Renée Steinhagen, Esq.
NEW JERSEY APPLESEED
PUBLIC INTEREST LAW CENTER, INC.
744 Broad Street, Suite 1600
Newark, New Jersey 07102
(973) 735-0523
steinhagen_pilc@yahoo.com

Flavio L. Komuves, Esq.
ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
One Riverfront Plaza,
Suite 320
Newark, New Jersey 07102
(973) 623-1822
fkomuves@zazzali-law.com

DANIEL TUMPSON, RUSSELL HOOVER, ERIC VOLPE, CHERYL FALLICK, and JOEL HORWITZ ("COMMITTEE OF PETITIONERS"), Plaintiffs, v. JAMES FARINA, in his capacity as Hoboken City Clerk, and the CITY OF HOBOKEN, Defendants, and MILE SQUARE TAXPAYER ASSOCIATION 2009, INC., GINA DeNARDO, individually and on behalf of all similarly situated and 611-613 LLC, individually and on behalf of all similarly situated, Intervenors.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - HUDSON COUNTY Docket No. L-2375-11

LETTER BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON COUNT FIVE AND FOR AWARD OF COUNSEL FEES

September 8, 2011

Hon. Bernadette N. DeCastro, .J.S.C.
Superior Court of New Jersey
Hudson County Administration Bldg.
595 Jersey Avenue
Jersey City, N.J. 07306

Re: Tumpson et al. v. Farina et al., Docket No. L- 2375-11

Dear Judge DeCastro:

Plaintiffs Daniel Tumpson, Russell Hoover, Eric Volpe, Cheryl Fallick and Joel Horwitz (the "Plaintiffs"or "Committee of Petitioners") submit this letter-brief in support of their motion for Summary Judgment on Count V of the Verified Complaint, and for an award of counsel fees as the prevailing party. The two questions before this court are whether violation of Plaintiffs' substantive right of referendum, as provided in N.J.S.A. 40:69A-185 *et seq*., constitutes a violation of section (c) of the New Jersey Civil Rights Act, N.J.S.A. 10:6-2; and if so, are Plaintiffs, as the prevailing party, entitled to reasonable attorneys fees and cost. Plaintiffs assert that the answer to these related questions is an unqualified "yes."

TABLE OF CONTENTS

PRELIMINARY STATEMENT 3

STATEMENT OF FACTS AND PROCEDURAL HISTORY 4

A. In the Trial Court. 4

B. In the Appellate Division 8

LEGAL ARGUMENT 9

I. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR CLAIMS OF LIABILITY UNDER THE NEW JERSEY CIVIL RIGHTS ACT. 9

A. The Legislature Enacted the New Jersey Civil Rights Act to Create a State Law Claim Analogous to 42 U.S.C. § 1983. 11

C. New Jersey Referendum Laws Create Judicially Enforceable "Rights" in the Voters of Faulkner Act Municipalities That May Be Vindicated Under the New Jersey Civil Rights Act. 12

II. PLAINTIFFS ARE ENTITLED TO COUNSEL FEES UNDER THE FEE-SHIFTING PROVISIONS OF THE NEW JERSEY CIVIL RIGHTS ACT. 16

A. When Plaintiffs Substantially Prevail, Fees Should Be Granted as a Matter of Course. 17

B. Plaintiffs Are the Prevailing Parties. 19

C. Plaintiffs' Co-Counsels' Respective Hourly Rates Are Reasonable. 20

D. The Number of Hours Expended by Both Plaintiffs' Co-counsel Is Reasonable. 20

III. JOINT AND SEVERAL LIABILITY FOR DEFENDANTS AND INTERVENORS IS APPROPRIATE. 22

CONCLUSION. 24

PRELIMINARY STATEMENT

This is a classic case where City officials, supported by special interests, seek to deprive citizens of their substantive right of referendum, as established by N.J.S.A. 40:69A-185, when faced with the potential repeal by the voters of a controversial ordinance. Plaintiffs' Statement of Undisputed Material Facts in Support of Motion for Summary Judgment on Count V (hereinafter "SUMF") clearly establishes that but for this Court's Orders dated June 14, 2011, June 24, 2011, and August 25, 2011, directing the municipal defendants to process the Committee of Petitioners' referendum petition protesting the passage of Ordinance Z-88, in accordance with N.J.S.A. 40: 69A-187 through 191, Defendants Farina and the City of Hoboken (hereinafter, the "Defendants") would have successfully deprived Plaintiffs, and all Hoboken voters, of their right of referendum.

