

## **INTEREST OF AMICI CURIAE**

**New Jersey Citizen Action** ("NJCA") is the state's largest independent citizen watchdog coalition with over 100 affiliated labor, tenant, senior, religious, environmental and community groups representing 60,000 family members. NJCA unites low- and moderate-income people on issues that directly affect their lives and works to ensure that the peoples' voice is heard on legislative and regulatory issues and actions. NJCA's mission is to secure economic and social justice for all. NJCA works to protect and expand the rights of individuals and families, and to ensure that government officials respond to the needs of its citizenry rather than defer to the interests of those with money and power.

Specifically, NJCA has devoted full-time staff and resources to actively educating the public and the Legislature regarding campaign finance reform. It accordingly seeks to participate in this litigation because it has become familiar with just how vast the problem special interest money has impacted elections and has come to believe that publicly financed elections are an effective solution to the problem.

**BlueWaveNJ** is a grassroots organization dedicated to public education, community mobilization and direct

advocacy. Since its birth just two years ago, BlueWaveNJ has expanded rapidly. Its numerous working groups have organized petitions and letter-writing campaigns, and lobbied legislators on issues ranging from net neutrality, education, and clean elections to global warming. BlueWaveNJ seeks to participate in this litigation because it believes that publicly financed elections are the only effective solution to the problem of money in politics—a problem at all levels of government, including municipal elections.

**Public Campaign** is a nonprofit, nonpartisan organization dedicated to sweeping reform that puts voters in control of our elections and dramatically reduces the role of big special interest money in American politics. It is a central tenant of Public Campaign that fair elections are about ensuring that power is in the hands of voters, not big campaign donors. Because Ocean City's proposed ordinance to provide public financing of city elections would do just that, Public Campaign, as a matter of policy, supports the implementation of such an ordinance. Accordingly, it seeks to participate in this litigation pursuant to its interest in promoting public finance laws and ensuring that the court finds that municipalities, such

as Ocean City, have the home rule authority to enact such laws.

**Brennan Center for Justice at NYU School of Law** (the “Brennan Center”) is a nonpartisan institute dedicated to a vision of effective and inclusive democracy. The Brennan Center's Campaign Finance Project promotes reforms to ensure that our elections embody the fundamental principle of political equality underlying the Constitution. Through legislative drafting and litigation, the Brennan Center actively supports local campaign finance laws including those which provide public financing for local elections, such as the proposed Ocean City Fair and Clean Public Financing of Elections Ordinance.

*Amici* have no financial interest in the outcome of the case nor are they affiliated with any of the parties. Their interest is significantly implicated in this case, which concerns whether local governments' home rule powers should be construed to permit communities to adopt local public campaign finance ordinances as a means of addressing local social, political and economic conditions.

#### **SUMMARY OF THE ARGUMENT**

This case involves a noteworthy effort of local citizen activists to advocate the implementation of “clean money” or publicly financed election reform through Ocean

City's use of its home rule powers to undertake an innovative local approach to the health and well-being of the community. The authority of local governments to adopt public campaign finance schemes, and apply them to a panoply of local elections, is a question of growing importance in cities around the State of New Jersey and the country. *Amici* believe that under a proper understanding of home rule principles the Ocean City "Fair and Clean Public Financing of Elections Ordinance" falls well within the scope of a municipality's authority to legislate concerning the health and welfare of its community; it is certainly an ordinance enacted incident to the exercise of the independent municipal power to promote the local general welfare and expend monies in support of good government measures it chooses to adopt.

It is currently accepted that money is vital to a successful electoral campaign, and that without sufficient funds, voters are denied information about candidacies and the advantage of competitive elections. Similarly, it is also accepted that the influence of private money on elections, including local elections, has put a taint over the entire political process. An electoral process that is bloated with private money is often seen as facilitating overt and covert attempts at buying influence. So, in the

absence of any state law expressly denying local governments the power to enact local public campaign finance laws, Ocean City emphatically has the authority to respond to a series of mayoral candidate spending sprees by enacting a reform that is designed to open the process to candidates who normally would not be backed by a well-financed political organization, group or special interest at the same time as ending perceptions of municipal corruption.

#### **PROCEDURAL HISTORY AND STATEMENT OF FACTS**

*Amici* incorporate by reference the Statement of Facts and Procedural History set forth in the initial brief of Plaintiffs-Appellants dated October 24, 2007.

#### **ARGUMENT**

##### **I**

#### **THE OCEAN CITY FAIR AND CLEAN PUBLIC FINANCING OF ELECTIONS ORDINANCE EXEMPLIFIES THE ROLE OF HOME RULE IN EMPOWERING GRASS-ROOTS DEMOCRACY, AND ENABLING LOCAL COMMUNITIES TO ADOPT PROGRAMS THAT RESPOND TO LOCAL CONCERNS OF CORRUPTION IN MUNICIPAL ELECTIONS.**

As the Utah Supreme Court has observed, "the history of our political institutions is founded in large measure on the concept at least in theory if not in practice that the more local the unit of government is that can deal with a political problem, the more effective and efficient the exercise of power is likely to be." State v. Hutchinson,

624 P.2d 1116, 1121 (Ut. 1980). “[E]ffective local self-government” is “an important constituent part of our system of government.” Id. at 1120.

Local self-government enables the people to govern themselves at the level of government that is literally closest to home. Local government provides citizens with opportunities for participation in public decision making that are simply unavailable in larger units of government. As the most famous observer of American government, Alexis de Tocqueville, explained nearly two hundred years ago,

the strength of free peoples resides in the local community. Local institutions are to liberty what primary schools are to science; they put it within the people’s reach; they teach people to appreciate its peaceful enjoyment and accustom them to make use of it. Without local institutions a nation may give itself a free government but it has not got the spirit of liberty.

Alexis de Tocqueville, Democracy in America 62-23 (J.P. Mayer ed. 1969). The need for local democracy has, if anything, grown since de Tocqueville’s time, as the federal and state governments have become larger and more complex and access to them for ordinary citizens has become more difficult.

