

RE: H. 159 – “Consumer Concerns”

Dear Colleagues:

Below is “Part Two” of my response to the July 1 comments on H. 159:

**1.) My point:** H. 159 provides no mechanism for notifying purchasers of Special District properties of the amount and payment schedule of assessments.

**July 1 Comment:** “The assessing party shall file all schedules of assessments with the appropriate registry of deeds and the municipality’s assessor’s records so that notice thereof would be reported on a municipal lien certificate.”

**My Response:** It is wishful thinking to suggest that H. 159 provides buyers with notice that property in Special Districts is subject to lien, which must be repaid. Such liens are explicitly not held by the municipality. Moreover, municipal lien certificates (MLCs) – typically issued just prior to the closing of a sale of real property – show only amounts which are presently due and payable.

MLCs are not vehicles for disclosure of ongoing financial obligations. Moreover, the MLC discloses unpaid debts of property in anticipation of closing, so that debts can be paid to clear title. A buyer who will have to pay regular assessments in addition to property taxes needs to understand before making an offer on the property, since this debt affects the affordability and mortgagability of the property for the buyer.

**2.) My point:** The bill’s lack of mandatory minimum ratio between value of land and of bonds puts subsequent property owners (as well as bond buyers) at risk from overextension; also, unpaid assessments accelerate foreclosure.

**July 1 Comment:** “We know of no mandated minimum ratio of land value in Massachusetts for any program or any of our fifty states.”

**My Response:** California law, for instance, requires a ratio of 3:1 between land value and value of special district bonds issued for new developments. Standard & Poor’s Public Finance Criteria guidebook (2007 edition) expresses a preference for a ratio “above 7:1 for investment-grade ratings, [which] increase the likelihood of making assessment payments on a timely basis.” (p. 82)

**Further July 1 Comment:** “The establishment of special assessment financing would in fact reduce the foreclosures. First, there is no personal liability with this financing. The only security is the betterment lien on the real the real estate...”

**My Response:** Reduce foreclosures? On developers, perhaps, but certainly not on owners of property encumbered by liens. It is small comfort to property owners unable to keep up with assessment payments that the “only security” for 40T debt is a lien on their real estate. Section 5(a) of H. 159 provides that the lien resulting from unpaid assessments may be enforced by “a civil action brought in the superior court” – under the same statute by which municipalities bring tax title proceedings. The court may then order the sale of the property to satisfy the law.

**3.) My point:** Insufficient nexus in the bill between infrastructure projects bonded and benefit to/debt burden on individual property owners begets dissatisfaction with “unfair taxes” and political pushback.

**July 1 Comment:** “Nonsense! This is a property owner initiated program. Everyone has input at a public hearing and the municipality must approve.”

**My Response:** The reality of Special District financing is that the original property owner may initiate the issuance of debt, but subsequent purchasers pay off the debt through their special assessments.

Additionally, they are paying property taxes to support and maintain the infrastructure used by the other residents of the municipality – who don't pay special assessments. Eventually, special district owners realize that they are paying their own way, unaided, while supporting the rest of the community through taxes.

This realization led to pushback against Community Facilities Districts in California, resulting in significant changes to their 1982 law a decade later (contact me if you'd like a copy of the testimony submitted). Other states that have special district legislation face abuses and unintended consequences (see, e.g. Chapin & Thomas, "Investigating the Community Development District (CDD) Model of Infrastructure Financing" (working paper). Proposed amendments to special district laws become a regular and contentious feature of legislative business. See, e.g. Mitchell & Gyden, "State Legislatures and Residential Development Districts," *Urban Lawyer* (Fall 2003).

**4.) My Point:** H. 159 lacks provisions protecting homeowners in situations when developers default or go bankrupt – also a concern for government, which might feel pressure to "rescue" such projects.

**July 1 Comment:** "H. 159 deals only with infrastructure financing and cannot be used for the commercial or residential buildings themselves. In a special assessment financing, each parcel is responsible only for its [sic] pro rata share of the financing."

**My Response:** These comments are so utterly non-responsive, I can only infer that Mr. Davis concedes that government will indeed feel pressure to bail out projects gone belly-up – just as the Commonwealth will probably have to take over some uncompleted infrastructure responsibilities of the North Point project – the beneficiary of its own special district legislation (Chapter 123 § 114, Acts of 2006: <http://www.mass.gov/legis/laws/seslaw06/sl060123.htm>). Looking nationally, the web site of the California Debt Advisory Commission regularly lists special districts which have had to draw on reserves, or are in default. In a Boston Globe article last month about the bankruptcy filing of Vallejo, California, municipal bankruptcy specialist James Spiotto stated that of 543 municipal bankruptcies since 1937, two-thirds were "small tax districts established to sell municipal bonds for projects."

**5.) My Point:** H. 159 neither requires nor ensures that publicly-subsidized facilities built pursuant to it are publicly accessible.

**July 1 Comment:** "That is not true. H. 159 specifically rules out so-called gated communities."

**My Response:** This bill could have included a requirement of public ownership and access as easily is it precluded investments in gated communities. These are not equivalent provisions, and do not guarantee public benefit from publicly-subsidized infrastructure. Chapin & Thomas cite instances of misuse of special district funds "to pay for improvements that were not open to the public, such as cart paths for private golf courses and members-only community centers and pools," (supra at p. 14) in both Texas and Florida, stating that "a lack of oversight by local governments and by the state allows for potential abuses."

#### **My Response to the July 1 Closing Argument:**

We can agree that the Commonwealth has unmet infrastructure needs without having to agree that H. 159 is the only, the best, or even a desirable way for us in Massachusetts to fund infrastructure. One thing we must always do is to distinguish "needs" from "wants." The task of government is then to prioritize "needs" and schedule their satisfaction as cash flow and bonded debt permit.

Mr. Davis asserts that "No one has a better idea" for building infrastructure than he does, with H. 159. Special assessment financing is not a new idea; one author states that "[l]ocal governments in the U.S. commonly used special assessments to finance public investment until the Great Depression led to widespread defaults and foreclosures on special assessment tax liens" (Shoup, Donald C., "Financing Public Investment by Deferred Assessment," *National Tax Journal*, December 1980, at p. 413). Actually

Shoup's idea of using deferred special assessment seems better than the scheme of H. 159 – but that's a thought for another day.

Studying "modern" special district legislation, such as that of Florida, California, Texas, Arizona, and Nevada could teach us about "best practices" in this area. H. 159 is not that bill, and poses an open-ended hazard in an era of widespread foreclosure and failures of long-established financial institutions.

Thank you for your thoughtful consideration of these observations.

Best regards,

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