

# Superior Court of New Jersey

CHAMBERS OF  
JUDGE MARLENE LYNCH FORD  
ASSIGNMENT JUDGE



OCEAN COUNTY COURT HOUSE  
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Re: Donald Whiteman, et al. v. Township Council of Berkeley Township, et al.  
Docket No: OCN-L-2667-20

Dear Counsel:

This is a complaint in lieu of prerogative writs. The Plaintiffs (Donald Whiteman, Patricia A. Dolobacs, Judith A. Erdman and 282 other Petition Signers of the South Seaside Park Homeowners & Voters Association, collectively referred to hereinafter as "Plaintiffs") challenge the decision of the Township Council of Berkeley Township (the "Township Council") to deny consent to deannex South Seaside Park from Berkley Township. A final hearing on this complaint was concluded on March 31, 2022. The court has considered the voluminous exhibits submitted by the parties, the briefs of both parties and the oral argument presented. For the reasons set forth herein the court

finds the requirements of the statute have been met and that final judgment will be entered in favor of the Plaintiffs, authorizing deannexation from Berkeley township subject to consent by the adjacent municipality, Seaside Park, to annexation.

### **BACKGROUND**

On September 22, 2014, Plaintiffs filed a Petition to deannex the area commonly known as South Seaside Park from the Township of Berkeley. Plaintiffs are residents of this section of Berkeley Township, which is located on the Barnegat Peninsula, completely separated from Berkeley Township. It is a strip of land with Island Beach State Park to the South; the Barnegat Bay to the west, the Atlantic Ocean to the east and the Borough of Seaside Park to the North.

The process of separating from a municipality requires two-steps. The petitioners for deannexation must first obtain consent from the Township they wish to leave, and once consent is obtained, they are required to petition an adjacent municipality to accept them or annex them to that municipality. The only adjacent municipality is the Borough of Seaside Park. This opinion is confined to the first step of that process, and the petitioners allege that the refusal to consent to the deannexation petition was arbitrary, capricious and unreasonable.

South Seaside Park is completely separated from the rest of Berkeley Township located across Barnegat Bay on the mainland. This neighborhood represents approximately 1% of the total population of Berkeley Township and contains approximately 1,400 single-family, multi-family, business and commercial properties.

The South Seaside Park Homeowners & Voters Association (the "Association") is a non-profit organization with membership composed of residents of South Seaside Park. The petition was signed by 285 of the 435 registered voters in South Seaside Park or approximately 66% of the registered voters in South Seaside Park. The petition therefore met the percentage requirements

under the statute. N.J.S.A. [insert cite]

Plaintiffs maintain deannexation is appropriate for several reasons. This part of Berkeley township is separated from the rest of the Township by the Barnegat Bay, and is isolated from the preponderance of government services and departments located on the mainland in Berkeley Township. Geographic separation is a major concern for these petitioners. South Seaside Park residents are remotely located not only from government offices, but also from fire, police and emergency services which are primarily provided by neighboring Seaside Park. Petitioners maintain that the lack of geographic connection to Berkeley Township has contributed to the inability of emergency response services to respond in a reasonable period of time, and that these residents have experienced for an extended period of time inadequate and untimely provision of medical, fire, safety or other police emergency services. Testimony presented to the Board also underscored that more likely than not South Seaside Park residents rely upon a mutual aid response from the borough of Seaside Park.

South Seaside Park residents have also cited the lack of Township investment in recreational, park and other amenities to this remote barrier island community. As a result, South Seaside Park residents closely identify with Seaside Park and other barrier communities as opposed to the distant mainland communities of Berkeley Township. Plaintiffs maintain that they rely upon businesses on the barrier island in order to recreate, conduct business or engage in social activities.

The petition for deannexation was referred to the Berkeley Township Planning Board for review, to develop a hearing record and to make recommendations to the governing body. Plaintiffs presented testimony before the Planning Board during thirteen meetings between January 8, 2015 and November 25, 2019, with the Township presenting its own witness testimony at twenty meetings between September 1, 2016 and July 5, 2018. The Planning Board held a total of thirty-eight

hearings on the 2014 Petition over the course of January 2015 to November 2019. Ultimately the Planning board adopted a resolution on August 6, 2020 which recommended the Township deny the petition for deannexation. Certification of Nicholas R. Carlson, Ex. B at 1. The Township Council, acting on the recommendation of the Planning Board, adopted a resolution of denial on September 21, 2020. Certification of Nicholas R. Carlson, Ex. D.

As a result of the action of the governing body, the petitioners made application to this court for a ruling on the merits.

