Chapter 17: Tax Aspects of Urban Redevelopment Corporations

Patricia Hassett

Follow this and additional works at: http://lawdigitalcommons.bc.edu/asml

Part of the Tax Law Commons

Recommended Citation
CHAPTER 17
Tax Aspects of Urban Redevelopment Corporations

PATRICIA HASSETT

§17.1. Introduction. A limited dividend company is a private company which undertakes certain responsibilities (usually relating to urban redevelopment) and accepts certain limitations (usually relating to profits and supervision of its activities) in exchange for certain privileges or benefits (usually relating to exemption from real property taxes). The legislators who enacted limited dividend company statutes during the 1930's and the 1940's viewed the device as a means of encouraging the flow of private capital into the field of urban redevelopment. Unfortunately, few, if any, developers shared the legislators' vision. More recently, the spread of deterioration and obsolescence through core city areas has moved legislators to encourage new development activity. At the same time, spiraling taxes and other impediments to profitable construction have caused developers to hesitate to undertake the risks of development. In Massachusetts, one solution to this impasse was the revival of the limited dividend company. The modern limited dividend companies, called Urban Redevelopment Corporations differ from their predecessors in that the range of eligible activities has been considerably enlarged. The advantages of this new device have been recognized and utilized by an increasing number of developers. Their increasing use of Urban Redevelopment Corporations has occasioned a variety of interesting legal and practical questions. Some of these questions, specifically those which relate to the statute's real property tax exemption provisions, are examined here.

§17.2. Evolution of the urban redevelopment corporation. In 1945, the Massachusetts General Court added an entirely new chapter to the General Laws to deal specifically with Urban Redevelopment Corporations. The new chapter provided for the formation, by private

PATRICIA HASSETT is a member of the New York Bar and is in private practice in Elmira, New York. Miss Hassett is also a candidate for the LL.M. degree from Harvard University.

§17.2. 1 Acts of 1945, c. 654, §1 adding G.L., c. 121A. At the same time, sections 26A to 26H inclusive of the Housing Authorities Law (G.L., c. 121) were repealed. Acts of 1945, c. 654, §2. These sections had been added to Chapter 121 of the General Laws in 1933. Acts of 1933, c. 364, §6. They had authorized the establishment of certain "limited dividend" corporations for the purpose of undertaking building construction, or reconditioning projects intended to improve
citizens, of corporations which would undertake redevelopment projects. The corporations were declared to be “instrumentalities of the Commonwealth,” but subject to the laws governing ordinary corporations.

Applications to form a Chapter 121A corporation were to be submitted to the local housing authority, and to the mayor. Other provisions described the nature of eligible projects, the contents of the project application, planning requirements, financing, inspection and supervision of construction, amendments to the application, contracts with the local government, and the disposition of the project in the event of its insolvency.

In exchange for undertaking a redevelopment project, thereby fulfilling a public purpose and need, the 121A corporation was given an exemption from real and personal property taxation for a period of the housing supply. The corporations had been subject to the supervision and regulation of the housing board. They had been designated “instrumentalities of the commonwealth,” and were to be “deemed to have been organized to serve a public purpose.” Dividends had been limited to six percent. The limit applied to dividends resulting from the sale of assets as well as to the dividends declared on annual earnings. Upon the dissolution of the corporation, any surplus earnings were to revert to the Commonwealth.

The repealer also provides: “[N]othing in this section shall affect the powers, rights, duties and obligations of any corporation organized under the provisions of said sections and in existence on the date when this act takes effect.” However, there do not appear to have been any corporations organized under the 1933 act.

---

2 Acts of 1945, c. 654, §1, adding G.L., c. 121A, §3.
3 Id. It is not entirely clear what purpose this declaration was intended to serve. Other sections also touched on the relationship between the corporations and the Commonwealth: “Every such corporation shall be deemed to have been organized to serve a public purpose, and shall remain at all times subject to reasonable rules and regulations of the housing board. All real estate acquired by any such corporation and all structures erected by it shall be deemed to be acquired or erected for the purpose of promoting the public health, safety and welfare and shall be subject to the provisions of this chapter.” Id., adding G.L., c. 121A, §8. “Nothing in this chapter shall be construed to obligate the commonwealth, or to pledge its credit, to any payment whatsoever to any such corporation or to any stockholder, bondholder or creditor thereof.” Id., adding G.L., c. 121A, §15.
4 G.L., c. 156, except section 7 thereof which limits the duration of corporations dealing with real estate to fifty years. In the event of any inconsistency, the provisions of Chapter 121A are to apply. Acts of 1945, c. 654, §1, adding G.L., c. 121A, §3.
6 Id.
7 Id., adding G.L., c. 121A, §1.
8 Id., adding G.L., c. 121A, §5.
10 Id., adding G.L., c. 121A, §7.
11 Id., adding G.L., c. 121A, §8.
14 Id., adding G.L., c. 121A, §17.
forty years. Instead, the corporation was to pay a special excise tax equal to five percent of its gross income plus one percent of the fair cash value of its real and personal property.\textsuperscript{15}

The Urban Redevelopment Corporation concept was initially unproductive. Then, in the early 1950's, the Boston & Albany Railroad offered to sell its Huntington Avenue Railroad Yard, a twenty-eight acre tract located in Boston.\textsuperscript{16} The potential for blight in the area of the abandoned yard was a cause of concern both to Bostonians, and to the Massachusetts legislators, who established a special legislative commission\textsuperscript{17} to investigate the possibility of developing the yard. The result of the commission's efforts was the proposed Back Bay Redevelopment Act of 1955\textsuperscript{18} which would have created a public commission to acquire the yard by eminent domain and to sell it to the highest bidder. The bill contained elaborate regulations concerning the various rights and responsibilities of the commission, the city of Boston, and the successful bidder.\textsuperscript{19} Tax provisions included a five-year freeze on the assessed value, special privileges when applying for abatements, prohibition on tax foreclosure under some circumstances, and options for delay or avoidance of tax payments.\textsuperscript{20}

\textsuperscript{15} Id., adding G.L., c. 121A, §10.

