DISTRICT COURT, MESA COUNTY, COLORADO 125 N. Spruce Street, Grand Junction, CO 81501	DATE FILED: June 5, 2018 11:42 AM CASE NUMBER: 2016CV30317
Plaintiffs **The Board of County Commissioners of the County of Mesa, Colorado** and **the Grand Junction Area Chamber of Commerce**, in its individual capacity as assignee to the claims of Conquest Developments, LLC; Knowles Corporation; EmTech, Inc. (an Electro Mechanical Technical Co.); GJ Tech Center, LLC; and Western Hospitality, LLC v. Defendant **Grand Valley Drainage District**	**COURT USE ONLY** Case Number **16CV30317** Division **9** Courtroom **Timbreza**
Declaratory Judgment and Permanent Injunction	

THIS MATTER came before the court on a trial to the court on June 5, 6, 8 and 9, 2017. Representatives of both Plaintiffs and Defendant appeared with counsel. Plaintiffs were represented by Ben Wegener, Esq. and Defendant by William M. Kane, Esq. The court heard the testimony of various witnesses and exhibits admitted into evidence. The court has considered the evidence at trial, arguments of counsel, proposed findings of fact and conclusions of law, court file, relevant authorities and, I now enter this order.

Tim Ryan, Scott McInnis, Cody Davis, Jim Shanks, Mark Harris, Shauna Lee Konkright, Scott Godrey and Kenneth Brownlee all testified during the course of the 4-day trial. Based upon the testimony presented at the hearing, the court's determination of credibility and assessment of the sufficiency, probative effect and weight of the evidence, as well as the reasonable inferences and reasonable conclusions that the court drew from its assessment of the evidence the court makes its findings of fact and conclusion of law.

I.

Introduction

This case involves a challenge to a charge imposed by the Grand Valley Draining District on a subset of property owners within its boundaries. Plaintiffs characterize the charge as an unconstitutional tax, and the Defendant characterizes the charge as a fee. Citizens have long held divergent views on taxation. As Chief Justice John Marshall wrote in *McCulloch v. Maryland*, "The power to tax involves the power to destroy." 17 U.S. 316, 430 (1819). In 1992, Colorado voters adopted the Taxpayer's Bill of Rights (TABOR) as a reasonable restraint on the growth of government. TABOR seeks to limit government revenue, spending and debt without voter approval.

This case involves a challenge under TABOR to GVDD's determination that it needed to raise revenue to address the management of storm water within its boundaries. This case necessarily involves political implications. This case is not, however, about my personal view as to the wisdom of the constitutional framework, the charge, the mechanism utilized or whether I may personally support or oppose it.

Further, it is not an agreement or disagreement with Grand Valley Drainage District's belief that storm water drainage facilities within its boundaries are not sufficient and additional funding is needed to repair, improve and construct facilities capable of meeting increased demands brought by growth. I voice no opinion on those political and policy questions. "It is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. 137, 177 (1803). This case is about what the law requires and whether Grand Valley Drainage District has acted permissibly within its confines.

II.

Background

A. History of the Grand Valley Drainage District Pre-TABOR

The Grand Valley Drainage District (GVDD) was created in 1915 to manage irrigation return flow (IRF) and seepage. At the time, GVDD was called the Grand Junction Drainage District. For over 100 years, GVDD has managed IRF and seep. The system has been sufficient to manage IRF and seep throughout that time. Tim Ryan, GVDD's general manager, described IRF and seep: IRF results from water that flows from an irrigated surface after it has been irrigated generally into a collection point or as a natural wash. Seep percolates through the surface to the ground and becomes ground water. It is also collected at a collection point or a natural wash off the valley.

GVDD was formally created by the General Assembly on March 20, 1923 when H.B. 183 was approved.[1] Ch. 106, 1923 Colo. Sess. Laws 283-306. The purpose of the legislation was to provide for the "construction of a suitable drainage works for the protection of urban and rural property within [GVDD]. Ch. 106, sec. 1, 1923 Colo. Sess. Laws 283. The General Assembly described the "drainage works" as "a governmental function conferring a general benefit upon all of the people residing within or owning property with the district." Ch. 106, sec. 1, 1923 Colo. Sess. Laws 283. GVDD was necessary because of the "seepage conditions" that existed in the GVDD that were "peculiar to that particular territory, and affect in a peculiar manner the people residing

[1] At that time GVDD was formally created as the Grand Junction Drainage District it comprised the district then known as the Grand Valley Drainage District and became its successor. Ch. 106, sec. 2 & 4, 1923 Colo. Sess. Laws 283. I use GVDD throughout since the name is not dispositive. It was later renamed GVDD.

within and owning property within [GVDD]." Ch. 106, sec. 1, 1923 Colo. Sess. Laws 283. GVDD was given taxing authority to levy taxes to carry out the purposes of GVDD. Ch. 106, sec. 35, 1923 Colo. Sess. Laws 283.

Specifically, GVDD's purpose was to "construct, operate and maintain a system or systems of drains and drainage works, sufficient to reclaim and protect any and all lands and property within said district from seepage and waste water." Ch. 106, sec. 42, 1923 Colo. Sess. Laws 283.

Voters within GVDD approved a mill levy in 1923 and that mill levy has funded GVDD since. According to Mr. Ryan, mill levy revenue was just under $2 million dollars in 2016.

On November 10, 1981, the GVDD's Board of Directors adopted a resolution modifying its purpose. The resolution provided the following:

> BE IT RESOLVED that [GVDD] be designated the duly authorized agency to manage, construct and maintain a storm drainage system in Mesa County in addition to its existing purpose and that a request be made of the Colorado Legislature *[sic]* to grant whatever additional powers are required to fulfill the purpose of managing storm waters.

At that time, both the GVDD Board of Directors and Mesa County Commissioners had studied problems of the development and the resulting need for management, construction and maintenance of a system for storm waters and determined no such agency was authorized to operate for that purpose in Mesa County. The Resolution did not distinguish between urban and rural storm waters.

GVDD was willing to accept responsibility for storm waters in addition to seep waters and waste irrigation waters and to be statutorily mandated to do so.[2] GVDD intended to seek whatever additional powers would be necessary for it to manage storm water from the General Assembly.

The General Assembly amended C.R.S. § 37-31-101 and added the following language to the paragraph addressing "seepage:" "IT IS FURTHER DECLARED THAT TORRENTIAL STORMS AFFECT THE TERRITORY IN SAID DISTRICT IN AN ADVERSE MANNER." Ch. 399, sec. 1, C.R.S. § 37-31-101, 1983 Colo. Sess. Laws 1386. The General Assembly also added to the purposes of GVDD "STORM WATERS" as follows: "The purposes for which the district is organized are to construct, operate, and maintain systems of drains and drainage works sufficient to reclaim and protect all lands and property within said district from seepage, ~~and~~ waste waters, AND STORM WATERS." Ch. 399, sec. 4, C.R.S. § 37-31-119, 1983, Colo. Sess. Laws 1388.

The necessity continued to be a general one. The inclusion of the new purpose, managing "storm waters," did not change the public necessity:

> It is further declared that the construction of a suitable drainage works for the protection of urban and rural property within said district will promote the health, comfort, safety, convenience, and welfare of all people residing or owning property within said district and that construction of said drainage works is therefore a *governmental function conferring a general benefit* upon all of the people residing or owning property within said district.

[2] What has been referred to as IRF.

Ch. 399, sec. 1, C.R.S. § 37-31-101, 1983, Colo. Sess. Laws 1386 (emphasis added). GVDD was now statutorily mandated construct, operate and maintain systems of drainages and drainage sufficient to reclaim and protect lands and property from seep, IRF *and* storm waters regardless of territorial locale or origin within GVDD.

As part of the 1983 amendments, GVDD was granted the power to levy taxes, to collect assessments for specific areas in the district designated as improvement districts, and to collect rates, fees and other services charges pertaining to GVDD's facilities. Ch. 399, sec. 6, C.R.S. § 37-31-137, 1983, Colo. Sess. Laws 1389.

