

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

In Re Petition for
Referendum on City of
Trenton Ordinance 09-02

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-5864-08-T3

ON APPEAL FROM: SUPERIOR COURT OF
NEW JERSEY, MERCER COUNTY,
LAW DIVISION

CIVIL ACTION

DOCKET NUMBER: MER-L-548-09

SAT BELOW: Hon. Linda R.
Feinberg, A.J.S.C.

REPLY BRIEF OF APPELLANT

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LEGAL ARGUMENT

POINT I

IN IN RE ORDINANCE 04-75 THE SUPREME COURT LIMITED ATTACKS ON FAULKNER ACT PROTEST PETITIONS TO EXPLICIT ORDERS IN PERTINENT STATUTES ENDING PRACTICE OF ARGUING BY ANALOGY AND EXTRAPOLATION TO DEVINE A LEGISLATIVE POLICY.

Respondents City of Trenton and NJ American strive to blunt the sharp edge honed by the Supreme Court in In Re Ordinance 04-75, 192 N.J. 446 (2007) in a decision which abruptly cut off the decades-old practice of asking judges to interpret one statute or another as being out of bounds for Faulkner Act protest petitioning. Their briefs ignore the Supreme Court's ruling, continuing to argue by inference and imagined legislative policy instead of putting forward the only acceptable evidence of a ban on protest petitions: an explicit statutory bar.

In Ordinance 04-75, after listing many individual statutes in which the Legislature discretely and explicitly barred protest petitions, the Court issued its caveat to court and counsel alike in the concluding sentences:

The sampling clearly established that the Legislature has determined, on multiple occasions, those municipal matters that should not be called before the voters in a referendum. Because the Legislature had made exception to N.J.S.A. 40:69A-185 with such precision in a multitude of statutes, we cannot find that it intended an amorphous legislative/administrative distinction that cannot be gleaned from the statute's

text, legislative history, or place in the larger statutory scheme. (Id. at 467, emphasis added)

With those words, the Court ruled out and rejected respondents' round-about argument attempting to qualify MUL Section 3.1 for 'honorary placement' on the list of clearly worded protest-exempt statutes. With those words the Court ended nearly a half century of lawyers conjuring up "public policy" rationales for reducing the scope of Section 185. In doing so it handed to this court and to all courts an easy-to-apply formula for determining whether a particular ordinance is exempt from protest: *Find a statute which plainly says so.*

The same legislative precision which led the Ordinance 04-75 Court to erase the decades-old "administrative" barrier to protest petitions applies equally to any other form of imprecise or inferential legislative barriers. The Court's ultimate holding was that, in the face of a multitude of discrete legislative pronouncements, the judges can no longer engage in a search for hints of a legislative policy by interpolation or extrapolation or anything short of a clear directive to disallow the protest petition:

It is the function of the Legislature, not the courts, to determine how much direct democracy through referendum should be conferred on the voters of a municipality. Our role is to construe the statute, not to impose our policy preferences, particularly when to do so inhibits voter participation.

From the point of view of those with a vested interest in insulating an ordinance from voter review, a referendum challenging any ordinance might be seen as harassing and the democratic process as inconvenient or inefficient. But the Legislature determined that the referendum right—the right to participatory democracy—is of inestimable value in these circumstances as a check on local governing bodies. We are required to vindicate that value judgment made by the Legislature, which is the proper body to decide whether exceptions should be made to N.J.S.A. 40:69A-185. (Id. at 467, 8 emphasis added)

As though those words were never published or not binding on this Court, NJ American and the City of Trenton persist in their message: *Be not deterred by the absence of N.J.S.A. 40:62-3.1 from the Supreme Court's list of effective, precise protest-barring statutes. Be not discouraged by the absence of any MUL language mentioning the protest petition or relaxing the twenty-day waiting period or limiting public participation.* As though it were still useful to do so, NJ American continues to offer up theories of interpretation in place of precise language which our Supreme Court finds minimally acceptable, relying on decisional law, such as We the People Committee, Inc. v. City of Elizabeth, 325 N.J. Super. 329 (App. Div., 1999) which typifies the kind of Section 185 surgery which became invalid eight years later.

