SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-004277-97T2

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| HEALTH PROFESSIONALS AND ALLIED EMPLOYEES OF NEW JERSEY, AFL-CIO and LORY SCHALK and BARBARA ROSEN,<br><br>Plaintiffs-Appellants,<br><br>-v.-<br><br>COUNTY OF BERGEN, WILLIAM P. SCHUBER, Bergen County Executive, BERGEN COUNTY BOARD OF CHOSEN FREEHOLDERS, BERGEN COUNTY IMPROVEMENT AUTHORITY, SOLOMON HEALTH GROUP, LLC, THE VALLEY HOSPITAL AT RIDGEWOOD, and HORIZON MENTAL HEALTH MANAGEMENT, INC.,<br><br>Defendants. | On Appeal From:<br>Superior Court of New Jersey<br>Law Division-- Bergen County<br><br>Sat Below<br>Johnathon Harris, J.S.C. |

MEMORANDUM OF LAW OF *AMICI CURIAE* PUBLIC INTEREST LAW CENTER OF NEW JERSEY INC, NEW JERSEY PUBLIC HEALTH ASSOCIATION, CITIZENS FOR PUBLIC HEALTH, NEW JERSEY CITIZEN ACTION, AND GRAY PANTHERS OF NORTHERN NEW JERSEY IN SUPPORT OF PLAINTIFFS' APPEAL OF THE DECISION BELOW

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## STATEMENT OF INTEREST

The Public Interest Law Center of New Jersey, Inc. ("PILC of NJ" or "Public Interest Law Center"), the New Jersey Public Health Association ("NJPHA"), Citizens for Public Health ("CPH"), New Jersey Citizen Action ("NJCA"), and the Gray Panthers of Northern New Jersey (the "Gray Panthers") (collectively "*Amici*") file this brief to present to the Court the important public interests that are involved in the sublease of Bergen Pines County Hospital ("Bergen Pines" or the "Hospital") by the County of Bergen, New Jersey (the "County") to Solomon Health Group, L.L.C., ("Solomon"), a for-profit corporation organized under the laws of Colorado, through an intermediary public body, the Bergen County Improvement Authority (the "Improvement Authority" or "Authority"), which was approved by the court below.

The instant matter involves an issue of substantial importance to residents of the State -- namely, whether counties and municipalities will be able to use county improvement authorities as vehicles to privatize essential government services without specific authorization to do so. The immediate question presented in this case is whether a county improvement authority is permitted to lease a publically owned and operated county hospital, still needed for governmental use, for the purpose of subleasing that facility to a for-profit entity that is not specifically authorized to operate the facility.

The Court's disposition of this question, as a practical matter, will determine whether the Legislature, not individual freeholders, will have the opportunity to determine, after an open

policy debate, whether community health needs will be served adequately if public hospitals are transferred or leased to for-profit entities. Because this decision will have ramifications for future attempts to dispose of public facilities still needed for governmental purposes to private entities who do not have express statutory authorization to operate those facilities, *Amici* file this brief to express the public's interest in seeing that Bergen Pines remains a public hospital in accordance with current statutory law.

The Public Interest Law Center is a nonprofit corporation established to provide legal advocacy on behalf of residents of New Jersey in matters raising significant public policy concerns. The Center was initially authorized by the faculty of Rutgers Law School to develop and expand the reach of public interest law and education in state. Since 1994, the Center has been affiliated with The Appleseed Foundation, a national public interest organizing project created by alumni of Harvard Law School. (Steinhagen Certification dated May 1, 1998 at ¶3.).[1]

A significant area of the Center's activity has been institutional health access issues, and specifically the shift of health institution ownership from the public or quasi-public sector to the private sector. This past year, the Center filed legal memoranda and briefs with the Commission of Banking and Insurance, the Attorney General, the Law Division and Appellate Division of the New Jersey Superior Court in connection with the corporate

[1] Hereinafter "Steinhagen Cert., ¶__."

reorganization of Blue Cross and Blue Shield of New Jersey ("BCBS of NJ"). (Id., ¶4). In August, 1997, PILC-NJ also submitted a complaint, that was later found to be meritorious, to the New Jersey Department of Health alleging that Bergen County disclosed confidential medical information as part of the procurement documents prepared and distributed in connection with the proposed restructuring of Bergen Pines at issue here. (Id., ¶5). On December 2, 1998, PILC-NJ presented a statement to the Bergen County Board of Chosen Freeholders ("Board of Freeholders") in which the Center described several significant legal and policy issues, including those at issue in plaintiffs' complaint, (id. ¶6, Exhibit C); and, most recently, PILC-NJ wrote a letter dated December 23, 1997, to the Attorney General with respect to several transactions involving nonprofit or public health care institutions, including the lease of Bergen Pines to the Improvement Authority, and the Authority's sublease of the public hospital to Solomon. Id. at ¶7. In this letter, the Center expressed certain concerns that reflect its special interest in ensuring that (1) the Bergen County Board of Freeholders comply with the substantive requirements set forth in statutory law in regard to its reorganization of Bergen Pines and (2) county improvements authorities are not used as vehicles to privatize essential government services in violation of such requirements. Id. at ¶10.

NJPHA is an affiliate of the American Public Health Association ("APHA"), which is the oldest, largest and most diverse

public health organization in the world. APHA and its affiliates, including NJPHA, have long been concerned about the potential negative impact of a profit motive in the provision of health care services. Based on the information NJPHA has reviewed, it believes that conversions of nonprofit and public hospitals to for-profit status have, in many instances, resulted in a reduction of health care accessibility, accountability and quality of care. Because NJPHA holds this position, it has a special interest in ensuring that the question of whether a public hospital still needed for public use can be transferred or leased to a for-profit entity first be considered by the New Jersey Legislature prior to the consummation of the transaction between Bergen County, the Improvement Authority and Solomon. (Id., ¶11).

CPH is a volunteer coalition of Bergen County residents who oppose the privatization of Bergen Pines. It seeks to represent senior citizen, religious, community and labor organizations that are based in Bergen County as well as patient family members and other residents directly served by the Hospital. CPH appreciates the need for the County to respond to the dramatically changing health care marketplace in New Jersey, but believes that the proposed restructuring is not authorized by New Jersey law and is not in the best interests of the public. Specifically, CPH advocates for the creation of a public health authority by the Legislature that is expressly authorized to operate Bergen Pines while maintaining its status as a public hospital. (Id., ¶12)

NJCA is the State's largest, independent citizen's coalition that works on behalf of the public interest, and engages in advocacy work specifically related to health care issues. Founded in 1982, NJCA currently has 60,000 members and 80 affiliate organizations. (Id., ¶13). Over the years, NJCA has been involved in several health care initiatives on the state level. Most recently, it has directed its research and legislative advocacy efforts to the issue of health care conversions, as nonprofit health care organizations convert to for-profit status across the State. Specifically, it has been actively involved in lobbying for legislation that regulates the conversion process and ensures the public's participation in any administrative decision concerning a health care organization's application to restructure or convert. (Id., ¶14-15).

NJCA is also the lead organizer in a statewide coalition of approximately 75 senior, labor, civic, health care, civil rights, and community groups concerned with the conversion of BCBS of NJ to a for-profit mutual insurer. A primary goal of NJCA and the above coalition is to protect and ensure the redistribution of the charitable assets that BCBS of NJ has accrued over its 60-year history to another nonprofit corporation dedicated to improving the health care of New Jersey residents. Similarly, NJCA is concerned that the public health care assets held by Bergen County are leased within the limitations and in the manner prescribed by law, and thus are used only for the benefit of New Jersey residents, not for individual pecuniary gain. (Id., ¶15)

and, to date, serves the community health purposes for which it was established and maintained. No one alleges that the Hospital's public health services are no longer needed.

In response to the dramatically changing health care marketplace in New Jersey, the County now seeks to transfer the operation of Bergen Pines to Solomon Health Group, a for-profit Colorado company, by way of a long term lease to the Improvement Authority and sublease to Solomon. The apparent purposes of this complex transaction are to: (1) enable the county to retire its outstanding debt that is allocable to Bergen Pines without either selling or directly leasing the Hospital to a private entity; (2) enable the Hospital to act unencumbered by contracting, purchasing and employment restrictions that govern the actions of county government; (3) keep the Hospital's operating license in the hands of a public entity in an attempt to retain certain public funding streams despite its for-profit use; and (4) permit a for-profit entity to enjoy the use of, and operate the Hospital -- a result that the County cannot accomplish directly.

As a general matter, property held by a public body such as the County or the Improvement Authority, in its government capacity (as opposed to a proprietary capacity) is held in trust for the public and cannot be leased or otherwise "diverted to a possession or use exclusively private without specific legislative authority." 10 McQuillin, The Law of Corporations §28.42 (3d ed.)(hereinafter "McQuillin"). A corollary of this principle -- known as the public trust doctrine -- is that county property can only be disposed of

in accordance with "the terms of the trust, i.e., in the public interest as declared by statute." 10 McQuillin §28.38.

Under the New Jersey Local Lands and Building Law, the County is authorized to lease property still needed for public use for, inter alia, "the provision of health care or services by a nonprofit . . . corporation or association," N.J.S.A. 40A:12-15(b). This statute, however, explicitly prohibits a lease to be entered into "for, with or on behalf of any . . . profit-making enterprise." Id. Under the County Improvement Authorities Act, the County is also authorized to lease property still needed for public use to an authority if that property is "necessary or useful and convenient for the purposes of the authority." N.J.S.A. 40:37A-77. In turn, the Improvement Authority is authorized to (1) "lease to any governmental unit or person, all or any part of any public facility," N.J.S.A. 40:37A-55(f), and (2) make agreements "with any governmental unit or person for the use or operation of all or any part of any public facility" in furtherance of the purposes of the authority. N.J.S.A. 40:37A-55(i).

In the decision below, Judge Harris relied on the aforementioned provisions of the County Improvement Authorities Act to approve the two-step transaction herein at issue. Pa387-390. In doing so, he implicitly affirmed defendants' position that the proposed transaction constitutes the "provision" of a public facility "for use by the [County]" under N.J.S.A. 40:37A-54(a), and the sublease to a private, for-profit entity is in furtherance of that purpose. Based on his expansive (and *Amici* contend erroneous)

interpretation of the Authorities Act, Judge Harris found that the proposed transaction did not violate the public trust doctrine, and that the Improvement Authority was a permissible vehicle to privatize all public facilities still needed for governmental purposes. Pa389-390.

In examining the Legislature's choice of the term "provision" in N.J.S.A. 40:37A-54(a), it is evident that the Legislature intended that county improvement authorities were to create new or improved public facilities rather than merely to purchase or lease an existing facility without making any commitment to cause any improvements thereto. In addition, the Legislature's selection of the phrase "provision . . . for use by the State, the county, or any municipality" clearly indicates that the Legislature did not intend that county improvement authorities were to operate the public facilities they provided under N.J.S.A. 40:37A-54(a).

Even if this Court were to conclude that the Legislature intended an improvement authority's purpose to include the mere refinancing of debt and/or the operation of all types of public facilities still needed for governmental purposes, an authority's general power to lease the real property and business assets of such facilities to any person must give way to more specific legislative declarations of public purpose. The New Jersey legislature has specifically deemed the operation of a nonprofit -- not a for-profit -- hospital to be a public governmental function both in the Improvement Authorities Act, N.J.S.A. 40:37A-54(l), and elsewhere. These specific declarations must prevail.

Finally, Amici believe that county improvement authorities were never intended to serve generally as vehicles to privatize government facilities and services without specific authorization to do so. Even if each of the two steps involved in the transaction at issue herein -- i.e., the County's lease to the Improvement Authority and the Authority's sublease to Solomon, -- literally fit within the language of the County Improvement Authorities Act, the result violates the intent and spirit of the Act and is thus in derogation of the public trust doctrine and Art. VIII, §3, ¶¶2,3 of the New Jersey Constitution.

