

PIECE TOGETHER

Items to consider before entering an intergovernmental agreement



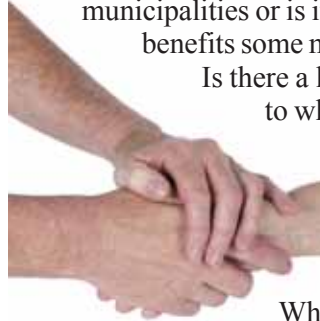
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Most Borough officials can readily think of examples of how boroughs are able to save money through intergovernmental cooperation. Combining resources, eliminating duplication, increasing efficiency by providing various services to several municipalities in a common geographic area – all are benefits that add up to cost savings. Noteworthy examples of intergovernmental cooperation include joint municipal authorities, regional police services and multi-municipal purchasing and service contracts. Sometimes the benefits are not monetary, but are still easily recognized such as in the case of regional planning.

In all these examples, the advantages of inter-municipal cooperation are readily apparent. One sewer or water authority serving multiple municipalities is likely to be more efficient than each municipality having its own authority. Regional police forces can reduce the number of police officers on duty for the graveyard shift and increase the number of available officers for peak demand and special events. The benefits of regional planning include eliminating the burden of requiring each municipality to provide for all land uses in favor of allowing municipalities to concentrate high density housing and commercial and industrial land uses where existing or new infrastructure is best suited in the region. Local governments can take full advantage of economies of scale when joining forces to purchase goods like road salt or banding together to seek bids for a multi-municipal single hauler trash and recycling contract. In all these examples, intergovernmental cooperation typically helps to reduce transaction fees and eliminate duplication of consultants.

With so many potential benefits, it is easy to understand why we are seeing more intergovernmental cooperation and why we can expect the trend to continue. While the benefits of intergovernmental cooperation may be obvious and easy to gauge, potential drawbacks are far less foreseeable and much more difficult to evaluate. For this reason, borough officials must carefully evaluate all opportunities for intergovernmental cooperation before joining forces with neighboring municipalities. A careful, cautious and thorough evaluation of the opportunity to cooperate with neighboring municipalities is essential to help avoid litigation and other disputes.

When considering opportunities for intergovernmental cooperation, borough officials must consider several questions: What does the borough hope to gain? Is intergovernmental cooperation necessary or can the borough achieve the desired result on its own? Is the benefit of intergovernmental cooperation the same for all the participating municipalities or is it skewed in a manner that benefits some municipalities more than others?



Is there a loss of local control and, if so, to what extent is local control lost? What are the borough's financial obligations and legal liabilities? How long is the borough committed? What is the procedure for withdrawal? What are some of the foreseeable problems? What is the dispute resolution process? All of the above questions require careful consideration and borough officials must seek the advice of their solicitor and other qualified professional consultants when deciding whether intergovernmental cooperation will be a benefit to the borough.

Assuming the threshold questions have been carefully evaluated and it is determined that intergovernmental cooperation will be beneficial, borough officials will want to be certain all their concerns are adequately addressed in a thorough, detailed intergovernmental agreement. This will require the solicitor's attention to the concerns of the borough officials when drafting and negotiating the agreement. However, even the most carefully drafted

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intergovernmental agreement cannot foresee every contingency, and detailed methods for dispute resolution must be included.

Borough officials and their solicitors need to be aware that municipalities frequently overlook the statutory requirements for intergovernmental agreements. The legal and constitutional basis for intergovernmental cooperation is found in Section 5 of Article IX of the Constitution of the Commonwealth of Pennsylvania, which is reproduced below:

§ 5. Intergovernmental Cooperation

A municipality by act of its governing body may, or upon being required by initiative and referendum in the area affected shall, cooperate or agree in the exercise of any function, power or responsibility to, one or more other governmental units including other municipalities or districts, the Federal government, any other state or its governmental units, or any newly created governmental unit.

Additionally, Act 180, which was passed by the General Assembly and signed into law by the Governor on July 12, 1972 and amended by Act 177 of 1996, serves as the enabling legislation for intergovernmental cooperation. The Act contains provisions for initiating intergovernmental cooperation including the identification of the necessary contents of an ordinance to authorize intergovernmental cooperation. Act 180 and its amendments is part of the General Local Government Code and can be found in the Pennsylvania Consolidated Statutes at Title 53, §§2301 through 2315. Additional enabling legislation can be found at Section 1202, clauses (34) and (35) of the Borough Code which grants authority to Borough Councils to enter into agreements for the purpose of intergovernmental cooperation. Other enabling legislation such as the Municipality Authorities Act will need to be consulted for the formation of joint authorities. Depending on the type and purpose of intergovernmental cooperation, there may be additional sources of enabling legislation to be considered.

Intergovernmental agreements are typically accompanied by by-laws to govern the functional procedures of the intergovernmental body. The by-

laws should detail the requirements for appointment of representatives from each municipality, term of appointment, designation of officers, rotation of the chairman position if desired, quorum, frequency of meetings, procedures for action, removal of representatives and other functional and procedural requirements of the intergovernmental body. The procedure for dissolution will frequently be found in the by-laws and should track all applicable statutory requirements for dissolution.

Both the intergovernmental agreement and by-laws must be reviewed by the solicitors for the participating municipalities in order to insure that the documents are thorough in content and properly adopted so that the intergovernmental agreement is not later determined to be void. Proper adoption procedures are particularly important when an intergovernmental body is charged with enforcement responsibilities. In such situations, concurrent jurisdiction for enforcement by the participating municipalities is typically recommended. Concurrent jurisdiction for enforcement serves to protect the participating municipalities in the event the intergovernmental agreement is subsequently declared void or the intergovernmental body is dissolved.

