

Supreme Court, Appellate Division, Second Department, New York.
In the Matter of the Application of Stuart D. BAKER, Daniel Breen and
Stuart

Hersch, Petitioners-Appellants,

v.

Patrick A. HEANEY, Supervisor of the Town of Southampton, the Town of
Southampton, Scott Strough, Jon Semlear, Frederick Havemeyer, Eric
Shultz, and

Edward Warner Senior, Individually and as the Trustees of the
Freeholders and

Commonalty of the Town of Southampton, and the Trustees of the
Freeholders and

Commonalty of the Town of Southampton, Edmund R. Davis, Joseph R.
Dilworth,

Jr., Julia Douglas, Linda B. Franke, Stephen Gutman, Tracey Mitchell,
Peter

Matthiessen, Louis Meisel, Ari K. Meisel, Edward B. Quimby, Carol
Schein,

Margaret B. Taylor, William Tillotson, Peter A. Wadsworth, Gary
Wasserman,

Catherine Guarino, Frederick Cammann, Ana Daniel, Robert Dash, Marcella
Free,

Patrick Guarino, Earl Albright, Joanna Watson Barton, and Elizabeth
Barton,

Respondents-Respondents,

Leis Knapp, et al, Additional-Respondents.

No. 2004-3456.

September 29, 2004.

for a Review of the Decision of Patrick Heaney, Supervisor of the Town
of Southampton, pursuant to Section 2-210 of the Village Law and Article
78 and Section 3001 of the Civil Practice Law and Rules

Suffolk County Clerk's Index No. 23873/03

Brief for Respondents-Respondents Individual Objectors

Patrick J. Guarino, Esq., Attorney for Respondents-Respondents,
Individual Objectors, P.O. Box 428, Sagaponack, New York 11962, (631)
822-1713.

***i** TABLE OF CONTENTS

TABLE OF CASES ... i

PRELIMINARY STATEMENT ... 1

QUESTIONS PRESENTED ... 2

STATEMENT OF FACTS ... 3

DECISION IN THE COURT BELOW ... 5

POINT I

THE OBJECTORS MET THEIR BURDEN OF PROOF THAT THE INCORPORATORS OF
DUNEHAMPTON FAILED TO LIST AT LEAST 500 REGULAR INHABITANTS ... 6

POINT II

THE SUPERVISOR PROPERLY REJECTED THE PETITION BECAUSE OF NUMEROUS ERRORS, IRREGULARITIES AND AN ERRONEOUS METHODOLOGY ... 14

CONCLUSION ... 22

CERTIFICATE OF COMPLIANCE ... 23

***ii** TABLE OF CASES AND AUTHORITIES

Statutes

Village Law § 2-200 ... 3, 11

Vehicle and Traffic Law § 392 ... 8

Authorities

Black's Law Dictionary ... 9

Cases

Proskein v. May, 40 NY 2d 829 ... 15

Schaeffer v. Perez, 275AD2d 430 (2000) ... 15

***1** *PRELIMINARY STATEMENT*

This case pits the people who actually live in the three historical and long established (over 300 years) hamlet communities of Water Mill, Bridgehampton and Sagaponack in the Town of Southampton against a small group of second homeowners over the issue of whether part-time beachfront owners should be allowed to partition the beach front areas of each of the three hamlets to form the proposed Village of Dunehampton.

The proposed Village of Dunehampton is a Potempkin village to be established by a small group of individual beachfront owners for their own self interested purposes. Dunehampton is not a community as much as a vehicle by which beachfront owners are seeking to remove themselves from what they perceive to be potentially onerous zoning laws. It would create a village with a territory consisting of a thin strip of land at most points no wider than 1,200 feet and approximately 6 miles long along the ocean front of each of the three hamlets wholly devoid of historical integrity and context (R. oversized exhibit attached).

The proposed village is a far cry from what was intended by the legislature. The proponents of the incorporation filed a petition listing 1,079 names, which they claim to be "regular inhabitants" in the proposed territory *2 that contains 236 primarily summer weekend homes, had 91 registered voters prior to the start of incorporators' petition efforts and 202 registered voters upon filing their petition.

QUESTIONS PRESENTED

1. Did the objectors meet their burden of proof in showing that the incorporators of Dunehampton failed to list at least 500 regular inhabitants as required by the Village Law Article 2.

The court below answered this question in the affirmative.

2. Was the petition list of regular inhabitants prepared and filed by the incorporators properly rejected because of numerous errors, irregularities and erroneous methodology.

The court below answered this question in the affirmative.

