IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:23-cv-01351-RMR-STV

GRCO LLC, a Missouri limited liability company,

Plaintiff,

v.

GRANBY RANCH METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado,

Defendant.

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Plaintiff, GCRO LLC ("Plaintiff"), by and through undersigned counsel, submits the following Response in Opposition to Motion to Dismiss ("Motion") filed by Defendant, Granby Ranch Metropolitan District ("GRMD"). *ECF No. 19*.

INTRODUCTION

Plaintiff's Amended Complaint ("Complaint") challenges GRMD's unauthorized and illegal use of capital facilities fees paid by Plaintiff in 2022. *ECF No. 15*. The Complaint asserts that GRMD has used these fees – authorized for the narrow purpose of financing infrastructure that benefits the burdened property – for GRMD's administrative and legal expenses. GRMD's collection of these funds under the guise of a "capital facility fee" is nothing more than a pretext to exact funds for GRMD's operating expenses, with no corresponding special benefit to the property owners who pay the fees. Plaintiff asserts that GRMD's blatant diversion of property

owners' fees from the sole purpose for which they were authorized violates the authorizing resolution, Colorado statute, and the Colorado and United States Constitutions.

GRMD's Motion is most interesting for what it does not say. GRMD does not challenge the language of the authorizing resolution or the limitations it imposes on use of the fees. Nor does it claim any right to use the fees for purposes not authorized in the resolution or assert any specific benefit to the property owners from use of the fees for GRMD's administrative and legal expenses, flippantly asserting that "any misplacement of funds did not harm Plaintiff." Motion, 9.

Instead of addressing the claims as filed, GRMD tries to change the narrative by controverting the factual allegations. For instance, GRMD asserts that the capital facilities fee "still" serves the purpose for which it was imposed "by reimbursing or repaying debt related to [costs of improvements]." Motion, 2. That statement directly contravenes Plaintiff's allegation that, "[s]ince 2019, GRMD has not used the Capital Facility Fees for any allowed debt service." ¶ 71. Since Plaintiff's factual allegations are accepted as true for purposes of GRMD's Motion, GRMD's contrary allegations must be ignored.

Second, GRMD consistently misstates Plaintiff's claims. In its Motion, GRMD frequently defends itself from phantom attacks on the *establishment* of the capital facilities fee. But, as the Complaint makes clear, that is not the wrong alleged by Plaintiff. Plaintiff challenges GRMD's *misuse* of the fees — and specifically misuse of the fees paid by Plaintiff in 2022.

As a result, GRMD's Motion largely ignores the legal arguments posed by the Complaint, instead opting to knock down strawmen that have no place in this fight. These errors are compounded by GRMD's reliance on legal authorities that are either outdated or inapplicable. For these reasons and those described below, GRMD's Motion should be denied in its entirety.

BACKGROUND

In 2006, GRMD—in conjunction with Headwaters Metropolitan District—passed a joint resolution establishing a capital facility fee (the "Resolution") that authorized a one-time $6,255 capital facility fee ("Facilities Fees" or "Fees") that was required for property owners to obtain building permits to develop lots within GRMD's boundaries. Compl. ¶36 & Ex. 7. The Resolution provided that the proceeds:

> "*will be used solely for the purpose of financing the acquisition, reimbursement, construction, replacement, maintenance and repair of the Improvements*, including, but not limited to, paying debt service on, and other costs related to, the Series 2006 Bonds and any obligations refunding such Series 2006 Bonds and reimbursements of amounts advanced by other parties."

Id., Ex. 7 at ¶ 6 (emphasis added). "Improvements" are defined as infrastructure described in GRMD's service plan. *Id.*, Ex. 7, Fourth Whereas Clause.

From 2006 to 2019, GRMD collected Facilities Fees and deposited them in its Debt Service Fund for payment on its Series 2006 Bonds, debt incurred to finance some of the infrastructure serving a portion of Granby Ranch. *Id.* at ¶¶ 49-50. Beginning in 2019, however, GRMD has deposited all such Fees into its General Fund. *Id.* at ¶¶ 54-55. The General Fund is not restricted to any specific use; GRMD's manager confirmed under oath that the funds deposited into GRMD's General Fund are used for payment of GRMD's general and administrative expenses, including, for example, legal fees incurred by GRMD in a separate lawsuit it filed against Headwaters Metropolitan District and the owner of the Granby Ranch ski and golf amenities. *Id.* at ¶ 56.

Since 2019, GRMD has not acquired, constructed, replaced, repaired or financed any infrastructure within its borders. *Id.* at ¶ 51. GRMD has no plans to undertake any capital improvement projects; nor does can it do so under its Service Plan. *Id.* at ¶ 52.

