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March 8, 2010

Honorable Valerie H. Armstrong, A.J.S.C.  
Superior Court of New Jersey  
Atlantic County Court House  
1201 Bacharach Blvd.  
Atlantic City, New Jersey 08401

Re: In Re the Petition for Referendum to Repeal Ordinance 70 of 2009  
of the City of Atlantic City, County of Atlantic, State of New Jersey

Dear Judge Armstrong:

This office represents the Plaintiffs Charles R. McDevitt and Dajenaba Passion Blackwell, who are voters, residents and taxpayers of Atlantic City and representative members of the Referendum Committee of the petition which is the subject of the above referenced matter.

**STATEMENT IN LIMINE**

The Defendants City Clerk, Council and Atlantic City adopted Ordinance Number 70 (hereinafter referred to as "Ordinance") on December 30, 2009. The Ordinance was approved by the Mayor of Atlantic City on December 31, 2009. Thereafter, the plaintiffs, as representatives of the Referendum Committee, gathered and on January 15, 2010 submitted sufficient signatures on the petition protesting the adoption of the Ordinance and sought to have it placed on the

election ballot as a referendum question for the voters to decide whether or not to repeal it. The City Clerk summarily rejected the petition on a legal ground without a review.

### **FACTUAL STATEMENT**

Defendant City of Atlantic City is a Faulkner Act municipal corporation under N.J.S.A. 40:69A-1 et seq., of the State of New Jersey. As a Faulkner Act municipality, its citizens are empowered and permitted under the provisions of N.J.S.A. 40:69A-185, entitled, "Power of Referendum; Time for Filing Petition," to avail themselves of citizen initiatives to submit or repeal legislation.

The plaintiffs and members of the Referendum Committee, prepared and circulated a protest petition to the registered voters of the City of Atlantic City, protesting the passage of the Ordinance and seeking a citywide referendum. On January 15, 2010, plaintiff Charles R. McDevitt submitted to the City Clerk of the City a four hundred and ninety (490) page petition which was marked received by the City Clerk. The Defendant City Clerk did not carry out her limited statutory mandate of review. Rather, the City Clerk advised plaintiff Charles R. McDevitt by letter dated January 20, 2010, that the petition is "invalid under N.J.S.A. 40A:12A-28, which states 'No ordinance, amendment, or revision of an ordinance under this act (Local Redevelopment and Housing Law) shall be submitted to or adopted by initiative or referendum, notwithstanding any other law to the contrary.' Accordingly, the Petition...is hereby rejected."

Plaintiffs bring this action seeking to compel the placement of the referendum question upon the election ballot to determine the sentiments of the voters as to whether or not they desire to repeal the Ordinance. The Plaintiffs allege that the City Clerk, acted in an arbitrary, whimsical and capricious manner, did not perform her functions, did not review or validate the petition and rendered a legal opinion which is beyond her purview, skills and competence.

**POINT I: THIS MATTER IS RIPE FOR SUMMARY DISPOSITION PURSUANT TO RULES**

New Jersey Court Rule 4:67-1(a) provides that a summary proceeding may be brought where "the court is permitted by rule or by statute" to so proceed. The summary action provision "is intended to accomplish the salutary purpose of swiftly and effectively disposing of matters which lend themselves to summary treatment while at the same time giving [the parties] an opportunity to be heard." Pressler, Current N.J. Court Rules, Comment on R. 4:67-1 (2010).

This matter is appropriate for summary proceeding as Plaintiffs have filed a verified complaint seeking a review and prerogative writ, and it should therefore proceed as an order to show cause. See also, R. 4:67-2(a). In particular, the New Jersey courts have held that the use of the summary action procedure is appropriate where the case involves a matter of public interest and no genuine issue of material fact exists. Ocean County v. Stockhold, 129 N.J. Super. 286, 290-291 (App. Div. 1974) (affirming use of summary proceeding in action regarding county's right to condemn property for drainage easement where affidavits did not create a triable issue of fact); City of Newark v. Essex County Board of Taxation, 110 N.J. Super. 93, 96 (Law Div. 1970) (complaint in lieu of prerogative writ regarding whether Newark was entitled to credit for certain property taxes paid for land leased to the Port Authority deemed appropriate for disposition by summary proceeding pursuant to R. 4:67). Here both the actions and inactions of the Defendant City Clerk raise a matter of public importance.

