

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

In Re:)
PROPERTY ASSESSMENT LIEN FORECLOSURE BY THE CITY OF)
FAIRBANKS, ALASKA, UPON LOT BLOCK 12, FAIRBANKS TOWNSITE)
Case No. 4FA-02-1176 Civil)

MEMORANDUM DECISION

Introduction

This case asks whether the City of Fairbanks ("the City") may foreclose upon a lien assessed against the record owner of a demolished building under the Uniform Code for the Abatement of Dangerous Buildings ("UCADB"). The current owner challenges the power of the City to create priority demolition liens in general and to assess such a lien in this particular case.

Facts

After a building inspection, the Pioneer Hotel was ordered condemned in 1997. The owner of the property at the time, Bill Cobb ("Cobb"), was given a Notice and Order to demolish it using his own funds, or else the City would demolish it and Cobb would have to pay

¹ Uniform Code for Abatement of Dangerous Buildings (International Conference of Building Officials, 1994) (UCADB).

the City. Cobb filed a timely appeal of the order with the Board of Appeals. He then postponed his appeal because he was about to sell the property.

In 1998, Cobb sold the property to Marpat Corporation ("Marpat"). In 1999, the City sent another Notice and Order to Marpat. Marpat did not appeal within the allotted 30-day period. In March 2000, Marpat's president, Mike Cusack ("Cusack"), signed temporary permits consenting to the demolition and granting the City access to the property to demolish the Pioneer Hotel. In October 2000, the City prepared a cost summary under the UCADB which was sent to all interested parties, and notified Marpat of a City Council hearing to approve the project.

In November 2000, the City Council met and approved the project; no public testimony was given. A few minutes before the meeting, Cusack faxed to the City Building Department a handwritten objection to the demolition costs, which was not received until the following day. Several days later, the City Building Department notified Cusack that his appeal was not timely, and that he had exhausted his opportunities for administrative appeals.

In December 2000, the City filed with the Recorder's Office an abatement lien for \$205,959 for the demolition of the Pioneer Hotel. A year later, in December 2001, Equivest Mortgage Company foreclosed on its deed of trust on the property, and scheduled a foreclosure sale. On March 12, 2002, the property was sold at public auction to Bachner Company ("Bachner"), which received a quitclaim deed from Marpat.

In an October 10, 2003, affidavit filed in this case, J. Andrew Bachner, President of Bachner Company, offered a hearsay statement that before buying the property he inquired of the title company and was told there were "no assessments against the property that would survive the foreclosure." However, the lien was of record and the title report from the title company, dated March 4, 2002, listed the property as subject to the City's abatement lien. The

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title report did not indicate what interest, if any, might survive the foreclosure sale.² Bachner bought the building anyway.

In May 2002, the City filed this property lien foreclosure action to recover its demolition costs.

Procedural History

Following the City's petition for judgment of foreclosure, in July 2002 Bachner filed a crossclaim against Kiewit Construction and a counterclaim against the City for illegal impairment of contracts, trespass, slander and disparagement of title, negligence, intentional interference with prospective economic advantage, and violations of state statutes and city ordinances.³

In November 2002, the City moved for summary judgment, which Bachner has opposed. In July 2003, Bachner filed a cross-motion for summary judgment, which the City has opposed.

Standard of Review

A motion for summary judgment will be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Civil Rule 56(c). All reasonable inferences must be "drawn against the movant and viewed in the light most favorable to the party opposing the motion." Williams v. Municipality of Anchorage, 633 P.2d 248,

² It does not appear that Bachner is making any claim against the title company for its alleged misrepresentation.

³ The crossclaim against Kiewit Construction was later dismissed.

250 (Alaska 1981).

The decision of a local legislative body will be presumed valid unless proven to have been taken without lawful authority. The action of a city council may also be reversed "upon proof of fraud or conduct so arbitrary as to be the equivalent of fraud, or [where a decision is] so manifestly arbitrary and unreasonable as to be palpably unjust and oppressive." Weber v. Kenai Peninsula Borough 990 P.2d 611, 614 (Alaska, 1999).

