ED 5.0000

MRSC Information Bulletin 489
WSAMA Proceedings, April 1995

CITY INVOLVEMENT IN ECONOMIC DEVELOPMENT

By: Don L. Hogaboam, Senior Assistant City Attorney, City of Tacoma

I. INTRODUCTION

RCW 35.21.703 provides:

> It shall be in the public purpose for all cities to engage in economic development programs. In addition, cities may contract with nonprofit corporations in furtherance of this and other acts of economic development.

This writer has not found any other state statutory provision which defines the term "economic development" in relationship to the authority of a city to engage in it. When U.S. Supreme Court Justice Douglas was asked by a lawyer critical of the Supreme Court's vague definition of obscenity of how he would define it, Justice Douglas is reported to have responded that he could not define it, but that he would certainly recognize it if he saw it. At this juncture in time, this writer is not able to predict how the state Supreme Court will define "economic development," but I would imagine most attorneys representing municipalities in this state will be quick to recognize it when they see it, particularly since there appears to be at first blush a blanket statutory authority to engage in it and presumably to spend public funds for its advancement. The following analysis is a brief and incomplete overview of (1) some of the federal and state constitutional provisions which would appear to impact the legal authority of a city to spend funds for "economic development," and (2) the conduit theory and public development authorities.

II. FEDERAL CONSTITUTIONAL LIMITATIONS ON THE EXPENDITURE OF PUBLIC FUNDS

The State Supreme Court at an early date (Lancey v. King County, 15 Wash. 9, decided June, 1896) held that where either a municipality or the United States had the authority singly to undertake a particular enterprise, then stated generally, they could jointly proceed to prosecute such undertaking. It would appear, however, that conversely stated, the authority of the Federal Government and a State or municipal government to cooperate to a common end would be contingent upon the authority of each to reach it, and such cooperation may only be effectuated by an exercise of the power which they severally possess.

The Fifth Amendment to the U. S. Constitution prevents the Federal Government from taking "property without due process of law" and the Fourteenth Amendment prohibits a state from "taking property without due process of law." The U. S. Supreme Court has, from an early date, held that the Fourteenth Amendment precludes a state from imposing taxes for merely private purposes, and requires that the purposes for which tax funds are to be expended must be public as opposed to private purposes. Everson v. Board of Education, 91 L.Ed. 711 (1946); Citizens Savings and Loan Association v. Topeka, 20 Wall. (US) 655, 22 L.Ed. 455; Parkersburg v. Brown, 106 U.S. 487, 27 L.Ed, 238, 1 S.Ct. 442; Thompson v. Consolidated Gas Utilities Corporation, 300 U.S. 55, 81 L.Ed. 510, 57 S.Ct. 364; Green v. Frazier, 253 U.S. 233, 64 L.Ed. 878, 40 S.Ct. 499; Jones v. City of Portland, 245 U.S. 217, 38 S.Ct. 112. See also Public Purpose and Taxation (1930), Selected Essays on Constitutional Law, The Association of American Law Schools, Volume 1, 18 Cal. Law Rev. 137.

Even prior to the ratification of the Fourteenth Amendment to the U. S. Constitution, and in the absence of any specific constitutional prohibition in the State Constitution, Chief Justice Black of the Pennsylvania Supreme Court set forth what has been asserted to be the first clear cut statement of the "public purpose doctrine," as follows:

> The legislature has no constitutional right to create a public debt or to levy a tax, or to authorize any municipal corporation to do so in order to raise funds for a mere private purpose. No such authority passed to the assembly by the general grant of legislative power. This would not be legislation. Taxation is a mode of raising revenues for public purposes. When it is prostituted to objects in no way connected with the public interest or welfare, it ceases to be taxation, and becomes plunder.

Sharpless v. Mayor of Philadelphia, 21 Pa. 147 (1853).

In general, the issue of public purpose under the Fourteenth Amendment is reached in two classes of cases: first, those involving government aid to private individuals or corporations, and second, those involving the assumption by government of new functions. The U.S. Supreme Court has held that a state or its political subdivisions may, in the public interest, constitutionally engage in a business commonly carried on by private enterprise, may levy taxes to support it, and may compete with private interests engaged in like activity. Puget Sound Power and Light Company v. City of Seattle, Wash., 54 S.Ct. 542, 2910 U.S. 619, 78 L.Ed. 1025. It would appear that, insofar as the Fourteenth Amendment is concerned, as interpreted by the U.S. Supreme Court, there is no real definable limit to state and municipal activities in the field of publicly-owned business enterprises. However, where the state undertakes to aid a private

institution by public taxation, this will constitute a taking of property without due process of law in violation of the Fourteenth Amendment, if such expenditure does not primarily serve a legitimate public purpose. The U.S. Supreme Court has noted that:

> The state taxing power can be exacted only to effect a public purpose and does not embrace the raising of revenue for a private purpose, but the requirement of due process leaves free scope for the exercise of wide legislative discretion in determining what expenditure will serve the public interest.

