DONALD F. BURKE JR., ESQ. #034812011
LAW OFFICE OF DONALD F. BURKE
45 GALE ROAD
BRICK, NEW JERSEY 08723
TEL: (732) 966-4922
ATTORNEYS FOR DEFENDANTS

PHILIP I. BRILLIANT,

PLAINTIFF,

v.

TOWNSHIP OF TOMS RIVER, COUNCIL PRESIDENT CRAIG COLEMAN, COUNCIL VICE PRESIDENT LYNN O'TOOLE, COUNCILMAN JUSTIN LAMB, COUNCILMAN GEORGE LOBMAN, MAYOR DANIEL RODRICK, TOMS RIVER MUNICIPAL CLERK STEPHEN HENSEL, BUSINESS ADMINISTRATOR JONATHAN SALONIS, ATTORNEY PETER PASCARELLA, ESQ. & ATTORNEY GREGORY MCGUCKIN, ESQ.,

DEFENDANTS.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: OCEAN COUNTY

CIVIL ACTION

DOCKET NO.: OCN-L-2111-24

SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFF'S APPLICATION FOR INJUNCTIVE RELIEF AND IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

ON THE BRIEF:

DONALD F. BURKE, ESQ.
DONALD F. BURKE JR., ESQ.
COUNSEL FOR DEFENDANTS

PETER S. PASCARELLA, ESQ.
ASSISTANT TOWNSHIP ATTORNEY

GREGORY P. MCGUCKIN, ESQ.
KELSEY A. MCGUCKIN-ANTHONY, ESQ.
CO-COUNSEL FOR THE TOWNSHIP OF TOMS RIVER

LAW OFFICE OF DONALD F. BURKE
45 GALE ROAD
BRICK, NEW JERSEY 08723
TEL: (732) 966-4922
ATTORNEYS FOR DEFENDANTS TOWNSHIP OF TOMS RIVER, COUNCIL PRESIDENT CRAIG COLEMAN, COUNCIL VICE PRESIDENT LYNN O'TOOLE, COUNCILMAN JUSTIN LAMB, COUNCILMAN GEORGE LOBMAN, MAYOR DANIEL RODRICK, TOMS RIVER MUNICIPAL CLERK STEPHEN HENSEL, BUSINESS ADMINISTRATOR JONATHAN SALONIS, ATTORNEY PETER PASCARELLA, ESQ.

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PRELIMINARY STATEMENT

This supplemental brief is submitted by leave of Court granted at oral argument on September 6, 2024. As suggested by the Court, the parties met and conferred regarding resolution of the issues raised but were unsuccessful.

Plaintiff Philip I. Brilliant (Brilliant) brings this Complaint seeking relief far beyond what the statute at issue provides including asking the Court to overturn decisions of the governing body of the Township of Toms River as how to best utilize available resources regarding animal control. Mayor Rodrick and the governing body have determined that it is in the best interest of the Township of Toms River to enter into an agreement with Ocean County to operate the former Toms River Animal Shelter. Brilliant does not agree with the governing body regarding the best method of providing animal control services and asks this Court, among other things, to order the Township of Toms River to reopen, offer to hire all staff, and to operate the Toms River Animal Shelter. (*See* Verified Complaint, page 24).

Plaintiff's Complaint names many defendants without even attempting to explain what action each of the defendants took that allegedly violated his rights. Plaintiff claims to be opposed to operation of the Toms River Animal Shelter by the County, but plaintiff cites no evidence that the County cannot competently and effectively operate the animal shelter.

Plaintiff's purported knowledge of the shelter and its previous operation under Township management is unexplained – he does not claim to be a former employee or even a volunteer.

Plaintiff has failed to meet the requirements of the well-accepted standard outlined in *Crowe v. DeGioia*, 90 N.J. 126 (1982) and therefore, has failed to demonstrate an entitlement to the entry of temporary restraints against the Township of Toms River. At this juncture, the only issue to be decided by this court is whether the Plaintiff has demonstrated a right to the emergent relief being sought in his Order to Show Cause. As will be demonstrated throughout this brief, Plaintiff has failed to demonstrate an entitlement to relief under *Rule* 4:52. Plaintiff has failed to show any immediate and irreparable harm, a likelihood of success on the legal claims outlined in his Complaint and has failed to demonstrate a hardship that justifies the relief sought. For those reasons, the restraints sought by Plaintiff must be denied.

The issue before the Court is whether the governing body's Ordinance repealing the Ordinance challenged by Brilliant here should be voided by the Court. For the following reasons, there is nothing in the statute, municipal governance or reasonable common sense that would permit the official action of the elected official in repealing the Ordinance in question and certainly nothing that would authorize this Court to countermand the decisions of the governing body of the Township of Toms River as to how best to deal with animal control and welfare in the Township.

Plaintiff's application should be denied and his Complaint dismissed.

