Massachusetts Department of Revenue
Division of Local Services

LOCAL TAXES

Abatement Applications and Open Meeting Law, Phased Condo Assessments and Other Assessment and Collection Issues

2012

Workshop A

Amy A. Pitter, Commissioner
Robert G. Nunes, Deputy Commissioner

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WORKSHOP A

LOCAL TAXES
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Workshop A Case Study Problems

I. Electric power lines serving a wide region of North Central Massachusetts were laid out in Bedlam, Massachusetts around the turn of the 20th century. With upgrades over the course of the last century and decade, power lines now crisscross the backyards of numerous properties (sub-divided since the time of the easement) in a part of Bedlam that has recently seen a surge in residential development. The electric company has easements in the land area over which the power lines stretch, but the land occupied by the power transmission equipment is being taxed to the owners of the fee interest in the real estate. A homeowners' group is now demanding that the assessors stop charging them for the portion of their parcels they effectively cannot use.

1. To whom is the land occupied by the utility easement taxable?
2. Does it matter if the electric company acquired the easements over which the power lines run pursuant to a right of eminent domain? What if the easements were purchased from landowners as an alternative to a taking by the electric company, which received eminent domain powers from the legislature as part of its charter?
3. What if the electric company had no specific legal right to take the easements it used for the power lines by eminent domain and simply made a purchase from a single large landowner over 100 years ago? How would the easements be subject to tax in that instance?

II. In Tinytown, Massachusetts, the Pagan Forest Fellowship, a non-profit corporation, owns a 100 acre site which consists primarily of wooded areas and undeveloped open space. In addition, approximately 15 acres of the parcel have been improved with nine structures and landscaping, which provide housing, office space, and dining and recreational facilities for the Fellowship and attendees at an annual summer camp named for the Greek god Pan. The 15 acres includes a small lake improved with a dock and a diving platform. The summer camp operates for 3 weeks in July and August, offers a range of recreational, nature awareness, and self-help programs, and enrolls approximately 100 campers for an attendance fee of $7,000, which covers the costs of operation with a surplus of about $15,000, which is used to maintain the 100 acre site. The office headquarters is in use year round.

Much of the site is fenced in, and no trespassing signs are prominently displayed, mostly in the vicinity of the improved area. Even so, much of the wooded area and open space is accessible from adjacent parcels, a small, town-owned road, and a publicly accessible footbridge which crosses the river which marks the property's

eastern border. Officers of the corporation provide some educational programming during the course of the year, touching on the pantheist religious and self-help philosophy of the Fellowship, rare species of flora and fauna found on the site, and nature and conservation awareness. These educational offerings, which are free of charge, are advertised on the group's web site, which also explains the group's religious beliefs as espoused in a self-help book written by the Fellowship's founder. Organized sessions of silent meditation on the divinity of nature are also held on an irregular schedule in a wooded grove area in the undeveloped portion of the site and are announced by email and on the web site.

Individuals desiring to participate in educational or meditation programming are required to submit an application to the corporate officers and explain their interest in communing with nature. If a non-applicant is observed on the site, s/he is directed to the group's offices in the improved camp area to apply for access privileges. Even so, the size of the site and its open accessibility at certain points entail many individual non-applicants using the property over the course of a year.

A number of community organizations in Tinytown also use the site during the year for picnics and recreational purposes. A group of Druids gathers on the property to observe the solstices and conduct a bonfire ritual on the fall pagan holiday of Samhain. Residents of Tinytown are also allowed access to the property to hunt non-protected animal species during hunting season.

1. Does the 100 acre Fellowship property in Tinytown qualify for charitable exemption under G.L. ch. 59, § 5, Clause Third?
2. Does the 100 acre Fellowship property, or any part of it, qualify for the religious exemption under G.L. ch. 59, § 5, Clause Eleventh?
3. Does the 100 acre Fellowship property, or any part of it, qualify for classified status under G.L. ch. 61B, § 1.

III. Developer Wilderness Improvements, Inc. purchased a 30 acre site in Boomtown, Massachusetts that had previously been classified "natural, wild, and open" under G.L. c. 61B for over 20 years. They announced plans to build a condo complex on the site in phases. The first phase was completed by mid-2010 and the master deed covering the 30 acres and declaring the 15 Phase 1 units was recorded that year. All 15 units, which occupy about 5 acres, had been sold to purchasers by early 2012. In the master deed, the developers retained rights to build phases 2 and 3 in the undeveloped 25 acres of the common area.

In January, 2012, the developers commenced construction of the second phase to consist of 25 units to be located on another approximately 5 acres of the site. As of June 30, 2012, the units were 25% completed. They will be finished as of January 1, 2013 and ready for occupancy. However, the developers do not plan to offer the phase 2 units for sale immediately and will not amend the master deed and declare the units when ready for occupancy. Instead they intend to rent units in phase 2 as apartments for a year or more. Their attorney has argued that, because no condo units will yet be declared for phase 2, these units are not yet taxable.

1. What is the rollback/conveyance tax liability for the site as of FY 10, when construction of phase one was carried out?
2. Is the phase 2 development taxable, even though no condo units have been declared, for FY 14? What is the rollback/conveyance tax exposure for the land covered by the phase 2 development?

IV. Cathartide Cove, a lakefront community in central Massachusetts, built a sewer system to cover about 75% of community households around the turn of the 20th century, and made certain system improvements and upgrades in the 1960's to modernize. Since then, the volume of effluent which passes through the town's treatment facility has nearly reached the plant's capacity. Meanwhile, the Turkeyneck neighborhood of Cathartide Cove has never had town sewer service, forcing residents to maintain septic systems in order to meet the requirements of the Uniform State Plumbing Code.

The town board of health has recently conducted a series of water quality tests in Turkeyneck. In an area of the neighborhood characterized by the presence of wetlands, levels of nutrient enrichment in the water table were found to be elevated. The board of health has determined that the scale of the nutrient enrichment is such that improvements to individual septic systems would not be an effective countermeasure.

Under pressure from the Department of Environmental Protection, the board of health has recommended that sections of Turkeyneck affected by nutrient enrichment be required to hook up to an expanded town sewer system. After a contentious town meeting, the comprehensive water resources management plan developed by the board of health and DEP was approved and the town accepted the local option at G.L. c. 83, § 1A to authorize the recommended sewer expansion.

