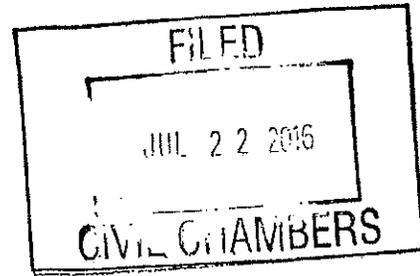


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Attorneys for Defendants Joseph Pryor,
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THOMAS MCKAY, Mayor of the
Township of Lopatcong, County of
Warren, State of New Jersey,

Plaintiff,

v.

JOSEPH PRYOR, Councilman; LOUIS
BELCARO, Councilman; MAUREEN
MCCABE, Councilwoman; MARGARET
B. DILTS, Municipal Clerk; MICHAEL
B. LAVERY, Esq.; LAVERY,
SELVAGGI, ABROMITIS & COHEN,
and as Successors in Interest to
COURTER, KOBERT and COHEN, P.C.,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: WARREN COUNTY

DOCKET NO.: WRN-L-000039-16

CIVIL ACTION

**ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT IN FAVOR OF
LOPATCONG COUNCILMEMBER
DEFENDANTS PURSUANT TO R. 4:46**

THIS MATTER having been brought to the Court by Joseph J. Bell, Esq., of the law offices of Bell, Shivas & Fasolo, P.C., attorneys for Defendants Joseph Pryor, Louis Belcaro, and Maureen McCabe, appearing on behalf of Defendants in seeking relief by way of a Motion to for Summary Judgment in Favor of Lopatcong Councilmember Defendants, and William J. Caldwell, Esq., of Carter, Van Rensselaer & Caldwell, appearing on behalf of Plaintiff Thomas McKay, and Lawrence P. Cohen, Esq., Attorney At Law, appearing on behalf of Defendants Michael B. Lavery and Lavery, Selvaggi, Abromitis & Cohen, Successors in Interest to Courter, Kobert & Cohen, and Michael L. Marcus, Esq., of DiFrancesco, Bateman, Kunzman, Davis,

Lehrer & Flaum, P.C., attorneys for Defendant Margaret B. Dilts, based upon the facts set forth in the attached Letter Brief and Certifications, and the Court having considered the arguments of the respective parties, and for good cause having been shown:

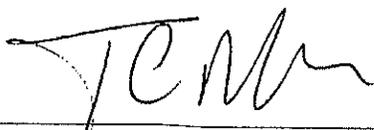
It is on this 22 day July of 2016,

ORDERED that summary judgment is hereby granted in favor of Defendants Joseph Pryor, Louis Belcaro, and Maureen McCabe;

AND IT IS FURTHER ORDERED that Plaintiff's Complaint against Defendants Joseph Pryor, Louis Belcaro, and Maureen McCabe is hereby dismissed with prejudice;

~~AND IT IS FURTHER ORDERED that Defendants Joseph Pryor, Louis Belcaro, and Maureen McCabe may pursue sanctions against Plaintiff pursuant to R. 1:4-8 in the form of reasonable attorney's fees and filing costs to be paid by Plaintiff to Defendants, Joseph Pryor, Louis Belcaro, and Maureen McCabe;~~

AND IT IS FURTHER ORDERED that a copy of this Order shall be served on all parties within 7 days.



Hon. Thomas C. Miller, P.J.Cv.

Dated: July 22, 2016

See attached Statement of Reasons
dated 7/22/2016

McKay v. Pryor, et al

WRN-L-39-16

Defendants' Motion for Summary Judgment

Opposed

Returnable: July 22, 2016

I. PARTIES & RELIEF SOUGHT

Defendants, Joseph Pryor, Louis Belcaro, and Maureen McCabe, by and through their counsel, Joseph J. Bell, Esq., move for summary judgment.

Plaintiff, Thomas McKay, by and through his counsel, William J. Caldwell, Esq. of Carter, Van Rensselaer & Caldwell, PC, has filed an opposition to the Defendants' Motion for Summary Judgment.

II. STATEMENT OF FACTS OFFERED IN SUPPORT OF DEFENDANTS' MOTION

Defendants offered the following Statement of Material Facts in support of their Motion for Summary Judgment:

A. Parties

1. Plaintiff Thomas McKay ("Plaintiff") has been the duly-elected Mayor of the Township of Lopatcong, County of Warren, State of New Jersey 08865. (Certification of Plaintiff ¶ 1).

2. The Township of Lopatcong ("Lopatcong Township") is a municipal corporation organized under the laws of the State of New Jersey pursuant to the Faulkner Act, N.J.S.A. 40:69A-115 et seq., under the Small Municipality Plan A. (Certification of Plaintiff ¶ 2; Court Opinion at 35-37).

3. Joseph Pryor, Louis Belcaro, Maureen McCabe ("Defendant Pryor," "Defendant Belcaro," "Defendant McCabe," collectively "Council Defendants") are three (3) of the four (4) duly-elected Councilmembers of the Lopatcong Township Council ("Township Council"). Donna Schneider is a duly elected Councilmember of the Lopatcong Township Council. (Certification of Plaintiff ¶¶ 3, 21; Certifications of Defendant Pryor February 2016 ¶¶ 1, 3 and March 2016 ¶¶ 1, 3; Certification of Defendant McCabe ¶¶ 1-2).

4. Margaret B. Dilts ("Defendant Dilts") is the Municipal Clerk of Lopatcong Township. (Certification of Plaintiff ¶ 4; Certification of Defendant Dilts ¶¶ 1-2).

5. Nisivoccia LLP is the Municipal Auditor of Lopatcong Township. (Certification of Plaintiff ¶ 5; Certification of Defendant Pryor March 2016 ¶¶ 10-11).

6. Michael B. Lavery, Esq. (“Defendant Lavery”), of the law firm Lavery, Selvaggi, Abromitis & Cohen, formerly of the law firm Courter, Kobert, and Cohen, P.C. (“Defendant Law Firm”), is the Municipal Attorney for Lopatcong Township. (Certification of Plaintiff ¶ 6; Certification of Defendant Lavery ¶¶ 1-9).

B. General Legal Authority of Parties

7. Pursuant to N.J.S.A. 40:69A-121, the Mayor of Lopatcong Township exercises executive authority. (Certification of Plaintiff ¶ 7).

8. Pursuant to N.J.S.A. 40:69A-120, the Township Council exercise legislative authority. (Certification of Plaintiff ¶ 8).

9. Pursuant to N.J.S.A. 40:69A-32(b), the Mayor of Lopatcong Township exercises administrative or executive functions assigned by general law to the Governing Body. (Certification of Plaintiff ¶ 9).

10. Pursuant to N.J.S.A. 40:69A-124, the Mayor holds executive authority to appoint officers and employees whose appointment or election is not otherwise provided for by law. (Certification of Plaintiff ¶ 10).

11. Lopatcong Township is subject to the provisions of the Civil Service Act. (Certification of Plaintiff ¶ 11).

12. Although the Mayor of Lopatcong Township possesses executive authority, the Lopatcong Township Council possesses legislative authority, and the Mayor’s appointment power is not unilateral. Although the Mayor can nominate appointments, these nominations require the advice and consent of the Township Council in any instance where the law so provides before assuming such requisite offices. (Certification of Defendant Pryor February 2016 ¶ 11; Certification of Defendant Pryor March 2016 ¶ 6).

13. If the Mayor’s nominations for such positions are rejected, or if the Mayor fails to nominate an individual, both the law and public policy favor the retention of officeholders serving in holdover capacities except where the law provides otherwise. (Certification of Defendant Pryor February 2016 ¶ 12).

14. The Court recognized Plaintiff’s executive authority as the Mayor pursuant to N.J.S.A. 40:69A-121 as being limited by the Court’s opinion, requiring that the Mayor’s governance be

carried out with the Township Council, and in no way supporting “an unauthorized power grab.” The Court granted Plaintiff’s request for such declaration in part. (Court Opinion at 44-46).

15. The Court also declined to address Plaintiff’s request to restrain or enjoin the Township Council from interfering with Plaintiff’s powers as Mayor, as “the Court has not found that any such interference or usurpation has occurred nor is there any imminent harm that is likely to occur.” (Court Opinion at 46).

C. **Plaintiff’s Lawsuit, Attempted Appointments February 3, 2016, and Court Rulings**

16. Plaintiff prevailed in the 2014 General Election and assumed office on January 1, 2015. Interactions between Plaintiff and Defendant Dilts then declined sufficiently to the point that Defendant Dilts filed a Tort Claims Notice. In November 2015, a Notice of Recall Petition was filed in Lopatcong Township, resulting in the circulation of a Petition for the Recall of Plaintiff as Mayor. Separately, the Township Council has been subjected to an ever-increasing amount of debates with the Mayor with respect to a number of political questions of interest to Lopatcong Township, including with respect to “Asphalt Litigation,” appointment of the Municipal Attorney and Municipal Auditor, and the budget process. (Certification of Defendant McCabe ¶ 6).

17. Plaintiff filed the underlying litigation in order to seek relief from the Court regarding his understanding of separation of powers, including injunctive relief to attempt to compel the Lopatcong Township Council to approve Plaintiff’s nominations, budget, and other policies where such proposals lack sufficient support by the imposition of restraints compelling the specific votes of individual members of the Township Council, as well as that of the Township Council as a whole. (Certification of Defendant Pryor February 2016 ¶¶ 4-5, 15; Certification of Defendant Pryor March 2016 ¶¶ 4-5, 16; Certification of Defendant McCabe ¶¶ 4-5, 11).

18. At the meeting of the governing body of Lopatcong Township on February 3, 2016, Plaintiff used the Public Comment portion of the Meeting Agenda to read a prepared statement explaining the nature of the instant lawsuit, expressing disapproval of the Township Council not approving his policies, and claiming to invoke statutory authority in order to then attempt to unilaterally make a number of appointments, including for the offices of Municipal Attorney and Municipal Auditor, as well as control the budget process. The official videotape of this meeting may be accessed from the official Lopatcong Township municipal government website: http://www.lopatcongtpw.com/joomla/index.php?option=com_content&view=article&id=82:cou

[ncil-agendas&catid=40:meeting-agendas-a-minutes-&Itemid=107](#). (Certification of Defendant Pryor February 2016 ¶¶ 6-7, Exhibits A-B).

19. Shortly thereafter, Defendant Pryor made a motion as Council President to adjourn the meeting, which passed by a vote of 3-2 and the meeting adjourned. Defendant Pryor cited two (2) principal reasons for seeking adjournment of this meeting. (Certification of Defendant Pryor ¶ 8).

20. Defendant Pryor cited as a first reason that Plaintiff went beyond stating opinions or announcing a lawsuit by attempting to unilaterally make appointments and take official actions, many of which Defendant Pryor believed were at variance with applicable law the statutes. Defendant Pryor believed that since Plaintiff's actions did not have the sanction of a Court Order, such actions lacked proper authority and created a situation where official actions could have been legally challenged. (Certification of Defendant Pryor February 2016 ¶ 9).

21. Defendant Pryor cited as a second reason the specific conflicts he believed would arise out of the appointment of William J. Caldwell, Esq., as interim Municipal Attorney. Defendant Pryor cited: (a) the confusion that would result from two (2) Lopatcong Township attorneys offering conflicting rulings and advice; (b) the conflict of interest involving Plaintiff appointing his own attorney as the Municipal Attorney, including the Township's operation under the advice of Defendant Lavery while Plaintiff would seek to impose the advice of Mr. Caldwell, which without proper appointment as Municipal Attorney could lead to legal challenges to official action. (Certification of Defendant Pryor February 2016 ¶ 10).

22. The Court ruled and decided on both February 8, 2016 and March 11, 2016 that the present Municipal Attorney is the proper duly-appointed Municipal Attorney, denying Plaintiff's requested injunctive relief with prejudice regarding the Municipal Attorney position and Defendants Lavery and Law Firm. (Court Order dated February 8, 2016, Court Order and Opinion dated March 11, 2016; Certification of Defendant Pryor March 2016 ¶ 15).

23. The Court denied Plaintiff's requested injunctive relief with prejudice regarding the Council Defendants on March 11, 2016. On that same date, the Court denied Plaintiff's requested relief without prejudice regarding Defendant Dilts. (Court Order and Opinion dated March 11, 2016).

D. Appointment of Municipal Attorney

24. Pursuant to N.J.S.A. 40A:9-139, every municipality shall have a municipal attorney, whose term is generally one (1) year. (Certification of Plaintiff ¶¶ 54, 73; Court Opinion at 39).

25. Pursuant to N.J.S.A. 40:69A-122, in a municipality operating under the Small Municipality Plan A form of government, the municipal attorney is appointed by the Mayor with the advice and consent of the Council of the municipality. (Certification of Plaintiff ¶ 56, 74; Court Opinion at 39).

26. According to Plaintiff, there is no provision in the Lopatcong Township Code regulating the appointment of the municipal attorney. (Certification of Plaintiff ¶ 55).

27. On February 5, 2014, Defendant Lavery, of Defendant Law Firm, entered into a Professional Services Agreement as municipal attorney for Lopatcong Township pursuant to the exception in the Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq., for professional services. (Certification of Plaintiff ¶ 57; Certification of Defendant Lavery ¶¶ 5-7).

28. The terms of Defendants Lavery and Law Firm expired as of December 31, 2014 pursuant to N.J.S.A. 40A-9:139, N.J.S.A. 40A:11-15, and the Professional Services Agreement, after which time Defendants Lavery and Law Firm have continued their service via holdover status pursuant to applicable law. (Certification of Plaintiff ¶¶ 58-59; Certification of Defendant Lavery ¶¶ 5-7; Court Opinion at 38-39).

29. Plaintiff has made allegations that upon assuming office as Mayor in January 2015, he believed that a change in municipal attorney was appropriate. (Certification of Plaintiff ¶ 60).

30. Plaintiff has made allegations that at the January 2015 Reorganization Meeting the Lopatcong Township Council indicated a refusal to consent to any other choice of attorney to serve as municipal attorney. (Certification of Plaintiff ¶ 61).

31. Plaintiff never appointed or executed a Professional Services Agreement with Defendants Lavery or Law Firm, nor any other attorney from any law firm as municipal attorney throughout 2015 and in January 2016. (Certification of Plaintiff ¶¶ 62-63; Certification of Defendant Lavery ¶ 4; Certification of Defendant Pryor February 2016 ¶ 13).

32. Plaintiff has made allegations that the Lopatcong Township Council declared that Defendants Lavery and Law Firm would remain in a holdover status for 2016, and that work has been performed pursuant to such status. Plaintiff has also alleged that there is no legal authority for a municipal attorney to remain in a holdover capacity and claims that Defendants Lavery and Law Firm crafted a self-serving perpetual reappointment clause in the Professional Services Agreement. (Certification of Plaintiff ¶¶ 59, 64-67, Exhibit A).

33. Defendants Lavery and Law Firm have indicated that the provision providing for reappointment in the Professional Services Agreement is based on well-settled law. (Certification of Plaintiff Exhibit A; Certification of Defendant Lavery ¶ 7).

34. At a regular meeting of the Lopatcong Township Council on February 3, 2016, Plaintiff attempted to appoint Plaintiff's own attorney, William J. Caldwell, Esq., as municipal attorney. The Lopatcong Township Council did not provide advice or consent for Plaintiff's attempted appointment, and Plaintiff announced his belief that he had the sole right to do so, where the apparent source of such belief is pursuant to N.J.S.A. 40:69A-124. (Certification of Defendant Lavery ¶¶ 8-9; Certification of Defendant Pryor February 2016 ¶¶ 10, 13; Court Opinion at 39).

35. Plaintiff has made allegations that as Mayor he has challenged the ability of Defendants Lavery and Law Firm to provide accurate and impartial advice, and that Plaintiff should have the power to make an interim appointment for municipal attorney. (Certification of Plaintiff ¶¶ 75-76).

36. Plaintiff has made allegations that the Lopatcong Township Council has interfered with the Mayor's statutory power of interim appointment by continuing the appointment of Defendants Lavery and Law Firm in the capacity of municipal attorney. (Certification of Plaintiff ¶ 77).

37. The Court recognized legal precedent establishing holdover status for municipal attorneys and found that Defendants Lavery and Law Firm were properly serving and providing legal services to Lopatcong Township under holdover status, and that Plaintiff's arguments and actions were based on an "over-simplified and unsupported legal theory that is also based upon a misreading of the applicable law ... a hyper-literal interpretation of the statutes ... to make certain 'executive decisions' without input from the Township Council and even against their will." (Court Opinion at 40-44).

E. Position of Labor Counsel

38. At the Lopatcong Township Reorganization Meeting on January 5, 2016, Plaintiff attempted to appoint Ryan Carey, Esq., as Labor Counsel. (Certification of Plaintiff ¶¶ 12-13; Council Defendants' Answer First Count ¶ 12-13).

39. The Township Council did not provide advice and consent for Plaintiff's attempted appointment of Labor Counsel. Defendant Pryor has set forth an understanding that all appointments of attorneys representing Lopatcong Township require the advice and consent of the

Township Council. (Certification of Plaintiff ¶ 14; Certification of Defendant Pryor March 2016 ¶ 8).

40. The Court found that there was no position of “Labor Counsel” created by statute or ordinance, that such position appeared to be a subset of Municipal Attorney, that the Township Counsel had the ability to reject an appointment to such position, and that Plaintiff’s position taken to its logical conclusion could result in the creation of multiple positions that would undermine the Municipal Attorney. The Court denied Plaintiff’s requested relief with respect to the position of Labor Counsel. (Court Opinion at 44).

