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IN THE SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION

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Docket No. A-5864-08-T3  
—————

In Re Petition for Referendum on City of Trenton Ordinance 09-02

ON APPEAL FROM THE SUPERIOR COURT  
OF NEW JERSEY, MERCER COUNTY, LAW DIVISION  
CIVIL ACTION  
DOCKET NUMBER: MER-L-548-09  
SAT BELOW: HON. LINDA R. FEINBERG, A.J.S.C.

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**BRIEF OF *AMICUS CURIAE* FOOD & WATER WATCH, INC.**

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## **Interest of *Amicus Curiae***

*Amicus Curiae*, Food & Water Watch, Inc. (“*Amicus*” or “*FWW*”), is very concerned about this case’s implications for all New Jersey residents. *FWW* is a national, non-profit, public interest organization that is headquartered in Washington, DC. The organization works to ensure safe and clean water. Through research, public and policymaker education, media, and lobbying, *FWW* informs public officials and concerned citizens about the economic, social, and environmental benefits of local ownership of drinking water. Although the organization is relatively young, having only started in 2005, *FWW* already has 380 dues-paying members in New Jersey, and more than 4,330 people in New Jersey support the organization by subscribing to its email list-serves.

The City of Trenton (“the Appellee” or “the City”) is attempting to sell major components of its publicly-owned water utility system to New Jersey-American Water (“the Appellee-Intervenor” or “American Water”), a subsidiary of the largest water company in United States. The components to be sold serve the surrounding Townships of Ewing, Hamilton, Hopewell, and Lawrence, and account for 60% of Trenton Water Works’s gross revenue, or approximately \$24 million.

A group of local citizens, the Protest Petitioners’ Committee Against Ordinance 09-02 (“the Appellant” or “the

Committee"), are challenging this \$80-million sale. The group raises serious and legitimate questions about whether the sale would provide the benefits that the City promises. The Committee worries that the sale would ultimately hamstring what would be left of the municipality's water system, forcing the city to either raise rates or cut services. These citizens gathered enough petition signatures to put the question on the ballot so the voters could decide for themselves whether the sale was wise policy.

Notwithstanding that New Jersey law requires the City to put the question of the sale before the voters, the City and American Water sued to stop the citizens from doing so themselves. The City and American Water argue that the Municipal Utilities Law (MUL) preempts the Faulkner Act, which gives the municipality's citizens the power to approve or reject municipal ordinances by referendum. They rely on MUL, N.J. Stat. Ann. § 40:62-3.1 (West 2009), which states that the City does not need to conduct a referendum for a sale of its utility system to a private entity when the system serves less than 5% of the selling municipality's population.

The Law Division agreed and allowed Trenton's sale under N.J. Stat. Ann. § 40:62-3.1. Employing quite technical arguments, the Appellee and Appellee-Intervenor were able to convince the lower court that the to-be-sold suburban sections

of the water works constitute a separate water system, and, because this system operates outside Trenton, that it serves less than 5% of Trenton's citizens. The court, however, ignored other language of this section that says that the provision only applies when a municipality seeks to sell a water system operating within the selling municipality's boundaries.

The court broadly found a broad new exception to the Faulkner Act. As a result, no longer will citizens be able to directly vote on certain very large municipal-water-utility sales to corporations. The municipality holds this property in trust for the public. The sales will divest the public of its ownership without direct consent. This decision opens up a large hole in New Jersey law, which generally mandates public review of the sale of municipal water systems to private corporations.

These types of sales generally do not have to go through the rigorous and comprehensive proceedings that the Legislature has set out for approving public entities' contracts with private companies for water services. This means that, as a result of the lower court's decision, municipalities may choose to sell their utilities rather than entering into service contracts with private companies, precisely so that they can avoid both detailed Board of Public Utilities (BPU) proceedings and voter review.

The lower court's decision limits citizen participation in crucial municipal matters, potentially spurring the sale of public trust water systems without public input. Because of these serious implications both for democracy and the public ownership of municipal water utility property, FWW submits the following brief on behalf of all of its members and supporters in New Jersey.

## **Preliminary Statement**

As touched upon above, this case does not simply involve a group of aggrieved citizens who disapproves of a municipal utility sale. At its heart is the right of the people to exercise direct democracy over the sale of large amount of commonly-held property that is vital for ensuring the City has an economical and plentiful water supply.

The New Jersey Legislature has codified the people's referenda powers under the Optional Municipal Charter Law, N.J. Stat. Ann. §§ 40:69A-1 to -210 (West 2009), or the Faulkner Act, which provides that a municipality's citizens have the right to propose and vote on municipal ordinances through the initiative process, N.J. Stat. Ann. § 40:69A-184, and also have the power by referendum to approve or reject municipal ordinances passed by the council. N.J. Stat. Ann. § 40:69A-185.

As discussed in detail below, despite the Appellate Division and Supreme Court's instructions that the Faulkner Act must be liberally construed to allow referenda and initiatives, the Law Division in this case has read a broad new exception into the Act. Under a misinterpretation of N.J. Stat. Ann. § 40:62-3.1, the Law Division has ruled that direct citizen review of an ordinance is barred when a municipality seeks to sell a large amount of its water works to a private corporation because

the sold property does not directly provide water to 5% of the selling municipality's population.

As detailed in the first section of this brief, this decision directly undermines the Public Trust Doctrine, which requires that the sale of municipal utilities only be allowed in the manner expressly required by statutory authority. In New Jersey, this means that the citizens must have the opportunity to directly vote on such sales. Holding otherwise would be to disregard the public as the beneficiary of the municipal water works, which are simply held in trust by the municipality. If the public opposes the sale but is not allowed to vote against it via referendum, it will have limited recourse to retain ownership of its property.

Trenton's decision is not simply a bureaucratic decision; the merits of the sale cut right to the core duties imposed under the Public Trust Doctrine, to conserve water resources and to ensure such resources are economically and prudently managed for the benefit of the public. When facing difficult decisions regarding whether to sell water utilities held in public trust, states and municipalities around the country have regularly relied on direct democracy as the clearest indication of public consent.

