

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WAYNE  
54 Broad Street, Lyons NY 14489

Index # 2014-76640  
Hon. John Nesbitt

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In the matter of the Elector Initiated Dissolution of the Village of Lyons:

**Jack Bailey**  
**Andrew DeWolf**

**Petitioner reply to Respondent Answer  
and Cross Motion #2 dated January 13,  
2014**

PETITIONERS,

-against-

**Village of Lyons – Village Clerk & Board of Trustees**

RESPONDENT

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**PLEASE TAKE NOTICE** that Petitioners received this 2<sup>nd</sup> Answer and Cross Motion & Memorandum of Law at 2100hrs on January 13, 2014 which was 14 hours prior to the Motion hearing on this case. The 1<sup>st</sup> Answer and Cross Motion was received via mail on January 7, 2014. As a result of our objections, we were granted permission by Judge Nesbitt to Respond and Re-Argue our responses to the 1<sup>st</sup> Answer as well as this present answer.

Petitioners:	Jack Bailey	Andrew DeWolf
	35 High Street	7 Sisson Street
	Lyons NY 14489	Lyons NY 14489

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Respondents: Village of Lyons Clerk & Board of Trustees  
76 William Street  
Lyons NY 14489

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1) Petitioners ADMIT the allegations/facts in paragraphs 2, 4, and 6.

2) Petitioners DENY paragraph 3 in that this matter is as a result of an initial ELECTOR initiated Dissolution that began on August 9, 2012 , petitioners failed to complete required statutory duties and a Mandamus to Compel Order was obtained, Petitioners approved a final dissolution plan, and now have certified a Petition December 26, 2013 by Connie Rios. Respondents have already ADMITTED to these facts.

3) Petitioners DENY paragraph 5 in that the Village Clerk Certified the December 18, 2013 Petition of Connie Rios at 0938hrs on December 26, 2013 upon returning from Christmas Vacation and the offices being closed from December 21-25 as previously established. (See Petitioner **Exhibit D** page 2).

4) Petitioners deny paragraphs 3-6 in as much as the facts ignore the October 28, 2013 Special Board Meeting and then later held the November 4, 2013 meeting to adopt a Final Amended Plan. In response, we expand upon paragraph 38 in our initial petition to further allow understanding of the weight of that paragraph for consideration, we ask the Court to consider the entire environment and atmosphere in which the signatures to this petition were gathered.

A: The Electors in this community bravely chose to dissolve their village government on November 6, 2012 as the law empowered them to do.

B: They then watched how the Dissolution Plan was created, watched their public officials ignore the law and have to be dragged to Court to be compelled to finish the preliminary dissolution plan.

C: They watched their Police Chief on live Video in the dissolution meetings actively argue against dissolution during the political process as an equal voting member of the Dissolution Committees representing the Police Department, while there was not equal representation by the Fire Department.

D: They heard time and again from Village Officials and on the street that “We need to save our Fire Department and Police Department.”

E: Finally, at the Special Village Board Meeting of October 28, 2013 the community observed a strong police presence as they entered, had to sign in and obtain comment cards in front of the Police Secretary Helen Weimer and Parking Enforcement Denise

Eaton, and had their questions asked for them by Village Police Chief Richard Bogan who led the entire process, and was only arbitrated occasionally by Palmyra Mayor Vicky Dailey.

F: They ultimately received news that the Village determined \$9.21 per \$1,000 savings would be achieved with dissolving versus \$1.74 per \$1,000 using Alternatives.

G: Finally, they were confronted with a difficult and potentially intimidating situation for the average elector when the persons who knocked on their doors or catching them in public and asking them to sign these petitions were the very people they had to trust in daily life or would respond to their emergencies: (**Exhibit G**) i.e., Police Chief, Police Officers, Code Enforcement Officer & Fire Chief, Police Secretary, Village Trustees, Planning Board and Zoning Board members, and the wives/friends/family of Village Employees. (Reference **Election Law Article 17, Section 110** for our concerns).

