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**Intergovernmental Cooperation in Michigan:  
A Policy Dialogue**

**White Paper B**

**Legal Barriers to Intergovernmental Cooperation,  
“Legal Issues” (Urban Cooperation Act)**

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# **Intergovernmental Cooperation in Michigan: A Policy Dialogue**

## **White Paper B**

### **LEGAL BARRIERS TO INTERGOVERNMENTAL COOPERATION AGREEMENTS IN MICHIGAN**

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## EXECUTIVE SUMMARY

This paper summarizes the principal legal and statutory impediments which confront policymakers seeking to implement consolidation of services and other forms of intergovernmental cooperation.

The principal statutes whose amendment would better enable greater cooperation and collaboration:

1967 PA 7 (Urban Cooperation Act): Amend to permit greater flexibility in assuming or coordinated labor agreements; provide express authority for “lending of credit” between local units.

1967 PA 8 (Intergovernmental Transfer of Functions and Responsibilities Act): Amend to permit greater flexibility is incorporating transferor collective bargaining rights with transferee collective bargaining rights; provide express authority for “lending of credit” by the transferee in favor of the transferor.

1988 PA 57 (Emergency Services Authority Act): Amend to permit greater flexibility in assuming or coordinating labor agreements.

PERA and 1969 PA 312 (Compulsory Arbitration of Labor Disputes in Police and Fire Departments): Amend PERA to limit unfair labor practice grounds; amend Act 312 to require (i) no arbitration until last best offer submitted, (ii) exempting certain IGA arrangements under Acts 7 and 8, (iii) require selection of either last best offer, in full.

1954 PA 116 (Election Law): Prohibit intergovernmental cooperation actions to be a valid basis for recall.

1909 PA 279 (Home Rule City Act): Prohibit minimum staffing as an appropriate charter provision.

1971 PA 140 (State Revenue Sharing): Provide financial incentives to local units fostering cooperation.

1893 PA 206 (General Property Tax Act): Provide greater tax base sharing.

## INTRODUCTION

As state and local revenues continue to decline in Michigan, local units of government are constantly reassessing how they provide essential services within their respective jurisdictions. This task always involves an assessment on the scope of services provided and the cost associated with these services. One of the solutions often examined, but underutilized, is the adoption of an intergovernmental cooperation agreement pursuant to one of the Michigan statutes permitting such agreements.

The financial case for the utilization of such agreements is obvious: economies of scale reduce costs without arguably sacrificing the overall scope and quality of services.

Under Michigan law, local units of government are authorized broadly to enter into one of several forms of general agreements under, *inter alia*, Act 7 (Urban Cooperation Act) and Act 8 (Intergovernmental Transfers of Functions and Responsibilities Act) of 1967, and specific purpose agreements under, *inter alia*, Act 57 of 1988 (Emergency Services to Municipalities Act), and Act 292 of 1989 (Metropolitan Councils Act). The Citizens Research Council of Michigan, in a 2007 report, details the provisions of no less than 77 Michigan statutes enabling governmental cooperation of some sort.<sup>1</sup>

If the statutory authority is generous, why are cooperative arrangements not flourishing as long-term solutions to restructuring government in Michigan?

The answer is straightforward: the current statutory framework constrains local units of government from fully capitalizing on the cost savings resulting from intergovernmental cooperation.

This paper provides an overview of the current statutory framework governing intergovernmental cooperation agreements, discusses legal challenges to intergovernmental cooperation agreements and, finally, offers several suggestions to overcome the legal challenges to intergovernmental cooperation agreements.

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<sup>1</sup> *Authorization for Interlocal Agreements and Intergovernmental Cooperation in Michigan*, Citizens Research Council of Michigan, April 2007, Report 346.

## **INTERGOVERNMENTAL COOPERATION AGREEMENTS: MANY STATUTORY OPTIONS WITHIN CONSTITUTIONAL LIMITS**

Intergovernmental cooperation is neither a recent legal innovation nor an example of the modernization of Michigan’s statutory framework. Indeed, the concept of intergovernmental cooperation agreements has been around since at least the mid-1800s, if not before. *See, e.g.*, PA 1877, No. 164 (MCL 397.201 et seq.) (Permitting cities, villages and townships to establish free public libraries, and enter into contracts with other municipalities for the provision of library services). The stated mission of the Council of State Governments, founded in 1933 to replace the American Legislators Association, included “promoting intergovernmental cooperation.” *See* Ross, William G., “Attacks on the Warren Court by State Officials: A case study of why court-curbing movements fail,” 50 Buff. L. Rev. 483 at n. 231 (2002). And one of Michigan’s frequently used intergovernmental cooperation statutes is PA 1951, No. 35 (MCL 124.1 et seq.) (Authorizing any two or more municipal corporations to own, operate or perform any property, facility or service which each has the power to own operate or perform separately).

