IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

High Street Buildings LLC, Plaintiff, v. Lisa A. Atkins, et al., Defendants.	No. CV-18-03567-PHX-SRB **ORDER**

Plaintiff High Street Buildings LLC ("Plaintiff" or "HSB") brought this lawsuit alleging that the Arizona State Land Department ("ASLD") improperly delegated its power over public lands to a private developer who used that power to violate Plaintiff's property rights. Defendants CPF Vaseo Associates, LLC ("CPF") and Lisa A. Atkins ("Atkins")[1] have each filed a motion to dismiss. (*See* Doc. 17, CPF Mot. to Dismiss ("CPF Mot."); Doc. 30, Atkins Mot. to Dismiss ("Atkins Mot.").)[2] The Court heard oral argument on both motions on February 5, 2019. (Doc. 56, Minute Entry.) For the following reasons, the Court dismisses Plaintiff's federal claims and declines to exercise supplemental jurisdiction over Plaintiff's remaining state law claims.

I. BACKGROUND

This case concerns ASLD's management of 5,700 acres of trust lands located in a Northeast Phoenix development known as Desert Ridge. In 1981, the Arizona State

[1] Atkins is named in her capacity as Land Commissioner for ASLD.
[2] Defendant ROI Properties filed a Joinder in support of Vaseo's motion. (*See* Doc. 26, Def. ROI Properties, LLC's Joinder in CPF Mot.) Atkins also joins Vaseo's motion. (*See* Atkins Mot. at 2, 7.)

Legislature passed the Urban Lands Act ("ULA"), which permitted ASLD to plan and zone certain trust lands for urban development. *See* A.R.S. §§ 37-331–37-338. In the late 1980s, ASLD engaged Northeast Phoenix Partners ("NPP") to assist the agency in planning and zoning Desert Ridge. (Doc. 12, Am. Compl. ¶ 19.) ASLD and NPP developed—and on July 18, 1990, the Phoenix City Council adopted—the Desert Ridge Specific Plan. (*Id.*) Part of the Specific Plan included zoning a portion of Desert Ridge, known as the Commercial Core, as C-2. (¶ 20.) C-2 zoning permits a variety of commercial uses for property owners, including hotel, office, retail, restaurant, and multi-family residential uses. (*Id.*) ASLD later auctioned a "Master Lease" for the 332-acre Commercial Core, which NPP ultimately purchased. (¶¶ 22–25.)

Included in the Master Lease is the right of NPP to be the "master developer of Desert Ridge." (¶ 26.) These rights included that all future amendments to the Specific Plan first be approved by NPP. (*Id.*) NPP and ASLD also executed a set of Covenants, Conditions, Restrictions, and Easements ("Master CC&Rs") governing all of Desert Ridge. (¶ 27.) The Master CC&Rs granted NPP control over certain aspects of Desert Ridge's development. (*Id.*) Years later, ASLD approved and NPP recorded "Core CC&Rs" to govern the Commercial Core. (¶ 28.) The Core CC&Rs imposed additional requirements on lessees of Core land, including master developer approval for "[a]ll proposed site plans, subdivision plats and condominium declarations for a Parcel, or portion thereof." (¶ 29.) They additionally prohibit Core lessees from filing "applications for zoning, rezoning, or to amend the Desert Ridge Master Development Plan" without prior approval from the master developer. (*Id.*) Requests for approval must be answered within 30 days; otherwise, the request "shall be deemed approved." (¶ 54.)

Plaintiff's lawsuit concerns its attempt to develop five undeveloped acres within its 25-acre leasehold in the Commercial Core (the "HSB Property"). (*See* ¶¶ 44–45.) Plaintiff leased the HSB Property subject to the Core CC&Rs, as well as a Property Development Agreement ("PDA") that Plaintiff's predecessor negotiated to ease development restrictions on that parcel. (¶ 46.) On April 20, 2018, Plaintiff submitted approval requests

to construct a hotel, office building, and parking structure on the five undeveloped acres. (¶ 49.) On June 15, Plaintiff received a letter denying its request "without prejudice" citing ongoing bankruptcy litigation that would affect the eventual holder of the master developer rights. (*See* ¶ 59.) Argument then ensued concerning Plaintiff's right to consider the request approved under the Core CC&Rs' 30-day deadline. (*See* ¶¶ 60–64.)

