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Fair cash value in connection with real estate auctions, bulk sales and real estate tax abatements

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The most common reason to file and obtain a tax abatement is that the local board of assessors has put an assessed value on the property which exceeds the fair cash value of the property.

The issue is: What is the fair cash value of the property?

It seems clear to me that an arms length auction of condominium units in a condominium community to buyers in fact establishes the fair cash value for each unit, whether sold at or after the auction.

Assessors often refuse to accept that an auction is a valid way to establish fair cash value. Assessors generally think of an auction as a "fire sale" of condominium units. In fact, I believe that an auction can be a good determination of the market.

The method used in assessing condominium units which a developer is trying to sell is the comparable sales method. An auction meets each of the requirements of the comparable sales method. Each unit is similar to the other units with adjustments for size, location and number of rooms. Auctions are actual sales, not just opinions of value.

Many Boards of Assessors have in the past refused to consider foreclosures as having any significant bearing on establishing fair cash value.

However, an auction of many units in a condominium is different than a foreclosure sale of a single condominium unit. For example, in a 20 unit condominium complex, the sale by auction of 10 of the units to 10 different and unrelated buyers certainly establishes the value of the 10 units sold and also of the 10 unsold units.

In a case before the Appellate Tax Board (ATB), the ATB stated that:

"Fair cash value means fair market value, which is defined as the price at which a willing seller and buyer will agree if both of them are fully informed and under no compulsion." *Boston Gas Co. v. Assessors of Boston*, 334 Mass. 549, 566 (1956).

The ATB and our courts interpret compulsion very narrowly. Compulsion has been defined as "duress, fraud or imperative need for immediate cash at a cost that would preclude a free market." *Epstein v. Boston Housing Authority*, 317 Mass. 297, 300 (1944). While there is compulsion in a foreclosure, in an auction of multiple condominium units, in my opinion, there is no compulsion. Rather than sell one unit a month for many months, the developer has decided to use an auction to market all of the units at the same time and move on. For example, we did all of the legal work for an auction at the end of 2008. Approximately one third of the units sold at the auction. The master deed was recorded in January 2009. We closed all of the units in 2009, both those that we put under agreement at the auction and those that we put under agreement after the auction. Clearly, the auction determined the value of all of the units.

The "tax date" in Massachusetts for fiscal 2010 (that is, July 1, 2009, to June 30, 2010) is January 1, 2009. Assessors must determine fair cash value as of January 1, 2009. In the event that an auction

was held in 2008 and 10 of the 20 condominium units in a building were sold at that auction, it seems to me that the auction in fact determines the fair cash value of all 20 units as of January 1, 2009.

An auction is a very efficient way of determining market value. It brings the entire market together at the same time and in the same room. Some people argue that by its very nature the auction causes people to bid below market. Others argue that the excitement of an auction causes people to over-pay. I submit that the bidding process at an auction produces the fair cash value of the property.

I am not going to discuss in detail whether a bulk sale of condominium units is as good evidence of fair market value as an auction of units to multiple buyers. I believe that a bulk sale of condominium units between a willing seller and a willing buyer is also very good evidence of value. Bulk sales usually are between sophisticated real estate buyers and sellers, unlike auctions where the buyers could be novices. For that reason, I believe that a bulk sale of condominium units is likely to produce the fair cash value of the property as often as the bidding process at an auction.

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