



September 22, 2009

Hon. Laura M. LeWinn  
Appellate Division  
Middlesex County Courthouse  
56 Paterson Street, 4<sup>th</sup> Fl.  
New Brunswick, N.J. 08903

Hon. Dorothea Wefing  
Appellate Division  
Brennan Courthouse  
583 Newark Avenue  
Jersey City, N.J. 07306

Re: Empower Our Neighborhoods, et. al. v.  
Daniel A. Torrissi, et al.  
Docket No. Below: MID-L-7460-09  
App. Div. Docket No.:  
(On Emergency Appeal)

Dear Judges LeWinn and Wefing:

The undersigned are the attorneys for the Plaintiffs-  
Respondents Empower Our Neighborhoods (hereinafter EON),  
Margarita Bonarenko, Amy Braunstein, Dominic Bombace, Adriel  
Bernal's and Anthony Shull's (hereinafter "Plaintiffs") Please  
accept this letter in lieu of a more formal brief in opposition  
to Defendants-Appellants Daniel A. Torrissi's and the New  
Brunswick City Council's (hereinafter, "New Brunswick

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Defendants") emergent appeal from the judgment entered below in Plaintiffs' favor.

PRELIMINARY STATEMENT

Plaintiffs are the proponents of a change of government referendum question that will be appearing on the November 2009 ballot as a result of their having obtained a judgment in lieu of prerogative writs (mandamus) in previous litigation against the New Brunswick defendants on August 10, 2009. In that case, known as EON II, the New Brunswick Defendants had refused to certify Plaintiffs' question for the ballot based primarily upon the statutory prohibition of more than one Charter Change Proceeding going forward at any one time and their claim that a Charter Study Ordinance had been passed by the New Brunswick City Council before Plaintiffs' petition was filed. Judge Hurley, who also decided the present case below, held in EON II that the Charter Study Ordinance was void, because it had been passed while an earlier Charter Change Proceeding (a petition also filed by Plaintiffs) was then pending.

Plaintiffs brought the present action in lieu of prerogative writs (mandamus), known as EON III, when the Municipal Defendants certified the question presented by a new Charter Change Proceeding filed on August 24, 2009, for the November 2009 ballot. In doing so, the New Brunswick Defendants violated the statutory prohibition against two Charter Change

Proceedings going forward at the same time and completely reversed their own interpretation of that prohibition that they had argued, and that the Court and Plaintiffs had accepted, in EON II.

Judge Hurley's decision below, granting Plaintiffs the mandamus relief they sought by prohibiting the New Brunswick Defendants from certifying the new referendum question for the November 2009 ballot must be affirmed because it simply enforced the statutory scheme set forth in the Optional Municipal Charter Law, N.J.S.A. 40:69A-1 et seq. which, among other things, prohibits multiple charter amendment or change of government referendum proceedings from going forward simultaneously. Defendants' pettifogging attempt to exclude change of government petitions (seeking to amend a charter to include any alternative permitted under the current plan of government) filed pursuant to N.J.S.A. 40:69A-25.1 from the ambit of N.J.S.A. 40:69A-21, which prohibits all proceedings "for the adoption of any other charter or form of government available to the municipality," id., (initiated either by petition or ordinance) from going forward when another such proceeding is pending cannot be sustained by the language and intent of the relevant provisions read *in pari materia*.

In sum, only one Change of Government Proceeding may go forward on any one ballot and, as Plaintiffs' Proceeding was

commenced first, only Plaintiffs' referendum question may appear on the New Brunswick November 2009 ballot.

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

EON is an unincorporated, non-partisan political committee consisting of New Brunswick residents. (P2a)<sup>1</sup> The five named individual plaintiffs in this case are persons associated with EON, all of whom comprise the Committee of Petitioners with respect to their "Petition for a Referendum on a Ward Based Alternative" ("Charter Amendment Proceeding One"), which has had its question placed on the November 2009 ballot by virtue of the Judgment entered in EON II. The petition initiating Charter Amendment Proceeding One was submitted to the New Brunswick City Clerk on October 1, 2008, in accordance with N.J.S.A. 40:69A-

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1 Pursuant to R. 2:6-8, Defendants' appendix should have been paginated "Da1" rather than "Pala". Accordingly, to avoid confusion, Plaintiffs will refer to their appendix as "Da1."

