

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ERIE**

**DANIEL T. WARREN,**

Plaintiff,

vs.

**JOEL GIAMBRA**, as County Executive of the  
County of Erie, New York, et al

Defendants

**MEMORANDUM OF LAW IN OPPOSITION TO  
DEFENDANTS' MOTION TO DISMISS OR  
ALTERNATIVELY FOR SUMMARY JUDGMENT**

Index No.: I 2004-12768

**PROCEDURAL STATEMENT**

Defendants have cross-moved to dismiss this action pursuant to CPLR § 3211(a)(7) or alternatively for summary judgment in addition to opposing the plaintiff's motion for a preliminary judgment<sup>1</sup>.

The court has not given sufficient notice pursuant to CPLR § 3211(c) that it is treating this motion to dismiss as one for summary judgment and issue has not been joined so a motion for summary judgment under CPLR § 3212 is premature. In any event the movants have failed to meet their burden of proof to establish their entitlement to judgment as a matter of law and in any event there are triable issues of material fact relating to the scienter of the organizers of the private meeting amongst a quorum of the legislature that occurred on December 8, 2004 that was attended by legislators that are affiliated with the Republican and Democratic Parties and the ensuing conduct of the people who attended such meeting. Additionally the copy of the cross-motion served did not bear any indicia that the fee required by CPLR § 8020(a) was not paid and if in fact this was not paid the cross-motion should not be considered.

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<sup>1</sup> Defendants state that the Summons with Verified Complaint was served on December 29, 2004. Actually Defendant Naples was served on the 29<sup>th</sup> and the County Attorney accepted service on behalf of all other defendants on the 23<sup>rd</sup> of December.

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2 **JUDICIAL NOTICE**  
3

4 Plaintiff requests that this court take judicial notice of the pleadings and proceedings that  
5 have occurred in the actions of Mohr, Naples, Adamczyk, & Marshall v. Giambra, et al, Index #  
6 2004-12707 and Pawarski v. Giambra, et al, Index # 2004-13013. Undisputed portions of court  
7 files or official records may be judicially noticed (Matter of Ordway, 196 NY 95, 97; Kane v  
8 Walsh, 295 NY 198; Maggio v State of New York, 88 A.D.2d 1087; Matter of Allcity Ins. Co.  
9 [Kondak], 66 AD2d 531, 533; People v Singleton, 36 AD2d 725; Matter of Theresa C., 121  
10 Misc.2d 15; In re Allen, 301 AD2d 11; People ex rel. Bloom v Collins, 277 App Div 21, 23, affd  
11 302 NY 603; cf., Sleasman v Sherwood, 212 AD2d 868, 870).  
12

13  
14 **INFORMAL JUDICIAL ADMISSIONS**  
15

16 The allegations contained in the petition in Mohr, Naples, et al v. Giambra, et al, Index  
17 #2004-12707 are informal judicial admission of Defendant Naples in this action. Matter of  
18 Liquidation of Union Indem. Ins. Co., 89 NY2d 94, 103 [admissions made by counsel for party  
19 in separate action constitute informal judicial admissions that were binding on same party in  
20 instant action]). Additionally the formal judicial admissions of the other defendants made in  
21 their responsive pleadings and submissions are informal judicial admissions in this action.  
22  
23

24 **STANDING**  
25

In addition to the statutory standing under General Municipal Law § 51 plaintiff has  
common law taxpayer standing under Boryszewski v Brydges (37 N.Y.2d 361), because to deny

1 plaintiff standing would erect an impenetrable barrier to challenge and seek a declaration on  
2 which budget is legally in effect for the County of Erie as well as the legality of the Erie County  
3 Legislature's vote on the sales tax increase.

#### 4 5 **LIKELIHOOD OF SUCCESS ON THE MERITS**

6  
7 In addition to the Open Meetings violation (discussed *infra*) the vote of the legislature  
8 violated the requirement that amendments presented less than 48 hours prior to the annual  
9 meeting be considered and voted on separately (County Charter Art. XVIII § 1803(A) ¶ 3).

