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

Utah Court of Appeals

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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,** **v.** **JORDANELLE SPECIAL SERVICE DISTRICT, a body corporate and politic, JORDANELLE SPECIAL SERVICE DISTRICT, UTAH SPECIAL IMPROVEMENT DISTRICT NO. 2005-2, a county improvement district, and W. JEFFERY FILLMORE, foreclosure trustee of Jordanelle Special Service District, Utah Special Improvement District No. 2005-2,** **Defendants/Appellees.**	**Appellate Case No. 20111089** **Oral Argument Requested**

BRIEF OF APPELLANTS

Appeal from a Final Order of the Fourth Judicial District Court
for Wasatch County, Judge Derek P. Pullan Presiding
Civil No. 100500444

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JURISDICTION

On August 26, 2011, the District Court entered its *Order Granting in Part and Denying in Part Defendants' Motion to Dismiss* (the "**Order**"). On November 9, 2011, the District Court entered its *Order Granting Plaintiffs' Motion for Rule 54(b) Certification* (the "**Certification Order**"), wherein the District Court certified the Order as final and appealable at the request of Appellants BV Jordanelle, LLC ("**BVJ**") and BV Lending, LLC ("**BVL**" and, together with BVJ, "**BV**"). Accordingly, this Court has jurisdiction to hear and decide this appeal pursuant to Utah Code Ann. § 78A-4-103(2)(j).

STATEMENT OF THE ISSUES

1. Did the District Court err when it dismissed for lack of traditional standing at the Rule 12(b)(6) pleadings stage and without considering any evidence BV's claims under the Utah and United States Constitution where BVL, which had a lien on the Encumbered Subject Property when the Assessment Ordinance was passed, subsequently assigned its interest and claims to BVJ, an affiliate, and BVJ now owns the property and must either pay the claimed assessment or risk forfeiture of its property? (Issue preserved in BV's Joint Memorandum in Opposition to Motion to Dismiss, R. 1796-99.)

2. Did the District Court err when it dismissed for lack of alternative standing at the Rule 12(b)(6) pleadings stage and without considering any evidence BV's claims under the Utah and United States Constitution where BVJ was found to be an appropriate party to assert such claims and where the important legal question presented is whether a lien holder of record is constitutionally entitled to actual notice of a proposed assessment ordinance which will prime its lien before the assessment is enactment? (Issue preserved

in BV's Joint Memorandum in Opposition to Motion to Dismiss, R. 1796-99.)

Standard of Review: "[A] determination of standing is generally a question of law, which [this Court] review[s] for correctness." *Mellor v. Wasatch Crest Mut. Ins., Co.*, 2009 UT 5, ¶ 7, 201 P.3d 1004. An appellate court will afford "deference for factual determinations that bear upon the question of standing, but minimal deference to the district court's application of the facts to the law." *Cedar Mountain Envtl., Inc. v. Tooele Cnty.*, 2009 UT 48, ¶ 7, 214 P.3d 95. As the District Court did not take or consider any evidence prior to entering the Order, BV asserts that the standard of review here is purely *de novo*, and that the Order must be reviewed for correctness.

DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

I. **Fifth Amendment to the United States Constitution**, a copy of which is attached to Appellants' brief as Addendum 1.

II. **Fourteenth Amendment to the United States Constitution**, a copy of which is attached to Appellants' brief as Addendum 2.

III. **Constitution** of the State of Utah, Article I, **Section 1**

> All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

IV. **Utah Code Ann. § 11-42-106 (2007)**, a copy of which is attached to the Appellants' brief as Addendum 3.

STATEMENT OF THE CASE

Nature of the Case and Course of Proceedings

This appeal is from a final order entered by Judge Derek P. Pullan of the Fourth Judicial District Court, Wasatch County, State of Utah, which dismissed certain of BV's claims for lack of standing. BV asserted numerous claims before Judge Pullan under Utah and federal law stemming from the Assessment Ordinance (as defined in the First Amended Complaint) which was adopted in July 2009. The Assessment Ordinance purported to levy a multi-million dollar assessment against and impose a priming lien on part or all of the approximately 584.36 acres now owned by BVJ (the "**Encumbered Subject Property**"). Although BV's claims all stem in some way from the Assessment Ordinance, the underlying case can be divided naturally into two separate sets of facts and claims. Those separate facts and claims are referred to herein as the "**Notice Claims**" and the "**Implementation Claims**." Generally, Judge Pullan dismissed the Notice Claims for lack of standing, but allowed the Implementation Claims to go forward.

Brief Description of the Notice Claims: BVL received no notice of the assessment before its passage and, as a result, was unable to appear and be heard concerning it, even though BVL had recorded trust deeds against the Encumbered Subject Property exceeding $6 million at the time of the assessment. Defendants claim that their assessment lien, which now purportedly exceeds $26 million, primed BVL's recorded interest, as mortgagee, in the property and became a lien on par with a statutory property tax lien. BV asserted below that, if the assessment lien primed BVL's lien as claimed by

Defendants, then those actions rendered BVL's recorded interest in the Encumbered Subject Property without any economic value. Accordingly, BV asserted that its constitutional rights were violated, including its right to due process, because BVL was not provided with notice of the proposed Assessment Ordinance and was therefore denied an opportunity to be heard or challenge the assessment. BV also asserted that Defendants' actions resulted in a taking of its property without just compensation in violation of the United States and Utah Constitutions. These Notice Claims were dismissed by Judge Pullan, not upon the merits, but rather because Judge Pullan did not believe that either BVL (which had a multi-million dollar lien on the Encumbered Subject Property when the assessments occurred) or BVJ (which is a related entity that now owns the Encumbered Subject Property and must pay the assessment or lose its interest) had standing to assert the claims.

Brief Description of the Implementation Claims: BV also has asserted claims against Defendants arguing that, even if the Assessment Ordinance was lawfully enacted, the subsequent implementation of the Assessment Ordinance by the Defendants has been unlawful. In other words, these claims allege facts demonstrating that even if the Assessment Ordinance were properly enacted, the Defendants have failed to move forward in accordance with the requirements of the Assessment Ordinance, and that either BV does not owe the assessment or, at a minimum, that BV does not owe as much as Defendants claim. These Implementation Claims remain pending against the Defendants below.

Statement of Facts

1. BVJ is an affiliate and assignee of, and the successor in interest to, all rights and claims of BVL with respect to the Encumbered Subject Property, including all rights and claims of BVL that are asserted herein against the Defendants. (R. 1393.)