25.1 (Pa21-22, 26). Specifically, Plaintiffs' referendum petition seeks to present the voters of New Brunswick with the option of changing their existing Mayor-Council form of government from one with five (5) at-large seats on the City Council, to a hybrid ward-based system with six (6) ward based seats and three (3) at-large seats. Id.

By letter dated October 22, 2008, Mr. Torrasi advised Plaintiffs that further proceedings of their petition were "barred" because:

1. [T]he New Brunswick City Council has previously adopted Ordinance titled "An Ordinance to Provide for an Election in the City of New Brunswick of Establishment of a Charter Study Commission," on July 2, 2008. The adoption of this Ordinance prevents the validation of any charter change petition.
2. It is noted also that the petition fails to provide a properly constructed initiative ordinance on every petition paper, as required [by] the Initiative and Referendum statutes.

(Hamilton Letter of October 22, 2008) (emphasis added) (Pa27).

Defendants later specified that N.J.S.A. 40:69A-21 dictated that the charter amendments proposed by Plaintiffs "could not appear on the same ballot" as the City Council's Charter Study Ordinance. Db6.

In response to this rejection, Plaintiffs filed a Complaint in Lieu of Prerogative Writs (referred to in the pleadings as "EON II"), on December 3, 2008, to compel

Defendants to place the question presented in its charter amendment petition on the November 3, 2009 General Election ballot. (Pa27)<sup>2</sup> This matter was decided in Plaintiffs' favor by Judge Hurley on August 10, 2009.

In his Decision and Final Judgment, Judge Hurley held that Plaintiffs' referendum petition in Charter Amendment Proceeding One was sufficient in form as a matter of law, and was not precluded from appearing on the ballot due to Defendants' Charter Study Ordinance. (P33a-44a). Rather, he agreed with the reasoning of Judge Currier in earlier litigation between these same parties known as EON I, and found that Defendants' Ordinance was invalid pursuant to the language of N.J.S.A. 40:69A-17 prohibiting the enactment of such an ordinance "while proceedings are pending under any other petition or ordinance filed or passed under article 1 of this act, . . . or any other statute providing for the adoption of any other charter or form of government available to the municipality." Id.

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<sup>2</sup> EON I refers to an Order to Show Cause and Verified Complaint in Lieu of Prerogative Writs filed by the Plaintiffs against the New Brunswick Defendants in this case on August 8, 2008. This Verified Complaint concerned a change of government petition also submitted pursuant to N.J.S.A. 40:69A-25.1. (Pa25) On September 2, 2008, the Hon. Heidi Currier, J.S.C. placed her decision in favor of Plaintiffs on the record; however, "because of the proximity of the decision to the election, EON I concluded with the withdrawal of Plaintiffs' petition." Pa26

In other words, Plaintiffs' section 25.1 petition at issue in EON I prohibited the enactment of Defendants' Ordinance thus permitting Plaintiffs' section 25.1 petition at issue in EON II to proceed. Accordingly, Judge Hurley ordered Defendants Torrisi and Flynn, respectively, to further process Plaintiffs' charter amendment petition to ensure its placement on the November 2009 ballot. (Pa45).

Despite the pending processing of Plaintiffs' referendum petition as directed by Judge Hurley, Defendants Bucca, Dunbar, Escobar, Fleming and Rufino, formed a second Committee of Petitioners, and submitted a petition on August 24, 2009, to the Municipal Clerk requesting that an alternative change in government question also be placed on the November 3, 2009 General Election ballot. (Pa46) Defendants' petition, also filed under N.J.S.A. 40:69A-25.1, is entitled "Petition for a Ballot Question on Expanding New Brunswick's At-Large City Council to Seven Members" ("Charter Amendment Proceeding Two"), and seeks to initiate "an ordinance to provide for the submission to the voters . . . the question of a change in the City's Charter." (Pa46).

