New Jersey
Appleseed

September 8, 2009

Hon. James P. Hurley
Superior Court of New Jersey
Middlesex Court House
56 Paterson Street
P.O. Box 964
New Brunswick, New Jersey 08903-0964

Re: Empower Our Neighborhoods, et. al v. Torrisi, et. al
Docket No. L-

Dear Judge Hurley:

Please accept this letter brief in lieu of a more formal brief in support of Plaintiffs' Order To Show Cause seeking to restrain Defendants' processing of a recently filed petition for a ballot question on expanding New Brunswick's at-large City Council to seven (7) members. Pursuant to N.J.S.A. 40:69A-21, it is clear that a petition to amend a municipality's form of government must be rejected if a previously filed change of government petition is still pending. Less than one month ago, this Court ordered defendants Torrisi and Flynn to proceed to place the question presented in Plaintiffs' petition filed in October 2008 on the November, 3, 2009 ballot; accordingly, no other charter amendment question may appear on the same ballot, and Defendants must be prohibited and restrained from doing so.

New Jersey Appleseed
Public Interest Law Center of New Jersey
744 Broad Street, Suite 1600
Newark, New Jersey 07102

Phone: 973.735.0523 Fax: 973.735.0524
Email: rsteinhagen@lawsuites.net
Website: www.njappleseed.net

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiffs incorporate all the factual allegations set forth in their Verified Complaint submitted in the afore-captioned matter (hereinafter referred to as "EON III"). Furthermore, since the Verified Complaint demands performance of a ministerial act or duty, Plaintiffs are entitled, at this time, to apply for summary judgment, by Order to Show Cause supported by the Certification of Charles Kratovil (verifying the facts and authenticity of the documents set forth in the Complaint) and this letter brief. R. 4:69-2.

LEGAL ARGUMENT

I

GOVENRNMENT DEFENDANTS HAVE ACTED ILLEGALLY BY ACCEPTING INDIVIDUAL DEFENDANTS' CHANGE OF GOVERNMENT PETITION FOR PROCESSING AND PLACEMENT ON THE NOVEMBER 3, 2009, BALLOT.

A. N.J.S.A. 40:69A-21 Bars the Filing of a Second Change of Government Petition While a Previously Filed Petition is Pending.

On August 10, 2009, this Court entered a Decision and Final Judgment in lieu of prerogative writs in which it overturned Defendant Torrisi's refusal to certify Plaintiffs' change in government petition, entitled "Petition for a Referendum on a Ward-Based Alternative" (hereinafter, "Initiated Petition"). In that case, (hereinafter referred to as "EON II"), the Court held, in part, that Plaintiffs' Initiated Petition was properly submitted to the Municipal Clerk in accordance with law, was sufficient in form, and should have been accepted and processed by the Clerk to ensure its appearance on the November 2009 General Election ballot. See Decision and Final Judgment, attached hereto as Exhibit 1 (hereinafter "Decision"). The Court, as set forth below, specifically ordered Defendants Torrisi and Flynn, respectively, to further process Plaintiffs' Initiated Petition:

3. The Defendant, Daniel A. Torrisi is hereby directed to forthwith certify the Plaintiffs' Petition to the Defendant Elaine Flynn, Middlesex County Clerk.

4. The Defendant Elaine Flynn, is hereby directed to place the Question, posed in the Petition, on the November 2009 ballot.

Decision at p.23.

In its decision, this Court had the opportunity to interpret N.J.S.A. 40:69A-17 (prohibiting the enactment of an ordinance for the election of a charter commission while "proceedings are pending pursuant to … any other statute providing for the adoption of any other charter or form of government available to the municipality, . . .) and the statutory scheme in which it is embedded. Indeed, the Court acknowledged the "extreme[]" similarity of N.J.S.A. 40:69A-21 insofar as both sections 17 and 21 precluded the acceptance and/or validity of a charter amendment proposal (by ordinance or petition) while "proceedings are pending pursuant to another such petition." N.J.S.A. 40:69A-21. See Decision at p. 13. Specifically, the Court found as part of its holding that

> The Charter Study Ordinance, relied upon by Mr. Torrisi in rejecting Plaintiffs' Petition, was not lawfully adopted pursuant to N.J.S.A. 40: 69A-17 because of the pending initial petition, and therefore under the same provision, no bar to Plaintiffs' second filing. To allow an ordinance never lawfully adopted to be pulled forward by the withdrawal of a petitioner's filing abrogates the force and effect of to N.J.S.A 40: 69A-17.