Carmichael v. Southern Coal and Coke Company, 57 S.Ct. 868, 81 L.Ed.2d 1245, 109 ALR 1327.

The generally accepted view as to the constitutional limitation on the spending power of the federal government as construed by the U. S. Supreme Court is set forth in Antieau, Modern Constitutional Law, Volume 2 at Paragraph 12 58 as follows:

> 12.58--CONSTITUTIONAL LIMITATIONS.
>
> All members of the Supreme Court in 1936 agreed that Congress can constitutionally spend only for the general welfare. This limitation, according to the language of the majority, will seemingly be equated to the "public purpose" doctrine customarily deemed a limitation upon all American governments in both taxing and spending.
>
> So long as the spending act is for the benefit of the many, rather than a preferred few, it will surely survive Supreme Court scrutiny under this norm. The court has observed: "The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event." The court is apparently ready to give almost unreviewable deference to the congressional determination that its spending is for the general welfare. In upholding spending for unemployment compensation by a state, the Supreme Court said:
>
> > As with expenditures for the general welfare of the United States, whether the present expenditure serves a public purpose is a practical question addressed to the lawmaking department, and it would require a plain case of

> departure from every public purpose which could reasonably be conceived to justify the intervention of a court. The present case exhibits no such departure.

The same year the court, after noting that no formula can determine whether spending is for general purposes, added:

> There is a middle ground or certainly a penumbra in which discretion is at large. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law.

Bergman has interestingly commented: "The power to spend is limited by the amount of money which Congress has to spend."

Spending by Congress for reclamation and irrigation projects has been held to be for the general welfare. The court has said: "In developing these projects the United States is expending federal funds and acquiring federal property for a valid public and national purpose, the promotion of agriculture. This power flows not only from the General Welfare Clause of Art. I, Section 8 of the Constitution, but also from Art. IV, Section 3, relating to the management and disposal of federal property."

Spending by Congress to provide low-cost housing has also been held to be compatible with the general welfare clause.

The general welfare is not a static or historical concept. The Supreme Court has remarked: "Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation. What is critical or urgent changes with the times."

See, United States v. Butler, 297 U.S. 1, 80 L.Ed. 477, 56 S.Ct. 312, 102 ALR 914 (1896); Helvering v. Davis, 301 U.S. 619, 81 L.Ed. 1307, 57 S.Ct. 904, 109 ALR 1319 (1937).

The lack of more specific criteria as to what is a "public purpose" or a "federal purpose" for which federal funds may be expended would appear in part to be a

result of the holding by the U.S. Supreme Court in Frothingham v. Mellon, decided with Mass. v. Mellon, 262 U.S. 447, 43 S.Ct. 597 (1923), wherein the Court held that a taxpayer of the United States does not have standing to challenge a federal appropriation, for the reason that the financial interest of a taxpayer in any particular federal appropriation is too minute or indeterminate to amount to a judicially-protected interest. While the enforcement of the Fifth Amendment by an individual taxpayer to prohibit a federal expenditure for an alleged non-public or non-federal purpose may be by way of the ballot box, as opposed to the Courts, where a state or municipality is involved under the Fourteenth Amendment, the "public purpose" requirement does exist, and it is anticipated that the Courts will intercede in the event of a flagrant abuse by Congress of this constitutional limitation.

In applying the foregoing principles to the expenditure of funds by City for the promotion of economic development, it is clear that such expenditures will be constitutionally required to advance a lawful public purpose, even if only federal funds are being utilized.

III. STATE CONSTITUTIONAL LIMITATIONS

In State ex rel. Collier v. Yelle, 9 Wn.2d 317, the Court set forth the general principle that public funds can be appropriated only for public purposes under the Washington State Constitution. The Court stated in part at page 325:

> According to the fourteenth amendment to the state constitution, all taxes shall be levied and collected for public purposes only, and the levy or collection of taxes for private purposes is thereby forbidden. This provision of our constitution does not expressly prohibit the legislature from appropriating public funds for private purposes, the amendment referring only to the levy and collection of taxes. It must be held, however, that the same limitation is imposed upon the expenditure of public money as is imposed upon the levy and collection of public money by taxation, and that a legislative appropriation of funds derived from taxes for a private purpose is in violation of the constitutional provision. If this did not follow, an appropriation of public moneys might be made for a private purpose, and the money so appropriated be replaced by taxation, which would, in effect, be the use of money raised by taxes, for private purposes. Since money can be raised and collected by taxation only for public purposes, it follows that such funds can be appropriated only for public purposes.

