COURT OF APPEALS
DECISION
DATED AND FILED

September 15, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP2632 **Cir. Ct. No. 2009CV98**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

BAYLAKE BANK,

PLAINTIFF-APPELLANT,

V.

FAIRWAY PROPERTIES OF WISCONSIN, LLC, ROBERT J. STEIDL, JAMES W. TRANTOW, CITY OF WAUPACA, FOXFIRE RESTAURANT AND BANQUET HALL, LLC AND YOUNG DEVELOPMENT & CONSTRUCTION, INC.,

DEFENDANTS-RESPONDENTS,

FIRST STATE BANK,

DEFENDANT.

APPEAL from a judgment of the circuit court for Waupaca County: PHILIP M. KIRK, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 LUNDSTEN, P.J. This appeal involves a priority dispute in a foreclosure proceeding initiated by Baylake Bank. The Bank sought to foreclose on a mortgage on property held by Fairway Properties of Wisconsin, LLC. The property was located in the City of Waupaca in a tax incremental district. After the Bank and Fairway entered into the mortgage agreement, the City and Fairway entered into a development agreement regarding the same property. The development agreement included a damages provision that was triggered when Fairway failed to complete the agreed-to development. The City argues that the amounts owed under the contract damages provision should receive priority over the Bank's interests in the foreclosure action. The circuit court agreed. As we explain, we agree with the Bank that the circuit court erred and that the City provides no alternative basis on which to affirm. Accordingly, we reverse and remand with directions.

Background

¶2 Fairway Properties of Wisconsin, LLC, entered into a mortgage agreement with Baylake Bank relating to property in the City of Waupaca. The property was located in a district that had been designated as a tax incremental district by the City pursuant to the tax increment law, WIS. STAT. § 66.1105.[1]

¶3 The City subsequently entered into a development agreement with Fairway. According to that agreement, Fairway was to develop the property into

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

single-family housing, with a minimum value of $4,500,000, and the City was to provide improvements that would benefit Fairway's development, including the installation of sidewalks, wells, and driveway approaches. Fairway agreed to meet a graduated development goal each year for eleven years, the last of which was the $4,500,000 ending goal. For each year, if Fairway did not meet the agreed development goal, Fairway was contractually required to pay the City what was labeled "a liquidated damages penalty." The damages amount was based on a formula in the contract designed to compensate the City for the difference between the actual property tax levied for a given year and the property tax that would have been levied had the development goal been reached for that year. The development agreement further stated that "[t]he payment due is a special charge, which may be entered in the tax roll as a charge against the real property … and collected in the same manner as real estate taxes" and that this was "a lien upon the property superior to all other liens." The Bank was not a party to the development agreement.

¶4 After Fairway defaulted on its mortgage, the Bank brought a foreclosure action naming Fairway and the City, among other interested entities. The City answered, and alleged that Fairway owed delinquent property taxes from 2006 to 2008, and further owed property taxes for 2009, in an amount totaling over $150,000. The City also asserted that the development agreement's liquidated damages clause was triggered, with total damages of over $80,000 for the years 2006 to 2009. The Bank agreed that the delinquent property taxes had priority over the Bank's interests. However, the Bank took the position that the amounts owed under the development agreement's damages provision were subordinate to the Bank's interest as a mortgagee. The City disagreed and asserted

that the damages were a tax and, accordingly, the damages were entitled to priority by statute.

¶5 The Bank moved for summary judgment on the foreclosure, including on the priority issue. The circuit court granted summary judgment and, in doing so, concluded that the contractual damages were "real estate taxes" and, accordingly, had priority. The Bank appeals.

Discussion

¶6 The Bank argues that the circuit court's reasoning was flawed when the court deemed the contractual damages to be real estate taxes. Further, the Bank contends that, on appeal, the City provides no viable alternative basis on which to affirm the circuit court. We agree in both respects.[2]

¶7 A party is entitled to summary judgment when there are no disputed issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). Here, the parties agreed for purposes of summary judgment that there are no factual disputes, and the parties' arguments are directed solely at a question of law. We review questions of law *de novo*. ***United Rentals, Inc. v. City of Madison***, 2007 WI App 131, ¶11, 302 Wis. 2d 245, 733 N.W.2d 322.