F. Appointment of Municipal Auditor

41. Pursuant to N.J.S.A. 40A:5-4, Lopatcong Township is required to employ a municipal auditor. (Certification of Plaintiff ¶ 15; Court Opinion at 47).

42. At the Lopatcong Township Reorganization Meeting on January 5, 2016, Plaintiff sought to employ Robert S. Morrison as Municipal Auditor on the basis of Plaintiff’s allegations of shortcomings in the auditing services provided by Nisivoccia, LLP. Plaintiff’s attempted employment of Robert S. Morrison was not approved by the Township Council. Plaintiff and Council Defendants continue to have a difference of opinion concerning the nature of Plaintiff’s allegations with respect to the auditing services provided by Nisivoccia LLP. (Certification of Plaintiff ¶¶ 16-17, 19-20; Certification of Defendant Pryor March 2016 ¶¶ 10-11; Court Opinion at 47).

43. In April 2015 the Township Council voted against Plaintiff’s seeking the commission of an independent audit. (Certification of Plaintiff ¶ 18; Court Opinion at 47).

44. At the Lopatcong Township Reorganization Meeting on January 5, 2016, the Township Council voted 3-2 over the objections of Plaintiff and Councilmember Donna Schneider to retain Nisivoccia, LLP as Municipal Auditor. (Certification of Plaintiff ¶ 21; Court Opinion at 46).

45. Defendant Lavery has submitted an opinion that the appointment of the Municipal Auditor is not a mayoral appointment. (Certification of Defendant Pryor March 2016 ¶ 9).

46. The Court found that the governing body of Lopatcong Township, consisting of the elected Councilmembers and Mayor, was authorized to employ a Municipal Auditor pursuant to N.J.S.A. 40:5-4, and that the governing body defeated Plaintiff’s proposal. The Court denied Plaintiff’s requested relief with respect to the position of Municipal Auditor. (Court Opinion at 47).

G. Municipal Clerk's Duties Regarding Directory and Official Records

47. Pursuant to N.J.S.A. 40:69A-121, it is the Mayor's "duty to see that all laws and ordinances in force and effect within the municipality are observed." (Certification of Plaintiff ¶ 22).

48. Pursuant to N.J.S.A. 40:69A-127, the Municipal Clerk is required to "perform such functions as may be required by law." (Certification of Plaintiff ¶ 23).

49. Pursuant to N.J.S.A. 40A:9-9.2(a), the Municipal Clerk's duties include compiling and maintaining a directory of local authorities, boards, and commissions. (Certification of Plaintiff ¶ 24).

50. Plaintiff has made allegations that Defendant Dilts has failed to fulfill her duties as Municipal Clerk with respect to the maintenance of a directory of local authorities, boards, and commissions, and that such failure is related to separate legal action maintained by Defendant Dilts against Plaintiff. Plaintiff has also made allegations that such deficiencies in the said directory have prevented him from confirming whether his appointments to such entities are in legal compliance and whether potential challenges to actions taken by such officials could be legally challenged. (Certification of Plaintiff ¶¶ 25-29, 33-34).

51. Plaintiff has made allegations that the Township Council and Defendant Law Firm have failed to provide assistance or remedy the issues relating to the directory of local authorities, boards, and commissions despite Plaintiff's requests to Defendants Pryor and Law Firm, thereby interfering with Plaintiff's statutory responsibilities as Mayor. (Certification of Plaintiff ¶¶ 30-32, 35).

52. Council Defendants assert that Plaintiff never made any request to Defendant Pryor for assistance in the matter relating to Defendant Dilts and the directory of local authorities, boards, and commissions, where such directory had become dated because Plaintiff did not provide proper notification of new appointments to such corresponding entities. Defendant Dilts was assigned to report to the Township Council instead of the Mayor due to a Tort Claims Notice filed by Defendant Dilts against Plaintiff, a situation that also resulted in an independent investigation and censure of Plaintiff by the Township Council in October 2015. (Council Defendants' Answer Third Count ¶¶ 11-12; Certification of Defendant Pryor February 2016 ¶ 14; Certification of Defendant Pryor March 2016 ¶¶ 12-13; Certification of Defendant McCabe ¶¶ 6-7; Certification of Defendant Dilts ¶¶ 8, 16-20, 22-37).

53. Defendant Dilts has denied the allegations of Plaintiff relating to the maintenance of a directory of local authorities, boards, and commissions, and asserted that the difficulties associated with the directory are the result of his actions and errors with respect to notifications of new appointments and corresponding entities. (Certification of Defendant Dilts ¶¶ 13-15; 22-37).

54. Pursuant to N.J.S.A. 40A:9-133, the Municipal Clerk is responsible for maintaining the official records of Lopatcong Township. (Certification of Plaintiff ¶ 36).

55. Plaintiff has made allegations that Defendant Dilts has failed to fulfill her duties as Municipal Clerk with respect to the maintenance of the official records of Lopatcong Township. (Certification of Plaintiff ¶¶ 37-40).

56. Plaintiff has made allegations that the Township Council have failed to provide assistance or remedy the issues relating to the maintenance of the official records of Lopatcong Township records despite Plaintiff's requests to the Township Council, thereby interfering with Plaintiff's statutory responsibilities as Mayor. (Certification of Plaintiff ¶¶ 41-43).

57. Council Defendants assert that Plaintiff never made any request to Defendant Pryor or the Township Council for assistance in the matter relating to Defendant Dilts and the performance of her duties. (Certification of Defendant Pryor March 2016 ¶¶ 12-13).

58. Defendant Dilts has denied the allegations of Plaintiff relating to the maintenance of the official records of Lopatcong Township, and asserted that records are stored and maintained pursuant to applicable requirements according to space availability, thereby resulting in the use of off-site storage in various instances. (Certification of Defendant Dilts ¶¶ 38-56).

59. Plaintiff's allegations concerning Defendant Dilts' alleged failure to perform duties concerning the local directory or maintenance of official records contain no allegations of any official administrative disciplinary action being taken prior to instituting the instant litigation, nor any other indication of exhaustion of administrative remedies. (Certification of Plaintiff ¶¶ 22-43).

60. The Court denied Plaintiff's application without prejudice with respect to Defendant Dilts, finding differing factual allegations and Plaintiff had not demonstrated any imminent harm that would necessitate Court action at this stage of litigation. (Court Opinion at 48).

61. The Court has not found any evidence or indication to support Plaintiff's allegations that the Council Defendants have in any way interfered with Plaintiff's statutory duties as Mayor or that any actual harm has been incurred based on Plaintiff's allegations. (Court Opinion at 46).

H. Finance Committee, Municipal Budget, and Municipal Expenses

62. Pursuant to N.J.S.A. 40:69A-128, “the mayor shall prepare the annual budget with the assistance of the treasurer and the cooperation of the other members of the council.” This process requires the involvement of the Lopatcong Township Treasurer / Chief Financial Officer (“CFO”) and Lopatcong Township Council. (Certification of Plaintiff ¶ 44; Certification of Defendant McCabe ¶ 8; Certification of Defendant Pryor March 2016 ¶ 14; Court Opinion at 48).

63. Pursuant to N.J.S.A. 40:69A-123, “the Mayor shall also appoint a finance committee of council which may consist of one or more councilmembers.” (Certification of Plaintiff ¶ 45).

64. In 2016, Plaintiff appointed Councilmembers Defendant Joseph Pryor and Donna Schneider as the councilmembers of the Lopatcong Township Finance Committee. The Finance Committee does not presently have clearly-defined powers. (Certification of Plaintiff ¶ 46; Certification of Defendant Pryor March 2016 ¶ 14).

65. Plaintiff has made allegations that the Township Council and Defendant Dilts have refused to acknowledge Plaintiff’s authority to name and direct the Finance Committee. Plaintiff has also made allegations that the Township Council and Defendant Dilts have asserted that they have the power to prepare the municipal budget. (Certification of Plaintiff ¶¶ 47-48).

66. Plaintiff has made allegations that establishing the budget is important to helping to control costs to taxpayers, citing his 2015 objection to the Township Council’s decision to continue funding litigation captioned as Marinelli v. Township of Lopatcong, et al., Docket No. WRN-L-000374-11 litigation, which resulted in the issuance of an opinion by Judge Miller dated April 21, 2014 and further consideration on appeal by the Appellate Division, also known as the “Asphalt Litigation.” Plaintiff has also alleged his intention to “defund” further proceedings in the “Asphalt Litigation.” (Certification of Plaintiff ¶¶ 49-50; Certification of Defendant Pryor February 2016 ¶ 14; Certification of Defendant McCabe ¶ 6).

67. Plaintiff has made allegations that the Township Council has decided to continue such funding, which according to Plaintiff only benefits the developer who is the party to the lawsuit. (Certification of Plaintiff ¶ 49).

68. Council Defendants have denied Plaintiff’s allegations, citing Lopatcong Township’s role in the “Asphalt Litigation” as in fulfilling its duty to defend the integrity of its process concerning standardized notices and procedures that were the subject matter of the litigation, and

not to advocate for any particular outside party. (Certification of Defendant Pryor February 2016 ¶ 14, Certification of Defendant McCabe ¶ 10).

69. Defendants assert that the scheduling associated with the preparation of the municipal budget is related to staffing levels related to vacancies in the Chief Financial Officer (“CFO”) position in 2015 and the involvement of appropriate authorities, which include Lopatcong Township Treasurer / CFO Janice Saporino, who assumed her current position in January 2016 and auditor John Mooney. (Certification of Defendant Dilts ¶¶ 57-67; Certification of Defendant McCabe ¶ 9).

70. Pursuant to N.J.S.A. 40:69A-130, the Mayor and Treasurer have authority to sign municipal checks upon warrant of the Finance Committee where such funds are dispensed within appropriations limits and in accordance with law. (Certification of Plaintiff ¶ 52, 68).

71. Under the provisions of N.J.S.A. 40:69A-130, the Mayor does not have authority to refuse to sign checks for municipal expenses and bills which have been approved through the proper municipal channels. (Certification of Defendant Pryor March 2016 ¶ 7; Court Opinion at 49, fn. 16).

72. Plaintiff has made allegations that the Township Council has unlawfully authorized other individuals to sign municipal checks and bypass the statutory authority of the Mayor. (Certification of Plaintiff ¶ 53).

73. The Township Charter authorizes the Council President to serve in place of the Mayor in the event of his absence, disability, or refusal to act. There have been various instances of the Mayor’s failure to act, including with respect to the failure to sign checks after the bills have been approved by the Township Council, failure to address recommendations of the Township’s insurance carrier, and failure to follow the vote of Township Council. (Certification of Defendant Pryor March 2016 ¶ 7; Certification of Joseph J. Bell, Esq., ¶ 5, Exhibit 4).

74. Plaintiff has made allegations that as Mayor in 2015 he did not authorize all purchase orders or sign all checks paid to Defendants Lavery and Law Firm. (Certification of Plaintiff ¶ 69).

75. Plaintiff has made allegations that he believes that any payments to Defendants Lavery and Law Firm authorized by the Lopatcong Township Council are in violation of the statute, should be void, and that as Mayor he is legally obligated to seek recovery of such funds paid by Lopatcong Township. (Certification of Plaintiff ¶¶ 70-72).

76. Neither the Lopatcong Township Code nor the Charter provide for the Mayor's refusal to sign checks after the bills are lawfully approved by the Township Council, requiring that the Council President serve in place of the Mayor to ensure the payment of municipal expenses in the event that the Mayor fails or refuses to act. (Certification of Defendant Pryor March 2016 ¶¶ 7, 14; Certification of Joseph J. Bell, Esq., ¶ 5, Exhibit 4; Court Opinion at 49, fn. 16).

77. The Court found that the budgetary, finance committee, and financial powers of the Mayor pursuant to N.J.S.A. 40:69A-123, -128, and -130 are not ministerial and require the cooperation of the Township Council where parties are able to work together, including with respect to the budget. The Court also found that the Township Council has the ability to prepare a budget in the event that Plaintiff fails to do so. (Court Opinion at 49, fn. 17).

78. The Court acknowledged the statutory reading of N.J.S.A. 40:69A-128, but found that the Township Council is not required to approve the Mayor's budget proposals or process. The Court did not enter any immediate or injunctive relief concerning budgetary issues. (Court Opinion at 48-49).

III. PLAINTIFF'S RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS¹

Plaintiff offered the following response to Defendants' Statement of Material Facts:

1. Admitted. Councilman Lou Belcaro lost the primary to Mayor McKay and Councilwoman Ciesla lost the general election to Mayor McKay. Both Belcaro and Ciesla were funded by the Leadership PAC for Better Government which is primarily funded by the former mayor's law firm, the Township Counsel Law Firm, Joseph A. Bell's Law Firm and the Township Engineer's firm. (Suppl. Cert. of McKay)

2. Admitted. However it was organized as a Plan C. The Mayor entered office seeking to improve the Township as it was rated the 446th most desirable municipality in the State in which to reside by NJ Monthly in its bi-annual rating report released in the Summer of 2015 (based upon 2013 and 2014 statistics). In addition, he was made aware by COAH of \$295 thousand in mis-spent COAH funds and a heavy debt burden, etc. Once in office, the plaintiff found that several long term senior Township Officials seemed to consistently receive a disproportionate percentage of favorable legal opinions from the Municipal Attorney and to be lightly audited by the Township

¹ The Court, for completeness of the record, has included the Plaintiff's response verbatim. Plaintiff's response is clearly intermixed with unsupported and superfluous facts and opinions that are not relevant or probative to the legal issues in the case.

Auditor. For instance, the matter of the mis-spent COAH funds did not appear in an audit report until the 2014 Report after the mayor requested its inclusion. These Township Officials openly supported the retention of both professionals. The Municipal Attorney, The Township Engineer and Mr. Bell's law firm are the largest contributors to the Leadership PAC for Better Government. The PAC funded several campaigns of Councilman Belcaro and the 2015 campaign of Council President Pryor, When the mayor took office, one senior employee was being compensated at nearly the same rate as the State's Governor. (Suppl. Cert. of McKay)

3. Admitted. At the meeting of the governing body of the Township of Lopatcong on June 1, 2016, Councilwoman Donna Schnieder resigned. She read a prepared statement citing concerns and issues.

4. Admitted.

5. Admitted. Nisivoccia LLP has been auditors for approximately a dozen years. Plaintiff sought to follow state issued guidance concerning hiring of professionals that recommends beginning to look after 5 years and making a change no longer than 10 years. (Supplemental Cert. of McKay).

6. Admitted. Michael B. Lavery, Esq. has been Municipal Attorney for approximately a dozen years. Plaintiff sought to follow state issued guidance concerning hiring of professionals that recommends beginning to look after 5 years and making a change no longer than 10years. (Suppl. Cert. of McKay)

7. Admitted

8. Admitted

9. Admitted

10. Admitted

11. Admitted

12. Admitted

13. Denied

14. Denied. There was no "power grab". The plaintiff never sought attaining any "power" in the Township of Lopatcong. He sought to remediate the Township's poor performance, ratings and other reputational issues. He was landslide elected to do that. He asked for and accepted nothing beyond his merger \$5 thousand salary for his service. He believed that given the Township's situation, replacing professionals who had served approximately a dozen years would

logically be a consideration. To the contrary, there was a power grab by the Council majority. (Suppl. Cert. of McKay)

15. Denied. During 2015, the Council Majority concentrated its efforts in several areas.

a. They attacked and attacked the Mayor and Councilwoman Schneider by threatening lawsuits;

b. They illegally changed the Ordinance governing the Recreation Committee so that the mayor could no longer make appointments;

c. They participated in a incorrectly commenced "recall of the mayor". Initially, the Township Clerk received, reviewed, processed and approved the petition in one day. The Mayor complained to the County Clerk..." As I believe you are also aware, there are many conflicts in Lopatcong that have manifested out of complaints, conflict-ridden "investigations", inappropriate releases to the press, lack of due process, Councilperson penned censure resolution, threatened lawsuits and lawsuits. I believe that none of the Township officials and/or elected officials so conflicted should be able to participate in any measure in this recall process. I respectfully trust your office will navigate these waters with caution and appropriate due process." The mayor lost his bid for reelection to the Republican Committee.

d. During 2015, the Council majority (Belcaro, Ciesla and McCabe) engineered a fake, conflicted, investigation against the Mayor. The investigator was recommended by the Clerk's attorney. Both persons were known by the former Mayor.

e. The Council majority (Belcaro, Ciesla and McCabe and/or Counsel Katrina Campbell) refused to take any action when at the same (October 7th) meeting, during his official Council Report, in front of 50 to 75 witnesses, Councilman Lou Belcaro openly and hostility said he was going to "get his rocks off"... No need to investigate this...an overt sexual remark made in his official capacity in front of witnesses and on video tape and it was completely ignored by Council Majority. (Suppl. Cert. of McKay)

16. Admitted to the extent that the plaintiff prevailed at the general election. Plaintiff cannot address the state of mind of defendant, Dilts. Dilts failed to perform the duties of her job. It is admitted that a Recall Petition actively supported by the Township Attorney was circulated which failed to attain the requisite number of signatures.

