



DLS

DIVISION OF LOCAL SERVICES
MA DEPARTMENT OF REVENUE

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2021 Municipal Law Seminar WORKSHOP B Proper Municipal Expenditures and Special Funds

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.

For information concerning public purpose please see the “[Ask DLS: Public Purpose Expenditures](#)” section of the August 5, 2021 edition of *City and Town*. For information concerning the anti-aid amendment please see pages 23-24 of [Informational Guideline Release \(IGR\) 2019-14](#) and for a review of home rule and pre-emption see DLS publication “[What is Home Rule](#)” dated January 2020.

PART I:

Question #1:

The City of Bourbon is on the brink of celebrating it’s 350th anniversary. It establishes an incorporation celebration special fund pursuant to [G.L. c. 44, § 53I](#) and appropriates \$100,000 into the fund to pay for festivities at the anniversary’s signature gala event. The City of Bourbon, founded by the cousin of “The Father of Bourbon” Elijah Craig, wants to honor that heritage by purchasing 10 barrels of Kentucky’s finest to be enjoyed by gala guests. Is this purchase permissible?

In short, no. [G.L. c. 44, § 58](#) prohibits a city or town from paying a bill incurred by any official for wines, liquors or cigars. This language reflects an explicit legislative disapproval of spending municipal resources for these purposes.

DLS has advised, however, that alcohol and tobacco can be purchased for the limited purpose of compliance testing for law enforcement or public health purposes. For example, local officials may stage purchases of alcohol or cigarettes by minors from local stores using money for anti-smoking or underage drinking campaigns. Those expenditures would not be prohibited because they are not for consumption but to ensure compliance with local regulations and state statutes.

Question 2:

Upon hearing that the City auditor and legal counsel advised against using the special fund from Question 1 to purchase the 10 barrels of bourbon, a descendant of Elijah Craig makes a gift in the amount of \$5,000 to the anniversary committee. Noting the express language in [G.L. c. 44, § 58](#) prohibiting liquor and cigars, the descendant conditions his gift to the purchase of beer and cigarettes. As the funds are no longer from a City appropriation and for products not expressly named in the statute, can the purchase be made from the gift account?

[G.L. c. 44, § 58](#) states that “No city or town shall pay a bill incurred by any official thereof for wines, liquors or cigars.” It’s not clear whether [G.L. c. 44, § 58](#) is limited to such expenditures from public funds, as opposed to private donations. Its proscription against paying for “wines, liquors or cigars” is not, however, by its terms based upon the funding source; it is a prohibition against paying any such bills incurred by public officials. This prohibition may hold true despite the funding source. Although the statute does not forbid, by name, beer or cigarettes, DLS has noted that we think this statute forbids the purchase of alcohol or tobacco generally given the context in which this statute was passed.

Question 3:

The accountant in the Town of Compassion is reviewing warrant articles for the upcoming Town Meeting and comes across one that gives them pause. The article seeks to appropriate \$25,000 for the purpose of providing emergency fuel assistance to needy residents. The way the program is envisioned to work is as follows: if the Council on Aging Director receives a request from a resident for assistance, they would call a local oil delivery company and order an oil delivery for the resident. The bill would then be paid by the Town. This program is being put into place since there has been significant cuts in the federal and state fuel assistance programs. Is this expenditure permissible?

DLS cannot conclude definitively that any such appropriation would be clearly unlawful. However, a reasoned argument may be made that the state and federal government has assumed the on-going responsibility for assisting the poor and needy, including fuel assistance, to the exclusion of municipal governments, and that municipalities may appropriate for such purposes only as specifically provided in general or special laws.

At the outset, note that expenditures from municipal appropriations were specifically authorized by G.L. c. 40, § 5(3) "(f) or the relief, support, maintenance and employment of the poor" until 1990 when all the clauses of that statute were stricken. At that time the statute was rewritten to authorize town appropriations "for the exercise of any of its corporate powers; provided that a town shall not appropriate or expend money for any purpose, on any terms, or under any conditions inconsistent with any applicable provision of any general or special law." St. 1989, c. 687, §§ 12 & 25. DLS has generally concluded that this change in the law was not intended to eliminate the numerous municipal expenditure purposes set forth in the clauses, but to continue to include such purposes within the general authorization that remained after the amendment. Prior to the change the Supreme Judicial Court (SJC) in [Anderson v. City of Boston, 376 Mass. 178 \(1978\)](#) had opined that the list of provisions was not an exclusive one and appropriations for other municipal purposes was authorized by the general language of the statute.

Nevertheless, in the case of expenditures for assistance to the poor and needy, the Commonwealth has undertaken a comprehensive scheme at least since Chapter 117 of the General Laws was rewritten by St. 1971, c. 908, taking primary responsibility for public welfare

assistance out of the hands of cities and towns and providing for state liability. Currently [Chapters 117A](#) (Support by the Commonwealth), [118](#) (Aid to Family with Dependent Children) and [118A](#) (Assistance to Aged and Disabled) provide a comprehensive scheme of general public assistance, in partnership with the federal government under several grant programs. One such program is the Low Income Home Energy Assistance Program (LIHEAP). LIHEAP is a federal grant program with the Commonwealth as grantee, which is administered by the state Division of Community Services under the Department of Housing and Community Development in the Health and Human Services Agency of the Commonwealth. These programs are the result of years of legislative and agency consideration, establishing comprehensive eligibility requirements and targeting the persons most in need, given limited resources. An appropriation of municipal funds to provide additional or alternative assistance could be considered counter to the specific intentions of state and federal law.

Question 4:

The COVID-19 pandemic is a declared emergency. In the initial days, folks could be seen hoarding supplies, supermarkets were empty and there was significant concern that the most vulnerable residents in cities and towns would be facing food insecurity and lack access to other common necessities of life. Many communities desired to appropriate funds for these purposes, is that permissible?