Not only does the Public Trust Doctrine demand different results in this case, the Law Division's decision simply ignored

key limiting language in the statute that provided the grounds for the court's finding of Faulkner-Act preemption. The second section of this brief demonstrates that the statutory provision supposedly preempting the Faulkner Act does not apply to sales such as Trenton's, where the private corporation purchasing the utility is to operate outside the selling municipality's borders. Further, the Law Division erred when it found an implied exception to the referendum statute based on the Legislature's enactment of detailed and elaborate proceedings involved when a public entity plans to sell its utility. No such proceedings exist. Without any other indication that the Legislature intended the MUL to preempt the Faulkner Act, the citizens' referendum petition must proceed.

Because of these errors of law, this Court should overturn the Law Division's decision and allow citizens' voices to be heard on the sale of major components of Trenton's water utility to American Water.

## Argument

### I. The Law Division's Opinion Improperly Undermined the Public Trust Doctrine.

As argued in the second section of this brief, the Law Division improperly found that the MUL preempted the Faulkner referendum statute. This decision was incorrect because the lower court ignored language of the MUL requiring referenda when a municipality seeks to sell its utility to a private entity. It also incorrectly relied on a section of the MUL that is inapplicable to municipal utility sales to private purchasers operating outside of the selling municipalities' boundaries. Finally, it incorrectly found that the mandatory BPU review of such sales evidences the Legislature's intent for this agency's proceedings to preemptively regulate the sale.

Perhaps unbeknownst to the lower court, this decision implicates larger issues than simply the City of Trenton's attempts to reduce its budget deficits.

As detailed in this section, municipal utilities are public trust property. That is, the municipality is the trustee for the public, which is the beneficiary of these assets. Because of the status of this property, the lower court could not simply allow the City Council to devolve its public trust duties by selling the property to American Water without more evidence that the Legislature intended for such sales to be permitted.

In effect, the lower court's decision undermines the age-old Public-Trust-Doctrine principle that only express statutory provisions can authorize the sale of public trust assets. Moreover, for the lower court to ignore the referendum requirement was to treat the property as if the City does not hold it in trust for the public. The decision allows the City's trust duties to devolve to American Water, leaving the public with little recourse to stop it from happening. The citizens must retain the right to review the sale, which directly affects core public trust duties - namely, conserving water resources and ensuring such resources are economically and prudently managed for the benefit of the public.

The fact that municipal utilities are held in trust for the public mandates that the Court not bar Trenton's voters from directly reviewing the sale of the major suburban components of its utility.

***A. In New Jersey, drinking water assets are held in public trust.***

In New Jersey, "[t]he public trust doctrine applies with equal impact upon the control of our drinking water reserves." Mayor & Mun. Council of Clifton v. Passaic Valley Water Comm'n, 224 N.J. Super. 53, 64, 539 A.2d 760, 765 (Law Div. 1987) aff'd and modified, 115 N.J. 126, 557 A.2d 299 (1989). As a result, "[u]ltimate ownership rests in the people and this precious

natural resource is held by the state in trust for the public benefit." Id.

These pronouncements, which have never been questioned by either this Court or the New Jersey Supreme Court, were made by the Law Division in a case addressing an agreement between cities to form the Passaic Valley Water Commission ("the Commission"), and then to distribute this body's surplus proceeds. But the policy behind it is equally applicable to the agreement in this case, in which a municipality seeks to sell utility property to a private corporation. One need no more evidence that the Public Trust Doctrine is implicated than by examining N.J. Stat. Ann. § 40:62-6 (West 2009), which sets how the proceeds of such sales are to be used:

The proceeds from any sale shall be used for the retirement of bonds issued for the purposes of such plant, if any, or in case no such bonds are outstanding, then to the retirement of other bonds of the municipality. If no such bonds are outstanding the proceeds or any balance thereof may be used for the general purposes of the municipality.

Under this statute, then, the New Jersey Legislature requires that the proceeds from the sale of public utility assets go first to pay off the debt incurred from issuing bonds for the utility, before they are spent elsewhere. This is a concept mirroring black-letter trust law, which provides that "[w]hen real property held in trust is sold, the sale results in a mere substitution of assets, with the proceeds being held by the

trustee, with the income payable to the beneficiaries in the same manner as the income from the land, in accordance with the distribution set forth in the trust instrument." 76 Am Jur 2d Trusts § 501 (2008). Likewise, under New Jersey law, if debts are incurred for the public trust property, and the income derived from the property is used to pay off such debts, the proceeds from the sale of this property must also go towards these obligations. This is strong evidence that the Legislature intended the Public Trust Doctrine and common law trust concepts to apply to municipal sales of its utilities.

The policy behind Public Trust Doctrine was explained in N.J. Sports & Exposition Auth. v. McCrane:

The genesis of the public trust doctrine can be gleaned from the opinion by Chief Justice Kirkpatrick in Arnold v. Mundy, 6 N.J.L. 1, 69-78 (Sup. Ct. 1821). There are two types of public property, one "reserved for the necessities of the state, and used for the public benefit" (at 71), the other "common to all the citizens, who take of them and use them, each according to his necessities, and according to the laws which regulate their use and are called common property." Id. This common property consisted of navigable rivers, . . . ports, bays, sea coasts, including the land under the water which could be utilized for "navigation, fishing, fowling, sustenance, and all the other uses of the water and its products (a few things excepted \* \* \*)." Id. at 77. Since by its nature common property did not permit title to vest in the people, the common law "placed it in the hands of the sovereign power, to be held, protected, and regulated for the common use and benefit." Id. at 71. Subsequent to the American Revolution, the sovereign's power vested in the people of each State, to be exercised through their representatives, the Legislature. . . .

The control of the State for the purposes of the trust can never be lost, except as to such parcels as are

used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.

