



DLS

DIVISION OF LOCAL SERVICES
MA DEPARTMENT OF REVENUE

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Local Taxes

Assessing Condominiums and Time-shares And Collecting Taxes and Charges Without Liens

Workshop A 2015

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Workshop A

LOCAL TAXES

Condominiums and Time-shares

And

Collecting Taxes and Charges for Which No Lien Exists

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Discussion Topics

CASE STUDY 1 CONDOMINIUM ASSESSMENT

Walt Disneyland owns 50 acres of unimproved property abutting Dana Lake in Resortville, Massachusetts. On December 15, 2013, pursuant to a duly approved subdivision plan, Walt conveys 25 of the 50 acres to XYZ Development Company for \$250,000 and records the deed. On January 1, 2014, the valuation of each unimproved 25-acre lot is \$250,000.

1. For FY 2015, who should be assessed?

Starting in July, 2014, XYZ begins construction of a condominium development on the 25-acre parcel. On November 1, 2014, Resortville’s tax rate for FY 2015 is set at \$10/\$1000. On November 13, 2014, XYZ completes construction of two buildings containing five identical condominium units. On that date, XYZ records the master deed for the Dana Lake Condominium that includes the entire 25-acre parcel, declaring the five condominium units, together with their undivided interests in the common area. On the same day, XYZ obtains occupancy permits for all five condominium units. Each condominium unit has a value of \$400,000. In the master deed, XYZ reserves to itself, the right to add additional units to the condominium through phasing amendments to the master deed. On December 31, 2014, XYZ conveys Unit #1 of the condominium to M. Mouse for \$400,000 and the unit deed is recorded on that date. The other units are not sold until January 2, 2015.

2. Can any additional value related to the construction after January 1, 2014 be added to the assessment for FY 2015?

- a. Does G.L. c. 59, § 2A(a) (added by Chapter 653 of the Acts of 1989) apply?
- b. Does G.L. c. 59, § 2D apply (supplemental assessment)?
- c. If so, pro rata assessment? Pro forma assessment?

Supplemental Assessment – Condominium Construction G.L. c. 59, § 2D

<i>Pro Rata Assessment</i> (For the FY occupancy permit is issued)	Occupancy permit(s) issued 11/13/14 (during 1 st half FY 2015)
FY 2015 assessed valuation per 1/1/14	\$250,000 vacant land
Master Deed Recorded	11/13/2014
Construction Completed & Occupancy Permits Issued - Units 1 - 5	11/13/2014
FY 2015 Assessed Valuation as Improved	\$2,000,000 (5 condominium units, each valued at \$400,000)

FY 2015 Valuation Increase (percentage)	700% - Increase in value of \$1,750,000 [\$2,000,000 - \$250,000] is divided by original assessment of \$250,000; (\$1,750,000/\$250,000)
FY 2015 Pro Rata Assessment?	YES
FY 2015 tax rate	\$10/\$1000
FY 2015 additional tax revenue	Increase in Valuation Units 1 through 5 (\$400,000 - \$50,000) x tax rate (\$10/1000) x 229 days/365 days = \$2,195.89 x 5 units = \$10,979.45
<u>Pro Forma Assessment?</u>	

3. For FY 2016, who should be assessed for the 50 acres originally owned by Walt?

- G.L. c. 59, § 2A(a); Chapter 653 of the Acts of 1989
- G.L. c. 59, § 2D
- G.L. c. 59, § 11
- G.L. c. 183A, § 14

**CASE STUDY 2
UNDECLARED CONDOMINIUM UNITS**

(Facts continued from above.) On January 2, 2015, XYZ begins construction of Phase II of the Dana Lake Condominium, which will include two additional buildings housing five additional condominium units. The construction is within the common area of the condominium. By June 20, 2015, four additional condominium units are 100% complete and occupancy permits have been requested. On June 22, 2015, occupancy permits are issued for the four units. By June 30, the fifth unit is 90% complete. On July 10, 2015, the occupancy permit for the 5th unit is issued. And on August 20, 2015, XYZ records the First Amendment to the Dana Lake Condominium Master Deed, including Phase II, declaring the five additional units to be part of the Dana Lake Condominium.

Pursuant to Chapter 653 of the Acts of 1989, Resortville has accepted the last sentence of the first paragraph of G.L. c. 59, § 2A(a) which says:

“Notwithstanding the foregoing, in any city or town which accepts the provisions of this sentence, buildings and other things erected on or affixed to land during the period beginning on January second and ending on June thirtieth of the fiscal year preceding that to which the tax relates shall be deemed part of such real property as of January first.”

- 1. Can the value of the construction in the common area of the condominium on June 30th be included in the assessments to the individual condominium units as of January 1 under c. 653?**

2. **What if instead of constructing more units, XYZ built a beautiful new swimming pool, recreation room and health club on the common areas.**
3. **Can a supplemental assessment be made as a result of the construction of Phase II?**
4. **What, if any, additional assessments can be made as a result of the construction of Phase II?**

G.L. c. 59, § 2A(a); Chapter 653 of the Acts of 1989

G.L. c. 59, § 2D

G.L. c. 59, § 11

G.L. c. 183A, § 14

CASE STUDY 3

ASSESSMENT TO HOLDER OF PRESENT INTEREST CONDOMINIUM COMMON AREA

The Beaconsfield Condominium was created by Declarant John Beaconsfield by Master Deed recorded on January 2, 2013. The Master Deed site plan showed the condominium consisted of two lots, one lot containing a four-story office building in which 20 business condominium units are located and the other lot shown as “Open Space” upon which a parking area was shown. The Master Deed designated the “Open Space” as part of the common area of the condominium. In the Master Deed, the Declarant reserved the right to remove the “Open Space” from the Condominium and, by acceptance of the Unit Deed, each unit owner was deemed to consent to such removal. By amendment to the Master Deed recorded on August 29, 2013, to which the condominium unit owners separately consented in writing, the Declarant reserved the additional right to lease the “Open Space” in its entirety to a third party and the third party could develop the Open Space free from any restrictions, requirements or other limitations set forth in the Condominium Documents and otherwise on such terms as the Declarant may prescribe.

Thereafter, on October 25, 2013, a Notice of Lease was recorded that listed Declarant John Beaconsfield as Landlord and Blue Moon Development as Lessee. The leased premises consisted of the “Open Space” shown on the Condominium Master Deed Site Plan. The term of the lease commenced October 25, 2013 and expired December 31, 2088; however, the lease term automatically extended for successive periods of seventy-five (75) years each unless either party notified the other 12 months in advance of the start of a 75-year extension period. But - Beaconsfield, as Landlord, had no right to stop the automatic 75-year lease extensions before January 1, 2689. (The period of time from October 25, 2013 to December 31, 2688, is 675 years, plus a little more than two months.)

Sometime after the master deed was amended, construction of a 20-unit residential apartment building was commenced on the “Open Space” portion of the common area. The building was completed in December, 2014.

1. **For FY 2016, can the residential apartment building located in the “open space” portion of the common area of the condominium be separately assessed and taxed?**
2. **If so, how and to whom?**

G.L. c. 59, § 11
G.L. c. 183A, § 14
G.L. c. 186, § 1A

CASE STUDY 4 TIME-SHARE CONDOMINIUMS

In 2014, Great White Inn, Inc. purchased a resort property on the Massachusetts coastline in the Town of Amity. It included an existing hotel, land and recreational areas. Later that year, Great White Inn, Inc. recorded a Master Deed of the Great White Inn Resort Condominium, submitting the entire property to the provisions of G.L. c. 183A, the condominium statute. The condominium consists of 58 condominium units located within the hotel and the common areas. There are 20 studio condominium units, 24 one-bedroom condominium units and 14 two-bedroom condominium units. The Master Deed included an Exhibit “C” which listed the percentage interest of each condominium unit in the common areas of the condominium. The Master Deed also stated that the Declarant intended to submit the condominium to time-sharing and to sell “Time-shares” in Condominium Units whereby the purchaser of a Time-share will acquire an undivided fee simple interest in a Condominium Unit and its furnishings as a tenant in common with the other time-share owners. It incorporated by reference an Exhibit “D” to the Master Deed, entitled “Time-Share Supplement to Master Deed of Great White Inn Resort Condominium,” which described the program of time-share (or interval) ownership and set forth the percentage interest of each time-share in the respective condominium units. Exhibit D also designated the management of the time-share property to the Trustees of the Great White Inn Resort Condominium Trust.

No condominium units were sold by the Declarant and no Unit Deeds were recorded, but time-share estates were sold by the Declarant and time-share deeds were recorded at the Registry of Deeds in 2014.

Great White Inn Time-share estates—the right to use a particular unit for a designated interval of one week per year into perpetuity—are priced based on unit size and desirability of a particular week. Time-share estates are available for 30 weeks out of the year. There are 600 interval interests or time-share estates in the 20 studio units; 720 interval interests in the 24 one-bedroom units; and 420 interval interests in the 14 two-bedroom units.

1. **For FY 16, how should the Great White Inn Resort Condominium be treated regarding the assessment and collection of real estate taxes?**
 - a. **Would the condominium property taxation statute apply (183A:14) or the time-share property taxation statute (183B:3(b))?**

- b. **Are these two property taxation statutes in conflict with one another?**
 - c. **If in conflict, which law applies?**
 - d. **Are there any Massachusetts judicial decisions or ATB decisions that would govern the assessment and taxation of time-share condominiums today?**
2. **Should the owners of the individual condominium units be taxed? The owners of the time-share intervals? Someone else?**

G.L. c. 183A, § 14

G.L. c. 183B, § 2

G.L. c. 183B, § 3

G.L. c. 183B, § 9

The assessors in Amity have been assessing the condominium units at the Great White Resort in accordance with the condominium statute, G.L. c. 183A, § 14. That is, each condominium unit is separately valued and tax bills are prepared for each condominium unit and sent to the owners of each condominium unit. In this case, Great White Inn, Inc., the Declarant, is owner of all the condominium units, subject to the time-share estates. The assessors are relying on the decision of the Supreme Judicial Court in *McCabe v. Assessors of Provincetown*, 402 Mass. 728 (1988) and the New Hampshire Supreme Court ruling in *Appeal of New England Marketing Associates, Inc.*, 128 N.H. 750 (1986). They are using the comparable sales approach to value and looking to market sales of individual condominium units believed comparable to the subject property for indications of value. They are making no allowance for the sub-divided character of interests in condos at the Inn, following the Appellate Tax Board's method in the *McCabe* case.

- 3. **Comment on the method of assessment of the Amity assessors.**
- 4. **How are assessors currently valuing time-share properties in communities that have time-share developments?**
- 5. **Are time-share estates and condominium units the same type of property?**
- 6. **What are some differences between condos and time-shares?**
- 7. **Might the differences between condos and time-shares affect fair market value? How?**
- 8. **What about a time-share property and a hotel or motel? Are they the same?**
- 9. **What are the possible valuation methodologies an appraiser might use with respect to a time-share property?**
- 10. **What information would you need to appraise the value of a time-share estate?**

11. **Are there components of value in the sales price of a time-share estate that are not real estate?**
12. **How should non-real estate components of value be treated for assessment purposes?**
13. **What about sales of the original time-share interests and resales by subsequent owners?**
14. **Do values fluctuate based on influences like the view from a particular unit or the unit configuration?**
15. **What about time-share estates or interval interests that remain unsold?**

G.L. c. 183A, § 14

G.L. c. 183B, § 3

G.L. c. 183B, § 9

CASE STUDY 5 PERSONAL PROPERTY TAX COLLECTION

Mr. Aloysius Laboure owns as sole proprietor a luxury spa and massage parlor. In addition to personal property like massage tables, aromatherapy dispensers, sheets, towels, and furnishings, the offices display Mr. Laboure's collection of paintings created by local Massachusetts artists. Because a few of the artists on display have since achieved some renown, the art collection was recently appraised for considerably more than Mr. Laboure paid for it.

Mr. Laboure filed his form of list for FY 16 on March 1, 2015, but did not include the paintings and their appraised values in his listing. The assessment director, an art buff herself, immediately noticed the omission and opened a personal property audit. In the course of the audit the assessor turned up the appraisal report on the collection on display in the massage parlor. She issued a Revised Assessment reflecting the considerable value of the art collection.

Mr. Laboure was furious that he was being taxed for an art collection he considered his personal property. He refused to pay the personal property tax assessed on his art collection, but otherwise paid the personal property tax due on the other items situated in his business. He applied for abatement of the revised assessment, but the assessors denied him. He filed an appeal with the Appellate Tax Board, but it was dismissed because he hadn't paid half of the value of the assessed tax.

The tax collector conferred with the assessment director as to options the town had for collecting the unpaid personal property tax.

1. **What are the means by which the collector can attempt to collect the unpaid personal property tax?**

2. **Will it be possible to suspend the license on the massage parlor for non-payment of taxes? What are the necessary steps?**
3. **Mr. Laboure is entitled to an abatement on the real estate tax assessed against his home. The abatement was approved after the 4th quarter bill had been paid, so a refund is due and payable. Can that refund be intercepted and applied to the personal property tax revised assessment?**
4. **Let's say the tax deficiency is less than \$7000. What recourse might the collector have in litigation?**
5. **How might Mr. Laboure legitimately avoid personal property tax on the art collection for the next upcoming fiscal year?**

G.L. c. 40, § 57
G.L. c. 59, § 18
G.L. c. 59, § 29
G.L. c. 59, § 31A
G.L. c. 59, § 76
G.L. c. 60, § 35
G.L. c. 60, § 93
G.L. c. 218, § 21

CASE STUDY 6

REAL vs. PERSONAL PROPERTY

Samhain Concoctions, Inc. ("SC") manufactures specialty chemicals for funeral home, educational, and governmental use. Among its products are an advanced variation of formaldehyde which preserves dead biological specimens in perpetuity, for dissection or display; a high-quality plaster product that can be used to fill abrasions and other damage to the features of a dead body; and customized embalming fluids used to expedite the embalming process. SC owns a chemical manufacturing and distribution plant in Samhain, Massachusetts; and on the same site a warehouse, a laboratory, an administrative office building, and underground storage tanks. SC has been recognized as a manufacturing corporation since its inception.

There are twelve underground storage tanks on the premises of the manufacturing site containing the commodity chemicals SC uses to manufacture its specialty chemicals. The tanks hold between 2000 and 8000 gallons and are double-walled and steel-coated or glass-coated. When they are needed in the manufacturing process, the chemicals flow from the tanks to the main manufacturing facility through color-coded pipes. These pipes begin inside the tanks and travel to cylindrical reservoirs above ground. The pipes then travel above ground to tanks inside the manufacturing facility. By using pumps, SC draws chemicals from the underground tanks through the color-coded pipes and into the above-ground tanks. The chemicals are then blended according to proprietary formulas for the creation of SC's product line. The tanks include electronic monitoring equipment to provide readings, from a location outside the tanks, of the temperature and volume of stored commodity chemicals. There are also shut-off valves.

Each tank rests on a concrete pad located about twelve feet underground, to which it is joined by removable straps. The tops of the tanks are about three feet under the surface. Sand or peastone is placed above and around the tanks so that they can be removed quickly and easily. A small backhoe is used to dig out the sand or peastone surrounding the tanks. The removable straps are unfastened, then a crane with an attached hook draws the tank to the surface.

The town assessed these underground storage tanks as real property in an effort to apply its liens to secure payment of taxes.

1. **What attributes of the underground storage tanks support the assessors' characterization of them as real estate?**
2. **What features suggest that the underground storage tanks are personal property?**

G.L. c. 59, § 2
G.L. c. 59, § 2A
G.L. c. 59, § 18
G.L. c. 60, § 36

CASE STUDY 7 SOLAR GENERATING PROPERTY UNDER A PILOT

Psychedelic Power Co. has agreed to lease a 5-acre parcel in Green Acres, Massachusetts, on which it constructs a solar array to generate solar power for general distribution through the electricity grid. The property owner is Farmer Bobson, who will receive rental income but whose property does not receive subsidized electric power from the installation. Given the size of the facility, the apparatus of the solar array will be situated on metal pilings above a concrete foundation. The pilings pass through the foundation and are embedded 5 feet into the ground beneath. A construction crew would be required to remove the array. The solar panels on the array, on the other hand, are designed to be readily removable when they need to be replaced.

Psychedelic is pressuring the Select Board to enter into a PILOT agreement whereby a fixed amount would be paid to meet the property tax obligations entailed by the solar equipment. The Select Board recommends, and Town Meeting approves the PILOT agreement. Implementation is smooth for the first three years. However, the federal government then repealed the tax credits which subsidize construction and operation of solar power plants. The company abruptly leaves the state and fails to meet its payment obligations, to the town and to Farmer Bobson. The solar array is deactivated but remains in good repair such that another company could revive the electric generating capacity.

