

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

3 DANIEL T. WARREN,)

4 Plaintiff,)

5 vs.)

6 JOEL GIAMBRA, as County Executive of the)
7 County of Erie, New York; and)

8 JOSEPH PASSAFIUME as Director of the Erie)
9 County Division of Budget, Management &)
10 Finance, and)

11 NANCY NAPLES, as Comptroller of the County)
12 of Erie, New York; and)

13 DAVID J. SWARTS, as Clerk of the County of)
14 Erie, New York; and)

15 COUNTY LEGISLATURE, COUNTY OF)
16 ERIE, NEW YORK; and)

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

19 COUNTY OF ERIE, NEW YORK)

20 Defendants)
21)
22)
23)
24)
25)

MEMORANDUM OF LAW

Index No.: I 2004-12768

26 Preliminary Statement

27 Action #2 is a taxpayer action commenced under General Municipal Law § 51 to
28 challenge the validity of the home rule message of necessity requesting the increase of the
29 County's sales and use tax by 1% and the budget purportedly adopted with amendments on
30 Wednesday December 8, 2004. This bill and budget was adopted in violation of numerous
31 sections of the Erie County Charter and is an illegal and ultra vires act of the Erie County
32 Legislature. Furthermore the County Legislature violated the open meetings law (Public
33 Officers Law Article 7) in meeting privately with a quorum in private offices in a building other

1 than the legislative chambers and discussed issues of public importance, then returned to the
2 legislative chambers to vote publicly. The relief sought is a declaratory and injunctive in nature.

3 This motion seeks a preliminary injunction to maintain the status quo pending the hearing
4 and determination of this action.

5 **MOTION FOR PRELIMINARY INJUNCTION**

6 **ARGUMENT**

7 It is well settled that in order to be entitled to a preliminary injunction, a movant must
8 clearly demonstrate (1) a likelihood of ultimate success on the merits, (2) irreparable injury
9 absent granting of the preliminary injunction, and (3) a balancing of the equities in the
10 movant's favor (see, e.g., *Doe v Axelrod*, 73 N.Y.2d 748, 536 N.Y.S.2d 44, 532 N.E.2d 1272;
11 *Doe v Poe*, 189 A.D.2d 132, 595 N.Y.S.2d 503).
12

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14 **LIKELIHOOD OF SUCCESS ON THE MERITS**

15 **Standing**

16
17 Plaintiff is a resident taxpayer and registered voter of Erie County and has standing
18 pursuant to General Municipal Law § 51 and Public Officers Law § 107(1) (*Korn v. Gulotta*, 72
19 N.Y.2d 363 (1988); *Phelan v. City of Buffalo*, 54 A.D.2d 262 (4th Dept 1976); *Rampello v East*
20 *Irondequoit Central School District*, 653 N.Y.S.2d 469 (4th Dept. 1997)).
21

22 **Validity of Legislature's action on bill to increase county sales tax**

23
24
25 The Open Meetings Law, passed in 1976 after the crisis of confidence in American
politics occasioned by Watergate, was intended--as its very name suggests--to open the decision-
making process of elected officials to the public while at the same time protecting the ability of

1 the government to carry out its responsibilities (*Sciolino v Ryan*, 81 A.D.2d 475, 477; *Matter of*
2 *Orange County Publs. v Council of City of Newburgh*, 60 A.D.2d 409, 418, *affd* 45 N.Y.2d 947;
3 see also, *Communications Sys. v Federal Communications Commn.*, 595 F.2d 797, 800
4 [interpreting 5 USC § 552b]). Thus, the statute provides generally that "[e]very meeting of a
5 public body shall be open to the general public" (Public Officers Law § 103 [a]). As the
6 Legislature stated in its preamble to the statute: "It is essential to the maintenance of a
7 democratic society that the public business be performed in an open and public manner and that
8 the citizens of this state be fully aware of and able to observe the performance of public officials"
9 (Public Officers Law § 100). Given this explicit declaration, it is clear that the provisions of the
10 Open Meetings Law are to be liberally construed in accordance with the statute's purposes (*Matter of*
11 *Orange County Publs. v Council of City of Newburgh*, 45 N.Y.2d 947, 950 [Cooke, J.,
12 concurring], (*supra*) ; *Matter of Holden v Board of Trustees*, 80 A.D.2d 378, 381).