In 2022, Plaintiff paid $125,100 in Facilities Fees to GRMD to obtain building permits to construct single-family homes. *Id*. at ¶¶ 57-59. As with all such Fees collected since 2019, those funds were deposited into GRMD's General Fund. *Id*. at ¶ 56.

STANDARD OF REVIEW

"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.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). In reviewing a motion to dismiss, the Court accepts as true all well-pleaded factual allegations in the complaint and views them in the light most favorable to the plaintiff to assess whether the pleadings state a plausible claim for relief. *Burnett v. Mortg. Elec. Registration Sys., Inc.*, 706 F.3d 1231, 1235 (10th Cir. 2013). If the Court finds that there is "at least a reasonable inference of the legally relevant facts," Defendant's Motion should be denied. *Id*. at 1236.

ARGUMENT

I. Plaintiff has sufficiently alleged takings claims (Counts V and VI) by asserting that GRMD imposed monetary exactions linked to specific property interests.

GRMD challenges Plaintiff's takings claims on two grounds.[1] First, it asserts that a taking may only occur if the governmental action involves the loss of the use or enjoyment of real property and that Plaintiff has not alleged such a loss. Motion, 3-4. Second, GRMD contends that even if Plaintiff lost a property interest by paying the Facilities Fees, Plaintiff cannot prevail

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[1] Critically, in the Motion, GRMD does not challenge whether the Facilities Fees satisfy the *Nollan/Dolan* analysis pertinent to *per se* takings. Specifically, GRMD does not address the essential nexus or rough proportionality elements of the *Nollan/Dolan* analysis.

because the Town of Granby ("Town"), not GRMD, issued the building permits for which Plaintiff paid the Facilities Fees. *Id.* at 4. Neither contention has merit.

A. Plaintiff's payment of the Facilities Fees as a condition to obtaining building permits for its lots constitutes a burden on Plaintiff's property sufficient to implicate the *per se* takings analysis.

GRMD's argument that Plaintiff has not alleged an unlawful deprivation of a protected property interest ignores the alleged facts and relevant law. The Complaint asserts that to obtain building permits to construct homes on its lots, Plaintiff was required to pay the Facilities Fees. Compl. ¶¶ 34, 43, 57-59, 99, 104. Those Fees were then used to defray GRMD's general governmental expenses instead of financing improvements within the District—the sole purpose for which the Fees were authorized. *Id.* ¶¶ 49-56, 58. Thus, Plaintiff's payment of the Facilities Fees is directly linked to its ownership of real property within the District.

As alleged, these Facilities Fees are precisely the type of "monetary exactions" that may give rise to a *per se* taking under the Supreme Court's decision in *Koontz v. St. John's River Water Management Dist.* 570 U.S. 595, 612 (2013). In that case, the petitioner applied to the applicable water management district for the necessary permits to develop a portion of its property. *Id.* at 601. As a condition for approving the permits, the district required petitioner to fund the improvement of other property within the district. *Id.* at 602. The petitioner refused and sued the district, claiming that the condition was an unconstitutional taking. *Id.* The Florida Supreme Court rejected the petitioner's takings claim, in part, because the water management district "asked him to spend money rather than give up an easement [or other interest] on his land." *Id.* at 611-12.

The *Koontz* court, however, flatly rejected the Florida Supreme Court's analysis. It concluded that to survive constitutional scrutiny such "'monetary exactions' must satisfy the

[essential] nexus and rough proportionality requirements of *Nollan* and *Dolan*" for *per se* takings. *Id.* at 612. The Court reached this conclusion because there was a "direct link between the government's demand and a specific parcel of real property." *Id.* at 614. To the Court, "when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a *per se* takings approach is the proper mode of analysis under the Court's precedent." *Id.* (alterations & quotations omitted).

In light of that decision, GRMD's reliance on the Colorado Supreme Court's earlier decision in *Krupp v. Breckenridge Sanitation District,* 19 P.3d 687 (Colo. 2001), is erroneous. In *Krupp*, the court prognosticated that "[r]ecent pronouncements by the United States Supreme Court strongly indicate that the *Nollan/Dolan* test is limited to exactions involving the dedication of [real] property." *Id.* at 697. GRMD relies on this case to assert that unless GRMD required Plaintiff to forfeit part of its property for public use, it cannot commit a taking. *Koontz* court clearly rejected that same argument in 2013, and this aspect of *Krupp* is no longer good law.

B. The allegations establish that GRMD contracted with the Town to withhold building permits absent payment of the Facilities Fees.

GRMD attempts to defeat the takings claims by pointing its finger at the Town, asserting that the Town, not GRMD, has the authority to issue building permits. Motion, 4. In support, GRMD cites *Krupp v. Breckenridge Sanitation Dist*., 1 P.3d 178 (Colo. App. 1999) ("*Krupp II*"), noting that the court did not find a taking, in part, because the defendant sanitation district did not have the authority to issue the permit. *Id.* But this is only part of the story. In *Krupp II*, the court found nothing in the record "to support a conclusion that the District has the power, officially or unofficially, *de facto* or *de jure*, to prevent the issuance of a building permit." *Id.* at 182.