The Issues and Arguments

A. Does the City Have the Power to Create Priority Abatement Liens in General?

1. Bachner's Argument

Bachner argues that the City does not have the power to enact priority abatement liens because no state law grants that power to cities. Bachner argues that home rule power is not limitless, and that the prohibitions listed in state statutes are not exclusive. AS 29.10.200.⁴ Bachner contends that home rule municipalities may not alter AS 34.20.090(a), under which a foreclosure purchaser takes the land subject only to the encumbrances created before the deed of trust, except where provided otherwise by statute.

UCADB liens are not expressly addressed in the state's lien statutes. According to Bachner, any changes in the lien priority system must be expressly granted by a statute. Bachner points out that while mechanics' liens get priority over earlier encumbrances, there is no similar statute on priority demolition liens, and therefore the City does not have the authority to

⁴ The introduction to the list of prohibited actions in AS 29.10.200 recites "only the following provisions of this title apply to home rule municipalities as prohibitions on acting otherwise..." Building codes, abatement and demolition of dangerous buildings are not listed. Nor are recovery of demolition costs by lien or assessment.

create them. AS 34.35.060. The only statute allowing demolition liens, argues Bachner, is AS

18.55,840, but it does not grant priority over earlier encumbrances.

Moreover, Bachner insists that since the City calls its action an assessment lien,

the only statute that could authorize it is AS 29.46.010, which allows municipalities to levy liens

against property benefited by public improvements. Because his property value was not in-

creased, he concludes that the City's action cannot be a special assessment lien.

Bachner also argues that demolition liens are invalid in general because the

UCADB itself is unconstitutional, as inconsistent with state law. He contends that UCADB is

also in violation of Article III of the Fairbanks City Charter, which requires all legislation to be

enacted via ordinance. To Bachner, it is an unconstitutional delegation of duty to unelected

building officials. Finally, Bachner argues that the City cannot enact this type of lien because it

is a nonconsensual common law lien, prohibited by AS 34.35.950.

2. The City's Response

The City responds that it has the authority to create priority demolition or abate-

ment liens under state law and the UCADB, because home rule municipalities can do anything

not prohibited by law.⁵ The City agrees that under AS 34.20.090(a) a foreclosure purchaser only

takes senior, not junior, encumbrances unless another statute gives a junior lien priority. The

City argues that it may grant priority to abatement liens because its grant of the lien is not listed

as an action prohibited to home rule municipalities. AS 29.10.200.

The City further responds that its liens are not "special assessment" liens under

⁵ AS 29.10.200.

AS 29.46.010 but are UCADB liens, allowed by local ordinances. UCADB is valid, as are any demolition liens created pursuant to it, because it does not conflict with state law. Finally, the City notes that its priority demolition lien is not a nonconsensual common law lien, because it was consented to by Marpat, and it is not common law but is authorized by state statutes.

3. Discussion

Whether a home rule municipality can place a priority lien on property for the demolition or abatement of a dangerous building appears to be a question of first impression in Alaska, although Alaska statutes and cases have addressed other types of lien priorities. In Alaska, home rule municipalities are granted broad powers, including the ability to exercise any authority not prohibited by law or charter. See AS 29.10.200, AS 29.35.250, and AK Const. Art. 10, Sec. 11.

Under AS 29.35.400, "[a] liberal construction shall be given to all powers and functions of a municipality" While a municipality's powers should be liberally construed, they "are not unbounded."

A municipality may only exercise those powers which are specifically enumerated in Title 29 of the Alaska Statutes, or those "necessarily or fairly implied in or incident to the purpose of all powers and functions conferred in this title."

Kenai Peninsula Borough v. Associated Grocers, Inc., 889 P.2d 604, 606 (Alaska, 1995). A municipality can act even if state law is silent on the issue; a prohibition can be express, or can be implied if the state law and local ordinance are in irreconcilable conflict. <u>Jefferson v. State</u> 527 P.2d 37, 43 (Alaska 1974). None of these problems exist. There is no such conflict in this case.

