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LAW of the LAND

Municipal Financing Program Can Aid Private Developments

Act Allows Tax-Exempt Financing Of Project Infrastructure

This law provides the missing link enabling our communities to tap into a robust, multi-billion dollar market for investment capital for public infrastructure, without placing further stress on scarce municipal resources.

BY WILLIAM F. GRIFFIN JR.
SPECIAL TO BANKER & TRADESMAN

On Aug. 7, Gov. Deval Patrick signed into law a bill providing municipalities an option to approve "special assessment financing" of public infrastructure to support private development or community projects.

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Chapter 23L of the General Laws, which I participated in drafting, is a proven method of tax-exempt financing for public infrastructure in many other states. It has also been used in Massachusetts when authorized by special legislation.

Many desirable private or community development projects must be supported by public infrastructure improvements. However, municipalities are often unwilling or unable to allocate scarce tax revenues or increase municipal debt burdens to finance public infrastructure for worthy projects.

Massachusetts has attempted to deal with this problem through a variety of programs, including direct state grants, state tax credits and pledging expected increases in state or local tax revenues to finance bonds for infrastructure improvements. The common thread of all of these programs is that either the state or its municipalities ultimately use their resources to support private development.

This measure is different: It is the "developer pays" option. It provides the missing link enabling our communities to tap into a robust, multi-billion dollar market for investment capital for public infrastructure, without placing further stress on scarce municipal resources.

How It Works

Under the new measure, a private landowner may file a municipal petition to establish a "development zone." The petition must be consented to by all affected landowners and include a detailed improvement plan, an estimated budget and timetable to complete the public improvements.

If the petition is approved by the municipal governing body after a public hearing, then an "assessment plan" is adopted to impose special betterment assessments on privately-owned property within the development zone. These special assessments will provide the revenues to support tax-exempt bonds issued by MassDevelopment to finance construction of the public improvements, which may be owned only by a public entity. The entire cost of construction, financing and maintaining the improvements is borne by the property owners in the development zone, not by the municipality.

Special assessment financing is not novel. It has been employed for years in more than 35 states. Bond issuance peaked at about $5 billion in 2007, but has declined since the 2008 financial crisis. The five largest bond underwriters sold 573 issues totaling $8.6 billion in principal amount from 2005 to 2009. Because these bonds are secured by tax liens on the property, they are high-credit, tax-exempt, long-term securities very attractive to investors.

Developers like special assessment bonds because they provide a long-term, low-interest source of funding for preconstruction expenditures, which does not interfere with construction or permanent project financing. The municipality benefits from enhanced property tax revenues from the project, without a reduction of its scarce tax revenues or an increase in its municipal debt burden.

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Legislation's Effect

The special assessment financing legislation in Massachusetts:

Does Not Create An Entitlement For Developers. It is entirely optional. The municipality may elect in its sole discretion to take advantage of its provisions in any given case, and to condition its approval of a special assessment project as it deems appropriate.

Does Not Add Additional Debt Burdens To Municipalities. The costs of the infrastructure and the debt service on the associated bonds are paid by special betterment assessments on the privately-owned real property in the development zone. By law, the state and its municipalities have no liability on the special assessment bonds, which are "revenue bonds" secured only by the special assessments on the property in the development zone. Betterment assessments are, by law, excluded from tax revenues subject to the Proposition 2 ½ limit.

Will Enhance Municipal Tax Revenues. The municipality in which a development zone is created benefits from enhanced tax revenues from new construction added to the municipal tax base.

Does Not Affect Zoning or Land Use Regulation. Private development in a Chapter 23L development zone is subject to all zoning and land use regulations applicable to conventional development projects.

Can Be Used To Finance Municipal Improvement Programs. Special assessment financing may be used to finance community development projects as well as to support private development, so long as all affected landowners consent to the special assessments.

Bonds May Be Used Only For Public Infrastructure. Proceeds of special assessment bonds must be used for public infrastructure improvements and costs of issuance.

The Massachusetts law embodies a proven financing program successfully used in many other states to attract billions of dollars of investment capital for public infrastructure. It is a local option, not an entitlement, which allows each municipality to choose the rate of economic growth which best fits its needs. No state or local general tax revenues or credit are involved. Special assessment financing promises to be the rocket fuel needed to propel economic growth in Massachusetts.

Attorney William F. Griffin Jr. is a shareholder at Davis, Malm & D'Agostine P.C. in Boston. His practice focuses on business law, real estate and environmental areas.