STATE OF NEW YORK

1977

# OPINIONS OF THE COMPTROLLER

# RELATING TO MUNICIPAL GOVERNMENT

**ARTHUR LEVITT**

**Comptroller**

**Vol. 33**

1977

Each year the Department of Audit and Control publishes the Opinions of the Comptroller on questions relating to local government. The present volume, for 1977, is the thirty-third in the series of annual volumes since 1945.

Problems in municipal administration become more complex each year as communities expand in size and services. It is a primary function of the Legal Consultant Section of the Division of Municipal Affairs — under the direction of Counsel to the Comptroller, Theodore Spatz — to assist and advise municipal officials in solving these problems within the framework of applicable statutes.

Since an average of more than a thousand opinions are rendered upon request each year, only those of general interest can be published. In reading an opinion, care should be taken to consider possible statutory changes which have taken place since the opinion was issued.

Arthur Levitt
Comptroller

# *Table of Contents*

# *1977 Opinions of the State Comptroller*

## OPINION 77-11

**Inquiry:** Where a city establishes and operates a public parking area, may the costs of operating and maintaining such parking area be assessed and levied against real property deemed benefited by the improvement?

**Statement of Law:** General City Law §20 grants specific powers to cities. Section 20(11) provides in pertinent part that cities may ". . . construct and *maintain* . . . public works and public improvements, including local improvements, and *assess and levy upon the property benefited thereby the cost thereof,* in whole or in part." [Emphasis added]

It is a fundamental rule of statutory construction that statutory language should be construed according to its natural and most obvious sense (McKinney's Statutes §94). Applying this rule to the provisions of §20(11), it is our opinion that the word "maintain" has reference to the costs of operating and maintaining a public improvement. Accordingly, the costs of operating and maintaining a parking area constructed by a city may be assessed and levied against the real property deemed benefited by the improvement pursuant to the provisions of §20(11).

In a prior opinion (28 Op St Compt 216 (1972), the Department expressed the view that a *village* could not assess operating and maintenance costs of a public parking facility against the property deemed benefited by the improvement. Said opinion was predicated upon different statutory provisions than those involved in the present inquiry, and it has no bearing on the conclusion reached herein.

**Conclusion:** Where a city establishes and operates a public parking area, the costs of operating and maintaining such parking area may be assessed and levied against real property deemed benefited by the improvement.

February 9, 1977.

## OPINION 77-14

**Inquiry:** May a fire district, with the permission of the federal government, enter upon unprotected federal land immediately adjacent to the fire district to fight a fire which threatens properties within the district?

**Statement of Law:** Ordinarily, the jurisdiction of a fire district and, consequently, of its firemen is limited by the district's boundaries (Town L §§170 *et seq.*). Nevertheless, we believe that if a fire occurs on the unprotected federal land which immediately threatens homes within the district, the fire district should not have to wait until the fire crosses the boundary and starts to burn a house. Fire protection includes fire prevention. We are confident that a court would recognize the right of firemen to prevent the spread of such a potentially dangerous fire.

In the long run, the fire district may wish to consider an alternative course of action available under the statutes: namely, the extension of the boundaries of the fire district to include some or all of the federal property (Town L §170).

And under more normal situations, General Municipal Law §209 already authorizes the district's firemen to fight fires on adjacent federal property in response to calls for assistance. Such calls can come from virtually anyone who is aware of the peril and of the need for assistance.

**Conclusion:** When a fire upon unprotected federal land lying immediately adjacent to a fire district threatens homes just within the district's boundary, firemen from the district may enter upon the adjacent federal land to prevent the fire from spreading to such homes. Boundaries of the fire district may be formally extended to include some or all of the federal property.

April 21, 1977.

## OPINION 77-21

**Inquiry:** Is a town authorized to purchase a sand and gravel pit (to be used also as a sanitary landfill or dump) and finance the purchase through the issuance of bonds with a five-year maturity?

**Statement of Law:** Highway Law §145 authorizes a town to purchase land containing a gravel bed or other material for use on the public highways and bridges of the town. The town is also authorized under Town Law §220(5) to purchase land for the establishment of a public dump. Moreover, the town may acquire a sand and gravel pit to be used as a town dump without violating



Highway Law §145 (see *Singelaub v. Town of Smithtown*, 29 M2d 655, 214 NYS2d 573 (1961).

In either case, the resolution authorizing *the expenditure* would not be subject to permissive referendum, inasmuch as the purchase of the sand and gravel pit is being financed pursuant to the Local Finance Law (see 30 Op St Compt 104 (1974). Moreover, the bond resolution, to be adopted by the town board for the financing of the purchase of the sand and gravel pit, would also not be subject to permissive referendum, since the proposed maturity of the bonds is not more than five years (Loc Fin L §35.00(b). However, since more than 10% of the total assessed valuation of the town consists of State-owned lands within the Adirondack Park, the consent of the State Comptroller would be a condition precedent, in this case, to the issuance of bonds in the amount of $15,000 (Loc Fin L §104.10(3).

Finally, moneys used to fund the debt service appropriation for the bonds would be charged to the town's general fund.

**Conclusion:** A town is authorized to purchase a gravel pit for highway and town dump purposes and finance the purchase thereof pursuant to the Local Finance Law.

March 14, 1977.

## OPINION 77-31

**Statement of Fact:** A village wants to adopt a procedure for the approval of subdivision plats which does not require a performance bond. Many developers are having difficulty obtaining performance bonds, and some companies are no longer writing this type of bond.

The basic features of the proposal are as follows. Subdivision plats would be finally approved by the village and filed with the county clerk without requiring completion of specified improvements or furnishing of a performance bond to cover the cost of improvements. Instead, the village would require the completion of certain improvements before building permits are issued, such as laying the base coat of the road or street and installing utilities. In addition, the village would require that a developer may not obtain a certificate of occupancy until all improvements are completed or the developer deposits a pro rata share of the costs of uncompleted improvements, such as finishing the roads and sidewalks.

**Inquiry:** May the village adopt such a procedure?

**Statement of Law:** In the opinion of this Department, the procedure described is unlawful. Village Law §7-730(1) provides that a subdivision plat

may not be finally approved by the planning board and filed with the county clerk until all required improvements are completed or a performance bond is furnished. This provision is designed to ensure that the developer bears the responsibility for completing improvements or putting up security therefor. The plan described does not comply with this basic requirement.

The courts have held that a town or village may not adopt subdivision regulations which exceed the authority granted in Town Law §277(1) and Village Law §7-730(1), respectively (*Levine v. Town Board of Carmel*, 34 AD2d 796, 311 NYS2d 691 (1970); *Incorporated Village of Northport v. Guardian Federal Savings and Loan Assoc.*, 87 M2d 344, 384 NYS2d 923, 926, aff'd 54 AD2d 893, 387 NYS2d 1015 (1976). The *Levine* case held that a town lacks the authority to require a cash deposit as part of a performance bond as a condition to approval of a subdivision. If a town or village may not even modify the security provision to that extent, then certainly they may not dispense with the performance bond requirement altogether.

Even though a town or village *may not require* cash in lieu of a performance bond, this Department is of the opinion that the municipality *may accept* cash or some other security of equivalent value, such as a letter of credit (28 Op St Compt 183 (1972); 23 Op St Compt 179 (1967). This option may solve the problem when a developer is unable to obtain a performance bond.

In summary, therefore, the procedure being proposed for approving subdivision plats is not legally valid. Nevertheless, it may be possible for developers who are unable to obtain performance bonds to proceed by allowing them to furnish cash or another security, which is equivalent to a performance bond.

One further point bears mention. Village Law §7-730(1) permits a departure from the alternative requirements of completed improvements or a performance bond in certain special instances. It provides, in part, as follows:

> provided, however, that the planning board may waive subject to appropriate conditions and guarantees, for such period as it may determine, the provision of any or all such improvements as in its judgment of the special circumstances of a particular plat or plats are not requisite in the interest of the public health, safety and general welfare.

Thus, the planning board may waive for a time the provision of improvements when the special circumstances of a particular plat so indicate, but this provision does not authorize the planning board to dispense with the requirement of completed improvements or a performance bond in all or most cases.

**Conclusion:** A village may not approve a subdivision plat until the specified improvements are completed by the developer or a performance bond is furnished.

February 25, 1977.



## OPINION 77-45

**Statement of Fact:** A county sewer agency is nearing completion of a feasibility study with respect to a proposed sewer district which, if established, will include portions of two towns and two villages. After the completion of such study and the holding of a public hearing thereon, a resolution of the board of supervisors approving the establishment of such district and the geographical boundaries thereof would be subject to a permissive referendum as required by County Law §256.

**Inquiry:** At a permissive referendum called to vote upon the question of establishing a proposed county sewer district, if a majority of the voters within that area of one of the towns included within the geographical area of such proposed district vote against the establishment of the district, but the proposition passes by a majority vote in the other three municipalities affected, so that the total vote favors the proposition, is such town bound by the majority vote and must it remain within the jurisdiction of the district?

**Statement of Law:** County Law §257 contains the provisions of law governing the manner of holding a permissive referendum on the approval of the establishment of a proposed county sewer district. Section 257(1) provides, in part, that the provisions of County Law §§101 and 102 shall be applicable to any such permissive referendum.

County Law §102(2) provides that if the majority of the votes cast on any proposition submitted to a referendum shall be in the affirmative, the resolution shall be approved. There is no provision of law which would exempt all or a portion of those electors voting against a proposition from the application of the particular proposition being voted upon where the proposition is approved by majority vote.

The adoption of a proposition submitted to a permissive referendum requires simply a majority vote, and the residences of the electors voting for or against the proposition are irrelevant. Accordingly, the inquiry must be answered in the affirmative.

**Conclusion:** At a permissive referendum called to vote upon the question of establishing a proposed county sewer district, if a majority of the voters within that area of one of the towns included within the geographical area of such proposed district vote against the establishment of the district, but the proposition passes by a majority vote in the other three municipalities affected, so that the total vote favors the proposition, such town is bound by the majority vote and must remain within the jurisdiction of the district.

February 15, 1977.

## OPINION 77-49

**Inquiry:** Is time served in a village police department to be credited in determining the starting grade of a policeman who has been transferred to a town police department in the same county?

**Statement of Law:** Town Law §153 provides that a policeman who has been transferred between town and village police departments in the same county shall receive credit with the department to which he is transferred for time served in the former department, for purposes of "seniority, promotion, pensions and general administration" (see also former Vill L §188). In a prior opinion (31 Op St Compt 11 (1975), we stated that the apparent broad intent of the aforementioned statute is to "place the transferee squarely in the shoes of the policeman who may have served all such time in the district to which the transfer is made." Accordingly, a village policeman transferred to a town police department should receive credit for time served in his former department for purposes of starting grade (see 1977 Op St Compt #77-250 (unreported).

We have been informed that the respective policeman transferee agreed to start at a lower grade than he would be entitled to based on his past service. The existence of this agreement does not alter our opinion. The provisions of Town Law §153 are imperative, "and to the extent that such provision is imperative, it is beyond the power of the parties to alter or modify the statutory provision by collective bargaining, agreement to arbitrate or otherwise" (*Union Free School District No. 2 of the Town of Cheektowaga et al. v. Nyquist et al.*, 38 NY2d 137, 379 NYS2d 10 (1975).

**Conclusion:** A village policeman transferred to a town police department should receive credit for time served in his former department for purposes of starting grade.

May 10, 1977.

## OPINION 77-63

**Inquiry:** Would a town be authorized to accept moneys from town residents on a monthly basis, holding such moneys in an escrow account, and applying said moneys toward payment of the residents' real property tax obligations as they come due?

**Statement of Law:** In a recent opinion (32 Op St Compt 100 (1976), we were asked whether a village could accept moneys from its residents and apply



said moneys toward the payment of the village real property taxes at a future date.

In that opinion, we concluded that a village could not accept moneys in advance to satisfy later tax obligations since the village treasurer was unauthorized to take custody of such moneys. It is our opinion that the absence of authorization within the Town Law for any town officer to accept custody of such moneys would, similarly, preclude a town from establishing such a program for the payment of taxes.

In addition to the above, although there is provision within the Real Property Tax Law for the payment of taxes in installments (§928), there is no authorization within that statute to allow the payment of taxes in the manner described. The foregoing reinforces our conclusion that a town may not establish such a program for the payment of taxes.

**Conclusion:** A town may not accept moneys from town residents to be held in escrow for the future payment of real property taxes.

March 1, 1977.

## OPINION 77-67

**Statement of Fact:** An individual holding a tax sale certificate received a conveyance of a tax deed to the property affected by such certificate. Pursuant to the provisions of Laws of 1936 chapter 313 (Livingston County Tax Act), by §10(2) thereof, such conveyance may not be recorded until the expiration of six months after filing evidence of service of a notice to redeem on the owner or occupant of the property.

Pursuant to the provisions of Livingston County Tax Act §10, the said notice to redeem is prepared by the county treasurer and delivered to the grantee. The grantee must serve such notice to redeem on the owner or occupant of the property in the manner specificed by the tax act. The notice to redeem must advise the delinquent taxpayer that unless he redeems the property by payment of the amount due *within six months after the time of filing of evidence of the service of such notice*, the conveyance shall become absolute, and the owner and all others interested in such property shall be forever barred from all right or title thereto.

In the situation at hand, evidence of service of the notice to redeem was filed with the county treasurer by the tax sale certificate holder on May 20, 1976. The redemption period expired on Saturday, November 20, 1976. A mailed payment of the amount necessary to redeem the property was received by the county treasurer on Monday, November 22, 1976. On the same day, the county

treasurer refused to issue a certificate of nonredemption to the tax sale certificate holder on the grounds that the property in question had been properly redeemed.

**Inquiry:** Was there a timely redemption of the property in question in the described circumstances?

**Statement of Law:** General Construction Law §25-a contains the provisions of law governing the extension of time where performance of an act is due on a Saturday, Sunday or public holiday. Section 25-a(1) provides, in pertinent part, as follows:

> 1. When any period of time, computed from a certain day, within which or after which or before which an act is authorized or required to be done, ends on a Saturday . . . such act may be done on the next succeeding business day . . . .

In the situation at hand, the period for the act of redeeming real property from a tax sale expired on a Saturday. Pursuant to the above-quoted provisions of §25-a, such expiration date was extended to the following Monday. Therefore, there was a timely redemption of the property in question.

**Conclusion:** Where the redemption of real property from a tax sale expires on a Saturday, the provisions of General Construction Law §25-a operate to extend the expiration date to the following Monday, and payment of the amount necessary to redeem the property on Monday constitutes timely redemption.

February 23, 1977.

## OPINION 77-74

**Inquiry:** May a city laboratory accept credit cards (*i.e.*, Master Charge, Bank Americard, etc.) for payment for laboratory services rendered to outpatients?

**Statement of Law:** In a prior opinion (26 Op St Compt 198 (1970), this Department was faced with the same issue with respect to municipal hospitals. In that opinion, we expressed the view that a municipal hospital may not accept the standard Master Charge and Bank Americard charge card slips for payment of hospital bills. Our rationale was as follows:

> The standard Master Charge and Bank Americard plans provide that the "merchant" must pay, as a cost of participating in the plan, a "discount," or an amount representing a percentage of the monetary value of the credit card transactions accepted by the merchant. When the merchant is a municipal hospital, the use of a credit card is for the sole benefit of the credit card user. He is asking the hospital to accept the guaranty of the bank in lieu of his personal obligation. There is no authority which permits a municipal hospital to pay a "discount" to the guarantor bank from which it demands payment.

Our basic concern was the fact that the payment of a discount to the credit card issuer would bring about an unwarranted diminution of the moneys which the municipal hospital had earned and to which it was entitled. Because payment of such a discount was not authorized, either expressly or impliedly, by any statute and because we could see no logical justification for it, we concluded that it would be improper.

However, since that opinion was rendered, we have learned that there has been a marked increase in both the number and the amounts of uncollected and uncollectible accounts receivable owed to municipal hospitals and laboratories. This has caused us to reconsider and re-evaluate the position which we previously took.

We realize that there are a great many instances where a person who has received treatment or services from a municipal hospital or laboratory may not have sufficient cash with him to pay his bill. The hospital or laboratory, if it insists on cash (or a check) which the patient does not have, is simply defeating its own purposes by not accepting a credit card and by allowing the patient to get away without paying. The result of this can well be costly efforts to collect, which may include litigation and substantial legal fees.

In view of all the foregoing, it is now our opinion that where the municipal hospital or laboratory is given no other reasonable choice, it can honor the patient's credit card, notwithstanding that this will involve the payment of a discount to the credit card issuer. We believe that the likelihood is great that such discount will be smaller than the ultimate cost of trying to collect (possibly unsuccessfully) against a patient who has not otherwise paid his bill. It is also our view that under these circumstances, the credit card discount may properly be treated as a collection cost.

**Conclusion:** There are circumstances under which a city laboratory may accept bank credit cards for payment of laboratory services rendered to outpatients.

June 20, 1977.

## OPINION 77-76

**Inquiry:** May a school district public library purchase liability insurance to protect members of the library board of trustees from claims arising out of the performance of their duties?

**Statement of Law:** Presently, cities, counties, towns, villages, fire districts and school districts may purchase liability insurance for the purpose of protecting their officers and employees against liability for claims arising from their acts while exercising or performing their powers and duties, pursuant to the provisions of new §52 of the General Municipal Law (L 1976 ch 831). In addition, Education Law §3811 provides that whenever the trustees or board of education of any school district or any school district officers are instructed to defend an action brought against them arising out of the exercise of their powers or the performance of their duties, all their reasonable costs and expenses, as well as all costs and damages adjudged against them, shall be district charges. In this connection, we have stated that a school district may purchase indemnity insurance to protect its board members from personal liability, where such liability arises out of acts performed or exercised in the course of official duties (29 Op St Compt 159 (1973).

While neither of the above-cited provisions of law address themselves directly to the proposal in question, we are of the opinion that the library board of trustees possesses implied authority to purchase liability insurance in the same manner as the above-mentioned municipal corporations and districts.

Two past opinions of this Department stated that a library board of trustees may purchase liability insurance covering the board and its members (1975 Op St Compt #75-1164 (unreported); 1976 Op St Compt #76-599 (unreported).

**Conclusion:** The board of trustees of a school district public library possesses implied authority to purchase liability insurance to protect such trustees from claims arising out of the performance of their duties.

February 18, 1977.

## OPINION 77-77

**Statement of Fact:** A town board advertised for bids for the utilization of a privately owned garbage disposal site, with the bid specifications calling for a price estimate based upon a contract for a term of one year. In response to the bid offering, only one bid was submitted. The board now wishes to enter into a *two-year* contract with the successful bidder, based upon the same price as was quoted for the one-year contract.

**Inquiry:** Is such action on the part of the board authorized?

**Statement of Law:** Our response is in the negative. When the town board awarded the contract to the low (and sole) bidder, that award was necessarily based upon that bidder's response to the bid specifications, that is, an estimated price for a one-year contract. Entering into a contract for a two-year term would mean that the town board has, in effect, altered its specifications. The successful bidder would be granted an unfair advantage over other bidders who may have declined to submit bids for a one-year contract, on the ground that their best price may have been based upon a two-year contract term. If the town board does, in fact, desire to enter into a two-year contract, we are of the opinion that the board should reject the bid submitted and readvertise for new bids.



**Conclusion:** Where a town board has advertised for bids for a one-year contract and awarded the contract to the lone bidder, the board may not subsequently enter into a two-year contract with that bidder.

February 22, 1977.

## OPINION 77-78

**Inquiry:** Where a town's share of county sales tax revenues is greater than the estimate of such revenues applied to the reduction of county taxes within the town, what disposition is to be made of such excess sales tax revenues?

**Statement of Law:** The disposition of excess sales tax moneys is governed by the following provisions of Tax Law §1262(c):

> If the amount allocated to a town exceeds the amount of the county taxes and general town taxes levied upon real property in the town, the excess shall be apportioned between the town and each village, if any, wholly or partially situated therein . . . .

In a prior opinion (1971 Op St Compt #71-514 (unreported), we interpreted the above-quoted provision of §1262(c) to require that where a town's share of county sales tax revenues exceeds the amount necessary to cover county and general town taxes, the excess must be divided between the town and any village therein.

In another opinion (1973 Op St Compt #73-287 (unreported), we considered the provisions of §1262(d), which state that if the amount of sales tax allocated to a city exceeds the amount of the county tax levied upon real property, such excess shall be paid to the city. In light of those provisions, we stated that the county is to pay the city in cash the sales tax revenues in excess of the estimate of such revenues applied in reduction of the county taxes within the city.

In light of the provisions of §§1262(c) and 1262(d) and the interpretations thereof made, respectively, in the previously cited opinions, it is our opinion

that the excess moneys in question must be paid to the town by the county treasurer.