1. **Would the agreement treat the solar array as personal or real property?**
2. **What recourse do the assessor and collector have under the agreement?**

3. **Does the collector have recourse to G.L. c. 60 remedies to collect the amounts due on the tax agreement?**
4. **After the agreement has been breached, could Green Acres assess the solar array as real property to Farmer Bobson?**
5. **Does the agreement foreclose treatment of the solar array as real property?**

CASE STUDY 8 COLLECTING TAXES FROM A TAX EVADER

Sergei Kerplopnik is an internationally renowned chef who moved to Massachusetts from Russia several years ago amidst a flurry of media interest. He allegedly evaded taxes and embezzled money from a state-owned business in Russia, and has since become the subject of an extradition request from the Russian authorities. The current diplomatic stand-off between Russia and the United States over Ukraine has impeded the extradition.

In 2013, Kerplopnik leased real estate and opened a restaurant named the Russian Tea Room in Berkshire, Massachusetts, open during the spring, summer, and fall. The restaurant was operated by the ABC Restaurant Corp. Despite doing a brisk business, after its first season the restaurant closed for good and sold all its equipment, furnishings, and fixtures before year end and distributed the proceeds of sale to its sole shareholder, Kerplopnik.

Kerplopnik opened a second restaurant, Chez Putin, operated through yet another corporation, XYZ Corp. in 2014. Personal property was acquired after January 1st. Although the restaurant closed for the winter season, he was unable to dispose of the restaurant personal property by year's end, and it remained on site into 2015, beyond the assessment date of January 1, 2015 for FY 16. XYZ fails to file a form of list on March 1, but the assessor is aware of Kerplopnik's penchant for tax avoidance and opens a personal property audit. The assessor obtains the bill of sale for the restaurant personal property, which Kerplopnik finally managed to dispose of in February. He assesses XYZ for its personal property only to find that it had distributed all its cash to its sole shareholder shortly after the February liquidation sale.

The collector is very determined that the FY 16 assessment be paid. But Kerplopnik opened a new restaurant and formed a new entity QRS Corp. for calendar year 2015. He did not acquire restaurant personal property until the spring. And XYZ has no assets to pay the personal property tax assessment. Does the collector have legal options to collect the FY 16 assessment?

1. **Do G.L. c. 60, § 93 or G.L. c. 40, § 57 have potential as collection tools against Kerplopnik?**
2. **What about G.L. c. 60, § 35?**
3. **Which party would the collector bring suit against?**
4. **Is there any way to reach Kerplopnik's personal assets?**

G.L. c. 40, § 57
G.L. c. 59, § 18
G.L. c. 59, § 29
G.L. c. 59, § 31A
G.L. c. 59, § 76
G.L. c. 60, § 35
G.L. c. 60, § 93

CASE STUDY 9 PERSONAL PROPERTY TAX AUDITS

The law firm Dewey, Cheatum, and Howe is an LLC which employs approximately 20 people in leased space in a downtown office building. They have been filing forms of list declaring their taxable personal property to be some several-years-old computers and office furnishings. Items are declared on the form of list at net book value (*i.e.* original cost less accumulated depreciation.) Dewey, Cheatum, and Howe has been assessed personal property tax based on the reported assets at the stated values. Assessor Busybody reviews their state-of-the-art web site and talks to an employee of the building inspector's department who describes the offices as having been extensively upgraded in 2008.

- 1. What should Assessor Busybody's response be on learning of possible undeclared personal property in Dewey, Cheatum, and Howe's offices?**
- 2. What information would be helpful in ascertaining the law firm's correct personal property tax liabilities for Fiscal Years 2010 and 2011?**
- 3. Assessor Busybody wants to conduct an inspection of the law firm's offices to ferret out all items of personal property subject to tax. The law firm refuses to give its consent. Can Assessor Busybody enter upon the premises without permission? What if the law firm has appealed a denial of abatement on their revised personal property tax assessment to the Appellate Tax Board?**

4. **The audit reveals that extensive, undeclared personal property is situated at the law firm's offices, including new furnishings, original works of art, state-of-the-art computer equipment and systems, a fully equipped kitchen, and a multimedia library. What is the correct assessing procedure given the audit findings?**
5. **Records reveal that Dewey, Cheatum, and Howe made extensive purchases of software in 2008. Is software subject to personal property tax?**
6. **Assuming assessments are made based on information uncovered in the course of the personal property tax audit, what are Dewey, Cheatum, and Howe's rights to obtain an abatement of the additional assessments of the undeclared personalty? What difference might it make if they refused to comply with the audit information requests until the assessor obtained a court order, which they vigorously contested?**
7. **How would values for the undeclared personal property assets uncovered in the course of the audit be set?**

G.L. c. 59, § 31A

G.L. c. 59, § 75

G.L. c. 59, § 76

**POWERS AND DUTIES OF CITIES AND TOWNS:
LOCAL LICENSES AND PERMITS; DENIAL, REVOCATION OR
SUSPENSION FOR FAILURE TO PAY MUNICIPAL TAXES OR CHARGES
General Laws Chapter 40, § 57**

Section 57. Any city or town which accepts the provisions of this section, may by by-law or ordinance deny any application for, or revoke or suspend a building permit, or any local license or permit including renewals and transfers issued by any board, officer, department for any person, corporation or business enterprise, who has neglected or refused to pay any local taxes, fees, assessments, betterments or any other municipal charges, including amounts assessed under the provisions of section twenty-one D or with respect to any activity, event or other matter which is the subject of such license or permit and which activity, event or matter is carried out or exercised or is to be carried out or exercised on or about real estate whose owner has neglected or refused to pay any local taxes, fees, assessments, betterments or any other municipal charges. Such by-law or ordinances shall provide that:

(a) The tax collector or other municipal official responsible for records of all municipal taxes, assessments, betterments and other municipal charges, hereinafter referred to as the tax collector, shall annually furnish to each department, board, commission or division, hereinafter referred to as the licensing authority, that issues licenses or permits including renewals and transfers, a list of any person, corporation, or business enterprise, hereinafter referred to as the party, that has neglected or refused to pay any local taxes, fees, assessments, betterments or other municipal charges for not less than a twelve month

period, and that such party has not filed in good faith a pending application for an abatement of such tax or a pending petition before the appellate tax board.

(b) The licensing authority may deny, revoke or suspend any license or permit, including renewals and transfers of any party whose name appears on said list furnished to the licensing authority from the tax collector or with respect to any activity, event or other matter which is the subject of such license or permit and which activity, event or matter is carried out or exercised or is to be carried out or exercised on or about real estate owned by any party whose name appears on said list furnished to the licensing authority from the tax collector; provided, however, that written notice is given to the party and the tax collector, as required by applicable provisions of law, and the party is given a hearing, to be held not earlier than fourteen days after said notice. Said list shall be prima facie evidence for denial, revocation or suspension of said license or permit to any party. The tax collector shall have the right to intervene in any hearing conducted with respect to such license denial, revocation or suspension. Any findings made by the licensing authority with respect to such license denial, revocation or suspension shall be made only for the purposes of such proceeding and shall not be relevant to or introduced in any other proceeding at law, except for any appeal from such license denial, revocation or suspension. Any license or permit denied, suspended or revoked under this section shall not be reissued or renewed until the license authority receives a certificate issued by the tax collector that the party is in good standing with respect to any and all local taxes, fees, assessments, betterments or other municipal charges, payable to the municipality as the date of issuance of said certificate.

(c) Any party shall be given an opportunity to enter into a payment agreement, thereby allowing the licensing authority to issue a certificate indicating said limitations to the license or permit and the validity of said license shall be conditioned upon the satisfactory compliance with said agreement. Failure to comply with said agreement shall be grounds for the suspension or revocation of said license or permit; provided, however, that the holder be given notice and a hearing as required by applicable provisions of law.

(d) The board of selectmen may waive such denial, suspension or revocation if it finds there is no direct or indirect business interest by the property owner, its officers or stockholders, if any, or members of his immediate family, as defined in section one of chapter two hundred and sixty-eight A in the business or activity conducted in or on said property.

This section shall not apply to the following licenses and permits: open burning; section thirteen of chapter forty-eight; bicycle permits; section eleven A of chapter eighty-five; sales of articles for charitable purposes, section thirty-three of chapter one hundred and one; children work permits, section sixty-nine of chapter one hundred and forty-nine; clubs, associations dispensing food or beverage licenses, section twenty-one E of chapter one hundred and forty; dog licenses, section one hundred and thirty-seven of chapter one hundred and forty; fishing, hunting, trapping license, section twelve of chapter one hundred and thirty-one; marriage licenses, section twenty-eight of chapter two hundred and seven and theatrical events, public exhibition permits, section one hundred and eighty-one of chapter one hundred and forty.

A city or town may exclude any local license or permit from this section by by-law or ordinance.

**ASSESSMENT OF LOCAL TAXES:
REAL PROPERTY; MORTGAGES; CLASSIFICATIONS
General Laws Chapter 59, § 2A(a)**

Section 2A. (a) Real property for the purpose of taxation shall include all land within the commonwealth and all buildings and other things thereon or affixed thereto, unless otherwise exempted from taxation under other provisions of law. The assessors of each city and town shall determine the fair cash valuation of such real property for the purpose of taxation on the first day of January of each year. Notwithstanding the foregoing, in any city or town which accepts the provisions of this sentence, buildings and other things erected on or affixed to land during the period beginning on January second and ending on June thirtieth of the fiscal year preceding that to which the tax relates shall be deemed part of such real property as of January first. ...

**ASSESSMENT OF LOCAL TAXES: TAXATION OF
IMPROVED REAL ESTATE BASED ON VALUE AT
ISSUANCE OF OCCUPANCY PERMIT; PRO RATA
General Laws Chapter 59, § 2D**

Section 2D. (a) Whenever in any fiscal year real estate improved in assessed value by over 50 per cent by new construction is issued a temporary or permanent occupancy permit after January 1 in any year, the owner of the real estate shall pay a pro rata amount or amounts, as herein defined, to the city or town where such real estate is located that would have been due for the applicable fiscal year under this chapter if the real estate had been so improved on the assessment date for the fiscal year in which the occupancy permit issued. The amounts payable to the city or town shall be determined as follows:

(1) A real estate tax based on the assessed value of the improvement for the fiscal year in which such improvement and issuance of an occupancy permit occurred allocable on a pro rata basis to the days remaining in the fiscal year from the date of the issue of the occupancy permit to the end of the fiscal year; and

(2) A real estate tax based on the assessed value of the improvement for the succeeding fiscal year where the occupancy takes place between January 1 and June 30 of any year.

(b) A real estate tax based on the assessed value of the improvement shall be computed by applying the tax rate or the appropriate classified tax rate of the city or town for the fiscal year in which such improvement and issuance of an occupancy permit occurs to the assessed value of the improvement as if the real estate had been so improved on January first of the year of occupancy.

(c) Such amounts shall be paid by the property owner to the collector of the city or town within 30 days of the date of issuance by said city or town of a notification of such liability to said property owner or the date by which a tax assessed upon real estate would otherwise be payable without interest for the applicable fiscal year, whichever is later. Any amount not paid by the said date shall bear interest from the said date at the rate per annum provided in section 57. The collector shall have for the collection of sums assessed under this section all remedies provided by chapter 60 for the collection of taxes upon real estate.

(d) A person upon whom a tax has been assessed pursuant to the provisions of this section shall have all remedies provided by section 59 and section 64 of chapter 59 and all other applicable provisions of the General Laws for the abatement and appeal of taxes upon real estate.

(e) Whenever in any fiscal year, the assessed value of real estate is decreased by over 50 per cent as the result of fire or natural disaster, the city or town shall abate or refund taxes received, as the case may be, in an amount to be calculated in the same manner as a real estate tax increase, based on the assessed value of an improvement, is calculated pursuant to the provisions of this section.

(f) The local appropriating authority, as defined in section 21C, may reject this section by written notification to the department of revenue.

ASSESSMENT OF LOCAL TAXES: REAL ESTATE General Laws Chapter 59, § 11

Section 11. Taxes on real estate shall be assessed, in the town where it lies, to the person who is the owner on January first, and the person appearing of record, in the records of the county, or of the district, if such county is divided into districts, where the estate lies, as owner on January first, even though deceased, shall be held to be the true owner thereof; provided, that whenever the commissioner deems it proper he may, in writing, authorize the assessment of taxes upon real estate to the person who is in possession thereof on January first, and such person shall thereupon be held to be the true owner thereof for the purposes of this section; and provided, further, that whenever the commissioner deems it proper he 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; . . . (Emphasis supplied.)

ASSESSMENT OF LOCAL TAXES: REAL ESTATE DIVIDED AFTER ASSESSMENT; APPORTIONMENT OF TAX General Laws Chapter 59, § 78A

Section 78A. If real property is divided by sale, mortgage, upon a petition for partition or otherwise after January first and such division has been duly recorded in the registry of deeds, the assessors, at any time before said real property has been advertised for sale for nonpayment of taxes, upon the written request of the owner or mortgagee of any portion thereof, shall apportion said tax, with costs and interest upon the several parcels thereof, in proportion to the value of each, and only the portion of said tax, interest and costs so apportioned upon any such parcel shall continue to be a lien upon it; and the owners or mortgagees shall be liable only for the tax apportioned upon the parcel owned in whole or in part by them respectively. If a tax so apportioned upon any parcel remains unpaid after such a commitment to the collector, it may be recovered in an action of contract or in any other appropriate action, suit or proceeding brought by the collector either in his own name or in the name of the town against said owners and mortgagees. Assessors shall send notice

of the request for such apportionment and of the time appointed therefor, by mail, to every person interested in said real property whose address is known to them.

**ASSESSMENT OF LOCAL TAXES:
APPEAL FROM APPORTIONMENT
General Laws Chapter 59, § 81**

Section 81. A person aggrieved by any action of the assessors in making such Apportionment may within seven days thereafter appeal in like manner as in case of an overassessment, and the decision upon such appeal shall be final.

**COLLECTION OF LOCAL TAXES: ACTIONS AGAINST
DELINQUENT TAXPAYERS
General Laws Chapter 60, § 35**

Section 35. If a tax which has been committed to a collector remains unpaid after it has become due and payable, it may be recovered in an action of contract or in any other appropriate action, suit or proceeding brought by the collector either in his own name or in the name of the town against the person assessed for such tax.

**COLLECTION OF LOCAL TAXES: MONEY DUE
TAXPAYER FROM MUNICIPALITIES; WITHHOLDING FOR
DELINQUENT TAXES
General Laws Chapter 60, § 93**

Section 93. The treasurer or other disbursing officer of any town may, and if so requested by the collector shall, withhold payment of any money payable to any person from whom there are then due taxes, assessments, rates or other charges committed to such collector, which are wholly or partly unpaid, whether or not secured by a tax title held by the town, to an amount not exceeding the total of the unpaid taxes, assessments, rates and other charges, with interest and costs. The sum withheld shall be paid or credited to the collector, who shall, if required, give a written receipt therefor. The person taxed or charged may in such case have the same remedy as if he had paid such taxes, assessments, rates or other charges after a levy upon his goods. The collector's rights under this section shall not be affected by any assignment or trustee process or attorney's lien.

**CONDOMINIUMS:
TAXATION AND BETTERMENT ASSESSMENTS; LIEN
General Laws Chapter 183A, § 14**

Section 14. Each unit and its interest in the common areas and facilities shall be considered an individual parcel of real estate for the assessment and collection of real estate taxes but the common areas and facilities, the building and the condominium shall not be deemed to

be a taxable parcel. Except as provided in section 53E3/4 of chapter 44 and section 127B1/2 of chapter 111, betterment assessments or portions thereof, annual sewer use charges, water rates and charges and all other assessments, or portions thereof, rates and charges of every nature due to a city, town or district with respect to the condominium or any part thereof, other than real estate taxes, may be charged or assessed to the organization of unit owners; provided, however, that any lien of the city, town or district provided by law therefor shall attach to the units in proportion to the percentages, set forth in the master deed on record, of the undivided interests of the respective units in the common areas and facilities.

REAL ESTATE TIME-SHARES: SELECTED DEFINITIONS

General Laws Chapter 183B, § 2

Section 2. As used in this chapter, the following words shall, unless the context otherwise requires, have the following meanings:--

"Association", the association organized under the provisions of subsection (a) of section nineteen.

"Manager", any person, other than all time-share owners or the association, designated in or employed pursuant to the time-share instrument or project instrument to manage the time-share units.

"Managing entity", the manager or, if there is no manager, the association.

"Project", real property, subject to a project instrument, containing more than one unit. A project may include units that are not time-share units.

"Project instrument", one or more recordable documents, by whatever name denominated, applying to the whole of a project and containing restrictions or covenants regulating the use, occupancy, or disposition of units in a project, including any amendments to the document, but excluding any law, ordinance, by-law, or governmental regulation.

"Time-share", a time-share estate or a time-share license.

"Time-share estate", a right to the occupancy of a unit or any of several units during five or more separated time periods over a period of at least five years, including extension or renewal options, coupled with a freehold estate or an estate for years in a time-share property or a specified portion thereof.

"Time-share expenses", expenditures, fees, charges, or liabilities (i) incurred with respect to the time-shares or by or on behalf of all time-share owners in one time-share property, and (ii) imposed on the time-share units by the entity governing a project of which the time-share property is a part, together with any allocations to reserves, but excluding purchase money payable for time-shares. Time-share expenses shall include real estate taxes and other governmental assessments and charges with respect to the time-share property in which the time-shares are located.

