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 REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Defendant Granby Ranch Metropolitan District (the "District"), by and through undersigned counsel, submits its Reply to Plaintiff's Response to Defendant's Motion to Dismiss (ECF No. 32, filed September 1, 2023) and states as follows:

ARGUMENT

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

1. No viable Takings claim

Plaintiff has failed to state a viable Takings claim. Plaintiff's reliance on *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013) is misplaced. Although *Koontz* expanded the scope of *Nollan/Dolan* takings to certain types of "monetary exactions,"[1] the Supreme Court expressly

[1] *Koontz* did not expand the definition of *per se* takings to include ***all*** government-imposed financial obligations "linked to a specific, identifiable piece of property." *Better Hous. for Long Beach v. Newsom*, 452 F. Supp. 3d 921, 934 (C.D. Cal. 2020) (noting that *Koontz*'s holding is "far narrower").

acknowledged that "fees" are not takings. *Koontz*, 570 U.S. at 615 ("it is beyond dispute that taxes and user ***fees*** are ***not*** takings") (cleaned up and emphasis added). As the Supreme Court clarified, "[*Koontz*] therefore does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners." *Id*.

Koontz is inapposite because the development exaction at issue there was discretionary and made on the basis of an individualized determination specific to just the plaintiff's property. By contrast, the CFF is a set fee that is uniformly imposed on all property owners in the District. There is no discretionary or individualized exaction involved. *See Mission Terrace Estates, LLC v. St. Vrain Sanitation Dist*., 2016 Colo. Dist. LEXIS 706, *6-9 (Weld Cty. Dist. Ct., June 23, 2016) (distinguishing a *Koontz*-type "exaction" from a *Krupp*-type "fee" and ruling that *Koontz* did not apply because the charge at issue was a service fee, not a monetary exaction)[2]; *see also Dabbs v. Anne Arundel Cty*., 157 A.3d 381, 393 (Md. App. 2017) (distinguishing *Koontz* and holding *Nollan/Dolan* test inapplicable to "impact fees" enacted for "the purpose of requiring new development to pay its proportionate share of the costs for land and capital facilities necessary to accommodate development impacts on public facilities" that must have been paid before issuance of a building permit) and *Am. Furniture Warehouse Co. v. Town of Gilbert*, 425 P.3d 1099, 1106 (Ariz. App. 2018) ("*Koontz* did not hold that *Dolan* applied to generally applicable legislative development fees…").

Koontz's concern for "extortionate" demands from government in exchange for land-use permits is not present here. 570 U.S. at 605. The CFF is similar to the Plant Investment Fee (a one-time charge on all properties within the district) that the Colorado Supreme Court held was outside

[2] Also attached as **Exhibit A** for the Court's convenience.

the scope of the *Nollan/Dolan* test. *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 698 (Colo. 2001) (distinguishing "generally applicable fees" such as the PIF from "exactions stemming from adjudications particular to the landowner and parcel."). *Krupp* remains good law and is controlling here.

Additionally, it is undisputed that the Town—and not the District—had the ultimate authority to grant building permits. As in *Krupp*, the District has no "statutory or regulatory authority to deny or condition the issuance of building permits." 1 P.3d 178, 181 (Colo. App. 1999).

2. No viable Due Process claim

Plaintiff conflates special assessments with special fees and its citation to cases addressing special assessments (rather than special fees) is inapposite. (Resp. at 7-10; citing *Ochs v. Hot Sulphur Springs*, 407 P.2d 677 (Colo. 1965), *Reams v. Grand Junction*, 676 P.2d 1189 (Colo. 1984), *Landmark Towers*, 436 P.3d 1139 (Colo. 2018)). Although a special assessment requires the conferral of a "special benefit" to the property assessed, a special fee does not. (*See* Mot. at 5-6). The CFF is a valid special fee, not a special assessment. It was enacted to defray the costs of Improvements that generally benefit the development as a whole, not just some specific properties. *Id*. at 6-7. Plaintiff's conclusory allegations that it does not receive any benefit are insufficient to withstand dismissal.