10  
11 "Precedents and rules must be followed, unless flatly absurd or unjust" (Blackstone,  
12 Commentaries on the Law, p 70). Blackstone's blunt statement of the rule shows that from the  
13 earliest times the doctrine of *stare decisis* did not require a strict adherence to precedent in every  
14 instance. In an early case the Court of Appeals recognized that the doctrine had certain  
15 limitations, but it was noted that the court would not depart from its prior holdings, "unless  
16 impelled by ' the most cogent reasons'" (Baker v Lorillard, 4 NY 257, 261). It is now well settled  
17 in this State and elsewhere, that the courts will not, as a general rule, follow a former decision  
18 "where it can be shown that the law has been misapplied, or where the former determination is  
19 evidently contrary to reason" (Rumsey v New York & New England R. R. Co., 133 NY 79, 85;  
20 see, also, 20 Am Jur, Courts, § 187). As Chief Judge Breitel noted in *People v Hobson* (39  
21 N.Y.2d. 479, 488) " *stare decisis* does not spring full-grown from a 'precedent' but from  
22 precedents which reflect principle and doctrine rationally evolved."

23 The doctrine of *stare decisis* does not, of course, demand unyielding resignation to even  
24 recent precedent. Policy considerations are inherent in the prudent, considered application of the  
25 doctrine. (*People v Hobson*, 39 N.Y.2d. 479.) Whether it is appropriate for the courts to overturn  
judicial precedent must depend on several factors. Among them will be the nature of the rights  
and interests at stake and the extent and degree to which action may justifiably have been taken

1 in reliance on the precedent (Matter of Eckart, 39 N.Y.2d 493, 500; People v Hobson, 39 N.Y.2d.  
2 479, 488-489, supra). In addition to such familiar considerations but apart therefrom, weight may  
3 properly be attached to the relative ease or difficulty of modification or change in the precedent.  
4 Invitations to judicial reconsideration carry more weight when addressed to constitutional issues  
5 because of the very great difficulty of effecting change by constitutional amendment. (Higby v.  
6 Mahoney, 48 N.Y.2d 15)

7 Stare decisis "was intended, not to effect a 'petrifying rigidity,' but to assure the justice  
8 that flows from certainty and stability. If, instead, adherence to precedent offers not justice but  
9 unfairness \* \* \* it loses its right to survive, and no principle constrains us to follow it." (Supra, p  
10 667; see, also, People v Hobson, 39 N.Y.2d. 479.)

11 Although a contrary ruling was made recently by this court in the matters of Pawarski v.  
12 Giambra, et al, and Mohr, et al. v. Giambra, et al. plaintiff believes said ruling to be factually and  
13 legally erroneous and plaintiff raises these issues before this court for its consideration or  
14 alternatively in order to preserve them for appellate review.

15 Defendants argue that a line by line vote was not necessary on the budget amendments.  
16 The actions of the legislature in suspending its rules in order to avoid this requirement are an  
17 admission of a party defendant that the contrary is true. This court's holding in the prior budget  
18 actions held that this was proper and in fact obviated the need for a line amendment by line  
19 amendment vote despite County Charter § 1803. This is analogous to the state legislature  
20 suspending its rules and bypassing the requirement set forth in Article III § 15 of the State  
21 Constitution. It is contrary to black letter law that the limitations imposed upon the legislature  
22 by the organic law that created it cannot be circumvented by any of its acts alone. An  
23 amendment of the County Charter must be in the same manner that imposed those limitations. In  
24 the case at bar a local law not a suspension of the legislative rules.  
25

Secondly the motion to suspend the rules required unanimous consent which it failed  
because it did not get the consent of Legislators Marinelli. The County has since either changed

1 or clarified its position relative to the legislative minutes annexed as Exhibit "O" to the affidavit  
2 of Mr. Tuppen sworn to on the 21<sup>st</sup> day of December, 2004 in light of the public airing by  
3 WGRZ TV of the actual vote where Legislators Marinelli voted "In the negative" to the motion to  
4 suspend the rules. Specifically it appears that they are now asserting that it is merely a draft and  
5 not a final version of the legislative minutes nor is it a transcript of the events that occurred on  
6 December 8, 2004 in the legislative chambers. Therefore it is not admissible evidence to support  
7 or oppose a motion for summary judgment.  
8