14 The State Legislature, by enacting the Open Meetings Law, intended to affect the entire
15 decision-making process and not merely formal vote taking as it is the "deliberative process
16 which is at the core of the Open Meetings Law" (*Matter of Orange County Publs. v Council of*
17 *City of Newburgh*, 60 A.D.2d 409, 414, *affd* 45 N.Y.2d 947). Public bodies may not escape
18 public view by claiming that they did not formally convene when, in fact, a meeting took place at
19 which business of public interest was discussed (*Matter of Oneonta Star Div. of Ottaway*
20 *Newspapers v Board of Trustees*, 66 A.D.2d 51, 54).

22 Although not every assembling of the members of a public body was intended to fall
23 within the scope of the Open Meetings Law. Clearly, casual encounters by members do not fall
24 within its purview (see, *Matter of Orange County Publs. v Council of City of Newburgh*, *supra*,
25 at 416), but informal conferences, agenda sessions and work sessions do invoke the provisions of
the statute when a quorum is present and when the topics for discussion and decision are such as

1 would otherwise arise at a regular meeting (see, supra, at 416-417; see also, Matter of Oneonta
2 Star Div. of Ottaway Newspapers v Board of Trustees, supra, at 53).

3 The Appellate Division, Fourth Department held in Gernatt Asphalt Products v. Town
4 Sardinia, 208 A.D.2d 139 (1995) that “The ‘courts are empowered, in their discretion and upon
5 good cause shown, to declare void any action taken by a public body in violation of the mandate
6 of this legislation’ (Matter of New York Univ. v Whalen, 46 N.Y.2d 734, 735 [emphasis in
7 original]) and will scrutinize the propriety of executive sessions, ‘lest the * * * mandate be
8 thwarted by thinly veiled references to the areas delineated thereunder” (Daily Gazette Co. v
9 Town Bd., Town of Cobleskill, 111 Misc. 2d 303, 304; accord, Matter of Sanna v Lindenhurst
10 Bd. of Educ., 107 Misc. 2d 267, 268-270, mod on other grounds 85 A.D.2d 157, affd 58 N.Y.2d
11 626).” The Court went on to hold “Here, although the Town Board and certain Town officials
12 went into executive session at the close of the August 18, 1993 public hearing on the proposed
13 Special Use Permit Amendments, ostensibly to discuss their likely effect on existing litigation,
14 the Board emerged little more than 30 minutes later, and formally resolved, without any further
15 public involvement, to accept a previously prepared Environmental Assessment Form ("EAF")
16 and a Negative Declaration, as well as to adopt the Prohibition of Mining Amendments. In effect,
17 the public was permitted to know only the result, viz., that the Prohibition of Mining
18 Amendments would be adopted without further SEQRA review, and, thus, was deprived of the
19 opportunity to debate that adoption. That violated both the letter and the spirit of the Open
20 Meetings Law inasmuch as the decisions apparently reached at the executive session ‘affected
21 the public and directly related to the possibility of a municipal matter becoming an official
22 enactment’ (Matter of Sciolino v Ryan, supra, at 478).” Just as in the case at bar the legislators
23 and others went to a private office that was not open to the public to discuss the sales tax
24 increase and the public was only permitted to know the result
25

1 The facts at bar strongly suggests that Defendants' violations were not "unintentional"
2 (see, Public Officers Law § 107 [1]), but calculated to minimize public awareness of
3 respondents' sensitive political decision to raise the sales tax in Erie County and other matters.
4 Such ongoing awareness is important in that it may well play a significant role in the degree of
5 public concern about, and attendance at, future public sessions to approve an increase. It may
6 also influence the public's future choices in the legislature. The public's awareness, therefore,
7 should be fostered through compliance with the Open Meetings Law.
8

9 **Validity of Legislature's action on the Budget in violation of the County Charter**

10

11
12 In America the sovereign powers reside in the people who have delegated certain of these powers
13 to the Federal Government and have prohibited some to the States reserving all others to the States
14 respectively, or to themselves. (See U. S. Const., 9th and 10th Amdts.; N. Y. Const., art. I, § 14.)

15 "A State Legislature possesses all powers of law-making inherent in sovereignty except as
16 curtailed by State or Federal Constitution expressly or by necessary implication". (Trade Accessories v.
17 Bellet, 184 Misc. 962, 965.) Likewise a County Legislature possesses all powers of local government
18 except as curtailed by the County Charter, State or Federal Constitution or law expressly or by necessary
19 implication.