By empowering communities at the grass-roots level, home rule allows the people to tailor public services and regulations to local needs and circumstances and endorses

the diversity of viewpoint concerning what makes good public policy that has long been characteristic of American life. This diversity of local policy making "is one of the basic justifications" for home rule. Gary T. Schwartz, *The Logic Of Home Rule and the Private Law Exception*, 20 U.C.L.A. L.REV. 671, 747 (1973).

Local self-government also promotes policy innovation and experimentation. Much as federalism facilitates state-level innovation, local autonomy permits local governments to serve as "laboratories of democracy" and "try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting). Indeed, as one Oregon court found, "municipalities tend to be the proving grounds—in terms of both need and public acceptance—for nondiscrimination policies that later are adopted at state and national levels." Simms v. Besaw's Café, 997 P.2d 201, 213 n.3 (Or. App. 2000).

To be sure, as the Utah Supreme Court acknowledged in Hutchinson, there has often been a gap between our formal commitment to local democracy, and the traditional limits on local power. For many years, judicial doctrines such as Dillon's Rule curtailed local autonomy, as courts interpreted local powers narrowly and forced local

governments to turn to their states for express, detailed, and often limited, grants of authority. The adoption of home rule changed all that. As Professor Schwartz has explained, “[i]n lawyer’s language, home rule ‘inverts the presumption’ or ‘shifts the burden’ on the authority issue; in common language, home rule converts city authority from a question of ‘why’ into a question of ‘why not’?” *The Logic of Home Rule*, supra, 20 U.C.L.A. L.REV. at 678. The New Jersey Legislature adopted this expansion of local authority when it amended the State Constitution in 1947.

**A. The Legislative History of Home Rule in New Jersey Supports Ocean City’s Authority to Enact the Fair and Clean Public Financing of Elections Ordinance.**

For nearly a century, the New Jersey Legislature has embraced the expansion of local authority through its development of home rule. Home rule is defined as the power granted by the Constitution and/or Legislature to municipal governments to self-regulate a range of matters of local concern in order to protect the health, safety and general welfare of its citizenry. John E. Tafford, *Home Rule in the '90s: Is it Alive or Dead?* (League of Municipalities, 1995).

The New Jersey Legislature first codified home rule in 1917, in a lengthy piece of legislation that contained specific powers enumerated to local governments. This

enactment became known as the "Home Rule Act of 1917." N.J. Laws Chap. 152, art. XIV, §2 (1917). Although municipalities at the time were restricted to regulating only those subjects upon which the Legislature had granted them express power, the Home Rule Act of 1917 contained a section which to date forms the heart of the home rule doctrine:

In construing the provisions of this subtitle, all courts shall construe the same most favorably to municipalities, it being the intention to give all municipalities to which this subtitle applies the fullest and most complete powers possible over their internal affairs of such municipalities for local self-government. N.J.S.A. 40:42-4.

Despite this express intent to enable municipalities to control their own affairs, as time went on, it became apparent that the constraints of the Home Rule Act of 1917 denied municipalities the flexibility to respond in a timely manner to many issues of local concern. *Constitutional Convention Proceedings Record*, 400-403 (1947). So, in 1947, when the New Jersey Legislature convened a constitutional convention, the expansion of the home rule doctrine was a top priority. Proponents of expanding the doctrine called for language in the Constitution allowing municipalities to act not only pursuant to the powers expressly or incidentally conferred

and specifically enumerated by the Legislature, but also “those powers which are reasonably convenient for the exercise of such powers, provided that they are not inconsistent with or prohibited by the Constitution or by law.” *Constitutional Convention Proceedings Record* at 401.

Opponents argued that the “reasonably convenient” doctrine was far too permissive in nature. They called for limiting the constitutional language to:

The provisions of this Constitution and of any law concerning counties and municipal corporations formed for local government shall be liberally construed in their favor. *Constitutional Convention Proceedings Record* at 449

This proposed amendment, however, was defeated. In the end, proponents of expanding home rule and their opponents settled on compromise language that curtailed the unlimited powers of the original “reasonably convenient” language, but preserved the articulated desire to expand home rule powers beyond those contained within specific statutes<sup>1</sup>. *Constitutional Convention Proceedings Record* at 402, 763. The outcome of this debate was Art. IV, §7, ¶11 of the Constitution thus enabling municipalities to act on matters

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<sup>1</sup> Proponents stated the purpose of expanding home rule in an amendment to the Constitution was “in line with the overwhelming weight of public opinion,” and would be a “tremendous improvement” over the present relationship between municipalities and the State. *Constitutional Convention Proceedings* at 401-402.

of local concern absent a specific grant of enumerated powers by the Legislature:

The provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. The powers of counties and such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or law. N.J. CONST., art. IV, §7, ¶11 (1947)

In 1950, the Legislature further expanded municipal powers by enacting the Optional Municipal Charter Law (Faulkner Act); thus, demonstrating a legislative intent consistent with the amendments made to the Constitution just three years earlier:

The general grant of municipal power contained in this article is intended to confer the greatest power of local self-government consistent with the Constitution of this State. Any specific enumeration of municipal powers contained in this act or in any other general law shall not be construed in any way to limit the general description of power contained in this article, and any such specifically enumerated municipal powers shall be construed as in addition and supplementary to the powers conferred in general terms by this article. All grants of municipal power to municipalities governed by an optional plan under this act, whether in the form of specific enumeration or general terms, shall be liberally construed, as required by the Constitution of this State, in favor of the municipality. N.J.S.A. 40:69A-30

That same year, the Legislature acted again to expand home rule when it adopted N.J.S.A. 40:48-2; thus resolving any doubt of its intent to grant municipalities broad police powers to act upon matters of local concern, absent any conflicts with state law:

Any municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and by-laws not contrary to the laws of this state or of the United States, as it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants, and as may be necessary to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law.  
N.J.S.A. 40:48-2.

The passage of N.J.S.A. 40:48-2 ended the age in which municipalities were required to justify their authority by first identifying an explicit grant of enumerated powers in a specific statute. Decades of court decisions have followed, interpreting N.J. CONST., art. IV, §7., ¶11 and this aforementioned bundle of statutes in favor of permissive home rule.