Plaintiff's allegation that since 2019, the CFFs have been "deposited into GRMD's General Fund" where they are "available to pay GRMD's general and administrative expenses" is also insufficient to state a Due Process violation. (Am. Compl. ¶ 56). The relevant inquiry is what the primary purpose for the imposition of the charge was ***when enacted*** and whether it was to defray

the cost of Improvements. *See Barber v. Ritter*, 196 P.3d 238, 241-42 (Colo. 2008) (referring to "the charge's enabling legislation" to determine "primary purpose").

"Because the purpose for which the charge is imposed, ***rather than the manner in which the monies generated by the charge are ultimately spent***, determines the characterization of the charge . . . the ***transfer of fees from a cash fund to a general fund does not alter the essential character*** of those fees as fees."). *Id*. (emphasis added). Plaintiff's argument that *Bloom* suggests a different result has been rejected by the Colorado Supreme Court. *See id*. at 250 ("*Bloom* does not compel the conclusion that any transfer of fees from special cash funds to a general municipal or state fund results in the transformation of that fee into a tax.").

The Court has explained in no uncertain terms, "[t]he fact that the fees were eventually transferred to the General Fund ***does not alter their essential character*** as fees because the transfer does not change the fact that the primary object for which they were collected was not to defray the general cost of government." *Id*. (emphasis added). Indeed, "the transfer of fees to a general fund where, as here, the statutes authorizing assessment of those fees do not contemplate the generation of revenue for general use, 'incidentally' makes funds available to defray the general cost of government." *Id*. However, "such incidental defraying of general governmental expense" does not transform the nature of the charge. *Id*.

3. Plaintiff's claims are time-barred

Plaintiff does not dispute that its Section 1983 claims must be brought within two years of accrual. (Resp. at 10). Even if Plaintiff contends that it is bringing an "as-applied" challenge to the resolutions adopting the CFFs, Plaintiff needed to do so, at the latest, within two years of accrual of such a claim. *See* C.R.S. § 13-80-102(1)(h). Apparently, Plaintiff's "as-applied" claims are

based on its allegation that, **since 2019**, the District has deposited the CFFs collected by it into its general fund. (Am. Compl. ¶¶ 3, 54). Plaintiff alleges that it has owned property within the District since May 5, 2021. (Am. Compl. ¶ 9). Yet, Plaintiff did not file suit until May 26, 2023—more than two years later. Not only was the resolution adopting the CFFs publicly recorded and accessible to Plaintiff at the time of its purchase of property within the District, but the District's budgets and annual financials showing allocation of the CFFs were also publicly available at that time.[3] Thus, Plaintiff's contention that its claims did not accrue until November 2022 is unpersuasive. At the latest, Plaintiff should have known of any claims by May 5, 2021.

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

As discussed, Plaintiff's allegation that the District has deposited funds from the CFFs to a general fund is insufficient to state any cognizable claim for relief. Plaintiff has failed to allege a violation of C.R.S. § 32-1-1001(1)(j) because the CFFs were enacted to defray the costs of Improvements that generally benefit the entire development. As discussed, the Colorado Supreme Court's opinion in *Barber v. Ritter*, 196 P.3d 238, 250 (Colo. 2008) makes clear that the question must be analyzed based on the primary purpose of the charge at the time it is enacted and the mere transfer of funds into a general account is irrelevant. Pursuant to § 32-1-1001(1)(j), the District

[3] The District's annual financial information is accessible on its website: https://www.granbyranchmetro.org/view/metropolitan-district-document-library.aspx Although its website was upgraded and changed in 2023, such information was available on the District's former website since before 2021. The Court may consider this information without converting the motion into one for summary judgment because the annual financial information is mentioned in the complaint (*see* Am. Compl. ¶ 54) and central to the claims at issue. *See 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).

had authority to impose the CFFs to defray the costs of Improvements, which it did, and any alleged transfer of funds into a general fund does not constitute a violation of that section.

