



July 3, 2014

Hon. Dennis F. Carey, III  
Essex County Historic Courthouse  
470 Martin Luther King, Jr. Blvd.  
Newark, New Jersey 07102

Re: In re Initiated Petition Regarding a Proposed Save Our  
Water Ordinance and Councilman Ras J. Baraka, Councilman Ronald C. Rice,  
and the Committee of Petitioners, Docket No. ESX-L-6649-12

Dear Judge Carey:

As you know, New Jersey Appleseed Public Interest Law Center represents the Counter-Claimants/Third-Party Plaintiffs, William Chappel, Kenneth Gibson, Wynnie-Fred Hinds, Wilbur McNeil and Terri Seuss (“Plaintiffs” or the “Committee of Petitioners”) in this matter.

We no longer represent the two Councilmen named in the caption. Councilman Ras Baraka has now become Mayor of Newark, and is represented by Mr. Scott, and Councilman Ron Rice, has moved his residency out of State, and thus, no longer has standing to proceed. We make this submission in response to the Appellate Division’s directive to address: (1) the exact nature of the expenses incurred by the Newark Watershed Conservation and Development Corp.

(NWCDC) to which the June and July 2013 payments ordered by your Honor applied, when they were incurred, and whether they were reimbursable pursuant to the Executive Order’s directive to continue the management contract and the water treatment facility agreement until a successor is established; and (2) the facts upon which NWCDC relies to support its arguments that the City

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of Newark is estopped from asserting that it has no continuing obligation to fund the dissolution of the NWCDC.

With respect to the first issue, we offer the Certification of Brendan O’Flaherty, who, after review of the two agreements at issue here, the Executive Order, and Newark’s administrative payment history with the NWCDC, offers some factual answers to the Appellate Division’s questions. See Certification of Brendan O’Flaherty attached hereto. The upshot of his analysis is that this Court must understand the nature of the two service contracts at issue here in order to analyze whether any of the expenses itemized by the NWCDC are reimbursable. This is the case, because the Management (Conservation) Contract was a cost-reimbursement contract that was valid under the Local Government Contract Law, while the Water Treatment Facility/Reservoir Memorandum of Agreement was not a cost-reimbursement contract and was not valid pursuant to that law since it was not competitively bid.

Furthermore, we urge this Court when addressing the issue of expenses incurred by the NWCDC generally and more specifically with respect to its dissolution to employ the legal framework that is appropriate for municipal fiscal affairs within the New Jersey context. That is, how, when, and on what a municipality like Newark spends its revenues is governed not only by the Local Fiscal Affairs Law, N.J.S.A. 40A:5-1 et seq., and the Local Public Contracting Law, N.J.S.A. 40A:11-1 et seq., but also the common law principle that the “hands of [a municipality’s] successors cannot be tied by contracts relating to governmental functions,” unless such contracts, typically more than one-year in length, are specifically authorized by state statute. N.J. Attorney General Formal Opinion, No. 18, at 107 (1956)(citing 10 McQuillan on Corporations §29:101, pp. 408-409 (3d ed.)). Each municipal council must have the right to revise, repeal or reject the policy choices of its predecessor council, and must retain the ability to

determine its own fiscal fate, without the weight of financial obligations or revenue constraints imposed by a previous legislative body through contract or ordinance. Cf. N.J. Educ. Ass'n v. State, 412 N.J. Super. 192, 216-217 (App. Div.), certif. denied, 202 N.J. 347 (2010)(finding that the state reserved the right to alter the means of funding its public employee retirement system obligations because the State Constitution “place[d] limitations upon any legislature to bind its successor as to appropriations,” which are determined on the basis of a single fiscal year). This established principle must advise this Court when it seeks to determine the “facts” on which it is going to estop Newark from asserting that it has no continuing obligation to fund the NWCDC.

With respect to the dissolution of the NWCDC, it is clear that its Board passed a resolution to dissolve effective May 31, 2013, on March 25, 2013, and adopted a Plan of Dissolution. Kanefsky Cert., Ex. QQQ. It is less clear whether the three trustees that approved that dissolution had the authority to act, and if not, why. The NWCDC has taken the position throughout this litigation that a conflict of interest emerged after the resolution to dissolve (created by the issuance of subpoenas by the Office of State Comptroller) requiring the appointment of provisional trustees; however, the Committee of Petitioners (and Councilmen Baraka and Rice) have always maintained that the NWCDC had been operating in violation of its governing documents with an insufficient number of trustees for almost two years prior to that date. The validity of the resolution to dissolve is moot at this point; however, what is relevant are the terms of the NWCDC’s Dissolution Plan, and the statute governing that dissolution once the former Mayor of the City, then a Trustee of the NWCDC, and two other trustees of the NWCDC went to court to seek appointment of provisional trustees pursuant to N.J.S.A.15A:12-12, governing involuntary dissolutions of nonprofit corporations.<sup>1</sup>

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<sup>1</sup> The Consent Order Appointing Provisional Trustees does not state what prong of

N.J.S.A.15A:12-12(g) makes clear that,

In any proceeding under this section, the court shall allow reasonable compensation to the custodian or provisional trustee for services and reimbursement or direct payment of the reasonable costs and expenses, which amounts shall be paid by the corporation.

In addition, the Plan of Dissolution states: “14. In connection with and for purposes of implementing and assuring completion of this Plan, the corporation shall pay any agency, professional and other fees and expenses of persons rendering services to the corporation in connection with the . . . discharge of its liabilities and the implementation of this Plan.” (Ibid.)

It therefore follows that the NWCDC, as a nonprofit corporation organized under Title 15A must bear the cost of its dissolution, whether voluntary or involuntary and whether it is operating under its 1994 governing documents (which reflect its fiduciary obligations to the City of Newark) or its 2012 Certificate of Incorporation and By-Laws (which do not).

Respectfully submitted,

NEW JERSEY APPLESEED  
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By: \_\_\_\_\_  
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N.J.S.A.15A:12-12(a), the Court relied upon when accepting jurisdiction (*e.g.*, the corporation was no longer able to carry out its purposes; the trustees looted or wasted corporate assets, the trustees or persons having management authority cannot effect action on one or more substantial matters respecting the management of the corporation's affairs, etc.) . It did, however, include in its Order, N.J.S.A. 15A:12-12(c), which gives the court the authority to appoint provisional trustees when it determines that appointment to be in the best interest of the corporation.