

Legal Memorandum  
**Home Rule Charter Process**

**Question: What is the process for multiple municipalities to formulate a home rule charter under Act 90 for a vote on municipal consolidation?**

**Answer:** The answer to this question assumes that the consolidation will involve a new home rule charter rather than the extension of an existing home rule charter from one of the original municipalities to cover the entire consolidated municipality.

Act 90 provides very little guidance on the process for creating and implementing a home rule charter in conjunction with a municipal consolidation. Section 734 of Act 90 requires that the governing bodies of each municipality to be consolidated must enter into a joint agreement to consolidate. Section 734(b) specifies the elements which must be included in such a joint agreement. Among these elements are:

“(4) Whether a consolidated . . . . municipality shall be governed by a home rule charter or optional plan of government that has not been previously adopted in accordance with the Home Rule Charter and Optional Plans Law by any of the municipalities to be consolidated . . . , but which . . . in the case of a home rule charter, has been formulated and approved by the governing body of each of the municipalities to be consolidated . . .”

The above-quoted language leaves open both the question of when such a home rule charter must be adopted and the process for adopting it.

With respect to the question of when such a home rule charter must be formulated and approved, Section 734 permits this to be done either before or after the joint agreement. Obviously, in order to be approved by the governing body of each of the municipalities to be consolidated, the home rule charter must be formulated and approved before these existing municipalities go out of existence, though not necessarily before the consolidation is approved at the polls. The Committee must decide whether it is better to have a home rule charter drafted and approved before the vote or after the vote. There are advantages and disadvantages to each. If the home rule charter is drafted and approved prior to the vote, it will be more clear to the voters what it is that they are being asked to accept. It is also more likely that there will be support for the consolidation from the governing bodies of the existing municipalities if they have approved in advance the home rule

charter. On the other hand, where the terms of the home rule charter are set in advance of the vote, opponents may have the opportunity to focus on particular provisions of the charter as a basis for voting down the consolidation, rather than to address the more fundamental question whether consolidation is in the best interests of the community.

In the alternative, a joint agreement may provide that the home rule charter will be formulated and approved by the governing bodies after the vote on consolidation and during the transition before the new government takes over. This process involves a great leap of faith on the part of the voters, since they will not know what exactly their new government will look like. In one way this simplifies the vote, because the focus is solely on the issue of joining the communities. A favorable vote on the consolidation would also inhibit existing government officials from dragging their feet in drafting a home rule charter, because there would be a specific time limitation on their action — the date when the new government takes effect. This procedure also leaves open the question whether a second referendum must be taken to approve the home rule charter which has been adopted by these lame duck governing bodies.

The Committee may wish to consider a third alternative, under which the joint agreement would contain a skeleton outline of the provisions of a home rule charter, the details of which would be formulated and approved by the governing bodies after the consolidation vote.

The second question concerns the process for formulating and approving a home rule charter. Section 734 does not address this question in any respect. Quite obviously, a committee should be formed for this task. Section 734 states that the home rule charter is to be formulated and approved by the governing bodies. Section 734 therefore imposes the duty of drafting such a charter on the governing bodies, and apparently not their delegates (though, as a legal matter, it would seem irrelevant who formulates the charter if the governing bodies ultimately approve it). It also seems implied in Section 734 that the governing bodies of the municipalities share equally in the decision, regardless of the size of each governing body or the population of the respective municipalities. It is therefore suggested that a drafting committee be created, consisting of an equal number of representatives from each of the municipalities.

Once a drafting committee is constituted, it is recommended that the committee use the provisions of the Home Rule Charter and Optional Plans Law as a guide in its deliberations.

I will be pleased to assist in this process if necessary.

Legal Memorandum  
**Ballot Question - Home Rule Charter**

**Question:**

**How would a drafted home rule charter under Act 90 be tied to the ballot question for consolidation, e.g., through the joint governmental agreement, etc.?**

**Answer:**

As noted in the answer to the question regarding the process for formulating the home rule charter under Act 90, a home rule charter may be drafted either before or after the consolidation vote. If it is drafted before the consolidation vote as the question suggests, it should either be contained in full in the joint agreement or be attached to the joint agreement by reference.

Section 734 of Act 90 requires a joint agreement between the consolidating municipalities. This joint agreement must be drafted and signed prior to submission of the ballot question, but there is no requirement that the joint agreement be outlined or even mentioned in the ballot question. Act 90 does not require any specific form of a ballot question regarding consolidation. However, such a ballot question should be worded in clear language which will not be subject to misunderstanding by the voters.

It is recommended that the exact form of the ballot question be specified in the joint agreement between the municipalities. The question could be as simple as: "Shall the Boroughs of Wheatland and Sharpsville and the Cities of Farrell, Sharon and Hermitage consolidate into a single municipality, to be known as the City of \_\_\_\_\_?" The terms of the joint agreement would then be automatically implemented if the majority in each municipality voted in favor of the consolidation.

Even where a home rule charter has been fully drafted by the municipal governing bodies prior to the consolidation vote, as permitted under Section 734, there is no requirement that this drafted home rule charter be separately submitted to the voters for their consideration. In such a circumstances, the fully drafted home rule charter would simply be part of the joint agreement and would be automatically implemented if the ballot question is approved by the voters.

Legal Memorandum  
**Ballot Question - Name**

**Question:**

**Must the question of consolidation include the name of the new municipality?**

Answer:

Section 736(a) of Act 90 states:

“Following initiation of proceedings for consolidation or merger by the procedures set forth either in Section 734 (relating to joint agreement of governing bodies) or 735 (relating to initiative of electors), the question of consolidation or merger as set forth in the joint agreement or initiative petition shall be placed before the electors of each of the municipalities proposed to be consolidated or merged. . .”

