

**A SECTION-BY-SECTION ANALYSIS OF  
CHAPTER 23L**

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A new Chapter 23L of the Massachusetts General Laws was enacted on August 7, 2012 as part of Chapter 238 of the Acts of 2012, “An Act Relative to Infrastructure Investment, Enhanced Competitiveness and Economic Growth in the Commonwealth” (St. 2012, c. 238, §14). It takes effect 90 days later, on November 5, 2012.

Introduction

Chapter 23L provides Massachusetts municipalities an option to approve “special assessment financing” of public infrastructure to support private development or community projects. Special assessment financing is a proven method of tax-exempt financing used successfully in other states for many years.

Under Chapter 23L, a private developer or private landowners petition a local municipality to establish a “development zone,” outlining a detailed plan to acquire or construct public infrastructure improvements to support new development and to finance these costs by issuing tax-exempt revenue bonds.

If the petition is approved by the municipal governing body, an “assessment plan” is adopted to impose special betterment assessments on the private real estate within the development zone. These special assessments will provide the revenues to pay the debt service

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on the bonds. The public improvements, when completed are transferred to the municipality or another public entity.

Special assessment financing has been called the “developer pays” alternative to paying for public infrastructure. This is a proper characterization, since financing the entire cost of construction, financing and maintaining the improvements is borne by the property owners in the development zone, not by the municipality.

This article examines the provisions of Chapter 23L in section-by-section detail. For convenience, I have indicated the defined terms used in Chapter 23L with initial capital letters and have added my own captions to each of the Sections of the Chapter.

Section 1.     Definitions. This section contains the principal definitions used in Chapter 23L. It defines the four major players in a special assessment bond financing: The Massachusetts Development Finance Agency, the issuer of the special assessment bonds (the “Agency”); the municipality or municipalities authorized to impose special assessments on property in the development zone (the “Assessing Party”); the city or town, or multiple cities or towns, in which the development zone is created (the “Municipality”); and the Commonwealth, the Municipality, or another political subdivision, public agency or public authority of the Commonwealth which will own the public infrastructure improvements financed by the bonds (the “Public Facilities Owner”).

Other important definitions include the following: The “Municipal Governing Body” responsible for the establishment of the development zone, is defined as the mayor and city council or mayor and city manager, in a city; and the municipal council or board of selectmen in a town (no provision is made for a town meeting vote); a “Development Zone” is defined as one or more parcels of real estate in the Municipality, contiguous or not, to be benefited by the public

infrastructure improvements and subject to assessments as described in the infrastructure plan (note that the Development Zone must include all of the private land subject to special assessments, and may, but does not necessarily need to, include the public infrastructure improvements themselves); “Improvements” are broadly defined to include the acquiring, laying, constructing, improving and operating of capital improvements to be owned by a Public Facilities Owner, “including but not limited to” a wide variety of public infrastructure (excluding certain “gated communities” and any type of improvement specifically prohibited from tax-exempt financing under the Internal Revenue Code); “Infrastructure Development Program” is defined as the acquisition, construction, expansion, improvement or equipping of Improvements serving a new or existing commercial, retail, industrial, residential or mixed use project; and “Infrastructure Assessments” means the special assessments, betterments, charges or fees assessed by the Assessing Party upon real estate in the Development Zone to finance the Improvements.

Other defined terms will be discussed as they are encountered in the discussion of subsequent Sections of Chapter 23L.

Section 2.     Petition for Establishment of a Development Zone. A Municipality acting through its Municipal Governing Body, may establish a Development Zone, “notwithstanding any general or special law or charter provision to the contrary.” (Section 2(a)).

The establishment of a Development Zone is initiated by the filing of a “Petition” in the office of the clerk of the Municipality and the office of the Agency. The Petition must contain at least the following information:

- (1)     a legal description of the boundaries of the Development Zone;

- (2) the written consent to the establishment of the Development Zone and the “Improvement Plan” by the record owners of 100% of the acreage to be included in the Development Zone (any real estate owned by the Commonwealth or an agency or political subdivisions thereof is excluded);
- (3) the name of the proposed Development Zone;
- (4) a map of the proposed Development Zone, showing its boundaries and any current public improvements to be made or added as Improvements;
- (5) the estimated timetable for the construction of the Improvements;
- (6) the Improvement Plan for the proposed Development Zone;
- (7) estimates of other private or public funding sources for the Improvements; and
- (8) the procedure by which the Municipality shall be reimbursed for costs incurred in establishing the Development Zone and for any administrative costs incurred in the administration of the Infrastructure Assessments imposed within the Development Zone. (Section 2(b)).

