CITY OF ORANGE TOWNSHIP BOARD OF EDUCATION,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
Plaintiff/Appellant	:	Docket No. A- Motion No. M-
-vs.-	:	On Appeal From an Order of the Superior Court
CITY OF ORANGE TOWNSHIP, JOYCE L. LANIER, CITY CLERK for the City of Orange Township; ESSEX COUNTY CLERK COMMITTEE FOR AN ELECTED SCHOOL BOARD, c/o Anthony P. Johnson,	:	Docket No. ESX-L-6652-17
	:	Sat Below:
	:	Hon. Thomas R. Vena, J.S.C.
Defendants/Respondents.	:	

RESPONDENT COMMITTEE OF PETITIONERS' BRIEF AND APPENDIX IN OPPOSITION TO ORANGE TOWNSHIP BOARD OF EDUCATION'S MOTION FOR EMERGENT RELIEF

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Date: October 27, 2017

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PRELIMINARY STATEMENT

The Committee for an Elected Orange School Board (the "Committee of Petitioners" or "COP") is a group of eight voters residing in Orange Township, who are intimately involved in the affairs of the Orange Township public schools; and who, on behalf of a significantly larger group of concerned citizens, are currently advocating for the reclassification of the Orange Township Board of Education ("BOE") from a board that is appointed by the Mayor to one whose members are elected by the City of Orange voters. The COP, in response Judge Vena's published decision, dated April 13, 2017, (Ra17) designed and circulated a petition to place a revised reclassification question and interpretative statement on the November 2017 General Election ballot. (Ra27) The petition was properly submitted to the Orange City Clerk, who in turn submitted the public question to the Essex County Clerk to be placed on the ballot. (Pa28) (hereinafter the "Reclassification Referendum")

Now, the BOE is seeking emergent relief, yet a second time, to prevent the Reclassification Referendum from going forward, allegedly because a similar question appeared on the ballot at the November 8, 2016 General Election. Such conclusion misreads the intended operation of the relevant referendum provisions and fails to appreciate, as Judge Vena held (Pa19), that an election held, but later vacated, has no legal or binding effect as a

matter of law. It therefore follows that the "once in five years" restriction imposed on the frequency that a question of school board reclassification can appear on the ballot, found in N.J.S.A. 18A:9-4, 9-5, and 9-6 (the "Frequency Restriction"), is not triggered by "an election held" on that question, if such election is subsequently set aside, in accord with N.J.S.A. 19:29-9 and the outcome of such referendum election is declared "null and void," as was the case herein. (Ra40)

More importantly for purposes of this motion, the BOE has not met its heavy burden justifying the emergent injunctive relief it now seeks. Nowhere in its brief in support of its motion for emergent relief has the BOE articulated why an injunction in this matter, i.e., an order prohibiting the reclassification question from being voted on or prohibiting certification of the Reclassification Referendum election --- is necessary to prevent irreparable harm. This is the case, because the history of this matter clearly indicates that the judiciary always has the authority to void an election after the fact if it is determined to be illegal.

On the other hand, the parents and taxpayers of Orange, who are also voters, have evidenced, for some time now, a strong desire to have an elected school board. They should not have to wait another election cycle before they can assert themselves and have more control over their school board than they

currently have under the status quo. In this way, the equities weigh in their favor: The Reclassification Referendum should be permitted to proceed, and the BOE stopped from further deploying taxpayer resources to deprive the voters of their statutory right of referendum, and, ultimately, their choice to have an elected school board.

