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April 25, 2012

Honorable F.J. Fernandez-Vina, A.J.S.C.
New Jersey Superior Court
Hall of Justice
101 S. 5th Street
Camden County N.J. 08103-4001

Re: Berry et al. v. Rosemary DiJosie, Township Clerk
Docket No. L- (Action in Lieu of Prerogative Writ)

Dear Judge Fernandez-Vina:

Plaintiffs Joshua Berry, Tom Crone, Elizabeth Holzman, Don Choyce and Robbie Traylor (the "Committee" or the "Petitioners") respectfully submit this letter-brief in support of their application for an Order to Show Cause in connection with the Township of Gloucester's ("Township" or "Gloucester") unlawful rejection of their initiative petition.

Simply stated, this is a case of municipal abuse of power; an attempt by the Township to thwart the efforts of a highly motivated group of community activists, South Jersey Citizens ("SJC") to end and/or limit the practice of "pay to play" in Gloucester Township, a phrase that refers to the practice of awarding government contracts to campaign donors. At this juncture, Gloucester's Township Clerk, Rosemary DiJosie (the "Clerk" or "DiJosie") has deprived these citizens of one of their most valued civil rights: the ability to petition government for redress of their grievances through the initiative process. By rejecting Plaintiffs' Public Contracting

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Reform Ordinance Petition on erroneous grounds, DiJosie has violated Plaintiffs' statutory rights to a public vote on their proposed ordinance. The merit of Plaintiffs' anti-pay-to-play ordinance is not at issue in this case; rather, the issue is the right of the people of Gloucester Township to have a say on these matters at the ballot box. The Clerk's conduct in thwarting the people's right to a say on this matter can and should be enjoined by the Court.

Specifically, this is a summary proceeding seeking judicial review of the Township Clerk's decision to disqualify certain signatures by ignoring the clear language and intent of the Legislature to permit a Committee of Petitioners to employ persons other than themselves to circulate the petitions that it sponsors, and to permit the Committee to correct circulator affidavits that are incorrect as to form, as expressed in N.J.S.A. 40:69A-186 to -188. DiJosie's position that the petition is insufficient because of the aforementioned defects is wrong and lacks any basis in law and practice. Plaintiffs' petition is proper, valid and sufficient in all respects, and, pursuant to N.J.S.A. 40:69A-190 must be submitted to the Township Council for consideration "without delay."

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STATEMENT OF FACTS

Plaintiffs repeat and reassert the allegations set forth in the Verified Complaint, which has been filed with this letter brief, as if they are fully stated herein.

STATUTORY FRAMEWORK

Substantive Right of Initiative

By way of background, the Township of Gloucester is governed by the Optional Municipal Charter Law, N.J.S.A. 40:69A-1 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") 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). ("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. at 459. As such, the Supreme Court announced in this recent case that "the referendum statute should be liberally construed . . . to promote the 'beneficial effects' of voter participation." Id.; see also Sparta Tp. v. Spillane, 125 N.J. Super. 519, 523 (App. Div. 1973), cert. denied, 64 N.J. 493 (1974)(both the initiative and referendum process "encourage public participation in municipal affairs in the face of normal apathy and lethargy in such affairs.)

The Supreme Court, in the Ordinance 04-75 case, recognized that virtually every kind of municipal ordinance is subject to the referendum right unless the Legislature has specifically excluded it. Id. at 466-67 (listing exceptions to the referendum power). In so doing, the Court noted that the Legislature had used the term "any ordinance" in defining which matters were the proper subject of a referendum or initiative. Unless such an exception exists, "any ordinance" is also subject to initiative, which is the power of "the voters of any municipality [to] propose any ordinance and . . . adopt or reject the same at the polls." N.J.S.A. 40:69A-184. Defendant does not appear to quarrel that public contract legislation like the one at issue here, which seeks to reform the terms on which public service contracts may be awarded, is somehow exempt from the initiative power.

Procedural Requirements

The mechanics of citizens' initiative and referendum efforts in Faulkner Act municipalities like Gloucester Township are carefully laid out in the applicable statutes, which also clearly define the role that the municipal clerk plays in these efforts.

Basically, any five registered voters of the jurisdiction can organize themselves into a Committee of Petitioners. N.J.S.A. 40:69A-186. They then are responsible for circulating a petition, the format of which is regulated by that same statute, among registered voters of the municipality, and cause signatures to be collected from these voters.

The statute then sets forth what must be done with the circulated petitions: simply put, they are filed with the municipal clerk. See N.J.S.A. 40:69A-187 ("All petition papers comprising an initiative or referendum petition shall be assembled and filed with the municipal clerk as one instrument.") (emphasis added); see also N.J.S.A. 40:69A-189 (referring to the "filing of a referendum petition with the municipal clerk"); N.J.S.A. 40:69A-190 (". . . any petition or amended petition filed with him . . .") Once the petition is submitted to and received by the municipal clerk, the clerk has the mandatory duty to inquire into whether "each paper of the petition has a proper statement of the circulator and whether the petition is signed by a sufficient number of qualified voters." N.J.S.A. 40:69A-187. This "examination of the petition," id., itself involves sifting through dozens of signature pages and hundreds, even thousands of individual signatures, to determine the sufficiency of each.[1] Even before that process begins, the clerk must also familiarize him or herself with other applicable information, such as the turnout in the last relevant election (which determines how many petition signatures are needed) and in the case of a referendum, a review of records to determine the exact date on which the council passed, or the mayor approved, the ordinance at issue. The clerk's examination of the sufficiency of a petition is a complex task and the method used to arrive at his determination is discretionary, not prescribed by statute. D'Ascensio v. Benjamin, 142 N.J. Super. 52, 55 (App. Div. 1976), certif. denied, 71 N.J. 526 (1976).

For these reasons, the clerk has up to twenty days to make this examination. N.J.S.A. 40:69A-187. The clerk need not take all 20 days, but as soon as a determination of insufficiency

[1] See D'Ascensio v. Benjamin, 137 N.J. Super. 155, 159 (Law Div. 1975), aff'd, 142 N.J. Super. 52 (App. Div. 1976), certif. denied, 71 N.J. 526 (1976) (describing the process of signature review which at the time was delegated by municipal clerks to county officials). Since 2005, however, municipal clerks do not need to delegate the signature review process to county officials because they have access to the relevant election information through the Statewide

is made, the clerk must "at once notify at least two members of the Committee of the Petitioners of his findings." N.J.S.A. 40:69A-187; likewise, if the finding is that the petition is sufficient, the clerk must submit it to the municipal council "without delay." N.J.S.A. 40:69A-190. In either case, the clerk must "certify the result thereof [i.e. of her examination] to the council at its next regular meeting." N.J.S.A. 40:69A-187.