It is clear on the face of the New Jersey Civil Rights Act, that a "person" may bring a civil action under the Act, when he is "deprived . . . of any substantive rights, privileges or

immunities secured by the Constitution or laws of this State." N.J.S.A. 10:6-2(c). The legislative history of this Act makes clear that it was intended to protect substantive rights, was intended to provide the citizens of New Jersey with a State remedy for deprivation of or interference with their civil rights, and was modeled on 42 U.S.C. §1983. New Jersey case law acknowledges that a statutory provision may provide a claim for relief under the New Jersey Civil Rights Act, Felicioni v. Administrative Office of the Courts, 404 N.J. Super. 382, 401 (App. Div. 2008), and abundant federal case law exists establishing that the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law. See e.g., Maine v. Thiboutout, 448 U.S. 1 (1980). Indeed the right of referendum established in N.J. S.A. 40:69A-185, is the quintessential substantive "rights-creating" statue that the New Jersey Civil Rights Act was intended to protect.

Because Plaintiffs have established their claim under N.J.S.A.10:6-2(c), and have successfully secured injunctive relief, they are also entitled to an award of reasonable attorney's fees and costs as the prevailing party. N.J.S.A.10:6-2(f). Because the paramount goal of the New Jersey Supreme Court when applying such fee-shifting provisions has been to further the statutory policy of attracting competent counsel to vindicate the rights of plaintiffs and enforce the law through the judicial process, Coleman v. Fiore Bros., 113 N.J. 594, 597 (1989), an award of fees is particularly appropriate herein. Without New Jersey Appleseed Public Interest Law Center, and the assistance of Flavio Komuves, Esq., the Committee of Petitioners would have been deprived of their right of referendum and their civil right to participate in the affairs of local government.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. In the Trial Court

Plaintiffs filed their Verified Complaint ("Complaint") and an accompanying Order to Show Cause in this action on May 5, 2011. The Complaint described how Defendants had passed an ordinance that radically rolled back tenants' rights under the Hoboken rent control laws, and how Plaintiffs responded to it by circulating and filing petitions seeking a public vote on the matter under the applicable referendum laws. N.J.S.A. 40:69A-185 et seq.

The Complaint also set forth how Defendants first accepted the petition, then "unfiled" it, then failed to conduct the statutory examination of the signatures, and later refused to accept a timely supplementary petition. SUMF, ¶¶2-5. It also detailed how Defendants and other government actors gave the Committee of Petitioners constantly shifting information about the number of signatures they needed to file to have the referendum vote. The Complaint sought to have the City's actions overturned under a variety of legal, equitable, and prerogative writ theories, as well as the New Jersey Civil Rights Act, ("NJCRA"), N.J.S.A. 10:6-2(c).

The Defendants filed a motion to dismiss the Complaint. Also, Intervenors, Miles Square Taxpayer Association 2009, Inc., and Gina DeNardo, representing a class of landlords, sought leave to intervene, which was granted as unopposed, and filed an Answer to the Complaint.

After the various parties filed multiple briefs on the various applications and motions, this Court held a hearing on June 10, 2011. On June 14, 2011, the Court signed two Orders and issued a 13-page Opinion finding, among other things, that the Clerk "did not follow the procedure set forth in N.J.S.A. 40:69A-185 through 187" respecting the filing and processing of referendum petitions, and the legal effect of same. (Trial Ct. Decision, dated June 14, 2011 at p. 12). The Court further found that "based upon a reading of the statutes . . . that Mr. Farina's actions were arbitrary and capricious." (SUMF, ¶6)

As a remedy, the Court, in its orders dated June 14, 2011, directed that the City Clerk was to "process the plaintiffs' filed petition as provided by law and review the petition and amended petition timely submitted consistent with the statute." (Id.). The second order denied Defendant Farina's and Defendant City of Hoboken's Cross-Motion to Dismiss Plaintiffs Complaint. (SUMF, ¶7) The Court also implicitly rejected additional arguments by solely by Intervenors that there were defects in the form of the petition used by Plaintiffs.