**Conclusion:** When a town's share of county sales tax revenues exceeds the estimate of such revenues applied to reduction of county taxes, such excess must be paid to the town by the county treasurer.

December 8, 1977.

## OPINION 77-81

**Statement of Fact:** A local law had been adopted pursuant to the provisions of Real Property Tax Law §467 to amend the maximum income limitation for eligibility for the partial exemption from real property taxes granted to persons 65 years of age or over by such section.

**Inquiry:** Is a local law amending the prior local law subject to a permissive referendum (Mun HRL §24(2)(c)?

**Statement of Law:** An opinion rendered by the Attorney General (1966 Op Atty Gen 175 (informal) expressed the view that the provisions of Real Property Tax Law §467 granting partial exemptions from real property taxation for real property owned by persons 65 years of age or over, if the governing board of the municipality adopts a local law, ordinance or resolution providing therefor, are *not* a proper subject for permissive referendum (see also 22 Op St Compt 905 (1966). Since the original local law granting the partial exemption authorized by §467 is not subject to permissive referendum, it follows that any amendment changing the income limitation for eligibility for such exemption would not be subject to permissive referendum either. Accordingly, the inquiry must be answered in the negative.

**Conclusion:** A local law amending a local law, adopted pursuant to Real Property Tax Law §467 to amend the maximum income limitation for eligibility for the partial exemption from real property taxes granted to persons 65 years of age or over by such section, is not subject to a permissive referendum.

February 14, 1977.

## OPINION 77-88

**Statement of Fact:** A fire district fire company's by-laws permit minors between the ages of 16 and 18 to be admitted to membership as volunteer



firemen. However, any such members are not permitted to drive fire vehicles, operate radios or to enter burning buildings. They are permitted to assist in other ways at the scenes of fires.

**Inquiry:** Would such restrictions affect their coverage under the Volunteer Firemen's Benefit Law?

**Statement of Law:** The laws relating to volunteer firemen recognize only active volunteer members of fire companies and only such active volunteer members are protected in case of injury or death resulting from the performance of firemanic duties (1970 Op Atty Gen 191 (informal); Vol Fire Ben L §3(1). This Department has expressed the view that a volunteer fireman is an "active member," not because of the classification used to describe his status by any company by-laws, but rather by reason of the duties he is required to perform (1970 Op St Compt #70-748 (unreported); 1972 Op St Compt #72-279 (unreported).

In applying the above-stated test, both this Department and the Attorney General have expressed the view that an active volunteer fireman is a member of a fire company who is subject for call for duty and who does not have the option of determining whether to place himself on duty (1972 Op St Compt #72-279 (*supra*); 1974 Op St Compt #74-282 (unreported); 1958 Op Atty Gen 168 (informal).

The volunteer firemen in question are on restricted duty, that is, they are not permitted to perform all firemanic duties. It is our opinion that the mere fact that a fireman is on restricted duty, standing alone, would not affect his entitlement to benefits under the Volunteer Firemen's Benefit Law.

The letter of inquiry does not indicate whether the volunteer firemen in question have an option to determine whether to place themselves on duty. If they do have such an option, they would not seem to be entitled to benefits under the Volunteer Firemen's Benefit Law.

**Conclusion:** The mere fact that a volunteer fireman is on restricted duty, standing alone, would not affect his entitlement to benefits under the Volunteer Firemen's Benefit Law.

March 1, 1977.

## OPINION 77-90

**Inquiry:** May a village pay the members of its planning board?

**Statement of Law:** The former Village Law (§86(3) specifically authorized the board of trustees to fix the compensation of village boards, but this section was omitted from the new Village Law.

Many specific powers enumerated in the former Village Law were omitted from the new Village Law. The omission of a specific provision does not imply a lack of authority (*Metzgar v. Elar*, 78 M2d1002, 359 NYS2d 160 (1974). The new law is intended to encompass many specific powers within the broad general grant of powers to the village board of trustees (Vill L §4-412(1).

Moreover, the board of trustees of a village is authorized to appoint a planning board (Vill L §7-718) and to appropriate funds for expenses of the board, including the employment by the planning board of experts, clerks, and a secretary (Vill L §7-720).

We believe that the power to provide compensation for members of the planning board may be inferred from the several sections cited. It is illogical to conclude that the board of trustees may pay the salaries of employees of the planning board and not be able to set salaries for the members of the planning board itself.

Furthermore, a village has broad home rule powers which include the power to establish compensation for officers and employees (Mun HRL §10(1)(ii)(1). There is no question that the village board could provide such compensation by local law. But we believe it can also accomplish this result by a simple resolution.

**Conclusion:** A village may provide for compensation of the members of the planning board.

March 27, 1977.

## OPINION 77-101

**Statement of Fact:** A town wants to extend the interest-free period for the payment of real property taxes until February 5, either pursuant to the provisions of existing law, or by the adoption of a local law pursuant to the provisions of Municipal Home Rule Law §10(1)(ii)(d)(3) as added by Laws of 1976 chapters 365 and 805.

Additionally, the town board has established a policy of rotating the chairmanship so that each assessor would be chairman for one year. No additional compensation has been provided for the office of chairman. The assessor who is next in line for the office of chairman has stated that he would accept the position only if given more compensation. The town board does not wish to provide any additional compensation to such assessor.



**Inquiries:** (1) May the town extend the interest-free period for the payment of real property taxes until February 5 under the above conditions?

(2) Can an assessor resign the office of chairman and, if so, what should be done if the assessor designated to be chairman resigns that office?

(3) What remedies are available if the chairman of the assessors neglects to perform the duties of chairman?

**Statement of Law:** (1) The above-mentioned amendment to the Municipal Home Rule Law authorizes towns to amend or supersede provisions of the *Town Law* as they apply to a particular town, notwithstanding that such provision is a general law. The provisions of law governing the time within which real property taxes may be paid without interest are contained in the Real Property Tax Law (see §924) and, therefore, could not be amended or superseded by adoption of a local law pursuant to Municipal Home Rule Law §10(1)(ii)(d)(3).

Town supervisors are authorized to apply to the county treasurer for extension of the time for collection of taxes to a day not later than the first day of June, with certain exceptions not applicable to the instant county (Real Prop Tax L §938(1). However, this Department has expressed the view that where a county extends the time for collection of taxes pursuant to §938, such extension does *not* excuse the payment of interest on taxes not paid by January 31 (1974 Op St Compt #74-105 (unreported).

Notwithstanding the foregoing discussion, it should be pointed out that pursuant to Laws of 1977 chapter 2, the interest-free period for payment of 1977 town-county taxes was extended until February 15, 1977, for certain counties, including the instant county. This legislation, however, was enacted as a result of the extremely bad winter weather in 1977 and has no permanent bearing on the inquiry.

(2) Town Law §22-b contains the provisions of law governing the designation, compensation and duties of the chairman of assessors. Said section provides in pertinent part as follows:

> The town board of any town having more than one assessor *may establish* the office of chairman of town assessors and *at its first meeting in each year designate one of such assessors to be chairman* until the first day of January next succeeding such designation. [Emphasis added]

The Department has expressed the view that there is no legal requirement that an assessor accept appointment as chairman of the assessors, and that where each of three elected assessors refuses appointment as chairman of the assessors, there is no disciplinary action which may be taken by the town board (25 Op St Compt 118 (1969). Likewise, there is no provision of law which would prevent an assessor who has been designated as chairman of assessors from resigning that office.

If the chairman of assessors resigns, it is our opinion that the town should designate one of the other assessors as chairman (see Town L §64(5). If none of the assessors will serve as chairman of the assessors at the salary fixed in the budget (in the situation at hand no such salary was fixed), the town board may either grant a salary increase from available funds or abolish the chairmanship (see 22 Op St Compt 156 (1966).

(3) Where a town officer is guilty of any misconduct, maladministration, malfeasance or malversation in office, he may be removed from office by application to the State Supreme Court pursuant to the provisions of Public Officers Law §36. Accordingly, where a chairman of assessors is guilty of such acts, he may be removed from the office of chairman pursuant to such section. Whether or not the specific acts involved constitute grounds for removal is a question of fact to be determined by the court.

**Conclusions:** (1) There is no authority for extending the time during which real property taxes may be collected without interest beyond January 31, and such authority may not be provided by the adoption of a local law.

(2) There is no legal requirement than an assessor accept appointment as chairman of the assessors, and there is no provision of law that would prevent an assessor who has been designated as chairman from resigning that office.

(3) Where a town officer is guilty of any misconduct, maladministration, malfeasance or malversation in office, he may be removed from office by application to the State Supreme Court.

March 3, 1977.

## OPINION 77-103

**Inquiry:** Who is responsible for reviewing the plans for construction of a firehouse by a fire district, since the fire district is not subject to the town building code and town zoning ordinance?

**Statement of Law:** We reaffirm our opinion that a fire district, in constructing a firehouse, is not subject to the town building code or the town zoning ordinance (28 Op St Compt 210 (1972).

We have been asked which governmental body is to review the plans and construction of the firehouse, since the fire district lacks the resources for such review, *e.g.*, the plans and construction of a town building are reviewed internally by the town.

The law is clear that the governmental body responsible for reviewing the plans and construction of a firehouse is the board of fire commissioners. Such



board is the governing body of the fire district, and is empowered by statute to acquire real property and to construct "suitable buildings" (Town L §176(14). The board has the responsibility of making sure that the firehouse meets its requirements.

What is troubling is the fact that the fire district does not have in its employ a trained engineer, architect, or similar professional. Nonetheless, the fire district is governed by Education Law §7209(3), which reads in part as follows:

> No county, city, town or village or other political subdivision of this state shall engage in the construction or maintenance of any public work involving engineering or land surveying for which plans, specifications and estimates have not been made by, and the construction and maintenance supervised by, a professional engineer or land surveyor; provided that this section shall not apply . . . to any other public works wherein the contempleted expenditure for the completed project does not exceed five thousand dollars.

This Department has expressed the opinion on several occasions that §7209(3) requires a fire district, in constructing a firehouse costing more than $5,000, to employ a licensed engineer to prepare plans and supervise construction (1976 Op St Compt #76-1207 (unreported); 24 Op St Compt 453 (1968); 18 Op St Compt 213 (1962).

**Conclusion:** A fire district, in constructing a firehouse, is not subject to the town building code or town zoning ordinance. A fire district is required, however, to employ a licensed engineer to prepare plans for a firehouse costing more than $5,000.

April 4, 1977.

## OPINION 77-106

**Inquiry:** May a county appropriate county funds to purchase an aerial ladder vehicle and subsequently loan said vehicle to villages and fire districts located within the county for fire-fighting purposes?

**Statement of Law:** As a general rule, the powers of municipal corporations, as creations of the Legislature, are limited and defined by the statutes under which they are constituted, and they possess only such powers as are expressly conferred upon them by statute or necessarily implied thereby (*Wells v. Town of Salina*, 119 NY 280, 23 NE 870 (1890). There is no authority, statutory or otherwise, which would permit a county to appropriate funds for the general purchase of fire-fighting vehicles (1945 Op Atty Gen 102 (formal). Fire

protection and prevention is a function performed exclusively by fire districts, villages or cities, as the case may be. Counties are nowhere given the authority to engage actively in fire protection and prevention.

We note that General Municipal Law §209-j, relating to the establishment of a county mutual aid program, has been previously interpreted by this Department to authorize expenditures for radio communication and coordination equipment to be used in aid of the county mutual aid plan, since communication is an incident to the successful operation of such a mutual aid plan (1970 Op St Compt #70-397 (unreported); 15 Op St Compt 400 (1959); 6 Op St Compt 295 (1950). Even if a mutual aid program were involved in this situation (and we assume that is not the case), the county would still be without authority to purchase the fire-fighting equipment in question under the circumstances described.

The foregoing renders academic the question of whether such aerial ladder vehicle may be loaned to municipalities located within the county.

**Conclusion:** A county has no authority to purchase fire-fighting apparatus for the purpose of loaning the same to villages and fire districts.

March 14, 1977.

## OPINION 77-115

**Inquiry:** May a village give a token sum of money annually to four officers of its volunteer fire department, and, if so, must these officers be members of the New York State Retirement System?

**Statement of Law:** A village may not "give" any money or property to members or officers of a volunteer fire department. That would constitute a gift to private individuals in violation of State Constitution Article VIII §1. Volunteer firemen are not employees of the village. They are private citizens who volunteer their services to a private organization, the volunteer fire company or department.

On the other hand, the village may engage officers or members of a volunteer fire department as call or part-time paid firemen (Vill L §10-1000(8). While engaged as paid village firemen, they are not eligible to receive the benefits accorded to volunteer firemen (Vol Fire Ben L §5(2)(d). They are then village employees and are required to become members of the New York State Policemen's and Firemen's Retirement System (Retire & Soc Sec L §§302(11)(d), 330(a).

It is possible for a paid village fireman to be also a volunteer fireman, but if he



sustains injury while performing services as a paid fireman, he is not entitled to any of the benefits provided for volunteer firemen (Vill L §10-1000(8).

A recent opinion of this Department discusses some of the complications resulting from such dual status (1976 Op St Compt #76-940 (unreported).

**Conclusion:** A village may not give an annual token sum of money to officers of a volunteer fire department. If such officers are compensated by the village for their performance, either partially or fully, they become paid village firemen, and while so serving are not entitled to the benefits accorded volunteer firemen. A paid fireman, whether part-time or full-time, must be a member of the NYS Policemen's and Firemen's Retirement System.

April 21, 1977.

## OPINION 77-116

**Statement of Fact:** Town subdivision regulations require plat approval by the town planning board for a subdivision of five or more lots. The owner of a large parcel of land conveys more than five lots without applying to the planning board for plat review and approval. The lots are sold by metes and bounds descriptions, and no map is filed with the county clerk.

**Inquiries:** (1) What are the town's remedies against the subdivider?

(2) What are the town's remedies against purchasers of lots from the subdivider? May the town refuse to issue a building permit to the owners of individual lots?

(3) May action be taken against the county clerk to have the deeds removed from the record?

(4) What action can the town take to prevent this situation from recurring?

**Statement of Law:** (1) Town Law §268 is the principal enabling statute authorizing a town to enforce its subdivision regulations. A town may provide by ordinance that a violation of its subdivision regulations is punishable by a fine not exceeding $250 or imprisonment for a period not to exceed six months, or both. Each week's continued violation shall constitute a separate additional violation.

Assuming the existence of such an ordinance, therefore, a town may proceed to enforce it against a subdivider who has sold lots without obtaining approval of the subdivision plat. In the absence of an ordinance, however, the town may not proceed, since Town Law §268(1) is not self-executing.

Even without a town ordinance, the town may institute a court proceeding to

restrain or enjoin the subdivider from further division of land by the sale of lots (§268(2). Indeed, any three taxpayers of the town residing in the district where the violation occurred who are aggrieved by the violation may institute an injunction proceeding, if the town refuses to do so within 10 days after a written request by a resident taxpayer of the town.

The town may also deny building permits to the subdivider on the remaining lots, assuming the existence of local legislation authorizing that remedy.

Statutory remedies imposed by other governmental authorities against the subdivider may assist the town's enforcement of its subdivision regulations. Real Property Law §334 authorizes the Attorney General to sue to recover a $25 penalty for each lot sold by a subdivider without filing a subdivision map in the office of the county clerk. Also, the Commissioner of the State Health Department may bring an action to recover a civil penalty up to $1,000 for a violation of subdivision regulations in Public Health Law §§1115 *et seq.* (see §12 of that law).

(2) The question whether the town has remedies against persons who purchased lots from the guilty subdivider is a more difficult problem. As this Department stated in an earlier opinion (22 Op St Compt 41 (1966), we believe that the provisions of Town Law §§268, 276 and 277, relating to the enforcement of subdivision regulations, were intended to apply to subdividers themselves and not to individual purchasers from the subdivider, particularly good faith purchasers for value. On the other hand, this Department is of the opinion that purchasers who are in collusion with the subdivider or who participate in a scheme by the subdivider, such as "checkerboarding," to circumvent subdivision regulations, may be subject to some of the same penalties applicable to the subdivider, as discussed above.

Court decisions in New York are inconclusive on the question of whether a municipality may deny a building permit to, or impose other sanctions upon, a person who purchases a lot from a noncomplying subdivider (*Adams v. Incorporated Village of Westhampton Beach,* 71 M2d 579, 336 NYS2d 662 (1972) — building permit denied; *In re Schwartz,* N.Y.L.J., 5 Oct., 1964, p. 20, col. 8 — building permit granted; see also *Fullam v. Kronman,* 51 M2d 1079, 275 NYS2d 44, aff'd 31 AD2d 947, 298 NYS2d 865, aff'd 26 NY2d 725, 308 NYS2d 880 (1970). Language in the *Adams* case cited above tends to support the imposition of sanctions against individual purchasers. But other jurisdictions have held that innocent purchasers for value may obtain a building permit (*Keizer v. Adams,* 2 Cal2d 976, 471 P2d 983, 3 Cal Rptr 183 (1970); *State ex rel Craven v. City of Tacoma,* 385 P2d 372 (Wash Sup Ct, 1963); see Rathkopf, the Law of Planning and Zoning, Vol. 3, pp. 71-121 – 71-129).

(3) A town is not authorized to bring an action against the county clerk to remove from the record deeds from a noncomplying subdivider to individual purchasers. A purchaser may be able to rescind a lot sale if there was fraud or misrepresentation by the subdivider. But we are not aware of any statute



authorizing a town to sue to compel the county clerk to expunge the record.

(4) With respect to future preventive actions, the town may adopt the penalties or remedies discussed in section 1 above. This Department has previously expressed the opinion that a town may not require all deeds of land within the town to be submitted to a town official for stamping prior to their recording in the office of the county clerk (1974 Op St Compt #74-1060 (unreported). The discussion in Rathkopf, cited above, may suggest other possible remedies.

**Conclusions:** (1) A town may, by ordinance, enforce its subdivision regulations against a subdivider, who sells lots without obtaining plat approval, by imposing a civil or criminal penalty or by denying building permits on remaining lots. A town may also enjoin the subdivider from selling additional lots.

(2) It is doubtful that a town may deny a building permit to, or impose other sanctions against, an innocent purchaser for value of a lot from a noncomplying subdivider.

(3) When a subdivider conveys a lot without first obtaining approval of the subdivision, a town may not bring an action against the county clerk to remove the deed of record.

(4) A town may not require all deeds of land within the town to be submitted to a town official for stamping prior to their recording in the county clerk's office.

April 14, 1977.

## OPINION 77-125

**Inquiry:** May a member of a board of trustees of a public library be appointed library treasurer?

**Statement of Law:** The library board of trustees, of course, has the power to appoint library officers and employees (Educ L §226(7). However, we point out that it would be improper for the board of trustees to appoint one of their number as an officer or employee of the library (18 Op St Compt 34 (1962).

In *Wood v. Town of Whitehall* (120 M 124, 197 NYS 789, aff'd 206 AD 786, 201 NYS 959 (1923), the Supreme Court, Washington County, held that where a town board was vested with the power to appoint a police justice, the appointment by the board of one of its own members was illegal. The court stated in part:

> An appointing board cannot absolve itself from the charge of ulterior motives when it appoints one of its own members to an office . . . .

The opportunity improperly to influence the other members of the board is there. No one can say in a given case that the opportunity is or is not exercised.

Accordingly, this Department is of the opinion that a trustee of a public library may not be appointed library treasurer.

**Conclusion:** A member of a board of trustees of a public library may not be appointed library treasurer.

March 8, 1977.

## OPINION 77-128

**Inquiry:** May surplus funds of a part-county health district which has been dissolved and has no outstanding liabilities be transferred to the county general fund?

**Statement of Law:** Title 3 of Article 3 of the Public Health Law (§§340-357) contains the provisions of law applicable to county and part-county health districts. Section 346(2) provides that the board of supervisors shall levy a tax upon *the taxable property within the part-county health district* to the extent necessary to provide funds to meet appropriations for such health district.

Public Health Law §355 contains the provisions of law governing the dissolution of a county or part-county health district. However, the said section does not provide for the manner in which a surplus in a part-county health district should be handled.

Inasmuch as an appropriation for a part-county health district is raised from a different tax base than the appropriation for county general fund purposes, it would be inappropriate to transfer surplus funds of such district to the county general fund. It is our opinion that any such surplus should be credited to the taxpayers within the area which had comprised the part-county health district. This is accomplished by crediting the surplus to the account for towns and cities (Account No. 430 in the Uniform System of Accounts for Counties Manual).

**Conclusion:** Surplus funds of a part-county health district which has been dissolved and has no outstanding liabilities may not be transferred to the county general fund.

March 21, 1977.



## OPINION 77-133

**Inquiry:** May a county contract with a private collection agency for the collection of amounts due the county mental health department and the county public health department?