Additional sewerage treatment plant capacity will be needed to accommodate the additional effluent from affected sections of Turkeyneck.

The Sewer Commissioners are considering possible options for building and financing the sewer improvements.

1. The sewer commissioners have decided on a plan that will require sewer connections of only those Turkeyneck properties that are demonstrably related to the nutrient enrichment problems, which relies on the purchase of processing capacity from neighboring Clearwater. When are the sewer special assessments to be committed? When does the lien on affected properties arise? Are there any mechanisms to accelerate the anticipated cash flow needed to finance the improvements?
2. Initial cost projections are discovered to have been undercounted by a mistake as to the number of properties requiring sewer connections. The sewer special assessments have not yet been committed. What can the town do?
3. Following project completion, special assessments are ready to be made against the affected parcels, in an overall amount that substantially exceeds initial cost estimates. How are the assessments allocated among benefited parcels? When do bills go out? When are they due? What happens if a property owner doesn't pay the assessment in full within 30 days?
4. Over how long a time period can sewer special assessments be apportioned? How does interest work?
5. How are the special assessments applied to and collected from classified horticultural/agricultural land?
6. The sewer commissioners are concerned that rising demand for sewer connections over the next 20 years—not limited to affected areas in Turkeyneck—require a substantial rebuilding of the sewerage treatment plant to handle a volume of waste matter 40% higher currently processed. Can the costs of this general system upgrade be assessed to Turkeyneck landowners? Is a sewer special assessment the only mechanism by which the sewer commissioners can finance the overall increase in system capacity beyond that needed to accommodate Turkeyneck? Does this alternative route have any impact on what costs of system improvements can be charged to Turkeyneck property owners?

Massachusetts Department of Revenue *Division of Local Services*
Henry Dormitzer, Commissioner Robert G. Nunes, Deputy Commissioner & Director of Municipal Affairs

January 22, 2008

Ronald W. Rakow
Commissioner of Assessing
City of Boston
City Hall, Room 301
Boston, MA 02201

Re: Assessment of Easement to CSX
Our File No.2007-294

Dear Mr. Rakow:

This is in reply to your letter seeking authority from the commissioner of revenue under Ch.59 §11 to assess easement interests in certain parcels of land to the easement holder, CSX.

CSX is the holder of easements granted by the Massachusetts Turnpike Authority in 1962, when the Boston extension of the Turnpike was constructed. The parcels had been owned by CSX's predecessor, the New York Central Railroad, which conveyed them to the Turnpike Authority, along with other land from Weston to Boston. In return, the Turnpike Authority granted the railroad easements in certain parcels in Allston for "railroad and related purposes, and while so used, for any other common carrier purposes." While the Turnpike Authority held title to the parcels, CSX was taxed for its easement interests under Ch.81A §14, which authorizes the taxation of Turnpike Authority property occupied or used in connection with a business conducted for profit to the user, lessee or occupant. Ch.81A §14 is broadly similar to Ch.59 §2B, which however is expressly made inapplicable to easements of public utility companies. The Turnpike Authority conveyed the parcels involved in this request to Harvard University Beacon Yards, LLC (Harvard), an affiliate of Harvard University, in 2000 and 2003, after which the city has not taxed CSX for the value of its easements. The city has been assessing Harvard as the owner of the property.

Authority to assess CSX for the value of its easement in the parcels identified in Exhibit 1 is hereby granted. In granting the authority to assess CSX for the value of its easement interests, we leave open the question of whether, or the extent to which, CSX may be eligible for exemption with respect to any such assessments. The parcels in question, as reflected on the Exhibit 1 attached to the city's letter requesting authority to assess CSX, are:

1. Western Avenue, Ward 22, Parcel 00298-000;
2. 100 Western Avenue, Ward 22, Parcel 00299-000;
3. Western Avenue, Ward 22, Parcel 00300-000;
4. Cambridge Street, Ward 22, Parcel 00104-000; and
5. Soldiers Field Road, Ward 22, Parcel 00303-000.

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Under Ch.59 §11, taxes on real property are ordinarily assessed to the owner of the fee interest in a parcel. However, the commissioner of revenue "may, in writing, authorize the assessment of taxes upon any present interest in real estate to the owner of such interest on January first, and taxes on such interest may thereupon be assessed to such person." We have authorized assessments to the holders of present interests only in cases where the value of such interest could not otherwise be taxed, or where the assessors' power to tax such value was at least doubtful. We used to authorize such assessments routinely for the value of development rights in condominium common areas, because we did not believe that the value of such rights could be included in assessments of the condominium units under Ch.183A §14, which provided for the taxation only of the units and the unit owners' interests in the common areas. We stopped authorizing such assessments after the Appeals Court held that such development rights were not present interests. *First Main Street Corporation,* 49 Mass. App. Ct. 25 (2000). Since the decision in *First Main Street* we have authorized the city of Boston to assess separately parking easements in condominium common areas where such interests are easements in gross, and not appurtenant to any condominium unit, because we did not believe that the city could otherwise tax the value of such easements. See Our File No.2002-533, dated Oct. 22, 2002.

There is express statutory authority (Ch.59 §3B) to assess interests of corporations that were (or could have been) taken by eminent domain – for example, easements of public utility companies – to the holders of such interests. However, §3B is inapplicable to railroad corporations, the taxation of whose real estate is governed by Ch.160 §87. That section does not explicitly provide for an exemption, but instead provides that real estate of a railroad corporation outside the right of way five rods in width (82.5 feet) shall be subject to taxation. The effect of Ch.160 §87 is to limit the scope of a common law exemption for railroads established by *Worcester v. Western Railroad Corp.*, 45 Mass. (4 Met) 564 (1842), which held that even railroad depots and other buildings used for railroad purposes within the railroad rights of way, not exceeding five rods wide, were exempt from property tax because they were held for a public purpose. The court inferred that the property was held in trust for a public purpose because the railroad had the power to take property by eminent domain, and was subject to extensive regulation in the public interest. Just as Ch.160 §87 limited the common law exemption for the railroad right of way, Ch.59 §3B prohibits the extension of the rationale for railroads' common law exemption to real estate other sorts of public utility companies. It also authorizes the assessment of real estate interests of public utility companies, such as easements, that assessors could not ordinarily assess separately.

