



**2019 Municipal Law Seminar
WORKSHOP B
Treasurer, Collector and Accountant Issues**

DISCUSSION SUMMARY
(Prepared For Informational and Training Purposes Only)

This summary of the informal discussion presented at Workshop B is provided for educational and training purposes. It does not constitute legal advice or represent Department of Revenue opinion or policy, except to the extent it reflects statements contained in a public written statement of the Department of Revenue (Informational Guideline Release or Local Finance Opinion).

OPEB TRUST FUNDS

In January of 2016, the Town of Asgard met to consider how to start funding their long-term liabilities. To that end, town meeting voted to accept General Law Chapter 32B, § 20 and establish an Other Post-Employment Benefit (OPEB) Trust Fund. Town meeting designated the treasurer, Thor, as the custodian of the Fund and appropriated \$100,000 into it. No action has been taken since. All this occurred prior to the passage of the Municipal Modernization Act and G.L. c. 32B, § 20 has not been re-accepted since.

1. Wealthy local resident, Tony Stark, wishes to make a significant gift to Asgard's OPEB fund. In addition, he convinces the federal SHIELD Agency to match whatever amount he contributes with a grant of their own for the same purpose. Given the above facts, is Asgard permitted to accept this gift and grant for their OPEB Fund? G.L. c. 32B, § 20(b)

There are two ways under the old version of G.L. c. 32B, § 20 to get money into the OPEB Fund (Fund). First, the legislative body (here town meeting) may, by majority vote, appropriate money into the Fund. Second, it may, again by majority vote, dedicate reimbursements that the town receives as a sponsor of a Medicare Part D qualified retiree prescription drug plan. Both actions require the legislative body. However, here we are considering gifts and grants. The old version of the statute is silent about the receipt of gifts and grants. However, under the new, revised G.L. c. 32B, § 20, it specifically states that the treasurer may accept gifts, grants and contributions to the Fund. As the town is under the old version, how would they handle gifts? Under G.L. c. 44, § 53A, a city, town or district officer or department head

may accept a gift or grant of money for the purposes or functions the applicable office or department carries out. Therefore, the gift or grant can be accepted, but by whom? Under the old OPEB law, the Fund custodian for a town is the treasurer unless the custodian is the State Retiree Benefits Trust Fund board of trustees. For purposes of the question, assuming the Fund custodian is the town treasurer, s/he could accept the gift and grant and establish a gift account under G.L. c. 44, § 53A. Under § 53A, gifts are spent without appropriation, with the approval of the selectboard. Therefore, the money in the gift account could be expended by the treasurer, with the selectboard's approval, for OPEB purposes - funding of the employer's liabilities for retirees health insurance. However, the gift funds are not credited to the Fund and may not be appropriated into the Fund. Gift/grant funds under section 53A are not subject to appropriation.

2. Asgard is a member of the Hydra School District. Is it permissible to appropriate an amount to the town's OPEB Fund for the town's share of the RSD's OPEB liability (for RSD employees)? G.L. c. 32B, § 20

No, not under the old version of G.L. c. 32B, § 20 or the new version. The town's OPEB Fund is for the retirees of the town only. If the town desires, its legislative body could vote to establish a special purpose stabilization fund under G.L. c. 40, § 5B to fund its share of the RSD's liability for the OPEB of RSD retirees and appropriate a sum of money into the stabilization fund.

3. With a booming downtown area, commonly referred to as Titan, Asgard is starting to see some significant increases in moneys received from the local sales tax on restaurant meals, pursuant to G.L. c. 64L, § 2. Can this money be dedicated to the OPEB Fund? G.L. c. 64L, § 2; G.L. c. 32B, § 20(b); G.L. c. 40, § 5B

No. The only revenue that can be "dedicated" to the OPEB Fund is Medicare Part D payments. However, the town's legislative body can vote to create a special purpose stabilization fund for OPEB purposes under G.L. c. 40, § 5B and vote to dedicate a percentage (not less than 25%) of the local excise on meals to the stabilization fund. The money in the stabilization fund could then be appropriated into the OPEB fund. Note that there have been a small number of communities who have sought special legislation to allow this type of dedication directly to the OPEB Fund.

