DATE FILED: January 25, 2023 8:24 PM
FILING ID: E6F996D018F64
CASE NUMBER: 2021CV30008

DISTRICT COURT, GRAND COUNTY, COLORADO 307 Moffat Avenue Hot Sulphur Springs, CO 80451	
Plaintiff: GRANBY RANCH METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado, v. **Defendants:** HEADWATERS METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado; GRAY JAY VENTURES, LLC.; REDWOOD CAPITAL FINANCE CO., LLC, GRANBY PRENTICE, LLC; and GR TERRA, LLC.	
Attorneys for Headwaters Metropolitan District and GR Terra LLC: Jamie H. Steiner, #49304 JoAnn T. Sandifer *(Admitted Pro Hac Vice)* Husch Blackwell LLP 1801 Wewatta St., Suite 1000 Denver, CO 80202 Phone: 303-749-7200 Fax: 303-749-7272 E-mail: jamie.steiner@huschblackwell.com joann.sandifer@huschblackwell.com	▲ *COURT USE ONLY* ▲ Case No. 2021CV30008 Division 1

MOTION FOR SUMMARY JUDGMENT OF HEADWATERS METROPOLITAN DISTRICT ON COUNTS II AND VI OF PLAINTIFF'S THIRD AMENDED COMPLAINT

Defendant Headwaters Metropolitan District ("Headwaters") submits this motion for summary judgment on Counts II and VI of Plaintiff's Third Amended Complaint ("Amended Complaint").

CERTIFICATION PURSUANT TO C.R.C.P. 121 § 1-15(8)

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

relief requested herein.

Introduction

This case turns upon the rights and obligations of two metropolitan districts, quasi-municipal corporations and political subdivisions of the State, organized to facilitate the development of the Granby Ranch residential community and development in Grand County. Though the development has a long and complex history, the claims turn on straightforward principles of Colorado real estate and contract law. And that Colorado law, applied to the undisputed facts, compel summary judgment on all claims against Headwaters.

GRMD's claims arise in conjunction with a lease purchase agreement executed in 2012 ("LPA") between Headwaters and the private owner of the Granby Ranch ski and golf facilities. The LPA gave Headwaters the right to operate apportion of these facilities for public use, along with an option to purchase during the 50-year term. Count VI of the Amended Complaint seeks declaratory and injunctive relief to enforce the LPA. Assuming that GRMD has standing to bring this claim, Headwaters is entitled to summary judgment for two simple reasons.[1]

First, foreclosure of a senior deed of trust extinguished the LPA as a matter of law. This conclusion is mandated by the plain language of Colorado's nonjudicial foreclosure statute and Colorado cases decided under the identical language in the current statute, which confirm that foreclosure of a senior security interest extinguishes subordinate leases, liens or encumbrances upon expiration of the redemption period. It makes no difference whether the junior interest contains a covenant running with the land; a junior covenant is extinguished in the same manner

[1] Headwaters is addressing these claims out of order so that it can present the argument to the Court in the most streamlined fashion in that Headwaters' arguments with respect to Counts VI also dispose of a portion of Count II.

as all other junior encumbrances. Any other result would contravene the plain statutory language, undermine the statute's purpose of rendering title to real property secure and marketable, and cripple the sale and development of Colorado property.

Second, if not previously extinguished, the LPA terminated by its own terms on December 31, 2020 based upon Headwaters' failure to appropriate funds for rent payments. The LPA clearly stated that it would terminate at the end of any one-year term if Headwaters' legislative body did not appropriate rent for the following lease year. Any attempt to restrict the unfettered discretion of the Headwaters' Board not to appropriate rent for future lease years would render the LPA void under Colorado law. Such restrictions cannot be read into the LPA without defeating its validity at the outset. Thus, the extent it still existed at the time, Headwaters' failure to appropriate funds for payment of rent for the 2021 lease year terminated the lease on December 31, 2020 as a matter of law.