State laws create and regulate some types of liens, including mechanics' liens,⁶ sales and property tax liens,⁷ special assessment liens,⁸ and Alaska Housing Finance Corporation "slum clearance" liens.⁹ These statutes exist alongside the state law setting out the general rule of first mortgage and deed of trust priority and are exceptions to that general rule.¹⁰

"[A] purchaser at a deed of trust sale takes land subject only to those encumbrances created before execution of the trust deed, except where provided otherwise by statute."

Lynch v McCann, 478 P.2d 835, 836 (Alaska 1970) (emphasis added). As such, Bachner concludes that the City's lien is invalid because no statute provides priority status to demolition liens. In Lynch, the Court invalidated a priority mechanics' lien because the work done did not fit within the definition of "original construction" under which mechanics' liens are granted priority status, explaining that "for the mechanics' liens in the case at bar to burden the addition, they must come within some statute or rule of law conferring priority upon them." Id. at 837 (emphasis added). In this case, however, priority of city demolition liens arises from the rule of law giving broad powers granted home rule municipalities and the adoption by ordinance of UCADB, providing protection from and demolition of dangerous buildings for public safety, a power "necessarily or fairly implied in or incident to the purpose of all [public safety] powers and functions. . . " Kenai Peninsula Borough, 889 P.2d at 66.

⁶ AS 34.35.060(c).

⁷ AS 29.45.650(c).

⁸ AS 29.35.010(6).

⁹ AS 18.55.840.

¹⁰ AS 34.20.090(a).

The Alaska Supreme Court has addressed other "statutory" liens for which the priority in AS 34.20.090 is altered by law. See Nystrom v. Buckhorn Homes, Inc., 778 P.2d 1115 (Alaska, 1989) (statutory mechanics' liens are entitled to priority, but do not include those filed by a contractor); Weber v. Kenai Peninsula Borough 990 P.2d 611, (Alaska, 1999) (special assessment for utility improvements benefit the public and are valid); Fairbanks North Star Borough v. Howard 608 P.2d 32 (Alaska, 1980) (lien on business for unpaid sales tax invalid as beyond scope of what was implied or incident to borough power to collect taxes). However, these cases are distinguishable as none addresses home rule liens generally, or demolition or abatement liens specifically.

There is no state statute or case directly authorizing, regulating, or prohibiting home rule municipalities from creating priority demolition or abatement liens to recover the costs of demolishing a dangerous building. Under Alaska's system of home rule power, in the absence of an express prohibition, cities such as Fairbanks have the authority to provide for abatement by demolition of dangerous buildings.

State law is not the only authority for local action. In home rule cities, the charter confers particular powers upon the city. <u>Lien v. City of Ketchikan</u>, 383 P.2d 721, 723 (Alaska, 1963). In this case, Fairbanks' charter and ordinances have conferred upon the City the power to create these liens: Fairbanks' charter authorizes the City Council to regulate local improvements. In 1997, the City Council adopted the UCADB by ordinance.

The State of Alaska has adopted the Uniform Building Code ("UBC"). 13 AAC

¹¹ Fairbanks Home Rule Charter, Article IX, Sec. 9.1.

¹² The entire UCADB, with several local amendments, became Fairbanks Code of Ordinances Sec. 10-206 and 10-207.

50.020, Register 139 (October 1996). Municipalities have authority under state law to adopt uniform building codes pursuant to that regulation. The City's priority lien is not inconsistent, in conflict with, or prohibited by the UBC. The state has indirectly endorsed the UCADB by its adoption of the UBC. 13 AAC 50.020. The UCADB describes it as "designed to be compatible with the UBC and its notice, order, and appeals procedures are referenced in the UBC." UCADB at iii. It flows from and works hand in hand with the UBC. Under Sections 202 and 401-403 of the UCADB, the local building official can declare a building dangerous and order it be repaired or demolished, at the option of the property owner. If the owner refuses to obey the order by neither repairing nor demolishing, the city will demolish the building. Section 701.2. The city can recover its demolition costs by either making it a personal obligation of the property owner or assessing it as a lien against the property, at the discretion of the city council. Section 905. If the city council decides to rely on its lien, Section 908.1 grants the lien priority over all other encumbrances except tax liens.

