

PRELIMINARY STATEMENT

This is an enforcement action brought by two City Councilman and five members of the Committee of Petitioners, including the former Mayor of Newark, Kenneth Gibson, against the Newark Watershed Conservation and Development Corporation (“NWCDC”), a nonprofit charitable corporation, which since its creation in 1973 has functioned as a quasi-governmental arm of the City of Newark. The Counter-Claims filed in response to the NWCDC’s Complaint dated September 18, 2012, seek declaratory and other equitable relief arising from the harm caused by the decision of three members of NWCDC’s Board to fundamentally change the nature and purposes of the corporation without formally dissolving.

Now, in response to Intervener NWCDC’s Motion to Dismiss their Counter-Claims, Defendants make a Counter-Motion to transfer their claims to the Chancery Division, and to permit them to amend their pleading to join the three NWCDC directors already mentioned in their initial filing. They also seek to amend their complaint in order to state their claims independently from the allegations set forth in the Verified Answer that they filed in response to the City of Newark’s prerogative writ action, dated September 6, 2012. Because Defendants’ Counter-Claims are entirely equitable in nature and are lodged against a charitable corporation, this Court should exercise its discretion in favor of transfer, R. 4:28-4(b); also, to facilitate such transfer, this Court should allow Defendants to disentangle their claims asserted against NWCDC from their response to Newark’s mandamus action (in which NWCDC intervened).

Pursuant to R. 4:9-1, Defendants are able to amend their Counter-Claims, as a matter of right, because NWCDC has yet to file a responsive pleading as enumerated in R. 4:5-4(a). Notwithstanding this assertion, leave to amend a pleading should “be freely given in the interest of justice;” and, in the context of the procedural history of this matter, justice requires permission

to amend the Counter-Claims and join three individuals who are necessary parties to this action. R. 4:28-1(a).

On the other hand, this Court should deny NWCDC's Motion to Dismiss the Counter-Claims for failure to state a claim upon which relief may be granted under R. 4:6-2(e). Under New Jersey law, the Attorney General is not the exclusive enforcer of charitable trusts and corporations and because of the "special interests" each of the Defendants asserts in the governance and operation of the NWCDC, each has standing to bring this action. Mayor Kenneth A. Gibson, is an initial incorporator of the NWCDC; William Chappel attended the NWCDC special meeting dated September 13, 2012, and raised the question of adequate public notice; Wynnie-Fred V. Hinds, Wilbur J. McNeil and Terri A. Suess, are members of the Newark Water Group, which is responsible for the report entitled, Hog Wild: An Analysis of the Activities of the Newark Watershed Conservation and Development Corporation; Ras J. Baraka and Ron C. Rice are two Newark Councilman, who, with the remaining members of the Council have entrusted the NWCDC with the management, conservation, planning and development of Newark's Watershed Properties, and, in particular, have taken an active role in addressing problems arising from Newark's Department of Water and Sewer Utility's contracts with the NWCDC; and all of them are Newark residents, taxpayers and users of Newark's public water and sewer systems. As such, the NWCDC and its Board have a fiduciary duty to Defendants, who are representative of the NWCDC's sole beneficiaries—the City of Newark and its residents. Conversely, Defendants have standing to enforce that trust.

Furthermore, a fair analysis of the Four Counts Defendants have asserted in their Counter-Claims indicates that they have alleged, contrary to NWCDC's assertions otherwise, legally sufficient facts to withstand a motion to dismiss.

COUNTER-STATEMENT OF FACTS

In 1973, the Newark City Council caused to be created, at the recommendation of former Mayor Kenneth A. Gibson, the NWCDC. In accordance with a Newark City Council resolution, this entity was organized under Title 15A, the New Jersey Nonprofit Corporations Act, “to implement[] the recommendations for a community based agency which, under contract with the City of Newark can . . . provide the services of planning and general watershed administration.” (Counter-Claims, Ex. R). The general purpose of the NWCDC has been, since 1973 until most recently, “to promote the common good and general welfare of the City of Newark, and of its inhabitants and businesses, through civic betterments, educational opportunities and social improvements relating to the planning, conservation, development and management of the City’s [Pequannock] watershed properties.” (*Id.*; *see also* Ex. M¹). Mayor Gibson was one of the incorporators of the NWCDC, and sat on its first Board. (Hartwyck Cert., Ex. G).² As an arm of the City of Newark, with a social welfare or civic improvement purpose relating to planning and conservation of Newark property, NWCDC is a charitable corporation. (Counter-Claims, ¶¶20, 27)

Over the past two decades, Newark has entered into numerous service contracts with the NWCDC to manage, plan, conserve and develop the Newark Watershed Properties; and since 1998, Newark has also retained this nonprofit corporation to manage and operate the Pequannock Water Treatment Plant and Water Storage Reservoirs as well. (Verified Answer, ¶3). For years,

¹ The Certificate of Incorporation was amended in 1974 to include promotion of “educational opportunities” in its mission.

² Exhibit G appears to be the actual Certificate of Incorporation that was filed with the State in 1973. Defendants attached to their pleadings as Exhibit M the version of the Certificate that was approved by the Newark City Council in 1973. It appears from a comparison that the only difference between the two exhibits is that the former includes the names of the incorporators and the members of the first Board of Directors.

however, there has been serious contention among several Mayors, City Councils and residents of Newark as to how best to manage and conserve Newark's precious Watershed Properties and manage, operate and improve its Water and Sewage Systems.

