

STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

In the Matter of the Application of

RALPH M. MOHR and LAURENCE F. ADAMCZYK, as
Commissioners of Election constituting the Erie County Board
Of Elections and, respectively, resident taxpayers of the town of
Lancaster, Erie County and the City of Buffalo, Erie County

DENISE E. MARSHALL, as Member of the Erie County
Legislature representing the 5th Legislative District and a resident
Taxpayer of the town of Lancaster, Erie County

and

NANCY A. NAPLES, as Comptroller of the County of Erie and
a resident taxpayer of the town of Hamburg, Erie County

Index No.: I2004-12707

Petitioners

against

Justice Assigned:
Hon. Peter J. Notaro

JOEL A. GIAMBRA, County Executive of the County of Erie,
New York

JOSEPH PASSAFIUME, Director of Budget, Management and
Finance for the County of Erie, New York

JOHN W. GREENAN, Commissioner of Personnel for the
County of Erie, New York

**AFFIDAVIT OF
JAMES L. TUPPEN**

ERIE COUNTY LEGISLATURE
and
COUNTY OF ERIE,

Respondents

STATE OF NEW YORK)
COUNTY OF ERIE) SS:

JAMES L. TUPPEN, being duly sworn, deposes and says:

1. I am an Assistant County Attorney in the Erie County Department of Law, which is headed by FREDERICK A. WOLF, the Erie County Attorney, and I make this affidavit on personal knowledge in support of Respondents' motion to dismiss and in opposition to the relief sought in the petition.

2. On or about March 31, 1979, I was appointed as an Assistant County Attorney. I have been continuously so employed since that time, serving at the pleasure of each incumbent Erie County Attorney thereafter appointed by each elected Erie County Executive.

3. The Erie County Department of Law maintains custody of and official records with respect all local laws duly adopted by Erie County, including both the Erie County Charter ("the Charter"; Erie County Local Law No. 1 – 1959, as amended) and the Erie County Administrative Code ("the Administrative Code"; Erie County Local Law No. 1 – 1960, as amended), which together provide for the basic structure and detailed workings of all of the administrative units of Erie County government, and set forth the duties and powers of all Erie County officers.

THE 2005 COUNTY BUDGET PROCESS

4. I attach hereto and/or incorporate herein, as Exhibits "A", "B", "C", "D", "E", "F", "G", "H", "I", "J", "K", "L", "M", "N", "O", "P", "Q" and "R" are the following documents:

- A. Erie County Charter (excerpts)
- B. Erie County Local Law 1 – 1978 submissions to NYS Secretary of State
- C. Pleadings received in case *Daniel Warren v. Joel Giambra, et al.*, I2004-12768
- D. Pleadings in *Chester C. Pawarski v. Joel Giambra, et al.*, I2004-13013
- E. Budget Committee Amendment Package "A"
- F. Budget Committee Amendment Package "B"
- G. Budget Committee Amendment Package "C"
- H. Budget Committee Amendment Package "D"

- I. Erie County Executive's Tentative Budget (the "Red Budget") (not attached)
- J. November 5, 2004 letter from Joel Giambra
- K. Amendment to Comm. 24E-1 2005 Budget Resolutions (contract authorization)
- L. December 8, 2004 letter from Clerk of County Legislature to Erie County Executive
- M. December 13, 2004 letter from Erie County Executive to the Clerk of the Erie County Legislature and attached memorandum
- N. December 7, 2004 Resolution on Sales Tax and Sharing (Comm. 26E-4)
- O. Erie County Legislature Clerk's draft meeting minutes of Meeting No. 28 which started December 7, 2004
- P. Resolution (Comm. 24E-1; 2005 Erie County Budget approval)
- Q. Resolution (Comm. 26E-8; 2005 tax levy)
- R. Public Budget Hearings Media Alerts

5. Charter Article XVII (§§ 1801 – 1813) sets forth the timetable and process for the adoption, annually, of Erie County's calendar-fiscal year budget.

6. Pursuant to Charter § 1802, on or before November 10 of each year, the County Executive is required to submit a tentative budget to the County legislature for the ensuing calendar-fiscal year, a capital program for the next six calendar-fiscal years and an accompanying message.

7. Upon information and belief, as set forth in Exhibits "I" and "J" annexed hereto and/or incorporated herein, on November 5, 2004, the County Executive submitted his Tentative

2005 Erie County Budget, Capital Program and Accompanying Message to the County Legislature.

8. According to the Budget Message accompanying the Tentative 2005 Erie County Budget submitted by the County Executive, due to an anticipated revenue shortfall of some \$130 million, that budget was a “bare bones” budget (oftentimes referred to as the “Red Budget”) that excluded spending for programs and services not mandated by New York State Law or the Charter. In his Budget Message, the County Executive referred to a “Green Budget”, albeit unsubmitted, which he stated contained an almost *status quo* spending plan and was considered by him to be clearly preferable in terms of its continuation of non-mandated County services and programs and discretionary spending. However, without a commitment from the County Legislature to a “Medicaid Penny” increase in the County sales tax so as to provide \$130 million in new revenue, the County Executive further indicated that he could not submit the “Green Budget” as his Tentative 2005 Erie County Budget because its adoption, without such “Medicaid Penny” revenue, would likely cause a doubling of County real property taxes. Thus, the County Executive submitted the “Red Budget” as his Tentative 2005 Erie County Budget.

