DATE FILED: January 25, 2023 8:23 PM
FILING ID: E4A189BB8440D
CASE NUMBER: 2021CV30008

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	▲ ***COURT USE ONLY*** ▲ Case No. 2021CV30008 Division 1

DEFENDANT GR TERRA'S MOTION FOR SUMMARY JUDGMENT ON COUNTS IV, V AND VI OF THE THIRD AMENDED COMPLAINT

Defendant GR Terra, LLC ("GR Terra") submits this motion for summary judgment on Counts IV, V and VI of Plaintiffs' Third Amended Complaint ("Amended Complaint").

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.

Introduction

GR Terra and an affiliate purchased portions of the stalled Granby Ranch development in May of 2021. Since that time, while investing in the infrastructure for the benefit of the entire Granby Ranch community, GR Terra has also been defending the misguided claims asserted in this litigation. The claims against GR Terra seek to reinstate a terminated lease purchase agreement against a portion of GR Terra's property and/or seek damages for alleged breach of that agreement. Though the development has a long and complex history, this case turns on straightforward principles of Colorado real estate and contract law. And that Colorado law, applied to the undisputed facts, compel summary judgment on the claims against GR Terra.[1]

Counts V and VI of the Amended Complaint seek a declaration that a portion of the ski and golf facilities now owned by GR Terra remain are subject to a lease purchase agreement (LPA) executed in December of 2012 by the prior owner of the property, as landlord, and Headwaters Metropolitan District ("Headwaters"), as tenant. Colorado law defeats both claims.

First, foreclosure of a senior deed of trust extinguished the LPA as a matter of law, and the purchaser following the foreclosure took the property free and clear of that interest. This conclusion is mandated by the plain language of Colorado's nonjudicial foreclosure statute and decisions from the Colorado Supreme Court (decided under the identical language in the prior statute), which confirm that foreclosure of a senior security interest extinguishes subordinate leases, liens or encumbrances upon expiration of the redemption period. It makes no difference whether the junior interest contains a covenant running with the land; a junior covenant is

[1] The claims should be dismissed for the initial reason that GRMD lacks standing. This argument is set forth in Defendants' Renewed Motion to Dismiss for Lack of Standing filed herewith.

extinguished in the same manner as all other junior encumbrances. Any other result would contravene the plain statutory language, undermine the statute's purpose of rendering title to real property secure and marketable, and cripple – or even halt – the financing, sale and development of Colorado property.

Second, if not previously extinguished, the LPA terminated by its own terms on December 31, 2020 based upon Headwaters' failure to appropriate funds for rent payments. The LPA clearly stated that it would terminate at the end of any one-year term if Headwaters' legislative body did not appropriate rent for the following lease year. Any attempt to restrict the unfettered discretion of the Headwaters' Board not to appropriate rent for future lease years would render the LPA void under Colorado law. Such restrictions cannot be read into the LPA without defeating its validity at the outset. Thus, the extent it still existed at the time, Headwaters' failure to appropriate funds for payment of rent for the 2021 lease year terminated the lease on December 31, 2020 as a matter of law.

Count IV of GRMD's Amended Complaint asserts that GR Terra breached the LPA by failing to recognize the lease and refusing to act as landlord. GRMD cannot establish such breach because, as set forth above, the LPA terminated months before GR Terra acquired title. In addition, the parties to the LPA treated it as terminated before GR Terra ever took title. Since that time, Headwaters has never tried to perform any of the tenant's obligations under the LPA or demanded any performance by GR Terra. ***If*** the Court determines that the LPA was not terminated and a final judgment is so entered, GR Terra must be given the opportunity to perform before it is declared in breach.

Statement of Undisputed Facts

All Defendants have filed a joint statement of undisputed facts in support of their respective summary judgment motions (referred to herein as "DSOF").[2] These facts and exhibits are incorporated herein by this reference. In particular, the facts set forth in DSOF paragraphs 1, 21-31, 51-75, 78-79 are material to this motion.

Standard for Granting of Summary Judgment

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 informing the court of the basis for the motion and 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.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)).

Once the moving party has met this initial burden of production, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. *Id.* If the nonmoving party cannot muster sufficient evidence to make out a triable issue of fact on his claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law. *Id.* (citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986)).

A defendant is entitled to summary judgment when it proves that the plaintiff cannot

[2] All defined terms used in this Motion shall have the meaning set forth in the DSOF.

establish essential elements of its claim or that a defense asserted by defendant entitles it to judgment as a matter of law. *See Gibbons v. Ludlow*, 304 P.3d 239, 245 (Colo. 2013).

