April 27, 2022

Hon. Mala Sundar, P.J.T.C.
Robert Hughes Justice Complex,
25 Market Street, 7th Fl.
Trenton, New Jersey 08625

Re: New Jersey Citizen Action et al. v. Philip Murphy and State of New Jersey, Docket No. MER-L- 001968-21

Dear Judge Sundar:

Please accept this letter brief filed on behalf of New Jersey Citizen Action, Maura Collinsgru, American Federation of Teachers, Donna Chiera, Mark Smith, and Katherine Smith (the "Plaintiffs") in reply to the *amici curiae* briefs submitted to the court by the Independent Colleges and Universities of New Jersey and Center for Non-Profit Corporations, Inc. ("*University Amici*") and the New Jersey Hospital Association ("*NJHA Amici*"), respectively.

REPLY ARGUMENT

As shown by the briefs of *Amici Curiae,* all parties now agree on one determinative legal conclusion, i.e., that P.L. 2021, c. 17., §6 eliminates **only** an administrative remedy consisting of the right of a taxpayer to challenge an assessment

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or exemption by means of a "tax appeal" before the County Board or the Tax Court. Like the State defendants, *Amici* now agree that following the amendment of N.J.S.A. 54:3-21 (the "Amendment"), the right of a taxpayer to challenge an assessment or exemption decision of another taxpayer continues via the constitutionally protected Action in Lieu of Prerogative Writ. See N.J. Const. (1947), Art. VI, sec. 5, ¶4. This means that the Amendment simply opens the door to such tax challenges directly to the Superior Court, rather than requiring a taxpayer to first exhaust the former administrative remedy. Since Amici agree that the right of a third party to make the exemption or assessment challenge is preserved via the Action in Lieu of Prerogative Writ, see *University Amici* Brief at 9,16,18,30; *NJHA Amici* Brief at 5,10-11, such concession supports the declaratory and injunctive relief sought by Plaintiffs.

Not Necessary to Decide First Amendment Right of Petition

It is no longer necessary for the court to consider these issues under the First Amendment "Petition" clause since all parties now agree that the New Jersey Constitution separately guarantees the right of a citizen to bring the tax exemption or assessment challenge via the action in lieu of prerogative writ. Consequently, the declaratory relief sought by plaintiffs is appropriate since it will eliminate the ambiguity created by

Legislative statements in P.L. 2021, c. 17, §6 that indicate an apparent intent to eliminate third party tax appeals entirely. See e.g. Garnick v. Serewitch, 39 N.J. Super. 486, 498 (Ch. Div. 1956), quoting N.J.S.A. 2A:16-51 ("The purpose of the Declaratory Judgment Act is to 'settle and afford relief from uncertainty and insecurity'").[1]

Amici's Respective Statements of Interest Enhance the Need for Declaratory Relief

The Statement of Interest of both *University Amici* and *NJHA Amici* highlight the very confusion that gives rise to the need for declaratory and injunctive relief. On the one hand, *Amici* assert that the Amendment to N.J.S.A. 54:3-21 seeks to reduce the "significant costs associated with third-party tax appeals," (*NJHA Amici* Brief at 2) and the "threat of such third-party attacks" (*University Amici* Brief at 5), suggesting that the Legislative purpose was to eliminate challenges to tax exemption

[1] If First Amendment analysis was still necessary, Plaintiffs would argue that cases cited by Amici are inapposite as they concern actions against private parties, Jung v. Association of Am. Medical Colleges, 339 F. Supp. 2d 26 (D.D.C. 2004); City of New York v. Beretta U.S.A. Corp., 524 F.3d 384 (2d Cir. 2008); Kurzke v. Nissan Motor Corp., 164 N.J. 159 (2000), or, if they do involve governmental agencies, in fact protect the right of access to the courts. See e.g. Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649 (1st Cir. 1997). See *University Amici* Brief at 15-17; *NJHA Amici* Brief at 8-10; citing cases. While Christopher v. Harbury, 536 U.S. 403 (2002), also cited by *Amici*, held that non-justiciable claims are not within the First Amendment right of Petition, Harbury does not deny First Amendment protection to property tax challenges that have never been deemed non-justiciable. In any event, the First Amendment issue need not be reached since all parties now agree that the right of third party challenge is preserved under the New Jersey Constitution.

determinations entirely. This reasoning, however, is at odds with *Amici's* contrary conclusion that the Amendment "vindicat[es] the purposes of the Remedial Legislation," (*University Amici* Brief at 18), because a third party challenging an exemption "can still file actions in lieu of prerogative writ …" See *University Amici* Brief at 16-17; *NJHA Amici* Brief at 5,10-11 (same).

The obvious disjunct between these positions highlights the confusion begat by the Amendment, yet another reason for the court to accept Plaintiffs' request for declaratory and injunctive relief.

