



To: Housing and Community Development Network and the Fair Share Housing Center
From: Renée Steinhagen, NJ Appleseed
Stephanie Platzman-Diamant, McCarter & English, LLC
Date: February 21, 2011
Re: Potential Challenge to (1) Governor Christie's Taking of Funds From the Neighborhood Preservation Nonlapsing Revolving Fund, and (2) the Legislature's Attempt to Override The "Poison Pill" Provision in Affordable Housing Law.

QUESTIONS PRESENTED

You have asked (1) whether the Housing and Community Development Network and Fair Share Housing Center (collectively "HCDN/FSH") are time-barred from challenging Governor Christie's diversion of \$701,000 from the Neighborhood Preservation Nonlapsing Revolving Fund (the "NPNRF") to the state's general fund and subsequent spending in fiscal year 2010; and (2) whether the New Jersey Legislature's attempt to override the "poison pill" in the statutory provisions dedicating a portion of the realty transfer tax to the NPNRF, which suspends collection of the realty transfer tax if the statutorily dedicated amount is not allocated to NPNRF, is valid.

SHORT ANSWER

HCDN/FSH's ability to challenge Governor Christie's fiscal year 2010 diversion to the state's general fund and subsequent spending of \$701,000 taken from the NPNRF will depend upon whether the challenge is barred pursuant to the doctrine of laches. Since we know that the

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appropriated money was improperly taken (in contrast to HCDN-NJ's 1994 challenge in which it was uncertain whether funds had been taken), jurisdiction of a challenge to such diversion lies in the Appellate Division in accord with *R. 2:2-3(a)(2)*. The next question is whether such a challenge takes the form of an appeal from a final decision or action of a state officer under *R. 2:4-1(b)* or an injunctive action finding Governor Christie's diversion and spending of NPNRF funds to be unconstitutional and requesting reinstatement of the funds. Under *R. 2:4-1(b)*, appeals from final decisions or actions of state officers shall be taken within 45 days. However, the 45-day rule applies only to quasi-judicial actions and decisions of administrative agencies adjudicating the rights of particular individuals. *See Northwest Covenant Medical Center v. Fishman*, 167 N.J. 123 (2001). If the governor's actions were not quasi-judicial, which the facts strongly suggest, the equitable doctrine of laches may still bar HCDN/FSH's challenge. On one hand, the time limit for bringing an action under the New Jersey constitution is two years (*see Schneider v. Twp. of Toms River*, No. 09-3866, 2010 U.S. Dist. LEXIS 32562, at *12-13 (D.N.J. March 29, 2010) (citing *Freeman v. State of New Jersey*, 347 N.J. Super. 11, 22, 788 A.2d 867 (App. Div. 2002)). ("Claims arising under the New Jersey State Constitution are [] controlled by a two-year statute of limitations."); however, it may be argued that once the fiscal year is over, the State is unable to reimburse the NPNRF. This latter issue needs to be further explored.

HCDN/FSH can challenge the New Jersey Legislature's attempt to override the "poison pill" provision on the basis that inclusion of language purporting to override the "poison pill" of the statutory provisions dedicating a portion of the realty transfer tax to the NPNRF within the annual appropriations act violates the "one object" provision in the state constitution. *See* N.J. Const. art. IV, §. 7, ¶ 4.

RELEVANT FACTUAL AND STATUTORY BACKGROUND

In 1985, pursuant to the Fair Housing Act (*N.J.S.A.* § 52:27D-301 *et seq.*) the state legislature created the NPNRF. *See N.J.S.A.* § 52:27D-320. The purpose of this fund was to provide municipalities with grants and loans for the development of affordable housing for low and middle-income families. *See id.* Simultaneously, in a companion bill, the Legislature amended the statute governing the realty transfer tax to require that a specific portion of the fees collected be remitted to the State Treasurer to be credited to the fund. *See N.J.S.A.* § 46:15-8. In 1992, the legislature enacted the Shore Protection Act (“SPA”), P.L. 1992, c. 148. The Act’s purpose was encapsulated in its title: “An Act concerning the realty transfer fee and the dedication and appropriation of certain revenues therefrom” SPA, P.L. 1992, c. 148. The SPA included, among other things, a “poison pill”, i.e., a collection of statutory provisions, which effectively suspended the collection of the realty transfer tax if the legislature failed to appropriate the revenues targeted for the NPNRF (and/or the Shore Protection Fund). *See N.J.S.A.* §§ 46:15-7, -8; *see also N.J.S.A.* § 46:15-10.2, -11(c).