## STATEMENT OF FACTS

### Industry Context of Proposed Transaction

The significance of the immediate issue before this Court can best be understood in the context of the conditions prevailing in the health care industry at this time. The conversion of nonprofit corporations to for-profit status, either through a change in entity structure or the transfer of entity assets, is a growing trend in the health care industry. This trend reflects structural changes in the health care industry that have included the regionalization of managed-care, the expansion of integrated health care delivery systems, and increased pressures on operating efficiencies from the competition of both for-profit providers and insurers. Philip M. Gassel and Jay E. Gerzog, Conversions of Not-for-Profit Organizations Proliferate, N.Y.L.J., August 26, 1996, at 7. Specifically, for-profit conversions have been fueled by the fact that traditional sources of not-for-profit capital have become

limited and the prohibitions against offering private inurement, such as stock options, have limited nonprofit organizations' ability to negotiate employment contracts. Id. See also Beth Fitzgerald, Blue Cross Considers Making Switch to For-Profit Status With Stock Sales, STAR-LEDGER, July 1, 1994, at 1. No suggestion has been made that such conversions assist in delivering health services to those persons currently unable to afford such services.

Whether the conversions entail a change in structure or the transfer of all or a substantial portion of the nonprofit's assets, the mechanisms of the conversion are governed primarily by state law. Similarly, the transfer of a public hospital into the hands of a hospital authority or private entity is also governed by state law. Unlike nonprofit conversions, however, the restructuring of public hospitals is also motivated by increased uncertainties regarding government reimbursement rates and charity care levels.

The validity of such transfers and the public or quasi-public nature of the resulting entities have been contested in several courts across the country. In these actions, courts have decided whether the transfer of a public hospital to a private corporation, typically a nonprofit corporation, (1) was valid under constitutional provisions prohibiting the use of government debt for private use,[2] and/or (2) was expressly authorized pursuant to

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[2] E.g., State ex. rel. Taft v. Campanella, 368 N.E.2d 76 (Ohio Ct. of App.), aff'd, 364 N.E.2d 21 (Ohio 1977)(where statute declared governmental interest in financing nonprofit hospital facilities, county's lease of public hospital to nonprofit not violative of constitution)

relevant statutory provisions,[3] or (3) resulted in an entity subject to state open meeting laws.[4]

The validity of a lease to a for-profit entity -- one of the issues disputed herein -- was addressed in both National Medical Enterprises, Inc. v. Sandrock, 324 S.E.2d 268 (N.C.Ct. of App. 1985) and Richmond County Hosp. Auth. v. Richmond County, 336 S.E.2d 562 (Ga. 1985). In Richmond County, the court found that the County Hospital Authority's 40-year lease to four private corporations, one of which was a for-profit, was valid; whereas in Sandrock, the court voided the county's lease of its hospital facility to a for-profit entity. In both cases, however, the respective courts affirmed the principal that a public body can dispose of county property that is devoted to public government use

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[3] E.g., University Medical Affiliates v. Wayne County Exec., 369 N.W.2d 277 (Mich. Ct. of App. 1985) (under county charter, county empowered to lease its hospital to nonprofit facility and not required to operate the hospital itself); W.A. Foote Memorial Hosp., Inc. v. Kelley, 211 N.W. 2d 649 (Mich. 1973) (under Hospital Finance Authority Act, public authority able to acquire city hospital and lease it to nonprofit corporation); Gilbert v. Bath, 227 S.E.2d 177 (S.C. 1976) (pursuant to statute, county able to finance construction of hospital to be leased by regional health services district to private, nonprofit corporation); State v. Williamson County Hosp. Trustees, 679 S.W.2d 934 (Tenn. 1984) (under County Recovery and Post War Act of 1945, county empowered to sell county hospital to newly established nonprofit).

[4] E.g., Yoffie v. Marin Hosp. Dist., 193 C.A.3d 743, 238 Cal. Rept. 502 (Cal. App. 1987) (private, nonprofit corporation operating hospital owned by a local hospital district pursuant to 30-year lease not subject to open meeting requirements); Memorial Hosp. Assoc. v. Kuntson, 722 P.2d 1093 (Kan. 1986) (not-for-profit hospital association which leased hospital from county not subject to open meeting law).

only in accordance with the public interest as declared by statute.[5]

Most recently, in two New Jersey companion cases,[6] employees at the former Essex County Geriatric Center and an unsuccessful respondent to Essex County's Request for Proposal process, contested the process chosen by the county to privatize its public facility still needed for public use. The plaintiffs alleged that the county's termination of the competitive bidding process and subsequent sale of the facility to the Essex County Improvement Authority for the sole purpose of transferring the facility to Kessler Nursing Homes, Inc., then a nonprofit entity, violated, inter alia, the open bidding provisions of the Local Land and Building Law. Pa268. In the trial court, Judge Weiss found that the Local Land and Building Law did not apply, because "the property [was] still needed for public use" and an improvement authority is not subject to the Local Lands and Building Law.

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[5] In Richmond County, the Georgia Supreme Court interpreted the Hospital Authorities Act to allow the Authority to lease the county hospital to a "proprietary or for-profit" corporation, because the statute explicitly permitted the "lessee to obtain a reasonable rate of return. 336 S.E.2d at 567-568. On the other hand, in Sandrock, the North Carolina Court of Appeals interpreted the statute enabling the county to organize and operate a hospital to void its lease to a for-profit association. The court specifically held that the inclusion of statutory authority to lease to a nonprofit hospital operates to exclude authority to lease to a for-profit. 324 S.E.2d at 271.

[6] Communications Workers of America, AFL-CIO, et al. v. County of Essex et al., Docket No. ESX-L-208-96 (August 7, 1996), aff'd Docket No. A-783-96T5 (App.Div. Feb. 18, 1998)(employees)(Pa381); Cedar Grove Healthcare System, Inc. v. County of Essex, et al., Docket No. ESX-L-02084-96 (Law Div. April 26, 1995)(unsuccessful bidder)(Pa266).

Pa270-1. This decision, holding that the process used by Essex County was authorized under the County Improvement Authorities Act, was affirmed by the Appellate Division in a very short opinion. Pa380-3.

In the Appellate Division's decision, it is unclear whether the court considered in any depth the questions at issue here. That is, whether (1) the mere purchase (or lease, as lessee) of an existing public facility and the immediate sale (or lease, as lessor) of that facility to a private entity is within the contemplated purposes of a county improvement authority, and (2) the Legislature intended that improvement authorities serve as conduits to privatize public facilities in the absence of a legislative declaration that private use satisfies the particular public governmental purpose involved.

**History of Bergen Pines County Hospital**

In 1916, a group of physicians from Hackensack Hospital came to the Board of Freeholders with an idea for a hospital facility that would offer patients with communicable diseases such as tuberculosis, or who were otherwise denied care by private hospitals, the "fresh air, sunshine, and isolation of open farmland." Matthew Mosk, Hospital Celebrates Its 80th Anniversary, THE RECORD, October 27, 1996. As the range of available medical treatments expanded and new diseases appeared, Bergen Pines transformed itself from a small infirmary into a general and psychiatric hospital. In 1952, the County built a 363-bed building, and in 1985, a $40 million, state-of-the-art psychiatric

pavilion was constructed. Id. See also N.J.S.A. 30:9-12.1 (permitting counties to establish and maintain public hospitals for "sick, disabled, or aged persons,. . . the mentally ill, . . . and for persons suffering from communicable diseases"). Today, the Hospital is the largest hospital in New Jersey. Pursuant to B.C.A.C. 8.8.1, it operates as a department of Bergen County under the jurisdiction of the Board of Freeholders. The County currently operates a 1,185 bed Medicaid/Medicare certified general acute care and teaching hospital offering a wide range of services to all Bergen residents regardless of their ability to pay. See Local Advisory Board II Staff Summary and Comments: County of Bergen's Certificate of Need Transfer Application (hereinafter "LAB Staff Summary")(Pa313). As in its early years of existence, Bergen Pines continues to serve poor and uninsured residents of Bergen County, and to play a disproportionately large role in caring for those who suffer from special access problems -- problems that today are due to conditions such as HIV/AIDS, drug addiction, alcoholism and psychiatric illnesses.

**Legislative History of County Improvement Authorities Act**

In 1959, the Legislature created county improvement authorities to authorize counties "by means and through the agency" of an improvement authority "to acquire, construct, maintain, operate or improve public recreational facilities[.]" L. 1959, c.1, §2. One year later, this act was repealed (L. 1960, c.10) and a new improvement act was enacted. L. 1960, c.183. Pursuant to this act, the purposes of each authority were delineated as the:

> **provision** within the county (a) of **public buildings** for **use by** the State, the county, or any municipality in the county, or any 2 or more or any subdivisions, departments, agencies or instrumentalities of any of the foregoing, (b) of structures and facilities for public transportation or terminal purposes, and (c) of structures and other facilities **used or operated by the authority or any governmental unit** in connection with, or relative to development and improvement of, aviation for military or civilian purposes, including research in connection therewith.

L. 1960, c.183, §11 (emphasis added).

"Public facility" was defined[7], and recreational purposes were omitted.[8]

Effective 1963, the purposes of an improvement authority were expanded to authorize the acquisition of lands "and other property disposed of by the Federal Government and the development or redevelopment, **use** and disposition thereof" **by the authority**. Preamble, L. 1962, ch. 224 (emphasis added). The definition of "public facility" was similarly expanded to mean "lands, structures . . . acquired or constructed by an authority for its purposes and either (i) operated or to be operated by the authority or by any governmental unit or person . . ., or (ii) constituting a

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[7] "Public facility" was defined to mean

> any lands, structures or other property or facilities acquired or constructed or to be acquired or constructed by an authority for its purposes and operated or to be operated by an authority or by any governmental unit or person under a lease or other agreement by or with the authority[.]

L. 1960, c.183, §2(o).

[8] It was not until 1978 that improvement authorities regained their authority to acquire, construct, maintain and operate recreational facilities, although in 1967, the Legislature established First Class County Recreational Authorities currently enacted as N.J.S.A. 40:37B-1. (L. 1967, c. 136, §1)

development project" (id., §3) and many specific provisions in the law were added regarding development projects. In 1967, provisions that are currently N.J.S.A. 40:37A-54(a) and (c) were amended to include the

> (a) provision with the county of **public buildings for use by** the State, . . . including buildings **for use by any municipality** bordering on the Atlantic Ocean as enlargements or parts of or supplements to any municipal convention hall **maintained by it**, (b) provision within the county of structures and facilities for public transportation or terminal purposes including for public use in counties, in along or through which a navigable river flows.

L. 1967, c.242, §11 (emphasis added).

In 1968, the Legislature specifically amended the Act to permit county improvement authorities to operate public transportation facilities,[9] and several provisions were added concerning the powers of an authority operating such a facility, (L. 1968, c.66, §§12, 13), and employee relations in such facilities. Id., §§7-11. In 1973, the purposes of an authority were again expanded to include the "acquisition, construction, maintenance and **operation** of garbage and solid waste disposal systems . . ." L. 1973, c. 330, §11 (emphasis added); and, in 1978,

> (f) the improvement, furtherance and promotion of the tourist industries and recreational attractiveness of the county through the planning, acquisition, construction, improvement, maintenance and **operation** of facilities for the recreation and entertainment of the public . . .

L. 178, c.112, §11 (emphasis added),

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[9] "The purposes of every authority shall be . . . (b) provision within the county of structures, franchises, equipment and facilities **for operation of** public transportation . . ." L. 1968, c.66, §11.

were added to the array of authority purposes. In late 1979, effective January 1980, the Legislature enacted an act "vesting [county improvement authorities] with necessary powers to undertake, finance and operate housing projects and to redevelop property in connection therewith[.]" Preamble, L. 1979 c.275. New legislative findings were incorporated into the County Improvement Authorities Act, N.J.S.A. 40:37A-106, specific provisions regarding the development of low and moderate income housing were added as were new definitions and provisions delineating authority powers that relate to such redevelopment and housing projects. See, e.g., N.J.S.A. 40:37A-112 (powers of authority as condition of loan). The definition of "public facility" and the list of enumerated authority purposes were also amended respectively to reflect the expanded public mission of the authorities.[10]

Approximately two years later, the Legislature amended N.J.S.A. 40:37A-54(a) to specify that improvement authorities may

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[10] ""Public facility" shall mean lands, structures, franchises, equipment, . . . acquired or constructed by an authority for its purposes or, to the extent authorized by section 11 (C.40:37A-54) for governmental and nongovernmental purposes, and either (i) operated or to be operated by the authority . . . or (ii) constituting a development project or redevelopment project[.]" L. 1979, c.275, §31.

