



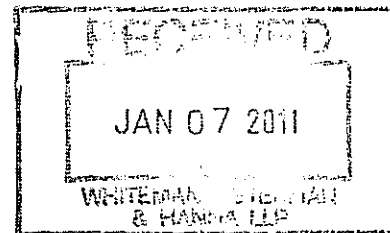
THOMAS D. NOLAN, JR.  
Justice

STATE OF NEW YORK  
SUPREME COURT CHAMBERS  
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Mark F. Cacoza  
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January 5, 2011



Whiteman Osterman & Hanna LLP  
One Commerce Plaza  
Albany, New York 12260

**RE: SARATOGA CITIZEN v FRANCK**  
**RJI No. 45-1-2010-1483**  
**Index No. 20103368**

Dear Counselor(s):

Enclosed please find original Decision, Order and Judgment in the above-entitled matter. By copy of this letter, I am forwarding copy of same to remaining attorneys. All original motion papers are herewith being transmitted to the Supreme Court Clerk/County Clerk for filing.

Very truly yours,

THOMAS D. NOLAN, JR.  
Supreme Court Justice

TDN/lc  
Enclosure

cc: FitzGerald Morris Baker Firth P.C.  
Rice & Justice  
DeVall and DeVall  
Supreme Court Clerk

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF SARATOGA

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SARATOGA CITIZEN, INC., PATRICK KANE, PATRICK JANKOWSKI,  
COLLEEN BOARDMAN, JESSICA FLEMING, LINDA HODDY,  
LINDA R. KRAUS and LORRAINE WRIGHT,  
Petitioners.

**DECISION, ORDER AND JUDGMENT**

**RJI No. 45-1-2010-1483**

**Index No. 20103368**

For a Judgment Pursuant to Article 16 of the Election Law and  
Article 78 of the Civil Practice Law and Rules,

-against-

JOHN P. FRANCK, City Clerk of the City of Saratoga Springs,  
Respondent.

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**PRESENT: HON. THOMAS D. NOLAN, JR.**  
**Supreme Court Justice**

APPEARANCES: WHITEMAN OSTERMAN & HANNA LLP  
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One Commerce Plaza  
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59 Franklin Street  
Saratoga Springs, New York 12866

This proceeding seeks a judgment reversing a decision of the respondent, the City Clerk of the City of Saratoga Springs, rejecting a petition filed by petitioner Saratoga Citizen, Inc. to place on the ballot a proposal to amend the City Charter to replace the City's current commission form of government with a council-manager form.

### **Background**

Since Saratoga Springs became a city in 1915, it has operated under a Charter which provides for a commission form of government in which an elected mayor and four elected commissioners constitute the City's legislative body and act as the heads of the City's various departments. In essence, the Charter blends the legislative and executive branches of government.

Saratoga Citizen, Inc., a not-for-profit corporation, whose members include the individual petitioners, drafted a proposed local law to amend the City's Charter to modify the structure and operation of the City's government by keeping an elected mayor and four city councilors as the legislative body but providing for a City Manager as the "chief executive officer" to be in charge of essentially all day-to-day operations of the departments of the City.

To have its proposed local law placed before the qualified electors of the City, petitioner must comply with Municipal Home Rule Law § 37 and file with the City Clerk a petition containing the signatures of 10 percent of the City's qualified electors. On July 20, 2010, petitioner filed a petition, and on August 19, 2010, respondent issued a certificate under Municipal Home Rule Law § 37 (5) stating that the petition did not comply with all the requirements of the law. Specifically, respondent found that the petition did not satisfy Municipal Home Rule Law § 37 (11) because the proposed local law did not include "a plan to

provide money and reserves to meet such proposed expenditures”, that the petition, when submitted, was not “fastened together” as required by Municipal Home Rule Law § 24 (1) (1), and lastly, that it did not contain sufficient valid signatures. In his review and for various reasons, respondent invalidated 287 of the 1,280 signatures set forth in the petition, leaving petitioners 144 short of the 1,137 signatures the respondent found were the minimum required. As a result of the respondent’s action, the proposed local law was not included on the ballot for the November 2, 2010 general election.