In February 2012, an attorney with the Office of the State Comptroller advised Newark's Business Administrator that he finds NWCDC's contract with Newark to operate the Pequannock Water Treatment Plant and Water Storage Reservoirs to be unlawful. (Counter-Claims, Ex. D). One month earlier in January 2012, the Newark Water Group, whose members include the Committee of Petitioners, issued a report entitled, Hog Wild: An Analysis of the Activities of the Newark Watershed Conservation and Development Corporation, (Id., Ex. O), which triggered the City Council's attempts to investigate the operations of the NWCDC through direct questioning,³ and requests to the Attorney General to do the same. (Id., Ex. Q). And, in May 2012, the City Council took an initial step through resolution, dated May 16, 2012, to cause the dissolution of the NWCDC by urging its Board to do so and return all files and records belonging to Newark. (Id., Ex. G)

For the past several years, the NWCDC has been operating with only five to seven directors/trustees. (Id., ¶4). Over the past year or more, however, it has been conducting its affairs with only a five member Board – fewer than 50% of the Board members required by its By-Laws. The Board has consisted of the Mayor, *ex officio*, Council President Donald Payne, and three other directors who were appointed by the Mayor and approved by the Newark City Council. Id. During this period of time, NWCDC's By-Laws required the Board to consist of 11

³ The NWCDC responded to the Newark City Council's attempts to investigate by filing an Order to Show Cause seeking a Temporary Restraint. (Counter-Claims, Ex. P)(where Councilman Payne, who also served as a Director of the NWCDC at the time, stated that the "NWCDC [had taken] legal action [without my approval] against the City of Newark seek[ing] to invalidate the Council's resolution 7R9-b 120811 creating the investigative committee.")

directors, with three City officials serving on the Board, and 8 trustees appointed by the Mayor with the advise and consent of the City Council. (Id., Ex. N). As a “quasi City agency,” the NWCDC 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. (Id., ¶13). At this time, Defendants do not know whether NWCDC receives other public or private funding to support its conservation, planning and development activities executed solely on behalf of Newark.

In accordance with Article Six of its 1994 Certificate of Incorporation, as amended, the NWCDC is, as a general matter, entrusted with administering and maintaining Newark’s public Watershed properties. (Id., ¶24). Therefore, many of its enumerated powers require authorization by the City Council, adoption by the Council, or approval by the Council. (Id., ¶22). Net revenues must be annually transferred and paid to the City of Newark, (Id., ¶25); and in the event of dissolution, the balance of all money and other property received by NWCDC from any source, must be “distributed solely to or for the benefit of the City of Newark.” (Id., ¶26.). In addition, pursuant to Article 14 of the Certificate, all “purchase contracts and agreements by the NWCDC are subject to the requirements of New Jersey’s `local public contracts law.’” (Id., Ex. M).

On August 8, 2012, the Committee of Petitioners filed an initiated ordinance entitled “Save Our Water Ordinance,” with the City Clerk (the “Initiated Ordinance”). (Order, dated October 24, 2012, Hartwyck Cert., Ex. A). This Initiated Ordinance contemplated the eventual dissolution of the NWCDC, and the establishment of a new nonprofit corporation with whom the Newark City Council could contract for planning, conservation, development and management of the City’s Pequannock Watershed Properties. Such entity would have the same

mission as the NWCDC, but would be “restricted by its charter to engaging in those activities and only those activities,” and would explicitly be covered by the Open Public Meetings Act, the Open Public Records Act, the Local Public Contract Law, and the Local Government Ethics Law. (Initiated Ordinance, Newark’s Verified Complaint, Ex. E).

On September 11, 2011, the Newark City Council adopted the Committee’s Initiated Ordinance. The previous day, the Board of NWCDC had amended its Certificate of Incorporation at a Regular Board meeting; and two days later on September 13, 2012, it amended its By-Laws at a Special Meeting. (Hartwyck Cert., Ex. C). On information and belief, the NWCDC did not give “adequate notice” of either meeting as defined by the Open Public Meeting Act. (Id., Am. Counter-Claims, ¶¶26-27). Neither Mayor Booker nor Council President Donald Payne was present at either one of these Board meetings, and neither of them voted. The three remaining directors adopted by unanimous vote changes to NWCDC’s Certificate of Incorporation and By-Laws that eliminated all references to the City of Newark and its residents. (Hartwyck Cert., Ex. C) Defendant Chappel spoke at the Special Meeting held on September 13, 2012, and asserted that public notice of that meeting, as required by the Open Public Meetings Act, had not been given. (Id.; Am. Counter-Claims, ¶5)

PROCEDURAL HISTORY

Plaintiff, the City of Newark, filed an Order to Show Cause and Verified Complaint in Lieu of Prerogative Writ, dated September 6, 2012, seeking to prohibit the Newark City Council from adopting the Save Our Water Ordinance that was initiated by the Committee of Petitioners. On September 18, 2012, the NWCDC sought to intervene in that matter and filed its own Verified Complaint against the Committee of Petitioners and the Newark City Council, which at that date, had adopted the Ordinance. In accordance with a Consent Order, dated September 24, 2012, the individual members of the Committee of Petitioners and Councilman Ras Baraka and

Councilman Ron Rice (collectively, the “Defendants”) filed a Verified Answer in response to both Complaints and asserted Counter-Claims against the NWCDC concerning a related matter -- *i.e.*, fundamental changes to the corporation’s governing documents seemingly in response to the Committee of Petitioner’s Initiated Ordinance. The Committee of Petitioners served that pleading both on the NWCDC and the three directors participating in the “change of governance” decision. (Steinhagen Cert., Ex. IV). A summary hearing was held on October 22, 2012, at which time the Court found the Ordinance invalid. An Order disposing of the claims of the City and the NWCDC was entered on October 24, 2012. (Hartwyk Cert., Ex. A).

Interveners now bring this Motion to Dismiss Defendants’ Counter-Claims, pursuant to R. 4:6-2(e), dated November 19, 2012. Counsel for Defendants had agreed to one-week extension of time to file a responsive pleading, and further delays were caused due to Hurricane Sandy. NWCDC decided not to file a responsive pleading, but instead served a Motion to Dismiss. In response to NWCDC’s motion, Defendants now bring a Counter-Motion to transfer the remaining claims in this action to the Chancery Division for final disposition, pursuant to R. 4:3-1(b), and to allow Defendants to amend their Counter-Claims to re-instate those claims independent from their Verified Answer and to join three necessary parties. For the reasons set forth below, Interveners’ Motion to Dismiss must be denied, and Defendants’ Motion to Transfer the Counter-Claims, as amended, should be granted.

