

# Chapter 1

## Forms of Municipal Government

### 1-1 AUTHORITY OF MUNICIPAL GOVERNMENT

In the State of New Jersey, the authority of municipal government flows from the state. Any exercise of municipal power must be authorized by state law, primarily statute.<sup>1</sup> Certain powers are granted by the state to all municipalities, and such authorizations may be termed “general law” because they apply generally to every municipality in New Jersey. Other powers, however, are extended only to certain forms of government. Accordingly, a municipality’s powers are determined in large part by its form of government.

Ten forms of municipal government are currently authorized by statute, six of which pre-date the 1947 New Jersey State Constitution. The six pre-1947 forms of government are City, Town, Borough, Township, Village, and Commission.<sup>2</sup> Four forms of government are authorized by the 1950 Optional Municipal Charter Law, namely the Mayor-Council Plan, the Council-Manager Plan, the Small Municipality Plan, and the Mayor-Council-Administrator Plan.<sup>3</sup> Additionally, certain municipalities operate outside any of the statutory forms under special charters granted by the state.<sup>4</sup>

<sup>1</sup> *Dome Realty, Inc. v. City of Paterson*, 83 N.J. 212, 225 (1980); *Eastern Planned Cmty. at Lincroft, Inc. v. Middletown Twp.*, 235 N.J. Super. 467, 470 (Law Div. 1989).

<sup>2</sup> See § 1-3 through § 1-8.

<sup>3</sup> N.J.S.A. 40:69A-1 et seq.; see § 1-9.

<sup>4</sup> See § 1-9:2.

## 1-2 CITY

The city form of municipal government currently applies to 15 New Jersey cities.<sup>5</sup> If a city is governed by a special charter enacted prior to 1875, the city will continue to apply that charter in respect of certain regulations.<sup>6</sup> However, the city council is empowered by ordinance to call a referendum at least 60 days prior to a general election regarding the abandonment of the existing pattern of governmental organization.<sup>7</sup>

Any city may adopt a new name,<sup>8</sup> but the boundaries will remain unchanged.<sup>9</sup> The city clerk must file a copy of the name change resolution with the county clerk.<sup>10</sup> Cities have the “full power to sue and be sued” that is unaffected by a change in the city’s name.<sup>11</sup> A name change also does not affect any proceeding or instrument pertaining to the entity.<sup>12</sup>

### 1-2:1 Elected Officers and Organization of Council

The only officials who may be elected by a city are the mayor and councilpersons.<sup>13</sup> These positions are to be filled through annual general elections.<sup>14</sup> If a city has provisions for the election of the mayor or city council that were in place prior to the adoption of N.J.S.A. 40A:61-2, the city may continue to be governed by such

<sup>5</sup> A municipality is defined as “any village, borough, town, township or city” of the state of New Jersey. N.J.S.A. 40A:16-2(d). The statutes pertaining to the city form of government enacted in 1987 were designed to describe the city form of government in a way that is “readily understandable by both citizens and officials alike.” The municipal laws pertaining to cities had not been thoroughly revised since the 1890s. The revisions were not intended to alter the division of power that existed between the mayor and council in a city. Senate County and Municipal Government Committee Statement, S. 2782/L.1987, c. 314. Prior to 1987, of the 15 current cities, seven were operating under 1897 provisions, three under 1899 provisions, and five under pre-1875 provisions.

<sup>6</sup> N.J.S.A. 40A:61-1(c). The old charter will continue to apply with regards to the mayor’s term of office, the number of wards, the number of councilmen, the councilmen’s terms of office and whether the councilmen’s terms are staggered.

<sup>7</sup> N.J.S.A. 40A:61-1(c).

<sup>8</sup> N.J.S.A. 40A:61-1(e).

<sup>9</sup> N.J.S.A. 40A:61-1(a).

<sup>10</sup> N.J.S.A. 40A:61-1(e).

<sup>11</sup> N.J.S.A. 40A:61-1(d), (e). *But see Atlantic Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders*, 893 F. Supp. 301, 315 n.11 (D.N.J. 1995) (a state statute empowering municipalities to sue and be sued does not extend to create a right “to sue for the violation of constitutional protections that they do not enjoy vis-à-vis the creating state”).

<sup>12</sup> N.J.S.A. 40A:61-1(e).

<sup>13</sup> N.J.S.A. 40A:61-2(c).

<sup>14</sup> N.J.S.A. 40A:61-2(d).

provisions until a referendum of the voters is held to adopt new provisions.<sup>15</sup> If no such provisions are already in existence, the mayor will be elected by the voters for a four-year term.<sup>16</sup>

In the absence of a contrary provision, the city council will be composed of seven members.<sup>17</sup> Six of the members will be elected from each of two wards with three members from each, while the seventh member is to be elected at large.<sup>18</sup> The council members elected from the wards will be elected for staggered three-year terms, while the at-large member will be elected for a four-year term.<sup>19</sup>

### 1-2:2 Mayoral Powers

Every New Jersey city has the “full power to exercise all powers of local government” except as provided by law.<sup>20</sup> The mayor is the chief executive officer empowered to enforce both local ordinances and New Jersey law.<sup>21</sup> The mayor is responsible for ensuring that the laws of the city are “faithfully executed.”<sup>22</sup> The mayor also acts as head of the police department, serves as supervisor of city employees and has the power to “suppress all riots and tumultuous assemblies.”<sup>23</sup>

The mayor also plays a role in the functioning of the city council. The mayor may recommend measures to the council in the interest of the city’s welfare.<sup>24</sup> In addition to participating in council deliberations, the mayor may cast a tie-breaking vote.<sup>25</sup> The

<sup>15</sup> N.J.S.A. 40A:61-2(a)(1), (b)(2).

<sup>16</sup> N.J.S.A. 40A:61-2(a)(1).

<sup>17</sup> N.J.S.A. 40A:61-2(b)(1).

<sup>18</sup> N.J.S.A. 40A:61-2(b)(1).

<sup>19</sup> N.J.S.A. 40A:61-2(b)(1).

<sup>20</sup> N.J.S.A. 40A:61-3. The city form of government has a strong mayor and a weak council. *McCann v. Clerk of Jersey City*, 167 N.J. 311, 340 (2001).

<sup>21</sup> N.J.S.A. 40A:61-4(a), (b) and (f).

<sup>22</sup> N.J.S.A. 40A:61-4(e).

<sup>23</sup> N.J.S.A. 40A:61-4(e) through (g). The mayor’s position as head of the police department includes the power to appoint, suspend or remove any police department employee. Albert J. Wolfe, N.J. State League of Municipalities, *A History of Municipal Government in New Jersey Since 1798*, 13 available at [http://www.njslom.org/history\\_municipal\\_govt.pdf](http://www.njslom.org/history_municipal_govt.pdf) (last visited June 24, 2014). *But see In re Johnson*, 267 N.J. Super. 600, 601 (App. Div. 1993) (position does not inherently grant the right to carry a handgun).

<sup>24</sup> N.J.S.A. 40A:61-4(e).

<sup>25</sup> N.J.S.A. 40A:61-4(e); N.J.S.A. 40A:61-5(c); *see also* N.J.S.A. 40A:9-132:

In every municipality, unless otherwise provided by law, if the governing body shall fail (a) to organize and elect a president or chairman at its annual meeting held for such purpose, (b) to fill any vacancy in office or position, (c) to adopt

council submits ordinances to the mayor to affirm or send back to council with written objections.<sup>26</sup> An ordinance must have the mayor's approval unless the mayor fails to either affirm or send the ordinance back or unless the council votes by a two-thirds margin to enact the ordinance over the mayor's veto.<sup>27</sup>

### 1-2:3 Council Powers

The council serves as the legislative body of the municipality.<sup>28</sup> The powers of the council include passing, amending and repealing ordinances and resolutions, overseeing the finances and activities of the municipality, and appointing subordinate city officials.<sup>29</sup>

The city council must convene an annual meeting during the first week of January.<sup>30</sup> At the meeting, the council must elect a council president as well as a president pro tempore who takes the place of the president if necessary.<sup>31</sup> The term of office of both officials is one year.<sup>32</sup> The president pro tempore will also step in for the mayor if there is a vacancy or if the mayor cannot fulfill the duties of the office.<sup>33</sup> The council at the annual meeting may also form committees for the following year.<sup>34</sup> A quorum composed of a majority of council members is required to conduct business.<sup>35</sup>

---

any resolution or ordinance, or (d) to take any other action whatsoever, by reason of a tie or insufficient vote among the members, the mayor shall vote in aid of said organization, the election of candidates, appointments of officers or others, adoption of resolutions or ordinances or the taking of any other action.

*Patterson v. Cooper*, 294 N.J. Super. 6, 16-17 (Law Div. 1994) (mayoral vote was appropriate when five members of the city council voted in favor of an ordinance, two voted against it and three members abstained).

<sup>26</sup> N.J.S.A. 40A:61-4(d).

<sup>27</sup> N.J.S.A. 40A:61-4(d); N.J.S.A. 40A:61-5(b)(4).

<sup>28</sup> N.J.S.A. 40A:61-5(a).

<sup>29</sup> N.J.S.A. 40A:61-5(b)(1)-(3), (c); see also *Sudol v. Borough of N. Arlington*, 137 N.J. Super. 149, 154 (Ch. Div. 1975) ("It is true that a city council has an absolute right to adopt and enforce such rules and regulations as are necessary to protect its public meetings.").

<sup>30</sup> N.J.S.A. 40A:61-6(a).

<sup>31</sup> N.J.S.A. 40A:61-6(b).

<sup>32</sup> N.J.S.A. 40A:61-6(b).

<sup>33</sup> N.J.S.A. 40A:61-6(g).

<sup>34</sup> N.J.S.A. 40A:61-6(d).

<sup>35</sup> N.J.S.A. 40A:61-6(c); see *Patterson v. Cooper*, 294 N.J. Super. 6, 14 (Law Div. 1994) (no quorum existed when a majority of the whole number of city council members of East Orange was not present at a meeting); *Garner v. Mountainside Bd. of Adj.*, 212 N.J. Super.

Council may convene other meetings throughout the year at a time and place of its choosing, although all regular meetings must be held within the city.<sup>36</sup> A majority of council members or the president of the council may also convene a special meeting of the council.<sup>37</sup> Each member of council must be notified either in person or at the member's residence of any special meeting.<sup>38</sup>

The city council may appoint persons to non-elected positions. The council may delegate to an administrator some or all of the executive responsibilities of the municipality.<sup>39</sup> It may also appoint advisory councils if it so chooses.<sup>40</sup>

The city council also has the power to adopt an administrative code consistent with its power to pass ordinances.<sup>41</sup> The administrative code should include the key provisions of the city's charter as well as the general law that supplements the charter.<sup>42</sup> The code should also provide a guide for the city council in performing its duties, including the powers and duties of any committees or department heads.<sup>43</sup> The administrative code should also include the parameters of municipal departments including the appointment of officers and the organization of departments.<sup>44</sup>

---

417, 427 (Law Div. 1986) (when members of council abstain because they are ineligible to vote on a matter, the abstaining members should not be counted as present for purposes of establishing a quorum).

<sup>36</sup> N.J.S.A. 40A:61-6(e).

<sup>37</sup> N.J.S.A. 40A:61-6(f).

<sup>38</sup> N.J.S.A. 40A:61-6(f).

<sup>39</sup> 40A:61-7(a). Somers Point, a New Jersey "city," hired an administrator because it determined that a professional should be in charge of the administrative functions of city government. Donald T. DiFrancesco & Peter R. Lawrance, N.J. Department of the Treasury, Government That Works: Opportunities for Change—The Report of the City of Somers Point, 3 (2001) *available at* <http://www.nj.gov/treasury/lgbr/munpdf/somerspoint.pdf> (last visited Aug. 20, 2017).

<sup>40</sup> N.J.S.A. 40A:61-7(d).

<sup>41</sup> N.J.S.A. 40A:61-7(b).

<sup>42</sup> N.J.S.A. 40A:61-7(b). Somers Point adopted an administrative code that includes "how the council shall perform its duties, the titles and duties of various municipal officers, how various departments are organized, the powers and duties of various department heads, as well as, [sic] the many laws and policies of the city." Donald T. DiFrancesco & Peter R. Lawrance, N.J. Department of the Treasury, Government That Works: Opportunities for Change—The Report of the City of Somers Point, 3 (2001) *available at* <http://www.nj.gov/treasury/lgbr/munpdf/somerspoint.pdf> (last visited Aug. 20, 2017).

<sup>43</sup> N.J.S.A. 40A:61-7(b).

<sup>44</sup> N.J.S.A. 40A:61-7(b).

### 1-3 TOWN

Nine entities in New Jersey currently operate under the town form of government.<sup>45</sup> Each town has the power both to sue and be sued.<sup>46</sup> Any town may change its name if its town council so resolves, but such a change has no effect on any suit, proceeding or instrument in which the entity may be involved.<sup>47</sup> In addition, all liabilities and assets of any board, commission or district created by statutes that were repealed<sup>48</sup> are transferred to the municipality.<sup>49</sup>

#### 1-3:1 Elected Officers and Organization

The mayor<sup>50</sup> and the council members of a town form the town council.<sup>51</sup> The residents of the town elect a mayor from the entire municipality for a term of four years.<sup>52</sup> Two council members are elected from each of four wards for a total of eight council members who each serve a four-year term with half of the members being elected every two years.<sup>53</sup> However, if immediately prior

<sup>45</sup> The act pertaining to the town form of government repealed parts of the statutory law, amended others, and added chapter 62 to Title 40A of the New Jersey Statutes. N.J.S.A. 40A:62-1, Historical and Statutory Notes. Senate Bill 86 revised the laws pertaining to the town form of government with the goal of making the law “readily understandable by citizens and municipal officers alike.” Senate County and Municipal Government Committee Statement, S. 86-L.1988, c. 7. Of the nine towns in the state, Dover, Harrison and Kearny follow the election procedures for mayor and town council provided by N.J.S.A. 40A:62-1 et seq. The new legislation allowed the election procedures in the remaining towns of Belvidere, Clinton, Boonton, Guttenberg, Hammonton and Secaucus to remain unchanged. The regulations of this form of government apply to towns that previously were governed by the Revised Statutes, Title 40, chapters 123 to 141, as well as to towns that were incorporated prior to 1875 by special act. The boundaries of towns are not altered by these regulations.

<sup>46</sup> N.J.S.A. 40A:62-1(c). *McCurrie v. Town of Kearny*, 174 N.J. 523, 532-33 (2002) (holding that a town’s decision to pay the legal fees for its clerk’s defense was “entitled to judicial deference” because the town had “unquestionable authority to provide for its own defense”).

<sup>47</sup> N.J.S.A. 40A:62-1(d).

<sup>48</sup> N.J.S.A. 40A:62-8.

<sup>49</sup> N.J.S.A. 40A:62-7(c).

<sup>50</sup> The mayor has also historically been called the “councilman-at-large.” N.J.S.A. 40A:62-3(b).

<sup>51</sup> N.J.S.A. 40A:62-3(a).

<sup>52</sup> N.J.S.A. 40A:62-2(a).

<sup>53</sup> N.J.S.A. 40A:62-2(c). Prior to 2005, N.J.S.A. 40A:62-2(c) provided separate provisions for the election of councils in towns with less than 12,000 people or more than 16,000 people. N.J.S.A. 40A:62-2(c) (repealed 2005). In 1991, the Town Act was amended to provide that a town that had been electing a mayor and council members for two-year terms could change the terms to four-year terms by petition and referendum of the legal

to 1988, when the new town regulations were enacted, a town had “a council whose method of election, composition or tenure of its membership differed in any way from the[se] provisions...[the town] shall continue to be governed by those provisions...”<sup>54</sup> Such provisions will remain in effect until a referendum of the voters of the town determines that they should be altered.<sup>55</sup> For council to conduct business, a quorum must be present, consisting of the majority of the council members.<sup>56</sup>

The council must hold an annual meeting during the first week of January each year.<sup>57</sup> Thereafter, the council may determine when its meetings will be held and establish the rules to govern its own proceedings.<sup>58</sup> During the annual meeting, the council may establish committees for the following year.<sup>59</sup> Special meetings may also be called either by the mayor or by any two councilpersons as long as written notice is provided to each council member a minimum of 24 hours prior to the meeting.<sup>60</sup> Only the business for which the special meeting was called may be discussed during the special meeting.<sup>61</sup>

### 1-3:2 Mayoral Powers

Each town has the “full power to exercise all powers of local government in such manner as council may determine.”<sup>62</sup> In a town, any executive responsibilities of the municipality that

---

voters of the town. N.J.S.A. 40A:62-2.1(a). A petition with signatures of at least 15 percent of the legal voters of the town must be submitted for the issue to be put before the voters in a general election. N.J.S.A. 40A:62-2.1(b). However, the issue may not be submitted to the voters more than once every four years. A majority of the votes cast is required for the proposition to be adopted. N.J.S.A. 40A:62-2.1(e). The only towns affected by N.J.S.A. 40A:62-2.1 are Boonton, Dover, Guttenberg, Harrison, Kearny, Secaucus and Hammonton. A. 550-L.1991, c. 277.

<sup>54</sup> N.J.S.A. 40A:62-2(d).

<sup>55</sup> N.J.S.A. 40A:62-2(d). To hold a referendum, the town council must pass an ordinance calling for the referendum to be on the ballot at least 60 days before the general election. Such a referendum may only be submitted to the voters once every three years.

<sup>56</sup> N.J.S.A. 40A:62-3(d). However, a group of council members that does not constitute a quorum may meet more frequently without the official “transaction of business” that requires a quorum.

<sup>57</sup> N.J.S.A. 40A:62-3(a).

<sup>58</sup> N.J.S.A. 40A:62-3(c).

<sup>59</sup> N.J.S.A. 40A:62-3(f).

<sup>60</sup> N.J.S.A. 40A:62-3(e).

<sup>61</sup> N.J.S.A. 40A:62-3(e).

<sup>62</sup> N.J.S.A. 40A:62-4.

are not specifically reserved for the mayor are performed by the town council.<sup>63</sup>

The mayor is the head of the municipal government, serving as chairperson of the town council and presiding over its meetings.<sup>64</sup> In all official documents and instruments, the mayor shall be referred to as “the mayor of [town name],” and the mayor shall use this title in signing such documents.<sup>65</sup> The mayor is also vested with the power to appoint all members of the municipal utilities authority if such an entity has been created by the municipality.<sup>66</sup>

### 1-3:3 Council Powers

The council is the legislative body of the municipality.<sup>67</sup> Council has the power to “[p]ass, adopt, amend and repeal any ordinance or, where permitted, any resolution for any purpose required for the government of the municipality or for the accomplishment of any public purpose for which the municipality is authorized to act under general law.”<sup>68</sup> Council also has control over the finances of the municipality, including the power to raise money through borrowing or taxation.<sup>69</sup> Council may appoint necessary officials as provided by law and may also remove such officials unless legally precluded from so doing.<sup>70</sup> However, approval of both the mayor and council is required to appoint the town clerk, tax assessor and tax collector.<sup>71</sup> Council may delegate part or all of the executive responsibilities of the municipality

<sup>63</sup> N.J.S.A. 40A:62-6(c). *McCann v. Clerk of Jersey City*, 167 N.J. 311, 340 (2001) (town form of government is considered to have a strong mayor and a weak council.).

<sup>64</sup> N.J.S.A. 40A:62-3(b); N.J.S.A. 40A:62-5(d).

<sup>65</sup> N.J.S.A. 40A:62-5(a).

<sup>66</sup> N.J.S.A. 40A:62-5(g).

<sup>67</sup> N.J.S.A. 40A:62-6(a).

<sup>68</sup> N.J.S.A. 40A:62-6(b)(1).

<sup>69</sup> N.J.S.A. 40A:62-6(b)(2).

<sup>70</sup> N.J.S.A. 40A:62-6(b)(3); N.J.S.A. 40A:62-6(b)(5). The positions of town attorney, engineer, clerk, tax collector and tax assessor are appointed by council for terms of service, while all other officers are appointed “at the pleasure of the council.” Any official appointed pursuant to N.J.S.A. 40A:62-6 must serve until a successor has been appointed and qualified. N.J.S.A. 40A:62-6(e).

