
**Massachusetts Department of Revenue
Division of Local Services**

MUNICIPAL FINANCE

**Expenditures for Public Purposes and
Administration of Trust Funds**



2014

Workshop B

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MUNICIPAL FINANCE
Expenditures for Public Purpose
and
Administration of Trust Funds

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MUNICIPAL FINANCE

Expenditures for Public Purpose and Administration of Trust Funds

Discussion Topics

CASE STUDY 1

PROPER MUNICIPAL EXPENDITURES

During the course of the year, the accounting officer is presented with the bills described below by various departments. Should the accounting officer pay these bills? Should the source of the funds to be used to pay these bills (e.g., grant, revolving fund, enterprise fund, etc.) be a factor in the accountant's decision?

Questions:

1. Purchase of wine to be given away as part of the town's centennial celebration.
2. Floral arrangement for the funeral of a selectperson who had served the town for twenty years in various capacities.
3. Payment for the Police Chief's dinner at her retirement party. Payment for the dinners of her husband and her extended family.
4. Dinners for the Selectboard and Department Heads to celebrate the hiring of the new Town Administrator. To celebrate the departure of the old Town Administrator.
5. Sandwiches served at an off-site all-day meeting for town employees to discuss the implementation of town-wide goals and objectives adopted for the next fiscal year.
6. Donation to the local Boys and Girls Club.
7. Payment to Boys and Girls Club by the School Department pursuant to a contract with the Club to provide outdoor science education services to middle school students as part of the school curriculum.
8. Payment by the School Department to St. John's School for the services of one of its teachers, Brother John, who just won a Pulitzer Prize for his book "A History of the Town of Everywhere", to create a curriculum for a high-school level local history class.

9. Reimbursement for an employee's conference registration, plus a late fee incurred, lobster and fillet mignon dinners, including 30% tips, cigars, luxury car rental with local tax surcharge, dry cleaning and laundering bills, in-room bar charges, cable movie rentals.
10. What if this town had a policy whereby late fees were payable only if the employee reasonably could not have registered on time?
11. What if the town's travel reimbursement policy required a supervisor to approve any conference registration and the employee in this case timely obtained his supervisor's approval, but simply delayed registration for no apparent reason?
12. What if the town's policy includes a dollar limit for meals reimbursement and tips?
13. Bill of the School Department for printing and mailing a flyer by the Parent-Teachers Organization to promote a car wash it is holding to raise money for the schools.
14. Bill from the Library Trustees for operation of the free library owned by a non-profit corporation and governed by a board of trustees created under a will.

Mass. Const. Amendment, Article 46, § 2, as amended by Article 103

G.L. c. 40, § 5

G.L. c. 41, § 56

G.L. c. 44, § 58

CASE STUDY 2

GIFTS AND TRUST FUNDS

Albertina Einstein wanted to encourage science education in her community, the Town of Galileo. So, when Albertina died, her will included the following legacy:

"I hereby bequeath to the School Committee of the Town of Galileo the sum of \$100,000 to be set aside as a perpetual trust fund for the purpose of establishing an annual high school senior class science contest and giving scholarship awards to the winners."

The School Committee was notified of the bequest by the Personal Representative of Albertina's Estate and voted to accept the funds at its last meeting.

The Town Treasurer informed the School Committee that she will take custody of the funds and place them in a special account with the interest going to the general fund. The School Committee believes it should have custody of the funds because Albertina's will granted the funds to the School Committee and any interest earned on the funds should stay with the funds.

Questions:

1. Is the \$100,000 bequest general fund revenue?
2. Does this bequest have to be accepted? By whom?
3. What if the bequest was in the amount of \$5,000 for maintenance of a school swimming pool on condition that the school department constructs a swimming pool? What might happen with such a bequest?
4. Is Albertina's bequest a trust? How can you tell? If so, what difference does it make?
5. Who should take custody of the money?
6. What should happen with any interest earned on the monies?
7. How should the fund be invested?
8. Who makes investment decisions?
9. What monies can be expended?
10. On what can the monies be spent?
11. Who makes determinations on expenditures?
12. How are the expenditures made (checks issued)?

13. What happens if the town discontinues the high school senior class science contest?
14. Can the town appropriate funds into the account?
15. Can the town accept other gifts for the same purpose? How?

G.L. c. 41, § 35
G.L. c. 41, § 45
G.L. c. 41, § 45A
G.L. c. 41, § 46
G.L. c. 41, § 47
G.L. c. 41, § 52
G.L. c. 41, § 56
G.L. c. 44, § 53
G.L. c. 44, § 53A
G.L. c. 44, § 54
G.L. c. 44, § 55B
G.L. c. 71, § 37A

CASE STUDY 3 WORKS OF ART

Vincentia Van Gogh, a wealthy “wannabe” artist desired to establish a memorial to herself at Anytown High School from which she graduated in 1942. Although she did not have much success as an artist, she believes she inherited her ancestor Vincent’s talent and that one day, her work will be appreciated as much as his. In her will, she left 50 of her favorite paintings (which she was unable to sell) to her high school as well as one of Vincent’s paintings. Her will stated the following:

“I hereby give and bequeath to the School Committee of Anytown the following works of art: an original painting by Vincent Van Gogh entitled ‘Sunny-Sunny Day’ together with fifty paintings by me from my Flowers collection entitled ‘Flowers #1’ through ‘Flowers #50’, on the following condition: that all the paintings be permanently displayed in the main entry and hallway of the high school.”

Her residuary clause left the rest and residue of her estate to Acme Art Institute.

The School Committee readily accepted the bequest and immediately placed the “Flowers” paintings in storage and offered the Van Gogh for sale through Sotheby’s auction house.

Questions:

1. Who should accept this gift?
2. If you are Acme Art Institute, what would you do?
3. Will the School Committee be able to sell the Van Gogh? The “Flowers” collection? If so, what will happen to the revenue?
4. What if the bequest stated the following? *“I hereby give and bequeath to the School Committee of Anytown the following works of art: an original painting by Vincent Van Gogh entitled ‘Sunny-Sunny Day’ together with fifty paintings by me from my Flowers collection entitled ‘Flowers #1’ through ‘Flowers #50’, for the purpose of enhancing art education in the schools.”*

G.L. c. 41, § 35

G.L. c. 41, § 45

G.L. c. 41, § 45A

G.L. c. 41, § 46

G.L. c. 41, § 47

G.L. c. 41, § 52

G.L. c. 41, § 56

G.L. c. 44, § 53

G.L. c. 44, § 53A

G.L. c. 44, § 53A½

G.L. c. 44, § 54

G.L. c. 44, § 55B

G.L. c. 71, § 37A

CASE STUDY 4 LIBRARY TRUSTEES

The trustees of the public library would like the town to assist it in managing its funds and want the town to set up a “Gift Account.” They want to enter into a Memorandum of Understanding (MOU) with the town for this purpose. The library’s trust fund is invested by the trustees through a licensed brokerage. Some of the terms they wish to include in the MOU are:

- The Town will create a Gift Account for the Library.
- The Trustees will deposit to the Gift Account:
 - Earnings from the Trust Funds that are not reinvested when the funds become available to the Library.
 - Donations received by the Library weekly.
- The Town will invest the deposits in the Gift Account with disbursements from the fund under the sole control of the Trustees.
- Disbursements from the Gift Account will be made using the Town’s normal voucher process under the signature of both the Chairman and Treasurer of the Trustees.
- The Gift Account held by the Town will accrue interest that will be credited to the Gift Fund.

Question:

1. As the new town treasurer or finance director, how would you respond to this inquiry?

- G.L. c. 41, § 35
- G.L. c. 41, § 45
- G.L. c. 41, § 45A
- G.L. c. 41, § 46
- G.L. c. 41, § 47
- G.L. c. 41, § 52
- G.L. c. 41, § 56
- G.L. c. 44, § 53
- G.L. c. 44, § 53A
- G.L. c. 44, § 54
- G.L. c. 44, § 55B
- G.L. c. 78, § 7
- G.L. c. 78, § 10
- G.L. c. 78, § 11

ANTI-AID AMENDMENT
Massachusetts Constitution Articles of Amendment
Article 46, § 2, as amended by Article 103

Section 2. No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the Commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the Commonwealth or federal authority or both, except that appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town and to carry out legal obligations, if any, already entered into; and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society. Nothing herein contained shall be construed to prevent the Commonwealth from making grants-in-aid to private higher educational institutions or to students or parents or guardians of students attending such institutions.

APPROPRIATION OF MONEY FOR EXERCISE OF
CORPORATE POWERS
General Laws Chapter 40, § 5

Section 5. A town may at any town meeting appropriate money for the exercise of any of its corporate powers; provided, however, 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.

TREASURER; DUTIES; BOND
General Laws Chapter 41, § 35

Section 35. Every town treasurer shall give bond annually for the faithful performance of his duties in a form approved by the commissioner of revenue and in such sum, not less than the amount established by said commissioner, as shall be fixed by the selectmen or the mayor and aldermen, and if he fails to give such bond within ten days after his election or appointment, or if within ten days after the expiration of said bond or any renewal of said bond he fails to file a renewal thereof, the selectmen or the mayor and aldermen shall declare the office vacant and the vacancy shall be filled in the manner prescribed by section forty or sixty-one A, as the case may be. He shall receive and take charge of all money belonging to the town, and pay over and account for the same according to the order of the town or of its authorized officers. No other person shall pay any bill of any department; provided, however, this provision shall not prohibit the treasurer from paying such bill by the use of bank treasurer's or cashier's check. He shall have the authority given to an auditor by section fifty-one, and shall annually render a true account of all his receipts and disbursements and a report of his official acts. The bond required herein shall

cover the duties of the treasurer with respect to trust funds and funds of retirement systems which are in his custody by virtue of his office, and any such funds, for the purposes of said bond, shall be deemed to be public funds.

**BOARD OF COMMISSIONERS OF TRUST FUNDS;
MEMBERSHIP; POWERS AND DUTIES
General Laws Chapter 41, § 45**

Section 45. Any city or town, except Boston, may create a board of commissioners of trust funds, consisting of three persons who shall have the management of all trust funds given or bequeathed for the benefit of the town or the inhabitants thereof, unless the donor in making the gift or bequest shall otherwise provide. In cities the commissioners shall be appointed by the mayor and confirmed by the council. In towns they shall be elected in the same manner as other town officers. At the time of creating said board there shall be appointed or elected one member for one year, one member for two years, and one member for three years; and there shall be appointed or elected annually thereafter one member for three years. Vacancies shall be filled by the mayor, with the approval of the council, or by the selectmen.

**TRUST COMMISSIONERS IN TOWNS UNDER FIVE
THOUSAND POPULATION
General Laws Chapter 41, § 45A**

Section 45A. If a town having less than five thousand inhabitants votes to accept this section, the board of selectmen of such town shall thereafter have all the powers and duties of commissioners of trust funds, as provided in sections forty-five and forty-seven, until such time as the number of inhabitants of said town shall exceed five thousand.

**TREASURER; TRUST FUND DUTIES; BOND
General Laws Chapter 41, § 46**

Section 46. The town treasurer shall be the custodian of all funds and securities of such trust funds, shall invest and reinvest them and expend therefrom moneys as directed by the commissioners. The treasurer shall furnish a bond satisfactory to them for the faithful performance of his duties.

**POWERS AND DUTIES OF TRUST COMMISSIONERS
General Laws Chapter 41, § 47**

Section 47. The said board of commissioners shall, so far as consistent with the terms of the trusts, manage and control the same, and distribute the income in accordance with the terms of the respective trusts. The board shall keep a record of its doings, and at the close of each financial year shall make a report to the town, showing the total amount of the

funds, and their investments, receipts and disbursements on account of the same, setting forth in detail the sources of the receipts and the purposes of the expenditures.

APPROVAL OF BILLS

General Laws Chapter 41, § 52

Section 52. All accounts rendered to or kept in the departments of any city shall be subject to the inspection of the city auditor or officer having similar duties, and in towns they shall be subject to the inspection of the selectmen. The auditor or officer having similar duties, or the selectmen, may require any person presenting for settlement an account or claim against the city or town to make oath before him or them, in such form as he or they may prescribe, as to the accuracy of such account or claim. The wilful making of a false oath shall be punishable as perjury. The auditor or officer having similar duties in cities, and the selectmen in towns, shall approve the payment of all bills or pay rolls of all departments before they are paid by the treasurer, and may disallow and refuse to approve for payment, in whole or in part, any claim as fraudulent, unlawful or excessive; and in that case the auditor or officer having similar duties, or the selectmen, shall file with the city or town treasurer a written statement of the reasons for the refusal; and the treasurer shall not pay any claim or bill so disallowed. This section shall not abridge the powers conferred on town accountants by sections fifty-five to sixty-one, inclusive.

