

Bard College filing, September 8, 2021
Response to "Public Meeting" of September 3, 2021

- I. Affirmation of Michael Donofrio in Further Support of Verified Petition
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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In the Matter of the Application of

BARD COLLEGE, ELECTION@BARD, LEON
BOTSTEIN, ERIN CANNAN, CYNTHIA DEANN
AUSTIN CUNNINGHAM, MARIA ALEJANDRA
RODRIGUEZ ORTIZ, SARINA JAQUELINE CULAJ,
AND TOMAS S. FORMAN,

Index No. 2021/52777

Petitioners,

-against-

DUTCHESS COUNTY BOARD OF ELECTIONS,
ERIK J. HAIGHT, in his official capacity,
HANNAH BLACK, in her official capacity.

Respondents,

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

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**AFFIRMATION OF MICHAEL DONOFRIO, ESQ.
IN FURTHER SUPPORT OF VERIFIED PETITION**

MICHAEL DONOFRIO, an attorney being duly licensed to practice before the Courts of the
State of New York, hereby affirms the following under the penalties of perjury:

1. Along with co-counsel Yael Bromberg, I represent petitioners Bard College,
Election@Bard, Leon Botstein, Erin Cannan, Cynthia Deann Austin Cunningham, Maria Alejandra
Rodriguez Ortiz, Sarina Jaqueline Culaj, and Tomas S. Forman (collectively, "Bard" or "petitioners")
in this proceeding. I submit this affirmation in further support of petitioners' Verified Petition.

2. More specifically, this affirmation updates the Court on two significant events since
the parties appeared before this Court on August 25: First, on August 27, the parties visited five sites
that had been raised by at least one party as potential polling locations. Second, on September 3, the
BOE held a public meeting where it failed to designate a 2021 District 5 polling site. In each event,

Commissioner Haight has expressed unrelenting, unfounded opposition to the Campus Center. His numerous mis-statements during the BOE meeting bring into sharp view the arbitrary and capricious nature of his decision-making. As explained below and in the accompanying Affidavit of Erin Cannan, the site visit and the BOE public meeting fortify Petitioners' request for relief—namely, an order designating Bard's Bertelsmann Campus Center as the District 5 polling site.

Procedural Background

3. On August 25, 2021, counsel for all parties, as well as petitioners' representatives and respondent Commissioner Hannah Black, appeared at an in-person conference before this Court. After spending several hours conferring, the parties were unable to resolve the case. The parties did, however, propose to visit three sites on Bard's campus, after which Commissioners Haight and Black would convene a public meeting of the Dutchess County Board of Elections (BOE) for the purpose of attempting to designate a District 5 polling location for 2021. This Court instructed the parties to proceed with those actions and scheduled a hearing for September 7 at 2:00 p.m.

4. Immediately after the August 25 hearing, counsel for all parties, Commissioner Black, and the Bard representatives (petitioner Erin Cannan, Dr. Jonathan Becker, and Sarah deVeer) conferred to schedule the site visits and BOE meeting. During that discussion, the parties agreed to visit four sites on August 27: the three Bard sites the parties had presented to the Court (the Bertelsmann Campus Center, the Stevenson Athletic Center, and the Fisher Performing Arts Center) and the St. John's Episcopal Church. The respondents agreed that the BOE would then hold a public meeting on September 3 at 11:00 a.m.

5. As detailed in the accompanying Affidavit of Erin Cannan, on August 27 the parties and/or their representatives visited the four sites mentioned above, plus Bard's Alumni Center (which was added at the end of the site visit at the request of Commissioner Haight's representatives).

6. The BOE met as scheduled on September 3, via Microsoft Teams. The Commissioners

were unable to agree upon a polling location for District 5. Therefore, as of this date, the BOE has not designated a District 5 polling location for 2021.

7. To the best of my knowledge, the BOE recorded the meeting but has not made a recording available. Bard's representatives who attended the meeting did record the meeting. That recording is available to the Court, the parties, and the public at the following URL: <https://www.youtube.com/watch?v=HdNYErw1Xu0>.

8. Meanwhile, on September 1, 2021 and with the consent of all parties, I filed a request asking the Court to adjourn the September 7 appearance because it fell on Rosh Hashanah. The Court granted that request the next day, ordering the parties to appear for an in-person conference on September 10.

ARGUMENT

I. The BOE Has Not Designated A 2021 District 5 Polling Location, Warranting Relief Under Article 78.

9. There is no dispute that Commissioners Black and Haight have been unable to reach an agreement on a 2021 District 5 polling site. Without an agreement between the Commissioners, there can be no designation by the BOE, as required by New York Election Law § 4-104. Moreover, it appears that the BOE is now incapable of performing that duty, because the Commissioners are at an impasse. It follows that the BOE has "failed to perform a duty enjoined upon it by law," necessitating relief from this Court under CPLR § 7803(1).¹

10. Critically, the Commissioners' impasse results from Commissioner Haight's arbitrary

¹ In addition, the fact that the BOE held, let alone failed to reach agreement at, the September 3 meeting is fatal to Commissioner Haight's motion to dismiss. The motion is premised on the factually untenable claims that the BOE designated a District 5 polling location during its February 25, 2021 meeting, or somehow did so via the purported minutes that Commissioner Black never approved and that the BOE never issued or publicized. Given that the BOE met on September 3, 2021 for the purpose of trying to designate a District 5 polling site, and was unable to do so, it is now established beyond any possible argument that the BOE has tried, and failed, to designate a 2021 District 5 polling location. As a matter of logic, the premises of Commissioner Haight's motion have now been refuted, and the motion should be denied for that reason alone.

and capricious refusal to consider the objective facts and the best interests of all District 5 voters. As explained below, in Ms. Cannan's accompanying affidavit, and in Bard's prior filings in this litigation and in the 2020 case, Bard's Bertelsmann Campus Center ticks every box as a pollsite: It satisfies the eight key criteria laid out in statute and state guidance; it stood out among the five sites visited on August 27; and, perhaps most importantly, it served as a convenient, safe, welcoming, and effective polling location for the 2020 General Election. Indeed, Commissioner Black has favored the Campus Center to serve as District 5's polling site consistently since the BOE's February 25 meeting.

11. Nevertheless, Commissioner Haight continues to reject the Bertelsmann Campus Center in favor of three locations whose defects as polling locations are significant and obvious: the Church, the Alumni Center, and the Performing Arts Center. Each of them would be less convenient for poll workers and voters as a whole while more burdensome on student voters and voters with disabilities.

12. Most remarkable is that, out of the blue, the Alumni Center is now Commissioner Haight's first choice. He did not mention the Alumni Center at any time leading up to the BOE's February 25 public meeting, in any communications following that meeting, in any communications during the pendency of this litigation, nor in any communications among the parties in preparation for the August 27 site visit. The first mention of the Alumni Center came from Commissioner Haight's representatives at the conclusion of the August 27 visits to the four sites the parties had agreed to visit. *See Cannan Affidavit ¶¶29-30.*

13. As Ms. Cannan explained during the site visit, the Alumni Center is "entirely unsuitable as a polling location—it is a small office building that contains only individual offices and a small conference room used to store supplies" and "is not used as a venue for events for the general public, except for a few small committee meetings of the Lifetime Learning Institute each year." She adds that "[i]t is my understanding that, during the pandemic, those meetings are not taking place at

the Alumni Center.” Cannan Aff. ¶29.

14. Even worse, the Alumni Center “is located across from Route 9G (a 45-mile-an-hour highway that is heavily trafficked with no crosswalk), and thus inaccessible from campus by foot. The Alumni Center is not located near any public transportation and would inconvenience all voters in the district since it is located on the outskirts of the district and not in a central location or near residents.” Cannan Aff. ¶30. Simply put, the Alumni Center poses a serious safety concern.

15. Commissioner Haight’s belated preference for a transparently unsuitable, unsafe site presents this Court with the clearest possible choice: between the Campus Center, which is the *most* accessible, *most* spacious, *most* convenient and *most* safe of the sites in question, and the Alumni Center, which is the *least* accessible, *least* spacious, *least* convenient and *most* unsafe—except for the Church.

16. This is the epitome of arbitrary and capricious—as well as discriminatory—conduct. And it fits an unfortunate pattern, evidenced by the 2013 federal consent decree² that required the BOE to cease discriminating against college students by imposing certain address requirements on them in connection with their voter registrations, and by the conduct and outcome of last year’s litigation. See, e.g., Doc No. 1 at ¶46 (granting 2020 petitioners’ motion to renew and ordering BOE to move 2020 polling site to Campus Center in large part because “the primary factor identified by Commissioner Haight and relied upon by this court was simply untrue”). In other words, the BOE failure to perform its statutory duty to designate a District 5 polling site, itself a grounds for relief under CPLR § 7803(1), is the product of Commissioner Haight’s arbitrary and capricious actions, amply justifying judicial action under CPLR § 7803(3). Under the circumstances, the only way forward is for this Court to order the BOE to designate a District 5 polling location that meets the eight criteria summarized in paragraph 23 below.

² The consent decree is available at https://cce.bard.edu/community/election/files/Voting_rights_settlement.pdf.

17. During the September 3 meeting, Commissioner Haight referenced a court decision involving the Rensselaer County Board of Elections, which he claimed stood for the proposition that while a court can reject an improper polling site, its authority ends there. It appears that he was referring to People by James v. Schofield, a 2021 case that confirms that courts may invalidate improper pollsite designations but in no way cabins the judiciary's authority to fashion relief where, as here, a Board of Elections simply fails to act.

18. In Schofield, the Rensselaer County Board of Elections had, over time, designated early polling locations outside of the City of Troy, home to the majority of the county's Black, Hispanic, and lower-income communities. People by James v. Schofield, No. EF2021-268959, slip op. at 18 (Sup. Ct. Rensselaer Cty. June 7, 2021) (Silverman, Acting J.), aff'd, Index No. 533467, 2021 WL 3774203, 2021 N.Y. Slip Op. 04785 (App. Div. 3d Dep't, Aug. 26, 2021).³ For 2021, the Board continued its previous out-of-city designations and added a belated designation of a site in the city's southeastern corner (an attempt to comply with a 2020 amendment to the New York Election Law). Ex. A at 6-8. Echoing pre-designation advocacy efforts by many groups and constituents, the Attorney General argued that the designations ignored multiple factors set out by the state's early voting statute, including consideration of population density, travel time to the polling place, and public transportation accessibility. Id. at 3.

