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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2007-000686 05/04/2009

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT
S. Brown
Deputy

BORDER CITIES LAND CORPORATION THOMAS M PARSONS

v.

COCHISE COUNTY EDWARD G RHEINHEIMER

MINUTE ENTRY

The Court has considered Defendant's Motion For Partial Summary Judgment and the briefs. The Court finds and rules as follows.

A.R.S. § 42-13201 defines "shopping center" as an area meeting either five or six criteria. It must be comprised of three or more commercial establishments, its purpose must be primarily retail sales, it must have a combined gross leasable area of at least 27,000 square feet, it must be owned or managed as a unit, at least one of the commercial establishments must have a gross leasable area of at least 10,000 square feet, and it must be either owner-occupied or subject to a lease of at least fifteen years. At issue here are the third and fifth criteria: whether Copper Queen Plaza has a gross leasable area of at least 27,000 square feet and whether it has one establishment with at least 10,000 square feet gross leasable area.

The Court first observes that it fails to see the need for further discovery. The only relevant evidence would be the square footage of the Plaza and its commercial tenants, and the identity of any establishment occupying 10,000 square feet of gross leasable area. This information is readily available to Plaintiff, the owner of the Plaza. It also notes that the Bisbee parking litigation is immaterial, based as it is on a completely dissimilar municipal ordinance (and in any event, the Court of Appeals merely found that the local administrative decision did not lack credible evidence; it did not itself address square footage). Finally, Mr. Havins's conclusion that the Plaza is a shopping center goes beyond his competence: whether it satisfies the legal criteria is a question of law for the Court.

Beginning with the combined gross leasable area criterion, the County has presented the report of its assessor from 2003 and that of Mr. Havers, who was retained by Plaintiff, from 2007. While their estimates of total square footage vary slightly, both agree that gross leasable area – total square footage less non-leasable common area of some 7800 square feet – is less than 27,000 square feet. Plaintiff itself brings up the City of Bisbee Board of Adjustment's calculation of 31,488 square feet gross size, which, again after deducting 7800 square feet non-leasable common area, would result in gross leasable area of less than 27,000 square feet. Against this, Plaintiff offers the affidavit of Mr. Page, its president, who avows, without citing to any documentation, that the gross leasable area is in excess of 27,000 square feet. The only document included in Taxpayer's Controverting Statement of Facts to support Mr. Page's assertion is an assessment report from 1966, when the Plaza was still a single store operated by Phelps Dodge. While the copy is in parts difficult to read, it appears to show a total square footage of 41,412 square feet. Both the ground floor and the basement are nearly 5000 square feet larger in the 1966 appraisal than in the two more recent ones, and the second floor is also significantly larger in the 1966 appraisal. Plaintiff offers no showing that the square footage in the building in its present multiple-store configuration is comparable to its square footage as a single-user structure, and does not deduct for non-leasable common area (which would not have existed in a single store configuration). The Court therefore finds Plaintiff has presented no more than a scintilla of evidence on this issue, insufficient to withstand a motion for summary judgment. *Orme School v. Reeves*, 166 Ariz. 301, 309 (1990).

As to the existence of a commercial establishment having a gross leasable area of at least 10,000 square feet, Plaintiff urges that the Court so consider the basement. According to Mr. Page's deposition, there has been no permanent commercial occupant in the basement since Chinese Caverns left some time in 2007. Since then, the basement has been leased sporadically, in some cases to trade shows where retail activity is conducted, in others to noncommercial users like the Jehovah's Witnesses and the Arizona Rangers; much of the time, the basement is vacant. Plaintiff does not appear to argue that such occasional retail activity is sufficient to meet the statutory condition (or for that matter that it utilizes 10,000 square feet of basement space). Rather, by conflating the last two criteria, it argues that the statute is satisfied if the 10,000-square-foot space is occupied by the owner. This in inconsistent with the language of the statute: "… owned or managed as a unit *with at least one of the establishments* having a gross leasable area of at least ten thousand square feet *and* that is either owner-occupied or subject to a lease.…" "At least one of the establishments" refers back to the "three or more commercial establishments" a shopping center must have, the only other place in the statute where the word "establishments" is used, and Plaintiff does not claim to be a commercial establishment itself; and the final "and" would be misplaced if the condition of being owner-occupied or subject to a fifteen-year lease was attached to the "establishment" along with the 10,000 square foot gross leasable area. Plaintiff's argument thus fails as a matter of law.

The Court does not dispute that Copper Queen Plaza is a mercantile building. It cannot answer whether old Bisbee has any shopping centers. All it can say is that, under the statutory definition, Copper Queen Plaza is not a shopping center.

Therefore, IT IS ORDERED Defendant's Motion For Partial Summary Judgment is granted.