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## CONFIDENTIAL MEMORANDUM

To : Princeton Transition Task Force

From : William John Kearns, Jr., Attorney

Re : *Municipal Positions*

Date : March 14, 2012

I have been asked by the Princeton Transition Task Force to review the enabling statutes with a focus on leadership positions for the new consolidated Princeton, and to address the tenure protections available to certain employees.

For convenient reference, when I refer to Princeton, that will mean the new consolidated municipality. When I refer to the existing municipalities, I will use the terms Borough or Township.

I offer the following comments for your consideration.

First of all, the Municipal Consolidation Act, *N.J.S.A. 40:43-66.35*, et seq, provides the statutory framework for the consolidation of municipalities.

The consolidation referendum provided for the establishment of the consolidated Princeton, with the Borough form of government as of January 1, 2013, with the new Mayor and Council to be elected at the General Election in November, 2012.

It should be clearly understood that the consolidation does not create a “new” municipality, starting from scratch. It is a “consolidated” municipality building on both the Borough and the Township.

The consolidated municipality assumes the assets as well as the contracts, debts and other obligations of the participating municipalities.

All governing powers, as of January 1, 2013, are vested in the Mayor and Council who take office on that date. The new government assumes the assets and liabilities of the Borough and the Township, pursuant to *N.J.S.A. 40:43-66.65*

**40:43-66.65. Succession in government**

From and after the date of consolidation, the consolidated municipality or new school district, if any, shall be vested with and subject to the assets, contracts, debts and other obligations of the participating municipalities, or constituent school districts, as the case may be, to the extent set forth in the recommendations contained in the final report of the joint municipal consolidation study commission. The consolidated municipality, or such new school district, as the case may be, shall have the power to complete any work, service or improvement, and to confirm and collect previously levied taxes and assessments of the participating municipalities or constituent school districts, as may be appropriate, which are incomplete, unconfirmed, or uncollected on the date of consolidation. The consolidated municipality or new school district shall carry out those provisions of the plan of consolidation approved by the voters of the participating municipalities which are not inconsistent with this act or other laws of this State.

In order to provide the consolidated municipality with a “fresh start”, existing terms of office and appointments terminate as of January 1, 2013, when the new Mayor and Council may make appointments.

**40:43-66.68. Officers and appointees of governing body of participating municipalities; termination of office**

The terms of office and appointments of all local officers and employees elected or appointed by, in, or for the participating municipalities shall, except as otherwise provided in this act, cease and terminate on the date of consolidation. The terms of office of any members appointed by the governing body of any participating municipality to any special district or public authority shall cease and terminate on the date of consolidation.

The language is very similar to the language in the Optional Municipal Charter Law where a municipality adopts a new form of government. *N.J.S.A. 40:69A-207*. Cases have held that even where an individual has been appointed to a term, the position terminates as of the date the new form of government takes place – except for tenured employees. *Jordan v Zidel*, 40 N.J. 244 (1963) [members of a Municipal Utilities Authority]; *Keuerleber v Township of Pemberton*, 260 N.J. Super 541 (App Div 1992) [Tax Collector]; *Downey v Board of Education of Jersey City*, 74 N.J. Super 548 (App Div 1962) [Appointed Board of Education members]

That power, however, is constrained by the provisions of:

**40:43-66.75. Officers and employees**

All officers and employees of the participating municipalities whose employment is continued following consolidation shall be employees of the consolidated municipality. They shall be subject to the orders and control of the mayor or other chief executive officer of the consolidated municipality, and of such other officers of the consolidated municipality as he shall authorize, or as shall be authorized under the plan or form of government of the consolidated municipality.

The tenure and pension rights under State laws of officers and employees of the participating municipalities, or of any public authority thereof, shall not be affected by the consolidation of the participating municipalities, but the provisions of this section shall not preclude the revision, consolidation or elimination of offices and positions as may be required by the consolidation, all of which shall be carried out in conformity with the provisions of the consolidation plan approved by the voters pursuant to section 28 of this act.

Clearly, the consolidation law contemplates the continuation of officers and employees and the challenge arises where there are two people filling what will be a single position. The new Mayor and Council will have to decide on the individuals to fill the positions, and, as a matter of general municipal law, layoffs are permitted for economic reasons. In this circumstance, some layoffs will take place in order to carry out the consolidation plan approved by the voters.

However, the consolidation statute, above, also provides that tenure rights shall not be affected by the consolidation of the participating municipalities. While it does include language that it does “not preclude the revision, consolidation or elimination of offices and positions as may be required by the consolidation,” it simply means that where

there are two people tenured for the same position, the duplicate position can be eliminated.

Fortunately, there are only a handful of positions impacted by tenure.

Tenure protection is provided for the Municipal Clerk, Tax Assessor, Tax Collector and the Financial Officer under specific statutes. Where an individual has served in the position for 5 or more years, that person has tenure protection in that position. [The Municipal Court Administrator also has tenure, but I will address that in a separate Opinion Letter.]

