

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF ERIE

3 DANIEL T. WARREN,)

4 Plaintiff,)

5 vs.)

6 COUNTY LEGISLATURE, COUNTY OF)
7 ERIE, NEW YORK; and)

8 KEVIN M. KELLEY, as Clerk of the Legislature)
9 of the County of Erie, New York; and)

COUNTY OF ERIE, NEW YORK)

Defendants)

AMENDED VERIFIED COMPLAINT

Index No.: I 2004-12768

10 Plaintiff, Daniel T. Warren, as and for his complaint for declaratory and injunctive relief
11 pursuant to General Municipal Law § 51, Public Officers Law Article 7, and CPLR § 3001
12 against the defendants herein allege:
13

- 14 1. Plaintiff, Daniel T. Warren is a resident of the Town of West Seneca, County of Erie and
15 State of New York.
- 16 2. Plaintiff owns property in the County of Erie, State of New York and pays New York State
17 Income Taxes, Town and County property taxes on property with an assessed value of more
18 than \$1,000.00 and sales taxes on all purchases made within the State of New York.
- 19 3. Plaintiff is a duly registered voter in the County of Erie and State of New York.
- 20 4. That on or about Wednesday the 8th day of December, 2004 the Erie County Legislature
21 passed legislation and issued a message of necessity requesting that the State Legislature
22 increase the sales an use tax in this county to be increase by 1% and adopted the tentative
23 budget for 2005 as amended.
- 24 5. Legislators met in an office in the Liberty Building with County Executive Giambra.
- 25

Attached hereto and marked as Exhibit "A" is a copy of a Buffalo News Article by Robert J.

1 McCarthy entitled “At the end, a lot of blinking” which appeared in the December 9, 2004
2 issue.

3 6. Attached hereto and marked as Exhibit “B” is the Affidavit of Albert DeBenedetti sworn to
4 on the 27th day of December 2004.

5 7. This meeting of 10 legislators consisted of a quorum and was not open to the public and in
6 fact was done in this manner to avoid public viewing.

7 8. Shortly after the meeting at the Liberty Building in attorney Anthony J. Colucci, III’s office
8 ended the 10 legislators present voted in favor of the tax increase in exchange for certain
9 concessions on the part of the County Executive on the 2005 budget as amended and voted to
10 adopt the 2005 tentative budget as so amended. Attached hereto and marked as Exhibit “C”
11 is a copy of a Buffalo News article by Mathew Spina entitled “County budget process
12 anything but pretty” which appeared in the December 13, 2004 issue.

13 9. This meeting and the subsequent vote was had in violation of Article 7 of the Public Officers
14 Law.

15 10. Upon information and belief on various occasions which include but is not limited to
16 December 8, 2004, January 6, 2005, February 12, 2005, February 13, 2005 and/or February
17 14, 2005 members of the Erie County Legislature in a number sufficient to constitute a
18 quorum of the public body met in a closed session where the public was not allowed.

19 20 11. Upon information and belief, Sheriff Gallivan, Comptroller Naples, and David Swarts or
21 their representatives were present at the meeting(s) of February 12, 2005, February 13, 2005
22 and/or February 14, 2005 together with the mediators appointed by Justice Makowski.
23 Attached hereto and marked as Exhibit “D” is an article entitled “Sessions break open
24 meeting laws” by James Heaney that appeared in The Buffalo News on February 15, 2005.
25

1 12. Upon information and belief debate and discussion of public budgetary matters including
2 sales tax increases not otherwise exempted by the Open Meetings Law occurred and these
3 meetings were not convened pursuant to the procedures required.

4 13. Upon information and belief the Erie County Legislature has repeatedly violated the
5 provisions of the Open Meetings Law by conducting discussions and debates of public
6 business and of public concern which includes but is not limited to budgetary issues and the
7 proposed sales tax increase out of public view;
8

9 14. Plaintiff has no adequate remedy at law.

