

For Headwaters' Website:

Litigation Update

Headwaters Metropolitan District (“Headwaters”) is a defendant in litigation commenced by the Granby Ranch Metropolitan District (“GRMD”). The case focuses on the Second Amended and Restated Lease Purchase Agreement (“LPA”) entered on December 31, 2012 between Headwaters and Granby Realty Holdings, LLC (“Granby Realty”). The LPA granted Headwaters possession of certain property then owned by GRH (“Leased Premises”), which included portions of the Granby Ranch ski and golf facilities, the right to control operations of those amenities for the use of Granby Ranch homeowners and the public, and an option to purchase the Leased Premises during the potential 50 one-year terms of the LPA (ending on December 31, 2062).

The Leased Premises were part of the Granby Ranch foreclosure undertaken in 2020 by the owner of GRH’s outstanding debt (then some \$62 million) and holder of the 2005 deed of trust recorded on the Leased Premises. On September 1, 2020, the purchaser at the foreclosure sale notified Headwaters that the LPA had been terminated through the foreclosure process.

GRMD filed this lawsuit in February of 2021 in the District Court in Grand County. In addition to Headwaters, GRMD names as defendants (i) GR Terra, the current owner of the former Leased Premises, (ii) the foreclosing entity, and (iii) the purchaser at the foreclosure sale. GRMD seeks over \$6 million in damages and/or a declaration that the LPA has not been terminated. Headwaters and GR Terra have filed counterclaims against GRMD, asking the Court to declare that the LPA has been terminated either: (i) because the 2020 foreclosure of the senior deed of trust extinguished the LPA, a junior lien on the property; (ii) because Headwaters did not appropriate funds for rent payments from and after the 2021 lease year, automatically terminating the LPA under its terms; or (iii) because the prior owner exercised its right to terminate the LPA on the ground that Headwaters did not operate the amenities on the Leased Premises for a period of more than 30 days in the spring of 2020. Headwaters and GR Terra also seek damages from GRMD, including attorneys’ fees, for breach of various contracts.

In January of 2022, the District Court granted the defendants’ motions to dismiss several of GRMD’s claims before the defendants answered the complaint. The Court allowed some claims to proceed, but it did not decide the merits of those claims. All defendants have filed motions for summary judgment seeking rulings in their favor on GRMD’s claims. GRMD and GR Terra have also filed cross-motions for summary judgment seeking rulings on three of GR Terra’s counterclaims.

GRMD’s Third Amended Complaint, Headwaters’ Answer, Affirmative Defenses, and Counterclaims, and all parties’ summary judgment filings are posted on this website.

The parties conducted a mediation on January 30, 2023, but that proceeding was not successful in resolving the case. If the case is not decided on summary judgment, a two-week bench trial (no jury) is set to commence on April 24, 2023.

Headwaters' Response to Statements On GRMD's Website.

GRMD's litigation could have significant consequences for the future of Granby Ranch, and in particular, the operation of the ski and golf amenities. Homeowners in the community have requested more information about the litigation and the parties' respective positions. Toward that end, Headwaters is providing its response to some of the statements relating to the litigation on GRMD's new website, launched this month (February of 2023).

GRMD Website: "Prior to the foreclosure, GRH was developing the ski resort facilities using public funds received from HMD [Headwaters] (which received over \$6 million in funds from the \$10,000 lot amenity fees charged to District property owners.)"

Headwaters' Response:

- The ski resort and golf facilities were built with private funds before GRMD was created or amenity fees imposed. Amenity fees were later paid by Headwaters as rent to GRH, giving Headwaters possession of the Leased Premises and allowing it to make those amenities available for use by homeowners and the public. GRH was not obligated to use the rental payments for development of the ski resort or golf facilities.
- The \$10,000 per lot amenity fees were paid by the *sellers* of lots not the buyers; the seller was typically GRH or a homebuilder. Some of the amenity fees GRMD seek as damages were not even paid in relation to lots within GRMD boundaries.

GRMD Website: "In August 2020, GPGH foreclosed on the prior developer of the ski resort . . . and assumed ownership of and privatized the ski resort facilities (and all revenue generated from such facilities)."

Headwaters' Response:

- The ski resort facilities remain open to the public, and Granby Ranch homeowners receive significant benefits and discounts for use of the ski and golf facilities through the Granby Ranch Conservancy.

- Prior to the 2020 foreclosure, ski and golf operational revenues were not paid to Headwaters or any other public entity.
- Under the management agreement in effect prior to the 2012 LPA, GRH had to make advances to Headwaters to cover operating shortfalls and other amounts due under that agreement. In November of 2012, Headwaters owed GRH over \$8 million for those advances, and the parties anticipated that this obligation would continue to increase.
- In December of 2012, Headwaters determined that it was not in the interests of the District, or the taxpayers, residents, tenants, occupants, visitors or invitees of Granby Ranch, for the District's financial obligations to GRH to continue to increase. It entered the LPA and a new management agreement with GRH's affiliate, Granby Ranch Amenities ("GRA"). Under that agreement, GRH forgave the outstanding amounts (over \$8 million) then due to it from Headwaters, and GRA agreed to assume the risk of operating shortfalls in exchange for the potential benefit of receiving profits, if any, generated by the operation of the amenities. GRA paid Headwaters only a small amount of rent (\$14,856 with potential adjustments) under the management agreement.
- Considering the significant investment and capital expenditures needed to maintain the ski/golf facilities, the amenities did not generate a profit prior to the 2020 Foreclosure.
- In 2018, Headwaters issued a request for proposal ("RFP") for a new operator for the ski and golf amenities. Though that RFP was kept open for some two years, no independent operators responded. The only response came in 2020 from an operator affiliated with the new owner after the foreclosure. GRMD did not assist with the RFP or identify any operators willing to manage the ski or golf facilities.

