IN THE EIGHTEENTH JUDICIAL CIRCUIT COURT
DU PAGE COUNTY, ILLINOIS

Andrew Schmidt, *et al.*,	)	
	)	
Petitioners,	)	
	)	
v.	)	
	)	2016 MR 1670
Community Consolidated School	)	
District Number 181, *et al.*,	)	
	)	
Defendants.	)	

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS

In the proverbial nutshell, this case results from Defendant's failure to comply with a simple and direct legislative mandate: Notice of an election must be published in an appropriate newspaper within a 21-day window ("not more than 30 days nor less than 10 days") before that election.[1] Defendant Community Consolidated School District 181 ("District 181" or "the District") wants this Court to find that the Election Code is like a game of horseshoes, where "close" counts; and that Code violations may be legislatively corrected by "special legislation", despite the prohibition by the Illinois Constitution, Article IV, Section 13.

Defendant offers several specific grounds for excusing the violation of law:

[1] 10 ILCS 5/12-5

735 ILCS 5/2-615 challenge

Election Code section 23-24 is the appropriate vehicle for challenging validity of an election. Defendants cite a 1926 case, *Cipowski v. Calumet City*, 322 Ill 575, for the proposition that the Election Code does not support an action to challenge the validity (only the results) of an election. What they do not cite is the 1943 addition to the election Code – section 23-26, which provides:

> The judgment of the court in cases of contested election, shall confirm or annul the election *according to the right of the matter*; or, in case the contest is in relation to the election of some person to an office, shall declare as elected the person who shall appear to be duly elected. [Emphasis added.]

Laws 1943, vol. 2, p. 1. The only post-1943 case Defendant cites to support its contention, *Black v Termunde*, 14 Ill. App. 3d 937 (1st Dist. 1973), is inapposite as plaintiff in that case (a candidate election – not a policy proposition) sought a recount, and did not challenge the election's validity.

The express (emphasized) language of the statute, as quoted above, makes clear that election contestants may raise challenges *beyond* the strict limits of the "results"; if an election is not "right" – because invalid – it may be annulled. Applying the rule cited by Defendants (Motion to Dismiss, Part B.2.a.), that statutory construction may best be achieved by examining the language itself, it is clear from that part of the provision following the word "or" (applicable only to cases of office-candidate elections) that "results" are

reviewable; whereas, the broader language (including the emphasized phrase) before the "or" is amply worded to include election contests challenging validity. *Cf.*, *People ex rel. Town of Richwoods v. City of Peoria*, 80 Ill. App. 2d 359, at 365-66 (3rd Dist. 1967).

735 ILCS 5/2-619 challenges

Publication by Cook County does not relieve DuPage County of responsibility under the law. The first sentence of section 12-5 resolves this issue simply:

> Not more than 30 days nor less than 10 days before the date of a regular election at which a public question is to be submitted to the voters of a political or governmental subdivision, and at least 20 days before an emergency referendum, the election authority shall publish notice of the referendum.

The District 181 proposition was to be submitted to voters of Cook County and to voters of DuPage County. Each is a political entity, and each has its own "election authority".[2] The statute, therefore, obligates each to publish. In this case, substantial evidence of the statute's interpretation is that Defendant *did* attempt to cause timely publication in each county (but achieved it in only one).

The statute's "not more than 30 days" mandatory requirement is not "around 30 days" or "about 30 days". In 2015, the Illinois

[2] "8. 'Election authority' means a county clerk or a Board of Election Commissioners." 10 ILCS 5/1-3. Cook County and DuPage County each have an independent Board of Election Commissioners. While District 181 overlaps the county line, it does not have its own "election authority".

Supreme Court had opportunity to review the election process, and the Election Code, and made crystal clear that the Election Code is to be followed *as written*. *Jackson-Hicks v. East St. Louis Bd. Of Election Com'rs*, 2015 IL 118929 (2015); Illinois Constitution, Article III, section 4.

Defendants wrongly argue that much of the Election Code is merely "directory" – a rough guideline to the conduct of elections that the election authorities really need not take seriously. The Supreme Court made clear that is not the case, "Generally speaking, requirements of the Illinois Election Code are *mandatory*, not directory [citing appellate court cases]." *Id.* at ¶ 23 (emphasis added).

