

# Direct Democracy in Faulkner Act Municipalities: A Right Unbridled by Fiscal Necessity

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The scope of a citizen's right to initiative and referendum under the Optional Municipal Charter Act, N.J.S.A. 40:69A-1, et seq. (hereinafter "Faulkner Act"), has been further solidified at the Supreme Court of New Jersey. In *Redd v. Bowman* (N.J. Aug. 11, 2015), the Supreme Court held a group of citizens had the right of initiative to propose an ordinance under the Faulkner Act to restrain the city of Camden from dissolving its police department, even when the proposed ordinance conflicted with the city of Camden's obligation to decrease its spending and payroll as consideration for its receipt of state financial aid under various state-administered municipal aid programs, including the Municipal Rehabilitation and Economic Recovery Act, N.J.S.A. §§52:27BBB-1, et seq. (MRERA); the Special Municipal Aid Act, N.J.S.A. §§52:27D-118.24, et seq. (SMAA); and the Transitional Aid to Localities Program, N.J.S.A. §§52:27D-118.42a (TALP).

The New Jersey Legislature enacted the Faulkner Act to provide for the "free adoption by the people ... [of] a specific form of [municipal] government with specific powers." *Paoella v. Mayor & City Council of Hackensack*, 76 N.J. Super. 86, 88-89 (Law Div. 1962). The Faulkner Act identifies and allows citizens to choose from four voluntary forms of government, each of which has varying political structures and separation of powers. The available plans under the Faulkner Act include: (1) the mayor-city council plan; (2) the city council-manager plan; (3) the small government plan; and (4) the mayor-city council-administrator plan.

In each Faulkner Act municipality, individual citizens also have the right of initiative to propose and place ordinances on a ballot for citizens of that municipality to vote on, thus bypassing their elected representatives' legislative authority. This right is intended to "arous[e] public interest and plac[e] in the hands of the voters ... direct means of controlling proposed ... municipal legislation." *City of Ocean City v. Somerville*, 403 N.J. Super. 345, 352 (App. Div. 2008). The right of initiative is available to citizens early in the legislative process and allows voters to "propose any ordinance" to the municipality's governing body and to "adopt or reject the same at the polls." N.J.S.A. §40:69A-184; see also *City of Ocean City*, 403 N.J. Super. at 351.

Upon the filing of a petition, which requires signatures from at least 10 percent of the municipality's registered voters, the municipality's governing body has 20 days to pass the ordinance. N.J.S.A. §40:69A-191. If the municipality's governing body fails to pass the proposed ordinance within 20 days after the petition is filed and the petitioner does not withdraw the petition within 10 days thereafter, the municipality's governing body must place the proposed ordinance on the ballot. If the proposed ordinance passes by a majority of the votes cast in the

municipal election, the ordinance is enacted as law and cannot be amended or repealed by the municipality's governing body for three years. N.J.S.A. §40:69A-196. After the three-year moratorium expires, the municipality's governing body may replace or modify the ordinance, but it must place a proposition for the repeal or amendment of the ordinance on the ballot during the next election and acquire a majority vote for the repeal or amendment.

In *Redd*, two public policy goals were in play: (1) the development of healthy local economies and fiscally sustainable municipal governments; and (2) the involvement of citizens in the governance of their local communities. The Supreme Court found that the cultivation of civic engagement under the Faulkner Act, even if the civic engagement conflicted with obligations imposed by the state to promote fiscal sustainability, was envisioned by the Legislature when it drafted the Faulkner Act and provided citizens with limited initiative rights. The Supreme Court also found that the Legislature did not intend MRERA, SMAA or TALP to pre-empt proposed ordinances under the Faulkner Act, even when the proposed ordinance's language interfered with the state's terms and obligations for the receipt of state funding.

Prior to the initiation of this litigation, the city of Camden sought to disband its police department and help the county of Camden create a county-wide police department, so the city of Camden could decrease its spending and comply with conditions imposed by the state as a result of it receiving financial aid under various municipal financial relief programs, including MRERA, SMAA and TALP.

Generally, MRERA, SMAA and TALP seek to place distressed municipalities, like Camden, on a path to fiscal sustainability by providing financial aid in exchange for municipal government reforms or, in dire situations, the appointment of a state-controlled chief operating officer to manage local affairs and impose procedural and substantive restrictions on municipal government. For example, under SMAA and TALP, a municipality may receive emergency financial assistance to meet urgent fiscal obligations and retain fiscal stability if they agree to state-imposed conditions to promote municipal "operational efficiency" and implement "oversight measures necessary for the fiscal recovery." N.J.S.A. §52:27D-118.27-.29; see also N.J.S.A. §52:27D-118.42a.