LEGAL ARGUMENT

I.

BECAUSE THE COUNTER-CLAIMS CONSTITUTE AN ENFORCEMENT ACTION SEEKING EQUITABLE RELIEF AGAINST A CHARITABLE CORPORATION, THEY SHOULD BE TRANSFERRED TO THE CHANCERY DIVISION.

Pursuant to R.4:3-1(b), a motion to transfer an action from one division of the Superior Court to another must be made within 10 days after expiration of the time prescribed by R. 4:6-1 for the service of the last permissible responsive pleading; or, any time thereafter, the court may order such transfer on its own accord. Although a responsive pleading to the filing of a counterclaim is typically due 35 days after service, R. 4:6-1(a), the filing of a motion to dismiss under R. 4:6-2, postpones that date until 10 days after a court denies the motion in whole or in part. R. 4:6-1(b). Therefore, because Interveners have filed a motion to dismiss, Defendants' counter-motion is timely, and their request to transfer their Counter-claims to the Chancery Division of the Superior Court has not been waived.⁴

It is well-established that transfer of an action by the court between the Law and Chancery Divisions is discretionary. Steiner v. Stein, 2 N.J. 367 (1949). This is because one of the purposes for the adoption of Art. VI, § III, ¶4 of the 1947 N.J. Constitution was to permit a court to resolve all aspects of a controversy between parties in one forum, regardless of whether the claims were legal or equitable in nature. Leisure Technology-Northeast, Inc. v. Klingbell Holding Co. and Village of Woodlake Co., 137 N.J. 353, 357 (App. Div. 1974)(where court should not have severed and transferred counterclaims to Law Division when such claims were germane to equitable foreclosure action). However, if the claims presented are “not primarily derived from traditional concepts of charity,” and the relief sought is legal in nature, the court should transfer the matter to the Law Division. Larocco v. Gardella, 352, N.J. Super. 234 (Ch. 2002). Similarly, when legal claims are resolved, and all that remain are equitable counter-claims lodged against only one party to the initial complaint, the Law Division should transfer

⁴ See also Exhibit II attached to Steinhagen Certification (noting that counsel for Defendants had raised this issue in its Letter Brief submitted prior to the summary hearing held on Newark's prerogative writ action).

the unresolved claims to the Chancery Division. Cf. The May Stores v. Hartz Mt. Free Zone Center, 162 N.J. Super. 131, 136 (Ch. 1975)(finding transfer to Law Division appropriate when equitable claims in the matter rendered moot).

In this case, all the relief Defendants seek against NWCDC is equitable in nature; and their Counter-Claims are primarily derived from traditional concepts of charitable corporations,⁵ fiduciary duties, and corporate accountability. Moreover, resolution of these claims does not depend on resolution of the issues that were raised in the prerogative writ action, and have now been determined. It is certain that had NWCDC not intervened in that action, Defendants would have brought their claims in the Chancery Division, not the Law Division. See R. 4:3-1(a)(1) (General Equity venue); New Jersey Court Website (actions brought in General Equity Part include those seeking “to enforce performance of contracts, trusts and fiduciary obligations”) www.judiciary.state.nj.us/essex/civil/equity.htm.

For the foregoing reasons, this Court should transfer Defendants’ Counter-Claims to the Chancery Division.

II.

PURSUANT TO R. 4:9-1 AND RULES 4:7-6 AND 4:28-1, DEFENDANTS MUST BE PERMITTED TO AMEND THEIR INITIAL PLEADINGS AND JOIN THREE DIRECTORS OF THE NWCDC AS THIRD-PARTY DEFENDANTS TO THEIR COUNTER-CLAIMS.

At this time, Defendants seek to amend their Counter-Claims to disentangle their claims asserted against NWCDC from their response to Newark’s mandamus action (in which NWCDC intervened). In addition, they request permission to join the three trustee/directors who had been

⁵ See Exhibit I attached to Steinhagen Certification (noting that NWCDC is a public charity because it is “[a]n organization that normally receives a substantial part of its support from a governmental unit or from the general public as described in section 170(b)(1)(A)(vi)). This document, and Exhibit II, are submitted to the Court for the sole purpose of supporting Defendants’ Motion to Transfer this matter to the Chancery Division.

mentioned in the Counter-Claims, but who had not been named as third-party defendants. At the time the Counter-Claims were filed, counsel did not create a new caption, but did serve those individuals with the Verified Answer and Counter-Claims. (Steinhagen Cert., ¶5, Ex. IV).

Specifically, Defendants' propose the following changes to their pleading:

(1) Chancery Division replaces Law Division; (2) a caption is created and the three individual trustees that were mentioned in the Counter-Claims are joined as parties; (3) some paragraphs of Defendants' Verified Answer that were incorporated in the initial Counter-Claims are deleted, while others are re-incorporated in this amended pleading verbatim; (4) a separate section identifying the parties is added to this pleading, because the relevant paragraphs of the Answer had not been incorporated in the initial Counter-Claims; (5) Exhibits A-X that were attached to the Verified Answer and Counter-Claims are resubmitted to preserve the integrity of the record in this matter; (6) Count III is restated so it is clear that it is brought against both NWCDC and three individual trustees of the corporation; (7) a paragraph setting forth the definition of adequate notice under the Open Public Meeting Act is added; (8) Count I is restated so it is clear that it is brought under state and common law against both NWCDC and the three individual trustees of the corporation; (9) language is added to acknowledge that NWCDC changed its governance documents at its September 10th meeting in addition to its special meeting on September 11th; and (10) all paragraphs are appropriately re-numbered.

Id. ¶4, Ex. III.

Pursuant to R. 4:9-1, “[a] party may amend any pleading as a matter of course at any time before a responsive pleading is served, Thereafter a party may amend a pleading only by written consent of the adverse party or by leave of court which shall be freely given in the interest of justice.” It is Defendants' position that, at this time, they are entitled to amend their Counter-Claims as a matter of right. Nonetheless, if this Court should disagree, they assert that the procedural posture of this case, the short period of time Defendants had to prepare their pleading, and the liberal standard of review embodied in the Rule governing amendments, provide a sufficient basis on which to grant their request.