**Statement of Law:** Counties are authorized to enter into contracts for lawful county purposes (see County L §215(2) and may appropriate county funds therefor. If the county board of supervisors determines that it would serve the best interests of the county to contract with a collection agency for the collection of past accounts due and owing the county, then it may by resolution, ordinance or local law (Mun HRL §10(1)(i) authorize the appropriate county officer to enter into a contract with such a collection agency. If the amount to be paid pursuant to said contract exceeds the sum of $3,500, or if such amount is to be contingent upon the moneys collected and is anticipated to exceed the said sum, then, in either event, the contract should be let only after competitive bidding (Gen Mun L §103(1); 1973 Op St Compt #73-890 (unreported); see also 1976 Op St Compt #76-854 (unreported).

We note that the use of such a collection agency should be more or less a device of the last resort. The usual efforts to enforce collection should first be made by the appropriate county officers and/or employees so that the county does not place itself in the position of paying additional moneys for services normally performed by its own personnel. This is, of course, a matter to be determined by the county board of supervisors, in the exercise of its discretion (1976 Op St Compt #76-854 (*supra*).

**Conclusion:** Subject to competitive bidding requirements, a county may enter into a contract with a private collection agency for the collection of amounts due the county.

March 30, 1977.

## OPINION 77-137

**Inquiry:** Does the tax exemption provided by Real Property Tax Law §485-b include special assessments, water rents and sewer rents?

**Statement of Law:** Laws of 1976 chapter 278 added a new §485-b to the Real Property Tax Law to provide a partial exemption (the "business investment exemption") from real property taxes for owners of commercial and industrial properties who undertake new construction or alter existing improvements on such properties. Section 485-b(1) provides as follows:

1. Real property constructed, altered, installed or improved subsequent to the first day of July, nineteen hundred seventy-six for the purpose of commercial, business or industrial activity shall be exempt from taxation, special ad valorem levies and service charges to the extent hereinafter provided.

Real Property Tax Law §102(15) defines a special assessment as follows:

15. "Special assessment" means a charge imposed upon benefited real property in proportion to the benefit received by such property to defray the cost, including operation and maintenance, of a special district improvement or service or of a special improvement or service, but does not include a special ad valorem levy.

In view of the above-quoted provisions, the exemption from taxation granted by §485-b clearly does *not* include special assessments.

The question of whether the exemption granted by §485-b extends to water rents and sewer rents arises because of the definition of the term "service charge" contained in Real Property Tax Law §102(13-a). Said section provides in pertinent part as follows:

13-a. "Service charge" means a charge, other than a special ad valorem levy or a special assessment, imposed upon real property by or on behalf of a county, city, town or village, to defray the cost of such services, for the following purposes: . . . *sanitation*; *and water supply*. [Emphasis added]

*supply*. [Emphasis added]

In light of the above-emphasized portion of §102(13-a), we have been asked whether water rents and sewer rents are included within the meaning of the term "service charge" as used in said section. An opinion rendered by the State Board of Equalization and Assessment (2 Op SBEA #2-32 (1973) answers this very question in the negative.

The Department of Audit and Control agrees with the position taken by the State Board. Accordingly, since water rents and sewer rents are not "service charges" within the meaning of that term as it is used in the Real Property Tax Law, the exemption granted by §485-b does not include water and sewer rents.

We should also point out that notwithstanding the foregoing discussion, the service charge concept contained in §102(13-a) and related sections (Real Prop Tax L §§400, 420, 428) has not yet taken effect (see Laws of 1976 chapter 98 postponing the effective date of amendments to the sections mentioned until April 1, 1977). Accordingly, the concern about service charges is unwarranted. In fact, there exists the possibility that said amendments may be repealed before they ever take effect.

**Conclusion:** The exemption provided by Real Property Tax Law §485-b does not include special assessments, water rents or sewer rents.

March 3, 1977.



## OPINION 77-138

**Inquiry:** Does a village have the authority to enact speed limits and other traffic regulations by local law, and how are moneys collected for fines and penalties imposed for violations of vehicle and traffic regulations, State and local, distributed to the village?

**Statement of Law:** Vehicle and Traffic Law §1640 authorizes a village to adopt a wide variety of traffic regulations "by local law, ordinance, order, rule or regulation." Sections 1643 and 1644 authorize a village to establish speed limits by similar means. Under the current Village Law, villages must legislate by local laws rather than ordinances.

A recent opinion of the Attorney General contains a full discussion of how fines and penalties collected for *speeding violations* are distributed to a village (1975 Op Atty Gen 171 (informal).

Briefly, fines collected for violations of *State speeding laws* are paid to the State, but a village is entitled to receive the fees set forth in General Municipal Law §99-1 (Veh & Tr §1803(1)(c), (2). Fines collected for violations of *village speeding laws* are returned in full to the village up to a limit of $2.00 per year for each inhabitant of the village (Veh & Tr L §1803(1)(b),(5). In order to assure that a village recovers all the fine moneys due it, the village court should specify the nature of the offense, whether State or local, in its monthly report to the State Comptroller (§1803(8). Some villages fail to recover moneys due them because they fail to identify village speeding violations.

Fines and penalties collected for traffic violations *other than speeding*, which are authorized by Title VII of the Vehicle and Traffic Law (including village regulations adopted pursuant to §1640), are paid in full to a village in which the office of village justice is established (§1803(1)(b), whether or not the regulations are State or local. This takes place after all fines and penalties have first been paid to the State Comptroller (§1803(8).

**Conclusion:** A village may by local law adopt traffic regulations and speed limits as authorized by applicable sections of the Vehicle and Traffic Law, and the distribution of fines and penalties to the village for violations of vehicle and traffic laws are governed by pertinent provisions of the Vehicle and Traffic Law and the General Municipal Law.

March 12, 1977.

## OPINION 77-143

**Inquiries:** (1) In the absence of an appointed board of fire commissioners, can a village board of trustees perform the functions which would normally be

performed by the board of fire commissioners?

(2) Can a village fire department comprised of a volunteer fire company be committed to provide fire protection outside the village without its consent?

**Statement of Law:** (1) Village Law §4-412 provides for the general powers of the board of trustees. As part of its general powers, the board of trustees *may* create various boards, among which is a board of fire commissioners (Vill L §3-308(1).

Village Law §10-1006(12) specifically authorizes that:

> In a village where there is no board of fire commissioners, the board of trustees shall have the powers and perform the duties of such board which are prescribed in this section.

Accordingly, until the board of trustees establishes a separate board of fire commissioners, the board of trustees continues to exercise the functions which would otherwise be undertaken by a board of fire commissioners (1974 Op St Compt #74-1140 (unreported)

Village Law §3-301, which states that "not more than two members of the board of trustees may be members of each board or commission," would apply only with respect to membership by village trustees on a separate board, such as the board of fire commissioners. But where the board of trustees has not appointed a separate board of fire commissioners, the above-mentioned provision of §3-301 would not apply because then the whole board of trustees "acts" as the board of fire commissioners, at least until it establishes a separate board (1953 Op St Compt 6062 (unreported).

(2) General Municipal Law §209-d, which deals with contracts for outside service by volunteer fire departments and companies, states as follows:

> Notwithstanding any other provision of law, no contract shall be made by a municipality or fire district whereby the services of a volunteer fire department or company are to be supplied outside of such municipality or fire district to provide (1) fire protection . . . unless such volunteer fire department or company *consents* thereto. [Emphasis added]

Hence, approval expressed by the volunteer fire company is requisite to the validity of a contract between the village and the town (13 Op St Compt 156 (1957); 13 Op St Compt 120 (1957). Furthermore, the volunteer fire company signs for itself and the village board signs for the village, as a party to the contract and not on behalf of the firemen.

**Conclusions:** (1) In the absence of an appointed board of fire commissioners, a village board of trustees performs the functions which would normally be performed by the board of fire commissioners.

(2) Consent of a volunteer fire company is necessary to a fire protection contract between a village and a town.

March 23, 1977.



## OPINION 77-147

**Inquiry:** May a town use Title II moneys (Public Works Employment Act of 1976, Pub L 94-369, "Antirecession Fiscal Assistance Act") for legal fees and publication costs incurred in the recodification and adoption of a revised town zoning ordinance?

**Statement of Law:** A prior opinion sets forth basic guidelines for the permissible expenditure of Title II moneys (32 Op St Compt 161 (1976). That opinion states that local governments receiving grants pursuant to the federal statute should use such grants for the *maintenance* and *expansion* of basic and essential governmental services (see §204 of the Act). While in the final analysis the determination of the proper utilization of Title II moneys must be made by the local governing board, we are of the opinion that from the facts presented to us, Title II moneys may be utilized for legal fees and publications costs incurred in connection with the revision and recodification of the town's zoning ordinance.

Interim regulations issued by the Office of Revenue Sharing, which is monitoring the expenditure of Title II funds, include, as one of several permissible expenditure areas, a category of "general administration" (see 31 CFR §52.40(a). We believe that costs incurred in connection with the recodification and revision of the town's zoning ordinance could be paid with Title II funds. We reiterate, though, that the final decision to do so must be made by the town board.

**Conclusion:** A town board must ultimately decide whether Title II funds may be used to pay the costs incurred in connection with the recodification and revision of the town's zoning ordinance.

March 21, 1977.

## OPINION 77-152

**Inquiry:** May a town library building be used for a "Food Co-op?"

**Statement of Law:** There is, generally, no authority for municipal property to be used for purely private purposes. Consequently, the town library building may not be used for the purposes of a private "Food Co-op." Such use is not a municipal or library purpose and, thus, would be violative of State Constitution Article VIII §1, which prohibits a town from giving or loaning money or property to or in aid of any individual, private corporation or association, or private undertaking.

**Conclusion:** A town library building may not be used for a "Food Co-op."

April 5, 1977.

## OPINION 77-156

**Inquiry:** Is it permissible for a village to continue group life insurance coverage for its employees after they retire?

**Statement of Law:** General Municipal Law §93(2) authorizes a municipality to purchase group life insurance for its active employees. However, neither that statute nor any other statute authorizes a municipality to purchase group life insurance for its *retired* employees at municipal expense.

In a prior opinion (1971 Op St Compt #71-369 (unreported), we stated the following:

> The authority of a town board to establish a group life insurance plan for town employees is provided in section 93 of the General Municipal Law and 204 of the Insurance Law. We interpret said sections of law to be limited in application exclusively to coverage affecting *active* municipal employees. [Emphasis supplied]

The above-quoted opinion would apply to villages as well as towns.

Although there has been no mention of a collective bargaining agreement, we consider it appropriate to discuss whether or not the village could accomplish the desired result pursuant to such a bargaining agreement under the Taylor Law (Civ Serv L §§200 *et seq.*). We think that it could not, for reasons based on the following rationale.

In *Bd. of Ed. of UFSD No. 3 of Town of Huntington v. Assoc. Teachers of Huntington, Inc.* (62 M2d 906, 310 NYS2d 929, mod 36 AD2d 753, 319 NYS2d 469, mod 30 NY2d 122, 331 NYS2d 17 (1972), the Court of Appeals stated that a subject would be proper for collective bargaining as a "term or condition of employment" unless:

> some other *applicable statutory provision explicitly and definitely prohibits* the public employer from making an agreement as to a particular term or condition of employment. [Emphasis supplied]

It is our opinion that a statutory prohibition does exist against a municipality paying for group life insurance premiums for its retired employees. Civil Service Law §201(4) provides, among other things, that "terms and conditions of employment" under a collective bargaining agreement shall not include payments to an insurer to provide "payment to retirees or their beneficiaries." The effect of §201(4) is restricted somewhat by the provisions of Retirement and Social Security Law §470 and Laws of 1976 chapter 491 (as amended), but



such restriction does not go to or affect the statutory prohibition described above.

Consequently, it is our opinion that the village may not, either under General Municipal Law §93(2) or pursuant to a collective bargaining agreement, pay group life insurance premiums for its retired officers or employees.

In passing, we should mention that in another opinion (1975 Op St Compt #75-57 (unreported) we stated that:

> a municipality is barred from purchasing *individual* life insurance policies for its officers and employees, whether pursuant to collective bargaining or otherwise. [Emphasis supplied]

Thus, for the same reasons previously set forth, the village would also be prohibited by law from paying all or any part of the cost of converting the group life coverage to individual life coverage upon retirement, just in case that might be the next issue raised by the village employees.

**Conclusion:** A village may not continue group life insurance for its employees after they retire.

April 15, 1977.

## OPINION 77-166

**Inquiry:** May the City of Hudson Industrial Development Agency acquire real property owned by the city but located in a contiguous municipality?

**Statement of Law:** General Municipal Law §858 lists the purposes and powers of an industrial development agency, including the power "to acquire by purchase, grant, lease, gift, condemnation, or otherwise and to use, real property or rights or easements therein necessary for its corporate purposes . . . and (t)o do all things necessary or convenient to carry out its purposes and exercise the powers expressly given in this title."

This general grant of powers, however, must be read in conjunction with the statute which establishes this particular industrial development agency. In this case, General Municipal Law §902-b states as follows:

> For the benefit of the city of Hudson and the inhabitants thereof, an industrial development agency, to be known as the City of Hudson Industrial Development Agency, is hereby established for the accomplishment of any or all of the purposes specified in title one of article eighteen-A of this chapter. It shall constitute a body corporate and politic, and be perpetual in duration. It shall have the powers and duties now or hereafter conferred by title one of article eighteen-A of

this chapter upon industrial development agencies and *provided that the exercise of the powers by such agency with respect to the acquisition of real property whether by purchase, condemnation or otherwise, shall be limited to the corporate limits of the city of Hudson*, and such agency shall take into consideration the local zoning and planning regulations as well as the regional and local comprehensive land use plans. [Emphasis added]

Using this section to amplify the general powers granted in §858, it becomes clear that the City of Hudson Industrial Development Agency may not acquire any real property which is located outside of the corporate limits of the City of Hudson. We are aware that General Municipal Law §854(4) authorizes industrial development agencies, generally, to acquire property outside (as well as inside) their respective municipalities, but we believe that the specific provisions of §902-b are controlling in this instance.

**Conclusion:** The City of Hudson Industrial Development Agency may not acquire property owned by the city and located outside the corporate limits of the city.

March 21, 1977.

## OPINION 77-177

**Inquiry:** Where a town of the first class does not have a police department or is not part of a county police district, is the town authorized to appoint constables or is it limited to the designation of enforcement officers, pursuant to Uniform Justice Court Act §110, to serve and execute the processes of the town justice court?

**Statement of Law:** Town Law §20(1)(b) authorizes the appointment, in a town of the second class which does not have a police department, of as many constables as the town board may determine to be necessary. Subdivision (1)(a) of §20 provides that in any town of the first class in which a town police department has been established, or which is a part of a county police district, the town board may appoint not more than four civil officers who shall possess all the powers and duties of constables in civil actions and proceedings only. There is no authority contained in the Town Law for the appointment of constables in a town of the first class, whether or not such town has a police department or is part of a county police district. Nor may such town appoint civil officers pursuant to §20(1)(a), unless there *is* a police department in the town or the town is part of a county police district. However, town justice court



enforcement officers may be appointed as provided in Uniform Justice Court Act §110.

While, as noted above, there is no *express* authority contained in the Town Law for the appointment of constables in towns of the first class, consideration must be given to the broad powers of towns under the Municipal Home Rule Law. Section 10(1)(ii)(a)(1) authorizes municipalities to adopt local laws, not inconsistent with the State Constitution or any general law, relating to the powers, duties and number of its officers and employees. Further, §10(1)(ii)(d)(3) authorizes a town to amend or supersede in its application to it any provision of the Town Law relating to the property, affairs or government of the town or to other matters in relation to which and to the extent to which it is authorized to adopt local laws by §10, with certain exceptions not pertinent here.

The existence of the office of constable in a town of the first class is not inconsistent with any general statute or any provision of the State Constitution.

Accordingly, it would seem that the town in question could adopt a local law providing for the appointment of constables, notwithstanding the absence of specific authority to do so in the Town Law, and, consistent with general statutes, prescribe in such local law their powers, duties, and functions. If a constable is appointed, then he would function as an enforcement officer under Uniform Justice Court Act §110.

**Conclusion:** A town of the first class may appoint constables in the exercise of its home rule powers.

April 12, 1977.

## OPINION 77-181

**Inquiry:** May a village adopt a local law increasing supplemental pension payments made to widows of deceased retired policemen so that total pensions would exceed $1,200 per year?

**Statement of Law:** Retirement and Social Security Law §162 authorizes villages and other municipalities to adopt local laws providing for supplemental pension payments to widows of deceased retired policemen. Section 162(3), however, limits the total pension of such widows to $1,200 per year.

The State Legislature has enacted several special bills in recent years authorizing specific municipalities to adopt additional supplemental pension payments to such widows, bringing their total pensions up to $2,400 per year (L 1976 chs 299 (Village of Irvington), 951 (Village of Larchmont); L 1975 chs

683 (Village of Elmsford), 689 (Town of Mamaroneck).

The enactment of these special laws means that Retirement and Social Security Law §162(3) is no longer a general law, at least as respects villages and towns, since it does not apply to all villages and to all towns. Nevertheless, a village may not increase the $1,200 annual limitation by local law without State legislative authorization because Retirement and Social Security Law §113(b) provides, in part, as follows:

> Notwithstanding any inconsistent provisions of any general, special or local law, ordinance or city or village charter, no municipality shall have power to add, change, modify, supersede, amend or repeal any provision relating to contributions payable to or pensions, annuities, or other benefits payable by any pension or retirement system or fund administered by such municipality or an agency thereof for the benefit of officers or employees of such municipality, except as provided herein or in article four or article six of this chapter.

While approving special bills last year, the Governor stated that a "piecemeal approach towards authorization of local governments to supplement pension payments is inappropriate and unwise" (Governor's Memorandum #52, 7/27/76). He went on to state that he would introduce legislation in 1977 amending Retirement and Social Security Law §162 to increase the $1,200 per year limitation, thus making it unnecessary "for localities to seek specific and particular State authorization for additional supplemental payments."

**Conclusion:** A village may not, without State legislative authorization, adopt a local law providing for additional supplemental pension payments to widows of deceased retired policemen which would result in total pensions exceeding $1,200 per year.

April 19, 1977.

## OPINION 77-190

**Inquiry:** May salaried county employees receive their regular salaries for snow emergency days when the county office buildings were closed by order of the Governor and the chairman of the county legislature?

**Statement of Law:** It is our opinion that the county not only may, but should, pay the regular compensation of its salaried employees on days when it is impossible for such employees, as a whole, to reach their places of employment because of snow emergency where, pursuant to the order of either the State or



county government, or both, the county buildings were closed. This has to be regarded as an absence which is wholly involuntary on the part of the county work force, somewhat akin to an act of God which would render contracts unenforceable under the law of contracts.

We are of the opinion that when the county legislature fixes annual salaries for its salaried employees, such salaries are intended to cover both those days when the whole county work force would normally work and those days when, by reason of weekends, holidays and natural emergency, the entire work force would not be expected to be at work. If statutory authority is needed as a basis for making the determination to pay these salaries under such conditions, we believe that it exists in General Municipal Law §92, which authorizes paid leaves of absence for municipal employees in the discretion of the municipal governing board. We think that a mass paid leave of absence is indicated under the circumstances described.

We do feel that a different result will necessarily have to obtain with respect to hourly rated employees who necessarily would have to perform their duties in order to receive their hourly pay.

**Conclusion:** A county may pay salaried employees their regular salaries for days when the county buildings are closed because of a snow emergency.

March 4, 1977.

## OPINION 77-192

**Inquiry:** Does the absence of the town clerk from a special meeting of the town board validly convened pursuant to Town Law §62 render invalid a resolution adopted at such meeting which authorized the superintendent of highways to advertise for bids for the purchase of highway equipment?

**Statement of Law:** Attendance at lawfully convened town board meetings and the keeping of complete minutes thereat is the statutory obligation of the town clerk (Town L §30(1). Yet, the town clerk's failure to attend such a meeting does not render invalid any resolutions or motions adopted at such meetings. In an opinion from the Attorney General (1963 Op Atty Gen 85 (informal), it was stated that a resolution or motion passed by a town board, if otherwise valid, is not invalid because the town clerk fails to record it in the minutes. This Department has taken the same position (23 Op St. Compt 231 (1967); see *Parr v. President and Trustees of the Village of Greenbush*, 72 NY 463, 40 NYS 325 (1878). Nor would such resolution or motion be invalid by reason of the town clerk's absence (*Roth v. Loomis*, 54 M2d 39, 281 NYS2d 158 (1967).

Therefore, we are of the opinion that the town clerk's absence from a lawfully convened special meeting of the town board does not render invalid any resolutions adopted at such meeting.

**Conclusion:** The town clerk's absence from a lawfully convened special meeting of the town board does not render invalid resolutions adopted at such meeting.

April 1, 1977.

## OPINION 77-196

**Inquiry:** Is a sheriff entitled to mileage fees where the person to be served with a paper cannot be located and service is not actually made?