That is not the situation before this Court. The 2006 Resolutions (and the prior resolution approved in 2005) require the payment of the Facilities Fees upon issuance of a building permit by the Town. Compl. at Ex. 7, § 2. To ensure the Town's compliance, GRMD contractually obligated the Town to require payment of the Facilities Fees to GRMD prior to issuance of a building permit. *Id.* ¶¶ 32-34. The Town Facilities Fee Agreement states that the Town "shall not approve . . . [a] building permit . . . until the applicant provides a signed acknowledgement . . . indicating the applicant's payment of the required [Fees] . . . ." *Id.* at ¶ 34 & Ex. 6 § 1.1. Thus, Unlike in *Krupp II*, GRMD does have the power, and has exercised the power, to prevent the issuance of the building permits until the Facilities Fees are paid.

GRMD's exaction of the Facilities Fees from Plaintiff in exchange for the privilege to develop Plaintiff's land establishes the factual predicate for a *per se* takings assessment.

II. GRMD's challenge to Plaintiff's due process claims (Counts VII and VIII) do not support dismissal.

GRMD's attempted challenge to Plaintiff's due process claims is similarly flawed. As an initial matter, GRMD's contention that the Facilities Fees provide some special benefit to Plaintiff hinges on its assertion that Fees are being used to pay for Improvements. Motion, 7. The allegations in the Complaint, however, directly contradict GRMD's assertion. Compl. ¶¶ 51-54, 71. GRMD's arguments fails for that reason alone.

Likely realizing that hurdle, GRMD invests considerable effort arguing that the Facilities Fees are special fees instead of special assessments. Motion, 5-7. This discussion, however, is irrelevant to GRMD's arguments for dismissal. Regardless of whether the Facilities Fees are considered a special fee or special assessment (Plaintiff pleaded both in the alternative), neither type of charge can be used to pay for the general expenses of government. *Reams v. City of Grand*

Junction, 676 P.2d 1189, 1195 (Colo. 1984); *Bloom v. City of Fort Collins*, 784 P.2d 304, 308 (Colo. 1989). Rather, special fees and assessments must be used to offset the costs of providing a specific governmental service or improvement that specially benefits the property owner. *Reams*, 676 P.2d at 1195; *Bloom*, 784 P.2d at 308. The idea that GRMD can ignore the clear commands of Colorado law and use the Fees for general governmental expenses simply because the Resolution was valid at inception is untenable. As the Colorado Supreme Court has clearly stated: "[w]e recognize that even though the ordinance be a proper exercise of the police power, it must in its application to the specific property, be such as not to be an unreasonable demand upon the individual for the benefit of the public welfare." *Apple v. City and County of Denver*, 390 P.2d 91, 95 (Colo. 1964).

Plaintiffs' Complaint demonstrates that the Facilities Fees were established to defray the costs of the financing Improvements. Compl. ¶ 46 & Ex. 7. And it establishes that since 2019, the funds have not been used to finance Improvements or repay related debt. Compl. ¶¶ 51-54, 71. Plaintiff asserts that from 2006 to 2019, the Fees were collected and deposited in the Debt Service Fund, which existed for the purpose of paying the bonds issues to finance Improvements. *Id.* ¶¶ 49-54, 56. Since 2019, however, GRMD deposited the Fees, including the $125,100 paid by Plaintiff in 2022, into its General Fund where they are comingled with funds used for GRMD's general administrative expenses, including legal fees. *Id.* ¶¶ 54-56, 58. The only permissible inference is that GRMD is using the funds for costs unrelated to payment on the bonds.

Rather than providing any service, improvement or special benefit to Plaintiff's property, GRMD's use of the Facilities Fees for general governmental expenses unjustly burdens Plaintiff and violates due process. GRMD's use of the Fees for general governmental expenses eviscerates

any legitimate relationship between GRMD's need to finance the Improvements and the Fees. *See, e.g., Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (explaining that due process exists to prevent the "exercise of power without any reasonable justification in the service of a legitimate governmental objective.") (*abrogated on other grounds*, 533 U.S. 833, 847 n.8). There is no rational connection between the need to finance the Improvements and the collection and use of the Fees for entirely unrelated purposes. *See Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528, 548–49 (2005) (J. Kennedy, concurring) ("The failure of a regulation to accomplish a stated or obvious objective would be relevant to [the due process] inquiry."). GRMD's decision to intentionally ignore the clear limitations in the Resolution and Special District Act is entirely arbitrary and irrational.