4. A rising star in Asgard's local political scene, Loki, is trying to rally support behind appropriating the \$100,000 currently in the Fund to another purpose. Can Town Meeting re-purpose this money? G.L. c. 32B, § 20

This question raises a major reason for why the original OPEB statute was amended. The old OPEB law did not specifically state, as it does in the new OPEB law, that the Fund assets shall be held solely to meet the current and future liabilities of the governmental unit for group health insurance. Although it is clear that OPEB Funds under the new law may not be re-purposed or revoked; it is not so with OPEB Funds under the old law. As a result, it could reasonably be argued that an

OPEB Fund under the old law did not qualify as a trust complying with the legal requirements for trusts under Governmental Accounting Standards Board (GASB) standards. Not only was there no clear statement that the funds could not be repurposed, there was no explicit authority in the old law to create a trust or a requirement to adopt a declaration of trust.

5. Thor has been discussing Asgard's OPEB Fund with Odin, who, as the custodian and trustee of his town's OPEB Fund, invests in the OPEB Fund of another government unit. Thor is strongly considering doing the same for Asgard. Can he? G.L. c. 32B, § 20(k)

No. Participating in the OPEB Fund of another governmental unit is only permissible under the new G.L. c. 32B, § 20. However, under the old OPEB law, there is an option for the town to designate the State Retiree Benefits Trust Fund board of trustees as the Fund custodian and invest the Fund in the State Retiree Benefits Trust Fund.

6. In evaluating the initial town meeting vote, Asgard's counsel realized that their 2016 vote did not actually have quorum. As such, counsel has determined that the 2016 town meeting vote was not validly taken. He has informed Asgard of the need for town meeting to re-accept G.L. c. 32B, § 20. Is Asgard permitted to re-accept the older version of G.L. c. 32B, § 20? G.L. c. 32B, § 20

No. A vote to establish an OPEB Fund on or after November 7, 2016 establishes an OPEB Fund under the new OPEB law.

7. Asgard's counsel has now been charged with researching the effects of re-accepting G.L. c. 32B, § 20. Where can counsel find the old version of the statute? G.L. c. 32B, § 20

In this workbook or through historical records as the old version of the statute will not be re-printed or updated moving forward.

8. What do "health insurance benefits" include? G.L. c. 32B, § 20

Group health insurance benefits may include hospital, surgical, medical, dental and other health insurance benefits if the governmental unit offers that coverage to retirees. This does not include life insurance benefits.

9. A new wave of candidates, known locally as the "Avengers," takes over a majority of the board of selectmen seats. Once in power, they tell Thor he can only invest in a fund that is approved by them and several recommendations are made for him to consider. Thor on the other hand wishes to invest with the State Retiree Benefits Trust Fund. Can the board of selectmen veto Thor's investment decision? If this occurred under the revised G.L. c. 32B, § 20 would the result be any different? G.L. c. 32B, § 20

In short, no. Under the old version of G.L. c. 32B, § 20, the fund shall be invested by the custodian (here, the treasurer) "consistent with the prudent

investor rule established in chapter 203C and may, with the approval of the State Retiree Benefits Trust Fund board of trustees, be invested in the State Retiree Benefits Trust Fund established in section 24 of chapter 32A.”

Under the new version, monies in the Fund “shall be invested and reinvested by the custodian as directed by the investing authority from time to time; provided such investment or reinvestment is made in accordance with: (i) section 54 of chapter 44, if the treasurer or OPEB Fund board of trustees is the investing authority, unless the governing body of the governmental unit authorizes investment under the prudent investor rule established in chapter 203C; (ii) section 23 of chapter 32, if the retirement board is the investing authority; or (iii) sections 24 and 24A of chapter 32A, if the OPEB Fund is invested in the State Retiree Benefits Trust Fund.” The board of selectman, as the executive of the town, does not have the authority under the old or new statute to direct or veto OPEB investment decisions.

Collection of Non-tax Municipal Charges

1. Robert Harper is the sole owner of a single-family house. He is married but has separated from his wife, Mary, who resides in the house with a young child. Harper lives elsewhere in town. Robert has an agreement with his wife that he will pay the real estate taxes and Mary, on her part, will pay the utility bills. G.L. c. 40, § 42A-42B; G.L. c. 40, § 21E
 - A. Mary has not paid her water bills. The bills due November 15, 2018 and May 15, 2019 are outstanding. The town water department sent a demand letter to Robert who told town officials that his wife was responsible for payment of the water bills under their separation agreement. Can the unpaid bills be added to Robert’s fiscal year 2020 real estate tax bill?