10 Wherefore, Plaintiff prays for a judgment of this court:

11 A. Declaring that the meetings of December 8, 2004, January 6, 2005, February 12,
12 2005, February 13, 2005 and/or February 14, 2005 was in violation of Article 7 of the
13 Public Officers Law;

14 B. Enjoining the defendants from convening meetings to discuss or debate matters of
15 public concern in private that are not specifically exempted by Article 7 of the Public
16 Officers Law;

17 C. Together with costs and disbursements of this action together with such other further,
18 and different relief as the court deems just and proper.

19 DATED: February 25, 2005
20 Buffalo, New York

21 _____
22 Daniel T. Warren
23 Plaintiff, Pro Se
24 836 Indian Church Road
25 West Seneca, New York 14224

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State of New York)
County of Erie) ss:
City of Buffalo)

I Daniel T. Warren, am the Plaintiff in the within action. I have read the foregoing complaint and know the contents thereof. The contents are true to my own knowledge except as to matters therein stated to be alleged upon information and belief, and as to those matters I believe them to be true.

Daniel T. Warren

Sworn to before me this
__ day of February, 2005

Notary Public

Exhibit A

At the end, a lot of blinking

Giambra and legislators stretched fight to limit

By ROBERT J. McCARTHY
News Political Reporter
12/9/2004

For days, Erie County's legislative and executive branches glared at each other in a stare fight laden with devastating consequences for almost 1 million Erie County residents.

Neither side will say who went first, but at the almost absolute last-minute deadline of 11 p.m., a whole lot of blinking on both sides resulted in a tentative budget agreement that while not totally "green," features some very strong verdant shades.

It raises the sales tax to 9.25 percent but still implements some of the most significant cuts in the county work force in years. And most importantly, it allows for a compromise figure of what appeared late Wednesday to be \$12.5 million in cash to be used by the city and other municipal entities.

But the agreement stemmed from a grinding process that took every minute of the long day that will be recorded as Wednesday, Dec. 8. After only two Republican legislators were brought on board - Legislator Charles M. Swanick of Kenmore, and Legislator Jeanne Z. Chase of Evans - the standoff broke enough for the Legislature to swing into action and formally adopt the agreement just before the legal deadline of midnight. Two Democrats,

Majority Leader Lynn M. Marinelli, D-Town of Tonawanda, and Albert DeBenedetti, D-Buffalo, voted against the budget but with the 10 legislators who approved the sales tax hike.

Some of the most significant movement in the monthlong budget standoff occurred Tuesday, when Giambra first backed off his hard stand of no cash for the City of Buffalo and other municipalities. He had maintained as recently as Monday that he would consider a revenue

sharing agreement only if it meant assuming Buffalo services and not if it involved cash.

"Joel Giambra's not giving cash to anybody while he's in this office," he said even more adamantly on Nov. 23.

But that changed when he signaled on Tuesday his willingness to change his stand, setting in motion a process that morphed from deep philosophical differences to one involving finding a mutually acceptable cash figure. Most sources said that while the city and other municipalities sought \$15 million from the new cash proceeds, Giambra moved from nothing in his initial stand to \$6.5 million on Tuesday.

"I agreed to provide cash, and then was told it would be 15 million (dollars) more," he said at 5 p.m. Wednesday. "There is not \$15 million to share."

Finally, at the deadline, both sides agreed to a \$12.5 million pot to be split evenly between the city and the rest of the county's municipalities. It proved to be the central aspect of long and grueling negotiations.

And what initially complicated matters, he acknowledged, was the absolute refusal of Republican legislators such as Elise M. Cusack of Amherst and Denise E. Marshall of Lancaster to consider any form of tax hike.

"There are a number of legislators on the Republican side, unfortunately, who decided to take themselves out of the process," he said.

Indeed, a process that by all accounts would require five Democrats and five Republicans to equally shoulder the political weight of the tax hike never materialized. Only two Republicans signed on.