The “Improvement Plan” is the heart of the Petition. It is defined in Section 1 as a plan set forth in the Petition setting forth the following: (1) the proposed Improvements, services and programs, revitalization strategy, replacements and maintenance program; (2) cost estimates for the Improvements and the replacement and maintenance program; (3) the identities of the Public Facilities Owners and the “administrator of the plan;” (4) the boundaries of the Development Zone; (5) an analysis of any costs of financing the Improvements; (6) identification of the Assessing Party; (7) the method and structure of the Infrastructure Assessments; (8) the allocation of the Infrastructure Assessments among parcels in the Development Zone; (9) the selection of the assessing powers listed in Section 4 to be used by the Assessing Party; (10) a statement that no funds of the Municipality shall be used to pay Infrastructure Assessments; (11) a description of the Infrastructure Development Project within the Development Zone; (12) the

proposed use of bonds to finance the Project by the Agency; and (13) the participation, if any, of the Agency in a district improvement program under Chapter 40Q, as provided in Section 7 of Chapter 23L. (Section 1).

Section 3. Approval of a Development Zone. Upon receipt of a Petition, the Municipal Governing Board shall within 120 days hold a public hearing on the Petition. Written notification of the hearing and a summary of the Petition and the Improvement Plan shall be provided by the clerk of the Municipality to “all owners and tenants” of properties in the proposed Development Zone, and to the appropriate regional planning agency, not later than 14 days before the hearing. Notice shall be given by mail to the address listed in the Municipality’s tax records “or other appropriate listing of owners and residents.” Notice shall also be given by publication once a week for two consecutive weeks in a newspaper of general circulation in the Municipality “and in a newspaper of general circulation in all other municipalities within one-half mile of the borders of the Development Zone,” the first publication shall be at least fourteen days prior to the public hearing. The public notice shall state (1) the boundaries of the Development Zone; (2) the Improvements proposed for the Development Zone; (3) the proposed basis for determining Infrastructure Assessments; and (4) any locations for viewing and copying the Petition and the Improvement Plan. (Section 3(a)).

The public hearing shall be held (1) to determine if the Petition satisfies the provisions of Chapter 23L and (2) to obtain public comment regarding the Improvement Plan and the effect of the Development Zone on the owners, tenants and other persons within the Development Zone and on the Municipality or adjacent communities. Within 90 days after the conclusion of the public hearing, the Municipal Governing Body shall issue recommendations on the Petition, which shall include the following findings:

- (1) whether the establishment of the Development Zone is consistent with any applicable element or portion of the Municipality's master plan, which finding shall be confirmed in writing by the Municipality's planning board; and
- (2) whether the proposed Improvements in the Development Zone will be compatible with the capacity and uses of existing local and regional infrastructure services and facilities. (Section 3(b)).

Within 21 days after the receipt of the recommendations and findings, the Municipal Governing Board shall vote on the Petition. (Section 3(c)).

It should be noted that the *maximum* time period for approval of a Petition is about 231 days, nearly eight months.

Upon the approval of the Petition by the Municipal Governing Body by a majority vote, notice of such approval shall be filed with the clerk of the Municipality, the Agency and the Secretary of the Commonwealth. Upon such filing, the Development Zone shall be established and the Improvement Plan approved. (Section 3(d)).

The Public Facilities Owner is granted broad rights and powers necessary or convenient to carry out and effectuate the provisions of Chapter 23L that are consistent with the Improvement Plan. These include the purchase or acquisition of property, the construction, maintenance and operation of Improvements within and without the Development Zone, the right to enter upon private property for purposes of construction, contacts with any public or private party with respect to matters convenient or desirable to carry out Chapter 23L, including the acquisition of existing improvements and contracts for collection of revenue, data processing and other administrative matters (Section 3(e)).

Significantly, the Municipality and the Public Facilities Owner are authorized, "notwithstanding any other general or special law to the contrary," to contract with the owners of

real estate within a Development Zone to acquire or undertake Improvements within the Development Zone. Upon completion of construction of these Improvements, they shall be transferred from the landowners to the Public Facilities Owner at cost. (Section 4(d)). The term “cost” is broadly defined in Section 1 to include costs of acquisition and construction, financing charges and interest during the construction period and for one year thereafter, architectural, engineering, financial and legal services, plans, studies and surveys, administrative expenses and other necessary or incidental expenses. (Section 1).

