IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

GRCO LLC, a Missouri limited liability company,

Plaintiff,

v.

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

Defendant.

DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Defendant Granby Ranch Metropolitan District (the "District"), by and through undersigned counsel and pursuant to Fed.R.Civ.P 12(b)(6), requests dismissal of Plaintiff's Amended Complaint (ECF No. 15) and states as follows:

CERTIFICATION PURSUANT TO D.C.COLO.LCivR 7.1

Pursuant to the Court's Civil Practice Standard 7.1B(b), the parties conferred prior to the filing of this Motion. Plaintiff objects to the relief requested herein.

INTRODUCTION

This action concerns a developer's suit against a Title 32 special district for imposition of a Capital Facilities Fee (a one-time per lot/parcel charge collected from the property owner prior to building thereon to defray the cost of facilities) ("CFF") that has been in effect for close to two decades. The fee was duly imposed in 2005 to defray millions of dollars of improvements in the district, including but not limited to entrance monuments, a major entrance road to connect the development to a highway, and storm and sanitary sewer major lines. These improvements were made years ago and benefit the entire district, not just some particular lots. The fee was allocated

and applies to all lots within the district, and roughly 600 homeowners have already paid their fair share of the costs. Plaintiff, however, desires to be exempted from paying the fees on the ground that there are no plans for new improvements to be made in the future. Plaintiff's argument is misplaced. The fee was imposed to defray the costs of improvements and still serves the same purpose by reimbursing or repaying debt related to those costs. That the fee does not become due and payable until a particular lot is ready for development does not exempt new developers (like Plaintiff), who develop the lots after the improvements have already been made. For these reasons and those described below, all of Plaintiff's claims fail and should be dismissed.

STANDARD OF REVIEW

The facial plausibility standard from *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) applies with respect to whether a pleading fails to state a claim upon which relief can be granted. *See Bixler v. Foster*, 596 F.3d 751, 756 (10th Cir. 2010). Under this standard, plaintiffs must allege "sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). In evaluating this issue, the Court must first identify the allegations in the complaint that are not entitled to the assumption of truth; that is, allegations that are legal conclusions, bare assertions, or merely conclusory factual allegations. *Iqbal*, 556 U.S. at 677-82. The Court need not accept conclusory allegations without supporting factual averments. *See Papason v. Allain,* 478 U.S. 265, 286 (1986); *S. Disposal, Inc. v. Tex. Waste Mgmt.*, 161 F.3d 1259, 1262 (10th Cir. 1998). "A plaintiff must 'nudge [its] claims across the line from conceivable to plausible' in order to survive a motion to dismiss." *Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012) (quoting *Twombly*, 550 U.S. at 570)).

This motion relies on certain documents that were exhibits to Plaintiff's Amended Complaint. The Court should not convert the motion into a motion for summary judgment because it is well established that on a Rule 12(b)(6) motion a court may consider documents incorporated into the complaint by reference, without converting the motion to a Rule 56 motion. *See e.g. Toone v. Wells Fargo Bank, N.A.*, 716 F.3d 516, 521 (10th Cir. 2013) (court may consider documents outside the pleadings if they are (1) mentioned in the complaint, (2) central to [the] claims [at issue], and (3) not challenged as inauthentic); *Smith v. U.S.*, 561 F.3d 1090, 1098 (10th Cir. 2009).

ARGUMENT

I. PLAINTIFF'S FIFTH AMENDMENT (COUNTS V AND VI) AND DUE PROCESS CLAIMS (COUNTS VII AND VIII) FAIL

Plaintiff asserts a claim for damages alleging a Fifth Amendment violation and a separate claim seeking injunctive relief alleging a continuing violation. It also asserts a claim for damages alleging Due Process violations and a separate claim seeking injunctive relief alleging continuing violation. All of these claims fail as a matter of law.

A. Damages claims for alleged Fifth Amendment and Due Process violations fail.

Plaintiff argues that the CFF is unconstitutional as it allegedly deprived it of its property rights in violation of the Fifth Amendment. (Am. Compl. ¶ 104; Count V). Plaintiff fails to identify which specific right protected by the Fifth Amendment it claims was violated.