> Prior to the enactment of the fourteenth amendment, this court considered the same limitation of the power to tax as inherent in our constitution, based on the due process clause, the principle having been considered as applying with equal force to appropriation acts and to taxation statutes. State ex rel. State Reclamation Board v. Clausen, 110 Wash. 525, 188 Pac. 538, 14 ALR 1133; State ex rel. Hart v. Clausen, 113 Wash. 570, 194 Pac. 793, 13 ALR 580.
>
> In the case of William Deering & Co. v. Peterson, 75 Minn. 118, 77 N.W. 568, an appropriation act was held unconstitutional. The court said:
>
> > Taxation cannot be imposed for a private purpose, and, if the state can appropriate for a private purpose the money in its treasury and then replace it by taxation, it can do indirectly what it cannot do directly.

In addition to the "public purpose" limitation, a municipality as a general rule may only levy taxes, incur debt, and expend its funds for a proper municipal or corporate purpose. Article VIII, Section 7, setting forth limitations upon municipal indebtedness, provides in part:

> . . . No part of the indebtedness allowed in this section shall be incurred for any purpose other than strictly county, city, town, school district, or other municipal purpose.

Article VII, Section 9, provides in part:

> . . . For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes and such taxes shall be uniform with respect to persons and property within the jurisdiction of the body levying the same.

Article XI, Section 12, provides:

> The legislature shall have no power to impose taxes upon counties, cities, towns, or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, but may, by general laws, vest in the

> corporate authorities thereof the power to assess and collect taxes for such purposes.

The principal that a municipality may only expend its funds for a proper municipal purpose was recognized in State ex rel Latimer v. Henry, 38 Wash. 39, where the Supreme Court held that Article XII, Section 7, and Article VII, Section 5, prohibited a county from paying costs associated with school property with funds of the county raised by taxation for general county purposes, as such payment would not be for a county purpose. See, also, AGO 1988 No. 21.

Besides the previously stated constitutional limitations on the expenditure of public funds, there is an additional limitation imposed by Article VIII, Section 7, of the State Constitution with respect to expenditures by municipalities, which provides:

> No county, city, town or other municipal corporation shall hereafter give any money or property or loan its money or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.

It is beyond the scope of this paper to analyze or even give a general overview of how this "gift or loan" prohibition has been applied by the courts, although this provision will be referred to under the subheading "Conduit Theory" below. If a city desire to engage in an "economic development" program, which involves financial assistance, or any assets of a city including its "credit," then the issue of applicability of Article VIII, Section 7, will be of considerable concern. There are several other state constitutional provisions which have an impact on the use of public funds to provide financial assistance to promote "economic development." Article VIII, Section 5, provides essentially the same (as interpreted by the State Supreme Court) limitation on the expenditure of state funds as Article VIII, Section 8, does for municipal funds.

Article VIII, Section 8, allows port districts to use public funds "in such manner as may be prescribed by the legislature for industrial development or trade promotion" and also declares "promotional hosting shall be deemed a public use for a public purpose and shall not be deemed a gift within the provisions of Section VII of this Article." This section was adopted after the State Supreme Court had determined that "promotional hosting" by a port district constituted a prohibited gift under Article VIII, Section 7. It is noted that this provision does not include other municipalities, and it would appear that the "promotional hosting" prohibition still applies to the use of city funds.

Article VIII, Section 10, allows "municipal corporations or quasi-municipal corporations" to provide financial assistance for certain improvements for the conservation of water or energy.

Article XXIX allows the investment of public pension or retirement funds not withstanding the prohibitions of Sections 5 and 7 of Article VIII, and Section 9 of Article XII.

