

At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Chemung County Courthouse, Elmira, New York, on the 19th day of July, 2019.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK COUNTY OF CHEMUNG
SUPREME COURT

CHRISTOPHER J. MOSS, in his official capacity as Chemung County Executive, and M. HYDER HUSSAIN, in his official Capacity as Chemung County Attorney;

Petitioners-Plaintiffs,

(FIRST ACTION)

For a Judgement Pursuant to Article 78 and a Declaratory Judgment Pursuant to Section 3001 of the Civil Practice Law and Rules

Index No.: 2019-1251

-against-

RJI No.: 2019-0142-M

CHEMUNG COUNTY LEGISLATURE; JOHN C. PASTRICK, in his official capacity as Chemung County Legislator; DAVID L. MANCHESTER, in his official capacity as Chemung County Legislator; MARTIN D. CHALK, in his official capacity as Chemung County Legislator; L. THOMAS SWEET, in his official capacity as Chemung County Legislator; ROBERT BRIGGS, in his official capacity as Chemung County Legislature; JOSEPH C. BRENNAN, in his official capacity as Chemung County Legislator; WILLIAM MCCARTHY, in his official capacity as Chemung County Legislator; MARK MARGESON, in his official capacity as Chemung County Legislator; SCOTT DRAKE, in his official capacity as Chemung County Legislator; BRIAN HYLAND, in his official capacity as Chemung County Legislator; MICHAEL SMITH, in his official capacity as Chemung County Legislator; JOHN BURIN, in his official capacity as Chemung County Legislator; RODNEY J. STRANGE, in his official capacity as Chemung County Legislator; CHRISTINA SONSIRE, in her official capacity as

**DECISION, ORDER AND
JUDGMENT**

Chemung County Legislator; PEGGY L. WOODARD, in her official capacity as Chemung County Legislator; and LINDA PALMER, Clerk of the Chemung County Legislature, in her official capacity as Clerk, and BRYAN MAGGS, in his official capacity as Attorney for the Legislature and Special Districts,

Respondents-Defendants.

CHRISTOPHER J. MOSS, in his official capacity as Chemung County Executive, and M. HYDER HUSSAIN, in his official Capacity as Chemung County Attorney;

(SECOND ACTION)

Petitioners-Plaintiffs,

For a Judgement Pursuant to Article 78 and a Declaratory Judgment Pursuant to Section 3001 of the Civil Practice Law and Rules

Index No.: 2019-5064

-against-

Hon. Eugene D. Faughnan

CHEMUNG COUNTY LEGISLATURE; JOHN C. PASTRICK, in his official capacity as Chemung County Legislator; DAVID L. MANCHESTER, in his official capacity as Chemung County Legislator; MARTIN D. CHALK, in his official capacity as Chemung County Legislator; L. THOMAS SWEET, in his official capacity as Chemung County Legislator; ROBERT BRIGGS, in his official capacity as Chemung County Legislature; JOSEPH C. BRENNAN, in his official capacity as Chemung County Legislator; WILLIAM MCCARTHY, in his official capacity as Chemung County Legislator; MARK MARGESON, in his official capacity as Chemung County Legislator; SCOTT DRAKE, in his official capacity as Chemung County Legislator; BRIAN HYLAND, in his official capacity as Chemung County Legislator; MICHAEL SMITH, in his official capacity as Chemung County Legislator; JOHN BURIN, in his official capacity as Chemung County Legislator; RODNEY J. STRANGE, in his official capacity as Chemung County Legislator; CHRISTINA SONSIRE, in her official capacity as Chemung County Legislator; PEGGY L. WOODARD, in her

DECISION, ORDER AND JUDGMENT

official capacity as Chemung County Legislator;
and BRYAN MAGGS, in his official capacity as Attorney
for the Legislature and Special Districts,

Respondents-Defendants.

APPEARANCES:

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EUGENE D. FAUGHNAN, J.S.C.