### 9 10 **OPEN MEETINGS LAW**

11  
12 As evidenced by the affidavit of Albert DeBenedetti sworn to on the 27<sup>th</sup> day of  
13 December, 2004, both the vote on the budget together with the vote on the sales tax increase was  
14 tainted by the private meeting held on December 8, 2004 in the Liberty Building between County  
15 Executive Joel Giambra and others with 10 members of the legislature. This meeting does not  
16 fall within the ambit of a political caucus because members of differing political affiliations were  
17 present. Public business was discussed and based on the votes had thereon an inference can be  
18 made that there was a quid pro quo arrangement made where some legislators would support the  
19 sales tax increase in exchange for certain items to be included in the budget and for a sharing of  
20 the sales tax revenue. Mr. DeBenedetti avers in ¶ 8 of his affidavit "That during said meeting  
21 considerable discussion and deliberation took place regarding disputed items in the tentative  
22 budget proposed by County Executive Giambra and the Legislature's amendments thereto."  
23 Additionally the Legislature failed to provide public notice of the special meeting at a reasonable  
24 time prior thereto (Public Officers Law § 104 [2]) The affidavit of Mr. Collucci does not  
25 controvert anything stated in Mr. DeBenedetti's affidavit. Mr. Collucci cannot state with  
certainty the number of legislators present or the topic of conversation.

1           The Defendants cite *Gernatt Asphalt Products v. Town Sardinia*, 87 N.Y.2d 668 (1996)  
2 for the position that “the court did not find a violation of the Open Meetings Law where the  
3 plaintiff had failed to establish that what allegedly took place at the private meeting related in  
4 any meaningful way to the challenged act of the public body.” This is not correct. The court  
5 found based upon the affidavit of one of the board members that the town had alleged and  
6 proved an affirmative defense that such meeting was exempted pursuant to Public Officers Law  
7 § 105 (1) (d). In fact the Court’s exact wording in its decision is “Petitioner has failed to assert any fact  
8 controverting the Town's sworn allegation that the executive session was conducted only for a permissible  
9 purpose under Public Officers Law § 105 (1) (d), and its allegation that respondent violated the Open  
10 Meetings Law is without merit.” In the case at bar there is no assertion that this meeting falls within any  
11 of the exemptions codified in Public Officers Law Article 7.

12           The Defendants cite the case of *MCI Telecommunications v. Public Service Commission*, 231  
13 A.D.2d 284 (1997) for the position that “the public did have notice and an opportunity to provide input in  
14 the overall decision being made at the various public meetings which were held, regardless of  
15 any private session held” This again is simply incorrect. Specifically the court held “Petitioners  
16 allege that because the PSC did not debate or vote on the Plan at either the May 10, 1995 or June  
17 1, 1995 public sessions, the PSC's debate and determination must have been made in private  
18 before the June 1, 1995 public session. While it is clear that staff members and PSC  
19 commissioners discussed this exceedingly complex matter outside the confines of the public  
20 meetings, petitioners do not allege or present any evidence that a quorum attended any such  
21 meeting (see, Public Officers Law § 102 [1]; see also, *Mobil Oil Corp. v City of Syracuse Indus.*  
22 *Dev. Agency*, 224 A.D.2d 15, 29, 646 N.Y.S.2d 741, appeal dismissed 89 N.Y.2d 860, 653  
23 N.Y.S.2d 281, 675 N.E.2d 1234, lv denied 89 N.Y.2d 811; *Matter of Tri- Village Publs. v St.*  
24 *Johnsville Bd. of Educ.*, 110 A.D.2d 932, 933-934, 487 N.Y.S.2d 181; *Matter of Orange County*  
25 *Publs. Div. of Ottaway Newspapers v Council of City of Newburgh*, supra), or that these

1 discussions were part of an effort to thwart public scrutiny of their process in deliberate violation  
2 of the Open Meetings Law.” Therefore the evidence before the court varied greatly between the  
3 allegations and proof in *MCI Telecommunications v. Public Service Commission*, supra, and the  
4 case at bar in that in this case there is uncontroverted proof that a meeting was held in private  
5 and was attended by legislators of differing political affiliations in a number sufficient to  
6 constitute a quorum wherein the budget was discussed and the public was not permitted to  
7 attend. The cases are also factually distinguishable in that the amendments that were actually  
8 voted on were not widely publicly debated prior to the private meeting and attendant vote  
9 thereon. The four sets of proposed amendments by the Budget Committee that were the topic of  
10 the public hearings were deleted at 11:36 p.m. on December 8, 2004 the new amendments were  
11 then substituted and then voted on just after the vote on the resolution memorializing the request  
12 for a sales tax increase. (¶ 16 of the Affidavit of James L. Tuppen sworn to on the 21<sup>st</sup> day of  
13 December, 2004). To this day the legislators themselves have not been provided with a copy of  
14 what was voted on so how can the public possibly have participated in the deliberative process  
15 prior to the December 8, 2004 votes and subsequent to this illegal private meeting?  
16

