

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

In the Matter of the Application of

ANDREW GOODMAN FOUNDATION,
ELECTION @ BARD, SADIA SABA, ERIN CANNAN
and LEON BOTSTEIN,

DECISION AND ORDER

Petitioners.

Index No. 52737/20

-against-

DUTCHESS COUNTY BOARD OF ELECTIONS,
ERIK J. HAIGHT, in his official capacity, and
ELIZABETH SOTO, in her official capacity,

Respondents.

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules.

The following papers were read on this Article 78 proceeding and Respondents' cross-
motion.

- ORDER TO SHOW CAUSE
- NOTICE OF PETITION
- VERIFIED PETITION
- EXHIBITS 1 - 5; A - 1
- MEMORANDUM OF LAW IN SUPPORT
- AFFIDAVIT OF ELIZABETH SOTO
- EXHIBIT 1
- NOTICE OF MOTION
- MEMORANDUM OF LAW IN SUPPORT
- AFFIDAVIT IN SUPPORT
- AFFIDAVIT IN SUPPORT
- EXHIBITS 1 - 8

REPLY AFFIRMATION
EXHIBITS A - B
REPLY MEMORANDUM OF LAW
REPLY AFFIDAVIT OF FELICIA KEESING
REPLY MEMORANDUM OF LAW
REPLY AFFIDAVIT

Governor Cuomo's Executive Order 202.58 required the Boards of Election to send information to voters including the location of their polling places by September 8, 2020. On September 4, 2020 (a Friday) Petitioners commenced this proceeding challenging the Respondent Dutchess County Board of Elections' March 13, 2020 designation of St. John's Episcopal Church located at 1114 River Road, Barrytown, New York as the polling place for the 5th Legislative District of Dutchess County. The Petition was returnable September 28, 2020. Petitioners Andrew Goodman Foundation, Inc. and Election@Bard are organizations focused on protecting voting rights and facilitating voting by students of Bard College which is located within Dutchess County's 5th Legislative District. The individual petitioners are students and employees of Bard College registered to vote in that district. Petitioners maintain that the designated polling place violates voter access requirements of the New York State Constitution and New York State Election Law. They seek an order directing the Dutchess County Board of Elections to change the polling place to the Bertelsmann Campus Center at Bard College or to make that location a supplemental polling place in the November 3, 2020 general election. They assert that they sent a letter to the Dutchess County BOE Commissioners on February 28, 2020 asking that the polling place be relocated to Bard College. Despite the unfavorable response, the March 13, 2020 designation, for nearly six months Petitioners failed to challenge it.

New York State Election Law requires that every Board of Elections, in consultation with respective municipalities, designate the polling places in each election district in which an election may be held. Elec. Law §4-104(1). The Board of Elections must designate the polling places by March 15th of each year but has the discretion to select an alternative polling location after the date if the initially designated polling place is subsequently found to be unsuitable or unsafe. *Id.*

The only questions that may be raised in an Article 78 proceeding such as this one are whether the body or officer failed to perform a duty enjoined upon it by law; or proceeded or is about to proceed without or in excess of jurisdiction; or whether a determination was made by an error of law, was arbitrary and capricious or an abuse of discretion. CPLR Section 7804. In reviewing the Board of Elections' polling place designation, applying the relevant part of Section 7804, this court must determine whether the determination was arbitrary and capricious or affected by an error of law. See Matter of Scherbyn, 77 NY2d 753, 758 (1991). An action is arbitrary if it is without sound basis in reason and taken without regard to the facts. See Matter of Pell v. Board of Educ. of Union Free School Dist., 34 NY2d 222 (1974). The court's role in reviewing an agency action "is not to determine if the agency action was correct or to substitute its judgment for that of the agency, but rather to determine if the action taken by the agency was reasonable." Hill v. State Bd. of Elections, 120 AD2d 55 (2nd Dept 1986).

The Board of Elections' March 13, 2020 designation of St. John's Episcopal Church as a polling place was part of a broader resolution designating polling sites for the entire county. No specific explanation was offered for the designation of the St. John's Episcopal Church. Undisputed evidence in the record reflects that St. John's Episcopal Church has been the polling place for the 5th Legislative District since at least 2011. Both election commissioners signed the resolution designating the polling location. However, Respondent Commissioner Elizabeth Soto has submitted an affidavit and the record contains a letter stating that she was in agreement with petitioners' contentions that the poll site should be moved to a suitable on-campus location at Bard College. She notes that she lacks the authority to unilaterally approve moving the polling location. Correspondence she sent to Petitioners' counsel dated March 3, 2020 asserts that she would fully cooperate in any litigation seeking to establish that the community would be better served having a polling site on the Bard College campus.

