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DISTRICT COURT, GRAND COUNTY, COLORADO
307 Moffat Avenue
Hot Sulphur Springs, CO 80451

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

v.

Defendants: HEADWATERS METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado; GRAY JAY VENTURES, LLC.; REDWOOD CAPITAL FINANCE CO., LLC, GRANBY PRENTICE, LLC; and GR TERRA, LLC.

Attorneys for Headwaters Metropolitan District and GR Terra LLC:
Jamie H. Steiner, #49304
JoAnn T. Sandifer *(Admitted Pro Hac Vice)*
Husch Blackwell LLP
1801 Wewatta St., Suite 1000
Denver, CO 80202
Phone: 303-749-7200
Fax: 303-749-7272
E-mail: jamie.steiner@huschblackwell.com
joann.sandifer@huschblackwell.com

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Case No. 2021CV30008

Division 1

DEFENDANT GR TERRA'S CROSS-MOTION AND OPPOSITION TO PLAINTIFF'S RENEWED MOTION FOR SUMMARY JUDGMENT ON COUNTS I, II, AND III OF DEFENDANT GR TERRA'S COUNTERCLAIMS TO THIRD AMENDED COMPLAINT

Defendant GR Terra LLC ("GR Terra") submits this cross-motion and opposition to the Renewed Motion of Plaintiff Granby Ranch Metropolitan District ("GRMD") on Counts I, II, and III of GR Terra's Counterclaims.

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

The undersigned counsel has conferred with Plaintiff's counsel and Plaintiff opposes the relief requested herein.

Statement of Undisputed Facts

On January 25, 2023, GR Terra and Headwaters Metropolitan District ("Headwaters") filed a joint statement of undisputed facts in support of their respective summary judgment motions ("DSOF").[1] To avoid redundant filings of voluminous documents, those facts and exhibits are incorporated herein. GR Terra also sets forth the following supplemental facts.

GR Terra notes that GRMD's motion does not set forth the facts supporting its motion in separate paragraphs, making response to those facts virtually impossible. GR Terra does not dispute the validity of the documents cited or relied upon in GRMD's motion, but does dispute GRMD's attempt to characterize those documents in any manner contrary to the plain terms thereof. GR Terra further submits that many of the facts are not properly supported with citation to evidence and that many others are not material to the issues raised in GRMD's Motion.

Defendants' Supplemental Statement of Undisputed Facts

80. Section 10 of the LPA states that "if Tenant ever ceases to operate the Amenities on the Lease Premises for 30 days or longer . . . Landlord may, in its sole discretion . . . elect to terminate this Lease[.]" DSOF ¶ 25, Ex. 13, § 10.

81. GRMD has unequivocally admitted that all the amenities subject to the LPA ("LPA Amenities"), including the golf and ski facilities, were closed to the public between

[1] All defined terms used in this Cross-Motion and Opposition shall have the meaning set forth in the DSOF.

March 15, 2020 and June 16, 2020. Ex. 20, Pl.'s Resp. to Headwaters First Reqs. for Admis. ¶ 19. *See also* **Exhibit 29**, Excerpts of Deposition of GRMD Board President, Matt Girard, pp. 15, 206-208.

82. The ski resort usually does not close until April. **Exhibit 30,** Excerpts of Deposition Transcript of GRMD Board Vice-President, Glenn O'Flaherty, pp. 15, 128. *See also* Ex. 29, pp. 204 & 208. On March 14, 2020, the Governor of Colorado issued an executive order closing Colorado's ski resorts due to the COVID pandemic, and the ski resort at Granby Ranch was closed at that time or a few days later. Ex. 30, p. 127 and Ex. 29, p. 207. The ski facilities did not reopen until December 2020. Ex. 29, pp. 203-204.

83. On April 20 & 21, 2020, current GRMD Board Vice-President Glenn O'Flaherty, his wife Natascha O'Flaherty, and current GRMD President Matt Girard sent e-mails to Headwaters, attached as **Exhibits 31, 32 & 33,** which that included statements that no work was occurring on the golf course and that Headwaters' manager Granby Ranch Amenities ("GRA") had "abandoned" its contract. *See also* Ex. 29, pp. 212-220, Ex. 30, pp. 134-142. Ms. O'Flaherty and Mr. Girard called for Headwaters to terminate that contract based upon a provision (similar to § 10 of the LPA) allowing termination if the manager failed to operate the Amenities for more than 30 days. Exs. 32, 33. *See also*, GRA Management Agreement attached as **Exhibit 34**, § 6.1.

84. Lance Badger, a Headwaters' Board member in the Spring of 2020, testified that after GRH laid off staff following COVID and it became clear that GRH or GRA did not have the resources to open the golf course, no work was done on the course until Headwaters entered a new management agreement with Touchstone on June 1, 2020, which contract was funded

through the Receiver with funds from the lender. **Exhibit 35**, Excerpts of Deposition Transcript of Lance Badger, pp. 206-10, 272-277.

85. The golf course opened to the public for the 2020 season on or after June 16, 2020. Ex. 30**,** p. 132. Other golf courses in the area, including the nearby Grand Elk course, opened in April 2020. Exs. 31 & 32.