"Time-share instrument", 1 or more documents, by whatever name denominated, creating or governing time-shares including, without limitation, a declaration or plan establishing a

time-share regime, articles of organization and by-laws of a time-share association, rules and regulations, offering materials, sales documents, and instruments of conveyance or transfer.

"Time-share liability", the liability for time-share expenses allocated to each time-share pursuant to paragraph (4) of subsection (a) of section twelve.

"Time-share license", a right to the occupancy of a unit or any of several units during five or more separated time periods not coupled with a freehold estate or an estate for years.

"Time-share owner", a person who is an owner or co-owner of a time-share other than as security for an obligation.

"Time-share property", one or more time-share units subject to the same time-share instrument, together with any other real estate or rights therein appurtenant to those units.

"Time-share unit", a unit in which time-shares exist.

"Unit", real property, or a portion thereof, designated for separate use.

**REAL ESTATE TIME-SHARES:
ESTATES IN FEE SIMPLE; ESTATES FOR YEARS;
SEPARATE ESTATES; TAXES AND ASSESSMENTS;
RECORDING DOCUMENTS
General Laws Chapter 183B, § 3**

Section 3. (a) Except as otherwise provided in this chapter and notwithstanding any contrary rule of common law, a grant of an estate in a unit conferring the right of possession during a potentially infinite number of separated time periods creates an estate in fee simple having the character and incidents of such an estate at common law, and a grant of an estate in a unit conferring the right of possession during five or more separated time periods over a finite number of years equal to five or more, including extension or renewal options, creates an estate for years having the character and incidents of such an estate at common law.

(b) Each time-share estate constitutes for all purposes a separate estate in real property; provided, however, that a time-share property shall be considered one parcel of real estate for the assessment and collection of real estate taxes, betterment assessments or portions thereof, annual sewer use charges, water rates and charges, and all other assessments or portions thereof, rates and charges of every nature, due to a city, town or district with respect to the time-share property. Notices of assessments and bills for taxes shall be furnished to and paid by the managing entity, if any, as agent for the time-share owners, or if there is no managing entity, to each time-share owner. The managing entity shall give notice of such assessment to the time-share owners.

(c) A document transferring or encumbering a time-share estate may not be rejected for recording because of the nature or duration of such estate.

**REAL ESTATE TIME-SHARES:
CONFLICTS WITH OTHER LAWS
General Laws Chapter 183B, § 9**

Section 9. In the event of any conflict between this chapter and chapter one hundred and eighty-three A or chapter one hundred and fifty-seven, the provisions of this chapter shall prevail, but this chapter does not invalidate or otherwise affect rights or obligations vested under said chapter one hundred and eighty-three A or said chapter one hundred and fifty-seven, or the manner of their exercise or enforcement....

**ESTATE FOR YEARS AND AT WILL:
LAND DEMISED FOR TERM OF 100 YEARS OR MORE
REGARDED AS ESTATE IN FEE SIMPLE
General Laws Chapter 186, § 1A**

Section 1A. If land is demised for the term of 100 years or more, the term shall, so long as 50 years thereof remain unexpired, be regarded as an estate in fee simple as to everything concerning the descent and devise thereof upon the decease of the owner, the sale thereof by personal representatives, guardians, conservators or trustees, the levy of execution thereon and the redemption thereof if mortgaged or taken on execution. Whoever holds as lessee or assignee under such a lease shall, so long as 50 years of the term remain unexpired, be regarded as a freeholder for all purposes.

**DISTRICT COURTS: POWER TO ESTABLISH RULES OF
PROCEDURE; VENUE; JURISDICTIONAL AMOUNT;
HEARINGS; DAMAGES AND PENALTIES
General Laws Chapter 218, § 21 (Small Claims)**

Section 21. There shall be within the district court department and the Boston municipal court department a simple, informal and inexpensive procedure, hereinafter called the procedure, for the determination, according to the rules of substantive law, of claims in the nature of contract or tort, other than slander and libel, in which the plaintiff does not claim as debt or damages more than \$7,000; provided, however, that said dollar limitation shall not apply to an action for property damage caused by a motor vehicle, and for a review of judgments upon such claims when justice so requires. The procedure shall not be exclusive, but shall be alternative to the formal procedure for civil actions begun by summons and complaint....

Actions under this section and sections twenty-two to twenty-five inclusive, shall be brought, at the option of the plaintiff, in the judicial district where either the plaintiff or the defendant lives or has his usual place of business or employment....

FIRST MAIN STREET CORPORATION vs. BOARD OF ASSESSORS OF ACTON (and a companion case ¹).

1 Arbors Limited Partnership vs. Board of Assessors of Acton.

Nos. 98-P-982 & 98-P-993

APPEALS COURT OF MASSACHUSETTS

49 Mass. App. Ct. 25; 725 N.E.2d 1076; 2000 Mass. App. LEXIS 236

November 16, 1999, Argued

March 23, 2000, Decided

SUBSEQUENT HISTORY: [***1] As Amended April 10, 2000.

PRIOR HISTORY: Suffolk. Appeals from decisions of the Appellate Tax Board.

DISPOSITION: Decision of the Appellate Tax Board affirmed.

HEADNOTES:
Condominiums, Development rights, Common area. Taxation, Real estate tax: assessment. Municipal Corporations, Condominiums. Real Property, Condominium. Statute, Construction.

COUNSEL: Matthew P. Schaefer, for Board of Assessors of Acton.

Brian K. French (Martin Fantozzi with him) for First Main Street Corporation & another.

JUDGES: Present: Armstrong, Kass, & Rapoza, JJ.

OPINION BY: KASS

OPINION

[**1077] [*25] KASS, J. As in the preceding case in this volume, ² assessors of a town seek to tax retained development rights to build subsequent phases of a condominium. Here, the assessors of Acton have proceeded not by assessing the land to which the development rights pertain, but by treating the development rights as a "present interest" in real estate that is taxable under *G. L. c. 59, § 11*. We conclude that the limited scope of that taxing statute and the unambiguous prescription and proscription of *G. L. c. 183A, § 14*, regarding the taxation of common areas of a condominium, do not authorize the tax the assessors have sought to impose. We affirm the decision of the Appellate Tax Board that so held.

² *Spinnaker Island & Yacht Club Holding Trust vs. Assessors of Hull, ante* (2000).

[***2] 1. *Facts.* Under the master deed that on August 9, 1988, created [*26] The Arbors at Bellows Farms Condominium (condominium), the declarant subjected to the regime of *G. L. c. 183A* only the land the declarant called Phase I. ³ There was a reservation of rights to the declarant to build Phases II, III, and IV but these would be on land that, while identified, was not yet included in the condominium. The land associated with Phase I became part of the common area of the condominium as matter of law. *G. L. c. 183A, § 1(4). Spinnaker Island & Yacht Club Holding Trust v. Assessors of Hull, ante* (2000). Even as to Phase I, however, the declarant was not, at the time of the creation of the condominium, committed to more than twenty-four condominium units. The declarant reserved the right in the master deed to build subphases of Phase I that would add units to the condominium on its common land. There were three potential subphase areas reserved: Phase 1A, described in the master deed as containing 13.0562 acres; Phase 1B, 8.7549 acres; and Phase 1C, 3.2055 acres. ⁴

³ The name of the declarant was Bellows Farm Joint Venture, Inc., a Massachusetts corporation.

[***3]

⁴ The condominium documents use roman numerals for the major phases and arabic numerals for the subphases; we follow that practice.

At the time of the first tax assessment of development rights, which was for fiscal tax year 1995 (July 1, 1994, through June 30, 1995), the developer of the condominium had leapfrogged the Phase 1A and 1B lots and used only the Phase 1C lot, on which it built twenty-five units, so that the condominium stood at an aggregate forty-nine units. ⁵ The assessors for the tax year in issue valued the right reserved in the master deed to build additional units on the common area demarcated Parcel 1A at \$ 1,100,000 and on Parcel 1B at \$ 700,000. Those valuations produced tax bills of \$ 20,119 and \$ 12,803 for 1A and 1B,

respectively. At the time of the tax assessment, the owner of the development rights was First Main Street Corporation (FMSC).

5 The master deed contemplated a maximum 237 units.

[**4] As first assessed, the tax purported to be on real estate levied pursuant to *G. L. c. 59, § 2A(a)*. FMSC applied unsuccessfully to the assessors for tax abatements and lodged appeals with the Appellate Tax Board. While those appeals were pending, the assessors recognized weakness in their position and, proceeding [*27] under *G. L. c. 59, § 77*, reassessed the development rights.⁶ The basis on which the assessors [**1078] now imposed the tax was that the development rights were a *present interest* in real estate, taxable under *G. L. c. 59, § 11*. That statute authorizes imposition of a tax on a present interest upon written authorization from the Commissioner of Revenue, an authority that the commissioner conferred on the Acton assessors in this case.⁷ Appeals to the Appellate Tax Board on the substituted basis for taxing the retained development rights were consolidated with the earlier appeals. There were also like assessments and appeals for fiscal tax years 1996 and 1997, by which time the development rights had devolved upon Arbors Limited Partnership.⁸ The Appellate Tax Board, as noted in the introductory [**5] paragraph of this opinion, decided that the authority to tax a present interest in real estate did not trump the exclusion in *G. L. c. 183A, § 14*, of common areas from separate taxation.

6 *General Laws c. 59, § 77*, as amended by St. 1945, c. 333, states in part: "Every tax except a poll tax, which is invalid by reason of error or irregularity in the assessment and every tax on land which, by reason of such error or irregularity, does not constitute a valid lien on such land, may, if it has not been paid in full, or if it has been recovered back, or if it has been paid under such circumstances that it can be recovered back, be reassessed by the assessors for the time being, to the just amount to which, on the estate on which, and to the person to whom, it ought at first to have been assessed, whether such person has continued an inhabitant of the town or not."

7 *General Laws c. 59, § 11*, as appearing in St. 1939, c. 175, so far as pertinent provides: "Whenever the commissioner deems it proper he may, in writing, authorize the assessment of taxes upon any present interest in real estate to the owner of such interest on January first . . ."

[**6]

8 In disposing of the 1996 and 1997 cases, the Appellate Tax Board adopted the

findings and rulings it had made in the 1995 case. We consolidated the appeals lodged with us from the various Appellate Tax Board cases.

2. *Discussion.* In the *Spinnaker Island* case, *ante* at we rejected the argument of the assessors that the land in which development rights had been retained was not common area of the condominium. In this case, the assessors take the more sophisticated position that the development rights are severable from the underlying fee; that while the underlying fee is common area, the retained right to build on that soil is not common area and, therefore, is subject to taxation.

That the right to develop future condominium units has economic value is persuasively illustrated by FMSC's sale of those rights in Phase 1A and 1B to Arbors Limited Partnership [*28] for \$ 972,000.⁹ Everything of value, however, is not necessarily subject to taxation, unless the Legislature makes it so. An option to acquire real estate, for example, has value but, in the current property tax structure, [**7] is not taxable. To see if there is any legislative sanction for the taxation of development rights in common area of a condominium, we examine *G. L. c. 59, § 11*, on which the assessors rely.

9 See 4 *Powell, Real Property § 34.11[2]*, at 34-153 (1999) (the "right to further develop is considered a valuable and tangible interest . . .").

Squantum Gardens, Inc. v. Assessors of Quincy, 335 Mass. 440, 448-450, 140 N.E.2d 482 (1957), involved the use of *G. L. c. 59, § 11*, to tax a reversionary interest on a sublease as a present interest. The court commented that the phrase "present interest," as used in the statute, was "somewhat ambiguous," *id. at 448*, but decided that, in any event, the reversionary interest was a *future interest* because the right to possession of the land had to await the end of a currently existing (i.e., present) right to possess that land. *Id. at 448-449. Restatement of Property [**8] § 153 & comment e* (1936). In that sense, the right to build additional phases of a condominium is less obviously a future interest because the holder of the right does not have to wait until some current possessory right expires. On the other hand, there is no immediate right of the holder of the right to build additional phases to possess the common area. Rather, like the holder of an option -- and the development right greatly resembles an option -- the holder of the development right must take certain [**1079] steps, notably, build the additional buildings and facilities and amend the master deed, before the expansion phase land is the holder's to deal with. An option to acquire a fee interest has been considered a future, rather than present interest. *Certified Corp. v. GTE Prod.*

Core., 392 Mass. 821, 823-826, 467 N.E.2d 1336 (1984). The status of the development right as a present interest within the meaning of *G. L. c. 59, § 11*, is doubtful and, to that degree, runs up against the well-worn principle, brought out from under the rug in the *Squantum Gardens* case, that: "The right to tax must be plainly conferred by the statute. It is not [***9] to be implied. Doubts are resolved in favor of the taxpayer." *Cabot v. Commissioner of Corp. & Taxn.*, 267 Mass. 338, 340, 166 N.E. 852 (1929).

Two additional -- and more fundamental -- difficulties confront the assessors. The first is that the condominium expansion land encompassed in Parcel 1A and Parcel 1B is common area of the condominium and, as such, is taxed pro rata to the [*29] current unit owners in the condominium. For that very reason, common area may not, under *G. L. c. 183A, § 14*, be taxed other than proportionately to the unit owners. The statute says:

"Each unit and its interest in the common areas and facilities shall be considered an individual parcel of real estate for the assessment and collection of real estate taxes, but the common areas and facilities, the building and the condominium shall not be deemed to be a taxable parcel."

Second, under the Massachusetts tax statutes, real estate generally is to be assessed as a whole unit, not on the basis of separate interests in it. *Donovan v. Haverhill*, 247 Mass. 69, 72, 141 N.E. 564 (1923). *Crocker-McElwain Co. v. Assessors of Holyoke*, 296 Mass. 338, 344-345, 5 N.E.2d 558 (1937). [***10] *Boston v. Quincy Mkt. Cold Storage & Warehouse Co.*, 312 Mass. 638, 649, 45 N.E.2d 959 (1942). *Sisk v. Assessors of Essex*, 426 Mass. 651, 654, 689 N.E.2d 1340 (1998). As the unit owners have already been taxed for their interest in the common area land, the assessors may not tax another slice of the same real property to other

While we come to the conclusion that, under existing statutory and decisional tax law, the right to develop future phases of a condominium on land of that condominium may not be taxed as a present interest under *G. L. c. 59, § 11*, we are not unmindful that this result represents a dissonance as a matter of economics or sound tax policy. The development right, as earlier noted, has economic value -- demonstrably considerable in this case --

and it would be reasonable fiscal policy to tax such a right. That has been recognized in the Uniform Condominium Act (UCA), which provides: "Any portion of the common elements for which the declarant has reserved any development right must be separately taxed and assessed against the declarant, and the declarant alone is liable for payment of those taxes." Uniform Condominium Act ****11] (1980), 7 U.L.A. (Pt. II) § 1-105(c), at 225 (1997). Comment 2 to the UCA explains the purpose of the provision: "Even if real estate subject to development rights is a part of the condominium and lawfully 'owned' by the unit owners in common, it is in fact an asset of the declarant . . ." ¹⁰ [**1080] Although the UCA may serve as a guide to the reasonableness of developer control of the structure, [*30] management, and marketing of a condominium, see *Barclay v. DeVeau*, 384 Mass. 676, 685 n.17, 429 N.E.2d 323 (1981), it cannot override the existing tax law of Massachusetts. That is a task for the Legislature.

10 A number of States have adopted § 1-105(c) of the UCA or a provision that obtains the same result. See, e.g., *Ala. Code § 35-8A-105(c)* (1991); *Alaska Stat. § 34.08.720(c)* (Michie 1998); *Ariz. Rev. Stat. Ann. § 33-1204(C)* (West 1990); *Conn. Gen. Stat. § 47-204(b)(2)* (1999); *Me. Rev. Stat. Ann. tit. 33, § 1601-105(c)* (West 1999); *Mo. Rev. Stat. § 448.1-105(3)* (1986); *Neb. Rev. Stat. § 76-829(b)* (1996); *Nev. Rev. Stat. § 116.1105(3)* (1999); *N.M. Stat. Ann. § 47-7A-5(B)* (Michie 1995); *N.C. Gen. Stat. § 47C-1-105(c)* (1999); *Or. Rev. Stat. § 94-728(3)* (1990); *68 Pa. Cons. Stat. Ann. § 3212(c)* (West 1994); *R.I. Gen. Laws § 34-36.1-1.05(c)* (1995); *Tex. Prop. Code Ann. § 82.005(b)* (West 1995); *Vt. Stat. Ann. tit. 27A, § 1-105(b)* (1998); *Va. Code Ann. § 55-79.42* (Michie 1995); *Wash. Rev. Code Ann. § 64-34.040(3)* (West 1994); *W. Va. Code § 36B-1-105(c)* (1997). Cf. *Cob. Rev. Stat. § 38-33.3-105* (1999) (adopting substantially all of § 1-105 of the UCA, but not the provision for the taxation of retained development rights); *Minn. Stat. § 515B.1-105* (1998) (same).

