

# Granby Ranch Metropolitan District Regular Board Meeting Agenda (Friday February 11, 2022)

Directors	Office	Term Expiration
Matt Girard	President	May 2022
Steven Conrad	Asst. Secretary/ Asst Treasurer	May 2022
Vacancy		May 2022
Timothy Archie	Asst. Secretary	May 2023
Glenn O’Flaherty	Asst. Secretary	May 2023

Meeting Start Time: 6:00pm

Meeting Location: Online video conference site is as follows:

<https://www.gotomeet.me/DistrictBoardMeetingRoom2> Members of the public may also participate via phone using the dial-in number: (646) 749-3112 / Access code #534-031-373

## I. Administrative Items:

- A. Call To order
- B. Declaration of quorum
- C. Director qualifications / disclosure matters
- D. Meeting protocol and logistics of public comment – Director Girard
- E. Unscheduled public comments (limited to 3 minutes/each)
- F. Policy regarding unidentified participants on meeting video – Director Girard
- G. Review and Consideration of November 12, 2021 board meeting minutes **[Exhibit 01]**
- H. Status update – GRMD request of Town to change Town representative **[Exhibit 02]**
- I. Status update – 2022 board election – District Manager

## II. Financial Matters:

- A. Review and ratify contractor invoices **[Exhibit 03]**
- B. Review and consider December 31, 2021 financial reports **[Exhibit 04]**

## III. Legal Items:

- A. 2018 Refinance agreement Road Repair commitments by Developer (GRH)
  - i. Status of road repairs by Developer and status of existing SIA’s with Town – Director Girard
  - ii. Developer proposed new SIA’s for Filing 8, phase 2 & 3 – Director Girard **[Exhibit 05]**
- B. HMD/GPGH/GR Terra Litigation Update - Director O’Flaherty and Director Girard (Litigation Subcommittee) **[Exhibit 06]**
- C. **Executive Session** per C.R.S. 24-6-402(4)(b) to confer with legal counsel regarding December 31, 2012 Second Amended and Restated Lease Purchase Agreement and the June 1, 2005 Amenity Fee Agreement, and status of associated ongoing litigation with HMD/GPGH/GR Terra
- D. **Post Executive Session Discussion & Potential Action regarding Litigation**

## IV. Adjournment

The next regular board meeting is scheduled for Friday May 13, 2022 at 10:00am to be held online at the following location: <https://www.gotomeet.me/DistrictBoardMeetingRoom2> Members of the public may also participate via phone using the dial-in number: (646) 749-3112 and access code #534-031-373.

# EXHIBIT 01

# GRANBY RANCH METROPOLITAN DISTRICT

## Regular Board Meeting Minutes

Meeting Date: Friday November 12, 2021

Meeting Time: 10:00am to 12:35pm

Meeting Location: Online video conference site as follows:

<https://www.gotmeet.me/DistrictBoardMeetingRoom2> Members of the public may also participate via phone using the dial-in-number: phone: (646) 749-3112/Access code #534-031-373

### I. Roll Call (10:00am)

A regular meeting of the Board of Directors of the Granby Ranch Metropolitan District (District) was called and held as shown above and in accordance with the statutes of the State of Colorado. The following Directors were in attendance:

Directors	Office	Attendance
Matt Girard	President	Present
Steven Conrad	Asst. Secretary/ Asst Treasurer	Present
Timothy Archie	Asst. Secretary	Present
Glenn O' Flaherty	Asst. Secretary	Present
Vacancy		N/A

Also, in attendance was district manager Charles Wolfersberger (Wolfersberger, LLC); general counsel for the District, Alan Pogue (Icenogle Seaver Pogue, P.C.); special counsel for the District, Charles Norton (Norton & Smith, PC); Katie Jenner (Hush Blackwell); Town of Granby liaison with the District and resident, Nick Raible, Amy Golden (SkyHi News); and the following residents/homeowners: John Gillogley, Bill Rose, Rick and Carolyn Poulson, , Robert O' Munneke, Micah Hildenbrand, Tamy Hermanson, Dave Richardson, Jack James, Bradley Bearson, Jennifer Dubrow, Katie Jenner, Joe Byker, David Sardinta, Stefan Haberer, Natasha O' Flaherty, K. Weiser, Lauren, Doug and 4 unidentified callers.

### II. Administrative Matters

1. Call to Order: The meeting was called to order by Director Girard. Director Girard noted that a quorum of the Board was present, and the Directors confirmed their qualification to serve and, therefore, called the special meeting of the Board of Directors of the District to order.
2. Declaration of Quorum: Director Girard noted 4 directors are present and quorum is met for this meeting.
3. Present disclosures of potential conflicts of interest: The Board reviewed the agenda for the meeting, following which all directors disclosed no conflicts of interest with the business to be discussed and conducted at the meeting. Director O'Flaherty stated his wife recently resigned as a trustee serving on the Town of Granby's Board, (which was previously considered by the District's general counsel as not creating a conflict for Director O' Flaherty).

- 2) Meeting agenda: The Board reviewed the agenda as presented by the Director Girard. Director Girard motioned to revise the agenda and add an item II.5 below. Director O' Flaherty seconded the motion and the Board voted 4-0 to approve the agenda.
- 3) Meeting protocol & logistics of public comment: Director Girard briefly reviewed and discussed the protocol & logistics for public comments during this meeting, which will be considered and allowed for each and every agenda item going forward. Director Girard also stated the meeting will be recorded and posted on our website as soon as practical.
- 4) Unscheduled public comments: Director Girard opened the floor to public comments. No attendees requested time to address the Board.
- 5) Review and consider proposal to request Town to appoint a new liaison between the Town of Granby and the District: Director O' Flaherty read a statement regarding concerns he has that the land developer wants to install a public trail across Director O' Flaherty's property and has held discussions with Mr. Raible (the liaison with the District appointed by the Town of Granby) regarding this proposed project. Director O' Flaherty was very concerned about conflicts of interest that arise given the potential of litigation to resolve this dispute and Mr. Raible's involvement.

Mr. Raible stated that he would like to see a public trail installed to the gazebo but has not discussed any such project with the Developer. He has asked the Developer regarding the status of the road repairs within the District and the developer has not responded other than to state the developer wants to see the roads repaired quickly.

Director O' Flaherty motioned to direct the District's general counsel to draft a letter on behalf of the District to the Town of Granby Board of Trustees requesting the Board of Trustees appoint another individual as liaison with the District. Director Girard seconded the motion and the Board voted 3-1 to approve the motion. (Director Conrad voted against the motion.)

**Action Item 1:** The District's general counsel will draft a letter on behalf of the District requesting the Board of Trustees for the Town of Granby replace Mr. Raible with another individual as liaison with the District

- 6) Review and consider August 25, 2021 board meeting minutes: The Board reviewed the August 25, 2021 meeting minutes. Director Girard motioned to approve the minutes as presented. Director O' Flaherty seconded the motion and the Board voted 4-0 to approve the minutes.
- 7) Status update – District website: The District Manager reported the redesign of the District's website is still in process, while targeting this to be complete by the next meeting (Feb 2022).
- 8) Review and consider 2022 administrative resolution. The District Manager presented and the Board reviewed and discussed the 2022 administrative resolution. The Board agreed to keep officer positions the same among the directors. The Board discussed whether to hold future meetings at 10am or 6pm and agreed to modify the resolution to reflect scheduling the February and August meetings at 6pm and the May and November meeting at 10am. Director

Girard also noted he is waiving his \$100/meeting stipend afforded under CRS 32-1-902(3)(a). Director Girard motioned to approve the 2022 Administrative Resolution modified such that clause 3 on page is modified such that the primary notification location will be on the GRMD website ([www.granbyranchmd.org](http://www.granbyranchmd.org)), with the back-up location being posted at 998 Village Road, Granby, CO. Director O' Flaherty seconded the motion and the Board voted 4-0 to approve the motion.

**Action Item 2:** The District Manager will post the 2022 administrative resolution, as modified, on the District's website.

- 9) Review and consider 2022 election resolution: The District Manager presented and the Board reviewed and discussed the 2022 election resolution. Director Girard motioned to approve the 2022 Election Resolution as presented. Director O' Flaherty seconded the motion and the Board voted 4-0 to approve the motion

### **III. Financial Matters:**

- 1) Review and ratify contractor invoices: The Board reviewed the schedule of contractor invoices submitted for payment since the last meeting – five invoices totaling \$9,867.30. Director Girard motioned to approve payment of all invoices. Director O' Flaherty seconded the motion and the Board voted 4-0 to approve the motion.
- 2) Review October 31, 2021 financial reports: The District Manager reviewed the District's year-to-date October 31<sup>st</sup> financial reports. Approximately 101.7% of the district's property tax revenue and 94.8% of specific ownership tax has been collected for the Bond Fund through October 31. Approximately 99.3% of the district's property tax revenue and 99.0% of the specific ownership tax has been collected for the General Fund through October 31. The District had a cash balance of \$58,378 in its checking accounts and \$2,560,985 in its CSAFE and UMB trust accounts.

The District Manager reviewed the general fund and debt fund budget-to-actual reports for revenue and expenses for the 10-month period ended October 31<sup>st</sup>. In the general fund, the District has incurred expenses totaling \$174,353, which is \$32,770 higher than year-to-date budgeted expenditures.

The District will pay its semiannual interest (\$322,669) and principal (\$80,000) payment on the 2018 Series Bonds on December 1<sup>st</sup>. Through October 31, 2021, total expenses in the debt fund total \$368,984 which is comprised of accrued interest, county treasurer collection fees (\$42,815) and the annual trustee fee (\$3,500). Total actual expenses was \$2,101 less than year-to-date budgeted expenses for the debt fund.

For the 10-month period ended October 31, 2021, the District Manager noted revenue exceeded expenses in the general fund and the debt fund by \$139,306 and \$577,350, respectively

- 3) Review and consider closing checking account with First Bank: The District Manager noted the District opened a checking account with Vectra Bank this year and now no longer uses the checking account at First Bank. Director Girard motioned to close the District's checking

account with First Bank. Director O' Flaherty seconded the motion and the Board voted 4-0 to approve the motion.

**Action Item 3:** The District Manager will work with the Board on closing the checking account with First Bank.

- 4) Public hearing regarding proposed 2021 budget amendment: Director Girard motioned to open the public hearing at 11:02am regarding the proposal to amend the District's 2021 budget. Director O' Flaherty seconded the motion and the Board voted 4-0 to approve the motion.

The District Manager reviewed the proposed 2021 budget amendment. The District Manager pointed out the proposed budget amendment only affects the District's operating fund and recognizes an increase in spending from \$157,883 to \$220,000. The increase is related to litigation costs incurred by the District that was not anticipated when the original 2021 budget was approved by the Board on November 13, 2020. The District Manager also noted the District's operating fund will remain cash flow positive in 2021 and the year-end balance in the operating fund is projected to be \$559,300 (assuming the budget amendment is approved), which reflects an increase in the District's fund balance by approximately \$156,000 for 2021.

Director Girard motioned to close the public hearing at 11:08am. Director O' Flaherty seconded the motion and the Board voted 4-0 to approve the motion.

- 5) Review and consider resolution to amend 2021 budget: The District Manager presented the resolution to amend the District's 2021 budget. Director Girard motioned to approve the resolution as presented. Director O' Flaherty seconded the motion and the Board voted 4-0 to approve the motion.

**Action Item 4:** The District Manager will file the 2021 budget amendment with the Division of Local Government and post the budget amendment on the District's website.

- 6) Public hearing on District's proposed 2022 budget: Director Girard motioned to open 2022 Budget public hearing at 11:09am. Director O' Flaherty seconded the motion and the Board voted 4-0 to approve the motion. The District Manager reviewed the proposed 2022 budget. Highlights from the review included the following:

- Property valuation within the operating district boundaries increased 10.4% from \$17.4 million for 2021 to \$19.3 million for 2022.
- Property valuation within the bond district boundaries increased 16.6% from \$18.74 million for 2021 to \$21.8 million for 2022.
- Total expenditures for the operating fund are budgeted at \$188,000 for 2022 – a \$12,000 decrease from total expenses projected to be incurred in the operating fund in 2021. \$100,000 of the \$188,000 is budgeted for additional litigation costs related to the current lawsuit initiated by the District against HMD/GPGH/GR Terra. The 2022 operating fund budget also includes \$12,000 for covering the cost of running a potential board election in May 2022.

- The District's administrative costs are projected to decrease for the third year in a row.
- The 2022 budget reflects collecting facility fee revenue totaling \$75,060 (\$6,255/lot x 12 lots). This revenue is entirely dependent on the timing of when vacant home lots are developed.
- Total expenditures in the debt fund are projected to be \$786,300 in 2022. Expenses are comprised primarily of principal and interest payments due on the District's Series 2018 bonds.
- The annual contribution from the Sol Vista Metro District is projected to be \$40,000 for 2022.
- Specific ownership tax revenue is projected to be 7.2% of gross property tax revenue in 2022.

The Board reviewed and discussed three mill levy scenarios: 60 mills (same mills as 2021), 54 mills and 50 mills. The Board noted the District will generate positive cash flows under all three scenarios. The Board noted that all three mill levy scenarios allows the District to increase its cash balances which will improve the District's financial position when it is able to refinance the debt (at the earliest in December 2023).

Director Girard motioned to close the 2022 Budget public hearing at 11:42am. Director O' Flaherty seconded the motion and the Board voted 4-0 to approve the motion.

- 7) Consider resolution to adopt 2022 budget, appropriate funds, set mill levies: The District Manager presented the resolution to adopt the 2022 budget, set mill levies and appropriate funds. **Director Girard motioned to approve the resolution reflecting a total of 54 mills (an 10% reduction in mills from 2021).** Director O' Flaherty seconded the motion and the Board voted 4-0 to approve the motion.

**Action Item 5:** District Manager will file the 2022 budget with the State of Colorado and the mill levy certification with the County Treasurer.

- 8) Review and consider 2022 management/accounting contract w Wolfersberger, LLC: The Board reviewed and discussed the 2022 service contract submitted by Wolfersberger, LLC. The District Manager noted there are no changes to service fees for 2022 compared to 2021. Director Girard motioned to approve the 2022 service contract as submitted. Director O' Flaherty seconded the motion and the Board voted 4-0 to approve the motion.
- 9) Review and consider engagement of BF Borgers for 2021 financial statement audit: The District Manager presented the audit engagement letter submitted by BF Borgers to audit the District's 2021 annual financial statements. Director Girard motioned to approve the engagement letter submitted by BF Borgers. Director O' Flaherty seconded the motion and the Board voted 4-0 to approve the motion.

#### **IV. Legal Matters**

- 1) Status of road repairs by Developer and Status of SIA's with Town-Director Girard: Director Girard discussed the status of Road Repairs by Developer (GR Terra) and the status of SIA's with Town. He noted GPGH assumed responsibility to repair the roads when they purchased the development from the prior land developer out of foreclosure, and GR Terra assumed same responsibility when they purchased from GPGH, and they are bound by same SIA agreements. He also reported that the performance insurance bonds filed by the previous Developer (GRH) with the Town were inadequate to cover claims submitted by the Town for road repairs. Consequently, the Town placed building restrictions (no building permits or Certificates of Occupancy) on every current Developer owned undeveloped home lot in Filing 3, 6, 8 and 10 starting in 2019, as well as not allowing the Developer to sell individual lots within these filings. These restrictions will stay in place until the either the roads are repaired, or property securities valued at the estimated full cost of repairs are placed with the Town. Director Girard is not aware of any pending activity regarding road repairs. Mr. Raible indicated he is also unaware of any pending repairs as required to the roads within the District.
- 2) Draft "Omnibus Development Agreement" from Developer to Town: Director Girard indicated this agreement was submitted from GR Terra to the Town of Granby and proposes several changes to the contractual agreements and responsibilities between the Town and the developer regarding the land within the District, and the referenced SIA and road repair work mentioned above in IV.1 . Per the Town Trustee meeting on Nov. 9<sup>th</sup>, the Town (via Town Attorney and Town Manager) are negotiating this agreement further with GR Terra. Mr. Raible provided a brief update on the status of the Town's review of this proposed agreement submitted by the developer.
- 3) Letter from GRC to GRMD dated October 1, 2021 regarding road maintenance and snow removal services related to an Intergovernmental Agreement on Snow Removal dated April 11, 2018: Director Girard reported that the District received a notice from GRC on October 1, 2021 that GRC is only budgeting \$180,000 for road maintenance and snow plowing of the roads within the District. Ms. Hildenbrand and Ms. O' Flaherty provided comments regarding the road repair and maintenance agreements.

Mr. Paulson expressed his support for the litigation initiated by the District against HMD/GPGH/GR Terra.

#### **V. Executive Session**

At 12:09pm, Director Girard motioned to convene the meeting to executive session per C.R.S. 24-6-402(4)(b) to confer with legal counsel regarding (1) December 31, 2012 Second Amended and Restated Lease Purchase Agreement and the June 1, 2005 Amenity Fee Agreement, and status of associated ongoing litigation with HMD/GPGH/GR Terra, and (2) letter from GRC to GRMD dated October 1, 2021 regarding road maintenance and snow removal services. Director O' Flaherty seconded the motion and the Board voted 4-0 to approve the motion.

In addition to all directors, the following individuals also attended the executive session: Mr. Wolfersberger, Mr. Norton, Mr. Pogue. No actions or motions were voted on by the Board during executive session.

Director Archie dropped off the call during executive session.

At 12:34pm, Director Girard motioned to close the executive session. Director Conrad seconded the motion and the Board voted 3-0 to approve the motion.

Post executive session Discussion re Litigation effort against GPGH/HMD: Mr. Pogue reported that the Board properly convened to executive session and that the executive session was not recorded due to attorney/client privileged discussion in executive session.

Re. the GRC letter to GRMD, GRMD continues to take this letter under legal advisement.

Director Girard reported that there is no update since the last board meeting regarding the status of the lawsuit between the District (Plaintiff) and Headwaters Metro District, Gray Jay Ventures, LLC, Redwood Capital Finance Co, LLC, GR Terra, LLC and Granby Prentice, LLC (collectively, Defendants) regarding the 2012 amended and restated lease purchase agreement. The District has been waiting three months now for the court to rule on filed motions, which has been in court's hands since August 13<sup>th</sup>. Director Girard pointed out that all legal filings are posted on the District's website. Director Girard opened up the meeting to public comments and questions to which nobody submitted any questions.

## **VI. Adjournment (12:35pm)**

There being no further business to come before the Board, and upon motion duly made by Director Girard, seconded by Director Conrad and unanimously carried, the meeting was adjourned. The next board meeting is scheduled for Friday February 11, 2022, at 6:00pm online at: <https://www.gotmeet.me/DistrictBoardMeetingRoom2> Members of the public may also participate via phone using the dial-in-number: phone: (646) 749-3112/Access code #534-031-373

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Secretary

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Date

# EXHIBIT 02

# GRANBY RANCH METROPOLITAN DISTRICT

November 22, 2021

## VIA ELECTRONIC MAIL

Ted Cherry, Town Manager  
Town of Granby  
PO Box 440  
Granby, Colorado 80446  
[tcherry@townofgranby.com](mailto:tcherry@townofgranby.com)

**Re: Perceived Conflict of Interest of Current Town Representative Appointed to Granby Ranch Metropolitan District**

Dear Mr. Cherry,

At the regular meeting of Granby Ranch Metropolitan District (the “District”) held on Friday, November 12, 2021, the Board of Directors of the District (the “Board”) discussed the potential conflict of interest of the current Town Representative to the District, Nick Raible. At that same meeting the Board approved the sending of a letter to the Town regarding the Board’s concern about the perceived conflict of interest of Mr. Raible.

The Board respectfully requests that the Town remove Mr. Raible from the position of Town Representative due to the perceived conflict of interest and appoint a new Town Representative to participate as a non-voting member of the District.

Thank you and please contact me if you have any questions.

