	:SUPERIOR COURT OF NEW JERSEY
Ras Baraka, Juba Dowdell, William Stewart, Dwayne Middleton, Joseph Nardone, Richard Cammarieri, and Santiago Pamiagua,	:LAW DIVISION: ESSEX COUNTY : : Docket No. L-2820-00 :
Plaintiffs,	: Action In Lieu of : Prerogative Writ
v.	:
Robert Marasco, in his capacity as Newark City Clerk, and Newark City Council,	:
Defendants.	:

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR FAILURE TO STATE A CLAIM

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PRELIMINARY STATEMENT

Defendants move to dismiss plaintiffs' Complaint In Lieu of Prerogative Writ challenging the refusal of the Newark City Clerk to place their "Right to Speak" ordinance on the November General Election ballot, as required by N.J.S.A. 69A-184, on three grounds. First, defendants contend that the extent of public participation at a municipal council meeting, or the scope of a public comment section at such meeting, is not a legislative subject appropriate for public initiative and referendum. Second, they argue, even if it is, plaintiffs' proposed ordinance is invalid because (a) it does not provide for a time limit on citizen comments, (b) it requires attendance of five (5) Council members at Hearings of Citizens meetings, and (c) the Newark Council cannot control television broadcasting of its meetings. Finally, defendants repeat the one justification originally stated by the City Clerk for refusing to place plaintiffs' initiated ordinance on the general ballot: that the February ordinance enacted by the City Council is "substantially in the form" proposed by plaintiffs. As plaintiffs will demonstrate, each of these arguments is flawed.

In the course of arguing that plaintiffs have no constitutional rights to initiative and referendum or to be heard at municipal council meetings (claims that plaintiffs do not

raise), defendants also contend that this important issue of free expression and public participation in government is effectively preempted by the State Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., (hereinafter "The Sunshine Law"); that is, that the Newark City Council is nothing more than an administrator of a comprehensive state policy when it decides to permit or otherwise regulate public participation at any meeting. However, defendants must concede that there is nothing in the Sunshine Law that indicates a legislative intent to enact a uniform state plan regarding the scope of public participation at a local municipal meeting. Indeed, the statute contemplates local variation on the issue and explicitly delegates to "the discretion of a public body" the authority to legislate local rules regarding the extent of "active [public] participation" allowed at any particular meeting. N.J.S.A. 10:4-12(a).

By acknowledging the Sunshine Law's requirement that local governing bodies conduct their meetings in the open, defendants have also conceded the propriety of providing for public participation in government meetings through legislative means; both provisions (*i.e.*, public attendance and active public participation) effect a qualitative change in the nature of such meetings and both represent significant policy choices. It is

thus disingenuous for defendants to argue that the provision of a public comment period during the City Council's regular meetings reflects a mere administrative concern -- *i.e.*, a procedural rule of conduct in contrast to a significant policy decision,-- to be exclusively determined by municipal officials free from participation by the sovereign municipal electorate.

As to defendants' contentions of alleged overreaching in plaintiffs' proposed ordinance, plaintiffs demonstrate below that: (a) plaintiffs' proposed ordinance makes no attempt to amend the current Rule 17 of the City Council's rules of procedure, which limit public comment at all meetings to five minutes per person; (b) the requirement that five (5) Council members be present at Hearing of Citizens meetings must be interpreted as nothing more than a quorum requirement; and (c) the televising of Council meetings is completely within the control of the Newark City Council which controls the operation of Newark Public Access Channel 26.

Finally, the ordinance adopted by the Council is substantially different from the one proposed by plaintiffs in that it does not provide for citizens to address the entire City Council during regular council meetings, at which time the Council conducts its business and the public is able to tune in

and watch a dialogue between citizens and Council members over the local access television channel.

STATEMENT OF FACTS

Prior to May 1997, Newark citizens were allowed to address the Newark City Council during regularly held Council meetings. Complaint at ¶10 (hereinafter "Comp.,¶_"); Baraka Certification at ¶3 (hereinafter "Baraka Cert. at ¶_"); Cammarieri Certification at ¶3 (hereinafter "Cammarieri Cert at ¶_"). As part of the meeting's agenda, the "Hearing of Citizens" allocated time for citizens to address the entire council on any item of concern to local citizens. Comp.,¶10; Cammarieri Cert. at ¶¶2,3. In addition, the whole Council meeting, including the Hearing of Citizens, was broadcast live on a local pubic access channel, Channel 26 (Comp.,¶12), and rebroadcast the following Saturday morning. Baraka Cert. at ¶15; Cammarieri Cert. at ¶15.

In May 1997, the Newark City Council adopted a new ordinance revoking the citizens' opportunity to be heard at Council meetings. Comp.,¶14; Baraka Cert. at ¶3; Cammarieri Cert. at ¶3. This 1997 ordinance allowed citizens to address the Council at regular meetings only with respect to ordinances upon second reading (a time by which most Council members have already decided how they will vote), and created an alternative forum

where citizens could speak to Council members regarding other issues. Comp., ¶¶15-17; Baraka Cert. at ¶¶ 4,18; Cammarieri Cert. at ¶¶4,18. This forum, located in the wards on a rotating basis, provided the citizens of a given ward a chance to speak to Council members once every five months, and required only three Council members for a quorum. Comp.,¶18; Baraka Cert. at ¶¶4,5; Cammarieri Cert. at ¶¶4,5. Since the ward meetings are not considered regular Council meetings and no Council business is conducted, the meetings are not televised, thus eliminating the possibility of nonattending citizens viewing these discussions. Comp.,¶19; Baraka Cert. at ¶15; Cammarieri Cert. at ¶15.