PROCEDURAL HISTORY & STATEMENT OF FACTS

On July 6, 2016, the Orange City Council passed resolution 125-2016, calling for a referendum at the next general election, at which time the voters could decide whether to change from an appointed school board, a Type I school district, to an elected school board, a Type II school district. City of Orange Twp. Bd. of Educ. v. City of Orange Twp., 2017 N.J. LEXIS 119, *4 (App. Div. 2017)(hereinafter, "City of Orange Twp. Bd. of Educ."). (Ra20) In accord with the Council's resolution, the referendum question appeared on the November 8, 2016. (Pa3) The Orange electorate voted overwhelmingly to switch from an appointed school board to a board elected by the residents "with approximately 77% of the voters expressing their desire for the change." City of Orange Twp. Bd. of Educ., 2017 N.J. Super. LEXIS 119, *5. (Ra20) On March 28, 2017, a special school board election occurred at which time an additional two members were elected to the school board. (Pa3) Approximately one month later, the trial court "voided" the election results of the

referendum election as well as the special school board election, which was predicated upon the approval of the November referendum question. (Pa3-4) Specifically, with respect to the referendum that appeared on the November 8, 2016 General Election ballot, the trial court ordered that the "outcome of the Referendum . . . is hereby declared null and void and is vacated in its entirety." (Ra40) Similarly, the "March 28, 2017, [Special] election, predicated upon the passage of the Referendum, is also declared null and void and is vacated in its entirety." (Ra40)

On August 22, 2017, the Committee of Petitioners submitted a petition to the Orange City Clerk requesting that a public question be placed on the November 7, 2017 General Election ballot, asking the Orange electorate again whether it wanted to change from a Type I school district to a Type II school district -- the Reclassification Referendum herein at issue. (Pa4) Given the fact that the previous November referendum election was voided because of a "defective" public question and interpretive statement, the petition set forth a question and statement that closely adhered to the language employed by the Court in its City of Orange Twp. Bd. of Educ. opinion to ensure that an ample amount of detail was provided "to allow voters in the City to be sufficiently informed." Id. at *26. See Sample Petition. (Ra27-34)

On August 25, 2017, the City Clerk wrote the COP via e-mail informing the Committee that she had been "informed by the Orange City Attorney that the Law Department ha[d] determined that the legality of resubmitting the petition, either by resolution or petition [was] prohibited. Therefore, at the direction of the Law Department" she could not proceed with verifying the COP's petitions. (Ra35) Three hours later, she sent the COP a revised letter via e-mail, stating that the City Attorney had now decided that she could proceed with processing the submitted petitions. (Ra37) See also E-mail from Eric Pennington, Esq. to Ms. Lanier. (Ra55) She additionally stated that she had determined that the petition was "valid and sufficient." (Ra37) By letter dated August 28, 2017, the City Clerk certified that the COP's petition was "sufficient and valid," and submitted the Public Question and Interpretive Statement appearing on the petition (in three languages) to the County Clerk for further processing. (Pa28-32)

On September 15, 2017, the BOE filed an Order to Show Cause ("OTSC"), seeking temporary restraints, and a Verified Complaint, which was served on each of the defendants in this matter, including Anthony Johnson, the Chairman of the COP. A hearing was held before Judge Vena on September 18, 2017, at which time he denied the BOE's request for temporary restraints finding that the BOE had not established either irreparable harm

and that the right underlying its claim was "settled law," or that the equities weighed in its favor and that it was likely to succeed on the merits. (Ra2)

On October 2, 2017, the Committee of Petitioners filed a Motion to Dismiss, pursuant to R. 4:6-2(e) for failure to state a claim for injunctive relief, (Ra7-Ra48), Counsel for the City Clerk filed an Answer, and neither the City of Orange nor the County Clerk filed a responsive pleading. In accord with the OTSC, the BOE filed reply papers, and, in accord with R. 1:6-3(a), the COP filed, on October 16, 2017 a reply to the BOE's opposition to its Motion to Dismiss. The BOE then filed a sur-reply without leave of the court two days before the return date of the OTSC. On October 20, 2017, Judge Vena held a hearing, heard oral argument and read his decision from the bench. (Pa15-20). An Order was signed later that day. (Pa13-14).

The BOE now seeks a stay of Judge Vena's decision, and an order preventing voters from participating in the Reclassification Referendum election or, alternatively, to prohibit the certification of such election. The Committee of Petitioners adamantly opposes the BOE's request for emergent relief, and further requests that the motion be denied and the decision on appeal be affirmed in its entirety. The BOE should not be able to further use the public's money to retain itself in power against the will of the Orange electorate.