Section 4. Special Assessments. The Assessing Party is authorized to fix, revise, collect and abate Infrastructure Assessments for the cost, maintenance, operation and administration of the Improvements on the real estate, leaseholds and other interests therein, located in the Development Zone, excepting real estate owned by the Commonwealth or any political subdivision, public instrumentality, agency or authority. The Assessing Party may avail itself of all other laws relative to assessment, apportionment, division, fixing, reassessment, revision, abatement, and collection of Infrastructure Assessments by municipalities, including the establishment of liens and payment of interest thereon.<sup>1</sup> A special provision for foreclosure of special assessment liens by using the procedures of G.L. c. 254, §§5 and 5A (providing a simplified method of foreclosing liens for condominium assessments under G.L. c. 183, §6), is provided. The Assessing Party shall record the Improvement Plan and all schedules of Infrastructure Assessments in the appropriate registry of deeds and with the Municipality’s assessors so that the lien shall be reported on a municipal lien certificate. (Section 4(a), First Para.)

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<sup>1</sup> These laws would include G.L. c. 80 (betterment assessments); G.L. c. 40, §§42G-42K (water special assessments); G.L. c. 83, §§15-24 (sewer special assessments); and G.L. c. 83, §§26-29 (sidewalk special assessments).

The Assessing Party may pay all costs of Infrastructure Improvements, or the debt service on bonds used to fund such costs from Infrastructure Assessments. Infrastructure Assessments shall be established within one year after completion of construction or acquisition of any such Improvements. Infrastructure Assessments shall have a payment schedule not to exceed 25 years. A public hearing on the schedule or any revision thereof must be held prior to its adoption by the Assessing Party. Notice of the public hearing shall be delivered to the Municipality and published in a newspaper of general circulation in the Municipality at least 14 days prior to the hearing, and the schedule must be delivered to the Municipality and made available to the public. (Section 4 (a), First Para.)

The Assessing Party may contract with the Agency for any services required regarding the assessments, apportionment, division, fixing, reassessment, revision, collection and enforcement of Infrastructure Assessments and the fees, costs and other expenses of these services may be included in the calculation of the Infrastructure Assessments. (Note that the Agency does not generally impose assessments on property and may presently lack the expertise in this area; it is expected that the Agency will initially subcontract these services to consultants or others.) (Section 4(a), Second Para.)

Infrastructure Assessment shall be fixed so as to provide revenues sufficient to (1) pay the administrative expenses of the Agency and the Assessing Party; (2) pay the debt service on the bonds as they become due; (3) create and maintain reasonable reserves as required by the bond indenture or resolution; (4) provide funds for the cost of operation and necessary maintenance, repairs, replacements and renewals of the Improvements; and (5) pay any amounts, including reasonable administrative fees, as the Agency may be obligated to pay or provide by law or contract, including the bond indenture or resolution. (Section 4(a), Third Para.)

The Agency shall not be precluded from carrying out its obligations under Chapter 23L if it has provided assistance to (1) any other Infrastructure Development Project, including one in which it has an economic interest; or (2) another municipality associated with, or that may benefit from such a project. (Section 4(a), Fourth Para.)

Because the existing provisions of the General Laws relating to special assessments contain limitations which may impair the use of these revenues as collateral for bonds, Section 4(b) provides for a range of “alternative” methods of levying and allocating special assessments on property within the Development Zone. Such special assessments may be calculated and levied using any of the following methods that result in fairly allocating the Costs of the Improvements to the property in the Development Zone: (1) equally per length of frontage, or by lot, parcel or dwelling unit, or by the area of a lot, parcel or dwelling unit; (2) according to the value of the property as determined by the Municipality’s assessors; or (3) in any other reasonable method resulting in a fair allocation of the cost, administration and operation of the Improvements according to the benefit conferred or use received, including commercial or residential classifications or distance from the Improvements. (Section 4(b), First Para.)

The Assessing Party, consistent with the Improvement Plan, may also provide for the following: (1) a maximum amount to be assessed to any parcel; (2) a tax year or other date after which no further special assessments will be levied or collected on a parcel; (3) annual collection without approval of an assessed party; (4) the circumstances under which a special assessment may be reduced or abated; and (5) the procedures for payment of special assessments. (Section 4(b), Second Para.)

Infrastructure Assessments shall be collected and secured in the same manner as property taxes, betterments and assessments and fees owed to the Municipality, unless otherwise provided

by the Assessing Party, and shall be subject to the same penalties and procedures, sale and lien priority in case of delinquency as provided for such taxes, betterments and assessments and fees. Liens for property taxes, betterments and assessments and fees, including Infrastructure Assessments, shall have priority in payment over any other liens placed on real property within the Development Zone. (Section 4(c)).

