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Public Infrastructure Financing Options

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PUBLIC INFRASTRUCTURE FINANCING OPTIONS

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Introduction

This is one of a series of summaries of the law related to land use and development prepared for the Utah Land Use Institute. It was prepared in association with a presentation by the author which was recorded for online streaming at www.utahlanduse.org/library/. This summary includes case law and other statutory changes up to June 2023.

Summary of Public Infrastructure Financing Options

Public infrastructure is one of the most critical aspects of any society. The term public infrastructure covers all essential systems and facilities that allow for society's day-to-day life and enhance people's standard of living. In particular, public infrastructure is of interest at all levels of government since these systems and facilities are developed, owned, and operated by the government.

At all levels of government public infrastructure needs to be a focus and government entities need to keep a high standard or risk suffering a declining in society. Accordingly, governments need to spend money to operate, maintain, and improve public infrastructure. Therein lies one of the problems governments face; the lack of funds to properly finance the growth and maintenance of its public infrastructure.

Every four years, the American Society of Engineers (ASCE) estimates the amount of infrastructure investment needed to maintain a state of good repair for the nation's infrastructure. In its most recent report it gave the nation a C- grade.[3] The ASCE also issues state specific report cards evaluating that state's infrastructure across 12 categories. On the most recent report card for Utah, the ASCE gave Utah an overall grade of C+ and no single category obtained an A grade while two categories received D grades.[4]

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[2] The Office of the Property Rights Ombudsman has provided funding for this update from the 1% surcharge on all building permits in the State of Utah. Appreciation is also expressed to the Division of Housing and Community Development of the Department of Workforce Services for funding the project which produces these topical summaries of land use regulations. The Utah Land Use Institute also expresses continuing appreciation for the ongoing funding provided by the S. J. and Jessie E. Quinney Foundation and the Dentons Law Firm.

[3] https://infrastructurereportcard.org/

[4] https://www.infrastructurereportcard.org/wp-content/uploads/2020/12/UTAH-SECTION-ASCE-Brochure-Final-Grades-3.pdf

One of the key findings of the most recent ASCE nationwide study is that between 2020 and 2029 there will be a total infrastructure investment gap, defined as the difference in estimated needs and the estimated amount actually spent, of $2.59 trillion.[5] This means that the amount being spent on infrastructure is only covering about half of what is needed to maintain a B grade across the nation.[6]

As infrastructure funding continues to lag behind expected infrastructure needs, the question of how to finance infrastructure and close the investment gap becomes even more important. For a state such as Utah, which is growing rapidly and contains a diverse ecosystem and five national parks, the need for investment to continue that growth while maintaining Utah standards is even more necessary.

The question then becomes what are the options to finance public infrastructure; luckily for Utah, and its state and local governments, there are plenty of options to help finance this pivotal aspect of governance.

The primary purpose of this guide is to provide a primer on several types of financing options available to governments including: (i) Taxation, (ii) Value Capture and Tax Increment Financing ("**TIF**"), (iii) Grants, (iv) Public Private Partnerships ("**PPP**s"), and (v) Public Infrastructure Districts (**PID**s). These are only a few of the many options for funding infrastructure. A matrix of a variety of funding sources is attached hereto as <u>Exhibit A</u>. Those interested may wish to explore other options beyond those discussed in more detail here.

1. <u>Taxation</u>

As Benjamin Franklin famously said, "nothing is certain, except death and taxes[7]. Everyone knows what taxes are and everyone pays taxes one way or another. However, certain types of taxes and tax rules and regulations are more applicable than others when it comes to public infrastructure financing.

a. <u>Applicable Law</u>

Utah law restricts what a local government entity can tax in many areas. For example, Utah law caps what a county or a municipality may charge a public service provider at no more than six percent (6%) of gross revenue.[8] Furthermore, a municipality cannot impose a transportation utility fee on another political entity subdivision.[9] A county, municipality, or other political subdivision may not impose a tax on the gross proceeds or gross income of a car sharing transaction that the jurisdiction does not impose on other transactions involving the rental of a motor vehicle without a driver.[10]

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[5] infrastructurereportcard.org/resources/investment-gap-2020-2029/
[6] *Id*.
[7] Letter to Jean-Baptiste Le Roy, https://constitutioncenter.org/blog/benjamin-franklins-last-great-quote-and-the-constitution#:~:text=%E2%80%9COur%20new%20Constitution%20is%20now,and%20taxes%2C%E2%80%9D%20Franklin%20said.
[8] Utah Code Annotated § 11-26-201
[9] Utah Code Annotated § 11-26-301
[10] Utah Code Annotated § 11-26-401

These examples are just a sample of the way Utah law controls taxation in the state. Chapter 11 of the Utah Code contains over 50 chapters which are related to Cities, Counties, and Local Taxing Units. There are many more examples of tax limitations found within the Utah Code and any government hoping to use taxes to build public infrastructure will need to consult the applicable title and chapter and ensure what it wants to do is permitted under Utah Law. Since there are too many restrictions to discuss them all in detail here, this section speaks of taxation and user fees in general terms.

User fees for example have traditionally been a common way the government funds infrastructure.[11] While technically not a tax, user fees operate in a similar manner.[12] The main difference is that user fees are imposed to recoup costs of a particular service while taxes are imposed broadly for the general purpose of raising revenue to fund government services.[13] A user fee is a charge imposed for the purpose of covering the costs of a service, essentially a direct fundraiser for the good or service being provided.[14] Toll roads represent a good example of a user fee. People drive on a certain road and pay a toll, that toll is in turn used to maintain or improve the road and thereby benefits the drivers.

Taxes can be issued to fund public infrastructure. These types of taxes can be added to goods or services and generate revenue through that mechanism, in the form of a sales or gas tax for example. Property taxes are commonly used to pay off facilities by means of retiring bonds or funding capital accounts which are accumulated and then used on a pay-as-you-go basis.

b. Advantages

User fees fundamentally conform to the benefit principle, or the idea that any taxes or fees paid to the government should be connected to the benefits received from the government by the person or entity who pays those taxes or fees. Using the toll road example, we can see this principle in practice. The driver who commutes to and from work on the same road every day and pays a toll as part of his commute benefits by that toll being used to maintain and improve the same road the driver uses on a daily basis.

