



# Tri-Cities Municipal Government & Public Finance Seminar

PRESENTATION MATERIALS  
July 19, 2018

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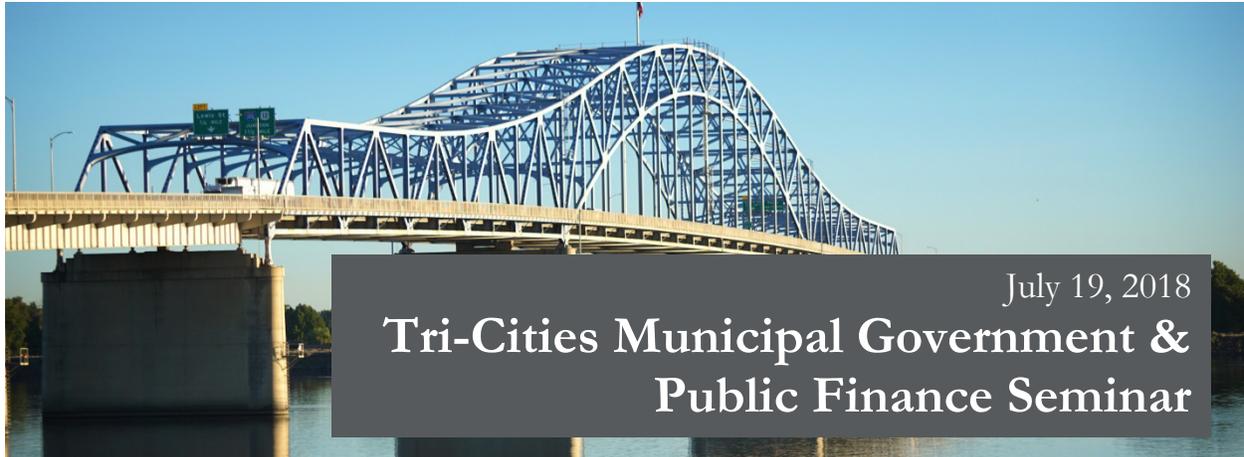
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**THURSDAY, JULY 19, 2018**

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▪ Jim McNeill	
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## AGENDA

- 9:30 – 10:00 a.m.                      **Registration and Networking**
- 10:00 a.m.                                **Welcome and Program Overview**  
*Allison Schwartzman*
- 10:05 – 10:55 a.m.                    **Federal Tax Law Highlights and New Developments**  
*Marc Greenough and Bill Tonkin*
- 11:00 – 11:50 a.m.                    **Federal Securities Law Highlights and New Developments**  
*Stacie Amasaki and Nancy Neraas*
- 11:50 a.m. – 1:00 p.m.                **Lunch Program: New Developments in Water Law and the *Hirst* Decision**  
*Joe Brogan*
- 1:00 – 1:50 p.m.                        **What You Need to Know...About What You Can and Cannot Do During a Ballot Measure Election**  
*Jim McNeill and Lee Marchisio*
- 2:00 – 2:50 p.m.                        **Construction Contracting for Public Works Projects**  
*Steve DiJulio*
- 3:00 – 3:50 p.m.                        **Cooperative Agreements, Interlocal Agreements, and Affordable Housing**  
*Jeff Nave and Allison Schwartzman*
- 3:50 – 5:30 p.m.                        **Wine Tasting Social**



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# Agenda

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- Welcome and Program Overview – Allison Schwartzman
- Federal Tax Law Highlights and New Developments – Marc Greenough and Bill Tonkin
- Federal Securities Law Highlights and New Developments – Stacie Amasaki and Nancy Neraas
- Lunch Program: New Developments in Water Law and the *Hirst* Decision – Joe Brogan
- What You Need to Know...About What You Can and Cannot Do During a Ballot Measure Election – Jim McNeill and Lee Marchisio
- Construction Contracting for Public Works Projects – Steve DiJulio
- Cooperative Agreements, Interlocal Agreements, and Affordable Housing – Jeff Nave and Allison Schwartzman
- Wine Tasting Social

# Federal Tax Law Highlights and New Developments



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# Repeal of Authority to Issue Tax-Exempt Advance Refunding Bonds

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- Tax Cuts and Jobs Act repealed the authority to issue tax-exempt advance refunding bonds after December 31, 2017.
  
  - Bonds are “advance” refunding bonds if they are issued more than 90 days before all proceeds are spent to redeem the refunded bonds. Advance refunding bonds have been used to:
    - Reduce interest costs by replacing higher interest rate debt with new debt having lower interest rates.
    - Restructure debt service requirements—*e.g.*, by extending the bond repayment schedule over a longer period of time.
    - Modify bond covenants associated with outstanding revenue bonds—*e.g.*, by changing debt service reserve requirements or net revenue coverage requirements.

- 
- Issuers may consider possible alternatives to tax-exempt advance refunding issues, such as issuing:
    - “Current” refunding bonds whose proceeds will be fully spent to redeem the refunded bonds within 90 days.
    - Taxable advance refunding bonds.
    - “Cinderella” bonds—i.e., taxable bonds that are converted to tax-exempt bonds within 90 days prior to the date when all bond proceeds will be spent to redeem to refunded bonds.
    - “Forward delivery” bonds—i.e., bonds that are sold a relatively longer period before the bonds are actually issued and delivered to the purchaser on a date that is within 90 days prior to the date when all bond proceeds will be spent to redeem to refunded bonds.
    - “New money” bonds to finance needed capital projects and using available cash to accomplish a legal defeasance and redemption of outstanding bonds.

New “Safe Harbor” Conditions  
for Management Contracts  
Involving Bond-Financed  
Property

- 
- Internal Revenue Service (“IRS”) Revenue Procedure (“Rev. Proc.”) 2017-13.
    - Applies to any management or service contract (“management contract”) entered into after January 17, 2017, and any existing management contract materially modified or extended after August 18, 2017.
    - Replaces “mechanical” rules of IRS Rev. Proc. 97-13 with more substantive “safe harbor” conditions.
    - A management contract that meets all of the safe harbor conditions will be treated as not giving rise to private business use of the managed property.

- 
- No Net Profits Arrangements. Must not provide to the service provider a share of the net profits from the operation of the managed property or provide compensation that takes into account *both* the managed property's revenues and expenses.
  - No Bearing of Net Losses. Must not impose on the service provider the burden of bearing any share of net losses from the operation of the managed property.
  - Term of the Contract. Term of the contract, including all renewal options under which either party has a legally enforceable right to renew the contract, must not be longer than the lesser of 30 years or 80% of the weighted average reasonably expected economic life of the managed property as of the beginning of the term of the contract or as of any later date on which the contract is materially modified.

- 
- Control of the Property by the Qualified User. The qualified user must have the right to exercise a significant degree of control over the use of the managed property, such as by:
    - Approving the managed property's annual budget.
    - Approving capital expenditures for the managed property.
    - Approving dispositions of property from the managed property.
    - Determining the permitted uses of the managed property.
    - Approving rates charged for use of the managed property.

- 
- Qualified User Must Bear Risk of Loss of the Managed Property. The qualified user must bear the risk of loss upon damage to or destruction of the managed property, but this does not preclude insuring against risk of loss with third party insurance or imposing penalties on the service provider for failing to operate the managed property in accordance with the management contract.
  - Service Provider Not to Take Inconsistent Federal Tax Position. The service provider must agree not to take any federal tax position inconsistent with being treated only as a service provider, such as by claiming depreciation deductions with respect to the managed property.
  - No Substantial Limitation of Qualified User's Exercise of Rights. The service provider must not have any role or relationship with the qualified user that would substantially limit the qualified user's ability to exercise its rights under the management contract.

New and Revised “Remedial  
Action” for  
Tax-Exempt and  
Tax-Advantaged Bonds

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- General Rules. IRS regulations permit an issuer of tax-exempt or tax-advantaged bonds to take certain “remedial actions” if the issuer takes a deliberate action that would cause the bond issue to meet the “private business tests.”

In general, a bond issue will meet the private business tests if:

- More than 10% of the proceeds of the issue (including the facilities financed with proceeds) are used for a private business use, and
- Debt service on more than 10% of the issue is secured or paid with private payments (including payments in respect of property used for private business use).

Thus, sale or lease of bond-financed property to a private business could cause the bond issue that financed the property to meet the private business tests.



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For most governmental bond issues, the two most commonly used remedial actions are:

- To redeem or defease bonds that become “nonqualified” as a result of the deliberate action, or
- To use the disposition proceeds received as a result of the deliberate action for an alternative governmental use that would qualify for tax-exempt financing.

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- Pre-conditions for taking a remedial action.
    - Issuer did not expect on the issue date that the bond issue would meet the private business tests at any time during the entire term of the bond issue.
    - The length of the bond term is not longer than reasonably necessary for the purpose of the bonds.
    - Any arrangement that causes the private business tests to be met is *bona fide* and arm's-length and the new user pays fair market value for the use of the bond-financed property.
    - Disposition proceeds received as the result of the deliberate action are treated as gross proceeds of the bond issue for arbitrage purposes.
    - Except when redemption or defeasance of nonqualified bonds is the remedial action to be taken, the bond proceeds must have been originally spent for a governmental purpose.



- Timing of remedial actions.

- Except for an “anticipatory” remedial action (discussed below), bonds that become “nonqualified” bonds must be redeemed, or defeased and called for redemption, on their earliest call date, within 90 days after the deliberate action that causes the private business tests to be met.
- For alternative qualified use of disposition proceeds as a remedial action, the disposition proceeds must be expected to be spent within two years on an alternative qualified governmental use.
- For the alternative qualified use of disposition proceeds as a remedial action, the issuer must receive exclusively cash consideration for the disposition or lease of the bond-financed property.



- “Anticipatory” remedial action.

- Declares an official intent to take a remedial action, such as redemption or defeasance of nonqualified bonds, in advance of taking the deliberate action that would cause the private business tests to be met.
- Identifies in the official intent declaration the bond-financed property that will be affected.
- Describes in the official intent the deliberate action that will cause the private business tests to be met.
- Takes the specified remedial action with respect to the identified bond-financed property.

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- Modified “alternative use of disposition proceeds” remedial action for longer-term leases. This modified remedial action has the same requirements that apply to the alternative use of disposition proceeds from the sale of bond-financed property, with the following modifications:
    - The lease must be an “eligible lease,” *i.e.*,
      - Consideration for the lease must consist exclusively of cash lease payments, regardless of when paid, and
      - The term of the lease must (a) be at least equal to the lesser of 20 years or 75 percent of the weighted average reasonably expected economic life of the leased property as of the beginning of the lease term; or (b) run through the end of the measurement period for measuring private business use.
    - Funds in an amount equal to the “lease amount” are treated as disposition proceeds that must be spent on an alternative governmental use.

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- The “lease amount” is equal to the present value of all the lease payments required to be made under the lease, determined as of the beginning of the lease term using the yield on the issue as of the beginning of the lease term as the discount rate.
  - Note that this remedial action requires the issuer to provide its own funds, not including any proceeds of tax-advantaged bonds, to effect the remedial action.

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- Remedial Action for Direct Pay Bonds By Reduction of Refundable Federal Tax Credit. Rev. Proc. 2018-26 permits an issuer of direct pay bonds, such as “Build America Bonds,” to cure a nonqualified use by reducing the amount of the refundable tax credit that would otherwise be received for interest on the nonqualified bonds. To accomplish this remedial action, the issuer must:
    - Treat any disposition proceeds as “gross proceeds” for arbitrage purposes under section 148 of the Code.
    - Beginning with the first Form 8038-CP filed for any interest payment date for the bonds after the nonqualified use occurs, exclude the portion of the interest reported on the form that is allocable to the nonqualified use that accrues on or after the date of the nonqualified use.

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- For the first Form 8038-CP filed after the nonqualified use has occurred, print or type across the top of the form “Remedial Action under Section 6 of Rev. Proc. 2018-26” and
    - Attach an explanation of the difference in the scheduled credit payment,
    - State that a nonqualified use occurred and the date it occurred, and
    - Include a revised debt service schedule reflecting the exclusion of the interest amounts allocable to the nonqualified bonds beginning with the date of nonqualified use.