The purposes of every authority shall be the "(d) provision within the county of a public facility for a combination of governmental and nongovernmental uses provided that not more than 50% of the usable space . . . shall **be made available** for nongovernmental use **under a lease or other agreement** . . ., (h) provision of loans for the construction . . . to provide decent, safe and sanitary dwelling units for persons of low and moderate income in need of housing, . . . (i) planning, initiating and carrying out redevelopment projects . . . and the **disposition, for uses in accordance with the objectives of the redevelopment project** . . ." Id., §11 (emphasis added).

provide public buildings as appurtenances to any convention hall including office facilities, commercial facilities, parking facilities and the like;[11] and in 1982, it enacted an act concerning the security for the financing of certain facilities undertaken by improvement authorities. Preamble, L. 1982, c.113. Pursuant to this legislation, the Legislature redrafted the definition of a "public facility" and an authority's purpose under N.J.S.A. 40:37A-54(a) with no indication that it intended to change either provision's substantive effect.[12] Such changes remain today.

Most recently the purposes of an improvement authority were again expanded in 1994 to permit such entities to (1) provide services in counties which have not created a county improvement authority, L. 1994, c.76, §4 and (2) plan, design, acquire,

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[11] "The purposes of every authority shall be (a) **provision** within the county of public buildings **for use by** the State, the county, . . . including buildings **for use** in any municipality bordering on the Atlantic ocean, **by the municipality, county, or any other public body authorized by law to operate such facilities,** as convention halls, or . . . supplements to any convention hall. . . including but not limited to office facilities, commercial facilities, community service facilities, parking facilities, and facilities for the accommodation and entertainment of tourists and visitors[.]" L. 1981, C.460, §11.

[12] "Public facility" means "lands, structures, franchises, equipment, or other property or facilities acquired, constructed, owned, financed, or leased by the authority or any other governmental unit or person **to accomplish any of the purposes of an authority** authorized by section 11 of this act[.]" L. 1982, c.113, §2.

"The purposes of every authority shall be (a) **provision** within the county of **public facilities for use by** the State, the county, or any municipality in the county, . . . **for any of their respective governmental purposes,** (b) **provision** within the county of public facilities **for use as** convention halls, or the rehabilitation, improvement or enlargement of any convention hall, including appropriate and desirable appurtenances located within the convention hall or near . . ." Id., §11.

construct, maintain and **operate** facilities or other property **for a corporation or other person organized under the New Jersey Nonprofit Corporation Law** except certain facilities that can be financed under the Health Care Facilities Financing Authority Act, N.J.S.A. 26:2I-1 et seq. See L. 1994, c.110, §1.

**History of Bergen County Improvement Authority**

In 1986, the Board of Freeholders, by resolution, created the Improvement Authority, pursuant to N.J.S.A. 40:37A-44 et seq. In establishing the Improvement Authority, the Board intended to create a financing instrument that would provide "low cost financing of capital structures and facilities within the County of Bergen through the establishment of a pooled loan program." Bergen County Res. No. 80, dated June 4, 1986. Pa322.

For approximately eight years, the Improvement Authority was a dormant and inactive agency, and existed in name only. It is an autonomous public entity that is governed by the County Executive, with the advice and consent of the Board of Freeholders. Pa313. The Improvement Authority "has no current or prior experience in owning or operating health care facilities." Pa313,320. Upon the transfer of Bergen Pines to the Improvement Authority, the Improvement Authority is expected to create a community oversight board that will be "responsible for monitoring the operations of [the Hospital]." Pa321. The legal authority of this oversight board and its specific role with respect to the Improvement Authority and Solomon are not clear from the documents that have been made public by the parties to this transaction. Id.

## The County and Authority Resolutions

In order to "strengthen and enhance the `safety net' of health care services that have been provided at Bergen Pines for more than 80 years," in response to the "structural and organizational changes that have occurred and are occurring in the health care market," defendant Schuber decided to implement a "Repositioning Plan" for Bergen Pines. See, e.g., Bergen County Res. 2128, dated December 17, 1997, ("Res. 2128")(Pa15-6). The Plan provided for "the transfer of [the County's] responsibility for provision of services relating to the management, operation, maintenance and administration of Bergen Pines" to a third-party "Manager" through the lease of Bergen Pines' personal and business assets to the Improvement Authority, and the Authority's sublease of those assets to the Manager. (Pa17-8). See also Improvement Auth. Res. 97-33, dated December 19, 1997, ("Res. 97-33")(Pa28-9).

The County, on behalf of the Improvement Authority, initiated implementation of the Plan by (1) issuing a Request for Qualifications, dated April 4, 1997, and a Request for Proposals, dated July 3, 1997; (2) authorizing the Project Team to enter into negotiations with Bergen Health Network and Solomon; and (3) approving "the terms and conditions of Solomon's proposal." Res. 97-33 (Pa29-31). See also Improvement Auth. Res. 97-34, dated December 19, 1997,("Res. 97-34")(Pa38-40).

At some time in in 1997, the Improvement Authority agreed "to undertake a financing to issue taxable debt to replace bonds issued by the County of Bergen in junction with its ownership of the

Bergen Pines County Hospital." Improvement Auth. Res. 97-30A submitted to Local Advisory Board, attached hereto as Ex. 1. The record below does not indicate why the replacement bonds are not tax-exempt bonds.[13]

On December 17, 1997, the Board of Freeholders approved defendant Schuber's two-step Repositioning Plan and approved, inter alia, the Lease and Agreement for Bergen Pines by and between Bergen County and Bergen County Improvement Authority (hereinafter "BCIA Lease")(Pa83), and the Lease and Operating Agreement for Bergen Pines by and between Bergen County Improvement Authority and Solomon Health Group (hereinafter "Solomon Sublease")(Pa140) See Res. 2128. As required by law, the County expressly authorized the Improvement Authority to undertake the Bergen Pines Project. See Bergen County Res. unnumbered, dated December 17, 1997, ("Res. ##")(Pa23). Two days later, the Improvement Authority also approved the BCIA Lease and the Solomon Sublease. See Res. 97-33 (Pa25) and Res. 97-34(Pa34).

Under the agreements approved by the County and the Improvement Authority, Solomon is to pay a "fixed annual rent" to the Improvement Authority which, in turn, is required to pay that amount less debt service and administrative costs to the County.

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[13] *Amici* understand that for federal tax purposes a nonprofit or public hospital may lose its tax-exempt status (and thus its ability to issue qualified 501(c)(3) bonds or, in the case of a public entity, tax-exempt bonds under Sect. 115 of the Code) if more than 5% of its property is being used for a private business use. See generally Thomas Hyatt & Bruce Hopkins, The Law of Tax-exempt Healthcare Organizations §30.3 (1995). We also understand that the interest from the bonds would have to be taxable if this were the second refinancing of the bonds.

See BCIA Lease Pa.95 (defining "Fixed Annual Rent"). The Improvement Authority must also pay a monthly "management fee" to Solomon plus any "additional revenues" that it receives. See Solomon Sublease at Section 5.1. This management fee is tantamount to all gross revenues due the Hospital for services rendered, with adjustments made in the event of decreases in government reimbursement programs. Id.

The above-mentioned resolutions, and the agreements they ratify, indicate that: (1) the County represents that it is acting pursuant to its power to lease real property to a public body, such as the Authority, for a nominal fee under N.J.S.A. 40A:12-14(b) and the Improvement Authority Act, BCIA Lease (Pa91); (2) the Improvement Authority is acting pursuant to its power to lease, as lessee, "public facilities" for use by the County, (id.; Res.97-33 (Pa26)) and to lease, as lessor, such facilities to allegedly any person "for such term and under such conditions" as the authority deems necessary, Solomon Sublease (Pa147-8); (3) Bergen Pines is to be operated as a "public health facility," BCIA Lease (Pa89), Solomon Sublease (Pa.146); (4) the Improvement Authority intends to refinance the County's outstanding debt allocable to Bergen Pines with taxable bonds; (5) the Improvement Authority has made no commitment to construct new facilities or to improve the existing one; and (6) all the parties are aware that this transaction may put certain tax exemptions and government reimbursement rates at risk. Solomon Sublease at Section 2.4(e) (taxes or government assessments) and Section 5.1(e)(iv)(government programs).

## ARGUMENT

### I. THE COUNTY'S LEASE OF BERGEN PINES TO THE COUNTY IMPROVEMENT AUTHORITY IS NOT SPECIFICALLY AUTHORIZED BY STATUTE AND IS THUS ULTRA VIRES AND VOID.

*Amici* contend that the proposed transaction between the County, the Improvement Authority and Solomon cannot be used to subvert the well-established public trust doctrine. This doctrine holds that a public body can dispose of county property which is devoted to public government use only in accordance with the public interest as declared by statute. Because Bergen Pines is still needed for public use and the Improvement Authority does not have the authority to merely refinance the County's outstanding debt allocable to Bergen Pines or to operate such facility, the County's lease to the Authority is void.

Counties, such as Bergen County, are created by the State, and thus their "existence and powers depend upon" and are designated by the Legislature. Clark v. Degnan, 83 N.J. 393, 399-400 (1980). See also Bergen County v. Port of New York Auth., 32 N.J. 303, 313 (1960)(county's powers are only those granted to it by legislature); State v. Rosenman, 183 N.J.Super. 137, 143 (App. Div. 1982)(counties are dependent upon and subject to control of State). Counties, and the authorities they create, such as the Bergen County Improvement Authority, have only such powers as delegated to them by the State, including the authority to lease publicly owned property used for government functions. See Camden Plaza Parking, Inc. v. City of Camden, 16 N.J. 150, 155 (1954); Camden City Bd. of Freeholders v. Camden County Clerk, 193 N.J. Super. 100, 107 (Law

Div.), aff'd on other grounds, 193 N.J. Super. 111 (App. Div. 1983).

As a general matter, a public body such as the County (or the Improvement Authority) may dispose of its property acquired or dedicated for public government uses, only within the limitations and in the manner prescribed by statute. See 20 C.J.S. Counties §148 (1991); 10 McQuillin §28.37-28.40. See also Springfield Township. v. Board of Educ., 217 N.J.Super. 570, 579 (App. Div. 1987)(unlike an individual, a public body must act when dealing with its property "in careful performance and with specific statutory authorization"); 4 C.J.S. Hospitals §6 (1991)(a statute that authorizes the purchase and operation of a public hospital does not necessarily authorize its sale). Specifically, a county cannot, by lease, permit its property acquired and maintained for public use "to be diverted to a possession or use exclusively private without specific legislative authority." 10 McQuillin §28.42. See also Camden Plaza Parking, Inc., 16 N.J. at 155 (municipality had no statutory authority to enter into leasehold with private person to construct and operate a public parking facility); Seward v. Orange, 59 N.J.L. 331, 333-4 (Sup. Ct. 1896)(lease of land to place highway through commons not expressly authorized by statute and thus not permitted).

**A. Because Bergen Pines Is Still Needed for Public Use, N.J.S.A. 40A:12-14 Does Not Govern This Transaction.**

Pursuant to N.J.S.A. 30:9-12.1, the County is authorized to acquire and hold property and appropriate money and borrow funds

for purposes of establishing and maintaining a hospital for "sick, disabled, or aged persons, for the mentally ill, and for persons suffering from communicable diseases." The same enabling statute authorizes the County to accept and hold in trust for the county any grant, gift or bequest for such public purpose. See also N.J.S.A. 40:5-2.10c (authorizing county to make contributions to a "public or private nonprofit hospital"). By maintaining and operating Bergen Pines, the County has acted in its governmental capacity,[14] and has created a public charity.[15]

Under the Bergen County Administrative Code, Bergen Pines is a department of Bergen County operating under the jurisdiction of the Board of Freeholders. B.C.A.C. 8.8.1. The County Executive is given the authority to place Bergen Pines "under the direction of a management firm," (id. at 8.8.14), pursuant to the County's general "right to reorganize its structure," which is subject to its mandate to perform government services. Bergen County Charter, Art. 1, §7. There is no provision in the County Charter, Bergen Pine's enabling statute or the County's administrative code that specifically permits the County to lease or sell Bergen Pines to a private entity. Therefore, the County's general power to "sell, lease, hold and dispose of real and personal property,"(id. at Art. 1, §4(f), must be interpreted in light of general state law

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[14] See, e.g., Kress v. City of Newark, 8 N.J. 562, 572-73 (1952); Kent v. Hudson County, 102 N.J.Super. 208, 219 (App. Div. 1968), aff'd, 53 N.J. 546 (1969); 40 Am. Jur. Hospitals & Asylums §21 (1968); 10 McQuillin §28.37.