The original section 10 provided: "The real estate and personal property of any such corporation shall for a period of forty years after its organization be exempt from taxation under chapter fifty-nine. During such period every such corporation shall in lieu of such taxes, but subject to the provisions of section fifteen, pay annually to the commonwealth with respect to its corporate existence at anytime within the preceding calendar year an excise equal to the sum of the following: namely, an amount equal to five per cent of its gross income in such year, from all sources, and an amount equal to ten dollars per thousand upon the fair cash value of the real estate and tangible personal property of such corporation, as of January first in the taxable year, to be determined by the assessors of the city or town in which the project is located and subject to abatement and appeal as in the case of city or town taxes; provided that such excise shall not in any year be less than an amount equal to that which the city or town would receive for taxes, at the rate for such year, upon the average of the assessed values of the real estate held by such corporation for the three years last preceding the acquisition thereof. While the provisions of this section are in effect, such corporation shall pay no other excise under chapter sixty-three." The wording of this provision (but not its function) was changed by Acts of 1956, c. 640, §4.


\textsuperscript{17} Resolves of 1954, c. 98.

\textsuperscript{18} Senate Bill 580 (1955).

\textsuperscript{19} Opinion of the Justices, 332 Mass. 769, 770-775, 126 N.E.2d 795, 796-799 (1955) (Back Bay) outlining the proposed legislation. This opinion was the first of four opinions which affected the evolution of the urban redevelopment corporation. In order to assist the reader to distinguish among the four opinions, a parenthetical reference to the subject of the opinion has been added to each full citation of any of the four opinions.

\textsuperscript{20} Senate Bill 580, §9 (1955). The tax provisions are described in some detail in Opinion of the Justices, 332 Mass. 769, 772-775, 126 N.E.2d 795, 797-799 (1955) (Back Bay).
The proposed act was forwarded to the Massachusetts Supreme Judicial Court for an advisory opinion as to the validity of, among other things, the special tax provisions. The Court examined the tax provisions in the context of the two provisions of the Massachusetts Constitution which it deemed "relevant and controlling." One provision states that every individual is obliged to contribute "his share" to the expense of government. The specific effect of the phrase "his share" is to prohibit "the imposition upon one taxpayer of a burden relatively greater or relatively less than that imposed upon other taxpayers." The second provision authorizes the state legislature to impose "proportional and reasonable" taxes. The specific effect of the phrase "proportional and reasonable" is to prohibit the imposition of taxes "upon one class of persons or property at a different rate from that which is applied to other classes. . . ."

Despite the apparent emphasis upon absolute equality in taxation, the Massachusetts Legislature can constitutionally grant exemptions from

21 The eleven page order requesting the opinion contained a litany of "whereas" clauses which set forth the relevant facts, statutes and cases. The order concluded with fourteen specific questions about the bill's validity. The questions are reproduced in Opinion of the Justices, 332 Mass. 769, 775-777, 126 N.E.2d 795, 799-800 (1955) (Back Bay). The order was accompanied by a copy of the Back Bay Development Commission's Report, note 16, supra.
22 See Commonwealth v. Welosky, 276 Mass. 398, 400, 177 N.E.2d 656, 658 (1931): "It has been uniformly and many times held that such [advisory] opinions, although necessarily the result of judicial examination and deliberation, are advisory in nature, given by the justices as individuals in their capacity as constitutional advisors of the other departments of government and without the aid of arguments, are not adjudications by the court, and do not fall within the doctrine of stare decisis." See also, 1969 Ann. Surv. Mass. Law §10.1.
24 Mass. Const. pt. I, art. 10: "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection. . . ."
26 Mass. Const. pt. II, c. 1, §1, art. 4: "And further, full power and authority are hereby given and granted to the said general court . . . to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within said commonwealth. . . ."
27 Opinion of the Justices, 332 Mass. 769, 778, 126 N.E.2d 795, 800 (1955) (Back Bay). The Court continues that discriminatory rates are prohibited whether "effected directly in the assessment or indirectly through arbitrary and unequal methods of valuation. . . ."Id.
28 Cf. Long, Taxation in Massachusetts, 32 B.U.L. Rev. 375 (1952): "Massachusetts . . . has certain constitutional limitations in respect to taxation much more restrictive than those of many of the other States." Mr. Long, then Commissioner of Corporations and Taxation for the Commonwealth of Massachusetts, describes the origin and nature of some of the exceptions to the rule of equality in taxation.
taxation for a variety of reasons. For example, real property tax exemptions for charitable non-governmental organizations have been justified upon the theory that the uses of exempted property "not only relieve the burden of government, but [also] advance the public good." However, in its analysis of the Back Bay Act's tax provisions, the Court made no attempt to enumerate and evaluate the ways in which the corporation would assume government burdens or advance the public good. Indeed, the analysis of the tax provisions proceeded on the assumption that the corporation was an "ordinary business corporation" for which special privileges were sought. Therefore, it is not surprising that the Supreme Judicial Court concluded that the tax provisions would violate the state constitution.

29 Assessors of Quincy v. Cunningham Foundation, 305 Mass. 411, 26 N.E.2d 335 (1940). The Court outlines the rationale by which certain tax exemptions are consistent with constitutional principles of equal taxation. Id. at 414-20, 26 N.E.2d at 338-40.


31 The corporation was to give the city all land used for public ways [Senate Bill 580, §6, lines 52-54 (1955)], to build all public streets inside the project area [Id., lines 57-59], to pay for inspections [Id., lines 88-90], to maintain certain books and records [Id., §5, lines 16-17], to file annually a reasonably detailed financial statement [Id., lines 20-25], to submit a development plan [Id., §6, lines 6-7], and to sign a contract for a scheduled development [Id., lines 48-51].

32 Opinion of the Justices, 332 Mass. 769, 126 N.E.2d 795 (1955) (Back Bay). In a later part of the opinion the Court discusses what it characterizes as "an entirely different point—whether the plan as a whole is for a public purpose." Id. at 781, 126 N.E.2d at 802. The point was raised, not in relation to the use of special tax benefits, but in relation to the issue of Boston's monetary commitments to the project. Despite the legislative predictions of economic blight, juvenile delinquency, and declines in property values, the Court concluded that the public benefit (if any) would be indirect, and insufficient to render the project "one for a public purpose." Id. at 783, 126 N.E.2d at 803.

