

To: New Jersey Law Revision Commission
From: Carol Disla-Roa, Legislative Fellow
Re: Time Limitation on Actions Concerning Publications of Bond Resolutions
Date: December 11, 2023

MEMORANDUM

Project Summary

Pursuant to N.J.S. 40:14B-2(4), municipal and county utilities authorities have the “power to issue bonds in order to pay for infrastructure projects.”¹ Once a bond resolution is issued, N.J.S. 40:14B-28 bars any challenge to the validity of such resolution “or of any covenants, agreements or contract provided for by the bond resolution” that is not within “the first twenty days of issuance.”² In other contexts, not concerning utilities authorities, the New Jersey Supreme Court, “has emphasized that statutes of limitation in bond issuances are designed to ‘assure bondholders and financial markets that bonds, once issued, will not be subject to attack;’” thus, allowing untimely challenges to bond ordinances would weaken public confidence in the legitimacy of bonds issued.³

In *Vernon Township v. Sussex County Municipal Utilities Authority*, the Appellate Division considered whether a challenge to a 2005 contract, which predated the relevant 2008 bond resolution, was barred by N.J.S. 40:14B-28 since the challenge was brought well beyond twenty days from the date of bond issuance.⁴ The Court considered the plain language of the statute, along with its earlier decision in *Graziano v. Mayor of Montville*, to determine “whether the 2008 bond resolution ‘provides for’ the 2005 service contract by reference.”⁵ The Court held that the action was time-barred pursuant to N.J.S. 40:14B-28.⁶

Statutes Considered

N.J.S.A. 40:14B-28 provides in relevant part that:

[A]ny action or proceeding of any kind or nature in any court questioning the validity or proper authorization of bonds provided for by the bond resolution, or the

¹ *Vernon Twp. v. Sussex Cnty. Mun. Utilities Auth.*, No. A-0897-21, 2023 WL 2026174, at *1, *3 (N.J. Super. Ct. App. Div. Feb. 16, 2023); N.J. STAT. ANN. § 40:14B-2(4) (West 2023).

² *Id.* at 3; N.J. STAT. ANN. § 40:14B-28 (West 2023) (emphasis added).

³ *Id.* at 4 (citing *In re Ordinance 2354-12 of Twp. of W. Orange, Essex Cty. v. Twp. of W. Orange*, 223 N.J. 589, 592 (2015) (considering N.J. STAT. ANN. § 40A:2-49, a similar statute)). *But see, Gallo v. Twp. Comm. of Weehawken*, 181 N.J. Super. 385, 392 (Law. Div. 1981) (where a twenty-day limitation on action to challenge the validity of bonds, pursuant to N.J.S.A. 40:68A-47 (on Municipal Port Authorities) and R. 4:69-6(b)(11), may have been enlarged in the interest of justice to allow a challenge to an unlawful guarantee of a \$17 Million bond issue filed 48 days after the bond issue.)

⁴ *Id.*

⁵ *Id.* (citing *Graziano v. Mayor of Montville*, 162 N.J. Super. 552,555-56 (App. Div. 1978)).

⁶ *Id.* at 5.

validity of any covenants, agreements or contract provided for by the bond resolution shall be commenced within 20 days after the first publication of such notice. If any such notice shall at any time be published and if no action or proceeding questioning the validity of the creation and establishment of the municipal authority, or the validity or proper authorization of bonds provided for by the bond resolution referred to in said notice, or the validity of any covenants, agreements or contract provided for by said bond resolution shall be commenced or instituted within 20 days after the first publication of said notice, then all residents and taxpayers and owners of property in the district and users of the utility system and all other persons whatsoever shall be forever barred and foreclosed from instituting or commencing any action or proceeding in any court, or from pleading any defense to any action or proceedings, questioning the validity of the creation and establishment of the municipal authority, or the validity or proper authorization of such bonds, or the validity of any such covenants, agreements or contracts, and said municipal authority shall be conclusively deemed to have been validly created and established and to be authorized to transact business and exercise powers as a municipal authority under this act, and said bonds, covenants, agreements and contracts shall be conclusively deemed to be valid and binding obligations in accordance with their terms and tenor.⁷

