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Re: Cape Henlopen Taxpayers for Fair Elections, et al. v.  
Cape Henlopen School District, et al.  
C.A. 2078-S  
Date Submitted: December 20, 2006

Dear Counsel:

Following argument on the cross-motions for summary judgment, I reserved decision on a few issues.

1. The Defendants argue that, in light of the progress achieved on the various projects, awarding any remedy with respect to the challenged contract

awards would be impracticable. The hallmark of equitable jurisdiction is the flexibility of its remedies. The Defendants are, no doubt, correct that framing any remedy, assuming for these purposes that the Plaintiffs establish an entitlement to any relief, will be difficult. I cannot conclude, however, that there could be no relief that could be granted rationally. Therefore, there is no basis for dismissing the public works contracting claims. The Defendants' motions for summary judgment on these claims, accordingly, are denied.

2. A similar argument has been presented with respect to the challenge to the referendum process. No challenge to the validity of the bonds issued as a result of the referendum can now be pursued. The Plaintiffs, however, support their claim to declaratory relief by arguing that there would be a public benefit achieved by determining whether or not the challenged conduct was permissible, in addition to providing the framework for imposing penalties under 15 *Del. C.* § 5162. The purpose of the referendum was authorization of the bonds. As noted, the bonds have been issued and are beyond the power of this, or any, court to set them aside even if issued pursuant to an irregularly conducted referendum. Thus, there is no prospective equitable relief that can be granted; in short, the Plaintiffs' equitable claims are moot.

On the other hand, the penalties prescribed by 15 *Del. C.* § 5162 are to be imposed in accordance with a statute which confers exclusive jurisdiction upon the Superior Court, to the exclusion of any other court. Thus, putting aside the fundamental question of whether private citizens are entitled to enforce this statute, the General Assembly has instructed that this Court should not be involved in imposing such penalties. Moreover, imposition of penalties is not part of the historical jurisdiction of this Court.<sup>1</sup> This is a classic matter for the law courts. Even if it were possible to craft an argument that would bring this claim within the so-called cleanup doctrine that enables this Court to reach related legal claims,<sup>2</sup> the Court, in recognition of the clear policy established by the General Assembly, would decline to exercise jurisdiction over this claim.

Finally, the Plaintiffs argue that a declaratory judgment determining the propriety of the Defendants' conduct during the referendum process would serve a useful purpose of establishing the standards governing conduct of such referenda. The Declaratory Judgment Act, 10 *Del. C.* Ch. 65, of course, does not confer subject matter jurisdiction. With no equitable claims remaining, no equitable

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<sup>1</sup> DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, *CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY* §2-5, at 2-75 (2006) (“Courts of equity historically have been without power to impose penalties . . .”).

<sup>2</sup> See, e.g., *Wilmington Homes, Inc. v. Weiler*, 202 A.2d 576, 580 (Del. 1964).

claims likely to be subject to assertion in the future, and no potential for an equitable remedy, the Court similarly declines to exercise subject matter jurisdiction over the Plaintiffs' request for a declaratory judgment.<sup>3</sup> Any "facts" that would inform the award of a declaratory judgment would, of course, be substantially the same as those that would be determined in any action for penalties. Thus, there would be no judicial economy achieved if this Court were to address the Plaintiffs' declaratory judgment claims.<sup>4</sup>

Accordingly, all claims relating to the referendum will be dismissed. Any claim regarding the validity of the bonds issued pursuant to the referendum has been dismissed on summary judgment. All remaining equitable claims regarding the referendum are dismissed as moot. The Court declines to exercise subject matter jurisdiction over any other remaining claims relating to the referendum.

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<sup>3</sup> Cf. *Reed v. Brady*, 2002 WL 1402238, at \*3 (Del. Ch. June 21, 2002), *aff'd*, 818 A.2d 150 (Del. 2003) (TABLE).

<sup>4</sup> I express no view as to the viability of any of the claims as to which the Court does not exercise jurisdiction. I note that the Declaratory Judgment Act requires an actual controversy and does not enable the pursuit of moot or hypothetical matters. Because the likelihood of similar conduct reoccurring appears remote, the Plaintiffs' quest for a separate declaratory judgment with respect to the referendum raises a question as to whether there actually is a controversy amenable to judicial resolution. See, e.g., *Energy Partners, Ltd. v. Stone Energy Corp.*, 2006 WL 2947483, at \*6 - \*7 (Del. Ch. Oct. 11, 2006).

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Those claims are dismissed for lack of subject matter jurisdiction but may, if the Plaintiffs so choose, be transferred to the Superior Court.<sup>5</sup>

An implementing order will be entered.

Very truly yours,

*/s/ John W. Noble*

JWN/cap  
cc: Register in Chancery-S

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<sup>5</sup> See 10 Del. C. § 1902.