New Jersey
Appleseed

September 5, 2012

Hon. Robert C. Wilson
New Jersey Superior Court
Bergen County Justice Center
10 Main Street, Room 215
Hackensack, N.J. 087601

Re: Food & Water Watch et al. v. Doug Ruccione, Township Clerk, et al.
Docket No. BER-L- 5566-21

Dear Judge Wilson:

Plaintiffs Food & Water Watch ("FWW"), and Elissa Schwartz, Bettina Hempel, Paula Rogovin, Lisa Rose and Laurie Ludmer (the "COP" or the "Petitioners") respectfully submit this letter-brief in further support of their Order to Show Cause, and in reply to the Township of Teaneck's ("Township" or "Teaneck") opposition to their claim that the Township unlawfully rejected their Community Energy Aggregation Initiative Petition (the "Petition").

To be clear, the COP is not attacking defendant Ruccione personally, in either his professional competence or his motives. The COP just claims that he misinterpreted his duties, pursuant to N.J.S.A. 40:69A-184 et al., as modified by several Gubernatorial executive orders, and mislead the COP and the public about his decision to accept petitions that included electronic signatures that were validly collected prior to July 3, 2021 only if they were submitted on or prior to that date. Once the Legislature ended the Public Health Emergency, N.J.S.A. 26:13-32 et seq., and the Governor signed Executive Order 244 ("EO 244") permitting Executive

New Jersey Appleseed
Public Interest Law Center of New Jersey
23 James Street
Newark, New Jersey 07102

Phone: 973.735.0523; Cell: 917-771-8060
Email: renee@njappleseed.org
Website: www.njappleseed.org

Order 216 ("EO 216") to expire but remain in effect until July 4, 2021, defendant Ruccione remained obliged under the Faulkner Act to accept petition signatures that were validly collected pursuant to the Executive Orders. Further, to the extent that he wanted to change his procedures so as to deem electronic signatures collected prior to July 3 invalid if submitted after that date, at minimum, he should have placed his on the Teaneck Township website[1] or simply informed the COP of such interpretation—a group of voters with whom he had been corresponding since early March. The COP respectfully responds to Defendant Ruccione's specific arguments as follows:

1. **This is a summary hearing on an election matter; plaintiffs are seeking final judgement, not temporary or preliminary relief**.

Defendants claim that the COP has not satisfied the four prongs of Crowe v. De Gioia with clear and convincing proof, and thus "this Court should dismiss their Order to Show Cause, deny the injunctive relief sought and, at best, set this matter down for a full plenary hearing at a later date. Teaneck Letter Brief ("Teaneck Br."). at 6. However, the Crowe test is no longer relevant. The Court has already signed a temporary restraining order prohibiting the County Clerk from sending the Teaneck 2021 General Election ballot to the printer prior to resolution of this matter, and Plaintiffs' proposed Order to Show Cause has been signed, with a summary hearing to be held on September 13, 2021, pursuant to Rule 4:67. As a routine matter, election cases and disputes that relate to the sufficiency of an election petition are tried and disposed of in a summary way, and there is no reason for this Court not to do so here. See Plaintiffs' Br. at 14. See also Bd. of Educ. of E. Newark v. Harris, 467 N.J. Super. 370 (App. Div. 2021) (expediting an election matter given urgency of issues); and Fuhrman v. Mailander, 466 N.J. Super. 572

[1] --- a public announcement that at least two county clerks—Burlington and Camden—undertook with respect to candidate petitions due in late July or August, according to defendant Ruccione's own exhibits,

(App. Div. 2021) (upholding the entry of an order to show cause given the "extremely time-sensitive nature of the matter and the need for immediate resolution").

2. This matter involves a legal question only, and thus no deference to the Clerk is appropriate.

Defendants respond to the COP's legal argument that defendant Ruccione has misinterpreted the Faulkner Act, as modified by several Gubernatorial executive orders, by emphasizing that the Township Clerk is "a licensed civil servant who works arduously at his profession," Teaneck Br. at 1, and that he "acted in good faith when he attempted to the best of his ability to assist the Committee as shown throughout the various e-mails." Ibid. at 4. Good faith, politeness and professional competence does not excuse a decision that is nonetheless arbitrary, capricious and in violation of the law. The COP agrees with Defendants that "a gubernatorial executive order is treated as the equivalent of a statute enacted by the Legislature," (Teaneck Br. at 6); and, it therefore asserts that this matter constitutes a question of statutory interpretation, which is purely a legal issue. As a result, the Court owes no deference to Ruccione's legal conclusions, regardless of his professional competency. See Tumpson v. Farina, 431 N.J. 164 (App. Div. 2013), *aff'd and rev'd in part,* 218 N.J. 450 (2014) (legal question constitutes *de novo* review with no deference).