APPROVAL OF WARRANTS FOR PAYMENT OF BILLS

General Laws Chapter 41, § 56

Section 56. The selectmen and all boards, committees, heads of departments and officers authorized to expend money shall approve and transmit to the town accountant as often as once each month all bills, drafts, orders and pay rolls chargeable to the respective appropriations of which they have the expenditure. Such approval shall be given only after an examination to determine that the charges are correct and that the goods, materials or services charged for were ordered and that such goods and materials were delivered and that the services were actually rendered to or for the town as the case may be; provided, however, that such approval may be given to any bill received from a state agency for the town's share of the costs of a federal urban planning assistance program, established under the provisions of section 701 of Public Law 83-560, as amended, before any goods, materials or services ordered or to be ordered under such a program have been delivered or actually rendered, as the case may be. The town accountant shall examine all such bills, drafts, orders and pay rolls, and, if found correct and approved as herein provided, shall draw a warrant upon the treasury for the payment of the same, and the treasurer shall pay no money from the treasury except upon such warrant approved by the selectmen. If there is a failure to elect or a vacancy occurs in the office of selectman, the remaining selectman or selectmen, together with the town clerk, may approve such warrant. The town accountant may disallow and refuse to approve for payment, in whole or in part, any claim as fraudulent, unlawful or excessive, and in such case he shall file with the town treasurer a written statement of the reasons for such refusal. The treasurer shall not pay any claim or bill so disallowed by the town accountant. So far as apt this section shall apply to cities.

TREATMENT OF MUNICIPAL REVENUES

General Laws Chapter 44, § 53

Section 53. All moneys received by any city, town or district officer or department, except as otherwise provided by special acts and except fees provided for by statute, shall be paid by such officers or department upon their receipt into the city, town or district treasury. Any sums so paid into the city, town or district treasury shall not later be used by such officer or department without specific appropriation thereof; provided, however, that (1) sums allotted by the commonwealth or a county to cities or towns for highway purposes and sums allotted by the commonwealth to cities, towns or districts for water pollution control purposes shall be available therefor without specific appropriation, but shall be used only for the purposes for which the allotment is made or to meet temporary loans issued in anticipation of such allotment as provided in section six or six A, (2) sums not in excess of twenty thousand dollars recovered under the terms of fire or physical damage insurance policy and sums not in excess of twenty thousand dollars received in restitution for damage done to such city, town or district property may be used by the officer or department having control of the city, town or district property for the restoration or replacement of such property without specific appropriation and (3) sums recovered from pupils in the public schools for loss of school books or paid by pupils for materials used in the industrial arts projects may be used by the school committee for the replacement of such books or materials without specific appropriation.

TREATMENT OF GIFTS AND GRANTS

General Laws Chapter 44, § 53A

Section 53A. An officer or department of any city or town, or of any regional school or other district, may accept grants or gifts of funds from the federal government and from a charitable foundation, a private corporation, or an individual, or from the commonwealth, a county or municipality or an agency thereof, and in the case of any grant or gift given for educational purposes may expend said funds for the purposes of such grant or gift with the approval of the school committee, and in the case of any other grant or gift may expend such funds for the purposes of such grant or gift in cities having a Plan D or Plan E form of government with the approval of the city manager and city council, in all other cities with the approval of the mayor and city council, in towns with the approval of the board of selectmen, and in districts with the approval of the prudential committee, if any, otherwise the commissioners. Notwithstanding the provisions of section fifty-three, any amounts so received by an officer or department of a city, town or district shall be deposited with the treasurer of such city, town or district and held as a separate account and may be expended as aforesaid by such officer or department receiving the grant or gift without further appropriation. If the express written terms or conditions of the grant agreement so stipulate, interest on the grant funds may remain with and become a part of the grant account and may be expended as part of the grant by such officer or department receiving the grant or gift without further appropriation. Any grant, subvention or subsidy for educational purposes received by an officer or department of a city, town or school district from the federal government may be expended by the school committee of such city, town or district without including the purpose of such expenditure in, or applying such amount to, the annual or any supplemental budget or appropriation request of such committee;

provided, however, that this sentence shall not apply to amounts so received to which section twenty-six C of chapter seventy-one of the General Laws, and chapter six hundred and twenty-one of the acts of nineteen hundred and fifty-three, as amended, and chapter six hundred and sixty-four of the acts of nineteen hundred and fifty-eight, as amended, apply; and, provided further, that notwithstanding the foregoing provision, this sentence shall apply to amounts so received as grants under the Elementary and Secondary Education Act of 1965, (Public Law 89-10). After receipt of a written commitment from the federal government approving a grant for educational purposes and in anticipation of receipt of such funds from the federal government, the treasurer, upon the request of the school committee, shall pay from the General Fund of such municipality compensation for services rendered and goods supplied to such federal grant programs, such payments to be made no later than ten days after the rendition of such services or the supplying of such goods; provided, however, that the provisions of such federal grant would allow the treasurer to reimburse the General Fund for the amounts so advanced.

GIFTS OF TANGIBLE PERSONAL PROPERTY

General Laws Chapter 44, § 53A $\frac{1}{2}$

Section 53A1/2. A city council, with the mayor's approval if the charter so provides, or a board of selectmen or town council may, in its sole discretion and authority, accept gifts of tangible personal property on behalf of the city or town from the federal government, a charitable foundation, private corporation, individual, or from the commonwealth or any political subdivision thereof, and may, in its sole discretion and authority, use said gifts, without specific appropriation thereof, for the purpose of such a gift or, if no restrictions are attached to the gift, for such other purposes as it deems advisable.

INVESTMENT OF TRUST FUNDS

General Laws Chapter 44, § 54

Section 54. Trust funds, including cemetery perpetual care funds, unless otherwise provided or directed by the donor thereof, shall be placed at interest in savings banks, trust companies incorporated under the laws of the commonwealth, banking companies incorporated under the laws of the commonwealth which are members of the Federal Deposit Insurance Corporation, or national banks, or invested by cities or towns in participation units in a combined investment fund under section thirty-eight A of chapter twenty-nine, or in paid-up shares and accounts of and in co-operative banks, or in shares of savings and loan associations or in shares or savings deposits of federal savings and loan associations doing business in the commonwealth to an amount not exceeding one hundred thousand dollars, or in bonds or notes which are legal investments for savings banks. Cities and towns having such funds in the custody of the treasurer in an aggregate amount in excess of two hundred and fifty thousand dollars may also invest such funds in securities, other than mortgages or collateral loans, which are legal for the investment of funds of savings banks under the laws of the commonwealth; provided, that not more than fifteen per cent of any such trust funds shall be invested in bank stocks and insurance company stocks, nor shall more than one and one-half per cent of such funds be invested in the stock of any one bank or insurance company. This section shall not apply to the city of Boston.

**PUBLIC FUNDS ON DEPOSIT;
LIMITATIONS; INVESTMENTS
General Laws Chapter 44, § 55**

Section 55. A city, town, or district or regional school district shall not at any one time have on deposit in a bank or trust company or banking company an amount exceeding sixty per cent of the capital and surplus of such bank or trust company or banking company, unless satisfactory security is given to it by such bank or trust company or banking company for such excess. The treasurer of any city, town, district or regional school district shall not deposit funds for which he is accountable in any bank, trust company or banking company with which such treasurer is associated as an officer or employee or has been associated as an officer or employee at any time during the three years immediately preceding the date of any such deposit. For the purpose of paying the principal or interest due on any bond, note or other obligation of the city of Boston, which is payable or requested to be paid in the city of New York, the city of Boston may keep on deposit in any national bank or trust company in the city of New York a sum not exceeding in the aggregate twenty-five thousand dollars; provided, that for a period of two weeks prior to the date of any such payment or payments, said amount may be increased by a sum or sums sufficient to cover the same. A treasurer of a city, town, district or regional school district may invest such portion of revenue cash as he shall deem not required to pay expenses until such cash is available and all or any part of the proceeds from the issue of bonds or notes, prior to their application to the payment of liabilities incurred for the purposes for which the bonds or notes were authorized, in term deposits or certificates of deposit, in trust companies, national banks, savings banks, banking companies or cooperative banks, or in obligations issued or unconditionally guaranteed by the United States government or any agency thereof and having a maturity from date of purchase of one year or less, or in United States government securities or securities of United States government agencies purchased under an agreement with a trust company, national bank or banking company to repurchase at not less than the original purchase price of said securities on a fixed date, not to exceed ninety days or in shares of beneficial interest issued by money market funds registered with the Securities and Exchange Commission under the Investment Company Act of 1940, as amended, operated in accordance with Section 270.2a-7 of Title 17 of the Code of Federal Regulations, that have received the highest possible rating from at least one nationally recognized statistical rating organization and the purchase price of shares of beneficial interest purchased pursuant to this section shall not include any commission that these companies may charge, or in participation units in a combined investment fund under section thirty-eight A of chapter twenty-nine; provided, however, that no temporary notes in anticipation of revenue shall be issued under section four as long as any revenue cash, exclusive of revenue sharing or other revenue cash the use of which is restricted to purposes other than current maintenance expenses, remain so invested.

LIABILITY OF DEPOSITOR FOR LOSSES DUE TO BANKRUPTCY

General Laws Chapter 44, § 55A

Section 55A. A city, town, district or regional school district officer receiving public money and lawfully and in good faith and in the exercise of due care depositing the same in a savings bank or trust company organized under the laws of the commonwealth, on paid-up shares and accounts of and in cooperative banks, a banking company organized under the laws of the commonwealth which is a member of the Federal Deposit Insurance Corporation, or in a national bank doing business in the commonwealth or in participation units in a combined investment fund under section thirty-eight A of chapter twenty-nine, or, in the case of the city of Boston, in accordance with the provisions of section fifty-five in a national bank or trust company in the city of New York, or in good faith and in the exercise of due care purchasing share accounts of a federal savings and loan association located in the commonwealth, shall not be personally liable to the city, town, district or regional school district for any loss of such money by reason of the closing up of such depository or federal and loan association for the liquidation of its affairs.

INVESTMENT OF PUBLIC FUNDS

General Laws Chapter 44, § 55B

Section 55B. All moneys held in the name of a city, town, district or regional school district or any other account under the jurisdiction of a city, town, district, or regional school district or officer thereof, which are not required to be kept liquid for purposes of distribution, shall be invested in such a manner as to require the payment of interest on the money at the highest possible rate reasonably available, taking account of safety liquidity and yield. All officers of a city, town district or regional school district who control the investment of such funds shall invest them prudently, consistent with the provisions of sections fifty-four and fifty-five and, if the funds are the result of gift or grant or bequest, the terms of such gift or grant or bequest, so as to accrue the highest amount of interest reasonably available on such funds taking account of safety, liquidity and yield. The provisions of section sixty-two shall not apply to this section.

PROHIBITED EXPENDITURES

General Laws Chapter 44, § 58

Section 58. No city or town shall pay a bill incurred by any official thereof for wines, liquors or cigars.

SCHOLARSHIP FUND

General Laws Chapter 60, § 3C

Section 3C. Any city or town which accepts the provisions of this section or has previously accepted chapter one hundred and ninety-four of the acts of nineteen hundred and eighty-six is hereby authorized, subject to the approval of the commissioner, to design and designate a place on its municipal tax bills, or the motor vehicle excise tax bills, or to mail with such tax bills a separate form, whereby the taxpayers of said city or town can voluntarily check off, donate and pledge an amount not less than one dollar or such other designated amount which shall increase the amount otherwise due, and to establish a city or town scholarship fund, the purpose of which shall be to provide educational financial aid to deserving city and town residents in accordance with this section and to establish a city or town educational fund, the purpose of which shall be to provide supplemental educational funding for local educational needs or to provide funding for existing adult literacy programs.