**B. Ocean City Has Sufficient Authority to Enact the Fair and Clean Public Financing of Elections Ordinance Pursuant to its Express Grants of Municipal Police Power Found in N.J.S.A. 40:48-2; N.J.S.A. 40:69A-29 and N.J.S.A. 40:69A-30.**

The trial court granted summary judgment to Defendant and Third-Party Defendant on the grounds that the

Plaintiffs failed to demonstrate that the proposed Ordinance was expressly authorized by state law:

Plaintiffs have not demonstrated that the proposed Ordinance is expressly authorized or that the proposed Ordinance is authorized by necessary or fair implication, or incident to the powers expressly conferred or essential thereto. *It is therefore impossible to construe, in any fashion, the total absence of authority as support for Plaintiffs' position.*

(Pa76) (emphasis added).

In rendering this decision, the trial court ignored fifty years of case law precedent, an impressive legislative history stating otherwise, and the bedrock tenets of home rule. In point of fact, contrary to the trial court's opinion, Ocean City possesses the authority to enact this Ordinance pursuant to the express grant of municipal police power found in New Jersey Constitution, (N.J. CONST., art. IV, §7, ¶11); the Home Rule Act (N.J.S.A. 40:48-2), and the Optional Municipal Charter Law (N.J.S.A. 40:69A-29 and N.J.S.A. 40:69A-30) ("Faulkner Act").

On the surface, it was accepted by all parties at oral argument that Ocean City could only enact this Ordinance if it were acting pursuant to authority delegated to it by the Legislature. T10-5 to 6. Plaintiffs, however, posited that the broad grant of police powers conferred to

municipalities by N.J.S.A. 40:69A-30, N.J.S.A. 40:48-2, and the New Jersey Constitution constituted that delegation of power, and it alone was a sufficient basis for Ocean City to enact its campaign finance ordinance. T4-3 to 10. Defendants contested that proposition and argued that Ocean City was prohibited from acting unless it could identify a statute which specifically authorized or enumerated the power to appropriate money for public financing of local elections. T10-1 to 3; T15-20-25; T17-14 to 18; T18-8 to 11. All parties expressed anticipation in how the court would resolve this central dispute. T16-16 to 18; T25-4-6; T26-9-11.

Approximately two weeks after oral argument, the court issued a decision agreeing with the Defendants, in which it flatly concludes, without explanation, that Plaintiffs did not demonstrate that the Ordinance was authorized by state law. (Pa76) The trial court's decision, however, does not explain why the general grant of powers found in either N.J.S.A. 40:69A-30, N.J.S.A. 40:48-2, or the Constitution fail to establish authority for Ocean City to enact the proposed Ordinance.

The trial court's bare conclusion suggests, by implication, that in order to prevail, the Plaintiffs were required to produce a statute "expressly authoriz[ing] the

creation of dedicated trust funds to provide public financing for election campaigns for candidates for municipal office," id., and, absent this showing, their case must fail. A discussion of the seminal cases dealing with home rule - notably, cases that evolved after the two cases cited by the court in its decision<sup>2</sup> - brings into clearer focus how the trial court erred.

It has been firmly established that the narrow view of municipal police powers evidenced in the trial court's ruling - *i.e.*, that a municipality is prohibited from regulating an issue unless there exists a statute expressly delegating those specific powers to it - has been rejected by a long line of New Jersey courts. Most prominent is the New Jersey Supreme Court decision in Iganamort v. Borough of Fort Lee, 62 N.J. 521 (1973). There, the Supreme Court

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<sup>2</sup> It is important to note that the trial court in reaching its decision relied on cases inapplicable to the present set of facts. First, Magnolia Development Co. v. Coles, 10 N.J. 223, 227-228 (1952) was decided on the issue of state preemption, and relied on the outdated, narrow interpretation of a municipality's police powers. It is cited today only for the proposition that municipalities cannot regulate municipal subdivisions in a manner inconsistent with the former Municipal Planning Act of 1953, now the Municipal Land Use Act. The second, Reid Development Corp. v. Parsippany-Troy Hills Tp., 10 N.J. 229, 238 (1952) reviewed whether the township's issuance of water rights to a developer was consistent with state statutes governing municipal planning and zoning. Both of these cases are not applicable herein.

reviewed whether a municipality had proper authority to control rents. In its analysis, the court revisited the holding in Wagner v. City of Newark, 24 N.J. 467 (1957), in which it had previously held that rent control was “not within the realm of municipal power” because there was no “express authority [to do so] from the State,” *i.e.*, the legislature had not passed a law that specifically stated “‘municipalities have the authority to regulate rents.’” Iganamort, 62 N.J. at 531, (*quoting Wagner*, 24 N.J. at 479).

The Iganamort court rejected the view set forth in Wagner that to constitute an express grant of power, the Legislature must enact a law dealing specifically with the subject matter at hand. It reached this conclusion after undertaking a multi-step analysis. First, it recognized that the New Jersey Constitution intended to equip local government to deal with matters of local concern, especially when the Legislature had not acted and was not expected to act. Iganamort, 62 N.J. at 533. Having established the existence of constitutional authority permitting local governments to regulate local matters, the Iganamort court then went on to acknowledge that the Borough of Fort Lee would only be able to govern the issue of rent control if the state legislature had expressly

granted it the power to do so. Id. at 534. But instead of requiring such legislative delegation to come from a statute that dealt squarely with the issue of rent control, the Iganamort court found that such express grant of power to the municipality derived from two sources: The “general grant of municipal power” contained in the Optional Municipal Charter Law, N.J.S.A. 40:69A-30, and the “reservoir of police power” found in N.J.S.A. 40:48-2. The New Jersey Supreme Court thus concluded that the general powers found in these two laws alone formed the basis for Fort Lee’s authority to control rents. Emphatically, it was not necessary for the Legislature to have passed a law granting municipalities the specific power to deal with rent control in order for the municipality to have the authority to regulate the problem. Id. at 534-535.

In reaching this conclusion, the Iganamort court settled the question of whether N.J.S.A. 40:48-2 is “itself a source of municipal power or merely gives auxiliary power in aide of specific grants.” Id. at 535. The court concluded that “[w]e have consistently held the statute [N.J.S.A. 40:48-2] is itself a reservoir of police power,” referring to the 1950’s case Fred v. Old Tappan, 10 N.J. 515 (1952).

