IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 23-cv-1351-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.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Magistrate Judge Scott T. Varholak

This matter is before the Court on Defendant's Motion to Dismiss Plaintiff's Amended Complaint (the "Motion"). [#19] The Motion has been referred to this Court. [#21] The Court has carefully considered the Motion and related briefing, the entire case file, and the applicable case law, and has determined that oral argument would not materially assist in the disposition of the Motion. For the following reasons, the Court respectfully **RECOMMENDS** that the Motion be **GRANTED IN PART** and **DENIED IN PART**.

I. BACKGROUND[1]

This action concerns the Granby Ranch Development ("Granby Ranch"), an approximately 5,000 acre planned mixed use development located in Grand County,

[1] The facts are drawn from the allegations in Plaintiff's Amended Complaint (the "Complaint") [#15], which the Court accepts as true at this stage of the proceedings. *Wilson v. Montano*, 715 F.3d 847, 850 n.1 (10th Cir. 2013) (citing *Brown v. Montoya*, 662

Colorado. [#15 at ¶ 15] In 2003, the owner and private developer of Granby Ranch sought the organization of Headwaters Metropolitan District ("Headwaters") and Defendant, Granby Ranch Metropolitan District ("GRMD"), to facilitate the development of Granby Ranch. [*Id*.] The Town of Granby (the "Town") approved Service Plans for each District. [*Id*. at ¶¶ 15-16] The Service Plans contemplated a dual district structure where, simply put, Headwaters was authorized to provide the public improvements within the entire development (e.g., infrastructure) and GRMD was authorized to finance those public improvements. [*Id*. at ¶¶ 18-20]

On May 26, 2005, the Boards of Directors of Headwaters and GRMD approved a joint resolution to establish a capital facilities fee (the "2005 Facilities Fee Resolution"). [*Id.* at ¶ 25] The 2005 Facilities Fee Resolution established a fee of $6,255 to be paid by the owner of each lot or parcel of land within GRMD to obtain building permits to develop lots within GRMD's boundaries. [*Id.* at ¶¶ 25-27] The proceeds would be used "***solely*** for the purpose of financing the acquisition, reimbursement, construction, replacement, maintenance and repair of Improvements, which may include, without limitation, issuance of bonds or reimbursement of amounts advanced by other parties." [*Id*. at ¶ 29 (emphasis added)] The 2005 Facilities Fee Resolution authorized Headwaters, not GRMD, to collect the fee. [*Id*. at ¶146]

F.3d 1152, 1162 (10th Cir. 2011)). The Court also finds it appropriate to consider the documents that Plaintiff incorporates into the Complaint, by reference, in assessing the sufficiency of Plaintiff's allegations, because the documents are central to Plaintiff's claims and the parties do not dispute their authenticity. *Jacobsen v. Deseret Book Co*., 287 F.3d 936, 941 (10th Cir. 2002); *U.S. Olympic Comm. v. Am. Media, Inc*., 156 F. Supp. 2d 1200, 1204 (D. Colo. 2001).

On or before June 2, 2005, Redwood Capital Finance Co, LLC entered into a Loan Agreement with Granby Realty Holdings LLC ("GRH")—which owned all of the property within Headwaters and GRMD. [*Id.* at ¶¶ 18, 23, 64] This agreement granted Redwood a deed of trust (the "2005 Deed of Trust") that encumbered the majority of Granby Ranch. [*Id.* at ¶ 64] The 2005 Deed of Trust required Redwood's written consent prior to: (1) the initiation of certain development operations and (2) "the imposition of any additional taxes, assessments or other monetary obligations or burdens on the Subject Property." [*Id.*]

On April 11, 2006, the Town, Headwaters and GRMD entered an Intergovernmental Agreement Concerning the Facilitation of Payment of Capital Facilities Fees (the "Town Facilities Fee Agreement"). [*Id.* at ¶ 32] The purpose of the Town Facilities Fee Agreement was for the Town to assist in ensuring payment of the capital facilities fee imposed under the 2005 Facility Fee Resolution by requiring payment of the fee to GRMD prior to issuance of a building permit. [*Id*. at ¶ 34] The Agreement also acknowledged that GRMD had determined to issue Limited Tax General Obligation Bonds, Series 2006 (the "2006 Bonds") to finance some of the infrastructure serving a portion of Granby Ranch. [*Id.* at ¶¶ 33, 39, 50]

On June 7, 2006, Headwaters and GRMD approved an Amended and Restated Joint Resolution to Establish a Capital Facilities Fee (the "2006 Facilities Fee Resolution."). [*Id.* at ¶ 36] The 2006 Facilities Fee Resolution authorized the same $6,255 capital facilities fee [*id*. at ¶ 42], and the proceeds were to be used:

> ***solely*** for the purpose of financing the acquisition, reimbursement, construction, replacement, maintenance and repair of the 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 reimbursements of amounts advanced by other parties.

[*Id.* at ¶ 46 (emphasis added)]. The 2006 Facilities Fee Resolution authorized GRMD, not Headwaters, to collect the fee. [*Id.* at ¶ 6]

From 2006 to 2018, GRMD collected capital facilities fees and deposited them in its Debt Service Fund for payment on its 2006 Bonds. [*Id.* at ¶¶ 49-50] Beginning in 2019, however, GRMD deposited these facilities fees into its General Fund. [*Id*. at ¶ 54] Specifically, in 2019, 2020, and 2021, GRMD deposited $43,785, $12,510, and $68,755 respectively into its General Fund. [*Id*.] GRMD's manager confirmed, under oath, that GRMD's General Fund is not restricted to any particular use; those funds are available to pay GRMD's general and administrative expenses, including, for example, legal fees incurred by GRMD in a separate lawsuit it filed against Headwaters and others. [*Id.* at ¶ 56]

At some time prior to January of 2020, GRH defaulted on its obligations under the 2005 Deed of Trust, which prompted foreclosure. [*Id*. at ¶¶ 65-66] GP Granby Holdings LLC eventually took title to the property involved. [*Id*. at ¶¶ 66-67]

In May of 2021, Plaintiff purchased real property in Granby Ranch from GP Granby Holdings. [*Id*. at ¶ 68] In 2022, Plaintiff applied for and obtained 20 building permits. [*Id*. at ¶ 57] In doing so, it paid a total of $125,100 in capital facilities fees to GRMD pursuant to the 2006 Facilities Fee Resolution. [*Id*. at ¶ 58] Plaintiff owns other undeveloped property which Plaintiff intends to develop. [*Id.* at ¶ 61]

Plaintiff initiated the instant action on May 26, 2023. [#1] Plaintiff filed the operative Amended Complaint (the "Complaint") on July 12, 2023. [#15] The Complaint asserts: Fifth Amendment takings and due process claims pursuant to 42 U.S.C. § 1983 ("Section 1983"); violations of the 2006 Facilities Fee Resolution, the Colorado Local

Government Act, and the Colorado Special District Act; an illegal material modification claim pursuant to GRMD's Service Plan; and a claim regarding lien priority which alleges the foreclosure in 2020 extinguished the authority for collection of a capital facilities fee within GRMD's boundaries. [*See generally* #15] The Complaint seeks declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202 and damages under 42 U.S.C. § 1983. [*Id*. at ¶ 7]

On July 28, 2023, Defendant, GRMD, filed the instant Motion, seeking dismissal of all of Plaintiff's claims. [#19] Plaintiff has responded to the Motion [#32] and Defendant has filed a reply [#41].