Mr. Ryan testified that it was his belief that the addition of the "fee" provision was for the specific purpose of raising revenue to handle storm water. According to him, the mill levy has always been sufficient for seep and IRF. It has not been sufficient for storm water. Notwithstanding, no fee was imposed at the time storm water was added to its statutory purpose, and GVDD managed seep, IRF and storm water in its existing system. It was not as if a new phenomenon called "storm water" suddenly came to be. In spite of this, GVDD did not seek to impose a fee until 2006. This takes us to the adoption of TABOR.

B. TABOR

The voters approved an amendment to the Colorado Constitution by a voter referendum submitted to the electors and approved at the November 3, 1992 general election. The amendment created Article 10, § 20 of the Colorado Constitution – the Taxpayer's Bill of Rights (TABOR). The amendment limits revenue, spending and the ability to raise additional tax revenue without voter approval. Colo. Const. art. X, § 20(1),

(4), (7) & (8). It applies, subject to exceptions, *inter alia,* to any new tax, mill levy above that for the prior year, extension of an expiring tax, or a tax policy change directly causing a net tax revenue gain to any district. Colo. Const., art. X, § 20 (4).

A tax is "designed to raise revenues to defray the general expenses of government, but [a fee] is a charge imposed upon persons or property for the purpose of defraying the cost of a particular governmental service." *Colorado Union of Taxpayers Foundation v. city of Aspen*, 310 P.3d 625, 628 (Colo. App. 2015) (quoting *Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008)). A tax is subject to TABOR's requirements but a fee is not. *Id.* (citing *Bruce v. City of Colorado Springs*, 131 P.3d 1187, 1189-90 (Colo. App. 2005)). Thus, a tax would require voter approval; a fee would not.

C. GVDD's Continued Management of Seep, IRF and Storm Waters Post-TABOR

Increased urbanization was not as much of a problem in the early 1980s, according to Mr. Ryan; however, as the Grand Valley continued to urbanize, GVDD faced increased challenges in managing storm waters. According to GVDD this was not so for seep and IRF, which continued to be manageable. Apparently GVDD reaches this conclusion because flooding occurs during a storm event and flooding does not occur when there is not a storm event. During these storm events, seep and IRF continue to flow into the GVDD drainage system along with the storm waters. There was no testimony, for example, that users within GVDD cease irrigating during a storm event. Indeed, the testimony is that it is virtually impossible to create a system that does not handle each of the 3 types of drainage – seep, IRF and storm waters – when all 3 are demanding

management by the system. There would be times when storm waters are not present because there is no storm event occurring to generate them.

GVDD's boundaries have always included urban and rural areas of the Grand Valley. GVDD is particularly concerned with urban storm waters because the extent of impervious surfaces in urban areas. According to Mr. Ryan, storm waters in rural areas do not really cause a problem.

By 2006, GVDD's Board believed something needed to be done to address storm waters. On August 8, 2006, the Board passed Resolution 2006-8080. The Resolution contained several findings:

- The properties within GVDD's boundaries were rapidly changing how the land was being used;
- Local growth and the demand for services and improvements to GVDD's systems were increasing; and
- The Board had identified over 60 capital improvement projects that would improve the existing drainage system to better protect properties located within the GVDD's boundaries from stormwater *[sic]* damage.

The Board identified 5 areas where a storm detention area would reduce flooding of properties in the "lower reachings" of the existing drainage basins. The estimate for the capital improvement projects exceeded $11,900,000.00 and GVDD's budget for capital improvement projects was limited to $350,000.00. Given this, the Board voted to submit a mill levy increase to the electors in the November 7, 2006 general election.

The 2 revenue raising proposals stated they were being referred to the voters to comply with TABOR and C.R.S. § 29-1-301[3], but the measure was not approved by the voters.

By 2014, GVDD's Board had grown frustrated and on March 14, 2017, adopted Resolution 2014-105 titled, "Urban Storm Water Policy Regarding Use of District Facilities and Rights-of-Way." According to the Resolution, GVDD had been established to construct and maintain a drainage system to transport seep and IRF to the Colorado River. In the 1980s, the Grand Valley was "experiencing tremendous growth." This resulted in new housing and the local land use jurisdictions approving numerous subdivisions. Mesa County and "members of the development community" were concerned that without adequate drainage facilities development might be constrained. According to the Board, Mesa County asked GVDD to "assume administrative duties throughout the Grand Valley, presumably to allow for a Grand Valley-wide effort to develop capital funding and planning to develop 'storm water' facilities that could be used by new subdivisions and developments." There is no historical record available defining the "administrative duties" GVDD would undertake.

According to the Resolution, the District developed a method of imposing fees and sought support from the "development community" and Mesa County in establishing a system for collecting fees to fund the Valley-wide system from 1985-1989. When attempts

[3] At trial, GVDD objected to the admission of testimony about the 2006 resolution and election as being irrelevant. While I do not consider it for purposes of whether the later resolution was a fee, it is relevant as to the historical avenues used by GVDD to manage seep, IRF and storm waters, including when and how to generate additional revenue.

failed, the District determined it would not continue efforts to make improvements to District facilities nor move forward to administer the Valley-wide system. Within the Resolution, the District attempts to limit its interpretation of the 1983 amendments related to "torrential storms" and "storm waters" contained in the amended statute. The Board also attempts to distinguish "regulated waters" from other "storm waters." The "urban storm water" is characterized as "regulated storm water."

The Board blamed decreased revenues on decrease in his mill levy revenue due to decreased land values within the GVDD and the enactment of TABOR.

Given what it perceived as a lack of cooperation from other interested parties, the Board enacted the resolution in which it sought cooperation with the 5-2-1 Drainage Authority, Mesa County, the cities of Grand Junction, Fruita and the Town of Palisade in addressing the issues related to funding and infrastructure or it would go it alone.[4] The Resolution proposed alternatives such as a fee; an administration agreement only after an intergovernmental agreement (IGA) was reached with all of the interested parties; the IGA would have to acknowledge GVDD had no statutory obligation to "accept, collect, convey or otherwise be involved in regulated storm water." If an agreement could not be reached, GVDD would take unilateral action including imposing fees, requiring payment from persons owning land from which regulated storm water flows in to GVDD

[4] The 5-2-1 Drainage Authority is a member based organization consisting of the Town of Palisade, City of Fruita, City of Grand Junction, Mesa County and GVDD. It was organized to address valley-wide issues regarding storm water and drainage. It is valley-wide organization. Whether the 5-2-1 Drainage Authority is better-suited to address valley-wide storm water drainage is not a question before the court. That is a political decision and not a legal one. The issue before the court is the constitutionality of the Fee imposed by GVDD.

facilities and prohibiting the introduction of "any additional regulated water" into GVDD facilities. GVDD expressed a preference that the 5-2-1 be responsible for managing any such Grand Valley draining system through the cooperation of all interested parties and believed each member of the 5-2-1 must either delegate the authority for the 5-2-1 to generate new revenues through an urban water enterprise or directly fund the 5-2-1 through local land use authority.

The Board next passed Resolution 2014-107 on March 19, 2014, titled, "A Resolution Establishing an Urban Stormwater *[sic]* Enterprise to be Accounted and Administered as a Water Activity Enterprise and Adopting a Partial Schedule of Rates and Fees for the Grand Valley Drainage District's 'Urban Stormwater *[sic]* Enterprise.'" The Resolution created the Grand Valley Drainage District "Urban Stormwater Enterprise" (Enterprise). The Enterprise is "created, owned and operated by" GVDD.

According to GVDD, "The Board finds that the mill levy revenues of the District are properly dedicated to addressing seep, irrigation return flow (IRF), and, more recently torrential storm water but not regulated water." "Regulated water" is GVDD's term for property owners who generate storm water regulated as "Multiple Separate Storm Sewer System (MS4)." "Multiple separate storm sewer system" or "MS4" is defined as:

> a conveyance or system of conveyances including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains, that is
>
> (I) Owned or operated by … city, town, county, district … created by statute pursuant to state law having jurisdiction over disposal of … storm water … including … drainage district …

(II) Designed or used for collecting or conveying storm water
(III) Not a combined sewer; and
(IV) Not part of a publicly owned treatment works.