In Fred v. Old Tappan, the New Jersey Supreme Court dealt with the issue of whether a municipality had proper authority to regulate soil removal. At that time, it held that municipalities have a broad grant of police power under N.J.S.A. 40:48-2, and that “within that power was the authority to enact an ordinance regulating the removal of soil.” Id. at 515. The Fred Court further determined that because the ordinance was reasonably designed to deal with the local problem at hand, was not an arbitrary exercise of authority, and was not preempted by state law, the municipality had authority under N.J.S.A. 40:48-2 alone to regulate soil removal. Id. at 515, 519.

Before reaching this conclusion, the Fred court had examined two different interpretations of a key phrase in N.J.S.A. 40:48-2: “and as may be necessary to carry into effect the powers and duties conferred and imposed . . . by any law.” It asked itself whether the phrase meant that a municipality was allowed only to act *incidental* to specific grants of powers found in other laws, or was N.J.S.A. 40:48-2 *itself* an express grant of broad police powers to municipalities? Id. at 519. It answered that N.J.S.A. 40:48-2 *itself* constitutes an express grant of broad powers to municipalities. In so ruling, the Fred court recognized that municipalities must sometimes act with haste to

address matters of a local concern, and cannot wait for the state legislature to take notice and act. Id. at 521-522.

The Fred court had also found its answer more consistent with the intent of the New Jersey Constitution than a statutory interpretation requiring a more specific grant of authority: "Plainly . . . N.J.S.A. 40:48-2 must be considered as an express grant of broad general police powers to municipalities." Id. at 520. In support of its position, the Fred Court cited numerous decisions which preceded its decision, and stated "This interpretation of N.J.S.A. 40:48-2 [by the cases cited] as an express grant of general police powers to municipalities has been made impregnable by the continued legislative acquiescence therein, and by the mandate of Article IV, Section VII, paragraph 11 of the Constitution of 1947[.]" Id.

Indeed, court after court over the past fifty years has affirmed the principle that either N.J.S.A. 40:69A-30 or N.J.S.A. 40:48-2 alone constitutes an express grant of power to municipalities to act in matters of local concern.<sup>3</sup>

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<sup>3</sup> Regulation of convenience store's business hours (Quick Check Food Stores v. Springfield, 83 N.J. 438 (1980)); Regulation of local housing conditions (State v. C.I.B. International, 83 N.J. 262 (1980)); Regulating truck facilities (Hudson Circle Service Center, Inc. v. Kearny, 70 N.J. 289 (1976)); Municipal prohibition against canvassing and soliciting without a permit (Collingswood v. Ringgold, 66 N.J. 350 (1975), appeal dismissed by 426 U.S.

With respect to N.J.S.A. 40:48-2, the Fred Court further explained that in enacting such provision, the Legislature recognized practical concerns involved in local governance, consistent with the principles of home rule. A municipality must have the authority to take action "as it

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901 (1976)); Prohibiting "blockbusting" in real estate sales (Summer v. Teaneck, 53 N.J. 548 (1969)); Creating an exemption under Sunday closing laws (Williamson v. Mayor & General Council of Paramus, 36 N.J. 328 (1962)); Ability to enact a rent control ordinance (Salem Management Co. v. Township of Lopatcong, 387 N.J. Super. 573 (App. Div. 2006)); Banning cigarette vending machines (C.I.C. Corp. v. Township of E. Brunswick, 266 N.J. Super. 1 (App. Div. 1993), aff'd by 135 N.J. 121 (1994)); Regulating parking lots (State v. Kraus, 225 N.J. Super. 312 (App. Div. 1988)); Subject of Sunday closings (Mack Paramus Co. v. Paramus, 201 N.J. Super. 508 (App. Div. 1985)); Prohibiting overnight on-street parking (Spring Lake Hotel & Guest House Assoc. v. Spring Lake, 199 N.J. Super. 201 (App. Div. 1985)); Enacting mining safety ordinance (South Brunswick Township v. Covino, 142 N.J. Super. 493 (App. Div. 1976)); Ability to regulate launder mats (Little Falls v. Husni, 139 N.J. Super. 74 (App. Div. 1976)); Requiring an apartment complex owner to provide security (Sunrise Village Associates v. Roselle Park, 181 N.J. Super. 567 (Law Div. 1980), aff'd 181 N.J. Super. 565 (App. Div. 1981)); Ability to restrict hours of movie theatre showing X-rated movies (New Chancellor Cinema, Inc., v. Irvington, 169 N.J. Super. 564 (Law Div. 1979)); Authority to appoint a municipal public advocate (Berkeley Heights v. Board of Adjustment, 144 N.J. Super. 291 (Law Div. 1976)); Requiring elected officials to make financial disclosures (Lehrhaupt v. Flynn, 129 N.J. Super. 327 (Ch. Div. 1974), aff'd 140 N.J. Super. 250 (App. Div. 1976)); Permitting prohibition of minors from purchasing alcohol (State v. Greco, 86 N.J. Super. 551 (Law Div. 1965)); Prohibiting gambling within city limits (State v. DeLouisa, 89 N.J. Super. 596 (Law. Div. 1965)); Allowing a bank to create a curb-side depository (Kirzenbaum v. Paulus, 51 N.J. Super. 186 (Law Div. 1958), aff'd 57 N.J. Super. 80 (App. Div. 1959)); Controlling air pollution (State v. Mundet Cork Corp., 8 N.J. 359 (1951), cert. den'd, 344 U.S. 819 (1952)).

may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and general welfare of the municipality and its inhabitants." Id. at 521 (*quoting* N.J.S.A. 40:48-2). And that authority is N.J.S.A. 40:48-2 itself.

Finally, the New Jersey Supreme Court in Iganamort v. Borough of Fort Lee, went one step further than the Fred court: It recognized that courts do not have the authority to create exceptions to curtail these general powers. The Iganamort court stated:

If it is accepted that the power to deal with the subject may be given to local government, we see no basis upon which the judiciary can carve out that exception from the expressed legislative intent "to confer the greatest power of local government consistent with the Constitution of this State." Id. at 535 (*quoting* N.J.S.A. 40:69A-30).