Notwithstanding the agreement between the parties, the unpaid water bills can be added to the FY 2020 tax bills. The husband has a claim against the wife for the money.

- B. Assume the unpaid water bills were not added to the FY 2020 real estate tax bill. Can they be added to the FY 2021 real estate tax bill? Could there be a problem with the water liens for unpaid bills?

They could be added to the FY 2021 tax bills, but the lien would not be co-terminous with the real estate tax. The town must make a tax taking promptly since the lien for the water bill due in November 2018 would expire on October 1, 2021 and the lien for the water bill due May 2019 would expire on October 1, 2022.

- C. What is the rule on interest for delinquent water charges?

This a local matter. There should be a by-law or ordinance concerning the number of bills each fiscal year, the due date and the rate of interest on unpaid bills. Once the unpaid bills are added to the tax bill, the interest rate is the rate for unpaid taxes.

2. Seven houses are located on Hiawatha Lane in the Town of York, Massachusetts. The households do not receive water or sewer service from the Town of York. The owners petitioned the neighboring town of Brussels, Massachusetts to allow the owners to connect to the Brussels water and sewer system. G.L. c. 83, § 16A
 - A. The Town of Brussels is receptive to the extension of water and sewer service. Brussels, however, wants to be paid. Can the Town of Brussels impose water and sewer special assessments on the York houses to pay for the extension of the water and sewer pipes? If not, how will Brussels be paid?

The seven owners must pay the Town of Brussels for the installation of the water and sewer pipes, and probably pay prior to construction. There is no extraterritorial betterment provision – Brussels cannot assess betterments in the neighboring town.

- B. The seven houses were ultimately connected to the Brussels water and sewer system. The owners in York paid their water and sewer bills promptly for a few years. Now, some of the owners are not paying their bills. Can the Town of Brussels place liens on the York houses? How can Brussels collect the amounts owed?

The Town of Brussels must sue the owners for payment of the water bills. There is, however, a general law that allows unpaid bills for extraterritorial sewer use charges to be added to York tax bills. Previously, only lighting plants could impose liens on property located outside the borders of the municipality where the plant is located. The Town of Brussels must adopt G.L. c. 83, § 16A; file a certificate of such acceptance in the proper Registry of Deeds and file a copy of the certificate with the collector of the municipality where the lien is to take effect. If procedure is followed, then the unpaid Brussels sewer use charge can be liened to a parcel in York. There is no similar lien procedure for an extraterritorial water use bill. Although the Municipal Modernization Act proposed one, the legislature deleted it and only adopted the process for extraterritorial sewer bills.

3. John Green recently purchased a house in town. At the time of closing a municipal lien certificate (MLC) did not disclose any water liens. G.L. c. 60, § 23; G.L. c. 40, § 42B; G.L. c. 83, § 27; G.L. c. 80, § 12
 - A. Shortly after he moved into the house, the water department informed him there was an unpaid balance for water service. Can the town legally assert

money is owed to the water department? Can the unpaid amount be added to the ensuing fiscal year real estate tax bill?

John should have requested a final meter reading. If the amount due was not a lien as of the issuance date of the MLC, it would not be listed on the MLC. The amount due can be added to the ensuing fiscal year real estate tax bill.

B. A year later, Green saw heavy construction equipment being delivered to his neighborhood. He learned that the town was installing sewer lines and sewer betterment assessments would be owed by each house on the street. Green quickly called his closing attorney and asked whether he would be liable for his share of the cost of construction. His attorney informed him that the town had no lien for the sewer project because of the issuance and recording of the municipal lien certificate. Does the town have a valid lien on Green's property for the sewer betterment?

Yes, if the procedure under G.L. c. 80 to establish the betterment assessment and lien was followed. The sewer commissioners must record in the registry of deeds the order laying out the sewer system, the list of ways in which the sewer lines will be located and that betterments will be assessed. The sewer commissioners should also record a list of owners of all parcels to be assessed a betterment as of the prior January 1 for tax purposes. The recording of the MLC does not release liens for taxes, betterments, assessments and other charges like water and sewer if a separate lien document, a tax taking or a statement to continue municipal lien has been previously recorded or registered. The reason is that the world is put on notice of the existence of the lien by the recording and the law requires that specific instruments must be recorded to discharge these liens. Tax takings are discharged by instruments of redemption under c. 60 § 62, and betterments and special assessments are discharged by certificates under c. 80 § 12.

