



January 30, 2007

Carl E. Axelrod, Esq.
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One Financial Center
Boston, MA 02111

Re: Application of Property Tax to Privatized Military Housing
Our File No. 2005-354

Dear Mr. Axelrod:

This is in reply to your letter seeking confirmation from our office that certain real property being constructed by a private developer on Hanscom Air Force Base (hereafter "Hanscom AFB") will be exempt from local property tax.

We understand from your letter that the United States Air Force (hereafter "Government") entered into an agreement with a private developer, Hanscom Family Housing, LLC (hereafter "HFH"), under the authority of the Military Housing Privatization Initiative (hereafter "MHPI") to replace the existing units of military housing with new units at Hanscom AFB. You informed us that the Government conveyed to HFH a leasehold interest in real property, together with any improvements, which will revert back to the Government upon termination of a 50-year ground lease. The property is located within the boundaries of Hanscom AFB, which is subject to the exclusive jurisdiction of the federal government. Under the terms of the ground lease, HFH will build and operate the on-base housing units, but the Government will control the design of the units, the tenants who will occupy the units, and the rents to be paid by the tenants. You maintain that the replacement housing units that HFH constructs on Hanscom AFB should not be subject to local property tax because the MHPI legislation does not contain congressional consent to the assessment of local property taxes on a private entity's leasehold interest.

The Commissioner of Revenue does not determine the status of property for local tax purposes. Property taxes in Massachusetts are assessed and collected by cities and towns, not by the state. The Lincoln Board of Assessors, as the local tax administrator, has the sole power to determine whether this or any real property located within the town is taxable or exempt. However, we do offer the following comments about whether local property taxes apply in Massachusetts to military family housing built and operated by a private developer on a military base under an agreement made pursuant to the legislative authority of the MHPI.

As we understand it, the Hanscom AFB project involves the lease by the Government of two (2) parcels consisting of four (4) lots located in the town of Lincoln and situated within the boundaries of Hanscom AFB. The Government will convey to HFH by quitclaim deed all Government-owned housing located on the leased premises. The lease of the parcels is subject to and conditioned on HFH's obligation to demolish, design, construct, renovate/rehabilitate,

replace, own, operate, and maintain a rental housing development for use by military personnel assigned to Hanscom AFB and their dependents. The military personnel leasing the housing units will pay rent to HFH. The project will be under the general supervision of the Government, and certain actions taken by HFH will be subject to the Government's approval. At the expiration of the 50-year ground lease, all rights, title, and interests in the property will revert to the Government.

All real property located within the Commonwealth of Massachusetts is taxable unless specifically exempted by statute.¹ The tax is assessed to the person who is either the owner or in possession.² Real property owned by the federal government generally is exempt from local property tax.³ However, under Section 3E of Chapter 59 of the General Laws, property owned by an exempt federal agency may still be subject to taxation on any leasehold interest if occupied by private persons or entities.

The MHPI legislation authorizes the military to convey or lease its land and buildings to a private party who will make housing available to military members.⁴ The MHPI legislation specifically provides that such leaseholds will be exempt from the provisions of 10 U.S.C. § 2667.⁵ That statute governs the leasing of non-excess and underutilized military property generally and before the MHPI provided authority for the military to acquire housing through agreements with the private sector. Subsection (e) of Section 2667 states that "[t]he interest of a lessee of property leased under this section may be taxed by State or local governments."

As you indicated in your letter, the federal government owns Hanscom AFB and exercises jurisdiction over it. This type of area is commonly referred to as a federal enclave. Within a federal enclave, State and local laws are applicable only to the extent that State legislation reserved jurisdiction when the State ceded jurisdiction to the federal government or Congress has granted effect to State and local laws.⁶ In ceding jurisdiction to the land located at Hanscom AFB, Massachusetts did not reserve the right to tax private property located on that federal enclave.⁷ Therefore, Massachusetts may not impose property tax on private property located at Hanscom AFB absent permission of Congress.⁸

¹ G.L. c. 59, § 2.

² G.L. c. 59, § 11.

³ See G.L. c. 59, § 5, Cl. First. This exemption is grounded in federal case law interpreting the Supremacy Clause of the U.S. Constitution (Article VI, cl. 2) as prohibiting a state from levying a tax directly upon the United States. See *United States v. New Mexico*, 455 U.S. 732, 733; 102 S. Ct. 1373, 1382 (1982).

⁴ See 10 U.S.C. § 2871 et seq.

⁵ See 10 U.S.C. § 2878(d).

⁶ See *Ft. Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 537-38 (1885); *Paul v. United States*, 371 U.S. 245, 263-65 (1963); see also *S. R. A., Inc. v. Minnesota*, 327 U.S. 558 (1946); *Kansas City v. Querry*, 511 S.W.2d 790 (Mo. 1974).

⁷ See Mass. St. 1955, c. 347, § 2; Mass. St. 1958, c. 512, § 2; Mass. St. 1965, c. 761, § 2; Mass. St. 1985, c. 456, § 2.

⁸ See *S.R.A. v. Minnesota*, 327 U.S. 558 (1946); *Offutt Housing Co. v. County of Sarpy*, 351 U.S. 253 (1956).

Some military housing programs that involve leases of government-owned land have contained explicit grants of authority for states to impose property taxes in federal enclaves. The MHPI legislation, however, contains no express authorization for states to tax in federal enclaves. You contend that the MHPI legislation was intended to foreclose state taxation of private interests in federal enclaves because, unlike the military leasing program under 10 U.S.C. § 2667, the MHPI legislation does not grant states the right to tax leasehold interests in property on federal enclaves. You point out that the MHPI legislation provides that leaseholds under its authority will not be subject to 10 U.S.C. § 2667.⁹

It seems to us that provision in the MHPI legislation is concerned primarily with the inapplicability of the property leasing and management procedures found in 10 U.S.C. § 2667 to this particular privatized military housing program.¹⁰ Nevertheless, we agree that because the MHPI legislation contains no express authorization for states to tax in federal enclaves the intent may have been to foreclose state taxation of the private leasehold interests held by private developers under the program. We are aware that some developers in other states have received rulings or advisory opinions declaring that property taxes may not be imposed on military family housing built and operated by private developers on federal land under the authority of the MHPI. While we conclude that Lincoln cannot impose local property taxes upon the housing units that HFH constructs at Hanscom AFB, we would emphasize again that the Lincoln assessors will make the determination about the tax status of the property.

We hope that this information is helpful. If you have any additional questions concerning this matter, please do not hesitate to contact us.

Very truly yours,



Kathleen Colleary, Chief
Bureau of Municipal Finance Law

KC/mcm

⁹ 10 U.S.C. § 2878(d)(1).

¹⁰ Section 2878(d) exempts property conveyed or leased under the authority of the MHPI from the limits imposed by Section 2667 which authorizes the federal government to lease non-excess, but under-utilized, property in order to put it to productive use by allowing state and local governments and private sector firms to use it. This exemption is necessary because the MHPI legislation authorizes the Government to convey or lease its land and buildings to a private party. Normally, government agencies cannot sell or donate their property to a selected recipient. Only when other specified recipients have refused the property does it become "surplus" and available to be sold or leased.