

X	:	SUPERIOR COURT OF NEW JERSEY
STEVEN FENICHEL, GEORGINA	:	APPELLATE DIVISION
SHANLEY, MARIE TOMLINSON,	:	CAPE MAY COUNTY
BRIAN H. ARNETT, ALLEN	:	Docket No. A -005933-06T1
LOVEKIN, JANE MCCARTHY, JAMES	:	
F. MCCARTHY, PETER J. GUINOSSO	:	
and JOSEPH A. SOMERVILLE,	:	
in their capacities as	:	
taxpayers and residents of	:	
the City of Ocean City, New	:	
Jersey,	:	On Appeal From:
Plaintiffs-Appellants	:	Superior Court of New Jersey
	:	Law Division: Cape May County
	:	Docket No. CPM-L-000548-06
--vs.--	:	
	:	
THE CITY OF OCEAN CITY, a	:	
municipal corporation of the	:	
State of New Jersey and	:	Sat Below:
THE CITY COUNCIL of the CITY	:	Hon. Joseph C. Visalli,
OCEAN CITY,	:	J.S.C.
Defendant-Third Party	:	
Plaintiff-Respondent	:	
	:	
--vs.--	:	
	:	
STATE OF NEW JERSEY,	:	
DEPARTMENT OF COMMUNITY	:	
AFFAIRS	:	
Third Party Defendant-	:	
Respondent	:	
X	:	

SUPPLEMENTAL BRIEF FOR PLAINTIFFS-APPELLANTS
STEVEN FENICHEL, GEORGINA SHANLEY, MARIE TOMLINSON, BRIAN H.
ARNETT, ALLEN LOVEKIN, JANE MCCARTHY, JAMES F. MCCARTHY, PETER
J. GUINOSSO and JOSEPH A. SOMERVILLE

Ira Karasick, Esq.*
460 Bloomfield Avenue
Montclair, NJ 07042
(973) 509-1616
**Counsel of Record*

*Attorneys for Plaintiffs-
Appellants*

Paul S. Ryan**
THE CAMPAIGN LEGAL CENTER
1640 Rhode Island Avenue NW
Suite 650
Washington, DC 20036
(202) 736-2200
** *Admitted Pro Hac Vice*

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PRELIMINARY STATEMENT

Plaintiffs-appellants (hereinafter "plaintiffs"), in their capacities as taxpayers and residents of the City of Ocean City, New Jersey, sought a declaratory judgment from the court below that the City of Ocean City (hereinafter "City") has the legal authority to adopt the proposed public campaign financing ordinance at issue in this case, entitled: "The Fair and Clean Public Financing of Elections Ordinance of 2006" (hereinafter "proposed Ordinance").

At oral argument on November 6 the Court requested supplemental briefing on the question of whether an opinion in this case would constitute an impermissible advisory opinion by the Court, or a permissible judgment on the legality of the Ordinance at issue in this case under the State's Declaratory Judgments Act. See N.J.S.A. 2A:16-50 et seq.

The New Jersey Supreme Court has made clear that the Declaratory Judgments Act is to be liberally construed and administered, and that declaratory relief is appropriate when there is an actual dispute between parties who have a sufficient stake in the outcome. The City at oral argument concurred with our assertion that declaratory relief is appropriate in the present matter. Further, there exists no uncertainty with respect to the facts or legal issues in the present case. The Court has before it a specific ordinance—the legality of which

under the State's "home rule" doctrine has been fully briefed and argued by the plaintiffs, the City and the State. Substantial taxpayer and private resources have been expended by all parties involved, as well as by the courts of New Jersey, in this litigation to date.

In the event this Court decides not to issue declaratory relief, these costs will be compounded by the necessity to re-litigate the same exact issues by the same exact parties in the coming years through efforts by plaintiffs to place the ordinance before the voters of Ocean City—efforts that will undoubtedly be opposed by the City Solicitor once again.

For these reasons, as detailed below, it is in the interests of the parties, the courts and the taxpayers of the State of New Jersey for this Court to grant the requested declaratory relief.