# IRS Audits of Tax-Exempt Bonds

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- Low interest rate environment during the last 10 years following the Great Recession has substantially reduced potential arbitrage rebate liability, but that may change with rising investment rates—e.g., for investments held in debt service reserve funds for revenue bond issues.
  - A “new money” bond issue with a substantial amount of unspent bond proceeds remaining at the end of the 3-year “temporary period” after the issue date may be at risk for “hedge bond” treatment on audit.
    - Bonds are treated as “hedge bonds” if the issuer does not *reasonably expect* on the issue date to spend at least 85 percent of the sale proceeds of the issue within three years after the issue date.
    - IRS regulations define “reasonable expectations” to mean that:  
“A prudent person in the same circumstances as the issuer would have those same expectations or take those same actions, based on all the objective facts and circumstances.”

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- IRS may question whether the issuer's spending expectations on the issue date were reasonable if, in fact, substantially less than 85 percent of sale proceeds have been spent within three years.
  - “Hedge bonds” are taxable—purpose is to discourage issuing bonds earlier than reasonably necessary for the governmental purposes of the bonds.

# Post-Issuance Compliance Procedures

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- Risks of failure to comply with arbitrage requirements and restrictions on excessive “private business use” of bond-financed property may be mitigated by adopting and following post-issuance compliance policies and procedures.
    - IRS Form 8038-G Information Return for tax-exempt bonds asks issuers to “check the box” to indicate whether it has adopted post-issuance compliance policies.
    - Purpose is to ensure compliance with applicable rules on spending and investing bond proceeds, compliance with the arbitrage rebate requirement when applicable, avoiding excessive private business use of bond-financed property, and keeping records sufficient to demonstrate compliance if bonds are audited.

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- No particular form of compliance policies is required, but IRS believes they should:
    - Identify an official who is responsible for compliance efforts.
    - Require diligence reviews at regular intervals and whenever private business use arrangements are proposed for bond-financed property.
    - Provide for appropriate training of officials on federal tax requirements for tax-exempt bonds.

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- Provide for retention of records during the term of the bonds (including refunding bonds), plus three years.
  - Identify any instances of potential noncompliance.
  - Promote timely correction of noncompliance through permitted remedial actions or the IRS Voluntary Closing Agreement Program.

# Opportunity Zones

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- Tax Cuts and Jobs Act created tax benefits for investors in “Opportunity Zones.”
  - Opportunity Zones (low-income communities) are nominated by the Governor of each state and approved by the Treasury Department.
  - Washington Opportunity Zones have been approved and are shown on the next slide.

# Washington Opportunity Zones



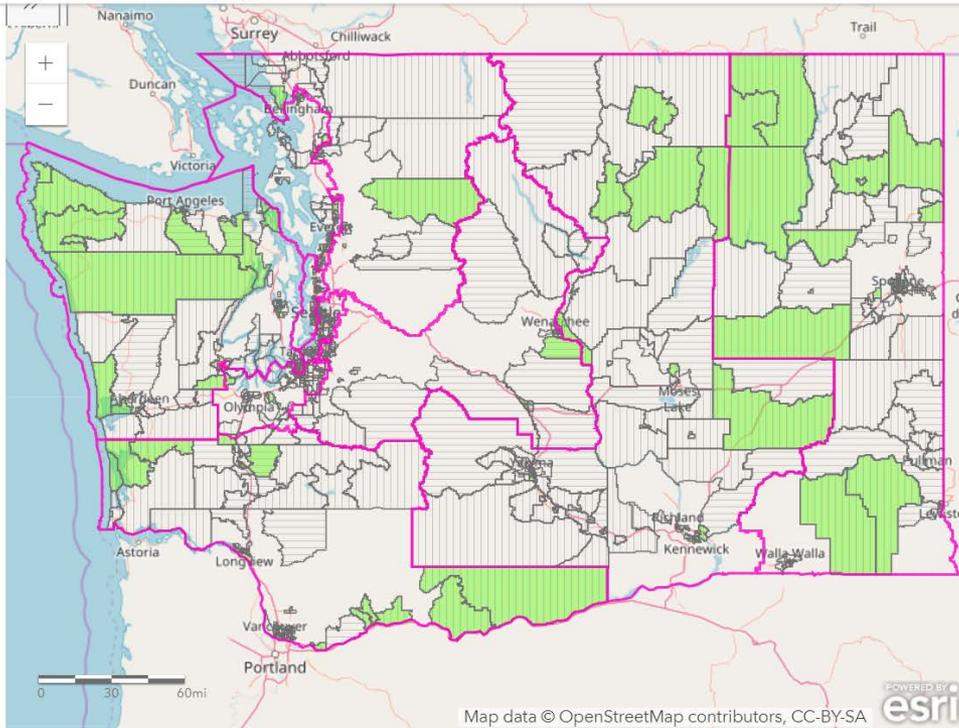
Department of Commerce

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Tracts Designated as Opportunity Zones

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- Investors who invest gains from the sale or exchange of assets in “Opportunity Funds” are permitted to defer recognition of the gains.
  - Investors may also benefit from a reduction in the amount of gain realized if the investment is held five years or longer.
  - Investors may benefit from exclusion of gain on the appreciation of the investment in the Opportunity Fund if it is held ten years or longer.
  - There is no cap on the amount of money that may be invested in Opportunity Funds.
  - It is estimated that individuals and corporations currently have up to \$6 trillion in unrealized gains.

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- An Opportunity Fund may be a corporation, partnership, or limited liability company and must invest at least 90 percent of its assets in Opportunity Zone property.
  - Opportunity Zone property may be (1) stock or a partnership interest in an Opportunity Zone business that owns or leases substantially all of its tangible property in Opportunity Zone business property or (2) Opportunity Zone business property.
  - Opportunity Zone business property is tangible property acquired after December 31, 2017, that is used in an Opportunity Zone trade or business. Either the use of the property in the Opportunity Zone must originate with the Opportunity Fund, or the Opportunity Fund must, during any 30-month period after acquisition, improve the property in an amount equal to the adjusted basis in the property at the beginning of the 30-month period.
  - An Opportunity Fund or Opportunity Zone business may borrow cash to purchase or improve Opportunity Zone business property.

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- An Opportunity Fund is self-certifying – no approval or action by the IRS is required.
  - Taxpayers investing in an Opportunity Fund are required to complete a form that the IRS has announced will become available this summer.
  - No further action is required by local government officials, but expect to hear more in the months to come as consultants and accountants establish Opportunity Funds and seek investment opportunities.

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# Federal Securities Law Highlights and New Developments



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# Federal Securities Law

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- SEC Rule 10b-5 provides that it is unlawful, in connection with the purchase and sale of securities to:
    - Employ any device, scheme or artifice to defraud;
    - Make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
    - Engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person

# Federal Securities Law (continued)

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- Securities laws:
  - Govern disclosure for a bond issue,
  - Require certain ongoing disclosure, and
  - Provide certain restrictions while bonds are outstanding
- Prior to purchasing bonds to be publicly sold, the underwriter must:
  - Obtain and review an official statement and
  - Obtain an undertaking of the issuer to provide certain ongoing disclosure

# Official Statements

- Purpose:
  - Official statements are prepared for public offerings of securities and set forth information concerning the terms of the securities, financial information and operating data concerning the issuer, and other material information necessary for investors to evaluate the security
- Standard for what is included:
  - All “material information”
    - “Materiality” is an objective standard: “substantial likelihood that, under all the circumstances, a fact would assume actual significance in the deliberations of a reasonable investor.”
    - No formal administrative framework for the content of official statements
- Issuer Responsibility:
  - Primarily responsible for the content of disclosure documents and may be liable for misleading disclosure

# Selective Disclosure

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- When an issuer discloses material nonpublic information to certain persons it must publicly disclose that information in a method reasonably designed to effect broad distribution of the information to the public
- Cannot give information to one investor that is not publicly available or given to other investors.
  - Includes giving information to underwriters
- Selective disclosure can occur when information is not consistent from one communication to the next

# Speaking to the Market

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- When an issuer of securities provides information that can reasonably be expected to be relied upon by the market, the issuer must ensure the information is not inaccurate or misleading
- Designed to protect holders of securities against misleading or incorrect information that could impact the market price of the securities
- Examples of information that can be relied on are:
  - Audited financial statements,
  - Investor presentations,
  - Financial information posted on a website, and
  - Certain press releases

# Ongoing Disclosure

- Ongoing Disclosure Obligations
  - SEC Rule 15c2-12 requires an underwriter to obtain an undertaking by the issuer to provide ongoing disclosure to the market
  - Financial statements and certain operating data must be filed by the issuer within a specified period after the end of each fiscal year
  - Certain listed events must be filed within 10 days. Includes:
    - Rating changes,
    - Redemptions of bonds,
    - Failure to file annual information, and
    - Payment and covenant defaults
- Underwriters should not underwrite a bond issue if they do not have a reasonable basis for concluding the issuer will comply with its ongoing disclosure requirements

# Ongoing Disclosure (continued)

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- Practical tips:
    - Include any operating data in annual financial statements
    - Have at least 2 people that are registered and familiar with issuer's undertakings
    - Sign up for reminders on EMMA
    - Educate yourself
      - MSRB website – [www.msrb.org/EducationCenter.aspx](http://www.msrb.org/EducationCenter.aspx)
      - MuniEdPro – [msrb.csod.com](http://msrb.csod.com)

# Proposed Amendments to Rule 15c2-12

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- Proposed amendments would require an event notice if:
  - Issuer incurs a financial obligation that is material, including any bank loans
  - Certain actions or events related to a financial obligation occurs that reflects financial difficulties, such as a default, termination or modification of terms
- Issuers commented that the proposals were too far reaching; financial obligation should encompass debt and similar obligations, not leases, guarantees or derivatives

# SEC Enforcement Actions

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- Between 2013-2017, SEC brought enforcement actions against 76 state and local governments and 16 public officials.
- Between 2002-2012, there were actions against 6 governments and 12 officials
- 71 issuers and obligated persons entered into settlement orders for violations under the Municipalities Continuing Disclosure Cooperation Initiative (MCDC)
  - Violations ranged from minor to significant
  - Issuers did not admit or deny the findings and agreed to cease and desist from future violations
  - 72 underwriter settlements under MCDC

# Examples of SEC Enforcement Actions

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- Joint powers authority failed to disclose its non-compliance with its ongoing disclosure undertakings and did not participate in MCDC
- CFO of charter school operator failed to disclose contracts with conflicted parties that jeopardized grant funding to the operator
- Municipal advisor failed to notify bondholders that an issuer amended its prior continuing disclosure undertakings to increase the time for filing annual reports
- President of a school was negligent for signing an offering document without even reading it
- Sandee Cooper is being investigated by the SEC relating to its decision to halt construction on 2 nuclear reactors; there was a project assessment report which uncovered problems with the project and remained a secret

# Remedies used by SEC

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- Injunctions halting the bond offering
  - Ban from participating in municipal bond offerings
  - Civil money penalties against the issuer and officials
  - Criminal action in extreme cases

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# New Developments in Water Law and the *Hirst* Decision



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# What Are Water Rights?

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- Water rights are *usufructuary* in nature. In other words, the right is a right to *use* water, not own it. Water is generally held to belong to the public.
- Water rights may be surface water or ground water rights, and are defined by their characteristics:
  - Point of Withdrawal/Diversion
  - Place of Use
  - Type and Period of Use
  - Annual Demand Rate
- Water rights are appurtenant to the land where used.