I. GRMD's Claim Against GR Terra for Declaratory Relief (Count VI) Fails As A Matter Of Law Because The 2020 Foreclosure Terminated The LPA, Regardless Of Whether The LPA Contained Covenants That Ran With The Land.

GRMD's sixth claim for relief, asserted against all Defendants, seeks a declaration that the LPA is a restrictive covenant that has not been terminated by foreclosure and invokes the Court's injunctive powers to enforce the LPA. An essential element of this claim is GRMD's ability to prove that the LPA is currently capable of enforcement. GRMD cannot establish a right to this relief because even if the LPA constituted a covenant that ran with the land (or contained such covenants), the 2020 Foreclosure eliminated the LPA as a matter of law. The 2020 Foreclosure under the 2005 Deed of Trust followed the statutory process for nonjudicial foreclosures in C.R.S. § 38-38-100 *et seq*. DSOF ¶ 52. GRMD has not asserted any challenge to the foreclosure itself.

Section 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.*

Here, the clear statutory language compels the conclusion that the 2020 Foreclosure extinguished the LPA. 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. As such, GRMD cannot establish a right to the declaratory relief it seeks.

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.*

This Court previously addressed the impact of the 2020 Foreclosure in conjunction with Defendants' motion to dismiss an earlier version of GRMD's declaratory judgment claim. At that time, this Court stated that "a covenant running with the land is not *necessarily* extinguished by foreclosure." Order granting in part the Private Defendant's Motion to Dismiss dated January 28, 2022, p. 18 (hereinafter "Order"), p. 8 (emphasis added). As set forth below, the cases cited by this Court are not applicable here. There is no support in Colorado law for the

proposition that a junior lien survives a foreclosure just because it contains covenants that run with the land. The controlling law establishes the opposite.

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 . . . .").[3] 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, 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 § 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

[3] GRMD asserts that the entire LPA is a covenant that runs with the land. DSOF ¶ 74. 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 . . ."). This Court need not decide what, if any, agreements in the LPA ran with the land because the entire agreement terminated upon foreclosure.

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 then § 38-39-110, the court held that foreclosure of a deed of trust recorded prior to the parking agreement extinguished the parking agreement. *Id.* at 788. The court held that the parking agreement was therefore not binding on the purchaser following the foreclosure, regardless of whether the purchaser was aware of the agreement prior to his purchase. *Id.* The court did not engage in any particular analysis of the impact of the foreclosure

on the covenant because it was not necessary; the covenant was a junior lien and thus extinguished under the plain language of the Colorado foreclosure statute.[4]

This Court's prior order cited two cases in support of its conclusion that a covenant is not *necessarily* terminated via foreclosure: *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). These cases do not create any broad exception to the general rule that junior liens and covenants are eliminated by foreclosure of a senior deed of trust. Nor do they turn upon the nature of the contractual provisions as covenants that run with the land. They are based upon narrow circumstances wherein a lender or the lender's successor is allowed to enforce contractual provisions in deeds of trust against borrowers who agreed to those provisions for the lender's benefit.

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 appointment of a receiver, designed to protect the beneficiary from loss of

[4] 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.

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 in this case 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 C.R.S. § 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 (covenants running with the land) are extinguished by foreclosure of a lien if the lien was created prior to the servitude. *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's prior reluctance to decide this issue rested on 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). *See* section II below. 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.

II. GRMD's Claim For Declaratory Relief (Count V) Fails As A Matter Of Law Because The 2020 Foreclosure Terminated The LPA In That (A) The LPA Did Not Constitute An Installment Land Contract And (B) Even If It Did, That Interest Was Junior To The Deed of Trust And Eliminated In The Foreclosure.

Count V of the Amended Complaint asks this Court to declare that the LPA was not terminated through the foreclosure because it was an installment land contract. This Court previously rejected GRMD's argument that the LPA constituted an installment land contract. *See* Order granting in part the Motion to Dismiss of Gray Jay Ventures, et al. dated January 28, 2022, pp. 19-21. The Court further recognized that even if the LPA was an installment land contract, it was terminated by the foreclosure because the alleged vendee (Headwaters) did not exercise its right of redemption. *Id.* at 20.

GRMD's Amended Complaint states that, based upon the Court's prior ruling, this claim "is pled solely to preserve any right to appeal that Plaintiff may have." Am. Compl., ¶ 79. This statement indicates that GRMD is not challenging this Court's prior ruling on this issue. Therefore, GR Terra will rely upon the prior briefing submitted by Defendants with their motion

to dismiss and the Court's order thereon. To the extent GRMD challenges the Court's prior ruling in its response, GR Terra reserves the right to address those arguments in its reply.

