New Jersey
Appleseed

June 18, 2014

Mark Neary
Clerk, Supreme Court of New Jersey
25 W, Market Street
8th Floor
Trenton, New Jersey 08625

Re: Redd et al. v. Bowman, et al.
Docket No. 73567; A-005731-11T4

Honorable Justices of the Supreme Court and Mr. Neary:

Proposed amicus curiae, New Jersey Appleseed Public Interest Law Center ("NJ Appleseed"), respectfully submits this letter brief in support of its argument that the Appellate Division decision in the aforementioned matter should be affirmed, but for different reasons than stated therein.

This case raises the question of whether the right of initiative and referendum in a Faulkner Act municipality, such as the City of Camden, is effectively coterminous in scope with the legislative authority of the municipality, unless the State Legislature explicitly withdraws that right from the people. NJ Appleseed posits that the answer to that question is a

New Jersey Appleseed
Public Interest Law Center of New Jersey
744 Broad Street, Suite 1525
Newark, New Jersey 07102

Phone: 973.735.0523 Fax: 973-710-4653
Email: steinhagen_pilc@yahoo.com
Website: www.njappleseed.net

resounding yes, and for that reason the Appellate Division decision should be affirmed.

Specifically, NJ Appleseed asserts that the common law principle prohibiting a governing body, absent specific legislative permission, from "divesting" its successors of legislative powers is limited to the inability of one city council from creating enforceable obligations on a future city council that effectively tie, inhibit or preclude a successor's authority to revise its policy choices and determine its own fiscal fate. In one sense, any law or ordinance "binds" or "restrains" future legislators or municipal councils, respectively. That is, unless the enactment is one of those rare creatures that has a self-executing "sunset" provision, an enactment stays in effect until amended or repealed. However, it is only those ordinances that divest a successor governing body of discretion (with respect to its governmental, as opposed to any proprietary, functions), either by making it impossible or more burdensome for subsequent councils to amend or repeal the ordinance, or by conferring private contractual rights that would withstand repeal, which constitute an improper restraint or an undue burden on future action.

The bottom line is that one governing body cannot set tax rates, assess fees, commit to specific budget appropriations, or enter into contracts that impose **binding** financial constraints

on future legislators beyond one-year that are not authorized by state statute. Because the Camden Police Ordinance (Da445-456) at issue in this case does not do so, but rather represents nothing more than a policy choice on a local matter, which though long-term in effect does not divest future councils of their right to revise it (except for the three years where the power of revision rests with the voters), the Initiative Ordinance is a valid exercise of municipal authority; and is thus a proper subject of initiative and referendum.

NJ Appleseed does not take a position as to whether the Appellate Division correctly remanded the matter to the trial court to do additional fact-finding in order to determine whether the proposed ordinance is pre-empted by the Municipal Rehabilitation and Economic Recovery Act, N.J.S.A. 52:27BBB-1 to -75 (MRERA), and the Special Municipal Aid Act, N.J.S.A. 52:27D-118.24 to -118.31 (SMAA). We only note if such laws do not pre-empt a mayor's and council's legislative authority to establish and maintain a police department or provide for other local services, they similarly do not pre-empt the citizen's legislative authority to do so by an initiative petition. The only exception to such a rule would be if the operative statute expressly withdraws such right from the people.

TABLE OF CONTENTS

INTEREST OF THE AMICUS

New Jersey Appleseed Public Interest Law Center ("NJ Appleseed") is a non-profit, non-partisan organization whose mission includes advocacy for election process reform and governmental accountability. To that end, NJ Appleseed has engaged in litigation, legislative, and policy activity in support of fair election procedures, and liberal implementation of New Jersey's local initiative and referendum laws.

Specifically, over the years, NJ Appleseed has worked with several community organizations who have decided to hold their local governments accountable by circulating an initiative or referendum petition. Ordinances have varied from initiatives to support anti pay-to-play reforms (*i.e.*, limitations on the award of government contractors to certain political contributors), maintain rent control, change the form of government, establish a municipal legal department, re-name a street, and most recently, return municipal water treatment and supply functions

to Newark back from a nonprofit corporation that the citizens determined had gone rogue.