GRMD Website: "[T]he District is seeking a declaration of the court to reinstate the LPA between HMD and GRH, which requires the publicly-funded ski resort facility be owned and operated by a public entity."

Headwaters' Response:

- The ski resort and golf facilities were not publicly funded, as set forth above.
- Nothing in the LPA requires that the amenities included in the Leased Premises, including portions of the ski resort and golf facilities, be owned and operated by a public entity.
- None of the other documents cited in GRMD's complaint require that Headwaters purchase the ski resort or golf facilities formerly subject to the LPA, on its own behalf or on behalf of GRMD. One of the primary documents relied upon in GRMD's complaint,

the 2003 Master IGA, was terminated by the parties in 2006 and, in any event, did not obligate Headwaters to acquire any particular amenities or transfer them to GRMD. GRMD agreed to terminate all versions of subsequent Master IGAs between GRMD and Headwaters in 2017 in exchange for valuable consideration from GRH, including its release of payment by GRMD on over \$11 million of outstanding GRMD bonds then held by GRH, which equated to more than \$12,000 debt for each home subject to GRMD's bond debt.

- Headwaters' ownership and operation of the ski resort and golf facilities subject to the LPA is not feasible. Headwaters does not have revenue to pay an operator or to invest the millions of dollars required each year to operate, maintain, and improve the ski and golf facilities. Headwaters has no tax base or source of revenue, which is why it relied upon developer contributions over the years to operate, maintain and improve the ski resort and golf facilities.
- While GRMD asserts that it could own and operate the ski and golf amenities by raising its tax levy or issuing additional debt, it has not undertaken any analysis of the funds needed to maintain, operate and improve these amenities, its ability to raise the necessary revenue, or the attendant costs to its property owners.
- In addition, the Leased Premises do not include key components of the ski resort and golf facilities. Portions of the golf course and ski areas (including Kicking Horse and portions of Conquest ski lifts, the maintenance facility, the overflow parking lot, and the 12th golf hole) are not included in the Leased Premises, but are held solely by owner of Granby Ranch. In addition, all water rights are held solely by the owner of Granby Ranch. Without ownership of significant portions of the ski/golf parcels, those operations would be severely limited. Without water, there would be no snowmaking or sprinkler systems for the golf course. The golf course would not survive, and ski opportunities would be drastically curtailed, if not shuttered.
- Metropolitan Districts do not have eminent domain power to acquire recreational facilities; their authority in this regard is limited to obtaining access to recreational facilities.
- In any event, the LPA was terminated by foreclosure of the senior deed of trust. GRMD was aware of the foreclosure months before it occurred, but it took no action to try to prevent the termination of the LPA – and GRMD's alleged interest therein – through the foreclosure process, just as it took no action to assist with locating an operator for the ski and golf amenities between 2018 and 2020.
- If not terminated through the foreclosure, the LPA was thereafter terminated because Headwaters did not appropriate funds for rent payments from and after the 2021 lease year and the LPA gives Headwaters' board unrestricted discretion to terminate the lease

at the end of any one-year lease term by not appropriating funds for rent payments for the ensuing lease year. Alternatively, the purchaser at the foreclosure sale terminated the LPA based upon Headwaters' failure to operate the amenities on the Leased Premises for a period of more than 30 days in the spring of 2020.

GRMD Website: "The current developer, GR Terra LLC, who acquired the ski resort after February 2021, requested to be added as a defendant to this litigation."

Headwaters' Response: The litigation was pending in May of 2021 when GR Terra closed on its purchase of the portion of Granby Ranch that includes the former Leased Premises. Given GRMD's claim to encumber GR Terra's property by reinstating the LPA, GR Terra requested consent to intervene to protect its investment in the property. GR Terra did not ask for this lawsuit to be commenced. Nor did it ask to be sued for \$6 million dollars.

GRMD Website: "Earlier this year, GRMD negotiated and finalized a "contingent fee" agreement with new legal counsel Brian Matise at Burg Simpson Eldredge Hersh Jardine, PC on the matter. This agreement markedly limits GRMD's cost exposure in advancing this litigation." (Dec 20, 2022 letter to Homeowners in January 2023 Newsletter).

Headwaters' Response:

- While GRMD's hybrid-rate fee agreement may limit GRMD's legal fees, the litigation remains expensive for all parties. GRMD incurred over \$172,000 in fees to its former litigation counsel and agreed to pay its current litigation counsel \$200,000 with a contingency fee thereafter that allows counsel to collect up to 40% of any monetary recovery. In the event GRMD prevails and obtains non-monetary relief, the contract requires GRMD to pay counsel the additional fees incurred to obtain the verdict, up to a total of \$500,000.
- Under its fee agreement, GRMD bears litigation costs and expenses, including expert witness fees, deposition costs, and travel costs incurred for the out-of-town depositions (including depositions already taken by GRMD in Idaho and Missouri) and a lengthy trial in Grand County.
- The fee agreement does not limit GRMD's exposure for any damages or attorneys' fees awarded to Headwaters or GR Terra on their counterclaims.
- The residents of Granby and Granby Ranch would be best served if the funds expended on this litigation, including the tax dollars and other public funds being spent by GRMD, were directed to continued investment in Granby Ranch and its amenities.