

City – Town Consolidation and the Surrounding Legal Issues

This memo touches briefly on some of the legal issues that would surround a city – town consolidation in New York State under current law and existing circumstances, and attempts to give some guidance. This is written in the context of several proposed city - town consolidations being studied, but is a general discussion in nature.

Current law provides general statutory procedures for town and village consolidation or dissolution, but there are no corresponding consolidation or dissolution statutes for cities or counties. Moreover, there are enough special situations likely to be encountered in a city – town consolidation that would need special attention, including the provisions for special districts and villages, school district issues, and the acceptance of a charter for the new city. While the annexation article of the General Municipal Law provides a process for changing municipal boundaries without special state legislation, that approach would not provide a suitable vehicle for this type of consolidation. It is a cumbersome process, with legal hurdles, often involving the courts, and does not address dissolution of an existing government or special districts. Moreover, it would not sufficiently address school issues, nor would it provide for the creation of a new city, with the type of charter provisions that might be desired.

The decision on a final entity that would result from a city – town consolidation is more fully examined below. However, the following sections are written from the position that, ultimately, formation of a new city would be the desirable outcome of a city – town consolidation.

As the creation of a city is the province of the State Legislature, a city – town consolidation may be best achieved through a special act passed by the State Legislature and signed into law by the Governor. The special law would be similar to prior laws incorporating a new city, which often had existed previously as a village, however, also dealing with issues involving the consolidation of the town, and likely, school district issues.

Constitutionality and Home Rule

The 1938 Constitutional Convention Committee wrote that “the State may create a local unit or destroy it, give powers to it or take them away.” Since that time, however, Article IX of the State Constitution has been significantly amended, adding the local government “bill of rights” and strengthening “home rule” authority. Article IX grants power to local governments over their own property, affairs, and government; likewise, it restricts the power of the State Legislature to act regarding a local government’s property, affairs, and government except by general law or a special law upon a home rule request.

The Constitutional restriction on annexation should not restrict a consolidation, dissolution, or incorporation of a city and/or a town, and there are no other provisions of



the Constitution prohibiting special legislation with respect to consolidation, dissolution, or incorporation of a city or a town.¹ The State can act by general law, or as in this case, by special law in either a matter of state concern or upon a home rule request of the affected city and town.² The consolidation of a town and a city and the creation of a new city could arguably be a matter of state concern³; however, it appears that previous special laws creating new cities have been accompanied by a home rule message, and the Legislature would not likely act on a consolidation of two municipalities without

¹ Article IX, § 1(d) reads in part, “No local government...shall be annexed to another until the people...shall have consented thereto by majority vote on a referendum...” What little legislative history there is on that section of the Constitution, as well as commentaries on the topic, suggest that it is written to apply to actions taken by local governments in an attempt to annex territory of neighboring municipalities. Also, General Municipal Law Article 17, the annexation article, conforms exactly with this section of the Constitution, and that article defines annexation as an “alteration of boundaries,” but it is specifically not, “creation or dissolution of a county, city, town or village, or the consolidation of two or more counties, two or more cities, two or more towns or two or more villages, respectively....”

² The Court of Appeals stated in Lane v. Johnson, 283 NY 244 (1940) that, “the constitutional provisions placing restrictions on legislative power to provide a form of government of counties or to change that form...was not intended to restrict exercise by the Legislature of its constitutional power to provide for the organization of cities.” That case also says that it is up to the Legislature to put into the special law whether or not a referendum would be required. Also, § 11 of the Statute of Local Governments provides that, “The [State] legislature hereby ...reserves to itself the right and power to enact any law ... notwithstanding the fact that it repeals, diminishes, impairs or suspends a power granted to one or more local governments in this statute: ... (5) Any law authorizing the voluntary transfer of a power by a local government to another local government or other governmental agency.”

³ In City of New York v. Village of Lawrence, 250 NY 429 (1929) the Court of Appeals treated a municipal boundary change as a matter of state concern. The court held that although “annexation or disconnection” of a city’s territory “does in greater or lesser degree affect the property, affairs or government of [a] city,” the “property, affairs or government” language in the home rule article did not limit the legislature’s power to act by special law, adopted without a home rule message, to transfer territory from the City of New York to the adjacent Village of Lawrence. The 1964 Home Rule amendment altered the legislature’s traditionally plenary authority over municipal boundary changes, however. Article IX now gives constitutional protection to an aspect of local boundaries, and it does so in a manner clearly intended to protect existing boundaries from alteration by the state without the consent of the affected localities. Taking the amendment in combination with the other extensions of the scope of home rule, it could be argued that local boundaries are no longer a matter of “state concern,” but instead should be protected as an aspect of local “property, affairs or government.” However, there is no express constitutional limitation on other forms of boundary alteration, such as consolidation or dissolution. In fact, since the Constitution limits annexation and does not address local boundaries generally, it could be interpreted as ratifying the traditional judicial treatment of all other aspects of local boundaries as matters of state concern subject to the plenary authority of the legislature.