## FINDINGS

### **Standard of Law – Municipal annexation**

Petitions for annexation are governed by N.J.S.A. § 40A:7-12, which provides:

[l]and in one municipality may be annexed to another municipality to which said land is contiguous. To effect such annexation, a petition in writing shall be presented to the governing body of the municipality to which such annexation is sought to be made, specifically setting forth the boundaries of such land, signed by at least 60% of the legal voters residing thereon....The petition shall also have attached thereto a certified copy of a resolution adopted by two-thirds of the full membership of the governing body of the municipality in which said land is located, consenting to said annexation.

The petition filed by the plaintiffs met the statutory two thirds requirement to commence the process of leaving Berkeley Township. The issue before this court is whether or not the decision of the governing body of the Township of Berkeley, declining to approve deannexation, was arbitrary, capricious and unreasonable, and therefore subject to reversal by this court.

The legislature recognized the right of a 2/3 majority of voters in part of a municipality to leave that municipality and to join another. Clearly the legislature, in enacting this procedure, anticipated deannexation would be a rare event. The public policy

of this state is to recognize the existing municipal boundaries, which should not be disturbed but for valid reasons. Where a petition for deannexation is based upon insubstantial reasons, for example “tax shopping” or avoidance of assessments, our courts have recognized the state interest in preservation of municipal boundaries outweighs the interest of certain property owners to become part of another municipality. Ryan v Mayor and Council of the Borough of Demarest, Bergen County, 64 N.J. 593, 319 (1974). The right of property owners to pursue such a course of action, however, is nonetheless codified, and when a petition for deannexation, the governing body may properly consider a variety of circumstances that weigh in favor or against deannexation. Our courts have considered not just the tax impact of de-annexation, but also the ability of the petitioners to have meaningful participation in religious, cultural, civic, charitable and intellectual activities of both the community from which they seek to secede as well as the community they wish to join. Their meaningful interaction with other members of the community; their contribution to the prestige and social standing of the community, and the role the petitioners play in the social diversity of the community are also legitimate factors for the court to consider.

Municipal consent to deannexation is rare. No municipality desires to lose the ratable base, the revenue it generates, or to explain to their own constituents the inevitable increase in property taxes caused by the deannexation. However, in certain circumstances the Legislature has authorized a path for secession that meets the criteria of making profound sense under the individual factual circumstances. The legislature also recognized a path for judicial review when the petition for deannexation is denied by the host community’s governing body. The statute provides:

In any judicial review of the refusal of the governing body of the municipality in

which the land is located or the governing body of the municipality to which annexation is sought to consent to the annexation, the petitioners have the burden of establishing that the refusal to consent to the petition was arbitrary or unreasonable, that the refusal to consent to the annexation is detrimental to the economic and social well-being of a majority of the residents of the affected land, and that the annexation will not cause a significant injury to the well-being of the municipality in which the land is located. N.J.S.A. 40A:7-12.1

The Plaintiffs therefore carry a heavy, but not impossible, burden of proof. The court will consider the criteria as set forth in the statute.

In this case, the first issue is whether deannexation of South Seaside Park would result in “significant injury” to the balance of residents within the Township of Berkeley. In determining whether residents would suffer significant harm, the governing body must balance the petitioners’ interests against potential injury to the community. Seaview Harbor Realignment Comm. v. Twp. Comm. of Egg Harbor Twp., 2021 N.J. Super. LEXIS 146 (App. Div. Dec. 29, 2021). Additionally, the governing body must provide its reasoning and explanation for any objections to deannexation, explaining “...why such deannexation would be injurious to the social and economic well-being of the municipality.” W. Point Island Civic Ass’n v. Twp. Comm. of Dover, 54 N.J. 339, 347 (1969) (“The mere providing of adequate municipal services in the past does not earn the right to withhold consent to deannexation.”). However, the ultimate burden of proof rests with the petitioners to show

that the refusal to consent to the petition was arbitrary or unreasonable, that refusal to consent to the annexation is detrimental to the economic and social well-being of a majority of the residents of the affected land, and that the annexation will not cause a significant injury to the well-being of the municipality in which the land is located. [N.J.S.A. § 40A:7-12.1.]

See also Ryan v. Demarest, 64 N.J. 593, 602 (1974); D’Anastasio Corp. v. Twp. of Pilesgrove, 387 N.J. Super. 241, 246 (App. Div. 2006).

The trial court typically must view the actions of a board or governing body as presumptively correct due to the members peculiar knowledge of local conditions. Judicial review of a governing body’s refusal to consent to deannexation is warranted in order to provide a right of appeal to the

unsuccessful petitioners and for other reasons as well. See Rixon v. Bd. of Adjustment of Haddonfield, 10 N.J. 1, 7 (1952); see also Ward v. Scott, 16 N.J. 16, 23 (1954). In one of the few cases involving a successful application for deannexation, involving another barrier island Ocean County community, the court discussed the parameters of this review.

