New Jersey
Appleseed

October 3, 2012

Hon. Dennis F. Carey, III, P.J. Civ.
Essex County Historic Courthouse
470 Martin Luther King, Jr. Blvd.
Newark, New Jersey 07102

Re: In re Initiative Petition Regarding A Proposed Save Our Water Ordinance, Docket No. ESX-L-00649-12

Dear Judge Carey:

Please accept this letter brief on behalf of William Chappel, Kenneth A. Gibson, Wynnie-Fred V. Hinds, Wilbur J. McNeil and Terri A. Seuss (the "Committee of Petitioners") , Councilman Ronald C. Rice and Councilman Ras J. Baraka (collectively, "Defendants") in lieu of a more formal brief in opposition to Plaintiff, the City of Newark's Order to Show Cause and Verified Complaint, dated September 6, 2012, and Intervenor, the Newark Watershed Conservation and Development's Verified Complaint in Lieu of Prerogative Writ, dated September 18, 2012. This response is filed in accordance with the Consent Order, dated September 24, 2012, and asserts that, as a matter of law, the Save Our Water Ordinance constitutes a valid exercise of legislative authority pursuant to the Faulkner Act, and, as an initiated ordinance, the City Clerk was not authorized to present the ordinance to the Mayor for approval after adoption by the Newark City Council "in substantially the form requested." N.J.S.A. 40:69A-191. The Committee of Petitioners and Councilman Rice and Baraka do not

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address the merits of their Counterclaims filed against the NWCDC in response to its Complaint, and do not believe that such claims are ripe for summary disposition at this time.

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## PRELIMINARY STATEMENT

The "Save Our Water Ordinance" emerges out of years of contention among several Mayors, City Councils and residents of Newark as to how best to manage and conserve Newark's precious Watershed Properties and manage, operate and improve its Water and Sewage Systems. Over the past two decades, Newark has entered into numerous service contracts, primarily with the NWCDC, a nonprofit corporation established in 1973, in accordance with a Newark City Council resolution, to manage, plan, conserve and develop the Watershed Properties; and since 1998, Newark has retained this private entity to manage and operate the Pequannock Water Treatment Plant and Water Storage Reservoirs as well. However, in February 2012, the State Comptroller advised Newark's Business Administrator that he finds the latter agreements to be unlawful.

One year earlier in January 2011, the Newark Water Group, whose members include the Committee of Petitioners, issued a report entitled, Hog Wild: An Analysis of the Activities of the Newark Watershed Conservation and Development Corporation, which triggered the City

Council's attempts to investigate the operations of the NWCDC through direct questioning and requests to the Attorney General to do the same; and most recently, the Council has taken an initial step through resolution, dated May 16, 2012, to cause the dissolution of the NWCDC by urging its Board to do so and return all files and records belonging to Newark.

During this same period of time, the City of Newark, like many other cities throughout the country, has experienced and continues to experience a fiscal crisis—a crisis that exacerbates the difficulties facing its Water and Sewer Systems, but one that is not caused by such Systems. In order to resolve Newark's budget deficit in 2011, the State gave the City a $32million forgivable loan. The loan was conditioned upon the satisfaction of numerous requirements, including a mandate that the City undertake a "good faith effort to explore the creation of a water authority." The Memorandum of Understanding accompanying that loan does not require Newark to establish such authority, merely to study and consider its creation; and several letters received by the City Council from the Director of the Division of Local Government Affairs since July 2012 indicate that Newark is not at risk of being required to repay that loan. Indeed, the City is currently in discussion with the State as to the size of a new loan to address this year's budget gap. Accordingly, Newark's systemic budget deficit continues, while improvements to its Water and Sewer Systems are both needed and required by longstanding DEP Consent Orders.

Now, the City Council, at the urging of over 5,000 Newark residents, is proposing a way forward by adopting the Committee of Petitioners' Initiated Ordinance. The City Council is requiring that the Director or Acting Director of the DWSU be a full-time employee of the City, and requiring that his/her duties – the supervisory duties of the Department—not be contracted out. The City, in turn, is still authorized to carry out its governmental water and sewer functions

through service contracts that are competitively bid, or exempt from such bidding pursuant to any exception in the Local Public Contract Law (other than the one exception amended by L. 2002, c. 47, an act sponsored by a Newark Senator at the behest of former Mayor Sharpe James). Planning, conservation and management services with respect to Newark's Watershed Properties, historically performed by NWCDC on behalf and in trust of the City of Newark, may be provided by an entity that is, by ordinance (not just judicial decision), subject to the Open Public Records Act and the Open Public Meetings Act, the Local Public Contracting Law and the Local Government Ethics Law; and whose by-laws may only be amended with the approval of the City Council, by ordinance. The Ordinance also provides that no attorney hired by the DSWU or this entity, which is negotiating contracts, entering into leases, and collecting fees and revenues on behalf of Newark, may represent entities that the City Council considers to have an actual conflict with Newark. This provision does not interfere with the Court's supervisory role over attorneys, as asserted by NWCDC, but is consistent with R.P.C. 1.8 (l) prohibiting municipalities from waiving a conflict of interest, R.P.C. 1.8(k) governing attorneys retained by municipalities, and R.P.C. 1.9 concerning duties to former clients.

The Ordinance further abolishes the NWCDC, a quasi-City agency that is incorporated under Title 15A, most probably as a charitable, social welfare or civic improvement corporation whose sole beneficiaries are the City of Newark and its residents. And, although Defendants admit that this provision of the Ordinance is not self-executing, it is within the authority of the City Council through ordinance to abolish an instrumentality of the City that it previously caused to be established. Moreover, this provision together with section 9 of the Ordinance contemplates the establishment of a new entity that will perform NWCDC's governmental functions, with a Board that is more accountable, by ordinance, to the City Council; a laudable

effort by the City Council to remedy its failure to do so in 1973. Most importantly, the Save Our Water Ordinance provides for a referendum vote, in accordance with N.J.S.A. 40:69A-192(c), when and if the City Council passes an ordinance which is then approved, to establish a municipal utility authority ("MUA"), to enter into a lease agreement with such entity or to guarantee its bonds. Nothing in the Ordinance prohibits the City from studying or making a good faith effort to establish an MUA; and, pursuant to the principles of self-government and public participation embodied in the Faulkner Act, it is within the legislative authority of a municipality that is governed by that Act to enact an ordinance that "by its own terms authorizes a referendum in the municipality concerning the subject matter thereof." N.J.S.A. 40:69A-185.

For the foregoing reasons, the Committee of Petitioners, Councilman Rice and Councilman Baraka contend that the Initiated Ordinance that has been adopted by the Newark City Council by a 7-0 vote, with 1 abstention, is within the legislative authority of the City Council, and is a proper subject of initiative. Specifically, because provisions in the Ordinance are neither pre-empted nor inconsistent with State law, including the respective duties of the Council and Mayor pursuant to the Faulkner Act, and they are not expressly immune from the vote of the people, Plaintiff's and Intervenor's respective Complaints must be dismissed in their entirety.

