2011

BV Lending, LLC v. Jordanelle Special Service District : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

BV LENDING, LLC, an Idaho limited liability company, and BV JORDANELLE, LLC, an Idaho limited liability company, Plaintiffs/Appellants, **Plaintiff/Appellant,** **v.** **JORDANELLE SPECIAL SERVICE DISTRICT, a body corporate and politic, JORDANELLE SPECIAL SERVICE DISTRICT, UTAH SPECIAL IMPROVEMENT DISTRICT NO. 20052, a county improvement district, and W. JEFFERY FILLMORE, foreclosure trustee of Jordanelle Special Service District, Utah Special Improvement District No. 2005-2,** **Defendant/Appellee.**	**Appellate Case No. 20111089**

BRIEF OF APPELLEES

Appeal from Order of the Fourth Judicial District Court, Wasatch County, State of Utah, Honorable Derek P. Pullan, District Court Judge

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JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. §§ 78A-3-102(4) and 78A-4-103(2)(j).

COUNTER STATEMENT TO ISSUES ON APPEAL

The Defendants hereby submit their Counter Statement to the issues on appeal. The reason for offering the counter statement is the BV Entities' suggestion that determining whether a party has standing requires the district court to consider evidence of the BV Entities' claims. However, questions of standing "arise early in the litigation, usually before discovery and the introduction of evidence." *Utah Chapter of the Sierra Club v. Utah Air Quality Board*, 2006 UT 74, 148 P.3d 960 ¶ 28, n.3. Accordingly, Defendants assert that the issues on appeal are as follows:

1. Did the district court correctly dismiss BV Lending, LLC ("BV Lending") on the grounds that it lacked traditional standing to contest the Assessment Ordinance because it transferred ownership of the certain real property to BV Jordanelle, LLC ("BV Jordanelle") in November 2009, thereby eliminating any stake it may have in the outcome of the proceedings since the assessment lien does not follow BV Lending as a personal obligation?

2. Did the district court correctly dismiss BV Jordanelle on the grounds that it lacked traditional standing to contest the Assessment Ordinance because it was not formed as a legal entity until October 29, 2009, did not exist as a legal entity, and acquired the property after the Assessment Ordinance, notice of the assessment, and the assessment lien were matters of public record?

3. Did the district court correctly conclude that BV Jordanelle did not have traditional standing to contest the constitutional rights of BV Lending regarding the Assessment Ordinance because BV Lending did not transfer to BV Jordanelle any interest in the First Note, Second Note, or the Deed of Trust because BV Lending made a credit bid at the trustee's sale leaving no such interest to transfer?

4. Did the district court correctly conclude that BV Lending lacks alternative standing to contest the Assessment Ordinance because it has no obligation to pay the assessment and the case does not present issues of sufficient public importance?

5. Did the district court correctly conclude that BV Jordanelle lacks alternative standing to contest the Assessment Ordinance because this case does not present issues of sufficient importance to balance the absence of traditional standing criteria?

The foregoing issues should be reviewed for correctness. *Mellon v. Wasatch Crest Mut. Ins. Co.*, 2009 UT 5, ¶ 7, 201 P.3d 1004. The issues were preserved below by Plaintiff's opposition to the Motion to Dismiss (R. 1808) and Motion for Rule 54(b) Certification. (R. 1903.)

COUNTER STATEMENT TO DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

Although BV Lending and BV Jordanelle (collectively the "BV Entities") have directed the Court to the Fifth and Fourteenth Amendment to the United States Constitution and Article 1, Section 1 of the Constitution of the State of Utah, none of these constitutional provisions are determinative. The fundamental question is whether

the BV Entities have standing to pursue their constitutional claims. The Defendants recognize that one the most fundamental rights we have as a citizenry is the right to due process. Yet, equally fundamental is that a party must have standing to pursue such rights. *Utah Chapter of the Sierra Club*, 2006 UT 74, ¶ 23. It is standing that lies at the heart of this appeal. In that vein, only Utah Code Ann. § 11-42-106 (2007), a copy of which is attached the Appellant's Brief as Addendum 3, is determinative in this case.

COUNTER STATEMENT OF THE CASE

Nature of Case and Procedural Posture

This is an appeal from the Order Granting in Part and Denying in Part, Defendants' Motion to Dismiss, whereby the district court dismissed the BV Entities' first, second, and third causes of action on the grounds that the BV Entities lacked standing to pursue their constitutional claims.[1]

The BV Entities' motives are clear upon examination of the procedural and factual history of this case. Using the United States and Utah Constitutions as their bully pulpit, the BV Entities filed suit against the Defendants seeking to avoid a scheduled foreclosure sale on certain real property securing an assessment lien properly established by Wasatch County in accordance with the Utah Assessment Area Act (the "Act"). The BV Entities claim their constitutional rights to due process were violated when they failed to receive "actual notice" of the adoption of the Assessment Ordinance.

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[1] The district court also dismissed the fourth cause of action, which is not an issue in this appeal.

After securing a temporary restraining order, two days later, BV Jordanelle sought bankruptcy protection and immediately removed this case to the United States Bankruptcy Court in the District of Utah (the "Bankruptcy Court"). When the Bankruptcy Court indicated its inclination to abstain from hearing the case due to the overwhelming presence of state law issues, the parties stipulated to the Bankruptcy Court's abstention and transferred the case back to the district court.

With the case back before the district court, Defendants moved to dismiss the First Amended Complaint (the "Complaint"). Central to this effort was whether the BV Entities had subject matter jurisdiction or standing. They did not and do not. Although the district court determined that it had jurisdiction to consider the merits of the BV Entities' constitutional claims, section 11-42-106 of the Act provides the exclusive remedy to contest both the establishment of an "assessment area" and "assessment lien." Specifically, it provides that a "person who contests an assessment or any proceeding to designate an assessment area or levy" shall file an action not "more than 30 days after the effective date of the assessment resolution of ordinance … ." Utah Code Ann. § 11-42-106. Here, it is undisputed that the applicable assessment ordinance (hereinafter "Assessment Ordinance") became effective on August 14, 2009. The BV Entities did not file their complaint until August 30, 2010, over a year after the Assessment Ordinance became effective and over eight (8) months after they admittedly learned of the assessment lien. Subsection 106(5) expressly states, "[a]fter the expiration of the 30-day period referred to in subsection (2)(b)," "a suit to enjoin, … or to attack or question in any way the legality of assessment bonds, … or an assessment may not be commenced,

and a court may not inquire into those matters." *Id.* at § 11-42-106(5). Accordingly, the district court had no jurisdiction to even consider the claims asserted by the BV Entities.[2]

Regardless, the district court correctly dismissed BV Entities' first, second, and third claims because the BV Entities lack the requisite standing to assert their claims. At the heart of the BV Entities' constitutional claims is the Defendants' purported failure to provide notice reasonably calculated to apprise interested parties of the action being taken to approve the Assessment Ordinance. However, the BV Entities openly admit that Wasatch County and the Defendants satisfied all statutory notice requirements including publishing notice of the creation of the Assessment Area in 2005 and Assessment Ordinance in the summer of 2009. It is further undisputed that when BV Lending purchased the property (pledged by its borrower, PWJ Holdings, LLC), via a trustee's sale on October 29, 2009, the assessment lien to which the BV Entities now object was a matter of public record, having been recorded in September of 2009. As such, the BV Entities took title subject to the Assessment Ordinance and lien and have no standing to assert there was an "error or irregularity" in the adoption of the Assessment Ordinance.[3]

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[2] As discussed further below, in affirming the Order of the district court appealed from, this Court may sustain the judgment on any legal ground or theory apparent on the record. *See In re T.E.*, 2011 UT 51, ¶ 36. ("It is well settled that 'an appellate court may affirm the judgment appealed from if it is sustainable on any legal ground or theory apparent on the record.'").

[3] The adoption of the Assessment Ordinance is the second step in a two step process established by the Utah Legislature for allowing local governmental entities, with the input, consent and participation of property owners, to establish special service districts to build and construct infrastructure for development. *See* Utah Code Ann. §§ 11-42-201- 208; 11-42-401- 416.

Any right to object to and/or commence an action contesting the "levy [of] an assessment" had to be brought within thirty (30) days "after the effective date of the assessment resolution or ordinance." Utah Code Ann. § 11-42-106. Since this action was commenced over a year after the Assessment Ordinance was established, there is no justiciable controversy. Therefore, the district court correctly ruled that the BV Entities have no standing to pursue the claims.