Sincerely,



Matt Girard, President  
Granby Ranch Metropolitan District  
Board of Directors

**cc:**

Alan Pogue, GRMD Counsel ([apogue@isp-law.com](mailto:apogue@isp-law.com))  
Steve Conrad, GRMD Board member ([steve.conrad@impactrealestatesolutions.com](mailto:steve.conrad@impactrealestatesolutions.com))  
Tim Archie, GRMD Board member ([tim.archie0@gmail.com](mailto:tim.archie0@gmail.com))  
Glenn O’Flaherty, GRMD Board member ([goflaherty@comcast.net](mailto:goflaherty@comcast.net))  
Nick Raible, Town of Granby Trustee ([nraible@townofgranby.com](mailto:nraible@townofgranby.com))

# EXHIBIT 03

**Granby Ranch Metropolitan District**  
**Contractor Invoices**  
**January 31, 2022**

<b>Payment</b>			
<b>Date</b>	<b>Payee</b>	<b>Amount</b>	<b>Invoice description</b>
11/15/21	Icenogle Seaver & Pogue, PC	\$ 1,363.00	General counsel - legal services
11/15/21	BF Borgers CPA PC	\$ 3,000.00	Deposit on 2021 financial statement audit services
11/18/21	Norton & Smith, PC	\$ 404.22	Litigation support services
11/29/21	Wolfersberger, LLC	\$ 6,786.00	Management and accounting fees - November/December
12/16/21	Special District Association	\$ 776.28	2022 membership dues
12/20/21	Icenogle Seaver & Pogue, PC	\$ 4,761.00	General counsel - legal services
12/22/21	Colorado Special Districts Property and Liability Pool	\$ 2,291.00	2022 Liability insurance premium
12/22/21	Norton & Smith, PC	\$ 2,468.10	Litigation support services
01/07/22	Wolfersberger, LLC	\$ 6,786.00	Management and accounting fees - January/February
01/28/22	Norton & Smith, PC	\$ 186.00	Litigation support services
		<u>\$ 28,821.60</u>	

# EXHIBIT 04

**Granby Ranch Metropolitan District - Bond Fund  
2021 County Treasurer Tax Deposit Activity**

	Deposit in CSAFE Account	Property Taxes	Specific Ownership Taxes	Collection Fees	Interest Income
January	\$ 48,992.21	47,028.38	4,315.25	(2,351.42)	
February	270,281.26	278,314.39	5,887.23	(13,915.72)	(4.64)
March	65,858.27	64,350.49	4,711.49	(3,218.26)	14.55
April	189,316.44	192,615.15	6,317.87	(9,631.51)	14.93
May	69,728.33	67,754.26	5,091.36	(3,401.96)	284.67
June	166,537.00	170,315.85	4,651.33	(8,520.30)	90.12
July	31,750.08	27,117.33	5,286.30	(1,392.83)	739.28
August	13,134.71	7,372.81	5,855.14	(383.14)	289.90
September	5,664.14	-	5,664.14	-	-
October	5,223.56	-	5,223.56	-	-
November	10,612.23	4,709.94	5,828.22	(251.79)	325.86
December	5,605.97	-	5,605.97	-	-
<b>Total</b>	<b>\$ 882,704.20</b>	<b>\$ 859,578.60</b>	<b>\$ 64,437.86</b>	<b>\$ (43,066.93)</b>	<b>\$ 1,754.67</b>
<b>Budget</b>		<b>\$ 840,323</b>	<b>\$ 50,419</b>	<b>\$ (42,016)</b>	
<b>% of Budget Collected</b>		<b>102.3%</b>	<b>127.8%</b>	<b>102.5%</b>	

**Note:** The revenue amounts per the monthly County Treasurer distribution statements are deposited into District's CSAFE account in the following month. For example, the revenue per the December County Treasurer distribution statement is deposited into the District's CSAFE account in January.

**Granby Ranch Metropolitan District - General Fund  
2021 County Treasurer Tax Deposit Activity**

	Deposit in CSAFE Account	Property Taxes	Specific Ownership Taxes	Collection Fees	Interest Income
January	\$ 16,896.19	15,676.13	2,003.87	(783.81)	-
February	89,633.04	92,423.44	1,833.10	(4,621.18)	(2.32)
March	21,849.28	21,450.17	1,467.01	(1,072.75)	4.85
April	45,312.31	45,621.46	1,967.20	(2,281.33)	4.98
May	17,205.83	16,409.41	1,585.29	(822.14)	33.27
June	55,410.17	56,771.95	1,448.28	(2,840.10)	30.04
July	10,467.11	9,038.96	1,646.00	(464.27)	246.42
August	4,249.63	2,457.60	1,823.11	(127.71)	96.63
September	1,763.64	-	1,763.64	-	-
October	1,626.45	-	1,626.45	-	-
November	3,409.40	1,569.98	1,814.73	(83.93)	108.62
December	1,745.52	-	1,745.52		
<b>Total</b>	<b>\$ 269,568.57</b>	<b>\$ 261,419.10</b>	<b>\$ 20,724.20</b>	<b>\$ (13,097.22)</b>	<b>\$ 522.49</b>
<b>Budget</b>		<b>\$ 261,661</b>	<b>\$ 15,699</b>	<b>\$ (13,083)</b>	
<b>% of Budget Collected</b>		<b>99.9%</b>	<b>132.0%</b>	<b>100.1%</b>	

**Note:** The revenue amounts per the monthly County Treasurer distribution statements are deposited into District's CSAFE account in the following month. For example, the revenue per the December County Treasurer distribution statement is deposited into the District's CSAFE account in January.

**Granby Ranch Metropolitan District  
Budget Comparison Report - Operating Fund**

	01/01/21 - 12/31/21				Annual Budget
	Actual	Budget	Variance		
			\$	%	
<b>Accounts 4000 to 4999 (Revenue)</b>					
4006 - Property Tax Revenue	261,419	261,651	(232)	0%	261,651
4007 - Specific Ownership Tax Revenue	20,724	15,699	5,025	32%	15,699
4010 - Capital Contributions (New Move-ins)	50,010	-	50,010	100%	-
4072 - Interest - Op. Savings Account	247	-	247	100%	-
4074 - Interest - County Treasurer	522	-	522	100%	-
<b>Total Revenue</b>	<b>\$ 332,923</b>	<b>\$ 277,350</b>	<b>\$ 55,573</b>	<b>20%</b>	<b>\$ 277,350</b>
<b>TOTAL REVENUES AND INFLOWS</b>	<b>\$ 332,923</b>	<b>\$ 277,350</b>	<b>\$ 55,573</b>	<b>20%</b>	<b>\$ 277,350</b>
<b>Accounts 5000 to 5099 (Administrative Costs)</b>					
5000 - Base Management Service Fees	37,415	47,000	9,585	20%	47,000
5002 - Collection Fees - County Treasurer	13,097	13,083	(14)	0%	13,083
5005 - Administrative Costs	572	1,000	428	43%	1,000
5010 - Insurance	2,977	5,000	2,023	40%	5,000
5015 - Audit Fees	5,600	5,500	(100)	-2%	5,500
5020 - General Legal Consultation Fees	19,698	25,000	5,302	21%	25,000
5023 - Legal Fees - Litigation	111,340	112,117	777	1%	112,117
5095 - Miscellaneous Admin Expense	-	3,000	3,000	100%	3,000
5100 - Collection Fees - Management Co.	143	-	(143)	-100%	-
<b>Total Administrative Costs</b>	<b>\$ 190,843</b>	<b>\$ 211,700</b>	<b>\$ 20,857</b>	<b>10%</b>	<b>\$ 211,700</b>
<b>Accounts 8100 (Fund Transfers Out)</b>					
8100 - Fund Transfers Out	-	87,000	87,000	100%	87,000
<b>Total Fund Transfers Out</b>	<b>\$ -</b>	<b>\$ 87,000</b>	<b>\$ 87,000</b>	<b>100%</b>	<b>\$ 87,000</b>
<b>TOTAL EXPENSES AND OUTFLOWS</b>	<b>\$ 190,843</b>	<b>\$ 298,700</b>	<b>\$ 107,857</b>	<b>36%</b>	<b>\$ 298,700</b>
<b>NET INCREASE(DECREASE) IN FUND BALANCE</b>	<b>\$ 142,080</b>	<b>\$ (21,350)</b>	<b>\$ 163,430</b>	<b>765%</b>	<b>\$ (21,350)</b>

No assurance is provided on these financial statements  
These financial statements do not include a statement of activities  
Substantially all disclosures required by GAAP are omitted

**Granby Ranch Metropolitan District  
Budget Comparison Report - Debt Service Fund**

	01/01/21 - 12/31/21					Annual Budget
	Actual	Budget	Variance			
			\$	%		
<b>Accounts 4000 to 4999 (Revenue)</b>						
4006 - Property Tax Revenue	859,579	840,323	19,256	2%		840,323
4007 - Specific Ownership Tax Revenue	64,438	50,419	14,019	28%		50,419
4010 - Capital Contributions (New Move-ins)	18,765	-	18,765	100%		-
4072 - Interest - Op. Savings Account	552	15,000	(14,448)	-96%		15,000
4074 - Interest - County Treasurer	1,755	-	1,755	100%		-
4300 - Sol Vista Metro Contribution	41,901	40,000	1,901	5%		40,000
<b>Total Revenue</b>	<b>\$ 986,990</b>	<b>\$ 945,742</b>	<b>\$ 41,248</b>	<b>4%</b>		<b>\$ 945,742</b>
<b>Accounts 8000 (Fund Transfers In)</b>						
8000 - Fund Transfers In	-	87,000	(87,000)	-100%		87,000
<b>Total Fund Transfers In</b>	<b>\$ -</b>	<b>\$ 87,000</b>	<b>\$ (87,000)</b>	<b>-100%</b>		<b>\$ 87,000</b>
<b>TOTAL REVENUES AND INFLOWS</b>	<b>\$ 986,990</b>	<b>\$ 1,032,742</b>	<b>\$ (45,752)</b>	<b>-4%</b>		<b>\$ 1,032,742</b>
<b>Accounts 5000 to 5099 (Administrative Costs)</b>						
5002 - Collection Fees - County Treasurer	43,067	42,016	(1,051)	-3%		42,016
<b>Total Administrative Costs</b>	<b>\$ 43,067</b>	<b>\$ 42,016</b>	<b>\$ (1,051)</b>	<b>-3%</b>		<b>\$ 42,016</b>
<b>Accounts 6000 to 6999 (Debt Costs)</b>						
6000 - Bond Interest Expense	645,338	645,338	-	0%		645,338
6100 - Paying Agent Fees	3,500	6,400	2,900	45%		6,400
<b>Total Debt Costs</b>	<b>\$ 648,838</b>	<b>\$ 651,738</b>	<b>\$ 2,900</b>	<b>0%</b>		<b>\$ 651,738</b>
<b>TOTAL EXPENSES AND OUTFLOWS</b>	<b>\$ 691,905</b>	<b>\$ 693,754</b>	<b>\$ 1,849</b>	<b>0%</b>		<b>\$ 693,754</b>
<b>NET INCREASE(DECREASE) IN FUND BALANCE</b>	<b>\$ 295,085</b>	<b>\$ 338,988</b>	<b>\$ (43,903)</b>	<b>-13%</b>		<b>\$ 338,988</b>

No assurance is provided on these financial statements  
These financial statements do not include a statement of activities  
Substantially all disclosures required by GAAP are omitted

**Granby Ranch Metropolitan District  
Statement of Net Position**

	12/31/21	12/31/20	Change	
			\$	%
<b>ASSETS</b>				
Cash				
Vectra Bank (Checking)	\$ 67,263	\$ -	\$ 67,263	100.0%
First Bank	-	13,513	993,047	7348.8%
CSAFE	1,006,560	969,730	36,830	3.8%
Money Market Funds w UMB	1,172,717	920,605	252,112	27.4%
Accounts receivable	-	6,255	(6,255)	-100.0%
Total Cash	<u>2,246,540</u>	<u>1,910,103</u>	<u>336,437</u>	<u>17.6%</u>
Accrued Specific Ownership Tax Receivable	7,351	6,736	615	9.1%
Prepaid Expenses	6,512	2,032	4,480	220.5%
Property Taxes Receivable	1,157,400	1,101,974	55,426	5.0%
<b>TOTAL ASSETS</b>	<b><u>\$ 3,417,803</u></b>	<b><u>\$ 3,020,845</u></b>	<b><u>\$ 396,958</u></b>	<b><u>13.1%</u></b>
<b>LIABILITIES &amp; FUND BALANCES</b>				
<b>CURRENT LIABILITIES</b>				
Accounts Payable	\$ 186	\$ 17,200	\$ (17,014)	-98.9%
Bonds Payable - Series 2018	11,750,000	11,830,000	(80,000)	-0.7%
Accrued Interest - Series 2018A Bonds	53,778	53,778	-	0.0%
<b>TOTAL LIABILITIES</b>	<b><u>11,803,964</u></b>	<b><u>11,900,978</u></b>	<b><u>(97,014)</u></b>	<b><u>-0.8%</u></b>
<b>DEFERRED INFLOWS OF RESOURCES</b>				
Property tax revenue	1,157,400	1,101,974	55,426	5.0%
<b>NET POSITION</b>				
Operating Fund	545,286	403,207	142,079	35.2%
Debt Service Fund	(10,088,847)	(10,385,314)	296,467	-2.9%
Capital Project Fund	-	-	-	0.0%
<b>TOTAL NET POSITION</b>	<b><u>(9,543,561)</u></b>	<b><u>(9,982,107)</u></b>	<b><u>438,546</u></b>	<b><u>-4.4%</u></b>
<b>TOTAL LIABILITIES, DEFERRED INFLOWS OF RESOURCES AND NET POSITION</b>	<b><u>\$ 3,417,803</u></b>	<b><u>\$ 3,020,845</u></b>	<b><u>\$ 396,958</u></b>	<b><u>13.1%</u></b>

No assurance is provided on these financial statements  
These financial statements do not include a statement of activities  
Substantially all disclosures required by GAAP are omitted

# EXHIBIT 05a

# Granby Ranch – Filing 8 SIA's

Filing 8 (Phase 1) – **Existing SIA**

VS.

Filing 8 (Phase 2 & 3) – **Proposed SIA's**

# Granby Ranch – Filing 8 (Phases 1, 2, 3)



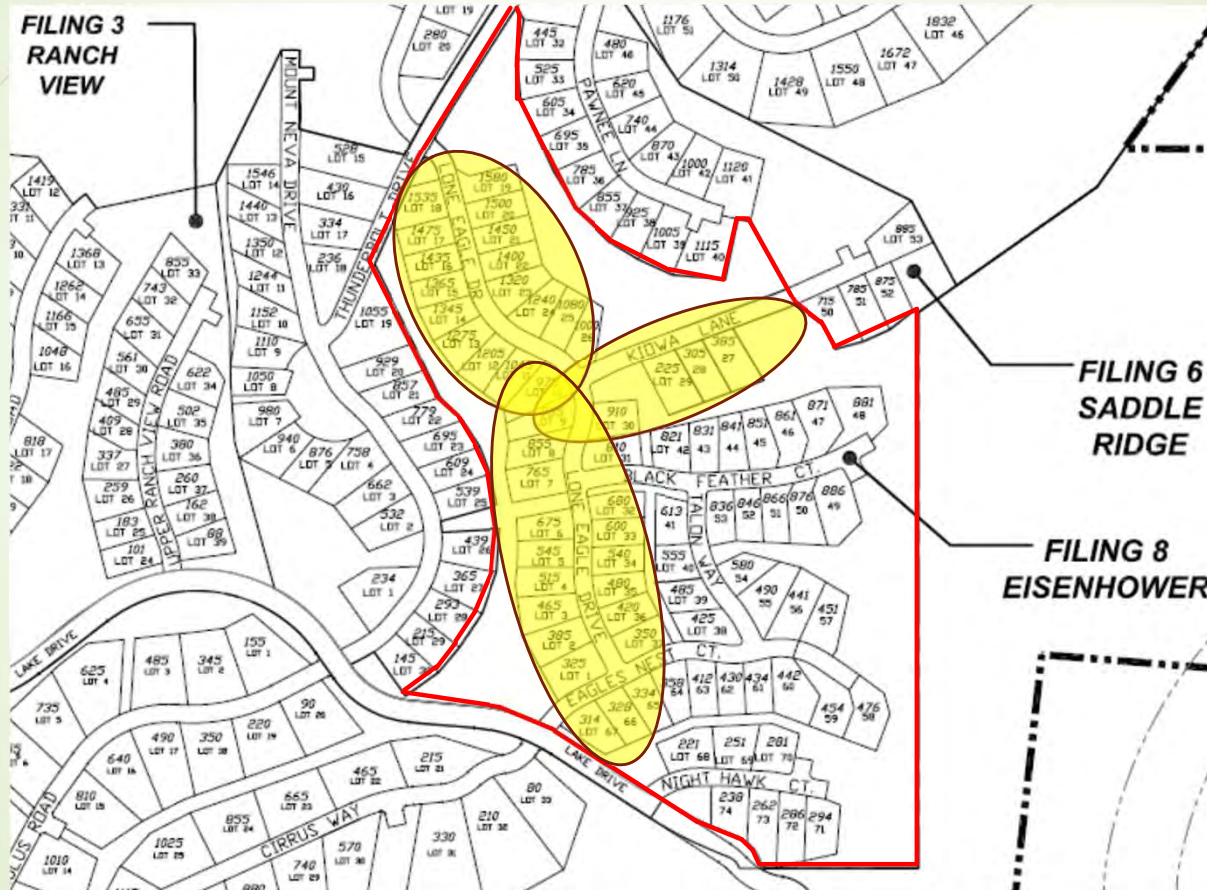
Filing 8

Phase 1

Phase 2

Phase 3

# Granby Ranch – Filing 8 (Phase 1)



Filing 8

Phase 1

# Granby Ranch – Filing 8 (Phase 1) Roads

Roads in Disrepair..... History per Town Engineer (SGM)

\* Constructed in 2007

\* Defects ID's by Town Engineer (SGM) in 2009



April 28, 2020

Paul Chavoustie, Mayor  
Town of Granby  
Zero Jasper Ave  
Granby, CO 80446

**RE: Granby Ranch - Filings 3, 6, & 8  
Construction Defects/Final Acceptance**

- While several water and sewer deficiencies were identified, the primary issue of concern was widespread, differential settling and cracking of the asphalt surface.
- Oftentimes this subsidence and cracking was located above utilities and SGM (and essentially all the involved parties) speculated that deficient trench backfill, and compaction was the cause.
- As Town Engineer for Granby, I can conclusively state that the subsidence and cracking of asphalt identified in 2009 was never repaired satisfactorily to the point where the roads could be accepted by the Town.

# Granby Ranch – Filing 8 (Phase 1) Roads

Lone Eagle Dr. Current status - ~13 years later



# Granby Ranch – Filing 8 (Phase 1) Roads

Town put Development in “BREACH” of SIA (Filing 8, Phase 1) – JAN 2019



Granby Realty Holdings LLC  
Marise Cipriani  
P.O. Box 1110  
Granby, Colorado 80446

Granby Realty Holdings LLC  
Michael S. Gilliland, Manager  
P.O. Box 1100  
Granby, Colorado 80446

January 9, 2019

The failure of the Developer to provide the increased bond is a breach of Section 3 the SIA. Accordingly, you are also hereby notified of such breach pursuant to the provisions of Section 9.a. of the SIA and all the provisions of Section 9.a. shall now apply to this matter, in addition to the provisions of Section 3 of the SIA.

Regards,

A handwritten signature in black ink, appearing to read "A. Blair".

Aaron Blair, Town Manager

Re: Breach of Subdivision Improvements Agreement for Granby Ranch Filing Nos. 6 and 8

# Granby Ranch – Filing 8 (Phase 1) Roads

SIA for Filing 8 (Phase 1) – Per SIA, “Breach” is binding on property & transfers to GRCO

2006-004205 05/03/2006 11:08A SUBAGR SARA L ROSENE  
1 of 13 R 66.00 D 0.00 GRAND COUNTY CLERK

## **SUBDIVISION IMPROVEMENTS AGREEMENT (LOTS 1-29, 30-37 AND 65-67, GRANBY RANCH FILING NO. 8 AND LOTS 50-53 OF FILING NO. 6)**

THIS AGREEMENT is entered into among the Town of Granby, Colorado, a Colorado municipal corporation (“the Town”), Headwaters Metropolitan District, a quasi-municipal corporation of the State of Colorado (the “District”), and Granby Realty Holdings LLC, a Colorado limited liability company (“the Developer”) effective the 11<sup>th</sup> day of April, 2006.