Plaintiff's "constitutional violation as irreparable injury" argument fails because, as discussed above and in the Motion, Plaintiff has failed to state a viable claim for a constitutional violation. Plaintiff's argument that the "unauthorized by law" exception to the rule precluding injunctive relief for Fifth Amendment Takings claims fails because it relies on an outdated case on the issue. (Resp. at 15, citing *Custer Cty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1042 (10th Cir. 20**01**)).[4] The Supreme Court has since held that injunctive relief is not available for Takings claims where other remedy at law is available. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2179 (2019) ("As long as just compensation remedies are available—as they have been for nearly 150 years—injunctive relief will be foreclosed."). "As multiple courts have explained, the proper remedy for a Takings violation is not injunctive relief, but rather monetary damages." *Willowbrook Apartment Assocs., LLC v. Mayor & City Council of Balt.*, No. SAG-20-1818, 2020 U.S. Dist. LEXIS 117931, at *10 (D. Md. July 6, 2020) (collecting cases); *see also Cty. of Butler v. Wolf*, No. 2:20-cv-677, 2020 U.S. Dist. LEXIS 93484, at *11 (W.D. Pa. May 28, 2020) ("Plaintiffs may have a remedy for the takings that they allege, but declaratory relief is not the appropriate avenue to pursue it.") (citing *Knick, supra*).

[4] Plaintiff incorrectly cites to this case as being decided in 2021. The difference is significant because *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019) was decided after, not before, *Custer*.

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

The CFF is not a "land development charge" subject to the requirements of C.R.S. § 29-1-803(1). (*See* Mot. at 11-12).

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

Plaintiff has failed to sufficiently allege a claim for material modification of the Service Plan. The Special District Act defines "material modifications" as "changes of a basic or essential nature." C.R.S. § 32-1-207(2)(a); *see also* Mot. at 13. The determination of whether a service plan has been materially modified involves a question of law. *Indian Mt. Corp.*, 412 P.3d at 893.

Plaintiff fails to provide any substantive legal analysis to support its claim, let alone address the cases cited in the Motion. Instead, it chooses to rely solely on conclusory allegations in support of its "simple claim." (Resp. at 18; citing Am. Compl. ¶¶ 19, 92-97). Even taking Plaintiff's allegations as true, Plaintiff has failed to show a material modification of the Service Plan. Indeed, Plaintiff does not allege in any non-conclusory manner that there has been a material modification, rather, it seeks to go on a fishing expedition "to confirm GRMD's use of these funds and whether same is for any purpose not allowed under GRMD's Service Plan." (Resp. at 19). The plausibility pleading standard, however, "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Ashcroft*, 556 U.S. 662, 678-79 (2009). Plaintiff's claim fails as a matter of law.

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

Plaintiff's citation to the nonjudicial foreclosure statute is inapposite because the District's statutory lien is not "junior to the lien foreclosed." (Resp. at 19; citing C.R.S. § 38-38-501).[5] Per *Wasson*, a special district's statutory lien is neither junior nor subordinate to a deed of trust even under circumstances where other types of liens could be. The District's statutory, "perpetual" lien remains on the property and is favored "over that of the private lender," even if it was created after a recorded deed of trust. *See Wasson v. Hogenson*, 583 P.2d 914, 919 (Colo. 1978) and C.R.S. § 32-1-1001(1)(j)(I). Further, the CFFs were established pursuant to the 2005 Facilities Fee Resolution, which was adopted on May 26, 2005—***prior to*** the Deed of Trust dated June 1, 2005. The provision in the Deed of Trust cited by Plaintiff does not apply to fees "already created as of the date of this Deed of Trust." (Compl. Ex. 8 at 8, § 5.7(b)).