Once the examination of the petition is complete, the clerk has two and only two options, which are:

(1) to declare the initial submission sufficient and submit the same to the municipal council for further action, N.J.S.A. 40:69A-191; or

(2) to declare the initial submission insufficient, and await further action by the Committee of Petitioners. This is laid out in N.J.S.A. 40:69A-187 and -188. Specifically, the statute grants the Committee of Petitioners ten days to cure the deficiency. If the declaration is that the petition is insufficient, it is undisputed that "the petitioners have . . . an opportunity to cure the deficiency." Hudson Cty. Ch. of Commerce v. Jersey City, 310 N.J. Super. 208 (App. Div. 1997), aff'd, 153 N.J. 254 (1998).

In curing a deficiency, it is undisputed that in the initiative or referendum context, a committee of petitioners is permitted to correct defects of substance or form, but also to solicit and file additional signatures beyond what was originally submitted. Unlike statutes governing nominations for public office, which "may be amended in matters of substance or of form but not to add signatures," cf. N.J.S.A. 19:13-13 (emphasis added), the Legislature imposed no restrictions on the power of a committee of petitioners to add signatures as part of correcting a deficiency. See, e.g., Citizens for Charter Change in Essex Co. v. Caputo, 136 N.J. Super. 424,

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Voter Registration System (SVRS). See N.J.S.A. 19:31-31(b)(5).

431 (App. Div.), certif. denied, 74 N.J. 268 (1975) (acknowledging the right of petitioners to add signatures beyond their original submissions).

If the petitioners choose to avail themselves of their rights to amend or supplement an insufficient petition, they must make the amended or supplemental filing within ten days after the clerk has served the notice of insufficiency. N.J.S.A. 40:69A-188. The clerk then has five days from the filing of these "additional papers" to make a ruling on the sufficiency of the amendments. Id. If the Clerk finds that the new papers are also insufficient, the clerk shall "notify the Committee of the Petitioners of his findings," id., whereas if the clerk finds the new filing to be sufficient, he shall submit the petition to the municipal council "without delay" as in the case of an original sufficient petition. N.J.S.A. 40:69A-190. The clerk's certification of sufficiency/insufficiency is a final action subject to judicial review via an action in lieu of prerogative writ.

Formal Requirements

In order for an initiative petition to be valid, there are six formal requirements that must be satisfied under N.J.S.A. 40:69A-184 through 186. These requirements are the following:

a. The "petition" must be signed by voters equaling "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. In this case that figure is 1,047; and Plaintiffs secured 1,091 signatures of qualified voters, See Verified Complaint, Ex. J1;

b. "All petition papers" must be uniform in size and style. The petition here complies in that all sheets comprising the petition are on 8 ½ x 14 paper, are of uniform color and all text on the petition is in Times New Roman font. See Verified Complaint, Ex. B;

c. The "petition papers" must contain the full text of the proposed ordinance. The petition here complies in that the proposed ordinance appearing on two sides of one sheet of paper was stapled with each sheet of signatures comprising each petition paper. See Verified Complaint, Exhibit A;

d. "Each separate petition paper" must have attached thereto an affidavit and a statement of the circulator in the manner and form prescribed by N.J.S.A. 40:69A-186. The initial petition and supplemental petition here complies with this requirement insofar as each individual petition paper has the circulator's affidavit contained therein. See Verified Complaint, Exhibit B;

e. "Each signer" of the petition must sign in ink or indelible pencil and list his place of residence by street and number or other description sufficient to identify the place. There is no question that Plaintiffs' petition satisfies this requirement; and

f. "Each petition paper" must contain the name and addresses of five voters listed as the Committee of Petitioners; otherwise the signatures appearing on the petition paper are disqualified. The petition here also complies with this requirement in that each separate petition paper includes the names and addresses of each of the Committee of Petitioners. Verified Complaint, Exhibit B. See e.g., Hamilton Twp. Taxpayers' Ass'n v. Warwick, 180 N.J. Super. 243 (App. Div.), certif. denied, 88 N.J. 490 (1981) (denying the sufficiency of the petition because the names and addresses of the five-member Committee of Petitioners were omitted at the time the voters affixed their signatures to the petition, although they were added on each separate sheet at the time of filing with the Township Clerk).

Defendant DiJosie has been a municipal clerk for at least three decades, and knows --- or at least ought to know --- the parameters of these formal requirements. However, based on her

rewrite of N.J.S.A. 40:69A-186, DiJosie obviously failed to take to heart the instructions of the Supreme Court in In re Ordinance 04-75; that is, the Court's instructions about the "inestimable value" of participatory democracy, as exercised through initiative and referendum petitions, and the need to liberally construe the laws governing those petitions in favor of the petitioners.

LEGAL ARGUMENT

I. MANDAMUS IS APPROPRIATE WHERE THE LAW REQUIRES THE PERFORMANCE OF MINISTERIAL ACT.

When government officials refuse to perform ministerial duties (such as refusing to certify a valid petition as sufficient and process it in accordance with the Faulkner Act governing the right of initiative and referendum) mandamus is the appropriate remedy. As the New Jersey Supreme Court stated in Switz v. Middletown Tp., 23 N.J. 580, 587 (1957):

> The generally accepted limitations upon the exercise of the ancient extraordinary remedy of Mandamus obtain in New Jersey. It is a coercive process that commands the performance of a specific ministerial act or duty, or compels the exercise of a discretionary function, but does not seek to interfere with or control the mode and manner of its exercise or to influence or direct a particular result. Mandamus lies to compel but not control the exercise of discretion. Roberts v.Holsworth, 10 N.J.L. 57 (Sup. Ct. 1828); Benedict v. Howell, 39 N.J.L. 221 (Sup. Ct. 1877). Unless the particular duty be peremptory, the fair use of judgment and discretion is the province of the functioning authority. The right of the relator and the public duty sought to be enforced must be both clear and certain. Uszkay v. Dill, 92 N.J.L. 327. 327, 106 A. 17 (Sup. Ct. 1919); Edward C. Jones Co. v. Township of Guttenberg, 66 N.J.L. 58, 48 A. 537 (Sup. Ct. 1901), affirmed, 66 N.J.L. 659, 51 A. 274 (E. & A. 1901); Clark v. City of Elizabeth, 61 N.J.L. 565, 40 A. 616, 737 (E. & A. 1898). Mandamus issues `to compel performance, in a specified manner, of ministerial duties so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of their performance. . .

