STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

JACK BAILEY and ANDREW DEWOLF

Petitioners,

vs.

VILLAGE OF LYONS BOARD OF TRUSTEES,

Respondent.

MEMORANDUM OF LAW

INDEX # 76640

QUESTIONS PRESENTED

1. Is standing established for purposes of maintaining an Article 78 Proceeding under General Municipal Law Sections 779 and 785?

2. Does the Petition submitted to the Village Board on the question of whether the Elector-Initiated Dissolution Plan take effect contain the requisite minimum number of valid signatures necessary to require the holding of a special election?

STATEMENT OF FACTS

An Elector-Initiated Dissolution Plan was adopted by the Lyons Village Board on November 4, 2013. Thereafter, concerned residents of the Village of Lyons petitioned the Village pursuant to GML §785 for a referendum as to whether or not the Elector-Initiated Dissolution Plan should take effect.

On December 18, 2013 the Petition was filed with the Village Clerk of the Village of Lyons. Thereafter, and pursuant to GML §785, the Village Clerk made a determination as to the sufficiency of the Petition. The Petition contained 615 signatures and of those 615 signatures the Village Clerk determined 570 of the signatures to be valid

signatures based on the current list of Village Electors provided to her by the Wayne County Board of Elections. The number of signatures required in order to cause a referendum to be scheduled is 491, thereby exceeding the number of signatures required by 79 signatures.

On December 16, 2013 the Village Clerk certified the Petition to the Village Board of the Village of Lyons. Pursuant to GML §785 (5), on January 9, 2014, the Village Board, at a duly convened special meeting, adopted a resolution scheduling a special election on the ballot proposition to be held on March 18, 2014.

POINT I

THE PETITIONERS LACK STANDING FOR THE PURPOSES OF MAINTAINING AN ARTICLE 78 PROCEEDING UNDER GENERAL MUNICIPAL LAW SECTIONS 779 AND 785

General Municipal Law Section 785 is the sole statutory mechanism by which a municipality which has elected to dissolve can vote on an adopted plan of dissolution. General Municipal Law Section 785 sets out the procedure to be followed and the requirements to be met in order to cause a referendum to be scheduled.

It is important to note that the initial affirmative vote to dissolve is ***separate and distinct*** from the vote as to whether an adopted Plan of Dissolution should take effect.

General Municipal Law Section 779 addresses the initial process of seeking an Elector-Initiated Dissolution while GML §785 addresses whether the voters want to adopt the after-the-fact Plan of Dissolution.

In both GML §779 and §785 the legislature specifically addressed the issue of standing. While many statutes are silent as to standing leaving it up to the courts to determine based upon past precedence, the legislature in this instance specifically set

out who has standing to challenge a petition. General Municipal Law § (4) specifically states:

> *"The contact person or any individual who signed the Petition may seek judicial review of such determination in a proceeding pursuant to Article 78 of the Civil Practice Law and Rules."*

Neither Jack Bailey nor Andrew DeWolf are the contact person on the Petition, moreover, neither Jack Bailey nor Andrew DeWolf are signatories to the Petition, and thus lack standing to bring this proceeding.

Although legislative history on the new Article 17 of the General Municipal Law is scant, it would seem that the legislated limits on standing would appear to be in line with court precedence and case law on the issue.

"Standing is, of course, a threshold requirement for a plaintiff seeking to challenge government action." *New York State Assn. of Nurse Anesthetists v. Novello,* 2 N.Y3d 207, at 211 (2004). In order to challenge an administrative determination by a Village Board, whether by Article 78, or an action for an injunction, a party must be "aggrieved" by the determination being challenged. *The Society of Plastics Industry, Inc. v. County of Suffolk,* 77 N.Y.2d 761 (1991); *Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals of Town of North Hempstead,* 69 N.Y.2d 406 (1987). To be aggrieved sufficiently to have standing to challenge an administrative determination requires first, an initial demonstration that the challenger has been adversely affected by the determination of the respondent or defendant; that the challenger has suffered special damage, different in kind and degree from that suffered by the community general. *Sun-Brite Car Wash, Inc., supra.* The Court of Appeals in *The Society of Plastics Industry, Inc. v. County of Suffolk,* 77 N.Y.2d 761 (1991), said:

> In order to establish standing ". . .a party must show that the in-fact injury of which it complains (its aggrievement, or the adverse effect upon it) falls within the "zone of interests," or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted." [Internal citations omitted] *Society of Plastics Industry, Inc. v. County of Suffolk,* 77 N.Y.2d 761 at 773.