There are two related actions pending before this Court in connection with the appointment by the Chemung County Legislature (“Legislature”) of an Attorney for the Legislature and Special Districts. In the first action (Index 2019-1251), the Chemung County Executive, Christopher Moss (“Moss”), and the Chemung County Attorney, M. Hyder Hussain (“Hussain”), filed an Order to Show Cause and a hybrid Article 78 and declaratory judgment action, challenging the Legislature’s January 1, 2019 appointment of Bryan Maggs (“Maggs”) as Attorney for the Legislature and Special Districts.¹ Petitioners argue the power to make that appointment rests with the County Executive under the Chemung County Charter (“Charter”) and New York law, and not the Legislature. In the second action (Index 2019-5064), Petitioners filed a hybrid Article 78 and declaratory judgment action challenging the Legislature’s adoption of

¹In the Order to Show Cause, the Court declined Petitioners’ request to enjoin the Legislature’s employment of Maggs pending a determination on the application.

Local Law No. 2 of 2019 (“Local Law 2”), which amended the Charter to expressly authorize the Chairman of the Legislature to appoint the Attorney for the Legislature and Special Districts. Petitioners argue that the adoption of Local Law 2 was impermissible and should be annulled; and that in any event Local Law 2 cannot be applied retroactively. The crux of the two actions is whether it is the County Executive or the Chairman of the Legislature who has the power to make the appointment, and resolution of that question requires due consideration of the separation of powers, the County Charter and other statutes.

BACKGROUND FACTS

Prior to 2001, the Legislature utilized the services of an attorney on a contract basis. In 2001, a decision was made to have those services performed by a paid County employee, similar to a business deciding to bring their legal representation “in house”. At that time, the position of “Attorney for the Legislature and Special Districts” was created. The position was established by Resolution No. 01-120, which transitioned the job from a contract basis to a Civil Service position, with 50% of the time allotted to Attorney for the Legislature and 50% as Attorney for the Special Districts.. The County Executive from 2000-2018 was Thomas Santulli, and the Attorney for the Legislature and Special Districts was Richard Keyser. There was no turnover in either position, and no conflict over the power of appointment, although Keyser was re-appointed three more times. Keyser retired from that position at the end of 2018, at the same time Santulli left office.

Moss took office as County Executive on January 1, 2019. In the first action (Index 2019-1251), he states that prior to taking office he was informed that the position of Attorney for the Legislature and Special Districts would be appointed by the Chairman of the Legislature, and he did not initially question that authority. On January 1, 2019, by Resolution 19-003, the Chairman of the Legislature appointed Maggs as Attorney for the Legislature and Special Districts. Resolution 19-003 cited Section 203 of the Charter as the authority for such appointment. After further consultation and consideration, Moss concluded that the power to appoint to the position of Attorney for Legislature and Special Districts actually belongs to the

County Executive not the Legislature. On or about February 21, 2019, Moss informed some of the legislators that he believed that the Legislature's appointment of Maggs was not authorized and was illegal. Thereafter, Moss sent a letter dated February 27, 2019 purporting to terminate Maggs, claiming that the "powers and duties" of the County Executive under Section 302 of the Charter gives the County Executive the power to make that appointment. On February 28, 2019, the County Legislature held a special meeting and passed Resolution 19-192 which re-asserted the Legislature's powers under Charter Section 203 and County Law 204 and affirmed Maggs' appointment and "clarif[ied] the appointment authority and going forward employment status for the Attorney for the Legislature and Special Districts."

Soon thereafter, Petitioners filed the first action on March 7, 2019, challenging the Legislature's authority to make the appointment. The Petition seeks a declaration that Resolutions 19-003 and 19-192 were null and void.

After the first action was commenced, in order to eliminate any dispute as to the authority to make the appointment, the Legislature adopted Local Law 2 on or about March 11, 2019. Local Law 2 amends the Charter to make explicit the Legislature's power to appoint the Attorney to the Legislature and Special Districts. Moss vetoed Local Law 2, which was then overridden by the Legislature. With the amendment of the County Charter, Respondents take the position that there is no question now that the power to appoint belongs to the Legislature, and even if the initial appointment was to be invalidated, that the Legislature would re-appoint Maggs pursuant to the new Local Law 2, thereby making the first action moot. Respondents have also made a motion to consolidate the two actions.² Petitioners claim that the first action is not moot because Local Law 2 has no retroactive application, and that Local Law 2 is invalid in any event.