Any amounts donated to the scholarship fund or educational fund shall be deposited into a special account in the general treasury and shall be in the custody of the treasurer. The treasurer shall invest said funds at the direction of the officer, board, commission, committee or other agency of the city or town who or which is otherwise authorized and required to invest trust funds of the city or town and subject to the same limitations applicable to trust fund investments, except as otherwise specified herein. Interest earned upon such fund shall remain therewith and shall be used for the purpose of said fund without further appropriation.

In any city or town establishing a scholarship fund, there shall be a scholarship committee and educational fund committee to consist of the superintendent of the city or town schools or designee thereof, and no fewer than four residents of the city or town appointed by the board of selectmen to a term of three years. The scholarship committee or educational fund committee shall select the recipients of and amounts of financial aid from the scholarship fund and educational fund and shall be guided by any criteria established by the scholarship committee or educational fund committee subject to any ordinance or by-law and further subject to the following criteria:

(a) The recipients of financial aid must be residents of the city or town at the time the financial aid is first awarded and have been accepted to pursue education beyond the secondary school level at an institution deemed accredited by the committee.

(b) The committee shall take into consideration each recipients financial need, character, scholastic record and involvement in community work as well as extracurricular school activities.

The scholarship committee may distribute financial aid from both interest and principal of the fund, without further appropriation. The scholarship committee shall establish a procedure for determining at least on an annual basis the amounts or percentage of the funds that shall be authorized for distribution and for notifying the investing officer or agency so that the funds may be made available in a timely manner and with a minimum of penalties.

**PUBLIC SCHOOLS
GRANTS; ACCEPTANCE AND DISBURSEMENT
General Laws Chapter 71, § 37A**

Section 37A. School committees of cities and towns and regional district school committees may accept grants or gifts for educational purposes from federal, state, county and municipal governments or agencies thereof, charitable foundations and private corporations and disburse the same for such purposes. Any amounts so received by a school committee of a city or town shall be deposited with the treasurer of such city or town and held as a separate account, and expended by said school committee without further appropriation, notwithstanding the provisions of section fifty-three of chapter forty-four. Any amounts so received by a regional district school committee shall be deposited with the treasurer of such regional school district and held as a separate account and expended by said committee.

**LIBRARIES: ESTABLISHMENT BY CITIES AND TOWNS;
RECORDS
General Laws Chapter 78, § 7**

Section 7. A town may establish and maintain public libraries for its inhabitants under regulations prescribed by the city council or by the town, and may receive, hold and manage any gift, bequest or devise therefor. The city council of a city or the selectmen of a town may place in such library the books, reports and laws which may be received from the commonwealth. That part of the records of a public library which reveals the identity and intellectual pursuits of a person using such library shall not be a public record as defined by clause Twenty-sixth of section seven of chapter four. Library authorities may disclose or exchange information relating to library users for the purposes of inter-library cooperation and coordination, including but not limited to, the purposes of facilitating the sharing of resources among library jurisdictions as authorized by clause (1) of section nineteen E or enforcing the provisions of sections ninety-nine and one hundred of chapter two hundred and sixty-six.

**TOWN LIBRARIES; SELECTION OF TRUSTEES AND
OFFICERS
General Laws Chapter 78, § 10**

Section 10. A town which raises or appropriates money for the support of a free public library, or free public library and reading room, owned by the town, shall, unless the same has been acquired entirely or in part through some gift or bequest which contains other conditions or provisions for the election of its trustees, or for its care and management, which have been accepted by the town, elect by ballot at a meeting a board of trustees consisting of any number of persons, male or female, divisible by three, which the town determines to elect. When such board is first chosen, one third thereof shall be elected for one year, one third for two years and one third for three years, and thereafter one third shall

be elected annually for a term of three years. The board shall, from its own number, annually choose a chairman and secretary and, if the town so votes, a treasurer, who shall give a bond similar to that given by the town treasurer, in an amount and with sureties to the satisfaction of the selectmen. Until the town otherwise directs the town treasurer shall act as treasurer of the board of trustees.

BOARD OF LIBRARY TRUSTEES; POWERS AND DUTIES **General Laws Chapter 78, § 11**

Section 11. The board shall have the custody and management of the library and reading room and of all property owned by the town relating thereto. All money raised or appropriated by the town for its support and maintenance shall be expended by the board, and all money or property which the town may receive by gift or bequest for said library and reading room shall be administered by the board in accordance with the provisions of such gift or bequest. The board of any library, for the purpose of improving the services of said library, may enter into an agreement with the board or boards of any neighboring library or libraries, to pay for services in common, or to manage a facility to be operated jointly by more than one municipality, such payments to be shared in accordance with terms of such agreement.

GIFTS OR BEQUESTS FOR CEMETERIES; INVESTMENT OF FUNDS; DISPOSITION OF PROCEEDS OF SALES OF LOTS OR BURIAL RIGHTS **General Laws Chapter 114, § 25**

Section 25. A town in which cemetery commissioners are chosen may receive gifts or bequests for maintaining cemeteries or cemetery lots, which shall be paid into the town treasury and, with the accounts thereof, shall be kept separate from the other money and accounts of said town. The town treasurer shall invest all such funds in accordance with the stipulations, if any, accompanying them; otherwise he shall invest them as ordered by said commissioners and pay the income therefrom upon their order or with their approval. The proceeds of sales of lots or rights of burial in such cemeteries shall be paid into the town treasury and be appropriated to reimburse the town for the cost of the land, its care, improvement and embellishment, or the enlargement of the cemetery.

FOCUS

on Municipal Finance

Municipal Expenditures: Proper Public Purposes

by Mary Mitchell, Esq.

Increasingly over the past few years, the Division of Local Services' (DLS) legal and accounting staffs are asked if certain expenditures made by cities and towns are allowable. Many of these issues arise as the municipal accounting officer reviews departmental bills for payment. This article discusses the rules regarding the expenditure of public funds and makes recommendations for ensuring proper payment.

Authority to Spend

The authority for cities and towns to spend money arises under Section 5 of M.G.L. Ch. 40. That section provides that:

[a] town may at any town meeting appropriate money for the exercise of any of its corporate powers; provided, however, 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.¹

Cities and towns are free to exercise any power or function, except those denied to them by their own charters or reserved to the state, that the Legislature has the power to confer on them, as long as the exercise of these powers is not inconsistent with the Constitution or laws enacted by the Legislature.² In general, the properties and purposes for which cities and towns are authorized to spend are not specified, but rather include any necessary expenditures arising from the exercise of their powers or functions.

Public Purpose Limitation

Cities and towns can spend only for public purposes. Public funds cannot be used for private purposes. Thus, cities and towns have the right to spend money for any purpose where the public good will be served, but not where the expenditure of money is directly for the private benefit of certain individuals. This principle is expressed in the Massachusetts constitution and in numerous cases.³

In some situations, however, the expenditure of public funds advances both public and private interests. In those situations, if the dominant motive for the expenditure is a public one, incidental private benefits will not invalidate the expenditure.⁴ If, however, the dominant motive is to promote a private purpose, the expenditure will be invalid even if incidentally some public purpose also is served.⁵

Prohibitions Against Certain Expenditures

In addition to the general prohibitions against spending money for any purpose or under any conditions inconsistent with any general or special law, there are two other prohibitions on municipal spending.

1. Anti-Aid Amendment

The first is a prohibition against the giving of money or property by a city or town to or in aid of any individual, association or corporation embarking upon any private enterprise. This prohibition is referred to as the Anti-Aid Amendment.⁶ It provides in pertinent part:

No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the Commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or second-

dary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the Commonwealth.

This amendment prohibits the use of public money or property by cities and towns for the purpose of maintaining or aiding any institution or charitable or religious undertaking that is not publicly owned. The kinds of expenditures barred by the amendment are those that directly and substantially benefit or "aid" private organizations in a way that is unfair, economically or politically.⁷

The prohibition against using public funds for private organizations includes any grants, contributions or donations made by a city or town to an organization for the specific purpose of directly supporting or assisting its operations. However, the Anti-Aid Amendment does not preclude a city or town from purchasing specific services from private organizations in order to carry out a public purpose.⁸ Further, as with the public purpose limitation discussed above, if an expenditure is for a public purpose, but also incidentally benefits a private organization, the expenditure generally will not violate the Anti-Aid Amendment.⁹

2. Wines, Liquors, Cigars

In addition to the prohibition against the use of public funds for private organizations, there is also a prohibition against the use of public funds to purchase alcohol and tobacco under Section 58 of M.G.L. Ch. 44.

What Constitutes a Public Purpose?

The question of what constitutes a permissible "public purpose" has been discussed in many cases.¹⁰ The cases "do not, however, establish any univer-

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Municipal Expenditures: Proper Public Purposes

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sal test."¹¹ Instead, they generally stress the certainty of benefits to the community.¹² Thus, the basic test is whether the expenditure is required for the general good of the inhabitants of the city or town.¹³

Generally speaking, local government spending for the following purposes satisfies the public purpose test:

Wages and Benefits. Cities and towns have the right to spend reasonable amounts to execute their powers and duties.¹⁴ This right includes the right to compensate people for services rendered.¹⁵ Compensation for services may include sick leave and vacations.¹⁶ Cities and towns also have the right to settle employment and other claims that may be made upon them arising out of their administration of their municipal affairs.¹⁷

Merit Awards. Cities and towns may spend reasonable amounts on awards for students.¹⁸ Cities and towns may also 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.¹⁹

By contrast, local government spending for these purposes does not satisfy the public purpose test:

Gifts and Gratuities. Since public money can only be expended for public purposes, cities and towns have no power to appropriate money for gifts or gratuities to persons whose situations may appeal to public sympathy.²⁰

Lobbying. Cities and towns cannot spend money to influence elections.²¹

Frequently Asked Questions

DLS is asked frequently whether the following expenditures are for public purposes and may be paid:

Alcohol purchased by a department to be served at a fundraiser or for compliance testing. The language of M.G.L. Ch. 44 Sec. 58 is prohibitive. It reflects an explicit Legislative disapproval of spending municipal resources for alcoholic beverages and cigarettes. DLS has advised, however, that they 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 under-age drinking campaigns. Those expenditures would not be prohibited because they are not for consumption but to ensure compliance with local regulations and state statutes.

Floral arrangements for funerals of municipal employees. Funeral flowers, sympathy cards and other expenses for the customary expression of sentiments that are incidental to the social relationships that employees develop during work are not expenses made for public purposes. Those expenses are not within a municipal department's budget simply because the relationships developed in conjunction with the conduct of departmental business. Therefore, it is not appropriate to pay for funeral flowers or sympathy cards out of municipal funds. They should be covered from private donations.

Plaques and gifts awarded to persons retiring from municipal government or to current employees for outstanding performance during the year. Retirement gifts, plaques, merit payments and other similar awards given to retirees or employees may be considered a proper purpose for the expenditure of municipal funds if they are not excessive and are used to (i) encourage continuity of service or to (ii) enhance efficiency and loyalty or to

(iii) promote productive performance. 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. However, paying for the cost of dinner for the retiree would be appropriate. By contrast, paying for the dinners, gifts or party expenses for any attendees other than the retiree would generally be considered a mere gratuity and not for a proper municipal purpose.

Refreshments at public functions, such as a ribbon-cutting ceremony, an opening day, a reception or banquet, or a presentation. Refreshments and meals may be served at legitimate public functions such as ribbon-cutting ceremonies, opening day events, receptions or banquets, presentations, and the like so long as they are modest and served to provide a benefit for the city or town by helping to keep the participants alert and receptive. The public function must be a department sponsored public event for authorized persons and related to the public purpose of the department sponsoring it. If the function is open only to select groups or individuals, or spouses are in attendance, it is more likely to be considered a private celebration of primarily a social character.

Refreshments served to employees, such as coffee made available at a staff meeting or light refreshments provided to election workers or lunch served at an all-day training program or planning meeting. Refreshments and meals may be served to officers or employees of the city or town or persons doing business with the municipality at official meetings or official events so long as they are modest and benefit the city or town by helping to keep the participants alert and receptive or by enhancing efficiency by avoiding loss of time and disruption if participants leave the premises. The official meeting or event must be a department or municipi-

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pal sponsored meeting or event for authorized persons and related to the public purpose of the sponsor.