In 2009, the governor recommended language for the Fiscal Year 2010 budget which was ostensibly designed to prevent the operation of the “poison pill” provision of the SPA and several other statutes. *See* Department of Environmental Protection, Analysis of the New Jersey Budget, Fiscal Year 2009-2010, (prepared by Office of Legislative Services), attached hereto as Exhibit A, at 13; Letter from Office of Legislative Services (“OLS”) to Hon. Thomas H. Kean, Jr., dated April 22, 2009, attached hereto as Exhibit B (listing of statutes including poison pills at 2, n. 2). At least one legislator, State Senator Thomas H. Kean, Jr. requested an analysis from OLS with respect to whether an annual appropriations act may overcome a statutory poison pill. *See* Exhibit B. OLS concluded that “attempting to suspend a poison pill’s

collection cessation provision through an annual appropriations act may violate the one object requirement of the New Jersey Constitution,” and further advised that “[s]uch a suspension may best be undertaken through separate legislation.” *Id.* at 1.

It appears that despite OLS’s well-reasoned advice to Senator Kean, the proposed language suspending the operation of the poison pill first appeared in the state’s budget for fiscal year 2010, which was enacted under Governor Corzine. The initial appearance of this language did not pose any threat to the NPNRF because in fiscal year 2010, the Legislature appropriated the full amount of the realty tax for its dedicated purposes. However, toward the end of fiscal year 2010, Governor Christie diverted \$701,000 of the properly appropriated funds from the NPNRF to the general treasury.

In the state budget for fiscal year 2011, the following language, which suspends the operation of the poison pill and is nearly identical to that of the prior year’s budget, appeared:

Notwithstanding the provisions of any law or regulation to the contrary, it is not possible in Fiscal Year 2011 to appropriate monies to fund all programs authorized or required by statute. As a result, the Governor’s Budget Message and Recommendations for Fiscal Year 2011 recommended, and the Legislature agrees, that either no State funding or less than the statutorily-required amount be appropriated for certain of these statutory programs. To the extent that these or other statutory programs have not received all or some appropriations for Fiscal Year 2011 in this Appropriations Act which would be required to carry out these statutory programs, such lack of appropriations represents the intent of the Legislature to suspend in full or in part the operation of the statutory programs, including any statutorily-imposed restrictions or limitations on the collection of State revenue that is related to the funding of these programs.

2010 N.J. ALS 35, § 72 (emphasis added). Pursuant to an OPRA request it has been determined that the NPNRF was due \$48 million of realty transfer tax funds in fiscal year 2011. The legislature, however, has failed to appropriate \$16 million -- one-third -- of these funds.

DISCUSSION AND ANALYSIS

CHALLENGE TO GOVERNOR CHRISTIE'S DIVERSION OF \$701,000 FROM THE NPNRF TO THE GENERAL TREASURY

Jurisdiction

R. 2:2-3(a) reads in relevant part:

. . . Except as otherwise provided by R. 2:2-1(a)(3) . . . appeals
may be taken to the Appellate Division as of right

* * *

[] to review final decisions or actions of any state administrative agency or officer, and to review the validity of any rule promulgated by such agency or officer excepting matters prescribed by R. 8:2 (tax matters) and matters governed by R. 4:74-8 (Wage Collection Section appeals), except that review pursuant to this subparagraph shall not be maintainable so long as there is available a right of review before any administrative agency or officer, unless the interest of justice requires otherwise; From a response to an OPRA request, it has been determined that in fact Governor Christie and/or the Commissioner of the Department of the Treasury diverted \$701,000 from the NPNRF to the General Treasury. In this way, it is appropriate to challenge their action in the Appellate Division.

In 1994, prior to end of the relevant fiscal year, HCDN structured its challenge as a declaratory judgment action in the Chancery Division of the Superior Court requesting a declaration that the governor's alleged impoundment of funds appropriated to the NPNRF was unconstitutional and demanding that any funds otherwise diverted from the NPNRF be returned a returned and be retained in that Fund. The New Jersey Declaratory Judgment Act (*N.J.S.A. § 2A:16-50 et seq.*) does not contain a statute of limitations. *See Ballantyne House Assocs. v. City of Newark*, 269 N.J. Super. 322, 330 (App. Div. 1993). Although the State at the time did not

challenge the jurisdiction of the Chancery Division, it could have argued that the constitutionality of the governor's actions is not within the purview of the Declaratory Judgment Act, which provides, in relevant part:

Questions determinable and rights declarable

A person interested under a deed, will, written contract or other writing constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

N.J.S.A. § 2A:16-53. On the other hand, the Declaratory Judgment Act is to be liberally construed and applied pursuant to *N.J.S.A. § 2A:16-51*, and thus, jurisdiction was proper.

