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Alan LeBovidge
Commissioner

Gerard D. Perry
Deputy Commissioner

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Affordable Housing Valuation Issues

by Kenneth W. Gurge, Esq.

This article addresses some of the issues that arise in attempting to determine the fair cash value of affordable restricted single-family homes for property tax valuation purposes. Most issues relating to the property tax valuation of subsidized or affordable housing remain open questions in much of the country and particularly in Massachusetts. In the case of large subsidized housing projects even more complex issues arise. Capitalization rates, rent subsidies and federal tax credits further complicate the valuation question. However, those issues are beyond the scope of this article, which instead focuses on issues surrounding single-family homes. While the general principles underlying the controlling Massachusetts law in this area are clear, application of those principles to the unique and sometimes contradictory situations that exist in the arena of subsidized or affordable housing is murky at best. The lack of a legislative resolution or an established body of case law in this field means that for the time being those involved in this process can do no better than estimate what the "right" answer may be.

The starting point for property tax valuations is found in M.G.L. Ch. 59 Sec. 38. The valuation standard is fair cash value. This means "fair market value" (FMV), which is the price a willing buyer would pay to a willing seller on the valuation date with neither being under any compulsion to buy or sell. *Boston Gas Co. v. Assessors of Boston*, 334 Mass. 549, 566 (1956). Under this standard, it also is clear that governmental restrictions on the return a property can produce must be taken into account in valuing the property. *Community Development Co. of Gardner v. Assessors of Gardner*, 337 Mass 351 (1979). In addition, privately imposed restrictions, such as may be placed in a deed, must also be considered. *Trueheart, et al. v. Assessors of Montague*, ATB 1999-158 (April 21, 1999), citing *Mashpee Wampanoag Indian Tribal Council, Inc. v. Assessors of Mashpee*, 379 Mass. 420, 422 (1980) and *Parkinson v. Assessors of Medfield*, 398 Mass. 112, 116 (1986). However, if a restriction is temporary or affects only the current owner rather than the fee simple interest in the property, it generally should not be considered. *Pepsi-Cola Bottling Co. v. Assessors of Boston*, 397 Mass. 447 (1986); *Donovan v. Haverhill*, 247 Mass 69, 72 (1923).

Although there have been many single-family affordable housing programs implemented over the years in Massachusetts, most have had certain elements in common. Typically, these programs allow qualifying persons to acquire a first home at a price below FMV. Often, there also is a mortgage interest subsidy involved, though this subsidy may have to be paid back from the proceeds of any subsequent sale of the property. Additionally, the sponsoring agency or entity generally has a right of first refusal to purchase the property when its owner sells. There also usually is a cap on the return that the owner may receive upon resale. These restrictions are designed to maintain the stock of affordable homes. They are almost universally accomplished through deed restrictions on the property.

Historically, the right of first refusal has always been exercised, except in the case of bureaucratic oversight. Theoretically, however, they are not required to be exercised and a subject property could "escape" to the open market. There even have been instances where the right of first refusal expired after a certain period, for example 10 years. Originally, these programs were sponsored by governmental or quasi-governmental agencies. More recently, private, non-profit entities with varying levels of ties to federal or state agencies have entered the field.

Clearly, a willing buyer would be unwilling to pay FMV for a property if the maximum return that could be achieved on resale is capped well below FMV. However, what if the cap expired after a period of years? Or, what if the landscape — legal, regulatory or factual — changed generally or with respect to a particular property or locality such that

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Inside This Issue

From the Deputy Commissioner

One way for cities and towns to establish or modify an organizational structure and define relationships among officials, boards and commissions, is to adopt a charter or revise one that already exists. A "charter" refers to a written instrument that defines the government structure under which a city or town operates.

Under the Home Rule Amendment to the Massachusetts Constitution (Amendment Article 89) and the Home Rule Procedures Act (M.G.L. Ch. 43B), cities and towns can form a charter commission to adopt or revise a charter. Communities may also adopt or amend a charter by a special act of the state Legislature with approval by the governor.

Charter provisions can address issues of elected versus appointed officers and boards. The budget process, capital planning steps, the elements of employee performance evaluations, as well as the responsibilities of municipal officials, are often set out in charter provisions.

A charter has become the preferred vehicle, over bylaws, to achieve long-term continuity and stability in government. For more information, refer to the Financial Management Assistance section of the Division of Local Services website (www.mass.gov/dls). Proposed charters or charter amendments must be submitted to the Attorney General for his opinion as to their consistency with state law. For more information, click on www.mass.gov/ago/sp.cfm?pageid=1024.

Gerard D. Perry
Deputy Commissioner

Legal in Our Opinion

Relocating Easements

by James Crowley

The Supreme Judicial Court recently changed the Massachusetts common law rule concerning the relocation of easements. Previously, a servient estate (i.e., an estate burdened by an easement) could not relocate an easement without the consent of the dominant estate (i.e., the easement holder that benefits from an easement). In *M.P.M. Builders, LLC v. Dwyer*, 442 Mass. 87 (2004), the Supreme Judicial Court adopted the more modern position in the Restatement of Property and declared that a burdened property owner may relocate an easement if certain criteria are satisfied. This decision may benefit property owners seeking to develop their land.

