

MEMORANDUM

TO Drew E. Aldinger Esq.

FROM Christopher A. Jones
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RE Comments on the Proposed Amendments to the Regulations (the “Proposed Regulations”) of the Office of Property Assessment (“OPA”)

This memorandum addresses four issues with the Proposed Regulations related to the exemptions from real estate provided by Sections 19-1303.2, 19-1303.3 and 19-1303.4 of the Philadelphia Code (the “Code”).

By way of background, the Code provides for a 10-year abatement for newly-constructed residential property under Section 1303.3 (the “Residential Abatement”) and a 10-year abatement for newly-constructed commercial property under Section 1303.4 (the “Commercial Abatement”). Prior to 2022, the Abatements were identical in all material aspects. Therefore, for most mixed-use projects, it was irrelevant whether the projects were classified as “residential” or “commercial.” In practice, guidance available on OPA’s website and the abatement application forms themselves indicated that “commercial” property for these purposes included property that generated income that was subject to the City Business Income and Receipts Tax (“BIRT”).

However, for abatement applications filed on or after January 1, 2022, the scope of the Residential and Commercial Abatements is different. We understand that OPA intends to look at the use of property by floor space, rather than whether the property is subject to BIRT, when determining the applicable abatement.

We believe that the Proposed Regulations should be amended to clarify how this policy will be applied in practice to newly-filed abatement applications.

1. How will Condominiums be Treated?

Under the Proposed Regulations, OPA will approve only a single Abatement application each newly constructed or rehabilitated project. Proposed Regulations § 301(a). OPA will determine which abatement applies based on the “predominant use of the newly constructed building’s assessable square footage,” with “predominant use” meaning “fifty percent (50%)

or more.” *Id.* § 302 (b)(1)-(2). It is not, however, clear how a mixed-use project that consists of multiple condominium units would be treated under the Proposed Regulations because it is not clear what constitutes a “property.”

For example, suppose a newly constructed building was divided into two condominium units with one commercial unit comprising 49% of the building’s assessable square footage and the other residential unit comprising remaining 51%. Under the Pennsylvania Condominium Act, a condominium unit “constitutes for all purposes a separate parcel of real estate,” including for “taxation and assessment.” 68 Pa. C.S. §§ 3105(a) and (b).

Because each condominium unit must be treated as a separate property, under Sections 301(a) and 302(a) of the Proposed Regulations, each unit should separately apply for and obtain its own abatement.¹ *See* Proposed Regulations §§ 301(a) (“Newly constructed and improved **properties** designed for both residential and non-residential uses (mixed-use properties) may be eligible for one temporary real estate tax exemption pursuant to §§ 19-1303.2, 19-1303.3 or 19-1303.4 of the Code.”); 301(a) (“Newly constructed mixed-use **property** may qualify either as a residential **property** for exemption pursuant to § 19-1303.4 or as non-residential **property** eligible for exemption pursuant to § 19-1303.3.”) (emphasis added).

But under Section 302(b), each unit may not receive a separate abatement because the units are in the same predominantly residential building. Section 302(b) uses the terms “property” and “building” interchangeably, which creates confusion for condominiums in which more than one property is located in the same building:

(b) The predominant use of the newly constructed **building’s** assessable square footage shall determine the qualifying exemption.

(1) **Property** shall be considered residential **property** for purposes of [the Residential Abatement] if fifty percent (50%) or more of the newly constructed assessable square footage is dedicated to residential use.

(2) **Property** shall be considered residential **property** for purposes of [the Commercial Abatement] if fifty percent (50%) or more of the newly constructed assessable square footage is dedicated to non-residential use.

Proposed Regulations § 303(b)(1-2) (emphasis added).

Mixed-use condominiums are often employed by developer’s to legally separate commercial from residential uses, as the buyers and/or tenants for those spaces are often very different, even within the same building. Developers and lenders need to know which abatement will apply to which portions of a newly constructed project in order to properly forecast revenues and underwrite new projects.