When the bankruptcy action failed to resolve the disagreement about the parties' obligations under the Core CC&Rs and PDA, Plaintiff brought this action. On October 26, 2018, Plaintiff filed suit alleging several constitutional, statutory, and common law claims that aim to either enforce its interpretation of the Core CC&Rs or deem the underlying master developer rights unlawful. (*See generally* Doc. 1, Compl.) Plaintiff filed an Amended Complaint on November 19. (*See* Am. Compl.) CPF and Atkins now seek dismissal for lack of subject matter jurisdiction and for failure to state a claim.[3] (*See generally* CPF MTD; Atkins MTD.)

II. LEGAL STANDARDS

A. Rule 12(b)(1) – Lack of Subject Matter Jurisdiction

Federal Rule of Civil Procedure 12(b)(1) allows parties to move to dismiss for lack of subject matter jurisdiction. As courts of limited jurisdiction, federal courts may only hear cases as permitted by Congress and the U.S. Constitution. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). And "it can never be forfeited or waived." *United States v. Cotton*, 535 U.S. 625, 630 (2002). Federal jurisdiction is thus presumed lacking, leaving it to the claimant to demonstrate otherwise. *Kokkonen*, 511 U.S. at 377.

"A Rule 12(b)(1) jurisdictional attack may be facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A facial attack "asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Id.* The court in turn accepts the plaintiff's allegations as true and draws all reasonable inferences in the plaintiff's favor. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th

[3] Defendants Gray Phoenix Desert Ridge II LLC, Bruce W. Gray, Gray/Western Development Company, Gray Development Group LLC, and Gray Guarantors II, LLC have already answered the Amended Complaint. (*See* Doc. 20, Answer.)

Cir. 2014). From there, the court "determines whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction." *Id.* A factual attack challenges the underlying factual allegations by introducing evidence beyond the pleadings. *Id.* In either instance, the party asserting jurisdiction bears the burden of proof. *Industrial Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir. 1990).

B. Rule 12(b)(6) – Failure to State a Claim

Rule 12(b)(6) dismissal for failure to state a claim can be based on either (1) the lack of a cognizable legal theory or (2) insufficient facts to support a cognizable legal claim. *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011). In determining whether a claim can be sustained, "[a]ll of the facts alleged in the complaint are presumed true, and the pleadings are construed in the light most favorable to the nonmoving party." *Bates v. Mortg. Elec. Registration Sys., Inc.*, 694 F.3d 1076, 1080 (9th Cir. 2012). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). But "the nonconclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). In other words, the complaint must contain enough factual content "to raise a reasonable expectation that discovery will reveal evidence" of the claim. *Twombly*, 550 U.S. at 556.

III. DISCUSSION

The Amended Complaint includes the following claims:

(1) ASLD violated Plaintiff's due process and equal protection rights under the Fourteenth Amendment of the U.S. Constitution and under the Arizona Constitution by delegating state authority in the form of master developer rights (Am. Compl. ¶¶ 75–83);

(2) ASLD's creation of master developer rights violate the federal Enabling Act

and Arizona Constitution by unlawfully encumbering trust lands (¶¶ 84–95);

(3) ASLD's creation of master developer rights exceeds its statutory authority under the ULA (¶¶ 96–105);

(4) those defendants holding the master developer rights violated their duties of good faith and fair dealing to Plaintiff by failing to comply with the terms of the Core CC&Rs and PDA (¶¶ 106–17);

(5) pursuant to 42 U.S.C. § 1983, ASLD (and the master developer rightsholders) violated the Arizona Constitution, the Fourteenth Amendment of the U.S. Constitution, and the Enabling Act by delegating (or improperly exercising) ASLD's authority in the form of master developer rights (¶¶ 118–26); and

(6) CPF tortiously interfered with Plaintiff's contract to have a third-party purchaser develop a hotel on a portion of Plaintiff's parcel (¶¶ 127–39).