Similarly, under MRERA, a municipality may receive financial aid to provide basic public services and funding for capital projects to stimulate the local economy under the condition that the governor appoints a chief operating officer (COO) for a five-year term to reorganize government operations "to assure the delivery of essential municipal services and the professional administration of ... municipal government." [N.J.S.A. §52:27BBB-3](#). During the COO's five-year term, he or she has broad executive power to manage the municipality and enter into "memorandums of understanding" to receive financial assistance from the state in exchange for government reforms. [N.J.S.A. §§52:27BBB-6\(c\), -9, -11, -23\(a\)\(1\)\(a\)-\(b\)](#). The COO also has the power to veto any ordinance or resolution adopted by the municipality's governing body, subject to a motion by the municipality's governing body to override the veto and if requested by the municipality, an arbitration hearing to appeal the municipality's governing body's override. [N.J.S.A. §§52:27BBB-23\(a\)\(1\)\(a\)-\(b\)](#).

On Oct. 28, 2002, the state, while under the direction of Gov. Jim McGreevy, invoked MRERA and began overseeing the city of Camden's finances and government operations to revive its local economy and place its local government on a solid fiscal foundation. The "rehabilitation period," during which the city of Camden was governed by a COO, concluded on Jan. 18, 2010. The city of Camden is currently in the "recovery period," whereby its mayor, Dana L.

Redd, carries out reforms while under the New Jersey Department of Community Affairs' supervision. See [N.J.S.A. §52:27BBB-23\(a\)\(20\)](#). The recovery period began when the COO's five-year term expired on Jan. 18, 2010, and extends 10 years. See N.J.S.A. §52:27BBB-3.

The city of Camden also had entered into various "memorandums of understanding" with the state under SMAA and TALP to receive millions of dollars in aid from the state in exchange for its instituting budget and management reforms, such as the reducing its workforce, decreasing its operating costs, maximizing potential revenue, and retaining outside consultants to assess municipal operations. At the time this litigation began, a major expenditure in the city of Camden's operating budget was its police force, which constituted one-third of the city's spending for fiscal years 2010, 2011 and 2012, and one-half of its payroll costs. To comply with the state's requirement of reducing its workforce, the city of Camden laid off 168 police officers, which reduced the police department's presence in the city to below what was recommended by its security advisors.

To fix the public safety problem, the city of Camden entered into a "memorandum of understanding" with the county of Camden and the New Jersey State Department of Community Affairs in August 2011, whereby the parties agreed that the city would dissolve its police department, and the county would create and administer a police department that would provide police protection to all of the municipalities residing within the county of Camden. The City Council and the Board of Chosen Freeholders for the county of Camden issued resolutions implementing the agreement on Dec. 27, 2011, and Jan. 26, 2012.

The defendants, Lance Bowman, Larry Gilliams, Eulisis Delgado, Mary Cortes and Robert Davis, opposed the city of Camden's proposal to disband its police force and introduced a petition for initiative under the Faulkner Act seeking the passage of an ordinance that: (1) required the city of Camden to maintain its own police force; and (2) enjoined the city of Camden from disbanding the municipal police force and replacing it with a regionalized police force. The plaintiffs, Camden Mayor Dana L. Redd, and the president of Camden's City Council, Francisco Moran, opposed the defendants' petition, filed suit on May 2, 2012, and sought equitable relief enjoining it from having to submit the proposed ordinance to the City Council or place it on the ballot for a vote pursuant to the Faulkner Act. In support of its application, the plaintiffs argued that: (1) the defendants' proposed ordinance impermissibly restrained the City Council's legislative power; and (2) the ordinance was pre-empted by MRERA, SMAA and TALP.

On June 12, 2012, the Law Division granted the plaintiffs' application for equitable relief, finding that the defendants' proposed ordinance impermissibly restricted the City Council's legislative authority. The Law Division, however, did not reach the question of whether the proposed ordinance was pre-empted by MRERA, SMAA and TALP.

The defendants, thereafter, appealed the Law Division's order. During the pendency of the defendants' appeal, the city of Camden disbanded its police force on April 30, 2013, and the county of Camden began providing the city of Camden police protection the next day, on May 1, 2013. On Oct. 29, 2013, approximately five months after the city of Camden disbanded its police force, the Appellate Division issued a written opinion, reversing the Law Division's finding that the proposed ordinance impermissibly restricted the City Council's legislative power, and remanded the matter back to the Law Division for it to make findings of fact and conclusions of law as to whether the proposed ordinance was pre-empted.

