Jardim, Meisner & Susser, P.C.
ATTORNEYS AT LAW

30B Vreeland Road, Suite 100
Florham Park, NJ 07932

(973) 845.7640
ssalmon@jmslawyers.com

August 9, 2021

VIA HAND-DELIVERY

Doug Ruccione, Township Clerk
Township of Teaneck
818 Teaneck Road
Teaneck, NJ 07666

Re: 2021 Direct Petition to Move the Date of Municipal Elections

Dear Mr. Ruccione:

As you are aware, I represent the Committee of Petitioners (the "Committee") in the direct initiative petition (the "Petition") that was previously submitted to your office.[1] I am submitting this letter in collaboration with New Jersey Appleseed Public Interest Law Center, who has agreed to represent the Committee as co-counsel if this matter proceeds to litigation. Enclosed with this cover letter is an amended petition pursuant to N.J.S.A. 40:69A-188 that includes 2,066 signatures (the "Amended Petition") in addition to the 1,350 that were previously submitted, or nearly 45% of the total number of votes cast in the last election in which members of the General Assembly were elected. This number is sufficient to meet the minimum signature threshold provided for in your Notice of Insufficiency, dated July 29, 2021 (the "Notice").[2]

Aside from this minimum signature threshold, the Notice contained a variety of other reasons by which you found the Petition deficient. The Committee is enclosing this letter to set forth the legal basis for why these reasons are invalid or otherwise insufficient to reject the petition, as amended with additional signatures. Given the Committee's compliance with your Notice, we request that you accept these signatures as both lawfully collected and submitted.

A. New Jersey's Election Laws Must Be Construed Broadly

As a threshold matter, municipal clerks, acting in a ministerial role, have a circumscribed role when it comes to evaluating petitions of any type. Under N.J.S.A. 40:69A-187, "the municipal clerk shall determine 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." Id. Those two tasks

1. A "direct" petition is one where individuals can put a question directly to the voters without governing body review, as opposed to an indirect initiative or referendum petition that provides the governing body an opportunity to adopt or repeal a specific ordinance, precluding the need for a referendum vote.

2. The Committee does not concede that your reading of the applicable statutes with respect to the minimum signature threshold is accurate and reserves all rights to contend otherwise.

are limited in nature and should be done with the mindset that the Faulkner Act, which governs both the Township of Teaneck as well as the Amended Petition, "was adopted in order to encourage public participation in municipal affairs in the face of normal apathy and lethargy in such matters." Twp. of Sparta v. Spillane, 125 N.J. Super. 519, 523 (App. Div. 1973).

In Faulkner Act municipalities, there is a "strong public policy favoring the right of the voters to exercise their power of initiative." In re Jackson Twp. Admin. Code, 437 N.J. Super. 203, 215 (App. Div. 2014) (quoting Clean Cap. Cnty. Comm. v. Driver, 228 N.J. Super. 506, 510 (App. Div. 1988)). Thus, "statutory provisions for initiative as to municipal ordinances are generally to be liberally construed to effect the salutary objective of popular participation in local government." Concerned Citizens of Wildwood Crest v. Pantalone, 185 N.J. Super. 37, 43 (App. Div. 1982) (citing In re Certain Petitions for a Binding Referendum, 154 N.J. Super. 482, 484 (App. Div. 1977)). And, indeed, "[t]he law in this State . . . is well established on the point that initiative and referendum statutes should be liberally construed in order to encourage public participation in municipal affairs in the face of normal apathy and lethargy in such matters." Fuhrman v. Mailander, 466 N.J. Super. 572 (App. Div. 2021) (quoting Margate Tavern Owners' Ass'n v. Brown, 144 N.J. Super. 435, 441 (App. Div. 1976)).

B. Electronic Signatures

The Notice provided a number of reasons for rejection, including, critically, a blanket rejection of all electronic signatures that were collected prior to July 4, 2021, but that were not submitted until July 9, 2021. The issue therefore is not that electronic signatures were collected, nor the audit trail provided, but merely the date of submission. This is not a legitimate reason to disenfranchise several hundred voters who wished to participate in their democracy but could not do so due to the ongoing COVID-19 pandemic.

On April 29, 2021, Governor Phil Murphy issued Executive Order No. 132, which mandated collection of electronic signatures through the use of online forms. It was meant to enhance voter participation and permit initiative and referendum campaigns to continue to operate during the pandemic. The Executive Order states that, "municipal clerks shall also accept petitions with signatures collected via an online form." See E.O. No. 132. It additionally states that "[t]he use of the online form to gather signatures for petitions shall cease upon termination of this Order."

Subsequently, the Legislature codified this requirement in L. 2020, c. 55, which states:

> . . . the requirements to collect petition signatures via an online form and to submit petitions online implemented by the Secretary of State, county clerks, and municipal clerks pursuant to . . . paragraphs 1, 2, 3, and 4 of Executive Order No. 132 (2020) shall be implemented to include any pending petition for all remaining elections in 2020 **and for any other election taking place thereafter for the duration of the COVID-19 Public Health Emergency and State of Emergency** declared by the Governor under Executive Order No. 103 (2020).

L. 2020, c. 55. (emphasis added).

Thereafter, on January 25, 2021, Governor Murphy issued Executive Order No. 216, which states that municipal clerks "**shall** accept petitions . . . collected via an online form," and that "[t]he respective filing officer for the petition shall develop the procedures for the electronic submission and signing of petitions, and of any required oaths, certifications and affidavits, which documents shall be submitted to such filing officers as are designated under law, notwithstanding any provision of P.L.2020, c.55 to the contrary." It further states that it "shall apply to any petition that is due or **may be submitted** during the Public Health Emergency, first declared in Executive Order No. 103 (2020)." See E.O. No. 216 (emphasis added).[3]

As a result of Executive Order No. 244, the Public Health Emergency was set to expire or sunset as of July 4, 2021, which would mean that as of that date, petitioners cannot collect any new electronic signatures and municipal clerks may not accept petitions submitted electronically. However, absolutely **nothing** in any of the executive orders or statutes referenced indicate that, as of July 5, 2021, all previously collected electronic signatures were suddenly stale or invalid.

To be sure, this is a position that the Township of Teaneck seems to hold on its own and has apparently created out of whole cloth. In Piscataway, New Brunswick, North Brunswick, Long Branch, and Woodbridge, municipal clerks have accepted paper printouts of electronic petitions, so long as the audit trails indicated that they were signed on or before July 4.

Moreover, this is a position that your office seems to have created only upon our initial submission. Executive Order No. 216, issued on January 25, 2021, more than six months ago, required municipal clerks such as yourself to develop the procedures for the electronic submission and signing of petitions. When we met in your office on June 16, 2021, I specifically inquired into these policies and procedures. You stated that you had none, and in fact questioned me as to how the audit trail for these electronic signatures would work. Not only that, but we specifically discussed the previously issued Executive Order No. 244 and had a discussion, at length, about when exactly it meant that the Public Health Emergency would end, and we assured you that we would not collect any electronic signatures after that date, **and specifically gave you advance warning that the submission would come after the sunset date.** If you were going to take the position that you are not authorized to accept electronic signatures collected before July 4, it was your responsibility to put it in writing and, at a minimum, to inform all persons who had previously asked your office for your procedures regarding electronic petitions. The Committee cannot be expected to divine your intentions when we explicitly ask for them and you withhold your answers from us and other members of the public who inquired about election petition procedures. And indeed, when we sent you a confirming e-mail on June 26, 2021, we summarized the meeting as follows:

3. While Governor Murphy ended the Public Health Emergency as of July 4, 2021, via Executive Order No. 244, a State of Emergency continues to exist in the State of New Jersey. See E.O. No. 244 ¶ 2.

1-You agreed that the 10% figure under the statute for the amount of signatures needed to put the initiative on the ballot was 791;[4]

2-Although the meeting had been called initially for you to give comments and suggestions regarding the live and electronic petitions being used by our group, the town attorney indicated that you could not give us any legal advice in this regard;

3-You advised that the latest date to get the petitions to the county clerk for placement on the ballot would be the end of August;

4-We advised you that we were obtaining both electronic and live signatures on our petitions in accordance with the Governor's executive order;

5-We agreed that the last date to obtain electronic signatures would be July 4, 2021. We indicated we would close down our electronic voting link on July 3;

6-You asked a question regarding how electronics signatures could be verified since you had never done this before. Our response was that the executive order did not require a verification of the signatures, only verification that there is a registered voter by that name at the address provided. We indicated also that we verified by requiring the signer to provide a valid email address;

7- Bill Rupp asked if the 25% requirement contained in assembly bill 5404, passed in 2019, applied to this petition rather than the 10-15% of NJSA40:69A-184. We responded that that amendatory statute only pertained to a change in the whole form of government from non-partisan to partisan and not to a mere change in the date for election of the council. Scott Salmon indicated that that statue had not even been raised by any of the parties in the litigation that had followed a similar successful initiative in Ridgewood last year.