ARGUMENT

I. DECLARATORY RELIEF IS APPROPRIATE IN THE INSTANT CASE BECAUSE THERE IS AN ACTUAL DISPUTE BETWEEN THE PARTIES AND THE PARTIES HAVE A SUFFICIENT STAKE IN THE OUTCOME.

The Declaratory Judgments Act makes clear that "[i]ts purpose is to settle and afford relieve from uncertainty and insecurity with respect to rights, status and other legal relations. It shall be liberally construed and administered . . ." N.J.S.A. 2A:16-51 (emphasis added).

The New Jersey Supreme Court has explained the scope and purposes of the Declaratory Judgments Act as follows:

We will not render advisory opinions or function in the abstract, Crescent Park Tenants Ass'n v. Realty Equities Corp. of New York, 58 N.J. 98, 107 (1971); Friedland v. State, 149 N.J. Super. 483, 495 (Law Div. 1977). Nor will we decide a case based on facts which are undeveloped or uncertain, Burlington Tp. v. Middle Dep't Inspection Agency, Inc., 175 N.J. Super. 624, 627 (Law Div. 1980).

However, we will render declaratory relief when there is an actual dispute between parties who have a sufficient stake in the outcome, New Jersey Home Builders Ass'n v. Division on Civil Rights, 81 N.J. Super. 243, 251-52 (Ch. Div. 1963), aff'd sub nom. David v. Vesta, 45 N.J. 301 (1965); Friedland v. State, 149 N.J. Super. at 495; Young v. Byrne, 144 N.J. Super. 10, 16 (Law Div. 1976). We have discretion to issue a declaratory judgment when to do so would be just and fair. Burlington Tp. v. Middle Dep't Inspection Agency, 175 N.J. Super. at 628.

The Declaratory Judgment Act, N.J.S.A. 2A:16-50 to -62, is remedial legislation entitled to liberal construction and administration, N.J.S.A. 2A:16-51; Union County Board of Chosen Freeholders v. Union County Park Comm'n, 41 N.J. at 336; Burlington Tp. v. Middle Dep't Inspection Agency, Inc., 175 N.J. Super. at 628. Its purpose is to end uncertainty about the legal rights and duties of the parties to litigation in controversies which have not yet reached the stage at which the parties seek a coercive remedy. Union County Bd. of Chosen Freeholders v. Union County Park Comm'n, 41 N.J. at 336; Hammond v. Doan, 127 N.J. Super. 67, 72 (Law Div. 1974). We have held that a declaratory judgment may be rendered under N.J.S.A. 2A:16-53 when there is an actual controversy between the parties which involves differing views on the meaning of applicable statutory provisions, Union County Bd. of Chosen Freeholders v. Union County Park Comm'n, 41 N.J. at 336; Burlington Tp. v. Middle Dep't Inspection Agency, 175 N.J. Super. at 628; Hammond v. Doan, 127 N.J. Super. at 72.

N.J. Assoc. for Retarded Citizens v. N.J. Dept. of Human Services, 89 N.J. 234, 241-42 (1982) (emphasis added) (parallel citations omitted).

The Superior Court, Chancery Division has summarized the standard under the Declaratory Judgments Act as follows:

Although courts will not render an advisory opinion or function in the abstract, declaratory relief is appropriate when there is an actual dispute between parties and those parties have a sufficient stake in the outcome. Both of those elements are satisfied here and all parties agree that relief under the Declaratory Judgment Act is appropriate. N.J.S.A. 2A:16-50 to 62.

Re/Max of New Jersey, Inc. v. Wausau Insurance Companies, 304 N.J. Super. 59, 64 (Ch. Div. 1997) (emphasis added).

Importantly, the New Jersey Supreme Court has made clear (in the context of the mootness doctrine) that “[u]nlike the federal Constitution, the New Jersey Constitution does not confine the exercise of the judicial power to actual cases and controversies.” DeVesa v. Dorsey, 134 N.J. 420, 428 (1993). Although the Court “refrains from rendering advisory opinions or exercising its jurisdiction in the abstract[,]” in some circumstances New Jersey courts “will entertain a case despite its mootness.” Id. Specifically, New Jersey courts “will entertain a case that has become moot when the issue is of significant importance and is likely to recur.” Id. (emphasis

added) (citing In re Conroy, 98 N.J. 321, 342 (1985); Clark v. Degnan, 83 N.J. 393, 397 (1980)).¹

The present matter—the “home rule” authority of the City of Ocean City to enact a specific proposed public campaign financing ordinance—is suitable for declaratory judgment under New Jersey Supreme Court precedent.