Section 734(b)(2) requires the joint agreement of the municipalities to include “the name and the territorial boundaries of the consolidated or merged municipality”. Section 735 requires the initiative petition to contain “the name of the consolidated or merged municipality”. Section 736 does not require a reference to the joint agreement or the initiative petition in the ballot question. Therefore, there is no legal requirement that the name of the new municipality be set forth in the ballot question. However, it is very clear that the name of the new municipality must be established in the joint agreement or in the initiative petition before there is a vote on the ballot question.

Legal Memorandum

**Ballot Question - Schedule of Procedures**

**Question:**

**In addition to the joint governmental agreement, would there need to be a “schedule of procedures” tied to the ballot question?**

**Answer:**

Because of the many details which are usually involved in municipal consolidations or mergers, it is common to have a short ballot question and to attach a detailed schedule of procedures to be followed if the ballot question is approved. The schedule of procedures is not set forth on the ballot but is filed with the county board of elections along with the request to have the ballot question placed on the ballot.

Act 90 requires the governing bodies of the consolidating municipalities to adopt a joint agreement which addresses all major issues involved in the consolidation.

Section 734 of Act 90 requires a substantial list of elements which must be contained in the joint agreement approved by all of the consolidating municipalities. For your information, a copy of Section 734 is attached to this memorandum. It should be noted that Section 734(b) permits the joint agreement to contain other matters in addition to the required elements.

As you will see from reviewing the list, the requirements of a joint agreement are fairly comprehensive. The required elements include a governmental organization structure and a transition plan and schedule applicable to elected officers. While it is possible to have a joint agreement which does not cover all of the potential issues which might be set forth in a schedule of procedures attached to a ballot question, it would make sense that the joint agreement be a complete substitute for the typical schedule of procedures. Then there would be no need for a schedule of procedures.

Legal Memorandum  
**Combining a Joint Agreement and Initiative Petition**

**Question:**

**In the event that a joint municipal agreement is negotiated among all of the municipalities involved but one or more of the governing bodies refuses to sign it, could the citizens of those municipalities who do not sign the joint agreement use the initiative procedure to override their governing bodies? Would this be possible if the joint agreement calls for adoption of a new home rule charter?**

**Answer:**

You will note that I have rephrased your original question to some degree to clarify the issues which these questions involve. As the questions anticipate, there are two separate methods by which a consolidation vote may reach the ballot — joint agreement of the municipal governing bodies (Section 734) or initiative of electors (Section 735).

Section 736(a) of Act 90 states:

“Following initiation of proceedings for consolidation or merger by the procedures set forth either in Section 734 (relating to joint agreement of governing bodies) or Section 735 (relating to initiative of electors), the question of consolidation or merger as set forth in the joint agreement or initiative petition shall be placed before the electors of each of the municipalities proposed to be consolidated or merged. . .”

The language of Section 736 suggests that the joint agreement and initiative petition procedures may be used in conjunction to produce a single ballot question. Although it may be argued that the use of the word “either” in Section 736 suggests that the legislature intended the alternative procedures to be disjunctive — that they can not be used in combination — Article 9, Section 8 of the Pennsylvania Constitution guarantees to the electors of any municipality the right, by initiative and referendum, to consolidate without the approval of any governing body. This right guaranteed to citizens under the Pennsylvania Constitution would supercede any interpretation of an act of the legislature which might limit or impede that constitutional right. A municipal governing body should not be able to block the right of citizens to vote on the issue of consolidation simply by refusing to enter into a proposed joint agreement.

Nevertheless, if one were to pursue a consolidation question by mixing together the joint agreement process with the initiative process, it would be critically important that the initiative petition be exactly consistent with the terms of the joint agreement. Any difference, however minor, would expose the consolidation referendum to a legal action to invalidate it. It is also significant to note that Section 741 of Act 90 grants to the county court the power to order the appropriate municipal governing bodies to implement the terms of any transitional plan and schedule adopted as part of the consolidation referendum process. This means that the proponents of an initiative have the power, through the legal system, to force municipal governing bodies to comply with the will of the voters if a majority favor consolidation.

One of the significant differences between the joint agreement process under Section 734 and the initiative process under Section 735 is that the initiative process makes no provision for the formulation and adoption of a home rule charter. Therefore, if it is the intent of the committee to propose a consolidation under a new home rule charter, the initiative process will not be available to be used in those municipalities where the governing bodies refuse to enter into a joint agreement.

Legal Memorandum  
**Unanimous Approval of Ballot Question**

**Question:**

**Could a joint agreement under Section 734 of Act 90 be set up in such a way that the consolidation would take effect only in those municipalities where a majority of the voters have approved the consolidation and not in those municipalities where the consolidation referendum is defeated?**

**Answer:**

Section 736(b) of Act 90 states:

“Consolidation or merger shall not be effective unless the referendum question is approved by a majority of the electors voting in each of the municipalities in which the referendum is held. If in any one of the municipalities in which the referendum is held a majority vote in favor of consolidation or merger does not result, the referendum shall fail and consolidation or merger shall not take place . . .”

A joint agreement between the municipalities which provides that consolidation shall be effective only in those municipalities in which the voters have approved it, runs afoul of the explicit language in Section 736(b), which requires a majority vote in all of the municipalities in which the referendum is held.

Of course, if the consolidation vote passes in several of the municipalities, those municipalities have the option of immediately readdressing the issue with a new joint agreement and new referendum.

Legal Memorandum  
**Special Tax Districts**

**Question:**

**Could the Home Rule Charter provide for special districts with differing levels of taxes and services?**

**Answer:**

This question actually has two aspects — taxes and services.

With respect to taxes, Article 8, Section 1, of the Pennsylvania Constitution provides:

“All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws”.