### **10. Binding Effect**

This Agreement shall be binding on the parties hereto, their respective successors and assigns (which may include Headwaters Metropolitan District), and shall be deemed to constitute a covenant running with the land. The Developer and any such successor and assign shall be jointly and severally liable for performance of this Agreement; provided, however, that no

# Granby Ranch – Filing 8 (Phase 1) Roads

SIA for Filing 8 (Phase 1) – Per Town Resolution, “breach” transfers with property

**TOWN OF GRANBY  
BOARD OF TRUSTEES  
RESOLUTION 2020-05-26**

**A RESOLUTION OF THE BOARD OF TRUSTEES OF THE TOWN OF  
GRANBY NOTIFYING THE PUBLIC OF THE STATUS AND CONDITION  
OF ROADWAYS WITHIN THE GRANBY RANCH DEVELOPMENT**

shall have no responsibility or liability for construction, ownership, operation, maintenance, repair or replacement of such roadways, the Board of Trustees has concluded that it is important to provide additional notice to persons who are or may become involved in the Granby Ranch development of the need to inquire into the condition of the roadways, and the obligations to construct, maintain, repair and replace such roadways, by adopting this resolution and directing its recordation in the records of the Clerk and Recorder of Grand County; and

**WHEREAS**, the current developer is in breach of the subdivision improvement agreements for Filings 6&8 and 10 based on its failure to construct the roads, repair the roads, or have sufficient performance guarantees and/or warranty guarantees in place for the required construction or repair, and the Town has provided notification, including written notification of such breaches; and

# Granby Ranch – Filing 8 (Phase 1) Roads

SIA for Filing 8 (Phase 1) – Per Town attorney, Town can withhold additional approvals to properties transferred to GRCO



**KROB LAW OFFICE, LLC**  
Attorneys at Law

## CONFIDENTIAL MEMORANDUM

**To:** Ted Cherry

**From:** Nathan Krob

**Date:** August 10, 2021

Here, the liability and obligation the Town seeks to enforce is the requirements that roads are properly constructed in Granby Ranch Filing Nos. 3, 6 & 8 and 10. These roads, and their repairs, do not relate to the construction of improvements for roads in Granby Ranch Filing No. 1B. Furthermore, the chain of title for the Tall Timbers properties differs from the chain of title to other properties obtained by GRCO. GRCO is a successor to William Lyons related to the Tall Timbers properties and the Town has not alleged that William Lyons was in breach of the annexation and development agreement. Accordingly, the Town is likely not able to withhold its consideration of the Tall Timber's SIA. In contrast, the Town may be in a better position to withhold applications and approvals related to the development of properties that were transferred from GRH through GPGH's foreclosure.

# Granby Ranch – Filing 8 (Phases 1, 2, 3)



Filing 8

Phase 1

Phase 2

Phase 3

# Why approve Filing 8 (Phase 2/3) SIA's?

## **1 – Phase 1 roads have been in disrepair for ~13 years !**

- \* Town put Development in breach of SIA **3+ years ago**
- \* NO set schedule to repair the roads – potentially “this year” ?

## **2 - SAME Developer (GRCO) responsible to repair Phase 1 wants to do Phase 2 & 3**

## **3 – How would you feel if you lived on Lone Eagle Dr. ?**

- \* Ongoing disrepair for 13 years, while.....
- \* Same Developer going to expand phase 2 & 3 **right behind you**

**RECOMMENDATION – Have GRCO fix Phase 1 roads BEFORE approving Phase 2/3 SIA's**

# EXHIBIT 05b

# MEMO



To: Mayor and Board of Trustees  
From: Ted Cherry, Town Manager  
Cc: Deb Hess, Town Clerk  
Date: 1.25.2022  
Re: Granby Ranch Filing 8 Phase 2 & 3 SIAs

---

**Summary:** Staff has been working with GRCI LLC for the creation of the Subdivision Improvement Agreement (SIA) for phases 2 & 3 of Filing 8 in Granby Ranch. Within the two phases there are a total of 26 lots. SGM has been working on the development and construction plans for the public improvements to the properties to ensure they are constructed correctly.

The SIAs take into account a few items. They require improvements are made constructed, there is a sales restriction on the properties until improvements are made, a performance guarantee is provided for the improvements of at least 115% of cost estimates, improvements are made withing 2 years of this agreement, and proper review, testing, and inspections are completed.

There is one portion of the SIAs that are not standard for the Town. The process for getting the improvements signed off by SGM has taken longer than expected due to some past issues on the development and the amount of work the engineers have this time. The agreement would contemplate the approval of the SIA, but would need to have full engineer sign off of the improvements before they are completely approved for construction. SGM has made it aware to the Manager they expect for phase 2 to be ready by the end of January and phase 3 shortly thereafter. The Town has done this before with developers. Cost estimates may change slightly based on further review.

Maps of the areas have been provided to the Board. These lots are located on Night Hawk Court, Eagles Nest Court, Talon Way, and Black Feather Court.

**Financial:** None

**Recommendation:** Manager would recommend the approval of the SIAs for Granby Ranch Filing 8 Phases 2 and 3 as presented.

**SUBDIVISION IMPROVEMENTS AGREEMENT  
(GRANBY RANCH FILING NO. 8, PHASE 2, LOTS 68-74)**

**THIS SUBDIVISION IMPROVEMENTS AGREEMENT** (this "*Agreement*") is entered into by the Town of Granby, Colorado, a Colorado municipal corporation (the "*Town*") and GRCO LLC, a Missouri limited liability company (the "*Developer*"), effective as of the 25th day of January, 2022. (The Town and the Developer are collectively referred to herein as the "*Parties*").

WHEREAS, the Developer is the owner of Lots 68-74 of Granby Ranch Filing No. 8 (the "*Property*"), as shown on a map attached hereto as Exhibit A; and

WHEREAS, the Town has approved the subdivision of the Property in accordance with the final plat of Granby Ranch Filing No. 8 (the "*Plat*"); and

WHEREAS, the Developer intends to develop the Property, the effect of which will be to directly impact and generate the need for on-site and off-site improvements. The Developer acknowledges that the exactions set forth herein are reasonably attributable to the special impacts which will be generated by the proposed uses of the Property, and that the terms and conditions set forth in this Agreement are necessary, reasonable and appropriate; and

WHEREAS, the Town is reviewing the Roadway and Utility Construction Plans for Granby Ranch Filing No. 8, Phase 2, Lots 68-74 (the "*Construction Drawings*"); and

WHEREAS, the Parties desire to provide for the construction of the improvements described in the Construction Drawings that are required to serve the Property (the "*Improvements*") as set forth herein and in such areas as depicted on Exhibit A, attached hereto.

NOW, THEREFORE, in consideration of the premises herein contained, the Parties agree as follows:

1. Improvements Required.

The Developer agrees to make, construct and install (or cause to be made, constructed or installed) the Improvements in accordance with the Construction Drawings as approved by the Town's engineer. Prior to the completion and final acceptance of the Improvements, any and all costs of the Town's inspection of the Improvements shall be borne solely by the Developer. The extent of the Developer's compliance with this Agreement shall be determined solely by the Town and its duly authorized agents and employees. Prior to commencement of work on the Property, the Developer shall obtain all necessary permits to complete the Improvements. In addition, Developer shall fully comply with all terms and conditions of any such permits.

2. Sales Restriction.

a. The lots within the Property shall not be conveyed or transferred, except for a bulk transfer of all such lots to a single person or entity, until such time as all of the Improvements have been completed and initially accepted by the Town in accordance with this Agreement, or a Performance Guarantee as described in Section 3 below has been provided to the Town. (the "*Sales Restriction*"). The recording of this Agreement shall, among other actions, provide notice of the Sales Restriction.

b. The Town and the Developer agree that, with respect to the Property, the Sales Restriction is intended to replace that certain Sales Restriction (Lots 38-64 and 68-74, Granby Ranch Filing No. 8) recorded May 3, 2006 at Reception No. 2006-004204 in the Grand County Official Records (the "*Original Sales Restriction*") and the Town agrees to release and forever discharge Developer of any obligations it may have under the same related to the Property. The Original Sales Restriction shall remain in full force and effect as to all other lots not included in the Property. The Town and the Developer further agree that, in order to effectuate the Sales Restriction and release the Property from the Original Sales Restriction, upon the execution of this Agreement, the Town will execute and record in the office of the Grand County Clerk and Recorder a Qualifying Resolution of the Board of Trustees as provided for in the Original Sales Restriction and that the same shall constitute conclusive evidence that the Original Sales Restriction is null and void as to the Property.

c. The provisions of this Section 2 shall not prohibit the Developer from entering into sale contracts for the lots within the Property, provided that any such contract requires that: (1) any earnest money is paid directly to an independent title company acting as escrow agent; and (2) such earnest money is repaid to the buyer on demand if a qualifying resolution releasing the Sales Restriction has not been recorded on or before the closing date specified in such contract.

3. Performance Guarantee.

If the Developer desires to convey or transfer any lots other than in a bulk transfer of all such lots to a single person or entity prior to the completion and acceptance of the Improvements, the Developer shall furnish to the Town, in a form and substance acceptable to the Town, an Irrevocable Letter of Credit, Warranty Bond or other security deemed acceptable by the Town (the "*Performance Guarantee*"), in an amount not less than one hundred fifteen percent (115%) of the total estimated cost of the Improvements, as certified by the Developer and accepted and approved by the Town's engineer in writing. The Parties acknowledge that the Improvements will not be completed as of the date on which the Performance Guarantee is provided to the Town.

The Town and the Developer agree that the acceptance of the Performance Guarantee by the Town, shall release the Property from the Sales Restriction and shall release the Developer from any obligations it may have under the same. The Town further agrees that, upon the Town's acceptance of the Performance Guarantee, the Town shall pass a Qualifying Resolution releasing the Property from the Sales Restriction, and that the same shall constitute conclusive evidence that the Sales Restriction is null and void.

The Performance Guarantee shall be subject to the following terms and conditions:

a. The Developer shall have no direct or indirect ownership or managerial control over the entity issuing the Performance Guarantee;

b. In the event that, prior to the Town's initial acceptance of the Improvements, the Performance Guarantee should expire or the entity issuing the Performance Guarantee becomes non-qualifying, or the cost of the construction of the Improvements is reasonably determined by the Town to be greater than the amount of the Performance Guarantee provided, then the Town shall furnish the Developer with written notice of such condition, and within fifteen (15) days of receipt of such notice, the Developer shall provide the Town with a substituted qualifying Performance Guarantee, or augment the deficient security to achieve one hundred fifteen percent (115%) of the cost of the completion of the Improvements. If such substituted qualifying Performance Guarantee is not timely furnished, then development activities including but not limited to the issuance of building permits and certificates of occupancy, may be suspended by the Town pending compliance herewith.

c. Developer shall have the right from time to time, but not more frequently than once a month, to provide the Town with a certification stamped by a professional engineer licensed in the State of Colorado (a "*Certification of Partial Completion*") stating that a certain percentage of the Improvements (the "*Completed Improvements*") have been installed in accordance with the Construction Drawings. Upon review and approval of the Certificate of Partial Completion by the Town (which may include, if deemed necessary or appropriate by the Town, review by the Town's engineers or other agents and employees), which approval shall not be unreasonably withheld or delayed, the Town shall promptly submit to the issuer of the Performance Guarantee such documentation as is required to reduce the amount thereof by an amount equal to 85% of the estimated cost of the Completed Improvements (as calculated in accordance with the estimated cost of the Improvements as approved by the Town's engineer).

The Developer shall ensure that all contractors and/or subcontractors employed in connection with construction or installation of the Improvements shall be licensed, to the extent such licensing is required, before any work on the Improvements is commenced.

4. Completion of Improvements.

The Improvements shall be completed within twenty-four (24) months of the date of this Agreement (the "*Improvements Completion Period*"). The Improvements Completion Period may be extended by mutual agreement of the Parties, particularly when the need for such extension is caused by persons or matters over which the Developer has no control. Notwithstanding the foregoing, in the event that the construction of the Improvements is delayed by a person or matter over which the Developer has no control, the Developer may, but shall not be obligated to, extend the Improvements Completion Period for one (1) period of twelve (12) months by providing the Town with written notice of its intent to extend the Improvements Completion Period within ten (10) working days from the date of such delay.

5. Completion of Improvements by Town.

In the event the Developer fails to complete the Improvements in compliance with this Agreement, the Town may, but shall not be obligated to, proceed with restoring or completing some or all of the remaining portions of the Improvements to a condition satisfactory, in the sole discretion of the Town's Board of Trustees, to the health, safety and welfare of the Town. The Town shall be entitled to draw on the Performance Guarantee in order to accomplish such restoration and/or completion. The Town must give the Developer at least thirty (30) days prior written notice of its intent to draw on the Performance Guarantee in order to restore or complete all or any portion of the Improvements. If the Town completes some or all of the Improvements, then the Town Board of Trustees shall have full discretion to determine the rules and regulations governing use of the Improvements and any fees to be charged for or associated with such use.

6. Development Standards and Procedures.

a. Engineering Services.

The Developer shall, at its sole expense, procure all engineering and landscaping services necessary and appropriate in conjunction with the Improvements, which shall fully conform to the Town's applicable ordinances, standards and specifications. Professional services shall be performed by engineers, surveyors, architects or other professionals duly licensed by the State of Colorado as may be appropriate. Landscaping services shall be performed by persons trained in landscape architecture or horticultural design. In addition to design services, the Developer's Engineer shall oversee construction, providing daily construction observation, Record Drawings and all documentation and certifications necessary for Initial and Final Acceptance.

b. Review.

The Construction Drawings are being reviewed by the Town's engineer and the Town's engineer anticipates approving the Construction Drawings after completion and submittal by the Developer of certain soil tests and geotechnical opinions and plan revisions as required herein. Developer shall not commence construction of the Improvements until the Town's engineer has provided written approval of the Construction Drawings.

c. Testing.

The Developer, at its sole expense, shall employ a professionally qualified, independent testing company acceptable to the Town to perform all testing of materials or construction that may reasonably be required by the Town to ensure compliance with the Town's applicable standards and specifications. Developer shall furnish the Town with certified copies of test results, and agrees to release and authorize full access by the Town and its designated representatives to all work-up materials, procedures and documents used in preparing the test results as requested by the Town.

d. Inspection.

At all times during construction of the Improvements, and until final acceptance thereof by the Town, the Town shall have the right, but not the duty, to inspect materials and workmanship in order to ascertain conformance with the Construction Drawings and all applicable standards and specifications. Developer shall reasonably cooperate and assist the Town to gain appropriate access to the areas designated for inspection. It shall also be the duty of the Developer to notify the Town upon discovery of any nonconformance with the said plans, standards and specifications. Inspection and acceptance of work by Town personnel shall not relieve the Developer of any responsibility. Notwithstanding the foregoing, Developer shall have no obligation or liability for any claim or injury resulting from the presence of any agent or representative of the Town on the Property, unless the same is the direct result of Developer's negligence or willful misconduct.

e. Street Access.

Developer shall, at its expense, be responsible for keeping on-site streets, off-site streets used as construction routes and other existing rights-of-way clean of mud, rocks and debris at all times during said construction of the Improvements (collectively, the "*Street Access Requirements*"). All work shall conform to the requirements for erosion control as described in the Town's statutes, ordinances and regulations. If the Developer fails to comply with the Street Access Requirements, the Town shall provide the Developer with written notice via email specifying the nature of such failure, and the Developer shall have two (2) working days upon receipt of such notice in which to cure the specified failure. If the Developer does not cure the specified failure within said two (2) working days (unless unable to do so due to inclement weather or other conditions beyond the Developer's control), or if such failure is not waived in writing by the Town, the Town may take corrective action and invoice the Developer at the Town's prevailing rate.

f. Initial Acceptance of Improvements.

The Developer shall submit a "*Request for Initial Acceptance*", including a "*Certification of Completion*", "*Certificate of Payment*", "as built" drawings of the Improvements and

certified cost estimates of the Improvements, to the Town upon completion of the Improvements. The Certification of Completion shall be submitted upon written oath or affirmation of the Developer's engineer that the Improvements have been completed in substantial compliance with the approved Construction Drawings and other applicable Town code and building requirements, as in effect on the date of this Agreement. The Certificate of Payment shall be submitted upon written oath or affirmation of the Developer that the Improvements have been fully paid for and Developer has fully paid all persons or entities having furnished labor or materials for the design, construction and installation of such Improvements. The Town, however, shall not be deemed to have accepted any payment responsibility or liability in conjunction with the ascertainment of such payment. The Town shall inspect the Improvements within ten (10) working days of the Town's receipt of the Developer's Request for Initial Acceptance, unless unable to do so due to inclement weather or other natural conditions or conditions beyond the Town's control (each such period being referred to herein as an "*Initial Acceptance Inspection Period*"). The Improvements shall be deemed accepted by the Town unless, within ten (10) working days of the expiration of the Initial Acceptance Inspection Period, the Town furnishes the Developer with specific written objections to the status of the completed Improvements. In the event that the Town, within ten (10) working days following the expiration of the Initial Acceptance Inspection Period, provides the Developer with specific written objections to the status of the completed Improvements, the Developer shall have such amount of time as is reasonably necessary to address such objections and when addressed shall re-submit the Request for Initial Acceptance, including a new Certification of Completion, Certificate of Payment, "as built" drawings of the completed Improvements and certified cost estimates of the completed Improvements. Upon a finding of satisfactory completion of the Improvements in compliance herewith and all applicable ordinances and standards of the Town, the Town shall issue a "*Certificate of Initial Acceptance*" to the Developer for the Improvements. Following the issuance of a Certificate of Initial Acceptance, the Town shall, upon request by the Developer: (i) release a portion of the Performance Guarantee correlating to the initially accepted Improvements, provided a Warranty Guarantee meeting the requirements of subsection (g) below has been executed and delivered to the Town, and provided no mechanics lien statements have been filed with respect to the project; and (ii) at the Developer's expense record the Certificate of Initial Acceptance in the office of the Grand County Clerk and Recorder. In the event that the Town, within ten (10) working days of the Town's receipt of the Developer's request, has not recorded the Certificate of Initial Acceptance, the Developer shall thereafter have the right to record the same.

The Parties agree that, upon the issuance of the Certificate of Initial Acceptance with respect to the Improvements consisting of water and sewer lines and facilities, the Developer shall convey such lines and facilities to the Town by bill of sale. The Parties further agree that, upon the issuance of the Certificate of Initial Acceptance with respect to the Improvements consisting of roadways, the Developer shall convey such roadways to the Headwaters Metropolitan District or such other governmental body or property owner's association designated by the Headwaters Metropolitan District, to the extent the Developer or the Developer's predecessors have not previously done so.

g. Warranties.

(1) For a period of two (2) years from the date of a Certificate of Initial Acceptance, the Developer shall warrant that the Improvements covered by the Certificate of Initial Acceptance will be free from defects, including but not limited to defects in materials, workmanship, design, construction and installation, and that the Improvements shall otherwise fully comply with all applicable standards and

specifications (each such two (2) year period being referred to herein as an “*Initial Warranty Period*”). If repairs are required for the Improvements covered under an Initial Warranty Period, such Initial Warranty Period shall be extended with respect to such repairs for a period of two (2) years from the date of the repairs (each such period, an “*Extended Warranty Period*”). For the purposes of this Agreement, an Initial Warranty Period and any subsequent Extended Warranty Period for a Completed Section or all of the Improvements (as applicable) shall collectively be referred to herein as a “*Warranty Period*”.

(2) Prior to the Town issuing a Certificate of Initial Acceptance, the Developer shall furnish to the Town an Irrevocable Letter of Credit, Warranty Bond or other security for the benefit of the Town, deemed acceptable by the Town and conforming to the requirements applicable to the Performance Guarantees set forth in Section 3 of this Agreement (the “*Warranty Performance Guarantee*”), in an amount equal to fifteen percent (15%) of the total actual cost of the Improvements covered by the Certificate of Initial Acceptance, as certified to the Town. The Warranty Performance Guarantee shall provide security for the costs which may be incurred in repairing or replacing the Improvements during a Warranty Period.

(3) In the event that any substantial repair or replacement is required to any of the Improvements during a Warranty Period, and such repair or replacement is not timely made upon notice of defect or in any event before the expiration of the Warranty Period, the Town may elect, but shall not be obligated, to:

(i) call the Warranty Performance Guarantee and secure repair or replacement of the nonconforming Improvements;

(ii) order denial or suspension of additional building permits, utility services or certificates of occupancy outstanding with respect to the Property until any non-conforming Improvements have been repaired or replaced; or

(iii) Take such other action as may be authorized in law or equity.