In dismissing the BV Entities' constitutional due process claims, the district court held they lacked traditional and alternative standing. BV Lending lacked traditional standing, the district court concluded, because "BVL no longer has a security interest or ownership interest in the property, having transferred ownership of the property to BVJ in November, 2009." (R. 1892.) By divesting itself of any interest in the property, "BVL eliminated any stake it may have had in the outcome of the[] proceedings and the relief sought, especially since the assessment lien does not follow BVL as a personal obligation." (*Id.*) Likewise, BV Jordanelle lacked traditional standing, the district court concluded, because it was not even established until October 29, 2009, and when "BVJ acquired the property, the assessment ordinance, notice of assessment, and assessment lien were all matters of public record." (R. 1891.) Thus, "the adoption of the assessment ordinance, notice of assessment, and assessment lien did not cause injury to BVJ's interest in the property." (*Id.*) Further, the district court rejected the BV Entities' claim that they collectively have the right to pursue their claims by concluding "BVJ **cannot litigate the rights of BVL in this action**." (*Id.* (emphasis added).) The reason was because BV Lending "did not transfer to BVJ any interest in the First Note, Second Note

or Deed of Trust," due to BV Lending having "made a full credit bid at the trustee's sale." Accordingly, no such interest remained to transfer. (*Id.*)

The district court also held that the BV Entities lacked alternative standing. Again, because BVL retained no "current interest," it has no stake in the outcome. As the district court correctly held, "[t]o maintain standing to prosecute the claims in this case, a party must retain some interest – whether a security interest or ownership interest – in the property subject to the assessment ordinance." (R. 1890.) BV Lending had neither. Focusing on the second aspect of alternative standing, whether the case presents issues of sufficient public importance, the district court concluded that while the case impacts the rights of private property owners, "it does not present issues of sufficient public importance to balance the absence of traditional standing criteria." (R. 1889.) Accordingly, it held BV Lending and BV Jordanelle lacked alternative standing because unlike *Grantsville v. RDA,* 2010 UT 38, *Cedar Mountain Environmental, Inc. v. Tooele County*, 2009 UT 48, and *Club v. Utah Air Quality Board*, 2006 UT 74, "a public interest of equal weight is not at stake here." (R. 1890.)

Here, the very property owners who sought and invited Defendants to create the District, and to construct and install $50 million in improvements, directly benefit from these improvements. Those property owners did not oppose the adoption of the Assessment Ordinance in accordance with Utah law, and they cannot now be heard to complain. Nor can the lenders and/or subsequent purchasers be heard to complain since they acquired title to the subject property **after** the passage of the Assessment Ordinance of which they had actual or constructive knowledge.

Counter Statement of the Facts

As the district court noted, the facts in this case are generally undisputed. (R. 1979 at 124:8-10.) The only possible exception relates to whether BV Lending was on actual as opposed to constructive notice of the Creation Resolution. However, notice has no bearing on whether BV Lending has standing to contest the Assessment Ordinance, having sold its interest in the assessed property. Notice has even less bearing on whether BV Jordanelle has standing to pursue its claims when it did not even exist as an entity when the Assessment Ordinance was adopted.

A. The Parties.

1. BV Lending, LLC is an Idaho limited liability company with its principal place of business in Idaho Falls, Idaho. (R. 1393 at ¶ 1.)

2. BV Jordanelle, LLC is an Idaho limited liability company with its principal place of business in Idaho Falls, Idaho that was established on October 29, 2009. (*Id.* at ¶ 2.)

3. Defendant Jordanelle Special Service District ("JSSD") is a special service district, as that term is defined and used in the Utah Special Service District Act, created by Wasatch County. (*Id.* at ¶ 6.)

4. Defendant Jordanelle Special Service District, Utah Special Improvement District No. 2005-2 (the "District") is a county improvement district created in 2006 by Resolution 2006-4 of the Wasatch County Council acting as the governing board of JSSD pursuant to the Utah County Improvement District Act. (R. 1392 at ¶ 7.)

5. Defendant W. Jeffery Fillmore ("Fillmore") is an attorney and resident of Salt Lake County appointed by JSSD as the foreclosure trustee of the District for the purpose of foreclosing upon certain assessment liens which Defendants assert encumber the BV Entities' real property pursuant to that certain Ordinance No. 09-10 adopted by the Wasatch County Council acting as the governing board of JSSD on July 8, 2009.

B. Wasatch County Establishes Special Service District and Constructs Improvements in Accordance with Creation Resolution.

6. On or about October 19, 2005, the Wasatch County Council adopted a Notice of Intention to create the Jordanelle Special Service District, Utah Special Improvement District No. 2005-2. (First Amended Complaint, January 12, 2011 (R. 1392 at ¶ 13.)

(a) Pursuant to the Notice of Intention, (R. 1678-1694) the Governing Authority (i.e. Wasatch County) disclosed that the "method by which the assessments are to be levied shall be according to 'equivalent residential units'" (or "ERU"). (R. 1690.)

(b) The Notice of Intention further revealed and identified "all Properties within the Improvement District" including property owned by "Aspens" and designated that the "Aspens" property would have a total of 1,384 ERU's. (*See* R. 1689.)

(c) The Notice of Intention further provided an estimated cost of improvements to be constructed for the benefit of the property owner's listed therein and the estimated assessment cost per ERU. (*Id.*)

7. In February 2006, the Wasatch County Council unanimously passed the Creation Resolution, (R. 1391), which resolution was recorded in the Wasatch County Recorder's Office on February 17, 2006 as Entry No. 297016, in Book 830, at Pages 532-561, against the real property impacted by the Creation Resolution. (R. 1391 at ¶¶ 14-15.)

8. The Creation Resolution was recorded against the "Aspens" property, which at the time was owned by PWJ Holdings, LLC ("PWJ Holdings") and/or its predecessor (the "Aspens Parcel"). (*Id.* at ¶ 16; R. 1649-1676.)

9. The Minutes of the February, 15, 2006 Wasatch County Council meeting, which was duly noticed and called to order, revealed the following:

(a) The Notice of Intention was published in the Wasatch Wave, a newspaper of general circulation in the Special Service District four times, once during each week for four consecutive weeks with the last publication being not less than five (5) nor more than twenty (20) days prior to November 23, 2005. (*See* R. 1676.)

(b) The Notice of Intention was mailed to each owner of land affected by or specially benefited by such improvements as said property was described in the Notice. (R. 1675-1676.)

(c) The Protest Hearing was held on November 23, 2005. (R. 1675.)

(d) No written protests against the creation of the District were received, nor were any verbal protests presented at the Protest Hearing. (*Id.*)

10. After the creation of the District, certain bonds were issued to cover the costs of the improvements and the District caused the improvements to be constructed. (R. 1741 at ¶ 5.)

C. BV Lending Extends Credit to PWJ Holdings.

11. In March 2008, BV Lending made two loans to PWJ Holdings in the amounts of $4,232,804.00 and $2,116,402.00, respectively. The loans were evidenced by two notes (the "First and Second Notes") and secured by a Deed of Trust dated March 31, 2008, which Deed of Trust was recorded in the Wasatch County Recorder's Office as Entry no. 334115, in Book 0963, at Pages 2246-54 (the "BV Lending Deed"). (R. 1390-1391 at ¶¶ 18-21.)

12. The BV Lending Deed was recorded against approximately 700 acres of the Aspens Parcel (the "BV Property") owned by PWJ Holdings through a metes and bounds description. (R. 1390 at ¶ 23.) The collateral pledged to secure the First and Second Notes was not improved or subdivided. (R. 1541-1543.)

13. When the BV Lending Deed was recorded, the Creation Resolution was a matter of public record. (R. 1649-1676.)

14. On or about February 10, 2009, PWJ Holdings, LLC filed a bankruptcy petition under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court, District of Utah, Bk. No. 09-21044 JAB (the "PWJ Bankruptcy Case"). (R. 1639-1646.)

15. On or about February 11, 2009, BV Lending filed a Notice of Appearance and Request for Notice in the PWJ Bankruptcy Case. (R. 1635-1637.)

16. On or about May 11, 2009, PWJ Holdings filed a Disclosure Statement to Accompany Plan of Reorganization Proposed by the BV Jordanelle Dated May 11, 2009, (R. 1556-1633) wherein it disclosed (a) the existence of the District and (b) the existence of JSSD's secured claim arising out of the Assessment Ordinance. Specifically, PWJ Holdings disclosed the following:

> Prior to the Petition Date, the Jordanelle Special Services District ("JSSD") approved the issuance of an infrastructure bond in the amount of $44.21 million. The secured claims of the JSSD arise out of and in connection with the Assessment Ordinance. The Debtor believes that the bonds are allocated to the Project on the basis of approximately $12,850 per Equivalent Residential Unit ("ERU") within the JSSD. The Project currently has approval for 1,384 ERU's. The Debtor is not certain of the exact amount of the obligation or when the obligation to pay interest or principal on the bonds may begin.

(*See* R. 1609.) BV Lending received a copy of the Disclosure Statement. (R. 1635-1637.)

D. Wasatch County Adopts Assessment Ordinance.

17. On June 23, 2009, the Wasatch County Council recorded a Notice of Proposed Assessment against the Aspens Parcel including the BV Property and all other property within the District. (R. 1389 at ¶ 29.)

18. On July 8, 2009, the Wasatch County Council, as the governing board of JSSD, adopted an Assessment Ordinance levying an assessment against the Aspens Parcel, including the BV Property. Section 12 of the Assessment Ordinance provided that any party may challenge the Assessment Ordinance "not later than thirty (30) days

after the effective date of the Ordinance. This action shall be the exclusive remedy of any aggrieved party." (R. 1385 at ¶ 38.h.)

(a) Section 13 provided that written notice of the Assessment Ordinance would be provided to "the property owners in the District." (*Id.* at ¶ 38.i.)

(b) Section 17 provided that the Ordinance "shall be published in the Wasatch Wave, a newspaper published and having general circulation in the county, and shall take immediately upon its passage and approval and publication as required by law." (R. 1384-1385 at ¶ 38.j.)

19. The BV Entities do not allege or dispute that the District and Wasatch County gave notice of the Assessment Ordinance in accordance with the Act, Utah law, and the terms of the Assessment Ordinance. (R 1385 at ¶ 39.)

20. The Assessment Ordinance became effective on July 15, 2009. (*Id.* at ¶ 40.) Thus, the thirty (30) day period for challenging the Assessment Ordinance expired on August 14, 2009. (*Id.*) No objections were filed by any of the affected property owners within the District or any other party, including but not limited to lenders whose loans had been secured by property within the District.

