

Renée Steinhagen, Esq.
NEW JERSEY APPLESEED PILC
744 Broad Street, 16th Fl.
Newark, New Jersey 07102
973-735-0523

Attorney for Committee of Petitioners,
Councilman Ronald C. Rice,
and Councilman Ras J. Baraka

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IN RE INITIATED PETITION : SUPERIOR COURT OF NEW JERSEY:
REGARDING A PROPOSED SAVE : ESSEX COUNTY: LAW DIVISION
OUR WATER ORDINANCE. :
: Docket No. ESX-L-006649-12
: VERIFIED ANSWER
: AND COUNTERCLAIMS

X

Defendants WILLIAM CHAPPEL, KENNETH A. GIBSON, WYNNIE-FRED V. HINDS, WILBUR J. McNEIL. TERRI A. SUESS (collectively, the “Committee of Petitioners”), COUNCILMAN RAS J. BARAKA and COUNCILMAN RONALD C. RICE, all of whom are Newark residents, taxpayers and users of the Newark public water and sewer system, by way of Answer to Plaintiff CITY OF NEWARK’s Verified Complaint, dated September 6, 2012, and Intervenor NEWARK WATERSHED CONSERVATION and DEVELOPMENT CORPORATION’s Verified Complaint, dated September 18, 2012, allege as follows:

As to CITY OF NEWARK’S COMPLAINT

Although the Plaintiff is represented as the City of Newark, it is unclear whether the Plaintiff, at this time, is better denoted as Newark Mayor Cory A. Booker. This is the case because, since the filing of the Complaint, the initiated ordinance, “Save Our Water Ordinance,”

at issue herein, has been adopted unanimously by the Newark City Council, and published by the Newark City Clerk, who has deemed it appropriate to do so without presenting it to the Mayor.

INTRODUCTION

1. Admit that the City of Newark operates under the Optional Municipal Charter Law as Mayor-Council Plan C.

2. Admit that Newark's water and sewer systems are operated by the City as two "self-liquidating utilities" to the extent that such term means that their respective budgets must balance annually and any debt that they issue is not imputed to the Newark's general obligation debt limit.

3. Admit that the City of Newark has contracted until recently with the Newark Watershed Conservation Development Corporation ("NWCDC"), a non-profit corporation (which was established pursuant to a 1973 City Council Resolution approving the creation of the NWCDC and its initial Certification of Incorporation), to 1) manage, plan and provide for the conservation and development of the Newark Watershed properties located in Morris, Passaic and Sussex counties; and 2) operate, maintain and manage the Newark Pequannock Water Treatment Plant.

4. Defendants do not have enough information on which to deny or admit the number of residential and commercial/industrial users of the Water System.

5. Defendants do not have enough information on which to deny or admit the geographical extent of the Water System.

6. Admit that the City retains title and owns the Pequannock Newark Watershed properties and "provides and receives water through interconnections with the Passaic Valley Water Commission, the City of Jersey City and New Jersey American Water."

7. Defendants do not have sufficient information on which to admit or deny the identity of the municipalities provided water by the Water System, especially those municipalities that do not have a contract that has been approved by the City Council.

8. Defendants do not have enough information on which to deny or admit the geographical extent of the Sewer System, but admit that such system “delivers untreated wastewater to both the Joint Meeting of Essex and Union Counties (the “JMEUC”) and to the Passaic Valley Sewage Commissioners (not Commission) for treatment and disposal.”

9. Defendants do not have enough information on which to deny or admit the exact services provided to the City’s non-Newark water customers.

10. Admit that the Water and Sewer Systems are old, in need of investment and infrastructure improvement and are the subject of two DEP Consent Orders entered into May 2001 and May 2009. Defendants deny allegations in the paragraph that impute that such difficulties are the cause of revenue deficiencies and the inability of the City to receive low-interest rate financing. Defendants further deny that environmental requirements of the Systems are “heightened” in view of the fact that the DEP Consent Orders are three and eleven years old, and deny that the City could not successfully apply to the New Jersey Environmental Infrastructure Trust, or that it has not done so. Defendants further state that the Hatch Mott MacDonald Report (“HMM Report”) estimated the cost of the Cedar Grove reservoir improvements to be \$75 million, not \$100 million; and in the July 2010 City application to the Local Finance Board that cost was estimated to be \$50 million.

11. Admit that the numbers stated in paragraph 11 are copied correctly from the HMM Report, but note that many of the projects appearing on the HMM list are described as “low

priority.” The Defendants further note that the estimates appearing in the HMM Report are “Class 5 estimates” that “are prepared on very limited information and have wide accuracy ranges.” (HMM Report, Exhibit B of City’s Verified Complaint, p. 5.1.)

12. Admit that the Department of Water and Sewer Utilities (“DWSU”) currently lacks the employees needed to efficiently and effectively manage the Systems, but deny allegations in paragraph 12 that connect such deficiency to the City’s current fiscal crisis. The Defendants further note that DWSU is paying for the required employees or consultants, who manage and operate the system, but who are not directly employed by the DWSU.