This provision has long been held to apply to municipalities as well as the legislature. *YMCA v. City of Philadelphia*, 139 Pa. Super 332, 11 A. 2d. 529 (1940).

The test for determining whether a tax meets the uniformity requirement is whether there exists a reasonable distinction and difference between classes of taxpayers sufficient to justify different taxation. The classification must be nonarbitrary, as well as reasonable and just. *Brown v. Department of Revenue*, 155 Pa. Cmwlth. 197, 624 A. 2d. 795 (1993). The uniformity clause does not require absolute equality and perfect uniformity in the imposition of a tax. *City of Pittsburgh v. Commonwealth*, 522 Pa. 20, 559 A. 2D. 513 (1989).

Establishing different tax districts merely for the purpose of maintaining the tax rates which existed in the separate municipalities prior to consolidation would probably be a clear violation of the uniformity clause. In order to maintain different general fund tax rates in the different districts, the municipality must be prepared to demonstrate that there is a clearly-defined distinction between the districts which justifies the variation in tax rates. In considering the adoption of such a plan, the following issues should be carefully scrutinized:

Is there a direct and quantifiable relationship between the lower (or higher) taxes in one district than in another? For example, is there a different type of governmental activity conducted in the district which has a different tax level, and can the different amount of tax be calculated and identified specifically to that different activity.

In the district in which the different taxation is levied, does the reason for the difference apply to all of the taxables in the district? For example, where a district has a larger property tax in order to fund a service not available in other districts, is that service available equally to all properties within the district?

Even where one can construct a logical argument to justify nonuniform tax rates, such a plan may embroil the consolidated municipality in some extended and uncertain litigation. If such a nonuniform plan is found to be in violation of the uniformity clause, then the consolidated municipality will be required to refund substantial revenues to some of the taxpayers who were overtaxed, created an unfunded liability and a significant budget problem.

With respect to services, the analysis is quite different. Where there is a direct relationship between a service provided by the municipality and the charge made by the municipality for this service, then the uniformity clause does not apply. Pennsylvania law has recognized the propriety of creating districts to provide services such as sanitary sewer, water and street lights. The Second Class Township Code allows for the creation of police protection districts, where the properties within the district are assessed by the front foot for the cost of providing police protection. One practical issue which must be considered if a plan is developed for assessment for services which are special to a particular district is the procedure for collecting the assessments. Such an assessment is probably not considered to be a "tax" for which tax collectors would traditionally have collection responsibilities. The municipality will therefore be responsible for developing a system for the collection of these assessments, which would be separate from the customary tax bills, creating additional administrative expenses.

Legal Memorandum  
**Post Offices**

**Question:**

**If municipal governments in the Shenango Valley were to be consolidated, how would this change impact the post offices?**

**Answer:**

The United States Post Office is a quasi-governmental agency created by the federal government. The designation of delivery areas by the United States Post Office is not directly governed by state or municipal action. Therefore, the proposed consolidation need not result in any change in the service areas of the local post offices.

Presumably, when the consolidated municipalities receive a common name, the names of the post offices will also change, though the zip codes may remain the same. An example is the consolidation of Northern Cambria in Cambria County. Prior to consolidation, the neighboring communities of Barnsboro and Spangler had separate post offices. After the consolidation, the post offices continued to operate with the same zip codes but both of the names of the post offices were changed to Northern Cambria. Because the post offices operate independently of any state or local regulation, consolidation will not directly affect post office operations.

Legal Memorandum  
**ELECTION DISTRICTS**

**Question:**

**Could the home rule charter call for one time, election districts for the elected legislative officials with initial unequal populations in the districts based on the boundaries of some or all of the former municipalities? Could this initial inequality of the districts be remedied based on a future apportionment applying to future elections? If the answer to this is “no” is it possible for the home rule charter to call for interim appointments to the new legislative body to be made by the former governments before they cease to exist?**

**Answer:**

The United States Supreme Court has determined that in all cases involving the election of representatives for general government purposes, including municipal governments, the principle of “one person, one vote” must be applied. *Reynolds v. Simms*, 84 S. Ct. 1362, 377 US 533 (1964). The essence of the “one person, one vote” rule is that all citizens have a right under the equal protection clause of the Fourteenth Amendment of the United States Constitution to have their vote counted equally in the election of the representatives of their government. Therefore, any plan which does not make a reasonable attempt to achieve equality of votes throughout the municipal government risks a violation of this standard.

In a number of cases the United States Supreme Court has backed away from a strict construction of the “one person, one vote” rule by recognizing that mathematical exactitude can not be achieved and there may be legitimate reasons which will permit modest deviations from the requirement of equal populations in voting districts. *Hadley v. Junior College District*, 397 US 50, 90 S. Ct. 791 (1970); *Abate v. Mundt*, 403 US 182, 91 S. Ct. 1904 (1971). It is also apparent from the cases that the Supreme Court is more tolerant of larger deviations at the municipal level than at the federal or state level. The Supreme Court has approved a deviation of 16.4% where the reason was to follow existing political subdivision boundaries. *Mahan v. Howell*, 410 US 315, 93 S. Ct. 979 (1973). Deviations are suspect particularly when they discriminate in favor of or against a particular group (for example, a minority or a rural area). Therefore, the task before the Committee is to design an election district system that, as mathematically close as possible, meets the “one person, one vote” requirement and that at the same time does not create a reason for a particular constituency to argue that it has been singled out for discrimination.

As you probably realize, the large disparity in populations between the existing municipalities creates significant mathematical problems in developing an apportionment system which uses the current municipal boundaries. Since Wheatland Borough has only 748 residents according to the 2000 Census, the consolidated municipality would need to create a legislative body with 58 representatives in order to provide that Wheatland Borough be able to elect a single representative to the governing body. Therefore, the proposal to base election districts in the consolidated municipality on the old municipal boundaries will not meet the constitutional standard without some adjustments.