In fact, Plaintiffs brought this action precisely because P.L. 2021, c. 17, §6 appears to express the intent of the Legislature to "prohibit[] property taxpayers from filing property tax appeals with respect to the property of others," as was said in the Sponsor Statement, a conclusion that reasonably could give rise to a perception that the Legislature intended to eliminate all third-party assessment or exemption challenges, a proposition that would raise intense constitutional concerns since N.J. Const. (1947), Art. VI, sec. 5, ¶4 expressly preserves all such citizen rights. The resulting uncertainty under the 2021 Amendment requires that the Court grant Plaintiffs' application for declaratory and injunctive relief to

clarify that rights of third-party challengers will continue via the action in lieu format, *as all parties now agree*.

The Amendment to N.J.S.A. §54:3-21 is Not "Remedial"

Plaintiffs must take issue with *Amici*'s use of the word "remedial." As explained in our *amicus curiae* brief in Joseph Colacitti et al., v. Philip Murphy, Docket No. MER-L-000738-21 at pp.44-46, the use of the term "remedial" to describe the current legislation is an inappropriate use of the term. Remedial legislation is designed to correct a social or societal "evil," not simply to overrule Judge Bianco's holding in AHS Hospital Corp., 28 N.J. Tax 456 (Tax 2015), or force a shift in tax assessment or exemption challenges from the administrative process directly into the Law Division. See e.g. Masel v. Paramus Borough Council, 180 N.J. Super. 32, 30 (App. Div. 1981) (noting that an act that modifies procedure cannot fairly be deemed "remedial"); cf., Mann v. Staples, Inc., 2012 N.J. Super. Unpub. LEXIS 1838, *11 (App. Div. 2012), quoting Cicchetti v. Morris Cnty. Sheriff's Office, 194 N.J. 563, 588 (2008)(noting that "LAD, as remedial legislation, is designed to provide an effective means "to root out the cancer of discrimination[.]"). A statutory amendment that merely shifts third-party assessment or exemption challenges from an administrative to the "action in lieu" format, is a procedural change that does not root out a

social evil or "cancer", cf., Mann v. Staples, Inc., and cannot fairly be called "remedial".

In addition, no evidence is offered by *Amici* as to any "evil" or "cancer" to eliminate. While both *Amici* groups claim that their "charitable" purposes must be protected from any exemption challenges, no substantive harm appears to have ever occurred to the non-profit industry in New Jersey from tax exemption challenges. As *University Amici* helpfully point out, the non-profit sector is healthy, massive and growing, comprising ten percent of the New Jersey economy with more than 300,000 employees in this State alone; it has suffered no ill effects from the right to bring third party exemption challenges. See *University Amici* Brief at 3-4.

For their part, *NJHA Amici* identify no decline in health care services or lowering of health care standards since the Morristown judgment. In fact, no evidence of economic or other harm is shown to the *Amici* despite the availability of the assessment or exemption challenge for the past 150 years. To the contrary, *University Amici* have shown that the non-profit

sector has grown dramatically in this time, demonstrating that the parade of "horribles" they posit is a mere chimera.[2]

Third-Party Tax Exemption Challenges in the Superior Court

As for *University Amici's* discussion of the standard of review, the statute of limitations and burden of proof in future third-party challenges brought as actions in lieu of prerogative writ, such discussion is premature, irrelevant and in many ways disingenuous. *Amici's* position that the prerogative writ action would provide a different, and more manageable, forum to handle third-party tax appeals than currently existing is difficult to understand, and in many ways unnecessarily confusing. As Judge Bianco pointed out in Fields, such actions have been rare, see n.2, supra, and no difficulty as to their management has ever been identified by any court.

Amici's argument begs the obvious, which is: since the Legislature cannot eliminate the right of taxpayers to challenge the assessment or exemption of another in a prerogative writ

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[2] Along these same lines, Judge Bianco observed that such third-party challenges are rare, at best:

> The Tax Court has never seen any actions like these before - private citizens challenging the decision of a local Tax Assessor in granting exempt status to certain properties owned by a not-for-profit University with extensive land holdings.

Fields v. Trustees of Princeton Univ., 29 N.J. Tax 284, 291 (Tax Ct. 2016). Clearly, no disproportionate harm arises to *Amici* from such challenges since, as the Tax Court itself has pointed out, third-party exemption challenges are rarely brought.

action, it is highly likely that the Superior Court will simply transfer all such third-party challenges to the Tax Court, whose current practice is likely to prevail. In other words, once the first third party challenges are filed via the action in lieu format, there will essentially be no difference with the status quo with respect to statute of limitations, burden of proof and standard of review since the Tax Court is likely to continue to apply its prior practice and substantive law.

