STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: May 21, 2014]

FC BILTMORE, LLC,	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. PC 14-1209**
	:	
DAVID QUINN, in his capacity as Tax Assessor for the City of Providence; JOHN A. MURPHY, in his capacity as Tax Collector for the City of Providence; MICHAEL D'AMICO, in his capacity as Director of Administration for the City of Providence and Chief of Staff for the Mayor of the City of Providence; and THE CITY OF PROVIDENCE,	:	
Defendants.	:	

DECISION

SILVERSTEIN, J. FC Biltmore, LLC (Plaintiff) brings this action seeking redress from a revised tax bill issued to it by David Quinn, in his capacity as Tax Assessor for the City of Providence (Quinn), John A. Murphy, in his capacity as Tax Collector for the City of Providence (Murphy), Michael D'Amico, in his capacity as Director of Administration for the City of Providence and Chief of Staff for the Mayor of the City of Providence (D'Amico), and the City of Providence (the City), collectively referred to as Defendants. Plaintiff seeks a determination regarding the obligations owed by it to Defendants with respect to a Tax Stabilization Agreement (TSA) that was executed by the parties. Currently before the Court are cross-motions for summary judgment. Jurisdiction is pursuant to G.L. 1956 §§ 9-30-1, 44-5-26, and 44-5-27.

I

Facts and Travel

Plaintiff is the current owner of the Biltmore Hotel (the Hotel),[1] located at 11 Dorrance Street in Providence, Rhode Island. Plaintiff acquired the property by deed on May 31, 2012, from a court appointed special master, Richard L. Gemma,[2] hereinafter "Special Master."[3]

The Special Master sought to sell the Hotel to an interested buyer. To make the Hotel more attractive to a prospective buyer, the Special Master submitted an application for tax stabilization with the City. On March 15, 2012, the Special Master entered into a TSA with the City regarding the Hotel. The TSA was conditioned upon City Council approval per ¶ 16[4] of the TSA. ("This Agreement shall only take effect upon City Council approval.") The City Council later passed Resolution of City Council No. 145 (the Resolution), which approved the application for tax stabilization. On March 22, 2012, the Resolution was approved by the Mayor of Providence. As a result of the TSA and the Resolution, the Special Master was able to sell the Hotel, along with the Special Master's rights under the TSA, to Plaintiff.

Pursuant to the TSA, Plaintiff's tax bill for the Hotel was not to be more than the taxes assessed on or at December 31, 2010, or $124,506.20 (the Stabilized Tax Payment). Plaintiff was issued tax bills by the City for 2012 and for 2013 in the amount of the Stabilized Tax Payment. Plaintiff paid both these tax bills to the City on time and in full. However, in November 2013, the City issued a revised tax bill for the tax years of 2012 and 2013. With this

[1] The Hotel has been a Providence landmark since its opening in 1922.
[2] The Hotel's secured creditor sought the appointment of a special master to take control of the Hotel, and the appointment was granted on April 26, 2011.
[3] In the TSA, the term "Developer" was used to refer to the entities under the special mastership. The Court chooses to use 'Special Master."
[4] The paragraph is mislabeled ¶ 15 in the TSA.

revised tax bill, the City took the position that the Tax Stabilization Period[5] did not go into effect until renovation of the Hotel was substantially completed, and assessed back taxes in the total amount of $1,345,695.33. Defendants, pointing to language set forth in the TSA defining the Commencement Date, claim that the Tax Stabilization Period is conditioned upon substantial completion of renovation of the Hotel, which has yet to occur.[6] Plaintiff disagrees, contending that the Tax Stabilization Period began upon execution of the agreement in accordance with City Ordinance 2011-1 (the Ordinance). Due to Plaintiff's refusing to pay the assessed back taxes, the Hotel was scheduled for a tax sale on May 15, 2014 at Providence City Hall (the Tax Sale).

