

STATE OF NEW YORK
SUPREME COURT: COUNTY OF NIAGARA

BLAKE LEMOI,
KATHRYN FOGLE,
GINA PASCERI,
JOSEPH KIBLER,

Petitioners,

VERIFIED PETITION

Index No. _____

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

-against-

CITY OF LOCKPORT,
MICHELLE ROMAN, Mayor,
PAUL M. BEAKMAN, JR., Council President,
LUKE D. KANTOR, Council Member,
MARK S. DEVINE, Council Member,
MARGARET LUPO, Council Member,
LISA SWANSON-GELLERSON, Council Member,
LOCKPORT PROFESSIONAL FIREFIGHTERS IAFF LOCAL 963,

Respondents.

Petitioners, BLAKE LEMOI, KATHRYN FOGLE, GINA PASCERI,
JOSEPH KIBLER, by and through their attorney James Ostrowski as and for their
Verified Petition seeking relief pursuant to Article 78 of the New York Civil
Practice Law and Rules, respectfully allege:

INTRODUCTION

1. This Article 78 proceeding arises from the failure of the City of Lockport ("City") and other respondents to meet their "good governance" obligations with respects to meetings held on December 19, 2022.
2. The City of Lockport ("City") and other respondents failed to follow proper procedure for calling a special meeting on December 19, 2022, pursuant to §51 of the City of Lockport Charter.
3. The City failed to properly notify the public of its December 19, 2022, meeting in violation of the City Charter and New York State's Public Officers Law.
4. The City violated the City Charter and New York State's Open Meetings Law by failing to follow proper procedures to conduct an executive session and had no basis in law for an executive session.
5. No tie vote existed for the Mayor to cast the tie breaking vote.
6. The City of Lockport Code of Ethics prohibited Alderman Mark Devine from voting on Resolution 121922.2

PARTIES

7. Petitioners, BLAKE LEMOI, KATHRYN FOGLE, GINA PASCERI, JOSEPH KIBLER, are residents and taxpayers in the City of Lockport, New York.

8. KATHRYN FOGLE and GINA PASCERI were members of the City of Lockport Council on December 19, 2022. GINA PASCERI has since resigned her office.
9. Respondent, City of Lockport, is a municipal corporation organized pursuant to the laws of the State of New York with its principal office located at One Locks Plaza, Lockport, New York 14094, and it is a "public body" as that term is defined in Public Officers Law §102(2).
10. MICHELLE ROMAN is the mayor of the City of Lockport and participated in the meeting of December 19, 2022
11. PAUL M. BEAKMAN, JR., is the Council President of the City of Lockport and participated in the meeting on December 19, 2022.
12. LUKE D. KANTOR, MARK S. DEVINE, MARGARET LUPO, and LISA SWANSON-GELLERSON, are Council Members of the City of Lockport and are joined herein as possibly necessary parties.
13. MARGARET LUPO, and LISA SWANSON-GELLERSON were not on the Council on December 19, 2022 and are added here only as possibly necessary parties.
14. Lockport Professional Firefighters IAFF Local 963 was affected by the resolution passed on December 19, 2022 and is joined herein as possibly necessary party.

VENUE

15. Pursuant to CPLR §506(b), Niagara County is designated as the venue for this proceeding because it is the county where Respondent, City of Lockport, took the actions in which the Petitioners complains in this Verified Petition.

REQUIREMENTS OF THE CITY OF LOCKPORT CHARTER FOR SPECIAL MEETINGS

16. Upon information and belief, §51 of the City Charter states that "the Mayor, or any three Alderman, may call special meetings, by notice in writing, to be signed by him or them and filed with the City Clerk, which shall be served personally upon the other members of the Common Council or be left at their several residences or usual places of business."

REQUIREMENTS OF PUBLIC NOTICE

17. Upon information and belief, Public Officers Law §104 (1) states that "Public notice of the time and place of the meeting scheduled at least one week prior thereto shall be given or electronically transmitted to the news media and shall be conspicuously posted in or more designated public locations at least seventy-two hours before such meeting.

18. Upon information and belief, Public Officers Law §104 (6) states that "When a public body has the ability to do so, notice of the time and place of a meeting in accordance with subdivision one or two of this section, shall also be conspicuously posted on the public body's internet website.

**REQUIREMENTS OF OPEN MEETINGS AND
EXECUTIVE SESSIONS**

19. Upon information and belief, §52 of the City of Lockport Charter states that: "The sittings of the Common Council shall be public, except when the public interest requires secrecy. Minutes of its proceedings shall be kept by the Clerk, and the same shall at all times be open to the public."

20. Upon information and belief, when the New York State Legislature enacted Article VII of the Public Officers Law, also known as the Open Meetings Law, it issued the following legislation declaration:

It is essential to the maintenance of a democratic society that the public Business be performed in an open and public manner and that the Citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The People must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonwealth will prosper and enable the governmental process to operate for the benefit of those who created it. Public Officers Law §100.