Count II of GRMD's Amended Complaint tries, in vain, to concoct a breach of contract claim against Headwaters; it seeks some $6 million in damages based upon Headwaters' alleged breach of a duty to acquire ski and golf facilities on behalf of GRMD. Of the five documents cited by GRMD in this Count, two (the District's Service Plans) are not contracts that could possibly support GRMD's damages claim, and two others (the 2003 Master IGA and LPA) have been terminated.

Moreover, the LPA simply gave Headwaters an <u>option</u> to purchase the Leased Premises during the potential lease terms that ran until December 31, 2062, <u>if the LPA was not terminated prior to that time</u>. It imposed no obligation for Headwaters to exercise that option prior to 2021. And given the termination of the Master IGA, amendment of the Service Plans, and the broad

waivers and releases provided by GRMD to Headwaters, any claim relating to the terms of the LPA or GRMD's alleged rights thereunder are now barred.

The only surviving contract cited in Count II is the Second Granby IGA. That agreement only acknowledges that Headwaters, along with GRMD and GRMD Nos. 2-8, *will be* "authorized" to acquire various amenities at Granby Ranch. It imposes no mandatory obligation on Headwaters to do so.

Headwaters has now spent some two years defending the flawed claims against it. While this Court did not have all the relevant information when it ruled on Headwaters' motion to dismiss, discovery has now confirmed that GRMD cannot succeed on its claims. This Court should bring these claims to an end and enter summary judgment in favor of Headwaters, allowing it to devote its resources to the public purposes it was designed to accomplish, in particular, enhancing the development of Granby Ranch.

Statement of Undisputed Facts

All Defendants submitted a joint statement of undisputed facts in support of their respective summary judgment motions (referred to herein as "DSOF").[2] Those facts and exhibits are incorporated herein by this reference.

Standard for Granting of Summary Judgment

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, if any, establish that there is no genuine issue as to a material fact, and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Georg v. Metro Fixtures Contractors, Inc*., 178 P.3d 1209, 1212 (Colo. 2008). The moving party

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

bears the initial burden of informing the court of the basis for the motion and establishing the nonexistence of a genuine issue of material fact. *Cont'l Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987). This "initial burden of production may be satisfied by showing the court that there is an absence of evidence in the record to support the nonmoving party's case." *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)).

Once the moving party has met this initial burden of production, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. *Id.* If the nonmoving party cannot muster sufficient evidence to make out a triable issue of fact on his claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law. *Id.* (citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986)).

A defendant is entitled to summary judgment when it proves that the plaintiff cannot establish essential elements of its claim or that a defense asserted by defendant entitles it to judgment as a matter of law. *See Gibbons v. Ludlow*, 304 P.3d 239, 245 (Colo. 2013).

Argument

I. GRMD's Claim Against Headwaters for Declaratory Relief (Count VI) Fails As A Matter Of Law Because The 2020 Foreclosure Terminated The LPA, Regardless Of Whether The LPA Constituted A Covenant That Ran With The Land.

GRMD's sixth claim for relief, asserted against all Defendants, seeks a declaratory and injunctive relief to enforce the LPA on the ground that it is a restrictive covenant that was not terminated by foreclosure. An essential element of this claim is GRMD's ability to prove that the LPA was not terminated and is capable of enforcement. It cannot meet its burden because the undisputed facts establish that the 2020 Foreclosure under a senior deed of trust eliminated the LPA, a junior lien on the property. DSOF ¶¶ 11-12, 25, 30-31, 51-56.

GR Terra briefed this issue as Point I of its Motion for Summary Judgment. Rather than repeat that argument here, Headwaters incorporates by this reference the argument and grounds for relief in GR Terra' Motion.

II. Alternatively, GRMD's Claims For Declaratory Relief (Count VI) Fail As A Matter Of Law Because The LPA Has Been Terminated In That Headwaters' Board Did Not Appropriate Rent Payments For Lease Years 2021 to 2023.