8-You requested that we file our petitions as early as possible as you anticipated that your office would have a lot of work to do with the CCA petition coming in as well. We responded that we planned on filing shortly after the July 4th holiday.

See Exhibit A.

On June 28, 2021, you confirmed your receipt of this e-mail and thanked us for the recap but made no effort to make us aware that electronic signatures would no longer be accepted after July 4. And then, on July 2, 2021, right before the executive orders were set to expire, we sent another e-mail to you confirming that we would submit the petitions the following week, as we had previously

4. Even though the Committee is meeting the 25% threshold that you have now indicated is required, we dispute that this many signatures are necessary and reserve all rights related to same. See *infra* fn. 5. Additionally, this requirement flies in the face of all previous communications that we have had between the Committee and your office, in which you repeatedly acknowledged that only 10% of signatures would be required, even after seeing a draft copy of the petition that was ultimately submitted.

discussed. We did this as a courtesy to you, since you had previously expressed concern about whether your office would be able to handle all of the signature verification required in such a short time frame. It is disappointing that the same courtesy was not extended to us, as you responded, "Thanks for the heads up! Be safe & in touch!" If you were planning on rejecting all electronic signatures because they were to be submitted after July 4, that would have been an appropriate time to inform us of this newly developed policy. Alas, you did not.

For the reasons stated, it is legally absurd to think that signatures that were valid on July 4 would suddenly become invalid on July 5, despite absolutely nothing in the law stating that should be the case. Courts have held that "signature petitions must be reasonably current and not stale," but have upheld signature gathering drives that were 18 months long—an eternity compared to this! See D'Ascensio v. Benjamin, 137 N.J. Super. 155 (Super. Ct. 1975).

This policy is not only logically absurd, but it is against public policy and all legal precedent. It is your obligation to interpret the Governor's executive orders and the Legislature's statutes regarding electronic initiative and referendum petitions in a manner that enfranchises voters, not disenfranchises them, by preventing this question from ever going to the ballot for a referendum vote. As there is no logical or legal basis for your position, we request that you accept the electronic signatures as submitted.

C. Signature Verification Process

Aside from the rejection of all electronic signatures, your office also rejected 472 of the 1,125 handwritten signatures. Of these rejections, per the Notice, "322 signatures contained information that did not correspond with the voter's registration information, 39 signatures were not fully completed, [and] 9 signatures contained illegible information." As described below, these rejections were made not only in violation of the spirit of the law, to enfranchise voters and not disenfranchise them over minor technical mistakes, but, more importantly, were made in a discriminatory manner that violates the rights of every citizen involved.

In Stone v. Wyckoff, the seminal case on the matter, the Appellate Division dealt with the question of how close the voter's signature must be to voting records for a municipal clerk to count the signature as a "match" in reviewing a recall petition. See Stone v. Wyckoff, 102 N.J. Super. 26 (App. Div. 1968). In Stone, there was a voter who signed the petition as "Mrs. John Jones" when the voting records showed her registered as "Adele Jones." Id. at 34. As the Court said, however, "[t]he statute merely requires that the signers by 'qualified voters,' N.J.S.A. 40:69A-169, not that their signature be in the form identical with that appearing in the registration records." Id.

According to Stone, if the municipal clerk is having difficulty identifying voters, the clerk is entitled to request some proof of identity for administrative purposes. Id. **That said, the Stone Court explicitly held that there is a presumption that if the signature is generally consistent with that of a registered voter residing at the recorded address, it is presumed, *prima facie*, to be the same individual, and the burden is then placed on the municipal clerk to show the contrary.** Id.; see also Matthews v. Deane, 201 N.J. Super. 583 (Ch. Div. 1984).

Here, the Committee provided a list in Excel spreadsheet form of all the individuals who signed the Petition to you alongside the original submission. There was no question as to who any of individuals were because they were provided to you at the very start. Yet, you somehow rejected some individuals such as Ronald Schwartz, the lead organizer for the Committee, even though his name and signature are exact matches to those in the voter files. Even more egregiously, you even met Mr. Schwartz at our June 16, 2021, meeting and knew he was supporting the Petition, as he was the same individual who sent the e-mail referenced above confirming the contents of the meeting. It is impossible to understand why his signature, for example, was rejected.

Additionally, there were other egregious and improper rejections, such as Annekee Brahver-Keely, who is registered solely under her maiden name, Annekee Brahver. You also rejected individuals who signed their name using hypocorisms, i.e., Bill instead of William, even though all other information provided matched to the registered voter. There were rejections for individuals who simply had sloppy signatures, even though all other information matched. There were even apparently rejections of signatures even though all the information was there but simply was placed in the wrong section.

Given this knowledge, it appears that your office was going out of its way to reject signatures, finding any possible (or imagined) defect to do so. As a result, the Committee requests that you reconsider the earlier rejections made by your office as well as keep this knowledge in mind when you review the Amended Petition.

D. Ordinance Requirement

Although the Notice is unclear as to whether your office would have rejected the Petition due to its failure to include an ordinance if there were no dispute over the number of valid signatures, such a rejection would also be invalid and should not be considered by your office as it reviews the Amended Petition.

All changes to the date of an election take place under N.J.S.A. 40:69A-25.1,[5] as it requires an amendment to the municipal charter. As stated in N.J.S.A. 40:69A-25.1(a)(1), there are two

5. It should be noted that N.J.S.A. 40:69A-25.1(a)(1) refers to the "pertinent provisions of N.J.S.A. 40:69A-184, et seq. for two reasons. First, N.J.S.A. 40:69A-19, passed in 1950, indicates that 20% of all registered voters, need to sign a petition seeking a charter amendment such as this one. See L. 1950, c. 210, p. 467, s. 1-19. However, in 1981, the Legislature enacted N.J.S.A. 40:69A-25.1 to enable voters who sought to change only one or two aspects of their Faulkner charter to be able to do so employing a lower number of signatures than that required under N.J.S.A. 40:69A-19. Legislative history and judicial decisions interpreting N.J.S.A. 40:69A-25.1 state that the reference to 40:69A-184 was specifically intended to lower the number of signatures required to the 10% number listed in that provision. See L. 1981, c. 465, s. 7. Then, in 2019, the Legislature amended the section again to raise the participation rate threshold for a direct petition to 25% of the total votes cast in the last election at which members of the General Assembly were elected, but only if the question regarded Alternative A was placed on the ballot. See L. 2019, c. 161, s. 1. Though the language of the amendment made the change for all petitions initiating the Alternative A question, the Legislature explicitly intended the change to only capture

methods for initiating a public vote on an alternative plan of government (which includes changes to the date of an election). It can either be done by the people themselves through a petition initiating a "question of adopting an alternative," or it may be "submitted to the voters by ordinance adopted by the governing body." Id. If the people bring the issue forth themselves, it is done through a question placed directly on the ballot, whereas if the governing body brings it forth, it must pass an ordinance to put a question on the ballot.

In both cases, a question of whether to change the municipal charter must be presented to the voters for a referendum vote, because an ordinance cannot change the municipal charter; it can only amend or supplement the municipal code. This process—whereby the voters initiate a question to change the charter, and the governing body submits the same question to the voters via ordinance—is not unique to the Faulkner Act and is found throughout New Jersey's statutes. *E.g.*, N.J.S.A. 40:71-1 (direct petition by voters to adopt commission form of government); N.J.S.A. 40:41A-20 (direct petition by voters to adopt an optional county charter); N.J.S.A. 40:81-1 (direct voters petition to adopt municipal-manager form of government); N.J.S.A. 40:43-66.41 (direct voter petition to request a joint municipal consolidation study); N.J.S.A. 40:54-21 (direct voter petition to submit question of whether to hold run-off elections); and N.J.S.A. 40:69A-19 (direct petition by voters to submit question whether to adopt optional municipal charter).

This difference is best explained by way of example. Attached hereto as Exhibit B is an ordinance passed by the governing body of the City of Trenton to put a question on the ballot changing the terms of several municipal officers. As you can see, all the ordinance does is serve as a vessel to provide the wording of the question and the ability of the elected officials to vote on whether to place the question on the ballot. There is no functional purpose of requiring the voters to do this same thing when they have already provided the question. That is why N.J.S.A. 40:69A-25.1(b) specifies the language of the various questions that must be placed on the ballot, and not an ordinance seeking to put that question on the ballot. The question is the singular most important aspect of this process and the only thing actually seen by the voters. Everything else, whether petition or ordinance, is just the means of putting the question on the ballot.

