

November 19, 2004

### Chapter 121A Does Not Cap “In Lieu of” Payments

On November 17, 2004, in the case of *Anderson Street Associates v. City of Boston*, the Massachusetts Supreme Judicial Court held that Chapter 121A of the Massachusetts General Laws (“MGL”) did not cap payments made by developers under 121A in lieu of tax payments at an amount not to exceed the taxes for which they would otherwise be liable under Chapter 59 of the MGL.

Chapter 121A permits a developer to apply to undertake urban redevelopment projects. Once the project obtains the requisite approval, the developer enters into a contract with the city or town in which the project is located. The developer is exempt from paying real and personal property tax for a period of time, but in lieu of taxes the developer must make an excise payment described in Section 10 and may agree to make additional payments in the contract with the city or town.

The plaintiffs entered into contracts with the city of Boston providing for payment of the excise and an additional amount based on a varying percentage of gross retail rent collections. At the time of the execution of the contract, the combined payments were less than the tax payments the developer would have otherwise paid. As a result of Proposition 2 ½, the combined contractual payments eventually became greater than the applicable tax payments. The plaintiffs brought an action to have the contracts declared unenforceable on common law, public policy and constitutional grounds. The Superior Court granted summary judgment in favor of the defendants.

The Supreme Judicial Court upheld the decision of the Superior Court. The Court noted that, unlike other statutes, there was no express language capping the in lieu of payments at the amount of taxes the developer would otherwise pay. The Court noted that even if the intent of the statute was to provide tax concessions, the plaintiffs initially received such concessions and there was no requirement that the concessions last for the terms of the contracts. The Court also noted that the terms of the contracts were clear and unambiguous and thus enforceable in accordance with their terms.

The Court rejected the plaintiffs' argument that the payments were an unconstitutional tax because of the differences between the payments and the tax determined under Chapter 59. The Court stated that the payments under the contracts were not taxes but payments in lieu of taxes and the plaintiffs had no basis for challenging the terms of a voluntary contract. The Court rejected the plaintiffs' claim of a violation of their right to equal protection, which was based on the argument that Boston had renegotiated contracts with other developers. The Court held that Boston was entitled to decide to renegotiate contracts on a case by case basis based on whether the modification of the contract was in the public good.

Developers entering into contracts under Chapter 121A should negotiate a cap as part of the terms of the agreement or risk losing the benefits of the contract if actual tax payments would be lower than the in lieu of payments.



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