IN THE EVANSTON CITY COUNCIL

JUDY FISKE and JEANNE KAMPS LINDWALL,	)
Petitioners,	)
v.	)
CHERYL WOLLIN, *et al.*,	)
Respondents.	)

MOTION TO DISMISS ELECTION CONTEST PETITION

Respondent Cheryl Wollin, by and through her attorneys, Jeffrey P. Smith of the Law Offices of Jeffrey P. Smith, and Stephen B. Engelman of Engelman & Smith, respectfully moves this Council to dismiss the Election Contest Petition ("Petition") filed by Judy Fiske and Jeanne Kamps Lindwall (collectively, "Fiske" herein) on May 19, 2005, for reason that the Petition exceeds this Council's jurisdiction, and does not state facts sufficient for this Council to overturn the results of the election of April 5, 2005. In support, Respondent Wollin states as follows:

1. On April 5, 2005, at the consolidated municipal election, Respondent Cheryl Wollin was elected Alderman of the 1st Ward of the City of Evanston, receiving, according to the official proclamation of the canvassing board for the City of Evanston, 736 votes to 655 for her only opponent, plaintiff Fiske. Petition, Appendix A.

2. On May 19, 2005, Fiske filed two actions: (a) the Petition with the Evanston City Council, and (b) a lawsuit, *Fiske v. Wollin*, No. 05 CO EL 000031, captioned a "Verified Complaint in Equity and Law," in the Circuit Court of Cook County ("Lawsuit"). The Lawsuit included a Count I repeating, essentially verbatim, the allegations of the Petition.

3. Both the Petition and the Lawsuit are extraordinary in seeking to reverse the results of the election by disenfranchising, after the fact, approximately 200 student voters on the alleged grounds that their registration and "attendance" at the polls were "purchased" (in unspecified manner) by a third party (allegedly Northwestern University). Fiske does not

state a single fact amounting to any "purchase," but, having so characterized the third-party actions, then terms the voters' votes "purchased votes," and then takes a further legal leap by asserting that every vote of every such voter should be stripped – by this City Council -- from the election results[1].

4. Neither the Petition nor the Lawsuit sets forth any fact establishing that a single voter's will was exercised other than as he or she chose, in the privacy and freedom of the voting booth[2]. A reversal of an election upon such grounds – *ex post facto* disenfranchisement for reason that a third party influenced the act of registering and "attendance" – is, to this Respondent's knowledge, without precedent in Illinois. Disenfranchisement of voters should not occur where there is no evidence of wrongful acts by the election officials. *Gibson v. Kankakee School Dist.,* 34 Ill. App. 948 (5th Dist. 1975). Rather, the "sole question" a Court usually examines in an election contest is ballot counting. *Likens v. Baas*, 133 Ill. App. 3d 42 (1st Dist. 1985) (quoting *Wood v. Hartman*, 381 Ill. 474 (1942)).

5. Judge Bertucci of the Circuit Court, at the first hearing of the Lawsuit on May 23, 2005, was advised that a municipal election contest had also been filed, and inquired as to where jurisdiction lay. It is fundamental that two forums cannot simultaneously hear the same matter, for numerous reasons, e.g., to avoid inconsistent results, and because the actions of one tribunal might moot the proceeding before the other. Fiske, through counsel, suggested that the matter ought to be resolved by a motion to dismiss.

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[1] The Petition, on its face, seems defective for failing to name and serve all interested parties. If entire ballots are to be nullified, then votes for school board and mayoral races, as well as an advisory referendum, are affected.

[2] This Council can also take notice that (1) students participated actively in the municipal election of 2001; (2) many students (including some of the same individuals named in the instant Petition) participated in Council meetings and hearings in 2003-04, where robust discussion and Council action took into account student voting potential in the 2005 elections, (3) students voted in high numbers in the general elections in the fall of 2004, and (4) both mayoral and aldermanic candidates campaigned on campus, where the student newspaper covered the campaigns.

I. An Aldermanic Election Contest Is Properly Filed Before A City Council, Which Has Limited Jurisdiction To Review The Ballots, But No Jurisdiction to Inquire Into Intent or Motivation of Voters

6. All election contests are governed by statute, and the contest must be in the forum, and in the manner, provided by statute. *Nesladek v. Kanka*, 341 Ill. 180, 183 (1930) (municipal jurisdiction exclusive; county court assumption of jurisdiction was improper).