Decision at p.12.[1]

In this case, section 21 of the Optional Municipal Charter Law is directly implicated, not section 17. Pursuant to N.J.S.A. 40:69A-21,

[1] It should be noted that in EON II, Defendant Torrisi asserted that "pursuant to N.J.S.A. 40:69A-17, [Plaintiffs' Initiated] Petition was precluded from being filed, as the Ordinance for election of a charter study commission had previously been adopted." Decision at p.11.

> 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. f this act.

(emphasis added).

It is clear from the language of the first sentence of section 21, and the intended effect of such provision (especially when read in conjunction with section 17 of the same act), that Defendants' Petition, submitted in accordance with N.J.S.A. 40:69A-25.1 of the Optional Municipal Charter Law while the processing of Plaintiffs' Initiated Petition is still ongoing, is invalid and therefore should not have been approved/certified for placement on the November 2009 ballot. That is, by ignoring the clear mandate, language, and intent of the Legislature to prohibit multiple change of government proceedings from placing questions on the ballot at the same time, as expressed in N.J.S.A. 40:69A-21 and 17, Defendant Torrisi has abused his authority and has failed to perform his mandatory duty to reject the Defendants' Petition. Indeed, instead of determining that Defendants' Petition is barred by the ongoing processing of Plaintiffs' Initiated Petition, he has acted illegally and in bad faith by certifying Defendants' Petition as sufficient and thereafter, submitting that petition to the City Council for adoption as an ordinance with the object of placing same on the November 2009 ballot.

This conclusion is directly supported by the legal position taken by Defendants in EON II, and accepted by your Honor, with respect to the legislative intent and effect of N.J.S.A. 40:69A-17 and 21. In its memorandum of law opposing Plaintiffs' Motion for Summary

---

Plaintiffs contend, however, that it is N.J.S.A. 40:69A-21 that would have barred Plaintiffs' Initiated Petition if the Charter Study Ordinance had been lawfully enacted, not section 17.

Judgment and in support of Defendants' Cross-Motion for Summary Judgment, Defendants stated,

> Similarly, N.J.S.A. 40:69A-21 prevents the filing of a petition to completely change the form of government of a municipality while a charter commission ordinance or other petition is pending. (emphasis added)

Defendant Torrisi's and City Council's Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgement and in Support of Defendants' Cross-Motion for Summary Judgment, MID-L-101613 (hereinafter "Defs. Memorandum") at p.15 (attached hereto as 'Exhibit II"). Defendants continue to assert that "where the Faulkner Act has addressed the issue, it has precluded conflicting proposals from being on the ballot at the same time" (id.), and "various provisions of the Faulkner Act indicate a legislative intent that only the first proposal that is first in time proceeds." Defs. Memorandum at p.14 (emphasis added). It therefore follows that Defendants in this case should be judicially estopped from asserting otherwise. See e.g., State of New Jersey Dept. of Law & Public Safety v. Gonzalez, 142 N.J. 618, 667 (1995) (stating that judicial estoppel "bars a party to a legal proceeding from arguing a position inconsistent with one previously asserted")(internal quotation and citation omitted); Cummings v. Bahr, 295 N.J.Super 374 (App. Div. 1996)(judicial estoppel may be applied when a party takes "inconsistent legal positions in different proceedings in the same litigation").

Although EON III is technically separate from the litigation in EON II, both concern the processing of Plaintiffs' Initiated Petition. In both cases, Plaintiffs seek to protect the integrity and careful consideration by the voters of their Initiated Petition, without interference from competing petitions or ordinances placed on the same November 3, 2009, general election ballot. To permit Defendants now to change their interpretation of N.J.S.A. 40:69A-21 would impose an "unfair detriment" on Plaintiffs and the voting public of New Brunswick, and would directly

interfere with Plaintiffs' right to have their change of government proposal properly presented on the November ballot. See Morgan v. Gay, 477 F.3d 469, 471 (3d Cir. 2006) (considering whether party seeking to assert an inconsistent position would derive "an unfair advantage or impose an unfair detriment on the opposing party" if not estopped) (*quoting* New Hampshire v. Maine, 532 U.S. 742, 750-751 (2000)).