See also Loigman v. Tp. Com. Of Middletown, 297 N.J. Super. 287, 299 (App. Div. 1997).

As is more fully developed in the following points of this letter brief, Plaintiffs' Public Contracting Reform Ordinance Petition must be certified, sent to the Township Council and ultimately placed on the ballot (unless adopted by the Township Council), because it satisfies all

of the substantive requirements mandated by statute. Most importantly, the Clerk herself has concluded that the petition contained a sufficient number of signatures of qualified voters in order to satisfy the substantive initiative standard set forth in N.J.S.A. 40:69A-184. See Verified Complaint, Exhibit J1. In addition, because DiJosie's decision to disqualify signatures that appeared on petitions circulated by persons other than the Committee of Petitioners or were associated with circulator affidavits that she herself attached to the corresponding petition paper is inconsistent with the form requirements set forth in N.J.S.A. 40:69A-186, she has no further discretion. Rather, she must proceed to perform her ministerial duties of certifying the valid initiative petition as sufficient and further processing it in accord with N.J.S.A. 40:69A-190 to 192.

II. A SUMMARY PROCEEDING IS APPROPRIATE FOR RESOLUTION OF PLAINTIFFS' CLAIMS AS A MATTER OF LAW.

Pursuant to R. 4:69-2, governing prerogative writ actions, a plaintiffs may at any time after filing of a complaint that demands performance of a ministerial duty apply for summary judgment. On a motion for summary judgment, the Court must inquire "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Brill v. The Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995). Where a party opposing the motion only points to disputed issues that are of an insubstantial or irrelevant nature, the proper disposition of the motion is to grant summary judgment. 142 N.J. at 529.

Notwithstanding R. 4:69-2, courts do not require plaintiffs involved in election disputes to file motions for summary judgment. Instead, election disputes such as this one 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)(William J. Brennan, 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 Plaintiffs' claims may be resolved on the basis of the documents attached to their Verified Complaint, there are no material facts in dispute. Accordingly, it is appropriate to "try this action on the return date" of the Order to Show Cause utilizing the "pleadings and affidavits," and proceed to "render final judgment thereon." R. 4:67-5. Furthermore, since the only questions for this court are legal ones, namely, the legal propriety of the Township Clerk's action and the appropriate remedies, the Clerk's actions are subject to de novo review. Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 191 N.J. 344, 372 (2007) ("issues of law are subject to de novo review").

III. THE TOWNSHIP CLERK ACTED ARBITRARILY AND CAPRICIOUSLY BY REFUSING TO APPROVE PLAINTIFFS' PETITION ON LEGALLY ERRONEOUS GROUNDS.

On the face of the relevant statutory scheme concerning initiative and referendum petitions governing Faulkner Act municipalities, the Legislature has set forth a clear statutory scheme for processing such petitions. A group of registered voters, known as a Committee of Petitioners,

initiates the process by submitting an initiative petition to the Municipal Clerk, who must receive and accept such petition (otherwise known as filing) prior to undertaking an examination of such petition to determine whether it is sufficient to permit further processing by the City Council; and, if the council refuses to act, the appropriate question is placed on the ballot for submission to the voters. There is nothing in the statute that contemplates the Municipal Clerk imposing any substantive or procedural requirements not explicitly set forth in the statute since to do so would contravene the accepted principle that the initiative statute in the Faulkner Act should be liberally construed to promote the "beneficial effects" of voter participation. Ordinance 04-75, supra, 192 N.J. at 459 (citing Retz v. Mayor & Council of Saddle Brook, 69 N.J. 563, 571 (1976)); Borough of Eatontown v. Danskin, 121 N.J. Super. 68 (Law Div. 1972)(statutory scheme is specifically aimed at increasing public participation).

Mindful that the initiative and referendum provisions of the Faulkner Act are specifically aimed at increasing public participation in civic affairs, New Jersey courts consistently understand that such liberal construction is appropriate and often necessary to secure the beneficial effects of voter participation.[2] A municipality, such as Gloucester Township, is therefore prohibited from attempting to evade the effect of a citizen's initiative or referendum petition by imposing unduly restrictive or technical requirements upon that petition that have no basis in law. All Peoples Congress of Jersey City and Council of the City of Jersey City, 195 N.J. Super. 532 (Law Div. 1984)(prohibiting a municipality from enacting, after the referendum

[2] As a matter of statuory interpretation, under New Jersey law "[t]he initiative and referendum processes. . . comprise two useful instruments of plebiscite power and provide a means of arousing public interest in an age of normal apathy and lethargy among voters. As a result, such provisions should be liberally construed." Sparta Tp. v. Spillane, supra., 125 N.J. Super. at 523; Tumpson v. Farina, 240 N.J.Super. 346, 350(App. Div.), aff'd, 120 N.J. 55 (1990)("The legislative grant of the referendum power should be liberally construed in order to encourage public participation in municipal affiars in the face of normal apathy in such

process was abandoned, the same ordinance it had repealed while the referendum process was pending).

A. The Township Clerk Erred As A Matter of Law When She Disqualified Signatures Because They Were Solicited By Persons Other Than The Committee of Petitioners.

The Township Clerk's rejection of Plaintiffs' petition is based, in part, on her assertion that the five (5) members of the Committee of Petitioners are the only persons who are able to circulate an initiative petition and solicit signatures. Verified Complaint, Exhibits D, E, J1 and J2. This position misinterprets the explicit language of N.J.S.A. 40:69A-186 (absence of any restriction placed on circulators of initiative and referendum petitions) and imposes an unconstitutional restriction on the Committee of Petitioners. See Buckley v. American Const. Law Foundation, 525 U.S. 182 (1999)(striking down requirement that circulators be registered voters as a violation of First Amendment "core political speech").