¶8 There is no dispute in this case that property taxes generally have priority over other liens. *See* WIS. STAT. § 70.01 (providing that "[t]axes shall be levied, under this chapter, upon all general property in this state except property

[2] The Wisconsin Bankers Association submitted an amicus brief in support of the Bank's position, and our understanding of the issue in this case benefited from that brief.

that is exempt from taxation" and that, "[w]hen so levied such taxes are a lien upon the property against which they are charged," and this lien is "superior to all other liens," with certain exceptions); WIS. STAT. § 706.11(1) (listing types of mortgages, and providing that they have priority over all liens "except tax and special assessment liens filed after the recording of such mortgage"). Nor is there an issue in this case about the scope or meaning of the term "tax" in the provisions that grant taxes priority. The dispute here is solely whether the damages in the development agreement are a tax.

¶9 The development agreement between the City and Fairway related to the fact that the property was located in a tax incremental district. WISCONSIN STAT. § 66.1105 governs the creation of tax incremental districts, which, generally speaking, provide a mechanism for municipalities to finance public improvement projects by allowing municipalities to divert property taxes from increased property values in a district to pay for improvements provided by the municipality in that district. *See* ***Town of Baraboo v. Village of W. Baraboo***, 2005 WI App 96, ¶32, 283 Wis. 2d 479, 699 N.W.2d 610 (describing the tax increment law). The development agreement here contemplated that the City would implement an improvement plan benefiting Fairway's proposed development. The City essentially explains that the development agreement's damages provision was an effort by the City to ensure that it would recoup its financing of the improvements, regardless whether the development was completed. That is, the City contemplated two scenarios: first, Fairway would develop the property as promised and the City would recoup the expenses it incurred through increased property taxes via the tax increment law's mechanisms or, second, Fairway would not perform as promised and the City would recoup the expenses it incurred by

enforcing the contract damages clause, thereby making up the difference between the actual taxes levied and the anticipated taxes.

¶10 The City takes the position that the development agreement's damages provision "*is* a tax and is collectable in the same manner as real estate taxes" (emphasis added). The circuit court agreed with the City. The Bank contends that the circuit court erred and, in support, observes, correctly, that for the contract damages to be a tax there must be authority for the damages to be properly categorized as a tax. The Bank argues that the circuit court erred because it did not base its decision on any statutory or constitutional authority to tax. We agree.

¶11 The supreme court has explained that "cities have no inherent power to tax," and that "[c]ities may only enact the types of taxes authorized by the legislature." ***Blue Top Motel, Inc. v. City of Stevens Point***, 107 Wis. 2d 392, 395, 320 N.W.2d 172 (1982); *see also* ***id.*** at 395-96 (concluding that a city could impose a room tax because a statute provided "a specific legislative grant of authority for cities to enact such a tax"). The court has further explained that a city may not impose a tax "without clear and express [statutory or constitutional] language for that purpose, and where ambiguity and doubt exist, it must be resolved in favor of the person upon whom it is sought to impose the tax." ***City of Plymouth v. Elsner***, 28 Wis. 2d 102, 106, 135 N.W.2d 799 (1965); *see also* ***id.*** at 105-07 (rejecting a city's attempt to impose what resembled an excise tax on electrical service meters because the city "cited no constitutional or statutory provision which authorizes a city to levy [such] an excise tax"). With these principles in mind, we turn to the circuit court's decision.

¶12 The circuit court, in its summary judgment decision, stated: "The Court finds that the interest of the City of Waupaca in what is described as a liquidated damages penalty in the Development Agreement are, in fact, real estate taxes." The court did not explain its reasoning in its written decision. At the hearing on summary judgment, the court provided the following explanation:

> [I]t seems to me that the essence of the issue here is labels, or more appropriately not getting hung up on the labels.
>
> If you look at the development agreement, starting at the last paragraph of page two, it starts talking about the liquidated damages provisions. And then going over to page three at the top of the paragraph, the first full sentence starts "The payment due is a special charge which may be entered in the tax roll as a charge against the real property identified in Exhibit A then owned by the developer and collected in the same manner as real estate taxes. The amount due is a lien upon the property superior to all other liens."
>
> To me, that is the salient language of the contract. What I think it is doing … is that it indicates that if the special developments aren't met pursuant to the schedule, that is in the development agreement, that those delinquencies in and of themselves become extra and/or additional real estate taxes. And as such, it is memorializing not only to Fairway Properties but is memorializing to anybody else, even a prospective buyer as an example, of what is in that agreement.
>
> So, it seems to me that the issue is even though … these charges … are described as penalties of the development agreement, I believe they automatically take the form of a penalty as real estate taxes. Because the City is saying because you didn't, in effect your individual pieces of property are being punished and your real estate taxes are being increased, and therefore, the City is indicating that is how we will be assessing those properties for real estate tax purposes.