But even as Giambra considered the revenue sharing demand in order to reach a compromise, he was saying as late as his 5 p.m. news conference that he still faced

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THE BUFFALO NEWS

At the end, a lot of blinking

a \$20 million hole even with the new \$109 million generated by the new sales tax.

"You add another \$15 million, and now you've got a \$35 million hole," he complained, adding that at that point, he expected the disaster "red budget" that gutted county services and laid off 3,000 county workers to take effect.

According to sources familiar with the process, however, significant progress began to be noted at about 6:45 p.m., when Giambra and Legislature Chairman George A. Holt Jr. separately and secretly left the Rath County Office Building to negotiate at what one source said was the office of attorney Anthony J. Colucci.

When they returned at about 9:30 p.m., the same sources said the county executive began meeting with his top staff and key Republican legislators in an effort to tighten up last-minute details before eventually reaching a final agreement with Holt, his Democrats and what appeared late last night to be two Republicans.

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Exhibit B

AFFIDAVIT OF ALBERT DEBENEDETTI

STATE OF NEW YORK)
COUNTY OF ERIE) SS.:

ALBERT DEBENEDETTI, being duly sworn, deposes and says as follows:

- 1) I am a duly elected member of the Erie County Legislature, representing the 6th Legislative District.
- 2) I am registered to vote and affiliated with the Democratic Party.
- 3) I am a resident and real property owner in the City of Buffalo, County of Erie. As such I am a taxpayer subject to payment of real property taxes and other taxes and fees imposed upon the residents of Erie County by its government.
- 4) In the evening of December 8, 2004, I was attending to my duties as an Erie County Legislator and participating in attempts to reach a number of funding compromises in order to pass a timely budget for the 2005 fiscal year.
- 5) That during said evening activities, I was invited to attend a meeting of Legislators with the County Executive, Joel A. Giambra.
- 6) That I attended said meeting which took place at the Liberty Building in the office of Anthony J. Colucci, III, at approximately 8:00 PM on December 8, 2004.
- 7) That the persons attending said meeting were myself, County Executive Giambra and Democratic Legislators Lynn M. Marinelli, Edward J. Kuwik, Timothy M. Wroblewski, Mark J.F. Schroeder, George A. Holt, Jr., Demone A. Smith, Raymond K. Dusza. In addition, the meeting was attended by Republican Legislators Charles M. Swanick and Jeanne Z. Chase, and several other staff persons.
- 8) That during said meeting considerable discussion and deliberation took place regarding disputed items contained in the tentative budget proposed by County Executive Giambra and the Legislature's amendments thereto.
- 9) That no members of the public were present at said meeting, nor were any allowed to attend.
- 10) That the said meeting ended when no agreement could be reached over the inclusion of patronage jobs for the County Executive in the budget.


ALBERT DEBENEDETTI

Sworn to before me this 27th
day of December, 2004



PETER A. REESE
Notary Public, State of New York
Qualified in Erie County
My Commission Expires Sept. 30, 2008

Exhibit C

THE BUFFALO NEWS

BEHIND THE HEADLINES

County budget process anything but pretty

The 2005 spending package has been described as ugly, not only for the sales tax hike but because it failed to reduce patronage or pork.

By MATTHEW SPINA
News Staff Reporter
12/13/2004

There are reasons why sausage and a government budget as gristly as Erie County's new package are produced out of public view.

The sight is no treat for consumers or taxpayers.

Legislators late Wednesday brushed aside New York State's Open Meetings Law so they could find an out-of-the-way corner with County Executive Joel A. Giambra. There, both sides were free to argue blatant political positions.

Although they haggled over the "Medicaid penny" that will be added to the sales tax, the politicians saved some of the very things taxpayers at public hearings said they didn't want saved: patronage and pork.

"This budget process was terrible," Giambra said later, "and I hope to never have to experience something like this again because the taxpayers were not the winners here."

So what went on? Sources on both sides painted scenes of a pivotal meeting, waged between 8 and 9 p.m. Wednesday.