In her letter dated February 28, 2012, Ms. DiJosie disqualified the signatures of 250 registered voters because they appeared on petition papers circulated by a person other than a member of the Committee of Petitioners. Verified Complaint, Exhibit D. In her letter dated March 14, 2012, she disqualified an additional 49 otherwise valid signatures for the same reason. Verified Complaint, Exhibit JI. In both letters, she adopted the reasoning of the Township Attorney, David F. Carlamere, Esq., who stated in an undated memorandum sent to the Township Clerk on February 28, 2012, that initiative petitions must be "circulated by a member of the Committee of Petitioners who by statute are required to be responsible for the circulation." Verified Complaint, Exhibit E. In a second memorandum (also undated) sent to the Clerk on March 14, 2012, Mr. Carlamere further explained that, in his opinion, "[i]f it were the intent of

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matters."(quoting Narcisco v. Worrick, 176 N.J. Super. 315, 319 (App. Div. 1980).

the Legislature to permit other than a member of the Committee of Petitioners to circulate their petition for signing, it would have so stated in Section 186." Verified Complaint, Exhibit J2. To support his opinion, he cites to Hamilton Tp. Taxpayers Ass'n v. Warwick, 180 N.J. Super. 243 (App. Div.), cert. denied, 88 N.J. 490 (1981) and Lindquist v. Lee, 34 N.J. Super. 576 (Law Div. 1955). Both cases, however, do not stand for the proposition for which he cites them.[3] Moreover, Mr. Carlamere's interpretation of N.J.S.A. 40:69A-186 goes against all principles of statutory interpretation as well as decades of practice in New Jersey.

As noted above, when approaching N.J.S.A. 40:69A-186, one must be mindful that numerous courts have found as a generally accepted principle that the initiative and referendum statute in the Faulkner Act should be liberally construed to promote the "beneficial effects" of voter participation, Repeal Ordinance 04-75, 192 N.J. 446, 459(2007) (citing Retz v. Mayor & Council of Saddle Brook, 69 N.J. 563, 571 (1976)). Secondly, courts are directed to look first to the plain language of the statute in order to derive the Legislature's intent based upon "the words that it has chosen." Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 553 (2009)(internal citations omitted); DiProspero 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). Furthermore, a court should not consider extrinsic evidence when the statutory language "is clear and unambiguous, and

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[3] In Lindquist, the court held that the names and addressess of the members of the committee of petitioners must appear on the petition paper at the time the signature of the registered voter is affixed thereto. Id. 201 N.J.Super. at 580. The Appellate Division in Hamilton Tp. Taxpayers Ass'n relied upon the holding in Lindquist to hold that the names and addresses of the members of the committee of petitioners must appear on each sheet of the petition in order "to inform the "voters, who are solicited for their signatures, who the sponsors of the petition are and where they live, not only to charge to enable the voters to charge the sponsors with responsibility as agents but to guide the voters whether to sign." Hamilton Tp. Taxpayers Ass'n, 180 N.J. Super. at 247 (emphasis added). In this way, the Appellate Division characterized the committee of petitioners as the sponsors of the initiative, not the soliciters of the signatures, and the Law Division distinguished between the members of the committee and the "various solicitors" who circulated the petition papers. Lindquist, 34 N.J. Super. at 579.

susceptible to only one interpretation." In re Petition for Referendum on City of Trenton Ordinance 09-02, 201 N.J. 349, 359 (2010)(quoting DiProspero v. Penn, 193 N.J. at 492). Emphatically, it is the role of the court "to construe the statute, not to impose policy preferences, particularly when to do so inhibits voter participation." Ordinance 04-75, 192 N.J. at 467-468.

In this case, the statutory language is clear. Each petition paper circulated for the purposes of an initiative or referendum must include "the names and addresses of five voters designated as the Committee of Petitioners, who shall be regarded as responsible for the circulation and filing of the petition and for its possible withdrawal" and an "affidavit of the circulator" must be attached thereto. N.J. S.A. 40:69A-186. (emphasis added) Nowhere in the statute are the circulators defined as the members of the Committee of Petitioners, and conversely, the plain meaning of the phrase "responsible for" does not require the members of the committee to undertake the circulation of the petitioners themselves (though they have the authority to do so).[4] Simply put, the statute does not mandate that the Committee of Petitioners be the exclusive circulators.

On the face of the statute, the Legislature explicitly required members of the Committee of Petitioners to be voters of the municipality in which the initiative petition is circulated, but did not similarly restrict the circulators. That is, if the Legislature intended to restrict circulators to be resident voters it would have done so.[5] Cf. N.J.S.A. 19:27A-9(a)(circulator of recall petition

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[4] According to the Merriam Webster online dictionary, to say a person is "responsible for" implies that such person "hold[s] a specific duty or trust;" that is, he is "liable to be called to account as the primary cause" or is "able to answer for one's conduct and obligations." Similarly, Black's Law Dictionary notes that a person is "responsible" if "he is able . . . to discharge an obligation which he may be under." (www/the law dictionary.org/responsible). Neither definition requires an individual to personally undertake the task to which he has a duty to satisfy nor does such person have exclusive authority to get the job done.

[5] Since the statute requires the circulators to submit an affidavit, it must be assumed that the Legislature intended all circulators, at minimum, to have the capacity to affirm that "he, and

must be registered voter in the jurisdiction for which the official sought to be recalled was elected); and N.J.S.A. 19:23-11 (circulators of nomination petitions of partisan candidates required to be registered voters of the jurisdiction, a members of the political party and a signers of the petition). The case law under the Faulkner Act is also clear that courts cannot read restrictions into the statute that simply do not appear in the language employed by the Legislature. See Ordinance, 04-75, 192 N.J. at 466-467 (rejecting administrative/legislative distinction historically imposed by the courts holding that the right of referendum includes "any" ordinance, since that was the term used by the Legislature). Accordingly, in this case, silence by the Legislature means that the circulators need not be registered voters, and certainly are not limited to the five members of the Committee of Petitioners.

