

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

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In the Matter of the Application of	:	Index No.
FELIX PROCACCI,	:	615888/2018
	:	
	:	
Petitioner,	:	AFFIDAVIT IN
	:	OPPOSITION OF
-against-	:	MOTION TO DISMISS
	:	
	:	
TOWN OF HEMPSTEAD	:	Justice Assigned:
	:	Hon. Sharon M.J.
	:	Gianelli
Respondent.	:	
	:	
	:	Return Date:
	:	01/09/2019
-----		X

TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NASSAU:

I Felix Procacci, being duly sworn, deposes and says:

1. I am the Petitioner in this proceeding. Petitioner is appearing Pro Se in this matter. Petitioner makes this affidavit in opposition to the motion by the Respondent Town of Hempstead to dismiss the Petition challenging the legitimacy of the "Emergency Free Air Law".
2. The Respondent cites two reasons for dismissing this action. First, the Petitioner does not have standing, and second, this proceeding is improperly brought pursuant to

an Article 78 because Petitioner is an unaggrieved party in this litigation.

3. The Petitioner disagrees with the Respondent's arguments for dismissal.
4. Each of these issues were discussed in the Petition (in items 27 through 33), and the Respondent chose not to respond directly to those statements.
5. The Petitioner explained in the Petition, why he believes he has standing and why an Article 78 mandamus proceeding is appropriate in this case.
6. For convenience those arguments, made in the Petition, will be repeated and expanded here to ensure that the Respondent is cognizant of the case law cited which allows an unaggrieved Citizen-Taxpayer to challenge the Constitutionality of a local law and bring this case with an Article 78 seeking a writ of mandamus.
7. First, the Respondent argues that the Petitioner does not have standing because he is not specially aggrieved by the ordinance referred to as the "Emergency Free Air Law" in the petition and hereon after.
8. Second, the Respondent argues that an Article 78 is improper for this proceeding as follows: "Mandamus to compel does not lie in the absence of a clear legal right

to the relief sought, and there is no such right,  
petitioner's claims notwithstanding."

9. This proceeding is challenging the Constitutionality of the "Emergency Free Air Law" claiming it violates the Fourteenth amendment to the United States Constitution as well as Town and State laws.
10. The following statements cite case law from the second department that shows an unaggrieved Citizen-Taxpayer does have standing to challenge the Constitutionality of a local law.

#### **Petitioner Has Standing**

11. An unaggrieved Citizen-Taxpayer has standing to Constitutionally challenge a local law (see St. John's Law Review, Issue 1, Volume 39, December 1964, Number 1). Referenced portion is attached hereto as Exhibit 1.
12. The Petitioner is an unaggrieved citizen-taxpayer in this matter but has standing. (see: *Policeman's Benevolent Ass'n v. Board of Trustees*, 21 App. Div. 2d 693, 250 N.Y.S.2d 523, 2d Dep't 1964).
13. In pertinent parts, the aforementioned reference (provided in Exhibit 1), states the following regarding an unaggrieved citizen-taxpayer challenging a local law.

Petitioner Has Standing - continued

ARTICLE 78—PROCEEDING AGAINST BODY OR OFFICER

*Unaggrieved citizen-taxpayer has standing to constitutionally challenge a village law and injunctive relief is available in an Article 78 proceeding.*

*Policemen's Benevolent Ass'n v. Board of Trustees*<sup>289</sup> involved a proceeding brought by an individual taxpayer and a Patrolmen's Benevolent Association pursuant to Article 78 to obtain a declaration of invalidity of a local village law, and related injunctive relief.

. . .

As a result of *Policemen's Benevolent Ass'n*, the law is, at least in the second department, that an unaggrieved citizen-taxpayer has standing to challenge the validity of a local village law, as well as the action of a county board of supervisors, since the *Ahern* case involved such action by a county board, and was expressly overruled by the instant case insofar as the question of standing is concerned.

. . .

The appellate division, second department, reversed, holding that the petitioners had standing, and that injunctive relief could be granted in such a proceeding. In holding that the petitioners had standing to challenge the local village law, the court expressly overruled its prior decision in *Ahern v. Board of Supervisors of Suffolk County*.<sup>291</sup> The court in *Ahern* had held that the mere fact that the petitioner was a taxpayer, resident and voter, did not give him the standing to challenge a local legislative act. In the instant case the court stated that "one who is a citizen, resident and taxpayer has standing to bring an Article 78 proceeding such as the one at bar, even though he does not show a personal grievance or a personal interest in the outcome. . . ."<sup>292</sup>

. . .