Courts in several other states have addressed this exact question. New York, Florida, Ohio, Illinois, Washington, and Oregon courts have all held that municipal abatement liens to recover the costs of demolishing dangerous buildings survive mortgage or deed of trust foreclosure sales and take priority over other earlier encumbrances.¹³ Other states have not.¹⁴

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¹³ See Application of Bidias, 143 N.Y.S.2d 346 (N.Y. Sup. 1955), City of Venice v. Valente, 429 So. 2d 1241 (Fla. App. 2 Dist., 1983), Cleveland Metropolitan Housing Authority v. Lincoln Property Management Co., 259 N.E. 2d 512 (Ohio App. 1970), Radford v. Cosmopolitan Nat. Bank of Chicago, 201 N.E. 2d 622 (Ill. App. 1964), Pierce County v. Schwab, 739 P.2d 116 (Wash. App., 1987), Lincoln Loan Co. v. City of Portland, 855 P.2d 151, (Or., 1993).

¹⁴ See <u>Isaac v. City of Los Angeles</u>, 66 Cal. App. 4th 586 (Cal. App. 2 Dist., 1998) (invalidating a utility lien because it interfered with the statewide interest in uniform existing lien priorities); <u>Gold Vein LLC v. City of Cripple Creek</u>, 973 P.2d 1286 (Colo. Ct. App. 1999) (statutory, non-

The Alaska Constitution and state statutes grant home rule municipalities the

power to take any action not otherwise prohibited by law. No state statutes prohibit priority

demolition liens, and the Fairbanks City Charter and Code of Ordinances have conferred the

power to create these liens upon the City. This Court concludes that the City has the authority to

create priority demolition liens.

B. Did the City Follow its Own Procedural Requirements in This Case?

1. Bachner's Argument

Bachner argues that even if the City has the authority to create priority demolition

liens, the lien is not valid in this case because the City failed to follow required procedures and,

in so doing, violated his due process rights.

In Bachner's view, the only statutes authorizing assessment liens are found in AS

29.46 and the City must follow mandated special assessment procedures: the City Council must

meet before, not after, the project; they must enact an ordinance creating a special assessment

district; the lien must be placed on borough tax assessment rolls; and the City must revise its

order because Bachner, the property owner, bore more than 50% of the cost. AS 29.46.020(b).

Bachner argues that none of this happened.

Bachner also argues that even if the City's lien does not qualify as a special

assessment lien, the City still did not follow UCADB procedures. Specifically, Bachner argues

that the City Council did not approve a written report before demolition as required by the

UCADB Sec. 904 and 908. Bachner also argues that this particular lien is invalid on its face be-

home rule city had authority to enact abatement liens but absent express statutory grant of pri-

ority, lien was extinguished upon foreclosure sale).

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cause the Notice and Order filed at the Recorder's Office mistakenly refers to "Sections 401 and 901-912 of the *Uniform Building Code*," instead of the UCADB (emphasis added).

Bachner complains that his rights were further violated because he was given no notice of the lien against the property. Bachner asserts that if the assessments had been listed on the borough's tax assessment rolls, he would not have bought the property. He further argues that he should have been given the opportunity to appeal the original Notice and Order, as were given to earlier owners of the property during the time of planning and the demolition process. He also contends that he is not bound by the consent granted by earlier owners.

2. The City's Response

The City explains that its lien was a UCADB lien, not "a special assessment lien" as addressed in AS 29.46.010. As such, it has only to follow the procedural requirements of the UCADB. It argues it is illogical to create a special assessment district for each single property project; nor should it have to place the lien on borough tax assessment rolls, because the borough only collects city taxes and this is not a tax. The City asserts that local demolition liens are not listed on the tax rolls. In the City's view, any change in Bachner's property value is irrelevant, because public improvements and property value increases are only implicated by the state special assessment law, AS 29.46.020(b), not local ordinances about removing dangerous oneowner buildings. The Notice and Order is valid on its face, the City argues, because the sections the notice references are the correct sections of the UCADB, and the UCADB is part of the Uniform Building Code in the Fairbanks Code of Ordinances.