Frequently, intergovernmental agreements fail to adequately anticipate foreseeable disputes or provide an adequate dispute resolution process. As a result, litigation is often the only recourse. Such litigation is typically damaging to the municipalities involved. Interpersonal relations between municipal officials are strained and the reputation of governing bodies can become tarnished. To avoid these ill effects, borough officials should consider including provisions in the intergovernmental agreement to require mediation, arbitration or some other alternative dispute resolution process. Many disputes can be resolved by mediators or binding arbitration especially when both parties are motivated to keep municipal officials and local governments in a favorable light. Alternatives to litigation are typically more expeditious, less expensive and may provide a better forum than the courts for resolving disputes

and maintaining working relationships between municipal officials.

Very often, intergovernmental agreements require participating municipalities to make significant changes for compliance with the goals of the intergovernmental body. The intergovernmental agreement may even require some official action by the participating municipalities. An example of this in the context of regional planning includes requiring the borough's zoning ordinance to comply with the regional comprehensive plan. Whenever an intergovernmental agreement requires compliance with the goals of the intergovernmental body, the agreement must be specific on when and how compliance must be achieved rather than simply mandating compliance. The intergovernmental agreement must also clearly define the role of the intergovernmental body. Once again, by way of example in the context of regional planning, the intergovernmental agreement should clearly state whether or not the regional planning commission's role is advisory only.

Funding of intergovernmental bodies is often a delicate matter. Typically, the participating municipalities have vastly different budgets and resources. A well conceived intergovernmental agreement will require the adoption of a budget on an annual basis as well as an annual audit. Funding of the intergovernmental body is often as simple as assessing rates for services such as in the case of sewer and water authorities. Intergovernmental cooperation for the purpose of achieving buying power or purchasing service contracts to serve multiple municipalities might be more difficult to apportion fairly. For example, a purchase of road salt may need to be apportioned by population or miles of roads treated. Likewise, regional police services may apportion costs according to population or square miles or according to some other objective benchmark. Regional planning commissions often find it difficult to achieve funding fairly. Some municipalities will have many more applications for subdivision and land development than other municipalities. These applications will require additional services from consultants to the regional

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planning commissions, which cannot fairly be apportioned evenly to all municipalities. Further complicating the issue is the question of whether the Pennsylvania Municipalities Planning Code can be read to require developers to reimburse regional planning commissions for consultant costs in the same manner as reimbursement to municipalities.

In order to help assess legal liability, borough officials need to consider the legal status of the intergovernmental body. Joint municipal authorities will generally have legal standing on their own when they are properly registered. Intergovernmental bodies formed under Act 180 alone are not likely to have legal standing of their own by virtue of formation, although this issue remains undecided by the Pennsylvania courts. Intergovernmental bodies formed under Act 180 can achieve entity status by becoming authorities under the Municipal Authorities Act or by becoming incorporated. While Act 180 does not specifically confer legal entity status upon any intergovernmental body formed under the Act, it does specify in Section 2307(7) that any entity created under that section shall be empowered to enter into contracts for policies of group insurance and employee benefits, including Social Security, for its employees. While these powers are usually reserved for entities with legal standing of their own, it remains unclear in Pennsylvania whether intergovernmental bodies formed under Act 180 have legal entity status. In order to help insulate the participating municipalities from liability for acts of the intergovernmental body, the intergovernmental body may incorporate to achieve legal entity status.

Borough officials should carefully consider the ability and parameters of the intergovernmental body to incur liabilities and enter into contracts. More specifically, because the intergovernmental body does not have taxing authority, the member municipalities are the likely source of funding for any and all obligations and contracts. For this reason, contracts should have short terms such as one or two years because a participating municipality may remain liable for its proportionate share of a contract even after withdrawal from or dissolution of the intergovernmental body. A typical example of a contract, which may continue after withdrawal, is a collective bargaining agreement for police services. The remaining term of the collective bargaining agreement could exceed the period of time needed for a municipality to withdraw. Under a typical, unincorporated Act 180 intergovernmental agreement, the collective bargaining agreement will require execution by each municipality, rendering

each municipality liable under the terms of the contract. There are numerous other examples of such contracts and a well-drafted intergovernmental agreement should address the contractual obligations of a withdrawing municipality.

Before entering into any intergovernmental agreement, the participating municipalities must determine whether the benefits of intergovernmental cooperation are skewed in favor of one or more of the participating municipalities. For example, a skewed perception of benefits is common when entering into intergovernmental agreements for regional planning. The municipalities with existing higher density housing will alleviate the pressure for additional high density housing elsewhere within the region. While there may be a benefit to the region as a whole in that less housing units will be constructed in the region, the municipality with the existing high density housing will often perceive its participation benefits to be less than the municipality with vacant land that can be zoned for lower density housing. Very often, boroughs participating in regional planning will find themselves in this position. In an effort to help achieve balance in this arena, boroughs should consider negotiating a relatively short period of time for withdrawal so that their participation is less likely to be taken for granted.

Without a doubt, borough officials can benefit their communities by participating in various opportunities for intergovernmental cooperation. The benefits of such cooperation are easily recognized and include substantial cost savings and elimination of duplication of efforts. However, as intergovernmental cooperation increases, litigation between neighboring municipalities is becoming more prevalent. When considering opportunities for intergovernmental cooperation, borough officials must carefully examine the details of the opportunity and be sure to adequately address all concerns in the intergovernmental agreement to help insure lasting success of the cooperative effort.

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About the Author

Mark Hosterman is a partner with the Blue Bell law firm, Wisler Pearlstine LLP. He concentrates his practice in the areas of municipal law, zoning and land use, and he represents municipalities and governing bodies on a broad range of municipal issues. He may be reached at mhosterman@wispearl.com.