[***12] Accordingly, the decisions of the Appellate Tax Board are affirmed.

So ordered.

NOTE: THE BELOW DECISION PRE-DATES THE EFFECTIVE DATE
OF THE REAL ESTATE TIME-SHARE ACT, M.G.L. c. 183B

JOSEPH B. McCABE & others, trustees, ' v. BOARD OF ASSESSORS OF
PROVINCETOWN

1 Fred E. Sateriale, Wayne T. McCabe, and Fred E. Sateriale III, as trustees
of The Royal Coachman Condominium Trust.

No. 4425

Supreme Judicial Court of Massachusetts, Suffolk

402 Mass. 728; 525 N.E.2d 640; 1988 Mass. LEXIS 185

March 8, 1988

July 6, 1988

PRIOR HISTORY: [***1] APPEAL from a
decision of the Appellate Tax Board.

The Supreme Judicial Court granted a request for
direct appellate review.

DISPOSITION: *Decision of the Appellate Tax
Board affirmed.*

HEADNOTES

*Taxation, Appellate Tax Board: findings; Real
estate tax: value, condominium. Value.
Condominiums, Time-share ownership.*

SYLLABUS

Trustees of a time-share condominium trust, by
full and timely payment of a town's real estate tax
bills for 1983 and 1984, preserved their right to
appeal the assessors' denial of tax abatements for
those years. [731]

In a proceeding in which the Appellate Tax
Board granted real property tax abatements to the
trustees of a time-share condominium trust, the
record supported the board's method of valuing
individual condominium units, based upon sales of
comparable nontime-share condominium units in two
nearby locations, in preference to the municipal
assessors' approach that would have established a
value by adding together the actual or imputed sale
prices of time shares in each unit for the thirty-week
period of the unit's availability. [731-734]

COUNSEL: *Elizabeth A. Wolfe Arnold Bloom* with
her) for the Board of Assessors of Provincetown.

Edward E. Veara Paul V. Benatti [***2] with him)
for the taxpayers.

JUDGES: Hennessey, C.J., Liacos, Abrams, Nolan,
& O'Connor, JJ.

OPINION BY: LIACOS

OPINION

[**640] [*728] The board of assessors of the
town of Provincetown (assessors) challenges a
decision of the Appellate Tax Board (board) granting
abatements of certain real estate taxes assessed
against the plaintiffs (taxpayers). The assessments
cover fiscal years 1982-1985. This court granted the
assessors' petition for direct appellate review. We
affirm.

[*729] In 1977, two of the taxpayers purchased
a 4.7 acre shorefront property in Provincetown. A
resort complex, including three motel buildings,
occupied a portion of the land. In 1979, these
taxpayers converted the waterfront motel building
situated on approximately 1.93 acres of the land into
a condominium facility. See *G. L. c. 183A, § 16*.
The new condominium was called The Royal
Coachman Condominium (condominium). The
condominium master deed provided that some or all
of the units could be devoted to time-sharing use.²
All of the condominium units are currently time-
share facilities.

2 Time-sharing, or interval ownership, is the
exclusive right to possess and use real
property for set time periods.

[***3] From the time of purchase through fiscal
year 1981, the assessors apparently valued the
property as a motel complex. The taxpayers received
one assessment on the entire property. For fiscal year
1982, the [**641] assessors increased the
assessment on the property four-fold. In doing so,
the assessors valued individually the condominium
common areas and facilities. The individual
condominium units, however, were not assessed
separately. The assessors mailed one tax bill for the
entire 4.7 acre parcel to certain of the taxpayers as

individuals, and not to the trustees of the condominium trust.

The taxpayers sought declaratory relief in the Superior Court in Barnstable County. They claimed that record ownership of the condominium rested with the individual time-share unit owners. On August 5, 1983, a judge of that court found that the taxpayers had established a "de facto" condominium. The judge determined that the condominium, and the taxpayers as trustees but not as individuals, were the record owners for assessment purposes.³ See *G. L. c. 59, § 11* (1986 ed.); *G. L. c. 183A, § 14*.

3 The judge ruled that, under *G. L. c. 183A* (1986 ed.), time-share ownership is not an interest in real property. He declared invalid that portion of the master deed purporting to convey a property interest in time-share units. The judge made it clear, however, that he did not rule on the validity of the purchase and sale agreements between the trustees of the condominium and the purchasers of time-share interests. The decision of August 5, 1983, was not appealed and is not now before us.

We note the recent adoption of *G. L. c. 183B* (Supp. 1987), the Real Estate Time-Share Act. This law creates a real estate interest in time-share units, and provides for tax assessments to the individual time-share owners. *G. L. c. 183B, § 3 (a) & (b)*. This law does not govern the case at bar.

[**4] [*730] The tax bill for fiscal year 1983 was issued on July 28, 1983. That bill assessed the taxpayers, as individuals, on the property as a whole. On December 29, 1983, the assessors mailed tax bills for fiscal year 1984. Again, condominium units were not assessed separately. The bills were addressed to the taxpayers individually or as trustees of the condominium. The taxpayers filed a contempt complaint in the Superior Court. A second judge of that court issued a preliminary injunction on January 24, 1984, restraining the assessors from collecting the fiscal year 1984 bill. On February 2, 1984, the parties agreed to a permanent injunction against collection of the fiscal year 1984 bill, as issued in December, 1983. The agreement declared the bill null and void. On February 17, 1984, a third Superior Court judge enjoined the assessors from the collection of taxes not assessed on the condominium by individual unit. See *G. L. c. 183A, § 14*; *G. L. c. 59, § 11*. The judge further ordered that, within forty-five days, the assessors were to issue to the taxpayers, as trustees, separate tax bills on each condominium unit for fiscal years 1982 and 1983. No appeal was taken [**5] from these decisions.

Ten months later, on December 6, 1984, the assessors issued, in proper form, bills for fiscal years 1982 and 1983. These bills, on which no interest was assessed, were paid in full within thirty days of issuance.⁴ On the assessors' constructive denial of an application for abatement, the taxpayers appealed to the board.

4 The tax collector for the town of Provincetown testified before the board that the bills issued on December 6, 1984, for fiscal years 1982 and 1983, had been paid in full and on time. The board so found.

The tax collector, however, had refused to acknowledge receipt of payment until the taxpayers, under protest, paid retroactive interest of \$ 58,460.10 on the prior bills for fiscal years 1982 and 1983.

On December 20, 1984, the assessors issued a bill, in proper form, for fiscal year 1984. The taxpayers again paid the amount in full within thirty days. The assessors denied constructively [*731] the taxpayers' application for abatement. A timely appeal to the board followed. [**6] A similar procedural history governed the assessment for fiscal year 1985, which was issued on August 13, 1985.

1. *Jurisdiction of the board.* The assessors challenge the board's jurisdiction to hear the appeals for fiscal years 1982 and 1983. The assessors assert that the taxpayers failed to comply with statutory requisites to preserve their right to appeal. See *G. L. c. 59, §§ 57 & 64* (1986 ed.). The assessors argue, first, that the taxpayers did not pay fully and in a timely manner the originally issued fiscal year 1982 and [**642] 1983 assessments. In the alternative, they assert deficient payment on the fiscal year 1982 and 1983 bills that were issued in December, 1984. We do not see the relevance of actions taken on the original bills for these years. The judgments of the Superior Court of August 5, 1983, and of February 17, 1984, make clear that these assessments were issued improperly. The Provincetown tax collector acknowledged before the board that these bills had been rescinded. Nor do we perceive a problem regarding the lawfully issued bills of December 6, 1984. Again, the tax collector conceded that these bills had been paid on time and in full. See note 4, *supra* [**7]. The board properly determined that it had jurisdiction over these appeals for fiscal years 1984-1985.

2. *Review of the board's decision.* "A decision of the board will only be disturbed if it was not supported by 'substantial evidence,' or was tainted by an error of law." *Tenneco Inc. v. Commissioner of Revenue, 401 Mass. 380, 383* (1987), and cases cited. Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion." *G.*

L. c. 30A, § 1 (6) (1986 ed.). In *New Boston Garden Corp. v. Assessors of Boston*, 383 Mass. 456, 466 (1981), quoting L.L. Jaffe, *Judicial Control of Administrative Action* 598 (1965), we stated that we shall consider the entire record to determine whether "the evidence points to no felt or appreciable probability of the conclusion or points to an overwhelming probability of the contrary."

[*732] The board accepted the market data valuation approach of the taxpayers' appraiser.⁵ This method used comparable sales of condominium units in two nearby locations -- one practically next door to the condominium and the other approximately one-quarter mile away.⁶ Through this [***8] approach, a comparison of the values of the comparable properties, with necessary adjustments, was applied to units in the condominium. Further, the condominium's square foot value was refined to distinguish ocean view units from poolside units. The board found, specifically, that this market data method valued the condominium properly, in accordance with accepted appraisal practices.

5 The taxpayers' appraiser testified regarding his reasons for not choosing either an income approach or a reproduction cost approach to valuation. The board concluded that the methodology used by this appraiser was both proper and consistent with the rulings of the Superior Court.

6 Neither of the other properties sold time-share intervals. We note, however, that the board took a view of the subject property and of the comparable properties. Whether the other properties were "comparable" was within the board's sound discretion. See *Alstores Realty Corp. v. Assessors of Peabody*, 391 Mass. 60, 65-66 (1984).

[***9] In contrast, the board rejected the assessors' proffered approach as "patently absurd . . . unreasonable [and] unsupported." The assessors urged adoption of an "aggregate of the time-share deeds" approach. Here, the actual or imputed⁷ sale prices of time-share intervals for a particular unit were added together for the thirty-week period of availability.⁸ The unit was then valued at that aggregate price. No allowances were made for personal property in the units (furniture and appliances) or for marketing costs, unsold intervals, and other sundry expenses. Marketing costs alone were found by the board to be 45% to 55% of the gross sale prices which the assessors' witnesses utilized.

7 For certain intervals, a value higher than the actual sale price was imputed. This occurred where a less desirable time interval

was purchased at a reduced price in conjunction with the purchase of two or more units for a desirable period, or where intervals were unsold.

8 For a variety of reasons, the condominium units were usable only during thirty weeks of each year.

[***10] [*733] Neither of the assessors' witnesses produced any basis of support for his use of this methodology. The assessors' valuation resulted in assessments up to six times greater than assessments on comparable units of superior quality. The assessors argued that the time-share provision made these condominium units more valuable than ordinary condominium units. As the [**643] board noted, however, it is possible that a condominium unit could be leased for weekly intervals.⁹ The board concluded that the assessors' approach failed to produce a reasonable estimate of a fair market value for each unit.¹⁰

9 In reaching its decision, the board adopted the Superior Court judge's ruling of August 5, 1983. See note 3, *supra*, and accompanying text. Specifically, the board emphasized that time-share intervals did not constitute a real property interest. The assessors claim that the board misinterpreted the Superior Court judge's decision. Their interpretation limits the decision to a resolution of record ownership for assessment purposes.

The board's broader reading of the decision was essentially correct. Nonetheless, at one point in its decision, the board mistakenly credited the Superior Court decision as a mandate that the units must be *valued* as a condominium, irrespective of time-share usage. Given the other grounds for the board's conclusions, however, this assumption is not fatal to its decision.

[***11]

10 "Fair cash value or fair market value is 'the price an owner willing but not under compulsion to sell ought to receive from one willing but not under compulsion to buy.' *Boston Gas Co. v. Assessors of Boston*, 334 Mass. 549, 566 (1956)." *New Boston Garden, supra* at 458 n.2.

We have reviewed the record. The assessors offered an alternative valuation method. The board was not required to adopt a particular valuation method or to believe a particular witness's testimony. *New Boston Garden, supra* at 469, and cases cited. The reasons militating against adoption of the assessors' approach were detailed carefully in the board's opinion. Further, the assessors took ample opportunity to explore fully with the taxpayers'

appraiser his reasons for choosing nontime-share condominiums as comparable properties. They offered no adequate evidence to require use of a market data valuation approach that included time-share properties. The record supports the board's choice of a valuation approach. See *id.* at 470-471 (board [***12] must credit proponent's evidence if [*734] "logically adequate, and . . . neither

contradicted nor improbable"). We find no indication in the record of an "overwhelming probability" that the board's conclusion was erroneous and unsupported by substantial evidence.

Decision of the Appellate Tax Board affirmed.

SPINNAKER ISLAND AND YACHT CLUB HOLDING TRUST vs. BOARD OF ASSESSORS OF HULL.

No. 98-P-800

APPEALS COURT OF MASSACHUSETTS

49 Mass. App. Ct. 20; 725 N.E.2d 1072; 2000 Mass. App. LEXIS 237

November 16, 1999, Argued

March 23, 2000, Decided

PRIOR HISTORY: [***1] Suffolk. Appeal from a decision of the Appellate Tax Board.

DISPOSITION: Decision of the Appellate Tax Board is affirmed.

HEADNOTES

Condominiums, Development rights, Common area. Taxation, Real estate tax: assessment. Municipal Corporations, Condominiums. Real Property, Condominium. Statute, Construction.

COUNSEL: Brian P. Mansfield for the defendant.

Seth H. Emmer (William DeBear with him) for the plaintiff.

JUDGES: Present: Armstrong, Kass, & Rapoza, JJ.

OPINION BY: KASS

OPINION

[**1073] [*20] KASS, J. This is the first of two cases that consider whether municipalities may tax rights retained by the declarant of a condominium ("developer") to build additional phases of the condominium. ¹ Here, the assessors of Hull assessed real estate taxes to Spinnaker Island and Yacht Club Holding Trust ("taxpayer") for fiscal tax years 1996 and 1997, as owner of ten parcels of land ("expansion parcels") on Spinnaker Island. ² The Appellate Tax Board (board), after proceedings under its formal procedure, ³ decided

that the expansion parcels were part of the condominium's common area as defined by *G. L. c. 183A, [*21] § 1*, and as such, were exempt under *G. L. c. 183A, § 14*, from assessment as separate parcels of real estate.

1 The second case, *First Main St. Corp. v. Assessors of Action*, is reported, *49 Mass. App. Ct. 25, 725 N.E.2d 1076 (2000)*.

[***2]

2 Before the developer made it the site of a condominium, Spinnaker Island was known as Hog Island, a less tony address. The developer made a sail out of a hog's ear.

3 Compare *G. L. c. 58A, § 7* (formal procedure), with *G. L. c. 58A, § 7A* (authorizing informal procedure).

1. *Facts.* By master deed dated January 16, 1985, and recorded with the Plymouth [**1074] Registry of Deeds, the developer ⁴ submitted all of Spinnaker Island to the provisions of *G. L. c. 183A*, the condominium enabling law. See *G. L. c. 183A, § 2*. The master deed described a condominium consisting of twenty-two units in ten buildings. That was to be Phase I of the condominium.

4 The declarants of the condominium were Paul R. Townsend, Francine F. Townsend, Mary N. Fazio, trustees of The Sandcastle Associates Trust.

Under § 6 of the master deed, the declarant reserved the [***3] right, at its sole option, to increase the size of the condominium in phases, to a limit of 103 units. ⁵ *Section 7* of the master deed, captioned "phasing lease," speaks of a lease of the land -- on which the

additional phases are to be built -that the declarant has "entered into," although it neglects to say with whom or how long the lease shall run. Whenever the declarant built an additional phase, the lease automatically terminated as to the land incorporated in the new phase of the condominium. There is no evidence that any "phasing lease" was ever executed and, as we shall see, there is some evidence that it never was. Details of the developer's option to add to the condominium are further set out in § 14 of the master deed, dealing with amendments to that document. Among the limitations that appear in § 14 is that the developer's right to increase the size of the condominium by building additional units expires January 1, 2004.

5 For a collection of authorities concerning the legitimacy of phased condominiums, a "mutation[] which creative real estate lawyers have contrived," *Barclay v. DeVeau*, 11 Mass. App. Ct. 236, 247, 415 N.E.2d 239 (Greaney, J., dissenting), S. C., 384 Mass. 676, 429 N.E.2d 323 (1981), see *DiBiase Corp. v. Jacobowitz*, 43 Mass. App. Ct. 361, 364 n.5, 682 N.E.2d 1382 (1997), S. C., 427 Mass. 1004, 691 N.E.2d 548 (1998).

[***4] In 1985, the declarant added twenty-five units to the condominium; in 1986, thirty-three units; and in 1988, four units. There were then eighty-four units in the condominium. For five years the condominium did not grow further; the real estate boom of the late 1980's had run out of steam. On January 20, 1994, the developer assigned all residual development rights to the taxpayer, a nominee trust of which the sole beneficiary was the condominium unit owners' organization (see *G. L. c. 183A, § 10*), Spinnaker Island and Yacht Club Association. [*22] That instrument of assignment, which bore the caption, "Quitclaim Deed," refers to the phasing lease "to the extent such Phasing Lease is existent," thereby reinforcing doubt that a phasing lease was ever drafted, let alone signed. ⁷ Six months later, on June 15, 1994, the taxpayer executed and recorded a document by which it relinquished development rights in eight parcels of Spinnaker Island, but retained rights in ten. Those ten parcels make up the expansion parcels that the town has undertaken to tax. At the time the taxpayer reduced its development rights to ten parcels, the unit owners amended the by-laws of [***5] their condominium association to provide that the management board of the association could authorize the addition of units to the condominium only with the consent of the holders of at least sixty-seven percent of the beneficial interests in the unit owners' association.

