STATE OF ILLINOIS)
) SS
COUNTY OF DU PAGE)

IN THE CIRCUIT COURT OF DU PAGE COUNTY
FOR THE EIGHTEENTH JUDICIAL CIRCUIT OF ILLINOIS

ANDREW SCHMIDT, KIRSTEN SCHMIDT, KAREN WEBER, BRADFORD TOCHER and EDWARD CORCORAN,	)	
Plaintiffs,	)	
-vs-	)	No. 16 MR 1670
COMMUNITY CONSOLIDATED SCHOOL DISTRICT NUMBER 181, DUPAGE AND COOK COUNTY, ILLINOIS, an Illinois quasi-municipal corporation and body politic,	)	
Defendants.	)	

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause, before the Honorable BONNIE M. WHEATON, recorded on the DuPage County Computer Based Digital Recording System, DuPage County, Illinois, transcribed by Kristin M. Barnes, Certified Shorthand Reporter, commencing on the 27th day of March, 2017.

Kristin M. Barnes
Official Court Reporter
CSR No. 084-004026

PRESENT:

MR. BRUCE C. DAVIDSON,

appeared on behalf of the Plaintiffs;

MAYER BROWN, LLP, by
MR. THOMAS V. PANOFF,

and

HAUSER IZZO, LLC, by
MR. WILLIAM F. GLEASON,

appeared on behalf of the Defendant.

THE CLERK: Line 9, In the Matter of Andrew Schmidt.

MR. PANOFF: Good morning, your Honor.

THE COURT: Good morning.

MR. PANOFF: Tom Panoff, P-a-n-o-f-f, for District 181.

MR. GLEASON: Good morning, your Honor.

William Gleason, G-l-e-a-s-o-n, on behalf of District 181.

MR. DAVIDSON: Bruce Davidson, D-a-v-i-d-s-o-n, on behalf of plaintiff.

MR. PANOFF: Your Honor, we're here on our motion to dismiss today. I'd like to address the issue of subject matter jurisdiction, and Mr. Gleason will address the other arguments in the motion to dismiss.

But, your Honor, before I turn to subject matter jurisdiction, I would just like to focus on, I believe, the context here because that's important.

We're here on a clerical error that my client did not make, a clerical error that has caused no harm whatsoever to anyone, and a clerical error that the legislature has now stepped in and expressly ratified.

To call this case meritless, I believe, is generous to plaintiffs at this point, but there clearly

are victims here. It's the children in District 181.

Each day that this litigation goes on costs the District --

MR. DAVIDSON: Your Honor --

THE COURT: I'm going to let him argue. You may respond in any way you want.

MR. PANOFF: Thank you, your Honor.

Each day that this litigation goes on costs the District between 6 and $9,000 in advanced construction costs that it has to pay.

Just this month alone, it's going to cost the District close to $570,000 in advanced construction costs and there's -- at the current rate, the District is set to exhaust its reserves in mid May.

So there's no doubt that the plaintiffs would like to delay this case as long as possible, but time is of the essence here, your Honor.

On the issue of subject matter jurisdiction, it's very clear, your Honor, that this is now a moot case, and your Honor can deal with the subject matter jurisdiction and therefore bypass all the other arguments we have for dismissal because subject matter jurisdiction is a core element and, if that's lacking, the Supreme Court is very clear that all the Court can

do at that point is dismiss the case.

So, your Honor, the Supreme Court is very clear that a justiciable matter is one that has to be definite and concrete as opposed to hypothetical and moot. A moot case, the Illinois Supreme Court has defined, is one where the Court cannot grant any effectual relief to the complaining party.

That's clearly the case here. The legislature has stepped in, it's passed the law, and it said that the notice that occurred was valid. The only relief that they are seeking in their complaint is a judicial declaration that the vote itself was improper and invalid. That's the only relief that they're seeking. The legislature has now said, you know what, it's now valid, we ratified it, it was signed into law. Once the legislature did so, this case became moot.

It's very clear in Illinois case law that a case can become moot even after the original petitioner complaint is filed. Cases become moot on appeal all the time and then the appellate courts dismiss it. The same logic applies here.

To the extent there was a justiciable controversy -- we don't think there was, but to the extent there was, as soon as the legislature passed the

bill, this case became moot in its entirety.

Now, plaintiffs, I think, recognize this fact and you see in their motion to dismiss opposition brief that what do they do, they now attack the constitutionality of the statute, essentially because they know that the legislature has moot the case.

What they don't mention, however, is kind of the touchstone here is that legislation enjoys a presumption of constitutionality. That has been the law in Illinois for decades.