Reimbursement of a department head for attending retirement or department dinners or parties or for attending other events not sponsored by the department or municipality. Employees and officials may be reimbursed for the expenses of attending functions that relate to their public duties. The function must relate to and further the public purpose of the department sponsoring it. If a department head incurs an expense in the performance of official duties in the representation of his or her department, the expense is reimbursable. Thus, the cost of a department head's attendance at a retirement dinner or department party at which he or she is the official presenter of token gifts or awards, as a representative of his or her department, would be a legitimate municipal expense. If the event is arranged and funded by department employees or others, and attendance is optional, then the event would seem to be social and for private purposes rather than for public ones. In addition, if the event is outside of municipality, and not related to the department or the community, the use of municipal funds would not be appropriate.

Reimbursement of purchases or expenses incurred during authorized travel or while engaged in authorized business. Employees who are out-of-town or working late on business or attending training programs or conferences on behalf of a city or town may be reimbursed for out-of-pocket costs of travel, meals, and other purchases incurred in furtherance of that objective and as a term or condition of employment. These types of expenses are permissible municipal expenses, provided that attendance is authorized by the municipal official or board with the authority to expend department funds. Included within the realm of reimbursable expenses are: (i) registration charges, including late fees; (ii) local surcharges

and taxes on car rentals; (iii) taxes and tips on meals, and (iv) taxes on petty cash purchases, so long as these expenses are reasonable and not in conflict with the reimbursement policies of the city or town. Late registration fees are considered to be part of the contract price for the training program or conference. Similarly, surcharges, taxes and tips are a necessary and customary part of legitimate expenses incurred by employees in the course of their employment.

Payment of expenses associated with fundraising for departments, e.g., mailings seeking donations or door prizes and refreshments at a fundraising event. Municipal departments like the Parks and Recreation Department, the Library, the Historic Commission, or the schools may want to raise money for a particular project. There is no law that prohibits seeking financial donations or some other kind of support. Fundraising activities that go beyond applying for grants or soliciting donations and involve raising and disbursing significant monies are problematic, however, because they are more in the nature of a profit on the business or transaction. DLS believes better practice may be to have a private entity sponsor and conduct fundraising events and turn over the net proceeds to the municipal department as a grant or gift.

The Anti-Aid Amendment prohibits use of municipal resources to assist a private group's fundraising activities even if the activities will benefit the municipality. Public funds may not be used to assist a private organization's fundraising activities, no matter how worthy or related the cause. For example, the school department cannot pay to print and mail a flyer by the Parent-Teachers Organization to promote a car wash if it is holding to raise monies for the schools.

Sharing the expenses of a community event co-sponsored by a municipal department and a private organization also raises Anti-Aid Amendment issues

because the event is not under the exclusive control of public officers. However, the municipal department could enter into a contract with the private organization to run the event on its behalf.

Conclusion

DLS strongly recommends that municipalities develop clear written policies or guidelines, preferably by bylaw or ordinance, about allowable expenditures. For example, to ensure the municipality receives the maximum benefit from its sales tax exemption, there should be clear standards about when department employees can purchase necessary supplies or materials and be reimbursed. Travel expenses are often set out in collective bargaining agreements, but the municipality should also adopt a policy to cover travel expenses for non-union employees. DLS also recommends that standards be established for merit awards, food or fundraising expenses. DLS also recommends that accounting officers advise managers and employees at the beginning of each fiscal year of the municipality's policies. This will help to avoid uncertainty or disagreements about whether certain expenditures are permissible and payable. ■

1. M.G.L. c. 40, § 5 applies to cities under M.G.L. c. 40, § 1.

2. See art. 2 of the Amendments to the Massachusetts Constitution, as appearing in art. 89, §§ 6, 7 and 8.

3. Mass. Const., Art. XI, c. 2, § 1 and Art. IV, c. 1, § 1; *Lowell*, 111 Mass. at 461, 471; *Matthews v. Inhabitants of Westborough*, 131 Mass. 521 (1881); *Mead v. Acton*, 139 Mass. 341 (1885); *In re Opinion of Justices*, 190 Mass. 611 (1906); *Whitaker v. Salem*, 216 Mass. 483 (1914); *Duffy*, 232 Mass. at 50; *In re Opinion of Justices*, 240 Mass. 616 (1922); *Jones v. Inhabitants of Town of Natick*, 267 Mass. 567 (1929); *D.N. Kelley & Son, Inc. v. Selectmen of Fairhaven*, 294 Mass. 570 (1936); *Quinlan v. City of Cambridge*, 320 Mass. 124 (1946); *Eisenstadt v. County of Suffolk*, 331 Mass. 570 (1954).

4. See e.g., *Opinion of the Justices*, 313 Mass. 779 (1943) ("The fact that the owner of a way may profit by expenditures 'for the removal of snow and ice' ... does not invalidate expenditures ... where the primary purpose of such removal is the benefit of the public to whose use the way is open.").

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5. See e.g., *Salisbury Land & Improvement, Co. v. Commonwealth*, 215 Mass. 371 (1913) (act was unconstitutional where it authorized the condemnation of lands for a public beach and the sale or leasing to private parties of any portion not needed for the public beach).

6. The Anti-Aid Amendment is contained in Section 2 of Article 46 of the Amendments to the Massachusetts Constitution (as amended in 1974 by Art. 103 of the Amendments).

7. See *Commonwealth v. School Committee of Springfield*, 382 Mass. 665 (1981); *Helmes v. Commonwealth*, 406 Mass. 873 (1990).

8. See e.g., *Commonwealth v. School Committee of Springfield*, 382 Mass. 665 (1981) (court held that the purchase of services by the school committee from private schools to meet the needs of special education students did not run counter to the anti-aid amendment because the purpose was to fulfill the obligation of the public school system which had chosen not to provide the services in its own schools).

9. See e.g., *Benevolent & Protective Order of Elks, Lodge No. 65 v. Planning Board of Lawrence*, 403 Mass. 531 (1988) (the taking of property for urban renewal project did not violate the Anti-Aid Amendment because the taking had a public purpose to eliminate a blighted open area and any benefit to college was incidental to that purpose).

10. See *Eisenstadt v. Suffolk County*, 331 Mass. 570, 573 (1954) and cases cited.

11. *Allydonn Realty Corp.*, 304 Mass. at 292.

12. See e.g., *Opinion of the Justices*, 313 Mass. at 784-85 (expenditures for snow removal from private ways that were open to public were for the public purpose of accommodating the public as to means of travel and transportation); *McLean v. Boston*, 327 Mass. 118 (1951) (expenditure of money for the development of housing for residents made homeless by tunnel expansion was for the public purpose of addressing a local emergency caused by a public improvement); *Opinion of the Justices*, 349 Mass. 794 (1965) (payments by city for retirement of certain alcoholic beverage licenses was for the public purpose of cleaning up of the city).

13. See *Opinion of the Justices*, 337 Mass. 777, 781 (1958).

14. See e.g., M.G.L. c. 40, § 4 ("A city or town may make contracts for the exercise of its corporate powers. ..."); *Leonard v. Middleborough*, 198 Mass. 221 (1906).

15. See e.g., *Curran v. Holliston*, 130 Mass. 272 (1881); *Attorney General v. Woburn*, 317 Mass. 465 (1945).

16. See e.g., *Quinlan v. City of Cambridge*, 320 Mass. 124 (1946); *Wood v. Haverill*, 174 Mass. 578 (1899).

17. See *Mathews v. Westborough*, 131 Mass. 521 (1881); *Jones v. Natick*, 267 Mass. 576 (1929); *George A. Fuller Co. v. Commonwealth*, 303 Mass. 216 (1939).

18. See e.g., M.G.L. Ch. 71, § 47 (specifically authorizes the expenditure of municipal funds for student prizes).

19. See e.g., *Eisenstadt v. County of Suffolk*, 331 Mass. 570 (1954); *In re Opinion of Justices*, 190 Mass. 611 (1906); see also *In re Opinion of Justices*, 240 Mass. 616 (1922).

20. See e.g., *Mathews v. Westborough*, 131 Mass. 521, 522 (1881); *Whittaker v. Salem*, 216 Mass. 483 (1914); *Jones v. Inhabitants of Town of Natick*, 267 Mass. 567 (1929).

21. See e.g., *Anderson v. Boston*, 376 Mass. 178 (1978). *appeal dismissed*, 439 U.S. 1060, 99 S Ct. 822 (1979).

Joint Tax Revenue Figure Reached

On December 12, 2005, Commissioner Alan LeBovidge presented the Department of Revenue's economic and revenue forecast to members of the House Ways and Means Committees and the Secretary of Administration and Finance at their annual Consensus Revenue Hearing at the State House.

In addition to FY06 and FY07 revenue projections for the Commonwealth, this report provided information on recent revenue trends for the state and predictions regarding the US economy for FY06 and FY07.

Testimony was also provided by Michael Widmer of the Massachusetts Taxpayers Foundation, Dr. Yolanda

Kodrzyncki of the Boston Federal Reserve Bank, Professor David G. Tuerck of the Beacon Hill Institute and Professor Adam Clayton-Matthews of UMass Boston.

To access the full text of the materials presented at this hearing, click on www.mass.gov/eoaf/revenue_hearing_materials.html.

On January 13, Administration and Finance Secretary Thomas Trimarco; Senator Therese Murray, Chairwoman of the Senate Committee on Ways and Means; and Representative Robert DeLeo, Chairman of the House Committee on Ways and Means, issued a statement indicating that they agreed on a joint tax revenue figure of \$18.975 billion for FY07.

They also agreed upon the following off-budget transfers that are mandated in law:

- \$734 million for the MBTA.
- \$572.52 million for School Building Assistance (SBA).
- \$1.335 billion for the state pension system, consistent with the three-year schedule currently in effect.

The secretary and the chairs of the two budget committees agreed that \$16.333 billion will be the maximum amount of tax revenue available for the general appropriations act (GAA) in FY07. ☐

FOCUS

on Municipal Finance

An Analysis of the Treatment of Municipal Revenue

by Kathleen Colleary, Esq.

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

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

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

Overview

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

for those resources are established through the budget and appropriation process.

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

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

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

Payments by Developers and Vendors for Designated Purposes

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

- A property owner who has a permit application pending before the conservation commission and as a mitigation measure agrees to make a "donation"

to the conservation fund for the purchase of conservation land.

- A developer of a commercial property makes a payment required under the town's zoning bylaw in lieu of having sufficient parking spaces with the monies to be used for the acquisition, improvement and maintenance of municipal parking.
- A cell phone company that is leasing town-owned property for its equipment agrees to give the town a one-time or annual "gift" in addition to its lease payments.

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

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

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

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

Performance Deposits

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

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

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

Gifts, Fundraisers and Trusts

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

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

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

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

Summary

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

1. Case 3157, Bellingham (December 22, 2004).

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



September 17, 1996

Roscoe A. Cole, Treasurer
Town Hall
Drawer "E"
23 Green Street
Kingston, MA 02364

Re: Establishment of Trust Fund for Historic Preservation
Our File No. 96-672

Dear Mr. Cole:

This is in reply to your letter requesting our comments on the proposal of the Kingston Historical Commission to establish within the Town's financial framework a so-called trust fund for historic preservation purposes. For the inadvertent delay in responding, please accept my apologies.

Apparently, the Town of Kingston has already accepted the provisions of G.L. Chapter 40, Section 8D, which establishes an Historical Commission and explicitly authorizes such Commission to receive "...gifts, contributions and bequests of funds..." for historical preservation purposes.

At this time, it has been proposed by the Historical Commission that the Commission and Town Treasurer execute an agreement for purposes of establishing a formal trust fund and creating certain rights and obligations regarding the administration, management and use of monies directed to the trust fund.

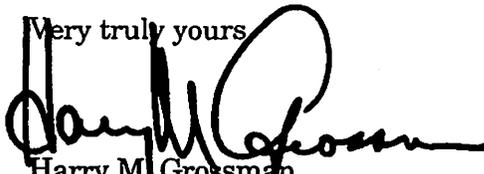
In our view, the custody, management, use and disbursement of general revenue, gift or grant funds, and trust funds is governed and prescribed by the statutory municipal finance provisions, and agreements (formal or otherwise) may not alter or operate inconsistently with such statutory provisions. Likewise, the specific authority, duties and obligations of municipal finance officers with respect to various types of funds are established in the General Laws. Certainly, the Historical Commission may accept grants or gifts of funds to further their statutory purposes, and if the gift of funds is in the form of trust, accept the same. However, there is no authority, in our view, for town

officers to pre-arrange specific treatments for various types of funds to be applied universally, or prescribe requirements or obligations that may be inconsistent with provisions of the General Laws.

