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IN THE FOURTH JUDICIAL DISTRICT COURT

WASATCH COUNTY, STATE OF UTAH

HOMES AT DEER MOUNTAIN HOMEOWNERS ASSOCIATION, INC.; *et al.*, **Plaintiffs,** **v.** **WASATCH COUNTY, a body corporate and politic, WASATCH COUNTY FIRE PROTECTION SPECIAL SERVICE DISTRICT, a county improvement district,** **Defendants.**	**REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO QUASH SUMMONS** **Case No.: 130500003** **Honorable Derek P. Pullan**

Defendant Wasatch County Fire Protection Special Service District (the "District"), by and through its undersigned counsel, Ballard Spahr LLP, hereby submits this reply memorandum of law in support of its motion to dismiss or, in the alternative, to quash summons (the "Motion").

INTRODUCTION

Recognizing their Amended Complaint suffers from a number of deficiencies, Plaintiffs attempt to add facts and allegations that are simply not found in the Amended Complaint through their opposition to the Motion – facts which are contrary to the allegations of the Amended Complaint, contrary to the documents referenced in the Amended Complaint, and contrary to the public record.[1] Plaintiffs argue that because they said so, it must be so. While the Court must accept Plaintiffs' well pled allegations as true, it need not accept unsupported and/or contradicted conclusions.

The reality of this situation is quite simple. Some landowners are unhappy with the County's decision to provide them fire protection. Though many of the Plaintiffs will never be assessed a fee for these services because they are outside of the Assessment Area,[2] and though many of the Plaintiffs have failed to exhaust their administrative remedies by filing a timely protest, Plaintiffs attempt to argue that the District has violated their constitutional rights and/or violated Utah law. Ignoring for a moment the glaring statute of limitations issues raised in the District's Motion, the reality is that Plaintiffs have not alleged that they have suffered any deprivation of a protectable property interest and, therefore, have no due process claims. Their claims are simply premature if cognizable at all. And, with respect to the argument that the

[1] Plaintiffs' memorandum in opposition to the Motion far exceeds the page limit allotted pursuant to Rule 7 of the Utah Rules of Civil Procedure. Plaintiffs' opposition contains approximately fifteen (15) pages of argument and was filed without leave of the Court.

[2] Terms not otherwise defined herein shall have the meaning ascribed them in the District's principal memorandum in support of the Motion.

District, a special service district, is applying an unlawful fee for fire service, Plaintiffs have simply misread and/or misinterpreted the Utah Code, confusing Title 17B with Title 17D, the Title under which the District has acted.

STATEMENTS OF FACT

Despite arguing that the Court should not look beyond the allegations of the Complaint when deciding a motion to dismiss, Plaintiffs, over the course of approximately twenty four (24) pages of facts, rely on numerous allegations and sources beyond the allegations of the Complaint. For purposes of a motion to dismiss, the Court may rely on the allegations of the Amended Complaint, documents referred to in the Amended Complaint, and/or the public record relating to the designation of the Assessment Area. *See* Utah R. Civ. P. 12(b)(6); *Oakwood Village LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 13, 104 P.3d 1226 (A "document that is referred to in the complaint … is not considered to be a matter outside the pleading….") (internal quotation marks omitted); Utah R. Evid. 201; Utah Code Ann. § 57-4a-2. The District's statement of facts included in its principal memorandum in support of the Motion are all based on the Amended Complaint, documents referred to in the Amended Complaint, and/or public records. Specifically, the District relied on the following in support of its Motion:

- Plaintiffs' Amended Complaint for Declaratory Judgment and Injunctive Relief;
- The spreadsheet posted on Wasatch County's website referenced in paragraph 139 of the Complain (the "Spreadsheet")t;
- The Notice of Intention to Designate Assessment Area;
- Resolution No. 12-15;

- The Notice of Encumbrance and Assessment Area Designation;
- The Notice of Meetings of Board of Equalization and Review; and
- The Declaration of Service.

While the District disputes a number of Plaintiffs' allegations, contained in both the Amended Complaint and the opposition to the motion to dismiss, it will refrain from engaging in a "tit-for-tat" rebuttal of these allegations. The District is content to allow the Court analyze the Motion under the appropriate standard, relying only on the Amended Complaint, the documents referred to in the Amended Complaint, and matters of public record.

