

**MINUTES OF THE MEETING OF THE  
COUNTY OF WESTCHESTER  
BOARD OF ACQUISITION AND CONTRACT  
HELD ON THURSDAY, MARCH 1, 2012 AT 11:00 A.M.**

County Executive	Robert P. Astorino
Chairman, Board of Legislators	Ken Jenkins
Comm. - Public Works & Transportation	Jay Pisco
Deputy County Executive	Kevin Plunkett
County Attorney	Robert Meehan
Deputy County Attorney	Jim Robertson
County Executive's Office	Bill Mooney
Budget	Patricia Haggerty
Deputy Commissioner, Dept. of Finance	Dennis Kelly
Board of Legislators	Anne Reasoner
Board of Legislators	Thomas Staudter
Board of Legislators	Larry Goldstein
Board of Legislators	Alie Moncada
League of Women Voters	Barbara Strauss
Secretary BAC	JoMary Vieira
Assistant Secretary BAC	Joan Cocciardi

**Mr. Astorino presided.**

**Mr. Astorino said, "Before we begin the meeting, has the Secretary checked the reception area to make sure that all members of the public who wish to attend this meeting have been invited into this conference room?"**

**Ms. Vieira confirmed that she had done so.**

**Mr. Astorino said, "Before we begin, I know there was an issue at last week's meeting, which I was not at, brought up by the Vice-Chair of the County Board, on the appointment and legality of the Commissioner of DPW/DOT Jay Pisco sitting as a member of the Board of Acquisition and Contract. We have a conclusion from a memorandum of an opinion from the County Attorney that I would like to read into the record and submit the full opinion to the minutes."**

**'It appears that the vote taken by the BOL which failed was the motion to refer the communication from the County Executive regarding the appointment of Jay T. Pisco as Commissioner of Public Works and Transportation to the Committee on Appointments. Such a motion was a procedural vote and not a substantive vote to confirm or reject his confirmation. Therefore, under the rule set forth by the Court in Berenson v. O'Rourke, Westchester County Supreme Court Index No. 15670/91, Jay T. Pisco remains "an acting commissioner, pending a confirmation vote by the County Legislature."'**

**I would like to submit the opinion from the County Attorney dated 2/27/12 to the Board of Acquisition and Contract."**

**Mr. Jenkins said, "Just on that particular point, the BOL will certainly have a written objection on that. Beyond that, the BOL action not to refer to committee is based on the same Berenson opportunity which we will read next time. Besides that we will direct the attention for our County Attorney to Montano vs. the County Legislature of Suffolk, and that would be id number 70AD3D203891 NYS Second Division 82. We will send this in writing so you will have the whole thing, which it says that basically a fundamental principle of organic law, each department of government should be free from interference on the lawful discharge of its duties expressly conferred by either side of the branches. In this regard it is**

not the province of the court to direct the legislature how to do its particular work. The separation of power and principles generally preclude the courts from intruding upon the policy making and discretionary decision that are reserved in legislative sessions and as it refers to Berenson. We certainly have identified the same language in there citing Berenson that the appointments were terminated based upon the failure to obtain a majority vote of the County Board to move forward. That's just one point and we will go from there.

Second, I note we received a document from the County Attorney regarding A&C legislation and the County Attorney's opinion on this. Just for the record the law is in effect not just because it passed here on the local level, it was filed at the NYS Dept. of State as required by NYS law and that was done on Monday so that law is in effect regardless of this particular opinion. If there is a change in the law that the administration would like to challenge you certainly are free to do so but that would be in a court and not from an opinion. The Dept. of State, I'm sure the County Attorney knows, changed the law last year so that the County Attorney does not certify the Board's actions on local laws anymore. That was filed in NYS and we are moving forward with that. We would expect notwithstanding our contentions regarding Mr. Pisco in the beginning of his appointment that at this point and time that legislation is in effect and that the Board of Acquisition and Contract makeup now includes the Budget Director."

Mr. Astorino asked, "The County Attorney is here. Do you want to comment at all?"

Mr. Meehan responded, "The opinion that I have given remains my opinion. The change in the State law regarding the Home Rule law doesn't change the fact the law under the law of the State of NY by case law is not operative because the requirement clause, the mandatory referendum didn't happen, and therefore the law is not in effect."

Mr. Jenkins said, "We have a difference of opinion on that particular matter. On that particular point it is the law at this particular time. At that particular moment we will vacate our position in this meeting. This meeting will now be over from that particular perspective."

Mr. Astorino asked, "You are choosing to vote or not?"

Mr. Jenkins replied, "We are choosing to leave the meeting."

Mr. Astorino said, "Let the record show that the Chairman of the County Board which represents the BOL at A&C has decided to leave the meeting. Notwithstanding we will submit for the record the County Attorney's opinion of 3/1/12 with regard to the composition of the BAC so we will submit that today. Also, I note the filing of an affidavit from Mr. Spiezio of R&S Waste Services with regard to item 6 on the agenda and understand Commissioner Pisco wishes to make a motion.