Additionally user fees are fair and efficient. Fees are charged for actual use. If someone uses a service then the user fee accounts for that use and charges a set amount. That amount can indicate to the user the real costs of the service.[15]

Lastly user fees provide a different revenue stream for governments; which can help diversify the income generated for public infrastructure and reduce the cost from other programs.[16] This revenue stream is also more easily tracked by the issuing government entity. The government

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[11] Erica York, *How Did We Ever Agree to Fund Infrastructure Investments?*, taxfoundation.org, July 28, 2021, https://taxfoundation.org/infrastructure-investment/
[12] https://taxfoundation.org/tax-basics/user-fee/
[13] *Id*.
[14] *Id*.
[15] Richard M. Bird and Enid Slack, *Who Should Pay For Infrastructure?*, cato.org, Spring 2018, https://www.cato.org/regulation/spring-2018/who-should-pay-infrastructure#why-users-should-pay
[16] https://taxfoundation.org/tax-basics/user-fee/

can view costs and benefits directly as it cannot be shifted by consumer behavior. Taxes on the other hand can be shifted as people and entities look for ways to reduce their taxes and in turn do not accurately reflect usage or cost.[17] Taxes also have benefits. Primarily, public infrastructure is expensive and taxes can be quite predictable and collected in amounts which allow for an economy of scale that may not exist with user fees.[18]

c. <u>Disadvantages</u>

Taxes and user fees have disadvantages in addition to the aforementioned advantages. One of the first is that no one likes taxes. The public may not be appreciative of the benefits of increased taxes and instead focus on the fact that more of their direct income goes to taxes. An increase in taxes can be hard for a government official to justify and/or survive a vote where necessary.

Another disadvantage is that taxes tend to disproportionately affect the lower and middle class households.[19] This relates to the aforementioned disadvantage of public perception of an increase in taxes and may or may not align with a government's position on social impacts. Even if the taxes are designed to impact businesses or higher wealth individuals these taxes could similarly have disadvantages as it may prevent these same businesses and individuals from privately investing or partnering to improve or build infrastructure. The trade-off between taxes and other forms of private or partner financing may not be worth it.

Lastly, taxes often fall short of meeting the needs for infrastructure. Governments are often bound by outdated tax rules that need approval to change and/or need to be reauthorized periodically.[20] These limits, typically imposed decades ago, often cannot cover current spending levels let alone allow for improvements. [21] Local governments also have to deal with limits to the types of revenue-raising taxes it may impose.[22] The State of Utah for example may prohibit levying a tax, restrict the tax rate, tax base, or total taxes collected.[23] The state can also require tax dollars to be used for specific purposes. While it is possible to design a tax that is required to be used for infrastructure, state legislation may still restrict the local government in inefficient ways and deny much needed flexibility.

d. <u>Conclusion</u>

Taxes and user fees have many benefits. They can be highly efficient, easily tracked, and be used to pay directly for infrastructure. They can allow the public to see exactly where their money goes, for example in the case of the fee paid to maintain a toll road. However, they also

[17] Richard M. Bird and Enid Slack, *Who Should Pay For Infrastructure?*, cato.org, Spring 2018, https://www.cato.org/regulation/spring-2018/who-should-pay-infrastructure#why-users-should-pay
[18] *Id*.
[19] Erica York, *How Did We Ever Agree to Fund Infrastructure Investments?*, taxfoundation.org, July 28, 2021, https://taxfoundation.org/infrastructure-investment/
[20] *Id*.
[21] *Id*.
[22] *Local Tax Limitations Can Hamper Fiscal Stability of Cities and Counties*, pewtrusts.org, July 8, 2021, https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2021/07/local-tax-limitations-can-hamper-fiscal-stability-of-cities-and-counties
[23] *Id*.

contain difficulties both related to public perception and to actual implementation. They can be inefficient, insufficient, and inflexible. A government that wishes to fund its infrastructure through user fees and taxes needs to be aware of these potential flaws and have a solution to counteract them. One of the key aspects is understanding good tax policy, and to that end there are educational classes that can help better understand taxes and tax policy. For example taxfoundation.org offers several legislative courses designed to teach the principles of sound tax policy.[24] Taxes and user fees are a viable option for public infrastructure financing. However, like the other options presented here they need to be understood and account for both the restrictions and the impact and whether they can sufficiently meet the governmental needs.

2. Value Capture and Tax Increment Financing – Redevelopment Agencies

Value capture is the idea that by improving infrastructure the surrounding locations become more desirable and subsequently result in an increase in the value and volume of business associated with the nearby land which in turn benefits landowners and developers.[25] Value capture takes the additional tax revenue that results from the new development and uses it to pay for the improvement of current infrastructure or for future projects.[26] One specific type of value capture is TIF.

TIF is a tool in which taxes on future gains in real estate values and sales tax revenue are used to pay for infrastructure improvements.[27] TIFs incentivize private development in a particular area and are typically used for land purchases, installing infrastructure, financial incentive agreements, and property tax rebates.[28]

The process begins with the designation of a geographic area as a TIF district.[29] This designation comes from submitting a TIF proposal to the appropriate authority. That authority may have requirements that will need to be met prior to submitting the proposal or to obtain proposal approval.[30] Salt Lake County, for example, requires that a project satisfies its "But For" requirement; which entails providing the county with a map of the project area with relevant parcels identified, parcel details, identification of property type and class for the planned or potential developments, and any plans, specs, drawings, or other details that strengthen the proposal.[31]

Once the project has received approval and a TIF designation is given, the redevelopment agency develops specific plans for the area.[32] TIFs create funding for projects by borrowing against the future increase in property-tax and sales tax revenues.[33] TIF districts are typically created for 20 to 25 years during which all incremental tax revenues above the base rate at the time the TIF