This is a critical point, since it is illogical and wrong to reject a petition initiated by the voters due to want of an ordinance when the charter change will never be effectuated via an ordinance. Moreover, any ordinance that the voters would initiate would be nothing more than an ordinance directing that the relevant question set forth in the statute appear on the ballot. The governing

---

petitions initiating the question of whether to hold nonpartisan or partisan elections. See Sponsor's Statement to A. 5404 18-19 (L. 2019, c. 161).

Second, the statute refers to the "pertinent provisions" of N.J.S.A. 40:69A-184, et seq. also to provide certain requirements of **form** to the petition, but not requirements of **substance**. See Pappas v. Malone, 36 N.J. 1, 4-5 (1961) (interpreting N.J.S.A. 40:69-25 applicability to petitions seeking to become a Faulkner municipality or reverting from a Faulkner municipality and explicitly incorporating the procedural requirements of N.J.S.A. 40:69A-186 to 188). In Pappas, the Supreme Court made clear that a direct petition initiating a question did not involve an ordinance, which is a substantive requirement, not one of form, such as the circulator's affidavit and the uniformity of petition page size.

body would not have the option of adopting it or rejecting it as is the norm when voters initiate an ordinance or seek to repeal an ordinance pursuant to N.J.S.A. 40:69A-184 et seq. That is the case, because the **question must go to the voters for approval** to effect a change in the municipal charter regardless, unlike an initiative or referendum petition to adopt or repeal an ordinance. In the end, inclusion of an ordinance would not make any practical difference, and our courts have repeatedly held that technical deficiencies should not hold back an otherwise valid petition. See Fuhrman v. Mailander, *supra* 466 N.J. Super. at 599 (awarding attorney's fees and costs due to the municipal clerk's failure to certify and file a petition due to "perceived technical noncompliance").

Lastly, it is worth noting that our position is backed up by precedent. See Empower Our Neighborhoods v. Torrisi, Docket No. MID-L-10613-08 (Law Div. 2009), aff'd on emergent appeal (Sep. 23, 2009). I have attached a copy as Exhibit C for your convenience. In that matter, Judge Hurley specifically and explicitly ruled that inclusion of an ordinance is not necessary under N.J.S.A. 40:69A-25.1 for the reasons stated above. Moreover, N.J.S.A. 40:69A-186 only requires a proposed ordinance to be included with an petition initiating an ordinance, not a direct petition submitting a question nor a referendum petition. Pappas v. Malone, *supra*, 36 N.J at 4-5. As stated, the reasons should be obvious: an petition initiating an ordinance seeks to make a change to the municipal code, something that can only be effectuated by and through an ordinance of the municipal governing body. That ordinance must be submitted to the governing body, which (under the Faulkner scheme) may adopt it prior to a referendum vote or after a majority of the voters cast their ballots in favor of enactment.

As such, the lack of an ordinance should not stand in the way of an otherwise valid direct petition submitting a question to the voters such as the one presented by the Committee.[6]

6. It is our position that the Legislature had no intention of completely changing the direct petition process, otherwise used by voters when initiating a change in government question, when it enhanced the threshold number of signatures needed to put a question on the ballot with respect to Alternate Plan A. We consider the insertion of the language "by ordinance" to be a drafting error that is inconsistent with the rest of N.J.S.A. 40:69A-25.1 and N.J.S.A. 40:69A-19 and is not reflected in the Committee Statements explaining the purpose of the 2019 amendment. See Sponsor's Statement to A. 5404 18-19 (L. 2019, c. 161).

* * *

While the Committee appreciates your continued work in this matter, you are advised that failure to certify the Amended Petition will, without question, lead to litigation, in which the Committee will seek not only to have the question placed on the ballot, but also to be reimbursed its attorneys' fees and costs for the blatant violation of their civil rights.

Please be guided accordingly.

Very truly yours,
JARDIM, MEISNER & SUSSER, P.C.

/s/ Scott D. Salmon, Esq.
Scott D. Salmon, Esq.

NEW JERSEY APPLESEED PILC

/s/ Renée Steinhagen, Esq.
Renée Steinhagen, Esq.

Exhibit A

Scott Salmon

From: Ron Schwartz <rockinron698@yahoo.com>
Sent: Monday, June 28, 2021 8:29 AM
To: Doug Ruccione
Cc: Noah Liben; Reshma Khan; Scott Salmon
Subject: ONE TOWN ONE VOTE

- Hi Doug: It was a pleasure meeting with you, Bill Rupp Esq. and John Shahdanian Esq. at your office on 6/16. Present at the meeting for One Town One Vote were myself, Scott Salmon Esq., Noah Liben, and Reshma Khan. The following is a summary of my notes of what transpired at the meeting:
  1-You agreed that the 10% figure under the statute for the amount of signatures needed to put the initiative on the ballot was 791;
  2-Although the meeting had been called initially for you to give comments and suggestions regarding the live and electronic petitions being used by our group, the town attorney indicated that you could not give us any legal advice in this regard;
  3-You advised that the latest date to get the petitions to the county clerk for placement on the ballot would be the end of August;
  4-We advised you that we were obtaining both electronic and live signatures on our petitions in accordance with the governors executive order;
  5-We agreed that the last date to obtain electronic signatures would be July 4, 2021. We indicated we would close down our electronic voting link on July 3;
  6-You asked a question regarding how electronic signatures could be verified since you had never done this before. Our response was that the executive order did not require a verification of the signatures, only verification that there is a registered voter by that name at the address provided. We indicated also that we verified by requiring the signer to provide a valid email address;

  7- Bill Rupp asked if the 25% requirement contained in assembly bill 5404, passed in 2019, applied to this petition rather than the 10-15% of NJSA40:69A-185. We responded that that amendatory statute only pertained to a change in the whole form of government from non-partisan to partisan and not to a mere change in the date for election of the council. Scott Salmon indicated that that statue had not even been raised by any of the parties in the litigation that had followed a similar successful initiative in Ridgewood last year.

  8-You requested that we file our petitions as early as possible as you anticipated that your office would have a lot of work to do with the CCA petition coming in as well. We responded that we planned on filing shortly after the July 4th holiday.

  Thanks again for the meeting! Ron

  Sent from my iPhone

Exhibit B

ORDINANCE

No. 20-19

1st Reading MAR 05 2020

Public Hearing MAR 19 2020

2nd Reading & Passage MAR 19 2020

Withdrawn _____ Lost _____

Date to Mayor MAR 23 2020

Date Returned APR 08 2020

Date Resubmitted to Council _____

Approved as to Form and Legality

CITY ATTORNEY

Factual content certified by

TITLE

Councilman / woman Robin M. Vaughn presents the following Ordinance:

AN ORDINANCE OF THE CITY OF TRENTON TO CHANGE BY REFERENDUM THE TERMS OF MEMBERS OF COUNCIL TO STAGGERED TERMS

WHEREAS, the City of Trenton is organized and existing under N.J.S.A. 40:69A-32, the Mayor-Council Plan of government under the Optional Municipal Charter Law, N.J.S.A. 40:69A-1 et seq; and

WHEREAS, Trenton's current Council consists of seven (7) members, three (3) of whom are elected at large, and four (4) Ward Councilpersons; and

WHEREAS, all Councilpersons are currently elected for four (4) year terms at the Regular Municipal Election in May, and all such terms end at the same time on June 30, 2022; and

WHEREAS, Council believes that a staggering of such terms would be in the best interests of the City and its residents in that it would insure that a certain number of Councilpersons with constitutional knowledge and experience would remain irrespective of the outcome of a single election; and

WHEREAS, pursuant to N.J.S.A. 40:69A-25.1, any municipality governed by a plan of government under N.J.S.A. 40:69-1 et seq may by Referendum, amend its Charter to include any alternative permitted under that plan of government; and

WHEREAS, the Governing Body may submit to the voters a question to amend the Charter to hold elections according to an alternative set forth in Group C of subsection b of said statute;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF TRENTON that the following question shall appear on the Referendum in this matter:

> "Shall the Charter of the City of Trenton governed by the Mayor-Council Plan of the Optional Municipal Charter Law be amended, as permitted under that Plan, to provide for the election of Council Members for staggered terms whereby Council Members elected at the Regular Election in 2022 shall serve as follows: Council Members elected at Large shall serve a term of four years;

ORDINANCE

and Council Members elected from Wards shall serve a term of two years; and for all subsequent elections all Council Members shall serve a term of four years;

and be it

FURTHER ORDAINED that shall he aforesaid Referendum pass according to law, the terms of Trenton City Council members shall be staggered, pursuant to N.J.S.A. 40:69A-34 et seq. and N.J.S.A. 40:69A-13 as follows:

The Council members elected at the Regular Election in 2022 shall serve as follows: Council Members elected at Large shall serve a term of four years; Council Members elected from Wards shall serve a term of two years. For all subsequent elections all Council Members shall serve a term of four years;

and be it

FURTHER ORDAINED that pursuant to N.J.S.A. 40:69A-25.3, this amendment to the Charter shall take effect for the next election at which Municipal Officers are elected in the Municipality and in the manner prescribed by law.