Article XXXII, as presently implemented by RCW 39.84, allows the issuance of tax exempt nonrecourse revenue bonds (known as industrial revenue bonds) to finance certain private projects. This provision is thought to have been enacted to allow the issuance of nonrecourse bonds that would have otherwise been a constitutionally prohibited loan of credit under Port of Long View v. Taxpayers of Port of Longview 85 Wn.2d 216, 533 P.2d 128 (1974). A fairly recent case (WEDFA v. Grimm, 119 Wn.2d 738, 837 P.2d 606 (1992)) has upheld the issuance of nonrecourse bonds by a state agency under RCW 43.163 for the purchase of certain SBA 504 loans to help free up capital of banks holding these loans so more private funds would be avaiiable to small businesses seeking capital. The legality of the bonds was challenged on the basis that they did not comply with the requirements of Article XXXIII. The court held that they did not need to comply with Article XXXIII as they were not industrial revenue bonds as defined in Article XXXIII and then recognized that authority existed prior to the adoption of Article XXXIII to issue properly structured nonrecourse bonds without violating the lending of credit prohibition in our State Constitution. The court noted that the nonrecourse bonds in question were bonds where (1) the repayment is made solely from revenues derived from the project being funded or other private sources, (2) they are not repaid from any public funds, (3) they do not create an obligation for the State or its subdivision, (4) proceeds of the bonds are not public money, and (5) proceeds are held as trust funds and segregated from public funds. This type of financing which the court approved (sometimes called "conduit financing"), should arguably also be recognized as a permissible activity of a municipality. While RCW 43.163 authorizes the public authority ("Authority") created thereunder to act as a financial conduit in local economic development programs, the specific statutory definition at RCW 43.163.010(11) of "economic development activity" is too limiting to have application to a number of economic development activities in which many cities are already engaged. The additional, more general, grant of authority at RCW 43.163.070 may allow cities under agreement with the Authority to use the Authority's "conduit financing" to provide financial assistance for economic development projects other than the statutorily defined economic development activities.

IV. THE CONDUIT THEORY AND PUBLIC DEVELOPMENT AUTHORITIES

The Attorney General in AGO 1970 No. 24 ruled that under the "conduit theory," the prohibition of Article VIII, Section 7, did not apply to federal funds ("Model Cities Funds") made available to cities under Title I of the Demonstration Cities and Metropolitan Development Act of 1966 (42 U.S.C. § 3301 et. seq.), but determined under AGO 1973 No. 18 that the "conduit theory" did not apply to federal funds ("Revenue Sharing Funds") given to cities under the state and local Fiscal Assistance Act of 1972, Public Law 92-512, commonly known as the "Federal Revenue Sharing Act." In making this decision, it was reasoned:

> In that prior opinion (AGO 1970 No. 24), we concluded that the first class city's expenditure of federal grants under that act (which would have constituted gifts if made from a city's own funds) did not fall within the prohibition of this Section of the Constitution (Article VIII, Section 7) for the reason that under the terms of the grants there in question, the funds involved are only available for the specific purposes for which they were granted. Because of this, we determined that these funds never actually became city funds subject to the Constitution. The city, in making the expenditures, thus acted only as a "conduit" for the expenditure of federal funds. . . . That reasoning (conduit theory), however, is simply not applicable in this situation, where, as in the case of general revenue sharing monies granted under the federal act herein question, the funds in question become those the local governmental unit to which they are granted and/or are expressly made subject to applicable restrictions of state law in any event.

In respect to federal "block grant funds," in a May 15, 1975, letter to Dr. Campbell, Municipal Research Council, Deputy Attorney General Phil Austin advised:

> Following up on our letter to you of May 1, 1975, it appears that we are in general agreement with Fred Andrews' tentative opinion of April 24, 1975, regarding the applicability of Article VIII,. Section 7, of the State Constitution to block grant money obtained by a city for a community development program received under Public Law 93-383, the Housing and Community Development Act of 1974. Insofar as

these funds themselves are concerned, the rationale of AGO 1970 No. 24, rather than that of AGO 1973 No. 18, appears to apply.

Copies of these letters, together with Yakima City Attorney, Fred Andrews' April 24, 1975, opinion, are on file with the Municipal Research and Service Center of Washington.

In the absence of a Washington Appellate Court case clearly accepting the conduit theory, there existed some reluctance to fully accept the theory, and it was the opinion of several municipal attorneys that there needed to be some mechanism to isolate the conduit funds from the city treasury and to isolate the city from any liability or obligation that might arise in respect to the use of the conduit funds by private entities or others. In 1970 and 1971, RCW 35.21.660 and 35.21.670 were adopted allowing all cities to participate with the Untied States to implement Model Cities programs and to create "public corporations" to carry out Model Cities activities and to limit the liability incurred by such public corporations to its assets and credits with no recourse to the "assets, credit, or services of the municipality creating the same." In 1974, the legislature, by the adoption of RCW 35.21.730-758, authorized the creation of public corporations by cities to implement and administer federal programs and block grants, and in 1985 authorized use of these public corporations "to perform any lawful public purpose or public function," and to "issue bonds and other instruments evidencing indebtedness. RCW 35.21.730 and RCW 35.21.745 presently provide as follows:

> **35.21.730 Public corporations--Powers of cities, towns, and counties--Administration.** In order to improve the administration of authorized federal grants or programs, to improve governmental efficiency and services, or to improve the general living conditions in the urban areas of the state, any city, town, or county may by lawfully adopted ordinance or resolution:
>
> (1) Transfer to any public corporation, commission, or authority created hereunder, with or without consideration, any funds, real or personal property, property interests, or services;
>
> (2) Organize and participate in joint operations or cooperative organizations funded by the federal government when acting solely as coordinators or agents of the federal government;
>
> (3) Continue federally-assisted programs, projects, and activities after expiration of contractual term or after expending allocated federal funds as

deemed appropriate to fulfill contracts made in connection with such agreements or as may be proper to permit an orderly readjustment by participating corporations, associations, or individuals;

(4) Create public corporations, commissions, and authorities to: Administer and execute federal grants or programs; receive and administer private funds, goods, or services for any lawful public purpose; and perform any lawful public purpose or public function. The ordinance or resolution shall limit the liability of such public corporations, commissions, and authorities to the assets and properties of such public corporation, commission, or authority in order to prevent recourse to such cities, towns, or counties or their assets or credit.

35.21.745 Public corporations--Provision for, control over-- Powers. Any city, town, or county which shall create a public corporation, commission, or authority pursuant to RCW 35.21.730 or 35.21.660, shall provide for its organization and operations and shall control and oversee its operation and funds in order to correct any deficiency and to assure that the purposes of each program undertaken are reasonably accomplished.

Any public corporation, commission, or authority created as provided in RCW 35.21.730 may be empowered to own and sell real and personal property; to contract with individuals, associations, and corporations, and the state and the United States; to sue and be sued; to loan and borrow funds and issue bonds and other instruments evidencing indebtedness; transfer any funds, real or personal property, property interests or services; to do anything a natural person may do; and to perform all manner and type of community services: PROVIDED, That such public corporation, commission, or authority shall have no power to eminent domain nor any power to levy taxes or special assessments.

The City of Tacoma presently has one active public corporation, commonly referred to as a public development authority ("PDA"), the Tacoma Community Redevelopment Authority ("TCRA"), which was chartered pursuant to a general

ordinance by the City in 1973 under RCW 35.21.660, and later pursuant to an amended charter under RCW 35.21.725-755, and under Chapter 1.60 of the Tacoma Municipal Code. A copy of the current TCRA Charter and Tacoma Municipal Code Chapter 1.60 are on file with the Municipal Research Center.

The TCRA was created to provide a separate entity which would (1) hold its funds completely separate from the City, (2) be treated by creditors and others as a separate independent legal entity with no liability or obligation flowing to the City, and (3) provide a legal mechanism by which the "conduit theory" could be fully utilized and under which conduit financing could be implemented, if desired by the City. The question whether the conduit theory is valid would seem to have been answered, at least in part, by the State Supreme Court. The questions of what a PDA created by a City can be authorized to legally do and what constitutional restrictions, if any, are applicable to a PDA are questions which have not as yet been fully answered by the Washington Appellate Courts.

The Port of Longview case (decided 1974), with its holding that "conduit financing" constituted a loan of credit in violation of Article VIII, Section 7, is labeled as a minority view and critically discussed, but not overruled in Health Care Facilities v. Ray, 93 Wn.2d 108, 605 P.2d 1260, where the court, in discussing Port of Longview, states:

> Our holding in Port of Longview that the bonding schemes violated article VIII, section 7, follows the minority view that nonrecourse development bonding schemes, unless otherwise exempted, constitute loans of credit. . . .
>
> The underlying rationale of the minority view and that of this court is that a state or municipal corporation lends its credit whenever it allows its unique governmental status or authority to be utilized for the purpose of enabling a private corporation or individual to obtain property or money that it could not otherwise acquire for the same price. A state or municipality can "lend its credit" without incurring the actual indebtedness.

