

## NOTICE FROM THE TAXATION COMMITTEE: SPLIT CLASS ASSESSMENTS AND OCTOBER 31<sup>ST</sup> DEADLINE

### Split Class Assessment Appeal Board Victory:

Following the regulation amendment achieved by UDI for the residential classification of development land, the taxation committee is pleased to report a significant win for owners of Development land. Peter Austin of Austin Real Estate Consultants initiated this issue and collaborated with Paul Sullivan of Burgess, Cawley Sullivan (BCS) and Phil Gertsman of the Altus Group to move the case to hearing with the expert legal assistance of Ludmila Herbst of Farris Vaughan. A site owned by Amacon Developments, was selected as having the optimum circumstances to advance the argument. BCS with Farris Vaughan advanced a case on nine properties on Seymour Street.

To achieve residential class BC Assessment (BCA) says two critical conditions must exist:

1. Land having no present use; and
2. Zoning on that land must specifically be residential.

Properties valued as development land often have an interim use, as incidental as say parking on asphalt. They are valued as high rise residential development sites. To this value, commercial tax rates apply as the property fails to pass point 1 above.

The issue at hand was does density equal land, and if yes could a property have a split classification based on the specificity in the zoning. In this case 2 FAR was zoned residential and 1 FAR was zoned commercial. BCA argued that land means dirt, and that is what possesses all of the value. BCS and Farris Vaughan successfully argued **density** is in fact land in determining the entirety of real property. The Appeal Board agreed that density is equivalent to land and given the zoning allowed for a specific amount of residential use, a split classification was applied.

Split class results in a significant tax savings for developers holding property. However, for developers to benefit from the decision in this case, it is critical that the amount of commercial space be clearly limited to a maximum in the Zoning document.

### October 31<sup>st</sup> Physical Condition and Permitted Use date

Many developers are aware that the value and classification of their property hinges on this statutory date. Strategies ought to be considered in advance of this date, as there are issues that commonly arise in dealing with the assessor:

#### **Classification**

- A. **Zoning** - **The biggest difficulty developers are having on obtaining residential classification is failing to have specificity in their zonings. You must specify the MAXIMUM amount of COMMERCIAL density that can be built on the site, with no flexibility.** As it stands today vacant land proposed as a mixed use development site without clear allocations of land specified in each use will attract commercial taxation. It may be a benefit of getting your rezoning complete as of October 31<sup>st</sup>.
- B. **Documentation** - Photo document your site as of October 31<sup>st</sup>, as this will be critical evidence in the event of an appeal. The assessor does look at development sites in and around this date.

C. *Agreements* - Development sites on the cusp of obtaining residential classification (typically the case when construction has not quite started at October 31<sup>st</sup>) can win a classification challenge if there are enough agreements in place that the developer is committed to the proposed project. Key examples are as follows:

- Pre sales;
- Residential Financing;
- Construction contracts;
- Issuance of a Development Permit (DP) or Building Permit (BP); and
- Other legal agreements.

Recent case law has said that residential class can be achieved on a mixed use development site with something less than actual construction. The more binding agreements there are - the better off you will be. Have notes with dates when changes are occurring on your site. There is not set indicia on this point.

D. *Improvements* - Commercial improvements or commercial parking on a site tend to cause the assessor to place a property in the commercial tax class. There is much case law around this point, however not having a preexisting commercial use is typically of assistance. If you have a residential use (e.g. an old house) be sure NOT to demolish it.

E. *Get started* - The best strategy to secure residential tax treatment is to get underway prior to October 31<sup>st</sup>. Projects under construction rarely fail to achieve residential classification.

## Valuation

- A. *Highest and Best Use* - The assessor values land at highest and best use and not necessarily on existing zoning. To assess a property in another use he must prove there is at least a 51% probability of achieving this use. Depending on the point a developer might be in the rezoning stage may cause a trigger in the assumption an assessor will make on highest and best use.
- B. *Density* - If you obtain a DP by October 31<sup>st</sup> that amends your allowable density, the BCA will then assess you for this extra density. If it is approved after this date, they will not.
- C. *Costs in Place* - The assessor will ask for a declaration of costs in place as of October 31<sup>st</sup>. Some developers provide them, others do not. If you do not the assessor will estimate them, and the developer can appeal this determination prior to January 31<sup>st</sup>. Not all costs hold "market value" and are assessable.
- D. *Land Value* - The assessor must consider the value of the determined highest and best use as of July 1<sup>st</sup>. Sales in and around this date are the most relevant.

Saving tax dollars requires good planning. Tax Consultants and Lawyers may be able to offer you advice on your specific projects. If you have a question for the UDI Taxation Committee please feel free to send an e mail. The above notice is a cursory overview of the many issues involved and in no way should be exclusively relied upon.

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