3. The Clerk has no obligation to give petitioners legal advice; but should not engage in a cat-and-mouse game by hiding information that could impact petitioner's actions.

In response to the COP's estoppel argument, Defendants state in their Statement of Facts that Ruccione "was under no obligation to notify FWW or any other committee of petitioners that Teaneck would not accept electronic signatures submitted" on or after July 4. Teaneck Br. at 3; see also, Ibid. at 10. The COP disputes that the existence of such obligation is a factual question and disagrees with Defendants' legal conclusion.

As stated in the COP's initial letter brief, both P.L. 2020, ch. 55 (July 1, 2020) and EO 216 (January 26, 2021) required that a "petition's respective filing officer . . . develop the electronic procedures for signature verification, petition notarization, and submission of oaths to meet the requirements of current law" P.L. 2020, ch. 55 at 1(c). EO 216 expanded that obligation to include "develop[ing] the procedures for the electronic submission and signing of petitions." EO 216 at ¶3 (Exhibit C). Accordingly, on March 1, 2021, FWW's staff member, Samantha DiFalco contacted defendant Ruccione to request "[his] procedures for the electronic submission and signing of initiative ordinance petitions." This request initiated the e-mail dialogue that continued until FWW and the COP actually submitted their Petition, and indicates that the COP was relying on the Clerk for accurate information regarding his procedures for electronic submission and signing of their Petition.

The relationship between a committee of petitioners and the filing officer responsible for processing the committee's initiative petition cannot be a cat-and-mouse game. Like the courts, in the context of interpreting the Faulkner initiative and referendum provisions, municipal clerks have the obligation not only to follow the law but also to interpret and implement the law to enfranchise voters and "promote the beneficial effects of voter participation." In re Referendum Petition to Repeal Ordinance 04-75, 192 N.J. 446, 459 (2007). In this way, the COP was not asking defendant Ruccione for legal advice; it was just asking him to make clear the procedures he was employing so its members could follow them to ensure the sufficiency of their Petition; and implicitly, to adopt procedures or rules that would not "in any way interfere with or impede [EO 216's] achievement," which included the facilitation of "full participation in the electoral process, both as a voter and as a candidate." EO 216 (Ninth WHEREAS clause), Exhibit C at 2.

It is therefore Plaintiffs' position that at the very least, prior to July 3, 2021, defendant Ruccione should have posted on the Township's website his position regarding the submission of initiative petitions after that date, with respect to the collection of electronic signatures and the submission of such petitions, just as some county clerks have done with respect to candidate petitions.

Alternatively, even if defendant Ruccione did not think to place his legal determination on the Township's website, he did not "correspond[] with and respond[] in a timely fashion to the Committee, at every turn" as he now claims. Teaneck Br. at 2. He did not respond to Paula Rogovin when she contacted him to inform him that the COP had switched its delivery date from June 30 to July 9, 2021. At that time, he should have informed her that he would not be accepting any electronic signatures after July 3, 2021. Specifically, as set forth in Plaintiffs' initial brief, defendant Ruccione knew that FWW's Petition consisted almost entirely of signatures the COP had collected electronically through the internet (for several months during the Public Health Emergency), and he should have told her that if she wanted such signatures to count toward the sufficiency of the petition, she must file the Petition by Friday, July 3. Plaintiffs' Br. at 22-23.