ARGUMENT

I. RESOLUTION NO. 12-15 WAS EFFECTIVE DECEMBER 5, 2012.

Plaintiffs argue that "[t]he assessment area act clearly requires a resolution to be in writing to be effective." (Opp., p. 32.) First of all, Plaintiffs have cited to no authority to support this supposition. Utah Code Ann. § 11-42-206(4)(a)(i), cited by Plaintiffs, provides that the resolution should be recorded in the county recorder's office, but does not state that the lack of recording affects the effectiveness of the resolution in any way. In fact, Utah Code Ann. § 11-42-206(4)(b) confirms the opposite is true, stating, "A governing body's failure to comply with the requirements of Subsection (4)(a) does not invalidate the designation of an assessment area." In other words, the "test" employed by Plaintiffs to determine the effective date of Resolution 12-15 is entirely baseless and the Court should hold that Resolution 12-15 was effective on the date it was adopted, December 5, 2012.

Furthermore, the Amended Complaint does not allege that Resolution 12-15 was back dated, the argument now relied upon by Plaintiffs. However, the public record and documents referred to in the Complaint clearly establish that, Resolution 12-15 was written and signed on December 5, 2012, the date it was adopted. Accordingly, even assuming writing was the test for effectiveness, Resolution 12-15 was effective on December 5, 2012.

Resolution 12-15 clearly establishes it was written, signed, and effective on December 5, 2012. First of all, Resolution 12-15 is dated December 5, 2012. The chair, Mike Kholer, signed his name stating that Resolution 12-15 was "ADOPTED AND APPROVED" on December 5, 2012. This statement was attested to by the Wasatch County Auditor and Clerk, Brett Tittcomb. This attestation bears the seal of Wasatch County. Similar attestations are repeatedly made by Mr. Tittcomb in the exhibits to Resolution 12-15. The public record clearly reveals that, despite Plaintiffs' unfounded and inappropriate allegations to the contrary, Resolution 12-15 was written, signed, and effective as of December 5, 2012.

II. MANY OF THE PLAINTIFFS LACK STANDING TO PURSUE THEIR CLAIMS.

Statute of limitations aside, Plaintiffs' claims still fail according to Utah law – both based on the elements of the claims, as well as on the fact that the majority of the Plaintiffs don't have standing to pursue their claims either because they do not own real property within the Assessment Area or because they failed to file a timely protest to the proposed Assessment Area. According to Utah Code Ann. § 11-42-203, "[a]n **owner of property** that is proposed to be assessed within an assessment area may, within the time specified … file a written protest," and the failure of an owner to file a timely **written** protest constitutes a **waiver** of **any** objection.

Utah Code Ann. § 11-42-203 (emphasis added). Utah Code Ann. § 11-42-106(3)(b) states, "[a] court may not hear any complaint that a person was authorized to make but did not make in a protest under Section 11-42-203 or at a hearing under Section 11-42-204." *Id.*

Of the forty four (44) Plaintiffs included in the Amended Complaint, only thirty (30) own property within the Assessment Area. Plaintiffs attempt to clear this hurdle with the self-serving, conclusory allegations that each individual Plaintiff owns property within the Assessment Area. (Am. Compl., ¶¶ 1-30.) Recorded documents – public records – reveal otherwise. The Notice of Encumbrance and Assessment Area Designation ("Assessment Area Designation"), Exhibit E to the District's principal memorandum in support of the Motion, includes a listing of each and every parcel number included in the Assessment Area. Without exception, every parcel number contained in the Assessment Area Designation is included in the Spreadsheet along with the names of the record owners. Absent from both of these lists are the following Plaintiffs' properties: Canyon Trails Homeowners Association, Star Harbour Estates Homeowners Association, Inc., Robert and Pamela Ford, Alan and Beverly Robinson, Lodge at Stillwater Owners Association, Inc., Ashe Family Trust, Matt Coffin, Cortez Tan Family Limited Partnership, Allan K. Kuerbis, Ron Labrum, Sue Wishnow, and Debra Wong Yang. These fourteen (14) Plaintiffs are <u>not</u> property owners within the Assessment Area, regardless of Plaintiffs' conclusory allegation. Accordingly, they do not have standing, as a matter of law, and should be dismissed from this case.

Of the remaining thirty (30) Plaintiffs, four (4), failed to file a protest to the Assessment Area (John Bessey, Richard and Diane Taylor, and David Wishnow). As noted above, any

landowner who fails to file a written protest to the designation of an assessment area waives any right to challenge the designation. Utah Code Ann. § 11-42-106(3)(b). Plaintiffs have attempted to argue that these Plaintiffs' failures to protest the designation of the assessment area is excused because some property owners, allegedly, did not receive the Notice of Intention to Designate Assessment Area. This argument fails, however, as Plaintiffs' Amended Complaint does not allege that Plaintiffs, John Bessey, Richard and Diane Taylor, and David Wishnow, did not receive notice. Accordingly, these Plaintiffs have waived their claims and should be dismissed from this case.