[15] See, e.g., RESTATEMENT (SECOND) OF TRUSTS §373(b) (1959); 17 McQuillin §47.01.

relating to local government. See Weiner v. County of Essex, 262 N.J.Super. 270, 283-4 (Law. Div. 1992)(Optional County Charter Law explicitly requires that a county's powers are subject to the provision of New Jersey constitutional and statutory law). Cf. McRobie v. Town of Westernport, 260 Md. 464, 467 (Md. Ct. of App. 1970)(town's general power to dispose of real property refers only to property held in proprietary capacity, not government capacity).

Indeed, the County asserts that its lease of Bergen Pines to the Improvement Authority is authorized pursuant to New Jersey Local Lands and Building Law, N.J.S.A. 40A:12-14(b). BCIA Lease (Pa91).[16] N.J.S.A. 40A:12-14(b) states in part:

> Any county or municipality may lease any real property, capital improvement or personal property **not needed for public use as set forth in the resolution** or ordinance authorizing the lease, . . . (emphasis added).

Neither resolution issued by the Board of Freeholders on December 17, 1997, declares that Bergen Pines is no longer needed for public use.[17] On the contrary, the terms of the two resolutions passed by the County (as well as the two resolutions passed by the Improvement Authority) and the lease agreements entered into

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[16] In the court below, counsel for defendants Bergen County and Schuber stated that this provision was in "there [i.e., in the agreement] just by way of analogy." T14-11 to 12, attached hereto as Ex. 2. This proposition is not credible given the specificity of the documents prepared.

[17] Unless ambiguous, the plain words of a statute, such as "no longer needed for public use," control. In re Information Resources, 126 N.J.Super. 42, 49-50 (App. Div. 1973). See also Skowysz v. City of Ventnor, 110 N.J. Super. 340, 349 (Law Div. 1969)(statute should be interpreted according to the most "natural and obvious import of the language" without "subtle or forced construction").

between the County, the Improvement Authority and Solomon all indicate (i) a "continued need" for public use of Bergen Pines and (ii) an intent to maintain the Hospital as a public facility. See, e.g., Drexler v. Commissioners of Bethany Beach, 135 A. 484 (Del. Ch. 1926) (where town did not cease to use or abandon hall acquired for community purpose or construct a new hall, terms of sale showed "continued need").

Because the resolutions passed and agreements ratified by the County and the Improvement Authority clearly indicate that Bergen Pines is still needed for public use, N.J.S.A. 40A:12-14 does not apply and the lease agreements are invalid unless specifically authorized by another statute. See West v. Borough of Monmouth Beach, 107 N.J.L. 445, 448 (E & A 1930) (public beach still needed so lease invalid).

**B. Because the Improvement Authority is Not Authorized to Simply Refinance and/or Operate Bergen Pines Under the Improvement Authorities Act, N.J.S.A. 40:37A-77 Does Not Govern This Transaction**

The County additionally asserts that its lease of Bergen Pines to the Improvement Authority is authorized pursuant to the County Improvement Authority Act, N.J.S.A. 40:37A-44 et seq., in particular N.J.S.A. 40:37A-77. BCIA Lease (Pa91) (citing language of such provision). N.J.S.A. 40:37A-77 states in part:

> Any county by resolution of its governing body,. . . is hereby empowered . . .to sell, lease, lend, grant or convey to an authority . . . to use, maintain or operate as part of any public facility, any real or personal property which may be necessary or useful and convenient **for the purposes of the authority.** (emphasis added)

The Court below agreed with defendants and explicitly held that the "operation of an acute care facility is within the ambit of the authority of the Bergen County Improvement Authority [under N.J.S.A. 40:37A-54(a)]." Pa387. In rendering this decision, Judge Harris implicitly agreed with defendants' position that pursuant to subsection 54(a), an improvement authority can do anything a county (or for that matter the State, or any municipality) can do.[18] This broad interpretation of an improvement authority's purposes cannot be sustained by the terms of the provision nor the legislative history of the Act.

To determine the meaning of a statute it is essential to first ascertain the purpose for which it was enacted. L.P. Marron & Co. v. Mahwah Township, 39 N.J. 74, 80 (1963). A fundamental rule of statutory construction is that the Legislature's intent should be derived from an interpretation of the entire statute and all statutory sections must be read in light of this intent. See

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[18] During the hearing below, the following dialogue occurred between Judge Harris and counsel for defendant Bergen County:

> MR COLE: . . . One of its purposes is the provision within the county . . .[of a] public facility for the use by the county for any of . . .the county's governmental purposes. And the governmental purpose of the county is the hospital and the improvement authority is, by that provision, empowered to carry out that purpose for the county.
>
> THE COURT: So what you're saying is this legalese gibberish means that anything the county can do the improvement authority can do?
>
> MR COLE: Basically that's correct, Judge.

T:9-1 to 12, Ex. 2.

Seatrain Lines, Inc. v. Medina, 39 N.J. 222, 226 (1963). The object of a law, the nature of its subject matter, the law's contextual setting, the history of the legislation, and other statutes related to the same matter may also be considered in ascertaining the underlying legislative intent of a statute. See State v. McCarthy, 123 N.J. Super. 513, 521 (App. Div. 1973).

A review of both the specific language and overall thrust of the Improvement Authorities Act supports the conclusion that the Legislature did not intend to extend to improvement authorities the power to lease a county hospital for the purpose of generating additional revenues for the county (or reducing its debt) and/or for the purpose of operating such a healthcare facility on behalf of the county. A consideration of the Act "as a whole indicates a legislative intent that the county improvement authorities serve as a means through which to create new or improved facilities to further various public purposes [specifically enumerated in] N.J.S.A. 40:37A-54." Letter from Attorney General to Chairman of Local Finance Board, dated November 15, 1988, (hereinafter "AG Letter") attached hereto as Ex. 3, at p. 3. One of the purposes specified is the provision of improved facilities to a governmental entity for that entity's use, not the improvement authority's use. N.J.S.A. 40:37-54(a). The transaction herein does not satisfy this threshold limitation.

In examining the Legislature's choice of the term "provision" in N.J.S.A. 40:37A-54(a), it is evident the Legislature intended that county improvement authorities were to create new or improved

public facilities rather than to merely purchase or lease an existing facility without making any commitment to cause any improvements thereto. The plain and ordinary meaning of the word "provision" is the "act or process of providing", and, in turn, the term "provide" is "to make provision for or against, to supply for use, to furnish, to make ready or to procure in advance." Webster Third New International Dictionary (1986)(hereinafter "Webster"). A transaction that does not result in an improvement authority furnishing or supplying a county with any facility which the county does not already possess and use does not fall within the contemplated purposes of an improvement authority under subsection 54(a). See also N.J.S.A. 40:37A-56 (requiring authority to submit a detailed report of the "**proposed** public facility or facilities" to a county prior to obtaining the County's approval)

In addition, the Legislature's selection of the phrase "provision . . . for use by the State, the county, or any municipality" clearly indicates that the Legislature did not intend that county improvement authorities operate the public facilities they were to provide under N.J.S.A. 40:37A-54(a), unless authorized to do so under a different subsection of N.J.S.A. 40:37A-54. In order to understand the meaning of this phrase, one must focus on the meaning of the word "use." Employed as a verb, "use" means "to put to action or service," and in law, the term denotes "the enjoyment of property as from occupying, employing or exercising it." Webster. It is therefore evident that under subsection 54(a), by using the phrase "for use by" the Legislature intended county

improvement authorities to provide facilities to government entities or public bodies who were authorized by law to operate such facilities, and not to allow county improvement authorities to operate such facilities themselves. See L. 1981, c.460 §11(a) (explicitly employing the language the provision of buildings for use by "public bod[ies] authorized by law to operate such facilities").

A review of the legislative history of N.J.S.A. 40:37A-54 and the Act generally supports this conclusion. Until 1982, an authority's purpose under 54(a) was to provide "public buildings for use by ..." even though the term "public facility" had been defined in the statute since its inception. There is no indication that the insertion of public facility to replace public building in 1982 was intended to effect a significant expansion of an authority's purpose to permit authorities to "to engage in any activity which might assist a [county] in carrying out any of its various responsibilities." AG Letter at 4. Such a radical change would have been noted in the Preamble of the 1982 act to amend the improvement authorities act, and it was not. See supra pp. 18-19. Rather, the employment of the term public facility for the first time in 1982 was to make clear that improvement authorities were also permitted to provide "lands, structures, franchises, equipment or other property,"[19] not just buildings, to public bodies for their governmental use.

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[19] N.J.S.A. 40:37A-45(p) (defining "public facility").

A review of the N.J.S.A. 40:37A-54 also makes clear that when the Legislature intended to empower authorities to operate the facilities they provided, it specifically stated so in the statute. The original improvement authorities act, which was repealed, expressly permitted authorities to operate recreational facilities; in 1960, authorities were given the power to operate aviation facilities; in 1968, the statute was specifically amended to permit improvement authorities to operate public transportation facilities, not just provide facilities for public transportation[20]; in 1973, authorities were granted the power to operate a garbage and solid waste disposal system; in 1978, the purposes of an improvement authority were extended to include operation of recreational and entertainment facilities; effective in 1980, authorities were given the right to own, lease and operate certain housing projects, N.J.S.A. 40:37A-108a(5); and, most recently in 1994, authorities were given the power to operate certain facilities on behalf of nonprofit corporations. See supra p. 19.

The omission of the term "operation" in 54(a) cannot be ascribed to a simple mistake in draftsmanship. Had the Legislature intended to permit improvement authorities to operate all facilities they provided "for use by" a governmental entity, it presumably would have done so expressly as it did in the

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[20] See Division 510, Amalgamated Transit Union, AFL-CIO v. Mercer County Improvement Authority, 76 N.J. 245, 247 (1978).

aforedescribed subsections. Russello v. United States, 464 U.S. 16, 23 (1983).[21]

A consideration of the entire Act, and its amendments over the years, further indicates that the Legislature did not intend to design N.J.S.A. 40:37A-54(a) as a catch-all provision that would enable improvement authorities to take over all governmental functions, including the operation of an acute care facility. When specifically authorizing improvement authorities to engage in the operation of public facilities, or redevelopment and housing development projects, the Legislature also enacted provisions to govern the improvement authorities' operations and activities. Had the Legislature intended to permit an improvement authority to operate a county hospital, it would have enacted specific measures to govern such operation to ensure that the desired public end was achieved.

For the foregoing reasons, *Amici* believe that Judge Harris' decision was erroneous. Although the County Improvement Authorities Act is to be construed liberally to effectuate the legislative intent, N.J.S.A. 40:37A-90, there is no basis in the

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[21] The Legislature has also expressly stated that operation of a public facility is a valid purpose with respect to other county or state authorities it has created. E.g., **State**: New Jersey Sports and Exposition Authority, N.J.S.A. 5:10-5(j); State Building Authority, N.J.S.A. 52:18A-52; South Jersey Food Distribution Authority, N.J.S.A. 4:26-6(a). **County** Municipal and County Utilities Authorities, N.J.S.A. 40:14B-2(1); County Food Distribution Authorities, N.J.S.A. 40:37D-6(a); Pollution Control Financing Authorities, N.J.S.A. 40:37C-4(a); Parking Authorities, N.J.S.A. 40:11A-6(3); County Recreation Authorities, N.J.S.A. 40:37B-10; County and Municipal Sewerage Authorities, N.J.S.A. 40:14A-2(1); County Transportation Authorities, N.J.S.A. 40:35B-13.

terms, structure or legislative history of the Act that remotely suggests that the Legislature contemplated that the lease herein constitutes a valid authority purpose under N.J.S.A. 40-37A-54.[22]

## II. UNDER THE CIRCUMSTANCES, THE IMPROVEMENT AUTHORITY CANNOT SUBLEASE BERGEN PINES TO SOLOMON HEALTH GROUP, A FOR-PROFIT CORPORATION

Even if this Court were to conclude that the Improvement Authority is empowered to lease Bergen Pines for the express purpose of simply refinancing the County's debt allocable to the Hospital and/or operating such facility in lieu of the County, an authority's general power to lease "any public facility" to "any person" does not govern this transaction. *Amici* contend that because the Legislature has specifically deemed the operation of a nonprofit hospital to be a public governmental function in the County Improvement Authorities Act and elsewhere, the Solomon Sublease is void.

