STATE OF NEW YORK
SUPREME COURT: ERIE COUNTY

In the Matter of the Application of

NEW YORK COALITION FOR
OPEN GOVERNMENT, INC.

NATHAN FEIST

MATTHEW AUSTIN

Petitioners

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

-against-

CITY OF BUFFALO
CITIZENS SALARY REVIEW COMMISSION
CITY OF BUFFALO BOARD OF REVIEW
BUFFALO COMMON COUNCIL

Respondents

Index No.

MEMORANDUM OF LAW

PRELIMINARY STATEMENT

Petitioners respectfully submit this memorandum of law in support of their petition seeking judgment as a matter of law for the relief demanded. Specifically, Petitioners seek a declaration that Local Law #2 (2023), which increases the salaries of elected officials in the City of Buffalo, is void and of no force and effect because it was not enacted in accordance with the City Charter, Common Council Rules and the Open Meetings Law.

SUMMARY OF ARGUMENT

The Charter of the City of Buffalo ("Charter") establishes a process that must be followed for city elected officials to receive a salary increase. Every two years, a Citizens Salary Review Commission ("Commission") must be formed to study elected official salaries. The members of the Commission, pursuant to the City Charter, are appointed by the Board of Review, which consists of the Mayor, City Comptroller, and the President of the Common Council. The Commission is required to report its salary recommendations to the Common Council by May 1.

Once the Common Council receives the Commission's report, the Council has the authority to adopt, modify or reject the report by June 15. In order for the salaries of elected officials to be increased, the Common Council must pass a local law, which does not become effective until the Mayor holds a public hearing and approves the law. The Mayor has the authority to veto the local law and the Council has the power to override such veto if they choose to do so.

With the City Charter-established deadline of May 1 fast approaching, the Common Council took it upon itself to appoint members to the Commission on April 18, 2023. Under the City Charter, only the Board of Review has the authority to appoint members to the Commission. The Common Council appointment of Commission members was done in violation of the City Charter.

The formation of the Commission is a required prerequisite to passing a local law to raise the salaries of elected officials. As the Commission was illegally created by the Common Council, the Commission's recommendations must be declared null and void. Likewise, the local law passed after the Common Council acted upon the Commission's report must also be declared null and void. In addition to violating the City Charter, the Common Council violated its own meeting rules when making appointments to the Commission.

If the Board of Review did act on appointments to the Commission, they did so in private in violation of the New York State Open Meetings Law.

Furthermore, the Commission did not provide the public the ability to observe their meetings virtually and held an illegal executive session in violation of the Open Meetings Law.

LAW AND ARGUMENT

POINT 1

PETITIONERS HAVE STANDING TO BRING THIS ACTION

As taxpaying, voting residents of the City of Buffalo, Petitioners have standing to address the significant municipal concern of whether the City Charter was properly followed in enacting a local law to raise the salaries of city elected officials. See Matter of Andrews v Nagourney, 41 AD 2d 778 (2nd Dept. 1973, also affirmed by the Court of Appeals). In *Nagourney*, the court stated:

> The threshold question presented on this appeal concerns standing to sue. We are of the view that the dismissal of the petition by Special Term on the stated ground that petitioner is not a "party aggrieved" was improper. In addition to being a citizen and taxpayer of the City of Long Beach, petitioner is, as will be seen, a member of a valid charter revision commission still in existence. In this matter of significant municipal concern to the citizens of Long Beach, involving the actions of municipal officials and only tangentially related to fiscal matters, petitioner has standing to bring this article 78 proceeding even though he does not show a personal grievance or a personal interest in the outcome (Matter of Policemen's Benevolent Assn. of Westchester County v. Board of Trustees of Vil. of Croton-on-Hudson, 21 A D 2d 693; see, also, Matter of Bon-Air Estates v. Building Inspector of Town of Ramapo, 31 A D 2d 502, 504; Matter of Werfel v. Fitzgerald, 23 A D 2d 306, 313; Semple v. Miller, 38 A D 2d 174, 175; Matter of Marino v. Town of Ramapo, 68 Misc 2d 44, 47).