There is, however, one significant constitutional limitation on local units’ power to cooperate: if the objective is to achieve something jointly, in general the thing to be accomplished must be something which each local unit is empowered to accomplish individually. Article VII, section 28, of the 1963 Michigan Constitution provides as follows:

The legislature by general law shall authorize two or more counties, townships, cities, villages or districts, or any combination thereof among other things to: enter into contractual undertakings or agreements with one another or with the state or with any combination thereof *for the joint administration of any of the functions or powers which each would have the power to perform separately*; share the costs and responsibilities of functions and services with one another or with the state or with any combination thereof which each would have the power to perform separately; transfer functions or responsibilities to one another or any combination thereof upon the consent of each unit involved; cooperate with one another and with state government; lend their credit to one another or any combination thereof as

provided by law in connection with any authorized publicly owned undertaking. ...

Mich Const 1963, art VII, § 28. (Emphasis added)

This section was a new section added to the Michigan constitution “designed to encourage the solution of metropolitan problems through existing units of government rather than by creating a fourth layer of local government.” *State of Michigan Constitutional Convention 1961, Official Record*, 1059-1064, 1071-1090. In essence, the drafters of the 1963 constitution directed the Legislature to encourage the fullest range of cooperative arrangements without extending the power of local units over certain subject matter. This can be problematic when units of different types seek to cooperate: units of general government (cities, townships, counties) typically have a broader range of powers than do units of limited purpose (school districts, authorities).

### **Act 7 – Urban Cooperation Act**

Act 7 of 1967, MCL § 124.501, *et seq.*, better known as the Urban Cooperation Act, authorizes public agencies, including cities and townships, to exercise jointly any power or authority which such agencies share in common pursuant to an interlocal agreement which is approved by the respective governing bodies of the participating municipalities. Section 124.505a, also permits two or more local governments to “enter into an interlocal agreement for the sharing all or a portion of revenue derived by and for the benefit of a local government entering into that agreement.” The Urban Cooperation Act mandates that any agreement for revenue sharing included four provisions covering the duration, method of rescission, description of property to be taxed, formula for revenue sharing and a distribution schedule. Interestingly, however, the Urban Cooperation Act does not mandate that an agreement governing purely the sharing of services contain any provisions. Rather, the inclusion of the nineteen provisions listed in Section 124.505 is permissive. As a practical matter, most of these provisions will be included in an agreement. However, the permissive nature of the language prevents legal challenges to interlocal agreements failing to include each of the listed provisions in Section 124.505.

To resolve anticipated governing disputes under the interlocal agreement, the Urban Cooperation Act permits the participating agencies to create a separate board or commission to administer the agreement. Although not mandatory under the Act, creation of a board or commission undoubtedly provides political cover to the respective governing bodies when inevitable complaints regarding the power sharing arrangement arise during the contract term.

### **1951 PA 35 (Intergovernmental Contracts)**

1951 PA 35, as amended (“Act 35”), MCL 124.1 et seq., authorizes municipal corporations to enter into contracts with other municipal corporations “for the ownership, operation, or performance, jointly, or by any 1 or more on behalf of all, of any property, facility or service which each would have the power to own, operate or perform separately.” Act 35 specifically authorizes a municipal corporation to furnish municipal services outside the corporate limits of the municipal corporation, and to sell and deliver heat, power, and light at wholesale or other than wholesale outside its corporate limits, so long as another utility serving that territory consents to the provision of those services in writing. Act 35 was amended in 1999 to permit municipalities to enter into multiple employer welfare arrangements under chapter 70 of the insurance code of 1956, MCL 500.7001 to 500.7090, for hospital, medical, surgical or dental benefits.

The key provision of Act 35, corresponding to a similar provision in article VII, section 28, of the 1963 Constitution, noted above, is the reference in section 2 that the joint ownership, operation or performance of a property, facility or service must relate to a property, facility or service which each would have the power to own, operate or perform separately. Interpreting this limitation, the Attorney General has opined that while a county board of road commissioners may construct and operate a heating plant jointly with a board of education (OAG, 1955, No 2217, p. 457 (September 6, 1955)), because each has the power to construct and operate a heating plant for its facilities, a school district could not share the cost of a pedestrian overpass with another political subdivision, since a school district does not have the power to use its funds for the purpose of installing such a pedestrian overpass, even for use by school children. OAG, 1959-60, No 3295, p. 6 (January 26, 1959).

### **Act 8 – Governmental Transfers of Functions and Responsibilities Act**

Act 8 authorizes two or more political subdivisions “to enter into a contract with each other providing for the transfer of functions or responsibilities to one another or any combination thereof upon the consent of each political subdivision involved.” MCL 124.532. Despite the significance of these agreements, the steps necessary to effectuate the valid transfer of functions or responsibilities are relatively simple: (1) “the contract shall be approved by concurrent resolution of the governing body of each political subdivision;” (2) “the terms of the contract shall be entered in the journal or minutes of the proceedings of the governing body of each political subdivision;” and (3) “a copy of the contract shall be filed with the secretary of state prior to its effective date.” MCL 124.533. Act 8 also sets forth seven mandatory provisions that must be included in the

contracts: (1) “a description of the functions or responsibilities to be transferred;” (2) “the effective date of the contract;” (3) the length of the contract; (4) subject to mandatory limitations set forth in the Act, “the manner in which the affected employees, if any, ... shall be transferred, reassigned or otherwise treated;” (5) “the manner in which any [assets] required in the execution of the contract” are “transferred, sold or otherwise disposed of between” the governmental units; (6) the financial terms of the agreement; and (7) any other terms necessary to complete the transfer of functions or responsibilities. MCL 124.534.