The City contends that it fulfilled all the required UCADB procedures. The City Council set costs and approved the project before the demolition was done, at a public hearing

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where the public could testify. UCADB Sec. 901. The lien was recorded at the Recorder's Office and was available for all to see. UCADB Sec. 905.3, 908.1. As to Bachner's assertion that it lacked notice, the City demonstrates that the title report received by Bachner listed the City's lien on the property. The City argues that Bachner had constructive notice of the lien under AS 40.17.080(a).

In the City's view, it met due process requirements by giving notice and an opportunity to appeal to the record owners during the project planning and demolition: Cobb and Marpat. Each was given thirty days to appeal the Notice and Order given to them. Cobb began the appeal process but abandoned it when Marpat acquired the property. Marpat chose not to appeal. Marpat later even consented to the demolition. The City argues that Bachner is bound by the earlier owner's consent to the lien. Bachner had actual and constructive notice of the lien before he purchased the property. As such, the City concludes that Bachner took the property as it stood from Marpat, without a right to appeal.

3. Discussion

The City enacted this demolition lien under the authority of the UCADB, not AS 29.46.010.¹⁵ The fact that the City's lien, is called an "assessment" is emphasized by Bachner in support of its argument. This nomenclature does not automatically make it "a special

¹⁵ Under AS 29.46.010, special assessments are levied for area improvements which benefit particular individuals or property and are allocated against affected owners in proportion to the special benefit conferred.

¹⁶ Assessment is broadly defined as a "[d]etermination of the rate or amount of something, such as a tax or damages . . . [or the] imposition of something, such as a tax or fine, according to an established rate." Black's Law Dictionary (7th ed. 1999).

assessment lien" under AS 29.46.010. This phrasing is found in the original Uniform CADB and remained after local amendments were made by the City in enacting its own version of the CADB. Section 905.1 first uses the verb assess, *i.e.*, "the legislative body . . . may . . . assess said charge against the property." Section 905.3 further explains that if it is decided "that the charge shall be assessed against the property, it shall confirm . . . record[] . . . and [the] assessment shall constitute . . . a lien upon the property."

The term assessment generally refers to the process of valuing and charging for a good or service. The City can assess a lien and later recoup the cost of demolishing a dangerous building, under the UCADB. The special assessments covered by AS 29.46.010 are a different creature of the law.

Inasmuch as the lien here is a UCADB lien, the UCADB procedures apply. These procedures were adopted by the Fairbanks City Council in 1997 and are codified at Sec. 10-206 of the Fairbanks Code of Ordinances. The abatement process began with an inspection and determination by the building official. UCADB Sec. 401.1. Next, the building official issued a Notice and Order to the property owner, giving the authority for the order, the reasons for the finding, and the 30-day appeals process. UCADB Sec. 401.2. The notice was served on the owner and the holders of any encumbrances. UCADB Sec. 401.3. When the owner did not comply by repairing or demolishing the building, the building official filed a new notice with the Recorder's Office that the building is dangerous and the owner was notified, and the building is then demolished by the City. UCADB Sec. 402 and 701.2.

A written appeal, in a specified format, could be made within 30 days of service

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¹⁷ In any event, "the failure to serve any required person does not invalidate the proceedings." UCADB Sec. 401.3.

of the order. UCADB Sec. 501. Within 60 days of the appeal, if any, the Board of Appeals holds a hearing. UCADB Sec. 501.3. Failure to appeal is a waiver of objections. UCADB Sec. 502.

The procedures for the hearing are set out in the UCADB Ch. 6. The City Council can decide whether to recover the costs of the work by assessing it against the property or enforce it as a personal obligation of the property owner. UCADB Sec. 801.2. After the work was completed, the project went before the City Council which held a hearing on the report and received any public testimony that was offered. UCADB Sec. 901. There the council can modify, approve, or reject the report. UCADB Sec. 904, 905.1. The council adopted the report.