In the Matter of the Julian, 22 AD 3D 1033 (4th Dept. 2005), the court ruled:

> We note at the outset that, contrary to respondents' contention, petitioner has standing to challenge "administrative action threatened or done pursuant to an allegedly invalid law" (Matter of Elefante v Hanna, 54 AD2d 822, 823 [1976], *mod on other grounds* 40 NY2d 908 [1976]). Indeed, we note that petitioner's standing

> is of particular importance where, as here, the case involves a "matter of significant municipal concern" (Matter of Andrews v Nagourney, 41 AD2d 778, 778 [1973], affd 32 NY2d 784 [1973]).

In Matter of Elefante, 54 AD 2D 822 (4th Dept. 1976), the petitioner, as a resident and taxpayer of the City of Utica, challenged the validity of a local law which created a charter revision commission. The court in its decision stated:

> The petitioner, as a resident taxpayer and qualified elector of the City of Utica and County of Oneida, has standing to collaterally attack, by means of an article 78 proceeding, administrative action threatened or done pursuant to an allegedly invalid law (Matter of Barile v City Comptroller of City of Utica, 56 Misc 2d 190) and is, therefore, entitled to seek declaratory relief with respect to the impending submission by respondents election commissioners of the proposed new city charter to the Utica electorate and the allegedly invalid local law which set the charter revision process in motion.

In addition to challenging the invalid procedures which raised the salaries of elected officials, Petitioners are also alleging violations of the Open Meetings Law. The Open Meetings Law provides: "Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the [CPLR], or an action for declaratory judgment and injunctive relief" (Public Officers Law § 107[1]). Moreover, in McCory v Village of Mamaroneck, 181 AD3d 67 (2nd Dept. 2020), the court ruled that:

> The purpose of the Open Meetings Law and the intent of the legislature in enacting that law dictate that the harm or injury is the alleged unlawful exclusion of the public from a municipal meeting. The Open Meetings Law plainly confers upon the public the right to attend certain meetings of public bodies (*see* Public Officers Law § 100). Consistent therewith, the harm or injury of being excluded from municipal meetings that should be open to the public is sufficient to establish standing in cases based upon alleged violations of the Open Meetings Law (see Matter of Sanna v Lindenhurst Bd. of Educ., 85 AD2d at 162; Matter of Friends of Pine Bush v Planning Bd. of City of Albany, 71 AD2d at 781).

In the matter before the Court, the Board of Review is the only entity, pursuant to the City Charter, with the authority to appoint members to the Commission. As shown in the Petition, the Board of Review did not meet in public, as required by the City Charter and the Open Meetings Law. At best, according to the City Comptroller, the members of the Board of Review excluded the public by conducting their public business over telephone. Petitioners were unlawfully excluded from attending and observing the Board of Review conduct public business, which is sufficient to establish their standing regarding alleged violations of the Open Meetings Law.

Several members of the Commission and government officials who were not members attended Commission meetings through video conferencing. Petitioners were unlawfully excluded from observing Commission meetings through video conferencing as required by Public Officer's Law Section 103-a. Pursuant to 103-a, if members of a public body attend a meeting through video conferencing, the public must be notified and provided the same ability to observe the meeting through video conferencing. The Commission did not notify the public of their right to observe Commission meetings through video conferencing.

In Taxpayers Association v Town Board, 69 AD 2d 320 (2nd Dept. 1979), the court ruled that a taxpayer association had standing to challenge a local law that was passed by the town board under the liberalizing principles enunciated by the Court of Appeals in Matter of Douglaston Civic Assn v Galvin, 36 NY2d 1 (1974). Under *Douglaston*, in order to establish standing an association must show in its pleadings that: one or more of its members would themselves have standing; the interests sought to be protected by the procedure are germane to the association's purpose; and the participation of none of the members is necessary to the relief requested.

