

Municipal & Public Finance

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IRS Proposes Safe Harbor for TRANS

By William G. Tonkin

Some recent news articles have reported that the Internal Revenue Service ("IRS") on audit is questioning whether tax or revenue anticipation notes ("TRANS") issued by certain school districts in other parts of the country may violate federal arbitrage rules against "abusive arbitrage devices" contained in Treasury Regulations §1.148-10. An "abusive arbitrage device" is defined as any action that has the effect of enabling an issuer to exploit the difference between tax-exempt and taxable interest rates to obtain a material financial advantage, and overburdening the tax-exempt bond market. The regulations provide that an issuer may be treated as overburdening the tax-exempt bond market if it issues more bonds, issues bonds earlier, or allows bonds to remain outstanding longer than is otherwise reasonably necessary to accomplish the governmental purposes of the bonds, based upon all the facts and circumstances.

In the reported school district audits, the IRS apparently is questioning whether there was any *bona fide* governmental purpose for issuing the TRANS in the first place, independent of the expected benefit of earning arbitrage profits on the TRAN proceeds. In certain other audits, the IRS apparently has questioned whether any TRAN issue can have a final maturity longer than 13 months after the issue date without violating the abusive arbitrage device regulations because that longer maturity would, in effect, allow the TRANS to remain

outstanding longer than reasonably necessary to accomplish the governmental purpose of the TRANS, which is usually to finance a cumulative deficit in operating cash flow.

The IRS apparently has focused upon a 13-month period as an acceptable term for TRANS because certain other arbitrage regulations permit proceeds of a TRAN issue that are expected to be fully spent within 13 months after the issue date to be invested in higher-yielding investments for the same 13-month "temporary period." However, the current "temporary period" rules for TRAN proceeds (unlike prior rules issued under the Internal Revenue Code of 1954) do not require the TRAN issue to mature within 13 months from the issue date. Moreover, the abusive arbitrage device regulations themselves expressly state that one factor evidencing that bonds may remain outstanding longer than necessary is a term (length of maturity) that exceeds the safe harbor against an issue being treated as creating "replacement proceeds." Those safe harbor regulations provide that replacement proceeds "do not arise" with respect to an issue used to finance working capital expenditures (current operating expenses) if it "is not outstanding longer than 2 years." Under these regulations, an issuer could quite reasonably assume that a TRAN issue with a term not exceeding 2 years would not be treated as outstanding longer than reasonably necessary.

In light of the inconsistency between the

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I-747: Will The Third Time Be the Charm or Strike Three?

By Alice M. Ostdiek

With the November election season swinging into high gear, voters will begin to pay closer attention to the three initiatives qualified for the statewide ballot. Among them is the third installment in the Tim Eyman saga of measures attempting to limit local government's taxing power.

INITIATIVE 747

Initiative 747 concerns "limiting property tax increases." The measure purports to amend the 6% limit factor (which I-722 attempted to reduce to 2%) and replace it with a limit set at the lesser of 1% or inflation. If approved, the measure will take effect 30 days after the election, or December 6, 2001, and will apply to 2002 levies.

In practical terms, this means that local governments who find it necessary to levy property taxes at a rate greater than 101% over the previous year's levy rate would be compelled to place their levies before the people to lift the levy lid. In addition, over the past decade, the Implicit Price Deflator (IPD), which determines the rate of inflation, has averaged 2.3%¹; this number is unlikely to fall below 1% (and likely will rise), while the levy lid under I-747 would remain at just 1%. Over the long-term, therefore, I-747 would prevent jurisdictions from keeping revenues in step with inflation and would perpetually decrease local government's ability to pay for services with revenues raised from property taxes, potentially forcing reliance on more regressive forms of taxation.

Although this measure is comparatively straightforward, and therefore free from many of the pitfalls of I-695 and I-722, I-747 is not beyond the reach of constitutional challenge. One such possible challenge involves the constitutional prohibition on the impairment of contractual obligations; another involves questioning the use of

the initiative power to limit a power specifically permitted by the constitution. Finally, I-747 purports to amend I-722 directly, as opposed to the underlying code sections. (I-747 would amend RCW 84.55.0101 rather than RCW 84.55.010.) Therefore, the fate of I-722 may have direct bearing on the viability of I-747.

HOW TO PREPARE?

