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Public Private Partnerships: From Economic Development to Local-Serving Infrastructure Procurement

Seth Merewitz

Partner, Best Best & Krieger LLP
Los Angeles, California

City Attorney Association of Los Angeles County
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Outline of Presentation

- Public Private Partnership Opportunities:
 - Public Assistance into Private Projects
 - Economic Development / Redevelopment
 - Land Use / Zoning
 - Real Estate Assets/ Long Range Property Mgt. Plan (DOF)
 - Private Assistance into Public Projects
 - Local Serving Infrastructure Opportunity
- Keys to a Successful Public-Private Partnership
- Q & A

Economic Development Realities

- Fewer Tools
 - RDA's and Enterprise Zones are (almost) Gone.
 - Legislation (or Statewide Initiative) Needed for any Useful Tax Increment Financing
- State is “Not Focused” on Local Government
 - Almost all Economic Development Bills Died or Vetoed

Local Infrastructure Realities

- Deficient and Aging Infrastructure
- Lack of O&M Funding
- Lack of Capital Improvement Funding
- Unfunded Mandates
- Regulatory Changes
- Revenue Raising Obstacles
- Public Has Few Available Resources!

Public Private Partnership Opportunities



Initial Thought on Econ Dev....

- Clearly Stated Vision for Community
- Political and Staff Consistency
- Adopted Policies and Goals
- Positive Community Engagement
- Identification of Local Incentives
- Awareness of Regional and State Incentives
- Great City Attorney...

1. P3 and Econ. Dev. Overview:

- Post-Redevelopment Economic Development
- Statutory and Constitutional Authority
- State Limitations on City Authority
- Local Economic Development Programs
- New and Emerging Tools

Post RDA- Revisiting Existing Tools:

- **Special Districts**
 - CFD's, BID's, Parking Authorities, etc.
- **Municipal Tools**
 - Ground Lease, Lease-Lease Back, etc.
- **Public Finance Tools**
 - Lease Revenue, Industrial Development Bonds, Certificates of Participation, etc.
- **Misc. “Emerging” Tools**
 - IFD, NMTC, EB 5, Cal IEDB

Statutory Limitations

- **Government Code Section 51298:**
 - Incentive programs for manufacturing facilities
- **Government Code Section 53084:**
 - Prohibition on Relocating Big Box and Auto Dealers
- **Government Code Section 53084.5:**
 - Prohibition on Sales Tax Sharing Agreements for Relocation

New Statutory “Authority”

- **SB 470 (2013)**
- **Added New Section Gov’t Code 52200-52203:**
 - Intent Language to Promote Econ. Development
 - Create “Economic Opportunity”
 - Requires Public Hearing Prior to Sale or Lease of Land under a Long Range Property Mgt. Plan (DOF)
 - Explicitly Does Not Authorize Eminent Domain for Economic Development

New Statutory “Requirement”

- **AB 562 (2013)**
- **Added New Section Gov’t Code 53083:**
 - Cities and Counties Provide Report and Hearing
 - For “Econ. Development Subsidies” of \$100,000
 - Report Contents to Include:
 - Description of the subsidy public purpose of the subsidy
 - Estimated number of jobs created
 - Projected tax revenue
 - Etc.

Constitutional Authority

- **Authority for City Economic Development:**
 - “Police Power”
- **California Constitution Article XI, Section 7:**
 - “A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.”

Constitutional Authority

- **A city's exercise of its police power must be:**
 - (1) reasonably related to a legitimate governmental purpose; and
 - (2) have a reasonable tendency to promote the public health, morals, safety, or general welfare of the community.

Constitutional Authority

- **“Police Power” is not a static concept:**
 - Interpreted in the context of modern developments
 - “What was at one time regarded as an improper exercise of the police power may now, because of changed living conditions, be recognized as a legitimate exercise of that power. . . .”
 - Miller v. Board of Public Works (1925) 195 Cal. 477, 484

Constitutional Authority

- “[A]s our civic life has developed so has the definition of ‘public welfare’ until it has been held to *embrace regulations ‘to promote the economic welfare, public convenience and *general prosperity* of the community.’”
 - Miller v. Board of Public Works (1925) 195 Cal. 477, 485, quoting Chicago, B. & Q. Ry. Co. v. Illinois (1906) 200 U.S. 561, 592*

Constitutional Limitations

- **Prohibition on Gift of Public Funds**
- **Multi-Year Debt Limit**
- **Other Limitations**

Prohibition on Gift of Public Funds

- **California Constitution Article XVI, Section 6**
 - Prohibits Public Entities from Lending Their Credit or Making any Gifts of Public Money or Property.
- **Purpose or Use of Public “Asset”?**
 - If Primarily Public Purpose then May Not Violate Sec. 6.
 - Does the Public Purpose Outweigh the Private Benefit?

