Friday, May 17, 2019

Rauseo v. Board of Assessors of Boston: The Declarant's Last Stand

By **Kate Moran Carter**

The Appeals Court's recent decision in ***Rauseo v. Board of Assessors of Boston*, 94 Mass App. Ct. 517 (2018)**, is the latest chapter in the body of case law concerning a condominium declarant's authority to reserve interests in land submitted to the Condominium Act. The Appeals Court was asked to decide whether individual parking easements, retained under the terms of the Master Deed of the Folio Boston Condominium, as personal interests, not appurtenant to any particular Unit in the Condominium, could be assessed as separate, taxable interests in real estate, without running afoul of **G.L. c. 183A, § 14**.

Cars are valet parked at the Folio, a mixed-use, downtown Boston condominium, in a three-story, below-grade parking garage defined in the Master Deed as the Condominium Parking Area. The Condominium Parking Area comprises a portion of the Limited Residential Common

Search This Blog

Search

Blog Archive

May (2)

Labels

- Adverse Possession (3)
- Affordable Housing (10)
- Airbnb (4)
- Amicus (1)
- Angel Kozeli Mozina (1)
- Attorney-Client Privilege (1)
- Audio (10)
- Banking (1)
- Bankruptcy (2)
- BBO (2)
- Beach Rights (1)
- Bench Trials (1)
- Black Equity (1)
- Blockchain (1)
- Boundaries (1)
- Business Interruption Insurance (1)
- buying a home (1)
- CERCLA (1)
- CFPB (6)
- Chapter 93A (1)
- Clean Water Act (2)
- Climate Change (5)
- Closing Industry (1)
- Columbia Gas (1)
- Commercial Lease (3)
- commercial lease disputes (2)
- Commercial Real Estate Finance (1)
- Community Volunteering (1)

Elements of the Condominium. Under the Master Deed, the Declarant of the Folio Condominium reserved to itself and its successors and assigns, the exclusive right and easement to sell, convey, lease, rent, or license easements for each of the 118 Parking Spaces in the Condominium Parking Area. Parking Easements at the Folio can be conveyed separate from a Unit in the Condominium. Moreover, any Parking Easements retained by the Declarant are expressly defined by the Master Deed as easements in gross.

The Broad / Franklin Development Trust, the Managing Member of the Declarant (the "Declarant"), currently owns the three commercial Units at the Condominium in addition to Parking Easements in the Folio garage. In 2002 the Department of Revenue issued a letter to the City of Boston authorizing it to separately assess and tax as present interests in real estate under **G.L. c. 59, § 11** parking easements located in condominium common areas that are easements in gross rather than easements appurtenant. Thereafter, beginning in FY2017, the City of Boston began assessing the Declarant separately for each of its 13 Parking Easements. The Declarant timely paid taxes assessed for FY2017 and FY2018, filed for an abatement, and then appealed the denial of the abatement to the Appellate Tax Board. The Appellate Tax Board upheld the abatement denials.

On appeal the Declarant argued that the Master Deed conferred on the Parking Easement holders a property interest in the Condominium Parking Area, which, under the Master Deed, constitutes a portion of the Limited Residential Common Element of the Condominium. Under G.L. c. 183A, § 14 each individual unit of a condominium, and its appurtenant beneficial interest in the common areas and facilities of the condominium, is assessed taxes as an individual parcel of real estate. Because the value of the common areas is part and parcel of the total assessed value of all the units of the condominium, the common areas and facilities themselves are not a separately taxable parcel. Thus, the Declarant argued, upholding the Appellate Tax Board's decision, violated the Condominium Act and would result in double-taxation. In support of its argument the Declarant relied on two companion cases, ***Spinnaker Island & Yacht Club Holding Tr. v. Assessors of Hull,* 49 Mass. App. Ct. 20 (2000)** and ***First Main St. Corp. v. Bd. of Assessors of Acton,* 49 Mass App. Ct. 25 (2000)**, which held that a declarant's retained interest to develop future phases of a condominium was part of the common areas and could not be separately taxed as a present interest in property without running afoul of G.L. c. 183A, § 14.