## COUNTER-STATEMENT OF FACTS

The Committee of Petitioners, Councilman Ronald R. Rice and Councilman Ras Baraka hereby repeat and incorporate the factual allegations set forth in their Verified Answer and Affirmative Defenses to the respective Verified Complaint of the City of Newark and the NWCDC, and in the factual allegations supporting their Counterclaims stated against the NWCDC. Furthermore, Defendants incorporate herein Exhibits A-Z, attached to their Answer,

in support of the facts relevant to final disposition of the City's and NSCDC's complaints challenging the validity of the Initiated Save Our Water Ordinance, which was adopted by the Newark City Council on September 11, 2012.

## LEGAL ARGUMENT

Pursuant to R. 4:69-2, governing prerogative writ actions, a plaintiff may at any time after the filing of a complaint that demands performance of a duty or enjoins municipal action apply for summary judgment. Notwithstanding R. 4:69A-2, courts do not require plaintiffs involved in election disputes to file motions for summary judgment. Instead, election disputes such as this one involving an initiated ordinance petition are routinely handled by the New Jersey courts as summary proceedings akin to the proceedings set forth in R. 4:67 (summary actions) and R. 4:71 (review of local officer actions when not an action in lieu of prerogative writ). Under these rules, and under the customary practice and procedure used by the courts in election cases, disputes relating to the sufficiency of an election petition are tried and disposed of in a summary way. See Murray v. Murray, 7 N.J. Super. 549 (Law Div. 1950)(WilliamBrennan, Jr., J.S.C.); see also In re Ocean County Com'r of Registration for a Recheck of the Voting Machines for the may 11, 2004, Mun. Elections, 379 N.J.Super. 461, 478-79 (App. Div. 2005)(finding that an election dispute was to be treated as a "fast track proceeding" and treating the complaint as "implicitly initiating a summary proceeding pursuant to Rule 4:67").

Given the fact that Newark's and the NSCDC's claims go to the legal validity of the ordinance that has been adopted by the City Council pursuant to the statutory provisions governing initiative petitions, it is appropriate for this Court to "try this action on the return date"

of the Order to Show Cause, October 9, 2012, utilizing the "pleadings and affidavits," and to render final judgment thereon." R. 4:67-5.[1]

Furthermore, summary actions, such as the matter herein, are decided pursuant to different standards than a motion for summary judgment. "In a summary action, findings of fact must be made, and a party is not entitled to the favorable inferences that are afforded to the respondent on a summary judgment motion for purposes of defeating the motion." Pressler, Current N.J. Court Rules, comment 1 on R. 4:67-5 (2010). See Courier News v. Hunterdon County Prosecutor, 368 N.J. Super. 373, 378-379 (App. Div. 2003); O'Connell v. New Jersey Manufacturers Ins. Co., 306 N.J. Super. 166, 172 (App. Div. 1997), appeal dism., 157 N.J. 537 (1998). Nonetheless, Defendants, who are responding to Plaintiff's and Intervenor's respective Order to Show Cause should prevail, as a matter of law.

## I. THE CITY CLERK DID NOT ERR, AS A MATTER OF LAW, WHEN HE PUBLISHED THE SAVE OUR WATER ORDINANCE WITHOUT PRESENTING THE ORDINANCE TO THE MAYOR FOR APPROVAL.

Although the City of Newark, seemingly representing Mayor Cory Booker, has not alleged in its Complaint that the City Clerk erred when he published the Save Our Water Ordinance without presenting the Ordinance to the Mayor for approval, Defendants understand, in accordance with this Court's Consent Order dated September 24, 2012, that the City intends to raise such objection on the return date of its Order to Show Cause. The Committee of Petitioners and Councilman Rice and Baraka fundamentally disagree with the City's contention.

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[1] Because the Committee of Petitioners', Councilman Ronald C. Rice's and Councilman Ras Baraka's Counterclaims against the NWCDC are related to one provision of the Ordinance, they were asserted in this matter. However, the validity of the Ordinance does not impact the outcome of such claims. Furthermore, since the claims involve matters of factual dispute and the handled by the Chancery Division and are inappropriate for summary disposition at this time.

Before turning to a discussion of the Clerk's legal decision not to present the Initiated Ordinance to the Mayor for approval, one must understand the purpose of the statute authorizing his actions. As a preliminary matter, the City of Newark is governed by the Optional Municipal Charter Law, N.J.S.A. 40:69A- et seq., commonly known as the Faulkner Act. Registered voters in such a municipality enjoy broad rights to propose ordinances (a right known as the "initiative", N.J.S.A. 40:69A-184) and to oppose ordinances passed by the council (a right that is denominated the "referendum"). N.J.S.A. 40:69A-185; In re Referendum Petition to Repeal Ordinance 04-75, 192 N.J. 446, 459 (2007) (hereinafter, "In re Ordinance 04-75"). Both powers are a check on the exercise of local legislative power, fostering citizen involvement in the political affairs of the community." Id. 192 N.J. at 459. As such, the New Jersey Supreme Court announced in this 2007 case that "the referendum statute should be liberally construed . . . to promote the 'beneficial effects' of voter participation." Id. Indeed, the voter's right to participate in government and to express their views at the ballot box requires this Court, as a matter of statutory interpretation, to interpret the initiative provisions herein at issue liberally and expansively. See e.g. In re Petition to Repeal Ordinance 2010-27 of Margate, ___ N.J. Super. ____ (App. Div. Feb. 14, 2012), approved for publication, slip op. at 13 (expansive reading of referendum rights "is also supported by the principle that referendum provisions, which foster[] citizens' involvement in the political affairs of the community[,]" should be "liberally construed." (citing In re Ordinance 04-75) (alterations in original); Sparta Tp. v. Spillane, 125 N.J. Super. 519, 523 (App. Div. 1973), cert. denied, 64 N.J. 493 (1973)(both the initiative and referendum process "encourage public participation in municipal affairs in the face of normal apathy and lethargy). That being said, the Clerk's decision not to present the Initiated Ordinance to the Mayor for his approval, pursuant to his interpretation of the relevant provisions

of the Faulkner Act, is a legal one subject to *de novo* review, and is given no deference. Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 191 N.J. 344, 372 (2007).