	INTRODUCTION				ADOPTION			
	AYE	NAY	NV	AB	AYE	NAY	NV	AB
BLAKELEY		↘				↘		
CALDWELL WILSON	↘				↘			
HARRISON		↘				↘		
MUSCHAL		↘				↘		
RODRIGUEZ	↘				↘			
VAUGHN	↘				↘			
MCBRIDE	↘				↘			

NV - NO VOTE AB - ABSENT

Adopted on first reading at a meeting of the City Council of the City of Trenton, NJ on MAR 05 2020

Adopted on second reading after the public hearing on MAR 19 2020

Mayor — APPROVED / REJECTED

President of Council — Reconsidered by Council – Override Vote — AYE / NAY

City Clerk

Exhibit C

FILED

AUG 10 2009

JUDGE JAMES P. HURLEY

BY THE COURT

EMPOWER OUR NEIGHBORHOODS, MARGARITA BONDARENKO, AMY BRAUNSTEIN, DOMINIC BOMBACE, ADRIEL BERNAL, and ANTHONY SHULL,	:SUPERIOR COURT OF NEW JERSEY :LAW DIVISION :MIDDLESEX COUNTY
PLAINTIFFS,	
v.	DOCKET NO. MID-L-10613-08
DANIEL A. TORRISI, in his capacity as New Brunswick City Clerk; ELAINE FLYNN, in her capacity as County Clerk; and the NEW BRUNSWICK CITY COUNCIL,	DECISION & FINAL JUDGMENT
DEFENDANTS	

Introduction

Empower our Neighborhoods ("EON"), Margarita Bondarenko, Amy Braunstein, Dominic Bombace, Adriel Bernal, and Anthony Shull (the latter five plaintiffs collectively, "Committee of Petitioners" and all plaintiffs collectively "Plaintiffs") bring this complaint in lieu of a prerogative writs to compel Daniel A. Torrisi, in his capacity as New Brunswick City Clerk; Elaine Flynn, in her capacity as County Clerk; and the New Brunswick City Council (collectively "Defendants") to place a referendum on the ballot for the November 2009 election.

Presently, both Plaintiffs and Defendants bring motions for summary judgment; in addition, Defendants bring a motion to dismiss Plaintiffs' complaint for failure to respond

to the first request to produce documents and to compel more specific responses to Defendants' initial interrogatories. There are no material questions of fact; this matter can be resolved by summary judgment as a matter of law.

Facts

EON is an unincorporated, non-partisan political committee consisting of New Brunswick residents. The five named individual plaintiffs in this case are persons associated with EON. During the city council meeting held on May 7, 2008, members of the EON announced their intention to urge voters to initiate a petition to amend New Brunswick's charter to adopt a ward form of government.

On June 18, 2008, the New Brunswick city council introduced on first reading Ordinance, O-060807, entitled "An Ordinance to Provide for an Election in the City of New Brunswick on the Question of the Establishment of a Charter Study Commission" (the "Charter Study Ordinance"). The Charter Study Ordinance calls for a referendum question pursuant to *N.J.S.A.* 40:69A-1, the Optional Municipal Charter Law (the "Act")[1], on whether a charter study commission should be elected to study the charter of New Brunswick and consider a changed form of government or another alternative of the existing form of government.

On June 30, 2008, EON filed a petition with the city clerk, after obtaining 1116 signatures, that set forth two proposed questions to be submitted to the electorate for a vote in accordance with *N.J.S.A.* 40:69A-25.1. The two questions were written as follows:

> One. Shall the charter of the City of New Brunswick governed by the mayor, council plan of the Optional Municipal Charter Law be amended as permitted under the plan to provide for the division of the

[1] Also interchangeably referred to herein as the Faulkner Act.

> municipality into six wards with three council members to be elected at large and one from each ward?
>
> Two. Shall the charter of the City of New Brunswick governed by the mayor, council plan of the Optional Municipal Charter Law be amended as permitted under that plan to provide for a municipal council to consist of nine members?

On July 2, 2008, the New Brunswick City Council formally passed and approved the Charter Study Ordinance. In a letter dated July 18, 2008, Mr. Torrisi communicated to EON that he had completed his examination of EON's petition and found a number of deficiencies based in part by observations from William Hamilton, Jr., Esq., New Brunswick's attorney. The deficiencies were (i) the failure to include the full text of the proposed ordinance, (ii) the failure to place the questions posed or an ordinance on both sides of each signature page, (iii) the failure to pose only one question or one alternative, and (iv) the timing of the petition.

On or about August 8, 2008, EON filed an order to show cause and verified complaint in the matter entitled *Empower Our Neighborhoods, et al. v. Daniel Torrisi et al.*, Docket No. MID-L-6408-08 (the "EON I" lawsuit) alleging that Defendants had improperly denied their request that the two questions be placed on the November 2008 general election ballot.

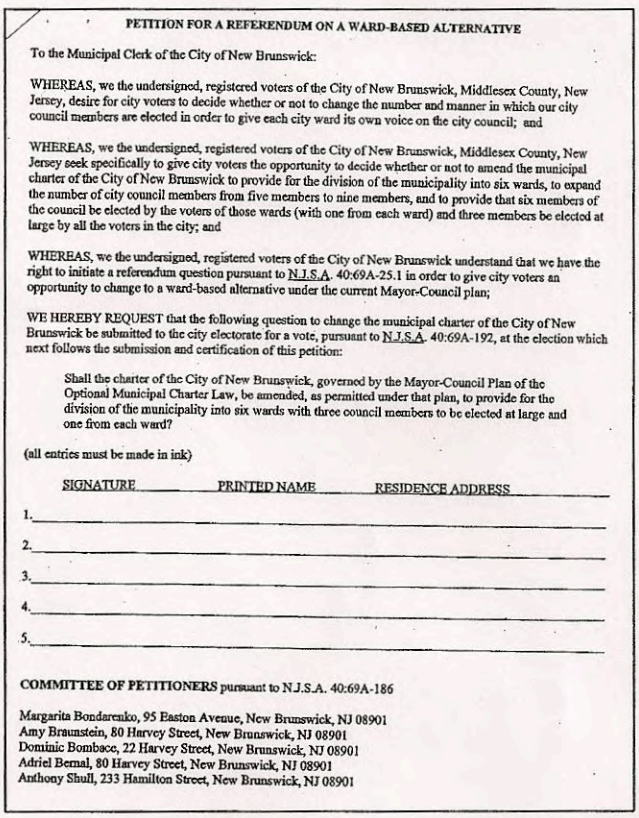
On September 2, 2008, the Honorable Heidi Currier, J.S.C. placed her decision concerning EON I on the record. Judge Currier rejected the reasoning of the New Brunswick city clerk and city attorney, finding that the wording of the petition did not render it defective, that the failure to print the two proposed questions on the back of each petition page did not render it defective, and that the petition was not rendered defective because of two proposed alternative questions, which is specifically provided for in

N.J.S.A. 49:69A-25.1(d). Lastly, Judge Currier concluded that the petition was filed before the charter study commission ordinance was passed, and therefore pursuant to *N.J.S.A.* 40:69A-17 is valid. Because of the proximity of the decision to the election, EON I concluded with the withdrawal of EON's. The complaint was dismissed as moot.

On October 1, 2008, the Committee of Petitioners submitted a petition entitled "Petition for a Referendum on a Ward Based Alternative" (the "Petition") to the New Brunswick city clerk in accordance with *N.J.S.A.* 40:69A-25.1. The question proposed the division of the city into six wards, with three council members to be elected at large and one from each ward.

The form and language of the Petition is found below:

Page 1. (front)



PETITION FOR A REFERENDUM ON A WARD-BASED ALTERNATIVE

To the Municipal Clerk of the City of New Brunswick:

WHEREAS, we the undersigned, registered voters of the City of New Brunswick, Middlesex County, New Jersey, desire for city voters to decide whether or not to change the number and manner in which our city council members are elected in order to give each city ward its own voice on the city council; and

WHEREAS, we the undersigned, registered voters of the City of New Brunswick, Middlesex County, New Jersey seek specifically to give city voters the opportunity to decide whether or not to amend the municipal charter of the City of New Brunswick to provide for the division of the municipality into six wards, to expand the number of city council members from five members to nine members, and to provide that six members of the council be elected by the voters of those wards (with one from each ward) and three members be elected at large by all the voters in the city; and

WHEREAS, we the undersigned, registered voters of the City of New Brunswick understand that we have the right to initiate a referendum question pursuant to N.J.S.A. 40:69A-25.1 in order to give city voters an opportunity to change to a ward-based alternative under the current Mayor-Council plan;

WE HEREBY REQUEST that the following question to change the municipal charter of the City of New Brunswick be submitted to the city electorate for a vote, pursuant to N.J.S.A. 40:69A-192, at the election which next follows the submission and certification of this petition:

Shall the charter of the City of New Brunswick, governed by the Mayor-Council Plan of the Optional Municipal Charter Law, be amended, as permitted under that plan, to provide for the division of the municipality into six wards with three council members to be elected at large and one from each ward?