M.P.M. Builders LLC (M.P.M.) received approval in 2002 from the Town of Raynham to subdivide its land into seven house lots. An abutter, Leslie Dwyer, purchased his parcel in 1941 and by deed received an easement across M.P.M.'s land. The location of the easement was described in the deed as a "right of way along the cartway to Pine Street." The cartway allowed access to M.P.M.'s property at three separate places. There was no language in the deed regarding the relocation of the easement, and Dwyer's easement blocked M.P.M. from developing three of the seven planned house lots. For this reason, M.P.M. offered to construct, at its expense, two new access easements to Dwyer's property. Dwyer would thereby retain an easement over M.P.M.'s parcel and all seven house lots could be developed. Dwyer, however, refused to allow the relocation of the easement since he was satisfied with the right of way used by him for the past 62 years.

M.P.M. then filed for a declaratory judgment in Land Court pursuant to M.G.L. Ch. 231A seeking to relocate the easement without Dwyer's consent. The Land Court judge believed he was bound to follow established common law principles. The judge ruled that once an easement location has been fixed, both parties (dominant and servient estates) must consent to a change in location. The Land Court ruled in favor of Dwyer. M.P.M. immediately appealed to the Supreme Judicial Court.

The issue to be decided by the Supreme Judicial Court was whether the owner of the servient estate (M.P.M.) could relocate an easement without the easement holder's (Dwyer) consent. In support of its position, M.P.M. cited the Appeals Court decision of *Lowell v. Piper*, 31 Mass. App. Ct. 225 (1991). In *Lowell*, the operators of a cranberry bog held by deed an easement to maintain certain components of a water and electric power system for the bog "at their present location" on the defendant's land. The defendant (Piper) sought to relocate the water system. The Appeals Court agreed that the changes sought by Piper were not precluded by the deed provided that the relocation would not interfere with the plaintiffs' right to a substantially unrestricted flow of water to their bog. The standard of review in *Lowell* was whether the relocation would result in a "material increase in the cost or inconvenience" to the easement holder's exercise of rights. To avert a situation where an easement holder either blocks or significantly impacts a parcel's development, M.P.M. requested that the Supreme Judicial Court take a progressive approach and adopt the rule proposed by the American Law Institute in the Restatement (Third) of Property (Servitudes) Section 4.8 (3) (2000), which states in pertinent part:

Unless expressly denied by the terms of an easement, … the owner of the

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Focus

on Municipal Finance

An Analysis of the Treatment of Municipal Revenue

by Kathleen Colleary, Esq.

Increasingly over the past few years, the Division of Local Services' (DLS) legal and accounting staffs are asked if certain payments made to cities and towns may be reserved for a particular purpose. With limited general revenues and tight budgets, municipalities are looking to raise additional revenue for particular purposes and want to know if a special fund can be used for those monies.

This article discusses the treatment of municipal revenue under Massachusetts law and looks at the following three categories of payments municipalities receive frequently:

- Payments made by developers, or parties to an agreement with the municipality, for a particular purpose.
- Cash payments from developers or vendors to secure performance of obligations, so-called performance deposits.
- Donations or other monies received from municipal fundraising activities.

Overview

One of the most fundamental principles of municipal finance in Massachusetts is established by M.G.L. Ch. 44 Sec. 53. It creates the basic rule that all revenues from any source are unrestricted general revenues available for expenditure for any valid municipal purpose after appropriation by the municipality's legislative body. Any analysis of the treatment of a particular receipt begins with this statutory presumption that any money received by any department or officer in the regular course of municipal business belongs to a common pool of financial resources referred to as the general fund, and spending priorities for those resources are established through the budget and appropriation process.

There are many exceptions that permit particular receipts to be segregated into a separate, special fund. However, any exception to M.G.L. Ch. 44 Sec. 53 must be created by another statute, either a general law or special act that applies to the particular city or town. A special fund cannot be created by the selectmen, mayor, finance director, or department head, a vote of the legislative body, or bylaw or ordinance. *Chart 1* (on page 5) includes a list of the general laws that create some type of special fund.

Chart 2 (on page 6) is a summary of the different treatments of municipal monies that are permitted by various general laws. This article looks at "special revenue" funds, which are funds where particular receipts are earmarked and restricted for expenditure for particular purposes. Special revenue funds include:

- Receipts reserved for appropriation, where the earmarked revenues have to be appropriated;
- Revolving funds, where the earmarked receipts can be spent without appropriation; and
- Gifts and grants, which can be spent without appropriation.

Payments by Developers and Vendors for Designated Purposes

Mitigation payments, infrastructure charges or other exactions made by a private party in connection with a regulatory activity or a municipal contract are often the subject of a bylaw or ordinance. Examples include:

- A property owner who has a permit application pending before the conservation commission and as a mitigation measure agrees to make a "donation" to the conservation fund for the purchase of conservation land.
- A developer of a commercial property makes a payment required under the town's zoning bylaw in lieu of having sufficient parking spaces with the monies to be used for the acquisition, improvement and maintenance of municipal parking.
- A cell phone company that is leasing town-owned property for its equipment agrees to give the town a one-time or annual "gift" in addition to its lease payments.