A trial court has discretion to convert an emergent application into a motion for summary judgment. See, Concerned Citizens of Borough of Wildwood Crest v. Pantalone, 185 N.J. Super. 37, 48 (App. Div. 1982) (determining that a trial court has discretion to convert an application for injunctive relief into a motion for summary judgment on the return date of an order to show

cause when there are no material facts in dispute). See also, Enourato v. N.J. Bldg. Auth., 182 N.J. Super. 58, 64-65 (App. Div. 1981), aff'd, 90 N.J. 396 (1982) (holding that a trial court has discretion to grant summary dismissal of a complaint on a return date of an application for an order to show cause seeking a preliminary restraint against the issuance of public bonds).

The Plaintiffs, Referendum Committee and voters who signed the petition have a right to a quick and expeditious determination as to the actions of the City Clerk.

**POINT II: ATLANTIC CITY IS SUBJECT TO THE PROVISIONS OF N.J.S.A. 40:69A-185 AND THE RIGHT OF THE CITIZENS TO SEEK TO REPEAL AN ORDINANCE BY REFERENDUM, AS SOUGHT HERE.**

**A. The Right to a Referendum.**

Applicable here is the Faulkner Act referendum statute, N.J.S.A. 40:69A-185, which provides in pertinent part:

The voters shall also have the power of referendum which is the power to approve or reject at the polls any ordinance submitted by the council to the voters or any ordinance passed by the council, against which a referendum petition has been filed as herein provided.

Historically, the judiciary is reluctantly thrust into the role of final arbiter over the meaning and validity of many ballot initiatives. In 1912, the U.S. Supreme Court addressed the fundamental question of whether the "initiative process" itself as a "system of direct democracy" violated the federal Constitution's guarantee of a "republican form of government" or a "system of representative democracy." The Supreme Court held in Pacific States Telephone and Telegraph Co. v. Oregon, 223 U.S. 118, 151 (1912), that the initiative process was simply an additional form of government, not one that eliminated or superseded the republican form of

government and the representative processes thought to be central to it. Since then, the courts have not questioned the legitimacy of the initiative process.

In New Jersey our courts have held that fostering the referendum is a right which encourages public participation in municipal governmental matters in the face of normal apathy and lethargy. Sparta Twp. v. Spillane, 125 N.J. Super. 519 (App. Div. 1973), cert. denied 64 N.J. 493 (1974); Nariso v. Worrick, 176 N.J. Super. 315 (App. Div. 1980).

Lacking understanding and questioning the wisdom of the governmental actions, the matter is ripe for a public referendum submitted to the voters with significant public discussion and debate. That debate and disclosure will involve all the citizenry in the pre-election campaigning. This is the type of issue that the political process and the statute envision will be the subject of a referendum. Professor Oesterle has observed:

First, it reveals that the referendum process is a useful method for handling controversial issues. Referenda promote public discussion and debate, educate voters on important policy matters, and cause voters to pay attention to the actions of their elected representatives. Those who lose at least feel included in the resolution of the issue, for they had a chance to persuade their fellow citizens. [Dale A. Oesterle, The South Dakota Referendum on Abortion: Lessons from a Popular Vote on a Controversial Right, 116 Yale L.J. Pocket Part 122, 124 (2006).]

As here other academic scholars have shown how local government can make "take-it-or-leave-it" offers to the voter that confronts them with a Hobson's choice: loss of homes and roads with city financing to foster casinos and development or no development. Thomas Romer & Howard Rosenthal, Political Resource Allocation, Controlled Agendas, and the Status Quo, 33 Public Choice 27 (1978). The statutory constraint of not being able to seek referenda on an ordinance demonstrates that voters face a binary choice between either the status quo or the particular ordinance being sought. Yet here, the City offers not a bond ordinance but conferring authority to conduct negotiations with a developer for an inchoate, potential and future business

dealing. The City Council put the issue in motion and in play by their own action, which the voters seek to have their voice heard, giving thumbs up or thumbs down. While this type of decision making confers substantial power on the Defendants as the agenda setter, it may result in an outcome that does not match the preferences of the voter. This then is the reason for the Faulkner Act concept of citizen democracy for initiative and referendum.

**B. The subject of a Referendum.**

We argue that the City Clerk's determination that the ordinance is not subject to referendum lacks both factual and legal support. The City Clerk's net legal opinion was issued without authority and is unrelated to the content or import of the Ordinance or the subject of the referendum. It appears that the Defendants in issuing the City Clerk's finding sought a safe harbor by an appellation that the Ordinance is under the provisions of N.J.S.A. 40A:12A-28, being an action under the Local Redevelopment and Housing Law.