#### 7. Procedure for Final Acceptance of Improvements.

a. No earlier than sixty (60) days and no later than thirty (30) days prior to the expiration of a Warranty Period, the Developer shall submit a written “*Request for Final Acceptance*” of the Improvements covered by such Warranty Period. Within ten (10) days of such request, the Town shall conduct a final inspection of the Improvements included in the Request for Final Acceptance, unless precluded from doing so by weather or natural conditions (each such period being referred to herein as a “*Final Acceptance Inspection Period*”). The Improvements shall be deemed accepted by the Town unless, within ten (10) working days of the expiration of the Final Acceptance Inspection Period, the Town furnishes the Developer with specific written objections to the status of such Improvements. In the event that the Town, within ten (10) days following the expiration of the Final Acceptance Inspection Period, provides the Developer with specific written objections to the status of the Improvements, the Developer shall have such amount of time as is reasonably necessary to address such objections and when addressed shall re-submit the Request for Final Acceptance. After Final Acceptance, the Developer may request, and the Town shall release, the corresponding Warranty Performance Guarantee, and the Developer shall have no further obligations or liabilities with respect to such Improvements. If the Improvements subject to the inspection fully conform to this Agreement and all of the Town’s applicable standards and specifications, and/or all repairs, if any are needed, have been made to bring such Improvements into conformance, the Town shall issue a “*Certificate of Completion*” certifying the “*Final Acceptance*” of such Improvements to the Developer. Following the issuance of a Certificate of Completion, the Town shall, upon request by the Developer and at the Developer’s expense, record the Certificate of Completion in the office of the Grand County Clerk and Recorder. In the event that the Town, within ten (10) working days of the Town’s

receipt of the Developer's request, has not recorded the Certificate of Completion, the Developer shall thereafter have the right to record the same.

b. If the Developer fails to obtain Final Acceptance of the Improvements as provided in this Section 7, the Developer shall be in default of this Agreement and the Town may exercise its rights to secure performance as provided by Section 5 hereof. In the event that the Developer has not submitted a Request for Final Acceptance within forty-five (45) days of the scheduled completion dates applicable (as may have been extended as herein provided), the Town shall have the right, but not the obligation, to at any time thereafter, conduct a final inspection of the Improvements. If, pursuant to the final inspection requested by the Developer or initiated by the Town, any such Improvements are found to be in nonconformance with this Agreement, or the Town's applicable standards and specifications, the Town shall have the rights set forth in Section 5, 6 and elsewhere herein.

Nothing herein shall be construed or deemed to require the Town to grant Final Acceptance or release from a warranty any Improvements that are defective or damaged.

8. Liability Limitations.

a. Indemnification.

The Developer agrees to indemnify and hold harmless the Town, and its officers, agents and employees, from and against all liability, claims, demands, and expenses, including court costs and attorney fees, on account of any injury, loss, or damage, which arises out of or is in any manner connected with the work to be performed under this Agreement, if such injury, loss, or damage is caused in whole or in part by, the negligent act or omission, error, professional error, mistake, accident or other fault of the Developer, any subcontractor of the Developer, or any officer, employee, or agent of the Developer, contractor or subcontractor. The obligations of this Section 8(a) shall not apply to damages for which the Town shall become liable by final judgment to pay a third party as a result of the negligent act or omission, error, professional error, mistake, accident, or other fault of the Town.

b. Insurance.

(1) The Developer agrees to procure and maintain for itself and for its contractors, subcontractors, representatives and agents engaged in the design, construction, or installation of the Improvements such liability insurance including general liability, contractors liability, professional liability, comprehensive automobile liability, worker's compensation insurance and sufficient public liability insurance as will protect the Town, Town Officials, Town employees, agents and representatives against any and all potential liability, claims, damage, demands, losses and expenses, that may be incurred or asserted. Liability insurance shall be in the minimum amount of three hundred thirty thousand dollars (\$330,000.00) for injury to one person, or nine hundred ninety-thousand dollars (\$990,000.00) for injury to two or more persons in any single occurrence, or such greater amounts as may be established by the Colorado Governmental Immunity Act, Sections 24-10-101, et seq., C.R.S. as it may be amended.

(2) Developer shall insure that all contractors and subcontractors providing services provide Workers' Compensation as required by the Labor Code of the State of Colorado and Employers' Liability Insurance;

(3) If approved by the Town, in its sole discretion, evidence of qualified self-insured status may be substituted for one or more of the foregoing insurance coverages.

(4) The Developer shall, at a minimum, procure and maintain the insurance coverages listed herein. Such coverages shall be procured and maintained with forms and insurers acceptable to the Town. All coverages shall be continuously maintained to cover all liability, claims, demands, and other obligations assumed by the Developer pursuant to retroactive dates, and extended reporting periods shall be procured to maintain such continuous coverage.

(5) A "*Certificate of Insurance*" shall be completed by the Developer's insurance agent as evidence that policies providing the required coverages, conditions and minimum limits are in full force and effect, and such Certificate of Insurance shall be subject to review and approval by the Town prior to commencement of construction of the Improvements. The Certificate of Insurance shall identify this Agreement and shall provide that the coverages afforded under the policies shall not be canceled, terminated or materially changed unless at least thirty (30) days prior written notice has been given to the Town.

(6) Failure on the part of the Developer to procure or maintain policies providing the required coverages, conditions and minimum limits shall constitute a material breach of Agreement and, if said breach is not cured within ten (10) days of written notice by the Town to Developer, the Town may immediately terminate this Agreement, or at its discretion, the Town may procure or renew any such policy or any extended reporting period thereto and may pay any and all premiums in connection therewith, and all monies so paid by the Town shall be repaid by the Developer to the Town upon demand, or the Town may offset the cost of the premiums against any monies due to the Developer from the Town, or the Town may cease to issue additional building permits or certificates of occupancy outstanding with respect to the Property covered by this Agreement until the defect has been remedied.

(7) The Town reserves the right to request and receive a certified copy of any policy and any endorsement thereto. The Developer agrees to execute any and all documents necessary to allow the Town access to any and all insurance policies and endorsements pertaining to the Improvements.

(8) The Parties understand and agree that the Town, its officers and its employees are relying on, and do not waive or intend to waive, by any provision of this Agreement, the monetary limitations or any other rights, immunities, and protections provided by the Colorado Governmental Immunity Act, Sections 24-10-101, et seq., C.R.S., as from time to time amended, or otherwise available to the Town, its officers, agents and employees.

c. Nonliability.

The Developer acknowledges that the Town's review and approval of the Improvements for the Property is done in furtherance of the general public health, safety and welfare, and that no specific relationship with, or duty of care to, the Developer or third parties is created or assumed by such review approval, nor is any immunity waived, as is more specifically set forth in Section 24-10-101, et seq. C.R.S., Colorado Governmental Immunity Act.

No one, individually or otherwise, other than the Parties, shall acquire, as a result of this Agreement, any rights, claims or obligations from or against the Town, its agents, employees or officers. Actions by the Town against the Developer to enforce any provision of this Agreement shall be at the sole discretion of the Board of Trustees of the Town. No third parties shall have any right to require any action by the Town pursuant to this Agreement, and this Agreement shall not create liability on the part of, or be a cause of action against, the Town for any personal or property damage that may result to any third parties from the failure of the Developer to perform or construct the Improvements. The Parties agree that it is their specific intent that no other individual or entity shall be a party

to or a third-party beneficiary of this Agreement, that no other individual or entity shall have any rights or cause of action hereunder, and that the consent of another individual or entity shall not be necessary to any agreement, amendment or document with respect to the obligations contemplated by this Agreement. The provisions of this Section 8(c) shall survive the Final Acceptance of all of the Improvements by the Town or the termination of this Agreement.

9. Enforcement and Remedies.

a. Breach of Agreement.

In the event the Developer fails to timely comply with any of the terms, conditions, covenants and undertakings hereof, and if such noncompliance is not cured and brought into compliance within thirty (30) days of written notice of breach to the Developer by the Town, unless the Town in writing designates a longer period as reasonably requested by the Developer (each such period being referred to herein as a "*Cure Period*"), then the Town may call for payment of the Performance or Warranty Performance Guarantee (as applicable). The Town may also, during a Cure Period, withhold any additional building permits, certificates of occupancy outstanding or the provision of new utility fixtures or services with respect to the Property covered by this Agreement. Nothing hereunder shall be construed to limit the Town from pursuing any other remedy at law or in equity which may be appropriate under the statutes and ordinances, and applicable laws and legal standards of the State of Colorado or the United States, before any court of competent jurisdiction. Such remedies shall be cumulative. Notice by the Town to the Developer shall specify the conditions of default.

b. Non-Waiver.

The failure of the Town to take timely action with respect to any breach of any term, covenant or condition hereof shall not be deemed to be a waiver of such performance by the Developer, or a waiver of any subsequent breach of the same or any other term, covenant or condition herein contained.

10. Binding Effect.

This Agreement shall be binding on the Parties, their respective successors and assigns (which may include the District), and shall be deemed to constitute a covenant running with the land. The Developer and any such successor and assign shall be jointly and severally liable for the Developer's performance of this Agreement; provided, however, that no individual lot that has been sold to an individual lot owner shall have any obligation or liability of any kind under this Agreement.

11. Entire Agreement.

This Agreement shall constitute the entire agreement between the Parties. This Agreement hereby supersedes and replaces any and all prior Subdivision Improvement Agreements entered into by the Town in connection with the Property, including any amendments thereto. No subsequent amendment to this Agreement shall be valid unless made in writing and properly executed by the Parties.

12. No Admission of Liability or Waiver of Claim or Position.

This Agreement shall not be construed, interpreted or used as an admission of liability or waiver of claim or position by any party hereto with respect to any rights or obligations arising by, or under that certain Subdivision Improvements Agreement (Lots 1-29, 30-37 and 65-67, Granby Ranch Filing No. 8 and Lots 50-53 of Filing No. 6) recorded May 3, 2006 at Reception No. 2006-004205 in the Grand County Official Records and all amendments thereto, if any, or any other agreement or contract.

13. Notice.

Any notice given under the terms of this Agreement shall be made in writing, and shall be deemed made upon personal service or upon mailing by United States Mail, postage prepaid, to the other, and unless amended by written notice, to the following:

The Town:	Town of Granby Post Office Box 440 Granby, Colorado 80446
With a copy to:	Krob Law Office, LLC 8400 E. Prentice Ave. Penthouse Greenwood Village, Colorado 80111
The Developer:	GRCO LLC PO Box 179173 St. Louis, Missouri 63117-9173 Attention: Robert B. Glamer, Jr.
With a copy to:	Husch Blackwell LLP 190 Carondelet Plaza, Suite 600 Clayton, Missouri 63105 Attention: David G. Richardson

14. Additional Developer Obligations.

Developer shall comply with the following requirements:

- a. Prior to commencing construction of the Improvements, Developer shall retain a soils engineer at Developer's cost to review and comment on the geotechnical reports submitted and provide recommendations for trench backfill and pavement sections based on actual test pits. Such recommendations shall be approved by the Town's engineer prior to commencing construction of the Improvements.
- b. Developer shall comply with any other reasonable requirements as determined and provided in writing by the Town's engineer upon the Town engineer's completed review of the Construction Drawings.
- c. The Developer will provide and the Town's engineer will approve miscellaneous utility designs prior to construction of such components of the Improvements.

15. Drafting and Constructing of Agreement.

This Agreement is the product of negotiations between the Parties and shall be deemed to have been drafted jointly by the Parties, and any uncertainties or ambiguities in or arising from this Agreement shall not be interpreted, construed or resolved in favor of, or against, the Town or the Developer based on any doctrine of interpretation or construction that purports to attribute significance to the identity of the drafter.

16. Applicable Law, Jurisdiction, Venue and Severability.

This Agreement is to be governed and construed according to the laws of the State of Colorado. Any action or claim filed to enforce this Agreement or relating directly or indirectly to the provisions, performance or enforcement of this Agreement shall be filed in the District Court of Grand County, State of Colorado. In the event that any provision of this Agreement is held to be in violation of the Town's ordinances or the laws of the State of Colorado or the United States and thereby rendered unenforceable, such unenforceable provision shall be ineffective without invalidating the remaining provisions of this Agreement.

*[Remainder of page intentionally left blank]*

**Acknowledgment, consent, and release of claims by Headwaters Metropolitan District.**

The Headwaters Metropolitan District (the "District") is the owner of the property on which a portion of the Improvements are to be constructed. The District hereby acknowledges and consents to the

Developer's construction of the Improvements upon, under, across, over and through the District's property. The District further agrees, to the extent permitted by law, to waive any and all current or future claims against the Town relating in any manner to this agreement or the Developer's construction of the Improvements upon the District's property.

HEADWATERS METROPOLITAN DISTRICT

\_\_\_\_\_  
Scott Johnson, President

STATE OF COLORADO     )  
  )  
COUNTY OF GRAND     )     ss

Acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2022 by Scott Johnson, as President of the Headwaters Metropolitan District, a Colorado special district.

Witness my hand and official seal.

My Commission Expires: \_\_\_\_\_

(Seal)

\_\_\_\_\_  
Notary Public

**IN WITNESS WHEREOF**, and agreeing to be fully bound by the terms of this Agreement, the Parties have set their hands below on the dates indicated.

**TOWN OF GRANBY**

By: \_\_\_\_\_  
Joshua Hardy, Mayor

ATTEST:

\_\_\_\_\_  
Deb Hess, Town Clerk

**GRCO LLC**

**Swiss LLC, its Manager**

By: \_\_\_\_\_  
Robert B. Glarner, Jr., Manager

STATE OF MISSOURI        )  
  )  
CITY OF ST. LOUIS        )        ss.

Acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2022 by Robert B. Glarner, Jr., as  
Manager of Swiss LLC, Manager of GRCO LLC, a Missouri limited liability company.

Witness my hand and official seal.

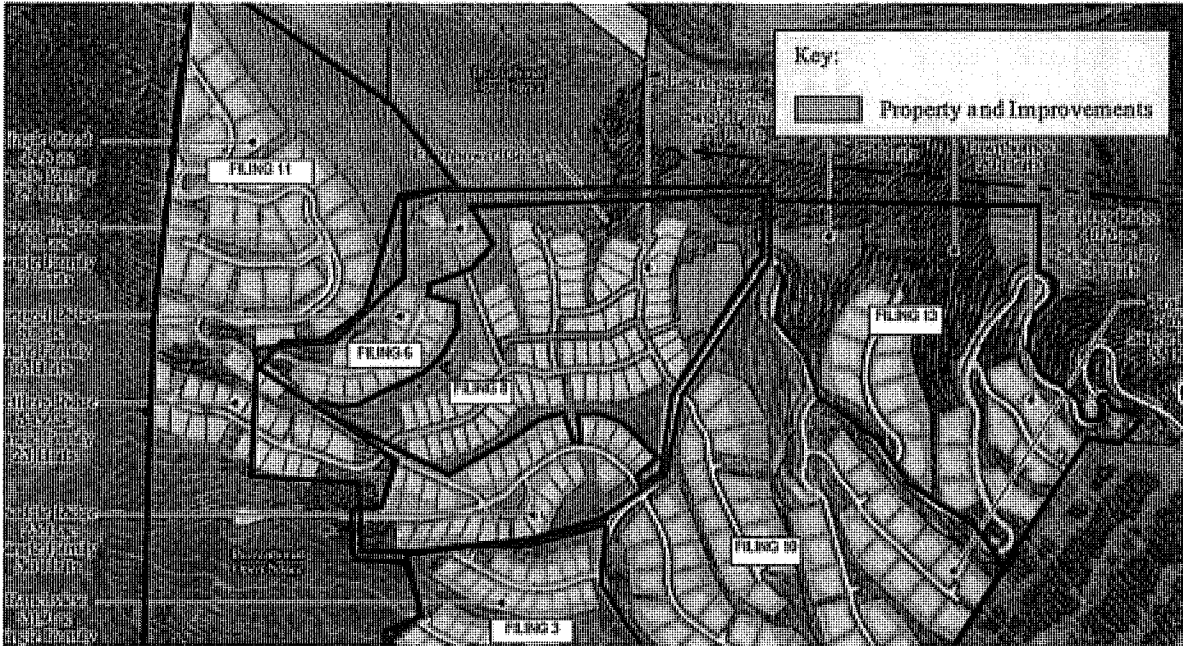
My Commission Expires: \_\_\_\_\_

(Seal)

\_\_\_\_\_  
Notary Public

**EXHIBIT A**

**Property and Improvements**



**SUBDIVISION IMPROVEMENTS AGREEMENT  
(GRANBY RANCH FILING NO. 8, PHASE 3, LOTS 38-55, 61-64)**

**THIS SUBDIVISION IMPROVEMENTS AGREEMENT** (this "*Agreement*") is entered into by the Town of Granby, Colorado, a Colorado municipal corporation (the "*Town*") and GRCO LLC, a Missouri limited liability company (the "*Developer*"), effective as of the 25th day of January, 2022. (The Town and the Developer are collectively referred to herein as the "*Parties*").

WHEREAS, the Developer is the owner of Lots 38-55 and 61-64 of Granby Ranch Filing No. 8 (the "*Property*"), as shown on a map attached hereto as Exhibit A; and

WHEREAS, the Town has approved the subdivision of the Property in accordance with the final plat of Granby Ranch Filing No. 8 (the "*Plat*"); and

WHEREAS, the Developer intends to develop the Property, the effect of which will be to directly impact and generate the need for on-site and off-site improvements. The Developer acknowledges that the exactions set forth herein are reasonably attributable to the special impacts which will be generated by the proposed uses of the Property, and that the terms and conditions set forth in this Agreement are necessary, reasonable and appropriate; and

WHEREAS, the Town is reviewing the Roadway and Utility Construction Plans for Granby Ranch Filing No. 8, Lots 38-55 and 61-64 (the "*Construction Drawings*"); and

WHEREAS, the Parties desire to provide for the construction of the improvements described in the Construction Drawings that are required to serve the Property (the "*Improvements*") as set forth herein and in such areas as depicted on Exhibit A, attached hereto.

NOW, THEREFORE, in consideration of the premises herein contained, the Parties agree as follows:

1. Improvements Required.

The Developer agrees to make, construct and install (or cause to be made, constructed or installed) the Improvements in accordance with the Construction Drawings as approved by the Town's engineer. Prior to the completion and final acceptance of the Improvements, any and all costs of the Town's inspection of the Improvements shall be borne solely by the Developer. The extent of the Developer's compliance with this Agreement shall be determined solely by the Town and its duly authorized agents and employees. Prior to commencement of work on the Property, the Developer shall obtain all necessary permits to complete the Improvements. In addition, Developer shall fully comply with all terms and conditions of any such permits.

2. Sales Restriction.

a. The lots within the Property shall not be conveyed or transferred, except for a bulk transfer of all such lots to a single person or entity, until such time as all of the Improvements have been completed and initially accepted by the Town in accordance with this Agreement, or a Performance Guarantee as described in Section 3 below has been provided to the Town (the "*Sales Restriction*"). The recording of this Agreement shall, among other actions, provide notice of the Sales Restriction.

b. The Town and the Developer agree that, with respect to the Property, the Sales Restriction is intended to replace that certain Sales Restriction (Lots 38-64 and 68-74, Granby Ranch Filing No. 8) recorded May 3, 2006 at Reception No. 2006-004204 in the Grand County Official Records (the "*Original*").

*Sales Restriction*") and the Town agrees to release and forever discharge Developer of any obligations it may have under the same related to the Property. The Original Sales Restriction shall remain in full force and effect as to all other lots not included in the Property. The Town and the Developer further agree that, in order to effectuate the Sales Restriction and release the Property from the Original Sales Restriction, upon the execution of this Agreement, the Town will execute and record in the office of the Grand County Clerk and Recorder a Qualifying Resolution of the Board of Trustees as provided for in the Original Sales Restriction and that the same shall constitute conclusive evidence that the Original Sales Restriction is null and void as to the Property.

c. The provisions of this Section 2 shall not prohibit the Developer from entering into sale contracts for the lots within the Property, provided that any such contract requires that: (1) any earnest money is paid directly to an independent title company acting as escrow agent; and (2) such earnest money is repaid to the buyer on demand if a qualifying resolution releasing the Sales Restriction has not been recorded on or before the closing date specified in such contract.

### 3. Performance Guarantee.

If the Developer desires to convey or transfer any lots other than in a bulk transfer of all such lots to a single person or entity prior to the completion and acceptance of the Improvements, the Developer shall furnish to the Town, in a form and substance acceptable to the Town, an Irrevocable Letter of Credit, Warranty Bond or other security deemed acceptable by the Town (the "*Performance Guarantee*"), in an amount not less than one hundred fifteen percent (115%) of the total estimated cost of the Improvements, as certified by the Developer and approved by the Town's engineer in writing. The Parties acknowledge that the Improvements will not be completed as of the date on which the Performance Guarantee is provided to the Town.

The Town and the Developer agree that the acceptance of the Performance Guarantee by the Town shall release the Property from the Sales Restriction and shall release the Developer from any obligations it may have under the same. The Town further agrees that, upon the Town's acceptance of the Performance Guarantee, the Town shall pass a Qualifying Resolution releasing the Property from the Sales Restriction, and that the same shall constitute conclusive evidence that the Sales Restriction is null and void.