²Per the Affidavit of Robert S. Rosborough IV, dated July 18, 2019, Petitioners do not oppose the motion to consolidate.

LEGAL DISCUSSION AND ANALYSIS

Section 101 of the Charter provides for a “separation of County Legislative and Executive functions and responsibilities.” Article II of the County Charter details the powers of the Legislative Branch, and Article III governs the Executive Branch. Petitioners and Respondents each cite to various portions of the Charter to support their respective positions for appointment authority.

In the first action, the Amended Petition claims that the authority to create the position of Attorney for the Legislature and Special Districts comes from Article III, Article XVI and Article XXVII of the Charter. The Petition also argues that the job was established nearly 20 years ago within the Department of Law, which is an administrative unit under the direct authority of the County Executive.

The powers and duties of the Executive Branch are found in Article III of the Charter. Section 302 sets forth enumerated powers of the County Executive including the right to “supervise and direct the internal organization of each department or other administrative unit, the head of which he has the power to appoint.” (Charter Section 302(b)). Further, he has “all necessary incidental powers to perform and exercise any of the duties and functions specified [in Section 302] or lawfully delegated to him.” (Charter Section 302(l)). In addition, the County Executive appoints “the head of every department or administrative unit not administered by an elective official.” (Charter Section 309)

Article XVI, entitled “Department of Law” directs that “[t]here shall be a Department of Law headed by a County Attorney, who shall be appointed by the County Executive subject to confirmation by the County Legislature, and shall serve at the pleasure of the County Executive.” (Charter, Section 1601). Petitioners argue that the duties of evaluating and preparing legislation is reserved to the County Attorney (Charter, Section 1602), or his designated Assistant County Attorneys. Under Charter Section 1603, the “County Attorney shall have the power to appoint Assistant County Attorneys as may be authorized by the County Legislature” and those

Assistants serve at the County Attorney's pleasure. Since the duties of the Attorney for the Legislature and Special Districts include drafting legislation, Petitioners claim that the position is essentially an Assistant County Attorney under the authority of the County Attorney and the County Executive. The County Attorney and Assistant County Attorneys are clearly within the Executive Branch of the County government. Since the County Attorney position was not filled at the time (January 1, 2019), Petitioners reason that the County Executive would have the right to make the appointment to the position of Attorney for the Legislature and Special Districts. The Petition alleges that if the County Legislature is permitted to make the appointment, it diminishes the power of the County Executive and violates the separation of powers.

Petitioners also point to the history surrounding the creation of Attorney to the Legislature and Special Districts in 2001 as supporting the power of the County Executive to appoint. Prior to 2001, the duties had been performed by an outside attorney on a contract basis. The County Executive and Legislature agreed to the creation of a new position within the County. Resolution No. 01-120 specified that the Legislature confirmed the County Executive's appointment of Keyser as Attorney for the Legislature and Special Districts. The resolution also stated that the position was authorized under Article XVI of the Charter (Department of Law) and the request for appointment was made by the County Executive.

Lastly, the Petitioners assert that Article XXIX also supports the County Executive's appointment powers over the subject position. Section 2901 states that the County Executive has the authority to appoint administrative members to the Sewer and Solid Waste Management Districts. Thus, the appointment at issue would be within the County Executive's purview.

In opposition, Respondents contend that separation of powers absolutely requires that an attorney serving the Legislature be free and independent from influences from the Executive Branch, and that County Law as well as the County Charter gives the Legislature the power to make the appointment at issue here. They also highlight that several outside attorneys are hired to provide advice on legal issues on various issues and areas of law, and they are not considered Assistant County Attorneys.

Respondents also assert that none of the tasks assigned to the Attorney for the Legislature and Special Districts encroach on the County Attorney's role. Rather, the focus is on assisting the Legislature. Further, Respondents do not agree that the County Attorney has sole responsibility for drafting resolutions, local laws and other legislative materials, and historically, has not done so exclusively.

Respondents urge that the broad powers conferred to the County Legislature under County Law and the Charter give it the right to make the appointment to the position. Moreover, the statutes do not reserve that right to the County Executive.

