New Jersey
Appleseed

September 25, 2017

Clerk
New Jersey Superior Court
Essex County Courthouse
50 West Market Street
Newark, New Jersey 07102

Hon. Thomas R. Vena, J.S.C.
New Jersey Superior Court
Room 402
470 Martin Luther King Blvd.
Newark, New Jersey 07102

Re: City of Orange Twp. Bd. of Educ. v. City of Orange Township, et al.
Docket No.: ESX-L-6652-17
OTSC Return Date: October 20, 2017
Motion to Dismiss Return Date: October 20, 2017

Dear Judge Vena:

We write on behalf of defendant Committee For An Elected Orange School Board (the "Committee of Petitioners" or "COP"). Please accept this letter memorandum in lieu of a more formal brief in support of the COP's motion to dismiss the Verified Complaint of plaintiff the City of Orange Township Board of Education's ("BOE") for failure to state a claim, pursuant to R. 4:6-2(e), and in opposition to its Order to Show Cause seeking preliminary injunctive relief.

Defendant Committee of Petitioners is a group of eight

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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 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 to Your Honor's decision, dated April 13, 2017, designed and circulated a petition to place a revised reclassification question and interpretative statement on the November 2017 General Election ballot. 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. (hereinafter the "Reclassification Referendum").

Now, the BOE is attempting to prevent the Reclassification Referendum from going forward, because the same 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 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 and the outcome of such referendum election is declared - as in Your Honor's own words - "null and void," pursuant to Your Honor's' Final Judgment, dated April 24, 2017.

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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."). In accord with the Council's resolution, the referendum question appeared on the November 8, 2016, Ver. Compl. ¶14. 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. On March 28, 2017, a special school board election occurred at which time an additional two members were elected to the school board. Ver. Compl. ¶14. Approximately one month later, this 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. Ver. Compl. ¶15. Specifically, with respect to the referendum that appeared on the November 8, 2016 General Election ballot, this Court ordered that the "outcome of the Referendum . . . is hereby declared null and void and is vacated in its entirety." Steinhagen Cert., ¶5, Ex. E (Final Judgment, dated April 24, 2017).

On August 22, 2017, defendant 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. Ver. Compl. ¶20. 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 Steinhagen Cert. ¶3, Ex. B (Sample Petition).

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. Steinhagen Cert. ¶7, Ex. C. 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. She additionally stated that she had determined that the petition was "valid and sufficient." Id., Ex. D. 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. Ver. Compl. ¶8, Edelstein Cert., Ex. A.

On September 15, 2017, plaintiff BOE filed an Order to Show Cause, 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 this Court on September 18, 2017, at which time the Court denied the BOE's request for temporary restraints finding that the BOE had not established irreparable harm, that the right underlying its claim was "settled law," or that the equities weighed in its favor.

Defendant Committee of Petitioners now submits a Motion to Dismiss the Verified Complaint in its entirety, and simultaneously opposes the BOE's request for preliminary injunctive relief.

LEGAL ARGUMENT

I. THE COURT SHOULD DISMISS PLAINTIFF'S COMPLAINT FOR FAILURE TO STATE A CLAIM PURSUANT TO RULE 4:6-2(e).

Unlike a summary judgment motion, a motion to dismiss for failure to state a claim pursuant to R. 4:6-2(e) is based on the pleadings themselves. See Rider v. Dept. of Transportation, 221 N.J. Super. 547 (App. Div. 1987). The Court has the discretion to convert a R. 4:6-2(e) motion into a motion for summary judgment when facts beyond the pleadings are relied upon and limited testimony is required to be taken. See, e.g., Wang v.

Allstate Ins. Co., 125 N.J. 2, 9 (1991). However, in this matter, there are no contested facts outside the Verified Complaint that are needed to resolve the BOE's legal claim.

As noted by the Supreme Court of New Jersey in Printing Mart v. Sharp Electronics, 116 N.J. 739, 746 (1989), on a motion brought pursuant to R. 4:6-2(e) the complaint must be searched in depth and with liberality to determine if a cause of action can be gleaned from the specific allegations set forth in the complaint. Every reasonable inference is therefore accorded the plaintiff, and the motion will not be granted under this rule where a cause of action is suggested by the facts and a theory of liability may be articulated by amendment of the complaint. Id. However, if the complaint states no basis for relief and discovery would not provide one, dismissal of the complaint is appropriate. Energy Rec. v. Dept. of Env. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999), aff'd o.b. 170 N.J. 246 (2001).