19. The court ordered the Rensselaer Board of Elections to designate lawful early voting sites for the 2021 primary election designed to provide adequate and equitable access for all voters after finding that "the record makes clear that their determination was arbitrary and capricious and must be set aside." Id. at 18. The Appellate Division affirmed, concluding that the Board's failure to address whether the designated sites were on or near public transportation, as required by state regulations, coupled with its proffer of inconsistent justifications, "renders the decision arbitrary and

³ The Supreme Court's Decision and Order and the Appellate Division's Opinion and Order are attached hereto as Exhibits A and B, respectively.

capricious.” Ex. B, 2021 WL 3774203 at *5.

20. Tellingly, neither Schofield decision touches on the scope of a court’s authority when a Board of Elections fails to act, let alone suggest that, in the face of such a failure a court has no choice but to defer, and wait for the Board to act. To the contrary, Justice Silverman cited with approval *this* Court’s October 23, 2020 decision, see Ex. A at 17, which ordered the BOE to designate the Campus Center *in place of* the Church *after* Commissioner Haight and then-Commissioner Soto had agreed to designate the Church prior to the March 15 statutory deadline. See Doc. No. 5 at 3. In other words, Schofield does not hold, suggest, or even hint that a court lacks the authority to order a Board of Elections to designate a particular site when the Board has failed to act.

21. The Schofield decisions also support Bard’s position that the specific facilities proffered by Commissioner Haight are not proper polling sites. Specifically, the courts in Schofield rejected the designated sites in part because one “does not appear to provide convenient access to public transportation for many residents” and another was “nearly two miles away from the closest bus stop, requiring bus-riding voters to walk that distance along roads that, in some spots, do not have sidewalks.” Ex. B, 2021 WL 3774203 at *5. Here, Commissioner Haight has advocated for sites like the Church and the Performing Arts Center, which are difficult to access by public transport, see Cannan Aff. ¶¶ 24-28 and are therefore less accessible for protected status voters (youth voters and disabled voters).

II. The August 27 Site Visits Confirmed That Bard’s Bertelsmann Campus Center Is The Optimal Polling Location For District 5’s Voters.

22. Just as it is now clear that the Court must take action, it is equally clear what that action should be: an order designating the Campus Center as District 5’s polling location. The case in favor of the Campus Center is well-documented in the petitioners’ previous filings. As Ms. Cannan’s affidavit explains, the site visits highlighted the indisputable facts that argue powerfully in favor of the Campus Center and against the other sites, especially the Church, the Performing Arts

Center, and the Alumni Center.

23. Indeed, as summarized in the table below, the Campus Center is the only visited site that clearly satisfies the following criteria, articulated in New York Election Law § 4-104 and in the New York State Board of Elections and Department of Public Health Safety Measures to Prevent Against Transmission of Covid-19 at Polling Stations,⁴ which are critical to the designation of a polling location: (1) Has the Board consulted with the town, and does the town support a particular site? (2) Is the site licensed to sell alcohol for onsite consumption? (3) Is the site handicap-accessible? (4) Does the site comply with the Americans with Disabilities Act? (5) Is the site on the ground floor? (6) Is the site on a public transportation route? (7) Can the site comfortably accommodate voters, poll workers and election equipment? and (8) Does the site follow relevant COVID guidance?

	Church	Bertelsmann	Gym	PAC	Alumni
Consult/Support of Town	●	●	●	●	●
Licensed to sell alcohol for on-premises consumption	●	●	●	●	●
Handicap Accessible	●	●	●	●	●
Complies with ADA	●	●	●	●	●
On ground floor	●	●	●	●	●
On Public Transport Rt.	●	●	●	●	●
Comfortably Accommodate Voters/Equipment	●	●	●	●	●
Follow Covid Guidance	●	●	●	●	●

As the table shows, only the Campus Center clearly satisfies all eight criteria, underscoring petitioner's position that it is the clear choice for District 5's polling site.

⁴ See https://coronavirus.health.ny.gov/system/files/documents/2020/06/boe-doh_covid19_pollsitecleaning_update_061120.pdf.

III. Commissioner Haight's Statements At The September 3 BOE Meeting Undermine His Position And Underscore The Need For The Requested Relief.

24. Commissioner Haight made a number of untrue or inaccurate statements during the September 3 BOE meeting that warrant correction. He misstates facts in an attempt to hide the virtues of the Campus Center and the flaws of the sites he prefers. He continues to do this in his effort to suppress the youth vote and, to use the Commissioner's word, "super-enfranchise" his preferred constituencies.

25. First, Commissioner Haight referred to having made a number of visits to District 5. However, to petitioners' knowledge, he has not scheduled or arranged to visit the Bard facilities in question. As far as petitioners are aware, he has never visited the Performing Arts Center or the Alumni Center—the two Bard locations he advocated for at the September 3 meeting.

26. Second, during the meeting (and on previous occasions, including the February 25 BOE meeting), Commissioner Haight claimed he received multiple complaints about the Campus Center. However, during the meeting (and in response to Bard's February 26, 2021 FOIL request) he pointed to precisely one such complaint—a letter from Ms. Corinne Weber, who is registered to vote in District 6, not District 5 (according to the latest voter registration information available to petitioners). Ms. Cannan recalls interacting with Ms. Weber, who served as the Town of Red Hook's Republican Inspector Coordinator during the 2020 election, more than once at the Campus Center on Election Day 2020, but Ms. Weber did not register any complaints with Ms. Cannan at that time. Cannan Aff. ¶¶32-34. Indeed, she did not hear any complaints from any poll worker or poll watcher, from either political party, while she was serving as poll captain at the Campus Center for the entirety of Election Day 2020. In sum, Commissioner Haight has now repeatedly failed to substantiate his assertion that *any* (let alone *multiple*) District 5 voters complained to him about their experience voting at the Campus Center in 2020.

27. Third, Commissioner Haight continued to press his legal argument that this Court did

not designate the Campus Center in its 2020 orders. He did so by ignoring the plain language of this Court's October 30, 2020 order, which is fatal to his argument:

ORDERED that Dutchess County Board of Elections update its website to indicate that Bertelsmann Campus Center has been designated as an additional polling location for the Town of Red Hook Election District 5 as soon as possible.

Doc No. 6 at 1 (emphasis added). "Has been designated" leaves no room for Commissioner Haight's argument that the Bertelsmann Campus Center was not "designated."

28. Fourth, Commissioner Haight claimed that Bard's website says that the Alumni Center hosts public events. This is incorrect. The webpage for the Alumni Center states that "In addition to housing the Office of Development and Alumni/ae Affairs, the space is configured to allow alumni/ae to host small functions, gather informally, set up readings and exhibitions, and interact with faculty and students."⁵ This is a far cry from hosting large public events, like an election.

29. Fifth, Commissioner Haight continued to assert that the Church is ADA-compliant. As previously documented by petitioners, and as confirmed by the site visit, the Church is an outdated facility that presents accessibility challenges for people with reduced mobility, and fails to comply with the ADA. Moreover, Commissioner Haight has been on notice since at least September 2020, when Bard raised the Church's failure to comply with the ADA in its 2020 petition. Indeed, petitioners have raised that issue again in this litigation, flagging the ADA compliance problems at the Church and reiterating the need for an updated ADA survey. Doc. No. 1, ¶¶ 106-108. Further, when Commissioner Black pointed out earlier this year that the Church has undergone renovations since the last ADA survey (thereby requiring a new survey), Commissioner Haight's reply was "says who?" *Id.* ¶ 60. Those renovations were also noted in the letter from Ms. Weber that Commissioner Haight read during the September 3 meeting. In other words, Commissioner Haight's track record of dismissing the Church's ADA compliance issues, insistence on using a survey which even a cursory

⁵ The webpage is available here:
<https://www.annandaleonline.org/s/990/bp18/interior.aspx?sid=990&gid=1&pgid=1533>.

visit to the Church reveals to be fatally flawed, and refusal to conduct a new survey despite being aware that the Church was renovated, as mandated by state law, emphasizes his unwillingness to consider District 5's pollsite designation in a rational, non-arbitrary manner.

30. Sixth, Commissioner Haight claimed that the Performing Arts Center and the Alumni Center are close to public bus stops. This is incorrect. The only bus stop serving Bard's campus is on Annandale Road (County Route 103), near the center of campus. The Performing Arts Center is approximately 0.75 miles from the bus stop, and the Alumni Center is on the other side of Route 9G. The Campus Center and the Stevenson Athletic Center are the only two locations under consideration that are within a safe, short walk of the bus stop.

31. Finally, Commissioner Haight stated that it is a long walk between the nearest parking lot and the Campus Center. However, as the videos and Ms. Cannan's affidavit make clear, the walk is shorter than that from the parking lot to the entrance of the Performing Arts Center, and it is a flat walk (unlike the incline that must be ascended at the Performing Arts Center). Moreover, the Campus Center has several handicap parking spots located within feet of the entrance—far closer than those at the Performing Arts Center.

32. These misstatements and flawed legal arguments show Commissioner Haight's insistence upon opposing the Bertelsmann Campus Center to be arbitrary and capricious.


CONCLUSION

For all of the foregoing reasons, petitioners respectfully request that the Court grant the relief sought in the petition.

Date: Montpelier, Vermont
September 8, 2021

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**AFFIDAVIT OF
ERIN CANNAN**

Petitioners,

-against-

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Respondents,

For a Judgment Pursuant to Article 78 of the Civil
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STATE OF NEW YORK)
) ss.:
COUNTY OF DUTCHESS)

ERIN CANNAN, being duly sworn, deposes and says:

1. I am over 18 years of age and a Petitioner in the above-captioned case. I am competent to testify on my own behalf and am authorized to submit this affidavit, which is based on my personal knowledge and experience, on behalf of the Petitioners. I submit this affidavit to provide relevant information based on the site visits that the parties to this litigation conducted on August 27, 2021..
2. I am employed by Bard College ("Bard") as Vice President for Civic Engagement and Deputy Director of the Center for Civic Engagement ("CCE") and have served in that role since 2011. I have been employed by Bard since 1995.

