

# Public Development Authorities

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Public development authorities, or PDAs, can be established by cities or counties pursuant to RCW 35.21.730 *et seq.* to perform public functions that the creating city or county could perform itself. PDAs are instrumentalities of their creating jurisdiction. PDAs are often created to manage the development and operation of a single project, which the city or county determines is best managed outside of its traditional bureaucracy and lines of authority. The particular project may be entrepreneurial in nature and intersect with the private sector in ways that would strain public resources and personnel. For example, the Pike Place Market is a City of Seattle PDA and essentially acts as the landlord to scores of retail establishments and nonprofit services provided in a series of historic buildings. The City of Seattle has determined that day-to-day operations of such an enterprise is best managed by professionals independent of the City, given the untraditional nature of the enterprise and the importance of responding to the unique needs of the private retail marketplace.

The following questions and answers discuss PDA powers, formation, governance, potential uses, advantages, disadvantages and applicable legal requirements.

## A. What Are Public Development Authorities?

PDAs are public corporations created by a city or county to perform a particular public purpose or public function specified in the ordinance or resolution creating the PDA and its charter. RCW 35.21.730. Although PDAs may be created for a general purpose, PDAs are more often created for a specific project or undertaking reflected in the PDA's charter.

## B. Why Are Public Development Authorities Formed?

PDAs are created to (1) administer and execute federal grants or programs; (2) receive and administer private funds, goods or services for any lawful purpose; and (3) to perform *any lawful public purpose or public function*. RCW 35.21.730(5). Such undertakings may be specified in the PDA's charter. PDAs are frequently created to undertake a specific project or activity requiring focused attention. PDAs tend to be more entrepreneurial than their sponsoring municipality, involving private sector participants as board members or partners. PDAs allow municipalities to participate in projects that they may be otherwise disinclined to partake in due to project risks and competing priorities of the municipality.

While PDAs have broad statutory authority to perform any lawful public purpose or public function, PDAs cannot undertake a public function that the creating city or county could not lawfully perform. *See* Memorandum Opinion of the Attorney General of Washington to Robert V. Graham, State Auditor, March 10, 1989. A PDA is thus limited to perform only public purposes or public functions that the creating municipality may undertake directly. A PDA may be limited further by specific reference to a particular undertaking in the PDA's charter.

## C. What Powers Do Public Development Authorities Have?

The powers of a PDA are provided in chapter 35.21 RCW. PDAs may:

- Own and sell real and personal property;
- Contract with a city, town or county to conduct community renewal activities;

- Contract with individuals, associations, corporations, the State of Washington and the United States;
- Sue and be sued;
- Loan and borrow funds and issue bonds and other instruments evidencing indebtedness;
- Transfer funds, real or personal property, property interests or services;
- Engage in anything a natural person may do; and
- Perform all types of community services.

#### **D. How Are Public Development Authorities Formed?**

A city or county may form a PDA by passing an ordinance or resolution approving the PDA's charter. The charter will include the PDA's name, scope of the project or purpose, the term of the PDA, and board characteristics. The charter may provide for municipal oversight and will limit the liability of the creating municipality. Because PDAs are separate legal entities, all liabilities incurred by the PDA must be satisfied exclusively from the assets of the PDA, except as otherwise agreed by contract. PDA creditors do not have any right of action against or recourse to the creating municipality, or its assets, on account of the PDA's debts, obligations, liabilities or acts or omissions.

#### **E. How Are Public Development Authorities Governed?**

The PDA's charter establishes the PDA's governing body composition, size, and nomination process. RCW 35.21.730 *et seq.* does not require any particular board composition and, therefore, the creating city or county has significant latitude in crafting a governance structure suited to the PDA's purpose. For example, PDA boards are often composed of persons with particular technical expertise (financing, construction or legal) and persons who represent key stakeholders.