2. 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. (R. 1393.)

3. 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.)

4. On or about October 19, 2005, the Wasatch County Council, acting as the governing board of JSSD, adopted a Notice of Intention declaring the intention of JSSD to create the District. (R. 1392.)

5. In February 2006, the Wasatch County Council adopted a Creation Resolution and thereby created the District. The boundaries of the District included certain real property owned by PWJ Holdings, LLC, or its predecessor in interest (collectively, "**PWJ**"), which was commonly referred to as both "Talisman" and "The Aspens" (the "**Subject Property**"). (R. 1391.)

6. In or about March 2008, BVL made two secured loans to PWJ. At the time of the loans, PWJ was the fee simple owner of the Subject Property. PWJ's obligations under the loans were secured by the Encumbered Subject Property, which consists of a

portion of the Subject Property, by that certain Deed of Trust with Assignment of Rents ("**Deed of Trust**"), dated March 31, 2008, executed by PWJ, as Trustor, in favor of BVL, as beneficiary. (R. 1391.)

7. The Deed of Trust was recorded against the Encumbered Subject Property and, upon its recordation, became a valid, perfected lien on and security interest against the Encumbered Subject Property. The Deed of Trust encumbered approximately 584.36 acres (according to the records of the Wasatch County Assessor) of the Subject Property which, as noted above, is referred to herein as the Encumbered Subject Property. (R. 1390.)

8. The Deed of Trust granted to BVL was a first priority lien on the Encumbered Subject Property at the time of recordation, subordinate only to a lien for general property taxes in favor of Wasatch County. At the time the BVL Deed of Trust was recorded, all general property taxes that had become due and payable on the Encumbered Subject Property had been paid in full. Thus, PWJ owned the property free and clear at the time. (R. 1389.)

9. On June 23, 2009, well after the date of recordation of the BVL Deed of Trust against the Encumbered Subject Property, the Wasatch County Council recorded a Notice of Proposed Assessment against certain property in the District, including the Encumbered Subject Property. (R. 1389.)

10. Thereafter, on or about July 8, 2009, the Wasatch County Council, acting as the governing board of JSSD and the District, adopted an Assessment Ordinance levying an assessment against certain properties within the District which Wasatch County, JSSD

and the District claimed were or would be benefited directly or indirectly by certain improvements that had been or would be constructed within the District. The Assessment Ordinance purported to levy an assessment against part or all of the Encumbered Subject Property, among other properties in Wasatch County. (R. 1389.)

11. Upon information and belief, the total principal amount of the assessment under the Assessment Ordinance for the entire District was $50,236,063.13. (R. 1388.)

12. The Assessment Ordinance was passed by the Wasatch County Council on July 8, 2009, and notice of its passage was published once in the Wasatch Wave, a newspaper in Wasatch County, on July 15, 2009. Thus, pursuant to the Utah Area Assessment Act, the Assessment Ordinance became effective on July 15, 2009, and the thirty (30) day period provided in the Assessment Ordinance for challenging the Assessment Ordinance expired on August 14, 2009. (R. 1384.)

13. BV asserts that the amount of the assessment levied against the Encumbered Subject Property was drastic, and substantially if not totally impaired the value of BVL's first position Trust Deed and BVL's interest in the Encumbered Subject Property. (R. 1384.)

14. Even though it had a recorded lien on and interest in the Encumbered Subject Property by virtue of the BVL Deed of Trust, BVL was not provided with any notices from Wasatch County, JSSD, the District or anyone else regarding the consideration or adoption of the Assessment Ordinance, and was not given the opportunity to question, challenge, argue against or otherwise dispute the Assessment Ordinance, or the method and rate of the assessment, prior to its adoption. (R. 1383.)

15. BVL and BVJ did not learn about the Assessment Ordinance until after August 14, 2009, which was the last day pursuant to the terms of the Assessment Ordinance that a challenge could be brought to the Assessment Ordinance. (R. 1383.)

16. Between July 8, 2009, and August 19, 2009, Wasatch County, JSSD and the District adopted certain other ordinances and resolutions affecting the Encumbered Subject Property and the proposed imposition of assessments and liens against the Encumbered Subject Property. (R. 1383.)

17. Even though it had a recorded lien on and interest in the Encumbered Subject Property by virtue of the Deed of Trust, BVL was not provided with any notices from Wasatch County, JSSD, the District or anyone else regarding the consideration or adoption of these additional ordinances and resolutions, and was not given the opportunity to question, challenge, argue against or otherwise dispute these ordinances and resolutions, or the method and rate of the assessment, prior to their adoption. (R. 1382-83.)

18. BVL and BVJ did not learn about and did not have notice of the existence of these additional ordinances and resolutions adopted in 2009 until January 2010. (R. 1382.)

19. On August 19, 2009, JSSD adopted a Notice of Assessment Interest, which Notice of Assessment Interest was thereafter recorded on September 24, 2009, against the Encumbered Subject Property. (R. 1382.)

20. Under the Notice of Assessment Interest, JSSD provided record notice that it was claiming an interest in certain property, including in particular the Encumbered

Subject Property, "arising out of the requirements of the Jordanelle Special Service District, Utah Special Improvement District No. 2005-2 (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. 1382.)

21. Even though it had a recorded lien on and interest in the Encumbered Subject Property by virtue of the Deed of Trust, BVL was not provided with any actual notices from Wasatch County, JSSD, the District or anyone else regarding the consideration or adoption of the Notice of Assessment Interest, and was not given the opportunity to question, challenge, argue against or otherwise dispute the Notice of Assessment Interest, or the method and rate of the assessment, prior to its adoption and/or recordation. (R. 1382.)

22. BVL and BVJ did not learn about and did not have actual notice of the Notice of Assessment Interest until January 2010. (R. 1381.)

23. On October 29, 2009, the trustee under the Deed of Trust granted by PWJ to BVL foreclosed upon and sold the Encumbered Subject Property at a trustee's sale held pursuant to Utah law (the "**Foreclosure Sale**"). (R. 1381.)

24. The Foreclosure Sale was held because PWJ had previously failed to pay all or any portion of the First Note or the Second Note. At the time of the Foreclosure Sale, PWJ owed $8,684,279.65 under the First Note and the Second Note. (R. 1381.)

25. BVL was the successful bidder for the Encumbered Subject Property at the Foreclosure Sale. As a result, BVL acquired the Encumbered Subject Property in return

for a credit bid against the amounts owed under the First Note and the Second Note in the amount of $8,684,279.65. (R. 1381.)