In other words, absent a finding of state preemption, courts may not decide that subjects of local concern are not within the province of municipal control.

More recent Supreme Court decisions have continued to uphold this principle. See *e.g.*, 515 Associates v. City of Newark, 132 N.J. 180, 186 (1993) (Ordinance requiring security guards in commercial parking lots upheld under general grant of powers in N.J.S.A. 40:48-2 or the Faulkner

Act); Dome Realty, Inc. v. City of Paterson, 83 N.J. 212, 230 (1980) (Ordinance enacted to combat deteriorating rental housing found to be a valid exercise of municipal power under N.J.S.A. 40:48-2); Quick Check Food Stores v. Springfield, 83 N.J. at 447 (Ordinance mandating closing hours for defendant's business upheld under general grant of powers by N.J.S.A. 40:48-2); State v. Boston Juvenile Shoes 60 N.J. 249 (1972) (Statutory delegation of power under Faulkner Act enabled municipality to enforce a licensing fee concerning signage in shop windows); and Whelan v. New Jersey Power & Light Co., 45 N.J. 237, 251 (1965) (Relying on authority conveyed by the Faulkner Act in upholding municipality's right to enter into a contract for a hydroelectric power plant).

In accordance with the above precedent, the Plaintiffs correctly argued below that the broad general powers found in both N.J.S.A. 40:69A-30 and N.J.S.A. 40:48-2, confer upon the City of Ocean City the authority to enact an ordinance dealing with the public financing of campaigns for local elective office. T23-3 to 25. Defendants' argument that Ocean City is unable to govern without a statute specifically authorizing this type of police power, is simply not supported by case law. Similarly, the lower court's conclusion that there is a "total absence of

authority" to authorize Ocean City to pass an ordinance concerning the funding of local elections is accordingly wrong.

**C. The Trial Court Erred in Finding that Plaintiffs Failed to Demonstrate that the Proposed Ordinance is Authorized by Necessary or Fair Implication.**

The trial court also ruled that Plaintiffs failed to demonstrate that Ocean City was authorized by "necessary or fair implication, or incident to the powers expressly conferred or essential thereto." (Pa76.) (referring to the N.J. CONST. art. IV, §7, ¶11). The court, however, did not examine the powers specifically granted to municipalities in N.J.S.A. 40:69A:29 of the Faulkner Act to determine whether the authority to enact the proposed Ordinance was incident to any one of them. It is clear that powers specifically enumerated in N.J.S.A. 40:69A-29 "should be treated as additional and supplementary to those bestowed in general terms" under N.J.S.A. 40:69A-30. State v. Boston Juvenile Shoes, 60 N.J. at 249. These powers include:

Each municipality governed by an optional form of government pursuant to this act shall, subject to the provisions of this act or other general laws, have full power to:

(a) Organize and regulate its internal affairs, and to establish, alter, and abolish offices, positions and employments and to define the functions, powers and duties thereof and fix their terms, tenure and compensation;

(b) Adopt and enforce local police ordinances of all kinds . . . [and] exercise all powers of local government in such manner as its governing body may determine;

(c) . . . [A]ppropriate and expend moneys, and to adopt, amend and repeal such ordinances and resolutions as may be required for the good government thereof . . . . (emphasis added)

N.J.S.A. 40:69A-30 further requires this Court to construe the above powers liberally in favor of the City.

Regulating the campaign financing of candidates running for local office, generally, and establishing a “dedicated non-lapsing Fair and Clean Elections Campaign Fund (“Fund”)” for public financing of the campaigns of “certified participating candidates” (Pa14) specifically are implied powers necessary and incidental to the powers expressly given to municipalities above. The proposed Ordinance deals solely with an internal affair of the City—*i.e.*, the election of candidates for municipal office, -- and entails the appropriation and expenditure of City monies to ensure the good government of the City.

Specifically, the proposed Ordinance would establish a public financing system for city elections whereby candidates who voluntarily choose to abide by spending limits would become eligible to receive a limited amount of public funds to operate their campaigns by collecting a

required number of \$5 "qualifying contributions." Id. The public funds would be disbursed from a Fund that would be financed by a maximum of \$150,000 annually from the municipal general fund, and additional monies would be received from "voluntary donations" of up to \$5,000 each. Id. In any given year, the Fund is not to exceed \$300,000, id, and the amounts distributed from the Fund to eligible candidates would constitute permissible municipal expenditures.

The authority to establish, finance and operate such Fund clearly falls within the scope of N.J.S.A. 40:69A-29(c) as the entire Ordinance additionally falls within the ambit of N.J.S.A. 40:69A-29(a) (permitting the City to "[o]rganize and regulate its internal affairs") and N.J.S.A. 40:69A-29(b) (authorizing the City to "[a]dopt and enforce local police ordinances of all kinds"). For several years now, it is becoming clear that money is playing no small part in local elections throughout the State. See ELEC, White Paper No. 14, Local Campaign Financing (November, 2000) available at [www.elec.state.nj.us/pdfiles/White\\_Papers/White14.pdf](http://www.elec.state.nj.us/pdfiles/White_Papers/White14.pdf); ELEC, White Paper No. 18, Local Campaign Financing: An Analysis of Trends in Communities Large and Small, (December, 2005), available at

[www.elec.state.nj.us/pdfiles/White\\_Papers/White18.pdf](http://www.elec.state.nj.us/pdfiles/White_Papers/White18.pdf).

Although legislative candidates have a larger fund raising base from which to raise money than local candidates have, the "ability to reward supporters with contracts, jobs, and permits, etc. are greater at the local level than at the legislative level." ELEC, White Paper No. 14 at 10. The confluence of decision making over property taxes, large scale redevelopment, school budgets and other significant public policy issues with "increasing financial activity among candidates for local government," ELEC, White Paper No. 18 at 11) has led to growing perceptions of corruption that are providing the impetus for public finance reform, such as the proposed Ordinance.