First, R. 4:5-4(a) denotes what pleadings are allowed; that is, complaint, answer, counterclaim, counterclaim, third party claim and answers thereto, and a reply to an affirmative defense. “No other pleading is allowed.” Id. Since a motion to dismiss is not among the enumerated pleadings of R. 4:5-4, it must be concluded that a motion to dismiss is not the type of “responsive pleading” that cuts off the right to amend as a matter of course under R. 4:9-1. See also R. 4:6-2(where filing of a motion to dismiss not considered responsive pleading under R. 4:6-1).

Notwithstanding this conclusion, the “interests of justice” require that Defendants be given the opportunity to amend their Counter-Claims as detailed in their proposed Amended Complaint (that is attached as Exhibit III to the Certification of Renée Steinhagen). With this amendment, Defendants separate their Counter-Claims from their Answer to the City’s prerogative writ action, which has been resolved, and clarify the nature of their enforcement action against NWCDC, a charitable corporation. There is also no reason to deny Defendants the opportunity to join persons other than the NWCDC as parties to their Counter-Claims, especially directors who hold a fiduciary duty to the nonprofit and its beneficiaries. See R. 4:7-6 (explicitly permitting joinder of persons “other than those made parties to the original action” to be made parties to a counterclaim). There is little doubt that Defendants will not be able to secure complete relief if the NWCDC’s directors, who are responsible for the fundamental governance decisions being challenged herein, are not added to this action. R. 4:28-1(a).⁶

For all the above reasons, Defendants’ Motion to Amend their pleadings must be granted.

⁶ This Court may also permit Defendants to join NWCDC’s directors to this action on the grounds that the relief they seek against such individuals “arises out of or in respect of the same transaction, occurrence, or series of transactions or occurrences and involves any question of law or fact common to all of them.” R. 4:29-1(a).

III

INTERVENER'S MOTION TO DISMISS MUST BE DENIED BECAUSE DEFENDANTS' COUNTER-CLAIMS CLEARLY STATE A CAUSE OF ACTION.

In lieu of filing an answer to Defendants' Counter-Claims, NWCDC has submitted a Motion to Dismiss based primarily on Defendants' alleged lack of standing to bring this action. Other criticisms of the pleadings do not raise fatal flaws, but rather are the result of a very cramped, ungenerous and illiberal reading of the pleading itself. Such stance is contrary to the guidelines set forth by New Jersey courts, and thus, NWCDC's Motion must be denied.

"Rule 4:6-2(e) motions to dismiss should be granted in "only the rarest [of] instances." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 165 (2005) (citations omitted). On a motion to dismiss, trial courts are "to search the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Id. See also F.G. v. MacDonell, 159 N.J. 550, 556 (1997)("If a generous reading of the allegations merely suggests a cause of action, the complaint will withstand the motion."). The complaint is to be read "indulgently" and plaintiff(s) must be accorded "every reasonable inference." NAACP of Camden County v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 442-43 (App. Div.), certif. granted, 209 N.J. 96 (2011). . See also Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989)(Court must assume the truth of all factual allegations giving the complainant the benefit of all reasonable inferences.). Pursuant to this liberal standard of review, Defendants' initial pleadings clearly state a cause of action, which is supported by sufficient factual predicates, and should not be dismissed at this early juncture of the litigation. Their proposed Amended Counter-Claims simply makes the theories behind their claims clearer than they were initially presented.

A. The Committee of Petitioners and Councilman Ras J. Baraka and Councilman Ron C. Rice Have Standing to Bring This Action Against the NWCDC, a Charitable Corporation In Which They Each Have a “Special Interest.”

In its Brief in Support of Motion to Dismiss the Counterclaim, the NWCDC claims that Defendants/Counter-Claimants/Third Party Plaintiffs lack standing to bring three of the four Counter-Claims they have asserted against the nonprofit corporation, and three of its Board members. (hereinafter, “NWCDC Br.”).⁷ It does so by ignoring the fact that (1) Mayor Kenneth Gibson was one of the incorporators of the NWCDC and served on its first Board; (2) the Counter-Claims was asserted on behalf of Councilman Ras J. Baraka and Councilman Ron C. Rice as well as the individual members of the Committee of Petitioners; (3) the Committee of Petitioners are members of the Newark Water Group, taxpayers, Newark residents and the beneficiaries of Newark’s public Water and Sewer Systems; and (4) the status of NWCDC as a nonprofit, charitable corporation entitles persons with a “special interest” in that corporation to maintain an action in court against the corporation and/or its board of trustees.

As a preliminary matter, the “essential purpose” of the standing doctrine in New Jersey (in contrast to the federal courts, which are limited in jurisdiction and confined, as a matter of constitutional law, to “actual cases and controversies”) is to:

Assure that the invocation and exercise of judicial power in a given case are appropriate. Further the relationship of plaintiffs to the subject matter of the litigation and to other parties must be such to generate confidence in the ability of the judicial process to get to the truth of the matter and in the integrity and soundness of the final adjudication. Also, the standing

⁷ There is little doubt that any member of the public has standing to assert a claim against the NWCDC, pursuant to the Open Public Meetings Act, N.J.S.A.10:4-6 et seq. (“OPMA”)—Count II of the Counter-Claims. Accordingly, Defendant Chappel, a member of the Committee of Petitioners, who attended the September 13, 2012, Special Meeting and raised that issue at that time, cannot be deemed a mere “interloper,” “intermeddler” or “stranger” to the dispute. Crescent Park Tenant Assoc. v. Realty Equities Corp., 58 N.J. 98, 108 (1971)(addressing standing of nonprofit association to bring action for equitable relief). See also People for Open Government v. Roberts, 397 N.J. Super. 502, 509 (App. Div. 2008)(same).

doctrine serves to fulfill the paramount judicial responsibility of a court to seek just and expeditious determinations on the ultimate merits of deserving controversies.

