P3s that Work and How to Finance Them

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Disclaimer

Please note that these presentations are intended for informational and educational purposes and to provide general statements from federal law, state law and agency guidance. Federal and state law may differ on particularized areas and this outline does not include all legal considerations. Each situation varies based on the individualized facts and the law is constantly evolving.

Please consult with your attorney for specific legal information, advice or individualized inquiries.

Overview

- What are “P3s”?
- Public-Private Partnerships in Iowa – Public Purpose
- Common Authority for Development Agreements
  - Economic Development
  - Urban Renewal
- Potential Financing Options
- 28E Agreements for Public-Private Agreements
- Common Issues

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P3s: Public-Private Partnerships

What is a P3?

- Tool for governments to build and finance public infrastructure projects

“A contractual agreement between a public agency (federal state or local) and a private sector entity. Through this agreement, the skills, and assets of each sector (public and private) 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.”

-The National Council for Public-Private Partnerships

Common P3 Projects Nationally

- Transportation/Highway Infrastructure Projects
- Airports, bridges, tunnels
- Utility Projects (e.g. Water, Electricity, Solid Waste)
- Economic Development Projects and Real Estate Development

P3 Authority

Legislative Authority Required

- The jurisdiction of the proposed P3 project must have legislative authority (“enabling statutes”) to enter into P3 transaction
- Examples:
  - Kentucky Code permits broad authority for local governments to use P3s for capital construction projects
  - Virginia Code authorizes private sector participation in designing, building, financing, and operating transportation facilities

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P3 Authority in Iowa

- Iowa does not have a P3 enabling statute
- Authority to enter into a public-private contract is limited
  - *No public funds for private purposes*

What options do we have in Iowa?

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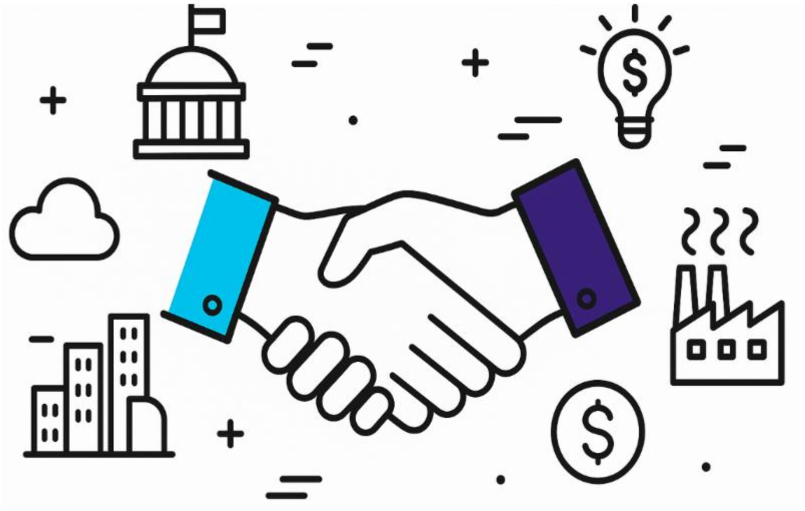
Authority in Iowa for public and private entities to work together on projects

Development Agreements pursuant to Chapter 403 and Chapter 15A of the Iowa Code

28E Agreements



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Importance of a Public Purpose

Article III, section 31 of the Iowa Constitution creates the constitutional hurdle cities must get over in order to give funds to private entities.

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Iowa Constitution, article III, section 31

“[N]o public money or property **shall be appropriated for** local, or **private purposes**, unless such appropriation, compensation, or claim, be allowed by two thirds of the members elected to each branch of the general assembly.”

The Iowa Supreme Court has said:

> “The body of section 31 is **emphatically prohibitive**. Its prohibition operates as a limitation of power, not only upon the Legislature, but upon every city council in the state.”

Love v. City of Des Moines, 230 N.W. 373, 378 (Iowa 1930).

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State Auditor Guidance

"Best Practices" Advisory to Governments on Working with Non-Profits, November 2021

- Aims to uphold and enforce Article III, section 31
- Issued in response to questions around dispersing public funds to non-profits, but pertains to private entities, generally

State Auditor's continued attention to public funds dispersed to private entities in financial audits

Provides recommended approaches for municipalities to work with non-profits and private entities and overcome the constitutional hurdle

State Auditor Guidance

What is included in the Auditor's "Best Practices?"

- 15A Economic Development Agreements
    - Reiterates the statutory factors in Chapter 15A for determining what falls within the meaning of "economic development" to meet the public purpose requirement

Non-Urban Renewal Authority DA

Iowa code chapter 15A authority

Identify goal, source of funding

Grants/reimbursements for public purposes

Identify specific 15A purposes = public purpose

- Creation of jobs and income
- Retention of jobs and income that would otherwise be lost

Identify how proposal from private entity fits stated purposes

Economic Development - Chapter 15A

Iowa Code Chapter 15A declares "economic development" a public purpose

- Creation of jobs and income
- Retention of jobs and income that would otherwise be lost

"Public assistance of economic development within a community is beneficial to a potentially broader segment of the community."

