

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5933-06T1

STEVEN FENICHEL, GEORGINA SHANLEY,
MARIE TOMLINSON, BRIAN H. ARNETT,
ALLEN LOVEKIN, JANE McCARTHY,
JAMES F. McCARTHY, PETER J.
GUINOSSO and JOSEPH A. SOMERVILLE,
in their capacities as taxpayers
and residents of the City of Ocean
City, New Jersey,

Plaintiffs-Appellants,

vs.

THE CITY OF OCEAN CITY, a
municipal corporation of the State
of New Jersey and THE CITY COUNCIL
OF THE CITY OF OCEAN CITY,

Defendants/Third-Party
Plaintiffs-Respondents,

vs.

STATE OF NEW JERSEY, DEPARTMENT
OF COMMUNITY AFFAIRS,

Third-Party Defendant-
Respondent.

Argued: November 6, 2008 - Decided: August 6, 2009

Before Judges Cuff, Fisher and Baxter.

On appeal from the Superior Court of New
Jersey, Law Division, Cape May County,
Docket No. L-548-06.

Paul S. Ryan (The Campaign Legal Center) of the D.C. bar, admitted pro hac vice, argued the cause for appellants (Ira Karasick and Mr. Ryan, attorneys; Mr. Karasick and Mr. Ryan, of counsel and on the brief).

Gerald J. Corcoran argued the cause for respondents the City of Ocean City and the City Council of the City of Ocean City (Montgomery, McCracken, Walker & Rhoads, attorneys; Debra B. Albuquerque, on the brief).

Patricia E. Stern, Deputy Attorney General, argued the cause for respondent State of New Jersey, Department of Community Affairs (Anne Milgram, Attorney General, attorney; Lewis Scheindlin, Assistant Attorney General, of counsel; Daniel P. Reynolds, Senior Deputy Attorney General, on the brief).

New Jersey Applesseed Public Interest Law Center, attorneys for amicus curiae New Jersey Citizen Action, BlueWaveNJ, Public Campaign and the Brennan Center for Justice (Renée Steinhagen and Diana Jeffrey, on the brief).

PER CURIAM

Acting in their capacities as taxpayers and residents of the City of Ocean City (the City), plaintiffs proposed adoption of a fair campaign finance ordinance by the governing body. The matter was not placed before the governing body as a result of the initiative process. The governing body declined to introduce the ordinance. Plaintiffs filed a complaint in lieu of prerogative writs seeking a declaratory judgment that the

governing body had the legal authority to enact their proposed ordinance. On cross-motions for summary judgment, the judge granted the motions filed by the City and the State of New Jersey and denied the motion filed by plaintiffs.

On appeal, plaintiffs argue that the issue in this case is whether the governing body possesses authority under State law to enact the proposed ordinance. We view the fundamental issue as whether a justiciable controversy was presented to the Law Division. We hold that plaintiffs have not presented a case or controversy for adjudication by a court; what plaintiffs have presented is a request for an advisory opinion. Therefore, we affirm in the sense that plaintiffs are not entitled to relief in their favor but modify the disposition to reflect that plaintiffs' complaint should have been dismissed for failure to present a justiciable controversy.

On June 15, 2006, plaintiffs Steven Fenichel, Georgina Shanley, Marie Tomlinson, Brian H. Arnett, Allen Lovekin, Jane McCarthy, James F. McCarthy, Peter J. Guinosso, and Joseph A. Somerville proposed to the City governing body adoption of an ordinance entitled "An Ordinance Adding a New Part IX to Chapter II of the Revised General Ordinances of the City of Ocean City: The Fair and Clean Public Financing of Elections Ordinance of 2006." The purpose of the ordinance is to preserve and protect

the integrity of the electoral process and local government and to minimize the influence of special interest groups through the creation of a public-funded campaign trust. The trust would be funded by an initial contribution of \$150,000 from funds appropriated in the first budget following adoption of the ordinance and \$150,000 annually thereafter, less any amount of money that would make the account balance in the fund exceed \$300,000. Individuals could make donations up to \$5000 each year but individually donated funds would not be eligible for distribution in the following year's campaign. As such, donations from individuals would not count against the amount of public funds needed to fund the project in the year of the donation. The ordinance would also impose restrictions on contributions to and expenditures by participating candidates, and require all participating candidates to engage in all pre-election debates.