20 While in general the courts will not interfere with the internal procedural aspects of the
21 legislative process, judicial review may be undertaken to determine whether the Legislature has
22 complied with constitutional prescriptions as to legislative procedures (Norwick v Rockefeller,
23 33 N.Y.2d 537; Matter of Schneider v Rockefeller, 31 N.Y.2d 420, 434; Finger Lakes Racing
24 Assn. v New York State Off-Track Pari-Mutuel Betting Comm., 30 N.Y.2d 207, 219-220;
25 People v Devlin, 33 NY 269; Franklin Nat. Bank of Long Is. v Clark, 26 Misc. 2d 724).
Likewise in the case at bar judicial review is sought to determine whether the County Legislature

1 has complied with the County Charter as to its legislative procedures in adopting the budget for
2 2005.

3 Under the County Charter the county executive is the chief budget officer of the county
4 much like the governor is in relation to the state budget.

5 When the County Executive, like the Governor, acts pursuant to a valid grant of
6 discretionary authority, his actions are largely beyond judicial review (see, e.g., Matter of
7 Cunningham v Nadjari, 39 NY2d 314, 317-318; Gaynor v Rockefeller, 15 NY2d 120, 131;
8 Matter of Nistal v Hausauer, 308 NY 146, 152-153, cert denied 349 US 962). Judicial review in
9 such cases is generally limited to determining whether he is empowered to act, and does not
10 include the manner in which he chooses to discharge that authority (see, e.g., Mulroy v Carey, 58
11 AD2d 207, 214-215, aff'd 43 NY2d 819; People ex rel. Saranac Land & Timber Co. v
12 Extraordinary Special & Trial Term of Supreme Ct., 220 NY 487, 491; People v Kramer, 33
13 Misc 209, 219). For abuse of lawful discretionary authority, the remedy as a rule lies with the
14 people at the polls, or with an amendment to the County Charter, or with corrective legislation if
15 the legislature is so empowered.

16 There are, however, limits to the breadth of legislative and executive power. The
17 County Charter like the State Constitution provides for a distribution of powers among the
18 three branches of government. This distribution avoids excessive concentration of power in any
19 one branch or in any one person. Where power is delegated to one person, the power is always
20 guided and limited by standards. In fact, even the Legislature is powerless to delegate the
21 legislative function unless it provides adequate standards (Packer Coll. Inst. v University of
22 State of N. Y., 298 NY 184, 189). Without such standards there is no government of law, but
23 only government by men left to set their own standards, with resultant authoritarian
24 possibilities.
25

This court can only determine if the budget process was in compliance with the procedure
set forth in the County Charter and declare which budget is legally in effect. It cannot substitute

1 its judgment for those of the County Executive or the County Legislature. As the Court of
2 Appeals held in Korn v. Gulotta, supra, “Manifestly, the courts cannot and will not intervene in
3 the budget process if doing so requires them to substitute their judgment on matters of discretion.
4 As we stated in Saxton, however, ‘[we] do not suggest by our decision today that the budgetary
5 process is per se always beyond the realm of judicial consideration * * * The courts will always
6 be available to resolve disputes concerning the scope of that authority which is granted by the
7 Constitution to the two other branches of the government’ (44 N.Y.2d 545, 551, supra; see also,
8 Wein v Carey, 41 N.Y.2d 498, rearg denied 42 N.Y.2d 910; Matter of Block v Sprague, 285 NY
9 69; People v Tremaine, 281 NY 1, supra).” This is equally applicable to the county budgetary
10 process.
11

12 The governing rule of statutory construction is that courts are obliged to interpret a statute
13 to effectuate the intent of the Legislature (People v Finnegan, 85 NY2d 53, 58, 623 N.Y.S.2d
14 546, 647 N.E.2d 758 [1995]). The “clearest indicator of legislative intent” is the statute itself
15 (People v Robinson, 95 NY2d 179, 182, 711 N.Y.S.2d 148, 733 N.E.2d 220 [2000], quoting
16 Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d 577, 583, 673 N.Y.S.2d 966, 696
17 N.E.2d 978 [1998]). If the language chosen by the Legislature is clear and unambiguous, and
18 “involves no absurdity or contradiction, there is no room for construction and courts have no
19 right to add to or take away from that meaning” (Tompkins v Hunter, 149 NY 117, 123, 43 N.E.
20 532 [1896]; see People ex rel. Harris v Sullivan, 74 NY2d 305, 309, 546 N.Y.S.2d 821, 545
21 N.E.2d 1209 [1989]). When this doctrine is violated, a court impermissibly encroaches upon the
22 legislative and executive domains and thereby violates the foundation of the separation of
23 powers doctrine
24

25 The facts relevant to this action are well known and have been widely reported. The
County Legislature purportedly adopted a budget with amendments near midnight on
Wednesday December 8, 2004 by an 8 to 7 vote. In order to meet their deadline to adopt the

1 budget with amendments, that were presented less than 48 hours prior to the vote, they
2 suspended their rules and voted on approximately 165 pages of amendments with a single vote.
3 Within these amendments were at least one possibly three fee increases.