The *Rauseo* Court, however, was guided by a separate line of cases in which the SJC and Appeals Court repeatedly acknowledged and upheld a condominium declarant's right to retain an interest in land described in the condominium master deed, without impermissibly dividing the common areas of the condominium in violation of **G.L. c. 183A, § 5(c)**. In particular, the SJC decision in ***Commercial Wharf East Condominium Ass'n. v. Waterfront Parking Corp.*, 407 Mass. 123 (1990)**, acknowledged that nothing in the Condominium Act precluded the coexistence of possessory and nonpossessory interests in the same land. In that case, by declaration of covenants and restrictions recorded *before* the condominium master deed, the condominium declarant reserved to itself the right to manage parking on the condominium land. The SJC held that where the master deed to the condominium made the association's fee simple ownership interest in the Commercial Wharf East Condominium parking and driveway area subject to the interests reserved in the declaration "it follows that the interests retained by the developer in the Declaration are not 'common areas.'" Since then the

courts have consistently upheld the declarant's right to reserve an interest in portions of the condominium land, separate from the common areas, whether by the terms of the master deed itself as in *Queler v. Skowron,* where the SJC upheld the declarant's retention in the master deed of an interest in the unphased portions of condominium land, or by amendment to the master deed prior to the conveyance of any unit as in *C.B.K. Brook House I Ltd. Partnership v. Berlin,* where the Appeals Court upheld the declarant's retained interest in parking spaces located within a condominium parking garage.

As the *Rauseo* Court explained, "[t]aken together, *Commercial Wharf E. Condominium Ass'n., Queler,* and *C.B.K. Brook House I Ltd. Partnership* make plain that an easement in gross for parking, reserved by a condominium declarant from the interests submitted under a master deed to the condominium form of ownership pursuant to G.L. c. 183A, **is not a part of the condominium common areas**" and therefore could be taxed as a separate interest in real estate. (emphasis added). Moreover, the *Rauseo* Court reasoned that its holding was consistent with the earlier decision in *First Main St. Corp.* on which the Trust relied. Whereas, in *First Main St. Corp.,* the rights reserved by the declarant were in land expressly defined in the Master Deed *as a part of* the condominium common areas, and therefore, not a separately taxable interest, the Parking Easement rights reserved under the Folio Master Deed to the Declarant and its successors and assigns, although physically located in a part of the limited common areas of the condominium … "are not appurtenant to any condominium unit, are separately alienable as interests in real property, and **are not (and never were) part of the condominium common areas**." (emphasis added). Having exercised the planning flexibility afforded by the Condominium Act, to reserve to itself – and thereby remove from the Common Areas – the right to park in the Condominium Parking garage, the Declarant created a separately taxable interest, for which the City was authorized to assess taxes.

What effect, if any, the *Rauseo* decision, will have on the way in which condominium declarants structure and define the way in which they retain rights, including parking rights, at a condominium, remains to be seen. However, where demand for downtown housing continues, and the value realized by a declarant who can freely convey or lease valuable parking spaces in high-demand areas will vastly outpace the amount of assessed tax in municipalities authorized to assess taxes on parking easements held as easements in gross, it is likely that this type of structure will remain a feature of urban condominiums for the foreseeable future.

Co-chair of the association's land use and zoning section, ***Kate Moran Carter*** *is a shareholder and director at* ***Dain, Torpy, Le Ray, Wiest & Garner, P.C.*** *focusing on real estate and commercial litigation, risk management and dispute resolution. Prior to joining the firm, she spent six years as an associate at Robinson & Cole, LLP where she focused her practice on representing title insurers, insured lenders and owners, condominium associations, and business owners. Kate can be contacted by email at* ***kcarter@daintorpy.com****.*

No comments:

Post a Comment

Enter Comment

Newer Post Home Older Post

Subscribe to: Post Comments (Atom)