First, there can be no usurpation by the courts of a legislative function, as defendant claims, when every municipal power is the product of a statutory grant . . . . Second, where the grant of discretion is general in its terms, as here, judicial review is especially warranted in order to assure that legally irrelevant or forbidden considerations have not determined the decision. Third, judicial review of decisions of local governing bodies is called for when . . . such decisions will affect the state-wide legislative scheme for deannexation of land from one municipality and annexation to another.

[W. Point Island Civic Ass'n, 54 N.J. at 347.]

Thus, the petitioners have a right to seek judicial review of the decision of Berkeley Township to decline the application for deannexation through the process of a complaint in lieu of prerogative writs. The Superior Court in the exercise of judicial review of municipal decisions must consider whether there has been any abuse of delegated discretion and correct same through an action in lieu of prerogative writs.

**A. Was the decision of the Berkeley Township governing body in denying petitioners' deannexation petition arbitrary, capricious, and unreasonable?**

Although a municipal body's decision to deny deannexation is within the scope of the exercise of reasonable legislative discretion, that discretion is not without limit and is "subject to review under the standard principals of arbitrariness or unreasonableness." New Jersey courts have held that clear evidence of bias, prejudice or collusion by a municipal body when discharging its duties rises to the level of arbitrariness, capriciousness , and unreasonableness and will justify overturning the body's action. See In re the Twp. of E. Brunswick, Nos. A-3115-19, A-3125-19, 2021 N.J. Super. Unpub. LEXIS 1627, at \*5 (App. Div. July 30, 2021) In that case, the Appellate



Division found that the prejudicial effect of numerous comments made by the Mayor of East Brunswick demonstrated clear bias against the plaintiff's application before the Planning Board and rendered the Board's adverse action on the application arbitrary, capricious, and unreasonable); Lackland and Lackland, et al. v. Readington Twp. et al., No. A-2190-05, 2008 N.J. Super. Unpub. (App. Div. February 26, 2008) (a board member's apparent advocacy for one side over another and biased conduct rendered the Board's acceptance and adoption of her advocacy arbitrary, capricious, and unreasonable).

The courts have distinguished arbitrary, capricious, and unreasonable conduct from conduct that does not significantly prejudice deannexation petitioners. Frustration of a party's due process rights, by denying an opportunity to cross-examine witnesses at a planning board hearing, for example, has been found to be clear evidence of bias, but a singular, isolated comment would be considered "inconsequential in the context of [the] comprehensive process." Avalon Manor Improvement Ass'n, Inc. v. Twp. of Middle, 370 N.J. Super. 73, 99 (App. Div. 2004) (an isolated comment by the mayor at a Township meeting failed to demonstrate biased and arbitrary conduct).

In the case of the South Seaside Park petition, the evidence presented established a pattern of continuous acts and statements by members of the Township Council and the Planning Board reflecting opposition to the deannexation petition. The matter was referred by the governing body to the Planning Board, as required by the statute. The undisputed facts demonstrated by the petitioners leads this court to the conclusion that the outcome of this process was in fact predetermined. The obligation of the board by this referral from the governing body, as difficult as it would seem to be, was to develop a fair, impartial and complete record in support of and in opposition to the arguments of deannexation. Both elected officials and Board members, however, were demonstrative in their



opposition to this petition. Rather than conducting a fact finding hearing, the members of the Planning Board became part of the adversarial process. The Board's planner, Stuart B. Wiser, P.P., reviewed transcripts of hearings and privately advised the Planning Board how to respond to the concerns raised. Since Wiser was not produced as a witness at the hearings, Petitioners were denied the right to cross examine Wiser, although his recommendations impacted the decision making of the Board. His comments and recommendations were shared with other witnesses, members of the Planning Board, and Township officials. Certification of Nicholas R. Carlson, Ex. A-71 at 46; Tr. of Oct. 3, 2019 Hr'g, 43:23-46:11, 50:3-55:14. The Planning Board and Township Council held joint meetings to discuss strategy to deny the petition. Certification of Nicholas R. Carlson, Exs. A-79, A-90. Plaintiffs assert that such collaboration between the two independent bodies is indicative of collusion. See Citizens for Strathmere & Whale Beach v. Twp. Comm. of Upper, 2010 N.J. Super. Unpub. LEXIS 3152, \*62-63 ("Maintaining the separate and independent functions of a planning board and a governing body, as provided for by the current Annexation Statute, allows for a better, as well as unbiased, record than if the entities were to commingle their functions . . . .")