4 It has been held in a prior budgetary battle that “[t]he charter imposes guidelines upon the
5 Executive and the Legislature which must be maintained to prevent either branch of government
6 from usurping the powers of the other. The check and balance system incorporated in the charter
7 is basic to our traditional governmental policy (Matter of Gallagher v Regan, 42 N.Y.2d 230,
8 233-234).” And “Any plan designed to circumvent the mandates of the charter, which is not in
9 compliance therewith, is a nullity, being contrary to law and to the orderly budgetary process
10 skillfully framed by the drafters of the county charter.”(Swanick v. Erie County Legislature, 103
11 A.D.2d 1036 (4th Dept. 1984)).

12 Article XVIII § 1803(A) provides that if amendments are presented after the tabling the
13 budget committee report and less than 48 hours prior to the annual meeting the amendments
14 “shall be considered separately and voted on individually on the floor of the legislature.”

15 Article XVIII § 1812 requires a two-thirds vote to increase any fees. Lumped in those
16 approximately 165 pages of amendment was at least one and possibly three fee increases. Since
17 the amendments to the budget were passed by barely a majority vote these fee increases did not
18 pass by the required 10 votes and therefore are of no force or effect.

19 Article XVIII § 1803(B) requires that the budget with increases or additions be voted on
20 and delivered to the County Executive no later than the Wednesday after the first Tuesday in
21 December. If there are no additions or increases the tentative budget goes into effect without
22 further action from the County Executive.

23 Article XVIII § 1803(E) provides that if a budget is not adopted on or before the second
24 Tuesday of December the tentative budget shall be the budget for the ensuing year. In Gallagher
25 v. Regan, 55 A.D.2d 284 (4th Dept. 1976) the court held: “The Legislature failed to meet and act

1 upon the County Executive's objections on or before the first Tuesday in December and thus the
2 tentative budget, to the extent as it is more particularly described herein (infra), became the
3 budget for fiscal year 1977. The legislative proceedings of December 9, 1976, insofar as they
4 relate to this issue, are a nullity.”

5 If the vote taken on December 8, 2004 was valid to the extent it adopted the budget, but
6 not the amendments, then the tentative budget went into effect without any further action
7 required of the County Executive.

8 If the vote taken on December 8, 2004 was totally invalid then no budget was adopted in
9 accordance with Article XVIII § 1803 and therefore the tentative budget became the budget for
10 the ensuing year pursuant to § 1803(E) on December 15, 2004.

11 In either scenario the end result is the same the tentative budget as submitted by the
12 County Executive becomes the budget for 2005. As the Appellate Division, Fourth Department
13 held in *Swanick v. Erie County Legislature*, supra, “While the Legislature may reconsider and
14 rescind a proposition that it has adopted (see *Matter of Eiss v Summers*, 205 App Div 691, 695-
15 696, app dsmd 236 NY 638), where, as here, a charter has provided dates by which such
16 reconsideration must terminate, the charter is controlling.”

17 The key issue in determining whether the voting irregularities raise to the level of
18 rendering the vote invalid. The purpose behind the requirement in the County Charter on
19 amendments proposed less than 48 hours prior to the vote be considered and voted upon
20 separately is to prevent concealment and surprise to the members of the Legislature and to the
21 public at large, and to prevent legislative “logrolling.” (*Economic Power & Constr. Co. v. City of*
22 *Buffalo*, 195 N.Y. 286) This purpose is also served by the provisions of Art. III § 15 of the N.
23 Y. Constitution and Municipal Home Rule § 20(3) and laws passed which do not comply with
24 these provisions render such laws a nullity. Therefore the amendments purportedly passed by
25 the County Legislature in violation of Article XVIII § 1803(A) are invalid and void.

1 paid from the public purse of the county they are not recoverable. Once these illegal fees and
2 taxes are collected the cost of returning or refunding these illegally collected fees and taxes will
3 be greater than collecting them retroactively and impose burdens on the providers of these
4 services. Therefore, the impact is immeasurable in dollars and cents and the time lost to
5 minimize the impact is irreplaceable. Furthermore plaintiff and all taxpayers should not be
6 required to suffer further economic harm by loss of these assets of the public purse during the
7 pendency of the action.
8

9 The Rule of Law as stated in President Theodore Roosevelt's 1903 Annual Message to
10 Congress (the written precursor of the modern State of the Union Address): "No man is above
11 the law and no man is below it; nor do we ask any man's permission when we require him to
12 obey it. Obedience to the law is demanded as a right; not asked as a favor."