Plaintiff's attempt to distinguish the controlling authority in *Wasson* is unpersuasive. Plaintiff's assertion that its property "did not receive any benefit" is wholly conclusory given that it is a property owner within the District, where Improvements (such as entrance monuments, a major entrance road to connect the development to a highway, storm and sanitary sewer major lines, etc.) have already been made using CFFs for the general benefit of all property owners. Just because the deed of trust purports to require the lender's consent for the imposition of any "additional taxes, assessments or other monetary obligations" also does not make *Wasson* inapplicable. As the Colorado Supreme Court explained, if special districts "are to remain viable

[5] *First Interstate Bank v. Tanktech, Inc*., 864 P.2d 116 (Colo. 1993), cited in the Response is also inapposite. That case concerned only private parties, not a special district like in this case and *Wasson*.

institutions capable of accomplishing their purposes, their charges cannot be subordinated to prior recorded deeds of trust." *Wasson*, 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. In so ruling, the Court relied on the following "concepts in the law which are fundamental":

> 1) "All private rights and interests in real property in a municipality are subject to the statutory powers of the municipality to levy assessments for local improvements pursuant to its governmental functions"; and
>
> 2) "priority of liens for a public improvement need not be expressly spelled out in the statute."

Id. at 917.

Wasson's holding would be rendered meaningless and its rationale based on a concern for viability of special districts would be utterly disregarded if a lender could simply bypass it by requiring prior consent. *See id*. at 919 (recognizing that the applicable statutory language uses "words which forcefully indicate that the ***legislature intended to favor the district's public lien over that of the private lender***.") (emphasis added). Plaintiff's policy arguments fail given that the Colorado Supreme Court already considered the interests of property owners, lenders, and special districts, and related policy implications in so ruling in *Wasson*. *See id*. at 918 (respecting the General Assembly's declaration that special districts "serve a public use and will promote the health, safety, prosperity, security and general welfare of the inhabitants of the district") and C.R.S. § 32-1-102(1) (identical language); *see also* C.R.S. § 32-1-113 (the Special Districts Act, "being necessary to secure the public health, safety, convenience, and welfare, shall be liberally construed to effect its purposes").

Gold Vein Ltd. Liab. Co. v. City of Cripple Creek, 973 P.2d 1286 (Colo. App. 1999) does not warrant a different conclusion. There, a division of the Court of Appeals concluded that a City's lien for nuisance abatement costs did not take priority over the lien of a deed of trust. However, the lien at issue in *Cripple Creek* was not for nonpayment of a special fee (or special assessment) and thus, the Court declined to consider its priority based on such a status. *Id*. at 1289 ("Because the lien was not one imposed for a special assessment, it follows that its priority, if any, cannot be based upon such a status"; declining to analyze argument that the expenditure was a special fee because the City failed to timely raise issue). Further, *Cripple Creek* was a Title 31, not a Title 32 (Special Districts) case such as this and *Wasson*. The Colorado Supreme Court's ruling that "priority of liens for a public improvement need not be expressly spelled out in the statute" is more specific to the facts of this case and controlling law. *Wasson*, 583 P.2d at 917.

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.

Dated this 22nd day of September, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2023, I electronically filed the foregoing, **DEFENDANT'S REPLY IN SUPPORT OF ITS 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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Exhibit A

DISTRICT COURT, WELD COUNTY, COLORADO 901 9th Avenue, P.O. Box 2038, Greeley, CO 80632 (970) 475-2400	DATE FILED: June 23, 2016 3:05 PM CASE NUMBER: 2015CV30936
Plaintiffs: **Mission Terrace Estates, LLC** and **Milan E. Timm Revocable Living Trust** *v.* *Defendant:* **St. Vrain Sanitation District**	▲ COURT USE ONLY ▲ Case No. 2015 CV 30936 Division 4

Order on the Plaintiffs' Motion for Summary Judgment

The plaintiffs, Mission Terrace Estates and the Milan E. Timm Revocable Living Trust, seek summary judgment on their fourth claim for declaratory judgment. Specifically, the plaintiffs seek a determination of a question of law: whether the standards set forth in *Koontz v. St. Johns River Water Management Dist.*, 133 S. Ct. 2586 (2013), apply to the fees at issue in this case, so as to render those fees invalid. In the alternative, if I conclude that *Koontz* does not apply, the plaintiffs contend that the less-stringent standard set forth in *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687 (Colo. 2001), still renders the fees invalid.