Mr. Pisco said, "Thank you. I move to add three items to today's agenda. The first item is urgent as it is required by the County Clerk to provide services on Passport Day. Specifically, I move to add item 25 (ID #25130), a resolution to authorize the County Clerk to enter into an agreement with the City of White Plains to allow the County Clerk to operate a mobile office on City property in front of 110 Dr. Martin Luther King, Jr. Blvd. on Saturday, March 10th. The second item is also urgent in order to timely reserve space at Mt. Vernon High School for the upcoming civil service tests. Accordingly, I propose to add item 26 (ID#25215), a resolution to authorize the County to enter into an agreement with the Mt. Vernon City School District to use the High School in order to conduct the civil service examination on April 14, 2012. The third item is crucial to implement the timely opening of the H-MRF at the request of Commissioner Lauro. Specifically, to add item 27 (ID #25110) to the agenda, which is a resolution to correct the resolution approved on January 19, 2012 to properly reflect the term of the agreement to make it the same as the term recited in the bid."

Mr. Astorino seconded the motion and items 25, 26 and 27 were added to the agenda.

**Acquisition & Contract.** Minutes of the meeting of 2/23/12 and the SEQR Review for agenda items.

J. Vieira

**Mr. Astorino moved to receive and file the foregoing minutes and SEQR review, which were duly seconded and approved.**

1. (24690) **Information Technology** - Amend the license agreement (GS-873) with New York SMSA Limited Partnership, d/b/a Verizon Wireless, Bedminster, NJ, for the operation of radio equipment at the Public Safety Headquarters Radio Tower in Hawthorne, by extending the termination date to 5/31/12, and increasing the revenue amount by \$42,069.04.

Beirne/Mahon

**Held Over By Board of Legislators – 2/23/12**

**Mr. Astorino moved the resolution, which was duly seconded and unanimously approved by the members present.**

2. (24434) **County Attorney** - Amend an agreement with Robert J. Ponzini, Esq., for the provision of Hearing Officer Services in connection with hearings under Sections 72,73 and 75 of the New York State Civil Service Law, from 11/1/10 – 10/31/11, in an amount not to exceed \$20,000, by retroactively extending the term of the agreement from 11/1/11 – 2/14/12.

R. Meehan

**Held Over By Board of Legislators – 2/23/12**

**Mr. Astorino moved the resolution, which was duly seconded and unanimously approved by the members present.**

3. (24636) **County Attorney** - Amend an agreement with Computer Sciences Corporation, to provide software maintenance for the County's risk management software system, in order to extend the term an additional (2) years, to a new termination date of 3/13/14, for a total cost of \$55,821.72, under the listed terms and conditions.

Meehan/Beirne

**Held Over By Board of Legislators – 2/23/12**

**Mr. Astorino moved the resolution, which was duly seconded and unanimously approved by the members present.**

4. (24574) **Social Services** - Amend a 3/18/11 agreement with Caring for the Homeless of Peekskill, Inc. for the operation of a 24-hour adult shelter program for up to nineteen (19) homeless single men and women at a facility known as Jan Peek House, Peekskill, from 2/1/11 – 1/31/12, in an amount not to exceed \$747,708, to enter into a subcontract with Grace Church Community Center, Inc., for the provision of management consulting services.

K. McGuire

**Held Over By Board of Legislators – 2/23/12**

**Mr. Astorino moved the resolution, which was duly seconded and unanimously approved by the members present.**

5. (24310) **Mental Health** - Enter into **1)** a grant agreement with the United States Department of Justice to receive a grant in the amount of \$443,188 for a family-based offender substance abuse treatment program, from 10/1/11 – 9/30/13; **2)** an agreement with St. John's Riverside Hospital, to provide pre-and post-release services targeted to substance-abusing offenders who are parents, for an amount not to exceed \$354,128, from 10/1/11 – 9/30/13; and **3)** an agreement with Social Policy Innovations, Inc., to provide program evaluation services for the aforementioned pre- and post-release services, for an amount not to exceed \$47,950, from 10/1/11 – 9/30/13.

G. Mitchell

**Held Over By Board of Legislators – 2/23/12**

**Mr. Astorino moved the resolution, which was duly seconded and unanimously approved by the members present.**

6. (24727) **DPW/Transportation** – Contract No. 12-201, for Countywide Solid Waste Removal Services, Westchester County, New York. Awarded to Low Bidder, R&S Waste Services, LLC, Harrison, in the amount of \$1,164,960. (3 bids)

J. Pisco

**Held Over By Board of Legislators – 2/23/12**

**Mr. Astorino moved the resolution, which was duly seconded and unanimously approved by the members present.**

7. (24621) **CE/Office for Women** - Enter into an agreement with Pace University, acting by and through the Women's Justice Center of Pace University Law School, to provide legal consumer education via telephone counseling in matrimonial, employment, health care, domestic violence and elder law, as well as education and training to private attorneys, to provide low cost matrimonial and elder law representation to low and middle income persons, for an amount of \$188,047, from 1/1/12 – 12/31/14, under the listed terms and conditions.

D. Balistreri

**Mr. Astorino moved the resolution, which was duly seconded and unanimously approved by the members present.**

8. (24822) **Finance** - Renew an agreement with JP Morgan Chase Bank, N.A. for the provision of general operating, payroll and direct deposit accounts banking services, from 4/1/12 – 3/31/14, under the listed terms and conditions.