Care must be taken that the transfer of functions or responsibilities of the political subdivision does not involve the transfer of the legislative power of the governing body of any participating political subdivision. OAG, 1977-78, No 5312, p. 476 (June 13, 1978). In other words, while the responsibility to provide police protection may be transferred to another municipal corporation, the function of the governing body in determining the ordinances being enforced must *not* be transferred to the other municipal corporation. The latter transfer would be an unconstitutional delegation of the legislative function of the governing body of the political subdivision. An example of this limitation was recently applied by the Attorney General in the context of fees for fire service in a joint fire board: each municipal member was obliged to adopt its own fee structure to be applied by the fire board across the service area. OAG, 2005-06, No. 7180 (September 29, 2005).

Where these agreements generally deteriorate is when resolving the mandatory limitations governing the transfer or reassignment of employees affected by the transfer of the functions or responsibilities. By its terms, Act 8 only requires the transfer of “employees ... *necessary for the operation*” of the transferred functions and responsibilities (emphasis added). Ostensibly, this does not require the transfer of all the employees of the governmental unit performing the function or responsibility transferred. However, as discussed further below, the transferring governmental unit may have greater obligations as the result of existing collective bargaining agreements and the attenuating requirements under Michigan labor laws.

Once transferred, however, Act 8 requires that those employees retain all rights and benefits previously held, including all “seniority credits and sick leave, vacation, insurance and pension credits in accordance with the records or labor agreements from the acquired system.” MCL 124.534(d)(i). The governmental unit that acquires the functions or responsibilities assumes “the obligations ... with regard to wages, salaries, hours, working conditions, sick leave, health and welfare and pension or retirement provisions for employees.” Although Act 8 does not specify that the acquiring

governmental unit must apply the terms of the transferred employees' collective bargaining agreement, if one exists, the Act in effect places such a burden by mandating that “no employee who is transferred to a position with the political subdivision shall by reason of such transfer be placed in any worse position with respect to [the terms and conditions of employment.]” Thus, while the acquiring governmental unit may or may not be a successor employer under Michigan law obligated to recognize the union representing the transferred employees and to abide by the terms of the associated collective bargaining agreement, the acquiring governmental unit must maintain the status quo of the terms and conditions of employment the transferred employees enjoyed while working for the transferring governmental unit.

### **Act 57 – Emergency Services to Municipalities Act**

An example of a statute authorizing a specific type of cooperation is PA 1988, No. 57 (“Act 57”). Act 57 permits local units to create emergency service authorities and limits the scope of functions and responsibilities that may be transferred to the newly created authority to “emergency services.”

Under Act 57, “emergency services” is limited to “fire protection services, emergency medical services, police protection, and any other emergency health or safety services” as defined by the governmental entity. Similar to Act 8, the steps necessary to form an authority under Act 57 are relatively straightforward: (1) articles of incorporation are adopted by the legislative body of each incorporating municipality; and (2) endorsement of the articles of incorporation by the county executive or chair of the county board of commissioners and county clerk, the mayor and city clerk, the village president and village clerk, or the township supervisors and clerk of the township. Once adopted and endorsed, the articles of incorporation must be published at least once in a newspaper that circulates within the jurisdiction of the municipality. After publication, the articles are filed with the Secretary of State. If not challenged in court within 60 days of filing the articles of incorporation with the Secretary of State, the validity of the incorporation is “conclusively presumed.” Under MCL 124.608, an authority under Act 57 can enter into a contract under Act 8 to provide services for a non-incorporating governmental entity. As a result of a 2006 amendment, an authority created under Act 57 may also adopt ordinances to collect fees for emergency services, further enhancing the economic benefit of consolidating services under the Act.

## **Act 292 – Metropolitan Councils Act**

About a year after the passage of Act 57, in 1989 the Legislature enacted the Metropolitan Councils Act (“MCA”) to permit local units of government in metropolitan statistical areas of less than 1.5 million to join together to form a public authority (a “Metropolitan Area Council” or “MAC”) to provide for nearly all municipal services. MCL 124.651, et seq. The United States Office of Management and Budget (OMB) defines metropolitan and micropolitan statistical areas according to published standards that are applied to Census Bureau data. The general concept of a metropolitan or micropolitan statistical area is that of a core area containing a substantial population nucleus, together with adjacent communities having a high degree of economic and social integration with that core.” See [www.census.gov/population/www/estimates/aboutmetro.html](http://www.census.gov/population/www/estimates/aboutmetro.html). As of June 6, 2000, there are 362 metropolitan statistical areas and 560 micropolitan statistical areas in the United States. *Id.* Of the 362, there are 29 metrostatistical areas completely in Michigan and two statistical areas crossing the Indiana and Wisconsin borders, respectively.<sup>2</sup>

To create a MAC, two or more local units in a metropolitan area must adopt articles of incorporation by “an affirmative vote of a majority of the members elected to and serving on the legislative body of each participating local government unit.” MCL 124.655 and 124.659. Subsequent to the creation of a MAC, a local unit of government may join an existing MAC by either an affirmative majority vote of the legislative body for that unit of government or upon a majority vote on a referendum by the registered electors residing in the nonparticipating unit. MCL 124.661 and 124.663. Once established a MAC may require that each participating unit pay up to “.2 mills multiplied by the taxable value of all the real and personal property within that local unit of government.” MCL 124.657. The statute also permits a MAC to authorize an “ad volorem tax of not to exceed 0.5 mills of the taxable value of the taxable property” within the council area. *Id.*

