

**Pennington Borough Council
Special Meeting – September 19, 2012**

Mayor Persichilli called the Special Meeting of the Borough Council to order at 5:00 pm. Borough Clerk Betty Sterling called the roll with Council Members Dunn, Griffiths, Heinzl, Ogren, and Tucker in attendance.

Also present was Borough Attorney, Walter Bliss.

Mayor Persichilli announced that notice of this meeting has been given to the Hopewell Valley News, The Times of Trenton and The Trentonian and was posted on the bulletin board in Borough Hall and on the Borough web-site according to the regulations of the Open Public Meetings Act.

Mayor Persichilli invited everyone to stand for the Flag Salute.

Open to the Public – Agenda Items Only

Mayor Persichilli read the following statement:

Meeting open to the public for comments on items on the agenda for which no public discussion is provided. In an effort to provide everyone interested an opportunity to address his or her comments to the Governing Body, a public comment time limit has been instituted for each speaker. **Please come forward and state your name and address for the record. Please limit comments to the Governing Body to a maximum of 3 minutes.**

There were no comments from the public.

Candidates to Fill Vacancy on Council

Mayor Persichilli announced that the Democratic Committee has presented three names for consideration to fill the vacancy on council and they are:

- Mary Anne Heino
- Meaghan Cannon Keogh
- Art Firestone

Mayor Persichilli stated that in the past, Borough Council has interviewed candidates however he would like Mrs. Heinzl to comment on the process to fill this vacancy. Mrs. Heinzl stated that the process when a vacancy on council occurs is that the committee for the party selects three people that are submitted to the governing body and the governing body then selects one of those candidates to fill the vacancy. Mrs. Heinzl stated that in this situation, the Democratic Committee is charged with selecting who the candidate will be that will appear on the ballot and that selection had to be made by last Wednesday. Mrs. Heinzl stated that the committee did meet and selected Mary Anne Heino to be the candidate to appear on the ballot for the unexpired term. Mrs. Heinzl stated that Council's job is to fill the vacancy from now until when the election occurs on November 6th. Council Member Tucker made a motion to endorse and move the appointment of Mary Anne Heino to fill the vacancy on Council created by the resignation of Alyce McClurg-Doldy, second by Council Member Heinzl. Upon a roll call vote, all members present voted in favor of the appointment.

Mayor Persichilli asked Mrs. Heinzl to clarify for Council what names will be on the ballot in November. Mrs. Heinzl stated that there are three seats for Pennington Borough, two for three year terms which will be Eileen Heinzl and Dina Dunn and one for the unexpired term which will be Mary Ann Heino.

New Business

**BOROUGH OF PENNINGTON
RESOLUTION 2012-9.8**

**RESOLUTION AUTHORIZING EXECUTION OF AGREEMENT AND DISBURSEMENT OF
REQUIRED ESCROW PAYMENT PURSUANT TO ADR PROCESS ORDER IN
ENVIRONMENTAL LITIGATION BROUGHT AGAINST THE BOROUGH AND OTHERS BY
CASTORO & CO.**

WHEREAS, the lawsuit encaptioned Castoro & Co., Inc. v. Borough of Pennington, et al., in the Superior Court of New Jersey, Law Division, Mercer County, Docket No. MER-L-864-11 has been brought against Pennington and more than two dozen municipalities and other entities under the New Jersey Spill Compensation and Control Act;

WHEREAS, plaintiff Castoro & Co. owns landfill property in West Windsor Township that has been determined to be contaminated with hazardous substances, and plaintiff believes the contamination resulted from discharges made there in connection with road and other construction projects performed for the defendants;

WHEREAS, plaintiff alleges that pertinent road projects in which Castoro & Co. performed work for the Borough of Pennington and dumped debris in its landfill occurred in 1972 and 1974;

WHEREAS, plaintiff's complaint seeks a judgment against each defendant equal to its proportionate share of the clean-up and renewal costs, presently estimated at a total of approximately \$2,000,000;

WHEREAS, the Borough is still in the process of identifying and confirming the liability insurance coverage it had in place in 1972 and 1974 and thereafter and is presently in communications with Resolute Management, Inc. (for the former Insurance Company of North America) and Selective Insurance Company of America (for the former Selected Risks Insurance Company) to have one or both of these carriers take up the defense and assign environmental counsel;

WHEREAS, pending the outcome of these communications, the Borough Attorney, with the knowledge of the carriers, has filed an answer to the complaint on the Borough's behalf and has joined with the majority of attorneys in the case in consenting to resolution of the matter through a process of Alternative Dispute Resolution (ADR) in which proceedings are conducted by an environmental specialist with expertise in both substance and procedure (known as the "Neutral"), leading to a consensual resolution of the liability of each defendant, if any, while reserving the right of each defendant to opt-out of the process along the way;