A. Berg

**Mr. Astorino moved the resolution, which was duly seconded and unanimously approved by the members present.**

9. (24761) **Planning** - Amend the agreement with the Town of Greenburgh to install sidewalks on Tarrytown Road (Route 119) near the Crossroads Shopping Center, in order to change the expiration date from 1/31/12 to 12/31/12.

E. Buroughs

**Mr. Astorino moved the resolution, which was duly seconded and unanimously approved by the members present.**

10. (24374) **Social Services** - Pursuant to Section 3(a)(xxi) of the Westchester County Procurement Policy and Procedures, to exempt from procurement an agreement for the provision of a subsidy coordinator who will assist providers with technical training in Child Care Time and Attendance tracking system.

K. McGuire

**Mr. Astorino moved the resolution, which was duly seconded and unanimously approved by the members present.**

11. (24391) **Social Services** - Enter into an agreement with the Child Care Council of Westchester, Inc., for the provision of a subsidy coordinator who will assist providers with technical training in Child Care Time and Attendance Tracking System, from 1/1/12 – 12/31/12, in an amount not to exceed \$40,000.

K. McGuire

**Mr. Astorino moved the resolution, which was duly seconded and unanimously approved by the members present.**

12. (24759) **Health** - Enter into contracts with various providers, to provide TB clinic patient chest x-rays and other radiological tests and interpretations as needed, from 3/1/12 – 2/28/13, in the total aggregate not to exceed amount of \$36,500.

S. Amler

**Mr. Astorino moved the resolution, which was duly seconded and unanimously approved by the members present.**

13. (24749) **Public Safety** - Pursuant to Section 3(a)(xxi) of the Westchester County Procurement Policy and Procedures, to exempt from procurement an agreement with Aircell Business Aviation Services LLC, for satellite phone voice/data service.

G. Longworth

**Mr. Astorino moved the resolution, which was duly seconded and unanimously approved by the members present.**

14. (24745) **Public Safety** - Amend a 10/13/11 Resolution with Aircell Business Aviation Services LLC, to which Aircell would provide satellite phone voice/data service for the ST-3100 satellite phone installed in the Bell 407 helicopter, from 9/16/11 – 9/15/16, for an amount not to exceed \$5,000, to remove the dates and not to exceed amounts, under the listed terms and conditions.

G. Longworth

**Mr. Astorino moved the resolution, which was duly seconded and unanimously approved by the members present.**

15. (24307) **Probation** - Enter into an agreement with The Children's Village, Inc., for the provision of a Family Court Assistance Program and an Alternative to Detention Program, which provide diagnostic, educational and non-secure detention services, from 1/1/12 – 6/30/12, in the not to exceed amount of \$1,308,723.

R. Pozzi

**Mr. Astorino moved the resolution, which was duly seconded and unanimously approved by the members present.**

16. (24864) **Parks** – Enter into a license agreement with Homestyle at Dunwoodie, Inc., Yonkers, for the operation of a food, refreshment and catering concession at Dunwoodie Golf Course, Yonkers, from 3/1/12 – 12/31/16, under the listed terms and conditions.

K. O'Connor

**Mr. Astorino moved the resolution, which was duly seconded and unanimously approved by the members present.**

17. (24803) **DPW/Transportation** - Amend Agreement No. DOT75281 with ACS Transport Solutions, Inc., for the implementation of a computer-aided dispatch and automatic vehicle location system for the County's Bee-line Bus System, in order to extend the term for an additional seven (7) year period through to 8/7/18, at no additional cost to the County.

Pisco/Beirne

**Mr. Astorino moved the resolution, which was duly seconded and unanimously approved by the members present.**

18. (24729) **DPW/Transportation** – Contract No. 05-508, with Bilotta Construction Corp., for Roadway Reconstruction, June Road, from Grant Corner to Putnam County Line, A Distance of 3.19 Miles, Town of North Salem, New York. Approved the six (6) listed subcontractors.

J. Pisco

**Mr. Astorino moved the resolution, which was duly seconded and unanimously approved by the members present.**

19. (24730) **DPW/Transportation** – Contract No. 08-501, with Caladri Development Corp., to Replace Bus Wash System, Central Maintenance Facility, 475 Saw Mill River Road, Yonkers, New York. Approved of Milcon Construction Corporation, West Babylon, as a subcontractor.

J. Pisco

**Mr. Astorino moved the resolution, which was duly seconded and unanimously approved by the members present.**

20. (24731) **DPW/Transportation** – Contract No. 09-512, with Arben Group LLC, for Household Materials Recovery Facility, Valhalla Campus, Valhalla, New York. Approved the eight (8) listed subcontractors.

J. Pisco

**Mr. Astorino moved the resolution, which was duly seconded and unanimously approved by the members present.**

21. (24732) **DPW/Transportation – WITHDRAWN BY DEPARTMENT.** Contract No. 09-519, with PCI Industries Corp., for Rehabilitation of Palmer Road and Access Ramps and Rehabilitation of Palmer Road Bridge over Central Park Avenue, City of Yonkers, New York. Approval of the JECI Corporation, Pelham, as a subcontractor.