In POINT III b. (Rb 45) NJ American renews its fixation on Section 3.1's verb phrase "shall not", hoping that the Court will read those words through a drinking straw. Only by such a narrow

focus on the verb phrase can respondents hope to persuade the Court that Section 3.1 mandates something important to its cause. All that is mandated by "shall not" is the non-application of MUL Sections 4 and 5 (meaning that Section 3.1 ordinances are not those which are required to be put to the voters at referendum before they can be effective).

Much is made of the number of times the Legislature used "shall" in Section 3.1. But all that counts is whether any of the uses mandated there be no protest petitions filed against a Section 3.1 ordinance. No such mandate appears. Instead, one of the three "shall" mandates the approval of a Section 3.1 sale by ordinance, not resolution.

POINT II

ORDINANCE 09-02 IS NOT "AN ORDINANCE WHICH WAS REQUIRED BY ITS TERMS OR BY LAW WAS REQUIRED TO BE SUBMITTED TO REFERENDUM BEFORE IT COULD BE EFFECTIVE", THEREFORE FAULKNER ACT SECTION 185 IS APPLICABLE TO IT.

In the rush to sell off the bulk of its last remaining capital asset, the City of Trenton asks this Court to suspend the rules of logic. Faulkner Act section 40:69A-185 plainly states that protest petitions can be filed against "any ordinance" with certain statutory exceptions. One of the exceptions is lodged in Section 185 itself:

The provisions of this section shall not apply to any ordinance which by its terms or by law cannot become effective in the municipality unless submitted to the voters or which by its terms authorizes a referendum in the municipality concerning the subject matter thereof.

There can be no doubt as to the purpose of Section 185's non-applicability clause. Without it, overzealous citizens could attempt to protest the adoption of an ordinance which was required by law to be submitted to a public referendum. Conceivably, such a protest against a referendum-bound ordinance could be motivated by the desire to have the governing body reconsider and withdraw the ordinance, sparing the public the need for a referendum. The Faulkner Act provides for withdrawal of the ordinance and of the petition prior to, and as an alternative to the protest referendum. However, in its wisdom, the Legislature has seen fit to bar even a benign detour from the path to the public vote.

Ordinance 09-02 was clearly not adopted as a referendum-bound ordinance. But in its opening point Trenton argues that Section 185's protest bar applies to it. Logically its argument would have to begin with the major premise that Ordinance 09-02 is an ordinance which by its terms or by law cannot become effective unless it is first submitted to the voters. If that were so there would be nothing for this court to decide.

Since Trenton cannot seriously contend that Ordinance 09-02, by its terms or by law requires it to be submitted to the voters before it becomes effective, Section 185's internal control switch is not effective to bar the protest petition. Simply put, the protest filed against Ordinance 09-02 does not generate a referendum on a referendum.

What Trenton is really struggling to gain is an absurd interpretation of Section 185: It permits no protest against ordinances which are required to go to referendum, and it permits no protest against ordinances which are not required to go to referendum. Such a reading makes a mockery of the clear language of the Section and would require this court to reverse its ruling in Campbell v. Borough of North Plainfield, 404 N.J.Super. 337 (App. Div., 2008), as discussed under Point III.

POINT III

APPELLATE DIVISION MUST APPLY RULE OF STATUTORY CONSTRUCTION WHICH REQUIRES REASONABLE ATTEMPT TO FIND HARMONIOUS AND COMPATIBLE INTERPRETATIONS OF LAWS IN PARI MATERIA, AVOIDING INTERPRETATIONS WHICH FRUSTRATE PUBLIC POLICY FAVORING VOTER PROTEST RIGHTS.

In 2008, in Campbell v. Borough of North Plainfield, 404 N.J.Super. 337 (App. Div., 2008), a panel of this court eloquently placed into Faulkner Act context the oft-expressed prime task of judicial statutory construction: seeking to

reconcile two putatively inconsistent statutes. The petitioners agree with the City of Trenton's view that there is no conflict between the Faulkner Act (N.J.S.A. 40:69A-1 et seq.) and the Municipal Utilities Law (N.J.S.A. 40:62-1 et seq.). However, the Petitioners see the two as meshing with a degree of precision exceeding accepted standards of modern legislation. The very point of this argument provides a clear example of how the Faulkner Act made way for laws and ordinances which have built-in referenda requirements. No need, therefore for a Section 185 protest referendum.