13. Admit that in June 2010, the City applied to the Local Finance Board for authorization to establish a Municipal Utilities Authority, but deny that consideration of the advantages or disadvantages of the MUA was undertaken by the City itself, since most of such efforts were funded by NWCDC, on information and belief, without City Council approval.

14. Admit the allegations set forth in paragraph 14. The Defendants further note that the proposal to create an MUA provoked widespread public outcry at each of the five public hearings that were held in each of Newark’s wards.

15. Admit the allegations set forth in paragraph 15 insofar as they describe the \$32,000,000 loan that was given to the City of Newark in December 2011. Defendants note that the 2011 fiscal difficulties that the forgivable loan addressed and resolved were caused by the inability of the Newark administration to submit a balanced budget for calendar year 2011 by November 2011. Neither the terms of that loan nor any correspondence between the Local Finance Board and the City Council since July 2012 requires actual establishment of an MUA in order to satisfy the terms of that loan. See Letter from Thomas Neff to Mayor and City Council dated September 7, 2012, (attached hereto as Exhibit A), and Letter from Thomas Neff to City

Council, dated August 21, 2012 (attached hereto as Exhibit B). On July 24, 2012 at a meeting between a subcommittee of the Newark City Council and the Newark legislative delegation, Assemblyman Albert Coutinho stated that the loan had been forgiven. Neither Newark Business Administrator Julien Neals nor any member of the legislative delegation disagreed with Assemblyman Coutinho.

16. Admit the allegations set forth in paragraph 16 regarding the requirement "that the City make a good faith effort to work cooperatively with the State to reconsider the feasibility of the creation of the a MUA." Defendants deny that the State considers the establishment of a MUA necessary to enable the City to become financially self-sufficient. To the contrary, in the letter dated September 7, 2012, the Local Finance Board noted that the franchise fees associated with the MUA that the City previously proposed "would have further destabilized the City's budget." See Exhibit A.

17. Admit the allegations set forth in paragraph 17.

18. Admit the allegations set forth in paragraph 18.

19. Admit the allegations set forth in paragraph 19.

20. Admit the allegations set forth in paragraph 20.

21. Admit the allegations set forth in paragraph 21, and state that the Committee of Petitioners submitted over 5, 300 signatures, and only 2, 371 were required by statute to request a special election if the Newark City Council had not adopted the initiated ordinance.

22. Defendants do not have sufficient information as to whether to deny or admit the allegations stated in paragraph 22, but note that the Newark City Clerk, Robert Marasco, retained special counsel to assist him with respect to the processing of the initiated ordinance.

23. Admit the allegations set forth in paragraph 23.

24. Admit the allegations set forth in paragraph 24, and note that the Municipal City Council adopted the initiated ordinance on September 11, 2012 by a vote of 7-0, with one abstention.

25. Defendants deny the allegations set forth in paragraph 25 since the initiated ordinance was adopted by the City Council in whole, and there does not have to be a special election.

26. Defendants do not have sufficient information on which to deny or admit the allegations set forth in paragraph 26.

27. Admit the allegations set forth in paragraph 27 and note that on September 11, 2012, Councilman Ras J. Baraka made a motion to table the ordinance to establish an MUA, and this motion was passed by the City Council by a vote of 8-0.

COUNT ONE

28. The paragraph does not set forth any allegations to which the Committee is able to respond.

29. Defendants deny the legal conclusion that the initiated ordinance is invalid because as a general matter it involves the ownership and management of Newark's water and sewage systems and the organization and contracting practices of Newark's DWSU, which are not pre-empted by State law, and it enacts provisions that are within the legislative authority of the Newark City Council.

*All allegations not specifically admitted in any of the foregoing paragraphs are hereby denied.

WHEREFORE, Defendants assert that the City of Newark has failed to state a claim justifying the relief sought; therefore, the Committee of Petitioners, Councilman Baraka, and

Councilman Rice demand judgment dismissing Count One of the Complaint in its entirety, and awarding counsel fees, costs, and all other relief the Court deems proper and just.

DEFENSES

FIRST AFFIRMATIVE DEFENSE

30. Newark's Verified Complaint fails to state a cause of action on which the relief sought may be granted.

SECOND AFFIRMATIVE DEFENSE

31. The Verified Complaint must be dismissed because Plaintiff has failed to clearly identify the parties in the caption of this matter as required by N.J.R. 1:4-1. Although the Verified Complaint identifies the Plaintiff as the "City of Newark," it is unclear whether the attorneys for the Plaintiff represent the Mayor, City Council and/or the City Clerk in this matter.

THIRD AFFIRMATIVE DEFENSE

32. The Verified Complaint must be dismissed because the enactment of the initiated ordinance by the Newark City Council does not put the City at risk of being liable for the \$32,000,000 forgivable loan that was given to the City by the Director of the Division of Local Government Services to resolve the 2011 budget deficit. The Memorandum of Understanding accompanying that loan required Newark, among many other things, to make "good faith efforts to explore the creation of a water authority," and did not require the City to actually establish such municipal utility authority. (emphasis added) Memorandum of Understanding, attached to Newark's Verified Complaint as Exhibit A.