7) Further, as we previously noted using **Exhibit G** for an example, we continue to sincerely believe that there was voter intimidation, there was an atmosphere in which potential fraud could easily flourish, and that the petition considered in its entirety fails to meet the substantial compliance standard we will further address again later in this reply.

8) Petitioners DENY paragraphs 7-10 and all other paragraphs or memorandum and instead will proceed forth to establish both prongs of the two part test for standing, as well as a clear Appeals Ruling further establishing a need to confer standing in this unique Article 78 case.

9) Petitioners further OBJECT to Respondent **Exhibit A** as valid and admissible evidence for consideration because it contains information that contradicts the Final Statutory Certification of the Village Clerk established as Petitioner **Exhibit D** page 1 and contains hand written notes that are only a response to Petitioners filed objections, not original dated notes or admissible evidence.

A: The Final Statutory Certification does not specify ANY signatures invalid.

B: This is further evident in that the replies correspond to our Exhibit Pages, as there were no paginations for her to relate to and per the fax date stamp, the only date and time

on them, they were sent at 1025hrs on January 13, 2014. We question how her reference notes could correspond with the petition itself as there were no paginations for reference.

C: The hand written notes were seemingly created AFTER Petitioners filed objections on December 30, 2013 and not prior to the Certification on December 26, 2013 at 0938hrs.

D: Further, the Village Clerk signed the petition which she was solely charged with certifying.

E: The Village Clerk refused to provide Petitioners a copy of the Formal Certification for 5 days, leaving us to question if any changes were made to it.

F: When the totality of facts are considered, a valid question of whether the affidavit and exhibits are perjurious is reasonably asked and considered..

10) **STANDING – Part 1 - INJURY IN FACT:** We were among a select group of electors signing the original petition to commence this entire process. We personally voted, and now due to a fatally defective petition and illegal certification of the Village Clerk, our Personal Votes will be disenfranchised by fraudulent means. Jack Bailey was the original contact person for the initial petition, and we were part of a unique group of electors who signed, filed, and voted that sets us apart from the population at large and the general vote at large. Thus we have standing to sue to protect our disenfranchised vote.

11) **STANDING – Part 2 -ZONE OF INTEREST:** The law makes clear its goal is to empower electors and limit the ability of government to work against electors rights, so that electors would be free to push for dissolution. The only exceptions carved out are to protect against fraudulent activity and to compel statutory duty, and the areas of clear standing are granted in a manner to empower electors and protect against fraud or misfeasant behavior by public officials. Thus, because we are both the initial electors originating this process and actual voters, and our votes were intended to be protected against fraud or misfeasant behavior by public officials, we meet the zone of interest requirement. Respondents fail to take the entire law in context when quoting the clear standing given to Electors in 779 and 785 – The assumption by the legislature was that the Clerk would not invalidate petitions without good cause and then

Electors could challenge invalidation. The assumption was never that the Clerk would approve and Certify clearly defective and fraudulent petitions.

12) Signors of the December 18, 2013 Petition at question seeking another vote would not be motivated to go against the Village and initiate such a legal fight to protect against fraud. Thus, in the public interest, it is rational and reasonable that the Original Electors with a stake in the matter and who voted should be conferred standing to proceed for the purpose of protecting against fraud or obvious malfeasance/misfeasance by public officials who have compromised themselves legally and ethically in the process.

13) Respondents are attempting to carve Section 785 out of the entire context of GML 17-A. In doing so they miss the forest for the trees in trying to protect their misfeasant behavior by clinging dearly to the threshold standing argument. This proceeding and the law did not arise in a vacuum, but instead the Elector Initiated Dissolution process began with Sections 773 and 779 of this law when we as initial Electors submitted a legal petition to initiate dissolution. Every other section from 779 onward commenced as a result of our actions. Thus, the protections against fraud or misfeasant behavior should be conferred on us as the original electors to challenge such behavior.

14) If Standing in this case is not granted, then the precedent set in this case will create an impenetrable barrier across all of NYS to any further judicial scrutiny of similar cases and would nullify the very reasons CPLR 7803 was codified into law.

