

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2005-050465

09/19/2007

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT
S. Brown
Deputy

ARIZONA STATE UNIVERSITY
FOUNDATION

DOUGLAS GERLACH

v.

MARICOPA COUNTY

ROBERTA S LIVESAY

UNDER ADVISEMENT RULING

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

The essential facts are these: In 2003, the Board of Regents and the Arizona State University Foundation signed a series of documents, the master Ground Lease and two Lease Agreements, providing that certain land owned by the Foundation would be transferred to the Board; that land would in turn be leased back to the Foundation. On that land, the Foundation would have buildings constructed; some of those buildings would be used by the Foundation, others would be used by the Board. Maricopa County may not, of course, tax the property of the state, which includes the Board of Regents, and does not appear to contest that the land is beyond its power to tax. It asserts, however, that the Foundation owns the buildings, which are therefore taxable, and has issued Notices of Valuation for tax years 2005 and 2006. The Foundation filed timely appeals of both.

The law presumes that, absent clear and express language to the contrary, buildings erected on leased government land are the property of the government. This has been true since *Maricopa County v. Novasic*, 12 Ariz.App. 551, 555 (1970), and remains true notwithstanding A.R.S. § 37-322.03(A) (the portion of that subsection to which the County appeals in fact predates *Novasic*, though it has been subsequently renumbered). Subsection A says, "All improvements placed upon state land shall, until they become the property of the state, be subject

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to assessment for taxes in the name of the owner, as other property.” This language does not itself determine ownership of improvements, but merely requires that, if and as long as they are not the property of the state, they are taxable. It applies only to the fee ownership of improvements; there is nothing in the statutory language, and the County has presented nothing in the legislative history, to extend the meaning of “improvements” to include mere leasehold interests in those improvements. This conclusion is supported by the requirement that the owner of the improvements be taxed in the same manner as the owner of other property would be taxed: taxes on private sector property fall upon the fee owner/lessor, not upon the lessee.

To determine the ownership rights of the parties, it is necessary to turn to the document creating the relationship, the Ground Lease. Article 1 of the Ground Lease states that the Board of Regents leases to the Foundation “the Land, *together with all improvements now or hereafter thereon,*” etc. (emphasis added). This relationship – the Board as lessor of the land and improvements and the Foundation as lessee of both – is confirmed by Article 6.3, which envisions that the Foundation will *sublease* portions of the Office Building and the Parking Structure to the Board of Regents. The language is clear that it is the improvements that are being sublet, not the land: thus, if the Foundation were the owner of the improvements, the relationship created by Article 6.3 would be lessor-lessee, rather than sublessor-sublessee. The County’s reliance on Articles 2.1 and 2.2 to establish that the Foundation owns the improvements goes beyond what those two clauses say, that the lease runs for thirty years and the Foundation has the option to extend it for an additional ten years; the clauses state nothing concerning ownership of the improvements, just the Foundation’s right to use them. In short, the improvements are owned by the Board of Regents, an instrumentality of the state. (Whether the State Land Department must by statute be deemed the owner is immaterial, as it, no less than the Board, is a state entity.) Whatever relationship may be referred to in subsequent documents is of no materiality: it is black-letter law that the owner of a partial interest in property may alienate only that interest he owns, which here is established by the Ground Lease. The latter documents must be interpreted consistently with the Foundation’s status as the mere lessee and consequent power to transfer only leasehold rights.

There is no indication here that under the ownership agreement the Foundation would possess all the benefits of ownership apart from paper title. The case law indicates that office buildings and similar structures, such as exist and are anticipated to be built on the leased land, are at least rebuttably presumed to remain suitable for occupancy by the public landlord at the conclusion of the lease term. *See Novasic, supra* at 554 (office building deemed to belong to city despite 52-year lease term). Nothing about the buildings here appears to be so peculiarly adapted to the Foundation’s use that the Board, upon the conclusion of the lease, would find them unusable. Indeed, Articles 5.1 and 5.2 reference specific plans that had already been approved by the Board and give the Board prior approval of any additional buildings erected on the leased land. In addition, the expectation that some of the buildings will be sublet back to the Board

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presupposes that those buildings at least will be constructed to be suitable for the Board's use. The Ground Lease does not permit the Foundation to tear down the improvements (though Article 5.3.1 does permit the demolition of buildings already existing as of the inception of the Lease in connection with the construction of the improvements).

Therefore, IT IS ORDERED Plaintiff's Motion for Summary Judgment is granted and Defendant's Cross-Motion for Summary Judgment is denied.