Petitioner, New York Coalition For Open Government as a non-profit organization meets the standing requirements established by the Douglaston decision. The Coalition has members who are taxpaying residents of the City of Buffalo. The City Charter and Open Meetings Law issues addressed in the pleadings are germane to the Coalition's mission as an advocate for transparency in government. Finally, the participation of none of the Coalition members is necessary to the relief requested.

POINT II

PETITIONER'S HAVE TIMELY BROUGHT THIS ACTION

The beginning of CPLR article 78 provides in relevant part that "a proceeding under this article *shall not* be used to challenge a determination: which is *not final* or can be adequately reviewed by appeal to a court" (see CPLR 7801[1] [emphasis added]; see also Watergate II Apts. v Buffalo Sewer Auth., 46 NY2d 52, 57 [1978]; Mahoney v Pataki, 261 AD2d 898, 899 [4th Dept 1999]).

It is anticipated that the Respondents will attempt to dismiss this action on the basis of it being untimely. Petitioners are challenging the procedures followed in enacting a local law and not the substance of the law. When challenging the procedures followed in enacting a local law, the action must be brought within four months of the enactment of the local law. Here, the local law in question was passed by the Common Council on October 3, 2023, and, as such, this action has been commenced well within the four month Statute of Limitations, if using the October 3, 2023 date.

Furthermore, the final and binding act to be completed in the process of enacting a local law is that the Mayor must hold a public hearing and then approve the law in order for the law to be enacted. The Mayor of Buffalo held a public hearing regarding the law in question on October

30, 2023. The Mayor approved the law on October 30, 2023. As the local law passed by the Council was not final and enacted until October 30, 2023, Petitioner's have four months from October 30 2023, to file an Article 78 proceeding challenging the local law.

In the Matter of Llana v Town of Pittstown, 234 AD 2d 881 (3rd Dept. 1996), the court stated:

> [W]hen the challenge is directed not at the substance of the local law but at the procedures followed in its enactment, a CPLR article 78 proceeding is appropriate *(see, Matter of Save the Pine Bush v City of Albany, 70 N.Y.2d 193, 202; Matter of Voelckers v Guelli, 58 N.Y.2d 170, 177*).
>
> …
>
> In short, we find that each of petitioners' causes of action concern matters "of procedure only, eschewing any intrusion into the substance of the matter voted on" (Matter of Voelckers v Guelli, supra, at 177), and were therefore properly brought in a CPLR article 78 proceeding, to which a four-month Statute of Limitations applies.
>
> This action/proceeding was commenced within four months of the enactment of Local Law No. 3 and is thus timely.

A similar determination was reached in Eadie v N Greenbush Town Bd., 854 NE 2d 464 (Ct. of Appeals 2006). The Court of Appeals stated in their decision:

> An article 78 proceeding brought to review a determination by a body or officer "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner" (CPLR 217 [1]). We have held that this time period begins to run when the petitioner has "suffered a concrete injury not amenable to further administrative review and corrective action" (*Matter of City of New York [Grand Lafayette Props. LLC], 6 NY3d 540, 548 [2006]; see also Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of NY, 5 NY3d 30, 34 [2005])*.

The Court additionally stated:

> Here, petitioners suffered no concrete injury until the Town Board approved the rezoning. Until that happened, their injury was only contingent; they would have suffered no injury at all if they had succeeded in defeating the rezoning through a

> valid protest petition, or by persuading one more member of the Town Board to vote their way.
>
> We thus reaffirm the holding of *Save the Pine Bush,* and make clear that an article 78 proceeding brought to annul a zoning change may be commenced within four months of the time the change is adopted.

As pointed out in the Petition before the Court, the New York Coalition For Open Government from June until October 3, 2023, (when the local law was passed), urged the Buffalo Common Council in multiple emails to not adopt the local law. The Common Council was made aware of the improper actions by the Board of Review and of the Common Council's own violations of the City Charter.