15) *Stein v metropolitan transit authority et al*, 110 misc 2d 1027 (1981) "The courts have increasingly recognized that, "If the requirement of standing is given a narrow construction when there is involved constitutional or important statutory rights or misfeasance or nonfeasance of public officials, then there is, in effect, no practical remedy for anyone with an interest in enforcing the right — and the right becomes but a mockery." (3 Weinstein-Korn-Miller, NY Civ Prac, par 3001.04.) Thus, in *Kessel v Long Is. R. R. Corp.* (Supreme Ct, Nassau County, Sept. 18, 1980), Justice SPATT of this court held that the MTA was required to comply with the State Environmental Conservation Law before eliminating an experimental off-peak fare because of the environmental impact of such an action. By such decisions the courts are not interjecting themselves into executive, legislative or administrative decision making. Rather they are merely

insuring that officials and administrative bodies abide by the procedural safeguards which have been developed to protect the citizenry. Petitioners then have standing insofar as they contend that the notice of the public hearing when compared with the fare increase ultimately adopted was defective.”

16) Even Election Law, gives the general electors the right to challenge clearly fraudulent or facially deficient petitions. As we previously noted, those that signed the petition at question would not be motivated to openly take them to court on fraudulent grounds such as this, so relying on Section 779 and 785 as the sole protection against a fraudulent petition would be injurious to the overall goal of protecting against fraud and empowering electors.

17) We are here via CPLR 7803 because the Village Clerk was misfeasant in that she certified a facially deficient petition on December 26, 2013 in an arbitrary and capricious manner, which then fraudulently attempted to overturn a legal vote on November 6, 2012 and compromised Petitioners Citizen rights to have a legal ballot counted and a legal vote upheld.

18) Pursuant to Sections 779 and 785 of GML 17-A Title III, the only appealable document in this case is Petitioner **Exhibit F**, which is the final statutory document to be compared with **Exhibit D**. Respondents clearly failed to show that ANY signatures were invalidated. As we previously noted and objected to the admissibility of, Respondents have attempted to enter into evidence Respondent **Exhibit A** an Affidavit and hand written notes obviously created after the certification and in response to our objections and tries to now justify the Final Statutory Document. Because the Village Clerk signed the petition, has major stake in this matter more so than anyone else as her husband also is the Fire Chief, Code Enforcement Officer, and was also a witness to the petitions at question, we do challenge the reliability and admissibility of the affidavit presented.

19) Further, in response to Respondent **Exhibit A**, we reference the court’s attention back to Petitioner’s Petition paragraphs 31-36 and the clear arguments already presented with reference to exhibits.

20) In response to Respondent’s paragraph 9 and 10, we DENY these paragraphs and again reference Petitioner **Exhibits D and F**. Per the Certification of the Village Clerk at 0938hrs on

December 26, 2013 she did not invalidate, disqualify, or determine substantial compliance pursuant to the specified requirements of Section 779 as required in Section 785. Respondent utilized strict parameters for reviewing Jack Bailey's Petition as noted in Exhibit D, but did not illustrate that she utilized any parameters other than 615 signatures were sufficient. This shows arbitrariness and capriciousness.

21) Respondents note in the Memorandum of Law page 1-2 that the Village Clerk used the current list of Village Electors provided to her by the Wayne County Board of Elections. We dispute that statement in as much as we utilized a list dated December 20, 2013 and she certified the Petition on December 26, 2013 at 0938hrs using a list from November 20, 2013. Petitioners list was much more current and would take into account any moves into the village or within the village. Thus, our challenges are based on the list of Legal Village Electors pursuant to the BOE list of December 20, 2013 which was most current and most reliable for establishing identity and legal residence.