In short, yes. There are provisions in the general laws authorizing cities and towns to spend – and even to borrow – money to aid people in need, but only in quite narrow circumstances. [G.L. c. 40, §§ 19 & 20](#) specifically authorize municipal expenditures "for the purpose of maintaining, distributing and providing at reasonable rates during time of war, public exigency, emergency or distress a sufficient supply of food, other common necessities of life and temporary shelter for their inhabitants...", even beyond any legal limit upon the tax rate or debt. These provisions generally call for the supply of such services or articles at cost and reimbursement from the recipients where practicable. Additionally, this is not assistance in the general sense that it is being provided free of charge whenever the need occurs. This is in specific times of a declared emergency with reimbursement of the expenses expected.

Question 5:

The Town of Damon is the home of the prestigious Matt Damon Community College for the Performing Arts. Given the pandemic, the college has experienced an unexpected drop in attendance and the alternative of acting classes via a video platform was not appealing to many students. The Town, in recognition of the financial hardship, would like to appropriate money to the college. Is this permissible?

DLS is not aware of any cases on this question. Community colleges are defined in [G.L. c. 15A, § 5](#) of the general laws. There are 15 of them in the Commonwealth. They are part of the public institutions of the higher education system and an instrumentality of the Commonwealth. Funding is provided for them in the state budget.

[G.L. c. 40, § 14](#) (regarding municipal land acquisitions) was amended in 1967 to specifically permit acquiring land for the purpose of conveying or granting the same to the commonwealth for the use of a regional community college. If legislative authority were not needed to acquire land for this purpose (which would ordinarily require an appropriation), the 1967 amendment would have been unnecessary. The fact that legislation was needed to permit cities and towns to

acquire land for the purpose of conveying or granting it to the Commonwealth for community colleges supports this informal opinion that the state may have pre-empted this field and legislation is needed in order for a city or town to appropriate money to grant it to a community college. Finally, please note that there is also statutory authority for cities and towns to appropriate money for the support of their local housing authority under [G.L. c. 121B, § 19](#). The fact that legislative authority was passed to allow such appropriations supports our general belief that statutory authority is required to enable a city or town to make appropriations for grants to other public entities.

Question 6:

The City of Pawnee, while conducting a review of their charter, contemplates inserting language that would create a Fund for Participatory Budgeting to be overseen by a newly created Office of Participatory Budgeting. Further, Pawnee would like to require certain appropriations into such a fund each year to be spent in accordance with the goals of that office. Is the creation of this fund through Pawnee’s charter process permissible?

Please see the attached DLS opinion file no. 2000-498 dated August 8, 2000 which notes, in part, that: “The general laws (especially G.L. Chs. [40](#) & [44](#)) authorize many special purpose municipal funds at local option. The number and variety of such funds created or authorized by statute lead us to believe that the legislature has preempted the field, so that municipalities cannot create dedicated funds outside the statutory framework without special legislation.”

Question 7:

The residents of the Town of Capeside have been particularly affected by the closing of the local powerplant that employed close to 10% of the Town. In order to help these residents, the Town has instituted a policy that anyone who lost their powerplant job is authorized to fill their private vehicle gas tanks at the Town's gasoline vendor and to charge it to the Town until they are employed again. The Town’s thinking is that if these folks are not able to get new jobs to meet their property tax obligations and contribute to local shops and businesses, it could eventually hurt the Town’s fiscal position. Is this permissible?

Charging the town for a resident to fill his or her gas tank at the town's gasoline vendor appears to be an inappropriate use of municipal funds. Since public money can only be expended for public purposes, cities and towns have no power to appropriate money to persons whose situations may appeal to public sympathy. Here, the expenditure of money is directly for the private benefit of certain individuals and, as such, does not seem permissible under the public purpose doctrine.

Question 8:

After decades of service to the City of Sunnydale, Buffy is retiring from the treasurer/collector’s office. Buffy was a beloved staff member that was universally liked by colleagues and residents alike. She received numerous awards for her dedication to public service. To honor Buffy, the City plans on covering the costs of:

- **Presenting Buffy with a plaque honoring her years of dedicated service;**
- **Presenting said plaque after a banquet style dinner at the City’s finest French restaurant, attendance optional for staff;**

- **Inviting Buffy's family to the dinner, including her 6 children; and**
- **A retirement gift equal to 3 months salary.**

Is the City permitted to do these things?

- Presenting Buffy with a plaque honoring her years of dedicated service:
 - Cities and towns may spend reasonable amounts on retirement gifts, plaques, merit service payments and other similar awards for municipal employees and officials. The expenditure of public money in recognition of services rendered, even though such expenditure of money is directly for the private benefit of certain individuals, is a public purpose where the benefit is conferred as an appropriate recognition of distinguished and exceptional service, such that the public welfare will be enhanced or the loyalty and productivity of the other employees will be promoted. As such, a plaque honoring service seems to be permissible.
- Presenting said plaque after a banquet style dinner at the City's finest French restaurant, attendance optional for staff:
 - The expense of holding a retirement party should be covered from private donations because it is mostly an expression of support and appreciation from colleagues. Here, there is a big concern about the cost being excessive and as the attendance is optional, the event would seem to be social and for private purposes rather than for public ones. Paying for the dinners or party expenses for any attendees other than the retiree would generally be considered a mere gratuity and not for a proper municipal purpose.
- Inviting Buffy's family, including her 6 children:
 - Paying for the cost of dinner for the retiree may be appropriate. However, as noted above, paying for the dinners or party expenses for any attendees other than the retiree would generally be considered a mere gratuity and not for a proper municipal purpose.
- Giving her a retirement gift equal to 3 months salary:
 - Cities and towns may spend reasonable amounts on retirement gifts, plaques, merit service payments and other similar awards for municipal employees and officials. The expenditure of public money in recognition of services rendered, even though such expenditure of money is directly for the private benefit of certain individuals, is a public purpose where the benefit is conferred as an appropriate recognition of distinguished and exceptional service, such that the public welfare will be enhanced or the loyalty and productivity of the other employees will be promoted. Here, 3 months salary seems to fall within the excessive category.
 - Additionally, appropriations for this purpose, when permissible, come directly from a bonus line-item or the functional equivalent and not just the money remaining in a salary appropriation at the end of the fiscal year. They are traditionally pursuant to an internal policy concerning bonuses.