II. STANDARD OF REVIEW

A. Federal Rule of Civil Procedure 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) empowers a court to dismiss a complaint for "lack of subject-matter jurisdiction." Fed. R. Civ. P. 12(b)(1). Dismissal under Rule 12(b)(1) is not a judgment on the merits of a plaintiff's case, but only a determination that the court lacks authority to adjudicate the matter. *See Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994) (recognizing federal courts are courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so). A court lacking jurisdiction "must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking." *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974).

Rule 12(b)(1) challenges are generally presented in one of two forms: "[t]he moving party may (1) facially attack the complaint's allegations as to the existence of subject matter jurisdiction, or (2) go beyond allegations contained in the complaint by presenting

evidence to challenge the factual basis upon which subject matter jurisdiction rests." *Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell*, 363 F.3d 1072, 1074 (10th Cir. 2004) (quoting *Maestas v. Lujan*, 351 F.3d 1001, 1013 (10th Cir. 2003)). When reviewing a facial attack on subject matter jurisdiction, the Court "presume[s] all of the allegations contained in the amended complaint to be true." *Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002).

B. Federal Rule of Civil Procedure 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." In deciding a motion under Rule 12(b)(6), a court must "accept as true all well-pleaded factual allegations . . . and view these allegations in the light most favorable to the plaintiff." *Cassanova v. Ulibarri*, 595 F.3d 1120, 1124 (10th Cir. 2010) (quoting *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009)). Nonetheless, a plaintiff may not rely on mere labels or conclusions, "and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). Plausibility refers "to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570). "The burden is on the plaintiff to frame a 'complaint with enough factual matter (taken as true) to suggest' that he or she

is entitled to relief." *Id*. (quoting *Twombly*, 550 U.S. at 556). The ultimate duty of the court is to "determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007).

III. ANALYSIS

The Motion alleges Plaintiff's claims should be dismissed, in short, because: (1) Plaintiff's Fifth Amendment takings and due process claims fail as a matter of law [#19 at 3-7]; (2) Plaintiff's allegations regarding violations of the 2006 Facilities Fee Resolution, the Colorado Special District Act, and the Colorado Local Government Act fail to state a claim [*id.* at 9-12]; (3) Plaintiff cannot sustain a material modification claim under the Service Plan's broad mandates [*id.* at 12-15]; and (4) Plaintiff's claim that the foreclosure on the 2005 Deed of Trust extinguished the authority to collect capital facilities fee is not supported by case law [*id*. at 15-16]. The Motion also alleges that: (1) Plaintiff lacks standing to bring certain claims [*id*. at 8-9, 12]; (2) certain claims are time-barred [*id*. at 8-9]; and (3) Plaintiff fails to plead grounds supporting injunctive relief [*id*. at 9-11]. The Court will address each contested claim in turn, beginning with the standing and statute of limitations issues.

A. Fifth Amendment: Takings and Due Process (Counts V, VI, VII, VIII)

Plaintiff asserts a Fifth Amendment takings and due process claim against Defendant pursuant to 42 U.S.C. § 1983 ("Section 1983").[2] [#15 at ¶¶98-138] Defendant

[2] Section 1983 allows a party to bring a cause of action for an alleged violation of the Fourteenth Amendment and provisions of the Bill of Rights incorporated into the Fourteenth Amendment. *See Scott v. Hern*, 216 F.3d 897, 906 (10th Cir.2000). Critically, the Due Process Clause of the Fifth Amendment applies only to federal actors. *See Koessel v. Sublette County Sheriff's Dept.,* 717 F.3d 736, 748 n.2 (10th Cir. 2013).

argues: (1) both claims are time-barred [#19 at 8-9]; (2) Plaintiff does not have standing to bring the claims [*id*.]; (3) Plaintiff's takings claim fails as a matter of law [*id*. at 3-5]; and (4) Plaintiff's due process claim fails as a matter of law [*id*. at 5-7]. The Court addresses these arguments in turn.

1. Whether the Claims are Time-Barred

Defendant argues Plaintiff's takings and due process claims were brought outside the statute of limitations period under Section 1983 and Colo. Rev. Stat. § 32-1-207(3)(b). [#19 at 8-9] The Court disagrees.

"Limitations periods in § 1983 suits are to be determined by reference to the appropriate state statute of limitations and the coordinate tolling rules." *Hardin v. Straub*, 490 U.S. 536, 539 (1989) (quotation omitted). Pursuant to Colorado law, the statute of limitations for Section 1983 claims is two years "from the time the cause of action accrued." *Fogle v. Pierson*, 435 F.3d 1252, 1258 (10th Cir. 2006); *see also* Colo. Rev. Stat. § 13-80-102. "A § 1983 action 'accrues when facts that would support a cause of action are or should be apparent.'" *Fogle*, 435 F.3d at 1258 (quoting *Fratus v. DeLand*, 49 F.3d 673, 675 (10th Cir.1995*)); see also Vasquez v. Davis*, 882 F.3d 1270, 1276 (10th Cir. 2018) ("claims accrued when [Plaintiff] had a complete and present cause of action; that is, when he could have filed suit and obtained relief" (quotation omitted)).

Plaintiff initiated the instant action on May 26, 2023. [#1] The Section 1983 claims are therefore viable if they accrued after May 26, 2021. Defendant argues the claims accrued in 2005 when the 2005 Facilities Fee Resolution was adopted. [#19 at 8]

Because Defendant does not raise this pleading error in the Motion, and in an effort to promote judicial efficiency, the Court will construe Plaintiff's Due Process claim as brought under the Fourteenth Amendment.

However, this argument misconstrues Plaintiff's claim as a facial challenge against the 2005 Facilities Fee Resolution. [#32 at 10-11] It is not. [*Id.*] Plaintiff's claims are predicated on the fees paid in exchange for the land-use permits and are thus an as-applied challenge to the fees. [#15 at ¶¶ 57-58] And an as-applied challenge does not accrue until Plaintiff's personal rights were allegedly violated and all the events necessary to state a claim have accrued. *See, e.g., Waltower v. Kaiser*, 17 F. App'x 738, 740 (10th Cir. 2001) (explaining a facial challenge against a statute accrues when it became effective, but an as-applied challenge accrues when plaintiff's personal rights were allegedly violated). As a result, Plaintiff's cause of action did not accrue until 2022, when Plaintiff applied for the 20 building permits, and his Section 1983 claims thus fall well within the statute of limitations period.