[24] https://taxfoundation.org/taxedu-legislative-courses/
[25] Fhwa.dot.gov/ipd/value_capture/defined/
[26] *Id*.
[27] slco.org/economic-development/TIF/
[28] *Id*.
[29] Fhwa.dot.gov/ipd/value_capture/defined/tax_increment_financing.aspx
[30] *Id*.
[31] slco.org/economic-development/TIF/how-to-submit-a-tif-proposal/
[32] Fhwa.dot.gov/ipd/value_capture/defined/tax_increment_financing.aspx
[33] *Id*.

district is created flow into the TIF project.[34] The redevelopment agency then uses the proceeds to repay the costs of the project or for future projects.[35] After expiration of the tax collection period, the dollars that previously flowed into the redevelopment agency will flow to the taxing entities that levy the property taxes within the project area.[36]

Property values and taxable retail sales in an area should increase with the development or improvement of public infrastructure in the same area which makes infrastructure projects a good candidate for TIF as long as the proposing entity can meet the necessary requirements of its jurisdiction.

a. Applicable Law

Utah law authorizes the use of TIF projects, but also applies certain limitations and restrictions. It states that an economic development zone may be created if (1) the area is located within a commercial or industrial zone, (2) the local government entity having jurisdiction over the area supports the creation of the development zone, and (3) the local government entity provides or commits to provide local incentives within the area in accordance with the local government entity's approved incentive policy.[37] The last part is key, TIF projects need to be set up in accordance with local government rules as seen above with the example of Salt Lake County.

Utah law also establishes how to become eligible for a tax credit,[38] how written agreements may be entered into, amended, or terminated[39], how to claim a tax credit, and even provides limitations on the tax credit amount.[40] For example, for a new commercial project that is located within the boundary of a first or second class county, a tax credit cannot exceed (1) 50% of the new state revenues from the commercial project in any given year; (2) 30% of the new state revenues from the new commercial project over a period of up to 20 years; or (3) 35% of the new state revenues from the new commercial project over a period of up to 20 years if (i) the new commercial project brings 2,500 or more new incremental jobs to the state, (ii) the amount of capital expenditures associated with the commercial project is $1,000,000,000 or more; and (iii) the commission approves the tax credit.[41]

Since there are so many laws and restrictions covered by Utah law, this section shall also be discussed in generalities. A government entity wishing to use TIF needs to ensure that it researches all applicable state and local laws. More recently enacted TIF opportunities involving transit areas both with and without high density residential development are also worth considering[42].

b. Advantages

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[34] *Id*.
[35] *Id*.
[36] slco.org/economic-development/TIF/
[37] Utah Code Annotated § 63N-2-104
[38] Utah Code Annotated § 63N-2-104.1
[39] Utah Code Annotated § 63N-2-104.2
[40] Utah Code Annotated § 63N-2-104.3
[41] *Id*.
[42]

Since TIF is a good match for infrastructure projects, it naturally follows that there are significant benefits and advantages to using TIF. One of the key advantages TIF provides is that it allows governments to invest in improvements without relying on other sources of funding which could be more costly or inefficient.[43]

Another benefit is that it can facilitate the self-financing of a project with minimal negative impact.[44] The idea being that the revenue raised by the taxes could pay for the project itself enabling a government to use its funds or other financing options on different infrastructure projects that do not meet the requirements of TIF.

A third benefit is that TIF can be used for a broad variety of infrastructure projects and goals offering tremendous flexibility for the government involved in the TIF project.[45] These goals could include creating high wage jobs, increasing affordable housing, attracting traded industries, or bringing new jobs and industries to the region.[46] Utah in particular has created a TIF policy with broad interpretation and TIF has many uses as long as the government can obtain the TIF designation.

Lastly, a benefit of TIF is it incentivizes developers by providing a tangible benefit for the development of areas in need of infrastructure improvement. For example, a developer planning to construct a building in a non-TIF district may have to pay for the development with its own accounts. In a TIF district that same developer would own the building but would have the surrounding areas tax revenue pay for it. This provides a strong incentive for developers to work with governments to build infrastructure in a TIF district which in turn benefits the government in the creation of improved public infrastructure.

c. Disadvantages

However, there are also negatives with TIF that need to be discussed. First is in the process itself. While there is tremendous flexibility in deciding which projects qualify for TIF, most projects must still pass an approval process which may include tests as Salt Lake County's "But For" test. A government hoping to use TIF for a public infrastructure project needs to first do the preliminary work to make sure its project will pass any required test, and ultimately be approved. This could add costs to a project that may never be approved; which could be a negative of TIF for many governments in need of funds.

Another negative is that TIFs may just shift economic activity from one area to another.[47] As noted above TIF creates a specific location or district for the project in the hopes of economic growth.[48] TIF needs this growth in order to be effective as its funds come from the higher value

[43] urban-regeneration.worldbank.org/node/17
[44] *Id*.
[45] *Salt Lake County TIF Policy Evaluation*, slco.org, April 28, 2021, https://slco.org/contentassets/fba12a8aa868491a9e85030ab3b3c9cc/sbf-tif-findings-and-report.pdf
[46] *Id*.
[47] Sean Campion, *Tax Increment Financing: A Primer*, cbcny.org, December 5, 2017, https://cbcny.org/research/tax-increment-financing-primer
[48] *Id*.

given to the surrounding property and the corresponding tax associated with it.[49] Therefore TIF is likely to push developers and other economic growth to the designated area which may come at the expense of other areas in the jurisdiction.[50]

A third potential risk of using TIF is that the revenue generated may not actually cover the costs it is intended to.[51] If for example, a TIF district is created and the corresponding increase in value is less than projected the project could suffer from not being able to recover enough capital to make the project worthwhile.

Another difficulty with TIF is that the area drawn for a TIF district needs to be appropriate. Some cities have created TIF districts so large that the district overlaps with an area that was going to appreciate in value naturally. This makes those particular TIF projects inefficient.[52] As with some of the prior negatives, the projections involved in creating and deciding where to put a TIF district need to be accurate and well done, which could also be an issue as some governments may not be appropriately equipped to handle the needs of TIF.