Question 9:

The Town of Hawkins is exploring the creation an economic development funding program and special revenue fund to give loans and grants to private individuals and businesses for use on private property. The purpose of the program would be to encourage and facilitate economic growth, including the creation of jobs, improvement of buildings and increasing the real estate and general tax base in the town. Is this type of program permissible?

This would not seem to be permissible through a local by-law or ordinance. However, it may be possible through special legislation (or if permitted pursuant to a specific general law). [Article 88](#) of the Amendments to the Massachusetts Constitution provides that “The industrial development of cities and towns is a public function and the commonwealth and the cities and towns therein may provide for the same in such manner as the general court may determine.” This means that the legislature could authorize a program for a city or town to give loans or grants to businesses for so-called industrial development. Similar special acts have allowed municipalities to create an economic development funding program and a special revenue fund to fund loans and grants to private individuals and businesses for use on private property. Those Acts have allowed the appropriation of town funds into the special fund for those purposes. But a special act is required to (1) create the special fund and (2) to satisfy Amendment [Article 88](#) of the Massachusetts Constitution. The SJC has indicated that “industrial development” should be broadly construed to include businesses other than manufacturing companies.

Question 10:

A company in the Town of Quohog has filed a Chapter 11 bankruptcy and owes the town both pre-petition and post-petition real estate taxes on their facility, which it used for many years to manufacture asbestos cloth. Because of the asbestos production, the facility probably has levels of asbestos requiring remediation. There may also be other hazardous waste material on the site. As a result of certain Bankruptcy Court proceedings, the town has recently received payment of approximately \$40,000 to be applied to the company’s post-petition tax obligations. However, unless the facility can be sold, no other funds are available for distribution to the town and the property would probably end up being taken by the town for non-payment of taxes. Quohog would like to lend funds to the bankruptcy estate, which would then contract with testing companies to identify the extent of contamination. The loan would be secured with a mortgage to be repaid with interest at the time the property is sold. This arrangement would be subject to the approval of the Bankruptcy Court. The facility, which is located in the downtown area of the town is in substantial disrepair, has been boarded up and presents a serious safety hazard. Can the Town of Quohog loan a manufacturing company funds to have an abandoned facility inspected and tested for asbestos and hazardous waste contamination?

Please see the attached DLS opinion file no. 1994-447 dated May 27, 1994.

Question 11:

In an application to the Community Preservation Committee (CPC), a local church requests funds for the historic preservation of its stained-glass windows in exchange for a historic preservation restriction on the same. The windows date back to the early 1700s and were hand crafted by a famous artist of the era. The church played a central role in the development of the Town but has fallen on hard times. The only way the renovation of the windows can occur is if it is completely funded by outside sources. Objections are

raised that the windows depict religious imagery. The CPC asks you if there is any reason the project cannot be funded?

This hypothetical is loosely based on one of the most recent cases handled by the Massachusetts Supreme Judicial Court concerning the [anti-aid amendment](#), namely [Caplan v. Town of Acton](#). The Court considered the constitutionality of a similar grant by a local CPC and worked through the 3-part anti-aid analysis developed by the court in [Commonwealth v. School Comm. of Springfield](#). First, what is the purpose of the grant? The argument here seems to be clear that the grant is being given for historic preservation, not to support the church. But that is slightly contradicted by the church disclosing it needs the funds (at least partially) to stay afloat. Second, is this considered “substantial” aid? If the aid is minimal it is less likely to violate the anti-aid amendment so the Court looks, in part, at both the amount and degree to which the aid assists the church in carrying out its essential functions. In this hypothetical, the funds would cover the entire cost of the project and therefore would seem to be “substantial” in nature. And lastly, do the funds avoid the political and economic abuses which prompted the passage of the Anti-aid Amendment.

The Court broke this down into three separate risks. Risk of liberty of conscience or a citizen being taxed to support the religious institutions of others. Risk number two, whether the funding would result in improper government entanglement with religion and, three, whether civic harmony would be threatened making the divisive question of religion a political question. The Court concluded in Caplan that the grant being considered would violate the anti-aid amendment as it related to comparable stained-glass windows that contained religious imagery. It offends liberty of conscience by using tax money for a church’s worship space and specifically for stained glass windows that feature religious imagery, it offends government entanglement with religion as the historic preservation restriction that would be required of the grant would make any subsequent renovation subject to government approval and as such intrudes upon the church’s worship space. And lastly, it offends civic harmony by making a question of religion a political question.

Question 12:

Anytown receives a federal grant that must be spent in equal parts for the purposes of: providing income eligible residents with home heating fuel, distributing interest free loans to struggling private businesses for private use and providing funds to aid local non-profit humanitarian organizations. Is Anytown prohibited from making any of these expenditures?

All of these expenditures would be permissible if they are being spent from a gift or grant account but would not be permissible if utilizing moneys raised by the municipality. Where there is no public money whatsoever, it does not seem that public purpose, anti-aid or pre-emption issues would necessarily be a barrier to these expenditures.

In the case of gifts and grants, the Town is acting in the capacity of a custodian of the money seeing that it be spent as intended by the donor or grantor of those funds. These funds are being held in a type of fiduciary capacity. This is distinct from the constitutional and statutory obligations imposed under public purpose, anti-aid or pre-emption doctrines when the proposed expenditures are from funds raised by the municipality.

DLS cautions that municipalities should be wary of accepting gifts or grants that are not for public purposes and have advised that a local non-profit may be better situated to receive and expend funds for purposes that may otherwise be questionable if made by the municipality with public funds. The municipality is under no obligation to accept gifts or grants of this nature. A gift or grant to a town department should be designed to enable that department to carry out some aspect of the public mission it was established to pursue. Additionally, the terms of the gift or grant control the use of the funds in accordance with donor instruction and intent.