Defendant also argues that Plaintiff's takings and due process claims are time-barred under Colo. Rev. Stat. § 32-1-207(3)(b). [#19 at 8] The Court disagrees. Colo. Rev. Stat. § 32-1-207(3)(b) provides that "[n]o action may be brought to enjoin the . . . imposition of rates, fees, tolls and charges . . . unless such action is commenced within forty-five days after the special district has published notice of its intention to undertake such activity." As noted, Plaintiff is not challenging the original imposition of the facilities fees pursuant to the 2006 Resolution. Moreover, courts will decline to apply Colo. Rev. Stat. § 32-1-207(3)(b)'s 45-day statute of limitations when proper notice, as defined by the statute, was not provided. *See, e.g., Bill Barrett Corp. v. Sand Hills Metro. Dist.*, 411 P.3d 1086, 1092 (Colo. App. 2016). The Motion's briefing and pleadings are devoid of any evidence that such notice was provided. [*See generally* #19, 41] Accordingly, the

Court cannot conclude, on the information before it, that Plaintiff's Section 1983 claims are time-barred.

2. Standing

Defendant argues that Plaintiff cannot establish an injury necessary for standing. [#19 at 8-9] There are three essential elements to constitutional standing: (1) injury in fact—plaintiff must show that he has suffered a harm that is concrete and actual; (2) causation—plaintiff must show a fairly traceable connection between the injury and defendant's conduct; and (3) redressability—the requested relief must address the alleged injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [courts] presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Id*. at 561 (quotation omitted). The Court addresses standing as it relates to the takings claim first and then the due process claim.

a. Takings Claim (Counts V and VI)

To support an injury in fact for its takings claim, Plaintiff submits that Defendant imposed an exaction of $125,100 in capital facilities fees in 2022 [#15 at ¶ 4], where the capital facilities fees lacked an essential nexus to a legitimate government purpose and were not roughly proportional to the impact of Plaintiff's development and use of its property. [*Id.* at ¶¶ 4,101] Plaintiff would have been unable to proceed with its property development projects had it refused to pay the capital facilities fees to Defendant, because the Town requires payment of the facilities fee directly to Defendant prior to issuance of a building permit. [*Id*. at ¶¶ 32-34] The Supreme Court in *Koontz v. St. Johns*

River Water Mgmt. Dist., cautioned of the coercion when the government uses its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed use of the property at issue. 570 U.S. 595, 604-06 (2013). This is precisely what Plaintiff has alleged. The Court therefore finds, for purposes of the Motion, that Plaintiff has adequately alleged injury.

Causation too is satisfied. It is Defendant who collects capital facilities fees prior to the issuance of a building permit. [#15 at ¶¶ 32-34] And it is Defendant who has misappropriated those funds on general and administrative expenses of government. [*Id.* at ¶ 54]. Thus, the second standing element is satisfied.

Finally, redressability is present, at least in part. A favorable decision on this claim would redress Plaintiff's injury by compensating Plaintiff for damages sustained through an unlawful government taking. Plaintiff therefore meets the elementary requirements for standing in seeking monetary damages.

The Complaint, however, also seeks declaratory and injunctive relief for continuing violations under 42 U.S.C. § 1983. [#15 at ¶¶107-115] The Motion asserts that Plaintiff has not credibly alleged "irreparable harm" for purposes of injunctive relief. [#19 at 11] The Court agrees. The Supreme Court foreclosed prospective injunctive and declaratory relief for takings claims in *Knick v. Township 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.").[3] Because there are no allegations indicating

[3] Plaintiff acknowledges *Knick* but then purports to cite a subsequent case that created an exception to *Knick*. [#32 at 15 (citing *Custer Cty. Action Ass'n v. Garvey*, 256 F.3d 1024 (2001)). Contrary to Plaintiff's citation, however, *Custer* was decided in 2001—18

that Plaintiff will be prevented from recovering just compensation remedies for any alleged future takings, Plaintiff cannot seek injunctive or declaratory relief for the alleged violations of the Takings Clause. *Id*. at 2167-68. The Court thus respectfully RECOMMENDS that the Motion be GRANTED to the extent it seeks to dismiss Plaintiff's takings claim for declaratory and injunctive relief (Count VI).

b. Due Process Claim (Counts VII and VIII)

Regarding the due process claim, to support an injury in fact, Plaintiff submits that Defendant was required, pursuant to the 2006 Facilities Fee Resolution, to use the capital facilities fees in ways that benefited the District's property owners (either through debt repayment or financing public improvements), yet in misusing the fees, Defendant denied Plaintiff any such benefit. [#15 at ¶¶ 116-38; *see also* #32 at 18] The Court finds that injury has been adequately alleged.

Causation is satisfied because it is Defendant who collects capital facilities fees prior to the issuance of a building permit. [#15 at ¶¶ 32-34] And it is Defendant who has misappropriated those funds on general and administrative expenses of government. [*Id.* at ¶ 54].

Finally, redressability is present. A favorable decision would redress Plaintiff's injury by compensating for any damages sustained. Further, by ordering Defendant to cease collecting capital facilities fees for the purpose of defraying general and administrative expenses of government, Plaintiff could reap the benefits of financed public improvements, as defined in the 2006 Facilities Fee Resolution. *Free the Nipple-Fort*

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years before *Knick*—not 2021, as represented by Plaintiff. To the extent the exception cited in *Custer* remains after *Knick*, the Court does not believe it would apply here where Plaintiff has failed to allege an absence of just compensation remedies.

Collins v. City of Fort Collins, Colorado, 916 F.3d 792, 805 (10th Cir. 2019) ("Most courts consider the infringement of a constitutional right enough and require no further showing of irreparable injury."); *see also Landmark Towers Ass'n, Inc. by EWG-GV, LLC v. UMB Bank*, N.A., 436 P.3d 1139, 1148-1151, as corrected (July 26, 2018) (upholding injunction barring metropolitan district's future special assessment on property upon finding that the assessment violated property owners' right to due process under both the Federal and Colorado Constitutions).

Plaintiff therefore meets the elementary requirements for standing. Having addressed these threshold issues, the Court turns to the substance of each constitutional claim.[4]

3. Takings Claim (Count V)[5]

The Complaint alleges that Defendant's exaction of $125,100 in capital facilities fees deprived Plaintiff of its property rights in violation of the Fifth Amendment. [#15 at ¶¶ 99, 104] Specifically, Plaintiff contends the exactions are unconstitutional, in violation of the Takings Clause, because the capital facilities fees lack an essential nexus to a legitimate government purpose and are not roughly proportional to the impact of Plaintiff's development and use of its property. [*Id*. at ¶¶ 4, 101; *see also* #32 at 5-6] This is because

[4] The Motion also maintains that Plaintiff's claims seeking injunctive relief alleging a continuing violation also fail as a matter of law. [#19 at 9] But as Plaintiff clarifies, the Complaint characterizes Defendant's constitutional violations as "continuing" only to underscore the need for injunctive relief. [#32 at 12] The Court has addressed both Defendant's statute of limitations argument and the plausibility of Plaintiff's injunctive relief claims, and does not need to address the application of the continuing violations doctrine to resolve either issue.