<sup>71</sup> N.J.S.A. 40A:62-6(d).



to an administrator.<sup>72</sup> It may also appoint advisory councils and investigate any activity of the municipality.<sup>73</sup>

A majority vote of the council members present at a meeting and a minimum of four affirmative votes is required to pass an ordinance.<sup>74</sup> If the mayor is not in attendance at a council meeting, the council may elect one of its members to temporarily serve as chairperson.<sup>75</sup> Within five days of passing an ordinance, excluding Sundays, the council must present the ordinance to the mayor.<sup>76</sup> The mayor must affirm the ordinance or send it back to council with written objections within 10 days after receiving it.<sup>77</sup> An ordinance must have the mayor's approval unless the mayor fails to either affirm or send back the ordinance or unless the council votes by a two-thirds margin to enact the ordinance over the mayor's veto.<sup>78</sup>

The council has the power to adopt an administrative code consistent with its power to pass ordinances.<sup>79</sup> The administrative code should include the key provisions of the city's charter as well as the general laws that supplement the charter.<sup>80</sup> The code should also provide a guide for the council in performing its duties, including the powers and responsibilities of any committees or department heads.<sup>81</sup> The administrative code should also include the parameters of municipal departments such as how officers will be appointed, how departments are to be organized and the titles of such officials.<sup>82</sup> However, the administrative code must

<sup>72</sup> N.J.S.A. 40A:62-7(a). Such an administrator shall be appointed pursuant to N.J.S.A. 40A:9-136.

<sup>73</sup> N.J.S.A. 40A:62-6(b)(4); N.J.S.A. 40A:62-7(d).

<sup>74</sup> N.J.S.A. 40A:62-5(f).

<sup>75</sup> N.J.S.A. 40A:62-3(b).

<sup>76</sup> N.J.S.A. 40A:62-5(e).

<sup>77</sup> N.J.S.A. 40A:62-5(e).

<sup>78</sup> N.J.S.A. 40A:62-5(e); N.J.S.A. 40A:62-6(b)(6); *see also Woodhull v. Manahan*, 85 N.J. Super. 157, 168 (App. Div. 1964) (holding that the mayor had the power to veto the appointment of a town attorney).

<sup>79</sup> N.J.S.A. 40A:62-7(b).

<sup>80</sup> N.J.S.A. 40A:62-7(b).

<sup>81</sup> N.J.S.A. 40A:62-7(b).

<sup>82</sup> N.J.S.A. 40A:62-7(b).

be restricted to what is authorized implicitly by statute or can reasonably be derived from such statutory authority.<sup>83</sup>

## 1-4 BOROUGH

Each borough<sup>84</sup> has the “full power to exercise all powers of local government in such manner as its council may determine.”<sup>85</sup> Each borough has the “full power to sue and be sued,” and also may adopt its own corporate seal.<sup>86</sup> A borough may change its name by resolution of the council and then filing the resolution with the county clerk.<sup>87</sup> However, no proceeding of which the borough is a part will be altered by a change of name, nor are the boundaries of any borough changed by the passage of N.J.S.A. 40A:60-1 et seq.<sup>88</sup>

### 1-4:1 Elected Officers and Organization

Elections for borough officers will be held annually on the same day as the general elections.<sup>89</sup> The mayor of a borough is elected by the voters of the municipality and serves for a four-year term.<sup>90</sup> The council of a borough has six members, all of whom are elected by the entire borough without dividing the borough into

<sup>83</sup>. N.J.S.A. 40A:62-7(b).

<sup>84</sup>. N.J.S.A. 40A:60-1 et seq.

<sup>85</sup>. N.J.S.A. 40A:60-4. The official name of each borough is “the borough of [name of borough].” N.J.S.A. 40A:60-1(a).

<sup>86</sup>. N.J.S.A. 40A:60-1(b). “The assets and liabilities of any board, commission or district created pursuant to the statutes repealed in section 40A:60-8...shall be transferred to the [newly named] municipality.” N.J.S.A. 40A:60-7(c).

<sup>87</sup>. N.J.S.A. 40A:60-1(c). In 1987, the Legislature repealing all the laws governing the borough form of government and reenacting them in a “clear and simplified form.” Senate County and Municipal Government Committee Statement, S. 2780-L.1987, c. 379.

<sup>88</sup>. N.J.S.A. 40A:60-1(a); N.J.S.A. 40A:60-1(c).

<sup>89</sup>. N.J.S.A. 40A:60-2(c). N.J.S.A. 40A:60-8.1 allows boroughs that had a board of public works in existence in 1987 and that meet certain population requirements to continue to operate under their boards unless the borough dissolves its board. This section became effective in 1990 and was implemented to allow Ramsey Borough to continue to operate under its board of public works. Senate County and Municipal Government Committee Statement, S. 2432-L.1990, c. 65.

<sup>90</sup>. N.J.S.A. 40A:60-2(a). The mayor must remain in office until his successor is prepared to take over the office of mayor. See *Bogdanove v. Mayor of Waldwick*, 120 N.J. Super. 5, 6-8 (App. Div. 1972) (when candidate died a week before election, but received majority of votes, mayor whose term was to expire should continue to hold the position of mayor until general election the following year).

distinct wards.<sup>91</sup> Councilpersons serve for three-year terms that are staggered so that two councilpersons are elected each year.<sup>92</sup>

An annual meeting of the mayor and council must be held each year during the first week of January.<sup>93</sup> During the meeting, the president of the council is elected by a vote of a majority of council members.<sup>94</sup> The council president serves for a term of one year and presides over council meetings when the mayor is not present.<sup>95</sup> The president of the council retains the right to participate in debates and vote on all matters.<sup>96</sup> If council fails to elect its president, the mayor may make the appointment without the consent of council.<sup>97</sup> Council may also form committees and advisory councils for the following year during the annual meeting.<sup>98</sup>

If the mayor is absent or unable to perform the duties for a period of three days or more, the council president assumes the duties of the mayor during the absence.<sup>99</sup> If the president is unable to act in

<sup>91</sup> N.J.S.A. 40A:60-2(b)(2). If a borough was divided into wards before the effective date of N.J.S.A. 40A:60-2, those divisions remain in place as long as the ordinance that established those wards remains in effect. N.J.S.A. 40A:60-2(b)(2). *Engle v. Sorrentino*, 116 N.J. Super. 300, 302-303 (Law Div. 1971) (due to incompatibility of positions, if a councilman is elected as mayor, his position as councilman is automatically vacated). *Republican Comm. of Garwood v. Mayor of Garwood*, 140 N.J. Super. 593 (Law Div. 1976) (when tie vote for two at-large council positions occurred, the incumbent was entitled to remain in office as a holdover).

<sup>92</sup> N.J.S.A. 40A:60-2(b)(1). In 1987 when the new statutes pertaining to the borough form of government were enacted, 218 of the 220 boroughs already appointed council members in this manner. Senate County and Municipal Government Committee Statement, S. 2780-L.1987, c. 379. The statutes provided that the two boroughs that did not use this method, Roselle and Roselle Park, could continue to elect council members and a mayor in the manner they employed at that time. Council members may draw lots if necessary to determine the staggering of their terms. N.J.S.A. 40A:60-2(b)(1). Council members must stay in office until their successors are prepared to assume the position. *See also Ayres v. Dauchert*, 130 N.J. Super. 522, 525 (App. Div. 1974) (finding that a councilman “may extend his term by resigning his seat in order to accept appointment to a different council seat for a longer term, the vacancy of which was created by resignation”). *But see Bernstein v. Krom*, 108 N.J. Super. 176, 177-79 (Law Div. 1969) (holding that an appointment to the council of the Borough of Pompton Lakes was invalid when it was the result of a councilman’s resignation with the appointment having the sole purpose of extending his term of office, although actions taken by council during his tenure were not invalidated because he was “at least a de facto member of the council”).

<sup>93</sup> N.J.S.A. 40A:60-3(a).

<sup>94</sup> N.J.S.A. 40A:60-3(b).

<sup>95</sup> N.J.S.A. 40A:60-3(b).

<sup>96</sup> N.J.S.A. 40A:60-3(b).

<sup>97</sup> N.J.S.A. 40A:60-3(b).

<sup>98</sup> N.J.S.A. 40A:60-3(e); N.J.S.A. 40A:60-7(d).

<sup>99</sup> N.J.S.A. 40A:60-3(c). The mayor of a borough is required by law to attend council meetings. N.J.S.A. 40A:60-3(c) does not provide a time limit for how long a mayor may be absent without relinquishing his position nor does it provide any limit to the time that the

place of the mayor, then the longest-serving member of council temporarily assumes the functions of the president of the council, including acting in the place of the mayor.<sup>100</sup>

A quorum must be present for council to conduct business.<sup>101</sup> Such a quorum may be established by the presence of either three council members and the mayor or four council members.<sup>102</sup> Council may hold meetings at times and places of its choice as long as the meetings take place within the borough.<sup>103</sup>

The council may convene special meetings.<sup>104</sup> The mayor may call such meetings, or, if the mayor neglects or refuses to do so, a special meeting may be called by four members of the council.<sup>105</sup> If a special meeting is called, all members of council must be notified personally or by notice left at the member's residence.<sup>106</sup>

### 1-4:2 Mayoral Powers

The mayor is the head of the municipal government and has all powers provided by general law.<sup>107</sup> The mayor ensures that state and borough laws are followed, the welfare of the people is protected and "peace and good order" is maintained.<sup>108</sup> The mayor also presides over council meetings.<sup>109</sup>

president of council may serve as acting mayor. *See, e.g., Levin v. Woodbine*, 181 N.J. Super. 61, 67, 71 (Law Div. 1981) (if a mayor is absent for eight weeks without express approval of majority of the governing body, the absence creates a vacancy that should be filled as early as possible).

<sup>100.</sup> N.J.S.A. 40A:60-3(c). Although other forms of municipal government provide for the recall of elected officials, the regulations pertaining to boroughs contain no such provision, and there has been almost no case law pertaining to the issue even though the borough form of government is presently used by 222 municipalities. *Eisenberg v. Comm. to Recall Levin*, 175 N.J. Super. 115, 117 (Law Div. 1980) (the right to recall is not guaranteed by the New Jersey Constitution and the lack of such a provision in the borough regulations is not a denial of equal protection of the law).

<sup>101.</sup> N.J.S.A. 40A:60-3(d).

<sup>102.</sup> N.J.S.A. 40A:60-3(d).

<sup>103.</sup> N.J.S.A. 40A:60-3(f).

<sup>104.</sup> N.J.S.A. 40A:60-3(g).

<sup>105.</sup> N.J.S.A. 40A:60-3(g).

<sup>106.</sup> N.J.S.A. 40A:60-3(g).

<sup>107.</sup> N.J.S.A. 40A:60-5(a); N.J.S.A. 40A:60-5(b). *McCann v. Clerk of Jersey City*, 167 N.J. 311, 340 (2001) (borough form of government has a strong mayor and a weak council).

<sup>108.</sup> N.J.S.A. 40A:60-5(h); *Levin v. Woodbine*, 181 N.J. Super. 61, 67 (Law Div. 1981) (noting that "a duty is imposed on the mayor to preside over all meetings" of the borough). The mayor also has the power "to suppress all riots and tumultuous assemblies." N.J.S.A. 40A:60-5(h).

<sup>109.</sup> N.J.S.A. 40A:60-5(c); *see also Corvelli v. Fonseca*, 323 N.J. Super. 342, 350 (Law Div. 1999) ("[r]epresentative government imposes a responsibility upon elected officials to give

The borough council acts as the legislative body of the municipality and has all executive responsibilities not specifically reserved for the mayor.<sup>110</sup> The council may pass, amend and repeal ordinances on any topic for which it is permitted by law to legislate for the advancement of any public purpose.<sup>111</sup> The council may also regulate the finances of the borough and borrow or levy taxes to raise money.<sup>112</sup> The council also has the authority to investigate any activity of the municipality.<sup>113</sup>

A majority of no less than three affirmative votes is required for the council to pass an ordinance or confirm the appointment of a subordinate officer made by the mayor.<sup>114</sup> The mayor may only cast a vote in the event of a tie.<sup>115</sup> Within five days of passing an ordinance, excluding Sundays, the council must present the ordinance to the mayor.<sup>116</sup> The mayor must affirm the ordinance or send it back to the council with written objections within 10 days after receiving it.<sup>117</sup> An ordinance must have the mayor's approval unless the mayor fails to either affirm or send back the ordinance or unless the council votes by a two-thirds margin to enact the ordinance over the mayor's veto.<sup>118</sup>

Necessary offices and positions may be filled by the borough council.<sup>119</sup> The council may adopt an ordinance whose purpose is to delegate all or part of the executive responsibilities of the borough to an administrator.<sup>120</sup> Officers appointed by the council

---

proper attention to the duties of their office, one of which is the regular attendance at and participation in the meetings of the body to which they had been elected").

<sup>110</sup> N.J.S.A. 40A:60-6(a); N.J.S.A. 40A:60-6(c).

<sup>111</sup> N.J.S.A. 40A:60-6(b)(1).

<sup>112</sup> N.J.S.A. 40A:60-6(b)(2).

<sup>113</sup> N.J.S.A. 40A:60-6(b)(4).

<sup>114</sup> N.J.S.A. 40A:60-5(e).

<sup>115</sup> N.J.S.A. 40A:60-5(e).

<sup>116</sup> N.J.S.A. 40A:60-5(d).

<sup>117</sup> N.J.S.A. 40A:60-5(d). When a proposed ordinance contains multiple distinct sections, the mayor may approve of or veto each individual section. N.J.S.A. 40A:60-5(f). *Great Atl. & Pac. Tea Co. v. Borough of Point Pleasant*, 137 N.J. 136, 142 (1994) (citing N.J.S.A. 40:55D-16) (once ordinance is signed by the mayor, it must be filed with the county planning board).

<sup>118</sup> N.J.S.A. 40A:60-5(d).

<sup>119</sup> N.J.S.A. 40A:60-6(b)(3).

<sup>120</sup> N.J.S.A. 40A:60-7(a). Such an administrator shall be appointed pursuant to N.J.S.A. 40A:9-136. N.J.S.A. 40A:60-7(a); see also *Bialkowski v. Borough of Ridgefield*, 120 N.J. Super 194, 195 (App. Div. 1972) (noting that council may appoint any officers necessary in addition to designated administrative officials).

must be residents of the borough with the exception of the borough attorney, engineer, borough clerk and building inspector.<sup>121</sup> The council may adopt an ordinance to permit the hiring of nonborough residents.<sup>122</sup> Except for the clerk, tax collector and tax assessor, officers serve at the pleasure of council and may be removed by council.<sup>123</sup> If the council does not act within 30 days to confirm the nomination of an official by the mayor, the council shall appoint the officer with a minimum of three affirmative votes.<sup>124</sup>

The borough council also has the power to adopt an administrative code consistent with its power to pass ordinances.<sup>125</sup> The administrative code should include the key provisions of the borough's charter as well as the general law that supplements the charter.<sup>126</sup> The code should also provide a guide for council in performing its duties, including the powers of any committees or department heads.<sup>127</sup> The administrative code should also include the parameters of municipal departments such as how officers are to be appointed, how departments are to be organized and the titles of such officials.<sup>128</sup> However, the administrative code must be restricted to what is authorized implicitly by statute or can reasonably be derived from such statutory authority.<sup>129</sup>

---

<sup>121.</sup> N.J.S.A. 40A:60-6(b)(3). Prior to 1988, N.J.S.A. 40A:60-6(b)(3) required that a clerk be a resident of the borough in which he is employed unless the borough by ordinance removed the residency requirements. Assembly Municipal Government Committee Statement, A. 2527-L.1988, c. 185. Thus, a nonresident clerk in a borough whose council had not passed such an ordinance could remain as a temporary clerk indefinitely without having the opportunity to obtain tenure.

<sup>122.</sup> N.J.S.A. 40A:60-6(b)(3).

<sup>123.</sup> N.J.S.A. 40A:60-6(b)(3); N.J.S.A. 40A:60-6(b)(4); N.J.S.A. 40A:60-6(b)(5). The tax collector and tax assessor's terms are regulated by chapter 9 of Title 40A of the New Jersey Statutes.

<sup>124.</sup> N.J.S.A. 40A:60-6(d). *Reuter v. Borough Council of Borough of Fort Lee*, 172 N.J. 38 (2002) (council does not have the authority to make an appointment when the mayor fails to nominate anyone for a position).

<sup>125.</sup> N.J.S.A. 40A:60-7(b).

<sup>126.</sup> N.J.S.A. 40A:60-7(b).

<sup>127.</sup> N.J.S.A. 40A:60-7(b).

<sup>128.</sup> N.J.S.A. 40A:60-7(b). *Reuter v. Borough Council of Borough of Fort Lee*, 167 N.J. 38 (2001) (the importance of police positions is demonstrated by the requirement that police positions be established by ordinance); see also *Hawthorne PBA Local 200 v. Borough of Hawthorne*, 400 N.J. Super. 51 (App. Div. 2008).

<sup>129.</sup> N.J.S.A. 40A:60-7(b).

## 1-5 TOWNSHIP

The Township Act of 1798 established the first township form of municipal government in the state.<sup>130</sup> The latest revision of the township form of government was instituted in 1990 under the Township Act of 1989.<sup>131</sup> Each township has the “full power to exercise all powers of local government in such manner as its committee may determine.”<sup>132</sup> Although a township may change its name, any name change for the township does not affect the township’s boundaries nor does it affect any “suit, proceeding or instrument” of which the township is a part.<sup>133</sup> All townships have the “full power to sue and be sued” and may also adopt a corporate seal.<sup>134</sup>

### 1-5:1 Elected Officers and Organization

The township committee is composed of the elected officers of the township.<sup>135</sup> The committee may elect a chairperson who will be known as the “mayor of the township.”<sup>136</sup> All committee members must be residents of the township.<sup>137</sup> The terms of officials begin on the first of January immediately following their election, and no officer may remain in office after the end of the term for which the officer was elected.<sup>138</sup> The election for township officials is held at the same time and place as are the general elections.<sup>139</sup> Only a plurality of the votes is required to elect any township officer.<sup>140</sup>

<sup>130</sup>. Albert J. Wolfe, N.J. State League of Municipalities, A History of Municipal Government in New Jersey Since 1798, 1 *available at* [http://www.njslom.org/history\\_municipal\\_govt.pdf](http://www.njslom.org/history_municipal_govt.pdf) (last visited Aug. 20, 2017). Eighty-eight of the original 104 townships incorporated in New Jersey under the Township Act of 1798 remain in existence today.

<sup>131</sup>. Albert J. Wolfe, N.J. State League of Municipalities, A History of Municipal Government in New Jersey Since 1798, 4 *available at* [http://www.njslom.org/history\\_municipal\\_govt.pdf](http://www.njslom.org/history_municipal_govt.pdf) (last visited Aug. 20, 2017). The official name of each township is “the township of [name of township].” N.J.S.A. 40A:63-1(a).

<sup>132</sup>. N.J.S.A. 40A:63-4.

<sup>133</sup>. N.J.S.A. 40A:63-1(a); N.J.S.A. 40A:63-1(b).

<sup>134</sup>. N.J.S.A. 40A:63-1(c).

<sup>135</sup>. N.J.S.A. 40A:63-2(a)(1).

<sup>136</sup>. N.J.S.A. 40A:63-3(f).

<sup>137</sup>. N.J.S.A. 40A:63-2(a)(2).

<sup>138</sup>. N.J.S.A. 40A:63-2(a)(2).

<sup>139</sup>. N.J.S.A. 40A:63-2(c).

<sup>140</sup>. N.J.S.A. 40A:63-2(a)(3).