1. No viable Takings claim

To the extent Plaintiff attempts to assert a takings claim, the claim fails. A taking occurs when an entity clothed with the power of eminent domain "substantially deprives a property owner of the use and enjoyment of that property." *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 695 (Colo. 2001). There is no taking, however, where the governmental entity does not "deny an owner economically viable use of his land." *Id.* (citing *Nollan v. Cal. Coastal Com.*, 483 U.S. 834

(1987)). Here, there is no allegation that the District substantially deprived Plaintiff of the use and enjoyment of its properties. Thus, any takings claim fails.

To the extent Plaintiff contends that the conditions for issuance of a building permit somehow creates a takings claim, the claim still fails. *See Krupp v. Breckenridge Sanitation Dist.*, No. 97CA1996, 1999 Colo. App. LEXIS 82, at *3-5 (App. Apr. 1, 1999) (concluding that there was no taking by the special district where the city, not the district, had authority to decide whether or not to issue a permit even though the city routed applications to the district for its "sign off"). As Plaintiff acknowledges, the Town of Granby has the authority to issue building permits, ***not*** the District. (*See* Am. Compl. Ex. 5 – 2005 Resolution at § 2: "before the date of issuance of a building permit ***by the Town***…." and Am. Compl. ¶ 27: "the fee was to be paid to Headwaters on or before the date of issuance of a building permit ***by the Town***") (emphasis added). Thus, the District did not deprive Plaintiff of any legally protected property interest it may have in obtaining a building permit.

Further, as explained by the Colorado Supreme Court, a one-time charge assessed on new building projects within the district for the purpose of defraying the costs of a government service to accommodate new projects does not constitute a taking. *Krupp,* 19 P.3d at 692 (holding that such charge "does not fall into the narrow category of charges that are subject to the *Nollan/Dolan* takings analysis") (citing *Nollan,* 483 U.S. 825 and *Dolan v. City of Tigard*, 512 U.S. 374 (1994)). Here, the CFF is a one-time charge per lot/parcel imposed to defray the costs of Improvements.[1] Plaintiff's conclusory allegations of lack of an "essential nexus" and "rough proportionality,"

[1] "Improvements" are defined, without limitation, as "services, streets and roadways, traffic safety and control, transportation, drainage, water and sanitary sewer transmission improvements and offsite capacity improvements, non-potable water facilities, storm drainage, park and recreation improvements, and right-of-way landscaping." (Am. Compl. Ex. 5 – 2005 Resolution, second recital clause).

which apply to "development exactions, in which the government requires a landowner ***to forfeit part of his or her property*** for public use as a condition of development," *Krupp*, 19 P.3d at 695 (emphasis added), are inapposite and do not change the result. *Krupp*, 19 P.3d at 696 (distinguishing *Nollan/Dolan* exactions from service fees that are "purely a monetary assessment rather than a dedication of real property for public use.").

2. No viable Due Process claim

Plaintiff also contends that the CFF constitutes an unconstitutional special assessment, or alternatively, an unconstitutional special fee in violation of the right to Due Process. (*See* Am. Compl. at 29-30, Count VII). The law supports neither position.

A special assessment is a charge to property owners for "benefits they receive from the particular improvements [that] are different from the benefits they enjoy in common with other property owners of the political subdivision." *Bloom v. Fort Collins*, 784 P.2d 304, 312 (Colo. 1989) (Lohr, J. dissenting but agreeing that fee at issue there was not a special assessment). "The essential characteristic of a special assessment is that it must confer some special benefit to the property assessed." *Id*. at 308. "A special assessment is based on the premise that the property assessed is enhanced in value at least to the amount of the levy." *Id*. (internal quotations and citation omitted). "The burden of the assessment falls on the property owners because the benefits they receive from the particular improvements are different from the benefits they enjoy in common with other property owners." *Id*. "A special assessment for a local improvement, therefore, must specifically benefit or enhance the value of the premises assessed in an amount at least equal to the burden imposed." *Id*. (citations omitted).