After examining Defendants' charter amendment petition, Defendant Torrisi determined that it contained a proper statement of the circulators and contained a sufficient number of signatures. With the approval of the Office of the City

Attorney, who determined that the petition was in proper form, Defendant Torrasi certified the petition, on or about September 1, 2009, and informed the City Council of his determination. (Pa47). On September 2, 2009, Defendant City Council deemed the Ordinance initiated in Defendants' petition to have been given its first reading, and resolved to schedule a public hearing on such Ordinance for September 16, 2009. (Pa48)

On September 8, 2009, Plaintiffs served an Order to Show Cause, with supporting documents, and a Verified Complaint in Lieu of Prerogative Writs on Defendants in this matter, which was filed with the Court on September 9, 2009. In their Order to Show Cause, Plaintiffs set forth the relief they were requesting as follows: An order (a) adjudging and declaring that the Municipal Clerk abused his authority and failed to perform his mandatory duty to reject Defendants' change of government petition; (b) directing the City Clerk to decertify and reject Defendants' petition to initiate an ordinance to provide for the submission of a change of City Charter question to the voters; (c) restraining and enjoining the City Council from further processing Defendants' petition; and (d) restraining and enjoining the County Clerk from printing upon any ballot for use at the November 3, 2009 General Election, the public question presented in Defendants' petition. (Pa14-15)

On September 9, 2009, Judge Hurley entered Plaintiffs' Order to Show Cause. (Pa17-20) On September 16, 2009, the Individual and Government Defendants filed their respective Answer (Da3-20) and Memorandum of Law in Opposition to Plaintiffs' Order to Show Cause. The County Clerk did not submit such Memorandum. That same evening, a public hearing was held and the Ordinance initiated by Defendants was adopted.<sup>3</sup> Pursuant to representations in Defendants' Appellate Brief such Ordinance was sent immediately thereafter to the County Clerk for placement on the November, 2009 General Election ballot. (Db7)

Two days later, on September 18, 2009, the trial court heard oral argument on Plaintiffs' Order to Show Cause. That same day, Judge Hurley entered an Order, "for the reasons set forth on the record on 9/18/09,"<sup>4</sup> granting Plaintiffs' requested relief in full, and ordering that "the ordinance adopted placing another alternate question on the ballot is hereby deemed null and void;" and that the "Middlesex County Clerk is hereby

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3 These actions by the Council are completely irrelevant to any issue presented in this appeal or, for that matter, any issue presented below. The entire question here is whether two Charter Amendment Proceedings can go forward at the same time.

4 The Defendants have not yet provided a transcript of Judge Hurley's oral decision, which Defendants say they have ordered on an expedited basis. Due to the absence of such a transcript, a portion of this letter brief attempts to set forth Judge Hurley's reasoning in accordance with the best recollection and notes taken by Plaintiffs' counsel.

enjoined from placing the question, adopted by Ordinance from being placed on the 11/3/09 ballot.” (Da1-2) Immediately thereafter, the New Brunswick Defendants filed an application for Permission to File an Emergent Appeal. Such motion was granted, and pursuant to a stipulation between the parties, papers in support and in opposition to such appeal are due Tuesday, September 22, 2009.

THE RELEVANT STATUTORY SCHEME

Article 1 of the Optional Municipal Charter Law, N.J.S.A. 40:69A-1 *et seq.* (the “Municipal Charter Law” or “Act”) sets forth various provisions governing referenda on charter changes concerning the adoption of a charter study commission and any of the proposed optional plans of government set forth in the Act, including any of the alternatives or suboptions contained therein. Prior to a revision of the Act effective January, 1982, N.J.S.A. 40:69A-14 set forth the sole form of the question to be submitted to the voters for the adoption of any of the optional plans of government authorized under the Act, including any of the suboptions permitted under any given plan;<sup>5</sup> and, a

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<sup>5</sup> N.J.S.A. 40:69A-14 reads as follows:

The question to be submitted to the voters for the adoption of any of the optional plans of government authorized by this act, including any of the alternatives contained in this act, shall be submitted in the following form or such part thereof as shall be applicable:

“Shall . . . (insert name of plan) . . . of the Optional

referendum on such question, which was initiated by a petition of the registered voters without a charter commission recommendation, was governed by the signature requirements set forth in N.J.S.A. 40:69A-19.