C.R.S. § 25-8-502(1)(f)(I-IV). By this definition, MS4 water includes storm water. The concept of MS4 regulated water was a result of the Clean Water Act of 1972, which was in effect at the time of the 1981 Resolution and 1983 amendments. The status of MS4 mandates a permit and here, the MS4 permit is held by the 5-2-1 Drainage Authority, and no individual municipality or governmental entity in Mesa County holds it aside from the 5-2-1 Drainage Authority. The Board stated that it views "regulated water" as being different from "torrential storm water, seep and irrigation return flow water."

The Board acknowledged it was not aware of any law prohibiting "regulated water" into GVDD facilities; however, it was also its position that there was no mandate such water be accepted. According to the Board, GVDD had the authority establish a water activity enterprise to perform water activities including the management of regulated water pursuant to C.R.S. § 37-45.1-101, *et seq.* As such, the Enterprise was "excluded from the provisions of Section 20, Article X. of the State Constitution, as provided in § 37-45.1-103, C.R.S." The Resolution specifically provided:

> Said [Enterprise] shall be managed and funded as a water activity enterprise accounting unit dedicated to the management, operation, maintenance, control, regulation and use of regulated water within the District, both independently and in connection with other activities of [GVDD].

The Resolution imposed fees on anyone who discharged regulated water into GVDD facilities. The Resolution provided definitions for "administrative costs," "natural

washes of the country *[sic]*," "torrential storm," "urban areas of Mesa County," and "Urban-type development." A "torrential storm" is "a storm that has a one per cent per year chance of occurring in any one year, i.e., a 100 year storm."

The term "regulated water" does not appear anywhere within C.R.S. § 37-45-101, *et seq.*, rather, the terms "wholesale or retail water or wastewater or storm water services." C.R.S. § 37-45.1-102(3) (defining "water activity"). Indeed, the term "regulated water" appears nowhere within the Colorado Revised Statutes.

GVDD sent a letter to the Mesa County Board of County Commissioners explaining its position:

> Most of [GVDD]'s piped system was built to only handle seep and [IRF] waters. It functions fine for seep and IRF waters, as it was designed. But, in too many parts of [GVDD]'s system, those same pipes are simply to small to handle urban stormwater *[sic]*, (what we call 'regulated water') flowing off of existing residential, commercial and industrial development.

GVDD was seeking a dialogue with Mesa County and the City of Grand Junction for "agreeable solutions." According to GVDD, the "single purpose mill levy is inadequate to pay to up-size [GVDD] pipe facilities to handle the much larger volumes of water results in from urban-type development." GVDD voiced its belief that a "stormwater enterprise" was necessary to protect urban areas from the risk of substantial flooding. "[GVDD] would be irresponsible to allow the existing flooding risks to increase for our taxpayers…." Further, major natural drains that carry "torrential storm water, urban stormwater *[sic]*, and seep/IRF waters, have not been maintained, increasing the risks of flooding in the areas." It was not, however, limited to concerns about urban areas.

The concern extended to all areas of GVDD and, indeed, beyond GVDD's territorial limits to the Grand Valley.

In that letter, GVDD told Mesa County if it could not reach a solution with the County it would pursue other options such as "a storm water fee to be used to construct a modern stormwater *[sic]* system" and as time allows to "upgrade existing deficiencies."

At an "ad hoc committee meeting" on September 3, 2015 in discussing the proposed fees, Mr. Ryan stated that roughly 40% of the expense budget would go to operation and maintenance of *existing systems* and the remainder to "pay-as-you-go" capital improvement projects. The possibility of raising revenue through bonds was rejected with one meeting attendee observing, "It seems crazy not to bond." Diane Swchwenke, a representative of Grand Junction Chamber of Commerce (Chamber), expressed concerns that GVDD's plan to design capital projects for the entire system when some of it may be outside of GVDD's boundaries because people within the "limit" would be paying for services and improvements for those living outside GVDD's "borders." GVDD's legal counsel, Dan Wilson, Esq., acknowledged this may be the case for the first "year or so" but was necessary to anticipate future growth.

D. Resolution 2015-107 (the Fee)

The Board enacted Resolution 2015-107 on December 10, 2015. The Resolution states that it "RE-ADOPTS AND RE-ENACTS REGULATED WATER RATES, FEES AND CHARGES AND PROVIDES FOR APPEALS, CREDITS, REBATES, VARIANCES, AND OTHER MATTERS." The Resolution relies upon C.R.S. § 37-31-101, *et seq.*, for its authority. The Resolution specifically states that GVDD "is mandated by § 37-31-101, *et*

seq., C.R.S., to address seep and irrigation return flow water ("IRF"), and is authorized by § 37-31-137, C.R.S. to impose fees for the use of its facilities and rights-of-way." The recital does not reference "storm water;" however, Mr. Ryan testified "storm water" is missing in the inclusion of what GVDD is statutorily mandated to address.

The Resolution contains a "Rationale for Imposition of Urban Storm Water Fees Based on Impervious Surfaces," which explains "the background, necessity, and public benefit of adopting the fees and charges set forth" in the Resolution. According to the "Rationale," GVDD's facilities are adequate to handle seep and IRF but not urban storm water (GVDD's term "regulated water."). The Board made a finding that the "general fund mill levy revenues of [GVDD] *must* be dedicated to maintain the Facilities that handle seep and IRF water." (emphasis added) Further that:

> Regulated water[5] is different in kind and quality from seep and irrigation return flow water. The quantity and quality of

[5] "Regulated water" is defined in the Resolution as follows: "Regulated water" means, for purposes of this Resolution, any surface flow, runoff, or drainage from any form of natural precipitation, including snowmelt, that flows from or off of any real property on which impervious surface(s) exist, including impervious surfaces such as roofs, driveways, sidewalks, buildings, structures or other man-made improvement that flows into, through or on any Facility or District right-of-way. "Stormwater" *[sic]* or "storm water" as used by the LUAs in their respective stormwater *[sic]* ordinances and regulations is included as "Regulated water." Water that is subject to regulation as "storm water" or "stormwater" *[sic]* under any Municipal Separate Storm Sewer System (MS4) permit is also included as "Regulated water."

"LUA" is defined as the local governments with land use authority in the District's Service Area, *i.e.*, the cities of Grand Junction and Fruita, the town of Palisade and Mesa County.

"Facilities" is defined as the rights-of-way, drains, pipes, tiles and other improvements owned or operated by [GVDD]. "Facilities" includes the drains, improvements and rights-of-way shown on the official maps.

> Regulated water in [GVDD] facilities creates costs and liabilities that must be paid for. [GVDD] finds that the rational and equitable way to pay for those costs and liabilities is through Regulated water fees.

The "Rationale" further states that Regulated water flows into 40% of GVDD's facilities. The Rationale acknowledges that neither the Environmental Protection Agency (EPA) or the Colorado Department of Public Health and Education (CDPHE) were imposing any costs of monitoring, testing, treatment and administration of Regulated water on GVDD. That is, nothing about Regulated water increased any burden on GVDD's facilities as to the *quality* of the urban storm water just as to the *quantity* of it. The Board found, however, "such regulatory efforts are highly likely in the future" and GVDD "must have the revenues to plan for and address the water quality control regulations when they are imposed." The Resolution provides no further support for this finding or conclusion. And, indeed, at the time of trial, there was no testimony that *quality* oversight had been imposed by the EPA or CDPHE or that either had any intention of doing so.

The Recitals further explain that 85% of Regulated water flows directly into District Facilities without any detention, which raises the risks of loss of hydraulic capacity and increased peak flows, which increases the risk of flooding. Even when the local government land use authorities require detention of Regulated water before it flows into District Facilities, it prolongs demands on the system, increases maintenance needs, and raises the risk of flooding. When Regulated water is present in the District Facilities, the capacity to handle seep and IRF is reduced.