THE DECISION BELOW

Citing New Jersey Supreme Court precedent with respect to the statutory construction of referenda and election laws, the trial court stated:

> [A]pplying the strict construction proffered by [the BOE] would read too narrowly the purpose of N.J.S.A. 18A:9-4 and 9-5, as well as misconstrue the Court's holding in City of Orange Twp. Bd. of Educ. v. City of Orange Twp., 2017 N.J.Super. LEXIS 119 (Pa18-19)

Judge Vena further stated that the "language of the statute is not as clear" as the BOE asserts, and that "contrary to the [BOE's] constrained construction" he does not accept that a referendum question "simply appearing on the ballot initiates the four-year waiting period." (Pa19) Noting that all parties "acknowledge [that] the November 8, 2016 referendum result was vacated and consequently the referendum [election] itself had no effect," he held the following:

> The statute . . . indicates that the four-year requirement begins after an election was held, and since the previous election was rendered meaningless, it was not actually held. The inherent irreconcilable inconsistency of seeking to void an election that overwhelmingly approved the conversion to an elected school board and then seeking to bar the repeat of the referendum that presumably supplies what the plaintiff claimed (and the court agreed) was missing is obvious. (Pa19-20)

In addition, June Vena supported his holding that, under the circumstances herein, the Reclassification Referendum "need not be delayed four years before appearing on the ballot," on

his previous holding in City of Orange Twp. Bd. of Educ. and his understanding of the legislative intent behind the Frequency Restriction, which he stated "is to prevent repeated referenda unsupported by the voters." (Pa20)

This decision is thoughtful, respectful of established principles of statutory construction and well-reasoned; it should thus be affirmed upon this Court's *de novo* review of what is strictly a legal issue. Tumpson v. Farina, 218 N.J. 450, 467-68 (2014).

LEGAL ARGUMENT

I. PLAINTIFF IS NOT ENTITLED TO EMERGENT RELIEF.

In its Application for Permission to File Emergent Motion, the BOE states in response to the question "What is the irreparable harm, and when do you expect this harm to occur?" as follows:

> If Orange residents are permitted to vote on a school district reclassification during the November 7, 2017 general election they will do so in violation of N.J.S.A. 18A:9-4 and -5. If the referendum passes, the Board will be required to hold an unlawful special school election.

This statement of "irreparable harm" is neither repeated nor explained in the BOE's Brief in Support of its Motion for Emergent Relief. In fact, in such brief, the BOE does not even attempt to demonstrate that it has satisfied the standards governing preliminary injunctive relief.

It is established that a party who seeks "mandatory preliminary injunctive relief" must satisfy a "particularly heavy burden." Guaman v. Velez, 421 N.J. Super. 239, 247 (App. Div. 2011)(citations omitted). In order to prevail, the BOE must "demonstrate by clear and convincing evidence that a stay is necessary to prevent irreparable harm, that the legal right underlying the claim is settled, that the material facts are substantially undisputed, that the applicant has a reasonable probability of success on the merits, and that a balancing of the equities and the hardships weighs in favor of granting relief." Id. (citing Crowe v. DeGioia, 90 N.J. 126, 132-134 (1982)). The BOE did not meet this burden before the trial court when it requested temporary restraints, and it does not do so at the appellate level as well.

Preliminary injunctive relief is appropriate in order to "prevent threatening, irreparable mischief, which should be averted until opportunity is afforded for a full and deliberate investigation of the case." Crowe v. DeGioia, supra, 90 N.J. at 126 (citations omitted)(quoted in City of Orange Twp. Bd. of Educ., 2017 N.J. Super. LEXIS 119, *8). However, as the trial court rendered a final judgment in this matter, this Court can do the same, because no further "investigation" of the case is necessary. Moreover, because this matter involves solely a question of law, preliminary relief is not appropriate.