21. On September 24, 2009, the District caused a Notice of Assessment Interest to be recorded in the Wasatch County Recorder's Office, as Entry 352632, in Book 1000, at Pages 1569-1583. (R. 1540-1554.) The Notice of Assessment Interest expressly provided that:

> *Notice is hereby given that [JSSD], claims an interest in the property described in Exhibit 1 arising out of the [District] and the terms and provisions of the Assessment Ordinance adopted by the*

Wasatch County Council as the governing body of JSSD on July 8, 2009, levying an assessment against certain properties in the District.

(R. 1554.)

22. The properties levied included the Aspens Parcel and the BV Property. (R. 1381 at ¶ 50.) The public was put on notice by the District's recording of the Notice of Assessment Interest. (*Id.*)

E. BV Lending Purchases the BV Property and Immediately Transfers the BV Property to BV Jordanelle.

23. Upon securing relief from the automatic stay in the PWJ Bankruptcy Case, BV Lending directed the trustee to schedule a trustee's sale of the BV Property, which sale was held on or about October 29, 2009 over a month after the Notice of Assessment Ordinance was recorded against the BV Property. (R. 1381 at ¶ 54.)

24. BV Lending voluntarily bid and was the successful bidder at the trustee's sale by making a credit bid of $8,684,279.65 representing the amounts owed under the First and Second Notes. (*Id.*, ¶ 56.)

25. BV Lending was under no obligation to purchase the BV Property or make a credit bid for the full amount due and owing by PWJ Holdings.

26. On October 29, 2009, the day of the trustee's sale, BV Jordanelle was created when it filed Articles of Organization with the Idaho Secretary of State. (R. 1538.)

27. Shortly after the trustee's sale, on November 10, 2009 BV Lending assigned and conveyed all of its right title and interest in the BV Property to BV

Jordanelle. (R. 1381 at ¶ 57; *see also* Trustee's Deed evidencing the transfer from BV Lending to BV Jordanelle which was recorded in the Wasatch County Recorder's Office on November 10, 2009, as Entry 354092, in Book 1004, at Pages 187-192 (R. 1530-1535.)

28. Significantly, the Trustee's Deed given to BV Jordanelle expressly states the transfer is "without any covenant or warranty of any kind, express or implied." (R. 1532.)

29. Based on the Trustee's Deed, BV Lending has no interest in the BV Property, and BV Jordanelle accepted fee simple title to the BV Property subject to the Assessment Ordinance and Notice of Assessment Interest. (*Id.*)

30. The Assessment Ordinance and Notice of Assessment Interest were recorded and were a matter of public record prior to the time BV Jordanelle received its interest in the BV Property. (R. 1540-1554.)

F. The District Seeks Payment of Assessments.

31. On November 1, 2009, the District sent notice to all property owners of record within the District, including PWJ Holdings, in accordance with the Assessment Ordinance and Utah law. (R. 1736 n.7.)

32. Notice was not sent to BV Jordanelle because title had not passed since it was not until November 10, 2009 that the trustee's deed conveying title was recorded with the Wasatch County Recorder's Office. (R. 1530-1535.)

33. No payment was received on February 1, 2010 from any owner of the Aspens Parcel, including BV Jordanelle. (R. 1523-1525.)

34. At page xiv, paragraph 28, footnote 1, of the Appellants' brief, the BV Entities call attention to the accelerated balance due and owing to the District due to the non-payment of the assessment by all owners of the Aspens Parcel. For some time, there was confusion over precisely what portion of the Aspens Parcel BV Jordanelle owned. The confusion lies between what BV Jordanelle claimed it owned and what Wasatch County showed was owned by BV Jordanelle. BV Jordanelle and the District have determined with reasonable certainty what BV Jordanelle owns. BV Jordanelle owns a portion of the Aspens Parcel consisting of over 1,500 acres assigned 1384 equivalent residential units.[4]

G. BV Jordanelle Defaults on Its Obligations Pursuant to the Assessment.

35. It is undisputed that the District has an assessment lien against the Aspens Parcel, including the BV Property, which lien was not extinguished by BV Lending's trustee's sale on October 29, 2009. (R. 1737 at ¶ 26.)

36. It is also undisputed that the BV Entities purportedly discovered the existence of the Assessment Ordinance and Notice of Assessment Interest in January, 2010.[5] (R. 1382 at ¶ 49.)

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[4] At the time of the adoption of the Assessment Ordinance, a portion of the Aspens Parcel had been subdivided into 71 lots and/or ERU's. (R. 1473.) Except for the Talisman Plat 1 subdivision, the balance of the Aspens Parcel had not been subdivided. (R. 1474-1476.)

[5] Defendants affirmatively assert the BV Entities had notice constructive of the Assessment Ordinance as early as May of 2009 when PWJ Holdings filed the Disclosure Statement, or at the very least when the Assessment Ordinance was recorded.

37. On or about February 23, 2010, the District sent written notices to BV Jordanelle regarding the Assessment Ordinance and Notice of Assessment Interest, informing it that the first installment was due February 1, 2010 and that BV Jordanelle was in default for failure to make the first required installment payment in accordance with the Notice of Assessment Interest recorded on September 24, 2009. (R. 1380 at ¶ 61.)

38. Between February 2010 and April 2010, BV Jordanelle failed to make any payment due on the assessment, despite its knowledge that such payments were due and owing. (R. 1523-1525.)

39. On or about April 16, 2010, the District sent, and BV Jordanelle received a Designation of Trustee and Notice of Default and Election to Sell ("Notice of Default") regarding the BV Property. The Notice informed Plaintiffs of their default and that because the assessment was not paid, the total unpaid balance for the principal of the Assessment owing has been accelerated and was due and payable. (*See* Notice of Default, R. 1523-1525.)

40. BV Jordanelle failed to pay any portion of the amount due and owing to the District pursuant to the assessment within 90 days after the recording of the Notice of Default.

41. As such, on August 3, 2010, the District directed Fillmore, to send BV Jordanelle a Notice of Trustee's Sale, (R. 1520-1521), informing BV Jordanelle that on September 1, 2010, the BV Property would be sold to satisfy BV Jordanelle's obligations for the assessments on the BV Property.

H. BV Jordanelle and BV Lending File Action and Motion for Temporary Restraining Order Seeking to Enjoin Trustee's Sale.

42. On August 30, 2010, despite having learned of the Assessment Ordinance in January 2010, the BV Entities filed their initial complaint seeking to enjoin the foreclosure sale of the BV Property.

43. The Complaint asserts six separate causes of action. The first three causes of action challenge the constitutionality of the Act, and specifically Utah Code Ann. § 11-42-106, by alleging that the Act violates the United States and Utah Constitutions by denying BV Lending of its due process rights to notice because the Act does not require that actual notice be provided to a recorded lienholder. Specifically, the Complaint asserts the following causes of action:

(a) Declaratory Relief for violation of the Due Process Clause, seeking declaratory relief that the Assessment Ordinance, the Notice of Assessment Interest, and the accompanying assessment lien deprived Plaintiffs of their property interests without due process of law in violation of the U.S. and Utah Constitutions. (R. 1368-1372 at ¶¶ 97-115);

(b) Declaratory Relief for violation of the Open Courts Clause, seeking declaratory judgment that the Utah Assessment Act, Utah Code Ann. § 11-42-106(2)(b) is unconstitutional under the Utah Constitution as applied to beneficiaries of deeds of trust. (R. 1366-1368 at ¶¶ 116-123);

(c) Declaratory Relief – Equal Protection Clause of the Fourteenth Amendment and Uniform Operation of Laws Clause of the Utah Constitution,

seeking declaratory judgment that the method of assessment used by JSSD and the District to assess the BV Property was unreasonable, arbitrary, capricious, and unconstitutional under the Equal Protection Clause of the United States and Utah Constitutions, and is therefore null and void. (R. 1363-1366 at ¶¶ 124-137);

(d) Declaratory Relief – Assessment Lien Void as to the BV Property because it was imposed in violation of the automatic bankruptcy stay, seeking declaratory judgment that, to the extent JSSD and the District were barred by the automatic bankruptcy stay from imposing a lien on the BV Property, the lien they seek to foreclose is void. (R. 1360-1363 at ¶¶ 138-153);

(e) Declaratory Relief- Various Matters Relating to Defendants' Alleged Lien and Claim, seeking declaratory relief with respect to the following issues: (1) whether JSSD and the District have a valid and enforceable lien and whether the lien encumbers all of the BV Property or a portion of it; (2) assuming JSSD and the District have a valid and enforceable lien, whether the BV Property includes the Disputed Property; (3) the correct amount of the "Original Assessment" against the BV Property; (4) the correct amount of all amounts currently owed to JSSD and the District pursuant to the Assessment Ordinance, the Notice of Assessment Interest, and the assessment lien imposed thereby on the BV Property; (5) whether all amounts claimed to be owed by JSSD and the District have been accelerated, as claimed by JSSD and the District or whether Plaintiffs can cure and reinstate any obligations owing to JSSD and the District. (R. 1359-1360 at ¶¶ 154-157);

(f) Accounting, seeking an accounting which provides Plaintiffs with a detailed, accurate and complete accounting of: (a) the proper amount of the assessment principal owed to Defendants and precisely how the principal was calculated; (b) the proper amount of any interest, late fees and/or attorneys' fees owed to Defendants and the backup detail for all those claimed charges; and (c) the proper amount of any cure amounts owed to Defendants. (R. 1357-1359 at ¶¶ 158-167.)

