

# POINT OF VIEW

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## Move Village Elections to November

New York State's Election Law provides that the election for local village officers shall take place in March each year. Villages may, however, opt to change their election schedule. Changing the time of the village general election from March to November has the potential to save a village thousands of taxpayer dollars every year, increase voter participation, and provide a fuller discussion of local issues because of a longer campaign in better weather. The New York Village Law provides that a village's annual budget will be formulated in March and adopted in April.<sup>1</sup> Thus, the November election provides more seasoned officers time to review the budget instead of requiring them to vote almost immediately after a March election.

The process for changing the date of a village's election appears on its surface to be relatively simple. A referendum to change the village election date may be placed on the ballot either by a resolution of the village board of trustees or by a petition of registered voters for a referendum and a favorable referendum vote.

However, two recent companion court cases highlight procedural pitfalls in the statutes that can be used to thwart the referendum process should a local board of trustees oppose such a change. Absent cooperation from a village's trustees, voters petitioning to have the question put to a referendum vote must have a thorough understanding of the state's Village Law and Election Law, to insure that

the question is placed on the ballot. Petitioners need to know what are the various statutes deemed applicable by courts, their consequences, and how to navigate or challenge the decisional law to ensure that the petition process results in a referendum being held on the date sought.

### The Statutory Structure

Section 15-104 of the Election Law provides that a general village election shall be held on the third Tuesday in March, unless a village adopts a proposition to elect its officers on a different date.<sup>2</sup> The board of trustees may adopt a resolution to have the election occur on the day of the regular November general election.<sup>3</sup> If its action is not challenged by local petitioners, it becomes final and the date is changed. If enough petitioners challenge the board's action, the proposed change is subject to a "permissive referendum" vote by the village. If the referendum vote is favorable to the board's action the election date will be changed.

Section 9-912 of the Village Law also authorizes the board of trustees to pass a resolution, and permits the voters to submit a petition, to place on the ballot for referendum the question of changing the voting date.<sup>4</sup> Where the village board opposes changing the time for the village election, and refuses or fails to adopt a resolution to do so, local voters by petition can force the board to place the question on the ballot. This is called a "mandatory referendum," which is conducted in the same way as a permissive referendum.<sup>5</sup> The require-

ments for the content and form of this citizen initiative petition are set forth in §§ 9-900 and 9-902(8) of the Village Law.

If the petitioners seek to hold the referendum vote at the annual March village election, or on a special village election date selected by the village board, the number of signatures necessary to compel the board to place the referendum on the ballot varies with the size of the particular village; but, even for villages with a population of 5,000 or more, the requirement does not exceed 200 registered voters.<sup>6</sup> In that case, the question shall be submitted at the next regular or special election for village officers, "held not less than thirty days after the filing of such petition."<sup>7</sup>

If, however, the petition demands that the referendum be held at a time other than the regular or a special village election, "such petition must contain twice the number of signatures otherwise required."<sup>8</sup> Thus, if voters seek to have the referendum held on a specific date, such as the date of the November general election, rather than in March, the petition must have double the number of signatures, or as many as 400 signatures for a village of 5,000 or more. In either case, "such referendum shall be held no less than thirty, nor more than sixty, days after the filing of such petition."<sup>9</sup> Accordingly, if the petition specifies a referendum date such as the November general election day, it must be filed between 30 and 60 days before the date for the proposed referendum.<sup>10</sup>

Another requirement, which figured prominently in two recent cases, is set forth in Election Law § 4-108. This law provides that when a petition seeks to have a village referendum held at the November general election, the village clerk must transmit to the County Board of Elections “at least thirty-six days prior to the election . . . a certified copy of the text of such . . . referendum, and a statement of the form in which it is to be submitted” to a vote of the people of the village.<sup>11</sup>