The Municipality or Public Facilities Owner may contract with the owners of real estate within a Development Zone to acquire or construct Improvements within the Development Zone. (Section 4(d), discussed under Section 3 *supra*.)

Section 5. Special Assessment Bonds. The Agency may issue and secure bonds as provided in Chapter 23L. The provisions of Chapters 23G and 40D, authorizing the Agency to issue revenue bonds, apply to special assessment bonds under Chapter 23L, with certain exceptions. In case of any conflict between Chapter 23L and Chapter 23G with respect to the issuance of bonds, Chapter 23L shall control (Section 5(a)).

Special assessment bonds may be issued by the Agency by resolution of its board of directors. Such bonds are revenue bonds – “special obligations payable solely from particular funds and revenues generated from [I]nfrastructure [A]ssessments.” Such bonds may be issued only under a trust agreement and related financing documents determined by the Agency’s board of directors to be “reasonable and proper” and in compliance with Chapter 23L. The Agency shall determine the date, form, denominations, place of payment, interest rate (which may be a fixed or variable rate), maturity (not exceeding 25 years) and redemption provisions of the bonds. Bonds may be signed manually or by a facsimile signature and shall be in registered form. The bonds may be sold at public or private sale and at a price determined to be in the best interests of the Development Zone. (Section 5(b), First Para.).

The Agency may issue interim receipts or temporary bonds exchangeable for definitive bonds, and provide for replacement of bonds that become mutilated, destroyed, or lost. (Section 5(b), Second Para.).

Bonds shall not be deemed to constitute a debt or a pledge of the faith and credit of the Commonwealth or of the Municipality, but shall be payable solely by the Agency as special obligations payable from particular funds collected from Infrastructure Assessments and any revenues derived from the operation of the Improvements. Any bonds issued by the Agency shall contain on their face a statement to the effect that neither the Commonwealth, nor the Municipality, shall be obliged to pay the same or the interest thereon, and that the faith and credit or taxing power of the Commonwealth, the Municipality or the Agency is not pledged to the payment of the bonds. All bonds shall be negotiable instruments under Article 3 of the Uniform Commercial Code. (Section 5(b), Third Para.).

Bonds may be secured by a trust agreement which pledges and assigns the revenues from Infrastructure Assessments and any monies and investments on deposit with the Assessing Party or the Agency and contains other customary provisions and covenants. Any pledge or assignment of revenues from Infrastructure Assessments or other monies shall be deemed continuously perfected without filing or recordation except in the Agency's records. (Section 5(c)).

The Agency may also issue grant anticipation notes for the payment of Costs of the Improvements in the Development Zone; such notes must mature within 20 years. (Section 5(d)).

Bonds may be secured by various credit enhancement devices, including letters of credit, lines of credit, bond insurance policies, liquidity facilities or other credit facilities and the

Agency may enter into necessary and appropriate agreements to that end. The Assessing Party may pledge or assign any of its revenues as security for reimbursement of funds advanced under such credit enhancement facilities. (Section 5(e)).

The Agency may also enter into such derivative contracts with respect to the bonds as it determines appropriate, including interest rate swaps, insurance agreements, futures contracts, interest rate floors or caps, options, puts, calls or similar arrangements. (Section 5(f)).

The Agency may also purchase and resell bonds and issue refunding bonds and additional bonds for the acquisition, construction, reconstruction, extension or improvement of Improvements. (Section 5(g)).

All moneys received from the proceeds of bonds or other revenues under Chapter 23L shall be deemed trust funds to be held and applied solely as provided in Chapter 23L. (Section 5(h)).

Bonds issued under Chapter 23L shall be legal investments for all public officers and public bodies of the Commonwealth and its political subdivisions, banks, trust companies, insurance companies, executors, trustees and other fiduciaries, electric or gas companies, railroad corporations, trustees, the Municipality, and others. (Section 5(i)).

Bondholders and bond trustees may protect and enforce bondholders rights under bond indentures and trust agreements. (Section 5(j)).

Bonds issued under Chapter 23L shall be deemed to be investment securities under the Uniform Commercial Code. (Section 5(k)).

Bonds may be issued under Chapter 23L without the consent of any agency of the Commonwealth and the validity of the bonds and their security shall not be affected by the lack of such consent. (Section 5(l)).

Section 6. Bonds Exempt from Massachusetts Taxation. Like MassDevelopment bonds issued under Chapters 23G or 40D, bonds issued under Chapter 23L, and their interest and any profit on the sale thereof, are at all times exempt from Massachusetts taxation.