Background

In 2021, Vernon Township sought rescission of a 2005 contract with Sussex County Municipal Utilities Authority (SCMUA).⁸ That contract allowed Vernon to join the county sewer system.⁹ As a precondition to the town joining the sewer system, however, the SCMUA had to make significant infrastructure upgrades to create capacity to manage the influx of additional wastewater.¹⁰

To finance such improvements, sewer and utility authorities may issue bonds and publish a bond resolution for their release.¹¹ In the *Vernon Township* case, the 2005 contract was entered into with the understanding that revenue from the contract would be used (as collateral) to partially secure the bonds needed to finance the expansion.¹² The contract did not make explicit reference to a specific bond resolution, but it was “entered into with the understanding that SCMUA would issue bonds to finance this expansion, secured in part by the revenue generated from the contract.”¹³

⁷ N.J. STAT. ANN. § 40:14B-28 (West 2023) (emphasis added).

⁸ *Vernon Township*, No. A-0897-21, 2023 WL 2026174, at *1. The “SCMUA is a county utility authority, created pursuant to the Municipal and County Utilities Authorities Law (MCUAL), N.J.S.A. 40:14B-1 to -78,” *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 3; N.J. STAT. ANN. § 40:14B-2(4).

¹² *Id.* at 1.

¹³ *Id.*

In 2008, SCMUA issued bonds for more than \$27 Million to fund the expansion.¹⁴ The bond resolution “specifically noted: ‘After completion of the project, Vernon Township will also be paying use charges on a contractual basis.’”¹⁵

N.J.S. 40:14B-22 of the Municipal and County Utilities Authority Law requires uniform and equitable pricing rates throughout the district for the use of a sewerage system.¹⁶ In the *Vernon Township* case, Vernon, like other municipalities using the services of the SCMUA, paid “a specified rate to the utility per gallon” which was “computed to be uniform as to all towns serviced by SCMUA.”¹⁷

Although the rate per gallon of wastewater was uniform across all towns, the pricing structure for each town included an Assigned Minimum Flow (AMF), which is essentially a usage floor based on monthly or annual average usage.¹⁸ Each municipality must pay the AMF amount even if it delivered less sewage than contemplated.¹⁹ Pursuant to the statutory authority of N.J.S. 40:14B-22, “AMF provisions are properly allowed.”²⁰

In 2013, with the expectation of a new housing development in Vernon, the parties amended their 2005 agreement to increase Vernon's AMF from 265,000 gallons per day to 461,000 gallons per day.²¹ The anticipated housing development failed to occur, and the dispute in this case arose from the 2013 AMF increase.²² Vernon claimed that it never used more the 223,000 gallons per day and argued for contract rescission on grounds that SCMUA was violating the uniform rate requirement of N.J.S. 40:14B-22.²³

The trial court dismissed the case with prejudice, ruling that Vernon was time-barred by the bond resolution statute quoted above, which requires that any action be brought within 20 days of the publication of the bond resolution.²⁴ On appeal, Vernon argued that because its 2005 contract predated the 2008 bond resolution, it was not barred by the statute, which pertains to contracts “provided for” by the bond resolution.²⁵ The Appellate Division disagreed with Vernon’s contention and affirmed.²⁶

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 3.

²¹ *Id.* at 1.

²² *Id.*

²³ *Id.* at 2.

²⁴ *Id.* at 2-3.

²⁵ *Id.* at 3.

²⁶ *Id.* at 5.

Analysis

The Appellate Division considered whether a contract predating a bond resolution was subject to the twenty-day time limitation set forth in N.J.S. 40:14B-28.

The Court explained that Vernon argued that it was not challenging a bond ordinance or resolution but was instead asserting statutory and contractual claims.²⁷ Vernon's position was that the statutory limitation in N.J.S. 40:14B-28 applied to contracts "provided for by the bond resolution," and that a service contract that predated the bond resolution by several years was not "provided for" as contemplated by the statute.²⁸

The *Vernon Township* Court noted that it had discussed this particular issue only once before, in the case of *Graziano v. Mayor of Montville*.²⁹

- *Graziano v. Mayor of Montville*

In *Graziano*, the court considered circumstances in which plaintiff taxpayers filed an action against the town of Montville and its Municipal Utilities Authority (MUA).³⁰ The *Graziano* plaintiffs challenged the legality of a service contract between the town and the MUA, because it required the town to make payments to offset the MUA's operating deficit.³¹ The service contract at issue in *Graziano*, like the one in *Vernon*, predated the bond resolution, and the plaintiffs argued that the time limitation on actions pursuant to N.J.S. 40:14B-28 did not bar their claim.³²