In its verified petition, pursuant to Article 16 of the Election Law and Article 78 of the CPLR, petitioners seek judgment annulling and vacating respondent’s August 17, 2010 determination and compelling respondent to certify that the petition complies with Municipal Home Rule Law § 37. Respondent answers and seeks judgment dismissing the petition.

#### **A Preliminary Matter - Intervention**

Two non-parties, an unincorporated association called “SUCCESS”,<sup>1</sup> and Elliott Masie (Masie), a City resident, seek intervention as citizens and taxpayers of Saratoga Springs. They urge, in part, that “Representation of SUCCESS’s interests by respondent is not adequate to protect the broad interests of the members of SUCCESS, its members [*sic*] and the public, all of whom may be bound by a determination in this proceeding”.<sup>2</sup> In addition, one of the group’s leaders explains that “SUCCESS” spearheaded opposition in 2006 to another Charter amendment referendum which sought to change the current form of the City’s government to a strong mayor

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<sup>1</sup>The full name of the group is “Saratogians United to Continue the Charter Essential to Sustain our Success”.

<sup>2</sup>Affidavit of John Carter Rice, attorney for SUCCESS, paragraph 3.

model and that “[t]he general public will be adversely affected in profound and pervasive ways if the Petition is not dismissed”.<sup>3</sup> Proposed intervenor Masie asserts that “as both [*sic*] Saratoga Springs citizen, taxpayer and businessman, I can bring before the court the analysis of a business owner as it relates to a significant and glaring fault in the Local Law proposed by the Petitioners; the failure of the Local Law to include a ‘fiscal note’ as required by New York State Municipal Home Rule Law Section 37 (11)”.<sup>4</sup>

Their respective motions include proposed answers should they be granted party status. Petitioners oppose both motions. Respondent takes no position.

In opposition, petitioners contend that the interests of SUCCESS and its members and Masie are no different from the interests of the public at large and that those interests are adequately represented by respondent.

### **Intervention**

In special proceedings, “other interested persons” may be allowed to intervene [CPLR 7802 (d)] and “[s]uch intervention, which is more liberal than provided in CPLR 1013 (citation omitted), lies within the discretion of the court”. Matter of Tennessee Gas Pipeline Co. v Town of Chatham Bd. of Assessors, 239 AD2d 831, 833 (3<sup>rd</sup> Dept 1997). Yet, to achieve party status, proposed intervenors must substantiate with proof, not speculation, that they have a “real and substantial interest” in the outcome. Matter of Bernstein v Feiner, 43 AD3d 1161 (2<sup>nd</sup> Dept 2007). Even if such interest is demonstrated, intervention will not lie if “the rights and interests of the prospective parties are already adequately represented”. Quality Aggregate, Inc. v Century

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<sup>3</sup>Affidavit of Remigia Foy, paragraph 17.

<sup>4</sup>Affidavit of Elliott Masie, paragraph 2.

Concrete Co., 213 AD2d 919 (3<sup>rd</sup> Dept 1995).

Here, a comparison of the prospective intervenors' proposed answers with the answer of respondent shows no significant difference. No new or additional defenses or legal arguments are raised by the proposed intervenors on the issue whether petitioners satisfied the Municipal Home Rule Law's requirements. Rather, the arguments presented in the respective affidavits in support of intervention go to the merit or more precisely, the claimed lack of merit, of the proposal advanced by petitioners and seem principally tailored to convince the electorate, if the proposal is submitted at referendum, to vote against it.

In exercising its discretion, the court does not find sufficient cause to afford SUCCESS or Masie party status as intervenors. Yet, SUCCESS and Masie are granted amici curiae status and their respective arguments will be considered. see Matter of Pace-O-Matic, Inc. v New York State Liquor Auth., 72 AD3d 1144 (3<sup>rd</sup> Dept 2010).

The motions of SUCCESS and Masie are denied, without costs, and on the court's own motion, both are granted amici curiae status.