Mayor McKay is retired from the Board of Governors of the Federal Reserve System where he served as Senior Special Money Laundering Examiner. Earlier, he served as a Supervising

Bank Examiner for the Federal Reserve Bank of New York. His work involved the examination of major financial institutions and assessing their safety and soundness, policies, procedures and management. Mr. McKay's job history in New York City and Washington makes it almost inconceivable that he would consider there to be any "power" worth grabbing in Lopatcong. Instead, he only wanted to give back and use his years of experience to bring good change to the Township he has made his home. Conversely, there exist those involved with the municipal government in various capacities that rely on it in various fashions for all or part of their livelihood. It is this group that logically covets the "power" of controlling a municipal government. The Plaintiff has no such motive.

It did not take long for the mayor to come to an understanding that these much was lacking and that morale in the Municipal Building was very low. The Clerk had served under the former mayor during the preceding approximately 15 years. The former mayor is a busy divorce attorney and left much of the day to day management of the Township to the Clerk who was being compensated nearly as much as the State Governor. The former mayor ran uncontested in his last three general elections and seemed permanently in place until the turmoil over the asphalt plant approval erupted. He lost his Republican Committee election in 2011 and chose not to run for mayor again. The Clerk seemed to rule the roost during those years and wanted the status quo to continue. She had few constraints. She obviously preferred candidates who would allow her to continue as before. Prior to 2015, the Clerk was found to have improperly acted in several elections to support the candidate of her choice.

The Clerk showed a decided bias against Mr. McKay commencing when he filed his petition to run for Mayor in the 2015 primary. On the day the petitions were due, Candidate McKay visited the Municipal Building to submit his own. He also inquired (as is his right) who else had filed a petition and to see copies of the petitions. He was given several different answers (told to wait for copies, told he would be given a list of those who filed, etc.). So, with two witnesses he waited outside of the building. Dilts decided not to give the candidate the information and then called the Lopatcong Police who arrived in two police cars and a private vehicle. The Police told him then that his request was declined and that he was not to enter the Municipal Building. Mr. McKay left without incident. Subsequently, Mr. McKay obtained a copy of the Police Report which read that the Clerk was fearful of him and called the Police for protection. The report was incomplete as it did not contain the supporting written statements

referred to therein that purportedly were prepared by the Clerk, et al. The Mayor believes that rationally, no employee in the open Municipal Building with other employees and residents present and a Police Station in the Basement would be afraid.

Within days of the Mayor taking office, there was a serious incident concerning an employee and CFO Rossetti involving reported sexual harassment and apparent intoxication that the Police responded to. The Police advised that the employee was intoxicated. Contrary to Policy, the Clerk failed to breathalize the employee and generally downplayed the incident. The Clerk just sent him home when his son drove in to get him. The employee left the employ of the Township. The Mayor reprimanded the Clerk for failing to ask the Police to breathalize the employee and she replied that the Mayor should have done it himself and then flipped the reprimand paper back at the Mayor. The Council majority overturned the Mayor's reprimand.

It is difficult to understand the magnitude of the Clerk's harassment against the new mayor without factoring in the loyalty of Ms. Kathryn Devos, a close personal friend of the Clerk, who frequently supported her goals.

Early on, the mayor observed that Kathryn Devos, then Chair of the Rent Leveling Board, was very frequently in the Municipal Building where she situated herself in the restricted area near the Clerk. He sometimes observed she was present several times in the same day. It was reportedly disruptive to the other employees who complained to the mayor. The Clerk advised that Mrs. Devos was there to perform her Rent Leveling Board duties. However, these duties would not require so much time to attend to and the Mayor observed her looking through the Veteran's records. For security reasons, the Mayor told her to work in the future at one of the tables in the public area (Labor Counsel was present). It was clear that the Clerk knew what Devos was working on. Mrs. Devos formerly submitted results of her "investigation" of the Tax Assessor to Council saying that she was improperly giving out veteran's exemptions. At least two experts later reviewed the charges and found the Tax Assessor had acted properly. (Suppl. Cert. of McKay)

17. Denied. Plaintiff filed his lawsuit to protect the statutory prerogatives of the Office of the Mayor and to prevent unlawful usurpation of executive authority by the governing body. The Plaintiff's intentions are innocent. He only wanted to give back and use his years of experience to bring good change to the Township he has made his home. He was not motivated by greed and did not seek or take any pecuniary benefit for himself. The Plaintiff having tried for more than a

year to have the Council Majority follow charter and statute, consulted legal counsel to determine his responsibilities and determine a way to remedy the situation. (Suppl. Cert. of McKay)

18. Admitted. The Plaintiff's statements were prompted by his desire that the public be informed as to the issues. Frustrated after having tried for more than a year to have the Council Majority follow charter and statute, the Plaintiff consulted legal counsel to determine his responsibilities and execute a way to remedy the situation. Upon legal advice, he proceeded. (Suppl. Cert. of McKay)

19. Admitted that at its peak the meeting was adjourned.

Despite the presence of a licensed NJ Attorney, the Council Majority terminated the meeting without approval of bills. Subsequently, the Mayor asked the Clerk to call a special meeting to approve the bills. She declined to do so. The Mayor felt that Councilwoman Schnieder and he were not equally represented by the Municipal Attorney who clearly favored the old regime and the current Council Majority. (Suppl. Cert of McKay)

20. Denied as Plaintiff cannot admit or deny Defendants' state of mind or belief. See #19.

21. Denied. See #19.

22. The Court Order speaks for itself, but is not a binding statement of fact.

23. The Court Order speaks for itself, but is not a binding statement of fact.

24. The statute provides for a one year term of office. - Defendant Law firm has been in position for approximately a dozen years. Plaintiff sought to comply with published guidance from the State of New Jersey Office of State Comptroller. The guidance includes: Selection and Use of Audit Firms by New Jersey Government Units - Report 2008-01. The Recommendations are found on its last two pages. Recommendation Number 1. says start looking for a new auditor after 5 years. Recommendation Number 2 states that in no event should a government unit use the same audit firm for more than 10 consecutive years. There is also other useful guidance including attorney selection. (Suppl. Cert. of McKay)

25. Admitted, but Loptacong does not have a valid ordinance.

26. Admitted

27. Admitted

28. Admitted to the extent that the Agreement expired December 31, 2014. Hold over status is unlawful.

29. Admitted

30. Admitted
31. Admitted, making the “appointment” interim.
32. Admitted
33. Admitted to the extent the statement is what the Defendant asserted. There is no statutory or case law
34. Admitted
35. Admitted
36. Admitted
37. Denied as not being a statement of material fact.
38. Admitted
39. Denied. Plaintiff contends that advice and consent is not required.
40. The court’s decision speaks for itself, but is not a settled material fact.
41. Admitted
42. Admitted
43. Admitted
44. Admitted
45. Admitted
46. The decision speaks for itself, but is not a settled material fact.
47. Admitted
48. Admitted
49. Admitted
50. Admitted, creating a material issue of fact.
51. Admitted, creating a material issue of fact.
52. Denied.
53. Admitted to the extent that Dilts has denied Plaintiff’s allegation.
54. Admitted
55. Admitted, creating a material issue of fact.
56. Admitted, creating a material issue of fact.
57. Denied
58. Admitted that this is what Dilts has alleged. The maintenance of records as required by law creates a material issue of fact.

59. Admitted to the extent that there is no allegation as administrative disciplinary action or exhaustion of administrative remedies in not required.

60. The court's decision speaks for itself, but does not create a settled material fact.

61. The court's decision speaks for itself, but does not create a settled material fact.

62. Admitted

63. Admitted

64. Admitted

65. Admitted

66. Admitted

67. Admitted

68. Denied. The Council Defendants have no obligation to defend the private interest of the developer.

69. Admitted that this is what Defendants asserted.

70. Admitted

71. Denied. The Mayor is not obligated to sign checks for unlawful purposes.

72. Admitted.

73. Denied.

74. Admitted.

75. Admitted.

76. Denied that bills were lawfully approved.

77. The court's decision speaks for itself, but does not create a settled material fact.

78. Admitted.

IV. PLAINTIFF'S ADDITIONAL STATEMENT OF FACTS²

In addition, Plaintiff provided the following additional statement of facts through the certification of Thomas McKay:

1. Thomas McKay is the duly elected Mayor of the Township of Lopatcong, County of Warren, State of New Jersey. (Certification of McKay, hereinafter code 1)

² Plaintiff's Statement of Facts are provided verbatim for the purposes of completeness of the record. The Court recognizes that the Plaintiff has not tied or cited all of the assertions made by him to the record as required by R. 4:46-2(a). Additionally, many of the "facts" provided by Plaintiff are, in actuality, unsupported assertions, opinions or proposed legal statements and arguments instead of being purely factual.

2. Lopatcong Township is a municipal corporation organized pursuant to the Faulkner Act, as set forth in N.J.S.A. 40:69A-115 et. seq. (1)

3. Joseph Pryor, Louis Belcaro and Maureen McCabe are duly elected Council members. (1)

4. Margaret B. Dilts is the Municipal Clerk. (1)

5. Nisivoccia LLP has been the municipal auditor. (1)

6. Michael B. Lavery, Esq. of the firm Lavery, Selvaggi, Abromitis & Cohen, formerly of the firm of Courter, Kobert, and Cohen, P.C. was last appointed municipal attorney in 2014. (1)

7. Pursuant to N.J.S.A. 40:69A-121 the executive authority in the Township is assigned solely to the Mayor. (Judicial Notice hereinafter coded J)

8. Pursuant to N.J.S.A. 40:69A-120 only the legislative authority is delegated to the Council. (J)

9. Pursuant to N.J.S.A. 40:69A-32(b) "...any administrative or executive functions assigned by general law to the governing body shall be exercised by the mayor..." (J)

10. Pursuant to N.J.S.A. 40:69A-124 the Mayor holds the exclusive authority to appoint "all officers and employees whose appointment of election is not otherwise provide for by..." law. (J)

11. The Township is subject to the provisions of the Civil Service Act. (1)

12. In the lawful exercise of statutory power, the Mayor determined that the best interests of the Township required the appointment of Labor Law Counsel, to guide the Township in labor law related issues. (1)

13. At the January 5, 2016 Reorganization Meeting the Mayor nominated and appointed Ryan Carey, Esq., a licensed New Jersey Attorney to be labor counsel. (1)

14. Pursuant to N.J.S.A. 40:69A-124 the Council refused to acknowledge the appointment. (1)

15. Pursuant to N.J.S.A. 40A:5-4 the Township is obligated to "employ" a municipal auditor. (1)

16. At the January 5, 2016 Reorganization meeting the Mayor sought to employ Robert S. Morrison, as auditor due to, among other reasons, the failure of Nisivoccia, LLP to conduct a full and complete audit of the Township's financial affairs. (1)

17. As auditor, Nisivoccia, had failed to recite in three consecutive audit reports the fact that the Council On Affordable Housing had asserted that the Township had improperly spent approximately \$250,000 from the Township's COAH trust fund for administrative expenses. (1)

18. In April 2015 the Mayor sought to have the Council commission an independent audit which the Council voted 3-2 not to approve. (1)

19. The Mayor had no confidence that Nisivoccia would properly audit the trust fund, let alone the general books of the Township. It was only through his insistence that the discrepancy was finally acknowledged by Nisivoccia in the 2015 audit report. (1)

20. At the January 2016 Reorganization meeting the Mayor sought to employ Robert S. Morrison, a registered municipal accountant, as municipal auditor. The Council refused to acknowledge his power of appointment to "employ" an auditor contrary to N.J.S.A. 40:69A-124. (1)

21. The Council on motion, adopted 3-2, over the objection of Councilwoman Schneider and the Mayor voted to retain Nisivoccia, LLP as auditor for 2016. (1)

22. Pursuant to N.J.S.A. 40:69A-121 "it shall be [the Mayor's] duty to see that all laws and ordinances in force and effect within the municipality are observed." (J)

23. Pursuant to N.J.S.A. 40:69A-127 the clerk is required to "perform such functions as may be required by law..." (J)

24. Pursuant to N.J.S.A. 40A:9-9.2 a. "(1) The clerk of the municipality...shall compile and maintain, on an ongoing basis, a directory of local authorities, boards and commissions." (J)

(2) The directory shall include at least the following information for every authority, board and commission:

(a) the name of the authority, board, or commission;

(b) the number of members or positions;

(c) a list of currently appointed members, along with their terms of office;

(d) vacancies;

(e) general frequency of meetings; and

(f) the appointing authority and the enabling statute, ordinance, or resolution, if any." (J)

25. An up-to-date directory is essential to the Mayor properly fulfilling his duties. (1)

26. The Mayor repeatedly since assuming office beginning in January 2015 and down through the present time has requested the clerk to provide the information mandated by the statute so that he could properly fulfill his power of appointment to various boards and commissions. (1)

27. The clerk, whose total compensation at the end of 2014 was in excess of \$190,000, has deliberately refused to comply with the lawful request supplying instead "unofficial notations" and minutes which, in one instance show the same individual being appointed in 2011, 2012 and 2013 to 4 year terms on the Planning Board. (1)

28. In January 2015 the clerk presented the Mayor with a document purporting to be the "official directory" that was so fraught with errors that the attorney had to attempt to reconcile terms of office. (1)

29. The Mayor believes that the clerk's failure to perform her statutory duty is motivated, in part, by her animus toward him arising from a lawsuit currently pending against the Mayor. (1)

30. In the face of the clerk's refusal to provide the 2015 directory for the 2016 appointments, pursuant to N.J.S.A. 40:69A-127 the Mayor requested the assistance of the Council through Councilman Pryor, who is Council President to compel the clerk's compliance. (1)

31. The Council President has refused to act to compel the clerk to fulfill her statutorily mandated function. (1)

32. Following the Council's failure to act, the Mayor sought the assistance of Katrina Campbell, Esq. an attorney in Lavery's firm regarding the clerk's misfeasance. The response was along the lines of "do not worry the clerk is working on it." (1)

33. As a consequence, the Mayor has been unable to confirm whether his appointments to such bodies as the Planning Board are in compliance with law. (1)

34. The Mayor is concerned that unlawful appointments could lead to challenges to any action taken by an unlawfully appointed member as well as exposing the Township to claims of monetary damages. (1)

35. The actions and inactions of the clerk and Council are interfering with the Mayor's mandated statutory responsibilities. (1)

36. In addition pursuant to N.J.S.A. 40A:9-133 the clerk is responsible for maintaining the official records of the Township. (J)

37. In order for the Mayor to properly fulfill his duties as Executive Officer he needs and is entitled to access to all public records required to be maintained by the municipal clerk. (1)

38. Since January 2015 the Mayor has requested the clerk to make available for review various municipal records. (1)

39. The clerk has and continues to store many of the records in an inappropriate facility physically removed from the municipal building. (1)

40. For example, the Mayor needed to understand why the Council on Affordable Housing was demanding an approximate \$250,000 refund from the trust fund. The Mayor specifically asked to review the records of Crymer Village, a Council on Affordable Housing project. Despite Crymer's 30 year history of being located in the Township, the clerk was able to produce only a few years of records. (1)

41. Once again, the Mayor sought the assistance of the Council to fulfill its statutory duty to compel the clerk to perform her duties. (1)

42. The Council has refused to assure that the clerk fulfill her statutorily mandated function. (1)

43. The Council's refusal has interfered with the Mayor's statutory duties. (1)

44. Pursuant to N.J.S.A. 40:69A-128 "the Mayor shall prepare the annual budget with the assistance of the treasurer and the cooperation of the other members of the council." (J)

45. Pursuant to N.J.S.A. 40:69A-123 "the Mayor shall also appoint a finance committee of council which may consist of one or more council members..." (J)

46. The Mayor appointed Councilwoman Schneider and Councilman Pryor as the council members of the finance committee. (1)

47. The Council, in concert with the clerk, has refused to acknowledge the Mayor's authority to name and direct the finance committee. (1)

48. The Council in concert with the clerk has asserted that they have the power to prepare the budget. The Mayor received a memo authored by the clerk asserting that the clerk and Chief Financial Officer would prepare the budget. (1)

49. Establishing the budget is important to help control costs to the taxpayers. For example, in 2015 the Mayor objected to the Council's decision to continue to fund, to the tune of \$100,000 or more, the defense of a lawsuit brought against a developer who received approval from the Planning Board. (1)

50. The Mayor intends to "defund" the ongoing litigation as a waste of taxpayer funds. (1)

51. The Council has indicated its intention to continue to fund litigation that only benefits the developer. (1)

52. Pursuant to N.J.S.A. 40:69A-130 municipal checks may be signed only by the Treasurer and Mayor upon warrant of the finance committee. (J)

53. The Council has unlawfully authorized other individuals to sign checks in an effort to by-pass and usurp the Mayor's statutory authority. (1)

54. Pursuant to N.J.S.A. 40A:9-139 "In every municipality the governing body, by ordinance, shall provide for the appointment of a municipal attorney who may be designated as the corporation counsel...and unless otherwise provided for by law the term of office of the municipal attorney shall be 1 year." (J)

55. Contrary to the statutory requirement there is no provision in the adopted Code of the Township regulating the appointment of the municipal attorney. (1)

56. Pursuant to N.J.S.A. 40:69A-122 the municipal attorney is appointed by the Mayor subject to the advice and consent of the Council. (J)

57. On February 5, 2014, Michael B. Lavery, Esq., then of the firm Courter, Kobert and Cohen, P.C., entered into a Professional Services Agreement as municipal attorney pursuant to the exception in the Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq. for professional services. (1)

58. Pursuant to N.J.S.A. 40A:9-139 and N.J.S.A. 40:11-15, as well as paragraph 1 of the Professional Services Agreement, the term of appointment expired on December 31, 2014 at midnight. (1)