The court in *Graziano* determined that the plaintiffs' challenge was time-barred by the twenty-day limitation on actions concerning bond resolutions.³³ The court declined to decide the statute of limitations issue, finding that its disposition concerning the validity of the service contract made that unnecessary.³⁴ The court found persuasive the argument by the Mayor and Township Committee that N.J.S. 40:14B-28 "would bar an attack on the validity of a contract incorporated in a bond resolution by reference, especially when payment of the bonds authorized by the resolution depends upon obligations established by such contract."³⁵ The court also stated that although it did not decide the question concerning the statute of limitations, that question "is of general interest and should be called to the Legislature's attention."³⁶

²⁷ *Id.* at 3.

²⁸ *Id.*

²⁹ *Id.* at 4.

³⁰ *Graziano*, 162 N.J. Super. 552, 555.

³¹ *Id.*

³² *Id.* at 565.

³³ *Id.* at 557.

³⁴ *Id.* at 565. The Court held that N.J.S.A. 40:14B-49 "validly authorized the township to take on obligations to the MUA that are limited only by the good sense and fiduciary responsibility of the township's officers," and allowed MUA to "impose service charges 'sufficient to meet any default or deficiency in any payments agreed in such contract to be made by such municipality,'" *Id.* at 564-65.

³⁵ *Id.* (emphasis added).

³⁶ *Id.*

- “*Provided for*” Analysis

In light of Vernon’s argument that the 2005 service contract predated, and thus could not “provide for” the 2008 bond resolution, and because Vernon brought this case in 2021 “fifteen years after the parties entered into the service contract, thirteen years after the bond issuance, and eight years after the parties amended the 2005 contract to add capacity,” the Court examined “whether the bond resolution ‘provides for’ the 2005 service contract by reference.”³⁷

Relying on the discussion in *Graziano*, the *Vernon* Court reasoned that “[t]he most plausible interpretation of ‘provides for’ is ‘incorporates by reference.’”³⁸ A “proper and enforceable incorporation by reference of a separate document into a contract” consists of two requirements: “(1) the separate document must be described in such terms that its identity may be ascertained beyond doubt, and (2) the party to be bound by the terms must have knowledge of and assent to the incorporated terms.”³⁹

With regard to the first requirement, the Court noted that the 2005 “service contract explicitly contemplates SCMUA’s issuance of bonds to finance the necessary infrastructure upgrades required to service Vernon,” and it mentioned SCMUA-issued bonds over thirty times.⁴⁰ With regard to the second requirement, the Court stated that the “intertwined” nature of “the service contract and bond resolution” is plain, and the plaintiffs clearly “assented to the financing of the sewer expansion via bond issuance.”⁴¹ Additionally, the Court noted that “the project of expanding the sewer service to Vernon is specifically recognized as the purpose of the bond issuance,” and the parties had no other contractual obligations, so the 2005 service contract was the only document implicated by statements on both the bond resolution and the contract referencing the agreement between Vernon and the SCMUA.⁴²

In rejecting Vernon’s claim for rescission, the Appellate Division agreed with the trial court that “granting the relief sought would ‘jeopardize SCMUA’s ability to pay its bond indebtedness’ and could ‘wreak [] havoc on the financing structure which allows SCMUA to function.’”⁴³

Pending Bills

There are no pending bills seeking to amend the language of N.J.S.A. 40:14B-28.

³⁷ *Vernon Township*, No. A-0897-21, 2023 WL 2026174, at 2-4.

³⁸ *Id.*

³⁹ *Id.* citing *Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn*, 410 N.J. Super. 510, 534 (App. Div. 2009).

⁴⁰ *Id.* at 4.

⁴¹ *Id.* at 5.

⁴² *Id.*

⁴³ *Id.*

Conclusion

Staff requests authorization to engage in additional research and outreach to determine whether N.J.S.A 40:14B-28 would benefit from clarification of “provided for” in reference to “covenants, agreements, or contract[s]” that may predate a relevant bond publication.⁴⁴

⁴⁴ N.J. STAT. ANN. § 40:14B-28 (West 2023).