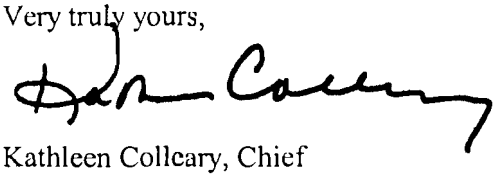
Although only the assessed owner is personally liable for a property tax assessment, the assessment includes the value of other interests, such as mortgagees' and lienholders' interests, remainder interests, and leasehold interests, all of which are subject to the lien for the tax assessed, and all of which would be extinguished by the foreclosure of the tax title. In other words, the interests whose value is included in the assessment are the same as the interests that are subject to the lien. See *Crocker-McElwain Company v. Assessors of Holyoke*, 296 Mass. 338, (1937) at 345 ("the lien is commensurate with the tax"), and again at 347, citing *Curtiss v. Sheffield*, 213 Mass. 239. However, the tax lien does not include easements, restrictions and covenants running with the land to which the parcel assessed are

subject, but it does include the value of easements, restrictions and covenants that benefit the parcel taxed. GL Ch.60 §45 & §54. In the case of an appurtenant easement, covenant, or restriction which burdens one parcel (the servient estate) and benefits another parcel (the dominant estate), the value of the easement, covenant, or restriction is included in the value of the dominant estate. For interests in the nature of easements in gross, such as public utility easements, there is no dominant estate, in whose valuation the assessors could include the value of the easement. As noted above, Ch.59 §3B solves this problem with respect to such interests of corporations other than railroads by making those interests separately taxable.

With respect to the CSX easements in Harvard's Allston parcels, it is not clear to what extent the easements constitute a right of way within the meaning of Ch.160 §87 and *Worcester v. Western Railroad Corp.*, or to what extent the statutory scheme and common law precedents would require the exemption of the right of way. The easements were not taken by eminent domain, and presumably could not have been so taken from the Turnpike Authority, but they were granted in connection with CSX's predecessor's conveyance of its right of way parcels. It is also unclear to what degree CSX's use of the parcel is subject to the sort of rate limitations and other kinds of regulatory control that helped courts to conclude that railroad rights of way were held for a public use. These are issues that the assessing department must resolve, and which CSX could raise by way of an abatement application. We authorize the assessment of the easements to CSX because of doubts about whether their value can be properly included in assessments to Harvard, and because it appears that at least some of the easements lie outside any right of way, which is at most 5 rods.

If you have any further questions, please do not hesitate to contact us.

Very truly yours,



Kathleen Colleary, Chief
Bureau of Municipal Finance Law

KC:CH

Massachusetts Department of Revenue *Division of Local Services*
Navjeet K. Bal, Commissioner Robert G. Nunes, Deputy Commissioner & Director of Municipal Affairs

April 4, 2011

Pamela Anderson, Principal Assessor
Office of the Board of Assessors
15 Middlefield Road
Chester, MA 01011

Re: Exemption Claim of New England Forestry Foundation, Inc.
Our File No. 2011-119

Dear Ms. Anderson:

You have sought our guidance in evaluating the claim of the New England Forestry Foundation, Inc. ("NEFF") to exempt status under G.L. c. 59, § 5, Clause 3 for real property it owns in the Town of Chester. You have supplied the organization's Return of Property Held for Charitable Purposes ("Form 3ABC") for Fiscal Year 2011, dated February 19, 2010; its Return of Organization Exempt from Income Tax ("Form 990") for Tax Year 2008; and its Form PC for the year spanning May 1, 2008 to April 30, 2009. No confidential information from the Form 3ABC appears in this letter.

You note in your letter of January 26, 2011 that NEFF "claims their property is used for 'education and conservation activities.'" In the Form 990 filed by NEFF with the Internal Revenue Service at Part III, Item 4, they describe three program services asserted to advance their exempt purposes under I.R.C. § 501(c)(3): 1) educational programming including "community discovery days, pre-timber harvest walks, and volunteer forest stewards[;]" 2) the land protection program which involves acquisitions of lands "which NEFF manages as additions to its community forest portfolio[;]" and 3) the conservation easement program "for acquiring and monitoring conservation easements acquired by NEFF through gift or purchase."

You further raise questions about public access to the lands owned by NEFF as a possible obstacle to its receiving a charitable exemption for its land in Chester. You point out that there is "a locked gate in front of their private bridge stating, "Private Property, No Trespassing." You report that NEFF claims the property is open to the public, and point out that public access is available "if you cross the Westfield River on foot by the bridge intersecting Route 20." You indicate that there is another possible access route, but "it is not posted as an access to NEFF property."

The Commissioner of Revenue does not determine the exempt status of property for local tax purposes. Property taxes in Massachusetts are assessed and collected by cities and towns, not by the state. The Board of Assessors of the Town of Chester, as the local tax authority, has the responsibility to determine whether the property held by NEFF is entitled to exemption under G.L. c. 59, § 5, Clause 3. However, we do offer the following advisory comments to assist you in determining the taxable status of the land owned by NEFF.

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"[R]eal estate owned by a 'charitable organization and occupied by it or its officers for the purposes for which it is organized'" is entitled to exemption from local property taxes. *See New Habitat, Inc. v. Tax Collector of Cambridge,* 451 Mass. 729, 731-32 (2008), *citing* G.L. c. 59, § 5, Clause 3. The Supreme Judicial Court in ***New Habitat, Inc.*** invoked the following definition to identify "the traditional objects and methods of charity[:]"

> 'A charity, in the legal sense, may be more fully defined as a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.'

Id. at 732, *quoting* ***Boston Symphony Orchestra, Inc. v. Assessors of Boston,*** 295 Mass. 248, 254-55 (1936).

