

An Entity to Address Emergency Services and Other Regional Needs of Pennsylvania Local Government

Presented by:

Jens H. Damgaard, Esquire

ECKERT
SEAMANS
ATTORNEYS AT LAW

© 2018 Eckert Seamans Cherin & Mellott, LLC. All rights reserved.

Major Regional Challenges

What are some major challenges more appropriately handled on a “regional,” rather than individual municipality basis?

Some Examples

- Uncoordinated/deteriorating fire and emergency transport services and funding (including, possibly, 911 communications)
- Stormwater management and flood mitigation
- Financial distress in urban (and some suburban) municipalities
- Threat of state surcharge for state police services

Fire Protection

- Fire Protection:
 - Decline of the PA volunteer fire company model (see 2005 PA Legislative Budget & Finance Committee study)
 - Collapsing membership (300,000 volunteers in 1970s to around 30,000 today)
 - Growing response time (particularly daytime)
 - Lack of professional/consistent management
 - Rising cost of training and duplication of equipment
 - Unpopular fundraising and growing taxpayer subsidies
 - Lack of coordination with the host municipalities
 - Competition among companies = resistance to merge/cooperate

Emergency Medical Services

- EMT/Ambulance service can be spotty (or nonexistent in some rural areas):
 - Whose responsibility is this anyway?
 - Cost/liability
 - Some ambulance authorities exist today (contract with private companies for service)

Cost of State Police Coverage

- Expensive municipal police force versus free state police coverage:
 - The high cost of maintaining a municipal police department is the principal cause of municipal financial distress (see Pa Economy League statistics)
 - Municipal growth gravitates to lower tax burdens
 - Governor Wolf's latest plan would not charge if there is partial municipal police service

Local Infrastructure

- Stormwater:
 - PA's Chesapeake Phase 3 WIP – Countywide Action Plan implementation (and funding) by 2025
 - The most economical and beneficial BMPs are outside of the MS4s
 - Lack of perceived service or benefit to ratepayers
 - Lack of political will to address this obscure problem
 - Should stormwater management be characterized as “flood mitigation” (more easily appreciated, and includable with emergency management)

Inefficient or Lack of Utility Infrastructure

- Water/Sewer:
 - Too many small municipal systems
 - Room for countywide plant operators
 - “Monetization” = liquidation?

Growing Municipal Distress

- Rising cost of providing municipal services
 - Police
 - Fire protection and ambulance
 - Social services
 - Pensions
 - Combatting blight
- Municipalities with services would have a new revenue source by making those services available to its neighbors

Major Impediments to Progress

- ❑ Fragmented PA local government
- ❑ Antiquated state laws – they increase costs and discourage potential new revenues (some programs foster duplicated or wasted resources)
- ❑ State political gridlock
- ❑ Counties reluctant to take on more unfunded responsibilities (despite success of county-based government service in other states)

Possible Solution

One Possible Solution – a New
Countywide (or Multi-County) Entity-
the “Emergency Services Alliance”

Municipal Authority Pros and Cons

Pros and Cons of Incorporating
Under the Municipality Authorities
Act (versus other PA corporate
entities and statutes)

Pros:

- ❑ No new legislation required (some statutory tweaks would be helpful, but not essential)
- ❑ Long history of undertaking large projects and debt financings (including as conduit borrowers for other entities)
- ❑ Flexible statute (broad powers and many projects)
- ❑ Governed by an independent, manageable board
- ❑ Reduced political pressure (five year appointments)
- ❑ Courts have historically avoided interfering (rate challenges rarely succeed)
- ❑ Opportunities in drafting Articles of Incorporation

More Pros:

- ❑ A municipal authority is an “instrumentality of the Commonwealth” (despite local incorporation), giving it statewide jurisdiction
- ❑ Recent cases have upheld authority “administrative” fees that do not require the it to own or operate actual “facilities” in order to impose such fees
- ❑ Industrial development, redevelopment, housing and other types of authorities have limited or unrelated powers, and boards that can be removed at any time
- ❑ COGs can do great work but have limited powers, decentralized (unanimous) governance and no independent borrowing or rate setting powers