The Second District anticipated that ruling by several years, in the specific context of the issue here: timing of pre-election notice publication, *In re Petition of Voters*, 234 Ill. App. 3d 294 (1992):

> Considering the supreme court's history of disapproving referendum proposals not in strict compliance with applicable requirements, the absence of authority that characterizes the timely publication requirement at issue as directory, plus the strong language of section 28 -- 4, we hold that the timely publication requirement here is mandatory. [234 Ill. App. 3d at 298-99]

Also highly significant, Defendant's case citations do not include *any* relating to statutory timeliness requirements. Defendant's claim that, "*[p]roviding too much notice of a public question is not a harm sought to be protected by the statute whatsoever*" (Defendant's Motion to Dismiss, part B.2.a.) is not supported, supportable, or even sensible. Members of the legislature are fully aware of the attention paid to elections by the general

electorate. They have campaigned over and over for votes, and they are experts at knowing the critical period during which voters become aware of election candidates and issues.

To claim that notice, say six months in advance of an election, would suffice to achieve the obvious legislative intent to cause *actual* notice to voters would be inane. And any claim that notice posted on a bulletin board at District 181 headquarters (wherever that is) serves to alert more than a handful of voters (if that) would be in the same category. Some line, therefore, needs to be drawn on the proper time for newspaper publication – and it makes sense the line would be a clear ("bright line") one.

A favorite argument of those who challenge clear statutory language is to claim that if the legislature had *really* wanted to make the point clear, it could have improved the language, e.g., "If the legislature desired to make the provisions of Section 12-5 mandatory, it could have done so by either expressly stating that it was mandatory or issuing a specific consequence for failing to strictly comply with its requirements."[3]

It is easy to rebut such arguments by pointing out that if the legislature *really* desired to make the provisions of Section 12-5 merely "directory", it could have done so by either stating publication could be "at the election authority's discretion", "as deemed appropriate within the authority's expertise", "30 days or so before the election", or any other of a variety of formulations. "[T]he court will not read into [the Election Code] exceptions,

[3] Motion to Dismiss, Part B.2.a. (page numbers not shown).

conditions, or limitations that the legislature did not express", *Jackson-Hicks, supra,* at ¶ 21.

The Election Code provides that election contests must be filed within 30 days of the authority's determination. Had Mr. Schmidt, *et al.*, missed filing this action within the allotted time period, by a single day, it is sure Defendant would have been on it like a mouse on cheese – and properly so. *See*, *Scribner v. Sachs*, 18 Ill. 2d 400 (1960) (discussing time-calculation statutes for the importance of time requirements). Any attorney knows the necessity of meeting filing dates, and observing statutory limitations, at considerable peril for failure to do so.[4]

With respect to the statutory timing requirement involved here, the statute (10 ILCS 5/12-5) is worded in explicitly mandatory terms:

> Not more than 30 days nor less than 10 days before the date of a regular election at which a public question is to be submitted to the voters of a political or governmental subdivision, . . . the election authority shall publish notice of the referendum.

The window is not defined in general terms, such as "two or three weeks", or "about a month", but very specifically as "*not more than*", and "*nor less than*" a particular number of days. There is no equivocation about the time period, and every reason to believe this is intended as a definitive mandate.

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[4] "One of the surest malpractice claim[s] is a missed statute of limitations." Lawyers Mutual Insurance site, http://www.lmick.com/resources/risk-management-articles/subject-index/item/illinois-statute-of-limitations-malpractice-case-a-good-object-lesson-for-kentucky-lawyers (retrieved March 14, 2017). Legal malpractice claims often arise when attorneys miss deadlines, such as the statute of limitations, that bar otherwise meritorious claims. http://corporate.findlaw.com/litigation-disputes/filing-legal-malpractice-claims-in-illinois.html (retrieved March 14, 2017).

Bottom line: the "mandatory"/"directory" dichotomy argument is largely the same as the "substantial compliance" argument – and Defendant has not cited a single case for either that holds time limitations in the Election Code are either "directory" or satisfied with less-than-exact ("substantial") compliance. The 21-day window is a simple requirement, and – until now – there does not appear to be a single case, in all the reported Illinois appellate cases, in which an election authority was unable to comply.