All jurisdictions with the power to impose property taxes are affected by this measure. Each jurisdiction should consult with financial advisors and attorneys to determine the options that will be open to them. At a minimum, all taxing districts should:

- ♦ Evaluate the expected property tax rates that will be necessary for 2002 and determine whether the measure's passage will make a levy lid lift action necessary.
- ♦ Plan budget adjustments assuming the passage of I-747.

Remember that state law prohibits the use of public money or facilities (including employee work time) to support or oppose ballot propositions. However, distribution of objective information about a ballot proposition is permitted to the extent that it falls within the scope of the duties of a department or office. Government officials should consult with their legal counsel or the Public Disclosure Commission if they have questions regarding campaigning for or against initiative measures.

¹ Source: Bureau of Economic Analysis, *National Income and Product Accounts Tables*, Table 8.1 (<http://www.bea.doc.gov/bea/dn/nipaweb/SelectedTables.asp>).



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Bill is an elected member of Foster Pepper and has been with the firm since 1969.

As part of the Municipal & Public Finance Group, Bill has specialized experience in federal tax requirements and restrictions, including arbitrage and arbitrage rebate requirements, applicable to all kinds of tax-exempt obligations, including state and local qualified 501(c)(3) bonds, qualified small issue (industrial development) and exempt facility bonds. He also has extensive experience in general business and corporate areas, emphasizing federal taxation and securities regulation.

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IRS Proposes Safe Harbor for TRANS

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express provisions of the existing arbitrage regulations and the IRS's apparent audit position, the IRS on August 20, 2001, issued Notice 2001-49 proposing a new revenue procedure that would provide an additional safe harbor against a TRAN issue being treated as being outstanding longer than reasonably necessary, if the final maturity date of the TRAN issue is not later than 13 months after the issue date. This new safe harbor would be effective for TRANS sold after the date a final revenue procedure is published in the Internal Revenue Bulletin, and the IRS has solicited comments on the proposed revenue procedure until November 18, 2001.

More importantly, because of the perceived "lack of clarity" in the applicable regulations, Notice 2001-49 includes the following statement:

Because of this lack of clarity in the regulations, the Internal Revenue Service announces that the issue of whether a tax or

revenue anticipation bond is outstanding longer than necessary for purposes of §1.148-10(a)(4) will be closed in any current examination, and will not be raised in any future examination, with respect to any issue of tax or revenue anticipation bonds that has a term of 2 years or less and was sold prior to August 3, 2001.

Thus, any TRAN issue with a term of 2 years or less that was sold prior to August 3, 2001, will not be questioned by the IRS solely because of its term to maturity.

However, this IRS announcement will, as a practical matter, effectively preclude any future TRAN issue from having a final maturity date later than 13 months after the issue date. An issuer confronted with significant financial distress may have difficulty financing operating cash flow deficits over a term longer than 13 months on a tax-exempt basis unless very unusual facts and circumstances unequivocally show that a longer term is required. 

Some Things to Remember for 2002 Municipal Elections

By Jim McNeill and Lee Voorhees

Planning for municipal elections in 2002 begins now. This article will briefly list some things to remember for those municipalities planning to go before the voters in the coming year.

2002 ELECTION DATES AND BALLOT PROPOSITION FILING DEADLINES

The 2002 election dates and deadlines for filing the ballot proposition resolution or ordinance are listed below. These are the dates permitted under current law, which may be changed by the Legislature. ***Please***

Note: absentee ballots must be mailed no later than 20 days prior to an election date.

CHANGES TO BALLOT TITLE LAWS

As reported in our August 2000 ***Municipal & Public Finance News***, the Washington Legislature has enacted sweeping legislation (chapter 197, Laws of 2000 (the "Act")) that changed the requirements for ballot titles for most bonds and most levy elections. The Act became effective June 8, 2000. Local governments intending to submit bond or levy propositions in 2002 should consult

<u>ELECTION DATE</u>	<u>BALLOT PROPOSITION FILING DEADLINE</u>
February 5, 2002	December 21, 2001
March 12, 2002	January 25, 2002
April 23, 2002	March 8, 2002
May 21, 2002	April 5, 2002
September 17, 2002	August 2, 2002
November 5, 2002	September 20, 2002

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Susan's practice is concentrated in land use. She has experience working through land use issues for hospital, university, government and private developer clients. She has additional experience involving project permitting as well as litigation work in a variety of forums such as the Growth Management Hearings Board, administrative tribunals, superior courts and appellate work.