To interpret the statute as narrowly as posited by the Township Attorney would also run into constitutional problems—something all courts avoid. Starting in Meyer v. Grant, 486 U.S. 414 (1988), the United States Supreme Court held that circulation of a ballot initiative is "core political speech" for which First Amendment protection is "at its zenith." Id. at 422 (striking down law making it a felony to pay initiative petition circulators). In Buckley v. American Const. Law Foundation, 525 U.S. 182 (1999), the court was satisfied that the restrictions in question, including a requirement that the circulators be registered voters in the district, "significantly inhibit[ed] communication with voters about proposed political change, and [were]

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he only personally circulated" the petition papers, that the signatures contained therein were made in his presence and that "he believes them to be the genuine signatures of the person whose names they purport to be." N.J. S.A. 40:69A-186. Cf. Notary Public Handbook: A Guide for New Jersey Handbook, §62 at 45 ("An affidavit must, of course, be made by a person having knowledge of the facts, and who is legally competent to testify under oath."); N.J. R. Evid. 17 (court must determine whether witness is capable of understanding the duty of a witness to tell the truth); State v. Zamorsky, 170 N.J. Super.198 (App. Div. 1979), cert. denied , 82 N.J. 287 (1980), cert. denied, 449 U.S. 861 (1981) (before a child can testify, court can inquire to determine whether the child is capable of understanding the duty to tell the truth).

not warranted by the state's interests." Id. at 425. Since Buckley, several federal courts have applied strict scrutiny to state restrictions on circulators, and all have found such restrictions wanting. See e.g., Yes on Term Limits, Inc. v Savage, 550 F.3d 1023 (10th Cir. 2008)(Oklahoma's ban on non-resident circulators does not survive strict scrutiny); Nader v. Brewer, 531 F.3d 1028, 1036 (9th Cir. 2008)(applying strict scrutiny to Arizona's ban on non-resident petition circulators); Nader v. Blackwell, No. 07-4350, 2008 WL4722584 (6th Cir. October 24, 2008)(ban on non-resident circulators held to violate First Amendment); Chandler v. City of Arvada, 292 F.3d 1236 (10th Cir, 2002)(municipality's ban on nonresidents of Arvada from circulating initiative referendum overturned); Krislov v. Rednour, 226 F. 3d 851, 866 n.7 (7th Cir. 2000)(holding a residency requirement for circulators of initiative petitions unconstitutional under First Amendment); and Citizens in Charge v. Gale, 810 F.Supp. 2d 916 (D. Neb. 2011)(residency requirement overturned).

In accordance with the above established law, the Clerk's final certification that 299 signatures were not qualified because they appeared on petition papers circulated by persons who were not members of the Committee of Petitioners, who must be registered voters in the Township, was "arbitrary, capricious and not in accordance with the law."

B. The Township Clerk Erred As A Matter of Law When She Rejected Circulator Affidavits That Were Properly Prepared, Signed and Affirmed By The Appropriate Circulator in the Presence of An Authorized Notary Public.

The Township Clerk also rejected 205 otherwise valid signatures of Gloucester voters on the alleged basis that the corrected circulator affidavits were deficient. As a legal matter, the corrected circulator affidavits are valid and proper since the Clerk has not established that the person notarizing the affidavit did not satisfy her duty to the public to use reasonable care to

satisfy herself that the signers of the circulator affidavits were the persons they purported to be, and that those affiants had knowledge of the statements to which they were swearing the truth. Notary Public Handbook: A Guide for New Jersey (East Coast Publishing, 1991) at p. 89-91; see also Immerman v. Ostertag, 83 N.J.Super. 364, 370-74 (Law Div. 1964). At the time the circulator affidavits were acknowledged, the affidavits had numbers on them that corresponded to numbers appearing on the already filed petition papers, and copies of such filed petitions were present at the time the circulators and the notary affixed their respective signatures to the affidavit.

Pursuant to N.J.S.A. 40:69A-186,

> All petition papers circulated for the purposes of an initiative or referendum shall be uniform in size and style. . . . Attached to each separate petition paper there shall be an affidavit of the circulator thereof that he, and he only, personally circulated the foregoing paper, that all the signatures appended thereto were made in his presence, and that he believes them to be the genuine signatures of the persons whose names they purport to be.

In her letter dated February 28, 2012, Ms. DiJosie disqualified the signatures of 147 otherwise qualified voters, because the affidavits affixed to several petitions failed to be acknowledged by a person authorized to administer oaths in the state. Thirty-eight additional signatures were eliminated because the affidavit incorrectly placed the name of the circulator on the wrong line. Verified Complaint, Ex. D. The Clerk correctly noted that a Pennsylvania notary public is not a person authorized to administer oaths in the state. However, it should be noted that if the venue on the affidavits had been properly designated to be in the State of Pennsylvania, the employment of a Pennsylvania notary public would have rendered the affidavit sufficient. See N.J.S.A. 41:2-17(permitting out-of state notaries to administer "any oath, affirmation or affidavit required or authorized to be taken in any suit or legal proceeding in this state, or for any lawful purpose whatever") An affidavit must accurately state the place where it

was taken. No venue or an inaccurate venue renders the affidavit insufficient. Notary Public Handbook: A Guide for New Jersey Handbook at 88.

In accord with N.J.S.A. 40:69A-187, Ms. DiJosie notified the Committee of Petitioners of her certification of the number of qualified signatures within 20 days of the Committee's filing (see correspondence date Verified Complaint, Ex. D (February 28, 2012); Ex. F1 (February 29, 2012); and F2 (March 7, 2012) and her finding that several circulator affidavits were deficient. See Verified Complaint, Ex. D. Consistent with the Committee's statutory right to supplement its petition papers by submitting additional signatures and correcting errors in form found with the circulator affidavits, Ms. DiJosie, in an e-mail dated March 1, 2012, sent the Committee the following:

> Tom,
>
> I have been instructed by the solicitor not to release the petitions already in my custody and control.
>
> Please have the notary contact my office, and we will then direct her to the library conference room where the relevant petitions will be available to be properly notarized.
>
> The only inconvenient time will be between the hours of 1:00 pm and 2:00 pm.
>
> Thank you,
>
> Roe

Verified Complaint, ¶22, Exhibit G.

This correspondence offered an opportunity for the Committee's Pennsylvania notary to come to the library and correct the deficient affidavits; it did not constitute a directive that this was the only manner in which the affidavits could be corrected. Moreover, it appears from the e-mail that Ms. DiJosie did not anticipate that the notary would be accompanied by the relevant

circulator. Perhaps, Ms. DiJosie simply expected the Pennsylvania notary to come to her office and correct the venue on each of the filed circulator affidavits.

In any event, the Committee of Petitioners chose not to accept Ms. DiJosie's offer and instead used a different, but valid process. Verified Complaint, ¶¶23-24. That is, certain members of the Committee of Petitioners and relevant circulators met with a New Jersey notary public with copies of the petition papers filed on February 13, 2012, and the originals of the supplemental petition papers that the Committee intended to file on March 9, 2012. Id. Each petition paper was numbered, and each corrected circulator affidavit had a corresponding petition number noted on the top of the page. Id.