4. On a cold wintry December day, the Patriots were fighting for a play-off berth. Richard Barnes, an avid football fan, hurriedly cleared snow from his sidewalk and then rushed to his den to watch the game. A town resident who was walking home slipped on the sidewalk in front of Barnes' house. The injured man used his cellphone to contact the police department. A town ambulance was sent to the scene and the victim was transported to the hospital. G.L. c. 40U; G.L. c. 40, § 58

A. The town has established fines for uncleared snow. If Barnes refuses to pay the fine, can the town enforce the fine by placing a lien on the house?

Chapter 40U is a local option statute which, if adopted, allows a city or town to enforce fines imposed for violations of municipal housing, sanitary or snow and ice removal requirements. After acceptance, the municipality must

adopt procedures for the payment of fines and appoint a hearings officer to hear appeals of any fines imposed. A municipality may also use the non-criminal disposition procedures under c. 40, § 21D for the fines. Chapter 40U sets out certain standards for violation notices, fine amounts and appeals. If a fine remains unpaid after 21 days and the alleged violator has not requested a hearing, a nonpayment notice is to be issued with an additional \$10 fee. The notice advises the alleged violator that the fine must be paid within 30 days unless a hearing is requested within 14 days and the alleged violator swears that the original notice was not received. Under c. 40U, § 12 a city or town may make an unpaid fine, together with interest and costs, a lien on the property by following the required procedures.

B. The accident victim has failed to pay his ambulance bill. Can the town place a lien on Barnes' house for the unpaid ambulance bill?

No. There must be nexus between the claim and the property. In this instance, the accident victim who failed to pay the town ambulance bill is not the owner of the property. The parcel is owned by someone else.

5. Questions have been raised about the collection of liens and assessments in connection with condominiums. G.L. c. 40, §§ 42A-E; G.L. c. 183A, § 14

A. A condominium with 60 units receives water and sewer service from the town. There is only one meter for the building. The public works department sent a bill to the condominium association which has not sent payment. How can the town collect the water/sewer bill? Can the town lien the condominium?

The community must adopt c. 40, §§ 42A-42F allowing the municipality to add unpaid water bills to the tax bill. The community can use c. 183A, § 14 to add a lien on each condominium unit to the extent of that unit's percentage interest in the common areas of the condominium. The liens arise automatically by operation of law. In this instance, the public works department certifies the unpaid amount to the assessors who prepare the tax list and warrant for the collector with the unpaid percentage amount added to each unit owner's tax bill.

B. A statement was recorded establishing a lien on an undeveloped parcel in another section of town for a sewer line extension. Subsequently, a condominium in three phases was declared under the recorded master deed. When the town assessed the costs for the sewer project, only one phase of the condominium with 20 units had been completed. The developer retains the right to build two additional phases for 20 units each. Can the town allocate costs to potential units that will not have their percentage interests fixed until amendments to the master deed are filed? What recommendation would you make to town officials?

The community could originally assess the costs on the first phases and impose permanent privilege fees once the potential units are built to share the cost of the sewer system with the benefited properties.

- C. The town made sewer assessments on the potential units. The developer later abandoned plans to build the remaining two phases. Can the town collect the assessments on the unbuilt units?

There is no court case on this subject and the town might not be able to collect amount assessed on unbuilt units.

6. The fire department has raised certain issues with the selectmen. G.L. c. 40, § 58; G.L. c. 139, § 3A; G.L. c. 60, § 77C
- A. The fire chief is concerned about the number of false fire alarms received by his department each year. He would like to assess charges to commercial property which repeatedly issues false fire alarms. The fire chief would also like to lien unpaid alarm charges to the tax bill. How would you advise the fire chief?

The town meeting could adopt a municipal charges lien specifically for false fire alarms. There should be a by-law pertaining to the calculation of the fee, the due date and the interest rate on unpaid bills. If unpaid, these municipal charges must appear on a list recorded at the registry of deeds with the amounts, assessed owners and locations.

- B. The board of selectmen has ordered a business owner to remove a fire damaged mill building. The owner has failed to comply. The town demolishes the building. What can the selectmen do if the owner fails to pay for demolition?