26. After the Foreclosure Sale concluded, BVL transferred, conveyed and assigned its interest under the First Note, the Second Note, the Deed of Trust and the Encumbered Subject Property, and any and all claims or causes of action related thereto, including but not limited to the claims asserted against Defendants below, to BVJ, which is an affiliated special purpose entity that was formed specifically to hold title to the Encumbered Subject Property. (R. 1381.)

27. BVJ is the current record owner of the Encumbered Subject Property, and has held title to the Encumbered Subject Property since October 29, 2009. (R. 1381.)

28. Under the foregoing ordinances and resolutions, Wasatch County, JSSD and the District have purported to assess the Encumbered Subject Property and impose a lien upon the Encumbered Subject Property, with the same priority as general property taxes, to secure repayment of certain improvements. Under the foregoing ordinances and resolutions, Wasatch County, JSSD and the District claim that the Encumbered Subject Property is encumbered by assessment liens in the amount of somewhere between $10,000,000.00 and $30,000,000.00.[1] (R. 1380-81.)

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[1] Originally, Defendants claimed that the assessment could be allocated to the various properties that were formerly part of the Talisman development, and that BV only needed to pay its aliquot share of the assessments related solely to the property owned by BV and the number of ERUs assigned to that property (which Defendants claim is 617.131607 ERUs). Recently, however, Defendants have taken the position that the entire assessment related to the Talisman development, consisting of 1,376.320496 ERUs, must be paid in order to clear the assessment lien against the Encumbered Subject Property. In other words, even though Defendants concede that BVJ has only

29. On August 30, 2010, BV filed their initial Complaint in this action. (R. 39-68.) On January 12, 2011, BV filed their First Amended Complaint (the "**Complaint**"). (R. 1353-94.)

30. The Complaint challenges the constitutionality of the Assessment Act, and specifically Utah Code Ann. § 11-42-106, by alleging that the Act violates the United States and Utah Constitutions. In particular, BV contends that, because BVL had a recorded trust deed against the Encumbered Subject Property when the Assessment Ordinance was enacted, it was entitled to actual notice and an opportunity to be heard regarding the ordinance before the ordinance was enacted. Because the Act does not require that actual notice be provided to a recorded lienholder, it is unconstitutional both on its face and as applied to the particular facts here. (R. 1353-94.)

31. On February 16, 2011, Defendants filed a motion to dismiss the Complaint. One of the arguments for dismissal was BV's alleged lack of standing to assert their claims, constitutional or otherwise, against Defendants. (R. 1704-60.)

32. On August 26, 2011, the District Court entered its Order, wherein it dismissed for lack of standing BV's Notice Claims. In short, the District Court held that BVL lacks traditional standing to assert the Notice Claims because it no longer has any interest in the Encumbered Subject Property, and that BVJ also lacks traditional standing

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44.84% of the ERUs associated with the Talisman development, and even though BVJ only owns a portion of the land which formerly comprised the Talisman development, it must pay for all of the ERUs that were assigned to all of the Talisman development in order to clear the assessment lien from the Encumbered Subject Property. Further, Defendants contend that the amount owed for the entire Talisman development, with penalties and late fees, easily exceeds $26 million.

because BVJ had no interest in the property at the time of the challenged actions. (R. 1885-95.)

33. The District Court also held that BVL and BVJ both lacked alternative standing to assert their Notice Claims. Specifically, the District Court held that BVL was not an appropriate party to have alternative standing because it no longer owned the property and that, although BVJ was an appropriate party for alternative standing because it owned the Encumbered Subject Property and was the one who was being asked to pay the assessment or face a foreclosure, and although the District Court recognized that the case "impacts the rights of private property owners," the court nevertheless held that the "case does not present issues of sufficient public importance to grant BVJ alternative standing." (R. 1885-95.)

34. In support of that holding, the District Court simply stated the following:

> Unlike Grantsville (involving closure of a military base and adverse economic impact of closure on the entire Tooele community), Cedar Mountain (where the "land use actions challenged . . . involved an industry that poses potential environmental and health-related hams [*sic*] to the citizens of Tooele County"), and Sierra Club (which claimed that a Coal Fire Plant would emit hazardous chemicals near homes and a national park), a public interest of equal weight is not at stake here.

(R. 1890.)

35. As the foregoing indicates, the dispositive and controlling legal questions here are (a) whether BVL and/or BVJ have traditional standing to challenge the Defendants' actions, and (b) even if they both lack traditional standing, whether this case, and the claims asserted by BV below, presents issues of sufficient public importance to allow BVJ to assert the Notice Claims under the doctrine of alternative standing.

36. With all due respect to the District Court, BV believes the District Court erred in dismissing for lack of standing BV's Notice Claims. Both BVL and BVJ were before the Court in the same action, and if they do not have traditional standing to sue Defendants then no one does. Moreover, the merits of the Notice Claims (which will never be heard if the Order is allowed to stand) raise numerous state and federal constitutional issues, including, without limitation, due process, related to whether or not the Assessment Ordinance was properly adopted without notice to Appellants. These are issues of substantial public importance, and the District Court should have allowed BV to present these issues on their merits.

SUMMARY OF THE ARGUMENT

This case is about the deprivation of property rights without due process of law. BV asserted in their Complaint numerous claims under the Utah and United States Constitution stemming from the Assessment Ordinance which was adopted in July 2009. BVL received no notice of the assessment before its passage and, as a result, was unable to appear and be heard concerning it, even though BVL had recorded trust deeds against the Encumbered Subject Property exceeding $6 million at the time of the assessment. Defendants claim that their multi-million dollar assessment lien primed BVL's recorded interest, as mortgagee, in the property and became a lien on par with a statutory property tax lien. BV asserted that if the assessment lien primed BVL's lien as claimed by Defendants, then those actions rendered BVL's recorded interest in the Encumbered Subject Property without any economic value. After the Assessment Ordinance was enacted, BVL transferred, conveyed and assigned its interest under the First Note, the

Second Note, the Deed of Trust and the Encumbered Subject Property, and any and all claims or causes of action related thereto, to BVJ, which is an affiliated special purpose entity that was formed specifically to hold title to the Encumbered Subject Property and that is owned and controlled by the same persons as BVL. BVJ and BVL jointly asserted below their Notice Claims, wherein they alleged their constitutional rights were violated because BVL was not provided with notice of the proposed Assessment Ordinance and was therefore denied an opportunity to challenge the assessment.