Even if the LPA survived the foreclosure, the relief sought in Count VI fails because the LPA terminated when Headwaters failed to appropriate rent payments for lease years 2021 to 2023. DSOF ¶¶ 57-64. GR Terra briefed this issue as Point III of its Motion for Summary Judgment. Headwaters incorporates by this reference the argument and grounds for relief in GR Terra's Motion.

Moreover, regardless of its prior termination, GRMD cannot compel Headwaters' future performance of the LPA, the relief it seeks in Count VI. *See* Am. Compl., ¶ 86 (seeking a declaration that the LPA exists and "appropriate injunctive relief under the equitable powers of this Court."). To comport with the Colorado Constitution and statute, the LPA clearly states that Headwaters retains discretion each year to elect not to appropriate funds for payment of rent in the ensuing lease year, and its failure to so appropriate terminates the LPA. DSOF ¶¶ 27-29. Any attempt to compel Headwaters to appropriate rent payments in future years or to compel Headwaters to exercise the option to purchase would violate the language of the LPA and Colorado law. *See Glennon Heights, Inc. v. Cent. Bank & Tr*., 658 P.2d 872, 879 (Colo. 1983); *Gude v. City of Lakewood*, 636 P.2d 691 (Colo. 1981).

Similarly, the Colorado courts lack authority to compel a government body to specifically perform a contract. *Wheat Ridge Urban Renewal Auth. v. Cornerstone Group XXII, L.L.C*., 176

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

Therefore, even if this Court determines that the LPA continues to exist, the Court cannot order Headwaters, a quasi-municipal corporation, to perform that contract.

III. GRMD's Claim Against Headwaters For Breach Of The Headwaters and GRMD Service Plans, 2003 Master IGA, Second Granby IGA and LPA (Count II) Fails Because GRMD Cannot Establish That Headwaters Breached Any Contractual Obligation To Acquire Specific Amenities On GRMD's Behalf.

GRMD's second claim for relief seeks damages for breach of contract. It is premised on the assertion that "[u]nder the Service Plans of Headwaters and GRMD, the 2003 Master IGA, the Second Granby IGA, and the LPA, Headwaters had a duty to acquire the Amenities on behalf of the GRMD." Am. Compl. § 55 (emphasis original). To prove its claim for breach of contract, GRMD must establish (1) the existence of a contract between plaintiff and defendant; (2) performance by the plaintiff; (3) breach of the contract; and (4) damages. *See D.R. Horton, Inc.-Denver v. Bischof & Coffman Const., LLC*, 217 P.3d 1262, 1271-72 (Colo. App. 2009).

Contract interpretation presents a question of law. *People ex rel. Rein v. Jacob*, 465 P.3d 1, 11 (Colo. 2020). The courts' primary goal in contract interpretation is to determine and give effect to the intent of the parties, determined primarily from the language of the instrument itself. *Id.* When a written contract is complete and free from ambiguity, the court will conclude that it expresses the intent of the parties and will enforce it according to its plain language. *Id.* The mere fact that the parties interpret the agreement differently does not establish an ambiguity in the agreement. *Id.* GRMD is not claiming any ambiguity in the documents that give rise to its breach of contract claim. DSOF ¶ 75. The plain language of the contracts GRMD relies upon defeat its claim.

Under the initial "dual district" structure established in 2003, Headwaters, the "Service District," was authorized to construct, manage and operate certain public facilities and provide other services in its Service Area, which encompassed the entire development. DSOF ¶¶ 1-5. GRMD, the "Taxing District," was authorized to levy a tax and issue bonds to finance this construction and services. *Id.* Under this arrangement, and intergovernmental agreements between them, GRMD levied taxes and issued bonds, and the bond proceeds were used by Headwaters to finance a portion of the construction or acquisition of the roads, water and sewer facilities for Granby Ranch. DSOF ¶¶ 8-9. GRMD's tax levies and bond proceeds did not finance the construction or operation of the ski and golf facilities at Granby Ranch, which were built prior to the creation of two Districts. *Id.*

GRMD admits that the Service Plans, 2003 Master IGA, and Second Granby IGA "standing alone" imposed no obligation on Headwaters to acquire the LPA Amenities. DSOF ¶ 72. It tries to fabricate such a duty by "reading those documents together" with other

documents and "Colorado law." DSOF ¶ 72, Ex. 20, Response to Request for Admission 5, 6 & 7. But Colorado law does not impose obligations not agreed to by the contracting parties Whether read separately or together, the documents establish that Headwaters has not breached any obligation to acquire the LPA Amenities.