Separate from a special assessment, a "special fee" (or a special service fee) is "a charge imposed upon persons or property for the purpose of defraying the cost of a particular

governmental service." *Id*. To be valid, the "amount of a special fee must be reasonably related to the overall cost of the service." *Id*. "Mathematical exactitude, however, is not required, and the particular mode adopted by a [governmental entity] in assessing the fee is generally a matter of [its] discretion." *Id*. A special fee generally will be upheld as long as it is "reasonably designed to defray the cost of the particular service rendered by the municipality." *Id*. (citing multiple cases). In other words, a special fee is valid if it was "reasonably designed to offset the overall cost of services for which the fees were imposed." *Id*. at 310-11.

The CFF is a valid special fee, not a special assessment. It was not designed to serve or enhance only a subset of the development. Rather, it was enacted to "acquire, finance, construct, maintain, provide and administer certain improvements and services benefiting the property within the Districts, including, without limitation, services, streets and roadways, traffic safety and control, transportation, drainage, water and sanitary sewer transmission improvements and offsite capacity improvements, non-potable water facilities, storm drainage, park and recreation improvements, and right-of-way landscaping (collectively, the 'Improvements')." (Am Compl. Ex. 5 – 2005 Resolution, second recital clause). Such Improvements were intended to, and do, generally benefit the ***entire development*** and were necessary for its development. (*See id*. at fifth recital clause). The amount of the fee was based on "a pro rata calculation of a portion of the appraised value of the Improvements" which were not otherwise funded by the Districts and are charged to ***each lot or parcel*** of land within the Property. (*Id*. at 2, § 1). There is no non-conclusory allegation that the fees were only designed to serve or enhance certain properties but not others. Because the CFF is not a special assessment, it need not specifically benefit any particular lot.

The CFF—a one-time fee charged per lot/parcel—was reasonably designed to defray the costs of Improvements and is a valid special fee. *See Krupp*, 19 P.3d at 691, 693-94 (holding that

one-time "plant investment fee" charged to "every new project in the District" prior to issuance of building permit or certificate of occupancy for a new building was a valid special fee); *see also Bruce v. City of Colo. Springs*, 131 P. 3d 1187, 1190 (Colo. App. 2005) (holding that a service charge to defray cost of operating and maintaining street lights that was calculated based on overall cost of providing streetlights to City was reasonably related) (collecting cases). Indeed, long-standing Colorado law establishes that the "imposition of a development fee on new users is rationally related to the purpose, prominent in modern legislation, of making new development pay its own way." *Arvada v. Denver*, 663 P.2d 611, 615 (Colo. 1983).

Importantly, in determining the nature of a government-mandated financial imposition, "the dispositive criteria is the primary or dominant purpose of the imposition ***at the time the enactment calling for its collection is passed***." *Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008) (emphasis added). Thus, the characterization of the CFF must be analyzed from the time it was first enacted (in 2005), not from the time it was collected from Plaintiff (more than a decade later). As such, Plaintiff's allegations that the specific CFF collected after 2019 were not used to defray the costs of Improvements is misplaced.

Plaintiff's conclusory allegations that the fees do not benefit its properties also do not save its claims. (*See, e.g.*, Am. Compl. ¶ 124). A benefit may be "anything that adds to another's security or advantage." *Indian Mt. Corp. v. Indian Mt. Metro. Dist.*, 412 P.3d 881, 888 (Colo. App. 2016) ("the word denotes any form of advantage"). The Improvements generally benefit the entire development, including Plaintiff's properties, by adding to and/or providing some form of advantage to the development as a whole. *See* discussion *supra* at 6.

3. Plaintiff's claims are time-barred

Even if Plaintiff could state a viable claim concerning the CFF (which it cannot), it would be time-barred. "No action may be brought to enjoin … the imposition of rates, fees, tolls and charges, or any other proposed activity of the special district unless such action is commenced ***within forty-five days*** after the special district has published notice of its intention to undertake such activity." C.R.S. § 32-1-207(3) (emphasis added). The CFF was imposed in 2005 (*See* Am. Compl. Ex. 5 – 2005 Resolution) and became a statutory lien on the subject properties since creation and all other parties are deemed to be on notice of the lien and take their respective interests in the property subject to it. C.R.S. § 32-1-1001(1)(j); *Wasson v Hogenson*, 583 P.2d 914, 919 (Colo. 1978). Plaintiff is barred by the statute from seeking to enjoin its collection almost two decades later.

