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LMCIT RISK MANAGEMENT MEMO

## TEN THINGS TO WATCH FOR WHEN ENTERING INTO JOINT POWERS AGREEMENTS

Joint powers agreements come in many forms: city-city, city-county, city-township, city-school district, city-Indian Tribe, and mixtures of all of the above. Whether a joint powers agreement is strictly between cities insured through LMCIT or cities and other governmental entities, the pitfalls and concerns are similar. Following is a list of the ten things to keep in mind when your city considers entering into a joint powers agreement:

### 1. **Lack of Adequate Insurance**

Unless special arrangements have been made, a joint powers entity is not a covered party under the city's coverage of LMCIT. Liability arising out of activities of the joint powers entity is specifically excluded from coverage unless coverage is modified to include it. This means that either the joint powers entity must have its own insurance or it must be covered under one or more members' insurance coverage.

Sometimes there is insufficient coverage for the risk involved in the joint powers entities activity. Parties to the joint powers entity should make sure there are no gaps or holes in coverage. If gaps aren't bridged and wholes aren't filled, individual members of the joint powers entity may be left holding the bag without insurance coverage from any source.

### 2. **Too Much Coverage**

When the joint powers entity is named as an additional named insured on all or numerous joint powers members' policies, this fact may make the joint powers entity an "inviting, deep pocket" target for litigation. Cities and joint powers entities waive statutory liability caps to the extent they have obtained insurance.

Recently, LMCIT argued that a joint powers entity consisting of the school district and city had one statutory liability cap. The Federal District Court agreed that the statutory liability caps applied to the joint powers entity and that neither the city nor the school district waived statutory tort liability caps through their participation in LMCIT or MSBAIT (Minnesota School Boards Association Insurance Trust). However, the district court held that because the joint powers entity was named as an insured on both the city and school district's coverage and because both the city and school district were sued, that plaintiff could seek recovery from both the city and school district's combined tort liability caps. This means that plaintiff has a potential of recovering \$600,000 rather than \$300,000.

It may be helpful for parties in a joint powers entity to either have the joint powers entity obtain coverage independently or have an agreement that the joint powers entity will be insured through one of its member's coverages. Note of caution—sometimes joint powers entities pose greater risks requiring greater coverage, i.e. joint police force agreements may pose U.S.C. §1983 exposure for the joint powers entity and its members that exceeds the state's statutory liability limits. While providing insufficient coverage is not good; providing too much or overlapping coverage may be costly to a joint powers entities members.

- 3. The Joint Powers Agreement Does Not Clearly Set Forth Who is Responsible for What**  
If the agreement calls for one member to provide insurance coverage for the joint powers entity, all members need to make sure there is appropriate follow through; i.e. documentation of coverage and/or joint powers entities status as an additional named insured on the appropriate policy.

Similarly, if there is no clear understanding of who does what, some things may not get done. When someone gets hurt and brings a lawsuit this increases the likelihood of conflict between members making it easier for a plaintiff to win and increasing the cost of litigation to all joint powers entity members. If members of the joint powers entity are pointing the finger of blame at each other, they must each hire their own attorney instead of one attorney representing the joint powers entity and all of its members.

Case law suggests that when governmental entities by agreement delegate responsibility for maintenance and inspection of shared infrastructure, unless there is something that says otherwise, liability follows maintenance and inspection (each party is legally responsible for what it maintains). *Huver by Huver v. Opatz*, 392 N.W.2d 237, 240 (Minn. 1986).

Another problem arises when the terms of the joint powers agreement are not followed or enforced. Parties to a joint powers agreement should agree on who does what and then follow the agreement or change the agreement.

- 4. Liability Does Not Follow Responsibility**  
This situation often occurs when there is a lopsided agreement in which one party is providing a service for another. This situation can create a number of problems. First, if the party doing the task does not carry the exposure for not doing it right, it may create a disincentive to act safely. This increases the likelihood of an accident and a successful claim and lawsuit. Secondly, the party with the liability exposure but no or limited responsibility for tasks or things contributing to that exposure may not understand or appreciate the risk. A party that does not understand or appreciate the risk may be underinsured for the risk involved. Thirdly, if party A is responsible for doing the work, but party B is legally liable, and if party A does it wrong, party B is likely to supervise party A's work. This increases liability exposure for both A and B because now there can be claims against the joint powers entity and/or parties A and B for both negligence in doing the work and for negligent supervision.

Finally, sometimes a joint powers agreement does not address what happens to shared liability after a joint powers entity dissolves or some members leave. For example, if cities enter into a joint powers agreement to run a landfill and years later a lawsuit is brought based on groundwater contamination, it may be difficult to determine who is on a liability hook, the joint powers entity, current members, or current and past members?

#### **5. Incomplete or Unclear Mechanism for Joint Powers Entity Decision Making**

The joint powers agreement should clearly set forth who has decision-making authority in what areas. If there is a joint powers board, the agreement should set forth the composition, duties, and responsibilities of that board and grant to that board the resources and authority necessary to meet its duties and fulfill its responsibilities.

Some joint powers boards are “advisory” requiring most joint powers board decisions to be ratified by the governing bodies of its members. Some boards have complete authority to make all decisions independently. Most boards have significant independent decision-making authority to run the joint powers entity on a day-to-day with specific areas requiring approval by joint powers members such as budget, purchase of land or facilities, location of facilities, etc.