The parties often characterize these payments as gifts, grants or donations. Under M.G.L. Ch. 44 Sec. 53A, genuine gifts or grants to a city or town department are segregated from the general fund and may be spent by the department head without appropriation for the purpose specified by the donor, but with the approval of the selectmen or mayor. These types of payments are rarely genuine gifts or grants, however. They do not come within the ordinary definition or meaning of a gift, which is a voluntary payment of money or transfer of property made without anything in consideration. Even if a party's decision to develop a property, engage in a regulated activity or contract with a municipality is one of choice, these payments are usually being made with the expectation of receiving something valuable in return. If the payment is a condition of receiving some privilege or benefit, or paid in return for some municipal action or authorization, it is not a voluntary donation or gift and the funds belong to the general fund regardless of the parties' characterization.

In a recent bylaw review, the attorney general took the same position regarding payments made by a developer for storm drainage and traffic light infra-

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structure under a bylaw that were to be deposited in a "special" gift account to fund the operation, maintenance and repair of the infrastructure.[1] The attorney general ruled that the bylaw was inconsistent with state law regarding the treatment of receipts under M.G.L. Ch. 44 Sec. 53 because the payments were not gifts.

There is a mechanism by which a municipality can reserve these payments for the identified purposes in the future, however. Under M.G.L. Ch. 40 Sec. 5B, a municipality may establish multiple stabilization funds for different purposes. By establishing a fund under that statute and appropriating the amount of the payment into the fund, a community can achieve the objective of reserving or saving these monies for use for a particular purpose in the future.

Performance Deposits

Performance deposits, which are also often the subject of a bylaw or ordinance, are cash payments made to secure performance of obligations, typically by developers or municipal contractors. For example, a bylaw may require a cash deposit to be held by the treasurer to secure restoration of a public road way under a street opening permit, or completion of work required under a drainage or driveway permit within two years of issuance. The intent is to hold the deposit and refund it if the work is performed, but if there is a default, for the municipality to use the funds to complete the work itself.

These arrangements make practical sense, but no statute generally governs when a third party escrow or surety is not used and cash is paid directly to the municipality to be held to secure performance. The only statutes dealing with these deposits apply to city contracts, M.G.L. Ch. 43 Sec. 29, and cash deposits of less than $100,000 that are accepted in lieu of performance bond to secure installation of infrastructure required by a municipal planning board under the subdivision control law, M.G.L. Ch. 41 Sec. 81U.

Two recent attorney general bylaw review letters provide guidance in structuring the deposits in order to make them consistent with the general rule that receipts belong to the general fund.[2] Officials should work with municipal counsel so that the deposits are not received by and do not belong to the municipality unless and until there is a default, *i.e.*, they are not subject to M.G.L. Ch. 44 Sec. 53 until that time. This requires having clear standards for defining default. Counsel would also advise about any liability issues with having the treasurer act as the escrow agent, so that a third party escrow might be considered instead. If there is a default, an appropriation is required before any expenditure may be made to complete the work.

Gifts, Fundraisers and Trusts

DLS is often asked how to handle many small contributions a community may receive when it is accepting donations for a particular project. For example, the parks department wants to refurbish a playground and is raising money to help pay for the new improvements and equipment. People are sending in small checks for the project. These payments are gifts under M.G.L. Ch. 44 Sec. 53A, but it is impractical to create a separate gift account for each payment. The accounting officer can create a consolidated gift account to accumulate the many smaller and general contributions for the same identified purpose. Some formal title or designation should be given to the account, *e.g.*, the "Yourtown Park Playground Project," and the specific spending purposes identified. Donors can then identify their contributions for that account fully aware of the purpose and terms and conditions of the gift. The formal designation can be made by the applicable board or officer, or a vote of the legislative body, for example if it appropriates money for the project, but sets a condition that a certain amount must be raised in gifts first.

Communities also ask how they can establish their own trust funds, *i.e.*, declare certain municipal revenues are held in trust. A community cannot create its own trust. A trust is created by a donor who gives a gift to the municipality in the form of a trust, which would typically mean there is some trust instrument or specific instruction authorizing a specified municipal trustee to hold the donated monies in trust. Typically, trusts are used when the gifts are given with the intention that they be continuing, *i.e.*, accumulate interest and that the municipality spend from the annual earnings for particular purposes.

There are some statutory special funds commonly called trust funds because they hold particular funds in a fiduciary capacity. An example would be perpetual care funds, which are paid by a person buying a plot in a municipal cemetery, with the interest to be used for the perpetual care of the plot. The local scholarship fund is another, with the primary source of revenue being voluntary contributions (gifts) made by taxpayers when they pay their property tax or excise bills.

A community does not create a trust, it administers one created by a donor, or established under a statute for particular receipts.