<sup>289</sup> 21 App. Div. 2d 693, 250 N.Y.S.2d 523 (2d Dep't 1964).

<sup>290</sup> CPLR 7804(f); CPLR 3211.

<sup>291</sup> 7 App. Div. 2d 538, 185 N.Y.S.2d 669 (2d Dep't 1959).

<sup>292</sup> *Policemen's Benevolent Ass'n v. Board of Trustees*, 21 App. Div. 2d 693, —, 250 N.Y.S.2d 523, 526 (2d Dep't 1964).

14. The cases cited above does show that the second department does allow an unaggrieved citizen-taxpayer to challenge

the Constitutionality of a local law and allows an unaggrieved citizen-taxpayer to challenge such a law pursuant to an Article 78 mandamus proceeding .

15. In addition, in New York State's overview of Article 78 Practice and Procedure (see : [http://onlineresources.wnyc.net/FairHearingResources/docs/an\\_overview\\_of\\_article\\_78\\_practice\\_and\\_procedure\\_05-21-09.pdf](http://onlineresources.wnyc.net/FairHearingResources/docs/an_overview_of_article_78_practice_and_procedure_05-21-09.pdf)), states the following :

**c) Mandamus To Compel.** Mandamus to compel is available to compel a public official to perform a duty enjoined by law, where there is a "clear legal right" to the relief requested. Klostermann v. Cuomo, 61 N.Y.2d 525 (1984), Mtr. of DiBlasio v. Novello, 28 A.D.3d 339 (1st Dep't 2006) Mandamus may be used to compel a purely ministerial act which is required by law, but it cannot be used to direct the form of such action or how a public official should exercise discretion.

16. The ministerial act requested in this proceeding is for the Respondent to rescind the Town's "Emergency Free Air Law" since State and Local Zoning laws were violated during its enactment and said law currently conflicts with both State and Local laws which violates the Fourteenth Amendment to the Constitution which guarantees equal protection of the laws.
17. In this proceeding, the Petitioner alleges that the Respondent, the Town of Hempstead did not follow New York State and Town law when they enacted the "Emergency Free Air Law".

18. There are no disputed questions of material fact in this case, and this has been codified by the Respondent in his Motion to Dismiss whereas he did not dispute any material facts in his Motion to Dismiss.
19. Consequently, as stated in *Ahern v. Bd. of Supervisors* :  
"It is well settled that where there is no disputed question of material fact but only an issue of law, the relief here requested may be awarded in a mandamus proceeding" (see: *Matter of Ahern v. Bd. of Supervisors*, 17 Misc. 2d 164, N.Y. Misc. 1959).
20. The Respondent's Motion to Dismiss does not refute the allegation that the "Emergency Free Air Law" preempts State Law (as alleged in Petition statement 6).
21. The Respondent's Motion to Dismiss does not refute the allegation that the "Emergency Free Air Law" preempts New York State Zoning Law (as alleged in Petition statement 7).
22. The Respondent's Motion to Dismiss does not refute the allegation that the "Emergency Free Air Law" preempts the Town's zoning law (as alleged in Petition statement 8).
23. The Respondent's Motion to Dismiss does not refute the allegation that the "Emergency Free Air Law" was not written to regulate land usage, as required by New York

State and Town Zoning Law, but was written to cut a deal to settle a law suit (as alleged in Petition statement 9).

24. It is important to note that the attorney for the Respondent, Joseph Ra, who is also the Town Attorney, advised the Town Board on the "Emergency Free Air Law" resolution saying the resolution was legal, but never provided any detailed reason for his position at the August 7th, 2018 Public Hearing for this law or in his Motion to Dismiss this matter.
25. The Respondent has spent over \$75,000 of taxpayer money litigating the "Emergency Free Air Law" and its predecessor, the "Free Air Law" from which it the "Emergency Free Air Law" was derived, but has not provided one material fact in this matter to support the law's legitimacy.
26. In the Resolution proposing the "Emergency Free Air Law", the preamble says the following :

**WHEREAS**, it is in the public interest to consider the amendment of Section 336 of Article XXXIII of the Building Zone Ordinance of the Town of Hempstead entitled "Gasoline Service Stations" in order to permit the use of coin-operated air compressor units for the inflation of tires at gasoline service stations except that compressed air must be provided at no charge in cases of emergency;

27. Despite the Respondent claiming this resolution is in the public interest, the Respondent during the hearing of the "Emergency Free Air Law", on August 7, 2018 never

explained exactly why this law is in the public's best interest, and refused to discuss it in any detail because it was a subject of pending litigation.

