



August 14, 2014

Hon. Garry S. Rothstadt, J.A.D.
Hon. Mitchel E. Ostrer, J.A.D.
Hon. Carmen Messano, J.A.D.
Appellate Division
25 West Market Street
Trenton, New Jersey 08625-006

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. A-4258-13.

Dear Judges Rothstadt, Ostrer and Messano:

Please accept this letter brief in lieu of a more formal response on behalf of Counter-Claimants/Third-Party Plaintiffs, William Chappel, Kenneth Gibson, Wynnie-Fred Hinds, Wilbur McNeil and Terri Seuss ("Committee of Petitioners") in this matter. New Jersey Appleseed Public Interest Law Center no longer represents the two Councilmen named in the caption. Councilman Ras Baraka has since 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. No order acknowledging their voluntary withdrawal from this case has been executed.

We make this supplemental submission in response to the trial Court's August 4, 2014 Decision that ostensibly addressed: (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 the Law Division court would be applied, and whether the NWCDC incurred, or became otherwise obligated to pay, those expenses prior to May 31, 2013"; and (2) "the facts upon which NWCDC relies to support any arguments it raised before the Law Division regarding its claims that the City of Newark is estopped from now asserting it has no continuing obligation to fund the dissolution of the NWCDC." App. Order, dated May 21, 2015 (emphasis added).

In its August 4, 2014 Decision, the trial court found that the City of Newark "has [f]unded the NWCDC for [d]ecades," (Decision at 3), and that certain expenses the NWCDC incurred during the months of June and July 2013 were incurred while "provid[ing] services to the City," (id. at 2), including dissolution expenses. The Committee of Petitioners disagrees with these findings, and asserts that they are not supported by evidence in the record. First, the City of Newark never "funded" the NWCDC; it made payments to the NWCDC pursuant to two different types of service agreements: The Management (and Conservation) Contract and the Water Treatment Plant Memorandum.

Second, there is insufficient evidence in the record that proves that the expenses incurred by the NWCDC during those two months were directly related to services actually performed for Newark pursuant to an enforceable service contract (given the fact that both the Management Contract for Services and the Water Treatment Memorandum of Understanding had expired as of May 31, 2013, pursuant to the exact language of the Executive Order dated October 1, 2012).¹ The trial court simply assumed, without basis, that because the NWCDC still had employees on its payroll that such persons were performing services for the City of Newark, and it improperly extended one or both of the contracts on the basis that the "NWCDC . . . was still winding down" even though as of May 31st "a successor organization was established but had not taken control of all responsibilities of the NWCDC." Id. at 3. The trial court, however, did not specify which responsibilities were not completely transferred nor did it link the expenses the NWCDC incurred to the performance of such responsibilities nor to either contract.

Finally, with respect to the legal expenses incurred during the months of June and July, the trial court did not address the conflict of interest raised by the Committee of

¹ NWCDC admits that the Executive Order was to apply only until such time as a successor can ensure the effective operation, maintenance and management of the Pequannock Water Treatment Plant, the Pequannock Watershed and the Water Storage Reservoirs. (Kanfesky Cert., Ex. RRR at p.3).

Petitioners in its initial brief (Da173-175) asserting that legal expenses, which were incurred by the NWCDC in defending either the Committee's counterclaims (alleging improper operation of the NWCDC and breach of fiduciary duty to Newark) or Mayor Booker's Order for Show Cause for preliminary relief based on a Verified Complaint alleging wrongdoing, cannot by definition constitute services rendered to the City of Newark (rather than services rendered to an entity that, over the years, had become adverse to the City). To do so, would be to compel Newark to pay its counsel's fees and the NWCDC's counsel's fees when the Mayor, supported by the Committee of Petitioners claimed that the NWCDC violated its fiduciary duties to the City. Such result makes no sense, and the trial court's silence on the issue, even to dismiss it, is puzzling.