And as the Illinois Supreme Court said in the Friends of The Parks Case that we cite in our brief -- this is the Illinois Supreme Court -- quote, Courts have a duty to sustain legislation wherever possible and resolve all doubts in favor of constitutional validity, close quote.

So the two arguments that they do make, neither of those has any merit. The first one is that they say this is special legislation and that somehow that runs afoul of Article IV, Section 13.

Plaintiffs are wrong. Again, the Illinois Supreme Court has said that for it to be special legislation, it has to be legislation that affects only one group, excludes others, and it has to be arbitrary.

Well, let's deal with the first prong. Does it exclude others? No. It's not as if this legislation applies just to District 181. There are three other districts that this legislation helps, as has been pointed out: Salt Creek 48, Bloomingdale Park District, and a library district as well.

Any referendum that occurred on that date that had been noticed between the 30 and 35 days, the legislation applies to. It's not singled out just to our district. So it doesn't fit within the definition of special legislation.

But even if it did, it still has to meet the arbitrary test, and plaintiffs admit in their brief that there is no arbitrary action by the legislature here. It's hard to imagine a more core and important governmental purpose than providing education to its citizens or upholding the democratic will of the people through a vote. And to say that that's arbitrary, I really think, speaks to the lack of merit in this lawsuit here by plaintiffs.

Their second constitutional argument, your Honor, doesn't fare any better. This is that it supposedly violates the three readings provision of the Illinois Constitution, which is Article IV, Section

8(d).

Again, this is wrong on both the law and the facts. In terms of the law, this was an enrolled bill, as we show in our motion to dismiss reply. Because it was an enrolled bill, both the speaker and the president of the Senate have certified the procedural properness of the bill, and the Illinois Supreme Court has said for enrolled bills those are nonjudicial -- justiciable matters. The Court can't hear that kind of appeal when it's an enrolled bill. Plaintiffs neglect this issue.

The other issue too is they're wrong on the facts. The bill has been read three times in each chamber of the General Assembly. As we point out again in our motion to dismiss reply, it's the title of the bill that has to be read in each chamber, and it was very clear that the title of the bill has been read in each chamber on three separate days. So not only are they wrong on the law, but they're wrong on the facts here.

So at the end of the day, your Honor, this Court lost the subject matter jurisdiction once the legislature passed the bill, this case has become moot, and proper course now, given the lack of subject matter

jurisdiction and the fact that no amendment can cure this because of subject matter jurisdiction has been taken away, is for the Court to dismiss this case and dismiss it in its entirety.

So we believe, your Honor, that issue disposes of the entire case, but there are alternative independent bases for dismissal which Mr. Gleason will now address.

THE COURT: Mr. Gleason.

MR. GLEASON: Thank you, your Honor.

And we split this up originally in our motion. I think the first thing that we brought to the Court's attention is that a cause of action pursuant to Section 23-24 of the Election Code is an improper vehicle to attack the validity of an election, which is what the plaintiffs have done here.

We made very clear in the briefs -- and the Illinois Supreme Court has made clear time and time again, frankly -- that an election contest is a statutory function that did not exist at the time in law and it exists solely to ascertain how many votes were cast for a candidate or for a measure.

And ironically, therefore, to ascertain the will of the people, this cause of action is expressly

to overturn the clearly expressed role of the people. But the Cipowski case from the Illinois Supreme Court made it very clear that the Election Code does not permit inquiry into the steps taken in calling and conducting the election.

That is precisely what this lawsuit is about and so it is not a proper vehicle to challenge the results of this election under 23-24 of the Election Code because that is limited to challenging whether there was sufficient votes for the question.

We raised several other A(9) defenses, your Honor, that I'll briefly go over. First off is the facts demonstrate that there was publication by a clerk within the statutory timeframe when the Cook County Clerk's Office published this in The Chicago Tribune on October 28, 2016.

And we provided you with the difference between Sections 12-5 and 12-4 of the Election Code, which say the election authority has to publish as 12-5 each election authority as 12-4. On the face of 12-5, it didn't require every single election authority. It required one to do it, and that happened. So on the facts, there's strict compliance with the statute.

But even if the Court were to believe that

each election authority had to publish, we believe that the requirements of Section 12-5 are directory and therefore can be met with substantial compliance, which is certainly in existence here.

The plaintiffs seem to confuse some of this and they get into not the mandatory directory test but the -- whether they had to do it, whether it's required. Well, obviously under the mandatory direction, everything is assumed to be required. It's whether or not the failure to strictly comply results in the action that was taken being avoided. There's a presumption that things are going to be directory that's only overcome when there's negative language of the statute in the case of noncompliance.