33 But cf. Opinion of the Justices, 334 Mass. 760, 762, 135 N.E.2d 665, 666 (1956) (Chapter 121A: exemption allowed), where the Supreme Judicial Court notes that the tax provisions under consideration would not be allowed to "ordinary business corporations," and then proceeds to distinguish the proposed urban redevelopment corporation from an "ordinary business corporation."

34 Opinion of the Justices, 332 Mass. 769, 779, 126 N.E.2d 795, 801 (1955) (Back Bay): "It follows in our opinion that the provisions of the proposed act by which valuations for the purposes of assessment, are to remain the same for five years, regardless of the values added by buildings, while taxpayers in general are required to pay annually upon total value, charge the corporation with less than its share of the public expense, necessarily produce disproportion, are unreasonable in the constitutional sense, and are unconstitutional. We are further of opinion that the other provisions by which the taxes payable by the corporation in any year are in part dependent upon profits and by which payment may be deferred as long as forty-five years and in certain contingencies may even never be made and the special provisions as to interest and as to application for abatement without paying any part of the tax, while other taxpayers must pay..."
The rejection of the Back Bay Act prompted the legislators, and others, to consider other ways to provide tax incentives for the development of the Huntington Avenue yard. The Urban Redevelopment Corporation device was one of the methods considered. Although the existing tax features of the device were more or less acceptable, they had never received any judicial sanction. As a result, a bill which revised the wording of the tax formulas (without significantly altering their monetary impact) was sent to the Supreme Judicial Court for an advisory opinion.

The Court's analysis of the proposed amendments began by assuming that the tax provisions conferred tax advantages which would be unconstitutional if they applied to "ordinary business corporations." But, the Court continued, "an urban redevelopment corporation is not an ordinary business corporation." A redevelopment corporation is subject to the control and supervision of various public agencies, has the power annually on full value without regard to profit and without special advantages as to interest and abatements, result in charging the corporation with less than its share of the public expense, produce disproportion, and are unreasonable and unconstitutional."

On the other hand, some non-tax features of the urban redevelopment corporation were not acceptable. For example, the original act provided that the six percent limit on dividends applied to the proceeds of the sale of the corporate assets as well as to the annual earnings. This limitation was one of the features which was subsequently changed. See note 37, infra.

35 On the other hand, some non-tax features of the urban redevelopment corporation were not acceptable. For example, the original act provided that the six percent limit on dividends applied to the proceeds of the sale of the corporate assets as well as to the annual earnings. This limitation was one of the features which was subsequently changed. See note 37, infra.

36 House Bill 2879 (1956). This bill was later replaced by Acts of 1956, c. 640, amending G.L., c. 121A, §§6-7, 9-10.

37 The bill also revised Section 6 (relating to authority for the housing authority to waive compliance with building, zoning and other regulations), Section 7 (relating to capitalization of the corporation) and Section 9 (relating to limits on dividends).

38 The proposed Section 10 was much longer than the original Section 10. It contained more elaborate statements of what property was exempt, of the extent of the exemption, and of the procedure for establishing fair cash value. It added provisions for determining fair cash value in advance of construction, for development of large projects in separate stages, and for the treatment of leased property. The main tax formula was not changed, but the alternative formula (which established a minimum tax) was changed to permit a lower minimum tax under some circumstances.

39 Opinion of the Justices, 334 Mass. 760, 762, 135 N.E.2d 665, 666 (1956) (Chapter 121A: exemption allowed): "It may be assumed that these [urban redevelopment] corporations derive some tax advantages from the excise as compared with ordinary local taxation, and that these advantages could not be allowed to ordinary business corporations under art. 10 of the Declaration of Rights and c. 1, §1, art. 4, of the Constitution."

40 Id.

41 The Court mentioned specifically the requirements of housing board approval [G.L., c. 121A, §3], of approval by the local planning board and mayor [Id., §6], and of compliance with state housing board rules and regulations [Id., §4].
§17.2 Tax Aspects of Urban Redevelopment Corporations

of eminent domain, and is an instrumentality of the commonwealth organized “to serve a public purpose.” The Court concluded that since urban redevelopment corporations, although in a sense private corporations, perform functions for the public benefit analogous to those performed by various other types of corporations commonly called public service corporations, property owned by them and used in such service may receive favored treatment in the matter of taxation.

The Court added that the redevelopment corporation is “readily distinguishable” from the corporation proposed in the Back Bay Development Act. Conceding that the Back Bay plan had “some public aspects,” the Court nevertheless viewed the plan as essentially a means of providing tax advantages to private interests and not as a means of eliminating slums.

As it turned out, the judicial acceptance of tax concessions for urban redevelopment corporations did not immediately effect the development of the Huntington Avenue tract. During the time that legislative remedies were being pursued, the Prudential Insurance Company had emerged as the strongest and most determined of the potential developers. Prudential’s proposed development of the tract included an office building, a hotel and commercial stores as well as residential buildings. However, since only residential buildings were eligible for urban redevelopment corporation treatment, the project could not proceed within the framework of Chapter 121A.

Instead, Prudential and Boston negotiated an “informal tax agreement,” by which the project’s annual tax was to be calculated by reference to its gross income rather than its fair cash value. The contents of the agreement were released to the public. Although the reaction to the project itself was generally favorable, there was some opposition to the tax agreement. Prudential, which had already begun construction, finally concluded that it could not proceed without some legal guarantee that its tax burden would be manageable.

While Prudential prepared to shut down construction, the Massachusetts legislature went back to work. The legislature finally proposed that the Massachusetts Turnpike Authority acquire and develop the ground

42 G.L., c. 121A, §11.
43 Id. §3.
44 Id. §8.
46 Id. at 764, 135 N.E.2d at 667. The Court also noted that in the case of the redevelopment corporation the tax advantages continue only as long as the project “continues to be operated under public regulation and for the public benefit.” Id., 135 N.E.2d at 667-68.
levels of the tract, and lease the air rights to Prudential. The Massachusetts Supreme Judicial Court was asked for an advisory opinion.