More recent decisions by the Appellate Division confirm that this action has been timely brought after the enactment of the local law in question. In Matter of Cor Route 5 Co., v Village of Fayetteville, 147 AD 3d 1432 (4th Dept. 2017), the Court stated:

> We agree with petitioner that the court erred in granting the motion [to dismiss]. "Generally, a CPLR article 78 proceeding may not be used to challenge a nonfinal determination by a body or officer" (Matter of Young v Board of Trustees of Vil. of Blasdell, 221 AD2d 975, 977 [1995], *affd* 89 NY2d 846 [1996]). In order to determine whether an action is "`final and binding upon the petitioner'" (Matter of Ranco Sand & Stone Corp. v Vecchio, 27 NY3d 92, 98 [2016]), courts follow a two-step approach: "[f]irst, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party" (Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y., 5 NY3d 30, 34 [2005], *rearg. denied* 5 NY3d 824 [2005]).

See also, Becker-Manning, Inc. v Common Council of City of Utica, 114 AD 3d 1143 (4th Dept. 2014):

> The Court of Appeals has consistently stated that in a proceeding alleging a SEQRA violation in the enactment of legislation, the challenge must be commenced within four months of the date of its enactment" (Beneke v Town of Santa Clara, 36 AD3d

> 1195, 1197 [2007], lv dismissed 8 NY3d 938 [2007], citing Matter of Eadie v Town Bd. of Town of N. Greenbush, 7 NY3d 306, 316-317 [2006] and Matter of Save the Pine Bush v City of Albany, 70 NY2d 193, 202-203 [1987]).

In a very recent case, the court in Hoehmann v Town of Clarkstown, 216 AD 3d 865 (2nd Dept. 2023), stated:

> "[W]hen the challenge is directed not at the substance of" a local law "but at the procedures followed in its enactment, it is maintainable in [a CPLR] article 78 proceeding," which is subject to a four-month statute of limitations period (Matter of Save the Pine Bush v City of Albany, 70 NY2d at 202; see CPLR 217[1]; Village of Islandia v County of Suffolk, 162 AD3d 715, 717 [2018]; Baker v Town of Wallkill, 84 AD3d 1134, 1135 [2011]).

POINT III

AN ARTICLE 78 IS THE PROPER WAY TO ADDRESS INVALID PROCEDURE

The general rule is that an Article 78 proceeding is unavailable to challenge the validity of a legislative act such as a local law. However, when the challenge is directed not at the substance of the law but at the procedures followed in its enactment, an Article 78 proceeding is proper. See Save Pine Bush v Albany, 70 NY2d 193 (Ct. of Appeals 1987).In Matter of McCarthy v Zoning Board of Appeals of the Town of Niskayuna, 283 AD2d 857 (3rd Dept. 2001), the court stated:

> To determine the applicable limitation period, we look to the underlying claim and the nature of the relief sought. Petitioner's first declaratory judgment cause of action does not challenge the substance of the local law, but is directed at the procedures followed in its enactment. Consequently, a CPLR article 78 proceeding is appropriate (see, Matter of Llana v Town of Pittstown, 234 AD2d 881, 882-883, lv denied 91 NY2d 812), and the four-month Statute of Limitations found in CPLR 217 applies.

In Matter of Jenkins v Astorino, 110 AD3d 882 (2nd Dept. 2013), the court stated:

> A challenge to the procedures by which local legislation is enacted should be raised in a CPLR article 78 proceeding against the body which enacted it (see Matter of Eadie v Town Bd. of Town of N. Greenbush, 7 NY3d 306 [2006]; Matter of Save the Pine Bush v City of Albany, 70 NY2d 193, 202 [1987]).

In Village of Islandia v County of Suffolk, 162 AD 3d 715 (2nd Dept. 2018), the court stated:

> A proceeding pursuant to CPLR article 78 is unavailable to challenge the validity of a legislative act. However, when a challenge is directed to the procedure followed in enacting, rather than the substance of, legislation, a proceeding pursuant to CPLR article 78 may be maintained.