6 Through a series of assignments, the development rights had devolved upon Spinnaker Island, Inc.

7 The Appellate Tax Board remarked in its decision that the assessors had "failed to prove the existence, let alone the terms, of the phasing lease." No phasing lease was offered in evidence.

2. *Discussion.* The theory on which the assessors in this case claim to be able to tax the development rights owned by the taxpayer is that those rights were real property. See *G. L. c. 59, § 2A(a)*. [**1075] ⁸ As the assessors see it, the rights appurtenant to the expansion parcels separated them from the common area of the condominium. In view of the real estate labels used by the developer in dealing with the retained development [***6] rights, one may imagine why the assessors were tempted to regard those rights as taxable real property. First there was the phasing lease, and second there was the instrument of assignment of development rights to the taxpayer, which was cast in the form of a quitclaim deed and was expressly so captioned. ⁹ Labels, however, may not camouflage the underlying reality. See *Commonwealth v. Beneficial Fin. Co.*, 360 Mass. 188, 292, 275 N.E.2d 33 (1971), cert. denied sub nom. *Farrell v. Massachusetts*, 407 U.S. 910, 32 L. Ed. 2d 683, 92 S. Ct. 2433, and sub nom. *Beneficial Fin. Co. v. Massachusetts*, 407 U.S. 914, 32 L. Ed. 2d 689, 92 S. Ct. 2433 (1972); *American Trucking Assn. v. Secretary of Admn.*, 415 Mass. 337, 342 n.9, 613 N.E.2d 95 (1993); *Tinkham v. Department of Pub. Welfare*, 11 Mass. App. Ct. 505, 512, 417 N.E.2d 452 (1981); *Cumberland Farms, Inc. v. Montague Economic Dev. & Ind. Corp.*, 38 Mass. App. Ct. 615, 621, 650 N.E.2d 811 (1995).

8 For a different basis for taxing retained development rights to build future phases of a condominium, see *First Main St. Corp. v. Assessors of Acton*, 49 Mass. App. Ct. 25, 26, 725 N.E.2d 1076, 1077.

[***7]

9 The document conveyed other interests such as easements and building foundations, for which the quitclaim deed form may have been apt.

General Laws c. 59, § 2A(a), as appearing in St. 1979, c. 797, § 11, provides that "real property for the purpose of taxation shall include all land within the commonwealth and all buildings and other things thereon or affixed thereto" By the terms of § 1 and schedule A of the master deed, all the land of the island is submitted to the condominium. Under *G. L. c. 183A, § 1*, the declarant of the condominium could have done no less, as that statute defines "common areas and facilities" of the condominium as including the land on which the condominium buildings are located. We read the statute as referring to the land dedicated to the condominium rather than the footprint

of a particular building. Section 4 of the master deed confirms that the common areas and facilities of the condominium shall include "all areas and facilities of the condominium as are not within a unit of the condominium."

[**8] Once it is recognized that the expansion parcels constitute common area of the condominium, it follows that they are not subject to real estate taxation because *G. L. c. 183A, § 14*, as appearing in St. 1963, c. 493, § 1, provides that "common areas and facilities . . . shall not be deemed to be a taxable parcel." This does not mean that the land of a condominium escapes taxation. "Each unit and its interest in the common areas and facilities shall be considered an individual parcel of real estate for the assessment and collection of real estate taxes." *Ibid.* That is, the assessors may factor common areas and facilities into the value of an individual condominium unit to be taxed but may not tax them separately. If retained condominium development rights are to be taxed, as we shall discuss more fully in the *First Main St. Corp.* case, *post* at , the Legislature shall have to act.

As to the phasing lease, apart from its peculiarly ephemeral quality, even had it existed, the arrangement as described did not purport to give possession to another but was a reservation of right to use common land for additional condominium units, the land under which [**9] would continue to be

common area. See *DiBiase Corp. v. Jacobowitz*, 43 *Mass. App. Ct.* 361, 364-366, 682 *N.E.2d* 1382 (1997), *S. C.*, 427 *Mass.* 1004, 691 *N.E.2d* 548 (1998).

Two cases that stand for the proposition that the statute does not preclude establishing nonownership interests in condominium land are not of assistance to the assessors. *Commercial [*24] Wharf E. Condominium Assn. v. Waterfront Parking Corp.*, 407 *Mass.* 123, 125, 552 *N.E.2d* 66 (1990), involved retention by the developer [**1076] of an easement in a driveway and parking area before declaration of the condominium, i.e., the real estate was withheld from the common area. Similarly, in *Beaconsfield Town House Condominium Trust v. Zussman*, 416 *Mass.* 505, 506-508, 623 *N.E.2d* 1115 (1993), the execution of a 155-year lease (of twelve parking spaces) executed and recorded prior to the master deed excluded the parking spaces concerned from the common areas and facilities of the condominium. In the instant case, there has been no exclusion of land from the common areas. By reason of the unambiguous exclusion in *G. L. c. 183A, § 14*, of common areas from taxation [**10] except to condominium unit owners in proportion to their percentage interests, the expansion parcels are not subject, as separate parcels, to real estate taxation. The decision of the Appellate Tax Board is affirmed.

So ordered.

Appeal of New England Marketing Associates, Inc. & a. (New Hampshire Board of Tax and Land Appeals)

No. 85-458

SUPREME COURT OF NEW HAMPSHIRE

128 N.H. 750; 519 A.2d 303; 1986 N.H. LEXIS 359

December 5, 1986

PRIOR HISTORY: [**1] Appeal from Board of Tax and Land Appeals.

DISPOSITION: *Reversed and remanded.*

COUNSEL: *Marcus Hurn*, of Concord, by brief and orally, for the taxpayers New England Marketing Associates, Inc., and The Village at Winnepesaukee Timeshare Owners Association.
Wescott, Millham & Dyer, of Laconia (*Peter V. Millham* on the brief and orally), for the taxpayer The Summit at Four Seasons.

Decker, Fitzgerald & Sessler, of Laconia (*James N. Sessler* on the brief and orally), for the City of Laconia.

JUDGES: Brock, C.J. Thayer, J., did not sit; the others concurred.

OPINION BY: BROCK

OPINION

[*750] [**303] This is an appeal from a decision of the New Hampshire Board of Tax and Land Appeals (the board) brought pursuant to *RSA 76:16-a, V* (Supp. 1985), denying the taxpayers' requests for abatements of the property taxes assessed for the tax years 1982 and 1983. *Inter alia*, the taxpayers argue that the board erred in permitting cumulative, separate assessments of fractional interests (unit weeks) in condominium units. We agree and therefore reverse and remand.

The taxpayers are owners of vacation time-sharing packages in resort developments in Laconia. Each of the developments [**2] involved in this appeal began with the establishment of condominium units

pursuant to the New Hampshire Condominium Act, RSA chapter 356-B. The owners of the time-share interests paid a gross price for their packages, and in return received a fractional interest in a condominium [*751] unit, appliances, and furniture, plus the benefits of management and exchange contracts.

Prior to 1982, the city assessed and taxed the subject properties in the same manner as conventional wholly-owned condominiums. The cost less depreciation method of determining fair market value was used. In 1982 the city reassessed those units from which at least one time-share interval had been sold, applying the market approach to fair market value using comparable time-share interval sales. The city first determined the average or typical value of each of the fractional interests (unit weeks), looking at both the initial sales from the original developer to the first buyer, and the resales from the first buyer to a subsequent buyer. The city then multiplied this value by fifty weeks. (As a general matter, two weeks a year are set aside for repair and maintenance.) Because of the high start-up marketing [***3] costs, high financial costs, high risk factor, and nontaxable furniture and fixtures, this amount was reduced by fifty percent to yield the fair market value of the unit. Then, an uncontested equalization ratio of seventy percent was applied to the fair market value, resulting in the assessed valuation. This assessed valuation was roughly double the valuations of the same [**304] properties prior to their use as time-share intervals.

The taxpayers challenged the assessments, arguing that condominiums in which time-share interests have been created should be assessed in the same manner as comparable wholly-owned condominiums. The city argued that the time-share intervals are separate estates which must be taxed separately. Following a four-day hearing, the board ruled that the taxpayers had "failed to prove that the assessments [were] unfair, improper, or inequitable or that they represent[ed] a tax in excess of the [t]axpayers' just share of the common tax burden," and denied their requests for tax abatements.

On appeal, the taxpayers seek reversal of the board's decision, arguing: (1) that assessment on the basis of cumulative, separate assessments of each fractional [***4] interest in a condominium was improper; and (2) that the assessments improperly incorporated elements of exempt property. This is a case of first impression in this State. But, we note in passing that the legislature has amended *RSA 356-B:4* by Laws 1985, 107:2, eff. April 1, 1986, to provide specifically for the appraisal of time-share interests. *RSA 356-B:4* (Supp. 1985) mandates that "[e]ach unit in which time sharing interests . . . have been created shall be valued for purposes of real property taxation as if such unit were owned by a single taxpayer."

This statute further requires that the "total cumulative purchase price paid for time sharing interests in any such unit shall not be determinative of the unit's assessed value," but may be considered as [*752] a factor in making such a determination "provided that appropriate adjustments are made to exclude from consideration any non-real property interests." *RSA 356-B:4* (Supp. 1985).

Taxes cannot be assessed in this State unless authorized by statute. See *Indian Head Nat'l Bank v. City of Portsmouth*, 117 N.H. 954, 955, 379 A.2d 1270, 1271 (1977); *King Ridge, Inc. v. Sutton*, 115 N.H. 294, 296, 340 A.2d 106, 108 [***5] (1975); N.H. Const. pt. II, art. 5. Real estate and buildings are subject to taxation under *RSA 72:6* (real estate) and *RSA 72:7* (buildings, etc.).

Prior to April 1, 1986, no specific statutory provision existed relating to the taxation of time-share interests. See *RSA 356-B:4* (Supp. 1985). The City of Laconia, however, developed an assessment formula whereby it took the average or typical value of the fractional interests or unit weeks and multiplied that value by fifty weeks. Then-existing law contained no authority for the appraisal of unit weeks as fractional interests.

Rather, because the time-share interests at issue were created in condominium facilities, they should have been assessed as condominiums. The taxation of condominiums is governed by *RSA 356-B:4*. This statute, entitled "Separate Titles and Taxation," provides in part that "[e]ach condominium unit shall constitute for all purposes a separate parcel of real property, distinct from all other condominium units." *RSA 356-B:4* (emphasis added). A "unit" is defined as "a portion of the condominium designed and intended for individual ownership and use. . . ." *RSA 356-B:3, XXIX*. A time-share interest is [***6] not a separate "unit," but rather a property interest in a condominium unit. *RSA 356-B:3, XXVIII*. Thus, we hold that for the tax years prior to April 1, 1986, condominium facilities in which time-share interests have been created should be taxed as wholly-owned condominium units. *RSA 356-B:4*.

Since the city lacked authority to separately assess each unit week, the board incorrectly concluded that the appraisals based on the value of the unit weeks were lawful. Because of the result reached, we need not address the taxpayers' second argument, that there was unlawful taxation of exempt property. The decision of the board is reversed, and the case remanded for further hearings to determine the [**305] amount of excess tax and to order an abatement of the excess amount.

Reversed and remanded.

LONDON BRIDGE RESORT, INC., a Delaware corporation; RESORT ASSOCIATION, INC., a corporation, individually and as agent of all its Members, Plaintiffs/Appellants, v. MOHAVE COUNTY, a political subdivision of the State of Arizona, Defendant/Appellee.

1 CA-TX 00-0013

COURT OF APPEALS OF ARIZONA, DIVISION ONE, DEPARTMENT T

200 Ariz. 462; 27 P.3d 819; 2001 Ariz. App. LEXIS 105; 352 Ariz. Adv. Rep. 18

July 10, 2001, Filed

SUBSEQUENT HISTORY: [***1] Peition for Review August 9, 2001.

PRIOR HISTORY: Appeal from the Arizona Tax Court. Cause Nos. TX98-00680, TX98-00681, TX98-00682, TX99-00123, TX99-00124, TX99-00125 (Consolidated). The Honorable Jeffrey S. Cates, Judge.

DISPOSITION: AFFIRMED.

COUNSEL: Morrill & Aronson, P.L.C., Phoenix, By K. Layne Morrill, John C. Doney, Attorneys for Plaintiffs/Appellants.

William J. Ekstrom, Jr., Mohave County Attorney, Kingman, By Christine L. Nelson, Deputy County Attorney, Deborah L. Herbert, Deputy County Attorney, Attorneys for Defendant/Appellee.

JUDGES: MICHAEL D. RYAN, Judge.
CONCURRING: SHELDON H. WEISBERG, Presiding Judge, E. G. NOYES, JR., Judge.
OPINION BY: MICHAEL D. RYAN, Judge

OPINION

[**820] [*463] RYAN, Judge

P1 The question we must answer in this appeal is whether Mohave County exceeded its statutory authority in valuing time-share condominium units by considering estimated market values of time-share interval interests associated with the units. Because the County's valuation method complies with *Arizona Revised [***2] Statutes ("A.R.S.") section 33-1204 (2000)*, we conclude that the County did not exceed its authority in adopting its sales comparison valuation method. We therefore affirm.

BACKGROUND

P2 The appellants are London Bridge Resort, Inc. and Resort Association, Inc. (collectively, "LBRI"). In 1986, LBRI's predecessor-in-interest¹ bought an existing hotel, land, and commercial buildings adjacent to the London Bridge in Lake Havasu City. In 1990, LBRI recorded a plat and declarations [*464] [**821] that transformed the existing hotel into a time-share condominium project that was initially composed of 102 units. Conversion activities proceeded, and the original time-share declarations were repeatedly amended during the period 1990 through 1998. When the conversion process was complete, the project encompassed a total of 122 condominium units.

¹ LBRI is actually the successor to the original developer, but for the sake of clarity, we refer to the original and successor developer as LBRI.

P3 Each condominium [***3] unit is either a studio, a one-bedroom unit, or a two-bedroom unit. Under the time-share declarations each unit is "divided in time." The resulting divisions are called "interval interests" or "interval units." Each interval interest is associated with one of the three types of units and is designated accordingly as a "Studio Interval Unit, a One Bedroom Interval Unit, or a Two Bedroom Interval Unit." The purchaser of an interval interest receives a non-severable membership in the owners' association and the right to occupy and use one unit of the associated type for one week each year or every other year, depending on the particular interval interest purchased. Interval interests do not include rights in any particular condominium unit or any particular calendar week.

P4 Each interval interest purchaser also receives, via warranty deed, an undivided fractional fee simple interest in all 122 condominium units and the common elements of the condominium project. The fraction on

which a given interval interest is based is equivalent to the ratio between the average square footage of the type of unit the owner has acquired the right to occupy, and the combined square footage [***4] of the 122 units multiplied by 51. No owner or group of owners can sell a condominium unit. None of the units has been or ever can be owned separately from the other units. All sales pertaining to the condominium project are of interval interests.

P5 Each condominium unit has a separate tax parcel number. The Mohave County Assessor has never assigned tax parcel numbers to interval interests. Every year since the condominium project was created, the Assessor has issued a separate valuation notice for each condominium unit. Property taxes levied on the condominium units are billed to the owners' association and are funded by the interval interest owners through regular assessments for ownership expenses.

P6 In Arizona, taxable property is to be assessed at its "full cash value." *A.R.S. § 42-11001(5)* (Supp. 2000). "Full cash value" means the value determined as set forth by statute, or if no statutory valuation method is set forth, "full cash value is synonymous with market value which means the estimate of value that is derived annually by using standard appraisal methods and techniques." *Id.* Market value is generally determined through [***5] three common appraisal approaches: capitalizing the income stream ("income method"), estimating replacement cost less depreciation ("cost method"), and estimating market value by comparable sales ("sales comparison method"). *Bus. Realty of Arizona, Inc. v. Maricopa County*, 181 *Ariz.* 551, 553-54, 892 *P.2d* 1340, 1342-43 (1995); *cf. A.R.S. §§ 42-11054(A)(1), 42-16051(B)* (1999). However, other "hybrid" methods may also be permissible. *See Recreation Cntrs. of Sun City, Inc. v. Maricopa County*, 162 *Ariz.* 281, 291, 782 *P.2d* 1174, 1184 (1989).