The Court examined the proposal in light of its Back Bay and redevelopment corporation opinions and concluded that the Turnpike proposal had no characteristics which would distinguish it from the Back Bay case. It emphasized that the public purpose features of the Turnpike proposal were either optional or lacking in definiteness. At the same time, the Court identified numerous features which it viewed as clearly benefiting private interests. The Court concluded that the Turnpike project was not for a "predominately public purpose."

In the Turnpike opinion, the Court mentioned the urban redevelopment corporation and its special characteristics, including its "favored treatment in the matter of taxation." This hint was picked up by the legislature, and less than two months after the adverse opinion on the Turnpike proposal, the Supreme Judicial Court was asked for an advisory opinion on a bill amending Chapter 121A.

Under the proposed bill, the areas eligible for redevelopment and the types of development authorized were redefined to encompass a new range of projects not limited to housing and including, of course, the Prudential Center. As a result, one of the first questions facing the Court was whether the new activities met the public purpose requirement upon which the 121A corporation's "favored tax treatment" was based. In analyzing the public purpose quotient of the 121A projects, relatively little attention was paid to the definitions of eligible areas and eligible buildings. The Court merely indicated that prior cases had established the public purpose character of land clearance programs and added that neither the public purpose doctrine nor the Constitution limited the redevelopment of cleared areas to residential buildings. On the other hand, the Court carefully scrutinized the procedures and the regulations governing the approval of projects, and the procedures

49 Id. at 755, 167 N.E.2d at 755.
50 Id. at 753, 167 N.E.2d at 753-54.
51 Id. at 757-58, 167 N.E.2d at 755-56.
52 Id. at 759, 167 N.E.2d at 756-57.
54 The eleven questions of the Senate and the House are reproduced in Opinion of the Justices, 341 Mass. 760, 770-72, 168 N.E.2d 858, 865-66 (1960) (Chapter 121A: eligibility enlarged).
55 Senate Bill 634 (1960).
56 The proposed amendments and additions to Chapter 121A, and their impact, are summarized in Opinion of the Justices, 341 Mass. 760, 763-70, 168 N.E.2d 858, 861-64 (1960) (Chapter 121A: eligibility enlarged).
57 Id. at 776-77, 168 N.E.2d at 868.
58 Id. at 774-78, 168 N.E.2d at 867-69.
§17.3 TAX ASPECTS OF URBAN REDEVELOPMENT CORPORATIONS

and the regulations for the continuing supervision of projects. It concluded that all the procedures and regulations supported the legislative declaration that such projects are for a public purpose.

Very shortly after the Supreme Judicial Court replied favorably to the questions asked by the legislature, the bill amending Chapter 121A was enacted. Prudential's application for the approval of its Prudential Center was promptly filed, processed and approved. Prudential, however, was apparently mindful of the Supreme Judicial Court's admonitions about the force and effect of advisory opinions. As a result, it arranged to have the Court's favorable (but only advisory) opinion, confirmed in an action for declaratory relief. The Court reexamined "the soundness of certain constitutional principals" reached in its advisory opinion on the 121A proposals and concluded that it would "adhere to and adopt the reasoning of that opinion."

In the end, few features of the urban redevelopment corporation were the same as they had been in the beginning: for example, new areas were eligible, new projects were eligible, and new and more complicated procedures were established. However, the fundamental premise of the corporation remained the same: an exchange of a tax benefit for a redevelopment project. And, while the constitutionality of the tax benefit was settled, the practical impact of the tax benefit remained an open question.

§17.3. Exemptions from real and personal property taxes. Real property development is often touted as a lucrative federal income tax shelter; and, in fact, it often is. On the other hand, real property development can be a risky business, and property taxes are one of the factors which contribute to the risk. From a business point of view, real property taxes can have little appeal. They are a business expense which is unrelated to income or to actual (as opposed to potential) productivity, which cannot be manipulated in times of financial emergency or community recession, and which benefits the enterprise only in the remote and usually unsatisfactory sense that municipal services provided at large are a benefit to each member of the community.

However unpleasant the immediate impact of the real property tax may be, the prospective impact of real property taxes is even more unpleasant. For at least the present, it is a certainty that there will be real property taxes, and it is a further certainty that those taxes will increase with each succeeding year. What is uncertain is whether a municipality's shrinking tax base and rising expenses will cause the in-

59 Id. at 778-80, 168 N.E.2d at 869-70.
60 Id. at 780, 168 N.E.2d at 870.
62 See, e.g., note 22, supra.
63 See Dodge v. Prudential Ins. Co., 343 Mass. 375, 376-78, 179 N.E.2d 234, 236-38 (1961), for the details of the interesting strategy by which all of the crucial questions were raised.
64 Id. at 383, 179 N.E.2d at 241.
crease to be arithmetic or geometric in nature. In Boston, for example, the tax rate has nearly doubled since 1960. The following table illustrates the upward progression of the tax rate of the City of Boston over the last 50 years.

<table>
<thead>
<tr>
<th>Year</th>
<th>Tax Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1920</td>
<td>$24.10</td>
</tr>
<tr>
<td>1925</td>
<td>26.70</td>
</tr>
<tr>
<td>1930</td>
<td>30.80</td>
</tr>
<tr>
<td>1935</td>
<td>37.00</td>
</tr>
<tr>
<td>1940</td>
<td>40.60</td>
</tr>
<tr>
<td>1945</td>
<td>42.50</td>
</tr>
<tr>
<td>1950</td>
<td>63.00</td>
</tr>
<tr>
<td>1955</td>
<td>69.80</td>
</tr>
<tr>
<td>1960</td>
<td>100.70</td>
</tr>
<tr>
<td>1965</td>
<td>115.00</td>
</tr>
<tr>
<td>1970</td>
<td>156.80</td>
</tr>
<tr>
<td>1972</td>
<td>196.70</td>
</tr>
</tbody>
</table>

In view of this dramatic increase, it is not surprising that real property developers closely examine any device by which the charge for community services can be converted from a wildly mushrooming expense of inestimable size into an expense which is not only smaller in the absolute sense, but which is also more acceptable in that it can be neatly tied to the actual productivity of the real property.

§17.4. The excise tax. An excise tax is the foundation of the Chapter 121A method of paying for municipal services.