17 The Appellate Division, Fourth Department has held in *Mobil Oil Corp. v. Syracuse*, 224  
18 A.D.2d 15 (4<sup>th</sup> Dept. 1996) that “it is the challenger's burden to show good cause warranting  
19 judicial relief (see, *Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 N.Y.2d 668, 686,  
20 (supra) ; *Matter of New York Univ. v Whalen*, supra, at 735).” Good cause is ”establishing that  
21 the SIDA board members carried out public business in private (see, *Town of Moriah v Cole-*  
22 *Layer-Trumble Co.*, 200 A.D.2d 879, 881), or that they attempted to circumvent the provisions  
23 of the Open Meetings Law (see, *Incorporated Vil. of Philmont v X-Tyal Intl. Corp.*, 67 A.D.2d  
24 1039, 1040).” In this case there is proof that the Erie County Legislature carried out public  
25 business in private and that there was no, or inadequate, notice of such meeting to the public in

1 an effort to keep the meeting private. The County Legislature not only attempted but did, in fact,  
2 circumvent the aforementioned provisions of the Open Meetings Law.

3 This court is bound by the decisions of the Appellate Division, Fourth Department until it  
4 is overturned by the New York Court of Appeals. The Fourth Department does not require a  
5 showing of prejudice in order to nullify and act of a public body (see Mobil Oil v. Syracuse,  
6 supra) In fact a showing of prejudice is only required for plaintiff to be awarded attorney fees,  
7 which is not sought herein (Gordon v. Village of Monticello, 87 N.Y.2d 124). In any event the  
8 court in Malone Parachute Club, Inc. v. Town of Malone, 197 A.D.2d 120 (3<sup>rd</sup> Dept. 1994)  
9 “Lastly, inasmuch as the resolution at issue was duly adopted at a regular, publicized meeting of  
10 the Town Board on July 9, 1992, the mere fact that the Town Board may have undertaken  
11 previous discussions or held prior meetings in violation of the Open Meetings Law does not,  
12 without more, constitute "good cause" for overturning that resolution (see, Matter of New York  
13 Univ. v Whalen, 46 N.Y.2d 734, 735, 413 N.Y.S.2d 637, 386 N.E.2d 245).” This case is  
14 factually distinguishable because no prior or subsequent public hearing or deliberative process by  
15 the Legislature was undertaken on the amendments proposed and adopted by the legislature  
16 between 10:00 and 11:59 p.m. on December 8, 2004. In fact, but for the after the fact reporting  
17 of this meeting the public would not have known anything about this because the minutes of the  
18 legislature as submitted by the County via the Tuppen Affidavit does not reflect any of this  
19 occurring.  
20

21  
22 Defendants also cite MFY Legal Services v. Toia, 93 Misc.2d 147 for the proposition that  
23 a showing of prejudice is required for a court to nullify an action taken in violation of the Open  
24 Meetings Law. Despite the fact that this trial court decision is in conflict with the decisions of  
25 the Fourth Department it is factually distinguishable. There was a good faith argument in that  
case that the defendants were not a public body subject to the requirements of the Open Meetings  
Law and if so what constituted a quorum for it. The court ultimately did issue a declaration that

1 they were subject to the requirements of the Open Meetings Law, but exercised its discretion in  
2 not nullifying its acts.

3 It is well settled, however, that the provisions of the Open Meetings Law are to be  
4 liberally construed in order to promote the legislative intent that public business be conducted in  
5 an open and observable manner [Matter of Smith v. City University of New York, 92 NY2d 707,  
6 685 NYS2d 910 (1999); Gordon v. Village of Monticello, 87 NY2d 124, 637 NYS2d 961  
7 (1995)]. Any exemption to the Open Meetings Law should therefore be narrowly construed  
8 (Sciolino v. Ryan, 81 A.D.2d 475 (4<sup>th</sup> Dept. 1981)). The defendants attempt at trying to minimize  
9 the enormous and egregious effects of this private meeting by stating in effect that they were  
10 present in the same office, but in separate rooms or in small groups in the same room are simply  
11 unavailing. First the affidavit of Mr. Colucci did state that some were on cell phones. Mr.  
12 Colucci does not state, nor could he have personal knowledge of, who they were speaking. For  
13 all Mr. Colucci knows they could be talking to each other in separate rooms in which case it was  
14 a teleconference and still covered under the Open Meetings Law similar to videoconferences.  
15