Notwithstanding, the COP asserts that the BOE has not satisfied any of the four standards for the issuance of preliminary emergent relief. First, the BOE has not established the requisite showing of irreparable harm. As Judge Vena's April 2017 published decision in City of Orange Twp. Bd. of Educ., 2017 N.J. Super. LEXIS 119 shows, the judiciary has the authority to void an election that is clearly illegal. If the Appellate Division or a higher court finds that the Frequency Restriction applies under the circumstances, the election may be voided after the fact. See Beaudoin v. Belmare Tavern Owners Assoc., 216 N.J Super. 213, 186-189 (1987)(Five-year frequency rule on public referenda found mandatory and so referendum held in violation of rule held invalid). Furthermore, the BOE's appeal can be decided on an expedited basis and a final decision can be rendered prior to the time that the required Special Election must be held, pursuant to statute, should the Reclassification Referendum prevail.

Second, the BOE has not shown that the legal right underlying its claim is settled. As the trial court said at the hearing it held on temporary restraints, there does not appear to be any published precedent guiding the court's interpretation directly under N.J.S.A. 18A:9-4 and N.J.S.A. 18A:9-5, and the statute, on its face is not as "clear" as the BOE claims.

Third, the BOE has not made a preliminary showing of a reasonable probability of ultimate success. Although the BOE established in the lower court, and the COP agreed, that "not all material facts are controverted," it is the Committee of Petitioners that has established reasonable probability of success on the merits of this case. Judge Vena's decision and Order is reasonable and supported by established principles of statutory interpretation in the context of referenda and election laws. It is more likely than nor to be affirmed on appeal, as the COP discusses in detail in Point II, infra, at pp12-21.

Finally, the relative hardship each party would face if this Motion Panel would grant or deny the relief sought weighs in favor of denying the BOE's request to prohibit the Reclassification Referendum from going forward. As noted above, if the Court were to deny the requested relief, the BOE's hardship would be slight. It could continue its fight even after the election was held and certified to seek invalidation. Conversely, if the court were to grant the relief sought, the COP's hardship would be severe. Even if the COP were to prevail on this matter after the electorate was barred from voting on the Reclassification Referendum or such election was not certified, the COP and the Orange electorate that it represents would lose yet another year before the public could assert

itself and have more control over their school board than they currently hold. For all the afore-mentioned reasons, this Court should deny the BOE's request for emergent relief.

II. THE TRIAL JUDGE'S ORDER AND DECISION SHOULD BE AFFIRMED BECAUSE THE FREQUENCY RESTRICTION EMBEDDED IN N.J.S.A. 18A:9-4, 5 and 6 IS NOT TRIGGERED BY AN "ELECTION HELD" BUT LATER VACATED, AND ELECTION RESULTS COUNTED BUT SUBSEQUENTLY DECLARED NULL AND VOID.

In its Verified Complaint, the BOE asserts that "[t]o place the referendum question on the ballot would violate the clear proscriptions of N.J.S.A. 18A:9-4 and N.J.S.A. 18A:9-5." (Pa6) It supports its position simply on the basis that an "election was held" on the very same reclassification question in November 2016, (Pa3), and that the question "was submitted at an election" within the previous four years. (Pa3) This extremely narrow interpretation, and literal application of the terms of the statute is at best opportunistic, and more likely indicates an attempt to "thwart the will of the City's residents," who have already indicated their desire to assert more direct control over the BOE. City of Orange Twp. Bd. of Educ., 2017 N.J.Super. LEXIS 119, *29-30. (Ra26)

Judge Learned Hand, in Giuseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944) has cautioned that "[t]here is no surer way to misread any document than to read it literally." Mindful of Judge Hand's admonition, Judge Vena did not, and this Court should not interpret and apply the statute in question in

isolation from other related statutes nor without regard to legislative intent. The COP does not deny that when construing statutes, courts must give words "their ordinary meaning and significance," recognizing that generally the statutory language is "the best indicator of [the). However, if the plain reading of language employed in the statute is "ambiguous, suggesting 'more than one plausible interpretation,' or leads to an absurd result, then [court's] may look to extrinsic evidence, such as legislative history, committee reports, and contemporaneous construction in search of the Legislature's intent." DiProspero v. Penn, 183 N.J. 477, 492-93 (2005), quoted in Tumpson v. Farina, supra, 218 N.J. at 467-468 (citations omitted). As the N.J. Supreme Court stated in Wene v. Meyner,13 N.J. 185 (1953):

> A statute is not to be an **arbitrary construction, according to the strict letter,** but one that will advance the sense and meaning fairly deducible from the context. The reason of the **statute prevails over the literal sense of terms;** the manifest policy is an implied limitation on the sense of the general terms, and a touchstone for the expansion of narrower terms.