Prior to joining FP&S, Susan had externships with both Justice Johnson at the Washington Supreme Court and for the Earthjustice Legal Defense Fund

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EHB 2247: State Conservation Programs and the Energy Consumption Analysis for Public Buildings

By Susan Elizabeth Drummond

The State is required to review and update conservation programs and is to "play a leading role in demonstrating updated and new energy efficiency technologies."


Publicly owned or leased facilities are pushed towards more cutting edge energy designs. Specific examples of the new requirements include:

Energy Consumption Analysis: The energy consumption analysis that is performed for publicly owned or leased buildings with 25,000 square feet or more of usable floor space must now include the consideration of an energy system that complies with "the sustainable design guidelines of the United States green building council leadership in energy and environmental design silver standard or similar standard" that may be adopted.

Consideration of Alternative Energy: The use of energy systems that utilize renewable resources (such as solar energy, wood or wood waste, or other nonconventional fuels) and that incorporate energy management

systems must be considered in the design of all publicly owned or leased facilities.

Energy Audits: State agencies and school districts are required to do energy audits and implement cost-effective conservation measures as set forth in Chapter 43.19 RCW. State-owned facilities are to conduct energy consumption surveys and walk-through surveys. If cost effective energy conservation measures are identified and recommended in an investment grade audit of the facility, then they must be installed.

Registry of Energy Service Contractors: The state department of generation administration will maintain a registry of energy service contractors and provide assistance to municipalities in identifying available performance-based contracting services. 

Water-Sewer Districts: Get Your Comp Plan Approved Right!

By Hugh Spitzer

A legal detail frequently overlooked by water and sewer districts is the proper approval of district general comprehensive plans – and amendments too.

Chapter 57.16 RCW provides an arduous scheme for adopting a district's sewer or water "comp plan":

- ♦ Investigation, planning and engineering;
- ♦ Adoption by district board resolution;
- ♦ Submission to the county engineer for approval, conditional approval or rejection within 60 days;
- ♦ Submission to the county health director for separate approval, conditional approval

or rejection within 60 days;

- ♦ Additional 60 days given to county engineer and health director if they find that sufficient time is not available to adequately review the proposed plan;
- ♦ Approval, conditional approval or rejection by the county legislative authority within 90 days of submission (with an extra 90 days if the county legislative authority finds that time is insufficient to adequately review the proposed plan);
- ♦ Approval, conditional approval or rejection by the council of each city or town in which the district lies, within 90 days unless an extra 90 days is

Water-Sewer Districts

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necessary because of inadequate time for review; and

- ♦ Submission and approval by “any state agency whose approval may be required by applicable law” (i.e., the State Department of Health or the State Department of Ecology, depending on project type).

RCW 57.16.010 requires that these steps be repeated each time the district amends its water or sewer comp plan.

These hoops are complicated. They are bothersome. They are time-consuming. They frustrate special district board members, their staff and their engineers.

But there’s a reason for this detailed approval process. The Legislature has consistently determined that key land use decisions are to be made by general purpose governments like counties and cities, not by special purpose utility districts. During the 1960s and ‘70s, there were instances of water and sewer lines being extended into new areas without proper advance planning. This contributed to zoning incongruities, congestion and unplanned sprawl. The comp plan approval requirement was meant to assure that utility expansion would go hand in hand with appropriate zoning and with planning for roads, stormwater and other infrastructure improvements.

The water and sewer district law also requires that connection charges be based on an adopted comprehensive plan, although a recent Court of Appeals decision in which Foster Pepper & Shefelman represented a district held that plan approval by the County was not necessary for purposes of rate setting pursuant to the plan. Adoption by the District’s board was sufficient. **Silver**


Firs Town Homes, Inc. v. Silver Lake Water District, 103 Wn. App. 411 (2000).

For construction projects, failure to comply with the complicated requirements of chapter 57.16 RCW will result in a loss of legal authority to spend money on a project (RCW 57.16.015) or an inability to issue bonds for project construction (RCW 57.16.010; 57.20.018).

A district may do preliminary engineering, surveying and other planning work prior to adoption of the comp plan or an amendment. But it can be exceedingly frustrating for a district to have a project stopped dead in its tracks because the district did not start the approval process early enough to have all the county letters and resolutions in place by the time a financing is to take place or construction is to begin.

Engineers and staff often believe that if they have an approval letter from the Department of Ecology, the Department of Health and the applicable County agency, nothing else is necessary. This is dead wrong.