119 N.J. Super. 457, 524-25, 292 A.2d 580, 617-618 (Law Div. 1971) (footnote omitted) (quoting, in block, from Ill. C. R. Co. v. Ill., 146 U.S. 387, 13 S. Ct. 110, 118 (1892)).

As it relates to the control of drinking water assets in New Jersey, the Public Trust Doctrine requires that drinking water be treated as "belong[ing] to, and . . . for the common use of, the public, and those who take it into their possession hold it in trust for the public good." Mayor & Mun. Council of Clifton v. Passaic Valley Water Comm'n, 224 N.J. Super. at 65-66, 539 A.2d at 765.

This entails at the very least three requirements: 1) "Funds derived from the sale of such water are held in trust for the benefit of the public which is being served." Id. 2) "[S]tatutes regulating public water resources must be liberally construed to advance and achieve this underlying beneficent policy." Id. at 65, 539 A.2d at 766 (internal citations and quotation omitted). And, 3) the public entity managing these assets derives its powers strictly from the enabling legislation. Id. at 66, 539 A.2d at 766.

***B. To deny the citizens of their right to evaluate a sale of commonly-owned assets undermines the Public Trust Doctrine, as it allows the City to devolve its duties to a private corporation in a manner that is contrary to express statutory authority.***

To allow the sale of Trenton's city utility to American Water without a referendum would be directly contrary to the Public Trust Doctrine. It would undermine the well-established principle that when "a municipal public utility plant or system is held by the municipal corporation charged with a public trust and that the duty under it cannot be devolved upon another, the municipal corporation cannot, in the absence of express legislative authority, sell such plant or system." Am Jur 2d Municipal Corp., Counties, Other Political Subdivision § 529 (2008) (emphasis added).

Here, the express authority detailing the manner in which Trenton is supposed to sell the suburban components of its water utility is embodied in N.J. Stat. Ann. § 40:62-3 (West 2009), which requires that the city initiate a referendum before such sales. As discussed in Section II of this brief, the City of Trenton did not abide by these express provisions. Rather it sought to avoid these requirements by asking the Law Division to sanction its behavior through implication, saying that, because N.J. Stat. Ann. § 40:62-3.1 did not require the City to run a referendum, it also must, by implication, bar the citizens from proposing such a referendum under the Faulkner Act. Further,

the Law Division found that BPU's review of the sale was enough to implicitly preempt a citizens' referendum. It was inappropriate for the lower court to allow the sale of public trust assets of the citizens of Trenton simply on this basis. *Express* legislative authority is required, and no such authority allows for such a sale without a referendum.

This decision cannot be left solely to the Trenton City Council. The people must have the right to directly participate in the decision to sell off major components of its publicly-owned water system. The property that is being sold is not owned by the incorporated City of Trenton. The municipality is simply the trustee, holding it for its citizen beneficiaries. To allow the municipality to solely exercise these trust duties would be to devolve the trust to the advocates of the sale, potentially at the expense of the public. See Mayor & Mun. Council of Clifton v. Passaic Valley Water Comm'n, 224 N.J. Super. at 67, 539 A.2d at 767. (finding that public entities that are the trustees of water resources "are created for the purpose of all the people they serve and not the governmental bodies that create or own them.")

If the public opposes the sale but is barred from voting against it via referendum, the public's only other recourse would be to elect different council members in the general election. At this point - after the sale - ownership of the

property will likely have passed, subject to acquisition only through condemnation proceedings.

The absolute sale of municipal utility property is not like a proposal to enter service contract for the water system, which as discussed below, the Court has allowed to be secured by cities without referendum. With such service contracts, the municipality always retains control over the property and has tools to ensure it is operating this property for the benefit of the public. For example, the city maintains the right to renegotiate the contract, N.J. Stat. Ann. § 58:26-15 (West 2009), and contracts are limited to 40 years. N.J. Stat. Ann. § 58:26-4 (West 2009)

The public's right and duty to review the terms of the sale of Trenton's public-trust assets are not something that the Law Division should have easily dismissed. The implications of Trenton's sale are greater than simply the City's attempts to balance its budget. The sale constitutes 60% of the City's total utility revenue. This means that Trenton Water Works will no longer generate \$25 million dollars in revenue after the sale. As the Appellant protests, it is unclear how Trenton Water Works could continue to sustain its operating budget after the sale, since it will have an operating deficit of over \$7 million. In the face of this deficit, Trenton's citizens are concerned that the only way that the city will be able to

continue operating the remaining publicly-owned property is through an increase in rates or the potential reduction of services. These issues are at the heart of public trust duties to conserve water resources and to ensure such resources are economically and prudently managed for the benefit of the public. Mayor & Mun. Council of Clifton v. Passaic Valley Water Comm'n, 224 N.J. Super. at 65, 539 A.2d at 766. The public has the right, nary the duty, to evaluate whether Trenton's sale of its common property will have the benefits the City proponents proclaim.

Moreover, the City has admitted that a portion of the proceeds from the sale will go to the city's FY 2009 budget, and the citizens have always feared that proceeds from the sale will go towards operating expenses rather than retired bond indebtedness or replacing other capital assets. As mentioned above, compliance with N.J. Stat. Ann. § 40:62-6, too, is a primary obligation correlative to the management of public trust assets. The Law Division citizens should not have divested the citizens from their review of this obligation. Just as the court said in Mayor & Mun. Council of Clifton v. Passaic Valley Water Comm'n, 224 N.J. Super. at 66, 539 A.2d at 766, when it found that the public Commission could not operate to distribute its profits and surpluses to the forming cities, the City in this case must operate for the benefit of the public it serves

and not for the purpose of collecting moneys "for distribution to the owner cities as subsidies for their tax rates." Id. Given that no express statutory authority allows Trenton to sell its municipal utility property - property held in trust for the public - without a referendum, such a sale must not be allowed under the Public Trust Doctrine. Given the stakes of selling such common property in this case, the approval of such a sale must not be devolved to American Water without the approval of the citizens.