In its written opinion, the Appellate Division acknowledged that an ordinance may not restrict a future City Council's legislative power, "absent specific legislative permission." *Redd*, 433 N.J. Super. at 188-89. The Appellate Division further acknowledged that "limitations on initiative authority may be inferred or implied from comprehensive state supervision, regulation or occupation of the field." *Id.* at 188. The Appellate Division, however, found the Legislature, under N.J.S.A. §40:69A-184 and N.J.S.A. §40:69A-196, permitted citizens in Faulkner Act municipalities to pass ordinances via initiative, and to bind a City Council for three years until the council was statutorily allowed to place a proposition on the ballot amending or repealing the initiated ordinance pursuant to N.J.S.A. §40:69A-196. The Appellate Division also held that the decision of whether the defendants' proposed ordinance is exempt from initiative under the Faulkner Act is a task better left to the Legislature. The Appellate Division found that the proposed ordinance, as written, did not violate the Faulkner Act "in the absence of an unequivocal legislative expression to the contrary." *Id.* at 192-93. The Appellate Division, thereafter, remanded the matter back to the Law Division because it found the record was inadequate to determine whether the proposed ordinance creates "an obstacle to the accomplishment and execution of the full purposes and objectives of the Legislature" under MRERA, SMAA and TALP. See *Id.* at 198.

Both the plaintiffs and defendants filed petitions for certification appealing the Appellate Division's holding to the Supreme Court of New Jersey. The Supreme Court granted the parties cross-petitions on March 20, 2014. See *Redd v. Bowman*, 272 N.J. 293 (2014).

After considering each party's arguments, as well as amicus curiae briefs filed by New Jersey Appleseed, a nonprofit public interest organization, and the New Jersey Department of Community Affairs, the Supreme Court affirmed the Appellate Division's holding. The Supreme Court held that the proposed ordinance did not impermissibly restrict the City Council's legislative power, but reversed the Appellate Division's holding to remand the matter back to the Law Division, finding the proposed ordinance was not pre-empted by PFS, MRERA, SMAA and TALP.

First, the Supreme Court found that the defendants' petition was not moot. The Supreme Court found there was a justiciable issue for it to decide because the defendants' appeal did not seek to enjoin the city of Camden from disbanding its police force, but sought the Court to determine whether the "proposed initiated ordinance is valid" under the Faulkner Act and whether the proposed ordinance should "be presented to the Council pursuant to N.J.S.A. 40:69A-184."

Second, the Supreme Court, like the Appellate Division, found the Legislature authorized citizens to restrict a municipality's City Council's legislative power in accordance with the terms of the Faulkner Act, and therefore, the proposed ordinance did not impermissibly divest the City Council's legislative authority.

Third, the Supreme Court found it could decide the question of pre-emption and found the proposed ordinance was not pre-empted by PFS, MRERA, SMAA or TLP. The Supreme Court acknowledged that the city of Camden could suffer severe consequences under SMAA and TALP if it fails to comply with the conditions attached to its financial aid. The Supreme Court also acknowledged that the Legislature, when drafting PFS and the MRERA, entrusted the municipalities' governing bodies with creating and regulating their police forces and envisioned distressed municipalities reforming their police departments due to their exposure to heightened crime and poverty, which necessitates large investments of tax dollars into public safety. However, the Supreme Court found that neither SMAA, TALP nor PFS bars "a municipality

from enacting ordinances by initiative or referendum under the Faulkner Act that contravene a condition imposed by the state." The Supreme Court also found MRERA did not prevent a municipality from retaining "all functions, powers and duties prescribed to it" under the form of government it chose to adopt under the Faulkner Act, which includes the facilitation of a citizen's right to propose an ordinance.

Fourth, the Supreme Court found that the Department of Community Affairs' veto power during the "rehabilitation period" under MRERA did not pre-empt the proposed ordinance. The Supreme Court interpreted the Faulkner Act and MRERA harmoniously and in concert to find that the Department of Community Affairs had authority to veto proposed ordinances during the "rehabilitation period," but only after the proposed ordinance is passed by either the City Council or the voters.

Fifth and finally, the Supreme Court found the proposed ordinance could not be salvaged, given the change in circumstance with the city of Camden dissolving its police force in 2012. The Supreme Court, therefore, instructed the defendants to start over, re-draft the proposed ordinance, and re-submit the petition.

In *Redd*, the Supreme Court unanimously and unequivocally re-affirmed the expansive scope of a citizen's right of initiative in Faulkner Act municipalities. This decision is a victory for direct democracy advocates who seek to facilitate citizen involvement in local political affairs.

The consequences of the *Redd* ruling, however, are far-reaching. The purpose of legislative municipal aid programs, such as MRERA, SMAA or TALP, is to provide distressed municipalities with financial aid in exchange for government reforms agreed to pursuant to a "memorandum of understanding" with the state. If distressed municipalities who receive state funding can't implement the reforms due to a restriction imposed by their local constituents, the state will decrease the distressed municipality's state funding. Given this potential friction, the inter-relationship between local citizens who oppose state interference in local affairs; local municipalities that seek and need financial aid from the state to provide basic public services; and the state, that seeks to impose local government reforms in distressed municipalities in exchange for financial aid, is something that should continue to bring about political strife and litigation in the future.

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