In response to their significantly diminished opportunity to address the Newark City Council at regularly scheduled Council meetings, plaintiffs, all long-time Newark citizens, circulated a petition for a proposed "Right to Speak" initiative which would amend the current means of addressing the Council. Comp.,¶2; Baraka Cert. at ¶¶2,8; Cammarieri Cert. at ¶¶2,8. The initiative, if passed, would restore to the citizens the right to address agenda and non-agenda issues during the regular City Council meetings when all City Council members would normally be in attendance. Comp., Ex A. Plaintiffs obtained the required number of signatures to place the initiative on the November

General Election ballot and filed it with the City Clerk, defendant Robert Marasco, on January 28, 2000. Comp.,¶20; Baraka Cert. ¶ 10; Cammarieri Cert. ¶ 10. Mr. Marasco certified that the initiative petition as amended and supplemented, contained enough valid signatures to satisfy the requirements of N.J.S.A. 40:69A-184.[1] Comp.,¶22.

Five days after the filing of the petition, on February 2, 2000, the Newark City Council adopted a new ordinance addressing citizens' speech and participation rights, but not at regular City Council meetings. Comp.,¶24; Baraka Cert. at ¶11; Cammarieri Cert. at ¶11. The new ordinance created an additional Hearing of Citizens meeting to take place two hours before the regular

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[1] N.J.S.A. 40:69A-184 provides:

> The voters of any municipality may propose any ordinance and may adopt or reject the same at the polls, such power being known as the initiative. Any initiated ordinance may be submitted to the municipal council by a petition signed by a number of the legal covers of the municipality equal in number to at least 15% of the total votes cast in the municipality at the last election at which members of the General Assembly were elected. An initiated ordinance may be submitted to the municipal council by a number of the legal voters of the municipality equal in number to at least 10% but less than 15% of the total votes cast in the municipality at the last election at which members of the General Assembly were elected, subject to the restrictions set forth in section 17-43 (C. 40:69A-192) of this act.

Council meeting. Comp.,Ex. D. This newly established pre-Council meeting is not televised, and citizens who want to speak during the meeting must sign up no later than one hour after the official agenda for the Council meeting is available to the public on the Friday before the Wednesday meeting. Comp.,¶29; Baraka Cert. at ¶¶11,15,16; Cammarieri Cert. at ¶¶11,15. Under the procedure the City Council utilized to pass this ordinance, citizens were not able to comment on it until the day of its second reading. At that time, Council members did not respond to any of the public's comments. Comp.,¶¶26-28; Baraka Cert. at ¶¶12,13; Cammarieri Cert. at ¶¶12,13.

Upon passage of the ordinance, defendant Marasco, Newark City Clerk, determined that the Council's February ordinance was in "substantially the form as requested" by the petitioners and as such, he refused to place the initiative on the November ballot in accordance with N.J.S.A. 40:69A-191.[2] Comp., Ex C.

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[2] N.J.S.A. 40:69A-191 provides:

> If within 20 days of the submission of a certified petition by the municipal clerk the council shall fail to pass an ordinance requested by a referendum 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 unless, within 10 days after final adverse action by the council or after the expiration of the time allowed for such action, as the case

Plaintiffs brought this action in lieu of a prerogative writ on or about March 17, 2000, in order to challenge the refusal of the Newark City Clerk to place the "Right to Speak" initiative on the November General Election ballot. Defendant City Council moved to intervene and, soon thereafter, defendants made this Motion to Dismiss. Since there is no supervening legislative intent to bar a referendum on the important policy matter herein at issue -- i.e., the extent of active public participation permitted during regular City Council meetings - and the Council's February ordinance is not in "substantially the form" of plaintiffs' initiative, the City Clerk's refusal to place the proposed initiative on the ballot violates his duty that is clearly mandated under state law.

ARGUMENT

I. THE NEWARK CITY CLERK FAILED TO CARRY OUT HIS DUTIES IN REFUSING TO PLACE THE NEWARK CITY RESIDENTS' INITIATIVE ON THE BALLOT.

By virtue of N.J.S.A.40:69A-184, the State Legislature has established a forum for encouraging citizen participation in

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may be, a paper signed by at least four of the five members of the Committee of the Petitioners shall be filed with the municipal clerk requesting that the petition be withdrawn. Upon the filing of such a request, the original petition shall cease to have any force or effect.

municipal affairs through the initiative and referendum processes. Tumpson v. Farina, 240 N.J.Super. 346, 351 n.2 (App. Div. 1990). This legislative grant of the referendum power is to be construed liberally "in order to encourage public participation in municipal affairs in the face of normal apathy and lethargy in such matters." Narcisco v. Worrick, 176 N.J. Super. 315, 319 (App. Div. 1980). See also Sea Girt Restaurant and Tavern Owners Assoc., Inc., 625 F.Supp. 1482, 1488 (D.N.J. 1986)(holding that referendum process set forth in New Jersey Statute used by citizens to limit hours of sale of liquor did not violate constitutional rights of holders of retail liquor licenses). The referendum process has been acknowledged as a classic demonstration of "devotion to democracy," James v. Valtierra, 402 U.S. 137, 141 (1971);[3] and thus there is a strong

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[3]In upholding the validity of a referendum process, the Supreme Court has noted:

> A referendum, however, is far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters— an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest.

Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 678 (1976)(*quoting* Southern Alameda Spanish Speaking Organization v. Union City, Ca., 424 F.2d 291, 294 (9th Cir. 1970)).

federal and state public policy favoring the right of voters to exercise their statutory power of initiative. Clean Capital County Comm. v. Driver, 228 N.J. Super. 506, 510 (App. Div.), cert. granted in part and denied in part, 134 N.J. 468 (1988).

In this context, plaintiffs worked for over one year to secure signatures on petitions seeking to give Newark citizens a right to actively participate in regular City Council meetings in accordance with the requirements of N.J.S.A. 69A-184. Baraka Cert. at ¶8. These petitions were then examined at the offices of the Essex County Commissioner of Registration, and defendant Marasco subsequently determined that the intitative petition contained 2,795 valid signatures, enough to satisfy the "at least 10%" requirement of N.J.S.A. 40:69A-184. Comp.,¶¶21,22, Ex.C.

Defendant Marasco also had and continues to have the duty, pursuant to N.J.S.A. 40:69A-191, to submit plaintiffs' proposed ordinance to the voters at the next General election unless the City Council passed within 20 days of submission of a certified petition an ordinance in "substantially the form requested." This power to place the initiative on the ballot is vested in the municipal clerk alone, is not subject to review by another executive officer and constitutes an "obligatory ministerial act"

subject to a prerogative writ in the nature of *mandamus*. Cf. Essex County Mayors Conference v. Board of Chosen Freeholders, 124 N.J. Super. 393, 405 (Law Div. 1973)(holding that once the Freeholders adopted a resolution authorizing an election on the question of a charter study in accordance with applicable law, the remaining act of filing the resolution with the county clerk became a ministerial task subject to *mandamus*).

On February 2, 2000, the City Council passed an ordinance that continued to ban citizen participation at regular Council meetings and instead created a separate Hearing of Citizens meeting to occur two hours before regular Council meetings in the Council chamber. Comp., Ex. D. Defendant Marasco refused and continues to refuse to submit plaintiffs' proposed ordinance to the voters on the alleged ground that the Council's ordinance is in "substantially the form requested" by the plaintiffs. Comp., Ex. C.[4]

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[4]It is interesting to note that defendants state that the City Council "advised the Clerk of its purpose and intent to adopt an ordinance in substantially the form requested by the proposed initiative ordinance." Brief In Support of Defendants' Motion to Dismiss at p.23 (hereinafter "Db. at __"). Contrary to defendants' position throughout its papers that this matter involves no factual issues, defendants are now relying on advise allegedly given to the City Clerk by the City Council (as to the Council's intent and purpose in adopting its February ordinance) to support their position that the City Clerk acted in accordance

Plaintiffs contend that this "substitute" ordinance is no substitute at all, but merely defendants' attempt to subvert their democratic right to actively participate in governmental affairs procedurally and substantively through the initiative process and the content of their proposed ordinance (*i.e*, the right to speak at City Council meetings). There is no governing body to whom plaintiffs may appeal defendants' actions.

Since there is no right of appeal and the public's interest is clearly at stake, plaintiffs seek relief by way of a prerogative writ and contend that the City Clerk has violated his duty in failing to place Newark City residents' public comment initiative on the ballot. See Township of Stafford v. Stafford Township Zoning Bd. Of Adjustment, 154 N.J. 62, 69 (1998)(noting propriety of using prerogative writ to determine the legality of a government official's actions where the action is not appealable to another government entity). Defendants have not demonstrated that plaintiffs' Complaint In Lieu of Prerogative Writ does not state a claim nor why this Court should not entertain the matters raised therein.

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with the law. Whether the City Council actually communicated such advise, let alone its content, has not been established.

II. DEFENDANTS' MOTION TO DISMISS SHOULD BE DENIED BECAUSE THE CITIZENS' "RIGHT TO SPEAK" ORDINANCE IS VALID ON ITS FACE.

In order to prevail on their motion to dismiss, defendants bear a heavy burden. Motions to dismiss for failure to state a claim pursuant to R. 4:6-2(e) are granted in "only the rarest instances." Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 772 (1989). This Court, therefore, must approach defendants' motion to dismiss with "caution." Lieberman v. Port Auth. of N.Y. & N.J., 132 N.J. 76, 79 (1993). The Court should treat as true all the allegations in plaintiffs' pleadings and "plaintiffs are entitled to every reasonable inference of fact." Printing Mart-Morristown, 116 N.J. at 746; F.G. v. MacDonell, 150 N.J. 550, 556 (1997).

In addition to these general standards, the Court must start its analysis of defendants' Motion to Dismiss in this case with the proposition that the legislative grant of initiative and referendum should be liberally construed. See supra. at pp.8-9. A careful application of the aforedescribed guidelines indicates that plaintiffs' proposed ordinance permitting active public participation in regular City Council meetings is valid on its face and plaintiffs have therefore stated a proper cause of action.

A. Plaintiffs' Proposed Initiative Does Not Contravene a Comprehensive State Statute.

Plaintiffs submitted their Right to Speak Ordinance pursuant to N.J.S.A. 40:69A-184, which grants the power of initiative to the voters in a Faulkner Act municipality. The statue defines the power of initiative as the ability of "[t]he voters of any municipality [to] propose any ordinance and [to] adopt or reject the same at the polls."

Despite the generality of this language, defendants urge that the legislature did not intend to permit a referendum under these circumstances. Specifically, defendants claim that the statutes that grant the City Council the authority to adopt its own procedural rules,[5] together with the Sunshine Law's grant of authority to regulate public participation at local government meetings,[6] indicate a "comprehensive legislative design" to

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[5]N.J.S.A. 40:69A-180(authority to determine its own rules of procedure); N.J.S.A. 40:69A-36(f)(authority to adopt rules for the council) and N.J.S.A. 40:69A-36(g)(authority to establish time and place for council meetings).