Issuance of a declaratory judgment in the present matter would not constitute an advisory opinion; this Court is not being asked to function in the abstract or based on uncertain facts. See N.J. Assoc. for Retarded Citizens, 89 N.J. at 241. Instead, we respectfully request that this Court examine the specific public financing ordinance at issue in this case, see Pall, and to declare as a matter of law that adoption of the specific ordinance is within the “home rule” authority of the City of Ocean City.

¹ See also In re J.I.S. Indus. Serv. Co. Landfill, 110 N.J. 101, 104 (1988) (“While we ordinarily refuse to examine moot matters due to our reluctance to render legal decisions in the abstract and our desire to conserve judicial resources, we will rule on such matters where they are of substantial importance and are capable of repetition yet evade review.”); Clymer v. Bancorp, 171 N.J. 57, 65-66 (2002) (“The threshold issue, then, is whether this case should be decided in its current posture. To answer that question, we must determine whether the State’s appeal, although technically moot, presents a question that is both important to the public and likely to recur.”); State v. Gartland, 149 N.J. 456, 464-65 (1997) (observing that resolving issues that are both important to the public and likely to recur “is worth the judicial effort.”).

There is an actual dispute between the parties in this case and the parties have a sufficient stake in the outcome of this declaratory judgment action. See N.J. Assoc. for Retarded Citizens, 89 N.J. at 241; see also Re/Max of New Jersey, Inc., 304 N.J. Super. at 64. Plaintiffs worked for years with members of the Ocean City Council crafting the ordinance at issue in this case. But for the opinion of the City Solicitor that enactment of the ordinance is beyond the City's "home rule" authority, the Ordinance would have been voted upon and likely enacted by the City Council. And but for the opinion of the City Solicitor that the ordinance is beyond the City's "home rule" authority, plaintiffs could pursue enactment of the ordinance via ballot initiative if the City Council does not enact the ordinance. Yet the opinion of the City Solicitor precluded a vote on the ordinance by the City Council. Further, the opinion of the City Solicitor would likely prevent any vote on the ordinance by the people of Ocean City via the ballot initiative process—as occurred with the proposed ordinance at issue in City of Ocean City v. Somerville, --- N.J. Super. ---, 2008 WL 4725285 (App. Div. Oct. 10, 2008), a case decided by this Court last month.

In Somerville, this Court issued a declaratory judgment regarding the legality of another ordinance proposed in Ocean City, but not yet voted upon or enacted by the Ocean City

Council or electorate of Ocean City. In Somerville, residents of Ocean City, collected initiative petition signatures to qualify a so-called "taxpayer protection ordinance" for the Ocean City election ballot. Id. at *2-*3. However, upon receipt of the initiative petitions by the City, the City refused to put the proposed ordinance before the City Council for a vote as required by N.J.S.A. 40:69A-190, -191. Instead, believing that the proposed ordinance "was not the proper subject of the initiative process and therefore ultra vires," the "City filed a declaratory judgment action in the Law Division, seeking a determination that the [proposed ordinance was] invalid and should not be placed on the ballot." Somerville, 2008 WL 4725285 at *3. The Ocean City residents proposing the ordinance counterclaimed, seeking a declaration supporting the opposite position that the proposed ordinance was valid. Id.

This Court affirmed the lower court's declaratory judgment issued in the case notwithstanding the fact that the proposed ordinance had never been voted on by the City Council or Ocean City voters, precisely the same circumstances that exist in this case. Id. at *14. See also Sloan v. Lettieri, 171 N.J. Super. 445, 448-49 (Ch. Div. 1979) ("The determination of the validity of an initiative ordinance before it is enacted by the voters is

a proper subject for a declaratory judgment action."); McCrink v. West Orange, 85 N.J. Super. 86, 91 (App. Div. 1974).