28. But even when faced with the task of defending this legislation in a court of law (in this action), the Respondent has not provided one statement defending the legitimacy or need for the "Emergency Free Law".
29. WHEREAS the Petitioner, Felix Procacci has shown that he has standing in this case and that an Article 78 of mandamus is appropriate, and the Respondent, Town of Hempstead has NOT SHOWN ANY EVIDENCE to support the legitimacy or need for the Town ordinance referred to as the "Emergency Free Air Law", the Petitioner respectfully asks the court to reject the Respondent's Motion to Dismiss and provide an order that the Town of Hempstead rescind the "Emergency Free Air Law" and provide the costs incurred by the Petitioner for this action, totaling \$475 (\$210 for the index number, \$45 for Notice of Petition, \$95 for the RJI, and \$125 for the process server). The receipts for these costs are attached hereto as Exhibit 2.
30. Petitioner argues that the Respondent pay for the cost of this action because this zoning ordinance, the "Emergency Free Air Law" was enacted in bad faith, to settle



litigation after the court issued an injunction on the Town's "Free Air Law" saying the Plaintiffs in that case would likely succeed based on the doctrine of preemption (see Exhibit 6 of the Petition).

31. Instead of just simply rescinding the "Free Air Law", (which would have been in the best interest of the Town's taxpayers) the Respondent chose to appeal the decision, for unspecified legal reasons, which led eventually to the negotiated illegal settlement which was to create the illegal "Emergency Free Air Law".

DATED: Nassau County, New York

December \_\_\_\_\_, 2018

Respectfully submitted,

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Felix Procacci  
*Pro Se*  
1165 Barnes Street  
Franklin Square, New York 11010  
(516) 233-1562

EXHIBIT 1

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**St. John's Law Review**

Volume 39

Issue 1 Volume 39, December 1964, Number 1

Article 68

May 2013

Unaggrieved Citizen-Taxpayer Has Standing to  
Constitutionally Challenge a Village Law and  
Injunctive Relief Is Available in an Article 78  
Proceeding

St. John's Law Review

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Available at: <http://scholarship.law.stjohns.edu/lawreview/vol39/iss1/68>

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BIANNUAL SURVEY

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ARTICLE 78—PROCEEDING AGAINST BODY OR OFFICER

*Unaggrieved citizen-taxpayer has standing to constitutionally challenge a village law and injunctive relief is available in an Article 78 proceeding.*

*Policemen's Benevolent Ass'n v. Board of Trustees*<sup>289</sup> involved a proceeding brought by an individual taxpayer and a Patrolmen's Benevolent Association pursuant to Article 78 to obtain a declaration of invalidity of a local village law, and related injunctive relief. The respondents were the board of trustees of the village and the village chief of police. The supreme court granted respondents' motion<sup>290</sup> made before answer, to dismiss the petition as being insufficient on its face on two grounds. First, petitioners failed to show that they were personally aggrieved, thus lacking standing to bring the proceeding. Second, injunctive relief is not available in an Article 78 proceeding.

The appellate division, second department, reversed, holding that the petitioners had standing, and that injunctive relief could be granted in such a proceeding. In holding that the petitioners had standing to challenge the local village law, the court expressly overruled its prior decision in *Ahern v. Board of Supervisors of Suffolk County*.<sup>291</sup> The court in *Ahern* had held that the mere fact that the petitioner was a taxpayer, resident and voter, did not give him the standing to challenge a local legislative act. In the instant case the court stated that "one who is a citizen, resident and taxpayer has standing to bring an Article 78 proceeding such as the one at bar, even though he does not show a personal grievance or a personal interest in the outcome. . . ."<sup>292</sup> The court distinguished the instant case from that of *St. Clair v. Yonkers Raceway, Inc.*,<sup>293</sup> wherein it was held that an unaggrieved citizen-taxpayer lacked standing to challenge the constitutional validity of a state statute. Here, because a village law was involved, the court ruled that petitioner had standing.

With respect to the granting of injunctive relief in an Article 78 proceeding, the court saw no reason why it should not be obtainable<sup>294</sup> in the instant case, despite some case law<sup>295</sup> to the contrary.

<sup>289</sup> 21 App. Div. 2d 693, 250 N.Y.S.2d 523 (2d Dep't 1964).

<sup>290</sup> CPLR 7804(f); CPLR 3211.