District 181 is the proper Defendant. The statute is clear: the proponent of the policy question is the – only – proper defendant in this election contest, 10 ILCS 5/23-24. District 181 pleads, "the Plaintiffs have failed to identify a single statutory failure of the Defendant in this case."[5] But section 23-24 does not require plaintiffs to attribute a statutory failure "to the Defendant" as an element of an election contest – only to identify a statutory failure pertaining to the election. There is no question that has been done.

It should be pointed out, however, that it is District 181 that caused this proposition to be placed on the ballot. It is District 181 that provided direction to the election authority that notice should be given as directed by the statute. Affidavit of Donald E. White, Exhibit A to Defendant's Motion to Dismiss. It is District 181 that set the amount of bonds at issue at *$53,329,194* (Exhibit 2 p. 4)

[5] Last page of text in Defendant's Motion to Dismiss (page numbers not shown).

To imply District 181 is blameless in failing to see the "i"s dotted and "t"s crossed is subject to substantial question. Again, however, *by statute* this action names District 181 as Defendant, regardless of blame-placement for the statutory violation. There is no obligation to allege District 181's accountability for apparently failing – *with a $53 Million proposition at stake* – even to make a 25c phone call to the local newspaper to confirm proper publication dates. Or District 181's apparent failure to question the notice's timing when it actually appeared in *The Hinsdalean* before the statutory 21-day window opened. The cost-benefit analysis boggles the mind, and it is absurd to claim District 181 is without fault.

Best evidence of legislative intent. In its supplemented motion, Defendant presents Public Act 99-935 (quoted at pp. 4-5 of Defendant's Motion to Supplement). That legislation says two crucial things about Defendant's pre-election notice publication: (i) it did not comply with the Election Code (with the consequence that any bonds approved by the voters at such election could not be issued and that taxes to be levied and extended pursuant to any limiting rate increases would not be authorized[6]), and (ii) missing the 30-day outside limit was not "substantial compliance".[7] In fact,

[6] That these consequences flow from failure of notification is evidenced by the legislature's specific inclusion of their approval in the special legislation.
[7] It should go without saying that if the legislature deemed the untimely publication to be "substantially compliant" there would be no need for it to enact a special public act. It should always be presumed that the legislature does not enact superfluous statutes.

the legislature also implied that the 30-day limit was reasonable, proper, mandatory – and that it was *not* extended to future cases.

If the Court fails to agree PA 99-935 says those things, it is reading the legislation as a superfluous, useless action. This the Court cannot do.

Public Act 99-935

Defendant's motion supplement does not present a Part 6 basis for "dismissal". If Public Act 99-935 is valid (see ensuing discussion, arguing it is *not*), it provides a basis for a defense judgment, but not under either 735 ILCS 5/2-615 or 735 ILCS 5/2-619. Those sections provide for dismissal in the event of some sort of legal defect in the pleading as filed, and when filed.

"[M]atters which arise after the original pleadings are filed" may be set up by supplemental pleading, 735 ILCS 5/2-609. The Court permitted this supplemental issue to be heard with Defendant's "combined motion", 735 ILCS 5/2-619.1, so as not to exalt form over substance, and we do address the merits of the supplemental material below. However, it should be noted that there *is* a material difference – not just one of form – between a Part 6 "dismissal" and, say, a dismissal (by, *e.g.*, summary judgment) for mootness due to later-arising matter.

We assume the issue is being presented as a 735 ILCS 5/2-1005 motion for summary judgment, based on supplemental matter.

Public Act 99-935 is "special legislation" violating Article IV, Section 13 of the Illinois Constitution. The Illinois Constitution provides, "The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination." Article IV, section 13. "If a statute is unconstitutional, this 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." *Best v Taylor Machine Works*, 179 Ill. 2d 367, 378 (1997) (citing *Wilson v. Department of Revenue*, 169 Ill.2d 306 (1996).

The analytic process in "special legislation" challenges is well-established: "There are two requisite elements to a successful special legislation challenge: (1) 'the statutory classification at issue discriminates in favor of a select group,' and (2) 'the classification is arbitrary.' " *Board of Education of Peoria School District No. 150 v. Peoria Federation of Support Staff, Security/Policeman's Benevolent & Protective Ass'n Unit No. 114,* 2013 IL 114853 ¶ 23; *Crusius v Illinois Gaming Board*, 216 Ill. 2d 315 (2005); *Moline School District No. 40 v. Quinn*, 2016 IL 119704 ¶ 21.