The pending motions target Plaintiff's federal claims.

A. Subject Matter Jurisdiction

CPF begins by arguing that Plaintiff is "attempt[ing] to create federal claims out of a garden variety real estate dispute." (CPF Mot. at 7; *see also* Doc. 47, Reply of CPF in Supp. of CPF Mot. ("CPF Reply") at 5.) Put another way, CPF contends that Plaintiff's federal claims do not actually "aris[e] under" federal law. 28 U.S.C. § 1331. Because this argument goes to its subject matter jurisdiction, the Court begins there. *See Bell v. Hood*, 327 U.S. 678, 683 (1946) ("Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy.").

A case "aris[es] under" federal law if "a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 27–28 (1983). When a complaint "is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions . . . must entertain the suit." *Bell*, 327 U.S. at 681–

82. Those two exceptions are "[1] where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or [2] where such a claim is wholly insubstantial and frivolous." *Id.* at 682–83. Plaintiff summarily dismisses CPF's jurisdictional challenge as meritless. (Doc. 36, Resp. to CPF Mot. ("CPF Resp.") at 7–8.) The Court does not.

1. Enabling Act

a. Count Two

Count Two alleges that the master developer rights violate the New Mexico-Arizona Enabling Act of 1910. *See* Pub. L. No. 61-219, 36 Stat. 557 (1910). The Act paved the way for Arizona's admission to the Union by granting the new state millions of acres of land to be held in trust primarily for the benefit of public education. *See Pierce v. Ducey*, No. CV-16-01538-PHX-NVW, 2018 WL 1472048, at *3–5 (D. Ariz. Mar. 26, 2018) (discussing the Act's passage). As this Court recently observed:

> The Enabling Act put teeth into that trust. It required the State to lease or dispose of those lands only to support permanent investment funds for the corresponding trust purpose. It forbade mortgages and required sales and leases to the highest bidder at public auction after advertisement unless the leases were short term. The Act further commanded that any "sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed . . . not made in substantial conformity with the provisions of this Act shall be null and void," and it required the Attorney General of the United States to enforce the Act.

Id., at *4 (citations omitted).[4]

Plaintiff alleges that the creation, delegation, and enforcement of the master developer rights was a breach of trust under the Enabling Act. (¶¶ 84–95, 124.) But it does not inevitably follow that there is a federal cause of action by which Plaintiff may enforce it. This rings particularly true given the Act's explicit grant of enforcement power to the

[4] The parties in *Pierce* did not dispute whether there was federal question jurisdiction. *See* 2018 WL 1472048, at *17–18. Even if they had, the jurisdictional basis there is absent here. Central to *Pierce* was the "meaning and effect of the 1999 amendments to the Enabling Act, particularly whether Congress abrogated its oversight authority over changes in the school trust lands fund." *Id.*, at *18. The focus of Plaintiff's claim, by contrast, is whether ASLD violated its trust obligations in its development and administration of the master developer rights—that is, an ordinary breach of trust claim. (*See* Am. Compl. ¶ 94 ("This breach of trust violates the Enabling Act and the Arizona Constitution.").)

Attorney General. *See* 36 Stat. at 575 ("It shall be the duty of the Attorney-General of the United States to . . . enforce the provisions hereof relative to the application and disposition of the [ ] lands."). More concretely, the Ninth Circuit held long ago that the Enabling Act does not create a federal cause of action for breaches of the trust. *Jones v. Brush*, 143 F.2d 733, 735 (9th Cir. 1944). "Congress instead gave citizens an interest in property, which Congress knew citizens could protect in court under principles of property law and trust law." *Pierce*, 2018 WL 1472048, at *12. Even if the alleged breach of trust requires interpretation of the Act, "it does not follow, nor is it true, that the matter in controversy arose under the Act." *Jones*, 143 F.2d at 735. Count Two thus appears to lack the jurisdictional hook on which to hang this suit.

This finding is buttressed by the Supreme Court's long-held antipathy toward the idea that a congressional act granting title to land engenders a federal question in disputes over that land. In *Shulthis v. McDougal*, the Court observed that

> [a] suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western states would so arise, as all titles in those states are traceable back to those laws.