It is Defendants' understanding that the City Clerk based his decision on the express language of N.J.S.A.40:69A-191, the general purpose of the initiative statute, and the absence of certain language that explicitly appears elsewhere in the Faulkner Act. In construing a statute, it is an accepted principle that words and phrases are to be read and construed within their context, and, unless inconsistent with the explicit intent of the legislature, should be given their generally accepted meaning, according to approved usage. N.J.S.A. 1:1-1 (quoted in Municipal Council v. James, 183 N.J. 361, 370 (2005). See also Tarr v. Bob Ciasulli's Mack Auto Mall, Inc., 181 N.J. 70, 82 (2004)(one looks to the "ordinary and well understood meaning" of the words therein); Di Prospero v. Penn, 183 N.J. 477, 492 (2005)( the "ordinary meaning and significance" of a statute's terms is the best indicator of legislative intent). The Court effectuates the legislative intent in light of the language used and the goals sought to be achieved by the statute, Municipal Council v. James, 183 N.J. at 370; and often, the plain meaning of a specific provision may only be determined by reviewing the entire legislative scheme of which it is part. Kimmelman v. Henkels & McCoy, Inc. 108 N.J. 123, 129 (1987). Moreover every word that is excluded from a statute must be presumed to have been excluded for a purpose. Estate of Frost v. Div. of Taxation, 22 N.J. Tax 537, 548 (2005) (citing G.E. Solid State, Inc. v. Director, Div. of Tax, 132 N.J. 298)(1993)(finding that Legislature's use of words in one section of the statute indicated that omission of same words in another section was intentional); see also Singer, Sutherland Statutory Construction, Vol 2A, §46:6 at 248 (7th ed. 2009)(same)(hereinafter "Sutherland Statutory Consturction"); Alan Cornblatt PA v. Barrow, 153 N.J. 218, 234 (1998)(noting that "where Legislature has carefully employed a term in one place and excluded it

in another, it should not be implied where excluded). With these principles in mind, the Clerk correctly concluded that in the case of an initiated ordinance, the general rule applying to the enactment of ordinances in a Mayor-City Council form of government simply does not apply.

N.J.S.A. 40:69A-191 states in part,

> If within 20 days of the submission of a certified petition to the municipal clerk the council shall fail to pass an ordinance requested by an initiative petition in substantially the form requested or to repeal an ordinance as requested by a referendum petition, the municipal clerk shall submit the ordinance to the voters . . . (emphasis added)

On its face, the statute fails to make mention of the Mayor's right of approval. That is, the statute does not mention that the Mayor's approval is required, and if it were needed would such right have to be exercised within the 20 days of submission to prevent the ordinance or referendum from going to the ballot. The absence of such language must be assumed to be intentional since in other parts of the initiative law and other sections of the Faulkner Act, the Legislature has included such language when it desired that the Mayor be given the opportunity to exercise the narrow 'legislative" authority given his office in the Mayor-City Council form of government. For example, in N.J.S.A. 40:69A-181 (b), the Legislature stated that "No ordinance other than the local budget ordinance shall take effect less than twenty days after its final passage by the council and approved by the mayor where such approval is necessary. . ." (emphasis added). N.J.S.A. 40:69A-192(c), which concerns the scheduling of an election with respect to an ordinance of the council which by its own terms or law cannot be effective in the municipality unless submitted to the voters, similarly states that such election must occur within a certain number of days "from the date of final passage and approval of the ordinance," not just passage.

(emphasis added). In this way, when the Legislature intended to protect the Mayor's veto power in provisions applicable to all Faulkner Act municipalities it did so explicitly.[2]

Furthermore, it is a generally accepted principle that if an ordinance goes to the ballot and is approved by the voters that the Mayor does not have the right to veto that ordinance. Similarly, if one views the City Council as exercising the citizens' voting rights during the referendum process rather than acting pursuant to its ordinary legislative powers, the Mayor should not have the opportunity to stymie the will of the petitioners. A closer look at the role of the City Council in the referendum process supports the notion that its powers, like the Mayor's are different therein than in the ordinary course of business. Pursuant to N.J.S.A. 40:69A-190, the City Council, upon receipt of a proposed ordinance subject to the initiation process, must immediately hold a public hearing. There is no first reading of the ordinance nor an opportunity to amend, or table it. The citizen's ordinance must be passed in "substantially the form requested," if a referendum election is to be avoided. N.J.S.A. 40:69A-191.

Accordingly, there is no support in the text of the initiative and referendum provisions of the Faulkner Act, other sections of the Faulkner Act, and the purpose of the statute (*i.e.*, to promote participatory democracy in matters of local concern) that justifies the Mayor's demand that he be given the opportunity to veto the Save Our Water Ordinance that was passed by the City Council unanimously. The City Council, at the behest of the Committee of Petitioners and the approximately 5,000 Newark citizens who signed the petition, adopted the Initiated Ordinance. The City Clerk was not authorized to present that Ordinance to the Mayor for

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[2] Also imagine the havoc the Mayor's opportunity to veto would have on the initiative process itself. In order to prevent a referendum election from occurring, either by initiative or petition to repeal, a city council would have to pass the ordinance and overturn a Mayor's veto, all within 20 days.

approval as he would not have been authorized to do had the electorate adopted the Ordinance at the ballot.

## III. THE SAVE OUR WATER ORDINANCE IS A PROPER EXERCISE OF LEGISTAIVE AUTHORITY, AND THUS THE CITY'S AND NWCDC'S COMPLAINTS MUST BE DISMISSED.

This prerogative writ action challenges the validity of an initiated ordinance that has been adopted by the Newark City Council on the grounds that it is *ultra vires*; the standard of review is not simply "whether there is support in the record for the City Council's action," as NWCDC contend. NWCDC Brief at pp. 6-7 (citing Jock v. Zoning Bd. of Adjustment, 184 N.J. 562 (2005)(challenge to granting of zoning variences). Rather, the Court must determine, as a matter of law, whether the ordinance, as a legal matter, is within the legislative authority of the City Council and does not violate State or federal constitutional or statutory law. Municipal ordinances, like statutes, carry a presumption of validity. Hutton Park Gardens v. Town Council of Tp. of West Orange, 68 N.J. 543, 564 (1975). The presumption is not an irrebuttable one, Collingswood v. Ringgold, 66 N.J. 350 (1975); but it places a heavy burden on the party seeking to overturn the ordinance. Assocs. v. City of Newark, 132 N.J. 180, 185 (1993); First Peoples Bank v. Medford Township, 126 N.J. 413, 418 (1991). Legislative bodies are presumed to act on the basis of adequate factual support and, absent a sufficient showing to the contrary, it will be assumed that their enactments rest upon some rational basis within their knowledge and experience. Hutton Park Gardens v. Town Council of Tp. of West Orange, 68 N.J. at 564-565. See also Township of Pennsauken v. Schad, 160 N.J. 156 (1999)(noting that same rules of interpretation and construction apply to ordinances as to statutes).

In this matter, neither the City nor NWCDC contend that the Save Our Water poses constitutional problems of any sort or that federal law is implicated. Rather, they contend in

general terms that the provisions of the Save Our Water Ordinance are pre-empted by state statutes, specifically the Local Public Contracting Law, and violate certain Faulkner Act provisions concerning the allocation of authority between the Mayor and the City Council. They additionally claim that the Ordinance improperly "divests" future governing bodies of their legislative authority, and, even if the Ordinance were within the authority of the City Council, it is not a proper subject of initiative. The Committee of Petitioners and Councilman Rice and Baraka adamantly disagree.

Prior to addressing the validity of each section of the Save Our Water Ordinance, one must be clear as to the law controlling these matters, so one has the capacity to determine whether these established doctrines even apply to the provisions of the Ordinance at issue. First, with respect to pre-emption, neither the City nor NWCDC actually engage in the appropriate analysis as to whether the Local Public Contracting Law (LPCL"), N.J.S.A. 40A:11-1 *et seq*., pre-empts municipal action. If they had done so, they would have discovered that it does not.

