



Tiffany Masuda

Joint Powers Authorities – Multi-Headed Dragons Their Care and Feeding and You

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Tailoring Your Joint Powers Authority

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JPA
TAILOR SHOP

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1. To Be or Not to be a Separate Legal Entity.

1.1. Joint Exercise of Powers Act (Gov. C. §§ 6500 et seq.) originally enacted in 1921. Amended in 1947 to allow the optional creation of a separate legal entity.

1.2. The “original” JPA was a contract between two public entities to provide services where no separate legal entity was formed. Common example today is where City A contracts with County B to perform police services for City A.

2. Why would you want to form a JPA under Gov. Code §§6500, et seq.?

2.1. Reason #1: To Form a Separate Legal Entity.

Two or more public agencies want to develop a project, operate an existing project, and/or provide services and want to form a legal entity separate and apart from the public agencies themselves.

2.1. Reason #1: To Form a Separate Legal Entity. (cont'd)

“While these sections [Gov. C. §§895 and 895.4] make clear that the Legislature intended that member entities of a JPA be liable for the torts of the JPA, it simply does not follow that these sections reflect legislative intent that member entities are also liable for the contractual obligations of the JPA.” *Tucker Land Co. v. State of California* (2001) 94 Cal. App. 4th 1191, 1199.

Member agencies are not liable for the contractual liabilities of the JPA if so stated in the JPA agreement.

Exception: Member agencies' liability for the payment of retirement benefits of JPA employees in the event that the JPA dissolves or can't make payments.

2.2. Reason #2: Financing Advantage – Show Me the Money – Feeding Your Dragon.

2.2.1. I want to finance a major project, but I don't want to go to the voters for approval.

2.2.2. **Financing Advantage of JPAs. Gov. Code §6547** – “The power of the entity [JPA] to issue revenue bonds is additional to the powers common to the parties to the joint powers agreement, but shall not be exercised until authorized by the parties to that agreement.”

2.2. Reason #2: Financing Advantage – Show Me the Money – Feeding Your Dragon. (cont'd)

2.2.3. Under the **Marks-Roos Local Bond Pooling Act of 1985** (Gov. Code §§6584, et seq.), a JPA can issue revenue bonds without prior voter approval and without being subject to a referendum. Prior to 1985 a JPA revenue bond issue was subject to referendum.

2.2.4. This ease of issuing project revenue bonds is the major reason that public agencies will form a JPA to finance a major project.

2.2.5. Consult with Bond Counsel and Public Financial Advisor.

3. Key Requirements to Form a JPA as a Separate Legal Entity.

3.1. A joint powers authority is established when two or more public agencies by agreement jointly exercise any power common to the contracting public agencies. Gov. Code §6502.

3.2. Each member must be a public agency (Gov. Code §6500) or a mutual water company (Gov. Code §6525(a)).

A JPA is itself a qualifying public agency, so a public agency could join with its existing controlled JPA to form a new separate JPA for financing purposes.

3. Key Requirements to Form a JPA as a Separate Legal Entity. (cont'd.)

3.3. Power to be Exercised must be Common to the Contracting Public Agencies.

3.3.1. Gov. Code §6502 provides that “two or more public agencies by agreement may **jointly exercise any power common to the contracting parties** . . . even though one or more of the contracting agencies may be located outside this state. **It shall not be necessary that any power common to the contracting parties be exercisable by each such contracting party with respect to the geographic area in which such power is to be jointly exercised.**”

3. Key Requirements to Form a JPA as a Separate Legal Entity. (cont'd)

3.3. Power to be Exercised must be Common to the Contracting Public Agencies. (cont'd)

3.3.2. **Latent Power Issue.** While individual enabling statutes normally grant special districts numerous powers, many districts have not exercised all those powers. Latent powers are those **services and facilities** authorized by a district's enabling legislation but **which the district has not provided prior to January 1, 2006.** Gov. Code §61002(h).

If a district now wishes to exercise a latent power, then it would need to apply to its County LAFCO for approval to activate the latent power in accordance with Gov. Code §§56824.10, 56824.12, and 56824.14. See Gov. Code §56654.

Question: Where a County LAFCO denies a district's request to exercise a latent power, is a possible work around to form a JPA with a public agency already exercising that power?

3.4. Examples of Different Types of Separate Legal Entity JPAs.

3.4.1. **Project-Focused JPAs**. A group of public agencies agrees to form a JPA to finance, design, environmentally review, construct and operate a specific water project or an electric generation or transmission project. JPA could be formed to acquire and operate existing water facilities.

3.4.2. **Common-Interest JPA with Projects to be Determined and Developed**.

3.4.3. **Primarily for Financing Purposes**. JPA owns the project, but one Member operates the project and takes the entire project output.

4. **Tailoring Your JPA** – Since you will be forming a Separate Legal Entity, key points to be agreed upon in the JPA agreement among the proposed JPA members include:

4.1. **Designating a Member Agency's Governing Law as governing the restrictions on the powers exercised by the JPA.**

The powers exercised by the JPA is “subject to the restrictions upon the manner of exercising the power of one of the contracting parties, which party shall be designated by the agreement.” Gov. Code § 6509. See *Zack v. Marin Emergency Radio Authority* (2004) 118 Cal. App. 4th 617.

4. Tailoring Your JPA (cont'd)

4.1. Designating a Member Agency's Governing Law. (cont'd)

Practical Question:

When bidding and awarding JPA public works contracts, which Member Agency's statutory contracting requirements provide the most flexibility?