Under such circumstances, the notary public was able to satisfy her duty to the public to use reasonable care to ensure herself that the signers of the circulator affidavits were the persons they purported to be, and that those affiants had knowledge of the statements to which they were swearing the truth. Cf. Immerman v. Ostertag, 83 N.J.Super. 364, 370-74 (Law Div. 1964)(where signers of the affidavit did not swear to the truth of the contents of the mortgage documents, notary public did satisfy his duty to "use reasonable care to see that the proposed affiants had knowledge and understanding" of such documents). It is established law that "[i]t is not the duty of the notary public to examine or investigate the statements of the affiant. However, it must be emphasized that a notary should not notarize any affidavit if he knows it contains false statements." Notary Public Handbook: A Guide for New Jersey at p. 89. A notary must simply make certain that the affiant is aware of the statements given and to which the affiant is affirming. Id. at 91. In light of the limited duties of the notary public, and the factual circumstances under which the corrected circulator affidavits were sworn to and affirmed by the circulators, the Clerk's finding that the amended affidavits "are improper" is without merit.

Specifically, the Clerk found in her March 14, 2012 letter that,

> [t]he submitted affidavits were signed separate and apart from any petition and presented void of any attached petition, thereby being without any possible verification by the Notary as to what was being acknowledged and to what document the oath was intended for, and to which document the administered oath and signed notary statement would be attached to.

Verified Complaint, Exhibit J1. First, the submitted affidavits were not signed separate and apart from any petition. Each affidavit was signed in the presence of copies of the original petition papers or the original amended petition papers, and each circulator affidavit had a number that corresponded to each petition paper. Id. at ¶23. Second, the notary does not have an obligation to verify what is "being acknowledged and to what document the oath was intended for, and to which document the administered oath and signed notary statement would be attached." The notary must just satisfy herself that the affiant is aware of the document and matters to which he/she is swearing the truth, and that the affiant is the person he/she purports to be. In any event, both the notary public and the circulators were aware of which petition paper the circulator affidavit corresponded and to which it would be affixed (when delivered to the Clerk) by virtue of the matching numbers appearing on both respectively. Most importantly, the notary was able to satisfy herself that the circulators were certain of the truth of the statements which they were affirming.

Moreover, the reasoning of the Township Clerk is undermined by her own actions in this case. It was Ms. DiJosie, herself, who attached the corresponding corrected circulator affidavit to the original petition paper based on the corresponding numbers appearing on both the petition papers and the corrected affidavits. Verified Complaint, ¶24. She did this in the presence of the Committee of Petitioners and was accordingly aware that the Committee had copies of the

original petition papers filed, since otherwise they would not have known which circulator was responsible for which petition.

It therefore follows that the Clerk's certification to delete 205 signatures because of her erroneous finding that the amended affidavits were "improper and deemed not acceptable," was also arbitrary, capricious and not in accordance with the law.

In summary, Defendant DiJosie's erroneous disqualification of 504 signatures warrants an order directing her to reinstate those signatures, and to certify the petition as sufficient. On the face of the Clerk's letters, Ms. DiJosie did not disqualify additional signatures for any other reason. Given the fact that the statutory review period is over, she is now estopped from finding "new" defects in order to justify her otherwise erroneous finding of insufficiency.

IV. PLAINTIFFS' ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR CLAIMS OF LIABILITY UNDER THE NEW JERSEY CIVIL RIGHTS ACT.

This is a classic case where Township officials, supported by special interests, seek to deprive citizens of their substantive right of initiative, as established by N.J.S.A. 40:69A-184, when faced with the potential enactment by the voters of a controversial ordinance. As outlined above, Defendant DiJosie's has clearly violated the Faulkner Act provisions regarding initiative petitions; thus justifying an order directing her to treat Plaintiffs' initiative petition as sufficient, N.J.S.A. 40:69A-188 , and directing her to submit that petition to the Township Council for further actions. N.J.S.A. 40:69A 189. "But for" such an order, Defendant DiJosie would successfully deprive Plaintiffs, and all Gloucester Township voters, of their right of initiative. Because the rights of initiative and referendum found in N.J.S.A. 40:69A-184 and 185, respectively, are the quintessential substantive "rights-creating" statutes, Plaintiffs are also entitled to injunctive relief under the New Jersey Civil Rights Act, N.J.S.A. 10:6-2(c).

A. The Legislature Enacted the New Jersey Civil Rights Act To Create a State Law Claim Analogous to 42 U.S.C. §1983.

N.J.S.A 10:6-2(c) provides:

> Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief. (emphasis added)

As one noted in Point IIIA, supra., in interpreting a statute, one looks to the "ordinary and well understood meaning" of the words therein. Tarr v. Bob Ciasulli's Mack Auto Mall, Inc., 181 N.J. 70, 82 (2004). Also, words are construed in a series consistent with the words surrounding them. Gilhooley v. County of Union, 164 N.J. 533 (2000). Accordingly, New Jersey courts have found, based on the plain language of the statute, that a person may bring a civil action under the NJCRA in two circumstances: (1) when she is deprived of a substantive right, or (2) when her substantive rights are interfered with by threats, intimidation, coercion or force. Felicioni v. Administrative Office of the Courts, 404 N.J. Super. 382, 400 (App. Div. 2008), quoted in Hurdleston v. New Century Financial Services, 629 F.Supp. 2d 434 (D.N.J. 2009).

Similarly, the statute's employment of the phrase "substantive rights . . . secured by the Constitution or laws of this State" indicates that a statutory provision may provide a claim for relief under the NJCRA. Felicioni, 404 N.J. Super. at 401. See also Owens v. Feigen, 194 N.J. 607, 612 (2008) (finding that whatever procedural requirements previously applied to statutory and constitutional claims applies to the vindication of such claims through the NJCRA); Office of the Governor, Press Release, dated September 10, 2004 (stating that the NJCRA "does not

create any new substantive rights, override existing statute of limitations, waivers, immunities, or alter jurisdictional or procedural requirements . . .that are otherwise applicable to the assertion of constitutional or statutory rights."). Notwithstanding the fact that that state laws may provide a claim for relief under the NJCRA, the language of the statute does not indicate whether any state law may serve as such predicate. For that answer, one must look to the legislative history of the Act.