Let me address several of the positions, including Administrator, Police Chief, Municipal Clerk, Tax Assessor, Tax Collector and Chief Financial Officer. There are, of course, other positions, but these seem to be those of immediate discussion.

### **Administrator**

Clearly Princeton will have an administrator, and that selection is up to the new Mayor and Council. However, both the Borough and the Township will need to have Administration provided up to December 31, 2012.

Assuming that the new Mayor and Council would want to have the administrator function continuing for at least a short time while they decide on making an appointment, perhaps some contractual agreement could be reached with one (or both) of the current Administrators to serve in a consultant role for a period of 3 to 6 months. While that would continue an expense into the new year, it may be an effective way to address the transition issues, without having one (or both) of the Administrators leaving. While a consultant contract would carry into the new year, there is no guarantee that the consultant would be appointed as the Administrator. There would have to be provisions in the consultant contract to terminate the agreement.

Additionally, be aware that Administrators who are terminated are entitled, by statute, to severance pay of 3-months.

Of course, if there are discussions among the Administrators and their respective governing bodies, it could develop that one of them may be contemplating retirement or leaving for another position. That departure might be accelerated if the appropriate governing body were to negotiate a severance package that respected the financial benefit that the Administrator would receive if terminated.

In that event, the Borough and the Township could enter into a shared service agreement for the Administrator function for the balance of the year and that individual would be in a position to be appointed either as Administrator or Acting Administrator by the new Mayor and Council.

### **Police Department**

A Police Department will be established by Ordinance adopted by the new Mayor and Council, pursuant to *N.J.S.A. 40A:14-118*. The Ordinance will provide for the size of the Department as well as the ranks within the Department. At some point, some draft ordinances, such as for the police department, should be ready in draft form for consideration by the new Mayor and Council. That is a separate topic and is only mentioned here so that the Transition Task Force will be aware of the need.

The Police Chief is to be in operational command. The ordinance will provide for the other ranks and the number in each. For example: Deputy Chief, Captain, Lieutenant, Sergeant.

The Consolidation Commission Report recommends a reduction, over time, in the size of the Department, but recommends that any reduction be accomplished by attrition, i.e., the retirements of various officers.

The challenge is that Departmental leadership should not be in a vacuum pending the election and taking office of the new Mayor and Council.

One possible solution is found in the Consolidation Commission Report where there is a recommendation, if the Consolidation was not approved, the Borough and the Township should consider establishing a shared service for the Police Department. It might be possible for the Borough and the Township to pursue that option in order to provide some stability as the transition takes place. A Shared Police Department would have to designate a single Chief of Police and other command structure that would then be in place. While the appointment would end when the new Mayor and Council take office, it must be anticipated that the desire for a smooth transition would be foremost in the decision making process for the Mayor and Council.

Additionally, while the Consolidation Report contemplates reductions in the size of the police force by attrition, it will be necessary for the consolidated police department to address command structure and whether the number of ranking officers will need revision. In looking at that aspect, the respective Chiefs of Police and the governing bodies should identify those ranking officers that may be ready for retirement, as that may ease some of the impact if some of the ranking officers are to be reduced in rank.

### **Municipal Clerk.**

A Municipal Clerk is initially appointed pursuant to *N.J.S.A. 40A:9-133* to a 3-year term, and receives tenure protections pursuant to *N.J.S.A. 40A:9-134, et seq.*, after serving “continuously for five years from the date of his original appointment” and that individual “shall not be removed therefrom except for good cause shown after a fair and impartial hearing.” Municipal Clerks are required to hold the Registered Municipal Clerk designation and to comply with the continuing education requirements.

For Princeton, this position will be easy, since it applies only to the Township Clerk, who has tenure. That individual will become the tenured Clerk of the consolidated Princeton. The tenure protections will follow her and be applicable in Princeton.

### **Chief Financial Officer**

The Chief Financial Officer is appointed pursuant to *N.J.S.A. 40A:9-140.10 et seq.* to a statutory term of 4 years and receives tenure pursuant to *N.J.S.A. 40A:9-140.8* on reappointment after serving 4 years.

Here there is a dilemma. Both the Borough and the Township Chief Financial Officers have tenure and are entitled to have the tenure respected in the consolidated Princeton. There can, however, be only one Chief Financial Officer and the designation is to be made by the new Mayor and Council.

Both the Borough and the Township Chief Financial Officers are tenured in that position, but they have also both served as Tax Collectors. Currently their Deputy Finance Officers are serving as Tax Collector.

It might be possible for whichever CFO is not selected as CFO for the consolidated Princeton to become the Deputy CFO and/or Tax Collector and to thereby respect the tenure protection, although tenure would not apply in the new position.

As to the Chief Financial Officer, the new Mayor and Council will need to select one of the tenured CFO's for the position, unless, of course, one of the incumbents decides to retire or resign.

The Consolidation Commission Report recommends a CFO and an Assistant CFO.