Prohibition on Gift of Public Funds

- **A City Should Make, At Least, the Following Two Findings Regarding the Use of a Public Asset:**

- (1) There are identifiable public purposes fulfilled by the agreement that outweigh private benefits;
- (2) There is “Real Consideration”

- **The City’s Findings Should be Based on Substantial Evidence.**

Leading Cases on Gift of Public Funds

- *Oakland v. Williams*
 - (1929) 206 Cal. 315.
- *San Vicente Nursery School v. County of Los Angeles*
 - (1956) 147 Cal.App.2d 79
- *Los Angeles v. Superior Court*
 - (1959) 51 Cal. 2d 423

Multi-Year Debt Limit

California Constitution Article XVI, Section 18:

- Cities are not permitted to incur any indebtedness or liability in exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters
- Need to structure deals creatively to avoid committing funds for future years

Multi-Year Debt Limit Exceptions

- **Three recognized exceptions to the multi-year debt limitation:**
 - (1) obligations imposed by state law;
 - (2) indebtedness payable from non-tax revenues held in a special fund; or
 - (3) contingent obligations.

Other Limitations and Requirements

- **Prevailing Wage**
- **CEQA**
- **Prop. 218**
- **Prop. 26**
- **Other Statutory Limitations**

Best Practices - Econ. Dev. P3's:

- **Site Specific Revenue Sharing**
 - City of Los Angeles Community Taxing District

- **Joint Use Projects**
 - Los Angeles Unified School District

- **Local Economic Development Program**
 - City of Hawthorne

2. P3 and Land Use / Zoning

- **Flexibility in Zoning**

- Form-Based Codes and Planned Unit Development

- **Pre-Zone/ Pre-Entitle Land**

- Specific Plans
- Transfer of Development Rights

- **Joint Planning Efforts**

- “Area of Benefit” Districts
- Integrated Finance Districts (the other IFD!)

Land Use / Zoning

- **Transparent Review and Approval Process:**
 - Clear “beginning, middle and end of process”
 - Understood and Communicated by Staff
 - Expectation of Time to Process Entitlements
 - Efficient Process:
 - Dedicated Project Contact
 - “One-Stop”
- **Expedited Project Processing**
 - CEQA and Local Permitting

Land Use / Zoning

- **Exactions/ Development Impact Fees**
 - Citywide Waiver
 - Delayed Time for Collection
- **Potential Incentives:**
 - Public Amenities
 - Utilities
- **Vested Rights**
 - Development Agreements and Vesting Maps
- **Density Bonus Law**

Best Practices Land Use/ Zoning P3's

- **Public Benefit Incentive Zoning**
- **Examples:**
 - Santa Ana Transit Zone
 - Culver City Mixed Use Ordinance
 - Burbank Media Overlay District Zone
 - Santa Monica Land Use and Circulation Element

3. P3 and Real Property Assets

- **Publically-Owned Assets**
 - Prioritize Development Needs and Opportunities
 - Think strategically
 - Focus on Goals- Long Term and Short Term
 - "Act Like a Facilitator, Not a Regulator!"
 - Assist the Process (Non-Adversarial, Work to Solutions)
- **Long Range Property Management Plans**
 - Catalyst Opportunity

From Econ. Dev. to Infrastructure:

- **Public Assistance for Private Projects:**
 - Economic Development / Redevelopment
 - Land Use / Zoning
 - Real Property / Long Range Property Mgt. Plans

- **Private Assistance for Public Projects:**
 - Local Serving Infrastructure (Gov't Code 5956)
 - Traditional P3... Infrastructure

4. What is an Infrastructure P3?

“A contractual agreement between a public agency and a private sector entity where the skills and assets of each sector are shared in delivering a service or facility for the use of the general public. In addition to the sharing of resources, each party shares in the risks and rewards potential in the delivery of the service and/or facility.”

-- National Council on Public-Private Partnerships

P3 for Infrastructure Procurement

- **Transportation**

- Roads, Bridges and Tunnels, Rail (urban and regional transportation)

- **Defense**

- Military housing, Utilities, and Reuse of former Military Bases

- **Health, Education and Rehabilitation**

- Hospitals, Schools and Prisons

- **Water**

- Collection, Desalinization and Distribution
- Wastewater Treatment

- **Social Infrastructure**

- Civic Centers
- Court Houses

Traditional Infrastructure Financing

- **Cities/Counties/Special Districts/Authorities**
 - Enterprise Revenue
 - Property Tax
- **Special Tax/ Assessment**
 - Community Facilities Districts
 - Assessment Districts
- **Redevelopment**
 - Tax Increment

P3 Infrastructure Delivery Structures

- Lease Agreements
- Service Agreements
- Concession Agreements
- Operation and Maintenance Agreements
- Design- Build- Finance- O&M (DBFOM) Agmts
- Performance Based Contracts

P3 Legal Issues in California

- **Legal Authority**
- **CEQA**
- **Procurement issues**
 - Selection Criteria; Degree of Competition
 - Public Contracts Code
- **Prevailing wage**
- **Property tax issues (if transfer of ownership)**