But that is a meshing or blending of two viable laws. The Faulkner Act's Section 185 is not "inapplicable to" to MUL. It is very applicable, but tailors its protest rights to avoid redundancy with the MUL's mandatory referendum provisions, but applies its protest rights to ordinances which are not required to go to referendum, such as Ordinance 09-02.

The question arose from an interpretation of N.J.S.A. 40:55D-63 of the Municipal Land Use Law. That section provides two separate protections for property owners living within those areas affected by the zoning change. One protection was a right of personal notification of a proposed amendatory ordinance. The other was a right to protest a change, leading to a reconsideration vote requiring a supermajority of the zoning

board. One exception was written into the law: It would not apply to zoning changes which were part of a major revision of the master plan.

Among the questions before the Appellate Division was whether the legislative amendment creating an exception to the personal notification rule for wholesale zoning revisions was intended to affect both the right of direct notice and the right of protest. This court answered in the negative, applying the rules of statutory interpretation which are due to be applied to the Faulkner Act and MUL in this case:

The Legislature did not change the "protest" language in 1995. It simply appended an additional notice requirement to the beginning of the statute. As such, "the provisions introduced by the amendatory act should be read together with the provisions of the original section that were reenacted or left unchanged, in the amendatory act, as if they had been originally enacted as one section. Effect is to be given to each part, and they are to be interpreted so that they do not conflict." Norman J. Singer, 1A Sutherland Statutory Construction § 22:34 at 401-03 (6th rev. ed.2002) (footnotes omitted).

It is not difficult to give effect to each portion of the amended N.J.S.A. 40:55D-63. The right to protest has enjoyed long-standing historical support in this state and other jurisdictions. Levin, supra, 82 N.J. at 180, 411 A.2d 704. It is unlikely that the Legislature intended to undercut that right. (Id. at 357, emphasis added)

Just as in Campbell, supra, the Petitioners' protest rights cannot be made to yield to another statute which does not clearly

curtail them. As in Campbell, the ease with which the two sections are able to be interpreted compels the conclusion that only referendum-bound MUL ordinances are exempt from protests, not the ones under Section 3.1 which are ordinary ordinances.

The rules of interpretation permit if not compel the presumption that the Legislature was aware of the existence of the 1949 Faulkner Act in 1983 when it adopted the Keasbey amendment (MUL Section 3.1). It is therefore permissible if not compulsory for this court to conclude that when Section 3.1 was added, its requirement that an ordinance be adopted for the private sale of a small utility was not an accident. Likewise its failure to eliminate the twenty-day petition-gathering period following the adoption of a Faulkner Act ordinance was not accidental, neither was its failure to simply declare the Section 3.1 ordinance to be non-protestable.

POINT IV

PLAIN MEANING AND LEGISLATIVE HISTORY MILITATE AGAINST CLAIM THAT MUL SECTION 3.1 WAS INTENDED AS VEHICLE FOR SUBJECT SALE OF MAJOR PORTION OF MULTI-JURISDICTIONAL WATER SYSTEM.

Both parties argue that Section 3.1 should be read so as to give meaning to each word and provision. That fact is clear from its legislative history. Keasbey was a tiny eight-block water system dwarfed by the surrounding service area of the Middlesex

Water Company. (See Da537) The Legislature had that in mind when it set the bar for exempting Keasbey from the mandatory referendum which Section 3 required to be initiated by Woodbridge Township. But it is remarkable how carefully the Legislature created the exception, limiting it to a system serving less than 5% of the population, and requiring that Woodbridge grant the operator privileges to operate in its area.

If another such system were to be sold, but claimed to serve as little as 5% of the population, a referendum would have been mandatory under Section 3.1. Having set the threshold for a mandatory referendum as low as 5%, is it conceivable that the Legislature intended to require a referendum for such a small internal system but intended to dispense with it entirely for an \$80 Million sale of the extra-urban branches of a massive water system representing 60% of its annual revenue?

Consistent with respondents' commitment to giving significance to every phrase in Section 3.1, if the Legislature had contemplated squeezing in an \$80 Million sale of extra-urban facilities into Section 3.1's referendum-free zone, how do Respondents deal with the mandatory condition of the ordinance approving the sale underlined in the concluding sentences of Section 3.1?

The terms of such sale and the ordinance authorizing same shall be subject to review by the Board of Public Utilities and shall provide that the purchaser shall have the privilege to operate the system within the area of the municipality covered.