***3 STATEMENT OF FACTS**

A. The Applicable Statute

The objectors concur with the brief submitted by the Town Attorney that Village Law § 2-200 contains a critical population and area standard, including the requirement that the proposed village territory contain a population of at least 500 persons who are "regular inhabitants" of that territory

The term "regular inhabitants" is defined in the statute as being:

all persons residing in the territory proposed to be incorporated except such persons who themselves, or who are persons under the age of eighteen years residing with persons who, maintain a residence outside such territory which is used as their address for the purposes of voting. Village Law § 2-200(2)

As will be demonstrated herein the touchstone of this definition is inhabitant.

B. The Supervisor's Hearings and Decision.

In accordance with the Village Law, the Supervisor held a public hearing on August 15, 2003, with respect to the incorporation petition and continued the hearing for a second day on September 3, 2003, hearing numerous witnesses and receiving numerous written statements on both *4 days, overwhelmingly in objection to the petition by people both within and outside the proposed territory.

In his decision the Supervisor sustained two out of the six challenges made, concluding that the petition was insufficient, because (a) the petitioners failed to establish that the proposed territory contained a population of at least 500 "regular inhabitants", and (b) the objections and testimony demonstrated that the incorporators had used faulty methodology in characterizing a significant number of persons as "regular inhabitants" when the incorporators knew, or should have known, that such characterization was erroneous, resulting in a petition that was permeated with errors and irregularities, such that it failed to comply with the statutory requirements and should be rejected in its entirety.

***5 THE DECISION IN THE COURT BELOW**

Appellants, who are the primary proponents of incorporation, commenced an Article 78 proceeding in the Supreme Court, Suffolk County to review the Supervisor's decision. On March 29, 2004 Justice Jones issued his opinion upholding the Supervisor's decision from which appellants now appeal. In issuing its opinion the court below stated:

it was reasonable for the supervisor to conclude that the proof supported an inference that the number of individuals listed as regular inhabitants was inflated to the point where the 500 had not been established. While "reside" does not mean domicile, neither does it include a holiday and occasional weekend visitor. Accordingly, the decision of the Supervisor is sustained, and the petition is denied. (R. 23)

***6 POINT I**

THE OBJECTORS MET THEIR BURDEN OF PROOF THAT THE INCORPORATORS OF

DUNEHAMPTON
FAILED TO LIST AT LEAST 500 REGULAR INHABITANTS.

Objections were filed evidencing the results of a search of the records of the Department of Motor Vehicles and major credit reporting bureaus of 400 of the names listed on petitioners' regular inhabitants list, including the 127 signers of the petition. In addition, objectors submitted the results of a search of the Town's Tax Assessor's records of the 236 property owners to determine the address to which property owners requested their tax bills be sent (R. 1384, 1580, 1814, 2556). The results of this investigation revealed that: (a) a total of 183 of the 236 property owners listed as regular inhabitants declared their address to receive tax bills at an address other than in the proposed territory, and (b) a total of 315 of the 400 names had an address outside the territory.

Appellants argue that these reports were part of an excessive number of irrelevant submissions accepted by the Supervisor. In fact the Supervisor in his decision determined not to utilize the information submitted with respect to the 400 names and to decide the matter on other grounds (R. 210).

*7 Objectors however, still contend that these reports are not only relevant, but are a significant part of a list of criteria that should be used in determining whether individuals meet the statutory definition of a regular inhabitant and more importantly because they evidence where individuals themselves indicate they actually live.

Objectors respectfully suggest that the above criteria when coupled with the additional criteria listed below provides a more reasonable and proper interpretation of the term regular inhabitant and is therefore the true test.

The criteria presented to the Supervisor with respect to 498 names (183 + 315) (R2556, 2557) included the following:

1. where they rent or own a home
2. the address listed for voter registration
3. where they requested mail to be sent, including tax bills
4. the address listed on their credit profile
5. the address they stated on their motor vehicle license application in response to the application query "address where you live" and

*8 6. the address where they spend their time other than occasional weekends and holidays.

It is important to note the significance of the discrepancy between an individuals address shown on the list of regular inhabitants and the driver's license address for that individual. An application for a driver's license requires a statement that all information given is true, and the applicant is warned that a false statement is a misdemeanor under Vehicle and Traffic Law § 392. The application calls for 2 addresses, the address where you receive your mail and the address where you live. It is patently inconsistent with the indicia of regular inhabitancy for persons to state that the address where they get their mail and the address where they live are different than the address shown on the list of regular inhabitants.