59. Pursuant to paragraph 4 of the Professional Services Agreement Lavery and Courter, Kobert and Cohen, P.C. warranted and promised that "the Firm agrees to provide to the Township, at no additional cost, the original work on all projects performed by the Firm for the Township." Such provision remains binding on Lavery and his current firm. (1)

60. In January 2015, after assuming office, the Mayor believed that a change in municipal attorney was appropriate. (1)

61. The Council at the 2015 Reorganization meeting indicated that they would refuse to consent to any choice other than the prior municipal attorney. (1)

62. The Mayor has never appointed Lavery or any attorney at his firm as municipal attorney for 2015. (1)

63. The Mayor has never executed a Professional Services Agreement for legal services in 2015 with Lavery or his firm as required by N.J.S.A. 40A:11-1 et. seq. (1)

64. The Council has again declared that Lavery and his firm would remain in a “hold-over” status for 2016 relying upon the 2014 Professional Services Agreement which stated in paragraph 1 that the law firm would continue “until a successor is appointed and qualified...”. (1)

65. There is no statutory authority for the Council to create by legislation, fiat or contract for a “hold-over” provision in the Professional Services Agreement. (1)

66. It appears that the provision was created by Lavery and his firm as a “self-serving” perpetual re-appointment clause. (1)

67. The Council at the January 2016 Reorganization meeting has purportedly continued Lavery and his firm as municipal attorney pursuant to the “hold-over” provision in the 2014 Professional Services Agreement. (1)

68. Pursuant to N.J.S.A. 40:69A-130 “No municipal funds shall be dispersed except pursuant to and within the limits of appropriations made in accordance with law. All disbursements shall be...signed by the mayor and countersigned by the treasurer.” (J)

69. In 2015 the Mayor did not authorize all purchase orders and/or sign all checks paid to Lavery or his law firm. (1)

70. Payments, to the extent authorized by the Council, were and remain in violation of statute. (1)

71. In the Mayor’s view unauthorized expenditures should be void. (1)

72. the Mayor believes that he is obligated to seek recovery of funds unlawfully paid by the Township. (1)

73. By law the Township is obligated to have a municipal attorney. (1)

74. By law the power of appointment is vested solely in the Mayor subject to advice and consent of Council only if an ordinance has been adopted pursuant to NJSA 40:69A-122. (J)

75. The Mayor has no confidence that Lavery and his firm can provide the Township impartial and accurate advice, especially since Lavery and his law firm have contributed to a Political Action Committee committed to recalling McKay; said petition having failed. (1)

76. The Mayor should be able to make an interim appointment for municipal attorney otherwise the council has usurped the power of appointment vested in the Mayor. (1)

77. The Council by continuing Lavery and his firm as municipal attorney is interfering with the Mayor's statutory power of interim appointment. (1)

V. STANDARD OF REVIEW

A party is entitled to summary judgment if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Rule 4:46-2(c). "Summary judgment procedure pierces the allegations of the pleadings to show that the facts are otherwise than as alleged." Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954) (citation omitted).

"[A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 530 (1995). Accordingly, "when the evidence is 'so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Id. (citation omitted).

Furthermore, where the moving party makes the requisite showing, it is incumbent upon the opposing party to come forward with competent proofs indicating that the facts are not as the moving party asserts. Spiotta v. Wm. H. Wilson, Inc., 72 N.J. Super. 572, 581 (App. Div.), cert. den., 37 N.J. 229 (1962). In considering the evidential materials presented, this Court's function is not to weigh the evidence and determine the truth of the matter, rather this court is to determine whether there is a genuine issue for trial. Brill, supra, 142 N.J. at 540 (citation omitted).

The Court Rules expressly provide for the applicability of summary judgment by way of formal motion in controversies involving prerogative writ where performance of a ministerial act or duty is at issue. See R. 4:69-2. The applicability of summary judgment to prerogative writ matters involving issues of the performance of discretionary acts or duties is somewhat more complex, where the Court has held summary judgment to be ordinarily inappropriate where the performance of ministerial duties is not at issue or the matter involves a constitutional challenge. In any such matter that involves a quasi-judicial determination, the matter is normally resolved through a non-jury plenary trial on the agency record below. See Odabash v. Mayor and Coun. Dumont, 65 N.J. 115, 121, fn. 4 (1974) (matter involved denial of zoning variance application and

constitutionality of zoning ordinance amendment). This Rule applies to such prerogative writ actions, which typically pertain to zoning and planning board decisions that include consideration of an administrative record. Such record is then supplemented by briefing and oral argument in order to facilitate early disposition of a matter. See Goodfellows v. Washington Plan. Bd., 345 N.J. Super. 109, 112 n. 1 (App. Div. 2001).

This doctrine is subject to exceptions related to questions of law or lack of factual issues. First, if such an action is filed beyond the time for filing a prerogative writ action pursuant to R. 4:69-6, this defense may be raised by summary judgment motion. See Brunetti v. Borough of New Milford, 68 N.J. 576, 584-585 (1975). Second, if the “prerogative writ action challenges governmental action which is not based on an administrative record developed in a quasi-judicial hearing or seeks performance of a ministerial duty, the usual procedures for the disposition of civil actions, including summary judgment practice, may be employed.” Willoughby v. Planning Bd., 306 N.J. Super. 266, 275 (App. Div. 1997) (emphasis in original) (summary judgment motion appropriate for timeliness defense but not for evaluation of site plan approval); citing Mitchell v. City of Somers Point, 281 N.J. Super. 492, 500 (App. Div. 1994); see also D’Anastasio v. Tp. of Pilesgrove, 387 N.J. Super. 241, 244-245 (App. Div. 2006) (affirming trial court decision regarding propriety of municipal denial of de-annexation petition submitted via cross-motions for summary judgment where parties acknowledged issues were legal in nature); Affiliated FM Ins. Co. v. State, 338 N.J. Super. 540, 557 (App. Div. 2001) (summary judgment dismissal of constitutional challenge to statute lacking genuine factual disputes and providing all reasonable inferences to plaintiffs); Downtown Residents v. Hoboken, 242 N.J. Super. 329 (App. Div. 1990) (prerogative writ constitutional challenge of city redevelopment plan could be resolved by summary judgment where critical legislative determination of blight was made eighteen (18) years earlier).

At times, Defendants’ Motion for summary judgment appears to argue that they are entitled to judgment as a matter of law based upon Plaintiff’s failure to satisfy the Crowe v. DeGioia standard. In deciding whether to grant injunctive relief, New Jersey courts are guided by three fundamental considerations: (1) whether there is substantial likelihood of irreparably injury to the moving party if the injunction does not issue; (2) whether the moving party has demonstrated a reasonable probability of success on the merits; and (3) whether in balancing the interests involved, the harm that plaintiff seeks to avert outweighs any possible harm to defendant. See Crowe v. DeGioia, 90 N.J. 126, 132-

34 (1982).; Zoning Bd. of Adjustment v. Serv. Elec. Cable Television, Inc., 198 N.J. Super. 370, 379 (App. Div. 1985). “Each of these factors must be clearly and convincingly demonstrated” by the party seeking injunctive relief. Waste Mgmt. of N.J., Inc. v. Union Cnty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

This Court has already determined that Plaintiff was not entitled to injunctive relief pursuant to Crowe v. DeGioia. For purpose of clarity, in order for Defendants’ to be entitled to judgment as a matter of law, the above summary judgment standard (Brill) must be applied. Stated another way, the Court must find that there is no genuine issue of material fact remaining as to Plaintiff’s claims, not whether Plaintiff can demonstrate a likelihood of success on the merits. Defendants’ Motion for summary judgment concerns the merits of Plaintiff’s claims.

VI. SUMMARY OF ARGUMENTS

Defendants advance the following arguments in support of their Motion for summary judgment: (1) the fact that Plaintiff waited many months in order to seek relief with respect to the appointment of a Municipal Attorney, Labor Counsel, or Municipal Auditor and specific municipal payments should bar such claims from being considered under Rule 4:69-6; (2) Defendants are entitled to summary judgment on the issue relating to the payment of municipal expenses as a result of the Court’s previous finding that there is no authority for Plaintiff as Mayor to prevent the payment of lawfully-approved municipal bills; (3) Plaintiff has not been able to demonstrate, nor the Court been able to find, the threat of any harm that would justify the issuance of injunctive relief; and (4) the well-settled applicable law establishes that Plaintiff does not have a right to the remedies sought and, therefore, he cannot demonstrate a likelihood of success on the merits with respect to Council Defendants.

Again, Defendants have filed a Motion for summary judgment. As such, Defendants’ arguments that (1) Plaintiff has not been able to demonstrate the threat of any harm that would justify the issuance of injunctive relief and (2) Plaintiff cannot demonstrate a likelihood of success on the merits with respect to Council Defendants are not properly before the Court. These issues have already been decided in the Court’s previous decision. Pursuant to Defendants’ current Motion for summary judgment, this Court must address the merits of Plaintiff’s claims and, specifically, whether any genuine issues of material fact exist.

VII. COURT'S PRIOR DECISION

Previously, Plaintiff McKay moved for injunctive relief concerning the various issues that are raised in his Complaint. In Plaintiff's Order to Show Cause, he argued that the Court should enter the following relief:

- a. confirming Plaintiff as holding the executive authority of the Township pursuant to N.J.S.A. 40:69A-121;
- b. confirming Plaintiff's power of appointment pursuant to N.J.S.A. 40:69A-128;
- c. confirming Plaintiff's power to prepare the budget pursuant to N.J.S.A. 40:69A-128;
- d. compelling the Municipal Clerk to comply with N.J.S.A. 40:69A-127 and N.J.S.A. 40:9-133;
- e. permanently restraining and enjoining the Municipal Clerk from interfering with the power of Plaintiff as Mayor;
- f. permanently restraining and enjoining the Council from interfering with the powers of Plaintiff as Mayor;
- g. permanently restraining and enjoining Michael B. Lavery and his law firm from holding over or acting as Municipal Attorney;
- h. compelling Lavery and his law firm to return all files to the Township;
- i. compelling Lavery and his law firm to execute Substitutions of Attorney;
- j. compelling Lavery and his law firm to return all fees paid in 2015;
- k. compelling member of Council to reimburse the Township for fees paid in 2015.

After extensive briefing and argument, the Court denied the Plaintiff's requested relief primarily on the basis that he was unlikely to succeed on the merits of those claims. The Court reasoned and found in relevant part that:

A) Standard of Review

Plaintiff brought this matter to the Court as an Order to Show Cause seeking immediate and emergent relief. In order to achieve immediate relief, Plaintiff's application will be measured by the standards enumerated in *Crowe v. DeGioia*, 126 N.J. 990 (1982). In that case, the New Jersey Supreme Court has explained:

The object of a preliminary injunction is to prevent some threatening, irreparable mischief which should be averted until opportunity is offered for a full and deliberate investigation of the case.

Evening Times v. Am. Guild, 124 N.J. Eq. 71, 74 (E. & A. 1938); accord *Crowe*, 90 N.J. at 134 ("[T]he point of temporary relief is to maintain the parties in substantially

the same condition ‘when the final decree is entered as they were when the litigation began.’” (citation omitted)).

In deciding whether to grant injunctive relief, New Jersey courts are guided by three fundamental considerations: (1) whether there is substantial likelihood of irreparably injury to the moving party if the injunction does not issue; (2) whether the moving party has demonstrated a reasonable probability of success on the merits; and (3) whether in balancing the interests involved, the harm that plaintiff seeks to avert outweighs any possible harm to defendant. *See Crowe*, 90 N.J. at 132-34; *Zoning Bd. of Adjustment v. Serv. Elec. Cable Television, Inc.*, 198 N.J. Super. 370, 379 (App. Div. 1985). “Each of these factors must be clearly and convincingly demonstrated” by the party seeking injunctive relief. *Waste Mgmt. of N.J., Inc. v. Union Cnty. Utils. Auth.*, 399 N.J. Super. 508, 520 (App. Div. 2008).

Plaintiff’s Brief also references the summary judgment standard, implying that the Court should apply that standard in this case. The New Jersey Supreme Court in *Brill v. Guardian Life Insurance Co. of America*, 142 N.J. 520 (1995), held that according to Rule 4:46-2, a court should grant summary judgment when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.” The *Brill* Court stated that, “[b]y its plain language, Rule 4:46-2 dictates that a court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a ‘genuine issue as to any material fact challenged.’” *Id.* at 529.

“A dispute of fact is genuine if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom, could sustain a judgment in favor of the non-moving party.” *Brill*, 142 N.J. at 538. The New Jersey Supreme Court holds that a non-moving party may only defeat a motion for summary judgment by submitting “competent evidential material beyond mere speculation and fanciful arguments.” *Hoffman v. Asseenontv.Com, Inc.*, 404 N.J. Super. 415, 426 (App. Div. 2009) (internal quotations omitted).

The Summary Judgment standard is not applicable to this case since (1) the Order to Show Cause was not filed as a Summary Judgment Motion but instead merely as a request for injunctive relief; and (2) there is no formal Summary Judgment Motion before the Court; and (3) Plaintiff has not provided a “Statement of Uncontested Facts which would be required in order to adjudicate such a Motion; R. 4:46-2(a); and (4) discovery is not complete and in fact discovery has not even begun, thereby making summary judgment inappropriate and premature. *Jackson v. Muhlenberg Hospital*, 53 N.J. 138 (1969); *Velantzas v. Colgate-Palmolive Co.*, 109 N.J. 189 (1988). Clearly there are disputed facts that are material to the issues before the Court, some of which may very well impinge upon discretionary (non-ministerial) duties of the Defendant Council Members.

For all of these reasons, the Court will not consider the Plaintiff’s request for relief to be for “summary judgment” as to any of the issues. Thus, the standard of review for summary judgment is not appropriate to the Court’s review.

B) Is Mandamus an Appropriate Remedy for the Requests for Relief made by Plaintiff in this Case?

Certainly a good portion of the relief requested by the Plaintiff in this case involves requests for the Court to interfere with discretionary and/or legislative finites as opposed to ministerial acts. It has been said that “[m]andamus lies to remedy official inaction where the right to be enforced or the duty to be performed is certain and specific.” *Gallena v. Scott*, 11 N.J. 231, 238 (1953). The writ of mandamus “is available only where there is a clear and definite right to the performance of a ministerial duty in essence mandatory and final and wholly free of the element of discretion ...” *Id.* at 238. Therefore, mandamus is an appropriate remedy: “(1) to compel specific action when the duty is ministerial and wholly free from doubt, , and (2) to compel the exercise of discretion, but not in a specific manner.” *Loigman v. Twp. Comm. of Middletown*, 297 N.J. Super. 287, 299 (App. Div. 1997). A ministerial duty is a kind of duty that “is absolutely certain and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion.” *Ivy Hill Park Apartments v. N.J. Prop. Liab. Ins. Guar. Ass’n*, 221 N.J. Super. 131, 140 (App. Div. 1987) (quoting *Case v. Daniel C. McGuire, Inc.*, 53 N.J. Super. 494, 498 (Ch. Div. 1959), certif. denied, 110 N.J. 188 (1988)).

It is axiomatic that injunctive relief is an extraordinary remedy and completely inappropriate when there are facts in dispute, which is the case in this instant matter. Injunctive relief is an extraordinary equitable remedy that should be entered only with the exercise of great care and only upon a showing, by clear and convincing evidence, that the party is entitled to the relief. *Dolan v. DeCapua*, 16 N.J. 599, 614 (1954) (“Injunctive judgments are not granted in the absence of clear and convincing proof”); *Waste Management of N.J., Inc. v. Union County Utilities Auth.*, 399 N.J. Super. 508, 519 (App. Div. 2008); *Mays v. Penza*, 179 N.J. Super. 175, 179-180 (Law Div. 1980) (Injunction should be granted “only where the proven equities establish a clear need” and “only in the clearest of factual circumstances and for the most compelling of equities.”); see also *R.* 4:52-1.

In order to determine whether injunctive relief is warranted, the Court must apply the test set forth in *Crowe v. DeGioia*, *supra*. is instructive whenever a party seeks injunctive or declaratory relief pursuant to an Order to Show Cause, where the moving party must demonstrate: (1) irreparable harm that will be suffered; (2) that the claim is based upon a settled legal right; (3) that the material facts are undisputed; and (4) that the party seeking relief will suffer the greater hardship if injunctive relief is not granted than the opponent, if the relief is granted.

The Court must be careful not to embroil the judiciary in a dispute between elected officials where those Officials are colorably acting within the scope of their duties as duly executed members of the Governing Body and are carrying out discretionary duties and responsibilities according to the constitution and applicable statutes. Clearly if it is determined that certain actions (such as appointments) and/or approving a “municipal budget” require confirmation by advice and consent of the Council, the Court is not able to require or “mandate” that the council take such actions.

The Court will review the specific issues that are before the Court with those principles of law in mind.