**Statement of Law:** Civil Practice Law and Rules 8012(a) provides as follows:

> A sheriff is entitled to twenty cents for each mile necessarily travelled in performing the following services, payable in advance:
>
> 1. in *serving* or executing a mandate upon or against one person, or upon or against two or more persons in the course of one journey, computed from the nearest office of the sheriff in the county to the place of service or execution, and return . . . .[Emphasis added]

The statute contemplates *service* of the mandate, not merely an attempt at service.

This Department, when interpreting similar language in former Civil Practice Act §1558 (upon which 8012(a) is based), has stated that a sheriff is not entitled to mileage fees for an unsuccessful attempt to serve or execute process (1958 Op St Compt #58-445 (unreported); 1952 Op St Compt #5692 (unreported). More recently, we expressed the opinion that a constable, who, under Uniform Justice Court Act §1911(b) is entitled to "the same fees to which a sheriff would be entitled for like services in supreme court," is not entitled to mileage fees where he attempts service but fails to locate the person to be served (1970 Op St Compt #70-761 (unreported); 20 Op St Compt 213 (1964); 10 Op St Compt 172 (1954). Since Uniform Justice Court Act §1911(b), in essence, incorporates the terms of Civil Practice Law and Rules 8012(a) regarding sheriff's fees, the interpretations in the above-cited opinions as to a constable's mileage fees would likewise apply to a sheriff's mileage fees.

**Conclusion:** A sheriff is not entitled to mileage fees if the person to be served with a paper cannot be located and no service is actually made.

April 1, 1977.



## OPINION 77-207

**Inquiry:** May a town councilman whose term will expire at the end of this year be appointed to fill a vacancy in the office of town assessor, which vacancy will occur October 1 of this year by reason of the retirement of the incumbent assessor, the dual office-holding to last only three months because the councilman will not be running for office to succeed himself?

**Statement of Law:** Town Law §64(5) covers this situation. It deals with vacancies in office and provides, in part, that "A person, otherwise qualified, who is a member of the town board at the time the vacancy occurs may be appointed to fill the vacancy provided that he shall have resigned prior to such appointment."

Accordingly, it is our opinion that in order for a town councilman to be appointed to fill a vacancy as appointive assessor of that town, he would first have to resign as councilman. This result would not be affected by the possibility that he would not receive dual compensation as both councilman and assessor if he were permitted to hold both offices. Further, the result is not changed by any of the provisions of Real Property Tax Law Article 15-A, and especially by any of the provisions of §1522 thereof dealing with the appointment, term of office and qualifications of a town assessor.

**Conclusion:** In order for a town councilman to be appointed to fill a vacancy as appointive assessor of the same town, he would first have to resign as councilman.

March 9, 1977.

## OPINION 77-208

**Inquiry:** May a village mayor and trustees use gasoline from the village pump when required to operate their private cars on official village business?

**Statement of Law:** Our answer is in the negative. Village Law §5-524(7) provides the only two ways, in the alternative, in which gasoline for such a purpose may be supplied, and, in each case, this must be accomplished by reimbursement of the particular officer after the fact. Insofar as applicable, §5-524(7) provides as follows:

> The actual and necessary expenses of all officers and employees incurred in the performance of their official duties shall be a village charge. The board of trustees of any village, in lieu of auditing and

> allowing the claim of a village officer or employee for actual and necessary expenses for travel, may determine by resolution to allow and pay such officer or employee a reasonable mileage allowance for use of his own automobile for each mile actually and necessarily traveled by him in the performance of the duties of his office or position . . . .

There are also numerous practical objections, and possibly some constitutional objections (see State Const Art VIII §1, prohibiting public gifts to individuals), to the use of village gasoline by these officers, but we think that the above statutory provisions are sufficient. Reimbursement either for actual and necessary travel expense or for miles actually traveled under a mileage allowance is all the statute allows. Other devices for supplying gasoline are unauthorized.

**Conclusion:** The mayor and trustees of a village may be compensated for official use of their private cars only by one of two methods: (1) by reimbursement for actual and necessary expenses; or (2) by a reasonable mileage allowance.

March 9, 1977.

## OPINION 77-211

**Inquiry:** Where a city has received a Community Development Block Grant pursuant to the Housing and Community Development Act of 1974 (Pub L 93-383), must the city adhere to the competitive bidding requirements governing purchase contracts in excess of $1,500 and public works contracts in excess of $3,500?

**Statement of Law:** Regulations promulgated by the United States Department of Housing and Urban Development, which is monitoring the Housing and Community Development Act of 1974, state that with respect to the procurement of supplies, materials and services with federal moneys received under the Act:

> formal advertising, with adequate purchase description, sealed bids, and public openings shall be the required method of procurement . . . However, procurements of Ten Thousand ($10,000.00) Dollars or less need not be so advertised *unless otherwise required by state or local law or regulations* . . . . [Emphasis supplied]

The underscored language quoted above (24 CFR 570 (Subpart 3) clearly indicates that a municipality located in this State is bound to adhere to the requirements of General Municipal Law §103, including the dollar amounts above which competitive bidding is required.

Therefore, it is our opinion that the competitive bidding requirements of General Municipal Law §103 are applicable to the expenditure by a city of moneys received pursuant to the Housing and Community Development Act of 1974 (Pub L 93-383).

**Conclusion:** The expenditure of moneys received by a city pursuant to the Housing and Community Development Act of 1974 is subject to the competitive bidding requirements of the General Municipal Law.

April 19, 1977.



## OPINION 77-223

**Inquiry:** May a town use Title II funds (Public Works Employment Act of 1976, Public Law 94-369, the "Antirecession Act") for the salaries of current employees and for the payment of employees' fringe benefits?

**Statement of Law:** We have been advised by representatives of the Office of Revenue Sharing in Washington that since Title II moneys should be used for the maintenance of basic services customarily provided to county residents, both salaries and fringe benefits of county employees may be paid with Title II funds. Indeed, the thrust and intent of Title II is directed at the payment of salaries and fringe benefits for local government employees. Therefore, it is our opinion that funds received pursuant to Title II of the Public Works Employment Act of 1976 may, and should, be utilized for the payment of salaries and fringe benefits of county employees (see also 32 Op St Compt 163 (1976).

**Conclusion:** Title II moneys may be utilized for the payment of employees' salaries and fringe benefits.

April 4, 1977.

## OPINION 77-226

**Statement of Fact:** A town wishes to establish a capital reserve fund to pay for the cost of a complete reassessment of the town, and a capital reserve fund to pay for the cost of remodeling a school building, which the town is considering

purchasing in the future. The town wishes to utilize federal revenue sharing funds for inclusion in such reserve funds.

**Inquiry:** Is such a procedure permissible?

**Statement of Law:** Pursuant to United States Public Law 94-488, which extended and modified the federal revenue sharing program (Pub L 92-512, the Federal Revenue Sharing Act of 1972), municipalities may expend federal revenue sharing funds in the same manner as they may spend their own moneys, subject to the same restrictions. In addition, a recipient local government which receives federal revenue sharing funds must:

> use, obligate or appropriate such funds within 24 months from the end of the entitlement period to which the entitlement is applicable . . . (31 CFR §51.100(b).

In other words, a municipality which has received federal revenue sharing funds must spend or appropriate such funds within two years after the receipt thereof. Essentially, then, the question is whether the establishment of a capital reserve fund, and the payment of revenue sharing funds into such fund within two years after the receipt thereof, constitutes a use, obligation or appropriation within the meaning of the federal regulations. We are of the opinion that this question must be answered in the affirmative. Once moneys are paid into a capital reserve fund, they are, in effect, "frozen" until such time as they are actually expended for the purpose for which the reserve fund was originally established. Therefore, we are of the opinion that payment of federal revenue sharing funds into a capital reserve fund within two years after the receipt thereof constitutes a use, obligation or appropriation within the meaning of the federal regulations.

We do wish to add some comments concerning the establishment of capital reserve funds for the purposes mentioned. It would appear that the reconstruction and remodeling of a surplus school building (if and when it is purchased by the town) would constitute a capital purpose for which a capital reserve fund could lawfully be established (Gen Mun L §6-c(1)(b); see also Loc Fin L §11.00(a)(11)(12), wherein a period of probable usefulness for the issuance of obligations is set forth for remodeling, etc. of buildings). Similarly, it would appear that the reassessment of the town constitutes a capital purpose for which a capital reserve fund may be established (see Loc Fin L §11.00(a)(53), wherein the appraisal of real property for assessment purposes is given a period of probable usefulness).

We note also that since we are concerned with capital purposes which consist of *specific* capital improvements, the provisions of General Municipal Law §6-c(4) would come into play. That section provides, in part, as follows:

> If the governing board authorizes the establishment of a capital reserve fund for the financing of all or part of the cost of the construction, reconstruction or acquisition of a specific capital improvement or the acquisition of a specific item or specific items of equipment, it shall set forth in such authorization the estimated maximum cost thereof. However, if the authorization by such governing board of the issuance of obligations for such capital improvement . . . is required by law to be subject to a permissive or mandatory referendum, then the authorization of the establishment of such a fund shall be subject to a permissive referendum. In the event that the authorization by such governing board of the issuance of obligations for such capital improvement . . . is required by law to be subject to a permissive or mandatory referendum only if such obligations are to have a maturity of more than five years or not less than some other minimum period, then the authorization of the establishment of such a fund shall be subject to a permissive referendum only if the period of probable usefulness of such capital improvement . . . is equal to or more than such minimum period of maturity.



It should be noted that the period of probable usefulness with respect to the reassessment is five years (Loc Fin L §11.00(b)(53), with the result that there would be no referendum requirements in connection with the establishment of that capital reserve fund, under the above-quoted statutory language. There would, however, appear to be referendum requirements in connection with the remodeling project (see Loc Fin L §11.00(a)(12).

We also wish to mention Town Law §55, which provides that the town board of a suburban town may establish a general reserve fund for the financing of all or part of the cost of town objects or purposes having periods of probable usefulness of at least five years (see Loc Fin L §11.00), with certain exceptions not relevant hereto. We note also that §55(2)(a) thereof provides that there may be paid into such fund such revenues as are not required by law to be paid into any other fund or account, *e.g.*, surplus funds (see 26 Op St Compt 132 (1970); see also 31 Op St Compt 108 (1975), wherein we stated that federal revenue sharing funds are in the nature of surplus funds and should be treated as such).

**Conclusion:** Generally speaking, federal revenue sharing funds may be paid into a capital reserve fund.

June 23, 1977.

## OPINION 77-232

**Inquiry:** Is a provision of a city fire prevention code containing restrictions and prohibitions with respect to blasting operations applicable to blasting which

is necessary in connection with the construction of a new school by a contractor engaged by the city school district?

**Statement of Law:** It has been held in a number of court cases that the State, or any political subdivision thereof, is not subject to local zoning or building restrictions in the performance of its governmental functions (*Board of Education of the City of Buffalo v. City of Buffalo*, 57 M2d 472, 293 NYS2d 421, aff'd 32 AD2d 98, 302 NYS2d 71 (1969); *Town of Onondaga v. Central School District No. 1*, 56 M2d 26, 287 NYS2d 581 (1968); *Town of Poughkeepsie v. Hopper Plumbing and Heating Corp.*, 46 M2d 761, 260 NYS2d 761, aff'd 26 AD2d 772 (1966). Extensive research has failed to disclose any cases adjudicating whether a school district or a municipality is subject to the fire prevention code or other police power enactment of a municipality in which its property is situate. However, the court in *County of Westchester v. Village of Mamaroneck* (41 M2d 811, 246 NYS2d 770, aff'd 22 AD2d 143, 255 NYS2d 290, aff'd 16 NY2d 940, 264 NYS2d 925 (1965) stated as follows:

> In our opinion, broad principles of sovereignty require that a state or its agency or subdivision performing a governmental function be free of local control. This principle is clearly stated in a very recent Arizona case (*Board of Regents of Univs. v. City of Tempe*, 88 Ariz. 299, *supra*). There the court said (pp. 309, 311): "The foregoing authorities persuasively support the claimed immunity of the Board of Regents [from the city's building code] in the instant case. The underlying rationale is that a State agency delegated by law the responsibility of performing a governmental function is not subject to the general police powers of a municipal corporation. * * * The essential point is that the powers, duties and responsibilities assigned and delegated to a state agency performing a governmental function must be exercised free of control or supervision by a municipality within whose corporate limits the state agency must act."
>
> * * *
>
> We think the rule laid down by the out-of-State cases (representing the clear weight of authority) is logical and sound; and in the absence of any New York cases on this precise point we are inclined to follow it. Also as previously noted, it appears to accord with the rationale of the *Nehrbas* holding (2 NY2d 190, 193, *supra*) regarding exemption from local zoning ordinance.

The issue in the *Mamaroneck* case was whether a county is exempt from a village zoning ordinance and building code when it builds an addition to a county sewage disposal plant located within the village. The court held in the affirmative. From the general tenor of the court's decision, and in particular from the quoted portion thereof, it would seem that a municipality (or school district) is exempt from the application of *any* local codes, regulations, laws or ordinances in the exercise of its governmental functions.



Perhaps a court would distinguish between regulations or laws which impose restrictions or prohibitions in relation to inherently dangerous activities such as blasting, and those which pertain to building construction or zoning matters. However, until such time as there is a definitive ruling on the issue in question, it would appear that the rationale of present case law, reflected in the foregoing quotation, would apply as well to a fire prevention code, including the provisions thereof pertaining to blasting, so that the city fire prevention code would not apply to the construction of school buildings for the city school district.

**Conclusion:** It would seem that the provisions of a city fire prevention code, including restrictions therein with respect to blasting operations, are not applicable to the construction of a new school building for the city school district.

March 30, 1977.

## OPINION 77-234

**Inquiry:** May a county employee be reimbursed for the value of tools which were stolen from his place of employment, if such tools were owned by the employee, stored on county property, and used as part of his employment with the authority of his supervisor?

**Statement of Law:** County Law §203(1) authorizes the payment from county funds of the actual and necessary expenses of all county employees which are incurred in the performance of their official duties.

In our opinion, it is not an "actual and necessary" county expense to reimburse an employee for stolen tools, even if the employee was requested, or even required, by the county to use his personal tools in his employment. Absent any underlying liability on the part of the county with respect to the loss, such as for negligence in storing or preserving the tools in the employee's absence, there is no authority for a county to reimburse an employee for loss of personal property.

In a prior opinion (27 Op St Compt 37 (1971), with regard to a similar situation in which a village policeman sought reimbursement for damage to his private automobile which he was required to use on his job, we stated as follows:

> The fact that a village policeman uses a privately owned vehicle or other privately owned personal property in the performance of his duties does not make the village the insurer of such property against

> damage or loss, nor does it impose any legal or moral obligation upon the village. The damage to the vehicle is not a necessary expense . . . .

Similar reasoning would be applicable to the county in denying reimbursement to the employee in this instance.

Accordingly, since there is no liability on the part of the county for the stolen tools, if the county were to make such an expenditure, it would be violative of State Constitution Article VIII §1, which prohibits a municipality from making a gift or loan of its money or property to a private individual (32 Op St Compt 49 (1976).

**Conclusion:** A county may not reimburse an employee for the loss of tools which were owned by him, used in his employment with the approval of his supervisor, stored on county property and stolen therefrom.

May 5, 1977.

## OPINION 77-235

**Statement of Fact:** A water main located within a village street ruptured and, as a result, water was forced under pressure into a broken sanitary sewer lateral also situate in the said street. The water backed up through the lateral into the basement of an adjoining home. An action was brought against the village by the homeowner for damages caused by the water. The action was dismissed by the trial judge on the ground that the plaintiff did not prove negligence on the part of the village.

**Inquiry:** May the village now compromise the homeowner's claim by the payment of any portion of his damages?

**Statement of Law:** A village possesses the inherent power to compromise any claim against it, based upon tortious conduct, for which the village in law is, or may be, liable (Vill L §§1-102(5), (6); 4-412(1). If there is no legal basis which would support a claim for damages, or if the claim is legally barred (such as by the statute of limitations), then the payment of such claim would not be a proper village purpose and would constitute an unconstitutional gift of public funds (State Const Art VIII §1). Whether a claim in tort is such as would expose the village to liability for the payment of damages, if litigated, and therefore justify a settlement thereof out of court, is initially for the determination of the village board of trustees aided by legal counsel.

In the instant case, however, the homeowner in question had his day in court and his lawsuit was dismissed because he could not establish negligence on the part of the village. Since we are not aware of any legal theory other than negligence which would support his claim for damages, it is our opinion that he is not entitled to compensation because a court has already ruled that he cannot establish such negligence. Since the village cannot be held legally responsible for the damages suffered by the homeowner, the payment of his claim voluntarily by the village would be gratuitous and, consequently, unconstitutional.

We are aware that some of the documentation accompanying the letter of inquiry herein considers the question of whether a village trustee who settles a tort claim which he has against his village would have a prohibited interest in his settlement agreement by reason of the conflicts-of-interest statute (Gen Mun L Art 18 §§800 *et seq.*). We have not addressed that question in this opinion because, in our view, it is rendered academic by our conclusion that the village may not compromise the particular claim involved.



**Conclusion:** It would be an unconstitutional gift of public funds should a village compromise a claim for damages incurred by a homeowner by reason of a ruptured water main, unless there is a legal basis for village liability for such damages.

May 5, 1977.

## OPINION 77-238

**Inquiry:** May a town purchase surplus and second-hand supplies, material or equipment from the New York State Thruway Authority without competitive bidding?

**Statement of Law:** General Municipal Law §103(6) provides as follows:

> Surplus and second-hand supplies, material or equipment may be purchased *without competitive bidding* from the federal government, the State of New York or from any other political subdivision, district or *public benefit corporation*. [Emphasis added]

Previously, this Department took the position that the reference to "The State of New York" in General Municipal Law §103(6) did not include the New York State Thruway Authority (1970 Op St Compt #70-318 (unreported). Since the date of that opinion, however, §103(6) has been amended to include a "public benefit corporation" as one of the entities from which surplus and second-hand equipment may be purchased without competitive bidding. It is our opinion that the New York State Thruway Authority is a "public benefit corporation."

Public Authorities Law §352(1) expressly provides that the New York State

Thruway Authority is "a body corporate and politic constituting a *public corporation.*" [Emphasis added] A "public corporation" is defined in General Construction Law §66(1) as follows:

> A "public corporation" includes a municipal corporation, a district corporation, or a *public benefit corporation*. [Emphasis added]

While the New York State Thruway Authority clearly is neither a municipal corporation nor a district corporation (see 1970 Op St Compt #70-318 (*supra*), it does fall within General Construction Law §66(4), which defines a "public benefit corporation" as a corporation "organized to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this or other states, or to the people thereof." The conclusion that the Authority is a "public benefit corporation" is supported by Public Authorities Law §353, which establishes the purposes of the Authority as follows:

> The authority is created to and shall have the power to construct, reconstruct, improve, maintain or operate a thruway system . . . *such purposes are in all respects for the benefit of the people of the state of New York* . . . . [Emphasis added]

These purposes bring the New York State Thruway Authority squarely within the definition of "public benefit corporation" in General Construction Law §66(4). That being so, a town may purchase surplus and second-hand supplies, material or equipment from the Authority without competitive bidding.

**Conclusion:** The New York State Thruway Authority, being a "public benefit corporation," would come within General Municipal Law §103(6), and, therefore, a town may purchase second-hand and surplus supplies, material or equipment from the Authority without competitive bidding.

April 14, 1977.

## OPINION 77-247

**Inquiry:** May a town purchase refrigerators to be used by town employees for storing food and milk while they are on the job?

**Statement of Law:** For the purposes of this opinion, we must assume that the town will retain ownership of the refrigerators in question, and, in addition, that the town has no intention of making a gift of such refrigerators to its employees, thus eliminating any unconstitutional gift implications in that regard (State Const Art VIII §1).



We are of the opinion that the purchase of refrigerators, in these circumstances, would be a valid town charge, for the reasons hereinafter stated. A town may, either by collective bargaining or by informal arrangement, provide general working conveniences for the good and welfare of its employees. In a prior opinion (1972 Op St Compt #72-1055 (unreported), we expressed the opinion that a village could lawfully purchase a coffee maker for its employees while they were at work. We stated therein that "it could not be reasonably argued that a village could not install a water cooler or fountain for the comfort and convenience of [its] employees." We feel that the foregoing principle is analogous to the present situation, in that it can fairly be said that a refrigerator would serve the same purpose as a water cooler or coffee maker. Therefore, it is our opinion that a town may, generally speaking, purchase the refrigerators in question.

