

SIGNED.

Dated: January 9, 2013



James M. Marlar

James M. Marlar, Chief Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA**

In re:) Chapter 11
VAL-MID ASSOCIATES, L.L.C.,) No. 4:12-bk-20519-JMM
Debtor.) **MEMORANDUM DECISION**

A hearing was conducted on December 11, 2012 on confirmation of the Debtor’s Plain of Reorganization dated September 28, 2012 (ECF No. 32), as modified (ECF No. 85). The Amended Report of Ballots (ECF No. 112) showed Class 2–Secured [real and personal property] Tax Claims of Pima County, as the only consenting noninsider class. Attorneys for creditor Canyon Community Bank (“CCB”) argued that the plan failed the threshold cram-down requirements of § 1129(a)(1) and (a)(10) because no *impaired* consenting class had voted in favor of the plan. Debtor’s attorney maintained that Class 2 was impaired. Thus, the legal issue arose whether the only consenting class -- Class 2 Secured Tax Claims -- qualified as an impaired class. This is a question of law. See In re L & J Anaheim Assocs., 995 F.2d 940, 942 (9th Cir. 1993).

After considering the arguments of counsel, the pleadings, including supplemental briefs, and the law, the Court concludes and orders as follows.

1 **Plan Treatment of Class 2**

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3 The plan provides the following treatment for the Class 2 secured tax claims pursuant
4 to a stipulation (ECF No. 100) entered into between Debtor and Pima County:
5

6 Class 2 (Secured Tax Claims):

7 Holders of Allowed Class 2 Claims will retain their liens on any Assets of
8 the Debtor that serve as security for repayment of Allowed Class 2
9 Claims. The Allowed Class 2 Secured Tax Claims of Pima County (Claim
10 Dkt. #4, 5, 6, and 7) will be paid by CCB upon the transfer of the Stations
11 to CCB. In the event that CCB fails to pay the Allowed Class 2 Secured
12 Tax Claims of Pima County upon the transfer of the Stations to CCB, then
13 Pima County will be free to exercise all of its rights and remedies with
14 respect to the Stations, including foreclosure of the tax liens on the real
15 and personal property that comprise the Stations. Class 2 Claims are
16 impaired, and holders of Allowed Class 2 Claims will be entitled to vote to
17 accept or reject the Plan.
18

19 With regards to transfer to CCB, Section 6.2 (Class 3) provides that “[o]n the
20 Effective Date, the Debtor shall execute and deliver a quit claim deed to CCB transferring title to
21 the Stations to CCB, subject to all existing liens, including but not limited to all Allowed Priority
22 Tax Claims.”

23 In other words, the plan shifts the payment of the taxes to CCB, the secured creditor.
24 Furthermore, CCB is under no obligation to pay the taxes and apparently has signed no agreement
25 to do so. Because Pima County will retain its liens, as well as all rights and remedies with respect
26 to enforcement of its liens, its statutory rights, under Arizona law, remain the same, and unaltered.
27

28 **Class 2 is Not an Impaired Class**

In the case of a nonconsensual, cram-down plan, at least one non-insider class of
claims that is impaired must accept the plan. 11 U.S.C. § 1129(a)(10).

The parties disagree on whether a secured tax claim can be an impaired class pursuant
to § 1123. This section provides for classes of claims “other than claims of a kind specified in

1 section . . . 507(a)(8),” which pertains to *unsecured* priority tax claims. Preferential treatment for
2 such claims is statutorily protected by § 1129(a)(9)(C). In 2005, however, under BAPCPA,
3 Congress added § 1129(a)(9)(D) in order to provide the same protection (afforded in §
4 1129(a)(9)(C)) for secured tax claims which would otherwise meet the description of an unsecured
5 claim under § 507(a)(8).

6 There is a split of authority on the issue, with no definitive Ninth Circuit precedent.
7 The Court does not need to decide whether or not a secured tax claim can achieve class status for
8 voting purposes, because Class 2 is, nonetheless, unimpaired.