In its June 14, 2011 decision, the Court cited amply to various cases finding the referendum right to be a substantive statutory right belonging to the voters of the City of Hoboken. The Court explained that "citizens have the right to propose and vote on municipal ordinances" through the initiative and referendum process; that "[v]oters also have the right of referendum to seek the repeal of any ordinance . . ."; and that "voters have th[e] right" to a public vote on an ordinance "both before and after the council adopts an ordinance." (Trial Ct. Decision, dated June 14, 2011, at pp. 3-5).

On June 20, 2011, Intervenors filed an Order to Show Cause seeking a stay of the Court's rulings pending appellate review. On the papers, it stated that the Defendants joined in such motion. Plaintiffs filed opposition.

On June 24, 2011 the Court denied the stay. The Court specifically found that Defendants and Intervenors established neither "likelihood of success on the merits nor irreparable harm." (Order Denying Stay, dated June 24, 2011, at p. 2). The Court specifically found that the balancing of the equities favored Plaintiffs. (Id.). This Court also ruled that in the event the review of the petition papers described in the June 14, 2011 Order resulted in a finding of insufficiency, Plaintiffs were entitled to file additional signatures to cure the insufficiency:

> In addition, to clarify, at the conclusion of the 20 days [for review of the previously-submitted signatures], if the City determines the filings are insufficient, the Plaintiff may amend pursuant to the law. N.J.S.A. 40:69A-188.

(SUMF, ¶8) Having decisively lost on their stay motion before the trial judge, neither Intervenors nor Defendants elected to seek emergent appellate review of that Order.

Nevertheless, predictably and consistent with its past pattern of obstructionism, on July 7, 2011, the City found the 2,314 signatures theretofore submitted to be insufficient by rejecting an inordinately high number of signatures on the referendum petitions. (See Certification of Renee Steinhagen, July 29, 2011, Exhibit. C (indicating rejection of over 32 percent of the signatures)). As allowed by Judge DeCastro's order, Plaintiffs then collected an additional 844 signatures, and submitted them on July 18, 2011 in the manner and within the time fixed by the order dated June 24, 2011. (SUMF, ¶9).

On July 25, 2011, Defendants replied to this submission by letter, and announced that the filing was untimely, despite Judge DeCastro's ruling expressly authorizing the filing. However, the letter also specifically found that the number of signatures submitted was sufficient under the law. (SUMF, ¶10). On July 26, 2011, Plaintiffs demanded that Defendants retract the finding of insufficiency and when they failed to do so, applied to this Court for an Order to Show Cause to enforce its orders, supporting their request with a brief, certification, and exhibits.

On August 1, 2011, this Court held that in its view of R. 2:9-1, there was no jurisdiction to hear the enforcement motion.

After an emergent appeal and remand (the particulars of which are discussed below), and after further briefing from Defendants and the Intervenors and a reply brief and an additional certification from Plaintiffs, on August 25, 2011, the trial court ruled that defendants had violated the litigants' rights of plaintiffs and ordered the submission of the referendum to the

Hoboken City Council and the immediate suspension of the ordinance. This Court also denied a stay pending appeal. (SUMF, ¶11).

In sum, after the submissions of voluminous briefs, research and writing about various points of law on which little explicit authority existed, and despite the obstructionism of the Plaintiffs and the Intervenors, the Plaintiffs obtained all of the relief they requested: the submission of the ordinance to the council and a suspension of the ordinance. (Id.)

B. In the Appellate Division

Plaintiffs also obtained unequivocal success in each of the three trips to the Appellate Division that were necessary for them to secure relief under their Verified Complaint in this court.

Initially, on July 14, 2011, the Intervenors filed a notice of appeal claiming, among other things, that the trial court's rulings had resolved all issues as to all parties and that therefore they could appeal as of right. The Intervenors represented that the City Defendants joined in their Notice of Appeal.

On or about July 22, 2011, Plaintiffs filed a Motion for limited remand. Contending that the trial court had not definitively ruled on Count V of their Complaint under the NJCRA or counsel fee issues under that Act, Plaintiffs filed a motion, brief, and appendix seeking a limited remand. A motions panel granted the order that Plaintiffs sought, which has resulted in the present motion proceedings.