### A. The Improvement Authority Lacks Authority to Lease a Public Facility That it Provides "For Use By the County" to Any Entity Not Expressly Authorized to Operate The Facility

Pursuant to its enabling statute, a county improvement authority has the general power "to lease to any governmental unit

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[22] In Cedar Grove Healthcare System, Inc., Judge Weiss cited to N.J.S.A. 40:37A-54(i) to justify the County's transfer of Essex County Geriatric Center to the Essex Improvement Authority (in addition to the County's revenue needs). (Pa270). However, there is no indication whether he engaged in any fact-finding as to whether the proposed project satisfied the definition of a "housing project" under the Act, that Kessler Nursing Homes, Inc. was a "qualified housing sponsor," or that the transaction would result in the creation of any low income housing. There is also no indication in Communication Workers of America, whether the Appellate Division considered this issue.

or person, all or any part of any public facility," N.J.S.A. 40:37A-55(f), "in conformity with its contracts with the holders of any bonds," N.J.S.A. 40:37A-78, and "for such term as [it] deems appropriate to fulfill its purposes." N.J.S.A. 40:37A-55(e).[23] Whether a county authority has the power to lease a particular facility to a private entity depends on the specific purpose for which it holds the facility and the existence, or lack thereof, of express legislative authority to do so.

Express legislative declarations of public purpose may be found both within the Improvement Authorities Act and elsewhere. The Legislature has specifically contemplated the use of improvement authority property by nongovernmental entities in the statement of authority purposes under N.J.S.A. 40:37A-54(b)(provision of office, commercial and hotel facilities); 54(e)(provision of facilities for 50% nongovernmental use); 54(l)(construction of a facility for a nonprofit corporation). When exercising its sale and leasing powers with respect to redevelopment and housing projects pursuant to N.J.S.A. 40:37A-54(f)((i) and (j), the Legislature has also expressly found that for-profit development is an appropriate means to accomplish the desired public ends. N.J.S.A. 40:37A-55.1(d)(redevelopment projects); N.J.S.A. 40:37A-107(j)(qualified housing sponsor includes for-profit and nonprofit corporations). See also N.J.S.A. 40:37A-98 (permitting authority operating a public transportation

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[23]"Person" is defined as "any person, partnership, association, corporation or entity[.]" N.J.S.A. 40:37A-45(n).

facility to lease that facility to any person or corporation).

Legislative declarations outside of the authorities enabling statute may also be relevant. For example, under the County Utilities Authority Law, N.J.S.A. 40:14B-3, which also governs an improvement authority operating a garbage or solid waste facility (see N.J.S.A. 40:37A-99), the Legislature has declared that a lease to a commercial entity serves a public purpose. See S. COUNTY AND MUN. GOV'T COMM. STATEMENT, S.NO.1284 (L. 1984, c.178 amending law to empower authority to lease, as lessor, land and other property to the private sector in carrying out its purposes). But no where in the County Improvement Authority Act, or any other applicable statute, is there any express legislative declaration that the operation of a public hospital by a for-profit entity serves a public purpose.

Rather, in three places the Legislature has stated that the operation of a nonprofit (not a for-profit) hospital may effectuate county governmental purposes: (1) pursuant to N.J.S.A. 40:37A-54(l), an improvement authority may construct, improve and operate facilities for a nonprofit corporation, including a nonprofit hospital; (2) under New Jersey Local Lands and Building Law, a county is authorized to lease its property, such as Bergen Pines, for "the provision of health care or services by a nonprofit clinic, hospital, residential home, outpatient center or other similar corporation or association," N.J.S.A. 40A:12-15(b)[24]; and

[24]. This statute explicitly prohibits a lease to be entered into "for, with **or on behalf of** any commercial, business, trade, manufacturing, wholesaling, retailing, or **other profit-making**

(3) pursuant to N.J.S.A. 40:5-2.10c, a county is authorized to make contributions to a "public or private nonprofit hospital.[25]

These specific declarations of governmental public purpose, made by the Legislature in the context of operating a healthcare facility, must prevail over the Improvement Authority's general power to lease to any governmental unit or person any public facility.[26] Indeed, the express authority of the County or the Improvement Authority to lease a public hospital to a nonprofit hospital, operate a hospital for a nonprofit corporation or make financial contributions to such nonprofit entities in effect excludes the power to lease a public hospital for operation by a

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**enterprise."** Id. (emphasis added).

[25] Pursuant to the Health Care Facilities Financing Authority Law, N.J.S.A. 26:2I-1 et seq., the Legislature has expressly permitted the State Health Care Facilities Financing Authority to finance, construct, improve, furnish or equip facilities owned by public or private hospitals with whom it has entered into regulatory agreements. Thus, the financing of a proprietary health care facility construction project under the terms specified in the statute has been declared a governmental purpose, not the financing of the operation of a for-profit healthcare facility generally.

[26] It is a well-established principle that specific terms covering a given subject-matter will prevail over general language of the same or another statute which might otherwise prove controlling. See Baltimore Nat'l Bank v. State Tax Comm'n of Maryland, 297 U.S. 209, 215 (1936). See also Zoning Bd. of Adjustment of Township of Sparta v. Service Elec. Cable Television, 198 N.J.Super. 370, 381 (App. Div. 1985)(specific statutory provision dealing with a subject prevails over general statute on same subject); Graziano v. Mayor and Township Comm. of Montville Township, 162 N.J.Super. 552, 564 (App. Div.), certif. denied 79 N.J. 462 (1978)(specific statute controls contract between municipality and utilities authority to the exclusion of general provisions in Title 40A).

for-profit. See National Medical Enterprises, Inc., 324 S.E.2d at 271.

### B. Because the Improvement Authority is Acting In Lieu of the County When Operating Bergen Pines Pursuant to N.J.S.A. 40:37A-54(a), It Cannot Sublease the Hospital to a For-Profit Entity.

In construing the language used by the Legislature in subsection N.J.S.A. 40:37A-54(a), in the context of its various transformations over the years, it is evident that the Legislature intended to permit improvement authorities to construct new or improved public facilities that they would then lease to a governmental entity for its own use.[27]

Defendants contend, and the court below agreed, that the Improvement Authority is permitted under 54(a) to perform the county's governmental functions in lieu of the county. If this interpretation is accepted, then improvement authorities, when operating a facility pursuant to their authority under 54(a), may only use the facility in the same manner as the relevant governmental body is authorized to do. Although improvement authorities, as creations of the county, always act on behalf of

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[27] With respect to N.J.S.A. 40:37A-54(b) that had been consolidated with 54(a) until 1982, the Legislature expressly granted authorities the power to construct or improve facilities that they would in turn lease to governmental units or other public bodies that were authorized to operate such facilities as convention halls and related office facilities, parking facilities, etc. See L. 1981, c.460, §11(a). In accordance with this interpretation, Atlantic City Improvement Authority has never operated a convention hall that it has financed, but has rather leased such facilities to other public bodies, such as the New Jersey Sports and Exposition Authority, to operate. Information received pursuant to a phone conversation with George Boileau, Comptroller of Atlantic City Improvement Authority.

the county, their power to carry out county responsibilities under 54(a), in contrast to other purposes specified in N.J.S.A. 40:37A-54, must be limited to the county's powers.[28] Therefore, when exercising its authority to operate Bergen Pines, the Improvement Authority must step into the shoes of Bergen County. Under the circumstances, the Legislature has simply not authorized a different or larger pair.[29]

In this way, the Improvement Authority's power to sublease Bergen Pines is no greater that the County's power to lease the Hospital. It is a well-settled principal of law that tenants have no greater rights to possession of real property than their immediate landlord. See D'Agostino v. Sheppard, 102 N.J.L. 154 (E & A 1925). Anything that defeats the tenant's estate, such as nonperformance of the terms and conditions impressed upon the

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[28] *Amici* accept that the powers of an improvement authority, when furthering its public purposes under other subsections in N.J.S.A. 40:37A-54, may be greater than those of the county. However, the Legislature must expressly grant those greater powers and enact specific provisions that assure that the desired public purposes are achieved.

[29] See North Arlington Management v. City of Orange et al., Docket No. ESX-L-6507-97 (June 26, 1997) attached hereto as Ex. 4. In this decision, Judge Weiss approved the City's lease of its water supply system and franchise to operate such facility to Essex County Improvement Authority and the Authority's agreement with East Orange Water Board to act as the Authority's agent for purposes of operating the facility. To the extent that Judge Weiss interprets N.J.S.A. 40:37A-54(a) broadly to permit an improvement authority to lease an existing facility with no intention to improve it and to operate that facility, *Amici* disagree with his decision. However, it must be noted that East Orange Water Board is an entity that is authorized by statute to operate such facility for the City of Orange. Thus, the City is not improperly using Essex Improvement Authority as a vehicle to put the property into hands that are not expressly authorized to operate it.

estate, will defeat the subtenant's estate. See Xerox Corp. v. Listmark Computer Sys., 142 N.J.Super. 232 (App. Div. 1976)(tenant's bankruptcy represented breach of lease so subtenant's interest in premises also extinguished); Wehrle v. Landsman, 23 N.J.Super. 40 (Law Div. 1952)(tenant's failure to pay increase in taxes extinguished subtenant's right to possession).

In this case, the County is expressly prohibited from using Bergen Pines for nongovernmental purposes or leasing it to or on behalf of a for-profit entity. Accordingly, the Improvement Authority takes possession of the Hospital subject to this absolute restriction. See N.J.S.A. 40:37A-77(permitting county to impose "terms and conditions" on its lease to improvement authority). If the Improvement Authority were to use Bergen Pines for for-profit purposes, its right to possession would clearly be defeated. Similarly, the Authority's attempt to sublease the Hospital to a for-profit company represents a breach of the terms and conditions of its lease with the County, thus defeating Solomon's right to possession as well. The Solomon Sublease is thus null and void.

## III. THE COUNTY'S SUBLEASE OF BERGEN PINES TO SOLOMON HEALTH GROUP, THROUGH AN INTERMEDIARY PUBLIC BODY, IS AN IMPERMISSIBLE USE OF THE COUNTY IMPROVEMENT AUTHORITIES ACT

A review of the language and overall thrust of the County Improvement Authorities Act supports the conclusion that the Legislature intended that improvement authorities serve as a means through which to create new or improved facilities to further various public purposes. They were not intended to serve as

vehicles to privatize government facilities and services without specific authorization to do so.

It is generally accepted that a public body cannot accomplish indirectly what it is not authorized to do directly. See United States v. Barone, 781 F.Supp. 1072, 1078 (E.D.Pa. 1991) See also Burke v. Kenny, 6 N.J.Super. 524 (Law Div. 1949)(where the plain language of a statute imposes obligations on the county that cannot be circumvented by indirect action contrary to legislative intent). The more difficult question, and the one at issue here, is whether the Board of Freeholders' use of the Improvement Authority to effect its sublease to Solomon is a legal avoidance of the prescriptions of a statute -- the Local Land and Building Law -- or whether it is an impermissible evasion. Compare McCutcheon v. State Bldg. Auth., 13 N.J. 46, 57-58 (1953)(where the court found creation of State Building Authority an impermissible contrivance to avoid constitutional limitations on state debt), with Clayton v. Kervick, 52 N.J. 138, 150-4 (1968)(where the court upheld creation of Educational Facilities Authority because facilities were meant to pay their way from revenues unrelated to legislative appropriations --effectively overruling McCutcheon).

