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PUBLIC DEVELOPMENT AUTHORITIES IN SEATTLE

Gerry Johnson and I are to discuss public corporations or public development authorities (which we commonly refer to as "PDAs"). Gerry will focus on their purposes and best uses. I will try to shed some light on the parent City's role in creating and overseeing them.

I. Genesis

PDAs have their roots in this state in the Model Cities' Act Programs (1966) and Economic Opportunity Act Programs (1964) of the late 1960s and early 1970s. Initially, RCW 35.21.660-RCW 35.21.670 provided a limited basis for their creation, almost by indirection. Those statutes authorized creation of public "corporations, commissions or authorities" to carry out the purposes of the Model Cities Act Programs; contracting with private corporations was

authorized for Economic Opportunity Act Programs.

RCW 35.21.680.

These were thought too scant in their detail, particularly by our office. As a result, RCW 35.21.730-35.21.755 (Chapter 37 Laws of Washington 1974, Ex. Sess.) came into being. Jorgen Bader of our office was one of the principal authors of that act. Later, in 1985, RCW 35.21.757 was tagged on to the other statutes (can't violate Art. VIII § 7 of Constitution) in the course of a major amendment to the original Chapter 37.

The major amendment of 1985 (Chapter 332 Laws of Washington, 1985) eliminated an earlier qualification regarding the use of PDAs--i.e., to implement federal programs.

Almost as a footnote to one of the events Gerry will describe, the 1990 Legislature added Chapter 189, Laws of Washington, 1990 to restrict

transfers of property by PDAs; this became RCW 35.21.747 and, of course, was fall-out from the little circus over the Pike Place Market about which you have been reading and hearing.

Numerous amendments have been made over the years since 1974 to RCW 35.21.755 regarding real property or in lieu real property taxation applicable to the PDAs.

II. Bases

A. State Statute. RCW 35.21.730--RCW 35.21.757 in general terms describe the methodology of creation, powers, and legal relationships of PDAs and their parent cities or counties.

RCW 35.21.780 establishes the conditions to create a PDA. They're broad: ". . . to improve the administration of federal grants or programs, to improve governmental efficiency and services,

or to improve the general living conditions in the urban areas of the state, . . ." (emphasis added.) Thereafter are enumerated a series of authorizations to transfer property or money, enter into contracts, continue federal programs (post termination), participate jointly with the federal government through PDAs, etc. This section also directs the city or county to limit recourse to the parent government in the ordinance creating the PDA.

RCW 35.21.735 is largely a relic of pre-1985 in its declaration of public purpose to carry out federal programs through PDAs.

The jurisdiction of a PDA is limited by RCW 35.21.740 to the corporate boundaries of the parent absent an agreement to the contrary between a PDA's parent and another unit of general government.

RCW 35.21.745 requires the creating parent government to provide for organization and operations of the PDA and oversee its operation and funds to the end that the PDA's corporate head stays above water and it accomplishes its purposes. This section also enumerates the powers with which a PDA may be endowed and finishes with the admonition that PDAs cannot have the powers of eminent domain or taxation or to levy assessments.

In the event of insolvency of a PDA, receiverships or trusteeships thereof may be established through the courts. RCW 35.21.750. This section also restates the limitation on recourse to the creating city or county by creditors of the PDA.

Finally, RCW 35.21.755 contains the various tax rules applicable to PDAs, including special rates for PDAs in special review districts. I

will not further explore this, now, because it is almost a full subject in itself.

B. City Ordinance

Seattle has enacted a comprehensive controlling law regarding PDAs: SMC Chapter 3.110.* I have included, as an addendum to this paper, a copy of that chapter of the Seattle Municipal Code so that you may see what a daunting task your oversight responsibilities (RCW 35.21.745) are.

As does the State, in order to comply with the Constitution (Article II § 28 and Article XI § 10), Seattle took the approach that PDAs should be chartered pursuant to a general law: that's what SMC Chapter 3.110 is. It authorizes the Mayor to charter upon compliance with the Code.

Boards of Directors for the PDAs are selected in a variety of ways, including: Mayoral

*Copies of ch. 3.110 of the Seattle Municipal Code are available from MRSC upon request.

appointment and City Council confirmation;
election by a constituency and City Council
confirmation; selection by members of the PDA
board and City Council confirmation.

Business is conducted, projects are achieved
and programs are operated pursuant to contracts
between the City and the PDA. The City may convey
property to the PDA to accomplish a public purpose
(e.g., Pike Place Market). The City may guaranty
loans from third parties to a PDA (e.g., Leschi
Health Clinic or the parking garage at the Pike
Place Market). The City may use a PDA as a
project manager to construct and operate a public
improvement (e.g., the Museum Development
Authority with respect the new downtown art museum
in Seattle). A myriad of social, health and other
public programs are accomplished through contracts

with PDAs having charters particularly tailored to the objects to be achieved.

Besides the usual definitional, "powers", and procedural provisions of corporation law, SMC Chapter 3.110 contains matters unique to the public sector:

Constituency concurrence in certain actions, where applicable (SMC 3.110.210);

Prohibition on discrimination (SMC 3.110.260);

Requirement of board member confirmations by City Council (SMC 3.110.270);

Authorization of a constituency (SMC 3.110.280);

Open meetings (SMC 3.110.300) and public records access (SMC 3.110.290) requirements;

Public accountability requirements (e.g., SMC 3.110.400, -.410);

Provision for City intervention (SMC 3.110.440); establishment of a trusteeship (SMC 3.110.450) and termination (SMC 3.110.460);

Provision for merger with another PDA (SMC 3.110.480); and

Code of ethics (SMC 3.110.560, -.570, -.580, and -.590).