[5] Again, Plaintiff has split its takings claim into two counts. [#15 at ¶¶ 99-115] Count V seeks monetary damages whereas Count VI seeks declaratory and injunctive relief. [*Id.*] As detailed above, the Court has recommended dismissal of Count VI. Thus, this Section focuses exclusively on Count V.

"[t]hese Capital Facilities Fees were collected by [Defendant] as a pretext for depositing those funds in [Defendant's] [G]eneral [F]und and using the fees to pay unrelated administrative expenses." [#15 at ¶ 101]

Defendant argues that the takings claim must fail because: (1) "there is no allegation that the District substantially deprived Plaintiff of the use and enjoyment of its properties;" (2) the Town, not the defendant, issued the building permits for which Plaintiff paid the facilities fees; and (3) a one-time charge assessed on new building projects that is uniformly imposed on all property owners within the District, for the purpose of defraying the costs of improvements, does not constitute a taking. [##19 at 3-5; 41 at 1-2] The Court addresses Defendant's arguments in turn.

The Takings Clause of the Fifth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides that the government may not take private property for public use without just compensation. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978). Takings claims are examined under one of four legal theories: (1) per se takings resulting in the permanent physical invasion of property; (2) per se "total regulatory takings" that completely deprive an owner of all economically beneficial use of property; (3) regulatory takings governed by *Penn Central* standards, and (4) land-use exactions violating the standards set forth in *Nollan* and *Dolan*. *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 538-39 (2005) (identifying first three legal theories); *Koontz*, 570 U.S. at 604 (identifying fourth legal theory) (citing *Dolan v. City of Tigard*, 512 U.S. 374, 374 (1994) and *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987)).

Relevant here is the fourth legal theory, also named the "unconstitutional conditions doctrine." *Dolan*, 512 U.S. at 385. Both *Nollan* and *Dolan* involved "exactions" of land—a beach access easement in *Nollan* and a greenway in *Dolan*—that were imposed as a condition of zoning approvals. *Dolan*, 512 U.S. at 380; *Nollan*, 483 U.S. at 828. The Supreme Court held the government may condition approval of a land-use permit on the landowner's agreement to dedicate a portion of his or her property to public use if there is an "essential nexus" and "rough proportionality" between the property that the government demands and the social costs of the landowner's proposed use for the remaining property. *Dolan*, 512 U.S. at 386, 391; *Nollan*, 483 U.S. at 837. "Under *Nollan* and *Dolan* the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts." *Koontz*, 570 U.S. at 606. And in *Koontz* the Supreme Court held that monetary exactions must also satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*. *Koontz*, 570 U.S. at 612. The majority, however, distinguished "monetary exactions" from taxes and user fees, which "are not takings." *Id*. at 615. The Court's holding thus "d[id] 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.*

Here, the Complaint asserts that to obtain building permits on its lots, Plaintiff was required to pay capital facilities fees, or "monetary exactions." [#15 at ¶¶ 34, 43, 57-59, 99, 104] Those fees were then used to defray Defendant's general governmental expenses instead of financing improvements or debt repayment within the District—the

sole purposes for which the facilities fees were authorized. [*Id.* at ¶¶ 49-56, 58] Accordingly, Plaintiff alleges these capital facilities fees are not roughly proportional to the impact of Plaintiff's development and use of its property. [*Id.* at ¶ 4]

In support of dismissal, Defendant first argues "there is no allegation that the District substantially deprived Plaintiff of the use and enjoyment of its properties." [#19 at 3-4] Defendant ignores Plaintiff's allegations that the imposition of the fees pursuant to the 2006 Facility Fee Resolution fails to satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan* where the fees were collected by Defendant and deposited into its General Fund to defray general expenses of government. [#15 at ¶¶4, 101]; *see also Kelo v. City of New London*, 545 U.S. 469, 478 (2005) ("Nor would [defendant] be allowed to take property under the mere pretext of a public purpose."). And Defendant's reliance on the Colorado Supreme Court's decision in *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 695 (Colo. 2001), on this point is misguided—*Krupp* predated the Supreme Court's decision in *Koontz* and relied on the now unsupported premise that the *Nollan*/*Dolan* analysis was confined to land use exactions involving real property, rather than a demand for money. *Krupp*, 19 P.3d at 697.

Second, Defendant argues the takings claim fails because the Town, not Defendant, issued the building permits for which Plaintiff paid the facilities fees. [#19 at 4] Defendant's argument is supported by a single Court of Appeals case, the Court of Appeals decision in *Krupp v. Breckenridge Sanitation Dist.*, 1 P.3d 178 (Colo. App. 1999) ("*Krupp COA*"). In *Krupp COA*, the court did not find a taking, in part, because the defendant sanitation district did not have the "power, officially or unofficially, de facto or de jure, to prevent the issuance of a building permit." *Id.* at 182. Here, unlike in *Krupp*

COA, Defendant does retain the power to prevent the issuance of the building permits until the facilities fees are paid because the Town requires payment of the facilities fees to Defendant prior to issuance of a building permit. [#15 at ¶ 34]

Third, Defendant argues a charge assessed on new building projects that is uniformly imposed on all property owners within the District, for the purpose of defraying the costs of improvements, does not constitute a taking. [##19 at 4-5; 41 at 1-2] For this contention, Defendant once again relies on the Colorado Supreme Court's decision in *Krupp v. Breckenridge Sanitation Dist*. [#19 at 4] which, as previously noted, predated the Supreme Court's decision in *Koontz.* And as the dissenting Justices in *Koontz* pointed out, the majority in *Koontz* declined to resolve this particular issue. *See* 570 U.S. at 628 (Kagan, J., dissenting) ("The majority might, for example, approve the rule, adopted in several States, that *Nollan* and *Dolan* apply only to permitting fees that are imposed ad hoc, and not to fees that are generally applicable. . . . Maybe today's majority accepts that distinction; or then again, maybe not."). And post-*Koontz*, at least one court has held that "a careful examination of *Koontz* does not suggest that its holding is limited to 'ad hoc' fees or exempts 'non-discretionary, generally applicable fees.'" *Anderson Creek Partners, L.P. v. Cnty. of Harnett*, 876 S.E.2d 476, 497 (N.C. 2022). Absent sufficient briefing on this issue,[6] and at this early stage in the litigation, the Court cannot find that Defendant's argument warrants dismissal. For purposes of the Motion, the Court finds that Plaintiff sufficiently pleaded allegations that the capital facilities fees are monetary exactions, triggering greater scrutiny under *Koontz*, *Nollan* and *Dolan. See Anderson*

[6] Defendant does not even begin to develop this distinction until its reply brief. [#41 at 2-3]

Creek Partners, 876 S.E.2d at 480-81, 506 (finding capacity use fees, which were a one-time, non-negotiable fee of $1,000 for water service and $1,200 for sewer service, imposed on landowners for the purpose of recovering the costs of the utility system, were monetary exactions subject to constitutional scrutiny under *Koontz*).