13 If this court does not issue the requested preliminary injunction and plaintiff prevails, the
14 underlying relief sought would be rendered moot and a judgment ineffectual.
15

16 **Balancing of the Equities**

17

18 In balancing the equities the court should consider various factors, including the interests of
19 the general public, whether plaintiff was guilty of unreasonable delay, and whether plaintiff has
20 unclean hands. See *Amarant v. D'Antonio*, 197 AD2d 432, 435 (1st Dept. 1993) (unclean hands);
21 *Currier v. First Transcapital Corp.*, 190 AD2d 507, 508 (1st Dept 1993) (unclean hands);
22 *Mercury Service Systems, Inc. v. Schmidt*, 50 AD2d 533, 533 (1st Dept. 1975) (laches); *DePina*
23 *v. Educational Testing Serv.*, 31 AD2d 744, 745 (2d Dept. 1969) (interests of general public); *De*
24 *Candido v. Young Stars, Inc.*, 10 AD2d 922, 922 (1st Dept. 1960), lv. denied, 11 AD2d 682 (1st
25 Dept. 1960) (laches); *Rodriguez v. DeBuono*, 175 F.3d 227, 233 (2d Cir. 1998) (interests of

1 general public); Southside Fair Hous. Community v. City of New York, 928 F.2d 1336, 1354 (2d
2 Cir. 1991) (laches).

3 This action was commenced within 7 days and this application is being made 15 days
4 from the date of the purported adoption of the budget with amendments and prior to the effective
5 date thereof. Laches is clearly not present.

6 Plaintiff comes to this court with clean hands. Plaintiff is a resident taxpayer and voter who as
7 his only recourse for poor exercise of valid discretionary authority of the defendant is at the voting booths.
8 Plaintiff by virtue of General Municipal Law § 51 has as his only remedy for the defendants' violations of
9 the County Charter this action for the prosecution of public officials for illegal acts. Defendants by virtue
10 of the violations of the County Charter has denied plaintiff and others similarly situated from evaluating
11 his elected representatives and making an informed decision by not considering and voting on the
12 amendments separately as required and by holding meetings in violation of the Open Meetings Law.

13 In light of the clear illegality of the adoption of the budget with amendments and the
14 passage of the sales tax increase there is no discernable harm to the defendants. In fact the
15 opposite is true. If allowed to be acted upon this clearly illegal budget and sales tax increase
16 would impose illegal taxes and fees on untold numbers of cell phone consumers and permit the
17 unlawful expenditure of county assets that will not be capable of being recouped and is therefore
18 irreparable. Regretfully, many employees of Erie County will be affected by the loss of their
19 jobs whether it be permanent or temporary. However, they will be eligible for unemployment
20 benefits and will be placed on preferred civil service lists. Though these are no substitute for a
21 job, people in Erie County face these events on a daily basis. The need to protect the interests of
22 the 1,000,000 citizens of Erie County outweighs the need of a few thousand employees. The
23 interest to be protected is the principle of the rule of law and separation of powers in our
24 republican form of government. As Supreme Court Justice Felix Frankfurter once said "If one man
25

1 can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny.
2 Legal process is an essential part of the democratic process."

3
4 **CONCLUSION**

5
6 The likelihood of success in this action is great. There are no substantial issues of material facts
7 of what occurred in the December 8, 2004 legislative session. The law is clear and unambiguous. In order
8 to prevent irreparable harm in the form of waste and injury to the estate of the County of Erie and to
9 prevent any judgment entered in this action from becoming ineffectual a temporary restraining order
10 pending this application for a preliminary injunction is necessary. The balancing of the equities tip in
11 plaintiff's favor for to not issue the judgment would regardless of the merits would provide plaintiff a
12 right without a remedy and permit the illegal acts complained of to continue.

13 Wherefore, Plaintiff prays for an order of this court granting

14 A. a preliminary injunction:

- 15 a. Enjoining the defendants from presenting the home rule message of necessity
16 passed on December 8, 2004 requesting any sales tax increase from being
17 presented to the State Legislature;
18 b. Enjoining the defendants from expending any funds in excess of those
19 appropriated in the tentative budget as submitted to the legislature by the
20 county executive on November 5, 2004;

21 B. together with such other, further or different relief as the court deems just and
22 proper

23 DATED: December 22, 2004
24 Buffalo, New York

25 _____
Daniel T. Warren
Plaintiff, Pro Se