Similar to the statutes outlined above, Section 23 of the MCA requires that “a public employee whose duties are transferred to a council ... shall be given a position of a comorable description with the council, and shall retain the seniority status and benefit rights of the public employment position held before the transfer.” MCL 124.673. Likewise, “the council shall immediately assume and be bound by an existing labor agreement applicable to those powers or duties for the remainder of the term of the labor agreement.” *Id.* Under the MCA, the union representing the employees continues to act

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<sup>2</sup> See [http://www.census.gov/population/estimates/metro\\_general/List1.txt](http://www.census.gov/population/estimates/metro_general/List1.txt).

in that capacity, unless or until the employees successfully win a decertification petition before the Michigan Employment Relations Commission (“MERC”). *Id.*

### **1969 PA 312 (Mandatory Binding Arbitration for Public Safety)**

Ostensibly, 1969 PA 312, MCL 423.321, et seq. (“Act 312”) is unrelated to the form or execution of intergovernmental cooperation agreements. Practically, however, Act 312 is inextricably intertwined with any intergovernmental cooperation agreement that involves police, fire or emergency services because all the statutes permitting these agreements require the assumption, continued application, or negotiation of a collective bargaining agreement. Act 312 mandates arbitration of interest or contract formation disputes and those arising during collective bargaining negotiations over the terms to be included in a new contract for all public safety employees. Thus, every unit government considering entering into an intergovernmental cooperation agreement must implicitly consider its obligations under Act 312 because current statutes essentially require the assumption of any existing bargaining agreements.

Since its original enactment in 1969, Act 312 has been unsuccessfully challenged on several fronts and is now part of the permanent fabric of public safety labor negotiations in Michigan. Designed to prevent costly work stoppages which could produce crisis situations, interest arbitration under Act 312 is the “final step” in the collective bargaining process and must have been preceded by unsuccessful mediation of the unresolved dispute and a written request for arbitration by either party. MCL 423.233; *Dearborn Fire Fighters Union Local 412, IAFF v. Dearborn*, 384 Mich. 229, 279, n.5; 231 N.W.2d 226 (1975). The decision rendered by an Act 312 arbitration panel is final and binding on the parties and reviewable by a circuit court only upon a showing of the existence of specific, statutorily defined grounds. MCL 423.242. The objective of an Act 312 award is to approximate a negotiated settlement. Since its inception, however, Act 312 has evolved into an often lengthy process, whereby the employer’s last best offer serves as the floor from which the arbitrator starts and permits selective consideration of each provision as opposed to considering the last best offer as a comprehensive package which resulted from lengthy negotiation between management and labor.

## **LEGAL CHALLENGES TO INTERGOVERNMENTAL AGREEMENTS**

Given the fifty-five years that have passed since the enactment of Act 35, forty years since the enactment of Act 7 and Act 8, and nearly twenty years since enactment of Act 57, there is surprisingly little case law interpreting these statutes. Research of

reported Michigan Supreme Court and Court of Appeals decisions, Michigan Attorney General opinions, and MERC decisions returns less than ten decisions involving intergovernmental cooperation agreements or the attenuating labor issues that arise during the negotiation or implementation of these agreements. By way of contrast, the Michigan Bullard-Plawecki Employee Right to Know Act, passed in 1978, has at least sixty-nine reported cases citing to or interpreting that Act. The few examples touching on the subject of intergovernmental cooperation agreements that are available, however, provide a glimpse of the legal challenges that stand on the horizon and may act as a “chilling effect” on local governments from seriously pursuing these agreements.

### **The DARTA Agreement – Act 7 and Act 8**

The most recent reported example of the significant challenges that arise when implementing an intergovernmental cooperation agreement is the Detroit Area Regional Transportation Authority (“DARTA”) Agreement (the “DARTA Agreement”) between the Detroit-area Regional Transit Coordinating Council (“RTCC”), the Suburban Mobility Authority for Regional Transportation Authority (“SMART”), and the City of Detroit. As widely reported, DARTA was established in June 2003 under the Act 7 and Act 8 in an attempt to create a unified and functional regional transportation system in southeast Michigan after legislation to create the authority was vetoed in late 2002 by then Governor John Engler. Almost immediately, the American Federation of State, County and Municipal Employees (“AFSCME”) Council 25, and its Local 312, initiated legal action on two fronts challenging DARTA’s validity.

First, AFSCME filed an unfair labor practice charge with MERC alleging that the City of Detroit violated its duty to bargain in good faith under Section 10(1)(e) of the Public Employment Relations Act (“PERA”). Section 10(1)(e) declares that it “shall be unlawful for a public employer ... to refuse to bargain collectively with the representatives of its public employees.” MCL 423.210. Second, AFSCME filed a civil suit in Wayne County Circuit Court challenging the creation of DARTA on several grounds, primarily that the RTCC did not have authority to enter into an intergovernmental cooperation agreement.