While the foregoing definition is not exhaustive, the more remote an organization's purposes are from this traditional understanding of charitable activity, the greater the extent to which the organization's status must be evaluated by reference to the "community benefit" test. *See* ***Mary Ann Morse Healthcare Corp. v. Assessors of Framingham,*** 74 Mass. App. Ct. 701, 703-705 (2009), *citing* ***Western Mass. Lifecare Corp. v. Assessors of Springfield,*** 434 Mass. 96 (2001). Under scrutiny for "community benefit," "[a] purpose qualifies as charitable if it 'is for the benefit of 'the public at large or some part thereof, or an indefinite class of persons' ....'" *See* ***Connors v. Northeast Hospital Corp.,*** 439 Mass. 469, 474 (2003)(Cites omitted.) "While there is no 'precise number' of persons who must be served in order for an organization to claim charitable status, and 'at any given moment an organization may service only a relatively small number of persons,' membership in the class served must be 'fluid' and must be 'drawn from a large segment of society or all walks of life.'" ***Western Mass. Lifecare Corp.,*** 434 Mass. at 104 (Cite omitted.)

"If, however, the dominant purpose of [the organization's] work is to benefit the members, such organizations will not be classified as charitable even though the public will derive an incidental benefit." ***Skating Club of Boston v. Assessors of Boston,*** ATB Findings of Fact and Reports 2007-193, 2007-207, *citing* ***Massachusetts Medical Society v. Assessors of Boston,*** 340 Mass. 327, 332 (1960). In addition to being organized for charitable purposes, the claimant "must prove that it is in fact so conducted that in actual operation it is a public charity." ***Jacob's Pillow Dance Festival, Inc. v. Assessors of Becket,*** 320 Mass. 311, 313 (1946). Moreover, to qualify for exemption, the property must be occupied "directly for the fulfillment of [the corporation's] charitable purposes." ***Boston Symphony Orchestra,*** 294 Mass. at 255, *citing* ***Burr v. Boston,*** 208 Mass. 537, 543 (1911). Such occupancy means:

> something more than that which results from simple ownership and possession. It signifies an ***active appropriation*** **to the** ***immediate uses of the charitable cause*** for which the owner was organized. ... [T]he nature of the occupation must be such as to contribute immediately to the promotion of the charity and physically to participate in the forwarding of its beneficent object. (Emphasis added).

Board of Assessors of Boston v. The Vincent Club, 351 Mass. 10, 14 (1966), *quoting* ***Babcock v. Leopold Morse Home for Infirm Hebrew & Orphanage,*** 225 Mass. 418, 421 (1917). The occupancy for charitable purposes must "contribute immediately to the promotion of the charity." ***Babcock,*** 225 Mass. at 422.

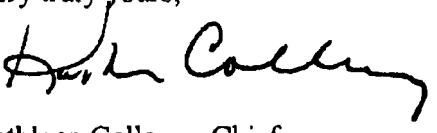
While it is possible that NAFF's asserted activities involving education and conservation might qualify as charitable in appropriate circumstances, any entitlement to a tax exemption is conditioned upon the land in question being open to public access. *See* ***Nature Preserve, Inc. v. Assessors of Pembroke,*** ATB Findings of Fact and Reports 2000-796, 2000-803-04, 2000-808. In two cases, the Appellate Tax Board determined that property sought to be exempted was not sufficiently open to the general public to support a conclusion that it was occupied for the benefit of the general public or an indefinite class of persons, as opposed to primarily members. In ***Skating Club of Boston,*** the Board acknowledged "that the public has access to the Club's facilities [and] that the Club offers skating lessons to both members and non-members." ATB Findings of Fact and Reports at 2007-210-12. However, noting restrictions on access to its facilities in the Club's constitution, the Club's narrow focus on competitive figure-skating, the costs of using its facilities, and the lack of information about non-member access, the Board ruled that the appellant skating club failed to prove that it occupied the subject property as a charitable organization.

In ***Forges Farm, Inc. v. Assessors of Plymouth,*** ATB Findings of Fact and Reports 2007-1197, exemption was denied because the taxpayer's requirement that members of the public contact corporate officers to gain entry onto the subject property limited public access. The Board reasoned: "Although Forges claimed that it would allow access to those who contacted its officers, the land is not marked with any sort of sign indicating that access can be attained in this manner, and Forges has not made any other attempt to inform the public that the subject property is accessible." ATB Findings of Fact and Reports 2007-1201-02.

In both ***Skating Club of Boston*** and ***Forges Farm,*** the determination of eligibility for exemption was based on careful examination of the relevant facts. Here the Board of Assessors of Chester should review all relevant facts and circumstances to determine whether access to the subject property is sufficient to benefit the general public or at least an indefinite class of persons, and not simply members of NAFF. To obtain an exemption, NAFF must demonstrate it owns and occupies the subject property in furtherance of qualifying charitable purposes.

If you have further questions, please do not hesitate to contact me again.

Very truly yours,



Kathleen Colleary, Chief
Bureau of Municipal Finance Law

KC:DG

Massachusetts Department of Revenue *Division of Local Services*
Navjeet K. Bal, Commissioner Robert G. Nunes, Deputy Commissioner & Director of Municipal Affairs

April 12, 2011

Pamela K. Davis
Board of Assessors
484 Broadway, Room 11
Everett, MA 02149-3638

Re: Taxation of Undeclared Condominiums with Certificates of Occupancy
Our File No. 2011-108

Dear Ms. Davis:

This is in reply to your letter about assessments of two townhouses constructed in the common areas of the Charleston Lofts Condominium, 210 Broadway Street in Everett, for which certificates of occupancy were issued in 2007 as units 107 and 108, but which no amendment to the master deed has declared as units. No unit deeds have been recorded for either townhouse. It is unclear whether the townhouses have been rented, but both units have been listed for sale on various websites.

The Commissioner of Revenue hereby authorizes the assessment of the value of the townhouses listed as units 107 and 108 on the certificates of occupancy to the holders of the present interests under G.L. c. 59, § 11.

As you know, the Commissioner used to authorize the assessment of condominium development rights under G.L. c. 59, § 11 as present interests. However, we have not done so since 2000, when the Massachusetts Appeals Court held that the Commissioner's authorization was invalid because the development rights were future rather than present interests. *First Main Street Development Corp. v. Assessors of Acton*, 49 Mass. App. Ct. 25 (2000).

In your case, however, the development rights have been exercised to construct two townhouses on the common areas. They are no longer merely potential as they were in *First Main Street* and *Spinnaker Island & Yacht Club Holding Trust* v. *Assessors of Hull*, 49 Mass. App. Ct. 20 (2000). Those cases dealt with the taxation of pure development rights, where there had been no exercise of those rights by way of any construction activity.