Because Plaintiff plausibly alleges a takings claim, the Court respectfully RECOMMENDS that the Motion be DENIED to the extent that it seeks dismissal of Plaintiff's Fifth Amendment takings claim seeking monetary damages (Count V).

4. Due Process (Counts VII and VIII)

The Complaint alleges that Defendant's exaction of $125,100 in capital facilities fees constitutes an unconstitutional special fee, or alternatively an unconstitutional special assessment, in violation of Plaintiff's due process rights under the Federal Constitution and Section 25 of Article II of the Colorado Constitution. [#15 at ¶¶ 116-127, 136]. "To state a substantive due process claim, [Plaintiff] must first allege a property or liberty interest warranting due process protections." *Heartland Biogas, LLC v. Bd. of Cnty. Commissioners of Weld Cnty.*, No. 16-CV-03183-RM-NYW, 2017 WL 3730997, at *15 (D. Colo. Aug. 30, 2017). "If [Plaintiff] alleges a sufficient property interest, it must also allege that the challenged governmental action was 'arbitrary and capricious.'" *Id.* "Arbitrary, however, does not mean erroneous; rather, an arbitrary action is one that has 'no conceivable rational relationship to the exercise of the state's traditional police power through zoning.'" *Id.* (quoting *Norton v. Vill. of Corrales*, 103 F.3d 928, 932 (10th Cir. 1996)).

Defendant does not dispute Plaintiff's protected property interest. [#19 at 5-7] Rather, Defendant argues that the capital facilities fee is properly characterized as a valid

special fee, not an assessment, and regardless, Plaintiff's allegations are merely conclusory. [*Id.*]

A "special fee" is "a charge imposed upon persons or property for the purpose of defraying the cost of a particular governmental service." *Bloom v. City of Fort Collins*, 784 P.2d 304, 308 (Colo. 1989). To be valid, the "amount of a special fee must be reasonably related to the overall cost of the service." *Id.* at 308. 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*.

A special assessment, on the other hand, 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. *Id.* at 308. "The essential characteristic of a special assessment is that it must confer some special benefit to the property assessed." *Id*. "Colorado law makes clear that imposing a special assessment on property that doesn't specially benefit from the funded improvements violates those property owners' rights to due process." *Landmark Towers,* 436 P.3d at 1147 (collecting cases).

Here, the Complaint asserts that, to obtain building permits on its lots, Plaintiff was required to pay capital facilities fees. [#15 at ¶¶ 34, 43, 57-59, 99, 104] Those fees were then used to defray Defendant's general governmental expenses instead of repaying debt or financing improvements within the District—the sole purposes for which the fees were authorized. [*Id.* at ¶¶ 49-56, 58] And, according to the Complaint, "[t]here is no reasonable relationship between the amount of the Capital Facility Fee paid by owners in the District since 2019 and the cost of any service, program, or facility provided to

Plaintiff." [#15 at ¶ 81]; *see also Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548–49 (2005) (J. Kennedy, concurring) ("The failure of a regulation to accomplish a stated or obvious objective would be relevant to [the due process] inquiry."). Given these allegations, for purposes of this Motion, the Court need not determine whether the capital facility fee is a "special fee" or "special assessment," because neither type of charge can be used to pay for the general expenses of government as is alleged here.[7] *Bloom*, 784 P.2d at 308 ("Unlike a tax, a special fee is not designed to raise revenues to defray the general expenses of government, but rather is a charge imposed upon persons or property for the purpose of defraying the cost of a particular governmental service."); *Landmark Towers*, 436 P.3d at 1147 ("[I]mposing a special assessment on property that doesn't specially benefit from the funded improvements violates those property owners' rights to due process."). Thus, whether considered a special fee or a special assessment, the use of the capital facility fee for general expenses violates Plaintiff's due process rights.

Accordingly, the Court finds that Plaintiff has plausibly alleged a Due Process claim. The Court therefore respectfully RECOMMENDS that the Motion be DENIED to

[7] Defendant argues that "the dispositive criteria is the primary or dominant purpose of the imposition at the time the enactment calling for its collection is passed." [#19 at 7 (quoting *Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008))] The Colorado Supreme Court made this statement in the context of determining whether certain cash funds were a tax or a special fee. *Barber*, 196 P.3d at 248. But neither party argues that the capital facility fee is a tax, and the Court need not determine whether it constitutes a special fee or a special assessment because neither type of charge can be used to pay for the general expenses of government as is alleged here. Moreover, as distinguished from *Barber*, Plaintiff does not allege a mere transfer of funds. Rather, Plaintiff alleges that Defendant's manager confirmed, under oath, that Defendant's General Fund is used to pay Defendant's general and administrative expenses, including legal fees incurred by Defendant in a separate lawsuit it filed against Headwaters and others. [#15 at ¶ 56]

the extent that it seeks dismissal of Plaintiff's due process claims against Defendant (Counts VII and VIII).

B. Violations of the 2006 Facilities Resolution (Count I)

The Complaint alleges Defendant has violated the 2006 Facilities Fee Resolution. [#15 at ¶¶ 51-56, 69-75] Defendant argues this claim should be dismissed because Plaintiff relies on a single conclusory allegation that debt repayment "did not finance any Improvements serving Plaintiff's lots." [#19 at 10] The Court disagrees. Plaintiff alleges that Defendant has not used the facilities fees to repay any related debt or district improvements since 2019. [#15 at ¶¶ 51-56, 71-72] These are not conclusory allegations—indeed, the Court fails to understand how Plaintiff could more specifically describe Defendant's failure to act pursuant to the 2006 Facilities Fee Resolution.[8]

The Motion also asserts that Plaintiff fails to plead grounds to support injunctive relief because Plaintiff fails to state a claim under the Fifth Amendment and for violations of the 2006 Facilities Fee resolution. [#19 at 9-10] The Court has already rejected this argument above.

Accordingly, the Court finds that Plaintiff plausibly alleged a claim for violations of the 2006 Facilities Resolution, and thus, respectfully RECOMMENDS that the Motion be DENIED to the extent that it seeks dismissal of Plaintiff's violation of the 2006 Facilities Fee Resolution claim (Count I).

[8] By way of analogy, if a lease agreement requires a tenant to make monthly payments, and the tenant has not paid rent since 2019, the landlord does not make a conclusory allegation in a breach of contract claim when they allege that "the renter has not made any payments since 2019."