***C. It is not uncommon in other jurisdictions for sales of such public-trust assets to be subject to direct voter review.***

It is worth noting that, when facing difficult decisions regarding if and when to sell water utilities held in public trust, states and municipalities around the country have regularly turned to voters to ensure that consent for the sale is directly granted by the people.

For example, the municipal charter cited in the Clark v. City of S. Haven, 153 N.W.2d 669, 670-71 (Mich. Ct. App. 1967), provided in part that:

Unless approved by the affirmative vote of three-fifths of the electors voting thereon at a regular or special election, the city shall not sell, exchange, lease or in any way dispose of any property, easement, equipment, privilege or asset belonging to and appertaining to any municipally owned public utility which is needed to continue operating such utility. All contracts, negotiations, licenses, grants, leases or other forms of transfer in violation of this section shall be void and of no effect as against the city.

The court in that case upheld the citizens right to referendum to review the municipality's purchase of power from a utility company that rendered its own plant and distribution system useless, unavailable, and inoperative a major community asset. Id. at 671.

As another example, Wisconsin law expressly provides that prior to a city consummating a proposed agreement to lease its own public utility, the "proposal shall be submitted to the electors of the municipality[,]” to be determined by a majority. Wis. Stat. § 66.0817(4) (2008). The Supreme Court eloquently stated in Wis. Gas & Elec. Co. v. Ft. Atkinson:

. . . [Q]uestions of general policy or the respective merits of private as opposed to municipal ownership . . . [are] a matter of public policy and a political question. The legislature has specifically provided that the determination of that issue shall rest with the electorate. . . . If the electorate is of the opinion that the best interests of the municipality and the residents thereof will not be served, it may say so. It may be opposed to a privately-owned public utility and it may veto the sale for that reason.

193 Wis. 232, 250-51, 213 N.W. 873, 880 (WI 1927).

Iowa law also provides that sales of city utilities require approval by the voter:

The proposal of a city to establish, acquire, lease, or dispose of a city utility, except a sanitary sewage or storm water drainage system, in order to undertake or to discontinue the operation of the city utility, or the proposal to establish or dissolve a combined utility system, or the proposal to establish or discontinue a utility board, is subject to the approval of the voters of

the city, except that a board may be discontinued by resolution of the council when the city utility, city utilities, or combined utility system it administers is disposed of or leased for a period of over five years.

Iowa Code § 388.2 (2008).

New Mexico also provides for referenda approval of municipal water utility sales. N.M. Stat. Ann. § 3-54-1 (2008). So does Oklahoma. 11 Okl. Stat. § 35-203 (2009). As another example, the Missouri statutes have at least two provisions allowing direct citizen review of the sale of municipal utilities, depending on the size of the city:

In case a proposition is made by the person, firm or corporation owning the plant in the city for the sale thereof under sections 91.090 to 91.300, and in case the city council fails or neglects to submit said proposition as herein provided, then upon the filing with the city clerk of said city a petition signed by one hundred taxpaying citizens of the city, requesting the submission of such proposition, as above provided, it shall be the duty of the city council and the mayor of such city to duly enact an ordinance submitting the said proposition to the voters of said city, as herein provided;

Mo. Rev. Stat. § 91.140 (2009); and

Before any city of the third class shall sell or dispose of, in any way, or abandon or cease to operate any electric light plant, waterworks plant, gas plant, street railway or any other public utility which may be owned by it, it shall first submit the proposition for such sale or disposition or abandonment or ceasing to operate, by ordinance, to the voters of said city and it shall require a majority of the votes cast to be in favor of the proposition before any authority shall exist for such sale, disposition, abandonment or ceasing to operate.

Mo. Rev. Stat. § 91.550 (2009).

Further, third class cities in Kansas must subject sales of

municipal works to referendum. Kan. Stat. Ann. § 15-809 (2008).

The State of Washington also provides the voters the right to directly review water districts' sales of utilities to private companies:

(1) A district may sell and convey, lease, or otherwise dispose of all or any part of its works, plants, systems, utilities and properties, after proceedings and approval by the voters of the district, as provided for the lease or disposition of like properties and facilities owned by cities and towns. The affirmative vote of three-fifths of the voters voting at an election on the question of approval of a proposed sale, shall be necessary to authorize such a sale.

(2) A district may, without the approval of the voters, sell, convey, lease, or otherwise dispose of all or any part of the property owned by it that is

(a) Outside its boundaries, to another public utility district, city, town or other municipal corporation; or

(b) Within or without its boundaries, which has become unserviceable, inadequate, obsolete, worn out or unfit to be used in the operations of the system and which is no longer necessary, material to, and useful in such operations, to any person or public.

Rev. Code Wash. § 54.16.180 (2009).

This list is by no means intended to be exhaustive, nor is *Amicus* insinuating that, because these states or jurisdictions require referenda when municipalities sell their utility property, New Jersey should as well. These simply illustrate that it is not uncommon for states to address the issues of the sales of public-trust utility assets by allowing the people to directly decide the question.

Because New Jersey state law expressly requires the same, the Court should overturn the Law Division and revive the Appellant's protest petition.

**II. The Law Division Improperly Read a Broad New Exception into the Faulkner Act, Denying Municipal Voters Their Right to Review Large Sales of Municipal Water Works to Private Corporations.**

This Court has set a high threshold for a court to find preemption of the Faulkner Act, which is to be liberally-construed to allow referenda. The Law Division in this case did not meet this threshold. It improperly interpreted statutory language to prevent the Committee's protest petition requesting direct citizen review of the sale of its utility property. The plain language of the statute and its history indicate that the section to which the Appellee and Appellee-Intervenor cite for preemption does not apply to Trenton's sale because the purchaser American Water will operate the water works outside of Trenton's boundaries.

The lower court also found implied preemption based on the thinnest of reeds, relying on language of the statute requiring the BPU to review the terms of sale and ordinance involved. None of this is sufficient to bar the Committee's protest petition, and this Court should overturn the decision and allow the referendum to proceed.