A. The Service Plans and 2003 Master IGA.

GRMD's claim for breach of the Service Plans fails for the fundamental reason that those Plans are not contracts. Headwaters and GRMD are Title 32 special districts and thus are statutorily required to implement service plans, which are approved by the governing municipality – the Town of Granby. *See* C.R.S. §§ 32-1-202; 204.5. "The Special District Act – not common law contract doctrines – controls the extent to which special districts must comply with, and courts can enforce, service plans." *Plains Metro. Dist. v. Ken-Caryl Ranch Metro. Dist*., 250 P.3d 697, 701 (Colo. App. 2010).

The Special District Act provides for injunctive relief to enforce mandatory provisions of a service plan where compliance is practicable. *See* C.R.S. § 32-1-207; *Plains*, 250 P.3d at 701.[3] But the Act does not authorize a claim for damages for breach of the service plan. *See* C.R.S. § 32-1-207. In fact, a Colorado District Court dismissed such a claim against a special district, recognizing that contractual remedies are not available to enforce service plans. *Starview Realty Invs. LP v. Cordillera Metro. Dist*., 2013 Colo. Dist. LEXIS 2351, *3.

[3] The statute only requires conformance to the approved plan "as far as practicable." C.R.S. § 32-1-207(1). It does not authorize specific performance to enforce a municipal contract with third parties, which is barred as set forth above. GRMD has not pleaded a claim for enforcement of the Service Plans, and it could not do so because Headwaters has no mandatory obligation under the Service Plan to perform the LPA or acquire the Amenities and GRMD cannot possibly prove that such performance is practicable given its lack of revenue without the private developer's substantial financial assistance. *See* DSOF ¶ 62, at 8369-8381.

Because they are not enforceable contracts, the Service Plans of Headwaters and GRMD contemplate entry of a separate Master Intergovernmental Agreement to govern the rights and obligations of the two metropolitan districts. Both Service Plans stated that "[t]he interrelationship between the Districts is governed, generally, by a master intergovernmental agreement ("District IGA") which will be executed by the Districts clarifying the dual responsibilities and nature of the functions and services to be provided by each District." DSOF ¶ 6. *See also* DSOF Exs. 1 & 2, Art. (I)(A)(5).

GRMD and Headwaters allegedly entered the 2003 Master IGA for this purpose. DSOF ¶ 7. But the 2003 Master IGA was terminated and replaced with an entirely new Master IGA in 2006. DSOF ¶ 10. Though GRMD pleaded a claim against Headwaters based on that document in several versions of its complaint, GRMD finally admits that the 2003 Master IGA was terminated. DSOF ¶ 40.

Since that time, the parties terminated all versions of the Master IGA between them. In consideration for the promises set forth in the Letter Agreement, including GRH's agreement to release any right to payment on some $11.1 million of subordinate bonds held solely by GRMD, Headwaters, GRMD and the owner agreed to "eliminate any obligations between the parties other than GRMD's funding of road operations, maintenance and minor repairs;" and "terminate any financial obligations other than road operation, maintenance and minor repairs between GRMD and Headwaters." DSOF ¶ 32. In furtherance of the Letter Agreement, on October 11, 2016, a second amendment to GRMD's Service Plan was approved by the Town to, among other things, "clarify that the relationship between GRMD and Headwaters as otherwise set forth in the Service Plan is terminated and rendered null and void." DSOF ¶ 34. It stated:

> The Original Service Plan is amended as a whole to clarify that the District IGA between GRMD and HMD will be terminated [and] GRMD will provide all its own operation and maintenance functions …. [and] any obligation of GRMD, other than as set forth in the road maintenance and snow removal agreement, to provide funds to HMD [Headwaters], or any delegation of power or delegation of approval or disapproval authority to HMD of any acts of the District, are repealed and rendered null and void ***with the intent that any role or relationship of GRMD as a "Tax District" and HMD as a "Service District" is terminated.***

DSOF ¶ 35.