In the unfair labor practice charge before MERC, AFSCME charged that the City of Detroit effectively repudiated its collective bargaining agreement by meeting to establish DARTA and eventually executing the final DARTA agreement. *City of Detroit*, 2004 MERC Lab. Op. 126. To support its position, AFSCME cited a provision in the Local 312 collective bargaining agreement that required the City of Detroit to give the union 60 days notice of any “merger, sale, transfer, consolidation or lease of the Detroit

Department of Transportation (“D-DOT”).” *Id.* MERC dismissed the charge, however, finding that the DARTA agreement did not “transfer” D-DOT’s functions and responsibilities to DARTA because under the agreement, DARTA merely coordinated D-DOT’s services with other public transportation systems. *Id.* Thus, the notice requirement of the collective bargaining agreement was not triggered. *Id.*

On cross motions for summary disposition in the civil action, the trial court “concluded that the RTCC did not have authority to participate in DARTA and that any involvement with DARTA was effectively invalidated.” *AFSCME v. City of Detroit*, 267 Mich.App. 255, 257 (2005). The trial court, however, declined to invalidate the entire DARTA agreement. *Id.*

On appeal, the Court of Appeals did not hesitate in dealing a death blow to DARTA. First, the court rejected the argument that the RTCC could enter into the DARTA agreement under the Act 7 and Act 8, concluding that the DARTA Agreement effectively modified the statutory terms of the RTCC. *Id.* at 271. The court went on to find, in contrast to MERC’s opinion about D-DOT’s foray into DARTA, that “RTCC transferred its functions and materially altered the manner in which decisions would be made.”<sup>3</sup> *Id.* at 272. In addition to declaring RTCC’s involvement illegal, the Court of Appeals summarily declared the entire “DARTA Agreement null and void” because the illegal provisions (i.e., the inclusion of RTCC) were essential to the agreement and could not be severed. *Id.* at 272-273. In adopting a narrow reading of the RTCC’s enabling statute, the decision has cast a cloud over the availability of Act 7 and Act 8 to local units, and has had a chilling effect on municipalities contemplating entering into similar agreements.

### **Royal Oak Firefighters Mandatory Staffing Ballot Initiative**

Just prior to the November 2005 election, the City of Royal Oak (“the City”) filed an unfair labor practice charge against the Royal Oak Professional Fire Fighters Association (“the Union”) asserting that the union violated its duty to bargain in good faith under Section 10(3)(c) of PERA. *Royal Oak Fire Fighters Ass’n*, MERC Lab. Op. 060 (2006). The charge was spurred by the Union’s sponsorship and support of a ballot

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<sup>3</sup> In *RESA Head Start Educational Association v. Wayne County RESA*, an unpublished Michigan Court of Appeals decision, 2002 WL 741538 (April 23, 2002), the union sought to gain the protection of the ITFRA after Wayne RESA decided to cease managing the Head Start program for Wayne County. The Michigan Court of Appeals determined that Wayne RESA did not transfer its authority to run the federally funded Head Start program to Wayne County because that authority was reserved to the U.S. Secretary of Health and Human Services. Thus, the union’s members were not entitled to the job and benefit protections of the Act.

initiative to amend the City's charter to require the City to employ at least 1.17 fire fighters per thousand residents. By sponsoring this initiative, the City argued that the Union unilaterally altered a mandatory subject of bargaining in violation of its duty to bargain in good faith. Under PERA, mandatory subjects of bargaining include "wages, hours and other terms and conditions of employment." In general, however, mandatory staffing provisions are not mandatory subjects of bargaining unless they relate to worker safety or workload. *Id.* (citing *AFSCME v. Center Line*, 414 Mich. 642 (1982)). Even if the mandatory staffing provision was a mandatory subject of bargaining, MERC concluded that the Union did not violate its duty to bargain in good faith by circulating petitions in support of the ballot initiative. In reaching this decision, MERC relied on previous decisions where mandatory subjects were placed on the ballot, but the employer did not implement the provisions prior to bargaining with the union over the effects of the ballot provisions. MERC also found that there was no evidence that the Union's officers were involved in the ballot initiative, thereby negating any inference that the Union violated its duty to bargain in good faith. *Id.*

### **Independence Day at the Detroit Housing Commission**

In 1995, the City of Detroit ("the City") notified AFSCME ("the Union") that it intended to separate the Detroit Housing Department ("DHD") into a new independent authority (the Detroit Housing Commission or "DHC") authorized under the recently passed Michigan Housing Facilities Act. *Detroit Housing Commission*, MERC Lab. Op. 186 (2002). Over the course of the next six years, the City and the Union discussed how the separation should be implemented and what effect the separation would have on the Union's members. *Id.* The Union sought to maintain the status quo, including the complete transfer of the collective bargaining agreement and the continued participation in the City's pension plan. *Id.* The City essentially agreed to all the Union's demands, but advised the Union that a new collective bargaining agreement could not be finalized until the separation was completed. *Id.* In an effort to prevent the separation, the Union attacked the proposal by filing a lawsuit in Wayne Circuit Court and filing unfair labor practice charges with MERC. *Id.* Although these claims arose outside the parameters of intergovernmental cooperation, the principals discussed are illustrative of further legal challenges that could arise during the negotiation and implementation of the agreements.

