IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 10/22/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

CITY OF CHANDLER, a municipal corporation, Plaintiff/Counterdefendant/ Appellee, v. WHITEWING II, LLC, Defendant/Counterclaimant/ Appellant.	)	1 CA-TX 12-0008 DEPARTMENT T **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. TX2010-000828

The Honorable Dean M. Fink, Judge

AFFIRMED; REMANDED

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W I N T H R O P, Judge

¶1 This is a transaction privilege tax case. Whitewing II, L.L.C. ("Taxpayer") appeals from a summary judgment

upholding a municipal tax assessment by the City of Chandler ("the City") under Chandler City Code ("City Code") § 62-416(a). Based on the following reasoning, we affirm the ruling, but remand for further consideration of an issue.[1]

BACKGROUND[2]

¶2 Taxpayer purchased real property in Chandler in 2000 to develop as a residential community. Taxpayer cleared and graded the property, which had previously been used for hog farming, and subdivided it into two parcels, self-denominated as "Community Land" and "Residential Land."[3] The Community Land was intended to be commonly used by the residents, and the

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[1] The City points out Taxpayer failed to cite to the record in the statement of facts in its opening brief. An appellant's brief must contain a statement of facts relevant to the issues, with appropriate references to the record, ARCAP 13(a)(4), or this court may disregard it. *See Flood Control Dist. of Maricopa County v. Conlin*, 148 Ariz. 66, 68, 712 P.2d 979, 981 (App. 1985). Taxpayer did, however, provide the missing citations in its reply brief. We decline the City's invitation to sanction Taxpayer, and instead exercise our discretion to decide this appeal on the merits. *See Clemens v. Clark*, 101 Ariz. 413, 414, 420 P.2d 284, 285 (1966); *Lederman v. Phelps Dodge Corp.*, 19 Ariz. App. 107, 108, 505 P.2d 275, 276 (1973).

[2] We view the facts in the light most favorable to Taxpayer, the party opposing the court's grant of summary judgment. *Angus Med. Co. v. Digital Equip. Corp.*, 173 Ariz. 159, 162, 840 P.2d 1024, 1027 (App. 1992).

[3] Taxpayer also constructed improvements, including streets and sidewalks, on the Community Land, but purportedly did not add those same improvements to the Residential Land. The City argues that no legal authority exists in the City Code or elsewhere for dividing Taxpayer's property in this manner "for purposes of taxability of sales." Given our resolution of the issue presented by Taxpayer, we do not address this argument.

Residential Land, which was divided into lots for sale, was designed so that purchasers would build homes on their lots. Between November 15, 2001, and November 5, 2004, Taxpayer sold one hundred lots.

¶3 Taxpayer's transaction privilege tax payments from February 2000 to November 2004 were audited. In August 2009, Taxpayer was assessed $103,722.39 in taxes, along with interest, fees, and penalties because the City considered Taxpayer a speculative builder with sales subject to the City's transaction privilege tax.

¶4 Taxpayer protested the assessment and pursued its administrative remedies. After a hearing before a municipal tax hearing officer and a determination that the assessment needed to be adjusted, the City issued an adjusted assessment.

¶5 The City then filed a complaint in the tax court, alleging the hearing officer's determination was erroneous as a matter of law and seeking to recover the original assessment along with interest and penalties. *See* Ariz. Rev. Stat. ("A.R.S.") § 9-491(A) (West 2013).[4] Taxpayer filed an answer and counterclaim, asserting the hearing officer's decision was wrong because Taxpayer did not owe any transaction privilege taxes.

[4] We cite the current version of the applicable statutes where no revisions material to our decision have since occurred.

¶6 The parties filed cross-motions for summary judgment based on the applicability of City Code § 62-416(a)(2)(B) and (D). After oral argument, the tax court granted the City's motion and denied Taxpayer's cross-motion, thereby upholding the City's assessment.[5] Taxpayer filed a timely notice of appeal from the signed judgment filed June 11, 2012. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

ANALYSIS

¶7 Taxpayer challenges the grant of summary judgment, arguing that it did not sell "improved real property" as a speculative builder under City Code § 62-416(a).

¶8 We review *de novo* the tax court's ruling, *Wilderness World, Inc. v. Dep't of Revenue*, 182 Ariz. 196, 198, 895 P.2d 108, 110 (1995), as well as the court's interpretation of a statute. *Ariz. Dep't of Revenue v. Ormond Builders, Inc.*, 216 Ariz. 379, 383, ¶ 15, 166 P.3d 934, 938 (App. 2007).[6] Summary

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[5] In the proposed judgment lodged by the City and signed by the tax court, Taxpayer was assessed $103,711.91 in taxes, along with license fees and interest, for a total judgment of $168,571.83, with additional accruing interest. The court also ordered that each party pay its own costs and attorneys' fees.