In 1982, the Legislature revised article 1, amending certain provisions therein and adding N.J.S.A. 40:69A-25.1-25.5, which permitted voters to initiate a petition for a referendum to amend its charter to include any alternative permitted under its plan of government employing the lower signature requirements set forth in the "pertinent provisions" of N.J.S.A. 40:69A-184 et seq. (the general initiative and referendum provisions available to residents of a Faulkner Act municipality). N.J.S.A. 40:69A-25.1. See also Saverino v. Zboyan, 239 N.J. Super. 330, 336-37 (App. Div. 1990) (noting that the legislative distinction between adoption of one of the four plans of government, and adoption of an alternative under an existing plan "is best underscored by the significant difference

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Municipal Charter Law, providing for (A division of the municipality into . . . (insert number) . . .wards, with . . . (insert number). . . council members (one to be elected from each ward and . . . (insert number). . .to be elected at large) for . . . (insert "concurrent" or "staggered" terms . . .) . . . at elections held in . . . (insert May or November) . . ., with the mayor elected. . . (insert "directly by the voters" or "by the ciybcuk from among its member"). . ., (insert, if appropriate) with run-off elections to be held thereafter if a sufficient number of candidates fail to attain a majority of votes, be adopted by . . . . (insert name of municipality) . . . ?"

between the number of voters necessary *to adopt an optional* plan of government, in contrast to the number required *to adopt an `alternative`*").

The legislative history of this revision also makes clear that a municipality is no longer "required to hold a referendum on the basic plan of government if it wish[s] to change one element thereof." Statement to Senate No. 3135, May 4, 1981 (Da21) (submitted to the trial court during oral argument). Instead, the governing body or the voters are able to propose that a referendum be held only on the question of adopting one or more of the suboptions available under a certain plan. Id. Furthermore, in accord with N.J.S.A. 40:69A-25.1, a charter amendment proceeding may propose a referendum on one or more of the different elements of a basic plan at the same time as long as it sets forth each of those alternatives in distinct questions, thus permitting the public to vote on each of them separately (in contrast to the one question limitation previously imposed by N.J.S.A. 40:69A-14).<sup>6</sup>

Article 1 of the Municipal Charter Law also incorporates a clear Legislative policy decision to preclude multiple charter amendment proceedings from going forward simultaneously and

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<sup>6</sup> N.J.S.A. 40:69A-25.1(b) states in relevant part: "If more than one alternative is to be submitted to the voters at the same time, each alternative shall be separately stated on the ballot in the form of a question as set forth above."

placing questions on the same ballot. This intent is expressed explicitly in the similar language found in N.J.S.A. 40:69A-17 and 21 of the Act, respectively. Section 17, which was directly implicated and interpreted in EON I and EON II, prohibits the enactment of a charter study commission ordinance or the filing of such a petition, "while proceedings are pending under any other petition or ordinance filed or passed under article 1 of this act, or while proceedings are pending pursuant to section 1-18 hereof or any other statute providing for the adoption of any other charter or form of government available to the municipality." N.J.S.A. 40:69A-17. Similarly, section 21, as held by the trial judge herein, prohibits the filing of a change of government petition while another such petition is pending, a charter study ordinance has been passed or petition has been filed, or "while proceedings are pending pursuant to any other statute for the adoption of any other charter or form of government available to the municipality." N.J.S.A. 40:69A-21. The 1982 revisions left these broadly stated prohibitions intact.

#### ARGUMENT

THE TRIAL JUDGE'S DECISION ACCORDS WITH THE  
OPTIONAL MUNICIPAL CHARTER LAW, AND ALL RELIEF  
GRANTED SHOULD BE AFFIRMED

The trial court correctly held that Plaintiffs' Charter Amendment Proceeding One precluded the certification of Defendants' Charter Amendment Proceeding Two for the November 2009 ballot. The basis of its decision is that N.J.S.A. 40:69A-21 must be read *in pari materia* with N.J.S.A. 40:69A-25.1, both of which explicitly prohibit multiple change of government referenda, whether initiated by statute or ordinance, from simultaneously proceeding to the same ballot. That is, although the Legislature permitted, after 1982, a single charter amendment proceeding initiated under N.J.S.A. 40:69A-25.1 to propose one or more questions concerning different elements under any given plan of government on a single ballot, it did not alter its prohibition against multiple charter amendment proceedings going forward at the same time.

N.J.S.A. 40:69A-21 states as follows:

No petition for submission of the question of adopting an optional plan of government pursuant to section 1-18 et seq. of this act may be filed while proceedings are pending pursuant to another such petition, or under an ordinance passed or petition filed pursuant to section 1-1 of this act, or while proceedings are pending pursuant to any other statute for the adoption of any other charter or form of government available to the municipality, nor within four years after an election shall have been held pursuant to any such petition filed pursuant to section 1-18 et seq. of this act.