[6]N.J.S.A. 10:4-12(a) reads in relevant part:

> Nothing in this act shall be construed to limit the discretion of a public body to permit, prohibit or regulate the active participation of the public at any meeting.

"preempt[] initiative ordinance proposals" such as plaintiffs' speech ordinance. Db. at 10.

To support its argument, defendants rely on several cases in which the courts found that action of the electorate would represent uncoordinated tampering with a comprehensive statutory scheme in which the local governing unit merely implemented state policy, typically by following detailed legislatively-established procedures.[7] These cases simply do not apply to plaintiffs'

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[7]See We the People Comm., Inc. v. City Of Elizabeth, 325 N.J. Super. 329, 334-5 (App. Div. 1999)("discern[ing] a supervening legislative design that the Water Supply Act's minute and definitive treatment of the subject [of privatization of a municipality's water supply] fully occupies the field" thus precluding referendum process; legislature explicitly set forth detailed procedures for a municipality to follow in its capacity as administrator of state policy); Sparta v. Spillane, 125 N.J. Super. 519, 525 (App. Div. 1973)(finding legislature's intention to provide uniformity of procedure for all municipalities in the State as to zoning matters reason to preclude voter initiated ordinances regarding such matters); Atlantic City Housing Action Coalition v. Deane, 181 N.J.Super. 412 (Law Div. 1981)(redevelopment process not proper subject of a voter initiated ordinance because action by the electorate would constitute uncoordinated tampering with a comprehensive state scheme and would subvert the detailed procedures to be followed by a municipality when implementing state policy); Smith v. Township of Livingston, 106 N.J. Super. 444, 456 (Ch. Div.), aff'd 54 N.J. 525 (1969)(finding that Zoning Act, which sets forth detailed procedure, mandatory in nature, covering both the substance of zoning ordinances and their method of passage constitutes an exclusive grant of legislative power to the governing bodies of municipalities preventing voters from exercising the power of initiative); Mervynne v. Acker, 189 Cal. App. 2d 558, 564-565 (4th Dist. 1961)(finding that proposed

proposed ordinance providing for active public participation at meetings of the Newark City Council -- the establishment of a substantive right that fundamentally affects the nature of City Council meetings in contrast to a procedural rule that simply refines that right. This is primarily the case because public participation, though mentioned in the Sunshine Law, remains a matter of municipal concern, not state policy.

Furthermore, it should be noted that the Legislature has not explicitly restricted resort to the initiative or referendum power with respect to public participation at these meetings. Cf. N.J.S.A. 40:55D-62(b) (zoning ordinances not to be submitted to or adopted by initiative or referendum). Rather, N.J.S.A. 10:4-12(a) contemplates local legislative action to develop a policy regarding public participation that may vary from municipality to municipality and meeting to meeting. The legislature has clearly not developed a comprehensive state plan as in Atlantic City Housing Action Coalition v. Deane, 181 N.J.Super. at 412, nor set forth detailed procedures to be uniformly followed by all

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repeal of parking meter ordinances not proper subject of an initiative because traffic regulation was a matter of statewide concern and not a "municipal affair;" legislature explicitly delegated its authority to implement state policy exclusively to local legislative body).

municipalities as in We the People Comm., Inc. v. City Of Elizabeth, 325 N.J. Super. at 329 or Sparta v. Spillane, 125 N.J. Super. at 519. Instead, the legislature has clearly stated that a citizen's right to speak or participate in a local government meeting is within the ambit of municipal affairs, not statewide concern; thus giving municipalities, and their electorates, the authority to create or abrogate that right. Cf. New Jersey State AFL-CIO v. Bergen County Bd. Of Chosen Freeholders, 121 N.J. 255 (1990)(holding that non-binding referendum statute authorizes local public questions only on issues about which the local unit of government has power to act).

In short, defendants have pointed to no evidence that the legislature intended to pre-empt municipal legislation regarding this matter[8] and that local legislative discretion was not to be

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[8]In Overlook Terrace Management Corp. v. Rent Control Bd. of West New York, 71 N.J. 451 (1976), the New Jersey Supreme Court established the test for determining whether a local ordinance is preempted by state law. The questions to be considered are the following:

> 1) Does the ordinance conflict with state law, either because of conflicting policies or operational effect (that is, does the ordinance forbid what the Legislature has permitted or does the ordinance permit what the Legislature has forbidden)? 2) Was the state law intended, expressly or impliedly, to be exclusive in the field? 3) Does the subject matter reflect a need for uniformity? (citations omitted) 4) Is the state scheme so pervasive or comprehensive that it

shared with the electorate. Cf. Clean Capital County Comm. v. Driver, 228 N.J. Super. at 511-12 (where State determined that all municipalities must implement a recycling plan, but did not detail contents of such plan, county initiative ordinance requiring deposits on certain bottles and cans was not facially preempted by operation of Solid Waste Management Act or recycling legislation). Plaintiffs' proposed ordinance is therefore valid.

B. The Proposed Ordinance Does Not Serve a Ministerial Function and Thus Cannot be Characterized as Merely "Administrative."

Defendants also claim that plaintiffs' proposed ordinance establishing Newark residents' right to speak at a regular Council meeting, in an effort to influence municipal policy, "intrudes" on the Council's "administrative powers." Db. at 11.