This court finds that the hearing before the Planning Board should have been an opportunity for impartial review of the petition, development of a record of evidence supporting and opposing the petition for deannexation. Clearly the obligation of the Planning Board to conduct an unbiased and independent review of the petition, as set forth in the statutory scheme, was thwarted by the pattern of conduct among the Berkeley Township officials and the failure to adhere to the statutory scheme of conducting an impartial and fair hearing. A planning board's role in the deannexation process is to impartially review evidence and testimony and issue a fair, unbiased report on the impact of deannexation based on reasonable consideration of the facts presented to it. N.J.S.A. 40A:7-12. Additionally, planning boards are not empowered to decide on the merits of the

annexation petitions, nor are they permitted to act in opposition to a petitioner or behalf of a municipality. See Lackland, 2008 N.J. Super. Unpub. (efforts by a planning board to act adversely to a petitioner or to engage in its own fact-finding or argument on behalf of the municipality are prohibited as they violate the board's duty of impartiality).

Plaintiffs allege that during hearings, members of the Planning Board would interrupt the testimony of a witness in order to argue an opposing view, acting in effect as an advocate for the Township. The court finds that the petitioners satisfied their burden of showing impartiality and bias, and therefore arbitrary and unreasonable actions of the township officials and planning board members. In lobbying and advocating against deannexation before and during hearings before the Board as well as within the community, the Board failed to function in its role as a disinterested, fair and impartial decisionmaker on the Plaintiffs' petition.<sup>1</sup>

The geographic isolation of South Seaside Park from the balance of Berkeley Township as a matter of common sense militates in favor of deannexation. The New Jersey Supreme Court has identified the "geography and logistics of the situation" as factors for courts to consider in ruling on whether a denial of a deannexation petition is detrimental to the social well-being of the majority of residents of the affected land. Ryan v. Demarest, 64 N.J. 593, 603 (1974). Courts have also held that when a community is non-contiguous to, or distant from, the rest of that municipality, it will suffer social detriment by denial of a deannexation petition. W. Point Island Civic Ass'n v. Twp. Comm. of Dover, 54 N.J. 339, 346 (1969) ("[I]nterpreting the granting of consent as a purely

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<sup>1</sup> Plaintiffs allege bias by the Planning Board and other Township representatives was self-evident. For example, a planning board member permitted a sign opposing deannexation to be displayed in front of his property, "JOIN US – SSPHVA.COM" with a red diagonal line indicating disapproval. A Township councilman, John Bacchione, addressed a meeting of the Italian-American Club to encourage them to start going to the meetings, because if South Seaside Park becomes Seaside Park, your taxes are going up." Tr.of May 5, 2016 Hr'g, 102:5-103:15. Another Township official, John Camera, testified that he believed Plaintiffs were "elitist." Tr. Of May 3, 2018 Hr'g 72:4-74:21.

ministerial act would deprive the municipality's governing body of the ability to protect the municipality against the injury to its social and economic well-being which might result from unchecked detachment.”). In the case of South Seaside Park, the distance of the remainder of the Township weighs even greater than that involved with West Point Island, formerly part of Toms River, which ultimately was approved to annex to Lavallette. West Point Island is much closer and more accessible to the mainland part of Toms River when compared to South Seaside Park and its proximity to the rest of Berkeley township.

Although in recent years Berkeley Township has attempted to locate certain satellite services in the area of South Seaside Park, substantially all of this municipality's government services, offices and businesses are connected to or located on the mainland part of Berkeley Township. South Seaside Part residents must drive through multiple other towns in order to reach the Berkeley Township Municipal building on Pinewald Keswick Road. Depending upon the route selected, a resident of South Seaside Park will travel through six municipalities (Seaside Park, Seaside Heights, Toms River, South Toms River, Beachwood and Pine Beach) if driving to the main business area on Route 9. To reach the center of Berkeley Township government, the resident would drive to Pinewald-Keswick Road, a distance of about 15 miles, and would most probably travel on Route 35 to Route 37 West, to the Garden State Parkway South and exit and pay a toll to get to the police department, the municipal offices and the municipal court. During periods of high traffic congestion, the trip can take more than the usual 25 minutes as projected. In order to participate in the civic and legal affairs of the community, residents are obliged to travel unreasonable distances, incur the expense of such travel and also the loss of personal time. More likely than not, they will just disengage from such social, civic, legal and other community activities.

