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| **DISTRICT COURT, GRAND COUNTY, COLORADO**<br>307 Moffat Avenue/P.O. Box 192<br>Hot Sulphur Springs, CO 80451<br>970-725-3357<br>_____<br><br>**Plaintiff:**<br><br>GRANBY RANCH METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado,<br><br>vs.<br><br>**Defendants:**<br><br>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 5:06 PM<br>CASE NUMBER: 2021CV30008<br><br>**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** | |

**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).

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)).

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).

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

"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.

[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

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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.

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

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.

[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.

> 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 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;
>
> 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.

(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."

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).

(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

Mary C. Hoak, District Court Judge