(all entries must be made in ink)

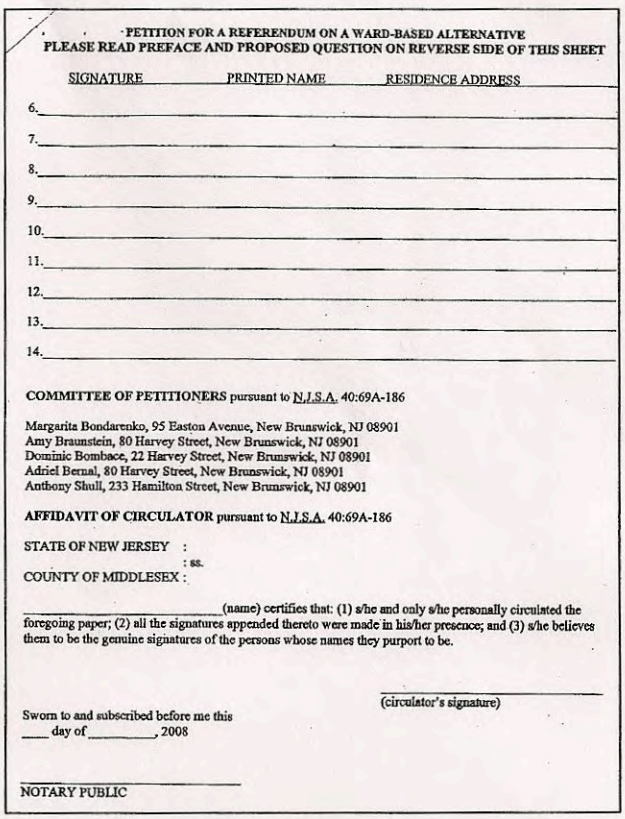
SIGNATURE PRINTED NAME RESIDENCE ADDRESS

1.
2.
3.
4.
5.

COMMITTEE OF PETITIONERS pursuant to N.J.S.A. 40:69A-186

Margarita Bondarenko, 95 Easton Avenue, New Brunswick, NJ 08901
Amy Braunstein, 80 Harvey Street, New Brunswick, NJ 08901
Dominic Bombace, 22 Harvey Street, New Brunswick, NJ 08901
Adriel Bernal, 80 Harvey Street, New Brunswick, NJ 08901
Anthony Shull, 233 Hamilton Street, New Brunswick, NJ 08901

Page 2. (back)



PETITION FOR A REFERENDUM ON A WARD-BASED ALTERNATIVE
PLEASE READ PREFACE AND PROPOSED QUESTION ON REVERSE SIDE OF THIS SHEET

SIGNATURE PRINTED NAME RESIDENCE ADDRESS

6.
7.
8.
9.
10.
11.
12.
13.
14.

COMMITTEE OF PETITIONERS pursuant to N.J.S.A. 40:69A-186

Margarita Bondarenko, 95 Easton Avenue, New Brunswick, NJ 08901
Amy Braunstein, 80 Harvey Street, New Brunswick, NJ 08901
Dominic Bombace, 22 Harvey Street, New Brunswick, NJ 08901
Adriel Bernal, 80 Harvey Street, New Brunswick, NJ 08901
Anthony Shull, 233 Hamilton Street, New Brunswick, NJ 08901

AFFIDAVIT OF CIRCULATOR pursuant to N.J.S.A. 40:69A-186

STATE OF NEW JERSEY :
: ss.
COUNTY OF MIDDLESEX :

_____(name) certifies that: (1) s/he and only s/he personally circulated the foregoing paper; (2) all the signatures appended thereto were made in his/her presence; and (3) s/he believes them to be the genuine signatures of the persons whose names they purport to be.

_____
(circulator's signature)

Sworn to and subscribed before me this
___ day of _____, 2008

_____
NOTARY PUBLIC

By letter dated October 22, 2008, Mr. Torrisi advised Plaintiffs that further proceedings of the Petition were "barred" based on his examination and the recommendation of the city attorney. These bases were two fold:

1. [T]he New Brunswick City Council has previously adopted Ordinance titled "An Ordinance to Provide for an Election in the City of New Brunswick on the Question of the Establishment of a Charter Study Commission," on July 2, 2008. The adoption of this Ordinance prevents the validation of any charter change petition.

2. It is noted also that the petition fails to provide a properly constructed initiative ordinance on every petition paper, as required [by] the Initiative and Referendum statutes.

(Hamilton Letter of October 22, 2008).

Challenging the rejection of the Petition, Plaintiffs bring this complaint in lieu of a prerogative writs.

Defendants' Motions to Compel More Specific Answers or to Dismiss

This Court is able to dispose of this matter fully by deciding the competing motions for summary judgment, which forecloses the necessity of deciding Defendants' motion to dismiss and/or compel more specific answers to interrogatories. This complaint in lieu of a prerogative writs focuses on Plaintiffs' Petition and Mr. Torrisi's finding that the Petition was barred from appearing on the November 2009 ballot. The discovery sought by Defendants seeks, inter alia, information regarding the origin and circulation of the Petition in order to clarify alleged ambiguities permeating the Petition. By deciding the questions of law embodied by these alleged ambiguities in the Petition further discovery is rendered unnecessary. Furthermore, pursuant to *R.* 4:69-4 this motion lacks foundation without an order directing Plaintiffs to provide the discovery

sought by Defendant, as such this motion was properly denied at colloquy on July 21, 2009.

EON I

As a preliminary concern approaching the issues presented in this complaint in lieu of a prerogative writs, this court recognizes the need to address the history between the parties, the past ruling and orders of the Honorable Heidi Currier, J.S.C. and the withdrawal of the initial petition, as each movant has asserted arguments referencing the dismissal of EON I as moot. For ease of reference Judge Currier's two October 29, 2008 Orders will be labeled Order staying proceedings as the first and the Order of dismissal as the second.

Defendants assert that the withdrawal of Plaintiffs' initial petition and the "voluntary" dismissal of EON I as moot render Judge Currier's prior rulings of no effect and that the finding of Mr. Torrisi, invaliding the initial petition, stands. Defendants further extend this line of reasoning stating that the September 2, 2008 Ruling and Order entered in EON I, regarding the Charter Study Ordinance, became a nullity upon the entrance of the second October 29, 2008 Order and does not serve to invalidate or bar proceedings with respect to that Ordinance. Therefore, Defendants contend that the Charter Study Ordinance, pursuant to *N.J.S.A.* 40:69A-17, precludes the filing of the present Petition and decides the instant matter in favor of Defendants.

Conversely, Plaintiffs contend that Judge Currier's previous rulings, which were expressly not vacated in the second October 29, 2008 Order, control, and Defendants are collaterally estopped from relying on the grounds stated in the Mr. Torrisi's letter of October 22, 2008 refusing to place the referendum on the November 2009 Ballot.

Plaintiffs further state that the initial petition was valid, per Judge Currier's ruling in EON I, which precludes the final passage of the Charter Study Ordinance, by virtue of the same statutory authority cited by Defendant above, as such the Charter Study Ordinance is no bar to the Petition instantly at issue. In addition, bound by Judge Currier's ruling, this Court must find the Petition compliant with the requirements of *N.J.S.A.* 40:69A-25.1 and order it placed on the November 2009 Ballot.

Arguments regarding the validity of Plaintiffs' initial petition and the preclusive effect of the Charter Study Ordinance were heard by Judge Currier, and she issued her decision on September 2, 2008. However, this ruling did not dispose of all of the parties' claims, as further proceedings were stayed by the first October 29, 2008 Order with respect to the September 2, 2008 Order, pending a further order. Also, a plenary hearing was to be scheduled with respect to a motion for reconsideration filed by the Defendants, Daniel A. Torrisi and the New Brunswick City Council. There was neither a further order lifting the stay nor a plenary hearing following the first October 29, 2008 Order, as the second October 29, 2008 Order dismissed EON I as moot after Plaintiffs' withdrawal of their initial petition. This Court, prompted by parties' arguments, is left with deciding what role, if any, does EON I play in deciding EON II.