III. Alternatively, GRMD's Claims For Declaratory Relief (Counts V and VI) Fail As A Matter Of Law Because The LPA Has Been Terminated In That Headwaters' Board Did Not Appropriate Rent Payments For Lease Years 2021 to 2023.

Section 2 of the LPA states that its "Original Term" shall terminate at the end of the current fiscal year, but that the "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 Tenant elects not to appropriate funds to pay amounts due under this Lease as set forth in Section 3.c." DSOF ¶ 27, Ex. 13 (emphasis added). That Section further states that the LPA automatically terminates upon the earliest of delineated events, the first of which is "The expiration of the Original or Renewal Terms 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 . . . ." DSOF ¶ 29, Ex. 13 (emphasis added).

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 override constitutional commands or impose limits on 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 limits a governmental entity's power to contract without a prior appropriation of funds:

> (1) During the fiscal year, no officer, employee, or other spending agency shall expend or contract to expend any money, or incur any liability, or enter into any contract which, by its terms, involves the expenditures of money in excess of the amounts appropriated. Any contract, verbal or written, made in violation of this section shall be void, and no moneys belonging to a local government shall be paid on such contract.
> (2) Multiple-year contracts may be entered into where allowed by law or if subject to annual appropriation.

C.R.S. § 29-1-110. This 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. GRH and Headwaters agreed in the LPA:

> [T]he 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.

DSOF ¶ 27, Ex. 13, § 3(c). The LPA clearly and unequivocally conditioned renewal of the lease following the initial lease year on annual appropriations of rent for each lease year following 2012. DSOF ¶¶ 27, 29. And it provided that the lease would automatically terminate at the end of any one-year term if Headwaters failed to appropriate funds for to pay rent in successive lease years. *Id.* Had it not done so, the LPA would have been void under the Colorado Constitution and § 29-1-110 and GRMD's claim for equitable relief would be barred on that ground alone.

Instead, as made clear in the Resolution of Headwaters' Board approving the LPA, its terms did not "place the District under an *economic* or *practical* compulsion to appropriate moneys to make payments under the Lease . . . ." DSOF ¶ 24. Headwaters' Board retained unfettered legislative discretion to "elect" not to appropriate rent for the following year's lease payments, thereby terminating the lease. DSOF ¶¶ 27, 29. Any party to the LPA, including third-party beneficiaries, were on notice of that potential outcome.

The record establishes that Headwaters' Board did not appropriate any funds for payment of rent under the LPA for the lease years commencing 2021 through 2023. DSOF ¶¶ 57-64. In prior filings on this issue, GRMD has asserted that Headwaters did not follow the procedure in § 3 of the LPA for Headwaters' chairman or president to request the Board to appropriate rent or pursue available administrative review. But the LPA does not make this process a prerequisite to termination of the LPA for nonappropriation; § 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, exactly what happened prior to the expiration of the 2020 Renewal Term. DSOF ¶ 29. In any event, Headwaters' Board followed the process in § 3 with respect to the 2022 and 2023 budgets, rejecting proposals to appropriate funds to pay the LPA rent for those

years and rejecting the Board President's appeal of those decisions. DSOF ¶¶ 58-64. At the latest, the LPA terminated on December 31, 2021. DSOF ¶¶ 58-64.

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.

IV. GR Terra Is Entitled To Summary Judgment On GRMD's Claim For Breach Of The LPA (Count IV) Because The LPA Was Terminated Prior To GR Terra's Acquisition.

To prove its claim for breach of contract, GRMD must establish (1) the existence of a contract between plaintiff and defendant; (2) performance by the plaintiff; (3) breach of the contract; and (4) damages. *See D.R. Horton, Inc.-Denver v. Bischof & Coffman Const., LLC*, 217 P.3d 1262, 1271-72 (Colo. App. 2009). GRMD's breach of contract claim against GR Terra fails for the initial reason that the LPA terminated before GR Terra acquired the leased property, either as of result of the 2020 Foreclosure or Headwaters' failure to appropriate rent funds for the 2021 lease year as set forth above. For this reason alone, GRMD's breach of contract claim fails as a matter of law.

V. Alternatively, GR Terra Is Entitled To Summary Judgment On GRMD's Claim For Damages For Breach Of The LPA (Count IV) Because, Even If Not Terminated, GRMD Cannot Establish Any Breach By GR Terra or Damages.