> precludes coexistence of municipal regulation? 5) Does the ordinance stand "as an obstacle to the accomplishment and execution of the full purposes and objectives" of the Legislature?

Id. at 461-62 (*quoting* Hines v. Davidowitz, 312 U.S. 52, 67-68 (1941)). In this case, a comparison of plaintiffs's proposed ordinance with the Sunshine Law results in negative answers to all the above questions. The Sunshine Law clearly contemplates that the rules governing public participation at Council meetings will vary from town to town and therefore there is no "state plan" or need for uniformity; local discretion is promoted. See N.J.S.A. 10:4-12(a)(no limits on "discretion of public body"). Rather than frustrating the purpose of the Sunshine Law, plaintiffs's initiative furthers it.

Specifically, defendants insist that plaintiffs' initiative impermissibly interferes with the Council's authority to "conduct [its] meetings," id. at 9, and to enact, by resolution, procedural rules for the Council. Id. at 12 (*citing* N.J.S.A. 40:69A-36).

In the course of its argument, defendants cite several cases, but engage in very little analysis of their applicability to the facts herein. See, e.g., Albigese v. Jersey City, 129 N.J. Super. 567 (App. Div. 1974)(finding provisions of ordinance calling for extension by way of resolution invalid because amendment of rent control ordinance was legislative in nature); O'Keefe v. Dunn, 89 N.J. Super. 383 (Law Div. 1965), aff'd, 47 N.J. 210 (1966)(council's appointment of one of its members to Elizabeth Housing Authority administrative in nature); D'Ercole v. Mayor & Council of Norwood, 198 N.J. Super. 531 (1984)(20-year lease of firehouse and appropriation of money to pay lease held to be administrative acts not subject to review by referendum). None are applicable to the circumstances prevailing herein. But see McLaughlin v. City of Millville, 110 N.J. Super. 200 (Law Div. 1970) also cited by defendants (where city ordinance which authorized lease of portion of city's sewage plant to private contractor did not merely implement the initial improvement

ordinance but reflected unanticipated policy decisions, referendum on merits of the ordinance necessary).

Similarly, defendants do not analyze whether all enactments that affect the manner in which the City Council conducts its meetings are necessarily procedural in nature. Plaintiffs adamantly contend that pursuant to the legislative/administrative test set forth in Cuprowski v. Jersey City, 101 N.J. Super. 15 (Law Div.), aff'd, 103 N.J. Super. 217 (App. Div.), cert. denied, 53 N.J. 80(1968),[9] ordinances that permit public attendance or participation at regular Council meetings and thus fundamentally change the nature of such meetings may not be characterized as simply procedural.

The trial judge in Cuprowski made the following distinction between legislative and administrative ordinances:

> Matters which are of a permanent or general character are considered to be legislative while those which are temporary in operation and effect are deemed administrative. Acts which are classified as administrative are those which result from governmental powers properly assigned to the executive department and necessary to carry out legislative policies and purposes already declared either by the legislative municipal body, or

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[9]In Cuprowski, the Court held that a budget ordinance was not subject to referendum because of an express statutory exception in N.J.S.A. 40:69A-185.

devolved upon it by the law of the state. Cuprowski v. Jersey City, 101 N.J. Super. at 23.

Under this test, if a local body is exercising its delegated discretion to design an ordinance that is responsive to local circumstances it is acting within its legislative authority and the adopted ordinance is subject to referendum. See Menendez v. City of Union City, 211 N.J. Super. 169, 172-173 (App. Div. 1996)(finding city ordinance increasing number of fire captains in city fire department from 20 to 28 and creating new positions in department to be legislative because municipality was exercising its delegated discretion "to establish or revise the structure of the fire department, responsive to local problems and needs"); Tumpson v.Farina, 240 N.J. Super. at 346 (holding ordinance authorizing execution of a municipal development agreement and lease between Hoboken and the Port Authority subject to referendum since it permits a project whose "location, size and nature will long and significantly affect the style and quality of life in the community"). Similarly, plaintiffs' ordinance exercises the discretion afforded municipalities under the Sunshine Law to respond to local preferences for public participation in Council meetings and must be seen as constituting a new legislative mandate. Because plaintiffs'

ordinance clearly formulates local policy that is long-term in effect, it is a proper subject for referendum. Cf. Concerned Citizens of the Borough of Wildwood Crest v. Pantalone, 185 N.J. Super. 37, 47 (App. Div. 1982)(beach fee repeal ordinance subject to referendum because it involved a "local question of a basic policy nature' and raised an issue that was "long-term in effect"); Sea Girt Restaurant and Tavern Owners Assoc., Inc., 625 F. Supp. at 1482 (noting that municipalities' broad authority to regulate, by virtue of state delegation, the hours during which alcoholic beverages may be sold in their local community is proper subject of voter referendum).

On the other hand, if a local ordinance merely complies with and implements a previously determined legislative mandate, the local body is in effect exercising a ministerial function and the ordinance is administrative and not subject to referendum. Menendez v. City of Union City, 211 N.J. Super. at 172-173. Examples of such administrative ordinances would include, assuming the existence of a previously enacted mandate to permit public participation at regular City Council meetings, procedural provisions that would designate at which point during the course of regular council meetings citizen comment would be allowed, the

length of time allotted to each speaker, and other like rules that would merely implement the previously agreed upon policy.