See also Belle v Town Bd., 61 AD2d 352 (4th Dept. 1978). An Article 78 proceeding is an appropriate method of collaterally attacking an administrative action threatened or taken pursuant to an allegedly invalid law.

POINT IV

THE COURT CAN CONVERT THIS ACTION TO A DECLATORY JUDGMENT

If the Court believes that an Article 78 proceeding is not the proper vehicle to review the validity of legislative action, the Court has the ability to convert this proceeding to a declaratory judgment action. See Matter of Swanick v Erie County Legislature, 130 AD 2d 1036 (4th Dept. 1984), where the court stated:

> A CPLR article 78 proceeding is not the proper vehicle to review the validity of egislative action (*see, e.g.*, Press v County of Monroe, 50 N.Y.2d 695, 702; Matter of Lakeland Water Dist. v Onondaga County Water Auth., 24 N.Y.2d 400, 407). Petitioners' appropriate remedy is an action for declaratory judgment (Matter of Clark Disposal Serv. v Town of Bethlehem, 51 AD 2d 1080). However, this court may remedy such procedural infirmity by converting the article 78 proceeding to a declaratory judgment action, with the petition deemed the complaint, and consider the merits of the appeal (CPLR 103, subd [c]; Press v County of Monroe, *supra*, p 702; Kessel v D'Amato, 72 AD 2d 790). Since the record is sufficient for that purpose, we convert the proceeding into an action for a declaratory judgment.

See also Matter of Tupper v City of Syracuse, 46 AD 3d 1343 (4th Dept. 2007), where the court stated:

> [I]nasmuch as "the proper procedural vehicle for challenging a legislative act is a declaratory judgment action" (Wright v County of Cattaraugus, 41 AD3d 1303, 1304 [2007]), we convert the CPLR article 78 proceeding to a declaratory judgment action and consider the merits of the appeal (see CPLR 103 [c]; Matter of Valley Realty Dev. Co. v Town of Tully, 187 AD2d 963 [1992], lv denied 81 NY2d 880 [1993]).

POINT V

DISSMISAL OF THIS PROCEEDING IS NOT APPROPRIATE

In determining a CPLR 3211(a)(7) motion—whether the pleading states a valid claim—the subject pleading is to be afforded a liberal construction (*see* CPLR 3026; Leon v Martinez, 84 NY2d 83, 87 [1994] [*ruling that motion to dismiss should have been denied*]). Under this liberal construction, "[t]he facts pleaded are to be presumed to be true and are to be accorded every favorable inference" in a petitioner's favor to see if they fit within any cognizable legal theory (Younis v Martin, 60 AD3d 1373, 1373 [4th Dept 2009] *[affirming denial of motion to dismiss]).* Thus, the criterion is whether the petitioner has a cause of action, not whether he or she has properly stated one (see Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977] [*reversing grant of motion to dismiss*]).

POINT VI

THE BOARD OF REVIEW IS A PUBLIC BODY

In enacting the Open Meetings Law, the New York State Legislature sought to ensure that "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" (Public Officers Law § 100). Thus, all "public bodies" are subject to the Open Meetings Law.

The purpose of the Open Meetings Law is to prevent public bodies from debating and

deciding in private what they are required to debate and decide in public. In the Matter of Perez v City University of New York, 5 NY3d 522 (Ct. of Appeals 2005), the Court of Appeals stated that in applying the Open Meetings Law "… we construe their provisions liberally in accordance with their stated purposes (see Matter of Gordon v Village of Monticello, 87 NY2d 124, 127 [1995]; Matter of Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale, 87 NY2d 410, 418 [1995])."