### Petitions and Opposition in Westchester

In the fall of 2003, petition drives were mounted in the villages of Ardsley and Dobbs Ferry, in the Town of Greenburgh in Westchester County, to hold referenda to change each village’s election day from March to November. In each case, the referendum process was initiated by means of citizen petitions submitted to the respective boards of trustees, requesting that a referendum be held on the date of the general election, November 4, 2003.<sup>12</sup> The petitions were submitted in anticipation of the boards’ action at their mid-September meetings.<sup>13</sup>

The Ardsley petition required 200 signatures and had 431, and was filed on September 15, 2003. The Ardsley village manager was told on September 9, 2003, that the petition would be submitted on September 15 in advance of the Board Meeting that night. The petition was submitted, accompanied by a cover letter, a copy of Village Law § 9-912, a form of resolution for the Ardsley Board of Trustees, a notice of adoption of the resolution for transmittal by the clerk, and an abstract of the referendum question. At the meeting, the Mayor stated that the petition had been duly filed, and that Village Law § 9-912 required the Board to have the question placed on the November 4, 2003, ballot. But the Mayor said he was opposed to changing the village election date, and referred the matter to the Village Attorney for “study,” saying it would be revisited at the Board’s next meeting on October 7.

The Dobbs Ferry petition required 400 signatures and had 613, and it was filed with the clerk on September 22, 2003, with the same additional documents. At the Dobbs Ferry Board meeting on September 23, the Mayor acknowledged the filing, but stated that the “matter was referred to the Village Attorney and Village Administrator for appropriate action under the law.” The Board did not pass the requested ministerial resolution asking the county Board of Elections to place the question on the November 4, 2003 ballot, nor was a special meeting of the Board called for that purpose.

None of the petition signatures in either village was challenged. The Dobbs Ferry clerk waited nine days and then certified on October 2, 2003, that all the signatures on the Dobbs Ferry petition were authentic and correct. The Ardsley clerk waited 22 days

and similarly certified on October 7, 2003.

### Petitioners Seek Relief

A majority of the trustees in each village opposed a change in the village election date and, as noted, neither Board passed a ministerial resolution placing the matter on the ballot, and neither clerk immediately transmitted the necessary paperwork to the Westchester County Board of Elections. On October 1, 2003, petitioners in both villages commenced CPLR Article 78 mandamus proceedings in the Supreme Court, Westchester County, by verified Petition and Order to Show Cause, to compel the villages and the County Board of Elections to place the question on the November ballot for referendum. In addition to the Mayor, the Board of Trustees and the Clerk of each village, the Commissioners of the

Westchester County Board of Elections were also named as Respondents in each suit, to insure swift compliance with any court orders. Each village filed a motion to dismiss the respective Article 78 proceeding and Petition.

Article 16 of the state's Election Law requires priority and expedited review of election law disputes concerning "any proposed . . . proposition or question"<sup>14</sup> brought by special proceeding. A hearing was held on October 8, 2003. The Ardsley petitioners prevailed, and the Ardsley referendum vote was held as requested, but the Dobbs Ferry petitioners were unsuccessful, and the vote

Petition.<sup>16</sup> The court opined that the Legislature did not intend in Village Law § 9-912 to allow two elections in November, the general election and another special election. Using what it termed a "reasonable, appropriate and practical" construction, the court held that the phrase "regular election" in Village Law §§ 9-910 and 9-912 referred to the regular general election rather than the regular village election.<sup>17</sup> Thus by filing double the minimum number of signatures, the petitioners could have the referendum at the November general election if the petition specified that date. The court held that "in compliance

on September 22, 2003, 43 days before November 4, it was untimely under the 45-day provision, precluding a referendum on November 4, 2003.<sup>21</sup> On the basis of how this 45-day requirement fell, the Ardsley petition was granted, and the Dobbs Ferry petition was dismissed.<sup>22</sup>

The court found "no contradiction" between MHRL and Election Law § 4-108(1)(b), which was the primary statute urged by the village trustees. That provides that "at least thirty-six days prior to the election at which [a] . . . referendum is to be submitted," the village clerk shall transmit to the

## Procedural pitfalls can be used to thwart the referendum process should a local board of trustees oppose such a change.

was not conducted until March 2004. The technical grounds by which the courts distinguished these two petition efforts, rewarding one and frustrating the other, are examined below.