Under Utah law, traditional TIF financing must also be approved by each taxing entity, such as the local school district, whose future tax revenues are going to be affected by the creation of the TIF. Without the consent of the larger taxing entities, the incremental taxes created in the TIF area may not be sufficient to cover the proposed infrastructure costs.[53]

d. <u>Conclusion</u>

The lesson to be learned here is that TIF is not a miracle cure all. TIF financing works by creating value in a particular location. This value in turn pays for the project or other projects through the taxes it generates. This enables TIF to have many strong advantages but also creates the need for caution when using TIF. If a government can correctly use TIF it can be a great tool to raise financing for public infrastructure holistically and therefore should be a tool that governments are aware of.

3. <u>Grants</u>

A grant at its simplest is a transfer of anything of value from a government awarding agency.[54] One key difference, and potential benefit of grants, is that a grant does not involve substantial involvement from the awarding agency which differentiates it from a cooperative agreement.[55] As such grants can be hugely beneficial for local and state governments in search of financing for public infrastructure. The "anything" that the federal or state government can transfer is often funds specifically dedicated for a particular purpose, such as public infrastructure.

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[49] *Id*.
[50] *Id*.
[51] *Id*.
[52] Urban-regeneration.worldbank.org/node/17
[53]
[54] *What Is a Grant?*, grantsgovprod.wordpress.com, February 7, 2017, https://grantsgovprod.wordpress.com/2017/02/07/new-series-what-is-a-grant/#more-190
[55] *Id*.

a. Types of Grants

i. Block Grants

Block grants are a specific type of grant that are used for a broadly defined function.[56] These grants are typically given by the federal government to state governments but occasionally can be given directly to local governments.[57] The recipient of the grant then uses the funds for the specific and legislatively defined purpose.[58] Block grants do however, provide more flexibility than discretionary grants.[59] The flexibility typically comes from the fact that the recipient can choose how to implement the program with more autonomy than other grants.[60] Lastly, a state may use funds it receives by making sub-awards to local organizations as long as the parameters are met.[61]

ii. Discretionary Grants

Federal agencies may award a discretionary grant to a government entity after a competitive review process and final funding decision following receipt of such government's application.[62] These grants are awarded based on merit and eligibility after the aforementioned review process.[63] However, the review process may vary for each program or federal agency.[64] As such a government applying for a discretionary grant needs to ensure that its application meets the requirements for that particular review process. Because of the review process federal agencies have more discretion than they do with other types of grants.[65] Therefore while these grants can be beneficial to a government in search of funds, the application and review process may be more difficult than other types of grants.

iii. Mandatory Grant

Unlike the competitive process of a discretionary grant, mandatory grants must be given to each eligible applicant.[66] The authorizing statute, which creates the mandatory grant, contains the requirements and conditions that dictate eligibility.[67] A proactive and aware government should be tracking new laws that create grants to which they are eligible. Mandatory grants are often created for local governments which can make them a tremendous fit for a government looking for funds. Luckily, a government in search of a mandatory grant can search grants.gov and research whether any of its public infrastructure projects would qualify for a grant.

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[56] *What is a Block Grant? [Updated]*, grantsgovprod.wordpress.com, January 21, 2020, https://grantsgovprod.wordpress.com/2020/01/21/what-is-a-block-grant-updated/
[57] *Id*.
[58] *Id*.
[59] *Id*.
[60] *Id*.
[61] *Id*.
[62] *What is a Discretionary Grant?*, grantsgovprod.wordpress.com, May 17, 2016, https://grantsgovprod.wordpress.com/2016/05/17/what-isa-discretionary-grant/
[63] *Id*.
[64] *Id*.
[65] *Id*.
[66] *What is a Mandatory Grant?*, grantsgovprod.wordpress.com, June 2, 2016, https://grantsgovprod.wordpress.com/2016/06/02/what-is-a-mandatory-grant/
[67] *Id*.

b. Grant Award Process

There are three main phases of the grant process: (i) Pre-Award, (ii) Award, and (iii) Post Award.[68]

i. Pre-Award Phase

First federal agencies and applicants must start their planning process; what projects or purposes are going to be funded by grants. A federal agency will review its budget and any legislation dictating its purpose or funds before publishing a Funding Opportunity Announcement (FOA).[69] An FOA contains the information needed by an applicant to determine whether or not it should apply.[70]

If an applicant does determine that it is eligible and wants to apply, it needs to do a series of things. First it must register to apply for grants through the grants.gov website.[71] The website will help guide the applicant through the process and complete its application.[72] After the application is complete, application review occurs.[73] Application reviews typically consist of multiple steps such as an initial screening, review and assessment of the application, financial review, and lastly the grant is awarded.[74]

ii. Award Phase

Compared to the Pre-Award Phase the Award Phase is much simpler. Following the application review process the federal agency determines who will receive the grant. This decision goes through several levels in the agency before landing with the ultimate decision-making staff tasked with the fiduciary responsibility and legal authority to enter binding agreements.[75]

After the ultimate decision has been made, the agency send a Notice of Award, which is the legally binding issuance of the award, to the selected applicants.[76] The applicant then accepts the award and becomes legal obligated to carry out the terms and conditions of the grant.[77]

iii. Post-Award Phase

As opposed to the simplistic Award Phase, the Post-Award Phase requires a lot of work by the recipient of the grant. This work includes: implementing the grant, reporting, and finishing the

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[68] https://www.grants.gov/web/grants/learn-grants/grants-101/grant-lifecycle.html
[69] https://www.grants.gov/web/grants/learn-grants/grants-101/pre-award-phase.html
[70] *Id*.
[71] *Id*.
[72] *Id*.
[73] *Id*.
[74] *Id*.
[75] https://www.grants.gov/web/grants/learn-grants/grants-101/award-phase.html
[76] *Id*.
[77] *Id*.

closeout requirements.[78] The issuing federal agency is there to assist in this phase but ultimately the job to carry out the grant program falls on the recipient.[79]

While the agency is there to help, it is also there to ensure there is no fraud or abuse and may audit the recipient to verify that the funds are used in the proper way. The recipient meanwhile must also report its progress and expenditures through various procedures and use performance metrics found in the grant agreement.[80]

Lastly the grant process ends. In order to end the process the recipient must submit the final reports within 90 days after the grant award expires or is terminated.[81] Once the agency confirms that all the required work is done, the grant process is over.[82]

c. Why Grants?