There is little doubt that New Jersey's Constitution grants local governments both express and implied powers, and requires liberal construction of statutes in favor of Home Rule.[3] See also N.J.S.A. 40:42-4 (Home Rule Act: "In construing the provisions of this subtitle, all courts shall construe the same most favorably to municipalities") and N.J.S.A. 40:69A-30 (Faulkner Act: "All grants of municipal power to municipalities governed by this act, whether in the form of specific enumeration or general terms, shall be liberally construed"). See McCann v. Clerk of the City of Jersey City, 167 N.J. 311, 328 (2011)("intended to confer the greatest possible power

[3] N.J.Const. art IV, §VII, ¶11 provides, in part:

> The provisions of this Constitution and of any law concerning municipal corporations formed for local government or concerning counties, shall be liberally construed in their favor. The powers of counties and such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication. . .

of self-government"). Furthermore, there is little doubt that both the Home Rule Act and Faulkner Act expressly authorize municipalities like Newark, to "prescribe the form and manner of execution and approval of all contracts to be executed by the municipality." N.J.S.A. 40:48-1(2). See also N.J.S.A. 40:69A- 40(j) (duty of mayor to negotiate contracts for the municipality, subject to council approval); N.J.S.A. 40:69A-36 (l)(duty of city council to approve contracts presented by the mayor).

Furthermore, a review of the text of the LPCLindicates that the Legislature neither expressly nor by implication intended to pre-empt Newark's authority to negotiate and enter into contracts—a power that is explicitly granted by both the Home Rule and Faulkner Acts. See Manalapan Holding Co. v. Planning Bd. of Hamilton, 92 N.J. 466, 477-78 (1983)(reading two statutes to avoid conflict and thus avoid implied repeal); Swede v. City of Clifton, 22 N.J. 303, 317 (1956)("[T]here is a presumption. . . against an intent to effect a repeal of legislation by mere implication."). Indeed, all contracts that are governed by the LPLC (*i.e.*, contracts above a certain threshold dollar amount, N.J.S.A. 40A:11-3) are predicated on the capacity of a municipality to enter into contracts and to negotiate the terms of the contract, the types of contracts in which they wish to enter, and the entities with whom they seek to contract.

There is little doubt that the statute delineates certain procedures that must be satisfied and places limits on the duration of certain contracts, but there is nothing that implies the Legislature's intent to pre-empt local power to contract and to regulate the terms of the contract so long as it does not violate specific state mandates. See Twp. Of Chester v. Panicucci, 62 N.J. 94, 102 (1973)(noting that "while the local legislation cannot conflict with state law . . . [a municipality may,] dependent on local conditions and pertinent circumstances, enact more stringent regulation in the field so long as such regulation is not unreasonable."). Local officials

must strictly comply with the LPCL to "secure for the public the benefits of unfettered competition," (CFG Health Systems v. County of Hudson, 413 N.J. 306, 314 (App. Div. 2010)(articulating the legislative purpose behind the LPLC)); however, they are expressly granted the authority to "set a lower threshold for the receipt of public bids" than that designated by the law, N.J.S.A. 40A:11-3(a) and they are not required to exempt certain types of contracts from the LPLC's competitive bidding requirements. See N.J.S.A. 40A:11-5 (stating that any contract above the threshold amount "may" be awarded by local governing body if it meets certain specified exceptions). In this way, the relevant question for this Court to address is not whether certain provisions of the Save Our Water Ordinance are pre-empted by the LCPL, but only whether those provisions violate specific requirements of that law.[4]

Second, both the City and NWCDC erroneously rely on two cases to assert that the Save Our Water Ordinance is beyond Newark's legislative authority because it impermissibly "divests" or "restrains" future City Councils of their legislative authority. City of Ocean City v. Sommerville, 403 N.J. Super. 345 (App. Div. 2008)(initiative petition requesting approval of an ordinance placing a cost of living cap on budgeted municipal expenditures) and Maese v. Snowden, 148 N.J. Super. 7, 12 (App. Div. 1977) (initiative prohibiting a local officials from committing or spending any public funds or incurring any debt for construction of a municipal complex). By ignoring the factual context and state legislative schemes pursuant to which municipal action was taken in such cases, the City and NWCDC suggest that a city council could never make a legislative policy decision insofar as any ordinance divests, delimits or restrains

[4] Although the City and NWCDC contend that the Legislature intended to pre-empt local action pursuant to the LPCL, they never undertake the analysis required by Overlook Terrace Mgmt. Corp. v. Rent Control Bd. of W. New York, 71 N.J. 451, 461-62 (1976) to determine whether the Legislature actually intended to pre-empt by implication local regulation and discretion in this area.

their successor's legislative authority. That simply cannot be the case. A closer look at these cases indicates that the ordinances at issue sought to restrain municipal budgets, determine appropriations and limit expenditures, and thus the general principle articulated by the respective courts is actually narrower than it appears on its face. See also McCrink v. West Orange, 85 N.J. Super. 86, 91 (App. Div. 1964)(initiative setting limits on salary increases and certain other appropriations for two years). It is clear that the "hands of [a municipality's] successors cannot be tied by contracts relating to governmental functions," unless such contracts are specifically authorized by state statute. N.J. Attoney General Formal Opinion, No. 18, at 107 (1956). This is because one council cannot tie, commit or restrict a successor's budget and thus its ability to take any legislative action. Accordingly, this general proposition of law, as stated in City of Ocean City, McCrink and Maese, simply does not apply to the subject matter of the Save Our Water Ordinance. Nothing in that Ordinance divests future council's of their ability to act.

Finally, whether a matter is a proper subject of referendum is no longer relevant to the matter at hand, because the City Council has passed the Ordinance obviating the need for it to be placed on the ballot for a referendum vote.[5] Notwithstanding this fact, the New Jersey Supreme Court decisions, In re Ordinance 04-75, 201 N.J. 446 (reversing lower court rulings to allow citizens to have their say on a referendum about the organization of a municipal police department) and In re Petition for Referendum on City of Trenton Ordinance 09-02, 201 N.J. 349, 353 (2010)(reversing lower court rulings to allow citizens to have their say on an ordinance about the sale of public water systems)(hereinafter "In re Trenton Ordinance 09-02"), both indicate that "in the absence of an unequivocal legislative expression to the contrary," citizens of a Faulkner municipality are "empowered to [initiate] or protest any ordinance." In re Trenton

Ordinance 09-02, 201 N.J. at 362. Common law distinctions between administrative and legislative ordinances no longer prevail, and clear expressions of prohibition are required. As will be further noted below, such "unequivocal legislative expressions" are absent herein and thus, the City's argument that the Save Our Water Ordinance is not a proper subject of initiative has no impact on this Court's determination of the validity of the Ordinance.