The Principal Formula. The excise is five percent of the gross income of the project plus one percent of the fair cash value of the project.\(^1\) Gross income is simply the Chapter 121A corporation's income "from all sources."\(^2\) Because most Chapter 121A corporations may not undertake more than one project or engage in any type of activity other than the development of a project,\(^3\) most corporations have only one source of income, the project. However, the requirement that each project be separately incorporated does not apply to insurance companies\(^4\) or savings banks.\(^5\) As to such companies or banks, gross income refers only to income generated by the project.\(^6\)

\(^1\) G.L., c. 121A, §10. The language of the statute is "an amount equal to ten dollars per thousand upon the valuation. . . ."

\(^2\) Id. The use of gross income, rather than some form of net income, avoids the need for complicated calculations and audits. However, such complications do occur in other Chapter 121A contexts. See, for example, Section 15 which deals with the treatment of receipts in excess of authorized expenditures.

\(^3\) Id. §3.

\(^4\) Id. §18(a).

\(^5\) Id. §18A. Section 18 authorizes insurance companies to undertake Chapter 121A projects and exempts such projects from a variety of the provisions which govern other projects; Section 18A authorizes savings banks to undertake Chapter 121A projects and incorporates by reference the exemptions set forth in Section 18.

\(^6\) Id. §18(g). Where a sponsoring insurance company or savings bank occupies a portion of the project for purposes unrelated to the development and management of the project, the fair rental value of the space occupied may be included in the computation of gross income. The amount of the fair rental value is to be agreed upon by the sponsor and the Boston Redevelopment Authority (outside of Boston, the municipal housing board); in the event that no agreement is
The fair cash value of the project is determined annually by the assessors of the city or town in which the project is situated. The assessor has until March 1 of each year to determine the fair cash value of the project as of the same year, and to certify the value to the state tax commission and to the corporation. Chapter 121A does not require the use of any particular method of valuation. The corporations have until April 1 to appeal the valuation to the appellate tax board.

Payment of the excise begins in the second calendar year of the corporation's existence. In that year (and in each succeeding year), the corporation pays five percent of its gross income earned in the preceding calendar year plus one percent of the fair cash value determined in the current year. The following figures illustrate the calculation of the excise:

<table>
<thead>
<tr>
<th>Gross Income</th>
<th>$490,129</th>
</tr>
</thead>
<tbody>
<tr>
<td>(calendar year ending 12/31/65)</td>
<td></td>
</tr>
<tr>
<td>5% thereof</td>
<td>$24,506</td>
</tr>
<tr>
<td>Fair Cash Value</td>
<td>$2,432,000</td>
</tr>
<tr>
<td>(as of 1/1/66)</td>
<td></td>
</tr>
<tr>
<td>1% thereof (i.e., $10/$1,000)</td>
<td>$24,320</td>
</tr>
<tr>
<td>Total Excise (payable in 1966)</td>
<td>$48,826</td>
</tr>
</tbody>
</table>

As the above illustration shows, the actual calculation of the excise is a simple matter. The only difficulty (if it can be called that) is in making sure that the correct data is used.
The Alternate Formula. Under some circumstances, the foregoing formula is not the one used to determine the amount of the excise. Section 10 provides that the excise payable in any year may not "be less than the amount which the city or town would receive for taxes . . ." at the tax rate for such year upon the lesser of (1) the current valuation, or (2) the average valuation for the three years prior to acquisition.

The alternate formula usually comes into play at the beginning of a corporation's existence, when it is in the process of construction. During this period, the corporation is unlikely to have an significant income; at the same time, the fair cash value is likely to be relatively low. As a result, the excise calculated under the principal formula would be nominal.

The following example illustrates the operation of the principal and the alternate formulas:

Project A incorporated in 1967. The average assessment of the project site for the three years prior to acquisition was $338,300. By January 1, 1968, the project had a fair cash value of $157,700. When the project was completed two years later, the fair cash value was $7,000,000.

FIRST: The excise payable in 1968 under the principal formula would be calculated as follows:

\[
\begin{array}{l}
\text{Gross Income (1967)} \\
\text{5\% thereof} \\
\text{Fair Cash Value (1/1/1968)} \\
\text{1\% thereof} \\
\hline
\end{array}
\]

\[
\begin{array}{c}
\$ 157,700 \\
\$ 1,577 \\
\hline
\end{array}
\]

SECOND: The excise payable in 1968 under the alternate formula would be calculated as follows:

\[
\begin{array}{l}
\text{Fair Cash Value (1968)} \\
\text{Three-year Average Valuation} \\
\text{Lesser of above} \\
\text{1968 Tax Rate} \\
\hline
\end{array}
\]

\[
\begin{array}{c}
\$ 157,700 \\
\$ 338,300 \\
\$ 157,700 \\
\$ 129.20/\$1,000 \\
\hline
\end{array}
\]

\[
\begin{array}{c}
\text{Alternate Excise} \\
\$ 20,374.84 \\
\hline
\end{array}
\]

As the above example illustrates, the actual calculation of the excise under the alternate formula is even more simple than the excise calculation under the principal formula.

Payment of the Excise. The excise is payable annually to the Massachusetts Department of Corporations and Taxation. The Department

12 The figures in this example are adapted from miscellaneous data relating to the New Boston Food Market Development Corporation, a Chapter 121A corporation located in the City of Boston. (Hereafter, the location of the project will be indicated in parenthesis.)
§17.5 TAX ASPECTS OF URBAN REDEVELOPMENT CORPORATIONS

has developed an Urban Redevelopment Excise Return, Form 121A, which is brief but complete. The collection of the excise is governed by the same procedures that govern the taxes applicable to ordinary domestic business corporations. But, whereas the taxes paid by ordinary corporations are paid into the general treasury of the Commonwealth, the proceeds of the excise are "distributed, credited and paid to the city or town where the project of the corporation is located." 

§17.5. The contract payment. Although, technically, 121A corporations must pay only the excise, most have contracted to pay the municipality additional sums under certain circumstances.