FOURTH AFFIRMATIVE DEFENSE

33. . The Verified Complaint must be dismissed because NWCDC has been providing water treatment and supply services to Newark in violation of state law, and has been operating

outside of the scope of activities specified in its Certificate of Incorporation, as amended. The state Director of Local Government Services stated in a letter dated July 5, 2012 that the “current and longstanding system of Newark providing water services through a not-for-profit corporation” has been determined to be “unlawful” in an opinion issued by the State Comptroller, dated February 8, 2012. See Letter from Thomas Neff to City Council dated July 5, 2012 (attached hereto as Exhibit C). The State Comptroller has stated that the contracts (i.e., memoranda of understanding) for the operation, maintenance and management of the Pequannock Water Treatment Plant and Water Storage Reservoirs are not valid pursuant to the exception to the Local Public Contract Law cited by the City, N.J.S.A. 40A:11-5(1)(gg) and N.J.S.A. 40A:11-5.1, because the required procedures have not been followed, and have never been followed. See Letter from Robert Shane to Julien Neals, dated February 8, 2012 (attached hereto as Exhibit D).

34. On information and belief, in the past Newark never followed the procedural requirements set forth in N.J.S.A. 58:26-19 (New Jersey Water Supply Public-Private Contracting Act) that were required to support its justification that its water management and operation contracts with NWCDC were exempt from bidding under N.J.S.A. 40A:11-5(1)(z). See e.g. Resolution of City of Newark dated April 7, 2009 re 7R12-A(S-1), 040709, contract period March 2009 through February 28, 2012 (attached hereto as Exhibit E).

35. In and during March 2012, the Mayor invoked the emergency purchasing procedure, and entered into a contract with NWCDC to operate, maintain and manage the water treatment plant and water storage facilities from March 1, 2012 to May 31, 2012. See Memorandum from Cory Booker to City Council dated March 2, 2012, regarding Emergency No. Contract E2012-04 (attached hereto as Exhibit F).

36. On or about May 16, 2012 the City Council approved a resolution calling on the Board of NWCDC to dissolve (noting that the NWCDC had refused to cooperate with the City Council and to answer questions by the Council members, and that the Council had asked the Attorney General to investigate the operation of the NWCDC) and urging the Mayor “to immediately begin a study to develop a plan for the management of the Newark watershed properties and the water treatment plant using City of Newark employees.” See Resolution of City of Newark dated May 16, 2012, No. 7R9B (attached hereto as Exhibit G).

37. On or about June 12, 2012 the City Council approved a resolution extending the NWCDC water treatment and supply emergency contract through August 31, 2012. See Resolution of City of Newark dated June 12, 2012, No. 7R1.D(S), as amended (attached hereto as Exhibit H).

38. On September 11, 2012, Councilman Baraka made a motion to table a resolution to extend the emergency contract for a six month period ending February 12, 2013, and the City Council unanimously approved Councilman Baraka’s motion. See Letter to File From Robert Marasco, dated September 12, 2012 (attached hereto as Exhibit I).

FIFTH AFFIRMATIVE DEFENSE

39. The Verified Complaint must also be dismissed because NWCDC is effectively no longer able to carry out its primary corporate purpose.

40. On March 2, 2011, the Newark City Council approved a one year service contract (from January 1, 2011 through December 31, 2011) with the NWCDC to assist the City with “managing planning and providing for conservation and development of the Newark Watershed properties” pursuant to the “Extraordinary Unspecifiable Services” exception to the open bidding requirements of the Local Public Contract Law. See Resolution of City of Newark dated March

2, 2011 re 7R12-B, contract period January 1, 2011 through December 31, 2011 (attached hereto as Exhibit J).

41. This Watershed Properties management contract came up for renewal on January 1, 2012 and the City Council extended it to June 30, 2012. See Resolution of City of Newark dated December 21, 2011 re 7R12-B, as amended, 122111, contract period January 1, 2012 through June 30, 1012, with an option to renew subject to City Council approval.(attached hereto as Exhibit K).

42. On information and belief, at this time, the City Council has not approved any contract authorizing NWCDC to undertake its primary purpose to provide planning, conservation, development and general watershed administration services to the City of Newark.

SIXTH AFFIRMATIVE DEFENSE

43. The Verified Complaint must also be dismissed because, on information and belief, the City Council has not approved a contract permitting the Mayor to retain counsel to challenge the validity of the ordinance that the City Council has adopted.

NWCDC COMPLAINT

1. Admit the allegation set forth in the first sentence of paragraph 1. Defendants deny the legal conclusion set forth in the rest of the paragraph insofar as the ordinance, by implication, requires the City Council to take all steps within its authority to secure the dissolution of the Newark Watershed, which is a nonprofit entity whose creation was approved by the Newark City Council in 1973 as a “community based agency which, under contract with the City of Newark, can serve as an interim body to provide the services of planning and general watershed administration” to the City. Defendants further note that NWCDC, in its Water Treatment Plant and Storage Reservoirs management memoranda of understanding with Newark over the years,

is described as a “quasi-City Agency to Administer and maintain watershed properties for the City of Newark, who is the owner of same.” See Whereas clause on Memorandum of Understanding 7R12-b40109 (March 1, 2009-February 28, 2012), (attached hereto as Exhibit L).