His failure to be open and direct with the COP, who relied on his representations, and the public generally should not be condoned.[2]

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[2] In their opposition brief, Defendants' state that it is "clear that the Committee was aware of the Petition submission deadline through a public Facebook posting on June 9, 2021." But the Court should know that the images and messages attached as exhibits are from a *private* Facebook page, where persons participated by invitation only. Further, neither the statements included in the Facebook page nor the Defendants' description of them indicate what Defendants say they express. Ms. DiFalco was presenting to the group an internal deadline that Plaintiffs set forth in their Complaint: Ms. Rogovin intended to make the COP's first submission on June 30, 2021. Most importantly, how can the COP possibly be aware of any such "Petition submission

4. By conflating several terms such as electronic petitions, electronic signatures, electronic collection of signatures, acceptance of petitions electronically, and electronic submission of petitions, the Clerk misinterprets the Governor's Executive Orders.

Throughout their legal argument, defendant Ruccione seems to conflate, or use interchangeably, the terms "electronic petitions," "electronic signatures," "electronic collection of signatures," "acceptance of petitions electronically," and "electronic submission of petitions" to conclude that after the expiration of EO 216**,** the Municipal Clerk did not have the authority to find signatures that were collected electronically to be valid. See Teaneck's Br. at 7-11. But the EOs are careful to distinguish their different requirements for each of these separate steps in the process. Defendants simply hope to confuse the issue. Plaintiffs are having a difficult time in understanding the Municipal Clerk's logic. Perhaps the Clerk's assumption that "EO 132 permitted clerks to accept petition signatures that were not, in fact, signatures at all" is driving his misguided interpretation of the all the relevant orders, and their impact on his duties under the Faulkner Act. Teaneck Br. at 9. But no matter the truth of this assumption, Defendants also must take another illogical leap, that simply because the EOs 132 and 216 allowed the valid collection and acceptance of non-pen-ink signatures during the Governor's Public Health Emergency, that such signatures immediately became invalid and unacceptable the moment the Public Health Emergency ended.

Nothing in the EOs or law provide as much. What is apparent from an examination of all the executive orders the Governor issued with respect to "relaxation" of rules pertaining to all election petitions—candidate, recall, and initiative and referendum—and P.L. 2020, ch. 55, is that they are very clear in what petitioners' and clerks' obligations were. All speak in terms of

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deadline," when a hallmark of initiative petitions under the Faulkner Act is that they can be submitted at any time.

the "electronic collection" of signatures and the "electronic submission" of petitions. See Executive Order 105 ("electronic collection and submission" of political party candidates and delegates "through an online form"); Executive Order 120 ("electronic collection and submission of petitions through online form" for independent candidates seeking direct nomination); EO 132 (allowing for "submission of initiative and referendum petitions electronically" in addition to submission by hand delivery; but required the "collection of signatures via an online form"); EO 216 (allowing petitions due prior to an election to be "submitted by hand delivery and electronically" and to include "hand-written signatures and signatures collected via an online form"); and P.L. 2020, ch. 55 ("requirements to collect petition signatures via an online form and to submit petitions online" and "the electronic signature and submission requirements for petitions"). As illustrated in COP's opening brief, this was motivated by protecting citizens and direct democracy during the Public Health Emergency. Seen through this prism, one can conclude that EO 244 and N.J.S.A. 26:13-32, which ended the Public Health Emergency and required several executive orders to expire, simply terminated the ability of petitioners to *collect* signatures electronically and to *submit* their petitions electronically, rather than eliminated the authority of the filing officer to *accept* a hand-delivered petition that included signatures that had been collected electronically via an online form during the time period when such collection was authorized. In other words, although EO 216's mandate requiring municipal clerks to accept petitions with signatures collected via an online form ended, their authority to accept such petitions did not. There is simply nothing in the Executive Orders to suggest otherwise.

To hold to the contrary would be to disenfranchise thousands of voters who signed initiative and referendum petitions throughout the Public Health Emergency, only because those

petitions were filed one month after the formal end of the Public Health Emergency—even though many voters were still practicing social distancing and the State of Emergency remained in place.

5. The plain language of the Executive Orders and legislation terminating those orders does not authorize the Clerk to reject signatures of qualified voters that were validly collected; to do so, would defeat the purpose and intent of the Governor as well as arbitrarily establish a deadline for the submission of petitions without any authority.