# How are Water Rights Acquired?

- Prior to 1967, Washington recognized *riparian* water rights and water rights under the doctrine of “prior appropriation.”
- Riparian rights is a system of allocating water between landowners with property adjacent to water.
- “Prior appropriation” establishes water rights by “first come, first served” (or “first in time, first in right”).
- Washington’s Surface Water Code was enacted in 1917, and Washington’s Ground Water Code was enacted in 1945.
- Water was confirmed as a resource belonging to the public.
- These codes confirmed the system of “prior appropriation” and introduced the permit system as the sole method for acquiring water rights, administered by the State’s Department of Ecology.

# How Does the Permit System Work?

- Under the system, there is (1) an Application; (2) a Permit; and (3) a Certificate.
- Priority dates back to the date of application.
- An application must include a description of water rights attributes.
- In addition, the application must include a development schedule.
  - Nonuse exception for “determined future development” – does not apply if no steps are taken within five years.
  - Plan must exist within 5 years, development must be completed within 15 years.
- An applicant must provide *notice* to other water rights holders that may be affected.

# Permit System (Continued)

- Ecology must make four findings before it can issue a permit:
  - 1) water must be available;
  - 2) the water must be put to beneficial use;
  - 3) the appropriation cannot impair existing rights; and
  - 4) the appropriation cannot detrimentally affect the public welfare.
- If these findings are not met, an applicant will likely need to mitigate for impacts.
- A Permit provides an “inchoate right” that is considered personal property until the water right is perfected.
- A Certificate is a vested right, and may be issued after proof inspection. A certificate may be obtained in the amount of water put to beneficial use.
- Attributes may be altered by a change application.

# Permit Exemptions

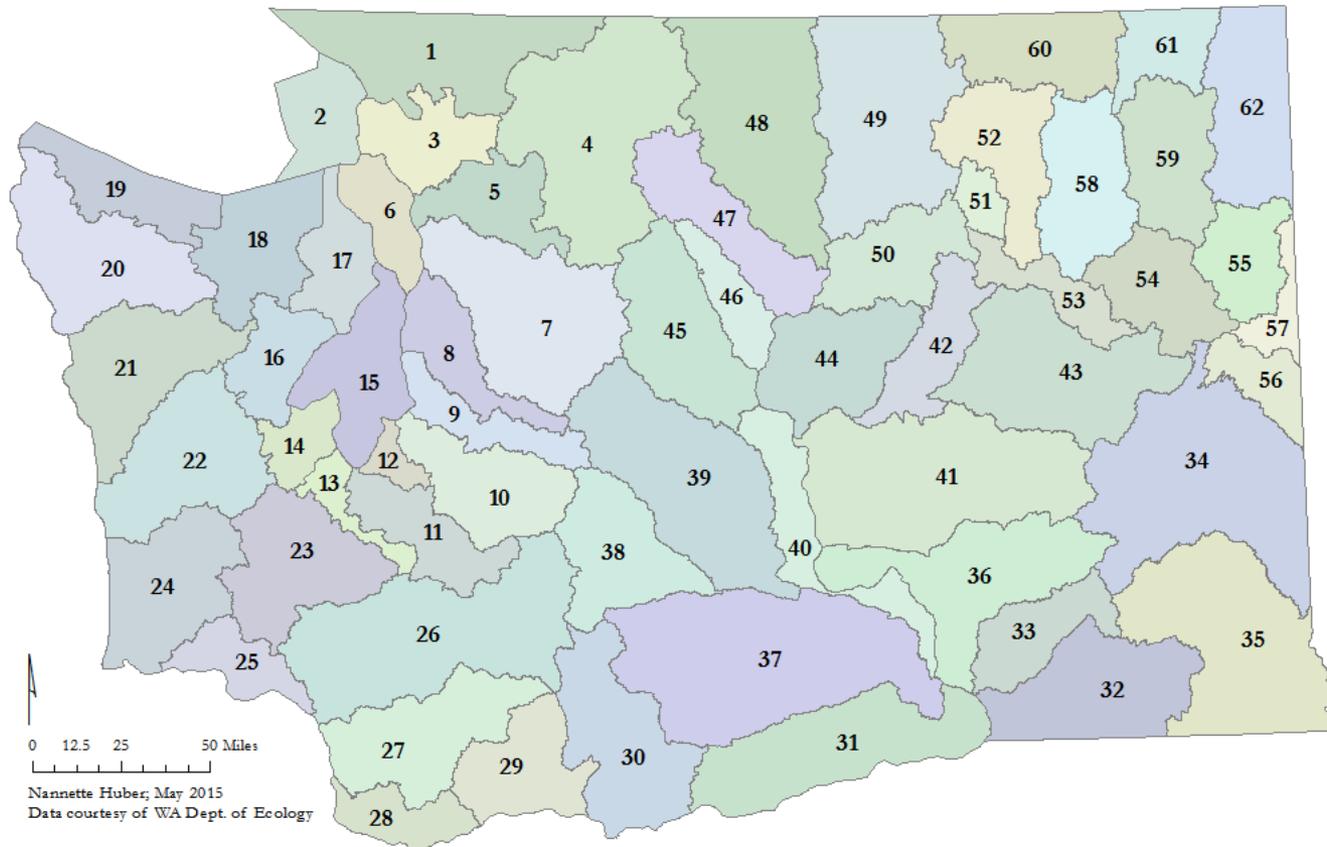
- A permit is not required for four types of uses:
  - Providing water for livestock (no gallon per day or acre restriction)
  - Watering non-commercial lawns or gardens ½ acre in size (no gallon per day restriction)
  - Water for a single home or group of homes (up to 5,000 gallons per day)
  - Providing water for industrial purposes, including irrigation (up to 5,000 gallons per day)
- These exemptions existed because the original thought was that homeowners used minimal water, which would not impact the environment.
- Additionally, in rural areas, homeowners could not rely on a city to provide them water.

# Watershed Planning Act

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- The legislature passed the Watershed Planning Act in 1997 to set a framework for developing local solutions to watershed issues in Washington.
- The Act gave Ecology authority to establish Water Resource Inventory Areas (WRIAs) and to designate planning units. The purpose is to retain perennial rivers, streams and lakes in the WRIAs with instream flows and levels necessary to preserve fish, wildlife and other environmental values.
- There are 62 WRIAs. Each WRIA has its own rules regarding:
  - Minimum in-stream flows
  - Which basins (and/or sub-basins) are closed to future appropriations.
- 10 of these have minimum in-stream flow rules that explicitly regulate permit-exempt groundwater withdrawals: 5, 17, 18, 27, 28, 32, 45, 46, 48, and 57.

# Water Resource Inventory Areas of Washington State



# Growth Management Act & State's Building Code

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- The Growth Management Act (GMA), RCW 36.70a, was enacted in 1990 and 1991 in response to public concerns about increasing development pressures on the environment.
- The GMA requires local governments to plan for the protection of the local environment by adopting a comprehensive plan that “provides for protection of the quality and quantity of groundwater used for public water supplies.”
- Counties are generally in charge of land use planning issues, and must ensure that an “adequate supply” of water is available before issuing a building permit under the state’s building code, RCW 19.27.097(1).

# Whatcom County v. Wash. Growth Mgmt. Hr'gs Bd. (2016)

- Whatcom County's Comprehensive Plan relied on Ecology's Rule in Nooksack WRIA 1 (**WAC 173-501**), under which the closures and minimum flow requirements established by the rule are not applicable to permit-exempt wells.
- The Washington Supreme Court held that the County could not rely on this regulation to satisfy its responsibility under the Growth Management Act to protect water resources.
  - The GMA does not define the requirements to plan for the protection of water resources, or how these requirements are to be met.
  - The Court interpreted the GMA in conjunction with the state's building code to require building permit applicants to produce evidence that water is both legally and physically available for appropriation.

# House Bill 6091 – Amending Hirst

- Applicants must still show evidence of an “adequate” water supply.
- However, local governments may rely on applicable state laws and rules about local water supply when making permitting decisions.
- New domestic exempt wells in many of the State’s Water Resource Inventory Areas (“WRIAs”) no longer need to provide mitigation in order to receive permit approval, even where those withdrawals could impact protected in-stream flows.
- Applicants may obtain approval for permit-exempt withdrawals for domestic indoor use only, with the following maximum annual average withdrawals:
  - Tier 1: 350 gpd (WRIAs 1, 7, 15, 8, 14)
  - Tier 2: 600 gpd (WRIAs 23, 11, 10, 9, 13)
  - Tier 3: 1,000 gpd (WRIAs 49, 22, 55, 12, 59)
- Watershed planning is required for each Tier.

# House Bill 6091 - Continued

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- Impact of Instream Flow Rules:
  - Impacts on in-stream flows must be mitigated when appropriating water
  - In-kind mitigation: water for water (retiring existing water rights, etc)
  - Out of kind mitigation: rebuilding stream slopes, other projects that enhance the environment
- Addresses WA Supreme Court decision in *Foster v. Yelm* (2015)
  - Foster: provided that out-of-kind mitigation was not allowed as a permanent way to mitigate for impacts to in-stream flows and the environment.
- Municipal Water Supply & GMA

- HB 6091 Revisits use of “Out-of-kind” Mitigation
  - The Bill designated five pilot projects. In these projects, out-of-kind mitigation is permitted if in-kind mitigation is not “reasonably attainable.”
  - Remaining question: what is “Reasonably Attainable”?
  - A task force will be created to review the *Foster* decision and the results of the pilot projects.

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# What You Need to Know...About What You Can and Cannot Do During a Ballot Measure Election



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Jim McNeill

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# Overview

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- Getting on the ballot (quick summary)
  - Public disclosure laws
    - History
    - Public facilities during elections
    - Enforcement
  - Common scenarios for local governments

# We're on the ballot

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- Staff development / community input
  - Project scoping
    - Election timing
      - Ballot resolution / ordinance
        - Ballot title ... in 75 words
          - Filed
            - With coversheet
              - And explanatory statement
                - And made pro and con committee appointments

Now what?

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Let's get the word out!

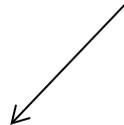


# Public Disclosure Laws

## Initiative 276 (1972)



Public Records, Fair Elections and Lobbying Disclosure  
(Originally codified at Chapter 42.17 RCW)



Public  
Records  
(Chapter 42.56 RCW)



Elections &  
Lobbying  
(Chapter 42.17A RCW)



Open Meetings  
(Chapter 42.30 RCW)  
(Separate legislation in 1971)

# Public Disclosure Commission

I-276 created the Washington Public Disclosure Commission (PDC)

- Implements and enforces election/lobbying disclosure
  - Chapter 42.17A RCW
  - Title 390 WAC
- Provides regulatory guidance
  - PDC Interpretation 04-02 (Guidelines for Local Government Agencies in Election Campaigns)
  - PDC Interpretation 01-03 (Guidelines for School Districts in Election Campaigns)
- No longer provides pre-publication review
  - “Current staff resources do not allow for individualized guidance”
  - PDC Memo re: Election-Related Communications by Local Government Agencies

# Use of Public Facilities Restricted

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- RCW 42.17A.555
  - “No elective official nor any employee of his or her office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition”
- Thou shalt not campaign with thy public facilities

# Use of Public Time and Resources Restricted

- What are public facilities?
- RCW 42.17A.555
  - Stationery
  - Postage
  - Machines
  - Equipment
  - Employees work time
  - Vehicles
  - Office space
  - Publications
  - Clientele lists
  - Other things
  - Computers
  - Text messages
  - Phones
  - Social media
  - Email

# Statutory Exceptions

## RCW 42.17A.555

- Elected bodies may express support for or opposition to a ballot proposition
  - Collective decision, usually motion or resolution
  - Meeting notice must include title and number of ballot measure
  - Equal opportunity for expression of opposing views
- Elected officials may respond to questions at press conferences
- May engage in “normal and regular conduct”

# “Normal and Regular Conduct”

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## WAC 390-05-273

- “Normal and regular conduct of a public office or agency ... means conduct which is:
  - (1) lawful, i.e., specifically authorized, either expressly or by necessary implication, in an appropriate enactment, and
  - (2) usual, i.e., not effected or authorized in or by some extraordinary means or manner”
- Example: a school district may distribute information to the public about its instructional programs, operations and maintenance (RCW 28A.320.090)

# “Normal and Regular Conduct” cont.

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- Must be objective and fair
- WAC 390-05-271(2)(b)
  - “RCW 42.17A.555 does not prevent a public office or agency from ... making an objective and fair presentation of facts relevant to a ballot proposition, if such action is part of the normal and regular conduct of the office or agency”

# “Normal and Regular Conduct” cont.

## Communications the PDC “presumes” are allowed

- One district-wide mailer
  - “... one jurisdiction-wide objective and fair presentation of the facts per ballot measure is appropriate”
- Other normal and regular conduct
  - Examples: “regularly scheduled newsletter, website, bilingual documents, or other format”
  - But “... the agency must be able to demonstrate that for other major policy issues facing the government jurisdiction, the agency has customarily communicated with its residents in a manner similar to that undertaken for the ballot measure”

# Free Speech

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- WAC 390-05-271(1)
  - “RCW 42.17A.555 does not restrict the right of any individual to express his or her own personal views concerning, supporting, or opposing any candidate or ballot proposition, if such expression does not involve a use of the facilities of a public office or agency”
- PDC Interpretations
  - “Public employees do not forfeit their rights to engage in political activity because of their employment. Neither may agency employees be subjected to coercion, pressure, or undue influence to participate ...”