### **The Binding Requirement**

Now the merits of this proceeding. First addressed is the claim that the petition was properly rejected by respondent because the sheets in the petition were not properly fastened. Municipal Home Rule Law § 24 (1) requires that a petition seeking a referendum be signed and authenticated "in the manner provided by the election law" for nominating petitions and that "the secured sheets so signed and authenticated, when fastened together and offered for filing shall be deemed to constitute one petition".

Here, the petition offered for filing consists of 87 sheets. When petitioner Patrick Kane

(Kane) delivered it to the Assistant City Clerk, the 87 sheets were not fastened and then either a City employee or Kane himself applied a metal binder clip to hold the sheets together.

Before the Election Reform Act of 1992 (L 1992, ch 79) and the Ballot Access Law of 1996 (L 1996, ch 79) manifested the Legislature's intent to liberalize the requirements for designating and nominating petitions, the binding of a petition with a spring clip was held to be a fatal defect invalidating a candidate designating petition. Matter of Bouldin v Scaringe, 133 AD2d 287 (3<sup>rd</sup> Dept 1987), lv denied 70 NY2d 604 (1987). Now under the more lenient Election Law, a flaw in the binding requirement is not automatically fatal to a petition absent evidence of fraud. Matter of Hogan v Goodspeed, 196 AD2d 675 (3<sup>rd</sup> Dept 1993), affd 82 NY2d 710 (1993). Indeed, the New York State Board of Elections has adopted a regulation governing binding that provides that "any two or more petition sheets shall be securely fastened together by any means which will hold the pages together in numerical order". [9 NYCRR § 6215.1 (c)] (emphasis added).

Election Law § 6-134 (2), now in effect, also provides that "[s]heets of a designating petition shall be delivered to the board of elections in the manner prescribed by regulations that shall be promulgated by the state board of elections...and that when a determination is made that a designating petition does not comply with such regulation, the candidate shall have three business days from the date of such determination to cure the violation". The regulation further provides that "within two business days of the receipt of the petition, the board with whom such petition was filed shall review the petition to determine whether the petition complies with...binding requirements of these regulations", [9 NYCRR § 6517.7 (a)], and that "in the event that...the board determines that a petition does not comply with these regulations, the board

shall forthwith notify the candidate or candidates named on the petition of its determination and the reasons therefor”. [9 NYCRR § 6215.7 (b)]. The regulations then specify the means of giving the notice of noncompliance [9 NYCRR § 6215.7 (c)] and provide that “[a] candidate may, within three business days of the date of determination that the petition does not comply with these regulations, cure the violation...”.

Here, under these regulations, respondent, if he concluded that the binding requirement for this petition had not been satisfied, was thus required to make that decision within two business days of receipt of the petition and then give notice of such determination to the filer, in this case, Saratoga Citizen, Inc. Respondent did not give such notice, and thus petitioner Saratoga Citizen, Inc. was deprived of the opportunity to cure the defect. In the court’s analysis, respondent thus waived his right to invalidate the petition on the ground that it was not “securely fastened”.

Even if there were no waiver, the use of the metal binder clip satisfies the regulation that the petition be “securely fastened...to hold the pages together in numerical order”. There is no evidence that the pages of this petition were not appropriately fastened together in numerical order at any time, namely from the moment of submission to respondent to the issuance of respondent’s rejection resolution. There is no evidence that any pages were either out of order or that the method of affixation hampered or hindered respondent’s review.

**Alleged Noncompliance with Municipal Home Rule Law § 37 (11)**

Municipal Home Rule Law § 37 (11) provides, in full, as follows:

No such petition for a proposed local law requiring the expenditure of money shall be certified as sufficient by the city clerk or become effective for the purposes of this section unless there shall be



submitted, as part of such proposed local law, a plan to provide moneys and revenues sufficient to meet such proposed expenditures. This restriction shall not prevent the submission of a local law to adopt a new charter or to reorganize the functions of city government, or a part thereof, relying partly or solely on normal budgetary procedures to provide the necessary moneys to meet the expenses of city government under such reorganization, whether or not such reorganization includes the creation of new offices, provided only that such reorganization shall not require specific salaries or the expenditure of specific sums of money not theretofore required.