¹ We note that OPA has historically required separate condominium units to each apply for an applicable abatement.

Suggested Changes

To make clear that a condominium unit should be treated as its own piece of property (as required by the Condominium Act) we suggest the following changes:

1. The term “building’s” in Section 302(b) be replaced with “property’s”.
2. The following be inserted after Section 302(b):

“(c) The predominant use a newly constructed condominium unit shall be determined by the predominant use of such unit.

(1) A condominium unit shall be considered residential property for purposes of § 19-1303.4 if fifty percent (50%) or more of the newly constructed assessable square footage of the condominium unit is dedicated to residential use.

(2) A condominium unit shall be considered non-residential property for purposes of § 19-1303.3 if fifty percent (50%) or more of the newly constructed assessable square footage of the condominium unit is dedicated to non-residential use.”

3. The word “residential” be inserted before the word “condominium” in Section 304(a)(1).

4. The word “exclusively” be inserted before the word “available” in Section 304(a)(3).

2. When will the Residential Abatement Begin for Rental Units?

Under the Proposed Regulations, any property with more than fifty percent of its floor area devoted to apartments (*i.e.*, dwelling units rented to non-owners) qualifies only for the Residential Abatement.

The Residential Abatement begins “immediately following the date upon which settlement is made, **and** a required certificate of use and occupancy is issued on an eligible dwelling unit.” Code § 19-1303.4(5)(b) (emphasis added). This is in contrast to the Commercial Abatement, which begins “in the tax year immediately following the year in which the initial certificate of occupancy for the property is issued.” Code § 19-1303.3(b)(.1).

The commencement language for the Residential Abatement is not easy to apply in the case of a multi-unit rental property because there will be not be a “settlement” with respect to each individual unit. The Proposed Regulations do not address this issue.

Suggested Changes

We suggest that the Proposed Regulations be amended to clarify that the Residential Abatement will, in the case of multi-unit rental residential properties, be effective beginning January 1 of the calendar year following the year that the certificate of use and occupancy is issued with respect to the property.

We believe that this will be easy to implement and will be consistent with the commencement of the Commercial Abatement. Moreover, we believe that this language is consistent with the Code because the Code requires both a settlement *and* the certificate of use and occupancy.

3. Will All Portions of a Mixed-Use Property with a Predominant Residential Use be Eligible for the Developer's Abatement?

The Proposed Regulations do not address how OPA will treat a predominantly residential property under Act 135's 30-month abatement for residential construction (the "Developer's Abatement").

Before the Proposed Regulations' predominance test, OPA granted the Developer's Abatement for mixed-use projects on a percentage of floor area basis. So if a project was 75% residential, 75% of its value was abated during construction. Now that OPA intends to treat that same project as entirely residential for the purposes of assigning its 10-year abatement, will OPA also treat that same property as fully abated under the Developer's Abatement?

If OPA's position is that a property's predominant use governs whether it is residential or commercial, then it only seems fitting that a predominantly residential property should be fully abated under the Developer's Abatement. This approach is consistent with the text of the Developer's Abatement and the Residential Abatement, which use nearly identical language to describe the sorts of property to be abated. *Compare* 72 P.S. § 5020-205(b) (exempting "[n]ew single and multiple dwellings constructed for residential purposes . . . until (1) occupied, (2) conveyed . . . or, (3) thirty months from the day of the month after which the building permit was issued") *with* Phila. Code § 19-1303.4 (defining residential construction as "the building of dwelling units").

In any case, the Proposed Regulations do not address this issue and we ask that OPA provide clarity.

4. Are the Proposed Regulations Retroactive?

Finally, we understand that the Proposed Regulations are being adopted to clarify how OPA will classify new projects now that the Residential and Commercial Abatements differ in material ways. However, the Proposed Regulations do not specify whether they are applicable only to Abatement applications filed on or after January 1, 2022.

cc: Commissioner James Leonard