The plaintiffs submitted to the Court a statute of limitations and I said that's a perfect example. It says no cause of action shall be filed that takes place more than one year before you bring a cause of action. It tells you right in the very context of the statute what is it to happen if you don't follow it. There is absolutely nothing within the language of 12-5 that has such a negative inference in here.

And there are other sections of the election

code that deal with petitions that do say such things, where if you do not follow all the rote requirements your petition shall be deemed invalid. So that's why when people forget to staple them, they forget to number them, courts routinely throw those out and say those are mandatory because the statute on its face says that's what you have to do. Section 12-5 doesn't say that.

The second part is when the right the provision is designed to protect would generally be injured under directory reading. Here we're talking about too much notice. We're not talking about not enough notice. We're talking about they gave notice too far in advance.

The primary purpose of Section 12-5, according to the Second District Appellate Court, is to ensure that the public is aware of an election. It is crystal clear, based upon the undisputed facts before the Court, that the public was provided notice in an ample time, time and time again, through newspaper mediums, through postings at public offices, and through a ton of information that was available on the District's website.

And lastly, even if the Court were to require

substantial compliance, substantial compliance can satisfy even a mandatory provision. So even if the Court found that 12-5 was mandatory, substantial compliance could still beat it, and we believe that the test here would be whether the purpose of the statute in order to determine whether its purpose was achieved without strict compliance. So could the purpose be met without strict compliance here, absolutely.

The notice is the purpose. The notice was provided. And whether any prejudice was suffered from the failure to strictly comply, the plaintiffs don't even allege that there was prejudice. They don't allege that they, oh, wait, read it in a newspaper and then we forgot by the next Tuesday or something like that. There's not even a hint of prejudice that the plaintiffs set forth.

So under all those tests, even if there was subject matter jurisdiction, which we argue to the Court there is not, the District should still prevail and this matter should be dismissed with prejudice.

THE COURT: Thank you.

Mr. Davidson.

MR. DAVIDSON: Good morning, your Honor.

First of all, I have to register a very

strenuous objection to what we tend to refer to as fast facts.

Mr. Panoff -- I think that's the name -- listed a ton of things about expenses and how it's running out and the District is running out of money because of these plans. None of that has any basis in the record at all. I mean, he just came in here and announced those facts. After --

THE COURT: This case will be decided on the law.

MR. DAVIDSON: Very good. Thank you. I appreciate your assurance on that.

Let me start by saying they characterize this as a frivolous kind of lawsuit and all the facts -- they're innocent bystanders, they did nothing wrong, there's no prejudice here. We don't have to allege prejudice under the statute. We have to allege a violation of the law. And one of the remedies that's specific and divided is annulment and that's the remedy we seek.

But there are some facts that they omit that are kind of relevant here. You've got a $53 million referendum, they register it properly, put it on the ballot, and at that point you're kind of reminded of the old cartoon where there's a railing going down and

steps going out. You had one job to do and that's publish a notice within a statutory window. It's 21 days. It's not that hard to do.

And we've uncovered, with the exception of Petition of Voters in the Second District, 234 Ill. App. 3d 294, which found expressly that you have to publish notice during the period, other than that, we found no case in which the election authorities failed to file within a 21-day window. So it's not that hard to do.

Were they innocent? They knew the rules. They had filed all the papers. It took a 25 cent phone call to call the paper and say, When are you publishing this? And the District authorities did nothing. They just sat there.

If you're advising a District, don't you put down a checklist of things to do and isn't publication within the time limit one of the things you tell the District? Make sure they're going to publish it during the time period. They didn't do that. Then it came out early.

I mean, so -- doesn't somebody call the office and say, Hey, this was early? You need to publish it during the -- and they still had 21 days to

do it and they did nothing.

So to say that they're sitting on the sidelines frittering away their money because of the plaintiffs ignores their own responsibility here. There is some accountability.

I want to just mention the arguments that Mr. Gleason raises, and I think basically the new legislation does either moot them or summarily resolves them. There are two principles of legislation that we're talking about here, and number one is the presumption of the constitutionality, which Mr. Panoff noted and we'll return to that.

But the second is the legislature does not enact meaningless legislation. If this legislation 99-935 has meaning, it means that they needed to fix this. Without that legislation, which is not meaningless, without the legislation, the election was filed under the law.

