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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re	)	
	)	
ERICKSON RETIREMENT COMMUNITIES, LLC, et al.[1]	)	**Case No. 09-37010**
	)	**Chapter 11**
	)	**Jointly Administered**
Debtors.	)	
_____	)	
	)	

OBJECTION OF THE CITY OF OVERLAND PARK, KANSAS TO (A) CONFIRMATION OF THE DEBTORS' FOURTH AMENDED JOINT PLAN OF REORGANIZATION AND (B) DEBTORS' MOTION FOR DETERMINATION OF TAX LIABILITY

The City of Overland Park, Kansas (the "City"), by and through its undersigned counsel, hereby files this objection (the "Objection") to (A) the Debtors' Fourth Amended Joint Plan of Reorganization dated March 8, 2010 (the "Plan") and (B) the Debtors' Motion for Determination

[1] The Debtors in these Chapter 11 cases are Erickson Retirement Communities, LLC, Ashburn Campus, LLC, Columbus Campus, LLC, Concord Campus GP, LLC, Concord Campus, LP, Dallas Campus GP, LLC, Dallas Campus, LP, Erickson Construction, LLC, Erickson Group, LLC, Houston Campus, LP, Kansas Campus, LLC,

of Tax Liability dated April 2, 2010 (the "Tax Motion"). The City files this Objection to both the Debtors' Plan and the Debtors' Motion because these two filings by the Debtors and the issues raised by the Plan and the Motion relate to each other. In support of its Objections, the City hereby states as follows:

BACKGROUND

1. One of the Debtors, Kansas Campus, LLC ("Kansas Campus"), is the owner of real property and improvements located in the City (the "Kansas Property"). Erickson Retirement Communities, LLC, also Debtor in these cases, is the developer of the Kansas Property (the "Erickson"). The Kansas Property is a retirement community that is in various stages of construction.

2. In order to facilitate the development of the Kansas Property, the City previously created a transportation development district (the "TDD") relating to the Kansas Property and, in November 2006, issued revenue bonds captioned $15,000,000 The City of Overland Park, Kansas Transportation Development District Special Assessment Bonds, Series 2006 (Tallgrass Project) (the "Bonds"). The Bonds were issued pursuant to a Trust Indenture dated as of November 1, 2006 (the "Indenture") between The City of Overland Park, Kansas, as issuer, and Manufacturers and Traders Trust Company (now succeeded in interest by Wells Fargo Bank National Association), as trustee (the "Indenture Trustee"). Proceeds of the Bonds were used, pursuant to the TDD and the Infrastructure, Development and Indemnity Agreement dated December 12, 2006 (the "Infrastructure Development Agreement") among the City, Erickson, Kansas Campus and Tallgrass Creek, Inc., to finance the construction of certain streets, sewers and other transportation-related infrastructure improvements on the Kansas Property. The

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Littleton Campus, LLC, Novi Campus, LLC, Senior Campus Services, LLC, Warminster Campus GP, LLC and Warminster Campus, LP.

infrastructure improvements financed with the City's Bonds not only facilitated the development of the Kansas Property by Erickson and Kansas Campus, but also directly benefited and increased the value of the Kansas Property. Based on Kansas law and the TDD, special assessments are levied on the Kansas Property to pay the Bonds. The special assessments are separate from the real property taxes levied on the Kansas Property and relate to the transportation-related infrastructure improvements concerning the Kansas Property that were financed by the Bonds. As expressly specified in the Indenture and the Bonds, the Bonds are not general obligations of the City, but are payable solely from the special assessments levied on the Kansas Property and certain funds held in accounts under the Indenture.

3. The Bonds were issued pursuant to the Kansas Transportation Development District Act, K.S.A. Sections 12-17,140 through 12-17,149 (2005 Supp.), and City Ordinance No. TDD-2643 adopted by the City on October 25, 2006. The TDD was created and the special assessments on the Kansas Property were levied by the City pursuant to City Resolution No. 3542 adopted by the City on September 11, 2006 and Ordinance ASMT No. 2639 adopted by the City on October 25, 2006.