The statute provides generally that "[e]very meeting of a public body shall be open to the general public," except for executive sessions that may be called for specified reasons (Public Officers Law § 103[a]; *see id.* at § 105). Moreover, public notice of the time and place of a meeting scheduled shall be given, minutes shall be taken at all open meetings of a public body, and the minutes shall be made available to the public (*see* Public Officers Law §§ 104, 106). Under Public Officers Law §102, a public body 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 for a public corporation … or an entity created or appointed to perform a necessary function in the decision-making process for which a quorum is required in order to conduct public business and which consists of two or more members. A necessary function in the decision-making process shall not include the provision of recommendations or guidance which is purely advisory and which does not require further action by the state or agency or department thereof or public corporation…

The Board of Review meets the above definition of a public body in that it consists of two or more members performing a governmental function for the City of Buffalo. Appointing the members of the Citizens Salary Review Commission is a governmental function and a necessary function in the decision making process of creating the Commission, which requires the approval of at least two of the three Board of Review members.

Among other governmental and necessary functions, the Board of Review is empowered to address and hear objections to awarding government contracts and to hear appeals of

government contractors that have been debarred or suspended, pursuant to § 10-27 of the City Charter; to affirm, reverse or reject public bids exceeding $7,000 and to require new bids to be advertised, pursuant to § 30-5 of the City Charter; to determine death benefits for members of the police and fire departments, pursuant to § 35-25 of the City Charter; and to issue final approval of all tax exemptions provided by the City of Buffalo , pursuant to § 281-10 of the City Charter.

In all of the instances enumerated above, the Board of Review has more than just advisory or recommendation powers. As such, the Board of Review clearly meets the definition of a public body, which makes it subject to the New York State Open Meetings Law. In Matter of Smith v CUNY, 92 NY2d 707 (Ct. of Appeals 1999), the Court of Appeals outlined the factors to be considered when an entity is determined to be a public body subject to the Open Meetings Law.

> In determining whether an entity is a public body, various criteria or benchmarks are material. They include the authority under which the entity was created, the power distribution or sharing model under which it exists, the nature of its role, the power it possesses and under which it purports to act, and a realistic appraisal of its functional relationship to affected parties and constituencies.

The Court of Appeals held further that an entity is a "public body" if:

> It is invested with decision-making authority to implement its own initiatives and, as a practical matter, operates under protocols and practices where its recommendations and actions are executed unilaterally and finally, or receive merely perfunctory review or approval.

As stated above, the Board of Review meets the statutory and case law definition of a public body. The New York State Open Meetings Law requires the Board of Review as a public body to provide public notice of their meetings, to post meeting documents online at least twenty-four hours prior to a meeting and to post meeting minutes or a recording online afterwards.

Upon information and belief, the Board of Review never met in public as required by the

Open Meetings Law. There is no record of public notice being provided regarding a Board of Review meeting in 2023, as required by the Open Meetings Law.

The Open Meetings Law requires public bodies to post their meeting documents that are scheduled to be discussed online twenty-four hours prior to the meeting. There is no record or proof that the Board of Review posted meeting documents regarding Commission appointments online at least twenty-four hours prior to discussing same.

After the Board of Review met, meeting minutes or a recording of a meeting were not posted online as required by the Open Meetings Law. Board of Review members conducting public business by way of individual telephone calls, as stated by the City Comptroller, is illegal and a violation of the Open Meetings Law.

As a public body, the Board of Review cannot meet and conduct business properly without complying with the Open Meetings Law. If the Board of Review met without complying with the City Charter and the Open Meetings Law, then any appointments made to the Commission should be declared null and void.

POINT VII

THE CITIZENS SALARY REVIEW COMMISSION IS A PUBLIC BODY

Under Public Officer's Law Section 102, commonly referred to as the Open Meetings Law, a public body subject to the law includes:

> … an entity created or appointed to perform a necessary function in the decision-making process for which a quorum is required in order to conduct public business and which consists of two or more members.

The Commission is an entity consisting of ten members created by the City Charter and appointed by the Board of Review to perform a necessary function in the decision making process regarding elected official salaries.

In order for the salaries of elected officials to be changed, the appointment of the Commission members is necessary. As stated in the City Charter, the Commission is required to review the salaries of all elected city officers, including members of the board of education, and report its recommendations to the Common Council by May 1 of that year.