Indeed, Colorado courts have repeatedly concluded that use of a special fee or assessment for the payment of general governmental expenses violates due process. *E.g.*, *Reams*, 676 P.2d at 1195. For example, in *Bloom*, 784 P.2d at 308, the court stated that the transfer funds generated by a special fee "to some other city fund would be tantamount to requiring the class of persons responsible for the fee . . . to bear a disproportionate share of the burden of providing revenues to defray *general governmental expenses*, unrelated to the purpose for which the fee is imposed." (emphasis original).

Similarly, in *Ochs v. Town of Hot Sulphur Springs*, 407 P.2d 677, 680 (Colo. 1965), the Colorado Supreme Court holding that Frontage taxes – which the court found to be special assessments – that did not specifically enhance the value of the plaintiff's property "were nothing more than a devise or a scheme, unsupported by any permissive revenue producing authority, to provide funds for the general community benefit, and hence violative of the due process of law

guarantees of the federal and state constitutions." *Accord Landmark Towers,* 436 P3d 1139, 1147-48 (Colo 2018) (special assessment that did not specifically on property that did not specially benefit from the funded improvements violated property owners' right to due process).

GRMD's attempt to saddle Plaintiff with the burden of paying for general governmental expenses that should be borne by all taxpayers under the pretext of financing Improvements violates Plaintiff's due process rights.

III. Plaintiff's takings and due process claims (Counts V – VIII) are not barred by any limitations period because the claims did not accrue until November 2022.

While Plaintiff agrees that its Section 1983 claims must be brought within two years of accrual, the Complaint establishes that Plaintiff's claims fall well within the statute of limitations. As GRMD states, "[a]crrual takes place when the wrongdoer commits an act and the plaintiff suffers damage." *Id.* (citing *Colby v. Herrick*, 849 F.3d 1273, 1279 (10th Cir. 2017)). A Section 1983 claim does not accrue until "plaintiff knows of or has reason to know of the injury which is the basis for the action." *Ullery v. Bradley*, 949 F.3d 1282, 1287-88 (10th Cir. 2020). Moreover, as-applied constitutional challenges do not accrue until all the events necessary to state a claim have occurred. *See, e.g.*, *Waltower v. Kaiser*, 17 F.App'x 738, 740 (10th Cir. 2001) (plaintiff's claim did not accrue until its personal rights were allegedly violated).

Though the Facilities Fees were established in 2006, Plaintiff was not harmed until 2022, when it was forced to pay $125,000 in Fees to obtain building permits. Compl. ¶¶ 57-58. Again, GRMD's argument turns upon its attempt to cast Plaintiff's claims as facial challenges to the resolution authorizing the Facilities Fees. The Complaint belies their argument; it plainly establishes that Plaintiff is asserting as-applied constitutional challenges to the GRMD's collection and use of Facilities Fees from Plaintiff. *See e.g.*, Compl. ¶ 104 ("GRMD's exaction of Capital

Facilities Fees from Plaintiff in 2022 deprived Plaintiff of its property rights in violation of the Fifth Amendment to the U.S. Constitution.") and ¶ 123 ("GRMD's deposit of the Capital Facilities Fees collected from Plaintiff into the General Fund and use of the fees for GRMD's general administrative expenses violates Plaintiff's rights to due process …"). Moreover, Plaintiff was not aware of, and had no reason to be aware of, GRMD's illegal use of the Fees until the deposition of GRMD's manager in November 2022 in other litigation. *Id.* Whether the claims accrued upon payment of the Fees or knowledge of misuse, the litigation was timely filed in May of 2023.

The Colorado statutes cited by GRMD are inapplicable. C.R.S. § 32-1-207(3)(b) provides that "[n]o action may be brought to enjoin the … imposition of rates, fees, tolls and charges … unless such action is commenced within forty-five days after the special district has published notice of its intention to undertake such activity." As set forth above, Plaintiff is not challenging the original imposition of the Facilities Fees pursuant to the 2006 Resolution.[2]

GRMD's reliance on C.R.S. § 32-1-207(1)(j) is similarly misplaced. That section merely says that, until paid, a special district's fees shall constitute a perpetual lien on the property served. Even if, as GRMD claims, property owners were on notice of the fees when established in 2006, Plaintiff – who did not even buy its property until 2021 (Compl. ¶ 9) – could not have known in

[2] Moreover, C.R.S. § 32-1-207(3)(b)'s 45-day statute of limitations only applies in situations where the special district has provided adequate notice "of its intention to undertake such activity." *Id.* Under the statute, notice requires that the special district "describe the activity proposed to be undertaken," (the Fee), and publish its notice in "a newspaper of general circulation in the district." The pleadings are devoid of any evidence that such notice was provided. For this additional reason, GRMD cannot invoke C.R.S. § 32-1-207(3)(b) as a bar to Plaintiff's claims. *See, e.g.*, *Bill Barrett Corp. v. Sand Hills Metro. Dist.*, 411 P.3d 1086, 1092 (Colo. App. 2016) (declining to apply C.R.S. § 32-1-207(3)(b)'s "unambiguous[]" statute of limitations when proper notice was not provided).