According to the court in *First Main Street*, there are two fundamental problems with separately taxing condominium development rights. The first is that neither development rights nor phased condominiums were expressly dealt with in the original condominium statute, G.L. c. 183A. In particular, § 14, which deals with the taxation of condominiums, provides that "[e]ach unit and **its interest** in the common areas and facilities" (emphasis added) is considered a taxable parcel. Although it is the unit owner's interest in the common area, not the land in the common area, that is taxed together with the unit under the statute, in *First Main Street*, the court nevertheless characterized § 14 as treating condominium expansion land as common area of the condominium and taxed pro rata to the current unit owners. The statute does not expressly exclude the taxation of interests in the common areas other than unit owners' interests, and we do not understand the court's discussion to mean that the legislature intended to exempt the value of built but undeclared units, or other improvements on the common area, which are clearly real estate for purposes of taxation under G.L. c. 59, §

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2A(a). Legislative authorization is needed for municipalities to tax the value of those interests to their holders, however, a point repeated in several cases cited in *First Main Street*. That, it seems to us, is a large part of the rationale behind the grant of power to the Commissioner of Revenue under G.L. c. 59, § 11 to authorize assessors to tax present interests, especially in cases where the value would otherwise not be taxable to anyone.

The second fundamental difficulty noted by the court is that real estate is generally assessed as a whole unit, rather than on the basis of the separate interests in it. *First Main Street* citing *Donovan v. Haverhill*, 247 Mass. 69 (1923). In *Donovan*, the Supreme Judicial court had been concerned that if the value of the leasehold interest were not included in the assessed value, it would escape taxation altogether. At that time, the Commissioner did not have the power to authorize assessments to holders of present interest. See St. 1939, c. 175, which amended G.L. c. 59, § 11. Moreover, that general rule has a number of statutory exceptions: present interests in governmentally-owned property must generally be assessed to the holder of those interests (G.L. c. 59, § 2B); certain easements of public utility companies must be assessed to the holder of the easement rather than to the owners of the fee interest (G.L. c. 59, § 3B); the interests of mortgagees and mortgagors may in certain cases be separately assessed (G.L. c. 59, § 12); and finally, other present interests in property may be assessed with the permission of the Commissioner of Revenue (G.L. c. 59, § 11).

In *First Main Street* the court's holding that the assessment of unexercised condominium development rights could not be authorized under G.L. c. 59, § 11 because such rights were future rather than present interests rested on an analogy between the development rights and an unexercised option to buy real estate. That rationale seems particularly inapt where the development rights are no longer merely potential, but have been exercised to construct buildings on the common areas. The *First Main Street* court did note the need for a holder of the development rights to take additional steps, such as building the buildings and amending the master deed, but it did not hold that there would be no exercise of development rights until an amended master deed were recorded.

A developer constructing buildings on the common areas of a condominium would be a trespasser if its actions were not an exercise of its development rights, and it is hard to see how ongoing construction activity could be considered the exercise of a future rather than of a present interest. Moreover, after the construction of the townhouses was completed, and certificates of occupancy had been issued, with the resulting dwelling units being held for either rental or sale, the developer's interest seems to us to be not merely a present rather than a future interest (which is all that is required for an authorization under G.L. c. 59, § 11), but is tantamount to a possessory interest. There is not only a physical occupancy of part of the common area by the developer's agents (if the property is being shown to prospective buyers) or tenants, (if the property is rented), but an exclusion from the dwelling units of unit owners and others. A right to occupy property physically, and to exclude others, is the essence of a possessory interest.

If you have further questions, please do not hesitate to contact us again.

Very truly yours,

Kathleen Colleary, Chief
Bureau of Municipal Finance Law

KC: CH

Massachusetts Department of Revenue *Division of Local Services*
Amy A. Pitter, Commissioner Robert G. Nunes, Deputy Commissioner & Director of Municipal Affairs

April 26, 2012

Jennifer O'Neil
Principal Assessor
Town Hall
30 Providence Road
Grafton, MA 01519

Re: Request for Authority to Assess Present Interest – G.L. c. 59, §11
Our File No. 2012-214

Dear Ms. O'Neil:

This is in regard to your letter about assessments of partially completed condominiums constructed in the common areas of Flint Pond Estates Condominium.

You have indicated that, as of January 1, 2011, one unit was completed and included in the amended master deed. Ten units are five per cent to ninety-five per cent finished but undeclared and still part of the common area of the condominium. Thirty-three additional condominium units are allowed by the special permit, but no construction or improvements have yet occurred. You are requesting authority, pursuant to G.L. c. 59, § 11, to assess the ten partially completed units as a taxable present interest commencing with FY2012 to the developer, Sotir Papalilo, as trustee of the 133 P.G. Realty Trust.

Phased condominium development rights that have not been exercised may not be assessed, under *First Main Street Development Corp. v. Assessors of Acton*, 49 Mass. App. Ct. 25 (2000) and *Spinnaker Island and Yacht Club Holding Trust v. Assessors of Hull*, 49 Mass. App. Ct. 20 (2000), because they are considered future interests, not present interests. However, to the extent that construction or site preparation had begun for any undeclared units as of January 1, 2011, we believe that the future interests in those portions of the property have become present interests. Therefore, the Commissioner of Revenue hereby authorizes the assessment of the value of those improvements to the holder of the present interest as of January 1, 2011 under G.L. c. 59, §11. This authorization to assess applies to all improvements made to the common areas for purposes of completing condo units under the phased development rights of the master deed, as of each January 1 assessment date in future years, until the master deed is amended to establish any particular additional condominium units. Assessment of those declared units would then be made to the owners of the units as of January 1 under G.L. c. 183A, § 14.