Because I conclude that the fees at issue here are not monetary exactions, *Koontz* does not apply. Instead, *Krupp* is directly on point. And after applying *Krupp* and the summary motion standards, I determine that summary judgment is not proper. I therefore deny the motion.

SUMMARY JUDGMENT & DETERMINATION OF QUESTION OF LAW STANDARDS

Summary judgment under C.R.C.P. 56(c) is a drastic remedy appropriate only when the pleadings and the supporting documentation show that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. *In re Tonko*, 154 P.3d 397, 402 (Colo. 2007). When determining whether summary judgment is an appropriate remedy, the nonmoving party is entitled to the benefit of all favorable inferences reasonably drawn from the undisputed facts, and all doubts must be resolved against the moving party. *Id*. A *material fact* is one that will affect the outcome of the case or claim. *Thompson v. Maryland Cas. Co.*, 84 P.3d 496, 501 (Colo. 2004).

C.R.C.P. 56(h) provides:

> At any time after the last required pleading, with or without supporting affidavits, a party may move for determination of a question of law. If there is no genuine issue of any material fact necessary for the determination of the question of law, the court may enter an order deciding the question.

The purpose of Rule 56(h) is

> to allow the court to address issues of law which are not dispositive of a claim (thus warranting summary judgment) but which nonetheless will have a significant impact upon the manner in which the litigation proceeds. [Resolving such issues] will enhance the ability of the parties to prepare for and realistically evaluate their cases … and allow the parties and the court to eliminate significant uncertainties on the basis of briefs and argument, and to do so at a time when the determination is thought to be desirable by the parties.

Stapleton v. Pub. Employees Ret. Ass'n, 2013 COA 116, ¶ 19 (quoting *Bd. of Cnty. Comm'rs v. United States*, 891 P.2d 952, 963 n. 14 (Colo. 1995)).

The same standards that apply to summary judgment under C.R.C.P. 56(c) also apply to determining questions of law under C.R.C.P. 56(h). *See Stapleton*, ¶¶ 20-22.

UNDISPUTED MATERIAL FACTS

Mission Terrace and the Trust purchased property in Firestone, Colorado with the intent to construct a 264-unit multi-family apartment complex. Shortly thereafter, the Trust purchased property across the street with the intention of constructing a 112-unit multi-family complex. The plaintiffs assert that these two projects would be the first for-rent apartment complexes in Firestone.

The defendant, St. Vrain Sanitation District, is a special district in charge of treating the wastewater created within the district. Treated wastewater is eventually delivered back into the St. Vrain River. The District assesses fees for its services, including a total plant investment fee (PIF)—a one-time fee assessed on every new project in the District. The purpose of the PIF is "to offset the capital costs for providing facilities to serve new customers and is used to reduce the burden to the existing customers for financing new growth." *See Report on Sewer Rates & Related Charges for the St. Vrain Sanitation District*, p. 39. The residential PIF for each single family equivalent (SFE) at the time was $5,650, as set forth in § 4.2 of the *St. Vrain Sanitation District Rules and Regulations*.

The regulations are legislatively enacted by the District's board of directors and imposed upon all property owners. Individual units, including apartments, condos, and townhomes, are classified as single family units and allocated 1 SFE. The SFE standard is defined as "1 SFE = 270 gallons per day (gpd) = 2.7

people." The total PIF is calculated by multiplying the PIF rate ($5,650) by the allocable SFE units.

In calculating the total PIF for the projects here, the Mission Terrace project totals $1,491,600[1] and the Trust project totals $632,800.[2] Mission Terrace and the Trust disputed the PIF as applied to their respective projects. In response, the District, in accordance with § 4.2 of the regulations, granted Mission Terrace and the Trust a 10% total PIF discount.[3] The District then granted an additional 15% reduction to Mission Terrace and the Trust, thereby reducing the PIFs by 25%.