44. On August 31, 2010, the Court heard oral argument on Plaintiffs' Motion for Temporary Restraining Order.

(a) During the hearing, counsel for the BV Entities stated that its title company did not discover the Creation Resolution when it conducted a title search.

(b) Specifically, the following exchange occurred at the hearing:

> "THE COURT: Before you lent $6.6 million on this property, surely BV Lending would run a title report and see-- . . .
>
> MR. DIBBLE: Which they did. And this Exhibit 1 was . . . not on the title report.
>
> THE COURT: I'm showing it recorded—recorded February 17.
>
> MR. DIBBLE: That was not on the title report, and we can put that as evidence. . . . That was never part—never showed up on the title report that BV Lending ran."

(R. 1979; Transcript from Hearing on Motion for Temporary Restraining Order, 8/31/2010 at 97:6-25; 124:10-15.)

45. The Court granted the BV Entities' Motion on the grounds that the case presents serious issues which should be the subject of further litigation and ordered the BV Entities to post a security bond in the amount of $25,000.00 to be paid to the Court by September 2, 2010. (R. 198-201.) In doing so, however, the Court noted that "there's some dispute as to whether or not – the creation resolution appeared on a title report, but there's no dispute that it was recorded. So plaintiffs may have a cause of action against a title company or title insurer. . . ." (R. 1979; Transcript at 124:10-15.)

I. Immediately After Filing Its Complaint in State Court, BV Jordanelle Declares Bankruptcy.

46. On September 2, 2010, BV Jordanelle filed its voluntary petition for relief under Chapter 11 of Title 11 of the United States Code with the U.S. Bankruptcy Court for the District of Utah.

47. On September 9, 2010, the BV Entities filed a Notice of Removal of Action to Bankruptcy Court (R. 209-210) (in this case) and a Notice of Removal of Pending State Court Action to the U.S. Bankruptcy Court for the District of Utah (in the Bankruptcy Court), notifying the district court and parties that the case would be removed to the Bankruptcy Court. (R. 221-222.)

48. As a result of the bankruptcy filing, the district vacated the preliminary injunction hearing, previously scheduled for October 4, 2010. (R. 224.)

49. Defendants accepted service of the Complaint on September 15, 2010.

50. On December 3, 2010, the parties submitted, and the Bankruptcy Court entered, an Order of Abstention, and Transferring the Lawsuit to the Utah Fourth District

Court for Wasatch County. In the Order, the Court stated "that portion of the Motion which seeks dismissal of Plaintiff's claims shall be deferred for later consideration by the State Court." (Stipulation, December 2, 2010 (R. 1511 at ¶ 7A).) The Bankruptcy Court noted that "[t]he State Court may in its discretion hear and decide that portion of the Motion in which Defendants seek dismissal of Plaintiff's claims along with Plaintiff's motion to amend and all other matters brought before the State Court by any party in the Lawsuit." (*Id.* at ¶ 7E.)

J. District Court Grants Defendants' Motion to Dismiss the BV Entities' First, Second, Third, and Fourth Causes of Action and the BV Entities' Appeal.

51. On February 16, 2011, Defendants moved to dismiss all six of the BV Entities' causes of action. Defendants argued that the Complaint should be dismissed because the district court lacked jurisdiction and the BV Entities lacked standing to assert their claims, including their constitutional claims. (R. 1757-1760.)

52. On August 29, 2011, the Court entered the Order Granting In Part and Denying In Part Defendants' Motion to Dismiss. (R. 1886-1895.) The district court first addressed the Defendants' jurisdictional argument and determined it had "jurisdiction to hear and decide this case." (R. 1894.) The district court reasoned that Utah Code Ann. § 11-42-106 limits it's jurisdiction "to hear and decide claims alleging an 'error or irregularity' in the assessment or the proceedings to levy an assessment." (*Id.*) However, the district court concluded it did not "limit the Court's jurisdiction to adjudicate claims challenging the constitutionality of the statutes notice provisions." (*Id.*) The court reasoned that "[i]f the notice mandated by the statute falls below that which is

constitutionally required by the due process clause, then the court has jurisdiction to hear and decide that issue."[6] (*Id.*)

53. Having declared it had jurisdiction, the district court turned its attention to standing and determined that neither BV Lending nor BV Jordanelle had standing to pursue their first, second or third causes of action. The district court held BV Lending lacked traditional standing because "BVL no longer has a security interest or ownership interest in the [Encumbered Subject] property, having transferred ownership of the property to BVJ in November, 2009." By divesting itself of any interest in the property, "BVL eliminated any stake it may have had in the outcome of the[] proceedings and the relief sought, especially since the assessment lien does not follow BVL as a personal obligation." (R. 1892.)

54. Likewise, the district court held BV Jordanelle lacked traditional standing because it was not even established as an entity until October 29, 2009, and when "BVJ acquired the property, the assessment ordinance, notice of assessment, and assessment line were all matters of public record." (R. 1891.) Thus, "the adoption of the assessment ordinance, notice of assessment, and assessment lien did not cause injury to BVJ's interest in the property." (*Id.*) Further, the district court rejected the BV Entities' claim that they collectively have the right to pursue their claims by concluding "BVJ **cannot litigate the rights of BVL in this action**." (*Id.* (emphasis added).) The reason was

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[6] The district court further noted that Utah Code Ann. § 11-42-106 did not limit it's jurisdiction to consider the BV Entities fourth, fifth or sixth causes of action. (*Id.*)

because BV Lending "did not transfer to BVJ any interest in the First Note, Second Note or Deed of Trust," due to BV Lending having "made a full credit bid at the trustee's sale." Accordingly, no such interest remained to transfer. (*Id.*)

55. The district court also held that the BV Entities lacked alternative standing. Again, because BVL retained no "current interest," it has no stake in the outcome. The district court held, "[t]o maintain standing to prosecute the claims in this case, a party must retain some interest – whether a security interest or ownership interest – in the property subject to the assessment ordinance." (R. 1890.) Focusing on the second aspect of alternative standing, whether the case presents issues of sufficient public importance, the district court concluded that while the case impacts the rights of private property owners, "it does not present issues of sufficient public importance to balance the absence of traditional standing criteria." (R. 1889.) Accordingly, it held BV Lending and BV Jordanelle lacked alternative standing because unlike *Grantsville*, *Cedar Mountain*, and *Sierra Club*, "a public interest of equal weight [was] not at stake here." (R. 1890.)

56. On November 9, 2011, the district court granted the BV Entities' Motion for Rule 54(b) Certification. (R. 1947-1949.)

57. This appeal was then filed by the BV Entities on November 29, 2011. (R. 1977-1978.)

58. In the appellate brief, at paragraphs 35 and 36 (at pages xvi and xvii) the BV Entities attempt to set forth the issues before the court and contend that if "[b]oth BVL and BVJ were before the Court in the same action" and "do not have traditional standing to sue … then no one does." (Appellant's Brief at xvii.) These are not facts, but

argument and ignore the undisputed fact that (1) BV Lending conveyed its interest in the BV Property in November of 2009 and has no further financial obligation to pay the assessment and (2) BV Jordanelle did not even exist when the Assessment Ordinance was passed. The standing of BV Lending must be considered separate and apart from BV Jordanelle and vice-versa.

SUMMARY OF ARGUMENT

Rather than address the standing arguments that led to the dismissal of their claims, the BV Entities characterize this case as a "deprivation of property rights without due process of law" hoping the Court will overlook that the BV Entities lack standing to pursue their constitutional claims. However, this case is not about the deprivation of property rights. This case is not about a multi-million dollar assessment lien "prim[ing] BVL's recorded interest." This case is not about the assessment lien rendering BV Lending's recorded interest without economic value. To the contrary, this is a case in which the BV Entities cannot and do not allege that Defendants acted in violation of the Act. This is a case in which Wasatch County and the District strictly complied with the four corners of the Act, including by providing notice. This is a case in which the owners of the Aspens Parcel, among others, came to Wasatch County and requested it construct $50 million in improvements, which the District did. This is a case in which BV Lending on its own, openly and knowingly extended credit to PWJ Holdings without doing its own due diligence. This is a case in which the BV Entities want the Court to correct its own bad business deal. The Court should see through the BV Entities' façade and affirm

the district court's dismissal of the first, second, and third causes of action on the grounds the BV Entities lack standing.

Throughout its brief, the BV Entities argue that since "the party that owned the property at the time of the assessment and was harmed by the priming lien (BVL) and the party that currently owns the property and must pay the assessment or risk foreclosure (BVJ)," are both before the Court, they must somehow have standing to pursue their claims. (*See* Appellant's Brief at 3, 5, 8, 9, and 10.) This generalization, however, completely ignores the facts of this case and the law that applies to the creation of a special improvement district, the constructing and installation of improvements, and the adoption of the assessment lien against those who benefit directly from the improvements. Here, there is no dispute that the owners of the Aspens Parcel, along with the other owners within the District, have benefited substantially from the establishment of the District. Without the sewer and water facilities, no development can occur.

However, the fundamental error in the BV Entities entire brief lies in the fact that BV Lending relinquished, transferred and conveyed its interest in the BV Property thereby removing any obligation to pay any portion of the assessment. As such, it has no injury from the adoption of the Assessment Ordinance. Instead, it pawned off that obligation to BV Jordanelle, an entity that was created **after** the Assessment Ordinance was adopted by Wasatch County. Both parties acted with knowledge of the existence of the Assessment Ordinance and notice of the assessment lien. Hence, they cannot be heard to complain now.

