

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of

NORMAN S. ROSENBLUM, as MAYOR OF THE
VILLAGE OF MAMARONECK,

INDEX NO.
3054/2016

Petitioner,

For a Declaratory Judgment for an
Order Declaring the September 6, 2016
Village Board Meeting Void

-against-

VILLAGE CLERK OF THE VILLAGE OF
MAMARONECK and THE VILLAGE OF
MAMARONECK BOARD OF TRUSTEES,

-and-

WESTCHESTER COUNTY BOARD OF ELECTIONS,

Respondents.

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Westchester County Courthouse
111 Dr. M.L.K. Blvd.
White Plains, New York 10601
October 27, 2016

BEFORE: HON. LAWRENCE H. ECKER
Justice of the Supreme Court

(Appearances on next page.)

CAMI L. LANDAU
Senior Court Reporter

APPEARANCES:

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COUNTY ATTORNEY OF WESTCHESTER COUNTY
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 BY: MELISSA-JEAN ROTINI, ESQ.

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(The following is a portion of the day's proceedings only.)

THE COURT: All right, be seated, everyone, please. I'll read into the record my decision on this case.

At the outset, let me state that I don't believe there is a necessity for any factfinding here. I think the record is complete and clear and allows me the opportunity to make the determinations that need to be made without any further factfinding.

1 That having been said, in this hybrid declaratory
2 judgment, Article 78 Election Law proceeding, Petitioner,
3 the Mayor of the Village of Mamaroneck, apparently, in his
4 individual capacity, although in paragraph one of the
5 petition, identifies himself as Mayor and a duly registered
6 and qualified voter, has brought this action against the
7 Village Board of Trustees and the Village Clerk, seeking to
8 nullify the vote of the Village Board of Trustees taken on
9 the evening of December 6, 2016, which passed two
10 resolutions to place on the ballot for the general election
11 to be held on November 8th of this year, Local Law T of
12 2016, and Local Law U of 2016, the former transferring
13 appointments to the ZBA, to the Zoning Board of Appeals and
14 the Planning Board, and the latter transferring the
15 appointment of the Village Attorney from the Mayor, subject
16 to confirmation by the Board of Trustees to the Board of
17 Trustees alone. If this is approved by the voters at the
18 general election, then the Mayor will be one of five votes
19 on each of these appointments rather than the appointing
20 officer subject to Board approval.

21 The transfer of this power from the Mayor to the
22 Board of Trustees must be put to the public vote pursuant to
23 Municipal Home Rule Law Section 23(2)(f), abolishment,
24 transfer or curtailment of any power of an elected officer.

25 The gravamen of Petitioner's legal challenge to the

1 proposed local law going to the public referendum is the
2 validity of the notice of the public hearing held on
3 September 6. The essential facts are not in dispute, relate
4 to the incorrect time being inserted in the original notice.

5 Let me say this: To the extent that this decision
6 is applicable to Mr. Santoro, albeit not a special party in
7 the action, it is deemed to be such.

8 MR. DERRICO: Thank you, your Honor.

9 THE COURT: Okay, the issues placed before the
10 Court, raised by the Village Respondents are fourfold; the
11 first being standing.

12 Petitioner has commenced this action as Mayor of
13 the Village. The issue is whether he has the power as Mayor
14 to do so. Village Law Section 4-400, which is entitled
15 "Mayor," as argued by him at Subdivision B, provides that he
16 is to provide for the enforcement of the laws, local laws,
17 rules and regulations, and to cause all violations thereof
18 to be prosecuted.

19 Subdivision D of the same section provides that the
20 Mayor shall institute, at the direction of the Board of
21 Trustees, all civil actions in the corporate name of the
22 Village. Clearly, this is a civil action pursuant to the
23 CPLR.

24 The Court finds Subdivision B is intended to
25 provide that the Mayor, as the chief executive of the

1 executive branch of the tri-partite governmental structure
2 of the Village, such that the Village police power is
3 properly supervised and administered by him, and that he
4 shall serve as the chief executive officer. He wears two
5 hats; that of the C.E.O. and that of a voting member of the
6 legislature, i.e. The Board of Trustees in accordance with
7 Subsection D.

8 Petitioner has sued here only as the Mayor of the
9 Village, and not in his individual capacity. Does he have
10 the power to bring this civil action in his official
11 capacity as Mayor? The Court finds that he does not. That
12 he is without the power to commence the action derivatively
13 on behalf of the Village or its citizens in the absence of a
14 Board of Trustees direction.