J. Pisco

22. (24733) **DPW/Transportation** – Contract No. 10-505, with DiMarino Brothers Contracting, Inc., for Exterior Repairs, Vernon Plaza Family Center, 17 South Second Avenue, Mount Vernon, New York. Approved Conceptual Restoration Inc., Bronx, as a subcontractor.

J. Pisco

**Mr. Astorino moved the resolution, which was duly seconded and unanimously approved by the members present.**

23. (24794) **DPW/Transportation** – Contract No. 12-207, for Replacement of Medium Voltage Feeders, 450 Saw Mill River Road, Ardsley, New York. Advertise for bids.

J. Pisco

**Mr. Astorino moved the resolution, which was duly seconded and unanimously approved by the members present.**

24. (24746) **DPW/Transportation** - Enter into a five (5) year Lease Agreement (No. 12-904) with Commerce Street Professional Center, LLC, for approximately 1431 square feet of office space located at 1940 Commerce Street, Yorktown Heights, beginning 4/1/12, for a fee of \$224,057.76, under the listed terms and conditions.

**Mr. Astorino moved the resolution, which was duly seconded and unanimously approved by the members present.**

- 25. (25130) **County Clerk** – Enter into an agreement with the City of White Plains, for a permit to park the County Clerk’s mobile office in front of 110 Dr. Martin Luther King, Jr. Blvd. on Saturday, March 10, 2012, to process passports as part of Passport Day in the USA 2012, a national passport outreach event.

T. Idoni

**Mr. Astorino moved the resolution, which was duly seconded and unanimously approved by the members present.**

- 26. (25215) **Human Resources** – Enter into an agreement with Mount Vernon City School District for a permit to use Mount Vernon City School District, in order to conduct civil service examinations on 4/14/12.

K. Oristano

**Mr. Astorino moved the resolution, which was duly seconded and unanimously approved by the members present.**

- 27. (25110) **DEF** – Amend Awarded Contract No. EF-1106, for Operation and Maintenance of Household Materials Recovery Facility, Valhalla Campus, Valhalla, New York, in the amount of \$1,573,368, to the Lowest Bidder, Clean Venture, Inc., Elizabeth, NJ, by changing the authorized term of the Contract from “commencing on 2/1/12 and ending 1/31/15” to “commencing within ten (10) days of the county giving the contractor notice to commence the work and continuing for 1,095 consecutive calendar dates from the date of the notice”.

T. Lauro


**Mr. Astorino moved the resolution, which was duly seconded and unanimously approved by the members present.**

This meeting was recorded and an electronic copy of the minutes is on file with the Board of Acquisition and Contract.

There being no further business, the Chair declared the meeting adjourned. All approved resolutions are on file electronically with the Board of Acquisition and Contract.

  
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 JoMary Vieira, Secretary

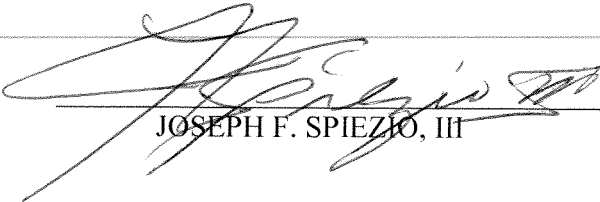
I have reviewed the foregoing minutes and have found them to be correct as written.

Dated 3/5/12  
  
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 JoMary Vieira, Secretary

COUNTY OF WESTCHESTER  
BOARD OF ACQUISITION AND CONTRACT

CONTRACT NO. 12-201

JOSEPH F. SPIEZIO, III being duly sworn deposes and says that I am a Managing Member of R&S Waste Services, LLC, 500 Mamaroneck Avenue, Suite 320, Harrison, New York, 10528 and in that capacity I hereby state that JAMES M. ROGAN is not currently employed by, has no ownership interest in and has no role in the management of R&S Waste Services, LLC.



JOSEPH F. SPIEZIO, III

Sworn to before me this  
1 day of March 2012.



NOTARY PUBLIC

HOWARD KASSMAN  
NOTARY PUBLIC-STATE OF NEW YORK  
No. 01KA6112367  
Qualified in Suffolk County  
My Commission Expires July 06, 2012

**DELIVERED ELECTRONICALLY  
PRIVILEGED & CONFIDENTIAL**

February 27, 2012

To: Kevin J. Plunkett  
Deputy County Executive

From: Robert F. Meehan  
County Attorney



Of Counsel:

Linda Trentacoste  
Associate County Attorney

Re: Appointment Confirmation

You requested a legal opinion regarding the following:

**QUESTION:**

The Chairman of the County Board of Legislators ("BOL"), a member of the Board of Acquisition and Contract ("B&A"), has objected to the participation of Jay T. Pisco, who was appointed Commissioner of Public Works and Transportation by the County Executive, as a member of B&A, on the ground that the BOL has not confirmed his appointment. You have asked whether this objection is meritorious.

**BACKGROUND:**

At a regular meeting of the BOL held on February 13, 2012, the BOL considered the items to be referred to its Committees. All the items listed on the agenda under Roman Numeral Number I, entitled "Communications", are usually referred to Committee in the aggregate by way of a unanimous vote of the BOL in a process commonly referred to as the "Consent Agenda". Prior to such approval (by unanimous vote), revisions to the Consent Agenda (typically referring a matter to an additional committee or committees or severance of

an item) can occur.

