

**STATE OF NEW YORK
SUPREME COURT** **COUNTY OF CORTLAND**

MARY BETH MATHEY,

Index No.:

Petitioner/Plaintiff,

**MEMORANDUM OF
LAW**

For a Judgment Under Article 78
Of the Civil Practice Law and Rules,
a Declaratory Judgment, and Injunctive Relief

-against-

TOWN BOARD OF THE TOWN OF CORTLANDVILLE,
CORTLAND COUNTY BOARD OF ELECTIONS,
THOMAS A. WILLIAMS, JAY E. COBB, DAVID J. DONLICK,
GREGORY K. LEACH, JEFFREY D. GUIDO in their capacity as
the Town Board of the Town of Cortlandville; THOMAS H.
BROWN and MICHELLE S. BROWN in their capacity as Cortland
County Election Commissioners; and JOHN A. DELVECCHIO,

Respondents/Defendants.

MEMORANDUM OF LAW

STATEMENT OF FACTS

The Town of Cortlandville is a town in the State of New York. Under Town Law § 20(1), all towns are to have two town justices. Petitioner Mary Beth Mathey is a duly elected justice of the Town of Cortlandville whose current four-year-term is set to end on December 31, 2023.

The Town of Cortlandville retained Respondent/Defendant John A. DelVecchio as Town Attorney. Respondent/Defendant DelVecchio is also a part-owner of the DelVecchio Family LLC that leases rental properties in the Town of Cortlandville. Mr. DelVecchio developed a personal grudge against Petitioner/Plaintiff starting in 2020 as a result of Judge Mathey's adherence to new restrictions and requirements for eviction petitions during the COVID-19 state of emergency. In 2020, Respondent/Defendant DelVecchio appeared on behalf of the DelVecchio Family LLC



before Judge Mathey in a landlord-tenant proceeding. The eviction petitions he prepared were dismissed by Judge Mathey for failure to satisfy the strict statutory requirements then in effect. Soon thereafter, Respondent/Defendant DelVecchio confronted Judge Mathey in her office, demanded preferential treatment, accused her of being prejudiced against him, and threatened to remove her from her elected position as Town Justice through his influence with the Town Board.

Although Judge Mathey recused herself from Respondent/Defendant DelVecchio's cases, he continued to retaliate against Judge Mathey through his influence with the Town Board. DelVecchio's grudge reached a boiling point in early 2023 when the Town Board attempted to eliminate a Town Justice position then and now held by Judge Mathey. However, when prior attempts on February 23 and March 1 were thwarted by public and media scrutiny, the Town Board resorted to holding a special town board meeting on Monday, August 7, 2023 in order to submit a last-minute referendum to abolish the Town Justice position held by Judge Mathey.

In this latest attempt to remove Judge Mathey through abolishing her position, numerous irregularities occurred leading up to and during the special town board meeting. The notice and agenda for the meeting referenced therein failed to specify the purpose of the meeting or how the meeting was intended to introduce a referendum in the next election to abolish a town justice position. Instead, the only notice the public received about the contents of this meeting was an allusion to a secret meeting of the Town Board: "Results of privileged conversation held between the Board at the Supervisor's request concerning potential changes at Town Hall."

However, the most egregious irregularity occurred when within minutes of the special town board meeting commencing, the Town Board admitted that four of the five members of the Town Board had convened in an illegal secret meeting regarding the abolition of the office of Town Justice held by Judge Mathey. "[T]he Town Board met with the Town Attorney in an attorney-

client meeting earlier today to discuss an ongoing situation in the Town concerning the number of Town Justice positions. . . . One of [several legal issues discussed with Mr. DelVecchio] was to eliminate the position of second Cortlandville Town Justice. . . .” Although three non-Board members were present at the special board meeting, it is unclear from the record whether said non-members were present during the secret meeting between the Town Attorney and the Board. Respondent/Defendant DelVecchio then took the unusual act of disclosing the contents of his secret “attorney-client” meeting on the record without the Board’s waiver of the alleged privilege. DelVecchio, according to the minutes, read the resolution he had prepared to abolish Judge Mathey’s position. The Town Board adopted the resolution in a 4-0 vote with no discussion or inquiry on the impact on court operations of returning to a single town justice and only raised conclusory claims that the Town Court has incurred heavy financial losses by having two town justices.

Now, Judge Mathey commences this hybrid Article 78/declaratory judgment proceeding to challenge the Town Board’s August 7, 2023 resolution and the procedural defects with the passage of the resolution calling for a referendum on the question of abolishing a position of one Town Justice of the Town of Cortlandville.