The Resolution establishes a District Enterprise wholly owned by GVDD to "address Regulated water, and to adopt Regulated water fees to be received and accounted within the District's Regulated water enterprise." Further:

> Such District Enterprise shall be financially responsible to the [GVDD] for addressing the costs, expenses, liabilities, responsibilities and other detriments resulting from the presence of Regulated water in District Facilities. Revenues received as a result of the adoption of this resolution shall be accounted for separate from [GVDD]'s general fund revenues; revenues received as a result of the adoption of this Resolution shall be used to pay for the operation, repair, maintenance, improvement, renewal, replacement and reconstruction of Facilities receiving Regulated water. No revenues received as a result of the adoption of this Resolution shall be diverted to the general fund of the District or otherwise used to pay the expenses of the District which are not incurred to deal with the cost of managing and controlling Regulated water, or to construct, operate, maintain, improve, repair and replace the Facilities needed to manage and control Regulated water…

GVDD's Board made a finding that "the public's health, welfare and safety will be promoted and improved" if the Fee is adopted to be used "to operate and maintain the District Enterprise, make capital improvements *to existing Facilities*…[and] provide necessary drainage facilities in advance of new development…" (emphasis added).

According to the Recitals, the District Enterprise is excluded from TABOR pursuant to C.R.S. § 37-45.1-103(1). The Fee charges should be roughly proportional to the demand the on the District Facilities by the owners of the real property with the impervious surface.[6] The amount of impervious surface on a particular piece of real

[6] "Impervious Surface" is defined in the resolution as a man-created hard surface with a runoff coefficient of greater than 0.89, such as nut not limited to asphalt or concrete paved areas, parking areas, roof areas including eaves of all man-made structures, driveways,

property is at least proportional to the impact on the demand of the District Facilities. Therefore, a reasonable way to calculate the Fee is to calculate it based upon the amount of impervious surface.

The Resolution sets forth the method for calculating the fee imposed using what is termed an "Equivalent Residential Unit" or "ERU." A single ERU is equal to 2,500 square feet of impervious surface per single-family detached parcel or lot. This was determined based upon a nationally recognized and statistical analysis determining that the average or means size of homes are 2500 square feet. There was a correlation with the nationally recognized statistic and the homes within GVDD, which averaged 2528 square feet. The method is recognized as a means of imposing various utility fees.

Finally, the Board found that the fees imposed by the Resolution are "not a tax of any kind, but are service fees imposed upon users of the District's Facilities in order to defray the cost of managing and controlling Regulated water, and the cost of operation, repair, maintenance, improvement, renewal, replacement and constructions of the Facilities needed to manage and control Regulated water." Additionally, the amount of the Fee and the manner in which the amount of the Fee is determined are reasonably related to the costs of the providing the services.

The amount of the Fee and arriving at the ERU rate was done by way of a Financial Model attached as Exhibit B to the Resolution. Essentially, the Financial Model budgets the cost of expenses over a 35-year period and sets an ERU rate to meet the anticipated

---

sheds and sidewalks (outside of public rights-of-way). Irrigation delivery and discharge improvements do not count as impervious surface for which Base Fees or FIFs are owed.

expenses. The Financial Model builds in ERU rate increases from the current $3.00 per ERU base rate to an increase in 2019 to $3.50 and increases each year thereafter until the end of the Financial Model with an ERU base rate of $9.00. Certain parcels pay a defined set rate based on an ERU. For example, any single family land coded as "1112" by the County Assessor regardless of size is subject to paying the Base Rate of one ERU. This means a 2,500 square foot house; 10,000 square foot house and 15,000 square foot house all pay the same rate regardless of the amount of impervious system on a parcel. The same is not true for non-residential properties, which are calculated individually and then divided by 2500 to arrive at the ERU. If the amount is below .5 the ERU is rounded down and above .5 the ERU is rounded up.

In addition to the on-going fee, there if a "Facilities investment fee" (FIF). There is a one-time $500.00 per ERU FIF for each new developed real property within [GVDD]. The initial rate was determined to be $983.00 per ERU but the rate was reduced to avoid undue negative impacts on the local development community and economy. The FIF was arrived at by the Board as "the dividend where the numerator is the District's reasonable estimate of the total value of the Facilities, plus the reasonable value of the District rights-of-way and the denominator is the District's reasonable estimate of the capacity of the Facilities to handle Regulated water."

FIFs are accounted for separately from the Base Rate Fees and are not used to upgrade existing deficiencies in the District's Facilities. Like Base Rate Fees, FIFs cannot be transferred into the general fund and cannot be used for anything other than expenses incurred to deal with the cost of managing and controlling Regulated water or to

construct, operate, maintain, improve, repair or replace the Facilities needed to manage and control Regulated water.

FIFs will continue to increase on the same schedule as the ERU Base Rate going from $500.00 to $1,736.00 by 2050.

The Resolution provides an "Education Credit" for state approved education institutions teaching kindergarten through twelfth grade physically located within GVDD. The Education Credit is a credit of up to $8.00 per K-12 student that is paid each calendar year. In exchange, the institution must prepare and propose a curriculum and have it approved by the District. The curriculum is focused on "water-related education programs." The "desired message" will include:

> (a) the drainage and Regulated water needs of the Grand Valley; (b) The importance of drainage and Regulated water on the physical and social environment of the Grand Valley and its people and property; (c) Unique aspects of the Grand Valley relating to Regulated water and drainage; (d) Other related subjects that will further the goal of helping [GVDD] school children and constituents understand the legal, financial, physical and political aspects of Regulated water and drainage.

The credit was adopted because national studies have shown that program targeted at students can be "very effective at spreading the desired message throughout a household, and thus through the constituents of [GVDD.]". In 2016, the Education Credit was $140,000.00. The credit increases on the same schedule as ERU Base Rate increases from $140,000.00 in 2016 to $420,000.00 in 2050.

The Resolution contains procedures for collections, appeals, and review. It also gives the General Manager the authority to interpret and administer the provisions of the

Resolution. The Fee is imposed on any owner of real property in the [GVDD] with at least 400 square feet of impervious surface.

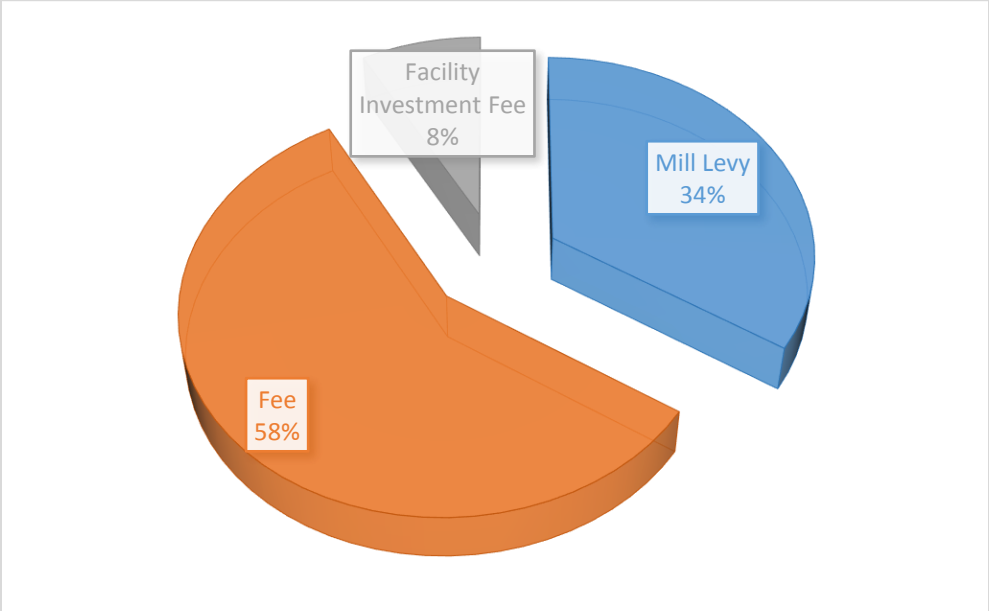
GVDD's service area is less than the whole of Mesa County, less than the service area of the entirety of the Grand Valley, less than that of the 5-2-1 Drainage Authority and encompasses portions of the City of Grand Junction, Town of Palisade, City of Fruita and Mesa County but not the entirety of them. The term "Grand Valley" generally refers to the areas of Mesa County comprising Grand Junction, Palisade, Fruita, Loma and Whitewater. It does not include DeBeque, Collbran, Mesa or Gateway, for example. It is surrounded by Grand Mesa, the Bookcliffs, and Colorado National Monument.