Cons:

- ❑ Historic distrust – there are (too?) many municipal authorities already (though most inactive or serve as conduit borrowers for health care, universities or economic development)
- ❑ Limited transparency (5 year appointments and Board terms; no taxpayer elections; removable only by courts)
- ❑ Can become disconnected from the needs of its incorporator or municipalities served
- ❑ High cost of constructing revenue generating “facilities” (debt often has to be guaranteed by the municipality anyway)
- ❑ Volunteer boards easily dominated by their manager, engineer or solicitor (who would fight to preserve status quo)
- ❑ Inflexible process to add new municipal members (requires unanimous approval by the existing municipalities)

More Cons:

- Countywide or multi-municipal authorities with purely administrative missions are currently rare (solid waste and nascent stormwater authorities are possible exceptions)
- Tradition of only charging rates for services rendered by authority-owned “facilities” (not for pure planning, management or administration services)
- Potential political backlash against county Commissioner for creating another “authority”?

The Goal

Goal – To Maximize the Pros and
Minimize the Cons to Create an
Entity Capable of Addressing These
Regional Challenges

Regional Powers But Local Accountability

Strategy #1 – Create an Entity,
Under the Authorities Act that has
Regional Powers but Local
Accountability

New Approach to Authority Creation

Strategy #2 – Rethink the Content of
Typical Authority Articles of
Incorporation to Address Local
Concerns Yet Add New Missions

Revamp Makeup of Authority Boards

Strategy #3 – Rethink the Role and Makeup of the Traditional Governing Board

Reinvent the Concept of Districts

Strategy #4 – Reinvent the Legal Concept of “Districts” in Order to Democratize, Professionalize and Optimize the Revenues of the Countywide Entity

Charge Fees Not Rates

Strategy #5 – Take Advantage of Recent Case Law to Legitimize Administration, Management and Planning Services Without having to Own or Lease Hard Assets
(Administrative Service “Charge” not a “Rate”)

New Countywide Entities

(1) Why the county as incorporator, and not joint among municipalities:

- Board appointments can legally be from anywhere in the county (or counties)
- Far more “regional” than is reasonably possible if municipally created
- Potential countywide economies of scale
- Must address negative, public perception of county politics in the entity’s missions
- Many examples of successful, countywide based services in other states

Detailed Articles of Incorporation

(2) Draft Articles of Incorporation that are Far More Detailed than those of Existing Authorities:

- Articles could look more like home rule charters
- Include detailed board election/appointment process, member qualifications and administrative missions
- Commissioners would rubberstamp pre-elected members
- Ex-officio member from the county planning office
- Give a nontraditional name to a nontraditional entity - law does not require “county” or even “authority” in the name (example: “Local Services Alliance” “Emergency Services Coalition” or “Emergency Management Cooperative”)

Create Both Voting and Fee Districts

(3) Create: (i) Voting Districts and (ii) Fee Districts

- Two exceptions to the Municipality Authorities Act (MAA) “reasonable and uniform” rates clause: (i) rates may vary within “classifications” of customers, and (ii) rates may vary among different rate “districts”
- Historically, Authorities created districts solely for rate-setting purposes (geographic service territories)
- The only legal requirement for districts is that the allocable revenues and expenses stay within that district (nothing restricts a district’s form or composition)
- The concept of districts can be used for multiple purposes

Multiple Voting Districts

- Consider creating “voting districts” to elect board members – based on equivalent population numbers, watersheds, or other geographic or historic distinctions
- One board member is elected from each voting district
- Municipalities assigned a number of “electoral votes” based its population (so a large municipality in the district would have proportionately more influence over the board member selections)
- *Consider* – to be eligible for authority board membership, a person must be either: (1) employed by a municipality in district (e.g. township manager), or (2) currently elected to a governing board (e.g. township supervisor)