STATEMENT OF FACTS

The former Toms River Animal Shelter was a facility that nearly everyone agreed could benefit from improvements in facilities and management. One issue of concern was that the building lacked adequate ventilation for the animals. Adequate ventilation is a

requirement of state regulations governing the operation of animal shelters. Pursuant to N.J.A.C. 8:23A-1.4:

> (c) Indoor housing facilities for animals shall be adequately ventilated to provide for the health and comfort of the animals at all times. Such facilities shall be provided with fresh air either by means of windows, doors, vents or air conditioning and shall be ventilated so as to minimize drafts, odors and moisture condensation. Auxiliary ventilation, such as exhaust fans and vents or air conditioning, shall be provided when the ambient temperature is 85 degrees Fahrenheit or higher. Windows and doors used for ventilation (except for guillotine doors) shall be screened to control the entrance of insects.

Further, the facility lacked dog runs. Dog runs are essential for animals to receive adequate exercise. Pursuant to state regulation, "[a]dult dogs confined in cages of less than double the minimum standard size as stated in (c) above shall be exercised in runs at least twice a day" or walked on a leash for at least 20 minutes per day. N.J.A.C. 8:23A-1.6.

The facility was also overcrowded. Accordingly, under Mayor Rodrick's administration, the Township waived adoption fees. The Township administration also requested the animal shelter remain open until 7:00 p.m. some evenings. However, staff at the animal shelter would not agree to stay open until 7:00 p.m.

Accordingly, due to concerns about the operation of the shelter, in addition to the significant cost of operation of the shelter to the residents of Toms River, the Township began discussions with the County regarding transfer of management of the shelter to the County. As part of this arrangement, the County would undertake necessary repairs and improvements to the facility. A bequest left to the Township would be provided to the

County for this purpose, and any monies left over would be returned to the Township if the agreement were to cease.

The Township passed an ordinance to approve a lease agreement with the County. Plaintiff submitted a petition to repeal the ordinance or submit it to a referendum vote.[1] The Township Clerk certified the petition. Thereafter, plaintiff reached out to the Township to discuss moving forward. Plaintiff recognized the cost to the Township of a referendum vote.[2]

The Township decided to repeal the ordinance rather than expend taxpayer funds and resources on a referendum vote. Thereafter, plaintiff filed this lawsuit, seeking to stay the repeal of the ordinance that he was challenging. After a second reading on August 28, 2024, the ordinance was repealed.

The parties appeared for oral argument on September 6, 2024. The Court expressed its concern about the 20 day provision in the statute and permitted supplemental briefing. The Court also suggested that the parties meet to discuss possible resolution. On September 11, 2024, members of the Township administration met with plaintiff and others for over an hour to see if this matter could be resolved without need for additional litigation.

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[1] For reasons unknown, this lawsuit was filed by plaintiff alone and not by any of the other petitioners.

[2] The Township believed the petitioners were considering withdrawing the petition. *See, e.g.*, *Hudson County v. Jersey City*, 153 N.J. 254, 256 (1998) (wherein "the petition was withdrawn because of the large costs that an election would impose on the City and on the supporters of the referendum petition.").

Plaintiff requested that the shelter be reopened, all staff re-hired and the Township continue operation of the shelter. While the Township is not willing to continue operating the shelter under Township management for the reasons set forth above, the Township appeared in good faith and presented the following proposal to plaintiff:

1. The Township would enter into a Shared Services Agreement with Ocean County to operate the Animal Shelter;
2. The Township would provide one (1) extra month pay for each employee who was terminated when the Shelter was closed;
3. The Township would form a Committee, including plaintiff and others, that would work with the County and make recommendations on the transition, plans and operations of the Shelter, subject to the Ocean County Board of Health's approval of such an arrangement, as the Township cannot unilaterally enter into such an agreement without same.

Plaintiff rejected the Township's offer. Accordingly, as the parties are unable to reach an agreement, the Township submits this Supplemental Brief in support of its opposition to plaintiff's application and the Township's motion to dismiss plaintiff's Complaint.

LEGAL ARGUMENT

Point I

THE STATUTE AT ISSUE MUST BE CONSTRUED REASONABLY IN ORDER TO EFFECTUATE THE LEGISLATIVE INTENT

In this matter, the Court was concerned about the 20 day provision in the statute at issue. However, nothing in the statute permits the relief that was suggested – vacating a duly enacted ordinance and directing a referendum. Such relief would have to be inferred as it is not in the statute and is not supported anywhere in case law. Further, such relief would be completely focused on the 20 day provision of the statute while stripping the Township of its ability – set forth in the same statute – to repeal the ordinance on its own and to avoid the time, resources and cost to the taxpayers of a referendum.

As the Appellate Division has held, "[t]he cardinal rule which applies is that statutory language should be given its ordinary meaning and construed in a common sense manner to further the legislative purpose." *Wnuck v. Division of Motor Vehicles*, 337 N.J. Super. 52, 57 (App. Div. 2001) (citing *N.E.R.I. Corp. v. New Jersey Highway Auth.*, 147 N.J. 223, 236 (1996)). Importantly for purposes of this case,

> **The spirit of the law must control the letter where a literal rendering will lead to a result that is not in accord with the purpose and the design of the act.**
>
> [*Wnuck*, 337 N.J. Super. at 57 (citing *New Jersey Builders, Owners and Managers Ass'n v. Blair*, 60 N.J. 330 (1972)).]

Here, a "literal rendering" of the statute – forcing the Township to conduct a referendum if the ordinance is not repealed in 20 days or less – would "lead to a result that is not in accord with the purpose and design of the act." *Ibid.*

The Appellate Division has reminded lower courts that "common sense should not be abandoned when interpreting a statute." *A.B. v. Div. of Med. Assistance*, 407 N.J.