We believe, however, that the above-described principle must, like many principles expressed in our opinions, meet the test of reasonableness. Providing town employees with comfortable and convenient working conditions is, of course, a salutary goal — one to be encouraged. From the town's point of view, much good is to be accomplished by having the "tools" of a coffee or "Coke" break right on the premises where the employees perform their jobs. This does away with the problem of having the employees go elsewhere for their coffee (or lunch) breaks and possibly not report back promptly. But, at the same time, the town should not place itself in the position of spending large sums for these conveniences and, in effect, subsidizing its employees by paying expenses which are basically private in nature. For example, one or two refrigerators, purchased by the town and strategically situated for employee convenience, would impress us as a perfectly legitimate town charge. But the purchase of a large number of costly refrigerators, situated so as to cater to the whims of individual employees, would strike us as unreasonable and improper. We expect town officials to exercise sound discretion in determining what is reasonable under given circumstances.

Furthermore, we hasten to point out that the town is wholly without authority to purchase any foodstuffs, etc. for use by town employees. Such purchase would clearly violate the prohibition against gifts of town money or property contained in State Constitution Article VIII §1.

**Conclusion:** A town may, under proper circumstances, purchase one or more refrigerators for the convenience of town employees while on the job.

May 4, 1977.

## OPINION 77-254

**Inquiries:** (1) Where a city conveys title to real property acquired through *in rem* foreclosure proceedings brought pursuant to Real Property Tax Law Article 11, must the city sell such property to the highest bidder if such high bidder is a tax-exempt entity?

(2) May the city sell such property to a tax-exempt entity subject to certain conditions, such as an agreement that such entity will make payments in lieu of taxes?

**Statement of Law:** (1) Real Property Tax Law §1166 contains the provisions of law applicable to the conveyance of real property acquired by a tax district through *in rem* foreclosure proceedings brought pursuant to the provisions of Title 3 of Article 11 of such law. Section 1166(1) provides as follows:

> 1. Whenever any tax district shall become vested with the title to real property by virtue of a foreclosure proceeding brought pursuant to the provisions of this article, such tax district is hereby authorized to sell and convey the real property so acquired, either with or without advertising for bids, notwithstanding the provisions of any general, special or local law.

While the above-quoted provision expressly authorizes the public or private sale of real property to which a tax district has acquired title by *in rem* foreclosure proceedings, we think there is an additional, implied requirement in any sale of municipal property that such property be sold to the best advantage of the municipality. What is to the best advantage of the municipality is a question of fact, with price a major consideration.

In a prior opinion (1969 Op St Compt #69-523 (unreported), relying on the case of *Ross v. Wilson* (308 NY605, 127 NE2d 697 (1959), this Department stated that the highest price offered for a parcel of property is deemed to be for the best advantage of a town in all cases except those in which the person making the highest offer proposes to use the property for an illegal use.

Although neither the cited opinion nor the *Ross* case (*supra*) specifically considered the question of whether the highest price offered must be accepted where the high bidder is a tax-exempt entity, we feel this question must be answered in the affirmative. We base this conclusion on the fact that it would be improper to discriminate against an entity based upon its tax-exempt status, which has been granted by the State Legislature. In any case, although the property may become exempt for the time being, there is no certainty that it will not become taxable by being later sold to a nonexempt entity, any more than a sale to a taxable entity guarantees that the property will remain taxable and not be later sold to an exempt entity. Accordingly, it is our opinion that the first inquiry must be answered in the affirmative and that the property should be sold to the highest bidder.



(2) With respect to the sale of real property to a tax-exempt entity subject to certain conditions, such as an agreement that such entity will make payments in lieu of taxes, we are aware of no statutory authorization, either express or implied, for the sale of municipal property in such manner (*cf.* Gen Mun L §506(b). Furthermore, we think there is a serious question with respect to the enforceability of such an agreement due to lack of consideration.

The conveyance of title to the property is the *quid pro quo* for payment of the amount of the highest bid. It would seem to us that there is no consideration for the tax-exempt entity's promise to make payments in lieu of taxes and, therefore, that such promise would be unenforceable. In view of the foregoing, it is our opinion that this inquiry must be answered in the negative.

**Conclusions:** (1) Where a city conveys title to real property acquired through *in rem* foreclosure proceedings brought pursuant to Real Property Tax Law Article 11, the city must sell such property to the highest bidder regardless of the fact that such bidder is a tax-exempt entity.

(2) A city may not sell such property to a tax-exempt entity subject to certain conditions, such as an agreement that such entity will make payments in lieu of taxes.

April 28, 1977.

## OPINION 77-255

**Inquiry:** Where moneys found on the body of a deceased are delivered by the coroner to the county treasurer pursuant to County Law §678, do such moneys immediately become county property, although subject to demand by the legal representatives of the deceased within six years?

**Statement of Law:** County Law §678 requires coroners to deliver money found upon the body of a deceased to the county treasurer. The county treasurer, in turn, is required to place the money to the credit of the county.

County Law §678(3) provides as follows:

> If the money in the treasury be demanded within six years by the legal representatives of the deceased, the treasurer must pay it to them, after deducting the amount of expenses incurred in connection therewith, or it may be so paid at any time thereafter, upon the order of the board of supervisors; provided, however, that such money may be so paid at any time upon the written order of the surrogate of the county.

The quoted statute makes it clear that after the coroner finds the money, it is

to be deposited to the credit of the county. Note that subdivision (3) refers to such moneys as then being in the county "treasury." This means that when the county treasurer receives these moneys from the coroner, they immediately become county moneys or general fund revenue, but subject to demand or claim by the deceased's legal representatives for a six-year period. Thereafter, the money is payable to such legal representatives only upon order of the board of supervisors or upon order of the surrogate court, within the discretion of the board or the court, but none of this alters the fact the moneys become county moneys from the moment when they are first delivered to the county treasurer.

**Conclusion:** Moneys found on a decedent and turned over to the county treasurer by a coroner pursuant to County Law §678 become property of the county as general fund revenue, but subject to demand by the legal representatives of the deceased within six years.

April 21, 1977.

## OPINION 77-258

**Inquiry:** Is there any legal prohibition against the appointment of an individual as acting village justice when the individual's brother is a police sergeant in the same village?

**Statement of Law:** It is our opinion that there is no legal prohibition nor any impropriety *per se* in the situation proposed. We dealt with a similar question in a recent opinion (1976 Op St Compt #76-165 (unreported) where a state trooper's wife was employed as clerk for a town justice before whom tickets issued by the trooper were returnable. We stated as follows:

> A presumption that he (the town justice) would be influenced in his judicial functions by reason of the relationship of the clerk to the trooper would be unwarranted.

Likewise, in this instance, it is not inherently improper or illegal for an individual to serve as an acting village justice when the individual's brother is a police sergeant in the same village. It should not be presumed, merely because of the familial relationship between the justice and the sergeant, that the acting justice's judicial functions will not be performed with propriety and integrity, even if his police sergeant brother is called upon to appear before him.

Of course, if the acting justice feels that he would be placed in a difficult or untenable position adjudicating a matter which might require the testimony or involve the credibility of his police sergeant brother, then, in good conscience, he probably should disqualify himself from hearing the matter. We have been



advised that this police sergeant frequently appears in village court. In addition, the acting village justice may be called upon to sit quite often for various reasons, including illness of the village justice.

Therefore, it is possible that such disqualification will occur with relative frequency. Accordingly, maybe the appointment of this individual to the office of acting village justice should be reconsidered. This is especially so since the acting village justice serves only in the absence or inability of the village justice, and, thus, his disqualification from hearing any matter would leave the court without a village justice, defeating the basic purpose of having an acting village justice.

At any rate, the justice should be guided by the New York State Bar Association Code of Judicial Conduct and, in particular, with respect to the matter in question, Canon 2, which states:

> A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

**Conclusion:** There is no legal prohibition against the appointment of an individual as acting village justice when the individual's brother is a police sergeant in the same village. However, if the acting justice must frequently disqualify himself from hearing matters, then it might be impractical for him to serve as acting village justice.

April 21, 1977.

## OPINION 77-262

**Inquiry:** May elective town officers receive extra compensation above the amount of their annual salaries for performing additional services?

**Statement of Law:** Town Law §27(1), which relates to the fixing of salaries for *all* town officers, provides in pertinent part that:

> Salaries shall be in lieu of all fees, charges or compensation for all services rendered to the town or any district or subdivision thereof, pursuant to law, except that the supervisor shall not be required to

account for and pay over such fees, salary or other compensation that he may receive or be entitled to from the county in which he is elected, for services rendered by him as a member of the board of supervisors.

Based upon the above-quoted provision, this Department has expressed the view that an assessor may not receive extra compensation for assessment services rendered in connection with the establishment of a fire district (13 Op St Compt 154 (1957); an attorney may not receive extra compensation for services rendered in connection with the providing of an extension to a town water district (1972 Op St Compt #72-305 (unreported); and a town supervisor may not receive extra compensation for work done on the books of a newly established sewer district (1972 Op St Compt #72-310 (unreported).

In view of the foregoing, it is clear that town officers, regardless of whether they are elected or appointed, may not receive extra compensation above the amount of their annual salaries for performing additional services. The foregoing, of course, would not apply where a town officer lawfully holds a second town office or a position of employment with the town. A further exception exists where the town supervisor, who also serves as town budget officer, may receive extra compensation for so serving (see Town L §§27(4), 103(2); also 1972 Op St Compt #72-828 (unreported).

**Conclusion:** Elective town officers may not receive extra compensation above the amount of their annual salaries for performing additional services.

April 27, 1977.

## OPINION 77-266

**Inquiry:** May a city establish a reduced fee schedule for the use of the municipal golf course by senior citizens?

**Statement of Law:** General Municipal Law §95-a, which authorizes programs for the aging, provides that:

> Any county, city, town, village or school district is hereby authorized and empowered to establish, maintain and operate programs devoted in whole or in part to the welfare of the aging . . . . Any such county, city, town, village or school district may appropriate, raise and expend moneys for the purposes of establishing, maintaining and operating, or contracting for the operation and maintenance of such programs, and may also receive and expend moneys from the state, the federal government or private individuals, corporations or associations for such purposes.



We believe that the establishment by the city of a reduced fee schedule for the use of the municipal golf course by senior citizens is that type of a program authorized by §95-a.

In an analogous opinion (28 Op Compt 201 (1972), which deals with the subject of reducing the cost of public transportation for senior citizens, the possible constitutional objections to such a program were discussed. State Constitution Article VIII §1 prohibits a municipality from giving or loaning any money or property to or in aid of any individual or private undertaking. "However, this would have no application to a municipal program under the direct operation and control of a specified municipality, whereby certain services are made available to a certain group or class of citizens at municipal expense." The State Legislature has expressly declared such a program to be a purpose of the respective municipalities under §95-a.

It could be argued that senior citizens, by having reduced fees established by the city for the use of the municipal golf course, are thereby being accorded special treatment to the detriment of other citizens. However, the constitutional requirement of equal protection of the laws (State Const Art I §11) permits a wide range of discretion in classifying both persons and things, and the requirement is not violated so long as persons and things similarly situated are treated similarly.

In a case involving local legislation enacted for the benefit of aged persons, the court held that:

> As bearing on the reasonableness of a classification based on age or income, we but note the many laws which provide for public assistance, social security payments, reduction in real estate taxes for elderly home owners and double exemption on the computation of Federal, State and city income taxes and other protective legislation based wholly on the age or economic need of the recipient. (*Parrino v. Lindsay*, 29 NY2d 30, 323 NYS2d 689 (1971), aff'g 66 M2d 342, 321 NYS2d 311; see also *Marino v. Town of Ramapo*, 68 M2d 44, 326 NYS2d (1971).

Accordingly, this Department expresses the opinion that a city may establish a reduced fee schedule for the use of the municipal golf course by senior citizens. It is to be noted that General Municipal Law §95-a had not been enacted when certain objections were raised by this Department concerning a similar proposal a number of years ago.

**Conclusion:** A city may establish a reduced fee schedule for the use of the municipal golf course by senior citizens.

April 8, 1977.

## OPINION 77-270

**Inquiries:** (1) Is the chief fiscal officer of a county entitled to receive commissions when he acts as a voluntary administrator of a small estate pursuant to Surrogate's Court Procedure Act Article 13?

(2) Is the chief fiscal officer of a county required to act as a voluntary administrator under that law?

**Statement of Law:** (1) Surrogate's Court Procedure Act §1303 provides that the chief fiscal officer of a county has "the right to act as a voluntary administrator" of a small estate (personal property of $5,000 or less) if certain named relatives of the decedent do not exist or will not act.

In the opinion of this Department, if the chief fiscal officer of a county acts as voluntary administrator, he is not entitled to commissions for his services. Surrogate's Court Procedure Act Article 13 establishes a special summary procedure for settling small estates. The provisions of the act make clear that the voluntary administrator is to act without being paid the commissions usually paid to a regular administrator. The term "voluntary administrator" in itself is some indication. Moreover, §1307(1), which sets forth various duties of the voluntary administrator, contains the following clause: "Without compensation for his services." Section 1219, which provides that the chief fiscal officer of a county shall be allowed the same commissions as an administrator, does not negate the above conclusion because it refers to regular administration and does not apply to the special administration of small estates.

(2) The chief fiscal officer is not obligated to act as a voluntary administrator. Again, the word "voluntary" indicates that conclusion. Also, §1303, quoted *supra,* grants various parties the "right to act as a voluntary administrator" but does not compel them to act. Finally, §1309(1) provides:

> The use of this article in the settlement of a small estate without the formality of court administration is permissive and not mandatory.

**Conclusions:** (1) The chief fiscal officer of a county, who acts as a voluntary administrator of a small estate pursuant to Surrogate's Court Procedure Act Article 13, is not entitled to receive commissions for his services.

(2) The chief fiscal officer of a county is not required to act as a voluntary administrator of a small estate pursuant to Article 13.

May 27, 1977.



## OPINION 77-271

**Inquiries:** (1) May a village abolish the office of village justice by resolution not subject to a permissive referendum?

(2) May a municipality establish a reserve fund to pay tort claims?

**Statement of Law:** (1) Village Law §3-301(2)(a) clearly implies that the office of village justice may be abolished *only* by resolution or local law subject to permissive referendum. We have expressed that opinion on several occasions (1976 Ops St Compt ##76-544, 876 (unreported). To the extent that earlier opinions have expressed a contrary opinion, they have been overruled. The resolution of the board of trustees of the village to abolish the office of village justice was not effective, therefore, since it was not made subject to a permissive referendum.

(2) In response to the second inquiry, we have expressed the opinion on several occasions that a municipality may not establish a reserve fund to pay tort claims (1976 Ops St Compt ##76-229, 1017 (unreported); 1977 Op St Compt #77-119 (unreported). These opinions supersede earlier ones which reached a contrary conclusion. [Note the following exception: a suburban town may establish a reserve fund to pay tort claims (Town L §55-b).]

**Conclusions:** (1) A village may abolish the office of village justice only by resolution or local law subject to a permissive referendum.

(2) A municipality may not establish a reserve fund to pay tort claims.

June 2, 1977.

## OPINION 77-272

**Statement of Fact:** A county acquired a parcel of land at tax sale and now proposes to enter into a contract with private persons, either in their own names or in the name of a certain realty corporation, for the so-called "operation and maintenance" of such property and the subsequent purchase thereof. The terms of the agreement are that the total consideration for the purchase of the property will be the aggregate of the delinquent taxes previously due to the county, together with all interest, penalties and publication costs. Payment shall be made at the rate of a minimum of $600 per month until the full delinquent taxes have been paid (with the purchasers also paying all current taxes) at which time the county will convey the title to the aforesaid purchasers.

**Inquiry:** Would the described arrangement be unconstitutional as a gift or loan of public moneys, or would it be illegal for any other reason?

**Statement of Law:** Under County Law §215(8), a county may undertake a negotiated sale of property which it has acquired by tax title. The only requirement thereunder, in connection with the amount of money which the county is to receive as consideration for such sale, is that it should satisfy itself that it has received the best possible price under all the circumstances. It is quite conceivable, under given circumstances, that the sum total of the delinquent taxes, which were the basis for the county's acquiring the tax title, would be quite adequate consideration for the sale, provided that the board of supervisors was satisfied that there was no chance of realizing a greater amount. If, when the inquiry refers to a possible unconstitutional gift (State Const Art VIII §1), it means that the consideration mentioned above — namely, the total of the accrued delinquent taxes, interest and penalties — is an insufficient amount, we cannot necessarily agree. It may well be that this is the total amount obtainable under current market conditions.

If, on the other hand, the inquiry is suggesting that the device for permitting the purchasers to pay the proposed purchase price in monthly installments represents an unconstitutional loan of property (or its commensurate value) to the private purchasers (see State Const Art VIII §1), then again we cannot agree. There are many statutory examples of municipalities selling real property and taking back purchase money bonds and mortgages whereby, in effect, the purchasers would be making installment payments of the purchase price.

One such example is to be found in Laws of 1974 chapter 953 §5(c), where Montgomery County was permitted to sell certain parklands and, in its discretion, to take back mortgages on such property for periods not to exceed 25 years. Another example is to be found in Laws of 1937 chapter 617, as amended (Westchester County Charter), in Article 1 §3(3), in which Westchester County is permitted to sell and convey real property and, under certain circumstances, to take back purchase money bonds and mortgages. Still another example is to be found in Laws of 1948 chapter 852, as amended (Westchester County Administrative Code), Article 16 (also known as the Westchester County Tax Law). Section 580 thereof authorizes towns therein which have acquired property by tax lien enforcement devices to sell such properties and take back purchase money bonds and mortgages.

So, there are ample statutory illustrations of the general type of arrangement under discussion herein. The only real difference is that the county here in question, instead of taking back a bond and mortgage, will withhold the transfer of the title until the full amount of the purchase price (that is, the total accrued prior tax delinquencies) has been paid. We regard this as a distinction without a real difference. Accordingly, it is our opinion that such a contractual arrangement is not unprecedented and is not, in and of itself, violative of any legal



principle. Of course, the practical advisability of entering into such an arrangement is a matter for the exclusive discretion of the county governing board.

There remains a procedural question to be considered. Although County Law §215(8), together with subdivision (5) of that section, authorizes a sale of county real property and although the type of contractual arrangement under consideration may very well fit within the general authorization contained in those subdivisions of §215, so that a simple resolution could conceivably be all that is required, we wonder if it might not be preferable for the county board to provide itself with authorization pursuant to the Municipal Home Rule Law. There can be no question that such a contractual arrangement would be within a county's property, affairs or government within the meaning of Municipal Home Rule Law §10(1), with the result that the county obviously could give itself the required authorization by the adoption of a local law. Whether the county attorney and the county governing board feel that the mere adoption of a resolution is adequate, or whether they would prefer the home rule route, is a matter for their determination.

**Conclusion:** There are circumstances under which a county may convey its tax-acquired property under an installment purchase arrangement.

March 30, 1977.

## OPINION 77-273

**Inquiry:** In a village building construction contract funded through the Economic Development Administration, where the low bidder is unable to obtain a performance bond through a surety company, would a certified check in the full contract amount, with appropriate contractual safeguards, suffice?

**Statement of Law:** There is no express statute which controls the posting of performance bonds in connection with municipal public works contracts. General Municipal Law §103 requires that a municipality, such as the village in question, award a public works contract which exceeds $3,500 in amount to the lowest responsible bidder. Among other things, "responsible" is interpreted to mean a bidder who is able to post sufficient security to cover the contract cost.

We are aware that custom normally dictates that the performance bond should be in the form of a surety company bond. However, no statute expressly imposes that requirement. Accordingly, it is our view that a low bidder who is able to furnish cash or a certified check or the equivalent thereof is every bit as "responsible" as the low bidder who can furnish a surety bond. In fact, in these

days when municipalities have found it necessary to take surety companies to court in order to force compliance with the provisions of surety bonds, it stands to reason that the low bidder who furnishes cash or the equivalent thereof is, perhaps, more "responsible" than the bidder who can furnish a surety bond.

Hence, it is our opinion that it is perfectly legal and proper for this village to accept a certified check from the low bidder as his performance bond in connection with the village building project in question.

**Conclusion:** There is no reason why a low bidder on a municipal public works contract cannot furnish cash or a certified check as a performance bond in lieu of a surety company bond.

March 29, 1977.

## OPINION 77-274

**Inquiry:** May a village treasurer accept payment of less than the full amount of taxes and assessments levied against a particular parcel of property?

**Statement of Law:** The village treasurer is charged with the duty of collecting, from the persons named in the tax roll, the sum mentioned in the last column extended opposite their names — not a part of that sum (Real Prop Tax L §1432(1). A village lacks the authority to accept installment payments of delinquent taxes on terms and conditions other than those specified in the Real Property Tax Law (see 1975 Op St Compt #75-344 (unreported). No provision of such law authorizes a village treasurer to accept a portion of the taxes and assessments levied against a particular parcel of property.