In this way, plaintiffs' proposed ordinance, seeking to enlarge the substantive scope of the public comment period held during regular City Council meetings, does not serve a ministerial function and therefore cannot be characterized as merely "administrative." To the contrary, the scope of citizen participation in a governing body's official deliberations is a substantial public policy issue and must be recognized as a "legislative act."

C. Plaintiffs Proposed Ordinance is Not Overreaching and Thus Is Valid.

In defendants' brief in support of their Motion to Dismiss, defendants argue that even if there is no supervening legislative intent to bar a plebiscite on plaintiffs' initiated ordinance, certain aspects of the ordinance are "unreasonable," (Db. at 14, 19), or "unworkable," (Db. at 18) and cannot be submitted to the voters. In support of this conclusion defendants contend that the City Council's February 2, 2000 ordinance placed only neutral time, manner and place restrictions on citizen's right to speak. Db. at 14. This argument is clearly misplaced. Plaintiffs herein are not challenging the constitutionality of the City Council's

substitute ordinance, but rather the refusal of the City Clerk to place their initiated ordinance on the November General Election ballot. Since no provision of plaintiffs' ordinance constitutes an unreasonable intrusion into the City Council's administrative domain, as established in Point IIB, supra., defendant Marasco must be compelled to submit their ordinance to the electorate.[10]

i. The Proposed Ordinance Does Not Disturb The Five-Minute Limit on Public Comment Already Contained in Council Rule XVII.

Defendants' argument that the proposed ordinance would require the City Council to allow a citizen "to speak for as long as he or she wishes" at City Council meetings, (Db. at 14), is puzzling, to say the least. The ordinance submitted by petitioners clearly states that it is amending only Rules XII and XVI of Title 2, Administration, Chapter 15 of the revised Ordinances of the City of Newark. It emphatically does not disturb pre-existing Rule XVII, which limits each person

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[10]Implicitly, defendants also claim that neutral time, place and restrictions, which are often found reasonable when determining whether a plaintiff's First Amendment rights have been violated, are necessarily administrative in nature, and not legislative. Db. at 15-17. This is not the case. Some changes in forum or topics to be discussed, though content or viewpoint neutral for constitutional purposes (and in that context designated as "procedural"), may constitute legislative changes for purposes of state referendum and initiative law under the Cuprowski test.

addressing comments to the Council to five (5) minutes. See Certification of Cecilia Haney (hereinafter "Haney Cert"), Ex.1 at p.2; Ex.3 at p.3 (Statement appended to proposed ordinance explaining that ordinance amends only Sections XII and XVI).

Moreover, if plaintiffs' ordinance had attempted to micro-manage the procedure used by the Council to conduct its meetings by establishing the length of time each member of the public might speak (in contrast to establishing the opportunity to speak about any topic) such effort would clearly be an inappropriate intrusion into an administrative matter within the discretion of the City Council. See N.J.S.A. 40:69A-180(a)(determine its own rules of procedure). Therefore, the cases cited by defendants as to the Council's right to establish neutral time limits or place restrictions on a citizen's right to speak at public meetings for purposes of determining whether that person's constitutional rights were violated are especially inapposite here.[11]

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[11]Hansen v. Westerville City Sch. Dist. Bd. of Educ., 43 F.3d 1472, 1994 WL 622153 (6th Cir., Nov. 7, 1994), cert. denied, 515 U.S. 1159 (1995)(finding school board's limitation on number of speakers and duration of their comments and preference for new speakers was a permissible content-neutral restriction on speech); Wright v. Anthony, 733 F.2d 575 (8th Cir. 1984)(finding enforcement of informal five minute restriction on presentations made during public hearings constitutional); Kindt v. Santa Monica Rent Control Bd., 67 F.3d 266 (9th Cir. 1995)(finding rent control board's regulations allowing speakers to address the

Plaintiffs are not contesting the constitutionality of defendants' February ordinance; they simply contend that their failure to provide a time limit on speech in their proposed ordinance was a deliberate effort to avoid intruding into the City Council's administrative domain.

ii. The Proposed Ordinance Does Not Mandate The Attendance of Five Council Members At Meetings.

Defendants' argument that the proposed ordinance "mandates" the attendance of five Council members at meetings answers itself. As defendants appropriately note, (Db. at 18), such a provision would be "legally unworkable." However, it is only defendants' own strained reading of the provision that "a number of not less than five (5) Council members shall be present" which creates an otherwise non-existent problem.

Board for three minutes in the order that their requests are drawn to be reasonable content-neutral time, manner, place restrictions); White v. City of Norwalk, 900 F.2d 1421 (9th Cir. 1990) (upholding constitutionality of City Council's rules of decorum against overbreadth and vagueness challenge) Webb v. City of Joliet, 1999 WL 350829 (N.D. Ill., May 19, 1999) (holding that plaintiff's First Amendment rights were not violated when the City Council moved the time when people could address the city council from its regular Tuesday night council meeting to its regular Monday afternoon pre-council meeting, excluding those people who could demonstrate inability to attend the Monday meeting due to scheduling conflict; resolution found to constitute a content-neutral place restriction).