86. On November 11, 2020, Gray Jay (then owner of the LPA Amenities) notified Headwaters that to the extent the LPA was not terminated in the foreclosure, it was electing to terminate the LPA pursuant to § 10 due of the LPA. GR Terra Countercl. ¶ 100 and GRMD Answer. *See also* November 11, 2020 Letter attached as **Exhibit 36**.

87. Lance Badger served on GRMD's Board from 2004 to 2018 and Headwaters' Board from 2004 to 2020. **Exhibit 37**, GRMD Minutes at HWMD 20, GRMD 2719 and **Exhibit 38**, Headwaters Minutes, at HWMD 1050. He also worked as a consultant on the Granby Ranch development from 2003 to 2013 (Ex. 35, p. 53), then worked part or full time for GRH (or its affiliate GRA) from 2013 to through May of 2020. Ex. 35, pp. 51-58. After that, the Granby Ranch receiver hired him as a consultant through December 2020. *Id*., pp. 58-62.

88. Mr. Badger testified that the Amenity Fees paid under the 2005 and 2013 Resolutions and Agreements were not paid by the purchasers of the lots; he testified that upon an eligible lot sale, the Amenity Fee was paid to Headwaters by the seller, GRH with the possible exception of a large homebuilder that sold lots to individual buyers. Ex. 35, pp. 238-240. The Amenity Fee came out of the seller's proceeds on all the settlement sheets Badger saw over the years. *Id.,* p. 238. The price of the lots was not impacted by the Amenity Fee. *Id*. at 240.

89. Mr. Badger testified that the seller GRH paid the Amenity Fee when he purchased his home in Granby Ranch in 2006 and that his purchase price was not increased to account for the Amenity Fee. Ex. 35, p. 239.

90. Kyle Harris served on both GRMD and Headwaters' Boards from 2005 to 2016. Ex. 37 at HWMD 8446 & Ex. 38 at HWMD 65, 835. He was also employed by GRH as Director of Development from 2004 to 2016. **Exhibit 39**, Excerpts of Deposition of Kyle Harris, pp. 27, 95. Mr. Harris confirmed that upon the sale of a lot for which an Amenity fee was due, the contract price was set at the market rate without consideration for the Amenity Fee, and then the Amenity Fee was paid out of the proceeds that would otherwise go to the seller. *Id.,* pp. 213-216. The developer GRH paid the fee in all the situations he was aware of. *Id*. pp. 214-15.

Standard of Review

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, if any, establish that there is no genuine issue as to a material fact, and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Georg v. Metro Fixtures Contractors, Inc*., 178 P.3d 1209, 1212 (Colo. 2008). The moving party bears the initial burden of establishing the nonexistence of a genuine issue of material fact. *Cont'l Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987). This "initial burden of production may be satisfied by showing the court that there is an absence of evidence in the record to support the nonmoving party's case." *Id*. The burden then shifts to the non-moving party to establish a triable issue of fact. *Id*.

Argument

GRMD has failed to establish a right to judgment as a matter of law. Instead, GR Terra submits that the undisputed facts prove its right to summary judgment on these claims.

I. GR Terra, not GRMD is entitled to summary judgment on Count I because the undisputed facts establish that the LPA has been terminated.

GR Terra's first counterclaims requests a declaratory judgment that the LPA was terminated for three independent reasons: (1) it was extinguished in the 2020 Foreclosure; (ii) it was terminated based upon Headwaters' failure to appropriate rent; and (iii) it was terminated due to Headwaters' failure to operate for more than 30 days. To succeed on its motion, GRMD must demonstrating a right to judgment as a matter of law as to *each* of the three grounds. In contrast, as GR Terra is entitled to summary judgment on Count I if the undisputed facts establish that the LPA terminated for any one of the three alleged grounds.

A. The 2020 Foreclosure Terminated the LPA as a Matter of Law.

GRMD's motion does not challenge the validity of the 2020 Foreclosure. Nor does it challenge GR Terra's assertion that the 2005 Deed of Trust was senior and superior to the 2012 LPA. Rather, GRMD simply cites this Court's prior order declining to dismiss GRMD's claim to enforce the LPA. *See* Court's January 28, 2022 Order on GR Terra's Motion to Dismiss ("Order"). Based on this ruling, GRMD asserts that "by offering the LPA to the Court," GRMD has met its burden of showing that genuine issues of material fact are lacking proving its right to summary judgment. Motion, p. 12. It is wrong.

This Court's order denying GR Terra's motion to dismiss does not compel entry of summary judgment for GRMD. An order denying a motion to dismiss is an interlocutory order—

it is not final, and judicial findings made therein are subject to change. As one Colorado court succinctly stated:

> [T]he court rejects plaintiff's contention that the court has, in effect, decided the issues raised by this [summary judgment motion] in denying [defendant's] motion to dismiss for failure to state a claim based on substantially similar arguments. The procedural posture and standards for motions to dismiss for failure to state a claim and motions for summary judgment are materially different. The denial of the motion to dismiss has no legal impact on this motion.