According to the court in *First Main Street*, there are two fundamental problems with separately taxing condominium development rights. The first is that neither development rights nor phased condominiums were expressly dealt with in the original condominium statute, G.L. c. 183A. In particular, § 14, which deals with the taxation of condominiums, provides that "[e]ach unit and **its interest** in the common areas and facilities" (emphasis added) is considered a taxable parcel. Although it is the unit owner's interest in the common area, not the land in the common area, that is taxed together with the unit under the statute, in *First Main Street*, the court nevertheless characterized § 14 as treating condominium expansion land as common area of the condominium and taxed pro rata to the current unit owners. The statute does not expressly exclude the taxation of interests in the common areas other than unit owners' interests, and we do not understand the court's discussion to mean that the legislature intended to exempt the

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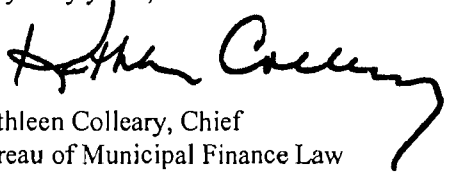
value of built but undeclared units, or other improvements on the common area, which are clearly real estate for purposes of taxation under G.L. c. 59, § 2A(a). Legislative authorization is needed for municipalities to tax the value of those interests to their holders, however, a point repeated in several cases cited in *First Main Street.* That, it seems to us, is a large part of the rationale behind the grant of power to the Commissioner of Revenue under G.L. c. 59, § 11 to authorize assessors to tax present interests, especially in cases where the value would otherwise not be taxable to anyone.

The second fundamental difficulty noted by the court is that real estate is generally assessed as a whole unit, rather than on the basis of the separate interests in it. *First Main Street* citing *Donovan v. Haverhill*, 247 Mass. 69 (1923). In *Donovan*, the Supreme Judicial court had been concerned that if the value of the leasehold interest were not included in the assessed value, it would escape taxation altogether. At that time, the Commissioner did not have the power to authorize assessments to holders of present interest. See St. 1939, c. 175, which amended G.L. c. 59, § 11. Moreover, that general rule has a number of statutory exceptions: present interests in governmentally-owned property must generally be assessed to the holder of those interests (G.L. c. 59, § 2B); certain easements of public utility companies must be assessed to the holder of the easement rather than to the owners of the fee interest (G.L. c. 59, § 3B); the interests of mortgagees and mortgagors may in certain cases be separately assessed (G.L. c. 59, § 12); and finally, other present interests in property may be assessed with the permission of the Commissioner of Revenue (G.L. c. 59, § 11).

In *First Main Street* the court's holding that the assessment of unexercised condominium development rights could not be authorized under G.L. c. 59, § 11 because such rights were future rather than present interests rested on an analogy between the development rights and an unexercised option to buy real estate. That rationale seems particularly inapt where the development rights are no longer merely potential, but have been exercised to construct buildings and other improvements on the common areas. The *First Main Street* court did note the need for a holder of the development rights to take additional steps, such as building the buildings and amending the master deed, but it did not hold that there would be no exercise of development rights until an amended master deed were recorded. A developer constructing buildings on the common areas of a condominium would be a trespasser if its actions were not an exercise of its development rights, and it is hard to see how ongoing construction activity could be considered the exercise of a future rather than of a present interest. Indeed, at that point the interest, which the master deed characterizes as an easement, seems to us to be not merely a present rather than a future interest (which is all that is required for an authorization under G.L. c. 59, § 11), but is tantamount to a possessory interest. There is not only a physical occupancy of part of the common area by the developer's construction crews and equipment, but an exclusion from the construction site of unit owners and others. A right to occupy property physically, and to exclude others, is the essence of a possessory interest.

If you have further questions, please do not hesitate to contact me again.

Very truly yours,



Kathleen Colleary, Chief
Bureau of Municipal Finance Law

KC: JFC

CASE STUDY 5

A taxpayer timely filed an overvaluation abatement application with the assessors in February 2012. The assessors meet on every Tuesday.

A. The notice for the February 28, 2012 meeting just stated that abatement and exemption applications would be considered at the meeting. Was the notice for the meeting properly posted?

B. Could the assessors go into executive session to discuss applications for abatement and exemption? What do the assessors need to do to enter into executive session? Does an exemption or abatement applicant have the right to attend the executive session?

C. The taxpayer was notified by the assessors that her abatement application was denied. She did learn from a friend at town hall that her neighbor had received a Clause 18 hardship abatement. The unhappy taxpayer then visited the assessors and requested a copy of the minutes of the meeting, and any town records on the subject. She also wants a list of all abatement and exemption applicants. What would be the result?

G.L. Ch. 30A §§ 18-25
G.L. Ch. 59 § 60

Hobart v. Commissioner of Corporations and Taxation, 311 Mass. 341 (1942)

The Official Website of the Attorney General of Massachusetts

Attorney General Martha Coakley

OML FAQ: Applications For Tax Abatement or Exemption

Applications For Tax Abatement or Exemption

When considering applications for tax abatement or exemption, must a Board of Assessors list the names and addresses of applicants in its meeting notice?

No, the Board does not need to list applicants' names or addresses in the Board's meeting notice, and the Department of Revenue's Division of Local Services has stated that Boards may be legally prohibited from doing so. Applications for abatement or exemption are confidential under G.L. c. 59, § 60. Although certain information about the application, such as the name or title in which the tax stands assessed, must be made public once an abatement or exemption has been granted, the Board is not required to release that information before that time. It is therefore sufficient for the meeting notice to state that the Board is considering applications for abatement or exemption. Boards may also wish to include the number of applications under consideration in their meeting notices. This provides the public with additional detail about the topic to be discussed without compromising applicant confidentiality.

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May a Board of Assessors meet in executive session to discuss applications for tax abatement or exemption?

A Board of Assessors may enter executive session to discuss and vote on applications for tax abatement or exemption. Massachusetts General Laws state that applications for tax abatement or exemption may only be disclosed to a select group of public officials, though certain information about the application must be made public if it is granted. G.L. c. 59, § 60. If a Board of Assessors plans to discuss the content of an application for tax abatement or exemption, therefore, the Board may convene in executive session under Purpose 7, "to comply with, or act under the authority of, any general law," citing G.L. c. 59, § 60 as the statute requiring confidentiality. See G.L. c. 30A, § 21(a)(7). The Board may also wish to discuss tax returns, health records, and other sensitive material that is often submitted along with applications for tax exemption in executive session, and may do pursuant to Purpose 7 by citing the statutory right to privacy, G.L. 214, § 1B, or any other statute requiring confidentiality of these records. See id. If the Board believes it can effectively discuss an application for tax abatement or exemption and supporting documents without revealing protected information, it may hold the discussion in open session. However, Boards should be aware that any document that is "used" during an open session meeting is no longer exempt from disclosure pursuant to any of the exemptions to the Public Records Law. See G.L. c. 30A, § 22(e). If a Board has questions about how to comply with the confidentiality requirements of other statutes in that situation, it should consult municipal counsel.