A. SECTIONS OF THE ORDINANCE THAT REQUIRE REFERENDUM ELECTIONS WITH RESPECT TO ORDINANCES CONCERNING SPECIFIC SUBJECT MATTERS ARE WITHIN NEWARK'S LEGISLATIVE AUTHORITY.

Three sections of the Save Our Water Ordinance require the City to submit ordinances that concern specific subject matters to the voters prior to taking effect. They are as follows:

> Section 1: Revised Ordinance section 2:17-1 shall be amended to include a new Section 2:17-1.4, as follows: The City will not establish a municipal utility Authority under N.J.S.A. [40:62-1 et seq][sic][6] or enter into any Interlocal or Services agreement with any entity established under that law, for any of the purposes enumerated under that law, without voter approval.
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> Section 3: Revised Ordinance section 2:17-1 shall be amended to include a new Section 2:17-1.6, as follows: The City will guarantee the debt issued by any Non-City entity or independent government authority, public or private or Any combination thereof, and will not enter into any deficiency agreement with any entity, for purposes or any activities enumerated in N.J.S.A. 40:62-1 et seq., without voter approval.
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> Section 4: Revised Ordinance section 2:17-1 shall be amended to include a new Section 2:17-1.7, as follows: Whenever voter approval is required under this Ordinance, the Muncipal Council shall call for the referendum by ordinance. The question shall be submitted at the next general [ ] election occurring not less than 40 days after the date specified in N.J.S.A.[40:69A-185] [sic][7]for the ordinance

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[5] This statement is limited to the extent that if a matter is not a proper subject of initiative, the Mayor's ordinary right to approve an ordinance passed by the City Council would be triggered.

[6] The Committee of Petitioners and Councilman Rice and Baraka state that this section was mistakenly cited, and that the drafters of the Ordinance intended N.J.S.A. 40:14B-1 *et seq*. to be the operative statute. See Section 3 of the Ordinance.

[7] The Committee of Petitioners and Councilman Rice and Baraka state that this section was mistakenly cited, and that the drafters of the Ordinance intended N.J.S.A. 40:69A-192(c) to be

to take effect.

Contrary to the interpretations put forward by the City and the NWCDC, none of these proposed amendments to the current municipal code prohibit the City from establishing an MUA, and from neither entering into a lease and service agreement with such entity nor entering into a deficiency agreement with such agency. Rather, the plain language of the amendments simply require the City Council to put an ordinance, which concerns the establishment of and MUA or a lease and service agreement with such entity or a deficiency agreement with such MUA on the ballot for a referendum election prior to that ordinance taking effect. Section 4 is procedural in nature and serves to implement Section 1 and Section 3 in accordance with the Faulkner Act.

Again the City and NWCDC contend that the City has no legislative authority to do so and are expressly prohibited from doing so. The Committee of Petitioners and Councilman Rice and Baraka disagree, and find that authority in the plain language of the Faulkner Act, N.J.S.A. 40:69A-185 and N.J.S.A. 40:69A-192(c). N.J.S.A. 40:69A-185 states:

> The provisions of this section [185 providing for the right of the voters to repeal an ordinance] shall not apply to any ordinance which by its own terms or by law cannot become effective in the municipality unless submitted to the voters, or which by its terms authorizes a referendum in the municipality concerning the subject matter thereof. (emphasis added)

Defendants contend that the last sentence of the section authorizes a Faulkner Act municipality to enact an ordinance that by its own terms authorizes a referendum vote on specified subject matter such as the establishment of an MUA.

As stated above, supra. Point I, the voter's right to participate in government and to express their views at the ballot box requires this Court, as a matter of statutory interpretation, to

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the operative provision. They further state that they inadvertently omitted "or regular municipal"

interpret the Faulkner act referenda provision liberally and expansively to effectuate legislative intent and achieve the statute's goals. In re Petition to Repeal Ordinance 2010-27 of Margate, ___ N.J. Super. ____ , slip op at 13. Public participation in local affairs must be encouraged unless specifically prohibited. In addition, when interpreting a statute, a court must "endeavor to give meaning to all words and to avoid an interpretation that reduces specific language to mere surplusage." DKM Residential Props. Corp. v. Twp. of Montgomery, 182 N.J. 296, 307 (2005). The question, therefore, is whether there is any meaning that can be reasonably ascribed to the phrase "or which by its terms authorizes a referendum in the municipality concerning the subject matter thereof."

First, the statute clearly prevents ordinances that are subject to a vote by the voters prior to enactment to be the subject to the right of repeal as the "right of referendum" is defined in the first paragraph of N.J.S.A. 40:69A-185. Such ordinances include according, to text of the provision, those ordinances that include language such as, "This ordinance will not be in effect until approved by the voters," and those that are governed by other state law that requires such ordinances to be submitted to the voters. In order to give effect to each word of the provision, such ordinance must also include those that are subject to a referenda vote by virtue of their subject matter. Otherwise, the last sentence of the paragraph would be rendered meaningless. Raybestos-Manhattan, Inc. v Glasser, 144 N.J.Super. 152 (Ch. Div. 1976), aff'd , 156 N.J. Super. 513 (App. Div. 1978). In this way, Section 185, itself, reflects Newark's legislative authority to authorize an ordinance to be submitted to the voters at the time it enacts such ordinance (i.e., "by its own terms") as well as the authority to enact an ordinance that determines as matter of

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after the word "general" as required by section 192(c).

policy that any ordinance that concerns a specific subject matter must be must be submitted to the voters.

Now, understanding that the City Council has the explicit authority to decide to submit an ordinance concerning a specific subject matter to a referendum vote, one must determine whether there exists state law that would prohibit a municipality from making such legislative decision with respect to the referenda required by Sections 1 and 3 of the Save Our Water Ordinance. With respect to the establishment of an MUA, a review of N.J.S.A. 40:14B-1 *et seq*. governing the transaction indicates that there is no such prohibition. Indeed, N.J.S.A. 40:14B-4 which governs the establishment of an MUA, by ordinance, neither prohibits nor requires such ordinance to be subject to a referendum vote. The City concedes as much, when it states that an ordinance establishing an MUA is subject to a referendum vote, after it is enacted by the City Council, pursuant to the right of referendum as defined by the first paragraph of N.J.S.A. 40:69A-185. Similarly, the City admits that an ordinance that concerns a debt guarantee or deficiency agreement with an MUA, which is governed by N.J.S.A. 40:14B-49 and the subject of Section 3 of the Ordinance, is also subject to a referendum vote, after it is enacted by City Council. Accordingly, if such ordinance is subject to a referendum vote after it is enacted, the City Council is also authorized to submit an ordinance concerning such subject matter to the voters, if it decides to so by ordinance.