N.J. State Chamber of Commerce v. N.J. Election Law Enforcement Comm'n, 82 N.J. 57, 69 (1980). See also Tumarkin v. Friedman, 17 N.J. Super. 20, 21 (App. Div. 1951), cert. denied, 9 N.J. 287 (1952) (noting that New Jersey courts historically have rejected procedural frustrations “in favor of just and expeditious determinations on the ultimate merits.”). New Jersey courts have also permitted litigation “where the litigant’s concern with the subject matter evidences a sufficient stake and real adverseness,” People for Open Government v. Roberts, 397 N.J. Super. at 510; and, “in cases of great public interest, any ‘slight additional private interest’ will be sufficient to afford standing.” Id. (quoting Salorio v. Glaser, 82 N.J. 482 (1980)).

New Jersey’s liberal application of standing criteria has also infused its approach to standing with respect to actions to compel enforcement of a charitable trust or corporation. It has long been established that in New Jersey members of a “general benefitted class” are able to complain about the administration of a charitable trust or corporation. Township of Cinnaminson v. First Camden Nat’l Bank & Trust, 99 N.J. Super. 115, 125 (Ch. Div. 1968)(citizens and taxpayers who were the beneficiaries of a library created by a testamentary trust had standing to sue for construction of the trust instrument). See also Horsemen’s Ass’n v. New Jersey Racing Com’n, 251 N.J. Super. 589, 602 (App. Div. 1991)(finding that beneficiaries of funds statutorily allocated for horsemen’s benevolence programs --- *i.e.*, owners, trainers and their employees --- have a “special interest” in the fund sufficient for standing); Paterson v. Paterson General Hospital, 97 N.J. Super. 514, 527 (Ch. Div. 1967)(individual city residents, taxpayers and the City of Paterson found to have standing to seek to enjoin nonprofit hospital from changing its location); and Larkin v. Wikoff, 75 N.J. Eq. 462, 474 (Ch. Div. 1909), aff’d,

77 N.J. Eq. 589 (E & A 1910)(residents of the immediate vicinity of church found to have standing to challenge proposed sale thereof). Specifically, the Chancery Division in Paterson v. Paterson General Hospital, 97 N.J. Super. at 527, explicitly stated that “the rule that parties especially interested may sue to compel performance is as applicable to the law of charitable corporations as to the law of charitable trusts.” Furthermore, because of “sporadic” and “inadequate” public supervision of charities “a liberal rule as to the standing of a plaintiff to complain about the administration of a charitable trust or charitable corporation seems decidedly in the public interest.” Id., 97 N.J. Super. at 528. Since Paterson v. Paterson General Hospital, it has been accepted that New Jersey’s Attorney General is not the exclusive enforcer of charitable trusts and corporations.

Based on the foregoing liberal interpretation of standing criteria, Defendants’ standing to bring their Counter-Claims is readily apparent. Former Mayor Kenneth A. Gibson recommended the establishment of the NWCDC as an “arm” of the City of Newark; he was an initial incorporator of the nonprofit, and sat on its first Board of Trustees. Because, courts give great weight to the intentions of those creating and contributing to a charitable organization, Mayor Gibson clearly has a special interest in the proper administration of the NWCDC. Queen of Angels Hospital v. Younger, 66 Cal. App. 3d 359, 136 Cal. Rptr. 33, 41 (2d Dist. 1977). In Queen of Angels Hospital v. Younger, the California Appellate Court found that the assets of a nonprofit “corporation must be deemed to be impressed with a charitable trust by virtue of the express declaration of the corporation’s purposes,” and the incorporator’s intent is certainly relevant to understanding those purposes. Id., 136 Cal. Rptr. at 39.

Ras J. Baraka and Ron C. Rice are two Newark Councilman, who, with the remaining members of the Newark City Council have entrusted the NWCDC with the management,

conservation, planning and development of Newark's Watershed Properties. In particular, these two councilmen have taken an active role in addressing problems arising from Newark's Department of Water and Sewer Utility's contracts with the NWCDC. They too clearly have a "special interest" entitling them to complain to the court about the performance and administration of the NWCDC, especially since the Counter-Claims challenge NWCDC's decision to eliminate the City of Newark, including the Newark City Council, from its corporate governing documents.

William Chappel, Wynnie-Fred V. Hinds, Wilbur J. McNeil and Terri A. Suess, are all members of the Newark Water Group, which is responsible for the report entitled, Hog Wild: An Analysis of the Activities of the Newark Watershed Conservation and Development Corporation. This report analyzes the operations of the NWCDC and evaluates their efficiency, effectiveness and cost to the City of Newark. See Cross-Claims, Ex. O. Together with Mayor Gibson and Councilmen Rice and Baraka, they are all Newark residents, taxpayers and users of Newark's public Water and Sewer Systems. Exactly as the plaintiffs in Paterson v. Paterson General Hospital, they each have a special interest in the performance of the NWCDC, which is a charitable corporation "charged with the performance of certain duties in the public interest." Id., 97 N.J. Super. at 527.

For the foregoing reasons, each of the Defendants/Counter-Claimants/Third -Party has standing. None of the cases cited by NWCDC support any other conclusion.

B. Each Count of the Counter-Claims State A Cause of Action Upon Which Equitable Relief Can Be Granted.

In addition to denying Defendants' standing, NWCDC denies the legal basis of three of their four Counter-Claims, and with respect to the Count II, it exaggerates the import of Defendants' decision not to plead the statutory definition of "adequate notice" under the OPMA.

Defendants disagree and assert that the Counter-Claims state valid legal theories and sufficiently detailed facts to support them. Notwithstanding this contention, even if one were to find that Defendants have not presented their legal theories as clearly as they intended, they have now done so in their Amended Counter- Claim. In Reider v. State Department of Transportation, cited by NWCDC to support its Motion to Dismiss, the court was very clear that “a complaint should not be dismissed if a cause of action is suggested by the facts, and a theory of accountability may be articulated by way of amendment.” Id., 221 N.J. Super. 547, 552 (App. Div. 1987) (emphasis added) (where plaintiff’s theory of inverse condemnation could not be sustained without allegation of physical invasion or a direct restraint on use of property). As fully explained below, Defendants’ initial pleadings, when viewed liberally, state four causes of action, which are each supported by sufficient factual predicates. As such, they should not be dismissed.