225 U.S. 561, 569–70 (1912). This rule "has been repeatedly reaffirmed by the Supreme Court, the Ninth Circuit, and other lower courts." *Virgin v. Cty. of San Luis Obispo*, 201 F.3d 1141, 1143 (9th Cir. 2000) (collecting cases). And "there is no Supreme Court or Ninth Circuit holding to the contrary." *Id.* at 1144. Neither the Amended Complaint nor Plaintiff's briefing address, much less refute, this default rule. The Court concludes that Count Two does not state a federal cause of action.

b. Count Five

i. Federal Question

Count Five, on the other hand, does. Plaintiff relies in part on the Enabling Act in

seeking relief under 42 U.S.C. § 1983. (Am. Compl. ¶ 124.) Section 1983 provides a remedy for violations of federal statutory rights. *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). It may do so even where the statute itself creates no cause of action. *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981). Still, "a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing v. Freestone*, 520 U.S. 329, 340 (1997). Congress must have intended to create an enforceable right. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283–84 (2002).

Courts employ a three-factor test in assessing whether such a right exists—namely, a court must ask whether:

> (1)"Congress ... intended that the provision in question benefit the plaintiff"; (2) the plaintiff has "demonstrate[d] that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence"; and (3) "the statute ... unambiguously impose[s] a binding obligation on the States," such that "the provision giving rise to the asserted right ... [is] couched in mandatory, rather than precatory terms."

Ball v. Rodgers, 492 F.3d 1094, 1104 (9th Cir. 2007) (quoting *Blessing*, 520 U.S. at 340–41). If all three factors are met, the right is "presumptively enforceable by § 1983." *Id.* at 1116 (quotation omitted). As is the case here.

The Ninth Circuit's Hawaiian Admission Act[5] jurisprudence resolves the issue. Like the Enabling Act, the Admission Act granted the new state lands to be held in trust for specific public purposes. 73 Stat. at 6. It provided that "use for any other object shall constitute a breach of trust for which suit may be brought by the United States." *Id.* And it, too, has long been understood not to include a private right of action for breach of trust. *See Keaukaha-Panaewa Cmty. Ass'n v. Haw. Homes Comm'n*, 588 F.2d 1216, 1220 (9th Cir. 1978) ("*Keaukaha I*"). For nearly as long, the Ninth Circuit has repeatedly recognized that § 5(f) of the Admission Act created a right enforceable by trust beneficiaries under § 1983. *See Keaukaha-Panaewa Cmty. Ass'n v. Haw. Homes Comm'n*, 739 F.2d 1467, 1471–72 (9th Cir. 1984) ("*Keaukaha II*"); *Price v. Akaka*, 3 F.3d 1220, 1225 (9th Cir.

[5] Pub. L. 86–3, 73 Stat. 4 (1959).

1993). Simply put, "Congress enacted the Admission Act, a federal public trust, which by its nature creates a federally enforceable right for its beneficiaries to maintain an action against the trustee in breach of the trust." *Akaka*, 3 F.3d at 1225.

Blessing and *Gonzaga* did not alter this understanding. *See Day v. Apoliona*, 496 F.3d 1027, 1034–38 (9th Cir. 2007) (reaffirming *Akaka* after examining the effect of those decisions). Salient was the Admission Act's use of the term "trust." Reaffirming *Akaka*, the Ninth Circuit observed that

> the term "trust," when paired with the statutory reference to "breach of trust" actions and in light of the common law consequences that attached to the use of the term, is reasonably read to indicate plainly that the trustees have a duty not to breach the trust and that the trust's beneficiaries have corresponding rights to enforce it with regard to each expenditure of § 5(f) funds.

Id. at 1038. As the court saw it, *Akaka* merely followed the longstanding rule that statutes borrowing terms of art are presumed to incorporate the "cluster of ideas" they embody, including their judicially understood meanings. *Id.* (quotation omitted). So too here.