Breach is an essential element of a contract claim. *Horton,* 217 P.3d at 271-72. GRMD's claim rests on its allegation that "[s]ince acquiring the Leased Premises, GR Terra failed to recognize the LPA and has refused to act as landlord and to accept the purchase provisions of

Section 23." Am. Compl., ¶ 68. This claim fails as a matter of law because, since GR Terra acquired the property, the tenant has not performed or requested performance by GR Terra.

As this Court recognized in its Order on Defendants' Motion to Dismiss, "[f]or the plaintiff to succeed with its claim [for breach of contract against the private defendants], it must allege that it or Headwaters performed its contractual duties or justify its (or Headwater's) nonperformance of contractual duties." *See* Order on the Gray Jay et al.'s Motion to Dismiss dated January 28, 2022, p. 22 (citing *Long v Cordain*, 343 P.3d 1061, 1067 (Colo. App. 2014)). *Accord W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1054 (Colo. 1992) (reversing judgment and remanding for new trial where plaintiffs did not prove that they performed their contractual obligations or that there was a justifiable reason for nonperformance).

At the time GR Terra purchased the former Leased Premises, its predecessor in title had already notified Headwaters that the 2020 Foreclosure terminated the LPA. DSOF ¶¶ 56, 68. Since GR Terra's purchase, Headwaters has never performed as tenant under the LPA. DSOF ¶ 68. Headwaters did not appropriate any funds for payment of rent for 2021 – 2023, asserted control over operations of the Leased Premises, or tried to assume possession of the Leased Premises. DSOF ¶¶ 57-64, 69. It never tried to exercise the option to purchase in the LPA and did not have sufficient funds to do so. DOSF ¶¶ 62, 71 at 8369-8381. GR Terra cannot be in breach for failing to accept a purchase price or rent payments that were never offered to it. And to the extent that GRMD has any right to do so, which GR Terra disputes, GRMD has not assumed any of the obligations of Headwaters as tenant under the LPA. DSOF ¶ 70.

There is no basis for GRMD's damages against GR Terra. If the LPA was terminated, GR Terra cannot be in breach. If the Court determines that the LPA was not terminated and a

final judgment is so entered and the tenant performs its obligations thereunder, GR Terra must be given the opportunity to perform before it is declared in breach. Contract repudiation consists of a present, positive, unequivocal refusal to perform; a mere declaration of a contingent intention not to be bound will not itself amount to a renunciation of the contract. *Meinhardt v. Inv. Builders Prop. Co.*, 518 P.2d 1376, 1379 (Colo. App. 1973) (emphasis added).

GRMD can point to no evidence to prove that GR Terra has unequivocally refused to perform if there is a final, binding adjudication that the LPA continues to encumber its property. GR Terra reasonably believed (and continues to believe) that the LPA was terminated. Under these circumstances, there is no existing breach by GR Terra.

Nor could GRMD establish damages for any alleged breach. GRMD does not have any "equity" interest in the Leased Premises. As this Court found, the LPA was a lease rather than a secured transaction (installment land contract) that creates equity in the Leased Premises. Order on the Gray Jay et al.'s Motion to Dismiss dated January 28, 2022, p. 19; *see also Strauss v. Boatright*, 418 P.2d 878, 879-80 (Colo. 1966). The LPA does not contemplate a transfer of any ownership interest of Headwaters in the Leased Premises to secure its rental payment obligations. Rather, title to the Leased Premises remained in the Landlord's hands and would not be transferred unless Headwaters exercised its option to purchase during the lease term or acquired at the end of the term in 2062, if the LPA had not previously been terminated.

Whether Headwaters would itself acquire the LPA is entirely speculative. And whether, if Headwaters did acquire the LPA Amenities, it would at some point dissolve and transfer title to GRMD (which it had no obligation to do) adds another layer of speculation. GRMD is not entitled to the consequential damages it seeks for the alleged breach of contract because it cannot

prove that both parties had these consequences in contemplation at the time of contracting or that the damages are the probable result of the breach and "are neither uncertain, unnatural, nor remote as to cause, or speculative and conjectural in effect." *Vanderbeek v. Vernon Corp*., 50 P.3d 866, 870-71 (Colo. 2002). This is particularly true in that the LPA itself bars recovery of consequential damages. DSOF Ex. 14, § 24(c). GRMD cannot seek damages not available to the parties themselves. *Bloom v. Nat'l Collegiate Athletic Assn*., 93 P.3d 621, 625 (Colo. App. 2004) (third-party beneficiary has no greater rights than the parties to the contract).

For all these reasons, GR Terra is entitled to summary judgment on all claims against it.

Dated this 25th day of January, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Summary Judgment was served via the Colorado Courts e-filing system on January 25, 2023, addressed to the following:

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