Notwithstanding the viability of asserting an action in the Chancery Division of the Superior Court in 1994, such challenge does not appear appropriate since we know that a final administrative action has taken place.

Statute of Limitations

Our research has not revealed any specific limitation on when a citizen or public interest group may challenge a governor's transfer of a properly appropriated statutorily dedicated sum from its designated fund to the general treasury and subsequent spending of that sum. That said, a challenge to the governor's diversion of \$701,000 from the NPNRF to the general fund may be limited by the 45-day time limit set forth in *R. 2:4-1(b)*. If, on the other hand, the challenge is not controlled by *R.2:4-1(b)*, the challenge may be subject to a two-year statute of limitations generally applicable to constitutional claims, unless the court applies the doctrine of laches. The application of these time limits is discussed below.ⁱ

Rule 2:4-1(b) states:

Appeals from final decisions or actions of state administrative

agencies or officers . . . shall be taken within 45 days from the date of service of the decision or notice of the action taken.

A court's decision to apply the 45-day time limit of *R. 2:4-1* depends on whether the challenged action of state administrative agency or officer was quasi-judicial or quasi-legislative in nature. *See Northwest Covenant Medical Center v. Fishman*, 167 N.J. 123 (2001). The 45-day rule "applies only to an agency's quasi-judicial decisions that adjudicate the rights of a particular individual." *Id.* at 135. An action is considered quasi-legislative if:

it appears that the agency determination, in many or most of the following circumstances, (1) is intended to have a wide coverage encompassing a large segment of the regulated or general public, rather than an individual or narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects and administrative policy that was (i) not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter, and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or policy.

Id. at 135-36 (quoting *Metromedia, Inc. v. Director, Div. of Taxation*, 97 N.J. 313, 331-32 (1984)) (internal quotations omitted). It is not necessary that all six of the above factors be present for a court to characterize an agency or official's action as legislative. *Id.* at 136 (citing *Metromedia*, 97 N.J. at 332).

On the other hand, a decision of a state officer or agency is quasi-judicial if "the fact finding involves a certain person or persons whose rights will be directly affected." *Id.* (quoting *Cunningham v. Department of Civil Service*, 69 N.J. 13, 22 (1975)) (internal quotations omitted). An agency's or official's quasi-judicial decision-making is characterized by consideration of evidence, application of the law to the facts found, and discretion or judgment

“judicial in nature” with respect to evidence. *Id.* (quoting *Handlon v. Town of Belleville*, 4 N.J. 99, 105 (1950)) (internal quotations omitted).

Here, the governor’s diversion of \$701,000 from the NPNRF to the general fund was clearly not quasi-judicial. The governor’s moving \$701,000 from its properly appropriated fund to the general fund certain did not involve “fact finding involv[ing] a certain person or persons whose rights will be directly affected.” Likewise, the governor’s action did not involve “consideration of evidence, application of the law to the facts found, and discretion or judgment ‘judicial in nature’ with respect to evidence.” Thus, the 45-day rule would not apply to an appeal of the governor’s action under *R. 2:4-1*.

If the 45-day rule does not apply, there is a strong argument that because the claim asserted rests on a constitutional violation, the statute of limitations applicable to such claims should govern. There is a two-year time limit for bringing an action under the New Jersey constitution. *See Schneider v. Twp. of Toms River*, No. 09-3866, 2010 U.S. Dist. LEXIS 32562, at *12-13 (D.N.J. March 29, 2010) (citing *Freeman v. State of New Jersey*, 347 N.J. Super. 11, 22, 788 A.2d 867 (App. Div. 2002)) (“Claims arising under the New Jersey State Constitution are [] controlled by a two-year statute of limitations.”).

However, when the 45-day rule does not apply to an appeal under *R. 2:4-1(b)*, courts will nonetheless consider whether the action is barred under the equitable doctrine of laches. *See Northwest Covenant*, 167 N.J. at 140-41. Laches is defined as “an inexcusable delay in asserting a right.” *Id.* at 140 (internal quotations omitted). Laches, however, “involves more than mere delay, mere lapse of time which, unexplained and unexcused is unreasonable under the circumstances and has been prejudicial to the other party.” *Id.* (quoting *West Jersey Title & Guar. Co. v. Industrial Trust Co.*, 27 N.J. 144, 153 (1958)) (internal quotations omitted). In

determining whether to apply laches, courts consider the length of the delay, reasons for the delay and the changing conditions of the parties during the delay. *Id.* at 141. Because laches is an equitable doctrine, courts will give significant consideration to “whether a party has been misled to his harm by the delay.” *Id.* (quoting *Lavin v. Board of Educ. of Hackensack, 90 N.J. 145, 152-53 (1982)*).