More importantly, when the Court evaluates the standing of each party separately, as it must, the unyielding conclusion is that neither party has standing. To have standing a party must: (i) assert that it has been or will be adversely affected by the challenged actions; (ii) allege a causal relationship between the injury to the party, the challenged actions and the relief requested; and (iii) seek relief that this substantially likely to redress the injury. Here, on the one hand you have BV Lending who, although arguably harmed by the priming of its security interest, elected to go forward with a trustee's sale, extinguish its security interest, and convey its interest to BV Jordanelle. As the court held, "BV Lending eliminated any stake it may have had in the outcome of these proceedings, especially since it has no personal obligation to pay the assessment." (R. 1892.) Similarly, since BV Jordanelle did not even exist when the assessment lien was adopted and made a matter of public record, it is impossible for its due process rights to have been violated.

ARGUMENT

The issue before this Court is straightforward: do the BV Entities have standing to pursue their constitutional claims? The answer is no.

It is axiomatic that before a party may pursue a claim, the party must establish that it has standing, which is determined at the time the action is brought. *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154 (10th Cir. 2005). Utah standing law "operates as gatekeeper to the courthouse allowing only those cases that are fit for judicial review." *Terracor v. Utah Bd. of State Lands & Forestry*, 716 P.2d 796, 798-99 (Utah 1986). By limiting cases, it ensures "that courts confine themselves to [the] resolution of those disputes most

effectively resolved through the judicial process." *Id.* at 799. Here, despite the protestations that their constitutional rights to due process have been violated, the BV Entities lack standing to pursue their claims and the district court properly dismissed the first, second and third causes of action.

I. JUDGE PULLAN CORRECTLY RULED THAT THE BV ENTITIES LACK TRADITIONAL STANDING.

The Utah Supreme Court has held that a party does not have standing to challenge a county's actions unless the party had an interest in the affected property **at the time** the complaint was filed. *Cedar Mountain Environmental, Inc. v. Tooele County*, 2009 UT 48, ¶¶ 3-5, 214 P.3d 95 (emphasis added); *see also Jenkins v. Swan*, 675 P.2d 1145, 1149 (Utah 1983) ("The requirement that a plaintiff have a personal stake in the outcome of a dispute is intended to confine the courts to a role consistent with the separation of powers, and to limit the jurisdiction of the courts to those disputes which are most efficiently and effectively resolved through the judicial process."). As discussed more fully in *Jenkins*, there are two means by which a party may establish standing: (i) the traditional test and (ii) the alternative test. *Jenkins,* 675 P. 2d at 1150-51. The traditional test is referred to as the "distinct and palpable injury" test and requires the plaintiff to allege that it has "suffered or will 'suffer[] some distinct or palpable injury that gives it a personal stake in the outcome of the legal dispute.'" *Utah Chapter of Sierra Club v. Utah Air Quality Board*, 2006 UT 74, ¶ 19, 143 P.23d 960 (citing *Jenkins*, 675 P.2d at 1148). To determine whether a party has suffered a distinct and palpable injury, the Court engages in a three step inquiry:

> First, the party must assert that it has or will be 'adversely affected by the [challenged] actions.'
>
> Second, the party must allege a causal relationship 'between the injury to the party, the [challenged] actions and the relief requested.'
>
> Third, the relief requested must be 'substantially likely to redress the injury claimed.'

Id. "A person who satisfies the traditional test has standing and the court need not inquire further." *Id.* at ¶ 41. As demonstrated below, however, the district court ruled that the BV Entities failed to demonstrate a distinct and palpable injury, thereby determining the BV Entities lack standing to pursue their constitutional claims.

A. BV Lending Lacks Traditional Standing Because It Does Not Own the Property at Issue and Is Not Responsible for the Assessment.

A fundamental flaw in the BV Entities' standing argument is their refusal to accept the undisputed facts of this case and their impact on standing. Although the BV Entities would have this Court believe that the district court recognized it met the first two elements of the traditional standing test, based on the undisputed facts and the district court's ruling, BV Lending cannot meet three standing requirements. Specifically, the district court found that BV Lending divested itself of any interest in the BV Property when it conveyed the property to BV Jordanelle. (Statement of Facts ("SOF") ¶ 53.) Without any interest in the BV Property, BV Lending cannot claim it was adversely affected by the adoption of the Assessment Ordinance. Nor can it claim a causal relationship between the injury to BV Lending, the adoption of the Assessment Ordinance and the relief requested – declaratory judgment. Finally, as the district court

correctly ruled, BV Lending lacks traditional standing because it does not have a stake in the outcome of the proceedings. (*Id.*)

One of the requirements for standing is that "the parties seeking relief must have a legally protectable interest in the controversy" or a "personal stake in the outcome of a dispute." *Jenkins v. Swan*, 675 P.2d 1145, 1148 (Utah 1983). BV Lending has neither. Specifically, Judge Pullan held that:

> BVL no longer has a security interest or ownership interest in the property, having transferred ownership of the property to BV Jordanelle in November 2009. By divesting itself of any interest in the property, BVL eliminated any stake it may have had in the outcome of these proceedings and the relief sought, especially since the assessment lien does not follow BVL has a personal obligation."

(SOF ¶ 53.) The BV Entities incorrectly state that Judge Pullan found BV Lending was injured when the Assessment Ordinance was adopted without notice being provided to BV Lending. (Appellate Brief at p. 4.) This is not accurate. The district court's ruling merely accepted the allegations of BV Lending as it was required to do on a motion to dismiss. Nonetheless, Judge Pullan went a step further and determined that regardless of this fact, BV Lending lacks standing due to a lack of redressability. (SOF ¶ 53.) Having sold and conveyed its interest in the BV Property, BV Lending has no personal stake or a legally protectable interest in the controversy. (*Id.*)

BV Lending admits it did not own the BV Property at the time it filed the Complaint. (*Id.* at ¶ 4.) Also, it is undisputed that BV Lending is not liable for the assessment. Nor do Defendants seek to foreclose against any property owned by BV Lending. Put simply, the outcome of this matter will not affect BV Lending in any way.

Because of this, the relief that the BV Entities seek will not redress the alleged injury to BV Lending. Therefore, BV Lending does not have traditional standing to bring this lawsuit. *See Cedar Mountain Environmental, Inc. v. Tooele County*, 2009 UT 48, ¶ 10, 214 P.3d 95, ("[W]e have determined that to have a personal stake in the outcome of a land use decision, a party must own or occupy property within the jurisdiction of the decision-making body."); *Tholen v. Sandy City*, 849 P.2d 592, 595, n.4 (Utah Ct. App. 1993) (In ruling complaint was untimely, Court concluded that if plaintiff sold property to third-party, the assessment lien would not follow the seller as a personal obligation.)

Nor can BV Lending attempt to prove standing by bootstrapping the standing analysis to its due process claims. To argue that somehow it is afforded a more lenient standard with respect to standing because it asserts procedural due process claims is of no avail. None of the cases cited by BV Lending support their argument. The *Copelin-Brown* and *Carey* cases stand for the proposition that a person's right to due process may be actionable even when there are ***nominal damages***. *Copelin-Brown v. New Mexico State Personnel Office*, 399 F.3d 1248,1254 (10th Cir. 2005); *Carey v. Phillips*, 435 U.S. 247, 266 (1978). Here, BV Lending does not seek nominal damages. (SOF ¶43.) It seeks declaratory judgment from the Court that the notice requirements of the Act are unconstitutional. (*Id.*) It seeks declaratory judgment to vacate the Assessment Ordinance and excuse its lien obligations. (*Id.*) This far exceeds the nominal damages purportedly allowed in the absence of actual injury, and justifies a heightened standing requirement. This is particularly so where the Utah legislature has already determined that the

appropriate parties to receive notice of a proposed assessment are the owners of the property affected thereby. *See* Utah Code Ann. § 11-42-101 *et seq.*

Additionally, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.7 (1992), has no application here where the Court stated that the traditional standing requirements may be loosened where, for example:

> One living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

Id. An individual living next to a proposed dam cite is in a vastly different position than a party who no longer owns the property at issue and has no obligations related to the property.

The BV Entities' reliance on *Electric Power Supply Association v. FERC* is also unfounded. 391 F.3d 1255, 1261-62 (D.C. Cir. 2004). In *Electric Power Supply*, EPSA sought to participate in a FERC hearing pursuant to the Sunshine Act, but it did not have any concrete or particularized harm to show it was currently aggrieved by the challenged orders. *Id.* at 1262. The Court found that even though EPSA lacked financial interest, because EPSA has a right, protected by the Sunshine Act's proscription against *ex parte* communications, to "fair decision making" by the Commission, "[t]his, not the financial interests of EPSA and its members, is the right directly protected by [the Act] and impaired by the market monitor exemption." *Id.* Thus, standing was premised upon the right to "fair decision making" provided by the Sunshine Act. *Id.* There is no analogous

right conferred upon mortgagees here. Nor have the BV Entities alleged a lack of "fair decision making." To the contrary, they claim their due process rights were violated because they did not receive "actual notice" that the District was seeking to adopt the Assessment Ordinance. (SOF ¶ 43.) They do so in the face of admitting that Wasatch County and the District gave the required notice under the Act and Utah law and that the Creation Resolution (which expressly outlined the means and methods upon which the assessment would be levied) was properly adopted and a matter of public record. (*Id.* ¶ 19.)