7. The Illinois Municipal Code gives a City Council original but limited jurisdiction to hear election contests between aldermanic candidates. The Municipal Code reads as follows:

> The city council shall be the sole judge of the election to office of the aldermen. It shall also be the sole judge whether under Section 3.1-10-5 aldermen are eligible to hold their offices. A court, however, shall not be prohibited from hearing and determining a proceeding in quo warranto.

65 ILCS 5/3.1-40-10.

8. The Municipal Code's clear directive is reinforced by the Election Code, which refers to the municipal council "having jurisdiction of the municipal election" and states that the municipality retains primacy of possession of the election materials. 10 ILCS 5/23-6.1.

9. Illinois courts historically interpreted the statutes to mean that a city council has "exclusive jurisdiction" in a contest between two persons for the office of alderman. *See generally Garms v. The People, ex rel.*, 108 Ill. App. 631 (3rd Dist. 1903). *Accord Latham v. The People, ex rel.,* 95 Ill. App. 528, 530 (3rd Dist. 1901) (same holding). *See also Lyons v. Becker*, 272 Ill. 333, 335-36 (1916) (circuit courts have no jurisdiction to hear election contests; discussing origin of doctrine). However, historically courts suggest that they may also hear challenges to officeholders *in quo warranto*.

10. The current statutory provision, with its exception for *quo warranto*, codifies the holdings of Illinois courts which set forth the two limited mechanisms for contesting election:

> [T]here are two types of legal proceeding by which the office or position of a public official may be attacked: (1) an election contest in which the result (votes

count) of the election is determined or (2) a quo warranto proceeding contesting the qualifications or the validity of the election of the office holder.

Boytor v. City of Aurora, 70 Ill. App. 3d 303, 307 (2d Dist. 1979), *aff'd* 81 Ill. 2d 308 (1980).

11. An election *contest*, being a creature of statute, is not a catchall forum for every type of grievance a defeated candidate might raise. The Illinois Supreme Court has made clear that it is a very limited proceeding: "a contest of an election before a city council is not a judicial but a ministerial proceeding, and its finding is not a judgment in the ordinary sense of that term." *Lyons v. Becker*, 272 Ill. at 336.

12. Courts have further elaborated on the scope of the Council's "ministerial" powers: "'the purpose of an election contest is to ascertain how many votes were cast for or against a candidate, or for or against a measure, and thereby ascertain and render effective the will of the people.'" *Geer v. Kadera*, 173 Ill. 2d 398, 406-10 (1996) (quoting *Wagler v. Stoecker,* 393 Ill. 560, 562 (1946). Again terming the municipal board a "ministerial office," the *Geer* Court looked at over 130 years of precedent and reaffirmed that the question in all such cases should be "whom did a majority of the qualified voters elect?" *Id*. Compare the Illinois Supreme Court's discussion in the Stevenson-Thompson case, *In re Contest of Election for Offices of Governor & Lieutenant Governor*, 93 Ill. 2d 463, 480 (1983), where the Court implicitly assumes that the remedy sought in an election contest is a recount.

13. *Likens v. Baas*, 133 Ill. App. 3d 42 (1st Dist. 1985), is the most exhaustive analysis of the primary but limited jurisdiction of a city council to hear election contests of aldermanic elections. In that case, the Countryside City Council heard an election contest in which the loser alleged that several voters accidentally voted in the wrong precinct and, had they voted as intended, would have voted for the losing candidate in the challenged race. The court held that it was proper for the City Council to hear the contest, but improper to go beyond the paper records and start considering affidavits of the voters as to why they did what they did on Election Day, in order to shift votes from one candidate to another.

The court stated, with respect to jurisdiction, that the Council's "power to act in that respect exists because the statute making it the judge of the election of its members has been construed to designate it as the body to hear an election contest, *but such right is not an unfettered right to act*." 133 Ill. App. 3d at 49-50 (emphasis in original, quoting *Crnkovich v. Kroll*, 4 Ill. App 2d. 435, 441 (1954)).