That sentence simply states that the ordinance (not the BPU) shall confer a privilege on the buyer to operate within its jurisdiction. The BPU has no authority to grant such a franchise. In re Petition of S. Lakewood Water Co., 61 N.J. 230, 240 (1972) ("There is no express provision in the general utilities law, nor, so far as we have been able to ascertain, in the chapters dealing with particular utilities, empowering the Board to grant a franchise in the first instance.") Only a municipality can confer a franchise to operate a water system within its borders. Were it within the contemplation of the Legislature when dealing with tiny Keasbey that the severance and sale of the suburban branches of a major urban water system were to be included in Section 3.1, would it not have taken the trouble to add: "...except as to parts of the system located beyond the municipal borders." or something similar to that?

The BPU's jurisdiction is quite limited in regard to a sale such as that being protested. It has no special function or expertise which would allow its past approvals of extra-territorial sales to become binding or even persuasive precedent on the question before this court.

Therefore this Court is urged to exercise its plenary review of the question: *Does Trenton's ordinance authorize a private sale of a water utility system serving less than 5% of the Trenton population within the contemplation of Section 3.1, or is this transaction substantially different from that for which Section 3.1 was enacted?*

POINT V

AVAILABLE SUIT IN LIEU OF PREROGATIVE WRITS TO CHALLENGE LEGALITY OF ORDINANCE AND POTENTIAL FOR HEARING BEFORE BPU ARE TOTALLY UNRELATED TO AND HAVE NO BEARING ON CITIZENS' RIGHT TO CHALLENGE UNDERLYING WISDOM OF ORDINANCE BEFORE IT PROCEEDS TO BPU ESPECIALLY IN THE ABSENCE OF EVIDENCE OF ILLEGALITY.

In its attempt to delve into the actual mechanics of MUL Section 3.1, Trenton admits that the Legislature requires an ordinance, not a resolution, to approve a private sale (even though there is an additional review at the BPU). It admits that the purpose of the Ordinance is to enhance public participation in the process of deciding such issues as whether it is in the public's interest to sell off a massive portion of the City's largest single asset. It admits that the law requires a twenty-day waiting period after final adoption. But Respondents refuse to concede, even in the face of judicial authority, that the twenty period serves the purpose of, and therefore *connotes* a

right of protest. City of Ocean City v. Somerville, 403

N.J.Super. 345 (App. Div., 2008):

Voters also have the right of referendum to seek the repeal of any ordinance that must be held in abeyance for twenty days after adoption. N.J.S.A. 40:69A-181(b), -185. If the council fails to repeal the ordinance as requested, the ordinance is then "suspended from taking effect" until the referendum election. N.J.S.A. 40:69A-185, 191. (Id. at 351-352, emphasis added)

The twenty-day period in Faulkner Act communities has the sole purpose of allowing time to gather and submit protest petitions which could lead either to reconsideration and withdrawal or a public referendum. The City's argument appears to suggest that, when it comes to selling off 60% of the Trenton Water Works revenue base, public participation in the ordinance process should quietly end with the close of the public hearing. It argues that without actually saying so, the Legislature intended the people to sit on their hands during the twenty-day period. It argues that they could use that time to prepare their in-lieu challenge (with the extra time added to the 45-day rule). It argues that the people's rights to participate get transferred from their local elected officials' forum to the BPU.

Nowhere in the MUL is there any suggestion that the Faulkner Act ordinance process is designed to facilitate public participation, but only up to the close of public comment on the ordinance's second reading. Where is it written that Board of

Public Utilities review is an acceptable substitute for public protest against sending the matter to the BPU?

There is no sense in the argument that an ordinance which can be protested can also be challenged legally by action in lieu of prerogative writs. Trenton appears to be shoring up its plea for judicial nullification of a statutorily prescribed right to protest the wisdom of a major asset sale by touting the availability of a lawsuit to challenge its legality. This red-herring argument appears to suggest that a law suit challenging the validity of an ordinance is a fair exchange for "supplanting" the right to protest the classic flaw of selling fixed capital assets to meet a recurrent operational expense. The two rights are completely separate and offer entirely different prospects. Only by filing the protest petitions can an ordinance be automatically forced into ineffectiveness pending reconsideration by the governing body or by a vote of the public. Such a result is barely conceivable, but not a likely outcome of an action in lieu of prerogative writs. A suit must demonstrate against a stiff presumption, that Ordinance 09-02 was unlawful or arbitrary, capricious and unreasonable.