In court, the trustees of each village contended that they were not bound to hold the referendum on November 4, 2003, the date specified in the petitions, but had the discretion to determine, within the time limits prescribed by the Village Law, the special election date for the referendum vote.<sup>15</sup> The boards in both villages provided diversionary referendum dates and placed them before the court. The Ardsley Board, at its October 7, 2003, "revisitation" meeting, voted to hold the referendum at a special election on November 12, 2003. That date would have required the voters to vote twice in November 2003. The Dobbs Ferry Board represented to the court that it was "undertaking steps that will place the ballot referendum before the voters in the March 2004 general village election."

The petitioners contended, and the Westchester County Supreme Court held, that the referendum date specified in the petition controlled, and that the trustees had no discretion or power to schedule the referendum on a date other than the one designated in the

with the language of the various statutes . . . the regular election date would be the regular election on November 4th [2003]."<sup>18</sup> The court also noted that no objections were filed to either set of petitions "within the five day period of time for filing such objection contained in Village Law § 9-902."<sup>19</sup>

The petitioners contended that since they had complied with the 30–60 day filing window specified in the Village Law prior to the November 4, 2003 referendum, the referendum should proceed on November 4. But the court did not consider this undisputed fact, or this statute, dispositive. Instead, the court went on to hold that under Municipal Home Rule Law (MHRL) § 23 and § 24, each petition had to be filed more than 45 days before the specified referendum date in order to allow the village clerk enough time to inspect the petition and transmit a certificate of examination and a copy of the proposal to the Westchester County Board of Elections.<sup>20</sup> The court held that the Ardsley petition had been timely filed on September 15, 2003, 50 days before November 4, and directed that the referendum be placed on the Ardsley November 2003 election ballot. On the other hand, the court held that because the Dobbs Ferry petition had been filed

County Board of Elections "a certified copy of the text of . . . [the] referendum and a statement of the form in which it is to be submitted," and an abstract stating its purpose and effect in clear language.<sup>23</sup> The court found that the Legislature intended the six-day difference between 36 days and 30 days as a span of time for receipt of mail.<sup>24</sup>

The Ardsley Board of Trustees did not appeal the decision and order, and the referendum was duly placed on the November ballot by the County Board of Elections. The referendum passed 453–321,<sup>25</sup> and Ardsley's first November village election was held on November 2, 2004.

The Dobbs Ferry petitioners moved for reargument by Order to Show Cause on October 15, 2003. The petitioners' primary point on reargument was that MHRL § 23 and § 24 by their terms do not apply to citizen-initiative petitions. MHRL § 24(b) applies to a "local law adopted by a village" which is "subject to referendum on petition" (that is, a permissive referendum) when sufficient local electors, meaning registered voters, protest against the law by petition. MHRL § 23 applies to a local law adopted "subject to mandatory referendum," and only incorporates by reference the "certifi-

cation by the clerk" process for those petitions filed within 30 days "after the adoption of such local law . . . [and] requesting its submission at a special election" (emphasis added), which is not the November general election. Further, MHRL § 23 and § 24 require a greater number of petitioners than is needed for the citizen initiative petition procedure under the Village Law and the Election Law. Finally, MHRL § 24 refers to permissive referendum procedures under Village Law Article 9, not to mandatory referenda.

On October 22, 2003, the supreme court issued its opinion on submission of papers, granting reargument but adhering to its original determination.<sup>26</sup>

### Dobbs Ferry Petitioners Appeal

The Dobbs Ferry petitioners appealed to the Appellate Division, Second Department, urging again that the 45-day time period in Municipal Home Rule Law § 23 and § 24 did not apply to the citizen initiative referendum process set forth in Village Law § 9-912. The trustees argued that MHRL § 23 and § 24 applied to all mandatory referenda in New York State, and that the "clerk review" specified there was necessary for the Dobbs Ferry petition.

