

TESTIMONY OF WILLIAM F. GRIFFIN, JR
BEFORE THE JOINT COMMITTEE ON COMMUNITY
DEVELOPMENT AND SMALL BUSINESS

June 11, 2007

Good morning. My name is William F. Griffin, Jr. I am an attorney and a managing director of the firm of Davis, Malm & D'Agostine, P.C., in Boston. For nearly 30 years, a large part of my practice – and my firm's -- has been in the area of government-assisted financing, particularly the issuance of tax-exempt private activity bonds by the Massachusetts Development Finance Agency and other similar issuers. My firm and I have participated, as bond counsel, or as counsel to bond issuers, borrowers, bond trustees, bond purchasers or underwriters, in nearly 300 private activity bond transactions.

I am here today to testify in support of H. 159, the proposed legislation to adopt new Chapter 40T, authorizing special assessment financing in Massachusetts. At the request of my colleague, Hal Davis, I have participated in the legal research and drafting of this bill as well as the similar bill passed by both houses of the Legislature last year. Although Hal unquestionably deserves the title of the "father" of the Chapter 40T bill, I like to think of myself as one of its uncles.

Statement of the Problem

Many desirable private or community development projects must be supported by public infrastructure improvements, such as streets, lighting, storm drainage, water and sewer systems, public transit improvements, traffic control systems, public parking, parks and recreational facilities, bridges, tunnels, and the like. Municipal resources, however, are limited, and municipalities are often unwilling or unable to allocate scarce tax revenues or increase municipal debt burdens to finance public infrastructure for projects they would otherwise support and encourage.

The Search for a Solution

The Legislature deserves an "A" for its efforts to address this economic development problem, which it has attempted to deal with in several ways. For example, the Legislature has provided state grants for some projects with which I am familiar, such as the Massachusetts Museum of Contemporary Art project in North Adams. In other cases, it has authorized public-private partnerships, such as those relating to land exchanges implement the street grid and MBTA Silver Line Courthouse Station in the South Boston Seaport. It has created new public entities, such as the Mystic Valley Development Commission to finance infrastructure in the Rivers Edge project in Malden, Everett and Medford through payments in lieu of taxes (PILOTs).

In recent years, the Legislature has enacted several initiatives to encourage infrastructure construction: Chapter 40Q, the “district improvement financing” (DIF) program, uses new property tax revenues from development projects to finance infrastructure improvements; the so-called “I-Cubed” legislation authorizes the use new state tax revenues and a municipal credit back-up to support bonds for infrastructure needs of up to five projects to be selected by a competitive process; and the MORE Jobs Capital Program, which provides state grants linked to job creation.

The Commonwealth now has the opportunity to provide its municipalities with a valuable and proven economic development tool which has attracted the investment of tens of billions of dollars in public infrastructure in other states: special assessment financing.

Special Assessment Financing Works!

There is nothing novel or experimental about special assessment financing. It has been employed for years in over 38 states, including California, Florida, Illinois and Maryland. The 2002 U. S. Census report on *Finances of Special District Governments* identifies some 35,000 special district governments in the nation. According to the *Bond Buyer*, Florida has sold \$14.8 billion in special assessment bonds in the last five year; California has sold \$6.3 billion in the same period. Bank of America Securities estimates that it will underwrite some \$3 billion in special assessment bonds this year.

Special assessment financing allows a municipality or local improvement district to issue tax-exempt revenue bonds to finance infrastructure improvements which are paid by special betterment assessments on the real estate of the private property owners in the development zone. Because these bonds are secured by tax liens on the property, they are high-credit, tax-exempt long-term securities which are very attractive to investors. Developers like special assessment bonds because they provide a long-term, low-interest source of funding for pre-construction expenditures, which does not interfere with construction or permanent project financing. The municipality benefits, of course, from enhanced property tax revenues from the project, without a reduction of its scarce tax revenues or an increase in its municipal debt burden.

