New Jersey
Appleseed

To: Anthony LaPorta
From: Renée Steinhagen, Esq.
Executive Director
Date: January 30, 2023

Question: Does the explicit prohibition in the Local Redevelopment and Housing Law ("LRHL") against a citizen's statutory right of initiative and referendum regarding matters subject to that law reach public questions placed on the ballot by a municipality for a non-binding, advisory vote?

Answer: Simple answer is no. The New Jersey Supreme Court has explicitly held that the prohibition, found in the Municipal Land Use Law ("MLUL"), against the voters' right to repeal a zoning ordinance (*i.e.*, their statutory right of referendum) does not apply to non-binding votes on questions placed by a municipality on the ballot pursuant to N.J.S.A. 19:37-1. Great Atlantic & Pacific Tea Co. v. Mayor & Council of Bor. of Point Pleasant Beach, 137 N.J. 136 (1994). This holding is directly applicable to redevelopment plans and other matters subject to the LRHL; a statute that has a similar prohibition to that included in the MLUL, which is directed at preventing citizens from initiating or repealing an ordinance regarding matters that are subject to or interrelated with that law. Millennium Towers Urban Renewal Ltd. Liability Co. v. Municipal Council of City of Jersey City, 343 N.J. Super. 367 (App. 2001) (prohibition against statutory right of referendum found in LRHL applied to citizens' efforts to repeal a tax-abatement ordinance enacted under the Long-Term Tax Exemption Law).

Discussion:

New Jersey Appleseed Public Interest Law Center ("NJ Appleseed") is a nonprofit legal advocacy organization that has operated a "Facilitating Local Initiative and Referendum Project" for approximately twenty years, under which it assists voters in drafting their petitions and often defends those petitions if challenged. *See generally* https://njappleseed.org/empowering-voters. Specifically, NJ Appleseed was plaintiffs' counsel in Tumpson v. Farina, 218 N.J. 450 (2014);

New Jersey Appleseed
Public Interest Law Center of New Jersey
23 James Street
Newark, New Jersey 07102

Phone: 973.735.0523; Cell: 917-771-8060
Email: renee@njappleseed.org
Website: www.njappleseed.org

has appeared as *amicus* in matters of first impression with respect to public referenda or matters in which it seeks to detail the interplay of various statutory referendum provisions without weighing in on one side or the other, such as in Redd v. Bowman, 223 N.J. 87 (2015); and most recently, represented plaintiffs in Ashish Kumar v. Piscataway Twp. Council, 473 N.J. Super. 463 (App. Div. 2022), a matter that dealt with the interplay between the Optional Municipal Charter Law ("Faulkner Act"), N.J.S.A. 50:69A-184 et seq., and the nonbinding referendum statute, N.J.S.A. 19:37-1 et seq., at issue herein.

It is because of NJ Appleseed's expertise in this matter that I understand that you, a member of two community-based organizations, Westfield Advocates and Residents for Westfield, have asked for our opinion about the question stated above. Contrary to public statements made by counsel representing Westfield, we think that the legal issue is clear, is not one of first impression and has been resolved by the New Jersey Supreme Court. A municipality's' authority to place a public question on the ballot for a nonbinding vote regarding matters within its legislative jurisdiction is permitted and is not restricted by explicit prohibitions placed on voters' statutory rights of initiative and referendum.

Statutory Right of Initiative and Referendum

The political power of the people of the State of New Jersey does not include the right to local initiative or referendum unless that right is **granted by statute**. Unlike many other states, there is no constitutional right to initiate laws, approve laws before they are passed by legislators or repeal laws already adopted by varying levels of government. Though not defined anywhere in New Jersey's statutes, the statutory right of initiative is employed and used to mean the right of the voters to initiate an ordinance. This right, provided for in several specific statutes, is most prominently found in the Faulkner Act, N.J.S.A. 50:69A-184 *et seq*., and the Commission Form

of Government ("Walsh Act") N.J.S.A. 40:74-1 *et seq.*, two laws governing many municipalities in New Jersey that permit their voters to initiate "any" ordinance that is within the legislative powers of the municipality, unless specifically prohibited. In re Referendum Petition to Repeal Ordinance 04-75, 192 N.J. 446, 459 (2007) ("Ordinance 04-75").

Both the Faulkner and Walsh Acts also provide for the right of referendum, understood as the right to oppose ordinances passed by the council. N.J.S.A. 40:69A-185; N.J.S.A. 40:74-5. In other statutes, however, the term referendum is used in the common-sense term of the word to mean "a general vote by the electorate on a single political question that has been referred to them for a direct decision; a plebiscite." Oxford English Dictionary (on web). There are numerous statutes found in New Jersey's statutory code that enable different levels of government, including school boards, to place public questions before the electorate for a public vote known as a "referendum vote." N.J.S.A. 19:37-1 (Submission of Public Questions to the Public for Non-binding Vote), is one of the most regularly used of such provisions, authorizing a referendum vote on any "policy pertaining to the government or internal affairs thereof," though the vote is simply advisory, *i.e.*, a nonbinding referendum vote. In any event, the right of to repeal any ordinance provided for in the Faulkner and Walsh Acts, like the right of initiative, is "to be liberally construed to promote the 'beneficial effects' of voter participation," **unless the Legislature has specifically excluded it**. Ordinance 04-75, 192 N.J. at 459, 466-67 (listing exceptions to the referendum power).