On November 8, 2016, an amendment to the Service Plan for Headwaters was similarly approved by the Town Board of Trustees for the express purpose of modifying the relationship between Headwaters and GRMD. DSOF ¶ 36. Specifically, Headwaters' Service Plan was amended "to clarify" that the IGA between GRMD and Headwaters would be terminated and that GRMD would thereafter provide all its own operation and maintenance functions:

> The Service Plan is further amended to clarify that any obligation of Granby Ranch Metropolitan District, other than as set forth in the road maintenance and snow removal agreement, to provide funds to the District, or any delegation of power or delegation of approval or disapproval authority to the District of any acts of Granby Ranch Metropolitan District, are repealed and rendered null and void ***with the intent that any role or relationship of the District (as the Service District) and Granby Ranch Metropolitan District (as the Tax District) is terminated.***

DSOF ¶ 37.

As contemplated in the Letter Agreement and the amendments to the Service Plans of Headwaters and GRMD, on November 17, 2017, those parties executed the Master IGA Termination. DSOF ¶ 38, Ex. 19. It stated that both the 2006 Master IGA (which had already terminated the 2003 Master IGA) and 2008 Master IGA (defined as the "Master IGAs") were terminated and of no further force and effect. DSOF ¶ 39. GRMD admits this termination. DSOF ¶ 40.

GRMD cannot seek damages for breach of a terminated contract, and its attempt to do is barred by the express waiver it provided to Headwaters.[4] Master IGA Termination defined the "Master IGAs" and 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." DSOF ¶ 41. It stated that Headwaters, GRMD, and Granby Ranch Metropolitan Districts Nos. 2-8 have "fully satisfied their obligations under the Master IGAs and are released from any further obligations thereunder." DSOF ¶ 42. It further provided that:

> To the extent permitted by law, each District hereby waives the right to recover from and generally, unconditionally, fully and irrevocably releases, waives, acquits and forever discharges each of the other Districts, their officers and directors (collectively "Released Parties"), from and against any and all costs, losses, claims, liabilities, expenses, demands, debts, controversies, actions or causes of action, agreements, and promises, including reasonable attorneys' fees (including appeals) (collectively, "Claims"), which has been raised or could have been raised, whether arising before, on or after the date hereof.

DSOF ¶ 42, Ex. 20, § 5.

Based upon the consideration provided, including GRH's release to payment on $11.1 of GRMD bonds, GRMD and Headwaters affirmed the release of claims between them in the 2018 Waiver and Release Agreement, again broadly releasing each other and their successors and assigns:

> from and against any and all claims, demands, obligations, duties, liabilities, damages, costs, and remedies therefor of every kind, description, character or nature whatsoever now or in the future, whether known or unknown, raised or which could have been raised, which may otherwise exist or which may arise in relation to ….the Master IGA, … or any other matter related to the formation,

[4] Headwaters asserted this defense in paragraph 3 of its Affirmative Defenses.

> administration, and operation of the Districts (the "Claims") existing as of the Release Date.

DSOF ¶¶ 46-48. The releases relating to the Master IGA and administration and operation of the Districts was effective in 2019. DSOF ¶¶ 49-50.