C. Statutory Violations: the Colorado Special District and Local Government Acts

Defendant argues that Plaintiff's claims alleging violations of the Colorado Special District and Local Government Acts, specifically violations of Colo. Rev. Stat. §§ 32-1-1001(1)(j) and 29-1-803(1), fail because: (1) Colo. Rev. Stat. § 32-1-1001(1)(j) does not provide Plaintiff a right of action; (2) Plaintiff fails to state a claim; (3) Plaintiff fails to plead grounds supporting injunctive relief, and (4) Plaintiff lacks standing under Colo. Rev. Stat. § 29-1-803(1). [#19 at 10-12] The Court first addresses the arguments related to Colo. Rev. Stat. §§ 32-1-1001(1)(j) and then addresses the arguments related to Colo. Rev. Stat. § 29-1-803(1).

1. Colo. Rev. Stat. § 32-1-1001(1)(j) (Count II)

The Complaint alleges a fee imposed under Colo. Rev. Stat. § 32-1-1001(1)(j), must be used "for a particular service, program or facility" provided by the district, and therefore cannot be imposed to defray the general expenses of government. [#15 at ¶¶ 76-84] In support of dismissal, Defendant argues: (1) the statute does not provide Plaintiff with a right of action to assert a claim; (2) the fee collection is not in violation of this provision, because Colo. Rev. Stat. § 32-1-1001(1)(j) gives special districts "all rights and powers necessary or incidental to or implied from the specific powers granted"; (3) 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"; and (4) Plaintiff fails to plead grounds supporting injunctive relief. [#19 at 10-11] The Court addresses these arguments in turn.

First, Defendant argues, without citing any case law or providing any supporting argument or factual allegations, that the Special District Act does not provide a right of action to assert this claim. [*Id.* at 11] But the Special District Act expressly enables the

board of directors of the special district to "be sued and to be a party to suits, actions, and proceedings." Colo. Rev. Stat. § 32-1-1001(c). Without more detailed briefing and argument from Defendant, the Court cannot conclude that the Special District Act fails to provide a private right of action to assert this claim.

Second, Defendant argues that Plaintiff fails to state a claim, because the fee collection is not in violation of Colo. Rev. Stat. §32-1-1001(1)(j). [#19 at 10] The Court disagrees. The rules of statutory construction apply in the interpretation of statutes and local government resolutions and ordinances. *See City of Colorado Springs v. Securcare Self Storage, Inc*., 10 P.3d 1244, 1248 (Colo. 2000). A statute should be interpreted in a way that best effectuates the purpose of the legislative scheme. *See Smith v. Myron Stratton Home*, 676 P.2d 1196 (Colo. 1984). When interpreting a statute, a court should look first to the plain language of the statute. *In re J.N.H., 209 P.3d 1221*, 1222–23 (Colo. App. 2009). If legislative intent is clear from the plain language of the statute, then other rules of statutory interpretation need not be applied. *Id.* at 1223. The statute should be read in its entirety, giving consistent, harmonious, and sensible effect to all parts. *Crow v. Penrose–St. Francis Healthcare Sys.,* 169 P.3d 158, 165 (Colo. 2007). In interpreting the statute, a court should avoid interpretations that would lead to an absurd result. *AviComm, Inc. v. Colo. Pub. Util. Comm'n*, 955 P.2d 1023, 1031 (Colo. 1998).

The statue in question is specific, needs no interpretation and should be given effect as written. This statute allows fees to be imposed for three discrete purposes, "***for services, programs, or facilities*** furnished by the special district." Colo. Rev. Stat. § 32-1-1001(j)(I) (emphasis added). Had the General Assembly intended to include general and administrative expenses, it would have expressly done so, or used language that

broadened the categories of permissible fees. Even though the District possesses the rights "necessary or appropriate to carry out the purposes and intent of" the Special District Act, Colo. Rev. Stat. § 32-1-1001(n), "such powers may not be used to go beyond the express powers granted," *Haggerty v. Poudre Health Services Dist*., 940 P.2d 1105, 1109 (Colo.App.1997); *see also City of Aurora v. Bogue*, 489 P.2d 1295, 1296 (Colo. 1971) (noting that doubts as to the existence of the entity's power must be resolved against the entity). Thus, the Court finds that Plaintiff has plausibly alleged a violation of the statute.

Third, Defendant argues that the purpose of the fees, as originally imposed, was to finance improvements or to repay any related debt, and "the mere placement of the funds in a General Fund account does not strip away the purpose or nature of the fees as original imposed." [#19 at 10 (citing *Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008))]. In *Barber*, the Court held the "[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." *Barber*, 196 P.3d at 250. Defendant's reliance on *Barber* is misplaced. Plaintiff does not argue that the "essential character" of the facilities fees changed when they were transferred to a General Fund; Plaintiff argues, to the contrary, "even when deposited into the General Fund, those funds remained subject to the limitations on their use imposed under the 2006 Resolution and the Special District Act."[9] [#32 at 14] As distinguished from *Barber*, Plaintiff does not allege a mere transfer

[9] Once again, the Colorado Supreme Court was analyzing whether certain cash funds collected as a fee had been transformed into a tax when placed into the General Fund. *Barber*, 196 P.3d at 248. Here, neither party argues that the fees were transformed into

of funds. Rather, Plaintiff alleges that Defendant's manager confirmed, under oath, that Defendant's General Fund is used to pay Defendant's general and administrative expenses, including legal fees incurred by Defendant in a separate lawsuit it filed against Headwaters and others. [#15 at ¶ 56] Presuming all of the allegations contained in the Complaint to be true, the Court finds Plaintiff sufficiently states a claim for violations of Colo. Rev. Stat. § 32-1-1001(1)(j).

Finally, Defendant argues Plaintiff fails to plead grounds supporting injunctive relief. [#19 at 11] But as with many of Defendant's arguments, Defendant does not develop this argument or explain why injunctive relief is not appropriate under the Colorado Special District Act. And without further development of this argument, the Court concludes that Plaintiff has made a sufficient showing of irreparable harm, at this stage, in alleging that Defendant's use of facilities fees to defray general expenses of government denies any benefit to the property owners as defined in the 2006 Facilities Fee Resolution (e.g. financing public improvements). *See Haggerty v. Poudre Health Servs. Dist.*, 940 P.2d 1105, 1106, 1109 (Colo. App. 1997) (upholding an injunction to prevent a special district from expending funds for purposes not authorized under the Special District Act.)

Accordingly, the Court finds Plaintiff has plausibly alleged a claim for violations of Colo. Rev. Stat. § 32-1-1001(1)(j). The Court thus respectfully RECOMMENDS that the Motion be DENIED to the extent that it seeks dismissal of Plaintiff's Colorado Special District Act claim (Count II).