E. The GVDD Facilities and Future Development

GVDD has 258 miles of conveyance system. 150 miles of the system is piped. The balance of the system is open ditches. GVDD also owns a detention facility as part of the system. GVDD's entire system handles storm water. The burden placed upon GVDD's system by urban storm water is different than that caused by rural storm water. Less than 1 mile of the 258 miles of drains do not handle seep and IRF and only handle storm water. The potential exists for all of the facilities to handle all 3 types of drainage – seep, IRF and storm water.

GVDD's facilities are not adequate to handle storm water, which is a statutory purpose of GVDD. While GVDD classifies urban storm water as "Regulated water" it is not treated any differently than urban storm water. GVDD's Fee purports to only go to the management of Regulated water and not storm water, generally.

The Fee currently generates $2,700,000 in revenue. GVDD's mill levy, which it has determined is not sufficient to be used for nor is the purpose of it to be used for storm water, generates approximately $1,800,000.00 in revenue. The chart, below, demonstrates the percentage source of the $4,864,421 revenue contained within GVDD's financial plan:



FIFs generate $390,890, the mill levy generates $1,659,123 and the Regulated water Fee generates $2,814,408. The imposition of the Fee dramatically increases revue for GVDD. According to the financial plan, the Fee out paces the mill levy by over 1 million dollars. By 2035, mill levy revenue is projected to be $5,083.491 with Fee revenue in the amount of $11,842,272.

The Fee imposed pursuant to Resolution 2015-107 is for the purpose of paying for the operation, repair, maintenance, improvement, renewal, replacement and reconstruction of Facilities receiving Regulated water. Mr. Ryan testified that the Fee would be used to update, improve, repair and maintain existing Facilities. In short, GVDD will utilize the Fee to make capital improvements to existing facilities that carry

seep, IRF and storm water, regardless of their location within GVDD or their use by the payers of the Fee.

Cody Davis, a Board member, provided an overview of GVDD. He testified the Fee is being used to defray the cost of storm water entering the Facilities. He also testified that there are no drains handling only seep, IRF or storm water. New infrastructure would be built, however, to deal with storm water.

GVDD's Master Financial Plan identifies various capital improvement projects GVDD intends to undertake over the next 15 years with revenue generated from the Fee. The capital improvement projects will help provide a sufficient system of drains and drainage works to manage storm water. GVDD's system has not been adequate to handle storm water since it was statutorily obligated to do so going back to 1983.

The capital improvement projects will not commence at the same time. Instead, a few capital improvement projects will be undertaken at a time. The Master Financial Plan includes projects that are on going through 2050. There was testimony that GVDD does not ever anticipate a decrease in the Fee to pre-Resolution 2015-107 levels or for projects to be completed. And, indeed, the capital improvement projects GVDD has identified it wants to undertake would lessen the burden on its existing facilities, benefiting both seep and IRF.

In spite of urban drainage projects targeting storm water, when residents in urban areas irrigate their lawns, plants, shrubbery and other landscaping around their homes, the irrigation runs off of driveways, sidewalks around residences and commercial buildings. This irrigation water will flow into the new closed storm water drains being

proposed to be installed as part of the capital improvement projects. These new storm water systems will also be handling irrigation water from urban areas within the boundaries of the GVDD and not just storm water or Regulated water that flows from impervious surfaces.

When storm water is shed onto lawns in urban areas from an impervious surface like a roof, 60% of that storm water is absorbed into the ground and becomes seep. In these situations, 60% of this storm water will ultimately be drained through GVDD's existing Facilities while 40% would be drained by the new storm water drains being proposed by GVDD. GVDD cannot distinguish between the types of water that would be running through the new facilities that are being proposed to be built with the revenue from Regulated Water.

As part of Resolution 2015-107, GVDD spent significant sums of revenue from the Fee on public relations. This included $40,872.10 on Ryan/Sawyer Marketing to produce a video shown to District 51 students. GVDD also paid Ryan/Sawyer Marketing from revenue generated by the Fee for creative services and for monthly campaign management to get the message out as to why the Regulated water Fee was now being charged.

GVDD has used the Fee in another instance to help the City of Fruita create an alleyway in the amount of $90,000.00. This alleyway is excluded from GVDD's impervious surface calculations, is not a District Facility and is the City of Fruita was not billed a Regulated water Fee.

GVDD's general fund covers the insurance policies for the Enterprise. GVDD's general fund also pays all of the information technology expenses for the Enterprise. Likewise, GVDD pays the cost of a rodder truck to do rodder work on Facilities benefiting seep, IRF and storm water. There is no agreement between GVDD and the Enterprise regarding the reimbursement of costs and the sharing of expenses between the 2 entities. Instead, the expenses covered by GVDD are allocated between GVDD and the Enterprise at the end of the year and GVDD is reimbursed by the Enterprise. There is little separation between employees of GVDD and the Enterprise. Instead, the Enterprise reimburses GVDD for various employees' time.

Finally, as the projects are developed, property owners paying the Fee may be paying the Fee for projects that do not directly benefit their property or for projects their property does not impact. That is, because various projects begin over time, a land owner may be paying a Fee for several years before the property owner's Regulated water flows into a new capital improvement projects. Further, the Fee is not connected or related in any way to the cost of a current project and whether an owner's Regulated water flows into that project. In other words, the landowner pays the fee, which has been determined based on hypothetical impact to the system, regardless of whether there is any actual impact imposed on the project being funded or constructed.

III.

Standing

The court previously addressed standing in ruling upon the party's motions for summary judgment. I consider the issue again. A party must have standing for the court to decide a case on its merits. *Barber v. Ritter*, 196 P.2d 238, 246 (Colo. 2008). To satisfy

standing in Colorado, there must be injury in fact and the injury must be to a legally protected interest as contemplated by statutory or constitutional provisions. *Id*. Conformance with TABOR is sufficient to raise a legally protected interest. *Id*. Colorado favors broad taxpayer standing. *Id*. When a taxpayer seeks review of a claimed unlawful government expenditure contrary to TABOR that is a sufficient injury-in-fact. *Id*. at 246-47.

The Parties to this case are the District, Board of County Commissioners of Mesa County, the Grand Junction Area Chamber of Commerce, in its individual capacity and as assignee to the claims of Conquest Developments, LLC; Knowles Corporation; EmTech, Inc. (an Electro Mechanical Technical Co.); GJ Tech Center, LLC; and Western Hospitality, LLC. The Parties and assignees all own property within the boundaries of the Grand Valley Drainage District. And here, the Defendant has asserted a counterclaim for damages against the 2 named Plaintiffs. The Parties have standing.

IV.

Standard of Review

Neither party has addressed the appropriate standard of review. It is unclear to me whether they do not dispute the appropriate standard and, even if they do not, what they believe the standard to be. In at least 2 recent cases the Colorado Supreme Court has declined to revisit the "beyond a reasonable doubt" standard in a challenge under TABOR. *See TABOR Found. v. Regional Trans. Dist.*, 2018 CO 29 ¶ 15 (declining to adopt a less onerous "plan showing" standard because neither standard had been met); *see also Colorado Union of Taxpayers Found. V. City of Aspen*, 2018 CO 36 ¶ 14 (declining to modify the standard of review a court should apply when deciding if an ordinance is

unconstitutional because the ordinance was found to be constitutional). Accordingly, the court applies the "beyond a reasonable doubt" standard.