DISCUSSION OF LAW

A. THE AUGUST 7, 2023 RESOLUTION IS VOID FOR THE TOWN BOARD’S VIOLATION OF THE OPEN MEETINGS LAW AND THE COURT MUST GRANT THE PLAINTIFF’S MOTION FOR A PRELIMINARY INJUNCTION

Under CPLR 6301, a court can enjoin a defendant from acting or continuing to act in a manner that will irrevocably harm a plaintiff during the pendency of an action:

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be

done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

According to the Court of Appeals, “[t]he party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor.” Whether to grant such a preliminary injunction “is a matter ordinarily committed to the sound discretion of the lower courts” and its review of the facts of each case. *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]. See also *Atlantic Specialty Ins. Co. v Landmark Unlimited, Inc.*, 2023 NY Slip Op 01253 at 1 [1st Dept 2023]; *23A Props., Inc. v New Mayfair Dev. Corp.*, 212 AD3d 900, 902 [3d Dept 2023]; *Sarker v Das*, 203 AD3d 973, 974 [2d Dept 2022].

In order to reduce the number of town justices, the Town Board must comply with the requirements of Town Law §§ 60-a; 90 *et seq.* Compliance entails the adoption of a resolution, subject to a permissive referendum, or by submission of the proposition to the electorate at a biennial town election. See 1981 Ops Atty Gen No. 83-59 [Note: informal opinion].

Furthermore, under the Open Meetings Law, all meetings of the Town Board must be open to the public with no exception apart from executive sessions called by motion during a public meeting. Public Officers Law § 103(a) [“Every meeting of a public body shall be open to the general public, except that an executive session of such body may be called. . . .”]. Likewise, a public body’s motion for an executive session must be accompanied with a declaration of the purpose for the motion. Public Officers Law § 105(1) [enumerating only 8 purposes an executive session may be called]. If a court determines that a public body violated the Open Meetings Law,

the court has the authority “to . . . declare the action taken in relation to such violation void. . . .”

Public Officers Law § 107(1).

According to an informal opinion of the State Attorney General’s Office, a town’s failure to substantially comply with the requirements calling for a referendum to abolish a town justice position invalidates the legislative action to abolish the position. 1990 Ops Atty Gen No. 90-35. In its opinion, the Attorney General’s Office concluded that the Town’s failure to substantially follow the procedural requirements for abolishing the office of town justice invalidated the town’s resolution and required the town to reappoint a town justice to the position: “We conclude that the failure to follow the procedure required by law for a permissive referendum invalidates action taken by a local legislative body.” *Id.*

The appellate courts have long held that holding a secret meeting with a quorum of a public legislative body in attendance is a prima facie violation of the Open Meetings Law. In *Oneonta Star Div. of Ottaway Newspapers, Inc. v Board of Trustees*, 66 AD2d 51, 52-53 [3d Dept 1979], the Oneonta School Board met “in closed session”, refused to allow members of the public to attend the meeting, and refused to disclose what transpired because it was “an informal conference”. When the lower court dismissed the petitioner’s complaint for failing to state a cause of action, the Third Department reversed the dismissal, citing that the Open Meetings Law unambiguously subjected every meeting of a public body’s members to the open meeting requirement.

It has recently been established that if any private or secret meetings or assemblages of a public entity are held when a quorum of its members is present and when the topics for discussion and eventual decision are such as would otherwise arise at a regular meeting a violation of the New York Open Meetings Law occurs.

Id. at 53 (citing *Matter of Orange County Pub., Div. of Ottaway Newspapers v Council of City of Newburgh*, 60 AD2d 409 [2d Dept 1978], *affd* 45 NY2d 947 [1978]).

When the City of Kingston was similarly found in violation of the Open Meetings Law for conducting secret informal meetings among its members, the Third Department further elaborated that the legislative intent of the Open Meetings Law is to disclose the entire deliberative process on matters of public interest and not merely the formal vote taking. *Goodson Todman Enters. v Kinston Common Council*, 153 AD2d 103, 105 [3d Dept 1990].

Public bodies may not escape public view by claiming that they did not formally convene when, in fact, a meeting took place at which business of public interest was discussed. . . . informal conferences, agenda sessions and work sessions do invoke the provisions of the statute when a quorum is present and when the topics for discussion and decision are such as would otherwise arise at a regular meeting.

Id.