THE PARTIES

1. [sic] Admit the allegations set forth in paragraph 1, except deny the description of the NWCDC as “independent.”

2. Admit the allegations set forth in paragraph 2, and further state that pursuant to its Certificate of Incorporation, as amended, and By-Laws in effect at the time the ordinance was initiated, the Board of Trustees of NWCDC is required to consist of the Mayor of Newark, *ex officio*, two City Councilpersons, and 8 other persons appointed by the Mayor and approved by the City Council. In addition, pursuant to those corporate documents several decisions made and actions taken by the Board are subject to the approval of the Newark City Council. See Amended Certificate of Incorporation submitted with Application for Emergency Contract in March 8, 2012 (attached hereto as Exhibit M); and By-Laws as amended (attached hereto as Exhibit N).

3. Admit the allegations set forth in paragraph 3.

4. Admit the allegations set forth in paragraph 4.

5. Admit the allegations set forth in paragraph 5.

6. Admit the allegations set forth in paragraph 6.

7. Admit the allegations set forth in paragraph 7.

8. Admit the allegations set forth in paragraph 8.

9. Admit the allegations set forth in paragraph 9.

10. Admit the allegations set forth in paragraph 10.

11. Admit the allegations set forth in paragraph 11.

12. Admit the allegations set forth in paragraph 12.

13. Admit the allegations set forth in paragraph 13, but note that the Committee of Petitioners in this matter was organized solely for purposes of circulation and filing a petition to initiate an ordinance.

14. Admit the allegations set forth in paragraph 14, and further state that William Chappel is a Newark taxpayer and beneficiary and customer of the Newark Water and Sewer Systems.

15. Admit the allegations set forth in paragraph 15, and further state that Former Mayor Gibson is a Newark taxpayer and beneficiary and customer of the Newark Water and Sewer Systems. Former Mayor Gibson was also Mayor at the time the NWCDC was incorporated at his recommendation.

16. Admit the allegations set forth in paragraph 16, and further state that Wynnie-Fred V. Hinds is a Newark taxpayer and beneficiary and customer of the Newark Water and Sewer Systems.

17. Admit the allegations set forth in paragraph 17, and further state that Wilbur J. McNeil is a Newark taxpayer and beneficiary and customer of the Newark Water and Sewer Systems.

18. Admit the allegations set forth in paragraph 18, and further state that Terri Suess is a Newark taxpayer and beneficiary and customer of the Newark Water and Sewer Systems. Committee of Petitioners further note that Councilman Ras J. Baraka and Councilman Ronald C. Rice are also Newark taxpayers and beneficiaries and customers of the Newark Water and Sewer Systems.

BACKGROUND

19. The Defendants admit the allegations set forth in paragraph 19 subject to the same qualification set forth in response to paragraph 2 of the City's Complaint.

20. Admit that the City has contracted until recently with the Newark Watershed Conservation Development Corporation ("NWCDC"), a non-profit corporation to 1) manage, plan and provide for the conservation and development of the Newark Watershed properties located in Morris, Passaic and Sussex counties; and 2) operate, maintain and manage the Newark Pequannock Water Treatment Plant.

21. Admit the allegation in paragraph 21 with the qualification that the NWCDC was created to "develop, provide, maintain and administer services to be offered to the City or Newark, through one or more service contracts" to plan, conserve, develop and manage the City's Pequannock Watershed properties.

22. Admit the allegations set forth in paragraph 22, but note that, on information and belief, there has been no such management contract since June 30, 2012.

23. Plaintiffs admit the allegations set forth in paragraph 23, and further state that since 1998 the memoranda of understanding between NWCDC and Newark to operate, manage and maintain the Pequannock Water Treatment Plant and Water Storage Reservoirs were unlawful because procedural requirements set forth in the Local Public Contract Law, and related statutes, relating to privatization of water supply services were not followed.

24. Admit that NWCDC is incorporated under and is governed by Title 15A of the New Jersey Statutes, but deny that it is "independent" from the City of Newark. Defendants allege that NWCDC is a "public body" under the Open Public Meetings Act, N.J. S.A. 10:4-6 et seq., and an "instrumentality or agency created by [Newark]," under the Open Public Records Act, N.J. S.A. 47:1A-1.1. Defendants further note that NWCDC is, on information and belief, a

501(c)(3) charitable corporation and, in this way, triggering the application of common law principles concerning charitable corporations.

25. Deny the allegations set forth in paragraph 25 insofar as Defendants allege that the Certificate of Incorporation, as amended in 1994, and the 1994 By-Laws, as amended, still govern the operations and activities of the NWCDC.

26. Admit the allegations set forth in paragraph 26 subject to the same qualification set forth in response to paragraph 15 of the City's Complaint.