Super. 330, 340 (App. Div. 2009). Citing our Supreme Court, the Appellate Division noted in *A.B.*:

> [W]e also have stressed that "where a literal interpretation would create a manifestly absurd result, contrary to public policy, the spirit of the law should control." *Turner v. First Union Nat Bank*, 162 N.J. 75, 84 (1999) (citing *Watt v. Mayor of Franklin*, 21 N.J. 274, 278 (1956)). Thus, when a "'**literal interpretation of individual statutory terms or provisions'" would lead to results "'inconsistent with the overall purpose of the statute,'" that interpretation should be rejected.** [*Alan J.*] *Cornblatt*[, *P.A.*] *v. Barow*, 153 N.J. 218, 242 (1998) (quoting *Young* [*v. Schering Corp.*,] 141 N.J. [16,] 25 [(1995))].
>
> [*A.B.*, 407 N.J. Super. at 341 (citing *Hubbard v. Reed*, 168 N.J. 387, 392-93 (2001)).]

Here, interpreting the 20 day provision literally would lead to an absurd and unjust result:

1. The Court would vacate a duly enacted ordinance repealing the ordinance challenged by the petitioners;[3]
2. The Township would incur the time, expense and cost of a referendum election;
3. If the petitioners were successful, the voters would vote to repeal the ordinance – **an ordinance that was already repealed.**

This simply cannot be what the Legislature intended. Common sense compels the conclusion that the 20 day provision in the statute cannot be interpreted literally.

[3] Such action is not set forth anywhere in the statute or interpreting case law.

Point II

TOMS RIVER'S POSITION THAT REFERENDUM PROCEEDINGS ARE MOOT, AND THEREFORE SHALL BE ABANDONED, EVEN WHEN AN ORDINANCE SUBJECT TO A REFERENDUM PETITION IS REPEALED BEYOND THE 20-DAY STATUTORY REQUIREMENT SET FORTH BY N.J.S.A. 40:69A-191, IS SUPPORTED BY THE MATTER OF ALL PEOPLE'S CONGRESS V. MAYOR AND COUNCIL OF CITY OF JERSEY CITY

As set forth above, the issue before the Court is whether referendum proceedings shall be abandoned if an ordinance that is subject to a referendum petition, pursuant to N.J.S.A. 40:69A-185, is repealed by the council beyond twenty days after the submission of a certified petition by the municipal clerk.

This precise issue was addressed in the matter of *All Peoples Congress of Jersey City v. Mayor and Council of City of Jersey City*, 195 N.J. Super. 532 (Law Div. 1984). In that matter:

> The City Council adopted a prior ordinance on September 1, 1981, ordinance MC–20, a law also designed to control rents which included the concept of vacancy decontrol. Shortly after its enactment, a committee of petitioners submitted a referendum petition directed to that ordinance to the city clerk pursuant to the statute previously cited. After the submission of supplementary valid signatures, **the city clerk certified the sufficiency of the petition January 25, 1982. However, before the question was placed before the electorate, the city council on April 22, 1982 passed on first reading ordinance MC–178 which repealed the provisions of the challenged ordinance MC–20.** Mention is made in passing to ordinance MC–179 and ordinance MC–180, passed at the same session of the council, which Judge O'Brien noted 'appear to be identical in language and content to MC–20.' Although ordinances MC–179 and MC–180 were tabled at a subsequent session, plaintiffs point to them as evidence of a strategy of the municipality to frustrate resort to the referendum device.
>
> Following the enactment of ordinance MC–178, the city clerk and the city council petitioned the court for instructions. **Judge O'Brien agreed with the position advanced by the city council that the issue had become**

> **moot by virtue of the repeal of ordinance MC–20 and the adoption of ordinance MC–178.**
>
> [*Id.* at 536 (emphasis added).]

Notably, the city council repealed the ordinance subject to the referendum proceedings in April when the clerk had certified the sufficiency in January of that year, or nearly three (3) months later. In the matter at bar, the council repealed the ordinance authorizing a lease of the Toms River Animal Shelter to the County Board of Health a little over a month from when Mr. Cruoglio, Toms River Township's former municipal clerk, certified to the sufficiency of the subject referendum petition.

In *All Peoples Congress*, Judge O'Brien agreed with the position advanced by Jersey City that by virtue of the council having repealed the subject ordinance—despite the fact that they repealed it three months after the city clerk had certified the petition's sufficiency—the issue was nonetheless moot and the referendum proceedings should be abandoned. *Ibid.*

It is undisputed that the intent of the referendum petition was to induce the council to repeal Ordinance No. 4802-24, authorizing the Township to lease the Toms River Animal Shelter to the County Board of Health. That is precisely what occurred. A case is moot "when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy." *N.Y. Susquehanna & W. Ry. Corp. v. State of N.J. Dep't of Treasury*, 6 N.J. Tax 575, 582 (Tax 1984), *aff'd*, 204 N.J. Super. 630 (App. Div. 1985). Moreover, "[m]oot or academic [matters] are generally dismissed." *Advanced Elec. Co. v. Montgomery Twp. Bd. Of Educ.*, 351 N.J. Super. 160, 166 (App. Div. 2002).