Counts V through VIII assert claims under 42 U.S.C. § 1983. A claim under Section 1983 must be brought within two years of accrual. *Braxton v. Zavaras*, 614 F.3d 1156, 1160 (10th Cir. 2010). "Accrual takes place when the wrongdoer commits an act and the plaintiff suffers damage." *Colby v. Herrick*, 849 F.3d 1273, 1279 (10th Cir. 2017). Even assuming (without conceding) that Plaintiff suffered any damage from the imposition of the CFF, the claims are time-barred because the alleged wrongdoing—the imposition of the fees on the subject properties—occurred more than a decade ago and Plaintiff is deemed to have been on notice thereof. In any event, Plaintiff did not file suit until May 26, 2023—more than two years later than when it alleges to have owned property in the development (since May 5, 2021). (*See* Am. Compl. ¶ 9). At the latest, Plaintiff knew or should have known of any claims by May 5, 2021.

To the extent Plaintiff contends that the alleged wrongdoing was the alleged placement of funds collected thereunder into a General Fund after 2019, Plaintiff cannot show that it was legally

injured by the act. Any alleged misplacement of funds did not harm Plaintiff. Regardless of the account in which such funds were placed, Plaintiff would have been charged the CFF just as the other property owners in the District.

B. Claims alleging "continuing violations" fail.

Counts VI and VIII allege "continuing violations" under Section 1983, mirroring the allegations in Counts V and VII, respectively. As discussed in Section I(A), Counts V and VII fail as a matter of law. The "continuing violations" claims also fail for the same reasons. Further, the continuing violation does not apply where, as here, the alleged wrongdoing took place on a discrete date. *Colby*, 849 F.3d at 1280. "Th[e] doctrine is triggered by continuing unlawful acts but not by continued damages from the initial violation." *Id*. (citing *Mata v. Anderson*, 635 F.3d 1250, 1253 (10th Cir. 2011)). Plaintiff's "continuing violation" claims are based on the imposition of the CFF "[u]nder the 2006 Facilities Fee Resolution" (Am. Compl. ¶¶ 99, 117)—which was a discrete, one-time act. That Plaintiff claims to continue to incur damages from enforcement of the imposition (the alleged initial violation) does not trigger application of the continuing violation doctrine. *Cf. Loard v. Sorenson*, 561 F. App'x 703, 706 (10th Cir. 2014) (holding that issuance of restitution order was a "discrete act" and continued garnishments thereunder were merely "continuing effects" of that act, not separate discrete acts that triggered the continuing violation doctrine).

II. PLAINTIFF'S CLAIMS FOR INJUNCTIVE RELIEF FAIL (COUNTS I-IV, VI, VIII, IX)

In Count I, Plaintiff asserts a claim for alleged violation of the 2006 Facilities Fee Resolution. The gist of the purported claim is Plaintiff's contention that the District's alleged placement of CFF into an "unrestricted General Fund" is allegedly in violation of the 2006 Facilities Fee Resolution, unauthorized, and illegal. (Am. Compl. ¶ 72). As explained above in

Section I, however, the District's collection of the CFF is not in violation of the Fifth Amendment or Plaintiff's Due Process rights. As such, it is neither unauthorized, nor illegal.

Moreover, it is not in violation of the 2006 Facilities Fee Resolution. That resolution specifically provides that proceeds of the CFF may be used for the purpose of "financing the acquisition, [and] reimbursement … of Improvements, including but not limited to paying debt service on, and other costs related to, the Series 2006 Bonds and ***any obligations refunding such Series 2006 Bonds*** and ***reimbursement of amounts advanced by other parties***." (Am. Compl. Ex. 7 at 3, § 6) (emphasis added). Plaintiff cannot withstand dismissal by relying on merely conclusory allegations that debt on the District's outstanding bonds "did not finance any Improvements" serving Plaintiff's lots.