# Use of Facilities by Third Parties

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## WAC 390-05-271(2)(a)

- “RCW 42.17A.555 does not prevent a public office or agency from ... making facilities available on a nondiscriminatory, equal access basis for political uses....”
- Examples:
  - Voters’ pamphlets
  - Candidate forums
  - Facility rentals

# Enforcement

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- Administrative Enforcement (PDC)
  - Investigation
    - PDC initiated
    - Citizen complaint
    - Attorney General / County Prosecuting Attorney referral
  - Hearing
  - Remedial Order
- Court Proceedings
  - For enforcement of PDC remedial orders
  - Independent AG / PA civil action
  - Citizen complaint, after AG / PA declines to bring action

# Consequences



- Civil Penalties

- Any person who violates RCW 42.17A.555 could be subject to a civil penalty up to \$10,000 for each violation

- Court Invalidation of Election

- “If the court finds that the violation of any provision of this chapter by any candidate or political committee probably affected the outcome of any election, the result of that election may be held void ... It is intended that this remedy be imposed freely in all appropriate cases to protect the right of the electorate to an informed and knowledgeable vote.”

- Practical Consequences

- Potential delay in issuance of bonds or collection of taxes
- Negative publicity; undermined credibility

# Common Scenarios: yes or no?

---



## Local Government Surveys?

Yes, but...

- Make research a customary practice
- Conduct before placing measure on ballot
- Ask questions that:
  - Are based on facts
  - Rate the performance of the local government
  - Measure awareness of local government's activities and issues
  - Identify opinions about potential project/facility proposals
  - Rate community priorities
- May share results with governing body, community and media

# Common Scenarios: yes or no?

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## Local Government Surveys?

Yes, but...

- Don't ask "what taxation level the public would support"
- Don't ask only voters. "Agencies shall not target registered voters or other specific subgroups..."
- Don't push-poll the electorate
  - Local governments should not use results "designed to support or oppose a candidate or ballot measure"

# Common Scenarios: yes or no?

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Campaign signs on employee vehicles at work?

Yes

- Under PDC guidelines, employees may place window signs and bumper stickers on their privately-owned vehicles, even when parked on local government property during working hours
- But a local government's statute, ordinance, rule or policy will still control

# Common Scenarios: yes or no?

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## Campaign buttons worn by employees?

Yes

- “Simply wearing a button which encourages support for or opposition to any candidate or ballot proposition, either directly or indirectly, is a form of personal expression and is not to be regarded as a ‘use of facilities’” under RCW 42.17A.555 (PDC Interpretation 92-01)
- But local policy will still control

# Common Scenarios: yes or no?

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■ Campaigning in employee uniforms during non-work time?

It depends...

- Local government owned uniform? NO
- Employee owned uniform? YES, if purchased without reimbursement or no longer used by local government
- Again, the local policy will control

# Common Scenarios: yes or no?

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Distribute campaign materials at work?

Sometimes...

- During non-work hours
- In lunchrooms and break rooms that are used only by staff or other authorized individuals

# Common Scenarios: yes or no?

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OTHERS?

# Questions?



**Jim McNeill** is an attorney at Foster Pepper. He has 28 years of experience serving as bond counsel to Washington municipalities. Prior to private practice, Jim served as Law Clerk to Justice Vernon R. Pearson, Washington State Supreme Court (1986). Jim has substantial experience drafting resolutions proposing ballot propositions for bonds and various tax levies, and on whether ballot propositions and information distributed to the public complies with Public Disclosure Laws. Jim received his B.A. from Washington State University (1982) and his J.D. from Gonzaga University School of Law (1985).

# Thank you!



**Lee Marchisio** is an attorney at Foster Pepper. He focuses his practice on representing local governments on public law issues, including bond finance, entity formation, governance, state and local taxes and fees, elections and open government. Lee regularly advises local governments on submitting ballot measures to the electorate and complying with PDC regulations. He has represented local governments in bond financings, bond validation actions, Public Disclosure Commission proceedings and Public Records Act lawsuits. Lee earned his J.D. (2012) and B.A. (2003) from the University of Washington.

FOSTER PEPPER PLLC

# Construction Contracting for Public Works Projects



Steve DiJulio  
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# Outline

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- 
1. Managing property acquisition to minimize project costs;
  2. Alternative Procurement and Managing the GC/CM Project;
  3. Effective Use of Bidder Responsibility Criteria (and why consultants should be watched); and
  4. Differing Site Conditions.

# PART 1 – Property Acquisition

# Avoiding Early Possession and Use

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- 
- Suggests poor integration of design, financing and timing of project;
  - 12% interest exposure;
  - Removes flexibility.

# PART 2 – Managing a GC/CM



# Why Use GC/CM or Design-Build for Your Project?

- Low Price **Does Not** Always Equal Best Value
- Complex Projects **Require** Specialized Expertise
- Early Contractor Involvement Helps **Reduce** Constructability Issues
- Risk-Sharing With Contractor **Improves** Your Project's Financial And Liability Profiles



# The GC/CM Approach is Increasing in Public Works

- The GC/CM approach utilizes **early-stage contractor** involvement, and the GC/CM, manages all facets of the construction effort including preconstruction services.
- During pre-construction the contractor provides **design** review and **project planning** services, and **converts to GC** after the guaranteed maximum price is decided upon.
- The GC/CM could subcontract work that the Owner feels is suitable for local hire such as **specialty subcontracts** (*painting, insulation, HVAC, refractory, grading/paving and site development*).

# Overview of the Design-Build Method

- A single entity provides both **design** and **construction** of the project.
- The Design-Builder is **obligated** to meet the design criteria and performance requirements specified in the bidding documents.
- On a design/build project the contractor and designer **work together** to serve the Owner on cost, schedule and scope of work.
- Ability for **fast track/phased** construction.
- **Three types** of design-build entities
- **Contractor Led** (*subcontract design or joint venture*)
- **Designer Led** (*subcontract construction or joint venture*)
- A **single** firm with **both** capabilities internally



# Who Authorizes GC/CM and Design-Build Projects?

- Capital Projects Advisory Review Board
- Membership **comprised** of diverse positions in the construction industry
- Approval authority **delegated** to Project Review Committees
- PRCs typically **include** representatives of:  
*general/specialty contractors, organized labor, public owners, construction managers, and MWBE.*



# Five Keys for Project Approval

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- 
- Experienced personnel are crucial
  - Good project management plan
  - Funding, schedule, contingencies
  - Respond directly and comprehensively to PRC's written questions
  - For agency approval, strong history of alternative contracting success



# Termination for Convenience?

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- 
- RCW 39.10.360
  - General contractor/construction manager procedure—  
Contract award process.

# Preconstruction Agreement

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(6) Public bodies may contract with the selected firm to provide services during the design phase that may include life-cycle cost design considerations, value engineering, scheduling, cost estimating, constructability, alternative construction options for cost savings, and sequencing of work, and to act as the construction manager and general contractor during the construction phase.

# When Negotiate MACC?

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- RCW 39.10.370
- General contractor/construction manager procedure—  
Maximum allowable construction cost.

# 90% Complete?

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(1) The maximum allowable construction cost shall be used to establish a total contract cost for which the general contractor/construction manager shall provide a performance and payment bond. The maximum allowable construction cost shall be negotiated between the public body and the selected firm when the construction documents and specifications are **at least ninety percent** complete.

# An Agreement to Negotiate is Illusory

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*Wharf Restaurant v. Port of Seattle*, 24 Wn. App. 601, 609 (1979). Citing *Johnson v. Star Iron & Steel Co.*, 9 Wn. App. 202, 206, 511 P.2d 1370 (1973), the Court stated:

“An agreement to negotiate a contract in the future is nothing more than negotiations.”

# Agreement to Agree

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- A supposed promise is illusory when its provisions make its performance optional or discretionary on the part of the claimed promisor.
- *Metro Park Dist. v. Griffith*, 106 Wn.2d 425, 723 P.2d 1093 (1986):

- 
- In Washington, the only case touching on the subject held that the implied duty of good faith and fair dealing does not restrict the use of an express and unambiguous termination for convenience clause.
  - *SAK & Associates, Inc. v. Ferguson Const., Inc.*, 189 Wn. App. 405, 414-15 (2015).

# Federal Standard?

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Certain federal decisions have held that the federal government's right to terminate is subject to an implied covenant of good faith. *See, e.g., Kalvar Corp. v. United States*, 543 F.2d 1298, 1301-02 (Ct. Cl. 1976).

# Superior Court

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Allowing WSCC to terminate the highest scoring GC/CM for convenience and to restart a competitive GC/CM selection process, **after** WSCC received the benefit of eight months of GC/CM services, in the absence of a material change to the Project, would undermine the alternative public works procurement statute.



PART 3 – Bidder Responsibility  
Criteria For Public Works  
Construction Projects:  
How To Ensure Your Low Bidder Can Do the Job!



# How to Select GOOD Public Works Contractors



## **RCW 39.04.350**

### **Bidder responsibility criteria — Supplemental criteria.**

(1) Before award of a public works contract, a bidder must meet the following responsibility criteria to be considered a responsible bidder and qualified to be awarded a public works project. The bidder must:

- (a) At the time of bid submittal, have a certificate of registration in compliance with chapter [18.27](#) RCW;
- (b) Have a current state unified business identifier number;
- (c) If applicable, have industrial insurance coverage for the bidder's employees working in Washington as required in Title [51](#) RCW; an employment security department number as required in Title [50](#) RCW; and a state excise tax registration number as required in Title [82](#) RCW;
- (d) Not be disqualified from bidding on any public works contract under RCW [39.06.010](#) or [39.12.065\(3\)](#);
- (e) If bidding on a public works project subject to the apprenticeship utilization requirements in RCW [39.04.320](#), not have been found out of compliance by the Washington state apprenticeship and training council for working apprentices out of ratio, without appropriate supervision, or outside their approved work processes as outlined in their standards of apprenticeship under chapter [49.04](#) RCW for the one-year period immediately preceding the date of the bid solicitation; and

Use It  
in Bid Documents to Ensure Contractor  
is Capable of Successfully Completing the Project

# The Statutory Framework: *RCW 39.04.350*



- (1) Before award of a public works contract, a bidder **must meet the following** responsibility criteria to be considered a responsible bidder and qualified to be awarded a public works project.