G.L. Chapter 44, Section 53A sets in place the requirements pertaining to gifts or grants of funds, and authorizes a particular town officer or department to accept gifts of monies and expend such funds for the purposes of the gift with the approval of the Board of Selectmen. Interest on such funds accrues to the General Fund in the absence of an express directive of the donor that it remain with the gift. Moreover, upon the acceptance of the gift, the Town is subject to any conditions attached. Where funds are given in the more formal trust context, such funds must be accounted for and administered in strict compliance with the specific terms of the trust indenture or instrument. Accordingly, we do not think an agreement of the type at issue is appropriate where it is envisioned that a variety of types of monies would be deposited to the "Trust Fund".

In closing, however, we would note that there may be instances where a city or town may wish to accept donations generally for a particular purpose, and a single or consolidated "gift account" designed for such purpose would prove efficient. In such a case, we would consider it appropriate for Town Meeting, the Board of Selectmen or a town officer to request of the Town Accountant that a "consolidated gift account" be established and identify the objects and purposes of this gift account. As a practical matter, it would also be useful to provide a specific title or designation for such consolidated gift account. By such action, we think a municipality may establish an account to accumulate and consolidate many smaller (or larger) and general contributions for the same identified purpose. Such funds, however, would continue to be "gift" funds governed fully by the provisions of G.L. Chapter 44, Section 53A and the other pertinent municipal finance provisions.

I hope this information proves helpful. If I may be of any additional assistance in this or any other matter, please do not hesitate to contact me.

Very truly yours

Harry M. Grossman
Acting Deputy Commissioner

HMG/jeb



March 21, 1997

Irwin Marks, Chairman
Acushnet Historical Commission
Acushnet, MA 02743

Re: Meetinghouse Restoration Trust Fund
Our File No. 97-59

Dear Mr. Marks:

You have requested a legal opinion concerning the rules (especially rule 2) adopted by the Historical Commission for the Meetinghouse Restoration Trust Fund. That rule provides that the Historical Commission acting as trustees "will hold and dispose of all property now or later transferred by any person to them as Trustees in accordance with the provisions of [the] rules". The rule also states that the trust fund will include "donations or bequests from local residents, businesses and foundations and other interested parties." You wish to know whether these rules conflict with the municipal finance laws with respect to future donations.

As a general matter the historical commission may accept gifts of funds to them as trustees for a specific trust fund, the terms of which are sufficiently specified by the donor or donors, such that the trust may retain interest. In addition, the commissioners, acting as such trustees, may accept subsequent gifts of funds specifically made to the trust, to the extent it may be ascertained that the donors intend the gifts to be governed by the terms of the trust.

However, the commission has no authority to deposit funds to the trust which have been gifted to the commission in its municipal capacity. Under **Massachusetts General Laws Chapter 40 Section 8D** a town historical commission may provide for the preservation, protection and development of historical or architectural assets of the town. The commission "may accept gifts, contributions and bequests of funds ... for the purpose of furthering the commission's programs...". Under this statute general gifts of funds to the commission for preservation purposes would ordinarily be deposited in the treasury in a separate gift account for that purpose, under G.L. Ch. 44, §53A. Neither G.L. Ch. 40, §8D nor G.L. Ch. 44, §53A provide that interest from such gifts remain with the gift account and unless the express terms of the gift so provide, interest would ordinarily go to the general fund. G.L. Ch. 44, §53.

Nevertheless, the commission is clearly permitted to accept gifts of funds with restrictions or in the form of a trust making them the trustees. Trustees of Pub. Lib. of Melrose v. Melrose, 316 Mass. 584, 588-89 (1944); Boston v. Dolan, 298 Mass. 346, 350 (1937). To the extent the donor establishes trustees as fiduciaries by means of a trust instrument, providing for accumulation and expenditure from interest, the donation will be governed by the terms of the trust. In addition, subsequent donations of funds to the trustees of the trust for trust purposes may be said to be accepted by the trustees subject to the terms of the trust.

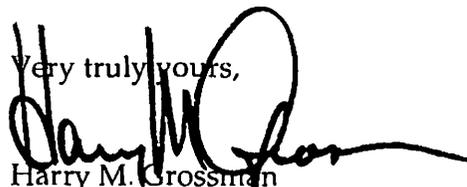
It appears that in this case the historical commission purported to set up a Meetinghouse Restoration Trust Fund with a \$1000 anonymous donation, in November, 1991. The declared purpose of the fund was for the restoration or maintenance of the Long Plain Friends Meetinghouse, which was given to the town in 1986 on the condition that the town's historical commission restore and maintain it in perpetuity. No trust fund was established pursuant to the 1986 gift and the property was apparently restored with public and gift funds.

The 1991 trust document provided that principal would remain untouched indefinitely and that interest would be used exclusively for restoration and maintenance. No trustees of such a fund were specifically established as such, but power to expend from interest was retained by the historical commission. The original trust rules also provided that the fund was to be composed of donations by citizens and local businesses. However, we have some doubt that a true trust was created by this process, since we have no indication that the "anonymous donor" actually gave the money to the trust, rather than to the commission in its official capacity, or agreed to the terms of the trust upon making the donation. We have insufficient information to determine whether this donation should have gone to a Section 53A gift account for the commission or was correctly placed in a separate trust account.

Nevertheless, the bulk of the corpus of the "trust" was received by means of a bequest in the will of Gertrude Braley to "Acushnet Historical Commission of Acushnet, Massachusetts, for the benefit of the Meetinghouse Restoration Trust Fund, to preserve and maintain the old Quaker Meeting House in Long Plain, in the Town of Acushnet." It appears that the decedent was aware of and believed in the existence of the trust fund at the time of making the will, in January, 1992, and intended to make a bequest of a portion of the residue of her estate to the commission as trustees of that fund. Whether such a fund previously existed in fact or was established by this instrument, we believe the donation was probably specific enough to require that the funds be treated as trust funds under the direction and control of the historical commission. Trustees of Pub. Lib. of Melrose v. Melrose, 316 Mass. 584, 589 (1944).

With respect to further gifts to the fund, some written declaration of the donor of an intent to donate the funds to this specific trust would be required in order to effectuate a donation to the trust, as opposed to the usual gift account. Merely providing a check payable to the commission as trustees or even in the specific name of the trust does not necessarily indicate an intent of the donor to have the funds treated pursuant to trust rules. Some declaration of the donor that the funds are being given for the specific purpose of the trust and in accordance with the trust rules would be preferable.

We hope this addresses your concerns. If we can be of further service, please do not hesitate to contact us again.

Very truly yours,

Harry M. Grossman
Chief, Property Tax Bureau

cc: Alan Coutinho
Town Accountant



Mitchell Adams
Commissioner

August 5, 1997

Richard M. Pattison, Chairman
Weymouth Historical Commission
841 Washington Street
Weymouth, MA 02189

Re: Preservation Fund Agreement
Our File No. 97-301

Dear Mr. Pattison:

You have asked us to review a Preservation Fund Agreement draft for examination and comment. The agreement is entitled "The Weymouth Historical Commission Preservation Project Fund" with the historical commission and the town treasurer as the parties. The agreement sets forth the statutory authority of the commission under **Massachusetts General Laws Chapter 40 Section 8D** and states as its purpose to prescribe the terms and conditions for holding and administering grant or gift funds, in accordance with such authority and in compliance with **G.L. Ch. 44, §53A**. The particulars of the agreement are as follows:

1-2. The agreement provides that the commission creates the above named fund with the treasurer as trustee "for the purposes hereinbefore set forth".

3. The agreement authorizes the commission to delegate to any other person, including a non-member, its authority to sign any written instrument or its authority to take any action required by the commission.

4. The agreement provides that donations may be made to the fund by the commission or other persons and provides that such donations and "all income therefrom" shall constitute the fund.

5. The agreement authorizes the treasurer to make payments only upon and in accordance with the written direction of the commission.

Division of Local Services

Joseph J. Chessey Jr., Deputy Commissioner

Post Office Box 9655, Boston, MA 02114-9655 Tel: 617-626-2300 Fax: 617-6262330

WWW: <http://www.state.ma.us/dls>

6. The agreement authorizes the treasurer to invest funds "as permitted by law".

7. The agreement authorizes amendments to the agreement to be made by the commission alone, except that no amendment can permit all or any part of the fund to be administered or distributed other than for the purposes specified in the agreement. The treasurer must also sign amendments which increase the treasurer's duties or obligations.

8. The agreement limits the treasurer's liability to negligent and willful misconduct.

9. The agreement requires that it be executed in duplicate with each to be deemed the original.

In our view the custody, management, use and disbursement of gift or grant funds made to the commission is governed and prescribed by the statutory municipal finance provisions, including **Massachusetts General Laws Chapter 44 Section 53A**, unless the donor(s) create a trust authorizing a specified trustee to hold the funds in a manner different from that specified in the statutes. In the absence of a trust, no agreements made by the commission with the treasurer may alter or operate inconsistently with such statutory provisions.

Even without the authority of **G.L. Ch. 40, §8D** any department may accept a gift or grant of funds which must be deposited in the treasury and may be expended without appropriation for the purposes of the gift with the approval of the board of selectmen. **G.L. Ch. 44, §53A**. The authority to accept "gifts, contributions and bequests of funds" for historical preservation purposes, as set forth in **G.L. Ch. 40, §8D**, in our opinion, grants no greater authority to the historical commission and clearly provides no specific authority to set up a special fund. Neither **G.L. Ch. 40, §8D** nor **G.L. Ch. 44, §53A** requires interest on gifts or grants of funds to remain with the fund and interest would ordinarily go to the general fund. **G.L. Ch. 44, §53**.

We acknowledge that the commission may be permitted to accept gifts of funds with restrictions or in the form of a trust making them the trustees. Trustees of Pub. Lib. of Melrose v. Melrose, 316 Mass. 584, 588-89 (1944); Boston v. Dolan, 298 Mass. 346, 350 (1937). To the extent the donor gives the funds to the commission as trustees by means of a trust instrument, providing for accumulation and expenditure from interest, the donation will be governed by the terms of the trust with the commission as fiduciaries. In addition, subsequent donations of funds to the trustees of the trust for trust purposes may be said to be accepted by the trustees subject to the terms of the trust. However, the commission has no authority to deposit funds to the trust which have been gifted to the commission in its municipal capacity. The agreement provided seems to suggest that the source of the funds is from the commission rather than from some other donor, much less a donor establishing a trust.

With this background in mind, we do not believe the commission may establish a separate fund in which interest will be retained. Any gifts must be deposited with the

treasurer under G.L. Ch. 44, §53A and may not be expended by the commission without the approval of the board of selectmen. Any expenditure must follow the warrant process under G.L. Ch. 44, §§52 & 56 which requires the signature of a majority of the commission or a signature of an authorized person signifying that expenditure has been authorized by vote of a majority of the commission. The treasurer may not by such an agreement limit his or her liability for any such gift funds and the treasurer will be liable on his or her bond for the safekeeping of the funds, except as provided in G.L. Ch. 44, §55A for money deposited in good faith in certain insured banks. Investment of the funds must be in accordance with the restrictions placed on public funds under G.L. Ch. 44, §55.

We hope this addresses your concerns. If we may be of further service, please do not hesitate to contact us again.

Very truly yours,

A handwritten signature in black ink, appearing to read "Harry M. Grossman". The signature is fluid and cursive, with a large loop at the end.

Harry M. Grossman
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
FAX (617) 727-6432

LESLIE A. KIRWAN
Deputy Commissioner

July 6, 1992

Richmond T. Edes
Town Counsel
Box 278
Seven Main Street
Concord, MA 01742

Re: Control and Expenditure of Gift Funds
G.L. Chapter 44, Section 53A
Our File No. 92-418

Dear Mr. Edes:

This is in reply to your recent letter requesting our opinion with respect to the handling of certain funds received from the Miriam Shaw Fund.

From the information provided, it appears that the Town of Harvard, on an annual basis, receives a distribution of funds from the aforementioned trust fund to be used for the Town's "School Building Program, or if no School Building Program is in progress for improvements to or equipment for its School Buildings." In our view, the foregoing expresses a clear intent that such funds only be used for capital expenditures for the school system and not for operating purposes. At this time, you request an opinion as to the appropriate financial procedures for accepting and expending such funds.