Defendants' assert that "[b]ased on the plain meaning of EO 244 and the passage of P.L. 2021, Ch. 103, post July 4, 2021, municipal clerks were unable to accept petitions electronically." Teaneck Br. at 8, 10. Plaintiffs agree that based on the expiration of EO 216, thirty days after the termination of the Public Health Emergency, a committee of petitioners was no longer able to *submit* its petition electronically, and municipal clerks were authorized to *accept* petitions that were hand-delivered only. However, Plaintiffs do not agree with Defendants' central claim in this matter, that the plain meaning of EO 244 and the enactment of N.J.S.A. 26:13-32 eliminated the authority of municipal clerks to *accept* "electronic signatures in support of [a petition]." Ibid. at 7.[3] Rather, Plaintiffs contend that EO 244, read together with EO 132 and P.L. 2020, Ch. 55, implied that simply the collection of signatures electronically was no longer an option going forward. Municipal clerks certainly still had the authority, if not the obligation, to accept petitions that included such signatures that were collected prior to the expiration of EO 216. This interpretation is consistent with, and indeed flows from, the policies

[3] Defendants also state that "[t]he reason petitions cannot be submitted owes to the fact that signing a petition has no force and effect." Teaneck Br. at 9. Plaintiffs admit that they do not understand this sentence, even if one alters it to mean that "petitions that include signatures collected electronically cannot be submitted post-July 3 . . . ." Even then, the Defendants' following discussion about the Faulkner Act's "requirements, as far as timing, deal with submission, not collection[]" do not seem to follow. As a result, Plaintiff cannot respond other than to say that, in fact, the Faulkner Act has no requirements for timing, either in submission or

motivating EO 132 and EO 216 as well as the established liberal interpretation of the Faulkner Act, which were specifically modified by the executive orders.

First and foremost, neither EO 244 or the legislation terminating the Public Health Emergency discussed any specific executive order, and thus, did not address the issues, as the Governor had in EO 132 and the Legislature in P.L. 2020, Ch. 55. In both, the drafters specifically noted that "[h]and signatures obtained prior to the effective date of this Order shall also be accepted." Exhibit B, ¶3; see also P.L. 2020, ch. 55 at §1(b)(3)("[H]andwritten signatures obtained prior to the effective date of this section shall also be accepted electronically or in person.") In this way, both the Governor and Legislature expressed their intent to ensure that changing the rules governing the collection of petition signatures would not disenfranchise voters who had followed those rules prior to the change but had yet to submit their petitions for review by the clerk. That intent must also be imputed to the Governor and the Legislature when they ended the Public Health Emergency and ended the right of voters to collect signatures and submit their petitions electronically.

To do otherwise, as Defendants conclude, would also effectively set a "due date" for initiative and referendum petitions, without any authority under the executive orders or legislation (discussed herein). Despite Defendants unsubstantiated assertion that "[FWW's] posting clearly reflects the understanding of the Committee that the Petition submission deadline was July 4, 2021," such deadline does not exist in the Faulkner Act, and definitely was not imposed by the executive orders. As a result, defendant Ruccione not only had the authority, but also the obligation to accept Plaintiffs' Petition with electronically collected signatures dated

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collection, and that is precisely why the Defendants' interpretation establishing such a deadline is fundamentally incorrect, as further discussed below.

prior to July 4, 2021, pursuant to Ruccione's own established procedures allowing audit trails for such signatures in lieu of wet-pen signatures.

6. The Clerk has failed to provide evidence that other municipal clerks share his erroneous interpretation of the law governing initiative and referendum petitions.

In their opposition papers, Defendants argue that "other New Jersey County Clerk's websites reflects that there is widespread understanding that . . . electronic petitions are no longer to be accepted post July 4, 2021." Teaneck Br. at 11-12. Contrary to the unsubstantiated hyperbole contained in this statement, Defendants provide support for their statement by referencing language found on the Burlington and Camden County Clerks' respective websites. The language provided with respect to Ocean County is quite generic and speaks only to potential changes in the "dates listed in this brochure" due to an "Executive Order issued by the Governor or an ACT signed into law" and is not relevant to the issue at hand. Ibid. at 12.