The township committee is composed of either three or five members who are elected by the entire township for terms of three years.<sup>141</sup> If the committee has three members, then one member must be elected each year.<sup>142</sup> If the committee has five members, then no more than two members may be elected in any given year.<sup>143</sup> The voters of the township may vote to increase or decrease the number of committee members to either three or five members.<sup>144</sup>

## 1-5:2 Mayoral Powers

The mayor presides over township committee meetings and is the “head of the municipal government,” but the mayor does not have additional authority unless otherwise provided for by law.<sup>145</sup> The mayor may participate in debates and vote on all questions before the committee.<sup>146</sup>

<sup>141</sup> N.J.S.A. 40A:63-2(b)(1); N.J.S.A. 40A:63-3(a). If the township was previously divided into wards, the township may continue to elect officials from those wards as long as the referendum that established the wards remains in effect. N.J.S.A. 40A:63-2(b)(3); N.J.S.A. 40A:63-3(b). If a ward system is in place, one member of the township committee will be elected by the entire township and will serve as the “mayor” of the township. N.J.S.A. 40A:63-3(b). The township committee may call for a referendum to elect the township committee at large instead of according to the ward system. Only one township, Winslow Township, continues to be represented by wards. Albert J. Wolfe, N.J. State League of Municipalities, *A History of Municipal Government in New Jersey Since 1798*, 5 n.1 available at [http://www.njslom.org/history\\_municipal\\_govt.pdf](http://www.njslom.org/history_municipal_govt.pdf) (last visited Aug. 20, 2017).

<sup>142</sup> N.J.S.A. 40A:63-2(b)(2)(a). If necessary, the terms of committee members will be staggered by lot.

<sup>143</sup> N.J.S.A. 40A:63-2(b)(2)(b). The terms of committee members when there are five members may also be staggered by lot.

<sup>144</sup> N.J.S.A. 40A:63-3(c). To change the composition of the township committee, a petition must first be presented to the township clerk with the signatures of at least 15 percent of the voters who cast votes in the proceeding General Assembly election. The township committee may then order an election on the proposition that will take place at the following general election. The same proposition may only be presented once every three years, and the notice provisions and conduct of such an election will be the same as those for voting for officers in a general election. A majority of votes cast is sufficient to enact such a change. If enacted, the change will be in place for the next general election. N.J.S.A. 40A:63-3(d). If two committee members are added, then one will have a two-year term and the other a three-year term. N.J.S.A. 40A:63-3(d)(1). If two committee members are subtracted, then the terms of all committee members already elected or elected in the same election will expire on December 31 following the general election. N.J.S.A. 40A:63-3(d)(2). At the next general election, three committee members will be elected with one member having a term of one year, one having a term of two years, and one having a term of three years.

<sup>145</sup> N.J.S.A. 40A:63-3(f); N.J.S.A. 40A:63-5(a). The mayor has all powers provided him “by general law.” N.J.S.A. 40A:63-5(b). *McCann v. Clerk of Jersey City*, 167 N.J. 311, 340 (2001) (the township form of government is viewed as having a strong council and a weak mayor).

<sup>146</sup> N.J.S.A. 40A:63-5(c).



### 1-5:3 Committee Power

The township committee must hold an annual meeting during the first week of January each year.<sup>147</sup> During the annual meeting, the committee may also form subordinate committees and advisory councils for the coming year.<sup>148</sup> A majority of the committee members must be present to constitute a quorum such that business may be transacted.<sup>149</sup> However, an ordinance may not be passed without affirmative votes from a majority of all members of the committee, including those members not in attendance.<sup>150</sup>

The legislative body of the township is the committee.<sup>151</sup> It has all executive responsibilities that are not specifically reserved for the mayor.<sup>152</sup> The committee may pass, adopt, amend or repeal any ordinance or resolution as permitted by general law in order to accomplish any public purpose.<sup>153</sup> The committee is also in charge of the finances of the township, including borrowing and taxation.<sup>154</sup> The committee has the power to create any offices and positions it deems necessary, and may delegate all or part of the township's executive responsibilities to an administrator.<sup>155</sup> Such officers serve at the pleasure of the committee,<sup>156</sup> except for the township attorney, engineer, building inspector, clerk tax collector and tax assessor.<sup>157</sup> The township committee also has the power to investigate any activity of the municipality and to remove for cause any officer of the municipality except as otherwise provided by law.<sup>158</sup>

<sup>147</sup> N.J.S.A. 40A:63-3(e).

<sup>148</sup> N.J.S.A. 40A:63-3(h); N.J.S.A. 40A:63-7(d).

<sup>149</sup> N.J.S.A. 40A:63-3(g).

<sup>150</sup> N.J.S.A. 40A:63-3(g).

<sup>151</sup> N.J.S.A. 40A:63-6(a).

<sup>152</sup> N.J.S.A. 40A:63-6(c).

<sup>153</sup> N.J.S.A. 40A:63-6(b)(1).

<sup>154</sup> N.J.S.A. 40A:63-6(b)(2).

<sup>155</sup> N.J.S.A. 40A:63-7(a). Such appointments shall be made consistent with Chapter 9 of Title 40A of the New Jersey Statutes.

<sup>156</sup> *Miller v. Twp. of Readington*, 39 F. App'x 774, 776 (3d Cir. 2002) (officers appointed for fixed terms who do not serve "at the Committee's pleasure" may still be removed for cause and officers who do serve "at the pleasure of the committee" may be terminated at will).

<sup>157</sup> N.J.S.A. 40A:63-6(b)(3), enacted in 1989, provides for one year terms for the township attorney. See *Hiering v. Twp. of Jackson*, 248 N.J. Super. 37 (Law Div. 1990).

<sup>158</sup> N.J.S.A. 40A:63-6(b)(4); N.J.S.A. 40A:63-6(b)(5).

Among the positions that the township committee may create is that of the assistant municipal administrator, whose primary function is to assist the municipal administrator.<sup>159</sup> The assistant municipal administrator assumes the powers and responsibilities of the municipal administrator if the administrator is absent.<sup>160</sup> The position is filled by the township governing body, which also has the power to remove a person from the position.<sup>161</sup> The governing body must determine by ordinance the salary to be received by the assistant municipal administrator and may also provide by ordinance that the position need not be held by a township resident.<sup>162</sup>

The township council also has the power to adopt an administrative code consistent with its power to pass ordinances.<sup>163</sup> The administrative code should include the key provisions of the township's charter as well as the general law that supplements the charter.<sup>164</sup> The code should also provide a guide for council in performing its duties, including the powers and duties of any committees or department heads.<sup>165</sup> The administrative code should also include the parameters of municipal departments such as how officers will be appointed, how departments are to be organized and the titles of such officials.<sup>166</sup> However, the administrative code must be restricted to what is authorized implicitly by statute or can reasonably be derived from such statutory authority.<sup>167</sup>

## 1-6 VILLAGE

Every municipality that is governed by laws pertaining to the village form of government transacts business under the laws pertaining to townships.<sup>168</sup>

<sup>159.</sup> N.J.S.A. 40A:63-7.1(a).

<sup>160.</sup> N.J.S.A. 40A:63-7.1(b).

<sup>161.</sup> N.J.S.A. 40A:63-7.1(c).

<sup>162.</sup> N.J.S.A. 40A:63-7.1(d).

<sup>163.</sup> N.J.S.A. 40A:63-7(b).

<sup>164.</sup> N.J.S.A. 40A:63-7(b).

<sup>165.</sup> N.J.S.A. 40A:63-7(b).

<sup>166.</sup> N.J.S.A. 40A:63-7(b).

<sup>167.</sup> N.J.S.A. 40A:63-7(b).

<sup>168.</sup> N.J.S.A. 40A:63-8(b). A village is governed by the laws pertaining to townships contained in N.J.S.A. 40A:63-1 et seq. and by general law, except as provided in N.J.S.A. 40A:63-8. However, any village governed by a special charter granted by the Legislature shall

### 1-6:1 Elections and Organization

The village is governed by a five-member board of trustees who are elected at large.<sup>169</sup> The terms of the members are three years, which must be staggered such that no more than two trustees are elected each year.<sup>170</sup>

When a village is governed under regulations pertaining to townships, certain terms must be substituted in the township regulations.<sup>171</sup> The term “village” shall be substituted for “township,” the term “board of trustees” substituted for “township committee,” and the term “president of the board” substituted for “mayor.”<sup>172</sup>

### 1-6:2 Administrator

The position of assistant municipal administrator may be created by ordinance by the board of trustees.<sup>173</sup> The trustees have the power to appoint the assistant municipal administrator and to remove the administrator, with or without cause.<sup>174</sup>

### 1-6:3 Assistant Administrator

The assistant municipal administrator assists in the administration of the village and is supervised by the municipal administrator.<sup>175</sup> If the municipal administrator is unable to perform the functions of the position, the assistant municipal administrator takes on such powers and responsibilities.<sup>176</sup> The board of trustees must by ordinance determine the compensation to be paid to the assistant municipal administrator, and the

---

not be affected by the provisions of N.J.S.A. 40A:63-8; N.J.S.A. 40A:63-8(a). While there are four municipalities with the village type of government, Loch Arbour is New Jersey's only remaining municipality that retains the traditional village form of government. New Jersey's three other villages—Ridgefield Park (now with a Walsh Act form), Ridgewood, (now with a Faulkner Act Council-Manager charter) and South Orange (now the Township of South Orange Village)—have all migrated to other, non-Village forms.

<sup>169.</sup> N.J.S.A. 40A:63-8(d).

<sup>170.</sup> N.J.S.A. 40A:63-8(d). If necessary, the staggering of the terms of office of the trustees may be decided by lot.

<sup>171.</sup> N.J.S.A. 40A:63-8(c).

<sup>172.</sup> N.J.S.A. 40A:63-8(c).

<sup>173.</sup> N.J.S.A. 40A:63-8.1(a).

<sup>174.</sup> N.J.S.A. 40A:63-8.1(c).

<sup>175.</sup> N.J.S.A. 40A:63-8.1(c).

<sup>176.</sup> N.J.S.A. 40A:63-8.1(b).

ordinance may also provide that the assistant municipal administrator does not have to be a resident of the village.<sup>177</sup>

## 1-7 COMMISSION FORM OF GOVERNMENT (THE WALSH ACT)

### 1-7:1 Historical Context

The Walsh Act<sup>178</sup> is intended to “govern[] over any inconsistent laws which existed at the time of the advent of the new government.”<sup>179</sup> The legislative intent in passing the Walsh Act was to establish a “new and complete” form of municipal government that vested all powers in the Board of Commissioners.<sup>180</sup> Because no legislation existed to exempt the Housing Authority Act from the application of the Walsh Act, the Supreme Court concluded that the provisions of the Walsh Act pre-empt those of the Housing Authority Act.<sup>181</sup> Although inconsistencies can be found between the two acts, passage of the Housing Authority Act after the Walsh Act does not imply that the Housing Authority Act should govern.<sup>182</sup> The language in the Housing Authority Act that provides for it to govern over inconsistent laws applies only prospectively, and the Walsh Act was in effect when the Housing Authority Act was passed.<sup>183</sup>

<sup>177</sup>. N.J.S.A. 40A:63-8.1(d).

<sup>178</sup>. N.J.S.A. 40:70-1 et seq.

<sup>179</sup>. *Stark v. Fell*, 124 N.J.L. 475, 478 (Sup. Ct. 1940) (Walsh Act attempts to establish “a new and complete form and scope of the municipal government”); *Buchl v. Bd. of Comm’rs of Beverly*, 90 N.J.L. 44, 45-47 (Sup. Ct. 1917) (purpose of the Walsh Act is to concentrate the powers of the municipality in the commissioners, and the legislature did not intend to then “scatter the powers among different boards”); see also *Grogan v. De Sapio*, 11 N.J. 308, 323 (1953).

<sup>180</sup>. *Stark v. Fell*, 124 N.J.L. 475, 478 (Sup. Ct. 1940) (only exceptions to the complete power of the Board of Commissioners are with regards to “the boards of education, the District Courts, policemen, firemen, veterans, or officials or employees protected by any Tenure of Office act or Civil Service act”). But see *Burke v. Kenny*, 9 N.J. Super. 160, 164 (1950) (tenure as it pertains to veterans “was not intended to encompass those whose terms of office or duration of employment was definitely designated”).

<sup>181</sup>. *Stark v. Fell*, 124 N.J.L. 475, 478 (Sup. Ct. 1940). But see *O’Keefe v. Dunn*, 89 N.J. Super. 383, 396-97 (Law Div. 1965), *aff’d*, 47 N.J. 210 (1966) (noting that N.J.S.A. 40:73-5 was enacted before the Local Housing Authorities Law and concluding that “[w]here there is a conflict between a provision of a general statute and a provision of a later statute, relating to the same subject matter in a more minute and definite way, the latter will prevail over the former and will be considered an exception to the general statute”).

<sup>182</sup>. *Stark v. Fell*, 124 N.J.L. 475, 478 (Sup. Ct. 1940).

<sup>183</sup>. *Stark v. Fell*, 124 N.J.L. 475, 478-79 (Sup. Ct. 1940).

## COMMISSION FORM OF GOVERNMENT (THE WALSH ACT)

1-7

The Walsh Act should be read in pari materia with election law statutes and the provisions of the Faulkner Act.<sup>184</sup> As long as they are not inconsistent with the Walsh Act, general election laws apply to elections in municipalities with the commission form of government.<sup>185</sup> Furthermore, if a change of government question is placed on the ballot, the Walsh Act neither expressly permits nor prohibits the inclusion of an interpretive statement.<sup>186</sup>

### 1-7:2 Method of Adoption

If a municipality is not governed by the commission form of government, such municipalities may nonetheless adopt the provisions of these chapters by election.<sup>187</sup> To hold an election, a petition or request must be submitted in writing with the signatures of 20 percent of the qualified voters from the previous general election.<sup>188</sup> Once the petition has been filed with the clerk, an election must be held on the third Tuesday after the petition was filed.<sup>189</sup> Public notice must be provided of the time and place that the election is to be held.<sup>190</sup>

<sup>184.</sup> *City of N. Wildwood v. N. Wildwood Taxpayers' Ass'n*, 338 N.J. Super. 155, 163 (Law Div. 2000).

<sup>185.</sup> *City of N. Wildwood v. N. Wildwood Taxpayers' Ass'n*, 338 N.J. Super. 155, 163 (Law Div. 2000).

<sup>186.</sup> *City of N. Wildwood v. N. Wildwood Taxpayers' Ass'n*, 338 N.J. Super. 155, 163 (Law Div. 2000) (an interpretive statement may be included if the change of government question is "vague or unclear").

<sup>187.</sup> N.J.S.A. 40:71-1; *see Delaware River Transp. Co. v. Inhabitants of Trenton*, 86 N.J.L. 48, 50 (N.J. 1914) (noting that the city of Trenton adopted the Walsh Act in 1911); *City of N. Wildwood v. N. Wildwood Taxpayers' Ass'n*, 338 N.J. Super. 155, 160 (Law Div. 2000) (noting that voters may petition to change their form of government to the commission form under the Walsh Act from a mayor-council form under the Faulkner Act); *In re Application of Vacaro*, 1 N.J. Super. 591, 600 (Law Div. 1948) (holding that an election to change the form of government was properly governed by N.J.S.A. 40:70-1 et seq.)

<sup>188.</sup> N.J.S.A. 40:71-1; *see also Baker v. Reeves*, 9 N.J. Misc. 1303, 1305 (Sup. Ct. 1931) (holding that the city clerk did not have the power to allow the withdrawal of names from a petition to hold an election to adopt the Walsh Act and thus finding "no proper basis" to refuse to call an election); *Cusack v. Edge*, 6 N.J. Misc. 13, 13-14 (Sup. Ct. 1927) (concluding that a sufficient number of signatures of qualified voters had been collected to require an election to adopt the provisions of the Walsh Act even though nineteen of the signatures had to be excluded).

<sup>189.</sup> N.J.S.A. 40:71-2; *City of N. Wildwood v. N. Wildwood Taxpayers' Ass'n*, 338 N.J. Super. 155, 162 (Law Div. 2000) (since time period provided by N.J.S.A. 40:71-2 conflicts with the notification requirements provided by the Absentee Voting Law, N.J.S.A. 1957-7, for military and civilian absentee voters, it was appropriate to hold the election pertaining to the adoption of the commission form of government the same day as the general election).

<sup>190.</sup> N.J.S.A. 40:71-2. Public notice must be given by advertisement signed by the clerk. Such advertisements must be posted in a minimum of 20 places in the municipality and must

The ballots for the election are provided by the municipal clerk.<sup>191</sup> The ballots must be printed on “plain, substantial white paper.”<sup>192</sup> In the square printed to the left of the word “YES” or in the square to the left of the word “NO,” the voter must indicate whether the commission form of government should be adopted.<sup>193</sup> The voter may indicate a preference by marking one of the squares with either a cross or a plus.<sup>194</sup>

The election should be held in the same places as the municipality’s annual elections are held and should take place during the regular hours for elections.<sup>195</sup> The election is governed by the law regulating elections in general.<sup>196</sup> The election officers must deliver to the municipal clerk a statement of the results of the election.<sup>197</sup>

The municipal clerk is in charge of certifying the results of the election and must provide the results to the legislative body of the municipality and to the secretary of state.<sup>198</sup> The clerk must also enter the results in the minutes of the municipality’s first meeting following the election.<sup>199</sup> The clerk must report whether a majority of the votes were in favor of the adoption of the commission form of government.<sup>200</sup> If a majority has voted for adoption, the clerk must report whether the number of votes in favor was at least 30 percent of the total votes cast at the proceeding general election in the municipality.<sup>201</sup> If both of these requirements are

---

also be published for a minimum of six days before the election in a newspaper that is printed and published in the municipality. If no paper is printed and published in the municipality, then advertisement in a newspaper circulated in the municipality is acceptable.

<sup>191</sup> N.J.S.A. 40:71-3. No time period is specified in which the clerk must verify whether the voters are qualified. *City of N. Wildwood v. N. Wildwood Taxpayers’ Ass’n*, 338 N.J. Super. 155, 161 (Law Div. 2000).

<sup>192</sup> N.J.S.A. 40:71-3.

<sup>193</sup> N.J.S.A. 40:71-3; *City of N. Wildwood v. N. Wildwood Taxpayers’ Ass’n*, 338 N.J. Super. 155, 160 (Law Div. 2000) (no provision permits the inclusion of an interpretative statement on the ballot).

<sup>194</sup> N.J.S.A. 40:71-3.

<sup>195</sup> N.J.S.A. 40:71-4.

<sup>196</sup> N.J.S.A. 40:71-4.

<sup>197</sup> N.J.S.A. 40:71-4.

<sup>198</sup> N.J.S.A. 40:71-5.

<sup>199</sup> N.J.S.A. 40:71-5.

<sup>200</sup> N.J.S.A. 40:71-5.

<sup>201</sup> N.J.S.A. 40:71-5. Prior to 1915, the Walsh Act required for its adoption that more than thirty percent of “the votes cast for members of the general assembly” be cast in favor of the

satisfied, then chapters 70 to 76 of Title 40 are “operative in such municipality and binding upon its inhabitants and upon all persons and property to be affected thereby.”<sup>202</sup>

If the majority of votes are against the adoption of chapters 70 through 76 of Title 40, the chapters will not be adopted by the municipality.<sup>203</sup> The issue cannot be brought before the voters again until the mayor who is elected at the election immediately following the rejection of the change to the commission form of government is in the beginning of the last year of his term.<sup>204</sup> At that point, the petition or request for an election on the issue must be resubmitted and the same procedure followed for its adoption.<sup>205</sup>

### 1-7:3 Effect of Adopting the Commission Form of Government

If a municipality adopts chapters 70 through 76 of Title 40, the municipality’s laws, other than those directly in conflict with the new provisions, will remain unchanged.<sup>206</sup> Laws or parts of laws that are inconsistent with chapters 70 through 76 are “repealed and abrogated” with the exception of the provisions of chapter eight

---

Walsh Act. In 1915, the act was changed to require “thirty percent of the total number of legal ballots cast...at the general election next preceding the submission of [the] question.” *Schwartz v. Wachlin*, 89 N.J.L. 39, 40 (1916); N.J.S.A. 40:71-5. Because some voters may not vote for members of the general assembly, the number of votes required under the revised act is likely greater. The difference is also crucial because not all general elections involve the election of members of the general assembly. In *Schwartz*, the Court concluded that the Walsh Act was not adopted when less than 30 percent of the total number of legal ballots in the previous general election were in favor of the adoption of the act.

