

Supreme Court Decision Fails to Lift 121A Tax Burden

November 2004

Many affordable housing complexes built years ago were structured as 'private' urban redevelopment projects under Massachusetts' Chapter 121A. The projects started off attractive from a tax standpoint, substituting what were then very favorable contractual 'payments in lieu' and an 'urban redevelopment excise tax' in place of ordinary real property taxes. Years later – particularly following decades of real property taxation limits under Proposition 2½ – owners are finding that their Chapter 121A agreements, in many instances, require payments that exceed what they would owe if they were simply taxed under the ordinary statutory scheme.

One effort to deal with this unforeseen burden has been to seek to persuade taxing authorities – and ultimately the courts – that implicit in the 121A structure is protection against payments ever exceeding what would otherwise be due under ordinary principles of taxation. After all, if the program was intended to use tax benefits to induce developers to invest in urban renewal and eliminate blight, then, owners have argued, it is contrary to the intent of the legislature and understanding of the participants that the program should prove tax disadvantageous.

However compelling the policy behind these arguments, the Supreme Judicial Court today issued a decision which shuts the gate on this particular approach. In *Anderson Street Associates v. City of Boston*, a unanimous court found that there is no such protection express or implicit in the statutory scheme. The Court relied on the language of the statute which explicitly provides that the redeveloper's contract may call for payments in lieu of taxes in addition to the urban redevelopment excise tax, and does not expressly provide any cap tied to the level of taxes which would be imposed under the general tax statute. By contrast, the Court notes, the legislature did explicitly include such a cap with respect to certain economic development corporations

under Chapter 121C, and indeed with respect to certain additional payments for project maintenance needs under Chapter 121A itself. The Court noted that the 'Legislature could have chosen to include a similar cap' on the excise tax and payments in lieu 'but it did not do so'. The Court explicitly rejected the contention that its interpretation of Chapter 121A would deter developers from entering into urban redevelopment contracts as, for any new project, the issue is on the table for negotiation with the municipality. The Court also rejected the claim that the Chapter 121A payments in lieu of taxes constituted an unconstitutional tax, reasoning that the payments are not taxes but rather contractually agreed upon amounts.

The across-the-board strategy of obtaining relief through the position argued in *Anderson* did not win the day. While the *Anderson* case closes one chapter in the 121A tax saga, it does not write the conclusion of the story. The disparate tax burden on numerous affordable projects – and other urban renewal projects – built under 121A cuts directly against continued long term affordability. There are additional approaches that owners can take on a project-by-project basis that offer potential for improving the current situation.

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