The import of the Ordinance is not under the Local Redevelopment and Housing Law but rather, as outlined in Sections 2 and 3 of the Ordinance, is in support of the State Incentive Grant Application of Revel Entertainment Group, LLC.

Finally, an examination of the applicable law demonstrates that the Defendants are engaged in a procrustean effort to make this square peg fit in the round hole of the law they precariously cling to in rejecting the referendum petition.

We begin by reviewing the holding in a prior case in which the Defendants were involved. In Atlantic City Housing Action Coalition v. Deane, 181 N.J. Super. 412 (Law Div. 1981), the court held that a redevelopment ordinance is not subject to referendum. A concise general rule, but this court must look to the content of what was examined and offered there with

the referendum ordinance before the court now, which is entirely different. Just saying it is does not make it so.

The general approbation of submitting ordinance challenges to the people was examined in The We the People Committee, Inc. v. City of Elizabeth, 325 N.J. Super. 328 (App. Div. 1999). The court reviewed the examination and balancing that must be conducted to determine whether the ordinance and its import is one that can be the subject of a referendum:

The novel question presented is whether the Faulkner Act's referendum process is applicable to an ordinance privatizing a municipality's water distribution system pursuant to the Water Supply Act. N.J.S.A. 40:69A-185 grants the power of referendum to the voters in a Faulkner Act municipality. The statute gives to the voters "the power to approve or reject at the polls any ordinance . . . passed by the council." Ibid. We have liberally construed this statutory provision to promote the salutary objective of popular participation in local government. D'Ercole v. Mayor of the Borough of Norwood, 198 N.J. Super. 531, 543 (App. Div. 1984); In re Certain Petitions for Binding Referendum, 154 N.J. Super. 482, 484 (App. Div. 1977); Cuprowski v. Jersey City, 101 N.J. Super. 15, 27 (Law Div.), aff'd o.b., 103 N.J. Super. 217 (App. Div.), certif. denied, 53 N.J. 80 (1968); see also Retz v. Mayor of the Township of Saddle Brook, 69 N.J. 563, 571 (1976). However, it has been said that the phrase "any ordinance" in the Faulkner Act's provisions for referendum "does not mean 'all ordinances.'" Tumpson v. Farina, 120 N.J. 55, 57 (1990). In a variety of factual settings, we have found a supervening legislative intent to bar a plebiscite on certain municipal ordinances. See, e.g., D'Ercole v. Mayor of the Borough of Norwood, 198 N.J. Super. 531 (ordinance authorizing lease of firehouse not subject to referendum); In re Certain Petitions for Binding Referendum, 154 N.J. Super. 482 (traffic ordinance could not be proposed by initiative petition); Township of Sparta v. Spillane, 125 N.J. Super. 519 (App. Div. 1973) (zoning ordinance not subject to referendum); see also Smith v. Township of Livingston, 106 N.J. Super. 444 (Ch. Div. 1969) (ordinance regulating use of water and fixing meter rates not subject to referendum); Atlantic City Housing Action Coalition v. Deane, 181 N.J. Super. 412 (Law Div. 1981) (redevelopment ordinance not subject to referendum); Cuprowski v. Jersey, 101 N.J. Super. 15 (budgetary ordinance not subject to referendum); but see Menendez v. City of Union City, 211 N.J. Super. 169 (App. Div. 1986) (ordinance increasing number of fire captains is subject to referendum). In finding a legislative design to foreclose referendum or initiative, we have emphasized in appropriate cases the danger of encouraging uncoordinated tampering by the electorate with a comprehensive statutory scheme. Atlantic City Housing Action Coalition v. Deane, 181 N.J. Super. at 419. In a somewhat related context, we have considered whether the action of the electorate would subvert or bypass

procedures mandated by the legislature, id. at 421, and whether the municipal action is subject to state approval. In re Certain Petitions for Binding Referendum, 154 N.J. Super. at 487. [id. at 330.]

