

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. SOMMERVILLE,	:	
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
--vs.--	:	Docket No. CPM-L-000548-06
	:	
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 REPLY 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

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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").

The issue in this case is whether the City possesses authority under New Jersey law to enact the proposed Ordinance and, in the presence of such authority, whether the ordinance is preempted by State law.

Now, several months after briefing had been completed, the Department of Community Affairs (hereinafter "DCA") argues that the City lacks the home rule authority to enact and implement the proposed Ordinance. Remarkably, as explained herein, the DCA fails to mention in its brief the principal source of the City's authority to enact and implement the proposed Ordinance—let alone explain why the statutory authority relied upon by plaintiffs does not in fact authorize the proposed Ordinance.

Rather the DCA argues that a certain "dedication by rider" provision of the State's Local Budget Law is an insurmountable obstacle to the implementation of the proposed Ordinance. This

argument lacks any legal basis, as demonstrated by the fact that the DCA fails to cite a single provision in the proposed Ordinance that would conceivably invoke the State law "dedication by rider" provision. Whereas the State law "dedication by rider" provision regulates a city's budgetary reliance on funds not yet in the city's possession and not subject to a reasonably accurate estimate at the time the budget is approved, the proposed Ordinance relies on an annual appropriation from the City's general fund—an appropriation of funds already in the City's possession. The State law "dedication by rider" provision simply is not applicable to the proposed Ordinance.

As explained in our BRIEF FOR PLAINTIFFS/APPELLANTS filed October 24, 2007 (hereinafter "PLAINTIFFS' OPENING BRIEF") and for the reasons set forth below, residents and taxpayers of the City urge this Court to declare that there is no legal impediment to the introduction on first reading of the aforesaid Ordinance.

PROCEDURAL HISTORY

Plaintiffs rely on the procedural history included in PLAINTIFFS' OPENING BRIEF.

STATEMENT OF FACTS

Plaintiffs rely on the statement of facts included in PLAINTIFFS' OPENING BRIEF.

ARGUMENT

As stated previously, the Supreme Court of New Jersey has "established a three-part analysis for determining the propriety of an exercise of legislative authority by a municipality" under the State Constitution. Dome Realty, Inc. v. City of Paterson, 83 N.J. 212, 225 (1980). According to the Court, "the first question is whether the State Constitution prohibits delegation of municipal power on a particular subject because of the need for uniformity of regulation throughout the State." Id. The DCA has not argued that the Constitution prohibits the State's delegation of power to the City to enact the proposed Ordinance at issue in this case. Plaintiffs contend that the Constitution in fact does not prohibit the State's delegation of this power to the City and incorporate by reference the argument to this effect in Part I(A) of PLAINTIFFS' OPENING BRIEF.

If the Legislature is constitutionally permitted to delegate authority in the area—as is the case here and the DCA does not contest this—“the second question is whether the Legislature has in fact done so.” Dome Realty, 83 N.J. at 226 (citing Inganamort v. Borough of Fort Lee, 62 N.J. 521, 527 (1973)). Put differently, the second question is whether the State has given to municipal governments the home rule authority to enact ordinances of a given type. In the court below, the DCA argued—and the court erroneously concluded—that the City lacks the authority to enact and implement the proposed Ordinance at issue in this case. See T10-12 to T10-15. As explained in PLAINTIFFS’ OPENING BRIEF Parts I(A) and (B), and for the reasons set forth below, plaintiffs contend that the Legislature has in fact delegated authority to the City to enact and implement the proposed Ordinance.

The third and final part of the test for home rule authority under the New Jersey Constitution is “whether any delegation of power to municipalities has been preempted by other State statutes dealing with the same subject matter.” Dome Realty, 83 N.J. at 226. In the court below, the DCA did not argue that the proposed Ordinance was preempted by any provision of state law and, instead, simply argued that the City lacked the authority to enact and implement it. See T10-12 to T10-15. Before this Court, however, the DCA conflates the

concepts of authority and preemption, cloaking its preemption argument in the guise of an authority argument.