The Statutory Provision. Section 6A provides that the corporation may contract with the municipality to pay sums in addition to the excise. No details regarding the timing, or the amount of the payment are prescribed or suggested. Unlike the excise, which is paid to the state for transmittal to the municipality, the contract payment is payable directly to the municipality.

The Contract Provisions. Most of the contract payments negotiated in the Boston projects are variations on a common theme: the project agrees to pay the difference (if any) between a stated minimum amount of money and the excise. A mathematical representation of this basic formula would be:

\[ K = X - E \]

where K represents the contract payment, E the excise, and X the given amount. The variations involve the method of determining the given amount, X. In some cases, the minimum amount is stated in dollars, or it may remain constant, or it may change from year to year according to a schedule established in the contract. In other cases,

13 G.L., c. 121A, §10.

14 Id.

§17.5. 1 The statute reads as follows: "Nothing in section ten shall prevent such contract [between the project and the municipality] from further providing for such corporation to pay to the city or town with respect to one or more years such specific or ascertainable amount in addition to the excise prescribed by section ten as may have been stated in the application."

2 G.L., c. 121A, §10.

3 The original contract between the Prudential Insurance Company and the City of Boston, for example, provided that Prudential pay the difference between the following amounts and the excise:

<table>
<thead>
<tr>
<th>Year</th>
<th>Parcel A (Tower)</th>
<th>Parcel B (Hotel)</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1962</td>
<td>$288,000</td>
<td></td>
<td>$288,000</td>
</tr>
<tr>
<td>1963</td>
<td>364,000</td>
<td>$162,000</td>
<td>546,000</td>
</tr>
<tr>
<td>1964</td>
<td>512,000</td>
<td></td>
<td>674,000</td>
</tr>
<tr>
<td>1965</td>
<td>672,000</td>
<td></td>
<td>834,000</td>
</tr>
<tr>
<td>1966</td>
<td>864,000</td>
<td></td>
<td>1,026,000</td>
</tr>
<tr>
<td>1967</td>
<td>1,088,000</td>
<td></td>
<td>1,250,000</td>
</tr>
<tr>
<td>1968</td>
<td>1,344,000</td>
<td></td>
<td>1,506,000</td>
</tr>
<tr>
<td>1969</td>
<td>1,632,000</td>
<td></td>
<td>1,794,000</td>
</tr>
</tbody>
</table>

4 See, for example, the column relating to Parcel B in note 3, supra.

5 See, for example, the column relating to Parcel A in note 3, supra.
the contract may contain a formula rather than a precise dollar figure. In such cases, the formula is usually a percentage of the project's gross income. The percentages which have been negotiated for Boston projects range from a low of 15% for a non-profit low income housing project to a high of 25% for a commercial project. Occasionally, the formula will also contain a minimum amount of payment; for example, in one case, the formula is 20% of the project's gross income but not less than $27,000. It is important to note that the "gross income" figure used to determine the contract payment is not always the same as the "gross income" used to calculate the excise. The excise "gross income" is defined as income "from all sources." The percentage "gross income," on the other hand, may be defined to exclude certain types of income, or to permit deduction of certain types of expenses.

In a few cases, usually where the project site is owned by the Boston Redevelopment Authority, the contract provides that the project will make no payment to the city. In such cases, the corporation has usually agreed to pay the BRA a fixed ground rent plus an additional payment. The amount of the additional payment is usually calculated by a "percentage of gross income minus excise" formula similar to those used in project municipality contracts.

§17.6. The incentive effect of Chapter 121A. Chapter 121A is still in its infancy, so it is not yet possible to define its full effect as an incentive. Nevertheless, some aspects of its role as an incentive are already apparent. Although Chapter 121A was slow in gaining acceptance, it has become very popular. Applications in Boston alone have jumped from one or two per year in the early 1960's, to a dozen or more per year in 1969, 1970, and 1971. And, the indications are that the number of applications per year will continue to increase. Such widespread use of an incentive is a prerequisite to its success.

A second characteristic of the Chapter 121A treatment is that it insures the intensive redevelopment of any property to which it applies.

6 Contracts relating to Chapter 121A projects are on file at the Boston Redevelopment Authority.
7 Jamaicaway, Inc. (Boston).
8 G.L., c. 121A, §10.
9 A typical definition of "gross income" for Section 6A purposes is found in the proposed contract in the application of Buse Boston, Inc. (Boston) for approval as a Chapter 121A corporation: "Gross income equals the gross rentals from the project exclusive of payments to reimburse the applicant for separately charged services rendered, expenses incurred or payment made; it excludes income from any business not directly related to the project, its construction, alteration, maintenance, repair, operation, and/or management." Inasmuch as Buse Boston, Inc. did not fall within any of the exceptions to the separate incorporation requirement it is difficult to reconcile the second portion of the definition with Section 3 (relating to the number of projects and to the types of activity for which a Chapter 121A corporation is eligible). See the text accompanying notes 3 through 6 in §17.4, supra.
10 See, for example, Back Bay Manor, Inc. (Boston).
§17.7 TAX ASPECTS OF URBAN REDEVELOPMENT CORPORATIONS

As a rule of thumb, the full advantages of 121A treatment cannot be realized unless the annual gross income of the project equals or exceeds the fair cash value of the project site (including existing improvements) prior to the project. Presumably, if this rule is followed, the city is assured that the post-development value of the site will be several times its prior value. In Boston, the gross income of most of the 121A projects is at least two or three times the prior fair cash value of the site. As a result, the project sites are generating substantially more revenue for the city than they did prior to the redevelopment.

What is yet unclear is whether Chapter 121A has stimulated redevelopment which would not have occurred in its absence. A determination on this issue will have to await a careful study of trends in non-governmental construction before, and since, the re-emergence of Chapter 121A.

§17.7. The administration of the Chapter 121A payment. In theory, the Chapter 121A payments are only slightly more complicated than real property taxes; and the added complexity is perhaps justified by the advantages accruing from the use of the Chapter 121A procedures. In practice, however, the payments as presently constituted are an administrative nightmare.

The Administering Agencies. The burden of administering the Chapter 121A payment system is shared by several state and local agencies and offices. The State Department of Corporations and Taxation is, of course, involved in the collection of the excise tax portion of the 121A payments. Other agencies which may participate in the procedures necessary to collect the 121A payments include the redevelopment or renewal agency, the assessor's office, the municipal treasurer's office and the municipal attorney's office.

