



To: Housing and Community Development Network
From: Renée Steinhagen, NJ Appleseed
Date: February 28, 2011
Re: The Neighborhood Preservation Nonlapsing Revolving Fund; the “poison pill”; and Appropriations

This memorandum sets forth the relationship between the Neighborhood Preservation Nonlapsing Revolving Fund, the current poison pill applicable to the collection of the State’s portion of the realty transfer tax, and appropriations made to that Fund in Fiscal Year 2011.

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 Neighborhood Preservation Nonlapsing Revolving Fund (“NPNRF”). See *N.J.S.A. § 52:27D-320* (now entitled the New Jersey Affordable Housing Trust Fund). The purpose of this fund is 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* (setting forth the allocation of the tax).

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 State’s portion of the realty transfer tax if the legislature fails to appropriate the revenues targeted for the NPNRF (and/or the Shore Protection Fund and/or the Highlands Protection Fund). See *N.J.S.A. §§ 46:15-7*(Realty Transfer Fees), 15-8 (County, State Sharing of fee proceeds); *N.J.S.A. § 46:15-10.2, 15-11c, 15-7a(1)* (together setting forth procedure to be followed if realty fees not appropriated in accord with dedicated purposes). Specifically, if the appropriations required to made to the NPNRF are not satisfied, the Director of the Division of Budget and Accounting must certify such failure to the Director of the Division of Taxation, *N.J.S.A. § 46:15-10.2b*, who in turn must similarly notify the county recording officers and county treasurers pursuant to *N.J.S.A. § 46:15-11c*. In accordance with *N.J.S.A. § 46:15-7a(1)*, “the State portion of the basic fee shall not be imposed” upon receipt of such notice and certifications.

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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. In addition to the State portion of the realty transfer tax, such statutes include the State hotel and motel occupancy fee as linked to the funding of certain cultural and tourism related programs (*N.J.S.A* § 54:32D-2); the corporation business tax as is linked to the Energy Tax Receipts Property Tax Relief Fund (*N.J.S.A.* § 52:27D-439 and § 52:27D-441); the greenhouse gas emissions allowance trading program (*N.J.S.A.* § 26:2C-51 and § 26:2C-53); the solid waste facility recycling tax (*N.J.S.A.* § 13:1E-96.7 and §13:1E-96.5); and the user fee on certain sales of littering generating products as related to the funding of the Clean Communities Program Fund (*N.J.S.A.* §13: 1E-216, §13:1E-217, and §13:1E-223).

The proposed language suspending the operation of the poison pill first appeared in the state’s budget for Fiscal Year 2010. The initial appearance of this language, however, 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.

In the state budget for Fiscal Year 2011, the following language, which attempts to suspend 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 \$48 million of realty transfer tax funds was due the NPNRF in fiscal year 2011. The legislature, however, failed to appropriate \$16 million -- one-third -- of these funds.

DISCUSSION

The importance of respecting legislative declarations concerning revenue dedications cannot be over emphasized. Accountability to the public for political promises to impose and collect specific taxes that will be used only for certain purposes overwhelms but does not eliminate the need to respect such dedications to maintain the integrity of the budget process.

Statutory dedications matched in some cases with poison pills represent the Legislature's commitment to the public that they will only collect certain taxes if they appropriate the revenue for the purposes stated. That is, the poison pill represents a promise to the public that the Legislature will not use such revenue to close budget gaps elsewhere for if they do it risks its ability to collect the tax in the first place.

In Fiscal Year 2011, the Legislature appears to have made an attempt to rescind all poison pills found in New Jersey's statutes so as to permit the State to continue to raise certain revenue even if it fails to appropriate the expected revenue for dedicated purposes. It is our position that such language fails to do as it intends. Specifically, the language in the budget attempting to suppress the operation of the poison pill may be unconstitutional because it violates the one object requirement of the New Jersey Constitution. The Office of Legislative Services concurs with this conclusion. See Letter from Office of Legislative Services ("OLS") to Hon. Thomas H. Kean, Jr., dated April 22, 2009. ("OLS Letter"). 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. OLS Letter 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 OLS Letter at 4-5 (*quoting* N.J. Const., art. VIII, §2, ¶ 2).

OLS then 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.

OLS Letter 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., *Mid-Atlantic Solar Energy Industries Assoc. v. Christie*, No. A-3374-09T4 (March 4, 2011)(permitting redirection of otherwise dedicated funds in accord with a supplemental appropriations bill); *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.

As a result, we believe that failure to appropriate the full \$48 million due the NPNRF in Fiscal 2011 puts the full amount that the State is entitled to collect of the real estate transfer tax

at risk. That is, if some interest sought to challenge the Legislature's decision to redirect revenue otherwise due the NPNRF without following the procedures set forth in the relevant "poison pill" provisions, an important revenue stream that currently is not in question may become unavailable. Accordingly, we believe that the status quo is unnecessarily precarious. Unless, a supplemental appropriations bill is enacted redirecting \$16 million to the NPNRF a major amount of money that supports not just housing and environmental programs, but also the General Fund is vulnerable to judicial challenge.