I. As of May 31, 2013, the Management (Conservation) Contract and The Water Treatment Facility Agreement Had Expired.

In his decision, Judge Carey implicitly concluded that both the Management (Conservation) Contract and the Water Treatment Facilities Agreement continued through June and July. He made no distinction between the two when he stated that "as of May 31, 2013, a successor organization was established, but it had not yet taken control of all responsibilities of the NWCDC." Decision at 3. As noted above, he did not specify which responsibilities had not been transferred to the Newark

Department of Water and Sewer, and for sure, he did not specify under which of the two contracts such services were performed. In addition, he made no finding that whatever "responsibilities" he thought had not been transferred prevented the City from satisfying the condition set forth in the Executive Order.²

Notwithstanding the trial court's failure to actually find which services were not transferred, the record indicates that the City had "assumed complete control of the land, reservoirs and operations at the Pequannock Watershed, except for issuance of permits for fishing, boating, hiking and hunting." Kanefsky Cert. at Exhibit O. (The record also indicates that the NWCDC did not dispute Mr. Neal's Certification that the City's Department of Water & Sewer had taken complete control over the operation of the Pequannock Water Treatment Plant and the City-owned reservoirs, effective June 1, 2013). Although the Committee of Petitioners deny that the NWCDC's activity related to the of issuance of permits after May 31, 2013 triggered the extension of the Management Contract, it for sure did not trigger the continuation of the Water Treatment Facility Agreement. With this understanding we turn to the expenses the

² As a matter of law, the Committee of Petitioners asserts that the City's Department of Water & Sewer did not have to take over every function and program of the NWCDC, no matter how minor, in order to conclude that as of May 31, 2013, the City was able to "ensure the effective operation, maintenance and management" of the properties and facilities previously under the control of the NWCDC, as the City's fiduciary.

trial court found the City owed the NWCDC for the months of June and July.

As a preliminary matter, the Committee of Petitions submitted the Certification of Brendan O'Flaherty, who, after review of the two service agreements at issue here, the Executive Order, and Newark's administrative payment history with the NWCDC presented factual information relevant to the question of whether the expenses itemized by the NWCDC were reimbursable under either service agreement. See Certification of Brendan O'Flaherty submitted by the City of Newark, under cover letter dated, August 11, 2014. He concluded that the Management (Conservation) Contract was a cost-reimbursement contract that was valid under the Local Public Contracting Law ("LPCL"), (id. at ¶4), while the Water Treatment Facility/Reservoir Memorandum of Understanding was not a cost-reimbursement contract and was not valid under state law requiring it to be competitively bid. Id. at ¶24.³ According to Mr. O'Flaherty, the Management Contract, since 1974 "had always been a cost-reimbursement contract, with a maximum annual budget," whereas the Facilities Agreement was for a lump-sum of

³ It should also be noted that for several years, members of the public, including Mr. O'Flaherty and some of the Committee of Petitioners, had had public arguments with counsel for the NWCDC, that operating the Water Treatment Facility for Newark did not fall within the NWCDC's mission. See 1994 Governing Documents. (Da54-81); O'Flaherty Cert., at ¶26.

money for each month of successful management and operation of the plant, and was not a cost-reimbursement contract. Id. at ¶28. Accordingly, because the record indicates that the NWDC was not operating the Treatment Plant or managing the reservoirs after May 31, 2014, no payments can be authorized under that agreement after that date, even if the NWDC incurred costs connected with their activities under that agreement. To the extent that the Management Contract continued after May 31, 2013, the NWDC can only be reimbursed for costs associated with services it actually performed during the month of June and July associated with that contract. The trial judge neither adopted nor denied Mr. O'Flaherty's characterization of the Management Contract as a cost-reimbursement contract (with maximum amounts for each category of expense) or the Treatment Facility Agreement as a lump sum payment contract without cost-reimbursement. Employing this characterization, however, the Committee asserts that none of expenses that the trial court ordered the City to pay are reimbursable based on the information in the record.