The third referendum vote required by the Save Our Water is also within the legislative authority of the City Council, but is subject to different reasoning. In Section 1 of the Ordinance, any ordinance approving an Interlocal or Services agreement with an MUA must be submitted to the voters for approval. Although "Interlocal or Services Agreement" is not defined, both the City and Defendants agree that such agreements are subject to N.J.S.A. 40:14B-48. Such statute

provides that a municipality is "empowered, without any referendum," to sell, lease, grant or convey public property to an MUA. However, it should be noted that this statute does not prohibit a municipality from deciding to put a lease or service agreement to a vote by the people, it just gives them the right not to do so. Contrast N.J.S.A. 40:55D-62(b)("No zoning ordinance and no amendment or revision to any zoning ordinance shall be submitted to or adopted by initiative or referendum"); N.J.S.A. 40A:12A-28 ("No ordinance, amendment of revision of any ordinance or resolution under this [Redevelopment] act shall be submitted to or adopted by initiative or referendum, notwithstanding any other law to the contrary); N.J.S.A. 40A:4-3.2 (Ordinance concerning adoption of new fiscal year "shall not be subject to referendum"); and N.J.S.A. 40A:2-18 (a bond ordinance "shall not be subject to referendum"). Because the language employed in N.J.S.A. 40:14B-48, found in several statutes enabling municipalities to sell, lease or convey port facilities or other utility systems to a MUA, is discretionary, it is within the legislative authority of the City Council to decide to submit such Interlocal or Services agreement to the voters, even though they are not required to do so by law prior to the enactment of such ordinance or after by way of the public's right of repeal. Accordingly, this clause of Section 1 is also within the legislative authority of the City Council to enact.[8]

Finally, the language of Section 4 of the Save Our Water Ordinance, as reformed in light of the mistake that the Committee has acknowledged above, is also authorized by state law. Indeed, this provision adheres to the language of N.J.S.A. 40:69A-192(c), which determines the timing of a referendum election that is held as a result of an ordinance whose subject matter requires such election. In short, the referenda provisions of the Save Our Water Ordinance are all

[8] Given the express language of N.J.S.A. 40:14B-48, however, the Committee of Petitioners and Councilman Baraka and Rice acknowledge that this portion of Section 1 is not a

authorized by state law and thus are within the legislative authority of City Council and the citizens of Newark.

B. THE CITY COUNCIL IS AUTHORIZED, AS A MATTER OF LOCAL POLICY, TO PROHIBIT THE CITY FROM ENTERING INTO A SERVICE CONTRACT THAT IS NOT COMPETIVELY BID PURSUANT TO A SPECIFIC EXCEPTION UNDER THE LOCAL PUBLIC CONTRACT LAW.

Section 2 of the Save Our Water Ordinance states:

> Revised Ordinances of the City of Newark section 2:17-1 shall be amended to include a new section 2:17-1.5 as follows: Neither the Director nor any City Official associated with the Department of Water and Sewer Utilities shall enter into any contract exempt from competitive bidding under N.J.S.A. 40A:11-1(gg) and/or N.J.S.A. 40A:11-5.1.

The City and NWCDC claim that because section 2 prohibits the City from contracting with certain private entities for the provision of water supply and waste treatment services or the construction or operation of water supply and wastewater treatment facilities under two related exceptions to the LPCL, it imposes an impermissible restraint on successor council actions.[9] This claim reveals a complete misunderstanding of the actual import of this provision and the scope of a municipality's authority under the LPLC, the Home Rule Act, and the Faulkner Act. See supra. Point I, introduction.

Simply put: This section of the Save Our Water Ordinance merely prohibits the City from exercising its option under the LPCL to refrain from competitive bidding requirements when it seeks to procure water supply and wastewater treatment services (including water supply and wastewater treatment facility operation services). It does not bar the City from entering into

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proper subject of initiative. As such, it must be presented to the Mayor for his approval before it is effective.

[9] N.J.S.A. 40A:11-1(gg) and N.J.S.A. 40A:11-5.1 are related insofar as the former incorporates the latter. N.J.S.A. 40A:11-5.1 was enacted at the behest of former Mayor Sharpe James, who desired to establish a nonprofit public utility for Newark that he could potentially

such contracts if competitively bid, and, in this way, simply expresses a policy preference for competitive bidding with respect to the City's Water and Sewer Systems.[10] Viewed from this perspective, the City Council's codification of its decision to decline to approve a certain category of service contracts that have not been subject to competitive bidding procedures must be seen as a proper exercise of legislative authority. The LPLC expresses a strong purpose in promoting competition and guarding against the "favoritism, improvidence, extravagance, and corruption" that often comes with contracts that are not subject to open bidding requirements. CFG Health Systems v. County of Hudson, 413 N.J. at 315. See Hog Wild: An Analysis of the Activities of the Newark Watershed Conservation and Development Corporation, Verified Answer, Exhibit O. And, as established above, the LPLC does not pre-empt local action in this area. Indeed, in the spirit of the Home Rule Act, the LPLC clearly permits local regulatory action that is not required under state law, especially regulation that is consistent with and in furtherance of the LPLC's primary purpose to promote competition and avoid favoritism.

A clear example of local regulation that is analogous to Section 2 of the Save Our Water Ordinance is presented by municipal Pay-to-Play ordinances. Such ordinances further restrict professional business contracts that are permitted to be exempt from competitive bidding under the LPLC. Specifically, city officers are not permitted to contract with certain entities that have made financial contributions of certain amounts to elected officials during a certain time period, unless those contracts are subject to competitive bidding. In this way, municipalities, like Newark with respect to the Save Our Water Ordinance, are permitted to prohibit the exercise of

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control upon leaving office. N.J.S.A. 40A:11-5.1 further imposes certain procedural requirements on a municipality that wants to contract there under.

[10] On information and belief, prior to 1998, it was common practice for Newark to require contracts to manage and operate its water treatment facility to be subject to competitive bidding requirements.

actions otherwise permitted under the LPLC (*i.e.*, the use of the professional business contract) in response to a local concern (*i.e.*, political corruption). See N.J.S.A.40A:11-51(b)(LPLC provision that municipal ordinances prohibiting pay-to-play practices are not pre-empted by state laws addressing the same, N.J.S.A. 19:44A-20.2 and 19:44A-22). Furthermore, it is commonly accepted that municipal ordinances prohibiting pay-to-play practices are a proper subject of initiative, even though citizens typically do not have the authority to subject individual professional business contracts, which are approved by resolution, to referendum. In re Ordinance 04-75, 201 N.J. 446 (erasing the distinction between administrative and legislative ordinances for purposes of initiative and referendum).

For this reason, Section 2 is a valid exercise of legislative authority.

C. THE CITY COUNCIL IS AUTHORIZED TO DEEM CERTAIN ENTITIES THAT RECEIVE WATER OR TO WHICH NEWARK PROVIDES WATER AS CONFLICTING AGENCIES PROHIBITING COMMON LEGAL REPRESENTATION IN ACCORDANCE WITH THE RULES OF PROFESSIONAL CONDUCT.