One possible adjustment might be to combine Wheatland Borough into an election district created from one of the other municipalities. Geographically, the logical choice would be a combination with the City of Farrell, since these two municipalities are contiguous. As an example of how the elected governing body might be apportioned in such a situation, consider the following example:

<u>District</u>	<u>Population</u>	<u># of Representatives</u>
Wheatland Borough & City of Farrell	6,798	2
City of Sharon	16,328	4
City of Hermitage	16,157	4
Borough of Sharpsville	<u>4,500</u>	<u>1</u>
	43,783	11

The above scenario would result in the following deviations from ideal population distributions:

<u>District</u>	<u>Actual Population</u>	<u>Pop./Rep.</u>	<u>% Deviation</u>
Wheatland/Farrell	6,798	7,960	-14.6%
City of Sharon	16,328	15,920	+2.5%
City of Hermitage	16,157	15,920	+ 1.5%
Sharpsville	4,500	3,980	+ 11.5%

The above scenario results in the combined district of Wheatland and Farrell being over-represented and the Borough of Sharpsville being somewhat under-represented. This situation results in a maximum deviation of approximately 26.1%. While this is beyond the deviation limits which have been approved by the United States Supreme Court, if the above apportionment plan were to be only a transitional plan for a few years, it would have a greater

likelihood of overcoming a court challenge. As noted above, the Supreme Court has given wider latitude for municipal apportionment than for the apportionment of state and federal election districts.

Another alternative might be to combine Wheatland Borough with the Borough of Sharpsville, even though these two districts are not contiguous. A possible scenario under these circumstances would be as follows:

<u>District</u>	<u>Population</u>	<u># of Representatives</u>
Wheatland and Sharpsville Boroughs	5,248	1
City of Sharon	16,328	3
City of Hermitage	16,157	3
City of Farrell	<u>6,050</u>	<u>1</u>
	43,783	8

Under the above scenario, an additional number of representatives (such as 3 or 5) could be elected at large throughout the consolidated municipality in order to create an uneven number of representatives, which is typical of municipal governing bodies.

Under this second scenario, the deviations from ideal population distributions (maximum 14.6%) will come within the standards which have been accepted by the courts:

<u>District</u>	<u>Actual Population</u>	<u>Pop./Rep.</u>	<u>% Deviation</u>
Wheatland/Sharpsville	5,248	5,472	+ 4.0%
City of Farrell	6,050	5,472	- 10.6%
City of Sharon	16,328	16,416	+ 1.1%
City of Hermitage	16,157	16,416	+ 1.6%

A third alternative might be to combine Wheatland Borough with the City of Hermitage with the following representation:

<u>District</u>	<u>Population</u>	<u># of Representatives</u>
Sharpsville Borough	4,500	1
City of Sharon	16,328	3
Hermitage/Wheatland	16,905	3

City of Farrell	<u>6,050</u>	<u>1</u>
43,783	43,783	8

Under this third scenario, an additional number of representatives (such as 3 or 5) could be elected at large throughout the consolidated municipality in order to create an uneven number of representatives.

Under this third scenario, the deviations from ideal population distributions are somewhat greater than under the second alternative:

<u>District</u>	<u>Actual Population</u>	<u>Pop./Rep.</u>	<u>% Deviation</u>
Sharpsville	4,500	5,472	+17.8%
City of Farrell	6,050	5,472	-10.6%
City of Sharon	16,238	16,416	+ 1.1%
Hermitage/Wheatland	16,905	16,416	- 3.0%

As the above scenarios demonstrate, it is reasonably possible to create election districts using the old municipal boundaries, provided that the voters of the Borough of Wheatland will agree to be merged into one of the other communities. Though there appears to be no case law on the issue, it would be my opinion that the courts would look more favorably upon a larger deviation which represents a temporary transition from the old municipalities to the newly consolidated one.

This leads to the second question whether an initial inequality in the districts could be remedied on the basis of a future apportionment applying to future elections. This very possibility is recognized under Section 2941 of the Pennsylvania Home Rule Charter Law, which sets forth a specific procedure for organizing a reapportionment committee in a home rule community. A copy of Section 2941 is attached to this memorandum for your information.

Your final question was whether it is possible under a home rule charter to provide for the interim appointment of a governing body by the former governing bodies before they go out of existence. If such a plan were contained in a home rule charter set up under a joint consolidation agreement under Act 90, it would be possible to establish a transitional government in such a way. However, such a transitional government still faces the same constitutional requirement of “one person, one vote”, as any other method of selecting the government body. The Supreme Court has held that the creation of unequal voting districts through a referendum is not permissible. *Lucas v. 44<sup>th</sup> General Assembly*, 377 US 713, 84 S. Ct. 1459 (1964). While a transitional appointed governing body followed by the appointment of a reapportionment committee under the Home Rule Charter Law will likely may survive a court challenge, it will also force the community to go through two transitions (first, consolidation and then, redistricting) within a very short period of time, which may bring more controversy than the

community is able to bear. It is an alternative that should be considered only if a fair appointment plan can not be formulated.

December 12, 2001

Shenango Valley Intergovernmental Study Committee  
c/o Pennsylvania Economy League - Northwest Division  
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Erie, Pa. 16501-2312

Gentlemen:

You have sought my advice regarding the following questions:

- **How will the proposed consolidation of the Cities of Sharon, Farrell and Hermitage and the Boroughs of Sharpsville and Wheatland affect the distribution of state funds under the Foreign Fire Insurance Tax Distribution Law to the various fire departments within these existing municipalities?**

This question actually has two parts:

What effect would consolidation have on the total amount of funds distributed by the state to these municipalities; and

What effect would consolidation have on the distributions to the individual fire companies?