The recommendations by the Commission are not purely advisory. Recommendations by a purely advisory body do not require further action. The City Charter requires that the Common Council act upon the recommendation made by the commission, as the City Charter states: "The common council **must adopt, modify or reject the report of the commission by June 15** of said year."

Section 102 of the Open Meetings Law states:

> A necessary function in the decision-making process shall not include the provision of recommendations or guidance which is purely advisory and which does not require further action by the state or agency or department thereof or public corporation

The language regarding bodies performing a function "in a decision-making process" became effective through an amendment of the Open Meetings Law on February 24, 2022. The State Legislature's objective in making this revision to the Open Meetings Law is clearly set out in the Memo to Senate Bill S7803:

> The work of our state's public bodies has a profound effect on the functioning of government and it is essential to our democratic process that members of the public are fully aware of and have the opportunity to observe the deliberations and decisions that go into the making of public policy. This legislation will ensure that those bodies which play a key role in the decision making process are covered by the Open Meetings Law, even if they do not have the authority to make final and binding decisions.

For the reasons stated above, the Commission meets the definition of a public body, in that is appointed to perform a necessary function in a governmental decision making process.

POINT VIII

THE CITIZENS SALARY REVIEW COMMISSION VIOLATED THE OPEN MEETINGS LAW

As a public body, the Commission is required to comply with the Open Meetings Law. On April 9, 2022, the Open Meetings Law was amended with the addition of Section 103-a. Pursuant to 103-a, a public body that wishes to allow for remote attendance by its members is required to adopt a local law or adopt a resolution authorizing such remote attendance and must establish written procedures that set forth what they determine to be "extraordinary circumstances." Upon information and belief, the Commission did not adopt such a resolution or establish written procedures for its members to attend Commission meetings remotely.

Section 103-a additionally requires that if a public body uses videoconferencing to conduct a meeting, the public notice for the meeting must inform the public that videoconferencing will be used and must include directions for how the public can view and/or participate (if participation is permitted) in such meeting. The public body must provide the opportunity for members of the public to view the meeting, using remote technology or in person, in real time. None of the Commission's meeting notices directed to the news media included directions as to how the public could view Commission meetings remotely in real time.

At the second meeting held by the Commission in Buffalo City Hall, on April 23, 2023, a motion was made by member Arthur Robinson to go into executive session, and the motion was seconded by member Angela Blue. The meeting minutes reflect that an executive session occurred from 6:06 pm to 6:54 pm. During this executive session, WIVB Channel 4 News personnel had to leave and were not allowed to observe what was discussed in executive session.

The Open Meetings Law provides for eight limited circumstances where a public body can meet in private. A proper motion for an executive session must provide a specific reason that is valid under Open Meetings Law Section 105. The Commission meeting minutes reflect that no reason was given for holding a private executive session discussion.

The minutes further reflect that Commission Chair David Franczyk directed staff to "create a chart of the salary numbers and rates that were discussed in executive session." Discussing across-the-board salary increases for elected officials is not a proper reason for an executive session. Opinions by the New York State Committee on Open Government, the recognized state entity for such issues, stating that such an executive session is a violation of the Open Meetings Law are attached as **Exhibit A**.

POINT IX

A PRELIMINARY INJUNCTION SHOULD BE GRANTED PREVENTING THE PAY RAISES FROM BEING IMPLEMENTED

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. See Ndbu 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].

Here, there have been multiple violations of the Council Rules, City Charter, and the Open Meetings Law in a self-interested effort to improperly increase the salaries of city elected officials. Given the likelihood of Petitioners's success on the merits of their case and the prejudice Petitioners would face if the illegally granted pay raises are implemented, the Court must grant the Petitioners motion for a preliminary injunction enjoining the Respondents from benefitting from their illegal actions.