The parties have pointed to sections of the Charter and County Law, and argue that the statutes support their positions. Where interpretation of statutes is at issue, "the starting point in any case of interpretation must always be the language itself." *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 (1998), and the various statutory sections should be considered together with reference to each other. *Matter of New York County Lawyers' Assn. v Bloomberg*, 19 NY3d 712, 721 (2012); *see also Matter of Theroux v. Reilly*, 1 NY3d 232 (2003).

Section 203 of the Charter provides that "[t]he County Legislature shall be the governing body of the County and shall be the legislative, appropriating and policy-determining body of the County and shall have and exercise all powers and duties of the County, now or hereafter conferred or imposed on the County Legislature by applicable law, and any and all powers and duties as are provided for in this Charter." Section 203 (a)-(l) lists specific enumerated powers, and Section 203(m) further provides that the Legislature has the power "to determine and make provision for any matter of County Government not otherwise provided for..." In addition to positions established by law, County Law §204 authorizes the board of supervisors (or County Legislature) "to establish positions of employment... [which] may be by local law, by resolution or by the adoption of the budget." Further, Municipal Home Rule Law §10(1)(ii)(a)(1) allows a county to adopt local laws not inconsistent with the state constitution or any general law, related to the powers and duties of its officers and employees.

The position of Attorney for the Legislature and Special Districts, as the name implies, consists of two distinct job components. The first is as the Attorney to the Legislature and the second is as Attorney for the Special Districts, which in this case are the Solid Waste Management District and the Sewer District.

The duties of the Attorney of the Legislature were described in the Civil Service job title written in 2002 and state that a person “would provide such service, functions and duties as may be assigned to me from time to time by the Chairman of the Legislature not inconsistent with the Chemung County Charter and applicable laws and regulations. The services would include, without limitation, legal and technical consulting in areas under the jurisdiction of the Legislature, investigating, researching, and evaluating prepared legislation, together with such other functions and assigned to me from time to time by the Chairman of the Legislature. I would maintain a confidential attorney-client relationship with the Chairman of the Legislature on all matters assigned to me by him.”

Based upon Charter Section 203 and County Law §204, the Legislature has authority to create new employment positions. The County Attorney is a position “provided within the law” and is not impacted, while County Law §204 permits the Legislature to establish additional positions; such as an Attorney for the Legislature and Special Districts. The Court concludes that the Legislature has the power to create the position of Attorney for the Legislature and Special Districts, and to establish that position separate from the County Attorney, as long as it does not infringe upon the statutory authority of the County Attorney. (*See* County Law §501, 502; *see also* Op. St. Compt., 70-247).

This interpretation is also consistent with the legislative history of this position. Although Petitioners correctly point out that the initial appointment of Keyser and Resolution 01-120 stated that the authority came from Article XVI of the Charter (Department of Law), all subsequent appointment to the position were made by the Chairperson of the Legislature under the authority of Section 203 of the Charter. Keyser was re-appointed by resolutions in 2011, 2012 and 2015 with all three resolutions noting that the appointment was made upon

recommendation of the Chairman of the Legislature and pursuant to Section 203 of the Charter. No objection was ever lodged with respect to those re-appointments, or authority under which they were made. Further, Maggs, the County Attorney prior to January 1, 2019, provided an affirmation that he never appointed anyone to the position of Attorney for the Legislature and Special Districts, and he considered it to be a Legislative appointment.