The Performance Guarantee shall be subject to the following terms and conditions:

a. The Developer shall have no direct or indirect ownership or managerial control over the entity issuing the Performance Guarantee;

b. In the event that, prior to the Town's initial acceptance of the Improvements, the Performance Guarantee should expire or the entity issuing the Performance Guarantee becomes non-qualifying, or the cost of the construction of the Improvements is reasonably determined by the Town to be greater than the amount of the Performance Guarantee provided, then the Town shall furnish the Developer with written notice of such condition, and within fifteen (15) days of receipt of such notice, the Developer shall provide the Town with a substituted qualifying Performance Guarantee, or augment the deficient security to achieve one hundred fifteen percent (115%) of the cost of the completion of the Improvements. If such substituted qualifying Performance Guarantee is not timely furnished, then development activities including but not limited to the issuance of building permits and certificates of occupancy, may be suspended by the Town pending compliance herewith.

c. Developer shall have the right from time to time, but not more frequently than once a month, to provide the Town with a certification stamped by a professional engineer licensed in the State of Colorado (a "*Certification of Partial Completion*") stating that a certain percentage of the Improvements (the "*Completed Improvements*") have been installed in accordance with the Construction Drawings. Upon review and approval of the Certificate of Partial Completion by the Town (which may include, if deemed

necessary or appropriate by the Town, review by the Town's engineers or other agents and employees), which approval shall not be unreasonably withheld or delayed, the Town shall promptly submit to the issuer of the Performance Guarantee such documentation as is required to reduce the amount thereof by an amount equal to 85% of the estimated cost of the Completed Improvements (as calculated in accordance with the estimated cost of the Improvements as approved by the Town's engineer).

The Developer shall ensure that all contractors and/or subcontractors employed in connection with construction or installation of the Improvements shall be licensed, to the extent such licensing is required, before any work on the Improvements is commenced.

4. Completion of Improvements.

The Improvements shall be completed within twenty-four (24) months of the date of this Agreement (the "*Improvements Completion Period*"). The Improvements Completion Period may be extended by mutual agreement of the Parties, particularly when the need for such extension is caused by persons or matters over which the Developer has no control. Notwithstanding the foregoing, in the event that the construction of the Improvements is delayed by a person or matter over which the Developer has no control, the Developer may, but shall not be obligated to, extend the Improvements Completion Period for one (1) period of twelve (12) months by providing the Town with written notice of its intent to extend the Improvements Completion Period within ten (10) working days from the date of such delay.

5. Completion of Improvements by Town.

In the event the Developer fails to complete the Improvements in compliance with this Agreement, the Town may, but shall not be obligated to, proceed with restoring or completing some or all of the remaining portions of the Improvements to a condition satisfactory, in the sole discretion of the Town's Board of Trustees, to the health, safety and welfare of the Town. The Town shall be entitled to draw on the Performance Guarantee in order to accomplish such restoration and/or completion. The Town must give the Developer at least thirty (30) days prior written notice of its intent to draw on the Performance Guarantee in order to restore or complete all or any portion of the Improvements. If the Town completes some or all of the Improvements, then the Town Board of Trustees shall have full discretion to determine the rules and regulations governing use of the Improvements and any fees to be charged for or associated with such use.

6. Development Standards and Procedures.

a. Engineering Services.

The Developer shall, at its sole expense, procure all engineering and landscaping services necessary and appropriate in conjunction with the Improvements, which shall fully conform to the Town's applicable ordinances, standards and specifications. Professional services shall be performed by engineers, surveyors, architects or other professionals duly licensed by the State of Colorado as may be appropriate. Landscaping services shall be performed by persons trained in landscape architecture or horticultural design. In addition to design services, the Developer's Engineer shall oversee construction, providing daily construction observation, Record Drawings and all documentation and certifications necessary for Initial and Final Acceptance.

b. Review.

The Construction Drawings are being reviewed by the Town's engineer and the Town's engineer anticipates approving the Construction Drawings after completion and submittal by the Developer of certain soil tests and geotechnical opinions and plan revisions as

required herein. Developer shall not commence construction of the Improvements until the Town's engineer has provided written approval of the Construction Drawings.

c. Testing.

The Developer, at its sole expense, shall employ a professionally qualified, independent testing company acceptable to the Town to perform all testing of materials or construction that may reasonably be required by the Town to ensure compliance with the Town's applicable standards and specifications. Developer shall furnish the Town with certified copies of test results, and agrees to release and authorize full access by the Town and its designated representatives to all work-up materials, procedures and documents used in preparing the test results as requested by the Town.

d. Inspection.

At all times during construction of the Improvements, and until final acceptance thereof by the Town, the Town shall have the right, but not the duty, to inspect materials and workmanship in order to ascertain conformance with the Construction Drawings and all applicable standards and specifications. Developer shall reasonably cooperate and assist the Town to gain appropriate access to the areas designated for inspection. It shall also be the duty of the Developer to notify the Town upon discovery of any nonconformance with the said plans, standards and specifications. Inspection and acceptance of work by Town personnel shall not relieve the Developer of any responsibility. Notwithstanding the foregoing, Developer shall have no obligation or liability for any claim or injury resulting from the presence of any agent or representative of the Town on the Property, unless the same is the direct result of Developer's negligence or willful misconduct.

e. Street Access.

Developer shall, at its expense, be responsible for keeping on-site streets, off-site streets used as construction routes and other existing rights-of-way clean of mud, rocks and debris at all times during said construction of the Improvements (collectively, the "*Street Access Requirements*"). All work shall conform to the requirements for erosion control as described in the Town's statutes, ordinances and regulations. If the Developer fails to comply with the Street Access Requirements, the Town shall provide the Developer with written notice via email specifying the nature of such failure, and the Developer shall have two (2) working days upon receipt of such notice in which to cure the specified failure. If the Developer does not cure the specified failure within said two (2) working days (unless unable to do so due to inclement weather or other conditions beyond the Developer's control), or if such failure is not waived in writing by the Town, the Town may take corrective action and invoice the Developer at the Town's prevailing rate.

f. Initial Acceptance of Improvements.

The Developer shall submit a "*Request for Initial Acceptance*", including a "*Certification of Completion*", "*Certificate of Payment*", "as built" drawings of the Improvements and certified cost estimates of the Improvements, to the Town upon completion of the Improvements. The Certification of Completion shall be submitted upon written oath or affirmation of the Developer's engineer that the Improvements have been completed in substantial compliance with the approved Construction Drawings and other applicable Town code and building requirements, as in effect on the date of this Agreement. The Certificate of Payment shall be submitted upon written oath or affirmation of the Developer that the Improvements have been fully paid for and Developer has fully paid all persons or

entities having furnished labor or materials for the design, construction and installation of such Improvements. The Town, however, shall not be deemed to have accepted any payment responsibility or liability in conjunction with the ascertainment of such payment. The Town shall inspect the Improvements within ten (10) working days of the Town's receipt of the Developer's Request for Initial Acceptance, unless unable to do so due to inclement weather or other natural conditions or conditions beyond the Town's control (each such period being referred to herein as an "*Initial Acceptance Inspection Period*"). The Improvements shall be deemed accepted by the Town unless, within ten (10) working days of the expiration of the Initial Acceptance Inspection Period, the Town furnishes the Developer with specific written objections to the status of the completed Improvements. In the event that the Town, within ten (10) working days following the expiration of the Initial Acceptance Inspection Period, provides the Developer with specific written objections to the status of the completed Improvements, the Developer shall have such amount of time as is reasonably necessary to address such objections and when addressed shall re-submit the Request for Initial Acceptance, including a new Certification of Completion, Certificate of Payment, "as built" drawings of the completed Improvements and certified cost estimates of the completed Improvements. Upon a finding of satisfactory completion of the Improvements in compliance herewith and all applicable ordinances and standards of the Town, the Town shall issue a "*Certificate of Initial Acceptance*" to the Developer for the Improvements. Following the issuance of a Certificate of Initial Acceptance, the Town shall, upon request by the Developer: (i) release a portion of the Performance Guarantee correlating to the initially accepted Improvements, provided a Warranty Guarantee meeting the requirements of subsection (g) below has been executed and delivered to the Town, and provided no mechanics lien statements have been filed with respect to the project; and (ii) at the Developer's expense, record the Certificate of Initial Acceptance in the office of the Grand County Clerk and Recorder. In the event that the Town, within ten (10) working days of the Town's receipt of the Developer's request, has not recorded the Certificate of Initial Acceptance, the Developer shall thereafter have the right to record the same.

The Parties agree that, upon the issuance of the Certificate of Initial Acceptance with respect to the Improvements consisting of water and sewer lines and facilities, the Developer shall convey such lines and facilities to the Town by bill of sale. The Parties further agree that, upon the issuance of the Certificate of Initial Acceptance with respect to the Improvements consisting of roadways, the Developer shall convey such roadways to the Headwaters Metropolitan District or such other governmental body or property owner's association designated by the Headwaters Metropolitan District, to the extent the Developer or the Developer's predecessors have not previously done so.

g. Warranties.

(1) For a period of two (2) years from the date of a Certificate of Initial Acceptance, the Developer shall warrant that the Improvements covered by the Certificate of Initial Acceptance will be free from defects, including but not limited to defects in materials, workmanship, design, construction and installation, and that the Improvements shall otherwise fully comply with all applicable standards and specifications (each such two (2) year period being referred to herein as an "*Initial Warranty Period*"). If repairs are required for the Improvements covered under an Initial Warranty Period, such Initial Warranty Period shall be extended with respect to such repairs for a period of two (2) years from the date of the repairs (each such period, an "*Extended Warranty Period*"). For the purposes of this Agreement, an Initial Warranty Period and any subsequent Extended Warranty Period for a Completed Section or all of the Improvements (as applicable) shall collectively be referred to herein as a "*Warranty Period*".

(2) Prior to the Town issuing a Certificate of Initial Acceptance, the Developer shall furnish to the Town an Irrevocable Letter of Credit, Warranty Bond or other security for the benefit of the

Town, deemed acceptable by the Town and conforming to the requirements applicable to the Performance Guarantee set forth in Section 3 of this Agreement (the "*Warranty Performance Guarantee*"), in an amount equal to fifteen percent (15%) of the total actual cost of the Improvements covered by the Certificate of Initial Acceptance, as certified to the Town. The Warranty Performance Guarantee shall provide security for the costs which may be incurred in repairing or replacing the Improvements during a Warranty Period.

(3) In the event that any substantial repair or replacement is required to any of the Improvements during a Warranty Period, and such repair or replacement is not timely made upon notice of defect or in any event before the expiration of the Warranty Period, the Town may elect, but shall not be obligated, to:

(i) call the Warranty Performance Guarantee and secure repair or replacement of the nonconforming Improvements;

(ii) order denial or suspension of additional building permits, utility services or certificates of occupancy outstanding with respect to the Property until any non-conforming Improvements have been repaired or replaced; or

(iii) Take such other action as may be authorized in law or equity.

7. Procedure for Final Acceptance of Improvements.

a. No earlier than sixty (60) days and no later than thirty (30) days prior to the expiration of a Warranty Period, the Developer shall submit a written "*Request for Final Acceptance*" of the Improvements covered by such Warranty Period. Within ten (10) days of such request, the Town shall conduct a final inspection of the Improvements included in the Request for Final Acceptance, unless precluded from doing so by weather or natural conditions (each such period being referred to herein as a "*Final Acceptance Inspection Period*"). The Improvements shall be deemed accepted by the Town unless, within ten (10) working days of the expiration of the Final Acceptance Inspection Period, the Town furnishes the Developer with specific written objections to the status of such Improvements. In the event that the Town, within ten (10) days following the expiration of the Final Acceptance Inspection Period, provides the Developer with specific written objections to the status of the Improvements, the Developer shall have such amount of time as is reasonably necessary to address such objections and when addressed shall re-submit the Request for Final Acceptance. After Final Acceptance, the Developer may request, and the Town shall release, the corresponding Warranty Performance Guarantee, and the Developer shall have no further obligations or liabilities with respect to such Improvements. If the Improvements subject to the inspection fully conform to this Agreement and all of the Town's applicable standards and specifications, and/or all repairs, if any are needed, have been made to bring such Improvements into conformance, the Town shall issue a "*Certificate of Completion*" certifying the "*Final Acceptance*" of such Improvements to the Developer. Following the issuance of a Certificate of Completion, the Town shall, upon request by the Developer and at the Developer's expense, record the Certificate of Completion in the office of the Grand County Clerk and Recorder. In the event that the Town, within ten (10) working days of the Town's receipt of the Developer's request, has not recorded the Certificate of Completion, the Developer shall thereafter have the right to record the same.

b. If the Developer fails to obtain Final Acceptance of the Improvements as provided in this Section 7, the Developer shall be in default of this Agreement and the Town may exercise its rights to secure performance as provided by Section 5 hereof. In the event that the Developer has not submitted a Request for Final Acceptance within forty-five (45) days of the scheduled completion dates applicable (as may have been extended as herein provided), the Town shall have the right, but not the obligation, to at any time thereafter, conduct a final inspection of the Improvements. If, pursuant to the final inspection requested by the Developer or initiated by the Town, any such Improvements are found to be in nonconformance with

this Agreement, or the Town's applicable standards and specifications, the Town shall have the rights set forth in Section 5, 6 and elsewhere herein.

Nothing herein shall be construed or deemed to require the Town to grant Final Acceptance or release from a warranty any Improvements that are defective or damaged.

8. Liability Limitations.

a. Indemnification.

The Developer agrees to indemnify and hold harmless the Town, and its officers, agents and employees, from and against all liability, claims, demands, and expenses, including court costs and attorney fees, on account of any injury, loss, or damage, which arises out of or is in any manner connected with the work to be performed under this Agreement, if such injury, loss, or damage is caused in whole or in part by, the negligent act or omission, error, professional error, mistake, accident or other fault of the Developer, any subcontractor of the Developer, or any officer, employee, or agent of the Developer, contractor or subcontractor. The obligations of this Section 8(a) shall not apply to damages for which the Town shall become liable by final judgment to pay a third party as a result of the negligent act or omission, error, professional error, mistake, accident, or other fault of the Town.

b. Insurance.

(1) The Developer agrees to procure and maintain for itself and for its contractors, subcontractors, representatives and agents engaged in the design, construction, or installation of the Improvements such liability insurance including general liability, contractors liability, professional liability, comprehensive automobile liability, worker's compensation insurance and sufficient public liability insurance as will protect the Town, Town Officials, Town employees, agents and representatives against any and all potential liability, claims, damage, demands, losses and expenses, that may be incurred or asserted. Liability insurance shall be in the minimum amount of three hundred thirty thousand dollars (\$330,000.00) for injury to one person, or nine hundred ninety-thousand dollars (\$990,000.00) for injury to two or more persons in any single occurrence, or such greater amounts as may be established by the Colorado Governmental Immunity Act, Sections 24-10-101, et seq., C.R.S. as it may be amended.

(2) Developer shall insure that all contractors and subcontractors providing services provide Workers' Compensation as required by the Labor Code of the State of Colorado and Employers' Liability Insurance;

(3) If approved by the Town, in its sole discretion, evidence of qualified self-insured status may be substituted for one or more of the foregoing insurance coverages.

(4) The Developer shall, at a minimum, procure and maintain the insurance coverages listed herein. Such coverages shall be procured and maintained with forms and insurers acceptable to the Town. All coverages shall be continuously maintained to cover all liability, claims, demands, and other obligations assumed by the Developer pursuant to retroactive dates, and extended reporting periods shall be procured to maintain such continuous coverage.

(5) A "*Certificate of Insurance*" shall be completed by the Developer's insurance agent as evidence that policies providing the required coverages, conditions and minimum limits are in full force and effect, and such Certificate of Insurance shall be subject to review and approval by the Town prior to commencement of construction of the Improvements. The Certificate of Insurance shall identify this Agreement and shall provide that the coverages afforded under the policies shall not be canceled,

terminated or materially changed unless at least thirty (30) days prior written notice has been given to the Town.

(6) Failure on the part of the Developer to procure or maintain policies providing the required coverages, conditions and minimum limits shall constitute a material breach of Agreement and, if said breach is not cured within ten (10) days of written notice by the Town to Developer, the Town may immediately terminate this Agreement, or at its discretion, the Town may procure or renew any such policy or any extended reporting period thereto and may pay any and all premiums in connection therewith, and all monies so paid by the Town shall be repaid by the Developer to the Town upon demand, or the Town may offset the cost of the premiums against any monies due to the Developer from the Town, or the Town may cease to issue additional building permits or certificates of occupancy outstanding with respect to the Property covered by this Agreement until the defect has been remedied.

(7) The Town reserves the right to request and receive a certified copy of any policy and any endorsement thereto. The Developer agrees to execute any and all documents necessary to allow the Town access to any and all insurance policies and endorsements pertaining to the Improvements.

(8) The Parties understand and agree that the Town, its officers and its employees are relying on, and do not waive or intend to waive, by any provision of this Agreement, the monetary limitations or any other rights, immunities, and protections provided by the Colorado Governmental Immunity Act, Sections 24-10-101, et seq., C.R.S., as from time to time amended, or otherwise available to the Town, its officers, agents and employees.

c. Nonliability.

The Developer acknowledges that the Town's review and approval of the Improvements for the Property is done in furtherance of the general public health, safety and welfare, and that no specific relationship with, or duty of care to, the Developer or third parties is created or assumed by such review approval, nor is any immunity waived, as is more specifically set forth in Section 24-10-101, et seq. C.R.S., Colorado Governmental Immunity Act.

No one, individually or otherwise, other than the Parties, shall acquire, as a result of this Agreement, any rights, claims or obligations from or against the Town, its agents, employees or officers. Actions by the Town against the Developer to enforce any provision of this Agreement shall be at the sole discretion of the Board of Trustees of the Town. No third parties shall have any right to require any action by the Town pursuant to this Agreement, and this Agreement shall not create liability on the part of, or be a cause of action against, the Town for any personal or property damage that may result to any third parties from the failure of the Developer to perform or construct the Improvements. The Parties agree that it is their specific intent that no other individual or entity shall be a party to or a third-party beneficiary of this Agreement, that no other individual or entity shall have any rights or cause of action hereunder, and that the consent of another individual or entity shall not be necessary to any agreement, amendment or document with respect to the obligations contemplated by this Agreement. The provisions of this Section 8(c) shall survive the Final Acceptance of all of the Improvements by the Town or the termination of this Agreement.

9. Enforcement and Remedies.

a. Breach of Agreement.

In the event the Developer fails to timely comply with any of the terms, conditions, covenants and undertakings hereof, and if such noncompliance is not cured and brought

into compliance within thirty (30) days of written notice of breach to the Developer by the Town, unless the Town in writing designates a longer period as reasonably requested by the Developer (each such period being referred to herein as a "*Cure Period*"), then the Town may call for payment of the Performance or Warranty Performance Guarantee (as applicable). The Town may also, during a Cure Period, withhold any additional building permits, certificates of occupancy outstanding or the provision of new utility fixtures or services with respect to the Property covered by this Agreement. Nothing hereunder shall be construed to limit the Town from pursuing any other remedy at law or in equity which may be appropriate under the statutes and ordinances, and applicable laws and legal standards of the State of Colorado or the United States, before any court of competent jurisdiction. Such remedies shall be cumulative. Notice by the Town to the Developer shall specify the conditions of default.

b. Non-Waiver.

The failure of the Town to take timely action with respect to any breach of any term, covenant or condition hereof shall not be deemed to be a waiver of such performance by the Developer, or a waiver of any subsequent breach of the same or any other term, covenant or condition herein contained.

10. Binding Effect.

This Agreement shall be binding on the Parties, their respective successors and assigns (which may include the District), and shall be deemed to constitute a covenant running with the land. The Developer and any such successor and assign shall be jointly and severally liable for the Developer's performance of this Agreement; provided, however, that no individual lot that has been sold to an individual lot owner shall have any obligation or liability of any kind under this Agreement.

11. Entire Agreement.

This Agreement shall constitute the entire agreement between the Parties. This Agreement hereby supersedes and replaces any and all prior Subdivision Improvement Agreements entered into by the Town in connection with the Property, including any amendments thereto. No subsequent amendment to this Agreement shall be valid unless made in writing and properly executed by the Parties.

12. No Admission of Liability or Waiver of Claim or Position.

This Agreement shall not be construed, interpreted or used as an admission of liability or waiver of claim or position by any party hereto with respect to any rights or obligations arising by, or under that certain Subdivision Improvements Agreement (Lots 1-29, 30-37 and 65-67, Granby Ranch Filing No. 8 and Lots 50-53 of Filing No. 6) recorded May 3, 2006 at Reception No. 2006-004205 in the Grand County Official Records and all amendments thereto, if any, or any other agreement or contract.

13. Notice.

Any notice given under the terms of this Agreement shall be made in writing, and shall be deemed made upon personal service or upon mailing by United States Mail, postage prepaid, to the other, and unless amended by written notice, to the following:

The Town:	Town of Granby Post Office Box 440 Granby, Colorado 80446
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With a copy to: Krob Law Office, LLC  
8400 E. Prentice Ave.  
Penthouse  
Greenwood Village, Colorado 80111

The Developer: GRCO LLC  
PO Box 179173  
St. Louis, Missouri 63117-9173  
Attention: Robert B. Glarner, Jr.