Patnode v. Atlantis Cmty., Inc., et al., No. 05CV5954, 2007 WL 2455113 (Colo. Dist. Ct. Jan. 12, 2007).

Moreover, this Court's prior order only stated that covenants that run with the land "are not *necessarily* extinguished by a foreclosure." The Court did not determine that the LPA survived the foreclosure. It did not.

The 2020 Foreclosure followed the statutory process for nonjudicial foreclosures in C.R.S. § 38-38-100 *et seq*. DSOF ¶ 52. C.R.S. § 38-38-501 provides that 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 junior to the lien foreclosed." In interpreting statutes, a court's "primary mission is to give effect to the intent of the legislature." *State Dep't of Highways v. Mountain States Tel. & Tel. Co*., 869 P.2d 1289, 1290 (Colo. 1994). To determine legislative intent, the court first looks to the plain language of the statute. *Id.* If the statutory terms are clear and unambiguous, the court's inquiry is complete and the language should be applied as written. *Id.*

The LPA, executed in 2012, was junior and subordinate to the 2005 Deed of Trust. DSOF ¶¶ 6, 25, 31. Under the plain language of § 38-38-501 and governing Colorado law, Gray

Jay, the holder of the certificate of purchase upon expiration of the redemption rights, took title to the foreclosed property "free and clear" of the LPA on August 27, 2020. DSOF ¶¶ 51-55.

The prior version of Colorado's non-judicial foreclosure statute, substantively similar to the existing statute for all relevant purposes, contained a provision identical to § 38-38-501. In *First Interstate Bank v. Tanktech, Inc*., 864 P.2d 116, 119 (Colo. 1993), the Colorado Supreme Court granted certiorari to determine whether foreclosure of a senior deed of trust terminated a lease executed after the deed of trust. The Court determined that the phrase "free and clear," as used in the statute, meant that title to property "is not incumbered by any liens." *Id.* (citing the then current version of the statute). Noting that a property lessee is considered a lienor under Colorado law, the Court held that the purchaser at the foreclosure "received title 'free and clear' of the prior lease," and it reversed the court of appeals' decision to the extent it gave effect to the lease following foreclosure. *Id.*

The result is the same regardless of whether the junior lien contains covenants that run with the land. Under established Colorado law, lease covenants may run with the land to bind successors where the necessary privity and other prerequisites are established. *See Schaffer v. George*, 171 P. 881 (Colo. 1917) ("It is the accepted rule of law that covenants to pay rent and to yield up the premises in a required condition are covenants that run with the land . . . .").[2] Yet the Colorado Supreme Court did not consider that factor in holding that a lease is extinguished through foreclosure of a senior deed of trust. *First Interstate*, 864 P.2d at 119. To the contrary,

[2] GRMD asserts that the entire LPA is a covenant that runs with the land. DSOF ¶ 74. But Colorado law requires specificity when determining which parts of an agreement, if any, constitute a covenant running with the land. *See In re Extraction Oil & Gas, Inc*., 627 B.R. 199, 221 (Bankr. D. Del. 2020) (applying Colorado law) ("The Court conducts a covenant-by-covenant analysis regarding whether each covenant runs with the land . . .").

it pointed out that under Colorado's foreclosure statute, "a property lessee is considered a lienor under Colorado law," citing the former section that, as the court noted, has been reenacted as § 38-38-305 (1993 Supp.), which currently states, "[f]or purposes of this article, a lessee of, or the holder of an easement encumbering, property shall be considered as a lienor . . . ." *Id.* at 119 n.4. Thus, upon expiration of the redemption period without redemption, the purchaser takes title "free and clear" of any junior subordinate liens or encumbrances, including any subordinate leases. *Id.* (citing former version of § 38-38-501).

The Colorado Supreme Court enforced the statutory language, broadly stating that "upon foreclosure of a senior security interest, any subordinate leases, liens or encumbrances are extinguished" once the statutory redemption period has expired. *Id.* The Court emphasized that any other conclusion would nullify the "plain intent" of the statute, noting that its purpose is to allow transferees to rely upon the state of record title and render title to real property secure and marketable. *Id.* (citing cases).

First Interstate is dispositive and demands the same result here. *Accord Land Title Ins. Corp. v. Ameriquest Mortg. Co*., 207 P.3d 141, 146 (Colo. 2009) (reasonable purchaser at foreclosure entitled to rely upon record title and to conclude that junior lien will be extinguished through foreclosure upon expiration of the redemption period); *Green Tree Servicing, LLC v. U.S. Bank*, 192 P.3d 1014, 1019 (Colo. App. 2007) (when redemption period expires and public trustee deed issued, all junior liens are extinguished as a matter of law). *See, e.g., Flrd #2 v. V*., 2019 Colo. Dist. LEXIS 5027, *7 (El Paso Cty. Dist. Ct., May 15, 2019) (junior lease extinguished by foreclosure of senior deeds of trust).