Colorado courts routinely uphold such releases, including a release of future claims, in recognition of the policy favoring settlement of disputes. *See, e.g.*, *Arline v. Am. Family Mut. Ins. Co.*, 431 P.3d 670 (Colo. App. 2018). "If a release agreement is valid, dismissal of claims encompassed by the agreement is proper." *Arline*, 431 P.3d at 672. Based upon the undisputed termination of the 2003 Master IGA (and all versions of the Master IGA) and GRMD's release of any claims related thereto, GRMD's claim under the 2003 Master IGA fails as a matter of law.[5]

B. The LPA

As set forth above, GRMD's claim against Headwaters for breach of the LPA fails because GRMD lacks standing to enforce the LPA and because the LPA terminated in 2020. *See*

[5] The 2003 Master IGA never obligated Headwaters to acquire the LPA Amenities, on its own behalf or on behalf of GRMD. It stated that "upon receipt of notice and dissolution of the Service District in accordance with its Service Plan, the Service District shall transfer, and the Tax District shall accept responsibility for the operation and maintenance of any Infrastructure located within the Tax District, which has not been transferred to the Town or another public agency." DSOF Exs. 1 & 2, Ex. F, § 5.4. As used in the 2003 Master IGA, the term "Infrastructure" refers to the facilities to be financed and constructed with proceeds of the "Obligations" (bonds) to be repaid with the tax levied by GRMD. *See* DSOF Exs. 1 & 2, Ex. F, §§ 1.1(k), 4.2-4.3, 5. GRMD's bonds did finance, in part, roads and water/sewer facilities for the development, but did not finance construction of the ski and golf amenities. DSOF ¶¶ 8-9.

Moreover, the 2006 Master IGA that replaced the 2003 Master IGA did not reference potential transfer of infrastructure to GRMD. Instead, that document specifically excluded the ski/golf amenities subject to the LPA from the definition of the "Facilities" that were contemplated to be owned by Headwaters, defeating any alleged plan for the ultimate transfer of those amenities to GRMD. DSOF ¶ 10, Ex. 5 §§ 2.1(u), 5.1.

Points I and II above. In addition, Headwaters has not breached any existing obligation under that contract to acquire the LPA Amenities. GRMD is essentially asserting that Headwaters was obligated to acquire the LPA Amenities before it filed suit, or during the first 8 or 9 years of the 50 one-year lease terms. The plain language of the LPA defeats that argument.

The LPA simply gave Headwaters an option to purchase the LPA Amenities during the potential lease terms that ran until December 31, 2062. It imposed no obligation for Headwaters to exercise that option during any successive lease term; to the contrary, the LPA contemplates that Headwaters may not have exercised the option at the end of the latest possible term in 2062 and recognizes that the Lease may have terminated prior to that time. DSOF ¶¶ 27, 29. The contract language is clear and unambiguous, and this Court cannot impose an obligation not found therein. *See Jacob*, 465 P.3d at 11.

Any authority granted to Headwaters to acquire the LPA Amenities prior to the expiration of the potential renewal terms does not equate to an enforceable duty. In *Indian Mountain Corp. v. Indian Mountain Metro. Dist.*, 412 P.3d 881, 893 (Colo. App. 2016), the court found that a district's failure to acquire or operate a water augmentation facility was not a material modification of its service plan when the service plan only gave the district authority to acquire and operate the facility but did not obligate it to do so. "[T]he language of the service plan is permissive and did not require IMMD to manage the [facility]." *Id.*

Nor could the LPA impose a mandatory obligation on Headwaters to pay the purchase price during one of the 49 one-year Renewal Terms of the LPA. Any such provision would violate the Colorado Constitution and statute that prohibit a municipality from assuming a future debt. *See* Colo. Const. art. X, § 20, cl. (4)(b); art. XI, § 6; C.R.S. § 29–1–110. *See, e.g.*, *Glennon*

Heights, 658 P.2d at 879 (lease-purchase agreement survived constitutional scrutiny because it did not require the State to appropriate funds for future rent or to exercise option to purchase); *Black v. First Fed. Sav. and Loan Ass'n of Fargo, N.D., F.A.*, 830 P.2d 1103 (Colo. App. 1992).

