



# COUNTY OF ERIE

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July 8, 2016

**VIA E-MAIL AND HAND DELIVERY**

Hon. John J. Mills, Chairman  
Erie County Legislature  
Old Erie County Hall  
92 Franklin Street, 4th Floor  
Buffalo, NY 14202

Re: Charter Revision Recommendations

Dear Chairman Mills:

I received a request by Arthur Musarra, Legislative Director-Republican Caucus of the Erie County Legislature, for a legal opinion as to the legality of the charter revision recommendations. Mr. Musarra did not specify which particular proposed revisions he wanted my office to look into. Therefore, my office took the liberty of identifying only those which raised concern to us. Due to the time constraints involved, as well as the fact that one of the proposed revisions applies to me and my office, I retained Hodgson Russ to conduct the analysis.

Accordingly, I enclose herein a copy of the July 8, 2016 Hodgson Russ Memorandum analyzing the legality of certain of the proposed Erie County Charter revisions.

Please contact me with any questions. Thank you.

Very truly yours,

Michael A. Siragusa  
Erie County Attorney

Enc.

MEMORANDUM FROM



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**To:** Michael A Siragusa, Esq.  
**Date:** July 8, 2016  
**Subject:** Proposed Charter Revisions

You requested that we review certain proposed County Charter Revisions for compliance with applicable law. Our evaluation is based solely on the legality of the proposed revisions. Nothing stated herein is a comment on the wisdom of the proposals or endorsement of any proposed change. Our goal, in the short time we had available, was simply to review for potential issues of concern.

Recommendation No. 34, Section 2507. This revision adds the following to the Charter: “Actions taken by independently elected officials (clerk, comptroller, district attorney, and sheriff) within the parameters of the adopted budget shall be approved by the county executive and any other necessary department or office within seven days.” As intended, to place a time deadline on the Executive for an action already required, we see no issue. But, if used by the Executive as a veto over an elected official’s actions, it may be invalid if it is a diminishment of the other elected official’s constitutionally required ability to perform. For example, if the Executive could refuse to hire jail personnel for the Sheriff or the retention of assistants needed by the District Attorney, it may be an improper action.

Recommendation No. 12, Section 204. This would change the procedure for adopting local laws by altering the manner in which they are adopted. The Municipal Home Rule Law Article III sets out the procedure, and states how laws are adopted and thus this section

violates that law. A local government does not have authority to change the procedure for adopting a local law. *See* 2012 N.Y. Op. Atty. Gen. No. 10; 1998 N.Y. Op. Atty. Gen. (Inf.) 1086. Generally speaking, a county charter may not supersede the Municipal Home Rule Law. *See* Municipal Home Rule Law § 34(3)(g).

Revision Recommendation C, Ethics Code, new Article 1A. On its face, this revision violates General Municipal Law § 808(1) by having appointment by other than the County Executive. Section 808(1) reads, in pertinent part, “The members of such board of ethics shall be appointed by such governing body *except in the case of a county operating under an optional or alternative form of county government or county charter, in which case the members shall be appointed by the county executive or county manager, as the case may be, subject to confirmation by such governing body.*” (Emphasis added). However, a reasonable argument can be made that the adoption of this revision would be acceptable. The Attorney General has opined that § 808(3) is not a general law because it gives cities the option to establish a board of ethics, and, therefore, only applies to cities opting to come under it. *See* 1986 N.Y. Op. Atty. Gen. (Inf.) 100. As a result, it is not a general state law with which a local law must be consistent. *Id.* A similar analysis can be applied to § 808(1), which specifically gives counties the option to establish a board of ethics. Thus, it is arguable that, due to the fact that a county may opt to establish a board of ethics, § 808(1) would not be an obstacle to the enactment of the proposed revision.

Revision Recommendation C, Recommendation No. 32, Department of Law re Section 601. The proposed Charter revision includes an amendment relating to the potential removal of the County Attorney by vote of the Erie County Legislature. We have not identified

any reported case that addresses the validity of procedures in a charter for the removal of the county attorney that differ from those provided under County Law § 400(4)(a) (requiring written charges and opportunity to be heard). However, Municipal Home Rule Law § 33(3)(b) provides that a county charter “shall” provide for “the agencies or officers responsible for the performance of the functions, powers and duties of the county and of the agencies or officers thereof and the manner of election or appointment, terms of office, if any, and removal of such officers.” In addition, Municipal Home Rule Law § 33(4)(e) provides that a county charter “may” provide for “the termination of the terms of office of existing officers.”