27. Admit the allegations set forth in paragraph 27 subject to the same qualification set forth in response to paragraph 16 of the City's Complaint.

28. Admit the allegations set forth in paragraph 28.

29. Admit the allegations set forth in paragraph 29.

30. Admit the allegations set forth in paragraph 30.

31. Admit the allegations set forth in paragraph 31.

32. Admit the allegations set forth in paragraph 32.

33. Admit the allegations set forth in paragraph 33, and state that the Committee of Petitioners submitted over 5, 300 signatures and only 2, 371 were required by statute to request a special election if the City Council had not adopted the ordinance.

34. Admit the allegations set forth in paragraph 34.

35. Admit the allegations set forth in paragraph 35 to the extent that they accurately represent the content of Exhibit F attached to the NWCDC Verified Complaint, but deny the legal conclusions set forth in that letter.

36. Admit the allegation set forth in paragraph 36.

37. Admit the allegation set forth in paragraph 37.

38. Admit the allegation set forth in paragraph 38.

39. Deny the allegation that the Initiated Ordinance was scheduled for a “second reading” on September 11, 2012, and state that the Initiated Ordinance was scheduled for a public hearing on September 11, 2012 pursuant to N.J. S.A.40:69A-190.

40. Defendants do not have sufficient information on which to deny or admit the allegations in paragraph 40 of the NWCDC Complaint.

41. Admit the allegation set forth in paragraph 41.

42. Admit the allegation set forth in paragraph 42.

43. Admit the allegation set forth in paragraph 43.

44. Admit that the Initiated Ordinance provides for the dissolution of the NWCDC, but deny that such provision is beyond the Municipal Council’s authority, if interpreted within the context of the Municipal Council’s May 16, 2012 resolution urging the dissolution of the NWCDC by its Board (who include the President of the City Council and three members approved by the City Council), the control of the City Council over the revenue of the NWCDC, and common law principles governing charitable corporations. The NWCDC was established, by the City of Newark, for the sole benefit of the City of Newark and its residents, to assist the City through service contracts to maintain, manage and develop City owned property. As a “quasi-City agency,” “arm or instrumentality of” the City, and “public body” that is authorized to spend taxpayer money, the City has the authority to abolish it.

45. Deny the legal conclusions set forth in paragraph 45, because all provisions of the Initiated Ordinance are not pre-empted by State law governing local public contracting, though Defendants admit that one minor requirement within an amended provision is inconsistent with that law.

46. Deny the legal conclusions set forth in paragraph 46, because the State Agreement with the Division of Local Government Services does not require the establishment of an MUA.

47. Deny the legal conclusions set forth in paragraph 47 because all the provisions of the Initiated Ordinance, if interpreted in accordance with the intent of the Committee of Petitioners, are within the legislative authority of the Newark City Council pursuant to the Faulkner Act, Mayor-Council Plan C.

48. Deny the legal conclusions set forth in paragraph 48 since “conflict of interest” applicable to attorneys retained by the DWSU and any nonprofit it contracts with for management services included in the Initiated Ordinance are not pre-empted by state law and are consistent with the Rules of Professional Conduct governing attorneys in the State.

COUNT ONE

49. The paragraph does not set forth any allegations to which the Committee is able to respond.

50. Defendants deny the legal conclusions that the initiated ordinance is invalid because as a general matter it involves ownership and management of Newark’s water and sewage systems and the organization and contracting practices of Newark’s DWSU, matters which are not pre-empted by State law, enacts provisions that are within the legislative authority of the Newark City Council, and does not violate the State Agreement.

*All allegations not specifically admitted in any of the foregoing paragraphs are hereby denied.

WHEREFORE, Defendants assert that the NWCDC has failed to state a claim justifying the relief sought; therefore, the Committee of Petitioners, Councilman Baraka, and Councilman

Rice demand judgment dismissing Count One of the Complaint in its entirety, and awarding counsel fees, costs, and all other relief the Court deems proper and just.

DEFENSES

FIRST-FIFTH AFFIRMATIVE DEFENSES

51. Defendants repeat and incorporate paragraphs 30-42 of their Answer to the City's Verified Complaint as fully set forth herein, except to the extent that "Verified Complaint" should be understood as referring to the Verified Complaint filed by NWCDC, dated September 18, 2012, and "Intervenor" should be substituted for "Plaintiff."

SIXTH AFFIRMATIVE DEFENSE

52. The Verified Complaint of NWCDC must be dismissed because of unclean hands. For several years, NWCDC's Board of Directors, Executive Director and consultants thereto have been unaccountable to the Newark City Council and its residents. On information and belief, persons associated with the NWCDC have unduly and unreasonably financially benefitted to the detriment of Newark residents, while Newark's Water and Sewer Systems have not been upgraded and improved as needed, and rather have continued to deteriorate. See Report prepared by Newark Water Group, Hog Wild: An Analysis of the Activities of the Newark Watershed Conservation and Development Corporation, January 2011 (attached hereto as Exhibit O).