Petitioners maintain that the current polling site disenfranchises voters because it is in a relatively remote location, is inaccessible by public transportation, has inadequate parking, does not comply with the accessibility requirements of the Americans with Disabilities Act and is too small to safely accommodate voters and poll workers in light of the COVID-19 pandemic. They assert that the proposed Bard College location is accessible by public transportation, has ample parking, complies with the Americans with Disabilities Act and is large enough to enable social distancing for voters and poll workers. They claim that the foregoing deficiencies of the St. John's Episcopal Church violate voting rights provisions of the New York State Constitution. See N.Y. Const. Art. I, §1; Art. II. Petitioners further assert that the Episcopal Church violates a provision in New York State Election Law §4-104(1)(a) providing that each polling place shall be accessible to citizens with disabilities and comply with the accessibility guidelines of the Americans with Disabilities Act of 1990. Election Law §4-104(1) requires the Board of Elections to take appropriate measures to comply with the requirements of those guidelines. Towards that end, a county Board of Elections is required to create an access survey for every polling site to assess its compliance with accessibility standards. See Election Law §4-104(1)(b). Any polling place that does not meet the standards must make changes or modifications or be moved to a verified accessible polling place. *Id.* Petitioners have submitted a 2019 access survey for the Episcopal Church stating that accessible handicap parking spaces do not have visible accessibility signage. It further indicates as "non-applicable" questions pertaining to whether passenger drop-off areas, sidewalks and walkways meet accessibility requirements. Petitioners have also submitted an affidavit of Bard College's Director of Accessibility and Disability Resources. She asserts that numerous aspects of the church and its parking lot fail to comply with the American with Disabilities Act. She states that an entrance ramp at the church lacks a railing. However, according to Commissioner Haight there in fact is a railing as the most recent BOE survey demonstrates. Petitioners assert there are uneven floors at the top of the ramp and there is no disability-accessible restroom facilities. None of this was raised in the February 28, 2020 letter proposing a change.

In opposition to the petition and in support of the cross-motion to dismiss, Election Commissioner Eric Haight has submitted an affidavit articulating the grounds underlying his March 2020 determination not to acquiesce to the request to relocate the polling site.

Commissioner Haight asserts that after receiving Petitioners' February 28, 2020 letter he discussed it with Commissioner Soto. He concluded, however, that cited concerns about pedestrian access, sidewalks and streetlights did not warrant moving the polling site. He asserts that St. John's Episcopal Church is between .3 miles and .7 miles from different parts of the Bard campus. He states that River Road, which runs from the campus to the polling site, goes through farmland and has relatively little traffic. He acknowledges there is no sidewalk but asserts there is a shoulder and notes that Bard College operates a shuttle that transports students directly to the church to vote. He states that the majority of Election District 5 is rural and most polling site locations would not have sidewalks or streetlights. Respondents assert that public transportation comes within about .5 miles of the current polling place. Finally, Commissioner Haight speculates that Bard is an insular environment that could impact the perceived neutrality of any voting site and pose risks of disruptive campus protests interfering with polling site operations. Commissioner Haight acknowledges that establishing a polling place on campus would be more convenient for Bard students but asserts that he also needs to take into consideration the non-student voters of Election District 5, and that state law does not authorize two polling places within the district.

Respondents have also submitted an affidavit of Board of Elections machine coordinator Timothy Malet. Mr. Malet states his familiarity with Board of Elections records pertaining to registered voters and asserts that as of September 2020 there were 1,035 registered voters in Election District 5 in the Town of Red Hook. He states that of those registrations, 670 had addresses indicating they are likely Bard students or reside on the Bard College campus, and there are approximately 365 voter registrations for individuals not associated with addresses on Bard's campus. He opines that these records likely overstate the number of people residing at Bard College who are eligible to vote because such voters are often students that have left the area after graduation. Annexed as an exhibit to Respondents' opposition papers is an Election District mailer the Board of Elections sent to all registered voters in the Election District notifying them that the polling place for the November 3, 2020 general election would be at St. John's Episcopal Church. The mailer also indicates that there will be a nine day early voting period from October 24, 2020 through November 1, 2020, lists the five Dutchess County locations for early voting and provides information about and the deadline for requesting and filing an absentee ballot.

