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R.I. SEEKONK HOLDINGS, LLC vs. BOARD OF ASSESSORS OF SEEKONK.

15-P-1722

APPEALS COURT OF MASSACHUSETTS

2017 Mass. App. Unpub. LEXIS 119

February 3, 2017, Entered

JUDGES: Cypher, Trainor & Desmond, JJ.[2]

2 The panelists are listed in order of seniority.

OPINION

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, R.I. Seekonk Holdings, LLC (Holdings), appeals from the Appellate Tax Board's (ATB) decisions upholding the board of assessors of Seekonk's (board) denial of its property tax abatement requests for two fiscal years.[1] The ATB determined that the subject properties were taxable as separate parcels, while Holdings contended that they were exempt as common areas. On appeal Holdings argues that (1) partially constructed buildings that have not yet become lawful condominium units are exempt from taxation under *G. L. c. 183A, § 14*; and (2) Holdings's development interest in the subject structures is not taxable under *G. L. c. 59, § 11*. We affirm.

1 This is a consolidated appeal from the ATB's decisions upholding the assessors' denials of abatement requests for the two years.

Standard of review. A decision by the ATB will not be modified or reversed if it "is based on both substantial evidence and a correct application of the law." *Boston Professional Hockey Assn., Inc. v. Commissioner of Rev., 443 Mass. 276, 285 (2005)*. "Although the proper interpretation of a statute is for a court to determine, we recognize the [ATB's] expertise in the administration of tax statutes and give weight to [its] interpretations." *Adams v. Assessors of Westport, 76 Mass. App. Ct. 180, 183 (2010)*, quoting from *Raytheon Co. vs. Commissioner of Rev., 455 Mass. 334, 337 (2009)*.

Discussion. 1. *General Laws c. 183A, § 14*. *General Laws c. 183A, § 14*, as appearing in St. 1998, c. 194, *§ 196*, states in part that: "Each [condominium] 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 . . . shall not be deemed to be a taxable parcel." Holdings argues that partially constructed buildings that have not yet become lawful condominium units are exempt from taxation under c. 183A, *§ 14*, because they are common areas.

Pursuant to Holdings's master deed, the structures it contends are common areas were reserved and "exclusively owned by [Holdings]." Section 13.1 of the master deed states in part that "[u]ntil such time as additional Phases are added to the Condominium by the recording of 'Phasing Amendments' . . . any buildings or portions thereof existing on the Land . . . (other than Phase 1). . . shall not be part of the Condominium or subject to the Act, and shall be exclusively owned by [Holdings]." Section 13.4 of the master deed provides in part that: "[Holdings] reserves for the benefit of itself . . . exclusive ownership of [] Building(s) or portions of Building(s) [not part of Phase 1 or included in a Phasing Amendment], as well as the right to fully construct, develop and finish same."

Holdings cites *Spinnaker Island & Yacht Club Holding Trust v. Assessors of Hull, 49 Mass. App. Ct. 20, 23-24 (2000)*, to support its proposition that partially constructed structures constitute common area. However, in *Spinnaker Island*, the tax payer did not exclude any land from the common areas in its master deed. *Id. at 24*. Conversely, Holdings reserved the structures in question for itself until they were included in a phasing amendment. Eventually, once the structures were named in a phasing amendment they became "Units" as defined by c. 183A, § 1, and, therefore, by definition not part of the condominium's common areas and facilities.

Holdings concedes that the plain language used in its master deed demonstrates an intent to reserve developmental rights as its own property, but contends that labels do not undermine the reality that the structures constituted common area. *Id. at 22*. Nevertheless, c. 183A specifically allows an owner to retain and exclude from its application other interests in real property not expressly declared to be subject to it. See *G. L. c. 183A, § 2*, as appearing in St. 1992, c. 400, *§ 5* ("The provisions of this chapter shall not be deemed to preclude or regulate the creation or maintenance of other interests in real property not expressly declared by the owner . . . ."). The master deed here provided, "The Common area and Facilities of the Condominium . . . consist of the entire Land exclusive of the Units . . . (and *exclusive* of any and all rights, interests and/or easements reserved by [Holdings])." The plain, unambiguous language of the master deed clearly defines Holdings's intent to exclude the structures from the condominiums' common areas. Consequently, the ATB did not err in concluding that Holdings was not entitled to the tax exemption for common areas provided by c. 183A, *§ 14*.

2. *General Laws c. 59, § 11*. Prior to the subject tax assessments, the town had accepted the provisions of *G. L. c. 59, § 2A*(*a*), which allowed the town to tax in the current fiscal year all new construction built in the six months following the valuation and assessment date for that fiscal year. Pursuant to c. 59, *§ 2A*(*a*), inserted by St. 1979, c. 797 *§ 11*, "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." Holdings argues that their future development interest in the structures is not taxable under c. 59, *§ 11*. We disagree.

The unexercised right to build additional phases of a condominium is a future interest, *First Main St. Corp. v. Assessors of Acton, 49 Mass. App. Ct. 25, 28 (2000)*, and is therefore not separately taxable under c. 59, *§ 11*. However, as the *First Main St.* court reasoned, an unexercised development right could be converted into a present interest by initiating affirmative actions, such as, "build[ing] the additional buildings and facilities." *Ibid.* Here, as of the relevant valuation and assessment date, units 15 and 16 were 100 percent complete, unit 19 was ninety percent complete, and unit 6,000 was thirty percent complete. Therefore, as the ATB reasoned "even if the subject properties could be considered part of the Condominium and subject to the provisions of c. 183A, under the facts and circumstances here -- where actual construction has taken place and [Holdings] has taken full possession of the property . . . [Holdings] had a present interest in the subject buildings and the assessors were warranted in assessing the subject properties to [Holdings.]" The "partially constructed structures," as Holdings categorizes, were in fact mostly completed at the time of the assessments and therefore a taxable present interest.

Decisions of the Appellate Tax Board affirmed.

By the Court (Cypher, Trainor & Desmond, JJ.[2]),

2 The panelists are listed in order of seniority. Entered: February 3, 2017.