Plaintiff asks this Court to order that Ordinance No. 4802-24 be placed on the ballot so that the voters can decide whether to repeal it. However, rendering such a decision would have no practical effect for plaintiff as the ordinance has already been repealed. In light of the foregoing, this Court should apply the same reasoning as the court in *All Peoples Congress* and find that holding referendum proceedings would be entirely moot, and moreover, a waste to the taxpayers of Toms River Township.

Point III

PLAINTIFF'S ASSERTION THAT THE COUNCIL VIOLATED THE REFERENDUM PROCESS UNDER THE FAULKNER ACT, BY PASSING A RESOLUTION AUTHORIZING A SHARED SERVICES AGREEMENT WITH THE COUNTY BOARD OF HEALTH FOR THE OPERATION OF THE TOMS RIVER ANIMAL SHELTER, IS NOT SUPPORTED BY LAW

Plaintiff alleges that this Court should stay the resolution authorizing a shared services agreement with the County Board of Health for its operation of the Toms River Animal Shelter as its passage violates the referendum process. While a municipality may not reenact the same ordinance after repealing said ordinance and causing referendum proceedings to be abandoned, nor may it pass an ordinance in all essential features the same as the repealed ordinance, "it may enact an ordinance covering the same subject matter provided the newly-enacted ordinance is **essentially different** from the challenged ordinance." *All Peoples Congress*, 195 N.J. Super. at 538 (citing 5 *McQuillan, Municipal Corporations* (3 ed. 1981) (emphasis added)). The court held that prohibiting a city or municipality from passing an ordinance that merely covers the same subject matter as an ordinance that was subject to a referendum petition would abrogate its "constitutionally vested, *N.J. Const.*, Art. IV, § VII, ¶ 11, and the legislatively-granted power to make laws

under both the optional Municipal Charter Law, N.J.S.A. 40:69A-30, and the grant of general and regulatory powers, N.J.S.A. 40:48-1 et seq. . . .” *Ibid.*

Here, the Township passed a resolution as opposed to an ordinance. However, the resolution is undoubtedly *essentially different* from the repealed ordinance. Merriam-Webster’s definition of the word essentially is as follows: “used to identify or stress the basic or essential character or nature of a person or thing.”

The issue before the Court is whether a shared services agreement has essential differences from a lease agreement. While the Township will concede that the repealed ordinance authorizing the Township to enter into a lease agreement with the County Board of Health for the Toms River Animal Shelter and the resolution authorizing a shared services agreement with the County Board of Health involve the same subject matter (operation of the Toms River Animal Shelter), it is not in violation of the referendum process based on the holding from *All Peoples Congress*. While the repealed ordinance and the resolution cover the same subject matter, they are <u>essentially different</u> from one another. They have different term lengths; they establish different duties, responsibilities and rights for each of the parties; there are different benefits conveyed by a shared services agreement that are not available through a lease agreement, such as applying for grants from the Department of Community Affairs; and, most of all, the ability to enter into a shared services agreement is authorized by a state statute that was enacted for the specific purpose of enabling public entities, such as municipalities and counties, to operate more efficiently for the benefit of their taxpayers, which is precisely what this shared services agreement intends to accomplish.

The repealed ordinance and subsequently passed resolution are essentially different, and therefore, this Court should not disturb Toms River Township's constitutionally vested and legislatively-granted power to make laws that benefit its residents.

Point IV

PLAINTIFF HAS FAILED TO SET FORTH ANY CONDUCT CONSTITUTING VIOLATION OF THE NEW JERSEY CIVIL RIGHTS ACT BY ANY DEFENDANT

Viewing plaintiff's Complaint liberally, there is no conduct pled that would constitute a violation of the New Jersey Civil Rights Act. To the extent plaintiff's claims are based upon the repeal of the ordinance, plaintiff's Complaint must be dismissed for two reasons. First, the statute does not prohibit the Council from repealing the ordinance after 20 days. Second, defendants' actions in repealing the ordinance – relief requested by the petitioners – cannot subject defendants to liability because that is the relief that was sought and, even if not, defendants would be shielded by the doctrine of qualified immunity.

The doctrine of qualified immunity, which extends to actions under federal section 1983 and the New Jersey Civil Rights Act, "shields law enforcement officers from personal liability for civil rights violations when the officers are acting under color of law in the performance of official duties." *Morillo v. Torres*, 222 N.J. 104, 107 (2015). As in the federal courts, the qualified immunity applied under New Jersey law insulates "**government officials performing discretionary functions generally . . . from liability for civil damages insofar as their conduct does not violate clearly established**

statutory or constitutional rights of which a reasonable person would have known." *Id.* at 116 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). This exacting standard "interposes a significant hurdle for plaintiffs seeking to recover for asserted violations of civil rights," *ibid.*, as it accords "'government officials breathing room to make reasonable but mistaken judgments' by 'protect[ing] all but the plainly incompetent or those who knowingly violate the law.'" *City & Cnty. of S.F. v. Sheehan*, 575 U.S. 600, 135 S. Ct. 1765, 1774, 191 L. Ed. 2d 856, 867 (2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)).