Similarly, Plaintiff's Count II fails because the CFF collection is not in violation of C.R.S. § 32-1-1001(1)(j). Not only do special districts possess the powers expressly provided in subsection 1001(1)(j), but they also have "all rights and powers necessary or incidental to or implied from the specific powers granted…." C.R.S. § 32-1-1001(1)(n). The specific powers stated in the statute "shall not be considered as a limitation upon any power necessary or appropriate to carry out the purposes and intent of [Title 32, Article 1]." *Id*. The fees were imposed to defray the costs of Improvements and they maintain that purpose even though they may now be used to reimburse or pay off debt related to the original costs. *See Barber v. Ritter*, 196 P.3d 238, 249 (Colo. 2008) (ruling that when determining the nature of a charge, "courts must look to the primary or principal purpose for which the money was raised, not the manner in which it was ultimately spent.").

The mere placement of the funds in a General Fund account does not strip away the purpose or nature of the fees as originally imposed. *Id*. at 248 ("The primary statutory purpose for the

collection of the transferred monies was to defray the cost of special services provided to those who paid the charge. As such, the monies were 'fees' when initially collected and remained 'fees' even after they were transferred to the General Fund"); *see also id.* at 250 ("The fact that the fees were eventually transferred to the General Fund does not alter their essential character as fees….").

This is especially so given that the statute must be liberally construed, *see* C.R.S. § 32-1-113. It is also worth noting that neither the 2006 Facilities Fee Resolution, nor C.R.S. § 32-1-1001(1)(j) gives Plaintiff standing or other right of action to assert these purported claims.

Finally, Plaintiff's claims requesting injunctive relief fail because Plaintiff has not credibly alleged any "irreparable harm"—that is, harm that cannot be undone or is incalculable. *See, e.g.*, *Fish v. Kobach*, 840 F.3d 710, 751 (10th Cir. 2016) (recognizing that party seeking injunctive relief "must demonstrate a significant risk that he or she will experience harm that cannot be compensated after the fact by money damages"); *Salt Lake Tribune Publ'g Co. v. AT&T Corp.*, 320 F.3d 1081, 1105 (10th Cir. 2003)("Irreparable harm, as the name suggests, is harm that cannot be undone, such as by an award of compensatory damages or otherwise.").

III. PLAINTIFF'S CLAIM FOR ALLEGED VIOLATION OF C.R.S. § 29-1-803(1) FAILS (COUNT III)

Plaintiff's reliance on C.R.S. § 29-1-803 is misplaced. That section and its accounting requirements are inapplicable because they only apply to "Land development charges"—which the CFF is not. Specifically, the section only applies to charges that are issued for new developments of land—that is, the creation of a subdivision of the land; construction, reconstruction, redevelopment, conversion, relocation or enlargement of land to increase the number of service units; or extending or creating new use of land resulting in an increase in the number of service units. *See* C.R.S. § 29-1-802(2) (defining "Land development"). Here, the land

was already platted and subdivided many years ago by the Town of Granby. The CFF is not charged for any of the "Land development" purposes identified by the statute.

Additionally, Plaintiff lacks standing. "To obtain a determination on the merits in federal court, parties seeking relief must show that they have standing under Article III of the Constitution." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 129 (2011). To establish standing, a plaintiff must have suffered an injury in fact, there must be a causal connection between the injury and the conduct complained of, and it must be likely that the injury will be redressed by a favorable decision. *Id*. at 133 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)). An injury in fact is an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. *Id*. "[T]he injury must affect the plaintiff in a personal and individual way." *Id*.

Plaintiff alleges that the District "deposited all Capital Facilities Fees collected into its unrestricted General Fund" instead of depositing them into a separate account. (Am. Compl. ¶ 88). Even if the Court takes Plaintiff's allegations as true at this stage of the proceeding, Plaintiff cannot meet its burden to show that it suffered an injury in fact, or show causation or redressability. Plaintiff has suffered no concrete or particularized injury from any allegedly wrongful deposit of funds in violation of the statute. Plaintiff, like other property owners, would still be subject to payment of the CFF regardless of the account in which the funds are placed. Any alleged misplacement of the funds does not affect Plaintiff in a personal and individual way under the circumstances.