¶13 Thus, the circuit court did not rely on any statutory or constitutional provision authorizing the contract damages as "extra and/or additional real estate taxes." Rather, the circuit court relied on the contract between the City and

Fairway and the City's readily apparent goal of obtaining contract damages if it could not obtain the expected flow of property taxes from a successful development. However, the court does not provide authority for the proposition that contract damages of this type can be properly labeled a tax. And, as the case law teaches, clear statutory or constitutional authority is required for a city to impose a tax. Here, the only "authority" compelling Fairway to pay the City is the contract. Accordingly, we find no support for the circuit court's conclusion in its explanation.

¶14 We turn to whether the City points to any authority to impose the tax that would provide an alternative basis to affirm the circuit court.

¶15 The City relies on the tax increment law, found in WIS. STAT. § 66.1105. Specifically, the City asserts that "the liquidated damages penalty, irrespective of what it is called, is a tax and is collectable in the same manner as real estate taxes under the authority given to cities under the Tax Increment Law." When it makes this assertion in its briefing, however, the City does not explain what particular language in the tax increment law it is relying on.

¶16 We note that, elsewhere in its argument, the City points to the following from the tax increment law as providing general authority for entering into agreements such as the development agreement here:

> **(3)** POWERS OF CITIES. In addition to any other powers conferred by law, a city may exercise any powers necessary and convenient to carry out the purposes of this section, including the power to:
>
> (a) Create tax incremental districts and define the boundaries of the districts;
>
> (b) Cause project plans to be prepared, approve the plans, and implement the provisions and effectuate the purposes of the plans;

> ....
>
> (e) Enter into any contracts or agreements, including agreements with bondholders, determined by the local legislative body to be necessary or convenient to implement the provisions and effectuate the purposes of project plans. The contracts or agreements may include conditions, restrictions, or covenants which either run with the land or which otherwise regulate the use of land.

WIS. STAT. § 66.1105(3).

¶17 On its face, this language allows a city to create tax incremental districts and to prepare and implement the related project plans—where property taxes *based on increased property value* are diverted to pay for improvements. *See* ***id.***; *see also* ***Town of Baraboo***, 283 Wis. 2d 479, ¶32 (explaining that WIS. STAT. § 66.1105 accomplishes its goals by permitting "the municipality to divert property tax revenues generated as a result of increased property values in a designated [tax incremental financing] district to pay for municipal improvements or development assistance provided within the district"). Further, the statutory language allows a city to enter into agreements to implement such a project plan. However, the statute says nothing about a city's authority to impose additional types of taxes on the entities in those districts. Thus, the City fails to point to "clear and express language" granting the relevant taxation authority.[3] *See* ***Elsner***, 28 Wis. 2d at 106.

¶18 What the City does argue is not persuasive. The City directs its argument at the broader mechanisms of the tax increment law. In doing so, the City presents a case for the contract damages being generally consistent with the

[3] For example, the City does not direct an argument at the meaning of the "necessary and convenient" powers language in WIS. STAT. § 66.1105(3). Accordingly, the City does not develop an argument that this language matters here.

tax increment law's tax-diversion mechanism, in that, like the law's mechanism, the contract damages help the City to recoup its investment. This line of reasoning, however, misses the mark. There is no dispute that the City may, by means of a contract, create a back-up mechanism should its hope for taxation fall through. But that does not turn the back-up mechanism into a tax. The crux of the issue here is whether that contractual mechanism, which comes into play only *in the absence of* property to tax, is itself an authorized property tax. The City does not point to any authority supporting that proposition.[4]

Conclusion

¶19 For the reasons discussed, we affirm summary judgment, except with respect to the portion of the judgment providing that the development agreement's liquidated damages have priority as a property tax. We remand with directions that the circuit court grant summary judgment to the Bank on this topic, consistent with this opinion.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

[4] The Bank and the Wisconsin Bankers Association also cite other statutory provisions and explain why these other provisions do not provide the required taxation authority. We do not address these arguments, but rather confine our discussion to what the City raises in its briefing.