Improvements owned by a Public Facilities Owner are also exempt from taxation, but Chapter 23L does not limit or restrict the taxation of individuals or companies or their real or personal property or any person or business within the Development Zone.

Section 7. District Improvement Financing.

*Introduction.* The District Improvement Financing (“DIF”) program was enacted in 2003 and has been amended on several occasions since then. It permits municipalities to finance public infrastructure in a development district by pledging a portion of the future incremental property taxes resulting from new construction in the district. These tax revenues are pledged to secure the debt service on bonds issued by the municipality or MassDevelopment to pay for the new infrastructure.<sup>2</sup> The amount of tax revenues pledged is a function of the “captured assessed value” of private property in the district, defined as the expected assessed value of such property in excess of a baseline equal to the original assessed value of the property. This baseline value is increased annually by an inflation factor.

One problem with the DIF program is that the tax revenues necessary to pay debt service on the bonds often have a long gestation period: There are no significant tax revenues during permitting, development and construction of the new property, and the first tax bills for the new construction are not mailed until eight months after the January 1 following the date the project is placed in service. Interest on the bonds accrues during this long gestation period without tax

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<sup>2</sup> This financing technique is called “tax increment financing” (“TIF”) elsewhere in the U.S. This terminology was unfortunately preempted by another Massachusetts program under G.L. c. 40, §59 (which is actually a “tax holiday” program used to stimulate new private construction). As a result, the TIF program is referred to in Massachusetts as DIF.

revenues. For this reason, many bond underwriters are reluctant to market DIF bonds without a back-up source of tax revenue.<sup>3</sup>

*Back-Up Special Assessments.* Section 7 of Chapter 23L provides a solution to this problem. With the approval of the Municipal Governing Body, the Agency may issue its bonds in lieu of those of the Municipality under Chapter 40Q if the Municipality otherwise complies with the requirements of Chapter 40Q relating to issuance of bonds. With the written consent of the owners of specific parcels in the Development Zone, the Assessing Party may adopt a plan under which any of the assessing powers described in Chapter 23L are made applicable exclusively to those parcels in order to secure the debt service on the bonds. The “project costs” (as defined in Chapter 40Q) shall not be reduced by these Infrastructure Assessments and the revenues derived from such Infrastructure Assessments may be made contingent upon, or abated, in whole or in part upon the receipt of the anticipated tax revenues. This allows Chapter 23L Infrastructure Assessments to be used to pay debt service on the Chapter 40Q bonds during the gestation period. As pledged tax revenues are collected, the Infrastructure Assessments can be abated on a dollar-for-dollar basis, until they are phased out, and the bonds are fully supported by tax revenues.

Under Section 7, the Municipality may also waive any adjustment for the inflation factor (as defined in Chapter 40Q) in order to increase the revenues available to finance Improvements benefitting property in the Development Zone.

The Agency, the Assessing Party and the Municipality shall enter into an agreement describing their rights and responsibilities under the District Improvement Financing program.

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<sup>3</sup> A capitalized interest fund can mitigate this problem only for a limited period, and developer guaranties can jeopardize the tax-exempt status of the bonds.

Section 8. Agency Representations and Warranties. The Agency may make representations and warranties to provide secondary market disclosure information to bondholders such as that required by Securities Exchange Act Rule 15c-2-12.

Section 9. Municipal Collection of Infrastructure Assessments. By agreement of the Municipality and the Agency, the Municipal collector-treasurer may collect Infrastructure Assessments on behalf of the Agency and disburse the funds to a designated management entity or financial institution, such as a bond trustee, selected by the Agency, within 30 days after such collection, together with any interest earned on the holding of such revenues.

Section 10. Applicable Laws. In the event of an inconsistency between Chapter 23L and any general or special law, administrative order or regulation, or any ordinance or resolution of the Municipality, the provisions of Chapter 23L shall control. In particular, no municipal resolution or ordinance requiring ratification of bond issues by the voters shall apply to the bonds issued by the Agency under Chapter 23L or the manner of voting or limitations as to the amount and time of payment of debts incurred by the Agency. (Section 10(a)).

Except as otherwise provided in Chapter 23L, all other statutes, ordinances, resolutions, rules and regulations of the Commonwealth and the Municipality shall be fully applicable to the property, property owners, resident and businesses located in the Development Zone.

Accordingly, all zoning, land use and environmental regulations applicable to any private development are not superseded by Chapter 23L and remain in full force and effect. Chapter 23L does not obligate the Municipality or the Agency to pay any costs for the acquisition, construction, equipping or operation and administration of the Improvements in the Development Zone. (Section 10(b)).