Here, the governor diverted and spent the funds in question before the fiscal year ended on June 30, 2010. At the very least, there has been an eight-month delay in bringing an appeal. During that time, the State took no further action. Therefore, it is unclear whether the harm to the State would be any different if HCDN/FSH had filed the lawsuit anytime earlier, but after the fiscal year was over. It is clear that that HCDN/FSH did not learn about the governor’s taking and spending \$701,000 of properly appropriated NPNRF funds until sometime in January many months after it had already happened. There is little question that HCDN/FSH could have made their OPRA request earlier, but it unclear whether their delay in securing a definitive answer as to whether all funds that were appropriated to the NPNRF were spent on dedicated programs (or remained in the Fund) prejudiced the State.

On paper, it appears that the equities favor HCDN/FSH; however, we need to explore this issue further. Specifically, we need to do additional research to understand whether failure to act within the fiscal year affected impugns a constitutional claim that otherwise has a two-year statute of limitations.

HCDN/FSH’s Arguments, In Brief

In challenging the governor’s transfer of \$701,000 from the NPNRF to the general treasury, HCDN/FSH can make many of the same arguments made by its predecessor organization in its June 1994 challenge of the Whitman administration’s impoundment of \$4

million in NPNRF revenues, which the administration planned to transfer to other government accounts. Among other things, HCDN/FSH can argue that the governor's transfer and subsequent spending of \$701,000 from the NPNRF violated Article VIII, § 2, paragraph 2 of the New Jersey Constitution, which provides: "No money shall be drawn from the State treasury but for appropriations made by law." Further, it is somewhat persuasive that the 1994 challenge to the Whitman administration's impoundment of \$4 million in NPNRF revenues led to a consent order in which the state agreed to "transfer to the . . . NPNRF . . . all monies that may have been transferred to other government accounts, if any," and further agreed that "[a]ny funds presently in the NPNRF for Fiscal 1994 shall be retained in said account or expended pursuant to *N.J.S.A. 52:27D-320*." See Consent Judgment, dated June 29, 1994.

Possible Arguments for the State

The state may argue that the governor's redirection to the general treasury and subsequent spending of \$701,000 in NPNRF revenues was proper under *N.J.S.A. § 52:27B-26*, which provides, in relevant part: "Whenever it appears to the satisfaction of the Governor that revenues have fallen seriously below those anticipated, the commissioner [of taxation and finance], on order of the Governor, shall have the power to revise the quarterly allotments." In *Perth Amboy Bd. of Educ. v. Christie*, 413 N.J. Super. 590, 598 (App. Div. 2010), Governor Christie argued, among other things, that this statute justified his executive order authorizing the Director of the Division of Budget and Accounting to withhold state aid to school districts in an amount equal to the anticipated surplus fund for each district as determined by the Commissioner of the Department of Education. *Id.* at 598. The school board argued that the executive order violated the state constitution's separation of powers provision because it constituted gubernatorial lawmaking, and further argued that it conflicted with the legislative

mandate of *N.J.S.A. § 18A:7F-7* that excess surplus be appropriated to the school district's budget for the next fiscal year. *Id.* at 597. The Appellate Division rejected the school board's argument and held that the executive order was supported the constitution and several statutory provisions, including *N.J.S.A. § 52:27B-26*.

The situation presented in *Perth Amboy* is distinguishable from this one. There, the governor's executive order provided for reallocation of the school district's surplus to meet budgetary shortfalls in the current fiscal year, rather than being allocated to the following fiscal year. In other words, the executive order moved yet-to-be appropriated funds to the current fiscal year's budget. By contrast, here, the governor moved properly appropriated funds from the NPNRF to the general fund. Furthermore, in *Perth Amboy*, the surplus funds were used for the purpose for which they were originally intended (i.e., public education). Here, the \$701,000 was diverted from its statutorily dedicated purpose of providing affordable housing for low-income and middle-income individuals to general government spending. Moreover, in *Perth Amboy*, Governor Christie's executive order set forth the reasons for his exercise of executive authority. Here, on the other hand, the governor simply diverted properly appropriated funds to the state's general fund without issuing an executive order or making any public statement for that matter.