As explained below, plaintiffs respectfully urge this Court to reject the confused legal analysis and meritless legal arguments offered by the DCA, and to instead apply the clear three-part test to determine home rule authority established by the Supreme Court of New Jersey in Dome Realty, Inc. v. City of Paterson, 83 N.J. 212, 225 (1980). Doing so will make clear that (1) the Constitution permits the State's delegation of authority to the City to enact and implement the proposed Ordinance at issue in this case, (2) the State has in fact delegated authority to the City to enact the Ordinance via enactment of N.J.S.A. 40:48-2, 40:69A-29 and 40:69A-30, and (3) the State Legislature has not preempted the field of public campaign financing; nor does the "dedication by rider" provision of the New Jersey "Local Budget Law" preempt the proposed Ordinance because it is in no way implicated by the proposed Ordinance. See DCA BRIEF at 15-18. Consequently, this Court should hold that enactment of the proposed Ordinance is a permissible exercise of the City's home rule authority.

PLAINTIFFS' OPENING BRIEF and PLAINTIFFS' REPLY BRIEF largely establish the City's home rule authority to enact and implement the proposed Ordinance. Plaintiffs submit this supplemental reply brief to address additional arguments raised

by the DCA in its brief filed February 19, 2008—more than two months after its original briefing deadline and more than one month after its extended briefing deadline.

I. CITY OF OCEAN CITY POSSESSES THE HOME RULE AUTHORITY TO ENACT AND IMPLEMENT THE PROPOSED ORDINANCE.

The DCA concedes that the question at issue in this lawsuit is whether the City possesses the requisite statutory authority to adopt the proposed Ordinance. Yet the DCA fails to so much as mention, let alone effectively rebut, plaintiffs' claim of authority under N.J.S.A. 40:48-2, 40:69A-29 and 40:69A-30.¹ For the reasons detailed in PLAINTIFFS' OPENING BRIEF and PLAINTIFFS' REPLY BRIEF, plaintiffs reiterate that these provisions of state law authorize the City to enact and fund the proposed Ordinance.

The decision in Dome Realty makes clear that, though home rule authority may be granted by one or more provisions of State law (e.g., N.J.S.A. 40:48-2, 40:69A-29 and 40:69A-30), the authority granted may be preempted by another provision of State law. Under Dome Realty, the third and final part of the test for home rule authority is "whether any delegation of power to

¹ For example, the DCA asserts that the Legislature has not authorized the City to fund the implementation of the proposed Ordinance. Yet the DCA fails to explain why the Faulkner Act provision explicitly authorizing the City to "appropriate and expend moneys . . . as may be required for the good government thereof," N.J.S.A. 40:69A-29(c), which this Court is required to construe liberally in favor of the City, see N.J.S.A. 40:69A-30, is not precisely just such a delegation of authority.

municipalities has been preempted by other State statutes dealing with the same subject matter." Dome Realty, 83 N.J. at 226.

It is not necessary—and indeed it would be contrary to the “liberal construction” principles of the State Constitution²—for every municipal ordinance to have countless sources of authority in every body of State law touched by the ordinance. Instead, the “preemption” prong of the Dome Realty analysis serves as the proper check on municipal ordinances enacted under any one of several broad State law grants of municipal home rule authority.

The DCA appears to argue that the home rule authority granted by N.J.S.A. 40:48-2, 40:69A-29 and 40:69A-30 has been preempted by the Local Budget Law with respect to the proposed Ordinance at issue in this case. As we explain in Part II below, the language used by the DCA in making its arguments is

² The Constitution’s guidance with respect to interpretation of legislative delegation of municipal home rule is incisive. The City’s home rule authority “shall be liberally construed” in its favor and “shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law.” N.J. Const. art. IV, § 7, ¶ 11 (emphasis added); see also Monmouth Lumber Co. v. Ocean Tp., 9 N.J. 64, 71 (1952) (Courts are “required to construe constitutional and statutory provisions liberally in favor of municipal corporations formed for local government.”) (citing N.J. Const. art. IV, § 7, ¶ 11). “In considering whether the City’s ordinance is a valid exercise of authority granted by the State, . . . municipal ordinances enjoy a presumption of validity.” Fanelli v. City of Trenton, 135 N.J. 582, 589 (1994) (citing Brown v. City of Newark, 113 N.J. 565, 571 (1989)).

that of field preemption analysis. Plaintiffs respectfully urge this Court to reject the DCA's attempt to conflate the second "authority" prong with the third "preemption" prong of the State law home rule analysis under Dome Realty and to recognize the DCA's argument for what it is: a preemption argument. As we argue below, the DCA's preemption argument is flat out wrong. Moreover, as argued in PLAINTIFFS' OPENING BRIEF, this Court should hold that the broad grants of home rule power under the New Jersey Constitution and N.J.S.A. 40:48-2, 40:69A-29 and 40:69A-30 authorize the City to enact and implement the proposed Ordinance.

