Common Element - Property Appraiser - Taxation

Number: AGO 2014-12

Date: November 14, 2014

Subject:
Common Element - Property Appraiser - Taxation

The Honorable Bob Henriquez
Hillsborough County Property Appraiser
County Center, 16th Floor
601 East Kennedy Boulevard
Tampa, Florida 33602-4932

RE: COMMON ELEMENT – PROPERTY APPRAISER – TAXATION – taxation of common element in subdivision. s. 193.0235, Fla. Stat.

Dear Mr. Henriquez:

You have asked for my opinion on substantially the following question:

Does section 193.0235, Florida Statutes, prohibit the separate taxation of property where the parcel in question is identified on the plat as, ". . . dedicated for private common recreational use, and shall remain privately owned, maintained, repaired and replaced and is specifically not dedicated to the use of the public in general" and where the facilities within the parcel are available to any member of the general public who pays a membership fee to use the facilities?

In sum:

In order to qualify as a "common element" for purposes of section 193.0235, Florida Statutes, a subdivision lot must not be subject to private sale or have been sold to a private party, must be designated on the plat or approved site plan as a common element for the exclusive benefit of the lot owners and must be used exclusively by such lot owners.

According to your letter, the property under consideration is located in a master planned residential community and essentially consists of a clubhouse, two pools and a marina with boat slips. The developer of the property has sold the parcel to a private, limited liability company, and this third party operates the facilities. You state that the property is not designated as a "common element" on the plat or approved site plan for the subdivision.

You have included reference to a document entitled "amenities declaration" relating to this property which allows for "non-deeded users" to use the parcel. "Non-Deeded Users" are described in the document as:

". . . individuals who are entitled to use the Amenities on an annual basis (as result of payment of an annual fee and other applicable charges to the Amenities Owner) or as otherwise permitted

from time to time by the Amenities Owner. A Non-Deeded User may be permitted to use the Amenities as determined by the amenities Owner in its discretion from time to time. Non-Deeded Users shall include, among others, the users of boat slips in the Marina who are not also owners of Lots, Units or Parcels in the Community."

While I have included this information for purposes of clarity, this office does not interpret contractual provisions nor is it a fact finder. Mixed questions of law and fact are most appropriately addressed to the judiciary, where they can receive a definitive resolution.[1] However, the following discussion may prove helpful to you in considering the application of section 193.0235, Florida Statutes.

Section 193.0235, Florida Statutes, was adopted by the Legislature in 2003 and is entitled "[a]d valorem taxes and non-ad valorem assessments against subdivision property."[2] The statute provides that:

"(1) Ad valorem taxes and non ad valorem assessments shall be assessed against the lots within a platted residential subdivision and not upon the subdivision property as a whole. An ad valorem tax or non ad valorem assessment, including a tax or assessment imposed by a county, municipality, special district, or water management district, may not be assessed separately against common elements utilized exclusively for the benefit of lot owners within the subdivision, regardless of ownership. The value of each parcel of land that is or has been part of a platted subdivision and that is designated on the plat or the approved site plan as a common element for the exclusive benefit of lot owners shall, regardless of ownership, be prorated by the property appraiser and included in the assessment of all the lots within the subdivision which constitute inventory for the developer and are intended to be conveyed or have been conveyed into private ownership for the exclusive benefit of lot owners
within the subdivision.
(2) As used in this section, the term 'common element' includes:
(a) Subdivision property not included within lots constituting inventory for the developer which are intended to be conveyed or have been conveyed into private ownership.
(b) An easement through the subdivision property, not including the property described in paragraph (a), which has been dedicated to the public or retained for the benefit of the subdivision.
(c) Any other part of the subdivision which has been designated on the plat or is required to be designated on the site plan as a drainage pond, or detention or retention pond, for the exclusive benefit of the subdivision."

Thus, pursuant to section 193.0235, Florida Statutes, ad valorem taxes or non-ad valorem assessments by a county, municipality, special district, or water management district may not be assessed separately against common elements that are utilized exclusively for the benefit of lot owners within the subdivision. The value of parcels of land that are part of a platted subdivision that are designated on the plat or on the approved site plan as a common element for the exclusive benefit of lot owners must be prorated by the property appraiser and added to the assessment of all the lots within the subdivision.

As this office noted in Attorney General Opinion 2003-63, the statute defines a "common element" as subdivision property not included in the inventory of lots intended to be sold or that

have been sold to private owners, easements that have been dedicated to the public or retained for the benefit of the subdivision, and any other part of the subdivision designated on the plat or the site plan as a drainage pond, or detention or retention pond, for the exclusive use of the subdivision. In plain terms the statute includes as a common element any subdivision property not already sold or that is intended to be sold into private ownership, that is designated on the plat or plan as a common element.

Information you have provided states that this subdivision property has been sold into private ownership and is not designated on the plat or plan of the subdivision as a common element.

Further, this office has previously considered whether property must actually be used exclusively by the lot owners of the subdivision or whether the designation of the property as a "common element for the exclusive benefit of lot owners" is sufficient to claim the entitlement to prorated taxes or assessments. In Attorney General Opinion 2003 63, this office addressed whether a common element includes any property in a subdivision plat or site plan intended to benefit lot owners that is not a lot either sold into private ownership or held by the developer as inventory for sale, regardless of the ownership of such property. Citing the plain language of section 193.0235, Florida Statutes, prohibiting separate assessments against common elements used exclusively for the benefit of lot owners within a subdivision and the need to refer to the subdivision plat or site plan to determine whether property is a common element, this office concluded that a property appraiser must be able to determine that property is used exclusively for the benefit of lot owners, regardless of ownership, before prorating the assessment among all lot owners within a subdivision.