With a copy to: Husch Blackwell LLP  
190 Carondelet Plaza, Suite 600  
Clayton, Missouri 63105  
Attention: David G. Richardson

14. Additional Developer Obligations.

Developer shall comply with the following requirements

- a. Prior to commencing construction of the Improvements, Developer shall retain a soils engineer at Developer's cost to review and comment on the geotechnical reports submitted and provide recommendations for trench backfill and pavement sections based on actual test pits. Such recommendations shall be approved by the Town's engineer prior to commencing construction of the Improvements; and
- b. Developer shall comply with any other reasonable requirements as determined and provided in writing by the Town's engineer upon the Town engineer's completed review of the Construction Drawings.
- c. The Developer will provide and the Town's engineer will approve miscellaneous utility designs prior to construction of such components of the Improvements.

15. Drafting and Constructing of Agreement.

This Agreement is the product of negotiations between the Parties and shall be deemed to have been drafted jointly by the Parties, and any uncertainties or ambiguities in or arising from this Agreement shall not be interpreted, construed or resolved in favor of, or against, the Town or the Developer based on any doctrine of interpretation or construction that purports to attribute significance to the identity of the drafter.

16. Applicable Law, Jurisdiction, Venue and Severability.

This Agreement is to be governed and construed according to the laws of the State of Colorado. Any action or claim filed to enforce this Agreement or relating directly or indirectly to the provisions, performance or enforcement of this Agreement shall be filed in the District Court of Grand County, State of Colorado. In the event that any provision of this Agreement is held to be in violation of the Town's ordinances or the laws of the State of Colorado or the United States and thereby rendered unenforceable, such unenforceable provision shall be ineffective without invalidating the remaining provisions of this Agreement.

*[Remainder of page intentionally left blank]*

**Acknowledgment, consent, and release of claims by Headwaters Metropolitan District.**

The Headwaters Metropolitan District (the “**District**”) is the owner of the property on which a portion of the Improvements are to be constructed. The District hereby acknowledges and consents to the Developer’s construction of the Improvements upon, under, across, over and through the District’s property. The District further agrees, to the extent permitted by law, to waive any and all current or future claims against the Town relating in any manner to this agreement or the Developer’s construction of the Improvements upon the District’s property.

HEADWATERS METROPOLITAN DISTRICT

\_\_\_\_\_  
Scott Johnson, President

STATE OF COLORADO     )  
  )  
COUNTY OF GRAND     )     ss

Acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2022 by Scott Johnson, as President of the Headwaters Metropolitan District, a Colorado special district.

Witness my hand and official seal.

My Commission Expires: \_\_\_\_\_

(Seal)

\_\_\_\_\_  
Notary Public

**IN WITNESS WHEREOF**, and agreeing to be fully bound by the terms of this Agreement, the Parties have set their hands below on the dates indicated.

**TOWN OF GRANBY**

By: \_\_\_\_\_  
Joshua Hardy, Mayor

ATTEST:

\_\_\_\_\_  
Deb Hess, Town Clerk

**GRCO LLC**

**Swiss LLC, its Manager**

By: \_\_\_\_\_  
Robert B. Glarner, Jr., Manager

STATE OF MISSOURI     )  
                                  )  
CITY OF ST. LOUIS     )     ss

Acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2022 by Robert B. Glarner, Jr., as Manager of Swiss LLC, Manager of GRCCO LLC, a Missouri limited liability company.

Witness my hand and official seal.

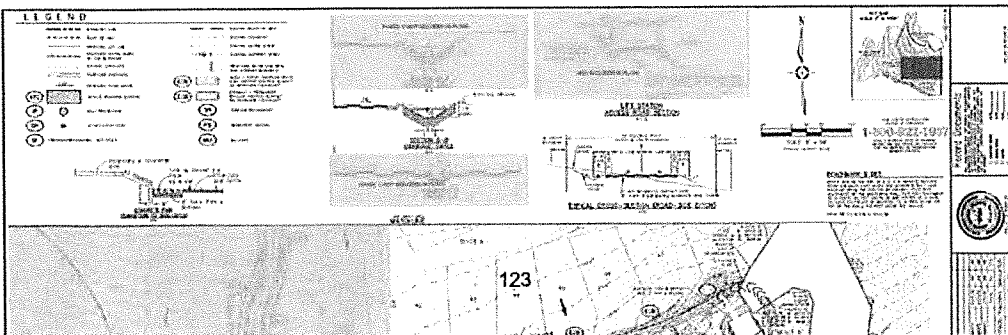
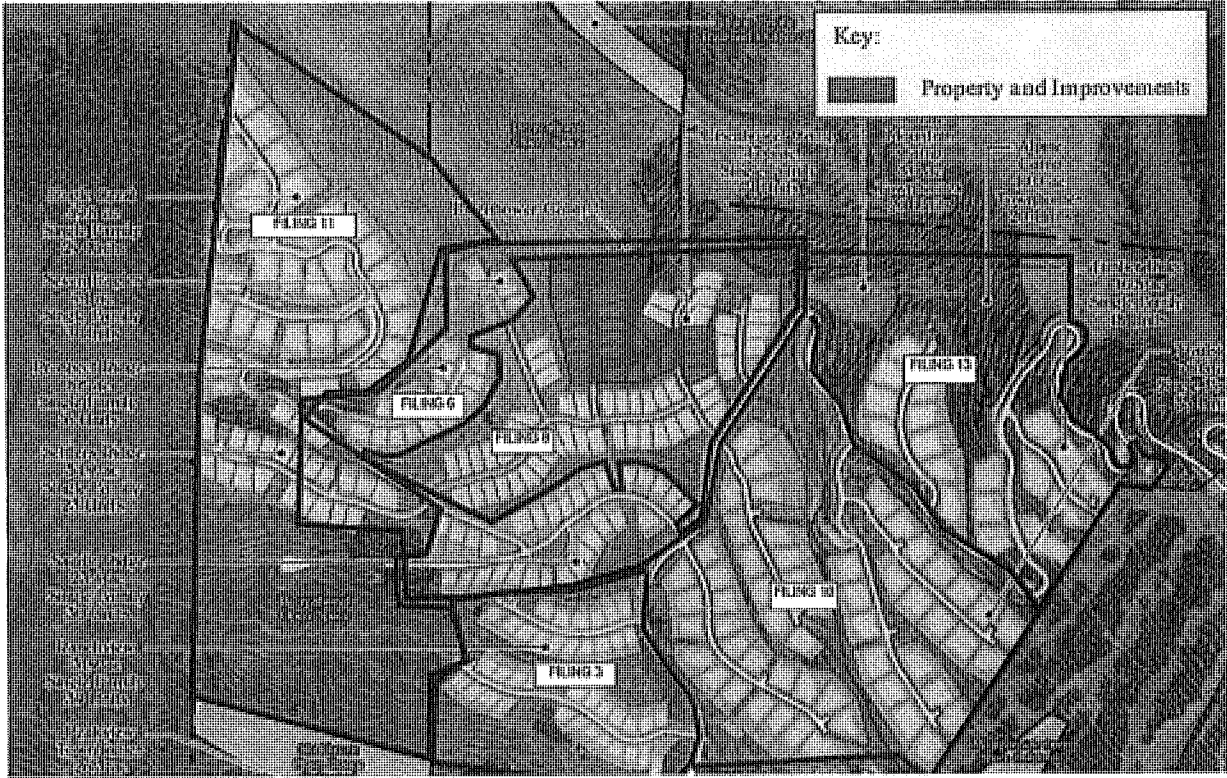
My Commission Expires: \_\_\_\_\_

(Seal)

\_\_\_\_\_  
Notary Public

**EXHIBIT A**

Property and Improvements





# EXHIBIT 05c

12/6/21, 9:00 AM

Krob Law Mail - (no subject)



Nathan Krob <nathan@kroblaw.com>

(no subject)

Richardson, David <David.Richardson@huschblackwell.com>  
To: Nathan Krob <nathan@kroblaw.com>  
Cc: "Jenner, Katie" <Katie.Jenner@huschblackwell.com>

Tue, Sep 7, 2021 at 10:53 AM

Nathan:

Please find attached an initial draft of the Omnibus Development Agreement between the Town, GRCO and GR Terra. Please note that this draft is based off the outline we shared in June and is intended to be a starting point for further discussion. It is being circulated simultaneously to our clients and, therefore, this draft remains subject to the comments, revisions, additions and deletions of our clients, and nothing contained in this draft shall be construed as an admission or waiver or binding upon our clients in any respect whatsoever.

Please also note that the attached is being submitted consistent with our position that our clients are not responsible in any way for the road repairs mentioned in the Confidential Memorandum to Ted Cherry dated August 10, 2021 (the "Memo"), and it remains our position, as has been consistently stated since our initial meeting in June, that our clients are not legally responsible for the "insufficient roads" discussed in the Memo nor for any obligations of GRH, GPGH or any other party with respect to any property our clients did not purchase. Furthermore, contrary to what is stated in the Memo, we do not believe the Town can lawfully withhold or delay consideration and review of our clients' plans, applications or permits under Section 17 of the Annexation Agreement because of the "insufficient roads", as our clients are not and cannot be in default of the Annexation Agreement because of the "insufficient roads".

Nevertheless, our clients remain committed to working out the Omnibus Agreement with the Town which provides for the repair of the "insufficient roads" and allows for the successful restart of the development of Granby Ranch. Once you've had a chance to review, please let us know what you think the next steps should be and please do not hesitate to call me.

Regards,

David

David G. Richardson, AICP

Partner

HUSCH BLACKWELL LLP

190 Carondelet Plaza,  
Suite 600

St. Louis, MO 63105-3443

Direct: 314-480-1718

Mobile: 314-616-6921

Fax: 314-480-1505

[David.Richardson@huschblackwell.com](mailto:David.Richardson@huschblackwell.com)

[huschblackwell.com](http://huschblackwell.com)

[View Bio](#) | [View VCard](#)

Husch Blackwell has been named a Tier 1 law firm in the United States for Real Estate by U.S. News -- Best Lawyers® for the Ninth Edition of "Best Law Firms"

 4839-8467-9663.7 GRCO Omnibus Development Agreement September 2021.doc  
103K

# EXHIBIT 06a

<p><b>DISTRICT COURT, GRAND COUNTY, COLORADO</b> 307 Moffat Avenue/P.O. Box 192 Hot Sulphur Springs, CO 80451 970-725-3357</p> <hr/> <p><b>Plaintiff:</b> GRANBY RANCH METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado, vs. <b>Defendants:</b> 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.</p>	<p>DATE FILED: January 28, 2022 11:28 AM CASE NUMBER: 2021CV30008</p> <p style="text-align: center;">↑            ↑ <b>COURT USE ONLY</b></p>
	<p>Case No: 2021CV030008</p>
<p style="text-align: center;"><b>ORDER GRANTING IN PART GRAY JAY VENTURES, LLC, GRANBY PRENTICE, LLC, AND GR TERRA LLC'S MOTION TO DISMISS SECOND AMENDED COMPLAINT</b></p>	

This matter comes before the Court on Gray Jay Ventures LLC, f/k/a GP Granby Holdings, LLC's ("Gray Jay"), Granby Prentice LLC's ("Granby Prentice") and GR Terra LLC's ("GR Terra")<sup>1</sup> Motion to Dismiss Second Amended Complaint, filed on July 9, 2021. Granby Ranch Metropolitan District ("GRMD") filed its Response on July 30, 2021. The Private Defendants filed their Reply on August 13, 2021. Upon being fully apprised of the facts and law, the Court finds and rules as follows:

<sup>1</sup> Collectively the "Private Defendants."

## FACTS

This case involves numerous agreements and fee arrangements for the development, servicing, operation, and financing of Granby Ranch, a golf/ski resort and residential subdivision located in Grand County, Colorado (“Granby Ranch”). Granby Realty Holdings LLC (“GRH”)<sup>2</sup> was the developer of Granby Ranch with Redwood Capital Finance Company, LLC (“Redwood Capital”) funding the development, secured by a deed of trust (the “2005 Redwood Deed of Trust”).

### 1. Formation of the Districts.

In 2003, GRH sought the organization of two metropolitan districts within Granby Ranch. See C.R.S. § 32-1-101 et seq.<sup>3</sup> The Plaintiff<sup>4</sup> and Headwaters are these two districts (collectively, the “Districts”).<sup>5</sup> The Districts were created to finance, manage, and operate services and infrastructure within Granby Ranch. Headwaters was the “Service District” and the Plaintiff was the “Taxing District.” (Sec. Amend. Compl., Ex.s 1 and 2 thereto.)

The Plaintiff was delegated “the power to finance public improvements, impose property taxes, and collect revenue or take other actions in cooperation with [Headwaters] that may be necessary to provide the services and facilities needed within the Service Area.” The Plaintiff was thus vested with authority to finance and pay for the parks and recreation within the Districts.<sup>6</sup> The Taxing District<sup>7</sup> was tasked with imposing a mill levy to pay the debt obligations incurred by the Districts; to adopt, impose, collect, and remit to Headwaters such rates, fees, tolls and charges as are established by the Service District to fund its administrative and operating expenses; and upon the dissolution of Headwaters, to accept responsibility for the operation and maintenance of any infrastructure located within the Taxing District. (Sec. Amend. Compl., Ex. 2, 2003 Master Intergovernmental Agreement, §§ 5.1, 5.2, 5.4.)

Headwaters, as the Service District, provided the administration and actual improvements, services and facilities within the Districts. According to the 2003 Master IGA<sup>8</sup>, Headwaters was considered the “Service District” tasked to “manage and control the financing” of infrastructure, budget monies for public purposes, adopt uniform rules and regulations for administrative and operational purposes, and establish all necessary service charges including “development fees” for the Taxing District. In addition, Headwaters was to “manage and administer all business affairs of the Districts.” Headwaters was to own and operate the infrastructure until it was transferred to the Town of Granby or another public agency. Headwaters was also responsible for the construction of the infrastructure and to arrange for its

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<sup>2</sup> GRH was originally called Sol Vista Corporation and should not be confused with GP Granby Holdings, LLC.

<sup>3</sup> These service plans were later terminated in 2016.

<sup>4</sup> GRMD was originally called Sol Vista Metropolitan District No. 2.

<sup>5</sup> Headwaters was originally called Sol Vista Metropolitan District No. 1.

<sup>6</sup> In 2007, the Granby Ranch Metropolitan Districts Nos. 2-8 (“GRMD Nos. 2-8”) were formed under a Service Plan approved by the Town. These Districts were also considered “taxing districts.”

<sup>7</sup> The taxing district eventually became the Plaintiff and GRMD Nos. 2-8.

<sup>8</sup> The 2003 Master Intergovernmental Agreement attached to the Service Plans (the “2003 Master IGA”) describes the interrelationship between the two districts and additional descriptions of their assumed roles and responsibilities. The 2003 Master IGA submitted to the Court is unsigned.

financing. (Sec. Amend. Compl., Ex. 2, 2003 Master Intergovernmental Agreement, Part 4, §§ 4.2-4.3.)

At the same time, Headwaters and the Plaintiff entered into an Intergovernmental Agreement with the Town of Granby to reflect responsibilities under the 2003 Master IGA and the Service Agreements (the “2003 Granby IGA”) (Sec. Amend. Compl. Ex. 2.).<sup>9</sup> The 2003 Granby IGA was superseded and replaced by the 2008 Intergovernmental Agreement between the Town of Granby, the Plaintiff, Headwaters and GRMD Nos. 2-8 in 2008 (the “2008 Granby IGA”) (Sec. Amend. Compl. Ex. 5). The Court addresses the 2008 Granby IGA is more thoroughly below.

## 2. The 2005 Joint Fee Resolution.

In May 2005, Headwaters and the Plaintiff passed a Joint Resolution to Establish an Amenity Fee (the “2005 Fee Resolution”) (Sec. Amend Compl. Ex. 4).<sup>10</sup> According to its terms, Headwaters would impose and collect the Amenity Fee on each lot within the Districts. The Amenities included “certain recreational amenities benefiting the property within the Districts, which include a golf course, ski area, river park and related improvements, trails, and other recreation improvements, facilities, appurtenances, rights-of-way and other amenities as shall from time to time be acquired, constructed and/or operated by the Districts.” The Amenity Fee was to provide “a source of funding to pay for the costs incurred by the Districts for the financing, acquisition, construction, installation, and/or replacement of the Amenities, which are generally attributable to the persons subject to such charges, and such fees and charges are necessary to provide for the prosperity and general welfare of the Districts and their inhabitants and for the orderly and uniform administration of the Districts’ affairs.”

## 3. The 2005 Amenity Fee Agreement.

In June 2005, GRH and Headwaters executed an Amenity Fee Agreement (the “2005 Fee Agreement”) (Headwater’s Mot. Dismiss, Ex. 9.) The Plaintiff was not a party to the 2005 Fee Agreement. This agreement imposed a one-time amenity fee of \$10,000, collected by Headwaters, per residential unit, with respect to each lot within the Districts. “Headwaters will impose and collect certain fees as set forth in this Agreement (the “Amenity Fee”) for the acquisition, financing, leasing, construction, replacement, operation, maintenance and repair of the Amenities...” (Headwater’s Mot. Dismiss, Ex. 9, Recitals.) The amenities were the same as those described in the 2005 Fee Resolution.

The purpose of this agreement was to “entitle certain minimum use and enjoyment of the Amenities” to owners and purchasers of homes and homesites within Granby Ranch. GRH authorized certain “priority access” entitlements for which an Amenity Fee had been paid.

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<sup>9</sup> The 2003 Granby IGA appears to have been amended in 2005 and again in 2006, but the parties have not provided copies of these amendments to the Court.

<sup>10</sup> The 2005 Fee Resolution was amended on September 6, 2006, and amended and restated on July 17, 2013.

4. The 2008 Granby Intergovernmental Agreement.

The 2008 Granby IGA superseded and replaced the 2003 Granby IGA. The 2008 Granby IGA provided for the Districts and the GRMD Nos. 2-8 “to acquire, construct, own, operate and maintain the ski area and lifts, ski lodge, golf courses and appurtenant clubhouse and maintenance facilities, which included a Fishing Camp on the Fraser River, the 18-hole Headwaters Golf Course, and the Sol Vista Ski Basin. Exhibit A to the 2008 Granby IGA more thoroughly describes these amenities.” (Sec. Amend. Compl. Ex. 5.) The 2008 Granby IGA recognized the Priority Access given to owners within Granby Ranch, but also stated that “preferred access” be given to the Town of Granby residents who are not owners within Granby Ranch. This amounted to various discounts to access the Amenities.

5. The Leased Premises Agreement.

On December 31, 2012, GRH as “Landlord” and Headwaters as “Tenant” entered into the Second Amended and Restated Lease Purchase Agreement (the “LPA”) granting Headwaters the right to use and acquire the Leased Premises, including the ski area, golf course, and improvements thereon. (Sec. Amend. Compl., Ex. 6.)<sup>11</sup> The Amenities described in the 2008 Granby IGA are the same as those leased and to be purchased by Headwaters under the LPA.

Headwaters would fund the rental and potential acquisition with the Amenity Fee, authorized pursuant to the 2005 Fee Resolution and the 2005 Fee Agreement. Annual rent consisted of all Amenity Fees collected by Headwaters each year under the 2005 Fee Agreement (as well as another 2005 fee agreement with a different property owner).

Headwaters and GRH also agreed to a Purchase Price for the Amenities which included all Amenity Fees collected by Headwaters under the 2005 Fee Resolution and the 2005 Fee Agreement. The Amenities were to pass to Headwaters on December 31, 2062 if the Lease had not been terminated in accordance with Section 2(a), and (b) or (c) of the LPA.

6. The 2013 Amended and Restated Joint Resolution.

In July 2013, Headwaters, the Plaintiff, and GRMD Nos. 2 and 8 adopted an Amended and Restated Joint Resolution to establish an amenity fee (the “2013 Fee Resolution”) continuing the Amenity Fee imposed on properties and collected by Headwaters. (Headwater’s Mot. to Dismiss, Ex. 11.)

7. The 2013 Amenity Fee Agreement.

In July 2013, GRH and Headwaters entered into an Amended and Restated Amenity Fee Agreement (the “2013 Fee Agreement”) that superseded and replaced the 2005 Fee Agreement. (Headwaters’ Motion to Dismiss, Ex. 10).<sup>12</sup>

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<sup>11</sup> The Parties have not provided the Court with the original lease agreement or any of the amendments thereto.

<sup>12</sup> The 2013 Fee Agreement affirmed the one-time amenity fee to be collected by Headwaters and affirmed the rights of eligible property owners to priority access to the Amenities. (Headwater’s Mot. to Dismiss Ex. 11 §§ 2-3).