Nothing in the Enabling Act urges deviation from this principle. The statute is not so structurally exceptional as to justify a more restrictive view of the rights afforded to its beneficiaries than to those under the Admission Act. Nor did Congress include any instruction that the term "trust" be construed to encompass anything less than the rights and duties that ordinarily accompany one's creation. *See id.* The Court concludes that Count Five's reliance on the Enabling Act presents a federal question.

ii. Standing

Plaintiff nevertheless lacks standing to enforce ASLD's duties as trustee of state trust lands.[6] Although the parties do not address standing in their briefing, the Court must

[6] The Enabling Act claim in Count Five does not pertain to CPF. First, the only CPF-related allegation in Count Five is limited to the constitutional component of Plaintiff's § 1983 claim. Specifically, Plaintiff alleges that CPF "acted under the color of state law by exercising these rights improperly delegated by ASLD to block and unreasonably interfere with HSB from developing its own property, *in violation of the Arizona Constitution and the Fourteenth Amendment of the United States Constitution*." (Am. Compl. ¶ 123 (emphasis added).) Second, Count Two—upon which Plaintiff bases the Enabling Act element of its § 1983 claim—alleges that ASLD violated its fiduciary duty as trustee in the creation, delegation, and failure to recoup adequate compensation for the master developer rights. (¶¶ 84–95.) It does not allege that CPF had a duty under the Enabling Act, much

consider it here. *See Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) ("When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented.") The federal judicial power extends only to "Cases" and "Controversies." U.S. Const., Art. III, § 2. Standing doctrine exists to ensure that federal courts do not overstep this constitutional limit. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). To establish standing, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.*

Plaintiff's Enabling Act claim relies, at least in part, on its status as an Arizona taxpayer. The Supreme Court has long held that a plaintiff's status as a taxpayer is ordinarily insufficient to confer standing in federal court. *See Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 134 (2011). This rule is not without exception. *See id.* at 138. The Supreme Court has nevertheless "refused to confer standing upon a state taxpayer absent a showing of 'direct injury,' pecuniary or otherwise." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613–14 (1989) (quoting *Doremus v. Bd. of Educ. of Hawthorne*, 342 U.S. 429, 434 (1952)). Plaintiff makes no such showing here.

Plaintiff alleges that ASLD breached its duty as trustee by failing to recover fair market value for the master developer rights and by allowing those rights to be used to arbitrarily encumber the development of trust lands. (¶¶ 91–94.) Even assuming these actions have deprived the trust fund of revenue, the resulting injury to Plaintiff depends upon "pure speculation." *See ASARCO Inc.*, 490 U.S. at 614. The recovery of fair market value for the master developer rights does not readily entail relief for Plaintiff, either as a taxpayer or as a lessee. Increased funding could mean a tax break; it might just as easily be allocated as additional school funding. *See id.* The connection to Plaintiff's development plans is similarly tenuous: the supposedly rightful purchaser of those rights has no greater incentive to grant Plaintiff's requests. The same uncertainty plagues any injury attributable

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less breached that duty. Finally, Plaintiff makes no argument to the contrary in its briefing. The Court thus has no basis to conclude that Count Five applies to CPF insofar as it alleges a violation of the Enabling Act.

to the allegedly deficient standards governing the master developer rights. The Court can only speculate whether stricter safeguards would likely benefit Plaintiff. Such "remote, fluctuating and uncertain" results prevent the Court from concluding that success on this claim would likely redress any injury Plaintiff attributes to this alleged breach of trust. *See id.* (quotation omitted). Plaintiff therefore lacks standing to bring the Enabling Act component of Count Five.

2. Constitutional Claims (Counts One and Five)

Plaintiff's constitutional claims present a federal question. Plaintiff alleges that the master developer rights delegate state authority to a private party in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[7] (Am. Compl. ¶¶ 75–83 (Count One), 118–26 (Count Five).) CPF argues that Plaintiff fails to allege both the deprivation of a specific federal right and state action. (*See* CPF Mot. at 8–10, 13–14; CPF Reply at 7–11.) Though couched as jurisdictional arguments, these are challenges to the sufficiency of Plaintiff's allegations, not to the presence of a federal question.