NJ Appleseed has also represented some of those community groups in defending their petitions when faced with court challenges attempting to prevent the citizens from exercising their legislative role by keeping the relevant referendum questions off the ballot. Specifically, it has been involved as counsel in Tumpson v. Farina, 431 N.J. Super. 164 (App. Div. 2013), certif. granted, 216 N.J. 4 (2013), where NJ Appleseed raised the question of whether the municipality wrongfully rejected the petition by refusing to process the petition as filed. In POG v. Roberts, 397 N.J. Super. 502 (App. Div. 2008), NJ Appleseed represented the plaintiffs, who were denied standing to enforce the very anti-pay to play ordinance that they had initiated, and had fought to get on the ballot in POG v. Javier Inclan and Hoboken City Council, Docket No. HUD-L-4812-04 (August 2004); and represented the committee of petitioners in In the Matter of an Initiative Petition for the Adoption of An Ordinance to Amend the Jackson Township Administrative Code, Docket No. A-517-13 (App. Div. argued Feb. 25, 2014; decision pending), where NJ Appleseed is seeking to enforce a robust severability clause in the proposed ordinance, which would permit the question of whether the municipality must establish a legal department to proceed to ballot, even if the

language of one discrete provision of the ordinance is invalid. Other cases involving initiative petitions where NJ Appleseed was counsel include Empower Our Neighborhood v. Torrisi, Docket No. MID-L-7460-09, aff'd on emergent appeal (change of government petition); Berry v. DiJosie, A-5569-12 (App. Div. August 7, 2012) (anti pay-to-play ordinance where manner in which the committee collected signatures and corrected circulator affidavits was challenged); and In re Save Our Water Initiative Ordinance, Docket No. ESX-L-006649-12, interlocutory appeal granted on other issue, A-004258-14 (where trial court found proposed ordinance invalid because it "restrained" future legislative action).

NJ Appleseed, as such, has acquired special interest, involvement or expertise in regard to the laws governing the right of initiative and referendum, within the meaning of R. 1:13-9, entitling it to be heard as amicus in this matter.

FACTS AND PROCEDURAL HISTORY

Amicus accepts the facts and procedural history as has been set forth by the parties in their respective submissions.

ARGUMENT

Simply stated, it is NJ Appleseed's position that the common law principle that "a governing body cannot, absent specific legislative permission, divest its successors of legislative powers," Redd v. Bowman, No. A-005731-11T4 (App.

Div. ___, __ 2014) ("slip op."), at 14 (quoting City of Ocean City v. Somerville, 403 N.J. Super. 345, 352 (App. Div. 2008) was misstated in McCrink v. West Orange, 85 N.J. Super. 91 (App. Div. 1964) (where court replaced "divest" with mere "place a restraint upon"), and later erroneously applied in Mease v. Snowden, 148 N.J. Super. 9 (App. Div. 1977)(where ordinance did not prevent repeal or amendment, and created no binding financial constraint on future municipal legislature that would withstand repeal). Properly understood, the principle prohibits a governing body or the voters from adopting ordinances that impose binding financial constraints on successor governing bodies (that is, beyond one-year), which are not expressly authorized by state statute. Because the Camden Police Ordinance stays clear of this prohibition, the Appellate Division must be affirmed; however, this Court should acknowledge that Mease v. Snowden was improperly decided, and mere "restraint upon" future legislative discretion does not constitute divestment of that same discretion.

Common Law Framework

The law is clear that "a governing body cannot, absent specific legislative permission, divest its successors of legislative powers." Slip op. at 14 (quoting City of Ocean City, 403 N.J. Super. at 352 (citations omitted). What that means has become less clear over the years; and unfortunately, the

principle has often been used by trial judges to quash controversial initiative petitions when there is active resistance by the governing body to the policy choices embedded in the proposed ordinance.

According to the often cited treatise on this matter, McQuillin on Municipal Corporations (hereinafter, "McQuillin"),

> Although a council has the power, unless restricted by charter, to enact an ordinance to take effect after the expiration of the terms of office of its members, it cannot, by ordinance, divest its successor of legislative power, as opposed to proprietary functions.

4 McQuillin §13:4 at 1090 (3d. ed. rev. 2011). The treatise further specifies the general rule that absent statutory authorization, "since the power to tax and set tax rates is a governmental function, a city council is without power to authorize specified ad valorem tax rates for a twenty-year period," ibid; and "a council may not be able to bind future members by its statements as to the necessity for future tax increases nor may it set rates of taxation for the future that are binding upon future city councils." 4 McQuillin §13:6 at 1093. Similarly, it has long been accepted that the "hands of [a municipality's] successors cannot be tied by contracts relating to governmental functions," unless such contracts, typically more than one-year in length, are specifically authorized by state statute. N.J. Attorney General Formal

Opinion, No. 18, at 107 (1956) (citing 10 McQuillin §29:101, pp. 408-409 (3d ed)).