The statute is crystal clear. The steps must be followed to the letter. And please don’t blame the general counsel or bond lawyer for calling the statute to the district’s attention. (It’s not fair to murder the messenger!)

The key is early planning and coordination with county and city officials. Our experience is that most jurisdictions are ready, willing and able to help so long as they receive adequate notice. That enables everyone to do their jobs and keep needed projects rolling forward. 

About the Author

Hugh D. Spitzer



Hugh has practiced law at Foster Pepper & Shefelman since 1982. He focuses his practice in municipal and public finance law. His experience includes a broad range of revenue and general obligation financings as bond counsel and underwriter’s counsel. Hugh also practices state constitutional law. He has been an affiliate professor at the University of Washington School of Law since 1986, teaching Roman Law, Urban Government, and Washington State Constitutional Law.

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A member of Foster Pepper & Shefelman PLLC since 1986, Al is a former deputy prosecutor for Snohomish County where he began his career after receiving his J.D. from Vanderbilt University in 1978 and his B.A. from Duke University in 1975.

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Effects of Terrorist Acts on Your Workforce

By Alan K. Willert

The President has authorized the call-up of military personnel for the initiation of Operation Enduring Freedom. Many employers will have members of their workforce called up in this and, perhaps, additional call-ups. This may also impact many more employers than those affected by occasional National Guard weekend duty. Employers need to be familiar with how to handle these call-ups under state law, collective bargaining agreements, company policies, and most importantly, the Uniformed Services Employment and Reemployment Rights Act ("USERRA").

a. Washington State Law.

Although there is little under state law that deals with military leave, there is one pertinent statute for public employers. Contrary to the requirements of USERRA (see (d) below), public employers under Washington State law are required to pay their employees for 15 days of military leave per calendar year. RCW 38.40.060. There are also other statutes dealing with the calculation of military leave under certain pension and retirement systems that can also affect public employers. Other states may have additional pertinent statutes that may affect you depending upon your location.

b. Collective Bargaining

Agreements. If your employees are unionized, in whole or in part, it is quite likely that the terms of your Collective Bargaining Agreement ("CBA") deal with this issue. For any union members who are subject to this call-up, make sure to check the CBA because if its terms are more favorable than applicable law, these terms of the CBA will apply.

c. Workplace Policies.

Your entity's Employee Handbook may have already provided for military leave. You will need to review those policies to see how they will affect your workforce, especially if your employees are non-union. If you have not updated your Employee Handbook in some time, now would be a good time to do it. If you do not have an Employee Handbook, for this and many other reasons, you should seriously consider having one implemented.

d. USERRA. This federal law (38 U.S.C.4301 *et seq.*) covers a number of issues related to employees called up for military duty. Some of the more pertinent ones are:

i. Employers

Subject to USERRA. Virtually all employers are covered.


ii. Replacement and

Reemployment Rights. Employers may replace employees who leave for active military duty. However, when those employees return, they are generally entitled to return to their old jobs without loss of seniority. The returning employees also cannot be fired except for just cause for one year after their return if their absence exceeded 180 days. If the employees were absent for more than 30 but less than 180 days, the just cause standard applies for 180 days from the time of their reemployment.

iii. Wage Payments.

Under USERRA, employers do not have to pay their employees for the time they are on military leave. However, employment agreements, collective bargaining agreements, state law, and workplace policies may require payment despite the provisions of this statute. Generally, the policy, agreement, or statute that is more favorable will apply.

iv. Benefits.

Employers must make group health coverage available to their employees on military duty for up to eighteen months of military service at the employee's expense. This requirement is similar to COBRA but also applies to employers who are not otherwise subject to the COBRA. If an employee is only gone on military leave for 31 days or less, however, the employer cannot charge the employee anything more than what the employee would have paid if he or she had remained employed. Employers also cannot require that employees on military leave use their vacation or sick leave for their military absence. 

TIF Update

By Jeffrey C. Nave

In the last installment of *Municipal & Public Finance News*, we explored Washington State's new tax increment financing ("TIF") statutes (Laws of 2001, Chapter 212; Engrossed Substitute House Bill 1418). Most of these statutes are codified in chapter 39.89 RCW.

Many questions have arisen regarding the use of tax increment financing to fund infrastructure projects around the State. This article has been developed as an aid to our clients who are considering whether to create—or to consent to the creation of—an increment area within their boundaries. The schedules set forth below show the approximate growth in assessed value that must occur to support each \$1 million of TIF bonds, as well as the principal amount of TIF bonds that can be supported by each \$1 million increase in assessed value. We find that this information is crucial in determining whether TIF is a viable financing alternative.