Summary

Any money received by the community belongs to the general fund and can only be spent by appropriation under M.G.L. Ch. 4 Sec. 53. Only another statute, either general law or special act, can authorize a different treatment for any particular revenue. If there is a statute permitting a different treatment, local officials must follow the specific requirements of the statute in accounting for and spending the revenue. ■

1. Case 3157, Bellingham (December 22, 2004).
2. Case 3171, Plainville (February 22, 2005); Case 3130, Sharon (December 13, 2004).

List of Special Funds and Citations

Enterprise Revenues

Water Surplus: G.L. c. 41 §69B
Landfill/Trash Collection Charges: G.L. c. 44 §28C(f)
Landfill Closure Reserve: G.L. c. 44 §28C (f)
Enterprise Funds: G.L. c. 44 §53F½
Electric Light Receipts: G.L. c. 164 §57

Temporary Funds (Expire at Year's End)

Reserve Fund: G.L. c. 40 §5A (cities); G.L. c. 40 §6 (towns)
Free Cash: G.L. c. 59 §23
Overlay Surplus: G.L. c. 59 §25

Revolving Funds (No appropriation needed)

Arts Lottery Council Monies: G.L. c. 10 §58
School Lunch Fund: c. 548 of the Acts of 1948
School Rental Receipts: G.L. c. 40 §3
Performance Bond Forfeitures (up to $100,000 by local option): G.L. c. 41 §81U
Expedited Permitting: G.L. c. 43D §3(h)
Police Special Detail: G.L. c. 44 §53C
Parks and Recreation Fund: G.L. c. 44 §53D
Departmental Revolving Fund: G.L. c. 44 §53E½
Planning/Zoning/Health Boards Consultants Fund: G.L. c. 44 §53G
Anniversary Celebration: G.L. c. 44 §53I
Affordable Housing Trust: G.L. c. 44 §55C
Culinary Arts Programs: G.L. c. 71 §17A
School Day Care Receipts: G.L. c. 71 §26C
Student Athletic and Activities: G.L. c. 71 §47
Student Activity Agency: G.L. c. 71 §47
Community Schools Programs: G.L. c. 71 §71C
Adult Continuing Education: G.L. c. 71 §71E
Use of School Property: G.L. c. 71 §71E
Non-resident Students' Tuition: G.L. c. 71 §71F
METCO Reimbursements: G.L. c. 71B §12
Vocational Education Programs: G.L. c. 74 §14B
School Choice: G.L. c. 76 §12B(O)
Law Enforcement Trust: G.L. c. 94C §47
Wetlands Protection Fund: G.L. c. 131 §40; c. 43 §218 of the Acts of 1997; c. 194 §349 of the Acts of 1998
Multi-community Yard Waste Program: c. 179 of the Acts of 1993
Millennium/Centennial Celebration: c. 59 of the Acts of 1998
School Bus Advertising Receipts: c. 184 §197 of the Acts of 2002

Other Special Purpose Funds (Held-over from Year to Year)

Self-Insurance Health Fund: G.L. c. 32B §3A
Stabilization Fund: G.L. c. 40 §5B
Pension Reserve Fund: G.L. c. 40 §5D
Unemployment Compensation Fund: G.L. c. 40 §5E
Ambulance Receipts Reserved: G.L. c. 40 §5F
Beach and Pool Receipts Reserved: G.L. c. 40 §5F
Golf Course Receipts Reserved: G.L. c. 40 §5F
Skating Rink Receipts Reserved: G.L. c. 40 §5F
Waterways Improvement Fund: G.L. c. 40 §5G: G.L. c. 60B §2(i)
Conservation Fund: G.L. c. 40 §8C
Recycling Commission Fund: G.L. c. 40 §8H
Building Insurance Fund: G.L. c. 40 §13
Workmen's Compensation Fund: G.L. c. 40 §13A
Parking Meter Fees: G.L. c. 40 §22A
Off-street Parking Receipts: G.L. c. 40 §§22B & 22C
Commission on Disabilities Fund: G.L. c. 40 §22G
Bond Proceeds: G.L. c. 44 §20
State Highway and Water Pollution Funds: G.L. c. 44 §53
Insurance/Restitution Proceeds (up to $20,000): G.L. c. 44 §53
Lost School Books/Industrial Arts Supplies: G.L. c. 44 §53
Grants and Gifts: G.L. c. 44 §53A
Sale of Real Estate Proceeds: G.L. c. 44 §63
Community Preservation Fund: G.L. c. 44B §7
Overlay: G.L. c. 59 §§25 & 70A
Local Education Fund: G.L. c. 60 §3C
Scholarship Fund: G.L. c. 60 §3C
Low Income Seniors and Disabled Tax Relief Fund: G.L. c. 60 §3D
Civil Motor Vehicle Registration Fines Receipts Reserved: G.L. c. 90 §3½(c)
Weight and Measure Fines Receipts Reserved: G.L. c. 98 §29A
Educational/Instructional Materials Trust Fund: G.L. c. 71 §20A
Cemetery Sale of Lots Fund: G.L. c. 114 §15
Cemetery Perpetual Care Funds: G.L. c. 114 §25
Spay and Neuter Deposits: G.L. c. 140 §139A
County Dog Fund: G.L. c. 140 §172
Building & Fire Code Enforcement Fines Receipts Reserved: G.L. c. 148A §5

Chart 1

Treatment of Municipal Revenues

General Fund Revenues (Estimated Receipts)

Unrestricted revenues, including property taxes, state aid and other local revenues available to support general government operations. Revenue belongs to the general fund unless otherwise provided by statute. M.G.L. Ch. 44 Sec. 53.

