

MEMORANDUM

TO: MNWA Board

FROM: Steven Clyde, Dave Tuckett

DATE: June 2, 2023

RE: Participation of Non-Governmental Entities in an Interlocal Agreement

Questions Presented:

- 1) Can a non-governmental entity or a private nonprofit corporation enter into or otherwise participate in the governance of an interlocal entity?
- 2) If so, what limitations or restrictions should be placed on such non-governmental entity's authority or ability to vote, govern, manage or otherwise participate in the governance of an interlocal entity?
- 3) What is required to withdraw from an interlocal entity?

Short Answers:

- 1) While the Utah Code does not expressly prohibit the participation of non-governmental entities in Interlocal Agreements, the nature and powers granted, include those that are generally limited to public entities.
- 2) Given the foregoing, if a non-public entity is allowed to participate in the Interlocal Agreement, its powers and participation should be limited or otherwise constrained such that it is not vested with powers generally reserved for the governmental entities.

- 3) The terms and conditions for withdrawal from the interlocal entity are to be set forth in the agreement and are at the discretion of the parties to the agreement, but generally should pay an equitable and proportionate share of any debt or other expenses incurred while they were a participant in the Interlocal Agreement.

Discussion:

The purpose of the Interlocal Cooperation Act (the "Act") is to "permit local governmental units to make the most efficient use of their powers by enabling them to cooperate with other localities on a basis of mutual advantage..." UCA § 11-13-102. The focus and purpose of the Act is clearly on allowing governmental and/or public entities to collaborate and coordinate for mutual benefit through joint or cooperative undertakings. Specifically, "any two or more Utah public agencies may enter into an agreement to approve the creation of a Utah interlocal entity to accomplish the purpose of their joint or cooperative action" UCA § 11-13-203(2)(a). A public agency is defined to include the typical forms of governmental and quasi-governmental agencies or entities. UCA § 11-13-103(19).

An interlocal entity is expressly defined as a political subdivision of the state and a body politic and corporate that is separate from the public agencies that created it. UCA § 11-13-203(1). As such, an interlocal entity is entrusted with powers that are specifically reserved to governmental entities. For instance, an interlocal entity may issue revenue bonds and impose or collect fees. UCA § 11-13-204. However, an interlocal entity is expressly prohibited from levying, assessing, or collecting ad valorem property taxes. *Id.* Thus, while the Act does not expressly state that non-governmental/public agencies are prohibited from participation in an interlocal agency, it seems unlikely that participation by nonpublic agencies was contemplated by the Legislature.

It would seem difficult to have a non-governmental as a full member of the Interlocal Agency with all the powers of the other member agencies. A "member" of an interlocal entity is defined as a "public agency that, with another public agency, creates an interlocal entity." *Id.* At (15). Each agreement creating an interlocal agency shall "require that [members] to the agreement have the right to appoint or select members of the Interlocal entity's governing board with a majority of the voting power." UCA § 11-13-206(2).

Because of this restriction in the Act, we by agreement of the members had Utah County appoint a representative to the board for SHLCC. This seemed to be a reasonable way around

the Act, and SUWA could be added in the same manner as SHLCC, but that is not what SWUA is asking for in terms of its participation if I understand their concerns correctly.

The alternative arrangement of having the County, as a member, appoint a SHLCC representative to serve on the board has worked, and the limits of SHLCC's participation are set forth in the Participation Agreement. However, we may have pushed the limit in allowing SHLCC a seat on the board and an equal vote with the public entity members, as that agreement has enabled a non-public entity to participate in and occupy a governance position, potentially exercising powers that are not within those granted by statute of a nonprofit corporate entity.

The "members" appointees maintained a majority of the voting power. Our view at the time was that SHLCC's minority position on the board was likely sufficient to insulate the nonpublic agency from exercising governmental powers. However, a question may arise if the director appointed from the nonpublic agency is a deciding vote on any matter brought before the board. Accordingly, any governing documents should attempt to avoid such a situation.

The agreement creating the interlocal entity is required to set forth both the process, conditions, and terms for withdrawal of a participating party and the permissible methods to accomplish partial or complete termination of the agreement. UCA § 11-13-206(1)(e-f). However, there is no guidance as to what these terms, procedures or conditions are to encompass. Likely, they will require some form of financial equalization or true-up, so that the withdrawing member pays their equitable and proportionate share of debts incurred by the Interlocal Agency during their participation. This is required based upon the parties concurrent fiscal and fiduciary responsibilities. Beyond that, however, the parties are likely free to contract.

It may be that the MNWA would benefit from changing its organizational structure from an Interlocal Agency to one of the various local districts authorized by Utah law. It would take time to review the statutes to see if there is one of these local districts that would meet the needs as a replacement for MNWA. Generally, such organizations are not planning or study organizations but are created to implement plans and construct infrastructure using the various financial tools available to each type of local district.

Each type of local district has its own governance structure and prescribed authorities and financial tools available to them, so that each would need to be reviewed to see if there is one that works best in this situation. Alternatively, we continue with MNWA, allow the participation of SWUA as proposed with CUWCD making a board appointment, but possibly amending the Interlocal Agreement to confirm the limits of non-member participants authority to act on the

board. We did provide for participation of non-member entities in specific projects where the nature, extent, and financial contributions of each can be spelled out in project-specific agreements. SWU and SHLCC could then participate or not in each project at their discretion and without impacting the governance of the MNWA by injecting non-governmental entities on the board.

Such an arrangement was not satisfactory to SLHCC at the time, and that is why we contrived the work-around with Utah County appointing an individual to serve on the board representing SHLCC, and why the same approach will work for SWUA by CUWCD making a board appoint for someone to represent SWUA. Whether that meets SWUA's goals and objectives is the question. What is clear however, is that non-governmental entities cannot be full members of an Interlocal Agency.