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Does an applicant for tax abatement or exemption have a right to be present and participate in a Board of Assessors' discussion regarding his or her request?

If a Board of Assessors chooses to discuss an application for tax abatement or exemption in executive session, the applicant does not have a right to be present or to speak during the executive session, though he or she may attend and participate at the discretion of the Board. In contrast, all members of the public have a right to attend any open session meeting of a public body; therefore, an applicant for tax abatement or exemption may be present during any open session discussion by a Board of Assessors of his or her application. See G.L. c. 30A, § 20(a). The Open Meeting Law does not require that a public body allow public participation, however, even during an open session meeting. The Open Meeting Law states that "[n]o person shall address a meeting of a public body without permission of the chair, and all persons shall, at the request of the chair, be silent." G.L. c. 30A, § 20(f). Public bodies should consult with municipal counsel about whether any other law requires that a member of the public be permitted to speak during a meeting.

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Must a public body list in its minutes all applications for tax abatement or exemption that are considered during a meeting?

Yes. The Open Meeting Law requires that the minutes of a public body's meetings contain "a list of documents and other exhibits used at the meeting," thus if a specific application and supporting documents are discussed by the body during a meeting, those documents should be identified in the minutes. G.L. c. 30A, § 22(a). However, the minutes of an executive session and all documents used at the session may be withheld from disclosure to the public as long as publication may defeat the lawful purposes of the executive session. G.L. c. 30A, § 22(f). Therefore, if a Board discusses an application in executive session under Purpose 7, "to comply with, or act under the authority of, any general law," citing G.L. c. 59, § 60 as the statute requiring confidentiality, the minutes may be withheld as long as that statute's confidentiality restrictions apply. Similarly, tax returns, health records, and other sensitive material discussed in executive session along with an application for tax exemption may also be withheld as long as a statute requiring their confidentiality applies. See G.L. c. 30A, § 21(a)(7); G.L. c. 30A, § 22(f). While the Open Meeting Law requires that a public body release executive session minutes once the executive session purpose has expired, a public body may still redact or withhold minutes subject to the exemptions to the Public Records Law contained within clause twenty-sixth of G.L. c. 4, § 7, or where discussions may be protected by the attorney/client privilege. See G.L. c. 30A, § 22 (f). If an application for tax abatement or exemption and supporting documentation are used during an open session meeting, however, neither those documents nor the minutes identifying them are exempt from disclosure pursuant to any of the exemptions to the Public Records Law. See G.L. c. 30A, § 22(e). If a Board has questions about how to comply with the confidentiality requirements of other statutes in that situation, it should consult municipal counsel.

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CASE STUDY 6

Emma and Robert are experiencing marital difficulties. Robert has left the house that they own, but Emma continues to live there. Robert has agreed to pay the taxes on the property which exceed $7,000 but expects Emma to pay all the utility bills.

A. When Emma received the first half real estate bill, she quickly forwarded it to Robert. He was outraged to discover a water lien with committed interest listed on the tax bill. He visited City Hall and presented the collector with a check with the notation "Tax Only." The check was in the amount of the tax portion of the bill. He requested that the collector apply the payment to the tax and leave the water lien unpaid. Must the collector follow Robert's instructions?

B. Robert then visited the assessors' office and submitted a Clause 22 veterans exemption application. Is Robert eligible to receive the exemption? Can Robert appeal a denial of the exemption application to the Appellate Tax Board?

C. Robert has filed a Clause 41A deferral application to postpone payment of the property taxes on the house. Emma has refused to co-operate in any way. Can the assessors grant the deferral?

G.L. Ch. 59 § 57
G.L. Ch. 60 § 3E
G.L. Ch. 59 § 5 Cl. 22
G.L. Ch. 59 § 5 Cl. 41A
G.L. Ch. 59 § 64

Belair Construction Co. Inc. v. Assessors of Quincy, 393 Mass. 1007 (1985)

CASE STUDY 7

You are a new assessor in town and you presently are reviewing property values. You realize you have a constitutional and statutory obligation to assess property at full and fair cash value.

A. You believe it is necessary to select a sample of properties and verify information on the valuation cards as to physical characteristics. At an assessors' meeting you were instructed that inspection of property is a key component of a revaluation program. Does an assessor have the right to measure and list a property without the permission of the homeowner?

B. The owner of a mixed use property has literally closed the door on the assessors. In the pre-assessment stage what could the assessors do? What recourse do the assessors have if the owner ignores the assessors? Any penalties?

C. The assessors still have not inspected the property but they did increase the parcel's valuation. The owner has filed an abatement application to contest the valuation. What should the assessors do now?

G.L. Ch. 59 § 38
G.L. Ch. 40 § 56
G.L. Ch. 59 § 38D
G.L. Ch. 59 § 61A
G.L. Ch. 58A §8A

CASE STUDY 8

You are the town treasurer. The town meeting adopted the senior work-off program and the new work-off program for veterans established by the VALOR Act.

A. Can a taxpayer who already participates in the senior work-off program also participate in the new veterans work-off program?

B. The elderly taxpayer is physically unable to work and wants a proxy to perform his tasks at the senior center. What would be the tax consequences if a designee performs the work?

C. A full-time DPW employee would like to take part in the senior work-off program. Is this permissible?

G.L. Ch. 59 § 5K
G.L. Ch. 59 § 5N
G.L. Ch. 268A § 20
EC-COI-04-4

CASE STUDY 9

It is your first day on the job as an assessor. A coffee hour is being held at town hall to welcome you. A number of residents have come to visit you.

A. John Avery complained his family has been overcharged for a property on Main Street. He claims the property description is inaccurate since the parcel contains 1.2 acres and not the 1.7 acres that appears on the tax bill. He thinks it only fair for the town to refund the taxes that were overassessed since 1980. How would you reply?