Here, the statute permits a municipality to repeal an ordinance. That is what was done here, albeit not within 20 days. However, as the Council took action permitted by statute – and, indeed, in accordance with the stated wishes of plaintiff (before this lawsuit was filed) – defendants cannot be held liable and would have qualified immunity for taking action to repeal the ordinance challenged by plaintiff.

Point V

PLAINTIFF'S CLAIMS ARE BARRED BY THE DOCTRINE OF LEGISLATIVE IMMUNITY

Legislative immunity extends to official acts which are both "'procedurally' legislative, that is, passed by means of established legislative procedures," and "'substantively' legislative," that is, acts "which involve policy-making decision[s] of a general scope." *Ryan v. Burlington County*, 889 F.2d 1286, 1290-91 (3rd Cir. 1989); *accord Acierno v. Cloutier*, 40 F.3d 597, 610-12 (3d Cir. 1994).

Here, viewing plaintiff's Complaint liberally, he is suing the defendants for enacting and then subsequently repealing an ordinance. These are actions for which the defendants cannot be subject to liability.

Legislative immunity has also been extended to others who are not strictly legislators but who perform administrative functions in connection with legislative activity. (*See, e.g.*, *Cleavinger v. Saxner*, 474 U.S. 193 (1985) (prison disciplinary committee members); *Wood v. Strickland*, 420 U.S. 308 (1975) (school board members); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (state executive officials, including governor and university president)).

Accordingly, the mayor and members of the administration cannot be held liable for actions of the Township Council for which the members of the Council are legislatively immune.

In this regard, it must be noted that plaintiff originally filed suit against the Township's Director of Law, only to voluntarily dismiss all claims against the Township's Director of Law after receiving a frivolous litigation letter – an acknowledgment that his claims against the Director of Law were frivolous. For the same reason, plaintiff's claims against the other defendants are completely lacking in merit and must be dismissed.

Point VI

PLAINTIFF HAS FAILED TO DEMONSTRATE AN ENTITLEMENT TO RELIEF UNDER THE STANDARD OUTLINED IN CROWE V. DEGIOIA

Injunctive relief is an extraordinary remedy that should only be entered upon a showing, by clear and convincing evidence, that the party is entitled to the relief. *Dolan v. DeCapua*, 16 N.J. 599 (1954) (Burling, J.) ("Injunctive judgments are not granted in the absence of clear and convincing proof."). Thus, the court should only grant a preliminary injunction if it is needed to prevent substantial, immediate and irreparable harm. *Crowe v. De Gioia*, 90 N.J. 126 (1982). An injunction is a drastic remedy because it compels a party, under pain of contempt or other coercive powers of the court, to act or not act; it is a command which precludes the exercise of free choice of action. *Sherman v. Sherman*, 330 N.J. Super. 638 (Ch. Div. 1999). Deciding whether to grant a preliminary injunction involves a prediction of the probable outcome of the case based on each party's initial proofs, usually limited to documents. The court is not deciding which party ultimately wins or loses, but rather whether the applicant has made a preliminary showing of a reasonable probability of ultimate success on the merits. *Brown v. City of Paterson*, 424 N.J. Super. 176 (App. Div. 2012).

According to the New Jersey Supreme Court, injunctive relief is appropriate where:

> (1) There is a showing of immediate and irreparable harm to the applicant;
>
> (2) The legal right underlying the applicant's claim rest on settled principles of law;

(3) There is a reasonable probability that the applicant will ultimately prevail on the merits; and

(4) The balance of hardships if the requested relief is granted favors the applicant.

[*Crowe v. De Gioia*, 90 N.J. 126, 132 (1982).]

In addition, plaintiff must have no adequate remedy at law. *Subcarrier Communications, Inc. v. Day*, 299 N.J. Super. 634 (App. Div. 1997). For the reasons which follow, plaintiff's claims fall woefully short of meeting the four part test outlined by our Supreme Court before such extraordinary relief may be granted.

A. IMMEDIATE AND IRREPARABLE HARM

The Repeal of the Ordinance At Issue Establishes That Plaintiff Faces No Irreparable Harm

Plaintiff cannot establish any irreparable harm in this matter since the ordinance challenged has been repealed, there is no authority to challenge resolutions of the governing body by way of referendum and there is no legal basis for residents who disagree with their elected officials to demand a non-binding public question be placed on the ballot.

The petition in question challenged the adoption of an ordinance under N.J.S.A. 40:69A-184, *et seq.* Consequently, by statute, the ordinance could not take effect until one of three things happened; the ordinance was amended, the ordinance was repealed, or a referendum was held with a majority of votes being cast in favor of the ordinance. N.J.S.A. 40:69A-189-191. The ordinance here was repealed. It cannot take effect, will not take effect and the township makes no argument to the contrary. Had the township not

repealed the ordinance, plaintiff may very well have been able to establish this first element of the *Crowe v. De Gioia* test, petitioners' right to have the ordinance declared invalid by majority vote would have been impacted. However, this is simply not the case, the original ordinance is already invalid, it no longer exists.