WHEREAS, in connection with the ADR process, as set forth in an ADR Process Order entered by the Court on August 28, 2012, it has been agreed that the firm of FTI Consulting, Inc. (principally William J. Hengemihle) will be retained to serve as the Neutral in these proceedings, pursuant to a retainer letter substantially similar to the draft letter attached to this resolution;

WHEREAS, further in connection with the ADR process, each defendant must file a formal opt-in statement and deposit \$1,500 as escrow for the fees and expenses of the Neutral on or before October 1, 2012;

WHEREAS, insurance coverage will not have been confirmed by October 1, 2012, thus requiring that the Borough advance this sum subject to reimbursement by the applicable carrier(s) at some later date;

NOW, THEREFORE, BE IT RESOLVED, by the Borough Council of the Borough of Pennington: (1) that the Mayor is hereby authorized to sign and enter into on the Borough's behalf an agreement with FTI Consulting, Inc. in substantially the same form as the attached draft of agreement, subject to approval by the Borough Attorney; and (2) that the Borough Clerk is hereby authorized to disburse the \$1,500 escrow payment as further set forth above.

Record of Council Vote on Passage

COUNCILMAN	AYE	NAY	N.V.	A.B.	COUNCILMAN	AYE	NAY	N.V.	A.B.
Dunn	S								
Griffiths	M				Ogren	X			
Heinzel	X				Tucker	X			

Council Member Griffiths made a motion to approve Resolution 2012-9.8, second by Council Member Dunn. Mr. Bliss stated that the last time this was discussed, he left without getting a commitment that if and when we are unsuccessful in getting the insurance company to front the money by October 1, 2012, the Borough would advance the money subject to reimbursement. Mr. Bliss stated that after the last meeting he spoke with Resolute Management who is in charge of managing the old policies for the carrier who is no longer around. Mr. Bliss stated that they take the position until such time as confirmation of coverage is made, which they have to research, they will not advance any funds or undertake representation and we are to do the best we can until help arrives. Mr. Bliss stated that he is hoping that the process of determining coverage will go quickly since we have the benefit of Selective's research and the documents have been sent to Resolute Management. Mr. Bliss stated that we are getting to a point where we would have to file a suit for coverage if we do not hear quickly. Mr. Bliss explained that the ADR Consent process will probably wrap up by next summer if we have not opted out before then. Mr. Bliss stated that if the Borough opts out, we would then morph into conventional litigation. Mr. Bliss stated that time is pressing now and he may be back to Council soon to discuss a suit for coverage to speed things along. Mr. Bliss explained that the \$1,500 will be escrowed in the hands of the consultant who specializes in superfund clean up litigation. Mr. Bliss explained that the consultant is not a lawyer; he is an environmental specialist who understands the spill compensation adjustment process. Mr. Bliss stated that all the expenses are shared per capita and there are at least 30 parties and some third party complaints. Mr. Bliss stated that the carrier has advised that this is subject to reimbursement. Mr. Bliss explained that we are a small player in the case and he is optimistic that the process will be kind to us. Mr. Bliss stated that instead of having the usual litigation process, with discovery, depositions etc, this process involves all of the attorneys meeting. Mr. Bliss stated that a meeting is scheduled for October 11th. Mr. Bliss stated that they will meet with the neutral party, agree on a set of questions, and agree on a set of documents that everyone has to produce. Mr. Bliss stated that the consultant will then take all of the information and come up with a report that allocates a percentage of contribution to each of the defendants. Mr. Ogren asked beyond the escrow amount what other exposure does the Borough have. Mr. Bliss stated that we have continuing exposure at the consultant's hourly rates. Mr. Bliss stated that our exposure could be up to \$5,000. Mr. Bliss explained the change of insurance carriers over the years. Mr. Bliss explained that as environmental liability goes, all carriers are responsible because this is a leeching situation that evolves over time. Mr. Bliss stated that the carrier would be responsible for the amount of the judgment and the cost of defense, but sometimes you have to sue in order to make that happen. Mr. Bliss

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stated that suing an insurance company for indemnification is one of the few situations in which attorneys fees are recoverable. Upon a roll call vote, all members present voted in favor of the resolution.

At 5:14 PM, Council Member Griffiths made a motion to adjourn the meeting, second by Council Member Tucker.

Respectfully submitted,

Elizabeth Sterling
Borough Clerk