C) General Background Regarding the Form of Government that is Applicable for Lopatcong Township

Lopatcong Township is currently chartered pursuant to the Optional Municipal Charter Law or Faulkner Act, N.J.S.A. 40:69A-1, et seq. The Faulkner Act was named in honor of the late Bayard H. Faulkner, a former Mayor of Montclair, New Jersey, who acted as the Chair of the Commission on Municipal Government in the late 1940s and 1950s. At its inception, and upon its passage in 1950, the Faulkner Act enabling Statute authorized six basic plans of Mayor – Council governance, that were alternates to other statutorily authorized forms of municipal government that had previously existed which include such forms of municipal government as Boroughs, Towns, Townships, Villages, Commissions, Cities and others. The Faulkner Act was created to provide municipalities with greater flexibility than was provided in the other then-existing traditional forms and to expand upon the reforms provided in Progressive Era Legislation, including the 1911 Walsh Act and the 1923 Municipal Manager Law. The six plans authorized by the 1950 Faulkner Act were alternatively known as Plans “A”, “B”, “C”, “D”, “E” and “F”. N.J.S.A. 40:69A-31 to N.J.S.A. 40:69A-80. The six plans were structurally identical with respect to the division of local powers, but they offered variations of the electoral aspects of the basic Mayor – Council Plan. The New Jersey Legislature enacted the Faulkner Act to provide for the free adoption by the people of a specific form of government with specific powers. *Paolella v. Hackensack*, 76 N.J. Super. 86, 98-99 (Law Div. 1962).

The variations of plans included different sizes of the Council; partisan (Nov.) or non-partisan (May) elections; ward or at-large representation; and staggered or non-staggered Council terms. All of the various plans incorporated language concerning the powers of the Mayor and the Council.

Generally the Faulkner Act offers four basic plans including (1) Mayor-Council; (2) Council Manager; and (3) small municipality and Mayor-Council administration. The Act also provides many choices with communities with a preference for a strong executive or for the professional management of municipal affairs. In 1981 the Legislature modified the Statute so that the elements of all six plans would appear in one Article as found in N.J.S.A. 40:69A-31 to 44. Also, in the 1981 amendment the letter codes that had been assigned in the 1950 enactment were eliminated and the number of varieties within each plan was significantly increased.

One of the forms of government that is available through the Faulkner Act is the Small Municipality Plan which can be adopted by communities with a population of fewer than 12,000.³ It is that form of government that has been adopted in Lopatcong Township. In fact, the parties acknowledge that Lopatcong was originally chartered under the 1950 Faulkner Act optional form of government as a Small Municipality Plan C. When the 1981 reform legislation was passed, the Small Municipality Plan C was repealed. By operation of law, the Township now operates under the provisions of a Small Municipality Plan A.

³ The 2010 Census indicates that Lopatcong’s population at that time was 8,014 people, which had increased from its year 2000 population of 5,765.

The Lopatcong Government consists of a Mayor and a four-member Township Council, with all positions elected at-large on a partisan basis in the November General Election. The Mayor is elected directly by the voters to a three year term. Council Members are also elected at large to serve a three-year terms on a staggered basis so that two seats come up for election each year that the Mayor is not up for election.

Under the Small Municipality Plan, all legislative powers are vested in the Council with the Mayor presiding over Council sessions and having both voice and vote. It has been said that the Small Municipality form is essentially a blend of the features of a traditional Borough and Township forms of government.

As noted above, the Small Municipality Plan is only available to Municipalities with a population of less than 12,000.⁴ Under that plan the voters select either a 3, 5 or 7 Council Members or a Mayor and 2, 4 or 6 Council Members. In the case of Lopatcong, it has chosen the variation which provides for 4 Council Members and a Mayor (or, in other words, there are 5 voting members of the Governing Body).

The Faulkner Act does offer a variation where the Mayor may be elected by the voters or the Council. In Lopatcong's case, the Mayor is elected by the Voters. The Mayor presides over the Council but he has no veto powers. The Mayor has executive powers of the Municipalities, along with the power to appoint Committees. While the Mayor appoints the Municipal Clerk, Attorney, Tax Assessor, Tax Collector and Treasurer, those appointments are subject to Council confirmation. N.J.S.A. 40:69A-115, et seq.

In the Small Municipality arrangement, the structure calls for a so-called "weak-mayor" system where the Mayor is effectively a co-council member who has certain limited executive functions.⁵ He is the leader of the Council in that he has certain executive duties and responsibilities which are then reviewed and approved (or not approved) by the entire Council, which includes the Mayor as a voting member.

N.J.S.A. 40:69A-116 provides that a Municipality like Lopatcong is governed by an elected Council and a Mayor. That provision states the obvious proposition that the responsibilities of local governance in a Mayor-Council Municipality are jointly shared. *In the Matter of Joel L. Shain*, 92 N.J. 524 (1983). Additionally, the shared responsibility requires that neither party can usurp the authority of the other.

⁴ Currently the Small Municipality form has been adopted in Belmar, Berlin Township, Chester Township, Clinton Township, Egg Harbor City, East Hanover Township, Lambertville, Lopatcong Township, Pohatcong Township and Woodland Park.

⁵ Michael A. Pane describes the arrangement in *34 New Jersey Practice on "Local Government Law"* as follows:

"Although the mayor is elected as mayor by the voters directly and does have some specific appointment powers, this form has been held not to be a "strong mayor" or mayor-council form in terms of the division of powers between the mayor and the council." (emphasis provided)

C) With regards to Michael Lavery and the Lavery Law Firm
(i) Background and Arguments

At the hearing for the preliminary injunction this Court definitely ruled that the Plaintiff's application to oust Michael Lavery and the Lavery Law Firm in favor of his own appointment as Township Attorney was DENIED as Plaintiff had not demonstrated that he was likely to prevail on that portion of the claim. Further, the Court ruled that the Plaintiff did not demonstrate that he was entitled to relief under the *Crowe v. DeGioia* standards which are described above.

In this hearing regarding Plaintiff's request for permanent injunctive relief, the Plaintiff challenges the Court's finding claiming that the court erred in its determination. The Court rejects the Plaintiff's arguments and affirms its prior position on the issue.⁶

The record before the Court indicates, and the Defendants can plausibly demonstrate, that Mr. Lavery and his Law Firm have acted as holdover municipal attorney since January 1, 2015. It is uncontradicted that Mr. Lavery was first appointed municipal attorney for the Township in 2004. In 2008, Mr. Lavery was again appointed municipal attorney, along with the law firm of Courter, Kobert & Cohen, predecessor to Lavery, Selvaggi, Abromitis & Cohen. The predecessor nature was recognized in the Complaint filed by Plaintiff.

Mr. Lavery indicates that he and the Law Firm were subsequently appointed each year for successive one-year terms. The appointments were made by the (then) Mayor and, as required, the Council voted in favor of the appointment on each reappointment, thereby providing their "advice and consent". The last time this occurred was in January 2014. Pursuant to the January 2014 appointment, a contractual agreement was entered into between the Township, Mr. Lavery and the Law Firm at that time.

In January 2015, Plaintiff, as the newly elected Mayor, did not offer the name of any individual or law firm as municipal attorney for the Township of Lopatcong. Nor did the Plaintiff challenge the authority of Mr. Lavery or his firm when they continued to act as the Township Attorney throughout 2015. On that basis the Defendants argue that pursuant to law, Mr. Lavery and the Law Firm remained as the holdover Township Attorney. It is uncontradicted that Mr. Lavery and the Law Firm indicate that they continued to act as the municipal attorney, in all respects, throughout the entirety of 2015. There were, among other things, appearances in court on behalf of the Township by the Law Firm; there were documents signed by members of the Law Firm that were required to be signed by the municipal attorney; there were opinions issued by the Law Firm in its capacity as municipal attorney, and so on. It is also uncontradicted that during that time Mayor McKay never challenged any of the official acts of Mr. Lavery or any members of the Law Firm in any of the many representations undertaken on behalf of the Township, even though he attempts to challenge their actions in this lawsuit

⁶ Even though the Court has previously ruled on this issue, the Plaintiff appears to challenge the Court's ruling by simply raising the issue again. The Plaintiff has not filed a Motion for Reconsideration of the issue pursuant to R. 4:49-2 which would be the appropriate vehicle for the Plaintiff to proceed. Notwithstanding the Plaintiff's misuse or misapplication of the applicable rule, the Court will address the issue again in this opinion in order to complete the record.

by seeking an Order that would require them to disgorge any legal fees earned by them in 2015 and during this year. Notwithstanding the Plaintiff's position in this lawsuit, Lavery indicates that Mayor McKay did not seek to appoint another municipal attorney until a regular Council meeting held on February 3, 2016, the day after he filed the Complaint in this case. On February 3, 2016, Mayor McKay sought to appoint his counsel in this case, William Caldwell, Esq. as the Township Attorney. It is uncontradicted that the Mayor failed to receive "advice and consent" for his proposed appointment as the Township Council has failed to affirmatively approve his appointment.

N.J.S.A. 40A:9-139 provides for the appointment of an attorney in every municipality. It states that a municipal attorney shall be appointed for every municipality for a term of office of one year. N.J.S.A. 40:69A-122, which is applicable to Small Municipality Plan A, specifically states that an ... attorney ... shall be appointed by the Mayor with the "advice and consent" of the Council.

The Plaintiff counters by his reliance upon N.J.S.A. 40:69A-124, which states, "All officers and employees whose appointment or election is not otherwise provided for in this article or by general law shall be appointed by the Mayor." (Emphasis added). Plaintiff argues that N.J.S.A. 40:69A-124, in and of itself, gives the Mayor the sole power to appoint the municipal attorney.

However, Plaintiff's reliance on N.J.S.A. 40:69A-124 is in error with regards to the appointment of the Municipal Attorney. N.J.S.A. 40:69A-122, as cited above, clearly states that the position of attorney shall be appointed by the Mayor "with the advice and consent of the Council." It is clear that the appointment of attorney is therefore "otherwise provided for in the same article" so that Plaintiff's reliance upon N.J.S.A. 40:69A-124 is clearly misplaced.⁷

As a result, the Lavery Defendants aver that there has been no proper appointment of a successor municipal attorney as of this date (that is an attorney who has received consent from the Council), and thus Mr. Lavery and the Law Firm remain as holdovers.

Mr. Lavery and his Law Firm contend that it is just as clear that until a successor is appointed, the pre-existing municipal attorney shall continue to serve as a "holdover." Defendants alert the Court to two matters: *Woodhull v. Manahan*, 85 N.J. Super. 157 (App. Div. 1964) and *Levine v. Mayor of City of Passaic*, 233 N.J. Super. 559 (Law Div. 1988). In the *Woodhull* case, under a different form of government, the township council had the right to appoint the municipal attorney. The mayor also had a right to veto. The previous municipal attorney had served under an appointment for one year, which ended on December 31, 1963. In the January reorganization meeting, the council voted to appoint a new municipal attorney. The mayor vetoed that action. The court held that the mayor's veto was valid and, as a result, the previous municipal attorney had to be considered as town attorney in a holdover capacity. *Id.* at 168. In that circumstance the Appellate Division confirmed the existence of "holdover" status for Municipal Attorneys.

The *Levine* matter involved a sitting municipal judge who had not been

⁷ A different result could occur if Lopatcong had just formed a new government. Such is not the case here however. See *Baumann v. Municipal Council of West Paterson*, 93 N.J. Super. 446 (App. Div. 1967); N.J.S.A. 40:69A-207.

reappointed after the end of his term. When ultimately reappointed, after approximately two years, the question became whether his appointment pursuant to statute was three years from the expiration of his original term, or three years from his new appointment.

The court held that it was three years from his new appointment, and stated very clearly that “the failure to appoint or elect a successor at the end of a defined period does not usually cause a vacancy where the officer is a holdover until the successor is elected or appointed and qualified.” *Id.* at 563. This is consistent with N.J.S.A. 40:69A-43(b), which refers to department heads. Although there are no established departments within the Lopatcong Township form of government, the statute states that each department head shall serve during the term of office of the mayor who appointed him, and “until the appointment and qualification of a successor.”

(ii) Court’s Decision

The Court finds that Plaintiff’s position is based upon an over-simplified and unsupported legal theory that is also based upon a misreading of the applicable law. Plaintiff adopts a hyper-literal interpretation of the statutes that supports his theory that he has the authority as the Executive (Mayor) to make certain “executive decisions” without input from the Township Council, and even against their will. The Mayor reads the grant of Executive Power vested by N.J.S.A. 40:69A-121 to be clear, absolute and unchecked. It is that general grant of authority, along with the enumerated powers under N.J.S.A. 40:69A-39 that form the basis of his theory that he can (unchecked) take the positions that he has in this case.

As indicated, this matter involves a municipality organized under a Small Municipal Plan of the Faulkner Act, a form of government that recognizes the separation of powers between a mayor and council. Under the Small Municipal Plan, “advice and consent” of the Council is required for Mayoral appointments to be validated. Such is the case despite the direct election of the mayor and appointment powers, where this form of local government has not been held to consist of a “strong mayor”. 34 *N.J. Prac. Local Government Law* §5.18 n. 2, Pane (4th Ed. (updated 2015)); see also *Matter of Fairfield Township*, 240 N.J. Super. 83 (App. Div.), cert. den. 122 N.J. 315 (1990) (appointment of municipal judge resides with council); *Baumann v. Municipal Council of Borough of West Paterson*, 93 N.J. Super. 446 (App. Div. 1967).

Plaintiff’s position can be characterized as either (1) he as the power to act without regard for the Council’s opinion; or (2) that the Council should be required to accept, or even vote in favor of his appointments since he is the Mayor. Plaintiff’s position ignores or perverts for his own ends the principles of separation of powers as well as the significance and ramifications of the “advice and consent” provisions of the law. Our Supreme Court held *In the Matter of Joel L. Shain*, supra. at 536-536 that Mayor Shain’s theory concerning the doctrine of “separation of powers” was not strictly applicable to a Faulkner Act municipal government.

Plaintiff effectively interprets his powers and N.J.S.A. 40:69A-121 to provide him with dictatorial powers. He is the Mayor. Not the king. He must abide by the form of government adopted in Lopatcong (Small Municipality Plan A) which recognizes that the electorate determines who holds the elected offices of the

Mayor and the Council. The Municipality is governed by the elected Council and the Mayor. N.J.S.A. 40:69A-116. The Mayor and the Council must work together to appoint necessary officials and run the government together. The Mayor is effectively a co-member of the Council even though he is also the person who is charged with administrative and executive duties. Even though he is charged with “enforcing the law”, that authority does not give him the power to make the law by himself or decide what the law is. N.J.S.A. 40:69A-121. His power to appoint a Municipal Attorney is checked, or limited by, the requirement that his appointment must be based upon advice and consent of the Council. N.J.S.A. 40:69A-122.

The position of a Municipal Attorney, which is required for all Municipalities in New Jersey pursuant to N.J.S.A. 40A:9-139 and *Loigman v. Township Committee of Township of Middletown*, 409 N.J. Super. 1 (App. Div. 2009), for Small Municipal Plan A governments, requires that “... an attorney ... shall be appointed by the Mayor with the advice and consent of Council.” N.J.S.A. 40:69A-122. Plaintiff’s reliance on N.J.S.A. 40:69A-122, which provides that, “[a]ll officers and employees whose appointment or election is not otherwise provided for in this article or by general law shall be appointed by the Mayor” is incorrect since the appointment of municipal attorneys is separately addressed for municipalities organized such as Lopatcong Township. This Court is not empowered with authority to require the Township Council to use their “discretionary power” of providing their “advice and consent”. As a result, Plaintiff’s request for relief concerning the status of the Municipal Attorney is not appropriate for consideration as injunctive relief.

Similarly, the law is also clear that until a successor is appointed, unless otherwise provided, the preexisting officeholder serves in a holdover capacity. See *Woodhull v. Manahan*, 85 N.J. Super. 157 (App. Div. 1964) (under different form of government, council right to appoint municipal attorney was properly vetoed by mayor, resulting in pervasive municipal attorney serving in holdover capacity); see also *Levine v. Mayor of City of Passaic*, 233 N.J. Super. 559 (Law Div. 1988) (date of new term for holdover municipal judge commenced upon date of subsequent reappointment approximately two (2) years later); but see *Casamasino v. City of Jersey City*, 158 N.J. 333, 351-353 (holdover not allowed for tax assessor position based on tenure where limited holdover provision was eliminated by change in governing law)⁸; *Baumann v. Mayor and Council of West Paterson*, supra. (where the court recognized that in a newly constituted Faulkner Act municipality, the council could not claim holdover status for a Municipal Attorney from the previous [abolished] form of government since the applicable statute recognized that the officers in the prior form of government could remain no longer than 30 days) (emphasis added).

It should be noted that Lavery and his Law Firm have, in the past, achieved a “perfected” appointment as the Township Attorney. By so doing, they passed the hurdle of appointment as it appears that (many times) they were nominated by the

⁸ Plaintiff miscites *Casamasino* for the overly broad proposition that holdover municipal attorneys are not permitted. The decision narrowly provides that a tax assessor may not achieve tenure status as a hold over. The *Casamasino* case is limited to the facts of the appointment of a tax assessor and is not precedential for the proposition which the Plaintiff seeks to apply to Municipal Attorneys.

(then) Mayor and obtained consent from the duly elected Council. Lavery and his Law Firm remain in that position until a new attorney is appointed and the “advice and consent” of the Council is achieved. By requiring that a newly appointed attorney must obtain “advice and consent” of the Council, the Legislature has effectively authorized the current duly appointed attorney to act in a holdover capacity until “consent” can be achieved.

Notably, Mr. Caldwell, the Mayor’s choice, has never achieved consent from the Lopatcong Council. To adopt the Plaintiff’s position would effectively create authority in the Mayor to override the Council and appoint his choice without regard to whether he ever obtained consent. The “advice and consent” criteria would be effectively avoided and rendered a nullity under Plaintiff’s theory. Mr. Caldwell would be the “de facto” attorney even if he never obtains consent from the elected Council Members as he would presumably hold over and hold that position for the remainder of the Mayor’s term or terms in office, even though the Council never provided their approval. Such a result cannot be countenanced as it would emasculate the very meaning and purpose of the “advice and consent” provision. The Township Attorney is the attorney for the Mayor and the Council in their capacity as the Township’s governing body. The appointment is not to be made by the Mayor alone, without regard to the Council’s rights and authority.