IV. PLAINTIFF'S ALLEGED ILLEGAL MATERIAL MODIFICATION OF SERVICE PLAN CLAIM FAILS (COUNT IV)

Plaintiff's claim fails because there has been no illegal material modification of the service plan. "The General Assembly enacted the Special District Act with the intent that special districts

promote the health, safety, prosperity, security, and general welfare of their inhabitants and of the State of Colorado." *Indian Mt. Corp. v. Indian Mt. Metro. Dist*., 412 P.3d 881, 892-93 (Colo. App. 2016). "Persons intending to form a special district must submit a service plan to the board of county commissioners." *Id*. (citing C.R.S. § 32-1-202). "Once established, a special district must conform to its service plan ***so far as practicable***." *Id*. (citing C.R.S. § 32-1-207(1) (emphasis added)). Any "material modifications" to the service plan must be approved by the board of county commissioners. *Id*. (citing C.R.S. § 32-1-207(2)(a)).

The Special District Act defines "material modifications" as "changes of a basic or essential nature," including but not limited to the following:

> any addition to the types of services provided by the special district; a decrease in the level of services; a decrease in the financial ability of the district to discharge the existing or proposed indebtedness; or a decrease in the existing or projected need for organized service in the area.

C.R.S. § 32-1-207(2)(a). The determination of whether a service plan has been materially modified involves a question of law. *Indian Mt. Corp.*, 412 P.3d at 893. To do so, the court must analyze the language of the service plan and give effect to its plain and ordinary meaning. *Id*.

The Service Plan expressly provides for the District's ability "to produce property tax and other revenue sufficient to pay the costs of operations and debt service expenses incurred for the public improvements." (*See* Am. Compl. Ex. 2 at 3, § I(A)(5)). It permits the District to issue revenue debt, and other multiple-fiscal year financial obligations "in amounts sufficient to finance and construct all public improvements under the plan…." *Id*. at 14 (last ¶). It gives the District "the power to ***finance*** public improvements, ***impose*** property taxes, and ***collect revenue*** or ***take other actions*** in cooperation with the Service District that may be necessary to provide the services and facilities needed within the Service Area." *Id*. at 6, § III (emphasis added). Further, it permits the District to "rely upon various other revenue sources authorized by law to fund their financial

obligations," including "the power to establish fees … or charges as provided in the Act…." *Id*. at 16 (first full ¶).[2]

The Service Plan is broad and its terms refute the restrictive interpretation that Plaintiff proposes. It provides that any failure to reference a possible source of revenue available to the District in the plan itself "will not preclude the District[] from implementing any revenue source legally available to the District[], if needed to fund debt service, operations or other expenses." *Id*. at 16 (first full ¶); s*ee also id*. at 13, § V(B), 6th ¶: "No provision of the Service Plan shall be construed to restrict the issuance of any form or type of bond, note, or other multiple-fiscal year financial obligation of either District"; 7th ¶: "All bonds issued by the Districts ***may be payable from any and all legally available revenues*** of the Districts…." (emphasis added). Neither the First nor the Second Amendments to the Service Plan materially modify these provisions. (*See* Am. Compl. Exs. 3 & 4).

Todd Creek Vill. Metro. Dist. v. Valley Bank & Tr. Co., 325 P.3d 591 (Colo. App. 2013) is instructive. There the Court of Appeals held that a district's issuance of a loan was not a material modification of its service plan. *Id*. at 598. The Court rejected the argument that the issuance of additional debt constituted a material modification because the service plan specifically only referenced revenue bonds, not the other debt that was incurred by the district. *Id*. In doing so, the Court noted that the service plan neither expressly allowed nor disallowed the issuance of such debt. *Id*. But the fact that the service plan did not specifically allow it was not a basis to find a

[2] The Service Plan also contemplated build-out of the development over 30 years to allow "the full costs of public improvements to be allocated fairly over the full build-out of the Development" to "avoid the imposition of disproportionate cost burdens upon the initial phases of the Development." *Id*. at 4.

material modification even though the service plan expressly noted that the district was "not anticipating issuing" such debt. *Id*.