This is precisely what has occurred in affordable housing cases following the demise of the Council on Affordable Housing ("COAH") in which the Supreme Court recognized that COAH's former administrative remedy must now be transferred to the Law Division, but that COAH's procedural and substantive rules would continue to govern the new legal remedy. See In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 30 (2015)(holding that trial courts should continue to apply COAH's former rules "if persuaded that the techniques proposed...will promote..." [the municipality's] fair share of...low- and moderate-income housing.") [emphasis added]. Here, too, going forward the courts are likely to continue to apply the former procedural and substantive law that has developed under N.J.S.A. 54:3-21.

Such matters are premature for yet another reason: it is far from clear that *University Amici* are correct in their claim

that the "arbitrary and capricious" standard of review will apply to third party exemption challenges. As Judge Bianco observed in the Princeton University case, no presumption of correctness applies to an assessor's decision to grant an exemption because such approval is not based on any independent factual determination, but

> "is an evaluation based significantly on the reliability of representations made by the applicant in the paperwork submitted in support of the application for exemption, and of the actual use of the property for which a tax exemption is claimed. Documents such as certificates of incorporation, bylaws, and charters submitted for exemption determination, might not necessarily reflect the actual use of the property, especially if the property has changed dramatically over time.

Fields v. Trustees of Princeton University, 28 N.J. Tax 574, 583 (2015). As such, Judge Bianco recognized that no presumption under the arbitrary and capricious standard is given to the assessor's approval of tax-exempt status. Fields at 582-584.

Judge Bianco also noted that exemption decisions are not subject to judicial deference for the further reason that they are "more properly one of statutory and case law interpretation than one requiring any special expertise possessed of an assessor." Id. at 583-84. From this analysis it follows that tax exemption challenges are not like other actions against government, such as planning board appeals, in which the court applies a highly deferential standard of review. (Though it must

be noted that in all prerogative writ actions, legal decisions and issues are subject to *de novo* review, and official legal determinations by local boards, commissions or officers are not given any deference).

In pushing their argument that the "arbitrary and capricious" standard has always applied to County Board and Tax Court cases, *University* Amici Brief at 22-23, *Amici* fail to cite any decisions involving a tax *exemption* challenge. Instead, they rely solely on "valuation" cases where deference does apply, because the assessor, in seeking true value, makes use of "specialized and first-hand knowledge that goes into the valuation process" and "extensive experience and first-hand knowledge of the property being assessed, the real estate appraisal process, and the marketplace". Fields v. Trustees of Princeton University, supra, 28 N.J. Tax at 583-84. In contrast, in *exemption* cases the court will give little or no deference because the assessor makes no independent findings and is essentially making rulings of law, as Judge Bianco recognized in Fields.

Thus, substantial doubt exists as to *Amici's* claim that a deferential standard of review will necessarily prevail in all third-party tax exemption cases going forward. Plainly, these are matters that must await actual tax appeals brought under the

action in lieu procedure so that the court may properly focus the issues before it determines a standard of review, burden of proof or how the 45- day statute of limitation period will be counted or other issues going forward.

University Amici are also incorrect in demanding that this court impose, prematurely and in the absence of any pending third-party tax challenge, a truncated trial and discovery process. Claiming that such is the case in all actions in lieu of prerogative writ, *University Amici* overlook one fundamental point: such abbreviated judicial proceedings typically follow extensive trial-type processes in the administrative agency, such as planning board and zoning board decisions that involve trial-type proceedings, with multiple witnesses, cross examination, experts, closing arguments and often briefs. Other actions in lieu of prerogative writ, such as challenges to municipal zoning ordinances, do proceed as traditional trials in the Law Division because there is typically no trial-type process in the course of municipal ordinance adoption. See e.g. Raskin v. Morristown, 21 N.J. 180 (1956)(noting that in action in lieu proceeding challenging zoning ordinance the court heard witnesses and took evidence).

As Judge Bianco observed, an assessor's approval of a tax exemption application falls into this latter category as it is

essentially a pro forma analysis with no independent evidence and no public hearing. Fields, supra, at 583-84. Under this reasoning, third party exemption challenges in the future, like the municipal zoning challenges, will almost certainly continue to be accorded a trial-type process.

In sum, the form of future third-party tax appeals brought through the action in lieu process is a complex question and should be reserved for when parties to such a case can advise the court of their particular needs and concerns so as to allow a focused and nuanced discussion of the proper manner of proceeding; such questions should not be determined in the abstract in the absence of an actual pending third-party appeal.

CONCLUSION

For all the foregoing reasons, Plaintiffs' cross-motion for Summary Judgment with declaratory and injunctive relief should be granted.

Respectfully submitted,

NEW JERSEY APPLESEED PILC

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