The website grants.gov does a great job educating applicants about the federal process and has many resources that will be covered in the next section, but it is important to understand the history of grant policy and why they are useful tools for public infrastructure projects.

The ability for the government to provide funding through grants is founded in the Constitution, but this process did not really take off until the 1970s.[83] The current process awards billions of dollars in federal grants each year and those funds are specifically created by law to be used for a variety of projects, some of which include public infrastructure projects.[84] As such grants represent a tremendous opportunity to gain already allocated funds. While the competitive process of some grants and dealing with a federal or state agency may cause some headaches it is likely to be less painful and costly than the time and cost of raising the same funds organically.

d. Helpful Resources

As mentioned above grants.gov is a tremendous resource for those looking to obtain financing by way of a federal grant. There is even an app. The website contains tutorials on how to apply for grants, grant writing tips, how to preventing scams, support and frequently asked questions, and any background information that may be needed about grant policies or agencies. In addition to all of those features the website also contains the database of existing grants and a search feature that can enable an applicant to determine what financial resources exist for its current or future public infrastructure projects.

The Utah Governor's Office of Planning and Budget has recently initiated a portal for Utah funding opportunities as well, found at https://gopb.utah.gov/planningresources/. This includes detailed information about dozens of grant opportunities, both public and private. A flyer outlining the Funding Opportunities Portal is attached to this summary as Exhibit B.

[78] https://www.grants.gov/web/grants/learn-grants/grants-101/post-award-phase.html
[79] *Id*.
[80] *Id*.
[81] *Id*.
[82] *Id*.
[83] https://www.grants.gov/web/grants/learn-grants/grant-policies.html
[84] *Id*.

e. Conclusion

Grants are a beneficial resource that can help any government in need of funds. However, the competitive nature of some grants means there will be times that a deserving project loses out. Grants also necessitate dedicating resources to searching for a grant and then going through the application process. There also may not be any laws currently in effect which create a grant for the specific need a government entity is looking for. However, the government is constantly creating new laws which contain the necessary language for new grant opportunities. This means that even if a grant does not exist today, it may exist tomorrow.

All in all, the opportunity to obtain funds without having to raise them means that grants can be an important tool for public infrastructure projects as long as the right grant can be found.

4. Public Private Partnerships

A Public Private Partnership (PPP) is a relationship between a government entity and a private partner where the parties work together to achieve a common goal, for example a PPP could build a needed toll road or fiber optic system. Typically, these relationships are long term agreements where the private party is the party responsible for funds.[85] These relationships can also use the private party's experience and expertise to create a more efficient project. A private company may be better equipped to facilitate some of the issues that may arise during an infrastructure project.[86] The private company may have tools to better assess risk, determine price points, and overcome obstacles and delays which are likely inevitable in an infrastructure project, which can provide a crucial benefit to often overworked and underequipped local governments.[87]

a. Applicable Law

In 2020, Utah's legislature passed a bill to promote PPPs.[88] In particular it created a role of facilitator to serve as the state's single point of contact and source of information for PPPs in Utah.[89] In 2020 P3+ was selected as the state's facilitator.[90] P3+ matches public entities to financiers; helps shape Utah law on PPPs; and provides training, resources, and technical advice in support of the PPP process.[91]

b. How do PPPs work?

[85] https://www.oecd.org/gov/budgeting/oecd-principles-for-public-governance-of-public-private-partnerships.htm
[86] Frank Beckers and Uwe Stegemann, *A smarter way to think about public-private partnerships*, mckinsey.com, September 10, 2021, https://www.mckinsey.com/capabilities/risk-and-resilience/our-insights/a-smarter-way-to-think-about-public-private-partnerships
[87] *Id*.
[88] Utah Code Annotated § 63N-13-3
[89]https://p3plus.org/about/#:~:text=In%202020%2C%20Utah's%20Legislature%20passed,P3s%20or%20PPPs)%20in%20Utah.
[90] *Id*.
[91] *Id*.

An efficient PPP works by creating an agreement that shifts specific risks and responsibilities at the various stages of a project to its private partner to better use the resources at its disposal.[92] Private partners often have to develop skills and abilities to operate in their respective business spaces that governments do not.[93] For example, a development company likely has more experience and a better understanding of what to do if a project faces cost overruns or construction delays than a government entity does.[94] Furthermore, because governments and private companies operate differently they also think differently and PPPs take advantage of those different mindsights and leverage the best of both.[95]

The goal is for the incentives found in the agreement creating the PPP to use the efficiency gains of the private partner's skill and experience to outweigh the costs of bringing in another party.[96] These gains are also made possible by accessing the networks and equipment of the private partner. Oftentimes the private partner will have tools of the trade that governments simple do not.[97]

Essentially PPPs work by leveraging the best attributes of both parties to create the most efficient avenue of raising capital for infrastructure or for the building and maintaining of the infrastructure.

c. Advantages

While the previous sections hint at the advantages of a PPP, these advantages can be boiled down to a simple statement: efficiency. PPPs can be extremely efficient ways to finance infrastructure. They are highly customizable as they consist of agreements between governments and a private party. These agreements can be drafted in such a way to maximize efficiency and get exactly what is needed for a specific project. Furthermore, working with a partner allows for greater efficiencies in the project itself as the differing mindsets and tools the various parties bring should be used to make the project the most efficient and effective possible.

For example, one type of PPP is creating an agreement where the parties agree to get the financing for the project on the balance sheet of the private operator rather than the project itself. This means that the cost to the governmental entity is the cost of funding the private operator and not the funding of the entire project so the cost should be lower. This relationship also makes it a less complicated process to build the infrastructure as it allows the private party to create the infrastructure project as part of its normal business.