4. Kansas Campus and Erickson, each a Debtor herein, entered into the following agreements related to the TDD, the Kansas Property and the Bonds (collectively, such agreements, together with all documents related thereto, the "TDD Documents"):

(i) the Infrastructure Development Agreement;

(ii) Tallgrass Creek Development Agreement dated October 20, 2006 (the "Project Development Agreement") between Kansas Campus, as owner, and Erickson, as developer, concerning the development of the project on the Kansas Property by Erickson as developer;

(iii) Tax Regulatory Agreement dated as of December 1, 2006 by and among the City, Kansas Campus and Tallgrass Creek, Inc.;

(iv) Agreement for Administrative Services dated December 12, 2006 by and among the City, Erickson and MuniCap, Inc.; and

(v) lease of the project on the Kansas Property by Kansas Campus to Tallgrass Creek, Inc.

We understand that the Indenture Trustee has or will file an objection to the Plan and that some or all of the TDD Documents and related ordinances will be attached to the Indenture Trustee's objection.

5. As of the date of the Debtors' bankruptcy filing, Kansas Campus owed an aggregate amount of $1,729,323.11 in real property taxes and special assessments for the 2009 tax year. Of this amount, the amount of special assessments owed was $1,283,537.44.

6. Based on Kansas law, any future owner of the Kansas Property will owe real property taxes and special assessments. A failure of any owner of the Kansas Property to pay real property taxes and special assessments can result in foreclosure of the Kansas Property by the City or other local taxing authorities ("LTAs").

7. Johnson County, Kansas timely filed proofs of claim in the bankruptcy cases of Erickson and Kansas Campus asserting a secured claim of $1,729,323.11 for pre-petition real property taxes and special assessments for the 2009 tax year. The claim of Johnson County, Kansas is based on an assessed property value of the Kansas Property in the amount of $35,096,120.00. The City similarly timely filed proofs of claim in the bankruptcy cases of Erickson and Kansas Campus asserting, among other things, a secured claim respecting special assessments for the 2009 tax year. While real property taxes and special assessments are billed together, as stated above the amount of pre-petition special assessments relating to the Kansas Property was $1,283,537.44. As summarized in more detail in the Objection by Board of County Commissioners of Johnson County, Kansas to Confirmation of Debtors' March 8, 2010 Fourth

Amended Joint Plan of Reorganization filed in these cases and the Kansas law and statutes cited therein, these claims are secured by a priority statutory lien on the Kansas Property under Kansas law and accrue interest at the rate of 8% per annum.

8. The City received a Notice of Non-Voting Status from the Debtors, indicating that the City did not have a right to vote on the Plan because the City's special assessment claims will be paid 100% and are unimpaired.

9. The Debtors filed the Tax Motion after the Debtors sought confirmation of the Plan and after sending the Notice of Non-Voting Status to the City. The Tax Motion seeks to, among other things, have the court determine the value of the Kansas Property in order to reduce the Debtors' liability for real property taxes and special assessments relating to the Kansas Property.

SUMMARY OF THE PLAN PROVISIONS RELATING TO KANSAS PROPERTY

10. The Plan provides for, generally speaking, the sale of the Kansas Property to Kansas Redwood. While the Plan provides for a cash purchase price to be paid by the Redwood purchaser for other properties of the Debtors, and the allocation of a portion of the aggregate purchase price to specific Debtor properties, the Plan does not provide for payment of a cash purchase price for the Kansas Property or for the allocation of any portion of the aggregate purchase price to the Kansas Property. Instead, in Section 6.2.5., the Plan specifies as follows:

> Redwood Kansas will acquire the assets of Kansas in exchange for assuming the obligations under the Kansas Special Assessment Bonds in full. …. The assumed debt will not be guaranteed.

A similar statement is contained in Section 6.3.6.3. of the Plan.