The facts alleged here are similar to those in *Todd Creek* and significantly different than those in other cases where the court did find a material modification. *See e.g., Bill Barrett Corp. v. Sand Hills Metro. Dist*., 411 P.3d 1086, 1090-91 (Colo. App. 2016) (holding that complete geographic shift removing district entirely from a town was a material modification). The CFF was imposed to defray the costs of Improvements as contemplated by the Service Plan and are permitted for the purpose of reimbursing or otherwise paying off any debt related thereto. Nothing in the Service Plan requires that the fees be limited to financing ***new*** construction as Plaintiff alleges. Indeed, Plaintiff concedes that the District may use revenue from the CFF for "allowed debt repayment." (Am. Compl. ¶ 93). It alleges, however, that "to the extent" the District has deposited the fees into an "unrestricted General Fund" for any purpose other than repayment of debt incurred to finance Improvements that constitutes a material modification of the Service Plan. (*Id*. ¶ 94). However, Plaintiff does not allege that the District ***has in fact*** used revenue from such fees for any purpose other than repayment of debt. Plaintiff's claim fails as a matter of law. In any event, that does not constitute a material modification.

V. PLAINTIFF'S ATTEMPT TO PREVENT COLLECTION OF CAPITAL FACILITIES FEES BASED ON FORECLOSURE SHOULD BE REJECTED (COUNT IX)

Plaintiff's Ninth Claim is based on its contention that a foreclosure on a private deed of trust extinguishes a statutory "perpetual" lien. (*See* Am. Compl. ¶ 144). That is incorrect. Until paid, a special district's fees and charges constitute a "perpetual lien" on and against the subject property. C.R.S. § 32-1-1001(1)(j)(I). It well established under long-standing Colorado law that such a statutory "perpetual" lien survives a foreclosure on a private deed of trust, even if the deed

was executed and recorded ***before*** imposition of the fees or charges. *See Wasson v Hogenson*, 583 P.2d 914 (Colo. 1978).

In *Wasson*, the property owner executed a deed of trust to a private entity to secure a loan, which was duly recorded. *Id*. at 915. Approximately five months later, the owner entered into a contract with a special district to obtain sanitary sewer services. *Id*. The beneficiary of the deed foreclosed on the property. *Id*. The trial court held that the prior recorded deed of trust was a first and paramount lien, and that the foreclosure decree extinguished the "perpetual lien" of the district. *Id*. The Colorado Supreme Court reversed. *Id*. The Court explained, if special districts "are to remain viable institutions capable of accomplishing their purposes, their charges cannot be subordinated to prior recorded deeds of trust." 583 P.2d at 918. The property owner, mortgagee, and beneficiary of a deed of trust, are all deemed to be on notice of the lien and take their respective interests in the property "subject to the statutory powers and rights of the District." *Id*. at 919.

Wasson is controlling. Thus, even assuming that a private deed of trust was executed before the 2006 Facilities Fee Resolution and that a foreclosure pursuant to a deed of trust occurred in 2020, the District's "perpetual lien" on the subject property has not been extinguished, and it may continue to collect the subject fees.[3]

CONCLUSION

Plaintiff's allegations fail to state a cognizable claim for relief against the District. Accordingly, all of Plaintiff's claims against the District should be dismissed with prejudice.

[3] The 2005 Resolution, which predates the Deed of Trust, also provides that the Facilities Fees constitute a "valid, perpetual lien on and against the Property, such lien securing the payment of such Facilities Fee until paid in full" and that "[a]ll such liens shall be in a senior position as against all other liens, whether or not of record, affecting the Property [except another lien inapplicable to the issues here]." (Am. Compl. Ex. 5 at 3, § 4).

Dated this 28th day of July, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2023, I electronically filed the foregoing, **DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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