When reviewing constitutional issues, there is a presumption a statute is constitutional. *Colorado Union of Taxpayers Found.*, 2018 CO 36 ¶ 13. A statute must be shown to be unconstitutional beyond a reasonable doubt. *Id.* The court applies the same standard to the Resolution at issue in this case.

V.

Analysis

The court considers first whether TABOR applies to GVDD's Resolution 2015-107. The court next considers whether the action is legislative taxation or regulatory police power. Finally, the court considers whether the Fee is a tax.

A. Application of TABOR

The parties do not dispute Resolution 2015-107 must comply with TABOR. They dispute the characterization of the Fee as a tax for purposes of TABOR. In short, Plaintiffs contend the Fee is a tax subject to TABOR's voter approval provisions. The Defendant contends the Fee is a fee within what has been recognized as an exception to TABOR's voter approval requirement or that the District Enterprise is a TABOR exempt enterprise.

TABOR requires that "any new tax, tax rate increase, mill levy above that for the prior year, valuation for assessment ratio increase for a property class, or extension of an expiring tax, or a tax policy change directly causing a tax revenue gain to any district" be approved by the voters. Colo. Const. art X, § 20(4)(a). A tax is subject to TABOR; a fee is not. *Id.* (citing *Bruce v. City of Colorado Springs*, 131 P.3d 1187, 1189-90 (Colo. App. 2005)). "Where multiple interpretations of TABOR are equally supported by the text, a court

should choose that interpretation which would create the greatest restraint on the growth of government." *Id.* (quoting *Nicholl v. E-470 Pub. Highway Auth.,* 896 P.2d 859, 867 (Colo. 1995); *Tabor Found. v. Colo. Bridge Enter.,* 2014 COA 106 ¶ 19, 353, P.3d 896)).

TABOR contains a definitional section. COLO. CONST. art. X, § 20(2). Neither the term "tax" nor the term "fee" are designed within TABOR. COLO. CONST. art. X, § 20(2). A "district" means "the state of any local government, excluding enterprises." COLO. CONST. art. X, § 20(2)(b). An "enterprise" is "a government-owned business authorized to issue its own revenue bonds and receiving under 10% of annual revenue in grants from all Colorado state and local governments combined." COLO. CONST. art. X, § 20(2)(d).

B. Legislative Taxation or Regulatory Police Power

A municipality's power to tax and its regulatory police power "is thoroughly established, and with few exceptions, universally recognized." *Colorado Union of Taxpayers Found. v. City of Aspen*, 2018 CO 36, ¶ 19 (quoting *Post v. City of Grand Junction*, 195 P.3d 958, 959-60 (Colo. 1948)). Municipalities are delegated broad general police powers. C.R.S. § 31-15-401. These include regulatory powers such as those to regulate business. C.R.S. § 31-15-501. This is compared with the general taxing power "to levy and collect taxes for general and special purposes on real property." C.R.S. § 31-15-302(1)(c) and C.R.S. § 31-20-101.

Taxes may be used to defray the estimated expenses of state government. Colo. Const. art. X, § 2. Taxes are charges that "raise revenues for general municipal purposes." *Colorado Union of Taxpayers Found.*, 2018 CO 36, ¶ 20 (quoting *Bloom v. City of Fort* Collins, 784 P.2d 304, 308 (Colo. 1989)). Taxes "are intended to raise revenue to defray the general

expenses of the taxing entity." *Id*. (quoting *Zelinger v. City & Cty. Of Denver*, 724 P.2d 1356, 1358 (Colo. 1986)). "Thus , when looking to see if a district has levied a tax, [a court will] look to see if the district is attempting to raise revenue for the general expenses of government." *Id*.

A separate but related power is the power to regulate under a municipality's police power. *Id.* at ¶ 21. A municipality may adopt these regulations pursuant to its police power to promote the health, safety and welfare of its citizens via this "inherent power" as a city and as part of its statutory power provided in C.R.S. § 31-15-103. *Id*. (quoting *City of Colo. Springs v. Grueskin*, 422 P.2d 384, 387 (Colo. 1966)). Pursuant to C.R.S. § 31-15-103, a municipality

> shall have the power to make and publish ordinances…which are necessary and proper to provide for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort, and convenience of such municipality and the inhabitants thereof."

A municipality's police power is broad. *Id*. (citing *Town of Dillon v. Yacht Club Condo. Home Owners Ass'n*, 325 P.3d 1032, 1038 (Colo. 2014)).

In determining whether the charge is a tax or a regulatory charge, the court considers (1) whether the charge was imposed as part of a regulatory scheme enacted pursuant to the government's police powers and (2) the charge bore a reasonable relationship to direct or indirect costs to the government of providing the service or regulating the activity. *Id.* at ¶ 23. In short, where the answer to both questions is "yes," the charge is not a tax. *Id*. Where, however, the primary purposes of the charge is "to

raise revenue for the general expenses of government," the charge has been deemed a tax. *Id*.

In determining whether a government levied a tax or some other type of charge, the court must analyze whether the government is exercising its legislative taxation power or its regulatory police power. *Id*. at ¶ 26. The court looks at the primary purposes for enacting the charge. *Id*. (citing *Barber v. Ritter*, 196 P.3d 238, 248-49 (Colo. 2008)). If the primary purposes is raising revenue for general government use, it is a tax. *Id*. (citing *Bloom,* 784 P.2d at 308; also citing *Zelinger*, 724 P.2d 1358). If however,

> a charge is imposed as part of a comprehensive regulatory scheme, and if the primary purpose of the charge is to defray the reasonable direct an indirect costs of providing a service or regulating an activity under that scheme, then the charge is not raising revenue for the general expenses of government and, therefore not a tax.

Id. (citing *Zelinger*, 724 P.2d at 1359; citing also *Western Heights Land Corp.,* 362 P.2d at 158)). Regulatory charges are not subject to TABOR's election requirements. *Id*.

To determine whether a charge is imposed pursuant to tax power as opposed to incidentally pursuant to a regulatory scheme the court looks at the government's stated purpose and the label the government gives the charge. *Id*. at ¶ 27. A charge may be labeled a fee when it is actually a tax. *Id*. (citing *Barber*, 196 P.3d at 250 n. 15). The focus is on "the practical realities of the charger's operation to determine if the charge's primary purpose is in fact to raise revenue for governmental use." *Id*. Consideration is given to "whether there is a reasonable relationship between the direct and indirect cost to the government of providing the product or activity assessed and the amount being charged." *Id*. A municipality, like the City of Aspen, undoubtedly has the power to tax

but it also has the power to enact regulations for health and welfare of its citizens. *Id*. (citing *Winslow Const. Co. v. City and Cty. of Denver*, 960 P.2d 685, 692 (Colo. 1998); citing also, *Grueskin*, 422 P.2d 837). A threshold issue, then, is whether GVDD likewise possesses the power to regulate.

C. GVDD and Resolution 2015-107

"Special districts" have been described as political subdivisions of the state that possess various proprietary powers. *South Fork Water and Sanitation Dist. v. Town of South Fork*, 252 P.3d 465, 468 (Colo. 2011). These districts only carry out the powers expressly conferred to them by the constitution or statute and incidental implied powers reasonably necessary to carry out express power. *Id*. Certain special districts are defined as quasi-municipal by statute. C.R.S. § 31-35-401(4).

Unlike special districts, municipalities are delegated general police power. *Id*. "This police power to do all acts necessary or expedient to promote public health affords a municipality broad authority." *Id*. Unlike the City of Aspen, GVDD does not enjoy such broad authority and is limited to its proprietary authority and does not possess broad police powers to regulate.

The General Assembly declared GVDD a public necessity for 3 specific reasons. First, "seepage conditions" that exist in the territory are peculiar to it and affect "in a peculiar manner the people residing and owning property within [GVDD]. C.R.S. § 37-31-101. Second, "torrential storms affect the territory in [GVDD] in an adverse manner." *Id*. Finally, "the construction of a suitable drainage works for the protection of urban and rural property within [GVDD] will promote the health, comfort, safety, convenience and

welfare of all the people residing or owning property with [GVDD]." *Id*. The construction of such "drainage works" was declared to be "a governmental function conferring a general benefit upon all of the people residing or owning property within [GVDD]." *Id*.