Brady v. City of Dubuque, 495 N.W.2d 701 (Iowa 1993).

Economic Development – Chapter 15A Factors

In determining whether the funds should be dispensed, the governing body shall consider any or all of the following factors:

a. Businesses that add diversity to or generate new opportunities for the Iowa economy should be favored over those that do not.

b. Development policies in the dispensing of the funds should attract, retain, or expand businesses that produce exports or import substitutes or which generate tourism-related activities.

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Economic Development – Chapter 15A Factors - Continued

c. Development policies in the dispensing or use of the funds should be targeted toward businesses that generate public gains and benefits, which gains and benefits are warranted in comparison to the amount of the funds dispensed.

d. Development policies in dispensing the funds should not be used to attract a business presently located within the state to relocate to another portion of the state unless the business is considering in good faith to relocate outside the state or unless the relocation is related to an expansion which will generate significant new job creation. Jobs created as a result of other jobs in similar Iowa businesses being displaced shall not be considered direct jobs for the purpose of dispensing funds.

Economic Development Under Urban Renewal

1985 amendment added:

- It is further found and declared that there exists in this state the continuing need for programs to alleviate and prevent conditions of unemployment; and that it is accordingly necessary to assist and retain local industries and commercial enterprises to strengthen and revitalize the economy of this state and its municipalities; that accordingly it is necessary to provide means and methods for the encouragement and assistance of industrial and commercial enterprises in locating, purchasing, constructing, reconstructing, modernizing, improving, maintaining, repairing, furnishing, equipping, and expanding in this state and its municipalities; that accordingly it is necessary to authorize local governing bodies to designate areas of a municipality as economic development areas for commercial and industrial enterprises. . .

Documenting the Public Purpose

Findings Made by Governing Body

Written contracts

- Development Agreements
- 28E Agreements

Development Agreements and Urban Renewal

Iowa's Urban Renewal Law, Iowa Code Chapter 403, provides statutory authority to get over the constitutional hurdle to pursue:

- Economic development
- Blight remediation
- Housing development

Housing

Iowa Code chapter 403 recognizes "shortage of housing" and the need for:

- "the provision of public improvements related to housing and residential development"
- "construction of housing for low and moderate income families"
- "…the powers granted in this chapter constitute the performance of essential public purposes for this state and its municipalities."

Development Agreements

- Generally a contract between a City and a private Developer
- Defines the rights and obligations of the parties for the project
- Examples:
  - Infrastructure in residential subdivision
  - New commercial buildings for local jobs
  - City selling land for new development

Able to be creative and tailor the agreement to each project

Or, can use a standardized approach within your City, if preferred

Practical Prompts – Public Purpose in Development Agreements

Direct Payments (e.g., grant payments)	Other Financial Incentives and Assistance	In-Kind Resources

Might be providing public funds and/or resources for:

- Local match to state development incentive
- Local development incentive
- Infrastructure for private development

Flexibility in Development Agreements

Variety of incentives

- Urban Renewal
  - “Tax Increment Financing”
  - Use LMI Fund Money- set aside from residential UR project.
- Iowa Code Chapter 15A Grants
  - Up-front cash grants – more risky
- Forgivable Loan/No Interest Loan
  - Options for financing vary: non-TIF funds the City has on hand, revolving loan fund (RLF program), perhaps TIF
- City-constructed infrastructure
  - e.g., new road leading to building, sewer serving housing development
- Sale/Transfer of City-Owned Property
  - Must follow provisions of Iowa Code 364.7
  - If in UR Area- follow Iowa Code 403.8

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Using UR Authority for Financing

1. Is the Project within an Urban Renewal Area?
2. Does the Project qualify under Iowa Law? Iowa Code 403.6; Iowa Code 403.12
3. Is the Project adequately described in the Urban Renewal Plan?
4. Will the Project achieve Plan's stated goals?
   - ☑ Eliminate Slum.
   - ☑ Eliminate Blight.
   - ☑ Create or Retain Jobs or Income.
   - ☑ Provide housing for LMI families.
   - ☑ Provide Public Improvements for non-LMI housing development.
5. Negotiate terms of Development Agreement
6. Approve Development Agreement after Public Hearing

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Examples of Public Private projects in Iowa

City Façade grants

Constructing a Rail Park

Reinvestment Areas

City constructing public streets in private development

Potential Funds for Financing DA Projects

- LOSST
- Hotel/Motel Tax
- Franchise Fees
- General Obligation
- Utility System Funds

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Financing Urban Renewal Projects-General Obligation Debt

Counts against your debt limit

- 5% of the value of property valuation (actual valuation) in the city.
- Tax Increment Revenue Debt counts
    - *Richards v. City of Muscatine:* ruled that urban renewal bonds issued pursuant to Code section 403.9 is debt subject to the constitutional limitation because the bonds are payable from the general revenues of the city and not from a special assessment or from the operating revenues of a municipal enterprise that generates income.