Plaintiff brings the within action for a determination regarding the TSA and whether the taxes assessed are proper. The Verified Complaint (Complaint) asserts eight counts—Injunctive Relief (Count I), Declaratory Judgment (Count II), Equal Access to Justice (Count III), Constitutional Violations (Count IV), 42 U.S.C. § 1983 (Count V), Civil Conspiracy (Count VI), Slander of Title (Count VII), and Breach of Contract (Count VIII)—against the Defendants. This Court, on April 10, 2014, entered a Temporary Restraining Order that restrained the City from listing, conducting, or taking any further action with regards to the Hotel and the Tax Sale until further order of the Court. Currently before the Court are cross-motions for summary judgment as to Counts I, II, and VIII, and more specifically, a determination as to (1) the proper interpretation of the TSA, as it concerns the date upon which the Tax Stabilization Period becomes effective; and, (2) whether the City had authority to impose the claimed back tax after having already assessed and collected the Stabilized Tax Payment for two years.

[5] "Tax Stabilization Period" shall mean the twelve year period when Plaintiff was required to pay only the Stabilized Tax Payment.

[6] Plaintiff asserts that in reliance on the Stabilized Tax Payment, it has spent approximately $10,000,000 renovating the Hotel of an anticipated $14,500,000. Defendants claim that Plaintiff has only made between $1,000,000 and $2,000,000 worth of improvements to the Hotel.

II

Standard of Review

"Summary judgment is a proceeding in which the proponent must demonstrate by affidavits, depositions, pleadings and other documentary matter . . . that he or she is entitled to judgment as a matter of law and that there are no genuine issues of material fact." Palmisciano v. Burrillville Racing Ass'n, 603 A.2d 317, 320 (R.I. 1992) (citing Steinberg v. State, 427 A.2d 338 (R.I. 1981)). The court, during a summary judgment proceeding, "does not pass upon the weight or the credibility of the evidence but must consider the affidavits and other pleadings in a light most favorable to the party opposing the motion." Id. (citing Lennon v. MacGregor, 423 A.2d 820 (R.I. 1980)). Moreover, "the justice's only function is to determine whether there are any issues involving material facts." Steinberg, 427 A.2d at 340. The court's purpose during the summary judgment procedure is issue finding, not issue determination. O'Connor v. McKanna, 116 R.I. 627, 359 A.2d 350 (1976). Therefore, the only task for the judge in ruling on a summary judgment motion is to determine whether there is a genuine issue concerning any material fact. Id.

"When an examination of the pleadings, affidavits, admissions, answers to interrogatories and other similar matters, viewed in the light most favorable to the party opposing the motion, reveals no such issue, the suit is ripe for summary judgment." Id. "[T]he opposing parties will not be allowed to rely upon mere allegations or denials in their pleadings. Rather, by affidavits or otherwise they have an affirmative duty to set forth specific facts showing that there is a genuine issue of material fact." Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998). However, it is not an absolute requirement that the nonmoving party file an affidavit in opposition to the motion. Steinberg, 427 A.2d at 338. If the affidavit of the moving party does

not establish the absence of a material factual issue, the trial justice should deny the motion despite the failure of the nonmoving party to file a counter affidavit.

III

Analysis

A

The Pertinent Documents

1

The Ordinance

The Ordinance was passed by the City Council and approved on January 29, 2011. The Ordinance amended Chapter 21, Article XIII of the Code of Ordinances of the City of Providence. The City Council was authorized to enact the ordinance pursuant to § 44-3-9.[7] The Ordinance states that it is "in the public interest to provide property tax incentives for owners of designated properties in order that there may be substantial rehabilitation of the properties for residential, commercial and institutional uses. The result being an improvement of the physical plant of the city which will result in a long-term economic benefit to the city." (Ordinance § 1(b).) However, the number of tax stabilization agreements that could be issued in connection with the Ordinance was limited to ten. (Ordinance § 1(l).) This number could be increased with City Council approval.