On July 29, 2011, Plaintiffs filed a limited cross-appeal, primarily challenging the Court's decision about the date on which the suspension of the ordinance would take effect. In addition, if the remand motion were to have been denied, Plaintiffs also sought appellate review of the NJCRA and counsel fee issues; however, this was mooted by the grant of the remand.

In addition, regarding Plaintiffs' Motion to Enforce Litigants' Rights that this Court denied on August 1, 2011, on jurisdictional grounds, Plaintiffs filed with Judge Miniman, on August 3, 2011, a request for leave to file an emergent appeal, which was granted. Both parties filed extensive briefing and appendices with the appeals court. On August 12, 2011, another appellate panel granted Plaintiffs' motion and remanded the case to the trial court for a hearing to determine whether the Committee of Petitioners filed their supplementary petition within 10 days of service of the City Clerk's notice of insufficiency, and if so, "plaintiffs were entitled to the relief sought in their order to show cause" and that the trial court had jurisdiction to hear the application.

Finally, on August 26, 2011, the Intervenors made a request for emergent relief to another Appellate Division judge. Plaintiffs filed a letter objecting to certain deficiencies in the application, and that same day, the Appellate Division denied the request for emergent relief. Instead, the Intervenors were permitted to apply for a stay by motion, with the customary briefing schedule that attends appellate motions. That stay motion was filed on September 1, 2011.

Again, as in the trial court, Plaintiffs have been unequivocally successful on each of the proceedings that the Appellate Division has heard to date.

LEGAL ARGUMENT

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

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)

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 v. Administrative Office of the Courts, 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.

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

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.[1] Both statements specifically state: "This bill is modeled on the Federal civil rights law, 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;

[1] 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 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.

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 a private cause of action to persons 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 v. Feigen, 194 N.J. Super. 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 referendum laws create judicially enforceable "rights" in the voters of Faulkner Act municipalities that may be vindicated under the NJCRA.

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).

The Legislature's use of the phrase "or laws" like Congress' use of the phrase "and laws" is not mere surplusage: the use of this phrase confers a clear and unambiguous right to proceed under N.J.S.A. 10:6-2(c) as § 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-185 establishes the right of referendum and sets forth who possesses that right (i.e., the voters), stating "The voters shall also have the power of referendum which is the power to approve or reject at the polls any ordinance submitted by the council to the voters or any ordinance passed by the council, against which a referendum petition has been filed as herein provided ." Id. SUMF, ¶1.

Decades of case law affirm that 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)).

And, if there were any doubt, the Supreme Court used the term "right" when referring to the voters' power of referendum, no less than seventeen times in its opinion in In re Ordinance 04-75, 192 N.J. 446 (2007), and no less than twelve times in its opinion in In re Petition for Referendum on City of Trenton Ordinance 09-02, 201 N.J. 349 (2010).

Understandably, this Court has previously acknowledged the Plaintiffs' statutory right of referendum. In its June 14, 2011 opinion, the Court explained that "citizens have the right to propose and vote on municipal ordinances" through the initiative and referendum process; that "[v]oters also have the right of referendum to seek the repeal of any ordinance . . ."; and that "voters have th[e] right" to a public vote on an ordinance "both before and after the council adopts an ordinance." (Trial Court Decision, dated June 14, 2011 at pp. 3-5).

There is also no doubt that the Defendants' actions deprived Plaintiffs of that statutory right of referendum. There can be no dispute that by "unfiling" the initial petition, and refusing to accept supplementary filings, even when ordered to do so by a Court, Defendants violated these statutory rights of Plaintiffs. This justifies an award of summary judgment under the New Jersey Civil Rights Act, N.J.S.A. 10:6-2(c) in Plaintiffs' favor.

On a summary judgment motion, 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). As the New Jersey Supreme Court emphasized in Brill, a court should deny summary judgment only where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" 142 N.J. at 529. Where a party opposing the motion only points to disputed facts that are of an insubstantial nature, the motion

for summary judgment must be granted. Id.; see also Johnson v. City of Hackensack, 200 N.J. Super. 185, 189 (App. Div. 1985).

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. 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).

Seen in the light most favorable to Plaintiffs, the material facts of this case are not in dispute. See generally SUMF ¶¶1-11. Thus, Plaintiffs are entitled to summary judgment on Count V of their Verified Complaint.