9. Pursuant to Charter § 1803(A), the County Legislature is authorized to amend the County Executive’s Tentative Budget by striking or reducing items of appropriation, other than those required by law or for debt service. Further, the County Legislature, after one or more budget hearings, is also specifically authorized to amend the County Executive’s Tentative Budget by adding to or increasing items of appropriation, provided that such additions or increases in spending are stated separately and distinctly. Charter § 1803(A) requires that the Budget Committee’s Report concerning amendments to the County Executive’s Tentative Budget to be presented and laid on the table at least forty-eight hours prior to the County Legislature’s annual meeting for budget adoption.

10. Upon information and belief, as set forth in Exhibit "R" annexed hereto and/or incorporated herein, a series of budget hearings took place in the latter half of November 2004. On December 3, 2004, I was present in the County Legislature when the Budget Committee presented its Report, consisting of Amendment Package "A" (Exhibit "E"), Amendment Package "B" (Exhibit "F"), Amendment Package "C" (Exhibit "G") and Amendment Package "D" (Exhibit "H"), to the County Legislature where it was "laid on the table". This occurred more than forty-eight hours prior to the County Legislature's meeting for the adoption of the 2005 Erie County Budget, previously scheduled for Tuesday December 7, 2004.

11. Charter § 1803(B) provides that the County Executive's Tentative Budget, if passed by the County Legislature with no additions or increases in appropriations, is deemed to have been adopted without any further action by the County Executive. Charter § 1803(B) further provides, however, that if a County Budget as passed by the County Legislature contains any such increases or additions, it must be must be presented by the Clerk of the County Legislature to the County Executive, not later than the Wednesday following the first Tuesday in December, for his consideration of such additions and increases only (see the third sentence of Charter § 1803(A); "Decreases shall not require executive approval.").

12. Pursuant to Charter § 1803(C), following the Clerk's presentation to the County Executive of a County Budget passed by the County Legislature and containing added or increased items of appropriation, the County Executive is specifically authorized to object any one or more of such added or increased items, provided that he does so in a written statement of the added or increased items to which he objects, with the reasons for his objections, and returns the County Budget, with his written objections statement, to the Clerk of the County Legislature who is required by Charter § 1803(C) to present same to the County Legislature on or before the Monday preceding the second Tuesday in December. Under Charter § 1803(C), the County

Legislature then reconsiders the additions and increases so objected to and may approve one or more of same, provided that at least two-thirds of the fifteen (15) member County Legislature vote each such approval. Any such reconsideration and approval of objected to additions and increases must occur, if at all, on or before the second Tuesday of December (see Charter § 1803(E)).

13. Conversely, pursuant to the last two sentences of Charter § 1803(B), the County Executive may choose instead to approve all such additions and increases by affixing his signature to a statement thereof and returning the passed County Budget and such statement to the Clerk of the County Legislature on or before the Monday preceding the second Tuesday in December, in which event the County Budget, as passed by the County Legislature and including the additions and increases as a part thereof, shall then be deemed adopted. If the County Executive neither approves nor objects to such additions and increases in appropriations, or otherwise fails to return the passed County Budget to the Clerk of the County Legislature on or before the Monday preceding the second Tuesday in December, the County Budget as passed by the County Legislature is deemed adopted (see Charter § 1803(D)).

14. As noted above, the County Legislature's meeting for the adoption of the 2005 Erie County Budget was scheduled for Tuesday December 7, 2004. Relative to the adoption of the 2005 Erie County Budget, the Court may wish to take judicial notice that the Wednesday following the first Tuesday in December (Charter § 1803(B)) fell on Wednesday December 8, 2004, that the Monday preceding the second Tuesday in December (Charter § 1803(C)) fell on Monday December 13, 2004 and, although not pertinent given the County Executive's approval of all of the additions and increases in the passed County Budget, that the second Tuesday in December fell on Tuesday December 14, 2004 (Charter § 1803(E)).

15. Upon information and belief, the County Legislature started its meeting for the adoption of the 2005 Erie County Budget on Tuesday December 7, 2004 and concluded same, after one or more recesses, late in the evening of Wednesday December 8, 2004.

16. Moreover, at that meeting, and specifically during the final post-recess portion of same that began at approximately 11:36 P.M. on Wednesday, December 8, 2004 and at which your deponent was present in person seated at a staff desk on the floor of the County Legislature, the County Legislature, with separate and independent motions and votes, did the following:

A. Amended an item identified as Comm. No. 26E-4, a resolution, *inter alia*, memorializing to the State Legislature that Erie County was respectfully requesting authority to impose an additional 1% Erie County sales tax (subject to a \$12.5 million revenue sharing formula incorporated in the amendment), and thereupon approved same, as amended, by a vote of 10 Ayes and 5 Noes.