First, with respect to Employee Payments there is still not enough information in the record to determine how much, if any of these expenses are reimbursable under the management contract since many of these employees may be water treatment employees. See O'Flaherty Cert. at ¶35A. Furthermore, there is no proof

that these employees actually performed any services under the management contract. 13-15 employees did not issue permits.

As to routine Vendor and Utility payments, the Judge determined that they were expenses incurred in connection with dissolution. Since the NWDC did not incur these costs in July and June in connection with its performance under the Management Contract, they are simply not reimbursable. Similarly, Judge Carey determined that since "many of the NWDC's insurance policies terminated on May 31, 2013," the NWDC needed to "procure additional insurance because it was dissolving."

Decision at 2. As costs incurred in connection with dissolution and not the Management Contract, such expenses are not reimbursable by the City of Newark. This reasoning also applies to the costs associated with Office Rental/Lease and payment of the Provisional Trustees, and expensed associated with Vehicles and Equipment. With respect to the latter, the trial court found that the NWDC incurred \$48,041.24 in charges and penalties for four leased vehicles that were returned to the dealer, and \$71,097.24 to terminate equipment contracts. To the extent that these are expenses associated with its performance of the Water Treatment Plant prior to May 31, 2013, they are not reimbursable; nonetheless, they too are dissolution costs rather than expenses incurred while performing either contract, let alone the Management Contract. The \$77,817.25 the NWDC

incurred to "obtain title to finance four vehicles before transferring them to the City" is also not a cost associated with the performance of either contract. Essentially, the NWCDC wants payment from the City for the costs associated with the transfer of property to the City without a contract or other agreement of sale. Again, there is no valid contract approved by the City Council permitting Newark to buy these vehicles from the NWCDC, and any costs associated with this transfer that the NWCDC incurred may also be characterized as a dissolution cost.

The trial court's findings of fact with respect to Professional Services are also a deficient basis on which to compel the City to pay. According to the trial court, Mr. Breckmeyer, a consultant to the NWCDC, provided services to the City relating to the Water Treatment Plant during the months of June and July. Because this was not an expense associated with services delivered under the Management Contract it is not reimbursable. Moreover, since the Water Treatment Facility Memorandum was no longer in effect, Mr. Breckmeyer should not have sought payment for his services to Newark from the NWCDC. Rather, in June and July, Mr. Breckmeyer should have negotiated a consultancy agreement directly with the City of Newark, to ensure that he would be paid. Because the NWCDC should not have paid Mr. Breckmeyer once it was no longer operating the treatment plant, the City clearly does not have to reimburse the

NWCDC. A sense of fairness may direct the City to do so, but because the Water Treatment Facility contract was no longer in effect, the trial judge improperly compelled the City to make such payment.⁴

Legal Fees. The court also found that the NWCDC incurred \$262,503.86 for attorney's fees and costs for services provided by Genova Burns Giantomasi Webster ("GBGW") in June and July 2013. Notwithstanding the Committee of Petitioners' assertion that in June and July 2013 the GBGW firm had a conflict of interest with the City of Newark, the Court's breakdown indicates that none of those expenses were incurred in association with the provision of services to Newark pursuant to the Management Contract (if this court were to conclude that such contract even continued). During those months, the only activity in the Save Our Water litigation was the appointment of the provisional trustees, and it would be absurd to hold the City liable for the NWCDC's fees when the Mayor sued them for financial improprieties and wrongdoing and sought an Order seeking the appointment of trustees to oversee the NWCDC's

⁴ The confusion as to who employs and supervises Mr. Breckenmeyer is long-standing problem that places this situation in perspective. It was Mr. Breckmeyer's representation of himself as a "member of the City Water's Department" to the Office of State Comptroller in January 2012, that led that office to decide not to authorize the award of the Water Treatment Facility contract to the NWCDC in February 2012. (Da28-29).

dissolution. The NWCDC's litigation costs in response to that Order to Show Cause as well as the actions it took in response to subpoenas issued by the State Comptroller are not expenses incurred when providing services to the City pursuant to the Management Contract, and are liabilities to be borne by the NWCDC alone. Similarly, the City has no contractual obligation to pay \$190,096.39 of legal fees associated with the NWCDC's dissolution over the two-month period at issue herein; especially to a firm, which had represented the NWCDC when it had sued the City Council in 2012 to stop the Council from investigating the NWCDC as well as to prevent its adoption of the Save Our Water Ordinance, which sought, among other things, to dissolve the NWCDC. The trial court's willingness to shut its eyes to this adverse relationship between GBGW and the City of Newark cannot be explained.