Special Legislation Authorizing Project-Specific Special Assessment Financing

Special assessment financing is not a novel concept in Massachusetts. Special legislation creating special Massachusetts districts sometimes authorizes special assessment financing, as in the case of the East Bedford Sewer District. More recently, the Legislature has enacted project-specific special legislation authorizing special assessment financing: the Northpoint legislation enacted as a part of the 2006 budget and the 2004 legislation creating the Taunton Industrial Improvement District are two examples with which I am familiar. I understand that other project-specific bills have been filed by developers of large projects seeking similar authority.

However, local Massachusetts governments cannot currently issue special assessment bonds without special legislation. Needless to say, this is a daunting, time-consuming and expensive process which is a severe impediment to small and midsize private and community development projects.

Chapter 40 T Solves the Problem

Under Chapter 40T, private developers or community groups may file a petition with the municipality for the establishment of a “development zone” within the municipality. Petitions must have the consent of the owners of 80% of the acreage, and 80% of the tax parcels, within the development zone, and must include a detailed improvement plan and an estimate budget and timetable for the completion of the public improvements. The petition may or may not seek the establishment of a “local improvement district,” a public entity which will construct, finance and maintain the public infrastructure improvements.

The city council or board of selectmen must hold a public hearing on the petition and make findings with respect to its compliance with Chapter 40T and the municipal master plan and its compatibility with existing infrastructure services and facilities. If the petition is approved by the municipal governing body (in most case, the mayor and city council or the board of selectmen and the town meeting), then the municipality, the MDFA, or the local improvement district, as designated in the petition, will adopt an assessment plan to provide revenues to construct, finance and maintain the improvements. For residential projects, the MDFA or the local improvement district may issue special assessment bonds to finance the construction and acquisition of the improvements; for commercial and mixed-use projects, only the MDFA may be the bond issuer. Public improvements in a development zone may be owned only by the Commonwealth, the municipality, the district, or a public authority.

The great benefit of the Chapter 40T program is that, unlike other methods of financing public infrastructure, the entire cost of design, construction, acquisition, financing, assessing, and maintaining the improvements is borne by the property owners in the development zone, not by the municipality or the state.

Benefits of Chapter 40T

Chapter 40T Is A Local Option, Not An Entitlement. Chapter 40T does not create an entitlement for developers. Under Chapter 40T, it is *entirely optional* with the municipality, which may elect in its sole discretion whether or not to take advantage of its provisions in any given case, and to condition its approval of a special assessment project as it deems appropriate.

Chapter 40T Does Not Add Additional Debt Burdens to Municipalities. Under Chapter 40T, the property owners in the development zone, not the municipality, have the obligation to construct new public infrastructure improvements which benefit the municipality and support a new development or community project. The costs of the infrastructure, and the debt service on the associated bonds, are paid by special betterment assessments on the real property in the development zone. Bonds issued by the MDFA or the local improvement district are not included in the municipal debt limits.

Chapter 40T Will Enhance Municipal Tax Revenues. The municipality in which a development zone is created will benefit from the enhanced tax revenues produced by construction of new buildings which will be added to the municipal tax base. Of course, new development is not costless, and may increase municipal expenses, including fire and police protection and (for residential developments) costs of public education. However, these are all

factors which a municipality can and should evaluate in deciding whether to approve an improvement project.

Chapter 40T Does Not Affect Zoning or Land Use Regulation. Private development in a Chapter 40T development zone is subject to the same zoning and land use laws and regulations applicable to any private development. There is no exemption or relief from any zoning or land use laws or regulations.

Chapter 40T Does Not Grant Any Eminent Domain Powers. Unlike the 2006 version of Chapter 40T, which (solely for tax reasons) granted special districts the power of eminent domain, the present bill does not grant any eminent domain powers.

Chapter 40T Can Be Used To Finance Municipal Improvement Projects. Chapter 40T may be used to finance community development projects as well as to support private development. For example, neighborhoods needing upgrades to sewage disposal systems, roads or other public works may petition the municipality to fund the improvements by special assessments under Chapter 40T rather than by municipal tax revenues or general obligation bonds. Or business owners in a city with a downtown area with inadequate parking can petition the municipality to construct a new parking garage financed by assessments against the downtown property owners.