On June 15, 2006, the proposed ordinance was discussed at a meeting of the City Council of the City of Ocean City (City Council). The municipal attorney reported to the City Council that an employee of the Department of Community Affairs, with whom he spoke about the proposed ordinance, opined that the municipal governing body lacked the statutory authority to enact a public election financing program and the proposed ordinance

was contrary to State law. The ordinance was not introduced following a vote of three in favor and three opposed on the motion to introduce the ordinance.

On September 6, 2006, plaintiffs filed a complaint in lieu of prerogative writs seeking a declaratory judgment that the proposed municipal campaign finance ordinance was authorized by the New Jersey Constitution and State law, that it was not preempted by State law, and that the City Council had the authority to enact their proposed ordinance. In their answer, defendants the City and the City Council asserted that the Legislature had not bestowed authority on it to create a public campaign finance fund, the proposed ordinance conflicted with the New Jersey Local Budget Law, N.J.S.A. 40A:4-1 to -88, the court lacked subject matter jurisdiction of the matter, there was no case or controversy, and the court should not exercise any jurisdiction it had because "there is no proof or demonstration that the present governing body of [the] City would consider the proposed ordinance if the court concluded the governing body had authority to do so."

The City also filed a third-party complaint against the State of New Jersey. The City asserted that the State was an indispensable party and should be required to "advise the court of its position concerning the proposed legislation and whether

the legislation does or does not violate provisions of the New Jersey Local Budget Law."

The parties filed cross-motions for summary judgment. In a memorandum of decision issued in conjunction with an order granting the motions for summary judgment filed by the City and the State, the judge held that neither the State Constitution nor any statute specifically prohibits the City from adopting the ordinance proposed by plaintiffs, but no statute expressly authorizes creation of the fund contemplated by the ordinance. The judge further reasoned as follows:

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.

The City does not have the authority to create the fund required by the proposed ordinance. The City cannot accept conditional donations which are earmarked for an unauthorized purpose.

Accordingly, the judge issued an order denying plaintiffs' motion for summary judgment and granting the motions for summary judgment filed by the City and the State.

On appeal, plaintiffs argue that the City, organized pursuant to the Faulkner Act,¹ possesses the authority to enact and implement the proposed ordinance, and that State law does not preempt the ordinance. The City responds that it lacks the authority to enact the proposed ordinance, the State has not delegated authority to the City to enact and implement the proposed ordinance, the subject matter of the ordinance is preempted by State law, and the proposed ordinance is not within the power of the City to enact because it is controlled by the Division of Local Government Services in the Department of Community Affairs. The State argues that the Legislature has not authorized municipalities to establish dedicated trust funds for the public financing of municipal elections, and the Local Budget Law allows the establishment of dedicated trust funds only for revenues required by statute to be utilized for a specific purpose.

At oral argument, we raised the issue whether the current dispute, which involves an ordinance proposed by a group of taxpayers but which failed to garner the necessary votes to be introduced on first reading, presents a case or controversy amenable to resolution by a court of law. We allowed submission of supplemental briefs on this issue. Plaintiffs and the City

¹ N.J.S.A. 40A:69A-1 to -210.

responded that the Uniform Declaratory Judgments Act (the Act), N.J.S.A. 2A:16-50 to -62, confers jurisdiction on the Superior Court to resolve the issue of the authority of the City to enact a municipal campaign financing scheme that includes a trust fund composed of general municipal funds and donations. The State argued that the Act does not dispense with the foundational requirements of justiciability and standing and that plaintiffs lacked standing to pursue this action.

The Act empowers courts to declare rights, status and other legal relations in order "to afford litigants relief from uncertainty and insecurity." Chamber of Commerce, U.S.A. v. State of New Jersey, 89 N.J. 131, 140 (1982). A person whose rights or legal relations are affected by legislation may ask the courts to determine the validity of that legislation. Ibid. (citing N.J.S.A. 2A:16-53). However, in order to maintain a declaratory judgment action, the plaintiff must be able to demonstrate a justiciable controversy between adverse parties, and a sufficient interest in the outcome of the dispute to confer standing. Bergen County v. Port of N.Y. Auth., 32 N.J. 303, 307 (1960); In re Ass'n of Trial Lawyers of Am., 228 N.J. Super. 180, 183-84 (App. Div.), certif. denied, 113 N.J. 660 (1988). Stated differently, the Act "'cannot be used to decide or declare rights or status of parties upon a state of facts

which are future, contingent and uncertain.'" Chamber of Commerce, supra, 89 N.J. at 140 (quoting Lucky Calendar Co. v. Cohen, 20 N.J. 451, 454 (1956)).