As indicated by the several WHEREAS clauses of the Fair and Clean Public Financing of Elections Ordinance, the citizens of Ocean City have proposed an ordinance that is expressly designed to safeguard the integrity of City government by reducing or eliminating corruption or the appearance of corruption that relatively large financial contributions from private interests have on the political process and the daily affairs of government. The proposed Ordinance thus falls clearly within the ambit of N.J.S.A. 40:69A-29 and exemplifies the vigorous local democratic problem-solving that home rule was intended to promote.

## II.

**THE LOCAL POWER TO ADOPT A PUBLIC CAMPAIGN FINANCE ORDINANCE SEEKING TO PROTECT THE INTEGRITY OF LOCAL ELECTIONS, PROVIDE AN EQUAL OPPORTUNITY FOR ALL CANDIDATES AND REDUCE THE INFLUENCE OF SPECIAL INTERESTS IS ENTITLED TO A PRESUMPTION OF VALIDITY.**

Despite the broad powers conferred by the New Jersey Constitution, N.J.S.A. 40:48-2, N.J.S.A. 40:69A-29 and N.J.S.A. 40:69A-30, municipalities are permitted to regulate only matters of local concern. Summer v. Teaneck, 53 N.J. at 552-553. A municipality must demonstrate that the exercise of its power is limited to a problem it is currently facing, and that the ordinance is sufficiently tailored to address that local problem. Summer v. Teaneck, 53 N.J. at 551. As long as a municipality meets that burden, there is a presumption of validity regarding the ordinance.<sup>4</sup> Hudson Circle Service Center, Inc. v. Kearny, 70 N.J. at 298; Summer v. Teaneck, 53 N.J. at 553. This presumption can be overcome only by a showing of arbitrariness or unreasonableness; and that burden is on the challenger. Hudson Circle Service Center, Inc. 70 N.J. at 299.

Moreover, N.J.S.A. 40:24-4, the Home Rule Act, requires courts to "give all municipalities . . . the

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<sup>4</sup> Defendants have already conceded (T10-12 to 13), and the trial court has implicitly ruled, that preemption by the state is not an issue here.

fullest and most complete powers possible over the internal affairs. . .for local self-government." Courts have long recognized that New Jersey's 566 municipalities differ widely in the kinds of issues and challenges they face. It is often difficult, if not impractical, for the state legislature to sculpt a "one size fits all" solution for municipalities of different geographical sizes, demographics and economic bases. In reality, municipalities in exercising local control can often deal more effectively with problems they are currently facing. Iganamort v. Borough of Fort Lee, 62 N.J. at 528-529.

As argued above, supra IA, this was the central issue that motivated the Legislature to amend the State Constitution in 1947 requiring a liberal approach to municipal powers. To insist that a municipality wait for the State to make a specific delegation of power is both impractical and contrary to state law. Local governments, "being near the scene, are more likely to detect, and may be better situated to rectify, their special problems," than wait for a specific grant of power from the legislature. *New Jersey Municipalities Have the Power to Enact Rent Control Ordinances*, 4 SETON HALL L. REV. 360, 370 (1972); See also Summer v. Teaneck, 53 N.J. at 552-553.

Plaintiffs, in seeking a declaratory judgment that Ocean City may consider enacting the proposed Ordinance, are trying to prod their local government to remedy a festering problem affecting its local elections. Consistent with statewide trends, candidates for mayor and city council in Ocean City have seen an increase in campaign contributions and expenditures. In 2002, candidates for Mayor of Ocean City raised \$186,065.43 and spent \$188,185.53, whereas in 2006, \$314,506.97 was raised and \$316,701.56 was spent. See <http://www.elec.state.nj.us/index.html> (contributions and expenditures made by Alessandrine and Knight in 2002 and Perillo, Alessandrine and McCall in 2006). Average expenditures among city council candidates participating in Ward elections also increased from \$9,597 in 2000 to \$11,987 in 2004. *Id.*<sup>5</sup>

This increase in candidate fund raising and spending in Ocean City is characteristic of other municipalities in New Jersey, but the problem is being experienced by New Jersey residents to different degrees depending on the size of the population of the municipality in which they reside.

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<sup>5</sup> Statewide, from 1996-2004, monies received by municipal candidates increased by 91% and monies spent by 103%. In actual numbers, the amount of funds raised by municipal candidates across the state increased from \$5.6 million in 1996 to \$10.7 million in 2004. ELEC, White Paper No. 18 at 14.

See ELEC, White Paper No. 18 (detailing the differences in municipal candidate fund raising, including sources, and expenditures based on municipal population). For example, Jersey City, a highly populated municipality, saw its Mayoral candidates raise \$890,693 in 2004 and spend \$852,097; Edison, a moderately-sized municipality, saw contribution levels for its 2005 Mayoral race reach \$581,113.85 and expenditures, \$487,017.82; and, contribution and expenditure levels for Mayoral races in smaller municipalities such as Atlantic City, Fort Lee and Brick also saw high levels of money floating through their campaigns: Atlantic City (2005:\$230,684.90/\$167,247.23); Fort Lee (2004:\$144,901.72/\$144,901.00) and Brick (2005:\$144,868.66/\$120,959.43). These latter municipalities experienced comparable or lower levels of spending than Ocean City did in its 2006 Mayoral race, even though Ocean City is a significantly smaller municipality. See <http://www.elec.state.nj.us/index.html> (for all contribution and expenditure data set forth herein).

Notwithstanding these significant differences between small and large municipalities, the \$53 per vote spent by the winner of the Ocean City 2006 Mayoral race, Salvatore Perillo, is simply too much for the residents of Ocean City to tolerate. See Eric Avedissian, *Clean Election reform on*

*city council's agenda tonight*, OCEAN CITY SENTINEL, June 15, 2006, at A11 (setting forth \$53 per vote spent by candidate Perillo based on campaign finance data available immediately after the election). Plaintiffs felt that local action was required to address this situation and thus the proposed Ordinance reflects a local effort to respond to particular local conditions. See Dome Reality, Inc. v. City of Paterson, 83 N.J. at 226 (noting that a municipal ordinance may address a problem that is "endemic" throughout the State, but "[v]arying conditions" call for "diversity of treatment").