Special Revenue Funds

Particular revenues that are earmarked for and *restricted* to expenditure for specified purposes. Special revenue funds include receipts reserved for appropriation, revolving funds, grants from governmental entities and gifts from private individuals and organizations. Special revenue funds must be established by statute.

Receipts Reserved for Appropriation

Receipts from a specific revenue source that by law are *accounted for separately* from the general fund (segregated) and must be spent *by appropriation*. Examples are:

Parking Meter Receipts: G.L. c. 40 §§22A–22C

Sale of Real Estate: G.L. c. 44 §63

Waterways Improvement Fund: G.L. c. 60B §§2(i) & 4; G.L. c. 40 §5G

Sale of Cemetery Lots: G.L. c. 114 §15

County Dog Fund: G.L. c. 140 §172

Revolving Funds

Receipts from a specific revenue source that are *accounted for separately* (segregated) from the general fund and may be spent *without appropriation* to support the activity, program or service that generated the revenue. Examples are:

Arts Lottery Council Fund: G.L. c. 10 § 58

School Rental Receipts: G.L. c. 40 §3

Parks and Recreation Revolving Fund: G.L. c. 44 §53D

Departmental Revolving Fund: G.L. c. 44 §53E½

Planning/Zoning/Health Boards Consultants Fund: G.L. c. 44 §53G

Anniversary Celebration Fund: G.L. c. 44 §53I

Student Athletic and Activity Fund: G.L. c. 71 §47

Wetlands Protection Fund: G.L. c. 131 §40; c. 43 §218 of the Acts of 1997; c. 194 §349 of the Acts of 1998

Trust and Agency Funds

Fiduciary funds segregated from the general fund to account for assets held by the city or town in a *trustee capacity* or as an *agent* for individuals, private organizations, other governmental units, etc. These include expendable trust funds, non-expendable trust funds, pension trust funds and agency funds.

Examples of *Trust Funds* are:

Scholarship Fund: G.L. c. 60 §3C

Local Education Fund: G.L. c. 60 §3C

Educational/Instructional Materials Trust Fund: G.L. c. 71 §20A

Cemetery Perpetual Care Fund: G.L. c. 114 §25

Examples of *Agency Funds* are:

Police Outside Detail Fund: G.L. c. 44 §53C

Student Activity Agency Account: G.L. c 71 §47

Sporting License Receipts: G.L. c. 131 §18

County Dog License Receipts: G.L. c. 140 §172

Enterprise Funds

Funds segregated from the general fund to account for services financed and delivered in a manner similar to private enterprises where costs, direct or indirect, of providing the goods or services may be financed or recovered primarily through user charges. Where the service is not fully financed by fees, it provides information about the level of general fund subsidy of the service. M.G.L. Ch. 44 Sec. 53F½ (formerly M.G.L. Ch. 40 Sec. 39K).

Appropriated Special Purpose Funds

Statutory funds to account for allocation of general revenues by the appropriating authority to particular purposes. Examples are:

Reserve Fund: G.L. c. 40 §5A (cities); G.L. c. 40 §6 (towns)

Stabilization Fund (unrestricted): G.L. c. 40 §5B

Pension Reserve Fund: G.L. c. 40 §5D

Unemployment Compensation Fund: G.L. c. 40 §5E

Conservation Fund: G.L. c. 40 §8C

Overlay (annual accounts): G.L. c. 59 §25

Overlay Surplus (balances): G.L. c. 59 §25

Chart 2

Getting a Grip on Health Benefit Costs

by J. Richard Johnson

You've heard the bad news. You've seen the projections. You know, approximately, how much more your organization will pay in 2006 for health benefits than last year. But is this steep uphill march inevitable, year after year? Can you do anything today to ease the financial burden tomorrow to help you address other pressing fiscal priorities?

Yes — if you're prepared to devote time, thought and energy to the task.

The first step involves understanding what's driving costs and employees' use of medical services. While many forces are at work, a few tell much of the story — and point to strategies to get a grip on costs:

The obesity "epidemic." Medical costs for the obese are sharply higher (56 percent in 2002, for example) than for the non-obese. And, the prevalence of obesity among U.S. adults hit 30 percent in 2000 — *twice* the rate only five years earlier.

The age wave. It's no surprise: Older people incur greater medical costs than younger ones. And, the aging Baby Boom generation is driving up utilization of medical services.

Health plan designs. Many popular health plan designs inadvertently encourage employees to go to the doctor and take prescription drugs to excess.

"Direct-to-consumer" (DTC) drug marketing. Pharmaceutical companies increasingly are targeting the public. Their investment in DTC ads grew from $166 million in 1993 to $3.3 billion a decade later. Not surprisingly, sales of prescription drugs have also grown dramatically.