PA 99-935 creates a number of classifications,[8] but Plaintiffs will focus only on the most obvious: public questions on the November 8, 2016, ballot *vis-à-vis* public questions on the ballot of any future date.[9] It is beyond peradventure, and must be presumed, that the General Assembly understood it had the ability simply to revise – for all time – the notice period from "not more than 30 days" to "not more than 35 days". That it did not, is of unmistakable significance: The legislature persisted in its original determination that 30 days is the appropriate outside limitation[10] – and that just one select group (those on the November 8, 2016 ballot) would benefit by being forgiven their neglect.

There can thus be no question the first of the two-prong test is met: those on the November 8, 2016, ballot benefit; those on future ballots, will not. Further, that a general law (*not* restricted to November 8, 2016, elections) could easily have been made applicable.

It remains, therefore, to determine the basis for the classification, and whether it was arbitrary. Unfortunately, the General Assembly omitted any explanatory preamble to PA 99-935, or any other provision explaining its legislative findings or purposes. Compare, *Moline School District No. 40 v.*

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[8] For example, the new legislation benefits public question issues, but not individual candidates who may have failed to provide timely notice of the November 8, 2016 election. And there is a distinction between public questions *with* notice, which were timely under then-existing law, and notice which is untimely without the new legislation. Plaintiffs do not perceive those distinctions to be material to this argument.

[9] We have previously pointed out that no past instance of a blown time-window has been found; therefore, the primary classification is between ballots of November 8, 2016, and public question ballots in future elections.

[10] See, discussion, above, at pp. 3-4.

Quinn, 2016 IL 119704 ¶¶ 8 & 27; *Board of Education of Peoria School District No. 150 v. Peoria Federation of Support Staff, Security/Policeman's Benevolent & Protective Ass'n Unit No. 114,* 2013 IL 114853 ¶ 59; *Best v Taylor Machine Works*, 179 Ill. 2d 367, 405-07 (1997); *Crusius v Illinois Gaming Board*, 216 Ill. 2d 315, 327 *et seq*. (2005).

For its part, Defendant's Motion to Supplement did not assert that PA 99-935 is constitutional, let alone explain the General Assembly's justification for the notice publication-timing classification.

Plaintiffs are left to speculate about the legislative purpose. This is unfortunate, and certainly not desirable; however, the cases are clear that a non-arbitrary legislative purpose must be identified in order to sustain a statute conferring a benefit on one class, but not on another similarly situated. We have identified nine possible legislative purposes, each of which we have numbered [(i) through (ix)]. The first (i) is suggested by the language of the new statute: to authorize the sale of bonds, and to levy and extend new tax increases. We will not attribute these purposes to the legislature, but will respond at oral argument should Defendant pursue this line.

Three other legislative purposes quickly come to mind, all of which are clearly laudable: (ii) to implement the will of the voters, (iii) to enhance the cause of public education, and (iv) to enhance the local economy by providing construction jobs and sale of materials. Any of the three would – in general – probably justify this legislation; *however*, they do *not* justify the time-based

classification (non-application to future elections). If any of these purposes was legitimately behind PA 99-935, the extension of the notice period would have been made general, and not limited to November 8, 2016.

The same is true of a broader "justification" (v) enhancement of the economy more broadly (jobs for teachers, etc.), but this is a less applicable justification because the public question in this case is simply to enable the construction of a new school building which will replace an old one. There is no plan to expand the community, the curriculum or the staff, generally.

Defendant may find it less attractive to advocate other justifications, but we have undertaken to identify them all in the interest of being totally complete: (vi) to excuse bureaucratic neglect, or insulate officials from accountability, for failing to publish a timely notice;[11] (vii) to excuse newspaper neglect or accountability for failing to assure legal requirements were met for the official notices they were paid to publish; or (viii) to advance the cause of some undisclosed special interest.[12]

Even as to the last three, none of those "justifications" can reasonably explain the classification of November 8, 2016 ballots, relative to those of any future date. Any of those justifications could apply equally to a future ballot.