Plaintiff's focus on the improper delegation of state power might initially suggest a separation of powers argument. Were that so, the U.S. Constitution would offer little recourse. *See Uphaus v. Wyman*, 360 U.S. 72, 100 (1959) ("[M]aintenance of the separation of powers in the States is not, in and of itself, a concern of the Federal Constitution."); *Ohio ex rel. Bryant v. Akron Metro. Park Dist. for Summit Cty.*, 281 U.S. 74, 79 (1930) (finding no federal question in allegation that state statute improperly delegated legislative power to judicial branch). But in this case, it does.

The Due Process Clause of the Fourteenth Amendment has long placed limits on the delegation of state power to private parties. *See General Elec. v. N.Y. State Dep't of Labor*, 936 F.2d 1448, 1454 (2d Cir. 1991) (collecting Supreme Court cases). Only those delegations which place adequate limitations on the private party's exercise of power pass muster. *Cf., e.g.*, *Washington ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 121–

[7] Plaintiff does not distinguish between its due process and equal protection theories. Its briefing relies exclusively on the due process principle embodied in the private nondelegation doctrine line of cases discussed herein. The Court accordingly treats these as a single constitutional claim.

22 (1928) (striking down delegation of zoning power to landowners because ordinance lacked opportunity for review and allowed private parties to exercise power arbitrarily); *Eubank v. City of Richmond*, 226 U.S. 137, 143–44 (1912) (rejecting similar ordinance for lack of governing standard and vulnerability to abuse). More specifically, "the state may not constitutionally abdicate or surrender its power to regulate land-use to private individuals without supplying standards to govern the use of private discretion." *Schulz v. Milne*, 849 F. Supp. 708, 712 (N.D. Cal. 1994). By alleging that the master developer rights run afoul of this rule, Plaintiff's constitutional claims implicate a federal question.

B. Legally Cognizable Constitutional Claims (Counts One and Five)

They do not, however, allege a cognizable transgression of this limitation. Plaintiff contends that the master developer rights violate due process by requiring master developer approval before lessees like Plaintiff may petition zoning and land use authorities. (CPF Resp. at 11.) Analogizing its claims to those in *Eubank* and *Roberge*, Plaintiff argues that these rights empower the master developer "to function as a self-interested gatekeeper, able to block the access of competing parcels owners to zoning and land use authorities." (*Id.* at 13.) Neither case parallels this one.

In *Eubank*, the Court struck down an ordinance that allowed certain property owners along city streets to decide, within a certain range, where to establish the building set-back line for their street. This arrangement allowed some property owners to curtail both the extent and kind of use to which other owners could put their property. *See* 226 U.S. at 143. All without recourse for the affected owners who naturally found themselves in the minority. *See id.* By giving property owners the power "to virtually control and dispose of the property rights of others" without some governing standard, the ordinance ran afoul of the Fourteenth Amendment's limitation on private delegations of legislative power. *See id.* at 143–44. So, too, in *Roberge*. There the Court invalidated an ordinance requiring the consent of a two-thirds majority of neighboring property owners before an owner could build a philanthropic home for children or the elderly. *See* 278 U.S. at 118. That ordinance, like the one in *Eubank*, omitted any guiding standard for these decisions or right of review

for those whose requests were denied. *Id.* at 121–22. Once again, the ordinance's possible tolerance of arbitrary limitations on property rights ran afoul of the Fourteenth Amendment. *See id.*

The due process principle recognized in *Eubank* and *Roberge* specifically prohibits the unfettered delegation of state authority to unaccountable private parties. Namely, "a legislative body may not constitutionally delegate to private parties the power to determine the nature of rights to property in which other individuals have a property interest, without supplying standards to guide the private parties' discretion." *Gen. Elec. Co.*, 936 F.2d at 1455. These cases do not place an absolute bar on the delegation of state power to private parties: only those that offend due process. *See Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 555 (9th Cir. 2004) (explaining that "delegated authority must satisfy the requirements of due process"); *see also Young v. City of Simi Valley*, 216 F.3d 807, 820 (9th Cir. 2000) (striking down zoning ordinance giving citizens veto power that could be used "to block adult uses for the purpose of suppressing [unpopular speech]"). This includes due process in both its substantive and procedural forms. The master developer rights offend neither.