III. Oversight

At least until the 1980s, Seattle didn't pay much heed to the mandate of RCW 35.21.745 to provide oversight for its progeny, although financial audits were conducted. The groups were chartered and they went on their merry way implementing programs and projects. They became visible only when they stepped on the toes of some constituency producing the inevitable call from a City Council member.

In establishing and maintaining oversight of the PDAs, care must be taken not to intrude into the affairs of the organization in a manner to bring into question its separate corporate existence. For instance a City employee assigned to monitor a PDA may attend meetings of the PDA's governing body, but shouldn't be an active participant in discussions or deliberations. Such

an observer should probably not attend executive sessions of such body, either, unless he or she becomes a "witness" for matters to be addressed by the PDA's counsel taking advantage of the attorney-client confidentiality privilege.

For the city or town attorney, PDAs are not an answer for the project or program which is forestalled by state law or constitution. We take the view that PDAs, by virtue of the authorizations in RCW 35.21.730-.757, overcome infirmities or prohibitions of our charter. Perhaps a similar analysis prevails for non-charter cities and towns as respects general provisions of the code applicable to them. PDAs may be more streamlined and more efficient organizations without the baggage of city personnel and procurement regulations. A PDA may also allow avoidance of some of the more

cumbersome city procedures engrafted on to public works contracting, although a PDA must still adhere to the basic bidding and prevailing wage requirements of state law.

--Comprehensive Ordinance

First among efforts to oversee PDAs should be a comprehensive, controlling ordinance: It gives the city the tools it needs to fulfill its responsibility under statute.

--Needs and Means Analysis

Second, I would counsel a kind of "needs and means analysis" approach to exploring the feasibility of using a PDA. Gerry will touch on this in much greater detail; and some of the analysis is suggested elsewhere in this paper.

PDAs seem to function best when they can take on a single, clearly defined task, whether the task is the provision of a single service or the

shepherding of a project. And you must ask and answer positively the question whether achievement of your goal will be demonstrably advanced by streamlined organization outside of the parent government. The political downside of this is, of course, loss of some degree of political accountability. But that's a philosophical and policy question I won't address, today.

Your PDA's functioning will be greatly improved by the appointment of experienced and motivated people; a PDA board position cannot become a patronage job.

PDAs do not manufacture money, although they may be able to receive greater value for the dollar invested within the confines of their narrow charge from the parent government. Thus, counsel your clients not to create PDAs if what they lack is money to achieve their aims.

--Continuous Monitoring

In the early 1980s, Charley Royer established a position in Seattle's Office of Management and Budget to provide more consistent monitoring and periodic reports. I strongly recommend such specific assignment with fully described duties to carry out the RCW 35.21.745 requirement to oversee.

In recent years, when Seattle has assigned a PDA the responsibility for constructing public improvement or carrying on an extended program involving disbursement or a guaranty of large sums of money, in addition to the "overseer," we have established financial oversight committees with duties ranging from the passive (monitoring) to the active (approving vouchers). This has worked fairly well and provides Council and Mayor a larger margin of political comfort.

--Arms length transactions

RCW 35.21.730-35.21.757 provide a statutory liability insulation for the creating government; this has not been fully tested judicially. Thus, I would counsel that business be conducted pursuant to contract entered into after arms-length negotiation. Remember, PDAs are separate corporations with the power to contract and to sue and be sued.

--Extreme cases

Monitors and overseers should prevent matters from becoming crises, for the most part, particularly with respect to City-PDA transactional matters and financial affairs. However, not all trouble can be avoided. Seattle established intervention and trusteeship procedures in its code, as previously cited, for such eventualities.

Seattle has exercised its intervention powers, once; it has never imposed a trusteeship. The intervention arose as a result of a governing board's inability to conduct business--to pay its bills. The members of the board, in part composed of constituency--elected members, fell into two factions divided over a philosophical approach to its primary mission; other boards have become deadlocked for non-disabling periods of time over mere personality conflicts.

Intervention proceeded as set forth in SMC 3.110.440. A resolution was passed giving a deadline to act; the deadline was missed. Dissolution of the board was ordered and a new board was established which was entirely appointed and confirmed. The new board acted for a stated period of time and the old charter was resurrected with some amendments.

The Pike Place Market lawsuits bespeak a crisis of a different kind. In that case (more fully described by Gerry), the City was seeking to protect its interest in the Market expressed in reservations of rights and powers and assignments of tasks in deeds of conveyance, contracts of implementation and the special zoning code provisions which overlay the Market. This crisis or extreme case was addressed, however, by complete cooperation between the City and the PDA to preserve the public interest and help the PDA achieve its goals.

IV. Exodus

PDAs are useful tools but are not the answer to every politician's prayer. Properly conceived, established and overseen they can provide increased flexibility to your clients. They can help to achieve aims at a lower cost and not cause

an increase in the regular city workforce. They can assume roles which, although legal, may be more difficult, risky or inappropriate for a city itself to perform. Contrasting, they may exacerbate an inappropriate remoteness of your clients from local concerns.

In sum, there are advantages and disadvantages to public development authorities; but they do add an extra dimension to local government. It takes hard work and attention to details inside and outside city government to make them successful.