P7 Assessors typically use the cost method to value condominium units in a new project, then switch to the sales comparison method when a sufficient number of units has been sold to render that method a reliable indicator of market value. From 1991 through 1998, every county assessor in Arizona valued all residential condominium units under either the replacement cost method or the sales comparison method, regardless of whether they were time-shared. Because no individual condominium units in the London Bridge Resort had been or could be sold as such, from

1991 through 1998 [***6] the Mohave County Assessor valued those units by the replacement cost method. But throughout that period, the Mohave County Assessor also tracked the affidavits of value filed under *A.R.S. section 11-1133* (Supp. 2000) on each sale of an interval interest in the London Bridge Resort. From the information reflected on those affidavits, the Assessor formed the opinion that a significant component of value inhering in time-share condominium units was escaping assessment.

[*465] [**822] **P8** The Assessor's office formulated a new methodology for valuing time-share condominium units and applied it in valuing the London Bridge Resort units for tax years 1999 and 2000. Under this methodology, the Assessor first determined the most probable sales prices of interval interests in studio, one-bedroom, and two-bedroom units, respectively, using recent market sales of such interests. Each such price was then multiplied by the number of interval interests sold or available for sale for each type of unit. This yielded a "gross market value" for each type of condominium unit.

P9 The gross market values were then reduced by 50% to account for extraordinary initial marketing [***7] costs, business going concern value, excess sales commission costs, unusual financing, arms-length transaction irregularities, atypical developer risk, extended marketing time and other non-realty intangibles such as vacation conveniences and services, exchange privileges and unusual closing costs.

The Assessor reduced each gross market value by an additional 10% to account for personal property. Twenty percent of the remaining amount was then deducted "as an equity adjustment to account for the general level of assessment in Arizona and Mohave County."

P10 In summary, Mohave County's valuation process for 1999 and 2000, began by taking an average of recent selling prices of interval interests for each of the three condominium unit categories and multiplying those averages by the corresponding number of interval interests for each category. After discounting the results by a uniform rate of 68% to account for non-real estate factors, the County ascribed the final figures to every individual unit in the categories to which they pertained, yielding identical valuations and tax bills for all units in each category.

P11 For 1999, this methodology yielded a valuation [***8] of \$ 128,928 for each studio unit, \$ 186,472 for each one-bedroom unit, and

\$ 238,724 for each two-bedroom unit, inclusive of value attributed to land. The aggregate valuation of the 122 condominium units was approximately \$ 25 million for 1999.

P12 LBRI appealed the 1999 valuations to the Mohave County Board of Equalization. The Board sustained the Assessor's valuations. LBRI and the owners' association appealed the Board's ruling, and later appealed the Assessor's valuations for 2000, to the tax court. The tax court appeals were consolidated.

P13 On cross-motions for partial summary judgment, the tax court ruled for Mohave County. The tax court rejected LBRI's challenge and concluded that LBRI's position would create an unauthorized property tax exemption for time-share interval units in violation of *Article 9, Section 2(12) of the Arizona Constitution*.² Observing that any of the standard appraisal methods may be used in determining full cash value, the tax court concluded that the Assessor's "method of valuing the London Bridge Resort time-share condominium units using a market-based approach is permissible, and presumed competent."

2 Article 9, Section 2(12) provides the following: "All property in the state not exempt under the laws of the United States or under this constitution or exempt by law under the provisions of this section shall be subject to taxation to be ascertained as provided by law."

[**9] P14 Before judgment was entered, the parties entered a partial settlement agreement for the purpose of focusing the case on the legality of Mohave County's time-share condominium valuation method and avoiding the expense and delay of litigating the actual values of the 122 units. They stipulated that, for both 1999 and 2000, the aggregate full cash values of the units would be fixed at \$ 19.5 million if Mohave County's valuation method were found legally permissible and at \$ 8 million if it were not. The tax court's judgment accordingly set the aggregate full cash value at \$ 19.5 million, assigning \$ 100,222, \$ 144,954, and \$ 185,575 as full cash values for studio, one-bedroom, and two-bedroom condominium units, respectively.

DISCUSSION

P15 On appeal from summary judgment in which the material facts are not in dispute, we review *de novo* whether the appellee [*466] [**823] was entitled to judgment as a matter of

law. *Cable Plus Co. v. Arizona Dep't of Revenue*, 197 Ariz. 507, 509, P10, 4 P.3d 1050, 1052 (App. 2000) (citation omitted); *Blum v. State*, 171 Ariz. 201, 203-04, 829 P.2d 1247, 1249-50 (App. 1992) (citations omitted).

[**10] I. Direct Taxation of Time-share Intervals

P16 The tax court apparently accepted LBRI's contention that Mohave County's valuation method directly assessed and taxed time-share interval interests, but disagreed with its contention that counties have no authority to do so. The tax court concluded instead that the *Arizona Constitution, Article 9, Sections 2(2) and (2)(12)*, required Arizona counties to assess and tax interval interests regardless whether specific statutory authority existed. Before we examine LBRI's contention itself, we comment briefly on the rationale by which the court resolved it.

P17 It is evident that the tax court made its ruling without benefit of this court's then-recent opinion in *Airport Properties v. Maricopa County*, 195 Ariz. 89, 985 P.2d 574 (App. 1999). There we rejected the view that *Article 9, Section 2(12) of the Arizona Constitution* requires *ad valorem* taxation of every conceivable variety of property not expressly exempted by federal law, the Arizona Constitution, or statutory exemption authorized by Article 9, Section 2(2) (property of charitable, educational, religious, or non-profit institutions). [**11] *See Airport Props.*, 195 Ariz. at 99, P 36, 985 P.2d at 584. We reached this conclusion based on the plain language of Article 9, Section 2(12), its history and treatment in the Arizona case law, and "the yardstick of common sense." *Id.* at 99-104, PP36-59, 985 P.2d at 584-89; *see also Maricopa County v. Fox Riverside Theatre Corp.*, 57 Ariz. 407, 408-15, 114 P.2d 245, 246-48 (1941) (holding that because the legislature had set up no machinery by which taxation of leasehold interests in public property could be carried into effect, the legislature had not exercised its power to tax such interests and thus an injunction against Maricopa County's assessment of taxes on such interests was appropriate).

P18 In light of *Airport Properties*, the tax court's rationale for its ruling was incorrect. The question whether to tax time-share interval interests as such is within the discretion of the legislature. *Airport Props.*, 195 Ariz. at 100-01, P 40, 985 P.2d at 585-86; *see also Fox Riverside Theatre Corp.*, 57 Ariz. at 409-12, 114 P.2d at . Article 9, Section 2(12), neither

requires nor permits [***12] county assessors to assess any distinct category of property that the legislature has not determined to tax. *See Airport Props.*, 195 Ariz. at 100-01, P 40, 985 P.2d at 585-86.

P19 We nevertheless conclude that the tax court correctly ruled against appellants because the tax was imposed on condominiums, not time-share intervals, and because the method employed by the County for valuing the condominiums was legally permissible.

II. Mohave County's Valuation Method for Time-share Condominium Units

A. Tax on Condominiums

P20 LBRI argues that the County exceeded its taxing authority by imposing a direct tax on time-share intervals without legislative authorization. We reject this argument. Although the County may not tax categories of property that the legislature has not determined to tax, the County is required to identify and value those categories of property that the legislature has determined to tax. *See A.R.S. § 42-13051(A), (B)(2)* (1999). The legislature has determined to tax condominiums. *See A.R.S. § 33-1204*. In determining the value of property [***13] identified for taxation, the County is required to take into consideration the "current usage" of the property. *See A.R.S. § 42-11054(B)* ("In applying prescribed standard appraisal methods and techniques, current usage shall be included in the formula for reaching a determination of full cash value."). "Current usage" is defined as "the use to which the property is put at the time of valuation by the assessor or the department." *A.R.S. § 42-11001(4)*.

P21 Here, the property identified for taxation is condominium units. Mohave County has never assigned tax parcel numbers to London Bridge Resort interval interests as [*467] [**824] such. Instead, the tax parcel numbers upon which the tax is based are those assigned to the 122 individual condominium units. In valuing those condominium units, the County Assessor considered the time-share regime as an appropriate indication of the current usage of the condominiums affecting value. Because valuation requires consideration of the condominiums' current usage under a time-share regime, the County imposed a permissible assessment on condominium units. The County thus did not exceed its authority [***14] under Article 9, Section 2(12) and *Airport Properties*.

B. Permissibility of the Valuation Method

P22 Despite the fact that condominiums--not interval interests--are being assessed, LBRI argues that the County's method of valuing condominiums by relying on recent sales prices of time-share interval interests is not legally permissible because it allegedly fails to tax and assess each unit separately, as required by *A.R.S. section 33-1204(B)*. In addressing this argument, we first consider a county assessor's statutory duties and obligations regarding valuation and assessment, and then address LBRI's substantive arguments regarding the Assessor's valuation methodology in this case.

1. Assessment Duties and Obligations of the County Assessor

P23 As discussed above, a county assessor is required to identify and "determine the full cash value" of all taxable property within the county. *A.R.S. § 42-13051(B)(2)*. In the absence of a statutorily defined method of determining "full cash value," the term is "synonymous with market value which means the estimate of value that is derived annually [***15] by using standard appraisal methods and techniques." *A.R.S. § 42-11001(5)*.

P24 Among the three commonly accepted valuation methods, county assessors have discretion in choosing the method by which a given piece of property will be valued. *See Mohave County v. Duval Corp.*, 119 Ariz. 105, 106, 579 P.2d 1075, 1076 (1978) (noting that the taxpayer is not entitled to choose which method the county assessor applies, nor, when the method is challenged, is the court entitled to grant a taxpayer relief simply because the court feels a different method would have been preferable) (citations omitted). In addition, the supreme court has adopted an approach under which the three standard appraisal methods are not to be applied mechanically, but rather pragmatically, in a way that ultimately determines and taxes the intrinsic value of the property in question. *Recreation Cntrs. of Sun City*, 162 Ariz. at 288-91, 782 P.2d at 1181-84 ("The assessor may utilize any appraisal approach or hybrid method of appraisal that takes the principles explained in this opinion into consideration.").

P25 With these principles in mind, [***16] it is generally recognized that the sales comparison method is the most accurate and reliable valuation method, particularly with respect to property commonly sold in the marketplace, such as residential property. *See*

Ariz. Dep't of Revenue, Assessment Procedures Manual 2.1.3 (1995) ("For those properties that are commonly sold in the market place, such as residential properties, the sales comparison approach is best suited."); Ariz. Dep't of Revenue, Land Manual 4.8-9 (2001) ("The Direct Sales Comparison Method is the most accurate, reliable and defensible method of valuing land. The remaining Alternative Methods are far less reliable, and should be utilized only in the absence of adequate market sales activity."); Ariz. Dep't of Revenue, Publication 546: Residential Property, available at

<http://www.revenue.state.az.us/property/pub546.htm>. ("The majority of single-family homes and condominiums in Arizona are valued using the sales [comparison] method."). Thus, in the condominium context, assessment by the sales comparison method is generally preferred as soon as a sufficient number of condominiums have been sold.

2. A.R.S. Section 33-1204

[***17] P26 Here, Mohave County in essence formulated a hybrid sales comparison method that incorporated a factor designed to determine the intrinsic value of the respective types of units. The Assessor's method took into account the condominium units' [*468] [**825] "current usage" as time-shares whose market value depends solely on each unit's status as a studio, one-bedroom, or two-bedroom condominium unit. LBRI challenges this valuation method, relying primarily on A.R.S. section 33-1204, which provides in relevant part the following:

A. If there is a unit owner other than a declarant, each unit that has been created, together with its interest in the common elements, constitutes for all purposes a separate parcel of real estate.

B. Except as provided in subsection C, if there is a unit owner other than a declarant, each unit shall be separately taxed and assessed, and no separate tax or assessment may be rendered against any common elements.

....

D. If there is no unit owner other than a declarant, the real estate comprising the condominium shall be taxed and assessed as a single parcel.

(Emphasis added.) Based on subsection B of this statute, [***18] LBRI argues that because interval interests in the Resort have been sold, there are "unit owners" ³ other than declarant

LBRI, and thus each of the 122 condominium units must be "separately taxed and assessed." Relying on *Crystal Point Joint Venture v. Arizona Department of Revenue*, 188 Ariz. 96, 932 P.2d 1367 (App. 1997), and case law from other jurisdictions, LBRI contends that because Mohave County's valuation method does not value each of the Resort's 122 condominium units individually, section 33-1204(B) precludes the County's valuation method. We disagree with LBRI's characterization and conclude that the County's method complies with section 33-1204(B) because it taxes and assesses each unit separately based upon the property's "current usage" and a consideration of the relevant characteristics of each unit in the marketplace.

3 "'Unit owner' means a declarant or other person who owns a unit" A.R.S. § 33-1202(23) (2000). "Unit" in turn means "a portion of the condominium designated for separate ownership or occupancy." A.R.S. § 33-1202(22).

[***19] P27 Preliminarily, we note that the language of A.R.S. section 33-1204 and the definitions of "unit" and "unit owner" suggest that the legislature did not envision application of this statute to time-share regimes in which no discrete group of interval interest holders owns any discrete condominium unit. The language of these provisions presupposes that the condominium "units" in question are physical objects of ownership that are each capable of being sold outright as a discrete unit to a single buyer. The issues with which the operative language of each subsection deals are those that would logically arise from that general background. The legal effect of each subsection turns on whether the declarant is still the sole owner of all such physical units, or instead has transferred ownership of one or more of them. None of the language in section 33-1204 contains any suggestion that the drafters of the statute crafted its provisions to apply to condominium projects subject to a time-share regime in which no "units" within the meaning of section 33-1204 are ever sold or owned as such. Nevertheless, because we do not believe that the requirements of [***20] section 33-1204 and the County Assessor's valuation methodology are substantively irreconcilable, we resolve LBRI's challenge within the framework of section 33-1204.

P28 LBRI's disagreement with the Assessor's methodology rests on the mistaken assumption that "separately taxed and assessed" necessarily requires the Assessor to consider all

of the unique characteristics of each unit, such as square footage, location, and view, in determining its individual value. We reject this overly broad construction. Separately taxing and assessing each unit requires the Assessor to consider only those unique characteristics of each unit that are relevant to a determination of the unit's "full cash value," which is synonymous with "market value." Here, characteristics such as square footage, location, and view are not relevant to the condominiums' market value. Although such unique characteristics may be, and usually are, relevant in determining value under ordinary condominium regimes, they are completely irrelevant to valuation under LBRI's "current usage" of the property as an interval interest time-share regime.

[*469] [**826] P29 Under LBRI's "current usage," the value of any individual [***21] unit depends solely on the unit's status as a studio, a one-bedroom, or a two-bedroom unit. Thus, although one studio unit may be in a better location or may have more square footage or a better view than another studio unit, its value in the marketplace does not depend on these distinctions. Therefore, the County is not required to consider any such distinctions in determining each unit's full cash value. Requiring the County to determine market value and then forcing it to consider factors which, in context, are irrelevant to market value is patently illogical, and we therefore decline to interpret *section 33-1204(B)* as requiring that result. *See Zaritsky v. Davis, 198 Ariz. 599, 603, P11, 12 P.3d 1203, 1207 (App. 2000)* (stating that in interpreting statutes, we must avoid constructions that lead to absurd results) (citations omitted); *Lake Havasu City v. Mohave County, 138 Ariz. 552, 557, 675 P.2d 1371, 1376 (App. 1983)* ("Statutes must be given a sensible construction which will avoid absurd results.") (citations omitted).

P30 Additionally, LBRI's position is inconsistent. On the one hand, LBRI has established a regime that effectively [***22] deprives each unit of the value inherent in its unique characteristics of square footage, view, etc. On the other hand, LBRI demands that the Assessor make her assessment valuations based on the same characteristics that LBRI has rendered irrelevant in its own marketing methodology. For LBRI and the market to which its sales are directed, the only unique characteristic of value in each unit is its status as a studio, a one-bedroom, or a two-bedroom unit. Because LBRI and the market consider the

units to be of equal value despite any unique characteristics of square footage, location, and view, the Assessor can do the same.

P31 In summary, we conclude that the Assessor's methodology complies with the requirements of *section 33-1204(B)* by taxing and assessing separately each unit, based upon the property's "current usage" and the characteristics of each unit that are relevant to value in the marketplace--namely, the unit's status as a studio, one-bedroom, or two-bedroom unit. The Assessor is not required to consider characteristics that are unique, but irrelevant, to value in the marketplace. That such a methodology results in an identical valuation for each category of units [***23] does not necessarily violate *section 33-1204(B)*'s separate assessment requirement.

P32 LBRI's reliance on *Crystal Point Joint Venture v. Arizona Department of Revenue* is misplaced. There, we did no more than apply *section 33-1204(B)* to one of the controversies that it was plainly designed to resolve--a dispute about the circumstances under which a group of condominium units, whose ownership the declarant retained, could be valued, assessed, and taxed as a single parcel of real property. We held that, under *A.R.S. section 33-1204*, "if even one unit in the complex is owned by someone other than the declarant, every unit must be treated as a separate parcel of real estate and separately valued, assessed, and taxed." *Crystal Point Joint Venture, 188 Ariz. at 101, 932 P.2d at 1372*. But if a declarant owns every unit, the "units that comprise the complex are to be valued, assessed, and taxed as a single parcel." *Id.* Based on this analysis, we rejected the taxpayer's proposed "bulk sales" valuation method, representing "what one willing buyer would have paid for all the units." *Id. at 99, 932 P.2d at 1370*. [***24] Thus, in our view, *Crystal Point* does not support appellants' position in this very different litigation. *Crystal Point* dealt with a traditional condominium project in which separate owners purchased discrete units. Here, we are dealing with a "non-traditional" condominium project in which no individual owner or group of owners purchase any individual unit. Further, the County's valuation method does not involve a bulk sales valuation. Rather, the County's valuation method appraised each unit separately based upon the characteristics that determine its value in the marketplace. *Crystal Point* is not to the contrary.