In *Transamerica Insurance Co. v. National Roofing, Inc.*, 108 *N.J.* 59 (1987), the court faced a similar procedural issue upholding the trial court's finding that a declaratory judgment action seeking coverage was moot due to the settlement of the underlying liability case and did not render the insured a "successful claimant." The Court determining the effect of a prior dismissal started its procedural analysis with *F.R.C.P* 41(b) that provides a dismissal other than for lack of jurisdiction is on the merits, yet

deviated from a strict adherence to the Federal Rules of Civil Procedure, as New Jersey courts did not face the same jurisdictional restrictions as their federal counterpart. Article III, section 2 of the United States Constitution limits the jurisdiction of federal courts to actual cases or controversies, thereby a matter dismissed for mootness is considered dismissed for lack of jurisdiction and not on the merits. *Id.* at 63.

The Court continued its analysis stating that New Jersey courts may retain jurisdiction even if a matter is technically moot "if to do so is in the public interest, *In re Boardwalk Regency Corp. Casino License*, 90 *N.J.* 361, 368 (1982), or if 'the litigants' concern with the subject matter evidence[s] a sufficient stake and real adverseness[,]' *Crescent Park Tenants Ass'n v. Realty Equities Corp.*, 58 *N.J.* 98, 107 (1971)," or "if the matter is cable of repetition, yet evading review," *Gilbert v. Gladden*, 87 *N.J.* 275, 295-96 (1975). Therefore as a preliminary tenet, the Court accepted that in New Jersey courts a dismissal for mootness is not always for lack of jurisdiction. *Transamerica,* 108 *N.J.* at 64 (1987).

Continuing its analysis of the effect of a dismissal for mootness the Court stated:

> [A] literal reading of Rule 4:37-2(d) could lead, as it led the Appellate Division, to the conclusion that a dismissal for mootness, not being one for lack of jurisdiction, was an adjudication on the merits. A rule of court, like a statute, however, should not be read literally when such a reading defies logic and leads to a result that is contrary to its purposes. *See Piscataway Township Bd. of Educ. v. Caffiero*, 86 *N.J.* 308, 317 (1981); *see also Westinghouse Elec. Corp. v. Board of Review*, 25 *N.J.* 221, 227 (1957) (courts not limited to reading statute literally). *A dismissal for mootness by definition is not an adjudication on the merits*. Because there has been no actual adjudication, such a dismissal is more like one for lack of jurisdiction than one after a trial on the merits.

Id. (emphasis added).

Plaintiffs' assertion that collateral estoppel applies is misplaced as the prior September 2, 2008 decision, which this argument is hinged upon, was never fully adjudicated on the merits. Generally, application of the doctrine of collateral estoppel requires a determination that (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding. *First Union Nat'l Bank v. Penn Salem Marina, Inc.,* 190 *N.J.* 342, 352-53 (2007). The court in *Transamerica* did not foreclose the notion that a dismissal for mootness could be an adjudication on the merits. However, courts must exercise sensitivity to the facts of a case in applying court rules and statutory constructions.

In EON I, the September 2, 2008 decision and order were interlocutory, as illustrated by the pendency of the ordered plenary hearing with respect to Defendants' motion for reconsideration and the stay issued. Any ruling by a court that does not adjudicate all of the claims of all of the parties is by negative implication interlocutory in nature. These outstanding matters were never pursued due to the dismissal for mootness after Plaintiffs withdrew their petition. As the court stated in *Transamerica*, "A dismissal for mootness by definition is not an adjudication on the merits. Because there has been no actual adjudication, such a dismissal is more like one for lack of jurisdiction than one after a trial on the merits." *Transamerica, supra*, 108 *N.J.* at 64. Defendants' motion for reconsideration was never heard, denying them the opportunity to fully and fairly be heard. Furthermore, the issues found in Defendants' motion for reconsideration were

never litigated. Because of the incomplete nature of the proceedings in EON I, Plaintiff cannot utilize collateral estoppel as a sword foreclosing Defendants' opportunity to be heard defending EON II. Therefore, Judge Currier's thoughtful decision in EON I is not a binding final judgment on the merits capable of collaterally estopping Defendants in the instant matter.

Complaint in Lieu of a Prerogative Writs

Actions in lieu or prerogative writs are afforded a particular set of procedural rules governing what is to be considered by a reviewing court. *See*, *R.* 4:69-1 *et seq.* If the complaint demands the performance of a ministerial act or duty, as is asserted here, the plaintiff may, at any time after the filing of the complaint, by motion supported by affidavit and with briefs, apply for summary judgment. *R.* 4:69-2

The extent of the material to be considered is that which is asserted in defense of the ministerial act or duty, as it is this ministerial act which is reviewed by the court. *See, Mitchell v. City of Somers Point*, 281 *N.J. Super.* 492 (App. Div. 1994) (making clear the applicability of the summary judgment rule where there is no municipal agency record and the facts on which the complaint is based are uncontested).

In addition, as stated by our Supreme Court:

> Mandamus issues "*to compel the 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*, but as to all acts or duties depending upon a jurisdiction to decide questions of law or to ascertain matters of fact, on the part of the officer or body at whose hands their performance is required, mandamus will not lie." *Citing Mooney v. Edwards*, 51 *N.J.L.* 479 (Sup. Ct. 1889).
>
> Mandamus is a legal remedy for the protection of purely civil rights. Time has worked changes in the early commonlaw concept of mandamus as a prerogative writ. The modern tendency is not to treat it

> as a prerogative writ *save when invoked in matters of direct concern to the public*, but as an ordinary writ of right to remedy official inaction. In New Jersey, prior to the adoption of the 1947 Constitution, the issuance of the writ ordinarily involved the exercise of a sound discretion; but in the enforcement of private rights the lawful exercise of discretion excluded mere caprice or arbitrary action and required that the rights of the parties in the particular case be declared and enforced according to law.

Switz v. Middletown, 23 *N.J.* 580, 588 (1957) (emphasis added). This Court in considering matters of direct concern to the public, such as a proposed voter initiated petition for referendum, will review the ministerial action and applicable law in deciding what performance is required.

The Petition was brought pursuant to *N.J.S.A.* 40:69A-25.1. Mr. Torrisi, acting in his official capacity as New Brunswick's city clerk, found the Petition to be defective in two ways. One, pursuant to *N.J.S.A.* 40:69A-17, the Petition was precluded from being filed, as the Ordinance for the election of a charter study commission had previously been adopted. And two, pursuant to *N.J.S.A.* 40:69A-186, the Petition failed to provide a properly constructed initiative ordinance on every petition paper. This Court will address the deficiencies as posited by Mr. Torrisi.

Effect of the Charter Study Ordinance

N.J.S.A. 40:69A-17 provides that:

> No ordinance may be passed and no petition may be filed for the election of a charter commission pursuant to section 1-1 of this act while proceedings are pending under any other petition or ordinance filed or passed under article 1 of this act, or while proceedings are pending pursuant to section 1-18 hereof or any other statute providing for the adoption of any other charter or form of government available to the municipality, nor within four years after an election shall have been held pursuant to any such ordinance or petition passed or filed pursuant to section 1-1 hereof.

The court in *Chasis v. Tumulty*, 8 *N.J.* 147, 153 (1951) interpreted the language of this statute stating that "[t]he contention that an ordinance is "passed" within the meaning of the statute when it has passed first reading or when it has passed second reading lacks substance. The language used in the statute plainly refers to an ordinance that has become effective through final passage."

Applying *N.J.S.A.* 40:69A-17, as interpreted in *Chasis*, this Court concludes that Mr. Torrisi was mistaken when he found the Charter Study Ordinance, adopted on July 2, 2008 two days *after* Petitioners had filed their initial petition, prevented the Petitioners' second filing. The language of the statute is clear. No ordinance may be passed for the election of a charter commission while proceedings are pending under any other petition filed or pursuant to any other statute providing for the adoption of any other charter or form of government available to the municipality. *N.J.S.A.* 40:69A-17. The Charter Study Ordinance, relied upon by Mr. Torrisi in rejecting Plaintiffs' Petition, was not lawfully adopted pursuant to *N.J.S.A.* 40:69A-17 because of the pending initial petition, and therefore under the same provision, no bar to Plaintiffs' second filing. To allow an ordinance never lawfully adopted to be pulled forward by the withdrawal of a petitioner's filing abrogates the force and effect of *N.J.S.A.* 40:69A-17.