## **The bidder must:**

- (a) At the time of bid submittal, have a **certificate of registration** in compliance with chapter **18.27 RCW**;
- (b) Have a **current** state unified business identifier number;

*RCW 39.04.350 (cont.)*

# The Statutory Framework: *RCW 39.04.350*



## (1) ...The bidder must:

- (c) If applicable, have **industrial insurance coverage** for the bidder's employees working in Washington as required in **Title 51 RCW**; an employment security department number as required in **Title 50 RCW**; and a state excise tax registration number as required in **Title 82 RCW**;
- (d) Not be **disqualified** from bidding on any public works contract under **RCW 39.06.010** or **39.12.065(3)**; and

*RCW 39.04.350 (cont.)*

# The Statutory Framework: *RCW 39.04.350*



## (1) ...The bidder must:

- (e) If bidding on a public works project subject to the apprenticeship utilization requirements in **RCW 39.04.320**, **not have been found out of compliance** by the Washington state apprenticeship and training council for working apprentices out of ratio, without appropriate supervision, or outside their approved work processes as outlined in their standards of apprenticeship under chapter **49.04 RCW** for the one-year period immediately preceding the date of the bid solicitation.

*RCW 39.04.350 (cont.)*

# The Statutory Framework: *RCW 39.04.350*



- (2) In addition to the bidder responsibility criteria in subsection (1) of this section, the state or municipality may adopt relevant **supplemental criteria** for determining bidder responsibility applicable to a particular project which the bidder must meet.

*RCW 39.04.350 (cont.)*

# The Statutory Framework: *RCW 39.04.350*



- (a) Supplemental criteria for determining bidder responsibility, including the **basis for evaluation and the deadline for appealing** a determination that a bidder is not responsible, must be provided in the invitation to bid or bidding documents.

*RCW 39.04.350 (cont.)*

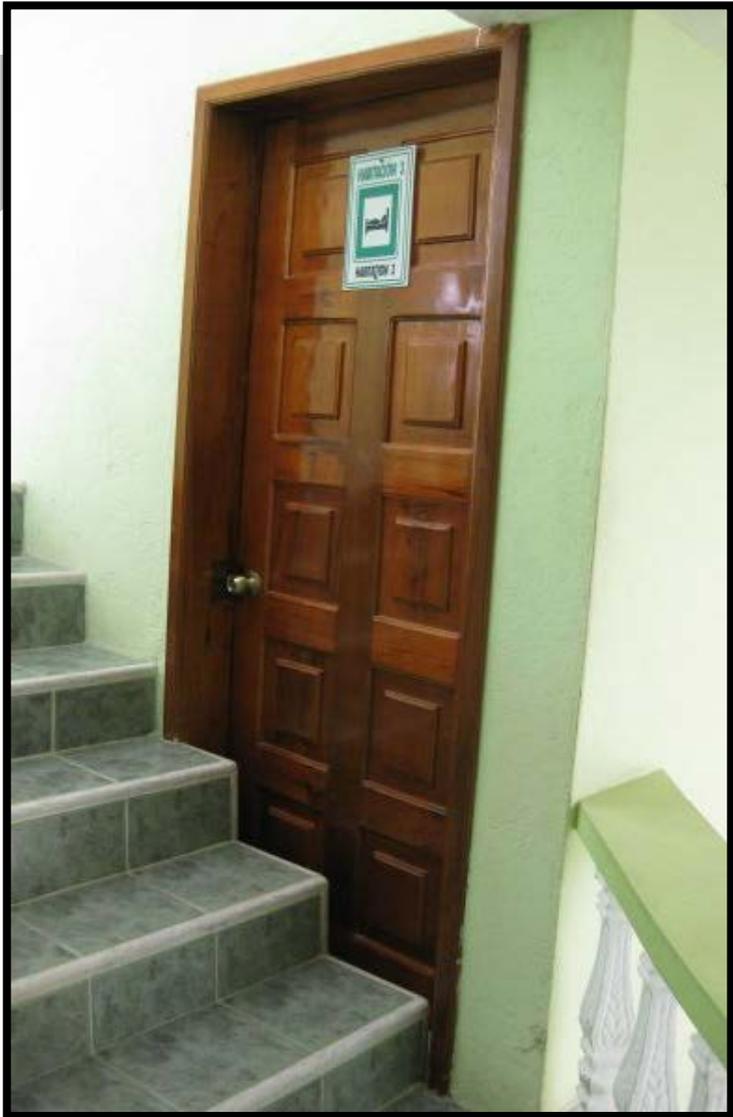
# The Statutory Framework: *RCW 39.04.350*



- (c) If the **bidder fails to supply** information requested concerning responsibility within the time and manner specified in the bid documents, the state or municipality may base its determination of responsibility upon any available information related to the supplemental criteria or may find the bidder not responsible.

*RCW 39.04.350 (cont.)*

# The Statutory Framework: *RCW 39.04.350*



- (b) In a timely manner before the bid submittal deadline, a potential bidder may request that the state or municipality **modify the supplemental criteria**. The state or municipality must evaluate the information submitted by the potential bidder and respond before the bid submittal deadline. If the evaluation results in a change of the criteria, the state or municipality must issue an addendum to the bidding documents identifying the new criteria.

*RCW 39.04.350 (cont.)*

# The Statutory Framework: *RCW 39.04.350*



- (d) If the state or municipality determines a bidder to be not responsible, the state or municipality **must provide, in writing, the reasons** for the determination. The bidder may appeal the determination within the time period specified in the bidding documents by presenting additional information to the state or municipality. The state or municipality **must consider the additional information** before issuing its final determination. If the final determination affirms that the bidder is not responsible, the state or municipality may not execute a contract with any other bidder until two business days after the bidder determined to be not responsible has received the final determination.

*RCW 39.04.350 (cont.)*

# How to Select GOOD Public Works Contractors



- (3) The capital projects advisory review board created in **RCW 39.10.220** shall develop suggested guidelines to assist the state and municipalities in developing supplemental bidder responsibility criteria. The guidelines must be posted on the board's web site.

*RCW 39.04.350 (cont.)*

# Standards in Bid Specifications

State of Washington

Capital Projects Advisory Review Board  
(CPARB)

Suggested Guidelines

for

Bidder Responsibility

Approved by CPARB

October 11, 2007

Revised January 10, 2008

Last Revised February 9, 2012

**Table of Contents**

- [Introduction](#)
- **Mandatory Requirements**
- [Bidder Responsibility Criteria \(mandatory\)](#)
  - Purpose and Goals
  - The Law
  - Suggested Language for Bidding Documents
  - Documentation
- [Subcontractor Responsibility Criteria \(mandatory\)](#)

Last Revised February 9, 2012 Page 1 of 15

<http://www.ga.wa.gov/CPARB/BidderResponsibilityGuidelines.doc>

# How Specific Can Our Responsibility Criteria Be?

- A. Company Experience:** The Bidder or Subcontractor must have successfully and satisfactorily completed at least two (2) ductile-iron pipe projects within the last five (5) years with a minimum diameter of 24 inches and a minimum length of at least 1,500 linear feet of buried ductile-iron pipe each with similar ground water and subsurface conditions and used for the pressurized conveyance of water at a working pressure of at least 150 psi. The Contractor shall submit a description of at least two (2) such projects for the ductile-iron pipe requirements using the forms provided in Section 00300 – Bid Forms – and that shall include at a minimum **a listing of the following:**

# What Information Should Bidders Provide Regarding Past Projects?

- Name of project
- Location of work (nearest city, state, significant natural feature)
- Dates of overall work effort from mobilization to cleanup
- Type and size of utility installed:
  - Fluid conveyed
  - Conduit outside diameter, material, operating pressure
- Contract (or Subcontract) amount
- Physical features of terrain where work was performed

# Examples of Specific Bidder Information on Past Experience:

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- Pipeline work:
  - Length and diameter of pipeline reach
  - Length of restrained joint
  - Depth of installation
  - Groundwater conditions
  - Soil conditions
- Utility owner:
  - Name of construction representative at time of work
  - Name, address and phone number of current engineering representative
  - Special Conditions, if any
- Description of all litigation and/or pending claims in connection with these projects, and any other information relevant to the issue of the successful completion of such projects.

# Does This Company REALLY Focus on This Type of Project?

**B. Bidder Business Revenue:** The Bidder, or Subcontractor(s) responsible for Pipeline construction and/or installation, shall provide such evidence that it is regularly engaged in the business of Pipeline construction and shall submit documentation summarizing its construction revenue derived from Pipeline work in the 12 months preceding the date of the Bid. Revenue may be represented as a proportion of Pipeline work versus total business or as an approximate monetary amount for Pipeline work only. The Bidder may mark such evidence/documentation as *“PROPRIETARY INFORMATION DO NOT DISCLOSE.”*

# Safety is Always Critical for Public Projects

- C. **Safety:** The Bidder/Subcontractor shall provide documentation pertaining to its past safety record for the last five (5) years, including information on all loss of work accidents



# A Company is Only as Good as Its People

**D. Personal Experience:** The Bidder/Subcontractor shall name the key personnel proposed for this project and shall **provide evidence** of their qualifications in accordance with the following:



# Who Will Actually Be Running My Project?

**The Project Manager** shall have directly supervised the successful performance and completion of two (2) ductile-iron pipeline projects in the last five (5) years. Each pipeline project shall have been constructed partly in saturated soil, a minimum length of 1,500 feet each and a minimum diameter of 24 inches.



# Perform Due Diligence on the People, Not Just the Company

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The Bidder/Subcontractor shall submit the **name, resumé, and experience summary** of at least two experienced project field superintendents who will be available for this assignment. Use the forms provided in Section 00300 – Bid Forms. One of the proposed project field superintendents **must be assigned** to the project and may not be substituted unless approved in advance by the ENGINEER. Substitute personnel must meet the experience requirements of this section.

# Don't Believe Everything You Read!

**E.** The OWNER may check Bidder/Subcontractor and/or OWNER **references** to evaluate and assess Bidder/Subcontractor satisfaction of Bidder/Subcontractor responsibility for experience under subsection 11.3.A. or other experience/projects known to OWNER, in the following areas:



# Investigate Key Performance Indicators

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- 
1. Quality Control;
  2. Safety Record, including records maintained by the State Department of Labor and Industries;
  3. Timeliness of Performance;
  4. Use of Skilled Personnel;
  5. Management of subcontractors and suppliers;
  6. Availability and use of appropriate conditions;
  7. Compliance with contract documents; and,
  8. Management of submittals process; change orders, warranties and close out.

# Examples of Responsibility Criteria

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## 1. Delinquent State Taxes

A. Criterion: The Bidder **shall not owe delinquent taxes** to the Washington State Department of Revenue without a payment plan approved by the Department of Revenue.

B. Documentation: The Bidder **shall not be listed** on the Washington State Department of Revenue's "Delinquent Taxpayer List" website:

<http://dor.wa.gov/content/fileandpaytaxes/latefiling/dtlwest.aspx>

# Performance Issues – RED FLAGS!

2. Federal Debarment
3. MWBE Participation on Federally Funded Projects
4. Apprenticeship
5. Public Bidding Crime



# What About the Bidder's Subcontractors?

## 6. Subcontractor Responsibility

- A. Criterion: The Bidder's standard subcontract form shall include the subcontractor responsibility language required by RCW 39.06.020, and the Bidder shall have an established procedure which it utilizes to validate the responsibility of each of its subcontractors. The Bidder's subcontract form shall also include a requirement that each of its subcontractors shall have and document a similar procedure to determine whether the sub-tier subcontractors with whom it contracts are also "responsible" subcontractors as defined by RCW 39.06.020.
- B. Documentation: The Bidder shall submit a copy of its standard subcontract form for review by the Owner, and a written description of its procedure for validating the responsibility of subcontractors with which it contracts.

# Check for These Warning Signs:

7. Claims Against Retainage and Bonds
8. Completion Record for Past Projects
9. Termination for Cause
10. Lawsuits
11. Prevailing Wages



# Life-Cycle Cost Analysis

- Gov. Inslee signed EO 13-03 in August 2013.
- Applies to all state agencies and “any entity receiving funds from the state capital budget”.
- Utilizing life-cycle cost analysis as a primary consideration in the selection of building design.
- Consideration of life-cycle and clean energy experience in selection of architects and engineers.
- Including life-cycle, operating cost, and energy efficiency experience in selecting GC/CM and Design-Build contractors under RCW 39.10.
- Above 3 requirements effective immediately.
- Within 180 days, OFM will issue new regulations providing method for calculating life-cycle and project capitalization data.
- After new regulations are issued, agencies must submit life-cycle and project capitalization data to OFM for projects prior to construction.