As a result, plaintiff now seeks nothing more than to have this court grant the extraordinary remedy of issuing an injunctive order, without any statutory basis, to place a non-binding public question on the ballot. It is undisputed that the reason such relief is being sought is simply because plaintiff is unhappy with decisions made by the Township's elected officials, decisions they were clearly authorized to make by statute. There is no legal right to seek a referendum on a resolution adopted by the governing body, (in this case authorizing a shared services agreement under N.J.S.A. 40A:65-1) and there is no authority for residents opposed to the Township's current elected leadership to place a non-binding public question on the general election ballot. It is critical to note that if this Court were to grant the extraordinary remedy of a preliminary injunction in this matter, and place such a question on the ballot, any resident in the future, who disagrees with a legally authorized decision of the township's elected officials, could make the same argument, *i.e.*, I disagree with my elected officials and I will be harmed if their decision is not enjoined until I can see if the rest of the town agrees with me by virtue of a ballot question. One can only imagine the problems which would ensue if every decision of a governing body could be subject to a referendum.

B. WELL SETTLED LAW AND A LIKELIHOOD OF SUCCESS ON THE MERITS

The Legal Right Underlying the Plaintiff's Claims Is Nonexistent And The Mayor of a Faulkner Act Municipality, As the Township's Chief Executive, Has the Right To Close Any Township Facility And To Address All Personnel Issues Relating Thereto.

Plaintiff has failed to demonstrate any likelihood of success on the merits of his claims against the Township of Toms River. The Township of Toms River operates under the Mayor-Council form of government outlined in the Faulkner Act, N.J.S.A. 40:69A-1, *et seq*. Under the Mayor-Council form of government, the legislative power of the local government is exercised by the municipal council. N.J.S.A. 40:69A-36. The executive power of the municipality is exercised by the mayor. N.J.S.A. 40:69A-39. This particular form of government is designed to mirror our state and federal governments, with clear delineations between the legislative and executive branches. Pursuant to N.J.S.A. 40:69A-40, mayoral duties include supervising, directing and controlling all departments of the municipal government. N.J.S.A. 40:69A-40(c). The mayor is also authorized to supervise the care and custody of all municipal property, institutions and agencies, and make recommendations concerning the nature and location of municipal improvements and execute improvements determined by the governing body. N.J.S.A. 40:69A-39(f). The mayor is further authorized to supervise the "development, installation and maintenance of centralized budgeting, personnel and purchasing procedures as may be authorized by ordinance." N.J.S.A. 40:69A-40(i). As Mayor he or she serves as chief executive, much like a governor does with respect to state property, state employees and state finances. In our state, it is the Governor, the state's chief executive who decides if a

state building, park or other facility should be closed. In Toms River, it is the duly elected Mayor.

Based on the powers afforded to the Mayor under the Faulkner Act, the Mayor, in his own right, on his own volition, and without approval of Township Council, has the authority to close any municipal building or facility he sees fit. This power is specifically authorized by statute, lies directly with the Mayor, and simply cannot be challenged by referendum as plaintiff wishes. Respectfully, unless such power is exercised in an *ultra vires*_manner, the judicial branch has no authority to overturn such a decision of the Mayor either. Only if he acts outside his authority, in direct conflict with his statutory powers, is such a decision subject to judicial review. No such allegation is made here. Once again, his remedy is at the ballot box, not in the Superior Court. Plaintiff brings this Complaint pursuant to New Jersey's Initiative and Referendum statute; N.J.S.A. 40:69A-184, *et seq.* Pursuant to N.J.S.A. 40:69A-185:

> The voters shall also have the power of referendum which is the power to approve or reject at the polls any ordinance submitted by the council to the voters or any ordinance passed by the council, against which a referendum petition has been filed as herein provided.
>
> [N.J.S.A. 40:69A-185.]

The above-cited statute permits voters to submit a referendum on any **ordinance** passed by the council, not any resolution of the governing body or any other decision of the chief executive, i.e. the Mayor. Plaintiff submitted such a petition with respect to the ordinance authorizing a lease agreement, and after submitting such petition, the ordinance was repealed. Therefore, Plaintiff's desire to have Ordinance No. 4802-24 declared

invalid by referendum is moot. The Ordinance is repealed. It is of no force and effect. The remedy sought by the petition has already been achieved through the actions of the Township Council. Even if the referendum was placed on the ballot, there would be no difference in the outcome. The referendum is to repeal Ordinance No. 4802-24. It has been repealed. As a result, plaintiff's Complaint goes well-beyond those remedies permitted under the Initiative and Referendum statute. Plaintiff now seeks to have this Court place restrictions and requirements on a local government that are not recognized or supported by the statutes or case law of our State.

Notably, Plaintiff references the resolution that was later adopted by the Township Council which permits the Township to enter into a Shared Services Agreement with the Ocean County Health Department under the Uniform Shared Services Act, N.J.S.A. 40A:65-1. First and foremost, the Initiative and Referendum statute relied upon by plaintiff, N.J.S.A. 40:69A-184, *et seq.* does not permit a referendum on a resolution adopted by the governing body. Respectfully, there is no further legal inquiry required. The law does not permit a ballot question referendum on a governing body resolution. Likewise, under N.J.S.A. 40A:69A-185, the power of initiative, the voters of any Faulkner Act municipality have the right to propose "any ordinance" and may submit same by petition to the governing body. If the Council fails to adopt said ordinance, it shall be decided by the voters via a ballot question. Once again, the statute does not permit or authorize the adoption of a resolution by virtue of an Initiative petition.