N.J.S.A. 40:69A-17 specifically states no ordinance shall be passed, not that the adoption of an ordinance is suspended, until proceedings pending under any other petition are resolved, nor does it provide that an ordinance adopted during that pendency is suspended from taking effect until those proceedings are resolved. The use of a suspension of an ordinance as a tool of municipal legislative regulation is utilized in the Act when a municipal ordinance is challenged. *N.J.S.A.* 40:69A-185. The Legislature

explicitly used a suspension during the pendency of proceedings challenging a formally passed ordinance and explicitly stated that no ordinance shall be passed during the pendency of proceedings providing for the adoption of any other charter or form of government. The courts' function is "to enforce the legislative will as expressed by the clear language of the statute." *Howell Twp. v. Manasquan River Regional Sewerage Auth.*, 215 *N.J. Super.* 173, 181 (App.Div. 1987). Comparing *N.J.S.A.* 40:69A-17 to *N.J.S.A.* 40:60A-185 leads this court to conclude that had the Legislature intended the passage of an ordinance suspended under *N.J.S.A.* 40:69A-17 it would have written it that way. Therefore, the Charter Study Ordinance adopted two days after the filing of Plaintiffs' initial petition is of no effect.

The Defendants offer another argument that only a valid petition is an effective bar to an ordinance under *N.J.S.A.* 40:69A-17 and that a finding of deficiency by Mr. Torrisi precludes Plaintiffs' initial petition from triggering *N.J.S.A.* 40:69A-17. This argument is unpersuasive for three reasons. One, the qualifier "valid" neither appears in *N.J.S.A.* 40:69A-17 nor in an extremely similar provision, *N.J.S.A.* 40:69A-21. If it was intended to be in either, this Court is confident that our Legislature would have placed it accordingly. *See Howell Twp., supra,* at 181.

Two, an initiative or referendum petition may be amended at any time within ten days after the notification of insufficiency has been served by the municipal clerk; the clerk, after receiving an amended petition, has five days to examine the amended petition and determine the sufficiency. *N.J.S.A.* 40:69A-188. The Charter Study Ordinance was passed two days after the Plaintiffs' first petition was filed, within the statutory period for remedying any deficiency. Without addressing the validity of that filing, in theory,

Plaintiffs still could have remedied that petition thereby complying with all applicable criteria, which would have negated the adoption of the Study Commission Ordinance. At the very least the adoption of the Charter Study Ordinance cannot be formalized, under Defendants' interpretation of *N.J.S.A.* 40:69A-17, until after a petitioner has been afforded the ten day remedial period after the notification of insufficiency and the question of validity satisfied, a requirement not met in this case.

Three, "[t]he finding of the insufficiency of a petition shall not prejudice the filing of a new petition for the same purpose." *N.J.S.A.* 40:69A-188. The first petition need not be valid to invoke the protections of *N.J.S.A.* 4:69A-17. If an insufficient petition was filed between the first reading of an ordinance for a charter study commission and its formal adoption and that petition was later held to be invalid, a new petition filed for the same purpose would be prejudiced at filing, if the charter study ordinance was deemed properly adopted due to the first petition's insufficiency. *N.J.S.A.* 40:69A-188 specifically provides that this scenario cannot occur, rendering the issue of the validity of the first petition of no moment.

Method of Adopting an Amendment Pursuant to *N.J.S.A.* 40:69A-25.1

The second defect found in Plaintiffs' Petition was a failure to provide a properly constructed initiative ordinance on every petition paper pursuant to *N.J.S.A* 40:69A-186. *See also N.J.S.A.* 40:69A-25.1. Plaintiffs' contend that the inclusion of an ordinance is not necessary under *N.J.S.A.* 40:69A-25.1 or that the absence of such an ordinance is not a terminal defect to their Petition. Defendants' argue that without the statutorily required ordinance Plaintiffs' Petition is incurably defective. The most complete manner of

resolving the parties' opposing interpretations of *N.J.S.A.* 40:69A-25.1 *et seq.* is to delineate the applicable requirements for Plaintiffs' ultimate goal, to place a referendum question on the November 2009 Ballot for the adoption of an amendment to the charter of the City of New Brunswick.

In municipalities organized under the Act, citizens are provided the right and encouraged to actively participate in municipal affairs. *See Twp. of Sparta v. Spillane*, 125 *N.J. Super.* 519 (App.Div. 1973) *cert. denied* 64 *N.J.* 493 (1974). The Act provides various options for form of governance but has several common features; two of these features are common methods of adoption and abandonment of form per *N.J.S.A.* 40:60A-1 to 40:60A-25.5 and the voters powers of initiative and referendum per *N.J.S.A.* 40:69A-184 to *N.J.S.A.* 40:69A-196.

The Act provides two basic methods of adopting an optional or an alternative form. *N.J.S.A.* 40:60A-1 *et seq.* The first involves holding a referendum on whether a Charter Study Commission should be elected and electing Charter Study Commissioners. *Id.* The second method of adoption, the so-called "direct petition" method, involves placing a referendum question on the ballot as to the adoption of a form without a charter study. *N.J.S.A.* 40:60A-18 *et seq.*

N.J.S.A. 40:69A-25.1 permits a municipality governed by a plan of government adopted pursuant to the Act to amend its charter to adopt one of the alternative forms authorized under the current plan of government. The full text of this provision, section a, reads:

> a. Any municipality governed by a plan of government adopted pursuant to [the Act] may, by referendum, amend its charter to include any alternative permitted under that plan of government. The question of adopting an alternative may be initiated by the voters pursuant to,

> and subject to the pertinent provisions of, [*N.J.S.A.* 40:69A-184 through 196]; or may be submitted to the voters by ordinance adopted by the governing body, in which case the question and ordinance shall be subject to the pertinent provisions [*N.J.S.A.* 40:69A-191 through 196], except that no petition of the voters shall be necessary in order to submit the question.

N.J.S.A. 40:69A-25.1. The five alternatives, A through E[2], are listed in the second provision of this section. This provision also provides the necessary language to present the alternatives to the electorate, which reads:

> b. At any election at which the question of adopting an alternative is to be submitted to the voters pursuant to this section, the question shall be submitted in substantially the following form:
>
> "Shall the charter of (insert name of municipality) governed by (insert plan of government) be amended, as permitted under that plan, to provide for (insert appropriate language from below for the alternative to be voted upon)

The point of contention regarding the necessity of an ordinance revolves around the structure of *N.J.S.A.* 40:69A-25.1, specifically the first two sentences. The first sentence states that any municipality may, by referendum, amend its charter to include any alternative permitted plan of government. The second sentence addresses how the question of adopting an alternative plan of government can be effected by the voters or the governing body, and delineates the pertinent provisions controlling each respective process. Defendants argue that the controlling pertinent provisions, specifically *N.J.S.A.* 40:69-186, require a voter petition initiating a question of amendment to include an ordinance. Reading the applicable sections *in materia* leads this Court to a different conclusion.

---

[2] Plaintiffs wish to utilize alternative Group B, which changes the election of council members at large to a plan utilizing six wards with council members elected from each ward and three elected at large.

N.J.S.A. 40:69A-18 provides for the adoption of an optional plan without a charter commission; similarly, *N.J.S.A.* 40:69A-25.1 provides for the adoption of an alternative plan without a charter commission. "The legally qualified voters of any municipality may adopt any of the optional plans provided in this act upon petition and referendum, without a charter commission, hereinafter provided." *N.J.S.A.* 40:69A-18. *N.J.S.A.* 40:69-19 sets forth the requirements for a petition calling for a referendum to adopt an optional plan without a charter commission.

Voters, utilizing *N.J.S.A.* 40:69A-25.1, are called upon to submit a *question* for a referendum vote regarding the amendment of a charter to adopt an alternative. Furthermore, the question may be initiated by voters pursuant to, and subject to, the *pertinent* provisions of, *N.J.S.A.* 40:69A-184 through 40:69A-196. The pertinent provisions encompass, inter alia, the requirements for an initiative and a referendum. These requirements set forth the number of voters' signatures necessary to successfully petition for a referendum, i.e. 15% of the total votes cast in the municipality at the last election at which members of the General Assembly were elected. *N.J.S.A.* 40:60A-185. Notably, the percent necessary to place a voter initiated ordinance on a ballot is at least 10% but less than 15%, less than required to place a referendum on a ballot. *N.J.S.A.* 40:69A-186 sets forth the size and style requirements for petition papers circulated for the purposes of an initiative *or* a referendum, yet only specifies that initiative papers shall require the full text of the proposed ordinance.

It is clear that the Legislature did not contemplate a petition for a *referendum* brought pursuant to *N.J.S.A.* 40:69A-25.1 to include an ordinance. Most pointedly, *N.J.S.A.* 40:60A-186 only states that an initiative petition requires an ordinance, not a

referendum petition. In addition, *N.J.S.A.* 40:69A-25.1 explicitly allows any Faulkner Act municipality, *by referendum*, to amend its charted to include any alternative permitted under that plan of government. The Legislature qualified the referendum petition requirements with the language "subject to the pertinent provisions of, *N.J.S.A.* 40:69A-184 through 40:69A-196." Using a liberal and commonsensical interpretation of these sections does not support applying every requirement found between *N.J.S.A.* 40:69A-184 through 196. Such an application is impossible as the petition in question would be held to a double standard regarding the percentage of voter signatures required.