When the joint powers agreement has financial and/or other contribution requirements, there must also be a clear understanding of an agreed upon enforcement mechanism for not meeting one’s responsibilities. The agreement should also address who owns what now, who will own property the joint powers entity purchases, and who will own what, if or when the joint powers entity dissolves. This can get especially tricky when the joint powers entity wants to build a facility and all member cities want it located within their boundaries. Similarly, when a joint powers fire district dissolves, pension benefit issues for firefighters may be a difficult issue to resolve.

#### **6. Who Is the Employer?**

It is important for everyone to know what and whose “hat” they are wearing when acting on behalf of the joint powers entity. Important questions include: Does the joint powers entity have its own employees? Who hires, fires, and supervises joint powers entity employees? How are joint power entity employees paid? Do city or school district employees performing joint powers entity tasks remain city and school district employees for liability and/or workers’ compensation purposes? Whose uniform does the employee wear? How is the vehicle the employee drives marked? If a uniform is from the individual city and vehicle is marked to identify the individual city, it looks like the person wearing the uniform and driving the vehicle is the city employee and not a joint powers entity employee.

In many joint powers agreements, especially mutual aid, police, or fire agreements, the employee remains an employee of the city for workers’ compensation purposes but is an employee or agent of the city in which he or she is responding for liability purposes. In a fire situation, the responsibility for managing the fire scene and supervising firefighters activities at the scene often rests with the chief in whose city firefighters are responding. Accordingly, liability for negligent “firefighting,” if any, should not be the responsibility of responding

departments. Otherwise, cities may be discouraged from responding in situations with the most danger and exposure. Those are precisely the situations in which “mutual aid” is most needed.

Finally, if the joint powers entity is the employer, it is important for it to have its own employment policies, practices, and procedures or to adopt the employment policy, practice, and procedures of one of its members.

**7. Actual Practice Does Not Follow the Joint Powers Agreement**

Over time, circumstances, facilities, and resources change. The joint powers agreement should be changed to reflect current reality. For example, there was a joint powers agreement between a city and a county for maintenance of pavement on county roads and city streets within the city. The agreement called for the county to provide the asphalt and the city to provide personnel and equipment to fill potholes. The county stopped providing the asphalt. The city started providing the asphalt and the county agreed that its road crews would fill potholes. The agreement needs to be changed to reflect current policies, practices, and procedures.

**8. Current Joint Powers Agreement is Out of Date**

Joint powers agreements can get outdated for reasons other than changes in actual practices. Membership of the joint powers entity may change. The name of the entity, its responsibilities, tasks, and goals may change or evolve. The agreement may no longer accurately describe current facilities, equipment, or practices. Sometimes the agreement requires something that is no longer an acceptable practice or procedure, i.e. outdated procedure for maintaining sewer lines, hiring and promoting employees, or some practice or procedure that is no longer “legal.”

**9. Three of the Most Important Things to Consider When Deciding Whether to Enter Into a Joint Powers Agreement—Location, Location, Location**

An important consideration for saving money, decreasing liability exposure, and increasing service by providing services jointly is whether these goals can be achieved given the relative locations of joint powers participants.

The importance of location may depend on the nature of the service being provided. For instance, two metro area cities have successfully run a joint parks and recreation facility for many years. This joint powers agreement works because the facility is in one city and right next to the other.

Other cities have an agreement for joint building inspection services. For this service, the cities need to be near each other but not necessarily contiguous. Because building inspection requires the builder or owner to call and schedule the inspection, one building inspector may be able to provide services for several small cities spread out throughout a county or other local area.

Agreements to share equipment and resources may allow for a greater coverage area if the equipment or resources are infrequently used, centrally located, easily transported, or easily scheduled.

#### **10. Some Types of Services are Easier to Do Jointly Than Others**

Mutual aide fire service agreements work well because it is unlikely that neighboring cities will have fire emergencies at the same time. In addition, the agreement can address what to do in those situations. On the other hand, snowplowing/public works agreements may be more difficult to work out since each member city is likely to get hit with the same snowfall and each city's residents think that their city should get plowed first.

Generally, services that require specialized equipment or training, services that involve a specific need or response to an emergency in one city but not in all cities at the same time, and agreements involving facilities or services in cities that are very close geographically, demographically, and politically (i.e. urban cities or cities and townships that boarder one another) work best. Examples of such joint powers agreements would include police or fire mutual aid, building inspection services, and sanitary sewer and water service districts.

Agreements for joint facilities or joint maintenance of member city facilities are usually heavily dependent on location. Examples of such facilities may include joint city/county library facilities, joint city school district playground or recreation facility agreements, and street, road, or traffic sign or signal maintenance agreements between adjoining cities, a city and adjoining townships, or between a city and county for city streets/county roads located within the city.

In some areas, it is more difficult, but not impossible, to consolidate delivery of services through joint powers agreements. Generally, these involve problems of location, geography, politics, or instances in which each member city needs the same services at the same time. Examples of such agreements would include agreements for joint city clerks, city administrators, snowplowing, and parks and recreation administration.

In conclusion, when entering a joint powers agreement of any type, cities should be concerned with these basic issues. First and foremost a good agreement must fairly and accurately set forth responsibilities and duties. The agreement must address responsibility for insurance coverage for the joint powers entities activities. Secondly, joint powers agreement members must do what they say they will do and be held accountable for what they have agreed to do. If circumstances change, the joint powers agreement also needs to be changed. Finally, joint powers agreements should be regularly reviewed by city staff and the city attorney to assure that they continue to serve the purpose for which they were created.

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