^{3a} Although it may seem odd to provide a local government with greater protection against the forcible annexation than the removal of one of its boroughs, in City of New York v. State of New York, 76 NY2d 479 (1990), the Court of Appeals held that chapter 773 of the Laws of 1989, a “special law that prescribes a procedure for determining Staten Islanders’ interest in secession from New York City, and the basis on which they would wish such separation to be accomplished,” was not an “act in relation to the property, affairs or government” of the city of New York, and thus, did not require a home rule message under the NYS Constitution.

home rule messages requesting such a special law from the affected local governments.⁴

Dual Property Tax Zones

In at least three cities in New York State there are multiple property tax zones or districts: Rome, Oneida and Saratoga Springs. Rome, for example, has an inside and outside district. The outside district, generally speaking, is not covered by City Police protection, trash pickup, sewer, water, or street lighting, and is taxed at a lower rate accordingly. These three cities have their systems set forth as city charter provisions, likely in the original charters, which are enacted by a special state law. Dual tax zones do not apply, nor would they be appropriate, in most cities as they are bounded now. However, in a city – town consolidation scenario this may be a helpful model, particularly where a significant portion of the town to be consolidated is rural in character.

School Districts

What would happen to the city school district as a result of a city – town consolidation would depend on the mechanism that is used in the municipal reorganization and the demographics of the situation. Under Education Law § 2(16)(b) and (c), when the new city is created, the school district that is not coterminous with that city, but contains all or a portion of the city within and a majority of the population of children, becomes by definition a city school district.

This could mean that nothing happens upon incorporation of a new city regarding reorganization of the existing school districts, if there is already a city school district with a majority of children in the area being consolidated. It may create a situation in which the city is much larger than the city school district. That may or may not be problematic. There would be issues regarding the right of children in those areas formerly of the town to transportation, since city districts are not obligated to transport children residing within the city but must transport children in the enlarged areas.

⁴ There is nothing in § 40 of the Municipal Home Rule Law that would suggest that the County would have to participate, unless the special law related to the property, affairs or government of the County. It was suggested during the creation of the City of Peekskill that the county should provide a home rule message requesting the special law because of the addition of city supervisors to the county's board of supervisors. The Court of Appeals disagreed in Lane v. Johnson (*supra*) saying that this was not a change to the county government, simply the orderly representation of the City, following existing general laws. Another issue that could affect the county is sales tax. We believe that it is unlikely that these would rise to the level of directly "relating to the property, affairs, or government" of the county, such that the special law authorizing the merger would require a county home rule message, especially in light of the Lane decision. Indeed, the annexation section of the Constitution (*supra*) provides that "The consent of the governing board of a county shall be required only where a boundary of the county is affected...."

Clearly, part of any special legislation to be considered for a city – town consolidation is an assessment of school district issues. The Education Law contains mechanisms for addition of territory to an enlarged city school; however, a referendum is required. Part of the overall assessment must be a transfer of indebtedness. Additionally, any school district wholly or partly within a city becomes subject to the 5% constitutional debt limit, as opposed to the 10% statutory debt limit that applies to non-city school districts. The State Education Department can assist with evaluating these issues.

Outstanding Debt and Obligations

Existing indebtedness and outstanding contracts should also be considered under special legislation for city – town consolidation. Under the Town Law consolidation article, a plan must be put forth to deal with outstanding debt. Two approaches could be taken, either the residents of the entire new city take on the obligations of both the prior city and town, or, like local improvement assessments or special districts, only the residents of the former city are taxed for the obligations of the former city and likewise for the residents of the former town. While resolving issues such as this can be challenging, the opportunities provided by a restructuring may provide strong incentives, and provide offsetting improvements in both the existing city and the merging town area.