If the council decides, as it did here, to charge the costs to the property, "it shall confirm the assessment, cause the same to be recorded on the assessment roll, and thereafter said assessment shall constitute a special assessment against and a lien upon the property." UCADB Sec. 905.3. Again, an appeal could be made within 30 days of that decision. The assessed lien is

subordinate to all existing special assessment liens previously imposed upon the same property and shall be paramount to all other liens except for state, county, and property taxes with which it shall be upon a parity....

UCADB Sec. 908.1 (emphasis added). 19 This section grants priority to the City's abatement

¹⁸ The UCADB does not specify exactly where the lien should be recorded, but instead refers to an "assessment roll." UCADB Sec. 905.3 and 908.1. Bachner argues that the lien should have been placed on the borough tax rolls along with regular borough property tax information. UCADB Sec. 910.

¹⁹ This suggests that the UCADB lien is not an AS 29.46.010 special assessment. Why would a building that has liens because it has been benefited from prior improvement projects be in need of demolition?

liens. In this case, the building official and the City Council met all the UCADB's procedural requirements.

Finally, Bachner challenges the validity of the lien on its face, because it mistakenly refers to Sections 401 and 901-912 of the Uniform Building Code as authority for the lien instead of the UCADB, which provides the authority to demolish dangerous buildings and encumber the property with abatement liens to recover the City's demolition costs.²⁰ Both the Uniform Building Code and the UCADB are within Chapter 10 of the Fairbanks Code of Ordinances, "Buildings and Building Regulations."

This flaw does not render the lien invalid. The Alaska Supreme Court has held that when an authorizing ordinance is misidentified in a municipal document, the document is not invalid if a reader could find the correct ordinance:

Since the [appellant] has not alleged or demonstrated that the error had any practical effect, the error is harmless. See 5 Beth Buday & Victoria Braucher, McQuillin Municipal Corporations § 16.78 (3d ed. rev.vol.1996) ("An error in the printing of a word in the publication of an ordinance will not affect its validity where it is plain from the context what word was intended.").

Kotzebue Lions Club v. City of Kotzebue, 955 P.2d 921, 924 (Alaska 1998). That is the situation in this case: Bachner has alleged no harm or effect from this error. It does not invalidate the lien.

²⁰ The Notice of Abatement Lien states that the lien is "in the manner of a Special Assessment as prescribed by Sections 401 and 901-912 of the 1994 Uniform Building Code." Sections 401 and 901-912 of the 1994 Uniform Building Code cover special occupancy rules and fire protection systems respectively, not abatement of dangerous buildings. Section 401 of the 1994 UCADB gives the City the authority to inspect and order the demolition of dangerous buildings, and to serve the notice and order upon the owner. Sections 901-912 of the 1994 UCADB give the City the authority to recover the cost of demolition via an assessment lien upon the property.

Conclusion

Bachner has challenged the power of the City of Fairbanks to place a priority abatement lien on the former Pioneer Hotel. Bachner has primarily argued that the City cannot create liens of this type because there is no state statute authorizing them. His arguments fail. Home rule municipalities can engage in any activity not otherwise prohibited by law.

Bachner has also argued that even if the City does have the power to create priority abatement liens, the lien on his property is invalid because the City did not follow procedural requirements. However, the record indicates that the City did fulfill the procedural requirements to the extent that Bachner had actual and constructive notice of the lien assessed to the property he bought. Cobb objected, Marpat could have objected but did not, and Bachner cannot object after the fact.

The City Council's decision to demolish and enforce its priority lien is a local legislative decision. Alaska courts give deference to local legislative decisions, invalidating them only upon proof of fraudulent conduct or arbitrary, unreasonable activity. Weber v. Kenai Peninsula Borough, 990 P.2d at 614.

Neither the City nor Bachner disagree about the facts of what the building official and the City Council did. They only disagree on whether those actions were sufficient under state and local law. They were sufficient. The City's lien is valid and superior to Bachner's title. Summary judgment is GRANTED to the City.

Dated at Fairbanks, Alaska, this 29 day of December, 2003.

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RICHARD D. SAVELL Superior Court Judge

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