The Ordinance provides in § 1(j)(i)(5) that "[t]he application shall not include a hotel . . . unless specifically approved by the City Council." However, the Ordinance also stated that "any building . . . bounded by Empire Street to Sabin Street to Exchange Terrace to Memorial Boulevard to Friendship Street[]" was an eligible property. (Ordinance § (1)(c).) The Hotel is

[7] Sec. 44-3-9 grants cities the authority to enter into tax stabilization or exemption agreements on property used for manufacturing, commercial, or residential purposes.

located within this bounded area. Moreover, § 2 of the Ordinance lists properties that are eligible for tax stabilization by plat, lot, and address. Included on this list are the plat, lot, and address of the Hotel.

Finally, and most importantly, the Ordinance provided a specific definition for when the Tax Stabilization Period would begin. Section 1(f) provides that: "[i]n order to allow sufficient time for construction and project stabilization, following approval of an eligible property for tax stabilization in accordance with this Ordinance, the stabilization shall last for a period of twelve (12) years from the date the subject stabilization agreement is executed." Additionally, if an owner of property failed to begin renovations within twelve months of executing the agreement, then the Ordinance contemplates the retroactive payment of taxes that amount to the difference between the actual stabilized tax payments and the amount that would have been paid, had no stabilization agreement existed. (Ordinance § 1(e).) These two sections make it clear that the Ordinance contemplated that tax stabilization agreements entered into pursuant to the Ordinance would commence immediately upon execution.

2

The TSA

The TSA was entered into on March 15, 2012, and became effective when the City Council later approved it on the same day. The existence of the Ordinance is referenced throughout the "whereas" clauses of the TSA.[8] Furthermore, the TSA recognizes that the Special Master "made application under and has satisfied each condition of the laws of the State of

[8] For example: "[T]he Providence City Council, pursuant to . . . [the Ordinance] has the authority to exempt property[.]"; "[I]t is in the public interest to provide property tax incentives for owners of properties described in [the Ordinance.]"; and, "[The Ordinance] provides that the City and Developer may make an agreement with respect to the stabilization of all property taxes and assessments[.]"

Rhode Island and the Code of Ordinances of the City of Providence with respect to stabilization of taxes[.]"

Section 2 of the TSA sets forth the definitions to be used in the TSA. Notably, § 2(a) defines "Commencement Date" as "the date that Developer substantially completes the Real Property Improvements, notice of which date Developer or the Project Owner shall deliver to the Tax Assessor of the City as soon as practical after said date is ascertained." Further, the agreement provides that '"Stabilization Period' means that period commencing on the Commencement Date and continuing through the Termination Date." (TSA § 2(f).) Finally, § 2(h) defines "Termination Date" as "that date which is immediately prior to the twelfth (12^{th}) anniversary of the Commencement Date. By way of example, if the Commencement Date is March 14, 2014, the Termination Date will be March 13, 2026."

The foregoing sections, when read in combination, make it clear that the TSA contemplated that the Tax Stabilization Period would not go into effect until Plaintiff had substantially completed the contemplated renovations.[9] The fact that § 3 of the TSA defines the "Term" of the agreement as "a period commencing on the Effective Date and terminating on the Termination Date[]" does not impact the TSA's definition of Tax Stabilization Period. Even though the "Effective Date" is the day the TSA was signed, the conditions that triggered the Tax Stabilization Period were not contingent on the "Effective Date." Rather, the "Term," as defined in § 3, necessarily included a period of time between the "Effective Date" and the "Commencement Date," for the conditional triggers to be completed (i.e., substantial completion

[9] The TSA contemplates that the renovation was to be completed by the fourth quarter of 2015.

of renovations).[10] Thus, the provisions of the TSA differ from those of the Ordinance, as both contemplate different start dates for the Tax Stabilization Period.