Finally, Plaintiffs have argued that certain homeowners associations (the "HOA's")[3] have standing to sue on behalf of all of their homeowners. (Opp., p. 33-35.) Plaintiffs state that an association must meet two criteria prior to having standing: "i) the individual members of the association [must] have standing to sue and; ii) the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to the proper resolution of the cause." (Opp., p. 34 (quoting *Utah Restaurant Assn. v. Davis Co. Bd. of Health*, 709 P.2d 1159, 1163 (Utah 1985).) The District does not dispute the test espoused by Plaintiffs but notes that Plaintiffs have neither alleged that the individual members of the HOA's have standing nor that all of the members of the HOA's wish to protest fire protection.

[3] These HOA's are Homes at Deer Mountain Homeowners Association, Inc., Canyon Trails Homeowners Association, Star Harbour Estates Homeowners Association Inc., and Lodge at Stillwater Owners Association, Inc.

As noted above, unless a property owner files a written protest to the designation of an assessment area, any claim that property owner may have against the District is waived. *See* Utah Code Ann. § 11-42-106(3)(b). Plaintiffs have not alleged and cannot allege that each and every member of the HOA's filed a protest to the designation of the Assessment Area[4] and, as such, because some of the individual members of the HOA's have waived their claims and do not have standing, the HOA's themselves do not have standing and should be dismissed from this case.

III. PLAINTIFFS' DUE PROCESS CLAIM FAILS AS A MATTER OF LAW.

The claims of the Plaintiffs who do own property within the Assessment Area and who did file a written protest should, likewise, be dismissed as they fail, as a matter of law. In order to maintain their due process claims, Plaintiffs must allege that they are being deprived of property without notice and an opportunity to be heard. *See* U.S. CONST. amend. XIV § 1; Utah CONST. art. I, § 7. Plaintiffs attempt to circumvent the very obvious requirement of a deprivation of property to create a circular formula for due process – a very low threshold – wherein an infirmity in the process, even in the absence of a deprivation of property, gives rise to a due

[4] The District believes that many of the members of the HOA's did not submit protests to the designation of the Assessment Area because they are in favor of the fire protection being provided. As noted *Architectural Committee of the Mount Olympus Cove Subdivision No. 3 v. Kabatznick*, a case cited by Plaintiffs, "[t]he second requirement relates to a conflict of interest among association members such that the association is unable to properly represent the interests of all of its members." 949 P.2d 776, 778 (Utah Ct. App. 1997) (internal quotation marks omitted). In other words, the HOA's do not meet either of the requirements necessary to have standing to pursue their claims.

process claim. Plaintiffs' proposed test is non-sensical and the cases relied upon by Plaintiffs to support this position are either misinterpreted by Plaintiffs or are readily distinguishable.

For example, Plaintiffs cite to *Rau v. City of Garden Plain*, 76 F.Supp.2d 1173 (D. Kan. 1999), for the proposition that a procedural due process claim ripens prior to the issuance of a final decision. (Opp., p. 37). What Plaintiff fails to inform the Court is that the *Rau* court stated that "[t]he Tenth Circuit, [ ], has held that a procedural due process claim which is coextensive with an unripe Fifth Amendment takings claim is unripe as well." *Rau*, 76 F.Supp.2d at 1177. The *Rau* Court dismissed the plaintiffs' due process claim arising from a municipality's rezoning of property as premature because the plaintiff, was alleging a deprivation of the full economic use of their property prior to finalizing decisions against the zoning ordinance. *Id.* Plaintiffs, similar to *Rau*, have asserted due process claims attacking a designation ordinance prior to any board of equalization hearings and prior to the actual levy of an assessment. (Opp., p. 38.) Accordingly, Plaintiffs claims are premature and unripe.

Plaintiffs' reliance on *Landmark Land Company of Oklahoma, Inc. v. Buchanan*, 874 F.2d 717 (10th Cir. 1989) is similarly misplaced. The Court in *Landmark Land* held that the plaintiff had a protectable property interest in certain permits that would require due process before withholding such permits. *Id.* at 723. The Tenth Circuit subsequently abrogated its holding in *Landmark Land*, stating:

> The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in "property" or "liberty." *Only after finding the deprivation of a protected interest* do we look to see if the State's procedures comport with due process.