3. In my role at Bard, I supervise the Center for Civic Engagement, Career Development Office and International Civic Engagement initiative. I work primarily on student engagement, leadership development and community-based projects. I co-teach a number of courses on civic engagement, civil society and local government.

4. I have been a resident of the Town of Red Hook for 27 years, where I have served as a poll worker for more than a decade. I served as a Poll Captain for the District 5 polling site at the Bertelsmann Campus Center for the November 3, 2020 election. Prior to that, I worked for 10 years at the polling place located at the St. John's Church.

5. On Friday, August 27, 2021, I participated on behalf of Petitioners in a visit to various sites at Bard and to the St. John's Church. I was joined by Cicily Wilson (Assistant Director for CCE, Bard Director of Community Partnerships), Sarah DeVeer (CCE Outreach Coordinator and Special Events Administrator) and Douglas B. Mishkin, an attorney representing the Petitioners. Ms. Wilson and Mr. Mishkin were present for the visits to all sites; Ms. DeVeer was able to participate only in the visits to the St. John's Church and the Bertelsmann Campus Center.

6. The following representatives of the Dutchess County Board of Elections (BOE) participated in the entirety of the site visits: Commissioner Hannah Black (D); Deputy Commissioner Diane Nash (D); Senior Elections Specialist Linda Haas Manley (D); Deputy Commissioner Erin Reverri (R); Voting Machine Coordinator Tim Malet (R); and David Jensen, Esq., counsel to BOE Commissioner Erik Haight. Commissioner Haight was not present.

7. Below, I summarize the substance of the visit to each site.

Bertelsmann Campus Center ("Campus Center")

8. I am very familiar with the operations and facilities of the Campus Center and its Multi-Purpose Room through 21 years of experience organizing and attending events there, both for

Bard students and for the community-at-large, as well as serving as a Poll Captain there for the election on November 3, 2020.

9. During the August 27 site visit, I pointed out to all participants the various features of the Campus Center and explained specifically how it functioned as a polling site last November:

- a. I noted the Campus Center's accessibility to public transportation and its visibility from Annandale Road, which is a public county road that local residents use regularly regardless of where they live in the district. It is the main artery for all residents to access State Highway 9G.
- b. I explained that it is within easy walking distance to those who live or work on or near campus and is in close proximity to three parking lots with approximately 70 parking spaces including handicap spaces.
- c. Closer to the building, I showed all participants the two handicap parking spaces that are within approximately 100 feet of the entrance of the Campus Center.
- d. We walked through the main entrance doors, which can be opened electronically via a handicap-accessible push button.
- e. From the main entrance, we walked approximately 80 feet down the hallway that leads to the Campus Center's Multi-Purpose Room. That section of the hallway ranges approximately six to eight feet in width.
- f. In the Multi-Purpose Room, I explained (and responded to questions about) where each of the voting machines and related tables were located last November 3. More specifically, I explained that intake tables were placed about 10 feet or so into the Multi-Purpose Room. Behind the intake tables, there were five or six privacy booths (where voters actually mark their ballots) that were separated by at least six feet. Two

voting machines (into which voters place those ballots) were spread apart and located next to easily accessible exit doors; this enabled people who had voted to exit without having to circle back through the line of waiting voters. The poll watchers (up to six of them) were able to spread out and observe the polling site. Voters could socially distance inside the hallway leading to the Room, enabling them if they chose to avoid standing outside in the chilly weather that day.

- g. I also explained during the site visit that the Campus Center was in 2020 and remains today fully ADA-compliant. A mobility-impaired voter who uses a walker or a wheelchair is able to enter the Campus Center, vote, use a restroom and exit the Campus Center all on one level, without needing to navigate stairs or use an elevator.

10. As all of the participants in the site visit were able to observe, there is ample room for the tables, chairs and voting machines that must be set up, positioned appropriately, and eventually removed. The space is flexible, with multiple outlets and modern HVAC.

11. As the name suggests, the Campus Center's Multi-Purpose Room hosts a wide variety of events throughout the year. In non-pandemic times, members of the general public are accustomed to attending all kinds of functions at the Campus Center, including movies, lectures, conferences, speakers, and community meetings. It has been used by the College's 300 Lifetime Learners students for 20 years.

12. I personally witnessed (and helped to facilitate) the Campus Center's success as a polling site on November 3, 2020. My fellow 2020 poll workers told me that they felt welcomed and that they appreciated the benefits the Campus Center and its Multi-Purpose Room offer as a polling location. They also commented to me on the ease of conducting the 2020 election at the Campus Center. For the first time, we had room to speak with voters who needed affidavit ballots or who

needed more assistance to vote (this had been a serious challenge in the overcrowded space in previous years in the St. John's Church).

13. Part of the Campus Center's success last November was due to its ability to protect voters and poll workers from pandemic-related concerns. The Campus Center allowed voters to practice social distancing while waiting to vote, voting, and exiting the Campus Center; it allowed poll workers to practice social distancing while setting up, administering the actual voting, and closing the voting-related facilities.

14. Bard generally (and the Campus Center in particular) remains a safe venue for hosting an election during a pandemic. For the Fall 2021 semester (that will include Election Day), Bard requires all students, faculty, and staff to be fully vaccinated against COVID-19 (subject to medical and religious exemptions). As of August 23, 2021, 96% of its students and 99% of its employees are fully vaccinated. <https://www.bard.edu/covid19/assessment/>.

15. Bard will do whatever is necessary, as it did in the last election, to ensure that every District 5 voter can vote at the Campus Center this November. Bard's guidance explicitly allows for the altering of Covid rules to accommodate important civic events such as elections.

Stevenson Athletic Center

16. We also visited the Stevenson Athletic Center, located at 32 Woods Avenue.

17. During our visit, Bard's Interim Athletic Director David Lindholm briefly described the Athletic Center and answered questions.

18. The main gymnasium certainly is spacious enough to accommodate all voters, poll workers and equipment for Election Day.

19. The Athletic Center is located a few hundred yards from public transportation. Parking is located across the street and includes two designated handicap spots. The parking lot is a short walk to the building.

20. The Athletic Center is accessible to those with mobility impairments, but not as easily accessible as the Campus Center. Access to the gymnasium is through the main door and down a long flight of stairs and then back up a shorter staircase. Handicap accessibility is provided through a small, single-person elevator that operates with key access. That elevator is slow and occasionally becomes inoperative, i.e., it can provide access, but transport may become time-consuming. An additional back door entrance affords slightly more ease, but still requires an elevator ride to accommodate the shorter staircase.

Fisher Performing Arts Center

21. We also visited the Fisher Performing Arts Center on Manor Avenue.

22. The Performing Arts Center is a performance hall designed for one purpose: to host performances and rehearsals attended by Bard students and the general public in the main theater, and theater-related classes (such as dance workshops) for Bard students only in three classroom spaces. There are two theaters with tiered audience sections—neither contains enough flat, open space to serve as a polling location. Unlike the other Bard locations, the Performing Arts Center is licensed to sell alcohol.

23. We looked through the window of one of the classroom spaces. These classroom spaces also are unsuitable because they are used throughout the day for scheduled classes and, of course, are considerably smaller than the Multi-Purpose Room in the Campus Center. In addition, the dance studio classrooms have special flooring that would need to be covered if used for any purpose other than dancing (dancers wear appropriate dance footwear).

24. The parking at the Performing Arts Center is less accessible than the parking at the Campus Center. Although the lot closest to the Performing Arts Center contains ample handicap accessible spots, it requires all voters to go up an outdoor flight of stairs and walk a long distance or use a pathway that is on a steep slope. The other parking lot is dedicated to student parking, is further from the Performing Arts Center entrance than the lot described above, and requires visitors to cross a road and follow winding paths which include significant inclines. There is a drive-through drop-off located on the road, but it has no parking spaces.

25. The Performing Arts Center also is far less accessible by public transportation, which is approximately three-quarters of a mile from the closest drop-off.

26. During the August 27 visit, the Republican BOE representatives suggested using the lobby area outside the main theater as a polling location. As all participants were able to see, that space itself is a small fraction of the size of the Campus Center's Multi-Purpose Room, thus requiring voters to wait outside. Lighting is limited. Two large cement barriers limit visibility and walkability. The lobby is designed to funnel people into the large performance space—not to shepherd 400 voters moving through a polling space. It is not used for administrative functions, particularly the types of administrative functions that would need to be available to have a successful polling site.

27. The Performing Arts Center also presents operational challenges because it is in nearly constant use by Bard as a performance and learning space. Unlike the Campus Center, which ordinarily serves a variety of activities—including some open to the public—on a day-to-day basis, the Performing Arts Center hosts multi-day or multi-week performances as well as ongoing student classes. Whereas the Campus Center can easily fit Election Day into its

schedule, inserting a single day event such as Election Day into the Performing Arts Center's calendar would pose potential disruption to the ongoing schedule of events.

St. John's Church

28. The site visit to the St. John's Church showed that the Church's considerable defects, detailed in Bard's Petition, still remain. I won't repeat all of those defects here, other than to say briefly that the Church still does not comply with the ADA. The side entrance to the Church, which is the only entrance that a mobility impaired voter could use, poses the most serious difficulties. Located on a hill, it is difficult for voters to navigate. The ramp is steep and cracked. The ramp's switchback has a small turning radius, likely posing difficulty for a person using a wheelchair or other mobility-assisting device. I have also observed that anyone using the handicap entrance enters behind the intake table and must pass by voters attempting to cast their ballots on the machines in a very small space infringing on privacy. Over my years of service as a poll worker, I have also observed many mobility-impaired voters use the main entrance, but that entrance includes a step up into the polling site. I have witnessed many voters tripping there and others needing additional assistance. During the site visit, the group did not observe any alterations to the space that would lessen these challenges.