***A. The Law Division's decision failed to meet the high threshold this Court has set for a finding that the Legislature intended to preempt the citizens' right to referendum under a liberally-construed Faulkner Act.***

*Amicus* need not spend much of this brief discussing the Faulkner Act, as this Court wrestled with its applicability in the recent case of City of Ocean City v. Somerville, 403 N.J. Super. 345, 958 A.2d 465 (App. Div. 2008). In the present case, the Law Division did not apply the lessons from this recent decision and that of the Supreme Court in In re Ordinance 04-75, 192 N.J. 446, 931 A.2d 595 (2007), as the lower court believed it was proper to read an exception into the Faulkner Act without a finding of the smallest scintilla of legislative intent.

The Law Division's decision misunderstands the true nature of the Act. As enacted, the referendum statute "mandates that 'any ordinance,' is subject to referendum unless, of course, a statutory exception applies." City of Ocean City v. Somerville, 403 N.J. Super. at 354, 958 A.2d at 470 (citing In re Ordinance 04-75, 192 N.J. at 461-62, 931 A.2d 595). And "'any ordinance' means 'all ordinances . . .'" City of Ocean City v. Somerville, 403 N.J. Super. at 357, 958 A.2d at 473 (quoting In re Ordinance 04-75, 192 N.J. at 454, 460-61, 931 A.2d 595).

This Court in City of Ocean City v. Somerville recently indicated that the power of referendum is not without limits, however, such as when the power to pass the underlying ordinance

is outside the municipality's authority, or when limitations are found in express or implied legislative mandates. 403 N.J. Super. at 360, 958 A.2d at 474. This decision, however, did not undermine the proposition relayed by the Supreme Court in In re Ordinance 04-75 a year previously: "The 'power of referendum' is a check on the exercise of local legislative power, fostering citizen involvement in the political affairs of the community." 192 N.J. at 459, 931 A.2d at 602. And that, as such, "[t]he right of initiative and referendum is to 'be liberally construed . . . to promote, where appropriate, its beneficial effects.'" City of Ocean City v. Somerville, 403 N.J. Super. at 358, 958 A.2d at 473 (quoting Retz v. Mayor & Council of Saddle Brook, 69 N.J. 563, 571, 355 A.2d 189 (1976)).

Moreover, the City of Ocean City v. Somerville decision set a high bar for finding that the Legislature implicitly intended Faulkner-Act preemption in a post-In re Ordinance 04-75 world. At issue in that case was an initiative-proposed ordinance imposing a cost-of-living cap on budgeted municipal expenditures. The Court found that the ordinance was exempted from the Faulkner Act's initiative process because the municipal budgets were expressly exempted by statute and the ordinance unlawfully operated as a restraint on all future governing body action. Perhaps more importantly, the Court conducted an exhaustive survey of the powers given to cities and citizens

under numerous state statutes relating to municipal budgets. This review prompted the Court to conclude that to allow an initiative on these matters would run afoul of State authority. The Court found that the legislature's vesting of ultimate power over fiscal and budgetary matters in the governing bodies of municipalities was laid out in comprehensive and detailed procedures by which such authorities carry out budgeting, incurring debt, and fixing salaries.

In the present case, on the other hand, the Law Division strained to read N.J. Stat. Ann. § 40:62-3.1 to apply to the City of Trenton's sale of its utility. This was the basis for the court's conclusion that the Legislature expressly preempted the Faulkner Act. And it relied on the fact that the BPU would review the sale as the grounds for its determination that the referendum ordinance was implicitly preempted. This falls far short of the threshold this Court set in City of Ocean City v. Somerville: that the limitation of the right to referendum must be found in a clear express mandate or a comprehensive regulation of the field that leaves no room for an inference otherwise. Id. at 371-72, 958 A.2d at 480-81.

Given the Law Division's limited findings, a liberally-construed Faulkner Act requires the lower court's decision be over-turned and the citizens' right to referendum be restored.

***B. The citizens' right to referendum is not barred when a city sells components of its water utility to a private corporation to operate outside of its municipal boundaries; direct democracy is required for such sales.***

If this case came to the Court before N.J. Stat. Ann. § 40:62-3.1 was enacted in 1981, there would be little grounds to challenge the Committee's petition. Any questions would be answered by examining N.J. Stat. Ann. § 40:62-3, which states that when any municipality that owns a water plant or public system seeks to sell or lease such plant or system to a private company, the municipality shall put the sale to a referendum as described in N.J. Stat. Ann. §§ 40:62-4 to -5 (West 2009).

Before 1981, it would strain all credulity for the City to argue that the citizens' right to referendum under the Faulkner Act was preempted by a mandatory referendum process that the City failed to follow.

After all, in its response brief, the City relies on Faulkner Act, N.J. Stat. Ann. § 40:69A-185 as proof that the legislature intended the MUL to be preemptive. Brief of Respondent City of Trenton in Opposition to the Appeal Filed by the Committee of Petitioners, Db18. But this section of the Faulkner Act also states that for another statutory referenda process to supersede that of the Faulkner Act, the ordinance that is subject to referendum must be one that "by law cannot become effective in the municipality unless submitted to the

voters.” Thus, for N.J. Stat. Ann. § 40:62-3, alone, to preempt the Faulkner Act, Trenton’s ordinance approving the sale would be void by operation of law unless it was submitted to the voters. While it might be the case that the city’s ordinance is a nullity because the City failed to comply with the referendum requirement of N.J. Stat. Ann. § 40:62-3, the City surely would not advance this argument.

Instead, the Appellee and Appellee-Intervenor desperately cling to N.J. Stat. Ann. § 40:62-3.1, arguing that this section not only exempts the mandatory referendum process required by N.J. Stat. Ann. § 40:62-3, but also the citizens’ referendum process under the Faulkner Act.