The District Court dismissed for lack of standing BV's Notice Claims. Utah courts have recognized two means by which a party can establish standing: the traditional test and the alternative test. The District Court held that BVL lacked traditional standing because it no longer has any interest in the property, having transferred that interest to its affiliate, BVJ. Accordingly, BVL, according to the district court, presumably could not satisfy the requirement that its injury could be redressed by the court. And although BVJ currently owns the property, the court held that BVJ lacked traditional standing because BVJ had no interest in the property at the time of the challenged actions—the interest being held by BVL. The court also held that BVL and BVJ lacked alternative standing to bring the Notice Claims. Specifically, the District Court held that BVL was not an appropriate party to have alternative standing because it no longer owned the property and, although BVJ was an appropriate party because it was the one who would have to pay the assessment or risk losing its property, the "case does not present issues of sufficient public importance to grant BVJ alternative standing." The District Court erred in these holdings.

First, BVL and BVJ have traditional standing to assert the Notice Claims in this action. The basic traditional standing requirements are injury, a causal connection between the injury and the challenged action, and redressability. However, when the claims are grounded in procedural due process, courts employ a more liberal standard for traditional standing, especially redressability. In this case, the relaxed "redressability" requirement is satisfied because BVL's claim for declaratory judgment is grounded in BVL's deprivation of property without the ability to be heard on the issue. In other words, even if the ruling of the court would not result in BVL getting its land back without a priming lien, BVL's right to procedural due process supports its standing to make such arguments. Furthermore, the policies underlying traditional standing—avoiding potentially poor advocacy and avoiding unnecessary decisions of constitutional issues—have clearly been satisfied in this case. With both BVL and BVJ as plaintiffs, the District Court had before it 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). These parties have a real and personal interest in this dispute. Additionally, the fact that the purposes of the standing doctrine have been served in this case demonstrates that BVJ could assert the rights of BVL in this matter under the "third-party standing" doctrine. BVL and BVJ have traditional standing to assert their Notice Claims.

Second, at a minimum, the District Court erred in holding that BVJ did not qualify for alternative standing. A party qualifies for alternative standing if it is an appropriate party to bring suit and the issue being presented is one of sufficient public importance to

balance the absence of traditional standing criteria. As correctly recognized by the District Court, BVJ is an appropriate party for alternative standing because it has the interest necessary to effectively assist the Court in developing the issues associated with the Notice Claims. With respect to whether the issues sought to be presented are of sufficient public importance, the Notice Claims involve core constitutional rights. Furthermore, the resolution of the issues raised by BV would have a significant impact on every local government and landowner in the entire State of Utah. In other words, resolution of the issues raised by BV may have an impact on government practices beyond the confines of this case. This reality, coupled with the fact that the judicial branch is uniquely situated to address the constitutional issues in the Notice Claims, demonstrates that alternative standing is warranted in this case. At a minimum, BVJ has alternative standing to assert the Notice Claims.

Accordingly, this Court should reverse the District Court's Order, and hold that BVL and BVJ have traditional standing, or at least BVJ has alternative standing, to assert the Notice Claims, and it should direct the District Court to address those claims on their merits.

ARGUMENT

BV has asserted numerous claims in this action under Utah and federal law stemming from the Assessment Ordinance, which was adopted in July 2009, purportedly in compliance with Utah's Assessment Act. The Assessment Ordinance purported to levy a multi-million dollar assessment against and impose a lien on part or all of the Encumbered Subject Property. At the time of enactment of the Assessment Ordinance, BVL had recorded first priority trust deeds against the Encumbered Subject Property in an aggregate amount exceeding $6.6 million in unpaid principal. BVL received no notice of the assessment before its passage and, as a result, was unable to appear and be heard concerning it, even though BVL's economic interest in the property was being jeopardized by the actions that Defendants took. Indeed, Defendants claim in this case that their assessment lien, which now purportedly exceeds $26 million,[2] primed BVL's interest, as mortgagee, in the property and became a lien on par with a statutory property tax lien, and that they were entitled to place this assessment lien on the property without providing BV with any actual notice of their activities, or the opportunity to object and be heard. After the Assessment Ordinance was enacted, BVL transferred, conveyed and assigned its interest under the First Note, the Second Note, the Deed of Trust and the Encumbered Subject Property, and any and all claims or causes of action related thereto, to BVJ, which is an affiliated special purpose entity that was formed specifically to hold

[2] As noted in footnote 1 above, Defendants have recently taken the position that, in order to clear the assessment lien that is currently a cloud on BVJ's title, BV must pay the entirety of the assessment that was imposed against the Talisman property, even though BVJ owns only a portion of that property. This new contention has increased the amount of BV's claimed liability by well over $10 million.

title to the Encumbered Subject Property and that is owned and controlled by the same persons as BVL. BVL and BVJ jointly asserted below their Notice Claims, wherein they alleged their constitutional rights were violated because, among other things, BVL was not provided with notice of the proposed Assessment Ordinance and was therefore denied an opportunity to challenge the assessment. (R. 1353-94.)

On August 26, 2011, after hearing oral argument and taking the matter under advisement, the District Court entered its Order, wherein it dismissed for lack of standing BV's Notice Claims. (R. 1888-95.) In short, the District Court held that BVL lacked traditional standing because it no longer has any interest in the property (having transferred that interest to its affiliate), and that BVJ lacked traditional standing because BVJ had no interest in the property at the time of the challenged actions (because the interest was held by BVL, BVJ's affiliate). (R. 1891-92.) The District Court made this ruling even though both BVL and BVJ were parties before the Court. The District Court also held that BVL and BVJ lacked alternative standing to bring the Notice Claims. (R. 1890-91.) Specifically, the District Court held that BVL was not an appropriate party to have alternative standing because it no longer owned the property and, although BVJ was an appropriate party because it was the one who would have to pay the assessment or risk losing its property, the "case does not present issues of sufficient public importance to grant BVJ alternative standing." (R. 1890-91.)

The District Court erred in these holdings. First, BVL and BVJ have traditional standing to assert the Notice Claims in this action and, indeed, if they do not have traditional standing then no one does. When the claims are grounded in procedural due

process, courts employ a more liberal standard for redressability and traditional standing. Accordingly, even if the ruling of the court would not result in BVL getting its land back without a priming lien, BVL's right to procedural due process supports its standing to make such arguments, especially where the policies underlying traditional standing have clearly been met. Second, at a minimum, BVJ, which is an affiliate of BVL and which currently owns the Encumbered Subject Property and must pay the assessment or risk foreclosure,[3] has alternative standing to assert the Notice Claims. BVJ has the interest necessary to effectively assist the Court in developing the issues associated with the Notice Claims, and the important constitutional questions involved are of sufficient public importance to balance the alleged absence of BVJ's traditional standing.