The Second Department agreed with the Dobbs Ferry petitioners on this point, holding that MHRL § 23 and § 24 had no applicability to citizen initiative petitions, and that the lower court had "improperly relied" upon the MHRL to dismiss the Dobbs Ferry petition as untimely.<sup>27</sup> The Appellate Division left undisturbed the holding that the referendum date specified in the petitions was controlling, and that the village board could not substitute another date.<sup>28</sup> It held that the petitioners had indeed complied with the requirements of Village Law § 9-912 for citizen-initiated propositions to be considered by the electors of a village, including filing the petitions 30–60 days before the referendum date.<sup>29</sup>

The court, however, found a fatal impediment to the Dobbs Ferry referendum. Under Election Law § 4-108(1)(b),

the village clerk is required to transmit to the Board of Elections, within 36 days before a proposed referendum vote, a certified copy of the text of the proposal that is to be voted on.<sup>30</sup> This required a village clerk to transmit the proposition "when it is *certain* that such proposal will in fact be placed on the ballot."<sup>31</sup> In the case of Dobbs Ferry, at the time the 36-day window deadline expired on September 29, 2003, the Dobbs Ferry Village Clerk had not yet completed her review of the petition for purposes of certification, and therefore, according to the court, could not timely forward a certified copy of the proposition's text to the Westchester County Board of Elections, pursuant to the Election Law.<sup>32</sup> Although voter signature cards are at the village clerk's office, and it could not take more than a few minutes to review a signature, the appellate court held that, in the absence of any evidence rebutting the clerk's statement "that she did not delay in her review of the petition and that she did not engage in inaction with respect thereto," the supreme court had properly dismissed the petition "under the circumstances,"<sup>33</sup> thereby precluding a November 2003 referendum vote in Dobbs Ferry.<sup>34</sup>

### Guidelines and Reflections

As a result of these court decisions, several matters have been clarified about citizen efforts to change a village's election date. A significant result for citizen-petitioners is the holding that petitioners submitting double the minimum signatures can designate the November general election date for their referendum, and it must be observed. The trustees may not ignore that date and schedule the referendum for a different date. Although the cases involved petitions designating the referendum date for the general November election, and not for a regular or special village election, it appears that submitting double the required signatures mandates that the referendum be held on the date named therein, not a special election date set by a potentially unfriendly board.

Other points appear to require further examination and harmonizing through litigation or legislation. Although Village Law § 9-912 requires that the petition be filed between 30 and 60 days before the date specified for the referendum vote, it should be filed with the village clerk as close to the 60-day date as possible. As matters stand now, the Village Law's already narrow 30-to-60 day window

for the filing of petitions before the referendum has been pared back to 36-to-60 days, or perhaps even 45-to-60 days. This severe reduction results from the Appellate Division's engrafting Election Law § 4-108 onto Village Law § 9-912, holding that the village clerk has a mandatory period, but of unspecified duration, to review and certify the petition to the county Board of Elections. The Appellate Division has suggested that it must be filed an unspecified number of days greater than 36 days before the date of the proposed vote, to comply with the requirement of Election Law § 408(1)(b) that the village clerk is to certify the petition and transmit the paperwork to the Board of Elections.

Thus, as a practical matter, the petition should be filed near the 60-day outside limit to avoid or and to overcome any argument that not enough time was permitted for the clerk's review and certification.

Election Law § 4-108 should not be used to eviscerate or control the citizen-initiative petition process. The proposition that it takes more than a day, or at most two, for a village clerk with voter signature and address cards to review 400 or 600 petition signatures of local village residents, is not compelling. Giving a clerk, who is responsible to a village board that is hostile to a petition, the power to stretch "review" of the petition to seven days, or 22, and thus keep it from the ballot, is not consistent with the legislative structure.

