

Some Options When A NY Representative Of Yours Is Not Acting Responsibly

(Note: these summaries were written by a non-lawyer, for NYS situations [other states should have similar laws]. Please consult with an experienced attorney when considering any of these actions.)

Caveat: The options listed are NOT necessarily the only choices. The ones selected were the most common, and typically the most applicable to deal with the problem of inadequate representation. A creative and aggressive lawyer may well come up with different options, depending on the particular circumstances.

A good example of this is that a group of progressive New Yorkers filed a 2007 claim against several wind power developers for allegedly being in violation of the **Sherman Antitrust Act**. Their theory is that these developers appear to be in collusion with each other (and/or are effectively the same company). Considering how rarely we see multiple developers competing with each other, there seems to be some merit to this. (See <<<http://tinyurl.com/36w3g7>>>.)

1 - A NYS Article 78 Lawsuit —>

This provision provides taxpayers with a right to file suit against NYS agencies or public officials who in their capacity as a public servant failed to perform a legal duty, who exceeded their jurisdiction, or who violated a lawful procedure, etc. Here is the exact wording of the law: <<<http://tinyurl.com/2mm4rz>>>.

Here is an interpretation for layman: <<<http://article78.com/primer/2.shtml>>>.

Normally there is **not** personal liability with an Article 78 proceeding, so when a town board member (for instance) is sued, it is the **town** (you) that pays for their defense, and it is the **town** (you) that pays for any judgment won against them. [Usually the directed verdict is a “cease action” rather than a financial award.]

As a result, most officials are usually not particularly concerned about an Article 78 lawsuit. They may have to stop a particular action, but they usually look at the court order as a temporary roadblock and simply repackage their original action with small changes — usually not the most desirable outcome.

Here is a good example of a successful Article 78 lawsuit (late 2007), which was originated in the Cooperstown area: <<<http://tinyurl.com/3av847>>>.

2 - A NYS General Municipal Law § 51 Lawsuit —>

This statute provides taxpayers with a right to file suit against public officials who **waste taxpayer monies** (ref: “GMU General Municipal” Article 4, § 51 on <<<http://public.leginfo.state.ny.us/menugetf.cgi?COMMONQUERY=LAWS>>>):

Prosecution of officers for **illegal acts**. All officers, agents, commissioners and other persons acting, or who have acted, for and on behalf of any county, town, village or municipal corporation in NY state, and each and every one of them, may be prosecuted, and an action may be maintained against them ... **to prevent waste or injury** to, or **to restore and make good**, any property, **funds** or estate of such county, town, village or municipal corporation...

Waste is defined in § 51 to include officers or agents of local government (e.g., county, town, village or municipal corporation) who allow for any fraudulent, illegal, unjust, or inequitable claims or expenses to be paid:

Waste or injury consists in any board, officer or agent in any county or municipality, **by collusion** or otherwise, **contracting**, auditing, **allowing or paying**, or **conniving** at the contracting, audit, allowance or payment of any fraudulent, illegal, **unjust** or inequitable claims, demands or expenses, or any item or part thereof against or by such county or municipality...

Section 51 authorizes a taxpayer lawsuit "when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes."

The taxpayer action is based on a public official's misconduct, such as fraud, collusion, corruption, or bad faith [Lavin v. Klein (2004) 783 N.Y.S.2d 815].

A bond may have to be posted when such a lawsuit is filed.

Personal liability arises only in some violations of this law, i.e. "if the illegal acts were collusive, fraudulent, or motivated by personal gain." [Stewart v. Scheinert N.Y., 1979] Despite the restrictions, that definition seems broad enough to cover many cases that might arise regarding situations like wind power.

The penalties are not clearly defined in this statute, but would likely be at least the extent of the damages proven.

3 - A NYS General Municipal Law Article 18 Lawsuit —>

There are several sections of NY General Municipal Law Article 18 (§800-§813) that may apply. (See <<<http://tinyurl.com/2srnb4>>>.)

For instance, §809 says that town officials should disclose any financial incentives they may obtain or relationships they have, that *could* result in a conflict of interest.

For the rest of this section I quote (my emphasis) from passages from <<<http://tinyurl.com/28s4h4>>>, as it seems to be very pertinent:

Article 18 of the General Municipal Law contains the provisions of law which relate to conflicts of interest of municipal officers and employees. Pursuant to General Municipal Law, §800(3), a municipal officer or employee has an interest in any contract with his municipality *if he receives a direct or indirect financial or material benefit as a result of that contract.*

That interest is prohibited if the officer or employee, individually or as a member of a board, has the power or duty to: **(a)** negotiate, prepare, authorize or approve the contract or approve payments thereunder; **(b)** audit bills or claims under the contract; or **(c)** appoint an officer or employee who has any such powers or duties (General Municipal Law, §801), and none of the exceptions contained in Article 18 are applicable (see General Municipal Law, §802).