9 Impairment is defined, in relevant part, in § 1124(1), which provides that “a class of
10 claims or interests is impaired under a plan unless, with respect to each claim or interest of such
11 class, the plan ... leaves unaltered the legal, equitable, and contractual rights to which such claim
12 or interest entitles the holder of such claim or interest.” Both parties agree that in our Circuit
13 impairment is defined very broadly and includes “any alteration of the rights . . . even if the value
14 of the rights is enhanced.” L&J Anaheim Assocs., 995 F.2d at 942 (citation omitted).

15 Here, the plan does not actually "treat" (or pay) the Class 2 claims, except to provide
16 that it will retain its liens and then to shift responsibility for the payment of the taxes to CCB.
17 However, the Debtor lacks standing to speak for CCB. Since the plan preserves Pima County’s full
18 rights and remedies to collect the taxes via statutory foreclosure of its liens in the event CCB fails
19 to pay them, its rights have not been altered or changed.

20 Here, the first halves of the taxes were due under state law on November 1, 2012, and
21 the transfer of the property to CCB would take place on the Effective Date. Debtor cites a case
22 where the alteration of payment due dates for a classified secured tax claim, which deviated from
23 the statutory treatment under § 1129(a)(9)(C), was determined to constitute impairment. See In re
24 Greenwood Point, LP, 445 B.R. 885, 906-07 (Bankr. S.D. Ind. 2011). Interestingly, the Greenwood
25 Point court’s springboard of reasoning was that the statutory language was itself an impairment of
26 the taxing authority’s state law payment rights. Id. at 907. Thus, Greenwood Point is clearly on
27 the *opposite* end of case law that holds that a tax claimant, whether secured or unsecured priority,
28 is *not* an impaired class that can accept a plan and bind other truly impaired creditors to a cram

1 down. See In re Bryson Props., XVIII, 961 F.2d 496, 501 n.8 (4th Cir. 1992) (“We agree that
2 priority tax claimants, which receive preferential treatment under the Code (*see* 11 U.S.C. §
3 1129(a)(9)(C)), are not an impaired class that can accept a plan and bind other truly impaired
4 creditors to a cram down.”); In re Mangia Pizza Invs., LP, 480 B.R. 669, 678 (Bankr. W.D. Tex.
5 2012) (holding that a secured tax claim could not qualify as an impaired class for purposes of cram
6 down because tax claimants are guaranteed preferential treatment under § 1129(a)(9)(C)) .

7 Furthermore, there was a true impairment in Greenwood Point, because the plan
8 provided that, prior to full payment of the claim, the real estate would vest in the reorganized debtor
9 free and clear of liens, including the tax lien. 445 B.R. at 907.

10 Here, Debtor’s plan does nothing to alter the payment due dates, because Debtor is
11 not paying the claim through the Plan. Upon transfer of the property, Debtor does not, and cannot,
12 guarantee payment by CCB on the Effective Date. For this reason, the plan explicitly provides that
13 Pima County’s lien rights are left unaltered.¹

14 Based on the foregoing analysis, the Court concludes that the plan does not alter Pima
15 County’s rights associated with its tax claims, and that Class 2 is therefore not an impaired
16 accepting class. Therefore, the Debtor's plan cannot be confirmed.

17 A separate order will be entered which denies confirmation of the Plan of
18 Reorganization Dated September 28, 2012, as modified. Any appeal must be filed within 14 days
19 after entry of that order. FED. R. BANKR. P. 8002.

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21 DATED AND SIGNED ABOVE.
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26 _____
27 ¹ Debtor maintains that, logically, CCB—which is receiving treatment in express
28 compliance with the Bankruptcy Code and retaining its lien rights under state law—would be
similarly unimpaired and would be deemed to accept the plan under § 1126(f). While CCB’s
treatment is not at issue, the court notes that CCB would be taking the property subject to the
liens.

1 To be NOTICED by the BNC ("Bankruptcy Noticing Center") to:

2 Attorneys for Debtor
3 Attorneys for Canyon Community Bank
4 Attorneys for Pima County
5 Office of the United States Trustee

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