It is important to note that even in a Faulkner Act municipality, not every ordinance is even subject to referendum. While N.J.S.A. 40:69A-185 grants voters in a

Faulkner Act municipality the "power to approve or reject at the polls…any ***ordinance*** passed by the council, against which a referendum has been filed…," the Court has recognized that the "any ordinance" language in the state does not mean "all ordinances." *In Re Referendum Petition to Repeal Ordinance 04-75*, 388 N.J. Super. 405 (App. Div. 2006) (quoting *Tumpson v. Farina*, 120 N.J. 55, 59 (1990)). In *Cuprowski v. City of Jersey City*, the Court explained that the Legislature, in adopting N.J.S.A. 40:69A-185, was referring to ordinances of a legislative nature and did not intend to include resolution or ordinances of an executive or administrative nature. *Cuprowski v. City of Jersey City*, 101 N.J. Super. 15, 24–25 (Law Div.), *aff'd o.b.*, 103 N.J. Super. 217 (App. Div.), *certif. denied*, 53 N.J. 80 (1968)). Once again, the courts have recognized the clear delineation between the legislative and administrative functions of local government.

The Plaintiffs in *Cuprowski* filed an action in lieu or prerogative writ after the municipal clerk refused to accept their referendum petition challenging the City's budget. In ruling that the Legislature intended local budget ordinances to be exempt from the referendum provisions, the court described the tests for determining whether municipal actions were legislative or administrative in nature. The Court stated:

> Matters which are of a permanent or general character are considered to be legislative while those which are temporary in operation and effect are deemed administrative. Acts which are classified as administrative are those which result from governmental powers properly assigned to the executive department and necessary to carry out legislative policies and purposes already declared either by the legislative municipal body, or devolved upon it by law of the state.
>
> [*Cuprowski*, 101 N.J. Super. at 23.]

As is outlined above by the direct language of the Faulkner Act, the executive power of Toms River lies with the mayor. N.J.S.A. 40:69A-39. The mayor is authorized to supervise, direct and control all departments of the municipal government. N.J.S.A. 40:69A-40(c). The mayor is also authorized to supervise the care and custody of all municipal property, institutions and agencies, and make recommendations concerning the nature and location of municipal improvements and execute improvements determined by the governing body. N.J.S.A. 40:69A-39(f). The Shared Services Agreement in question, which is to be executed by the Mayor, is a pure exercise of the Mayor's executive power granted to him by the Faulkner Act. The administrative act of authorizing a Shared Services Agreement, and the Chief Executives decision to close a township building or lay off employees is not subject to a binding referendum. While plaintiff may not agree with the Shared Services Agreement, it is an executive function of the mayor and not subject to referendum. If plaintiff, or any other citizen, is unhappy with the Mayor's decision as the executive of the municipality, their remedy is at the mayoral election. The plaintiff has no authority or right to circumvent the mayor's statutory power through referendum.

Plaintiff knows this to be true. That is why plaintiff has tried to distract this Court and affix the Referendum petition signatures, all of which were gathered on or before May 14, 2024, to a resolution adopted by the Township Council on August 7, 2024. There is simply no conceivable way that signatures gathered prior to May 14, 2024 can have any effect on a Resolution adopted nearly 3 months after their collection. Again, even if such signatures were gathered after the adoption of the Resolution authorizing the Shared

Services Agreement, the statutes of this state do not permit a referendum to challenge the adoption of a resolution.

The Uniform Shared Services and Consolidation Act, N.J.S.A. 40A:65-1, *et seq.*, was enacted to effectuate agreements between local units to share any service intended to reduce property taxes through the reduction of local expenses. *See* N.J.S.A. 40A:65-2(c). The legislature made it crystal clear in N.J.S.A. 40A:65-13 what the purposes of the Shared Services Act were:

> It is the intent of the Legislature to facilitate and promote shared services agreements, and therefore the grant of power under sections 1 through 5 of P.L. 2007, c. 63(40A:65-1 through 40A:65-35) is intended to be as broad as is consistent with general law.

Pursuant to N.J.S.A. 40A:65-4:

> Any local unit may enter into an agreement with any other local unit or units to provide or receive any service that each local unit participating in the agreement is empowered to provide or receive within its own jurisdiction, including services incidental to the primary purpose of any of the participating local units including services from licensed or certified professional required by statute to be appointed.

In order to effectuate its purpose, to streamline its operation and to encourage the use of this process, the legislature declared that such agreements need only be authorized by resolution. N.J.S.A. 40A:65-5.

This entire statutory framework is completely separate and apart from the initiative and referendum provisions of the Faulkner Act. Had the legislature intended for such agreements to be subject to initiative and referendum it most certainly would have

required they be adopted by ordinance, they did not. Granting the relief requested by the plaintiffs here will not only infringe upon the authority of the Mayor under N.J.S.A. 40:69A-39, but it would also frustrate the very intent and purpose of the Uniform Shared Services And Consolidation Act.