The first revision to the Consent Agenda was severance of item number A.1. (ID # 4952) which recited:

**Resolution – APPT – Comm of Public Works & Transportation – Pisco:**

Appointment of Jay T. Pisco as a Commissioner of the Westchester County Department of Public Works and Transportation for a term to commence on January 23, 2012.

Committee Referral: COMMITTEE ON APPOINTMENTS

Thereafter, following approval of the “Consent Agenda”, a vote was taken on ID # 4952, which had been severed. The vote was 8 in favor and 9 opposed, following which the Clerk declared that the item “fails 9-8.”

**DISCUSSION:**

The motion to sever (also known as the division of questions) is appropriate when a separation into two or more parts may be voted upon separately without being compelled to accept matters embraced in other parts of the measure. Mason’s Manual of Legislative Procedure, Chapter 32, Section 310, p. 225<sup>1</sup>. The County Board of Legislators’ motion to sever ID # 4952 from the Consent Agenda was appropriate because the single subject in question was the motion to refer to committee. It was that motion that was severed. Once severed from the Consent Agenda, the subsequent motion, as explicitly set forth in the agenda and considered and voted upon by the County Board of Legislators with respect to Jay T. Pisco’s appointment was the issue as to whether said item would be referred to committee. The draft minutes of the February 13, 2012 meeting confirm these facts.

Referring an item to a committee is a motion relating to the procedure of the County Board of Legislators. *See generally*, Rule Four of the Rules of the County Board of Legislators entitled “General Conduct of Meetings”. Subdivision 3 of Rule Four regarding Communications provides in part: “With reference to said communications, there shall be no debate on the substance of the item itself.”

By contrast, a motion to approve or disapprove an appointment is a substantive action on an item that must be taken by the County Board of Legislators. According to Mason’s Manual of Legislative Procedure, a motion to refer or commit is a subsidiary motion distinguishable from the approval or disapproval of an appointment, which constitutes a main

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<sup>1</sup> Rule Twenty-Five of the County Board of Legislators states that “Mason’s Manual of Legislative Procedure shall govern the procedure of the Board in all cases when not inconsistent with the foregoing rules.”

motion. Mason's Manual of Legislative Procedure, Sec. 187, pgs. 148-149. Consequently, the motion to refer to committee does not open the main question to debate. Mason's Manual of Legislative Procedure, Sec. 387(1), p. 262.

**CONCLUSION:**

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It appears that the vote taken by the BOL which failed was the motion to refer the communication from the County Executive regarding the appointment of Jay T. Pisco as Commissioner of Public Works and Transportation to the Committee on Appointments. Such a motion was a procedural vote and not a substantive vote to confirm or reject his confirmation. Therefore, under the rule set forth by the Court in *Berenson v. O'Rourke*, Westchester County Supreme Court Index No. 15670/91 (Burrows, J.), Jay T. Pisco remains "an acting commissioner, pending a confirmation vote by the County Legislature."

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RFM/nn

**DELIVERED ELECTRONICALLY  
PRIVILEGED & CONFIDENTIAL**

March 1, 2012

To: Hon. Robert P. Astorino  
County Executive

Hon. Kenneth Jenkins  
Chair, County Board of Legislators  
Legislator, 16<sup>th</sup> District

Jay T. Pisco  
Commissioner of Public Works and Transportation

Lawrence Soule  
Budget Director

CC: County Board of Legislators

From: Robert F. Meehan *RJM*  
County Attorney

Of Counsel:

Linda Trentacoste  
Associate County Attorney

Re: A&C Legislation

Over the years, the County Board of Legislators has considered legislation to change the Board of Acquisition and Contract ("A&C"). Last year was no exception. Consistent with the opinions of my predecessors, the County Attorney's office repeatedly advised that the proposed legislation was subject to a mandatory referendum pursuant to the Laws of Westchester County § 209.161 because it abolished, transferred, and curtailed the powers of elected officials. In the past two years, there are no less than six written opinions.

Notwithstanding the foregoing, on November 29, 2011, the County Board of Legislators passed the attached legislation which was vetoed by the County Executive. On December 22, 2011, the County Board of Legislators overrode the County Executive's veto of this legislation. The legislation, which was not subject to a mandatory referendum, claims that it is only subject to a

referendum on petition. If no petition is filed, said legislation purports to take effect sixty (60) days after its adoption.

As I have indicated previously, said legislation is subject to a mandatory referendum pursuant to the Laws of Westchester County § 209.161 which states that:

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No local law shall become operative or effective unless and until the same is adopted by the affirmative vote of a majority of the qualified electors of the county voting on a proposition for its approval at the next general election held not less than 90 days after the adoption thereof, if it abolishes or creates an elective office; changes the voting or veto power of, or the method of removing, an elective officer; changes the term of office or reduces the salary of an elective officer during his term of office; ***abolishes, transfers or curtails any power of an elective officer***; changes the form or composition of the elective governing body of the county; or provides a new form of government for such county. (Emphasis added)

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An opinion regarding the history of this Charter provision was set forth in my memorandum dated April 8, 2011.