Moreover, it is this wide range of campaign fund raising and spending in municipal elections that makes enactment an implementation of an ordinance providing public campaign financing to municipal candidates uniquely a matter of local concern. Public finance systems must be closely tailored to the elections to which they are applied to ensure that the amounts distributed to participating candidates are sufficient to enable them to compete with non-participating candidates without excessively burdening the relevant public budget. That is, a uniform response would be both inefficient and ineffective insofar as it would likely result in a distribution of public funds in

sums either too large or too small to enable the system to function properly.

Indeed, it is this tailored narrow approach that has been adopted by the State Legislature as it too seeks to address the threat of corruption posed by surging campaign fund raising and spending by candidates, but only for candidates seeking public office at the State level. Rejecting a need for a single statewide solution, the Legislature has enacted a public financing "pilot project" that was implemented in the 2007 Senate and General Assembly elections in Districts 14, 24, and 37. See "The 2007 New Jersey Fair and Clean Elections Pilot Project Act," P.L. 2007, Chapter 60. This Act only addresses the public financing of candidates for State office elections and, appropriately, makes no mention of the public financing of municipal elections.

The Legislature has taken a similar hands-off approach in the area of "Pay-to-Play" reform, which also targets growing concerns about municipal corruption and the undue influence of private money on government decision making, *i.e.*, government contracting. When enacting significant legislation in this area in 2004, the State Legislature specifically determined to focus solely on state contracts and took the extra step to explicitly state that it was not

pre-empting then existing local initiatives in the same area. See N.J.S.A. 40A:11-51. As a result, municipalities throughout New Jersey have continued to enact their own version of Pay-to-Play permitting them to design their own ordinances to meet the differing conditions posed in their respective communities. As of Fall 2006, over 75 municipalities have implemented their own Pay-to Play ordinance and have sought to achieve their goals (of reducing money in local elections and improving their contracting systems for professional services) more effectively than any uniform solution proposed by the State would have secured. See Common Cause New Jersey website, [www.commoncause.org/newjersey](http://www.commoncause.org/newjersey) "Public Contracting Pay-to-Play Reform." Cf. Lehrhaupt v. Flynn, 140 N.J. Super at 259-60 (holding that "regulation pertaining to the financial disclosure by municipal officials is not a subject matter necessarily pointing to uniform treatment on a statewide basis").

It is therefore clear that the New Jersey Legislature has acknowledged that campaign finance regulations, including municipal public campaign finance ordinances such as that proposed herein, are strictly matters of local concern, and obviously within the police power of the State as well as lower levels of government. See Quick Check Food

Stores v. Springfield, 83 N.J. at 448 (1980) (noting that a city's police power under N.J.S.A. 40:48-2 "is coterminous with the police power of the State Legislature"). A similar conclusion by this Court is thus justified.

### III.

**STATE COURTS ACROSS THE NATION RECOGNIZE THAT MATTERS OF LOCAL GOVERNANCE SUCH AS CAMPAIGN FINANCE REGULATIONS ARE OF CENTRAL IMPORTANCE TO HOME RULE AND DO NOT IMPLICATE STATEWIDE CONCERNS.**

A review of state court home rule decisions across the country determining the validity of local political reform laws reveals a prevailing trend among state courts that matters implicating local governance, such as local campaign finance laws, are issues of intense local concern. Further, courts have found that variations in such regulations entail virtually no external effects or costs and thus support a finding that adoption of such governance procedures is a permissible exercise of home rule authority. See Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & Pol. 1, 28 (2006).

In Johnson v. Bradley, 4 Cal.4<sup>th</sup> 389, 14 Cal Rptr. 2d. 470 (1992), for example, the California Supreme Court considered the question of whether the City of Los Angeles' adoption of a comprehensive campaign, election and ethics reform law including public campaign financing was a

permissible exercise of home rule authority. Despite the fact that the city's public financing law directly conflicted with a state statute prohibiting the use of public funds to finance candidate campaigns, the court nonetheless stated:

When the local matter under review "implicates a 'municipal affair' and poses a genuine conflict with state law, the question of statewide concern is the bedrock inquiry through which the conflict between state and local interests is adjusted. If the subject of the statute fails to qualify as one of statewide concern, then the conflicting charter city measure is a 'municipal affair' and 'beyond the reach of legislative enactment.' . . . If, however, the court is persuaded that the subject of the state statute is one of statewide concern and that the statute is reasonably related [and 'narrowly tailored'] to its resolution, then the conflicting charter city measure ceases to be a 'municipal affair' pro tanto and the Legislature is not prohibited by [the state Constitution] from addressing the statewide dimension by its own tailored enactments.

Id. at 399 (footnote omitted) (*quoting California Fed. Savings & Loan Assn. v. City of Los Angeles*, 54 Cal 3d 1, 17 (1991)). Though not as far reaching as the California Supreme Court, the Pennsylvania Supreme Court similarly has recognized that "the General Assembly may negate ordinances enacted by home rule municipalities only when the General Assembly's conflicting statute concerns substantive matters of statewide concern . . . ." Ortiz v. Commonwealth, 681

A.2d 152, 156 (Pa. 1996) (upholding state preemption of Philadelphia municipal assault weapon ban).

Specifically, in Johnson v. Bradley, the Supreme Court of California correctly rejected the notion that *uniformity* of campaign financing is a matter of statewide concern, explaining:

[T]he bare interest of “uniformity in the manner of electing officials” is no justification for treating public funding of municipal elections as a statewide concern, because, standing alone, it reveals no “convincing basis for legislative action originating in extra-municipal concerns.” Accordingly, we decline to accept County of Sacramento’s holding that campaign financing, and in particular, partial public funding of local election campaigns, is a statewide concern, because neither the County of Sacramento court, nor petitioners or their amicus curiae herein, have established any convincing reason, grounded on statewide interests, supporting Proposition 73’s attempt to treat public funding of election campaigns as a “statewide concern.”

Johnson v. Bradley, 4 Cal.4<sup>th</sup> at 406 (internal citation omitted). Although the court recognized maintenance of the integrity of local elections as a legitimate statewide interest, it found that the local campaign finance law advanced that state interest, whereas the state ban on public campaign financing did not. Id. at 410-411. Cf. Nutter v. Dougherty, 921 A.2d 44 (Pa. Commw. Ct. 2007) (holding that, although state election code demonstrates a legislative intent to establish uniform

procedures for the purpose of holding fair elections and securing honest election returns, it contains no language to show express or implied intent to legislate with respect to limits on campaign contributions to candidates for local elective office).