# PART 4 – DIFFERING SITE CONDITIONS

# No Damages for Delay?

## **RCW 4.24.360 Construction contract provision waiving, releasing, etc., rights of contractor, etc., to damages or adjustment for unreasonable delay caused by contractee, etc.—Declared void and unenforceable—Exceptions.**

Any clause in a construction contract, as defined in RCW 4.24.370, which purports to waive, release, or extinguish the rights of a contractor, subcontractor, or supplier to damages or an equitable adjustment arising out of unreasonable delay in performance which delay is caused by the acts or omissions of the contractee or persons acting for the contractee is against public policy and is void and unenforceable.

This section shall not be construed to void any provision in a construction contract, as defined in RCW 4.24.370, which (1) requires notice of delays, (2) provides for arbitration or other procedure for settlement, or (3) provides for reasonable liquidated damages.

# No Damages for Delay?

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- The delay must not be “unreasonable.”
- Caused by the acts or omissions of the contractee or persons acting for the contractee?
  - *Scoccolo Const., Inc. ex rel. Curb One, Inc. v. City of Renton*, 158 Wn.2d 506, 518, 145 P.3d 371, 376-77 (2006) (where city possessed the contractual right to compel utility companies to relocate their facilities, court concluded utilities were therefore “acting for” the City, rendering void a no-damages-for-delay clause and subjecting the city to delay damages for utility company delays).

# Differing Site Conditions Contract Claims



**Type I**: Encountered physical conditions that materially differ than what was represented to the contractor.

# Differing Site Conditions Contract Claims



**Type II**: Encountered physical conditions that materially differ than those ordinarily encountered and generally recognized as inherent in a particular type of work

# Shifting Risk and Defeating DSC Claims



## Pre-bid Investigation

- “It is well-settled that a contractor is charged with knowledge of the conditions that a pre-bid site visit would have revealed.”

*H.B. Mac, Inc. v. United States*, 153 F.3d 1338, 1346 (Fed.Cir. 1998)

# Shifting Risk and Defeating DSC Claims



## Consultant Reports

- If you provide information for the contractor to rely upon:
  - Provide data only; and
  - Avoid making conclusions.

# Shifting Risk and Defeating DSC Claims



## Notice

- Include notice provisions in the contract, and enforce them!



FOSTER PEPPER<sub>PLLC</sub>

# Cooperative Agreements, Interlocal Agreements, and Affordable Housing



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# Today's Takeaways

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- 
- What is affordable housing? What is low-income housing?
  - What tools exist for governmental entities to work together to address housing issues?
  - How are affordable housing apartment complexes in your communities being financed?

# Income Levels in Kennewick-Richland



	One Person Household	Two Person Household	Four Person Household	Six Person Household
30% of AMI “Extremely Low Income”	\$15,250	\$17,400	\$21,750	\$25,250
50% of AMI “Very Low Income”	25,400	29,000	36,250	42,050
60% of AMI Often Required for Tax Credit and Private Activity Bond Financing	30,480	34,800	43,500	50,460
80% of AMI “Low Income”	40,600	46,400	58,000	67,300

Generally, housing is “affordable” to an occupant if the household is not paying more than 30% of its income for gross housing costs, including utilities.

# What is a Housing Authority?

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- Housing Authorities Law creates a Housing Authority in each City and each County
- But, the Housing Authority is dormant until activated by resolution of the City or County
- 50% of space/units in Housing Authority developments must be made available to persons of low income, and rents of low income units are to be at lowest possible rates
- No taxing power; operating revenue from rents, HUD fees, etc.
- Flexible powers

# What is the Housing Cooperation Law?

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Gives extra powers to Cities, Towns, Counties, Port Districts, School Districts and other governmental entities of the State to work with Housing Authorities in the planning, undertaking, construction or operating of housing projects

- Sell or grant property
- Parks, playgrounds, community facilities, educational facilities, and utilities
- Dedicate, close or plan/re-plan streets, alleys and sidewalks
- Services
- Buy Housing Authority bonds
- Lend or donate money to a Housing Authority
- Enter into agreements with Housing Authorities relating to these and other Housing Cooperation Act powers

# Loans and Grants for Low Income Housing

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- RCW 35.21.685 (Cities or Towns) and RCW 36.32.415 (Counties) allow local governments to provide a loan or grant of general funds for construction, reconstruction, acquisition, or rehabilitation of housing for residents at or below 80% of area median income
- Housing may be publicly or privately owned
- Housing constructed with this money is not a public work

# Loans or Grants to Private Entities?

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- Washington State Constitution prohibits municipal governments from giving or lending money to private entities, except for the necessary support of the poor or infirm
- Recorded use restrictions (low income housing covenant agreement, regulatory agreement, etc.) may be used to ensure property is for low-income residents for term of loan or other agreed-upon period

# How are Affordable Housing Projects Financed?

One (or more) of the following:

- Low Income Housing Tax Credits
- Tax-exempt financing
- HUD guaranteed programs
- Loans/grants from governmental entities (Tri-Cities HOME Consortium, Washington State Department of Commerce Housing Trust Fund, Housing Authorities, Washington State Housing Finance Commission LAP Program, etc.)
- Deferred Developer Fees
- Other Contributions to Feasibility – Property Tax Exemptions, Sales Tax Exemptions (sometimes), Conversion to Project-Based Section 8 through HUD's RAD Program

# Low Income Housing Tax Credit Structure



With a \$0.93 Tax Credit Factor, \$541,902 in credit = \$5,039,689 in equity to build project

FOSTER PEPPER<sub>PLLC</sub>



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## SERVICES

Municipal Government

Public Finance

## PRACTICE OVERVIEW

Stacie is a member of the firm's Municipal Government and Public Finance practices and has assisted numerous Washington state municipal clients, including cities, counties, public utility districts and other special districts in borrowing transactions. She has particular experience in complex revenue bond financings, including drafting Official Statements for most of the electric utility financings in Washington.

## ACTIVITIES

- Washington Public Treasurers Association
- Washington Finance Officers Association
- Puget Sound Finance Officers Association
- National Association of Bond Lawyers
- Women in Public Finance, Pacific Northwest Chapter
- King County Bar Association

## EXPERIENCE

- Foster Pepper PLLC
  - + Of Counsel, 2015-Present
  - + Attorney, 2011-2015
  - + Paralegal, 2009-2011
- K&L Gates LLP
  - + Paralegal, 1998-2009
  - + Summer Associate, 2001
- Northwest Defenders Association, Rule 9 Intern, 2002

## BAR ADMISSIONS

- Washington, 2003

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Stacie L. Amasaki OF COUNSEL

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---

## EDUCATION

- J.D., Seattle University School of Law, 2003
- B.A., University of Washington, 1997

# Joseph A. Brogan

**MEMBER**



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## SERVICES

Land Use, Planning & Zoning (Chair)

Environmental & Natural Resources

Environmental Litigation Infrastructure

Municipal Government

Native American

Ports

Real Estate

Retail & Consumer Products

Transportation

Water Rights (Chair)

Wine, Beer & Spirits

## PRACTICE OVERVIEW

Joe is chair of the firm's Land Use, Planning & Zoning and Water Rights practices and has more than 25 years of experience in local, state, and federal permitting, enforcement matters and water rights. Joe puts his past experience working for city and county agencies and EPA Region 10 to work for his clients and delivers cost-effective legal services that produce results. He works closely with consultants, developers, lenders, real estate investors, and agency officials to achieve the client's objectives. Joe has served under two gubernatorial administrations as Regulatory Performance Advisor to the Washington State Department of Ecology.

He is one of the leading water rights lawyers in Washington state, providing strategic advice, permitting, and litigation support to water purveyors, public utility districts, ports, industry clients and private property owners. Joe represents clients in administrative appeals and in state and federal court on a wide range of water rights and water resource matters.

Joe's clients include: Costco Wholesale, Inc.; Safeway Inc.; Port of Tacoma; Pierce County; King County Department of Natural Resources; King County Facilities Management Division; Skagit PUD; Asotin PUD; City of Anacortes; ICON Materials; Goodman Real Estate; Vulcan, Inc.; Beacon Capital Partners; Swedish Hospital; Harborview Medical Center; Virginia Mason Hospital & Medical Center; Triad Development; Seattle Pacific University; Madison Marquette; City of Renton; Klickitat County; Skamania County; Spokane County; City of White Salmon; Wright Runstad & Co.; City of Yelm; Olympic Property Group; Griffin Capital Corporation; and Green Diamond Resources Company.

## RECOGNITION

- Rising Star, Washington Super Lawyers list, 2002-2010
- United States Environmental Protection Agency, Region 10, Water Resources, Research Fellow
- Broome County Association Scholarship for Academic Achievement & Community Service, Recipient
- Dean's Academic Scholarship, Seattle University School of Law, Recipient

Joseph A. Brogan

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## ACTIVITIES

- Governor’s Regulatory Performance Advisory Committee for the Department of Ecology Regulatory Reform Initiative, Member, 2002-Present
- Washington State Dept. of Ecology Water Resources Advisory Committee
- American Bar Association
- American Water Resources Association
- King County Bar Association

## EXPERIENCE

- Foster Pepper PLLC
  - + Member, 2007-Present
  - + Associate, 2000-2007
- United States Environmental Protection Agency Region 10, Office of Regional Counsel, Legal Research Fellow, 1999-2000
- King County Department of Natural Resources, Water and Land Resources Division, Program Coordinator, 1992-1997
- City of Seattle Department of Construction and Land Use, Code Development and Community Relations Division, Planning and Development Specialist, 1990-1992
- City of Seattle Office for Long Range Planning, Environmental Planner, 1989-1990

## BAR ADMISSIONS

- Washington, 2000
- U.S. District Court
  - + Western District of Washington, 2010
- 9th Circuit U.S. Court of Appeals

## EDUCATION

- J.D., Seattle University School of Law (*cum laude*), 2000
- Master of Public Administration, University of Washington, 1990
- B.A., State University of New York-Binghamton, 1987

# P. Stephen DiJulio

MEMBER



## SEATTLE

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## SERVICES

Municipal Government  
 Construction  
 Employment & Labor  
 Environmental & Natural Resources  
 Environmental Litigation  
 Infrastructure  
 Land Use, Planning & Zoning  
 Litigation & Dispute Resolution  
 Ports  
 Real Estate  
 Right-of-Way (Chair)  
 School Districts  
 Sports Law  
 Transportation  
 Wine, Beer & Spirits

## PRACTICE OVERVIEW

Steve's practice focuses on litigation involving state and local governments; civil service and public employment; and, land use and environmental law. His particular experience includes representation of jurisdictions on eminent domain, utilities (water, wastewater, storm water, solid waste systems), local improvement districts, facility siting and contractor litigation.

Steve serves as Chair of the firm's Executive Committee and in that capacity as the Managing Member (or "Managing Partner") of the firm.

