

## 1st Circ. Tosses Dispute Over Nonprofit's Housing Credit Deal

By **Theresa Schliep**

*Law360 (October 14, 2021, 6:27 PM EDT)* -- A suit from an investment group contesting an affordable housing not-for-profit's efforts to purchase a housing tax credit project was properly dismissed by a Massachusetts federal court, the First Circuit said, ruling the lower court lacked jurisdiction.

A Massachusetts federal court correctly tossed the legal challenge from AMTAX Holdings 227 LLC, which is controlled by Alden Torch Financial LLC, to the not-for-profit's ability to purchase the Boston low-income housing project from a partnership, the First Circuit said in an opinion Wednesday. AMTAX's challenge to an agreement giving the organization the ability to purchase the project at a discount can't be heard by the federal courts since the dispute has little relevance to the federal government, the opinion said.

AMTAX's "complaint does not challenge — nor even implicate — concrete federal activity (such as an attempt by the IRS to recapture the partnership's tax credits)," the First Circuit said. "And it is questionable whether the outcome of the litigation will have ramifications for other cases."

The case centers on a right-of-first-refusal agreement entered into between a partnership operating the project and Tenants' Development Corp., the low-income housing organization. That agreement allows TDC to purchase the project — consisting of 185 affordable housing units — at the lesser of a third party's offer or the debt attached to the project, plus taxes. The partnership itself was managed by Tenants' Development II Corp., an entity largely owned by TDC.

AMTAX had made a large capital contribution to the project and became a limited partner, which entitled it to close to 100% of the tax credit allotment under Internal Revenue Code Section 42, according to court filings. It later sought to force a sale of the project but reversed course, indicating that it didn't know about the right-of-first-refusal agreement that would essentially allow TDC to purchase the project for a discount.

A \$51 million purchase offer on the project came in, and TDC looked to exercise its rights under the right-of-first-refusal agreement. Under the agreement, TDC would have been allowed to purchase the property for a little over \$17 million, which was the debt plus taxes amount.

In 2019, AMTAX sued, contending that the right-of-first-refusal agreement didn't comply with Section 42. The Massachusetts federal court determined in 2020 that the dispute didn't raise a federal question involving the low-income housing tax credit program and instead focused on state law issues of whether

the agreement between the two parties was followed and ordered the case be dismissed, according to court documents.

The First Circuit agreed Wednesday, saying that Section 42's role in the case didn't mean the dispute implicated the federal government. The fight instead involves a disagreement over a contract, and AMTAX hasn't made a strong enough case that a federal court's input would have an impact on many low-income housing tax credit transactions nationwide, according to the opinion.

And while AMTAX suggested that its case could be considered by the federal courts because of a potential contract violation, it didn't adequately argue that theory, according to the opinion.

David A. Davenport of BC Davenport LLC, who is representing the housing not-for-profit in the dispute, told Law360 on Thursday that the First Circuit's decision delivers an important ruling on the federal courts' inability to consider right-of-first-refusal disputes under Section 42.

"The court confirmed that disputes involving Section 42 [rights of first refusal], which have become all too common in recent years, are contract-based disputes governed by rules of contract construction at their core, and thus do not invoke a federal question for purposes of federal court jurisdiction and are properly reserved for state courts to decide," Davenport said in an email.

In another dispute involving Alden Torch, Homeowner's Rehab Inc. et al. v. Related Corporate V SLP LP et al., a Massachusetts state court determined in 2016 that the not-for-profit could exercise its right of first refusal to purchase a tax credit property without investor consent, and the court dismissed a counterclaim that the not-for-profit breached its fiduciary duty as a general partner by not seeking consent.

The case eventually went to the Massachusetts Supreme Judicial Court, which sided with the not-for-profit in 2018 by determining that Congress' intent behind Section 42 was to facilitate the inexpensive transfer of properties to nonprofit organizations.

A legal representative for AMTAX declined to comment.

U.S. Circuit Judges William J. Kayatta, Jr., Bruce M. Selya and David J. Barron sat on the panel for the First Circuit.

AMTAX Holdings is represented by Louis E. Dolan Jr. and Stephen M. LaRose of Nixon Peabody LLP.

TDC and TD II is represented by David A. Davenport of BC Davenport LLC.

The case is AMTAX Holdings 227 LLC et al. v. Tenants' Development II Corp. et al., case number 21-1043, in the U.S. Court of Appeals for the First Circuit.

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