In *Town of Grand Lake v. Lanzi*, 937 P.2d 785 (Colo. App. 1997), the Colorado Supreme Court squarely addressed the impact of a foreclosure on covenants that run with the land. In that case, a property owner and the Town entered a parking agreement that was recorded in the land records and stated that it was a covenant appurtenant to the subject property. *Id.* at 786. A "covenant appurtenant" is defined as a "covenant running with the land." BLACK'S LAW DICT. (11th Ed.). Citing *First Interstate* and the former version of § 38-38-501, the court held that foreclosure of a senior deed of trust extinguished the parking agreement, regardless of whether the purchaser was aware of the agreement prior to his purchase. *Id.* at 788. The court made no exception based upon the status of the agreement as an appurtenant covenant.[3]

GRMD's reliance on *Schwab v. Martin*, 441 P.2d 17, 19 (Colo. 1968) and *Top Rail Ranch Estates, LLC v. Walker*, 327 P.3d 321 (Colo. App. 2014) is misplaced. In *Schwab*, the Colorado Supreme Court simply held that following foreclosure of certain deeds of trust, the purchasers at the foreclosure sale had the right to seek appointment of a receiver for the protection of the property under the terms of the subject deeds of trust. 441 P. 2d at 19-20. The case is inapposite because the contractual provisions at issue were not junior or subordinate to the deeds of trust that were foreclosed upon. The agreements were contained in the same deeds of trust that gave rise to the foreclosure. The Court merely held that the provision authorizing

[3] Although the Court previously indicated that neither *First Interstate* nor *Lanzi* "involve[d] foreclosure of a property subject to a covenant running with the land under C.R.S. § 38-38-501," those cases were decided under the prior version of the current statute, § 38-39-110, which is substantively identical to § 38-38-501. When citing the prior nonjudicial foreclosure statute, *Lanzi* also expressly cited § 38-38-501 and described it as the "substantially similar statute now in effect." 937 P.2d at 787. Moreover, as set forth above, both of those cases dealt with the foreclosure of covenants that ran with the land; expressly in *Lanzi* with respect to the parking agreement and implicitly in *First Interstate* due to the nature of leasehold covenants.

appointment of a receiver, designed to protect the beneficiary from loss of value in the event of such a foreclosure, remained operative as a contract between the parties and enforceable against the beneficiary who signed the contract. *Id.* at 19. In other words, the borrower contracted for provisions in the deeds of trust that, by their nature, would survive the foreclosure and be enforceable by the purchaser at the foreclosure sale.

In *Top Rail*, a borrower executed a deed of trust to the seller of property to secure a promissory note for the purchase price. 327 P.3d at 325. The borrower then obtained a bank loan, and the seller agreed to subordinate its deed of trust to the bank's lien. The bank foreclosed on its lien, and the seller exercised its right to redeem based upon its junior deed of trust and obtained title to the property. *Id.* On appeal, the court held that the seller had the right to enforce a provision in its deed of trust that allowed it to pay off other liens imposed on the property after execution of the deed of trust and to seek reimbursement from the borrower. *Id.* at 327.

Again, this case is inapposite. The seller holding the deed of trust with the contractual provisions at issue exercised its right to redeem and pay the debt on the property. Thus, the court held that even if the security interest under the seller's deed of trust was extinguished (because the debt was paid), the beneficiary who redeemed the property had the right to enforce provisions in the deed of trust agreed to by the borrower for the protection of the beneficiary and applicable in the event of foreclosure. *Id.*

In both cases, the courts merely enforced contractual provisions in deeds of trust against borrowers who agreed to those provisions for the benefit of the holder of the deed of trust. This is a very different scenario than subjecting a foreclosing party to a covenant imposed by the borrower after the deed of trust was recorded. The Colorado courts have not extended these

holdings beyond the context of contractual provisions in deeds of trust. *Lanzi* squarely establishes that the foreclosure of a senior deed of trust extinguishes junior covenants under Colorado law.

Any contrary holding would contravene this governing authority and the plain language of C.R.S. § 38-38-501. And it would directly undermine the statute's purpose of rendering title to real property secure and marketable and allowing transferees to rely upon record title. The statute creates a bright-line rule to guide those purchasing, insuring, and financing real property following a Colorado foreclosure: a senior deed of trust eliminates junior encumbrances. If that rule is subject to modification because the junior encumbrance might contain a covenant running with the land, it would be difficult (if not impossible) for potential purchasers, lenders or insurers to assess the status of title to foreclosed property without litigation. This would create confusion and destroy the market for any property that has been subject to a foreclosure, the precise result § 38-38-501 is designed to avoid.

Moreover, a ruling that a property owner can unilaterally encumber its property with restrictive covenants, options to purchase, leases, or other agreements that run with the land – and that such agreements would be binding upon the holder of a senior deed of trust following foreclosure – would cripple the real estate market for any property in Colorado. What lender would agree to finance the purchase of land if the borrower could thereafter bind the lender in the event of foreclosure to, for example, an option to sell the property for $1.00, a long-term lease with nominal rent, or a covenant that restricts all valuable use of the property? The borrower would have the unilateral right to destroy the value of the security after the loan is

given and deed of trust recorded. Such a ruling would have a devastating impact upon the market for both residential and commercial real estate in Colorado.