Question 13:

Everytown received a grant from the federal government in the late 1990s. The grant money was to be used to give low interest loans to income qualifying persons to remove or otherwise renovate certain hazardous conditions in their homes. Loan payments would become part of the grant fund which would continuously be used to make like loans. Due to a combination of circumstances, including updates in building codes, the loan program has become obsolete. After Everytown didn't receive any applications for a loan in over a decade, they contacted the division of the federal government responsible for the administration of this grant and discovered the division has long been dissolved. The updated information from the federal government is that they no longer consider the funds to be restricted in any way and Everytown can use these moneys as they see fit. When Everytown goes to spend said funds, do they have to adhere to the doctrines of pre-emption, public purpose and anti-aid?

As noted above, funds received by a municipality through a gift or grant are not traditionally subject to pre-emption, public purpose and the anti-aid amendment in the same way as public funds. However, that changes when a previously restricted gift or grant no longer is restricted in any way by the donor or grantor. In such a situation, the money is now more akin to a general bequest to the municipality. In that case, where a gift or grant is made for the general, unrestricted use of the municipality, it is the legislative body that would determine through appropriation the purposes for which the funds may be spent. Since the grant is no longer given to a particular department for particular spending purposes, there is no basis under [G.L. c. 44, § 53A](#) for any officer or department to spend the funds in this case. It follows that money being spent pursuant to an appropriation would be restricted as any other appropriation would be by pre-emption, public purpose and anti-aid. So here, with the removal of all restrictions of the gift or grant, the treatment of the funds is altered.

Question 14:

The school department has inquired if one of their administrative assistants can join the local Rotary Club and charge the approximately \$600.00 annual membership fee to "Incidentals or Gifts and Donations." The Rotary involves students in many of their activities and awards scholarships every year. The Rotary has requested that someone from the school department join and accompany these students to the meetings. The administrative assistant would attend every regular meeting as the school representative. Is this charge to the gift account allowable?

Whether the cost could be charged to the gifts and donations account depends upon the terms of the gifts involved. If the expenditure is within the scope of what the donors contemplated, there would seem to be no problem. If the scope of the donation is unclear with respect to the proposed expenditure, the schools could contact the donors, if they are still available, to seek a

clarification of their intent. The expenditure of the gift account must match the intent of the donor and, especially when gifts are pooled, determination of that intent may become more difficult.

Question 15:

Part of the state government’s response to a recent hurricane includes giving certain grants to local governments for “emergency services.” The expenditure of the grants is restricted to that broadly defined purpose, designed to assist the community in recovering from said disaster. The guidance from the state government indicates that the acceptor of the grant will be the city or town’s chief executive officer. Assuming there is no charter provision to the contrary, what is the main issue that arises in this situation concerning the expenditure of the grant?

For an overview of [G.L. c. 44, § 53A](#) please see “What’s New” 2018 [Workshop C – Special Funds – Community Preservation and other Special Funds](#).

The grant in this hypothetical is to provide emergency services, to be spent by the municipality’s CEO. The express reference to the CEO by the donor of the grant seems to satisfy [G.L. c. 44, § 53A](#)’s reference to grants to a particular officer or department. The purpose of the grant, to pay for emergency services, is broadly consistent with the CEO’s role under [G.L. c. 44, § 31](#) in authorizing deficit spending to deal with emergency threats to public health and safety. However, the difficulty in this situation is that the expenditure for operating purposes is within the authority of some department other than the CEO. If additional funding is needed for police or fire department overtime, for example, the spending would be by the police or fire chief, who would have to assign their employees to overtime duty. In effect, this would require a transfer of funds from the grant account to the police or fire department salary or overtime account, akin to the sort of transfer the finance committee might make from the reserve fund. This is arguably not within the express scope of [G.L. c. 44, § 53A](#), which seems to us to contemplate direct expenditures by officers or departments for purposes within the sphere of their duties and responsibilities. Nonetheless, the underlying rationale for [G.L. c. 44, § 53A](#)’s exception to the requirement of appropriation is that donors or grantors may make spending decisions with respect to money that they provide. Therefore, if the donor intends to permit the CEO to transfer part of the grant to other town departments to carry out the intent of the grant, we think such transfers would be consistent with the purpose of [G.L. c. 44, § 53A](#). It would, of course, be helpful if the terms of the grant were to make that permission explicit.

PART II:

For information concerning departmental revolving funds please see [IGR 2021-23](#).

1. Anytown, MA would like to establish a revolving fund pursuant to [G.L. c. 44 § 53E ½](#) for a kayak program along the beautiful Charlie River. Anytown would like to charge anyone who wants to rent a kayak a \$10/hour fee. The fees received from this program will be used to fund this kayak rental program for the purchase of kayaks, oars, life preservers, sunscreen, snacks, and to pay the part time teenage life guards. Is this allowed?

This kayak program is the exact type of activity that is ideal for a revolving fund. Why?

- a. It fluctuates with demand. As we know in New England a kayak program is going to fluctuate tremendously with demand. This past July may not have been very successful as it was extremely rainy and of course who is going to kayak in the chill of January. However, this September we have had exceptionally beautiful weather so many more residents in town would be likely to want to use it. But as any true New Englander knows, the weather changes on a whim and next summer may be entirely different. This program will always fluctuate with demand, which will be based on the weather, and therefore any attempt to estimate receipts and appropriate for this purpose would be too speculative.**
 - b. The money coming in and on hand is being used to fully fund the entire cost of the program.**
 - c. There is a direct relationship or nexus between the receipt and the expenditure. The money is for participation in the kayak program and being exclusively spent on providing the kayaking program.**
2. The residents of Anytown, MA are very excited by this kayak program especially because Anytown is home to Nationally ranked kayaker Jack Donaghey. Many children in town would love to be like Jack one day. Anytown would like to move forward with their Summertime Kayak Revolving Fund. In the bylaw establishing this fund, councilor Liz Lemon proposes having Jack Donaghey approve all the expenditures of the funds. Is this allowed?