In our view, each distribution of money from the Miriam Shaw Fund to the Town constitutes a gift for a particular purpose(s). To the extent that such distributions are characterized as a gift, the initial issue would be whether such gift is to the Town of Harvard generally, or may be considered a gift to a department or officer thereof. In this regard, you suggest that:

Richmond T. Edes
Town Counsel
Page Two

This Trust Instrument is something less than crystal clear in terms of the officer or department receiving the gift.

In our opinion, where the specific purpose of a gift to a municipality is clearly set forth without reference to a particular recipient, and a particular town board, officer or department is exclusively or primarily vested with authority over such matters or functions, it is reasonable to conclude that the gift is directed to such board, officer or department. From your correspondence, it seems the School Building Committee is the formal and official town entity with authority over the School Building Program and all construction, renovation and improvement of school facilities. If this is the case, we think it appropriate to consider the gifts of funds from the Miriam Shaw Fund to be made to the School Building Committee directly. As it does not appear that the gift is intended for general school operating purposes, it would be our view that G.L. Chapter 71, Section 37A is not applicable.

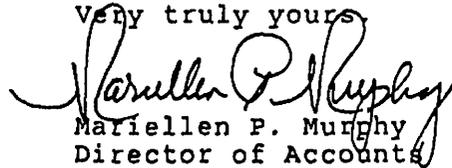
Where a gift or grant of funds is made to an officer or department of a city or town, G.L. Chapter 44, Section 53A governs and establishes the requisite financial procedures. Pursuant to Section 53A, therefore, the School Building Committee may accept the gifts of funds subject to the restrictions and conditions relating to the purposes for which the monies may be expended. The monies may be expended for the intended purposes (the School Building Program or improvements to or equipment for school facilities) by the School Building Committee with the approval of the Board of Selectmen, and pursuant to Section 53A no appropriation of such funds by town meeting is required. As these distributions should be accounted for in a special purpose gift account under G.L. Chapter 44, Section 53A, the funds would remain available from year to year until expended for a permissible purpose.

Finally, with respect to the disposition of interest earned on the distributions from the Miriam Shaw Fund, the materials presented suggest to us that these amounts are outright gifts and not funds formally given in trust to the Town for retention, accumulation and subsequent expenditure. In this case, it is our view that any interest earned on the gifted funds accrues to the municipality's General Fund absent an express written directive by the donor that interest earned remain with and become a part of the gift.

Richmond T. Edes
Town Counsel
Page Three

I hope this information proves helpful. If I may be of any additional assistance in this or any other matter, please do not hesitate to contact me.

Very truly yours,



Mariellen P. Murphy
Director of Accounts

MPM/jeb



March 30, 2000

Theresa E. Walsh
Town Accountant
Town Hall
1 Main Street
Pepperell MA 01463-1644

Re: Role of Town Meeting in Expenditure of Library Funds
Our File No. 2000-186

Dear Ms. Walsh:

You asked whether town meeting can direct the town's library trustees to spend trust, gift, grant or other funds over which they have control for a particular purpose or project. All of the funds in question were given or distributed for the purpose of benefiting the library and may be spent by the trustees for those purposes without appropriation.

Town meeting may certainly consider the extent to which the library trustees intend to make these funds available as a financing source when it deliberates and acts on the project. We do not believe, however, that a town meeting vote directing the trustees to spend the funds for the project is binding on the trustees. They still retain whatever power they have to decide how to spend the particular funds in question.

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

Very truly yours,

A handwritten signature in black ink, appearing to read "Bruce H. Stanford".

Bruce H. Stanford
Chief, Property Tax Bureau

BHS/KC



MASSACHUSETTS DEPARTMENT OF REVENUE
DIVISION OF LOCAL SERVICES

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MITCHELL ADAMS
Commissioner

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LESLIE A. KIRWAN
Deputy Commissioner

October 13, 1992

Robert G. Stokes
Treasurer/Collector
Town Hall
Medfield, MA 02052

Re: Custodianship of Trust Funds
Our File No. 92-659

Dear Mr. Stokes:

This is in reply to your letter requesting an opinion with respect to the custody of monies deposited in the "School Essay Fund." Specifically, you inquire as to whether such funds should be in the custody of the Town Treasurer, or whether the School Committee may retain such funds in investments or a depository account.

From the information provided, it appears that the Medfield 325th Anniversary and Special Bicentennial Committee, Inc., in 1977, gave \$1,000 to the School Committee of Medfield to be set aside in a perpetual fund. The annual income from this perpetual fund was to be used to provide awards to the winners of annual high school essay competitions conducted and supervised by the Medfield Public School System. At this point in time, there appears to be in excess of \$2,500 in the Essay Fund and you inquire as to the proper custodianship of these monies.

As a general matter, the Town Treasurer, pursuant to G.L. Chapter 41, Section 35:

shall receive and take charge of all money belonging to the Town, and pay over and account for the same according to the order of the Town or of its authorized officers.

Robert G. Stokes
Page Two

For this reason, the Town Treasurer, pursuant to G.L. Chapter 41, Section 35, must give bond annually for the faithful performance of his duties. Under these provisions, the responsibility for public funds is vested in the Treasurer and the safety of town monies is ensured.

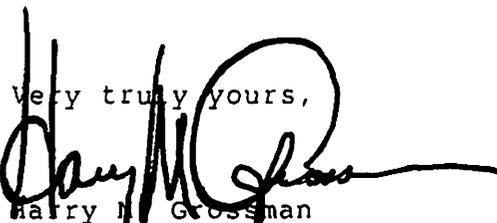
The provisions of G.L. Chapter 44, Section 54 further acknowledge that in most instances trust funds will be in the custody of the Treasurer. With respect to permissible investments for trust funds, Section 54 provides, in pertinent part, as follows:

Cities and Towns having such funds in the custody of the treasurer in an aggregate amount in excess of two hundred and fifty thousand dollars may also invest such funds in securities,.... (emphasis added).

Accordingly, for most trust funds the municipal Treasurer will be the custodian of the funds; and the Commissioners of Trust Funds, if any, will have authority under G.L. Chapter 41, Section 45, to determine investments unless the donor has explicitly specified that the management of the fund be vested in another person or entity.

With respect to the custodianship of the particular fund at issue, the "School Essay Fund", it is the intent of the donor that is critical. The vote of the Special Bicentennial Committee states that the sum "be given to the School Committee of the Town of Medfield." Unless this language is construed as expressing a clear intent to deviate from regular municipal practice and authorize the School Committee (not bonded) to hold the cash, the custodianship of the money should be with the Treasurer. Finally, the fact that the municipal Treasurer holds the cash need not alter in any way the current authority as to where such money is invested and how such funds are expended.

I hope this information proves helpful. If I may be of any additional assistance in this or any matter, please do not hesitate to contact me.

Very truly yours,

Harry I. Grossman
Chief, Property Tax Bureau

HMG/jeb



October 28, 2004

Mark Good, Finance Director
Town Hall
135 School Street
Walpole, MA 02081

Re: Roles of Trust Fund Commissioners and Treasurer
Our File No. 2004-438

Dear Mr. Good:

This is in reply to your letter asking about the respective roles of trust fund commissioners and municipal treasurers with respect to trust funds held by the municipality.

GL Ch.41 §45 specifies that trust fund commissioners ". . . shall have the management of all trust funds" Ch.41 §46 provides that "The town treasurer shall be the custodian of all funds and securities of such trust funds, shall invest and reinvest them and expend therefrom moneys as directed by the commissioners." We think it clear that these two statutes contemplate a division of responsibility between the treasurer's duty as custodian and the trust fund commissioners' responsibility for decisions on investment strategy and the expenditure of trust fund moneys. We agree that executing transactions necessary to carry out the investment decisions of the trust fund commissioners is part of the treasurer's custodial duties, rather than part of the management duties of the commissioners, and that the treasurer is therefore responsible for selecting brokers.

You noted that the Ethics Commission had issued a conflict of interest opinion on the question whether a trust fund commissioner could properly act as broker for investing the trust funds, and that the selectmen had exempted the trust fund commissioner acting as broker from the conflict of interest law (GL Ch.268A). The choice of any broker by the treasurer rather than by the trust fund commissioners may help avoid or obviate any recurrence of the conflict of interest problem.

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

Very truly yours,

A handwritten signature in cursive script that reads "Daniel J. Murphy".

Daniel J. Murphy, Chief
Property Tax Bureau

DJM/CH



The Official Website of the State Ethics Commission

State Ethics Commission

Home > Opinions & Rulings > Enforcement Matters > Divided Loyalties Actions > Last Name A-F > Francis Callahan DA

Callahan, Francis P. Docket No. 653

Docket No.: 653

IN THE MATTER OF FRANCIS P. CALLAHAN

January 10, 2002

DISPOSITION AGREEMENT

COMMONWEALTH OF MASSACHUSETTS STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY

This Disposition Agreement is entered into between the State Ethics Commission and Francis P. Callahan pursuant to Section 5 of the Commission's Enforcement Procedures. This Agreement constitutes a consented-to final order enforceable in Superior Court, pursuant to G.L. c. 268B, s.4(j).

On December 13, 2000, the Commission initiated, pursuant to GL. c. 268B, s.4(a), a preliminary inquiry into possible violations of the conflict of interest law, GL. c. 268A, by Callahan. The Commission has concluded its inquiry and, on September 12, 2001, found reasonable cause to believe that Callahan violated G.L. c. 268A, s. s. 17 and 19.

The Commission and Callahan now agree to the following findings of fact and conclusions of law:

Findings of Fact

1. Callahan is one of three Ayer Commissioners of Trust Funds. He is also employed by New England Financial as a financial representative.
2. The Ayer Commissioners of Trust Funds are responsible for investing the town's 14 scholarship trust funds, and awarding scholarships from those funds. As of Summer 1999, the funds overseen by the Commission totaled approximately \$320,000.
3. At the August 20, 1999 meeting of the Commission of Trust Funds, Callahan volunteered to explore how the Commission could achieve a higher rate of return on its investments. (The minutes of the August 20 meeting state that "Mr. Callahan will meet with the treasurer to provide guidance on the reinvestment of" a \$100,000 certificate of deposit. No formal vote was taken.) At the time, certificates of deposit - the investment vehicle usually employed by the Commission - were returning approximately five percent per annum. Most securities were earning a much higher return.
4. Four days later, the town treasurer transmitted materials to each of the three commissioners, including Callahan. Those materials included a copy of s. 19 of the conflict of interest law, which bars municipal employees from participating in particular matters in which they and/ or their employers have a financial interest.
5. At some time after the August 20, 1999 meeting, but before August 30, 1999, Callahan advised his colleagues on the Trust Funds Commission that the New England Securities Growth and Income Fund would be an appropriate investment vehicle for the Commission. On August 30, 1999, Callahan and the other two commissioners co-signed a letter to the town treasurer instructing him to deposit \$90,000 of the trust funds' money in the New England Securities Growth and Income Fund. The treasurer did so.
6. The New England Securities Growth and Income Fund is one of the mutual funds offered by New England Securities, the licensed broker/dealer of securities for Callahan's employer, New England Financial. The Trust Funds Commission's New England Securities account application names Callahan as the representative for New England Securities.
7. The up-front charge for the investment levied by Callahan's employer was 5.75 percent of the total value of the investment, or \$5,175. Of this amount, \$1,800 was paid to Callahan as a commission on the sale.
8. In or about late November 1999, the Ayer Board of Selectmen raised concerns regarding the investment. On or about December 16, 1999, at a meeting of the Trust Funds Commissioners, Callahan recommended to his fellow commissioners

that they "cancel the investment in question ... and start over." His fellow commissioners declined Callahan's invitation, instead affirming their initial investment in a December 18, 1999 letter to the town treasurer. (Callahan was not a signatory to the letter.)

9. On January 15, 2000, the Trust Funds Commission, with Callahan abstaining, voted to shift approximately half of the value of that investment to a New England Securities money market fund, a more conservative investment vehicle. The minutes of the January 15, 2000 meeting also note that "Mr. Callahan advised that he will donate his commission." On or about February 8, 2000, Callahan's \$1,800 commission was reinvested in the mutual fund.

Conclusions of Law

Chapter 268A, s.17

10. Section 17(a) of GL. c. 268A prohibits a municipal employee from, except as otherwise provided for bylaw for the proper discharge of official duties, directly or indirectly receiving or requesting compensation from anyone other than their city, town or municipal agency in relation to a particular matter in which the same city or town is a party or has a direct and substantial interest.