The schedules are based on various conclusions drawn from the TIF statutes, including:

- ♦ for many increment areas, it may be safest to assume that the maximum levy rate subject to allocation under chapter 39.98 RCW is \$5.90 per \$1,000 of assessed value of taxable property or less;
- ♦ as currently drafted, the date on which taxes are first allocated under RCW 39.89.070(1) and the "sunset" clause in RCW 39.89.901 work to severely limit the amount of tax allocation revenues that most increment areas can be expected to generate; and
- ♦ the entity creating the increment area is

entitled to a maximum of 75% of any increase in the value of real property within the increment area.

The law supporting these conclusions is discussed below.

AMOUNT OF TAXES SUBJECT TO ALLOCATION

"Tax allocation revenues" are defined in


RCW 39.89.020(8) to be those tax revenues derived from the imposition of "regular property taxes" on 75% of any increase in the true and fair value of real property in an increment area that is placed on the tax rolls after the increment area is created. For TIF purposes, "regular property taxes" are defined to mean property tax levies that (i) are subject to the aggregate limitation set forth in RCW 84.52.043 (*i.e.* the "\$5.90 per \$1,000 assessed value" limitation) and 84.52.050 (*i.e.* the "one percent" limitation), or (ii) are levied by a port district or a public utility district. Excluded from this definition are:

- ♦ regular property taxes levied by the State for the support of the common schools;
- ♦ regular property taxes levied by a port district or a public utility district, to the extent the port district or public utility district specifies (e.g. in the resolution submitting the levy request to the county assessor) that the tax receipts will be used to make required debt service payments on general indebtedness;
- ♦ voter-approved regular property tax levies to fund emergency medical services;
- ♦ regular property taxes levied by counties

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Foster Pepper Named Top Law Firm

Foster Pepper & Shefelman was recently named as one of the most respected law firms in the nation's 50 largest markets. *The Corporate Board Member*, a quarterly magazine, surveyed 32,500 members of corporate boards across the America, asking them to identify the firms they most admire nationally. Clients and the legal media's perception of the firm, its ability to attract top

clients and its landmark or notable cases were measured in determining the list of top firms. Foster Pepper, one of five firms listed in the Seattle area, was measured against other sources of data, including Law.com's rankings and lists compiled by the *The Yellow Book of Leaders* and the *National Law Journal*. 

Critical Employment Law Issues Annual Workshop

Foster Pepper's annual Critical Employment Law Issues Workshop is slated for Thursday, Nov. 15, from 8:30 AM-1:30 PM. Participants will attend sessions such as: Year in Review; Recent Changes in Wage & Hour Law; Harassment/Discrimination: Avoiding Liability for You and Your Supervisors; Public Sector Update; Monitoring Employee Use of Computers, Email and the Internet; and more.

The workshop takes place at the Washington State Convention & Trade Center in downtown Seattle. Registration is \$75 and CLE credits are available.

To register, visit www.foster.com. From the home page, click on Newsroom, then Conferences & Seminars. Or, call Ms. Stefin Kohn in Foster Pepper's Marketing & Client Services Department, at 206-447-8985.

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Jeff has significant experience representing local governments as bond counsel and disclosure counsel in addition to his work as tax counsel.

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TIF Update

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under RCW 84.34.230 to fund the acquisition of open space and conservation futures;

- ♦ voter-approved regular property tax levies by counties, cities and towns to fund affordable housing for low-income households; and
- ♦ certain voter-approved regular property taxes levied by metropolitan park districts.

Based on the foregoing, the maximum levy rate subject to allocation under chapter 39.98 RCW is \$7.70 per \$1,000 of assessed value of taxable property. However, it is **highly** unlikely that regular property taxes within an increment area would be levied at such an aggregate rate. Under existing laws, this can only occur if: (i) the aggregate levy rate within the increment area for all taxing districts subject to RCW 84.52.043 is \$5.90 per \$1,000 of assessed value; (ii) a port district is levying regular property taxes within the increment area for general purposes, dredging purposes and industrial development purposes (*e.g.* for an aggregate levy rate of \$1.35 per \$1,000 of assessed value); (iii) a public utility district is levying regular property taxes within the increment area (*e.g.* for an aggregate levy rate of \$0.45 per \$1,000 of assessed value); **and** (iv) neither the port district nor the public utility district has specified that the receipts from such tax levies will be used to pay debt service on general indebtedness.