*Amicus* finds and focuses upon three discrete errors that the Law Division made in finding that N.J. Stat. Ann. § 40:62-3.1 preempts the Faulkner Act. First, the statute by its plain terms does not apply to a city selling its water works to a corporation outside of its municipal boundaries. Second, the legislative history of this section supports *Amicus*’s reading. Finally, the Law Division erred in finding that the BPU engages in the comprehensive regulation of the sales of municipal utilities to private entities, analogous to the BPU’s supervision of a public entity’s contract with private companies for its water services. With the latter, the legislature requires far more BPU oversight from which preemption might be

inferred. When a municipality is selling its utility property, on the other hand, BPU supervision is far more circumscribed. Therefore, BPU review is not reason enough to find that the Faulkner Act is implicitly preempted.

Given these errors, this Court should overturn the Law Division's decision and return the right of municipal referenda to the people.

*1. The lower court found an exception to the right of referendum where none exists; N.J. Stat. Ann. § 40:62-3.1 does not apply to sales such as the one in Trenton, as this section's plain language limits it to sales of water systems to those who will operate within the selling municipality.*

The Law Division found N.J. Stat. Ann. § 40:62-3.1 preempts the Citizens' Committee's referendum. This section states:

If the governing body of any municipality shall deem it advisable in the interests of public health and safety to transfer a municipal water utility system serving less than 5% of the population of that municipality, to any person or another municipality or any authority, commission or other public body, the transfer shall be authorized by ordinance and may be made upon such terms as the ordinance shall provide, and the provisions of R.S. 40:62-4 and R.S. 40:62-5 shall not apply thereto. The terms of such sale and the ordinance authorizing same shall be subject to review by the Board of Public Utilities and shall provide that the purchaser shall have the privilege to operate the system within the area of the municipality covered.

Much of the debate before the Law Division surrounded whether the suburban components that the City of Trenton is looking to sell constitute a "water utility system."

But even assuming *arguendo* that what is being sold by Trenton, the so-called "Outer Water Utility System," ("OWUS") constitutes a separate water system serving less than 5% of Trenton municipal population, N.J. Stat. Ann. § 40:62-3.1 still does not apply to this sale. The plain language of the last sentence of this section indicates that the ordinance (and terms of sales) that the selling municipality is required to pass must provide "the purchaser . . . the privilege to operate the system within the area of the municipality covered." N.J. Stat. Ann. § 40:62-3.1. This limiting language, by its very terms, indicates that for this section to apply, 1) the purchaser must receive a privilege to operate the system by the selling municipality's ordinance, and 2) this privilege is to operate the system within an area covered by the selling municipality's ordinance.

With the Trenton sale, the "OWUS" does not operate within the area of municipality covered by Trenton's ordinance. Rather, it operates completely outside the municipality, in the surrounding Townships of the Ewing, Hamilton, Hopewell, and Lawrence. Thus, N.J. Stat. Ann. § 40:62-3.1 cannot apply to Trenton's sale of its water works.

The Law Division completely avoids this issue by mischaracterizing N.J. Stat. Ann. § 40:62-3.1 as applying to "private sale[s] serving less than 5 percent of the relevant population." In Re Petition for Referendum on City of Trenton

Ordinance 09-02, MER-L-548-09, Slip Op. at 14-15 (March 16, 2009). This reads out of the statute the limiting language and abandons the long-standing rule of statutory construction that a court "should try to give effect to every word of the statute, . . . should not assume that the Legislature used meaningless language[,] and [should] not construe the statute to render part of it superfluous." Med. Soc. of N.J. v. N.J. Dep't of Law & Pub. Safety, 120 N.J. 18, 26-27, 575 A.2d 1348, 1353 (1990) (internal citations omitted).

Instead of adhering to the statute's language, the Law Division tries to bolster its reading by relying on two BPU cases, In the Matter of Petition of New Jersey American Water I, BPU Docket No. WM99010018 (Dec. 7, 1999), and II, BPU Docket No. WM06090677, 2007 N.J. PUC LEXIS 121 (Sept. 13, 2007) ("Seaside Heights I and II," respectively). In Re Petition for Referendum on City of Trenton Ordinance 09-02, Slip Op. at 18.

But in these proceedings, the BPU also ignored the limiting language of the last sentence of N.J. Stat. Ann. § 40:62-3.1. In Seaside Heights I, the BPU failed to mention the limiting language altogether. In Seaside Heights II, the BPU simply misstated the law, saying that "[t]he terms of the sale and the ordinance authorizing same shall be subject to review by the Board and shall provide that the purchaser shall have the

privilege to operate the system." BPU Docket No. WM060906772007, at 2, 2007 N.J. PUC LEXIS 121, 3.

These BPU decisions should be afforded little deference. The BPU is not the agency charged with enforcing N.J. Stat. Ann. § 40:62-3.1. It is the duty of the City itself. So, the BPU's interpretations should not be given the usual deference afforded to agencies charged with enforcing statutes. Moreover, it has long been held in New Jersey, "that if an agency's statutory interpretation is contrary to the statutory language, or if the agency's interpretation undermines the Legislature's intent, no deference is required . . . . Clear legislative intent cannot be trumped by countervailing administrative practices." N.J. Tpk. Auth. v. AFSCME, Council 73, 150 N.J. 331, 351, 696 A.2d 585, 595 (1997) (internal citations omitted).

The Appellee and Appellee-Intervenor do not ignore the limiting language in the statute. Rather, the City in its Response Brief before the Law Division strangely argued that the city complied with this section of the statute through BPU review:

That is precisely what the BPU review concerned itself with - NJAWC's "franchise" to operate the OWUS, much in the fashion that the City of Trenton had operated its franchise of the OWUS in the townships.

Letter Response Brief of City, March 13, 2009, at 9 (MER-L-548-09). The Appellee-Intervenor likewise attempted to address this

issue in its reply brief by arguing that that BPU review accomplishes the statute's requirements, saying that N.J. Stat. Ann. § 40:62-3.1 requires that "the BPU 'shall' review the transaction and shall provide that the purchaser 'shall' have the privilege to operate the system 'within the area of the municipality covered.'" Letter Reply Brief of NJAWC, March 13, 2009 at 3 ((MER-L-548-09)).