The Court of Appeals has even upheld a trial court's award of sanctions including attorneys' fees when the public body's conduct to circumvent the Open Meetings Law are deceitful, intentional, and present obvious prejudice to the petitioner. In *Gordon v Village of Monticello*, 87 NY2d 124, 125-126 [1995], the Board of Trustees of Monticello engaged in a scheme of secretly holding a "closed, executive session to create the new position of full-time Village Attorney and to divide up by resignation and subsequent appointment various other elected leadership positions." When the Village Board convened for a public meeting two weeks later, the Board passed the resolution they had secretly agreed upon in advance and "[b]y the end of the meeting, every supposedly elected position had been redistributed, as privately prearranged by the Board at the earlier, closed meeting." *Id.* at 126.

When the Village Board's scheme was challenged by citizens of Monticello, "[b]oth Supreme Court and the Appellate Division found the Board's machinations to be patently illegal and declaring them null and void." *Gordon v Village of Monticello*, 87 NY2d at 126. When the Village Board appealed to the Court of Appeals, the Court reinstated the sanction of attorneys' fees because "in blatant disregard of the public's right to elect its own local officials -- [the Village

Board] secretly decided to play . . . the game of “musical chairs” with each others’ jobs.” *Id.* at 128.

Here, the Town Board of the Town of Cortlandville failed to substantially comply with the procedural requirements of the Town Law and Open Meetings Law in its attempt to surreptitiously abolish the office of Town Justice. Furthermore, given the likelihood of Plaintiff’s success on the merits of her case and the prejudice Plaintiff would face if this void and illegal resolution was presented to the electorate, the Court must grant the Plaintiff’s motion for a preliminary injunction enjoining the Respondents/Defendants from promoting, presenting, and promulgating a referendum on said resolution in the November 7, 2023 election.

When four of the five members of the Cortlandville Town Board met for a closed secret meeting prior to the special town board meeting on August 7, 2023 in order to secretly discuss the abolition of the position of the office of Town Justice, this meeting was prima facie subject to the provisions of the Open Meetings Law and would not have qualified for a closed-door executive session due to its subject matter even if the Town Board had made the proper motion to enter into an executive session. The Town Board’s failure to fully disclose to the public its decision-making process on a matter of public interest in adopting a resolution to abolish the office of Town Justice is prejudicial to the Petitioner/Plaintiff and all citizens of the Town of Cortlandville who are entitled to governmental transparency. The Town Board and Respondent/Defendant DelVecchio’s machinations are especially prejudicial for a public official in Judge Mathey’s position who is currently running for re-election for an office that the Board wishes to abolish on the same ballot.

Additionally, contrary to the Town Board’s potential claim that its meeting with Mr. DelVecchio prior to the special town board meeting was exempt from the Open Meetings Law due to “attorney-client privilege,” Respondent/Defendant DelVecchio’s public statements about the

secret meeting disclosed any privileged communications. Since this public disclosure was made without the Town Board's express waiver of the purported privilege, Mr. DelVecchio's conduct is potentially a violation of rule 1.6 (a) of the Rules of Professional Conduct. Furthermore, the possible presence of non-Board members during the Board's secret "privileged" meeting with Mr. DelVecchio defeats the Town Board's claims of privilege to the meeting.

Finally, regarding the equities between the parties, permitting the Respondents/Defendants to present the referendum on the void August 7, 2023 resolution would irreparably injure Judge Mathey. In the event the referendum were to pass during the November 7, 2023 election while Judge Mathey is seeking reelection for a second term to office, she would lose her office during the pendency of this action even if she were to win a majority of the votes. Furthermore, given the history of Respondent/Defendant DelVecchio and the Town Board's animus against Judge Mathey, when the August 7, 2023 resolution and the resulting referendum are found void, the Town Board will most likely take action to avoid appointing or reinstating Judge Mathey to the restored office of second Cortlandville Town Justice.

**B. ATTORNEY JOHN A. DELVECCHIO'S CONDUCT THROUGHOUT THIS AFFAIR VIOLATED
THE PROFESSIONAL RULES OF CONDUCT AND MUST BE SANCTIONED**

Under the Rules of Professional Conduct (22 NYCRR 1200.0), lawyers admitted to practice in the State of New York are bound to a higher ethical standard imposed on their profession compared to members of the lay public due to their position of trust. This is especially true for lawyers who also hold public office.

Under rule 1.11 (f) (2) of the Rules of Professional Conduct, a lawyer is prohibited from using his public position to influence a judge to violate their impartiality in order to "influence, or attempt to influence, a tribunal to act in favor of the lawyer." Likewise, under rule 8.4 (e) (1) of

the Rules of Professional Conduct, a lawyer is similarly prohibited from stating or implying “an ability to influence improperly . . . any tribunal, legislative body or public official. . . .”