<sup>202</sup> N.J.S.A. 40:71-6.

<sup>203</sup> N.J.S.A. 40:71-7.

<sup>204</sup> N.J.S.A. 40:71-7. However, this restriction on bringing the issue before the voters again is not imposed when the majority of the votes cast are in favor of adoption even though the number of affirmative votes is less than 30 percent of the total votes cast at the proceeding general election. *Vollmer v. Wachlin*, 89 N.J.L. 440, 442 (Sup. Ct. 1916) (“Under the plain language of this statute the limitation is only applicable when a majority of the votes cast are not in favor of the adoption of the act, and except for this there is no limitation upon the time within which another election may be called.”).

<sup>205</sup> N.J.S.A. 40:71-7.

<sup>206</sup> N.J.S.A. 40:71-8; see *Mattia v. Newark*, 119 N.J.L. 268, 269 (Sup. Ct. 1938) (the mechanism of the city’s government and its general laws and charter provisions relating to the city’s governance were not repealed unless they were inconsistent with the newly adopted provisions of the Walsh Act).



of Title 2A of the New Jersey Statutes.<sup>207</sup> The municipality's name and seal also are unaltered.<sup>208</sup>

Once chapters 70 through 76 of Title 40 have been adopted and the commissioners elected, the governing bodies and any agency boards and bodies shall be abolished with the exception of the board of education and any municipal courts.<sup>209</sup> The terms of both elected and appointed officers, including councilmen, will terminate, and the powers and responsibilities of these officers will be transferred to the board of commissioners elected pursuant to chapters 70 through 76.<sup>210</sup> The board of commissioners assumes all the powers of the boards and bodies that terminated upon its creation unless such powers are specifically withheld.<sup>211</sup>

<sup>207</sup>. N.J.S.A. 40:71-10; *see also* *Martini v. De Muro*, 26 N.J. Misc. 182, 186-88 (Sup. Ct. 1948) (provisions of the charter of the City of Passaic pertaining to the superintendent of streets were not voided by the enactment of the Walsh Act because the provisions were not inconsistent with the provisions of the newly enacted act); *Walsh v. Trenton*, 117 N.J.L. 64, 67 (Sup. Ct. 1936) (when a municipality adopts the commission form of government, "the powers already enjoyed by the municipality under any statute, general or special, shall continue where there is no inconsistency with the...new plan of government").

<sup>208</sup>. N.J.S.A. 40:71-8.

<sup>209</sup>. N.J.S.A. 40:71-9. *Morris v. Fagan*, 85 N.J.L. 617, 618-19 (Ct. Err. & App. 1914) (the city clerk of Jersey City who was appointed pursuant to the city charter of Jersey City was not entitled to the office with the same name created after the passage of the Walsh Act when the positions were "entirely different"); *see also* *Corb v. Nutley*, 101 N.J.L. 50, 52 (Sup. Ct. 1925) (the board of commissioners was without power to repeal the sanitary code and adopt a new one when the board had "no legal existence" after the adoption of a supplement to the Walsh Act that abolished the offices of the board).

<sup>210</sup>. N.J.S.A. 40:71-9. *Mattia v. Newark*, 119 N.J.L. 268, 270 (Sup. Ct. 1938) (internal quotation omitted) (effect of this provision is "to impose upon the board of commissioners the duty to fill existing offices, made vacant by the adoption of the act and the organization of the board"). However, the creation of subordinate boards under section 40:72-7 is not affected. The terms of office of members of the police or fire department and of war veterans are not affected, nor are the positions of tenured employees. N.J.S.A. 40:71-9; *see also* *Devlin v. Cooper*, 125 N.J.L. 414, 415, 418 (N.J. 1940) (individual holding the position of police justice in the city of Trenton had tenure and that his employment was thus protected against termination due to the change in form of government to the Walsh Act); *Stark v. Fell*, 124 N.J.L. 475, 478 (Sup. Ct. 1940) (members of the Housing Authority do not fall within an exception and the terms of its members therefore ended with the adoption of the Walsh act). The system of public instruction in any municipality is also unaffected. N.J.S.A. 40:71-11. In a township that has adopted the commission form of government, the board of fire commissioners of any fire district may be reinstated by ordinance. N.J.S.A. 40:71-9.1.

<sup>211</sup>. N.J.S.A. 40:71-9. *Sykes v. Heinzman*, 100 N.J.L. 12, 14-15 (Sup. Ct. 1924) (board of commissioners may distribute among the department heads the power of appointment subsequent to the first appointments after the adoption of the commission form of government). *De Muro v. Sullivan*, 64 N.J. Super. 103, 104, 107-09 (App. Div. 1960) ("Walsh Act requires that power to appoint be distributed among the several departments."); *see also* *Daly v. City of New Brunswick*, 3 N.J. 397, 400 (1950) ("power to appoint resides solely in the director of the department to which the particular position has been assigned...except where the appointment is made by the governing body as a board at its organization meeting").



## 1-7:4 Commissioners

### 1-7:4.1 Number and Qualifications

The number of commissioners depends on the population of the municipality.<sup>212</sup> Municipalities with a population of fewer than 12,000 people have commissions with three members while those with over 12,000 have five members.<sup>213</sup> Citizenship and residency requirements were deleted from the statute in 1980.<sup>214</sup> The “mayor” of the board is elected at the first meeting from the members of the board.<sup>215</sup>

A municipality with three commissioners may add an additional two commissioners if the voters elect to make such a change.<sup>216</sup> Before the proposal can appear on the ballot in an election, a petition must be submitted containing the signatures of at least 15 percent of the number of votes cast at the last election in which all members of the General Assembly were elected.<sup>217</sup> The ballot to change the number of commissioners must include a statement of the issue to be voted on.<sup>218</sup> Voters then must use either a cross or a plus sign before the “Yes” or “No” printed on the ballot to indicate their approval or disapproval of the measure.<sup>219</sup> A majority vote of qualified electors is necessary for the proposed ordinance to become “valid and binding” on the municipality.<sup>220</sup> A “vote of the

---

<sup>212</sup>. N.J.S.A. 40:72-1.

<sup>213</sup>. N.J.S.A. 40:72-1.

<sup>214</sup>. N.J.S.A. 40:72-1, Historical and Statutory Notes, Amendments, L1980, c. 94, § 4. *Stothers v. Martini*, 6 N.J. 560 (1951) (two-year residency requirement was reasonable). *But see Matthews v. Atlantic City*, 84 N.J. 153, 156 (1980) (two-year residency requirement was unconstitutional under the Equal Protection Clause of the federal constitution because it substantially infringed on the right of each voter to exercise his franchise).

<sup>215</sup>. N.J.S.A. 40:72-10. *Highton v. Musto*, 186 N.J. Super. 281, 295 (Law Div. 1982) (votes of four commissioners are sufficient to elect a mayor but it would be “appropriate” to wait until all five commissioners were present to vote).

<sup>216</sup>. N.J.S.A. 40:72-1.1. *Grogan v. De Sapio*, 19 N.J. Super. 469, 477 (Law Div. 1952) (Board of Commissioners in a municipality with five commissioners does not have the power of its own accord to distribute the powers and duties of the municipality among three departments rather than five).

<sup>217</sup>. N.J.S.A. 40:72-1.1. The petition to put the proposal to add two commissioners before the voters follows the same procedure as that for petitions to recall commissioners. The petition must be filed with and certified by the municipal clerk at least 60 days prior to the general election.

<sup>218</sup>. N.J.S.A. 40:72-1.2.

<sup>219</sup>. N.J.S.A. 40:72-1.2. If voting machines are used in a given county, Title 19 of the Revised Statutes governs the balloting.

<sup>220</sup>. N.J.S.A. 40:72-1.3.

people” is also required to repeal or amend an ordinance proposed by petition or adopted by a majority vote of the people.<sup>221</sup>

#### 1-7:4.2 Organization, Powers and Duties

The board of commissioners has “all the executive, administrative, judicial and legislative powers and duties” previously held by the mayor, city council and any executive or legislative body of the municipality.<sup>222</sup> The board thus has “complete control” over the municipality’s affairs.<sup>223</sup> The government of a municipality may “make, amend, repeal and enforce ordinances” in order to protect the “life, health and property” of its inhabitants, to deal with nuisances and to promote the general welfare and security of the municipality.<sup>224</sup> Any ordinance or resolution that was in place prior to the enactment of the Walsh Act remains in force as long as it is not inconsistent with the provisions of the Walsh Act.<sup>225</sup>

The mayor, who is also a member of the board of commissioners, presides over meetings of the board.<sup>226</sup> However, the mayor does not have veto power over any measure approved by the board.<sup>227</sup> The mayor is considered the president of the board and is also responsible for supervising all departments of the board.<sup>228</sup>

<sup>221</sup>. N.J.S.A. 40:72-1.3.

<sup>222</sup>. N.J.S.A. 40:72-2. If the board of commissioners is the first board elected after a change to the commission form of government and the appropriations for the expenditures of the municipal government for that year have already been made, the new board may revise or repeal any such appropriations or pass additional appropriations. N.J.S.A. 40:72-16. Any general provision of law pertaining to municipal boards of recreation commissioners also applies to municipalities under a commission government system. N.J.S.A. 40:73-8; see, e.g., *State ex rel. Dep’t of Health v. City of Hoboken*, 130 N.J. Eq. 564, 566 (N.J. Ch. 1942) (vesting control of the water department with the Board of Commissioners upon the adoption of the commission form of government).

<sup>223</sup>. N.J.S.A. 40:72-2; *Connors v. City of Bayonne*, 36 N.J. Super. 390, 393 (App. Div. 1955) (under N.J.S.A. 40:72-17, repealed in 1971, board was required to publish monthly financial statements as well as an annual audit).

<sup>224</sup>. N.J.S.A. 40:72-3. The municipality does not have any power that would conflict with laws pertaining to all municipalities. See also *Grogan v. De Sapio*, 19 N.J. Super. 469, 479 (Law Div. 1952) (“Municipal officers in the discharge of their duties do not act for themselves, but for the public.”).

<sup>225</sup>. N.J.S.A. 40:72-3.

<sup>226</sup>. N.J.S.A. 40:72-10.

<sup>227</sup>. N.J.S.A. 40:72-10; *Belleville Twp. v. Fornarotto*, 228 N.J. Super. 412, 417 (Law Div. 1988) (“Although the mayor presides at all meetings, his only other authority is to supervise all departments and report to the board, for its action, all matters requiring the attention of the board or any department.”).

<sup>228</sup>. N.J.S.A. 40:72-11. *Belleville Twp. v. Fornarotto*, 228 N.J. Super. 412, 418 (Law Div. 1988) (mayor does not have the authority to exercise all the powers of all the departments).

The mayor also has the duty to report back to the board on any matter requiring the board's action.<sup>229</sup> The director of the revenue and finance department is the vice president of the board and will perform the duties of the mayor if there is ever a vacancy in the mayor's office.<sup>230</sup>

The division of the powers of the commissioners depends on the number of commissioners.<sup>231</sup> In municipalities with five commissioners, the municipal "powers, authority and duties" are divided into five departments: public affairs, revenue and finance, public safety, public works, and parks and public property.<sup>232</sup> When a municipality only has three commissioners, there are only three departments: public affairs and public safety, revenue and finance, and public works, parks and public property.<sup>233</sup> In either case, one commissioner, including the mayor, must serve as the director for each of the departments.<sup>234</sup>

The commissioners may assign to each department the powers and duties it is to perform.<sup>235</sup> The allocation of powers between

---

<sup>229</sup> N.J.S.A. 40:72-11. *Belleville Twp. v. Fornarotto*, 228 N.J. Super. 412, 418 (Law Div. 1988) (citing *O'Connor v. Harms*, 111 N.J. Super. 22, 31 (App. Div. 1970)) (mayor must inquire into any matter that has the potential to "bring the community into public disrepute").

<sup>230</sup> N.J.S.A. 40:72-12. N.J.S.A. 40:72-15 relating to the filling of vacancies in the office of commissioner was repealed in 1979. Provisions relating to temporary appointments of commissioners and to special elections in N.J.S.A. 40:72-15.1 through N.J.S.A. 40:72-15.3 were repealed in 1975. *Highton v. Musto*, 186 N.J. Super. 281, 290 (Law Div. 1982) ("Municipal Vacancy Law," N.J.S.A. 40A:16-1, passed in 1979, applies to Walsh Act municipalities); *Monte v. Milat*, 17 N.J. Super. 260, 268 (Law Div. 1952) (statutory vacancy occurs when there is "no documentary title to the office").

<sup>231</sup> N.J.S.A. 40:72-4.

<sup>232</sup> N.J.S.A. 40:72-4; see *Mattia v. Newark*, 119 N.J.L. 268, 269 (Sup. Ct. 1938) (entrusting the management of municipal affairs to the board of commissioners consistent with the newly adopted Walsh Act).

<sup>233</sup> N.J.S.A. 40:72-4.

<sup>234</sup> N.J.S.A. 40:72-6. The assignment of directors is by majority vote of the board of commissioners at its first regular meeting following the election of its members. However, the assignments may be changed if a change would be of benefit to the public. See also *Grogan v. De Sapia*, 19 N.J. Super. 469, 476-77 (Law Div. 1952) ("The act contemplates that there shall be a division of authority and an imposition of individual responsibility in departmental work with each commissioner assigned to a single department so that he may be held accountable for its management.").

<sup>235</sup> N.J.S.A. 40:72-5; see, e.g., *O'Connor v. Calandrillo*, 117 N.J. Super. 586, 590 (Law Div. 1971) (members of the board of commissions have "the power to define the qualifications, functions and duties of all officers and employees, the conditions and terms of their employment and the salaries to be paid to them"); *Mattia v. Newark*, 119 N.J.L. 268, 271 (Sup. Ct. 1938) (director of revenue and finance was the appropriate officer to appoint an individual to the existing office of receiver of taxes of the city of Newark). *Grogan v. De Sapia*, 19 N.J. Super. 469, 479 (Law Div. 1952) (once powers and duties of government have been divided among the departments and the directors of the departments have been

the powers should be “a reasonably fair distribution,” and each department should be allotted a “substantial share” of the powers and duties in the municipality.<sup>236</sup> The board may also assign specific powers and duties to officers and employees within the various departments.<sup>237</sup> In counties of first and second class the powers and duties most closely related to each department name should be assigned to that department, and responsibilities should be divided as equally as possible among the departments.<sup>238</sup> In addition, the commissioners have the power to pass “other rules and regulations as may be necessary or proper for the efficient and economical conduct of the business of the municipality.”<sup>239</sup> Subordinate boards and officers may also be appointed by the board of commissioners either at the first meeting or soon after the first meeting.<sup>240</sup>

appointed, “the executive and administrative powers are to be exercised by the respective commissioner presiding over his department and not by the board of commissioners as a whole”). *Boyle v. DeNooyer*, 39 N.J. 245, 247, 249 (1963) (where Director of Public Affairs was assigned the “Water Supply and Distribution System,” appointment of a Water Commissioner should thus be made by the Director of Public Affairs); see also *State v. Hoboken*, 130 N.J. Eq. 564, 566 (Ct. of Ch. & Prerog. 1942).

<sup>236.</sup> *Grogan v. De Sapio*, 19 N.J. Super. 469, 481 (Law Div. 1952) (commissioner does not have the authority to act with respect to a department of which he is not the director); *Slurzberg v. City of Bayonne*, 29 N.J. 106, 112 (1959) (director of revenue and finance cannot appoint “special counsel” to assist the law department because the law department was subject to the jurisdiction of another commissioner).

<sup>237.</sup> N.J.S.A. 40:72-5; *Trenton v. Fowler-Thorne Co.*, 57 N.J. Super. 196, 201 (App. Div. 1959) (affirming that the board of commissioners must “determine the powers and duties to be performed by each department” and must assign such powers and duties as appropriate). The board may assign an employee or officer to perform work for more than one department at once. N.J.S.A. 40:72-5. However, the Walsh Act fails to address whether a person may simultaneously hold the offices of township commissioner and another position such as the municipal building code enforcement officer. *Belleville Twp. v. Fornarotto*, 228 N.J. Super. 412, 421, 427 (Law Div. 1988) (holding that the elected position of commissioner is “incompatible” with simultaneously holding the position of housing inspector); see also *O'Connor v. Calandrillo*, 117 N.J. Super. 586, 592 (Law Div. 1971) (holding that the position of commissioner is “legally incompatible” with holding other paid positions in the municipality).

<sup>238.</sup> N.J.S.A. 40:72-6.1. *Connors v. City of Bayonne*, 36 N.J. Super. 390, 393 (App. Div. 1955) (office of controller would naturally fall within the jurisdiction of the director of revenue and finance, although such an assignment was “probably not mandator[y]”).

<sup>239.</sup> N.J.S.A. 40:72-5. The budget for a municipality with five commissioners must be approved by a vote of three of the five commissioners. *Belleville Twp. v. Fornarotto*, 228 N.J. Super. 412, 425 (Law Div. 1988).

<sup>240.</sup> N.J.S.A. 40:72-2. The board also has the power to abolish such boards and to dismiss officers and employees for cause following a public hearing and in accord with civil service and tenure of office laws. N.J.S.A. 40:72-8, which related to the appointment and removal of an employee by persons in certain positions, was repealed effective 1982. N.J.S.A. 40:72-20 repealed in 1971, pertained to the appointment of delegates to attend nonpolitical conventions. N.J.S.A. 40:73-7 also repealed in 1971, dealt with the appointment, powers and duties of municipal clerks.

If a city is of the second class, or a city is of the fourth class with at least 6,000 inhabitants, the board of commissioners may appoint deputies for the directors of each department.<sup>241</sup> The directors have the power to remove any deputy at any time, and such a decision is not subject to review.<sup>242</sup> The terms of the deputies end with the term of the director who made the appointment.<sup>243</sup> The directors must each outline in writing the powers and duties of the deputies that the director appoints.<sup>244</sup> The acts of deputies consistent with these powers and duties are as legally binding as if the director had acted.<sup>245</sup>

The board of commissioners must hold regular meetings at least once a month.<sup>246</sup> Special meetings may also be called by the mayor or by two or more commissioners.<sup>247</sup> All meetings are open to the public and the minutes of all meetings must be made available to the public.<sup>248</sup>

A quorum is composed of a majority of the members of the board of commissioners.<sup>249</sup> All members have the right to vote on any measure before the board.<sup>250</sup> Before any vote is taken, the measure must be put in writing and read aloud.<sup>251</sup> The board members must vote by stating either “yea” or “nay,” and the votes are recorded in the minutes of the meeting which are signed by the majority of the commissioners and the municipal clerk.<sup>252</sup>

Any income that a municipality may receive through the operation or sale of its waterworks must be used for one of three

---

<sup>241</sup> N.J.S.A. 40:72-9. In 1953, N.J.S.A. 40:72-20.1, which provided for the appointment of an acting recorder in municipalities of 15,000 or more inhabitants, was repealed. In 1963, N.J.S.A. 40:72-20.2, which related to the powers of an acting recorder, was repealed.

<sup>242</sup> N.J.S.A. 40:72-9.

<sup>243</sup> N.J.S.A. 40:72-9. However, if an officer or employee takes on duties in addition to his regular employment, the regular employment will not be affected by the end of the term of the director who appointed him.

<sup>244</sup> N.J.S.A. 40:72-9.

<sup>245</sup> N.J.S.A. 40:72-9. The one exception is that deputies may not act in place of directors during meetings of the board of commissioners.

<sup>246</sup> N.J.S.A. 40:72-13.

<sup>247</sup> N.J.S.A. 40:72-13.

<sup>248</sup> N.J.S.A. 40:72-13.

<sup>249</sup> N.J.S.A. 40:72-14; *see, e.g., Housman v. Earle*, 98 N.J.L. 379 (Sup. Ct. 1923) (adjourning a meeting three times because a quorum was not present).

<sup>250</sup> N.J.S.A. 40:72-14.

<sup>251</sup> N.J.S.A. 40:72-14.