CHALLENGE TO THE APPROPRIATIONS ACT LANGUAGE SUSPENDING THE SPA'S POISON PILL

As stated above, OLS issued an opinion, prior to the enactment of the fiscal year 2010 budget, that the then-proposed language in the budget suppressing the operation of the poison pill may be unconstitutional because it violates the one object requirement of the New Jersey Constitution. See Exhibit B. The one object requirement refers to the following state

constitutional provision:

To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title.

N.J. Const. art. IV, §. 7, ¶ 4. (emphasis added). As OLS correctly stated in its opinion, the annual appropriations act is a law and as such, is subject to the state constitution's one object requirement. See Exhibit B at 4.

In determining whether a law complies with the constitution's one object requirement, New Jersey courts look to the "relatedness" of the statutory provisions. See *New Jersey Assoc. on Corr. v. Lan*, 80 N.J. 199, 206 (1979). In so doing, courts seek to avoid "not the inclusion in one act of more than one single matter, but the inclusion therein of matters not properly related among themselves." *Id.* (quoting *Newark v. Mount Pleasant Cemetery Co.*, 58 N.J.L. 168, 171 (E.& A. 1895)).

In conducting a "relatedness" analysis, courts will often look to the title of the law in question. "The purpose of the [one object] requirement is 'to prevent frauds upon legislation by means of uncertain, misleading or deceptive titles to statutes.'" *State v. Zelinski*, 33 N.J. 561, 565 (1960) (quoting *Public Serv. Elec. & Gas Co. v. City of Camden*, 118 N.J.L. 245, 250 (Sup. Ct. 1937)). Thus, courts examine "whether the title is such that thereby the members of the Legislature are given notice of the subject to which the act relates and the public informed of the kind of legislation that is under consideration." *Id.* (citing *Bucino v. Malone*, 12 N.J. 330, 343 (1953)). "If the general subject matter is fairly expressed, the constitutional mandate is satisfied." *Id.* (citing *Gen. Pub. Loan Corp. v. Dir., Div. of Taxation*, 13 N.J. 393, 403 (1953)).

Here, the title of the annual appropriations act is:

An act making appropriations for the support of the State Government and the several public purposes for the fiscal year

ending June 30, 2011 and regulating the disbursement thereof.

2010 N.J. ALS 35.

As noted by OLS, this title is consistent with Article VIII, Section II, paragraph 2 of the New Jersey Constitution, which provides:

All moneys for the support of the State government and for all other State purposes as far as can be ascertained or reasonably foreseen, shall be provided for in one general appropriation law covering one and the same fiscal year

See Exhibit B at 4-5 (citing N.J. Const., art. VIII, §2, ¶ 2).

OLS analyzed the appropriations act compliance with the constitution's one object requirement:

It seems that the "usual title" for the annual appropriations act is an expression designed to comply with the constitutional mandate pertaining to the contents of one general appropriation law [internal citation omitted]. Moreover, the New Jersey Supreme Court has accepted the meaning of an appropriation as "an authorization, statutorily enacted by the Legislature, for the withdrawal of monies from the State treasury for governmental purposes." *Karcher v. Kean*, 97 N.J. 483, 491 (1984) (citations omitted) The concept of authorizing the withdrawal of monies as pronounced in the usual title of the annual appropriations act may not as a matter of course encompass the authorization to continue the imposition of revenue raising devices in contravention of a poison pill's statutorily provided collection cessation provision.

Exhibit B at 5.

Put in another way, the purpose of the annual appropriations is to establish the way by which state funds will be withdrawn and allocated. If the appropriations act were merely reducing the amount of revenue available to the NPNRF, that action would arguably be related to the purpose expressed in the law's title. See, e.g., *In re Meridian Health Sys.-Ocean Med. Ctr.'s State Fiscal Year 2009 Charity Care Allocation*, No. A-2902-08T2, 2010 N.J. Super Unpub. LEXIS 379, at *4 (App. Div. Feb. 25, 2010) (noting that "the Legislature has

frequently included modifications of the HCCRA formula in the Annual Appropriations Act”). The poison pill, however, relates to revenue raising as it dictates the conditions under which the Realty Transfer Tax may be collected, which is at least one step removed from the annual withdrawal and allocation of state funds and is, therefore, unrelated to the purpose of the act.

Furthermore, it can be argued that the suppression of the poison pill effectively results in a “new tax” for New Jersey taxpayers for two reasons. First, if the poison pill was not amended the State would be prohibited from collecting the tax thus recreating a tax that would otherwise be rescinded. In addition, the statutory provision amending the poison pill changes the nature of the tax because a portion thereof is no longer dedicated to financing affordable housing. If the legislature’s aim was to levy a new tax, it should have and could have done so by enacting a separate, appropriately titled lawⁱⁱ, rather than hiding a new tax in the annual appropriations bill. Thus, the provisions of the fiscal year 2011 appropriations act do not fall squarely within the act’s title, violating the state constitution’s one object requirement.