The Explicit Prohibition in the Local Redevelopment and Housing Law

There is no doubt that the LRHL, enacted in 1992, includes such an explicit prohibition against the citizen's right of initiative and referendum. *See* Millennium Towers Urban Renewal Ltd. Liability Co. v. Municipal Council of City of Jersey City, 343 N.J. Super. 367 (App. 2001),

holding that an ordinance governed by the Long-Term Tax Exemption Law is not a proper subject of repeal by popular vote since it must be read together with the LRHL, which has an explicit exclusion from such citizen right of referendum (otherwise provided under the Faulkner Act). *See* N.J.S.A. 40A:12A-28 ("No ordinance, amendment, or revision of any ordinance, or resolution under this act shall be submitted to or adopted by initiative or referendum, notwithstanding any other law to the contrary.")

As the Appellate Court wrote in Millennium Towers, the LRHL sought

> "to codify, simplify and concentrate prior enactments relative to local redevelopment and housing to the end that the legal mechanisms for such improvement may be more efficiently employed." [citation omitted] The Statute provides a comprehensive framework for municipal governments to follow in the development of a plan to rebuild and resurrect areas of their cities which have become "blighted" or in need of repair. . . The Legislature in passing the Local Redevelopment and Housing Law made certain that once a redevelopment plan had been created by a municipal government it would not be subject to referendum. (Emphasis added.)

Millennium Towers Urban Renewal Ltd. Liability Co., *supra*, 343 N.J. Super. at 377.

What the decision does not explicitly state, but which has become common lore among those of us who have become active in the area of initiative and referendum in New Jersey, is the fact that this explicit exclusion was put in the LRHL in direct response to the New Jersey Supreme Court decision in Tumpson v. Farina, 240 N.J. 346 (1990), decided two years prior to the adoption of the LRHL. In that case, the New Jersey Supreme Court found that the citizens of Hoboken, a Faulkner municipality, had the right of referendum calling for the repeal of an ordinance authorizing execution of a municipal development agreement and lease between the Port Authority and City of Hoboken. Specifically, the court reversed a lower court decision that had found that "the redevelopment process undertaken by the Mayor and City Council of the City of Hoboken [was] not subject to the referendum process." *Id*.

Given the explicit language of N.J.S.A. 40A:12A-28, and the aforementioned legislative history, it is certain that the target of the explicit prohibition of referendum rights found in the provision is the statutory right of voters to repeal an ordinance enacted by the municipality, not the opportunity to participate in a public vote on a nonbinding question placed before the electorate by the municipality.

The Nonbinding Referendum Statute

N.J.S.A. 19:37-1 through N.J.S.A. 19:37-5 set forth a process that permits all municipalities and counties in New Jersey to submit to their voters public questions on any "policy pertaining to the government or internal affairs thereof" in order to "ascertain the[ir] sentiment" thereon. N.J.S.A. 19:37-1 (requiring submission of request to include a public question on the ballot to the clerk within 81 days before an election). Such process is also available for voters of a municipality, but only in response to the municipality's initial question. N.J.S.A. 19:37-1.1 (requiring voters' "reasonably related," alternative proposal to be submitted to the clerk within 67 days prior to the election). *See* Finkel v. Twp. Committee of Twp. of Hopewell, 434 N.J. Super 303 (App. Div. 2013) (discussing interplay between submission deadlines for municipality's proposed public questions and citizens' alternative proposals submitted in direct response to those of the municipality).

Public questions, which are submitted to the voters by a municipality seek what is in effect an advisory opinion; they are limited to matters within the powers of the government to act, not just issues of public interest. See, e.g., AFL-CIO v. Bergen County Bd. of Freeholders, 121 N.J. 255 (1990) (cannot seek advisory referendum on matter not within county's control); Bd. of Chosen Freeholders v. Szaferman, 117 N.J. 94 (1989) (question concerning automobile insurance regulation not within the control of the county and must be excluded from the ballot);

and Bogota v. Donovan, 388 N.J. Super. 248 (App. Div. 2006) (question ascertaining voter sentiment on an English-only ordinance not within the authority of the municipality to enact, may not be submitted to the voters).

In addition, a municipality's use of N.J.S.A. 19:37-1 is conditioned on the absence of any "other statute by which the sentiment [of the voters] can be ascertained by the submission of such question to a vote of the electors in the municipality." *Id.* This means that if there is a statute authorizing a binding referendum on the subject matter, placement of a public question on the ballot for a non-binding vote on the same subject is not authorized. Ashish Kumar v. Piscataway Twp. Council, 473 N.J. Super. 463 (App. Div. 2022). *See also* Bd. of Educ. of City of Hackensack et al. v. City of Hackensack, 63 N.J. Super. 560 (App. Div. 1960) (holding "that the characteristic statute for ascertaining voter sentiment on a particular municipal problem is the binding referendum, and consequently that is what the Legislature must have had in mind primarily, if not exclusively, by the condition written into N.J.S.A. 19:37-1"). Conversely, if there is no statute authorizing a binding referendum or there is a statute prohibiting such vote, the use of N.J.S.A. 19:37-1 to gauge public sentiment is proper. Great Atlantic and Pacific Tea Co., Inc. v. Borough of Point Pleasant, et al., 37 N.J. 136 (1994) (prohibition in MLUL against the adoption of a zoning ordinance by referendum does not include nonbinding votes on questions concerning zoning matters).

In this way, N.J.S.A. 19:37-1 is available for municipal use if the public question submitted to the electorate concerns a matter within the jurisdiction of the municipality, and there is no statute authorizing a binding referendum on the same or a reasonably related proposition. It is eminently appropriate for a municipality to use such nonbinding referendum

statute if the citizens themselves are explicitly prohibited from submitting a referendum petition seeking to repeal an ordinance, as they are when it comes to zoning and redevelopment matters.