1. Because the NWCDC Has Been Operating With More Than 50% of Its Board Seats Vacant, It Was Not Entitled To Change Its Governing Documents.

In its motion papers, NWCDC contend that Count I of the Counter-Claims rests solely on the proposition that “it was improper for the Board to act with less than all trustees present.” NWCDC Br. at p.7. The legal theories of that Count and the factual predicates on which it rests are more complicated. The cause of action presented in Count I rests not just on NWCDC’s By-Laws and Certificate of Incorporation, but also on New Jersey nonprofit corporation law with respect to quorums, and common law equitable principles regarding corporate governance. See Steinhagen Cert., Ex. III, ¶¶16-24.

Defendants do not assume, as NWCDC contends, that a nonprofit corporation may not transact business with any Board vacancies. Rather, Defendants assert that it “is well-settled that the power of a board of directors is not suspended by vacancies on the board, unless the number is reduced below a quorum,” which is fixed by statute or the corporation’s governing

documents. Fletcher, Vol 2 Cyclopedia of Law of Private Corporations §421 at 277 (per, rev. 2006). That is, vacancies on a board that reduce the number to less than a “quorum that is fixed by statute or otherwise, preclude action by the remaining directors, other than to fill vacancies.” Id. Moreover, a by-law or statute that provides that a majority of directors are sufficient to constitute a quorum typically means that the number necessary is a majority of the entire board, notwithstanding the fact that there may be vacancies on the board at the time. Id. See also Freidus v. Kaufman, 35 N.J. Super. 601, 611 (Ch. Div. 1955), aff’d 36 N.J. 321 (1956)(majority of entire board of directors must be present at any meeting to legally transact corporate business).

In this case, NWCDC’s By-Laws require the Board to consist of 11 members, while the Certificate of Incorporation states that the Board of Trustees may be no fewer than 7. A quorum of the entire Board is thus 6 --- one person greater than the 5 Board members in office in September, 2012, at the time the resolutions that Defendants are challenging were adopted. Given that Section 6 of NWCDC’s By-laws permit “the acts of the majority of the Trustee Members present at a meeting at which a quorum is present” to be the acts of the Board, NWCDC needed an affirmative vote by a minimum of 4 Trustees to validly adopt, as a procedural matter, new By-Laws. Moreover, because N.J.S.A. 15A:9-2 requires an “affirmative vote of two-thirds of those trustees present at a meeting called for the purpose of considering and voting upon [a] proposed amendment [to the Certificate],” as NWCDC notes on p. 6 of its Brief, a minimum of 4 Trustees to vote “yes” was needed to properly adopt a Certificate of Incorporation change.

NWCDC may contend that this logic is faulty, because pursuant to Section 6 of its By-Laws a quorum of its Board exists when “a majority of the Trustee Members in office” is present. (emphasis added). That is, because there are only 5 sitting Trustees, a quorum is

satisfied when 3 of them are present, and 2 of them take action. Defendants need not contest the general validity of this provision in order to argue that there are definitely a number of circumstances, including the situation at hand, where a strict application of this provision as stated would contravene NWCDC's Certificate of Incorporation and state law.

First, if this definition of quorum is applied in all circumstances, it would permit the NWCDC to function with the statutory minimum of 3 Board members, N.J.S.A. 15A:2-8(a)(9), a result that is contrary to the intent of the incorporators, who determined that a minimum number of 7 Trustees was necessary to adequately govern this entity. Furthermore, permitting NWCDC to operate with any number of vacancies greater than 6, would violate state nonprofit corporation law regarding quorums. Pursuant to N.J.S.A. 15A:6-7(a):

A majority of the entire board, . . . shall constitute a quorum for transaction of business, unless the certificate of incorporation or bylaws shall provide that a greater or lesser number constitutes a quorum, which in no case shall be less than the greater of two persons or one-third of the entire board.

(emphasis added); see also Fletcher, Vol 2 Cyclopedia of Law of Private Corporations §419 at 274 (Model Nonprofit Corporation Act : “. . .but a quorum cannot consist of less than one-third of the number of directors fixed in the bylaws”). This means, that the NWCDC Board cannot legally operate with a quorum of fewer than 4 Trustees, one-third of 11. A majority of 6 Board members is 4; so any number of vacancies greater than 5 that would result in a quorum of fewer than 4 violates state law. Accordingly, NWCDC may not properly operate when it has 6 or more vacancies --- more than 50% of its Board seats vacant, as was the case here.

In addition, Defendants predicate Count I on the fact that the Board of NWCDC must include two Newark City Councilmen in addition to the Mayor, who sits on the Board *ex officio*. At the time, the Board adopted the change in governance resolutions, Council President Donald Payne was the only representative of the City Council. A close reading of Defendants' Counter-

Claims indicates that they believe that it was improper for the NWCDC to operate with only one City Councilman, and to radically amend the Certificate of Incorporation and By-Laws without any City officials present or voting. Given the nature of the NWCDC as a “quasi-City agency” or an “arm” of Newark, Defendants contend that the NWCDC violated its fiduciary duty of care to Newark and the Newark City Council by adopting a Certificate and By-Law change without one City officer present or voting. N.J.S.A. 15A:6-14 (nonprofit director’s duty of care); see also Billig v. Buckingham Towers Ass’n Inc., 287 N.J. Super. 551, 563 (App. Div. 1996)(“in dealing with unit owners, association must act reasonably and in good faith’); Valle v. North Jersey Automobile Club, 141 N.J. Super. 568 (App. Div. 1976), modified and aff’d, 74 N.J. 109 (1977) (directors of a nonprofit corporation are considered by equity to be in a fiduciary relation with the corporation and its members); Griffith v. Rittenhouse Park Community Ass’n, 215 N.J. Super. 444, 450-51 (Ch. Div. 1986)(applying trust principles to property association where organizing documents clearly intended that the association be operated for the benefit of all owners). This theory is equitable in nature and rests on common law.

