At a Special Election Part I of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 2nd day of July, **2003**

P R E S E N T:

HON. JOSEPH S. LEVINE,

Justice.

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STANLEY COHEN, ET AL.,

Petitioners,

- against -

Index No. **22806/03**

NYC BOARD OF ELECTIONS, ET AL.,

Respondents.

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The following papers numbered **1** to **3** read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	**1**
Opposing Affidavits (Affirmations)	**2**
Reply Affidavits (Affirmations)	**3**
_____ Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, petitioners move, by order to show cause, for various relief, the most significant of which is an order declaring respondent-candidate Noach Dear ineligible and unqualified to be elected or to serve in the public office of Member of the New York City Council from the 44th Council District for the term of office which commences January 1, 2004; and permanently enjoining Noach Dear and others from circulating

designating petitions on behalf of his candidacy. Respondent Dear, at oral argument and upon a subsequent written submission, seeks an adjournment of the matter. In the alternative, respondent Dear urges the court to dismiss the petition. Respondent's application for an adjournment is denied. Of paramount consideration is the express provision of the Election Law that this is a summary proceeding. This is as it should be, because the time schedule expressly stated in the law is so short that no deliberately conducted or lengthy court proceedings are either contemplated or possible ***(see generally, Matter of Sinicropi,*** 135 NYS2d 77, *affd* 284 App Div 893). The court notes that despite having been served with the petition on Friday, June 27, 2003, counsel for respondent Dear was well-prepared to advance his client's cause and submitted thorough and cogent responsive papers within hours of oral argument.

The record reveals that respondent Dear intends to run for the office of City Council Member from the 44th Council District of the City of New York. To this end, designating petitions in support of his candidacy in the September 9, 2003 Democratic Primary Election are being circulated. Petitioners argue that respondent Dear is not eligible to be elected or serve as a New York City Council Member for the two-year term commencing on January 1, 2004, and thus should not be permitted to continue to circulate petitions. This argument is advanced on the strength of a recent amendment to the New York City Charter's term limits law enacted by the New York City Council in 2002.

Section 1138 of the New York City Charter provides that a person that has previously served as a council member for two or more consecutive terms' is not eligible to be elected or serve unless and until one full term or more has elapsed. Charter §25 (a), as amended by Local Law 27 of 2002, states that a single two-year term does not constitute a full term for purposes of § 1138 of the Charter. The court notes that the validity of Local Law 27 of **2002** was recently upheld by the Second Department in ***Golden*** v ***New York City Council*** (__ AD2d), 2003 ***NY*** App. Div. LEXIS 566 ***appeal denied*** 2003 ***NY*** Lexis 1364. Petitioners argue that since respondent Dear, who was elected to serve as a council member for two four-year terms commencing on January 1, 1994 and January 1, 1998, respectively, is not eligible to serve as a council member for the term commencing on January 1, 2004, because only one two-year term has elapsed since he left office on December 31, 2001, and is therefore ineligible to circulate petitions.

In response, respondent Dear argues that petitioners' application is premature, in that the proper procedural vehicle in which to challenge his qualification/eligibility to serve in office is governed by the procedures set forth in Election Law § 16-102 in a proceeding challenging the designating petition of a potential candidate.

" It is well settled that a court's jurisdiction to intervene in election matters is limited to the powers expressly conferred by statute" ***(Matter of Scaringe v Ackerman,*** 119 AD2d 327, 328, ***affd.*** 68 NY2d 885, ***citing Matter of Mansfield v Epstein,*** 5 NY2d 70, 74; ***Matter***

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[1] The statute is applicable to terms commencing on or after January 1, 1994.

of Lisa v Board of Elections, 54 AD2d 746). While section 16-100 of the Election Law vests the Supreme Court with the broad power to determine any question of law or fact arising under article 16 of the Election Law, section 16-102(2) expressly provides that "[a] proceeding with respect to a petition shall be instituted within 14 days after the last day to file petition . . ."