The Petitioners must show that they would suffer direct harm, injury that is in some way different from that of the public at large.

Only the persons that signed the Petition on the question of adopting the Dissolution Plan are interested in the outcome. The general public, by not having signed the Petition, has effectively said that they do not take a position. The Petition is the issue. The issue is not whether one is or is not in favor of dissolution. Petitioners are not "aggrieved" and cannot demonstrate any "injury in fact." While the Petitioners may want the Village and its accompanying village taxes to go away, they cannot demonstrate any injury based upon the issue of the sufficiency of the petition. Inasmuch as the Petitioners did not sign the instant Petition, they are not in the "zone of interest" that might afford them standing.

Petitioners' claim of injury is, at best, speculative and based on the assumption that at the referendum, the Village would decide not to dissolve. Petitioners' assumption lacks the concreteness required for "injury in fact." *New York State Assn. of Nurse Anesthetists v. Novello,* supra at 213.

Petitioners desire to bootstrap standing with the argument that they signed the first Petition. This argument is without merit and is not found anywhere in Article 17 of the General Municipal Law.

POINT II

THE PETITION CERTIFIED BY THE VILLAGE CLERK AND SUBMITTED TO THE VILLAGE BOARD CONTAINS THE REQUISITE MINIMUM NUMBER OF SIGNATURES AND IS A VALID PETITION PURSUANT TO THE GENERAL MULNICIPAL LAW SECTION 785

Petitioners' desperate attempt to invalidate 165 signatures must fail. While the Court may find a small handful of signatures may be disqualified for various reasons, the Court will find that there are ample, valid signatures to satisfy the requirements of GML §785. The Petition contains 570 valid signatures and only 491 are needed for the Petition to be given effect.

As a general rule, signatures on a Petition are presumptively valid [see General Election Law §6-154 (1)]. Respondent's reference to the Election Law is where most of the case law on the subject is found. Petitioners' first argument is that the entire Petition must be thrown out as it does not conform to the form mandated by the State of New York. Petitioners fail to set forth any statutory mandated form. General Municipal Law §785 (3) states that the petition must substantively comply with GML §779. General Municipal Law §779 provides a sample petition and states in GML §779 (3) that the petition must "substantially comply with the sample petition". Nowhere in GML §779 does it state what would constitute substantial compliance, or for that matter a fatal defect in the Petition. The obvious intent behind GML §779 is to provide voters with a right to be heard while at the same time ameliorating fraud in the petition process; fraud being the key. General Municipal Law §779 (5) states in plain English *"in matters of form, this section shall be liberally construed, not inconsistent with substantial compliance thereto and the prevention of fraud."* Additionally, the Courts should grant a liberal construction to the formal requirements of the Election Laws to insure that the will of the voter is

heard. *CF Matter of Cozzolino v. Columbia County Bd. Of Elections,* 218 A.D.2d 921, 922-923, 631 NYS2d 82 (3d Dept. 1995).

Petitioners' contention that the Petition is totally invalid for want of the wording "in witness whereof, we have signed our names on the dates indicated next to our signatures" is without support in the law. The Fourth Department in *Matter of Ian Hunter v. Frederick G. Campagni, Sr.* 74A.D2d 1000; 427 N.Y.S.2d 327; 1980 opined regarding that same wording "Although this phrase is used on the form provided by statute for petition sheets (Election Law §6-132, subd. 1), its omission has been held not to result in invalidation of the designating petition (*Matter of Cairo v. Harwood,* 42 N.Y.2d 1098)."

The test of compliance regarding the validity of a petition is whether or not the petition form contains the required information. A slight rearrangement as to how the information is presented or an insignificant deviation in the wording would not be a fatal effect, See *Matter of Irvin v. Sacks,* 129 A.D.2d 827 (2d Dept. 1987).