15 Does the Court have the power to amend the caption
16 sua sponte, and to add that Petitioner is likewise suing in
17 his individual capacity, as any citizen may do, pursuant to
18 General Municipal Law 51? Pursuant to CPLR 3025, amendments
19 to pleadings are to be liberally granted and may be done
20 either on application of a party or sua sponte, if not
21 prejudicial to a party. See *Clarke against Laidlaw*
22 *Transportation*, 125 AD 3d 920, Second Department 2015. See
23 also *Allstate Insurance Company against Joseph*, 35 AD 3d
24 730, Second Department 2006.

25 The Court finds there is no prejudice to

1 Respondents, as the issues to be determined herein remain
2 the same, do not change the theory of the case or the
3 defense thereof.

4 In *Giunta* against the Village of New Haven, 51
5 Miscellaneous 3d, I don't have the page number, Supreme
6 Court Nassau County 2016, the Mayor sued the Village Board
7 as Mayor, and in his individual capacity, seeking to
8 invalidate the vote of the Board of Trustees which had voted
9 to invalidate the dismissal of the Village Attorney by the
10 Mayor. The Court found that the Mayor, in her individual
11 capacity, pursuant to General Municipal Law Section 51, as a
12 resident and taxpayer, could make any action in her
13 individual capacity, but not in her capacity as Mayor.

14 Addressing the issue of standing somewhat
15 differently, and not in the light of the amendment to the
16 action, the Village Respondents nonetheless argue that
17 Petitioner bears the burden of demonstrating that his
18 asserted injury is within the zone of interests sought to be
19 protected by the Statute alleged to have been violated, and
20 that he has suffered no injury-in-fact. It is axiomatic
21 that the law favors resolution of cases on their merits.
22 The Court finds that there is a legitimate, justiciable
23 controversy of real concern to the citizenry of the Village
24 of Mamaroneck, and that as a matter of public policy, it
25 should be resolved and needs to be resolved by this Court.

1 There is obviously a dispute within the body politic within
2 the Village of Mamaroneck that triggered the drafting of the
3 legislation and the passing of the resolutions.

4 The Court finds that Petitioner's challenge to the
5 resolutions being added to the ballot constitutes a
6 justiciable controversy that affects the public weal or the
7 public well-being, albeit not one that necessarily effects
8 the fiscal capacities of the Village, and that Petitioner,
9 as an individual, does have standing to maintain this
10 action.

11 Next issue is laches. The Village Respondents
12 argue that Petitioner's delay in commencing this action,
13 which was filed on October 19, 43 days after the September 6
14 vote was taken, constitutes undue delay or laches. They
15 cite *Elefante against Hanna*, 40 New York 2d 908. It's
16 decided in 1976 by the Court of Appeals. They do so in
17 support of their argument, in support of their argument
18 where the Court of Appeals modified the lower court by
19 ruling that a delay from December 11, 1975, the date of the
20 public hearing for approval of the resolution approving a
21 new City Charter, until October 8, 1976, the date of
22 commencement of the action challenging the resolution was so
23 close to the November general election, that it worked a
24 prejudice to the Respondents, i.e. the Mayor and other
25 public officials, so as to constitute laches, or a bar to

1 the maintaining of the action. In another case cited by the
2 Village Respondents, Schulz against the State of New York,
3 81 New York 2d 336, decided in 1993, the Court ruled that
4 the delay in bringing the action challenging the
5 constitutionality of a vote that approved the issuance of
6 public bonds will be detrimental to the investors who
7 purchased the bonds and to the state that would have to make
8 good on the early redemption, upon cancellation of the
9 bonds. As petitioner argues in reply, laches is an
10 equitable defense that has two elements, namely delay and
11 prejudice. He argues that any prejudice that might flow
12 from this action is for the Board of Elections to assert,
13 which did not, which the Board of Elections has not done in
14 their answer, and is already answered by the attorney here
15 for the Board of Elections, assuming the ballots have
16 already been printed and absentee ballots have been cast,
17 should the Court invalidate the resolutions and remove their
18 consideration from the ballot, it's the Court's
19 understanding, and it's been advised, the ballots would not
20 be counted as to the two resolutions, which would result in
21 a null and void vote.

22 Election Law 16-104 Subdivision 4, cited by
23 Petitioner, provides, inter alia, that a final order in any
24 proceeding involving the contents of official ballots on
25 voting machines shall be made, if possible, at least five

1 weeks before the date of the election at which such voting
2 machines are to be used, or if such proceeding is commenced
3 within five weeks of an election, no later than the day
4 following the day on which the case is heard.

5 It would appear that this Statute allows that
6 consideration of this action at the present time, 12 days
7 before the general election, albeit perhaps inconvenient, is
8 yet permissive, placing the onus on the Court to decide the
9 matter within one day, which it is doing.