More uninsured Americans. While most public employers have maintained their health benefit plans, the overall percentage of the population with health coverage has dropped. (In 2003, only about 60 percent of Americans were covered by employer-sponsored plans, compared to 63 percent just two years earlier.) Employers that maintain health benefits inevitably contribute to the care of the uninsured.

Some other trends and developments set the stage for action steps to get a handle on health costs. Perhaps most notable — while not surprising — is that yesterday's managed care plan designs lack the cost-reducing potential they once had. For example, HMOs used to appeal to younger, usually healthier employees and were effective in managing care efficiently. But the original HMO patient population is older now, and HMOs are struggling with many of the same cost issues as the traditional insurance carriers 20 years ago. Also, consolidation among managed care companies and provider networks is removing some of the industry's competitive dynamic that once constrained inflation rates.

Another key trend — the boom in sophisticated health care technology — is simultaneously increasing the quality and cost of many medical services, from diagnostic procedures to "designer drugs" to administrative functions, such as prescription processing.

Add it all up, and public employers are left with opportunities to benefit from medical progress, as well as to combat underlying cost drivers. At the top of the list: spurring employee wellness and healthy lifestyles. The benefits can be huge: Healthy workers not only require less medical care, but are more productive on the job. Yet the difficulty of making significant progress in this area requires a thoughtful, long-term and multi-pronged effort. A few points to keep in mind:

- The effort should begin with individual health risk appraisals to identify problems early, educate employees and help them manage their health issues.
- Employees cannot be forced to abruptly abandon unhealthy lifestyles, but instead should be rewarded for trying — and demonstrating progress.
- Public employers have unique, but not insurmountable, challenges in health promotion that must be factored in. Among them are the fact that their worksites are often widely dispersed, making it difficult to achieve critical mass for health promotion activities and classes.

Aggressive health education and promotion programs can be coupled with "consumer-directed" health plans (CDHPs), which are beginning to gain acceptance from public employers for some of their employee groups. These designs feature high deductibles and tax-sheltered health savings accounts to prod workers to set aside dollars for medical expenses incurred prior to hitting the deductible threshold.

But, any significant changes in health benefit designs should only be made following a fresh review of your goals for the health benefit plan. This involves answering such questions as:

- What is the purpose of our health benefit program?
- What is our philosophy regarding sharing financial responsibility and risk with employees?
- Is our strategy appropriate given the demographics of our workforce today?
- What forms of compensation are most appropriate to our human resource strategy?

With those and similar questions resolved, you can proceed to lay the foundation for a health benefits package that holds the promise of rationalizing cost trends and giving you breathing room to begin to tackle other fiscal challenges. ■

J. Richard Johnson has more than 25 years of experience in working with state and local government health and welfare plans as well as pension and deferred compensation benefit plans, executive benefits and strategic benefit planning. He can be reached at 202.833.6470 or rjohnson@segalco.com.

Editor's note: This article represents the opinions and conclusions of the author and not those of the Department of Revenue.

Sagamore Rotary Project Update

by John Cogliano, Secretary of Transportation

For decades, the Sagamore Rotary has been notorious for traffic accidents and overall traffic congestion. For many years, it has been the highest accident location in Barnstable County. In addition, the accident rate in and around the rotary is five times the state average, with 269 incidents occurring between 1999 and 2001.

When the rotary was built in the 1930s, it was designed to handle 40,000 cars a day, but as many as 90,000 cars use it now. Furthermore, local residents, primarily from the village of Sagamore Beach in the Town of Bourne and the entire Town of Sandwich, have been trapped and inconvenienced, unable to access local roads on a regular basis.

The Sagamore Rotary Improvement Project is not only designed to make travel to and from Cape Cod safer and easier, but also to improve the landscape and other physical characteristics in the vicinity of the rotary. Since the official groundbreaking ceremony took place on December 3, 2004, the project is well underway and is on schedule for completion in late 2006/early 2007. The project consists of a grade separation between the Route 6 (Scenic Highway) and Route 3, and the replacement of the Sagamore Rotary with a modern highway interchange. The project is being constructed under five separate contracts with a total construction value of approximately $48 million. To complete this project, several buildings in the surrounding area had to be demolished and relocated.

The major purposes of the Sagamore Rotary grade separation are:

- To increase capacity, reduce congestion and improve the flow of traffic through the Sagamore rotary and on the State Route 3 and U.S. Route 6 approaches to the rotary.
- To reduce congestion and improve the flow of traffic on local streets in the area of the rotary, and to improve the flow of cross-town traffic during peak traffic periods.
- To minimize "cut-through" traffic on local roads from Route 3 Exit 2 seeking to avoid rotary-induced backups on Route 3 by increasing capacity and reducing congestion at the rotary.
- To reduce the incidence of traffic accidents at the rotary and approaches through improved geometrics and eliminating conflicting traffic movements.
- To improve or maintain access to abutting commercial and residential properties by separating regional and local traffic flows.
- To improve local and regional air quality by reducing congestion.
- To provide for improved pedestrian flow between abutting residential areas and the business area and to provide for improved bicycle traffic patterns through the rotary area with a connection to the Cape Cod Canal bicycle path.
- To provide a new centralized Park and Ride facility.
- To improve area aesthetics at one of the "Gateways to Cape Cod" by relocation of the highly visible MassHighway Maintenance Depot, and also provide a comprehensive landscape improvement program.