Relying on the case of *In re Wadham's Estate* (249 AD 271, 292 NYS 102 (1936), this Department has previously expressed the view that a town tax collector may not accept payment of less than the full amount of taxes levied against a particular parcel of property (13 Op St Compt 24 (1957). Since the provisions of law applicable to the collection of village taxes are similar to those applicable to towns, we think that the holding in *In re Wadham's Estate* (*supra*) applies equally to the collection of village taxes.

**Conclusion:** A village treasurer may not accept payment of less than the full amount of taxes and assessments levied against a particular parcel of property.

April 28, 1977.



## OPINION 77-276

**Statement of Fact:** A privately owned civic center wants to employ off-duty policemen as security guards, such policemen to wear city police department uniforms and carry city police department-issued firearms at the off-duty employment. The city will enter into an agreement with the civic center whereby the city will be named as insured on the civic center's insurance policy and the civic center will indemnify the city for any loss or claim arising from acts committed by the officers while in the employ of the civic center.

**Inquiries:** (1) May the off-duty policemen be employed as security guards under the above circumstances?

(2) May the city prohibit these police officers from wearing city-issued firearms and/or police department uniforms as a condition to accepting off-duty employment?

**Statement of Law:** (1) General Municipal Law §208-d authorizes city policemen to undertake outside work, so long as it is approved by the police commissioner or police department of the city, as the case may be, and so long as the statutory criteria are met. These criteria are that the work may not exceed 20 hours per week for each such officer, the work must not conflict with his regular duties or his immediate availability for emergencies, and the work must not affect his physical condition.

However, it is our opinion that even if the proposed off-duty employment as security guards meets the requirements of §208-d, a police officer should not wear a city uniform and firearm while employed at his off-duty job.

This conclusion is reached because there is no legal authority for guns and uniforms, being city property, to be used for noncity purposes. Although an off-duty policeman may perform certain functions pertaining to his office in appropriate circumstances (see 1973 Op Atty Gen 169 (informal), he is essentially acting as a private individual and, therefore, should not be entitled to wear his official city-issued uniform and weapon. In addition, to permit an off-duty officer to wear a city uniform and carry a city-issued weapon would be to clothe him with indicia of authority and create a false impression that the outside employment was actually being undertaken as part of his official duties as a city police officer. Then, notwithstanding any indemnity arrangement between the city and the private employer, the city would be especially vulnerable to potential lawsuits arising from tortious acts committed by the police officers in their private employment (see *Burns v. New York*, 11 M2d 123, 141 NYS2d 279, rev'd 6 AD2d 30, 174 NYS2d 192 (1958).

The above arguments do not take into account the possibility of authorizing the aforesaid arrangements pursuant to collective bargaining. However, the same practical objections would apply whether or not a collective bargaining

agreement was involved. We feel, therefore, for the reasons set forth above, that to permit police officers to wear city uniforms and firearms at their outside employment, even under a collective bargaining agreement, would be highly inadvisable.

(2) In regard to the second question, it is obvious from the foregoing discussion that a city may prohibit police officers from wearing city-issued firearms and police department uniforms as a condition to accepting off-duty employment.

Finally, it appears that the city will be entering into an agreement with the civic center whereby the city will, presumably, make off-duty police officers available in exchange for the civic center's guarantees of indemnification for potential liability and availability of the officers for emergency duty. As we stated in a recent opinion (1976 Op St Compt #76-799 (unreported):

> With respect to off-duty town police, there is no way in which the town could involve itself in a contract for their services. Either they *are* working for the town in an on-duty capacity or they are not. If they are not, then the town has no official interest in their work activity.

The same rationale militates against an agreement by a city to provide off-duty police officers to a private party. The city may either provide on-duty police protection to the civic center or permit the civic center and the off-duty officers to negotiate their own agreements. Naturally, if, in the latter instance, such agreements contain provisions for the city to be indemnified against tortious acts committed by the officers while in the employ of the civic center, that would be all to the city's good. But it is our opinion that the city must avoid being a party to any such contracts.

**Conclusions:** (1) Even if proposed off-duty employment as a security guard meets the requirements of General Municipal Law §208-d, a police officer should not wear a city uniform and firearm while employed at his off-duty job.

(2) A city may prohibit police officers from wearing city-issued firearms and police department uniforms as a condition to accepting off-duty employment.

May 3, 1977.

## OPINION 77-277

**Inquiry:** Must a village continue to provide school crossing guard services, and is a school district obligated to provide such services?



**Statement of Law:** General Municipal Law §208-a authorizes school crossing guards as follows:

> The duly constituted authorities of any city, town, or village or any county police department or police district *may* designate, authorize and appoint such a number of persons as such authority shall deem necessary, and at such salaries as such authority shall deem advisable, as school crossing guards to aid in protecting school children going to and from school . . . . [Emphasis added]

This section is permissive and not mandatory. A village need not provide school crossing guards if it does not so desire. We would, however, in this instance, advise that notice of any discontinuance of service be given to village residents who have relied thereon in the past.

In regard to the second part of the question, there is no authority for a school district either to employ such school crossing guards or contribute to the expense thereof (1972 Op St Compt #72-967 (unreported); 24 Op St Compt 793 (1968).

**Conclusion:** The provisions of General Municipal Law §208-a are permissive, and a village is not required to provide school crossing guards. In addition, there is no authorization for school districts to provide school crossing guards.

April 19, 1977.

## OPINION 77-279

**Inquiry:** Is there any legal prohibition against a municipal civil service commissioner serving as a committeeman of a county political party committee?

**Statement of Law:** Civil Service Law §27(2) provides that "a member of a municipal civil service commission or personnel officer shall not serve as an officer of any political party." A person, as a member of the county committee of a political party, is an officer of that party by virtue of his position as committeeman (see Elec L §2(8), (9), (10); 1958 Op Atty Gen 150; *Doherty v. Meisser*, 66 M2d 550, 321 NYS2d 32 (1971). We conclude, therefore, that a municipal civil service commissioner may not serve as the committeeman of a county committee.

We note that Public Officers Law §73(8) prohibits a party officer, while serving as such, from also serving as a judge of a court of record, attorney general, district attorney or assistant district attorney. The said statute defines the term "party officer," *as used therein*, to mean a member of a national

committee, an officer or member of a state committee or a county chairman of any political party. Thus, a county committeeman is not a party officer for purposes of Public Officers Law §73(8). Furthermore, we are advised that the federal Hatch Act (USC Title 5 §1502) appears to allow a civil service commissioner whose activities are financed in part by loans or grants from the United States or a federal agency to be a committeeman. However, notwithstanding the foregoing, it is our opinion that Civil Service Law §27(2) controls and that the term "party officer," as used in the said statute, was intended by the Legislature to be construed broadly to mean an individual who holds any party position or any party office, whether by election, appointment or otherwise.

**Conclusion:** A municipal civil service commissioner may not serve as a committeeman of a county committee of a political party.

June 7, 1977.

## OPINION 77-280

**Inquiry:** May surplus funds in a village water fund be carried over from year to year as surplus or must they appropriated yearly to specific appropriation accounts?

**Statement of Law:** We stated in a prior opinion (24 Op St Compt 474 (1968) as follows:

> [I]t must be remembered that there is no authority for a village to carry over surplus, as such, from one fiscal year to the next. If the proceeds of sale were available at the time when the next year's budget was being prepared, it would seem that the village would be required either to treat such proceeds as estimated or anticipated revenues for the reduction of taxes in the ensuing fiscal year or, if it intends creating the aforesaid capital reserve fund in lieu thereof, it should do so before the end of the current fiscal year, to avoid unauthorized carry-over of unappropriated surplus.

The accumulation of surplus from year to year is unauthorized and unlawful. In the sense that it represents current funds, it should be treated as a revenue in next year's budget. In the sense that it is tantamount to the establishment of a capital reserve fund, it is also unauthorized without resorting to the proper procedures, because reserve funds may be established and utilized only as provided in General Municipal Law Article 2.

**Conclusion:** Surplus moneys in a village water fund may not be accumulated and carried over from year to year.

May 18, 1977.



## OPINION 77-284

**Statement of Fact:** The annual school tax of a union free school district is levied and collected. Subsequent thereto, the board of education enters into an agreement with the teachers to increase their salaries, effective immediately. There are no moneys in the budget available for payment of the salary increase.

**Inquiry:** How may funds be raised to pay for the salary increase?

**Statement of Law:** In this instance, the only means of financing available to the school district is the issuance of budget notes as provided in Local Finance Law §29.00(a)(3). Budget notes may be issued only during the last nine months of any fiscal year for expenditures for which an insufficient or no provision is made in the annual budget for such fiscal year. The budget notes may not exceed the limitations specified in the statute unless the budget note resolution, as adopted by the school district finance board, has been approved by a vote of the district voters.

In lieu of issuing budget notes, the board of education may call a special meeting of the inhabitants of the school district for the purpose of voting on a proposition to levy a tax in order to raise moneys sufficient to meet the added expense of the salary increase (Educ L §§414(1), 1716, 2021(17), 2007; Real Prop Tax L §1306(1).

**Conclusion:** Where appropriations in the budget of a union free school district are insufficient to pay for teachers' salary increases negotiated subsequent to the levy and collection of the annual tax, necessary moneys therefor may be obtained either by the issuance of budget notes or by the levy of a supplemental tax subject to the approval of the school district residents.

June 2, 1977.

## OPINION 77-285

**Inquiry:** Where a village sells real property to a not-for-profit corporation and the village mayor, who is an attorney, is associated in a professional corporation of attorneys with an individual who is both attorney for and director of the not-for-profit corporation, does this give rise to a prohibited interest in contract?

**Statement of Law:** The mayor, who shares in the legal fees of the professional corporation, has an interest in the contract between the village and the

not-for-profit corporation by reason of the fact that his fellow member in the professional corporation is attorney for such not-for-profit corporation and, consequently, its alter ego (Gen Mun L §800(3). This interest would be a prohibited one within the meaning of General Municipal Law §801 were it not for §802(1)(f) of that law which creates an exception in the case of a "contract with a membership corporation or other voluntary non-profit corporation or association."

Hence, no prohibited interest in contract arises herein. However, the mayor is required to disclose his interest in such contract under General Municipal Law §803.

**Conclusion:** Where a village sells real property to a not-for-profit corporation and the village mayor, an attorney, is associated in a professional corporation of attorneys with an individual who is both attorney for and director of the not-for-profit corporation, no prohibited interest in contract arises.

April 1, 1977.

## OPINION 77-292

**Inquiries:** (1) Is there any prohibition against a municipality conducting a public subscription campaign whereby members of the general public are asked to donate money toward the cost of constructing a convention arena center, where such donation entitles the donor to receive a name plate, with his name on it, to be placed on a seat in the convention center?

(2) If there is no prohibition against such campaign, are the donations made to the campaign considered charitable donations, deductible for income tax purposes?

**Statement of Law:** (1) and (2) Notwithstanding the fact that the contributor would receive a name plate to be placed on a seat, these subscriptions are, basically, in the nature of a gift (see 57 NY Jur, *Subscriptions*, §1). General City Law §20(3) clearly authorizes a city to accept gifts of money or property and Glens Falls City Charter §1.4.2 specifically authorizes such acceptance.

However, we not only find no authority for a municipality itself to conduct a campaign to solicit such gifts, either by advertisement or otherwise, but we also find it to be contrary to public policy and, hence, not a lawful city purpose. We have found similar arrangements in the past to be "unauthorized and impermissible" (1974 Op St Compt #74-1102 (unreported).

It should be noted that should a local civic organization, rather than the city itself, sponsor the subscription campaign, any contributions received therefrom



could thereafter be accepted by the city as a gift (see 30 Op St Compt 156 (1974); 16 Op St Compt 64 (1960).

Since it is our opinion that a municipality may not conduct a subscription campaign, the question regarding whether donations to such a campaign would be income tax deductible becomes moot. At any rate, this Department is not in a position to pass on questions of possible income tax deductions for individual taxpayers. Any inquiries of that nature should be directed to the Internal Revenue Service (30 Op St Compt 156 (*supra*).

**Conclusion:** A city may not sponsor a public subscription campaign to finance construction of a convention center.

May 4, 1977.

## OPINION 77-295

**Statement of Fact:** A subdivision containing approximately 30 homes was approved by the planning board in the mid-1960's.

Apparently, the builder was unable to stabilize the banks around several of the homes in such subdivision with the result that during heavy rains, the banks slide down and threaten the homes.

**Inquiry:** Under such circumstances, would it be proper for the town to expend moneys to construct retaining walls to stabilize the banks on the properties in question?

**Statement of Law:** State Constitution Article VIII §1 prohibits the expenditure of municipal moneys for private purposes. The proposed construction of retaining walls to stabilize the banks would serve only the interests of the property owners under consideration, rather than constitute an improvement in the interests of the general public, and in our opinion would be an unconstitutional gift of town moneys. We feel that the inquiry involves essentially a private matter between the builder and the property owners.

**Conclusion:** A town may not expend moneys for the purpose of constructing retaining walls to stabilize banks on private property.

May 3, 1977.

## OPINION 77-296

**Statement of Fact:** On June 28, 1976 a certain building was leased by A to the town in question. The term of the lease was to begin on July 1, 1976. During all that time, the building was owned by the town supervisor. Subsequently, on July 13, 1976, the building was sold by the supervisor to the town's lessor, A.

**Inquiry:** Does the town supervisor have a prohibited interest in the lease between A and the town?

**Statement of Law:** At the outset, we point out that the entire discussion to follow relies on the presumption that A had some interest in the building so that he could validly lease it to the town. This presumption is based on the assertion, in a newspaper article accompanying the inquiry, that A had the right to possession of the building. Such a right is sufficient to enable one to give a valid lease (33 NY Jur, *Landlord and Tenant,* §60). Furthermore, as stated in 33 NY Jur, *Landlord and Tenant,* §61: "If a landlord has no title at the time of the execution of the lease, but thereafter acquires title, such title will inure to the benefit of the lessee by way of estoppel to bind the lessor's interest, and support the lease from the time of its execution."

We now turn to the issue of whether the town supervisor has a prohibited interest in the lease between A and the town. General Municipal Law §801 states that no municipal officer or employee shall have an interest in any contract with his municipality when he, either independently or as a member of a board, has the power or duty to negotiate, prepare, authorize or approve such contract or authorize or approve payment thereunder, or audit bills or claims under such contract. A town supervisor obviously has such powers or duties and, thus, if he has a statutory interest in the lease, such interest would be prohibited. Accordingly, the question becomes whether the supervisor has an interest in the lease.

Under §800(3), an interest is defined to mean a "direct or indirect pecuniary or material benefit accruing to a municipal officer or employee as a result of a contract with the municipality which such officer or employee serves." It is certainly conceivable, because of certain facts leading up to the conveyance of the property by the supervisor to A, that the supervisor did receive a material benefit by reason of the lease from his grantee, A, to the town. These facts are of considerable significance, as may be seen from the following discussion.

On February 10, 1975, the town was advised by the Attorney General (1975 Op Atty Gen 124 (informal) that if the town supervisor were to attempt to sell a building owned by him to the town, he would have a prohibited interest in the contract of sale, which would be thereby rendered void and unenforceable. The Attorney General went on to say, however, that the sale could be validly made pursuant to an exception contained in General Municipal Law §802(1)(d), if the



purchase and the consideration therefor were first approved by an order of the Supreme Court, upon petition of the governing board.

We are not expressly advised whether the property which was the subject of that Attorney General's opinion is the same property to which the present inquiry is addressed. However, we suspect that it is, because of the way in which it was described by the Attorney General. For instance, included in proposed town uses at that time were "a place to store an ambulance and a civic center." We know that the building currently under consideration consists of a garage and an area proposed to be used for youth activities. If two separate buildings *are* involved, the coincidence strains the imagination.

But whether or not the building is the same one, the fact remains that the town was advised by the Attorney General that the only way in which the supervisor could convey property to the town was by order of the Supreme Court. So, a year and a half later, the town apparently chose to ignore that advice and came up with a plan whereby the supervisor achieved much the same purpose by the circuitous device of selling his property to A, after first causing the town to enter into a prearranged lease with A, whereby the town could exercise an option to purchase from A at just about any time, *and* for the same $15,000, which we understand A paid the supervisor for the property in the first place. We also note that the town is not obligated to pay cash rent for the premises, but rather pays "all heat, electricity and water utility expenses incurred by the entire property [Note: Including an area occupied by a private tenant] and shall make all repairs and improvements needed by the leased premises."

Notwithstanding any other reactions which we might have to this arrangement, our objective here is to determine whether the supervisor has an interest in the lease, within the meaning of General Municipal Law §800(3), because, if he does, such interest is necessarily a prohibited one by virtue of §801, and the lease would appear to be null, void and unenforceable under §804. In our opinion, because of the sequence of events herein, the inference is almost irresistible that the supervisor has an interest in the lease, because it is hard to believe that the prearranged lease was anything but an inducement to A to make the purchase. If that is so, then the inference is equally irresistible that without the lease, A either would not have purchased the property at all or he would have paid the supervisor less money for it.

Either way, the supervisor would have derived a "direct or indirect pecuniary or material benefit" from the lease and, hence, would have an interest within the meaning of §800(3). As we indicated previously, such interest would necessarily be a prohibited one because the supervisor has all or most of the powers and duties set forth in §801.

Of course, the foregoing is all based, as we have stated, on inference. That inference is a strong one, because of the sequence of events, as we have also stated. We must caution, however, that there is still a factual issue here. Apart from inferences, the existence of an interest, on the part of the supervisor, in the

lease from A to the town, depends wholly on whether the supervisor did, in fact, derive a pecuniary or material benefit from the lease. If the fact is that without the lease A would have purchased the property and paid the same consideration anyway, then the supervisor did not derive such a benefit from the lease and, hence, has no statutory interest in it. We do not have sufficient knowledge of the facts to enable us to resolve that issue conclusively.

**Conclusion:** Where a town is leasing a building from the person to whom the town supervisor has sold it, and where the lease was actually executed and its term began before the supervisor sold the building to the town's lessor, the supervisor may well have a prohibited interest in the lease, depending on underlying circumstances.

May 6, 1977.

## OPINION 77-301

**Statement of Fact:** A person employed as an assessor's aide was appointed to fill the vacancy in the position of appointed assessor. The annual salary budgeted for the assessor is $3,150 and that for the assessor's aide is $5,050. The position of assessor's aide will be abolished, and the newly appointed assessor will work more hours than her predecessor.

**Inquiry:** Based on the foregoing, may the appointee receive the combined budgeted salaries of the two positions, assessor and assessor's aide, and may the town board establish an increased annual salary of $10,000 for the assessor for the remainder of the 1977 fiscal year?

**Statement of Law:** Generally, the salary of a successor appointed to fill a vacancy in a town office is that of his or her predecessor (see 1974 Op St Compt #74-213 (unreported). It is obvious that a successor in office holding that single position may not draw two separate salaries which were budgeted for two separate positions. Therefore, the newly appointed assessor may not serve in that single office and be paid the two separate salaries of assessor and assessor's aide.

However, the town assessor's salary may be increased during his or her term of office provided there is a sufficient amount available in the item of the budget applicable thereto (27 Op St Compt 163 (1971); 24 Op St Compt 51 (1968). As we stated in the above-cited 1971 opinion:

> a town may make funds available for such an increase in salary by a transfer of moneys to the assessor's item from unexpended balances (Town L §112(1), surplus moneys (Town L §112(1), contingency funds (Town L §112(1) or from the proceeds of a budget note (Loc Fin L §29.00(a)(2).



Thus, once the successor is in office and the assessor's aide position becomes vacant, the unexpended balance budgeted to the assessor's aide position could be used by the town board to increase the assessor's annual salary to the $8,200 level.

The town board could then further increase the assessor's salary to $10,000 annually if the additional $1,800 is available from one of the sources indicated above.

**Conclusion:** An individual appointed to fill a vacancy in the position of appointed assessor may not receive both the salary of assessor and that of her previous position, assessor's aide. The town board may, however, increase the salary of an assessor during the assessor's term of office.

May 4, 1977.

## OPINION 77-311

**Inquiry:** May a participating county in a regional planning board modify its annual appropriation for planning board purposes during the fiscal year for which such appropriation was made?

**Statement of Law:** General Municipal Law Article 12-B (§§239-b *et seq.*) contains the provisions of law applicable to regional planning boards. Section 239-c, with respect to the expenses of a regional planning board, provides in pertinent part as follows:

> the governing bodies of the participating municipalities comprising membership in a regional or metropolitan planning agency are hereby authorized independently or in collaboration with other local governments, in their discretion, to appropriate and raise by taxation moneys for the expenses of such metropolitan, regional or county planning board; and such municipal corporations shall not be chargeable with any expense incurred by such planning board except pursuant to such an appropriation.

The above-cited provision does not specifically prohibit a participating municipality from modifying its annual appropriation for planning board purposes during the fiscal year for which such appropriation was made. However, for the reasons hereinafter set forth, it is our opinion that such provision must be read as impliedly prohibiting a participating municipality

from making such modifications.