10 The Court finds that the equitable doctrine of
11 laches does not apply here; that the timeliness or
12 untimeliness of the commencement of an action is to be
13 scrutinized on a case by case basis, and that the Election
14 Law, as just recited, is of assistance in that evaluation,
15 particularly where there has been no prejudice shown.
16 Whether this vote is taken or is not, does not affect the
17 fiscal health of the Village or its citizen, but if
18 permitted to stand, does allow the citizens to determine the
19 course of their Government's appointment of individuals to
20 positions of authority and trust; hence, the Court finds
21 that this action has been timely commenced.

22 Before addressing points, issues or points three
23 and four, an analysis of Petitioner's curious posture in
24 this case, the issue of the first notice, and the remedial
25 actions taken.

1 At the special meeting convened on September 6 at
2 7:30 P.M., after discussion of the two items on the agenda
3 for that evening, namely the public hearings for the two
4 resolutions at issue here, the Mayor, after voicing his
5 objections to the meeting and the conduct of the public
6 hearing, withdrew his objection and made the motion and
7 voted to close the public meeting. Upon the call of the
8 questions, he voted "nay." The motions to place the
9 resolutions on the November general election ballot passed
10 by a majority of the Board of Trustees, as is required
11 pursuant to General Municipal Law Section 20 and General
12 Municipal Law Section 23.

13 Now comes the Mayor, in his individual capacity, as
14 permitted by the Court, to challenge that which he condoned;
15 namely, the closing of the public hearing and the taking of
16 the vote. It was he who called for the vote to close the
17 public hearing, which passed unanimously, when he could have
18 abstained on that vote. He then exercised his vote on the
19 resolutions themselves. The Court places no legal
20 significance on the Petitioner having voiced his objection
21 to the proceedings of that evening, as it's his vote that
22 counts, and not the colloquy that preceded those votes. His
23 viewpoint was aired, as was that of the public who attended
24 the hearing, including those he invited, or were invited on
25 his behalf. His vote was counted. His vote was not in the

1 majority.

2 To the extent Petitioner now seeks to undo that
3 which he already acted upon, and whether there may be an
4 issue of estoppel, has not been addressed by the parties,
5 nor under these time constraints does the Court have the
6 ability to do so.

7 However, the Court need not pursue Petitioner's
8 curious posture given the resolution of the issues that
9 follow.

10 In regard to the Petitioner's argument that the
11 notice did not specify that there would be a meeting, as
12 opposed to a public hearing, the Court refers the parties to
13 matter of Thomas against New York City Department of
14 Education, 2016 New York Slip Opinion 06989, decided October
15 25, 2016, wherein the First Department is citing to Public
16 Officers Law Section 102 Subdivision 2 says the meeting is
17 the official convening of a public body for the purpose of
18 conducting public business. It's the Court's opinion that
19 that applies here as well.

20 That having been stated, on August 15, 2016, the
21 meeting to be conducted on September 6, 2016 was properly
22 called for, but for the error we will now discuss in the
23 original notice.

24 Points number three and number four, sufficiency of
25 the notice and the error in the timing of the notice having

1 been stated within the first notice.

2 Turning to the merits, Petitioner contends there
3 has been insufficient public notice under the Municipal Home
4 Rule Law Section 20, and Public Officer Law Section 104, due
5 to an error in the notice that the public hearing would be
6 at 5:30 P.M. on September 6, instead of the correct time of
7 7:30 P.M.

8 Respondents counter the statutory notice
9 requirements for holding a public hearing or adopting a
10 local law was satisfied. That is, the public notice was
11 sufficient, and the error was inadvertent and de minimis.
12 The affidavit of Deputy Village Clerk Sally Roberts detailed
13 that notices of the 5:30 P.M. work session and public
14 hearings were posted on the Village's website, the events
15 calendar, and on Facebook. The following morning, on August
16 31st, she discovered in her review of the August 15th
17 meeting of the Board of Trustees that the public hearing had
18 been scheduled for 7:30 P.M. on September 6th, not 5:30; the
19 earlier time having been allotted for the work session only.
20 She immediately, within the next few hours, revised the
21 Village's events calendar that is posted on the Village's
22 website to reflect the correct time of 7:30, revised the
23 Village's Facebook page, sent an email blast to the news
24 media and to the approximately 500 residents who had
25 subscribed to receive notifications from the Village. She

1 also notified all of the Board of Trustee members and
2 Village officials of the error in the posted time and her
3 correction of same, as well as submitted a new notice to the
4 Journal News to be published at the earliest possible date,
5 which was September 5th, Labor Day. All of this occurred on
6 August 31st, six days before the scheduled public hearing.