Professional Board Members

- A board member is deemed to automatically (or by separate agreement) resign when he is no longer elected or employed in his voting district (more transparency and accountability); new districtwide election would be held for that member's remaining board term
- Consider – a board member from an “inactive” district (e.g. a district declining to charge a particular fee) would not be eligible to vote on matters affecting the “active,” districts
- County commissioners could deny political responsibility for locally-elected board appointments or actions

Multiple Fee Districts

- Consider – creating Authority “rate (fee) districts” that are not the same as the voting districts
- All of those municipalities that pay a particular fee to the Authority are included in that district (an accounting not geographic approach) - Rate A, Rate B and Rate C = District A, District B and District C
- Consider - customer classifications to further differentiate fees (residential, commercial, agricultural = different fee calculation methodologies)
- Greater revenues from a higher fee would stay in that district to provide more services

County Safeguards

- Note – Under the MAA: (1) incorporator (County) can acquire its Authority’s assets (but here there would be no valuable assets to acquire) there are MAA limitations on municipality seeking only the cash assets; (2) the incorporator can limit, by resolution, future Authority “projects” (though cannot legally disrupt, or must assume, existing contracts); and (3) Authority dissolution permitted after outstanding contracts/debt satisfied
- The County should be comforted by these political safeguards

Fees for “Administrative Services”

(4) Adopt Administrative Services Charge, in Lieu of Traditional User Rate

- Case law – (i) administrative charge can be imposed without owning or leasing any related assets; and (ii) although a solid waste authority was statutorily precluded from using administrative fee to fund recycling, it could charge fees for other administrative services (later cases allowed some administrative fee revenue for recycling)
- Courts sympathizing with authorities that use fees to undertake services for which state funding is lacking
- Could require preapproval by the Commissioners for rate setting and mission plan

MAA Stormwater Amendment

- Recent MAA stormwater amendment: created a new “project” that an Authority can “finance” (by fees); amendment reads as follows: “stormwater planning, management and implementation as defined by the articles of incorporation” – legislature did not require Authority ownership of BMPs on private land, or even the stormwater lines, to impose stormwater fees
- Consider: broadly define the authority’s stormwater mission in its articles of incorporation, to maximize mission scope and fee options
- This ability to define the Authority’s own powers in the articles is potentially revolutionary

Stormwater Fee Rational

- Recent lesson from stormwater fee outcry – customers are not accustomed to being charged for something without obvious, individual benefit
- Devising new collection mechanisms, not the fee methodology, could become the next task
- Are impervious surfaces the only “rational basis” for a stormwater fee?

New Administrative Services

- Consider – combining stormwater management fee with more popular services (e.g. fire or EMS)
- Potential legal challenges – (1) “administrative service” historically associated with “business improvements” (however good arguments exist from how the statute uses the words “and” and “or”); (2) entire county declared a “business district” (avoid competition clause); and (3) possible public hearing requirement
- Use the flexible rate setting powers in MAA to hire or competitively bid for services where needed

Revenue Opportunities for Cities/Boroughs

- New revenue opportunities for cities, borough and others that currently provide professional emergency services (opportunity for municipal entrepreneurship)
- Having partial municipal police service prevents proposed state police fees (get additional protection for less than what you would otherwise pay the state?)
- Examine common denominators of service that could best assist existing volunteer fire companies
 - ✓ Professional fire engine drivers?
 - ✓ Training and equipment?
 - ✓ Financial management and oversight?

Bottom Line

- These new entities could enable local government to undertake regional services, administration and planning AND have the statutory power to finance and implement - even leverage through borrowing (all under existing laws)

Questions?

Jens H. Damgaard, J.D., M.P.A

(717) 237.6031 | jdamgaard@eckertseamans.com

Laura B. Kurtz, J.D., M.P.A., Ph.D

(717) 237-6078 | lkurtz@eckertseamans.com

ECKERT
SEAMANS
ATTORNEYS AT LAW

© 2018 Eckert Seamans Cherin & Mellott, LLC. All rights reserved.