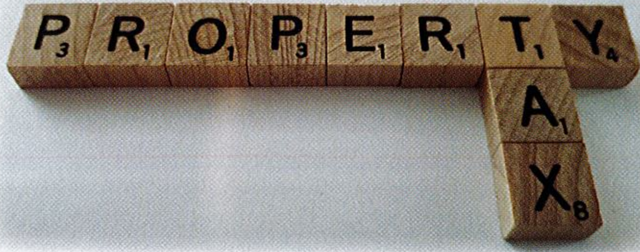
RECENT CHANGES IN **MASSACHUSETTS REAL ESTATE TAXATION PRACTICES** THAT COULD AFFECT YOU AND YOUR BUYER!

By Mark Kablack



There is an increasing trend by municipal tax assessors and collectors to aggressively tax new construction. This trend is attributable in large part to the need for municipalities to increase local revenue in order to support schools, infrastructure and municipal services. It is also fueled in part by municipal reaction to increased housing construction. These taxation efforts, as described below, are problematic to homebuilders, particularly where new construction involves townhouse condominiums. Owner and developers should be aware of these trends, both to consider the carrying cost obligations associated with increased tax bills and to prepare the proper disclosure forms for new buyers at the time of closing.

Recent changes to M.G.L. c. 59, Section 2D provide additional clarity and allow a municipality to issue a supplemental tax assessment where a temporary or permanent occupancy certificate is issued for a structure after the valuation date of a given fiscal year (January 1). Where new construction (or improvement) to a structure results in an increase in assessed value by over 50%, a supplemental bill can be issued. The supplemental bill is in addition to the regularly issued real estate tax bill, and is pro-rated based upon the number of days left in the fiscal year after the occupancy certificate is issued. The pro-rated assessment is computed by applying the tax rate for the current fiscal year to the value of the improvement and multiplying the result by a fraction. The numerator of the fraction is the number of days remaining in the fiscal year after the occupancy certificate is issued and the denominator is 365. The supplemental bill can be issued at any time in the tax year following issuance of the occupancy certificate and the establishment of the tax rate by the municipality, and payment is typically due within thirty days of issuance.

Due to the fact that the supplemental tax bill may or may not be available at the time of closing, an owner/developer should be clear with any buyer about this supplemental billing process and set appropriate expectations for a tax adjustment at some point, even after closing. An apportionment agreement of some form is appropriate as one of the recommended closing documents and such an agreement should clearly define how the supplemental bill will be apportioned between the parties and paid once issued. It is important to note that municipalities will differ in the degree of support provided to homebuilders and their clients when questions are raised about this process.

The second taxation trend involves the phasing of newly constructed condominium units. Condominium units, especially those involving townhouse construction, are often phased over time. The filing of a master deed will often include the initial phasing of several units, but not the entirety of the project. The remaining construction and phasing occurs later over the project life. In large developments, the phasing process can take several years. Phasing is accomplished through a reservation of rights whereby the owner/developer (or master deed declarant) reserves the right to convert common area of the condominium into one or more units by recording phasing amendments. The phasing process is dictated in part by Massachusetts condominium law, because a unit cannot be added to the condominium until construction is far enough along to prepare and record a unit floor plan together with as-built certifications. Phasing is also beneficial to a owner/developer, allowing the scope of a project to be modified over time, given market conditions, and owing to the fact that condominium fees are not due until a unit is phased, and, until recently, avoiding the assessment and payment of real estate taxes on units not yet legally phased.

For almost two decades, Massachusetts has been consistently governed by an appeals court ruling in the case of Spinnaker Island & Yacht Club Holding Trust v. Board of Assessors of Hull, 49 Mass. App. Ct. 20 (2000), which held that assessors may impart the value of common area and facilities to a unit, but they may not tax common areas (or, by extension, un-phased units constructed within common areas) separately. This holding is based upon the Massachusetts condominium statute, M.G.L. c.183A, Section 14, which also states that common area cannot be considered a separate taxable parcel.

All of this precedent has changed, however, given a recent decision by the appeals court in the case entitled: R.I. Seekonk Holdings LLC v. Board of Assessors of Seekonk, 91 Mass. App. Ct. 1104 (2017, rescript opinion), review denied 476 Mass. 1115 (2017). In Seekonk, the appeals court distinguished its prior ruling by looking to the rights expressly reserved by the owner/developer in the master deed. The court stated that future development rights can be converted on a unit by unit basis to a present taxable interest once the owner/developer takes affirmative action by constructing one or more units. According to the Seekonk case, where two units were 100% complete, one unit was 90% complete and one unit was 30% complete, the local assessor could properly assess the owner/developer for all five units, even though the units were not yet legally phased.

Until such time as the courts or legislature take further action, the Seekonk decision will add significant cost and uncertainty to the condominium development process. Municipalities will now be capable of assessing units that do not legally exist, are "mostly completed," and which do not have a clearly identifiable tax parcel identification number. This problematic scenario is further exacerbated by the supplemental billing procedures discussed above, and owners and developers should have heightened concerns regarding the carrying costs and buyer disclosure issues that the Seekonk decision will create.

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