With a midnight deadline approaching, lawmakers and Giambra needed privacy. Reporters and union leaders were pacing the fourth floor of Old County Hall, so the eight Democrats and two of seven Republicans met at the Liberty Building office of Anthony J. Colucci III, the lawyer to the Erie County Medical Center and a Giambra friend.

Democrats that afternoon had forced a test vote to show all eight were willing to raise the sales tax. Giambra had only two votes among his Republican caucus.

If the new sales tax was to attract the 10 votes needed, Democrats would drive the decisions.

Giambra had to cave on the amount of new sales tax money he was willing to share with other local governments - \$15 million and not a penny less, he was told.

Then there were jobs to protect. Not all jobs. Just the right jobs.

Giambra wanted to save the 200 workers the Democrats had targeted days earlier, calling them his patronage. A committee they controlled had deleted those positions, and while some Democrats insisted the jobs remain deleted, others would use them to bargain.

Democrats worried about their patronage, too. They control roughly half of the 95 staff jobs that serve the Legislature, a ratio of six full-time workers for every part-time lawmaker. The Democratic and Republican parties also split the 72 jobs at the Board of Elections.

The budget Giambra had proposed weeks earlier laid off dozens of those workers, making them his chits in bargaining for a better budget.

Inside Colucci's office, Giambra and the 10 legislators went round and round. If \$15 million of the \$108.4 million in new sales tax money was to be shared with other localities, how would the Democrats find the savings in county operations?

Both sides wanted to choose the options, and both sides complained the other was keeping the specifics to itself for as long as possible.

At one point, Democratic negotiators said they would talk about restoring Giambra's 200 patronage jobs after Jan. 1.

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THE BUFFALO NEWS

BEHIND THE HEADLINES

County budget process anything but pretty

Giambra, according to one lawmaker, said he didn't think he could trust that to happen.

That's when Mark J.F. Schroeder, a Democrat from South Buffalo, stiffened. He rose from his chair at the opposite end of the table and rounded the corner toward Giambra, arguing that it wasn't the Democrats who couldn't be trusted.

Some people in the room feared the worst, but to quell the confrontation, the meeting broke apart. "There were a lot of emotional highs and lows through the whole thing," Schroeder said Saturday. "It's not something I would prefer to talk about."

Said Giambra: "There was a lot of frustration."

At some point, Giambra and Legislature Chairman George A. Holt Jr., D-Buffalo, started talking again. About 9 p.m. they found common ground. The county would share \$12.5 million with other local governments, including about \$6 million with the City of Buffalo.

There were other provisions:

- Giambra's 200 jobs were restored.
- The Legislature would lose no staff members.
- Giambra would keep most of the 25 jobs authorized for his top-floor suite, though he said he'll reassign his patronage czar to another office.
- Legislators still have pork spending to bestow in their districts, about \$150,000 per member. And \$400,000 - perhaps eight to 10 jobs - was cut at the Board of Elections.

As for the taxpayers, they suffer a 12 percent increase in the sales tax, as it goes up a penny to 9.25 cents on the dollar.

At a series of public hearings, several taxpayers said they were willing to pay more for crucial services if the

county operated at a leaner level and shed the pork and patronage.

It didn't.

County departments are spared the suffering in Giambra's "scorched earth" package, which he drafted as an argument for a higher sales tax. But top officials are still assessing how much they can spend next year. They're also assessing the ranks, because about 400 county workers will be let go. Giambra calls it the largest onetime staff reduction in county history.

The budget process was roundly described as ugly. Some lawmakers doubt the budget would survive a legal challenge. They called it business as usual in Erie County.

Included in the new budget are a smattering of higher fees, which require 10 votes and received eight when Democrats Al DeBenedetti of Buffalo and Lynn M. Marinelli of the Town of Tonawanda broke from their caucus, enraged that pork and patronage were protected.

Giambra, who later accused them of hypocrisy, said he will have to veto some budget items "for corrections."