2006 that GRMD would collect fees from GRMD in 2022 and use those in a manner contrary to the authorization in the 2006 Resolution.

GRMD further argues that Plaintiff cannot rely upon a "continuing violation" theory to avoid the statute of limitations. Plaintiff's Complaint characterized GRMD's constitutional violations as "continuing" only to underscore the need for injunctive relief. Compl. Counts VI & VIII. Plaintiff need not invoke "continuing violations" for its claims to be timely.

IV. GRMD's challenges to Plaintiff's claims for injunctive relief (Counts I-IV, VI, VIII and IX) provide no grounds for dismissal.

In Section II of its Motion, GRMD asserts an array of superficial challenges to the above-referenced claims. None of its arguments provides grounds for dismissal.

A. Count I states a claim for violation of the 2006 Resolution.

In Count I, Plaintiff asserts that GRMD is using the Facilities Fees in violation of the 2006 Resolution because it is not using the Fees for Improvements or related debt service. GRMD's Motion does not address that contention. Instead, GRMD again tries to controvert the pleaded facts, asserting that the 2006 Resolution allows use of the funds to pay debt on the 2006 Bonds and arguing that Plaintiff's claim relies upon a "conclusory allegation that the debt on the District's outstanding bonds 'did not finance any Improvements' serving Plaintiff's lots." Motion, 10. GRMD's argument misses the central point of Plaintiff's claim – its allegation that since 2019 GRMD have not used the Fees to acquire, construct, repair or finance Improvements or to repay *any* related debt and has instead deposited all Facilities Fees into its General Fund for general administrative and legal expenses. Compl. ¶¶ 51-56, 71-72. GRMD does not even try to argue that those allegations fail to state a claim for relief.

Count I makes a secondary argument that, "even if" the Facilities Fees were used for debt service, that debt did not finance Improvements that serve some of the Plaintiff's lots. *Id.* at ¶ 73. This claim is not conclusory; it is based upon a specific, factual assertion that "GRMD has not provided or funded any infrastructure or other improvements that serve the Fall Line Lots." *Id.* at ¶ 60. That fact is sufficient to support Plaintiff's secondary argument. But it is not essential to Plaintiff's primary challenge that GRMD is not using the Fees for any Improvements or any related debt service.

B. Count II states a claim for violation of the Special District Act.

GRMD asserts that Count II does not violate C.R.S. § 32-1-1001(1)(j), which authorizes a special district to fix fees "for services, programs, or facilities" because C.R.S. § 32-1-1001(1)(j) gives special districts "all rights and powers necessary or incidental to or implied from the specific powers granted." In *Haggarty v Purdue Health Services Dist*., 940 P.2d 1105, 1109 (Colo. App. 1997), the court rejected reliance on a similar provision to expand the scope of a special district's authorized powers and enjoined a special district from using funds for purposes not expressly permitted under the Special District Act:

> [E]ven though a hospital district has authority to enter into contracts and agreements affecting the affairs of the district, to adopt rules and regulations for carrying on the business, objects, and affairs of the district, and has all rights and powers necessary or incidental to implied from the specific powers granted to the district, such powers may not be used to go beyond the express power granted.

Id. The Special District Act gives GRMD the power to impose fees only "for services, programs or facilities furnished by the special district." That language would be meaningless if, as GRMD now claims, it can use the Fees for any purpose at all. As *Haggarty* establishes, special districts

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are limited to the powers expressly granted by statute. Payment of GRMD's administrative expenses is not "incidental" to financing infrastructure for property owners who pay the fee.

GRMD's reliance on *Barber v. Ritter*, 196 P.3d 238 (Colo. 2008), is baffling. GRMD cites *Barber* for the proposition that GRMD's deposit of the Facilities Fees into its general account did not strip away the purpose or nature of the fees as originally imposed. Motion, 10. Plaintiff agrees. For that reason, even when deposited into the General Fund, those funds remained subject to the limitations on their use imposed under the 2006 Resolution and the Special District Act. GRMD has no right to treat those funds like tax receipts and use them for general administrative expenses.

C. Plaintiff has alleged grounds supporting injunctive relief.

GRMD next asserts, in a one-paragraph argument, that all seven of Plaintiff's claims for injunctive relief fail because Plaintiff has not alleged "irreparable harm." GRMD makes no attempt to distinguish between the different claims or explain why injunctive relief is not available for the harm alleged in each claim. This perfunctory argument does not provide sufficient grounds for dismissal and need not be addressed by this Court. *Ramos v. State Farm Mut. Ins. Co.*, 2020 WL 6134901 at *11 n. 4 (D. Colo. October 19, 2020) (*citing Penden v. State Farm Mut. Auto Ins. Co.*, 841 F.3d 887 n.3 (10th Cir. 2016). In any event, the Complaint alleges sufficient grounds for the requested injunctive relief.