In brief, the respondent and the amici curiae urge that the petition violates this provision because section 2.1.5 of the proposed local law sets forth proposed salaries proposed for the mayor and councilors, and this petition did not contain a “fiscal note”. As an initial matter, there is no case law interpreting § 37 (11). The court disagrees with respondent’s interpretation. A plain reading of the statute excuses the necessity of a fiscal note when the proposed local law advocates a reorganization of government to be funded by the normal budgeting process and does not include specific salaries or the expenditure of specific sums of money not “theretofore required”. In this case, the Mayor and City Council members are presently compensated in amounts greater than those set in the proposed local law and the salaries included in the proposal were necessarily “theretofore required”. The speculation about dramatically increased costs of operating City government proffered by respondent and the amici curiae in their opposition, if the proposal were adopted, has no relevance to the application of § 37 (11). To be sure, all those arguments and/or claims, valid or not, can be raised in opposition to the adoption of the local law, but they are not sufficient to defeat the effort to submit the proposed local law to a referendum. Whether the adoption of this local law will result in increased, or for that matter decreased costs, is simply not part of the calculus in determining whether the petition meets § 37

(11)'s basic requirements for placement of the proposition on the ballot. Respondent's interpretation of § 37 (11) is rejected, and his decision to deny certification for that reason cannot stand.

**Propriety of Respondent's Determination of the Number of Valid Signatures**

Now, since the legal impediments to the petition have been rejected, the court addresses whether there are sufficient valid signatures in the petition.

First addressed are the 11 sheets invalidated in their entirety by respondent on the ground that there were uninitialed alterations in the subscribing witness's statements.

Those 11 sheets are numbered 2, 3, 23, 24, 33, 53, 54, 58, 61, 76, and 84 and resulted in the disqualification of 167 signatures.<sup>5</sup> In support of their petition, petitioners submit affidavits from the six subscribing witnesses for those 11 sheets, to wit: Patrick Kane (Sheets 2, 3, and 76), Thomas Monteleone (Sheets 23 and 84), Richard Thompson (Sheet 24), John Kirwin (Sheet 33), Robert O. Wright (Sheets 53, 54, and 58), and Bonita Design (Sheet 61).

The law is settled that alterations made to the witness statement which are unexplained and uninitialed will cause the entire petition sheet to be invalidated. Matter of McGuire v Gamache, 5 NY3d 444, 448 (2005). Yet, when the subscribing witness, either through testimony given at a hearing or an affidavit submitted on motion, provides a credible explanation for the making of the uninitialed alteration, and when there is no credible evidence of fraud in the petition process, the underlying signatures need not be nullified. Matter of Oberman v Romanowski, 65 AD3d 992 (2<sup>nd</sup> Dept 2009); Matter of Rosmarin v Belcastro, 44 AD3d 1055 (2<sup>nd</sup>

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<sup>5</sup>An additional 21 signatures on those 11 sheets were invalidated for reasons other than the uninitialed alterations in the subscribing witness's statements.

Dept 2007); Matter of Curley v Zacek, 22 AD3d 854, 957 (3<sup>rd</sup> Dept 2005), lv denied 5 NY3d 714 (2005).

Here, the six subscribing witnesses, in detail, explain the circumstances surrounding the making of the alterations on the 11 sheets in issue and inasmuch as there is no evidence controverting their affidavits or asserting any fraud in the gathering of signatures offered by respondent, the 167 signatures on these 11 sheets are valid and when included in the count, results is a total of 1,160 valid signatures, a number sufficient in and of itself to satisfy the minimum 1,137 necessary to validate the petition.