The Civil Service Certification contains a section asking the “Names and Titles of persons doing substantially the same kind and level of work by ... [the person in the position of Attorney for the Legislature and Special Districts]”, and the response was the “County Attorney.” The fact that the County Attorney position involves the same kind and level of work does not equate to a conclusion that the new position is in the same category or within the same appointment authority. It simply means the duties are similar and actually suggests that drafting legislation could fairly be read to be a duty of both jobs. Contrary to Petitioners’ arguments, the County Attorney does not have exclusive authority for drafting legislation, and in fact, that is not even a duty listed in the County Attorney’s job description under County Law §501, nor in the Local Law detailing the position of County Attorney and Assistant County Attorneys (1987 Local Law No. 2). County Law §501 sets forth various duties of a County Attorney, including serving as advisor to the Board of Supervisors and public officials, as well as prosecuting and defending actions in which the County is a party, but the section does not include mention of drafting legislation. Furthermore, Local Law 2 of 1987 set forth the duties of the County Attorney and his assistants, and it also did not include language concerning drafting legislation. The Legislature has also adopted its own rules of procedure, which do not include any provision for the County Attorney drafting legislation. The Court has also reviewed and considered Charter Section 1602 which states that the County Attorney is the “sole legal advisor of the County”, and shall “prepare resolutions, ordinances, legalizing acts and local laws ... to be presented for action by the County Legislature.” The language of the Charter gives the County Attorney authority to prepare legislative materials, but not the sole authority. Thus, the County Attorney is not the only person who might have authority to draft legislation, nor are his duties being impaired or diminished if an Attorney for the Legislature is also provided with such authority.

Maggs' affirmation also stated that during his tenure as County Attorney, the Attorney for the Legislature and Special Districts took an active role in drafting legislation. Having an Attorney for the Legislature being involved in those duties does not exclude the County Attorney's role and any desired involvement in the process, and simply maintains the *status quo* which has existed for many years. In Maggs' affirmation, he also noted that when he was County Attorney he did occasionally draft resolutions or local laws when requested by the County Executive, but that the Legislature had the authority to put them into final form and act upon them. Thus, as County Attorney, he did not have sole responsibility for drafting legislation, which gives further support for the conclusion that those duties have been a shared responsibility with the Attorney for the Legislature and Special Districts. Accordingly, the law and facts show that the position of Attorney for the Legislature and Special Districts does not deprive the County Attorney of the role which he has historically played in drafting legislation.

Moreover, the Civil Service Certification also notes that the supervisors to the new position include the Chairman of the Legislature, the Executive Director of the Sewer District and the General Manager of the Solid Waste District. This provides further support that the position is not under the direction or control of the County Attorney, Department of Law or County Executive.

The legislative history overwhelmingly shows that this position has been considered within the appointment powers of the Legislature. This corresponds with the plain language of the statutes. The position is clearly meant to provide legal assistance to the Legislature and requires a confidential relationship with the Chairman of the Legislature. The confidential relationship between the attorney and the Chairman of the Legislature would be compromised if the power of appointment and/or removal rested with the County Executive. Such a scenario would also undermine the separation of powers between the Legislative and Executive branches.

The second portion of the job-Attorney for the Special Districts- is likewise supported as a legislative prerogative. There is no issue raised as to the creation and existence of the Solid Waste Management District and the Sewer District. The only issue is the power of appointment

for the Special Districts. County Law §261 provides that “[w]hen a county district shall have been established ... [a]ll matters relating to the membership of such administrative head or body, including but not limited to, numbers, method of selection, tenure, qualifications and compensation, shall be determined by the board of supervisors.”³ Further, County Law §262 authorizes a county district to utilize the county attorney or an attorney employed for that purposes. *See*, Op. St. Compt. 86-14.

“A sewer district is not an independent public corporate entity. It exists as a department or administrative unit of county government.” *Brockport v. County of Monroe Pure Waters Div.*, 75 AD2d 483, 486-487 (4th Dept. 1980) *citing Tom Sawyer Motor Inns v. Chemung County Sewer Dist. No. 1*, 33 AD2d 720 [3rd Dept. 1969] [other citations omitted]. Thus, the sewer district could not be sued as an entity distinct from the County. *Tom Sawyer Motor Inns v. Chemung County Sewer Dist. No. 1*, 33 AD2d 720. “Since the District’s powers are merely administrative in nature and subject to the control of the county board of legislators (County Law, §§ 263-268), it is the county which has the authority to make the rules and regulations under which the District conducts its operations.” *Brockport v. County of Monroe Pure Waters Div.*, 75 AD2d 483, 486-487 (4th Dept. 1980). “The powers conferred by statute on an administrative unit of a county government are not powers exercised by districts as if they were separate and independent governmental units. Such powers are subject to the overall control of the County Board of Supervisors, thus reinforcing the view that the County Sewer District is nothing more than an administrative unit of county government. (County Law, §§ 262, 264, 266, 268-271.)” *Tom Sawyer Motor Inns v. Chemung County Sewer Dist. No. 1*, 33 AD2d at 721.