Similarly, *Citizens for Better Forestry* is distinguishable where the court expressly held that the plaintiffs sustained an injury, and thus had standing: the "Citizens have adequately alleged injury to their members. The interest at stake preventing environmental damage to national forests and grasslands due to decreased regulatory oversight are pertinent to the interests of environmental organizations such as Citizens." *Citizens for Better Forestry v. US Dept. of Agriculture*, 341 F.3d 961, 976 (9th Cir. 2003). Again, here, there is no plausible injury to BV Lending.

Accordingly, because BV Lending transferred and conveyed any and all right, title and interest in the BV Property to BV Jordanelle and has no obligation to pay the assessment, it lacks traditional standing to pursue any of the claims asserted in this case.

B. BV Jordanelle Lacks Traditional Standing.

Bypassing the traditional standing test, the BV Entities attempt to bolster BV Jordanelle's standing by claiming that if BV Lending does not have standing, BV Jordanelle must. BV Jordanelle lacks standing because it, too, cannot demonstrate a

"distinct and palpable injury." *Sierra Club*, 2006 UT at ¶ 19. BV Jordanelle took title to the BV Property subject to all encumbrances, liens, assessments and all the like, of which it had actual or constructive notice at the time title was transferred. (SOF ¶ 30); *see Brewer v. Peatross*, 595 P.2d 866, 868 (Utah 1979) ("An encumbrance may be said to be any right that a third person holds in land which constitutes a burden or limitation upon the rights of the fee title holder."); *see also* Utah Code Ann. § 57-4a-2 ("A recorded document imparts notice of its contents regardless of any defect, irregularity, or omission in its execution, attestation, or acknowledgment."). As such, Judge Pullan held:

> BVJ lacks traditional standing. . . . BVJ was not formed until October 29, 2009. Effective the same day, BVL transferred the property to BVJ. On the day BVJ acquired the property, the assessment ordinance, notice of assessment, and assessment lien were all matters of public record. Therefore, the adoption of [those documents'] did not cause injury to BVJ's interest in the property. **At the time of these events, BVJ did not even exist as a legal entity.**

(SOF ¶ 54.) Therefore, BV Jordanelle does not have standing because it did not even exist when the "challenged action" – the adoption of the Assessment Ordinance – became effective. Not to mention, the Assessment Ordinance was a matter of public record when BV Jordanelle took title to the BV Property. (*Id.* at ¶ 30.)

Unlike the instant case, in which the District recorded the Creation Resolution, the *Brewer* court affirmed judgment in favor of grantees for breach of warranty deed due to the governing entities' failure to record the creation of improvement district. *Brewer*, 595 P.2d at 868. Indeed, BV Jordanelle took its interest in the BV Property over five years after the Creation Resolution was recorded and months after the Assessment

Ordinance was passed. (SOF, ¶¶ 7-8, 27, 30.) It cannot now be heard to complain about something that was decided years ago and which it knew, or should have known about. *See Henretty v. Manti City Corp.*, 791 P.2d 506, 510 (Utah 1990) (since challengers had "sufficient notice of the creation of the district and of the proposed improvements," failure to file a copy of notice of intention did not render assessment void.).

The BV Entities' reliance on the third party standing doctrine, in which they argue that BV Jordanelle should be permitted to assert the arguments of BV Lending, is likewise misplaced. This argument was not made below, and thus should not be considered by the Court. Regardless, the doctrine does not support the BV Entities' argument. *See e.g.*, *Hodak v. City of St. Peters*, 535 F.3d 899, 904 (8th Cir. 2008). According to the very cases cited by the BV Entities, the third party standing doctrine requires that the party on whose behalf the suit is brought lacks the ability to assert the claim on his/her own. *Id.* at 904 ("'[a] party must show that some barrier or practical obstacle . . . prevents or deters the third party from asserting his or her own interest.'" (citing *Benjamin v. Aroostook Medical Ctr., Inc.*, 57 F.3d 101, 106 (1st Cir. 1995)). The court in *Hodack* stated "[n]o practical barriers exist if the third party actually asserts his own rights." 535 F.3d at 904. Here, BV Jordanelle cannot assert the rights of BV Lending under the third party standing doctrine because BV Lending is a party to the lawsuit. *Id.* The doctrine simply does not apply.

The futility of BV Entities' third-party doctrine is further demonstrated by the Tenth Circuit decision of *Kemmerer Coal Company v. Brigham Young University*, 723 F.2d 54 (10th Cir. 1983). In *Kemmerer*, the plaintiff sought to quiet title in certain coal

deposits due to an assessor's mistake. *Id.* at 54-55. Kemmerer argued that its due process rights were violated because its predecessor in interest, San Rafael Fuel Company, did not receive notice of the tax assessment on the coal and received only publication notice of the resultant sale of the coal rights. *Id.* at 56-57. In fact, the notice erroneously listed strangers to the title as owners, although the Emery County records clearly showed San Rafael to be the true owner of the assessed interest. *Id.* at 57. The trial court found Kemmerer's due process rights were violated. *Id.* at 55-56. However, on appeal, the Tenth Circuit reversed and held that Kemmerer's due process rights were not violated. *Id.* at 57-58. In so ruling, the Tenth Circuit held that it did not need to decide whether Kemmerer's due process rights were violated "because Kemmerer itself has suffered no due process injury." *Id.* at 57. Specifically, the Court explained its ruling as follows:

> If a constitutional violation occurred, it was the taking of San Rafael's property without due process. Kemmerer thus seeks to advance its claim by asserting a third-party's constitutional rights. **"[T]he general rule is that a 'litigant may only assert his own constitutional rights or immunities.'"** *McGowan v. Maryland*, 366 U.S. 420, 429 (1961) [other citations omitted]. This rule has been applied to **bar a grantee's assertion that its grantor's due process rights were violated.** [citations omitted].

Id. (emphasis added (citations omitted)). As the grantee, BV Jordanelle cannot assert BV Lending's (the grantor's) due process rights, if any, and vice versa.

Moreover, the BV Entities' often repeated assertion that if neither BV Lending nor BV Jordanelle have standing, then no one does is simply wrong. The district court rejected the BV Entities' claim that they collectively have the right to pursue their claims

because "BVL divested itself of its interest in the property" and "BVJ **cannot litigate the rights of BVL in this action**." (SOF ¶ 54(emphasis added).) The reason was because BV Lending "did not transfer to BVJ any interest in the First Note, Second Note or Deed of Trust," because BV Lending "made a full credit bid at the trustee's sale." (*Id.*) Accordingly, no such rights remained to transfer. But, there were others who had the right to contest the Assessment Ordinance and chose not to do so.

The BV Entities also refuse to accept that the owners of the property at the time the District was created and assessment ordinance adopted, including PWJ Holdings, had standing to object. None of the owners objected. In fact, they all expressly requested that the County create the District to provide the infrastructure for their projected development plans. If BV Lending desired to protect its senior lien position, it certainly had the ability to include a contractual provision in its loan documents to address this very issue. It did not do so, and the County and JSSD complied with the Act, including providing notice as required by the Act. (SOF ¶ 19.) That PWJ Holdings later defaulted on its loan obligation to BV Lending, and BV Lending chose to credit bid at the foreclosure sale and take fee title interest in the BV Property subject to assessment is not the fault of Defendants. (*Id.* at ¶¶ 23-25.) That was BV Lending's decision alone.

Further, prior to making the credit bid on October 29, 2009, BV Lending was on notice of the assessment. (*Id.* at ¶¶ 13,19.) The following documents were a matter of public record: Creation Resolution (2005), PWJ Bankruptcy proceedings (2009), Assessment Ordinance (7/2009), and Notice of Assessment Interest (9/2009). (SOF, ¶¶ 7, 16-21.) Both BV Lending and its title insurer should have discovered the Creation

Resolution when the loan was made and/or at least before BV Lending made the credit bid and purchased the property at foreclosure sale. Counsel for the BV Entities admitted that its title company did not notice the Creation Resolution when they ran the title search. (*Id.* at ¶ 44.) Therefore, the BV Entities' argument that no one has standing is flawed.[7]

Finally, based on the *Tholen* decision, there is a strong public policy argument in support of finality of decisions. 849 P.2d at 595 n.4. Once the District was created, ordinance approved, and lien levied, disgruntled parties who took an interest in the property after-the-fact cannot be heard to complain. This has to be the case even where the claims are constitutional in nature. A property owner (BV Jordanelle) who, after the fact, acquires the property knowing the lien existed cannot be heard to complain and lacks traditional standing. *Id.; see also Henretty*, 791 P.2d at 510.

C. BV Jordanelle and BV Lending Do Not Satisfy the Policies Underlying Traditional Standing.

Relying on *Sierra Club*, the BV Entities seem to suggest that the sole policy consideration in determining traditional standing is to "avoid[] potentially poor advocacy and avoid[] unnecessary decisions of constitutional issues." (Appellate Brief at p. 9.) However, neither *Sierra Club* nor Utah law support such an assertion. *Sierra Club* actually states that the traditional standing test "addresses whether the party has 'a real

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[7] The BV Entities' footnote five suggests that Judge Pullan stated if BV Jordanelle transferred its interest in the property back to BV Lending, BV Lending would have traditional standing. (Appellate brief at p. 10, n.5.) Judge Pullan made no such statement or suggestion in its order and the record does not support this assertion.

and personal interest in the dispute'" because such a party will "have the incentive to 'fully develop[] all of the material factual and legal issues in an effort to convince the court that the relief requested will redress the claimed injury.'" *Sierra Club*, 2006 UT 74, ¶ 20 (citations omitted). These policy concerns are not met here. BV Jordanelle does not have traditional standing because it did not exist at the time the District was created and Assessment Ordinance adopted, so it is not able to "fully develop all of the material fact[s]," particularly the facts at the beginning of the dispute related to the creation of the District and establishment of the Ordinance. *Id.* Similarly, since BV Lending no longer has an interest in the property and does not owe the assessment amounts, it is unable to fully develop all material facts related to the current amounts due and owing pursuant to the assessment lien.