Id., 13 N.J. at 197(citation omitted)(emphasis added). See also Board of Educ. of City of Asbury Park v. Hoek, 38 N.J. 213, 231 (1962)(where court rejected plain meaning of the terms used in bidding statute, and construed the provision in light of the "manifest intent of the Legislature" and the statute's "patent . . . purpose"); Beaudoin v. Belmar Tavern Assoc., supra, 216 N.J. Super. at 184 (noting that the "internal sense of the law"

comes from "a general view of the whole expression rather than from the literal sense of the particular terms."); Application of Moffat, 142 N.J. Super. 217, 229-230 (1976)(refusing to construe an election statute "so narrowly" if the "application of the statute is made to depend literally upon a vacancy" only occurring during a term of office).

Last, in keeping with the N.J. Supreme Court's previous directives, referendum statutes, such as N.J.S.A. 18A:9-4 and N.J.S.A. 18A:9-5, and more generally, election statutes must be liberally construed for the purpose of "promoting the beneficial effects" of "voter participation," In re Referendum Petition to Repeal Ordinance 04-75, 192 N.J. 446 (2007)(quoting Retz v. Mayor & Council of Saddle Brook, 69 N.J. 563 (1976)); "fostering citizen involvement in the affairs of the community," In re Petition for Referendum on Trenton Ordinance 09-02, 201 N.J. 349 (2012); and "allow[ing] the voters a choice." New Jersey Democratic Party, Inc. v. Sampson, 175 N.J. 178, 190 (2002). See also In re Gray-Sadler, 164 N.J. 468, 475 (2000)(duty to construe election laws liberally to protect a citizen's right to have her vote count). With these principles in mind, the BOE's interpretation of the aforementioned provisions is not sustainable.

Though found in Title 18A governing Education, the two referendum provisions that are directly applicable herein --

N.J.S.A. 18A:9-4 and N.J.S.A. 18A:9-5 -- are intimately related to Title 19 concerning Elections, and may also be viewed in the context of other public referendum provisions, which share frequency restrictions similar to that imposed on school district reclassification referenda. As the events of this matter indicate, there is little doubt that the election contest provisions of Title 19 are relevant to the question of whether an election that is held, but later set aside, triggers the Frequency Restriction included in N.J.S.A. 18A:9-4, 9-5 and 9-6.

As this Court knows, referendums on public questions, such as the reclassification question at issue herein, can be contested under N.J.S.A. 19:29-1, and thus can be set aside under N.J.S.A. 19:29-9 (providing that "a certificate of elections" may be "annul[led]" and an election "set aside"). The effect of such a judgment is that the challenged election, and its outcome is "null and void" and bereft of any legal effect. In re Gray-Sadler, supra, 164 N.J. at 484 (because the court could not determine with reasonable certainty which candidate prevailed with a majority, the court declared the election for those offices "null and void"). Indeed, Judge Vena's Final Judgment, dated April 24, 2017, employs the language of the election contest statutes (though does not specifically reference such act) when it set aside the Reclassification

Referendum election that appeared on the November 8, 2016 General Election ballot.

Specifically, pursuant to that judgment, the previous Reclassification Referendum election was "vacated in its entirety" and the election "outcome" was declared "null and void." What does it mean to "set aside" an election? According to the Free Legal Dictionary on-line it means to "annul or negate" an election or "to make [it] void." http://legal-dictionary.thefreedictionary.com/setaside. (The site also refers to A Law Dictionary Adapted to the Constitution of U.S. by John Bouvier, who defines "set aside" as to cancel, annul or revoke). Similarly, "null and void" is defined as "of no binding force, of no effect, of no legal weight, invalid, negated, forceless and ineffectual." http://legal-dictionary.thefreedictionary.com/nullandvoid.