If an attorney “fails to conduct himself . . . in conformity with the standards of conduct imposed upon members of the bar . . . and . . . any disciplinary rule of the code of professional responsibility” said attorney is deemed guilty of professional misconduct within the Third Department Appellate Division. 22 NYCRR 806.2. *See also* Judiciary Law § 90(2) [authorizing the appellate division of the supreme court to censure, suspend from practice or remove from office any attorney found guilty of professional misconduct].

Here, Mr. DelVecchio’s interactions with Judge Mathey and his abuse of his position as retained Town Attorney to influence the Cortlandville Town Board are clear acts of professional misconduct.

Mr. DelVecchio’s threat to Judge Mathey implying that he would use his influence with the Town Board (a legislative body) as Town Attorney to report her and retaliate against her for making an unfavorable ruling against him in a personal matter are clear violations of rules 1.11 (f) (2) and 8.4 (e) (1) prohibiting the use of an attorney’s public office to coerce and influence a judge in her decision making in matters pending before her court. Likewise, his active engagement in and advocacy for the abolition of Judge Mathey’s position in the years since the 2020 incident, demonstrate his abuse of his role as retained counsel to the Town Board to retaliate against a sitting judge and commit professional misconduct.

Given the circumstances and personal animus behind Mr. DelVecchio’s campaign to abolish Judge Mathey’s office as Town Justice, Mr. DelVecchio’s conduct is a clear breach of his professional duties as the retained Town Attorney and a member of the State Bar.

CONCLUSION

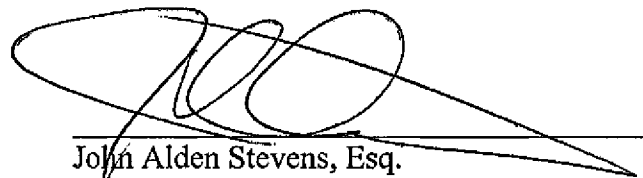
Based on Mr. DelVecchio's personal grudge against Judge Mathey and the Cortlandville Town Board's history of thwarted attempts to abolish the office of Town Justice, the Town Board has attempted to circumvent public scrutiny by introducing a suspect resolution to retaliate against an elected official performing the duties of her office. Indeed, since this action was made on the eve of a biennial election, the Town Board and Respondent/Defendant DelVecchio have blatantly conspired to manipulate and undermine the public's right to elect its own officials by seeking to remove Judge Mathey from office through an invalid and illegal referendum.

WHEREFORE Petitioner/Plaintiff respectfully requests the Court grant the motion for a preliminary injunction restraining and enjoining the Respondents/Defendants Town Board of the Town of Cortlandville, Cortland County Board of Elections, and Cortland County Election Commissioners, pending the determination of the issues in this proceeding/action from issuing, promulgating, promoting, and introducing the August 7, 2023 Resolution as a referendum on the question of removing a judicial position from the Town of Cortlandville on the November 7, 2023 election; and enter an order and judgment granting the following relief:

- a. Declaring the August 7, 2023 Resolution of the Town Board of Cortlandville void due to the illegal secret meeting conducted in violation of the Open Meetings Law;
- b. Enjoining the Town Board of the Town of Cortlandville, the Cortland County Board of Elections, and the Cortland County Election Commissioners from issuing, promulgating, and promoting the void August 7, 2023 Resolution;
- c. Directing the Cortland County Board of Elections and Cortland County Election Commissioners to remove the void August 7, 2023 Resolution as a ballot referendum on the November 7, 2023 election;

- d. Sanctioning Respondent/Defendant DelVecchio for his professional misconduct;
- e. Awarding Petitioner/Plaintiff costs and reasonable attorneys' fees; and
- f. Granting such other and further relief as the Court deems just and proper.

Dated: September 26, 2023



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STATE OF NEW YORK
SUPREME COURT COUNTY OF CORTLAND

MARY BETH MATHEY,

Index No.:

Petitioner/Plaintiff,

**22 NYCRR § 202.8-b
CERTIFICATION**

For a Judgment Under Article 78
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-against-

TOWN BOARD OF THE TOWN OF CORTLANDVILLE,
CORTLAND COUNTY BOARD OF ELECTIONS,
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Petitioner's Memorandum of Law was prepared on a word processor in 12-point font. The final word count of 3,107 words, excluding the caption and signature block, is below the 7,000-word limit and complies with the requirements of Uniform Court Rule 202.8-b.

Dated: September 26, 2023


John Alden Stevens, Esq.