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Atlantic City Emergency Manager Powers and Pre-Conditions for Filing Municipal Bankruptcy: Fox Rothschild

On January 22, 2015, New Jersey Governor Chris Christie issued Executive Order No. 171 through which he appointed an Emergency Manager for the City of Atlantic City. Drastic as this measure may seem, the Executive Order only grants the Emergency Manager the limited powers to analyze and assess Atlantic City's financial condition, recommend a plan to the governor within 60 days, negotiate with affected parties and consult with all stakeholders. The Emergency Manager is not empowered to directly run the city or make any unilateral decisions regarding Atlantic City's financial condition.

This alert outlines the powers granted to the Emergency Manager in the Executive Order, offers a brief summary of the statutes and other documents cited within and briefly discusses the pre-conditions necessary for a New Jersey municipal bankruptcy filing.

Emergency Manager Powers

The Executive Order grants the Emergency Manager the authority to perform three main tasks:

1. Analyze and assess the financial condition of Atlantic City;
2. Prepare and recommend, within 60 days of appointment, a plan to place the finances of Atlantic City in a stable condition on a long-term basis by any and all lawful means, including the restricting of municipal operations and the adjustment of the debts of Atlantic City pursuant to law; and
3. Negotiate with parties affected by the recommended plan for an adjustment of Atlantic City's debts and the restructuring of its municipal operations and, in [the Emergency Manager's] discretion, to recommend modifications of the plan as a result of such negotiations.

Executive Order No. 171 (January 22, 2015).

In support of these tasks, the Emergency Manager is granted wide discretion to consult with any and all parties necessary to secure the long-term financial stability of Atlantic City (i.e., the mayor and council of Atlantic City, creditors, representatives of bondholders, collective bargaining representatives, etc.). *Id.* And, the Emergency Manager is granted unlimited access to "all financial and other information, documents, and records of, or pertaining to Atlantic City." *Id.*

The Executive Order does not grant the Emergency Manager the power to make any unilateral decisions, despite his significant authority to investigate and assess Atlantic City's financial condition. Nor does the text of the Executive Order indicate that any power has been taken away from the mayor or city council. Thus, the mayor and city council remain in control of the city. The power to act on the Emergency Manager's recommendations is expressly reserved in the Executive Order for Governor Christie. The specific language of the Executive Order makes this undeniable, stating, "[p]ending receipt of recommendations from the Emergency Manager, I reserve the right to take such additional actions, invoke such emergency powers and issue such emergency order or directives as may be necessary..." *Id.* Accordingly, the Emergency Manager is limited to assessing,

recommending, negotiating and consulting.

The Emergency Manager's powers should not be trivialized, even though they are less than the total control granted to the recent Detroit Emergency Manager. The Executive Order expressly permits the Emergency Manager to make **any** lawful recommendations he sees fit, no matter how drastic, in stabilizing Atlantic City's finances. *Id.* This includes recommending the restructuring of municipal operations and the adjustments of the debts of Atlantic City. *Id.* Although they may just be recommendations for now, it is likely that some, if not all of them, will be implemented in the future.

Statutes and Documents Cited in the Executive Order

There are four main citations referenced in the Executive Order.

The Local Government Supervision Act, N.J.S.A. 52:27BB-54 et seq.

The act permits the state to appoint a Fiscal Control Officer to oversee and supervise the finances of a municipality in unsound financial condition, of which Atlantic City has been subject to since September 2010. Under this law, the Local Finance Board has the authority to approve all expenditures and any incurrence of debt.

Local Finance Board Resolution of September 10, 2014.

The Local Government Supervision Act requires the Local Finance Board to vote annually for the continuation of oversight and supervision of a city, otherwise the oversight automatically expires. This resolution was simply the most recent vote by the Local Finance Board extending its supervision over Atlantic City for another year.

Executive Order No. 11. Executive Order 11, issued February 3, 2010.

This Executive Order by Governor Christie created the New Jersey Gaming, Sports and Entertainment Advisory Commission. The Advisory Commission "is charged with developing recommendations for the governor for a comprehensive, statewide approach regarding the issues and financial needs of New Jersey's gaming, professional sports and entertainment industries and making proposals for the implementation of its recommendations." Exec. Order No. 11 (Feb. 3, 2010).

The Advisory Commission's November 12, 2014, report.

Among a number of financial problems and recommended solutions, this report suggested that an Emergency Manager be appointed immediately with "extraordinary supervisory powers" under the act. The report also notes that to appoint an Emergency Manager, legislative action may be required to augment the existing statute.

Thus, no statute cited in the Executive Order specifically authorizes the appointment of an Emergency Manager.

Pre-Conditions to New Jersey Municipal Bankruptcy

While the Emergency Manager has said that it is too early to discuss bankruptcy, his background in restructurings and the appointment as his special counsel of the former bankruptcy lawyer who shepherded Detroit through its bankruptcy, has led to speculation that this alternative is clearly on the table. New Jersey municipalities cannot file for bankruptcy under the United States Bankruptcy Code without state approval. Section 109 of the code, titled, "Who may be a debtor," provides that a municipality must be specifically authorized to be a debtor by state law. 11 U.S.C. § 109(c).

New Jersey state law requires the state Municipal Finance Commission to approve the filing of a petition, as well as any plan of readjustment, prior to a municipality filing a petition in bankruptcy

court. N.J.S.A. 52:27-40.

A petition to file for bankruptcy must also be authorized by an ordinance of the governing body of the municipality. N.J.S.A. 52:27-41. The governing body must adopt this ordinance by an affirmative vote of not less than two-thirds of the governing body's elected members. *Id.* After the ordinance is adopted, the municipality must submit the petition (and a plan of readjustment, if there is one) to the commission for approval. Ultimately, the commission possesses the discretion to approve any petition for bankruptcy or plan of readjustment. N.J.S.A. 52:27-43.

In the past 75+ years, only two New Jersey municipalities have even attempted to file for bankruptcy protection: the City of Asbury Park in 1936 and more recently the City of Camden in 1999.¹ This is most likely the result of "New Jersey [having] one of the most significant set of laws, budgetary tools and state oversight programs, including aid funds from the state, to monitor local government finance...."² The Division of Local Government Services in the Department of Community Affairs and its Local Finance Board serve as a constant check over the financial health of municipalities. There are numerous red flags under state law that identify when a municipality is experiencing financial difficulty, specifically designed to avoid a full-fledged bankruptcy. See N.J.S.A. 52:27-1 et seq. If any of the red flags are signaled, the state is empowered to step in and assume either partial or full supervisory control over a municipality's finances until stabilization.

Conclusion

The Executive Order primarily empowers the Emergency Manager to assess Atlantic City's financial condition while ultimately recommending solutions for long-term economic stability. Despite not possessing any actual "power" to take action, the Emergency Manager certainly has an abundant amount of influential "power" in shaping Atlantic City's economic future. For now, only Governor Christie can act on the Emergency Manager's recommendations while the mayor and city council remain in control of Atlantic City.

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¹ Shortly after the City of Camden filed for bankruptcy protection, the state sought to dismiss its bankruptcy petition because it had not received state approval prior to filing. Within days of filing the petition, Camden withdrew its bankruptcy petition in exchange for \$62.5 million in immediate state aid.

² Richard Keevey, *New Jersey's Laws and Fiscal Safeguards Make Municipal Bankruptcy Unlikely*, NJ Spotlight, Oct. 28, 2013, at 2.