A sensible reading of the provision, in light of the liberal construction afforded initiative and referendum statutes, is that plaintiffs' phrasing reflects an attempt to conform their proposed ordinance to the quorum requirement found in N.J.S.A. 40:69A-180(a)("A majority of the whole number of members of the council shall constitute a quorum). See also Nebinger v. Maryland Casualty Co., 312 N.J. Super. 400, 406 (App. Div. 1998)(noting that the words and phrases of a statute should be given their generally accepted meaning "unless inconsistent with the Legislature's manifest intent."). In any event, if the Court should find plaintiffs' wording to be unclear or confusing, the Court can modify the specific terms used in the petition rather than dismissing plaintiffs' entire Complaint. See Narciso v. Worrick, 176 N.J. Super. at 319(finding that petition was not invalidated by erroneous description of the mayor as being "full time" since the petition, subject to the condition that the words "full time" be omitted, was not misleading nor confusing in that it adequately stated the question to be presented to the voters in accord with statutory requirements). Ordinary citizens are not skilled in the art of legislative drafting; technical arguments, such as that asserted by defendants here, should not be used to

discourage public participation through the referendum and initiative process.

iii. There is Nothing Unreasonable About a Provision Requiring the Broadcast of City Council Meetings Over the Council's Own Public Access Channel.

In their papers, defendants jump on the words "local affiliate" in the proposed ordinance to make the absurd claim that plaintiffs want the City Council to require that NBC, or some other private television station/network televise Council proceedings. Db. at 20.

While the non-legally trained plaintiffs may not have used the exactly appropriate legalese to describe the City of Newark's local access cable channel, it is obvious to most Newark residents, that the reference was to Newark Cablevision Channel 26, which plaintiffs allege is under the direction and control of the City of Newark and regularly televises City Council meetings live as well as rebroadcasts them on the Saturday following the meeting. Baraka Cert. at ¶15, Cammarieri Cert. at ¶16. Although plaintiffs do not have a right to demand access to Channel 26 as a matter of constitutional law, it is not inappropriate for plaintiffs' proposed ordinance to require the City Council to broadcast the public comment period within City Council meetings

over its own public access channel, as it does the rest of the City Council meeting, in order to enable greater public access to and participation in City Council meetings.[12] This request is in conformity with past and present City Council practice. Baraka Cert. at ¶15.

III. NEWARK CITY COUNCIL'S ORDINANCE IS NOT IN SUBSTANTIALLY THE FORM REQUESTED BY THE PLAINTIFFS' ORDINANCE.

In their brief, defendants first set up a *straw ordinance* based on fictitious defects in plaintiffs' proposed ordinance and then announce that the Council-enacted ordinance, as amended, "share[s] an overwhelming similarity" to defendants' fanciful version of plaintiffs' speech initiative. Db. at 22 ("overwhelming similarly . . .especially when the overreaching and invalid E's of plaintiffs proposed ordinance are eliminated.'"). Thus, defendants' argument falls , as did their objections to plaintiffs' proposed ordinance.[13]

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[12]The fact that the Sunshine Law does not require municipalities to do so only reinforces plaintiffs' arguments that the subject matter of their ordinance is not administrative in character but legislative.

[13]Defendants also argue, without relevant support, that defendant Marasco's determination that an adopted ordinance is "substantially in the form requested" is entitled to deference and a presumption of validity. Db. at 23. Not one of the cases cited by defendants involves judicial review pursuant to a *writ*

The fact remains that untelevised Hearing of Citizen meetings are not the equivalent of public comment periods held during regular televised City Council meetings as plaintiffs' petition requires. Plaintiffs' proposed ordinance changes the fundamental structure and nature of regular City Council meetings by injecting a citizen-City Council dialogue on all matters of public concern into regular Council meetings; the Council's adopted ordinance relegates that dialogue to a separate meeting during which no other Council business is conducted.

Defendants go to great lengths to establish that the standard of "substantially in the form requested" should be

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of mandamus, and defendants have not explained why presumptions of the cases cited should be transferred to this action. See Gormley v. Lan, 88 N.J. 26, 38 (1981)(deference given to interpretative statement of the Secretary of State and Attorney General in part because of "glaring inappropriateness of judicial management and supervision of such matters"); Hutton Park Gardens v. Town Council of West Orange, 68 N.J. 543 (1975)(municipal ordinances, like statutes, carry a presumption of validity); Moyant v. Paramus, 30 N.J. 528, 547 (1959)(presumption of propriety and reasonableness of a license fee fixed by an ordinance); Guill v. Mayor and Council of Hoboken, 21 N.J. 574 (1956)(licensing ordinance promulgated pursuant to municipal police powers presumed valid), overruled by Paterson Tavern & Grill Owners Assoc. V. Borough of Hawthorne, 57 N.J. 180, 189 (1970). Specifically, defendant's attempt to endow Mr. Marasco's determination with the presumption of validity given legislative enactments (Db. at 24) should not be approved. Advice allegedly given to the City Clerk by the City Council is not equivalent to the deliberations supporting legislation.

interpreted in accordance with the common meaning of the words employed. Db. at 22. Nonetheless, they do not define the word "substantially" and simply state, in circular fashion, that "the initiative ordinance and the Council-adopted ordinance need share only a substantial similarity of form." Db. at 23. Defendants further presume that "[t]he use of the word `substantially' bespeaks the Legislature's recognition that there can and will be some divergence from the proposed ordinance in the form and content of a governing body's response." Id. Acknowledging some divergence, however, does not tell us how much, nor do defendants provide this Court with any authority to justify their expansion of divergence in form to include divergence in content.