3

The Resolution

The Resolution acts as the approval that was required by the City Council per the TSA. The Resolution, like the TSA, references the Ordinance throughout. The Resolution cites the Ordinance as the authority to accept ten tax stabilization agreements, recognizes that the Special Master submitted the application pursuant to the Ordinance, and makes the necessary exceptions for the Hotel to be considered because there were eleven applications and the application was for a hotel, which was in contravention of § 1(j)(i)(5) of the Ordinance.[11]

Moreover, the Resolution states that the "City Council desires to authorize the City Tax Assessor and other appropriate Department Directors to review and make their own independent determinations as to the suitability of the Providence Biltmore's application for tax stabilization in accordance with the requirements of [the Ordinance.]" Finally, the City Council resolved that while it was not taking a position as to whether the Hotel "qualifies for tax stabilization pursuant to the requirements of [the Ordinance,]" it was authorizing the tax assessor and other directors to "make their own independent determinations as to the suitability of the property described in said application for such stabilization in accordance with the provisions of [the Ordinance], as

[10] By way of example, if the project was substantially completed and proper notice given by Plaintiff on October 1, 2015 (the first day of the fourth quarter of 2015), then the Effective Date of the TSA would be March 15, 2015; the Commencement Date would be October 1, 2015; the Termination Date would be September 30, 2027; the Stabilization Period would run from October 1, 2015 through September 30, 2027; and the Term would run from March 15, 2015 through September 30, 2027.

[11] As noted supra, the Hotel was identified in two other sections of the Ordinance as being eligible.

amended hereby." Most notably, the Resolution contains no reference to when the Tax Stabilization Period would commence.

B

Conflict of Tax Stabilization Period Start Date

Plaintiff argues that the Ordinance should control the start date of the Tax Stabilization Period because the City's authority to grant stabilization agreements originated from § 44-3-9, which was later adopted with conditions by the City Council through the Ordinance. Plaintiff argues that the "Commencement Date" as defined in the TSA conflicts with the Ordinance, which clearly states a different date for commencement of the Tax Stabilization Period, and as such, the TSA must yield to the terms as defined in the Ordinance. Therefore, Plaintiff asserts that the Tax Stabilization Period is to begin upon execution of the agreement. Further, Plaintiff argues that the City is without authority to issue a revised tax bill because it was not correcting an "omitted" property or an "illegal" or "erroneous" assessment, as provided for in § 44-5-23.[12]

Defendants counter that the TSA is not ultra vires as to the Ordinance, but rather, that the TSA was an independent agreement that was fully considered by the City Council and adopted when the Resolution was passed. Defendants argue that the TSA, while not necessarily compliant with the Ordinance, is fully compliant with § 44-3-9, which gives the City Council the authority to grant the stabilization agreements. Additionally, Defendants argue that they were

[12] "If any real estate liable to taxation in any city or town has been omitted in the assessment of any year or years and has thereby escaped taxation, or if any tax has been erroneously or illegally assessed upon any real estate liable to taxation in any city or town in any year or years, and because of the erroneous or illegal assessment the tax cannot be collected, or if paid has been recovered, the assessor of taxes of the city or town in the next annual assessment of taxes after the omission or erroneous or illegal assessment is known to him or her shall assess or reassess, as the case may be, a tax or taxes against the person or persons who were the owner or owners of the real estate in the year or years, to the same amount to which the real estate ought to have been assessed in the year or years."

authorized to issue the revised tax bill pursuant to § 44-5-23, because the error was jurisdictional in nature, and the revised bill was issued in a timely fashion.