The policy considerations noted by the *Sierra Club* court include whether the courts should resolve questions best left to the other branches of the government. 2006 UT 74 at ¶ 26. Arguably, the Court is not best positioned to address the BV Entities' complaint because it challenges the constitutionality of the Act and the parties entitled to notice under the Act. It is undisputed that JSSD provided notice to those entitled to it under the Act. The Act does not require such notice be provided in writing to mortgagees, and Wasatch County and the District complied with the statutory framework

established by the Utah Legislature.[8] (SOF ¶ 19.) Thus, the BV Entities' complaints do not involve JSSD, but rather the Legislature.

Even if the Court determines it is the appropriate venue for the BV Entities' complaints, to deem the Act unconstitutional would undermine the very purpose of the Act, which is to allow counties to establish special improvement districts for the benefit of its citizenry. *See Tholen v. Sandy City*, 849 P.2d 592 (Utah Ct. App. 1993). In *Tholen*, a landowner filed a complaint more than five years after the Sandy City Council had adopted an assessment ordinance and completed the promised improvements. *Id.* The claims, which were brought after the landowner became delinquent on his payments, challenged the initial assessment relating to the linear feet of frontage attributed to the landowner. *Id.* In rejecting the landowner's declaratory judgment and motion for injunctive relief, the Utah Court of Appeals concluded that it would be "patently unfair to force Sandy to start the assessment process over now, after it issued the requested bonds, performed the improvements for the special service district, and reasonably relied on the waiver and consent as well as the action – or more appropriately, inaction – of the landowners in the district." *Id.* at 596.

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[8] Significantly, the Act itself provides that "each assessment levied … constitutes a lien against the property assessed" and is deemed to be "superior to the lien of a trust deed, mortgage, …, or other encumbrance" and is equal to and on a parity with a lien for general property taxes." Utah Code Ann. § 11-42-501. Since the Legislature has determined such liens are superior to mortgages and on par with general property taxes, it has determined that notice to the property owners is sufficient. It is the owner who ultimately benefits from the improvements, not the lender who in the ordinary course expects its loan to be paid. And, if a lender wants to protect against circumstances such as here, it can include contractual terms in its loan documents.

Similarly, here we have a subsequent landowner attempting to use the United States and Utah Constitutions to recast the Assessment Ordinance by suggesting that it was entitled to notice and that the county's actions were arbitrary and capricious. Yet, aside from notice, the Complaint is devoid of any allegations that either Wasatch County or JSSD violated the Act. The BV Entities claim that had they received notice, they would have challenged "the imposition of any assessment against the BV Property" and the "method chosen by JSSD and the District for imposing the assessments in the first place." (R. 1369 at ¶ 110.) Yet, the Assessment Ordinance is simply the last step in a two step process. The decision to impose an assessment against the BV Property was determined in 2005, long before the assessment lien came into existence. (SOF ¶ 6.) BV Lending was not a lender in 2005 when the County created the District, determined the number of ERUs to be allocated among the Property owners (including PWJ Holdings) and established the method to be used to impose the assessment. (*Id.*)

Furthermore, even though BV Lending may not have received actual notice, it was on constructive notice that an Assessment Lien would be imposed against the BV Property. First, the Creation Resolution was a matter of public record. (*Id.* at ¶ 7.) BV Lending admits either it or its title company did not locate the Creation Resolution in its title search. (*Id.* at ¶ 44.) Second, BV Lending was put on notice as part of the PWJ Holdings bankruptcy. (*Id.* at ¶ 16.) Thus, to allow this case to proceed would be "patently unfair" to the Defendants, who fulfilled their statutory obligations, established the District over six (6) years ago, completed all of the improvements in the District, relied on the lack of any objection from any of the landowners (or any other person)

within the District when it was created in 2005, and now seeks to collect the assessments to pay the bonds issued in accordance thereto. 849 P.2d at 596.

In short, the BV Entities fail to satisfy the traditional standing test or the policies underlying the application of standing in this case. Neither party has a real or personal interest in the dispute or any incentive to fully develop all of the material and factual issues. The BV Entities' goal is merely to avoid or delay payment of an assessment lien covering the costs of improvements that directly benefit the BV Property and, which assessment has been due and owing since February, 2009. Thus, the Court should reject the BV Entities' efforts.

II. JUDGE PULLAN CORRECTLY RULED THAT THE BV ENTITIES LACK ALTERNATIVE STANDING.

Without traditional standing, the BV Entities turn their attention to the alternative standing test to argue the district court erred in not finding alternative standing. The district court did not err.

In *Jenkins*, the Utah Supreme Court provided an alternative means by which a party may prove standing "by showing that it is an appropriate party raising issues of significant importance." *Jenkins*, 675 P.2d at 1150; *Sierra Club*, 2006 UT 74 ¶ 36. A party meets this burden by demonstrating that it has "the interest necessary to effectively assist the court in developing and reviewing all relevant legal and factual questions" and that the issues are "unlikely to be raised if the party is denied standing." *Sierra Club*, 2006 UT 74, ¶ 36 (quoting *Jenkins*, 675 P.2d at 1150). "If the party is not an appropriate party, the court's inquiry ends and standing is denied." 2006 UT 74, ¶ 41. The second

part of the alternative standing test requires the party to "demonstrate that the issue it seeks to raise 'are of sufficient public importance in and of themselves to warrant granting the party standing." *Id.* at ¶ 39. As the *Sierra Club* court noted:

> This requires the court to determine not only that the issues are of sufficient weight but also that they are not more appropriately addressed by another branch of government pursuant to the political process. The more generalized the issues, the more likely they ought to be resolved in the legislature or executive branches.

Id. Stated another way, if the court determines the party is an appropriate party, "the court then considers whether the party is asserting issues of sufficient public importance to balance the absence of the traditional standing criteria." *Id.* at ¶ 41.

In this case, Judge Pullan noted that "[t]o maintain standing to prosecute the claims in this case, a party must retain some interest – whether a security interest or ownership interest – in the property subject to the assessment ordinance." (SOF ¶ 55.) As the district court correctly held, BV Lending had neither. (*Id.*) Specifically, Judge Pullan held because BV Lending retained no "current interest," it has no stake in the outcome. (*Id.*)

Even if BV Jordanelle were deemed an appropriate party to bring suit, the alternative standing theory fails when the second requirement of public importance is examined. The district court correctly concluded that while the case impacts the rights of private property owners, "it does not present issues of sufficient public importance to balance the absence of traditional standing criteria." (*Id.*) The district court held BV Lending and BV Jordanelle lacked alternative standing because unlike *Grantsville*, *Cedar Mountain*, and *Sierra Club*, "a public interest of equal weight is not at stake here." (*Id.*)

Actions are of significant public importance where they challenge industries that pose potential environmental and health-related harms to citizens of a county, for example the storage of hazardous waste. *Cedar Mountain Envtl.*, 2009 UT 4, ¶ 17; *see also Sierra Club*, 2006 UT 74, ¶ 42 ("Sierra Club and its members have an interest in ensuring that the construction and operation of the plant comply with all applicable state and federal environmental laws as well as with state administrative procedures."). Here, the issue of whether mortgagees are entitled to notice under the Act is not one of significant importance to the public, especially when the party seeking relief is not a mortgagee, but a single property owner whose property was directly benefited by the creation of a district and implementation of an assessment lien.[9] Indeed, this is not an action directed to either contest the creation of the District or an "error or irregularity in an assessment … ." Utah Code Ann. § 11-42-106(c). Instead, it is an attempt to avoid foreclosure because BV Jordanelle does not want to pay a properly levied assessment, despite the fact that its land has received substantial benefit from the public

[9] Surely, if the issue of whether mortgagees are entitled to notice under the Act were a matter of significant public importance, other land owners and mortgagees who were allegedly harmed by the Act would have come forward to complain. In this case, it was the property owners themselves who asked Wasatch County to create the District and build the improvements. Although it may be of significant personal importance to the property owners, it is not of "significant public importance." *Sierra Club*, 2006 UT 74, ¶ 39.

improvements, constructed and installed with the consent of its borrower and every other property owner within the District.[10]

In fact, the BV Entities' delay in filing this lawsuit demonstrates that this action is not one of significant public importance, but one of personal importance only. The BV Entities were on constructive, if not actual, notice of the District and Assessment Ordinance when they took title to the BV Property. BV Jordanelle certainly was aware of or should have been aware of the District and Assessment Ordinance when it received title from BV Lending. (SOF ¶ 30.) Even if the Court accepts that BV Jordanelle did not learn about the assessment until January 2010, the BV Entities waited over eight months to file this lawsuit in late August 2010, on the eve of the scheduled foreclosure sale. (*Id.* at ¶ 42.) If the BV Entities truly believed or claimed an "error or irregularity" with the assessment, then they should have filed this action within days after learning of the Assessment Ordinance. Utah Code Ann. § 11-42-106. This is not a matter of significant public importance to justify alternative standing.