Federal Lands Legal Consortium ex rel. Robart Estate v. U.S., 195 F.3d 1190, 1195 (10th Cir. 1999) (*quoting American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999)).[5] In the instant case, Plaintiffs have failed to plead that they have been deprived of any protected property interest and, as such, their due process claims fail.[6]

Plaintiffs, recognizing the deficiency in their Amended Complaint, attempt to make something out of nothing by claiming that "Plaintiffs intend to prove at trial that the creation of the Assessment Area caused the Plaintiffs' property values to decrease." (Opp., p. 38.) This allegation, however, is not included in the Complaint and cannot, therefore, form the basis for surviving the Motion.

Plaintiffs also attempt to add the argument that Plaintiffs were not afforded a Constitutionally protected right to vote. (Opp., p. 39.) First of all, there was no vote of the citizens of Wasatch County needed or taken with respect to the designation of the Assessment Area. Accordingly, there has been no denial of a right to vote. Furthermore, as before, Plaintiffs' Amended Complaint does not include any allegation or claim that Plaintiffs were deprived a right to vote.

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[5] Given the clear standard established by the United States Supreme Court and the Tenth Circuit in 1999, Plaintiffs' reliance on *Nasierowski Bros. Inv. Co. v. Sterling Heights*, 949 F.2d 894 (6th Cir. 1991) is unpersuasive.

[6] Even assuming a deprivation of a property interest had occurred, Plaintiffs' Amended Complaint contains no allegation that any Plaintiff failed to receive the Notice of Intent and/or was denied an opportunity to file a written protest and/or be heard at the public hearing held November 8, 2012.

Finally, Plaintiffs incorrectly claim the right to assert the due process claims of property owners who are not parties to this action. (Opp., pp. 39-40.) The District adamantly disagrees with this argument, however, this determination is irrelevant for purposes of this Motion. The designation of the Assessment Area, the act challenged by Plaintiffs, has not resulted in the deprivation of any protectable property interest for any landowner with the Assessment Area and, as such, no landowner – plaintiff or otherwise – has a due process claim.

IV. PLAINTIFFS' FIFTH CLAIM IS CONTRARY TO BLACK LETTER LAW AND SHOULD BE DISMISSED.

The entirety of Plaintiffs' argument with respect to their Fifth Cause of Action is that the District is a "service area" governed by Title 17B of the Utah Code and not a "special service district" governed by Title 17D of the Utah Code, simply because Plaintiffs said so. While a court considering a motion dismiss is to presume the allegations of the Complaint are true, it need not accept a Plaintiffs' unsupported conclusory allegations. *See Franco v. Church of Jesus Christ of Latter-Day Saints*, 2001 UT 25, ¶ 26-36, 21 P.3d 198; *Margae, Inc. v. Clear Link Tech.*, 620 F.Supp.2d 1284, 1285 (D. Utah 2009) ("the court … need not consider conclusory allegations.") Plaintiffs have made the conclusory statement that the District is a "service area" without any factual allegations to support this conclusion. The public record and documents referenced in the Complaint, however, clearly reveal that the District is a "special service district." (*See*, Compl., Ex. 1; Resolution No. 12-15 attached to the principal memorandum in support of the Motion as Exhibit D; Notice of Encumbrance attached to the principal memorandum in support of the Motion as Exhibit E.) The Court should no more accept

Plaintiffs' unfounded conclusion that the District is a "service area" than it would an allegation that the sky is red or that day is night. The District is a "special service district" governed by Title 17D of the Utah Code and, as such, any alleged prohibitions found in Title 17B are inapplicable to the District.

Plaintiffs, operating under this realization, have accused the District of attempting to "side-step" Utah law. (Opp., p. 41.) Plaintiffs incorrectly insinuate that the Utah Legislature amended the law in direct response to something Wasatch County or the District was doing. (Opp., pp. 41-42.) Like much of the Opposition, this argument is utterly false. The reality is Wasatch County and the District have followed and complied with Utah Code Ann. §§ 17D-1-101, *et seq.*, and 11-42-101, *et. seq.* If Plaintiffs wish to change Utah law, they should petition the Utah Legislature, not seek redress in this Court for the District's lawful compliance with the Code. Accordingly, Plaintiffs' Fifth Claim should be dismissed.

CONCLUSION

For the reasons stated above, as well as those advanced in the District's principal memorandum in support of the Motion, the District respectfully requests the Court dismiss this Action in its entirety.[7]

DATED this 8th day of April, 2013.

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[7] The District respectfully withdraws its alternative motion to quash Plaintiffs' Summons.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct of copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO QUASH SUMMONS** was served to the following this 8th day of April, 2013, in the manner set forth below:

[ ] Hand Delivery

[X] U.S. Mail, postage prepaid

[ ] E-mail:

[ ] Federal Express

[ ] Certified Mail, Receipt No. _____, return receipt requested

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