Petitioners compare this scenario to the relative ease of access to government offices, services, police, fire, emergency and businesses in Seaside Park. These services associated with their neighboring community are easily accessible by car, by bicycle as well as by walking. As a result, many of these services are used more frequently by the residents of south seaside park. The unique and unusual location of South Seaside Park residents is even more compelling a reasons for deannexation that that which the courts approved in the case of West Point Island, in which the Appellate Division reasoned:

The residents of West Point Island naturally look to the contiguous Borough of Lavallette as the focus of community interest and activity. The record shows that the West Point Islanders use Lavallette recreation facilities, and the Lavallette Borough Hall for community meetings. Since Dover Township [now known as the Township of Toms River] is not being economically or socially injured by the deannexation, and the geography is so pointedly in favor of allowing it, on the facts of this case there is no reason to deny the overwhelming majority of voters and taxpayers on West Point Island the opportunity of joining the Borough of Lavallette. [W. Point Island Civic Ass'n, 54 N.J. at 350.]

The court agrees that the geographic location of South Seaside Park is "...pointedly in favor of allowing " deannexation.

Plaintiffs contend that, in addition to the geographic reasons which support deannexation, the South Seaside Park community lacks a social or community identification with the balance of the Township and that these residents identify more closely with their fellow barrier island communities and residents. Plaintiffs more frequently participate in the community life of their neighbors on the barrier island rather than the mainland. See Pls.' Br. at 65-9. See generally W. Point Island Civic Ass'n, 54 N.J. at 339; Avalon Manor Improvement Ass'n, Inc. v. Twp. of Middle, 370 N.J. Super. 73, 78 (App. Div. 2004) ("Among the reasons asserted for deannexation were that Manor was 'wholly isolated from any other portion of upland contained within the Township,' and that Manor had a number of similar attributes to Avalon and significant concerns which Avalon shared but in

which the remainder of the Township had no interest.”); Ryan, 64 N.J. at 605 (“[W]e would suggest that social detriment might be found in a community's being deprived of the petitioner's participation in the religious, civic, cultural, charitable and intellectual activities of the municipality; their meaningful interaction with other members of the community and their contribution to its prestige and social standing; the part they play in [the] general scheme of their municipality's social diversity; and, conceivably, the wholesome effect their presence has on racial integration.”).

South Seaside Park, a non-contiguous land body, (except for reaching across the waters of the Barnegat Bay), wholly separated from the majority of the Berkeley Township community, is clearly excluded to their social detriment from the activities of the mainland Township of Berkeley, and looks to its more proximate neighbors for that support. The social detriment suffered by South Seaside Park weighs heavily in favor of deannexation. By contrast, the remainder of Township would incur little if any social detriment with the loss of South Seaside Park.

“The mere providing of adequate municipal services in the past does not earn the right to withhold consent to deannexation.” W. Point Island Civic Ass’n, 54 N.J. at 348. Plaintiffs allege that the Township has failed to provide adequate services to the community and attest that the community has been an afterthought among the various neighborhoods contained in the Township mainland. For example, Plaintiffs testified that normal municipal services, like snow plowing, is commonly delayed by the Township while other parts of the Township get priority. Residents complained in recent years their streets were left untouched for several days after a major snow, when the streets in Seaside Park were cleared and treated in a more timely manner. Tr. of Feb. 5, 2015 Hr’g, 19:6-21:5; Tr. of Apr. 2, 2015 Hr’g, 15:24-18:11. Residents also testified that the Township failed to consistently pick up bulk refuse and recycling in the community in spite of complaints. Tr. of Apr. 2, 2015 Hr’g, 20:25-21:9, 100:20-103:15; Tr. of May 7, 2015 Hr’g, 53:19-

55:10, 74:4-77:25. Residents further claimed that Seaside Park police officers often responded faster to calls than Township officers, since they are located and patrolling a short distance away, while Township officer may not arrive for an extended period of time. Tr. of May 2, 2016 Hr'g, 65:18-67:10; Tr. of Apr. 2, 2015 Hr'g, 27:6-17.

The residents have also enumerated a number of other attributes or deficiencies in municipal services. This court attributes less weight as to evidence which is particularly anecdotal, although it is reasonable to conclude that as a result of the extreme geographic separation of South Seaside Park from the rest of Berkeley Township reduced government services is inevitable and a logical basis to support deannexation. Even if municipal services were more adequate, the court in West Point found that alone was not a sufficient basis to deny consent to deannexation.