The Local Law relating to A&C purports to amend the Westchester County Charter to:

- (1) substitute the membership of the Commissioner of Public Works with Budget Director [§ 161.01];
- (2) remove certain contracts which, by New York State Law, are required to be approved by the Board of Legislators (such as inter-municipal agreements) from the contract execution requirements under Section 161.11 of the Laws of Westchester County and require the designation and authorization of an individual who shall be responsible to take actions and execute documents necessary to effectuate such contract [§ 161.01; § 161.11];
- (3) require that, prior to the approval of an amendment to the cost of any contract, the submission of a schedule or backup information be provided as to the impact of the modification to the agreement [§ 161.01];
- (4) establish a meeting schedule for A&C and limit the circumstances when such meeting can be changed [§ 161.41];
- (5) require A&C resolutions for the procurement of services added by the Westchester County Board of Legislators to be advanced by March 31<sup>st</sup> or within one quarter of the expiration of an existing contract for the same service item, the Chairman may place an A&C resolution at any time [§ 161.51];

- (6) require a written declaration of emergency by the County Executive or his duly authorized designee relating to an A&C resolution for an emergency contract [§ 167.171(3)];
- (7) limit the term of an emergency contract to one year [§ 167.171(4)]; and
- (8) define the term “emergency” [§ 167.171(5)].

As will be discussed in further detail below, this proposed legislation should have been the subject of a mandatory referendum pursuant to Section 209.161 of the Laws of Westchester County to the extent that its provisions abolish, transfer, and/or curtail the power of the elected officials who serve on A&C. Notably, the rationale provided in the Committee Report to the County Board of Legislators confirms that it was the County Board’s intention to abolish, transfer and curtail the powers of the County Executive:

Your Committee finds that these particular changes have become necessary to, *inter alia*, address the County Executive’s failure to submit to or advance contracts through A&C the funding for which has been authorized by the County Board...

Where, as here, a local law was enacted which should have been the subject of a mandatory referendum but was not, said local law is nonoperative. *See Matter of Fogarty v. Warden*, 191 Misc. 916, 919, 79 N.Y.S.2d 364 (Sup. Ct., Orange County 1948), *aff’d* 273 A.D. 910, 78 N.Y.S.2d 758 (2d Dep’t 1948), *aff’d* 297 N.Y. 963, 80 N.E.2d 355 (1948).

As previously stated, this office has repeatedly advised that a mandatory referendum was necessary for the enactment of this legislation. The substitution of the Budget Director for the Commissioner of Public Works (§ 161.01) is subject to a mandatory referendum because it affects the power of an elected official. The County Executive possesses the power to appoint (subject to confirmation by the County Board) and to dismiss the Commissioner of Public Works, the third voting member of A&C. The substitution of the Commissioner of Public Works with the Budget Director, who is appointed for a fixed term of office and can only be removed after notice and opportunity to be heard and a two-thirds’ affirmative vote of the County Board would necessarily diminish the County Executive’s power to remove the third member of A&C. The New York State Court of Appeals has expressly stated that “limiting the power” of an elected official “to appoint commissioners, . . . would require a referendum”. *Mayor of the City of New York v. Council of the City of New York*, 9 N.Y.3d 23, 33, 842 N.Y.S.2d 742, 874 N.E.2d 706 (2007). The power to appoint also implies the power to remove. *See Bishopp v. Village of Spring Valley*, 213 A.D.2d 618 (2d Dep’t 1995); *Rine v. City of Sherrill*, 152 Misc.2d 19 (Sup. Ct. Oneida Co. 1991). Accordingly, any limitation of a power of an elected official, including the power to remove, would require a mandatory referendum.

Furthermore, the New York State Court of Appeals repeatedly required a referendum based upon limitations imposed on an elected officer’s “structural authority” (*see Morin v. Foster*, 45 N.Y.2d 287, 408 N.Y.S.2d 387, 380 N.E.2d 217 (1978) (limitation on power to appoint county manager held to require referendum); *Matter of Fogarty v. Warden*, 191 Misc.

916, 79 N.Y.S.2d 364 (Sup. Ct., Orange County 1948), *aff'd* 273 A.D. 910, 78 N.Y.S.2d 758 (2d Dep't 1948), *aff'd* 297 N.Y. 963, 80 N.E.2d 355 (1948) (limitation on power to dismiss city manager held to require referendum); *Matter of Heeran v. Scully*, 135 Misc. 874, 240 N.Y.S. 2 (Sup. Ct., Rensselaer County 1930), *aff'd* 229 A.D. 822, 242 N.Y.S. 901 (3d Dep't 1930), *aff'd* 254 N.Y. 344, 173 N.E. 7 (1930) (adding members to board created by city charter held to curtail power of existing members); *Mayor of City of N.Y. v Council of City of N.Y.*, 280 A.D.2d 380, 721 N.Y.S.2d 39 (1st Dep't 2001) (limitation on Mayor's authority to appoint members of police investigatory board held to require referendum)). Consequently, legislation which is intended to substitute the Commissioner of Public Works with Budget Director is subject to a mandatory referendum.