<sup>252</sup> N.J.S.A. 40:72-14.

purposes.<sup>253</sup> First, the proceeds should be used to cover the costs of the operation, management and maintenance of the waterworks.<sup>254</sup> Second, the annual interest on bonds and other obligations issued to raise money for the waterworks must be paid as well as any amount of the principal necessary to pay the bonds and obligations when they reach maturity.<sup>255</sup> Finally, any excess revenue may be used for any purpose for which the board has the authority to tax.<sup>256</sup>

The board of commissioners also has the power to construct convention halls in its municipality.<sup>257</sup> This power includes the power to acquire land and construct buildings for a variety of uses.<sup>258</sup> The commissioners may also lease the premises of a convention hall for any purpose, including the sale of merchandise and other privileges.<sup>259</sup> The board may also issue bonds to finance the municipality's convention hall.<sup>260</sup>

### 1-7:4.3 Election of Commissioners

The election of the first members of the board of commissioners must be held on the fifth Tuesday after the adoption of the Walsh Act.<sup>261</sup> The term of the commissioners starts at noon on the first Tuesday after the election and continues through the third Tuesday in May four years after the election.<sup>262</sup> However, commissioners must stay in office until their successors have been elected and “duly qualified.”<sup>263</sup>

<sup>253</sup> N.J.S.A. 40:72-18.

<sup>254</sup> N.J.S.A. 40:72-18(a).

<sup>255</sup> N.J.S.A. 40:72-18(b).

<sup>256</sup> N.J.S.A. 40:72-18(c).

<sup>257</sup> N.J.S.A. 40:72-19.

<sup>258</sup> N.J.S.A. 40:72-19. A convention hall may be used for conventions, exhibitions, entertainment purposes, receptions, lectures, addresses and assemblies.

<sup>259</sup> N.J.S.A. 40:72-19.

<sup>260</sup> N.J.S.A. 40:72-19.

<sup>261</sup> N.J.S.A. 40:75-1. Prior to 1982, N.J.S.A. 40:75-3 through N.J.S.A. 40:75-5 provided for nomination by petition for members of the commission but did not include provisions for a primary election to nominate candidates. *Bell v. Foster*, 83 N.J. Super. 455, 459 (App. Div. 1964).

<sup>262</sup> N.J.S.A. 40:75-1. The “Uniform Nonpartisan Elections Law” governs the election procedure for the commissioners. The start of the commissioners’ term on the first Tuesday after the election is in contrast to the governing body members in other nonpartisan forms of government who serve starting on July 1 under the “Uniform Nonpartisan Election Law.” Senate County & Municipal Government Committee Statement, S. 1441-L.1983, c. 183.

<sup>263</sup> N.J.S.A. 40:75-1, 2. The “Uniform Nonpartisan Elections Law” governs the election procedure for the commissioners.

The election of commissioners after the first election under the Walsh Act will take place on the second Tuesday in May every four years.<sup>264</sup> The election should be held as part of a regular municipal election.<sup>265</sup> The commissioners serve for terms of four years starting at noon on the third Tuesday of May immediately following the election.<sup>266</sup>

If a municipality governed by the commission form of government under the Walsh Act votes to adopt a different form of government, the new form becomes effective July 1 following the date set for the next election for commissioners.<sup>267</sup> However, no election for commissioners shall be held on that date.<sup>268</sup> Commissioners and all positions and employees of the municipality's subordinate boards, departments, bodies and offices shall remain in office through July 1 at noon.<sup>269</sup> The parameters of their offices shall remain the same through July 1.<sup>270</sup>

Once a commissioner has been in office one year, a recall petition may be filed for his removal.<sup>271</sup> The recall petition must be signed by at least 25 percent of the municipality's registered voters and be filed with the municipal clerk.<sup>272</sup> The clerk must then examine the petition to ensure that it conforms with all statutory requirements within 10 days of its receipt.<sup>273</sup> If the clerk questions the authenticity

---

<sup>264.</sup> N.J.S.A. 40:75-2.

<sup>265.</sup> N.J.S.A. 40:75-2. The election must be held consistent with the guidelines in the "Uniform Nonpartisan Elections Law."

<sup>266.</sup> N.J.S.A. 40:75-2. However, the fixed term of four years should not be read to preclude a candidate based on previous service as a commissioner. *Lynch v. Town of W. New York*, 115 N.J. Super. 1, 5 (App. Div. 1971). The court noted that previous experience may be desirable when electing a commissioner.

<sup>267.</sup> N.J.S.A. 40:75-2.1.

<sup>268.</sup> N.J.S.A. 40:75-2.1.

<sup>269.</sup> N.J.S.A. 40:75-2.1. Incumbents should also continue in office through July 1.

<sup>270.</sup> N.J.S.A. 40:75-2.1.

<sup>271.</sup> N.J.S.A. 40:75-27. The petition need not be on a single paper in the interest of convenience in collecting signatures. N.J.S.A. 40:75-47. An affidavit of one of the signers of each paper of the petition must be attached stating that the signatures on the page are "to the best of his knowledge and belief" the names of the persons signing. These same requirements apply to all petitions required under this article. *See Musto v. Leone*, 60 N.J. 298, 302 (1972).

<sup>272.</sup> N.J.S.A. 40:75-27 provides the wording for the recall petition and renders the recall provisions uniform with those that apply to municipal manager municipalities and to Faulkner Act municipalities. N.J.S.A. 40:75-27, Introductory Statement, A. 2334-L.1984, c. 129.

<sup>273.</sup> N.J.S.A. 40:75-28. The municipal clerk should not reject a petition merely because of a typographical deviation or a minor departure from the required form because the form is



of any of the signatures, he may use the signatures in registry books as a comparison.<sup>274</sup> If the petition is not in compliance with all requirements, the clerk must return it to the agent who filed it and allow 10 days for it to be corrected and refiled.<sup>275</sup>

If the petition conforms with all requirements, the clerk must call an election to determine whether the commissioner will be recalled.<sup>276</sup> The election will be held on a Tuesday 30 to 40 days after the date of the certificate of notice unless that day is not convenient.<sup>277</sup> The board of commissioners and the municipal clerk must make all preparations for the recall election and provide for the funding of the election.<sup>278</sup> Funds may be raised for this purpose in “any convenient manner.”<sup>279</sup>

A petition to nominate a replacement for the commissioner subject to possible recall must be signed by at least 15 percent of the legal voters of the municipality.<sup>280</sup> Any person who signs a petition but is not an elector will be guilty of a misdemeanor.<sup>281</sup> If the clerk finds the nominating petition deficient, the clerk shall return it so that it may be corrected and resubmitted within three days.<sup>282</sup> The clerk must provide in writing the reasons for returning it.<sup>283</sup> If the commissioner subject to recall resigns within three days

---

provided merely for guidance. N.J.S.A. 40:75-47. “Substantial” conformity with the forms is sufficient.

<sup>274</sup> N.J.S.A. 40:75-28.

<sup>275</sup> N.J.S.A. 40:72-28. *In re Byrne*, 19 N.J. Super. 313, 326 (Law Div. 1952) (“day” must be interpreted as “a period from midnight to midnight of that day”).

<sup>276</sup> N.J.S.A. 40:75-29. The clerk must prepare a certificate of notice in the form provided by N.J.S.A. 40:75-29. A copy of the certificate must be served on the commissioner to be recalled. N.J.S.A. 40:75-30. If this commissioner cannot be found, copies of the certificate must be served on the other commissioners of the municipality. Copies of the certificate must also be printed weekly in a newspaper circulating in the municipality and, if the municipality has a daily newspaper, for three days immediately before election day in the daily paper. *Mocco v. Picone*, 203 N.J. Super. 443, 447 (App. Div. 1985) (withdrawal of signatures from a petition to recall a commissioner is not permitted after the clerk has approved the signatures as part of a “final and binding” court order).

<sup>277</sup> N.J.S.A. 40:75-31; *see also Clolery v. Carmeci*, 176 N.J. Super. 10, 12 (1980) (scheduling the recall election on the same date as the general election because of convenience both to the administration of the election and to the voting public).

<sup>278</sup> N.J.S.A. 40:75-31.

<sup>279</sup> N.J.S.A. 40:75-31.

<sup>280</sup> N.J.S.A. 40:75-32. The exact form for the petition is provided in N.J.S.A. 40:75-32.

<sup>281</sup> N.J.S.A. 40:75-49. Any person who violates any section of this article will be guilty of a misdemeanor.

<sup>282</sup> N.J.S.A. 40:75-33.

<sup>283</sup> N.J.S.A. 40:75-33.



after the certificate of notice is served on him, the election of a successor will proceed in the same manner as if the recall election were also required.<sup>284</sup>

The commissioner subject to a recall vote may choose to contest the recall by filing a petition with the clerk at least 15 days prior to the recall election.<sup>285</sup> The petition must be signed by at least 15 percent of the municipality's legal voters.<sup>286</sup> The clerk must then review the petition within three days and, if it is deficient, return it to the commissioner to be revised.<sup>287</sup> If the incumbent commissioner fails to file a petition, it is considered to be a resignation from office effective immediately, and the office will be deemed vacant.<sup>288</sup> The election to appoint a successor must proceed as mandated as if the commissioner had filed a timely petition.<sup>289</sup>

More than one recall petition may be addressed during the same election.<sup>290</sup> However, each recall action shall remain a separate transaction, and the entire mandated form for the ballot must be provided for each commissioner subject to recall.<sup>291</sup>

Prior to holding a recall election, a judge of the Superior Court must be available in a public place on at least one occasion during the week preceding the election.<sup>292</sup> At that time, the judge may add to the registry books the names of legal voters who would be qualified to register as if the recall election was a general election

---

<sup>284.</sup> N.J.S.A. 40:75-34.

<sup>285.</sup> N.J.S.A. 40:75-34. The filing of a petition contesting the recall by an incumbent also has the effect of nominating the incumbent to succeed himself. *Musto v. Leone*, 60 N.J. 298, 302 (1972) (same number of signatures is required for petitions to nominate a candidate as to oppose recall of an incumbent). *But see In re Hackensack Recall Election*, 57 N.J. Super. 257, 259 (App. Div. 1959) (holding that Legislature did not intend incumbents to be eligible to succeed themselves in the event of their recall).

<sup>286.</sup> N.J.S.A. 40:75-34. N.J.S.A. 40:75-34 provides the format for such a petition.

<sup>287.</sup> N.J.S.A. 40:75-35.

<sup>288.</sup> N.J.S.A. 40:75-36.

<sup>289.</sup> N.J.S.A. 40:75-36.

<sup>290.</sup> N.J.S.A. 40:75-37.

<sup>291.</sup> N.J.S.A. 40:75-37. N.J.S.A. 40:75-38 provides the format to be used or "substantially" followed for the ballot for a recall election. *See also Musto v. Leone*, 60 N.J. 298, 303 (1972) (all candidates should be listed in single column on ballot and that "the ballot should expressly advise the voters to vote for as many candidates as there are offices involved in the recall").

<sup>292.</sup> N.J.S.A. 40:75-39.

but who are not yet on the books.<sup>293</sup> There will not be a primary election before the recall election to nominate candidates.<sup>294</sup>

The recall election should be conducted as much as possible in the same manner as a general election.<sup>295</sup> The municipal court is in charge of providing all necessary registry books, ballots and tally sheets to the boards of election.<sup>296</sup> The board of election must conduct the election as they would a general election to the extent possible.<sup>297</sup> On the day of the recall election, the assignment judge of the Superior Court must be available to make any additional orders necessary to carry out the election.<sup>298</sup>

If a majority votes to remove the commissioner from office, the commissioner's term will "immediately cease and determine."<sup>299</sup> If the majority votes not to recall the commissioner, the commissioner remains in office for the rest of the term.<sup>300</sup> Another recall election for the commissioner may not be held for at least one year.<sup>301</sup>

The nominee receiving the most votes at the recall election shall be appointed commissioner if the office of the incumbent is vacated based on resignation, failure to file an incumbent's petition, or through the recall election.<sup>302</sup> The newly appointed commissioner will hold office for the remainder of the term to which the incumbent was elected and shall assume all rights and duties of that office.<sup>303</sup>

If the municipal clerk shall find defective any petition pertinent to the recall election, the clerk must record the objections in writing.<sup>304</sup> The

<sup>293</sup>. N.J.S.A. 40:75-39.

<sup>294</sup>. N.J.S.A. 40:75-39.

<sup>295</sup>. N.J.S.A. 40:75-41. *Musto v. Leone*, 60 N.J. 298, 300 (1972) (same election may address separately whether an incumbent should be recalled and provide for the election of a successor should the incumbent be recalled.)

<sup>296</sup>. N.J.S.A. 40:75-40.

<sup>297</sup>. N.J.S.A. 40:75-40. The Superior Court assignment judge has the power "to make any order or regulation which in his judgment is necessary or convenient to enable a fair and impartial recall election to be held." N.J.S.A. 40:75-45. Any such order is final. Applications to the judge are to be heard "in a summary manner and without notice."

<sup>298</sup>. N.J.S.A. 40:75-45.

<sup>299</sup>. N.J.S.A. 40:75-42.

<sup>300</sup>. N.J.S.A. 40:75-42.

<sup>301</sup>. N.J.S.A. 40:75-42.

<sup>302</sup>. N.J.S.A. 40:75-43.

<sup>303</sup>. N.J.S.A. 40:75-43. A nominee to fill a vacated commissioner position must be qualified under N.J.S.A. 40:72-1.

<sup>304</sup>. N.J.S.A. 40:75-44.

objections should be given to the Superior Court assignment judge in the county in which the municipality is located.<sup>305</sup> The judge must then issue an order either sustaining or overruling the objections.<sup>306</sup> The order is final and binding on all parties involved.<sup>307</sup>

No court order is allowed that would prevent or delay the recall election with the exception of proceedings pertaining to the legality of any petition, act, or elections that may be reviewed.<sup>308</sup> This prohibition is designed to prevent the incumbent or any other person from delaying or obstructing the recall election.<sup>309</sup>

If it is determined that the removal of a commissioner was not legal, the commissioner shall be restored to office.<sup>310</sup> The commissioner must then be paid for the period of removal from office.<sup>311</sup> However, such an erroneous removal does not invalidate any action performed by the board of commissioners during the period of such removal.<sup>312</sup>

Once a new commissioner has been appointed and the incumbent recalled, the board may reorganize, including the reassignment of department heads.<sup>313</sup> The newly formed board may choose to remove from office any person appointed by the removed commissioner within the previous six months.<sup>314</sup>

## 1-7:5 Officers and Employees

### 1-7:5.1 Qualifications and Elections

Officers and employees must be elected or appointed based on their qualifications for the position rather than based on political beliefs or party affiliation.<sup>315</sup> No appointment of any officer or

<sup>305</sup>. N.J.S.A. 40:75-44.

<sup>306</sup>. N.J.S.A. 40:75-44.

<sup>307</sup>. N.J.S.A. 40:75-44.

<sup>308</sup>. N.J.S.A. 40:75-46.

<sup>309</sup>. N.J.S.A. 40:75-46.

<sup>310</sup>. N.J.S.A. 40:75-46.

<sup>311</sup>. N.J.S.A. 40:75-46.

<sup>312</sup>. N.J.S.A. 40:75-46.

<sup>313</sup>. N.J.S.A. 40:75-48.

<sup>314</sup>. N.J.S.A. 40:75-48.

<sup>315</sup>. N.J.S.A. 40:73-1. In second-class cities governed by the commission form of government, no appointments to any subordinate board, department or office may be made between the first Tuesday in May and the third Tuesday in May in a year in which an election for the board of commissioners takes place. N.J.S.A. 40:73-5. This prohibition extends to the positions of patrolman and fireman. In addition, no new position may be created during this time period. *See also Abbott v. Donohoe*, 10 N.J. Misc. 1037, 1038 (1932)

transfer of anything of value can be made in order to gain political support or the vote of any party.<sup>316</sup> The penalty for violation of this rule is that the violator loses the position held by virtue of election or appointment.<sup>317</sup>

Every elected official must publish a sworn statement of election and campaign expenses and the names of those who contributed funds for such expenses.<sup>318</sup> Such a statement must be published in the municipality's newspaper or, if none exists, in a newspaper that circulates in the municipality.<sup>319</sup> The punishment for any violation of this provision is grounds for dismissal from office and will be considered a misdemeanor offense.<sup>320</sup>

If a borough has a population of less than 5,000 inhabitants, the residency requirements of N.J.S.A. 40A:9-1 are relaxed.<sup>321</sup> The offices of borough tax collector and/or borough treasurer do not have to be filled by a resident of the borough as long as a municipal ordinance is passed waiving the requirement.<sup>322</sup>

### 1-7:5.2 Prohibitions

Officers and employees of the municipality are prohibited from having any interest in a contract pertaining to services to be rendered or materials purchased for the municipality.<sup>323</sup> Such persons are also prohibited from having any interest in contracts relating to the operation of interurban railways, street railways, gas works, waterworks, electric light or power plants, heating plants, telegraph lines, telephone exchanges, or any other public utility operating within the municipality.<sup>324</sup>

(“a dying board should not be permitted to forestall the action of its successors and thereby possibly defeat the public will”). *Monte v. Milat*, 17 N.J. Super. 260, 268 (Law Div. 1952) (members of the board of commissioners should be elected at regular intervals, allowing for a “continuing body” in which all members are never elected at the same time).

<sup>316</sup> N.J.S.A. 40:73-1.

<sup>317</sup> N.J.S.A. 40:73-1.

<sup>318</sup> N.J.S.A. 40:73-1. See Chapter 15 on Elections.

<sup>319</sup> N.J.S.A. 40:73-1. See Chapter 15 on Elections.

<sup>320</sup> N.J.S.A. 40:73-1. See Chapter 15 on Elections.

<sup>321</sup> N.J.S.A. 40:73-9.

<sup>322</sup> N.J.S.A. 40:73-9.

<sup>323</sup> N.J.S.A. 40:73-2. This prohibition applies to elected and appointed positions. See also *In re Wellhofer*, 137 N.J.L. 165, 166-68 (Sup. Ct. 1948) (holding that investigation must be completed to determine if N.J.S.A. 40:73-2 had been violated by awarding contracts to entities in which city employee had direct or indirect interest).

<sup>324</sup> N.J.S.A. 40:73-2.

Officers and employees of the municipality are prohibited from receiving free or reduced price services within the city.<sup>325</sup> This prohibition does not apply to uniformed police or firefighters.<sup>326</sup> In addition, free services that were provided prior to the enactment of N.J.S.A. 40:73-3 by franchise or ordinance are permitted to continue.<sup>327</sup>

The salaries of officers and employees of the municipality cannot be reduced below their level at the time that chapters 70 through 76 of Title 40 were adopted.<sup>328</sup> The board of commissioners has the power to set the compensation level for the municipality's officers and employees.<sup>329</sup> Salaries must be paid at least every month, but they may be paid at shorter intervals.<sup>330</sup>

### 1-7:6 Ordinances and Resolutions

The Enacting Clause of the Walsh Act provides the language necessary for the enactment of ordinances.<sup>331</sup> An ordinance must be passed by the board of commissioners using the language "the board of commissioners of the (here insert name of municipality) do ordain."<sup>332</sup> The ordinance must be available for public inspection for at least two weeks prior to its final adoption.<sup>333</sup> Once the board passes an ordinance, the ordinance must be recorded in the same book in which the names of those commissioners who voted for

---

<sup>325</sup> N.J.S.A. 40:73-3.

<sup>326</sup> N.J.S.A. 40:73-3 (uniformed police and firefighters may receive free transportation while on duty).

<sup>327</sup> Any violation of N.J.S.A. 40:73-2 or N.J.S.A. 40:73-3 is punishable as provided by law or ordinance, N.J.S.A. 40:73-4.

<sup>328</sup> N.J.S.A. 40:73-6.

<sup>329</sup> N.J.S.A. 40:73-6; *Belleville Twp. v. Fornarotto*, 228 N.J. Super. 412, 425 (Law Div. 1988). Until 1975, provisions in N.J.S.A. 40:72-21 through N.J.S.A. 40:72-25 regulated the compensation of the mayor and commissioners in municipalities of various sizes. *See generally Atlantic City v. Bd. of Comm'rs of Atl. City*, 138 N.J. Super. 595 (Law Div. 1976) (discussing the requirements for salaries for commissioners in municipalities of various sizes and providing a history of such regulations).