II. THE PROPOSED ORDINANCE IS NOT PREEMPTED BY STATE LAW.

The enactment of the proposed Ordinance is a permissible exercise of the City's home rule authority so long as this delegation of power to the City has not been "preempted by other State statutes dealing with the same subject matter." Dome Realty, 83 N.J. at 226.

Although the DCA makes no mention of preemption in its brief, the DCA's arguments can only be interpreted as preemption arguments in light of the unrebutted broad grants of home rule authority in N.J.S.A. 40:48-2, 40:69A-29 and 40:69A-30 upon which plaintiffs rely. Indeed, the DCA employs the language of field preemption throughout its brief. See, e.g., DCA BRIEF at 7 ("[T]he Legislature has established a comprehensive statutory

framework which is intended to carefully regulate and prescribe the manner in which all municipalities in the State of New Jersey . . . are to collect, appropriate and expend the public funds with which they are entrusted."); see also DCA BRIEF at 8-9 ("This comprehensive statutory structure is intended to ensure that all such municipalities follow sound business principles in their budgetary and financial practices.").

Plaintiffs readily acknowledge that "a municipality may be unable to exercise a power it would otherwise have if the Legislature has preempted the field." Summer v. Teaneck, 53 N.J. 548, 554 (1969). But even cast in the light most favorable to the DCA—i.e., as preemption arguments—the DCA's arguments still wholly lack merit. This is because, contrary to the DCA's claims, the proposed Ordinance in no way alters the City's budgetary process in a manner inconsistent with the Local Budget Law. Instead, the proposed Ordinance operates within the existing illustrative, minimum, non-exhaustive list of "separate items of appropriation" in the Local Budget Law, found at N.J.S.A. 40A:4-32, which reads, in operative part:

Separate items shall be included for at least:

- a. Administration, operation and maintenance of each office, department, institution or other agency of the local unit.
- b. Contingent expenses in an amount not more than 3% of the total amount stated pursuant to subdivision a of this section.
- c. Interest and debt redemption charges.

- d. Deferred charges and statutory expenditures.
- e. The payment of all judgments not for capital purposes and for which notes or bonds cannot be lawfully issued.
- f. Such reserves as may be required by this chapter, or deemed advisable by the governing body.
- g. Cash deficit of preceding year.

N.J.S.A. § 40A:4-32 (emphasis added).

Section 2-26.3(c) of the proposed Ordinance, see Pa14, merely supplements these minimum City Budget line items required by the Local Budget Law, by providing for the appropriation of specified amounts from the municipal general fund in the City's annual budget to fund the public financing program: \$150,000 in the first City budget adopted after the proposed Ordinance becomes law, and in each year thereafter \$150,000 less any amount that would cause the balance in the Fair and Clean Elections Campaign Fund to exceed \$300,000.³ Further, proposed Ordinance section 2-26.3(b) allows any person to "make a voluntary donation" up to \$5,000 to the Fair and Clean Elections Fund, which, under proposed Ordinance section 2-26.3(c), is accounted for in following year's budget. See Pa14.

Despite the clarity and harmony of N.J.S.A. § 40A:4-32 and proposed Ordinance section 2-26.3(c), the DCA argues that the proposed Ordinance is illegal under the Local Budget Law. Yet the only thing established by the DCA's argument is the DCA's

³ Both the \$150,000 figure and the \$300,000 figure would be adjusted for changes in the cost of living pursuant to section 2-26.20 of the proposed Ordinance. See Pa24.

misunderstanding of how the proposed Ordinance would operate. The DCA's argument hinges on the following misstatement: "Since the amount of such contributions would not be subject to reasonably accurate estimate in advance, the establishment of such a fund would require the establishment of a dedication by budgetary rider pursuant to N.J.S.A. 40A:4-39 of the Local Budget Law" DCA BRIEF at 15.