The direct petition method found in *N.J.S.A.* 40:69A-25.1 is also seen in *N.J.S.A.* 40:60A-19, which does not require an ordinance. The Appellate Division in *Saverino v. Zboyan*, 239 *N.J. Super.* 330, 336-37 (App.Div. 1990) noting the effect of adopting an "optional" plan of government pursuant to N.J.S.A. 40:60A-19, verses adopting an "alternative" under an existing plan of government, pursuant to N.J.S.A. 40:69A-25.1, highlights the fundamental similarity therein:

> To us, this statutory scheme makes clear that the Legislature carefully distinguished between *adoption* of one of the four plans of government, and *adoption* of an "alternative" under an existing plan of government. The distinction is best underscored by the significant difference between the number of voters necessary *to adopt an optional plan* of government, in contrast to the number required *to adopt an "alternative."*

Both *N.J.S.A.* 40:69A-19 and *N.J.S.A.* 40:69A-25.1 reflect the direct petition method, utilizing referenda to submit questions to voters, to wit, whether or not to adopt the proposed changes or amendments. Initiative and ordinance are not part of this method.

In barring Plaintiffs' Petition, Mr. Torrisi found that Plaintiffs failed to attach a properly constructed initiative ordinance on every petition paper pursuant to *N.J.S.A.* 40:69A-186, which this Court finds to be incorrect since an ordinance is not necessary. Plaintiffs' petition adequately informed the voters as to what they may or may not support. *See Hamilton Twp. Taxpayers Ass'n v. Warwick*, 180 *N.J. Super.* 243 (App.Div. 1981) (expressing the legislative intent behind petition requirement is to sufficiently inform voters.).

The provisions of the initiative and referendum law provided for in the Act are to be liberally construed to promote their beneficial effects. *Millenium Towers Urban Renewal v. Mun. Council of Jersey City,* 342 *N.J. Super.* 367 (LawDiv. 2001). Further guidance as to the interpretations of these provisions is found in *D'Ascensio v. Benjamin, 137 N.J. Super.* 155, 163-164 (Ch.Div. 1975), wherein the court provides two polestar statements, emphasized by succession:

> Any consideration of the issues here involved must be undertaken in full recognition of the principle that provisions for initiative and referendum elections must be liberally construed in order to effectuate their purposes and to facilitate and not to hamper the exercise by the voters of the rights thereby granted to them. *42 Am. Jur. 2d, Initiative and Referendum, § 5 at 645.*

The court continues by quoting from *Twp. of Sparta, supra,* 125 *N.J. Super.* at 523:

> The Faulkner Act was adopted in order to encourage public participation in municipal affairs in the face of normal apathy and lethargy in such matters. The initiative and referendum processes authorized by the act comprise two useful instruments of plebiscite power and provide a means of arousing public interest. Ordinary rules of construction would, of course, dictate that such provisions should be liberally construed.

With the aforementioned in mind, the proposed text contained in Plaintiffs' Petition needs to be examined to determine if it provides potential signatories the

requisite information about the action they are being asked to sponsor and to effectuate the purpose of *N.J.S.A.* 40:69A-1 *et seq.*

The text of Plaintiffs' petition should not be subjected to a hypercritical and tortuous scrutiny, which may ultimately preclude active participation in local government, for ensnaring motivated and concerned citizens in legal jargon was not the aim of the Faulkner Act. *See D'Ascensio v. Benjamin, 137 N.J. Super.* 155 (Ch.Div. 1975). However, the need for genuine and clear communication cannot be understated; voters must be sufficiently informed as to the material aspects of what they are being asked to endorse. *See Hamilton Twp. Taxpayers Ass'n v. Warwick*, 180 *N.J. Super.* 243 (App.Div. 1981). The Faulkner Act, as a comprehensive piece of legislation, provides for this determination.

The text of the Plaintiffs' Petition is found below:

PETITION FOR A REFERNDUM ON A WARD-BASED ALTERNATIVE

To the Municipal Clerk of the City of New Brunswick:

WHEREAS, we the undersigned, registered voters of the City of New Brunswick, Middlesex County, New Jersey, desire for city voters to decide whether or not to change the number and manner in which our city council members are elected in order to give each city ward its own voice on the city council; and

WHEREAS, we the undersigned, registered voters of the City of New Brunswick, Middlesex County, New Jersey seek specifically to give city voters the opportunity to decide whether or not to amend the municipal charter of the City of New Brunswick to provide for the division of the municipality into six wards, to expand the number of city council members from five members to nine members, and to provide that six members of the council be elected by the voters of those wards (with one from each ward) and three members be elected at large by all the voters in the city; and

> WHEREAS, we the undersigned, registered voters of the City of New Brunswick understand that we have the right to initiate a referendum question pursuant to *N.J.S.A.* 40:69A-25.1 in order to give city voters an opportunity to change to a ward-based alternative under the current Mayor-Council plan;
>
> WE HEREBY REQUEST that the following question to change the municipal charter of the City of New Brunswick be submitted to the city electorate for a vote, pursuant to *N.J.S.A.* 40:69A-192, at the election which next follows the submission and certification of this petition:
>
> Shall the charter of the City of New Brunswick, governed by the Mayor-Council Plan of the Optional Municipal Charter Law, be amended, as permitted under that plan, to provide for the division of the municipality into six wards with three council members to be elected at large and one from each ward?

Plaintiffs' Petition incorporates into its body the form of the question to be submitted to the voters pursuant to *N.J.S.A.* 40:69A-25.1(b). The Legislature deemed this statutorily constructed phrase a statement complete enough to inform voters as to what they were exercising their franchise for. This language informs more voters by appearing on a ballot than by appearing on a petition, which indicates the statutory phrasing selected by the Legislature to inform *all* the voters as to their choice of adopting an alternative is therefore sufficient to inform *some* of the voters if they wish to endorse a petition putting the question on the ballot.

The remaining language and format of the petition is easily understood, and the sentences are structured in a straightforward and direct manner. The paragraphs appearing before the question provide the requisite information to the voters, so they know and understand what they are signing and its implications. In addition, the penultimate body paragraph introducing the question to be submitted clearly indicates that the question is to be submitted to the *electorate*, meaning the voting public and not to

the governing body, as Defendants had argued.[3] This paragraph also informs the potential signer when he or she can expect this question to appear on the ballot, as timing may influence a voter's decision.

The Defendants contend that each page must contain the text of the ordinance or the question on the back and front of the petition page citing *N.J.S.A.* 40:69A-186. The Appellate Division ruled in 1981 under *Hamilton Twp. Taxpayer's Assoc. v. Warwick*, 180 *N.J. Super.* 243 (App.Div. 1981) *cert. denied* 88 *N.J.* 490 (1981), that the phrase petition papers refers to each sheet of paper on which signatures are secured.

This Court, adopting Judge Currier's reasoning, does not find a requirement that the ordinance, or in this case the proposed question, needs to be written again on the back of each page. The second page, which is merely the back of the first page, is a continuation of the front page containing the requisite language.

After reading the body of Plaintiffs' petition and examining the front and back pages, this Court cannot find a deficiency sufficient to invalidate the Petition. Also, in light of the Act's legislative intent to combat voter apathy and encourage participation, holding Plaintiffs' petition invalid for technical flaws when it conforms on a practical level defeats the benefits legislated by the right of initiative and referendum.

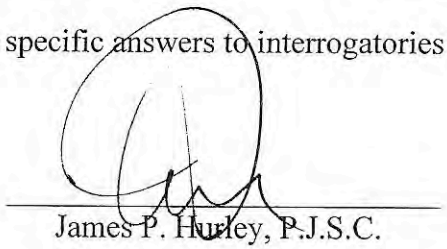
For the foregoing reasons, it is

ORDERED and ADJUDGED on this 10th day of August, 2009 as follows:

1. The Defendants motion for summary judgment to dismiss the complaint be and is hereby denied with prejudice;
2. The Plaintiffs motion for summary judgment is hereby granted;

[3] Electorate as defined by Merriam Webster means, "a body of people entitled to vote."

3. The Defendant, Daniel A. Torrisi, is hereby directed to forthwith certify the Plaintiff's Petition to the Defendant, Elaine Flynn, Middlesex County Clerk;
4. The Defendant, Elaine Flynn, Middlesex County Clerk, is hereby directed to place the question, posed in the Petition, on the November 2009 ballot.
5. The Defendants motion for more specific answers to interrogatories is denied.



James P. Hurley, P.J.S.C.