II. PLAINTIFFS ARE ENTITLED TO COUNSEL FEES UNDER THE FEE-SHIFTING PROVISIONS OF THE NEW JERSEY CIVIL RIGHTS ACT.

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.

A. When Plaintiffs Substantially Prevail, Fees Should Be Granted As a Matter of Course.

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. For the reasons discussed below, both Ms. Steinhagen's and Mr. Komuves' hourly rates and time expended on the case are reasonable.

Renee Steinhagen, Esq. Ms. Steinhagen has been the Executive Director of the New Jersey Appleseed Public Interest Law Center for the last 15 years, and has been an attorney for 24 years. See Steinhagen Cert., Ex. B. She has litigated a myriad of public interest cases, including election law cases, in the trial and appellate courts, and specifically has succeeded in four matters involving the initiative and referendum laws. See Steinhagen Cert., ¶3(c). In Blum v. Stenson, 465 U.S. 886 (1984), the Supreme Court held that non-profit, public interest attorneys are entitled to fees based on prevailing market rates, not the actual cost of providing the legal services at issue. Id. at 894-95. See also Rendine v. Pantzer, 141 N.J. 292, 337 (1995); Public Interest Research Group v. Windall, 51 F.3d 1179, 1185 (3d. Cir. 1995) (quoting Blum v. Stenson) (plaintiff entitled to prevailing market rates even if represented by non-profit counsel).

The current market rate in New Jersey for an attorney of Ms. Steinhagen's experience is at least $350.00 per hour. See Steinhagen Cert., Exhibits D and E. In addition, over 10 years ago in 2000, Judge Anthony Parrillo awarded Ms. Steinhagen $295.00/hr. for her service in another case in which she represented her clients on a *pro bono* basis. Id, Ex. C.

Flavio Komuves, Esq. Mr. Komuves has 14 years experienced as a trial and appellate attorney, and for 3 ½ of those years, he was the lead attorney for the New Jersey Department of the Public Advocate's Voting Rights Project. No less so than counsel working for nonprofit organizations, private counsel is also entitled to attorneys' fees at the prevailing market rate. Rendine, 142 N.J. at 316-17. As evidenced by recent decisions, the current market rate in New

Jersey for an attorney of Mr. Komuves' experience is at least $350.00 per hour. Komuves Cert., Exhibits B and C.

In assessing a fee petition, courts consider whether Plaintiffs were the prevailing parties, their hourly rate, and the number of hours expended. If the Court is satisfied as to the reasonableness of these items, it should award counsel fees.

B. Plaintiffs Are the Prevailing Parties.

Although there are a number of ways in which a litigant can be deemed to be a prevailing party, one unequivocal way in which a litigant is deemed prevailing is to obtain a judgment on the merits. Jones v. Hayman, 418 N.J. Super. 291, 305 (App. Div. 2011) (citing Mason v. City of Hoboken, 196 N.J. 51, 76 (2008). There can be no dispute here that the Plaintiffs are prevailing parties. Plaintiffs secured injunctive and declaratory relief in the June 14, 2011 order, directing the City Clerk to accept and process the petitions. They secured further injunctive and declaratory relief in the August 25, 2011 order, directing the City Clerk to validate the petitions and submit them to council, and decreeing that the ordinance was suspended. In sum, Plaintiffs obtained all the relief they were seeking in the Complaint, despite strenuous opposition from both the Defendants and the Intervenors. In addition, Plaintiffs twice defeated applications by the Intervenors for a stay pending appeal in this court, secured an emergent order and remand from the Appellate Division on the order enforcing litigants' rights, and won a second appellate order for a limited remand on the fee issues. Under these circumstances, Plaintiffs clearly were the prevailing parties. See, e.g., Inst. Juveniles v. Secy. Of Public Welfare, 758 F.2d 897, 911 (3d Cir. 1985); P.G. v. Brick Twp. Bd. of Ed, 124 F. Supp. 2d 251, 259 (D.N.J. 2000); Singer v. State, 95 N.J. 487, 495 (1984) (requiring a "factual causal nexus between plaintiff's litigation and the relief ultimately achieved").