The PDA's charter also usually determines the term of the PDA. The charter may include a sunset provision, which may automatically dissolve the PDA upon completion of the project or its financing. Alternatively, if the PDA has a broader mandate encompassing numerous phases of an ongoing project or a general endeavor, the PDA's existence may be indefinite. PDA staffing, administrative costs, and oversight requirements may vary as the particular undertakings differ.

The creating municipality will have limited control over the PDA, but will not be relieved of all oversight responsibility. By statute, the city or county is required to oversee and control the PDA's operations and funds in order to correct any deficiency and to assure that the purposes of each project are reasonably accomplished. *See* RCW 35.21.745. The PDA's accounting and other responsibilities to its creating city or county may be identified in the PDA's charter and serve to assist the city or county in meeting its oversight obligations. The municipality may further specify the level of autonomy, accountability, and control it will have over the PDA in the PDA's charter or in any contracts or leases the municipality executes with the PDA.

#### **F. What Type of Projects Can Public Development Authorities Construct, Operate and Finance?**

A PDA may undertake any "public purpose" specified in the PDA's charter and that is a lawful public purpose or undertaking of the creating municipality. Examples of projects include developing the Seattle Art Museum, assisting in the development of the Museum of Flight at Boeing Field in King County, developing City Hall on Mercer Island, restoring Officers' Row in Vancouver, managing the Pike Place Market in Seattle, and developing the Convention Center in Bellevue.

#### **G. What Resources Do Public Development Authorities Have?**

PDA's do not have the power of eminent domain or the authority to levy taxes. RCW 35.21.745. A PDA may borrow funds or issue tax-exempt bonds. Despite broad authority to undertake various projects, PDA financing is generally project specific. To facilitate access to the financial markets, PDA project financings are often backed by a city or county guarantee, typically in the form of a contingent loan agreement. A creating city or county may adopt an ordinance authorizing the transfer of property or funds to a PDA. RCW 35.21.730. Property and funds frequently transferred to a PDA include real property and operating funds. A creating municipality can control and oversee how the PDA uses the transferred property by placing terms and conditions on a PDA's use of such property in the transferring documentation.

A transfer of property or funds to the PDA from the creating city or county does not violate the constitutional prohibition on the lending of credit or giving of public funds by a city, county or other municipal corporation. Article VIII, Sections 5 and 7 of the Washington Constitution prohibit the lending of public credit or gift of public funds to private entities. This prohibition does not apply to transfers between municipal agencies and is therefore not violated when a parent city or county transfers funds to its PDA. *See State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 56 Wn.2d 86, 104, 351 P.2d 493 (1960); *Mount Spokane v. Spokane County*, 86 Wash. App. 165, 936 P.2d 1148 (1997), *review denied*, 133 Wn.2d 1021 (1997).

#### **H. Can Public Development Authorities Issue Tax-Exempt Bonds?**

PDA's can issue tax-exempt bonds pursuant to RCW 35.21.735. As noted above, PDA's do not have taxing authority, and so can pledge only project, grant or other revenues to repay bonds.

In order to access financial markets at attractive rates, PDA project revenue bonds are often backed by a city or county guarantee or contingent loan agreement. If the agreement is contingent in nature, it should not be a debt of the city or county for the purposes of constitutional and statutory debt limitations, but will need to be identified on the city or county financial statements.

There are numerous federal tax law considerations that a PDA must take into account when financing a project with tax-exempt debt. For the bonds to be tax-exempt, the project must be used for a public purpose, as opposed to a private activity, and must be repaid from public funds and not private sources. Any private management contract must meet the safe harbor provisions under the federal tax code. All of these issues would need to be reviewed by bond counsel.

#### **I. What Are Examples of Recent Public Development Authority Projects?**

Recent projects completed by PDA's include the Village Square project completed in two phases by the Seattle Chinatown-International District Preservation and Development Authority ("SCIDPDA"), a PDA created by The City of Seattle. The project includes affordable family housing, a Seattle Parks Department recreation center and Seattle Public Library branch, as well as senior housing, retail space and space for health and social service non-profit agencies.