Alumni Center

29. As we were concluding the site visit, the Republican BOE representatives suggested looking at Bard's Alumni Center as a possible polling site. Although this building had not been part of the site visit planning process, we promptly arranged for security to open the building. I explained to the group that the Alumni Center was entirely unsuitable as a polling location—it is a small office building that contains only individual offices and a small conference room used to store supplies and that it is not used as a venue for events for the general public, except for a few

small committee meetings of the Lifetime Learning Institute each year. It is my understanding that, during the pandemic, those meetings are not taking place at the Alumni Center.

30. As the site visit participants all observed, it is located across from Route 9G (a 45-mile-an-hour highway that is heavily trafficked with no crosswalk), and thus inaccessible from campus by foot. The Alumni Center is not located near any public transportation and would inconvenience all voters in the district since it is located on the outskirts of the district and not in a central location or near residents.

Site Videos

31. I oversaw the creation of a series of brief videos that depict the five locations discussed in this affidavit with the assistance of personnel from Bard. The five videos run a total of eight minutes three seconds and are accessible to the Court, the parties, and the public at the following link: <https://cce.bard.edu/community/election/polling-location-videos/>. I narrated each video, providing commentary similar in content to my remarks to the participants in the August 27, 2021 site visit. We finalized these videos Thursday night, September 2, and submitted them to the Board of Elections on Friday morning, September 3, prior to the Board of Elections meeting that morning.

Election Day 2020

32. I have reviewed the video recording of the Board of Elections meeting that occurred on September 3, 2021.¹ During that meeting, Commissioner Haight referenced a letter from Ms. Corinne Weber—who is not, to the best of my knowledge, a resident or eligible voter of District 5—in which Ms. Weber describes her purported observations of Election Day 2020 at the

¹ The recording is available here: <https://www.youtube.com/watch?v=HdNYErw1Xu0>

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At a Term of the Supreme Court, held in and
for the County of Rensselaer, in the City of
Troy, New York, on the 7th day of June,
2021.

PRESENT: HON. ADAM W. SILVERMAN,
Acting Justice Supreme Court

SUPREME COURT
COUNTY OF RENSSELAER STATE OF NEW YORK

In the Matter of the Application of
PEOPLE OF THE STATE OF NEW YORK, by
LETITIA JAMES, Attorney General of the State of
New York,

Petitioner,

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

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-against-

JASON SCHOFIELD, individually and in his capacity of
Commissioner of the Rensselaer County Board of Elections,
EDWARD MCDONOUGH, individually and in his capacity
of Commissioner of the Rensselaer County Board of Elections,
and RENSSELAER COUNTY BOARD OF ELECTIONS,

Respondents.

APPEARANCES: HON. LETITIA JAMES
Attorney General for the State of New York
Jessica Clarke, Civil Rights Bureau Chief
Lindsay McKenzie, Assistant Attorney General
Amanda Meyer, Assistant Attorney General
Attorneys for Petitioner

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Attorneys for Respondents

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ADAM W. SILVERMAN, A.J.S.C.

Before this Court is a case of first impression as no other court of this state has reviewed the early voting statute and its requirement of adequate and equitable access to the polls. In its brief two-year existence, the state Legislature has already responded to concerns with its implementation by modifying the statute multiple times, refining its charge to local boards of elections that voters must have equal access to polling locations. The record in this proceeding signals the need for further modifications to the law if the noble intentions of the legislation are to be achieved absent court intervention.

Here, the Attorney General of the State of New York, acting under her *parens patriae* authority on behalf of New York voters, brings this special proceeding asking the Court to review the determination of the Rensselaer County Board of Elections (hereinafter “Board of Elections”) in locating early voting polling sites. Unquestionably, “[v]oting is of the most fundamental significance under our constitutional structure” (*Matter of Walsh v Katz*, 17 NY3d 336, 343 [2011] [internal quotation marks, brackets, and citations omitted]). It is by this right that all other rights are preserved. With absolute appreciation of this fact, the Court is also mindful of its role in reviewing determinations made by agencies. The law requires that courts grant significant deference to agencies in their role of making factual determinations and the statute at issue specifically acknowledges the flexibility granted to local boards of elections in administering elections. The Attorney General brings this lawsuit solely to challenge Respondents’ compliance with the Election Law.

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Petitioner argues Respondents have failed to comply with Election Law, which requires local boards of elections to determine the location of early voting poll sites by considering the following factors: population density, travel time to the polling place, proximity to other early voting poll sites, public transportation routes, commuter traffic patterns and such other factors each board of elections deems appropriate. Petitioner asserts that, particularly in light of a community effort in support of alternative or additional early voting locations, Respondents have failed to make a determination consistent with these statutory factors and thereby committed arbitrary action that was without sound basis in reason and taken without regard to the facts.

Respondents challenge the Attorney General's standing and capacity to bring this special proceeding. Regardless, Respondents assert they had a rational basis in designating the three selected sites for early voting and they did so in accordance with the standard established under Election Law.

Procedural History

This special proceeding pursuant to CPLR article 78 was commenced by signed Order to Show Cause (Silverman, J.) on May 27, 2021. Respondents joined issue on June 2, 2021. Petitioner replied in further support of the Petition on June 3, 2021.

The Court held oral arguments on June 4, 2021. At oral arguments, counsel for all parties were present and further reiterated their positions as had been laid out in their submissions. The Court, upon hearing these arguments and upon consideration of all the papers submitted, issued an oral decision that the determination of Respondents was arbitrary and capricious. The Court noted the quickly approaching start of early voting and the need for clarity for voters. Therefore,

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upon consent of all parties, the Court agreed to hold in abeyance its ruling until June 7, 2021 to allow parties to consider if an agreement upon consent could be reached to resolve the matter (see e.g. *Matter of Kelleigh McKenzie v Ulster County Board of Elections*, Sup Ct, Ulster County, October 30, 2020, Fisher, J., index No. EF-2020-2716 [Ordering the extension of early voting hours on consent]). All parties were told, as part of this agreed upon hold, that if the parties failed to come to a consensus, the deadline for a new determination regarding early voting would be no later than June 9, 2021.

As no consent agreement has been presented to the Court by the agreed upon deadline, the Court now issues its ruling and Order.

Facts**2019 Early Voting Law**

In 2019, to expand the availability of voting opportunities to “meet contemporary standards for accessibility, equity, and efficiency,” the State of New York joined thirty-seven states and the District of Columbia by passing legislation that offers early voting (Sponsor’s Mem, Bill Jacket, L 2019, ch 6). In order to effectuate the law’s intent of “designat[ing] polling places in locations that maximize accessibility for eligible voters” (Sponsor’s Mem, Bill Jacket, L 2019, ch 6), the legislation relies upon local county boards of elections. In so doing, the law “takes into account the wide variation in characteristics of different counties throughout the state, by providing county boards of elections with flexibility,” however “[t]his flexibility is balanced by minimum standards that . . . ensure that all voters have a meaningful opportunity to vote early” (Sponsor’s Mem, Bill Jacket, L 2019, ch 6).

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County boards of elections have broad authority to designate polling places (*see* Election Law § 4-104). The early voting law explicitly requires “at least one early voting polling place for every full increment of fifty thousand registered voters in each county” (Election Law § 8-600 [2] [a]). Each county board is further authorized to add additional sites (*see* Election Law § 8-600 [2] [b]). Election Law § 8-600 (e) provides, in relevant part, that “Polling places for early voting shall be located so that voters in the county have adequate and equitable access, taking into consideration population density, travel time to the polling place, proximity to other early voting poll sites, public transportation routes, commuter traffic patterns and such other factors the board of elections deems appropriate” (*see also* 9 NYCRR 6211.1). These sites are subject to the same accessibility requirements as Election Day polling sites (*see* Election Law § 8-600 [2] [e]; *see generally* Election Law § 4-104).

2019 Rensselaer County Polling Site Selection

In support of their determination, Respondents Jason Schofield and Edward McDonough, Commissioners of the Rensselaer County Board of Elections (hereinafter “commissioners”) swear that they “looked at and studied a map of Rensselaer County” and then considered the statutory factors based on their “working knowledge” [Schofield Aff ¶ 13; McDonough Aff ¶ 13]. This review coupled with their “working knowledge” allegedly enabled them to determine the County should be divided into a northern and southern half. The commissioners then swear that they considered a “site in the Town of East Greenbush, the most populous town in the County” [Schofield Aff ¶ 13; McDonough Aff ¶ 13]. Because the East Greenbush library holds a fundraising event during the early voting period, the commissioners decided against that location

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[Schofield Aff ¶ 14; McDonough Aff ¶ 14]. Likewise, the commissioners ruled out the use of schools because “school officials would not be receptive” to the disruption [Schofield Aff ¶ 13; McDonough Aff ¶ 13]. The commissioners then chose to use the second floor of the Schodack Town Hall based upon its parking lot and location on Routes 9 & 20, which they identify as major thoroughfares for the County [Schofield Aff ¶ 15; McDonough Aff ¶ 15].

As relates to the City of Troy, the commissioners swear they first considered the County Office Building but found its parking inadequate during normal business days [Schofield Aff ¶ 16; McDonough Aff ¶ 16]. They further considered the other fifteen polling sites and ruled out churches as it would be “disruptive to religious services on weekends,” and schools because it would “be problematic for schools [because of]. . . student safety, . . . security reasons and school staffing costs” [Schofield Aff ¶ 16; McDonough Aff ¶ 16]. They then determined the location should be outside of the City of Troy and in the adjoining Town of Brunswick [Schofield Aff ¶ 17; McDonough Aff ¶ 17]. The Brunswick Town Hall is located on Route 7, a “heavily used commuter road” [Schofield Aff ¶ 17; McDonough Aff ¶ 17].

The commissioners then swear that during this period of time, they met with “a number of individuals and community groups about an early voting site in Troy, [including] representatives from the League of Women Voters, and the NAACP” [Schofield Aff ¶ 18; McDonough Aff ¶ 18]. The commissioners characterize these meetings as “not required by law,” despite an explicit regulatory requirement that boards of elections conduct communications outreach regarding early voting and report to the State Board of Elections the community based groups that were involved in the development of the plan (*see* 9 NYCRR 6211.7 [b]). The

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commissioners confirm that this outreach informed them of “concern that there was no early voting site in Troy” [Schofield Aff ¶ 18; McDonough Aff ¶ 18].