The Board was conferred with certain "General powers of district," which vested the Board with "all powers necessary for the accomplishment of the purposes for which [GVDD] is organized and capable of being delegated" by the General Assembly. C.R.S. § 37-31-105(1). As part of its general powers, the Board was given certain specific powers related to "nonpoint source water pollution control programs related to agricultural purposes". C.R.S. § 37-31-105(2). "The purposes for which the district is organized are to construct, operate, and maintain systems of drains and drainage works sufficient to reclaim and protect all lands and property within said district from seepage, waste waters, and storm waters ." C.R.S. § 37-31-119.

In order to carry out its purposes, GDD may levy taxes; designate specially benefited areas within GVDD as improvement districts and collect assessments against real property in the improvement district; to fix and collect fees and other service charges pertaining to the facilities of the district. C.R.S. § 37-31-137.

The court first considers the stated purpose of the Fee imposed by GVDD within Resolution 2015-107. In the first Recital to Resolution 2015-107, GVDD acknowledges it is mandated by C.R.S. § 37-31-101 to address seep and IRF. Mr. Ryan, who has authority to interpret the Resolution, testified that although "storm water" is absent it should have been included. The Recitals go on to state that the District's Facilities are adequate to handle seep and IRF but not urban storm water, which is defined as Regulated water.

Again, the term "storm water" is missing. "Regulated water" is different in kind and quality from seep and IRF. According to the Recitals, the *kind* and *quality* of Regulated water is different from seep and IRF. The Board made this finding in light of 2 considerations: (1) Regulated water is not treated any differently than seep or IRF as it relates to *quality* and (2) Regulated water is not treated any different than other storm water (e.g. rural storm water) as it relates to *quality*.

The Board states that the *quantity* and *quality* of Regulated water in District facilities creates costs and liabilities that must be paid for. The Board finds the "rational and equitable" way to pay for those cost and liabilities is through Regulated water fees. The Resolution acknowledges that neither EPA nor CDPHE are currently imposing costs of monitoring, testing, treatment and administration of Regulated water on the District but that such efforts are likely in the future.

The Regulated water Fee will be used to "to pay for the operation, repair, maintenance, improvement, renewal, replacement and reconstruction of Facilities receiving Regulated water." The Board found and determined "the public's health, welfare and safety will be promoted and improved if the District adopts these Regulated water fees that will be used to operate and maintain the District's Enterprise, make capital improvements to the existing Facilities…provide necessary drainage facilities in advance of new development in areas selected by LUAs…."

Following the Recitals, in the substantive portion of the Resolution, it states, "The Board of Directors of the Grand Valley Drainage District hereby finds and declares the

above Recitals are substantive provisions of this Resolution as if set forth in full below, and are vital for the protection and promotion of the public health, welfare and safety."

On its face, the Fee appears to be adopted for the stated purpose of the "protection and promotion of public health, welfare and safety." The Resolution does so to reduce the risks of flooding, to improve facilities and to handle what it terms Regulated water. Regulated water, according to GVDD, creates a specific and unique burden on GVDD in both the *kind* and *quantity* of water. In this way, on its face, the stated purpose is to protect health, welfare, and safety and, thus, does not facially purport to levy a tax. *Colorado Union of Taxpayers Found.*, 2018 CO 36, ¶ 29.

The problem, however, is that GVDD does not possess general police power to impose a regulatory scheme on Regulated waters. Instead, it is limited to its proprietary powers to constructing, operating and maintaining a system of drains to handle seep, IRF and storm water. To the extent that the words "health," "safety," or "welfare" in the enabling legislation, they are limited to the General Assembly's exercise of its police power to establish GVDD for the purpose of delegated its general proprietary powers for management of seep, IRF and storm water and not as a broad grant of police powers. The management of storm water is a general purpose of GVDD. Thus, it cannot enact a Regulated water Fee of this nature exercising police powers it does not possess.

To the extent that a later court determines GVDD possesses some limited police powers to carry out its statutory purpose or proprietary powers, I turn next to examine "the practical realities of how the charge operates to determine if the charge is in fact imposed to defray the direct or indirect costs of regulation and if the amount of the fee is

reasonable in light of those costs, or if the charge's primary purpose is to raise revenue for general governmental use. *Id.* at ¶ 30. The court concludes the primary purpose is to raise revenue for general governmental use – to meet the general statutory purpose of GVDD. That practical reality is that the Fee defrays the cost of every statutory function of GVDD related to seep, IRF and storm water (both rural and urban).

The Board, on its own, determined its mill levy may only be utilized for seep and IRF. The problem is that virtually all of GVDD's Facilities now and in the future will handle all 3 types of water – seep, IRF and storm water. GVDD attempts to single out Regulated water but, in reality, it is unable to do so. That is, in all but a small percentage of its citizens any of GVDD's Facilities handling Regulated water also handle other storm water, seep and IRF.

The Fee will be used to both improve existing District Facilities and to build new District Facilities. This will improve not just the handling of seep, IRF and storm water but will also increase the ability to handle seep, IRF and storm water in all systems. All of these are part of the general purpose of GVDD.

GVDD utilized a method of calculating the Fee imposed on property owners with impervious systems based upon a method used for other types of utilities. This is based upon most residential property owners being charged a flat ERU of $3.00 per month based on an average of 2,500 square feet of impervious surface. This is regardless of how much impervious surface a residential property actually has. Non-residential properties Base Rate Fee are based upon the actual ERU unit rounded up or down to the nearest half percentage (e.g. 1.0; 1.5; 2.0; 2.5). Other property owners do not pay any Base Rate related

to the Regulated water Fee because they do not fall within Resolution's definitions. In each instance, different properties have different amounts of storm water entering the District Facilities regardless of impervious surface. Other property owners have seep and IRF entering the District Facilities in larger quantities than storm water but do not pay a fee for the service.

In spite of believing this is a reasonable way to calculate the fee and that it is related to the impervious surface on a particular piece of real property it is unrelated to any specific drainage project (e.g. the drainage project into which a particular property's water flows) and it is projected to be ongoing without any reduction for at least the next 35 years regardless of whether a project has been completed or what the revenue needs of GVDD (or the Enterprise) are.

The Fee is also used for Educational Credits, wholly unrelated to management of the District's Facilities and related to the general purpose of the District. While a charge may "incidentally benefit the general public," this is not an incidental benefit. *Barber*, 196 P.3d at 349-50. It is part of the general purposes of GVDD. And its purposes are to educate beyond Regulated water. For example, curriculum addresses not just "Regulated water" but "drainage," more broadly and not just within GVDD but within the Grand Valley. Likewise, the Fee has been used on an alleyway project in the City of Fruita unrelated to the alleged-special nature of the Fee and, apparently, related to general purposes of GVDD. It is also used for public relations expenses.

The burden placed upon GVDD's system by urban storm water is different than that caused by rural storm water. Less than 1 mile of the 258 miles of drains do not handle

seep and IRF and only handle storm water. The potential exists for all of the facilities to handle all 3 types of drainage – seep, IRF and storm water.

The Fee imposed pursuant to Resolution 2015-107 is for the purpose of paying for the operation, repair, maintenance, improvement, renewal, replacement and reconstruction of Facilities receiving Regulated water. Mr. Ryan testified that the Fee would be used to update, improve, repair and maintain existing Facilities. In short, GVDD will utilize the Fee to make capital improvements to existing facilities that carry seep, IRF and storm water.

GVDD's Master Financial Plan identifies various capital improvement projects GVDD intends to undertake over the next 15 years with revenue generated from the Fee. The capital improvement projects will help provide a sufficient system of drains and drainage works to manage storm water. And, indeed, the capital improvement projects GVDD has identified it wants to undertake would lessen the burden on its existing facilities, benefiting both seep and IRF.