B. Robert Craig is unhappy about the passage of a debt exclusion for the construction of a new elementary school. He requested that the assessors show as a "separate charge" on the tax bills the amount of additional taxes assessed because of the debt exclusion. What is the reply?

C. Albert Green is upset that he was denied a residential exemption. He has paid taxes for years and does not think the town has acted fairly. Albert admits his property is in trust with his son as trustee but he pays the taxes, lives there and maintains the property. Albert hopes you will grant the residential exemption. How do you reply?

G.L. Ch. 59 § 59
G.L. Ch. 60 § 3A

Kirby v. Board of Assessors of Medford, 350 Mass. 386 (1966)
Moscatiello v. Board of Assessors of Boston, 36 Mass. App. 622 (1994)

CASE STUDY 10

The collector issued a municipal lien certificate (MLC) in July 2012 for a parcel which failed to show outstanding fiscal year 2012 taxes. The MLC was duly recorded.

A. Can the collector record a corrected municipal lien certificate and reinstate the lien?

B. What course of action should the collector take? Is the tax uncollectible?

C. The collector received payment for the August 1, 2012 tax bill for FY 2013. Yet, the FY 2012 taxes remain outstanding. Can the collector apply the August payment to the FY 2012 tax balance? Would it matter if the property had been sold?

G.L. Ch. 60 § 23
G.L. Ch. 60 § 35

Cressey Dockham & Co., Inc. v. Board of Assessors of Andover, ATB #141825 (1989)
Warren Brothers Co. v. Sentry Insurance, 13 Mass. App. 431 (1982)
Spinney v. Freeman, 230 Mass. 356 (1918)

CASE STUDY 11

Kenneth Branagh, the noted English actor, purchased a summer home in Truro in July 2011. The purchase price was $2.4 million. For fiscal year 2013 the collector sent a tax bill for the real estate as well as a personal property tax bill. Alarmed at the $50,000 personal property value, Branagh contacted the assessor who agreed to visit the house and discuss the valuation. When the assessor arrived, he noticed what appeared to be a painting by Edward Hopper on the wall. Hopper was a famous artist who had once lived in Truro. Branagh confirmed it was a painting by Hopper. In bookcases, there was a treasure trove of Charles Dickens memorabilia including first editions, letters and items once owned by Dickens.

A. Could the assessors grant a partial abatement of the personal property tax bill for FY 2013?

B. What should the assessors do with the information gleaned from the visit to the house?

C. How should the personal property be valued?

G.L. Ch. 59 § 29
G.L. Ch. 59 § 61
G.L. Ch. 59 § 76

CASE STUDY 12

Robert Dawson is the record owner of a five acre vacant parcel. He failed to pay recent tax bills due to money woes. The collector sent a warning letter to Dawson advising him that a tax taking would be made to perfect the lien unless payment in full were made within 30 days. The collector's letter went unanswered. The collector then sent a demand to Dawson's residence and by mistake addressed the letter with the demand to "74 Main Street" rather than the correct address of "47 Main Street." The advertisement and postings were properly made. The tax taking was made and the instrument of taking was properly recorded.

A. Is there a valid tax title? Would it matter if Dawson actually received the demand?

B. Dawson never received the demand. The collector learned of the flaw in the tax taking from Land Court where he had filed a petition for tax title foreclosure. What should the collector do when he learns the tax title is invalid?

C. Dawson plans to subdivide the land into five parcels and he has found a buyer for one of the parcels. Can the taxes be apportioned? Can there be a partial redemption of the tax title?

G.L. Ch. 60 § 84
G.L. Ch. 60 § 37
G.L. Ch. 60 § 76A

Hilde v. Dixon, 16 Mass. App. 981 (1983)
Town of Lynnfield v. Owners Unknown, 397 Mass. 470 (1986)

CASE STUDY 13

John Henry, devastated by the disastrous 2012 Red Sox season, has decided to buy a famous farm in Middlesex County. It is rumored that he has sold his yacht to finance the purchase. John Henry plans to own and operate the farm as a solo proprietorship.

A. How would the farm personal property be assessed for 2013 if John Henry buys the farm in October 2012? Are there filing requirements?

B. Assume the community has opted not to impose tax under G.L. Ch. 59 § 8A. How would the personal property be assessed?

C. Assume the land is subject to an agricultural preservation restriction. How would the property be assessed for fiscal year 2013?

G.L. Ch. 59 § 8A
G.L. Ch. 61A
G.L. Ch. 20 §§ 23-26
G.L. Ch. 184 § 31

CASE STUDY 14

For years the collector has dutifully sent tax bills to the owner of a small lot at the outskirts of town. The parcel has an assessed value of $13,000. No tax payments have been made since 1995. A tax taking was made and the collector is urging the treasurer to foreclose so as to get the parcel off the tax rolls.

A. What action could the treasurer take regarding the tax delinquent parcel?

B. Assume there is an auction and the parcel is listed as owing $1,500 in outstanding taxes, interest and charges. What should be the minimum bid?

C. Assume a town resident purchased the lot at auction for $15,000. How should the proceeds be entered in the town's books and records?

G.L. Ch. 60 § 79

CASE STUDY 15

The collector mailed real estate and motor vehicle excise bills to taxpayers in 2012.

A. A taxpayer visited the assessors and claimed exemption under a treaty between the United States and the Republic of Korea. Would the official be exempt on the house which he owns? Would he be exempt from motor vehicle excise?

B. A taxpayer conveyed his house to a new non-profit corporation formed by him which is named "Focus on the Future, Inc." The deed was recorded on June 30, 2012. The corporation's mission is to advance the transition to a sustainable, equitable and humane global civilization. The corporation, it is expected, will be conducting research and issuing reports on topics like energy, sustainable communities and corporate social responsibility. Would the property be exempt for fiscal year 2013?

C. A corporation which designs software programs for clients has operated in town for many years and owns a building in the office park. The financial climate has adversely affected the company and it is having difficulty in paying employees and vendors. The company has requested the assessors to abate real estate taxes on a short term basis until the company's financial condition improves. Can the assessors comply with this request?

G.L. Ch. 59 § 25 Cl. 3
G.L. Ch. 59 §5 Cl. 18 & 18A

Meadowbrooke Day Care Center, Inc. v. Assessors of Lowell, 374 Mass. 509 (1978)