53. On or about December 13, 2011, the Municipal Council by Resolution 7R9-b 120811 establishing a Municipal Council Investigative Committee to investigate and examine the functions, practices and operations of the Newark Watershed, the proposed water and sewer rate increases and to develop a plan of action and submit recommendations to improve the efficiency of the Newark Watershed and the DWSU. The Executive Director of NWCDC refused to cooperate, and NWCDC filed an Order to Show Cause seeking temporary restraints to invalidate

the Council's resolution. Board member Councilman Donald M. Payne, Jr., Council President denied participation in the vote approving legal action against the City Council. See Letter from Donald Payne, Jr. to Linda Watkins-Brashear, dated January 17, 2012 (attached hereto as Exhibit P).

54. Because of NWCDC's refusal to cooperate with the City Council, the Council requested the assistance of the New Jersey Attorney General. See Letter from Robert Marasco to Jeffrey S. Chiesa, dated June 29, 2012 (attached hereto as Exhibit Q).

55. Because of the City Council's deteriorating relationship with NWCDC, and the City Council's perception that the agency had a "diverse and opposite agenda" from the City and was deviating from "its original mission," (Id., Exhibit Q), the City Council passed a resolution urging the dissolution of the NWCDC. See Exhibit G.

66. Because NWCDC has violated its fiduciary duties to the City of Newark and its residents, its Verified Complaint seeking to prevent the legal effect of the Save Our Water Ordinance must be dismissed.

DEFENDANTS' COUNTERCLAIMS

Defendants WILLIAM CHAPPEL, KENNETH A. GIBSON, WYNNIE-FRED V. HINDS, WILBUR J. McNEIL, TERRI A. SUESS (collectively, the "Committee of Petitioners"), COUNCILMAN RAS J. BARAKA and COUNCILMAN RONALD C. RICE, all of whom are Newark residents, taxpayers and users of the Newark public water and sewer system, by way of Counterclaims against Intervenor NEWARK WATERSHED CONSERVATION and DEVELOPMENT CORPORATION allege as follows:

FIRST COUNTERCLAIM

(Operation in Violation of By-Law Requirement regarding Board Composition)

1. By Resolution dated June 27, 1973, the City Council approved the establishment of the NWCDC, as a non-profit corporation under Title 15A. The initial Board was to have eight directors: The Mayor, *ex officio*; two members of the City Council (one ward councilman and one councilman-at-large); and five other persons appointed by the Mayor from among the members of the corporation with the approval of the City Council. See Resolution dated June 27, 1973 and attached Certificate of Incorporation (attached hereto as Exhibit R).

2. In and during 1975, the NWCDC amended its Certificate of Incorporation with the approval of the Newark City Council, by resolution. The number of directors was increased to eleven, with the same number of City officials required, and the number of members were increased from 35 to 40. See Resolution of the City of Newark, No. 7RCJ 061875 (attached hereto as Exhibit S)

3. In and during 1994, the Certificate of Incorporation and By-Laws of the NWCDC were again changed. Pursuant to the By-Laws, as amended, the number of directors, sometimes called trustees, remained the same, with the same number of City officials serving on the Board, and 8 trustees appointed by the Mayor with the advise and consent of the City Council. Membership was eliminated. See 1994 By-Laws, as amended, Exhibit N. Pursuant to the Certificate of Incorporation, the number of trustees could be no less than seven and no more than eleven.

4. On information and belief, the NWCDC has been operating for several years with only five to seven directors/trustees. For the past year, it has been conducting its affairs with a five member Board consisting of the Mayor, *ex officio*, Council President Donald Payne and three other trustees who were appointed by the Mayor and approved by the City Council.

7. Pursuant to the By-Laws, as amended, the By-Laws may be amended by a majority vote of the directors present, and to constitute a quorum for the transaction of business a majority of the directors in office is required. Exhibit N at pp. 5, 13.

8. On information and belief, NSCDC held meeting a special meeting on September 13, 2012 at which time three directors approved two-related resolutions amending the Certificate of Incorporation and By-Laws. See Resolutions No 12-007 and No.12-008, dated but not signed September 10, 2012, attached hereto as (Exhibit T). On information and belief, neither City official was present and voted for such resolutions.

9. Following a motion sponsored by Councilman Rice and adopted by the City Council on September 11, 2012, the City Council had expressly advised the NWCDC not to approve the amendments to its governing documents in a letter that was hand-delivered to the NWCDC by someone from the City Clerk's office.

10. By operating the NWCDC with only five Board members, only two of whom are City officials, and by taking action with only three directors present, none of whom were City officials, the action taken by the NWCDC to amend its corporate governing documents is in violation of its Certificate of Incorporation and By-Laws and is thus invalid.

WHEREFORE, Defendants assert that the NWCDC has violated their corporate governing documents by operating with only five trustees, and by taking a vote with only three trustees, none of whom were City officials; therefore, the Committee of Petitioners, Councilman Baraka and Councilman Rice demand judgment declaring the September 13, 2012 amendments invalid and requiring the corporation to cease conducting activity until six additional board members are appointed, including one additional Council person representing a ward of Newark.