## RECOGNITION

- *The Best Lawyers in America*® Appellate Practice, 2012-2018
- Best in the Business: Leading Lawyers in the Puget Sound Region, *Seattle Business* magazine, Appellate Practice, 2013
- Washington Super Lawyers list, 2002-2018
- 2010 Top Lawyer, *Seattle Metropolitan* magazine
- Martindale-Hubbell AV rating

## ACTIVITIES

- Municipal League, Board of Trustees, 2010-2013
- Washington State Association of Municipal Attorneys
- International Municipal Lawyers Association
- American Bar Association, State and Local Government Law and Employment Law Sections, Member
- Washington State Bar Association
  - + Environmental and Land Use Law and Administrative Law Sections, Member
- King County Bar Association, Trustee, 1986-1989
- South King County Bar Association, Trustee, 1986-1988
- South King County Legal Clinic
  - + Founder and Attorney Coordinator, 1985-1986
  - + Volunteer, 1978-1989

P. Stephen DiJulio MEMBER

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- University of Washington
  - + Lecturer, Evans Graduate School of Public Affairs

## EXPERIENCE

- Foster Pepper PLLC
  - + Chair, Executive Committee, 2017-Present
  - + Member, 1990-Present
  - + Associate, 1986-1990
- City of Kent, City Attorney, 1982-1986
- City of Seattle, Assistant City Attorney, 1977-1982

## BAR ADMISSIONS

- Washington, 1976
- U.S. District Court
  - + Eastern Division of Washington, 1993
  - + Western Division of Washington, 1976
- 9th Circuit U.S. Court of Appeals, 1980
- Supreme Court, State of Washington, 1976

## EDUCATION

- J.D., Seattle University, 1976
- B.A., University of Washington (Oval Club Scholastic Honorary), 1973

# Marc R. Greenough

MEMBER



## SEATTLE

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## SERVICES

Municipal Government

Public Finance

Environmental & Natural  
Resources

Infrastructure

Investment Management

Native American

Ports

Senior & Affordable  
Housing

## PRACTICE OVERVIEW

Marc is a member of the firm's Municipal Government and Public Finance practices and serves as bond counsel, underwriters' counsel, and disclosure counsel on general obligation, revenue, and special obligation financings by state, local and tribal governments. Marc has extensive experience in structuring municipal and public/private ventures and in providing representation in administrative proceedings and litigation.

## RECOGNITION

- *The Best Lawyers in America*® Public Finance Law, 2010-2018
- Foster Pepper Pro Bono Attorney of the Year, 2008
- Washington Appleseed 2007 Innovator Award for Pro Bono Service
- 2007 Bond Buyer Deal of the Year, Far West Region Small Issuer
- 2006 Bond Buyer Deal of the Year, Far West Region Small Issuer
- Order of the Coif

## ACTIVITIES

- National Association of Bond Lawyers
- Washington State Association of Municipal Attorneys
- Washington Finance Officers Association
- Alaska Municipal Attorneys Association
- Alaska Government Finance Officers Association
- WSBA Indian Law Section, Former Trustee
- Magnolia Presbyterian Church, Board of Directors, Former Treasurer and Secretary
- Southeast Youth & Family Services, Board of Directors, Former Secretary
- Washington Appleseed, Board of Directors, Former Member
- SafeFutures Youth Center, Board of Directors, Former Member
- Foster Pepper Pro Bono Committee, Former Chair
- Leadership Tomorrow, Class of 2001

Marc R. Greenough MEMBER

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## EXPERIENCE

- Foster Pepper PLLC
  - + Member, 2005-Present
  - + Associate, 1997-2001
- Orrick, Herrington & Sutcliffe LLP, 2001-2005
- Seattle City Council, Legislative Analyst, 1994-1997
- Morgan Stanley & Co. Incorporated, 1986-1990
- Nippon Kokan K.K., 1984-1986

## BAR ADMISSIONS

- Washington, 1994
- Alaska, 2003
- Oregon, 2002

## EDUCATION

- J.D., University of Washington School of Law (with high honors), 1994
  - + *Washington Law Review*, Associate Editor
- A.B., Columbia University, 1984

# Lee R. Marchisio

## ASSOCIATE



### SEATTLE

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### SERVICES

Municipal Government  
Constitutional Law &  
Statutory Rights  
Litigation & Dispute  
Resolution  
Ports  
Public Finance  
School Districts

### PRACTICE OVERVIEW

Lee focuses his practice on general municipal law and dispute resolution for public and private clients throughout the state. He assists general purpose governments and special purpose districts on a wide range of issues, including with municipal entity formation, governance, legal authority and constitutional limitations, as well as counseling on open meetings, public records, real and personal property transactions, right-of-way franchises, operator agreements and utility rate setting.

Lee's litigation experience includes representations in public records injunction actions, local improvement district formation and assessment challenges, state constitutional matters and general commercial disputes.

Lee has published and presented on public records law and on state constitutional issues, including separation of powers. He is a regular contributor to Foster Pepper's [Open Local Government Blog](#).

Prior to joining private practice, Lee served more than four years in Governor Chris Gregoire's administration as liaison to local government and community groups and as the Governor's outreach director.

### RECOGNITION

– Order of the Coif

### ACTIVITIES

– International Community Health Services, Board Member, 2017-Present

### EXPERIENCE

– Foster Pepper PLLC  
+ Associate, 2012-Present  
+ Summer Associate, 2011  
– T-Mobile USA, Legal Extern, 2010

Lee R. Marchisio

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- Office of Governor Christine Gregoire
  - + Outreach Director, 2008-2009
  - + Public Liaison Officer, 2005-2007

## BAR ADMISSIONS

- Washington, 2012

## EDUCATION

- J.D., University of Washington School of Law (with high honors), 2012
  - + Washington Law Review, Associate Editor-in-Chief
  - + Puget Sound Area Minority Clerkship Program Recipient, 2010
- B.A., University of Washington (*cum laude*), 2003

Jim McNeill

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## SEATTLE

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## SERVICES

Municipal Government

Public Finance

Infrastructure

School Districts (Chair)

Wine, Beer & Spirits

## PRACTICE OVERVIEW

Jim's practice is focused on municipal law and finance with emphasis on serving as bond counsel to Washington school districts and other Washington municipalities. He has additional substantial experience in the practice of defending municipalities against challenges to the exercise of municipal authority.

## RECOGNITION

- *The Best Lawyers in America*® Education Law, 2013-2018
- Spokane Top Lawyers, *Spokane/Coeur d'Alene Living* magazine, 2008-2009
- Granite Falls School District, Partnership of the Year Award, 2008

## ACTIVITIES

- Washington State Bar Association
  - + Judicial Recommendation Committee, Co-chair, 1991-1995
- Spokane County Bar Association
  - + Judicial Evaluation Committee
  - + Professionalism Committee
  - + CLE Committee
  - + Pro Bono Panel
- National Association of Bond Lawyers, Member, 1991-Present
- Washington Council of School Attorneys, Member, 1995-Present
- Christian Legal Society, Member, 1990-Present

## EXPERIENCE

- Foster Pepper PLLC
  - + Member, 2005-Present
  - + Of Counsel, 1998-2004
- Perkins Coie LLP
  - + Of Counsel, 1998
  - + Associate, 1990-1997
- Preston Thorgrimson Shidler Gates & Ellis, Associate, 1988-1990

Jim McNeill

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- U.S. Bankruptcy Court, Western District of Washington, Law Clerk, 1987-1988
- Washington State Supreme Court, Law Clerk, 1986

## BAR ADMISSIONS

- Washington, 1986
- U.S. Supreme Court, 1992
- U.S. Court of Appeals, Ninth Circuit, 1988
- U.S. District Court,
  - + Eastern District of Washington, 1988
  - + Western District of Washington, 1987

## EDUCATION

- J.D., Gonzaga University School of Law, 1985
- B.A., Washington State University, 1982

# Jeffrey C. Nave

## MEMBER



### SPOKANE

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### SERVICES

Municipal Government

Public Finance

Infrastructure

Native American

Senior & Affordable  
Housing

### PRACTICE OVERVIEW

Jeff has more than 20 years of experience practicing in the area of tax-advantaged financing, including the syndication of federal tax credits and the issuance of tax-exempt bonds. He has substantial experience representing cities, Indian tribes, public housing authorities and other local governments. In addition, Jeff represents investment banking firms as underwriters' counsel on municipal securities offerings.

### RECOGNITION

- *The Best Lawyers in America*® Municipal Law, 2010-2018
- Washington Super Lawyers list, 2009-2018
- Spokane Top Lawyers, *Spokane/Coeur d'Alene Living* magazine, 2008-2015

### ACTIVITIES

- Spokane Housing Authority
  - + Board of Commissioners, Chair, 2012-2013
  - + Board of Commissioners, Vice Chair, 2011
  - + Board of Commissioners, Member, 2010-Present
- Northeast Public Development Authority
  - + Board of Director, Member, 2012-2013
- Downtown Spokane Partnership
  - + Board of Directors, Chair, 2007-2008
  - + Board of Directors, Member, 2003-2011
- National Association of Bond Lawyers
  - + Board of Directors, Member, 2006-2009
  - + Education Committee, Chair, 2004-2006
- Inaugural Tax and Securities Law Institute, Co-Chair, 2003
  - + Washington Seminar, Vice Chair, 2002
  - + Steering Committee for Bond Attorneys Workshop, Member, 2000-2002
- American College of Bond Counsel, Fellow, 2008-Present
- Mayor's Affordable Housing Task Force (Spokane, WA), Member, 2007

Jeffrey C. Nave

MEMBER

SPOKANE

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---

- Downtown Spokane Ventures Association
  - + Board of Directors, Chair, 2003-2005
  - + Board of Directors, Member, 2001-2005
- Washington Attorneys Assisting Community Organizations, Member, Board of Directors, 2003-2004
- California State Bar Association, Member, 1990-Present
- Washington State Bar Association
  - + Member, 1991-Present
  - + Rules of Professional Conduct Committee, Member, 2004
  - + Indian Law Section, Member
- Idaho State Bar, Member, 1992-Present
- State Bar of Montana, Member, 1997-Present
- American Bar Association
  - + Forum on Affordable Housing and Community Development Law, Member
- Washington State Association of Municipal Attorneys, Member
- Washington Finance Officers Association, Affiliate Member
- Washington Public Treasurers Association, Associate Member

## EXPERIENCE

- Foster Pepper PLLC
  - + Member, 2001-Present
  - + Of Counsel, 1998-2001
- Perkins Coie LLP
  - + Partner, 1998
  - + Associate, 1990-1997

## BAR ADMISSIONS

- Washington, 1991
- Idaho, 1992
- Montana, 1997
- 9<sup>th</sup> Circuit U.S. Court of Appeals, 1990
- U.S. District Court
  - + Eastern District of Washington
  - + District of Idaho
  - + Northern District of California
- Tulalip Tribal Court, 2008
- California, 1990 (inactive)

## EDUCATION

- J.D., University of California, Hastings College of the Law, 1990
- B.A., University of California at Berkeley, 1987

# Nancy M. Neraas

MEMBER



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## SERVICES

Municipal Government

Public Finance

Infrastructure

## PRACTICE OVERVIEW

Nancy has more than 25 years of experience as bond counsel for cities, counties, and special districts (public utility districts, water, sewer, park, school, and fire protection) in Washington and other states on municipal financings, including general obligation bonds, revenue bonds and special assessment district financings. Nancy has worked on numerous electric utility financings for various cities, public utility districts and other special districts. Nancy is disclosure counsel for many issuers, including the State of Washington.

## RECOGNITION

– *The Best Lawyers in America*® Public Finance Law, 2010-2018

## ACTIVITIES

- Washington Finance Officers Association
- Washington Public Treasurers Association
- Washington State Association of Municipal Attorneys
- National Association of Bond Lawyers, Member, 1984-Present
- Seattle Symphony, Board of Directors
- Treehouse, Finance Committee
- The Bush School, Finance Committee
- Washington Women's Foundation, Member
- Whitman Parent Committee, Member

## EXPERIENCE

- Foster Pepper PLLC, Member, 2009-Present
- K&L Gates LLP, Partner, 1984-2009

## BAR ADMISSIONS

- Washington, 1984

Nancy M. Neraas MEMBER

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## EDUCATION

- J.D., University of Washington School of Law (with honors), 1984  
+ *Washington Law Review*
- B.A., Mount Holyoke College (*magna cum laude*) 1979



Allison C. Schwartzman

MEMBER

## SEATTLE

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## SERVICES

Municipal Government  
(Chair)

Public Finance (Chair)

Health Care

Infrastructure

Senior & Affordable  
Housing

## PRACTICE OVERVIEW

Allison is a member of the firm's Municipal and Public Finance practice and has more than a decade of experience serving as bond counsel, underwriter's counsel and borrower's counsel in tax-advantaged financings. Allison's practice is focused on multifamily and senior housing, health care, transportation, higher education and nonprofit financings. She also counsels housing authorities and other public entities regarding general municipal law.