But the wisdom of an ordinance is reserved for the voters. Since only the petition offers the remedy sought by the

Petitioners Committee, its choice of petition rather than In Lieu litigation should not become an issue on appeal.

It is unbecoming of the City of Trenton, representing the turning point in our War of Independence, to be straining so hard (for the second time in five years) to diminish its citizens' right of direct participation on a matter so important to all.

POINT VI

AUTHORITY TO SELL WATER UTILITY SYSTEM IS VESTED EXCLUSIVELY IN THE VOTERS OF THE CITY OF TRENTON, INITIALLY THROUGH THEIR ELECTED REPRESENTATIVES, BY ORDINANCE WHICH PROCESS EXCLUDES ANY PARTICIPATION BY NON-RESIDENT USERS UNTIL ORDINANCE IS EFFECTIVE AND MATTER IS PROPERLY BEFORE THE BOARD OF PUBLIC UTILITIES.

Tucked into its preliminary statement the City of Trenton argues that a right of protest against an authorizing sale ordinance diminishes the rights of the City's suburban water consumers. The argument ignores the stark reality that the decision to sell or not to sell is legally, morally, and equitably a decision for the people of Trenton, not for its suburban customers and not for the BPU. The argument masks over the reality that Trenton's suburban customers have a right to be heard before the Board of Public Utilities, but only after a sale-authorizing ordinance becomes effective.

The TWW customers who live in the served towns to be affected by the sale do not vote on the City ordinance. They have no voice in electing the council members or the mayor of the selling municipality. Their first opportunity to be heard is before the BPU, but only if and after the City decides that the sale is to go forward. If the selling municipality's governing body were to vote a sale down, the suburban users' voice would not be heard.

Since the suburban users' participatory rights arise only if an ordinance becomes adopted by the people of the selling jurisdiction without any input from the suburban voter/users, what is their basis for claiming a deprivation of rights if the sale-authorizing ordinance is held up by a protest petition and is either withdrawn by the City Council (one Faulkner Act option) or is defeated at the referendum election?

As for the City's point that the protest should not be permitted after so much effort has been put before the BPU, the Petitioners cannot be held responsible for the manner in which the City Administration conducted itself, or for the fiscal brinksmanship it engaged in when it sued to prevent a referendum which could have been conducted more than nine months ago.

The Petitioners' actions were timely and foreseeable in response to an ordinance authorizing a contract which was not

finalized or approved until February, 2009. As early as 1990, the Supreme Court issued a warning to all municipalities in its decision in Tumpson v. Farina, 120 N.J. 55 (1990). There, Hoboken chose the form of an ordinance to approve a complex, multi-party riverfront redevelopment plan with the Port Authority and State of New Jersey. It could have chosen a resolution, but having chosen an ordinance, the Appellate Division and Supreme Court ruled that the protest petitions were valid.

This was seventeen years before the distinction of administrative and legislative ordinances was wiped away. The Supreme Court noted the high degree of public interest in the dynamic program, and although it included land use provisions (which are typically beyond attack by Petition) and although the plan represented a major engagement of the highest levels of government, the Supreme Court ruled that the power of protest and referendum was designed to allow the citizens affected by a major undertaking to vote it up or down.

Here, the citizens of Trenton who have signed the petitions qualifying for submission of this matter to the City Council and then to referendum if needed, share an interest in the fate of their City and have no less a right than the citizens in Hoboken to put the matter to a vote, up or down. As set forth in the Committee member's certification (Da40-43) and a City resident's

certification (Da36-39), they have sincere, grave concern for the wisdom of this transaction. They abhor the attempt by their elected officials to plug a recurrent gap between income and expenditures using proceeds of a one-time-only sale of a major revenue-producing asset. Their prodigious petition gathering was spurred on by the poor quality of the explanations offered by Trenton officials as to the financial consequences of the sale on the remaining Water Utility (after 60% of its gross revenue was sold off). They were moved to circulate petitions during the late winter of 2009 to raise public awareness of the poor financial planning and great speculation on which the sale was concluded.

Therefore they cannot be appeased or made to surrender their right to a public vote on this momentous transaction by reading in the respondents' briefs that their interests were carefully considered and protected by the BPU.

Respectfully,
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Dated: _____

9/3/09

By: _____

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