Similarly, the provision to exempt from A&C's review certain contracts which, by New York State Law, are required to be approved by the Board of Legislators (such as inter-municipal agreements) (§ 161.01) would effectively limit the jurisdiction of A&C and remove from the County Executive and the Chairman of the County Board of Legislators the power to approve certain contracts. Such a curtailment of the powers of these elected officials would be subject to a mandatory referendum.

The requirement that prior approvals of contracts by A&C be delayed until the submission of mandatory documentation (*i.e.*, schedule or backup information (§ 161.01) is also subject to a mandatory referendum. Aside from the County Board's imposition of an additional obligation, such requirement may delay any vote of A&C, thereby curtailing the powers of the elected officials serving on A&C until the newly required documentation is provided.

The legislation mandates that an A&C meeting schedule be established at the beginning of the year and prevents any change to the schedule unless certain enumerated factors have been met (§ 161.41). Such a curtailment of the powers of elected officials would be subject to a mandatory referendum.

Similarly, section 161.51 dictates the conduct of A&C business, limiting the powers of the elected officials who serve thereon and consequently is subject to a mandatory referendum.

Sections 167.171(3), (4) and (5) all relate to emergency contracts and impose additional obligations and limitations to A&C's approval of such contracts. As such, the powers of the elected officials serving on A&C have been diminished and curtailed and therefore would be subject to a mandatory referendum.

Finally, it should be noted that I expressly disagreed with the interpretation and analysis proffered by other individuals which was ultimately relied upon by the County Board when the legislation was adopted. Consequently, it is my legal opinion as the County Attorney that the current composition of the A&C, its duties and functions remain unchanged by this legislation as this legislation is nonoperative.

RFM/nn  
Attachment

LOCAL LAW INTRO. NO. -2011

A LOCAL LAW amending the Laws of Westchester County, in relation to the Board of Acquisition and Contract.

BE IT ENACTED by the Board of Legislators of the County of Westchester as follows:

Section 1. Section 161.01 of the Laws of Westchester County is hereby amended to read as follows:

Sec. 161.01. Board created; powers and duties.

There shall be a Board of Acquisition and Contract which shall consist of the County Executive, the Budget Director[Commissioner of Public Works] and the Chairman of the County Board. In the event of absence from the county or disability of the Chairman of the Board of Legislators, the Vice Chairman of the County Board may act as a member of the Board of Acquisition and Contract in the place and stead of the Chairman of the County Board. In the event of absence from the county or disability of both the Chairman of the Board of Legislators and the Vice Chairman of the County Board, the majority leader of the County Board may act as a member of the Board of Acquisition and Contract in their place and stead. The Board of Acquisition and Contract shall contract for and acquire by purchase or condemnation all lands, buildings and other real property, the acquisition of which has been authorized by the County Board, and shall award on behalf of the county all contracts, including but not limited to contracts for the construction, reconstruction, repair or alteration of all public works or improvement, and

excepting: (1) contracts authorized under section 161.11 to be executed by the Bureau of Purchase and Supply[, and excepting also]; (2) contracts authorized under section 161.11 to be made by the head of any department, board or commission for matters relating to the maintenance and/or operation of such department, board of commission; and (3) contracts which are required to be by New York State Law to be approved by the County Board of Legislators, such as inter municipal agreements, but not excepting contracts required to be approved by the Board of Acquisition and Contract under section 3307 of the Public Authorities Law or any other New York State Law. The Board of Acquisition and Contract shall require, prior to the approval of an amendment to the cost of any contract, the submission of a schedule or backup information which shall consist of: (1) the contract number; (2) the date when the Board of Acquisition and Contract awarded the original contract and the amount of the original contract; (3) a brief description of the need for the change order; (4) the total amount of the increase; and (5) the revised contract amount which includes the amount of the increase.

Section 2. Section 161.11 of the Laws of Westchester County is hereby amended to read as follows:

Sec. 161.11. Execution of contracts and bidding procedure.

1. All contracts entered into by or on behalf of the County of Westchester, with the exception of contracts which solely require the approval of the County Board of Legislators pursuant to Section 161.01 of this Chapter, shall be executed in accordance with one of the following methods:

a. The authority to execute contracts for the purchase, sale, rental, maintenance or repair of supplies, materials, and equipment and the services incidental thereto is delegated to the Bureau of Purchase and Supply, except that with respect to the Westchester Community College, such authority is delegated to the President of Westchester Community College or his duly authorized designee, subject to the approval of the Board of Trustees of the Westchester Community College, to be exercised in accordance with the procedures prescribed by law: provided, however, that the authority delegated hereunder shall not extend to contracts for the rental, leasing or licensing of equipment at a rate of \$3,000.00 or more per month.

b. All contracts, except those contracts to be executed in the manner provided by subsection a. hereof relating to matters which have been the subject of an appropriation by the board of legislators and which have been approved by the Board of Acquisition and Contract and the office of the County Attorney, may be executed by the head of the appropriate department, board or commission pursuant to a written authorization signed by the County Executive. Such authorization shall require the approval of the Board of Acquisition and Contract and, in addition, may contain such other limitations as the County Executive deems appropriate.

c. Notwithstanding the foregoing, the County Executive may, by written authorization, empower the head of any department, board or commission to execute contracts on behalf of his department, board or commission, without the need for approval by the Board of Acquisition and

Contract, provided such contracts do not exceed in total amount the maximum set forth in said written authorization, which authorization shall have been previously approved by the Board of Acquisition and Contract.

d. No contract shall be executed on behalf of the county until it has been approved as to substance and as to form by the office of the County Attorney.