11. The classes of claims relating to Kansas Campus, in Section 3.L. of the Plan, include Priority Tax Claims, Secured Tax Claims and Kansas Special Assessment Bond Claims.

The Plan specifies that Priority Tax Claims relating to Kansas Campus will receive "Payment in full" and are not entitled to vote on the Plan. The Plan does not specify whether Priority Tax Claims relating to Kansas Campus will be paid on the Effective Date of the Plan and does not specify the source of funds for such payment.

12. The Plan specifies that Secured Tax Claims relating to Kansas Campus are "Unimpaired" and not entitled to vote on the Plan. In Section 4.12.2, the Plan specifies that Secured Tax Claims relating to Kansas Campus will be paid as follows:

> On the Effective Date or as soon thereafter as is reasonably practicable, each Holder of an Allowed Secured Tax Claim shall receive, at the option of the Reorganized Debtors, (i) the proceeds of the sale or disposition of the Collateral securing such Allowed Secured Tax Claim to the extent of the value of the Holder's secured interest in the Allowed Secured Tax Claim, (ii) such treatment that leaves unaltered the legal, equitable, and contractual rights to which the Holder of such Allowed Secured Tax Claim is entitled, or (iii) such other distribution as necessary to satisfy the requirements of the Bankruptcy Code. In the event the Reorganized Debtors treat a Claim under clause (i) of this Section, the liens securing such Secured Tax Claim shall be deemed released. The Debtors and the Reorganized Debtors specifically reserve the right to challenge the validity, nature, and perfection of, and to avoid pursuant to the provisions of the Bankruptcy Code and other applicable law, any purported liens relating to the Secured Tax Claims.

13. The Plan specifies that Kansas Special Assessment Bond Claims are "Unimpaired" and not entitled to vote on the Plan.

OBJECTIONS TO THE PLAN

14. While, as stated above, the City does not have a general payment obligation on the Bonds and the Bonds are payable solely from special assessments relating to the Kansas Property, the City files this Objection to the Plan and the Debtors' Tax Motion because the City has an interest in clarifying certain important issues respecting the acquisition of the Kansas Property as proposed under the Plan, the treatment of the taxes, special assessments and Bonds

relating to the Kansas Property, the TDD Documents and the development of the Kansas Property.

15. For the reasons stated below, the Plan cannot be confirmed because the Plan fails to comply with the confirmation standards of Section 1129 of Title 11 of the United States Code, as amended (the "Bankruptcy Code") as they relate to the Kansas Property. The Plan is ambiguous in several material respects relating to the TDD, the Kansas Property, the TDD Documents and the Bonds. Moreover, Section 1123(a)(5) states, in relevant part, that "a plan shall provide adequate means for the plan's implementation." The Debtors' Plan fails to fulfill this requirement because several of its key terms and provisions lack material information as it relates to the TDD, the Kansas Property and the Bonds. The material ambiguities, discussed further below, demonstrate that the Plan is not feasible as currently proposed. Further, when a plan lacks the adequate means of implementation required under Section 1123(a)(5), the plan cannot satisfy the good faith requirement for confirmation under Section 1129(a)(3). In the present case, the Debtors fail to provide an adequate means for implementing the proposed Plan, and therefore lack the good faith required for confirmation.

16. Specifically, the Plan (i) fails to specify the manner in which the Kansas Property, the Bonds and the TDD Documents to which the Debtors are a party will be treated in connection with the proposed sale of the Kansas Property and (ii) fails to describe the source of payment of such taxes and special assessments relating to the Kansas Property. Accordingly, the City asserts that the Plan is ambiguous at best as it relates to the TDD, the Kansas Property, the TDD Documents and the Bonds, is not feasible as currently proposed and that confirmation of the Plan must therefore be denied.