There's no better authority on whether this is a mandatory requirement than the legislature itself; and if the legislature requires that there be a fix, you have to give that meaning. It means that there's something that needed to be fixed that was wrong.

So we think it boils down to the special

legislation argument of the constitution, and that is the General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether general law is or can be made applicable should be a matter for judicial determination.

Could there have been a general law? Sure. You could have said any election, the publication date is 10 days to 35 days. Easy. It's fixed. But they didn't do that. They classified. They said this 35-day benefit applies only to elections on November 8, 2016. Any other election falls into a different classification that does not get that benefit. It's a very simple analysis in terms of classification.

So they have made a classification. It provided a benefit to the members of one classification, a large publication, and they denied it to everybody else that comes along.

Now, I think that's pretty easy and doesn't require a lot of analysis. The trick comes when they say, well, it can't be an arbitrary discrimination and they say, well, it's for kids and we need education, you need to implement the will of the voters.

But the problem is these are great

justifications if it was, in fact, a general law and you came in and attacked it on due process grounds. But when it's special legislation and there's a classification, the justification that they announce, provide, has to go to the classification.

And if the education of the children and implementation of the will of the voters is what's critical, then they should have extended it to all the classes. It should have been the general law. Those purposes are not advanced by establishing this special classification.

And that's the key to the analysis that you have is they can have the greatest justifications in the world, but if it doesn't justify the classification, it doesn't remove the statute from the special legislation prohibition.

Best against Taylor Machine Works: If a statute is unconstitutional, the Court is obligated to declare it invalid. This duty cannot be evaded or neglected no matter how desirable or beneficial the legislation may appear to be.

So now we come to the presumption of constitutionality. It's not a conclusive presumption; it's a rebuttable presumption. And if we're right

about the law -- and, as you noted, it's a question of law -- and if we're right, the Court is obligated to say it's unconstitutional and it has to be stricken.

The plain fact of the matter is when you come right down to it we identified, I think, nine possible purposes for the special legislation and, when you start to analyze them, you're left uncomfortably with a feeling that it's one of the ones we mentioned, that there's some special interest involved here that's undisclosed.

You've got a $53 million pot and they attract the attention of the legislature. You know, one starts to wonder. I mean, how does this attract the attention of the legislature and isn't this something we need to be concerned about? It's not education for the children or they'd have expanded the time limit for all. It's not implementation of the will of the voters or they'd have expanded the window for all.

So, you know, I think at the end I just have some basic final thoughts, and that is here in the court of chancery, you generally are here to resolve disputes and we have a dispute that needs resolving. But we also invoke the other role that you play with a check and a balance against the legislative and the

executive branch. You are not here to examine the policy questions. The legislature did that. They said, for whatever reason, we should change the result of this election. Okay, they've done that. Now the job of the judiciary is to say, Did you follow the constitution? Well, you did that. It's not to say, Yes, we agree that this is a small clerical error, no real consequence, and so we're just going to grant it.

There's a lot of things they could have done to correct this. They could have put it on the ballot in another week. They could have had the legislature pass a general bill. But they came into the judiciary expecting someone is going to bend the rules. You can't do that. You have constitutional strictures. The analysis is there. They want to ignore the classification of the November 8th date and November 8th is okay, any other date is not okay. They want to ignore that. You can't do that. That's the law. It's a constitutional question.

We've not been able to find a case where time limits are given this mandatory directory thing. You've got the Jackson Hicks case, where it says that the Election Code is mandatory in all its provisions.

So, you know, just historically the

establishment of bright-line tests and then you -- once you start to allow -- you don't have to go back very far in the history to find that once you establish a bright-line test and allow people to cross it without consequence, without accountability, some bad things can happen.

Once you say that an election doesn't have to be held in strict conformity with the rules and the law, it's a bad precedent, and I hope that your Honor will step up and say to the legislature, sorry, but go back and provide it for everybody or else the law is stricken.

MR. PANOFF: Your Honor, may I briefly in reply make a few points?

THE COURT: Yes, certainly.

MR. PANOFF: There are a couple things that really struck me as part of the response that my colleague just made here.

First of all, they admit this case is now moot. That should be the end of the story. Because it is moot, this Court lacks subject matter jurisdiction and dismissal is proper.

Second of all, nowhere in any of their briefing or in their argument is there any allegation

of injury here. There's no injury at all. All they are claiming is a bare procedural violation by a party that's not even a defendant here, your Honor.

That raises the other issue then of standing, which also goes to this Court's subject matter jurisdiction. Absent any concrete particularized injury to them, they don't have standing as plaintiffs to be here before the Court.