The majority of cases regarding the validity of petitions find their roots in the prevention of fraud; for example:

Signatories on designating petition of candidates for primary election were not to be penalized for mispagination, absent some indication that gaps in pagination were result of some fraudulent act. *Erazo v. Ruiz* (1 Dept. 1985) 112 A.D.2d 909, 493 N.Y.S.2d 458. Designating petition was not invalid although cover sheet contained arithmetic discrepancies regarding total number of volumes, pages, and signatures where petition contained signatures greatly in excess of that required for office. *Franco v. Velez* (1 Dept. 1985) 112 A.D.2d 875, 493 N.Y.S.2d 551, affirmed 65 N.Y.2d 967, 493

N.Y.S.2d 1022, 483 N.E.2d 1154. Failure of designating petitions to contain date of primary election and failure to have petitions consecutively numbered were trivial and inconsequential objections which did not invalidate petition. *Lloyd v. Power* (4 Dept. 1971) 37 A.D.2d 792, 324 N.Y.S.2d 771.

Where designating petition contained more than sufficient signatures and pages were counted by nominee in presence of deputy commissioner of elections and all sheets were bound together in one volume with cover sheet setting forth nominee's name, office he was seeking, number of pages contained in petition and total number of signatures, failure to consecutively number each sheet did not invalidate petitions. *Reed v. Power* (4 Dept. 1971) 37 A.D.2d 793, 324 N.Y.S.2d 864.

The petition form utilized in the instant Petition contains all of the elements necessary to support it being a legal petition. A review of the applicable case law discloses that the requirements of "substantial compliance" has been satisfied. Literal and precise compliance is not required. *Peter Cavallaro v. Michelle Schimel* 194 Misc2d 788; 755 N.Y.S.2d 809, 2003.

Petitioners' residency arguments must also fail. Residence of the signer should be their residence at the time they signed the petition. *Dye v. Callahan,* 42 A.D.2d 916 (3rd Dept., 1973). An address is acceptable if it matches the address listed in the board's registration list. Some latitude should be given if the address does not match, but it appears that they are one and the same. *Regan v. Toole,* 63 N.Y.2d 681 (1984).

The residence address of the signatures on the designating petition is adequate and does not warrant invalidation of the designating petition where "there has been substantial compliance with the statutorily prescribed format" *Torporek v. Beckwith,* 32

A.D.3d 684 (4th Dept., 2006), *quoting, (Matter of Belak v. Rossi,* 96 A.D.2d 1011, 1012, 467 N.Y.S.2d 100, *lv denied* 60 N.Y.2d 552). The *Toporek* Court went on further to say that "[T]he Election Reform Act of 1992, amending section 6-134 (2) of the Election Law . . ., provides for liberal construction of the residence address requirement". *Toporek* at 685 citing, *Matter of Regan v. Starkweather,* 186 A.D.2d 980, 981. Indeed, "where the information sought is apparent on the face of the form and the defect cannot possible confuse, hinder or delay any attempt to ascertain or to determine the identity, status and address of the witnesses, the defect is not such as to mandate invalidation of all signatures on each of the several paged" *Toporek* at 685, *citing, Matter of Weiss v. Mahoney,* 49 A.D.2d 796, 797.

While the Petitioners would very much like to obviate the ballot proposition on whether the Elector-Initiated Dissolution Plan should take effect, their efforts operate, if successful, to deny the right of the people to petition the government, or any department thereof (N.Y. Const. Art I, §9 Art. 1X) which right should not be abridged by technicalities. "This ancient and hallowed right of petition can be destroyed and lost to the electors if circumvented by restrictive legislation or narrow interpretation of the statutes pertaining thereto. Every liberal interpretation must be given to the legislative enactments to the end that the right of petition be preserved to the electors." *Matter of Warren Potash v. Stanley Molik* 35 Misc2d 1; 230 N.Y.S.2d 544, 1962.

CONCLUSION

On the basis of the foregoing, Respondent, Village of Lyons, respectfully requests that the Petitioners' application be dismissed, or in the alternative, that the instant Petition

be validated allowing a referendum on the question of whether the Elector-Initiated Dissolution Plan take effect.

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Respectfully submitted,

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