Research has not revealed any case in which a New Jersey court has struck down as unconstitutional any statute on the basis that it violated the state constitution’s one object requirement. The New Jersey Supreme Court has upheld several contested statutory provisions as being related to the object expressed by the statute’s title. *See, e.g. Zielinski v. State*, 33 N.J. 561, 564-65 (1960) (upholding a statute pertaining to the wrongful use of telephone party lines, a disorderly persons offense, even though the statute’s content may have been inconsistent with the word “crimes” used in the title); *New Jersey Assoc. on Corr. v. Lan*, 80 N.J. 199, 212, 216-18 (1979) (upholding a bond act which provided for the construction of correctional facilities and residential institutions for the mentally disabled on the basis that these two objectives were encompassed within the statute’s title); *State v. Churchdale Leasing, Inc.*, 115 N.J. 83 (1989)

(rejecting argument that section of Transportation Trust Fund Authority Act, which raised penalties for vehicle registration violations, impinged upon the state constitution’s “one object” provision on the basis that this section was well within the act’s express purpose of preserving a sound, balanced transportation system through the provision of a stable source of funding). New Jersey courts presume that in enacting legislation the legislature acted constitutionally. See *Karcher v. Kean*, 97 N.J. 483, 506 (1983). It is perhaps because of this presumption that the New Jersey Supreme Court has employed a “broad rather than a strict hyper-technical approach” in determining relatedness. *Lan*, 80 N.J. at 213. Further, it is well-settled that “[t]he title of a statute need only accurately label, not extensively index, the contents of the statute” *Churchdale Leasing*, 115 N.J. at 111. Indeed, OLS noted in its opinion that this rationale may support an argument “that a poison pill’s collection cessation provision is related to and within a broadly defined one object of the annual appropriations act.” Exhibit B at 6. However, this argument is weak given the fact that the title of the appropriations bill gives no hint that new revenue mechanisms are hidden within.

Cases in other jurisdictions where courts have overturned legislation because of the law’s failure to comply with the one object provision in the relevant state’s constitution provide guidance in the application of the one object doctrine.^{iii iv} For example, in *Surety Credit Co., Inc. v. Tieman*, 171 La. 581, 131 So. 678 (1930), the Supreme Court of Louisiana overturned a wage garnishment law as contrary to the state constitution’s one object provision. There, the title of the law in question read:

Providing an exemption from seizure and garnishment a portion of the wages or salaries of all laborers, wage earners, or employees, of any kind, whether skilled or unskilled, and providing the procedure by which the portion not exempt may be seized and garnished.

Tieman, 171 La. at 583, 131 So. at 678. The statute provided for, among other things, the seizure of future unearned wages and employers' liability for their employee's debts. *Id.* at 584, 679. The court held that these features of the statute were at odds with the statute's object, namely amending the garnishment laws to exempt from seizure a portion of certain individuals' salaries. *Id.* The court reasoned:

. . . [T]he statute seeks to enforce its object by authorizing the seizure not only of the earned, but also of the unearned, wages and salaries of judgment debtors, and by imposing upon employers, under penalty of personal liability, the burden of collecting in installments from judgment debtors the amounts due judgment creditors and paying over such installments as collected to the officer charged with the execution of the judgment.

The statute, in short, introduces a radical change to our laws relating to garnishment. . . .

The object of the statute is not fairly expressed in its title, and the title itself, is misleading, and wholly insufficient to put on inquiry those persons who are affected by its provisions.

There is nothing in the title to indicate in the slightest degree the intention of the lawmaker to change the existing and familiar procedure for enforcing judgments by garnishment process, and to substitute therefore a special or new mode of executing judgments in garnishment proceedings. We are satisfied that no one reading the title of the statute could infer or imagine from its language that the body of the act contained any provision completely changing the existing and well-known law covering the execution of judgments by garnishment process.

Id. at 584-85, 679 (emphasis added). Similarly, there is nothing in the title of the appropriations act that would indicate in the slightest degree the intention of the lawmaker to change the existing conditions under which the administration can collect the realty transfer tax.