21. Upon information and belief, the Open Meetings Law applies to any "meeting" that falls within the following definition: "the official convening of a public body for the purpose of conducting public business... " Public Officers Law §102(1).
22. Upon information and belief, the Open Meetings law applies to any "public body" which is defined as "any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof... or committee or subcommittee or other similar body consisting of members of such public body or an entity created or appointed to perform a necessary function in the decision-making process." Public Officers Law §102(2).
23. Upon information and belief, Public Officers Law §103 (1) requires every meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with section ninety-five of this article.
24. Upon information and belief, Public Officers Law §105 (1) states that upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or

areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys:

- a. Matters which will imperil the public safety if disclosed;
- b. Any matter which may disclose the identity of a law enforcement agent or informer;
- c. Information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;
- d. Discussions regarding proposed, pending or current litigation;
- e. Collective negotiations pursuant to article fourteen of the civil service law;
- f. The medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation;
- g. The preparation, grading or administration of examinations;
- h. The proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or the sale or exchange of securities

held by such public body, but only when the publicity would substantially affect the value thereof.

VOTES IN COUNCIL; MAYOR TO PRESIDE

25. Upon information and belief, §53 of the City of Lockport Charter states: "In the proceedings of the Common Council, each Alderman shall have one vote. The Mayor may, when present, preside at all meetings of the Common Council, and shall have a casting vote when the votes of the other members are tied."

QUORUM; MAJORITY VOTE

26. Upon information and belief, §54 of the City of Lockport Charter states: A Majority of the Common Council shall be a quorum for the transaction of business, but no tax or assessment shall be ordered, or resolution authorizing the appropriation, expenditure or payment of money, or ordinance be passed or adopted, except by a concurring vote of a majority of all the members of the Common Council in office, which vote shall be by yeas and nays, and a record thereof be entered at large in the minutes."

VOTES BY "YEAS" AND "NAYS"

27. Upon information and belief, §55 of the City of Lockport Charter states: "Upon the demand of any member thereof, the vote upon any resolution or question shall be taken by the yeas and nays of

all the members present, and a record thereof be entered at large in the minutes."

CORPORATION COUNSEL; DUTIES

28. Upon information and belief, §80 of the City of Lockport Charter states: "The Corporation Counsel of said city shall prosecute and defend all actions brought by or against said city, and render such other professional services connected with the affairs of said city as may be require of him by law or by the Common Council."

29. Upon information and belief, Rule 1.7 of 22 NYCRR 1200 states that a lawyer shall not represent a client in a reasonable lawyer would conclude that there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or personal interests.

STANDING

30. Upon information and belief, under Open Meetings Law, any aggrieved person shall have standing to enforce its provisions by the commencement of an Article 78 Proceeding, or an action for declaratory judgment and injunctive relief. Public Officers Law §107(1).

31. The Petitioners are residents and taxpayers residing in the City of Lockport.

RELEVANT FACTUAL BACKGROUND

Improper Meeting Notice

32. The Mayor held an illegal executive session meeting on December 19, 2022, under the guise of a "personnel meeting" to vote on a highly controversial matter that would have a profound financial impact on the city for future generations.
33. Since the City of Lockport's inception it has held "Committee of the Whole Meetings (also know more commonly as "Work Sessions") on the alternate weeks of the regularly scheduled Common Council meetings to allow the Common Council members the opportunity to gather vital information and to ask question of department heads and staff members regarding agenda items prior to voting. Mayor Roman unilaterally and arbitrarily canceled all work sessions leaving the Common Council in the dark.
34. Upon information and belief, without the benefit of a work session the Common Council has been forced to discuss and deliberate agenda items on the same night as the formal Common Council meeting many times with little or no information about the agenda items.
35. Upon information and belief, the Mayor has further frustrated the Common Council's ability to govern by deliberately failing to

follow the City Charter and the New York State Public Officers Law regarding advance notices for meetings.

36. Upon information and belief, the Mayor has further frustrated the Common Council's ability to govern by failing to conduct meetings in public.
37. On December 19, 2022, the Common Council and Mayor illegally voted on a Resolution 121922.2 regarding the resumption of ambulance service by the City of Lockport Fire Department.
38. Upon information and belief, the vote on the Resolution No 121922.2 was the product of a Personnel Meeting improperly held in executive session for several hours.
39. Upon information and belief, no notice was ever given in writing and served upon the Common Council Members for the December 19, 2022, Common Council meeting to vote on Resolution No. 121922.2.
40. Upon information and belief, no public notice was provided in accordance with the New York State Public Officers Law giving the time and place of the meeting at least one week prior thereto and conspicuously posted in one or more designated public locations at least 72 hours before the December 19, 2022, meeting and no notice

of the December 19, 2022, meeting was posted on the City of Lockport's website.

