

OK to
release
updated

PRIVILEGED AND CONFIDENTIAL



KROB LAW OFFICE, LLC
Attorneys at Law

MEMORANDUM

To: Board of Trustees of the Town of Granby

From: Nathan Krob

Date: January 12, 2021

Re: Appointment of Directors to Vacant Positions on Headwaters Metropolitan District Board

This memorandum is provided to address a request by citizens of Granby Ranch (“Applicants”) for the Board of Trustees of the Town of Granby (“BOT”) to appoint the Applicants to the Board of Directors for the Headwaters Metropolitan District (“HMD”).

Background

The Applicants assert that they are qualified, eligible electors that are willing to serve on the HMD board and should be appointed to the four HMD Director vacancies.¹ The citizens assert that the BOT may make such appointments in “its capacity as the approval authority of the HMD.” The Applicants state that they notified the current HMD Board of their interest to serve as directors on the HMD Board on December 21, 2020. The current HMD Directors did not appoint any of the Applicants at its meeting on December 22, 2020. The relevant legal issues before the Board are whether the BOT may appoint Directors to the HMD Board to fill the Board’s vacancies, and if so, the process for appointment.

May the Town make an appointment?

A court would likely find that the Town could make such appointments where the Board of Directors of a special district fails, neglects or refuses to appoint a director or directors. Colorado Revised Statute Section § 32-1-905 provides the process for filling vacancies on the board of directors of special districts. While the statute does not provide explicit authority of

¹ Applicants assert that four seats are vacant. However, counsel for HMD has notified Town counsel that there are two directors, leaving three vacancies.

municipalities to fill vacancies where there is a duly elected Director, it does provide that “the board of county commissioners of the county which approved the organizational petition may² appoint a director to fill such vacancy.” C.R.S. § 32-1-905(2)(a). While it has never been litigated, the consensus among practitioners is that the intent of the statute was to empower the entity that approved the organizational petition, whether it be a county or municipality, with the ability to fill vacancies that the Special District’s Board fails to fill. Such an interpretation is supported by the fact that the statutes governing Special Districts generally treats a county that approves a special district the same as a municipality that approves a special district. In fact, the last sentence in subsection 2.5, while not applicable here, provides in “the event a district is wholly within the boundaries of a municipality, the governing body of the municipality may appoint directors.” C.R.S. § 32-1-905(2.5)

Nonetheless, there is some risk that a court could find differently and uphold a challenge to a municipality’s ability to appoint directors in instances of vacancies. No other statute provides the Town the ability to fill vacancies.

What is the process for the Town to appoint Directors?

Section 32-1-905(2) provides the process for the Town to appoint Directors in the absence of action by the Board of Directors of the Special District. It provides in relevant part:

(a) any vacancy of the board shall be filled by appointment by the remaining director or directors.... If, within sixty days of the occurrence of any vacancy, the board fails, neglects or refuses to appoint a director from the pool of any duly qualified, willing candidates, the board of county commissioners of the county which approved the organizational petition may appoint a director to fill such vacancy. The remaining director or directors shall not lose their authority to make an appointment to fill any vacancy unless and until the board of county commissioners which approved the organizational petition has actually made an appointment to fill the vacancy.

(b) No board of county commissioners shall make an appointment pursuant to paragraph (a) of this subsection (2) unless it provides thirty days’ notice of its intention to make such appointment to the remaining members of the board and the vacancy remains open at the time the board of county commissioners makes its appointment... Such appointment shall be made at an open public meeting.

C.R.S. § 32-1-905(2)

The statutory language shows a preference for the current directors of a special district to appoint directors to vacant position, rather than the organization approving the petition of the district. Accordingly, a number of circumstances must be present before the Town may appoint any individual to fill a vacancy on the HMD Board. First, there must be a vacancy or

² The statute is also permissive. To the extent the BOT does not desire to appoint directors, it is not required to do so.

vacancies. Second, there must be “duly qualified, willing candidates” for the HMD Board to consider. Upon the occurrence of these two prerequisites, the Board of Directors of the HMD has 60 days to appoint a director or directors from the pool.

Here, three vacancies existed and three ostensibly qualified Applicants indicated their willingness to serve on the Board on December 21, 2020. Accordingly, the HMD Board has until February 19, 2021 to fill the vacant director positions. After that date, the BOT may appoint a duly qualified and willing candidates to any remaining vacant director positions.

In order to do so, the statute also requires the BOT provide the HMD Board of the organization 30 days advanced notice of its intent to fill any vacant director positions with qualified individuals.

Accordingly, while the BOT may appoint directors if the HMD director positions remain vacant and willing candidates to fill remain, it may not do so at this time. Doing so could, and would likely, subject the BOT to a legal challenge by the HMD Board.