17. The Debtors' Plan fails to specify the manner in which the Kansas Property, the Bonds and the TDD Documents to which the Debtors are a party will be treated in connection with the proposed sale of the Kansas Property. The Plan states that the claims and Bonds set forth above are unimpaired and that the purchaser of the Kansas Property will acquire the Kansas Property by "assuming the obligations under the Kansas Special Assessment Bonds in full." The Debtors' Notice of Non-Voting Status delivered to the City also provides that such claims will be paid 100%. However, given that the Bonds are payable from special assessments on the Kansas Property, the intent and application of the language in the Plan as it relates to the TDD Documents and the Bonds is unclear. The Plan needs to clarify the intent and application of this language. Specifically, the Plan must clarify whether the sale of the Kansas Property will be subject to the terms of the TDD Documents, whether all TDD Documents will be assumed by the Debtors and assigned to the purchaser of the Kansas Property, whether the Project Development Agreement will be assumed and assigned to a developer of the Kansas Property and the identity of such developer, and whether such assumption and assignment will be in compliance with the TDD Documents (including obtaining the City's prior consent to any assignment of the Infrastructure Development Agreement) and Section 365 of the Bankruptcy Code. The TDD Documents do not currently appear to be among the agreements that the Debtor proposes to assume and assign. Without specifying the foregoing matters and accomplishing each of the foregoing steps, the claims of the City and LTAs relating to the Kansas Property would be impaired. The City further states that such claims cannot be unimpaired, as specified in the Plan, if the guaranty of Erickson as contained in the Infrastructure Development Agreement is not replaced with a guarantor acceptable to the City. In sum, the claims set forth herein and the

Bonds cannot be unimpaired, as set forth in the Plan, without clarifying and accomplishing the foregoing matters.

18. The Plan fails to specify the timing and source of payment of Priority Tax Claims and Secured Tax Claims relating to the Kansas Property. The timing and source of payment on these claims is particularly important respecting the Kansas Property, as there is no cash purchase price for, or allocated to, the Kansas Property that would otherwise provide a source of funds from which such claims would be paid. The language contained in the Plan, as quoted above in Paragraph 12 of this Objection, concerning the method of payment is ambiguous and improperly confers too much discretion on the Debtors. The Plan also cannot adversely affect the liens on the Kansas Property or the priority thereof securing taxes and special assessments.

19. The City also asserts that the Plan cannot be confirmed because it violates Section 1129(d) of the Bankruptcy Code. Section 1129(d) of the Bankruptcy Code provides as follows:

> (d) Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance taxes….

20. While the Debtors' Plan specifies that various LTAs will be paid 100% or will be unimpaired, the Plan cannot be read in isolation, but must instead be read in conjunction with the Debtors' Tax Motion. In the Tax Motion, the Debtors seek to impair the claims of, and avoid taxes owed to, numerous LTAs, including the LTAs associated with the Kansas Property, in violation of Section 1129(d) of the Bankruptcy Code. Accordingly, the Plan cannot be confirmed.

OBJECTIONS TO THE TAX MOTION

21. The City further submits that the Tax Motion must be denied because (i) the value of the Kansas Property cannot be set based on the Tax Motion, (ii) the special assessments on the

Kansas Property do not relate to the assessed valuation of the Kansas Property, are owed by the owner of the Kansas Property independent of the assessed value of the Kansas Property and thus cannot be altered based on any re-valuation of the Kansas Property and (iii) the relief requested in the Tax Motion lacks fundamental due process. To the extent the matters discussed herein in connection with the Tax Motion are applicable to the Plan, such matters shall also constitute an objection to the Plan.