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taxes when they were placed into the General Fund. Rather, Plaintiff argues that the fees remained subject to the limitations placed upon them when originally collected. [#32 at 14]

2. Colo. Rev. Stat. § 29-1-803(1) (Count III)

The Complaint alleges that Defendant's deposit of facilities fees into its General Fund violates Colo. Rev. Stat. § 29-1-803(1). [#15 at ¶¶ 85-91] That Section requires that "land development charges . . . shall be deposited . . . in an interest-bearing account which clearly identifies the category, account, or fund of capital expenditure for which such charge was imposed." Colo. Rev. Stat. § 29-1-803. Defendant argues Plaintiff cannot establish standing because Plaintiff has not suffered an injury in fact. [#19 at 12] The Court agrees.

In *United States v. Richardson*, 418 U.S. 166 (1974), the Supreme Court addressed a taxpayer's challenge to the government's failure to disclose the expenditures of the Central Intelligence Agency, in alleged violation of the constitutional requirement, Art. I, § 9, cl. 7, which reads: "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." The Supreme Court held that such a suit rested upon an impermissible "generalized grievance," and was inconsistent with the framework of Article III because "the impact on [plaintiff] is plainly undifferentiated and common to all members of the public." *Id.* at 176-77 (quotation omitted). The Court thus concluded that Plaintiff lacked standing to litigate the issue. *Id.* at 176-80. Like *Richardson*, Plaintiff here raises the same generalized grievance undifferentiated and common to all members of the public.

In an attempt to establish standing, Plaintiff argues that "the apparent purpose of requiring local government bodies to properly segregate and identify the category of capital expenditure for which charges are imposed is to ensure proper use of those fees." [#32 at 17] Plaintiff argues transparency allows property owners to monitor expenditure

of the fees for proper purposes. [#32 at 18] The Court does not believe that this argument distinguishes *Richardson*. Presumably, Art. I, § 9, cl. 7 also provided transparency to government expenditures, and the *Richardson* Court nonetheless found that the plaintiff lacked standing to challenge a violation of that constitutional requirement. Thus, the Court does not believe that the fact that Plaintiff has been denied transparency so as to follow the actions of state government actors distinguishes *Richardson*. Rather, Plaintiff raises the same kind of generalized grievance that fails to give rise to constitutional standing. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 574-76 (1992) (collecting generalized grievance cases).

Accordingly, the Court finds Plaintiff cannot allege standing to pursue a claim for violations of Colo. Rev. Stat. § 29-1-803(1). As a result, the Court respectfully RECOMMENDS that the Motion be GRANTED to the extent that it seeks dismissal of Plaintiff's Local Government Act claim (Count III).

D. Illegal Material Modification of Service Plan (Count IV)

The Complaint alleges that under the current Service Plan "[Defendant] does not have the ability to undertake the construction or acquisition of any infrastructure, improvements, or facilities or to provide any related services within its Service Area[;]" therefore "[t]o the extent [Defendant] has deposited Capital Facilities Fees collected since 2019 into its unrestricted General Fund for potential capital improvements or any purpose other than repayment of [Defendant's] debt incurred to finance Improvements, that action constitutes a material modification of its Service Plan." [#15 at ¶¶ 92-97] Defendant argues this claim fails per the plain language of the Service Plan. [#19 at 12-15] The Court agrees.

Persons intending to form a special district must submit a service plan to the board of county commissioners. *See* Colo. Rev. Stat. § 32–1–202. "Once established, a special district must conform to its service plan 'so far as practicable.'" *Indian Mt. Corp. v. Indian Mt. Metro. Dist.,* 412 P.3d 881, 893 (Colo. App. 2016) (quoting Colo. Rev. Stat. § 32–1–207(1)). "Further, any material modifications to the service plan must be approved by the board of county commissioners." *Indian Mt. Corp*., 412 P.3d at 893 (citing Colo. Rev. Stat. § 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.

Colo. Rev. Stat. § 32-1-207(2)(a). To determine whether a service plan has been materially modified, the court must analyze the language of the service plan and give effect to its plain and ordinary meaning. *Indian Mt. Corp*., 412 P.3d at 893.

The Court does not believe that Plaintiff has plausibly pled a material modification of the Service Plan. Specifically, the Court disagrees with Plaintiff's interpretation that, under the Service Plan, "[Defendant] does not have the ability to undertake the construction or acquisition of any infrastructure, improvements, or facilities or to provide any related services within its Service Area." [#15 at ¶ 92] 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." [#15-2 at 8-9,[10] § I(A)(5))]. It permits the district to issue revenue debt, and other multiple-fiscal year financial obligations, "in amounts sufficient to finance and

[10] The Court cites to the page number stamped at the top of the PDF.

construct all public improvements under the plan." [*Id.* at 19, § V(B)] And 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 11, § 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 21, § V(B)]

Moreover, despite attaching the Service Plan to the Complaint [#15-2], neither the Complaint nor Plaintiff's Response to the Motion provides a direct citation to the Service Plan to support the argument that Defendant lacks the ability to impose a facilities fee for "construction or acquisition of Improvements or related services." [#32 at 18] Plaintiff's conclusory statements—that "the only use [Defendant] can make of the Capital Facility Fee revenue . . . is for allowed debt repayment" [#15 at ¶93], and "[t]o the extent [Defendant] has deposited Capital Facilities Fees . . . into its unrestricted General Fund for potential capital improvements . . ., that action constitutes a material modification of its Service Plan" [*Id.* at ¶ 94]—do not sufficiently establish a material modification claim. Plaintiff must plead more than just bald conclusory allegations; Plaintiff must make some attempt to specify the ways in which financing public improvements, for example, contravenes the Service Plan. Without more, these allegations amount to nothing more than a formulaic recitation of the elements of a cause of action insufficient to state a plausible claim. *Twombly*, 550 U.S. at 555.

Accordingly, the Court finds that Plaintiff has not alleged a claim for material modification under the Service Plan. Thus, the Court respectfully RECOMMENDS that

the Motion be GRANTED to the extent that it seeks dismissal of Plaintiff's claim material modification claim (Count IV).

E. Foreclosure Extinguished 2006 Facilities Fee Resolution (Count IX)

Plaintiff alleges that the 2005 Deed of Trust and the lien created therein are senior to the 2006 Facilities Fee Resolution, and therefore the foreclosure, in 2020, terminated Defendant's authority set forth in the 2006 Facilities Fee Resolution to collect facilities fees. [#15 at ¶¶ 139-150] Defendant argues that this claim should be dismissed because a special district's fees constitute a "perpetual lien," and under Colorado law, a statutory perpetual lien survives a foreclosure on a private deed of trust. [#19 at 15-16] The Court agrees.