This odd interpretation, however, confuses the statute's requirement for BPU review and its mandates for the terms of the sale and the ordinance. A more careful read of the sentence at issue in the section reveals that it involves two major clauses:

[1]The terms of such sale and the ordinance authorizing same shall be subject to review by the Board of Public Utilities [2] and shall provide that the purchaser shall have the privilege to operate the system within the area of the municipality covered.

The first clause does not say what the BPU must review, only that the terms of the sale and ordinance shall be subject to such review. The second clause is initiated by an "and," indicating that what is following is not simply a modifier of the first clause. It does not exist to provide more detail about BPU's review. Rather, this clause is an additional requirement placed on the subject of the first clause, "the terms of the sale and ordinance" - that they shall grant the purchaser the privilege to operate within the area of the municipality that they cover. Cf. Polaroid Corp. v. Offerman,

507 S.E.2d 284, 290-91 (N.C. 1998) (finding that when the subject of the sentence is defined by two independent clauses, each with its own verb and subsequent definitional language, the statute cannot be construed in a manner so that the second clause simply modifies the first).

The Appellee and Appellee-Intervenor's reading of the statute, however, reads out the "and" in the statute, turning this second clause into simply a modifier elaborating on the first. In other words, the Appellee and Appellee-Intervenor's reading of the statute is: "The terms of such sale and the ordinance authorizing same shall be subject to review by the Board of Public Utilities ~~and~~ [which] shall provide that the purchaser shall have the privilege to operate the system within the area of the municipality covered." This twisted reading completely and improperly ignores the actual words of the statute.

Moreover, this reading turns the BPU or BPU review into the subject of the second clause, rendering it completely nonsensical, as it is unclear how the "BPU" or "BPU review" is able to "provide that the purchaser shall have the privilege to operate a water system within the area of the municipality covered." The BPU may be authorized to review and approve a sale and ordinance granting the transfer of franchises. It has no authority to actually provide the franchises themselves. In

re Petition of S. Lakewood Water Co., 61 N.J. 230, 240, 294 A.2d 13, 18 (1972) ("There is no express provision in the general utilities law, nor, so far as we have been able to ascertain, in the chapters dealing with particular utilities, empowering the Board to grant a franchise in the first instance.")

Under the proper reading of the statute, the ordinance and terms of sale must grant the privilege to the purchaser to operate the system within the area of the municipality that they cover. Further, since it is the selling city's ordinance (in addition to the terms of the sale) that bestow the privilege to the purchaser to operate the system being sold, it makes no sense for it to give a privilege or franchise to a private entity to operate in a different municipality altogether. Cf. id. at 249, 294 A.2d at 23 (finding that the enabling statute for municipal water authorities confers a legislative franchise to furnish water and sewer service, "exclusive except with its consent, to the municipal area specified in the creating ordinance.") Rather, the privilege that is bestowed by the city ordinance can only operate within the city bestowing the privilege.

If pressed, it would not be surprising if the Appellee and Appellee-Intervenor seek to advance a new reading at oral arguments. They might concede that the subject of the second clause is "the terms of sale and the ordinance," but argue that

the "ordinance" granting the privilege can include the consent ordinances of the surrounding municipalities. But N.J. Stat. Ann. § 40:62-3.1 covers the selling municipality, and therefore its reference to the "ordinance" can only mean the ordinance passed by this municipality. Other parts of the code, such as N.J. Stat. Ann. § 48:19-17 (West 2009), entail the consent provisions relating to the municipalities in which the purchasers are to operate. Without any legislative text to indicate otherwise, these sections of the code cannot be cross-referenced-by-shoehorn simply to achieve the Appellee and Appellee-Intervenor's desired outcome in this case.

Again, the better, more commonsensical, and plain-language reading of the statute is that N.J. Stat. Ann. § 40:62-3.1 has limited applicability to those sales where the selling municipality's ordinance grants the privilege to the purchasing entity to operate within the area of the selling municipality. And, as discussed below, this reading is supported by the history of the passage of N.J. Stat. Ann. § 40:62-3.1.

Because the plain-language reading of N.J. Stat. Ann. § 40:62-3.1 indicates that it does not apply to municipal water system sales such as the one in Trenton, prior inconsistent BPU decisions must not be entitled to deference, and the Law Division's decision must be overturned.

*2. The legislative history of N.J. Stat. Ann. § 40:62-3.1 indicates that it only applies when the to-be-sold water system operates within the selling municipality.*

While it is true that when a statute's language is clear and unambiguous, the Court "need delve no deeper than the act's literal terms to divine the Legislature's intent," State v. Smith, 197 N.J. 325, 333, 963 A.2d 281, 286 (2009) (internal quotations and citations omitted), the legislative history of N.J. Stat. Ann. § 40:62-3.1 is instructive towards clarifying the legislative intent in passing the statute.

The section was added in 1981 in response to a situation in the Township of Woodbridge, which had the small water system of Keasbey within it. Woodbridge sought to sell Keasbey's water system to Middlesex Water System, but wished to avoid the referendum process. Senator Weiss introduced S. 1565, the predecessor of N.J. Stat. Ann. § 40:62-3.1, to allow the sale without referendum.

In a conditional-support letter to the Senate, then-Governor Byrne said that while he generally supported the bill, he recognized the possibility of abuse if such sales are allowed without referenda, notwithstanding the small size of the sale. The best read of this letter is that that in order to foreclose "any possibility of abuse," Governor Byrne demanded two

conditions for his support of the bill. First, he conditioned his approval on BPU approval of the terms of the sale. Second, he introduced language to ensure that the terms of any such sale did not become larger than the limited circumstances for bypassing the referendum process. So, he proposed limiting language, which was adopted, to ensure that the grant of the operating franchise, accomplished through the terms of sale and ordinance, only provided the purchaser, "the privilege to operate the system within the area of the municipality covered," and no more. See Petitioner's Letter Brief in Response to Order to Show Cause, March 11, 2009. Aff. of James Manahan, Ex. C (MER-L-548-09).