The more difficult issue for resolution is whether or not the loss of South Seaside Park to the ratable base of Berkeley Township will effect a substantial loss or injury to the residents of the remaining Township. Expert testimony presented on behalf of the petitioners to the Planning Board opined that the property taxes in South Seaside Park residents would decrease by approximately 40 percent. See Tr. of Oct. 4, 2018 Hr'g, 78:12-79:5. Whatever the tax savings is for South Seaside Park residents, and whether that opinion is sound today, is not a conclusive factor in authorizing deannexation over the objection of the host community. However, stated broadly, there is a positive property tax factor for the South Seaside Park residents, and a negative property tax factor for the remainder of the Township. Again, it is the obligation of the court to weigh that factor in the totality of factors relative to deannexation.

Even if the court accepts that the deannexation will result in a tax increase for the remainder of the Township, it is but one factor for consideration, and the other factors discussed above are certainly substantial and weighty in the opinion of the court. The court is satisfied that the petition

was motivated more as a result of the feeling of isolation and neglect by this community as opposed to “tax shopping” which is clearly not sufficient to meet the burden imposed upon the plaintiffs to justify deannexation.

The Township has articulated a justified concern for the fiscal impact of losing South Seaside Park upon the remaining taxpayers of Berkeley Township, because while South Seaside Park accounts for only one percent of the population of the Township, it represents about 10% of the Township ratables. Both parties have offered competing testimony as to the tax impact upon the remainder of the Township.

The Plaintiffs’ expert financial witness undertook a Financial Impact analysis of the proposed deannexation that found the total net assessed value of property in South Seaside Park in 2014 was \$543,926,800.000, or 10.68 percent of the Township’s net assessed value. Certification of Kelsey A. McGuckin-Anthony, Ex. B at 337. Additionally, the expert found that in the event of deannexation of South Seaside Park, the total net value of the Township would be reduced to \$4,550,048,622.00 from \$5,094,011,422.00. The Township argues that if no change occurs in the Township’s or Berkeley School District’s services or if there are no increases in non-tax revenue, the Township would be required to increase taxes to recoup the lost revenue caused by the South Seaside Park separation. Id. at 338.

Moreover, the Planning Board’s own financial expert opined that while the community is small in land area, it still represents 10.68 percent of the property tax revenue stream for the Township, and the loss of revenue would be felt annually by property taxpayers and in perpetuity. Id. at 381.

Plaintiff’s financial expert conceded that the first-year post-deannexation tax increase for remaining Township residents would be around 3.1 percent, which the Township argues will also



have a compounding affect as the impact of deannexation extends in perpetuity. Plaintiff's expert witness testified that deannexation would cost Township residents an "annual tax increase of \$19.00 for a home assessment at \$100,000.00, \$35.00 for the average home assessed at \$183,600.00, and \$94.00 for a home assessed at \$500,000.00." Certification of Nicholas R. Carlson, Ex. B at 15.

The Township counters that Plaintiffs failed to address the 2 percent cap on municipal tax increases implemented in 2010. Even if the Township raised taxes by the authorized 2% various municipal services and programs would need to be cut in the first year alone in order to balance the municipal budget. The Township maintains the average home assessed in the Township would incur an annual increase of around \$200, and that would continue in perpetuity.

Even if the court accepts the representation that the impact upon the average residential property tax would be about \$200, although not insubstantial, the analysis by the Township does not include cost savings realized by the Township if it were relieved of the obligation to provide municipal funded services to South Seaside Park. In addition, Plaintiffs argue credibly that the Township also does not account for the increase in the value of ratables, and the new ratables that would be added to the tax rolls as a result of development and growth in areas of the Township exclusively on the mainland.

Deannexation of a part of a municipality will always have some negative impact upon taxpayers in the balance of the community, even an imperceptible amount. What is not disputed is that the area of South Seaside Park is completely built out. There is no room for expansion or to add additional ratables, unless existing housing and businesses are destroyed and replaced. By comparison, the mainland of Berkeley Township includes vast amounts of developable land upon which ratable growth may occur, diminishing the impact annually of a South Seaside Park deannexation. Plaintiffs' expert financial witness opined that the Township would completely

recover from the loss of South Seaside Park ratables in “probably less than five years,” Tr. of Mar. 1, 2018 Hr’g, 97:15-98:23.

Therefor this court must conclude that although the initial impact of deannexation would effect an increase in property taxes due to the loss of ratables, that would be ameliorated by the reduction in the cost of services to South Seaside Park, and the growth potential of ratables in the rest of Berkeley Township. There would be no impact upon school taxes since Seaside Park, the adjacent municipality, is in the Central Regional School District, the same as South Seaside Park. The court is satisfied that the impact upon Berkeley Township residents is not so substantial as to be a basis to deny deannexation. The benefit to the residents of South Seaside Park, by comparison, would be quite substantial.