In spite of urban drainage projects targeting storm water, when residents in urban areas irrigate their lawns, plants, shrubbery and other landscaping around their homes, the irrigation runs off of driveways, sidewalks around residences and commercial buildings. This irrigation water will flow into the new closed storm water drains being proposed to be installed as part of the capital improvement projects. These new storm water systems will also be handling irrigation water from urban areas within the boundaries of the GVDD and not just storm water or Regulated water.

In short, GVDD has not shown that the Fee bares a reasonable relationship to the regulation of Regulated water. Instead, the Fee benefits the general purposes of GVDD and helps it meets the general purposes of its statutory obligations, which it has failed to meet since 1983. Even the reimbursement rates used by GVDD from the Fee are imprecise and arbitrary. GVDD cannot say precisely how the Fee relates to water activity related to Regulated water, storm water (generally), seep and IRF in any particular manner. The court finds the primary purpose of the Fee is to raise general revenue to defray the general costs of government and, therefore, it violates TABOR without voter approval.

Without question, storm drainage improvement fees have been held to be fees for direct services that are not taxes. These cases are distinguishable. In *Zelinger*, (a pre-TABOR case) the City Council of Denver enacted Ordinance 160, which included "a provision for a service charge *to all owners of property* in the County to pay for the operation, maintenance, improvement and replacement of the City's storm drainage facilities." 724 P.2d at 1357-58. First, the primary purpose of the City of Denver as municipality is not to provide storm drainage facilities; rather, this was a charge against the users of an improvement. *Id*. at 1358. Unlike the Fee here, this included all property owners in Denver and not just certain property owners. Further, the funds were not being raised "for general municipal purposes as a sole or principal objective." *Id*. at 1359. Here, I first hold that GVDD does not possess any such broad regulatory police power and, instead, its general governmental purpose is to construct, operate and maintain systems of drains and drainage works sufficient to reclaim and protect all lands and property within GVDD from seep, waste and storm waters. C.R.S. § 37-31-119. Thus,

unlike *Zelinger*, the Fee here is for the general purposes of raising revenue for GVDD's general governmental use.

Similarly, in *Bloom* (another pre-TABOR case), the City of Ft. Collins's primary governmental function was not maintaining local streets. Instead, it was a regulatory police power exercised to protect the health, safety and welfare of the city. 748 P.2d 304, 305 (Colo. 1989). The fee was "for the purpose of defraying the cost of a particular governmental service." *Id*. at 308. Further, the "ordinance is reasonably designed to defray the cost of the particular service rendered by the municipality" and not for general costs of government. *Id.*

D. TABOR Exempt Enterprise

The District contends the District Enterprise is appropriately created under C.R.S. § 37-45.1-102. An enterprise for purposes of TABOR is a "government-owned business authorized to issue its own revenue bonds and receiving under 10% of annual revenue in grants from all Colorado state and local governments combined." *Nicholl v. E-470 Pub. Highway Auth.*, 896 P.2d 859, 867 (Colo. 1995) (quoting Colo. Const. art X, § 20(2)(d)). If the District Enterprise is an enterprise, it is exempt from TABOR. Colo. Const. art X, § 20(2)(b). Whether an entity is "government owned" and a "business" are subject to the ordinary meaning and understanding of the terms. *Nicholl,* 896 P.2d at 868. "Government owned" means owned by a government entity. *Id*. Here, GVDD. It is undisputed the District Enterprise is government owned.

The term, "Business," "is generally understood to mean an activity which is conducted in the pursuit of benefit, gain or livelihood." *Id*. Collecting fees in order to

provide or gain a benefit is consistent with a business. *Id.* Collecting or levying a tax on every transaction or levying general taxes is inconsistent with the characteristics of a business. In *E-470 (*or *Nicholl)*, the enterprise collected tolls and user fees to fund the limited fee-for-service tollway. *Id*. But it also had taxing authority and it could impose that authority "with no direct relation to services provided." *Id*. at 869. Given this, it was a "district" and not an "enterprise." *Id*.

GVDD's position is simple in this case: the District Enterprise does not have taxing authority within the Resolution and it derives all of its revenue from the Fee. The problem, at the outset, is that the court has already determined that the Fee is in the nature of a tax and not in the nature of a Fee. The Fee is also imposed by GVDD, not the Enterprise, for the benefit of the District Enterprise. It would frustrate the purposes of the TABOR limitation on Enterprise revenue if GVDD could impose a tax, call it a fee, and allow the Enterprise to collect it on order to escape the limitation on revenue from to under 10% from all Colorado state and local governments combined. At trial, there was testimony that the Enterprise falls under the 10% annual revenue threshold; however, GVDD's imposed tax benefits only the Enterprise. It, essentially, receives nearly all of its funding from the tax imposed by GVDD. This places it well-above the threshold. Even so, it is clear from the analysis above that the revenue generated by virtue of this ostensible fee benefits GVDD as a whole, since its statutorily required to manage storm water, regardless of whether that storm water originates in urban or rural areas. The Enterprise, on the other hand, was established arguably only to address the burdens on the system created by urban storm water, or what GVDD has labeled "Regulated water."

The allocation of the revenue for projects through GVDD renders the label "Enterprise," just that: a label created by GVDD to avoid the mandates and prohibitions of TABOR.

Assuming, *arguendo*, the Fee is an enterprise fee. The District Enterprise, while an effort to operate as a business, is unlike a business. It is intended, essentially, to carryout the statutory purpose of GVDD in a manner that eclipses GVDD. It carries out every function GVDD carries out. It, however, also seeks to do so for the benefit of "the Grand Valley" and not just within GVDD's territorial limits. The expanse of its Fee, as discuss, *infra*, is unlike a business providing a specific service and for which the fee offsets the costs of those services.

The District Enterprise, as it is constituted, is more akin to a government that is as a business and thus, is not a TABOR exempt enterprise.

E. FIFs

The court discussed the FIFs separate and apart from the Base Rate Fee. The Complaint in this case specifically challenges the fees invoiced to the Plaintiffs by the Defendant. This was the Base Rate Fee and not the FIFs. The Counterclaim, likewise, seeks a declaration that the fees charged to the Plaintiffs, specifically, the Base Rate Fee is constitutional. Thus, neither party raises the issue of the validity of FIFs, and, thus, I do not consider FIFs as part of this order. While the parties use the broader term "Regulated Water Fees" at various time, the legal claims pleaded and the facts as presented focused on the Base Rate and not on the one-time fee charged of new users to the system. The court renders no judgment as to the constitutionality of the FIFs imposed by the Resolution.

VI.

Conclusion

The nature of GVDD as a limited purpose district does not impose upon it broad regulatory police power authority. In enacting this particular Fee, GVDD seeks to raise general revenue that, as a practical matter, raises revenue for general governmental use – for meeting the general purposes for which GVDD was established and to which is it is statutorily mandated. Given this, the Fee cannot stand.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT

The Regulated water Fee (specifically the Base Rate Fee at issue) charged by GVDD is a tax subject to and in violation of the voter approval requirements of TABOR and, therefore, it runs afoul of TABOR and is unconstitutional beyond a reasonable doubt.

For the reasons set forth above, Plaintiffs have demonstrated actual success on the merits, irreparable harm will result unless an injunction is issued, that threatened injury outweighs the harm the injunction may cause to the opposing party and an injunction will not adversely affect the public interest as the success on the merits here is the determination of a Fee imposed in violation of TABOR. *Langlois v. Bd. of Cty. Comm'rs of El Paso*, 78 P.3d 1154, 1158 (Colo. App. 2003).

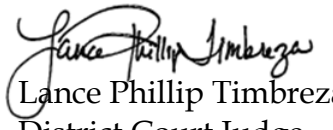
The court permanently enjoins GVDD from charging or collecting the Regulated water Fee (specifically the Base Rate Fee) as provided for in Resolution 2015-107 against Plaintiffs.

The court enters judgment in favor of Plaintiffs on their claims and in Plaintiffs' favor on Defendant's counterclaims.

Any requests for attorney fees, interests and costs shall be submitted within 21 days of the date of this order.

Dated:June 5, 2018

BY THE COURT



Lance Phillip Timbreza
District Court Judge