Furthermore, although Defendants did not prevail in EON II, their interpretation, as set forth on pages 14-15 of their Memorandum of Law, was adopted by the Court and was the basis, in part, of its finding that the Charter Study Commission Ordinance was invalid. This factor also dictates that Defendants be estopped from asserting any legal conclusion inconsistent with their previous position that the Faulkner Act explicitly prohibits multiple change of government proceedings from placing questions on the ballot at the same time. See McCurrie v. Town of Kearny, 174 N.J. 523 (2002)(stating that "judicial estoppel is a doctrine designed to protect the integrity of the judicial process by not permitting a litigant to prevail on an issue and then to seek the reversal of that favorable ruling"); State v. Abeskaron, 326 N.J.Super. 110, 119 (App. Div. 1999)(dissenting opinion)(judicial estoppel applicable when party against whom applied had "successfully asserted" the inconsistent position in the prior proceedings); Morgan v. Gay, 477 F.3d at 471 (*quoting* New Hampshire v. Maine, 532 U.S. at 750-751 that "courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled."); cf. Bell Atlantic Network Services, Inc. v. P.M. Video Corp., 322 N.J. Super. 74 (App. Div.1999)(judicial estoppel not applicable because legal position taken in previous proceeding was not the basis of the judicial determination ending the litigation).

Because N.J.S.A. 40:69A-21 explicitly prohibits multiple change of government proceedings from placing alternative plan of government questions on the ballot at the same time, Defendant Torrisi's certification as sufficient and approval of Defendant Committee of Petitioners' petition for change of government violated his non-discretionary mandate pursuant to that statute. Accordingly, this Court must direct him, as the New Brunswick City Clerk, to decertify and reject the petition, entitled PETITION FOR A BALLOT QUESTION ON EXPANDING NEW BRUNSWICK'S AT-LARGE CITY COUNCIL TO SEVEN MEMBERS, as improper and invalid. In addition, this Court must restrain the New Brunswick City Council from conducting further proceedings or processing of Defendants' Petition, and must prohibit the Clerk of Middlesex County from printing upon any sample, regular, absentee, provisional, emergency or any kind of ballot for use at the November 3, 2009 General Election, the public question set forth in Defendants' Petition.

B. N.J.S.A. 40:69A-25.1 Does Not Authorize Citizens to Initiate an Ordinance to Provide for the Submission to the Voters the Question of a Change in the City of New Brunswick's Charter.

Notwithstanding the sufficiency of the argument above, Plaintiffs seek to point out that Defendants' Petition is also defective since it seeks to initiate an ordinance, pursuant to N.J.S.A. 40:69A-25.1, to place a change of government question on the ballot; a procedure that is not authorized by such statute. As this Court just stated in its August 10, 2009 Decision in EON II:

> N.J.S.A. 40:69A-25.1 allows any Faulkner Act municipality, by referendum, to amend its charter to include any alternative permitted under that plan of government.

Decision at p. 18. (emphasis added)

> It is clear that the Legislature did not contemplate a petition for a referendum brought pursuant to N.J.S.A. 40:69A-25.1 to include an ordinance.

Decision at p.17.

It is the height of legal games and unfairly confusing to the public, for whom the initiative and referendum provisions of the Faulkner Act were written, to argue that the reference to the "pertinent provisions of N.J.S.A. 40:69A-184 through N.J.S.A. 40:69A-196," found in section 25.1 permit, the voters, not just the City Council, to initiate a change of government referendum by ordinance. The absurdity of Defendants' position becomes apparent when one follows the processing of just such a petition through the "pertinent provisions of N.J.S.A. 40:69A-184 through N.J.S.A. 40:69A-196," which are applicable to ordinances only.

The following scenario does take into consideration the filing of Plaintiffs' Initiated Petition (a factor in and of itself that precludes the acceptance of Defendants' Petition for processing to appear on the November 2009 ballot). If the City Council were to adopt the proposed ordinance in its exact form or to refuse to adopt such ordinance, the one question presented by Defendants' Petition would proceed to the ballot. However, if the City Council were to delete, add or otherwise modify in any significant way the proposed ordinance, both ordinances would have to proceed to the ballot. This result would then directly contradict the Faulkner Act's purpose to prevent and prohibit prohibits multiple change of government proceedings or ordinances from placing alternative plan of government questions on the ballot at the same time.

Although Plaintiffs contend that the filing and processing of their Initiated Petition, pursuant to this Court's Final Judgment dated August 10, 2009, bars the acceptance and processing of Defendants' Petition, Defendants decision to initiate an ordinance pursuant to N.J.S.A. 40:69A-25.1 can not be sanctioned. Permitting citizens to petition for a change of government by initiating an ordinance rather than by referendum would create confusion in future cases and would be against sound public policy.

CONCLUSION

For the foregoing reasons, Plaintiffs' application for summary judgment by Order to Show Cause should be granted and all relief in lieu of prerogative writs (mandamus) that has been requested against government Defendants Torrisi, Flynn and the City Council and their agents, officers and employees be ordered.

Respectfully submitted,

Renée Steinhagen, Esq.

And

Bennet D. Zurofsky, Esq.