With respect to the first question, Section 704 of the law contains a distribution formula for each municipality which is based on both population and market value of real estate. Since the population and the market value of real estate for the consolidated municipality will be the same as the aggregated population and market value of real estate for the five municipalities, there should be no effect on the total distribution which will be made under the law to the consolidated municipality. In other words, the total distribution of funds by the state will be the same, whether the municipalities receive the money separately or whether the monies are received by a single, consolidated municipality.

The answer to the second question is more complex. Section 706 of the Distribution Law requires that each municipality certify to the Auditor General whether the municipality is served solely by paid firefighters, solely by volunteer firefighters or by both paid and volunteer firefighters. In a case where a municipality is served by both paid and volunteer firefighters, the municipality must also determine the portion of the "actual fire protection service" which is provided by the paid firefighters and the portion provided by the volunteer firefighters. The Distribution Law does not define what it means by "actual fire protection service", nor does the law set forth a formula for distinguishing between the

service provided by paid firefighters and the service provided by volunteer firefighters. I consulted on this issue with the Auditor General's office and was advised that the determination of the portions is within the discretion of the municipality.

Section 706(b)(3) of the Distribution Law further provides that, in municipalities having both paid and volunteer firefighters, the foreign fire insurance funds are to be divided between the paid firefighters and the volunteer firefighters in the same proportion as their shares of "actual fire protection service", as certified by the municipality; provided that the minimum to be distributed to paid firefighters is \$1,100 per paid firefighter.

It is my understanding that in the Shenango Valley area the municipalities are served in the following manner:

1. In the City of Sharon, by a paid fire company;
2. In the City of Farrell, by a combination of paid and volunteer firefighters;
3. In the City of Hermitage, by two separate volunteer departments, with a paid fire marshal and a paid assistant fire marshal;
4. In the Borough of Sharpsville, by one volunteer fire department;
5. In the Borough of Wheatland, by one volunteer fire department.

Assuming that the citizens of Shenango Valley desire to retain their existing fire departments and desire to continue receiving fire protection services in the same manner as before consolidation, then the consolidated municipality will be served by both paid firefighters and volunteer firefighters, so that Section 706(a)(3) and Section 706(b)(3) will apply.

The governing body of the consolidated municipality therefore can apportion its calculation of "actual fire protection service" between the paid firefighters and the volunteer firefighters in such a manner that each of the existing fire companies will continue to receive the same distributions as they had received prior to the consolidation.

Furthermore, the governing bodies of the five current municipalities have the ability to guarantee that the same distributions will continue to the existing fire companies after consolidation. Under Section 733 of the Municipal Consolidation or Merger Act, 53 Pa.C.S.A. Section 733, a consolidation of municipalities may occur either by joint agreement of the governing bodies, approved by ordinance, or by initiative of the electors. If consolidation proceeds on the basis of a joint agreement of the governing bodies of the five municipalities, then the continued distribution of these foreign fire insurance funds in the same manner as before consolidation is a matter which may be fixed in the joint agreement and therefore binding on the new municipality.

- **Will the new municipality be required to have a paid fire department to serve the entire municipality or, conversely, will the new municipality be required to eliminate the paid fire company so that all municipalities have the same method of fire protection service?**

It is my understanding that a majority of citizens in each of the current municipalities is satisfied with the manner in which they currently receive fire protection services, so that there is unlikely to be an impetus from the consolidation effort to change the method of service. However, some citizens may argue that the providing of fire protection services in one part of the consolidated municipality by paid firefighters and in other parts by volunteer firefighters constitutes discrimination in violation of the equal protection provisions of the federal and Pennsylvania constitutions.

The decision as to whether any particular situation involves a violation of a constitutional provision is made by the courts of the Commonwealth of Pennsylvania or by the federal courts. My research has failed to disclose any cases in the Pennsylvania appellate courts or in the federal courts having jurisdiction in Pennsylvania that have held that providing different forms of fire protection services to different parts of a municipality constitutes a denial of equal protection or is discriminatory. Anyone familiar with municipal government understands that services are not always uniform throughout a municipality, particularly where the municipality has a mixture of urban and rural areas. In the absence of any clear precedent, the only conclusion which we can reach is that it is highly unlikely that a court will find that a violation of the equal protection provision will occur if the current form of fire protection services continue to be provided in the various parts of the proposed, consolidated municipality. I come to this conclusion for the following reasons:

6. There is nothing in the Municipal Consolidation or Merger Act which requires that municipal services be provided uniformly throughout the consolidated municipality. A consolidation may be commenced by a joint agreement of the governing bodies of the municipalities. Under Section 734 of the Municipal Consolidation or Merger Act, there are certain provisions which must be covered by a such a joint agreement. In particular, Section 734 requires a uniform tax system and uniform enforcement of ordinances. However, Section 734 says nothing about uniformity of municipal services.
7. General municipal law of Pennsylvania prohibits a municipality from replacing a volunteer fire company with a paid fire company unless a

majority of the voters in the municipality have voted in favor of the change. *53 P.S. Section 2832.*