The village trustees contended, and the courts found, that a clerk review was called for here. However, it has been held that in the absence of a statutory "clerk review" provision for the specific type of petition in question, the clerk has no power to review or to hold up submission of the petition, but must perform "strictly ministerial" duties in forwarding it.<sup>35</sup> Election Law § 4-108(1)(b) does not explicitly provide for any village clerk review of the petition. It provides only that the clerk shall do ministerial acts:

[T]he clerk of such political subdivision, at least thirty-six days prior

to the election at which such proposal, proposition or referendum is to be submitted, shall transmit to each board of elections a certified copy of the text of such proposal, proposition or referendum and a statement of the form in which it is to be submitted.

Moreover, § 4-108(b) does not require that the certified copy be transmitted to the Board of Elections only "when it is *certain* that such proposal will in fact be placed on the ballot." The Appellate Division has engrafted a substantive "clerk review" requirement onto Village Law § 9-912, as opposed to the ministerial acts set forth in § 4-108. The "certainty" standard is circular since it is not "certain" the proposal will be placed on the ballot until the clerk certifies. The court has also compounded the clerk's (and a village board's) ability to frustrate the citizen-initiative petition process by placing the burden of proof on the petitioners to show that the clerk delayed his or her review or "engaged in inaction" if, as would be expected, the clerk swears in an affidavit that he or she acted properly. Contradicting affidavits by petitioners would only create a question of fact on that point, and might not be decisive.

Moreover, leaving uncertain the number of days a village clerk must certify before the 36-day submission deadline in § 4-108 makes it extremely difficult and unpredictable for petitioners. The current state of the law severely truncates the 30-60 day window of § 9-912. Further legislative or judicial refinement of the procedural parameters for this citizen effort appears necessary.

In addition to being cognizant of these legal requirements and practical principles, proponents of the referendum process who desire to hold the referendum vote at the regular November election should, preferably before they start gathering signatures, check with the County Board of Elections to verify the Elections Board's deadlines for placing referenda on the ballot, and the type of documentation that must be supplied by the village clerk. At the time the petition is filed, the petition-

ers, as they did in Ardsley and Dobbs Ferry, should provide the village clerk with written notice of the deadline to transmit the proposition to the Board of Elections and remind the clerk of his or her duty to promptly and diligently review the petition to meet that deadline. As in Ardsley and Dobbs Ferry, the referendum proponents should also provide a written proposed form of resolution that tracks the language of the proposition as stated in the petition, and other ancillary documents, to assist the clerk in providing the necessary documentation to the Board of Elections.

### Conclusion

Conducting local village elections in November instead of March can save local governments thousands of dollars, lead to fuller discussion of issues, and result in greater voter participation in local elections and better informed debate during the budget process. The March date can be changed through referendum. In the event a village's trustees do not pass a resolution setting a November election date, or setting a referendum date to vote on such a change, the citizens have the right to petition and to set the date for such a referendum. By gathering the signatures of several hundred voters and presenting the petition to the village clerk between 45 and 60 days before the date of the proposed vote, the citizens of a village have the power to effect change that, on the local level, will save money and increase participation in the democratic process. ■

1. See Village Law §§ 5-502-5-510 for changing the village's fiscal year.
2. Election Law § 15-104(1)(a). See generally J. Bellano, *A Change for the Better: Changing the Date of Village Elections*, N.Y. St. B.J. (Oct. 1996) p. 44.
3. Election Law § 15-104(1)(c). The village board may also resolve, subject to a permissive referendum, to have the village election conducted by the County Board of Elections, instead of by town or village election officials.
4. Village Law § 9-912(1), (2)(e).
5. Village Law § 9-900.
6. Village Law § 9-912(1).
7. *Id.*



8. *Id.*

9. *Id.*

10. Village Law § 9-912 does not say where the petition is to be filed, nor does it refer to any other statute's filing requirements.