Just as this Court in Somerville issued a declaratory judgment regarding whether a proposed ordinance that had not yet been voted on was ultra vires, so too should this Court issue the requested declaratory judgment here. This Court has "discretion to issue a declaratory judgment when to do so would be just and fair." N.J. Assoc. for Retarded Citizens, 89 N.J. at 241. See also Burlington Tp. v. Middle Dep't Inspection Agency, 175 N.J. Super. at 628. Issuance of a declaratory judgment in this matter would undoubtedly be just and fair. The City explicitly agreed at oral argument that issuance of a declaratory judgment in this appeal is proper. There is an actual dispute in this case between parties with a significant stake in the outcome. There is nothing abstract about the present matter—there are no facts undeveloped or uncertain that would render a decision here a mere advisory opinion. Further, this legal "issue is of significant importance and is likely to recur." DeVesa, 134 N.J. at 428 (emphasis added). This legal action is thus ripe for a declaratory judgment.

II. JUDICIAL ECONOMY CONSIDERATIONS WEIGH HEAVILY IN FAVOR OF ISSUANCE OF A DECLARATORY JUDGMENT IN THIS CASE.

This Court's issuance of a declaratory judgment in the present matter is by far the most efficient means of resolving

the legal controversy between all parties in the case. The original complaint was filed in this matter more than two years ago. See Pal. Over the course of two years, significant taxpayer resources have been expended by the State of New Jersey and the City of Ocean City to litigate (including the New Jersey judiciary) and decide this matter. Further, significant private resources have been expended by plaintiffs to litigate this matter. The case has been fully developed and is ripe for decision by this Court. If this Court were to dismiss the case as not suitable for declaratory judgment, tens of thousands of dollars and countless hours will have been wasted.

In addition, if this Court declares the case non-justiciable, it is likely that the exact same issue will again come before this Court in a couple of years (after further litigation below). If this case is dismissed, plaintiffs will have to expend thousands of dollars of personal resources and hundreds of hours of personal time collecting signatures on petitions to qualify the public financing ordinance as a ballot initiative. Upon presentation of those signatures to the Ocean City Council, the City Solicitor will likely again opine that the City lacks authority to enact such an ordinance and plaintiffs will be back in court seeking the same type of declaratory judgment they seek here (and in the identical posture as plaintiffs in the Somerville case, supra). Both

plaintiffs and the City (and likely the State of New Jersey) will then have to spend additional and substantial taxpayer resources seeking the same exact declaratory judgment being sought from this Court today.²

Such a waste of judicial and taxpayer resources would not be in the public interest.

In a few years, all parties presently before this Court will return to re-litigate this same exact issue. What will have changed? Nothing except the price tag of resolving this issue and the ensuing burden to plaintiffs of a delay in obtaining the declaratory judgment they seek.

This Court has "discretion to issue a declaratory judgment when to do so would be just and fair." N.J. Assoc. for Retarded Citizens, 89 N.J. at 241. See also Burlington Tp. v. Middle Dep't Inspection Agency, 175 N.J. Super. at 628. Further, this Court has discretion to decide a legal issue of significant importance likely to recur. See DeVesa, 134 N.J. at 428 (emphasis added). As counsel for Ocean City stated at oral argument, issuing the requested declaratory judgment in this case would not only be just and fair to the parties in this

² The City will also likely file a third party complaint against the State, identical to the one in the present matter, which will, in turn, force the State to spend thousands of taxpayer dollars litigating this matter all over again.

case, it would also best serve the interests of the Court and the parties in efficiency and economy.

CONCLUSION

For the foregoing reasons, issuance of a declaratory judgment in this matter is proper. The judgment of the court below granting the City's and State's Cross-motions for Summary Declaratory Judgment and denying plaintiffs' Motion for Summary Declaratory Judgment should be reversed.

Respectfully submitted.

By: /s/ Ira Karasick
Ira Karasick, Esq.*
460 Bloomfield Avenue
Montclair, NJ 07042
(973) 509-1616
**Counsel of Record*

Paul S. Ryan**
THE CAMPAIGN LEGAL CENTER
1444 Rhode Island Ave. NW,
Suite 650
Washington, DC 20036
(202) 736-2200
*** Admitted Pro Hac Vice*

*Attorneys for Plaintiffs-
Appellants*

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