<sup>291</sup> 7 App. Div. 2d 538, 185 N.Y.S.2d 669 (2d Dep't 1959).

<sup>292</sup> *Policemen's Benevolent Ass'n v. Board of Trustees*, 21 App. Div. 2d 693, —, 250 N.Y.S.2d 523, 526 (2d Dep't 1964).

<sup>293</sup> 13 N.Y.2d 72, 192 N.E.2d 15, 242 N.Y.S.2d 43 (1963).

<sup>294</sup> Cases holding that injunctive relief in an Article 78 proceeding is available are: *Matter of New York Post Corp. v. Leibowitz*, 2 N.Y.2d 677, 143 N.E.2d 256, 163 N.Y.S.2d 409 (1957); *Matter of O'Reilly v. Grumet*, 308 N.Y. 351, 126 N.E.2d 275 (1955).

<sup>295</sup> *Gapinski v. Zoning Bd. of Appeals*, 3 App. Div. 2d 976, 162 N.Y.S.2d

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As a result of *Policemen's Benevolent Ass'n*, the law is, at least in the second department, that an unaggrieved citizen-taxpayer has standing to challenge the validity of a local village law, as well as the action of a county board of supervisors, since the *Ahern* case involved such action by a county board, and was expressly overruled by the instant case insofar as the question of standing is concerned. As to an unaggrieved citizen-taxpayer attacking the validity of a state law, the court of appeals case of *St. Clair* is controlling, and the petitioner will be deemed to lack standing to challenge its validity.

*Mandamus unavailable to prevent judge X from referring matter to Judge Y.*

In *Kahn v. Backer*,<sup>294</sup> the question presented was whether an Article 78 proceeding was properly brought against a justice of the supreme court. The proceeding was instituted in the appellate division,<sup>297</sup> first department, in order to compel the respondent to render a decision on a motion to dismiss a cause of action.<sup>298</sup> The case was on the general jury reserve calendar when the motion was made. Respondent disposed of the motion by referring it to the trial justice. The appellate division held that the respondent had in fact exercised his discretion and that the disposition of the motion in the above manner was the equivalent of a denial of the motion. Proper procedure was to enter an order thereon and to appeal the order.

The court pointed out that an Article 78 proceeding could not be used to challenge a determination made in a civil action, unless it was an order summarily punishing a contempt committed while in the court's presence.<sup>299</sup> The court also held that the disposition of the petitioner's motion, even if erroneous, could not be indirectly reviewed in a proceeding in the nature of mandamus, since the only proper avenue by which one may challenge such a determination is by appeal.<sup>300</sup>

The proceeding in the *Kahn* case was one in the nature of mandamus, which has always been a discretionary remedy. The court points out, relying on well-established case law,<sup>301</sup> that it will

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945 (4th Dep't 1957). The court made a blanket statement in this case that injunctive relief is not appropriate in a proceeding under Article 78, Civil Practice Act.

<sup>294</sup> 21 App. Div. 2d 171, 249 N.Y.S.2d 572 (1st Dep't 1964).

<sup>297</sup> CPLR 506(b)(1).

<sup>298</sup> A motion to dismiss a cause of action is made pursuant to CPLR 3211.

<sup>299</sup> CPLR 7801(2).

<sup>300</sup> CPLR 7801(1).

<sup>301</sup> See, e.g., *Walker v. Reidy*, 31 Misc. 2d 915, 221 N.Y.S.2d 564 (Sup. Ct. 1961); *Lindner v. Frisina*, 194 N.Y.S. 2d 843 (Sup. Ct. 1959).

**EXHIBIT 2**

**Proof of Petitioner's Expenses  
for this Action**

Index Number	\$210.00
Notice of Petition	\$45.00*
Request for Judicial Intervention (RJI)	\$95.00*

**Anke**  
**JUDICIAL SERVICES, INC.**  
247 Nassau Boulevard  
Garden City So., NY 11530



(516) 483-6880

FAX: (516) 486-0420

TO: Felix Procacci  
1145 Barnes St  
Franklin Square NY 11010

11/29/18

ID #11-2791290

516 233-1512		PREVIOUS BALANCE			
DATE	PLAINTIFF	DEFENDANT	Mailing & Postage	Filing & Fee Chgs.	SERVICE Charge
11/29/18	Felix Procacci	Town of Hempstead			
	RJI	One Washington St			125.00
	Not of Petition	Hempstead NY			
	CD 1/9/18				125.-
			Clk # 2090		