Counts VI and VIII seeks to enjoin continued violation of Plaintiff's constitutional rights. The Tenth Circuit has recognized that "[m]ost courts consider the infringement of a constitutional right enough and require no further showing of irreparable injury." *Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792, 805 (10th Cir. 2019). The Tenth Circuit is not unique in this regard, and "well-settled law supports the constitutional-violation-as-irreparable-

injury principle." *Id.* at 806 (citing *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976)). Similarly, the Colorado courts will enjoin violations of due process rights, such as those asserted in Count VIII. *See Landmark Towers,* 436 P3d at 1148-1154 (upholding injunction barring metropolitan district's future special assessment on property that did not specially benefit from the funded improvements upon finding that the assessment violated property owners' right to due process).

Although equitable relief is not generally available in Fifth Amendment takings cases, *see Knick v. Township of Scott, Pennsylvania*, 139 S.Ct 2162, 2176 (2019), this case falls under a recognized exceptions to that rule. As the Tenth Circuit stated in *Custer County Action Ass'n v. Garvey*, "[i]njunctive relief is not available under the Fifth Amendment *absent an allegation the purported taking is unauthorized by law*." 256 F.3d 1024, 1042 (10th Cir. 2021) (emphasis added). The phrase "unauthorized" is defined in relevant part as "action explicitly prohibited." *Id.* Plaintiff has alleged that GRMD's misuse of the proceeds is explicitly prohibited by the 2006 Resolution and the Special District Act. Plaintiff has alleged grounds for the injunctive relief sought in Count VI.

Plaintiff's other claims for injunctive relief (in Counts I, II, III, IV, and IX) assert that GRMD's collection of the Facilities Fees violates the 2006 Resolution, the Colorado Special District Act, or Colorado common law. Again, GRMD has not established why injunctive relief is not appropriate with respect to those different claims, likely because the law is to the contrary.[3] In *Haggarty*, *supra*, the Colorado court upheld an injunction to prevent a special district from expending funds for purposes not authorized under the Special District Act. 940 P.2d at 1108-09.

[3] For instance, the Special District Act grants the Court authority to enjoin the material modification of its service plan alleged in Count IV. *See* § 32-1-207(1)(3)(a).

Similarly, the Colorado courts routinely entertain taxpayer suits to enjoin alleged unlawful expenditures of taxpayer funds. *See e.g.*, *Nicholl v. E-470 Pub. Highway Auth*., 896 P.2d 859, 866 (Colo. 1995).

At its core, Plaintiff seeks injunctive relief to hold GRMD accountable to the clear limitations in the Resolution and Special District Act. The property owners should not be forced to continue to pay unlawful fees and then be compelled to file repeated lawsuits for damages after GRMD has improperly expended the funds. Injunctive relief is appropriate to prevent further violations of the property owners' rights.

V. Count III states a claim for violation of C.R.S. § 29-1-803.

Count III asserts that GRMD's deposit of Facilities Fees into its General Fund violates C.R.S. § 29-1-803, which requires that "land development charges" shall be deposited into a separate account that clearly identifies the category or fund of capital expenditures for which the charge was imposed. GRMD asserts that Facilities Fees are not land development charges because "the land was already platted and subdivided many years ago by the Town of Granby." Motion, 11. This argument fails for two reasons.

First, GRMD's factual allegation, again, directly contradicts the Complaint, which unambiguously asserts that Plaintiff currently owns "undeveloped property, which it intends to develop." Compl. ¶ 61. There is no support in the pleadings for GRMD's conclusory assertion that all the land subject to the Facilities Fees has been finally platted.

Second, a land development charge is not limited to payments due upon the subdivision of land. Under the statute, the term "land development" includes any "[c]onstruction, reconstruction, redevelopment, or conversion of use of land or any structural alteration, relocation, or enlargement

which results in an increase in the number of service units required." The term "land development charge" is defined as "any fee, charge, or assessment relating to a capital expenditure which is imposed on land development as a condition of approval of such land development, as a prerequisite to obtaining a permit or service." C.R.S. § 29-1-802(3). A "service unit" is defined as "a standard unit of measure of consumption, use, generation or discharge of the services provided by local government." *Id.* at § 29-1-802(5).

GRMD paid the Facility Fees as a prerequisite to obtaining building permits to construct new homes. Compl. ¶¶ 57, 59. The construction of these new homes is "land development" that will increase the consumption of the services provided by the local government. C.R.S. § 29-1-802(5)). Thus, the statute applies.

GRMD also asserts that Plaintiff lacks standing to assert violation of the statute. There is a presumption of standing in cases such as this, where the plaintiff is the subject of the government action at issue. In *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992), the United States Supreme Court stated:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred…in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.