22. The Debtors request in the Tax Motion that the value of all properties subject to the Tax Motion, including the Kansas Property, be set by the Court based on the amount to be paid for, or allocated to, such property following the auction for all the Debtors' properties. However, while there is a cash purchase price payable for, or allocated to, certain properties of the Debtors, there is no such cash purchase price payable for, or allocated to, the Kansas Property. Instead, as specified in the Plan and summarized above, the purchaser of the Kansas Property is acquiring such property in exchange for purportedly assuming the obligations of Kansas Campus on the Bonds. The Tax Motion allocates a "zero" amount of the aggregate purchase price for the Debtors' properties to the Kansas Property. The hearing on the Debtors' Allocation Motion (as defined in the Tax Motion) also does not appear to assign a purchase price to the Kansas Property. Neither the Disclosure Statement, the Plan, the Tax Motion nor the hearing on the Allocation Motion allocated any cash purchase price or other value to the Kansas Property that would be determinative of its value for tax purposes. Accordingly, even if the Debtors' proposed valuation method were accepted, to which the City objects, there are no sale proceeds for the Kansas Property to serve as any determinant of value for such property. In addition, the $15,000,000 original par amount of the Bonds does not relate to the value of the Kansas Property as a whole (which, as noted in the Johnson County proofs of claim, is assessed

at $35,096,120.00). The Bonds were issued to finance only certain transportation-related infrastructure improvements relating to the Kansas Property. The only value of the Kansas Property before the Court is the $35,096,120.00 assessed value in the Johnson County, Kansas proofs of claim.

23. Moreover, the special assessments on the Kansas Property cannot be reduced based on a re-valuation of, or a reduction in the assessed value of, the Kansas Property. The special assessments are not calculated based on the value of the Kansas Property. The proofs of claim of Johnson County, Kansas filed in the Erickson and Kansas Campus cases are for both real property taxes and special assessments (i.e., a total of $1,729,323.11, of which $1,283,537.44 represents special assessments for 2009). The City's proofs of claim describe a claim for, among other things, special assessments on the Kansas Property that are required to pay the Bonds. The amount of such special assessments is not based on the assessed value of the Kansas Property, but instead is based on the related Bonds that financed improvements to the Kansas Property. Thus, the amount of special assessments on the Kansas Property will not be altered by a reduction, if any, in the assessed value of the Kansas Property and the full amount of special assessments (i.e., $1,283,537.44) will still remain owed by Kansas Campus (or any other owner of the Kansas Property). The Debtors' Plan and the Tax Motion, as they relate to Kansas Campus, seem to be based on a fundamentally flawed misunderstanding of the Bonds and related special assessments. The City specifically reserves the right to seek all special assessments, and any other related amount owed, from any owner of the Kansas Property.

24. The relief requested in the Tax Motion also lacks fundamental due process. The City and other LTAs were not advised in connection with the relief requested by the Debtors in the Allocation Motion that the allocation would be determinative of the value of the related real

properties for purposes of tax claims. The LTAs holding secured and prior tax claims would not know of any need to participate in the hearing on the Allocation Motion (and may not have had standing had they tried to participate given that the purpose of the Allocation Motion was not to reduce tax claims). Instead, the proper procedure to resolve any disagreement concerning the tax claims is for the Debtors to object to the claims filed by the LTAs and resolve any disagreement in the claims process. The Debtors want to essentially skip the entire claim objection and response process with LTAs. The LTAs should be permitted direct and meaningful notice that their claims are at issue and be provided with an opportunity to procure evidence of property values in the particular areas and circumstances applicable to such properties. Last, neither the purchase price a third party would pay for a property, nor an essentially artificial allocation of an aggregate purchase price for purposes of this bankruptcy case, is an appropriate method to value property for tax purposes, as a third party will discount the purchase price by all outstanding taxes and mortgage liens whereas a taxing authority with a first lien on such property may not need to discount the property value by existing liens.

WHEREFORE, for the foregoing reasons, the City respectfully requests that the Court: (i) deny confirmation of the Debtors' Plan, (ii) deny the approval of the Tax Motion and (iii) grant such other and further relief as it deems just and appropriate.

This the 8th day of April, 2010.

/s/ David W. Parham

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on April 8th , 2010, a true and exact copy of the foregoing Objection was served via this Court's electronic filing system or by overnight mail with postage fully prepaid to the following necessary parties:

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