2. All contracts that are solely approved by the County Board of Legislators shall, in the legislation approving the contract, designate who shall be responsible to take such actions and execute such documents as may be necessary and appropriate to effectuate the purpose of such contract authorization.

[2]3. Whenever any contract for public work involves the expenditure of more than \$20,000.00, the contract shall be awarded to the lowest responsible bidder by sealed bids or proposals, made in compliance with the public notice published at least once in a newspaper published in the county designated by the Board of Acquisition and Contract at least ten days prior to the day on which such sealed bids or proposals are to be opened. The bids or proposals shall be opened publicly in the presence of at least two members of the Board of Acquisition and Contract or their representatives. The successful bidder must give security for the faithful performance of his contract, the adequacy and sufficiency of which shall be approved by the Board of Acquisition and Contract; provided, however, that the Board of Acquisition and Contract may, in its discretion, waive security requirements for contracts which are not in excess of \$15,000.00 in amount. A copy of each such contract when executed shall be filed with

the Commissioner of Finance together with a copy of any act, other than the annual appropriation act, upon which the right to make such contract rests.

Section 3. A new section 161.41 is hereby added to the Laws of Westchester County to read as follows:

Sec. 161.41. Board of Acquisition and Contract Meeting Schedules.

On or before January 15<sup>th</sup> of each year, the Board of Acquisition and Contract shall, by resolution, adopt a schedule of the dates and times of all meetings of the Board of Acquisition and Contract for the calendar year. Any change to such this schedule, other than a change due to extreme weather conditions or other emergency situations which makes a meeting of the Board of Acquisition and Contract physically impractical to attend, must be obtained at least seventy-two (72) hours prior to such meeting.

Section 4. A new section 161.51 is hereby added to the Laws of Westchester County to read as follows:

Sec. 161.51. Acquisition and Contract resolutions for the procurement of services added by the Westchester County Board of Legislators which appear in a finally adopted County budget Act.

Acquisition and Contract resolutions for the procurement of services added by the Westchester County Board of Legislators which appear in a finally adopted County budget Act shall be advanced to the Acquisition and Contract agenda by March 31st of the budget year consistent with requirements of Westchester County Procurement policy. Should an Acquisition and Contract resolution for the procurement of such

service items fail to be advanced to the agenda of the Board of Acquisition and Contract agenda by March 31st of the budget year or within one quarter of the expiration of an existing contract for the same service item, the Chairman of the County Board may place an Acquisition and Contract resolution for the procurement of service item on the Acquisition and Contract agenda at any time during that budget year consistent with requirements of Westchester County procurement policy.

Section 5. Section 167.171 of the Laws of Westchester County is hereby amended to read as follows:

Sec. 167.171. Emergency appropriations and contracts.

1. The County Board, during a fiscal year, may make additional appropriations or increase existing appropriations to meet emergencies or unforeseen circumstances requiring action to protect the interests of the county and its citizens, the funds therefor to be provided from unappropriated revenues, if any, or made available pursuant to the Local Finance Law.

2. Notwithstanding the provisions of section 161.11 of this act, in an emergency the County Executive, with the approval of the Board of Acquisition and Contract, may execute a contract or contracts without receiving bids therefor.

3. No Resolution for the approval of an emergency contract may be voted upon unless and until the County Executive, or his duly authorized designee, submits a written declaration of the emergency to the members of the Board of Acquisition and Contract.

4. No emergency contract shall have a term in excess of one year.

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5. For the purposes of this section, the term "emergency" shall mean a public emergency arising out of an accident or other unforeseen occurrence or condition whereby circumstances affecting public buildings, public property or the life, health, safety or property of the inhabitants of the County of Westchester, which would require immediate action which cannot await competitive bidding.

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Section 5. A new section 233.02 is hereby added to the Laws of Westchester County to read as follows:

Sec. 233.02. The listing and posting of all County contracts.

A list of all contracts executed on behalf of Westchester County, including short form contracts, are to be included on the agendas of the Board of Acquisition and Contract for information purposes and said listing must be posted on Westchester County's website for the Board of Acquisition and Contract.

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Section 6. The Clerk of the Board, as soon as practicable after the adoption of this Local Law, shall cause a notice to be published at least once, in one or more newspapers published in the County of Westchester, selected by the Clerk for that purpose, said notice to contain the number, date of adoption and a true copy of this Local Law and a statement that this Local Law, which changes a provision of law relating to public bidding, purchases or contracts, is subject to a referendum on petition pursuant to the provisions of Sections 199.61 & 209.171(2) of the Westchester County Administrative Code and Sections 24(2)(b) and 34(4) of the New York State Municipal Home Rule Law.

Section 7. This Local Law shall take effect sixty (60) days after its adoption.