The Legislature has a meeting set for 2 p.m. Tuesday to take up remaining budget matters.

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Exhibit D

THE BUFFALO NEWS

Sessions break open meeting laws

Judge tells legislators, mediators to meet in open setting in future

By JAMES HEANEY
News Staff Reporter
2/15/2005



Charles Lewis/Buffalo News From left, David Rutecki, Dennis Penman and Robert Gioia, who are trying to help county legislators come up with a budget compromise, faced the media Monday at Medaille College.

The County Legislature's budget deliberations over the past four days have been done in secret and in apparent violation of the state's open meeting laws.

Legislators have held about 31 hours of meetings since Friday in an effort to resolve a budget standoff that threatens to cripple county government. The meetings, facilitated by three mediators appointed by State Supreme Court Justice Joseph G. Makowski, have been held behind closed doors.

Reporters who attempted to cover a meeting held Monday at Medaille College challenged officials when they were denied access. Officials initially asked college staffers to prohibit reporters from entering the building in which meetings were held, but relented when challenged by reporters.

Officials gave various reasons for closing the meeting: Makowski had directed them to do so; discussions were related to ongoing litigation; the session was part of a confidential mediation process.

None is a legitimate reason to close the meetings to the press and public, said Robert J. Freeman, executive director of State Committee on Open Government.

The Legislature's private meetings were a "failure to comply with the open meetings law," he said.

"In my opinion, since a majority of the County Legislature gathered for the purpose of conducting public business, it constituted a meeting falling within the coverage of the open meetings law," he said.

Monday's four-hour meeting may have been the last one held behind closed doors.

After hearing an objection from an attorney for The Buffalo News, Makowski said he would clearly instruct the mediators and legislative leaders that the Legislature does not have his permission or encouragement to circumvent state law on open meetings.

Both the mediators and a legislator said Makowski had earlier told them they were permitted to operate in a confidential manner, and the judge's chambers were used to host a private meeting over the weekend. But Makowski said he issued no orders that authorized lawmakers to close meetings to the public or to ban disclosure of what is discussed.

"They set up their own ground rules," Makowski said. "I made no ruling. All I did was appoint three mediators."

Monday's four-hour meeting ended soon after reporters raised strenuous objections to the mediators about being excluded from the meeting.

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THE BUFFALO NEWS

Sessions break open meeting laws

Legislators, except for Majority Leader Lynn M. Marinelli, D-Town of Tonawanda, and Minority Leader Michael H. Ranzenhofer, R-Clarence, hurried from the meeting and ignored questions posed by a pack of reporters that followed them out of the building.

That left the three mediators - real estate executive Dennis M. Penman, banking executive David P. Rutecki and businessman Robert D. Gioia - to do most of the talking.

Penman earlier had insisted the meeting could be closed because "it's not a formal meeting of the Legislature," and, "This is not a process related to the budget."

Instead, mediators said, the meeting dealt with the lawsuits filed by assorted government officials regarding planned cuts to the budget. But no county attorneys were present at the meeting Monday, and the point of the mediation was to come up with a revised budget plan.

Mediators are working with legislators and County Executive Joel A. Giambra to develop a compromise that would attract the votes necessary to not only pass a budget, but gain authorization from the governor and state Legislature to raise the sales tax. Absent an agreement by Thursday, Makowski said he would continue action on the eight lawsuits before him.

This is not the first time this budget season that legislators have violated the open meeting law.

Ten lawmakers met privately on Dec. 11 in the law offices of attorney Anthony J. Colucci III, a Giambra friend and counsel to Erie County Medical Center. Legislators emerged in time for a public vote on a then-proposed penny increase in the sales tax a half-hour before a midnight deadline for passage, leaving them no time to review documents or debate the spending plan.

A lawsuit filed by a taxpayer challenged the budget, in part because of the secret meeting that preceded the vote. State Supreme Court Justice John P. Lane ruled

that the private meeting probably violated the open meetings law.

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