The court in this case went on to uphold the constitutionality of "conduit financing" by the Health Care Facilities Authority pursuant to RCW 70.37 with four Justices holding that such bonds constitute a loan of the State's credit, but fall within the exception of the prohibition of Constitution Article VIII, Section 5, as aid to the infirm, and with four Justices holding that the bonds do not constitute a loan of the State's credit. In a subsequent case (Health Care Facilities Authority v. Spellman, 96 Wn.2d 68, 633 P.2d 866), which involved the

same State agency and conduit financing, which was to be used to provide financial assistance for health care facility projects affiliated with religious organizations, the court finally recognized the distinction on which the "conduit theory" is based. In construing Article I, Section 11, which reads in material part:

> "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment. . . "

the court held that the funds in questions were not "public money or property" and that the prohibition did not apply. In response to the argument that the federal income tax exemption made available on the interest earnings constituted "public" financial assistance, the court stated:

> Furthermore, even arguing the exemption represents some sort of financial support to a taxpayer, its source is the federal treasury. The reasonable meaning of "public money" in article 1, section 11 is money from the treasury of this state or its municipalities, not some other governmental exchequer.

In holding that the bond proceeds, even though issued by a public body, were not "public money" the court was persuaded by five arguments: (1) no money comes from the public treasury, (2) the bond proceeds never enter the public treasury, (3) repayments of the bonds do not pass through the public treasury, (4) the bonds are not state debts, and (5) although bond sales are enabled by a public body, the money is not acquired either for or from the general public. In holding that the Port of Longview did not apply, the court stated:

> This is not the same situation as in Port of Longview v. Taxpayers, 85 Wn.2d 216, 533 P.2d 128 (1974), where as we succinctly said in Washington Health Care Facilities v. Ray, supra at 113, "[T]he municipalities were simply borrowing money in their own names in the form of municipal bond issues and loaning that same money to private corporations." A totally different method of financing is provided by RCW 70.37.

It would seem clear that the "conduit theory" is on solid legal footing as to utilization of federal block grant funds and to other federal programs where federal funds or guarantees are given to accomplish federally specified purposes. In many cases, it will be easier to treat the funds received as "non-

public" funds, and to maintain these funds as "non-public" funds, if such funds are held and used by a separate legal entity, such as a PDA. In addition, it would appear that even the holding in the Port of Longview case can be avoided (assuming it still has some validity), by having "conduit financing" done by a PDA as a separate independent legal entity, such that the bonds issued would not be the bonds of the City.

A PDA does not appear to be a municipal corporation as envisioned under State constitutional provisions and accordingly, if this be the case, most (if not all) of the constitutional provisions relating to municipal corporations or cities do not apply to a PDA. The "public purpose" requirement applies statutorily and the PDA's authority must be found statutorily or in the city ordinance under which it is created, and in its charter.

In looking to the extent of the authority which can be given to a PDA the rationale of Winkenwerder v. Yakima, 52 Wn.2d 617, should be looked to. In Winkenwerder, the court stated:

> . . . the only limitation on the power of cities of the first class is that their action cannot contravene any constitutional provision or any legislative enactment. . . . The principals adhered to in the preceding cases clearly indicate that a city of the first class has as broad legislative powers as the state, except when restricted by enactments of the state legislature.

The grant of powers to cities to create and utilize a PDA is very broad, and under the rationale of Winkenwerder and the statute itself, a city should have the same legislative authority as the state in defining the specific role of a PDA under the general grant of authority to the cities by the state statute, unless specifically prohibited by the statute or the State Constitution. A PDA is statutorily prohibited from having the power of eminent domain or to levy taxes or special assessments, and while having an exemption from taxation similar to that of a city it is specifically subject to an excise tax on its property, except for certain specific exemptions. If a PDA were a municipal corporation, then under Article VII, Section 1, of the Constitution, its property could not be taxed by the state. In an unpublished Attorney General Letter Opinion to the State Auditor dated March 10, 1989 (copy on file with the Municipal Research Center), it was concluded that a PDA could not be authorized to do "conduit financing" as the legislation in question did not set forth the detail of how such "conduit financing" was to be done as had been done for conduit financing of state agencies under RCW 30.37, RCW 28B.07, RCW 39.84, and RCW 43.180. This opinion failed to recognize that cities were given a very broad grant of authority to create public corporations and to provide the "details" of what functions they could perform,

which functions could clearly include "conduit financing," provided a public purpose is being achieved. The cited AGO letter opinion also argues that since a city does not have explicit statutory authority to do the "conduit financing," therein discussed, a PDA cannot be created having broader power than the city which created it. There is no rational support for this argument as the statute allows the city to create a PDA which can "do anything a natural person may do." The issue is not what can it do, but rather what is it prohibited from doing, the only limit (with some exceptions) is what is expressly prohibited by the statute and by the city which creates it, and what is prohibited by the State Constitution.