Nonetheless, the additional signatures which petitioners contend were wrongly invalidated are reviewed. The first category consists of 82 signatures stricken on the ground that the signatories were not registered voters. Petitioners contend that 44 of those 82 signatures should be reinstated based upon the certified 2009 City voter registration records of the Saratoga County Board of Elections. The court addresses each individually and rules as follows:

<u>Petition Sheet No. and Line No.</u>	<u>Court Ruling</u>
Sheet 4, Line 8	Voter Duly Registered - Signature Valid
Sheet 4, Line 9	Voter Duly Registered - Signature Valid
Sheet 5, Line 4	Voter Duly Registered - Signature Valid
Sheet 6, Line 1	Voter Duly Registered - Signature Valid
Sheet 10, Line 3	Voter Duly Registered - Signature Valid
Sheet 12, Line 7	Voter Duly Registered - Signature Valid
Sheet 12, Line 9	Voter Duly Registered - Signature Valid
Sheet 15, Line 4	Voter Duly Registered - Signature Valid
Sheet 26, Line 15	Voter Duly Registered - Signature Valid
Sheet 26, Line 16	Voter Duly Registered - Signature Valid
Sheet 27, Line 1	Voter Duly Registered - Signature Valid
Sheet 30, Line 8	Voter Duly Registered - Signature Valid
Sheet 35, Line 4	Voter Duly Registered - Signature Valid
Sheet 35, Line 5	Voter Duly Registered - Signature Valid
Sheet 35, Line 6	Voter Duly Registered - Signature Valid

Sheet 36, Line 5	Voter Duly Registered - Signature Valid
Sheet 37, Line 2	Voter Duly Registered - Signature Valid
Sheet 39, Line 14	Voter Duly Registered - Signature Valid
Sheet 46, Line 16	Voter Duly Registered - Signature Valid
Sheet 51, Line 3	Voter Duly Registered - Signature Valid
Sheet 51, Line 4	Voter Duly Registered - Signature Valid
Sheet 51, Line 13	Voter Duly Registered - Signature Valid
Sheet 52, Line 5	Voter Duly Registered - Signature Valid
Sheet 55, Line 1	Voter Duly Registered - Signature Valid
Sheet 55, Line 18	Voter Duly Registered - Signature Valid
Sheet 57, Line 6	Voter Duly Registered - Signature Valid
Sheet 57, Line 19	Voter Duly Registered - Signature Valid
Sheet 60, Line 4	Signature, Name and Address Do Not Match Registered Voter - Signature Properly Invalidated
Sheet 60, Line 16	Voter Duly Registered - Signature Valid
Sheet 62, Line 4	Voter Duly Registered - Signature Valid
Sheet 62, Line 10	Voter Duly Registered - Signature Valid
Sheet 65, Line 3	Voter Duly Registered - Signature Valid
Sheet 67, Line 4	Voter Duly Registered - Signature Valid
Sheet 67, Line 5	Voter Duly Registered - Signature Valid
Sheet 69, Line 6	Voter Duly Registered - Signature Valid
Sheet 71, Line 4	Voter Duly Registered - Signature Valid
Sheet 71, Line 5	Voter Duly Registered - Signature Valid
Sheet 71, Line 7	Voter Duly Registered - Signature Valid
Sheet 71, Line 6	Voter Duly Registered - Signature Valid
Sheet 71, Line 9	Voter Duly Registered - Signature Valid
Sheet 71, Line 10	Voter Duly Registered - Signature Valid
Sheet 73, Line 14	Voter Duly Registered - Signature Valid
Sheet 79, Line 7	Voter Duly Registered - Signature Valid
Sheet 85, Line 16	Voter Duly Registered - Signature Valid

In summary, 43 of these signatures are valid and are added to the total count.

Next considered are individual signatures in the 11 pages stricken on the ground that these witnesses are not duly registered voters. Petitioners contest the propriety of that objection in regard to 8 of the 12 signatures and assert that the 8 were duly registered voters according to the certified 2009 City voter registration records of the Saratoga County Board of Elections.

Petition Sheet No. and Line No.

Court Ruling

Sheet 2, Line 7	Voter Duly Registered - Signature Valid
Sheet 23, Line 4	Voter Duly Registered - Signature Valid
Sheet 23, Line 5	Voter Duly Registered - Signature Valid
Sheet 24, Line 2	Voter Duly Registered - Signature Valid
Sheet 33, Line 15	Voter Duly Registered - Signature Valid
Sheet 33, Line 16	Voter Duly Registered - Signature Valid
Sheet 53, Line 7	Voter Duly Registered - Signature Valid
Sheet 54, Line 5	Voter Duly Registered - Signature Valid

In summary, the eight signatures are valid and are added to the total count.