As delineated above, Defendants legal theories are grounded in statutory and common law and are therefore not analogous to the litigants in Camden Co. Energy Recovery Assocs. v. Dep’t of Environmental Protection, 320 N.J. Super. 59 (App. Div. 1999), cited by NWCDC in support of its Motion to Dismiss. NWCDC Br. at p. 4. In Camden Co. Energy Recovery Assocs., the Appellate found that the State’s State Solid Waste Management policy did not create judicially enforceable contractual rights for any of the litigants when that policy was held to be constitutionally flawed by a federal court. Contrary to the plaintiffs in that case, Defendants have certainly stated a cause of action upon which relief may be granted.

2. Defendants Adequately Set Forth a Claim That the NWCDC Did Not Provide

Adequate Notice ToThe Public of its Special Meeting held on September 12, 2010, As Required By the OPMA.

NWCDC does not contest the right of individual members of the Committee of Petitioners to bring Count II of the Counter-Claims; it also does not assert that the OPMA does not apply to the NWCDC as a matter of law. See Times of Trenton Pub. Corp. v. Lafayette Yard Community Development Corp., 183 N.J. 519 (2005), where the New Jersey Supreme Court extended the definitions of the OPMA and the Open Public Records Act to include nonprofits that could not have been created without municipal approval, even if the municipality did not directly create the nonprofit. Id., 183 N.J. at 535.

Instead, NWCDC distorts Defendants' allegations and asserts that the "Second Count does not state the manner in which the OPMA was allegedly violated or ... why the public notice for the September 13, 2012 meeting was allegedly inadequate." NWCDC Br. at 7. A proper reading of the Second Count indicates that Defendants are alleging that the notice that was not provided prior to the September 13, 2012 meeting was the "adequate notice" that is required under the OPMA. The fact that Defendants did not set forth the statutory definition of adequate notice is not fatal to this count or the fact that they did not specify how the notice did not meet this standard. On information and belief, Defendants do not believe that any notice was provided to the public so it is impossible to specify how "notice" that was not given is defective.

Accordingly, Defendants have indeed pled sufficient facts to withstand NWCDC's Motion to Dismiss this count.⁸

⁸ In support of its Motion to Dismiss, NWCDC has produced accurate copies of documents initially attached to Defendants' Verified Answer/Counter-Claim. See Hartwyck Cert. Exhibits. Based on these documents, including the minutes of the September 10, 2012 and September 13, 2012, Board meetings, Counter-Claimants have amended their Counter- Claims to allege that adequate notice under the OPMA was not provided before either meeting. Steinhagen Cert., Ex.

3. By Removing the City of Newark From the Mission, Purpose, Dissolution Clause and other Clauses of its Governing Documents, NWCDC and Three Individual Trustees Have Violated Their Fiduciary Duty to the City of Newark and All Its Residents, Including Defendants.

In addition to its allegation that the Committee of Petitioners and Councilmen Baraka and Rice lack standing to allege a fiduciary duty claim against NWCDC, and certain of its Trustees, NWCDC seems to imply that there is no fiduciary relationship between NWCDC and Defendants justifying a claim for breach, as a matter of law. See NWCDC Br. at p. 8.⁹ This argument has no merit under New Jersey law.

Ordinarily, the principles and rules applicable to charitable trusts are applicable to other charitable entities. Restatement (Second) of Trusts §348, cmt. f (1959). In New Jersey, when a nonprofit corporation is organized for some charitable, social welfare or other public benefit purpose (as is the NWCDC), its assets are impressed with a charitable trust by operation of law. See Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306 (1984)(trust imposed on nonprofit association responsible for access to a maintenance of beach-front based on its commitment to the welfare of the community); Leeds v. Harrison, 7 N.J. Super 558 (Ch Div. 1950)(trust imposed on Y.M.C.A., based on its status as a nonprofit corporation and the charitable purpose stated in its incorporation certificate). See also Thomas E. Blackwell, “The Charitable

III, ¶26. The amended pleading also sets forth the definition of “adequate notice” as employed throughout the OPMA. Id. ¶27.

⁹ NWCDC further asserts that Count III must fail since Counter-Claimants did not “name” the three Board members present at the September meetings. This argument ignores the fact that the Count is stated against the NWCDC as well as the three Trustees (both of which owe a fiduciary duty to its beneficiaries, including the Newark City Council), and is grossly unfair, given the procedural history of this case. Counsel for Defendants served those three individuals with the Verified Answer and Counter-Claims, and as argued above, they may be joined to this action at this time.

Corporation and the Charitable Trust,” 24 Was. L. Q. 1, 42 (December 1938)(noting that the courts in New Jersey have consistently held since McKenzie v. Trustees of Presbytery of Jersey City, 67 N.J. Eq. 652 (E & A 1905) that gifts and bequests to charitable corporations are trusts). Thus, where property is given or acquired by a charitable corporation without restrictions, it must be applied to one or more of the charitable purposes for which the corporation is organized. Restatement (Second) of Trusts §348, cmt. f (1959). See also Montclair Nat’l Bank & Trust Co. v. Seton Hall College of Medicine, 90 N.J. Super. 419 (Ch. Div. 1966), rev’d on other grounds, 96 N.J. Super. 428 (App. Div. 1967)(noting that corporation must use funds bequeathed for the “accomplishment of its proper corporate purposes”). In this way,

[NWCDC] is not, strictly speaking, a charitable trust. It is, rather, a charitable corporation, governed by the law applicable to charitable corporations. To some extent this body of doctrine has its roots in the law of trusts, to some extent in the law of corporations; to some extent it may partake of both or indeed be sui generis.

Paterson v. Paterson General Hospital, 97 N.J. Super. at 518.