Noreen McKee, a Board Member and volunteer at Unity House, a Board Member of the Rensselaer County Chapter of the League of Women Voters, a Board Member and Officer of the Justice Center of Rensselaer County, swears that she and Judy Meyer, Co-President of the League of Women Voters, met with the commissioners in March of 2019 [McKee Aff ¶ 2, 5-7]. She states that the commissioners told her about their plans to designate Schodack Town Hall based on parking and requirements for accessibility for people with disabilities, but discuss no other factors, including population density and public transportation [McKee Aff ¶ 6-7]. McKee further swears that she traveled to the Brunswick Office Building by bus from downtown Troy to vote, a journey that, after a 30-40 minute bus ride, included a 1.8-mile walk along a highway with only intermittent sidewalks [McKee Aff ¶ 15]. McKee further notes various letters that were sent to the Board of Elections urging the addition of a Troy location and specifically the recommendation of Unity House [McKee Aff ¶ 17-18].

Chris Burke, Chief Executive Officer of Unity House, further swears to the willingness of his organization to host a polling site [Burke Aff ¶ 13-24]. In a September 2019 letter, the Board of Elections was presented with information that Unity House was more centrally located than the current sites, was ADA compliant, had sufficient parking, and had people willing to work as poll workers [Burke Aff, Ex B].

Additionally in 2019, David Bissember, a then-member of the City Council of the City of Troy wrote to the Board of Elections expressing concern about the lack of an early voting site in

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Troy [Bissember Aff, Ex A]. After consulting with Commissioner McDonough, it was his understanding that a lack of funding was the hurdle [Bissember Aff ¶ 8-10]. The Troy City Council responded by passing a resolution offering to match up to \$7,500 of County funding [Bissember Aff, Ex B]. The County opted not to provide funding so the City Council again took action by offering to provide the full \$15,000 in funding [Bissember Aff, Ex C].

A press conference was held in front of Unity House where members of the state legislature proposed amending the Election Law to require each county to locate early voting sites in their largest municipalities [Burke Aff ¶ 24]. Despite this press conference and outreach from Burke, Bissember, and others, the Board of Elections chose not to visit Unity House in 2019 [Burke Aff ¶ 23].

Addition of Holy Cross Armenian Church as an Early Voting Site

In response to the potential state legislation requiring early voting sites in each county's largest municipality, the commissioners began a search for an appropriate location in Troy [Schofield Aff ¶ 19; McDonough Aff ¶ 19]. They swear they considered "existing polling sites in the City of Troy" and identified The Holy Cross Armenian Church, which had been a polling site since 2016 [Schofield Aff ¶ 20; McDonough Aff ¶ 20]. They offer no explanation as to why they did not identify this as a site during their first review of existing polling sites. They further offer no explanation as to why they did not visit Unity House, despite the community requests.

In July 2020, several community organizations again wrote to the Board of Elections requesting consideration of Unity House [Burke Aff, Ex C]. Similarly to the 2019 letter, the Board of Elections was again informed that Unity House was more centrally located than the

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previously selected sites, including the Armenian Church, was ADA compliant, had sufficient parking, and had people willing to work as poll workers [Burke Aff, Ex C].

2020 Amendment to the Early Voting Law

Following the 2019 election, the state Legislature amended the early voting statute to require that “the municipality with the highest population in each county based on the latest federal decennial census shall have at least one polling place designated for early voting, and to the extent practicable if such municipality has public transportation routes, such polling place shall be situated along such transportation routes” (L 2020, ch 344). While avoiding explicitly naming the county, the sponsor’s memo makes clear that the intent of the amendment was to prevent what happened in Rensselaer County in 2019. The memo explains:

“It has come to the attention of the sponsor that in at least one county in the state, the intent of these provisions has been disregarded, with polling locations being sited outside the county’s largest municipality and urban center. The sites of the polling locations do not lend adequate and equitable access to the polls for the county’s urban voters, as they are located a significant distance outside the county’s largest city. Many urban voters, due to population density, utilize public transportation and will not have adequate and equitable access to the polling locations established in such county; these voters are effectively being disenfranchised from New York’s early voting system” (Sponsor’s Mem, L 2020, ch 344).

2021 Early Voting Polling Sites

By letter dated November 24, 2020, the Office of the New York State Attorney General requested:

1. All documents including communications, plans, reports, studies, maps, publications, memoranda, and other materials containing information within the Board’s possession concerning the location of early voting poll sites in Rensselaer County, including requests for, or consideration of, additional or alternative sites, from January 1, 2019 through the present; and

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2. All documents, including communications, plans, reports, studies, maps, publications, memoranda, and other materials containing information within the Board's possession concerning the number of early voting poll sites in Rensselaer County, from January 1, 2019 through the present. [McKenzie Aff, Ex 11].

In December 2020, a group of community organizations submitted a Freedom of Information Law request for:

1. Records of any plans, maps, demographic profiles, drawings, photographs, GIS records, shapefiles, electronic files, lists, or other description of Rensselaer County's proposed early voting locations and early voting districts generated since March 2019.
2. Any reports, analyses, spreadsheets, maps, and studies generated by the Board or for consideration by the Board in the identification or selection of early voting locations in Rensselaer County, including any accessibility surveys.
3. Any records prepared by, provided to or considered by the Board regarding the consideration of locating any early voting sites in the City of Troy such as, for purposes of illustration, potential sites at Unity House of Troy (located at 2341 Sixth Ave in Troy) or Johnstone Supply (2600 Sixth Ave in Troy).
4. All documents and communications reflecting consideration by the Board of demographic data concerning the racial, ethnic, or language minority status of residents or voters in the identification or selection or rejection of any actual or potential polling places for early voting under Election Law § 8-600 in Rensselaer County since January 1, 2019. [Burke Aff, Ex D].

The Attorney General's request was repeated in a December 24, 2020 letter [McKenzie Aff, Ex 12]. The Board of Elections replied on January 13, 2021 that the only document responsive to the information request was the community organization's December 2020 Freedom of Information request [McKenzie Ex 13]. A week after the letter to the Attorney General's Office, Respondent Commissioner Jason Schofield replied to the community organization's Freedom of Information request stating: "There are no documents, maps, drawing, photos, lists or any other materials that you have requested in your 4 requests in our office" [Grossman Aff, Ex B].

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In a letter dated April 9, 2021, the NYCLU, the League of Women Voters of Rensselaer County, Unity House of Troy, the NAACP Troy Branch, the Troy Area United Ministries, The Justice Center of Rensselaer County, the Troy Coalition of Black Leaders, Rensselaer County Women for Change, the Oakwood Community Center, and Troy 4 Black Lives wrote to the Board of Elections requesting consideration of four proposed sites [Burke Aff, Ex E]. Because the Board of Elections' information request response confirmed the BOE had no information relevant to the consideration of the statutory factors, the community groups provided their own detailed analysis based on the statutory factors and additional information they believed relevant to the four proposed sites compared to the three previously selected and used sites [Burke Aff, Ex E]. For example, the letter showed that each of the proposed sites had at least twice the population density, as measured by population per square mile, compared to the existing sites [Burke Aff, Ex E]. The letter also showed that persons living around the proposed sites were at least twice as likely to not exclusively rely on cars for commuting and ten times as likely to use public transportation [Burke Aff, Ex E].

Board of Elections Review of Proposed Sites

The commissioners provide no explanation regarding why they did not respond to the first three letters, but swear that based on the April 9, 2021 letter they conducted a review of the four proposed sites [Schofield Aff ¶ 23; McDonough Aff ¶ 23].

Troy School #2 and Johnstone Supply

Commissioner Schofield telephoned John Carmello, Superintendent of the Troy City School District [Schofield Aff ¶ 23; McDonough Aff ¶ 23]. Superintendent Carmello wrote to

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Commissioner Schofield stating that there was “no way for [the School District] to accommodate that request” [Respondents’ Ex A]. While the commissioners note that the Superintendent was “not amendable” and the Superintendent’s email describes the inquiry as a “request” while citing expenses and cleaning difficulties, the record does not make clear whether the Board of Elections considered the location beyond this discussion considering its statutory authority “to designate polling places [in] a public school building” and the requirement that “the board or agency which controls such building *must* make available a room or rooms in such building which are suitable for registration and voting and which are as close as possible to a convenient entrance to such building” (Election Law § 4-104 [3] [emphasis added]).

Similarly, Commissioner Schofield met with George Bejian, owner of Johnstone Supply, a private business that is used as a Primary Day and Election Day polling site [Schofield Aff ¶ 29-31; McDonough Aff ¶ 29-31]. While Mr. Bejian had previously expressed interest in serving as an early voting site, upon learning from Commissioner Schofield that it would require his business to be open for nine days, including nights and weekends, he no longer wished to participate [Schofield Aff ¶ 30; McDonough Aff ¶ 30]. Subsequently, Mr. Bejian wrote to Commissioner Schofield stating, “[a]fter considering the amount of days and the times needed for the early voting program I feel that this would be more difficult than initially anticipated” [Respondents’ Ex B].

Bethel Baptist Church

Both commissioners made a personal visit to Bethel Baptist Church, together with Kevin O’Malley, the registrar who oversees the Board of Elections’ polling sites [Schofield Aff ¶ 24;

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McDonough Aff ¶ 24]. The church is in the middle of its block, but its parking is located separately from the church [Schofield Aff ¶ 24; McDonough Aff ¶ 24]. The street on which the church is located has parking restrictions and the bus stop is several blocks from the church [Schofield Aff ¶ 24; McDonough Aff ¶ 24]. The commissioners do not explain why a separation of several blocks from the public transportation stop to the polling site is now a critical factor when in 2019 they selected a polling site that required people to travel 1.8 miles without sidewalks from the nearest public transportation stop. Additionally, in reply Petitioner provides an affidavit from Troy Mayor Wm. Patrick Madden, who swears he “would do everything in [his] power as Mayor to address those concerns, including by reserving street parking as accessible parking spots for the full nine days of the early voting period” [Madden Aff ¶ 7].