§17.6. In Boston, the rate of the property tax (196.70 per $1,000) and the usual contract percentage rate (20%) are virtually equal. Accordingly the minimum tax, as derived from the alternate formula, will apply if the annual gross income of the project is less than or equal to the average valuation of the project site for the three years preceding development. Since the dollar amount of the minimum tax remains constant despite a decrease in gross income, to the extent that gross income is less than the prior cash value the tax due under the alternate formula will represent a larger percentage of gross income than would have been required had the contract percentage rate been applicable. For example, if a project in Boston had a 20% contract rate, gross income of $50,000 and a prior fair cash value of $100,000, the $20,000 tax due under the alternate formula would constitute 40% of gross income. As a result, the full benefit of Chapter 121A treatment—a tax based on the taxpayer's ability to pay—would not be realized.

If the property tax rate exceeds the contract percentage, then the annual gross income of the project must also exceed the prior fair cash value in order to avoid the minimum tax and the resultant increased percentage of gross income payable thereunder. Conversely, if the property tax rate is less than the contract percentage rate, then the annual gross income can be less than the prior fair cash value. However, given the tendency of property tax rates to skyrocket while a contract percentage rate remains constant, such a situation is likely to be rather short-lived.
Of all the agencies, only the Department of Corporations and Taxations has a well-defined role, which is to administer the assessment and collection of the 121A excise tax. The administration of taxes is a familiar role for the department and the procedures which govern its administration of other taxes are incorporated by reference in Chapter 121A. As a result, the department is able to fulfill its role without any significant departure from its ordinary routine.

There are, however, two features of the 121A excise which distinguish its administration from the administration of other taxes. First, the calculation of the tax is based in part upon the fair cash value of the project and in part upon the current tax rate. But it is highly unusual for either of these factors to be known and available at the time that the excise tax is required to be filed. As a result, the 121A returns must be filed late (which of course means penalties and interest), or amended and adjusted (which means additional handling for the department, as well as penalties and interest for the project if the tax is underestimated). Second, the tax collected is returned to the city or town in which the project is located rather than added to the general revenue fund of the Commonwealth. This feature, however, does not create any administrative problems for the department.

The remaining agencies have rather nebulous roles to play. The local assessor is required to determine and certify the fair cash value. The renewal agencies can be expected to collect such contract payments as are tendered them. The municipal treasurer's offices will do the same for transmitted excise taxes as well as for contract payments. The municipal auditor's offices keep books for all the payments. The municipal attorney's offices answer any questions which arise in the course of administering the program. However, none of the agencies or offices has been charged by Chapter 121A with the responsibility to coordinate or direct the various tasks involved in the collection of 121A corporations' taxes.

§17.7. 1 G.L., c. 121A, §10: "All provisions of chapter sixty-three relative to the assessment, collection, payment, abatement, verification and administration of taxes, including penalties, applicable to domestic business corporations, as defined in section thirty of said chapter, shall be applicable to the excise payable under this section."

2 The fair cash value is a factor in both the principal and the alternate formulas; the current tax rate is a factor in the alternate formula only. See §17.4, supra.

3 Section 10 requires the assessor of each city or town in which a project is located to certify the fair cash value of each project to the state tax commission and the corporation "on or before March first in such year." In practice, the certifications are not available by that time, or even by March 15 when the returns must be filed. The current tax rate is usually not available until mid-summer.

4 G.L., c. 121A, §10: "Said excise shall be distributed, credited and paid to the city or town where the project of the corporation is located."

5 Id. See also note 95, supra.
§17.7 TAX ASPECTS OF URBAN REDEVELOPMENT CORPORATIONS

payments in lieu of real property taxes. No municipal agency is charged with the responsibility of checking annually to see that each corporation has paid both its excise tax and its contract payment; and, if the experience of Boston is typical, no local agency or department has voluntarily assumed the responsibility.

Moreover, it would not be easy for any agency or office to try to assume the responsibility, because no groundwork for such an effort has been laid in Chapter 121A, or elsewhere. There is no provision that the corporations file annual statements of their gross income. There is no provision for the Department of Corporations and Taxation to cooperate

6 Many of the comments, relating to the enforcement or non-enforcement of the contract payments, apply as well to limited dividend provisions.

7 The City of Boston was the only city studied in preparation for this essay. However, conversations with 121A developers having developments in other cities as well as in Boston, conversations with Department of Corporations and Taxation personnel about the reports accompanying the transmittal of excise proceeds to cities other than Boston, and conversations with Boston personnel who claimed to be familiar with the practices of the corresponding departments in other Massachusetts municipalities, support the conclusion that Boston's experience is indeed typical.

8 The Boston Assessor's Office claims to be responsible for coordinating the collection of the payments in lieu of real property taxes. As part of this responsibility, it prepares the certifications of fair cash value which are submitted annually to the state tax commission. As an additional part of this responsibility, it annually calculates the excise payable by each corporation and the contract payment owed by each corporation. In making their calculations of the excise payable, the assessors use the "real" fair cash value which is different from the FCV certified to the state tax commission. They also use income data derived by having the city's assessors ask project tenants how much rent they pay. They use the previous year's tax rate because the current rate (which is used by the Department of Corporations and Taxation) is not available when the calculations are made. Contract data is taken from whatever contracts are on hand without checking to see if a contract is current. They do not check their results with the corporation, the Department of Corporations and Taxation, the city treasurer, or the city auditor. They make the computations because they are responsible for coordinating and enforcing the 121A payments, but they do not check to see if payment is made and have never concluded that a payment was incorrect. It should be apparent that these efforts, however well-intentioned, do not constitute the assumption of responsibility for the coordination and enforcement of the 121A payments in lieu of real property taxes.

9 In the municipality-project contracts, for example, or in the rules established by the Boston Redevelopment Authority pursuant to Section 4.