<sup>330</sup> N.J.S.A. 40:73-6.

<sup>331</sup> N.J.S.A. 40:74-2.

<sup>332</sup> N.J.S.A. 40:74-2.

<sup>333</sup> N.J.S.A. 40:74-1. This requirement is intended to give the community at large advance notice of any contemplated action by the board of commissioners. *Shurzberg v. City of Bayonne*, 29 N.J. 106, 113 (1959) (citing *Franklin v. Horton*, 97 N.J.L. 22 (Sup. Ct. 1922)).

the ordinance are recorded.<sup>334</sup> Any proceedings relating to the violation of a municipal ordinance must be “commenced and prosecuted in the corporate name of the municipality.”<sup>335</sup>

An ordinance that has been passed cannot become effective until at least 20 days after its passage.<sup>336</sup> However, exceptions may be made for urgent matters in the interest of “public peace, health or safety” by a two-thirds vote of the board of commissioners.<sup>337</sup>

If a petition with signatures of at least 15 percent of the entire vote cast in the preceding election is submitted within 20 days after the passage of the ordinance, the ordinance will not become effective until the board of commissioners reconsiders the ordinance within 20 days of receiving the petition.<sup>338</sup> However, certain categories of ordinances are exempt from this requirement, including those pertaining to the compensation of employees or to incurring debt and to those requiring submission to the voters for passage.<sup>339</sup> If the commission does not entirely repeal the ordinance, it must be submitted to the voters and will only become effective if a majority of the qualified voters vote in favor of the ordinance.<sup>340</sup>

### 1-7:6.1 Board Submission

The board also has the authority to submit ordinances to the voters in a regular or special election.<sup>341</sup> Any ordinance that the

<sup>334</sup>. N.J.S.A. 40:74-3. If an ordinance or resolution is published, all of the names of the commissioners who signed it must also be published.

<sup>335</sup>. N.J.S.A. 40:74-2.

<sup>336</sup>. N.J.S.A. 40:74-4. Prior to 1982, only 10 days was required between passage of an ordinance and its taking effect. N.J.S.A. 40:74-4, Historical and Statutory Notes, Amendments, L. 1982, c. 145, § 8.

<sup>337</sup>. N.J.S.A. 40:74-4.

<sup>338</sup>. N.J.S.A. 40:74-5. Five voters comprise the Committee of the Petitioners, and their names and addresses must be included in the petition. A vote by four of the five members is sufficient to withdraw a petition. The paragraph pertaining to the Committee of Petitioners was added in 1982. N.J.S.A. 40:74-5, Historical and Statutory Notes, Amendments, L. 1982, c. 145, § 9. The clerk must examine and certify any petition. N.J.S.A. 40:74-7.

<sup>339</sup>. N.J.S.A. 40:74-5. The portion regarding ordinances that must be submitted to the voters was not added until 1979. N.J.S.A. 40:74-5, Historical and Statutory Notes, Amendments, L. 1979, c. 278, § 1.

<sup>340</sup>. N.J.S.A. 40:74-5. The purpose of the provisions regarding submission of ordinances to the voters is to avoid the necessity of two elections before the ordinance could take effect. N.J.S.A. 40:74-5, Introductory Statement, A. 3674-L. 1979, c. 278.

<sup>341</sup>. N.J.S.A. 40:74-7. In 1982, N.J.S.A. 40:74-7 was amended to permit the submission of ordinances during regular municipal elections. N.J.S.A. 40:74-7, Historical and Statutory Notes, Amendments, L. 1982, c. 145, § 10; *see also McCarthy v. Walter*, 108 N.J.L. 282, 289 (N.J. 1931) (noting that in the Walsh Act, “the power to initiate is definitely reposed and

board has the authority to enact may be brought before the voters with the exception of ordinances establishing the compensation of municipality employees.<sup>342</sup> If a special election is called, other questions may also be submitted to the voters as long as such questions may generally be addressed through an election.<sup>343</sup> If provisions submitted during the same election conflict, the provision receiving the greater number of affirmative votes is controlling.<sup>344</sup> However, a vote during an election is not necessary to “authorize the undertaking or completion of any work, the purchase or construction of any public utility or improvement...or to authorize the borrowing of money and the issuance of bonds or other obligations....”<sup>345</sup>

### 1-7:6.2 Voter Initiative

The voters may propose an ordinance to the board by petition of the electors.<sup>346</sup> If the board does not approve the ordinance, it may be submitted to the voters.<sup>347</sup> Such an ordinance may relate to any matter except the compensation of the employees of the municipality.<sup>348</sup> A petition signed by a number of voters equal to at

vested in the governing body, but the power to execute and perform is either contingent upon approval of the voters or may be arrested until such approval is obtained”).

<sup>342</sup> N.J.S.A. 40:74-7. The submission of an ordinance to the voters shall follow the same procedure as provided for the submission of a petition to the voters.

<sup>343</sup> N.J.S.A. 40:74-7.

<sup>344</sup> N.J.S.A. 40:74-7.

<sup>345</sup> N.J.S.A. 40:74-8.

<sup>346</sup> N.J.S.A. 40:74-9. *In re Certain Petitions for a Binding Referendum Filed Pursuant to N.J.S.A. 40:74-1 et seq.*, 154 N.J. Super. 482, 485 (App. Div. 1977) (ordinance for which there is a contrary legislative purpose, express or implied, may not be proposed by the electors); *Cuprowski v. City of Jersey City*, 101 N.J. Super. 15, 23 (Law Div. 1968) (referendum on the annual municipal budget could not be held because budget making was an administrative function and as such was not intended to be submitted to the electorate), *abrogated by In re Ordinance 04-75*, 192 N.J. 446, 451 (2007) (holding that the judicially created legislative-administrative distinction used in determining whether an ordinance is subject to referendum is not supported by the referendum statute, N.J.S.A. 40:69A-185).

<sup>347</sup> N.J.S.A. 40:74-10; *State ex rel. Chernin v. Bd. of Comm’rs*, 1 N.J. Misc. 402, 405 (N.J. 1923) (holding that, where the commissioners have refused to pass a proposed ordinance, it must be submitted to the voters by calling a special election).

<sup>348</sup> N.J.S.A. 40:74-9. *Compare In re Ridgefield Park*, 149 N.J. Super. 530, 531, 536 (Law Div. 1977) (comprehensive traffic ordinance was not properly subject to an initiative-referendum petition), and *Menendez v. City of Union City*, 211 N.J. Super. 169, 171 (App. Div. 1986) (when an ordinance merely complies with a state or local legislative mandate it is administrative and not subject to referendum), *abrogated by In re Ordinance 04-75*, 192 N.J. 446, 451 (2007) (holding that the judicially created legislative-administrative distinction used in determining whether an ordinance is subject to referendum is not supported by the referendum statute, N.J.S.A. 40:69A-185), *with Concerned Citizens of Wildwood Crest v. Pantalone*, 185 N.J. Super. 37, 45 (App. Div. 1982) (beach fee repeal ordinance could be subject to the initiative petition).



least 15 percent of the votes cast at the preceding general election involving members of the General Assembly is required to submit an ordinance to the board.<sup>349</sup> Each signer must provide a signature and residential address.<sup>350</sup> The petition must include the names and addresses of five members of the Committee of the Petitioners.<sup>351</sup> One of the signers must swear under oath that he believes the statements in the papers to be true and that all signatures are genuine.<sup>352</sup>

The municipal clerk must examine the petition within 20 days of its filing.<sup>353</sup> The clerk must certify that the petition has sufficient signatures.<sup>354</sup> If the clerk determines that the petition is lacking, the clerk must notify two of the members of the Committee of the Petitioners.<sup>355</sup> The Committee has 10 days in which to amend and refile the petition.<sup>356</sup> The clerk then has five days in which to re-evaluate the petition.<sup>357</sup> If the petition is sufficient, the clerk must submit it to the board as soon as possible.<sup>358</sup> If the petition is insufficient, it must be returned to the Committee which may refile a new petition on the same issue without prejudice.<sup>359</sup>

<sup>349</sup> N.J.S.A. 40:74-10; N.J.S.A. 40:74-14. The petition should be filed with the municipal clerk.

<sup>350</sup> N.J.S.A. 40:74-11. It is not necessary that all signatures be on the same paper.

<sup>351</sup> N.J.S.A. 40:74-10. The requirement that the names and addresses of five voters be included in the petition was added in 1982. N.J.S.A. 40:74-10, Historical and Statutory Notes, Amendments, L.1982, c. 145, § 11.

<sup>352</sup> N.J.S.A. 40:74-11.

<sup>353</sup> N.J.S.A. 40:74-12. In 1982, the time provided the clerk to review the petition was changed from 10 days to 20, and the notification requirement in case the petition is inadequate was changed from requiring only the notification of the person who filed the petition to requiring that two members of the committee be notified. L.1982, c. 145, § 12.

<sup>354</sup> N.J.S.A. 40:74-12; *see also Marotta v. Leone*, 172 N.J. Super. 62, 71 (Law Div. 1979) (ordering that the city clerk determine the sufficiency of the signatures and imposing an injunction such that the ordinance remains inoperative until after the sufficiency of the petition has been affirmed). *But see Atlantic City Hous. Action Coal. v. Deane*, 181 N.J. Super. 412, 416 (Law Div. 1981) (clerk's authority does not extend to determining whether it is within the power of the voters to adopt such an ordinance).

<sup>355</sup> N.J.S.A. 40:74-12.

<sup>356</sup> N.J.S.A. 40:74-12.

<sup>357</sup> N.J.S.A. 40:74-13. Prior to 1982, the clerk had 10 days to examine the petition after it was refiled. N.J.S.A. 40:74-13, Historical and Statutory Notes, Amendments, L.1982, c. 145, § 13.

<sup>358</sup> N.J.S.A. 40:74-13. Once the clerk accepts and files the petition, the signers of the petition may no longer withdraw their signatures. *Ford v. Gilbert*, 89 N.J.L. 482, 485 (Sup. Ct. 1916) (21 of the signers of a petition could not withdraw their signatures after the clerk had accepted and filed the petition); *see also McLaughlin v. City of Millville*, 110 N.J. Super. 200, 206 (Law Div. 1970).

<sup>359</sup> N.J.S.A. 40:74-13. Prior to 1982, the clerk returned the petition to whoever filed it rather than to the Committee if it was deemed insufficient. N.J.S.A. 40:74-13, Historical and Statutory Notes, Amendments, L.1982, c. 145, § 13.



Within 20 days after the clerk certifies the petition, the board must either pass the ordinance as is, or call a special election.<sup>360</sup> The special election must be held between 40 and 60 days following the final date for the withdrawal of the petition.<sup>361</sup> However, if a general election or regular municipal election is to be held within 40 to 90 days, the ordinance may be voted on at that election.<sup>362</sup>

If the petition includes the signatures of only between 10 and 15 percent of the votes at the proceeding general election for members of the General Assembly, then the board still must vote on the ordinance within 20 days.<sup>363</sup> If the board does not pass the ordinance, it will be put before the voters at the next general election or regular municipal election at least 40 days after the petition is certified by the clerk.<sup>364</sup> If four members of the Committee of Petitioners file a signed request to withdraw the petition within 10 days after a final adverse action by the board or after the time has expired for the board to take action, the petition will have no effect.<sup>365</sup>

More than one proposed ordinance may be voted on in the same election, but no more than one special election may be called in any six-month period.<sup>366</sup> If during the six-month period there is an ordinance that would otherwise be submitted for a special election and a special election is already scheduled in not less than 30 days after the final date for the withdrawal of the petition, the ordinance will be voted on at the special election.<sup>367</sup> If no such election is scheduled, the ordinance will be voted on at the next general election or regular municipal election.<sup>368</sup>

---

<sup>360.</sup> N.J.S.A. 40:74-14.

<sup>361.</sup> N.J.S.A. 40:74-14. Prior to 1982, the special election could not be held less than sixty after the final withdrawal date unless a general election was scheduled in between 40 and 90 days. N.J.S.A. 40:74-14, Historical and Statutory Notes, Amendments, L.1982, c. 145, § 14.

<sup>362.</sup> N.J.S.A. 40:74-14.

<sup>363.</sup> N.J.S.A. 40:74-14.

<sup>364.</sup> N.J.S.A. 40:74-14. Prior to 1982, such a vote could not occur at an election less than thirty days after the clerk's certification rather than less than forty days. N.J.S.A. 40:74-14, Historical and Statutory Notes, Amendments, L.1982, c. 145, § 14.

<sup>365.</sup> N.J.S.A. 40:74-14.

<sup>366.</sup> N.J.S.A. 40:74-15.

<sup>367.</sup> N.J.S.A. 40:74-15. The procedure for submitting ordinances to voters when a special election has already been scheduled during a six-month period was added in 1982. N.J.S.A. 40:74-15, Historical and Statutory Notes, Amendments, L.1982, c. 145, § 15.

<sup>368.</sup> N.J.S.A. 40:74-15.

The clerk must publish in at least two newspapers circulated in the municipality the ordinance or proposition to be submitted to the voters.<sup>369</sup> The publication must take place between five and 20 days prior to the election in which the ordinance will be voted on.<sup>370</sup>

The ballot for the ordinance submitted to the voters shall include the question to be voted on along with a box for “YES” and a box for “NO.”<sup>371</sup> The voter must mark the “YES” box with a cross or a plus to vote for the ordinance or mark the “NO” box with a cross or plus to vote against it.<sup>372</sup>

If the ordinance garners a majority of the qualified electors, it will become valid and binding on the municipality.<sup>373</sup> Such an ordinance may not be repealed or amended for a period of three years after its adoption unless it is changed “by a vote of the people.”<sup>374</sup> During the three-year period, the board of commissioners may submit to the voters a proposition to repeal or amend the ordinance.<sup>375</sup> Such a vote may take place during a general election or a regular municipal election.<sup>376</sup> A majority vote will be sufficient to amend or repeal the ordinance.<sup>377</sup>

### 1-7:7 Abandonment of Commission Form of Government

A municipality that has been governed by the commission form of government for more than six years may hold a special election to return to the form of government in effect before the adoption of the commission form.<sup>378</sup> The special election must be held before

<sup>369.</sup> N.J.S.A. 40:74-16; *see also Lynch v. Town of W. New York*, 115 N.J. Super. 1, 3 (App. Div. 1971) (acting town clerk had to publish the ordinance consistent with the provisions of N.J.S.A. 40:74-16 and print the ordinance on the ballot consistent with the provisions of N.J.S.A. 40:74-17).

<sup>370.</sup> N.J.S.A. 40:74-16.

<sup>371.</sup> N.J.S.A. 40:74-17. In some cases, it may be appropriate to add an explanatory statement to the ordinance on the ballot. *Margate Tavern Owners' Ass'n v. Brown*, 144 N.J. Super. 435, 442-43 (App. Div. 1976) (requiring an explanatory statement for an ordinance seeking to regulate the hours of sale of alcoholic beverages when the petition as submitted lacks such a statement and “commingles several objectives”).

<sup>372.</sup> N.J.S.A. 40:74-17.

<sup>373.</sup> N.J.S.A. 40:74-18.

<sup>374.</sup> N.J.S.A. 40:74-18.

<sup>375.</sup> N.J.S.A. 40:74-19.

<sup>376.</sup> N.J.S.A. 40:74-19.

<sup>377.</sup> N.J.S.A. 40:74-19.

<sup>378.</sup> N.J.S.A. 40:76-1.

August 15.<sup>379</sup> The municipality may then return to its previous form of government but shall be subject to any amendments and supplements that may have been added during the time the municipality was governed by the commission form.<sup>380</sup>

For a change of form of government to be put before the voters, a petition with signatures of at least 25 percent of the electors of the municipality must be submitted in writing to the municipal clerk.<sup>381</sup> If anyone who is not an elector “willfully and knowingly” signs the petition or if anyone assists such a person in signing the petition, that person will be guilty of a misdemeanor offense.<sup>382</sup> The petition must request that a special election be held and include the language as provided by statute to ask the voters whether the municipality should resume the form of government in effect prior to the passage of the Walsh Act.<sup>383</sup>

Within 10 days after the submission of a petition, the municipal clerk must examine the petition to ensure that it complies with all statutory requirements.<sup>384</sup> The clerk may compare the signatures in the petition with the signatures in the registry book from the preceding general election to ensure that the signatures on the petition are genuine.<sup>385</sup> “Substantial” compliance with the format for the petition as provided by statute is sufficient, and the clerk should not reject a petition based on typographical deviations or “minor departure[s]” from the mandated format.<sup>386</sup>

If the clerk determines that the petition is deficient, the clerk within 10 days of the initial filing of the petition must personally

---

<sup>379</sup> N.J.S.A. 40:76-1.

<sup>380</sup> N.J.S.A. 40:76-1.

<sup>381</sup> N.J.S.A. 40:76-2. The petition can be contained on multiple sheets of paper to make it easier to collect the signatures. N.J.S.A. 40:76-4. The form of the petition to be submitted to the clerk is found in N.J.S.A. 40:76-3. The petition must include the name or names of the agents who are filing the petition. N.J.S.A. 40:76-3. The petition also includes an affidavit of the person who collected the signatures that the names in the signatures are “to the best of his knowledge” those of the persons who signed. N.J.S.A. 40:76-4. Such an affidavit must be made before an officer competent to administer oaths.

<sup>382</sup> N.J.S.A. 40:76-27. The violation of any provision in Chapter 76 of Title 40 will be considered a misdemeanor offense.

<sup>383</sup> N.J.S.A. 40:76-2.

<sup>384</sup> N.J.S.A. 40:76-5.

<sup>385</sup> N.J.S.A. 40:76-5; *Fenias v. Reichenstein*, 124 N.J.L. 196, 199 (Sup. Ct. 1940) (noting that if the clerk has any doubt as to the genuineness of a signature, he may use the registry books from the last election for comparison).

<sup>386</sup> N.J.S.A. 40:76-5.

serve in writing a detailed explanation of such deficiencies on the agent specified in the petition.<sup>387</sup> The agent then has 10 days in which to apply to a Superior Court judge to determine the validity of the clerk's objections.<sup>388</sup> If the judge determines that the petition as filed sufficiently conforms to the statutory provisions, the judge should order that the petition be filed with the municipal clerk.<sup>389</sup> The clerk must then call a special election.<sup>390</sup> If the judge concludes that the petition does not substantially conform to the statutory requirements, the judge must issue an order sustaining the clerk's objections.<sup>391</sup> The petition must then be returned to the agent who filed it.<sup>392</sup> The agent has 30 days in which to refile the petition after it has been amended or supplemented in order to cure the deficiencies noted by the court.<sup>393</sup> The same procedure as for the initial filing of the petition is then followed for the amended petition.<sup>394</sup> Further amended or supplemented petitions may be filed with the clerk without prejudice and according to the same procedure.<sup>395</sup>

Once the petition has been approved by the municipal clerk or by a Superior Court judge, the clerk shall call a special election.<sup>396</sup> The election must be held before August 15 to submit to the voters whether the commission form of government should be abandoned.<sup>397</sup> A certificate of notice must be prepared by the clerk and a copy submitted to the board of commissioners at their first meeting after the date of the certification.<sup>398</sup>

The clerk must schedule the special election for a Tuesday between 20 and 30 days after the date of the certificate of notice.<sup>399</sup> However, the election to abandon the commission form of

---

<sup>387</sup> N.J.S.A. 40:76-6.

<sup>388</sup> N.J.S.A. 40:76-7.

<sup>389</sup> N.J.S.A. 40:76-8.

<sup>390</sup> N.J.S.A. 40:76-8.

<sup>391</sup> N.J.S.A. 40:76-9.

<sup>392</sup> N.J.S.A. 40:76-9.

<sup>393</sup> N.J.S.A. 40:76-10.

<sup>394</sup> N.J.S.A. 40:76-11. The clerk again has 10 days to review the petition and return it to the agent with any objections. The agent then again has the opportunity to apply to a Superior Court judge to review the clerk's determination.