In addition, Defendants demand an award of counsel fees, costs, and all other relief the Court deems proper and just.

SECOND COUNTERCLAIM
(Violation of Open Public Meetings Act)

11. Defendants repeat and incorporate paragraphs 1-10 of their Counterclaims as set forth herein.

12. On September 13, 2012, the NWCDC held a Special Meeting. Public notice of such meeting was not adequately given. Nonetheless, members of the public were permitted to attend the meeting, and speak during the meeting's public comment period.

13. As stated in this Verified Answer, NWCDC currently operates the City of Newark's Water and Sewer Systems in addition to its management and development role with respect to the City's Watershed Properties. It receives regular appropriations from Newark through service contracts, and has been authorized to collect fees, assessments and other revenue on behalf of Newark arising from its management of the Newark Watershed properties, and on information and belief currently collects such fees.

14. Because NWCDC receives public funding, it is required by the City Council through ordinance to file a variety of reports with the City on a periodic basis, including budgets, audits, agendas, a list of meetings, etc. In addition, leases or concessions are not "authorized. . .without a public hearing on reasonable public notice" and certain contracts are not effective "unless first subject to prior public hearing." Certificate of Incorporation, as amended, Ex. M. at Article Eleven.

15. In a letter dated April 19, 2011, NWCDC took the position that it was not subject to the Open Public Records Act ("OPRA"), though stated that "In accordance with N.J.S.A. 47:1A-5(i) and (g), the Newark Watershed is hereby requesting a three(3) week extension of time to

compile the necessary documentation in response to [Mr. Chappel's] OPRA request." Letter from Jodi M. Luciani to William Chappel, dated April 19, 2011 (attached hereto as Exhibit U).

16. An entity is subject to OPMA if it is a "public body" defined by the statute as an entity empowered "to perform a public governmental function affecting the rights, duties, obligations, privileges, benefits, or other legal relations of any person, or collectively is authorized to spend public funds." N.J.S.A. 10:4-8a.

WHEREFORE, Defendants assert that the NSCDC has violated the public notice requirements of OPMA with respect to its special meeting held on September 13, 2012; therefore, the Committee of Petitioners, Councilman Baraka, and Councilman Rice demand judgment declaring the September 13, 2012 amendments invalid, awarding counsel fees, costs, and all other relief the Court deems proper and just.

THIRD COUNTERCLAIM
(Breach of Fiduciary Duties)

17. Defendants repeat and incorporate paragraphs 1-16 of their Counterclaims as set forth herein and paragraphs 30-42 of their Affirmative Defenses stated against the City and paragraphs 51-66 of their Affirmative Defenses stated against NWCDC.

18. The General Purpose of NWCDC "is to promote the common good and general welfare of the City of Newark and of its inhabitants and businesses through civic betterment, educational opportunities and social improvements relating to the planning, conservation, development and management of the City's watershed properties located outside of Newark." Certificate of Incorporation, Ex. M at p. 1.

19. NWCDC has made representations in official documents that it is a "quasi City agency." Moreover, on at least one occasion a consultant to the NWCDC (Joseph Beckmeyer)

has represented to the State of New Jersey that he is authorized to speak for the City of Newark DWSU (see exhibit D).

20. On information and belief, NWCDC has received 501(c)(3) status from the Internal Revenue Service as a social welfare or benefit or civic improvement corporation with a charitable purpose.

21. Pursuant to its governing documents, the Newark Mayor is the Chairman of NWCDC's Board of Trustee. Other Board members include two City Councilpersons and 8 other persons who are appointed by the Mayor, with the advice and consent of the City Council. By-Laws, as amended, Ex. N at 2-3.

22. Pursuant to its Certificate of Incorporation, as amended, NWCDC "may develop, provide, maintain, and administer services to be offered to the City of Newark under one or more service contracts." Several of the powers listed require authorization by the City Council, adoption by the City Council, or approval of the City Council. See Certificate of Incorporation, as amended, Ex. M at Article Six, Section (B)(2)(3)(4)and(5).

23. Pursuant to its governance documents, NWCDC may charge and collect fees on behalf of Newark for the use of the properties under its jurisdiction and it may receive funds for accomplishing its management, planning or development purposes, including appropriations from Newark. See Id at (B)(6)(7); See also Resolution of City of Newark regarding the establishment of the Pequannock Watershed Properties Dedicated Trust Fund (attached hereto as Exhibit V).

24. In accordance with Article Six of its Certificate of Incorporation, NWCDC is entrusted with administering and maintaining Newark's public Watershed Properties. Ex. M, Article Six, Section (B)(1).

25. In accordance with Article Ten of its Certificate of Incorporation, as amended, the net revenues of NWCDC must be annually transferred and paid over to the City of Newark. Id. at Article Ten.

26. In the event of liquidation or dissolution of the NWCDC, the balance of all money and other property received by the corporation from any source, after payment of all debts and obligations, is to be “distributed solely to or for the benefit of the City of Newark.” Id. at Article Five.