The Sagamore Rotary Improvement Project entails much more than making it easier to get on and off of Cape Cod. It is about eliminating an obsolete, dangerous intersection that handles more than double the amount of traffic it was originally designed to accomodate. ■

Editor's note: This article represents the opinions and conclusions of the author and not those of the Department of Revenue.

View of Sagamore Rotary prior to construction. Picture courtesy of Boston.com.

Affordable Housing Valuation Issues **continued from page one**

there was some likelihood of the right of first refusal not being exercised. In these cases a property tax valuation limited to the capped resale price, as in the Appellate Tax Board's *Truehart v. Montague* case, would not be appropriate.

Similarly, as non-governmental sponsoring entities with more and more attenuated connections to government agencies enter the field, does the legal basis for valuing a property below FMV diminish? Private, voluntary contractual restrictions do not have the same legal force historically as governmentally imposed restrictions. Additionally, from the municipal taxpayers' point of view, there is a fairness issue involved. The situation will often arise where two identical properties in the same town might be assessed at $300,000 and $150,000, respectively, where the latter is subject to affordability restrictions. This means that one homeowner would pay only half the property tax paid by the other. Yet, the cost of municipal services that each receives is the same.

On the other hand, private deed restrictions limiting the value of property have been judicially recognized, so the government/non-government distinction may not be dispositive. As to the fairness issue, one could argue that property taxes are paid, in part, for the benefits and privileges of ownership, and one of the most significant of those privileges — the right to benefit from appreciation in the value of the property — is greatly diminished in the case of the affordably restricted property. Finally, since the Legislature has indicated a level of support for these programs on public policy grounds, and the courts and the Appellate Tax Board have thus far recognized these public policy intentions in the limited number of decisions rendered in the field, it seems likely that the trend to uphold values below FMV in this context will continue for the foreseeable future. ■

Kenneth W. Gurge is principal in the Law Office of Kenneth W. Gurge and is the former Chairman of the Massachusetts Appellate Tax Board.

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New Census Bureau Data

According to estimates released by the US Census Bureau in December 2005, Nevada's population increased by 3.5 percent between July 1, 2004, and July 1, 2005, marking the 19th consecutive year that Nevada has been the fastest-growing state. The nation's population rose by 0.9 percent (2.8 million people) over the period, to 296.4 million.

The South and West monopolized the list of the fastest-growing states; Idaho, Florida, Utah, Georgia, Texas, North Carolina, Delaware and Oregon rounded out the top 10.

Oregon replaced New Mexico on the list of the top 10 fastest-growing states this year. The South now accounts for 36 percent of the nation's total population, with the West comprising 23 percent, the Midwest 22 percent and the Northeast 18 percent. California remained the most populous state in the nation with 36.1 million people in 2005. The second and third most populous states were Texas (22.9 million) and New York (19.3 million).

For the second consecutive year, however, Massachusetts lost residents. Updated figures from the Census Bureau indicate that from 2003 to 2004, Massachusetts lost 10,183 residents. According to the 2005 Census data, another estimated 8,639 residents have departed. Since April 2000, Massachusetts ranks as the third slowest growing state in the nation. ■

Easements **continued from page two**

servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not (a) significantly lessen the utility of the easement, (b) increase the burdens on the owner of the easement in its use and enjoyment, or (c) frustrate the purpose for which the easement was created.

Agreeing with the plaintiff, the Supreme Judicial Court held that the Restatement offered a "sensible development in the law" that balances the rights of the parties and was now expressly adopted as the common law in the Commonwealth. In the court's view, if an easement holder could veto the development of the servient estate by refusing permission to relocate the easement, then the easement would take on the character of a possessory interest rather than being merely a right of way.

According to the court, unless there was an express prohibition against relocation in the instrument creating the easement, the parties should attempt to come to agreement or risk a court-imposed result. The owner of the servient estate had no self help remedy and must seek a judicial resolution of the dispute in accordance with the three criteria set forth in the Restatement quoted above. In the court's view, however, litigation was preferable over a remediless situation.

In *Dwyer*, the court established the rule that the owner of a parcel burdened by an easement may not unilaterally relocate the easement but may, under certain circumstances, successfully seek a judicial resolution, even if opposed by the easement holder. On the other hand, still unchanged in the Commonwealth is the rule that the holder of the easement may not relocate the easement without the permission of the burdened estate. ■

DLS Update

New Name for DLS Legal Bureau

Kathleen Colleary, Esq., has announced a name change for the Division of Local Services' (DLS) legal bureau that more accurately reflects the types of services this bureau provides. The name has been changed from Property Tax Bureau to Bureau of Municipal Finance Law.

The Division's attorneys are specialists in municipal tax and finance law. They interpret new laws and respond to the legal concerns of local officials in those areas. Under the previous name, however, the bureau received numerous inquiries that did not relate to legal issues.