I. BVL AND BVJ HAVE TRADITIONAL STANDING TO ASSERT THE NOTICE CLAIMS.

The District Court held that BVL and BVJ both lack traditional standing to assert the Notice Claims, even though these related entities were proceeding jointly on their claims, and there was no question but that the affected parties were before the District Court. (R. 1885-95.) The District Court erred in this ruling.

To have traditional standing a "petitioning party must allege that it has suffered or will 'suffer[ ] some distinct and palpable injury that gives [it] a personal stake in the outcome of the legal dispute.'" *Utah Chapter of the Sierra Club v. Utah Air Quality Bd.*, 2006 UT 74, ¶ 19, 148 P.3d 960 (*quoting Jenkins v. Swan*, 675 P.2d 1145, 1150 (Utah 1983)). Courts analyzing this "distinct and palpable injury" requirement engage in a

[3] Defendants, not being content to let this case play out in the courts, have recently initiated new foreclosure proceedings against the Encumbered Subject Property.

three-step inquiry. First, a "party must assert that is has been or will be 'adversely affected by the [challenged] actions.'" *Id.* (*quoting Jenkins*, 675 P.2d at 1150). "Second, the party must allege a causal relationship 'between the injury to the party, the [challenged] actions and the relief requested.'" *Id.* (*quoting Jenkins*, 675 P.2d at 1150). And, third, "the relief requested must be 'substantially likely to redress the injury claimed.'" *Id.* (*quoting Jenkins*, 675 P.2d at 1149). This traditional test ensures that a party has a real, personal interest in the matter. Indeed,

> [a] party who satisfies all three of the traditional criteria will have the incentive to "fully develop[] all the material factual and legal issues in an effort to convince the court that the relief requested will redress the claimed injury." *Jenkins*, 675 P.2d at 1150. Thus, the traditional standing test helps confine the courts' jurisdiction to cases appropriately resolved through the adversarial judicial process.

Id., 2006 UT 74, ¶ 20. In other words, the traditional standing test serves the purpose of avoiding potentially poor advocacy and avoiding unnecessary decisions of constitutional issues by parties who do not have sufficient "skin" in the game. In this case, both BVL and BVJ, both individually and collectively, have every incentive in the world to prosecute their claims with vigor, and to protect their substantial economic investment. As such, both satisfy the requirements for traditional standing.

A. BVL Has Traditional Standing.

The District Court correctly recognized that BVL satisfies the first two elements of the traditional standing test. (R. 1892.) BVL was an interested party in the Encumbered Subject Property at the time the Assessment Ordinance was adopted, and was damaged when the Assessment Ordinance was adopted without notice being provided to BVL,

because a multi-million dollar priming lien was placed on the Encumbered Subject Property ahead of its secured position. (R. 1892.) Further, the Notice Claims consist of a number of constitutional challenges to the adoption of the Assessment Ordinance and assessment that was assessed on the Encumbered Subject Property, showing a causal relationship between the injury and the challenged action. (R. 1892 (stating that "[t]here is a connection between this injury and the relief sought"). However, because BVL transferred its interest in the property to BVJ, an affiliate which was created expressly to hold the Encumbered Subject Property and which is owned by the same ultimate parent, the District Court held that 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 as a personal obligation." (R. 1892.) In other words, the District Court appears to have held that BVL failed to satisfy the third element of the traditional standing test, redressability, because its affiliate now owns the Encumbered Subject Property. This holding is in error.

At the heart of the Notice Claims is the allegation that BVL's lack of notice regarding the Assessment Ordinance violated its due process rights in light of BVL's interest in the property affected by the Assessment Ordinance. Courts have recognized that claims grounded in violations of procedural due process warrant a more liberal interpretation of Article III standing, especially the "redressability" requirement. The United States Supreme Court has stated that "[b]ecause the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural

due process be observed . . . we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury." *Carey v. Piphus*, 435 U.S. 247, 266 (1978) (internal quotations omitted) (addressing action against school board by students who claimed they were suspended from school without procedural due process); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992) ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."); *see also Brody v. Vill. of Port Chester*, 345 F.3d 103, 112 (2d. Cir. 2003) ("In a procedural due process challenge, the question before the court is whether the process affording the plaintiff an opportunity to participate in governmental decision-making before being deprived of his liberty or property was adequate, not whether the government's decision to deprive the plaintiff of such liberty or property was ultimately correct."). Indeed, the fact that courts consistently entertain declaratory judgment actions, particularly on constitutional questions, underscores the principle that the alleged lack of redressability does not necessarily dictate a lack of standing, especially in the context of actions involving constitutional rights.

In *Electric Power Supply Association v. F.E.R.C.*, the D.C. Circuit addressed a challenge by the Electric Power Supply Association ("EPSA") under the Sunshine Act, which afforded the association the right to "fair decisionmaking" by the Commission. 391 F.3d 1255, 1261-62 (D.C. Cir. 2004). FERC argued that EPSA did not have standing because the results of the hearing (a market monitor exemption) "cannot cause current or future injury to the financial interests of EPSA or its members, because it is designed to

enhance the competitiveness and efficiency or regulated markets." *Id.* at 1262. The court found FERC's arguments "entirely off the mark," stating that the right to fair decisionmaking, "not the financial interests of EPSA and its members, is the right directly protected by [the Sunshine Act] and impaired by the market monitor exemption." *Id.* Accordingly, "EPSA's standing is not defeated by the fact that it cannot show, with any certainty, that its or its members' financial interests will be damaged by the operation of the market monitor exemption." *Id.*; *see also Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 51 (D.C. Cir. 1999) ("[I]n cases involving alleged procedural errors, the plaintiff must show that the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff.") (internal quotations omitted).