The TSA was clearly conditioned upon the approval of the City Council. See TSA ¶ 16 ("This Agreement shall only take effect upon City Council approval."). Therefore, the TSA could not become effective unless the City Council had passed the Resolution. Upon examination of the language of the Resolution, the City Council clearly contemplated that any agreement for stabilization would be "in accordance with the provisions of [the Ordinance.]" Therefore, the Resolution, which approved the TSA, required that the TSA be in conformance with the Ordinance. Because the TSA and the Ordinance are not in conformance, the TSA is ultra vires. See Potter v. Crawford, 797 A.2d 489, 492 (R.I. 2002) (finding that a contract made by a town official without authority, and thus in contravention of the town ordinances, was void); but see Citizens for Pres. of Waterman Lake v. Davis, 420 A.2d 53, 58 (R.I. 1980) ("It is a well-established principle that if a contract can be performed legally, it will be presumed by a court that the parties intended a lawful mode of performance.").

However, merely because the TSA is ultra vires does not necessarily mean that the terms of the Ordinance control the start of the Tax Stabilization Period. See Walburn v. City of Naples, Florida, No. 2:04-CV-194-FTM33DNF, 2005 WL 2322002, at *5-9 (M.D. Fla. Sept. 22, 2005) (finding that a lease entered into between plaintiff and defendant-city was void, because the "term" section of the lease executed differed from the sample authorized lease adopted in conjunction with the city resolution authorizing such leases). In fact, contracts that are in contravention of ordinances can be considered void. See Potter, 797 A.2d at 492; see also, generally 10 Eugene McQuillen, The Law of Municipal Corporations § 29.2 (3d ed. 2009) (McQuillen). In addition to general contractual theories, there are four additional matters to be

considered when analyzing municipal contracts. McQuillen, § 29.2. The first is whether the city has authority to enter into a particular contract. Id. Second, whether the contract was entered into by the appropriate department, board, committee, officer, or agent. Id. Next, whether the contract was entered into in the mode provided for by the ordinance. Id. Last is the question of whether the contract agreed upon is so evidenced that it is binding on the parties. Id.

Additionally, courts have considered contracts where only part of the contract is illegal. Section 29:96 of McQuillen states that "[a] municipal contract void as to an inconsiderable or insignificant part is not invalid in toto, especially where the city has received substantial benefits under it and cannot place the other party in status quo . . . . Of course, where the good and bad parts of a contract are inseparable the contract is ordinarily deemed invalid in its entirety." See City of Del Rio v. Ulen Contracting Corp., 94 F.2d 701 (5th Cir. 1938) (finding that if a provision were ultra vires, such invalid portion could be severed from the remainder of the contract so as to not impair the valid part of the agreement); Nev-Cal Elec. Sec. Co. v. Imperial Irr. Dist., 85 F.2d 886 (9th Cir. 1936).

At this juncture, this Court declines to make a determination about whether the TSA is invalid in its entirety or whether the terms that conflict with the Ordinance are severable from the TSA. Compare City of Hollywood v. Witt, 789 So.2d 1130, 1131-32 (Fla. Dist. Ct. App. 2001) ("In order for a contract with a city to be valid, it must comply with the city charter or ordinances.") with Swain v. Wiley College, 74 S.W.3d 143, 147 (Tex. App. 2002) ("A contract of a municipal corporation authorized by an irregular resolution is not 'void,' but simply voidable.") (citing Aspinwall-Delafield Co. v. Borough of Aspinwall, 77 A. 1098, 1100 (Pa. 1910)).

IV

Conclusion

The Court at this time declines to rule on either parties' motions for summary judgment and invites both parties to submit memoranda of law on the issue of whether the TSA is invalid in toto, or if the terms of the TSA may be severed, and if severed, what should the Tax Stabilization Period be. Additionally, the Temporary Restraining Order issued by the Court on April 10, 2014 shall remain in full force and effect.

Within five (5) days of receipt hereof, counsel for both parties shall confer with the Court with respect to the matters herein contained.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	FC Biltmore, LLC v. David Quinn, et al.
CASE NO:	PC 14-1209
COURT:	Providence County Superior Court
DATE DECISION FILED:	May 21, 2014
JUSTICE/MAGISTRATE:	Silverstein, J.
ATTORNEYS:	
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