With regard to the conflict between County Law § 400 and Municipal Home Rule Law §33, the New York State Attorney General has opined: “Unlike local laws adopted by a local government, which must be consistent with general state laws (NY Const, Art IX, § 2[c], Municipal Home Rule Law, § 10), **neither the Constitution nor the County Charter Law require that charter laws be consistent with general state laws.** The courts have recognized this in upholding the validity of charter laws, which were inconsistent with general state laws. *See* 1984 N.Y. Op. (Inf.) Att’y Gen 139 (citing *Matter of Smithtown v Howell*, 31 NY2d 365 (1972) and *Meimbach v Mills*, 67 A.D.2d 731 (2d Dept. 1979)). Accordingly, while we can identify potential arguments to the contrary, it appears likely that the proposed revisions to Section 601 are not contrary to applicable law.

**Revision Recommendation C, Ethics Code, new Article 1A Limits on Political Donations, new section 1-A-05.** The proposed Charter revision includes limitations on political donations from certain business entities, including Limited Liability Companies. These provisions include limitations different than those set forth in State law. Review of the statutory

scheme indicates that the Election Law and its corresponding regulations evidence an intent to preempt the field of the regulation of campaign contributions and prohibit local regulation in this arena.

“It is evident from the comprehensive nature of the Election Law that the State intended to occupy fully the area of campaign contribution limits, leaving no room for additional local regulation. Article 14 provides for detailed reporting and disclosure of campaign receipts and expenditures and establishes individual contribution limits. These limits are designed to apply to elections for party positions and to elections for and nominations for all public offices, including those at the local level. Furthermore, these limits are specifically designed to be recalculated quadrennially by the State Board of Elections.” 1998 N.Y. Op. Att’y Gen. (Inf.) 1008 (1998).

Moreover, the Attorney General’s Office has also opined that establishing contribution limits different than those set forth in State law are inconsistent with the “preemptive State scheme [as t]hey do not permit certain contributors to make the maximum contribution permitted by the Election Law. The caps set by Article 14 are the product of a myriad of considerations such as free speech and freedom of association.” 1995 N.Y. Op. Att’y Gen. (Inf.) 1105 (1995). In addition, the landmark U.S. Supreme Court decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), provides additional levels of First Amendment protections for political speech. While that decision dealt with independent expenditures by organizations, rather than contributions to a political candidate, it makes clear that the First Amendment’s protections are broadly applied in this context.

“Under Article 14, only the State Board of Elections may modify contribution caps, in accordance with standards set by the State Legislature.” 1995 N.Y. Op. Att’y Gen. (Inf.) 1105 (1995). The requirement to adopt a local code of ethics in Section 806 of the General Municipal Law does not provide an alternate basis for a local government to set different

campaign contribution limits. *Id.* Where a State law indicates a purpose to occupy an entire field of regulation, local regulation is preempted regardless of whether the terms conflict with provisions of the State statute or only duplicate them. *Id.*; *see also Ames v. Smoot*, 98 A.D.2d 216, 218, 220 (2d Dep't 1983).

Recommendation No. 43, Section 210, Creation of Independent Commission on Reapportionment. The County has the power to re-district after a census and can adopt laws relating to the "mode of selection" of its officers (NY Const., art IX, § 2). Most redistricting committees are subject to eventual legislative oversight, in whole or in part. *Leib v. Walsh*, 45 Misc. 3d 874, 992 N.Y.S.2d 637 (2014) ("this Court finds that the term 'independent' is misleading, because the creation of the Commission, its procedures and its ultimate outcome are all 'subject to control by others'). New York City's Redistricting Commission has authority over the redistricting, but the City Council can reject a plan. NYC Charter, § 51(d). However, final authority rests with the Commission, NYC Charter, § 51(f). We can find no case where the Legislature hands off full authority without any right to overrule, at least temporarily. Nor do the cases address whether the County can delegate what is normally viewed as a legislative power to an independent commission. In New York, generally legislative bodies can delegate rule-making power but not law-making authority. *Boreali v Axelrod*, 71 NY2d 1, 523 N.Y.S.2d 464 (1987). As drafted, the Commission's power may be beyond the delegation authority of the Legislature. "Legislative reapportionment is primarily a matter for legislative action..." *Yatauro v Mangano*, 32 Misc. 3d 838, 853 (Sup. Ct. 2011), and therefore this truly Independent Commission may be beyond the Legislature's power.

DAS

cc: Jeremy Toth, Esq

Charles Malcomb, Esq.