For those reasons the Court finds that the Plaintiff has not demonstrated a clear likelihood that he will succeed on his claim with regards to Lavery and his Law Firm.

As such, the Court will order that Plaintiff’s requests in his Order to Show Cause to:

- g. permanently restraining and enjoining Michael B. Lavery and his law firm from holding over or acting as Municipal Attorney;
- h. compelling Lavery and his law firm to return all files to the Township;
- i. compelling Lavery and his law firm to execute Substitutions of Attorney;
- j. compelling Lavery and his law firm to return all fees paid in 2015;
- k. compelling member of Council to reimburse the Township for fees paid in 2015.

are DENIED as there is no basis to enter interim, immediate and extraordinary relief concerning those requests.

D) With Regards to the Labor Counsel’s Position

Similarly, with regards to the Plaintiff’s position concerning the appointment of Labor Counsel, the result is the same. The position of “Labor Counsel” is not a statutorily created position. In fact, the position is not statutorily defined, although it appears to be a subset or subordinate position to that of the Municipal Attorney. Nor has the position been created or recognized by any applicable Lopatcong Township Ordinance. Thus, there is no position to fill and the Council can properly reject it.

The Mayor advocates that he should be able to create the position and to appoint his own specialized Labor Counsel as he has lost confidence in the current

counsel and that, as the Mayor, he should be able to create the position and appoint his own choice. He offers no authority for that proposition.

If the Mayor's position were adopted and then taken to its logical extreme, the Mayor could appoint multiple "specialized attorneys" which could effectively undermine the position of Township Attorney by substituting specialized lawyers to perform most, or even all, of the Township Attorney's duties. Such a result would circumvent the Council's power to advise and consent in an impermissible and illogical manner.

Plaintiff's request to have the Court restrain the Council from ignoring his appointment of Labor Counsel, on an immediate and emergent basis, is DENIED as the Court finds that the Plaintiff is unlikely to succeed on the advancement of that position.

E) With regards to the Mayor's request for a declaration that as Mayor he holds Executive Authority in the Township

N.J.S.A. 40:69A:-121 provides:

The executive power of the municipality shall be exercised by the mayor. It shall be his duty to see that all laws and ordinances in force and effect within the municipality are observed. He shall address the council and report to the residents annually, and at such other times as he may deem desirable, on the condition of the municipality and upon its problems of government.

Based upon that authority, the Mayor requests that the Court issue an Order declaring that he, and he alone, holds executive authority of the Township of Lopatcong.

The real issue is not whether the Mayor holds "executive authority" as he clearly does by virtue of the authority vested by N.J.S.A. 40:69A-121, but instead how he interprets that authority and how he uses it.

The Mayor sees his "authority" as akin to that of the President of the United States or the Governor of New Jersey. The Mayor cites that proposition without authority. While the Court acknowledges that there is some degree of separation of powers within Faulkner Act municipalities, the structure between municipal government is significantly different than our State and Federal constitutional form of government.⁹

Pursuant to N.J.S.A. 40:69A-116, the municipal government is governed by the elected Council, the Mayor and other Municipal Offices. In fact, the Mayor is a voting member of the governing (legislative) body (which is a characteristic that is unlike our State and Federal Governments). As the elected Mayor, the Plaintiff does obtain certain specifically delineated executive duties. N.J.S.A. 40:69A-121. On the other hand, the elected Council has been delegated with does have legislative powers. N.J.S.A. 40:69A-122. Notwithstanding those specialized duties and

⁹ For instance, the New Jersey Constitution provides that the three branches of government are distinct and no person belonging to one branch can belong to or exercise the power of another. In the case of the Lopatcong structure, the Mayor and Council jointly constitute the governing body and all vote together on the issues that affect the Township. New Jersey Constitution, Article III, para. 1. The Governor also has veto rights and the power to "line item veto" appropriation bills, which of course, Mayor McKay does not have. New Jersey Constitution, Article V, sec. 1, para. 15. There are, of course, other differences, the specifics of which are beyond the scope of this opinion.

powers, both the Council and the Mayor govern the Township jointly. While there may be certain limited circumstances where a Court may be able to “pigeon hole” a particular act or action as purely “executive” or purely “legislative”, in many, and perhaps most functions, their respective duties and responsibilities are intertwined and overlapping.

The Court does recognize that the Mayor holds executive authority pursuant to N.J.S.A. 40:69A-121. The Court is concerned that the Mayor misconceives the breadth of that authority, however. The concern, of course, is that the Mayor will use this Court’s simple and uneventful declaration that N.J.S.A. 40:69A-121 is valid to support an unauthorized power grab. With regards to the Mayor’s request for the Court to recognize that N.J.S.A. 40:69A-121 provides the Mayor with “executive power”, of course it does. But that authority does not grant the Mayor the right or power to govern the Township by his own whim or by fiat and without the Council. Unless the Court has a specific set of facts or circumstances before it in order to determine if there is a case or controversy involving the Mayor’s use of his Executive Power or the Council’s usurpation of that power, any declaration that the Court makes is a hollow one. The Mayor recites several times in his Brief that he has a duty to see that all laws and ordinances in force and effect in the Township are obeyed. That authority cannot be misread to say that the Mayor shall make law or that he shall enforce all laws based upon his sole interpretation.

For that reason, the Mayor’s request for a declaration that he holds executive authority pursuant to N.J.S.A. 40:69A-121 is GRANTED IN PART and limited by the Court’s opinion.

The Court will not address the Plaintiff’s request to restrain or enjoin the Council from interfering with his powers as the Mayor. In this opinion the Court has not found that any such interference or usurpation has occurred nor is there any imminent harm that is likely to occur. As such, there is no need for the Court to enter such an injunction.

F) Other Requests for “Declarations” concerning various statutory provisions

The Mayor asks that the Court confirm various statutory provisions, including (1) the Plaintiff’s right to prepare the budget; (2) to compel the Municipal Clerk to comply with N.J.S.A. 40:69A-127 and N.J.S.A. 40:9-133; (3) to restrain the municipal Clerk from interfering with his powers as Mayor; and (4) the Mayor’s right to appoint a Township “Auditor” pursuant to N.J.S.A. 40:69A-124.

i) Mayor’s Appointment of the Auditor

Plaintiff contends that N.J.S.A. 40:69A-124 authorizes his action to appoint an Auditor for the Municipality. Apparently in this case the Mayor sought to appoint his own choice as the Auditor. The matter was put to a vote and his choice was rejected by a 3-2 vote.

N.J.S.A. 40:69A-124 provides:

All officers and employees whose appointment or election is not otherwise provided for in this article [40:69A-115 to 40:69A-132] or by general law shall be appointed by the mayor. If the municipality has not adopted the provisions of Title 11 of the Revised Statutes (Civil Service), it shall be the

duty of the mayor to recruit, select and appoint persons qualified by training and experience for their respective offices, positions and employments.

In his Brief, Plaintiff addresses three specific appointments including the Township Attorney and Labor Counsel (which have been addressed above) and appointment of a Township auditor. Notably the Mayor's request for the Court to address the issue concerning the Township Auditor was not requested within the relief requested in his Order to Show Cause.

Plaintiff indicates that in April 2015 he sought to have the Council have an independent audit but the Council refused to approve his request. The Mayor claims that he has "lost faith" in the current auditor and thus he now seeks to employ Robert S. Morrison, a registered municipal accountant, as the Municipal Auditor. He offered Mr. Morrison's name at the reorganization meeting in January 2016 but the Council rejected his proposal. The Mayor voted with the minority in the 3-2 rejection.

Plaintiff requests that the Court acknowledge that by virtue of the Mayor's power of appointment pursuant to N.J.S.A. 40:69A-124 that he alone has the right to appoint the auditor. Effectively he asks that the Court override the Governing Body's 3-2 rejection of his choice as Township Auditor.

The Court will decline to award the relief to the Mayor for several reasons, First, the Plaintiff failed to include the request within the requests for relief contained within his Order to Show Cause. It is simply not a matter that is before the Court.

Secondly, N.J.S.A. 40A:5-4 specifically authorizes the "governing body" of each Municipality to employ a registered municipal accountant to prepare its audit. The governing body of Lopatcong Township consists of the "elected Council and the Mayor". N.J.S.A. 40:69A-116; N.J.S.A. 40:69-140. It does not, as the Mayor urges, consist of him alone.

The Small Municipality Plan specifically provides for mayoral approval with council advice and consent for "[a]n assessor, a tax collector, an attorney, a clerk, a treasurer and such other offices as may be provided for by ordinance." N.J.S.A. 40:69A-122. All of the appointed positions at issue in this matter are governed by N.J.S.A. 40:69A-122 or otherwise by general law, such as the Municipal Auditor under N.J.S.A. 40A:5-4.

In this case the governing body has acted on the Mayor's proposal to appoint Mr. Morrison. It was defeated. The Court will not interfere with that action in this Order to Show Cause since the Plaintiff has not demonstrated a likelihood of success on the issue.

ii) Mayor's Request for Relief Regarding the Municipal Clerk

With regards to the Municipal Clerk, Plaintiff's Brief does not address (with legal arguments) the issue at all. In his "Statement of Facts" the Plaintiff makes several references to the Township Clerk, Margaret Dilts.¹⁰ In his "Statement of Facts" the Plaintiff offers his views regarding her deficiencies and his opinion that

¹⁰ The Statement of Facts provided in Plaintiff's Brief is not a Statement of Material Facts containing citation to the record as required by R. 4:46-2(a).

she has not complied with her statutory duties. N.J.S.A. 40:69A-121 and 133 and N.J.S.A. 40:9-9.2(a). Plaintiff plainly acknowledges that there is a degree of animosity and distrust between these parties. Also, the Mayor's claims that the Clerk has failed to fulfill her duties are disputed facts that are unsupported by documents or the record – except for competing Certifications.

The counterstatement of facts provided by Township Clerk Margaret Dilts concerning the claims made against her indicates that the factual versions are sharply divergent. Clearly at this juncture, given the disparate claims, the Court is not able to discern with any degree of certainty that the Plaintiff will likely succeed on his claims regarding the Clerk. The issues are complicated by a separate pending Torts Claims Notice filed by the Clerk against the Mayor.¹¹ The factual versions concerning the issues relating to the Clerk are sharply disputed. It would clearly be inappropriate for the Court to address the issues by awarding immediate or injunctive relief, under the circumstances.¹² Also, the Court does not find that the Plaintiff has demonstrated any imminent harm that would necessitate Court interference at this early stage of the litigation. In fact, the Plaintiff thought so much of his claim for injunctive relief with regards to the Clerk that he did not address it at all in his brief.

Plaintiff's request to (1) compel the Municipal Clerk to comply with N.J.S.A. 40:69A-127 and N.J.S.A. 40:9-133; and (2) permanently restrain and enjoin the Clerk from interfering with the Mayor's duties is DENIED WITHOUT PREJUDICE.

iii) Mayor's Request for Relief Concerning his Authority with Regards to the Preparation of the Budget

With regards to the Mayor's request for the Court to confirm that he has power to prepare the budget pursuant to N.J.S.A. 40:69A-128, that section provides:

The mayor shall prepare the annual budget with the assistance of the treasurer and the co-operation of the other members of the council.

Again, that section speaks for itself. The Mayor can prepare a budget to present to the Council for consideration in accordance with that section. He can insist upon assistance from the Treasurer. The Members of the Council are obligated to provide cooperation. Their obligation to provide cooperation does not mean that they have to agree with the Mayor's budget or the process that he employs to prepare his budget. Nor does it mean that they are precluded from taking steps to prepare their own version of the budget.

Apparently the Mayor is distracted by his concern that the Council will not or has not acknowledged that he has designated a Finance Committee to either prepare or help him prepare the budget. He also complains that the Council has advised him, instead, that the Clerk and CFO will be preparing a separate budget at the direction of the Council.

¹¹ Inexplicably the Mayor omitted any reference to the Torts Claims Act filing or the Council's prior censure of the Mayor concerning issues related to the Clerk.

¹² Let alone Summary Judgment.

With respect to the budgetary, finance committee, and financial powers of the Mayor under N.J.S.A. 40:69A-123, -128, and -130, such powers clearly are not ministerial. Those sections require the cooperation of the Township Council where the parties are able to work together.¹³

Certainly the Council does not have to accept the budget that the Mayor prepares in accordance with his responsibilities. Given the dysfunctional relationship between the Mayor and Council, it is not unexpected that they would not see “eye to eye” on a proposed budget. Under the circumstances it is within their authority that the Council has taken affirmative steps to prepare their own budget in the event the Mayor fails to present one or if his proposed budget is not approved.¹⁴ Given the short statutory time line to prepare such a budget, the Court will certainly not interfere with their efforts. N.J.S.A. 40A:4-5.

The Court will acknowledge that N.J.S.A. 40:69A-128 reads in the manner which is set forth above. However, the Court will not enter any other immediate or injunctive relief concerning the budgetary issues as there is no call for the Court to do so at this time.

Certainly, the Court incorporates its prior reasoning and rulings with regards to the current issues that are before the Court. In its Order to Show Cause opinion, the Court made its rulings based upon the standard of review that the Plaintiff must demonstrate that he was likely to succeed on the merits of those issues. The Court found that he was not likely to succeed.

The analysis that must now be conducted by the Court is whether the Court should dismiss the Plaintiff’s Complaint on summary judgment. Brill v. Guardian Life Ins. Co., 142 N.J. 520, 530, *supra*.

VIII. COURT’S DECISION

A. Should the fact that Plaintiff waited many months in order to seek relief with respect to (1) the appointment of a Municipal Attorney, Labor Counsel, or Municipal Auditor and (2) specific municipal payments bar such claims from being considered under Rule 4:69-6?

Rule 4:69-6, entitled “Limitation on Bringing Certain Actions,” provides, in pertinent part, that: “[n]o action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right to the review, hearing or relief claimed . . .”. In addition, the Rule provides

¹³ However, the Mayor is not free to use his financial authority to withhold the payment of duly-authorized expenditures of the Township, where the issuance of authorized payments is a ministerial duty. There is no provision of any law or statute that authorizes the Mayor to withhold the payment of properly-authorized bills and expenses of the Township. (N.J.S.A. 40:69A-115 to -132; Lopatcong Township Code; Lopatcong Township Charter; Pryor Merits Brief Certification).

¹⁴ In fact, given the apparent conflict between the parties, it could be said that the Council’s anticipation that it may have to also prepare its own budget is a prudent step.

that “[t]he court may enlarge the period of time . . . where it is manifest that the interest of justice so requires.” Rule 4:69-6.

Defendants argue that this matter involves the late filing by Plaintiff of claims well over 45 days after their accruals based upon the conduct alleged. As a result, the Defendants request the issuance of an Order for Summary Judgment for those claims, or a portion of those claims, that are outside of the applicable time limits established by R. 4:69-6. For instance, the Defendant claims that (1) Plaintiff first expressed a desire to seek a change in the Municipal Attorney upon assuming office in January 2015 and encountered resistance from Defendants shortly thereafter; (2) Plaintiff attempted to seek an independent audit and/or change the Municipal Auditor going back into 2015 and, again, encountered resistance from Defendant shortly thereafter; (3) Plaintiff alleged objection with Defendant Dilts’ performance of her duties and lack of action by the Township Council going back into 2015; and (4) Plaintiff alleged problem with Defendants relating to the municipal budget and payments of expenses that go back into 2015. It is undisputed that Plaintiff filed this action on or about February 1, 2016.

The applicability of the limitation period of R. 4:69-6, as applied to the facts of this case, presents complex issues that, for the most part, need not be addressed by this Court. As a conceptual matter, each new governing body (along with the Mayor) is constituted as of January 1st of each year. As such, with regards to those municipal officials who are subject to annual appointment, the determination of the starting time for a Prerogative Writ action would begin anew each year with the formation of the new governing body.

Thus, with regards to the Municipal Attorney, Labor Counsel or Municipal Auditor positions, the fact that the Plaintiff did not raise issues concerning their appointment or reappointment in 2015 when the Plaintiff first took office, does not preclude the Plaintiff from raising the issue with the newly constituted governing body in January 2016. In other words, the commencement time for him to bring a Prerogative Writ action as to those claims or issues did not necessarily accrue in January 2015. For that reason, the Defendants’ argument is rejected and that Motion is denied, in part.

However, as to the Plaintiff’s claim that, for instance, the 2015 appointment of the Lavery Law Firm was improper or unauthorized so that he now seeks relief from the Court to invalidate their January 2015 appointment, and in so doing, have them refund the fees earned by them in

2015, that particular claim is untimely. The claim was not filed within 45 days of its accrual pursuant to R. 4:69A-6 and, thus, shall be stricken, with prejudice.

With regards to Plaintiff's claim regarding the appointment of a Municipal Attorney and whether it should be barred under Rule 4:69-6, the Defendants' brief claims that upon assuming the office of Mayor in January 2015, Plaintiff attempted to appoint a new Municipal Attorney and that the Council indicated a refusal to consent to any other choice of attorney as municipal attorney at a January 2015 Reorganization Meeting. However, Mr. Pryor's certification indicates that that the Plaintiff never nominated an attorney at the *January 2016* Reorganization Meeting. The Mayor does not dispute that assertion. Moreover, it appears Plaintiff further alleges that at a regular meeting of the Council on February 3, 2016, the Council did not provide advice and consent.