It therefore follows that a direct result of Judge Vena's Final Judgment in April 2017 was that the Referendum election, was "held" or "took place", only in a literal sense because the court's subsequent judgment **rendered it without any legal or binding effect**. This is the very reason that courts, when they set aside a public question election, typically order the annulled referendum election to be re-held. See, e.g., In re Contest of the November 6, 2012 Election Results for the City of Hoboken, Public Question No. 2, 2013 N.J. Super. Unpub. LEXIS

2250* (App. Div. Sept. 11, 2013). (Ra59) Rerunning the election this November is an outcome specifically contemplated by Judge Vena when he stated in his April 2017 decision that "the notion that voters will be burdened by a revised referendum being placed on the November 2017 ballot is far-fetched, at best." City of Orange Twp. Bd. Of Educ., 2017 N.J. Super. LEXIS 119, *29. An expected outcome that Judge Vena confirmed in his October 20, 2017 decision now on appeal herein. (Pa20)

Moreover, because of the reluctance of courts to "vitiate an election unless those contesting it can show that as a result of irregularities the 'free expression of the popular will in all human likelihood has been thwarted,'" In re Gray-Sandler, supra, 164 N.J. at 482(quoting Wene, supra, 13 N.J. at 196), it is doubtful that Judge Vena would have granted the BOE the extraordinary remedy that it requested back in April, had he thought that voiding the Reclassification Referendum would prevent the Orange electorate from revisiting the question of school board control for another four years. In his opinion, Judge Vena explicitly stated that the BOE was "not seeking to permanently thwart the will of the City's residents." City of Orange Twp. Bd. of Educ., 2017 N.J. Super. LEXIS 119, *29-30. (Ra26) The BOE's literal interpretation of the terms of the relevant statutes, however, looks more and more like an attempt

to thwart, on a continuing basis, the will of the Orange electorate.

Moreover, the BOE's alleged distinction between voiding an election *ab initio* and voiding the results of an election has no merit; such distinction has legal significance in the context of an ordinance, contract, will, or statute, but makes no sense in the context of an election. This is the case because when a court voids the results of an election, it also vacates (and sets aside) the election rendering that election without any legal import or effect. See N.J.S.A. 19:29-9 ("annul[ling]" a "certificate of election" and "set[ting] aside" that "election"). The whole purpose of an election is to generate binding results, and if the results are not binding then the election itself also has no import.[1]

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[1] As discussed in Price v. City of Union City, 2016 N.J. Super. Unpub. LEXIS 1060 *3 (May 16, 2016), cited by the BOE (Pb12), when an ordinance is challenged and found by a court to violate a statute or constitutional provision, it is said to "lack legal authority," be "void *ab initio*" and have "no legal efficacy." This does not mean that the ordinance was not adopted by the City Council, that expenditures were not made to publish the ordinance in a local newspaper nor that other actions had not occurred in reliance on that ordinance prior to a court's invalidation. Voiding ordinance *ab initio* versus simply invalidating an ordinance simply means that the court's decision applies retroactively, not just prospectively, and thus the court also nullifies any other action whose validity is found to have been predicated on the validity of the ordinance.

Similarly, in this matter, when Judge Vena voided the election results of the Referendum Election held in November 2016, he also vacated the March 28, 2017 Special Election in its entirety, because such election was "predicated upon the passage

Furthermore, there is nothing in the language of N.J.S.A. 18A:9-4 and N.J.S.A. 18A:9-5 and its legislative history that prohibits the rerun of a Reclassification Referendum election that was vacated; and, thus, as a matter of law, a vacated election has no binding effect and can be deemed effectively to not have been held. Indeed, the statements accompanying the Senate bill that ultimately became law, and the corresponding Assembly Statement do not indicate otherwise.