1. Substantive Due Process

To violate substantive due process, the master developer rights must lack "any reasonable justification in the service of a legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). Only an "egregious or arbitrary" denial of a zoning application or building permit reaches this level. *See City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 198 (2003). Neither aptly describes the requirement that Plaintiff, as a lessee of property subject to those rights, first obtain consent from the master developer before filing such an application.

The condition is, on its face, "eminently rational." *See id.* at 199. Arizona law gives ASLD the power to auction off development rights in trust lands. A.R.S. § 37-258.01. ASLD may institute development plans that include, among other things, "[p]rovisions for needed zoning and land use control mechanisms." § 37-334(D)(6); *see also* § 37-334.01(B)(1) ("A development plan approved for a master plan area may propose . . .

[d]esign guidelines and covenants, conditions and restrictions."). And it may sell and lease trust lands subject to such a development plan and its attendant covenants and restrictions. *See* § 37-335(G)–(I). Pursuant to its statutory authority, ASLD planned and zoned Desert Ridge, which included the Commercial Core; it sold the Master Lease for the Commercial Core, which included the rights of "master developer of Desert Ridge," to NPP at auction; and it approved the subsequent recording of the Core CC&Rs, which implemented the pre-approval condition at issue here. Unlike the ordinance in *Roberge*, which gave individuals with no ownership interest in the plaintiff's property the power to impede that property's development, the pre-approval condition wrought by this statutory scheme ensures that development rightsholders retain the ability to steer development of the property subject thereto. *See* 226 U.S. at 143; *see also Eubank*, 278 U.S. at 118. There is nothing inherently arbitrary, then, in requiring the lessee of such property to clear its development plans with the master developer before engaging the permitting or rezoning process.

The Court meanwhile finds nothing in Plaintiff's briefing that might reasonably be considered an as-applied challenge to the master developer rights. Plaintiff's sole aim appears to be the invalidation of the master developer rights in their entirety. (*See* Resp. at 10–14 (arguing that master developer rights inherently violate the private nondelegation doctrine); *see also* Am. Compl. ¶¶ 82–83 (requesting declaratory judgment voiding master developer rights and permanent injunction against their enforcement), 125–26 (same).

2. Procedural Due Process

Plaintiff fares no better in a procedural sense. Plaintiff argues that ASLD's delegation of authority in the form of master developer rights subjugates lessees' property rights to the self-interested whims of the master developer. Yet Plaintiff is not without administrative and judicial recourse.

The master developer rights pass procedural muster because state law furnishes adequate standards by which ASLD must administer trust lands and their appurtenant development rights.[8] It also provides for judicial review. Contrary to the ordinances in

[8] State law includes a process by which one may protest the terms of an auction, sale, or lease of such lands and their associated development rights. A.R.S. § 37-301(A). An order

Roberge and *Eubank*, the master developer rights scarcely preclude review of a decision denying a request for approval, leaving Plaintiff or any other lessee defenseless against the arbitrary whims of the master developer. To the contrary, a lessee who disagrees with a denied request may exhaust any remedies available under the lease or CC&Rs, and then sue the master developer. *See Garza v. Gama*, 379 P.3d 1004, 1008 (Ariz. Ct. App. 2016) ("Implied in every contract is a duty of good faith and fair dealing that prohibits a party from doing anything to prevent other parties to the contract from receiving the benefits and entitlements of the agreement.") (quotation omitted). Exactly as Plaintiff does in Count Four. (*See* Am. Compl. ¶¶ 106–17 (alleging breach of duty of good faith and fair dealing).) State law thus affords Plaintiff ample process to challenge arbitrary decisions by the master developer. *See Moore v. City of Kirkland*, No. C05-2062JLR, 2006 WL 1993443, at *5 (W.D. Wash. July 14, 2006) (finding no procedural due process violation where city's building permit process required homeowners' association approval before permit application affecting association's ownership interest could be approved for condo owner).