This legislative history makes clear that it was the Legislature's intent for N.J. Stat. Ann. § 40:62-3.1 to only allow a sale without a referendum when the ordinance authorizing it also grants the privilege to the purchaser to operate within the selling city. Such ordinances must not, as Trenton's does, provide the private corporation the privilege to operate the system within different municipalities altogether.

Because the legislative history of N.J. Stat. Ann. § 40:62-3.1 makes it clear that it does not apply to the Trenton sale, this section must be disregarded and the citizens' right to referendum cannot be preempted by the statute.

3. *Sales of municipal utilities are not covered by comprehensive state regulation so as to imply preemption under the Faulkner Act.*

The Law Division also erred in finding that there was implied preemption based on the fact that the BPU review of a sale of utilities serving less than 5% of the population "is a better process than a referendum." In Re Petition for Referendum on City of Trenton Ordinance 09-02, Slip Op. at 21. Just because the lower court believes that the BPU review process is better than referenda does not mean that the Legislature intended BPU review to preempt the Faulkner Act. To honor such predilections is to disregard the Supreme Court's admonition that a court shall not "write judicial qualifications into the referendum statute that limit voters' right to participatory government." In re Ordinance 04-75, 192 N.J. at 470, 931 A.2d at 608-609.

The Law Division in the instant case found support for its implied preemption argument by comparing BPU's review of water utility sales to that agency's review of municipality contracts for long-term supply of water services under the Water Supply Act. With this latter law, the Court in We the People Comm. v. City of Elizabeth, 325 N.J. Super. 329, 739 A.2d 430 (App. Div.

1999), found that the agency's detailed proceedings preempted the Faulkner Act.

But the regulatory proceedings involved in reviewing such a contract are far more detailed than those involved in the BPU's review of the municipality's sale of its water utility in the present case. The We the People Comm. v. City of Elizabeth Court found it compelling that the Water Supply Act provides an "elaborate and detailed set of procedures a public entity must follow in order to privatize its water supply system." 325 N.J. Super. at 333, 739 A.2d at 432 (internal quotation omitted). The Court found at least ten procedures related to BPU review of such transactions that were relevant to its conclusion:

- Public notice of its intent to enter into a privatization agreement; N.J. Stat. Ann. § 58:26-23a;
- A specification of the type of services desired; N.J. Stat. Ann. § 58:26-23b;
- A review and evaluation process respecting the proposals that are submitted; N.J. Stat. Ann. § 58:26-23c (2009);
- A written statement of the reasons for selecting a particular qualified proposal to be made available to the public along with the proposed contract; N.J. Stat. Ann. § 58:26-23d;
- A public hearing at which the local government unit is to explain the terms and conditions of the proposed contract

and answer questions raised by prospective consumers and other interested parties; N.J. Stat. Ann. § 58:26-24c;

- A verbatim record of the public hearing kept open for a period of seven days to allow interested parties to submit written statements; N.J. Stat. Ann. § 58:26-24d;
- A written hearing report, by the public entity consisting of the proposed contract, the statement of reasons for selecting a particular proposal, the stenographic record of the public hearing, the written statements submitted, and a statement summarizing the major issues raised, and the local government unit's responses' to those questions; id.;
- A review of the contract by the Local Finance Board, to determine whether: (1) the terms of the contract materially impair the ability of the public entity to pay principal and interest due on its outstanding indebtedness and to supply other essential public improvements and services, (2) a concession fee or other monetary benefit has been paid to the municipality and, if so, whether the purpose of such concession or monetary benefit is to reduce property taxes, and (3) the contract contains the terms prescribed by law; N.J. Stat. Ann. § 58:26-25d;
- A review by the Department of Environmental Protection (DEP), under which the DEP may provide comments respecting the proposal, and must enforce applicable standards as to

water supply and water quality; N.J. Stat. Ann. § 58:26-24f; and

- A BPU review determining whether: (1) the private firm entering into the contract has the financial capacity and technical and administrative experience to ensure continuity of service, (2) the terms of the contract are reasonable, (3) the franchise customers are protected, and (4) the agreement contains all of the contractual terms required by law. N.J. Stat. Ann. § 58:26-25c.

We the People Comm. v. City of Elizabeth, 325 N.J. Super. at 333-36, 739 A.2d at 432-33.

On the other hand, when a municipality proposes to *sell* its property as it did in the present case, the statute does not require such proceedings. All that is required under N.J. Stat. Ann. § 40:62-3.1 is for BPU to review of the terms of sales and the ordinance authorizing the sale. This is far less prescriptive than the BPU review under the Water Supply Law. And this is a lot less than what this Court said was necessary for a finding of preemption in City of Ocean City v. Somerville: that the legislature's comprehensive regulation of the field "leaves no room for an inference that it has ceded any more authority to a municipality's governing body or its voters than its enactments expressly or necessarily provide." 403 N.J.

Super. at 372, 958 A.2d at 481. Therefore, simple BPU review is not reason enough to find that the Faulkner Act is preempted.

In sum, because the language and legislative history of N.J. Stat. Ann. § 40:62-3.1 make clear that the statute is inapplicable to a municipality's sale of its water utilities outside of the selling municipality's boundaries, and because the legislature has not spelled out an elaborate and detailed set of procedures that a municipality must follow in selling its water systems, the Law Division's decision was plainly in error. And the people's referendum to review the sale must proceed.

### **Conclusion**

In sum, the Law Division barred the Committee's protest petition because it erred in interpreting statutory language it believed applied to the sale at issue and believed expressly preempted the Faulkner Act. The court improperly relied on BPU review of the ordinance at issue as evidence of implied preemption. Because these findings directly undermine the required narrow interpretation of the Faulkner Act to allow referenda, and undercut the Public Trust Doctrine, which requires that the sale of municipal utilities be only allowed in the manner expressly required by statutory authority, this Court should reverse the Law Division's decision and allow the citizens' referendum to proceed.

Respectfully Submitted,

FOOD & WATER WATCH, INC.

By:

Date: September 11, 2009

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