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To: Councilwoman Jennifer Giattino
From: Jason Ryglicki, Esq.

Re: Review and Analysis of Corporate Counsel's Memorandum regarding Appointments to Rent Control Board

Issue: Who has the power of appointment when an authorizing statute requires the passing of an ordinance that designates the appointment procedure?

Councilwoman Giattino,

Please be advised that the Hoboken City Council ("City Council" or the "Council") put forth an ordinance on the February 21, 2018 agenda, seeking to amend the appointment procedures of the Rent Control Ordinance which would allow the City Council to appoint members to the Rent Leveling and Stabilization Board. In response to the proposed ordinance, the City of Hoboken's Corporation Counsel issued a Memorandum dated March 6, 2018, which claimed that the proposed ordinance would violate the Faulkner Act, N.J.S.A. 40:69A-1 et seq. However, after careful review of the Memorandum provided by the Corporation Counsel and associated Caselaw, it appears that the Corporation Counsel mistakenly usurped the City Council's legislative authority, as provided by the Faulkner Act, N.J.S.A. 40:69A-36, by attributing a legislative power to the executive branch of the municipality. The Mayor in a Mayor-Council form of government adopted pursuant to the Faulkner act has no legislative authority, but is instead granted executive authority with broad appointment powers, pursuant to N.J.S.A. 40:69A-39.

While the Corporation Counsel does not misstate any statute or citation, it is overbroad in its assertion that N.J.S.A. 40:69A-43(f) grants sole appointment powers to the Mayor, with advice and consent of the Council unless a different appointment authority is granted specifically by a statute, including those appointment powers which are created explicitly by creation of an ordinance. Pursuant to established caselaw, “[i]t is axiomatic that governing bodies of municipalities in this State have no powers other than those delegated by the Legislature, and must perform their prescribed activities within the statutory ambit.” Scatuorchio v. Jersey City Incinerator Authority, 14 N.J. 72, 85 (1953). Moreover, the Faulkner Act addresses who should be considered the “governing body” in any general law, such that “any administrative or executive functions assigned by general law to the governing body shall be exercised by the mayor, and any legislative and investigative functions assigned by general law to the governing body shall be exercised by the council.” N.J.S.A. 40:69A-32(b). This is further supported by caselaw, where the Supreme Court of New Jersey found that

“the Faulkner Act "plainly envisages some separation of functions between the Council (the legislative body) and the Mayor (the executive)." *In re Shain, supra*, 92 N.J. at 537, 457 A.2d 828 (emphasis omitted). Principles of separation of powers have been found applicable to the mayor-council plan of government. *Casamasino v. City of Jersey City*, 158 N.J. 333, 343, 730 A.2d 287 (stating that "[w]here one branch of government has been specifically vested with the authority to act in a prescribed manner, neither of the other branches may usurp that authority").”

Stomel v. City of Camden, 192 N.J. 137, 149-150 (2007).

In this particular instance, the authorizing statute enabling the creation of Hoboken’s Rent Leveling and Stabilization Board, N.J.S.A. 2A:42- 77(a), requires that in the event that “a municipality . . . finds that the health and safety of residents of that municipality are impaired or threatened by the existence of substandard multiple dwellings, it may *adopt an ordinance* . . . providing for the regulation of rents and the possession of rental space in substandard multiple dwellings. Such ordinance *shall* include in its provisions that . . . A public officer be designated

or appointed to exercise the powers prescribed by the ordinance.” N.J.S.A. 2A:42-77 & 77(a) (italics added).