No. First and foremost, we do not think you could use a bylaw to deputize a resident to serve as an overseer of the department head who is in charge of the program as the statute allows the spending power to be conferred upon “municipal agencies, boards, departments or offices” – not Jack Donaghey. But this question is actually more to stress that the reason why revolving funds are so desired by cities and towns is because the revolving fund allows fees, charges or other receipts received in connection with a departmental program or activity to be applied directly, without further appropriation, to support that program or activity. Adding additional roadblocks would seem to frustrate the purpose of the statute.

It’s important to additionally stress that a key feature of the departmental revolving fund statute is that each fund must be authorized by by-law or ordinance. The by-law or ordinance establishing a departmental revolving fund must specifically identify the program or activity receipt to be credited to the revolving fund and clearly specify the purposes for which monies in the revolving fund may be spent.

It is the language of the by-law or ordinance that determines the scope of, and restrictions upon, each proposed departmental revolving fund. Care should be exercised to ensure that the language is sufficiently specific to implement the revolving fund without confusion.

A full list of ordinance or bylaw requirements can be found in [IGR 21-23](#).

3. Anytown's Recreation Department already has a revolving fund established for frisbee in the local park. Can they still establish this Summertime Kayak Revolving Fund when they already have the frisbee revolving fund?

Yes. There is no limit on the number of departmental revolving funds that may be authorized and a single department may have more than one revolving fund.

4. Anytown's Summertime Kayak Program would like to impose a fine for anyone who flips a boat over, intentionally, or intentionally throws someone off the kayak. This would be a \$25 fine. Assuming such a fine is permissible, can it be accounted for in the kayak revolving fund?

What this question is asking is whether or not money received as a fine is a permissible receipt that can go into the revolving fund. Speaking generally, fines or penalties are not usually permissible revolving fund receipts. However, exceptions exist that have seemed permissible if they are very tailored and demonstrate a direct connection or nexus to proposed expenditures. Fines and penalties are not charged for the specific purpose of recovering expenses. By definition, they are imposed to penalize or deter certain conduct. Here, the fine is being used to penalize dangerous kayaking activity as opposed to paying for an expense of the kayak program. As the fines are being used to deter users from being irresponsible and causing further damage to both the users and the kayaks and not to pay for an expense of the program, they do not fall within the scope of a fee, charge or other receipt and therefore could not be accounted for in the revolving fund.

This is in contrast to receipts like "user fees" or "participation fees" that are the receipt noted above.

5. The kayak program has become so popular due to Jack Donaghey being a large supporter and user of the program. The demand has become so high lines are down the dock to get on a kayak. Anytown has decided it would be prudent to hire Tracy Jordan full time and let him be in charge of this program. However, Anytown does not plan on paying Tracy Jordan any type of benefit from the revolving fund besides a salary. Is this allowed?

Assuming Tracy is otherwise entitled to benefits due the amount of hours worked, expenditures may not be made from a departmental revolving fund to pay the wages or salaries of full-time municipal employees unless the revolving fund is also charged for the costs of fringe benefits associated with the wages or salaries paid. So here, as a full-time employee, Tracy's benefits would have to be paid from the revolving fund.

Please note there is an exception to this prohibition, with other stipulations, for wages or salaries paid to full-time or part-time employees who are employed as drivers providing transportation for public school students.

In general, DLS always strongly cautions communities when they are exploring paying full time employees from a revolving fund. As the employment of full-time

employees usually entails other expenses in addition to direct payments (e.g., health insurance, retirement contributions, etc.), which costs may be borne within the general town budget, the compensation of full-time employees should really be provided for by regular budgetary appropriation.

6. Due to how popular this kayak program has become, Anytown has become overwhelmed with the amount of money they have earned and would like to credit some of the receipts to their general fund for other expenses in town that need the funding more than the kayak program. Is this allowed?

No. This seems to defeat the purpose of the revolving fund statute where money coming in should match the money going out. If there is a significant excess, the municipality may be charging too much for the program. Additionally, the money coming in is restricted by the statute and by the bylaw or ordinance and can only be used to support this program and not the general fund.

Further, for each particular program or activity for which a departmental revolving fund is authorized, an account will be established and the charges, fees and receipts described in the authorization vote will be credited directly to the account, rather than local estimated receipts.

7. How does Anytown spend the funds in their Summertime Kayak Program? Are there any additional limitations?

After receipt, money that is credited to the revolving fund may be spent by the figure who has control over the fund. A municipality cannot have expenditures or obligations which exceed the cash balance available in the fund. Expenditures may be made without further appropriation for expenses that support the program or activity as long as the purposes are allowed in the authorizing vote which established the revolving fund.

Accordingly, in cities, absent a charter provision to the contrary, all payments must be approved by the city auditor, and in towns, absent a charter provision to the contrary, all payments must be approved by the town accountant and board of selectmen.

8. Anytown would like to establish a sidewalk revolving fund. They would like to credit to the fund "payments in lieu" that have been given to the town as a condition in the Planning Board approval process. The intent was for the Planning Board applicant to pay to renovate or build sidewalks throughout town to mitigate the impact of their various developments. Is this permissible?

In short, no. These monies should be treated as general fund revenue. The town here is attempting to create a type of mitigation revolving fund which does not satisfy the requirements of the departmental revolving fund statute.

Programs or activities are generally discretionary and open to the public at large. Therefore, regular government activities or operations focused on an individual or small group of individuals do not seem within the scope of the statute. In [IGR 21-23](#) it is noted that there is no program or activity in the sale or lease of property or assets, governmental transactions, fundraisers, taxes, intergovernmental reimbursements or regulatory exactions. Mitigation or buy-out payments, the focus of this question, fall into this last category. There is no aggregation of fees charged to all participants or customers of a program or activity so the municipality can pay on-going operating expenses of that program or activity. Just an involuntary, individualized payment from a particular applicant to pay for capital.

The town could alternatively consider putting the money into a stabilization fund which could be restricted for these purposes and further could dedicate such future receipts to that fund. Information concerning stabilization funds can be found in [IGR 2017-20](#).