P33 LBRI also cites several cases from other jurisdictions that have determined that statutes similar to *section 33-1204* preclude taxing authorities from valuing time-share condominium units by reference to the values of time-share interval interests. *Hausman* [**827] v. *VTSI, Inc.*, 482 So. 2d 428 (Fla. Dist. Ct. App. 1985); [*470] *Inn Group Assocs. v. Booth*, 593 A.2d 49 (R.I. 1991); *New England Marketing Assocs.*, 128 N.H. 750, 519 A.2d 303 (N.H. 1986). None of these decisions provides persuasive support for LBRI's [***25] position.

P34 In *Hausman*, the court based its holding in part on a provision in Florida's time-share statutes that prohibited the courts from interpreting them as changing existing assessment procedures based on the subjection of property to a time-share regime. *Hausman*, 482 So. 2d at 430 (citing *Fla. Stat. ch. 721.03(3)* (1981)). Given the applicable Florida law, the Florida court's conclusion that the pre-existing statutory requirement for separate assessment of "condominium parcels" applied to condominium projects was understandable. Arizona, however, has no statutory provision analogous to the Florida statute upon which the court in *Hausman* relied.

P35 *Inn Group Associates* and *New England Marketing Association* are similarly unpersuasive. The courts in those cases offered no explanation for the view that the language of their respective statutes contemplated application to condominium projects in which the individual physical units were not owned and sold as such, but rather were subjected to time-share regimes. Moreover, none of the jurisdictions from which *Hausman*, *Inn Group Associates*, and *New England Marketing Association* [***26] arose appears to have pursued anything like the pragmatic, flexible approach to property tax valuation announced in *Recreation Centers*. See *Recreation Cntrs. of Sun City*, 162 Ariz. at 291, 782 P.2d at 1184 (allowing assessors to develop appropriate "hybrid" methods in valuing property for

taxation). Nor did any of those cases involve a statutory requirement that counties consider the property's "current usage" in determining market value.

CONCLUSION

P36 Mohave County's valuation method does not amount to taxation of time-share intervals without legislative authorization. Also, it complies with *section 33-1204(B)*'s requirement that condominium units be assessed and taxed "separately." Therefore, the Assessor permissibly considered the estimated market values of time-share interval interests in valuing condominium units.

P37 The parties have not asked us to determine whether the details of Mohave County's method, as opposed to the method's underlying principle, yielded results that are defensible as a matter of fact based on professional appraisal principles. We offer no opinion on the latter question, and instead give effect to [***27] the parties' stipulation concerning the appropriate numerical results for this litigation.

P38 LBRI requests an award of attorneys' fees on appeal under *A.R.S. sections 12-348* and *12-349*. Because LBRI does not prevail, we deny its request.

P39 The judgment is affirmed.

MICHAEL D. RYAN, Judge

CONCURRING:

SHELDON H. WEISBERG, Presiding Judge

E. G. NOYES, JR., Judge



THE COMMONWEALTH OF MASSACHUSETTS

Appellate Tax Board

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**Docket Nos. F315751, F315752, F315753, F315754, F315755, F315756,
F315757, F315758, F315759, F315760**

**PG REALTY TRUST
Appellant.**

**BOARD OF ASSESSORS OF THE
TOWN OF GRAFTON
Appellee.**

ORDER

The appellant's Motion for Summary Judgment is denied in part and the appellee's Cross Motion for Summary Judgment is allowed in part. The subject properties are properly taxable as separate parcels to appellant and are not "common areas" of the condominium as described in the Master Deed and as defined in G.L. c. 183A, § 1. Accordingly, *First Main Street Corporation 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) are not controlling.

However, because appellant has raised a claim of overvaluation in each of these appeals, the disposition of the parties' Motions for Summary Judgment does not result in a final judgment. Accordingly, a hearing on the issue of overvaluation is hereby scheduled for Thursday, February 14, 2013 at 9:30 a.m.

ORDERED ACCORDINGLY

APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr., Chairman

Attest: _____
Clerk of the Board

Date:
(Seal)

APPORTIONMENT AND SUPPLEMENTAL ASSESSMENTS **CONDOMINIUM AND CONSTRUCTION**

10-acre tract of land on January 1 for FY1

Master deed for 5 units and right to create another 5 units recorded on September 1

FY1 Assessed valuation of tract \$1,000,000 (land and partial construction of 5 units as of 6/30 per c. 653 of Acts 1989)

Each unit valued at \$500,000

Units 1 & 2 sold October 15; Units 3 & 4 November 15; Unit 5 sold February 15 next year

5-unit condominium on January 1 for FY2

Amended master deed to create another 5 units recorded on July 1

Each new unit valued at \$600,000

Units 6 & 7 sold August 15; Units 8 & 9 September 15; Unit 10 sold November 15

Example 1 (Quarterly – Regular tax not apportioned when supplemental assessed)

- FY1 preliminary tax for entire tract assessed to Developer and bill issued 7/1.
- Developer pays 1st and 2nd quarter installments.
- FY1 actual tax assessed on entire tract to Developer and bill issued 12/15.
- Developer does not pay FY1 actual tax (3rd and 4th quarter installments)
- Supplemental tax assessed for occupancy permits issued during FY1 for Units 1, 2, 3, 4 and 5.
 - Assess and bill Developer for entire tract.
 - Supplemental based on pro-rated tax on \$1,500,000 valuation difference (2,500,000 units – 1,000,000 assessed value).
 - Developer does not pay FY1 supplemental tax.
- FY2 actual taxes assessed to Owners of 5 existing units and bills issued 12/15.
- No FY2 supplemental tax assessed for occupancy permits issued during FY2 for Units 6, 7, 8, 9 and 10.
- Unpaid FY1 actual and supplemental tax assessed to Developer is lien on Units 1-10.
- Assessors may apportion FY1 actual and supplemental tax on own or request of any owner.

Example 2 (Quarterly – Regular tax apportioned when supplemental assessed)

- FY1 preliminary tax for entire tract assessed to Developer and bill issued 7/1.
- Developer pays 1st quarter installment.
- FY1 actual tax assessed on entire tract to Developer and bill issued 12/15.
- Assessors apportion tax immediately upon commitment.
 - Divide tax among 5 sub-parcels with 1/5 to Developer, 1/5 to Owner 1, 1/5 to Owner 2, 1/5 to Owner 3 and 1/5 to Owner 4.
- Supplemental tax assessed for occupancy permits issued during FY1 for Units 1, 2, 3, 4 and 5.
 - Assess and bill new owners of Units 1, 2, 3, 4 and 5 sub-parcels created due to apportionment of regular tax.
 - Supplemental based on pro-rated tax on \$300,000 valuation difference (500,000 unit – 200,000 apportioned value).
 - All but Owner 5 pay FY1 supplemental taxes.
- FY2 actual taxes assessed to Owners of 5 existing units and bills issued 12/15.
- No FY2 supplemental tax assessed for occupancy permits issued during FY2 for Units 6, 7, 8, 9 and 10.
- Unpaid FY1 supplemental tax assessed to Owner 5 is lien on Unit 5 only.

See Supplemental Assessments, G.L. c. 59, § 2D and IGR 03-209; Apportioned Taxes, G.L. c. 59, § 78A, 81 and IGR 92-207.



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

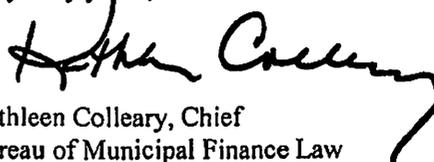
value of built but undeclared units, or other improvements on the common area, which are clearly real estate for purposes of taxation under G.L. c. 59, § 2A(a). Legislative authorization is needed for municipalities to tax the value of those interests to their holders, however, a point repeated in several 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



February 13, 2014

Gary J. McCabe
Chief Assessor
Brookline Board of Assessors
333 Washington Street
Brookline, MA 02445

Re: Request for Authority to Assess Present Interest – G.L. c. 59, §11
Our File No. 2014-145 (28 Addington Road Condominiums Parking Easement)

Dear Mr. McCabe:

This is in reply to your letter dated February 5, 2014 requesting authorization to assess taxes upon a present interest in real estate, *i.e.*, an exclusive right-to-use easement for a condominium parking space, not appurtenant to any individual unit, at the 28 Addington Road Condominiums in Brookline. You indicate that the 28 Addington Road Condominiums were created by Master Deed executed January 19, 1988 and recorded in the Norfolk County Registry of Deeds at Book 7866, Pages 283-295.

As of January 1, 2012, five of the six parking spaces in the detached six-bay parking garage at the 28 Addington Road Condominiums were assigned to unit owners by exclusive right-to-use appurtenant easements. The exclusive right-to-use easement for the remaining parking space not appurtenant to any unit at the 28 Addington Road Condominiums (“the subject parking easement”) is owned by Mr. Ira Cohen. Mr. Cohen acquired the exclusive use of the sixth condominium parking space on September 8, 2011 for \$40,000, through a “Grant of Easement,” which was recorded on September 12, 2011. Not a resident of the 28 Addington Road Condominiums himself, Mr. Cohen owns residential property at 255 Tappan Street in Brookline.

There is no impediment to the present interest assessment of the easement in the decision of the Appeals Court in *First Main Street Corp. v. Assessors of Acton*, 49 Mass. App. Ct. 25 (2000). *First Main Street* held that retained, unexercised rights under a master deed to develop subsequent phases of a condominium project in the future in common areas of the condominium were not present interests in real estate and accordingly not subject to tax. In our opinion, the facts of the *First Main Street* case differ substantially from the circumstances of the subject parking easement. To assume that the legislature intended that condominium unit owners be taxed for a parking easement when such interests are being used under the exclusive control of a third-party is to ascribe an irrational result to G.L. c. 183A, § 14, which the courts strive to avoid. *See, e.g., Bridgewater State University Foundation v. Assessors of Bridgewater*, 463 Mass. 154 (2012.)

Easements for parking are clearly present interests in real estate, since holders of such easements can exercise them presently. *See generally Bates Sand & Gravel Co. v. Commonwealth*, 380 Mass. 933 (1980) (Holding that a *profit à pendre*—which is a type of easement—is a present

interest in real estate compensable in an eminent domain taking.) *See also Houston v. West*, 520 S.W. 2d 752, 754 (Tex. 1975)(existing easement constitutes present interest in land.) *Accord* Gerald E. Welsh, *The Assignability of Easements in Gross*, 12 U. CHI. L. REV. 276, 278 (1945) ("An easement in gross is ordinarily a present interest in land...") Although easements are not possessory interests, G.L. c. 59, § 11 does not require that present interests be possessory interests in order for the Commissioner of Revenue to authorize their taxation to the holder of such interests. We are unwilling to interpret *First Main Street* as reading a requirement of a possessory interest into G.L. c. 59, § 11.

We therefore authorize the Brookline Board of Assessors, pursuant to G.L. c. 59, § 11, to assess separately to the owner thereof the subject parking easement in the 28 Addington Road Condominiums not appurtenant to units in the condominium complex. This authorization applies to the owner of such easement as of January 1, 2014, and as of each January 1 assessment date in future years.

Please do not hesitate to contact us again if we may be of further assistance.

Very truly yours,



Kathleen Colleary, Chief
Bureau of Municipal Finance Law

KC: DG



February 13, 2015

Gary McCabe, Chief Assessor
Board of Assessors
Town of Brookline
333 Washington St.
Brookline, MA 02445

Re: Request for Authority to Assess Present Interest - G.L. c. 59, § 11
Our File No. 2015-2 (Beacon 1842 Condominium)

Dear Mr. McCabe:

This is in reply to the Town of Brookline's request for authorization under G.L. c. 59, § 11 to assess taxes to the holder of a present interest in real estate, *i.e.*, a leasehold of the "Open Space" portion of the Beacon 1842 Condominium (Condominium).

The Condominium was created by the Declarant Benglewood LLC by Master Deed dated January 7, 2010 and recorded at the Norfolk County Registry of Deeds at Book 27366, Page 58. The Master Deed Site Plan, dated November 16, 2009 and recorded with the Master Deed, shows the Condominium as consisting of two lots: a lot containing an existing four-story office building and a second lot shown as "Open Space" upon which a parking area is shown. You have indicated that twenty business condominium units were created within the office building and that at the time of the recording of the Master Deed, the "Open Space" was comprised of a parking area. Pursuant to Article 7 of the Master Deed, the "Open Space," upon which a parking area was located, is designated part of the common area of the Condominium.

Pursuant to Article 16 of the Master Deed, entitled "Removal of Open Space," the Declarant reserves the right to remove the "Open Space" from the Condominium and, by acceptance of the Unit Deed, each unit owner is deemed to consent to such removal. On August 29, 2011, the Eighth Amendment of Master Deed of the Condominium was recorded at Norfolk County Registry of Deeds Book 29076, Page 340, to which Amendment it appears the then individual condominium unit owners consented in writing. Amendment Eight replaced Article 16 of the Master Deed with a new Article 16 re-titled "Open Space." The restated Article 16 gave Declarant, in addition to the right to remove the "Open Space" from the Condominium, the right to lease the "Open Space" as follows:

"lease the Open Space in its entirety to a third party, which lease may without limitation allow for the development of the Open Space by the lessee free from any restrictions, requirements or other limitations set forth in the Condominium Documents and otherwise on such terms as the Declarant may prescribe. Declarant may, in the name of the Unit Owners and without the consent of any Mortgagee, execute, acknowledge and/or record with the

Registry such instruments as may be necessary or appropriate in order to effect such removal, withdrawal, conveyance or leasing. Each Unit Owner expressly and irrevocably authorizes and constitutes the Declarant as such owner's attorney-in-fact to execute any such instrument on such Unit Owner's behalf. The power of attorney is coupled with an interest, and hence shall be irrevocable and shall be binding upon each and every present and future owner of a Unit...."

On October 25, 2011, a Notice of Lease (Notice) was recorded at the Norfolk County Registry of Deeds Book 29253, Page 424. The Notice states the Landlord is Benglewood LLC and the Lessee is Green Eyes Environmental LLC (Green Eyes). The demised premises consist of the "Open Space" lot as shown on the Condominium Master Deed Site Plan. An easement is reserved for "pedestrian and vehicular access to and egress from the Condominium, including the right to make all improvements and repairs necessary or useful for such purpose. Such easement shall be deemed appurtenant to the Condominium and shall inure to its benefit in perpetuity." The term of the lease commences October 25, 2011 and expires December 31, 2086; however, as stated in the Notice, "[t]he term of the lease shall be extended for successive periods of seventy-five (75) years each (an "Extension Period") unless either party notifies the other to the contrary (a "Non-Exercise Notice") at least twelve (12) months prior to the date on which a particular Extension Period is scheduled to commence, provided however that Landlord is in no event entitled to give a Non-Exercise Notice with respect to any Extension Period scheduled to commence earlier than January 1, 2687." (Emphasis added.) We note that the period of time from October 25, 2011 to December 31, 2686, is 675 years, plus a little more than two months.

You have indicated that sometime after the recording of the Master Deed, a four-story, twenty-unit apartment building was constructed on the "Open Space" lot and that the building was completed in 2013.

By document dated June 11, 2013 and recorded on June 24, 2013 at Norfolk County Registry of Deeds Book 31470, Page 2, Benglewood LLC assigned its rights as Declarant of the Condominium to Englepark, LLC. On the same date, by document recorded at Norfolk County Registry of Deeds Book 31470, Page 4, Benglewood LLC also assigned its rights in the lease (described in the Notice) to Englepark, LLC.

As a result, as of January 1, 2012, Green Eyes was the holder of a leasehold interest of the "Open Space" lot as described in the Notice. Although the initial term of the lease is 75 years, because the lease is automatically extended for 75 years, and then another 75 years, and so on, without any action required on the part of either party and because landlord has no power to prevent automatic extensions of and continuation of the lease for 675 years, we believe the demise of the leasehold of the "Open Space" is tantamount to a demise of the freehold interest under G.L. c. 186, § 1A. Therefore, because 50 years of the leasehold remain unexpired, Green Eyes, as leaseholder, would be regarded as a freeholder or the owner in fee of the "Open Space" for all purposes, which would include local property taxation. As a fee owner or lessee, however, Green Eyes holds a present interest in the real estate.

