

RESOLUTION 6-04-2003

DIGEST

Joint Power Agencies: Responsibility For Debts

Amends Government Code section 6508.1 to eliminate the right of a public entity that is a party to a joint power agency agreement to avoid responsibility for the agency's debts.

RESOLUTION COMMITTEE RECOMMENDATION

DISAPPROVE

History:

None known.

Reasons:

This resolution amends Government Code section 6508.1 to eliminate the right of a public entity that is a party to a joint power agency agreement to avoid responsibility for the agency's debts. This resolution should be disapproved because joint power agencies ("JPAs") allow our state government to provide many essential services and this resolution will likely force JPAs out of business.

JPAs play an important part in the smooth functioning of our government. Article 16, section 18 of the California Constitution prohibits public entities from entering into contracts that require them to make payments for more than a year without approval by two-thirds of voters. To finance large capital transactions, therefore, many state and local agencies have banded together to create private, contractual entities called joint power agencies, which are not subject to the debt limitation. For example, the California Association for Park and Recreation Insurance (a JPA) allows approximately 60 local park agencies to pool their self-insurance funds and enter excess insurance contracts. This allows local parks to remain open. Other JPA's own and administer recreational land for the state, or perform a host of other services.

Section 6508.1 allows public entities who form a JPA to choose to limit their liability and this encourages JPA formation. This is similar to allowing shareholders in a corporation to limit their personal liability to encourage investments in corporations. Any contractor worried about a public entity's ability to avoid responsibility for a joint power agency's debt can protect itself by refusing to do business with such joint power agency, just as it can refuse to contract with a corporation if it is worried about that corporation's ability to pay for its debts. Prohibiting public entities from limiting their liability under joint power agency agreements will strongly discourage public entity participation in such agreements and thus significantly reduce valuable JPA services in this state.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Government Code section 6508.1 to read as follows:

- 1 §6508.1
- 2 If the agency is not one or more of the parties to the agreement but is a public entity,
- 3 commission, or board constituted pursuant to the agreement, the debts, liabilities, and obligations of
- 4 the agency shall be the debts, liabilities, and obligations of the parties to the agreement, ~~unless the~~
- 5 ~~agreement specifies otherwise.~~
- 6 A party to the agreement may separately contract for, or assume responsibility for, specific
- 7 debts, liabilities, or obligations of the agency.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

Existing Law: Under existing law, according to the Second District Court of Appeal, two or more entities may form a joint powers agency (“JPA”) and provide in the agreement forming the JPA that the forming agencies shall not be liable for the debts of the JPA they have created.

This Resolution: Provides that the forming agencies are liable for the debts of a JPA they form, except that the forming agencies may agree to apportion liability in some manner other than joint and several.

The Problem: In 1968 an embezzlement caused the Association of Bay Area Governments (a JPA) to be unable to pay its debts. Existing law did not require the agencies that formed ABAG (and were its sole source of income) to pay its debts. Assemblyman John T. Knox sponsored an amendment to Government Code section 6508.1, as it reads above, which he said will “require cities and counties who have created a joint-powers agency to be liable for the debts and obligations of that agency....” In 2002, however, the Court of Appeal held that Section 6508.1 permits forming agencies to provide in the joint powers agreement that they will not be liable for the debts of the JPA, thus in essence nullifying the intent of Section 6508.1. The court said that the language of the code section was clear on its face in permitting such an exception and therefore it refused to consider legislative history to the contrary. *Tucker Land Company v. State of California* (2002) 94 Cal.App.4th 1191. It should further be noted that Government Code section 895.2 provides that the forming agencies are liable for the tort liabilities of the JPA, but that provision is now in question because Section 6508.1 was the later enacted statute. Section 6508.1 contains no language indicating it is limited only to contractual obligations, although the *Tucker* court implied that is how it should be read.

Under *Tucker*, two or more government agencies may form a JPA, become the sole sources of the JPA’s income, cause the JPA to engage in financially speculative ventures and then deny financial responsibility if the ventures lose money and leave the JPA insolvent. In the *Tucker* case the JPA purchased land from Tucker for open space, gave Tucker an unsecured promissory note, assuring it that funding was available to pay the note, and then reneged on the note after using appropriated funds for other purposes.

Persons and entities who do business with governmental agencies should be able to rely on the good credit of the government, and not have to engage in due diligence and obtain guarantees, etc., when entering into contracts with the government. As the California Supreme Court said over 50 years ago, if a government agency does not honor its contracts “then there is no such thing as the inviolability of contract and the stain of repudiation is on every governmental entity in the state.” *May v. Board of Directors* (1949) 34 Cal.2nd 125, 133. This resolution will restore the original intent of Assemblyman Knox and prevent government agencies from allowing JPAs they create to become insolvent.

IMPACT STATEMENT

This resolution does not affect any other law statute or rule.

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COUNTERARGUMENT

SAN DIEGO COUNTY BAR ASSOCIATION

This resolution would terminate much lease-revenue financing in California, and therefore it should be disapproved. Most California local government entities, including cities, counties, and special districts, cannot make contracts that require payment of money over a period of more than one year without approval of two-thirds of the voters in an election. (Cal. Const., art. 16, § 18.) As a result, many municipal capital transactions are accomplished by lease-revenue financing. In lease-revenue financing, a third party that is not subject to the constitutional debt limitation obtains the financing for the capital transaction, incurs the debt, and leases the capital asset to the governmental entity that needs it on terms that relieve the entity of rent if it is deprived of use of the asset. Joint powers authorities (JPA's), which are not subject to debt limitation, are the most common third parties used as financing and leasing agencies in lease-revenue financing. Lease-revenue financing is used for both improvements to real estate and acquisition of equipment. In *Rider v. City of San Diego* (1998) 18 Cal.4th 1035, the court reaffirmed that lease-revenue financing through a JPA does not violate the constitutional debt limitation. Central to that holding is the underlying law that member entities are not liable for the debts of JPA's. (*Id.* at 1045.) And central to that underlying law is Government Code section 6508.1, on which the California Supreme Court explicitly relied for the very proposition that the proponent here asserts was new in 2002. (*Ibid.*) Some lease revenue financing might be salvaged under Government Code section 6551, which applies to a particular kind of bond secured by a lease, but this resolution would create a conflict between section 6508.1 and 6551. All other lease-revenue financing by JPA's would be wiped out.

Even if the resolution were amended to protect lease-revenue financing, San Diego questions the proponent's public policy argument. Many JPA's are, in effect, limited liability corporations created by multiple governmental entities to accomplish projects that could not be prosecuted by a single agency. Contractors who deal with JPA's know their rights are not backed by the credit of the member agencies, just as contractors who deal with corporations know their rights are not backed by the shareholders. Perhaps it might be wise to develop principles holding member agencies liable for inequitable abuse of the right to form JPA's, following concepts of alter ego liability in private transactions. That would be a precision-guided munition aimed at a genuine enemy. This bunker-buster of a resolution will cause far too many civilian casualties.