11. Section 17(c) of GL. c. 268A prohibits a municipal employee from, inter alia, acting as an agent for anyone in connection with any particular matter in which the municipality is a party or has a direct and substantial interest, except as otherwise provided for by law for the proper discharge of official duties.

12. As a Trust Funds Commissioner, Callahan was, in August 1999, a municipal employee as that term is defined in GL. c. 268A, s. 1.

13. The decision to invest funds in the New England Securities Growth and Income Fund was a particular matter.

14. The Trust Funds Commission had a direct and substantial interest in the matter; it was entrusted with protecting the trust funds' corpus, and the number of scholarships that it could award hinged in large part on the value of the funds.

15. Callahan received an \$1,800 commission from his employer for the town's investment in the New England Securities Growth and Income fund. (He later returned the Commission.)

16. Callahan's receipt of this compensation was not authorized by law for the performance of his official duties

17. By receiving compensation from his employer in relation to a particular matter in which the Trust Funds Commission had a direct and substantial interest, Callahan violated s. 17(a).[1]

18. At the time he recommended the investment as a board member, Callahan was also acting as an agent for his employer regarding the investment. Indeed, Callahan was, in effect, acting in a dual capacity when he made the recommendation. He was both a private agent and a public employee.

19. Callahan's actions as his employer's agent were not authorized by law for the performance of his official duties.

20. By acting as agent for his employer in relation to a particular matter in which the Trust Funds Commission had a direct and substantial interest, Callahan violated s. 17(c).

Chapter 268A, s.19

21. Section 19 of GL. c. 268A prohibits municipal employees from participating in their official capacity in particular matters in which, to their knowledge, they or their employer have a financial interest.

22. As already noted, Callahan was a municipal employee and the decision to invest funds in the New England Securities Growth and Income Fund was a particular matter.

23. By advising the Trust Funds Commission to make that investment, and then joining with his fellow commissioners to execute a letter to the town treasurer directing him to make the investment, Callahan participated, in his official capacity, in this particular matter.

24. Callahan and his employer, New England Financial, each had

a financial interest in the particular matter. Callahan's employer earned \$5,175 in the transaction, of which \$1,800 was paid to Callahan as a commission.

25. Callahan knew of these financial interests when he recommended the investment and signed the letter to the treasurer directing him to make the investment.

26. Therefore, by participating in two decisions leading to the purchase by the Trust Funds Commission of an investment vehicle marketed by his employer, which in turn led to his collection of an \$1,800 commission, and his employer's receipt of a fee, Callahan participated in a particular matter in which, to his knowledge, he and his employer had a financial interest, thereby violating s. 19.

Resolution

In view of the foregoing violation of GL. c. 268A by Callahan, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed to by Callahan:

(1) that Callahan pay to the Commission the sum of \$2,000.00 as a civil penalty for violating G.L. c. 268A, s. 17 and s. 19; and

(2) that Callahan waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.

DATE: January 10, 2002

[1] Callahan's receipt of a commission derived from town funds under a contract between his employer and the town also violated s.20. That section bars municipal employees from having a financial interest in municipal contracts. The Commission, in its discretion, elected to impose a penalty only for Callahan's s. 17 and s. 19 violations.

End Of Decision

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MASSACHUSETTS DEPARTMENT OF REVENUE
DIVISION OF LOCAL SERVICES
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MITCHELL ADAMS
Commissioner

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LESLIE A. KIRWAN
Deputy Commissioner

May 13, 1992

Thomas C. Abisalih
Town Treasurer
Town Hall
Two School Street
Merrimac, MA 01860

Re: Cemetery Perpetual Care Trust Funds
Scope of Permissible Investments
Our File No. 92-344

Dear Mr. Abisalih:

This is in reply to your recent letter concerning the statutory provisions relating to cemetery perpetual care trust funds. Specifically, you inquire as to the authority to determine investments of such funds and the scope of legal investments.

Chapter 114, Section 25 of the General Laws pertains to the investment and expenditure of cemetery trust funds. Under its provisions, town treasurers must invest cemetery perpetual care trust funds and disburse trust fund income as ordered by the cemetery commissioners unless the donor provided that funds be invested and spent in a particular manner. Absent special instructions, investment and disbursement decisions are made solely by the cemetery commissioners.

While the aforementioned section vests in the cemetery commissioners the general authority to determine investments, such investment decisions, in our view, remain fully subject to the provisions of G.L. Chapter 44, Section 54 relating to legal investments for trust funds. Indeed, Section 54 provides, in pertinent part, as follows:

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Trust funds, including cemetery perpetual care funds, unless otherwise provided or directed by the donor thereof, shall be placed at interest in savings banks, trust companies incorporated under the laws of the commonwealth, banking companies incorporated under the laws of the commonwealth which are members of the Federal Deposit Insurance Corporation, or national banks, or invested by cities or towns in participation units in a combined investment fund under section thirty-eight A of chapter twenty-nine, or in paid-up shares and accounts of and in co-operative banks, or in shares of savings and loan associations doing business in the commonwealth to an amount not exceeding one hundred thousand dollars, or in bonds or notes which are legal investments for savings banks. Cities or towns having such funds in the custody of the treasurer in an aggregate amount in excess of two hundred and fifty thousand dollars may also invest such funds in securities, other than mortgages or collateral loans, which are legal for the investment of funds of savings banks under the laws of the commonwealth;.... (emphasis added).

The foregoing establishes the legal parameters for the investment of trust funds, and pursuant to the first sentence, explicitly applies to the investment of cemetery perpetual care funds.

With respect to the permissible investments for cemetery perpetual care funds, the initial language clearly lists the deposits or investments that are legal for a municipality having less than two hundred and fifty thousand dollars of trust funds. Generally, these include deposits in various banks, bonds and notes that are legal investments for savings banks, and participation units in the Massachusetts Municipal Depository Trust investment fund.

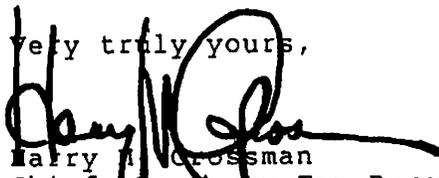
Cities or towns having in excess of two hundred and fifty thousand dollars of trust funds are afforded additional flexibility, however, as they may also invest in certain "securities" which are legal investments for savings banks. Under this provision, certain investment or mutual funds may be legal for the investment of trust funds (and cemetery perpetual care funds) provided they appear on the Commissioner of Banking's list of legal investments for

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savings banks. If a mutual fund does not appear on the List of Legal Investments, it is our opinion that it would not constitute a permissible investment for cemetery perpetual care funds.

For your information, I have enclosed copies of the pertinent pages of the most recent List of Legal Investments that this Division has been able to obtain. It is likely that this list has been amended and updated, and you may wish to contact the Office of the Commissioner of Banks for the most recent list.

I hope this information proves helpful. If I may be of any additional assistance in this or any other matter, please do not hesitate to contact me.

Very truly yours,

Harry M. Crossman
Chief, Property Tax Bureau

HMG/jeb
Enclosures



December 4, 2000

G. Lillian Whitney, Treasurer
Town Hall
895 Main Street
Ashby, MA 01431

Re: Gift of Stock
Our File No. 2000-683

Dear Ms. Whitney:

You informed us that a local resident has advised that he proposes to make a gift to the town of a number of shares of stock. This gift, you stated, is to be utilized by the town to pay costs associated with the acquisition of open space. You asked a number of questions relating to the proposed gift. First, you inquired whether you, as treasurer, would have authority to sell the stock and, if so, what your options would be.

As you know, G.L. Ch. 44 §§54 and 55, which govern the investment of municipal funds, expressly specify the permissible investments of such monies. Section 54 pertains to municipal trust funds and Section 55 to general fund monies. These statutory provisions limit the ability of municipalities to invest in stocks. Only under Section 54 may municipalities invest in any stocks, at all, and those are restricted to the particular stocks enumerated by the commissioner of banks in his "List of Legal Investments," issued in accordance with G.L. Ch. 167 §15A. Therefore, we believe that upon a municipality's receiving a gift of stock not contained in this list, the treasurer should, unless the donor has otherwise stipulated, convert that stock within a reasonable time period. Subsequently, the treasurer should perform any investments of the proceeds of such a conversion in accordance with the relevant provision of Ch. 44.

The acceptance and expenditure of gifts of monies by cities and towns is subject to the provisions of G.L. Ch. 44 §53A. This statute permits any municipal officer or department to accept gifts of monies and to expend these monies, with the approval of the selectmen or mayor, without appropriation. However, if the donor places restrictions on the expenditure of these monies, the municipality must abide by these restrictions.

In the case presented, you indicated that the donor intends to give the stock with the express specification that it be converted to cash and expended for open space acquisition. Under such a circumstance, not only would you be authorized to sell the stock, but also, we think, you would be obliged to sell it pursuant to the terms of the gift.

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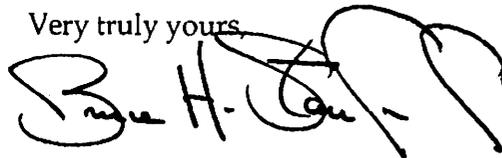
You asked, "Is it acceptable to receive only the amount of the value of the stock at the time of sale?" We think what you are asking with this question is, "If, indeed, the town performs a sale of the subject stock, when should it consummate that sale?" The question arises, of course, because stock values regularly fluctuate from moment to moment. Indeed, it is the volatile nature of stock values, we think, that prompted the Legislature to limit the investment in these instruments by cities and towns. The constraint is intended to offer protection to municipalities from dramatic investment losses.

In any case, a town must employ the services of a brokerage in selling stock. In the subject anticipated sale, although you are certainly not required to do so, we think you should place substantial reliance upon the advice of the town's broker in timing that sale, at the same time taking care that the sale is not unreasonably delayed. We think your taking guidance in the timing of the sale from a reputable broker, at the same time instructing that broker to sell the stock at the earliest prudent time, would satisfy your fiduciary duty with respect to the stocks' conversion.

With regard to payment of the costs of such a sale, while G.L. Ch. 44 §55 provides that the purchase price of shares in certain investment instruments shall not include commission costs, we do not think this statute applies to the case presented. Rather, we think the statute pertains to investments made on a recurring basis in the sorts of instruments which generate commission charges. These charges, the statute directs, should be paid out of an appropriation. In the case presented, however, the town will be obligated to convert a specific gift of stocks under the express terms of gift. The transaction will be a one-time event, not arising out of routine and regular investment practices of the treasurer. We think in this distinctive circumstance the town may properly pay sale costs, including commissions, out of the proceeds of the sale.

If you have any additional questions concerning this matter, please do not hesitate to contact us.

Very truly yours,

A handwritten signature in black ink, appearing to read "Bruce H. Stanford". The signature is stylized and somewhat cursive, with a large loop at the end.

Bruce H. Stanford, Chief
Property Tax Bureau



November 5, 1998

Wendy Nightingale
Town Accountant
136 Elm Street
North Easton, MA 02356

Re: Appropriation to Scholarship Fund
Our File No. 98-727

Dear Ms. Nightingale:

You requested our opinion whether the town of Easton may, by town meeting vote, appropriate monies into an existing local scholarship fund. This fund was originally created by town meeting action on March 4, 1957, at which time the town voted to transfer \$17,415.07 from the Memorial Playground Fund to establish a veterans scholarship fund. Later that year, the Legislature, with the enactment of Chapter 742 of the Acts of 1957, ratified the town meeting vote. In addition to validating the appropriation, the special act stated:

The principal of said scholarship fund shall be preserved intact in the custody of the town treasurer of the town of Easton but said town may accept from private sources contributions to be added to the principal of said fund. (Emphasis supplied.)

We do not believe the town can properly appropriate monies to a scholarship fund. To do so, we think, would violate the so-called Anti-Aid Amendment (Arts. 18, 46 & 103) of the State Constitution. This provision prohibits (in §2) the use of public funds to aid any school, hospital or other charitable institution which is not under the exclusive control of public officers. After stating several express exceptions to the prohibition, §2 goes on to provide that:

Nothing herein contained shall be construed to prevent the Commonwealth from making grants-in-aid to private higher educational institutions or to students or parents or guardians of students attending such institutions. (Emphasis supplied.)