The parties dispute the long term impact of deannexation upon the tax burden of residents of South Seaside Park and Berkeley Township. Some economic loss is anticipated from the loss of tax ratables caused by separation from the Township. The question is whether or not the impact is a significant economic injury. Plaintiffs argue that as a growth community Berkeley township will benefit from replacement ratables approved by the Township, and that the long range impact would not be substantial. See, e.g., W. Point Island, 54 N.J. at 348-49 (the Supreme Court held that the township’s loss of ratables “would be offset by an equivalent reduction in cost of municipal services” provided to the deannexing community). Plaintiffs contend that the economic impact of deannexation on the Township would be de minimis when weighed against the obligation to provide police and emergency services, to provide municipal services such as road maintenance and snow plowing, recycling and trash removal, as well as the economic gain due to placing new ratables on the tax rolls as a result of development and expansion in the undeveloped areas of the Township. For this reason, the Court cannot conclude that the economic impact upon the Township as a result

of the deannexation of South Seaside Park would be substantial, nor would it cause any significant economic, social cultural or other harm to the residents of South Seaside Park.

South Seaside Park, by comparison, has virtually no potential for growth or expansion, being substantially built out with homes, commercial establishments, motels and bungalow communities. The Township would not lose the benefit of any new ratables in the future. See Tr. of Feb. 5, 2015 Hr'g, 14:9-22 ("Best of my knowledge, the growth of South Seaside Park is done, okay. South Seaside Park has just about every lot built on."). In addition, and in recognition of the lack of any growth potential in South Seaside Park, the Township's master plan sought "...to identify long range goals for the Township's physical, recreational, business and community development" and focused mainly on the mainland including a town center, but no plans for development in South Seaside Park. Tr. of Aug. 6, 2015 Hr'g, 57:

The Township also maintains that the loss of a prestigious and socio-economically desirable neighborhood would cause significant social harm to the remaining residents. The proofs however showed that the existing residents in South Seaside Park have limited contact with the social, economic and intellectual fabric of the rest of Berkeley Township. South Seaside Park is the location of a small public ocean beach, and deannexation would effect a loss of that public beach. However, the loss of ocean front access would represent only 5.4 percent of the Township's 28 miles of shoreline most of which is located in Island Beach State Park and within the Township of Berkeley. The park provides public parking, food concessions, a pavilion with bathrooms and other amenities for all. However, it is likely that the residents of the mainland part of Berkeley Township will continue to have additional access to public beaches in Ortley Beach, Seaside Heights and Seaside Park, closer to the mainland, and to the same degree they had before deannexation.

Berkeley Township has significant waterfront residential and commercial development on

the waters of the west side of Barnegat Bay. There are restaurants, marinas and many water front residential communities. The values within these communities are comparable to the valuations in South Seaside Park. Census data relied upon by the Plaintiffs indicates that South Seaside Park and other waterfront sections of the Township are nearly identical in terms of race/ethnicity, average household size, and income and employment history. The court is satisfied that Petitioners have proven that the loss of South Seaside Park would have little if any impact upon demographics, ethnic diversity or neighborhood prestige in the mainland or remainder of the Township.

An additional consideration is the impact of deannexation upon the Township's cultural sites or environmental resources. The parties agree that the Township affords residents on the mainland access to fourteen public parks, compared to South Seaside Park which has only 1 public park, a small marina and one small public basketball court, in addition to having access to the state park of Island Beach . Tr. of Aug, 6, 2015 Hr'g, 29:5-15; Tr. of May 7, 2015 Hr'g, 7:21-13:9. Although South Seaside Park is the location of a small number of motels, restaurants and other retail businesses, some of which are seasonal operate only, mainland residents would continue to have access to substantially similar businesses and amenities along the Route 9 corridor, in bayfront areas and close by in neighboring communities. The residents in South Seaside Park, who have overwhelmingly supported deannexation, would suffer no social or economic harm as a result of separation from Berkeley Township. This factor is not significant in evaluating the deannexation petition since the impact is the same on all parts of the Township.

Plaintiffs claim the long delay in conducting hearings and coming to a resolution on its petition reflect bad faith on the part of the Township. When a vote denying the petition was conducted, on December 19, 2019, the Resolution of denial was not adopted until August 6, 2020. Certification of Nicholas R. Carlson, Ex. B. The court is less persuaded that this

delay was intentional or meant to thwart the rights of the petitioners. The court takes notice of the fact that the vote on the resolution occurred in December 2019, just prior to the onset of the international pandemic which caused the closure of government offices and activities in March 2020. While the adoption of the resolution was not timely, it did not reflect bad faith by the Township since there was great uncertainty about how to conduct public meetings during the early stage of isolation and shut down attributed to the worldwide Covid-19 pandemic.