*Amici* contend that it is the latter. Even if each of the two steps involved in the transaction herein -- i.e., the County's lease to the Improvement Authority and the Authority's sublease to Solomon, -- literally fit within the language of the County Improvement Authorities Act, the result violates the intent and spirit of the Act and is thus in derogation of the public trust

doctrine and Art VIII, §3, ¶¶2,3 of the New Jersey Constitution. Cf. Gregory v. Helvering, 293 U.S. 465 (1935)(questioning whether corporate reorganization that satisfied every element required by the tax code provision was the type of transaction the statute intended).

In Gregory, the petitioner, who owned 100% of the stock in a corporation, sought to bring about a corporate reorganization for the sole purpose of procuring a transfer of these shares to herself without paying the amount of income tax that would result from a direct transfer. The Supreme Court, looking at the transaction as a whole, recognized that while a real valid corporate entity was created and was within the terms of the statute, it was in fact an "elaborate and devious form of conveyance masquerading as a corporate reorganization, and nothing else." Gregory, 293 U.S. at 470. See also Commissioner of Internal Revenue v. Court Holding Co., 324 U.S. 331, 334 (1945)(holding that a sale by one person cannot be transformed for tax purposes into a sale by another by using the latter as a conduit through which to pass title); United States v. Wexler, 31 F.3d 117, 122 (3d Cir. 1994)(where transaction has no substance rather than to create deductions it is disregarded for tax purposes); Strick Corp. v. United States, 714 F.2d 1194, 1206 (3d Cir. 1983)(operation of tax law is not to be frustrated by "forced adherence to mere form in which parties choose to reflect their transaction"); Weller v. Comm'rs of Internal Revenue 270 F.2d 294, 297 (3d Cir. 1959)(true nature of a transaction may not be

disguised by mere formalisms). An analysis of the transaction herein results in an analogous conclusion.

A review of the BCIA Lease, Solomon Sublease and the Improvement Authority's operating history indicate that the Authority is nothing more than a conduit for revenues to be received by Solomon and "rent" to be paid to the County and bondholders. This transaction is designed to keep the Hospital's operating license in the hands of a public entity while the Hospital is being used and operated by a for-profit entity and to bypass statutory prohibitions against for-profit use that are found in the Local Land and Building Law. The Improvement Authority in this case is neither providing a facility to Bergen County -- it is only assuming the outstanding debt -- nor is it providing a service to the County -- it is disposing of the facility to a private party that is not expressly authorized to operate a public hospital.

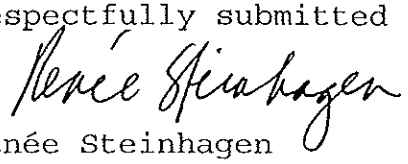
The Legislature created improvement authorities, and authorities in general, to further public purposes in accordance with statutory provisions enacted to ensure that the desired public ends were accomplished. Roe v. Kervich, 42 N.J. 191, 217 (1964)(holding that "so long as the means are restricted to the public end by the legislation and contractual obligation" a statute that expressly authorized government loans to finance private for-profit redevelopment was constitutional under N.J. CONST. of 1947, Art. VIII, §3, ¶¶2,3). Because specific legislative enactments regarding the operation of a public hospital by a for-profit entity are lacking either in the Improvement Authority's enabling statute

or elsewhere, the transaction herein violates the public trust doctrine and Art. VIII, §3, ¶¶2,3 of the New Jersey Constitution. To find otherwise would be to sanction the use of improvement authorities as vehicles to privatize all public facilities and functions including prisons, municipal police departments, the judicial system, etc., without express legislative authorization.

**CONCLUSION**

For all the reasons set forth above *Amici Curiae* the Public Interest Law Center of New Jersey, Inc., the New Jersey Public Health Association, Citizens for Public Health, New Jersey Citizen Action and the Gray Panthers of Northern New Jersey contend that the decision below must be reversed.

Respectfully submitted



Renée Steinhagen
PUBLIC INTEREST LAW CENTER
OF NEW JERSEY, INC.
Attorney for *Amici*

Dated: May 18, 1998

| MEMBERS | AYE | NAY | NOT VOTING | ABSENT |
|---|---|---|---|---|
| DiPirro, E. | | | | X |
| MARSHALL, R. | | | | X |
| Mueller, N. | X | | | |
| Steuert, J. | X | | | |
| WOLFE, A. | X | | | |
| TOTALS | 3 | 0 | 0 | 2 |

Offered by: _____

Seconded by: _____

Approved by: _____

Date 12/1/97

Subject: Page # 1 of 2

Proposed Financing; Re; Repositioning of Bergen Pines County Hospital

Purpose:

Selection of Underwriters

Account No. _____

Contract No. _____

Dollar Amount: _____

RESOLUTION

WHEREAS, the Bergen County Improvement Authority is about to undertake a financing to issue taxable debt to replace bonds issued by the County of Bergen in conjunction with its ownership of the Bergen Pines County Hospital; and,

WHEREAS, there exists a need for the services of an underwriter(s) for the bonds to be issued by the Authority in connection with such project; and,

WHEREAS, statements of qualifications were solicited from four firms; and,

WHEREAS, responses were received from four firms and analyzed by the Authority's Financial Advisor in correspondence dated November 24, 1997; and,

WHEREAS, the qualification, experience and financial capabilities of such firms were reviewed by staff; and,

WHEREAS, the firms of First Union, Shattuck Hammond and Smith Barney were determined to have the requisite expertise and experience necessary to best address the needs of the Authority in conjunction with such issue;

NOW, THEREFORE, be it resolved by the Commissioners of the Bergen County Improvement Authority that First Union, Shattuck Hammond and Smith Barney are hereby appointed to serve as co-underwriters for the Authority's bond issue pursuant to terms and conditions to be negotiated and as shall be more fully set forth in an agreement of sale to be entered into between the parties, said services having been procured as an Extraordinary Unspecifiable Service.

I hereby certify the above to be a true copy of a

resolution adopted by the Bergen County Improvement Authority on this date.

Nancy C. Macedo
Interim Executive Director

Dated: December 1, 1997

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
BERGEN COUNTY
DOCKET NO. L-11895-97
APP. DIV. NO. _____

HEALTH PROFESSIONALS ALLIED EMPLOYEES OF NEW JERSEY, AFL-CIO, et al,
Plaintiff,

vs.

COUNTY OF BERGEN BOARD OF FREEHOLDERS, et al,
Defendant.

TRANSCRIPT
of
MOTION

Place: Bergen County
Justice Center
10 Main Street
Hackensack, NJ 07601

Date: February 20, 1998

BEFORE:

HONORABLE JONATHAN N. HARRIS, J.S.C.

TRANSCRIPT ORDERED BY:

LOCCKE & CORREIA (24 Salem Street, Hackensack, New Jersey 07601)

Transcriber Lyn Dion
ELITE TRANSCRIPTS, INC.
28 Catherine Street
Bloomingdale, NJ 07403
(973) 283-0196
Audio Recorded
Recording Operator, _____

improvement authority law. One of its purposes is the provision within the county -- I'm skipping words -- a public facility for the use by the county for any of should be -- says "their," it should be the county's governmental purposes. And the governmental purpose of the county is the hospital and the improvement authority is, by that provision, empowered to carry out that purpose for the county.

THE COURT: So what you're saying is this legalese gibberish means that anything the county can do the improvement authority can do?

MR. COLE: Basically that's correct, Judge.

THE COURT: If that's correct, and I'm not suggesting that it's not, why bother with B, C, D, E, F, G, H, I, J, K, and L?

MR. COLE: As I --

THE COURT: Can't the county do all of those things too?

MR. COLE: I would think they can, Judge, but the Legislature, by enumerating powers, specifically said they were not limiting other powers. They have a general provision, they have some enumerations. If you go to Section 134 --

THE COURT: Yeah, but when was 134 adopted? That wasn't adopted until 1979 as part of the low



income housing provision.

MR. COLE: But it's still adopted and it still reflects the legislative judgment of specific enumeration power --

THE COURT: Well, let's take --

MR. COLE: -- isn't meant to limit --

THE COURT: Let's take a look at that. I remember that argument from the brief, but then when I read it it says the powers enumerated in this act. This act is not the whole county improvement authorities act. That's just the act that was adopted, Chapter 275 of the laws of 1979.

MR. COLE: No, I think, Judge, you have to read those statutes as cognated statutes. They both deal with the same subject. They're both to be read together. And when you read them you have -- you can't read them as two separate acts.

THE COURT: Well, I have to --

MR. COLE: You have --

THE COURT: -- read them sensibly. If the Legislature -- the Legislature created the County Improvement Authorities act in 1960, or thereabouts, effective '61. 19 years later it adopts specific provision allowing a county improvement authority to engage in various facilitation of low and moderate



income housing and adopts Section 29 of Chapter 275 of the laws of 1979, which is a broad construction of powers.

Prior thereto there was no such broad construction of powers in the overall act, and what you're saying is you want me now to read this, which is limited to the act that was adopted by the Legislature in 1979, as more expansive than what the language says.

MR. COLE: Judge, this had not been raised as an issue; otherwise, I would have come with case law. This is not unlike the situation with the North Jersey District water supply, where you have an initial enabling act in the early 1900s and then a separate statute some 40, 50 years later.

THE COURT: Well, I'm not -- I agree, the issue isn't raised. But I'm in no rush to get this case done. I want to get it done right. I mean, I'll ask for further briefs if you think you're being mouse trapped here. It's not my intention.

MR. COLE: There is a case on North Jersey, an Appellate Division case, that I don't have the cite with me, but it's a case where the same argument was basically raised, that you have to treat these as two separate statues, and not anything said in the second statute shouldn't apply to the powers of the first.



And the Court said no, they both deal with the same subject matter, in that case it's the provision of water supply, and they both are towards that end, and we're going to read them as cognated statutes and we're going to read them together.

THE COURT: I think that's taking a rather bold leap. If we start with the proposition, as Mr. Glynn did and you've taken up, that the Legislature, in 40:37A-55(a), says the powers of the authority are co-extensive with the county, it seems to me that everything else is just gratuitous surplusage.

MR. COLE: Well, that would say you don't need that liberal construction language.

THE COURT: But what it says is maybe your broad, expansive reading of Paragraph A is wrong.

MR. COLE: Well, Judge, if you break A down into its component parts, and that's how we have to read the statute, it says the purposes of the authority are the provision within the county of public facilities, and there's a definition of public facilities in the early part --

THE COURT: Right. It's in, I think, 44 or 45.

MR. COLE: 45, I think. 45.

THE COURT: 45-P.

MR. COLE: There's a definition of public facilities, which --

THE COURT: It's circular, because it says a public facility will facilitate the purposes of the authority, so it brings us right back to this statute.

MR. COLE: But a public facility, for use by the county --

THE COURT: Okay.

MR. COLE: -- that's Bergen Pines. The county is providing a hospital through the improvement authority, for any of the foregoing county government purposes. And the government purpose of the county is to provide a hospital. So that's what it says.

THE COURT: Well, is that -- see, here's where I'm getting confused, and maybe I'm either reading or understanding the briefs too literally or I'm not understanding the subtleties.

If this were governed by the local land and buildings law, and I understand the differences of opinion on that, are you saying that this facility would still be needed for public use?

MR. COLE: Absolutely.

THE COURT: Okay.

MR. COLE: And I think both sides -- I think plaintiffs concede that this facility is being put to a



public use.

THE COURT: Okay.

MR. COLE: I don't think there's any question about that.

THE COURT: All right.

MS. STEINHAGEN: Your Honor.

THE COURT: Just hold one minute. What do I make, if I make anything, of the whereas clause in the lease that makes reference to the local land and building law, 48:12-14(b)?

MR. COLE: Judge, I think that's there just by way of analogy. They've cited that, and I think that actually mis-cited it. If you look at that clause, it appears on Page 3 of the lease and agreement between the county and the improvement authority. If you look two whereas clauses above it, it says, "pursuant to the terms of the act, the BCIA may enter into agreements to lease as lessee public facilities," and it goes on.