In addition, when one makes a major purchase, opens a bank account or applies for a credit card, a compilation is made by the major financial

and credit reporting agencies creating a "credit profile" for each person. When the public records are later searched, the self-reporting of where that individual actually "lives" becomes part of their financial and credit profile. So to is it inconsistent with the indicia of regular inhabitancy for a person to *9 state that the address used for major financial and credit transactions is different than the address shown on the list of regular inhabitants.

Objectors acknowledge that the courts have recognized that individuals may have more than one residence. However the definition of regular inhabitant under the Village Law does not use the word residence, it uses the words inhabitant and resident with resident merely a part of the definition of inhabitant. Justice Jones in his decision stated "while 'reside' does not mean domicile, neither does it include a holiday and occasional weekend visitor." (R. 23) Objectors agree that reside does not mean domicile. However, "inhabitant" is far closer to the meaning of domicile if not synonymous with it than reside. Black's Law Dictionary defines inhabitant as "one who *10 resides actually and permanently in a given place and has domicile there." It defines domicile as "that place where a man has his true, fixed and permanent home." Objectors submit that simply having a part-time residence and listing that address on the Town of Southhampton voter registration form does not qualify to meet the definition of a regular inhabitant under the Village Law. If it was intended that merely maintaining a part-time second residence in addition to voter registration in the proposed territory were all that were necessary to meet the 500 population requirement in the statute, it would have been very simple for the statute to require that a population of 500 "residents" was required. It would therefore appear that the legislature was requiring something more than maintaining a residence in the proposed territory, in addition to voter registration, as a population requirement when it used the words "Regular Inhabitant". Objectors suggest that the something more contained in the term "Regular Inhabitant" include many if not all the indicia of where someone lives as listed above as opposed to only where one maintains a part-time summer weekend residence. The evidence and exhibits filed by the objectors clearly show that an overwhelming number of claimed regular inhabitants examined do not "live" in the territory by their own admissions contained in the public records.

*11 As noted earlier the record contains proper submissions showing that the objectors investigated the 236 owners of the houses in the proposed territory, which included the 202 individuals on the voter registration list for the proposed territory when the criteria set forth above is applied to the 186 names where tax bills are sent outside the territory 96 do not qualify as regular inhabitants. In addition to this number a further 203 proposed regular inhabitants listed at the same addresses as the 96 would not qualify as regular inhabitants because they represent either their minor children or adult children and visitors who were not registered to vote in the Town. The Village Law § 2-200 does not allow minor children to be counted as regular inhabitants unless one or more parent qualifies as a regular inhabitant.

Objectors disagree with the Supervisor's rejection of the proof submitted in challenging the 315 out of the 400 names searched through the Department of Motor Vehicle and credit profile reports. The Supervisor did not consider this evidence, purportedly because it was not also accompanied by a showing that the 315 names were registered to vote outside the territory. The record shows that given the time allotted to objectors and because of the deliberately scattered manner in which persons were listed on the petition, objectors could not realistically obtain and review the voter registration records from each of the counties in the tri-state area and in *12 many cases beyond, to determine if the voter registration address was the same as listed on their drivers' license or their credit profile address. Indeed even if

objectors could accomplish such a monumental task, it would still not be sufficient for disqualification of a name on voter registration grounds, because if a name does not appear on the voter registration list in the same county in which the drivers license address is listed it does not mean that the person is not registered to vote elsewhere. Given the number of people in the proposed territory who maintain multiple residences there would be no way of knowing where they were registered. It is common knowledge that the proposed territory has one of the highest valuations and per capita incomes in the country and therefore a well educated and politically sophisticated populace. The likelihood that an overwhelming number of home owners in the territory, if not registered to vote in the Town of Southampton, would not be registered elsewhere is almost inconceivable, since according to the Federal Election Commission the National Average for voter registration of the general populace is 73 percent. Since the Supervisor as an elected official has the ability to consider certain information to be common knowledge, objectors believe he should have taken notice of such knowledge in lieu of proof of voter registration elsewhere. The supervisor's failure to take such notice and his requiring proof of voter registration elsewhere *13 before accepting objectors' challenge to the 315 names placed more of a burden of proof on the objectors than is required under the statute and therefore was an improper denial of the challenge. A showing that the 315 names did not "live" or inhabit the territory was sufficient to meet objectors burden of proof in challenging the names because as argued earlier a person cannot qualify as a regular inhabitant unless they "live" in the territory even if they are not registered to vote elsewhere.