B. Moved "off the table" an item identified as Comm. 24E-1, consisting of the County Executive's Tentative 2005 Erie County Budget (Exhibit "I") and the Report of the County Legislature's Budget Committee, and thereupon:

- (i) amended same by deleting from the Budget Committee's Report Amendment Package "A" (Exhibit "E");
- (ii) amended same by deleting from the Budget Committee's Report Amendment Package "B" (Exhibit "F");
- (iii) amended same by deleting from the Budget Committee's Report Amendment Package "C" (Exhibit "G");
- (iv) amended same by deleting from the Budget Committee's Report Amendment Package "D" (Exhibit "H");

(v) amended same by separately adding an amendment consisting of numerous appropriation adjustments appearing on what I have learned are 341 pages (Petitioners' Exhibit "C") and an amendment appearing on a single page (Exhibit "K") (Petitioners' Exhibit "C" and Respondents' Exhibit "K" are hereinafter referred to as the "Swanick Amendments"), and;

(vi) approved the 2005 Erie County Budget, as amended, by a vote of 8 Ayes and 7 Noes..

C. Approved an item identified as Comm. 26E-8, a resolution levying the amounts required to be raised by taxes for the adopted 2005 Erie County Budget, by a vote of 8 Ayes and 7 Noes. (Exhibit "P").

17. Immediately following the adjournment of said meeting of the County Legislature, while I was still seated at a staff desk on the floor of the County Legislature, I personally observed KEVIN M. KELLEY, the Clerk of the Erie County Legislature, present to FREDERICK A. WOLF, the Erie County Attorney, who was seated at a staff desk immediately in front of the desk I occupied, the 2005 Erie County Budget, as passed by the County Legislature. FREDERICK A. WOLF informed KEVIN M. KELLEY that he (i.e. Mr. Wolf) was authorized to receive the adopted 2005 Erie County Budget on behalf of Erie County Executive JOEL A. GIAMBRA, who was at that moment addressing those assembled in the County Legislature from the Chairman's dais. This occurred on Wednesday December 8, 2004, a few minutes before 12 Midnight.

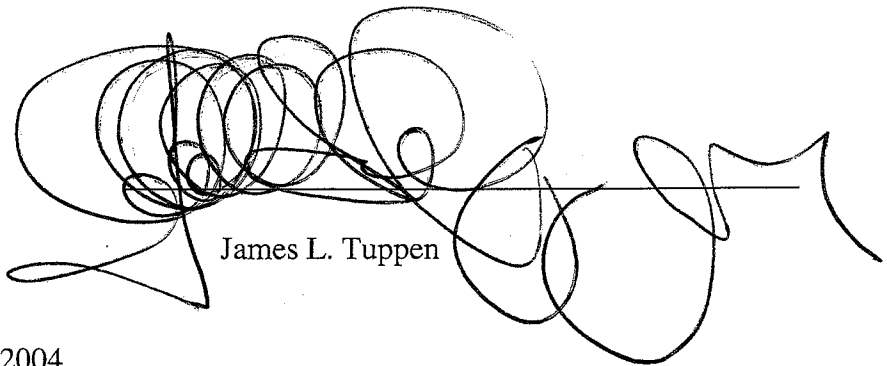
18. The foregoing recitation of the actions I witnessed being taken by the County Legislature during the final post-recess portion of its meeting for the adoption of the 2005 Erie

County Budget are confirmed by the Clerk's draft Minutes of the County Legislature's December 7 – 8, 2004 meeting annexed hereto and/or incorporated herein as Exhibit "O".

19. Upon information and belief, as set forth in Exhibit "M" annexed hereto and/or incorporated herein, on Monday December 13, 2004, Erie County Executive JOEL A. GIAMBRA notified the Clerk of the County Legislature in a signed writing, at which time he returned the passed 2005 Erie County Budget to the Clerk, the that he did "not object" to any of the additions or increases contained in the 2005 Erie County Budget, as approved by the County Legislature "on December 8, 2004 at a recessed session of its December 7, 2004 Budget meeting." The 2005 Erie County Budget, including the additions and increases as part thereof, was thus deemed adopted on Monday December 13, 2004 (see Charter § 1803(B)).

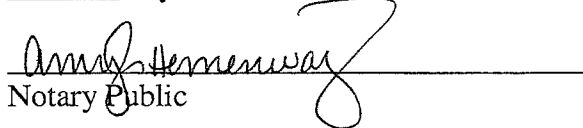
THE ADOPTION OF ERIE COUNTY LOCAL LAW NO. 1 - 1978

20. Upon information and belief, as set forth in Exhibit "B" annexed hereto and/or incorporated herein and copied directly from the County Attorney's official local law file, Erie County Local Law No. 1 – 1978 was duly passed by the County Legislature on December 22, 1977 and was duly approved by the County Executive, and thus deemed adopted, on January 18, 1978. Moreover, Exhibit "B" further indicates that no referendum was had with respect to Erie County Local Law No. 1 – 1978 and that it was filed with the New York State Secretary of State on January 30, 1978.



James L. Tuppen

Sworn to before me this
21st day of December, 2004.



Notary Public

AMY L. HEMENWAY
Notary Public State of New York
Qualified in Erie County
Commission Expires April 29th 2006