Government support can also be customized to find the most efficient and helpful solution. A government may offer direct support, which would involve financing the project itself. It could

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[92] Frank Beckers and Uwe Stegemann, *A smarter way to think about public-private partnerships*, mckinsey.com, September 10, 2021, https://www.mckinsey.com/capabilities/risk-and-resilience/our-insights/a-smarter-way-to-think-about-public-private-partnerships
[93] *Id*.
[94] *Id*.
[95] *Id*.
[96] *Infrastructure Challenges and How PPPs Can Help*, ppp.worldbank.org, June 23, 2022, https://ppp.worldbank.org/public-private-partnership/infrastructure-challenges-and-how-ppps-can-help
[97] https://www.unescap.org/sites/default/files/ppp_guidebook.pdf

waive fees and create other benefits for the private party. It could provide financing in the form of loans. Instead of providing any direct funding at all a government entity could insert itself and offer guarantees, indemnification, insurance, and contingent debt. The opportunities to create an efficient agreement are only limited by what the government feels is necessary for a project and any applicable rules or regulations on the project.

Keeping the theme of efficiency, partnering with a private sector entity could give the government access to technology and innovation that it otherwise would not have access to, whether it be proprietary or just expensive.[98] This technology and innovation in turn should provide better public services and improve operational efficiency.[99]

Another benefit with a PPP is that it also promotes efficiency by allowing the government to do what it does best.[100] Governments are not typically in the business of building and developing projects, but what they do better than almost anyone is plan, create policy, and regulate. In a PPP, the agreement can be structured to allow both parties to do what they do best, the private partner builds and develops and the government governs.[101] This in turn creates a more efficient process and allows funding to go further.

PPPs where the private partner funds the costs can also be highly efficient. A private partner financed project coming from a PPP can spread the project cost for the public over a longer period of time, and allows public funds raised through other mechanisms to be used for other investments where private investment may be impossible, impracticable, or inappropriate.[102]

The efficiency and flexibility of a PPP makes it a highly valuable tool of public infrastructure financing.

d. <u>Disadvantages</u>

One of the main advantages of PPPs is the efficiency they provide, however a disadvantage then is what happens when a PPP is inefficient. A PPP can be inefficient when a government fails to capitalize on the true advantage of its private sector partners.[103] Further if a PPP does not transfer risk to the private partner then once again the government is failing to maximize the PPP.[104] A PPP’s flexibility and customization can be a disadvantage if the parties fail to create an efficient partnership.

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[98] *Government Objectives: Benefits and Risks of PPPs*, ppp.worldbank.org, June 21, 2022, https://ppp.worldbank.org/public-private-partnership/overview/ppp-objectives
[99] *Id*.
[100] https://ppiaf.org/sites/ppiaf.org/files/documents/toolkits/highwaystoolkit/6/pdf-version/1-14.pdf
[101] *Id*.
[102] *Id*.
[103] Frank Beckers and Uwe Stegemann, *A smarter way to think about public-private partnerships*, mckinsey.com, September 10, 2021, https://www.mckinsey.com/capabilities/risk-and-resilience/our-insights/a-smarter-way-to-think-about-public-private-partnerships
[104] *Id*.

There are still costs involved with creating a PPP and a government needs to be sure that the costs are justified as there may be other ways to finance a particular project in a cheaper manner.[105]

Another potential disadvantage is that there will be some infrastructure projects which will be easier to partner and fund than others.[106] If a government plans on using PPPs as a primary source of financing infrastructure, it needs to be sure that there are private parties who would want to partner on such a project, and that the benefits the private partner brings are worth it.[107]

Another consideration when using a PPP is that the private partner will perform its duties under the partnership but may not go above and beyond what it is obligated to do, and therefore a successful PPP needs the right incentives to motivate and drive the private partner.[108] This can be a disadvantage as a PPP without the appropriate incentives and performance requirements may be inefficient without the best efforts of the private party.

Selecting an appropriate private partner is another challenge for a governmental entity. PPPs work because of the partnership between the government and the private party, if the selected private party is not a good partner than naturally the PPP and the related infrastructure project will suffer. In situations such as these, the public will often still hold the government responsible which presents another challenge with PPPs. The government entity will need to have sufficient expertise either on staff or hired to effectively create the PPP, regulate the PPP, understand the PPP agreement, monitor private performance, and carry out its own obligations which could involve more costs to the government than were originally anticipated.[109]

These agreements are often long-term and it is impossible to predict and forecast every single issue and identify appropriate contingencies on the project in advance.[110] This means that the contract with the private party will likely need to be renegotiated at some point during the agreement which can lead to further costs and complexities. The long-term nature and uncertainty of undertaking infrastructure projects can also lead to failed projects or terminated projects. A final concern is what happens if a project becomes too long, too complex, too difficult or unprofitable. It may result in the termination of the agreement and a failure to develop or improve the desired public infrastructure.

e. Conclusion

A PPP can be one of the best options for public infrastructure financing. PPPs are flexible and customizable and can create efficiencies by leveraging the expertise of a private company that other financing options simply cannot. However, a government needs to be sure that the agreement is necessary and worth it. The government needs to make sure it has the resources to follow a PPP from start to finish and that it drafts an agreement that maximizes the benefits of the private party

[105] *Government Objectives: Benefits and Risks of PPPs*, ppp.worldbank.org, June 21, 2022, https://ppp.worldbank.org/public-private-partnership/overview/ppp-objectives
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*

while still retaining ownership of the project. These challenges may be steep and as with any long-term project the agreement may need to change and may fail. A government considering using a PPP needs to be aware and consider all of the surrounding factors before it signs on the dotted line. If a government can effectively create a PPP there is clearly a path for public infrastructure to be funded efficiently.

5. Public Infrastructure Districts (PIDs)

A PID is solely a public financing tool which allows growth and development to pay for its government-owned infrastructure.[111] One key component of this tool is that a PID is a separate entity and therefore its obligations and debts are separate from the creating city or county.[112] The existence of PIDs in Utah is relatively new, coming through a 2019 bill, and as such are an interesting and hot button topic currently in the public infrastructure space.