Municipalities that seriously are considering whether to create an increment area should prepare a detailed analysis of the historical and anticipated tax levy rates within the proposed increment area, as well as the purpose of each such tax. This analysis should consider the potential impacts of future limitations on the amount by which regular property taxes can increase—such as the limitations currently threatened by Initiative 747 (see Alice Ostdiek's article in this newsletter for a discussion of Initiative 747). Only after such an analysis is prepared can one estimate the aggregate tax rate that should be used in projecting future tax allocation revenues for a specific increment area. For a more casual analysis, we suggest that an aggregate tax rate of no greater than \$5.90

per \$1,000 assessed value be used.

PERIOD DURING WHICH TAX ALLOCATION REVENUES CAN BE EXPECTED

Pursuant to RCW 39.89.070(1), the county treasurer is required to distribute tax allocation revenues commencing in the calendar year following the passage of the ordinance creating the increment area. According to RCW 39.89.901, most of the new TIF statutes—including those requiring county assessors and county treasurers to allocate assessed value and distribute tax allocation revenues—expire on July 1, 2010. This is halfway through the 2010 tax collection cycle. From these two statutes, we can draw the following conclusion: if an increment area is created during 2002, the entity creating the increment area will only receive tax allocation revenues during the years 2003 through 2009, and for the first six months of 2010 (*i.e.* for 7½ years).

The practical effect of these limitations is that the increment area must generate substantial tax allocation revenues, **and** do so immediately, if such tax allocation revenues are being relied upon exclusively to finance meaningful infrastructure improvements.

SCHEDULES RELATING TO GROWTH IN ASSESSED VALUE

Considering these limitations, we prepared schedules that we have used to determine whether the benefits of TIF will outweigh its costs (both monetary and political). These schedules are based on certain assumptions that we believe are reasonable, but we understand will not apply under all circumstances. These assumptions are discussed below.

The following schedule (Chart One) shows the approximate growth in assessed value that must occur to support each \$1 million of TIF bonds. The schedule suggests that property values in an increment area must increase by more than \$335 million to support a \$10 million TIF bond issue.

Another way of analyzing whether TIF bonds are a viable alternative for infrastructure financing is to determine the aggregate principal amount of TIF Bonds that can be supported by each \$1 million

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Chart One

Assessed Value Increases Necessary to Support Debt Service on \$1 Million of Bonds

Increment Area Created	First Distribution of Tax Allocation Revenues	Necessary Increase in Assessed Values		
		4% Assumed Interest Rate	5% Assumed Interest Rate	6% Assumed Interest Rate
2002	2003	\$33,565,612	\$34,965,382	\$36,392,303
2003	2004	37,651,890	39,055,326	40,482,490

increase of assessed value in an increment area. The schedule below (Chart Two) provides estimates and attempts shows the approximate growth in assessed value that must occur to support each \$1 million of TIF bonds.

the increment area is created to make the initial debt service payment on such date (note: only the April 30th installment of property taxes will have been due by such date);

UNDERLYING ASSUMPTIONS

These schedules should not be considered as gospel. They merely are intended to provide “ballpark” figures for initial planning purposes. The schedules assume various factors, some of

- ♦ the tax allocation revenues will be based on an aggregate regular property tax rate of \$5.90 per \$1,000 of assessed value of real property;

- ♦ the full increase in assessed value

Chart Two

Principal Amount of TIF Bonds Supported by Each \$1 Million Increase in Assessed Value

Increment Area Created	First Distribution of Tax Allocation Revenues	Principal Amount of TIF Bonds Supported		
		4% Assumed Interest Rate	5% Assumed Interest Rate	6% Assumed Interest Rate
2002	2003	\$29,792	\$28,600	\$27,478
2003	2004	26,559	25,605	24,702

which will not be relevant under all circumstances. These include;

- ♦ the bonds will be paid solely from tax allocation revenues (note: an issuer may pledge other sources of money to the repayment of TIF bonds);

- ♦ the bonds will be issued on July 1 of the year in which the increment area is created;

- ♦ the bonds will bear interest at a single rate calculated on the basis of a 360-day year, will mature on July 1, 2010, and will have equally amortized payments of principal and interest;

- ♦ sufficient tax allocation revenues will have been received by the issuer by July 1 of the year after

necessary to support debt service on the bonds will be placed on the tax rolls immediately after the increment area is created, and there will be no future increases in such assessed value (both of which assumptions are highly unlikely to materialize); and

- ♦ the tax allocation revenues received by the issuer will be based on 75% of the increase in the true and fair value of real property in the increment area that is placed on the tax rolls after the increment area is created, and not on some lesser percentage (note: an issuer may be required to use a lesser percentage if necessary to secure the consent of the other taxing districts affected

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Lee is an elected member of Foster Pepper and has been with the firm since 1966.