Governor McGreevey signed the NJCRA into law on September 10, 2004. See Office of the Governor, Press Release, dated September 10, 2004. At the time, Assemblyman Neil Cohen, the primary sponsor of the Act, stated to the press that the new law would "decrease[] the state's reliance on the federal government for safeguarding the civil rights of New Jersey citizens." Jason Martucci, "When Should The Victor Receive the Spoils: Determining the Proper Threshold for Attorney Fee Awards and The Prevailing Standard Under the New Jersey Civil Rights Act's Fee-Shifting Provision," 30 Seton Hall Leg. J. 163, 165 ((2005) (hereinafter "Seton Hall Leg. J."). Similarly, Senator Nia Gill, the primary sponsor of the Act in the Senate, stated that the NJCRA would "fill in gaps that exist under current law" and "deter civil rights violations." Id.

A review of the respective Assembly and Senate Judiciary Committee Statements to Assembly No. 2073 indicate the Legislature's intent to create a state law analogue to 42 U.S.C. § 1983.[6] Both statements specifically state: "This bill is modeled on the Federal civil rights law,

[6] Section 1983 authorizes a civil action by a person whose rights under the U.S. Constitution or federal laws have been violated by a governmental defendant:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

which provides for a civil action of deprivation of civil rights (42 U.S.C.A. § 1983)." Assembly Judiciary Comm., Statement to the Assembly No. 2073, 211th Legis., February 19, 2004, at 2; Senate Judiciary Comm., Statement to Assembly, No 2073 with committee amendments, 211th Legisl, May 6, 2004 at 2. Furthermore, like the federal civil rights statute, NJCRA gives persons a private cause of action against actors, who "under the color of law" deprive them of their substantive rights under the U.S. Constitution and federal law, and extends that cause of action to reach rights arising under either the New Jersey Constitution or state law. N.J.S.A. 10:6-2(c). See also Owens, 194 N.J. at 166 (stating that the Legislature passed the NJCRA to create a state law claim analogous to 42 U.S.C. § 1983).

It therefore follows that New Jersey courts should heed case law developed under § 1983 when interpreting analogous provisions under the NJCRA.

B. New Jersey Initiative Laws Create Judicially Enforceable "Rights" in the Voters of Faulkner Act Municipalities That May Be Vindicated Under the New Jersey Civil Rights Act.

As outlined above, the private right of action in the NJCRA, N.J.S.A. 10:6-2(c) was derived from the language of 42 U.S.C. § 1983. Both N.J.S.A. 10:6-2(c) and 42 U.S.C. § 1983 grant a private cause of action to a person whose constitutional or statutory rights have been abridged by a defendant; it is not by its terms limited to constitutional rights. See N.J.S.A. 10:6-2(c) ("substantive rights, privileges or immunities secured by the Constitution or laws of this State") (emphasis added); 42 U.S.C. § 1983 ("the deprivation of any rights, privileges, or immunities secured by the Constitution and laws") (emphasis added).

> secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Legislature's use of the phrase "or laws" like Congress' use of the phrase "and laws" is not mere surplus: the use of this phrase confers a clear and unambiguous right to proceed under N.J.S.A. 10:6-2(c) as under § 1983 when statutory rights are issue. See Felicioni v. Administrative Office the Courts, 404 N.J. Super. 382, 401 (App. Div. 2008) (acknowledging that a "statutory provision" may provide "a claim for relief under the Civil Rights Act."). In Maine v. Thiboutout, 448 U.S. 1 (1980), the leading Supreme Court case on this matter with respect to the Federal Civil Rights Act, Justice Brennan, speaking for a six-justice majority, held that this language "means what it says," and that the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law. Id. at 4. In addition, because violations of statutory rights can be vindicated in a § 1983 suit, attorneys' fees are also available to prevailing plaintiffs in such cases. Id. at 9 ("Since we hold that this statutory action is properly brought under § 1983, and since § 1988 makes no exception for statutory § 1983 actions, § 1988 plainly applies to this suit").

Accordingly, in the Third Circuit alone, courts have upheld § 1983 lawsuits to vindicate the statutory rights of nursing home residents, see, e.g., Grammer v. John J. Kane Reg'l Centers-Glen Hazel, 570 F.3d 520 (3d Cir. 2009) cert. denied, 130 S. Ct. 1524 (2010), and the statutory rights of public housing residents, see, e.g., Farley v. Philadelphia Hous. Auth., 102 F.3d 697, 704 (3d Cir. 1996).

In a series of cases originating with Blessing v. Firestone, 520 U.S. 309 (1997), the Supreme Court has emphasized that for a plaintiff to prevail under a statutory claim under §1983, the identified statute relied upon by a plaintiff cannot be just any statute, but one that affirmatively vests rights in the plaintiff. As the court explained, "a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law."* Id. at 340. If a statute was

"intended to confer individual rights upon a class of beneficiaries," Gonzaga Univ. v. Doe, 536 U.S. 273, 285 (2002), then a lawsuit under § 1983 to vindicate those rights will lie. Conversely, in the absence of this kind of "rights-creating language," id. at 287, a claim under § 1983 will not lie. For example, such "rights-creating language" has been found absent from laws that generally tell federally-funded institutions how to organize their internal recordkeeping procedures, id. at 288-89; or from laws that direct different state agencies to enter into agreements with one another about voting rights, Brunner v. Ohio Republican Party, 555 U.S. 5 (2008).

In this case, the Faulkner Act's initiative and referendum statutes are couched in rights-creating language. The operative statute, N.J.S.A. 40:69A-184 establishes the right of initiative and sets forth who possesses that right (i.e., the voters), stating "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."

Decades of case law affirm that initiative, like referendum, is a substantive "right." As early as 1979, the Law Division acknowledged that the referendum laws were rights-creating:

> Also, it is well recognized that the right to referendum is a democratic ideal. Moreover, provisions relating to a referendum should be liberally construed so as to effectuate, facilitate and encourage voters to participate in government. It is not the policy of our law to frustrate the right of voters to seek democratic redress, as provided for through referendum.

Stop the Pay Hikes Comm. v. Town Council of Town of Irvington, 166 N.J. Super. 197, 207 (Law Div. 1979) aff'd sub nom. Stop the Pay Hikes Com. v. Town Council, 170 N.J. Super. 393 (App. Div. 1979) (citing D'Ascensio v. Benjamin, 137 N.J. Super. 155, 163 (Ch. Div. 1975) and Sparte Tp. v. Spillane, 125 N.J. Super. 519, 523 (App. Div. 1973)).