In the unfair labor practice charge before MERC, AFSCME challenged several actions, including charges that the City and DHC violated Section 10 of PERA by refusing to bargain over the effects of the separation, repudiating the collective bargaining agreement and unilaterally implementing terms and conditions of employment. *Id.* As a threshold issue, MERC reaffirmed that a successor employer (i.e.,

DHC) is not obligated to bargain with the union until: (1) it takes over the operations of the other employer; (2) the majority of the new employees had been bargaining unit members of employed by its predecessor; and (3) the union makes a demand to bargain. *Id.* MERC also rejected the Union's argument that the City failed to bargain over the effects of the separation decision because the collective bargaining agreement did not contain provisions governing the time period for employees to consider their decision to remain with DHC or whether to participate the City's pension and health plans.

At the trial level, the union sought and was granted an injunction to keep the City from severing its employment relationship with the housing commission employees. The trial court also held that the City's employment relationship was not severed by operation of law. After the Court of Appeals reversed the trial court's decision in these respects, AFSCME appealed to the Supreme Court. The Supreme Court affirmed the Court of Appeals decision, ruling that the 1996 amendments to the Michigan Housing Facilities Act severed the employment relationship, unless the Mayor and the City Council approved a resolution declaring otherwise. The Supreme Court also rejected AFSCME argument that the City essentially adopted such a resolution by its conduct when the City acted as a co-employer with the HCA during the six years between the 1996 amendments and the final severance of the employment relationship. Thus, the court ruled that HCA was the sole employer of the former City employees.

### **Mount Clemens Police Transfer to County Sheriff**

In an unpublished decision which sustained a consolidation program, the Michigan Court of Appeals in 2006 approved of the City of Mount Clemens' determination to eliminate its police department and contract with the Macomb County Sheriff for policing services. In 2005, following the elimination of its police department by the city, the city and the county entered into a contract by which the county agreed to provide law enforcement services for the city. The collective bargaining unit representing patrol and command officers filed a four-count complaint, seeking injunctive and declaratory relief, arguing, among other things, that the agreement violated Sec. 76(3) of the Sheriffs Act, MCL 51.68 *et seq.* The city and county responded that the Sheriffs Act did not apply and that the contract was lawful under both the Home Rule City Act, MCL 117.1 *et seq.*, and under Act 7. In a unanimous opinion, the court affirmed the trial court's decision granting summary judgment to the city and county.

## OVERCOMING LEGAL AND PRACTICAL HURDLES TO INTERGOVERNMENTAL COOPERATION

As set forth above, there are several legal fronts on which an intergovernmental cooperation effort must be prepared to defend. Often, these legal hurdles are so problematic that talks to effectuate an intergovernmental cooperation agreement are scuttled before they begin in earnest. Listed below, therefore, are suggested legislative solutions that may help in removing some of the legal barriers inhibiting cooperation among municipalities.

### **PERA and Act 312**

Perhaps the most far-reaching, though straightforward, legislative action to increase cooperation would be to amend the Public Employment Relations Act (“PERA”), MCL 423.210 *et seq.*, and Act 312. PERA, which authorizes public-sector employees to organize and enter into collective bargaining agreements, is the principal statute governing disputes involving public-sector labor organizations and government employers. Act 312 generally prohibits striking by police officers and fire fighters, substituting a compulsory arbitration process in lieu of the right to strike. Since PERA and Act 312 cover very similar subject matter, the courts have ruled that they are to be read together.

A number of changes would preserve employee rights while granting local governments more flexibility in aligning functions to need. PERA could be amended, for example, by limiting the scope of unfair labor practice charges that may be levied against the local government employer based on the employer’s conduct related to the creation of an intergovernmental cooperation agreement. The following language should be added to Section 10 of PERA:

(4) Nothing herein prevents or limits a public employer from taking actions necessary to enter into an agreement with another public employer, provided that the agreement complies with the requirements set forth in Public Act 7 and 8 of 1967.

Although arguably unfair labor practice charges could still result, this language would effectively narrow the scope of charges that could be filed. For example, charges that an employer repudiated a collective bargaining agreement by establishing an intergovernmental cooperation agreement could no longer be asserted.

Perhaps more than any other statute, amending Act 312 to give local governments more flexibility under its interest arbitration rules would spur the creation of more intergovernmental cooperation across Michigan in the area where the most money is spent by local government: providing police and fire service. As suggested above, there are several amendments that would improve Act 312 from the standpoint of intergovernmental cooperation.

First, Act 312 should be amended to require the local government and the union to submit their last best offer prior to mediation. Section 3 of Act 312 should be amended to include the following language:

Arbitration under this Section may not be initiated unless each party previously submitted their last best offer to the mediator.

Second, public employers should be able to unilaterally implement the terms of their last best offer after reaching impasse and mediation has been unsuccessful. Thus, Section 13 of Act 312 should be amended to include the following language:

This section is not applicable to the first contract negotiations resulting from the combination, transfer or assumption of functions or responsibilities pursuant to Acts 7 or 8 of 1967, or other applicable law.