Pursuant to Colo. Rev. Stat. § 32-1-1001(1)(j)(I), the Colorado Special District Act allows for the imposition of fees, and stipulates that "[u]ntil paid, all such fees, rates, tolls, penalties, or charges shall constitute a **perpetual lien** on and against the property served, and any such lien may be foreclosed in the same manner as provided by the laws of this state for the foreclosure of mechanics' liens." (emphasis added). In *Wasson v. Hogenson*, 583 P.2d 914, 915 (Colo. 1978), the Colorado Supreme Court addressed the relative priority between a private deed of trust on real estate and a "perpetual lien" for charges imposed by a water and sanitation district pursuant to former Colo. Rev. Stat. § 32-4-113(1)(I)(VI)—the language of which is identical in all material respects to Colo. Rev. Stat. § 32-1-1001(1)(j)(I).[11]

[11] Former Colo. Rev. Stat. § 32-4-113(1)(I)(VI) read: "[u]ntil paid, all rates, tolls, or charges shall constitute a **perpetual lien** on and against the property served, and any such lien may be foreclosed in the same manner as provided by the laws of the state of Colorado for the foreclosure of mechanics' liens." *Wasson*, 583 P.2d at 915 n. 1 (emphasis added).

In holding the special districts' perpetual liens have priority over prior deeds of trust, the *Wasson* Court relied on the following "fundamental concepts" in the law, expressed in *Lybass v. Town of Ft. Myers*, 56 Fla. 817 (Fla. 1908):

> [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 the Legislature may create liens upon private property in favor of a municipality for local improvements, and to make such liens superior to other liens acquired subsequent to the statute.
>
> [2] Priority of liens for a public improvement need not be expressly spelled out in statute.
>
> [3] The exigencies of all governments justify giving to governmental taxes, assessments and demands priority over private rights.

Wasson, 583 P.3d 1888-90. The *Wasson* Court held that the fees assessed under Colorado's virtually identical former water and sanitation statute were "not taxes in the strict sense of the term," but were, "like special assessments, in the nature of taxes." *Id.* at 189. In considering the same statutory language before this Court, the *Wasson* Court interpreted former Section 32-4-113(1)(L)(VI)'s use of the words "until" and "perpetual" in their context to "forcefully indicate that the legislature intended to favor the district's public lien over that of the private lender." 583 P.2d at 190-91. This Court thus follows the *Wasson* court's interpretation of identical statutory language and finds that the 2005 Deed of Trust and the lien created therein are not senior to the 2006 Facilities Fee Resolutions' perpetual lien. *Wasson*, 583 P.2d at 918 (1978) ("[I]t follows that if the [special] districts are to remain viable institutions capable of accomplishing their purposes, their charges cannot be subordinated to prior recorded deeds of trust.").

The case law cited by Plaintiff is inapposite. *First Interstate Bank v. Tanktech, Inc.* concerned only private parties, not a special district like those at issue in this case and

Wasson. 864 P.2d 116 (Colo. 1993). *Tanktech* is thus irrelevant to the analysis of whether the special district's fees constitute a perpetual lien.

Gold Vein Ltd. Liab. Co. v. City of Cripple Creek is similarly unhelpful to the Court's analysis. 973 P.2d 1286 (Colo. App. 1999). Initially, the Court notes that Cripple Creek was a Title 31, not Title 32 (special districts) case such as this and *Wasson*. *Id.* at 1288. Perhaps more importantly, the *Cripple Creek* Court found that the charge at issue was not a special assessment—and therefore its priority could not be based upon its special assessment status—and that the City had failed to timely raise the issue of whether the charge was a special fee. *Id.* at 1289. By contrast here, Plaintiff does not dispute that the 2006 Fee Resolution constitutes either a special fee or a special assessment. [#32 at 7] Thus, *Cripple* Creek does not speak in any way to whether the 2006 Facilities Fee Resolution's status as a special fee or a special assessment gives it a perpetual lien status and thus priority over other liens.

Plaintiff's attempts to distinguish *Wasson* are similarly unsuccessful. Plaintiff argues that "[i]mportant to the court's decision [in *Wasson*] was its conclusion that the property was enhanced in value by the services provided . . . [whereas] [h]ere Plaintiff's property did not receive any benefit from [Defendant's] use of the Facilities Fees it paid, so that rationale does not apply." [*Id.* at 20] However this assertion contradicts the Complaint's allegations that between 2006 and 2018, Defendant used the facilities fees for the purpose expressed in the 2006 Fee Resolution; *i.e.*, in ways that benefited the District's property owners through financing public improvements and debt repayment. [#15 at ¶¶ 49-50]

Finally, Plaintiff argues that *Wasson* is distinguishable because the 2005 Deed of Trust required the lender's consent for the imposition of any "additional taxes, assessments or other monetary obligations," and absent this consent, "[u]nder these circumstances, the purchaser at a foreclosure sale would not anticipate that the property remained subject to special district charges." [#32 at 21] However, "under these circumstances," the purchaser at the 2020 foreclosure sale would have anticipated these special district charges pursuant to the 2005 Facilities Fee Resolution, which predates the 2005 Deed of Trust, as it established that the capital facilities fee "constitutes [a] valid, perpetual lien on and against the Property," 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." [#15-5 at 3, Section 4] Moreover, the purchaser at a foreclosure sale would anticipate that "[a]ll 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." *Wasson*, 583 p.2d at 917 (quotation omitted).

Accordingly, the Court finds Plaintiff, per *Wasson*, cannot state a claim premised on the fact that the 2006 Fee Resolution was "junior and subordinate to the 2005 Deed of trust." [#32 at 19] Thus, the Court respectfully RECOMMENDS that the Motion be GRANTED to the extent that it seeks dismissal of Plaintiff's final claim (Count IX).

IV. CONCLUSION

For the reasons articulated above, the Court respectfully **RECOMMENDS** that: (1) the Motion be **GRANTED** to the extent that it seeks to dismiss Count III, Count IV, Count

VI and Count IX, but **DENIED** to the extent that it seeks to dismiss Count I, Count II, Count V, Count VII, and Count VIII.[12]

DATED: December 21, 2023

BY THE COURT:

s/Scott T. Varholak
United States Magistrate Judge

[12] Within fourteen days after service of a copy of this Recommendation, any party may serve and file written objections to the magistrate judge's proposed findings of fact, legal conclusions, and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *Griego v. Padilla (In re Griego)*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the district court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review." *United States v. 2121 East 30th Street*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the district judge of the magistrate judge's proposed findings of fact, legal conclusions, and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings of fact, legal conclusions, and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (holding that the district court's decision to review magistrate judge's recommendation *de novo* despite lack of an objection does not preclude application of "firm waiver rule"); *Int'l Surplus Lines Ins. Co. v. Wyo. Coal Refining Sys., Inc.*, 52 F.3d 901, 904 (10th Cir. 1995) (finding that cross-claimant waived right to appeal certain portions of magistrate judge's order by failing to object to those portions); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (finding that plaintiffs waived their right to appeal the magistrate judge's ruling by failing to file objections). *But see, Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (holding that firm waiver rule does not apply when the interests of justice require review).