Unity House

Both commissioners also visited Unity House [Schofield Aff ¶ 25; McDonough Aff ¶ 25]. After being refused admission when they arrived without prior notice and while the building was closed, the commissioners returned for a tour with Executive Director Burke [Schofield Aff ¶ 26-27; McDonough Aff ¶ 26-27]. The commissioners swear they were offered two separate locations on the first floor [Schofield Aff ¶ 27; McDonough Aff ¶ 27]. The commissioners determined the first space was insufficient for the necessary equipment and tables [Schofield Aff ¶ 27; McDonough Aff ¶ 27]. The second room had sufficient size, but a narrow doorway, and there was only one way in and one way out [Schofield Aff ¶ 28; McDonough Aff ¶ 28]. The commissioners found that this would be problematical to have people entering and exiting through this narrow doorway, particularly with peoples’ concerns about COVID [Schofield Aff ¶

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28; McDonough Aff ¶ 28]. Notably, in reply, Petitioner provides a supplemental affidavit from Chris Burke challenging the commissioners' finding that the doorway is narrow and swearing "there are two entrances . . . [and both] are wide double doors that automatically open when someone pushes a button on the outside of the building" [Burke Supplemental Aff ¶ 8-9].

Law

As a threshold issue, Respondents contest the Attorney General's standing to bring this special proceeding. "In order to maintain [*parens patriae* standing], the State must articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party [and t]he State must express a quasi-sovereign interest" (*Alfred L. Snapp & Son, Inc. v Puerto Rico ex rel. Barez*, 458 US 592, 607 [1982]; see *New York by Schneiderman v Utica City School Dist.*, 177 F Supp 3d 739, 748 [NDNY 2016] ["A state may invoke the doctrine of *parens patriae* if it: (1) articulates a 'quasi-sovereign interest' apart from the interests of particular private parties; (2) alleges a concrete injury to a substantial segment of its population; and (3) demonstrates that complete relief from that injury could not be obtained by individuals in a private lawsuit"]; see generally *People of the State of NY by Abrams v 11 Cornwell Co.*, 695 F2d 34, 38-39 [2d Cir 1982], *mod on other grounds*, 718 F2d 22 [1983]; *Support Ministries For Persons With AIDS, Inc. v Vil. of Waterford, NY*, 799 F Supp 272, 277-278 [NDNY 1992]).

Here, the Attorney General asserts that minority residents, low-income residents, and those with disabilities are disproportionately facing a higher burden in early voting due to the arbitrary and capricious determination of Respondents [Petition ¶ 112-113; McKenzie Ex 1 ¶

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42]. The issue of capacity is less clear. Still, this Court is troubled by the record in this proceeding which implicates the potential infringement upon the fundamental nature of our right to vote which is both alone of paramount important and is critical as a protection for all other rights. There is also scarce appellate authority relating to the capacity of the Attorney General to bring a special proceeding to protect voting rights. Faced with this, the Court refuses to dismiss the proceeding without addressing the merits and finds the Attorney General has standing to protect the rights of these potential voters (*see People of New York ex rel. Spitzer v County of Delaware*, 82 F Supp 2d 12, 14 n 1 [NDNY 2000]; *People of New York ex rel. Spitzer v County of Schoharie*, 82 F Supp 2d 19, 21 n 1 [NDNY 2000]).

“Where, as here, petitioner challenges an administrative determination made where a hearing is not required, [judicial] review is limited to whether the determination lacks a rational basis and is, thus, arbitrary and capricious” (*Matter of Fuller v New York State Dept. of Health*, 127 AD3d 1447, 1448 [3d Dept 2015] [citations omitted]; *see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 [1974]). “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts” (*Matter of Murphy v New York State Div. of Hous. and Community Renewal*, 21 NY3d 649, 652 [2013] [internal quotation marks, brackets, and citations omitted]).

“Judicial restraint is required where . . . the litigated issues to some extent involve matters of administrative judgment, discretion and allocation of resources and priorities” (*Hill v State Bd. of Elections*, 120 AD2d 55, 57 [2d Dept 1986]). “[T]he court may not substitute its judgment for

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that of the agency responsible for making the determination” (*Matter of Beer v New York State Dept. of Envtl. Conservation*, 189 AD3d 1916, 1918 [3d Dept 2020]). “[O]nce it has been determined that an agency's conclusion has a ‘sound basis in reason’[,] the judicial function is at an end” (*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 428 [1st Dept 2007] [[internal quotation marks and citations omitted], *aff'd* 11 NY3d 859 [2008]]).

However, the Court’s “review is limited to the grounds invoked by the agency and the failure of the agency to set forth an adequate statement of the factual basis for the determination forecloses the possibility of fair judicial review and deprives the petitioner of his or her statutory right to such review” (*Matter of Buffalo Teachers Fedn., Inc. v Elia*, 162 AD3d 1169, 1172-1173 [3d Dept 2018] [internal quotation marks, brackets, and citations omitted], *lv denied* 32 NY3d 915 [2019]). “Absent a predicate in the proof to be found in the record, an unsupported determination must be set aside as without rational basis and wholly arbitrary” (*Metropolitan Taxicab Bd. of Trade v New York City Taxi & Limousine Commn.*, 18 NY3d 329, 334 [2011] [internal quotation marks, brackets, ellipsis and citations omitted]).

Discussion

Respondents fail to provide a rational justification for their determination. The repeated conclusive assertion in their affidavits that they considered the relevant statutory factors, by employing a “rigorous process” informed by their “working knowledge of travel times, proximity, transportation routes, traffic patterns, population density, and other factors” is

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insufficient. They provide no facts supporting this assertion and, more importantly, the basis of their “working knowledge.”

An agency cannot ignore data presented to it, exclusively rely on one data point that supports its determination without considering anything else, and then blindly adopt that position. (*see Matter of Metropolitan Movers Assn., Inc. v Liu*, 95 AD3d 596, 599 [1st Dept 2012] [Holding the Comptroller’s “blindly adopting” rates and “exclusively” relying on one data point was “arbitrary and capricious”]). Further, an agency may not simply rely on conclusory claims such as its own knowledge (*see Metropolitan Taxicab Bd. of Trade v New York City Taxi & Limousine Commn.*, 18 NY3d at 333 [Holding an agency’s determination arbitrary and capricious where it was provided in conclusory terms and had “no record support”]).

Where, as here, in the specific context of a polling site determination by a county board of elections, the result is clear; a court must set aside a determination that is based on vague information or contrary to the procedure required by law (*see Matter of Krowe v Westchester County Bd. of Elections*, 155 AD3d 672, 673 [2d Dept 2017] [Ordering a polling site reopened]; *Sutton v Howe*, 67 Misc 3d 1232 [A] [Sup Ct, Cortland County 2020, Masler, J.] [Ordering the reopening of a polling site where the Board of Elections had failed to comply with the statute]; *Matter of Andrew Goodman Foundation v Dutchess County Board of Elections*, Sup Ct, Dutchess County, October 23, 2020, Rosa, J., index No. 52737/20 [Moving a polling site]).

Respondents have twice denied that they have *any* records providing a basis for their determination. Despite the broad power of a board of elections to designate sites (*see generally* Election Law § 4-104 [Granting boards of elections authority to designate “a building exempt

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from taxation,” “a public school building,” “a building for which a tax exemption, tax abatement, subsidy, grant or loan for construction, renovation, rehabilitation or operation has been provided by any agency of the state or any political subdivision thereof,” or to use a “room or rooms under the control of” “any person or entity conducting any program, activity or service for which a loan, grant, contract, subsidy or reimbursement has been provided by any agency of the state or a political subdivision thereof”]), Respondents concede that for two years they failed to review any sites except those fifteen already designated polling sites within the City of Troy. Likewise, the record offers no support for a requirement of little to no activity from sites in the City of Troy (as shown by requiring The Holy Cross Armenian Church’s services to be moved and rejecting the County Office Building), but a willingness to use occupied sites in the Towns (two town municipal office buildings).

While the Election Law, even in its most recently amended form, requires neither a written record of the work done by a BOE’s commissioners in selecting sites nor a comprehensive analysis of the kind provided by Petitioner to Respondents, the record makes clear that their determination was arbitrary and capricious and must be set aside.

Accordingly, it is

ORDERED that the Petition is hereby granted and the Court hereby annuls as arbitrary and capricious Respondents’ determination that the early voting poll site locations for both the 2021 primary and general elections provide adequate and equitable access to all voters in Rensselaer County; and it is further

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ORDERED that no later than June 9, 2021, Respondents shall select early voting poll site locations for the 2021 primary election that provide adequate and equitable access for all voters in Rensselaer County, including voters in the City of Troy and otherwise comply with New York's Early Voting Law, N.Y. Election Law §8-600 *et seq.*; and it is further

ORDERED that by the earliest date practicable, Respondents shall select early voting poll site locations for the 2021 general election that provide adequate and equitable access for all voters in Rensselaer County, including voters in the City of Troy and otherwise comply with New York's Early Voting Law, N.Y. Election Law §8-600 *et seq.*

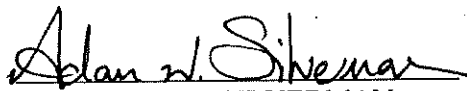
The Court has uploaded the original Decision/Order to the case record in this matter as maintained on the NYSCEF website whereupon it is to be filed and entered by the Office of the Rensselaer County Clerk.

Counsel for the Petitioners is not relieved from the applicable provisions of CPLR 2220 and 202.5b (h) (2) of the Uniform Rules of Supreme and County Courts insofar as it relates to service and notice of entry of the filed document upon all other parties to the action/proceeding, whether accomplished by mailing or electronic means, whichever may be appropriate dependent upon the filing status of the party.

SO ORDERED AND ADJUDGED

ENTER.