The ordinance challenged by Plaintiff has been repealed. The purpose of the referendum is moot. The Mayor has the authority to manage and control Township departments and buildings. The Shared Services Agreement at issue does exactly what that statute was designed to do: to save taxpayer funds for the residents of Toms River so they are not paying twice for the same animal shelter services they already pay for through their county taxes. Quite simply, plaintiff has no likelihood of success on the merits of this litigation and the requested relief must be denied.

C. BALANCE OF THE HARDSHIPS

The relief sought by Plaintiff is improper under the law. The Plaintiff has no probability of success on the merits of the Complaint in this matter. Entering the restraints sought would disrupt the function of local government and set a dangerous precedent. Requiring the Township to “undo” its actions, while awaiting the outcome of this case would require the Township to forego its statutory power. It would hinder the purpose of the Faulkner Act, which authorizes the township’s Chief Executive to control all township buildings, while simultaneously frustrating the very intent of the Uniformed Shared Services Act by delaying the township’s effort to share services with Ocean County. It would tie the hands of the duly elected Mayor and his administration from

taking action to save taxpayer money simply because some residents disagree with the decision of the of the Mayor to do so.

Further, entering the restraints sought by Plaintiff would create a dangerous precedent in which anyone unhappy with a local government decision could halt the functions of local government despite failing to demonstrate a likelihood of success on the merits of a claim. This would create a wave of orders to show cause, seeking to stop various actions of a municipality for a certain period of time, despite having no legal basis to do so. The purpose of the standard required for temporary restraints is to prevent restraints being entered in matters where the restraints would later have to be extinguished due to applicable law. The Township has clearly demonstrated that the actions taken by the Township were proper. As noted above, if such restraints were permitted by this court, during the time it takes for the township to ultimately prevail in this matter, months or years from now, the residents of Toms River will have no animal shelter services available to them in the community. In balancing the relative hardships, clearly the Township and its residents would be harmed.

Point VII

THE RELIEF REQUESTED IN PLAINTIFF'S COMPLAINT IS WITHOUT ANY BASIS IN LAW

Plaintiff's Complaint requests the following relief:

> a. Order the Township of Toms River to stay the Resolution No. 7 on the August 7, 2024 Agenda regarding a Shared Service Agreement with the Ocean County Board of Health to re-open the Toms River Animal Shelter under the management and control of the Ocean County Board of Health;

> b. Order the Township of Toms River to stay the Ordinance first introduced on August 7, 2024 to repeal Ordinance No. 4802-24 regarding the Toms River Animal Shelter lease Agreement with the Ocean County Board of Health;
>
> c. Order the Township of Toms River to reopen, offer to rehire all staff as of June 6, 2024 and operate the Toms River Animal Shelter;
>
> d. Order the Township of Toms River place Ordinance No. 4802-24 regarding the Toms River Animal Shelter on ballot for referendum vote;
>
> e. Stay the Township of Toms River from introducing any ordinances to transfer the Toms River Animal Shelter out of the operation or control of Toms River until the voters vote on the question;
>
> f. Order all Defendants to reimburse any and all Court Fees and each to donate a minimum of $1,000 to the Toms River Animal Shelter for their violation of the Civil Rights Act[.]

Plaintiff fails to provide any legal support for the relief requested. For the reasons set forth above, there is no statutory or case law support for plaintiff's request that the Court take any action requested in plaintiff's Complaint, including "Order[ing] the Township of Toms River to reopen, offer to rehire all staff as of June 6, 2024 and operate the Toms River Animal Shelter"; "Stay[ing] the Township of Toms River from introducing any ordinances to transfer the Toms River Animal Shelter out of the operation or control of Toms River until the voters vote on the question"; and ordering the defendants to "donate a minimum of $1,000 to the Toms River Animal Shelter for their violation of the Civil Rights Act."

Indeed, as set forth previously and as set forth above, plaintiff misunderstands the relief permitted under the statute. The statute does not permit a "question" to be put to voters such as who should operate the animal shelter. The statute only sets forth that the

voters can vote whether to repeal the ordinance or not – and the ordinance has already been repealed.

Accordingly, plaintiff has not set forth a claim for any relief to which he may be entitled and the Complaint must be dismissed.

CONCLUSION

For the foregoing reasons, plaintiff has failed to demonstrate by clear and convincing evidence an entitlement to the entry of the temporary restraints sought in his Order to Show Cause. As a result, Plaintiff's application for temporary restraints should be denied and the Complaint dismissed.

Should the Court grant plaintiff's request for injunctive relief, the Township respectfully requests a stay for purpose of seeking immediate appellate review.

Respectfully submitted,

LAW OFFICE OF DONALD F. BURKE
Attorneys for Defendants
TOWNSHIP OF TOMS RIVER, COUNCIL PRESIDENT CRAIG COLEMAN, COUNCIL VICE PRESIDENT LYNN O'TOOLE, COUNCILMAN JUSTIN LAMB, COUNCILMAN GEORGE LOBMAN, MAYOR DANIEL RODRICK, TOMS RIVER MUNICIPAL CLERK STEPHEN HENSEL, BUSINESS ADMINISTRATOR JONATHAN SALONIS, ATTORNEY PETER PASCARELLA, ESQ.

By: s/ *Donald F. Burke Jr.*
Donald F. Burke Jr., Esq.

Dated: September 16, 2024