It is clear from the Legislature's continued use of the language "section 1-18 et seq. of this act" and "while proceedings are pending pursuant to any other statute for the

adoption of any other charter or form of government," at the time that it revised the Act to include section 25.1, that Section 21's prohibition against the filing of change of government petitions at the time that other charter amendment proceedings are pending includes charter amendment petitions filed under section 25.1. That is, the "question of adopting an optional plan of government pursuant to section 1-18 et seq. of this act" encompasses the question of adopting any of the alternatives, suboptions or elements authorized under a given plan. Simply put, suboptions are options within the meaning of Section 21. Certainly nothing in the language of the Act can be reasonably read to suggest otherwise.

Defendants' interpretation of this provision, which selectively chooses to prohibit the filing of a section 25.1 petition only when a charter study commission proceeding is pending or when a referendum petition filed under section 18 is involved, distorts the explicit language and the plain intent of the statute. (Db13 n.13)<sup>7</sup>

As the New Jersey Supreme Court stated in Chasis v. Tumulty, 8 N.J. 147 (1951),

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<sup>7</sup> See also Da26-27 (In EON II, Defendants asserted that N.J.S.A. 40:69A-21 implied that Plaintiffs' charter amendment petition was preempted or precluded by the City Council's Charter Study Commission Ordinance and that both could not appear on the same ballot; noting "only the first proposal that is first in time proceeds.")

The Legislature has determined; and while it has clothed the governing body with the authority to initiate a movement looking toward an applied study, it has, in our opinion, given, in section 1-21, assurance that such authority shall not vitiate a popular movement toward a referendum election on a specific statutory charter.

Id. at 155. Similarly, as the Legislature has given any one committee of petitioners the authority to initiate a petition to place one or more alternative form of government questions on the ballot at the same time, section 1-21, assures such petitioners that their petition will not be interfered with or "vitiating" by competing change of government petition presented by either the municipality or another committee of petitioners.

If the first sentence of section 21 were not to include petitions filed under section 25.1 (and was limited to only those petitions filed under section 18, as Defendants assert), the filing of a petition under section 25.1 subsequent to the filing of a petition under section 18 or the relevant charter commission study provisions would not prevent both questions from appearing on the same ballot. However, if such petition were filed prior to the filing of either a petition under section 18 or the relevant charter commission study provisions, section 21 and section 17 respectively would prevent the appearance of both questions on the same ballot. The statutory language and scheme set forth in article 1 of the Municipal

Charter Law cannot sustain or tolerate such contradictory results.

In short, a referendum petition proposing a change to any alternative under a given plan authorized by the Act is the same thing as a referendum petition proposing any other charter change for purposes of N.J.S.A. 40:69A-21. Both involve charter amendments and both involve a change to the form of government currently in place in a given municipality.

In addition, the fact that Defendants' petition is a petition to initiate an ordinance that requires the placement of a referendum change of government question on the ballot does not remove such petition filed under section 25.1 from the ambit of section 21. To do so, would raise form over function.<sup>8</sup> The statute clearly prohibits more than one charter amendment proceeding from going forward at the same time, permitting only the proceeding that is first initiated to place a question(s) on the ballot. This is true whether the charter amendment proceeding takes the form of a direct petition, a petition for an ordinance, a charter study ordinance, or any other form that

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8 It should be noted that Plaintiffs did not plead in their Verified Complaint (Pal-12) nor did the trial court address or rule as to the propriety of the Individual Defendants' choice to initiate an ordinance to provide for change of government referendum under N.J.S.A. 40:69A-25.1.

creative lawyering or statutory interpretation might conceive.  
There can only be one charter amendment proceeding at a time.

Accordingly, the decision below, pursuant to which only  
plaintiffs' public question will appear on the November 2009  
ballot, must be affirmed.

CONCLUSION

For the foregoing reasons, the Trial Court must be affirmed  
and the Government Defendants must act in accord with its Order  
entered September 18, 2009.

Respectfully submitted,

Renée Steinhagen, Esq.

-and-

Bennet D. Zurofsky, Esq.

Cc: Marvin Brauth, Esq.  
Eric Aronowitz, Esq.  
George Hendricks, Esq.