The LPA itself makes clear that Headwaters had no obligation to appropriate funds in any year during the lease term to exercise the option to purchase. And it acknowledges that the LPA may terminate at any time during the potential 49 Renewal Terms, precluding Headwaters' potential acquisition. DSOF ¶¶ 27, 29. Headwaters' Resolution approving the LPA confirms that the LPA did not place the District "under an *economic or practical compulsion* to appropriate moneys to make payments under the Lease or to exercise its option to purchase the Leased Premises pursuant to the Lease." DSOF ¶ 24.

GRMD cannot read any a different obligation into the LPA based upon other documents. The LPA contained a merger/integration provision clearly stating that:

> 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.

DSOF ¶ 25, Ex. 13, § 28(c).

Moreover, nothing in the LPA suggests that if Headwaters exercised the option, it would be purchasing <u>on GRMD's behalf</u>. The document is clear that only Headwaters has the right to exercise the option and acquire title; there is no mention of a potential transfer of title to GRMD. And even if there had been any such intent in 2012 when the LPA was entered, the termination of the parties' former relationship and all obligations between them and the broad waivers and releases GRMD provided in 2012 through 2018, including a waiver of all claims relating to the

formation, administration, and operation of the Districts" bars any claim for such an obligation under the LPA. DSOF ¶¶ 32-50.

C. The Second Granby IGA.

Of the documents cited in support of its contract claim, the Second Granby IGA is the only existing contract between Headwaters and GRMD. This contract "constitutes the entire agreement among the Parties and supersedes all prior written or oral agreements, negotiations, or representations and understandings of the Parties with respect to the subject matter contained herein." DSOF ¶ 43, Ex. 21, ¶ 16.

The Second Granby IGA does not impose a mandatory duty on Headwaters to acquire any particular amenities. To the contrary, it distinguishes between the "Public Improvements" contemplated to be dedicated to Headwaters, the Town or another appropriate jurisdiction (with no specific reference to GRMD), and the "Amenities," that are not required to be conveyed or dedicated for public use. DSOF ¶ 43, Ex. 21, §§ 4-5. With respect to the latter, the agreement simply contemplates that such authorization *will be* provided to "the Districts" in the future. DSOF ¶ 44. That permissive language cannot support a claim for breach. *Indian Mountain Corp*., 412 P.3d at 893. Nor could such vague language impose a binding obligation on Headwaters to purchase real property.

In Colorado, "[a] contract for the sale of land must be in writing and must contain the names of the parties, the terms and conditions, a description of the interest or property, and the consideration." *Schreck v. T&C Sanderson Farms, Inc*., 37 P.3d 510, 513 (Colo. App. 2001) (citing C.R.S. § 38-10-108). There is no contract absent an essential meeting of the minds on the terms of the contract. *Pierce v. Marland Oil Co*., 278 P. 804, 806 (Colo. 1929). Preliminary

discussions or negotiations regarding a future contract do not give rise to enforceable obligations. *Id. Accord Am. Mining Co. v. Himrod-Kimball Mines Co.*, 124 Colo. 186 (Colo. 1951) (refusing to enforce alleged lease and purchase option where there was not sufficient agreement on the terms of the contract).

In denying Headwaters' prior motion to dismiss this claim, this Court noted that the Second Granby IGA references and incorporates the parties' obligations under the Service Plans. At that time, the Court did not have the 2016 Letter Agreement, the Service District amendments or all relevant documents establishing the termination of the Master IGA and severance of the District's relationship. The summary judgment record now establishes that, based upon the consideration provided, the parties agreement to terminate their relationship and all obligations between them In August of 2016, before the Second Granby IGA was entered in November of 2016. DSOF ¶ 32.

The Second Granby IGA was dated the exact same day as the Amendment to Headwaters' Service Plan. DSOF ¶¶ 36, 43. It was part of the overall plan for the Districts to clarify their roles and obligations in accordance with their agreement to terminate their prior "tax district/service district" relationship. And, as with the claims above, GRMD's claim that Headwaters had some obligation to it under the Second Granby IGA is barred by the broad waivers in the 2017 Master IGA Termination and 2018 Waiver and Release Agreement.