Now the act is defined as the improvement authority statute, at Page 4, and also --

THE COURT: I see it.

MR. COLE: -- at Page 1.

THE COURT: Right at the top.

MR. COLE: At Page 1 of the lease as well.



In the first whereas clause, the improvement authority cites the act.

Now in the clause following that it says, "Whereas, pursuant to the terms of the act, the county may, by resolution, without referendum or public or competitive bidding, sell, lease," et cetera, to the improvement authority. Then there's another whereas clause, which I think is just meant to say that, you know, by analogy, under the local land and buildings act, they could have done it this other way. But it's not the authority under which they purported to act, and it never has been. And they know that. That's clear just from a reading of the document.

THE COURT: Who knows that?

MR. COLE: Plaintiffs. It's clear from the reading of the document. All they've done is take one provision totally out of context and tried to structure this argument from that one provision. That's not what the parties intended. They always intended this transaction to be done pursuant to the improvement authority law, and the specific provisions of that law. And 77 is the provision -- Section 77 is the provision that allows them -- allows the county to lease property to the improvement authority.

THE COURT: Just so I understand the



argument, is it your position, as Mr. Glynn's client's position, as far as you understand it, that N.J.S.A. 40:37A-54(a) permits the Bergen County Improvement Authority -- this is going to maybe be an overstatement -- to do anything that the county, as a body politic, could do?

MR. COLE: I'm just going to give you one caveat only because I don't know the universe.

If there's a caveat in a specific statute that says only the county can run a prison and not an authority, that aside, yes. Unless there's a specific prohibition in another statute saying you can't do that, yes.

MR. HIRSCHHORN: Your Honor, if I may, James Hirschhorn for Solomon Group.

I think Your Honor has stated it slightly broadly, and --

THE COURT: Well, counsel, I apologize for interrupting. I don't think Solomon is going to get to say too much in this case. You haven't supplied any paperwork, I don't know what it's position -- other than it's writing piggyback on somebody else. So, I mean, a lot of these issues may be new, but I'm going to rely upon people that have submitted some papers and given it some thought and provide their thought to me.

State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
RICHARD J. HUGHES JUSTICE COMPLEX
CN 112
TRENTON 08625

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ASSISTANT ATTORNEY GENERAL
DIRECTOR

(609) 292-4965

November 15, 1988

Barry Skokowski, Chairman
Local Finance Board
Department of Community Affairs
South Broad and Market Streets
Trenton, New Jersey 08625

Re: M88-0119-Financing Of A Municipal Self-Insurance Fund By A County Improvement Authority.

Dear Mr. Skokowski:

You have requested advice regarding a proposed project financing which the Essex County Improvement Authority (the "Authority") has submitted to the Local Finance Board for review pursuant to N.J.S.A. 40A:5A-6, 7 and 8 of the Local Authorities Fiscal Control Law. More specifically, you have inquired as to whether the Authority and the Township of Bloomfield (the "Township"), which is an essential party to the proposed financing, are statutorily authorized to undertake the transaction which is the subject of the Authority's application. For the reasons set forth herein, you are advised that the transaction would exceed the statutory authority of the Authority under the County Improvement Authorities Law, N.J.S.A. 40:37A-45 et seq. However, you are also advised that a variety of other means exist through which a municipality, such as the Township, may provide for and finance insurance protection including, under certain circumstances, the issuance of municipal debt for this purpose.

The Authority's application to the Local Finance Board concerns a proposed Authority bond issue in the amount of $3.3 million. After deducting the Authority's issuance costs, the Authority proposes to use the remaining proceeds from the bond issue to purchase a building presently utilized by the Township to house its police department. Upon receipt of the monies realized by the sale of its police building, the Township would deposit such monies in a municipal self-insurance fund which the Township has previously established pursuant to N.J.S.A. 40A:10-6 et seq.

At the same time, the Township would enter into a lease/purchase agreement with the Authority under which it would lease back the police building conveyed to the Authority. The lease/purchase arrangement would extend for 20 years and would provide the Township with an option to purchase the building at the end of the lease term. Further, the Township would covenant to make whatever annual appropriations were necessary to meet its rental obligations under the proposed lease/purchase agreement. The Township's obligation in this regard is described in Section 5.3 of the agreement as "absolute and unconditional" and the application submitted by the Authority to the Local Finance Board states that the "lease payments of Bloomfield will be general obligation rental payments secured by the ad valorem taxing power of Bloomfield." Additionally, Section 12.3 of the agreement provides that the Township's obligation to make annual rental payments would survive the termination of the agreement.

Moreover, since the Township presently has debt outstanding which it had previously issued to finance the construction of the police building, the proposed lease/purchase agreement would provide that the Authority would assume the responsibility for retiring such debt. However, Section 2.1(h) of the lease explicitly states that the Authority's obligation to meet the debt service requirements on this debt would be limited to the Authority's receipt of annual rental payments from the Township. Such payments are to be sized so as to cover not only the annual debt service on the bonds to be issued by the Authority but also an amount sufficient to meet the debt service requirements on the debt previously issued by the Township to finance the construction of its police building. This amount is described in the agreement as the "Facility Debt Service Component" of the Township's annual "Rental Payments."

In considering the proposed transaction, the first question which must be addressed is whether it constitutes a legitimate statutory purpose of a county improvement authority under N.J.S.A. 40:37A-54 and, more specifically, whether it constitutes the provision of a public facility under N.J.S.A. 40:37A-54(a). The Authority has been created by Essex County. N.J.S.A. 40:37A-46. As such, it is, like the County which created it, a creature of the State which may only possess and exercise such powers as have been vested in it by the Legislature. Clark v. Degnan, 83 N.J. 393, 400 (1980); Bergen Cty. v. Port of N.Y. Auth., 32 N.J. 303, 312-313 (1960). Accordingly, the question which must be considered is whether the Legislature, in enacting and subsequently amending the County Improvement Authorities Law, intended to confer upon county improvement authorities the authority to undertake the type of transaction contemplated here.

In construing a statute, the fundamental inquiry must be to ascertain the underlying legislative intent. State v. Provenzano, 34 N.J. 318, 322 (1961); State v. Grant, 196 N.J. Super. 470, 480-481 (App. Div. 1984). In undertaking such an

inquiry, the sense of the law is to be gathered from its object, the nature of its subject matter, its contextual setting, the history of the legislation and other statutes related to the same subject matter. State v. McCarthy, 123 N.J. Super. 513, 521 (App. Div. 1973). In turn, the particular words of a statute must be made responsive to the reason and spirit of the overall legislative scheme. Sperry & Hutchinson v. Margetts, 15 N.J. 203, 209 (1954). A review of both the specific language and the overall thrust of the County Improvement Authorities Law supports the conclusion that the Legislature did not intend to extend to such authorities the power to undertake transactions of the type at issue here. Rather, consideration of the Law as a whole indicates a legislative intent that county improvement authorities serve as a means through which to create new or improved facilities to further various public purposes. See N.J.S.A. 40:37A-54. There is no indication that the Legislature intended to permit such authorities to engage in the activity of purchasing and then leasing back existing municipal buildings for the sole purpose of generating additional revenues for municipalities.

The Authority has urged that the proposed transaction falls within the scope of N.J.S.A. 40:37A-54(a) either because it results in the provision of a public facility in the form of a municipal police building to the Township or because it results in the provision of a municipal self-insurance fund which also would constitute a "public facility" for the purposes of N.J.S.A. 40:37A-54(a). Putting aside for the moment the question of whether a municipal self-insurance fund could constitute a "public facility" under N.J.S.A. 40:37A-54(a), it is clear that the proposed transaction will not result in the provision of a new or improved police building for the Township. Rather, the transaction will merely entail the sale and simultaneous lease back of a building which the Township already owns and utilizes and for which it has already incurred debt.

In considering the Legislature's use of the term "provision" in N.J.S.A. 40:37A-54(a), it is evident that the Legislature intended that county improvement authorities were to engage in the creation of new or improved public facilities rather than the mere purchase and lease back of existing facilities without any improvement being made thereto. In looking to the plain and ordinary meaning of the term "provision", Kingsley v. Hawthorne Fabrics, 41 N.J. 521, 526 (1964), we find that it is commonly understood as "an arrangement beforehand that provides for or against something". Random House College Dictionary (Rev. Ed.). The term "provide", in turn, means "to furnish, supply or equip." Random House College Dictionary (Rev. Ed.). A transaction which does not result in a county improvement authority furnishing or supplying a municipality with anything which the municipality does not already possess and use would accordingly not fall within the contemplated authority of a county improvement authority under N.J.S.A. 40:37A-54(a).

Further, this conclusion is supported by reference to other provisions of the Law. N.J.S.A. 40:37A-56 requires that, whenever, after investigation and study, a county improvement authority plans to undertake any public facility it is empowered to provide, it must first obtain the approval of the County's governing body. In seeking such approval, N.J.S.A. 40:37A-56 requires that the authority furnish the county's governing body with a detailed report of the "proposed public facility or facilities". The specific language of N.J.S.A. 40:37A-56 regarding a "proposed public facility" which a county improvement authority may "plan" to undertake "after investigation and study" imports a legislative intent that county improvement authorities engage in the provision of new or improved facilities which did not previously exist and which would accordingly warrant investigation and study prior to being undertaken. Since the proposed transaction does not result in the "provision" of a new or improved police facility for the Township, but rather is being undertaken solely to generate a sizeable amount of money for deposit in the municipality's self-insurance fund, it is evident that the transaction cannot reasonably be viewed as resulting in the provision of a public facility -- a police building -- pursuant to the statutory authority vested in the Authority under N.J.S.A. 40:37A-54(a).

The Authority has also suggested that the municipal self-insurance fund itself may properly be considered as a "public facility" which it is authorized to provide to the Township under N.J.S.A. 40:37A-54(a). However, construction of N.J.S.A. 40:37A-54(a) in this manner would clearly be inconsistent with the other provisions of the County Improvement Authority Law. The term "public facility", as defined in N.J.S.A. 40:37A-45(p), includes "any lands, structures, franchises, equipment or other property or facilities acquired, constructed, owned, financed or leased by the Authority or any other governmental unit". While the Legislature's substitution of the term "facilities" for the term "buildings" in N.J.S.A. 40:37A-54(a) in 1981, see L. 1982, c. 113, indicates an intent that the term "facilities" would encompass a broader category of objects than had the term "buildings", this amendment nevertheless does not warrant the conclusion that the Legislature intended to permit county improvement authorities to engage in any activity which might assist a municipality in carrying out any of its various responsibilities. Rather, the evident intent in using the term "facilities" in N.J.S.A. 40:37A-54(a) was to permit such authorities to undertake the provision of lands, equipment and structures which would not readily fall within the plain meaning of the term "buildings". Moreover, consistent with the principle of ejusdem generis, Denbo v. Moorestown Twp., 23 N.J. 476, 481-482 (1957), general words, such as "other property and facilities", which follow specifically named things of a particular class must be understood as being limited to things of the same class or at least of the same general character. Accordingly, to the extent that the term "public facility" is defined in N.J.S.A. 40:37A-45(p) to include "other property or facilities", the words

"other property or facilities" are limited by the more specific words which precede them.*

Further, a review of the other provisions in N.J.S.A. 40:37A-54 also supports the conclusion that the term "facilities", while intended to have a broader meaning than the term "buildings", is not intended to extend to the establishment of any fund or funds which municipalities might find it necessary or convenient to establish. In setting forth the various purposes of county improvement authorities, the other provisions of N.J.S.A. 40:37A-54 refer to facilities such as "office facilities, commercial facilities, community service facilities, parking facilities, hotel facilities and other facilities for the accommodation and entertainment of tourists and visitors", N.J.S.A. 40:37A-54(b); "structures, franchises, equipment and facilities for the operation of public transportation or for terminal purposes", N.J.S.A. 40:37A-54(c); and "structures or other facilities used or operated...in connection with...development and improvement of, aviation for military or civilian purposes", N.J.S.A. 40:37A-54(d). As noted above, the meaning of a particular statutory term must be gleaned from the statutory context in which it is found. Sperry and Hutchinson Co. v. Margetts, 15 N.J. at 209; State v. McCarthy, 123 N.J. Super. at 521. The language in N.J.S.A. 40:37A-54 clearly contemplates the provision of physical structures and equipment, as opposed to incorporeal forms of property, and accordingly serves to further elucidate the meaning of the term "public facilities" in N.J.S.A. 40:37A-54(a).