It does not matter that others have been injured by the challenged action, as long as the plaintiff can show it was injured "in a concrete and personal way." *Id.* at 581 (J. Kennedy, concurring).

Here, the apparent purpose of requiring local government bodies to properly segregate and identify the category of capital expenditure for which charges are imposed is to ensure proper use of those fees. Accounting for the fees in this manner allows transparency with respect to the fees

collected and required use of the fee. It allows property owns to monitor expenditure of the fees for proper purposes.

GRMD's failure to comply with this statute and its deposit of the Facilities Fees into its general account comingles the Fees with funds collected from different sources and allows their use for unauthorized administrative expenses. Plaintiff – a property owner that paid over $125,000 in Facilities Fees – has asserted harm from GRMD's failure to comply with the statute in that this failure facilitated GRMD's illegal and unconstitutional use of its fees. "If a defendant has caused physical or monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021).

GRMD also makes the nonsensical argument that Plaintiff is not harmed because it would have had to pay the Fees no matter how they were used. Yes, Plaintiff would have had to pay the fee if GRMD was using it properly, but it would have received a benefit (financing of infrastructure) in return. It is Plaintiff's payment of the Fees without the corresponding benefit that gives rise to Plaintiff's harm.

VI. Count IV states a claim to enjoin GRMD's material modification of its Service Plan.

Count IV is a simple claim, asserting that if GRMD takes the position that it is holding the Facilities Fee funds for construction or acquisition of Improvements or related services, it lacks the ability to do so under its Service Plan and its actions would constitute an illegal material modification of the Plan undertaken without approval of the Town. Compl. ¶¶ 19, 92-97.

GRMD's motion asserts that its Service Plan allows it to use the Facilities Fees for allowed debt repayment and that "Plaintiff does not allege that the District has in fact used revenue from such fees for any purpose other than repayment of debt." Motion, 15. Again, GRMD misstates the

Petition, which clearly asserts that in 2019 GRMD stopped using the Facilities Fees for repayment of debt and deposited them in General Fund, where the fees have been comingled with other funds used for payment of GRMD's administrative and legal expenses. *Id*. at 56. Plaintiff has sufficiently stated a claim for relief and is entitled to pursue discovery to confirm GRMD's use of these funds and whether same is for any purpose not allowed under GRMD's Service Plan.

VII. Count IX states a claim to enjoin the CFF based on elimination of the 2006 Resolution.

Plaintiff's last count seeks a declaration that 2006 Resolution and Facilities Fees authorized therein were eliminated via foreclosure of the senior deed of trust in 2020. This result is mandated by the plain language of the Colorado nonjudicial foreclosure statute. *See* C.R.S. § 38-38-501 (following the foreclosure sale, and expiration of redemption periods to lienors entitled to redeem, title to the foreclosed property vests in the holder of the certificate of purchase "free and clear of all liens and encumbrances <u>junior to the lien foreclosed</u>.") (emphasis added). The Colorado courts strictly enforce this provision, noting that its purpose is to allow transferees to rely upon the state of record title and to render title to real property secure and marketable. *First Interstate Bank v. Tanktech, Inc*., 864 P.2d 116, 119 (Colo. 1993).

The 2006 Resolution authorizing the Facilities Fees was junior and subordinate to the 2005 Deed of Trust, so the holder of the certificate of purchase took title to the foreclosed property "free and clear" of liens created by the 2006 Resolution. Compl. ¶¶ 36, 64-67. A state court judge recently reached a similar conclusion with respect to a lease-purchase agreement entered with respect to Granby Ranch property entered after the Deed of Trust, finding that, regardless of whether it served a public purpose, the lease was a junior lien that terminated in the foreclosure. *See* Order attached hereto as Exhibit A, pp. 9-12, 13-15.

GRMD nonetheless asserts that the statutory language does not apply here because special district fees are "perpetual" and the lien survives foreclosure of a prior deed of trust, citing C.R.S. 32-2-1001(1)(j)(I). The cited statute only states that "until paid" the fees imposed therein constitute a perpetual lien. It does not say that the lien takes priority over recorded deeds of trust. In *Gold Vain Ltd. Liability Co. v. City of Cripple Creek*, 973 P.2d 1286, 1289 (Colo. App. 1999), the court stated that "[a]bsent statutory authority, a 'superpriority lien" will not be inferred. Rather, if such a 'superpriority lien' is to be imposed, it must be done expressly by the General Assembly." (holding that lien for nuisance abatement was not a superpriority lien and was extinguished by foreclosure and distinguishing from a statute which expressly stated that "the assessment shall be a lien against each lot or tract of land until paid and shall have priority over all other liens except general taxes and prior special assessments.").