22) Petitioners further refute page 4, POINT 1: Respondents take on a position of hubris and claim that any member of the public who REFUSED to sign the petition failed to take a position and thus are not interested in the outcome. This is illogical at best, as a majority of legal electors voted and were sustained on November 6, 2012 GENERAL ELECTION that they wished to dissolve, and the Final Dissolution Plan of the Village of Lyons affirmed all of the public statements of Petitioner Electors that were stated prior to the vote. The petition placed before them asked them to sign to revote the issue and affirm the dissolution plan should NOT be commenced. It is equally rational and plausible that ANYONE who did not sign the second petition believed that dissolution should continue and thus WERE interested in the outcome.

23) Respondents stated to the public at the Dissolution Plan Special Meeting October 28, 2013 before the Village Board and the Town Board that they would be placing petitions on their counters for people to sign, and would leave them to sign. We further contest that witnesses to the petitions actually witnessed and verified the eligibility of every person signing the petitions as required. (See *Matter of Flower v. D'Apice*, 104 A.D.2d 578 (1984).

24) Re-Asserting paragraph 31 of our verified petition, expanding further: **Substantial Non-Compliance with GML 17A Title III, Sections 779 parts 3-5 and 785 is such that the gross and cumulative defects undermine procedural safeguards against fraud and confusion: Petition should be dismissed as it is Substantially Non-Compliant.** See *Matter of Contessa v. McCarthy*, 40 NY2D 629 (1976), *Matter of Lundine v. Hirschfield*, 122 A.D.2d 977(1986).

A: 100% of the pages of the petition were not consecutively numbered and paginated, they are all page 1 and page 2. This entire petition is mis-paginated which creates confusion and increases the risk of fraud. It makes review, reference, and challenges very difficult and time consuming.

B: A fraud prevention paragraph is missing from 100% of the petitions submitted, which is part of the procedural safeguards built in the petition and we believe is a fatal defect to the petition for that reason.

C: Petition shows plain sloppiness.

D: Petition shows a clear pattern of irregularity throughout greater than 2/3 of the pages submitted.

E: Petitions were clearly collected in a haphazard manner.

F: Petition contains non-registered voters, at least two instances where town residents used an address in the village to sign but reside in the town, and at least 11 pages of improper witness statements which have been held must be strictly complied with.

G: Many signatures appear possibly fraudulent, signed by the same person with deficiencies in the witness statements, and the entire petition deserves a full Court review against fraud if it is to be accepted as legitimate. (**Exhibit 15** for example)

25) Petitioners reference *Matter of Rancourt v. Kennedy*, NY Slip OP51499 (2011) *Matter of Fromson v. LeFever*, 112 A.D.2d 1064 (1985), “we cannot conclude that the petition at question contains gross irregularities as described in paragraph 24, there has not been overall substantial compliance, and there are insufficient number of legal electors to validate the petition.”



26) Petitioners question deceit, forgery, intimidation, and treachery in the petitions for many reasons already described; one example is because there were signatures gathered prior to an Actual Dissolution Plan being presented to the public to vote up or down, as the petition asks for: (**Exhibit 15** for example).

27) Petitioners question how the Village Clerk was able to perform a proper review of this petition given the gross and substantial non-compliance with law. She received the petition December 18, 2013, was given a Notice of Petitioners Intent to Object on December 20, 2013, was out of the office on vacation until December 26, 2013, and at 0938hrs upon her return that date she certified the petition as valid and sufficient pursuant to the same parameters she articulated in **Exhibit D**.

28) Petitioners finally question the Memorandum of Law and challenge whether the *Matter of Ian Hunter v. Frederick G. Capagni* continues to stand as settled law in this case, given that this law was passed in 2009 as a new law. The underlying election fraud guidelines that provide a major deterrent to possible fraud do not exist in this law and the penalties are not laid out. As we noted in our cases cited in paragraphs 26-28, the law and the layman's book clearly laid out the sample petitions to be used and state the petitions **MUST** be in substantial compliance.

A: We challenge the purpose of the phrase "in witness whereof, we have signed our names on the dates indicated next to our signatures." If this is not part of fraud prevention and safeguards, or necessary, why is it specifically included?