The town paid the demolition company and now seeks reimbursement from the owner. In order to establish a valid lien for the demolition charge, a statement of claim must be recorded at the registry of deeds within 90 days of the date the bill was issued. The statement must indicate the amount claimed for the work, without interest, and be signed by the board of selectmen. If the demolition lien is promptly added to the ensuing fiscal year tax bill, the lien is coterminous with the real estate tax lien. If not timely added, the demolition lien will expire on October 1 of the third year unless the collector makes a tax taking prior to the date of expiration.

- C. What should the town do if the above described mill building is in tax title with the land worth \$75,000 and the cost of demolition is \$100,000?

The town might consider requesting a deed in lieu of foreclosure under G.L. c. 60, § 77C from the owner, which requires town meeting approval.

7. Town officials plan to extend water service to an outlying section of town which contains residences, a nonprofit school and a farm with a farmhouse and 350 acres of classified farmland under Chapter 61A. G.L. c. 61A, § 18; *Williams College v. Williamstown*, 219 Mass. 46 (1914)
- A. Would the nonprofit school be exempt from a water betterment assessment and water user fees? What would be your answer if it was a regional high school?

The private school will be liable for the betterment and the water user charges. The private school is exempt from real estate taxes but can have property subject to a betterment which improves the property's value. The regional high school as a governmental entity is exempt from betterments but liable for water charges and accrued interest on unpaid water bills.

- B. How would the betterment assessment be calculated for the farmhouse and the 350 acres of land?

The farmhouse would be subject to a betterment based upon the uniform rate (example – frontage) or uniform unit (potential units) method. For the 350 acres of classified farmland, however, payment of the betterment is suspended (upon application of the owner) until there is a change in use. Any assessment would be calculated from the change in use.

- C. A few years later, the farmer records a subdivision plan dividing the land into 350 house lots. He informed town officials and the town has opted not to exercise its right of first refusal. What happens to the assessment on the vacant farmland? Can the town agree to subordinate its lien to a mortgage from the developer's bank?

The town has already assessed the betterment on the 350 lots and the documents to perfect the lien were properly recorded. The town cannot subordinate the municipality's interest or lien in the assessed property to the interest of a bank or other third party. The town has a duty to protect the municipality's interest and the collector has a duty to collect the amount owed.

8. A car dealership on a large parcel has been sold to a developer who plans to build a mall and a hotel. The town deemed the existing 8-inch diameter water main built in the 1930s to be inadequate for this large commercial development. The town constructed several improvements to the water system including the installation of 10,000 linear feet of a new 16-inch diameter water main in front of the dealership. G.L. c. 40, § 42G; *Seiler v. Board of Sewer Commissioners of*

Hingham, 353 Mass. 452 (1968); Morton v. Town of Hanover, 43 Mass. App. Ct. 197 (1997)

- A. Can the town impose a water betterment assessment on the parcel for the improvements?

Yes. The benefited parcel could be assessed a betterment to pay for the improvements to the system.

- B. Instead of an assessment, can the town impose surcharges on the new owner's water bills?

Yes. The Appeals Court approved such surcharges in connection with the development of the Hanover Mall.

- C. How else can the town offset the infrastructure costs associated with the new development?

The town could impose a permanent privilege fee.

9. Global warming is a subject which is discussed throughout the world. In the Town of New Castle, Massachusetts the selectmen are concerned about flooding causing severe property damage and contaminating both public and private water supplies. The selectmen seek to construct stormwater drainage facilities to avert such a disaster. G.L. c. 83, § 16; G.L. c. 40, § 39M; G.L. c. 83, § 27; G.L. c. 40, § 39M; G.L. c. 44, § 53F½

- A. Can the town impose a fee or a betterment to offset the cost of construction of stormwater facilities? If so, how would they do this? Could the community impose a real estate tax surcharge for stormwater infrastructure assets?

The community could impose stormwater fees or a betterment under Chapter 83 to pay for construction of the stormwater facilities.

Alternatively, the community could accept G.L. c. 40, § 39M and impose a real estate surcharge to pay for these improvements. Amounts generated by the surcharge are not subject to the levy limits of Proposition 2½.

Acceptance requires approval of the legislative body and the electorate at the next regular municipal or state election.

- B. How would stormwater fees be calculated? If an owner failed to pay the new stormwater fee, how would the unpaid amount be collected?