The power to appoint a Rent Control public officer as a function of legislative authority was explicitly addressed in Kessler v. Passaic, 113 N.J. Super. 59, 61 (Law Div. 1971). While the City of Passaic, at that time, was governed by a Council-Manager form of government under the Faulkner Act, a similar division of powers is present in the Council-Manager form of government, pursuant to N.J.S.A. 40:69A-81 et seq. In Kessler, the court found that in determining who has the power of appointment of Rent Control officials:

“the controlling factor must be N.J.S.A. 2A:42-74 et seq., which is the enabling legislation for municipal rent control. N.J.S.A. 2A:42-75(a) provides:

‘Public Officer’ shall mean the officer, officers, board or body who is or are authorized by *ordinances* adopted hereunder to exercise the powers prescribed by such ordinances and by this act. [Italics supplied] The above-quoted subsection clearly states that the public officer shall be authorized by ordinances. It is a well-settled rule that full effect must be given to every word of a statute, and that it cannot be assumed that the Legislature used meaningless language. Gabin v. Skyline Cabana Club, 54 N.J. 550 (1969). The statute uses the word ‘ordinances,’ and a city manager cannot enact an ordinance.”

Kessler v. Passaic, 113 N.J. Super. 59, 61 (Law Div. 1971).

Similarly, the Mayor in a Mayor-Council form of government cannot enact an ordinance, only the City Council, as the legislative body, can do so. The power to designate an appointment procedure by ordinance, including the power to grant itself any such appointment power is further supported by similar cases. Specifically, in Corrigan v. Palkoski, the Township Council in Berkley established, by ordinance, an appointment procedure which vested the power to appoint Board of Adjustment members to the council, not the mayor, finding that “[t]he legislative body, here the township council, must first adopt an ordinance establishing the method of appointment. Ultimately, it could choose to vest the mayor with the right to make the appointments. Here it has vested itself with the power. The amendment to the Faulkner Act has

not taken that option away from the township council." Corrigan v. Palkoski, 213 N.J. Super. 316, 323 (Law Div. 1986).

Lastly, the right of a Municipal Council to determine the procedure to appoint members to the rent control board, in Mayor-Council Municipalities is a standard practice throughout the State, including, but not limited to: Atlantic City¹, Elizabeth², Irvington³, Old Bridge⁴, Passaic⁵ and Paterson⁶. The Corporation Counsel and Mayor's assertion Council's proposed ordinance would somehow violate the Faulkner Act is contrary to a plain reading of the full terms of the Faulkner Act, current Case Law, Common Municipal practices, and the New Jersey's Legislature's clear intent to separate the powers between the executive and legislative branches of a Municipality. For the reasons stated above, it is my opinion that the Hoboken City Council is well within its designated authority to create an ordinance which grants the power to appoint members to the Rent Leveling and Stabilization Board to itself.

Should you have any questions or concerns, please contact my office at 201-552-9009 or via e-mail at jryglicki@rjgesq.com.

Sincerely,

Jason M. Ryglicki, Esq.
Ryglicki & Gillman, P.C.

¹ Ordinance § 42-1(a) "There is hereby provided by the enactment of this chapter the establishment of a five- member Landlord-Tenant Affairs Board, hereinafter referred to as the "Board." Two members shall be appointed by the Mayor and three members shall be appointed by City Council."

² Ordinance § 5.70.020(B) "The members of the board shall be appointed by the Elizabeth City Council and their terms of office shall be until their successors are appointed and qualified or as provided in Section 5.70.020(F)."

³ Ordinance § 151-6(A) "In order to administer the provisions of this chapter, there is hereby created a Rent Leveling Board within the Town of Irvington. Said Board shall consist of nine members, who shall be appointed by the Municipal Council and who shall not hold any elective office or position in the Town of Irvington."

⁴ Ordinance § 388-9(A)(1) "There is hereby created a Rent Stabilization Board within the Township. The Board shall consist of two landlords or their agents owning apartment rental property within the Township, three tenants residing within the Township and three homeowners who reside in the Township who shall be neither landlord nor tenant. The members of the Board shall be appointed by the Council."

⁵ Ordinance § 231-8(C) "The Council, by majority vote, shall select all regular and alternate Board members, and members shall serve until their successor is qualified and appointed."

⁶ Ordinance § 381-4(A) There is hereby continued a Rent Leveling Board within the Department of Health and Human Services. The Board shall consist of 14 members appointed by the Council.