



May 1, 2019

Mr. Keith Hahn
81 Fairview Avenue
Edison, New Jersey 08817

Re: Authority of Edison Township to Require a Referendum
Pursuant to the Terms of an Ordinance Adopting a Long-term
Lease of its Water and Sewer Systems.

Dear Mr. Hahn:

You have asked me whether Edison Township has the authority to enact an ordinance approving a long-term lease agreement pursuant to N.J.S.A. 58:26-19 to -27 ("New Jersey Water Supply Public-Private Contracting Act") and N.J.S.A. 58:27-19 to -27 ("New Jersey Wastewater Treatment Public-Private Contracting Act"), which by its own terms would not become effective unless submitted to the voters for their approval. The simple answer is "yes." As explained further below, this is based on New Jersey Supreme Court jurisprudence since 1999 regarding initiative and referendum under the Faulkner Act, N.J.S.A. 40:69A-184 et seq., as set forth in In re Petition to Repeal Ordinance 04-75, 192 N.J. 446 (2007) ("Ordinance 04-75"), In re Petition for Referendum on Trenton Ordinance 09-02, 201 N.J. 349 (2010) ("Trenton Ordinance 09-02") and Redd v. Bowman, 223 N.J. 87 (2015) ("Redd"). It is also my opinion that the older and arguably contrary decision by the Appellate Division in We The People Committee, Inc. v. City of Elizabeth, 325 N.J. Super. 329 (App. Div. 1999) ("We the People") is no longer good law. Moreover, even if the New Jersey Supreme Court were to choose not to revisit that decision, it is limited to prohibiting a citizen-initiated repeal referendum—not to restricting a municipality's general authority to enact an ordinance that by its own terms must be placed before the voters prior to such law becoming effective. Thus, there is nothing prohibiting the town from requiring such a referendum.

Pursuant to the explicit language of N.J.S.A. 40:69A-185, a Faulkner municipality has the general authority to adopt "any ordinance which by its terms or by law cannot become effective in the municipality unless submitted to the voters. . ." See also N.J. Home Rule Act,

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N.J.S.A. 40:48-2 (reservoir of police power authorizing municipality to adopt and enforce any ordinance it deems necessary and proper for good government). Although there are some circumstances where such authority is qualified (*e.g.*, where state statute explicitly states that the subject matter is not a “proper subject” of initiative and referendum; where municipality fails to protect a suspect class from discrimination by the majority voters; or where municipality decides to place a competing ordinance on the ballot with an intent to interfere with citizens’ right to initiate an ordinance), this is not one of them.

In We The People, the Appellate Division held that the regulatory and administrative procedures set forth in the Water Supply Public-Private Contracting Act were “intended to supplant” the Faulkner Act’s referendum provisions that permit the voters to repeal an ordinance adopted by the Faulkner municipality. Specifically, the court wrote that “[t]he referendum process would serve as a competitive source of lawmaking wholly at odds with the Legislature’s carefully crafted treatment of the problem.” Id., 325 N.J. Super. at 333. At the time the decision was rendered, there was no specific New Jersey Supreme Court guidance on the issue, and the Appellate Division felt free to find **an implied prohibition** of the citizens’ statutory right to repeal an ordinance prior to its effective date despite the fact that there was no explicit prohibition in the Water Supply Public-Private Contracting Act itself. Such conclusion is no longer viable in light of more recent New Jersey Supreme Court decisions.

First, in Ordinance 04-75, the Court rejected the long-standing legislative/administrative distinction that lower courts in New Jersey had imposed on the Faulkner Act’s right of initiative and referendum. Id., 192 N.J. at 467. In support of its decision overturning years of precedents, the New Jersey Supreme Court identified a panoply of statutes in which the Legislature demonstrated that it “knew precisely how to exclude particular ordinances from the purview of the referendum statute when it wished to do so.” Id., 192 at 466-67. The need for a party to point to an explicit prohibition of either the right of initiative or referendum to defeat a ballot question was further explained in Trenton Ordinance 09-02, involving the Municipal Utilities Law, N.J.S.A. 40:62-1 to -151. Despite the fact that the statute shared some similar procedural requirements as the Water Supply Public-Private Contracting Act, and other water privatization statutes required referenda, the Court refused to imply a prohibition where there was none. Here, the Court stated: “[I]n the absence of an unequivocal legislative expression to the contrary, citizens in Faulkner Act municipality are empowered to protest any ordinance under the Act.” Id., 192 N.J. at 362.

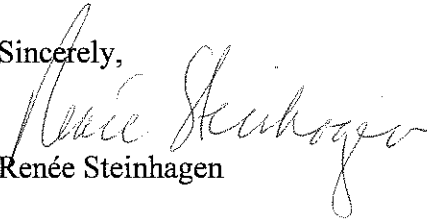
Finally, the need to point to an explicit prohibition was again reiterated in Redd. Redd involved the Municipal Rehabilitation and Economic Recovery Act, N.J.S.A. 52:27BBB-1 to -79 and several statutes governing municipal finance. In this case, the Court rejected claims of preemption and state “occupation of the field” and found that the relevant statutes “did not purport to bar Camden from enacting ordinances—including ordinances with negative fiscal consequences to the municipality—by initiative or referendum” primarily because the Legislature did not explicitly prohibit such legislative authority.

In light of these three New Jersey Supreme Court decisions, it is my position that were the state Supreme Court to face a challenge to a citizen-initiated referendum under the New

Jersey Water Supply Public-Private Contracting Act and the New Jersey Wastewater Treatment Public-Private Contracting Act the outcome would be different than the Appellate Division's decision in 1999. Moreover, even if the Court declined to revisit its decision in We the People, no trial court would be justified in prohibiting a municipality from deciding for itself (not the citizens) to place an ordinance it had adopted under those Acts on the ballot based on that decision. Without an explicit subject matter prohibition against initiative and referendum, similar to that found in the Housing and Redevelopment Law or the Municipal Land Use Law, Edison Township has the discretionary authority to put any ordinance adopting a long-term lease agreement with respect to its water and sewer systems to a vote of its electorate. Whether to exercise such discretion is a political question, not a legal one; the Township Council cannot hide behind a 1999 Appellate Division that is no longer good law.

If you have any questions, do not hesitate to contact me at 973-735-0523.

Sincerely,

A handwritten signature in cursive script, appearing to read "Renée Steinhagen".

Renée Steinhagen

Cc: Food & Water Watch