The charge for stormwater facilities could be a component of the sewer charge or a separate charge. The rate setting body or official for stormwater disposal charges may vary from community to community. The stormwater fee could be a multi-tiered fee system based on the amount of impervious

area within a parcel. The community would have to adopt a local stormwater by-law to establish the charges. If unpaid and the city/town's legislative body has accepted c. 83, § 16A – 16F and followed the procedure in those laws, a lien would arise by operation of law and the unpaid amount could be added to the next ensuing real estate tax bill.

C. How would the community account for stormwater revenues?

The money would be general fund revenue or the town could adopt enterprise funds accounting for the stormwater system as it is in the nature of a utility or it could be part of a sewer enterprise fund if the town has one.

SHORT TERM RENTALS

Small town, Gotham, does not have any hotels or motels. When visitors stay in town they usually reserve a room at the only, but well-managed and well-liked, bed and breakfast. Given the popularity of the bed and breakfast and a lack of a more general commercial lodging market demand, Gotham hasn't voted to adopt the local occupancy excise. However, lately, the owner of the bed and breakfast, Bruce Wayne, has noticed a steep decline in his reservations. He learns that several Air BnB rentals have popped up in town and are taking much of his business. Since the bed and breakfast is a local institution and Bruce Wayne is a prominent citizen of Gotham, town meeting votes to implement a tax on the Air BnB occupancies, exclusively. They also vote to accept only the second of two short-term rental local option impact fees which applies to short-term rental units located within a two- or three-family dwelling that includes operator's primary residence, imposing further costs upon certain types of short-term rentals.

An idea takes hold at town meeting to dedicate 100% of the short-term local option impact fees receipts to a newly created special purpose stabilization fund to purchase crime enforcement gear and dedicate 20% of the general Air BnB occupancy tax to Gotham's OPEB stabilization fund.

Bruce Wayne also proposes a by-law to further regulate the Air BnB rental market. The by-law requires certain local licenses, inspections and limits the number of potential short-term rental operators. It also requires operators pay their taxes directly to the town, in cash. The by-laws are passed by town meeting as written. The meeting took place on May 31, 2019 and the language of all votes indicated they would go into effect immediately (assuming Attorney General approval under G.L. c. 40, § 32).

What, if anything, did Gotham do wrong and right here? G.L. c. 64G, § 3A; G.L. c. 64G, § 3D(a); G.L. c. 64G, § 3D(b); G.L. c. 64G, § 3D(c)

- 1. You can't just tax Air BnBs or short-term rentals in general. Under the Massachusetts Constitution, cities and towns have no power to tax except such power to tax that the legislature gives them through general or special laws. So, assuming no special legislation, to tax room occupancies, the town must accept G.L. c. 64G, to impose a local room occupancy tax. And it would**

apply to short-term rentals, hotels, motels, beds and breakfasts – everything that the state room occupancy applies to. A city/town cannot pick and choose the room occupancies that will be subject to the tax. As a result, it would not be possible to exempt the bed and breakfast, which is taxed under G.L. c. 64G. You can accept the local option room occupancy excise and tax all the room occupancies covered by the state excise or don't accept the local option and tax none.

2. There are two local option impact fees specifically related to short-term rentals. The first is on professionally managed units and the second on owner-occupied two- or three-dwelling units. If the city or town has not adopted the local room occupancy excise, it cannot adopt any local option impact fee. And, if the community has not adopted the first local option impact fee, it cannot adopt the second. So here, on top of needing to accept G.L. c. 64G, the town would need to accept the first local option impact fee in order to accept the second.
3. The revenue from the local option community impact fees is already partially restricted. Thirty-five percent (35%) of the impact fee must be dedicated to affordable housing or local infrastructure projects. As a result, thirty-five percent of the local option community impact fee revenue must be credited to a “receipts reserved for appropriation” account for affordable housing or local infrastructure projects. A legislative body vote will be required to appropriate the funds in this account for either affordable housing or local infrastructure projects. The remaining 65% will be general fund revenue of the city or town and may be appropriated for any municipal purpose. So - in this case, 100% of the local option impact fee cannot be dedicated to any stabilization fund as 35% is already reserved. But, if the town chooses, it they can dedicate the remaining 65% of the local option fee to a stabilization fund pursuant to G.L. c. 40, § 5B.
4. Under IGR 17-20, after a city, town or district has accepted the fourth paragraph of G.L. c. 40, § 5B, its legislative body may vote to dedicate an allowable revenue source to a stabilization fund by a two-thirds vote. The vote must include the (1) specific revenue source being dedicated; (2) the percentage of that revenue source being dedicated, at least 25 percent; and (3) the stabilization fund into which the revenue source is being dedicated. A separate vote should be taken for each dedication. Here, the town did not dedicate enough to the OPEB stabilization fund to qualify under the statute. The 20% dedication would need to be raised to 25%.
5. A city/town may adopt an ordinance or by-law to regulate operators (of short-term rentals) registered with DOR. We suggest that cities and towns work with their local counsel if they wish to adopt a local by-law or ordinance. As part of that by-law, the town can regulate licensing, inspections and the number of local licenses. But they cannot require the operator pay the local tax or impact fee directly to the town; the statute requires the local excise and local option impact fee be paid by the operator directly to DOR and DOR distributes the local share to the city or town. Payments to cities and towns are made by DOR on a quarterly basis. Under