Dated: June 7, 2021
Troy, New York


ADAM W. SILVERMAN
Acting Supreme Court Justice

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INDEX NO. EF2021-268959**Papers Considered:**

The following e-filed documents, listed by NYSCEF document number 1-2, 4, 9, 14-24, including:

1. Signed Order to Show Cause (Silverman, J.) dated May 27, 2021.
2. Verified Petition dated May 27, 2021; Memorandum of Law dated May 27, 2021; Attorney Affirmation, Annexed Exhibits 1-11 (inclusive of sub-exhibits).
3. Answer dated June 2, 2021; Affidavit of Jason Schofield sworn June 2, 2021; Affidavit of Edward McDonough sworn June 2, 2021, Annexed Exhibits A-B; Memorandum of Law dated
4. Petitioner's Memorandum of Law in Reply dated June 3, 2021; Attorney Affirmation, Annexed Exhibits 1-2.

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2021 WL 3774203

Supreme Court, Appellate Division,
Third Department, New York.

In the Matter of the PEOPLE of
the State of New York, BY Letitia
JAMES, as Attorney General of the
State of New York, Respondent,

v.

Jason SCHOFIELD, Individually and as
Commissioner of the Rensselaer County
Board of Elections, et al., Appellants.
Troy Branch of the National Association
for the Advancement of Colored
People et al., Proposed Intervenors.

533467

Calendar Date: August 18, 2021

Decided and Entered: August 26, 2021

Attorneys and Law Firms

David Gruenberg, Troy, and Carl J. Kempf III, County
Attorney, Troy, for appellants.

Letitia James, Attorney General, Albany (Sarah L.
Rosenbluth of counsel), for respondent.

New York Civil Liberties Union Foundation, New York City
(Perry Grossman of counsel), for proposed intervenors.

Before: Garry, P.J., Lynch, Clark, Pritzker and Colangelo, JJ.

OPINION AND ORDER

Garry, P.J.

*1 (1) Appeal from a judgment of the Supreme Court
(Silverman, J.), entered June 7, 2021 in Rensselaer County,
which granted petitioner's application, in a proceeding
pursuant to CPLR article 78, to, among other things, annul
a determination of respondent Rensselaer County Board of

Elections designating polling places for early voting pursuant
to Election Law § 8-600(2), and (2) motion to intervene.

In 2019, the Legislature provided that, with limited
exceptions, persons registered and eligible to vote in any
general or primary election would be permitted to cast their
ballots in the 10 days prior to the election (*see* Election
Law § 8-600[1], as added by L 2019, ch 6, § 8). To ensure
that the early voting option would be fully available, county
boards of elections were directed to “designate[] at least
one early voting polling place for every full increment of
[50,000] registered voters in each county” (Election Law §
8-600[2][a]). Rensselaer County has approximately 109,000
registered voters. During the 2019 election cycle, respondent
Rensselaer County Board of Elections (hereinafter the Board)
sited two early voting polling places. Each of these sites
was in a suburban location that was difficult to reach via
public transportation from the City of Troy, Rensselaer
County (hereinafter the City), the County's most populous
municipality and home to almost a quarter of its actively
enrolled voters. For the 2020 election cycle, the Board
belatedly addressed concerns raised by elected officials and
various community and public interest groups regarding the
lack of an early voting polling place in the City – and pending
legislative efforts that would force the Board to designate such
a polling place (*see* 2019 N.Y. Assembly Bill A8610-B; 2019
N.Y. Senate Bill S8782) – by establishing a third early voting
polling place in the City's southeastern corner, at the Holy
Cross Armenian Church. The Board subsequently adhered to
these designated polling places despite repeated complaints
from petitioner and others – mainly a coalition of community
groups that included proposed intervenor Troy Branch of the
National Association for the Advancement of Colored People
(hereinafter the NAACP). These groups vigorously asserted
that Holy Cross did not satisfy the statutory criteria for early
voting polling places (*see* Election Law § 8-600[2]), and that
a polling place should either be relocated to, or established in,
a location more readily accessible to City residents.

After the 2020 election cycle concluded, Election Law § 8-
600 was amended to specifically require that county boards
of elections situate at least one early voting polling place
in “the municipality with the highest population in each
county,” located along public transportation routes if existent
(Election Law § 8-600[2][a], as amended by L 2020, ch
344, § 1). Thereafter, in April 2021, petitioner, the NAACP
and various groups proposed four sites for early voting in
the City, any one of which they asserted was “a significant
improvement over prior early voting plans in terms of meeting

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the requirements for equitable access defined in Election Law § 8-600(2).” Respondents Jason Schofield and Edward McDonough, the Commissioners of the Board, responded that they had met with representatives from the four proposed “sites to determine availability and whether they met all of the required specifications,” but they continued to believe that the Holy Cross site complied with the established legal requirements and was the best option for Rensselaer County residents.

*2 Petitioner commenced this CPLR article 78 proceeding to challenge the Board's determination as to the early voting polling places for the 2021 primary and general elections and to obtain injunctive and other relief. Following joinder of issue, Supreme Court annulled the Board's determination that the early voting polling places selected for the 2021 primary and general elections afforded “adequate and equitable access for all voters in Rensselaer County” and directed the Board to select new locations that satisfied the requirements of Election Law § 8-600. Respondents appeal. On June 24, 2021, in response to motions seeking various relief, this Court, among other things, granted petitioner's motion to vacate the automatic stay afforded by CPLR 5519(a)(1). Thereafter, the NAACP and three City residents who are registered voters moved to intervene as petitioners. We now decide that motion and the appeal.

First, with respect to the motion to intervene, “a court ‘may allow other interested persons’ to intervene in a special proceeding” and “[p]ermission to intervene in [a CPLR] article 78 proceeding may be granted at any point of the proceeding, including after judgment for the purposes of taking an appeal” (*Matter of Greater N.Y. Health Care Facilities Assn. v. DeBuono*, 91 N.Y.2d 716, 720, 674 N.Y.S.2d 634, 697 N.E.2d 589 [1998], quoting CPLR 7802[d]; see *Matter of Romeo v. New York State Dept. of Educ.*, 39 A.D.3d 916, 917, 833 N.Y.S.2d 298 [2007]; *Matter of Elinor Homes Co. v. St. Lawrence*, 113 A.D.2d 25, 28, 494 N.Y.S.2d 889 [1985]). The “interested persons” standard of CPLR 7802(d) is “more liberal than that provided in CPLR 1013” for intervention in other civil actions (*Matter of Tennessee Gas Pipeline Co. v. Town of Chatham Bd. of Assessors*, 239 A.D.2d 831, 832, 657 N.Y.S.2d 269 [1997]; see *Matter of Greater N.Y. Health Care Facilities Assn. v. DeBuono*, 91 N.Y.2d at 720, 674 N.Y.S.2d 634, 697 N.E.2d 589; *Matter of Ball v. Town of Ballston*, 173 A.D.3d 1304, 1306, 103 N.Y.S.3d 173 [2019], *lv denied* 34 N.Y.3d 903, 112 N.Y.S.3d 694, 136 N.E.3d 429 [2019]). This Court is “vested with all the power of Supreme Court to grant [a]

motion for intervention” (*Auerbach v. Bennett*, 47 N.Y.2d 619, 628, 419 N.Y.S.2d 920, 393 N.E.2d 994 [1979]; see *Matter of Clinton v. Summers*, 144 A.D.2d 145, 147 n., 534 N.Y.S.2d 473 [1988]), and “this permissive determination lies within the [C]ourt's discretion” (*Matter of Pace-O-Matic, Inc. v. New York State Liq. Auth.*, 72 A.D.3d 1144, 1145, 898 N.Y.S.2d 295 [2010]; see *Matter of Clinton v. Summers*, 144 A.D.2d at 147 n., 534 N.Y.S.2d 473). “[W]hen deciding whether to grant such a request, a court may properly balance the benefit to be gained by intervention, and the extent to which the proposed intervenor may be harmed if it is refused, against other factors, such as the degree to which the proposed intervention will delay and unduly complicate the litigation” (*Matter of Pier v. Board of Assessment Review of Town of Niskayuna*, 209 A.D.2d 788, 789, 617 N.Y.S.2d 1004 [1994]), and whether any party would be prejudiced (see *Jones v. Town of Carroll*, 158 A.D.3d 1325, 1328, 72 N.Y.S.3d 657 [2018], *lv dismissed* 31 N.Y.3d 1064, 77 N.Y.S.3d 332, 101 N.E.3d 974 [2018]).

The three individual proposed intervenors are minority and/or disabled City residents who rely upon public transportation. They aver as to their preference to take advantage of early voting and as to how their ability to do so will be hampered by the locations of the early voting polling places chosen by the Board. The president of the NAACP submitted an affidavit explaining that promoting and protecting voting rights is a critical part of the NAACP's mission, and setting forth how the location of early voting polling places in Rensselaer County impacts both specific NAACP members and other voters of color. Finding that all four proposed intervenors have thus established that they qualify as “interested persons,” we must next determine whether to exercise our discretion to permit them to intervene.

*3 Although the motion to intervene was filed quite late in the process, which we do not condone, we note that the NAACP had been informally involved with this situation for two years, writing letters to respondents and expressing its concerns with the selections and selection process for early voting sites. The record contains an affidavit from an individual who identified himself as a member of the NAACP and described his efforts to promote voting in the City, as well as an affidavit from proposed intervenor Sharon Ferguson, a voter with no vehicle access who explained her difficulty in reaching the early voting polling places; she is also an NAACP member. As noted above, the timing of the motion is not ideal, and surely the better practice would have been for the proposed intervenors to seek intervention in Supreme

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Court shortly after commencement. Nonetheless, considering the well-documented history of this dispute, respondents cannot credibly claim surprise or prejudice arising from the assertions of either the NAACP or Ferguson specifically.

The proceeding will not be delayed, as the proposed intervenors have not sought an adjournment or to file a separate brief but have adopted petitioner's brief and arguments (see *Jones v. Town of Carroll*, 158 A.D.3d at 1326–1328, 72 N.Y.S.3d 657). Similarly, although anyone seeking to intervene must provide, with the motion papers, “a proposed pleading setting forth the claim or defense for which intervention is sought” (CPLR 1014; see *Matter of Zehnder v. State of New York*, 266 A.D.2d 224, 224–225, 697 N.Y.S.2d 347 [1999]), the proposed intervenors have indicated that they adopt petitioner's arguments, are generally seeking the same relief and their claim is fleshed out in letters – which are included in the record – that were sent to respondents by the NAACP and its coalition partners (see *Jones v. Town of Carroll*, 158 A.D.3d at 1328, 72 N.Y.S.3d 657). Under these circumstances, we exercise our discretion to grant the motion to intervene (see e.g. *McDermott v. McDermott*, 119 A.D.2d 370, 374, 507 N.Y.S.2d 390 [1986], *appeal dismissed* 69 N.Y.2d 1028, 517 N.Y.S.2d 938, 511 N.E.2d 81 [1987]).