It would also be worthwhile to mention that if the goal was instead to use fees the town imposes on applicants to offset to costs of outside consultants to review the applications, they could explore a special consultant fund pursuant to [G.L. c. 44, § 53G](#).

Information concerning special consultant funds can be found in [IGR 2017-14](#).

9. Anytown would like to establish a revolving fund for fees associated with athletic programs for school aged children but the school committee already has a fund for this purpose under [G.L. c. 71, § 47](#). Is the revolving fund allowed?

A departmental revolving fund may be implemented in addition to or in conjunction with other existing statutory revolving funds, provided that the funds function in a harmonious manner. A departmental revolving fund may not be used to supersede or limit provisions of other statutory revolving funds. Here, [G.L. c. 71, § 47](#) authorized the school committee to expend without appropriation all participation fees received in connection with certain athletic programs. Anytown may not establish a departmental revolving fund under [G.L. c. 44, § 53E^{1/2}](#) for those receipts, and thereby restrict or impair the school committee's pre-existing statutory authority. Care should be taken, therefore, when implementing a departmental revolving fund for receipts that may already be governed by special provisions of other municipal finance laws.

10. How does Anytown account for the year end balances for each of their revolving funds?

A departmental revolving fund is subject to the terms of the by-law or ordinance that created it. Previously, the balance of a revolving fund, if reauthorized on an annual basis, was carried over to the revolving fund for use in the following year. Now, the balance of a revolving fund carries over from year to year, unless the by-law or ordinance that created the revolving fund is repealed. If a by-law or

ordinance creating a revolving fund is repealed, the balance in the fund at the end of that fiscal year will revert to surplus revenue at the close of the fiscal year.

A board, department or officer having control of a departmental revolving fund is required to submit an annual report on the operation of the fund. In a town, this report must be submitted to annual town meeting and the selectboard, and in a city to the city council and the mayor or city manager. For each revolving fund, the report must show (1) the total receipts and (2) the total expenditures of the fund for the full prior fiscal year and for the first six months of the current fiscal year. Additional reporting requirements may be established by vote of town meeting or the city council.

11. Manytown, MA would like to establish a revolving fund for money received from applicants before the planning board pursuant to an application under the Manytown Mixed Use Planned Unit Development to support significant improvement to infrastructure and public amenities at the Manytown Landing which will be consistent with the Town's vision and improvement plans. Manytown would like to authorize the Town Administrator after consideration of recommendations and cost estimates from appropriate department heads and after a majority vote of the Planning Board and Select Board to expend money from the fund only for significant improvement to infrastructure and public amenities, including wayfinding, historic plaques, and markers, landscaping, parking, power/ water for Farmers Market and waterfront boat, canoe, kayak, and rowing docks, benches, gazebos, etc.

Similar to prior examples, here, there is no specific, fee-based program or activity; rather the "activity" undertaken is a longstanding governmental function: issuing permits upon application for construction of improvements to real estate. The payors are not participants in any particular program supported by user fees. Revenues collected are not applied to the cost of reviewing and approving applications for construction by the Planning Board, but to building improvements to infrastructure and public amenities. There is insufficient nexus between fees charged and the broad spending purposes intended.

There is also inconsistency with how spending is authorized. Instead of a program lodged within a department, the head of which spends without further appropriation, spending decisions are assigned to the Town Administrator who must act upon majority votes of the Select Board and the Planning Board. This arrangement does not square with the terms of the statute. Regulatory exactions are inappropriate revenues to dedicate to a revolving fund.

12. As in the previous example, Manytown would like to use these same funds to authorize the town administrator to expend money from the fund for the preservation of town owned historic properties within the district or the purchase of historic properties within the Manytown Business district, and to authorize the town administrator to expend money from the fund in the form of grants or zero interest loans. A property owner could be required to convey a preservation restriction to the town and to act on anything relating thereto. Is this allowed?

Here the town appears to try to dedicate the same receipt earmarked in the previous example to a separate revolving fund with other distinct spending purposes. In addition to the reliance on the same receipt, which would not be permissible as the same receipt cannot be dedicated simultaneously to two different funds, this fund raises the same concerns that are were noted above. However, an additional concern is the provision for grants and “zero-interest loans” to private parties, which may be inconsistent with the Anti-Aid amendment and/or public purpose doctrine.

13. Now we are in the town of Everytown. Everytown has created a revolving fund for the Everytown Free Public Library. This Library Revolving fund was created for the purpose of replacing lost books and is funded by fines on those who lost said books. This program was largely successful in FY19 and the fund had more than enough money to help replace books that were lost. However, in FY20, the library shut down due to COVID and the library stopped charging fines for lost books. The fund has been very low and the Everytown library is planning a big reopening, but there are still lost books that the Library Director, Michael Scott would like to replace. Is Everytown allowed to deficit spend from this revolving fund account?

There can be no deficit spending from a revolving fund. Even assuming that a certain spending limit has been set, revolving fund expenditures may only be made with receipts received from the revolving fund operations. Therefore, the revolving fund statute does not allow for deficits. Any budgeting based upon projected revenue from a revolving fund is by nature of the statute essentially hopeful.

14. Michael Scott is also interested in an additional revolving fund for Everytown Library. He would like a Library materials replacement fee charged for all library users generally for the purpose of updating the library's catalog/circulation software? Is this allowed?

No, this is not a program being delivered to users. It is an ordinary and necessary operating expenses for a public, circulating library. As mentioned above, traditional government functions are not programs or activities within the scope of the departmental revolving fund statute.

15. Everytown Police Chief, Dwight Schrute has expressed interest in establishing a revolving fund for firearm license permit fees to be used for upgrading police computer systems and purchasing mobile data terminals? Is this allowed?

No, there is no nexus between the proposed firearm license fees and the proposed spending purpose of upgrading police computer systems and mobile data terminals. There is a statutory requirement that there be a direct relationship or nexus between the receipt and the expenditure. Additionally the argument could be made that, like the last question, this is a traditional government function and not a program or activity within the scope of the departmental revolving fund statute.