POINT VIIII

PETITIONER'S ARE ENTITLED TO AN AWARD OF ATTORNEY FEES

In Matter of Brown v Schenectady, 209 AD3d 128 (3rd Dept. 2022), the court stated:

> CPLR 8601(a) mandates an award of fees and other expenses to a prevailing party in any civil action brought against the state, unless the position of the state was determined to be substantially justified or ... special circumstances render an award unjust" *(Matter of Vapor Tech. Assn. v Cuomo, 203 AD3d 1516, 1517 [3d Dept 2022] [internal quotation m*arks and citations omitted]). The term "[s]tate" is defined as "the state or any of its agencies or any of its officials acting in his or her official capacity" (CPLR 8602[g]). Local officials and administrators may be deemed agents of the state (see Matter of Tormos v Hammons, 259 AD2d 434, 435-436 [1st Dept 1999]), including a municipal code enforcement officer applying the State Uniform Fire Prevention and Building Code (see Matter of Rivers v Corron, 222 AD2d 863, 864 [3d Dept 1995]). Such a determination is made on a case-by-case basis upon examination of the applicable statutory authority and nature of the entity (see John Grace & Co. v State Univ. Constr. Fund, 44 NY2d 84, 88 [1978]; Slutzky v Cuomo, 114 AD2d 116, 118-119 [3d Dept 1986], *appeal dismissed* 68 NY2d 663 [1986]; see generally Matter of Tormos v Hammons, 259 AD2d at 435-436).

In any proceeding brought pursuant to the Open Meetings Law, "costs and reasonable attorney fees may be awarded by the court, in its discretion, to the successful party" (Public Officers Law § 107 [2]). In the Matter of Zehner v Board of Education of Jordan-Elbridge Central School District, 937 NYS2d510 (4th Dept. 2012), the Court ruled:

> We further reject respondent's contention that the court abused its discretion in awarding attorney fees to petitioner. Pursuant to the Open Meetings Law, "costs and reasonable attorney fees may be awarded by the court, in its discretion, to the successful party" (Public Officers Law § 107 [2]). Determining the appropriate remedy for respondent's actions is thus expressly a matter of judicial discretion (*see Matter of Sanna v Lindenhurst Bd. of Educ.,* 85 AD2d 157, 159 [1982], *affd* 58 NY2d 626 [1982]), and we perceive no abuse of the court's discretion in awarding attorney fees to petitioner (*see Matter of Goetschius v Board of Educ. of Greenburgh Eleven Union Free School Dist.,* 281 AD2d 416, 417 [2001]).

There is no requirement that violations of the Open Meetings Law be repetitious or egregious in order for attorney fees to be awarded. See Auburn Publishers, Inc. v Netti, 229 AD 2d 988 (4th Dept. 1996).

> Order unanimously reversed on the law with costs and matter remitted to Supreme Court for further proceedings in accordance with the following Memorandum: Petitioner appeals from an order denying its application for attorney's fees pursuant to Public Officers Law § 107 (2). The court denied the application based upon its belief that it could award attorney's fees only where violations of the Open Meetings Law were repetitious or egregious; that belief is erroneous (*see*, *Gordon v Village of Monticello*, 87 N.Y.2d 124, 126-128). We therefore remit the matter to Supreme Court for determination of the application in accordance with the standard set forth in *Gordon v Village of Monticello* (*supra*, at 126-128).

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that their Verified Petition be granted in its entirety, with such other and further relief as this Court deems just and proper.

Dated:

Respectfully Submitted,

Berzer & Wolf

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STATE OF NEW YORK
SUPREME COURT: ERIE COUNTY

In the Matter of the Application of

NEW YORK COALITION FOR
OPEN GOVERNMENT, INC.

NATHAN FEIST

MATTHEW AUSTIN

Petitioners

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

-against-

CITY OF BUFFALO
CITIZENS SALARY REVIEW COMMISSION
CITY OF BUFFALO BOARD OF REVIEW
BUFFALO COMMON COUNCIL

Respondents

Index No.

CERTIFICATION
22 NYCRR § 202.8-B

Pursuant to Part 202.8-b, the undersigned hereby certifies that this Memorandum of Law contains 6,363 words and complies with the word count limit of Part 202.8-b.

Dated December 18, 2023

_____
Paul W. Wolf, Esq.