As a practical matter, the Second Granby IGA could not compel Headwaters to acquire the LPA Amenities because the then owner of those Amenities (GRH) was not a party to that agreement. Only the owner of that property could convey a right to acquire those Amenities, presumably why the Second Granby IGA merely acknowledges the *potential* for "the Districts,"

including Headwaters, GRMD, *and* the GRMD Nos. 2-8, to be authorized to acquire some undefined Amenities at some undefined time. It imposed no enforceable obligation on Headwaters to acquire the LPA Amenities by 2020 any more than it imposed such an obligation on GRMD. In fact, the Second Granby IGA provided that GRMD, Headwaters and GRMD Nos. 2-8 "shall be jointly and severally liable for each obligation of the Districts set forth herein." DSOF Ex. 21, ¶ 23; Headwaters' Countercl. ¶ 83 & GRMD's Answer thereto.

D. GRMD Cannot Establish Damages

In addition, GRMD cannot establish damage from breach of any of these documents. First, GRMD does not have any "equity" interest in the Leased Premises. As this Court found, the LPA was a lease rather than a secured transaction (installment land contract) that creates equity in the Leased Premises. Order granting in part Private Defendant's Motion to Dismiss dated January 28, 2022, p. 19-20. *See also Strauss v. Boatright*, 418 P.2d 878, 879-80 (Colo. 1966). The LPA does not contemplate a transfer of any ownership interest of Headwaters in the Leased Premises to secure its rental payment obligations. Rather, title to the Leased Premises remained in the Landlord's hands and would not be transferred unless Headwaters exercised its option to purchase during the lease term or acquired at the end of the term in 2062, if the LPA had not previously been terminated.

Whether Headwaters would itself acquire the LPA Amenities is entirely speculative. And whether, if Headwaters did acquire the LPA Amenities, it would at some point dissolve and transfer title to GRMD (which it had no obligation to do) adds another layer of speculation. GRMD is not entitled to the consequential damages it seeks for the alleged breach of contract because it cannot prove that both parties had these consequences in contemplation at the time of

contracting or that the damages are the probable result of the breach and "are neither uncertain, unnatural, nor remote as to cause, or speculative and conjectural in effect." *Vanderbeek v. Vernon Corp*., 50 P.3d 866, 870-71 (Colo. 2002). This is particularly true in that the LPA itself bars recovery of consequential damages. DSOF Ex. 14, § 24(c). GRMD cannot seek damages not available to the parties themselves. *Bloom v. Nat'l Collegiate Athletic Assn*., 93 P.3d 621, 625 (Colo. App. 2004) (third-party beneficiary has no greater rights than the parties to the contract).

For all these reasons, this Court should enter summary judgment in favor of Headwaters.

Dated this 25th day of January, 2023.

HUSCH BLACKWELL LLP

s/ Jamie H. Steiner
Jamie H. Steiner, #49034
JoAnn T. Sandifer (Admitted Pro Hac Vice)

Attorneys for Headwaters Metropolitan District

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **MOTION FOR SUMMARY JUDGMENT OF HEADWATERS METROPOLITAN DISTRICT** was served via the Colorado Courts e-filing system on January 25, 2023, addressed to the following:

David K. TeSelle
Brian K. Matise
Erica N. Garcia
BURG SIMPSON ELDREDGE
HERSH & JARDINE, P.C.
40 Inverness Drive East
Englewood, CO 80112
dteselle@burgsimpson.com
bmatise@burgsimpson.com
egarcia@burgsimpson.com
Attorneys for Plaintiff

Mark E. Champoux
Kyler K. Burgi
DAVIS GRAHAM & STUBBS LLP
1550 Seventeenth Street, Suite 500
Denver, CO 80202
mark.champoux@dgslaw
kyler.burgi@dgslaw.com
Attorneys for Defendant Gray Jay Ventures, LLC and Granby Prentice, LLC

/s/ Tessa Kern
Practice Support Team Specialist