Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2010-000828 04/02/2012

HONORABLE DEAN M. FINK

CLERK OF THE COURT
S. Brown
Deputy

CITY OF CHANDLER SANDRA K MCGEE

v.

WHITEWING I I, L L C STEPHEN C NEWMARK

UNDER ADVISEMENT RULING

The Court took this matter under advisement following oral argument on February 27, 2012. Upon further consideration of Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment, the Court finds as follows.

This is at least the third case in which the Tax Court has been called on to interpret the vexed language of the Model Tax Code, here at Chandler City Code § 62-416(a)(2)(B): "Improved real property means any real property … where improvements have been made to land containing no structure (such as paving or landscaping)." It is clear enough that paving and landscaping create improved real property, but the words "such as" as stubbornly as ever refuse to explain what characteristics of paving or landscaping must be shared by other activities to constitute improvements.

In its previous examination of this issue, *Scottsdale v. Terrabrook Mirabel LLC*, TX2006-050063 (unpublished minute entry order 2008), the Court took some guidance from *Lewis v. Midway Lumber, Inc.*, 114 Ariz. 426, 430 (App. 1977), which defined an "improvement" as "a valuable addition or betterment to real estate such as a building, clearing, drain, fence, etc." *Id*. (following *Interstate Lumber Co. v. Rider*, 19 P.2d 644, 646 (Mont. 1933)). Under the facts here, it is significant that "betterment" is distinguished from "addition" and that "clearing," the removal of something unwanted from the land, is offered as an example of an improvement, establishing (what may have been obvious in any event) that land can be

improved by subtraction as well as by addition.[1] To adopt Whitewing II's version of the facts, which is essentially identical to Chandler's, it removed a 4800 square foot concrete slab with associated footing and stem walls, removed a septic tank used by a hog farm previously occupying the land (apparently concluding, no doubt correctly, that in today's tight real estate market the proximity of pig waste would make homes more difficult to sell), and engaged in grading – "moving dirt around" – and clearing – "removing tangible personal property from land." The Court need not consider the extent to which the dirt-moving might have constituted an improvement; the removal of the slab and the septic tank plainly constituted a "valuable … betterment" to the land, and therefore constituted an improvement.[2]

As both parties agreed that the application of § 62-416(a)(2)(B) was appropriate for summary judgment, the Court need not reach the fact issue involved with subsection (D).

IT IS ORDERED granting Plaintiff City of Chandler's Motion for Summary Judgment filed November 15, 2011.

IT IS FURTHER ORDERED denying Whitewing II, LLC's Cross-Motion for Summary Judgment filed January 13, 2012.

IT IS FURTHER ORDERED directing Plaintiff to lodge a form of judgment and file any Application and Affidavit for Attorney's Fees and Statement of Taxable Costs within thirty (30) days of the filing date of this minute entry.

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[1] The Court does not read into "such as paving and landscaping" a requirement that tangible personal property be *added* to the realty. The dictionary definition of "landscaping" cited by Whitewing II states only that the natural landscape is modified or ornamented by altering the plant cover. This definition does not exclude *removal* of part of the plant cover, and it strikes the Court that the common-sense definition of landscaping naturally includes at least such alterations to the plant cover as removal of weeds and excess grass. While *Lewis* did not interpret the Model Tax Code, its examples of improvements are sufficiently similar to paving and landscaping as to be persuasive, taking into account the rule of *ejusdem generis* (which has been regularly applied by the Arizona courts, including in tax cases; *see, e.g., Wilderness World, Inc. v. Dept. of Revenue*, 182 Ariz. 196, 199-200 (1995) (transaction privilege tax)).

[2] The Court has received Whitewing II's Post-Oral Argument Submission Regarding the Meaning of Landscaping, Etc., attaching landscaping provisions from the Chandler City Code. These provisions focus, quite naturally, on what is added, but to the Court's mind presuppose that what was present before be removed; whether this removal is landscaping or a necessary precondition to landscaping, it is sufficiently similar to constitute a "such as." More pragmatically, the Model Tax Code applies throughout the state and must be applied uniformly. To adopt definitions from unrelated sections of municipal codes, which are not uniform statewide, would result in inconsistent interpretations of identical statutory language. As this document did not affect the ruling of the Court on the underlying motion,

IT IS ORDERED denying Plaintiff City of Chandler's Motion to Strike Defendant/Counterclaimant's Post-Oral Submission filed March 9, 2012.