Therefore, any alleged action at the Reorganization Meeting in January 2015 should be time barred pursuant to the Rule. Further, the action of Council on February 3, 2016 at the regular meeting occurred after Plaintiff filed his Complaint on February 1, 2016. Therefore, any action that occurred at this meeting could not have possibly been pled by Plaintiff in his Complaint. Moreover, Plaintiff never moved to amend his Complaint. As such, any alleged claim by Plaintiff attempting to challenge the Defendants' actions on February 3, 2016 is not properly before the Court. Additionally, any attempt by Plaintiff to file an action regarding the February 3, 2016 meeting would clearly be time barred under Rule 4:69-6.

In regards to Plaintiff's claim concerning the appointment of the Municipal Auditor, Defendants' statement of facts indicates that, at a Reorganization Meeting on January 5, 2016, Plaintiff sought to employ Robert S. Morrison as Municipal Auditor, which was not approved by the Township Council. As such, Plaintiff filed his cause of action within 45 days after this alleged action by Defendants. However, it appears that in April 2015, the Township Council voted against Plaintiff seeking the commission of an independent audit. Plaintiff has not amended his Complaint to challenge that action. Any challenge to that alleged action by Defendants clearly should be barred as untimely and in violation of Rule 4:69-6.

In addition, Plaintiff certifies that his claims against Defendant Dilts arise from her failure to perform her duties back in 2015. For instance, Plaintiff's certification stated that: (1) "[t]he Mayor repeatedly since assuming office beginning in January 2015 and down through the present time has requested the clerk to provide the information mandated by the statute so that he could properly fulfill his power of appointment to various boards and commissions;" (2) "[t]he clerk,

whose total compensation at the end of 2014 was in excess of \$190,000, has deliberately refused to comply with the lawful request supplying instead “unofficial notations” and minutes which, in one instance show the same individual being appointed in 2011, 2012 and 2013 to 4 year terms on the Planning Board”; and (3) “[i]n January 2015 the clerk presented the Mayor with a document purporting to be the ‘official directory’ that was so fraught with errors that the attorney had to attempt to reconcile terms of office.” Certainly, Plaintiff’s claims against Defendant Dilts and the Council arising from their alleged failure to act with respect to the maintenance of official records in January 2015 and throughout 2015 must be barred as untimely under Rule 4:69-6. Again, Plaintiff did not file the instant cause of action until on or about February 1, 2016.

Lastly, concerning Plaintiff’s claims regarding the municipal budget and payments of expenses, Plaintiff certified that: (1) “[t]he Council has unlawfully authorized other individuals to sign checks in an effort to by-pass and usurp the Mayor’s statutory authority” and (2) “[i]n 2015 the Mayor did not authorize all purchase orders and/or sign all checks paid to Lavery or his law firm.” Essentially, Plaintiff claims that the alleged unauthorized expenditures should be void. Plaintiff fails to specify when these alleged checks/payments were issued. Nonetheless, any claim by Plaintiff that payments issued before December 17, 2015 should be barred under Rule 4:69-6 as untimely.

Notably, Plaintiff has failed to offer any reason or argument (in fact, Plaintiff’s Brief does not address the issue at all) as to why the Court should enlarge the period of time for Plaintiff to file his claims under Rule 4:69-6 or why the interests of justice require such an enlargement.

B. Are Defendants entitled to summary judgment on the issue relating to the payment of municipal expenses as a result of this Court’s previous finding that there is no authority for Plaintiff as Mayor to prevent the payment of lawfully-approved municipal bills?

Defendants argue that the payment of municipal expenses approved by the Township Council is a ministerial duty of the Mayor that, pursuant to law, must be done. Defendants further assert that, although Plaintiff has claimed the authority to sign checks in order to block the payment of expenses to which he disagrees or objects, the Court found that there is no authority for Plaintiff as Mayor to prevent the payment of lawfully-approved municipal bills. As such, it is Defendants’ position that this issue has been decided and Defendants are entitled to summary judgment.

Plaintiff has not offered opposition to Defendants’ argument requesting the Court to find that they are entitled to judgment as a matter of law as to this issue.

In the March 11, 2016 Opinion, this Court previously found (under footnote 16):

However, the Mayor is not free to use his financial authority to withhold the payment of duly-authorized expenditures of the Township, where the issuance of authorized payments is a ministerial duty. There is no provision of any law or statute that authorizes the Mayor to withhold the payment of properly-authorized bills and expenses of the Township. (N.J.S.A. 40:69A-115 to -132; Lopatcong Township Code; Lopatcong Township Charter; Pryor Merits Brief Certification).

This Court unequivocally found that Plaintiff, as Mayor, has no authority to withhold the payment of properly-authorized bills and expenses of the Township. Further, this Court expressly found that the issuance of these authorized payments is a ministerial duty only. There remains no genuine issue of material fact in regards to this issue. Although the Court believes that its pronouncement concerning that issue would have resolved the issue, apparently it has not.

The Plaintiff has provided a long winded, rambling response to all of the issues that the Defendants have raised in this Motion. The Plaintiff's argument in opposition the Defendant's position on this issue appears to be based upon his theory concerning the scope of executive authority in a Faulkner Act Municipality like Lopatcong. Plaintiff cites to the listing of executive (Mayor) duties as listed within N.J.S.A. 40:69A-39 and juxtaposes those duties against the legislative powers of the governing body as enumerated in N.J.S.A. 40:69A-120. Plaintiff also relies heavily upon his interpretation of N.J.S.A. 40:69A-121 which provides in part that "it should be [the Mayor's] duty to see that all laws and ordinances in force and effect with the municipality are observed." Plaintiff reads that Statute (in conjunction with the other statutes cited above) to conjure a convoluted, novel and legally unsupported theory of government that places himself in the sole and exclusive position of determining whether any service provider to the municipality gets paid.

For instance, the Plaintiff theorizes that since the Mayor, by his refusal to sign checks for duly approved Municipal bills, is vindicating the public's right to honest and transparent government, the Mayor must be able to spend the town's resources only in a manner that is necessary to carry out his sworn duty as he sees it.

With that premise, Plaintiff takes a leap of logic to advocate that he, and apparently only he, can determine who gets paid. Taken to its logical extreme, Plaintiff effectively claims that he can grind the government to a standstill if he disagrees with the payment of any authorized bill or

invoice by simply not paying it. Plaintiff's theory has, of course, provided him, in effect, with a veto power that the Legislature did not see fit to provide him. Plaintiff's persistence with this position indicates that Plaintiff has not heeded the Court's prior admonition that "he is the Mayor, not the King".

There is no support in the applicable Statutes or the case law to support the Plaintiff's position.

As the Court has already made a final ruling as to this issue, the Court reconfirms and finds that Defendants are entitled to judgment as a matter of law concerning the Plaintiff's ministerial duty to issue payment for these properly authorized bills and expenses. The Court orders that payment of those expenses are to be made and issued within 15 days from the date of this Order.

C. Are Defendants entitled to Summary Judgment as to Specific Appointments and Actions?

Plaintiff's relief is sought within this action "in lieu of Prerogative Writ". The source of much of Plaintiff's relief is in the form of "writ of mandamus" which enlists the Court to mandate certain governmental action that is required by law.

"[M]andamus lies to remedy official inaction where the right to be enforced or the duty to be performed is certain and specific." Gallena v. Scott, 11 N.J. 231, 238 (1953). This writ "is available only where there is a clear and definite right to the performance of a ministerial duty in essence mandatory and final and wholly free of the element of discretion ...". Id. at 238. Therefore, mandamus is an appropriate remedy to compel: (1) the performance of a ministerial duty; and (2) the exercise of discretion, but without specific manner. See Loigman v. Twp. Comm. of Middletown, 297 N.J. Super. 287, 299 (App. Div. 1997). A ministerial duty is a kind of duty that "is absolutely certain and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion." Ivy Hill Park Apartments v. N.J. Prop. Liab. Ins. Guar. Ass'n, 221 N.J. Super. 131, 140 (App. Div. 1987) (quoting Case v. Daniel C. McGuire, Inc., 53 N.J. Super. 494, 498 (Ch. Div. 1959), certif. denied, 110 N.J. 188 (1988)). Injunctive relief is an extraordinary equitable remedy that should be entered only with the exercise of great care and only upon a showing, by clear and convincing evidence, that the party is entitled to the relief. Dolan v. DeCapua, 16 N.J. 599, 614 (1954); Waste Management of N.J., Inc. v. Union County Utilities Auth., 399 N.J. Super. 508, 519 (App. Div. 2008); Mays v. Penza, 179 N.J. Super. 175, 179-180 (Law Div. 1980); see also R. 4:52-1. Injunction and mandamus are

inappropriate with respect to the performance of discretionary duties. See, e.g., Town of Montclair v. Kipp, 110 N.J. Eq. 506 (Ch. Div. 1932); Gallena v. Scott, 11 N.J. 231, 238 (1953).

A significant portion of the disputes in this matter involves the manner of governance of Lopatcong Township, a municipality organized under a Small Municipality Plan “A” of the Faulkner Act, a form of government that recognizes the separation of powers between a mayor and council, requiring advice and consent of the council for proposed discretionary mayoral actions. See N.J.S.A. 40:69A-115 to -132; see also In the Matter of Joel L. Shain, 92 N.J. 524 (1983); Court Opinion dated March 11, 2016 at 35-36. This form of local government has not been held to consist of a “strong mayor,” as under the Small Municipal Plan “A”, the mayor serves on (and as a member of) the council. 34 N.J. Prac., Local Government Law § 5.18 n. 2, Pane (4th ed. (updated 2015)); see also Matter of Fairfield Township, 240 N.J. Super. 83 (App. Div.), certif. denied 122 N.J. 315 (1990) (appointment of municipal judge resides with council); Baumann v. Municipal Council of Borough of West Paterson, 93 N.J. Super. 446 (App. Div. 1967); Borough of Highlands v. Davis, 124 N.J. Super. 217 (Law Div. 1973).

This Court previously found that the Plaintiff has not been able to demonstrate, nor the Court been able to find, the threat of any harm that would justify the issuance of injunctive relief. The Certifications of Township Council President Joseph Pryor and Councilwoman Maureen McCabe establish that Council Defendants have acted within the scope of their discretionary duties as duly-elected members of the Township Council, including that appointments by the Mayor are not confirmed without the advice and consent of the Council. The same principles apply with respect to the budget, all of which were affirmed by the Court. (Certifications of Defendant Pryor February 2016 ¶¶ 5-15, March 2016 ¶¶ 5-16; Certification of Defendant McCabe ¶¶ 5-11; Council Defendants’ Statement of Material Facts ¶¶ 24-46, 62-69, 77-78; Court Opinion at 38-49). In all of these instances, the Plaintiff’s positions would have the practical effect of rendering the Township Council a “rubber stamp” on the decisions of the Mayor. (Certifications of Defendant Pryor February 2016 ¶¶ 5-15, March 2016 ¶¶ 5-16; Certification of Defendant McCabe ¶¶ 5-11; Council Defendants’ Statement of Material Facts ¶¶ 24-46, 62-69, 77-78).

Plaintiff has not demonstrated any interference by the Township Council with respect to the Plaintiff’s authority as the Mayor. Clearly, there are disagreements between the parties concerning how the Town should be managed. Municipal governments are designed to function with those kind of disagreements. In fact, such circumstances are not unusual or unexpected.

Notwithstanding these differences of opinions however, the Plaintiff has not presented claims that could be determined by any reasonable factfinder to be an interference with the powers and duties of his elected office that warrant relief – particularly the relief that he has requested.

(i) As to the Appointment of the Municipal Attorney

The Defendants' counsel argues that they are entitled to Summary Judgment with respect to the appointment of the Municipal Attorney. The law is clear that every municipality in New Jersey must employ a Municipal Attorney. See N.J.S.A. 40A:9-139 and Loigman v. Township Committee of Township of Middletown, 409 N.J. Super. 1 (App. Div. 2009). Small Municipality Plan governments require that an "... attorney ... shall be appointed by the Mayor with the advice and consent of the Council." N.J.S.A. 40:69A-122; see also N.J.S.A. 40:69A-121. Indeed, Lopatcong Township, which operates under the Faulkner Act as a Small Municipality, N.J.S.A. 40:69A-115 et seq., provides many examples where the appointment of offices by the mayor take effect only upon the advice and consent of the council of the governing body. See N.J.S.A. 40:69A-120 et seq.

Similarly, the law is also clear that until a successor is appointed, unless otherwise provided, the preexisting officeholder serves in a holdover capacity, a critical component for positions that statutorily require occupancy, as demonstrated by the Court's recognition of this dynamic with respect to the position of Municipal Attorney. See Woodhull v. Manahan, 85 N.J. Super. 157 (App. Div. 1964); see also Levine v. Mayor of City of Passaic, 233 N.J. Super. 559 (Law Div. 1988); N.J.S.A. 40A:9-139; see also Loigman v. Township Committee of Township of Middletown, 409 N.J. Super. 1 (App. Div. 2009). All such controlling authority was recognized by this Court at both hearings before the Court in February and March 2016 and in its prior opinion. (Court Order dated February 8, 2016; Court Order and Opinion dated March 11, 2016).

With regards to the appointment of the Municipal Attorney, the Court found that:

The Court finds that Plaintiff's position is based upon an over-simplified and unsupported legal theory that is also based upon a misreading of the applicable law. Plaintiff adopts a hyper-literal interpretation of the statutes that supports his theory that he has the authority as the Executive (Mayor) to make certain "executive decisions" without input from the Township Council, and even against their will. The Mayor reads the grant of Executive Power vested by N.J.S.A. 40:69A-121 to be clear, absolute and unchecked. It is that general grant of authority, along with the enumerated powers under N.J.S.A. 40:69A-39 that form the basis of his theory that he can (unchecked) take the positions that he has in this case.

As indicated, this matter involves a municipality organized under a Small Municipal Plan of the Faulkner Act, a form of government that recognizes the separation of powers between a mayor and council. Under the Small Municipal Plan, “advice and consent” of the Council is required for Mayoral appointments to be validated. Such is the case despite the direct election of the mayor and appointment powers, where this form of local government has not been held to consist of a “strong mayor”. 34 *N.J. Prac. Local Government Law* §5.18 n. 2, Pane (4th Ed. (updated 2015)); see also *Matter of Fairfield Township*, 240 N.J. Super. 83 (App. Div.), cert. den. 122 N.J. 315 (1990) (appointment of municipal judge resides with council); *Baumann v. Municipal Council of Borough of West Paterson*, 93 N.J. Super. 446 (App. Div. 1967).

Plaintiff’s position can be characterized as either (1) he as the power to act without regard for the Council’s opinion; or (2) that the Council should be required to accept, or even vote in favor of his appointments since he is the Mayor. Plaintiff’s position ignores or perverts for his own ends the principles of separation of powers as well as the significance and ramifications of the “advice and consent” provisions of the law. Our Supreme Court held *In the Matter of Joel L. Shain*, supra. at 536-536 that Mayor Shain’s theory concerning the doctrine of “separation of powers” was not strictly applicable to a Faulkner Act municipal government.

Plaintiff effectively interprets his powers and N.J.S.A. 40:69A-121 to provide him with dictatorial powers. He is the Mayor. Not the king. He must abide by the form of government adopted in Lopatcong (Small Municipality Plan A) which recognizes that the electorate determines who holds the elected offices of the Mayor and the Council. The Municipality is governed by the elected Council and the Mayor. N.J.S.A. 40:69A-116. The Mayor and the Council must work together to appoint necessary officials and run the government together. The Mayor is effectively a co-member of the Council even though he is also the person who is charged with administrative and executive duties. Even though he is charged with “enforcing the law”, that authority does not give him the power to make the law by himself or decide what the law is. N.J.S.A. 40:69A-121. His power to appoint a Municipal Attorney is checked, or limited by, the requirement that his appointment must be based upon advice and consent of the Council. N.J.S.A. 40:69A-122.

The position of a Municipal Attorney, which is required for all Municipalities in New Jersey pursuant to N.J.S.A. 40A:9-139 and *Loigman v. Township Committee of Township of Middletown*, 409 N.J. Super. 1 (App. Div. 2009), for Small Municipal Plan A governments, requires that “... an attorney ... shall be appointed by the Mayor with the advice and consent of Council.” N.J.S.A. 40:69A-122. Plaintiff’s reliance on N.J.S.A. 40:69A-122, which provides that, “[a]ll officers and employees whose appointment or election is not otherwise provided for in this article or by general law shall be appointed by the Mayor” is incorrect since the appointment of municipal attorneys is separately addressed for municipalities organized such as Lopatcong Township. This Court is not empowered with authority to require the Township Council to use their “discretionary power” of providing their “advice and consent”. As a result, Plaintiff’s request for relief concerning the status of the Municipal Attorney is not appropriate for consideration as injunctive relief.

Similarly, the law is also clear that until a successor is appointed, unless otherwise provided, the preexisting officeholder serves in a holdover capacity. See *Woodhull v. Manahan*, 85 N.J. Super. 157 (App. Div. 1964) (under different form of government, council right to appoint municipal attorney was properly vetoed by mayor, resulting in previous municipal attorney serving in holdover capacity); see also *Levine v. Mayor of City of Passaic*, 233 N.J. Super. 559 (Law Div. 1988) (date of new term for holdover municipal judge commenced upon date of subsequent reappointment approximately two (2) years later); but see *Casamasino v. City of Jersey City*, 158 N.J. 333, 351-353 (holdover not allowed for tax assessor position based on tenure where limited holdover provision was eliminated by change in governing law)¹⁵; *Baumann v. Mayor and Council of West Paterson*, supra. (where the court recognized that in a newly constituted Faulkner Act municipality, the council could not claim holdover status for a Municipal Attorney from the previous [abolished] form of government since the applicable statute recognized that the officers in the prior form of government could remain no longer than 30 days) (emphasis added).