Undoubtedly for these reasons, *Lanzi* demonstrates that Colorado follows the general rule that easements, restrictive covenants and other servitudes are extinguished by foreclosure of senior lien. *See, e.g.*, *Gray v. Shepard*, 505 S.W.3d 317, 320 (Mo. App. 2016) (foreclosure of a senior deed of trust extinguishes junior covenants and equitable servitudes burdening the real property because purchase at foreclosure 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 was not subject to restrictive covenants because its mortgage was recorded before the covenants); *Mortg. 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) (disapproved of on other grounds in *Reynolds Metals Co. v. Alperson*, 599 P.2d 83 (Cal.1979)); *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*, 189 Md. 10, 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).

To the extent the Court has concerns relating to the impact of the foreclosure on the purchase option in the LPA, those concerns are addressed by the plain language of the Colorado foreclosure statute. Under the statute, even a vendee's rights under a junior installment land contract (which the LPA is not) are extinguished if the vendee fails to exercise its right to redeem. C.R.S. § 38-38-305(3). *See also Paraguay Place-View Tr. v. Gray*, 981 P.2d 681, 683 (Colo. App. 1999). If a vendee's rights under an installment land contract are terminated via foreclosure, it is axiomatic that a lessee's junior purchase option is so terminated.

B. Headwaters' Failure to Appropriate Rent Terminated the LPA.

Alternatively, the undisputed facts establish that the LPA terminated under its own terms at the end of 2020 when Headwaters failed to appropriate rent for the 2021 lease year. As GRMD acknowledges, § 2 of the LPA stated that it terminates upon the expiration of the original one-year term or any one-year renewal term "due to the failure of Tenant [Headwaters] to appropriate Amenity Fees to be paid pursuant to the terms of the Lease." GRMD Motion, p. 8; *see also* DSOF 29. Neither the LPA nor governing law limits the discretion of Headwaters' Board with respect to the annual appropriation of funds to pay rent under the LPA; any attempt to impose such a restriction would render the LPA null and void.

The Colorado Constitution requires voter approval in advance of the "creation of any multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever." Colo. Const. art. X, § 20, cl. (4)(b). *See also* art. XI, § 6. Therefore, the Colorado courts find multi-year contracts entered by a government body invalid unless the legislative body retains

unfettered discretion to choose not to appropriate funds in any year of the contract. *Black v. First Fed. Sav. and Loan Ass'n of Fargo, N.D., F.A.*, 830 P.2d 1103 (Colo. App. 1992). "Constitutionally prohibited debt is created when one legislature, in effect, obligates a future legislature to appropriate funds to discharge the debt created by the first legislature." *Id.* at 1110 (internal quotations omitted). On the other hand, "[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. If nothing in the agreement limits the discretion of the legislative body, there is no debt by loan." *Id.*

The Colorado Supreme Court has consistently applied this analysis to multi-year lease-purchase agreements, finding such agreements valid only when the legislative body retains discretion to elect not to appropriate funds for future rent payments and the agreement terminates with no further obligation in that scenario:

- *Glennon Heights, Inc. v. Cent. Bank & Tr.*, 658 P.2d 872, 879 (Colo. 1983) ("The agreement provides that the Department of Institutions will use its 'best efforts' to obtain funding every year for the rent payments, but that the appropriation of funds is a legislative act beyond the control of the department. Renewal of each lease term is specifically tied to appropriation of sufficient funds, and the lease terminates with no further obligation of the department if funds are not available. Nothing in the agreement limits the discretion of the legislature.") (footnote omitted).
- *Gude v. City of Lakewood*, 636 P.2d 691 (Colo. 1981) (rent-to-own financing plan in the form of lease purchase agreement for new municipal office building did not create general obligation debt requiring voter approval because funds were to be

allocated annually at the city's discretion, and the future governing body was not obligated to appropriate funds to discharge the debt).

The intentions and expectations of the parties cannot impose limits on this discretionary authority. In *Glennon Heights*, the lease-purchase agreement – just like the LPA – provided that the lease would automatically renew for one-year terms upon appropriation of sufficient funds to meet rental payments and terminated if not so renewed. 658 P.2d at 874. Affirming summary judgment for the defendants, the Court held that the bank had "no legally enforceable right to require the general assembly to appropriate sufficient funds for renewal of the lease term every year or to require the state to exercise its option to purchase." *Id.* at 879. The Court noted the plaintiffs' argument that nonrenewal of the lease would ruin the credit of the state and force relocation of the disabled residents, but held that those concerns "do not commit revenues available to future legislatures to the payment of rentals under the lease." *Id.* The agreement passed constitutional muster because "[n]othing in the agreement limits the discretion of the legislature." *Id.*