The Tenth Circuit decision of *Copelin-Brown v. New Mexico State Personnel Office* is also instructive on the issue of standing to assert claims based on lack of procedural due process. 399 F.3d 1248 (10th Cir. 2005). In that case, Ms. Copelin-Brown suffered from severe migraine headaches and was terminated from her employment with the New Mexico State Personnel Office ("New Mexico SPO"). Ms. Copelin-Brown argued that she was wrongfully denied a post-termination hearing or appeal. The New Mexico SPO argued that because Ms. Copelin-Brown does not claim that she was not permanently disabled and admittedly receives total disability benefits, "a favorable ruling from the court would fail to redress her injury." *Id.* at 1254. The court rejected this argument, explaining that "even if Ms. Copelin-Brown's dismissal was justified on the merits, her right to procedural due process entitles her to at least nominal

damages." *Id.* (*citing Carey*, 435 U.S. at 266); *see also Citizens for Better Forestry v. U.S. Dept. of Agric.*, 341 F.3d 961, 976 (9th Cir. 2003) (finding that redressability requirement was met in the context of an injury for lack of notice under NEPA where the plaintiff arguably could have influenced the decision of the United States Department of Agriculture had plaintiff been given an opportunity to be heard).

Here, the District Court failed to recognize the significance of the fact that BVL has asserted claims based on the violation of its core constitutional rights to due process, and although it has transferred the Encumbered Subject Property, BVL certainly has an interest in the protection of its absolute right to due process. BVL had a right to be heard before being deprived of its property interest. This right was not recognized. Had BVL been afforded the opportunity to be heard, BVL's comments on the Assessment Ordinance may have influenced the decision of JSSD. *See Citizens for Better Forestry*, 341 F.3d at 976 (finding that the redressability requirement was met in the context of an injury for lack of notice under NEPA where the plaintiff arguably could have influenced the decision of the United States Department of Agriculture had plaintiff been given an opportunity to be heard). But regardless of whether BVL's input would have changed the details of the Assessment Ordinance, it is BVL's right to be heard that is at issue not whether Defendants would have listened—and that right was not recognized. In other words, even if the ruling of the Court would not result in BVL getting its land back without a priming lien, BVL's right to procedural due process supports its standing to make such arguments. *See Copelin-Brown*, 399 F.3d at 1254 (stating that the plaintiff had standing to assert her due process claim despite the fact that, based on the undisputed

facts, a ruling in her favor would not "redress" her injury of being terminated). Furthermore, BVL, along with other landowners and mortgagees, certainly has an interest in having its due process rights respected in all future situations where an assessment ordinance may be enacted. BVL has traditional standing to assert the Notice Claims.

B. BVJ and BVL Satisfy the Policies Underlying Traditional Standing.

As noted above, the traditional standing test serves the purpose of avoiding potentially poor advocacy and avoiding unnecessary decisions of constitutional issues. *See Sierra Club*, 2006 UT 74, ¶ 20. In this case, these purposes are clearly served. Both BVL and BVJ filed suit against Defendants below as co-plaintiffs. Accordingly, the District Court had before it 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). These parties have a real and personal interest to fully and zealously advocate their position in this case. *See id.* Indeed, who would do a better job in asserting and prosecuting these claims? A decision on the merits of the Notice Claims is critical to the preservation of due process rights, and the preservation of property interests. The purposes of traditional standing have been served in this case.

C. BVJ Has Traditional Standing.

Even if the Court were to determine that BVL lacked traditional standing and that BVL and BVJ together lacked standing, the fact that the purposes of the standing doctrine have been served in this case demonstrates that BVJ could assert the rights of BVL in this

matter under the "third-party standing" doctrine. *See, e.g., Hodak v. City of St. Peters*, 535 F.3d 899, 904 (8th Cir. 2008), *cert. denied,* 129 S. Ct. 1352 (2009) ("Third-party standing is an exception to the general rule that a plaintiff may only assert his own injury in fact and permits a litigant who lacks a legal claim to assert the rights of a third party."); *see also Powers v. Ohio*, 499 U.S. 400, 410 (1991) (recognizing that a litigant may bring actions on behalf of third parties where the litigant has suffered an injury in fact, have a close relationship to the third party, and the third party has some hindrance to its ability to protect its own interests); 13A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3531.9 (3d ed. 1998) ("The most common form of statement is that the rule against asserting the rights of others is a prudential rule that can be relaxed when the purposes of standing doctrine are served.").[4]

Curiously, the District Court held that neither BVL, nor BVJ, had traditional standing, even though 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), were both before it in the very same action.[5] If the District Court is correct, then no one in the world can now assert the Notice Claims, because no one in the world has standing to bring those claims. These constitutional claims simply vanished the moment that BVL transferred the Encumbered

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[4] Moreover, the law simply cannot be that valid constitutional claims vanish if assigned to an affiliate and pursued jointly with the affiliate in a common lawsuit, but can be resurrected and asserted if the affiliate simply transfers them back.

[5] However, the District Court's Order does suggest that if BVJ were to simply transfer its interest in the property back to BVL, BVL would have traditional standing because the relief requested would redress the alleged injury. (R. 1891-92.)

Subject Property, and all claims related thereto, to its affiliate BVJ. BV submits that traditional standing jurisprudence cannot be read this narrowly, especially where the policies underlying traditional standing have clearly been met in this case and where such important and fundamental rights are at issue.

BVL and BVJ have traditional standing to assert their Notice Claims. The District Court's finding to the contrary was incorrect, and should be reversed. BV should be given the right to present the Notice Claims on their merits.

II. AT A MINIMUM, BVJ HAS ALTERNATIVE STANDING TO ASSERT THE NOTICE CLAIMS.

Utah courts have recognized two means by which a party can establish standing: the traditional test and the alternative test. *See Jenkins*, 675 P.2d at 1150-51; *see also Sierra Club*, 2006 UT 74, ¶ 18. Traditional standing, of course, was addressed and shown above. Even if a party lacks traditional standing, however, a party may nevertheless "qualify for alternative standing if the party is (1) an appropriate party to bring suit and (2) the issue being presented is one of 'sufficient public importance to balance the absence of traditional standing criteria.'" *City of Grantsville v. Redevelopment Agency of Tooele City*, 2010 UT 38, ¶ 16, 233 P.3d 461 (*quoting Sierra Club*, 2006 UT 74, ¶ 41). Here, both elements have been met by BVJ. Therefore, the Court should hold that BVJ has standing to assert the Notice Claims, and it should direct Judge Pullan to address those claims on their merits, even if the Court disagrees with BV on their traditional standing arguments.

A. As Correctly Recognized by the District Court, BVJ is an "Appropriate Party" to Assert the Notice Claims.

Under the first prong of the alternative standing test, a "petitioning party must first establish that it is an appropriate party to raise the issues in the dispute before the court." *Sierra Club*, 2006 UT 74, ¶ 36. To meet this burden, a party must demonstrate 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." *Id.* (internal quotations omitted.)

