

Joint Powers Entities Present New Opportunities for Intergovernmental Collaboration

BY ERIN M. O'TOOLE

The 2016 Act Modernizing Municipal Finance and Government—generally known as the Municipal Modernization Act—includes a provision that allows governmental units to enter into joint powers agreements. The provision (the “Joint Powers Statute”) is codified under Chapter 40, Section 4A½, and was effective November 7, 2016.

Through adoption and execution of a joint powers agreement, the constituent members create a joint powers entity, which is a separate legal entity. The use of a JPE offers new opportunities for intergovernmental collaboration due to the liability protections afforded to members. The JPE’s status as a separate body corporate also provides for flexibility and certainty as to legal form when dealing with third parties.

Limitations of Intergovernmental Agreements

The most common way for governmental units to undertake joint projects is by entering into an intergovernmental agreement (IGA), pursuant to Chapter 40, Section 4A. One of the biggest concerns with using an IGA is whether joint and several liability applies to all governmental units entering into the IGA, without regard to fault. This concern is resolved with the joint powers approach because a separate legal entity is formed. It is not simply a cooperative contractual relationship among members. There is no liability of one governmental



unit for the acts or omissions of another participating governmental unit or the authority itself unless otherwise expressly agreed to in the joint powers agreement. The joint powers statute provides as follows: “[a] participating governmental unit shall not be liable for the acts or omission of another participating governmental unit or the region or any entity created by the joint powers agreement, unless the participating governmental unit has agreed otherwise in the joint powers agreement” [M.G.L. Ch. 40, Sec. 4A½ (g)].

In addition to liability protections, the formation of a JPE offers other benefits that are not available to governmental units that enter into an IGA. A JPE is a public employer and can have its own

employees instead of burdening its constituent members. A JPE has the power to sue and be sued. A joint powers agreement must specify its duration, but it is not subject to the twenty-five-year limitation that applies to IGAs. A JPE can borrow in its own name and purchase and lease land, affording it the opportunity to separately develop large-scale public works or infrastructure projects.

Formation of a JPE

Membership in a JPE is limited to governmental units. A governmental unit is defined as a city, town or regional school district; a district defined in Chapter 40, Section 1A (e.g., fire, water, sewer, etc.); a regional planning commission, however constituted; the Hampshire

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Council of Governments; a regional transit authority under Chapter 161B; a water and sewer commission formed under Chapter 40N or by special law; a county; or a state agency defined in Chapter 6A, Section 1. At least two government units are needed to form a JPE. The Joint Powers Statute provides that the chief executive officer of a city or town, or a board, committee or officer authorized by law to execute a contract in the name of a governmental unit, may enter into a joint powers agreement with another governmental unit for the joint exercise of any of their common powers and duties within a designated region. The agreement must be authorized by the city council with the approval of the mayor, the board of selectmen, or a prudential committee, respectively, for each governmental unit.

The Joint Powers Statute allows governmental units to enter into a joint powers agreement, which is a contract specifying the terms and conditions of the joint exercise of powers and duties.

A joint powers agreement is required to specify the following six terms [M.G.L. Ch. 40, Sec. 4A½ (c)]:

1. The purpose and the method by which the purpose sought shall be accomplished;
2. The services, activities or undertakings to be jointly performed within the region;
3. The specific organization, composition and nature of the entity created thereby to perform the services, activities or undertakings within the region, and the specific powers and duties delegated thereto, provided, however, that such entity shall be a body politic and corporate created pursuant to subsection (d) whose funds shall be subject to an annual audit and a copy of such audit shall be provided to the member governmental units and to the Division of Local Services in the Department of Revenue;
4. The manner of (i) financing the joint services, activities or undertakings within the region, (ii) establishing and maintaining a budget therefore, and (iii) authorizing borrowing pursuant to subsection (e), including any limitations on the purposes, terms and amounts of debt the entity may incur to perform such services, activities or undertakings;
5. Any procedures related to the termination of the joint powers agreement, the

withdrawal of any participating governmental unit and the addition of any new governmental units; and