Finally, assuming mediation is unsuccessful, Act 312 should be amended to require the arbitrator to select from the last best offer a single economic package as opposed to selecting single provisions from each last best offer. Section 8 of Act 312 should be amended as follows:

At or before the conclusion of the hearing held pursuant to section 6, the arbitration panel shall identify the economic issues in dispute, and direct each of the parties to submit, within such time limit as the panel shall prescribe, but not to exceed 15 days, to the arbitration panel and to each other its last offer of settlement on the economic issues. The determination of the arbitration panel as to the issues in dispute and as to which of these issues are economic shall be conclusive. The arbitration panel, within 30 days after the

conclusion of the hearing, or such further additional periods to which the parties may agree, shall make written findings of fact and promulgate a written opinion and order upon the package of economic issues presented to it and upon the record made before it, and shall mail or otherwise deliver a true copy thereof to the parties and their representatives and to the employment relations commission. As to the economic issues presented, the arbitration panel shall adopt the last offer of settlement on the economic issues which, in the opinion of the arbitration panel, more nearly complies with the applicable factors prescribed in section 9. The findings, opinions and order as to all other issues shall be based upon the applicable factors prescribed in section 9. This section as amended shall be applicable only to arbitration proceedings initiated under section 3 on or after January 1, 1973.

The amendments set forth above would permit intergovernmental cooperation agreements to flourish because they remove the single biggest obstacle: labor unrest.

### **Acts 7 and 8 of 1967**

Much of the difficulty that arises in entering into an intergovernmental cooperation agreement under Act 7 or Act 8 is related to the language in both acts which mandates that “[s]uch employees as are necessary for the operation thereof shall be transferred to and appointed as employees subject to all rights and benefits. These employees shall be given [wages and benefits] in accordance with the records or labor agreements from the acquired system ...” The Acts further state that “no employee ... shall ... be placed in any worse position with respect to [wages and benefits].” The end result is unmanageable multi-layer set of work rules, wages, and benefits established through years of collective bargaining which effectively eliminate the sought after economic efficiencies. The complicated web could be untangled and intergovernmental cooperation could be effectuated more easily with the addition of the following language to Section 5 of Act 7 and Section 4 of Act 8:

For purposes of this Act, the transferred employees shall be subject to the terms and conditions set forth in the then existing collective bargaining agreement of the political subdivision to which the functions and responsibilities have been transferred or acquired. All terms and conditions

of employment shall be immediately applied and the transferred employee shall obtain all the right and benefits under the collective bargaining agreement as if the employee had been an employee of the political subdivision to which the functions and responsibilities have been transferred or acquired.<sup>4</sup>

By imposing the terms and condition set forth in the collective bargaining agreement of the political subdivision to which the functions and responsibilities have been transferred or acquired, multi-layer work rules and non-economic benefits are effectively eliminated. To permit greater employee choice, alternatively, each Act could be amended to allow the employees to elect which collective bargaining agreement to apply upon the transfer of functions and responsibilities. This would avoid multi-layer bargaining and the problematic issues that would arise under Act 312 where an arbitrator would be permitted to select the most favorable provisions from each of the contracts, thus creating a new “mega collective bargaining agreement” with only the “best” terms and conditions.

### **Act 57 of 1988**

Similar to Act 7 and Act 8, Act 57 requires that the authority “immediately ... assume and be bound by any existing labor agreements applicable to that municipal service for the remainder of the term of the labor agreement.” MCL 124.610 The result of such an obligation is identical to that under Acts 7 and 8: an unmanageable multi-layer set of work rules, wages, and benefits established through years of collective bargaining which effectively eliminate the sought after economic efficiencies. To reduce this cumbersome hurdle, the following language could be added to Section 10(3) of Act 57:

When the duties of a municipal emergency service are transferred to an authority, the authority shall assume and be bound by the existing labor agreement applicable to that municipal service of the transferring municipality with the greatest number of employees being transferred to the authority. The authority shall be bound for the remainder of the term of the agreement.

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<sup>4</sup> In addition to this amendment, Section 5 of Act 7 and Section 4 of 8 would need to be revised in a manner consistent with this amendment. In particular, striking the language mandating assumption of current collective bargaining provisions unrelated to wages and pension benefits.

This language modification will help eliminate the problems associated with multi-layer collective bargaining by setting forth a uniform and objective mechanism to determine which terms and conditions shall apply to employees of the new authority. Alternatively, Section 10(3) could be amended to eliminate the fractured contract terms by providing that “the authority shall immediately assume and be bound by the existing labor agreement applicable to that municipal service for no more than six (6) months or until a new collective bargaining agreement is reached, whichever period is shorter. In conjunction with the suggested changes to Act 312, this amendment would ensure that a new authority could begin to function under a single collective bargaining agreement within a relatively short time period.

Although there are other amendments which could help lower the legal hurdles to forming intergovernmental cooperation agreements, the ones discussed above are a good start. Passage of these amendments should increase the likelihood of successful negotiation of an intergovernmental cooperation agreement and ultimately improve government services across the State.

### **Metropolitan Councils Act**

Just as Acts 7, 8 and 57 went before, the MCA requires that a “council shall immediately assume and be bound by an existing labor agreement applicable to those powers or duties for the remainder of the term of the labor agreement.” MCL 124.673. Not surprisingly, the result is identical: an unmanageable web of multi-layer set of work rules, wages and benefits. Similar to Acts 7, 8 and 57, the MCA should be amended to require that the parties reach agreement on a new collective bargaining agreement within six months of creation and assumption of the powers transferred, or the labor agreement of the largest participating municipality shall be implemented until the end of its then existing term.