### 16 17 **IRREPARABLE HARM**

18  
19 A preliminary injunction to maintain the status quo may be granted even where the  
20 court "ha[s] grave doubts regarding the likelihood of plaintiff[']s success on the merits" as long  
21 as the court finds that "if [the] preliminary injunction is not granted, any subsequent judgment  
22 might be rendered ineffectual" (Schlosser v United Presbyterian Home at Syosset, Inc., 56  
23 AD2d 615 [1977]). Generally, such a preliminary injunction is granted where injunctive relief  
24 will prevent the potential dissolution of an existing valuable asset or some comparable potential  
25 irreparable harm (see e.g. Mr. Natural, Inc. v Unadulterated Food Products, Inc., 152 AD2d  
729 at 730 [preliminary injunction necessary to maintain status quo despite factual disputes as

1 to merits of claim where "there [was] no assurance that the plaintiff [would] be able to stay in  
2 business pending trial" and was in "real danger of losing its business or suffering dissolution" if  
3 injunctive relief was not imposed]; U.S. Ice Cream Corp. v Carvel Corp., 136 AD2d 626 at 628  
4 [finding preliminary injunction necessary to maintain status quo where there was "no assurance  
5 that the plaintiffs [would] be able to stay in business pending trial" and noting that interference  
6 with an ongoing business warranted injunctive relief even where factual disputes exist];  
7 Burmax Co. v B & S Indus., Inc., 135 AD2d 599 at 600 [preliminary injunction enjoining the  
8 distribution of assets was appropriate where injunctive relief was necessary to preserve the  
9 status quo and "the defendants w[ould] suffer no great hardship as a result of the issuance of  
10 the preliminary injunction "]. The expenditure of funds pursuant to an invalid budget is  
11 sufficient irreparable harm for the issuance of a preliminary injunction.  
12

13 In the case at bar the complaint alleges and is corroborated by the Affidavit of  
14 Legislator DeBenedetti that a meeting was held at which a quorum of the Legislature was  
15 present and was also attended by members of the legislature and Executive Branch of County  
16 Government of multiple political party affiliations. At this meeting public business was  
17 discussed and deliberated on the budget and sales tax increase. The amendments discussed at  
18 such meeting were not known to the public at large prior to the meeting. These allegations and  
19 proof is uncontroverted.  
20

#### 21 **AMOUNT OF UNDERTAKING**

22  
23  
24 CPLR 6312(b) requires the Court to fix the undertaking in an amount sufficient to  
25 compensate Defendant for damages sustained if it is determined that the preliminary injunction  
was improvidently granted. (See, Margolies v. Encounter, Inc., 42 N.Y.2d 475 (1977))  
Therefore the amount of the undertaking should be inversely proportional to the Court's

1 assessment on the issue of plaintiff's likelihood of success. (the greater the likelihood the lower  
2 the undertaking). Plaintiff need not demonstrate a willingness or ability to post an undertaking  
3 prior to the issuance of a preliminary injunction. In fact it is the Defendants' burden of proof to  
4 demonstrate what damages it would suffer that would be proximately related to the issuance of  
5 the preliminary injunction (MonsterHut, Inc. v. PaeTec Communications, Inc., 294 A.D.2d 945  
6 (4<sup>th</sup> Dept. 2002)).

7  
8 Another factor to consider in setting the amount of undertaking is the length of time the  
9 preliminary injunction is anticipated to be in effect. Plaintiff anticipates that there will be little  
10 discovery. After this discovery it is anticipated the parties will cross-move for summary  
11 judgment.

12 In Johnson v. City of New York, 152 Misc. 2d 576, 578 N.Y.S.2d 977, the court set the  
13 undertaking at \$100.00 when it enjoined renting of a single apartment. In Nigra v. Young  
14 Broadcasting of Albany Inc., 177 Misc.2d 664, 676 N.Y.S.2d 848, the court enjoined defendant  
15 from enforcing a restrictive covenant and waived the requirement of an undertaking. However,  
16 see Rourke Developers Inc. v. Cottrell-Hajeck, Inc., 285 A.D.2d 805, 727 N.Y.S.2d 667 which  
17 holds that an undertaking may not be waived.

18 Wherefore the Defendants motion should be denied in its entirety or alternatively leave  
19 to re-plead should be granted pursuant to CPLR § 3211(e) and the preliminary injunction  
20 should issue forthwith.  
21

22  
23 DATED: January 7, 2005  
Buffalo, New York

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\_\_\_\_\_  
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