Reluctant to take the fatal requirement of public importance head on, the BV Entities instead assert their constitutional claims are of sufficient weight and that the judicial branch is best situated to address the claims. (Appellate brief at pp. 14-18.) The BV Entities' arguments concerning their constitutional claims do not bear on the alternative standing analysis. Just because the BV Entities believe their claims are

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[10] The public improvements were constructed and installed at a significant cost to the District pursuant to a well established statutory framework set forth in the Act, which was followed to the letter of the law. Utah Code Ann. § 11-42-101 *et seq.*

"weighty" to them individually, does not give them alternative standing to pursue their claims where the issues are not of significant public importance. This is particularly true where the BV Entities are the only ones who have questioned the Assessment Ordinance, albeit over a year after it became effective. The BV Entities merely claim that they were entitled to notice under the Act and that they were deprived due process. (SOF ¶ 43.) This is an important distinction, because it shows that the issues do not truly impact land owners and local governments in the entire state of Utah as asserted. (Appellate brief at p. 15.) Nor will the resolution of issues in this case "have an impact on government practices beyond the confines of the case itself." (*Id.*) To the contrary, this is a narrow issue dealing with a single landowner who thinks it should have received notice.

The BV Entities' reliance on *Mennonite Bd v. Adams*, 462 U.S. 791, 798 (1983) to bolster their procedural due process claims is misplaced. *Mennonite* deals with the different situation of a tax sale of property (not a tax lien) and stands for the principle that a mortgagee is entitled to notice reasonably calculated to apprise him of a pending tax sale because, under Indiana law, a mortgagee possesses a protected property interest that is adversely affected by a tax sale. *Id.* **This case does not involve a tax sale.** It involves an assessment lien. *See Fed. Deposit Ins. Corp. v. New Iberia*, 921 F.2d 610, 614 (5th Cir. 1991) (stating that "*Mennonite* in no way suggested [ ] that the taxing authority's decision to levy taxes, which resulted in the unpaid assessment on the underlying property, similarly affected the mortgagee or demanded adequate notice to the mortgagee."). *New Iberia*, which has facts similar to those here, held there was no constitutional claim of adequate notice where the property owner was not deprived of his

property by the assessment of a special improvement lien. 921 F.2d at 616. The court explained its ruling as follows:

> Unlike the above-cited special assessment cases that made their way to the Supreme Court, this one started with the landowners' request to New Iberia for aid in improving their property. "When, in such cases, government merely assists landowners in obtaining money on favorable terms [because of its lower costs to make public improvements], it does not thereby become responsible for ensuring that the investment yields its expected benefits...." *Furey v. City of Sacramento*, 780 F.2d 1448, 1455 (9th Cir. 1986). If, as in *Furey*, the owner-developers of Southport Subdivision III were contesting the assessment after they petitioned for the paving and sewage improvements, no constitutional taking would be recognized. **That the result should differ in this scenario because a mortgagee makes the claim is unthinkable**. The mortgagee's interest in the property is derivative from that of the owner. **To allow the mortgagee to assert an unconstitutional taking because of a special assessment sought by the landowner would allow the mortgagee potentially to receive whatever benefit did result from the improvements without having to pay for them.** Moreover, this claim by the mortgagee would place an impossible, if not absurd, burden upon the taxing authority: to police the landowner's requests for assistance with improvements so that his mortgagee will not be discomfited by the ensuing special assessments. FDIC's implicit plea for governmental paternalism in an area normally controlled by sophisticated contractual relationships is as strange as it is unsupported by precedent.

Id. at 615-16 (emphasis added). The BV Entities are seeking precisely the same outcome: to receive all the benefits resulting from the improvements without having to pay for them by relying on claims they have no standing to assert.

Finally, the BV Entities argue that the notice issue is best addressed by the judicial branch and not by another branch of government. (Appellate brief at 17-18.) In advancing this assertion, the BV Entities rely on the weighty assertion that this case

involves the deprivation of one's constitutional rights due to a lack of "actual" as opposed to "constructive notice." However, due to the BV Entities' failure to "show[] a real and personal interest in the dispute" because of BV Lending's divestiture of ownership in the BV Property and BV Jordanelle's, after the fact, acquisition of the same, they cannot "distinguish themselves from all citizens." *See Jenkins*, 675 P.2d at 1150. As Judge Pullan noted, "to the extent BVL seeks to require Defendants to create a new formula for imposing assessments because of changed economic circumstances and expectations, that is more appropriately addressed by a different branch of government—namely the county legislative body." (R. 1889.) The *Jenkins* court recognized the dichotomy between the various branches of the government:

> To grant standing to a litigant, who cannot distinguish himself for all citizens, would be a significant inroad on the representative form of government, and cast the courts in the role of supervising the coordinate branches of government. It would convert the judiciary into an open forum for the resolution of political and ideological disputes about the performance of government.

Id. (citing *Baird v. State*, 574 P.2d 713, 717 (Utah 1978)). By this action, the BV Entities seek to rewrite the Act. They seek to require notice when there has been a change in economic circumstances. They seek to require notice to all mortgagees under the Act. The Utah legislature has already determined who needs actual as opposed to constructive notice. The Utah Legislature has already determined the procedure a governmental entity must follow in creating a special improvement district and adopt an assessment lien. Defendants followed this statutory framework in its entirety. If parties such as the BV Entities want to change the law relating to who gets notice when a governmental entity

creates an improvement district, constructs the improvements and adopts an assessment ordinance, it is the legislature they should turn to for redress, not the courts.

III. THE COURT MAY AFFIRM JUDGE PULLAN'S RULING FOR ANY ALTERNATIVE BASIS.

A. The BV Entities' Claims Are Barred Because They Failed to Contest the Assessment Ordinance Within 30 Days After It Became Effective.

Although the BV Entities make much of their alleged standing to bring this suit, it is important to note Utah's Assessment Act, codified at § 11-42 101 *et seq.* deprives a party of standing to pursue a lawsuit if the party did not complain within thirty days after the effective date of the Assessment Ordinance. Utah Code Ann. § 11-42-106. As the Utah Supreme Court has noted in the past, an appellate court may sustain the judgment on any legal ground or theory apparent on the record. *See In re T.E.*, 2011 UT 51, ¶ 36 ("It is well settled that 'an appellate court may affirm the judgment appealed from if it is sustainable on any legal ground or theory apparent on the record.'"). That is the case here.

The Act provides that an action to contest an assessment or any proceeding to designate an assessment area or levy an assessment "may not be commenced against and a summons relating to the action may not be served on the local entity ***more than 30 days after the effective date of the assessment resolution or ordinance*** or, in the case of an amendment, the amended resolution or ordinance." Utah Code Ann. § 11-42-106(1), (2)(b) (emphasis added). The Assessment Ordinance contains similar language. (SOF, ¶ 18.) The Act goes on to state that an "action under this section is the ***exclusive remedy*** of a person who claims an error or irregularity in an assessment or in any proceeding to

designate an assessment area or levy an assessment." Utah Code Ann. § 11-42-106(3)(a). Finally, the Act provides that, "after the expiration of the 30-day period," the assessment bonds "become at that time incontestable against all persons who have not commenced an action. Utah Code Ann. § 11-42-106(5)(a). Additionally, after the expiration of the thirty (30) day period, a "suit" to enjoin the "levy, collection, or enforcement of an assessment or to attach or question in any way the legality of the assessment bonds, ... or an assessment **may not be commenced**, and **a court may not inquire into those matters**.[11] Utah Code Ann. § 11-42-106(5)(b) (emphasis added). The BV Entities failed to file a complaint within thirty (30) days after the effective date of the Assessment Ordinance.[12] In fact, even after being informed of the Assessment Lien (whether as part of the PWJ Bankruptcy Case or as they allege in January 2010), the BV Entities waited almost eight more months until the eve of the scheduled foreclosure sale of the BV Property, to assert their claims. Thus, the BV Entities' claims are barred because the court lacked jurisdiction to "inquire into [these] matters." Utah Code Ann. § 11-42-106(5).

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the district court and dismiss this case, and all claims stated therein, with prejudice.

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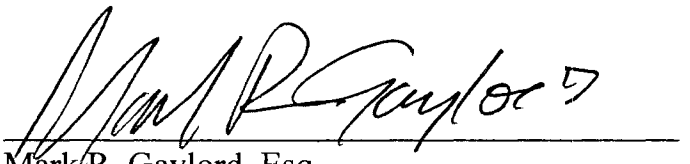
[11] The Act also bars a court from hearing any "complaint that a person was authorized to make but did not make in a protest under Section 11-42-203 or at a hearing under Section 11-42-204." Utah Code Ann. § 11-42-203(b).

[12] For BV Jordanelle, this would have been impossible since it did not even exist when the Assessment Ordinance became effective. (SOF ¶ 26.)

DATED this 30th day of May 2012.



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CERTIFICATE OF COMPLIANCE

WORD COUNT

Pursuant to Utah R. App. P 24(f)(1)(B), I certify that the brief is proportionally spaced and contains 13,425 words. I relied on my word processor, Microsoft Word, to obtain the count. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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DATED this 30th day of May 2012.

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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTION

I hereby certify that a copy of the forgoing Brief of Appellees was submitted in Digital Form via a CD, in an exact copy of the written document filed with the Clerk and has been scanned for viruses with the McAfee virus scan software with virus definitions dated May 30, 2012, and, according the program is free of viruses. In addition, I hereby certify that all privacy redactions have been made.

DATED this 30th day of May 2012.

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct of copies of the foregoing **BRIEF OF APPELLEES** were served to the following this 30th day of May 2012, in the manner set forth below:

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