Deputy Commissioner Gerard D. Perry said that, "This new name will best serve the interests of the Division of Local Services as well as local officials and other taxpayers. We believe it provides a better idea of the types of matters these attorneys handle on a daily basis."

Tax Credits for Film Industry

Governor Mitt Romney has signed a bill into law that provides the film industry with tax credits designed to attract movie and television production to Massachusetts. The tax incentive program reduces the cost of producing motion pictures to help expand the state's film business.

"Grab your popcorn and soda, because Massachusetts is ready for its close-up," said Romney. "Movie and television production has increased dramatically over the past 10 years and we want to get a piece of that growth by encouraging producers, directors, and crews to do their jobs right here in the Commonwealth."

Under the new measure, filmmakers who incur at least $250,000 of production costs in the Commonwealth will be eligible for income and corporate excise tax credits equal to 20 percent of the total Massachusetts payroll for the film, excluding salaries of $1 million and higher.

In addition, filmmakers who site more than half of their total production in Massachusetts or expend more than half of their total production costs here will be eligible for a 25 percent tax credit for all Massachusetts production expenses, excluding payroll.

Finally, filmmakers who expend over $250,000 in Massachusetts production costs in any one-year period will be eligible for a sales tax exemption. The total credits available for any one production are capped at $7 million.

New Law Covers School Costs Associated with Smart Growth

Governor Mitt Romney signed legislation on November 23, 2005, that will reimburse communities for increased education costs incurred when families move into new housing built within designated smart growth districts.

In the past, some cities and towns have been reluctant to add family housing, citing the increased costs that follow such growth. The new law ensures that the state provides reimbursement for additional school costs related to new smart growth development.

The measure approved by the governor complements zoning reform legislation signed into law last year to provide financial incentives to communities that build new housing in smart growth overlay zoning districts near transit stations, town centers and other infrastructure-rich locations.

"We applaud Governor Romney and the Legislature for this major step forward to provide positive incentives to cities and towns to adopt smart growth overlay zoning districts," said Geoffrey C. Beckwith, executive director of the Massachusetts Municipal Association. "Communities want to grow their housing stock while ensuring that they will be able to deliver a full range of basic services to their new residents, including quality schooling — Chapter 40S addresses this key concern. Today is a very good day for local government and everyone concerned about sustainable growth and progress."

Smart growth, or sustainable development, seeks to direct growth to areas where it makes the most sense: in and around city or town centers; near transit stations; or in areas that were previously developed for commercial, industrial or institutional uses. Growing in these locations allows cities and towns to take advantage of existing infrastructure and utilities.

Lieutenant Governor Kerry Healey applauded the bill signing and pledged to "continue to work with municipalities to provide incentives that encourage growth and development." ■

DLS Profile

DOR Problem Resolution Office Chief

Tanya Harrison

The Department of Revenue (DOR) seeks to ensure that taxpayer issues and concerns are addressed in an equitable and expeditious manner. Since coming to work for DOR in 1995, **Tanya Harrison** has played an important role in helping to achieve this objective.

Throughout her career at DOR, Tanya has worked for offices that fall under the purview of the Taxpayer Advocate, which provides many forms of assistance to taxpayers in resolving problems with DOR. Currently, she heads the Problem Resolution Office (PRO), which is made up of three distinct units:

- The Tax Administration Unit addresses complicated tax matters that have not been resolved through normal administrative channels within DOR. This unit is also responsible for handling inquiries from elected officials and DOR employees regarding their own tax matters.

- The Child Support Enforcement Unit addresses complicated child support matters that have been referred by the Commissioner of Revenue, the Governor's office, members of the Legislature, and federal, state, and local governmental agencies.

- The Special Research Unit is responsible for coordinating tax checks for new hires at DOR, gubernatorial appointments and new hires for the various constitutional offices.

Tanya said that staff in PRO are fortunate in that they "get to see matters through." In other words, they work on problems from the time they are brought to their attention until some sort of resolution has been reached. She also observed that while tax related matters tend to be somewhat "cut and dry," child support problems have an emotional element. Tanya said she enjoys working on both types of matters.

In addition to her duties as head of PRO, Tanya was recently assigned supervision of DOR's Publishing Services Office, which writes, designs, and produces a wide variety of material, including over 200 tax forms and schedules, taxpayer guides, and newsletters.

Originally from Lee and Lenox, Tanya received a bachelor's degree in business management from Simmons College. She currently resides in Hopkinton. ■

Course 101 DVD Reminder

The Division of Local Services' Course 101, the basic course for assessors, is available in DVD format.

The Course 101 DVDs may be used for:

- Assessors and others who cannot attend a regular classroom offering of the course due to disability, illness and/or other personal circumstances other than travel distance.

- Course 101 participants who do not pass the examination and would like to review the DVD version as a refresher.

- Internal training for assessors and their staff.

For information on how to obtain copies of the DVD version of Course 101, please contact Donna Quinn at quinnd@dor.state.ma.us. ■

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Joan E. Grourke, *Editor*

To obtain information or publications, contact the Division of Local Services via:
- website: www.mass.gov/dls
- telephone: (617) 626-2300
- mail: PO Box 9569, Boston, MA 02114-9569