Section 3 of the amendment sets out an additional exception to the prohibition of §2:

Nothing herein contained shall be construed to prevent the Commonwealth, or any political subdivision thereof, from paying to privately controlled hospitals, infirmaries, or institutions for the deaf, dumb or blind not more

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than the ordinary and reasonable compensation for care or support actually rendered or furnished.... (Emphasis supplied.)

It seems to us that the difference between the underlined portions of the passages quoted in Sections two and three clearly indicates that only the Commonwealth, itself, may expend monies to support private higher education, either directly through grants to educational institutions or indirectly through grants to defray the cost of attending such institutions.

The Supreme Judicial Court has stated expressly that the appropriating authority of a town "cannot authorize expenditure of public funds for the sole benefit of an individual." Quinlin v. City of Cambridge, 320 Mass 124 (1946). This prohibition is reiterated in Boston Association of School Administrators v. Boston Retirement Board, 383 Mass. 336 (1981), where the Court said, "There is...a constitutional doctrine that public funds may not be handed over to private citizens as a gratuity." To award a scholarship to an individual from public funds would, we think, be clearly violative of this doctrine.

We note that the special act which ratified the original appropriation did not authorize future appropriations to the scholarship fund. It merely permitted the town to accept contributions from private sources.

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

Very truly yours,



Harry M. Grossman
First Deputy Commissioner

LEGAL

in Our Opinion

Art Is Sometimes Not for Sale

In a recent decision, the Supreme Judicial Court (SJC) blocked the sale of 17 oil paintings which had been bequeathed to a charitable trust. The case is *Museum of Fine Arts v. Beland*.¹ Under the terms of the will of Reverend William E. Wolcott, who died in 1911, 17 paintings, including three masterpieces by Claude Monet, Camille Pissarro, and Eugene Boudin, were bequeathed to the trustees of the White Fund, a charitable trust. The minister's express purpose in making this bequest was "to create and gratify a public taste for fine art, particularly among the people of the City of Lawrence." Wolcott also stipulated in his will that the paintings be displayed at the Museum of Fine Arts (MFA) in Boston until such time as they could be exhibited in a public art gallery in the City of Lawrence. The MFA received the paintings, regularly exhibited the three important works, and held the 14 minor works in storage but available for viewing by persons interested in them.

Alarmed that the trustees planned to sell the paintings, the MFA brought suit in superior court seeking a declaratory judgment that the charitable trust lacked the power to sell the paintings. The superior court judge agreed that Wolcott's will did not permit the sale of the paintings. The judge also held that Wolcott's intent was being satisfied with respect to the three exhibited paintings. He further held that a trial was necessary to decide whether the bequest should be modified to permit the sale of the 14 paintings in storage. This decision was appealed to the Supreme Judicial Court.

The trustees stated that the terms of Wolcott's will permitted the sale of the paintings since the people of Lawrence were not receiving enough of a cultural benefit from the exhibition of only three paintings at the MFA. Pointing to the language "full and absolute authority" conferred on the trustees in the will, the trustees argued they could sell the paintings. The SJC rejected this claim. The court wrote that the will also contained the following crucial provision: "The ownership and control of the pictures shall be vested permanently and inalienably ... in [the] Trustees." The SJC interpreted this language to mean that the trustees were not to sell them but rather to possess the paintings permanently.

Even if the will did not permit the sale of the paintings, the trustees urged the court to apply the doctrine of *cy pres* to this bequest. Under this legal principle, where the intent of the donor can no longer be satisfied, a court of proper jurisdiction may allow property held for a specific charitable purpose to be directed toward some other charitable purpose. The trustees believed that the presence of the paintings in Boston, even if three were regularly exhibited there, did little to gratify the taste for fine art in Lawrence. There was also little chance that a suitable art gallery would be built in the City of Lawrence. A sale of the paintings, however, would raise millions of dollars that could be used to fund art programs in the City of Lawrence.

The SJC rejected that argument. Under the terms of the will, Wolcott's intent was "to create and gratify a public taste for fine art" with a preference for the people of Lawrence. The lack of a suitable gallery in Lawrence, however, did

not justify the sale of the three exhibited paintings since display of these works at the MFA complied with the express terms of the will. *Cy pres*, according to the court, should also not be employed to sell the remaining paintings since a sale would be the opposite of Wolcott's intent. Selling the paintings would deprive the public of viewing them. In the court's view, *cy pres* might be applied to permit exhibition of the 14 paintings at a site geographically near Lawrence, such as the Town of Andover. In the absence of information as to alternative locations, however, the court declined to rule on loosening the geographic restriction for the 14 paintings in storage.

Accordingly, the SJC held that the MFA had prevailed and the trustees could not sell the paintings. ■

written by James Crowley

1. 432 Mass. 540 (2000).

New Office

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performed under the direction of the former EMAB by the Department of Revenue's Education Audit Bureau. That bureau, created by Deputy Commissioner Joseph J. Chessey, Jr. and headed by Bureau Chief Dieter Wahl, has conducted 32 audits over the past three years, and teamed up with DOE for six of them. OEQA will absorb the school district accountability function of the Department of Education. ■

Legal

Court Approves Expansion of Gardner Museum

James Crowley, Esq., Bureau of Municipal Finance Law

Occasionally, local officials will ask the Division of Local Services (DLS) legal staff whether their community may use gifts given in trust for different or broader purposes. In some cases, the original purposes of these public charitable trusts have been served or are no longer achievable. In others, the trust *corpus is de minimis* and not able to generate sufficient income to achieve the purpose. A recent case in the news highlights that a court proceeding is required to deviate from the terms of a charitable trust.

The Isabella Stewart Gardner Museum is located in the Fenway section of Boston, and is near the Museum of Fine Arts. The museum with its more than 2,500 artifacts is housed in a building designed to resemble a 15th century Venetian palace. The Gardner Museum, originally known to Bostonians as "Fenway Cour," was first opened to the public in 1903. Isabella Stewart Gardner, an eccentric patron of the arts, left a large endowment for the Museum in her will, which was filed in 1924. The will also contained some other unusual provisions as discussed below.

In November 2004, the trustees of the Isabella Stewart Gardner Museum announced the selection of famed architect Renzo Piano, whose most illustrious project was the Pompidou Center in Paris, to design a new multistory building that would be adjacent to the historic museum. The new 60,000 square foot structure would contain administrative offices, a museum gift shop, a café, a visitor reception area and storage rooms. The expansion was envisioned as the means to preserve the historic museum and expand cultural programs for future generations. Building the new addition, however, would require the removal of a carriage house and the con-

struction of a new entrance to the museum as well as a glass-enclosed pathway between the buildings.

There was a rather large stumbling block to the proposed plan. Under the terms of Isabella Stewart Gardner's will, the museum essentially had to remain unchanged from the time of her death. If any changes were made, the will provided that the land, museum and all contents would pass to Harvard College to sell. The museum filed a request with the Attorney General to per-

... application of the *cy pres* doctrine was not necessary since the ... plan did not conflict with the primary purpose of Isabella Stewart Gardner's testamentary gift, which was to provide a museum for the public's education and enjoyment.

mit a reasonable deviation from the express terms of the will. The Attorney General, who is responsible for ensuring that funds given to public charities are properly administered, assented to the plan. The President of Harvard College also gave approval to the construction. A local neighborhood group, however, objected to the demolition of the carriage house and hired an attorney to oppose the expansion. The Gardner Museum then filed a petition in equity with the Supreme Judicial Court (SJC) pursuant to M.G.L. Ch. 214 §§ 1 and 10B to receive judicial approval for the project.

In its complaint, the Gardner Museum did not request the Supreme Judicial Court to apply the doctrine of *cy pres* to the bequest. Under this legal principle, where the intent of the donor can no longer be satisfied, a court may allow property held for a specific charitable purpose to be directed toward some other charitable purpose. Instead, the Gardner Museum sought a reasonable deviation from the subordinate terms of the will.

In March 2009, Justice Spina filed a Memorandum and Judgment in favor of the museum's expansion plan in the case of *The Isabella Stewart Gardner Museum, Inc. v. Attorney General Martha Coakley*. Justice Spina agreed that application of the *cy pres* doctrine was not necessary since the trustees and architect's plan did not conflict with the primary purpose of Isabella Stewart Gardner's testamentary gift, which was to provide a museum for the public's education and enjoyment. In his review of Mrs. Gardner's will, the Justice noted that Article 4 of the will expressly permitted new construction if the trustees considered it to be necessary, "for the protection or benefit of the Museum." By its terms, Article 4 of the will did not bar the demolition of the carriage house.

Nor did Justice Spina find the forfeiture provision of Article 7 to be applicable. Under this provision, the entire Gardner Museum would be forfeited to Harvard College if the museum trustees, "shall at any time change the general disposition or arrangement of any articles which shall have been placed in the first, second, and third stories of said Museum." According to the court, the trustees were not threatened with forfeiture since the carriage house demolition and the details of the expansion plan were not expressly forbidden by Article 7.

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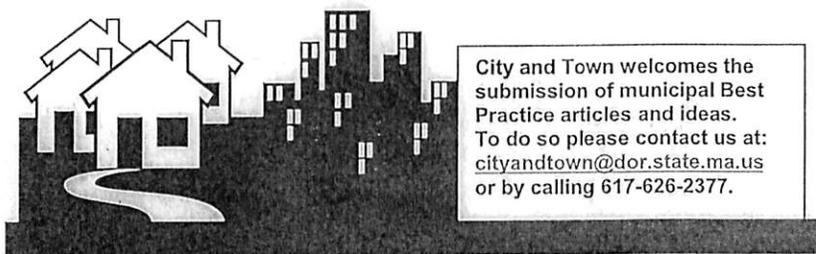
Springfield Productivity Bank continued from page 2

in support of the City's overall recycling reform efforts (a \$50,000 project with a projected annual savings of \$72,000).

Investments such as these are made routinely in the private sector but are more difficult in government because of intense competition for funding, the shortened perspectives created by electoral cycles, the difficulty in quantifying return on investment in some public services, and the absence of a profit incentive to motivate creativity and innovation. The Springfield Productivity

Bank is designed to help overcome these challenges and help improve the efficiency and effectiveness of municipal government.

The Springfield Productivity Bank is a stabilization reserve fund; special legislation is not required. The program is also scalable to any size or level of government. Please feel free to contact me at lisauskass@dor.state.ma.us or 617-821-5933 if you have any questions about the Productivity Bank. ■



City and Town welcomes the submission of municipal Best Practice articles and ideas. To do so please contact us at: cityandtown@dor.state.ma.us or by calling 617-626-2377. ■

Museum Expansion continued from page 3

The SJC perceived the planned expansion to require only a deviation from the subordinate provisions of Mrs. Gardner's will. According to the court, the expansion project was necessary to the public interest by relieving museum overcrowding, extending the life of the historic museum building, and reducing the risk of damage to the works of art. Justice Spina also rejected the claim of the community group that the trustees had failed to consider other alternatives before adopting a plan to demolish the carriage house. As noted by the court,

the trustees' plan had been favorably reviewed and supported by the Boston Landmarks Commission, the Boston Redevelopment Authority and the Massachusetts Historical Commission. Since the terms of the will were not violated and the public interest was served, the SJC approved the expansion plan.

For further reading on the *cy pres* doctrine, the reader should consult the March 2001 issue of City & Town for an article entitled "Art Is Sometimes Not for Sale." ■

Mark Your Calendars

The **New Officials Finance Forum** will be held on Thursday, June 11, 2009 in **Worcester** at the College of the Holy Cross. Pre-registration is required.

Assessment Administration: Law, Procedures and Valuations (Course 101) will be held in August at the University of Massachusetts **Amherst**. This course is offered through the Massachusetts Association of Assessing Officers (MAAO). Please visit their website for more information: www.maaao.org.

The location and dates for the Fall 2009 Course 101 have not been established. The proposed region is Middlesex County. The dates and location will be finalized in mid-June.

"What's New in Municipal Law" will be held on Friday, September 25, 2009 at the Log Cabin Banquet and Meeting House in **Holyoke** and Friday, October 2, 2009 at the Lantana in **Randolph**. The Bulletin announcing this training opportunity will be issued in July.

If you have any questions regarding the above information, please contact Donna Quinn, training coordinator, at 617-626-3838 or quinnd@dor.state.ma.us. ■