In the instant case and for the reasons set forth below, defendant COP respectfully submits that the Court should dismiss the BOE's Complaint based on the four corners of its pleadings, as the BOE's claim presents a pure question of law involving the statutory interpretation of the reclassification referendum provisions set forth in Title 18A.

II. THE COP IS ENTITLED TO DISMISSAL OF THE COMPLAINT 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 the 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." Ver. Compl. ¶29. It supports its position simply on the basis that an "election was held" on the very same reclassification question in November 2016, Ver. Compl. ¶14, and that the question "was submitted at an election" within the previous four years. Ver. Compl. ¶14. 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.

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, the Court here 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." Id. at 492-93, quoted in Tumpson v. Farina, 218 N.J. 450, 467-468 (2014)(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., 216 N.J. Super. 177, 184 (1987)(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, this Court'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 this Court's Final Judgment 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.** The election happened as a matter of fact, but was not officially acknowledged as a matter of law. This is the very reason that courts, when they set aside a public question election, 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*; 2013 WL 4821095 (App. Div. Sept. 11, 2013). Rerunning the election this November is an outcome specifically contemplated by this Court when it stated 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.

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 this Court would have granted the BOE the extraordinary remedy that it requested, had it thought that voiding the Reclassification Referendum would prevent the Orange electorate from revisiting the question of school board control for another four years. In its opinion, this Court 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. 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.

There is nothing in 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, had no binding effect or effectively, was not held. Indeed, the statements accompanying the Senate

bill that ultimately became law, and the corresponding Assembly 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 then appear on the ballot. Steinhagen Cert., Ex. F1 (Assembly Education Committee Statement to A.2112, January 16, 2003); Steinhagen Cert., Ex. F3 (Sponsor's Statement, P.L. 2003, Chapter 102, approved June 30, 2003); Ex. F2 (Senate Education Committee Statement to S.2357, June 9, 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." Steinhagen Cert., Ex. F2 and F3.

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),[1] 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 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 illegal and its outcome was not binding, there is therefore no barrier to the same question appearing on the November 2017 ballot. Moreover, by being

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[1] 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

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.

II. PLAINTIFF IS NOT ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF.

In its Order to Show Cause, the BOE has requested preliminary injunctive relief. BOE Letter Br. at 7-8. 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, 90 N.J. 126 (1982)(citations omitted)(quoted in City of Orange Twp. Bd. of Educ., 2017 N.J. Super. LEXIS 119, *8). However, as argued above, the Committee of Petitioners asserts that this Court can make a final decision 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 injunctive relief. First, the BOE has not established the requisite showing of irreparable harm. As this Court's decision in City of Orange Twp. Bd. of Educ., 2017 N.J.

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vehicle for deciding whether a school board should be appointed

Super. LEXIS 119 shows, the judiciary has the authority to void an election that is clearly illegal. If this Court 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., supra, 216 N.J Super. at 186-189 (Five-year rule on public referenda found mandatory and so referendum held in violation of rule held invalid).

Second, the BOE has not shown that the legal right underlying the claim is settled. As this Court said during 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 has established 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.

Finally, the relative hardship each party would face if the court 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

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or elected.

slight. It could continue its fight even after the election was held to seek invalidation. Conversely, if the court were to grant the injunction, the COP's hardship would be severe. Even if the COP were to prevail on this matter after the Reclassification Referendum were barred from appearing on this year's General Election ballot, 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 under the status quo.

CONCLUSION

For the foregoing reasons and authorities cited, the BOE's Complaint should be dismissed in its entirety, with prejudice, for its failure to state a claim upon which relief can be granted pursuant to R. 4:6-2(e), and its Order to Show Cause requesting preliminary injunctive relief should be denied.

Respectfully submitted,

Renée Steinhagen

Renée Steinhagen, Esq.

Cc: All parties