Pursuant to Webster's New Collegiate Dictionary (1981), "substantially" means "being largely but not wholly that which is specified." In accordance with this understanding, the Council's adopted ordinance must share in large part the form of the proposed ordinance before it can preclude submission of the initiated ordinance to the electorate. The use of the phrase "substantially in the form requested," however, does not indicate tolerance of any material deviations in content, as defendants suggest. The fact that the legislature did not require identity of form does not mean that it did not require identity of the

essential features of the proposed ordinance. See Young v. Byrne, 144 N.J. 10, 17 (Law Div. 1976)(Interpreting the Constitutional provision prohibiting resubmission of rejected amendments that effect "substantially the same change" to encompass amendments that are "the same in all important particulars.") Allowing the City Council to delete material features of plaintiffs' proposed ordinance would plainly nullify the initiative provisions of the Faulkner Act. Cf. All Peoples Congress of Jersey City v. Mayor and Council of Jersey City, 195 N.J. Super. 532, 537 (1984)(noting that if a municipality repeals a challenged ordinance while referendum proceedings are pending, it may not reenact the same ordinance, nor one that reenacts the essential features of the ordinance after referendum proceedings have been abandoned).

In light of this understanding of the phrase "substantially in the form requested," it is clear that the ordinance adopted by the Council does not share the essential features of plaintiffs' proposed ordinance and thus cannot be considered a valid substitute.

Ever since the City Council abolished the public comment periods at regular Council meetings in 1997, and replaced them with Hearings of Citizens meetings in the wards, plaintiffs and

their supporters have complained that the public is being excluded from effective participation in municipal decision-making. See Baraka Cert. at ¶¶ 4-7. For one thing, only a handful of Council members attend the Hearing of Citizens meetings, Id. at ¶ 4. "The inability to address the entire Council and to impact local government became so frustrating that petitioners and other Newark citizens conducted protests at regular Council meetings on two occasions." Id. at ¶ 7. Indeed, citizens were so unhappy with the new arrangement that a number of them spent a year gathering more than 3,600 signatures on a petition to put the issue to referendum. Id at ¶ 8.

Under the Council's substitute ordinance and the system in place since 1997, the only time Newark citizens can address the entire City Council is on second reading of an ordinance, a time when most Council members have made up their minds on an issue. Citizens no longer can address the full Council on introduction of ordinances, on resolutions, on communications or on other subjects of concern to them. Comp.,¶29. A consequence of this change is that public attendance at City Council meetings has declined dramatically. Cammarieri Cert. at ¶ 39; Baraka Cert. ¶ 19. And, of course, for citizens who obtained their information about municipal policy issues by viewing City Council meetings on

television, they are completely cut off from hearing the views of their fellow citizens and from witnessing a dialogue between those citizens and their elected officials which were available to them pre-May 1997 over Channel 26. As Plaintiff Baraka sums up the problem:

> It is clear to me ... that the Council's ordinance is not in substantially the form as the one we proposed. It does not serve the primary purpose of our proposal: the opportunity to be heard by the entire City Council on issues of concern and by all city residents via television. It does not afford the opportunity to hear from other citizens of Newark regarding all issues relevant to the city. I feel that the ordinance adopted by the Council on February 2, 2000 and amended on March 1, 2000, does not encourage public debate on local issues, but rather serves to stifle open discussion and participation.

Baraka Cert. at ¶ 20.

In this way, the Council's adopted ordinance, as amended, eliminates two core issues found in plaintiffs' petition: The opportunity for citizen participation at regularly scheduled Council meetings and the opportunity to expand that participation through televised broadcasting. There is no dispute that the Council's ordinance limits public discussion at regular Council meetings to comments on ordinances being considered on second

reading, and does not otherwise provide for public comment at such meetings. Plaintiffs' ordinance, on the other hand, permits public comment on ordinances on first reading, resolutions, and non-agenda items at regularly scheduled Council meetings. Comp., ¶ 29. Similarly, there is no dispute that the Council's ordinance does not provide for the televising of the Hearing of Citizen meetings that the Council has created, whereas plaintiffs' ordinance does. Id.

Finally, a comparison of the relevant ordinances indicates a third material difference between plaintiffs' requested ordinance and the Council's adopted ordinance. The Council's ordinance requires Newark citizens to sign up to speak at the Hearing of Citizen meetings no later than one hour after the official agenda for the regular Council meeting is available to the public on the Friday before the following Wednesday Council meeting; whereas plaintiffs' ordinance would allow citizens to sign up to speak at regular City Council meetings prior to the start of the meeting. Baraka Cert. at ¶¶ 11,15. This difference fundamentally affects the parameters of the potential dialogue between Newark residents and their elected officials. Plaintiffs' proposal allows citizens to sign up to speak at a time when they are sure

to have full knowledge of the Council's agenda. This opportunity is severely diminished in the Council's version.

As a result of these essential differences between plaintiffs' ordinance and the Council's ordinance, the latter is not in "substantially the form" requested by plaintiffs. Therefore, plaintiffs' proposed ordinance should be placed on the ballot as required by N.J.S.A. 40:69A-184 and 191.

Conclusion

For the foregoing reasons, defendants' Motion to Dismiss plaintiffs' complaint should be denied.

Respectfully submitted,

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CONSTITUTIONAL LITIGATION
CLINIC AT RUTGERS

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Dated: June 23, 2000

Renée Steinhagen, Esq.

CERTIFICATE OF SERVICE

I, Renée Steinhagen, Esq. hereby certify that I served on Friday, June 23, 2000, one copy of Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss in the case of Ras Baraka, et al. v. Robert Marasco,Newark City Clerk, Docket No. L-2820-00

upon:

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in this action by placing a copy thereof enclosed in a sealed envelope, via Federal Express.

I declare under penalty of perjury under the laws of the State of New Jersey that the foregoing is true and correct.

Executed this 23nd day of June 2000 at Newark, New Jersey.

Renée Steinhagen

Renée Steinhagen, Esq.