Lee is engaged primarily in public finance and health care law, including work in the areas of health planning, medical staff matters, governance of public and nonprofit institutions and the tax-exempt financing of facilities and equipment. His experience includes serving as bond counsel on numerous financings for cities and towns, counties, school districts and special purpose districts throughout the state, as well as for hospitals and colleges, and participation in similar bond issues in Alaska, California, Idaho and Oregon.

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Municipal Elections

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with bond counsel or local attorneys familiar with the Act before proceeding. UNDER NO CIRCUMSTANCES SHOULD OLD BALLOT TITLES SUBMITTED AT ELECTIONS OCCURRING PRIOR TO THE ACT'S EFFECTIVE DATE BE USED AS MODELS.

OPEN PUBLIC MEETINGS LAW AND PUBLIC DISCLOSURE LAWS

Municipalities must comply strictly with the Open Public Meetings Law (chapter 42.30 RCW) and the Public Disclosure and Campaign Reporting Laws (chapter 42.17 RCW). For a detailed discussion of the Open Public Meetings Act, please see our July 1999 *Municipal & Public Finance News*.

The Public Disclosure Commission (the "PDC") has a variety of useful publications to assist municipalities in complying with the Public Disclosure Laws. Recently, on August 28, 2001, the PDC adopted revised election campaign guidelines for school districts entitled *Guidelines for School Districts in Election Campaigns* (the "Guidelines"). A copy of the Guidelines is available online (<http://www.pdc.wa.gov>). According to the PDC, the Guidelines were adopted to provide a set of "common sense, easy-to-use guidelines for school district personnel." Although intended for school districts, the Guidelines provide a useful tool for interpreting how the PDC might apply the public disclosure laws to other municipal election campaigns.

LOCAL VOTERS' PAMPHLET

If a county, or first-class or code city, authorizes the publication of a local voters' pamphlet under chapter 29.81A RCW, a municipality seeking voter approval of a ballot proposition may need to prepare an explanatory statement and appoint committees to prepare statements for and against the ballot proposition. Municipalities should consult with the county auditor or city clerk, as applicable, to determine (i) whether a local voters' pamphlet will be authorized; and (ii) the necessary administrative rules that govern the pamphlet's content, including, most importantly, the deadlines for submitting

the explanatory statement and statements for and against the ballot proposition.

OTHER SUGGESTIONS

Other practical suggestions when planning for an election include:

- assemble the financing and election advisory teams early.
- allow ample time for preparation, review and approval of documents.
- set realistic priorities for actions to be taken.
- strive for consistency and accuracy in public statements.
- never try to write your own ballot title, especially for a bond issue.
- never hesitate to ask questions.

Please contact any of our municipal finance attorneys, if you have questions regarding bond or levy elections. Also, copies of the various editions of our *Municipal & Public Finance News* mentioned in this article are available upon request.

TIF Update

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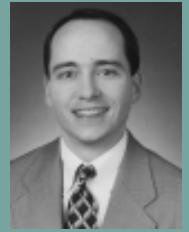
by the creation of the increment area).

CONCLUSION

We continue to believe the TIF statutes can provide a meaningful source of funds to finance infrastructure improvements under the right circumstances. However, unless the TIF statutes are amended, we think (i) TIF bonds will be most useful if they are issued in conjunction with other types of bonds, such as revenue bonds or special assessment bonds, or if additional sources of revenue are pledged to the payment of TIF bonds, and (ii) that TIF favors projects involving undeveloped and under-developed property (*i.e.* where the potential for growth in assessed value is the greatest).

About the Author

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Jim is an *of counsel* member of Foster Pepper and practices in our Spokane office.

Jim's practice concentrates on municipal law and finance practice with emphasis on Washington School Districts. He also serves as bond counsel to a variety of other Washington municipalities. Jim has additional substantial experience in the practice of defending municipalities against challenges to the exercise of municipal authority.