In addition to the search of public records, the objectors made a canvassed inquiry of claimed regular inhabitants living in the proposed territory, which led to a gathering of approximately 70 written statements and affidavits challenging 250 proposed regular inhabitants, including affidavits denying regular inhabitant status from the very people who were listed by the petitioners as regular inhabitants (R. 210).

Since an examination of the names investigated produced substantial evidence that an overwhelming number of proposed regular inhabitants were replete with irregularities that questioned their regular inhabitant status, it is a logical inference that a substantial number of remaining claimed regular inhabitants would be similarly flawed.

*14 Finally, the volumes containing the public records and the written statements were in the proper form and submitted as supplemental objections within the time allotted by the Supervisor for filing final written objections.

Appellants argue that since some of the objections may not have been in the required form, i.e. the objector did not state their address, they could not be considered by the Supervisor despite the fact that the same objections were filed in the proper form as supplemental objections within the time allowed by the Supervisor for final written submissions. There is no provision in the Village Law prohibiting a defect as to the form of objections from being cured by resubmission within the time allowed for filing objections.

Point II

THE SUPERVISOR PROPERLY REJECTED THE PETITION BECA USE OF NUMEROUS ERRORS, IRREGULARITIES AND AN ERRONEOUS METHODOLOGY.

A. The Supervisor was entitled to reject the petition without having to rule on

the legitimacy of each proposed regular inhabitant based on precedents arising under the Election Law.

It is well established law that a petition for nomination to public office may be invalidated where it is permeated by fraud and irregularity even after *15 the defective signatures are discarded and there still remain enough valid signatures to constitute a proper petition.

In the leading case of *Proskin v May*, 40 NY2d 829 a nominating petition found to have 116 invalid signatures was invalidated in its entirety even though there still remained 104 valid signatures with only 63 needed to constitute a proper petition. Although the court rejected an inference that all the signatures should be invalidated it found that the magnitude of fraud and irregularity so permeated the petition as a whole as to call for its invalidation. In *Shaeffer v. Perez*, 275 AD2 430 (2d Dept. 2000) a petition was invalidated because it was permeated with fraud and the candidate played a pivotal role in the gathering of signatures.

These cases and their underlying principles should be applied in this instance because both nominating petitions and village incorporation are essential steps on the path to conducting elections, and implicate the integrity of the electoral process. Village incorporation initiatives are so rare that courts only infrequently rule on them. This explains the paucity of the authority interpreting Article II of the Village Law, and why applying precedents under the Election Law is appropriate.

*16 The rationale for the application of these Election Law cases is compelling in this incorporation proceeding where there is no provision that persons listed as regular inhabitants be notified of their inclusion on the list let alone requiring their signatures before they could be included.

Let us now examine how the methodology was fatally flawed, and why the manner in which the list of regular inhabitants was compiled is so permeated with fraud and irregularities as to require invalidation of the petition.

The petition was fatally flawed when the incorporators used as a test for regular inhabitant that of "legitimate significant and continuing attachment", while ignoring the requirement that a person must both reside in the territory and not maintain any other residence for voting purposes. As pointed out in the Supervisor's brief the methodology employed by the incorporators excised not only the inhabitant requirement from the statute, but the residency requirement as well.

The objectors have urged the court in Point I above to utilize a narrower definition of regular inhabitant than that used by the Supervisor which determines where one lives.

*17 The groups of individuals included on the regular inhabitant list renders suspect the assertion of the care and diligence that went into the creation of the inhabitant list (R.4081-4082). Petitioners included persons and their minor children and grandchildren even though they denied being regular inhabitants, and who stated that they were enrolled to vote outside the proposed territory. In addition, they included house guests of those putative regular inhabitants being children, grandchildren, relatives and social acquaintances without reference to where they were registered to vote.

These abuses were cited by the Supervisor as examples of faulty methodology tainting the entire incorporation petition. They are

exhaustively treated in the Supervisor's decision, and in the appellate brief pp. 37-51. It includes the objection of Stanley and Taube Friedman objecting to the inclusion of their 10 nonresident children and grandchildren on the list of regular inhabitants. It also included the statement of Diane Burke whose conversation with Hildreth resulted in listing of some 18 people were well as regular inhabitants despite her statement to Hildreth that she and her husband were Princeton voters and that their children voted and resided elsewhere. Similarly Alvin Silverman stated he told Hildreth that he was registered to vote in Nassau County, but that Hildreth told him he was qualified as our regular inhabitant and that he and his family members who *18 visited can all be regular inhabitants. Subsequently petitioners listed 11 of his family members as regular inhabitants all of whom are registered to vote in other states. Muriel and Bernard Goldberg also complained that after a visit from Hildreth, their children and grandchildren were listed in the petition even though they did not live with the Goldbergs or elsewhere in the territory. It also included persons who worked at a tennis club that Lara Hildreth managed in the territory, but were known to live elsewhere as well as persons registered to vote in Dunehampton but still registered to vote elsewhere and persons registered to vote within be boundaries of Dunehampton but whose driver's license lists a different address.