Much closer to home, the parties and the court is In Hernandez-Turner v. Rosemary Adams et al, No. A-6668-05 (App. Div. August 2, 2007), which is one of the numerous petition matters which the Defendant Atlantic City has been involved. In that matter a salary ordinance was sought to be repealed by a referendum petition in which this Court itself ruled and upon appellate review was found to have correctly applied the law. There the Appellate Division held:

In New Jersey, "[w]here the right of referendum is statutorily granted, [it] ... is to be liberally construed to promote, where appropriate, its beneficial effects." In re Referendum Petition to Repeal Ordinance 04-75, 388 N.J. Super. 405, 412 (App. Div. 2006) (quoting D'Ercole v. Mayor and Council of the Borough of Norwood, 198 N.J. Super. 531, 543 (App. Div. 1984)). Further, "the legislative grant of the referendum power should be liberally construed in order to encourage public participation in municipal affairs in the face of normal apathy and lethargy in such matters." Tumpson v. Farina, 240 N.J. Super. 346, 350 (App. Div.), aff'd by, 120 N.J. 55 (1990) (quoting Narciso v. Worrick, 176 N.J. Super. 315, 319 (App. Div. 1980)) (internal citations omitted).

However, the Supreme Court has recognized the need for a balance; weighing the people's interest against the City's interest in being free to legislate. Tumpson, supra, 120 N.J. at 59. "In many situations it is difficult to determine how far the limitations [on initiative and referendum] should go. The courts must draw the line in these situations and in doing so must balance two interests—the protection of city government from harassment as against the benefits of direct legislation by the people." [id. at 8-9]

Yet the court in Hernandez-Turner harkened and trumpeted the salutary effect of permitting referendum and allowing the voice of the people to be heard:

Also, it is well recognized that the right to referendum is a democratic ideal. Moreover, provisions relating to a referendum should be liberally construed so as to effectuate, facilitate and encourage voters to participate in government...The judge went on to state that, "[i]t is not the policy of our law to frustrate the right of voters to seek democratic redress, as provided for through referendum." Ibid.

(citing D'Ascensio v. Benjamin, 137 N.J. Super. 155, 163 (Ch. Div. 1975); Sparta Tp. v. Spillane, 125 N.J. Super. 519, 523 (App. Div. 1973)). [Id. at 10-11]

In a referendum petition submitted to challenge an ordinance reorganizing the Trenton Police Department, the trial level opinion was overruled and the question was ordered to be submitted to the voters. In re the referendum petition to repeal Ordinance 04-75, No. A-2009-04, slip op at 6-8 (App. Div. October 25, 2006), the court held:

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." Millennium Towers Urban Renewal Ltd. Liab. Co. v. Mun. Council of the City of Jersey City, 343 N.J. Super. 367, 373 (Law Div. 2001). "Where the right of referendum is statutorily granted, however, the grant is to be liberally construed 'to promote, where appropriate, its beneficial effects.'" D'Ercole v. Mayor and Council of the Borough of Norwood, 198 N.J. Super. 531, 543 (App. Div. 1984) (quoting Retz v. Mayor and Council Twp. of Saddle Brook, 69 N.J. 563, 571 (1976)).

Within the rule of liberal construction, however, "it was not the intent for such provisions to grant unlimited and unqualified rights to citizens to challenge the acts of local municipal governments." Millennium Towers, *supra*, 343 N.J. Super. at 373. The Supreme Court has recognized the "judicial dilemma" inherent in such determinations:

In many situations it is difficult to determine how far the limitations [on initiative and referendum] should go. The courts must draw the line in these situations and in doing so must balance two interests — the protection of city government from harassment as against the benefits of direct legislation by the people. Tumpson v. Farina, 120 N.J. 55, 59 (1990) (quoting Cuprowski v. City of Jersey City, 101 N.J. Super. 15, 24-25 (Law Div.), *aff'd o.b.*, 103 N.J. Super. 217 (App. Div.), *certif. denied*, 53 N.J. 80 (1968)).

As the Appellate Division ruled in In re the referendum petition to repeal Ordinance 04-75, *supra*, slip op at 12-13, if there is doubt or a close question on whether an ordinance can be subject to a referendum, it is the people that prevail, first, last and always.

It suffices that, in situations where close questions are presented, the default rule in deciding where the ultimate decision-making authority on the municipal level lies is to be found in the Legislature's declaration of policy that that power rests with the people. See Tumpson, *supra*, 240 N.J. Super. at 350-51; Menendez, *supra*, 211 N.J. Super. at 172. To the extent the courts have articulated a distinction between the treatment of legislative questions and administrative questions so as to bring order and some predictability to questions presented, if it is difficult to determine, in a particular situation, on which side of the dividing line a certain governmental exercise falls, the legislatively declared policy preference for public participation must apply to favor the referendum mechanism.