To be sure, the State Constitution does not expressly limit the court's jurisdiction to actual cases and controversies; nonetheless, the courts will not "render advisory opinions or function in the abstract." Crescent Park Tenants Ass'n v. Realty Equities Corp. of N.Y., 58 N.J. 98, 107 (1971). Accord, N.J. Tpk. Auth. v. Parsons, 3 N.J. 235, 240 (1949).

Notably, in Chamber of Commerce, supra, the plaintiff sought a declaratory judgment that a statute commonly referred to as the "Strikebreakers Act" was unconstitutional because it was preempted by federal law. 89 N.J. at 138. The statute proscribed importation, transportation and supply of persons for the purpose of interfering with lawful employer/employee bargaining activities. Ibid. The Court held that the plaintiffs, whose members included thousands of employers within the State who had been served with criminal complaints for violating the statute, had standing to challenge the statute. Id. at 141. Moreover, the Attorney General filed an answer which admitted that a substantial question was presented whether the State statute was preempted by federal law or violated the Commerce Clause. Id. at 139.

In New Jersey Turnpike Authority, supra, the newly authorized and organized Turnpike Authority proposed to issue not less than \$175,000,000 in revenue bonds to fund the construction of the roadway. 3 N.J. at 239. A question arose whether establishing the Turnpike Authority and authorizing it to issue revenue bonds ran afoul of the State's constitutional limit on debt that may be issued by the State without approval of the voters. Id. at 241. The Court held that a justiciable controversy existed that was ripe for adjudication. Ibid. Notably, the Legislature had enacted legislation authorizing the establishment of the Turnpike Authority, authorized it to issue debt that would not be deemed a debt or liability of the State, the Turnpike Authority was prepared to issue revenue bonds, and the State Highway Commissioner argued that the debt would nevertheless be a debt of the State and that the amount of the debt to be issued by the authority exceeded the constitutional debt limitation. Id. at 243. The position of the State Highway Commissioner imperiled the successful issuance of the debt required to initiate the roadway building project. Ibid.

Moreover, the State Highway Commissioner objected to a provision that authorized him to advance funds available for state highway purposes to the Turnpike Authority subject to reimbursement at a later date. Id. at 246-47. Here, too, the

Court found a justiciable controversy because the Commissioner questioned his authority to divert funds appropriated to his department for general state highway purposes and to render services for a project not within the scope of authority conferred on the department by the Legislature. Id. at 247. As to the issue of justiciability, Chief Justice Vanderbilt wrote:

That the plaintiff, New Jersey Turnpike Authority, has a clear interest in all phases of the challenged legislation sufficient to enable it to maintain this suit is too obvious to require comment. Similarly the State Highway Commissioner in the light of his general supervision over the construction and maintenance of state roads and highways . . . is an indispensable defendant. His adverse interest is evident not only from the fact that the legislation under attack is generally in derogation of his jurisdiction but also because of his peculiar interest arising from the section making it possible for the Turnpike Authority to use the personnel and funds of his department for preliminary studies

[Id. at 240.]

Accord Re/Max of New Jersey, Inc. v. Wausau Insurance Cos., 304 N.J. Super. 59, 64 (Ch. Div. 1997) (status of real estate agents as employees or independent contractors subject to on-going dispute between brokers and workers' compensation insurance carriers), aff'd, 316 N.J. Super. 514 (App. Div. 1998), aff'd, 162 N.J. 282 (2000).

In both cases the legislation at issue had been adopted by the Legislature, signed by the Governor, and persons were acting in accordance with the statutes. In Chamber of Commerce, criminal complaints had been issued against various persons who were members or employees of members of the plaintiff organizations. In Turnpike Authority, state highway department personnel were providing services to the newly organized Turnpike Authority, funds had been advanced to it and bonds were about to be issued to allow it to proceed to build a roadway. These situations are in stark contrast to the situation in this case.