Special Assessment Financing Will Complement Existing State Economic Development Programs. Chapter 40Q, enacted in 2003, permits municipalities to finance bonds for public infrastructure through increases in *ad valorem* property taxes resulting from new development.¹ During the early years of a project financed under Chapter 40Q, problems can arise if property tax increases fail to meet debt service obligations on the bonds due to delays in permitting, development, construction or phasing of the improvements. Federal income tax rules also make it difficult or impossible to secure private developer guaranties of debt service during the early years of a project. Many other states use special assessments to “bridge” the gap between tax revenues and debt service shortfalls during the early years of the development. These special assessments are typically phased out once property tax revenues are generated as the project comes onto the tax rolls.

Special Assessment Bonds May Be Used Only for Public Infrastructure. Under Chapter 40T, all proceeds of special assessment bonds must be used for public infrastructure improvements and costs of issuance. Under Chapter 40T, and under Federal income tax rules as well, all project infrastructure must be owned by public entities and bond proceeds may not provide property used for private activities.

Chapter 40T Does Not Permit New Taxation Outside Proposition 2-1/2. Proposition 2-1/2 (G.L. c. 59, § 21C), does not limit municipalities in imposing assessments or betterment fees. Proposition 2-1/2 limits only “the net amount of any *ad valorem* property tax levied on the real estate and personal property located within the city or town.” Assessments and betterment fees are based on the special benefit received by particular property owners affected by the improvements and, under Chapter 40T, at least 80% of those owners must approve the improvement plan.

¹ This program, called “district improvement financing” in Massachusetts, is commonly called “tax increment financing” in other states.

Chapter 40T Does Not Affect Local Taxes On Property Within The Development Zone. All private property within a development zone is subject to local *ad valorem* property taxes in the same manner as other property within the city or town, in addition to the special assessments. The special assessment tax liens are subordinated to the tax liens securing the property tax, and do not affect the collection or enforcement of property taxes.

Thank you for the opportunity to present my views to the Committee. Attached hereto is a copy of an article appearing on the first page of the April 2, 2007 edition of the *Bond Buyer*, the daily newspaper of the public finance industry which contains a useful discussion of the proposed legislation.

THE BOND BUYER
April 2, 2007

Massachusetts May Gain More Access to SABs

BY MICHELLE KASKE

Massachusetts could hold an additional trump card in its infrastructure financing portfolio if state lawmakers pass legislation, known as chapter 40T, that would allow municipalities easier access to special assessment bond financing, a \$12 billion to \$15 billion market at the national level, experts say.

Currently, local governments cannot sell special assessment bonds, or SABs, unless state lawmakers enact special legislation that specifically identifies the pro-

posed projects. This additional layer of requisite action tends to slow the timelines on such projects.

Laura Canter, executive vice president of finance programs at the Massachusetts Development Finance Agency, said a general law facilitating SAB use could encourage local governments to use the financing mechanism.

"There's certainly a risk that many worthy projects simply won't get that far, wouldn't think about [SABs] if you don't have enabling legislation that just allows this as a matter of course," Canter said.

With special assessment financing, bonds are secured by a lien on the development property, which places responsibility for repaying the debt onto the developer and not on the municipality. In other types of infrastructure financing, local governments must participate in repayment of the debt, be it general obligation bonds or tax-incremental financing, which is known as DIFs, in Massachusetts.

In 2003, lawmakers passed legislation called 40Q enabling mu-

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Massachusetts Bill Would Allow Cities More Access to Special Assessment Bonds

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municipality to use DIFs, a financing technique that draws upon a portion of expected real estate tax increases, due to the property's improvement, as security for the bonds.

SAB financing allows local governments to facilitate development and increased economic activity without taking on additional debt or tapping into tax revenue. This can help local governments stay under the state's ceiling on increases to real estate taxes, said **James Shea**, co-chair of the real estate department at **Edwards, Angell, Palmer & Dodge LLP**. Shea was the sole author of 40Q and also helped draft 40T, the SAB bill.