10 It is interesting to note that BRA-project leases require the submission of an annual audited statement of gross income, when the rent is a percentage of gross income. For example, the lease between the BRA and Back Bay Towers requires the tenant, Back Bay Towers, to submit a statement "showing the amount and in reasonable detail the manner of computation of such [annual rental] payment, which statement shall be prepared on the accrual system of accounting and be certified to the landlord [BRA] by independent accountants of recognized standing selected by the tenant." The lease also authorized the BRA to inspect and to make extracts from the tenant's books, and requires the tenant to retain all records for three years. (The lease is on file at the Boston Redevelopment Authority.)

Published by Digital Commons @ Boston College Law School, 1972
with the municipalities, and to provide them with audited copies of the excise tax return. There is no provision for the municipalities themselves to conduct any audits (as might be required in cases where “gross income” for contract purposes is different from “gross income” for excise tax purposes). There is no provision for uniform dates for payment, or for penalties and interest.

The foregoing examples illustrate the kind of procedural difficulties which might face a volunteer enforcement agency. While these and other difficulties could ultimately be surmounted by a determined agency, careful planning during the drafting of Chapter 121A or during the drafting of the municipal-projects contracts could have avoided the problem. Moreover, careful planning during the drafting of municipal-project contracts for future projects could minimize or eliminate the difficulties as to those projects.

The Administration Time Table. The administration of the 121A payments is also complicated by the sequence of key events. For example, both the fair cash value of the project and the current tax rate of the municipality are factors in the calculation of the excise. But as a rule neither of these figures is available on March 15 when the excise return must be filed.

The excise is, in turn, a factor in the calculation of most contract payments. But if a date for payment is established at all, it usually has no relationship to the time when the excise is determined. For example,

11 The excise payments are periodically forwarded to the municipal treasurer by the state tax commission with a covering letter which lists each corporation’s payment “to the Commonwealth in accordance with Section 10 of Chapter 121A.” See, for example, a letter from C. F. Jaillet, Chairman State Tax Commission, to E. W. Holmes, Collector and Treasurer of Boston, June 9, 1970. (On file at the office of the Treasurer of Boston, City Hall, Boston, Massachusetts 02108.)

Apparently, no municipal department has ever asked to have the payments broken down into excise penalty and interest. Nor has any municipal department requested an explanation of how the excise was calculated. But, if either the break-down of the payment, or the calculation of the excise had been requested it is doubtful that the information would have been made available. Spokesmen for the Department of Corporations and Taxation have consistently taken the position that the break-down and the calculations are confidential information, and that the requirements of confidentiality preclude disclosure to other governmental offices as well as to the public.

12 And, if the problem of authority for the audit should be surmounted, would the volunteering agency have available to it auditors equal to the task?

13 Some of the difficulties which would face a volunteer agency would have existed for even a properly structured agency. For example, no one could have foreseen that the Boston City Clerk would lose about half of the 121A contracts filed in his office, or that the Boston Assessor’s Office would consider its 121A files so secret that it would decline to answer requests for information made by the Boston Mayor’s office, by the Boston Law Department, and by the Boston City Clerk.

14 See note 3, supra. Of course, if the assessor files the certification of fair cash value on time, and if it is clear that the alternate tax would not apply, it is possible to file an accurate and timely return.
§17.8 TAX ASPECTS OF URBAN REDEVELOPMENT CORPORATIONS

the payment may be due on March 30 (which may be before the excise is known), or may not be due until after December 30 (which complicates the bookkeeping and deprives the municipality of the use of the money in the meantime). Ideally, the excise return should not be due before the necessary information is available. The contract payment should be due shortly after the amount of the excise is determined.

The Provisions Administered. Most of the contracts use the basic "x minus excise" formula to determine the amount of the payment. Nevertheless, the variations on the basic formula are numerous.\(^{15}\) In addition, each variation of the formula is subject to individual treatment with respect to dates of payment, number of payment installments, definitions of gross income, verification, and similar factors which would affect either the project's "burden" to pay or the municipality's "burden" to enforce payment.\(^{16}\)

Unfortunately, the individual treatment of these secondary terms adds appreciably to the municipality's "burden" of administrating the contract payments. This burden could be minimized or eliminated as to future projects if the municipality would develop uniform and non-negotiable contract provisions governing these terms. Of course, the basic formula for the payment would remain negotiable.

§17.8. A reappraisal. Chapter 121A has been in operation for ten years or so and it may now be time to re-evaluate at least some aspects of the 121A concept.

The Two Stage Payment. Many of the administrative difficulties discussed in the previous section can be avoided or at least simplified if the municipality develops an administrative plan, defines the project's role in that plan, and then incorporates the plan into its contract with the project. However, the difficulties arising from the flow of tax payments through both state and local governments cannot be resolved simply by agreement between the project and the city or town. A better solution would be to amend the statute to provide for a single payment and a single collection agency. If necessary, the concept of the dual payment—one established by state formula and one established by municipal negotiation—could be retained but there would be only one payment and one collection process.

The Forty Year Freeze. The intended and achieved effect of most municipal project contracts is to freeze the relationship between the city and the project for forty years. The difficulty is that the municipality's role may change drastically in forty years, and as a result its rightful share of the project's income may change. Suppose, for example, that the municipality were to assume a service that is now provided com-

\(^{15}\) See §17.5, supra.

\(^{16}\) Compare, for example, the payment provisions in the contract between The Prudential Insurance Co. and the City of Boston with the payment provisions in the contract between Buse Boston, Inc. and the City of Boston. (The contracts should be on file at the Boston City Clerk's Office, but see note 13, supra. Copies of the contracts are on file at the Boston Redevelopment Office.)
mmercially. Fire protection, and refuse collection are ready examples of services once provided privately and now provided by most municipalities. Under such circumstances, it would seem appropriate to increase the project's contribution to the municipality. However, at present there is no provision for revising the contracts in the event of an altered municipal role.

Unequal Treatment. Of course, the most important reappraisal relates to the real property taxing system which occasions the need for Chapter 121A. The statute treats only the symptoms and not the underlying problem. As a result, the relief it affords is spotty and unequal. What is more, its very existence may relieve just enough discomfort to prevent any concerted effect to re-examine and re-design the prevailing methods of supporting municipal services. Therefore, any reappraisal of Chapter 121A should include the broader and more difficult problems with which it co-exists.