The Court acknowledges that this arrangement may prove inconvenient for lessees in Plaintiff's position. The master developer might, as alleged here, fail to honor the 30-day deadline or withhold approval for an arbitrary reason, compelling lessees to resort to "the cumbersome process of state court review." *See id.* But that is a byproduct of the "inherent compromise" of leasing property subject to master developer rights, which, like a common interest community, forces lessees to "give up a certain degree of freedom of choice which [they] might otherwise enjoy in separate, privately owned property." *See id.* (quoting *Shorewood W. Condo. Ass'n v. Sadri*, 992 P.2d 1008, 1011 (Wash. 2000)); *accord Grovenburg v. Rustle Meadow Assocs., LLC*, 165 A.3d 193, 208 (Conn. App. Ct. 2017) ("In purchasing units in a common interest community, owners forfeit certain liberties with respect to the use of their property by voluntarily consenting to restrictions imposed thereon, as specified in the declaration of the community."). It is not a subversion of due

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denying a protest is subject to review "through a special action to the court of appeals or supreme court." § 37-301(C). Additionally, as previously discussed, the Enabling Act's establishment of a trust creates a fiduciary duty enforceable by trust beneficiaries under both federal and state law.

process. Provided they are duly recorded, covenants and restrictions like those contained in the Core CC&Rs constitute a contract among the property's owners and interest holders. *See Arizona Biltmore Estates Ass'n v. Tezak*, 868 P.2d 1030, 1031 (Ariz. Ct. App. 1993); *see also* Restatement (Third) of Property, Servitudes § 3.1 cmt. i (Am. Law. Inst. 2000) ("The policies favoring freedom of contract, freedom to dispose of one's property, and protection of legitimate-expectation interests nearly always weigh in favor of the validity of voluntarily created servitudes."). Because the Amended Complaint fails to state a legally cognizable due process violation, the Court dismisses the constitutional claims alleged in Counts One and Five.

C. Supplemental Jurisdiction Over Plaintiff's Remaining Claims

The Court finally dismisses Plaintiff's remaining state law claims. Supplemental jurisdiction is properly denied when "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). Courts are not required to dismiss such claims. *Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1000 (9th Cir. 1997) (en banc) ("That state law claims *should* be dismissed if federal claims are dismissed before trial . . . has never meant that they *must* be dismissed.") (quotation and citation omitted). Even so, courts have come to recognize that "in the usual case in which all federal claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988); *accord Power Road-Williams Field LLC v. Gilbert*, 14 F. Supp. 3d 1304, 1313 (D. Ariz. 2014).

The Court is so inclined here. The dismissal of Plaintiff's federal claims eliminates the basis for the Court's federal question jurisdiction. As such, the resolution of Plaintiff's remaining state law claims is best left to the expertise of Arizona courts. Lastly, given the early stage of litigation, dismissal will benefit the federal system by conserving its scarce resources without unnecessary inconvenience to the parties.

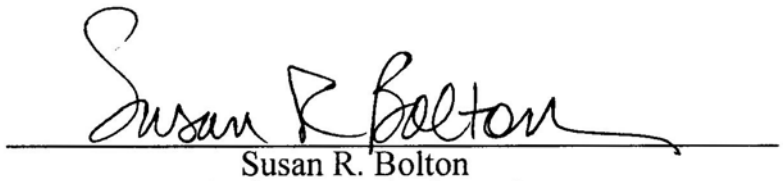
IT IS THEREFORE ORDERED granting CPF's Motion to Dismiss (Doc. 17) as to Plaintiff's federal claims against CPF.

IT IS FURTHER ORDERED granting Atkins' Motion to Dismiss (Doc. 30) as to Plaintiff's federal claims against Atkins.

IT IS FURTHER ORDERED declining to exercise supplemental jurisdiction over Plaintiff's remaining state law claims, which are dismissed without prejudice.

IT IS FURTHER ORDERED that Plaintiff may file a motion for leave to amend its complaint within 30 days of the date of this Order.[9]

Dated this 12th day of April, 2019.



Susan R. Bolton
United States District Judge

[9] The Court is uncertain whether any of Plaintiff's federal claims may be cured by amendment, and Plaintiff did not request leave to do so in its briefing. Even so, the Court will allow Plaintiff the opportunity to seek leave to amend before judgment is entered.