8. The 2016 Granby IGA.

On November 8, 2016, the Town of Granby, Headwaters, the Plaintiff, and GRMD Nos. 2-8 amended and restated the 2008 Granby IGA. (the “2016 Granby IGA”) (Sec. Amend. Compl., Ex. 7.) An Exhibit A to the 2016 Granby IGA is said to list the Amenities that would be acquired by the Districts. (*Id.* Para. 5.a.). Exhibit A to the 2016 Granby IGA was not provided to the Court. Section 5.a., however, of the 2016 Granby IGA provides a fairly comprehensive list and states that “in addition to the types of park and recreation services and facilities referenced or reflected in the Service Plans, including the exhibits thereto, the Districts will be authorized to acquire, construct, own, operation and maintain the ski area and lifts, ski lodge, golf courses and appurtenant clubhouses and maintenance facilities, fishing or “river park” facilities and programs, and parks, trails and open space for various recreational purposes as more fully described on Exhibit A, attached hereto and incorporated herein by reference, collectively called the Amenities.” These appear to be the same Amenities as those described in the 2008 Granby IGA (i.e., the fishing camp, the golf course, the ski area, and the parks, trails, and recreation areas). The Districts were authorized to continue the collection of the \$10,000 Amenities Fee. There is no evidence that the parties have terminated the 2016 Granby IGA, or that it has been amended or restated.

9. Termination of the 2006 and the 2008 Master IGAs.

In November 2017, the Plaintiff, GRMD Nos. 2-8 and Headwaters terminated the 2006 and 2008 Master IGAs (the “Termination IGA”). (Sec. Amend. Compl., Ex. 8.) The parties have not provided the Court with copies of either the 2006 or 2008 Master IGAs.

The Termination IGA provided that “the Parties intend for certain of the Granby Ranch Districts, specifically GRMD, to operate independently” from Headwaters,” and that “[d]ue to the amended service plans and the intention of certain of the Parties to operate independently from each other, there is no further need for the Master IGAs.” The Termination IGA further provided that Headwaters, the Plaintiff, and GRMD Nos. 2-8 have “fully satisfied their obligations under the Master IGAs” and those districts waived any right to pursue claims and damages against each other.

10. GRH’s Default and Successors-in-Interest.

At some point, GRH defaulted on its loan obligation with Redwood Capital. In March 2020, Granby Prentice, Redwood Capital’s successor and then holder of the 2005 Deed of Trust, initiated a foreclosure action pursuant to C.R.S. § 38-38-101. On August 14, 2020, the Public Trustee conducted a public sale to which Granby Prentice submitted the highest bid. Granby Prentice was issued a Certificate of Purchase for the property and it then assigned that certificate to Gray Jay Ventures (“Gray Jay”).

On November 11, 2020, Gray Jay notified Headwaters that it was electing to terminate the LPA pursuant to § 10 because Headwaters had ceased to operate the Amenities for a 30-day period.

On May 5, 2021, GR Terra, LLC (“GR Terra”) purchased the property from Gray Jay.

#### 11. Procedural History.

On February 23, 2021, the Plaintiff filed its Complaint against Headwaters and Gray Jay. On April 21, 2021, Gray Jay, and Headwaters both filed motions to dismiss. On July 6, 2021, the Plaintiff filed a Second Amended Complaint. The Second Amended Complaint named Gray Jay, Redwood Capital Finance, Granby Prentice, GR Terra, and Headwaters as Defendants. Claims I, II, III, IV, and V allege breach of contract claims against Gray Jay, Headwaters, Redwood Capital, Granby Prentice and GR Terra respectively. Claim VI alleges tortious interference with the LPA against Gray Jay, Granby Prentice, and Redwood Capital. Claim VII alleges breach of the covenant of good faith and fair dealing in the LPA against Gray Jay and Headwaters. Claim VIII seeks declaratory relief against Gray Jay and GR Terra in the form of a declaration that the LPA was not terminated by the 2020 foreclosure.

On July 9, 2021, Headwaters filed a Motion to Dismiss the Second Amended Complaint. On the same day, GRH, Granby Prentice, and GR Terra filed their own Motion to Dismiss and Granby Prentice filed a Motion to Dismiss Redwood Capital Finance. Granby Prentice, as successor to Redwood Capital Finance, filed a Motion to Dismiss Redwood Capital Finance as to both the Amended Complaint and the Second Amended Complaint.

### RULING

#### I. Standing

The Court first addresses the applicable standard of review as to the issue of standing. While the Private Defendants urges the Court to apply Rule 12(b)(1), the Plaintiff contends that the issue is a 12(b)(5) matter. The distinction is critical because the standards applied to each motion differ. Medina v. State, 35 P.3d 443, 452 (Colo. 2001) (comparing and explaining the two standards). Rule 12(b)(1) motions may require an evidentiary hearing to resolve any factual dispute upon which the existence of jurisdiction may turn. Id.

##### 1. Standard of Review.

A motion to dismiss under C.R.C.P. 12(b)(1) concerns “the court's authority to deal with the class of cases in which it renders judgment.” Paine, Webber, Jackson & Curtis, Inc. v. Adams, 718 P.2d 508, 513 (Colo. 1986). Motions challenging a plaintiff's standing are properly brought under Rule 12(b)(1) contesting the trial court's subject matter jurisdiction. Ferguson v. Spalding Rehab., LLC, 2019 COA 93, ¶ 6; 11 Colo. Prac., Civil Procedure Forms & Commentary § 12:4 (3d ed.) (“... standing is a component of subject matter jurisdiction and is a constitutional prerequisite to maintaining a lawsuit”).

Standing is required to invoke the court's jurisdiction. Rocky Mountain Animal Defense v. Colorado Div. of Wildlife, 100 P.3d 508, 513 (Colo. App. 2004). “Standing is a threshold jurisdictional question that must be determined before a case may be decided on the merits.”

Defend Colorado v. Polis, 2021 COA 8, ¶ 52; see also Ainscough v. Owens, 90 P.3d 851, 855 (Colo. 2004). Colorado courts provide for broad individual standing. See Ainscough, 90 P.3d at 856 (explaining that Colorado's test for standing “has traditionally been relatively easy to satisfy”). A case, however, must be dismissed where a plaintiff cannot meet the test and criteria for standing. Wimberly v. Ettenberg, 570 P.2d 535, 539 (Colo. 1977).

A motion to dismiss for lack of subject matter jurisdiction does not require the court to apply the same standards as those applied to Rule 12(b)(5) motions. Medina, 35 P.3d at 452 (“whereas Rule 12(b)(5) constrains the court by requiring it to take the plaintiff's allegations as true and draw all inferences in the plaintiff's favor, Rule 12(b)(1) permits the court ‘to weigh the evidence and satisfy itself as to the existence of its power to hear the case’”). “In the subject matter jurisdiction context, the court sits as the trier of fact and makes the required findings of fact and conclusions of law as to its jurisdiction.” Tabor Found. v. Colorado Department of Health Care Policy & Financing, 2020 COA 156, ¶ fn.3.

The Court declines to conduct a hearing on this issue. Rule 12(b)(1) permits a trial court “to make its own factual findings in determining its subject-matter jurisdiction, it necessarily permits the trial court to hold an evidentiary hearing to resolve any factual dispute upon which the existence of jurisdiction may turn.” Medina, 35 P.3d at 452 (citations omitted). The Plaintiff urges this Court to hold such a hearing if the Court chooses to apply the Rule 12(b)(1) standards. However, “if all relevant evidence is presented to the trial court, and the underlying facts are undisputed, the trial court may decide the jurisdictional issue as a matter of law . . .” Id.

The Court disagrees with the Plaintiff's argument that the Court should evaluate the Plaintiff's third-party beneficiary status as one similar to capacity. Capacity is a party's personal right to come into court and generally involves personal qualifications of that party. Currier v. Sutherland, 218 P.3d 709, 712 (Colo. 2009). A third-party beneficiary involves the enforcement of that party's rights under a contract. By definition, it involves a claim or defense. The Plaintiff has not cited any legal authority in which a court addressed a third-party beneficiary's standing as one of capacity, nor has it demonstrated any case law in which a court applied Rule 12(b)(5) standards to a standing claim.

The Plaintiff bears the burden of proving the court's subject matter jurisdiction. Medina, 35 P.3d at 452. The Court is required to dismiss the action “[w]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter...” C.R.C.P. 12(h)(3).

2. The Plaintiff is a Third-Party Beneficiary Entitled to Enforce the Terms of the LPA.

The Plaintiff is a third-party beneficiary entitled to enforce the terms of the LPA.

According to the Private Defendants, the Plaintiff lacks standing to enforce the LPA because it was not a party or successor thereto, was not an intended third-party beneficiary, and the surrounding circumstances do not support any other finding. According to the Plaintiff, it is a third-party beneficiary via the structure of the financing and operation of the Districts. It argues that it was one of the parties contemplated and intended to acquire the Leased Premises and was meant to benefit from Headwaters' rental or acquisition thereof.

“[A] plaintiff must satisfy two criteria in order to establish standing. First, the plaintiff must have suffered an injury-in-fact, and second, this harm must have been to a legally protected interest. Ainscough, 90 P.3d at 855 (citations omitted); Wimberly v. Ettenberg, 570 P.2d 535, 539 (Colo. 1977). “An interest is legally protected if the constitution, common law, or a statute, rule, or regulation provides the plaintiff with a claim for relief. 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); Kolwitz v. City of Boulder, 538 P.2d 482, 483 (Colo. App. 1975) (One seeking standing must have some special interest in the subject of the litigation and not just have a general interest as a resident of a community).

Third-party beneficiaries may be entitled to standing if they meet specific criteria. The individual or entity, not a party to an express contract, may bring an action on the contract if (1) the parties to the agreement intended to benefit that third party; and (2) if the benefit claimed is a direct and not merely an incidental benefit of the contract. SK Peightal Engineers, LTD v. Mid Valley Real Estate Sols. V, LLC, 342 P.3d 868, 872 (Colo. 2015). Thus, the inquiry examines whether the plaintiff is an intended or incidental beneficiary to the alleged contract:

The key question is the intent of the parties to the actual contract to confer a benefit on a third party. That intent must appear from the contract itself or be shown by necessary implication. It is a question of fact to be determined by the terms of the contract taken as a whole, 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, (Colo. App. 2003)(citing Concrete Contractors, Inc. v. E.B. Roberts Construction Co., 664 P.2d 722, 725 (Colo. App. 1982)).

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). The benefit must be direct and not merely incidental. Harwig v. Downey, 56 P.3d 1220, 1221 (Colo. App. 2002); Everett, 929 P.2d at 12 (“[I]t is not enough that some benefit incidental to the performance of the contract may accrue to the third party.”). The parties’ intent must be apparent from the terms of the contract, in light of all surrounding circumstances. Id.; see also East Meadows Co., LLC v. Greeley Irr. Co., 66 P.3d 214, 217 (Colo. App. 2003) (“[A] person who is not a party to an agreement may enforce a contractual obligation if the promise to be enforced is expressly stated in the contract, or is apparent from the agreement and surrounding circumstances, and the benefit conferred is direct and not incidental.”). The question of intent “may be evidenced either from the terms of the agreement, the surrounding circumstances, or both.” Villa Sierra Condo. Ass’n v. Field Corp., 878 P.2d 161, 166 (Colo. App. 1994).<sup>13</sup>

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<sup>13</sup> Thus, the Court disagrees with the Private Defendants’ argument that the Plaintiff lacks standing because the Complaint fails to allege which provision(s) of the LPA allegedly confer a direct benefit on the Plaintiff. The Plaintiff may have standing, despite the absence of a specific provision, if there is evidence that the parties intended to confer a benefit.

Incidental beneficiaries are not entitled to standing. Under Colorado law, “[t]he general rule is that one who is not a party to a contract, and from whom no consideration moved, has no connection therewith. He can avail himself of its terms neither as a cause of action nor a defense.” East Meadows, 66 P.3d at 217 (quoting Continental Casualty Co. v. Carver, 14 P.2d 181, 183 (Colo. 1932)); Bear Creek Development Corp. v. Genesee Foundation, 919 P.2d 948, 952 (Colo. App. 1996) (“incidental third-party beneficiary to the option contract . . . lacks standing to exercise the option”).

This analysis necessarily involves examining the LPA itself. 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. 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. Metropolitan 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.” Copper Mountain, Inc., 208 P.3d at 697. 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. People ex rel. Rein v. Jacob, 465 P.3d at 11.<sup>14</sup>

The Court notes the LPA does not contain language either expressly creating or disavowing the existence of any third-party beneficiaries. The Court, therefore, examines the contract as a whole and the surrounding circumstances to determine the parties’ intent. Jefferson County School Dist. No. R-1 v. Shorey, 826 P.2d 830, 843 (Colo. 1992); Vallagio at Inverness Residential Condo. Ass’n, Inc. v. Metro. Homes, Inc., 412 P.3d 709, 718 (Colo. App. 2015); (parties’ intent to confer benefit on third party may be evidenced by the circumstances surrounding the contract); Villa Sierra Condominium Ass’n, 878 P.2d at 166.

The Court finds “surrounding circumstances” to include the Service District Agreements for Headwaters and the Plaintiff, the 2003 Master Agreement,<sup>15</sup> the 2005 Fee Resolution, the 2005 Fee Agreement, and the 2008 Granby IGA. These documents were in force when Headwaters and GRH executed the LPA. These documents also reflect the complex and interrelated relationship between Headwaters and the Plaintiff, as well as the purposes of the dual-district structure.

The Private Defendants’ overall argument is that no provision of the LPA manifests an intent to confer specific legal rights on the Plaintiff. The Court disagrees because the LPA specifically references the Plaintiff, and likewise references the agreements and plans just discussed. These agreements outline the Plaintiff’s interest and expectation in the Leased Premises/Amenities.

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<sup>14</sup> Neither party raises an ambiguity issue.

<sup>15</sup> As previously indicated, the Court does not have copies of any restatements or amendments to the 2003 Master IGA.

The Court finds that the Plaintiff was an intended third-party beneficiary because the LPA appears to reflect a culmination of these different agreements and plans, the for the following reasons.

a. The LPA.

The Plaintiff and the 2005 Resolution and the 2005 Fee Agreement are both specifically described within the LPA. Recital B provides:

In order to pay rental payments with respect to the Leased Premises and pay the purchase price of the Leased Premises, Tenant has previously adopted, with the Granby Ranch Metropolitan District, a Joint Resolution to Establish an Amenity Fee dated May 26, 2005, as amended September 6, 2006 (as amended from time to time, the “Fee Resolution”), and has entered into that certain Amenity Fee Agreement with Granby Realty Holdings LLC dated as of June 1, 2005, and that certain Aspen Meadows Amenity Fee Agreement with Aspen Meadows Condominiums, LLC dated as of July 5, 2005 (collectively, the “Fee Agreements”), pursuant to which resolution and agreements the Tenant imposes Amenity Fees (as further described herein) on property within the Granby Ranch development (“Granby Ranch”) for use of the Leased Premises, as more particularly described therein.

At first blush, the Court was inclined to disregard the recital language as merely prefatory. In Colorado, however, while recitals are not “strictly any part of the contract” and cannot extend contractual stipulations, they may have material influence on the construction of the contract and the determination of the parties' intent.” Las Animas Consol. Canal Co. v. Hinderlider, 68 P.2d 564, 566 (Colo. 1937). Section 28(a) of the LPA states that its recitals are to be “incorporated into the covenants of this lease by reference.”

The 2005 Fee Resolution and Agreement are especially relevant in determining the parties' intent. The LPA defines the Amenity Fees as those fees “imposed pursuant to the [2005] Fee Resolution and the [2005] 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.” (Sec. Amend. Compl. Ex. 6, ¶ 3.a.)

Recital D demonstrates some evidence that the Plaintiff used and benefitted from the Leased Premises. Recital D provides, pursuant to the Headwaters' Service Plan and the 2008 Granby IGA, “the Leased Premises are used by the taxpayers, residents, occupants, visitors, and invitees of Granby Ranch.” Section 4(a) of the LPA reaffirms that Headwaters was to use the Leased Premises “for the enjoyment” of the same users. As previously noted, the Plaintiff alleges that it contains the “overwhelming majority” of such taxpayers, residents, and occupants. (Sec. Amend. Compl. ¶ 25.)

The Private Defendant also cite to Paragraphs 28.e. and 28.f. as evidence of an intent not to have any third-party beneficiaries:

e. This instrument shall merge all undertakings, representations, understandings, and agreements whether oral or written, between the Parties 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.

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. This instrument shall not become binding upon the Parties until it shall have been executed and delivered by both Landlord and Tenant.

(Sec. Amend. Compl. Ex. 6.)

The Court finds this language informative but not determinative as to standing. The terms are limited to “the Leased Premises and the provisions of this Lease,” which do not necessarily implicate the many other documents at play in this case and discussed below.

i. The District Service Plans and the 2003 Master IGA.

The Districts’ service plans provide the why and how each district was to function. The plans are directly related 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.” The plans describe the dual district structure and detail the “consolidated financial management and operation of the Districts.”

As previously discussed, the Plaintiff was authorized to impose a mill levy and collect fees to provide services and facilities to the Districts. (Sec. Amend. Compl. Ex. 2 Part 4, 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 . . .” (Sec. Amend. Compl., Ex. 2, Part 1, Taxing District Service Plan, ¶ III.C.)

The Service Plan Agreements reflect a symbiotic relationship between the Districts. (See Sec. Amend. Compl., Ex. 1, Sol Vista Metro District No. 1 Service Plan, ¶ IV.A.; Ex. 2, Part 1, Sol Vista Metro District No. 2 Service Plan, ¶ IV.A.). The Taxing District taxed and financed the services and infrastructure that the Service District acquired, constructed, and operated. There isn’t any indication in these plans that the two districts were meant to operate independently from one another.

The 2003 Master IGA<sup>16</sup> between Headwaters and the Plaintiff further addresses the interrelationship between the two districts and describes this mutual cooperation. It provides that Headwaters would manage and control the construction and financing of the infrastructure and establish all necessary service charges including the “development fees” for the Plaintiff. (Sec. Amend. Complaint, ¶ 14 and Ex. 2, part 4, Master IGA, Sections 4.2 and 4.3.) “The Service District shall manage and administer all business affairs of the Districts . . .” (Sec. Amend. Complaint, Ex. 2, part 4 Master IGA, Section 4.4.) Headwaters would own and operate the infrastructure until it was transferred to the Town of Granby or another public agency. (Sec.

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<sup>16</sup> To the extent that this 2003 Master IGA was terminated per the Termination Agreement, the Court notes that the latter was limited to a termination of the 2006 and 2008 Master IGAs, which have not been submitted to the Court. The Court, therefore, cannot determine as a matter of law whether the Termination Agreement eliminated the interrelated duties between the Districts according to the 2003 Master IGA.

Amend. Complaint, Ex. 2, part 4 Master IGA, Section 4.5.) Lastly, Section 5.4 of the Master IGA provides that “upon receipt of notice and the dissolution of the Service District in accordance with its Service Plan, the Service District shall transfer, and the Tax District shall accept responsibility for the operation and maintenance of any Infrastructure located within the Tax District, which has not been transferred to the Town or another public agency.” (Sec. Amend. Complaint, Ex. 2, part 4, Master IGA, Section 5.4.)

The 2003 Master IGA thus indicates that it was never intended for Headwaters to permanently operate and maintain the infrastructure – the Plaintiff had an expectation to do so if services and facilities were not transferred to the Town of Granby or another public agency.

b. The 2005 Fee Resolution between Headwaters and the Plaintiff.

The 2005 Fee Resolution was executed “in the best interests of the Districts to acquire, lease, construct, maintain, provide, operate, and or administer” the Amenities “benefiting the property within the Districts,” which included the golf course, ski area, river park and other improvements. (Sec. Amend. Compl. Ex. 4, part 1, Recitals.) It was deemed necessary “to provide for the prosperity and general welfare of the Districts and their inhabitants.” *Id.*

The resolution authorized Headwaters to impose and collect an “Amenity Fee” to fund the Amenities for these purposes. The revenue generated thereby was to be “used solely for the purpose of 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.” (Sec. Am. Compl., Ex. 4, Part 3, Section 6.) The 2005 Fee Resolution also detailed the priority access to the Amenities given to each residential dwelling unit for which the Amenity Fee had been paid. (Sec. Am. Compl. Ex. 4, Part 1, Section 2.)

The Court notes that none of the Resolution’s language limited any of the stated benefits to Headwaters and the Service District alone. Thus, the Resolution evidences an intent to benefit the Plaintiff for any acquisition, lease, and operation of the Amenities within both Districts.<sup>17</sup> 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.