The Transition Task Force could, certainly make recommendations for levels of staffing, but the actual decision will be up to the new Mayor and Council.

### **Tax Assessor**

The Tax Assessor is appointed pursuant to *N.J.S.A. 40A:9-148* and *40A:9-148* to a statutory term of 4-years and receives tenure pursuant to *N.J.S.A. 54:1-35.31* on reappointment after serving 4-years.

Again, this position will be easy, since the same individual is tenured as Assessor in both the Borough and the Township. He will continue as the tenured Assessor in the consolidated Princeton. The tenure protections will follow and be applied in Princeton.

### **Tax Collector**

The Tax Collector is appointed pursuant to *N.J.S.A. 40A:9-141, 142 et seq.* to a statutory term of 4 years and receives tenure pursuant to *N.J.S.A. 40A:9-145.8* on reappointment after serving 4 years.

With respect to this position, neither of the individuals currently serving as the Borough Tax Collector, nor the Township Tax Collector have tenure. As noted, above, both of the Chief Financial Officers have served as Tax Collector.

It is my understanding that one of the Tax Collectors has recently retired, so the transition in this position should be relatively easy, although it is certainly subject to appointment by the new Mayor and Council.

### **Salary Protection**

Additionally, *N.J.S.A. 40A:9-165* provides that “Salaries, wages or compensation fixed and determined by ordinance may, from time to time, be increased, decreased or altered by ordinance. No such ordinance shall reduce the salary of, or deny without good cause an increase in salary given to all other municipal officers and employees to any tax assessor, chief financial officer, tax collector or municipal clerk during the term for which he shall have been appointed.” You should be aware of a case interpreting the statute, which held that even where the hours of the Tax Assessor had been reduced, the statutory protection for the Tax Assessor prohibited any reduction in compensation. *Carlson v Hackensack*, 410 N.J. Super 491 (App Div, 2009). While that case involved the Tax Assessor, the interpretation of the statute would apply equally to the CFO, Tax Collector and Municipal Clerk.

### **Appointments**

As noted above, the consolidation act does provide that “the revision, consolidation or elimination of offices and positions as may be required by the consolidation, all of which shall be carried out in conformity with the provisions of the consolidation plan approved by the voters” so that the new Mayor and Council can act in that regard.

Please note the requirement to carry out changes in conformity with the provisions of the consolidation plan. Wholesale departures from the consolidation plan are not authorized. While there is nothing specific in the law, other than the provision that all appointments end with the start of the consolidated Princeton on January 1, 2013, the new Mayor and Council will have the full power to govern and to decide on the structure of the various departments. Minor adjustments based on changed circumstances, a determination that some departments may need to retain some employees in excess of the consolidation plan, while some departments may need a few less will be a governing decision for the Mayor and Council and would still be consistent with the overall recommendations of the consolidation plan. The consolidation plan does not constrain the Mayor and Council in making governing decisions.

One of the things that is really needed to know is the potential eligibility for retirement of current command officers in both the Borough and Township Police Departments. Retirements may address some of the overlap in command positions.

### **Observations and Comments**

Much as it would be desirable to provide employees in management positions with a degree of comfort that their positions will continue, that simply is not possible in light of the clear statutory provision that all terms and appointments end on January 1, 2013, and that the new Mayor and Council will be making the appointments for Princeton.

**However**, it must be assumed that the individuals who will be serving as the new Mayor and Council will be looking for continuity and a smooth transition and will not be making dramatic personnel changes. Certainly, the recommendations of the Consolidation Commission contemplate a smooth transition and a continuation of the municipal staffs, with some downsizing.

The CGR Report *Consolidation Options and Impacts for Princeton, NJ*, dated May 2011, also contemplates the possibility for retirement incentives in the form of terminal leave for the police chief position (p.46) to facilitate reductions in staff. Depending on how the Borough and the Township view such a potential, that could be implemented in other areas. There was mention of monetary employee retirement incentives in the June 6, 2011, letter from the Consolidation Commission to the Division of Local Government Services addressing "Anticipated Transition Costs for Consolidation."

If that is to be considered as an option, some guidance from DLGS would be needed to determine whether it can be done, impact on pension calculations, etc.

The respective Administrators may be able to advise the respective municipalities of any employees who are eligible for retirement and who may be inclined to retire.

Additionally, the various department heads may have thoughts, themselves, on how to effect the transition and the leadership of departments in Princeton.

However, it must be noted that personnel decisions are to be made by the Borough and Township governing bodies until January 1, 2013, and by the new Mayor and Council as of that date.

It is not the role of the Transition Task Force to undertake that role. Under the Resolution establishing the Transition Task Force, the Task Force derives its authority from and reports to the governing bodies. The power is to make recommendations “to propose implementation of the recommended municipal consolidation of the Borough and Township, using the Joint Consolidation Study Commission Final Report dated June 2011 as a guide.”

I hope that this is of assistance. I anticipate that there will be additional questions, and I will address those as they arise.