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[11] This would encompass the "substantial compliance" theory, see discussion at pp. 3-7, above.

[12] See, discussion of the origin of similar provisions, Schutz, Anthony (2014) "State Constitutional Restrictions on Special Legislation as Structural Restraints,"Journal of Legislation: Vol. 40: Iss. 1, Article 2 http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1024&context=jleg (retrieved March 14, 2017)

Which leaves the possibility (ix) that there is something unique about November 8, 2016, justifying the classification. Try as we might, however, we cannot identify anything. We have even checked the climatological data for the pre-election period, and find nothing particularly unique that might justify, say, a "Global Warming" explanation for the untimely notice-publication for the November 8, 2016, general election.

> For the foregoing reasons, we find that a general law could have been made applicable in this case, that there is no rational justification for the amendment's limited application via effective-date restriction. Thus, we hold that Public Act 96–1257 violates article IV, section 13, of the Illinois Constitution.

Board of Educ. of Peoria School District No. 150, supra, 2013 IL 114853 ¶ 60

General Assembly's Failure to Observe Illinois Constitution Article IV, section 8(d). "A bill shall be read by title on three different days in each house." The legislative history of PA 99-935[13] (SB 3319, 99th General Assembly) shows that the provision (House Amendment No.3, the first appearance in any form of the present language of 10 ILCS 5/12-5(b)), was proposed on January 9, 2017, and passed on January 10, 2017, at the tail end of the 99th General Assembly. The physical laws of space and time – let alone those of Illinois – thus make it impossible that the legislation advocated here was read on three different days.

If the Court does not undertake enforcement of this provision, there will be no "checks and balances" giving force to that Constitutional mandate.

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13 http://www.ilga.gov/legislation/billstatus.asp?DocNum=3319&GAID=13&GA=99&DocTypeID=SB&LegID=96678&SessionID=88&SpecSess= (retrieved March 14, 2017)

In 1992, the Supreme Court found the argument "persuasive", but nevertheless continued its deference to the legislature's "policing itself". Perhaps the time has come to look more carefully at reality. *Geja's Cafe v. Metropolitan Pier & Exposition Authority*, 153 Ill. 2d 239, 260, (1992)

CONCLUSION

For the reasons stated above, Petitioners respectfully pray this Honorable Court will deny Defendant's Motion to Dismiss, or its Motion for Summary Judgment insofar as its supplemented motion shall be so deemed.

Respectfully submitted,

/s/ Bruce Davidson
Bruce Davidson

Bruce Davidson
DuPage Atty No. 18954
733 North Oak Street
Hinsdale IL 60521
Akivida@aol.com
630-947-3117

Of Counsel:
Clinton A. Krislov (Cook Co. Atty. No. 26711)
Founder/Acting Director
Center for Open Government(sm) Law Clinic
Law Offices of IIT Chicago-Kent College of Law
565 West Adams Street, Suite 600
Chicago IL 60661
ckrislov@kentlaw.iit.edu
312-606-0500

CERTIFICATE OF SERVICE

I, Bruce Davidson, an attorney, hereby certify that I have caused a copy of the foregoing Response to Defendant's Motion to Dismiss to be served upon Defendants by electronic transmission to: wgleason@hauserizzo.com, jizzo@hauserizzo.com, and dboyle@hauserizzo.com; I further certify that I have caused a copy of the same with the United States Postal Service for delivery (postage pre-paid) by first-class mail to:

William F. Gleason, Esq.
John M. Izzo, Esq.
Daniel M. Boyle, Esq.
Hauser Izzo, LLC
19730 Governors Highway,
Suite 10
Flossmoor, IL 60422

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/s/ Bruce Davidson
Bruce Davidson

Bruce Davidson
DuPage Atty No. 18954
733 North Oak Street
Hinsdale IL 60521
Akivida@aol.com
630-947-3117

Of Counsel:
Clinton A. Krislov (Cook Co. Atty.No. 26711)
Founder/Acting Director
Center for Open Government(sm) Law Clinic
Law Offices of IIT Chicago-Kent College of Law
565 West Adams Street, Suite 600
Chicago IL 60661
ckrislov@kentlaw.iit.edu
312-606-0500