16. Chief Schrute has noticed an increase in speeding and accidents in town since many Everytown residents are back to working in person at the local paper company, Dunder

Mifflin. In fact, he recently had an accident where a woman named Meredith was hit by a car right outside the Dunder Mifflin Office by her very own boss. Chief Schrute would like to dedicate the fees received for copies of accident and incident reports to a revolving fund, should this be approved?

Again, these receipts are for regular governmental activity (access to public records) that must be provided regardless of demand, not charged directly to support a police departmental program. DLS has advised that the revenues generated by the issuance of tickets, fines or citations may not be deposited to a departmental revolving fund. These types of revenues derive from regulatory activities and are not in the nature of "user fees" like noted above. As such, they do not seem to qualify as receipts of a departmental program or activity within the scope of the revolving fund statute.

17. Two members of Everytown who are on the licensing board would like to help the environment. Jim and Pam are feeling guilty for their carbon footprint from working at a paper company. They, along with the licensing board, would like payments made in connection with construction permits where trees are removed to be reserved in a revolving fund to plant other trees in the future.

No, this is more like a reserve for a future expenditure. There is no direct relationship or program that sufficiently connects the payment with trees planted at some future, indefinite time. Therefore, it does not seem to meet the definition of program or activity. Additionally, the receipt is more like a mitigation payment which is not a proper receipt for a departmental revolving fund.

18. The Health Director in Everytown, Stanley Hudson, is planning on being proactive this year in keeping residents as protected as possible from Covid and other illnesses. He would like to set up a departmental revolving fund which would be credited a fee that is charged to residents to cover the costs of providing said residents with flu and COVID vaccinations. However, many of the residents won't pay the fee directly but will instead have that cost covered by their private insurance, Medicare or Medicaid. Is this fund permissible?

Yes, if the Board of Health or other department is administering such shots and charges a fee for that service. In this scenario, the individual can pay the fee and if covered by insurance, seek reimbursement on his or her own. Alternatively, the insurer can be billed directly. Monies received from insurers are the equivalent of an individual's payment for services rendered by the department and are therefore departmental receipts received in connection with a departmental program.

19. Everytown, has established several departmental revolving funds, including a "Cable Revolving Fund." The by-law states that the revenue source for the Cable Fund is "monies received from Cable Receipts."

The departmental revolving fund statute prohibits the establishment of a revolving fund for receipts of "a cable television access service or facility." Monies received and spent for cable television public, educational and governmental (PEG) access facilities and operations may be deposited in either an Enterprise Fund ([G.L. c. 44, § 53F ½](#)) or a Receipts Reserve Fund ([G.L. c. 44, § 55F ¾](#)). If neither option is

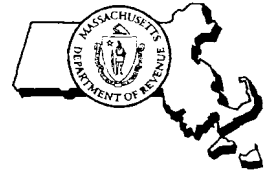
accepted, the monies belong to the general fund. Likewise, no revolving fund may be established for: 1. receipts of a municipal water or sewer department; 2. receipts of a municipal hospital; 3. receipts of a cable television access service or facility; 4. receipts of districts; or 5. receipts reserved by law, or as authorized by law, for expenditure for a particular purpose.

20. Everytown has established several departmental revolving funds, including an “Ambulance Service Revolving Fund.” The by-law states that the revenue source for the Ambulance Fund is “all of the service fees charged and received by the Ambulance Director in Connection with the Town’s ambulance service.”

Ambulance fees that are true fees for services rendered can properly be deposited in a departmental revolving fund. However, before depositing these fees into a revolving fund, the Town must ensure that it has not previously voted to deposit such ambulance fees in an enterprise fund under [G.L. c. 44, § 53F ½](#) or a receipts reserved for appropriation fund under [G.L. c. 40, § 5F](#). [G.L. c. 44, § 53E½](#) provides that a municipality may not deposit “receipts reserved by law or as authorized by law for expenditure for a particular purpose” into a revolving fund.

21. Chief Dwight Schrute is pretty relentless in advocating for the revolving funds for the police department around town. One of the funds he has been fighting for with the Everytown Town Council is “The Police and Fire Vehicles Fund.” The by-law would state that the revenue source for this Fund is for the sale of public safety vehicles. Is this allowed?

In this situation, the Town is attempting to deposit proceeds from the sale of municipal property into a departmental revolving fund, rather than the general fund. The proceeds from the sale of municipal property is not properly categorized as “fee, charge or other receipt.” In addition, the selling of municipal property, in this case a public safety vehicle, is not a departmental program or activity. When selling municipal property, the Town must ensure that it complies with the procedures of [G.L. c. 30B](#) (the Uniform Procurement Act) as well as any local by-laws of the Town pertaining to the sale or disposal of property. Unless there is a general or special law to the contrary, the Town should ensure that revenue received from the sale of municipal property is deposited in the general fund, as required by [G.L. c. 44, § 53](#).



August 8, 2000

Sandra R. Giordano
Municipal Law Unit
Office of the Attorney General
436 Dwight St.
Springfield, MA 01103

Re: Hull Bylaw Art.21 5/1/2000 - Building Permit Fees for Sewer Improvement Fund
Our File No.2000-498

Dear Ms. Giordano:

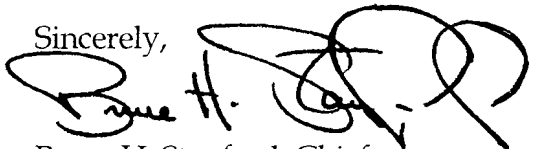
This is in reply to your letter asking for comments on Hull's vote under Article 21 of their town meeting this past May 1st to amend a town bylaw that imposes a charge for certain building permits, and dedicates the revenue to a fund to be used for sewer repairs and improvements.

The 1st amendment eliminates an existing exemption from the charges for owner-occupied single family homes; the 2d amendment increases the fee for each equal dwelling unit (EDU) from \$333 to \$500, and indexes the fee beginning in 2002 by changes in the Consumer Price Index.