Any contract willfully entered into in which there is a prohibited interest is null, void and unenforceable (§804) and **any officer or employee who willfully or knowingly violates the provisions of Article 18 may be guilty of a misdemeanor** (§805).

Also note that, if an officer or employee has an interest in a contract that is not prohibited (under the provisions of Article 18, General Municipal Law, §803) nonetheless it is generally **required that the interest be disclosed in writing and included in the official record of the governing board's proceedings.** Disclosure is not required under section 803 in the case of an interest in a contract which is not prohibited under subdivision two of section 802 (General Municipal Law, §803[2]).

A "contract", for purposes of Article 18, is defined in General Municipal Law, §800(2) as any "claim, account or demand against or agreement with a municipality, express or implied." At least one lower court, the City Court of the City of Mount Vernon, has held that an application for a building permit and subsequent issuance thereof constitutes a "contract" for conflict of interest purposes (People v Pinto, 88 Misc 2d 303, 387 NYS2d 385).

If the awarding of a wind power, water extraction (or similar) project to a developer is found to be a contract, a municipal officer or employee would have an interest if he or she stands to gain a direct or indirect material or pecuniary benefit from the contract even though the officer or employee is not a party to the contract (1985 Opns St Comp No. 85-60, p 84; 24 Opns St Comp, 1968, p 561; 1981 Opns St Comp No. 81-295, p 318).

The disclosure requirements of General Municipal Law, section 809 provide, that every application, petition or request submitted for a variance, amendment, change of zoning, license or permit must state the name, residence and the nature and extent of the interest of any officer or employee of the municipality, in the person, partnership or association making such application, petition or request, to the extent known to the applicant.

For the purpose of this section, an officer or employee is deemed to have an interest in the applicant when he, his spouse, or their brothers, sisters, parents, children, grandchildren, or the spouse of any of them:

(a) is the applicant, (b) is an officer, director, partner or employee of the applicant, (c) legally or beneficially owns or controls stock of a corporate applicant or is a member of a partnership or association applicant, or (d) is a party to an agreement with such an applicant, expressed or implied, whereby he may receive any payment or other benefit, whether or not for services rendered, dependent or contingent upon the favorable approval of such application, petition or request.

[Since this statute contemplates that the person or entity making the application will make the required disclosures, it also may not apply to a situation where the interest of the local government officer or employee is adverse to that of the applicant.]

It should be noted that even when a transaction does not result in a prohibited conflict of interest and the provisions of section 809 do not apply, the town's code of ethics should be reviewed to determine whether it contains any pertinent provisions. Under General Municipal Law, §806, a town code may regulate or prescribe conduct which is not expressly prohibited by Article 18.

Note that the courts of this State have held public officials to a high standard of conduct and, on occasion, have negated certain actions which, although not violating the literal provisions of Article 18 of the General Municipal Law, violate the spirit and intent of the statute, are inconsistent with public policy, or suggest self-interest, partiality or economic impropriety (see, e.g., *Zagoreos v Conklin*, 109 AD2d 281, 491 NYS2d 358; *Matter of Tuxedo Conservation v Town Board of the Town of Tuxedo*, 69 AD2d 320, 418 NYS2d 638; *Conrad v Hinman*, 122 Misc 2d 531, 471 NYS2d 521).

Thus, for example, in *Tuxedo*, supra, the court held that a board member should have disqualified himself from voting to grant a construction permit to a subsidiary of a client of the advertising agency of which he was an officer.

Accordingly, any town board member should **abstain from discussions** — and not even be present when such discussions are held — as well as obviously not **voting on any matter** which, while not violating Article 18 or the town's code of ethics, **suggests even an appearance of self-interest, partiality or economic impropriety**.

Violations of some sections of General Municipal Law Article 18 may mean that public officials may also be in violation of NYS Penal Law Section 195.00, Official Misconduct and/or Penal Law Section 200, (Bribery Involving Public Servants and related offenses).

4 - File an Ethics Complaint —>

If your municipality has a Code of Ethics, check that out to see if actions made by local representatives could be in violation of that law.

In a situation where a town does not have a municipal code of ethics (probably most), it is my understanding that NYS law may become operative.

The relevant law would appear to be NYS Public Officers Law, Section 74, "Code of Ethics": <<<http://www.dos.state.ny.us/ethc/POL74.html>>>.