As noted above, it is not the function of this court to substitute its judgment for that of an administrative agency, but rather only to determine if the action the agency as taken was reasonable. This court is cognizant of the provisions of the New York State Constitution Petitioners cite protecting the right to vote. Petitioners' claims alleging state constitutional violations are premised primarily on allegations that the Episcopal Church is not handicapped accessible in violation of the Americans with Disabilities Act. Petitioners' February 28, 2020 letter to the election commissioners did not cite violations of the Americans with Disabilities Act as grounds for their request to move the polling site. Thus this was not raised for consideration nor did it form the basis for the Commissioners' determination not to move the polling place. Petitioners have failed to make any factual claims or present evidence that any specific registered voters have been disenfranchised based upon the design or lack of accessibility to the polling place. Petitioners' letter cited a desire to move the polling place to an on-campus location to

facilitate easier pedestrian access and access via public transportation. While the letter makes generalized complaints that moving the polling site will ensure compliance with the law, it does not specify the alleged legal deficiencies other than making a general reference to ensuring compliance with New York State Election Law and federal law. It is well settled that a litigant is required to address his or her complaints initially to an administrative tribunal and exhaust all possibilities of obtaining relief through administrative channels before appealing to the courts. See Kaufman v. Inc. Vill. of Kings Point, 52 AD3d 604, 607 (2nd Dept 2008). Thus, in a CPLR Article 78 proceeding the court's review is limited to the arguments and record adduced before the agency. Id. Accordingly, Petitioners may not now maintain that the challenged determination was arbitrary or affected by an error of law based on violations of the Americans with Disabilities Act and New York State Constitution. These claims were not specifically raised to the election commissioners before the designation of the challenged polling site. The court finds that the selection of the St. John's Episcopal Church, which has been used as a polling place for many years, is not so arbitrary, unreasonable or capricious as to compel a conclusion that Respondents have abused their discretion in selecting it. Nor have Petitioners presented evidence that the location of the polling place is so inconvenient or unsuitable as to impede or restrain any eligible voter from casting a ballot. This is particularly true in light of the ability to vote via absentee ballots as a matter of right in this election cycle and by nine days of early voting. As noted, the Election District mailer sent out by the Board of Elections provided details on these voting procedures and listed the nine dates, times and locations for early voting. Based on the foregoing, Petitioners have failed to establish that the decision to retain the Episcopal Church as a polling place served to disenfranchise voters or was arbitrary and capricious, an error of law or an abuse of discretion.

The court is further cognizant of Petitioners' claims that circumstances related to the COVID-19 pandemic make the St. John's Episcopal Church a less desirable polling place. This contention is supported by the affidavits of Felicia Keesing, a professor with expertise in the transmission of infectious diseases. Professor Keesing asserts that the proposed polling place at Bard College is a safer option based upon the smaller size and layout of St. John's Episcopal Church. In fact, after Petitioners commenced this proceeding the Vicar and Treasurer of the Church sent a letter to the Board of Elections dated September 15, 2020, stating that the Church was too small to support social distancing during the voting process. They strongly suggest that the use of the St. John's Episcopal Church as polling location is not ideal based on its size and layout.

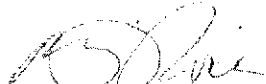
This Court can only adjudicate the controversies lawfully before it. Petitioners commenced this Article 78 proceeding on September 4, 2020 challenging respondents' March 13, 2020 polling place designation. Petitioners did not file a declaratory judgment action or articulate a theory in this Article 78 proceeding proving grounds upon which the Court could direct the Board of Elections to take any specific action based on the COVID-19 pandemic. While the Court has the authority to convert an Article 78 proceeding to a plenary action, it declines to do so here based the timing of petitioners' commencement of this proceeding and its procedural posture. The November 3, 2020 election is 21 days away. While the court has sixty days to render a determination it did so in this case within 2 weeks. Still, the election is too close in time to enable a change in the polling site that would be fair to all voters in the 5th district

including by giving them timely and effective notice of the change. Commissioner Haight underscores that mailing out notification of a new polling place at this late date would likely cause voter confusion and result in voters going to the wrong polling place. While Petitioners have stated good cause for fair consideration to be given to moving the polling place Petitioners offer no explanation for not commencing this action at an earlier date. Based on the foregoing, it is

ORDERED that the petition is denied without prejudice to renew sufficiently in advance of the 2021 elections. This constitutes the decision, order and judgment of the Court.

Dated: October 13, 2020
Poughkeepsie, New York

ENTER:



MARIA G. ROSA, J.S.C.

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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.