As *Brockport* and *Tom Sawyer Motor Inns* show, the special districts are subject to the supervision and control of the Board of Supervisors/County Legislature. This includes the power to appoint an attorney for the Special Districts. Petitioners claim that County Law §261 does not apply because Chemung County has adopted a Charter which gives the power to supervise and

³As Petitioners acknowledged at oral argument, where a County has adopted a Charter form of government, which utilizes a county executive-county legislature model (like Chemung County has done), the county legislature is equivalent to the board of supervisors.

appoint to the County Executive (Charter Section 2901). Petitioners claim that the Legislature opted to forego its power over the Special Districts when Section 2901 of the Charter was adopted. A close reading of that Section does not support Petitioners' argument. Section 2901 states that the board of the Sewer District and Solid Waste Disposal "shall continue as provided by law except that the powers of appointment of the administrative members of said board shall be exercised by the County Executive, subject to confirmation of the County Legislature." There is no indication that the Legislature completely ceded all authority over the Special Districts, just the power of appointment of the board members. All other powers, including the appointment of an attorney to represent the Special Districts would still be reserved to the Legislature. While the Charter does not contain a definition of "administrative member" or "Administrative Board", there is no indication that the Attorney providing advice to those Boards is a member of the Board. He is their legal counsel, not a Board member. Thus, Section 2901 does not support Petitioners' claim for appointment power of the attorney for the Special Districts.

The Petitioners point to the broad grant of powers to the County Executive as support for their position. Charter Section 302 does grant the County Executive the ability to supervise and direct organization and reorganization of any department or administrative units, the head of which he has the power to appoint. While he clearly does have the power to reorganize the Department of Law, that does not include the Attorney for the Legislature for the reasons noted above- the position is not within the Department of Law. With respect to the Special Districts, as the Court has already stated, the County Executive can appoint the Boards, but there is no provision giving him authority to appoint the Attorney for the Special Districts, and it has not been the practice for the County Executive to do so.

Similar to Charter Section 302, Charter Section 309 permits the County Executive to appoint non-elected heads of departments or other administrative units. The Legislature is an "administrative unit" of the County. The definition of "administrative unit" is provided in Charter Section 105 and includes "any department, executive division, institution, office or other agency of County Government, except a bureau, division, section, or other subordinate part." (Charter, Section 105(d)). The Legislature is a branch or administrative arm of the municipality,

and is not excluded from the definition of “administrative unit”. Since the Legislature is an administrative unit headed by an elected official, the County Executive does not have the power to appoint the head of that “administrative unit” or direct the organization or reorganization of that “administrative unit”. The people elected to head “administrative units” maintain control and authority over those “administrative units.” In this case, the Chairman of the Legislature has the power of appointment within the Legislature, including the Attorney for the Legislature and Special Districts, and the County Executive’s powers under Charter 309 do not provide a basis for the County Executive to make the appointment.

Based on the provisions of the County Law and the County Charter, the Court concludes that the Chairman of the County Legislature is vested with the authority to make the appointment to the position of Attorney for the Legislature and Special Districts.

Having reached the conclusion that the Legislature’s initial appointment of Maggs by Resolution 19-003 was proper, the basic question presented to the Court is resolved. Resolution 19-192 was passed to clarify that the Chairman of the Legislature had the power to appoint the Legislature’s counsel, and re-affirmed the appointment of Maggs. Since the initial appointment was proper, the Court need not consider the validity of Resolution 19-192.

It is also important to note that the Court’s conclusion does not impact the powers or duties of the County Attorney to be the sole legal advisor to the County. *See e.g. Judson v. Niagara Falls*, 140 AD 62 (4th Dept. 1910). This is particularly true with respect to outside parties. The County Attorney, and the Attorney for the Legislature, can both provide advice to the Legislature. At all times, however, the County Attorney has sole authority to represent the County with regard to third-parties.