One other case might also have some application to the use of the "conduit theory." In Lassila v. Wenatchee, 89 Wn.2d 804, 576 P.2d 54, the Supreme Court held that a municipal corporation's purchase of property with the intent to resell it to a private party, constitutes a loan of credit violation under Article VIII, Section 7. The court reasoned:

> Purchase of property by a municipality with an intent to resell it to a private party is prohibited by Const. art. 8, §7. Paine v. Port of Seattle, 70 Wash. 294, 126 P. 628, 127 P.580 91912). At acquisition a municipality must at very least intend a public purpose to insure that a later sale to a private party does not violate the constitutional prohibition. A municipality is absolutely prohibited from acting as a financing conduit for private enterprise.

It is interesting to note that in Miller v. Tacoma, 61 Wn.2d 374 (1963), the court in upholding the constitutionality of acquiring property by condemnation with the express purpose of reselling it for private redevelopment as a means to irradicate blight pursuant to RCW 35.81 (Urban Renewal) did not even mention Article VIII, Section 7, and held that such acquisition and resale to a private entity was a constitutionally permissible method to accomplish the public use and purpose of "blight irradication." It would seem that the real issue in Lassila is whether a private purpose was involved, rather than a predominately public purpose. However, Lassila involved the use of "city property" and is thus clearly distinguishable from, if not overruled, by the more recent "conduit theory" cases (WEDFA v. Grimm and Health Care Facilities Authority v. Spellman) holding that where public funds are not involved, the constitutional prohibition against using "public funds" did not apply.

One PDA created by the City of Tacoma (TCRA) presently has assets in excess of $30,000,000 and is involved with a variety of loan programs involving housing and economic development. These loans have been funded with its own tax exempt non-recourse bonds, with federal Model Cities Funds, federal Block Grant Funds, federal Economic Development Administration Grant funds, UDAG

grants, 108 Loan funds or guarantees, interest earnings, investments, and other non-city funds. The City has made some direct loans using federal UDAG grants, UDAG repayments, and 108 Loan funds or guarantees. The projects funded by the City include two hotels, several commercial buildings, parking facilities, apartment buildings, and others. The City and TCRA jointly assisted in the financing of a law center complex using a federal UDAG grant and 108 Loan funds, which involved the rehabilitation of three buildings and a parking structure formerly used as retail store complex into a law center housing the University of Puget Sound, the Washington State Appellate Court, and a variety of legal offices. The City has done a number of "float loans," under which allocated, but presently unneeded, federal funds were loaned on a short-term basis for eligible projects in order to stimulate economic development and to realize the interest earnings thereon.

While it was possible in some of these projects to structure them so that the City did not have to rely entirely on the "conduit theory" to avoid a legal challenge, there have been certain projects, which could only be legally accomplished using the so-called "conduit theory." A program commonly known as the 108 Loan Program and authorized, pursuant to Section 108 of Title I of the Housing and Community Development Act of 1974, as amended, allows the use of proceeds, from non-recourse notes of the City or TCRA guaranteed by the federal government, to be loaned for certain "private" projects meeting federal eligibility requirements. These private projects are the means by which the City accomplishes the federal and public purpose of irradicating blight, or providing jobs for low-income persons or other public purposes as authorized by the federal act. The 108 notes are only payable from the proceeds or assets of the project or from federal Block Grant Funds to which the City may be entitled with no liability or debt attaching to the City. If the City only is involved, bond proceeds and loan repayments are held by a trustee and are never deposited with or appropriated by the City.

State legislation has been introduced and appears it will be passed this year, which will specifically authorize 108 "conduit financing" by either a city or a PDA. It will be helpful for the legislature to provide a clear indication that a city or PDA has this express statutory authority. However, it would be the opinion of this writer that such authority already existed under the present statutes. It would seem beyond argument that if a PDA is used to do 108 "conduit financing," that the bonds issued are not the bonds of the city; the proceeds are not city funds; they are not debts of the city; and they are payable only from private or federal funds. Even where the city is directly involved with 108 "conduit financing," it would seem beyond any reasonable argument that the so-called "conduit theory" should apply and such financing would be legally permissible under the rationale of Health Care Facilities Authority v. Spellman and WEDFA v. Grimm.