C. Plaintiffs' Co-counsels' Respective Hourly Rates Are Reasonable.

Plaintiffs' counsel each seek an hourly rate of $350.00. As demonstrated in the accompanying Certifications of Ms. Steinhagen and Mr. Komuves, this is an eminently reasonable amount, consistent with awards made to other attorneys "of equivalent skill and experience performing work of similar complexity." Evans v. Port Authority, 273 F.3d 346, 360-61 (3d Cir. 2001); Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 22 (2004) ("the court should evaluate the rate of the prevailing attorney in comparison to rates for similar services by lawyers of reasonably comparable skill, experience, and reputation in the community") (quotations omitted).

Ms. Steinhagen and Mr. Komuves are both experienced attorneys, with relevant experience in trial and appellate practice in public law issues generally, and election law specifically. Their rates are consistent with what is charged by – and what has recently been awarded to – other attorneys in the North Jersey area. See Howley v. Mellon Financial Corp., Dkt. No. 06–5992 (FSH), 2011 WL 2600664 (D.N.J. June 27, 2011) ($350.00 to $400.00 per hour for attorneys with comparable experience); M&J Comprelli v. Town of Harrison, Docket No. L-1179-10 (Law Div. Aug. 26, 2010) (award of $400.00 to $520.00 as an hourly rate for attorneys with comparable experience in an OPRA case).[2]

D. The Number of Hours Expended by Plaintiffs' Co-counsel Is Reasonable.

In a fee-shifting case, the Court must also be satisfied that the number of hours expended on the matter is reasonable. Rendine, 141 N.J. at 316. The aggregate number of hours sought in this case for both counsel is 218.85. This number includes hours expended on making this application for summary judgment and fees. See Courier News v. Hunterdon County

[2] These cases are attached as Exhibits B and C to the Komuves Certification.

Prosecutor's Office, 378 N.J. Super. 539, 547 (App. Div. 2005)("time spent by counsel in prepraring a counsel fee petition" is compensable as part of the fee award.) This is reasonable, given both the complexity of the legal issues and the procedural track of this case. As an initial matter, the legal issues in this case were complex, as they involve provisions of the referendum law that are far from a model of clarity and on which case law is relatively sparse. Moreover, the Plaintiffs effectively faced two adversaries – the Defendants and the Intervenors, each of which presented somewhat different arguments. Next, the case has included two orders to show cause at the trial level, along with an order enforcing litigants' rights, two applications for emergent relief to the Appellate Division, and two other motions in the Appellate Division (necessary to secure Plaintiffs' right of referendum in this Court), as well as the present proceedings.

As the time records demonstrate, the two attorneys involved in this case acted at all times efficiently and diligently. Absolutely no excessive time or duplication of efforts is apparent from counsels' timesheets; while some limited strategy discussions and editing occurred as a matter of course, counsel have adjusted their timesheets to generally reflect only one attorney's time for such consultation, not both. In sum, the fee petition represents only time "reasonably expended." Furst, 182 N.J. at 22

On the whole, therefore, counsels' fee request is eminently reasonable given all the factors applicable under RPC 1.5(a) and the applicable case law. See Steinhagen and Komuves Certifications. These attorneys are experienced counsel entitled to a market rate for their fees; they obtained complete success for their clients on all issues; the legal issues were complex, and the proceedings were very fast-moving. Finally, Plaintiffs' counsel bore the risk that their fees would not be paid if they were not prevailing parties, meaning that this was the functional equivalent of a contingency case. Therefore, an award of 218.85 hours of professional time at $350 per hour is eminently justified. In addition, the relatively limited costs of $375 for Ms.

Steinhagen and $551.72 for Mr. Komuves, comprising filing fees, copies of the often voluminous papers, postage, and couriers, is also justified.

In closing, Plaintiffs note that their fee application includes Appellate Division work. While fees for appellate work are ordinarily presented to the appellate court, the last unnumbered paragraph of R. 2:11-4 provides an exception to that rule where the Appellate Division remands the matter, as it did here both on Plaintiffs' emergent appeal and their motion for limited remand. As such, because of the two respective remand orders, this court can award fees for appellate services that were necessary to secure the relief granted by the trial court.