Similarly, in *Bd. of County Comm'rs of the County of Boulder v. Dougherty*, 890 P.2d 199 (Colo. App. 1994) (overruled on other grounds by *In re Submission of Interrogatories on H.B. 99–1325*, 979 P.2d 549 (Colo. 1999)), the County entered into an equipment lease-purchase agreement with a bank pursuant to which the bank agreed to purchase a road grader and lease it to the County for an initial term of eight months with four additional one-year renewal terms. 890 P.2d at 201. At the conclusion of the final renewal term, the County had the option to purchase the grader at no additional cost. *Id.* The Court held that the agreement did not create a multi-year fiscal obligation in violation of the Colorado Constitution because the County was not

obligated to exercise its discretion to appropriate funds in future years, regardless of the parties' expectations:

> There can be very little doubt that [bank] contemplates receiving, and the County contemplates paying, rental payments in future years. It is equally clear that [bank] does not wish to own a road grader which is of very little use in the investment banking business. [Bank] may even consider its ultimate ownership of the road grader as the breach of an understanding. All of this is, or may be, true, but it is equally true that [bank] is amply advised in clear and unequivocal language that such an outcome is a distinct possibility . . . .

Id. at 208. The agreement was constitutional because the bank could not compel the County to perform in future fiscal years or respond in damages for failure to appropriate. *Id.*

Colorado statute contains a corollary to the Constitutional provisions, which invalidates a government body's multiple year contracts if not subject to annual appropriation. C.R.S. § 29-1-110. The statute conditions contractual validity on prior appropriation of funds for the year in which the contract was entered into and any subsequent years. *Falcon Broadband, Inc. v. Banning Lewis Ranch Metro. Dist. No. 1*, 474 P.3d 1231, 1240 (Colo. App. 2018) (metro district contract that required metro district to pay funds in future years regardless of appropriations was void under § 29-1-110).

The LPA clearly stated the parties' intent to comply with these restrictions, DSOF ¶ 27, Ex. 13, § 3(c), and it provides that the lease would terminate at the end of any one-year term if Headwaters failed to appropriate rent in successive lease years. DSOF ¶¶ 27, 29. Had it not done so, the LPA would have been void. Instead, as made clear in the approving resolution and

the LPA itself, that contract did not "place the District under an *economic* or *practical* compulsion to appropriate moneys to make payments under the Lease . . . ." DSOF ¶ 24.[4]

Headwaters' Board did not appropriate funds for rent for the lease years commencing 2021 through 2023. DSOF ¶¶ 57-64. GRMD does not dispute that fact. Rather, GRMD's motion is based solely on the contention that Headwaters did not follow "prerequisites" to terminate the LPA, referring to language in § 3 that the chairman or president of Headwaters would periodically request funds to be appropriated for rent. GRMD Motion, p. 8. The LPA does not make that process a prerequisite to termination. Instead, § 2 plainly states that the LPA automatically terminates if Headwaters "fails" to appropriate rent for lease payments prior to the expiration of any Renewal Term. Imposing a condition on termination of government contracts for nonappropriation would violate the Colorado Constitution by allowing a party to compel a government body's performance for years in which the requisite appropriate was not made.

In any event, GRMD's motion ignores Headwaters' records, provided to GRMD in discovery before it filed the instant motion, which establish that Headwaters' Board followed the process in § 3 with respect to the 2022 and 2023 budgets. For those years, the Board 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. DSOF ¶¶ 58-64.

GRMD's citation to *City of Golden v. Parker*, 138 P.3d 285 (Colo. 2006) does not advance its argument. In that case, the court held that developers had vested rights to have the

[4] Notably, GRMD has recently taken the position that a contract with Headwaters containing similar language allowing termination based upon a district's failure to appropriate funds in successive years terminated when GRMD's failed to appropriate funds after 2019. DSOF ¶¶ 65-67. GRMD cannot dispute the unequivocal consequences of Headwaters' failure to appropriate funds for rent under the LPA.

City Council consider appropriations under development agreements that were entered before a City's Charter Amendment that required voter approval to grant development subsidies, an amendment that would have defeated the ability of the City Council to appropriate funds to the developers. *Id.* at 291-94. That is not the situation in this case. GRMD has no rights under the LPA, much less any vested rights. And the potential that the LPA might be terminated for nonappropriation was contemplated in the LPA when first enacted. In fact, the Colorado Supreme Court noted in *Golden* that "there is no obligation that Golden make payments to the Developers in any single year." *Id.* at 295. "Golden may well have contracted with the intent to make appropriations under the Agreements every year and the Developers may well expect to receive reimbursement payments every year, but ultimately the language of the Agreements leaves the matter to the discretion of the City Council." *Id.*

C. The LPA Was Terminated Based on Headwaters' Failure To Operate.

To the extent still in existence, Gray Jay properly terminated the LPA in November of 2020 under § 10 because Headwaters failed to operate the Amenities on the Leased Premises for more than 30 days. GRMD admits that the LPA Amenities were not open to the public for some 90 days between March 15, 2020 and June 16, 2020. DSOF ¶ 81. That simple, uncontested fact proves that Gray Jay properly terminated the LPA.