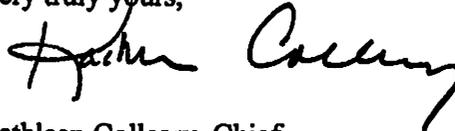
We do not see the holdings of the Massachusetts Appeals Court in the cases of *First Main Street Development Corp. v. Assessors of Acton*, 49 Mass. App. Ct. 25 (2000) and *Spinnaker Island and Yacht Club Holding Trust v. Assessors of Hull*, 49 Mass. App. Ct. 20 (2000) as an impediment to a grant of authority to assess taxes upon the present interest of the leasehold of the "Open Space" to the holder thereof. Both *First Main Street* and *Spinnaker Island* dealt with the taxation of pure development rights, where there had been no exercise of those rights by way of construction or other activity. In *Spinnaker Island* development rights had been assessed without any authorization from the Commissioner of Revenue. In *First Main Street*, the Commissioner had authorized the assessors to assess the development rights as present interests under G.L. c. 59, § 11, but the court held that the authorization was invalid because the development rights were future rather than present interests.

This case is decidedly different from *First Main Street* and *Spinnaker Island*. Here, we are not dealing with the assessment of unexercised development rights retained by the developer of a condominium. In this case, the developer/Declarant demised what is tantamount to a fee interest in the "Open Space" lot to a third party upon which a four-story apartment building has been constructed. The only retained right of the Condominium or unit owners regarding such "Open Space" is the access/egress easement previously described. To assume that the legislature (by reason of G.L. c. 183A, § 14) intended that the condominium unit owners be taxed for the value of the land and building(s) of and upon the demised "Open Space" is to ascribe an irrational result to G.L. c. 183A, § 14, which the courts strive to avoid. *See, e.g. Bridgewater State University Foundation v. Assessors of Bridgewater*, 463 Mass. 154 (2012).

Accordingly, the Commissioner of Revenue hereby authorizes the Brookline Board of Assessors, pursuant to G.L. c. 59, § 11, to assess separately the value of the leasehold described in the Notice recorded at Norfolk County Registry of Deeds Book 29253, Page 424, including the value of the land and building(s) located within the demised premises, the "Open Space," to the holder on each January 1 of the present interest thereon.

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:PH

cc: John J. Buchheit, Esq., Associate Town Counsel

CAPE WINDS RESORT MOTEL CONDOMINIUM
INTERVAL OWNERSHIP DEED

RESORTS DEVELOPMENT, INC., a Massachusetts Corporation, with a mailing address of 877 West Main Street, Hyannis, Mass. (hereinafter called the "GRANTOR") for consideration paid, and in full consideration

of FIVE THOUSAND SIX HUNDRED AND 00/100 (\$5,600.00) DOLLARS

Grants to THOMAS F. SCANNELL and NANCY A. SCANNELL, joint tenants with right of survivorship of 69 Columbia Street, Stoughton, MA 02072

(hereinafter called the "GRANTEE"), with QUITCLAIM COVENANTS, Interval(s) consisting of Use Period No.(s) 36 and comprising an undivided 1.923 percent interest in Unit No. 9 of CAPE WINDS RESORT MOTEL CONDOMINIUM, located at 887 West Main Street, Barnstable (Hyannis), Barnstable County, Mass., created by Master Deed and Time Share Supplement thereto, dated June 30, 1982, and recorded at the Barnstable County Registry of Deeds in Book 3508, Page 302.

Said Unit contains 540 square feet, more or less, and has an undivided 2.62 % interest in the Common Areas and Facilities of Cape Winds Resort Motel Condominium. Said Unit is more particularly described according to a plan recorded in Plan Book 367, Page 69.

The Interval(s) hereby conveyed is subject to and has the benefit of all applicable provisions of the Master Deed and Time Share Supplement referred to hereinabove.

Also conveying as between owners of interest in the Condominium Unit the exclusive right to use and occupy the Condominium Unit, and to use and enjoy the Common Areas and any other rights and easements as may from time to time be appurtenant to the Condominium Unit during Use Period No.(s) as designated above as said Use Periods are defined in said Time Share Supplement and upon and subject to all the terms, covenants, conditions and provisions set forth in the said Master Deed, and By-laws enacted pursuant thereto and said Time Share Supplement. The Grantee for himself, his heirs, successors and assigns, expressly consents to and agrees to be bound by all the terms and provisions of said Master Deed, the Declaration of Trust of Cape Winds Resort Motel Condominium, dated June 30, 1982 and recorded in Book 3510, Page 001, and Time Share Supplements thereto.

Said Unit(s) is intended to be used only for residential purposes as set forth in Section 9 of the Master Deed. Said Unit is further subject to the restrictions as set forth in Section 10 of said Master Deed, that unless otherwise permitted by instrument in writing duly executed pursuant to provisions of the By-laws of Cape Winds Resort Motel Condominium Trust, and subject to any provisions of the said Time Share Supplement to the contrary:

(a) No Unit shall be used for any purpose other than a purpose permitted under Section 9 of said Master Deed; (b) the architectural integrity of the buildings and the Units shall be preserved without modification, and to that end, without limiting the generality of the foregoing, no balcony enclosure, awning, screen, antenna, sign, banner or other device, and no exterior change, addition, structure, projection, decoration or other feature shall be erected or placed upon or attached to any such Unit or any part thereof, no addition to or change or replacement of any exterior light, door knocker or other exterior hardware shall be made, and no painting, attaching of decalcomania or other decoration shall be done on any exterior part or surface of the Unit nor on the interior surface of any window; and (c) no Unit shall be used or maintained in a manner contrary to or inconsistent with the By-laws of CAPE WINDS RESORT MOTEL CONDOMINIUM TRUST, and regulations which may be adopted pursuant thereto.

The Grantee acquires said Unit with the benefit of and subject to the provisions of Chapter 183A of the General Laws of the Commonwealth of Massachusetts relating to condominiums in force as of the date hereof and as amended from time to time hereafter.

For title, see deed dated March 23, 1982 from Belle Ingram Motel, Inc. to Grantor recorded in Book 3454, Page 010 of the Barnstable County Registry of Deeds.

For corporate authority, see Corporate Vote recorded in Book 3584, Page 49.

EXECUTED as a sealed instrument this 11th day of April 1983.

RESORTS DEVELOPMENT, INC.

By: Angelo Rosso, Pres.

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

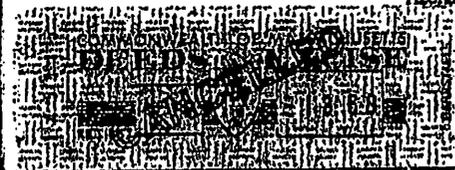
Date: April 11, 1983

Before me appeared the above named Angelo Rosso, President of Resorts Development, Inc. and acknowledged the foregoing instrument to be the free act and deed of said corporation.

Michael A. Dunning NOTARY PUBLIC

My Commission Expires: March 14, 1985

RECORDED SEP 19 83



Statement of Small Claim and Notice of Trial	FOR COURT USE ONLY →	DOCKET NO. _____	Trial Court of Massachusetts Small Claims Session
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PART 1	<input type="checkbox"/> BOSTON MUNICIPAL COURT _____ Division	<input type="checkbox"/> DISTRICT COURT _____ Division	<input type="checkbox"/> HOUSING COURT _____ Division
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PART 2	PLAINTIFF'S NAME, ADDRESS, ZIP CODE AND PHONE _____ _____ _____ PHONE NO: _____	PLAINTIFF'S ATTORNEY (If any) Name: _____ Address: _____ _____ PHONE NO: _____ BBO NO: _____
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PART 3	DEFENDANT'S NAME, ADDRESS, ZIP CODE AND PHONE _____ _____ _____ PHONE NO: _____	ADDITIONAL DEFENDANTS (If, any) Name: _____ Address: _____ _____ PHONE NO: _____
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PART 4	PLAINTIFF'S CLAIM. The defendant owes \$ _____ plus \$ _____ court costs for the following reasons: Give the date of the event that is the basis of your claim. _____ _____ _____ _____ _____ _____ _____ _____ _____ _____
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SIGNATURE OF PLAINTIFF X _____	DATE _____
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PART 5	MEDIATION: Mediation of this claim may be available prior to trial if both parties agree to discuss the matter with a mediator, who will assist the parties in trying to resolve the dispute on mutually agreed to terms. The plaintiff must notify the court if he or she desires mediation; the defendant may consent to mediation on the trial date. <input type="checkbox"/> The plaintiff is willing to attempt to settle this claim through court mediation.
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PART 6	MILITARY AFFIDAVIT: The plaintiff states under the pains and penalties of perjury that the: <input type="checkbox"/> above defendant(s) is (are) not serving in the military and at present live(s) or work(s) at the above address. <input type="checkbox"/> above defendant(s) is (are) serving in the military.
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SIGNATURE OF PLAINTIFF X _____	DATE _____
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NOTICE OF TRIAL	NOTICE TO DEFENDANT: You are being sued in Small Claims Court by the above named plaintiff. You are directed to appear for trial of this claim on the date and time noted to the right. If you wish to settle this claim before the trial date, you should contact the plaintiff or the plaintiff's attorney. SEE ADDITIONAL INSTRUCTIONS ON THE BACK OF THIS FORM.	NAME AND ADDRESS OF COURT _____ _____ _____ DATE AND TIME OF TRIAL _____ DATE AT _____ TIME ROOM NO. _____	BOTH THE PLAINTIFF AND THE DEFENDANT MUST APPEAR AT THIS COURT ON THE DATE AND TIME SPECIFIED ↑ COURT USE ONLY ↓	COURT COPY
FIRST JUSTICE _____	CLERK-MAGISTRATE OR DESIGNEE _____			

INSTRUCTIONS FOR FILING A SMALL CLAIM – You must complete Parts 1-6 of this form. See instructions on reverse.

Small Claims in Massachusetts: What You Need to Know

1. How do I bring a small claims action?

By filing a court form called a "Statement of Claim and Notice of Trial" and paying a filing fee. The form is available in the clerk's office of any of the district, Boston municipal, or housing courts. Instructions on completing a "Statement of Small Claim and Notice of Trial" form can be found on the back of the form itself. For a listing of court locations by county, see <http://www.mass.gov/courts/courtsandjudges/courts/courtscounty.html>. The person or business filing the claim is called the "plaintiff." The person or business being sued is called the "defendant."

2. Where do I file a small claim?

You may bring a small claim in the District or Boston Municipal Court where the person lives, works, or has a place of business. You may also bring a small claim concerning the rental of an apartment in the District Court or the Boston Municipal Court where the apartment is located. In the Housing Court, every small claim must be brought in the Housing Court serving the area where the apartment or other residence subject to the small claim is located.

3 Which claims can be brought as small claims?

Unless your case is based upon property damage sustained in an automobile accident, it cannot exceed \$7,000.00. The claim may, however, be subject to statutory damages or attorney's fees in excess of \$7,000.00 (e.g., consumer protection cases or certain landlord/tenant cases). In those cases, the base amount may not exceed \$7,000.00 even though the potential award may exceed that amount.

4. Is there a time limit on when I must bring my small claim?

Yes. The time limit (called the "statute of limitations") varies with the nature of the claim and applies both to small claims and to regular civil law suits. Generally, a claim based on a contract or a consumer protection law must be brought within 6 years, and a claim resulting from negligence or intentional harm must be brought within 3 years,

but there are exceptions. Consult Massachusetts General Laws chapter 260 or a public or law library for additional information.

5. Will I be able to collect from the defendant?

If you win, the defendant will be ordered to pay the judgment if he or she is financially able to do so. If the defendant is able to pay and does not do so, he or she may be held in contempt of court and imprisoned or assessed additional costs. Note that some sources of income and a portion of any wages will be exempt from any payment order.

6. What is the filing fee for a small claim?

The filing fee for small claims of \$500 and under is \$40. The filing fee for claims of \$501 to \$2000 is \$50. The filing fee for claims of \$2001 to \$5000 is \$100. The filing fee for claims of \$5001 to \$7000 is \$150. The filing fee for claims of property damage of more than \$7000 arising from an automobile accident is \$150.

7. What information must I include in my claim?

Fill in the "Statement of Small Claim" form with the amount you are suing for and briefly explain your claim. State your claim simply but clearly so that the defendant can understand why he or she is being sued. You must state specifically any amounts sought for damages, for multiple damages or statutory penalties, for attorney's fees, or for costs, as well as the total amount being sought, exclusive of any prejudgment interest being sought from the court pursuant to statute.

It is essential that you have the defendant's correct name and mailing address. If you are suing a business that is not a corporation, you should name as the defendant the owner(s) doing business ("d/b/a") under that trade name. You may obtain their names from the City or Town Clerk where the business is located. If you are suing a business that is a corporation, you must have its exact legal name. You can find this information from the Corporate Records Division of the Secretary of State's Office, One Ashburton Place,

Room 1712, Boston, MA 02108 (or at <http://corp.sec.state.ma.us/corp/corpsearch/corpsearchinput.asp>).

In the "MILITARY AFFIDAVIT" portion, you must indicate whether or not the defendant is on active military duty. If you know the defendant's social security number, you may determine whether he or she is on active military duty online at <https://www.dmdc.osd.mil/appj/scra/sraHome.do>; otherwise, you must write to the appropriate military service headquarters (listed at www.defenselink.mil/faq/pis/PC09SLDR.html). If you are unable to determine whether the defendant is on active military duty and the defendant fails to appear, the court may require you to post a bond or may issue other orders to protect the rights of the defendant if he or she is on active military duty.

8. What are "costs"?

If the plaintiff prevails, or if both sides settle the claim, the plaintiff may recover from the defendant as "costs" the court filing fee. By court order the plaintiff may sometimes recover certain other costs of bringing the claim.

9. How is the defendant notified of the claim?

The defendant is sent a copy of the "Statement of Claim and Notice of Trial" by first class mail. If the defendant lives out of state he or she will be notified by certified mail. Both types of notices will be provided by the court, after the "Statement of Claim and Notice of Trial" form is filed.

10. Will my case go forward if the defendant has not received notice?

If the Post Office is unable to notify ("serve") the defendant and the letter is returned to the court, your case cannot go forward. If the letter is not returned, but later shown to have never been delivered, or to have been sent to the wrong address, any judgment you have received may be vacated. For this reason it is crucial that you make sure that the mailing address entered for the defendant on the "Statement of Claim and Notice of Trial" form is accurate.

11. Are attorneys needed in small claims court?

Small Claims in Massachusetts: What You Need to Know

No, but you may hire one if you wish. You may be able to find self-help resources at your local public library (libraries.state.ma.us), the Trial Court Law Libraries (www.lawlib.state.ma.us), or MassLegal Help (www.MassLegalHelp.org).

12. When and where do the plaintiff and the defendant have to go to court?

Unless the plaintiff and defendant settle the case before the trial date, both sides must appear in court on the date the case is scheduled for trial.

13. What if I cannot come to court on the trial date?

You should call or write the person on the opposing side and ask him or her to agree to postpone ("continue") the case. Continuances should only be for good reason, such as illness, an emergency, or the unavailability of a witness. If both sides agree, or if the opposing side does not agree, or if you are unable to reach the person on the opposing side, you must write the clerk magistrate of the court to ask that the court give you a continuance. Do not wait until the last minute. If the other side makes a reasonable request for a continuance, it may save you some inconvenience if you agree to the request.

14. What if I do not come to court on the trial date?

If the plaintiff does not appear for trial, and the defendant does appear, the court will enter a judgment for the defendant. If both the plaintiff and the defendant do not appear for trial, the claim will be dismissed. If the defendant does not appear for trial, and the plaintiff does appear, the court will likely enter a default judgment and order the defendant to pay the amount claimed. The magistrate may ask the plaintiff to present some evidence of the claim, even if the defendant is not present.

15. How should I prepare for trial?

It may be helpful to write down ahead of time the facts of the case in the order in which they occurred. This will help you organize your thoughts and make a clear presentation of your story. On the trial date, you must bring

with you any witnesses, checks, bills, papers, photographs or letters that will help you prove your case. If you are submitting documents as exhibits at trial, bring copies for the magistrate and for the defendant. If you need a witness to come to court but the witness will not come, ask the clerk-magistrate's office for a witness summons which you must then arrange to have a constable or deputy sheriff deliver to the witness. You may need an expert witness to prove any matter not within common experience. The laws governing small claims are the same as those for major lawsuits, except that simplified procedures are used. The plaintiff must prove that the claim is one which the law recognizes and that the defendant is liable, or the magistrate will enter a decision for the defendant.

16. What will happen on the day of the trial?

Be sure to arrive on time. If your case is not resolved by a mediator, a trial will be held before a magistrate. The plaintiff will be asked to tell his or her side of the story, then the defendant will tell his or her side. Each will have an opportunity to ask questions of the other side and the other side's witnesses. To prevail, the law requires the plaintiff to prove the validity of his or her claim.

17. What if one of the parties wants a continuance?

If both parties are present when the case is called, the case will go forward unless there is good cause for a continuance. If you are ready to go forward and the other party wants a continuance, make sure you inform the magistrate if you object.

18. What will the magistrate do?

The magistrate will make a decision. Notice of the decision (called a "judgment") will be given or sent to each side.

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