8. The Pennsylvania Constitution itself says nothing about a requirement of uniformity in providing municipal services. This should be contrasted with Article 8, Section 1, of the Pennsylvania Constitution, which requires that all taxes shall be uniform within the territorial limits of the authority levying the tax. This uniformity provision has been applied in many cases to strike down nonuniform taxes levied by municipalities.
9. The recognized test for determining whether a particular municipal act or system is discriminatory (or a violation of the equal protection provision) is whether the classification possesses some legitimate distinction which provides a reasonable and concrete justification for differential treatment. *Leonard v. Thornburgh*, 489 A. 2d. 1349 (1985); *Barner v. Juniata County Tax Claim Bureau*, 522 A. 2d. 169 (1987). This is commonly referred to as the “rational basis” test. It is first significant to understand that no citizens in the consolidated municipality will be denied fire protection services. The information which has been supplied to me suggests that the quality of fire protection services provided to individual citizens within the Shenango Valley area is not affected by the status of the firefighters as paid or volunteer.
10. As noted above, the Pennsylvania Constitution requires uniform taxation across the territorial limits of a municipality. In a consolidated municipality where paid firefighters are paid from general taxes, those citizens who receive volunteer fire company services may argue that it is discriminatory that their taxes are being used to support a paid fire company when they do not receive services from that paid fire company. There are a number of logical errors in such a statement. First, it is assumed that all of the fire companies within the consolidated municipality will be participants to a mutual aid pact, under which all of the fire companies are pledged to provide fire protection services as needed throughout the entire municipality. Second, the principal purpose of fire fighting services is the protection of life and property. Particularly with respect to property, to the extent that a fire company in one part of the consolidated municipality saves a property from destruction, all citizens throughout the municipality are benefitted equally from that action which saves the building from being removed from the tax rolls.

For the reasons above stated, it is my opinion that the continuation of the existing fire companies, whether paid or volunteer, within the consolidated municipality

will be constitutionally valid. However, it is likely that the use of tax money to support the paid and volunteer fire companies will be a sensitive issue at the time of the vote on consolidation. It is recommended that this issue be explored and addressed fully in the joint municipal agreement.

- **Is it possible to create separate municipal districts for fire protection services and levy differing tax rates in these districts to accommodate the different kinds of fire protection services provided?**

Article 8, Section 1, of the Pennsylvania Constitution states:

“All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.”

This uniformity provision has been applied in many cases to municipal tax systems. It requires that municipalities levy taxes in a uniform manner. There have been a number of court cases in which it has been claimed that a municipal tax was not uniform and therefore unconstitutional. In some of these cases, the courts have pointed out that absolute equality and perfect uniformity in taxation are not required. Rather, the test is whether the classification is based upon some legitimate distinction between the classes that provides a nonarbitrary and “reasonable and just” basis for the difference in treatment. *Leonard v. Thornburgh*, 489 A. 2d. 1349 (1985). However, all of these cases involved distinctions between types of taxpayers and not between districts within a single municipality. The language in Article 8, Section 1, of the Pennsylvania Constitution which requires uniformity “within the territorial limits of the authority levying the tax” would seem to impose an additional burden on taxing bodies beyond the issue of classifying tax payers.

It may be argued that the cost of providing paid fire protection services in specific districts could be treated as a service fee, rather than a tax. However, at least one Pennsylvania court has already decided that the levy of a service fee for police and fire services is really a tax. *City of Washington v. Washington & Jefferson College*, 25 D&C 4<sup>th</sup>. 13 (1995).

A review of the recently-amended Second Class Township Code is also instructive on this issue. The Second Class Township contains various provisions which allow the township supervisors to create separate districts within the township to provide police protection, refuse collection, sanitary sewer systems, water systems, and street lighting. In each case, the Code permits the township to levy assessments against properties by the foot front or benefit rules for the cost of providing these services. None of these provisions allow for a general tax for such purposes. The Second Class Township Code, like all other municipal codes, permits the levy of general and special taxes. In Section 3207 of the Code, 53 P.S. Section 68207, the Code specifically prohibits “the levy of any taxes upon particular districts or parts of any township for particular purposes.” the Township Code implicitly recognizes the prohibition imposed by the Pennsylvania Constitution against setting up special tax districts.

For all of the above reasons, it is my opinion that it is probably not constitutionally permissible for a Pennsylvania municipality to levy different taxes in different districts within the municipality, even for a particular purpose. In the present case, serious concerns about the legality of creating special districts for tax purposes should make this a method of last resort in addressing issues of inequality in any consolidation.

I hope that the above information is useful in your deliberations. I will be pleased to meet with you to further discuss these issues.

Very truly yours,

Thomas G. Wagner

TGW/dlh

May 1, 2002

Shenango Valley Intergovernmental Study Committee  
c/o Pa. Economy League - Northwest Division  
113 Boston Store Place  
Erie, Pa. 16501-2312

Gentlemen:

This letter is a supplement to my opinion letter issued December 12, 2001, regarding fire protection services in the proposed, consolidated municipality. In Sections 2 and 3 of that letter I addressed the questions as to whether a common level of first protection services (paid or volunteer) must be provided throughout the consolidated municipality and whether differing tax rates could be levied in those parts of the consolidated municipality which receive greater fire protection service. In an attempt to clarify these issues, I will address the following questions.

**1. Is it legally permitted to divide the consolidated municipality into separate fire protection districts?**

Yes. There is no prohibition in the Pennsylvania Constitution or in Pennsylvania statutes against creating fire protection districts. As I pointed out in my December 12, 2001, letter some municipal codes specifically recognize the possibility of creating separate districts in a municipality to provide services. It is recommended that the joint municipal agreement which precedes the consolidation and any proposed home rule charter contain a section authorizing the creation of these special districts in order to eliminate any question about the power of the municipal governing body to do so.

**2. Is it legally permitted to have different levels or types of fire protection services within different districts in a consolidated municipality?**

Yes. There is no prohibition in the Pennsylvania Constitution or in Pennsylvania statutes against providing different levels of municipal services in separate areas of a municipality. In fact, this is a common practice in Pennsylvania municipalities having combined urban and rural areas. Some typical examples might be leaf collection, recyclable collection and methods of road maintenance.

Although the law may not require uniformity of service, one must still recognize the political ramifications of providing different levels of service — many taxpayers believe that if they pay the same taxes they should receive the same services as everyone else.