The LPA does not define "operate," but when determining the plain and ordinary meaning of words, Colorado courts may consider definitions in a recognized dictionary. *Renfandt v. N.Y. Life Ins. Co.*, 419 P.3d 576, 580 (Colo. 2018). "Operate" as a transitive verb means "to put or keep in operation" and "operation" means "the quality or state of being functional or operative." Operate & Operation, Merriam-Webster, https://www.merriam-

webster.com/dictionary/operation (last visited October 20, 2022). A ski resort is functional or operative when it is open for customers to ski. A golf course is functional or operative when it is open for customers to golf. Neither are "operating" when they are not available for use or generating revenues for their intended purpose. *See Regal Cinemas, Inc. v. Town of Culpeper*, No. 3:21-CV-4, 2021 WL 2953679 (W.D. Va. July 14, 2021) (movie theater ceased operations within meaning of lease provision authorizing termination when it closed to the public in the wake of Covid even if tenant conducted maintenance on the premises during that time).

GRMD's current President publicly advocated for termination of Headwaters' management agreement with GRA based upon his contention that the LPA Amenities had not been operated for more than 30 days, justifying termination under a provision of the management agreement that is virtually identical § 10 of the LPA. Ex. 29, pp. 214-220. His April 21, 2020, e-mail to Headwaters stated:

> I would therefore request that the Headwaters board consider terminating the management agreement immediately . . . in that GRA has ceased to operate the golf Amenity as required under the agreement, as any reasonable person would interpret the fact that GRA having no staff working and no intention to hire staff to work on opening the golf course, as for all practical purposes, "ceasing operations", and have already done so for a period of 30 days.

DSOF ¶ 83, Ex. 33.

In an attempt to avoid this admission, GRMD now asserts that Headwaters' 2021 Budget Resolution shows "Golf course revenue" and expenditures for "Golf course operations" during the entire 2020 calendar year. *See* GRMD Motion, Ex. B. Since that document does not identify when in 2020 the expenditures were incurred or revenues generated, it does not create a genuine dispute of fact regarding the timing of golf course operations in 2020. There is no dispute that the golf course did not began operations until at least June 16, 2020. DSOF ¶ 85.

GRMD also cites e-mails from Mike Oveson, golf course superintendent, to the O'Flahertys in May of 2020 outlining work and equipment needed to prepare the golf course for opening. GRMD claims that maintenance constitutes operations. For the reasons set forth above, GR Terra disagrees and asserts that it is entitled to summary judgment based upon the undisputed fact that the LPA Amenities were not open for use to the public for some 90 days. Moreover, Mr. Oveson's e-mail acknowledges that staff was not hired back after the Covid shut down until April 23, 2020, which is still more than 30 days after the mid-March shutdown. GRMD Motion, Ex. B. at GRMD 10685.

At a minimum, if the Court determines that maintenance work constitutes operations, there is an issue of fact defeating GRMD's right to summary judgment. Specifically, the record does not establish what, if any, work was undertaken between March and June of 2020 and whether that work was undertaken at the direction and the expense of Headwaters (or its prior operator). Mr. O'Flaherty admitted that he did not know who Mr. Oveson worked for in the Spring of 2020 or who was paying him. Ex. 30, pp. 143-145. The hearsay statements in Mr. Oveson's e-mail are not sufficient to prove that Headwaters was continuing to operate the LPA Amenities, especially when contradicted by Mr. Badger's testimony that Headwaters undertook no work on the course until it retained Touchstone on June 1, 2020 and Mr. Girard's admissions that the operator, GRA, had "abandoned" it management contract with Headwaters. DSOF ¶¶ 83, 85.

Finally, GRMD alleges that Gray Jay's notice of the termination was not provided within ten days after the Tenant ceases operations. This is a red herring; § 10 simply requires at least 10 days' advance notice of termination to Headwaters. Ex. 13, § 10. Gray Jay complied with that

provision stating that the LPA would terminate 11 days after receipt of notice. Ex. 36. The LPA further states that the notice "may" be given within 10 days' after Headwaters ceases operation. This is permissive not mandatory language and thus does not invalidate Gray Jay's notice. *Wu v. Good*, 720 P.2d 1005, 1008 (Colo. App. 1986) (holding that the word "may" in a contract notice provision implies a permissive remedy and does not bar sellers from seeking other remedies).[5]

Because the LPA was terminated by one or more of the three reasons alleged by GR Terra, this Court should deny GRMD's Motion and enter summary judgment in favor of GR Terra. At most, the record creates an issue of fact with respect to termination of the LPA under § 10, but this Court need not decide that issue if the LPA terminated for an independent reason.

II. GR Terra, not GRMD is entitled to summary judgment on Count II.

Count II of GR Terra's Counterclaims requests that the Court exercise its equitable power to remove any surviving restrictive covenants in the LPA enforceable by GRMD based upon changed circumstances. Colorado law recognizes that courts, sitting in equity, have the power to remove or cancel restrictive covenants as clouds on title; such power may be exercised when, as here, 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. *See Zavislak v. Shipman*, 362 P.2d 1053, 1088 (Colo. 1961) (modifying restrictive covenant based upon evidence of changed circumstances demonstrating that and the enforcement of a restrictive covenant would impose an oppressive burden without any substantial benefit); *Moore & Assocs. Realty, Inc. v. Arrowhead at Vail*, 892 P. 2d 367, 372 (Colo. App. 1994) (waiver of an express provision in an

[5] Moreover, it would be nonsensical for the LPA to require that the notice be provided within 10 days' of the tenant ceasing operations given that the landlord does not have the right to terminate until the tenant has ceased to operate for more than 30 days.

agreement may be implied if party engages in conduct that manifests an intent to relinquish rights or privileges or acts inconsistently with its assertion of a right and as such presents an issue of fact.).