The three individual proposed intervenors have standing in this matter as they are registered to vote in Rensselaer County, have expressed that they are interested in early voting and indicated that they would have difficulty reaching the current early voting polling places (see e.g. *Matter of Krowe v. Westchester County Bd. of Elections*, 155 A.D.3d 672, 672–673, 63 N.Y.S.3d 509 [2017]). The NAACP has established organizational standing to sue “[b]ecause one or more of its members would have standing individually to sue, the interests asserted herein are germane to its purpose and the participation of the individual members is not required” (*Matter of Ziemba v. City of Troy*, 37 A.D.3d 68, 72, 827 N.Y.S.2d 322 [2006], *lv denied* 8 N.Y.3d 806, 832 N.Y.S.2d 488, 864 N.E.2d 618 [2007]; see *Rudder v. Pataki*, 93 N.Y.2d 273, 278, 689 N.Y.S.2d 701, 711 N.E.2d 978 [1999]). Having found that the proposed intervenors have standing, the case may proceed on the merits. Whether petitioner has standing is rendered academic (see *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 813, 766 N.Y.S.2d 654, 798 N.E.2d 1047 [2003], *cert denied* 540 U.S. 1017, 124 S.Ct. 570, 157 L.Ed.2d 430 [2003]).

In reviewing the Board's designation of polling places, as with other administrative actions undertaken without a hearing,

this Court “may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious” (*Flacke v. Onondaga Landfill Sys., Inc.*, 69 N.Y.2d 355, 363, 514 N.Y.S.2d 689, 507 N.E.2d 282 [1987]; accord *Matter of Beer v. New York State Dept. of Envtl. Conservation*, 189 A.D.3d 1916, 1918, 138 N.Y.S.3d 684 [2020]; see CPLR 7803[3]). When conducting this analysis, “we are mindful that judicial review of administrative determinations is generally limited to the reasons provided by the agency and to the facts and record adduced before the agency” (*Matter of Hutchinson v. Annucci*, 189 A.D.3d 1850, 1854, 136 N.Y.S.3d 560 [2020]; see *Matter of National Fuel Gas Distrib. Corp. v. Public Serv. Commn. of the State of N.Y.*, 16 N.Y.3d 360, 368, 922 N.Y.S.2d 224, 947 N.E.2d 115 [2011]; see also *Matter of Montauk Improvement v. Proccacino*, 41 N.Y.2d 913, 914, 394 N.Y.S.2d 619, 363 N.E.2d 344 [1977]). However, an unsupported determination cannot stand. “Absent a predicate in the proof to be found in the record, an unsupported determination must be set aside as without rational basis and wholly arbitrary” (*Metropolitan Taxicab Bd. of Trade v. New York City Taxi & Limousine Commn.*, 18 N.Y.3d 329, 334, 937 N.Y.S.2d 153, 960 N.E.2d 944 [2011] [internal quotation marks, brackets, ellipses and citations omitted]).

*4 Turning to the merits, in designating early voting polling places, the Board “shall have at least one polling place” in the City (as Rensselaer County's most populous municipality) and, because the City has public transportation, “such polling place shall be situated along such transportation routes” (Election Law § 8–600[2][a]). Election Law § 8–600(2)(e) further states that any early voting polling place “shall be located so that voters in the county have adequate and equitable access, taking into consideration population density, travel time to the polling place, proximity to other early voting poll sites, public transportation routes, commuter traffic patterns and such other factors the board of elections deems appropriate” (see 9 NYCRR 6211.1[c]).

The Board failed to issue any contemporaneous explanation as to how it settled upon the early voting polling places it selected in 2020 or 2021. It further claimed to have no records documenting its deliberations or review when it did so in 2020, a telling absence given the numerous communications to the Board from petitioner and others regarding the need for a polling place in the City, the unsuitability of Holy Cross for that site, and the potential for moving it elsewhere.¹ The Board also gave no substantive explanation when rejecting

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the entreaties of petitioner and others to site an early voting polling place at one of four proposed alternatives in the City in 2021. Instead, as noted by Supreme Court, the Commissioners merely made various assertions in a conclusory manner, lacking factual findings or bases to support their claims and ultimate determination that Holy Cross met “all [s]tate and [f]ederal guidelines ... and continue[d] to be the best option for all residents of Rensselaer County.”²

In attempting to explain their actions after the fact, the Commissioners baldly averred that they had considered all the statutory factors as part of a “rigorous process” to establish early voting polling places. Yet, they provided few specifics as to the information they relied upon or how any of the required factors supported their determination. For example, they broadly averred that, “[w]ith respect to travel times, proximity, transportation routes, traffic patterns, and other factors, [they] looked at and studied a map of Rensselaer County, and, as informed by [their] working knowledge of travel times, proximity, transportation routes, traffic patterns, population density, and other factors,” divided the County in half and sought to locate one early voting polling place in each half. The source of their “working knowledge” is unclear; simply living in the locality or having previously been responsible for overseeing prior elections does not necessarily equate to adequate knowledge of things such as traffic patterns and population density.

*5 The Commissioners mentioned specific factors that they considered, such as whether the suburban sites were on major thoroughfares and whether the selected locations had adequate parking. As for the Holy Cross site, they note that it has a large hall, is located four tenths of a mile from the City's largest public housing project, and is located on one major thoroughfare and adjacent to another major residential and commuter road. The Commissioners specifically rejected a proposed site in the City for, among other reasons, the lack of bus service directly in front of that site and that residents would have to walk several blocks to a bus stop. They otherwise referenced public transportation routes in conclusory fashion but notably failed to indicate how those routes impacted their selection of any early voting site or even whether the Holy Cross location was on or near one as required by Election Law § 8-600(2)(a). In fact, the Holy Cross site does not appear to provide convenient access to public transportation for many residents. Moreover, one of the suburban sites is located nearly two miles away from the closest bus stop, requiring bus-riding voters to walk

that distance along roads that, in some spots, do not have sidewalks.

Upon our review of the record, we conclude that the Board did not adequately address “whether the early voting site[s] are] on or near public transportation” (9 NYCRR 6211.1[c][2][iv]). The failure to address that mandatory factor “precludes meaningful review of the rationality of” the Board's siting determination, renders the decision arbitrary and capricious and, by itself, warrants annulment (*Matter of Figel v. Dwyer*, 75 A.D.3d 802, 804, 907 N.Y.S.2d 75 [2010]; see *Matter of Acosta v. New York City Dept. of Educ.*, 16 N.Y.3d 309, 318–319, 921 N.Y.S.2d 633, 946 N.E.2d 731 [2011]; *Matter of Menon v. New York State Dept. of Health*, 140 A.D.3d 1428, 1430–1431, 34 N.Y.S.3d 667 [2016]). The Board failed to meaningfully address most of the other factors as well. Accordingly, Supreme Court properly granted the petition and annulled the Board's determination designating early voting polling places for the 2021 election (see e.g. *Matter of Krowe v. Westchester County Bd. of Elections*, 155 A.D.3d at 673, 63 N.Y.S.3d 509).

We note that Supreme Court's June 7, 2021 judgment required respondents to select early voting polling places that comply with Election Law § 8-600 “by the earliest date practicable.” On June 24, 2021, this Court vacated the statutory stay of that judgment. Nonetheless, there is no indication that respondents have complied with the judgment.³ Accordingly, we find it necessary to set forth a deadline of September 3, 2021 for respondents' compliance.

Lynch, Clark, Pritzker and Colangelo, JJ., concur.

ORDERED that the motion is granted, without costs.

ORDERED that the judgment is affirmed, without costs, and, by September 3, 2021, respondents shall select early voting polling places for the 2021 general election that provide adequate and equitable access for all voters in Rensselaer County, including voters in the City of Troy, and otherwise comply with Election Law § 8-600.

All Citations

--- N.Y.S.3d ----, 2021 WL 3774203, 2021 N.Y. Slip Op. 04785

Footnotes

- 1 The Board affirmatively represented that it had no relevant documents in response to a Freedom of Information Law request by a coalition of community organizations (one of which is the NAACP) and petitioner's demand for documents related to its determination and consideration of any possible alternative sites for early voting. However, numerous documents in the record, including letters sent to the Board by the coalition, appear to be responsive to those requests.
- 2 The Commissioners have stated that they received approval of their selected early voting polling places from the State Board of Elections. The record does not include any proof of such approval – aside from the Commissioners' affidavits – nor specify exactly what the State Board approved. Notably, Election Law § 8-600(2) and related regulations do not require State Board approval of early voting polling places, except to assure that they are accessible to voters with disabilities (*see* Election Law §§ 4-104[1-b], [1-c]; 8-600[2][e]; 9 NYCRR 6206.1, 6206.2, 6211.1[c][1]).
- 3 The Board's website still lists the three prior sites and the Board's office as locations for early voting (*see* <https://www.rensc0.com/departments/board-of-elections/early-voting-information> [last accessed Aug. 19, 2021]). In their submissions before this Court, respondents have represented that the Board's offices in the City provided residents with a fourth option for early voting, going so far as to represent that 93 voters cast their ballots at the Board's offices during the June 2021 primary. Notably, the early voting statute specifies that voters shall be able to cast their ballot in the same manner as on election day, i.e., by completing a ballot and by placing the ballot in a ballot scanner (*see* Election Law §§ 8-312[1], [2]; 8-600[6]). At oral argument, respondents' counsel confirmed that voters could obtain absentee ballots at the Board's offices during early voting hours, but regular in-person early voting was not available at that location during the June 2021 primary. Manifestly, providing an opportunity to apply for and complete an absentee ballot does not constitute early voting as defined by the statute, and respondents' argument to the contrary is misguided.

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