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- **If separate fire protection districts are established, can the municipality levy different tax rates in the districts to support the differing level of services?**

No. Article 8, Section 1 of the Pennsylvania Constitution states:

“All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax. . . “

Therefore, any tax in the consolidated municipality, whether it is a real estate tax or a tax levied under Act 511, must be uniform throughout the entire municipality.

4. **If fire protection districts are established and a uniform tax is levied throughout the municipality for fire protection services (either general fund millage or special tax millage), must the municipality divide these funds equally between the fire protection districts?**

No. As discussed above, a municipality has no constitutional or statutory requirement to equally divide its revenues throughout the entire municipality. While it is possible that a taxpayer may claim that an unequal division of funds, accompanied by an unequal level of services, is discriminatory, I am advised that the level of fire protection services is relatively equal among the existing municipalities and presumptively will remain relatively equal if fire protection districts are created in the consolidated municipality.

This answer does not address the political issues which may result if one part of the consolidated community believes that it is being short changed by a system of fire protection districts.

I hope that this letter clarifies my previous opinion. If you have more questions, please get in touch with me.

Very truly yours,

Thomas G. Wagner

TGW/dlh

May 3, 2002

Shenango Valley Intergovernmental Study Committee  
c/o Pa. Economy League - Northwest Division  
113 Boston Store Place  
Erie, Pa. 16501-2312

Gentlemen:

This letter is a supplement to my previous memoranda dated December 12, 2001, and May 1, 2002. You have asked the following additional question:

**If it is not possible to levy a special tax in fire protection districts, could the consolidated municipality have separate service fees for the separate fire protection districts?**

Pennsylvania law provides no clear answer to this question.

In the case of *City of Washington v. Washington & Jefferson College*, 25 D&C 4<sup>th</sup>. 13 (1995), the Washington County Common Pleas Court held that a service fee charged for police and fire protection services was actually a tax, rather than a fee. The Common Pleas Court pointed out that Pennsylvania Courts have long held that any municipal charge for the purpose of raising revenue is a tax. As I pointed out in the previous memoranda, the Pennsylvania Constitution requires that all taxes be levied uniformly throughout the territorial limits of a municipality. Therefore, if a service fee is considered to be a tax, then the service fee must be the same throughout the municipality; and a municipality may not charge different service fees in different districts within the municipality. The decision by the Washington County Court is not binding on the other courts within the Commonwealth. Therefore, it is always possible that your county court may disagree with the reasoning applied in Washington County and come to a different conclusion.

In my December 12 memorandum I also described certain provisions of the Pennsylvania Second Class Township Code which allowed for the assessment of properties within a designated district for specific services, such as police protection. These provisions of state law would suggest that it is possible to have a service fee in a special district. However, the Township Code provisions only allow for the assessment of that fee by the front foot or benefit method and not by a general millage tax within the district. It is also significant to note that the Township Code, at 53 P.S. Section 68207 specifically prohibits "the levy of any taxes upon particular districts or parts of any township for particular purposes."

**I believe it would be possible to establish separate fire protection districts and levy a service fee that is not based upon a millage tax. However, there is a serious risk that such a scheme**

**would not survive a challenge in the courts. Therefore, it is a process which ought not to be pursued unless there are no other viable alternatives.**

Legal Memorandum  
**School Districts**

**Question: If the five municipal governments of the Shenango Valley were to be consolidated, how would this change legally impact the four school districts that currently serve the land areas of the five municipalities?**

Answer: School districts are separate and independent legal entities from the municipalities in which they are located. *In Re: Annexation by Borough of Irwin, 165 Pa. Super 134, 67 A. 2d. 765 (1949)*. School districts are agencies of the legislature and have only those powers which are granted by statute, specifically or by necessary implication. *Parents United for Better Schools, Inc. v. School District of Philadelphia, 978 F. Supp. 197 (E.D. Pa. 1997), aff'd 148 F. 3d. 260; Wilson v. School District of Philadelphia, 328 Pa. 225, 195 A. 90 (1938)*. The character and powers of school districts are set forth in the Public School Code, 24 P.S. Section 1-101 et seq.

Neither the Municipal Consolidation and Merger Act (“Act 90”) nor the Public School Code specifically address what will occur to school districts as the result of a municipal consolidation under Act 90. The language in the Public School Code which most closely addresses this situation is Section 293.2, which states:

“Whenever the court of common pleas in any county orders the consolidation of any municipalities, it shall serve a copy of its order on the State Board of Education. Upon receipt of such order the Board shall direct the Council of Basic Education to make such changes in county plans as may be necessary.”

Although the above-quoted language does not apply to Act 90 consolidations, it demonstrates that where a municipal consolidation occurs, the effect that the consolidation will have on school districts will largely be determined by the Council of Basic Education.

Section 201 of the Public School Code provides that “all school districts shall remain as now constituted until changed as authorized by this Act. . .” This language suggests that a municipal consolidation will not automatically cause any changes in the school districts, but rather some action must be taken by the state.

Section 201 also provides that each separately constituted municipality in the Commonwealth should constitute a separate school district, provided that where the creation of a new municipality would result in the creation of a school district of the third or fourth class, the smaller school district would not be automatically created but would first require the approval of the Council of Basic Education. This language suggests that the Public School Code disfavors smaller school districts. A school district of the third class must have a population of 5,000 or more but less than 30,000. A school district of the second class has a population of 30,000 or more but less than 350,000. In light of the language of Section 201 and the population requirements of the Public School Code for district classification, it would appear that the proposed consolidation in Shenango Valley is unlikely to create any change in the school districts.

In an effort to clarify this issue, I have contacted the Pennsylvania Department of Education. When a response is received from the Department, I will forward it to you.