In respect to answering the question of what aspects of "economic development" are public purposes which can be publicly funded, the case of Anderson v. O'Brien, 84 Wn.2d 64, 524 P.2d 390, provides some interesting law and discussion on this issue, as does the dissent by Justice Hale. In this case, the Kalispel Indian Tribe applied for a State grant under the Economic Assistance Act of 1972 (RCW 43.31A) for the construction of a building which would be used to house manufacturing firms which would create permanent employment for members of the Tribe and residents of Central Pend Oreille County. The State Act authorized grants or loans to governmental agencies to finance the cost of public facilities which would assist in the creation or retention of long-term economic opportunities. The court was faced with three issues: (1) was the Tribe a private entity, such that the grant of state funds to it would violate Article VIII, Section 5, of the State Constitution, (2) was the building in question a public facility, and (3) were the State funds being expended for a public purpose? The court determined that the Tribe was an entity "with wholly public functions" and accordingly recognized (citing previous cases) that the constitutional prohibition of Article VIII, Section 5, is not applicable to corporations or entities whose functions are wholly public. In response to the second issue, the court construed the Act to allow payment for a facility which can be used directly or indirectly for a public purpose and reasoned that "inasmuch as reducing unemployment is a valid public purpose and the proposed building for lease will create jobs, the project is a public facility." In regard to the third issue as to whether the expenditure of State funds was for a public purpose, the court stated:

> Stimulation of investment and job opportunity for relief of unemployment and poverty are proper public purposes within this constitutional provision. State ex rel. Hamilton v. Martin, 173 Wash. 249, 23 P.2d 1 (1933). Where it is debatable as to whether or not an expenditure is for a public purpose, we will defer to the judgment of the legislature. State ex rel. Reclamation Bd. v. Clausen, 110 Wash. 525, 541, 188 P.2d 538, 14 ALR 1133 (1920).
>
> We have approved a condemnation of private property to build a public facility for air cargo storage and transfer which would be leased to private industry, recognizing that "[a]s long as the object sought to be accomplished for a public purpose, it is for the legislature to determine the means to accomplish it." In re Port of Seattle, 80 Wn.2d 392, 396, 495 P.2d 327 (1972). We there recognized that the lease of facilities to private enterprises was incidental to the main public purposes. Such is the

> case here. The reduction of unemployment and alleviation of economic distress for the Kalispel Indian Community is a proper public purpose and the use of private industry to assist government in this task is a permissible legislative choice.

The dissent in this case set forth some persuasive arguments as to why the Kalispel Tribe was not a public agency. It is interesting to note that a PDA, by statute, can only perform public functions, and accordingly should fit the definition of a "public agency" as delineated in this case.

In any event, cities have historically participated in a variety of programs and projects to advance "economic development," to entice all manner of businesses to locate within their borders, and to provide good-paying jobs for their citizens. It is doubtful that the bare assertion that a particular project being financially-assisted by a city will promote "economic development" will be sufficient in most cases to withstand a legal challenge that a proper public purpose is being served. It has been said that a project has six phases as follows: (1) enthusiasm, (2) disillusionment, (3) panic, (4) search for the guilty, (5) punishment of the innocent, and (6) praise and honors for the non-participants.

This writer would recommend that the first phase of any project be to articulate the public purposes which are to be accomplished by the project, and that these public purposes be stated in the ordinances and resolutions authorizing the project and in the project agreements. The very first official expression in respect to the project should emphasize the public purpose to be accomplished. For example, if the city desires to provide for a performing arts center to provide for the recreational and educational needs of its citizens, its city council should not pass a resolution of intent stating that the local theater group needs a facility in which to perform and expressing the intent of the city to pay for and build a new facility for them. Instead, the resolution should express the need for a public performing arts center to serve the recreational and educational needs of its citizens and to promote tourism (economic development), and also state any other public purposes as may be appropriate. If a large corporation indicates to the city that it will locate its home office in a large new multi-million dollar office complex to be built in the city and hire 1,000 new employees, if and only if the city will provide for a parking structure in which most of these new employees can park, do not proceed on the basis that the public purpose is to assist a private corporation in order to promote economic development. But rather, assuming there is a shortage of off-street parking in the downtown area, establish by appropriate findings that additional off-street parking is needed to relieve traffic congestion, and then articulate the public purpose of providing off-street parking to alleviate this traffic congestion under the city's police power and inherent municipal authority. Depending on the nature of the project, there are

probably a number of other public purposes which could be articulated in respect to the project, including some elements of "economic development."

V. CONCLUSION

In summary, the statutory declaration that "economic development" is a public purpose is helpful in buttressing the City's legal authority to engage in it; however, if at all possible, a more definitive "public purpose," which may be a component of economic development, should be articulated and found to exist, particularly where financial assistance is being provided for "economic development" through a city or a PDA.