the Home Rule Amendment to the Mass. Constitution, a city/town may not adopt a bylaw/ordinance that conflicts with a general law.

- 6. The effective date of local excise is the first day of the calendar quarter following 30 days after acceptance or the first day of a later calendar quarter if the later date is specified in the acceptance vote. Here the first day of the calendar quarter after 30 days from the May 31 vote would be July 1. Additionally, short-term rental taxes did not start until July 1, 2019 (for which a rental contract was entered into on or after January 1, 2019). So Gotham would have to wait for the local options to go into effect on July 1, which is also the start of when short-term rentals can be taxed. That is – if they had done everything correctly.**

MARIJUANA REVENUES

There has been much public discussion about the money that a city or town can receive from marijuana establishments in the community.

1. What kinds of revenue can a city or town receive? G.L. c. 64N, § 3; G.L. c. 94G, § 3(d)

The community can impose a local excise up to 3% on the retail sales of marijuana for adult use. The community can also negotiate impact fees (up to 3%) under a community host agreement with both a marijuana establishment and a medical marijuana treatment center.

2. What is the accounting treatment of the revenue? G.L. c. 64N, § 3; G.L. c. 94G, § 3(d)

General fund revenue.

CASINO REVENUES

Gambling was legalized throughout the Commonwealth and the first approved casino will be in Stephen King City, which directly abuts the Town of Derry. The town administrator of Derry, seeing the chance to remedy some of the fears of the citizenry, along with their other surrounding communities, starts to negotiate a “Surrounding Community Agreement” with the casino. The idea was to mitigate the casino’s impact on Derry and contribute to Derry’s efforts in turning its town around. The agreement calls for, among other things, the following:

- An annual payment of \$325,000.00 to enable Derry to promote the use of its MBTA Station as a "transportation hub" for casino guests, invitees, employees and/or vendors through mutually agreed upon promotional materials and improvements (including, without limitation, safety upgrades, improved lighting, fixtures, signage and beautification efforts). This will also include significant upgrades to its sewer system.

- An annual payment of \$100,000.00 to assist businesses in effectuating aesthetic upgrades and enable them to participate in the opportunities that will be available because of the "transportation hub."
- An annual payment of \$250,000.00 to fund staffing and other public safety initiatives.
- An annual payment of \$125,000.00 to the Pennywise Community Fund. The administrator of the Town of Derry agrees to establish a committee tasked with reviewing requests for assistance from qualified organizations and making determinations on the awarding of any portion of the Community Fund Payment.
- For general street and sidewalk repair, caused by exploding red balloons, a one-time payment of \$1,000,000.00.
- An annual payment of \$25,000.00 to a charity of choice by the board of selectmen, (whose favorite cause currently is related to cure for amnesia).
- On-going general annual payment of \$250,000.

1. Can these payments be handled in a separate special revenue account? G.L. c. 44, § 53

No. All money received or collected from any source by a city, town or district belongs to its general fund and can only be spent after appropriation unless a general or special law provides an exception. Here, there is no general law that provides an exception. All funds unless otherwise specified by statute are general fund revenues and must be appropriated by town meeting. Derry could, however, seek special legislation to allow special fund treatment for some or all of these payments.