One other argument that he made was that we came to the Court seeking the judicial declaration. We're the defendants here. We have no desire to be here, your Honor. This is a moot case. We want to go on with the bond and get that issued so that the school can be built.

They know that every day this goes on the bonds can't be issued because of the pending litigation that's going on. We want this case wrapped up. We want it -- I mean, if they really have issues here that they believe that the democratic process is being subverted, then their goal is to take it to the legislature and try to get the law amended.

But the law has been enacted here and it has mooted this case. Their argument that somehow it's unconstitutional now just does not square with Illinois

constitutional law.

As we've said, it doesn't apply just to District 181. It applies to any ballot referendum on that date where the notification was published between the 30 and 35 days.

We've identified at least three other districts in addition to ours that benefit from this. To call this special, I don't believe, is -- special legislation is a good faith argument when you look at the facts and you look at -- and the constitutional law here.

Your Honor, just to go back to the very beginning, the reason we raised these points about the cost and the delay here is just to show the context that this is a case that they have every motivation to try to drag out but we need to try to resolve quickly, including any eventual appeal that might come from this, because every day that's delayed is taking money out of the coffers of the school.

THE COURT: Mr. Gleason, do you have anything to add?

MR. GLEASON: Just briefly, your Honor.

We did cite two cases in our reply about timelines and them being given a directory reading. It

was Dowsett versus City of East Moline and Fiedler versus Sanitary District of Bloom Township.

And counsel has mentioned several times that there's no cases that involve the failure to file within the 21 window. There is a case that's cited to you in the briefs. It's Board of Education of Indian Prairie School District No. 204. It's the same electoral body that made the same mistake.

And in the context of that case, your Honor, there are very -- the Court is discussing the fact that substantial compliance might be something that would meet the code, but the reason that the legislation was enacted there was a reasonable person could also infer that investors would probably not be favorably disposed to substantial compliance arguments. The reason that they're doing things is the people who might purchase these bonds are concerned.

So I think that's a fallacious argument to say that it's never happened before. It has. And the exact situation has played out before.

That's all. Thank you, your Honor.

THE COURT: Thank you.

I believe that the arguments of Mr. Panoff and Mr. Gleason are persuasive on the salient issues

before the Court.

This matter is now moot because it has been corrected by the legislature. I don't believe that the requirements for special legislation have been met because this does not apply to this defendant only but to several others as well.

Even if the matter is not mooted by this legislation, I believe the substantive issues are still in favor of the defendant.

This Court is well familiar with the Election Code from 29 years of hearing ballot candidate cases. The part of the Election Code that governs whether a candidate should be on the ballot or whether an issue should be on the ballot, those sections are rife with consequences for not following all of the minutiae of the requirements. The sections that apply to this case do not have those consequences.

As a result, I believe that those sections of the Election Code are directory rather than mandatory and are not -- or do not require striking the results of this election because there was not absolute compliance with the requirement.

As Mr. Panoff said, I think in this case there was rather too much notice given as opposed to

not enough notice given. And, again, this was a clerical error on the part of a third party who was not directly involved in this litigation and through no direct fault of the school district.

For those reasons, I believe that there has been substantial compliance with the statute involving this election and that there has been no prejudice which is demonstrated by the result of the election.

As to prejudice, I think there is also a failure of the plaintiffs to allege any kind of direct prejudice to them. I'm not sure that standing is an issue, but if it does become an issue on appeal, I would find that I have significant questions about whether there is standing on the part of the plaintiffs to bring this action.

For those reasons, I believe that it is incumbent on the Court to grant the motion to dismiss with prejudice, and that will be a final and appealable orders.

MR. PANOFF: Thank you, your Honor.

MR. DAVIDSON: Thank you.

MR. GLEASON: Thank you, your Honor.

THE COURT: You can give me an order just stating for the reasons on the record.

MR. GLEASON: Thank you, your Honor.

MR. PANOFF: Thank you, Judge.

(Which were all the proceedings had at the hearing of the above-entitled cause, this date.)

STATE OF ILLINOIS)
) SS
COUNTY OF DU PAGE)

I, Kristin M. Barnes, hereby certify that I was assigned to transcribe the computer based digital recording of proceedings had of the above-entitled cause, Administrative Order No. 99-12, and Local Rule 1.03(b). I further certify that the foregoing, consisting of Pages 1 to 28, inclusive, is a true and accurate transcript completed to the best of my ability based upon the quality of the audio recording.

Kristin M. Barnes
Certified Shorthand Reporter
Eighteenth Judicial Circuit of Illinois
DuPage County