### **Statutory Changes Not Related to Labor Provisions**

In addition to the foregoing statutory revisions, revision or inclusion of the following statutory provisions would provide local governments with greater flexibility to better align resources to functions:

**1. Lending of Credit.** “Lending of credit” is an arrangement whereby the credit or financial resources of one governmental unit are pledged or committed to the benefit of another local unit. The 1963 Constitution generally prohibits lending of credit between local units; see 1963 Constitution, Art. IX, Sec. 18, and Art. VII, Sec. 26. There are

exceptions where lending of credit is permitted when authorized by statute, however; a common example is the issuance of bonds by a county for the construction of township utility improvements, to which the county's full faith and credit may be pledged. As noted above, the constitution expressly authorizes the Legislature "by general law [to] authorize [local governments] to ... lend their credit to one another or any combination thereof ... in connection with any authorized publicly owned undertaking." 1963 Constitution, Art. VII, Sec. 28. The Legislature has never fully implemented this provision. Both Act 7 and Act 8 should be amended to provide for more generous lending of credit among local governments for public purposes.

**2. Election Law Amendments.** Local officials seeking to implement intergovernmental cooperation in good faith frequently are the targets of political opposition, including recall efforts. The Election Law should be amended to prohibit recall efforts derived from actions by local elected officials in pursuit of intergovernmental cooperation. An example of such language within Section 951 of the Election Law:

Except as provided below, every elective officer in the state, except a judicial officer, is subject to recall by the voters of the electoral district in which the officer is elected as provided in this chapter. A petition shall not be filed against an officer until the officer has actually performed the duties of the office to which elected for a period of 6 months during the current term of that office. A petition shall not be filed against an officer during the last 6 months of the officer's term of office. A petition may not be filed against an officer in respect of actions taken by that officer in his or her official capacity pertaining to or furthering a plan of implementation of intergovernmental cooperation or consolidation. Any petition filed against an officer within 1 year of an action pertaining to or furthering a plan of implementation of intergovernmental cooperation or consolidation shall be presumed to filed in respect of such action. An officer sought to be recalled shall continue to perform duties of the office until the result of the recall election is certified.

**3. Home Rule City Act—Minimum Staffing Requirements.** In a number of cities, charter amendments have been successfully initiated which establish minimum public employee staffing levels (typically police or fire) per capita. Such provisions permit local policy makers very little flexibility in making staffing level decisions. Such requirements should remain within the scope of collective bargaining, and should not be permitted subjects of city charters. Amending section 5 of the Home Rule City Act by adding new subsection (j) would accomplish this change:

Sec. 5. A city does not have power: ...

(j) To adopt a charter or an amendment to the charter which contains a minimum staffing requirement in respect to city personnel.

**4. Enhanced Revenue Sharing.** Michigan does not presently statutorily authorize enhanced revenue sharing in support of intergovernmental agreements or combinations, although the Governor, in her 2007 State of the State message, announced that cities and townships that cooperate this year would be eligible for a 2.5% revenue sharing increase. The upcoming debate over the reauthorization of state revenue sharing provides an opportunity to amend the State Revenue Sharing Act, PA 1971, No. 140, to include direct financial incentives for cooperation.

**5. Tax Base Sharing.** A more aggressive financial model would include statutory tax base sharing<sup>5</sup> (sometimes referred to as “tax base revenue sharing”). Tax base sharing is a mechanism that pools the property taxes of municipalities of a region and redistributes the property taxes collected. The concept has been attempted in Minnesota, New Jersey and Virginia; the “Twin Cities Fiscal Disparities Plan” is the nation’s largest tax-base sharing program. Enacted in 1971, the Plan pools 40% of growth in commercial and industrial property valuation. As of 2000, 140 municipalities were recipients of the redistributed taxes, and 47 municipalities were contributors to the redistributed taxes. Tax base sharing could be accomplished by amendments to the General Property Tax Act, PA 1893, No. 206, or by a separate act.

**6. Boundaries, Annexation and Consolidation.** Cooperation can be made more difficult by irregular municipal boundaries and by annexation strategies. The State Boundary Commission Act, PA 1968, No. 191, is a candidate for review in respect of streamlining the consolidation process.

## CONCLUSION

The economic case for intergovernmental cooperation is clear. Unfortunately, antiquated legislation leaving too many cumbersome holes prevents municipalities from capitalizing on the economic savings intergovernmental cooperation creates. With careful and thoughtful drafting, the principal enabling statutes, Act 7 and Act 8 of 1967, together with Act 57 of 1988, Act 292 of 1989, PERA and Act 312, could be amended in manner that provides sufficient certainty in the accretion of two or more bargaining units

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<sup>5</sup> Act 7 permits a voluntary sharing of local property tax revenues, but such agreements have not seen widespread use. See MCL 124.505a.

without effectively limiting collective bargaining over wages, benefits and other terms and conditions of working. In addition, a number of other statutes bear review in respect of removing barriers to greater cooperation.