Each of these examples suggests that each municipal council must have the right to revise, repeal or reject the policy choices of its predecessor council, and must retain the ability to determine its own fiscal fate, without the weight of financial obligations or revenue constraints imposed by a previous legislative body through contract or ordinance. Cf. N.J. Educ. Ass'n v. State, 412 N.J. Super. 192, 216-217 (App. Div.), certif. denied, 202 N.J. 347 (2010) (finding that the state reserved the right to alter the means of funding its public employee retirement system obligations because the State Constitution "place[d] limitations upon any legislature to bind its successor as to appropriations," which are determined on the basis of a single fiscal year). Specifically, an ordinance cannot bind the hands of a future governing body by materially divesting it of legislative discretion. Such divestment occurs when one council makes it impossible or significantly more burdensome for subsequent councils to amend or repeal the ordinance, or confers private contractual rights that would nonetheless withstand repeal of the ordinance. Simply stating a policy choice that implicates or restrains a future council's budget or appropriations does not qualify as divestment of legislative discretion.

This general rule applies to council-initiated ordinances, as well as citizen-initiated ordinances. The fact that citizen-initiated ordinances under the Faulkner and Walsh Acts (since 1982) may not be amended for a period of three years without the consent of the voters does not change the rule's application to any ordinance, regardless of the adoption process employed. The trial court in this matter misapprehended the meaning and implications of this principle, but the Appellate Division basically understood the principle correctly.

In one sense, any law or ordinance binds or restrains future legislators or municipal councils, respectively. That is, unless the enactment is one of those rare ordinances that has a self-executing "sunset" provision, an enactment stays in effect until amended or repealed. Most importantly, however, this kind of "binding" or "restraining" of future legislative body that occurs simply through the inertia of laws that are neither repealed nor amended is proper, whereas divesting that legislative body of power to repeal or amend those same laws is an improper kind of binding or restraint.

This is a basic fact of life in a government where the rule of law is paramount. As Newton's First Law[1] says with regard to the physical world, this "inertia" principle applies to the

[1] "A body persists in a state of rest or of uniform motion unless acted upon by an external force."

legal world: a law/ordinance on the books stays on the books unless it is acted upon. As an example with regard to state statutes, acts or omissions that are crimes, punishable in a certain way remain crimes punishable in that same way until a new enactment changes the offense or the sentence. On the local level, zoning enactments that restrict or encourage certain kinds of development continue to do so until the local entity changes them in a legally-prescribed way.

Accordingly, a duly-passed ordinance that sets a certain policy or states a certain principle of law, unless and until that policy or principle is changed, is an ordinary and permissible enactment, not something that "divests [a] successor of legislative power."

Understanding McCrink v. West Orange

In 1964, the Appellate Division in McCrink v. West Orange, 85 N.J. Super. 86 (App. Div. 1964), found a salary ordinance proposed by an initiative petition defective on its face, because it sought to lock in the "maximum of the salary range for uniformed fire personnel, on file in the office of the town clerk," for two successive years. Id. at 92. The court included substantive portions of the ordinance, but among the provisions provided there is no indication that there was any particular provision that would have prevented amendment or repeal of the

ordinance in the ordinary course of business. There is reason to conclude, however, that the court assumed that there was a risk that such salary ordinance created private contractual rights that could be enforced by municipal employees, regardless of whether a succeeding council sought to amend the ordinance. As the court stated,

> Although defendants-appellants now claim that all they intended by this language was to indicate their objection to any salary increase, the proposed ordinance clearly indicates an intention that the governing body may neither increase nor decrease the maximum of the salary ranges of firemen. The language is "shall not be changed." Were the municipality to be faced by serious financial difficulties, it could not even reduce those maximums.

Ibid.

Whether this explanation is valid, the McCrink court held that because "it is fundamental that a governing body could not, by an ordinance presently adopted, place a restraint upon the future exercise of municipal legislative power," the proposed initiative petition could not proceed to the ballot. Id. at 91. Though NJ Appleseed posits that McCrink was correctly decided, the court's rephrasing of the common law principle prohibiting "divestment of legislative discretion" has unfortunately given rhetorical cover to trial courts since then to strike down an initiative ordinance that they simply perceive as threatening to the local status quo; not unlike the trial court in this matter.

It has been 50 years after McCrink was decided. However, in 1971, the Legislature, perhaps with this decision in mind, enacted three specific statutory provisions dealing with initiative and referendum regarding salaries of municipal employees and elected officials: N.J.S.A. 40A:9-165 permits voters to repeal a salary ordinance that provides increases for members of the governing body or other elective officials; N.J.S.A. 40A:9-167 allows a municipality to place an ordinance that sets the salaries of its members, or any other elected official, or any managerial executive or confidential employee for a period of up to 3 years to be placed on the ballot; and the referendum vote that ensues is binding for 2 years; and N.J.S.A. 40A:9-168, authorizes an initiated salary ordinance for certain municipal employees and elected officials where the referendum vote on that initiated ordinance is binding for at least 2 years. In this way, the Legislature has made exceptions to the principle set forth in McCrink with respect to salary ordinances not unlike that proposed by the citizens in McCrink. See also Burgdorfer v. Demarest, 81 N.J. Super. 15 (App. Div. 1963) (court approved for referendum vote an ordinance which fixed salaries of municipal police officers for a period of two years since governing statute required salaries to be voted upon once every 2 years).

