New Jersey
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September 17, 2009

VIA DELIVERY BY HAND

Hon. James P. Hurley, J.S.C.
Middlesex County Superior Court
56 Paterson Street
New Brunswick, New Jersey 08901

Re: Empower Our Neighborhoods et al. vs. Torrisi, et al.
Docket No. MID-L-7460-09

Dear Judge Hurley:

Please accept this reply letter in lieu of more formal brief in further support of Plaintiffs' Order to Show Cause which is returnable tomorrow afternoon at 2:30 p.m.

In their respective legal memoranda opposing Plaintiffs' application for declaratory and injunctive relief, the Municipal and Individual Defendants ignore this Court's final and binding holdings in EON II (as well as this Court's findings in EON I) and assert that the provisions in the Optional Municipal Charter Law, N.J.S.A. 40:69A-1 prohibiting multiple charter amendment referenda proceedings from moving forward at the same time do not apply to petitions filed pursuant to N.J.S.A. 40:69A-25.1 of the Act. The Individual Defendants state that N.J.S.A. 40:69A-21 does not apply to their petition, because it is "**not** a direct petition of voters, but rather, is an initiative ordinance," (Ind. Dfs. Mem. at 2); and Municipal Defendants claim that it does not apply "since that section prohibits only submission of multiple petitions regarding the question of adopting an optional plan of government,"(Mun. Dfs. Mem. at 7) rather than petitions regarding the question of adopting any alternative permitted under a particular optional plan.

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Plaintiffs adamantly disagree. As presented in our initial brief, Plaintiffs assert that the prohibitions found in N.J.S.A. 40:69A-21 (and N.J.S.A. 40:69A-17) apply to all change of government referenda that require amendments to a city charter. As the court in EON I acknowledged, the statutory scheme permits "more than one alternative [] to be submitted to the voters at the same time," N.J.S.A. 40:69A-25.1, but does not permit such multiple questions when they are the product of cotemporaneous charter amendment petition and/or ordinance proceedings. See Transcript of the Decision of Hon. Heidi Willis Currier, Empower Our Neighborhoods, et al. vs. Torrisi et al., Docket No. MID-L-6408-08, September 2, 2008, pp 12-14 (attached hereto).

The Legislature's intent that the prohibitions found in sections 21 and 17 include petitions filed pursuant to section 25.1 (a 1981 amendment to the Act) is indicated by the breadth of the language used in the two provisions. Specifically, N.J.S.A. 40:69A-21 reads in pertinent part:

> No petition for submission for the question of adopting an optional plan of government pursuant to section 1-18 et seq. of this act may be filed while proceedings are pending pursuant to another such petition, . . . or while proceedings are pending pursuant to any other statute for the adoption of any other charter or form of government available to the municipality, . . .

It is clear from the Legislature's continued use of the language "section 1-18 et seq. of this act" and "other statute for the adoption of any other charter or form of government," at the time that it amended the Act to include section 25.1, that it intended such provision to capture all change of government petitions requiring a charter amendment including the adoption of an alternative under any given optional plan of government.[1] Therefore, Municipal Defendants' attempt to distinguish the question of adopting an optional plan of government from the question of adopting an alternative under an optional plan of

[1] Similarly, N.J.S.A. 40:69A-17, prohibits the enactment of an ordinance or the filing of petition for the election of a charter commission from interfering with pending proceedings under "any other petition or ordinance filed or passed under article 1 of this act, . . . or any other statute providing for the adoption of any other charter or form of government available to the municipality, . . ."

government for purposes of sections 21 and 17 cannot be sustained.

Furthermore, as discussed in this Court's decision in EON II, and Plaintiffs' initial brief, exclusion of petitions and ordinances filed pursuant to N.J.S.A. 40:69A-25.1 from the prohibition against multiple change of government referenda proceeding at the same time is contrary to the policy scheme embedded in the statute. As the New Jersey Supreme Court stated in Chasis v. Tumulty, 8 N.J. 147, 155 (1951),

> The Legislature has determined; and while it has clothed the governing body with the authority to initiate a movement looking toward an applied study, it has, in our opinion, given, in section 1-21, assurance that such authority shall not vitiate a popular movement toward a referendum election on a specific statutory charter.

Similarly, as the Legislature has given any one committee of petitioners the authority to initiate a petition to place one or more alternative form of government questions on the ballot at the same time, section 1-21, assures such petitioners that their petition will not be interfered with or "vitiated" by competing questions presented by the municipality or another committee of petitioners.

The explicit language of N.J.S.A. 40:69A-21 and the policy and intent of article 1 of the Optional Municipal Charter Law generally also undermine the Individual Defendants' "form over function" argument. The fact that such Defendants have filed a "Petition [to initiate an ordinance] for a Ballot Question on Expanding New Brunswick's At-large City Council to Seven Members," (Ex. A, Verified Complaint), "pursuant to N.J.S.A. 40:69A-25.1," (id.) rather than a petition to place such a question directly on the ballot, does not remove such petition from the ambit of N.J.S.A. 40:69A-21. The authority for such petition is section 25.1, and not the general initiative provisions found in N.J.S.A. 40:69A-184; and for the reasons stated above falls within the scope of N.J.S.A. 40:69A-21.[2]

[2]Contrary to this Court's holding in EON II, Municipal Defendants continue to assert that "in a citizen initiated petition under N.J.S.A. 40:69A-25.1, an ordinance is required." (Mun. Dfs. Mem. at 11) For the reasons stated in our initial brief, Plaintiffs disagree with this conclusion. Notwithstanding our disagreement with defendants on this matter, Plaintiffs have not pleaded such

For the foregoing reasons, including those set forth in Plaintiffs' initial letter brief, Plaintiffs' application for summary judgment by Order to Show Cause should be granted and all relief in lieu of prerogative writs that has been requested against the Municipal Defendants be ordered.

Respectfully submitted,

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and

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deficiency as a reason for decertifying the Individual Defendants' petition, and thus, it is not a basis for granting the relief requested.