PIDs are intended to complement TIF and bonds as well as address some of the previously discussed financial tools' shortcomings and disadvantages.[113] PIDs create a new tax revenue stream instead of reallocating existing taxes and a PIDs only legal use is for public infrastructure.[114]

PIDs also require 100% consent of all property owners in the proposed area and cannot be imposed on any unwilling owner, so they are most often initiated by the owners of a large project before individual lots are sold.[115] By statute PIDs cannot compete with cities, counties, or other districts in providing the same public infrastructure services or owning the same infrastructure.[116] Additionally, PIDs have zero land-use authority such as planning, zoning, or density decisions.[117]

a. Statutory Language

Since PIDs are expressly created through legislation, it is beneficial to review some of the key components of the bill. A PID cannot be created unless a petition is filed with the creating entity that contains signatures from all registered voters within the applicable area and all of the signatures of surface property owners within the area consenting its creation.[118] As mentioned above this is statutory language and severely restricts the creation of a PID to the sole purpose of servicing existing land users and protecting landowners.

The creating entity may impose limitations on the powers of a PID through the governing document.[119] The creating entity may establish criteria to determine whether to approve or

[111] Elainna Ciaramella, *Misinformation Surrounding PIDs in Hurrican City: Mayor Nanette Billings Rallies Landowners, Developers, Council Members, and Community to Understand the Facts*, Accesswire, March 14, 2022, https://finance.yahoo.com/news/misinformation-surrounding-pids-hurricane-city-210000569.html
[112] *Id.*
[113] https://www.utah.gov/pmn/files/748751.pdf
[114] Ciaramella, *supra* note 111
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] Utah Code Annotated § 17D-4-201(1)
[119] Utah Code Annotated § 17D-4-201(5)

disapprove the creation of a PID.[120] The creating entity has sole discretion for approving or disapproving the creation of a PID.[121] The law clearly establishes that the creating entity has discretion and power to create or not create a PID and can create limits and focus the goals of a PID through its governing document. As such governments can create what it needs and tailor-make a PID for its infrastructure needs.

A PID is separate and distinct from the creating entity.[122] The financial burden of a PID is borne solely by the PID and is not borne by the creating entity, state, municipality, county, or other political subdivision.[123] However, the governing document may require the applicant bear the initial costs of the PID and the PID then has to reimburse the applicant for the initial costs.[124] Since a PID is a separate entity it also has sole responsibility of any liability or claim[125] and any collection, enforcement, or foreclosure proceeding with regard to any tax, fee, or assessment.[126] Again, the legislature makes clear that a PID is a separate entity and in no way compromises the creating entity or any governments affiliated with the PID.

The statutory language also provides rules and requirements of the governing document and the creation of a PID including rules on its board members. The board of the PID will be governed by the governing document, but statutorily terms for board members shall be set at four years if not otherwise limited in the governing document, approximately half of the board will serve an initial six-year term, and a board member is not required to be a resident within the PID if (1) all of the property owners consent, (2) there are no residents within the PID, (3) no qualified candidate timely files, or (4) no qualified individual files a declaration of candidacy.[127] A board member not living within the PID cannot be compensated.[128]

The governing document must also (1) include a boundary description and a map of the PID, (2) state the number of board members, (3) describe any divisions of the PID, (4) establish any applicable property tax levy rate limit for the PID, (5) establish any applicable limitation on the principal amount of indebtedness for the PID, and (6) include other information that the PID or the creating entity determines to be necessary.[129] These rules and requirements are necessary to understand how a PID is governed and what is required to create one.

Once a PID is created Utah law provides what express powers a PID has. Namely, a PID can issue negotiable bonds, enter into an interlocal agreement, acquire completed or partially completed improvements for fair market value, contract with the creating entity for the creating entity to provide administrative services, operate and maintain public infrastructure and improvements the PID acquires or finances, and use fees, assessments, or taxes to pay for the

[120] Utah Code Annotated § 17D-4-201(7)
[121] Utah Code Annotated § 17D-4-201(8)
[122] Utah Code Annotated § 17D-4-201(6)
[123] Utah Code Annotated § 17D-4-201(6)(b)(i)
[124] Utah Code Annotated § 17D-4-201(6)(b)(ii)
[125] Utah Code Annotated § 17D-4-201(6)(c)
[126] Utah Code Annotated § 17D-4-201(6)(d)
[127] Utah Code Annotated § 17D-4-202(3)
[128] Utah Code Annotated § 17D-4-202(6)
[129] Utah Code Annotated § 17D-4-202(7)

operation and maintenance of those public infrastructure and improvements.[130] A PID must also file annual reports with the creating entity as provided in the governing document.[131]

These powers expressly constrain a PID. The law only allows a PID to be used for public infrastructure and states how it may do so.

As explained above PIDs can issue bonds, collect fees, and levy taxes and those powers are likewise described in the law. For example, in order for a PID to issue bonds, the board must first adopt parameters for the bonds that establish the maximum amount of the bonds, term, and interest rate.[132] It must also set forth the expected security for the bonds and have them sent for review to the State Finance Review Commission.[133] The bond shall mature within 40 years of issuance and may not be secured by any improvement or facility paid for by the PID.[134] A PID may charge fees to pay some or all of the PID's costs of acquiring, improving, or extending improvements or costs associated with the enforcement of a legal remedy.[135] Taxes are also limited by statute. The property tax may not exceed .015 per dollar of taxable value of taxable property in the district.[136] As seen in the code, while PIDs may be powerful they can also be extremely limited and restrained by the statutory language.

Lastly, there are notice requirements as well. Within 30 days after the issuance of a certificate of incorporation, the board must record a notice with the recorder of the county in which property within the PID is located.[137] The notice must (1) contain a description of the boundaries, (2) state that a copy of the governing document is on file, (3) state that the PID may finance and repay infrastructure and other improvements through the levy of a property tax, and (4) state the maximum rate that the PID may levy.[138]

The law creating PIDs provides the framework for what a PID must have and how it can be created, but it does not explain how they work.

c. <u>How do they work</u>?

