



Informational Guideline Release

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ASSESSMENT OF PRESENT INTERESTS IN PARTIALLY- COMPLETED CONDOMINIUM CONSTRUCTION

[Chapter 218 of the Acts of 2016](#)
(Amending [G.L. c. 59, § 11](#))

This Informational Guideline Release sets forth requirements for local assessors to assess partially completed construction improvements in common areas of phased unit condominium developments to include them as new growth on municipal tax rolls. As of January 1, 2017 for fiscal year (FY) 2018, assessors no longer have to obtain prior written approval from the Commissioner of Revenue to assess taxes on the holders of a present interest.

Topical Index Key:

Valuation

Distribution:

Assessors
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**ASSESSMENT OF PRESENT INTERESTS IN PARTIALLY-
COMPLETED CONDOMINIUM CONSTRUCTION**

Chapter 218 of the Acts of 2016
(Amending G.L. c. 59, § 11)

SUMMARY:

The assessment of the holder of a present interest in a partially completed construction improvement in the common area of a phased unit condominium development is governed by [G.L. c. 59, § 11](#). The statute now provides that local assessors on their own authority may assess taxes on such properties. Prior to this legislation, approval from the Commissioner was required.

These guidelines provide municipal assessment officials with a statutory and legal context for such assessments.

GUIDELINES:

I. LEGAL CONTEXT

In prior years, local assessors sought authority from the Commissioner of Revenue to assess partially completed improvements in common areas of phased unit condominium developments. The Commissioner of Revenue, upon receipt of such requests, used to authorize the assessment of present interests in such next phase condominium developments, even prior to the local issuance of a certificate of occupancy for such construction. [G.L. c. 59, § 11](#). Assessors no longer need prior approval from the Commissioner to assess the holder of a present interest.

Phased condominium development rights that have not been exercised may not be assessed because they are considered future interests, not present interests. *First Main Street Development Corp. v. Assessors of Acton*, 49 Mass. App. Ct. 25, 28-29 (2000), and *Spinnaker Island and Yacht Club Holding Trust v. Assessors of Hull*, 49 Mass. App. Ct. 20 (2000). However, to the extent that construction or site preparation had begun for any undeclared units as of January 1 of the fiscal year, the future interests in those portions of the property have become present interests. Therefore, an assessment of the value of those improvements can be made to the holder of the present interest as of January 1 of the fiscal year. [G.L. c. 59, § 11](#).

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This authorization to assess would apply to all improvements made to the common areas for purposes of completing condominium units under the phased development rights of the master deed, as of each January 1 assessment date in future years, until the master deed was 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. [G.L. c. 183A, § 14](#).

According to the Appeals 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](#). Each unit and its interest in the common areas and facilities are considered a taxable parcel. [G.L. c. 183A, § 14](#). 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 Appeals Court nevertheless characterized [G.L. c. 183A, § 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 the Appeals Court's discussion is not interpreted to mean that the legislature intended to exempt the value of built but undeclared units, or other improvements on the common area, which are real estate for purposes of taxation. [G.L. c. 59, § 2A\(a\)](#). Legislative authorization is required for municipalities to tax the value of those interests to their holders, which is a point repeated in several cases cited in *First Main Street*. Without the grant of power to the assessors to tax present interests, the value would otherwise not be taxable to anyone. [G.L. c. 183A, § 14](#).

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 ([G.L. c. 59, § 11](#)).

In *First Main Street*, the Appeals 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 was 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.

II. INFORMATION REQUIRED

The assessment of present interests of partially completed construction improvements in common areas of phased unit condominium developments should be based on sufficient information to identify the condominium development, as of January 1, such as:

- Name of the condominium unit and parcel number, e.g., Beacon Estates, Parcel # 452;
- Number of units included in the master deed which were completed during the fiscal year in question, e.g., 17 units completed and described in the master deed;
- Number of condominium units in construction and the percentage of the construction completed for such units that are undeclared and still comprise a part of the common area of the condominium, e.g. 4 units, 90% complete, but undeclared and still part of the common area of Beacon Estates;
- Number of additional condominium units allowed by the special permit for which no construction or improvements have occurred, e.g., potential for 15 additional units; and
- Proposed value of undeclared condominium units under the present interest assessment.