41. Upon information and belief, sometime before December 19, 2022, the Mayor called for a Personnel Meeting.

Meetings to be held in Public

42. Upon information and belief, in direct contravention of Public Officers Law §103 and §105 and §52 of the City of Lockport Charter the Personnel Meeting held on December 19, 2022, was not held in public, no basis was ever given to go into executive session, and no vote was taken to go into executive session.

43. Upon information and belief, in attendance at the December 19, 2022, Personnel Meeting were Mayor Michelle Roman, Corporation Counsel Laura Miskell Benedict, Deputy Corporation Counsel Jason Cafarella, City Clerk Sarah Lanzo, Mary Pat Filbert, Fire Chief Luca Quagliano, Firefighter Union President Thomas Cinelli and Alderpersons, Kristin Barnard, Paul Beakman, Mark DeVine, Kathryn Fogle, Luke Kantor and Gina Pasceri. Ben Joe, the local reporter for the Union Sun and Journal was asked to leave the Personnel Committee Meeting.

44. Upon information and belief, there was absolutely no basis to enter into executive session at the Personnel Meeting on December 19, 2022.

45. Upon information and belief, the Open Meetings Law allows an executive session to discuss proposed, pending, or current litigation.

46. The sole basis for the exception to the Open Meeting Law requirement is to allow the City to discuss the proposed, pending or current litigation outside the presence of its adversary.

47. Once the adversary is invited into an executive session the sole basis for the secrecy is lost and the exception no longer applies.

48. The Fire Union President had no business attending a confidential executive session.

Resolution 121922.2 was not properly adopted

49. Upon information and belief, at the conclusion of the December 19, 2022, Personnel Meeting that was held in executive session Mayor Michelle Roman, Council President Paul Beakman and Corporation Counsel immediately convened a Common Council meeting to vote on Resolution 121922.2.

50. The resolution voted on established that the Lockport Fire Department will take steps to resume ambulance services, make operational two ambulances in its possession; and that the City of Lockport will apply for a Certificate of Need for Ambulance Service and negotiate for reimbursement from insurance companies. See, Exhibit "A".
51. Upon information and belief, the vote on Resolution No. 121922.2 was as follows: Alderman Paul Beakman, Mark DeVine and Luke Cantor voted in favor. Alderpersons Christin Barnard and Gina Pasceri vote against the resolution and Alderperson Kathryn Fogle abstained. The Mayor stated that she was going to break the tie and voted in favor of the resolution.
52. Upon information and belief, the New York Conference of Mayors Handbook states that abstentions and absences are neither positive nor negative votes.
53. Therefore, no tie existed pursuant to City of Lockport Charter §53 for the Mayor to cast a tie breaking vote.
- §§18-4 and 18-7 of the City of Lockport Code of Ethics Prohibited Alderman Devine from Voting
54. Upon information and belief, §18-7 of the City of Lockport Charter ("Code of Ethics") prohibits a municipal officer from participating in

any decision or taking any action with respect to any matter requiring the exercise of discretion including discussing the matter and voting on it when, he knows or has reason to know that the action could confer a direct or indirect financial or material benefit on a relative.

55. Upon information and belief, Alderman Mark Devine is a duly elected municipal officer and his son is a member of the City of Lockport Fire Department that would benefit both financially and materially with the adoption of Resolution 121922.2.
56. Upon information and belief, §18-4 of the City of Lockport Charter ("Code of Ethics") prohibits a municipal officer from using his or her municipal position or official powers to secure a financial or material benefit for a relative.
57. Upon information and belief, Alderman Mark Devine is a duly elected municipal officer and by failing to abstain or recuse himself from voting on Resolution 121922.2 he used his position to secure a financial and material benefit for his son who is a member of the City of Lockport Fire Department.
58. No prior petition or request for the relief requested herein had been filed.

AS AND FOR A FIRST CAUSE OF ACTION

59. Upon information and belief, on December 19, 2022, the City of Lockport held a Personnel Committee meeting and a subsequent special meeting of the Common Counsel.
60. Upon information and belief, the Mayor, or any three Alderman, failed to call special meeting, by notice in writing, signed by him or them, failed to file the same with the City Clerk, and failed to personally serve such notice upon the other members of the Common Council or leave it at their several residences or usual places of business.
61. Upon information and belief, the City failed to follow New York State Public Officers Law with respect to proper notice for a public meeting giving the time and place of the meeting at least one week prior thereto and conspicuously posted in one or more designated public locations at least 72 hours before the December 19, 2022, meeting and no notice of the December 19, 2022, meeting was posted on the City of Lockport's website.
62. Upon information and belief, the City failed to properly notice the personnel meeting.