PIDs work primarily by creating a new revenue stream through the use of a limited property tax or a special assessment.[139] The limited property tax is imposed on the landowners within the PID boundaries.[140] The additional tax is then used to pay back the costs incurred in developing the infrastructure. Similarly, if a special assessment is used a fixed annual cost is levied on the property

[130] Utah Code Annotated § 17D-4-203
[131] Utah Code Annotated § 17D-4-205
[132] Utah Code Annotated § 17D-4-301(1)
[133] *Id.*
[134] Utah Code Annotated § 17D-4-301(2)
[135] Utah Code Annotated § 17D-4-302
[136] Utah Code Annotated § 17D-4-303(1)
[137] Utah Code Annotated § 17D-4-303(3)(a)
[138] Utah Code Annotated § 17D-4-303(3)(b)
[139] Ciaramella, *supra* note 111
[140] *Id.*

that benefits from the infrastructure improvements resulting from the PID and then used to pay back the initial investment.[141]

d. Advantages

PIDs when used correctly are a great option to finance public infrastructure as they can benefit developers, landowners, and governments. Additionally, at least in Utah, many of the advantages are statutorily mandated which can provide clarity and certainty when committing to long-term infrastructure improvements.

Developers like PIDs because much of the risk gets passed on to future homeowners. While developers may have to pay for engineering, planning, testing, and convincing people to consent to a PID, they do not have to fund the infrastructure themselves.[142] The infrastructure costs are paid through the mechanisms seen above and neither of them are attributed to the developer, assuming the developer is not also the landowner. Even if the developer is also the landowner, a PID will raise the value of the land naturally through infrastructure improvements which is a benefit for the developer.

PIDs benefit landowners as the creation or improvement of infrastructure will raise the value of the land and in many cases give purpose to private property that is undeveloped. Landowners are also only paying for the infrastructure as long as they own the land within the PID, so after the infrastructure is built and the land value has increased, a landowner can sell at an increased value and not have to pay for the infrastructure itself instead passing it on to the buyer. Even landowners not directly in the PID can benefit. If there is increased infrastructure and growth in a PID, the neighboring properties may similarly increase in value and those landowners would not be burdened by new taxes or bonds which result from other financing options.[143]

Lastly local governments benefit from the creation of PIDs. A PID allows the government to retain land-use powers while still raising funds.[144] So all planning, zoning, and density decisions still reside with the government. Additionally, the debts and obligations of the PID are entirely separate from the government and as such the government cannot be liable.[145] Governments also still have final say in the creation of a PID and can require that a PID be more limited than provided by statute.[146]

Since PIDs raise revenue through taxes or assessments only on the areas within the PID, and with the consent of the relevant landowners, governments are also not forced to raise taxes or pass financial costs on to other constituents.[147]

Lastly, PIDs allow for collaboration between all the parties within the PID, and require consent from all parties. This allows for greater master planning and better designed communities

[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*

which is a more efficient and better result than the piece-meal solutions that other financing options create.[148]

e. <u>Disadvantages and Concerns</u>

One of the biggest disadvantages of PIDs is simply that they are new. As such many people have misconceptions and concerns about what a PID is and how it works. As with many things in life people are resistant to change and scared of something new. That is not to say that there are zero disadvantages to a PID. Like with the rest of the financing options covered PIDs are not a magic cure all and do need to be done correctly in order to maximize benefits and minimize risks.

By statute PIDs are limited in certain ways, such as the amount of the property tax, who the limited tax bonds may be sold to, how much those bonds must be, and gives the creating entity the power to further limit what a PID may do and how it may function.[149] While allowing the governing document the power to rule the PID provides flexibility and the ability to be tailor-made to a particular need, it also does require significant planning and considerations in order to capitalize on the benefits of PIDs. For example, the creating entity needs to consider what types of infrastructure it wants to allow financed, what the mill rate limit will be, and establish standards for obligation bonding, procurement, board requirements and transitions, the lifespan of the PID and how it will be dissolved, and how to provide notice to future property owners.[150] The planning also must account for the future. As mentioned above, PIDs allow a government to master plan an area and the total buildout of the infrastructure of that area. That ability comes with the cost of needing time and money to correctly plan and needs to be done prior to the creation of the public infrastructure.

Another potential disadvantage is the need for consent from 100% of all registered voters and 100% of all landowners in a potential PID area. While this may not always be an issue, such as in cases where there are few parcels of land involved and the developer is also the landowner, it could cause problems in certain situations if different landowners have different ideas on how to develop their respective property.

Lastly, PIDs require notice and governments must be sure that any potential consumers are aware of the obligations they will undertake by buying within a PID.[151] While this is an extra burden on cities, it is one that may be met at multiple points throughout the process and should not provide an extreme burden on governments.

f. <u>Conclusion</u>

PIDs are an exciting new addition to the public infrastructure financing landscape. They are a result of legislation that recognized the need for infrastructure and the challenges that currently exist in paying for it. As such PIDs have inherent advantages that are set as law and can greatly benefit all of the parties involved in the development and growth of a community. PIDs

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[148] *Id.*
[149] https://www.utah.gov/pmn/files/748751.pdf
[150] *Id.*
[151] *Id.*

function through the use of special assessments and specific property taxes on the landowners within the PID and use that money to in turn pay for the infrastructure. While PIDs do require foresight and planning to be efficient and effective, PIDs also help create a better planned and organized community.

6. Conclusion and Best Steps

There are many ways to finance public infrastructure. All of them with tremendous advantages and potential difficult disadvantages. A government entity hoping to solve its public infrastructure financing problem must be prepared to investigate all options, including options not discussed here. It must be prepared to use multiple options, perform the research, and identify the types of financing that may be best in any given scenario. The task assigned to governmental entities is not easy, there is no one size fits all solution. There is a huge need for public infrastructure in Utah and while it will be hard, there are ways to address this need. All a government entity has to do is find the right one.

EXHIBIT A

EXHIBIT B