Here, several taxpayers proposed introduction of an ordinance to establish a municipal campaign finance program in the municipality. The proposed ordinance did not garner sufficient votes to be introduced for first reading. Plaintiffs argue that the stated reason is that the Department of Community Affairs personnel expressed skepticism about the authority of the municipality to adopt such a program. That may be. The three members who voted against the motion may have also thought the measure was too expensive or they may be philosophically opposed to public campaign finance programs.

Of greater significance, we know of no authority that would condone litigation to force the introduction of the proposed

ordinance. Furthermore, the expression of an opinion that the municipality may lack the authority to adopt the proposed ordinance, followed by a vote not to introduce the legislation, does not present the concrete circumstances required to establish real adversity. Plaintiffs' position ignores the fact that many pieces of legislation are introduced and never enacted. Other pieces of legislation are amended during the legislative process. Litigation prior to introduction or enactment focusing on the authority of a municipality to adopt such an ordinance must be seen as nothing other than a request for an advisory opinion on an abstract plan. Adjudication of the authority of a municipality to enact a campaign finance reform program is abstract because the municipal governing body would have no obligation to introduce and adopt such a ordinance even if a court held that it had the authority to do so.

Plaintiffs insist that a recent decision by this court recognizes that the issue of the authority of the municipal governing body to enact a particular ordinance is well-suited to declaratory relief. In City of Ocean City v. Somerville, 403 N.J. Super. 345 (App. Div. 2008), this court reviewed a proposed ordinance that imposed a cost of living cap on budgeted municipal expenditures in the context of a declaratory judgment action. Taxpayers had invoked the initiative process, N.J.S.A.

40:69A-184, and presented the proposed order to the city clerk. Id. at 352. The city clerk verified that the petitions satisfied the statutory requirements for form and content and contained the requisite number of signatures. Id. at 354. Significantly, once certified by the city clerk, the initiative petition must be referred to the governing body which is required to either adopt the ordinance or submit it to a vote by the citizens. Ibid. The municipal governing body is expressly authorized to contest whether the ordinance is subject to the initiative process and unless the municipal governing body does so, the proposed ordinance must be adopted or presented to the citizens for a vote. Ibid. That is a markedly different situation than the facts of this case, where the proposed ordinance at issue is not the product of the initiative process.

We also reject the notion advanced by plaintiffs that addressing the issue of municipal authority now will accelerate resolution of the issue because they can resort to the initiative process and the municipal attorney has already expressed its opinion that the governing body lacks authority to enact such a measure. If plaintiffs do resort to the initiative process, then a concrete issue will be presented because the municipal governing body must adopt the ordinance or submit the question to the voters. A declaratory judgment action commenced

at that time has the requisite concreteness and true adversity. It also allows the ordinance to be measured by the law in effect at that time.²

For the foregoing reasons, we find that the underlying declaratory judgment action and this appeal fail to present a justiciable controversy. We, therefore, dismiss the appeal.

Appeal dismissed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office


CLERK OF THE APPELLATE DIVISION

² In addition to questions whether the proposed trust fund is authorized by State law, we must recognize that the area of campaign finance, particularly regarding caps on contributions and sources of contributions, is constantly evolving and prone to litigation. See, e.g., McConnell v. Fed. Election Comm'n, 540 U.S. 93, 156, 124 S. Ct. 619, 668, 157 L. Ed. 2d 491, 556 (2003) (the government's strong interest in preventing corruption is sufficient to justify subjecting all soft money donations to source, amount, and disclosure limitations); Colo. Rep. Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 613-19, 116 S. Ct. 2309, 2315-17, 135 L. Ed. 2d 795, 804-07 (1996) (political parties may, like individuals, make unlimited expenditures, provided they remain independent); Buckley v. Valeo, 424 U.S. 1, 29, 39, 96 S. Ct. 612, 640, 644, 46 L. Ed. 2d 659, 693-94, 699 (1976) (limitations on the amount an individual candidate can spend to help him or herself win an election violate free speech, whereas limitations on campaign contributions do not).