Apart from private donations and grants from the State or federal government, regional planning boards are entirely dependent upon appropriations from their constituent municipalities for the funds necessary to carry on their operations. Private contributions and State and federal grants are, at best, indefinite and inconsistent sources of revenue. Therefore, unless a regional planning board is able to rely upon fixed appropriations from the participating municipalities, its fiscal affairs would be thrown into a chaotic and unworkable state.

Furthermore, we note that this Department has previously suggested that the participating municipalities in a regional planning board should enter into an agreement providing for, among other things, the allocation of costs of the planning board among the participating municipalities (see 18 Op St Compt 327 (1962). In circumstances where such an agreement fixing the share of each participating municipality is entered into, it would seem that any attempt to modify the annual appropriation agreed to by a participating municipality could be viewed as a breach of contract on the part of such municipality. A strong argument can be made that paragraph 6 of the agreement between all the participating counties does bind each county to a share which is not subject to unilateral modification.

In view of the foregoing, it is our opinion that the inquiry must be answered in the negative.

**Conclusion:** A participating county in a regional planning board may not modify its annual appropriation for planning board purposes during the fiscal year for which such appropriation was made.

May 3, 1977.

## OPINION 77-312

**Inquiries:** (1) May a water district pay hospitalization insurance premiums for its active and retired employees?

(2) May a water district make Medicare payments for its active and retired employees who are over age 65?

**Statement of Law:** (1) A water district may pay hospitalization insurance premiums for its active and retired employees by way of either a local plan, under General Municipal Law §92-a, or as a participant in the State-wide plan, under Civil Service Law Article XI.

General Municipal Law §92-a provides that any "public corporation,"



including a water district (22 Op St Compt 916 (1966), may pay all or part of the premiums for medical, surgical and hospital insurance for its officers and employees under a local plan. This authorization includes the purchase of such insurance for retired employees and the payment of any portion of the premiums thereon. In another opinion (31 Op St Compt 135 (1975), we interpreted §92-a as permitting a public corporation to pay for the hospitalization insurance premiums of retired employees, even though such employees retired prior to the adoption of such a plan.

The water district may also obtain hospitalization insurance coverage for its active and retired employees under the State Health Insurance Plan, which is administered by the Department of Civil Service. Civil Service Law §163(4) provides that improvement districts, whose employees and retired employees are authorized under §163(2) to be included in the State-wide plan, may participate in the plan. The governing body may make an election with respect to inclusion of both present and retired employees at the same time or as to employees at one time and retirees at another. Under §163, employees who retire prior to the district's participation in the State-wide plan are also covered (1972 Op St Compt #72-846 (unreported).

(2) In a prior opinion (1972 Op St Compt #72-956 (unreported), we dealt with a similar question with regard to Medicare premium payments. In that opinion, we stated that where a municipality pays hospitalization and medical insurance premiums for its employees and retired employees under a local plan, it may reimburse those age 65 and older for Medicare premiums. That conclusion was based on the provisions of Civil Service Law §167-a, which authorize reimbursement for Medicare premiums, by municipalities participating in the State-wide plan, to active and retired employees who become eligible for Medicare. Our rationale for that conclusion was based on our determination that the provisions of §167-a, being sufficiently broad, could be extended to municipalities operating under local plans.

**Conclusion:** A water district may pay the hospitalization insurance premiums for all its active and retired employees either under a local plan or as a participant in the State-wide plan. In addition, a water district may reimburse active and retired employees for Medicare premiums where such district pays hospitalization insurance premiums for its active and retired employees either under a local or State-wide plan.

May 13, 1977.

## OPINION 77-322

**Inquiry:** Could a town supervisor refuse to sign a check reimbursing the town justice for travel expenses between his home and court for special arraignments?

**Statement of Law:** We stand by our previous opinion that a town justice may not recover mileage expenses for traveling between his home and the court, for special arraignments at off-hours (1977 Op St Compt #77-13 (unreported).

Now, if the town board should audit and approve a voucher from the town justice for such expenses, we believe that the supervisor would be justified in not signing the check. Normally, his duty to sign checks is a so-called "ministerial" function, which means that it is a duty that he is required to perform once the claim has been audited and approved by the town board (see 1976 Op St Compt #76-780 (unreported). He may withhold his signature, however, when he is subject to a statutory duty not to sign the check, as in the case of an overdrawn appropriation. Similarly, we are of the opinion that Town Law §116(1) does not allow a town justice to recover mileage expenses for commuting between his home and court.

The town justice is correct when he says that an opinion of the State Comptroller is simply an advisory opinion and not a definitive construction of the law. The final authority on the meaning of a statute in our legal system is a court. Nevertheless, until a court has ruled, an opinion of our Department on the question of what is a proper town expenditure will be followed by the Department's Division of Municipal Affairs in the performance of the Department's duty to audit municipal accounts. Therefore, until a Department opinion pertaining to a municipal expenditure is superseded by a contrary judicial decision, the opinion will be followed and applied by the Division of Municipal Affairs during the course of municipal audits.

**Conclusion:** A town justice may not recover mileage expenses for commuting between his home and court. A supervisor may refuse to sign a check for such travel expenses, even if the claim is audited and approved by the town board.

May 24, 1977.

## OPINION 77-326

**Inquiry:** Is a village required to deduct FICA taxes from sick leave payments made to village employees when such employees are absent due to illness?



**Statement of Law:** Under 26 US Code §3121(a)(2), the amount of any payment made to an employee "under a plan or system established by an employer which makes provision for his employees, generally . . . on account of — (s)ickness or accident disability . . ." is not considered to be "wages" within the meaning of the Federal Insurance Contributions Act. Therefore, no FICA tax need be deducted from such payment.

The Social Security Administration has ruled that even if there exists an established sick leave plan, payments made under such a plan by a municipal employer would be treated as "wages" under the Social Security Act unless it is shown, in addition, that the municipality has statutory or other legal authorization to make payments to employees *solely on account of sickness*, as distinguished from authorization merely to continue salary payments during periods of absence due to illness (SSR 72-56). This opinion has been confirmed by the US Court of Appeals, 10th Circuit, in the case of *State of New Mexico v. Weinberger* (517 F2d 989 (1975), cert den 423 US 1051 (1976).

General Municipal Law §92(1) authorizes villages to grant sick leave with pay to their employees. This, however, is merely authorization for a continuation of salary payments and does not authorize payments made on account of sickness. Therefore, such payment is considered to be "wages" for the purpose of Social Security and, accordingly, FICA tax must be deducted therefrom.

**Conclusion:** A village must deduct FICA tax from sick leave payments paid to village employees.

May 13, 1977.

## OPINION 77-330

**Statement of Fact:** A police officer injured in the line of duty was out of work from July 28, 1976 until February 28, 1977. The officer received his full pay during this period.

In January, 1977, during the period of his disability, the said officer was subpoenaed to testify in court as a police officer. Relying upon a provision in a collective bargaining agreement which provides that the basic work day shall be eight (8) hours, and the basic work week shall be forty (40) hours, with the exception of special assignments when required, the officer applies for overtime pay.

**Inquiry:** Is the police officer entitled to overtime pay in the described circumstances?

**Statement of Law:** General Municipal Law §207-c provides for the payment of full salary to policemen who are injured or taken sick as a result of the performance of their duties. In addition, a city may elect to provide Workmen's Compensation coverage to its policemen by appropriate action of its governing body (Work Comp L §3(1) group 19).

It is our opinion that the policeman in question should not receive overtime compensation for the time he is required to be in court, notwithstanding the collective bargaining provision mentioned above. A policeman would be entitled to overtime compensation for such courtroom appearance *only* if such appearance would result in his actually working over 40 hours in one week. Obviously, this was not the case in the described circumstances.

**Conclusion:** A police officer who is out of work as the result of injury or illness incurred in the line of duty, and who is receiving his full salary during such period of disability, is not entitled to overtime compensation where such officer is subpoenaed to appear in court to testify as a police officer.

June 8, 1977.

## OPINION 77-332

**Inquiry:** In a case where a fire district covers the entire unincorporated area of a town, may the same person hold the offices of town councilman and a member of the board of fire commissioners of the fire district?

**Statement of Law:** This Department has repeatedly taken the position that the two offices which are the subject of this inquiry are incompatible (6 Op St Compt 168 (1950); 15 Op St Compt 478 (1959); 1971 Op St Compt #71-943 (unreported). The rationale behind the aforementioned opinions has been that since there are various instances where the fire district commissioners contract with the town board — such as to provide fire protection to a fire protection district or fire alarm district within the town (Town L §§183, 184) — the same individual, as a member of the town board and board of fire commissioners of the fire district simultaneously, would be in the position of attempting to serve the best interests of two different groups of taxpayers. This situation involves an obvious incompatibility and overlapping of interests.

However, in the situation mentioned in the inquiry herein, there is no possibility of contracts of this nature arising between the board of fire commissioners and the town board, because, as indicated, the fire district covers the entire area of the town outside of any village or villages. It is the duty of the fire district to provide fire protection to the area of the fire district, and no contracts



for fire protection can ever come into existence in this fact situation. Consequently, the incompatibility referred to in the above-cited opinions cannot come into play.

The only other interrelationship between a fire district and a town board which might have a bearing on this situation is the fact that under Town Law §181, the budget of a fire district has to be submitted to the town board of the town in which the fire district is located. In this regard, however, §181(1) clearly states that the town board shall make no change in the budget estimate submitted by the board of fire commissioners. It is the town board's duty simply to forward the fire district's budget estimates to the county legislature so that the latter may cause such amounts to be levied against the taxable properties in the fire district. Accordingly, no incompatibility could arise here either.

As a result of all of the foregoing, then, it is our opinion that where a fire district is coterminous with the unincorporated area of a town, there is no incompatibility or other illegality involved when a member of the board of fire commissioners serves simultaneously as a member of the town board. In this regard, we hereby distinguish this conclusion from the conclusions reached in the opinions previously cited herein and any other similar opinions. However, it should also be noted that we found no incompatibility in the simultaneous holding of these two offices in a somewhat different fact situation in another opinion ( 1974 Op St Compt #74-175 (unreported).

**Conclusion:** In a situation where a fire district is coterminous with the entire unincorporated area of a town, there is no incompatibility between the offices of town councilman and a member of the board of fire commissioners of the fire district.

June 24, 1977.

## OPINION 77-333

**Statement of Fact:** A group of town taxpayers has petitioned the town board to undertake an investigation into alleged favoritism on the part of the local assessors in the assessment of real property within the town. We understand that the claim of favoritism is based upon the fact that in general assessed valuations of agricultural residences may be lower than those of nonagricultural residences.

**Inquiry:** In view of these circumstances, in what manner should the town board proceed?

**Statement of Law:** In the first instance, we note that the town has already received an opinion from the State Board of Equalization and Assessment, dated March 31, 1977, expressing the view that the assessor has the sole right to determine the level of assessment within the assessing unit, and that the town board may not substitute its judgment for that of the assessor. This Department reached a similar conclusion in a recent opinion (1976 Op St Compt #76-398 (unreported).

Notwithstanding the foregoing, we feel that a town board has inherent power to investigate *legitimate* allegations of misconduct on the part of town officers or employees, including the town assessor or assessors. If such an investigation produces substantial evidence of misconduct, the town board may wish to consider the institution of removal proceedings, pursuant to Public Officers Law §36, or other appropriate disciplinary action.

In order to determine whether there is a legitimate allegation of misconduct, the town board has a duty to scrutinize the facts surrounding such allegations before beginning an official investigation. If the town board were to undertake such investigations without an initial, detailed examination of the facts surrounding the charges, unnecessary friction is likely to result.

In any case where a town board is petitioned to investigate alleged misconduct on the part of the town assessor or assessors in connection with the assessment of real property, it will be necessary for the town board to determine in its initial inquiry into the allegations whether the facts involved present a *legitimate* allegation of misconduct, on the one hand, or whether they involve a review of the assessors' judgment, on the other. The former is a legitimate subject for town board investigation, while the latter is not. We recognize that the distinction between the two may not always be clear.

After an examination of the facts underlying the allegation of favoritism in the situation at hand, we incline toward the view that this is not an allegation of misconduct at all. Rather, it seems to us that the taxpayers involved are questioning the judgment of the assessors in their valuation of agricultural residences as opposed to nonagricultural residences. If so, the proper forum for this complaint is the board of assessment review (see Real Prop Tax L §512).

**Conclusion:** The town board may not review the actions of the town assessors involving the judgment of such assessors with respect to the valuation of real property within the town.

April 22, 1977.



## OPINION 77-334

**Inquiries:** (1) Does a prohibited conflict of interest exist where a member of the village board of trustees is also the president of an independently owned fire company which contracts with the village for fire protection?

(2) Does a prohibited conflict of interest exist when the owner and editor of the local newspaper, which is designated as the official newspaper for the village, is also the mayor of the village?

**Statement of Law:** (1) For the purposes of this inquiry, we assume that the fire company is a not-for-profit corporation or association comprised of volunteer firemen. By reason of General Municipal Law §801, the village trustee would have a prohibited interest in a contract between the village and the not-for-profit fire company of which he is an officer (Gen Mun L §800(2), (3). However, General Municipal Law §802(1)(f) excepts from the operation of §801 contracts with a membership corporation or other voluntary nonprofit corporation or association. Accordingly, the trustee would not have a prohibited interest in the contract for fire protection. The trustee will be required publicly to disclose in writing the nature and extent of his interest pursuant to General Municipal Law §803.

(2) The mayor, being a member of the village board of trustees, would have a prohibited interest in any contract between the village and his newspaper by reason of General Municipal Law §801.

However, General Municipal Law §802(1)(c) excepts from the operation of §801 the designation of an official newspaper. Although the mayor would not have a prohibited interest in the transaction in question, the mayor will, of course, be required to disclose publicly the nature and extent of his interest in writing pursuant to General Municipal Law §803.

**Conclusions:** (1) A prohibited conflict of interest does not arise where a member of the village board of trustees is also the president of a volunteer fire company which contracts with the village for fire protection.

(2) A prohibited conflict of interest does not exist where the owner and editor of a local newspaper, which is designated as the official newspaper for the village, is also the mayor of the village.

May 18, 1977.

## OPINION 77-338

**Inquiry:** May a member of the town planning board who was mistakenly believed to have been a resident of the town but who has, in actuality, been a

resident of neighboring town, be permitted to remain on the town planning board?

**Statement of Law:** Public Officer's Law §3(1) provides as follows:

> No person shall be capable of holding a civil office who shall not, at the time he shall be chosen thereto . . . be a citizen of the United States, a resident of the state, and if it be a local office, a resident of the political subdivision or municipal corporation of the state for which he shall be chosen, or within which the electors electing him reside, or within which his official functions are required to be exercised . . . .

Since town planning board members are public officers (18 Op St Compt 62 (1962), the provisions of Public Officers Law §3(1) are applicable in this instance. Thus, irrespective of any mistaken belief as to which town was his true residence, in order to serve on the town planning board, this individual must, in fact, be a resident of that town, the municipality for which he was chosen and within which his official functions are required to be performed (see 24 Op St Compt 778 (1968).

**Conclusion:** A town planning board member must be a town resident.

May 3, 1977.

## OPINION 77-340

**Statement of Fact:** The past practice of a town purchasing agent has been to place bid deposits in a noninterest checking account and to process a claim for the return of the deposit when the bids were finally analyzed and the contract awarded.

**Inquiry:** Inasmuch as this procedure has been protested, is the agent entitled to deposit these funds or, particularly in the case of a certified check, is he required to retain the same and ultimately return it in its original form?

**Statement of Law:** The answer to the question is contained in the last sentence of General Municipal Law §105, which provides as follows:

> A certified check, money, bonds or other obligations or security deposited to secure a bid shall be retained under the jurisdiction and control of the chief fiscal officer or other officer of the political subdivision or district having custody of its money, until returned to the bidder or forfeited.



It should be pointed out that the above-quoted provision was inserted in the law in 1973 (see L 1973 ch 356, eff 9/1/73). Since no similar provision was in the law previous to that time, it is conceivable that the commencement of "the past practice" pre-dated 1973, although there is some doubt whether there was authority even then for a municipality to place bid deposit checks in the bank.

In any case, under present law, the town is not authorized to deposit certified checks, received as bid deposits, in a checking account, because this would be a violation of the previously quoted provision of General Municipal Law §105. For what it may be worth, there is a bill before the current session of the New York State Legislature which would permit the deposit, in a bank, of certified checks received by a municipality as bid deposits. We cannot speculate, of course, on the likelihood that this bill will be signed into law (A #5459; S #2109).

**Conclusion:** Under present law, a certified check deposited to secure a bid must be retained by the chief fiscal officer of the particular political subdivision and may not be deposited in a bank account.

April 22, 1977.

## OPINION 77-360

**Inquiry:** May a town councilman simultaneously serve as administrator in the county department of buildings and grounds?

**Statement of Law:** It is assumed, for purposes of this opinion, that the administrator in question is a county officer. Accordingly, the doctrine of legal incompatibility of public offices must be considered. Briefly stated, that doctrine declares incompatible any two public offices in which there exists an inconsistency of function, or where the basic duties of each office would necessarily interfere with the other, or where the holder of one office would be required to account to or be subordinate in some way to the other (*Peo ex rel Ryan v. Green*, 58 NY 295 (1874). The powers and duties of a town councilman and such an administrator are not such as to render the two offices inherently incompatible. Therefore, we are of the opinion that the same individual may validly hold both offices.

**Conclusion:** The same individual may simultaneously serve as town councilman and administrator in the county department of buildings and grounds.

May 11, 1977.

## OPINION 77-373

**Inquiry:** May the same person simultaneously hold the offices of town councilman of one town and part-time town zoning enforcement officer of another town?

**Statement of Law:** Town Law §23 requires every town officer, with certain exceptions not here relevant, to be an elector of the town. Public Officers Law §3 also requires a town officer to be a town resident. Hence, in order for the town councilman to *be* town councilman, he must be a resident and elector of the town in question.

The same principle would apply to the holding of the office of part-time zoning enforcement officer in the second town, *i.e.*, the incumbent must be a resident and elector thereof. Since there is no way in which an individual can be a resident and elector of two towns at the same time, it becomes obvious that the same individual may not simultaneously be a councilman of one town and zoning enforcement officer of another town.

**Conclusion:** A person may not simultaneously hold the office of town councilman of one town and part-time zoning enforcement officer of another town because a town officer must be an elector of the town and there is no way in which he can be an elector of two towns at the same time.

June 10, 1977.

## OPINION 77-376

**Statement of Fact:** A village is about to embark on a relatively major project to repair and improve its water system. The improvements will involve replacing some water lines and installing some new water lines.

The town within which the village is located has indicated that it would be willing to expend town funds to pay a portion of the cost of the above-described work. The result of the repair and improvement of the water lines will be that an area in the village will lend itself to light industrial development, which allegedly stands to benefit the town as well as the village (*i.e.*, by increasing the town's tax base).

**Inquiry:** May town funds be expended to assist in the repair and improvement of a village water system in the described circumstances?



**Statement of Law:** General Municipal Law §119-o contains the provisions of law governing the performance of municipal cooperative activities. Section 119-o(1) provides in pertinent part:

> 1. In addition to any other general or special powers vested in municipal corporations . . . for the performance of their . . . functions, powers or duties on an individual, cooperative, joint or contract basis, municipal corporations . . . shall have power to enter into, amend, cancel and terminate agreements for the performance among themselves *or one for the other* of their respective functions, powers and duties on a cooperative or contract basis . . . . [Emphasis supplied]

It is our opinion that pursuant to §119-o(1), and in particular that portion thereof which we have emphasized, a village and a town could enter into an agreement pursuant to which the town would assist the village in the repair and improvement of the village water system. However, the village would have to reimburse the town for the town's expenses incurred in connection with such an agreement.

**Conclusion:** A village and a town may enter into an agreement pursuant to which the town will assist the village in the repair and improvement of the village water system, provided the town is reimbursed for its expenses.

June 27, 1977.

## OPINION 77-385

**Statement of Fact:** The board of trustees of a town public library seeks to remodel the exterior of the library building, which is owned by the town, by replacing bricks and other remodeling work at a cost of approximately $13,000. The library trustees do not have current funds available, and it is contemplated that after advertisement for bids, the work would be done in three yearly phases, each phase to be completed within a given year, with payment for each phase to be made at the completion of each phase.

**Inquiries:** (1) Is the town board or the library board to utilize the competitive bidding procedures of General Municipal Law §103?

(2) May the contract be divided into three phases, with payment for each phase to be made upon completion thereof?

**Statement of Law:** (1) In a previous opinion (1970 Op St Comp #70-709 (unreported), we stated that in substantially similar circumstances, since a

library building is a public building (indeed, the building in question is owned by the town), the town board has the right to approve the plans and specifications for the contemplated remodeling. Furthermore, a contract may not be awarded without town board approval.