Next considered are signatures invalidated on the ground that there were uninitialed alterations in the date line of these signatures. On Sheet 3, three signatures are sought to be reinstated - lines 5, 8, and 9 - supported by the reply affidavit of subscribing witness Kane (paragraph 17) who explains that he corrected the incorrect date of "6/17/2010" placed on the petition to reflect the actual date the petition was signed by these three individuals, to wit: "7/17/2010", but did not initial the change. His explanation is not challenged and these three signatures are ruled valid and are added to the total count. On Sheet 66, two signatures are sought to be reinstated at lines 12 and 13. Again, the reply affidavit of subscribing witness Kane states (paragraph 18) that he changed the date from "6/17/2010" to "7/17/2010" to reflect the correct date these witnesses signed the petition but did not initial the changes. His explanation is not challenged. These two signatures are ruled valid and added to the count. Next, on Sheet 76, two signatures are sought to be reinstated, lines 6 and 7. Again, the reply affidavit of subscribing witness Kane (paragraph 20) explains that these witnesses signed on "7/8/2010" but the date "7/17/2010" was placed on the petition and that he corrected the error but did not initial the changes. His explanation is not challenged. These two signatures are ruled valid and are added

to the count.

Next, two signatures are Sheet 45 - lines 4 and 5 were invalidated because of uninitialed alterations. The subscribing witness, Brent Wilkes, in a reply affidavit (paragraph 5), explains that he changed the dates from “7/10/2010” to “7/11/2010” to reflect the actual date of these signatures but did not initial the change. His explanation is not challenged. These two signatures are ruled valid and added to the count.

Subscribing witness Bonita Design explains that on Sheet 74, line 16, the subscriber signed the petition on “6/23/2010” but the incorrect date of “6/13/2010” was placed on the petition and that she corrected the date but did not initial the change. Her explanation is not controverted. This one signature is ruled valid and added to the count.

Subscribing witness Robert Wright in an affidavit explains that Sheet 31 - lines 2, 3, 4, 5, and 7, had been signed by the subscribers in his presence on “7/10/2010” but an incorrect date “7/12/2010” had been placed on the sheet and that he wrote over the “2” and changed it to “0” but did not initial the change. His explanation is not challenged. In addition, respondent also invalidated the signature on line 7 on the second ground that she was not a registered voter. The certified voter list shows she was registered. The five signatures on Sheet 31 are ruled valid and added to the count.

Next, in respect to Sheet 57 - line 12, subscribing witness Wright explains in his affidavit that the voter signed on “7/24/2010” but that the wrong date of “7/22/2010” was placed on the petition, and he corrected it but did not initial the change. His explanation is unchallenged. The one signature is valid and added to the count.

To recapitulate, a total of 234 signatures have been validated and thus the petition now

consists of 1227 valid signatures, a number sufficient to satisfy Municipal Home Rule Law § 37.

**Conclusion**

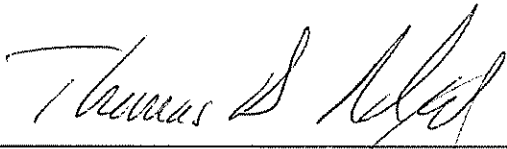
The petition is granted without costs and it is

Adjudged and Decreed that the respondent's determination dated August 19, 2010 is annulled and the petition filed July 20, 2010 under Municipal Home Rule Law § 37 is declared to have 1227 signatures of qualified electors of the City of Saratoga Springs and as a result, respondent is hereby directed forthwith to certify to the City Council that the petition complies with all the requirements of law.

This constitutes the decision, order, and judgment of the court. The original decision, order and judgment is returned to the counsel for petitioners. All original papers are delivered to the Supreme Court Clerk/County Clerk for filing. Counsel for petitioners is not relieved from the applicable provisions of CPLR 2220 relating to filing, entry, and notice of entry of the decision, order and judgment.

So Ordered, Adjudged and Decreed.

DATED: January 5, 2011  
Ballston Spa, New York



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HON. THOMAS D. NOLAN, JR.  
Supreme Court Justice