Even if the LPA created restrictive covenants to designed to directly benefit GRMD (which GR Terra disputes), the circumstances supporting GRMD's alleged right to enforce such covenants changed based upon events that occurred between 2016 and 2018. Specifically, in exchange for valuable consideration to GRMD – including GRH's relinquishment of any right to payment on some $11 million in GRMD bonds then held solely by GRH – GRMD, Headwaters and GRH all agreed to terminate the relationship between Headwaters and GRMD, agreed that those entities would operate independently of one another, and provided broad waivers and releases to one another of any claims based upon their prior relationships and Master IGA. The facts establishing these changed circumstances are set forth at DSOF ¶¶ 32-50. To the extent any covenants in the LPA ever ran in favor of GRMD, those covenants no longer serve their purpose because Headwaters has no obligation to acquire the Leased Premises on GRMD's behalf.

GRMD's Motion ignores GR Terra's asserted grounds for relief and does not present any facts or legal arguments supporting its alleged right to judgment as a matter of law. This Court should summarily deny GRMD's motion and enter summary judgment in favor of GR Terra.

III. GR Terra, Not GRMD, is entitled to summary judgment on Count III.

Count III of GR Terra's Counterclaims seeks relief under C.R.C.P. § 105(a), requesting that the Court enter judgment quieting title of the former Leased Premises in GR Terra free and clear of any right, title or interest under the LPA for the reasons set forth in Counts I and II. GRMD does not present any additional legal or factual basis for summary judgment on this

claim. For the reasons set forth above, this Court should deny GRMD's Motion and grant summary judgment in favor of GR Terra.

Conclusion

Though not asserted as a ground for summary judgment, GRMD asserts that summary judgment in its favor "will lead to a just result" because GR Terra seeks to retain the benefit of facilities funded by Amenity Fees "without restitution for the benefit of those lot owners who paid the Amenity Fees." Motion, p. 14. This assertion is not material to either party's motions for summary judgment. The claims turn upon the various agreements entered by the parties over the years and the legal principles set forth above and in the motions for summary judgment filed by GR Terra and Headwaters. A litigant's one-sided notion of equity cannot overcome the plain language of those agreements or resurrect terminated agreements, and it certainly is not grounds for summary judgment.

In any event, GRMD's equitable argument is defeated by the facts. GRMD admits that the ski and golf amenities included in the LPA were not built with any funds from GRMD, whether taxes, bond proceeds, or Amenity Fees. DSOF ¶ 9. Those facilities were constructed with private funds before GRMD and Headwaters were even created. DSOF ¶ 9. GRMD agrees, but nonetheless speculates that some of the rent paid by Headwaters to GRH may have been invested in the LPA Amenities. Ex. 20, Requests for Admission, ¶¶ 1-4. It has produced no evidence to support that speculation.

There were no restrictions on GRH's use of rental income; GRH was free to use those funds for the overall Granby Ranch development, including reduction of the debt on that entire property. Ex. 34, at 242-243. More importantly, GRH's use of the rent payments is not relevant.

The LPA and payment of the Amenity Fees as rent gave Headwaters possession of the LPA Amenities and the right to ensure their availability for public use. GRMD residents, along with the public, incidentally benefitted from Headwaters' rent payments regardless of any potential acquisition of title.

Finally, there is no evidence that GRMD residents in fact paid the Amenity Fees. Two long-term former board members of both GRMD and Headwaters (and former employees of GRH) testified that Amenity Fees were always paid by the seller, as opposed to the buyer, upon the first sale to an end user. DSOF ¶¶ 87-90. The seller was the developer GRH (with the possible exception of a homebuilder that sold homes on land previously acquired from GRH). *Id*. Thus, contrary to GRMD's claim, its property owners received the benefit of those payments without any of the burden.

GRMD's Motion should be denied. GR Terra respectfully requests that this Court enter judgment in its favor on Counts I – III of its Counterclaims.

Dated this 8th day of February, 2023.

HUSCH BLACKWELL LLP

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

Attorneys for Headwaters Metropolitan District and GR Terra LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANT GR TERRA'S CROSS-MOTION AND OPPOSITION TO PLAINTIFF'S RENEWED MOTION FOR SUMMARY JUDGMENT ON COUNTS I, II, AND III OF DEFENDANT GR TERRA'S COUNTERCLAIMS TO THIRD AMENDED COMPLAINT** was served via the Colorado Courts e-filing system on February 8, 2023, addressed to the following:

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

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

/s/ Ann Stolfa
Senior Paralegal