<sup>395</sup> N.J.S.A. 40:76-11.

<sup>396</sup> N.J.S.A. 40:76-12.

<sup>397</sup> N.J.S.A. 40:76-12.

<sup>398</sup> N.J.S.A. 40:76-15; N.J.S.A. 40:76-16.

<sup>399</sup> N.J.S.A. 40:76-13.

government may not be held in the same year as a regular election in which commissioners are elected.<sup>400</sup> At least 10 days before the election, copies of the certificate of notice must be posted in a minimum of 20 different “conspicuous public places” within the municipality.<sup>401</sup> In addition, the notice must be published once a week for three consecutive weeks immediately before the election in a municipal newspaper in print for at least one year.<sup>402</sup> If no such newspaper exists, the notice must be published in the newspaper within the same county that is widely circulated in the municipality holding the election.<sup>403</sup>

The funds for the election should be provided through the municipal clerk and the board of commissioners.<sup>404</sup> The board must raise whatever funds necessary to hold the special election.<sup>405</sup>

The special election should be held in the same location as the annual election, if practicable.<sup>406</sup> Otherwise, the clerk must find suitable places in each election district to serve as polling places.<sup>407</sup> The polling places should be open from seven in the morning until nine at night.<sup>408</sup> The election process should be overseen by the election officers who conduct other elections within the municipality.<sup>409</sup> In the week immediately preceding the special election, the county board of election must meet in a public place within the municipality in order to register to vote any person who was not in the registry books for the preceding general election but who would be entitled to vote if the special election were instead a general election.<sup>410</sup> The municipal clerk must provide ballots printed on “plain, substantial, white paper,” and must provide at least 15 percent more ballots than the total number of voters in the preceding general election.<sup>411</sup> The ballot should ask the voter

---

<sup>400.</sup> N.J.S.A. 40:76-14.

<sup>401.</sup> N.J.S.A. 40:76-17.

<sup>402.</sup> N.J.S.A. 40:76-17.

<sup>403.</sup> N.J.S.A. 40:76-17.

<sup>404.</sup> N.J.S.A. 40:76-18.

<sup>405.</sup> N.J.S.A. 40:76-18.

<sup>406.</sup> N.J.S.A. 40:76-19.

<sup>407.</sup> N.J.S.A. 40:76-19.

<sup>408.</sup> N.J.S.A. 40:76-19.

<sup>409.</sup> N.J.S.A. 40:76-19.

<sup>410.</sup> N.J.S.A. 40:76-20.

<sup>411.</sup> N.J.S.A. 40:76-21.

to use a cross or a plus to mark the box for “YES” or for “NO” in order to vote on whether to resume the form of government in existence prior to the Walsh Act.<sup>412</sup>

As soon as the ballots have been counted, the election officers must report the count to the municipal clerk.<sup>413</sup> The clerk must then certify to the board at the next meeting the results of the election and enter the results in the minutes of the board.<sup>414</sup> The clerk must also certify the results to the secretary of state.<sup>415</sup> The certification must include whether a majority of the votes were in favor of the proposition, and if so, whether the total number of votes in favor of the proposition was equal to at least 30 percent of the number of votes in the last general election.<sup>416</sup> If the proposition has been approved by a sufficient number of votes, the officers for the new form of government will be nominated and elected at the next primary and general elections.<sup>417</sup> The municipal clerk shall take on the responsibilities that the clerk would have under the form of government approved at the special election pertaining to the nomination and election of officers.<sup>418</sup> The board of commissioners must raise the funds necessary to effect the change in form of government.<sup>419</sup>

The commission form of government in the municipality that voted to return to its previous form of government will then be “ipso facto abolished.”<sup>420</sup> The officers of the municipality, including the commissioners, will have their terms cease.<sup>421</sup> The terms of office of police, firefighters, employees of the police or fire departments, veterans or any other employees who hold a tenured position will not be affected.<sup>422</sup> The change in form of government does not affect property, rights or liability of the municipality

<sup>412</sup>. N.J.S.A. 40:76-21.

<sup>413</sup>. N.J.S.A. 40:76-22.

<sup>414</sup>. N.J.S.A. 40:76-22.

<sup>415</sup>. N.J.S.A. 40:76-22.

<sup>416</sup>. N.J.S.A. 40:76-22.

<sup>417</sup>. N.J.S.A. 40:76-23.

<sup>418</sup>. N.J.S.A. 40:76-23.

<sup>419</sup>. N.J.S.A. 40:76-23.

<sup>420</sup>. N.J.S.A. 40:76-23.

<sup>421</sup>. N.J.S.A. 40:76-23. An exception applies to members of the board of education and the trustees of the public library whether they were elected or appointed.

<sup>422</sup>. N.J.S.A. 40:76-23.

already in existence.<sup>423</sup> In addition, the public education system of a municipality electing to return to its previous form of government will not be affected by the change.<sup>424</sup>

If a majority of voters at the special election does not vote in favor of the proposition, a new petition may not be submitted for at least two years.<sup>425</sup> After two years, a new petition may be filed following the same procedure as for the original petition.<sup>426</sup>

## **1-8        OPTIONAL MUNICIPAL CHARTER LAW (FAULKNER ACT)**

### **1-8:1     Historical Context**

In 1948, the Legislature created the Commission on Municipal Government.<sup>427</sup> The Legislature directed the Commission to study the form and structure of municipal government in New Jersey and recommend changes that would provide the fullest opportunity for local self-government.<sup>428</sup> The Commission published a report entitled *Local Self-Government: A Proposed Optional Municipal Charter Plan*, which became the basis of the Optional Municipal Charter Law (OMCL). On June 8, 1950, the Legislature enacted the Optional Municipal Charter Law—commonly referred to as the Faulkner Act in honor of Bayard H. Faulkner, the former mayor of Montclair and chairperson of the Commission on Municipal Government.<sup>429</sup>

The Faulkner Act created four distinct forms of municipal government with 136 potential combinations: a Mayor-Council Form, a Council-Manager Form, and a Mayor-Council Administrator Form, all of which may be adopted by any municipality, and a Small Municipality Form, which is available

---

<sup>423.</sup> N.J.S.A. 40:76-23.

<sup>424.</sup> N.J.S.A. 40:76-25.

<sup>425.</sup> N.J.S.A. 40:76-26.

<sup>426.</sup> N.J.S.A. 40:76-26.

<sup>427.</sup> Michael A. Egenton, N.J. State Comm'n on Cty. & Mun. Gov't Modern Forms of Mun. Gov't 11 (1992).

<sup>428.</sup> Michael A. Egenton, N.J. State Comm'n on Cty. & Mun. Gov't Modern Forms of Mun. Gov't 11 (1992).

<sup>429.</sup> Albert J. Wolfe, N.J. State League of Municipalities, A History of Municipal Government in New Jersey Since 1798 23 *available at* [http://www.njslom.org/history\\_municipal\\_govt.pdf](http://www.njslom.org/history_municipal_govt.pdf) (last visited Aug. 20, 2017).



only to municipalities under 12,000 in population.<sup>430</sup> Each of the forms of municipal government under the OMCL, except for the Mayor-Council-Administrator Form, includes a number of options on which decisions must be made when the municipality adopts the form. These can be changed at a later date through referendum, without changing the basic form of government.<sup>431</sup> Thus, municipal residents possess more politically potent rights under a Faulkner Act form of government, through the powers of initiative, referendum and recall, which are not generally available under the older forms.

Currently, the Faulkner Act is most prevalent in larger municipalities. To date, 129 out of 566 municipalities in New Jersey, with a combined population of 4,221,279 (50.1 percent of the state's population based on the 2000 Census) have adopted one of the Faulkner Act forms of government. A small majority of those municipalities (67) have adopted a mayor-council format, while 41 have adopted a council-manager format, 20 have adopted a small municipality format, and one municipality has adopted a mayor-council administrator form.<sup>432</sup> Notably, the 10 largest municipalities in New Jersey have adopted a Faulkner Act form of government, each selecting the mayor-council format.<sup>433</sup>

The Faulkner Act provides many choices for New Jersey municipalities. Some of the common themes that run through the different plans include a preference for a strong executive and for professional management of municipal affairs. Municipal councils are given vast freedom to address the needs of their communities. The residents of these municipalities are given the democratic procedures of initiative, referendum and recall to ensure that

<sup>430</sup>. Kevin Starkey, *The Faulkner Act and Options for Change*, New Jersey Lawyer, December 2006, at 22. The mayor-council-administrator plan was added to the options under the Faulkner Act in 1981.

<sup>431</sup>. Albert J. Wolfe, N.J. State League of Municipalities, *A History of Municipal Government in New Jersey Since 1798* 23-26 available at [http://www.njslom.org/history\\_municipal\\_govt.pdf](http://www.njslom.org/history_municipal_govt.pdf) (last visited Aug. 20, 2017).

<sup>432</sup>. Kevin Starkey, *The Faulkner Act and Options for Change*, New Jersey Lawyer, December 2006, at 21.

<sup>433</sup>. Kevin Starkey, *The Faulkner Act and Options for Change*, New Jersey Lawyer, December 2006, at 21. The 2000 Census determined that the 10 largest municipalities in New Jersey are: 1) Newark; 2) Jersey City; 3) Paterson; 4) Elizabeth; 5) Edison Township; 6) Woodbridge Township; 7) Township of Toms River; 8) Hamilton Township; 9) Trenton; 10) Camden.

municipal officials stay in step with the values and predilections of the public.

### **1-8:2 Procedures for Adoption of Optional Charter Plans**

A municipality proposes adoption of a Faulkner Act form of government in one of two ways, though ultimately the form can only be approved by a majority of voters in an election. The first method of adoption involves holding a referendum on whether to create a charter study commission.<sup>434</sup> The second method is called the “direct petition” method, which involves placing a referendum question on the ballot as to the adoption of a form of government.<sup>435</sup> The 129 municipalities that have adopted a Faulkner Act form of government have used the two methods almost equally.<sup>436</sup>

#### **1-8:2.1 Charter Commission**

A municipality may review its current form of government and consider a change to a Faulkner Act form by creating a charter study commission that will allow for public discussion of the issue. A charter study commission is created only if approved by the voters through a public question, which can be placed on the ballot either by a petition of the voters or by ordinance passed by the governing body. The number of signatures required for the creation of a charter study commission depends on the size of the municipality:

- 25 percent in municipalities with a population of 7,000 or less
- 20 percent in municipalities with a population between 7,000 and 70,000
- 10 percent in municipalities with a population of more than 70,000.<sup>437</sup>

The charter study commission, composed of five elected members, is obligated to study the current form of government in the municipality, compare it with other forms available, and determine whether the municipal government can be made more

---

<sup>434</sup>. N.J.S.A. 40:69A-1 et seq.

<sup>435</sup>. N.J.S.A. 40:69A-18 et seq.

<sup>436</sup>. Kevin Starkey, *The Faulkner Act and Options for Change*, New Jersey Lawyer, December 2006, at 22.

<sup>437</sup>. N.J.S.A. 40:69A-19.

efficient and effective under a different form of government.<sup>438</sup> To accomplish this, the Faulkner Act requires the commission to hold public hearing to “provide for the widest possible public information and discussion respecting the purposes and progress of its work.”<sup>439</sup>

The study by the commission may continue for up to nine months, after which time it is obligated to issue a report and recommendations.<sup>440</sup> The commission may recommend that the current form of government be retained without change, or that the form of government be changed to one of the four plans available under the Faulkner Act.<sup>441</sup> If the commission recommends a change to the Faulkner Act form of government, then the question must be placed on the ballot at the next general or regular municipal election.<sup>442</sup>

### 1-8:2.2 Direct Petition

Direct Petition is the most clear-cut method of change.<sup>443</sup> Under this method, a legally valid petition, which specifies a form of government that is permitted by the Faulkner Act, must be signed by the requisite number of registered voters in the municipality and approved by the municipal clerk.<sup>444</sup> The clerk then submits the question for the ballot at the next general or regular municipal election.<sup>445</sup> The number of signatures required depends on the size of the municipality:

- 25 percent in municipalities with a population of 7,000 or less
- 20 percent in municipalities with a population between 7,000 and 70,000
- 10 percent in municipalities with a population of more than 70,000.<sup>446</sup>

<sup>438</sup> N.J.S.A. 40:69A-7.

<sup>439</sup> N.J.S.A. 40:69A-9.

<sup>440</sup> N.J.S.A. 40:69A-10.

<sup>441</sup> N.J.S.A. 40:69A-12.

<sup>442</sup> N.J.S.A. 40:69A-15.

<sup>443</sup> N.J.S.A. 40:69A-18; N.J.S.A. 40:69A-21.

<sup>444</sup> N.J.S.A. 40:69A-19.

<sup>445</sup> N.J.S.A. 40:69A-20.

<sup>446</sup> N.J.S.A. 40:69A-19.

Use of the direct petition method saves significant time in implementing a Faulkner plan. However, since the time saved is usually spent discussing the benefits of adopting a charter, direct petition referenda may be defeated because the voters may not be willing to change their form of government before the community has had an adequate opportunity to study and debate the issue. In addition, absent adequate community knowledge about the issues, opponents may advocate that the petition be defeated and a charter study be undertaken instead.

To ensure that a transitional municipality is not plagued with an endless series of petitions and referenda, the Faulkner Act contains prohibitions against further proceedings within a certain time frame. Thus, if within four years a municipality has had a charter study, it may have a direct petition, but not another charter study. Similarly, if a municipality has had a direct petition but no charter study, it can have the latter.<sup>447</sup> Once a new plan is adopted, there can be no subsequent vote on the question of adopting another form of government for ten years.<sup>448</sup>

Whether the direct petition or charter study method is chosen, voter approval of a new form of government is followed several months later by an election for an entirely new governing body. The terms of all incumbent officials, under the abandoned form, are automatically ended as of the date that the new form of government is implemented and all municipal ordinances are automatically voided. In addition, the terms of all appointed officials are terminated.<sup>449</sup>

### **1-8:2.3 Abandonment of an Optional Plan**

Prior to 1981, a municipality seeking to make changes to its adopted Faulkner Act plan had to go through the charter study or direct petition route. However, pursuant to an amendment, municipalities operating under the Faulkner Act were allowed to make partial changes to their basic form of government, such as partisan or non-partisan elections.<sup>450</sup> The proposed changes

<sup>447</sup> N.J.S.A. 40:69A-17; N.J.S.A. 40:69A-21.

<sup>448</sup> N.J.S.A. 40:69A-23.

<sup>449</sup> Kevin Starkey, *The Faulkner Act and Options for Change*, New Jersey Lawyer, December 2006, at 23.

<sup>450</sup> N.J.S.A. 40:69A-25.1, Historical and Statutory Notes, L. 1981, c. 465, § 7.

could be placed on the ballot in a Faulkner municipality by ordinance of the governing body or by submission of a petition in accordance with the initiative and referendum sections of the Faulkner Act.<sup>451</sup>

### 1-8:3 Incorporation and Powers

After a municipality adopts an optional form of government, the municipality shall be governed by the general provisions of the charter law, the specific provisions applicable to the plan adopted, and by the general law applicable to all municipalities that are not inconsistent with the charter law.<sup>452</sup> Furthermore, a municipality is granted broad powers, such as the power to organize and regulate its internal affairs, the power to adopt and enforce certain police ordinances, the power to sue and be sued, the power to contract, and the power to condemn and tax property.<sup>453</sup> In addition, the act requires that grants of power are to be construed liberally in favor of the municipality.<sup>454</sup>

### 1-8:4 Mayor-Council Plan

The mayor-council plan has an executive branch led by the mayor and a municipal legislature led by the council.<sup>455</sup> Each branch serves as a check and balance on the other. The mayor and council are directly elected by the voters and serve four-year terms of office, with the council consisting of five, seven or nine members.<sup>456</sup> The council is elected either all at-large or on an at-large and district basis and serves concurrently for the full four years, or for staggered terms, so that councilpersons are elected every two years.<sup>457</sup> Elections may be held on a partisan basis, with primaries in the spring and the general election in November, or

<sup>451</sup>. N.J.S.A. 40:69A-184; N.J.S.A. 40:69A-196.

<sup>452</sup>. N.J.S.A. 40:69A-26. The act defines “general law” as “any law or provision of law, not inconsistent with this act...which is by its terms applicable or available to all municipalities....”

<sup>453</sup>. N.J.S.A. 40:69A-29.

<sup>454</sup>. N.J.S.A. 40:69A-30.

<sup>455</sup>. N.J.S.A. 40:69A-32.

<sup>456</sup>. N.J.S.A. 40:69A-33; N.J.S.A. 40:69A-34.

<sup>457</sup>. N.J.S.A. 40:69A-34.2.

on a nonpartisan basis in May.<sup>458</sup> To date, 67 municipalities have adopted the OMCL Mayor-Council Form of government.<sup>459</sup>

#### 1-8:4.1 Mayoral Power

The mayor, as chief executive, is responsible for enforcing the charter and ordinances of the municipality and all general laws.<sup>460</sup> The mayor has the authority to negotiate and sign contracts that bind the municipality, while the council has the authority to approve the contracts presented by the mayor.<sup>461</sup> The mayor is also responsible for supervising the departments of the municipal government, which consist of three to 10 departments, plus the offices of municipal clerk and tax assessor.<sup>462</sup> One of the departments must be a department of administration headed by a business administrator, who administers a centralized purchasing system and the personnel system and assists the mayor in preparation of the tentative budget.<sup>463</sup> The mayor appoints the department heads, the tax assessor, and most members of boards, commissions and authorities with the advice and consent of the council.<sup>464</sup> Department heads serve during the mayor's term of office and may be removed by the mayor, but the council may veto

<sup>458</sup> N.J.S.A. 40:69A-34.1.

<sup>459</sup> Kevin Starkey, *The Faulkner Act and Options for Change*, New Jersey Lawyer, December 2006, at 21. As of 2004, the following municipalities adopted the Mayor-Council form of government: Atlantic City, Avalon Borough, Bayonne City, Berkeley Township, Brick Township, Bridgeton City, Bridgewater Township, Burlington City, Burlington Township, Camden City, Cherry Hill Township, Clark Township, Delran Township, Denville Township, East Brunswick Township, Edison Township, Elizabeth City, Ewing Township, Florence Township, Gloucester Township, Hamilton Township, Hawthorne Borough, Hillside Township, Hoboken City, Irvington Township, Jefferson Township, Jersey City, Lincoln Park Borough, Long Branch City, Mahwah Township, Manchester Township, Marlboro Township, Mine Hill Township, Monroe Township (Gloucester County), Monroe Township (Middlesex County), Morristown Town, Mount Olive Township, Newark City, New Brunswick City, North Plainfield Borough, Ocean City, Old Bridge Township, Orange City Township, Parsippany-Troy Hills Township, Passaic City, Paterson City, Pemberton Township, Perth Amboy City, Phillipsburg Town, Piscataway Township, Rahway City, River Vale Township, Rockaway Township, Saddle Brook Township, South Amboy City, Spotswood Borough, Tinton Falls Borough, Trenton City, Vineland Township, Washington Township (Bergen County), Washington Township (Gloucester County), Wayne Township, West Orange Township, West Windsor Township, Woodbridge Township.

<sup>460</sup> N.J.S.A. 40:69A-40.

<sup>461</sup> *Municipal Council of Newark v. James*, 183 N.J. 361 (2005).

<sup>462</sup> N.J.S.A. 40:69A-40; N.J.S.A. 40:69A-43.

<sup>463</sup> N.J.S.A. 40:69A-43.