Authority for P3 in California

- **California Constitution**
 - Art. XI, Sec. 7 (police power)
- **Express Statutory Authority**
 - Cal. Government Code Section 5956 et seq.
 - Local Serving Projects (Not Statewide)
 - Fee Producing Infrastructure
 - Private Involvement / Investment
 - Public Contract Code Exemption

CEQA Requirements

- **General rule is “prior to project approval”**
 - Save Tara v. City of West Hollywood (2008) 45 Cal.4th 116
- **Exception for approval of “term sheet”**
 - Cedar Fair L.P. v. City of Santa Clara (2011) 194 Cal. App. 4th 1150
- **Practical Issues**
 - Structure Negotiation Process and Commitments

P3 Procurement vs. Traditional Procurement

- **Process for Procurement**
 - No RFP/RFQ, instead “Competitive Negotiation”
 - Public Contract Code Exemptions
- **Criteria for Selection**
 - “Best Value”
 - Qualifications, not Just Price
 - Like Professional Services
- **Focus on “Life Cycle”**

Major Life-Cycle Issues

- **Pre-Construction**
 - Site Selection
 - Procurement
 - Design and Financing
- **Construction**
 - Costs/ Change Orders
- **Post-Construction O&M**
 - Liability
 - Performance
 - Replacement Costs
 - Energy Costs

Benefits of P3 Structure

- **Shortened Procurement Cycle**
- **Deployment of Private Capital Resources**
- **Potential Reduction of “Life-Cycle” Costs**
- **Capital Replacement Reserves**
- **Profit Motive Allows Risk Transfer**
 - Cost
 - Schedule
 - Performance / O&M

Challenges of P3 Structure

- Perceived Lack of Transparency
- Accountability and Oversight
- Public Employee Transition
- Education on DBFOM Delivery Method
- Institutional and Industry Bias Against Change
- Perceived Higher Cost of Capital
 - Value for Money
 - “Life Cycle” Analysis

Private Financing Considerations

- Assurance of Payment Stream
- Divisions of Responsibility
- Verification of Investor / Lender Commitment
- Potential Tax Implications
- Any Public Entity / Regulatory Requirements
- Certainty (all crave as much as possible...)
- Allocation of Risks

Risk Allocation Chart

(Example- Waste Water Treatment Facility)

		Design-Bid- Build (DBB)	Design-Build (DB)	Design-Build- Operate (DBO)	Design-Build- Operate- Finance (DBOF)
Design/ Build	Initial Capital Cost	Public	Private	Private	Private
	Schedule/Completion	Public	Private	Private	Private
	Warranties	Public	Private	Private	Private
Asset Mgt	Performance	Public	Public	Private	Private
	Capital Replacements	Public	Public	Private	Private
	Power/Energy Performance	Public	Public	Private	Private
	Operation & Maintenance	Public	Public	Private	Private
Finance	Equity Risk	Public	Public	Public	Private
	Interest Rate Risk	Public	Public	Public	Private
	Future Cap Ex Funding	Public	Public	Public	Private

Best Practices Infrastructure P3

- **Santa Paula Water Recycling Facility**

<http://www.santapaulawater.com/>

Keys to Success for All Public Private Partnerships:

- **Understanding the 4P's First Before the P3**
- **Understand the Needs of the Parties**
- **Understand the Negotiation “Life-Cycle”**
- **Components of the P3 Deal**

Key to Success #1: Understanding the 4P's First Before the P3:

- **Problem?** **Needs of the Community?**
- **Project?** **Solution to the Problem?**
- **Priorities?** **Clear Vision and Goals?**
- **Politics?** **What's the Political Environment?**

Key to Success #2: Understand the needs of the Interested Parties

- **Public Agency Elected Officials**
- **Public Agency Staff / Legal Counsel**
- **Investor / Lender**
- **Members of the Public**
- **Interest Groups**
- **Regulators (State and Federal)**

Key to Success #3: Understand the Negotiation “Life-Cycle”

- **Problem Identification**
- **Analyze Options**
- **Due Diligence (Risks/Rewards)**
- **Business Plan**
- **Transactional Documents**
- **Implementation Issues**
- **Expect Changes**

Key to Success #4: Components of the PPP Deal:

- **Statutory Authority**
- **Stakeholder Support**
- **Clarity on CEQA /Regulatory Processes**
- **Identified Revenue Stream**
- **Detailed Business Plan**
- **Partner Selection**
- **Renew the Partnership**
 - Contract with Negotiated and Escalating Remedies
 - Regular Contact

Summary of Local P3 Opportunities

- **Economic Development Programs**
- **Zoning / Land Use Authority**
- **Real Property / LRPMP**
- **Local-Serving Infrastructure**

Questions:

- 1. Authority?**
- 2. Demonstrated Need?**
- 3. Public Benefits?**

Questions and Answers

Seth Merewitz, Partner

Best Best & Krieger LLP

(213) 787-2567

seth.merewitz@bbklaw.com