The Supreme Court of Connecticut, rejecting a home rule challenge to a local government charter amendment requiring voter referenda on certain town budget items, similarly examined the distinction between matters of local interest and matters of statewide interest, explaining:

"The purpose . . . of Connecticut's Home Rule Act is clearly twofold: to relieve the General Assembly of the burdensome task of handling and enacting special legislation of local municipal concern and to enable a municipality to draft and adopt a home rule charter or ordinance which shall constitute the organic law of the city. . . . The rationale of the act, simply stated, is that issues of local concern are most logically answered locally, pursuant to a home rule charter, exclusive of the provisions of the General Statutes. . . . Moreover, home rule legislation was enacted to enable municipalities to conduct their own business and [to] control their own affairs to the fullest possible extent in their own way . . . upon the principle that the municipality itself kn[ows] better what it want[s] and need[s] than. . . the state at large, and to give that municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs." Consistent with this purpose, a state statute "cannot deprive cities of the right to legislate on purely local affairs germane to city purposes." Consequently, "a general law, in order to prevail over a conflicting charter provision of a city having a home rule charter,

must pertain to those things of general concern to the people of the state. . . .”

Board of Educ. Of Town and Borough of Naugatuck v. Town of Borough of Naugatuck, 843 A.2d 603, 611-12 (Conn. 2004) (internal citations omitted); see also Windham Taxpayers Ass’n v. Windham, 662 A.2d 1281 (Conn. 1995) (rejecting home rule preemption challenge to local law making voter referenda more difficult on the basis that a local government’s procedure for holding referenda is of purely local interest).

The Supreme Court of New Mexico has likewise weighed state versus local interests when considering a home rule preemption challenge to a local governance law creating an eight-member city commission, where state law required such commission to have five members. See State ex re. Haynes v. Bonem, 845 P.2d 150 (N.M. 1992). The Court noted that “[e]ven if a statute applies to all municipalities throughout the state, it is not necessarily a general law if it does not relate to a matter of statewide concern.” Id. at 155. The Supreme Court of New Mexico explained the difference between matters of statewide and matters of local concern as follows:

The purpose (referring to the home rule amendments) was to give local communities full power in matters of local concern, that is, in those matters which peculiarly *affected* the

inhabitants of the locality, not in common with the inhabitants of the whole state. Those matters which *affected* all of the inhabitants of the state were viewed as state matters, and therefore subject to state control, but those things which did not concern inhabitants of the state other than those residing in the particular community, were sought to be differentiated as local concerns, which under these constitutional provisions were to be regarded as exclusively matters of local self-government. . . .

Id. at 156 (quoting City of Portland v. Welch, 59 P.2d 228, 232 (Or. 1936), cited in, Apodaca v. Wilson, 525 P.2d 876, 881 (N.M. 1974)). The Supreme Court of New Mexico went on to explain that the appropriate test to identify a state versus local interest depends on the “effect of a legislative enactment—whether it affects all, most, or many of the inhabitants of the state and is therefore a statewide concern, or whether it affects only the inhabitants of the municipality and is therefore of only local concern.” Id. Applying the test, it thus held that “the subject of the legislation (composition of the municipal government) is a matter of local concern; and, even if the subject is regarded as a matter of statewide concern, the legislature has not expressly denied the power to enact a composition different from that set out in the Municipal Code.” Id. at 151.

The above state Supreme Court decisions, emphasizing the distinction between local and statewide concerns, are

consistent with the New Jersey Supreme Court's reluctance to find preemption of home rule authority in the absence of an express intent to preclude municipal action. See, e.g., Summer v. Township of Teaneck, 53 N.J. at 554-555 ("[A]n intent to occupy the field must appear clearly. It is not enough that the Legislature has legislated upon the subject, for the question is whether the Legislature intended . . . to immobilize the municipalities from dealing with local aspects otherwise within their power to act."). Problems that may exist in many different communities throughout New Jersey, such as bloated election campaign coffers, may justify a baseline statewide approach (yet to be taken by the Legislature in this case); however, home rule authority permits each municipality to regulate beyond this baseline, as appropriate to satisfy its particular local needs and concerns. See Inganamort v. Borough of Fort Lee, 62 N.J. at 528 (recognizing that even if the "evil is of statewide concern, still practical considerations may warrant different or more detailed local treatment to meet varying conditions or to achieve the ultimate goal more effectively"; Mack Paramus Co. v. Mayor & Council of Paramus, 203 N.J. at 577 (stating "not all problems that have generated a concern throughout the State

demand uniform and homogeneous treatment at the state level").

Notwithstanding a general increase in campaign finance activity at the local level in municipalities throughout the State (see ELEC White Paper No. 18), the public financing of local candidates is a matter of local concern lying at the core of home rule. Regulations, such as the proposed Ocean City Ordinance have no external effect on the State or neighboring localities, and instead, embody an appropriate community-generated solution to what is perceived to be a heightened problem existing in Ocean City's municipal elections.

#### **CONCLUSION**

Instead of following the precedent found in Iganamort, Fred, Summer, and countless other cases, the trial court in the instant matter relies on outdated authority and clings to a narrow interpretation of both N.J.S.A. 40:69A-30 and N.J.S.A. 40:48-2 -- an interpretation that has been roundly criticized and rejected by New Jersey courts. Following the trial court's and Defendants' argument to its logical limits, one would have to conclude that the provisions of N.J.S.A. 40:69A-30, N.J.S.A. 40:48-2, N.J.S.A. 40:24-4, and the New Jersey Constitution are for all practical purposes, meaningless. Pursuant to these provisions, the State

Legislature intended to give municipalities the authority to act in resolving issues of local concern and to promote policy innovation. Localities are not to endure hardship while waiting for the State to act nor to endure a so-called uniform solution when uniformity is inappropriate.

For all the foregoing reasons set forth above, the lower court's decision must be reversed and a declaratory judgment entered in favor of the Plaintiffs.

Respectfully submitted,

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