Finally, the record does not indicate how much of the Pension Funding Shortfall Obligation that was paid in June or July (in order "to fulfill the funding requirements through 2013") is associated with employees who were paid pursuant to the Management Contract. As Mr. O'Flaherty explained, this is a difficult determination that the trial judge did not undertake. The difficulty arises because,

pension liability was not a budget line in the management contract. This was the case for at least two reasons: First, NWCDC employees since 1974 were

deemed not to be employees of the City. Second, since the NWDC never had a guarantee that its contract would continue forever, it was the NWDC's responsibility to fund its pension programs when it was providing management and conservations services to the City. With respect to pensions of persons employed pursuant to the water treatment and storage agreements, it is evident that the NWDC is independently responsible for any pension shortfall. We do not know whether [the previous contractor]PSG fully funded its pensions when it held the water treatment plant agreement, and I do not think anyone would expect the City of Newark to entertain a request from them at this date to make up any shortfalls that occurred in the 1990s with respect to their employees who worked at the water treatment facility.

O'Flaherty Cert. at ¶35D (emphasis added). For the foregoing reasons, the trial court's factual findings do not support compelling Newark to reimburse the NWDC for the aforementioned expenses incurred during the months of June and July 2013.

II. Pursuant to Relevant Provision of Title 15A, the NWDC Bears the Reasonable Costs of Dissolution Incurred By the Provisional Trustees, including their own Fees.

With respect to the dissolution of the NWDC, 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 NWDC 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 the Provisional Trustees; however, the Committee of Petitioners (and then 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.⁵

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

⁵ The Consent Order Appointing Provisional Trustees does not state what prong of 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.

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, and quasi-governmental status with respect to its management of the watershed properties only) or its 2012 Certificate of Incorporation and By-Laws (which do not).

III. A Municipality Cannot Be Estopped From Asserting a Continuing Obligation to “Fund” an Independent Corp., Without Statutory Authorization or an Enforceable Contract.

In its Decision the trial court gave facts to support its holding that the City of Newark has a “continuing obligation to fund the dissolution of the NWCDC.” Not one of these facts justifies its Order compelling the City to do so.

First, the fact that the “City initiated the dissolution process by seeking the appointment of the Provisional Trustees” does not support estoppel. As set forth above, the dissolution process is governed by N.J.S.A. 15A:12-12, and pursuant to the terms of that statute, the trustees of a nonprofit who seek

involuntary dissolution do not bear the costs of that dissolution, such as Mayor Booker and the two NWCDC trustees that simultaneously filed an OTSC.⁶ Accordingly, the request for appointment of provisional trustees by the Mayor in and of itself cannot support estoppel against the City of Newark.

Second, the trial court found that “[t]he City funded the NWCDC for Decades.” Decision at 3. This is an inaccurate characterization of the relationship. A municipality typically does not “fund” an independent agency or entity; it makes payments pursuant to service contracts. The record indicates that the City of Newark made monthly payments to the NWCDC from 1974 onward pursuant to the Management (Conservation) Contract; and it made additional monthly payments to the NWCDC from 1998, under the Water Treatment Facility Contract as well. Once the City Council adopted the Save Our Water Ordinance in September 2012, it became apparent to Mayor Booker that City Council would no longer approve contracts his administration had negotiated with the NWCDC.