[6] Taxpayer notes the City cites two unpublished decisions of the tax court as support for its argument. Unpublished decisions of the tax court may not be cited as binding authority or legal precedent. *See* Ariz. Tax Ct. R. Prac. 15.1(c); *Walden Books Co. v. Ariz. Dep't of Revenue*, 198 Ariz. 584, 589, ¶¶ 20-23, 12 P.3d 809, 814 (App. 2000). Consequently, the City's citation to those decisions was improper. Moreover, although tax court decisions may be due our respect, we are not bound by

judgment is appropriate only "if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990) (quoting former Rule 56(c), Ariz. R. Civ. P.).

I. Interpretation of the City Code

¶9 Section 62-416(a)(1) of the City Code imposes a 1.5 percent tax on the gross income of a speculative builder based on "the total selling price from the sale of improved real property at the time of closing of escrow or transfer of title." A "speculative builder" is defined in City Code § 62-100 as:

> (1) An owner-builder who sells or contracts to sell, at any time, improved real property (as provided in Section 62-416) consisting of:
>
> > (A) Custom, model, or inventory homes, regardless of the stage of completion of such homes; or
> >
> > (B) Improved residential or commercial lots without a structure; or
>
> (2) An owner-builder who sells or contracts to sell improved real property, other than improved real property specified in subsection (1) above:
>
> > (A) Prior to completion; or

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that court's interpretation of the City Code; instead, we independently review statutory language. *Nordstrom, Inc. v. Maricopa County*, 207 Ariz. 553, 557, ¶ 14, 88 P.3d 1165, 1169 (App. 2004).

> (B) Before the expiration of twenty-four (24) months after the improvements of the real property sold are substantially complete.

Thus, § 62-100 provides in part that a taxpayer is a speculative builder if "improved real property" is sold, including a home built in any stage of completion and improved residential lots without a structure.

¶10 The parties agree that Taxpayer sold or transferred real property, but they disagree whether the subject property constituted "improved real property" so as to trigger the speculative builder tax liability imposed by § 62-416(a)(1). The City Code defines "improved real property" as follows:

> "*Improved Real Property*" means *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.

City Code § 62-416(a)(2) (emphasis added).

¶11 In granting summary judgment to the City, the tax court determined that Taxpayer sold "improved real property" as defined by § 62-416(a)(2)(B) during the audit period. The court found that removal of a large concrete slab with associated

footings and stem walls, and removal of a septic tank from the hog farm, "constituted a 'valuable . . . betterment' to the land, and therefore constituted an improvement."

¶12 Although the tax court found the language of § 62-416(a)(2)(B), which came from the Model City Tax Code,[7] to be "vex[ing]," we have previously interpreted the term "improved real property" under the Model City Tax Code provision in *Estancia Development Associates, L.L.C. v. City of Scottsdale*, 196 Ariz. 87, 993 P.2d 1051 (App. 1999). There, in selling individual subdivided lots, the taxpayer used a purchase contract, which provided the purchaser was buying a vacant lot and the seller/taxpayer would ensure that it would "have completed the paved roads, sewers, water, telephone, cable television, natural gas and electric service to the Property by the date set forth in the Public Report." *Id.* at 88, ¶¶ 2-4, 993 P.2d at 1052. After auditing the taxpayer, the City of Scottsdale determined the taxpayer was a speculative builder, and assessed a tax deficiency with interest and penalties, even though no improvements had been made on any lot before any sale or the audit. *Id.* at 88-89, ¶¶ 5-6, 993 P.2d at 1052-53.

¶13 The taxpayer made a partial payment, sought a refund through the administrative process, and unsuccessfully challenged the assessment and penalties in the tax court. *Id.*

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[7] *See generally* A.R.S. §§ 42-6051 to -6056.

at 89, ¶¶ 6-7, 993 P.2d at 1053. The tax court reasoned that the taxpayer had engaged in taxable activity by contracting to sell improved property, even though the improvements would be added in the future. *Id.* at ¶ 7.

¶14 On appeal, after examining the applicable Scottsdale city tax code provision, (based on the Model City Tax Code and identical to the Chandler City Code provision at issue here), this court focused on whether "improvements have been made" at the time of the sale and concluded that "[n]o provision is made for taxation of vacant land on which improvements are yet to be constructed." *Id.* at 90, ¶ 15, 993 P.2d at 1054. Because the record reflected that it had only sold vacant land, the taxpayer had not sold "improved real property" because the city tax code provision did not tax "vacant land on which improvements are yet to be constructed." *Id*. As a result, this court reversed the grant of summary judgment. *Id*. at ¶¶ 15-17.