It should be noted that Lavery and his Law Firm have, in the past, achieved a “perfected” appointment as the Township Attorney. By so doing, they passed the hurdle of appointment as it appears that (many times) they were nominated by the (then) Mayor and obtained consent from the duly elected Council. Lavery and his Law Firm remain in that position until a new attorney is appointed and the “advice and consent” of the Council is achieved. By requiring that a newly appointed attorney must obtain “advice and consent” of the Council, the Legislature has effectively authorized the current duly appointed attorney to act in a holdover capacity until “consent” can be achieved.

Notably, Mr. Caldwell, the Mayor’s choice, has never achieved consent from the Lopatcong Council. To adopt the Plaintiff’s position would effectively create authority in the Mayor to override the Council and appoint his choice without regard to whether he ever obtained consent. The “advice and consent” criteria would be effectively avoided and rendered a nullity under Plaintiff’s theory. Mr. Caldwell would be the “de facto” attorney even if he never obtains consent from the elected Council Members as he would presumably hold over and hold that position for the remainder of the Mayor’s term or terms in office, even though the Council never provided their approval. Such a result cannot be countenanced as it would emasculate the very meaning and purpose of the “advice and consent” provision. The Township Attorney is the attorney for the Mayor and the Council in their capacity as the Township’s governing body. The appointment is not to be made by the Mayor alone, without regard to the Council’s rights and authority.

¹⁵ Plaintiff miscites *Casamasino* for the overly broad proposition that holdover municipal attorneys are not permitted. The decision narrowly provides that a tax assessor may not achieve tenure status as a hold over. The *Casamasino* case is limited to the facts of the appointment of a tax assessor and is not precedential for the proposition which the Plaintiff seeks to apply to Municipal Attorneys.

For those reasons the Court finds that the Plaintiff has not demonstrated a clear likelihood that he will succeed on his claim with regards to Lavery and his Law Firm.

As such, the Court will order that Plaintiff's requests in his Order to Show Cause to:

- a. permanently restraining and enjoining Michael B. Lavery and his law firm from holding over or acting as Municipal Attorney;
- b. compelling Lavery and his law firm to return all files to the Township;
- c. compelling Lavery and his law firm to execute Substitutions of Attorney;
- d. compelling Lavery and his law firm to return all fees paid in 2015;
- e. compelling member of Council to reimburse the Township for fees paid in 2015.

are DENIED as there is no basis to enter interim, immediate and extraordinary relief concerning those requests.

Effectively, this Court has found and determined that Defendants Lavery and Law Firm were properly appointed and properly serving Lopatcong Township as Municipal Attorney and in a holdover capacity since Plaintiff did not appoint them to a new term beginning in 2015. The Court also found that Plaintiff did not have the power to unilaterally appoint William J. Caldwell, Esq., in an interim capacity as Municipal Attorney.

With regards to this issue, notwithstanding that status, the Plaintiff's Brief seems to rehash many of the same positions and legal theories concerning why he believes that he should be able to appoint his own counsel, regardless of whether the governing body provides its advice and consent.

For instance, the Plaintiff claims that he should be able to appoint his own counsel, apparently Mr. Caldwell who is acting as his counsel in this application, because otherwise the governing body could simply never provide its consent thereby retaining the Lavery Firm as a holdover for an indefinite term. Plaintiff's argument does not acknowledge, of course, that if Plaintiff were afforded that same right to appoint Mr. Caldwell, over the governing body's objection, that he would maintain that position indefinitely even though he never achieved consent from the governing body. As previously pointed out by the Court, the Lavery Firm has achieved its position by receiving past Mayoral appointments that were consented to by the governing body.

Even though the Court's prior rulings were in the context of Plaintiff's request for injunctive relief, that issue has, in the Court's view, been decided as a matter of law. As such, the Court will **GRANT** Summary Judgment in favor of the Defendants as to the issue concerning the appointment of the Lavery Firm as Municipal Counsel.

The Court notes that the Plaintiff has raised arguments that the Lavery Firm should be disqualified because they contributed money to a failed recall campaign against the Plaintiff. Plaintiff raises the issue without any citation to the law or recognition of whether the individuals who may have contributed money (if they did) have a constitutional right to do so.

In any event, this issue has never been pled by the Plaintiff, and as such, it is not an issue that is before the Court in this case or in this Motion.

(ii) As to Labor Counsel

With regards to the appointment of Labor Counsel, this Court previously found that:

Similarly, with regards to the Plaintiff's position concerning the appointment of Labor Counsel, the result is the same. The position of "Labor Counsel" is not a statutorily created position. In fact, the position is not statutorily defined, although it appears to be a subset or subordinate position to that of the Municipal Attorney. Nor has the position been created or recognized by any applicable Lopatcong Township Ordinance. Thus, there is no position to fill and the Council can properly reject it.

The Mayor advocates that he should be able to create the position and to appoint his own specialized Labor Counsel as he has lost confidence in the current counsel and that, as the Mayor, he should be able to create the position and appoint his own choice. He offers no authority for that proposition.

If the Mayor's position were adopted and then taken to its logical extreme, the Mayor could appoint multiple "specialized attorneys" which could effectively undermine the position of Township Attorney by substituting specialized lawyers to perform most, or even all, of the Township Attorney's duties. Such a result would circumvent the Council's power to advise and consent in an impermissible and illogical manner.

Plaintiff's request to have the Court restrain the Council from ignoring his appointment of Labor Counsel, on an immediate and emergent basis, is **DENIED** as the Court finds that the Plaintiff is unlikely to succeed on the advancement of that position.

Even though the Court's decision was in the context of Plaintiff's Order to Show Cause for injunctive relief, the Court finds that there are no disputes as to any material facts concerning the issue so that the Court's ruling is effectively made as a matter of law.

As such, the Defendant's Motion for Summary Judgment as to the Labor Counsel issue is **GRANTED**.

(iii) As to the Appointment of Municipal Auditor

With respect to the appointment of the Municipal Auditor, this Court previously found that:

Plaintiff contends that N.J.S.A. 40:69A-124 authorizes his action to appoint an Auditor for the Municipality. Apparently in this case the Mayor sought to appoint his own choice as the Auditor. The matter was put to a vote and his choice was rejected by a 3-2 vote.

N.J.S.A. 40:69A-124 provides:

All officers and employees whose appointment or election is not otherwise provided for in this article [40:69A-115 to 40:69A-132] or by general law shall be appointed by the mayor. If the municipality has not adopted the provisions of Title 11 of the Revised Statutes (Civil Service), it shall be the duty of the mayor to recruit, select and appoint persons qualified by training and experience for their respective offices, positions and employments.

In his Brief, Plaintiff addresses three specific appointments including the Township Attorney and Labor Counsel (which have been addressed above) and appointment of a Township auditor. Notably the Mayor's request for the Court to address the issue concerning the Township Auditor was not requested within the relief requested in his Order to Show Cause.

Plaintiff indicates that in April 2015 he sought to have the Council have an independent audit but the Council refused to approve his request. The Mayor claims that he has "lost faith" in the current auditor and thus he now seeks to employ Robert S. Morrison, a registered municipal accountant, as the Municipal Auditor. He offered Mr. Morrison's name at the reorganization meeting in January 2016 but the Council rejected his proposal. The Mayor voted with the minority in the 3-2 rejection.

Plaintiff requests that the Court acknowledge that by virtue of the Mayor's power of appointment pursuant to N.J.S.A. 40:69A-124 that he alone has the right to appoint the auditor. Effectively he asks that the Court override the Governing Body's 3-2 rejection of his choice as Township Auditor.

The Court will decline to award the relief to the Mayor for several reasons, First, the Plaintiff failed to include the request within the requests for relief contained within his Order to Show Cause. It is simply not a matter that is before the Court.

Secondly, N.J.S.A. 40A:5-4 specifically authorizes the “governing body” of each Municipality to employ a registered municipal accountant to prepare its audit. The governing body of Lopatcong Township consists of the “elected Council and the Mayor”. N.J.S.A. 40:69A-116; N.J.S.A. 40:69-140. It does not, as the Mayor urges, consist of him alone.

The Small Municipality Plan specifically provides for mayoral approval with council advice and consent for “[a]n assessor, a tax collector, an attorney, a clerk, a treasurer and such other offices as may be provided for by ordinance.” N.J.S.A. 40:69A-122. All of the appointed positions at issue in this matter are governed by N.J.S.A. 40:69A-122 or otherwise by general law, such as the Municipal Auditor under N.J.S.A. 40A:5-4.

In this case the governing body has acted on the Mayor’s proposal to appoint Mr. Morrison. It was defeated. The Court will not interfere with that action in this Order to Show Cause since the Plaintiff has not demonstrated a likelihood of success on the issue.

The material facts that surround the appointment of the Municipal Auditor are undisputed. The only dispute concerning this issue, and other appointment issues, involves Plaintiff’s novel, but unsupported, theory concerning his power and authority as the Mayor.

Even though the Court’s previous decision was in the context of Plaintiff’s Order to Show Cause, the Court considers the matter to be decided as a matter of law as to the Municipal Auditor issue.

(iv) As to the Municipal Clerk’s Duties Regarding Directory and Official Records

Council Defendants claim that they are entitled to summary judgment with respect to Defendant Dilts’ performance of her duties, as Municipal Clerk, as they relate to the maintenance of an official directory and of official records, as well as the supervision of such duties set forth under N.J.S.A. 40:69A-127, -133, and 40A:9-9.2. Defendants argue that these matters relate to Defendant Dilts’ pending Tort Claims Notice and/or lawsuit against the Mayor making injunctive relief against the Council Defendants wholly inappropriate.

Clearly, the Plaintiff and Defendant Dilts have conflicting accounts of the relevant facts given animosity between the parties that resulted in Defendant Dilts’ filing of a Tort Claims Notice against Plaintiff and the Township Council’s October 2015 censure of Plaintiff. (Council Defendants’ Statement of Material Facts ¶¶ 47-61; Certification of Plaintiff ¶¶ 22-43; Certification of Defendant Dilts ¶¶ 13-15, 22-56). However, Plaintiff’s claims do not include any assertions that Plaintiff sought to make use of administrative remedies prior to instituting suit. (Council

Defendants' Statement of Material Facts ¶ 59; Certification of Plaintiff ¶¶ 22-43). Notably, Plaintiff has pointed out that Lopatcong Township is a civil service jurisdiction, meaning that the provisions and procedural protections of the Civil Service Act under Title 11A apply. See, e.g., N.J.S.A. 11A:1-1 et seq., 11A:2-1 et seq., and 11A:9-1 et seq. (Council Defendants' Statement of Material Facts ¶ 11; Certification of Plaintiff ¶ 11). While Council Defendants have denied Plaintiff's assertions that he gave proper notice to Council Defendants with respect to Defendant Dilts' duties (Council Defendants' Statement of Material Facts ¶¶ 52, 57; Certification of Defendant Pryor March 2016 ¶¶ 12-13), that factual dispute does not change the fact that Plaintiff has not established any harm by the Council Defendants. In fact, this Court has previously found no harm to the Plaintiff or his exercise of executive authority as Mayor by the Council Defendants in any way, including with respect to the duties performed by Defendant Dilts. (Council Defendants' Statement of Material Facts ¶ 61; Court Opinion at 46).

In this case, the relief requested by the Plaintiff against the Council Defendants as to this issue is purely for injunctive relief. As injunctive relief has been previously DENIED by the Court as to this issue, Plaintiff's claims against the Council Defendants must be dismissed as a matter of law.

For these reasons, the Council Defendants' Motion for Summary Judgment as to these claims is **GRANTED**.

(v) As to the Finance Committee, Municipal Budget and Municipal Expenses

Previously, the Court addressed the issue of the Municipal Finance Committee and Municipal Budget by holding as follows:

With regards to the Mayor's request for the Court to confirm that he has power to prepare the budget pursuant to N.J.S.A. 40:69A-128, that section provides:

The mayor shall prepare the annual budget with the assistance of the treasurer and the co-operation of the other members of the council.

Again, that section speaks for itself. The Mayor can prepare a budget to present to the Council for consideration in accordance with that section. He can insist upon assistance from the Treasurer. The Members of the Council are obligated to provide cooperation. Their obligation to provide cooperation does not mean that they have to agree with the Mayor's budget or the process that he employs to prepare his budget. Nor does it mean that they are precluded from taking steps to prepare their own version of the budget.

Apparently the Mayor is distracted by his concern that the Council will not or has not acknowledged that he has designated a Finance Committee to either prepare or help him prepare the budget. He also complains that the Council has advised him, instead, that the Clerk and CFO will be preparing a separate budget at the direction of the Council.

With respect to the budgetary, finance committee, and financial powers of the Mayor under N.J.S.A. 40:69A-123, -128, and -130, such powers clearly are not ministerial. Those sections require the cooperation of the Township Council where the parties are able to work together.¹⁶

Certainly the Council does not have to accept the budget that the Mayor prepares in accordance with his responsibilities. Given the dysfunctional relationship between the Mayor and Council, it is not unexpected that they would not see “eye to eye” on a proposed budget. Under the circumstances it is within their authority that the Council has taken affirmative steps to prepare their own budget in the event the Mayor fails to present one or if his proposed budget is not approved.¹⁷ Given the short statutory time line to prepare such a budget, the Court will certainly not interfere with their efforts. N.J.S.A. 40A:4-5.

The Court will acknowledge that N.J.S.A. 40:69A-128 reads in the manner which is set forth above. However, the Court will not enter any other immediate or injunctive relief concerning the budgetary issues as there is no call for the Court to do so at this time.

Even though the Court’s ruling was in the context of Plaintiff’s Order to Show Cause for injunctive relief, it appears that there are no factual disputes that prevent the Court from issuing its ruling as an Order for Summary Judgment as to Plaintiff’s claim. Clearly, the relationship between the Mayor and Council is dysfunctional. Given that the budget is a matter that requires some degree of cooperation and participation from both sides, the Court issued its ruling.

The Plaintiff has not moved for any relief concerning the status of the Municipal Budget or with regards to the direction previously provided by the Court. In fact, the Court has not been provided with any facts concerning the budget and its status.

¹⁶ However, the Mayor is not free to use his financial authority to withhold the payment of duly-authorized expenditures of the Township, where the issuance of authorized payments is a ministerial duty. There is no provision of any law or statute that authorizes the Mayor to withhold the payment of properly-authorized bills and expenses of the Township. (N.J.S.A. 40:69A-115 to -132; Lopatcong Township Code; Lopatcong Township Charter; Pryor Merits Brief Certification).

¹⁷ In fact, given the apparent conflict between the parties, it could be said that the Council’s anticipation that it may have to also prepare its own budget is a prudent step.

In Plaintiff's Brief, he again provides a rambling styled argument concerning his "theory" of budgeting and governmental spending. Plaintiff theorizes that:

In order to prevent the governing from mis-spending or over-spending the Mayor's budget actual payment by municipal check "must be signed only by the Mayor and Treasurer upon warrant of the finance committee" (N.J.S.A. 40:69A-130) which as cited above is appointed by the Mayor. Any other payment process, even if approved by the governing by resolution or ordinance, would be void.

The Court has opined in this opinion, and in its previous opinion, that the Plaintiff's theory of the structure of Municipal Government is misplaced. Of course, once the Township passes the budget, it becomes the Municipal Budget which provides a check on municipal spending as provided in the applicable Statutes. It is no longer the "Mayor's Budget" as the Plaintiff seems to infer.

Also, the Plaintiff appears to vault the authority given by him to sign checks under N.J.S.A. 40:69A-130 to be an implied veto power that allows him to decide which bills are paid, even if payment was approved by the governing body. Again, as the Court has previously noted earlier in this opinion, the Plaintiff's self-serving reading of the applicable Statutes is erroneous. The dual signature requirement (the Mayor and the Treasurer) is clearly devised to prevent fraud or embezzlement. It does not mean that the Mayor or the Treasurer can refuse to sign a bill authorized for payment because either of them disagree with the expenditure. Once the Governing Body (of which the Mayor is a voting member) approves a bill for payment, it is the Mayor's ministerial duty to sign the check for payment along with the Treasurer.

Although the Plaintiff raises the issue of possibly "overspending the budget" as a reason for him withholding his signature, there are no facts to indicate that is the situation in this case. Certainly, a Municipality cannot spend money that it does not have, but that concept cannot be used by the Plaintiff to decide to withhold payment of duly authorized bills that can be paid for with appropriated funds.

The Court notes that even though the Plaintiff has again raised this issue in his papers, there is no issue before the Court at this time as the issue was not raised in the Defendants' Motion -- which is the only Motion before the Court.

For those reasons, the Court finds that there are no genuine issues of material facts that affect the Court's ability to issue its declaration concerning these issues as a matter of law. For the

reasons expressed in this opinion, the Defendants' Motion for Summary Judgment as to this issue is **GRANTED**.

IX. CONCLUSION

For the reasons set forth in this opinion, the Defendants' Motions for Summary Judgment is **GRANTED** to the extent provided in the Court's opinion.