While we have concluded that the transaction proposed by the Essex County Improvement Authority would exceed its statutory powers under the County Improvement Authority Law, it should be noted that there remain a variety of means through which the Township can provide itself with insurance protection. These alternatives include: the purchase of commercial insurance coverage pursuant to N.J.S.A. 40A:10-3 et seq.; the establishment of a municipal self-insurance fund pursuant to N.J.S.A. 40A:10-6 et seq.; the use of such a fund for basic coverage in combination with the purchase of commercial coverage to meet catastrophic losses

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*To the extent that N.J.S.A. 40:37A-54(c) refers to the provision of "...franchises..." within a county, this reference does not alter our conclusion that the Legislature intended county improvement authorities to engage in the provision of physical structures and properties rather than incorporeal assets. The term "franchise" is employed in N.J.S.A. 40:37A-54(c) in conjunction with the provision of public transportation facilities. Since the acquisition of a "franchise" may be a prerequisite to the operation of a public transportation facility, the reference to such "franchises" was intended to make clear the authority of county improvement authorities to obtain such a "franchise" where necessary to carry out its authorized purposes, i.e., the provision of public transportation systems.

over a certain amount; and participation in a municipal joint insurance fund established pursuant to N.J.S.A. 40A:10-36 et seq. Moreover, in financing a municipal self-insurance fund established pursuant to N.J.S.A. 40A:10-6 et seq., a municipality can do so not only through appropriations in its annual budget but also, under certain circumstances, through the issuance of debt pursuant to its statutory authority under N.J.S.A. 40A:10-6 et seq. and in accordance with requirements of the Local Bond Law. N.J.S.A. 40A:2-1 et seq.

Under the Local Bond Law, a municipality may, through adoption of a bond ordinance, issue debt for any capital improvement or property which it may lawfully make or acquire, or for any other purpose for which a municipality is authorized by law to make an appropriation, provided that the purpose does not constitute a current expense and provided further that the purpose has a period of usefulness of not less than five years. N.J.S.A. 40A:2-3; N.J.S.A. 40A:2-21. Further, in authorizing municipalities to establish municipal self-insurance funds, the Legislature has specifically authorized municipal governing bodies to appropriate such monies as are necessary for that purpose.

Thus, certain appropriations made to finance the operations of a municipal self-insurance fund would clearly relate to current expenses, e.g. monies appropriated to enable such a fund to pay annual premiums for commercial insurance coverage which the fund maintains in accordance with N.J.S.A. 40A:10-10(e). On the other hand, appropriations made to support the operations of a municipal self-insurance fund which would have a period of usefulness of at least five years could be funded through the issuance of debt. In this regard, a review of N.J.S.A. 40A:10-6 indicates that the Legislature intended that municipalities would be able to establish and maintain funds which would be capable not merely of meeting insurance claims arising in an individual budget year but over a period of several years. It specifically provided that a governing body of a municipality could prescribe the maximum or minimum amount of such a fund, provide for the investment of monies contained therein, and provide for the disposition of any interest or profits generated through the investment of such monies. N.J.S.A. 40A:10-7; N.J.S.A. 40A:10-10. In turn, to the extent that the Legislature authorized municipalities to appropriate monies for this purpose, it would be reasonable to conclude that the Legislature intended that such appropriations could be made through the issuance of debt so long as the fund being financed through the issuance of such debt met the requirements of N.J.S.A. 40A:2-21, regarding a minimum period of usefulness, as well as the other requirements of the Local Bond Law.

Accordingly, a municipality could, as part of its overall insurance protection program, determine to establish a self-insurance fund capable of meeting insurance claims which would arise not only in the present budget period but in future budget years. We would expect that, in establishing such a fund, the municipality

would consult with an actuary as to the size and type of the fund which it should establish for this purpose so as to provide adequate insurance protection over the desired period of time. Upon receipt of such advice, the municipality's governing body could, in the exercise of the discretion it exercises pursuant to N.J.S.A. 40A:2-22, determine that the reasonable life of such a fund would be at least five years. Under such circumstances, the appropriation made by the municipality for the purpose of establishing such a fund would not constitute a current expense for the purposes of N.J.S.A. 40A:2-3 in that it would satisfy the requirements of N.J.S.A. 40A:2-21 regarding a minimum period of usefulness of five years and could accordingly be made pursuant to the adoption of a bond ordinance.

In conclusion, for the foregoing reasons, you are advised that the transaction proposed by the Essex County Improvement Authority would exceed its statutory powers under the County Improvement Authority Law. However, you are also advised that various other means exist by which a municipality may provide for and finance insurance protection including, under certain circumstances, the issuance of municipal debt for this purpose.

Very truly yours,

CARY EDWARDS
Attorney General of New Jersey

By: Deborah T. Poritz
Deborah T. Poritz
Assistant Attorney General
Director, Division of Law

DTP/smb

LAW DIVISION, CIVIL PART
ESSEX COUNTY
DOCKET NO. ESX-L-6507-97
APPELLATE DOCKET NO. _____

NORTH ARLINGTON MANAGEMENT,

Plaintiff,

vs.

CITY OF ORANGE, et al,

Defendant,

TRANSCRIPT

OF

ORDER TO SHOW CAUSE HEARING

Place: Essex County Courthouse
470 Martin Luther King Blvd.
Newark, New Jersey 07102

Date: June 26, 1997

BEFORE:

HONORABLE ALVIN WEISS, J.S.C.

TRANSCRIPT ORDERED BY:

PAUL S. DOHERTY, ESQ., (Crummy, Del Deo, Dolan, Griffinger & Vecchione)

APPEARANCES:

RICHARD MATANLE, ESQ., (Carella, Byrne, Bain, GCS&O)
Attorney for the Plaintiff

THOMAS N. LYONS, ESQ., (Crummy, Del Deo, Dolan, G&V)
MICHAEL R. GRIFFINGER, ESQ., (Crummy, Del Deo, Dolan, G&V)
PAUL S. DOHERTY, ESQ., (Crummy, Del Deo, Dolan, G&V)
Attorney for the Defendant, (Co-counsel City of Orange)

JONATHAN WILLIAMS, ESQ., (DeCotiis, Fitzpatrick & Gluck)
Attorney for the Defendant, (Essex County Improvement)

MR. MATANLE: Your Honor, that's clear.

THE COURT: Okay. Thank you very much. This matter is before the Court on the return of an order to show cause as to why the complaint -- the amended complaint should not be dismissed.

The issue that, and I think the crux of this case is whether or not the Essex County Improvement Authority under N.J.S.A. 40:37A-54 has within its purposes the right to carry out the transaction between Orange for the purchase of its water supply system and the event -- and the subsequent agreement with the East Orange Water Board. N.J.S.A. 40:37A-54 provides, "The purposes of every authority shall be;

A) Provision within the county of public facilities for use by any municipality in the county or any two of any of the foregoing." I've eliminated the language which doesn't apply.

The position of the ECIA and the defendant, City of Orange, is that under that provision the supplying of water is a governmental purpose. The water supply is a public facility, and that this language is broad enough to allow the Essex County Improvement Authority to issue bonds in connection with the acquisition and subsequent operation of the East Orange Water -- the Orange Water Supply System.

Plaintiffs in essence urge that the enactment of other legislation by the legislature, specifically, N.J.S.A.

58:26-1

50A:27-1, which is the act which permits privatisation of water supply systems, the N.J.S.A. 40A:31-1, the County and Municipal Water Supply Act, and N.J.S.A. 40:14B-2, the Municipal and County Utilities Authorities Law, are the only roots which can be followed in connection with the supplying of water.

I have read all of those statutes and I find nothing in any of those statutes which seems to preempt the improvement -- the County Improvement Authority Act, and which limits the supplying of water to one of the methods provided under any of those statutes. The legislature, as indicated in other opinions by the Supreme Court, when it wants to limit something it knows how to do it. Here the legislature was fully cognizant of the fact that the County Improvement Act was on the books when it adopted these statutes subsequent to the adoption of the County Improvement Act. The County Improve -- this Court is not at all concerned with or does not deal with the wisdom of the activities of the Essex County Improvement Authority. And as indicated by the plaintiff in its brief there's a question of whether or not this is not being used as a subterfuge in a way to satisfy a budgetary problem with the City of Orange. That is beyond the Court's jurisdiction. The wisdom of what's being done is not for me to comment upon. I find that the Authority -- the Essex County Improvement Authority does have as one of its purposes

the right to purchase the Orange Water Supply System and to enter into the operating agreement. I do not find that the other statute cited by the plaintiff in its papers in any way preempt or limit the Improvement Authority or the City of Orange from engaging in this transaction. There is N.J.S.A. 40:37A-77 which permits the Authority to acquire from counties or municipalities real and personal property of the facil -- or -- and operates as -- as part of any public facility real or personal property of a county or municipality. N.J.S.A. 40:37A-90 states that the act shall be construed liberally to effectuate the legislative intent, and as complete and independent authority for the performance of each and every act and thing herein authorized. In the absence of any specific limitations contained in the statute by the legislature or any decision by any higher court that would in any way impinge upon the authority I do find that the Authority has the right to enter into this transaction and will grant the relief requested by the defendant and dismiss the complaint. I will sign the order submitted.

MR. MATANLE: Your Honor, I have an order that I --

THE COURT: You have the order here? All right, thank you, may I have the order? Show it to counsel for plaintiff please.

MR. MATANLE: Your Honor, there is a provision in the order dealing with the Entire Controversy Doctrine. Just

to make sure, Your Honor, that should there have been any -- should there be any loses which we incur which are not yet incurred we'd like those preserved by the delay in this proceeding. We don't know whether there's any losses or any claims. We just want to make sure --

THE COURT: Oh, well, let me deal with that for a moment. I do reject the defendant's arguments that the statute, the 20 day statute, 40:37A --

MR. MATANLE: 62, I believe, Your Honor.

THE COURT: -- 62, is applicable to this case. This is an attack upon the adoption of the operating agreement which was done by separate authorities, a separate resolution of the parties involved. I do not believe that this is within -- comes within the meaning of, what is it, conveyance or agreements covered by the bond resolution. All right, go ahead, Mr. Lyons?

MR. LYONS: I was just saying, Your Honor, that we have put in the second order paragraph, in the event that there is a cause of action which accrues later because of the delay we would want to preserve that. We don't know that we have one right now, but given the difficulties of trying to see what the contours of the Entire Controversy Doctrine will take in the future we wanted to preserve those on the record.

MR. MATANLE: Your Honor, I take the position that if the reference to that is with respect to delay that there

hasn't been any appreciable delay. The suit was commenced timely, the defendants moved this proceeding along on a summary basis, and I would object to that provision in the order.

MR. LYONS: Your Honor, we're not asking for a ruling on the merits, just to preserve a claim if one exists.

THE COURT: You didn't file an answer or a counterclaim did you? You had a perfect right to.

MR. LYONS: No, Your Honor.

THE COURT: Why should I preserve it? I'm going to strike that clause. I'm not ruling that it's barred by the Entire Controversy or not barred. I don't think it's appropriate in here. If you wait a moment we'll get this filed for you and I'll give you copies.

MR. LYONS: Your Honor, I have extra copies if it saves the Court time.

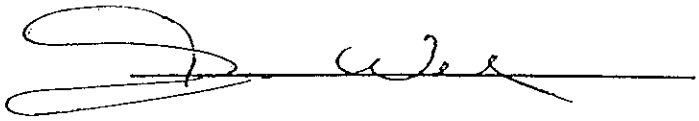
THE COURT: No, we'll Xerox, it's easier.

MR. LYONS: Thank you. Richard, thank you.

* * *

CERTIFICATION

I, Donna Weber, the assigned transcriber, do hereby certify that the foregoing transcript of proceedings in the Superior Court of Essex County on June 26, 1997, Tape No. 1, Index No. from 0030 to 3065, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings recorded.



DONNA WEBER A.O.C. #390

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