The wording of the NYS law includes such actions as:

No officer should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest.

More specifically, some examples:

- No officer should accept other employment which will impair his independence of judgment in the exercise of his official duties.
- No officer should use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others.
- No officer should engage in any transaction as representative or agent of the municipality with any business entity in which he has a direct or indirect financial interest that might reasonably tend to conflict with the proper discharge of his official duties.
- An officer should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person.
- An officer should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.

The penalties for such violations are a fine (up to \$10,000), a suspension from office, and/or a removal from office. Ethics claims against local representatives would be made to the local county District Attorney.

in January of 2008 such a claim was made by some citizens in the town of Burke (NY) against their Town Board and Zoning Board of Appeals. See this for a current discussion <<<http://www.rivercitymalone.com/?p=193>>>.

The local DA said he has talked to NYS officials regarding concerns brought to him by area residents in relation to the NYS Public Officers law. Whether this law applies only to state employees appears to be open to legal interpretation.

5 - A Federal "1983" Lawsuit →

This is a VERY powerful legal option that citizens have at their disposal. Read this page about Section 1983 <<<http://tinyurl.com/yt6hax>>>. A key sentence is:

By its terms, then, Section 1983 authorizes a private, civil lawsuit against any person who abuses state or local government authority to violate another person's civil rights. **In short, the statute creates a lawsuit for abuse of government power.**

That could well be applicable in local situations where elected officials have acted improperly. A person's civil rights can be infringed upon in several ways — like having their property value decline due to self-serving decisions made by elected representatives.

My understanding is that the real impact of a Section 1983 is that any sued local official may have to **pay for their own defense** and, if they lose, may have to **pay for any damages themselves**. In other words, they may be *personally* liable. See <<<http://tinyurl.com/3a3ckf>>> for a sample discussion of this issue.

In NY, the town of Canaan was sued by citizens due to what they felt were poor property tax assessments (methodology, etc.), and which was allegedly due in part by actions or inactions of certain town board members.

Interestingly, the town was sued under THREE provisions mentioned here (#1, #2, #5). This is a relatively common strategy for some lawyers to take: sue under all possible provisions, increasing their chances that something will stick.

The town filed an objection to all three of these provisions, basically saying that none of them were appropriate, for one reason or another. They asked for summary dismissal of the entire case.

*In 2007 the NYS Appeals court **denied** the town's request and **upheld** the citizens' right to file ALL THREE types of claims against the town!* (<<<http://decisions.courts.state.ny.us/ad3/Decisions/2007/500514.pdf>>>). [Resnick v. Town of Canaan (2007) 832 N.Y.S.2d 102]

As with ANY lawsuit, certain criteria must be met. Just filing a 1983 claim would usually be a *major* wake-up to local officials (once they understood the ramifications). The probable result of this message is that they would act much more responsibly right away. Done correctly, *it is unlikely that the suit would ever go to court*. That is exactly what happened here: the case was settled out of court.

Another interesting aspect of the latter two types of claims (#2 & #5) is that attorney fees can be covered by the defendant (more likely with a jury). *What this means is that some higher-power law firms might be willing to take on some of these types of cases based on a contingency fee arrangement.*

This is a VERY important case and was really about testing our rights as a citizens to file against representatives who are acting inappropriately.

Obviously what is also needed is a competent and aggressive attorney. They may be rare, but they are out there. [The lawyer for the Resnick v. Canaan case is Martin Cramer, esq: 212-239-4515, "martcramer@gmail.com". Although I do not know him personally, I was **very** impressed reading his briefs, and would recommend seriously considering him for any such case discussed here.]

6 - Create a local Political Action Committee (PAC) —>

The point of this is to collect funds and specifically use this money to get rid of non-responsive officials and replace them with cooperative persons who truly act in the best interest of their community. This can be for local, county or state representatives. (Note: IRS rules say that contributions are not tax deductible.)

Setting up such a PAC takes some time and effort, but it isn't *that* hard to do. If you want the instructions, send me an email and I will send them to you (less than two pages).

A good example of a local upstate NY PAC that was recently setup is the one in the Saranac/Lake Placid area: <<<http://www.AdkAction.org>>>. I'm sure that they would be glad to answer questions on it as well.

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Note1: All url links should be clickable

IMPORTANT General Note 2:

If you get involved in a matter with a contrary representative, make sure that all contrary evidence and arguments you can muster are placed in the administrative record. This history is usually the main evidence a reviewing court looks at. By papering the record, you improve your chances of a favorable decision as well as a court reversal. Moreover, many legal proceedings require a person's participation in the administrative process in order to have standing to mount a legal challenge.

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