27. Because of the nature of its specific powers and purposes, scope and limits of activities, and dissolution clause, NWCDC is a charitable “arm or instrumentality” of City of Newark” organized for the sole benefit of the City of Newark and its residents.

28. On September 13, 2012, three members of the Board of NWCDC, Oscar James, II, William T. Merritt and Rodney Johnson, enacted significant changes to the Corporation’s Certificate of Incorporation and its By-Laws. Such changes include, but are not limited to removing Newark and its residents as the sole beneficiary of the corporation. The City of Newark is removed from the purpose clause of the corporation, corporate activities, Board appointments and membership, and the liquidation clause. The limited focus on Newark and its Watershed Properties has been eliminated thereby fundamentally changing the mission, purpose and nature of the corporation. NWCDC has been changed in all material ways except that the name has remained the same. See Certificate of Incorporation, as amended in September 2012, (attached hereto as Exhibit W); By-Laws as amended in September 2012 (attached hereto as Exhibit X).

29. On September 19, 2012, Councilman Rice introduced an ordinance requiring that all quasi-City agencies must have any by-law changes approved by the City Council.

30. By abandoning the sole general purpose of the NWCDC, changing the nature of the corporation so as to no longer be an arm of Newark, and eliminating the intended beneficiaries of the charitable corporation ---the City of Newark and its residents---, eliminating the intended beneficiaries of the corporation (Newark and its residents), Oscar James, II, William T. Merritt and Rodney Johnson, in their capacity as Board members, violated their fiduciary duty of obedience to the mission, duty of care and duty of loyalty.

WHEREFORE, Defendants assert that James, Merritt and Johnson have violated their fiduciary duty to NWCDC; therefore, the Committee of Petitioners, Councilman Baraka, and Councilman Rice demand judgment declaring the September 13, 2012 amendments invalid or in the alternative dissolving NWCDC since it no longer serves its corporate purpose as stated in its 1994 governing documents. Defendants further demand an award of counsel fees, costs, and all other relief the Court deems proper and just.

FOURTH COUNTERCLAIM
(Conversion)

31. Defendants repeat and incorporate paragraphs 1-30 of their Counterclaims as set forth herein.

32. By effecting the above amendments to its Certificate of Incorporation and By-Laws, NWCDC has in effect dissolved, thus triggering Article Five of its Certificate of Incorporation, as amended in 1994, and that article's requirement that the balance of all money and other property received by the corporation from any source, after payment of all debts and obligations, be "distributed solely to or for the benefit of the City of Newark."

33. In a Resolution dated May 16, 2012, the City Council requested the Board of Directors of the NWCDC to vote to dissolve and to transfer all its records and files to the control of the Office of the Newark City Clerk, official custodian of City records.

34. By failing to formally dissolve and return all net revenue, property and nonfinancial assets upon effecting the recent changes to its governing documents, the NWCDC has wrongfully converted the use of such assets for its own use.

35. As a result of such misappropriation, conversion and use of such financial and nonfinancial assets, the NWCDC has unjustly enriched itself and has caused the City of Newark damages.

WHEREFORE, Defendants assert that NWCDC has wrongfully converted financial and nonfinancial assets and property belonging to Newark for its own use; therefore, the Committee of Petitioners, Councilman Baraka, and Councilman Rice demand an accounting of all NWCDC assets, and demand a judgment requiring NSCDC to return all net revenue and other assets and property belonging to Newark to the City and awarding counsel fees, costs, in accordance with New Jersey Court Rules, and all other relief the Court deems proper and just.

Respectfully submitted,

NEW JERSEY APPLESEED PUBLIC INTEREST
LAW CENTER, INC.

By: Renée Steinhagen, Esq.

October 1, 2012

DESIGNATION OF TRIAL COUNSEL

Renée Steinhagen, Esq. is hereby designated as trial counsel for Defendants Committee of Petitioners, Councilman Baraka, and Councilman Ronald C. Rice.

Renée Steinhagen, Esq.

Date: October 1, 2012

CERTIFICATION PURSUANT TO RULE 4:5-1

I, RENÉE STEINHAGEN, hereby certify that:

1. The matter in controversy is not the subject of any other pending Court or arbitration proceeding.

2. I am not aware of any other contemplated Court or arbitration proceeding and;

3. I am not aware at the present time of any other party that should be joined to this litigation.

Date: October 3, 2012

Renée Steinhagen, Esq.

CERTIFICATION OF COMMITTEE MEMBER WILLIAM CHAPPEL

I, WILLIAM CHAPPEL, being of full age do hereby swear and certify as follows:

1. I am a plaintiff and a member of the Committee of Petitioners in above referenced action, and have personal knowledge of the facts and circumstances giving rise to this action.
2. I have read the annexed Answer, Affirmative Defenses and Counter-claims including all the facts alleged therein.
3. All the facts alleged in the Answer and Counter-Claims are true and accurate to the best of my personal knowledge and belief.
4. Pursuant to R. 1:4-7, I intend this certification to constitute a verification of the Answer and Counter-claims in this matter.
5. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false that I am subject to punishment.

Dated: October 3, 2012

WILLIAM CHAPPEL