Notwithstanding petitioners' contention that this application falls outside the procedures set forth in Election Law § 16-102 because it is a challenge to respondent Dear's substantive qualifications for the office (Election Law § 6-122)[2] and not the sufficiency of his designating petition, the court finds that "[i]rrespective of how [petitioners] frame their claim, their attempt to have [respondent's] name removed from the ballot constitutes a contest to the designation or nomination of a candidate for public office pursuant to Election Law § 16-102 and a challenge to a ballot content pursuant to Election Law § 16-104.." ***(Matter of Olma v Dale,*** ___AD2d___, 2003 NY App. Div. LEXIS 6784; ***see Matter of Scaringe,*** 119 AD2d 327, ***aff'd*** [for reasons set forth in Appellate Division] 68 NY2d 885).

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[2] Election Law **16-122** provides:

"A person shall not be designated or nominated for a public office or party position who **(1)** is not a citizen of the state of New York; (2) is ineligible to be elected to such office or position; or (3) who, if elected will not at the time of commencement of the term of such office or position, meet the constitutional or statutory qualifications thereof or, with respect to judicial office, who will not meet such qualifications within thirty days of the commencement of the term of such office."

In ***Matter of Scaringe,*** petitioner sought to prohibit the New York State Board of Elections from placing respondent's name on the ballot for the public office of Member of the New York State Assembly, alleging that respondent was not qualified to hold the office on residency grounds pursuant to the New York State Constitution (art. 111, § 7) and the Election Law (§ 6-122). The court held that:

> Irrespective of the label given to the proceeding or the words used to describe the issue, the relief sought by petitioners seeks judicial intervention in the election process to remove a candidate from the ballot ...[and] clearly constitutes a challenge or contest to the designation or nomination of a candidate for public office. Since Election Law § 16-102 (1) provides a remedy for the relief sought by petitioners, they cannot avoid the time requirement of the statute..."

Based upon the foregoing, the court concludes that the within proceeding seeking a declaration that respondent Dear is ineligible and unqualified to hold office as a council member, and therefore cannot be a candidate pursuant to Election Law § 6-122, must be commenced in accordance with the requirements of Election Law § 16-102 ***(Matter of Scaringe,*** 119 AD2d at 329). As such, this proceeding is premature.

The court notes that, in any event, petitioners have failed to establish their entitlement to injunctive relief. It is well settled that injunctive relief is a drastic remedy and will only be granted if the movants establish a clear right to such relief under the law and the undisputed facts found in the moving papers ***(see Anastasi*** v ***Majopon Realty Corp.,*** 181 AD2d 706, 707). The movants must establish: (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that

a balancing of equities favors the movants' position ***(see Grant*** Co., ***v Srogi,*** **52** NY2d **496,** 517).

As to plaintiffs' request for an injunction enjoining and restraining respondent Dear from continuing the circulation of petitions, the court finds that petitioners have failed to sufficiently demonstrate essential predicates for such relief. While the court finds compelling petitioners' argument that it appears that respondent Dear may indeed be ineligible to serve as a Member of the New York City Council under the newly enacted amendment to the New York City Charter, and the ***Golden*** case affirming the propriety of the enactment appears on its face to apply to respondent Dear, petitioners have not adequately alleged that they would be harmed by the continued circulation of designating petitions unimpeded by this court. Respondent Dear contends, and petitioners do not dispute, that there are some **36,000** registered Democrats in the **44th** Council District eligible to sign petitions, and that only **900** valid signatures are required for placement on the ballot. However, only three instances of signatories to respondent Dear's designating petitions were cited by petitioners. In any event, petitioner may renew their application before this court on the return date for all election matters on August **4,2003.**

Accordingly, the relief requested in the petition is denied in its entirety; respondent Dear's motion to dismiss is granted and the petition is dismissed without prejudice.

ENTER,

J.S.C.

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