Since an examination of the names investigated produced substantial information that the overwhelming number of names were replete with irregularities contraindicating regular inhabitant status it is a logical interference that a substantial number of the remaining persons would be similarly flawed.

The petitioners have posed numerous technical challenges to objections made to the petition. They are, of course, entitled to pose most of these objections. However they should not be allowed to disqualify communications from individuals who unequivocally deny that they are *19 regular inhabitants of Dunehampton. In the first place as noted by the Supervisor in his decision, footnote 2, these objections were properly before him as they were incorporated in the Supplement to Objections dated September 2, 2003 and signed by 26 qualified residents whose names and addresses are clearly stated.

In addition the petitioners should be estopped from asserting these challenges because they have included these objectors in the list of regular inhabitants when they actually knew, should have known, or made no good faith effort to ascertain whether the objectors were registered to vote elsewhere.

The temerity of posing these challenges counterfeits the petitioners' claim that the information contained in the incorporation petition was both accurate and obtained in good faith. These practices are strongly indicative of why the petition is infected with an aura of sham.

Petitioner's contention that fraud is neither particularized nor proven misses the point. The objectors are not seeking to prove fraud as that term is defined in the Penal Law. What is sought is sought to be demonstrated is that fraud and irregularities taint the petition.

*20 The manner in which petitioners compiled its list of regular inhabitants contributes to a finding of fraud and irregularity.

Petitioners have argued that they are not obliged to list the names of the regular inhabitants of the proposed territory in either alphabetical order, or by address. However, the arrangement of the names of the regular inhabitants of the proposed territory is certainly not random but a purposeful scattering of names of related family members and visiting relatives and social guests with the same, as well as different

names, but alleged to reside at the same address on several different, and widely separated pages of the voluminous list of regular inhabitants. Its purpose was to make more difficult objectors' task of ascertaining the bona fides of the alleged regular inhabitants. It was through that methodology that petitioner's sought to disguise the fact that of the 21 regular inhabitants listed at Susan Blond's home 20 were visitors, many with different names. It is not enough for the petitioner's to declare that they are under no obligation to arrange the names in any particular order. The question is rather why have they chosen to do so in the manner they did if not too confuse and make more difficult the task of questioning the names of the regular inhabitants.

Appellant's brief cavalierly dismisses the egregious instances of *21 including persons such as Stanley Friedman, Alvin Silverman and James and Diane Burke and their respective children, grandchildren and assorted family members as inadvertent and inevitable. Its import is to counterfeit the assertion of the care and diligence that went into the preparation of the petition.

Petitioners claimed that they were unable to confirm whether persons were registered to vote at an address outside the territory when they spent 10 months compiling their list of inhabitants while at the same time alleging that objectors had sufficient time to conduct their investigation in 45 days. The objectors had far less time to compile their data, but one only needs to examine the exhibits submitted by the objectors, (exhibits R. 1384, 1580, 1814, 2556, 2557), to determine how the proper information regarding indicia of residency could have been ascertained if the petitioners were acting in good faith and wanted to list the names of bona fide regular inhabitants. The aura of sham is strikingly revealed by a simple comparison.

The deliberate inclusion of persons in the list of regular inhabitants notwithstanding the knowledge that they maintain voting addresses as well as residences elsewhere constitutes the kind of fraud and irregularity that justifies invalidating a petition on those grounds alone

***22 CONCLUSION**

Although the Supervisor properly accepted and applied sufficient and relevant information submitted at the public hearing and through written submissions and ruled that the objectors had met their burden of proof, he should have also accepted objectors' proof with respect to the test for inhabitancy and this qualified the 315 names objectors challenged on the petition. Nonetheless, he properly concluded that the petition for incorporation did not meet the statutory requirements. He also properly concluded that the remaining objections to the petition should be sustained. The Supervisor's decision was in accord with existing legal principles, was supported by sufficient evidence and was in accord with the weight of the evidence. The Supervisor's decision was properly affirmed by the court below and the petition challenging that determination was properly dismissed. This court should affirm the Judgment on appeal, with costs.