Based upon the foregoing discussion, the Court determines that the Petition in the first action is DISMISSED, and the Court upholds the Legislature’s appointment of Maggs as Attorney for the Legislature and Special Districts by Resolution 19-003. That determination resolves the issue between the parties as to the appointment of Maggs, and whether that power

belongs to the County Executive or the Legislature. While the challenge to Local Law 2, amending the Charter was focused on the hiring of Maggs, the Court must still determine if the Charter was properly amended.

Petitioners initially claim that Local Law 2 cannot be applied retroactively to validate the Legislature's appointment of Maggs by Resolution 19-003 (and 19-192). Petitioners also argue that Local Law 2 is invalid because: 1) it was subject to a mandatory referendum, which never occurred, 2) it violates New York's County Law that the County Attorney serve as the sole legal advisor, 3) it is inconsistent with the separation of powers, and 4) the procedure violated the Open Meetings Law.

With respect to the retroactivity argument, Petitioners alleged in the first action (2019-1251) that Maggs' appointment was invalid, and thus, in the second action, they claim that the Legislature cannot pass a Local Law amending the Charter to retroactively legitimize the improper appointment. However, as the Court determined above, the appointment of Maggs was proper from the beginning, so retroactivity of Local Law 2 is academic.

1. Referendum

Petitioners claim that the Charter Amendment is subject to a mandatory referendum because it changed or curtailed the County Executive's powers- specifically, the power to appoint the Attorney for the Legislature and Special Districts. Thus, Petitioners argue that the Local Law 2 was not valid since no mandatory referendum took place.

Petitioners cite to Municipal Home Rule Law §23(2)(f) to support their claim that a mandatory referendum was required. That section provides that "[e]xcept as otherwise provided by or under authority of a state statute, a local law shall be subject to a mandatory referendum if it ... [a]bolishes, transfers or curtails any power of an elective officer." (See also Charter Section 3002). The authority to appoint is a power of an elected official. *See New York Pub. Interest Research Group v. Giuliani*, 228 AD2d 276 (1st Dept. 1996).

Petitioners' argument is premised upon finding that the position is within the Department of Law, and therefore, within the County Executive's purview and appointment power. Petitioners view Local Law 2 as moving that position from the Department of Law to the Legislature. However, as already discussed above, notwithstanding the initial appointment paperwork, the Court concludes that the Attorney for the Legislature and Special Districts is not an Assistant County Attorney or within the Department of Law. Thus, Local Law 2 does not take away any appointment power from the County Executive. Accordingly, a mandatory referendum was not required.

Even if Local Law 2 did "abolish, transfer or curtail" any powers of the County Executive, a mandatory referendum was not required. Although Petitioners cite to *New York Pub. Interest v. Giuliani*, 228 AD2d 276, that case cites to *Morin v. Foster*, 45 NY2d 287 (1978), where the Court of Appeals observed that "[a] local law which curtails any power of an elected county legislature is inoperative unless subject to a *permissive* referendum." *Morin v. Foster*, 45 NY2d 287, 293 (emphasis added) (citation omitted). In *Morin*, the local law was invalidated as there was no permissive referendum. In the present case, the opportunity for a permissive referendum was provided. The Court cannot conclude that Local Law 2 is invalid based upon the lack of a mandatory referendum.

2. County Attorney as sole legal advisor

Petitioners further challenge Local Law 2 as an infringement upon the County Attorney's role as the sole legal advisor to the Legislature under County Law §§501-502. Under those statutes, as also described above, the County Attorney is the sole legal advisor to the Legislature, and has the power to appoint assistants to perform duties that he is authorized to perform. Petitioners claim that Local Law 2 impermissibly authorizes the Attorney for the Legislature and Special Districts to prepare legislation, which can only be done by the County Attorney. As explained above, the statutes and Charter do not make the County Attorney the only one who can draft legislation, and the appointment of an Attorney for the Legislature and Special Districts does not infringe upon the County Attorney's role. It serves to supplement the County Attorney, and provide independent counsel to the Legislature.