It is clear that the Defendant City Clerk has exceeded her authority in issuing her "net legal opinion." Moreover, her refusal to review the petition was arbitrary, capricious or unreasonable. "[M]unicipal action will be overturned by a court if it is arbitrary, capricious, or unreasonable." Bryant v. Atlantic City, 309 N.J. Super. 596, 610 (App. Div. 1998).

**POINT III: THE MUNICIPAL CLERK MUST FOLLOW THE PROVISIONS OF N.J.S.A. 40:69A-187 AND REVIEW THE PETITION WITHIN ITS FOUR CORNERS. THE MUNICIPAL CLERK HAS NO AUTHORITY OR DISCRETION TO REVIEW THE QUESTION PRESENTED AND SUCH CONDUCT CONSTITUTES AN ULTRA VIRES ACT.**

The New Jersey Optional Municipal Charter Act permits citizens of municipalities formed thereunder "have the power of referendum which is the power to approve or reject at the polls any ordinance passed by the council against which a referendum petition has been filed as herein provided." N.J.S.A. 40:69A-185.

As here, when the Ordinance received final approval by the Governing Body on December 30, 2009, was approved by the Mayor on December 31, 2009, and a petition of protest seeking a Referendum on such ordinance was filed on January 15, 2010, then the statute, N.J.S.A. 40:69A-185, suspends the Ordinance from going into effect:

If within twenty days after such final passage and approval of such ordinance a petition protesting against the passage of such ordinance shall be filed with the

municipal clerk and if the petition shall be signed by a number of the legal voters of the municipality equal in number to at least 15% of the total votes cast in the municipality at the last election at which members of the General Assembly were elected, the ordinance shall be suspended from taking effect until proceedings are had as herein provided.

Upon the filing and receipt of the referendum petition, the City Clerk is given but limited authority on how to proceed in her review and handling of the petition. These limitations are protections to provide a barrier and wall around the City Clerk from wrongful and unlawful pressures, political skullduggery and intrigue, and invasion and violation of the democratic process undertaken by the citizens. N.J.S.A. 40:69A-187 provides: (Filing of petition papers; examination; certification of result)

All petition papers comprising an initiative or referendum petition shall be assembled and filed with the municipal clerk as one instrument. Within twenty days after a petition is filed, 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. After completing his examination of the petition, the municipal clerk shall certify the result thereof to the council at its next regular meeting. If he shall certify that the petition is insufficient he shall set forth in his certificate the particulars in which it is defective and shall at once notify at least two members of the Committee of the Petitioners of his findings. (emphasis added)

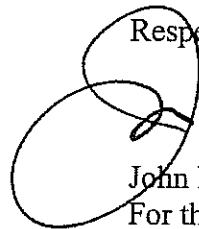
The City Clerk consequently has no discretion regarding her action and cannot refuse to carry out her statutory duties and responsibilities. Moreover, the City Clerk is neither empowered nor conferred with any authority to opine on the legal efficacy of substance of the referendum petition. The law commands that the City Clerk determine if the petition has a proper statement of the circulators and is signed by a sufficient number of qualified voters. The City Clerk presents that review to the Governing Body or if the petition is insufficient in the two areas of review notifies the Committee of Petitioners. Thereafter, the Committee of Petitioners can amend the filing with a supplemental petition, if necessary.

The City Clerk's function is merely clerical and she has no authority or competency to rule on the legality of the referendum question presented or the substance contained therein. That determination and responsibility is a power reserved to the judicial branch. Vreeland v. Byrne, 2 N.J. 292 (1977); Chamber of Commerce v. State of New Jersey, 89 N.J. 131 (1982); New Jersey Mortgage Fin. Agency v. McCrane, 56 N.J. 414 (1970); Civil Serv. Comm'n v. Senate of N.J., 165 N.J. Super. 144 (1970), certif. denied, 81 N.J. 266 (1979); Borough of Glassboro v. Byrne, 141 N.J. Super 19 (App. Div.), certif. denied, 71 N.J. 518 (1976); In re Advisory Committee on Professional Ethics Opinion, 705, 192 N.J. 46 (2007); State v. De Stasio, 49 N.J. 247 (1967); Masset Bldg. Co. v. Bennett, 4 N.J. 53 (1950).

### **CONCLUSION**

For the reasons set forth above, the Plaintiffs request that the Court order the referendum question be placed on the ballot for consideration of the voters.

Respectfully submitted,



John M. Carbone  
For the Firm

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cc: Rosemary Adams, Atlantic City Clerk  
Legal Department, City of Atlantic City