7 Public Office's Law Section 107 Subdivision 1
8 provides, if a Court determines that a public body failed to
9 comply with this article, meaning Article 7, the Open
10 Meetings Law, and its public notice requirement under Public
11 Officer's Law Section 104, the Court shall have the power,
12 in its discretion, upon good cause shown, to declare that
13 the public body violated this article and/or declare the
14 action taken in relation to such violation void, in whole or
15 in part, without prejudice to reconsideration in compliance
16 with this article. However, it goes on to state, an
17 unintentional failure to fully comply with the notice
18 provisions required by this article shall not alone be
19 grounds for invalidating any action taken at a meeting of a
20 public body.

21 Petitioner has not cited to this Court any case or
22 decision that stands for the proposition, provided a single
23 case that supports its position that annuls the
24 insignificant error noticing a public hearing two hours
25 ahead of schedule provides sufficient just cause to

1 invalidate the actions of the Village Board at the public
2 hearing and subsequent vote.

3 Several other undeniable facts need to be
4 underscored.

5 First, the two-hour error in the time was two hours
6 too early, not two hours too late. That is to say, if
7 anything, people who wished to attend the public hearing may
8 have appeared at 5:30 P.M. for the 7:30 P.M. hearing, but
9 there is no claim, nor could there be, that the error in
10 time caused anyone to show up too late for the public
11 hearing. This, in and of itself, suggests the benign nature
12 of the error here.

13 There is some evidence in the record that
14 Petitioner and those who shared his views about the
15 proposed, about the proposed local laws did their own
16 organizing and publicity to bring forth like-minded
17 residents to the meeting, as was perfectly proper. I'm
18 referring to the number of exhibits attached to the
19 affidavit of Trustee Leon Potok, particularly Exhibits A
20 through F.

21 Lastly, the public hearing at 7:30 was
22 well-attended, and proponents and opponents of the proposed
23 local laws, as residents of the Village of Mamaroneck,
24 appeared and spoke in public comment for and against the
25 proposal of the laws, as evidenced by the minutes of the

1 meeting at Exhibit V of the record.

2 Here, the Municipal Home Rule Law Section 20
3 requires notice of the public hearing not less than five
4 days in advance. Notices with the correct time were
5 circulated six days before the hearing. The Open Meetings
6 Law Section 104 Subdivision 1 requires 72 hours notice to
7 the news media and public of a public meeting. The purpose
8 of these requirements is to ensure a reasonable opportunity
9 for the presentation to and consideration by the Board of
10 complete data and arguments for and against proposed local
11 law. I cite the Village of Chestnut Ridge against the Town
12 of Ramapo, 46 AD 3d 74, Second Department 2007, citing
13 Martin against Flynn, 19 Appellate Division 2d 653, Second
14 Department 1963.

15 The Court finds substantial compliance with these
16 notice requirements and, in fact, there was adherence to the
17 spirit and letter of the law. There is no legal basis to
18 set aside the Board of Trustees' actions on the record
19 facts, and I decline to do so. I cite Alscott against
20 Laibach, 65 New York 2d 1042, 1985 Court of Appeals
21 decision, and again, Martin against Flynn.

22 And also, this is unlike 41 Kew Gardens against
23 Tyburski, 124 AD 2d 553, Second Department 1986, where the
24 wrong date was not rectified. Here, the wrong time was
25 rectified immediately and before the 72-hour deadline for

1 public notice.

2 The Court also finds no Board rule of procedure or
3 any other law or regulation that prohibits voting on a
4 proposed local law immediately after the public hearing on
5 that law.

6 Quite simply, whether these proposed local laws, in
7 fact, become law is for the voters of the Village of
8 Mamaroneck to decide on November 8th.

9 Therefore, the application to declare the public
10 hearing in the Village of Mamaroneck Board of Trustees, held
11 on December 6, 2016 at 7:30 P.M., to not be in compliance
12 with the Municipal Home Rule Law and Public Officer's Law
13 and to declare the Local Laws T and U void is denied, as is
14 the application to enjoin and restrain the Board of
15 Elections from printing and placing these propositions on
16 the November 8, 2016 general election ballot.

17 The petition is dismissed. Submit copy of the
18 Order and the transcript. Thank you all.

19 MR. PARISI: Thank you, your Honor, for your
20 extensive decision.

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(Continued on next page.)

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THE COURT: You're welcome.

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Certified to be a true and
accurate transcription of the
within proceedings.



CAMI LANDAU
Senior Court Reporter