## RECOGNITION

– Rising Star, Washington Super Lawyers list, 2012

## ACTIVITIES

– Municipal League of King County, Board Member

– Leadership Tomorrow Class of 2014

– National Association of Bond Lawyers

– Washington State Association of Municipal Attorneys

– Washington Finance Officers Association

– American Bar Association

+ Forum on Affordable Housing and Community Development Law, Member

– Washington State Bar Association

– King County Bar Association, Member

## EXPERIENCE

– Foster Pepper PLLC

+ Member, 2012-Present

+ Associate, 2007-2011

– Dilworth Paxson LLP (Philadelphia, PA), Associate, 2006-2007

– Parker McCay P.A. (Marlton, NJ), Associate, 2004-2006

– Boston College Legal Assistance Bureau (Waltham, MA), Student Attorney, 2003-2004

– Thornton & Naumers LLP (Boston, MA), Law Clerk, 2003

Allison C. Schwartzman MEMBER

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## BAR ADMISSIONS

- Washington, 2008
- Oregon, 2017
- New Jersey, 2004
- Pennsylvania, 2004

## EDUCATION

- J.D., Boston College Law School (*cum laude*), 2004
  - + Boston College Environmental Affairs Law Review
    - Solicitations Editor, 2003-2004
    - Staff Writer, 2002-2003
- Client Counseling Competition, Semi-Finalist
- B.A., Pomona College, 2001



William G. Tonkin

MEMBER

## SEATTLE

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F 206.749.2022

[william.tonkin@foster.com](mailto:william.tonkin@foster.com)

## SERVICES

Municipal Government  
Public Finance  
Infrastructure  
Native American  
Ports  
School Districts  
Tax

## PRACTICE OVERVIEW

Bill's practice is focused on public finance, focusing on federal tax requirements and restrictions, including arbitrage and arbitrage rebate requirements, applicable to all kinds of tax-exempt obligations, including state and local bonds, qualified 501(c)(3) bonds, qualified small issue (industrial development) and exempt facility bonds. He has extensive experience in general business and corporate area emphasizing federal taxation and securities regulation.

## RECOGNITION

- 2010 Top Lawyer, *Seattle Metropolitan* magazine
- Phi Beta Kappa
- Departmental Honors in History
- Martindale-Hubbell AV rating

## ACTIVITIES

- American College of Bond Counsel, Regular Fellow
- National Association of Bond Lawyers
- Washington State Association of Municipal Attorneys
- Washington Public Treasurers Association
- Washington Finance Officers Association
- American Bar Association, Taxation Section, Member
- Washington State Bar Association, Tax Law Section, Member
- King County Bar Association

## EXPERIENCE

- Foster Pepper PLLC
  - + Member, 1976-Present
  - + Associate, 1969-1976
- Idaho Supreme Court, the Hon. McQuade (Boise, ID) Law Clerk, 1968-1969

William G. Tonkin MEMBER

SEATTLE T 206.447.8967 F 206.749.2022 [bill.tonkin@foster.com](mailto:bill.tonkin@foster.com)

---

### BAR ADMISSIONS

- Washington, 1969
- Idaho, 1968 (inactive)

### EDUCATION

- LL.B., Harvard University, 1968
- A.B., Northwestern University, 1965

# Chapter 35.83 RCW

## Housing Cooperation Law

**35.83.005 Short title.** This act may be referred to as the “Housing Cooperation Law.”

[1965 c 7 § 35.83.005. Prior: 1939 c 24 § 1; RRS § 6889-31.]

**35.83.010 Finding and declaration of necessity.** It has been found and declared in the housing authorities law that there exist in the state unsafe and insanitary housing conditions and a shortage of safe and sanitary dwelling accommodations for persons of low income; that these conditions necessitate excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health and safety, fire and accident protection, and other public services and facilities; and that the public interest requires the remedying of these conditions. It is hereby found and declared that the assistance herein provided for the remedying of the conditions set forth in the housing authorities law constitutes a public use and purpose and an essential governmental function for which public moneys may be spent, and other aid given; that it is a proper public purpose for any state public body to aid any housing authority operating within its boundaries or jurisdiction or any housing project located therein, as the state public body derives immediate benefits and advantages from such an authority or project; and that the provisions hereinafter enacted are necessary in the public interest.

[1965 c 7 § 35.83.010. Prior: 1939 c 24 § 2; RRS § 6889-32. Formerly RCW 74.28.010.]

**35.83.020 Definitions.** The following terms, whenever used or referred to in this chapter shall have the following respective meanings, unless a different meaning clearly appears from the context:

(1) “Housing authority” shall mean any housing authority created pursuant to the housing authorities law of this state.

(2) “Housing project” shall mean any work or undertaking of a housing authority pursuant to the

housing authorities law or any similar work or undertaking of the federal government.

(3) “State public body” shall mean the state of Washington and any city, town, county, municipal corporation, commission, district, authority, other subdivision or public body of the state.

(4) “Governing body” shall mean the council, the commission, board of county commissioners or other body having charge of the fiscal affairs of the state public body.

(5) “Federal government” shall include the United States of America, the United States housing authority, or any other agency or instrumentality, corporate or otherwise, of the United States of America.

[1991 c 167 § 4; 1965 c 7 § 35.83.020. Prior: 1939 c 24 § 3; RRS § 6889-33. Formerly RCW 74.28.020.]

**35.83.030 Cooperation in undertaking housing projects.** For the purpose of aiding and cooperating in the planning, undertaking, construction or operation of housing projects located within the area in which it is authorized to act, any state public body may upon such terms, with or without consideration, as it may determine:

(1) Dedicate, sell, grant, convey, or lease any of its interest in any property, or grant easements, licenses or any other rights or privileges therein to a housing authority or the federal government;

(2) Cause parks, playgrounds, recreational, community, educational, water, sewer or drainage facilities, or any other works which it is otherwise empowered to undertake, to be furnished adjacent to or in connection with housing projects;

(3) Furnish, dedicate, close, pave, install, grade, regrade, plan or replan streets, roads, roadways,

## Chapter 35.83 RCW

### Housing Cooperation Law

alleys, sidewalks or other places which it is otherwise empowered to undertake;

(4) Plan or replan, zone or rezone any part of such state public body; make exceptions from building regulations and ordinances; any city or town also may change its map;

(5) Cause services to be furnished to the housing authority of the character which such state public body is otherwise empowered to furnish;

(6) Enter into agreements with respect to the exercise by such state public body of its powers relating to the repair, elimination or closing of unsafe, insanitary or unfit dwellings;

(7) Employ (notwithstanding the provisions of any other law) any funds belonging to or within the control of such state public body, including funds derived from the sale or furnishing of property or facilities to a housing authority, in the purchase of the bonds or other obligations of a housing authority; and exercise all the rights of any holder of such bonds or other obligations;

(8) Do any and all things, necessary or convenient to aid and cooperate in the planning, undertaking, construction or operation of such housing projects;

(9) Incur the entire expense of any public improvements made by such state public body in exercising the powers granted in this chapter;

(10) Enter into agreements (which may extend over any period, notwithstanding any provision or rule of law to the contrary), with a housing authority respecting action to be taken by such state public body pursuant to any of the powers granted by this chapter. Any law or statute to the contrary notwithstanding, any sale, conveyance, lease or agreement provided for in this section may be made by a state public body without appraisal, advertisement or public bidding: PROVIDED, There must be five days public notice given either by posting in three public places or publishing in the official county newspaper of the county wherein the property is located; and

(11) With respect to any housing project which a housing authority has acquired or taken over from the federal government and which the housing authority by resolution has found and declared to have been constructed in a manner that will promote the public

interest and afford necessary safety, sanitation and other protection, no state public body shall require any changes to be made in the housing project or the manner of its construction or take any other action relating to such construction.

[1991 c 167 § 5; 1965 c 7 § 35.83.030. Prior: 1939 c 24 § 4; RRS § 6889-34. Formerly RCW 74.28.030.]

**35.83.040 Agreements as to payments by housing authority.** In connection with any housing project located wholly or partly within the area in which it is authorized to act, any state public body may agree with a housing authority or the federal government that a certain sum (in no event to exceed the amount last levied as the annual tax of such state public body upon the property included in said project prior to the time of its acquisition by the housing authority) or that no sum, shall be paid by the authority in lieu of taxes for any year or period of years.

[1965 c 7 § 35.83.040. Prior: 1939 c 24 § 5; RRS § 6889-35. Formerly RCW 74.28.040.]

**35.83.050 Advances to housing authority.** Any city, town, or county located in whole or in part within the area of operation of a housing authority shall have the power from time to time to lend or donate money to such authority or to agree to take such action. Such housing authority, when it has money available therefor, shall make reimbursements for all such loans made to it.

[1965 c 7 § 35.83.050. Prior: 1939 c 24 § 6; RRS § 6889-36. Formerly RCW 74.28.050.]

**35.83.060 Procedure for exercising powers.** The exercise by a state public body of the powers herein granted may be authorized by resolution of the governing body of such state public body adopted by a majority of the members of its governing body present at a meeting of said governing body, which resolution may be adopted at the meeting at which such resolution is introduced. Such a resolution or resolutions shall take effect immediately and need not be laid over or published or posted.

[1965 c 7 § 35.83.060. Prior: 1939 c 24 § 7; RRS § 6889-37. Formerly RCW 74.28.060.]

**35.83.070 Supplemental nature of chapter.** The powers conferred by this chapter shall be in addition

## Chapter 35.83 RCW

### Housing Cooperation Law

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and supplemental to the powers conferred by any other law.

[1965 c 7 § 35.83.070. Prior: 1939 c 24 § 8; RRS § 6889-39. Formerly RCW 74.28.070.]

**35.83.080 State public body support.** For the purpose of aiding the board of commissioners of a housing authority in carrying out the board's duties or powers under any applicable law, any state public body may, with or without consideration, provide monetary, in-kind, or other support to the board of commissioners of a housing authority. Such support may not be for the purpose of compensation for a commissioner for his or her services rendered to the housing authority.

[2018 c 42 § 1.]

#### Certain Other Affordable Housing Statutes

**35.21.685 Low-income housing—Loans and grants.** A city or town may assist in the development or preservation of publicly or privately owned housing for persons of low income by providing loans or grants of general municipal funds to the owners or developers of the housing. The loans or grants shall be authorized by the legislative authority of the city or town. They may be made to finance all or a portion of the cost of construction, reconstruction, acquisition, or rehabilitation of housing that will be occupied by a person or family of low income. As used in this section, "low income" means income that does not exceed eighty percent of the median income for the standard metropolitan statistical area in which the city or town is located. Housing constructed with loans or grants made under this section shall not be considered public works or improvements subject to competitive bidding or a purchase of services subject to the prohibition against advance payment for services: PROVIDED, That whenever feasible the borrower or grantee shall make every reasonable and practicable effort to utilize a competitive public bidding process.

[1986 c 248 § 1.]

**36.32.415 Low-income housing—Loans and grants.** A county may assist in the development or preservation of publicly or privately owned housing for persons of low income by providing loans or grants of general county funds to the owners or developers of the housing. The loans or grants shall be authorized

by the legislative authority of a county. They may be made to finance all or a portion of the cost of construction, reconstruction, acquisition, or rehabilitation of housing that will be occupied by a person or family of low income. As used in this section, "low income" means income that does not exceed eighty percent of the median income for the standard metropolitan statistical area in which the county is located. Housing constructed with loans or grants made under this section shall not be considered public works or improvements subject to competitive bidding or a purchase of services subject to the prohibition against advance payment for services: PROVIDED, That whenever feasible the borrower or grantee shall make every reasonable and practicable effort to utilize a competitive public bidding process.

[1986 c 248 § 2.]

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