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Financing Process for General Obligation Urban Renewal Projects

Council Approved

- Fix date
- Hearing
- Issuance
- Closing

Subject to Reverse Referendum

Urban Renewal Projects

The aiding in the planning, undertaking, and carrying out of urban renewal projects under the authority of chapter 403, and all of the purposes set out in section 403.12. However, bonds issued for this purpose are subject to the right of petition for an election as provided in section 384.26, without limitation on the amount of the bond issue or the size of the city, and the council shall include notice of the right of petition in the notice required under section 384.25.

Reverse Referendum

≤5,000	≤ $520,000*	Reverse Referendum
>5,000 ≤75,000	≤ $910,000*	Reverse Referendum
>75,000	≤ $1.3 million*	Reverse Referendum

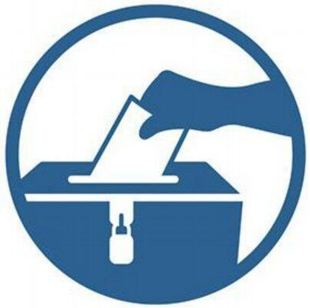
Petition is valid if signed by eligible electors of the city equal in number to ten percent of the persons who voted at the last preceding regular city election.

*adjusted annually in January per HF718

Election

Must pass by at least 60% of total vote cast

Reverse Referendum – if petition filed by number equal to 10% of the persons who voted at the last preceding regular city election.



Security

- GO Bonds secured by levy of unlimited ad valorem taxes on all taxable property within the city through debt service fund.
- No lien on city property
- No mortgage

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Tax Exempt Bonds

Interest on municipal bonds is exempt from federal income. Bondholders do not pay federal income tax on the interest income from the bonds they own.

Results in a subsidy to local governments by federal government because the bondholders pay a lower rate for these investments.

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Tax Law 101

Bonds must be for capital expenditures

- Costs to acquire, construct, or improve land, buildings, and equipment

Private Use

A bond issue exceeds the limits of the private business tests, and therefore does not qualify as a governmental bond issue, if the issue exceeds the limit of the private business use test **and** also exceeds the limit of the private security or payment test.

- **Private Business Use Test. If** more than 10 percent of the proceeds of an issue are to be used for any private business use.
- **Private Security or Payment Test.** If more than 10 percent of the proceeds of the bond issue is directly or indirectly (1) secured by any interest in property used or to be used for a private business use or payments in respect of such property, or (2) to be derived from payments (whether or not to the issuer) in respect of property, or borrowed money, used or to be used for a private business use.

What can cause bonds to become taxable?

Financing grants

- Housing grants
- Façade grants

Minimum assessment agreement provisions in Development Agreements

28E Agreements

- Purpose: "To permit state and local governments in Iowa to make efficient use of their powers by enabling them to provide ***joint*** services and facilities with other agencies and to cooperate in other ways of mutual advantage."

Iowa Code § 28E.1.

- 28E agreements may be between a **public agency** and a **private agency**, like a nonprofit, a business, or an individual.
Iowa Code § 28E.4.
- The parties should also make sure they have independent authority to do all those things the 28E obligates them to do.

Enhance, But Not Expand, Powers

Chapter 28E only grants political subdivisions the authority to contract for the joint exercise of powers.

- Chapter 28E agreements can merely be for the provision of services. Iowa Code § 28E.12.

Chapter 28E does not provide authority to do something that is not otherwise permitted in the Code, or by the Iowa Constitution (i.e., still cannot provide public funds for a private purpose).

Considerations for Transferring Public Funds to a Private Entity via 28E

Apply Auditor’s general contracting guidance for 28E agreements

Requires the Government’s ongoing involvement, management, and review to ensure compliance

28E agreement should provide for the Government authority to terminate the agreement and recover the public funds in the event the public entity violates the terms

Any depositing or investing of public funds must comply with Iowa Code chapters 12B and 12C

What are common issues to watch out for in Development Agreements?

Residential urban renewal projects have many limitations

- LMI Set-Aside (unless LMI housing project)
- TIF only for “provision of public improvements”
- 10-year TIF Sunset

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What are common issues to watch out for?

If using Urban Renewal Authority, need to authorize the Development Agreement as an "urban renewal project" IN ADVANCE

- Whenever using TIF, must be identified in the urban renewal plan, an amendment to the Plan.

What are common issues to watch out for?

Allow enough time for the steps – Don't rush

- Adoption of urban renewal plan (if needed)
- 30-day competitive bidding for City transferring land (if needed)

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What are common issues to watch out for?

Don’t mix Urban Renewal (TIF/tax rebates) and Urban Revitalization (tax abatement)

- Can’t collect tax increment if taxes aren’t being paid

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What are common issues to watch out for?

Emphasize to Developer that nothing guaranteed until City Council approves & signs the contract

Questions?

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