Wasson v. Hogenson, 583 P.2d 914 (Colo. 1978), also cited by GRMD, is inapplicable. In that case, the court held that a lien for sewer installation charges by a sanitation district had priority over a prior deed of trust. 583 P.2d at 919. Important to the court's decision was its conclusion that the property was enhanced in value by the services provided and giving the lien priority avoided unjust enrichment of the property owner. *Id*. Here, Plaintiff's property did not receive any benefit from GRMD's use of the Facilities Fees it paid, so that rationale does not apply. Moreover, *Wasson* did not address the situation before this Court, where the 2005 Deed of Trust specifically requires the prior written consent of the beneficiary (lender) to various acts of special districts, including "any event that would or might result in the imposition of any additional taxes, assessments or other monetary obligations or burdens on the Subject Property." Compl. Ex. 8, ¶ 5.7.

The Complaint asserts that the beneficiary did not provide its prior written consent to the 2006 Resolution, which allowed an increase in the amount of the Facilities Fees. Compl. ¶¶ 42, 142. Under these circumstances, the purchaser at a foreclosure sale would not anticipate that the property remained subject to increased special district charges imposed after recording of the Deed of Trust. In fact, such a holding would deter lenders from giving loans on property included – or that could be included – in special districts because it would have no ability to control burdens imposed on the property taken as security for its loan. Allowing a special district to trump this contractual provision, without the lender's consent, would frustrate the policy underlying Colorado's nonjudicial foreclosure statute by defeating the certainty and marketability of title.

CONCLUSION

WHEREFORE, Plaintiff respectfully requests that this Court deny GRMD's Motion to Dismiss in its entirety.

Respectfully submitted this 1st day of September, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on the September 1, 2023, I electronically filed the foregoing, **PLAINTIFF'S RESPONSE TO MOTION TO DISMISS** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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DISTRICT COURT, GRAND COUNTY, COLORADO 307 Moffat Avenue/P.O. Box 192 Hot Sulphur Springs, CO 80451 970-725-3357 **Plaintiff:** GRANBY RANCH METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado, vs. **Defendants:** HEADWATERS METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado; GRAY JAY VENTURES, LLC.; REDWOOD CAPITAL FINANCE CO., LLC; GRANBY PRENTICE, LLC.; GR TERRA, LLC.	DATE FILED: July 30, 2023 CASE NUMBER: 2021CV30008 **COURT USE ONLY**
	Case No: 2021CV30008

ORDER DENYING THE PLAINTIFF/COUNTERCLAIM DEFENDANT GRMD'S RENEWED MOTION FOR SUMMARY JUDGMENT ON COUNTS I, II, AND III OF DEFENDANT/COUNTERCLAIM PLAINTIFF GR TERRA'S COUNTERCLAIMS

EXHIBIT A

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

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

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

PROCEDURAL BACKGROUND

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

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

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

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

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

RULING

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

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

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

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

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

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

A. The 2020 Foreclosure Extinguished the 2012 LPA

The 2020 foreclosure extinguished the 2012 LPA.

1. GRMD's Motion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Court is not convinced.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. GR Terra's Cross Motion

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

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

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

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

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

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

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

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

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

17A Am. Jur. 2d Contracts § 516.

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

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

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

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

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

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

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

B. The 2012 LPA Terminated Per its Own Terms.

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

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

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

Section 2 of the 2012 LPA states in full that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Court agrees with GR Terra.

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

These principles are reflected in 2012 LPA:

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

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

> The Tenant and the Landlord acknowledge and agree that the obligation of the Tenant to pay Rental Payments hereunder constitutes a current obligation of the Tenant payable exclusively from current and legally available funds and shall not in any way be construed to be an indebtedness or multiple fiscal-year obligation of the Tenant within the meaning of the provision of any constitutional or statutory limitation or requirement applicable to the Tenant.

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

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

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

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

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

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Instead, GRMD merely argues that "these Amenity Fees should have been appropriated to make rent payments under the LPA, which clearly states in Section 3c. that 'If actual Amenity Fees collected during and fiscal year exceed the amount budgeted for Rental Payments for such year, the Board shall amend its budget during such fiscal year to allow for payment of such additional Amenity Fees.'" (GRMD Mot. Summ. J., p. 10).

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

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

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

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

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

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

CONCLUSION

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

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

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

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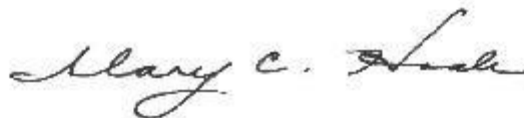
(3) The Court declares the 2020 Foreclosure extinguished the 2012 LPA in its entirety and/or the 2012 LPA terminated upon Headwaters' failure to appropriate funds for rental payments for the 2021 calendar year or the ensuing calendar years;

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

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

SO ORDERED this 30th day of July, 2023.



Mary C. Hoak, District Court Judge

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