Section 5 of the Save Our Water Ordinance provides as follows:

> Section 5**:** Revised ordinances of the City of Newark section 2:17-1 shall be amended to include a new section 2:17-1.7, as follows: Conflicts of interest. "Conflicting agency" shall mean (a) any entity from which the Department of Water and Sewer Utilities receives water or to which it provides water or sewage, including but not limited to, the North Jersey District Water Supply Commission, the Passaic Valley Sewerage Commissioners, and Joint Meeting of Essex and Union Counties; and (b) any municipal utility authority, municipal water or sewer department, or water company that serves any region that is contiguous to the City of Newark or to any other municipality to which the Department of Water and Sewer Utilities provides water. No legal counsel or legal firm shall be retained or employed by the Department of Water and Sewer Utilities or by the entity authorized under R.O. 2.17-3.2(c) if said legal counsel or legal firm is also employed or retained by a conflicting agency.

The City contends that this provision is an invalid restriction on the ability of future Mayors and Councils" to make appointments and approve legal service contracts and constitutes an ultra vires attempt to control a third party entity that contracts with the City. City's Brief at p.

15. The NWCDC joins the City in its opposition, and additionally contends that such provision is pre-empted by the Supreme Court's jurisdiction over the practice of attorneys. Both attorneys, who would be impacted by this provision, seem rather outraged by the Council's rational decision to set forth the public and private agencies that it believes hold interests that are materially adverse to DWSU, and by extension the entity that provides planning, conservation, development, and management services to DWSU regarding the City's Pequannock Watershed Properties.

This section of the Save Our Water Ordinance is a valid exercise of legislative authority and does not interfere with the Court's supervisory role over attorneys, as asserted by NWCDC. By grounding the prohibition against legal representation in the finding of an actual conflict, the City Council has acted consistently with R.P.C. 1.8 (l) , which prohibits municipalities from waiving a conflict of interest, R.P.C. 1.8(k), which governs attorneys retained by m municipalities or municipal agencies, (see In re Supreme Court Advisory Committee on Professional Ethics Opinion No. 697 189 N.J. 549 (2006)(holding that R.P.C. 1.8(k) governs in all instances in which a municipal attorney seek to represent private clients)), and R.P.C. 1.9 concerning duties to former clients. Twenty-First Century Rail Corporation v. New Jersey Transit Corp., 419 N.J. Super. 343 (App. Div 2011)(attorney barred from representing a present client when the present and former clients interests are materially adverse).

NWCDC and the City insist that NWCDC is an independent third party and thus who it hires as its attorney is not subject to the control of City Council. However, there is no mention of NWCDC in this section of the Ordinance. Rather, the Ordinance seeks to restrict the hiring choice of an entity that by the terms of R.O. 2.17-3.2(c)(as amended by the Ordinance) is clearly

a public body of Newark, and thus a lawyer representing such entity is certainly within the Newark municipal family governed by R.P.C. 1.8(k).

Notwithstanding the fact that this section of the Ordinance does not expressly mention NWCDC, a review of that entity's Certificate of Incorporation, as amended, and its By-Laws (Verified Answer, Exhibits M & N, respectively) indicates that it manages and operates Newark Watershed Properties in trust for the City, has the power to "undertake development of properties under the service contract, in its own name or on behalf of the City," to negotiate and with the approval of the City Council to enter into agreements with other governments on matters affecting the properties," and to charge fees for use of the property. Id., Ex. M at 4. NWCDC's primary source of revenue comes from Newark's budget, and thus Newark, in effect pays its legal fees. Accordingly, the City Council acted appropriately when it subject NWCDC to the same conflict rules that it imposed on DSWU, especially in light of R.P.C. 1.8(l) precluding a municipality from waiving a conflict. Cf. Newark R.O. 2:2-12 (prohibits any member of a city board or commission from having any interest in any alcoholic beverage license); Newark, R.O. 2:2-64. (restricting municipal judges, in accord with the R.P.C.s, from engaging in the practice of law other than in the discharge of their duties as a municipal judge).

D. THE CITY COUNCIL IS AUTHORIZED TO ABOLISH A QUASI-CITY AGENCY, ALTHOUGH THE PROVISION IS NOT SELF-EXECUTING.

> **Section 6:** The Newark Watershed Conservation and Development Corporation is hereby dissolved. All physical, commercial or other financial assets of the Newark Watershed Conservation and Development Corporation shall be paid to the Water Utility capital fund held by the City Treasurer All nonfinancial assets of the Newark Watershed Conservation and Development Corporation shall become the property of the Department of Water and Sewer UtilitiesText.—what it does, two things.
>
> Technical can not . Look at the history, the C, By-Laws, the Board Composition dthe Board has the capacity to effect the dissolution through mechanisms set forth

in Ttile 15A. Board members, Payne can go to court and CC can ask the AG to go to court.
Quasi.asi Government. Created and ertificte and by-laws Baord members, revenue controlled, net revenue comes back and pursuant to dissolution net assets go to Newark.

Not self-executing. Go through methods to cause dissolution.(15A) Cite resolution by Board. This is what it means . Second phase, consistent with dissolution clause, and within legislative authority of CC.

E. THE CITY COUNCIL IS AUTHORIZED TO REGULATE THE SALARY, TENURE AND TERMS OF A DIRECTOR OF A DEPARMENT OF THE MUNICIPALITY, AND TO PROHIBIT THE CITY FROM CONTRACTING HIS/HER DUTIES--THE DEPARTMENT'S SUPERVISORY DUTIES— TO AN OUTSIDE ENTITY.

**Section 7:** Revised ordinances of the City of Newark section 2.17-1.1(b) shall be amended to read as follows: Qualifications of Director. The Director of Water and Sewer Utilities shall, prior to appointment, be qualified by education, training and/or experience, in the planning and execution of water and sewer public works operations and improvements and possess the knowledge and ability to direct and supervise revenue accounting and collection operations. The Director's compensation shall be such sum annually as shall be fixed by ordinance of the Municipal Council. The Director or Acting Director shall be a full-time employee of the Department of Water and Sewer Utilities and shall hold no other title within the City of Newark. He or she shall receive no compensation from any entity that has a contract with the City of Newark.

**Section 8**: Revised ordinances of the City of Newark section 2.17-1.1(c) shall be amended to read as follows: Duties of the Department. The Director, through the Divisions and otherwise, shall direct and supervise the functions and activities for the design, condition and performance of the City's water, sanitary and storm sewerage systems and develop and maintain methods to account for water consumption and usage and the implementation of revenue collection systems related thereto in order to maintain the self-liquidating requirements of both the water and sewer utilities. Additionally, the Director of Water/Sewer Utilities, himself or herself, or through a nominee shall authorize, direct and supervise the preparation of plans, specifications, and the letting and performance of all service, professional, and construction contracts under the Department of Water and Sewer Utilities. The Department's [supervisory] [sic]duties shall be carried out by the City of Newark, and not by any other entity, public or private.

MLUL duties. Belongs to CC. Check specific statute and some cases.
29(a) establish and abolish—find statute re salaries and tenure. Point to other ordiances.

Indicate that meant Department's supervisory duties, the directors cannot be privatized otherwise inconsistent with previous sentence. Must be interpreted to make sense and valid.

Show other examples.