14. Citing the many provisions of the Election Code that refer to ballot tabulation, as well as Supreme Court precedent, the *Likens* decision makes clear that a City Council is prohibited from inquiring into "the intention of the voter." 133 Ill. App. 3d at 54. Rather, the "sole question" the City Council may examine is ballot counting. *Likens*, 88 Ill. Dec. at 201 (quoting *Wood v. Hartman*, 381 Ill. 474 (1942)). At most, the Council might consider irregularities in who was allowed to vote where, as that inquiry, which may be conducted purely by reference to paper records, is "ministerial."

II. Petitioner Fiske Has Not Stated Facts Sufficient to Give this Council Power to Overturn An Election

15. The Petition is inadequate to produce the remedy Fiske seeks. Barred from an inquisition into what motivated students to go to the polls, this Council could only consider those parts of the Petition challenging approximately 30 votes on grounds of the voter allegedly not being entitled to vote (and, in one case, a voter not being allowed to vote). However, because those votes are insufficient to change the outcome of the election – even if every challenge were sustained -- such an inquiry would be pointless.

16. The Illinois Supreme Court held in *Zahray v. Erickson*, 25 Ill 2d 121, 124 (1962), that an election contest petition must allege facts that are sufficient to change the outcome of the election. Accord, *In re Contest for Election of Governor*, 93 Ill. 2d at 490.

17. This is a bright-line "but for" test. In *Cooper v. Marcin*, 44 Ill. App. 3d 918, 921 (1st Dist. 1976), no facts were alleged to show that, had the irregularities not occurred, the result would have been changed. Consequently, the complaints were properly dismissed.

To the same effect is *Stroud v. McCallen***,** 386 Ill. 103, 108 (1944) ("there is nothing in this case to indicate to the slightest degree that if the statute had been strictly followed, as appellant claims it should have been, the result of the vote would have been different").

18. Fiske's complaints against Northwestern University are a private grievance – indeed, Fiske has alleged in the Lawsuit (but not the Petition before this Council) that her civil rights were violated by Northwestern, and she is suing for money. This Council, which is not a court of law, is not constituted to inquire into actions outside the polling place, which role might conflict with the actions of other tribunals. The Council cannot enter into a grotesquely time-consuming, expensive, and dangerous adjudication of the motivations and intents of perhaps 200 or more individual voters, all after the fact. There is no precedent for a City Council stripping votes from the winner of an election on grounds such as Fiske has alleged. On the contrary, there is a strong presumption against disenfranchising voters.

19. Despite best intentions, few elections run perfectly, and rare is the election without some charges and counter-charges by campaigns. However, these do not amount to grounds for revoking the franchise of voters or invalidating the election itself. Every reasonable presumption must be indulged in favor of the validity of an election, including that the election officials knew the law and legally discharged their official duties and that their certificate of results is correct. *Gibson v. Kankakee School Dist.,* 34 Ill. App. 3d 948, 955 (5th Dist. 1975) (quoting 26 Am.Jur.2d *Elections* § 343, (1966)).

20. In two First District cases involving aldermanic elections, the losing candidates alleged, inter alia, that various provisions of the Election Code had been violated, e.g., plaintiff's duly qualified poll watchers were improperly excluded in specific precincts; and that plaintiff's poll watchers were intimidated from properly performing their duties by election judges. In each case the court held that general allegations of voting irregularities from which it cannot be inferred that the results would have been changed are insufficient to sustain an election contest proceeding. *Smith v. Stewart,* 14 Ill. App. 3d 1039 (1973), (affirming dismissal of aldermanic election contest petition); *Savage v.*

Frost, 14 Ill. App. 3d 1036 (1973) (same result).

21. A decision by this Council on the basis of the allegations brought by Fiske would draw the City into a suit for mandamus. That is the real lesson of *Likens*. What Countryside did wrong in *Likens* was going beyond its limited jurisdiction over ballot counting.