¶15 *Estancia* did not, however, address whether any efforts expended by a taxpayer beyond simply clearing the property of vegetation and grading it would be considered in determining whether the real property sold was "improved" for purposes of speculative builder tax liability. Although the tax court here relied on a lien case, we look instead to the plain language of the code provision to determine the nature and timing of any taxable activity. *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915

P.2d 1227, 1230 (1996). And, if needed, we consider provisions "on the same subject matter to determine legislative intent and to maintain statutory harmony." *In re Robert A.*, 199 Ariz. 485, 487, ¶ 8, 19 P.3d 626, 628 (App. 2001) (citation omitted).

¶16 The code definition of improved real property means that something more has been done to the property to prepare it for sale than simple clearing, grading, and leveling. In fact, the code defines the "more" as: (1) the construction of a house or other structure; (2) improvements made to the lot, such as paving or landscaping; (3) reconstruction of the land as provided by regulation; or (4) construction of water, power, and streets to the property line. *See* City Code § 62-416(a)(2).

¶17 Taxpayer argues the term "such as paving or landscaping" in subsection (a)(2)(B) is restrictive, and requires that *tangible personal property be added* to the vacant land in order to qualify as an "improvement" under the City Code. We disagree that § 62-416(a)(2)(B) must be read so restrictively. *See generally* www.merriam-webster.com (defining "landscaping," as meaning "*to modify* or ornament *(a natural landscape) by altering* the plant cover" (emphasis added)). Instead, the question is whether substantial alterations have added value to the property so as to constitute an "improvement" for tax purposes under subsection (a)(2)(B).

¶18 Moreover, in this context, the reference to paving and landscaping is only illustrative. *See Stallings v. Spring Meadows Apartment Complex Ltd. P'ship*, 185 Ariz. 156, 159, 913 P.2d 496, 499 (1996). The subject language does not provide that vacant property is considered improved real property only if there is paving or landscaping. Instead, paving and landscaping are merely examples of work that may be performed on property, and do not preclude other work that may be performed on the land, short of building a home, which could transform vacant land into improved real property at the time of sale.

¶19 Here, the tax court found that Taxpayer did much more than simply clear some brush and grade and level the property. The court found that Taxpayer removed obstructive tangible personal property, removed a septic tank, and removed a 4800 square foot concrete slab with associated footings and stem walls. We agree with the tax court that these efforts by Taxpayer to get this property ready to subdivide are sufficient to support the conclusion that the vacant land was improved real property when sold.[8] Accordingly, we now turn to whether the

[8] The City also argued that the property could be considered improved real property under subsection (D) of City Code § 62-416(a)(2). We do not address that argument because the tax court did not use that subsection to reach its decision, and we need not analyze a provision that was not used in reaching the decision.

entire subdivided property is subject to the City's transaction privilege assessment.

II. Community Land Component

¶20 As noted, Taxpayer divided the property at issue into self-designated "Community Land" and "Residential Land" components. Taxpayer's manager, Gregory Bamford, submitted an affidavit implying that, unlike the Residential Land lots, the Community Land was never sold. As a result, Taxpayer maintained the Community Land was not subject to assessment. The City did not dispute the Community Land had not been sold or offer contradicting evidence, and instead argued that Taxpayer's version of the events had no relevance to the assessment of the transaction privilege tax.

¶21 Sections 62-416(a)(1) and (3) impose a transaction privilege tax only after the real property has been improved and sold, or equitable ownership is transferred. Because the limited record indicates the Community Land had not been sold (or apparently otherwise transferred) by the time of the audit, there is no "selling price" or value on which to assess tax on that portion of the property under City Code § 62-416(a)(1). As a result, the Community Land is not subject to tax until it is sold or otherwise transferred. *See* City Code § 62-416(a)(1) (providing that the speculative builder's taxable gross income is "the total selling price" at the time of transfer of title or

close of escrow). Accordingly, Taxpayer is not yet subject to tax for the Community Land portion of the Property, regardless whether it is "improved real property," because no sale or transfer has occurred. *See id.*; *cf. Estancia*, 196 Ariz. at 90, ¶¶ 13-17, 993 P.2d at 1054. Consequently, we remand this matter to the tax court for it to determine whether our analysis of the Community Land impacts the transaction privilege tax assessment.

III. Costs and Attorneys' Fees

¶22 Taxpayer seeks an award of costs and attorneys' fees on appeal pursuant to A.R.S. § 12-348. Because Taxpayer is not the prevailing party, we deny Taxpayer's request.

CONCLUSION

¶23 Based on the foregoing, we affirm the judgment of the tax court, but remand for the court to determine whether the assessment must be modified as it relates to the Community Land.

/S/
LAWRENCE F. WINTHROP, Judge

CONCURRING:

/S/
MAURICE PORTLEY, Presiding Judge

/S/
DONN KESSLER, Judge