ANALYSIS

1. Overview of *Krupp*, *Nollan/Dolan*, and *Koontz*

The crux of the plaintiffs' argument rests upon two cases: a 2001 Colorado Supreme Court case, *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687 (2001), and a 2013 United States Supreme Court case, *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

In *Krupp*, the petitioners sought to build a residential townhouse complex. They brought suit arguing, among other claims, that the PIF assessment was excessive in relation to the projected impact of the project. The Colorado Supreme Court held that the PIF was a valid, legislatively established fee that was "reasonably related to the District's interest in expanding its infrastructure to account for new development, and that the District's specific PIF assessment on the [petitioners'] project was fairly calculated and rationally based." *Krupp*,

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[1] 264 units multiplied by $5,650

[2] 112 units multiplied by $5,650

[3] Section 4.2 provides that "a development comprised of multiple residential structures that owns and maintains its own internal collection system, and that requires a single monthly sewer service charge billing" may be granted a 10% total PIF discount.

19 P.3d at 692. Thus, the PIF did not fall into the narrow category of charges that are subject to what is described as the *Nollan/Dolan* analysis. *Id*.

The *Nollan/Dolan* analysis refers to the Supreme Court's decisions in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994). Both cases involved "exactions" of land—a beach access easement in *Nollan* and a greenway in *Dolan*—that were imposed as a condition of zoning approvals. The United States Supreme Court held that a unit of government may not condition the approval of a land-use permit on the property owner's relinquishment of a portion of the property unless there is a "nexus" and "rough proportionality" between the government's demand and the anticipated effects of the proposed land use.

In *Koontz*, the petitioner sought to develop 3.7 acres of his property in an area classified as wetlands. 133 S. Ct. at 2592. He applied to the river management district for permits, and to mitigate the environmental effects of his proposal, he offered to deed to the district a conservation easement on the remaining 11 acres of his property. *Id*. at 2593. The district considered this proposal inadequate and informed the petitioner that it would approve the permit application only if he agreed to either reduce the size of the development to 1 acre (and deed the rest); or, in the alternative, develop according to his original plan, but agree to pay for improvements to some district-owned land located several miles away. *Id*. Because the petitioner refused these concessions, the district denied his permit application. The United States Supreme Court held that the government's demand for property from a land-use permit applicant must satisfy the *Nollan/Dolan* requirements even

when the government denies the permit and even when its demand is for money. *Id.* at 2603.

2. *Koontz* does not apply because the PIF is a service fee and not a monetary exaction.

At the outset, the plaintiffs maintain that the fees assessed here are monetary exactions and therefore subject to the higher standard set forth in *Koontz*. I disagree.

A service fee is "a charge imposed on persons or property for the purpose of defraying the cost of a particular government service." *Krupp*, 19 P.3d at 693 (quoting *E-470 Pub. Highway Auth. v. 455 Co.*, 3 P.3d 18, 24 (Colo. 2000)). The PIF in *Krupp* met that definition because it was "a one-time charge assessed on new building projects within the District for the purpose of defraying the cost of expanding the District's wastewater treatment system to accommodate new projects." *Id*. This purpose of the PIF here is precisely the same. The *Report on Sewer Rates & Related Charges for the St. Vrain Sanitation District* states that purpose of the PIF is "to offset the capital costs for providing facilities to serve new customers and is used to reduce the burden to the existing customers for financing new growth." And it is a "one-time charge for *all* new customers of the District." *Id*. (emphasis added).

An exaction, however, is a *condition* imposed on land-use approvals, like those at issue in *Nollan* and *Dolan*. An exaction requires a landowner to forfeit part of his or her property for public use as a condition of the government's approval of the proposed development. In other words, an exaction requires the landowner to give up valuable property in exchange for the government's *approval* of a proposed development; whereas, a service fee requires the landowner to pay for a government *service*—like providing access to a public

utility. An exaction must satisfy the "essential nexus" and "rough proportionality" tests. *See Krupp*, 19 P.3d at 695; *Wolf Ranch, LLC v. City of Colorado Springs*, 207 P.3d 875, 878 (Colo. App. 2008).