III. Fiske Has Not Sufficiently Pleaded Election Fraud

22. Even if this Council were permitted to dive into the thicket Fiske urges, the Petition fails to set forth a factual basis for doing so. The Illinois Supreme Court in *Zahray* elaborated on the need for specificity in an election contest petition: "The proceeding cannot be employed to allow a party, on mere suspicion, to have the ballots opened and subjected to scrutiny to find evidence upon which to make a tangible charge. [Citations.] And while the pleadings in contest proceedings are not required to comply with the strict technical rules applicable in civil actions, there should be such strictness as will prevent the setting aside of the acts of sworn officials without adequate and well defined cause. [Citations.]" *Zahray v. Emricson*, 25 Ill. 2d at 124.

23. Bare allegations, either parroting or paraphrasing the statute, do not state sufficient facts to trigger the proceedings under the Election Code. Such allegations constitute only conclusions of the pleader if unsupported by allegations of specific facts. *In re Contest of Election for Offices of Governor & Lieutenant Governor*, 93 Ill. 2d 463, 476 (1983).

24. Fiske's failure to show that any voter's will was overcome is fatal to her challenge. Proof of irregularities in voting does not justify the bulk disenfranchisement of voters. Fraud must be to the extent that it deprived legal voters of their vote or free choice. *Thornton v. Gardner*, 30 Ill. 2d 234 (1964).

25. In particular, the acts of *third parties* – persons other than the voter -- should not be used to nullify votes. Courts distinguish between voter fraud and wrongful third-party acts.

See Craig v. Peterson, 39 Ill. 2d 191, 196 (1968) (error to disenfranchise voters on basis of mandatory election requirements where violation not voters' fault); *Finn v. Durkin (In re Durkin)*, 299 Ill. App. 3d 192, 198-99 (2d Dist. 1998) (same). *See also Pullen v. Mulligan*, 138 Ill. 2d 21, 70 (1990) ("inadvertence, mistake, or even intentional wrong on the part of election officials will not be permitted to disfranchise voters;" if the intent of the voter can be ascertained from the ballot, then the ballot must be counted).

26. Fiske's petition, while lengthy, amounts to little more than repetitive conclusions. The Petition claims to be grounded on "mistakes and fraud … committed in the casting and counting of ballots" (Petition, at ¶5) but does not set forth one instance that meets Illinois's rigorous standards for pleading fraud. The bulky list of so-called "vote purchasing" is notable for a complete lack of specificity, and not one instance that amounts to the meeting of the minds necessary to effectuate a contract for purchase, nor any allegation of causation, let alone sufficient instances of fraud to alter the election.

IV. Dismissal of the Election Contest Is the Proper Procedural Resolution

27. Understandably, a City Council would not want to delve into the type of grievance Fiske has filed. However, the Contest having been initiated here, it must be addressed. The Petition cannot remain filed but unresolved, floating in some sort of legal limbo, perhaps for years, depriving the elected alderman and the First Ward voters and residents of certainty, and interfering with other city business. There is no statutory provision for the Council transferring the matter to the Circuit Court. Nor is hearing the contest discretionary, since it arises by statute.

28. In *Likens*, a petition to dismiss the election contest was filed before the City Council. The Appellate Court directed the City Council to grant the motion. Clearly, a Council may dismiss an election contest, and should where a petition is insufficient for relief.

29. The proper way for a Council to dispose of an election contest without hearing it on the merits is to dismiss it. Here, only that step will leave this case in the proper procedural posture. The Petition does not set forth grounds upon which this Council can overturn the election. The City Council responsibly should respond by saying, "We only have jurisdiction over certain aspects of elections, and as to what we have jurisdiction over, the petitioner has not alleged enough to change the result." At that point the Council will have discharged its duty and what remains of the Lawsuit can proceed, without City intervention (or cost or expense), in the courts.

CONCLUSION

Illinois law is clear that original limited jurisdiction over an aldermanic election contest vests here in the City Council, but the instant Petition does not set forth grounds that would trigger the Council's limited power to alter election results. The subject matter into which Petitioner requests the Council inquire is impermissible, and even if it were proper, the Petition is insufficient at law to warrant the relief requested. The Petition should be dismissed.

WHEREFORE, Defendant Cheryl Wollin, by and through her attorneys, Jeffrey P. Smith of the Law Offices of Jeffrey P. Smith, and Stephen B. Engelman of Engelman & Smith, prays that this Council enter an Order dismissing the Election Contest Petition filed by Judy Fiske and Jeanne Kamps Lindwall, with prejudice.

Respectfully submitted,

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