While these changes do not raise any particular difficulties, we have reservations about the preexisting bylaw on two counts. One is the creation of a dedicated fund. The general laws (especially G.L. Chs. 40 & 44) authorize many special purpose municipal funds at local option. The number and variety of such funds created or authorized by statute lead us to believe that the legislature has preempted the field, so that municipalities cannot create dedicated funds outside the statutory framework without special legislation.

The second concern is with the relationship between the incidence of the charges and the purposes of the fund. Only those who need building permits will pay into the fund, yet the fund will be used in part to remedy infiltration and inflow problems with the sewer system. Presumably infiltration and inflow problems are not a function of increased demand for sewer services, yet existing users would not normally pay the charge. This makes the charge more like a tax than a fee. See *Berry v. Town of Danvers*, 616 N.E.2d 809, 415 Mass. 1105 (Mass. 1993). Even the spending purposes other than correcting infiltration and inflow problems may be substantially for work that would be needed whether there were any new users or increased demand for sewer service.

Please do not hesitate to contact us again if we may be of further assistance.

Sincerely,


Bruce H. Stanford, Chief
Property Tax Bureau



MASSACHUSETTS DEPARTMENT OF REVENUE
DIVISION OF LOCAL SERVICES

P.O. Box 9655
Boston 02114-9655

MITCHELL ADAMS
Commissioner

(617) 727-2300
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LESLIE A. KIRWAN
Deputy Commissioner

May 27, 1994

William C. Perrin, Jr., Esq.
Bowditch & Dewey
311 Main Street
Worcester MA 01608-1552

Re: Loan to Bankrupt Company
Our File No. 94-447

Dear Mr. Perrin:

You asked whether the Town of North Brookfield may loan a manufacturing company funds to have its abandoned facility in the town inspected and tested for asbestos and hazardous waste contamination. We do not believe municipalities have authority to loan public funds in the absence of specific statutory authority.

As we understand the situation, the company in question filed a Chapter 11 bankruptcy proceeding in 1988 and owes the town both pre-petition and post-petition real estate taxes on the facility, which it used for many years to manufacture asbestos cloth. Because of the asbestos production, the facility probably has levels of asbestos requiring remediation. There may also be other hazardous waste material on the site. As a result of certain Bankruptcy Court proceedings, the town has recently received payment of approximately \$40,000 to be applied to the company's post-petition tax obligations.

However, you state that unless the facility can be sold, no other funds are available for distribution to the town and the property would probably end up being taken by the town for non-payment of taxes. You propose having the town lend funds to the bankruptcy estate, which would then contract with testing companies to identify the extent of contamination. The loan would be secured with a mortgage to be repaid with interest at the time the property is sold. This arrangement would be subject to the approval of the Bankruptcy Court. We also understand the facility, which is located in the downtown area of the town is in substantial disrepair, has been boarded up and presents a serious safety hazard.

William C. Perrin, Jr., Esq.
Bowditch & Dewey
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As you know, providing financial assistance to private enterprises or businesses is not generally considered a public purpose for which the Commonwealth and its political subdivisions may appropriate and spend public funds.

The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character a private and not a public object ... The incidental advantage to the public, or to the state, which results from promotion of private interests, and the prosperity of private enterprises or business does not justify their aid by the use of public money. Lowell v. Boston, 111 Mass. 454, at 461.

At issue in the Lowell case was special legislation authorizing the City of Boston to loan money secured by mortgages to individuals and businesses whose property had been destroyed or damaged in the great fire of 1872. Although the court held that the primary object of such loans was to further the private interests of the property owners, it recognized limited circumstances under which businesses may be provided with financial assistance, such as where the enterprises are in the nature of public utilities, for example railroads, or where the funds are to alleviate conditions in the nature of public nuisances. In such instances, the primary purpose of the expenditure would be to advance public safety, health and welfare and any benefit to the recipient of the aid would be merely incidental to the accomplishment of that primary purpose. See Massachusetts Home Finance Agency v. New England Merchants National Bank, 376 Mass. 669 (1978); Allydonn Realty Corporation v. Holyoke Housing Authority, 304 Mass. 288 (1939) and cases cited.

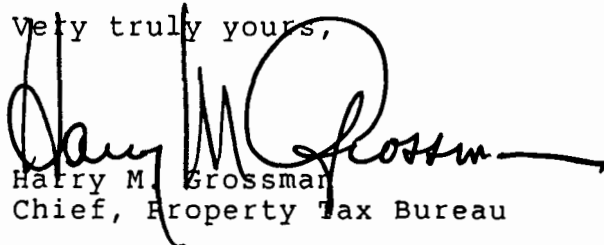
Here, the contamination and abandonment of the building obviously poses a present danger to public health and safety and we have little doubt that the town could spend public funds directly to identify hazardous conditions for the purpose of developing a plan for their abatement, even if the manufacturing company is benefited by that expenditure. Under various statutes, public funds may be expended by cities and towns to abate such hazardous materials or conditions. See G.L. Ch. 21E §13; Ch. 111 §§125 and 127B; Ch. 139 §3A; Ch. 143 §9; Ch. 148 §5. Any expenses incurred in connection with those abatement efforts are to be repaid by the property owner and a lien exists to secure such repayment.

William C. Perrin, Jr., Esq.
Bowditch & Dewey
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However, we do not believe these statutes authorize cities and towns to loan the funds to the property owner so that it may undertake the necessary analysis and work. In our opinion, specific statutory authority is required for cities and towns, or other political subdivisions or public authorities, to loan public funds to private individuals or businesses to accomplish a public purpose indirectly rather than directly. See, for example, G.L. Ch. 121C §5(r), which authorizes Economic Development and Industrial Corporations to loan funds in conjunction with certain economic development projects, and St. 1993, Ch. 462, which authorizes the Town of Brewster to borrow funds and loan them to property owners to cleanup, abate, repair and upgrade their septic systems.

If you have any further questions, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "Harry M. Grossman", with a long horizontal flourish extending to the right.

Harry M. Grossman
Chief, Property Tax Bureau

HMG/KC