i.e. that procedural inadequacies can undermine an adopted resolution. The 2012 LPA also does not require termination where there are deficiencies or inadequacies with Section 3.

GRMD has not met its burden to demonstrate Headwaters appropriated rental fees for 2021, 2022, and 2023.

GR Terra has met its burden in demonstrating that Headwaters failed to appropriate rental fees for these years, was within its discretion to do so, and as a consequence, the 2012 LPA automatically terminated.

2. Whether Headwaters Failed to Operate the Amenities for More than 30 Days

The Court does not address whether Headwaters failed to operate the amenities for more than 30 days because the Court has already found the 2012 LPA terminated upon Headwaters' failure to appropriate rental fees.

CONCLUSION

(1) The Court DENIES GRMD's Renewed Motion for Summary Judgment;

(2) The GRANTS GR Terra's Cross Motion for Summary Judgment and Opposition to the Renewed Motion Summary Judgment of GRMD. The Court grants judgment in favor of GR Terra and against GRMD on Counts I, II, and III of GR Terra's counterclaims.

[18] GRMD alleges Mr. Johnson failed to meet his duties under Section 3.c. of the 2012 LPA by not requesting the required appropriation from the board of directors, not exhausting all available administrative reviews, and appeals by not voting against the Budget Resolution, and not making a good faith request for the appropriation in accordance with appropriate procedures and with the exercise of reasonable care and diligence. (GRMD Mot. Summ. J., p. 9.) GR Terra argues the Headwaters' Board did follow the process with respect to Section 3 of the 2012 LPA when Headwaters rejected proposals from the Board President to amend the 2022 budget and proposed 2023 budget to appropriate funds for rent and rejected his appeal of those decisions." (GR Terra Response and Cross-Motion, p. 18; GR Terra Reply, p. 12).

(3) The Court declares the 2020 Foreclosure extinguished the 2012 LPA in its entirety and/or the 2012 LPA terminated upon Headwaters' failure to appropriate funds for rental payments for the 2021 calendar year or the ensuing calendar years;

(4) The Court declares the 2012 LPA, including any and all restrictive covenants contained therein, is hereby terminated, removed, and canceled as a cloud on title to the Leased Premises, as the same is defined in the 2012 LPA. See Zavislak v. Shipman, 362 P.2d 1053, 1055 (Colo. 1961) (courts have the equitable power "to remove or cancel restrictive covenants" when "it is shown that the restrictive covenants no longer serve the purpose for which they were imposed and are no longer beneficial to those claiming under them."). The 2020 foreclosure extinguished the 2012 LPA because the 2012 LPA was a junior encumbrance to the 2005 Deed of Trust and, thus the 2012 LPA no longer serves its purpose or benefits those claiming benefits under the 20212 LPA.

(5) C.R.C.P. 105(a) authorizes actions "'brought for the purpose of obtaining a complete adjudication of the rights of all parties thereto, with respect to any real property and for damages, if any, for the withholding of possession.'" Hinojos v. Lohmann, 182 P.3d 692, 696-7 (Colo. App. 2008). The existence of an encumbrance on the Leased Premises in the form of the 2012 LPA involves the rights of all parties to the Leased Premises. GR Terra has established ownership of the Leased Premises, free and clear of the 2012 LPA. GR Terra is, therefore, entitled to a decree quieting title to the Leased Premises. The Court hereby quiets title in GR Terra to the Leased Premises, free and clear of the 2012 LPA, including any and all restrictive covenants contained therein. GRMD has no rights to or interests in the Leased Premises, as the same is defined in the 2012 LPA.

SO ORDERED this 30th day of July, 2023.

Mary C. Hoak

Mary C. Hoak, District Court Judge

DATE FILED: September 15, 2023 8:57 PM
FILING ID: 42C092581CBC7
CASE NUMBER: 2023CA1612

GRANBY RANCH METROPOLITAN DISTRICT

v.

HEADWATERS METROPOLITAN DISTRICT; GRAY JAY VENTURES, LLC; GRANBY PRENTICE, LLC; GR TERRA, LLC

NOTICE OF APPEAL
(C.A.R. 3(d)(8) APPENDIX)

ATTACHMENT #3

July 30, 2023, Order Denying as Moot (1) GR Terra's Motion for Summary Judgment on to GRMD's Claims IV (Breach of Contract), V (Declaratory Judgment), and VI (Declaratory Judgment); (2) Headwaters' Motion for Summary Judgment on GRMD's Claim II (Breach of Contract against Headwaters) and VI (Declaratory Judgment); and (3) Gray Jay and Granby Prentice's Motion for Summary Judgment as to GRMD's Claim III (Breach of Contract) and VI (Declaratory Judgment)

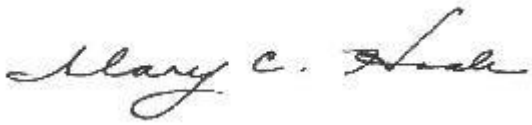
DISTRICT COURT, GRAND COUNTY, COLORADO PO Box 192/307 Moffat Avenue Hot Sulphur Springs, CO 80451 970-725-3357 _____ **Plaintiff:** GRANBY RANCH METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado, **v.** **Defendants:** HEADWATERS METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado; GRAY JAY VENTURES, LLC.; REDWOOD CAPITAL FINANCE CO., LLC, GRANBY PRENTICE, LLC; and GR TERRA, LLC.	DATE FILED: July 30, 2023 CASE NUMBER: 2021CV30008 COURT USE ONLY
	Case Number: 2021CV30008

ORDER DENYING AS MOOT (1) GR TERRA'S MOTION FOR SUMMARY JUDGMENT ON TO GRMD'S CLAIMS IV (BREACH OF CONTRACT), V (DECLARATORY JUDGMENT), AND VI (DECLARATORY JUDGMENT); (2) HEADWATERS' MOTION FOR SUMMARY JUDGMENT ON GRMD'S CLAIM II (BREACH OF CONTRACT AGAINST HEADWATERS) AND VI (DECLARATORY JUDGMENT); AND (3) GRAY JAY AND GRANBY PRENTICE'S MOTION FOR SUMMARY JUDGMENT AS TO GRMD'S CLAIM III (BREACH OF CONTRACT) AND VI (DECLARATORY JUDGMENT)

Given the Court's dismissal of the Plaintiff Granby Ranch Metropolitan District's Third Amended Complaint the Court denies as moot: (1) GR Terra's motion for summary judgment as to GRMD's claims IV (Breach of Contract), V (Declaratory Judgment), and VI (Declaratory Judgment); (2) Headwaters' Motion for Summary Judgment on GRMD's Claim II (Breach of Contract against Headwaters) and VI (Declaratory Judgment); and (3) and Gray Jay and Granby Prentice's Motion for

Summary Judgment as to GRMD's Claim III (Breach of Contract) and VI (Declaratory Judgment).

SO ORDERED this 30th day of July 2023.



Mary C. Hoak, District Court Judge