2. Can these payments be considered gifts? G.L. c. 44, § 53A

No. The payments are not gifts because they are made in consideration of a municipal contract or regulatory approval. A payment made by a private party to a municipality in connection with a regulated activity, contract or other municipal action is not a gift, donation or grant within the meaning of and for the purposes of G.L. c. 44, § 53A. These payments lack the donative intent that is an essential characteristic of a genuine gift. A gift is a voluntary payment of money or transfer of property made without consideration. In this case, the developer is giving the payments as a condition of approval of their project. DLS has consistently taken the position that even if the municipality has a contractual obligation to spend the amount paid for the designated purpose, in the absence of a statute permitting the payment to be treated otherwise, it must still be accounted for as general fund revenue and an appropriation is needed to authorize the expenditure.

3. How else could these payments be treated? G.L. c. 40, § 5B

If the mitigation payments are being paid over a number of years, the municipality might consider dedicating this revenue stream to a stabilization fund, pursuant to G.L. c. 40, § 5B, for the purposes for which the payments are being made or seek special legislation for special fund treatment.

4. Can these payments be treated as estimated receipts? G.L. c. 59, § 23

That depends. See DLS Bulletin 2019-1, which discussed whether short-term rental or marijuana revenue could be added to the recap as estimated receipts. “It is the Bureau of Accounts’ (Bureau) position that forecasts for property taxes, local receipts (page 3 of the tax recap), and state aid should be conservatively based on historical trend analyses and that municipalities use generally accepted forecasting techniques and appropriate data. Under G.L. c. 59, § 23, estimated receipts ‘shall not exceed the aggregate amount of actual receipts received during the preceding fiscal year from the same source, except with the written approval of the commissioner....’ Since marijuana and short-term rental revenue are new and there is no historical information available to help with forecasting future revenue, DLS will be requiring written documentation for any estimated marijuana and short-term rental revenue.”

5. What, if any, concerns do you have about the payments to assist businesses in effectuating aesthetic upgrades and the Pennywise Community Fund? Anti-Aid Amendment. Art. 18, § 2, as amended by arts. 46 and 103

The first is a prohibition against the giving of money or property by a city or town to or in aid of any individual, association or corporation embarking upon any private enterprise. This prohibition is referred to as the Anti-Aid Amendment. Art. 18, § 2, as amended by arts. 46 and 103. This amendment prohibits the use of public money or property by cities and towns for the purpose of maintaining or aiding any institution or charitable or religious undertaking that is not publicly owned. The kinds of expenditures barred by the amendment are those that directly and substantially benefit or "aid" private organizations in a way that is unfair, economically or politically. The prohibition against using public funds for private organizations would apply to grants, contributions or donations made by a city or town to an organization for the purpose of supporting or assisting its operations. However, the Anti-Aid Amendment does not preclude a city or town from purchasing specific services from private organizations in order to carry out a public purpose. Further, as with the public purpose limitation discussed above, if an expenditure is for a public purpose but incidentally benefits a private organization, the expenditure generally will not violate the Anti-Aid Amendment.

6. What are folks’ thoughts on the annual payment to a charity of the selectboard’s choice? Anti-Aid Amendment. Art. 18, § 2, as amended by arts. 46 and 103

In the general sense of land use or zoning mitigation agreements, the argument could be made that the exaction should be directly related to the project being proposed. Otherwise, it may not be allowable. This exaction is seemingly outside the scope of the project and would potentially have nothing to do with the casino or casino operations. The anti-aid amendment arguments above could apply here as well.

TRANSPORTATION NETWORK (TNC) REVENUES

We are all familiar with ride-hailing services like Uber and Lyft. These companies through their activities also generate revenue for many municipalities.

1. How is revenue from these companies derived? Chapter 187 of the Acts of 2016

Uber and Lyft pay a \$.2 per ride assessment to the Commonwealth Transportation Infrastructure Fund. 50% of the Fund is distributed to cities and towns based on the number of rides originated in each community.

2. What is the accounting treatment of the revenue? Chapter 187 of the Acts of 2016

The money is to be credited to a receipts reserved for appropriation account.

3. Are there restrictions on expenditures? Chapter 187 of the Acts of 2016

To spend the monies in this fund, a legislative body appropriation is required and expenditures are limited to address the impact of transportation network services on municipal roads, bridges and other transportation infrastructure.

4. Are there reporting requirements? Chapter 187 of the Acts of 2016

Municipalities that receive distributions from the Commonwealth Transportation Infrastructure Fund must submit a report to the Transportation Network Company Division of the DPU not later than December 31 of each year. The report must detail the allowable transportation-related projects conducted, including amounts spent or planned to be spent for such projects.