AS FOR A SECOND CAUSE OF ACTION

63. Upon information and belief, in direct contravention of Public Officers Law §103 and §105 and §52 of the City of Lockport Charter, the Personnel Meeting held on December 19, 2022, was not held in public, no basis was ever given to go into executive session, and no vote was taken to go into executive session.

AS AND FOR A THIRD CAUSE OF ACTION

64. Upon information and belief, the vote on Resolution No. 121922.2 was as follows: Alderman Paul Beakman, Mark DeVine and Luke Cantor voted in favor. Alderpersons Christin Barnard and Gina Pasceri vote against the resolution and Alderperson Kathryn Fogle abstained. The Mayor stated that she was going to break the tie and voted in favor of the resolution.

65. Upon information and belief, abstentions and absences are neither positive nor negative votes.

66. Therefore, no tie existed pursuant to City of Lockport Charter §53 for the Mayor to cast a tie breaking vote and Resolution No. 121922.2 did not pass by a majority of the votes cast on December 19, 2022.

AS AND FOR A FOURTH CAUSE OF ACTION

67. Upon information and belief, §18-7 of the City of Lockport Charter ("Code of Ethics") prohibits a municipal officer from participating in any decision or taking any action with respect to any matter requiring the exercise of discretion including discussing the matter and voting on it when, he knows or has reason to know that the action could confer a direct or indirect financial or material benefit on a relative.
68. Upon information and belief, Alderman Mark Devine is a duly elected municipal officer and his son is a member of the City of Lockport Fire Department that would benefit both financially and materially with the adoption of Resolution 121922.2.
69. Upon information and belief, §18-4 of the City of Lockport Charter prohibits a municipal officer from using his or her municipal position or official powers to secure a financial or material benefit for a relative.
70. Upon information and belief, Alderman Mark Devine is a duly elected municipal officer and by failing to abstain or recuse himself from voting on Resolution 121922.2 he used his position to secure

a financial and material benefit for his son who is a member of the City of Lockport Fire Department.

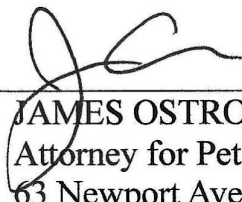
71. Therefore, the adoption of Resolution No. 121922.2 is null and void.

WHEREFORE, Petitioners respectfully request that this Court enter an Order in its favor as follows:

- (a) Declaring that, as to its meeting of December 19, 2022, and Resolution 121922.2, Respondents, including the City of Lockport ("City") failed to comply with the City of Lockport Charter § 51 and Public Officers Law §104 (1) and (6), regarding public notice requirements for meetings and special meetings, and that as a result thereof, all action taken by the City at the meetings are null and void; and
- (b) Declaring that Respondents, including the City of Lockport failed to comply with of Public Officers Law §103 and §105 and §52 of the City of Lockport Charter and the Personnel Committee meeting and subsequent Special Meeting of the Common Council held on December 19, 2022, were not held in public, no basis was ever given to go into executive session, and no vote was taken to go into executive session, and as a result thereof, all action taken by the City at those meetings are void.

- (c) Declaring that no tie existed pursuant to City of Lockport Charter §53 for the Mayor to cast a tie breaking vote and Resolution No. 121922.2 did not pass by a majority of the votes cast on December 19, 2022, and as a result thereof, the resolution did not pass and is null and void, and
- (d) Declaring that because Alderman Mark Devine as a duly elected municipal officer failed to abstain or recuse himself from voting on Resolution 121922.2, as a result thereof, Resolution No. 121922.2 is null and void.
- (e) Declaring that the Petitioners be awarded costs and reasonable attorney's fees associated with bringing this special proceeding.
- (f) Awarding the Petitioners such other and further relief as the court may deem just and proper.

Dated: April 18, 2023
Buffalo, New York



JAMES OSTROWSKI
Attorney for Petitioners
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Buffalo, New York. 14216
(716) 435-8918
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VERIFICATION

CITY OF LOCKPORT) ss:

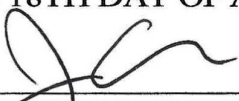
COUNTY OF NIAGARA)

KATHRYN FOGLE, being duly sworn, deposes and says that: I am a petitioner in this proceeding; I have read the foregoing petition and know the contents thereof; the same are true to my own knowledge, except as to matters therein stated to be alleged on information and belief; and as to those matters I believe them to be true.



KATHRYN FOGLE

SWORN TO BEFORE ME
THIS 18TH DAY OF APRIL, 2023



JAMES OSTROWSKI
NOTARY PUBLIC—STATE OF NEW YORK
QUALIFIED IN ERIE COUNTY
MY COMMISSION EXPIRES 7/5/23