Rejecting Maese v. Snowden

In Maese v. Snowden, 148 N.J. Super. 7 (App. Div. 1977), on the other hand, the appellate panel took to heart the McCrink "placement of a restraint" reformulation of the McQuillin "divestiture" principle and struck down an initiated ordinance, which had merely set forth a policy prohibiting the construction of a municipal complex on specified land owned by the township. Specifically, the ordinance made unlawful any action by the governing body or township officials to spend money or incur indebtedness to construct the public project.[2]

There is nothing in the Appellate Division's discussion of Maese to suggest that the ordinance at issue had, within its four corners, a bar on amendments by the council or the people generally, or that such revisions could not happen before a stated period of time. Nor was an amendment or repeal of the ordinance's terms subject to a supermajority requirement. There is also no reason to believe that ordinance created private enforceable rights against the township that would withstand repeal, and thus tie the hands of the township with respect to a

[2] During the 60 day period in which the council had to act on the initiative ordinance, the voters defeated an associated bond ordinance that the council had decided to submit to a referendum vote due to the number of signatures on the anti-development ordinance petition. Maese, 148 N.J. Super. at 11. See also N.J.S.A. 40:49-27 (granting the right of referendum to the voters to repeal a bond ordinance upon presentation of a petition signed by signatures representing 15% of the votes cast

future budget. In this way, Maese reflects the misunderstanding between ordinances that "bind" or "restrain" future action just because of the 'inertia' concept discussed above, which are generally permissible, and those which do more than that, by divesting future legislators of discretion.

Indeed, the ordinance wrongly voided in Maese is actually more akin to the ordinance upheld in Concerned Citizens of the Borough of Wildwood Crest v. Pantalone, 185 N.J. Super. 37 (App. Div. 1982), which effectively said that beaches in that municipality would henceforth be free. That rule of law – free beaches – was to remain in effect until it was repealed or amended, and the ordinance did not by its terms make it any harder for repeal or amendment to occur than it would be to repeal or amend any other ordinary ordinance.

Affirming the Appellate Court

Similar to the beach fee ordinance in Pantalone, the Camden Police Ordinance is just an ordinary enactment with only 'inertial' force against future lawmakers. If it had been initiated and adopted by a council, it would do nothing more than establish a municipal police force and require its continued existence. The council would then have the right to alter or repeal that law simply by following the statutory procedures applicable to any other ordinance, *i.e.*,

---

in the municipality at the last General Assembly election).

introduction, first and second reading, passage by the council, approval or veto by the mayor (if applicable), veto override (if applicable) and publication. If it had been adopted by the council but initiated by the voters, or had been adopted and initiated by the voters, the council would still have the right to alter or repeal that law, but only with the consent of the voters for a period of three years following enactment. N.J.S.A. 40:69A-196(a).

In other words, nothing in the Camden Police Ordinance makes it impossible or more burdensome for subsequent councils to amend or repeal it, in the manner prescribed by state statute, than any other ordinance. The Appellate Division correctly observed that the Ordinance here was more like the policy setting ordinance in Pantalone in that while it had 'inertial' forces behind it like every other law, it did not wrongly divest successors' powers.

With the foregoing understanding of the difference between the inertial binding or restraining that comes from any law, because we live under the rule of law, which is permissible; and the divestment of power to successors' powers to amend or repeal, which is not permissible, it must still be noted that the Legislature can craft exemptions to that rule so that successors' powers are limited. Most critically, in the context of citizen initiated ordinances, the Faulkner and Walsh Acts

require a three-year moratorium on changing a voter-initiated ordinance without the consent of the voters themselves. That is, the voters retain the authority to revise or amend, not the governing body itself. The Legislature has also set forth certain kinds of county and municipal public contracts that can be awarded for periods of up to 40 years. See generally N.J.S.A. 40A:11-15. These are exceptions to the general rule that forbid the divestment of successors' powers. But before such exceptions to the general rule are considered, it is necessary to correctly understand the general rule, which is far more limited than precedents like Maese have led trial courts to believe.

CONCLUSION

For the foregoing reasons, the Court should affirm the Appellate Division's conclusion that the initiated Camden Police Ordinance does not constitute an improper restraint or divestment of the legislative power of future municipal councils.

Respectfully submitted,

APPLESEED NEW JERSEY PUBLIC INTEREST LAW CENTER

By: _____
RENÉE STEINHAGEN

Dated: June 17, 2014