11. Election Law § 4-108(1)(b). See *Broda v. Monahan*, 309 A.D.2d 959, 767 N.Y.S.2d 111 (2d Dep't 2003).

12. The drives were conducted by the Ardsley Good Government Committee and the Dobbs Ferry Good Government Committee.

13. In 1998, Mamaroneck's Clerk-Treasurer and Board of Trustees, who later campaigned against the referendum changing the date, nonetheless accepted and forwarded to the County Board of Elections on or about September 18, 1998, the petition filed September 11, 1998 for a referendum at the 1998 November general election on changing the Mamaroneck village election date to November, together with ancillary documents. See September 18, 1998 forwarding Letter of Leonard M. Verrastro, Mamaroneck Clerk-Treasurer.

14. Election Law §§ 16-100, 16-104(2).

15. See Transcript of Proceedings, *Nardecchia v. Abate*, Index No. 15693/03; *Broda v. Monahan*, Index No. 15694/03, at 55 (Sup. Ct., Westchester Co., Oct. 8, 2003).

16. *Id.* at 62-63.

17. *Id.* at 61-63.

18. *Id.* at 70.

19. *Id.* at 49-50; Village Law § 9-902(9).

20. *Nardecchia v. Abate*, Index No. 15693/03; *Broda v. Monahan*, Index No. 15694/03 at 66-67; MHRL § 24(1)(a); alternatively § 24(1)(a) required clerk certification not later than 30 days after its filing if that was an earlier date. Here, the 45-day backwards date was the earlier one.

21. *Nardecchia v. Abate*, Transcript of Proceedings, Index No. 15693/03 (Sup. Ct., Westchester Co. Oct. 8, 2003).

22. *Id.* The court said, "This is good news for one municipality and not so good news for the other." *Id.* at 66.

23. Election Law § 4-108(1)(b), (d).

24. *Id.* at 67-68. This is confusing, since MHRL says that the 30-day period is for the village clerk receiving a petition in response to "a local law adopted"; it does not refer to the County Board of Elections clerk.

25. See *Ardsley Election Date Proposal Passes*, The Journal News, Nov. 14, 2003.

26. *Broda v. Monahan*, Decision and Order, Index No. 15694/03 (Sup. Ct., Westchester Co., Oct. 23, 2003).

27. *Broda v. Monahan*, 309 A.D.2d 959, 767 N.Y.S.2d 111 (2d Dep't 2003).

28. *Id.*

29. The court did not consider petitioners' point that, even if *arguendo* there is any "review" period, since no objections to the petition had been made within the five-day period allowed under Village Law § 9-902(9), and since that was certainly an

adequate review period, the Village Clerk had to forward the petition.

30. *Broda v. Monahan*, 309 A.D.2d 959, 767 N.Y.S.2d 111 (2d Dep't 2003) (quoting Election Law § 4-108(1)(b)).

31. *Broda*, 309 A.D.2d 959 (emphasis in original).

32. *Id.* The Dobbs Ferry clerk had asserted she had 30 days to complete the review under MHRL § 24(1)(a). In Dobbs Ferry, the referendum petition was signed by over 600 voters.

33. *Broda*, 309 A.D.2d 959. The Appellate Division Decision and Order was dated October 30, 2003, only five days before the November 4 election date. The County Board of Elections had raised practicality questions about placing the referendum on the ballot, and about absentee voters, many of whom had already voted on a ballot without the referendum. These points were not discussed by the court, but may have been part of the "circumstances."

34. Notwithstanding their victory in court, the Trustees passed a resolution to conduct the referendum during the March 2004 village election. The referendum passed by a vote of 787 in favor of changing the time of the village election, and 685 against. See *Dobbs Ferry Elections to Move to November*, The Journal News, Mar. 18, 2004. As a result, the Dobbs Ferry Village elections are held at the time of the regular elections in November each year, beginning in November 2005.

35. *Arditti v. Jacobson*, 180 Misc. 884, 44 N.Y.S.2d 750 (Sup. Ct., Nassau Co. 1943).

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