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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2005-000029 05/20/2009

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT
S. Brown
Deputy

TOWN OF FOUNTAIN HILLS ARIZONA, THE STEPHEN C NEWMARK

v.

FIREROCK LLC PAUL J MOONEY

UNDER ADVISEMENT RULING

(Plaintiff's Motion For Summary Judgment and Defendant's Cross-Motion For Summary Judgment)

As incorporated into the Fountain Hills Tax Code at Section 8A-416(a), the tax is imposed upon the sale of "improved real property," which is then defined as "any real property: (A) Upon which a structure has been constructed; or (B) Where improvements have been made to land containing no structure (such as paving or landscaping); or (C) Which has been reconstructed as provided by Regulation; or (D) Where water, power, and streets have been constructed to the property line." Only subsection (B) is at issue here.

To address first an issue raised by the Town, the language "such as paving or landscaping" is illustrative only. The more critical issue is to what real property the improvements must be done. The Town picks up on language from *Lewis v. Midway Lumber, Inc.*, 114 Ariz. 426, 430 (App. 1977), and asserts that an improvement on a separate parcel can constitute a "betterment" and thus an improvement to the sale parcel. It is not disputed that substantial improvements had been made to the plats containing the golf course, clubhouse, and tennis center, as well as utility and sewer lines. It is the Town's position that these improvements created betterments to, and thus constituted improvements to, each lot.

The Court does not embrace the Town's interpretation of subsection (B) because to do so, in effect, swallows subsection (D). While the Town adduces hypotheticals where subsection (B) applies but subsection (D) does not, there can be no converse situation in which subsection (D) applies and subsection (B) does not. A tax may be imposed under subsection (D) only if a water line *and* a power line *and* a street have been constructed to the property line; by the Town's interpretation, the tax may be imposed under subsection (B) if a water line *or* a power line *or* a street has been constructed, not necessarily to the property line, but anywhere that it might improve the saleability of the individual parcel.[1] If subsection (D) applies, subsection (B) will always apply; subsection (D) is redundant. Such a construction is to be avoided if at all possible. *City of Phoenix v. Yates*, 69 Ariz. 68, 71-72 (1949).

The Town also reads too much into *Lewis*. That case defined "improvement" as "a valuable addition or betterment to real estate such as a building, clearing, drain, fence, etc." *Id*. "Addition" and "betterment" are treated as synonymous. "Addition" can apply only to things on the added-to land itself, for instance, the building, clearing, fence, or drain cited by the court as examples. The court did not suggest that something off the subject land could constitute an improvement to the land. This Court's opinion in *Scottsdale City v. Terrabrook Mirabel LLC*, No. TX2006-050063 (Tax July 31, 2008), made the same distinction: the construction activity which potentially created tax liability (the Court found a question of material fact preventing summary judgment) took place on the sale parcels themselves, not on other parcels. It was not suggested in that case that the work on other parcels created tax liability. The Court does not believe that a proper reading of this section of the Model City Tax Code can support imposition of the speculative builder tax on the basis of work performed on land other than the parcel sold, except where provided by Subsection (D).

Although this was not raised in the Town's own motion, in its response to FireRock's cross-motion, it asserts that work was done on some of the individual lots before their sale, placing them under Subsection (B). For a number of them, this work is alleged to have consisted entirely of one-pass grading; the parties do not address whether this is sufficiently similar in nature to paving or landscaping or to the *Lewis* factors as to constitute improvements. In any event, the Town has not demonstrated any activity on the individual lots. Exhibit 279, which purports to detail work done on each lot, is a summary of the contents of voluminous writings. As such, it is admissible, and the Court has no problem with Ms. Harriss having compiled it, but it has no evidentiary value independent of the documents which it summarizes. The original documents show work done on the golf course and other common facilities and in some cases on the large parcels, but the Court does not find adequate substantiation of grading (if grading alone is sufficient for Subsection (B)) or landscaping on any of the individual lots prior to their sale.

[1] At the oral argument, the Town clarified that it was not arguing that subsection (B) can be read as a disjunctive.

Therefore, IT IS ORDERED:

1. Plaintiff, The Town Of Fountain Hills Arizona's Motion For Summary Judgment is denied.

2. Defendant FireRock LLC's Cross-Motion For Summary Judgment is granted.