Example: An irrigation district or a general law city?

4. Tailoring Your JPA (cont'd)

4.2. JPA Governing Board.

4.2.1. Gov. C. §6508 states, “The governing board of any [joint powers] agency” created by agreement after 1969 “***may*** as provided in such agreement . . . be composed exclusively of officials elected to one or more of the governing bodies of the parties to such agreement.”

4. Tailoring Your JPA (cont'd)

4.2. JPA Governing Board. (cont'd)

4.2.2. Brown Act Requirements for JPA Board Closed Sessions.

Pursuant to Gov. Code §54956.96(a), only “***a member of the legislative body of a local agency member***” who serves as either the member’s regular or alternative representative to the JPA Board may disclose confidential information received in a JPA Board closed session to the member agency’s legal counsel and to the member agency’s board in closed session.

Plain meaning of Brown Act requirement evidenced by Gov. Code §54956.96(b)(1)(A) [same §], which does not require a member agency’s alternate representative on the Clean Power Alliance of Southern California Board to be a member of the local agency’s legislative body.

4.2. JPA Governing Board. (cont'd)

4.2.2. Brown Act Requirements for JPA Board Closed Sessions. (cont'd)

Possible Practice. Have your member agency board appoint a member of your board as either the member's regular or alternative JPA representative and have that member attend JPA Board closed sessions to be able to report back to your board on what confidential information was discussed in the JPA Board closed session.

Note: This is a limitation on who can report confidential JPA closed session information to your member agency's legal counsel and to your board in closed session.

4.2. **JPA Governing Board.** (cont'd)

4.2.3. **Voting.** “One member, one vote” versus by project entitlement percentages.

Example: Water project JPA with the following members and entitlement percentages: Member A, 10%; Member B, 15%; Member C, 20%; Member D, 55%.

Option #1 - Require 3 “Yes” votes of Members having at least 60% of the project entitlement percentages.

Option #2 – Require “Yes” votes from Members having at least 85% of the project entitlement percentages.

4.2. JPA Governing Board. (cont'd)

4.2.4. Excluding a Member's Representative from a JPA Board Closed Session.

- a. Member X's representative has a personal financial conflict with the matter being discussed in closed session.
- b. Closed session to discuss litigation in which the JPA is a party, e.g., Member Y's agency is suing the JPA or the JPA is suing Member Y's agency.
- c. Closed session to discuss JPA's position on a lawsuit for which the JPA is not a party. [Initial Q of whether legitimate closed session matter.]

4.2.5. A JPA Board member may cast a valid vote on a matter before the JPA Board that is inconsistent with the position taken by the Board member's own board of directors. It does not invalidate the JPA Board vote. 83 Ops. Cal. Atty. Gen. 267 (2000).

4.3. **JPA Personnel**. As a separate public entity, will the JPA (a) hire its own employees, (b) contract with a JPA member agency or member agencies to provide services, or (c) contract with outside consultants, etc.?

“One or more of the parties may agree to provide all or a portion of the services to the other parties in the manner provided in the [JPA] agreement. The parties may provide for the mutual exchange of services without payment of any consideration other than such services.” Gov. C. §6506.

4.4. **JPA Insurance.** As a separate public entity, who will be the JPA's tort liability and E&O insurance carrier? How will the JPA coordinate its own insurance coverages with its members' insurance coverages, especially if one member agency will provide all services for the JPA? Will liability insurance continue to cover a withdrawn member where the tort or contract liability accrued prior to the date of a member's withdrawal?

4.5. **JPA Retirement Plans.** Public retirement system liabilities remain liabilities of the individual member agencies. See Gov. Code §6508.1 amended in 2018 and §6508.2 enacted in 2018 after a JPA tried to get out of its retirement plan liabilities to its employees.

4.6. Right to Withdraw from JPA and Obligation for Accrued and On-going Expenses.

Questions:

Does the Effective Date of a Member's withdraw taken into consideration JPA tort and breach of contract lawsuits that accrued before the effective date of withdrawal?

Are there JPA employees with vested retirement benefits and other accrued JPA retirement liabilities that will be paid after a JPA member withdraws?

4.7. Projects Financed, Owned, and Operated by a JPA.

4.7.1. JPA owns the project facilities, e.g., canal, reservoir. **Do JPA members acquire an entitlement or right to use a percent or fixed amount of the capacity of the various JPA facilities?**

4.7.2. Is the JPA Agreement clear that where a JPA project consists of a number of facilities that **each Member's entitlement or right to use a JPA facility apply to all facilities?**

Example: A sewage treatment facility JPA owns the treatment plant and outfall line to the ocean for brine disposal. Would a Member who purchased treatment capacity in the plant have the right to use excess capacity (not needed by any other Member) in the outfall line to dispose of brine from the Member's own desalination plant?

4.7. Projects Financed, Owned, and Operated by a JPA. (cont'd)

4.7.3. Do existing Members have **priority of use** of the JPA facilities over use by any Non-member?

4.7.4. **What happens if a Member defaults in making project payments to the JPA or wants to Lay Off Project Capacity? What are the Step Up Obligations of the Other JPA Members?** If a 20% Entitlement Member leaves or defaults in payments to the JPA, are the other Members required to proportionally step up their respective Entitlement percentages or is the step up capped at 25% of the Member's original entitlement?

QUESTIONS?

**Your Next Challenge:
Trying to
Train Your Dragon**

NICE DRAGON.
SIT!



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