6. Its duration.

JPE Powers

Subsection (d) of the Joint Powers Statute expressly confers the following powers on entities formed under the statute:

1. Sue and be sued;
2. Make and execute contracts and other instruments necessary for the exercise of the powers of the region;
3. Make, amend and repeal policies and procedures relative to the operation of the region;
4. Receive and expend funds;
5. Apply for and receive grants from the Commonwealth, the federal government and other grantors;
6. Submit an annual report to each member governmental unit, which shall contain a detailed financial statement and a statement showing the method by which the annual charges assessed against each governmental unit were computed; and
7. Any such other powers as are necessary to properly carry out its powers as a body politic and corporate.

44. The board of directors may, subject to Chapter 30B, enter into contracts for the purchase of supplies, materials and services and for the purchase or lease of land, buildings and equipment, as considered necessary by the board of directors.

Management of a JPE

Management and control of the JPE is vested in a board of directors. As stated in the Joint Powers Statute [subsection (e)]: “[t]he board of directors coordinates the activities of the entity and may establish any policies and procedures as necessary to do so.” Each member is entitled to representation on the board and each member is entitled to voting rights. A JPE can hire its own administrator or director to operate and manage the JPE on a daily basis. Under the Joint Powers Statute, joint powers entities are expressly empowered to hire their own employees. Subsection (f) provides that: “[t]he entity shall be a public employer. The board of directors may employ personnel to carry out the purposes of the joint powers agreement and establish the duties, compensation and other terms and conditions of employment of personnel.”

As an independent entity that is a body politic and corporate, a JPE must obtain a taxpayer identification number to file

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In addition, a separate portion of the Joint Powers Statute [M.G.L. Ch. 40, Sec. 4A½ (e)] provides for borrowing powers and the power to enter into contracts for purchasing supplies and land, among other powers. The JPE board of directors may borrow money, enter into long- or short-term loan agreements or mortgages, and apply for state, federal or corporate grants or contracts to obtain funds necessary to carry out the purposes of the entity. The borrowing, loans or mortgages shall be consistent with the joint powers agreement, standard lending practices, and Sections 16 to 28, inclusive, of Chapter

taxes. The JPE, through its board of directors, is required to “establish and manage a fund to which all monies contributed by the participating governmental units, and all grants and gifts from the federal or state government or any other source shall be deposited” [M.G.L. Ch. 40, Sec. 4A½ (e)].

Entities formed under the Joint Powers Statute are subject to certain financial controls and transparency. These provisions make retaining an outside fiscal agent unnecessary, although the JPE could choose to enter into a contract with a member or an

outside vendor to perform payroll, check writing, bookkeeping, accounting and other functions.

The Joint Powers Statute contains audit, reporting and accounting requirements. More specifically, the JPE must establish and maintain a budget and perform annual audits. The audits are to be distributed to its constituent members and to the Division of Local Services in the Department of Revenue [M.G.L. Ch. 40, Sec. 4A½ (c)]. Annual reports to members are also required; subsection (d) of the Joint Powers Statute specifies that the content of the report must include “a detailed financial statement and a statement showing the method by which the

annual charges assessed against each governmental unit were computed.”

In addition, management and disbursement of the JPE’s funds are under control of multiple parties—the board of directors, its treasurer and its business officer—providing a system of checks and balances. The Joint Powers Statute [subsection (e)] provides for appointment of a treasurer and a business officer. The treasurer can be from one of the participating governmental units, but the treasurer cannot be on the board of directors or an employee of the JPE. The board of directors must appoint a business officer—the officer may be a city auditor, town accountant or officer with similar

duties from one of the participating governmental units—that will have the accounting duties pursuant to Chapter 41, Sections 52 and 56. The business officer cannot also serve as treasurer.

New Opportunities

JPEs offer many opportunities for governmental units to pool their resources and jointly offer public programs and services without many of the risks and uncertainties that are associated with IGAs. These include forming a JPE to own and operate a fiber optic network, provide joint/collective cell coverage, and large-scale public works projects such as water and wastewater services. ❁