The DCA's reference to funds "subject to reasonably accurate estimate in advance" is a reference to the "dedication by rider" provision of the Local Budget Law, N.J.S.A. 40A:4-39. The "dedication by rider" provision of the Local Budget Law provides that "dedicated revenues anticipated during the fiscal year" from a source "not subject to reasonably accurate estimate in advance" may be included in the budget of any local unit for such fiscal year only with the Director's approval. N.J.S.A. 40A:4-39.⁴ The proposed Ordinance, however, contains no

⁴ The "dedication by rider" provision of the Local Budget Law reads, in operative part:

In the budget of any local unit, dedicated revenues anticipated during the fiscal year . . . when the revenue is not subject to reasonably accurate estimate in advance, may be included in said budget by annexing to said budget a statement in substantially the [statutorily-specified] form . . . subject to the approval of the director, who may require such explanatory statements or data in connection therewith as the director deems advisable for the information and protection of the public.

requirement that "dedicated revenues anticipated during the fiscal year" from a source "not subject to reasonably accurate estimate in advance" be included in the City budget for the fiscal year in which the anticipated revenues are collected. Instead, section 2-26.3(c) of the proposed Ordinance provides that the public financing program would be funded by the appropriation of a specified amount from a specified source, the City's general fund. See Pa14. The Local Budget Law "dedication by rider" provision is, therefore, entirely inapplicable to the proposed Ordinance.

Further, any voluntary donations received would not constitute "dedicated revenues anticipated during the fiscal year" included in that fiscal year's budget to fund appropriations. Instead, such voluntary donations would be used in the next fiscal year pursuant to proposed Ordinance section 2-26.3(c). See Pa14. Proposed Ordinance section 2-26.3(c)(1) explicitly provides that "[n]o later than December 1 of each year" the Municipal Clerk shall notify the mayor and council of the amount of funds existing in the Fair and Clean Elections Campaign Fund. Such accounting by the clerk would reflect any voluntary donations received and would serve as the basis of the council's appropriation in the next fiscal year, pursuant to proposed Ordinance section 2-26.3(c)(2).

N.J.S.A. 40A:4-39 (emphasis added).

Accordingly, contrary to the DCA's claim, the "dedication by rider" provision at N.J.S.A. 40A:4-39 is clearly inapplicable to the "voluntary donations" allowed by the proposed Ordinance, and in no way is inconsistent with or preempts the proposed Ordinance.

Furthermore, under field preemption analysis, legislative intent is paramount. As explained thoroughly in PLAINTIFFS' REPLY BRIEF at 17-20, the legislative purpose of the "dedication by rider" provision of the Local Budget Law is to prevent a city's careless financial reliance during a particular fiscal year on funds not yet in its possession and "not subject to reasonably accurate estimate in advance." See N.J.S.A. 40A:4-39(a). The statute plainly states that the statutory requirement that the Director approve a city's use of such funds is "for the information and protection of the public." N.J.S.A. 40A:4-39(b). The requirement that a city obtain approval of the Director before relying on funds not certain to come into the city's possession makes good sense. A municipality's residents would be disserved if a city council were to plan to pay for vital services using revenue that never materialized—and the "Director approval" requirement of N.J.S.A. 40A:4-39 serves to prevent such a situation from materializing. In this case, however, the proposed Ordinance's "voluntary donation" provision could in no way induce the City to rely on such donations that

are not yet in its possession to pay for the public financing program. The proposed Ordinance intentionally avoids the type of fiscal irresponsibility that the "dedication by rider" provision of the Local Budget Law guards against.

In short, the proposed Ordinance does not invoke the "dedication by rider" provisions of the Local Budget Law relied upon by the DCA; nor is the proposed Ordinance preempted by the Local Budget Law generally. To the contrary, the proposed public financing ordinance is a fiscally responsible measure that would operate in complete harmony with the Local Budget Law.

CONCLUSION

For the foregoing reasons, the judgment of the court below granting the DCA's Cross-motion for Summary Judgment and denying plaintiffs' Motion for Summary Judgment should be reversed.

Respectfully submitted.

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