F. THE CITY COUNCIL IS AUTHORIZED TO IMPOSE TERMS OF OPERATION ON ANY ENTITY WITH WHICH THE CITY CONTRACTS TO MANAGE AND DEVELOP NEWARK'S WATERSHED PROPERTIES.

**Section 9**: Revised ordinances of the City of Newark section 2.17-3.2(c) shall be amended to read as follows : In lieu of the planning, conservation, development and management of the City's Pequannock Watershed properties by regular City department, the City of Newark may enter into one (1) or more service agreement for any or all those purposes. In the event that any such agreement becomes operative, the department shall coordinate the administration of the agreement with the other water supply functions of the Division and the Director of Water and Sewer Utilities shall supervise the administration of the agreement on behalf of the City of Newark. Any such agreement shall be a cost-reimbursement contract. Any such agreement shall provide: that the entity is restricted by its charter to engaging in those activities and only those activities; that the entity shall be covered by the Open Public Meetings Act (N.J.S.A. 10:4-6 et seq.), the Open Public Records Act (N.J.S.A 47:1A-1 et seq.), the Local Public Contract Law (N.J.S.A. 40A:11-1 et seq)., and the Local Government Ethics Law (N.J.S.A. 40A:9-22.1 et seq.); that the entity's bylaws have been adopted and approved by ordinance. Any agreement under this section may be authorized only by ordinance, and at least one month must elapse between final adoption of the ordinance and the beginning of the contract period. No agreement under this section may exceed one year in length.

Consistent with Trenton case. Show examples.

Cost terms.

Check ordinance vs. resolution (LPCL) understand this to be like authorizing

giving away of municipal functions.

G. THE CITY COUNCIL IS AUTHORIZED TO REQUIRE THE MAYOR TO PREPARE AN ANNUAL REPORT REGARDING THE DEPARTMENT OF WATER AND SEWER UTILITIES.

Section 10 of Save Our Water Ordinance requires the Mayor, in coordination with the

Director of the DWSU, to report to the City Council on the state of Newark's water and sewer services and on its infrastructure, which all parties agree is in the need of improvement.[11] The City objects that this requirement is "impermissible attempt to infringe on the Mayor's executive authority." City Brief at p. 16. Again, the City erroneously claims pre-emption, an argument that on its face must be dismissed. The Faulkner Act promotes local self-government, rather than limits it to the enumerated duties listed in the statute. In re Shain, 92 N.J.523, 533 (1983)(power to issue subpoenas within the legislative purview of the Council although no statute expressly gave the Council such authority).

In general, it is accepted that even if federal and state government principles of separation of power are not strictly applicable to municipalities, the Faulkner Act plainly envisions a separation of functions between the Mayor and City Council. In re Shain, 92 N.J. at, 537. The Mayor's administrative and executive functions are intended to complement the Council's legislative powers, which include the right to investigate and inquire. N.J.S.A. 40:69A-32(b)(for statutory construction purposes, separation of functions assumed); N.J.S.A. 40:69-36(setting forth council's legislative powers but noting that they "include, but are not limited to"); N.J.S.A. 40:69-37(council's investigative powers); N.J.S.A. 40:69-39(vesting executive power in the Mayor); and N.J.S.A. 40:69-40 (setting forth the Mayor's duties).

The City does not deny that the Mayor's statutory duties include, but are not limited to reporting annually to the council and to the public on the state of the municipality, N.J.S.A.

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[11] Section 10: Revised ordinances of the City of Newark section 2.2-3 shall be amended to include a new section d: The Mayor, in coordination with the Director of the Department of Water and Sewer Utilities, shall annually report no later than April 1 on the state of water and sewer service and infrastructure. A copy of the report shall be posted on the city website and delivered to the main public library and every branch library located in the City of Newark..

40:69-39(b), or reviewing "trends of municipal services and finances and programs" of all municipal bodies and reporting thereon to the Council. N.J.S.A. 40:69-39(h). The City simply denies that the City Council has the authority to require the Mayor to report on an annual basis on the state of Newark's water and sewer services and on its infrastructure (in addition to or part of his required annual "state of municipality" presentation. This constricted view of the Faulkner Act cannot be sustained, especially in light of the Council's explicit authority to "require a report on any aspect of the government of the municipality." N.J.S.A. 40:69-37(b).

When all these provisions are read together, construed liberally and imbued with the spirit of cooperation that Justice Rivera-Soto invoked in Municipal Council v. James, 183 N.J. 361 (2005), one must conclude that Section 10 of the Save Our Water Ordinance is within the legislative/investigative functions of the Council. See e.g., Newark R.O. 2:2-28.3 a.2(b) (requiring monthly reports from the Director of Economic and Housing Development on hiring in all construction projects); R.O. 2:4-18 (requiring submission by the Administration to the City Council of an evaluation report on any grant program prior to the renewal of the grant award ).

H. EACH SECTION OF THE SAVE OUR ORDINANCE IS SEVERABLE SINCE EXCISION OF ONE WILL NOT IMPAIR THE GENREAL PURPOSE OF THE ORDINANCE.

Section 12 of the Save Our Water Ordinance states:

> If a provision of this ordinance is or becomes invalid, illegal or Unenforceable in any jurisdiction, that shall not affect the validity or enforceability in that jurisdiction of any other provision of this ordinance, or the validity or enforceability in other jurisdictions of that or any other provision of this ordinance.

City's Verified Complaint, Exhibit E. The City contends that despite the codification of this severability clause in the Ordinance itself, the Court should not enforce it. Applying the proposition stated in Lionshead Woods Corp. v. Kaplan Brothers, 250 N.J.Super. 545, 55 (Law

Div. 1991) , where a specific zoning ordinance was challenged and the severability clause appeared only in the general codification of the town's zoning ordinances, the City contends that each of the substantive provisions of the Ordinance are "so intertwined" that any one provision cannot stand alone. City's brief at pp. 16-17. The Committee of Petitioners and Councilman Rice and Baraka disagree.

It is an accepted principle of law that the provision of a severability clause in an ordinance creates a presumption that any one section of the ordinance can be excised if found invalid. Inganamort v. Borough of Fort Lee, 72 N.J.412, 422-423 (1977). Moreover, even if there is no express declaration, an unconstitutional provision that does not affect the validity of a separate article or clause of the enactment may be deleted. State v. Lanza, 27 N.J. 516, 527-528 (1958). Contrary to the City's assertion otherwise, each of the sections of the Ordinance is separate from another insofar as they make discrete changes to Newark's Revised Ordinances entitled, Department of Water and Sewer Utilities Established, Title 2:17. It is clear that if any one section, or clause within a section is found objectionable, it can be excised "without substantial impairment of the principle object of the statute," which deals with the reorganization of the City's DWSU. . Inganamort v. Borough of Fort Lee, 72 N.J. at 422. Accordingly, the legislative intent of the Committee and City Council must be respected.

## CONCLUSION

For the foregoing reasons, this Court should dismiss the City's and NWCDC's respective Verified Complaints, in their entirety, and permit the Save Our Water Ordinance to go into effect.

Respectfully submitted,

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