Here, the District Court stated that "BVJ is an appropriate party as the obligor under the assessment ordinance and has the interest necessary to develop the legal and factual issues presented in this case . . . ." (R. 1889.) The District Court correctly recognized that BVJ is an appropriate party to assert the Notice Claims in this action, and Defendants have not appealed that finding or contended otherwise. Thus, the first part of the alternative standing test is clearly present here.

B. The Issues Sought to be Raised are of Sufficient Public Importance and Should be Addressed by the Judicial Branch.

The second prong of the alternative standing test requires a party to demonstrate "that the issues it seeks to raise 'are of sufficient public importance in and of themselves' to warrant granting the party standing." *Sierra Club*, 2006 UT 74, ¶ 36 (*quoting Jenkins*, 675 P.2d at 1150). "This requires the court to determine not only that the issues are of a sufficient weight but also that they are not more appropriately addressed by another branch of government pursuant to the political process." *Id.* In this case, the issues sought to be raised involve core constitutional rights affecting numerous private

landowners in Utah, and the determination of whether a party's constitutional rights were violated should be addressed by the judicial branch.

1. The issues raised are of sufficient weight.

This case is about the protection of property and due process rights under the Utah and United States Constitutions. The Utah Constitution lists one's right to possess and protect property rights as an inherent and inalienable right. Utah Const. Art. I, Sec. 1 ("All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right."). Indeed, this language underscores Utah's strong position with respect to property rights. The Fourteenth Amendment ensures that a state may not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1; *see also* Utah Const. art. I.

Specifically, in this case, BV has alleged facts demonstrating, among other things, violations of both its procedural and substantive due process rights. With respect to procedural due process, the United States Supreme Court has stated that "prior to taking action which will affect an interest in life, liberty, or property protected by the Due Process Clause of the Fourteenth Amendment, a State must provide 'notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Mennonite Bd. v. Adams*, 462 U.S. 791, 798 (1983) (*quoting Mullane v. Central Hanover Bank & Trust*

Co., 339 U.S. 306, 314 (1950)); *see also Epice Corp. v. The Land Reutilization Auth. of the City of St. Louis, Missouri*, Case No. 4:07CV206, 2008 U.S. Dist. LEXIS 33802 (E.D. Mo. Apr. 2, 2008) (citing *Mennonite* for same proposition). In *Mennonite*, the United States Supreme Court held that "a mortgagee clearly has a legally protected property interest" under the Due Process Clause of the Fourteenth Amendment. *Id.* at 798. Like a mortgagee, a beneficiary of a deed of trust acquires a security interest in real property that generally has priority over subsequent claims or liens, and is functionally no different from a mortgagee when it comes to due process. *Homeside Lending, Inc. v. Miller*, 2001 UT App 247, ¶ 17 & n.1, 31 P.3d 607. Accordingly, BVL held a legally protected property interest. And, under *Mennonite*, BVL was entitled to the protections of procedural due process—notice of the proposed Assessment Ordinance before its enactment and an opportunity to be heard. BVL received no notice and its procedural due process rights were thus violated.

This conclusion is further supported by *Connecticut v. Doehr*, wherein the United States Supreme Court states that "even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection." 501 U.S. 1, 12 (1991). Furthermore, "the property interests that attachment affects are significant [because] . . . attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause." *Id.* Finally, at least one state has determined that "[d]ue process requires that interested persons be

given an opportunity to be heard on all phases of the lien-creating process." *Crane v. City of Williams*, 965 P.2d 76, 81 (Ariz. Ct. App. 1998).

BV is confident that, given the opportunity, it will prevail on its Notice Claims. However, regardless of whether BV ultimately prevails on these claims, the issue before this Court is simply whether the issues raised in those claims are of sufficient public importance such that BVJ would have alternative standing to assert the claims. As noted in *Trustees for Alaska v. State of Alaska*, the mere fact that BV's dismissed claims are constitutional claims may, in and of itself, satisfy the "sufficient public importance" prong of the test. 736 P.2d 324, 329 (Alaska 1987) ("[T]he case in question must be one of public significance. *One measure of significance may that that specific constitutional limitations are at issue . . . That is not an exclusive measure of significance, however, as statutory and common law questions may also be very important.*") (emphasis added). As explained above, the issues raised by BV here involve core constitutional rights—including due process and property rights—that would have a significant impact on every local government and landowner in the entire State of Utah. In other words, resolution of the issues raised by BV may have an impact on government practices beyond the confines of this case. That is a sufficient public importance to confer standing. *See Sloan v. Greenville Cnty.*, 606 S.E.2d 464, 468 (S.C. 2004) (noting that "the issue in the present case is of sufficient public importance to confer standing. Resolution of the issues in this case will likely have an impact on government practices beyond the confines of the case

itself.").[6]

In the District Court's Order, the court held that this case does not present issues of sufficient public importance. (R. 1890.) In support of that holding, the District Court simply stated the following:

> Unlike Grantsville (involving closure of a military base and adverse economic impact of closure on the entire Tooele community), Cedar Mountain (where the "land use actions challenged . . . involved an industry that poses potential environmental and health-related hams [*sic*] to the citizens of Tooele County."), and Sierra Club (which claimed that a Coal Fire Plant would emit hazardous chemicals near homes and a national park), a public interest of equal weight is not at stake here.

(R. 1890.) The District Court provides no additional explanation or support for this holding. (R. 1888-90.) Indeed, the District Court provides no explanation as to why the constitutional issues raised in the Notice Claims, which, as recognized by the District Court "impacts the rights of private property owners," are somehow not of "equal weight" to the other cases cited in its Order, particularly when we have cases, such as *Grantsville*, which find alternative standing when the claims being asserted are not constitutional claims. (R. 1889.) If the violation of a party's due process rights resulting in the loss of property and admittedly impacting the rights of countless other private property owners in the State of Utah is not an issue of "sufficient weight" or "sufficient

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[6] The Assessment Act is the statutory means used by every governmental entity in Utah to impose a special assessment on property. Thus, the Notice Claims that were dismissed below raise questions which potentially affect every special assessment levied or to be levied by every governmental entity in the State of Utah. "[A] challenge to a regulation which potentially affects every [assessment] by the State is likely of sufficient public importance to justify disregarding the standing requirement . . ." *A.F. Lusi Constr., Inc. v. Rhode Island Dep't of Admin.*, No. PB 07-1104, 2007 R.I. Super. LEXIS 66, at *23 n.13 (R.I. Super. Ct. May 7, 2007).

public importance," it is hard to contemplate an issue that would ever rise to that level. BV believes that a court's ability to resolve the type of issues sought to be presented in this case—the protection of property rights against government action in violation of the Utah and United States Constitution—is precisely the type of issue that inspired Utah courts to adopt an alternative standing test in the first place. *See* John Dimanno, *Beyond Taxpayer's Suits: Public Interest Standing in the States*, 41 Conn. L. Rev. 639 (Dec. 2008) ("Utah's alternative standing test adequately balances the competing interests involved in the public action context: on one side, the vindication of the public interest and the need for a check on government illegalities; and, on the other side, the conservation of judicial resources and the need for a proper separation of powers between the branches of government."). Thus, this Court should find that the constitutional issues raised below were of sufficient public importance to warrant alternative standing.