Notwithstanding this sui generis status, trustees of nonprofit, charitable corporations are considered by equity to be in a fiduciary relation with the corporation and its members, or in the case of a corporation with no members, the public or some portion thereof. As trustees of charitable corporations, their fiduciary duties are threefold: the duty of obedience, loyalty and care. See generally Daniel Kurtz, Safeguarding the Mission: The Duties and Liabilities of Officers and Directors of Nonprofit Organizations, C726 ALI-ABA 15 (1992); and Oberly v. Kirby, 592 A.2d 445, 468 n. 17 (Del. 1990)(noting that nonprofit directors incur a special fiduciary responsibility to “protect and advance [the corporation’s] charitable purpose”).

It is the duty of obedience that underlies this Count in Defendants’ Counter-Claims. This duty, “still vital in the nonprofit area,”(Safeguarding the Mission at 17), requires the NWCDC

Trustees to exercise only those powers that are “necessary and or convenient to effect” the purposes for which the corporation was organized, N.J.S.A. 15A:3-1(a)(16), which, under New Jersey law are required to be set forth with specificity. N.J.S.A. 15A-2-8(a)(2). It is NWCDC’s purpose clause, as specified in Article Two of its Certificate of Incorporation, therefore, that gives life to the nature of the fiduciary duties of the NWCDC Trustees, sets a functional boundary for legitimate corporate action, and provides the legal basis for Count III of Defendants’ Counter-Claims. See Paterson v. Paterson General Hospital, 97 N.J. Super. at 522 (affirming principle that directors of nonprofit corporation cannot use corporate assets to “subvert the general purposes on which the corporation was founded.”) . NWCDC seems to forget that it serves the City of Newark and its residents not just through its service contracts with the Newark DWSU, but more importantly for the issues raised herein, as a mandate of its charter. NWCDC Br. at pp 3-4.

For the foregoing reasons, the Committee of Petitioners and Councilman Baraka and Councilman Rice have alleged sufficient facts on which to determine whether NWCDC’s change of its Certificate of Incorporation and By-Laws, as adopted by Board members Merritt, Johnson and James, constitutes a violation of the corporation’s and its Board’s fiduciary duty to Newark and its residents.

4. By effecting Fundamental Changes to its Certificate of Incorporation and By-Laws, NWCDC Has Diverted and/or Converted for Its Own Use Assets Accumulated on Behalf of and Dedicated to the City of Newark.

NWCDC also argue that Count Four of the Counter-Claims must be dismissed because that claim “is premised entirely on the failure of the Newark Watershed to dissolve in accordance with the Newark City Council’s Resolution, dated May 16, 2012, which this Court declared invalid. NWCDC Br. at p. 9. First, this Court did not declare the May 16th resolution invalid; it

declared the Initiated Ordinance invalid.¹⁰ Secondly, and more importantly, the Committee of Petitioners and Councilmen Baraka and Rice do not base their claim of conversion on the fact that NWCDC has not dissolved as requested.

Instead, Count IV rests on the theory that the changes made to the corporate governance documents have resulted in a diversion of the NWCDC's assets due to significant alterations to the basic purpose of the NWCDC; which is to provide the City of Newark with planning, conservation, management and development services concerning its Watershed Properties, not to provide such services to any municipality in the State. Cf. Bible Presbyterian Church of Collingwood, Inc. v. Harvey Cedars Bible, 84 N.J. Super. 441 (App. Div. 1964), cert. denied, 43 N.J. 258 (1965)(action to set aside certificate changes to Bible Conference's Certificate of Incorporation and enjoin diversion of assets). Specifically, Defendants assert that because of such significant changes to its Certificate of Incorporation --- changes that eliminate the City of Newark from its mission, participation in its governance, and control over some of its operations --- the NWCDC has in effect dissolved, and has in effect reincorporated with the same name, but with a different mission.

Seen in this light, Count IV states a cause of action for conversion upon which equitable relief may be granted. Instead of officially dissolving as demanded by Councilman Rice and the

¹⁰ Defendants agree that the Newark City Council cannot effectuate dissolution of the NWCDC through ordinance. Cf. Harris v. Township of Haddon, 382 N.J. Super. 195, 201 (Law Div. 2005)(Township could not require nonprofit corporation to alter its method of choosing its Board of Directors by ordinance; it could, however, establish by ordinance a new entity to function as the special improvement district's management corporation). Rather, they argued in the prerogative writ action that the Initiated Ordinance was not self-executing, and merely expressed the City Council's demand to the Board of NWCDC to dissolve and return all financial and nonfinancial assets belonging to Newark. Similarly, the May 16, 2012, made the same demand to the Board. See Bondi v. Citigroup, Inc., 423 N.J. Super. 377, 432 (App. Div. 2011)(to sustain claim of conversion, plaintiff must establish that it has demanded return of assets, and tortfeasor has refused to do so)

Newark City Council generally, the NWCDC has refused to return the financial and nonfinancial assets that it has received and accumulated on behalf the City of Newark to the City, and has instead diverted or converted those assets for its own use. Cf. Cargill Global Trading v. Applied Dev. Co., 606 F.Supp.2d 563, 578 (D.N.J. 2010)(to establish conversion, a plaintiff must have actual interest in the asset, and defendant is capable of misuse of that asset in a way that would deprive plaintiff of its benefit), cited in Bondi v. Citigroup, Inc., 423 N.J. Super. at 431. Accordingly, Count IV must not be dismissed at this juncture of the litigation.

CONCLUSION

For all the reasons fully set forth above, the Committee of Petitioners, including former Mayor Kenneth Gibson, Councilman Ras J. Baraka, and Councilman Ron C. Rice request that their Motion to Transfer the Counter-Claims, as amended, and their Motion to Amend the Counter-Claims (including their request to join additional parties) be granted, and NWCDC's Motion to Dismiss those Counter-Claims be denied in its entirety.

Respectfully submitted,

NEW JERSEY APPLESEED
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By: _____
Renée Steinhagen, Esq.

Dated: December 14, 2012