Even if it is unlikely that there will be any change in school district status because of a consolidation, there will be some immediate practical problems which will need to be resolved:

11. With a consolidation, the municipal boundaries which generally establish the boundaries for school districts will be erased. This creates a potential problem for conducting elections of school board members. Unless the election districts within the consolidated municipality are kept consistent with the school district boundaries, it will be difficult and confusing to conduct an election for school board members, since some voters will be voting for board members in one district and other voters in the same election district would be voting for school directors in a different district. It is my understanding that it is possible at reasonable expense to segregate ballots in an election district so that each voter has a ballot corresponding to his school district election. It should also be noted that Section 303(b)(3) of the Public School Code requires that in districts where school board members are elected by region, the regions must be of relatively equal population.

12. One area in which school districts and municipalities overlap is in the levy of certain taxes under the Pennsylvania Local Tax Enabling Act (Act 511), such as earned income, occupational privilege and per capita taxes. Section 8 of the Local Tax Enabling Act imposes limits upon these taxes and requires that the taxes be shared between political subdivisions which have overlapping taxes. As a result, in the consolidated municipality every taxpayer would pay the same rate for each municipal tax, yet the consolidated municipality may receive different amounts from different taxpayers, depending whether the school districts in which these different taxpayers are located levy the same rate and types of these Act 511 taxes.

This memorandum is not intended to comprehensively address all of the issues which may relate to the school districts as a result of a municipal consolidation. There may be other significant issues unique to the locale. Any proposed consolidation plan should be reviewed with representatives of the various school districts so that any unforeseen complications may be addressed in the joint municipal agreement and prior to the referendum.

**Question:** Can the citizens through initiative petitions, or the governments through resolution or ordinance, place a non binding, advisory referendum question on the election ballot pertaining to a future binding vote on municipal consolidation?

**Answer:** In the case of *Board of Elections of Schuylkill County v. Blythe Township*, 600 A. 2d. 231 (1991), the Pennsylvania Commonwealth Court held that “. . . unless there is a specific statute authorizing a non-binding referendum a board of elections is without power to place such a question on the ballot. Representative government and the legislative process demands such a result.”

There is no specific statutory authority or provision of the Pennsylvania Constitution which authorizes non-binding referenda on issues related to municipal consolidations. Therefore, the County Board of Elections does not have the power or discretion to permit such questions to be placed on an election ballot.

There have been a number of reported court cases, all of which predate the *Blythe Township* case, in which non-binding referenda have survived court challenges. In all of those cases it appeared that the ballot question was formulated by a municipality and was placed on the ballot by the County Board of Elections without objection. One can therefore envision a situation in which the governing bodies of the municipalities draft such a non-binding referendum question, the question is submitted to the County Board of Elections, the County Board does not object to placing the question on the ballot, and no taxpayers or municipalities file any legal challenges to the placement. In such a scenario, a non-binding referendum could occur.

However, it is important to note that under the Pennsylvania Election Code the County is responsible for the costs of administering all ballot questions, and therefore the County would bear the considerable expense of placing a non-binding referendum on the ballot. In this era of tight government budgets, any party interested in pursuing such an uncertain path should first make sure that the County itself is willing to undertake this cost.

It would also seem logical that such a process could not be accomplished by initiative petition, which assumes that the governing bodies themselves would be unwilling to act on the matter. If a governing body is not willing to submit such a ballot question, then it is likely that the same governing body would object to placement of the question on the ballot by initiative petition.

Finally, there remains the difficult issue of determining what the results of any ballot question mean. Unless the electorate is presented with a definitive plan for

consolidation and unless there is a detailed public relations campaign, one will never know what factors compelled the electorate to vote in a certain way on the referendum question, leaving no guarantee that the vote will be replicated when the binding referendum vote follows.

Perhaps, under the current circumstances, funds might be better spent by hiring a qualified agency to conduct a poll, which is likely to produce a more useful analysis of the public's thoughts on the issues.

Question:

Is the Shenango Valley Intergovernmental Study Commission subject to the provisions of the Pennsylvania Sunshine Act?

Answer:

No, the Committee is not subject to the provisions of the Sunshine Act.

The Sunshine Act applies only to agencies, as defined under the Act. 65 Pa.C.S.A. Section 703. An "agency" is defined as: "The body, and all committees thereof authorized by the body to take official action or render advise on matters of agency business . . . of any political subdivision of the Commonwealth . . . or similar organizations created by or pursuant to a statute which declares in substance that the organization performs or has for its purpose the performance of an essential governmental function and through the joint action of its members exercises governmental authority and takes official action."

Therefore, in order be an "agency" covered by the Sunshine Act, the organization must:

- A. be a committee of the governing body; and
- B. have the purpose and ability to take official action.

It has been held in a number of reported court cases that a review or advisory committee is not an "agency". *Ristau v. Casey*, 647 A. 2d. 642 (1994); *Gowombeck v. City of Reading*, 48 Pa. D&C 3d. 324 (1988).

It is my understanding that the Committee does not consist merely of elected officials and has no authority to take any official action. At best, it can only make recommendations to the various municipalities in the Shenango Valley area. Therefore, the Committee does not have the characteristics which would make it an organization which performs an essential governmental function or takes official action.

This opinion letter should not be taken as a recommendation that the Committee conducts its deliberations behind closed doors. The Committee must consider whether private deliberations may create an air of distrust among the public and with the media which may adversely affect the credibility of the Committee and its recommendations.

Very truly yours,

/s/ Thomas G. Wagner

TGW/dlh

Subject: Shenango Valley Intergovernmental Study Commission  
Date: Tue, 9 Jul 2002 15:24:55 -0500  
From: "Meyer & Wagner" <meyerwagner@ncentral.com>  
To: "Alan Kugler" <pel@erie.net>

Gentlemen:

You have requested my opinion regarding the following question:

Question:

Is the Shenango Valley Intergovernmental Study Commission subject to the provisions of the Pennsylvania Sunshine Act?

Answer:

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Tom Wagner