January 15, 2021

Hon. April N.M. Baskin, Chairwoman
Erie County Legislature
Old Erie County Hall
92 Franklin Street, 4th Floor
Buffalo, NY 14202

Re: Opinion – Authority of Erie County Legislature to Waive Administrative Fine Issued by Erie County Health Commissioner

Dear Chairwoman Baskin:

We offer the following in response to your request for an opinion as to the propriety of the Erie County Legislature resolving to unilaterally waive the administrative fine issued by the Commissioner of the Erie County Department of Health as against RJOV Properties, LLC.

Public Health Law Section 201 empowers the New York State Department of Health to protect the public health by regulating the sanitary aspects of businesses.

§ 201. Functions, powers and duties of the department. 1. The department shall, as provided by law:

(m) supervise and regulate the sanitary aspects of camps, hotels, boarding houses, public eating and drinking establishments, swimming pools, bathing establishments and other businesses and activities affecting public health ....;

The New York State Commissioner of Health is empowered by Public Health Law Section 206 to carry out these duties and powers.
“§ 206. Commissioner; general powers and duties. 1. The commissioner shall:

(a) take cognizance of the interests of health and life of the people of the state, and of all matters pertaining thereto and exercise the functions, powers and duties of the department prescribed by law;”

Public Health Law Section 324(e) empowers local health officers within local health districts to enforce the Public Health Law, including regulations promulgated pursuant thereto.

324. Local health officer; general powers and duties. 1. In addition to such other duties as may be lawfully imposed upon him and subject to the provisions of this chapter and the sanitary code, every health officer shall:

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(e) enforce within his jurisdiction the provisions of this chapter and the sanitary code;

The Erie County Health Commissioner is the local health officer for the Erie County health district.

Erie County Charter Section 501. County Health District and Department; Commissioner; qualifications; appointment and term. The County, including the cities, towns and villages and special districts situated therein, shall continue to be a County Health District.

Erie County Charter Section 502. Powers and duties of the Commissioner. Except as otherwise provided in this Charter, the Commissioner of Health shall have all the powers and perform all the duties conferred or imposed upon county health commissioners and/or county boards of health by law.

Erie County Health Commissioner Gale Burstein charged RJOV Properties, LLC (the “Respondent”) with violations of the New York State Public Health Law, New York State Rules and Regulations, and Executive Orders, including violation of New York State Governor’s Order 202.68 which provides that: “any individual who encourages, promotes or organizes a non-essential gathering as set forth in Department of Health regulation, shall be liable for a civil penalty not to exceed $15,000 per day”.
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The resolution at issue here proposes to waive this fine unilaterally by action of the Erie County Legislature. The proposed resolution is in excess of the authority of the Erie County Legislature as the power to enforce the relevant Public Health Law and rules and regulations thereunder by a County Health District, including settlement of an enforcement action, rests exclusively with the Erie County Commissioner of Health. See Public Health Law Section 324(e).

Further, the waiver of a claim or debt owed to a local municipality cannot be unilaterally waived. Such a waiver would constitute a gift of public property in violation of New York State Constitution Article VIII.

"Section 1. No county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking..."

Erie County now has a valid claim against the Respondent. Waiving that claim as proposed by the proposed resolution would constitute an unconstitutional gift.

"A "gift" within [NYS Constitution Article VIII section1], is a voluntary transfer of money or property without any consideration or compensation therefor..." Lecci v. Nickerson, 63 Misc. 2d 756, 758, 313 N.Y.S.2d 474, 476 (Sup. Ct. 1970)

For the reasons stated above, we find no authority for the Erie County Legislature to waive the fine in question.

Very truly yours,

GREGORY P. KAMMER  
Assistant County Attorney