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Babcock v. Mason County Fire Dist. No. 6: Fire Fighters -- Be Cautious What You Say at Fire Scenes!

By Jim McNeill

In August, 1995, a fire broke out at a home owned by James and Kiyoko Babcock (the "Babcocks") in Union, Washington. Mason County Fire Protection District No. 6 (the "District") responded to the call. Upon arrival at the scene, heavy smoke and flames were observed coming from the home. The fire had also spread to an adjacent wood frame garage. A tent trailer was situated between the home and the garage. The Babcocks attempted to remove personal property from the garage and were told by a fire fighter not to remove any of their property. The fire fighter further told the Babcocks to leave matters in the hands of the fire fighters and they would "take care of protecting our property." Even though ordered by the fire fighters not to do so, Mr. Babcock moved his truck, which had been parked near the home. Eventually, the fire was brought under control. The Babcocks' home, tent trailer and garage, however, were destroyed.

The Babcocks sued the District in the Mason County Superior Court alleging that the District was negligent in fighting the fire. The superior court dismissed the claim holding that the Babcocks failed to establish an exception to the public duty doctrine, which provides immunity to fire fighters in the performance of their duties. The Court of Appeals affirmed the superior court's decision.

The Washington Supreme Court, in a divided opinion, affirmed the Court of Appeals decision on September 13, 2001. *See Babcock v. Mason County Fire Dist. No. 6*, ___ Wn.2d ___, Westlaw 1045052 (Wash. Sept. 13, 2001). Initially, the Washington Supreme Court noted that to recover from a municipal corporation in tort under the public duty doctrine, a plaintiff must show the duty breached was owed to an individual and was not merely a general obligation owed to the public. Under the special relationship exception to the public duty doctrine, municipal tort liability may arise if the plaintiff can show (i) there is privity between the public official and the injured

plaintiff and (ii) there are express assurances upon which the plaintiff justifiably relied. The Court concluded that there was *no special relationship* between the District and the Babcocks.

First, the Court held that there *was privity* between the District and the Babcocks that set the Babcocks apart from the general public because the government official, a fire fighter, communicated with them in person at their burning home. The Court also reasoned that a single statement made by a fire fighter could rise to the level of an assurance that would isolate the interests of the Babcocks from the interests of every other member of the public. Second, although the Court found privity, the Court determined that there were *no express assurances* that the District would save their property. The Babcocks did not seek any assurance from the fire fighter nor did they claim to have specifically sought such assurance. The statement made by the fire fighter did not indicate she or the other fire fighters would act in a specific manner, and consequently, the Court held that no express assurances were given. Third, the Court held that the Babcocks *did not justifiably rely* upon the fire fighter's alleged assurance. The Court determined that the Babcocks were not justified in relying on the fire fighter's statement to mean their property would be saved because the fire was intense and unpredictable. Additionally, Mr. Babcock's actions in moving his truck, contrary to the orders of the fire fighters, demonstrate that he did not justifiably rely upon the fire fighter's statement.

In a concurring opinion, three justices believed that the public duty doctrine should be discarded entirely and that the Court should instead apply traditional tort law principles to determine duty. Significantly, the concurring opinion concluded that even applying traditional tort law analysis to this case would lead to the same result as the majority opinion.

Although the analysis in *Babcock* is limited to the specific facts before the Court, there are several important lessons to be learned from the Court's decision, including:

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Fire Fighters

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- the public duty doctrine provides immunity to fire fighters in the performance of their duties. In the not to distant future, however, the Court may discard the public duty doctrine and apply a traditional tort law analysis.
- the public duty doctrine should not create a false sense of security -- fire fighters and other employees of fire districts, cities, towns and counties delegated with the authority to extinguish fires and protect human life and property must be very cautious with representations made to victims and others at fire scenes (*i.e.*, what you say could be held against you).

In support of the District, Foster Pepper & Shefelman PLLC filed an amici curiae brief with the Washington Supreme Court on behalf of the Association of Washington Fire Chiefs and the Washington Fire Commissioners Association. 

LINKS TO VALUABLE WEBSITES

Our website (<http://www.foster.com>) includes links to a number of other valuable resources including information on Foster Pepper & Shefelman's various Practice Groups and recent articles covering topics of local and national interest.

EDITOR'S NOTE

Municipal & Public Finance News is a periodic publication of Foster Pepper & Shefelman PLLC and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult your own lawyer concerning your own situation and any specific legal questions you may have.

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