Nonetheless, Plaintiffs contend that the statements expressed by the two County Clerks provided by Defendants also have little, if any, relevance to the issue presented herein. This is the case for several reasons. First, neither filing officer *is responsible for initiative or referendum petitions*; that is, neither county is governed by the Optional County Charter Law, N.J.S.A. 40:41A-144 et seq., which provides voters in counties governed by that law with the statutory right of initiative and referendum. Thus, their statements simply do not and would have no reason to address the requirements for submitting initiatives and referenda under the Faulkner Act. Second, all statements involve candidate petitions that pursuant to EO 216 still required a candidate to "provide a notarized oath of allegiance . . . regardless of whether a petition is submitted by hand delivery or electronically." Exhibit C, ¶4. Moreover, candidate petitions are often, if not always, provided by the county clerk to be picked up and utilized by the candidates, and all have specific deadlines by which time they must be submitted. See Teaneck Exhibit 2

("Traditional paper form petitions for November School Board and Fire District Elections may be found on the County Clerk's website."). Thus, any clerk statements about the petition-collection process for candidates is inapposite to the less stringent requirements for electronically collected initiative and referenda petition signatures. Third, from the printout, Plaintiffs do not know when the Camden and Burlington Clerk's made their respective postings; that is, whether it was between June 3 and July 3, 2021 or was it soon thereafter. Review of the 2021 General Election Timeline issued by the New Jersey Division of Elections, attached hereto as Attachment I, indicates that the first deadline for nomination petitions after July 4, was July 26, 2021 and the publication of the notice of that deadline was July 5, 2021. So, it is not evident from the information submitted whether school and fire district election candidates were even collecting signatures prior to July 4, 2021.

In any event, what is telling is that defendant Ruccione cannot point to at least one other municipal clerk that shares his narrow, very restricted interpretation of the Governor's orders and their impact on his duties under the Faulkner Act. That is the case because it is evident that no other clerk has sought to declare validly collected signatures of registered voters invalid simply because they were submitted to the clerk after a certain date. As Plaintiffs have shown, in their own experience, four other municipal clerks have reviewed petitions submitted after July 3, 2021, which included electronically collected signatures, and in each case, the clerks have found that petitioners satisfied the threshold number of signatures of qualified voters needed to deem their petitions sufficient.

Furthermore, contrary to Defendants' assertions, by rejecting Plaintiffs' Petition based on his erroneous legal interpretation of the Faulkner Act, as modified by the Governor's executive orders and the Legislature's codification of such orders, defendant Ruccione has interfered with

of Plaintiffs' substantive right of initiative. See Teaneck Br. at 14-15. This situation is exactly the same situation as Tumpson v. Farina. In that case, James Farina, the Hoboken Clerk, also defended his decision to reject Tumpson's filing of the committee of petitioners' petition based on his legal interpretation of language in N.J.S.A. 40:69A-185. He also argued that he made that interpretation in good faith and the court should defer to it. Three courts disagreed. Mr. Farina was not afforded any deference and the committee of petitioner did not have to produce evidence of bad faith in order to be awarded attorneys' fees under the New Jersey Civil Rights Act. Similarly, Plaintiffs should not have to do so here.

Conclusion

In short, this is a summary proceeding seeking judicial review of the Township Clerk's decision to disqualify all signatures the Committee of Petitioners collected electronically during the Public Health Emergency (declared in Executive Order No. 103, "EO 103"), but submitted in-person to the Clerk in paper form after the Governor terminated that emergency in EO 244. He ignores the clear language and intent of several Gubernatorial Executive Orders (primarily, EOs 132 and 216) and the Legislature's intent in P.L. 2020, ch. 55, which was to facilitate New Jerseyans' statutory rights of initiative and referendum by permitting them to circulate and submit electronic petitions during the COVID pandemic. The Clerk has thus abused his authority and has failed to perform a mandatory duty to process Plaintiffs' Initiative Petition in accord with N.J.S.A. 40:69A-184 et seq., as modified by those Executive Orders. Defendant Ruccione's position that the petition is insufficient because it lacked a sufficient number of valid signatures of qualified voters is wrong and lacks any basis in law and practice around the State. Accordingly, Plaintiffs' petition is proper, valid and sufficient in all respects, and, pursuant to

N.J.S.A. 40:69A-190, must be submitted to the Deputy County Clerk to be put on the November 2, 2021 ballot.

Respectfully submitted,

NEW JERSEY APPLESEED PUBLIC INTEREST LAW CENTER, INC.

/s/Renée Steinhagen
By: Renée Steinhagen, Esq.