2. The Judicial Branch is uniquely situated to address the issues raised in the Notice Claims.

Even if the issues presented are of sufficient weight, a party asserting alternative standing must also demonstrate that the issues "are not more appropriately addressed by another branch of government pursuant to the political process." *Sierra Club*, 2006 UT 74, ¶ 36 (*quoting Jenkins*, 675 P.2d at 1150).

In this case, the issues to be addressed are the constitutional violations alleged to have occurred in the Notice Claims. Specifically, BV is asking Utah's courts to determine whether its due process and other constitutional rights were violated in connection with the enactment of the Assessment Ordinance. The Judicial Branch of

government is uniquely situated to address such issues. Indeed, it is the only branch of government specifically charged and otherwise authorized to do so. Accordingly, the issues could not be more appropriately addressed by another branch of government.

In its Order, the District Court addressed this factor with only a single statement: "Finally, to the extent BVL seeks to require Defendants to create a new formula for imposing assessments because of changed economic circumstances and expectations, that issue is more appropriately addressed by a different branch of government—namely, the county legislative body." (R. 1889.) This statement is misplaced and otherwise ignores the issues raised in the lawsuit. The issues raised by BV are whether their constitutional rights were violated in connection with the Assessment Ordinance. If a court determines that BV's rights were indeed violated—a decision reserved for the Judicial Branch—then the effect of such a decision may be that the Defendants would "create a new formula" for the assessment after hearing from the parties who have a constitutional right to be heard on this issue. But until the Judicial Branch makes a determination as to whether BV was constitutionally entitled to notice before the Assessment Ordinance was enacted, BV cannot get the relief requested in its lawsuit. Moreover, as noted above, the issue is not whether Defendants would change their minds once they heard from BV, but rather that BV was not afforded the chance to speak in the first place. Who knows what would have happened had Defendants followed the law?

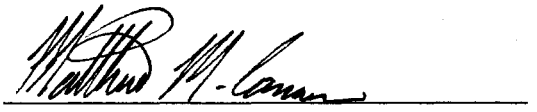
The Court has before it the best possible parties to raise these issues. For the reasons stated above, BVJ has alternative standing to assert the Notice Claims in this case, even if the Court does not find traditional standing.

CONCLUSION

For the foregoing reasons, this Court should reverse the Order, and hold that BVL and BVJ have traditional standing, or at least BVJ has alternative standing, to assert the Notice Claims, and it should direct the District Court to address those claims on their merits.

DATED this 28th day of March 2012.

RAY QUINNEY & NEBEKER P.C.



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CERTIFICATE OF COMPLIANCE

Word Count

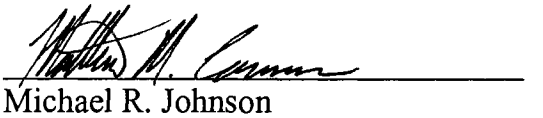
Pursuant to Utah R. App. P. 24(f)(1)(B), I certify that the brief is proportionally spaced and contains 9,279 words. I relied on my word processor, Microsoft Word, to obtain the count. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

Type Face

The brief complies with the typeface requirement of Utah R. App. P. 27(b) and the type style requirements of Utah R. App. P. 27 (b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 13-point Times New Roman font.

DATED this 28th day of March 2012.

RAY QUINNEY & NEBEKER P.C.



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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTION

I hereby certify that a copy of the foregoing **BRIEF OF APPELLANTS** was submitted in Digital Form via the Court's ECF system, in an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Symantec Endpoint Protection with virus definitions dated March 28, 2012 r2, and, according to the program, is free of viruses. In addition, I certify that all privacy redactions have been made.

DATED this 28th day of March 2012.

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing **BRIEF OF APPELLANTS** were mailed, postage prepaid, on this 28th day of March 2012, to:

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ADDENDUM 1

C

United States Code Annotated Currentness
Constitution of the United States
Annotated
Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property (Refs & Annos)

➡➡ AmendmentV. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ADDENDUM 2

C

United States Code Annotated Currentness
Constitution of the United States
Annotated
Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement (Refs & Annos)

➞➞ AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ADDENDUM 3

C

West's Utah Code Annotated Currentness
Title 11. Cities, Counties, and Local Taxing Units
Chapter 42. Assessment Area Act
Part 1. General Provisions

→→ § 11-42-106. Action to contest assessment or proceeding--Requirements--Exclusive remedy--Bonds and assessment incontestable

(1) A person who contests an assessment or any proceeding to designate an assessment area or levy an assessment may commence a civil action against the local entity to set aside a proceeding or enjoin the levy or collection of an assessment.

(2)(a) Each action under Subsection (1) shall be commenced in the district court with jurisdiction in the county in which the assessment area is located.

(b) An action under Subsection (1) 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.

(3)(a) 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.

(b) 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.

(4) An assessment or a proceeding to designate an assessment area or to levy an assessment may not be declared invalid or set aside in part or in whole because of an error or irregularity that does not go to the equity or justice of the assessment or proceeding.

(5) After the expiration of the 30-day period referred to in Subsection (2)(b):

(a) assessment bonds and refunding assessment bonds issued or to be issued with respect to an assessment area and assessments levied on property in the assessment area become at that time incontestable against all persons who have not commenced an action and served a summons as provided in this section; and

(b) a suit to enjoin the issuance or payment of assessment bonds or refunding assessment bonds, the levy, collection, or enforcement of an assessment, or to attack or question in any way the legality of assessment bonds, refunding assessment bonds, or an assessment may not be commenced, and a court may not inquire into those matters.

CREDIT(S)

U.C.A. 1953 § 11-42-106, UT ST § 11-42-106

Current through 2011 Third Special Session.

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