Subsequently, in Attorney General Opinion 2004-31, this office considered whether a golf course for which a user fee is charged (regardless of whether the users are property owners within a subdivision) could be classified as a common element under section 193.0235, Florida Statutes. As that opinion notes, "[f]or purposes of assessing the property in the instant situation. . . section 193.0235(1), Florida Statutes, requires that such property be used exclusively for the benefit of lot owners within the subdivision before it may be assessed as a common element with the assessment prorated among all lot owners within the subdivision." The opinion recognizes that taxing statutes are strictly construed against taxing authorities, while exemptions are strictly construed against taxpayers.[3] An exemption that has been claimed must be proved by clear evidence.[4] While the provisions of section 193.0235, Florida Statutes, do not represent an exemption from taxation, they do involve a shifting of the burden of paying a tax or assessment, and the rationale for requiring clear evidence of compliance with the statute's provisions would apply. Thus, the 2004 opinion states that "it would appear that before the golf course may be assessed on a prorated basis among all of the individual lot owners within the subdivision, it must be shown that its use is exclusively for the benefit of lot owners within the subdivision." To conclude otherwise would place the burden of taxation or special assessments upon individual lot owners when the property is used and enjoyed by others. Attorney General Opinion 2004-31 concludes that "a golf course that is open to the general public for play for a fee may not be classified as a common element of a subdivision for the exclusive benefit of the lot owners within the subdivision for purposes of prorating assessments among the lot owners."

This office continues to be of the opinion that, before a lot within a platted residential subdivision may be assessed on a prorated basis and that assessment imposed on all of the individual lot

owners within a subdivision, it must be shown that it is used exclusively for the benefit of the lot owners within the subdivision. That is, in order to qualify as a "common element" for purposes of section 193.0235, Florida Statutes, a subdivision lot must not only be designated on the plat or approved site plan as a common element for the exclusive benefit of the lot owners, but be used exclusively by those lot owners.[5]

Pursuant to section 193.0235, Florida Statutes, ad valorem taxes or non-ad valorem assessments by a county, municipality, special district, or water management district may not be assessed separately against common elements that are utilized exclusively for the benefit of lot owners within the subdivision. Where the Legislature has prescribed the manner in which a thing is to be done or, as here, specified the manner in which a property is to be assessed by the property appraiser, it operates, in effect, as a prohibition against its being done in any other manner.[6] Likewise, where a statute sets forth exceptions, no others may be implied to be intended.[7]

The parcel in question is not designated as a "common element" for the exclusive benefit of lot owners on the plat or the approved site plan. It is subdivision property which has been conveyed into private ownership and use of the property is available to any member of the general public paying a membership fee. Thus, the subdivision lot would not appear to satisfy the requirements of section 193.0235, Florida Statutes.

In sum, it is my opinion that in order to qualify as a "common element" for purposes of section 193.0235, Florida Statutes, a subdivision lot must not be subject to private sale or have been sold to a private party, must be designated on the plat or approved site plan as a common element for the exclusive benefit of the lot owners and must be used exclusively by such lot owners.

Sincerely,

Pam Bondi
Attorney General

PB/tgh

---

[1] *See* Department of Legal Affairs Statement Concerning Attorney General Opinions, available at: http://myfloridalegal.com/pages.nsf/Main/dd177569f8fb0f1a85256cc6007b70ad.

[2] *See* s. 4, Ch. 2003-284, Laws of Fla.

[3] *See Department of Revenue v. Bank of America, N.A.*, 752 So. 2d 637 (Fla. 1st DCA 2000), *review denied,*776 So. 2d 274 (Fla. 2000) (statutes authorizing tax refunds or exemptions must be strictly construed)*; Consumer Credit Counseling Service of the Florida Gulf Coast, Inc. v. State, Department of Revenue*, 742 So. 2d 259 (Fla. 2d DCA 1997); *State, Department of Revenue v. Anderson*, 403 So. 2d 397 (Fla. 1981).

[4] *See Green v. Pederson*, 99 So. 2d 292 (Fla. 1957) and *United States Gypsum Company v. Green*, 110 So. 2d 409 (Fla. 1959) (person seeking exemption bears the burden of establishing by clear evidence and law that he or she qualifies for the exemption, with all doubt resolved against the existence of the exemption).

[5] *And see* Op. Att'y Gen. Fla. 09-23 (2009), in which this office read the language of the statute to include the use of such property by the guests and relatives of lot owners as a benefit to the lot owners which did not jeopardize the exclusivity of such use.

[6] *See, e.g., Alsop v. Pierce*, 19 So. 2d 799, 805 (Fla. 1944) (where Legislature prescribes the mode, that mode must be observed).

[7] *See, e.g, Young v. Progressive Southeastern Insurance Company,* 753 So. 2d 80 (Fla. 2000); *Dobbs v. Sea Isle Hotel*, 56 So. 2d 341 (Fla. 1952).