In another case, the Supreme Court of Michigan held that a law purporting to regulate political activity violated the state constitution's one object requirement. *Advisory Opinion on Constitutionality of 1975 PA 227 (Question 1)*, 396 Mich. 123, 240 N.W.2d 193 (1976). There,

the law in question: (1) created the Political Ethics Commission as an autonomous entity within the Department of State and provided for its composition, powers and duties; (2) provided requirements for the establishment of candidate committees; (3) provided for filing of statement of organization and reporting contributions and expenditures; (4) set maximum limits on expenditures by candidates for certain offices; (5) established a State Campaign Fund with a diversion of certain taxpayer-designated portions of income tax revenues to the fund for distribution to qualifying gubernatorial candidates; (6) proscribed conflicts of interest; (7) required financial disclosure by candidates and their families; and (8) required the registration and reporting of lobbying activities. *Id.* at 126-27, 194. The law also repealed five “individual and distinct” laws, concerning the licensing and regulation of legislative agents, the corrupt practice section of the general election law, two different conflict of interest statutes, and an ethics act. *Id.* at 130, 195.

The Court overturned the statute because its various provisions were unrelated to or “foreign and incongruous” with one another and thus violated the state constitution’s one object requirement:

. . . [T]he creation of a state campaign fund for gubernatorial candidates is foreign to and incongruous with regulation of lobbying activities; the financial disclosure provisions aimed at preventing unethical conduct are foreign to and incongruous with the organization of a campaign committee. The tying together of these diverse sections resulted in the Legislature being confronted by an all-or-nothing dilemma to which the framers of the Constitution directed their attention.

Id. at 133, 196. Further, the court was unmoved by the argument that “the purification of the political process is the all-encompassing umbrella” under which the various statutory provisions fit. *Id.*

Both *Tieman* and *Advisory Opinion* can bolster HCDN/FSH's argument that the suppression of SPA's poison pill in the annual appropriations act violates the state constitution's one issue requirement. Like the overturned statute in *Tieman*, the appropriations act by suppressing the statutory poison pill. "introduces a radical change" in a New Jersey law because it impermissibly alters the conditions under which the realty transfer tax may be collected. By permitting the collection of the tax without allocating the proceeds to their dedicated purpose (i.e. affordable housing), the legislature is, in effect, creating a new tax.^v This is "foreign and incongruous" with the appropriations act's stated purpose of "making appropriations for the support of the State Government and the several public purposes for the fiscal year ending June 30, 2011 and regulating the disbursement thereof."

Furthermore, the fact that the general language employed by the Legislature in the appropriations did not clearly indicate that it was targeting the realty transfer tax, and rather was designed to govern at least seven other unspecified poison pills^{vi} strengthens the argument that this language violates the "one" object provision of the New Jersey Constitution. The policies behind that constitutional provision are clearly subverted if general language can be asserted into an appropriation bill that effectively changes the conditions under which several taxes can be collected without giving notice of such change in the title of the appropriations act as well as the language of the appropriations act itself. As a matter of transparency and accountability, a separate bill explicitly stating its intent to rescind each poison pill is required to pass constitutional muster.

Practical Considerations with Respect to the Poison Pill

It is worth considering the practical implications of challenging the constitutionality of the fiscal year 2010 appropriations act. While the one object provision of the state constitution

provides HCDN/FSH with an argument for attacking the appropriation act's suppression of the poison pill, a successful challenge would necessarily mean activation of the poison pill, which would result in no collection of the realty transfer tax. This would result in a reduction of funding for affordable housing programs, which would not be a desirable outcome for HCDN/FSH. However, it may be worthwhile to use the appropriations act's unconstitutionality as a bargaining chip in approaching the legislature about amending the act to appropriate the full statutorily dedicated amount to the NPNRF.

CONCLUSION

Although a challenge to Governor Christie's taking and spending \$701,000 taken from the NPNRF in fiscal year 2010 belongs in the Appellate Division, the 45-day limit for appealing decisions of a state agency or officer would most likely not apply because the governor's action was not quasi-judicial. However, an appellate court that finds that the 45-day limit does not apply to decisions by state officers may apply the doctrine of laches. In balance it appears that the equities rest with HCDN/FSH since during the delay in filing such a challenge, the state has not taken any further action. However, we need to further explore whether the termination of the fiscal year is determinative.

HCDN/FSH may challenge the constitutionality of the fiscal year 2011 appropriations act's suppression of the poison pill in the SPA on the basis that it violates the one object requirement of the state constitution. However, if HCDN/FSH is successful, the poison pill may be activated, resulting in a cessation in the collection of the realty transfer tax and fewer funds available for affordable housing in New Jersey. That said, it may be worthwhile to use the appropriations act's unconstitutionality as a bargaining chip in approaching the legislature about amending the act to appropriate the full statutorily dedicated amount to the NPNRF.