B: Exhibit B page 5, an interpretation and guide for citizens by NYS, makes it clear that the executive branch considers the missing paragraph as critical to the petition. Per the interpretation, the reason is for preventable error and ensuring required information is obtained, and attesting that they individually did sign their names to the petition as stated.

C: Per Exhibit B's general explanations, the missing paragraph is an integral part of the fraud prevention procedures in this petition process.

D: The missing paragraph coordinates as a fraud prevention safeguard with the Witness Statement to ensure all understand the seriousness of the signing of the petition.

29) The missing preamble to the petition “in witness whereof, we have signed our names on the dates indicated next to our signatures,” IS a **fatal defect** to the petition in this case, as its part of critical procedural safeguards to be followed in the prevention of fraud and confusion, and to allow proper authentication of signatures. We draw the Court’s attention to Town Law Article 7 Section 91, Election law Article 6 Section 140, a FRESH 2006 Appellate Case from the 2<sup>nd</sup> Department *Matter of Constance J. Fisher et al. vs Christian Sampson et al.*, 27 A.D3d 560 (2006) as well as a FRESH 2013 Supreme Court Case *Mathewson, Wendy B. vs. Town of Kent*, Putnam County Index #001042-2013. See also *Matter of Graham v City Clerk of City of Ogdensburg*, 104 A.D.2d 703 (1984).

30) Finally, in performing a fresh review of the 104 pages of the petition in light of the rulings cited by Respondents for Witness Statements, we discovered another 10 suspect signatures for Debra Coons as Witness on 11/23/2013 with required defective witness affidavit information. Thus, if the court decides to perform a review, we respectfully ask that a 100% review of every page of the petition be reviewed as new and concerning questions continue to arise as the petition is reviewed showing more evidence of fraud and being complicated by the mis-paginations in finding and referencing these issues.

### **Conclusion**

We are a nation of laws, and as such if something is a provision of law we should observe the law. If there are violations of law like occurred in this case, then there should be consequences. Otherwise the law is impotent and without meaning, the safeguards fail as each opening is further leveraged, and there is no incentive to comply with any part of the law. GML 17-A is a new law passed with very specific reasons and a goal of removing impediments to Electors succeeding in dissolving their local governments if they wished. Petitioners recognize that the law was written to ensure legal electors would have a right to petition, but that protection against fraud was integral to this process as a valid petition submitted would serve to overturn a legal vote of November 6, 2012. In fact, the Legislature chose to use a lesser standard of substantial compliance instead of strict compliance to ensure that courts and objectors would not be able to dismiss a petition on technicalities unless it can clearly be shown that gross irregularities, fraud,

and possible deceit or intimidation occurred and permeate the petitions. At least 66 of 104 pages, 2/3 of the total pages were challenged for gross deficiencies, which does not support substantial compliance. In such context, we ask this Court to take the entire atmosphere and the potential intimidation into consideration. This process is ripe for fraud and intimidation much more than a general election, with almost every person of village authority either passing the petition, signing it, or pushing for every village elector to reject dissolution at all costs. Placed in context, and taking into account the motivation and willingness of the passers of the petition to use whatever means necessary to reach their stated end. We question the gross irregularities of the petition and believe that this is a fraudulent attempt to overturn a legal vote of the electorate at a General Election on November 6, 2012. With full knowledge and understanding that there are a measure of legal electors who do wish a revote, we believe the majority of the petition to be so grossly non-compliant and possibly fraudulent or coerced that in this case we believe the legal vote of electors at a General Election should instead stand and this petition dismissed.

### **Verification – Affidavit**

#### **Petitioner Reply to Respondent January 13, 2014 Answer**

Each of the following states, deposes, and affirms that they have read the foregoing reply and know the contents thereof, and the same are true to the best of my knowledge except as to matters state to be alleged upon information and belief, and as to those matters I believe them to be true.

Jack Bailey:\_\_\_\_\_

Andrew DeWolf:\_\_\_\_\_

**Sworn before me this 17<sup>th</sup> day of January, 2014:**

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**Notary Public**