The Foss Waterway Development Authority, a PDA created by the City of Tacoma, facilitates redevelopment of previously contaminated areas of Tacoma's Foss Waterway, entering into agreements with private developers interested in developing parcels in a manner consistent with the City's plan for the Waterway.

The Seattle Art Museum is a tenant in the museum owned by the Museum Development Authority, a PDA formed by The City of Seattle. The PDA Board is composed in part of members nominated by the Seattle Art Museum. The PDA is undertaking an expansion of its space. Washington Mutual, the Seattle Art Museum and the PDA are planning for joint development of a 40-story downtown tower that would provide new corporate headquarters for the bank and allow the museum ultimately to triple in size.

#### **J. What Are the Disadvantages and Advantages of Forming a Public Development Authority?**

A potential disadvantage of forming a PDA is the relatively low level of control the creating city or county has over the PDA or the project. Although the creating municipality has oversight responsibilities for PDA operations to assure the purposes of the PDA are fulfilled, generally the creation, management, and facilitation of the project is in the hands of the PDA's governing board. Despite contract or charter provisions providing for oversight and control over the PDA, the PDA remains autonomous. The lack of control over the project and the PDA, however, may be beneficial for the city or county for it reduces liability and financial risk for the city or county. A PDA also provides a vehicle for a city or county to support a project without diverting city or county staff to the undertaking and to attract private citizens to serve on the PDA board.

#### **K. What Legal Requirements Apply to Public Development Authorities?**

Generally, a PDA is subject to all "general laws regulating local governments, multimember governing bodies, and local government officials." RCW 35.21.759. Such legal requirements include, but are not limited to, compliance with the following laws:

- To be audited by the State auditor and to be subject to various accounting requirements provided by chapter 43.09 RCW;
- Open public record requirements under chapter 42.17 RCW;
- Open public meetings and other public process laws as provided in chapter 42.30 RCW;
- Public works requirements under chapter 39.04 RCW;
- Competitive bidding and prevailing wage laws provided in chapter 39.04 RCW;
- Local government whistleblower laws as provided in chapter 42.41 RCW;
- The prohibition on using PDA facilities for campaign purposes under RCW 42.17.130; and
- The Code of Ethics for municipal officers under chapter 42.23 RCW.

A PDA is also subject to constitutional constraints imposed on local governments, primarily limiting the use of public funds. As described above, Article VIII, Sections 5 and 7 of the Washington Constitution prohibit the lending of public credit or gift of public funds to private entities, with limited exceptions. Furthermore, Article VII, Section 1 and Article VIII, Section 6, require that public debt be incurred and taxes levied exclusively for public purposes. Such constitutional constraints are often triggered when a PDA is formed to encourage private sector investment.

***Editor's Note: We want to emphasize how important it is that everyone who is or will be involved with a PDA read and understand the above section on legal requirements.***

***City and county staff know that it is sometimes hard to educate newly elected officials in these matters. Some of the restrictions under which local governments operate seem so, well, "restrictive!" Businessmen often tell us that they would not be able to make a profit if they had to run their businesses under these same laws. One PDA board commissioner has been quoted as saying, "My God, we're so constrained by so many rules, what's the point of it all? You can't turn around without stepping into a legal minefield."***

***This may be particularly true when a city or county wants to form a PDA to promote economic development. Economic development practitioners often cannot believe that cities and counties (and, therefore, PDAs) cannot do promotional hosting with public funds. (They work with port districts and those districts CAN use public funds for promotional hosting.) Serving coffee or soft drinks at a meeting is about the most that can be done by cities, counties, and PDAs.***

***What PDAs can and cannot do with a private partner can be complicated legally. To traverse the "legal minefield" safely, PDAs should work with attorneys experienced in municipal law and with PDAs in particular.***