As the New Jersey Supreme Court has stated in Hoek, supra, 38 N.J. at 231:

> The legislative goal is a guiding consideration and accordingly, words in a statute must be interpreted in context to serve the spirit of the law. (citation omitted)

In this instance, the relevant legislative statements are clear in purpose and intent: First, the Legislature desired to conform the frequency that a question of the reclassification of a school district could occur to be the same as the frequency that a question on a municipal charter study commission could

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of the Referendum." (Ra40) That is, he vacated the November election rendering it without legal effect, and therefore, retroactively vacated a subsequent election that was based on the November election results. Here too, the COP is not denying that the election happened, poll workers were paid, and actions were taken in reliance on the November 2016 Referendum election. The COP is simply saying that when vacating the November 2016 Reclassification Referendum election and voiding the election results, Judge Vena emptied the election of any legal effect in the same manner as the court did in Price, when it declared the relevant ordinance void *ab initio*.

then appear on the ballot. (Ra43)(Assembly Education Committee Statement to A.2112, January 16, 2003); (Ra45)(Senate Education Committee Statement to S.2357, June 9, 2003.); (Ra47)(Sponsor's Statement, P.L. 2003, Chapter 102, approved June 30, 2003). Second, the Legislature wanted to prevent the losers of a Reclassification Referendum election from putting the question back on the "ballot every year, which becomes a frivolous expense to the taxpayers." (Ra45, 47)

A proper reading of the last sentence of the Senate Committee and Sponsor Statements indicates that the target of the restriction is not a mandatory bar to expending any additional money on a second referendum election, (if any is required),[2] but rather, is a bar to expending such money on behalf of the losing side of a Reclassification Referendum. Simply put, the Frequency Restriction is not a prohibition from expending any money on a second election if the first is declared null and void and there are no winners or losers. Rather, it evidences an intent to grant the voters in a Reclassification Referendum election that is upheld and remains

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[2] It should be noted that the placement of the Reclassification Referendum – or any other public question – on the General Election ballot does not result in additional taxpayer expenditures. N.J.S.A. 18A:9-5, which requires all Reclassification Referendums to be placed on the ballot "at the next municipal or general election," is clear that an election, which does require additional expenditures is not an appropriate

valid, "the statutory right to have their vote binding for five years." Beaudoin v. Belmar Tavern Assoc., supra, 216 N.J. Super. at 188 (Mandatory frequency restriction seen as grant of right to have the result of referendum election binding for five years). Expenditures on behalf of losers of a public question referendum are deemed "frivolous" expenditures, and not expenditures *per se*.

Since the Reclassification Referendum election held in November 2016 was found to be unlawful and its outcome was not binding, there is no barrier to the same question appearing on the November 2017 ballot. Moreover, by being combined with the General Election ballot, the election generates absolutely no cost whatsoever to taxpayers, beyond the legal fees that the public entities are incurring through this baseless litigation.

CONCLUSION

For the foregoing reasons and authorities cited, the BOE's Motion for Emergent Relief should be denied, and Judge Vena's Decision and Order should be affirmed. There is little doubt that the Reclassification Referendum held in November 2016 had no legal effect; accordingly, Judge Vena properly held, in this case, that the Frequency Restriction found in N.J.S.A. 18A:9-4 and -5 does not apply. Such restriction is not triggered merely

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vehicle for deciding whether a school board should be appointed or elected.

by the fact that an "election happened." It is triggered by an election happening, remaining valid and generating binding election results. As the Appellate Division stated in Beaudon v. Belmare Tavern Assoc., supra, 216 N.J. Super. at 188, mandatory frequency restrictions evidence a legislative intent to grant voters in a valid referendum election, "the statutory right to have their votes binding for five years." It therefore follows that because the Reclassification Referendum election held in November 2016 was vacated and set aside, and its outcome was not binding, there is no barrier to the same question appearing on the November 2017 ballot, and the voters casting their ballots in that election.

Respectfully submitted,

NEW JERSEY APPLESEED
PUBLID INTEREST LAW CENTER

Dated: October 27, 2017

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