<sup>464</sup> N.J.S.A. 40:69A-43.

such removal by a two-thirds vote.<sup>465</sup> Subordinate officers and employees are appointed by department heads.<sup>466</sup> The mayor has the authority to set the salary of most municipal employees, but the council establishes the compensation to be paid to department heads.<sup>467</sup> The mayor may attend council meetings and has the right to speak, but not vote.<sup>468</sup> The mayor also has a veto power over ordinances, which may be overridden only by a two-thirds vote of the council.<sup>469</sup>

### 1-8:4.2 Council Power

The council is limited to legislative functions, with its only appointment being the municipal clerk.<sup>470</sup> The council may deal with employees of the municipality's administrative departments only through the mayor or the mayor's designee.<sup>471</sup> However, it may require the mayor or the designee to appear before the council to report on any matter under discussion.<sup>472</sup> The council also has various investigative and fiscal control powers, but may remove municipal officers only for cause.<sup>473</sup> The council selects one of its own members to preside, with the title of president of council.<sup>474</sup>

### 1-8:4.3 Budget and Control

The municipal budget is prepared by the mayor with the assistance of the business administrator, who submits it to the council for approval.<sup>475</sup> The council may reduce items in the mayor's budget by a simple majority, but may increase items only by a two-thirds majority.<sup>476</sup>

---

<sup>465.</sup> N.J.S.A. 40:69A-43.

<sup>466.</sup> N.J.S.A. 40:69A-43.

<sup>467.</sup> N.J.S.A. 40:69A-43a.

<sup>468.</sup> N.J.S.A. 40:69A-41.

<sup>469.</sup> N.J.S.A. 40:69A-41.

<sup>470.</sup> N.J.S.A. 40:69A-38.

<sup>471.</sup> N.J.S.A. 40:69A-37.1.

<sup>472.</sup> N.J.S.A. 40:69A-37.1.

<sup>473.</sup> N.J.S.A. 40:69A-36.

<sup>474.</sup> N.J.S.A. 40:69A-36.

<sup>475.</sup> N.J.S.A. 40:69A-45 through N.J.S.A. 40:69A-46.

<sup>476.</sup> N.J.S.A. 40:69A-46.



### 1-8:5 Council-Manager Plan

The second form of government made available to any municipality under the Optional Municipal Charter Law of 1950 is the Council-Manager Form. Under the Council-Manager plan the council appoints a professional manager to exercise functions of the municipality.<sup>477</sup> At the time of appointment, the manager need not be a resident of either the state or municipality, but during his term of office he may reside outside the municipality only with the council's consent.<sup>478</sup> Members of the council are elected for four-year terms of office, and there must be five council members, unless the municipal charter provides for a different number.<sup>479</sup> The municipality has the option of holding elections at large or dividing the community into districts, or wards, and electing some council members at large and some from wards.<sup>480</sup> Elections may be on a partisan basis, with primaries in the spring and the general election in November, or on a nonpartisan basis in May.<sup>481</sup> Council terms may be scheduled to run concurrently for four years, or they may be staggered, so that there is an election every two years.<sup>482</sup> If wards are used, the terms must be staggered, with the at-large members running in one election and the ward council members two years later.<sup>483</sup>

#### 1-8:5.1 Manager Powers

Under the Council-Manager format, the manager is the chief executive and administrative official of the municipality. The manager executes all laws and ordinances of the municipality, supervises all municipal departments, and negotiates contracts for the municipality, subject to council approval.<sup>484</sup> The manager either appoints all subordinate personnel not otherwise provided

---

<sup>477</sup>. Kevin Starkey, *The Faulkner Act and Options for Change*, New Jersey Lawyer, December 2006, at 20.

<sup>478</sup>. N.J.S.A. 40:69A-92.

<sup>479</sup>. N.J.S.A. 40:69A-83.

<sup>480</sup>. N.J.S.A. 40:69A-83.2.

<sup>481</sup>. N.J.S.A. 40:69A-83.1.

<sup>482</sup>. N.J.S.A. 40:69A-83.3.

<sup>483</sup>. N.J.S.A. 40:69A-83.3.

<sup>484</sup>. N.J.S.A. 40:69A-95.

for or delegates the appointive power to department heads.<sup>485</sup> The budget is prepared by the manager, who submits it to the council for revision and approval.<sup>486</sup> The manager must attend all council meetings, and may take part in discussions, but has no vote.<sup>487</sup> The manager serves at the pleasure of the council and may be removed by a majority vote at any time, so long as prescribed procedure is followed.<sup>488</sup>

### 1-8:5.2 Council Powers

The council is responsible for fixing policy and giving broad direction to the manager, who is charged with carrying out the will of the council. The council appoints the manager, a municipal clerk and a tax assessor, and may provide for the method of selection of the municipal attorney, the zoning board of adjustment, a personnel board and advisory boards and commissions.<sup>489</sup> The council is limited to legislative duties and must act as a body. Individual members of the council are prohibited from dealing with the municipal administrative personnel except through the manager.<sup>490</sup>

### 1-8:5.3 Mayoral Powers

Under the council-manager plan, the mayor simply presides over council meetings and has no separate policy-making power like the mayor in the mayor-council plan. The mayor may be selected by the council from among its own members, in which case the mayor will serve for a one-, two- or four-year term until the organization meeting following the next council election.<sup>491</sup> Alternatively, the mayor may be elected directly by the voters, serving four years in that office.<sup>492</sup> In either case, the mayor is little more than a presiding officer for the council, with a voice in all discussions and a vote.<sup>493</sup>

<sup>485</sup>. N.J.S.A. 40:69A-95.

<sup>486</sup>. N.J.S.A. 40:69A-96.

<sup>487</sup>. N.J.S.A. 40:69A-95.

<sup>488</sup>. N.J.S.A. 40:69A-93.

<sup>489</sup>. N.J.S.A. 40:69A-89.

<sup>490</sup>. N.J.S.A. 40:69A-91.

<sup>491</sup>. N.J.S.A. 40:69A-86.

<sup>492</sup>. N.J.S.A. 40:69A-86.

<sup>493</sup>. N.J.S.A. 40:69A-87.

## 1-8:6 Small Municipality Plan

The Small Municipality Form of government under the Faulkner Act may only be adopted by a municipality with a population of less than 12,000.<sup>494</sup> The small municipality plan is a hybrid of two “traditional” forms: the borough form and the township form.<sup>495</sup> Similar to the other optional government forms under the Faulkner Act, the council exercises the legislative power of the municipality while the mayor exercises the executive power of the municipality.<sup>496</sup> To date, 20 municipalities in New Jersey have adopted the Small Municipality Form of government.<sup>497</sup>

### 1-8:6.1 Elected and Appointed Officials

The Small Municipality Form includes an elected council consisting of the mayor and two, four or six other council members.<sup>498</sup> The mayor may be elected directly by the voters or may be selected by the council from among its own members.<sup>499</sup> Council terms are three years on either a concurrent or a staggered basis.<sup>500</sup> If the mayor is elected directly, the term of office is four years; if chosen from the council, the mayor serves for either one or three years, depending on whether the council terms are staggered or concurrent.<sup>501</sup> Elections may be either partisan, with primaries in the spring and the general election in November, or non-partisan, with a municipal election in May.<sup>502</sup> All elections are at large; wards are not authorized.

---

<sup>494</sup> N.J.S.A. 40:69A-115.

<sup>495</sup> Albert J. Wolfe, N.J. State League of Municipalities, A History of Municipal Government in New Jersey Since 1798 25, *available at* [http://www.njslom.org/history\\_municipal\\_govt.pdf](http://www.njslom.org/history_municipal_govt.pdf) (last visited Aug. 20, 2017).

<sup>496</sup> Albert J. Wolfe, N.J. State League of Municipalities, A History of Municipal Government in New Jersey Since 1798 25, *available at* [http://www.njslom.org/history\\_municipal\\_govt.pdf](http://www.njslom.org/history_municipal_govt.pdf) (last visited Aug. 20, 2017).

<sup>497</sup> Kevin Starkey, *The Faulkner Act and Options for Change*, New Jersey Lawyer, December 2006, at 21.

<sup>498</sup> N.J.S.A. 40:69A-116 through N.J.S.A. 40:69A-117.

<sup>499</sup> N.J.S.A. 40:69A-117.3.

<sup>500</sup> N.J.S.A. 40:69A-117.2.

<sup>501</sup> N.J.S.A. 40:69A-117.3.

<sup>502</sup> N.J.S.A. 40:69A-117.1.

### 1-8:6.2 Mayoral Powers

The mayor presides at council meetings with the right to participate and vote, but no veto power.<sup>503</sup> As the chief executive officer of the municipality, the mayor is responsible for seeing that all laws and ordinances are observed.<sup>504</sup> The mayor appoints an assessor, a tax collector, a municipal clerk, a treasurer and such other officers as are provided by ordinance, all with the advice and consent of the council.<sup>505</sup> The mayor also appoints the finance committee and other committees of the council and all other municipal personnel for whom no other method of appointment is specified.<sup>506</sup>

### 1-8:6.3 Council Powers

The council under the small municipality plan is the legislative body and has no specified administrative duties or appointments to be made.<sup>507</sup> One member of the council is chosen as president of council to preside in the absence of the mayor.<sup>508</sup> While there is no provision in the Small Municipality Form for a chief appointed administrative officer, such a position could be created by local ordinance.<sup>509</sup> The annual budget is prepared by the mayor with the assistance of the treasurer and submitted to the council for review, revision and adoption.<sup>510</sup>

### 1-8:7 Mayor-Council-Administrator Plan

The Mayor-Council-Administrator Form of municipal government was added to the Optional Municipal Charter Law in 1981.<sup>511</sup> This form of municipal government is based largely on the Borough Form, with the mandatory addition of a municipal administrator and a weak mayor.<sup>512</sup> A municipality adopting the

<sup>503.</sup> N.J.S.A. 40:69A-120.

<sup>504.</sup> N.J.S.A. 40:69A-121.

<sup>505.</sup> N.J.S.A. 40:69A-122.

<sup>506.</sup> N.J.S.A. 40:69A-123.

<sup>507.</sup> N.J.S.A. 40:69A-120.

<sup>508.</sup> N.J.S.A. 40:69A-120.

<sup>509.</sup> N.J.S.A. 40:69A-126.

<sup>510.</sup> N.J.S.A. 40:69A-128.

<sup>511.</sup> N.J.S.A. 40:69A-149.1, Historical and Statutory Notes, L. 1981, c. 465, § 36.

<sup>512.</sup> Kevin Starkey, *The Faulkner Act and Options for Change*, New Jersey Lawyer, December 2006, at 21.

plan is governed by an elected mayor and council and an appointed administrator.<sup>513</sup> Under the Mayor-Council-Administrator plan, the municipal council consists of the mayor and six members of council who are elected in at-large, partisan elections.<sup>514</sup> To date, only three municipalities, the townships of North Brunswick, West Milford and Berkeley Heights, have adopted the Mayor-Council-Administrator Plan.<sup>515</sup>

### **1-8:7.1 Mayor and Council**

The mayor serves a four-year term, and the other members of council serve for three-year terms on a staggered basis, with an election of two members every year.<sup>516</sup> The council exercises the legislative power of the municipality while the mayor exercises the executive power.<sup>517</sup> The mayor presides in council meetings, but votes only to break ties.<sup>518</sup> He or she has a veto over ordinances, which can be overridden by a two-thirds vote of the council.<sup>519</sup> The mayor is directed to enforce the charter, local ordinances and general laws.<sup>520</sup> On the other hand, council members have no administrative duties and no appointive power under this form of government.

The mayor, with the advice and consent of the council, appoints an assessor, a tax collector, an attorney, a municipal clerk, a treasurer and such other officers as are provided by ordinance.<sup>521</sup> All such appointments are for one-year terms unless required differently by some other statute.<sup>522</sup> The municipality may provide by ordinance for the establishment of up to six municipal departments, each to be headed by a director appointed by the mayor with the advice

---

<sup>513.</sup> N.J.S.A. 40:69A-149.2.

<sup>514.</sup> N.J.S.A. 40:69A-149.3.

<sup>515.</sup> Albert J. Wolfe, N.J. State League of Municipalities, A History of Municipal Government in New Jersey Since 1798 26, *available at* [http://www.njslom.org/history\\_municipal\\_govt.pdf](http://www.njslom.org/history_municipal_govt.pdf) (last visited Aug. 20, 2017).

<sup>516.</sup> N.J.S.A. 40:69A-149.4.

<sup>517.</sup> N.J.S.A. 40:69A-149.5 through N.J.S.A. 40:69A-149.6.

<sup>518.</sup> N.J.S.A. 40:69A-149.5.

<sup>519.</sup> N.J.S.A. 40:69A-149.7.

<sup>520.</sup> N.J.S.A. 40:69A-149.6.

<sup>521.</sup> N.J.S.A. 40:69A-149.8.

<sup>522.</sup> N.J.S.A. 40:69A-149.8.

and consent of the council.<sup>523</sup> Department heads serve during the term of the mayor and may be removed by the mayor; they may also be removed for cause by the council.<sup>524</sup> The council is responsible for preparing the annual budget with the assistance of the municipal administrator and the treasurer.<sup>525</sup>

### 1-8:7.2 Municipal Administrator

As in the mayor-council plan, there is a municipal administrator, who is appointed by the mayor with advice and consent of the council and who serves during the mayor's term.<sup>526</sup> The municipal administrator may be removed by a two-thirds vote of the council.<sup>527</sup> The municipal administrator is directed to administer the business affairs of the municipality and to supervise all departments.<sup>528</sup>

### 1-8:8 Additional Provisions Common to Optional Plans

Some features of the Optional Municipal Charter Law apply to all four plans. For example, the provision dealing with elections provides that regular municipal elections are to be held in the municipality on the second Tuesday in May in the years in which municipal officers are to be elected.<sup>529</sup> Another clause provides that no officer or employee appointed or elected in a municipality may be interested directly or indirectly in any contract or job for work or materials that is to be furnished or performed by the municipality or by any person operating the various utilities within the municipality.<sup>530</sup> If a person is convicted of a crime of moral turpitude, he or she is ineligible to assume a municipal office, position or employment.<sup>531</sup> Another feature that applies to all four plans is initiative and referendum, whereby the voters can propose an ordinance by petition and then either adopt or

<sup>523</sup> N.J.S.A. 40:69A-149.8.

<sup>524</sup> N.J.S.A. 40:69A-149.8.

<sup>525</sup> N.J.S.A. 40:69A-149.12.

<sup>526</sup> N.J.S.A. 40:69A-149.9.

<sup>527</sup> N.J.S.A. 40:69A-149.9.

<sup>528</sup> N.J.S.A. 40:69A-149.9.

<sup>529</sup> N.J.S.A. 40:69A-150 et seq.

<sup>530</sup> N.J.S.A. 40:69A-163 through N.J.S.A. 40:69A-164.

<sup>531</sup> See N.J.S.A. 2C:51-2.1. *Raphalides v. N.J. Dept. of Civil Serv.*, 80 N.J. Super. 407 (App. Div. 1963), *certif. denied*, 41 N.J. 597 (1964); *Roseff v. Byram Twp.*, 432 N.J. Super. 8 (App. Div. 2013).

reject it in a referendum election, by-passing the municipal council completely.<sup>532</sup> Also included is a recall procedure whereby the people may, by petition, propose the removal of an elected official before the expiration of his term of office, and then vote on the question at a scheduled municipal election or a special election.<sup>533</sup> No recall can be instituted until an official has served at least one year. An affirmative vote in a recall election results in the removal of the targeted official as soon as the election results are certified by the municipal clerk.<sup>534</sup>

## 1-9 SPECIAL CHARTERS

There are two kinds of special charters in New Jersey. The first of these special charters are called orphan charters. Orphan charters were issued by the state legislature in the 19th century prior to the major constitutional revision of 1875, which prohibited “special” or local legislation.<sup>535</sup> The second type of special charter is issued by the state legislature under the provisions of the New Jersey Constitution of 1947 and N.J.S.A. 1:6-10. These special charters are usually variations of an existing optional form of government, such as the mayor-council form and council-manager form.<sup>536</sup>

### 1-9:1 Orphan Charters

There are several municipalities that remain partially organized on the basis of old special charters that were granted by the Legislature before the 1875 constitutional amendment prohibiting the enactment of such special or local legislation.<sup>537</sup> For most of the 19th Century each municipality was created by these “orphan” charters that organized its system of government.<sup>538</sup> The charters would define the physical boundaries of the municipality, designate

<sup>532</sup>. N.J.S.A. 40:69A-184 through N.J.S.A. 40:69A-185. *See In re Referendum Petition to Repeal Ordinance 04-75*, 192 N.J. 446 (2007).

<sup>533</sup>. N.J.S.A. 40:69A-168 et seq.

<sup>534</sup>. N.J.S.A. 40:69A-168 et seq.

<sup>535</sup>. New Jersey League of Municipalities, *Types and Forms of New Jersey Municipal Government*, <http://www.njslom.org/types.html> (last visited Aug. 20, 2017).

<sup>536</sup>. New Jersey League of Municipalities, *Types and Forms of New Jersey Municipal Government*, <http://www.njslom.org/types.html> (last visited Aug. 20, 2017).

<sup>537</sup>. Michael A. Egerton, N.J. State Comm’n on Cty. & Mun. Gov’t Modern Forms of Municipal Government 62 (1992).

<sup>538</sup>. Michael A. Egerton, N.J. State Comm’n on Cty. & Mun. Gov’t Modern Forms of Municipal Government 62 (1992).



its officials and define the municipality's powers.<sup>539</sup> Because of these special charters, each local government was unique.

The constitutional revision of 1875 attempted to curb this practice. Today, New Jersey municipalities have largely modernized the organization of their municipal government and are no longer based on the provisions of the "orphan" charters. Some municipalities, however, have been permitted to retain remnants of their old special charters.<sup>540</sup> Thus, the method of electing mayors and councils, and the number of council members in certain municipalities may be based in part on their old special charters.<sup>541</sup>

### 1-9:2 Special Charters Issued by the State Legislature

Under the terms of the New Jersey State Constitution of 1947 and the Faulkner Act, a municipality may obtain a special charter from the New Jersey Legislature, providing a unique form of governmental organization for that community.<sup>542</sup> The special charters are often based on an existing optional form of government, and contain special variations to meet the needs of a community.<sup>543</sup> The procedure for obtaining a special charter can be accomplished in three ways. First, the governing body of a municipal corporation may enact an ordinance for a special charter, or the voters of a municipality may petition for a special charter.<sup>544</sup> Finally, under the provisions of the Faulkner Act, a charter study commission may recommend a special charter after their study.<sup>545</sup>

---

<sup>539</sup>. Michael A. Egenton, N.J. State Comm'n on Cty. & Mun. Gov't Modern Forms of Municipal Government 62 (1992).

<sup>540</sup>. Michael A. Egenton, N.J. State Comm'n on Cty. & Mun. Gov't Modern Forms of Municipal Government 62 (1992).

<sup>541</sup>. Michael A. Egenton, N.J. State Comm'n on Cty. & Mun. Gov't Modern Forms of Municipal Government 62 (1992).

<sup>542</sup>. Michael A. Egenton, N.J. State Comm'n on Cty. & Mun. Gov't Modern Forms of Municipal Government 59 (1992).

<sup>543</sup>. Michael A. Egenton, N.J. State Comm'n on Cty. & Mun. Gov't Modern Forms of Municipal Government 62 (1992).

<sup>544</sup>. N.J.S.A. 1:6-10.

<sup>545</sup>. N.J.S.A. 40:69A-16.

If one of these procedures is chosen, the municipal clerk must certify to the sufficiency of the petition for the special charters.<sup>546</sup> Thereafter, the chief executive of the municipality shall “adopt a resolution authorizing the filing of a petition with the Legislature for the passage of a private, special or local law of the general nature described in the petition so filed with the said clerk....”<sup>547</sup> A notice of intent to introduce the bill for special charter is published and the bill is introduced into the Legislature.<sup>548</sup> The Legislature may enact law embodying the special charter and, if approved, the voters in the municipality vote on its adoption at the next general election following enactment, unless this occurs within 25 days of a general election, in which case the referendum must be held at the next succeeding general or regular municipal election.<sup>549</sup> Following a favorable vote, the special charter is immediately effective in the municipality.<sup>550</sup>

---

<sup>546.</sup> N.J.S.A. 1:6-12.

<sup>547.</sup> N.J.S.A. 1:6-12.

<sup>548.</sup> N.J.S.A. 1:6-15 through N.J.S.A. 1:6-16.

<sup>549.</sup> N.J.S.A. 1:6-17 through N.J.S.A. 1:6-18.

<sup>550.</sup> N.J.S.A. 1:6-20.