IV. JOINT AND SEVERAL LIABILITY FOR DEFENDANTS AND INTERVENORS IS APPROPRIATE.

Finally, the Court should assess attorneys' fees jointly and severally against both the City Defendants and the Intervenor Defendants. In appropriate circumstances, Intervenors have been held liable for counsel fees under 42 U.S.C. § 1988. See, e.g., Planned Parenthood of Cent. New Jersey v. Attorney Gen. of State of New Jersey, 297 F.3d 253, 263 (3d Cir. 2002) (finding the Legislature liable for counsel fees for its defense, as intervenor, of an unconstitutional statute).

To be sure, the liability of an intervenor for counsel fees is fairly circumscribed as a matter of federal fee-shifting law. See Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754 (1989).[3] However, as the Third Circuit explained in Thorstenn v. Barnard, 883 F.2d 217, 219 (3d Cir. 1989), Zipes is not an absolute bar to the assessment of counsel fees against a losing intervenor. Thorstenn involved a challenge to the Virgin Islands' Bar residency requirement. Plaintiff sued the Chairman of the Committee of Bar Examiners (the "Chairman")

[3] The liability of an intervenor for attorneys' fees appears to be an issue of first impression under New Jersey law. Thus, while this Court is not bound by the general rule of Zipes limiting intervenor liability for attorneys' fees, for the reasons articulated above, the interpretation of §1988 is nevertheless persuasive authority for cases arising under State law fee-shifting statutes.

to invalidate the requirement and the Virgin Islands Bar Association (the "Association") intervened. On remand, after the requirement was declared unconstitutional, the plaintiff moved for attorneys' fees against both the Chairman and the Association. Applying Zipes, the Court held that the intervenors were not liable, but it noted that intervenors there played a limited role in the litigation:

> As noted, the Association did not advance any issue not already presented. Nor did it assert any interest distinct from that advanced by the Chairman as the basis for its position. In consequence, it imposed no additional burden on plaintiffs in the litigation. . . . Given the foregoing circumstances, and the fact that no relief was sought or granted against the Association, we conclude that the intervenor Association, although integrated, is not the functional equivalent of a defendant here.
>
> Thorstenn v. Barnard, 883 F.2d 217, 219-20 (3d Cir. 1989).

In the instant case, Intervenor Defendants' role was not similarly minimal. For example, it was the Intervenors who pursued (unsuccessfully) the stay-pending-appeal order to show cause after the Court's June 14, 2011 Order. It was the Intervenors who signed the premature notice of appeal on July 14, 2011, which necessitated Plaintiffs' motion for a limited remand and the instant proceedings. And it was the Intervenors who moved (unsuccessfully) for emergent consideration of the Court's August 25, 2011 Order. Moreover, Intervenors have advanced arguments distinct from that of the City; for example, Intervenors argued the Plaintiffs' petitions were defective as a matter of form because of where the names of the Committee of Petitioners was located on the petition. (See June 10, 2011 Transcript, at p. 36-37, 40-41). Finally, the Intervenors (but not the City) moved before the Appellate Division for a stay of all aspects of the Court's August 25, 2011 ruling. In contrast, when the City advocated for a stay before the trial court, it sought only a stay of the suspension of the ordinance; it did not seek to deny the people a vote at the ballot box the way the Intervenors urged. (See Aug. 25, 2011 Transcript, at p. 22).

Through the Intervenors' actions in this case, they have removed themselves from the protective cloak of Zipes by presenting new and distinct issues and procedural tactics and generally burdening the litigation with additional expense. They are not "blameless," (cf. Planned Parenthood, 297 F.3d at 263), because of the differences between their own substantive arguments and procedural tactics and those of the Defendants. In sum, they have extended this litigation and have made it more costly. For these reasons, Intervenors should be jointly and severally liable for attorneys' fees.

CONCLUSION

For the foregoing reasons, the Court should grant plaintiffs' motion for summary judgment on Count V of the Complaint, and assess attorneys' fees in the amount of $76,597.50 and costs in the amount of $956.72.

Respectfully submitted,

NEW JERSEY APPLESEED PUBLIC INTEREST LAW CENTER, INC.

_____

By: Renée Steinhagen, Esq.

and

Flavio L. Komuves, Esq.
ZAZZALI, FAGELLA, NOWAK, KLEINBAUM FRIEDMAN

Dated: September 8, 2011