As explained in *Krupp*, Colorado codified the *Nollan/Dolan* test and, by statute, limits the test to charges that are "determined on an individual and discretionary basis" and declined to apply the test to "any legislatively formulated assessment, fee, or charge that is imposed on a broad class of property owners by a local government." *See* § 29-20-203(1), C.R.S. 2016; *Krupp*, 19 P.3d at 696. The PIF at issue here is a generally-applicable, legislatively-formulated service fee imposed on all new property owners by the St. Vrain Sanitation District.

As discussed in *Koontz*, a monetary exaction is simply a condition involving money rather than property. Notably, however, the Supreme Court emphasized that its holding "does not affect the ability of governments to impose … user fees … that may impose financial burdens on property owners." *Id*. at 2601.

Thus, because the charge at issue here is a service fee and not a monetary exaction, *Koontz* does not apply.

3. The plaintiffs are not entitled to summary judgment under the lower standard set forth in *Krupp*.

The plaintiffs argue that they are entitled to partial summary judgment on their fourth claim for relief, which asserts that the PIF is invalid even if the lower standard set forth in *Krupp* is applied to this case. As the party moving for summary judgment, the plaintiffs bear the initial burden of showing the absence of a genuine issue as to any material fact; if this initial burden is met, the burden then shifts to the defendant, as the nonmoving party, to establish a

triable issue of fact. *See Westin Operator, LLC v. Groh*, 2015 CO 25, ¶ 20. I conclude that the plaintiffs have not met this burden.

First, the plaintiffs allege that, in calculating the PIF, the regulations do not rationally differentiate between different classes of buildings based upon anticipated peak wastewater flows. Because St. Vrain does not differentiate based on anticipated peak wastewater flows, the plaintiffs argue that the PIF cannot be reasonably related to the specific government service provided.[4] St. Vrain points, however, to § 4.2 of the regulations, which includes a table representing the different classifications and corresponding allocable SFE. The table distinguishes between private dwellings (individual units including apartments, condos, and townhomes); rooming houses and dorms; and mobile homes and trailers.

Second, based on information provided by their hydrogeologist, the plaintiffs allege that the average multi-family unit for the projects will use 98.3 gallons per day (gpd) rather than District's 270 gpd. The district disputes this calculation, contending that the SFE was computed using a 2.7 person per household/residence on the basis of 100 gallons per day per capita and that this standard was based on District demographics.

Third, the plaintiffs allege that the total PIF fee of $5,650 per SFE is not reasonably related to the actual impact of the projects. The District contends that the fee is appropriate and reasonably related to the overall cost of the new

[4] Notably, what the plaintiffs fail to discuss is that, in *Krupp*, the district's SFE conversion scale uses one rate for units that are typically used long-term and year-round, such as single family residences, duplexes, and manufactured homes, and another rate for short-term rental units, such as apartments, townhouses, and condominiums. *Krupp*, 19 P.3d at 691. Thus, the SFE conversion rate for apartments, townhouses, and condominiums is significantly *higher* than the rate for single family residences. *Id*. For example, a single family residence with three bedrooms and two baths would receive 1.0 SFE units, while an apartment with the same number of bedrooms and baths would receive 1.8 SFE units. *Id*.at 698.

plant and transmission pipeline, and that because the PIF is assessed on every new project in the District, it is not discretionary.

Finally, the plaintiffs argue that the reduction in the PIF by 25% was an adjudicative determination and not based on actual usage. The District contends that 10% of the PIF reduction is provided for in § 4.2 of the regulations, and that the additional 15% reduction was based not upon flows, but on the determination that multi-family residential buildings would result in significantly less infrastructure and pipelines as a result of their physical proximity to the existing lines.

Thus, viewing this evidence in the light most favorable to the District, the plaintiffs have not shown that the District has imposed a fee that lacks a rational basis or was not fairly calculated. Because of these genuine disputes, summary judgment on the fourth claim is not proper.

ORDER

Accordingly, Plaintiff's *Motion for Summary Judgment* is DENIED.

So Ordered:
June 23, 2016

BY THE COURT:

Todd Taylor
District Court Judge