Plaintiffs have argued that if the court finds that consent to deannex was improvidently withheld, that the relief should be immediate and that the petitioners should not be remanded to the Board for additional hearings. The court agrees. It appears that a remand for additional hearings before the Planning Board would be an exercise in futility. In the matter of Bay Beach Way Realignment Comm., L.L.C. v. Twp. Council of Toms River, No. A-5733-07T1, 2009 N.J. Super. Unpub. LEXIS 1792 (App. Div. July 9, 2009); W. Point Island Civic Ass'n, 54 N.J. at 339, the court directed the Township to immediately approve the deannexation petition, rather than a remand for more testimony and appearance. In this case, exhaustive hearings took place over an extended period of time, over the course of several years. The order entered in this matter shall be considered an approval of the deannexation, for purposes of petitioning the governing body of the Borough of Seaside Park for annexation. This approval for deannexation should be considered self-executing but shall be considered stayed for a period of 45 days, so that if either party files an appeal an application for continued stay can be made to the Appellate Division.

As a final comment the court considers the argument of the Township that Plaintiffs' reliance on West Point Island Civic Association and Beach Bay Way Realignment Committee is improper and inapplicable to the instant matter. In West Point Island, the court evaluated the case under the

prior deannexation statute which placed the burden of proof was on the township rather than the petitioner to justify deannexation. The legislature in 1982 amended the statute to make clear that the petitioners and not the Township carried the burden of proof. The legislative comments indicates the sponsors felt it was inappropriate to place that burden upon the taxpayers of the municipality, and therefore shifted the burden to the Petitioners. The substantive criteria for deannexation however was not changed. In West Point Island the court noted the Township would not be economically or socially injured by the deannexation since the loss of ratable would be “about equal.” W. Point Island, 54 N.J. at 350. The Township argues the facts of this case suggest a more significant economic burden caused by the deannexation, but for the reasons set forth above the court finds that over the course of time the impact of deannexation will be diminished. The Township also argues that the facts in Beach Bay Way are distinguishable from the instant matter as the petitioner in that case represented only 0.0003% of the municipality’s land area and the loss of tax revenue was relatively small, whereas the Township here faces the loss of 10.68 percent of its tax base. Bay Beach Way Realignment Comm., 2009 N.J. Super. Unpub. at \*10.

This court has carefully evaluated all of the factors required under N.J.S.A. 40A:7-12.1 . The amendments to the statute shifted the burden to the petitioners, but this court is satisfied that the proofs submitted satisfy the burden of proof requirements of the statute. The economic impact of deannexation when viewed in the lens of the passage of time is not substantial. The economic benefits to the residents of South Seaside Park are substantial. The impact upon the social, cultural, civic and community as to the balance of the Township is insubstantial. The social, economic, civic and community interests set forth by the Petitioners if deannexation is accomplished is quite substantial. The geography of the remoteness of South Seaside Park from the balance of Berkeley township is a substantial and significant factor militating in favor of deannexation. There is a strong

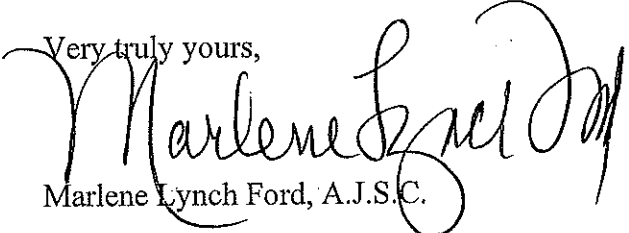
community connection between South Seaside Park residents and their barrier island neighbors. See, e.g., Avalon Manor Improvement Ass'n, 370 N.J. Super. at 87. It defies logic and common sense that the Plaintiffs be obligated to traverse six or seven municipalities in order to integrate into the community, social and civic affairs of Berkeley township. The remoteness of South Seaside Park has caused these residents to suffer significant loss or delay in receiving a multitude of municipal services, as well as to becoming fully integrated members of the Berkeley Township community.

The Petitioners have demonstrated substantial reasons in support of deannexation. They should be afforded the opportunity to petition Seaside Park to join them. Seaside Park may agree or decline the opportunity. However, these residents have made a compelling argument in favor of deannexation that distinguishes them from many other unsuccessful applications ruled upon in our case law.

Although not raised by either party, this court takes notice of the state policy to economize the rendering of state services, particularly police, fire and emergency response services, a policy that would be advanced by allowing South Seaside Park to petition for annexation to Seaside Park.

Attached is an order reflecting this final decision of the court.

Very truly yours,

  
Marlene Lynch Ford, A.J.S.C.

MLF/pb  
Enclosure