ⁱTo the extent that there are limitations on the timing of the activation of the poison pill, those limitations apply only to the Director of the Division of Budget and Accounting's filing a certification to the Director of the Division of Taxation that the annual appropriations act does fund the NPNRF as required by the SPA. *See N.J.S.A. § 46:15-10.2(b)*. These timing restrictions only apply with respect to the legislature's enactment of an annual appropriations act or an amendment or supplement thereto, not to the governor's transfer and spending of properly appropriated funds.

ⁱⁱ *See e.g.*, P.L. 2006 c. 33. This law imposes a 1% fee or tax on certain purchasers of certain commercial property over \$1 million, and is appropriately entitled "An Act imposing a fee upon grantees under certain deeds conveying commercial real property, imposing a tax on certain purchasers of controlling interests in certain commercial real property; amending P.L. 2004 c. 66 and supplementing P.L. 1968 c.49 (C.46:15-5 et seq.) and Title 54 of the Revised Statutes."

ⁱⁱⁱ Most states have a one object (referred to in some states as a "one subject") provision in their states' constitutions. *See Kincaid v. Mangum*, 189 W.Va. 404, 409, 432 S.E.2d 74, 79 (1993) (*citing* Michael V. Catalano, *The Single Subject Rule: A Check on Anti-Majoritarian Logrolling*, 3 Emerging Issues St. Const. Law 77, 80 (1990)).

^{iv} *See, e.g. Litchfield Elementary School District No. 79 of Maricopa County v. Babbitt*, 125 Ariz. 215, 608 P.2d 792 (Ariz. Ct. App. 1980) (statute violated one object rule and could not by law be deemed a general appropriation bill because it, among other things, provided for executive aircraft for the Department of Public Safety and a mobile dental clinic to be operated by the dental health bureau); *In Re House Bill No. 1353*, 738 P.2d 371 (Colo. 1987) (bill violated one object rule because it contained numerous and diverse subjects such as creation of a commission on information management, imposition of a requirement that prisoners be charged for medical visits, and repeal of the statute entitling old age pensioners to receive additional payments during the winter months to defray increased heating expenses); *Surety Credit Co., Inc. v. Tieman*, 171 La. 581 (1930) (statute whose title stated that its purpose was provides certain exemptions the garnishment of wages and establish the procedure for garnishment of unexempt wages violated one object provision of state constitution because it provided for the seizure of unearned wages and held employers of debtors personally liable in certain circumstances); *Stewart v. Stanley*, 199 La. 146, 5 So.2d 531(1941) (act creating commission to investigate government departments, commissions, boards and governmental subdivisions violated state constitution's one object requirement because it appropriated \$500,000 to carry out the act's objectives); *Porten Sullivan Corp v. State*, 318 Md. 387, 568 A.2d 1111 (Md. 1990) (an act imposing ethical requirements on county council's members and other and extending council's authority to impose and energy and transfer taxes violates one issue rule); *Grand Rapids v. Burlingame*, 93 Mich. 469, 53 N.W. 620 (1892) (law designed to allow municipalities to acquire by purchase or condemnation any part of the road beds of toll roads violated the one object requirement because it permitted toll road companies to sell its corporate rights and franchises to any other corporation or person); *In re Advisory Opinion on Constitutionality of 1975 PA 227 (Question 1)*, 396 Mich. 123, 240 N.W.2d 193 (1976) (act designed to regulate political activity, which, among things, created a state campaign fund for gubernatorial candidates, regulated lobbying activities, set required financial disclosures by candidates and

their immediate families, and repealed five different laws, violated the state constitution's one object provision); *Kincaid v. Mangum*, 189 W.Va. 404, 409, 432 S.E.2d 74, 79 (1993) (omnibus bill authorizing commissioner of commerce to promulgate rules relating to several unrelated government functions held to violated state constitution's one object requirement.)

^v The argument that the legislature's suppressing the poison pill is tantamount to a new tax is somewhat analogous to the argument made by the plaintiffs-taxpayers in *Stewart v. Stanley*, 199 La. 146, 5 So. 2d 531 (1941). There, the statute at issue created a commission to investigate corruption in government. The taxpayers argued that the statute violated the state constitution's one object requirement because it appropriated \$500,000 for 1940-42 to cover the expenses "necessary to carry out the purposes of [the] Act." The Court agreed with the taxpayers, reasoning that the state constitution required special appropriations to be contained within an act embracing not more than one object because "[i]f the appropriation is designed to cover two or more objects, it is impossible to determine how much of the money is to be dedicated to any one specific object."

vi See Exhibit B, at 2, n. 2.