3. Separation of powers

Petitioners claim that Local Law 2 allows the Legislature to bypass the County Executive by permitting the Attorney for the Legislature and Special Districts to evaluate and draft legislation without sending it to the County Executive for review. The County Executive claims a right to have a say in the resolutions or other legal acts that come before the Legislature. That right still exists with Local Law 2, the Legislature can receive input and advice from both the County Attorney and the Attorney for the Legislature and Special Districts. The separation of powers would actually be violated if the Court were to adopt Petitioners' argument, as that would allow only the County Attorney (serving at the pleasure of the County Executive) to bring resolutions or other legal matters to the Legislature, and would result in the County Executive controlling the legislative agenda.

4. Open Meetings Law

The Open Meetings Law provides that “[e]very meeting of a public body shall be open to the general public.” Public Officers Law §103(a). Its purpose is “to open the decision-making process of elected officials to the public while at the same time protecting the ability of the government to carry out its responsibilities.” *Gordon v. Village of Monticello*, 87 NY2d 124, 126 (1995) (citations omitted). Where the meeting is scheduled at least a week in advance, notice is to be provided to the news media and posted in public locations at least seventy two hours before the meeting. Public Officers Law §104(1). For other meetings, the notice shall be given at a reasonable time prior to the meeting. *Id.* at §104(2). The statute is to be liberally construed, but “not every violation of the Open Meetings Law automatically triggers its enforcement sanctions.” *Matter of New York Univ. v. Whalen*, 46 NY2d 734, 735 (1978); *see Goodson Todman Enters. v. Kingston Common Council*, 153 AD2d 103 (3rd Dept. 1990); Public Officers Law §107.

Petitioners claim that the Legislature called a special meeting on February 27, 2019 to be held on February 28, 2019. They contend that such a short time frame prevented any meaningful public review or comment. The facts do not support their argument.

The February 28, 2019 meeting dealt with the Legislature's response to the letter from Moss of February 27, 2019 attempting to terminate Maggs. The February 28, 2019 meeting resulted in the Legislature passing Resolution 19-192, in which the Legislature sought to re-affirm its authority to appoint to the position of Attorney for the Legislature and Special Districts. As already discussed above, since the Court has determined that the Legislature had the authority when it appointed Maggs on January 1, 2019, Resolution 19-192 was unnecessary. More importantly, however, is that Local Law 2 to amend the Charter was not introduced or voted on at the February 28, 2019 meeting. The meeting of March 11, 2019 is when Local Law 2 was introduced and adopted. Petitioners have not set forth any argument that notice of the March 11, 2019 meeting was not properly given.

Even if the Court were to conclude that a violation of the Open Meetings Law occurred, “[j]udicial relief is warranted only upon a showing of good cause. *New York Univ. v. Whalen*, 46 NY2d at 734. The Legislature's action at the February 28, 2019 meeting consisted of the passing of Resolution 19-192, not amending the Charter pursuant to Local Law 2. The Court concludes that Petitioners have not established good cause to show that any alleged violation of the Open Meetings Law should invalidate Local Law 2.

Based upon the foregoing discussion, Petitioners' request to declare Local Law 2 invalid is DENIED.

CONCLUSION

The Petition in the first action is DISMISSED, and the Court upholds the Legislature's appointment of Maggs as Attorney for the Legislature by Resolution 19-003.


The Petition in the second action is also DISMISSED, and the Court upholds the Legislature's enactment of Local Law 2.

There is no opposition to the motion to consolidate, so the Court does grant the motion to consolidate. Upon consolidation, both Petitions are hereby DISMISSED.⁴

THIS CONSTITUTES THE DECISION, ORDER AND JUDGMENT OF THIS COURT.

ENTER:

Dated: September 30, 2019
Elmira, New York



HON. EUGENE D. FAUGHNAN
Supreme Court Justice

⁴The second action (Index 2019-5064) is an electronically filed case, so the Court will upload this Decision, Order and Judgment to that file. The first action (Index 2019-1251) was not an electronically filed case, and the Court is forwarding the Decision, Order and Judgment to the Court Clerk for filing in the County Clerk's Office. This does not eliminate the need to serve a copy of the Decision, Order and Judgment with Notice of Entry.