More recently, in City of Ocean City v. Somerville, 403 N.J. Super. 345 (App. Div. 2008), the appeals court declared that "[v]oters also have the right of referendum to seek the repeal of any ordinance that must be held in abeyance for twenty days after adoption"), id. at 358 (emphasis added); and that "the right of initiative and referendum is to "be liberally construed .... to promote, where appropriate, its beneficial effects," id. (emphasis added) (citing Retz v. Mayor & Council of Saddle Brook, 69 N.J. 563 (1976)).

There is also no doubt that the Township Clerk's actions have deprived Plaintiffs of that statutory right of initiative. There can be no dispute that by imposing a requirement that the Committee of Petitioners be the only persons permitted to circulate the petition that they sponsor, and declaring their corrected circulator affidavits as defective (in face of no impropriety), Defendant has violated Plaintiffs' statutory rights. Such a finding therefore justifies an award of summary judgment under the New Jersey Civil Rights Act, N.J.S.A. 10:6-2(c) in Plaintiffs' favor.[7]

Even seen in the light most favorable to Defendant, the material facts of this case are not in dispute. See generally Verified Complaint, Exhibits A-J. Thus, Plaintiffs are entitled to summary judgment on Count II of their Verified Complaint.

[7] As noted in Point II, supra., The purpose of the summary judgment procedure is to avoid trials that would serve no useful purpose and to afford deserving litigants immediate relief. Warthen v. Toms River Community Memorial Hospital, 199 N.J. Super. 18, 23 (App. Div.), certif. denied, 101 N.J. 255 (1985). The Brill Court stressed that parties entitled to immediate relief should not be harassed by an unnecessary trial, id. 142 N.J. at 539, and especially so in the case of a civil rights matter such as this one, where the Court has already made rulings establishing both the substantive right secured by the law of New Jersey and defendants' violation of such law resulting in the deprivation of that right. Litigants are thereby saved the time and expense of protracted suits, and judicial resources are reserved for meritorious cases. Brill, 142 N.J. at 539; see also Robbins v. Jersey City, 23 N.J. 229, 241 (1957); Monmouth Lumber Co. v. Indemnity Ins. Co. of Am., 21 N.J. 439, 448 (1955).

C. Plaintiffs Are Entitled to Counsel Fees As the Prevailing Parties.

It is Plaintiffs' position that if they prevail on their Order To Show Cause and the injunctive relief sought is granted, they would be entitled to legal fees. See Order, dated October 24, 2011, in Tumpson v. Farina, L-HUD- 2375-11 (S.C.J. Lourdes I. Santiago)(attached hereto) granting Committee of Petitioners attorneys fees under NJCA with respect to a referendum petition.

N.J.S.A.10:6-2(f) provides for counsel fees to be awarded to plaintiffs who prevail in a New Jersey civil rights claim. The statute provides:

> In addition to any damages, civil penalty, injunction or other appropriate relief awarded in an action brought pursuant to subsection c. of this section, the court may award the prevailing party reasonable attorney's fees and costs.

See also Statement to Assembly No. 2073 with Senate Floor Amendments, adopted June 10, 2004 (noting that "[t]hese floor amendments would also amend subsection f of the bill to clarify that when a person brings an action, under this provision of the bill, the court may award the prevailing party reasonable attorney's fees and costs.").

As N.J.S.A. 10:6-2(c) was rooted in the federal civil rights statute, the fee-shifting provision of N.J.S.A. 10:6-2(f) was also based on 42 U.S.C. § 1988, which provides for an award of counsel fees to the prevailing party in a suit brought under § 1983:

> In any action or proceeding to enforce a provision of section[] . . . 1983. . . of this title . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988 . In fact, at the time of Senator Gill's floor amendments, Assemblyman Neil Cohen noted to the press that the Act now "mirrored the language of the fee-shifting provision applicable to the federal Civil Rights Act," (Seton Hall Leg. J. at 175, n.81) thus implying relevance of case law developed under that statute.

Litigants that prevail within meaning of § 1988 are entitled to receive fees "as a matter of course in the absence of special circumstances." Dunn v. N.J. Department of Human Services, 312 N.J. Super. 321, 333 (App. Div. 1998). The discretionary authority to deny fees outright is extremely limited and should be sparingly exercised. Gregg v. Hazlet Township Comm., 232 N.J. Super. 34, 37-38 (App. Div. 1989); The African Council v. Hadge, 255 N.J. Super. 4, 12 (App. Div. 1992) (reiterating that "counsel fees should be liberally granted").

An overly vigorous or unconstrained use of the power to deny fees would frustrate and potentially defeat the legislative purpose underlying § 1988 and the NJCRA, which exists to promote the vindication of constitutional values by creating a financial incentive for competent counsel to undertake civil rights cases. Student PIRG v. AT&T Bell Labs, 842 F.2d 1436 (3d Cir. 1988); New Jerseyans for Death Penalty Moratorium v. New Jersey Dept. of Corr., 185 N.J. 137, 153 (2005) (absent fee shifting to vindicate public rights, "the ordinary citizen would be waging a quixotic battle against a public entity vested with almost inexhaustible resources").

While a prevailing party will ordinarily receive fees, the amount of any fee award is subject to scrutiny. Such scrutiny awaits a separate hearing after Plaintiffs' injunctive relief has been granted.

CONCLUSION

For these reasons, the decision of defendant DiJosie should be reversed, and the Court should order that the Plaintiffs' Public Contracting Reform Ordinance Petition, as amended, constitutes a valid and sufficient initiative petition under N.J.S.A. 40A:69-184; that the Clerk shall submit that initiative petition to the Township Council for further action; and, if the Council fails to enact the proposed ordinance, that DiJosie should thereafter schedule an election on whether the proposed Public Contracting Reform Ordinance should be adopted. N.J.S.A. 40:69A-190 to 192. Furthermore, the Court should schedule a hearing to determine the actual amount of attorneys fees to which Plaintiffs are entitled as the prevailing parties in this litigation.

Respectfully submitted,

NEW JERSEY APPLESEED PUBLIC INTEREST LAW CENTER, INC.

_____

By: Renée Steinhagen, Esq.

Dated: April 25, 2011