"It's more palatable to the city or town because it's a betterment assessment that does not come out of their real estate tax revenues, and we have Proposition 2 1/2, so there's a levy limit, constitutional limit, on how much you can increase your real estate taxes," he said. "But a special assessment is not counted toward that, so it doesn't come out of their revenues for their budget."

Shea said that 40Ts passing would actually enhance the use of 40Q, as SABs could be used during the design and construction phase of a project until the development generates increased real estate taxes.

"[40T] would also work with the DIF law to provide for, in effect, a gap security between the time that you issue the DIF bonds and the time the project's actually built and the tax increment [is] there to service the bonds," he said.

Last year, former Gov. **Mitt Romney** killed 40T with his veto. State Sen. **Richard Moore**, D-Worcester and Norfolk, and state Rep. **Lida Harkins**, D-Norfolk, refiled the bill in January without an eminent domain clause that had prompted the veto, according to **Hal Davis**, a bond

lawyer who is "of counsel" at **Davis, Malm & D'Agostine PC** and president of **New England Economic Development**.

"The governor vetoed it primarily because it didn't have a public hearing and it had an eminent domain feature," he said. "In the revised bill, we've taken that out."

The measure now sits with the Joint Committee on Community Development and Small Business with a tentative public hearing date set for May 14, according to **Timothy Hoppe**, Moore's chief of staff. Under 40T, a project cannot use SAB financing without community approval and

they go in and have to make the annual payments," Davis said. "They don't have to pay off the bond issue, so it's patient money. So its not something that's called very easily and the rate probably is around 5.25% to 5.5% fixed for 30 years, which is pretty decent, so it isn't that much more than a straight municipal bond for 30 years."

Davis said he has been working on the 40T bill for two years and that he anticipates both developers and local governments taking advantage of SAB financing if the bill becomes law.

"This is a way for a neighborhood to get together and use a district as a method to finance that."

Hal Davis,
New England Economic Development

would include not only projects that the municipality does not want to accrue debt for, but also downtown revitalization projects, such as when businesses join together to finance parking structures, and also residential areas that need to improve their sewer systems, but do not want to issue GO debt, Davis said.

The cost of SAB financing is similar to GO bonds, and with the right project, 40T could benefit developers, communities, and investors.

"There's a lien that's on the property's security, but what the property owners like is its non-recourse, the only liability is the lien on the property. But that's pretty good security because the underwriter does a careful analysis and other lenders that are financing the actual buildings feel very comfortable, because if there's a default by the developer or the local neighborhood,

from the new development.

"We really have now, when the 40T passes, a full complement of infrastructure finance tools that fit together very neatly," Canter said. "They all line up and all work towards financing public infrastructure, but they really, together, allow for negotiations between a developer, a municipality, and then the commonwealth as to who will benefit and who will pay for that infrastructure — all tax-exempt financing tools, all tax backed — but to support different agreements, and one project might use all three of them."

Other states, such as Florida and California, have used SAB financing, a market that totals \$12 billion to \$15 billion at the national level, according to Davis and Shea. Over the past 10 years, Florida has sold \$14.8 billion of SABs followed by California with \$6.3 billion, according to **Thomson Financial**. Massachusetts is third on the list with \$1.48 billion of SABs, all of which the **Massachusetts Bay Transportation Authority** sold in four different series.

One project that will contribute to the commonwealth's potential rise in special assessment financing includes **MassDevelopment** selling \$150 million of SABs on behalf of **North Point Cambridge Land Company LLC** to help finance the transformation of a 45-acre site into a mixed-use neighborhood over the next 15 years. The land is located in Cambridge, Boston, and Somerville, with assessments on 4.9 million square feet of land to repay the debt, according to **MassDevelopment** documents.

The transaction will be the authority's first-ever SAB sale, which the agency expects to issue within the next few months. Lawmakers last year passed special legislation to facilitate the authority's use of special assessment financing for the project. □