⁶ It should be noted that technically, the City of Newark did not intervene. Mayor Booker, as an NWCDC Trustee, had standing under Title 15A. It appears that Mayor Booker came back into this action (which he had initiated and from which he had been dismissed when the trial court declared the Save Our Water Ordinance invalid), when he had gotten some indication that the Office of State Comptroller was aggressively investigating the affairs of the NWCDC. See State Comptroller’s Report (Da182-229).

As noted throughout this brief, he then issued an Emergency Executive Order that would extend these two service contracts "until such time as a successor can ensure the effective operation" of Newark's water properties and facility. In its decision, the trial court inaccurately found that the contracts were thus "modified." As set forth in the O'Flaherty Certification, the City Council had prohibited modification of the contracts, and payment was made in the same fashion as always. O'Flaherty Cert. at ¶¶10-14, 28-29.

The court further found that "as of May 31, 2013, a successor organization was established, but it had not yet taken control of all responsibilities of the NWCDC." Decision at 3. Again, as noted previously, the court made no specific findings as to what responsibilities had not been transferred and under which contract they fell. Persons who remained on the payroll may have been assisting the NWCDC wind down; some may have been holding a job title, performing no work, and waiting for the NWCDC to terminate them because they did not want to go work for the City. At most, one or two employees were handling the issuance of permits pursuant to the Management Contract perhaps solely because organizational obstacles delayed their transfer to the City. But none of these facts justify compelling a municipality to continue to fund an independent corporation,

without a valid service contract that is enforceable under state law.

Lastly, the court complains that the City of Newark allowed the Provisional Trustees to proceed with their work "without informing the [NWCDC] Board or the Court that it would not pay for the dissolution." Ibid. Again, Mayor Booker filed an OTSC for preliminary relief pursuant to Title 15A, which explicitly states that the dissolving nonprofit corporation pays for the provisional trustees expenses in overseeing the dissolution. N.J.S.A.15A:12-12(g). The Court was thus informed when it signed the Consent Order appointing the trustees.

Moreover, the court is assumed to know that under a Mayor-Council form of government neither a Mayor nor his Business Administrator can bind the City to make payments to persons or entities without City Council approval. Indeed, the Committee of Petitioners urged the trial judge to employ the legal framework that is appropriate for municipal fiscal affairs within the New Jersey context (when addressing the issue of expenses incurred by the NWCDC generally and more specifically with respect to its dissolution). 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 LPCL, 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).

The trial court ignored this established principle when it found that the Business Administrator's silence (i.e., "did not dispute the NWCDC's expectation that it would be receiving payment from the City for June and July," and did not inform the NWCDC that "the City would not fund the dissolution.") supports its legal determination that the City should be estopped from asserting that it has no continuing obligation to fund the

NWCDC. Decision at 4. At best, the Business Administrator speaks for the Mayor (though in this case, he did state anything affirmatively); and the Mayor alone cannot bind future City Council's to appropriate monies that the City is not otherwise required to be paid under state law.

CONCLUSION

For all the above reasons, it is position of Committee of Petitioners that the City of Newark, its taxpayers, and its ratepayers are not liable for any dissolution costs and are not liable for any expenses incurred in June and July. As of May 31, 2013, the Newark Department of Water and Sewer had taken full control over the Water Treatment Plant, the Storage Reservoirs, and the Watershed; it has assumed control over the operation of such properties, except for the issuance of permits that had always been provided to Newark pursuant to the Management (Conservation) Contract. Accordingly, the Emergency Executive Order had expired under its own terms, and the City is not authorized to make payments to an independent nonprofit corporation without a City Council approved contract that accords with state requirements under the LPCL.

Even if the this Court were to require the City to make payments for services received in June and July (despite the absence of a valid contract), there is insufficient evidence in the record to find that the expenses claimed by NWCDC are

directly related to the one identified activity (previously compensated on a cost reimbursement basis under the Management Contract) that was not transferred to the City by May 31, 2013. As a result, Judge Carey's April 25, 2014 Order should be reversed in its entirety, and the NWCDC be found responsible for bearing its own costs of dissolution.

Respectfully submitted,

NEW JERSEY APPLESEED
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