Public Employee Transfer Issues

Section 70 (and 83 for police department personnel) of the NYS Civil Service Law set forth the process, duties, and rights associated with transfers of functions from one local government to another. This and other Civil Service Law sections would be applicable unless superseded by a special law. Civil Service Law § 70(2) governs the transfer of personnel upon the transfer of a function from one unit of government to another. It includes a number of requirements regarding identifying employees for transfer, and the manner in which employee protests are submitted and processed. It also provides the rights of employees transferred and those not transferred. The statute imparts duties upon the governmental entities both losing and gaining employees and the functions that they perform. Section 80 provides that where positions in a competitive class are abolished, such cuts among incumbents shall be made in inverse order based on original permanent appointment. Employees who are transferred will retain their same title and salary grade, their same appointment status and their original seniority dates without further examination or qualification. The NYS Department of Civil Service, Municipal Services Division, can help you work through these issues.

Collective bargaining agreements with local employee unions may also come into play. While existing collective bargaining agreements can sometimes be a roadblock to local government consolidation, there are ways to address such issues.

The Taylor Law requires negotiation prior to the transfer of exclusive bargaining unit work to non-unit members under certain circumstances, and any unilateral action to consolidate could be a violation. In addition, even where the decision to consolidate is a



management prerogative, there is also a duty to bargain the impact or effects upon the terms and conditions of employment that any decision to consolidate may have.

These matters should be carefully resolved within any special legislation. The special law regarding the city – town consolidation should clarify the rights and duties of the successor city with respect to their bargaining unit employees.⁵ The legislation should describe the extent to which the new employer is free to establish terms and conditions of employment different from those enjoyed by employees under existing contracts or practices with their predecessor employer.

The rights and duties under collective bargaining agreements can be abrogated through legislation. This must be carefully crafted to be within existing Constitutional parameters.⁶ Similarly, there are certain vested contractual rights that public employees may enjoy that will survive a consolidation. The 1977 transfer of local court employees into the newly created State unified court system is a good model to follow. An entire statutory scheme was written into the Judiciary Law to complete the transfer of employees. However, the Court of Appeals later held that some of the vested contractual rights of former county employees to severance pay were violated and the employees were granted the opportunity to go back to the county for the unused leave pay. The statute could be used as a model, as well as, the lessons learned from subsequent court decisions, to formulate a comprehensive transfer of necessary employees during the city – town consolidation.

Town Option and Elected Officials

Another option that should at least be considered would be having a new town as the end result of a city – town consolidation. There are several issues that would be impacted. The town would not have the ability to preempt the county with respect to sales tax; this might be significant if the county had no other cities.⁷ Additionally, school districts that are partly or wholly within cities with populations under 125,000 may

⁵ Consolidation will involve a change in the employing unit. The legal obligations of both the city and the town to their present, new, and former employees and their unions are issues that must be resolved during a consolidation. The focus of the inquiry is often upon: what is the new or “successor” employer and what are its obligations with respect to the collective bargaining agreement entered into by the previous employer and the employees’ bargaining representative? Also, which bargaining representative should the successor employer recognize for negotiations when multiple bargaining units are involved?

⁶ The US Constitution Article 1, § 10 provides that “No state...shall pass any law that...impairs the obligation of contracts....” While the New York State Constitution has no counterpart Contract Clause, the due process clause (Article 1, § 6) of the state constitution has been construed to impose a similar limit on legislative action. However, the prohibition is not absolute.

⁷ Within counties, cities may impose sales taxes that pre-empt a portion of the county tax, meaning that the municipal tax is in place of rather than in addition to the county tax. In many counties that do not contain a city, the towns and villages do not receive a share of the county sales tax revenue since it is the city, with authority to pre-empt, that often forces the county to share sales tax revenue with all of the municipalities within the county.

impose sales tax on utility services at a rate up to 3 percent. Constitutional debt limits would be significantly different, as would the debt limits for the school districts within a town as opposed to a city. Cities provide services directly, as opposed to towns having various districts for many of the services provided. Cities have different taxing authority, e.g. a gross receipts excise tax on utilities may be imposed by cities, but not by towns. City Courts are run by OCA and paid for by the State, as opposed to Town Justice Courts, which, generally, are town expenses. Perhaps most importantly, creating a new city from a city – town consolidation provides a certain amount of flexibility since the city would have its own charter, which gives latitude as to the structure of the government and many other local issues.

It would be within the province of the legislature to provide for a special election for the elective offices of the new city or town. This would have the positive effect of helping to take politics out of the discussion (to the extent possible) of “who would run the city after the consolidation?” For example, the Mayor could not be accused of supporting the consolidation as a “power grab” if the office of Mayor would be open and filled as a result of a special election.