The Court disagrees with the Private Defendants’ assessment that only GRH can enforce the 2005 Fee Agreement because the Plaintiff was not a party thereto. The 2005 Fee Resolution authorized Headwaters to enter into the 2005 Fee Agreement. Presumably, Headwaters could not have performed these taxing and financing functions without the Plaintiff’s consent (which was a function reserved to the Plaintiff). As alleged by the Plaintiff, “Headwaters is collecting the Amenity Fee through GRMD and pursuant to GRMD’s legislative authority pursuant to C.R.S. 32-1-1001(j)(I).” (Sec. Amend. Compl., ¶ 26.) It would be illogical for the Plaintiff to enter into the 2005 Fee Resolution if the Plaintiff would not benefit from the 2005 Fee

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<sup>17</sup> The 2013 Amended Fee Resolution affirmed this intention - it was “in the best interests of the Districts, and the property owners, taxpayers, and residents of Districts,” to acquire use and ownership of the Amenities. (Headwaters Mot. to Dismiss, Ex. 11 Recitals.)

Agreement or if Headwaters could have imposed and collected the Amenity Fee without adoption of the Resolution.

The Court also disagrees with the Private Defendants' argument that GRH's and Headwaters' decision not to incorporate the 2005 Fee Agreement into the LPA or to designate the Plaintiff as a third-party beneficiary indicates GRH's and Headwaters' intention not to confer a benefit upon the Plaintiff. The 2005 Fee Resolution was specifically referenced in the LPA. (see Recital B, §§ 3.b. and 23.) The Plaintiff was a party to the Resolution and, as previously discussed, the 2005 Fee Resolution appears to have authorized Headwaters to act in the Plaintiff's place by imposing and collecting a fee within the Districts.

The Private Defendants have also not provided any legal authority supporting their position that "only the property owner could agree to subject its property to the amenity fee, and it did that in the 2005 Fee Agreement." The service plan agreements, the 2003 Master IGA, and the 2008 Granby IGA permit the District, not the property owner, through a mill levy, rates, fees, tolls and/or charges, to "finance public improvements, impose property taxes, and collect revenue . . . to provide the services and facilities needed within the Service Area" including for the financing, acquisition, operation of ski areas and/or ski lifts and golf courses. (Sec. Amend. Compl., Ex. 2, Part 1, Sol Vista Metropolitan District No. 2, Taxing District Service Plan, ¶ III.)

Lastly, the Court recognizes that the Developer was not obligated to convey, lease, or otherwise contract for any Amenities under the 2005 Fee Agreement. This has limited bearing on whether the surrounding circumstances reflect an intent to confer a benefit on the Plaintiff. Simply because the Developer was not required to sell does not eliminate the Plaintiff's expected benefit in the event that the Developer did, in fact, convey or lease the Amenities.

c. The 2008 Granby IGA.

The Court finds that the 2008 Granby IGA is a "surrounding circumstance" in the LPA's formation. Along with the 2003 Master IGA, the 2008 Granby IGA reflects the relationship between the Districts, as well as the interplay between Districts and the Town of Granby. It is clear to the Court that the Districts were intended to act reciprocally and for one another's benefit. In fact, the Town and the 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 development" of the property. (Sec. Amend. Compl. Ex. 5, Recitals.) The described amenities in the 2008 Granby IGA are the same amenities that were subsequently leased and to be purchased by Headwaters under the LPA.

This cooperation indicates the Plaintiff had an active role and expectation in collection of the Amenity Fee and continued operation of the Amenities/Leased Premises when Headwaters and GRH entered into the LPA. See Villa Sierra Condominium Ass'n, 878 P.2d 161 (condominium association was deemed third-party beneficiary to agreement between the city and developer in which city approved project plans in exchange for future street improvements that were never constructed).

To conclude, for the purpose of standing and given the complex relationship between Headwaters and the Plaintiff, the LPA is viewed in light of the operative agreements at the time of the formation of the LPA. Concrete Contractors, Inc. v. E.B. Roberts Const. Co., 664 P.2d

722, 725 (Colo. App. 1982) (question of intent should be taken from the contract, which should be “construed in the light of the circumstances under which it was made and the apparent purpose the parties were trying to accomplish”). The Districts’ Service Plans (as well as the 2003 Master IGA), the 2005 Fee Resolution, the 2005 Fee Agreement, and the 2008 Granby IGA (all operative in 2012 and expressly referenced by the LPA), paint a coherent and consistent picture of their overarching purpose: that the Plaintiff raised revenue for Headwaters to construct, lease, and acquire the Amenities for the use and enjoyment of Granby Ranch residents, taxpayers, and occupants, and that the parties effectuated that intent, in part, through the LPA - the Leased Premises were to be for the use and enjoyment of Granby Ranch residents and invitees, and the LPA was one way that Headwaters fulfilled its obligation to the Plaintiff under these agreements, resolutions, and plans.

The Court finds that, for the purposes of determining subject matter jurisdiction pursuant to CRCP 12(b)(1), that Headwaters and GRH intended to confer a direct benefit on the Plaintiff as a third-party beneficiary.

## II. Failure to State a Claim.

The Court partially grants the Private Defendants’ motion to dismiss on the grounds that the Plaintiff failed to state a claim upon which the Court can grant relief.

“A C.R.C.P. 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted serves as a test of the formal sufficiency of a plaintiff’s complaint. The chief function of a complaint is to give a defendant notice of the transaction or occurrence that is the subject of a plaintiff’s lawsuit.” Public Service Co. of Colorado v. Van Wyk, 27 P.3d 377, 385 (Colo. 2001). A C.R.C.P. 12(b)(5) motion to dismiss is looked upon with disfavor, and a complaint should not be dismissed unless it appears beyond a doubt that a plaintiff can prove no set of facts in support of her claim which would entitle her to relief. A complaint should not be dismissed for failure to state a claim so long as the plaintiff is entitled to some relief upon any theory of the law. Id. at 385-386 (citations omitted).

In Warne v. Hall, 373 P.3d 588 (Colo. 2016), the Colorado Supreme Court adopted the federal plausibility standard for a motion to dismiss, which is a shift from prior precedent.

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief. (internal quotation marks and citations omitted).

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Conclusory allegations are insufficient to state a plausible claim for relief. Coyle v. State, 492 P.3d 366, 371 (Colo. App. 2021). The Court is not required to accept as true legal conclusions couched as factual

allegations and a complaint may be dismissed if the substantive law does not support the claims asserted. Western Innovations, Inc. v. Sonitrol Corp., 187 P.3d 1155, 1158 (Colo. App. 2008).

A court may consider only the facts alleged in the complaint, documents attached as exhibits or referenced in the complaint, and matters of which the court may take judicial notice, such as public records. Walker v. Van Laningham, 148 P.3d 391, 397 (Colo. App. 2006) (discussing judicial notice); Yadon v. Lowry, 126 P.3d 332, 336 (Colo. App. 2005) (discussing documents attached or referenced in the complaint); Pena v. Am. Family Mut. Ins. Co., 2018 COA 56, ¶ 14. When documents are presented to the court in a motion to dismiss, the legal effect of the document is determined by their contents rather than by the allegations as stated in the complaint. Peña, 463 P.3d at ¶ 15; Stauffer v. Stegemann, 165 P.3d 713, 716 (Colo. App. 2006). In considering documents attached or referenced in a complaint, “a trial court is not required to accept legal conclusions or factual claims at variance with the express terms of the document attached to the complaint.” Stauffer, 165 P.3d at 716.

“A document that is referred to in the complaint, even though not formally incorporated by reference or attached to the complaint, is not considered a ‘matter outside the pleading.’” Yadon, 126 P.3d at 336. If that document “is central to the plaintiff’s claim, the defendant may submit an authentic copy to the court to be considered on a motion to dismiss, and the court’s consideration of the document does not require conversion of the motion to one for summary judgment.” Id. (quoting James Wm. Moore et al., Moore’s Federal Practice § 56.30[4], at 56–225 & –226 (3d ed.2005)).

Conversion is required, however, if matters are submitted in a motion to dismiss are outside of these described situations. Bristol Bay Productions, LLC v. Lampack, 2013 CO 60, ¶ 46; Churchey v. Adolph Coors Co., 759 P.2d 1336, 1339 (Colo.1988) (“Because [defendant] attached affidavits and exhibits to its motion, the court properly treated [defendant’s] motion as one for summary judgment.”); Garcia v. Centura Health Corp., 2020 COA 38, ¶ 50 (motion to dismiss properly treated as motion for summary judgment where defendant attached affidavits and exhibits to its motion and the district court considered these attachments in its order).

The Plaintiff attached the following exhibits to its Second Amended Complaint:<sup>18</sup>

- The 2003 Sol Vista Metro District No. 1 Service Plan and exhibits attached thereto (Exhibits A1-A2, B1-B2, C, D, E, and F – which include the 2003 IGA and the 2003 Master IGA);
- the 2003 Sol Vista Metro District No. 2 Service Plan and exhibits attached thereto (Exhibits A1-A2, B1-B2, C, D, E, and F - which include the 2003 IGA and the 2003 Master IGA);
- the 2007 Consolidated Service Plan for GRSD Nos. 2-8 and exhibits attached thereto (Exhibits A, B, C1, C2, D, and E);
- the 2005 Fee Resolution;
- the 2008 IGA;

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<sup>18</sup> These are the same exhibits that were attached to the Amended Complaint.

- the LPA;
- the 2016 IGA; and
- the 2017 Termination IGA.

The Private Defendants did not submit any exhibits to their motion. Instead, the Private Defendants refer to documents attached to Headwater’s Motion to Dismiss. These include Exhibits 9-12 to Headwater’s motion:

- the 2005 Fee Agreement;
- the 2013 Amended and Restated Amenity Fee Agreement;
- the 2013 Amended and Restated Amenity Fee Joint Resolution; and
- a Motion for Order of Exclusion of Property from the Plaintiff’s District.

Although none of these documents are authenticated, an authentic copy is not required (and conversion unnecessary) where the plaintiff refers to and relies upon that document and does not dispute its authenticity. *See Yadon*, 126 P.3d at 336. Here, the Plaintiff does not dispute authenticity and refers to the 2005 Fee Agreement in the Amended and Second Amended Complaint (Sec. Amend. Compl. ¶¶23-24, 75, 83.) The Plaintiff does not submit any exhibits or affidavits of its own in Response to the Private Defendants’ Motion to Dismiss. Most importantly, the Court does not rely on any of Headwaters’/the Private Defendants’ exhibits, other than the 2005 Fee Agreement, in this order.

Conversion is unnecessary. “[I]f matters outside of the complaint are submitted to the trial court, but not considered in review of the [Rule] 12(b)(5) motion to dismiss, the trial court need not convert the motion to dismiss into a motion for summary judgment.” *Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 386 (Colo. 2001).

Having found the Plaintiff is a third-party beneficiary under C.R.C.P. 12(b)(1), the Court examines whether the Plaintiff has sufficiently satisfied the C.R.C.P. 12(b)(5) standards regarding pleading third-party beneficiary status as to the claims for breach of contract and breach of the covenant of good faith and fair dealing.

The Court addresses the declaratory judgment claim first.

1. The Court Denies the Private Defendants’ Motion To Dismiss the Declaratory Judgment Claim Because the Plaintiff Alleges that the LPA is a Covenant Running with the Land, Which is not Necessarily Extinguished by Foreclosure (Claim VIII).

The Court denies the Private Defendants’ motion to dismiss the declaratory judgment claim because the Plaintiff Alleges the LPA is a covenant running with the land, which is not necessarily extinguished by foreclosure (Claim VIII).

The Private Defendants argue that the foreclosure of the Leased Premises extinguished the LPA before any of the Private Defendants acquired title, thereby absolving them from liability. The Plaintiff maintains that the LPA is a covenant running with the land which cannot be not extinguished by foreclosure. The Plaintiff also argues the LPA is an installment land contract, which can only be foreclosed through the courts. As such, the Plaintiff contends that Gray Jay

and GR Terra are bound as successors in interest to the LPA. GP Prentice is not a defendant as to this claim.

a. Covenants that Run with the Land.

Real covenants, as opposed to personal covenants, “run with the land” and are binding on the parties' successors in interest, as well as the parties themselves. Reishus v. Bullmasters, LLC, 2016 COA 82, ¶¶ 36-38. In order for a covenant to run with the land, there must first be an intent by the parties to the covenant that it do so. Cloud v. Association of Owners, Satellite Apartment Bldg., Inc., 857 P.2d 435, 440 (Colo. App. 1992).

Here, the LPA states that “[t]his 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.” (Sec. Amend. Compl., Exh. 6, Section 28.f.) Colorado courts have found similar terms indicative of the parties' intent to create covenants that run with the land. See Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Associates, 867 P.2d 70, 74 (Colo. App. 1993); Reishus, 2016 COA 82, ¶ 43; Cloud, 857 P.2d at 440.

A covenant in a lease, however, will run with the land “only where the act covenanted to be done or omitted concerns the land or the estate conveyed as where it affects the use, condition, value, and enjoyment of the premises.” 52 C.J.S. Landlord & Tenant § 458. Thus, even when there is expressed intent for a covenant to run with the land, the covenant must still “touch and concern” the land, that is, the covenant must closely relate to the land, its use, or its enjoyment. Cloud, 857 P.2d at 440. “Whether a covenant runs with the land turns on the construction of relevant documents.” Lookout Mountain, 867 P.2d at 74. The Court reads the covenant as a whole, and gives effect to all provisions, to make this determination. Reishus, 2016 COA 82, ¶ 38; Lookout Mountain, 867 P.2d at 75.

The Court finds the Plaintiff properly stated a claim that the LPA is a covenant running with the land because the Leased Premises touch and concern the land.

The Leased Premises are defined by the LPA as the combined “Real Estate” and “Improvements.” (Sec. Amend. Comp., Exh. 6, page 2.) They include the ski area and golf course, as well as all buildings (with the exception of the third floor of the Base Camp Lodge), the ski shop, golf course clubhouse, ranch house, golf course maintenance shop, and several other improvements. Id. The “Amenities” are defined as the “ski area and golf portions of the Leased Premises.” Id. at page 1. According to the specific language of the LPA “the Amenities are expected to entirely or largely be the same as the Leased Premises.” Id. at page 2.

Recital B of the LPA describes the Amenity Fee used to pay for the Leased Premises and Recital D describes the users of the Leased Premises. Recital B references the 2005 Fee Resolution and Recital D references the Service District Service Plan and the 2008 Granby IGA. (Sec. Amend. Compl., Ex. 6, page 1.) These referred-to documents define “Amenities” as the recreational amenities that encompass the land itself (for example, the ski area, golf course, and river park). Id.

Terms of the LPA demonstrate the LPA touches and concerns the land. Section 4.a. of the LPA further provides: “The Leased Premises are being used by Tenant for the enjoyment of the taxpayers, residents, occupants, visitors and invitees of Granby Ranch. The Parties acknowledge and agree that (i) the Tenant shall be entitled to acquire the Leased Premises at the end of the last

Renewal Term (or earlier as provided in Section 23) ...” (Sec. Amend. Compl., Exhibit 6, p. 4.) Section 8.a. states that Headwaters may make “substitutions and non-structural and structural alterations and additions (including without limitation minor boundary adjustments) to the Leased Premises . . . ” provided that they be of “such character as not to diminish the structural integrity of the Leased Premises, shall not violate applicable law, shall be subject to design review board approval, where applicable . . . ”

Importantly, Section 13.a. of the LPA states that “Landlord covenants, represents and warrants to Tenant as follows: . . . that upon Tenant keeping and performing the agreements and obligations of this Lease on its part to be kept and performed, Tenant shall have peaceful and uninterrupted possession of the entire Leased Premises during the Term of this Lease, and the right to acquire the Leased Premises in accordance with Section 23 hereof.” This also is evidence of a covenant running with the land. See 52 C.J.S. Landlord & Tenant § 544 (“covenants to pay rent or to repair and return the premises in good condition are examples of covenants that run with the land”).

Section 21 of the LPA acknowledges that GRH had the right to convey its interest in the Leased Premises to any other person or entity and that in such an event Headwaters would have no rental payment obligation to the new owner until it had been notified of the conveyance. (Sec. Amend. Compl., Ex. 6, §21.) Section 21 expresses an intent that any successor to the Landlord had continued rights and responsibilities to Headwaters. Id.

These combined terms reflect that the LPA contains covenants running with the land. The LPA, the 2005 Fee Resolution, and the 2008 Granby IGA detail the location and structure types of the Amenities/Leased Premises. Importantly, the covenants in the LPA benefitted Headwaters by reason of it being the Service District for the Leased Premises/Amenities located within a common scheme of development. These provisions are closely tied with the use, possession, and enjoyment of Granby Ranch. See Lookout Mountain, 867 P.2d at 74–75. Furthermore, the LPA may create a possessory interest in Headwaters by 2062. Thus, the Plaintiff has properly alleged that the parties intended for the LPA to touch and concern the land.

Lastly, the Court disagrees with the Private Defendants that foreclosure of the 2005 Redwood Capital Deed of Trust extinguished any covenant running with the land as a matter of law. Colorado law provides that a purchaser of property at a foreclosure sale obtains a deed to the property after the redemption period expires and that “upon the issuance and delivery of such deed ... title shall vest in the grantee and such title shall be free and clear of all liens and encumbrances recorded or filed subsequent to the recording or filing of the lien on which the sale referred to in this section was based.” First Interstate Bank v. Tanktech, Inc., 864 P.2d 116, 119 (Colo. 1993); C.R.S. § 38-38-501(1) (subject to rights to cure and redeem, title vests in the property free and clear of all liens and encumbrances junior to the lien foreclosed). The Private Defendants, however, have not cited any cases involving foreclosure under Section 501 and the extinguishment of covenant that runs with the land.

Absent legal authority to the contrary, a covenant running with the land is not necessarily extinguished by foreclosure and thus, the Plaintiff properly states a claim for relief. Top Rail Ranch Estates, LLC v. Walker, 2014 COA 9, ¶ 21 (covenants in deed of trust were not extinguished by foreclosure); Schwab v. Martin, 441 P.2d 17, 19 (Colo. 1968) (despite foreclosure, the right to appoint a receiver under the deed of trust remained an operative as a contract between the parties).

Thus, the Court finds the Plaintiff has pled factual content from which this Court draws the reasonable inference that a contractual obligation, i.e. a real covenant, binds the successors in interest to the LPA. Warne, 373 P.3d at 596.

b. Installment Land Contract.

The next question is whether the 2005 Redwood Capital Deed of Trust foreclosure extinguished the LPA, if it is an installment land contract.

An installment land contract is a secured financing arrangement where “the vendee is the owner in equity of the land, and the seller merely holds legal title as security for the payment of the purchase price.” Sleeping Indian Ranch, Inc., v. West Ridge Group, 119 P.3d 1062, 1068 (Colo. 2005). The vendee thus assumes the rights and responsibilities of ownership and possession of the realty. Id.

Installment land contracts are characterized by: (1) the owner's agreement to sell and the buyer's agreement to buy; (2) the promise of the buyer that he will make payments, usually over a long period of time and in installments, that he will keep the premises insured, etc.; (3) the seller's promise that he will deliver a deed when the payments have been completed; and (4) an agreement that, in the event of default by the buyer in making the payments or performing the other covenants contained in the instrument, the seller may declare the contract at an end and retain the payments made as liquidated damages. 2 Colo. Prac., Methods Of Practice § 61:8 (7th ed.) Without these hallmarks indicating a meeting of the minds and mutual asset on the sale and purchase of property, there can be no contract. See Brush Creek Airport, LLC v. Avion Park, LLC, 57 P.3d 738, 745 (Colo. App. 2002). The LPA must be construed as a whole; “its language examined in harmony with the plain meaning of the words.” Bernhardt v. Hemphill, 878 P.2d 107, 110 (Colo. App. 1994).

The parties did not act as though they executed an installment land contract. Real property contracts require the parties to designate the public trustee as an escrow agent for property taxes and that, within 90 days of signing, the seller to file a notice of transfer. C.R.S. § 38-35-126(1)(a) and (2). Contracts for deed to real property include installment land contracts. C.R.S. § 38-35-126(1)(b). The Plaintiff does not allege such designation and the LPA does require the parties to so designate.

Additionally, the LPA described Headwaters' payments to GRH as “Rental Payments,” not “installment payments.” (Sec. Am. Compl., Ex. 6, § 3.a.) These Rental Payments were not fixed and would “fluctuate greatly from month to month and year to year.” (Sec. Am. Compl., Ex. 6, § 3.b.) The parties agreed that the “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.” (Sec. Am. Compl., Ex. 6, § 3.c.)

These terms, and the absence of a C.R.S. § 38-35-126 notice, lead the Court to conclude that the LPA was not an installment land contract. A critical element of an installment land contract is that the vendee “is the owner in equity of the land, and the seller merely holds legal title as security for the payment of the purchase price.” (emphasis added) Sleeping Indian

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