(2) We feel that there is no legal impediment to the drawing of specifications in the manner proposed. The board of library trustees would be able to pay for the cost of such project with current moneys over the three-year period.

If, on the other hand, the board of library trustees does not wish to pursue the above course, the town board could issue obligations to pay for the entire cost of the project. Where the library building is owned by the town, the town would be in a position to utilize the available borrowing procedures of the Local Finance Law.

With respect to the payment of federal revenue sharing funds into a capital reserve fund, a current opinion (33 Op St Compt 37 (1977) states that payment of federal revenue sharing funds into a capital reserve fund within two years after the receipt thereof constitutes use, obligation or appropriation within the meaning of the federal regulations (31 CFR §51.00(b).

**Conclusion:** A public works project to be performed on a town public library building is governed by the provisions of General Municipal Law §103.

August 1, 1977.

## OPINION 77-390

**Inquiry:** Is a county chargeable with the cost of maintenance, care and treatment of a person remanded to a State hospital for psychiatric examination by order of the Family Court?

**Statement of Law:** Family Court Act §251, insofar as applicable, provides as follows:

> After the filing of a petition under this act over which the family court appears to have jurisdiction, the court may cause any person within its jurisdiction and the parent or other person legally responsible for the care of any child within its jurisdiction to be examined by a physician, psychiatrist or psychologist appointed or designated for the purpose by the court when such an examination will serve the purposes of this act, the court, during or after a hearing, may remand for a period not exceeding thirty days any such person for physical or psychiatric study or observation.

* * *



> (c) to a hospital maintained by the state of New York . . . .

Mental Hygiene Law §43.03, entitled "Liability for fees," indicates responsibility for fees in connection with various kinds of services provided for under the Mental Hygiene Law, including the maintenance, care and treatment which are the subject of this inquiry. Subdivision (c) of §43.03 provides as follows:

> Patients receiving services while being held pursuant to order of a criminal court *or for examination pursuant to an order of the family court* shall not be liable to the department [State Department of Mental Hygiene] for such services. Fees due the department for such services shall be paid *by the county in which such court is located* . . . . [Bracketed material and emphasis supplied]

Accordingly, in the circumstances described in this inquiry, the county is chargeable with the cost of maintenance, care and treatment of the individual remanded to the State hospital for psychiatric examination (see also 1973 Op St Compt #73-905 (unreported).

**Conclusion:** Where an order of the Family Court directs that a person in need of supervision is to be remanded to a hospital maintained by the State of New York for psychiatric examination, the cost of maintenance, care and treatment is a county charge.

June 30, 1977.

## OPINION 77-395

**Statement of Fact:** The suggested procedure for payment of water bills by a local bank would entail district customers bringing their water bills to a bank office and presenting the bills, together with the customers' so-called "Instant Transaction" card to a teller. The teller would insert the card in a terminal and the customer would, at the same time, key in a secret code known only to him to activate the transaction. The teller would also key in the amount to be paid.

Electronically, the customer's account would be debited in the amount of the bill. The bank would send the district a cashier's check for the daily total of payments received in the above-described manner. In addition, customers would receive a machine-printed record of the transaction and the bank would send the appropriate bill section to the district for proper updating of the customer's account. There would be no charge to the water district for the described service.

**Inquiry:** Are there any legal objections to the procedure?

**Statement of Law:** First of all, we assume that pursuant to the described payment procedure, individual water bills would not be deemed paid until the water district receives the cashier's check from the bank. Based upon this assumption, the described procedure simply involves the bank acting as the agent for its customers who wish to utilize the service for payment of their water bills. The district treasurer is clearly authorized to accept a cashier's check in payment of one or more water bills. Accordingly, we see no legal objections to the water district commissioners permitting a bank to implement the described procedure, provided there is no charge to the district.

**Conclusion:** The board of commissioners of a water district may permit district customers to pay their water bills through a bank, acting as their agent, provided there is no charge to the district.

June 2, 1977.

## OPINION 77-399

**Inquiry:** May a municipality pay the professional association membership dues for engineers employed by the municipality, and are membership dues in a professional association, specifically the Engineering Society, a proper town charge where the town itself seeks to join the organization?

**Statement of Law:** In a prior opinion (28 Op St Compt 159 (1972), we considered the question of municipalities paying membership dues of municipal officials in an association or organization composed of municipal officials. In that opinion, we took the position that a municipality could pay such dues only where membership in the organization is required as part of the duties of office. Membership could be required by a municipality only where it has been affirmatively determined that membership would be beneficial to the official in the performance of his duties, and where there is a close relationship between the activities of the organization and the duties of the official. The municipality would have to determine that the organization is composed exclusively of municipal officials and that one of the organization's primary objectives is local government efficiency. Finally, we stated that the municipality should not require membership by the same official in a number of organizations whose essential purpose and activities are similar in nature.

We stated in the above-cited opinion, with regard to professional associations of a nonmunicipal nature, as follows:

> Under no circumstances do we feel that membership could be required in an association with a membership that is not composed exclusively of municipal officials. Therefore, it is our position that membership in bar associations, accounting and business societies, scientific organizations, and the like, would be improper, since such associations do not have the efficiency of local government as their principal concern. The membership of a municipal official in such an organization would, quite clearly, be beneficial to the municipal official in a personal manner rather than beneficial to him as the official of a municipality.



It appears obvious that the instant engineering association would not be composed exclusively of municipal officials and would be that type of professional association which is not municipally oriented, benefiting the engineers in, primarily, a personal manner rather than in their capacities as the officials or employees of a municipality. Therefore, the municipality may not pay the engineers' dues in such organization.

In another opinion (23 Op St Compt 352 (1967), with regard to the situation where a town itself seeks membership in an association, we stated as follows:

> It is this Department's opinion that a town may properly become a dues paying member of an organization which has as its purpose the fostering of better municipal government. Such organizations, while they need not be made up entirely of municipalities, should have as their primary concern the problems of municipalities. (see also 23 Op St Compt 565 (1967).

As indicated above, the Engineering Society apparently is not the type of organization which has as its primary purpose the fostering of better municipal government. However, we feel that should a municipality's governing board be of the opinion that membership by the municipality itself in the organization would help improve the governmental functions of such municipality by, for example, enabling the municipality to receive various publications of such organization relating to municipal government, then, in our opinion, it would be proper for such municipality to pay the necessary membership dues on its own behalf. It is our opinion that such an expense, incurred for the purpose of bettering governmental functions, would be an expense necessarily incurred for the benefit of the town (Town L §116(1); 23 Op St Compt 565 (1967). To the extent that this conclusion is inconsistent with the opinions previously cited, we hereby overrule those opinions.

**Conclusion:** A municipality may not pay the membership dues of an engineer in an engineering organization where such organization is not composed exclusively of municipal officials and where the primary objective of such organization is not local government efficiency. However, where a municipality's governing board is of the opinion that joining such an organization would help improve municipal government functions through the receipt of literature, etc., the municipality itself may join and pay the necessary fees.

June 28, 1977.

## OPINION 77-401

**Inquiry:** Does the mailing of specifications to potentially interested bidders consitute a permissible procedure within the meaning of General Municipal Law §103?

**Statement of Law:** Generally speaking, all contracts for public work in excess of $3,500 and all purchase contracts in excess of $1,500 are subject to competitive bidding requirements, with such contracts being awarded to the lowest responsible bidder furnishing the required security after advertisement for sealed bids. In addition, General Municipal Law §103(2) provides as follows:

> Advertisement for bids shall be published in the official newspaper or newspapers, if any, or otherwise in a newspaper or newspapers designated for such purpose.

We do not think that anything contained within any of the aforementioned statutory material, or any other law, would prohibit a municipality from mailing copies of specifications to potentially interested bidders. We must emphasize that such mailing must be performed in good faith by the municipality, that is, the specifications should not be sent only to a favored few but should be sent to all known bidders, within reasonable limitations.

Therefore, we are of the opinion that a municipality may mail copies of bid specifications to potentially interested bidders, in addition to complying with the statutory requirements of General Municipal Law §103.

**Conclusion:** A municipality may mail copies of bid specifications to prospective bidders.

July 12, 1977.

## OPINION 77-409

**Inquiry:** Where a town board has established a recreation commission, does the authority to employ a recreation director lie with such commission or with the town board?

**Statement of Law:** Town Law §20(1)(a) provides that in a town of the first class, all officers, other than elective officers, and all employees, shall be appointed by the town board, *except as otherwise provided by law.*

General Municipal Law §243 authorizes a town board, by resolution, to establish a town recreation commission. General Municipal Law §244 provides



that a recreation commission " . . . may employ such persons as may be needed, as authorized by this act and pursuant to law."

General Municipal Law §244 is clearly the type of exception referred to in Town Law §20(1)(a), and, therefore, where a town board has established a recreation commission, the commission and not the town board has authority to employ a recreation director. This Department reached the same conclusion, which we hereby reaffirm (12 Op St Compt 45 (1956).

In another opinion (1969 Op St Compt #69-306 (unreported), we discussed several questions which bear upon the relationship between a town board and a town recreation commission.

**Conclusion:** Where a town board has established a recreation commission, the commission and not the town board has the authority to employ a recreation director.

May 27, 1977.

## OPINION 77-412

**Inquiry:** Does a town justice, after imposing a fine for a traffic infraction on a defendant who has appeared by mail and waived arraingment, have the right, at a subsequent time on his own motion, for reasons which are sufficient to the justice, to do either of the following:

(1) suspend payment of the fine; or

(2) change the sentence from a fine to conditional discharge

and thereafter report the case as "closed" on the monthly report to the State Comptroller?

**Statement of Law:** Before going further, we must point out that courts in New York State are no longer authorized either to suspend a sentence or to suspend the execution of sentence. This is borne out by reference to Penal Law §60.01, entitled "Authorized dispositions; generally," and to the practice commentary following that section (see also *Peo v. Darling*, 50 AD2d 939, 377 NYS2d 196 (1975). It is clear now that the former device of a suspended sentence has been replaced by three new sentences — namely, probation, conditional discharge and unconditional discharge. Accordingly, that part of the inquiry dealing with a suspended sentence is academic and we shall limit our discussion to the subject of conditional discharge.

The right of a defendant charged with a traffic infraction to appear by mail, waive arraignment in open court, waive the aid of counsel, and plead guilty to the offense as charged, is set forth in Vehicle and Traffic Law §1805. That

statute provides that after the defendant duly submits his application to appear by mail to the local criminal court, such court has certain prerogatives. In that connection, the statute provides, in part:

> Thereupon the local criminal court may proceed as though the defendant had been convicted upon a plea of guilty in open court, provided, however, that any imposition of fine or penalty hereunder shall be deemed tentative until such fine or penalty shall have been paid and discharged in full, prior to which time such court, in its discretion, may annul any proceedings hereunder, including such tentative imposition of fine or penalty, and deny the application, in which event the charge shall be disposed of pursuant to the applicable provisions of law, as though no proceedings had been had under this section.

From a reading of the above-quoted statutory language, it becomes apparent that if the justice, having once imposed a fine (notwithstanding that the fine is deemed tentative until paid in full), desires to change the sentence thereafter, he must first annul all proceedings taken and deny the application from its inception. The result of this is that he must then dispose of the charge in the usual manner, through arraignment in open court etc., as though no proceedings had ever been had under §1805. Obviously, at that time upon a guilty plea, the justice could, if he so desired, impose a sentence of conditional discharge.

It is to be noted that under the provisions of Penal Law §60.20, when a person is convicted of a traffic infraction, the sentence of the court shall be either:

> (a) A period of conditional discharge, as provided in article sixty-five [see §65.05]; or
>
> (b) Unconditional discharge as provided in section 65.20; or
>
> (c) A fine or a sentence to a term of imprisonment, or both, as prescribed in and authorized by the provision that defines the infraction; or
>
> (d) A sentence of intermittent imprisonment, as provided in article eighty-five.

The above-authorized dispositions or sentences are available to the justice when he first receives the application by mail provided for in Vehicle and Traffic Law §1805. They are also available when, after having imposed a fine and not receiving the same, he annuls all of the proceedings under §1805 and disposes of the traffic infraction without regard to §1805. In this latter instance, the ultimate disposition is equated with an original disposition. There is no authorization in the law for the justice, after having first imposed a fine under §1805, to act on his own motion and, without more, simply change it to either a conditional discharge or to some other disposition.

One special instance exists where a justice who has imposed a fine may summarily either change the terms of the original sentence or revoke the same entirely and impose any other sentence which he might have originally imposed. That instance is set forth in Criminal Procedure Law §420.10(4), which provides that in any case where the defendant is unable to pay a fine imposed by the court, he may at any time apply to the court for resentence. This procedure would seem to be available under the provisions of Vehicle and Traffic Law §1805 in a case where a defendant has appeared by mail and has been subjected to a fine. It is to be noted, however, that here, again, the justice may not simply alter a sentence on his own motion.



With respect to the last part of the inquiry, concerning the reporting of the case as "closed" on the monthly report to the State Comptroller, the answer simply is that where a fine has initially been imposed, the case cannot be reported as "closed" until the justice has received the fine, unless one of the previously mentioned statutory exceptions is met and unless the sentence is changed or revoked pursuant to such an exception. In other words, apart from the aforesaid exceptions, the tenets expressed in a prior opinion (22 Op St Compt 60 (1966) would generally apply and the justice could not mark a case "closed" until he has received the fine which he has imposed as a sentence.

**Conclusion:** Where a town justice has imposed a fine for a traffic infraction against a defendant who has appeared by mail and waived arraignment, the justice may not, at a subsequent time on his own motion, summarily change the sentence to conditional discharge.

June 13, 1977.

## OPINION 77-430

**Inquiries:** (1) May a town, without the express authorization of the State Legislature, "lease" lands, which have been dedicated for park purposes, to a private natural gas company for the purpose of drilling a specified and limited number of gas wells, if such drilling does not interfere with the intended park and recreation uses?

(2) May a town, without the express authorization of the State Legislature, enter into an agreement permitting these parklands to be made a part of a "pooled area," where such agreement specifies that no wells will be drilled on the town park land?

**Statement of Law:** (1) It is a well-established principle of municipal law that property owned by a municipality and dedicated to park purposes is held in trust for the public and cannot be alienated by sale or lease, nor may its use be discontinued, without express legislative authorization (*Brooklyn Park Com-*

*missioners v. Armstrong,* 45 NY 234, 6 AR 70 (1871), rev'g 3 Lans 429; *Miller v. City of New York,* 39 M2d 424, 240 NYS2d 716, mod 20 AD2d 720, 247 NYS2d 496, aff'd 15 NY2d 34, 255 NYS2d 78 (1964); *Gewirtz v. City of Long Beach,* 69 M2d 763, 330 NYS2d 495, aff'd 45 AD2d 841, 358 NYS2d 957, mot for lv to app den 35 NY2d 644, 364 NYS2d 1025 (1974); 25 Op St Compt 241 (1969). In addition, where State funds are used to purchase parklands, as in this case, Parks and Recreation Law § 15.09 provides that such lands may not be conveyed without specific legislative authorization.

Gas and oil "leases" differ from ordinary leases to such an extent that they are often deemed *sui generis* (37 NY Jur, *Mines and Minerals,* §26). It follows, then, that it is often difficult to determine exactly what type of interest in real property, if any, a gas "lessee" is receiving under a given instrument (38 Am Jur2d, *Gas and Oil,* §66).

Generally, the instrument granting the right to drill wells is intended to be a lease in the common law sense, in that the parties intend to convey to the lessee a present interest or estate in the land itself, rather than a mere grant of the right to explore for and produce oil or gas on such land (see 38 Am Jur2d, *Gas and Oil,* §69; 37 NY Jur, *Mines and Minerals,* §27). If that is the case in this instance, then, clearly, absent specific State legislative authority, the municipality may not grant to a private gas company such an interest in any municipal lands which are dedicated for park use (see 1975 Op Atty Gen 130 (informal); *Colonna v. State,* 224 AD 173, 230 NYS 19, aff'd 253 NY 595, 171 NE 797 (1930).

However, it is also possible for the parties to contemplate only a grant in the nature of a "license" to the gas company, revocable at will by the municipality, for the privilege of entering parklands and exploring for gas (see 38 Am Jur2d, *Gas and Oil,* §68).

The Department has expressed the opinion that a municipality may grant certain revocable permits, licenses or concessions to private parties with respect to parklands without express legislative authorization (23 Op St Compt 429 (1967); see also *Miller v. City of New York* (*supra*); *Williams v. Hylan,* 129 M 654, 222 NYS 163, rev'd 223 AD 48, 227 NYS 392, aff'd 248 NY 616, 162 NE 547 (1928). However, it is our opinion that a "license" to explore for gas on municipal parklands stands on somewhat different footing.

In most instances where we have said that a municipality may grant a revocable license or concession, such license or concession was for the operation of a service which might be operated in a park and was related to parks and recreation (23 Op St Compt 429 (1967) (restaurant); 6 Op St Compt 346 (1950) (ski lift); 23 Op St Compt 416 (1967) (tennis lessons).

In our opinion, drilling and exploring for gas on municipal parklands would not be the type of activity for which such a "license" could be granted. Such activity is not related to park purposes, and, although the letter of inquiry states that the drilling will not interfere with the intended park and recreation uses, it is

CONTINUED

1 OF 3

difficult to conceive of gas drilling apparatus being located on parklands which would not, at least to some extent, interfere with the public's enjoyment of the parklands.

Furthermore, such "licenses" to explore generally contemplate the vesting of a conditional estate in the licensee in the event of the discovery of gas within the time specified in the license (38 Am Jur2d, *Gas and Oil*, §68). Therefore, if the town should grant such a license, and if gas is discovered, an interest in the parklands would then vest in the licensee and such interest would, then, violate the rule against alienation of public parklands other than by express legislative authorization.

Finally, regarding a somewhat similar situation concerning the drilling of a water well on public parklands, this Department stated as follows (1971 Op St Compt #71-277 (unreported):

> Real property acquired for park purposes is held for the use of the public, and no portion may be alienated or transferred. Any permission for the use of any portion of the park property for the purpose of drilling a well, *regardless of the nature of the permission*, would be such an alienation and thus prohibited. [Emphasis added]

In light of the fact that it is indicated that the park property under consideration was purchased in part with State funds, we feel it pertinent to note, by way of analogy, that Environmental Conservation Law §23-1101 provides as follows with regard to oil and gas leases for State land:

> 1. The department may make leases on behalf of this state for the exploration, development and production of oil and gas in state owned lands, *except state park lands* . . . [Emphasis added]
>
> 2. All oil and gas leases shall
>
> e. Be inapplicable to any state park lands . . . .

Thus, in our opinion, absent express legislative authorization, a municipality may not enter into an agreement whereby a private natural gas company obtains the right to drill gas wells on municipal lands which have been dedicated for park purposes, regardless of whether such agreement is intended to be a "lease" or a "license."

(2) The second question deals with the propriety of a municipality entering into an agreement which would permit the parkland acreage to be part of a "pool" for gas extraction purposes. As indicated in the inquiry, the actual drilling and the location of any wells would be on private lands within the "pooled area" and not public parklands. Thus, any gas which might underlie the parkland would be extracted by wells located on private nonpark property. We are informed that the municipality would share in the royalties on a pro rata basis.

It would appear that agreeing to utilize public parkland as part of "pooled" acreage for the purpose of extracting the gas underlying such acreage would not violate the rule against alienating parklands without express State legislative

authority.

Basically, the portion of the municipal parkland which is necessary for park and recreation use is the "surface" land and the natural formations thereon. It is the opinion of this Department that when municipal parklands are utilized to compose a portion of a "pool" and no wells are being drilled on these lands, the "surface" land remains wholly unalienated by the municipality. The mere permission to include the acreage of the parkland within the "pool" acreage and to remove any underlying gas in exchange for a pro rata share of the royalties does not give the gas company any interest or estate in the "surface" lands.

37 NY Jur, *Mines and Minerals,* §18 states as follows with regard to the rights of owners of land containing oil and gas:

> [T]he landowner cannot convey title to oil and gas in situ apart from his estate in the land as a whole. Nevertheless, he has the power to create separate and distinct legal interests in the land and in the oil and gas thereunder by proper operative acts. . . . [A]ll of the oil rights vested in the owner of land may be severed from the general estate and transferred to a grantee.

Therefore, it would appear that a municipality may, in a "pooling" agreement, grant permission to a private gas company to extract any gas existing beneath the surface of the parklands by use of wells located on nonpark property without contravening the restriction on alienation of such lands. The municipality, in granting the right to remove underlying oil, would not be granting any interest or estate in the surface lands and thus would not be alienating such lands.

Furthermore, while gas and oil in place beneath the surface of the land constitutes realty (1948 Op Atty Gen 195 (formal); 37 NY Jur, *Mines and Minerals,* §9), General Construction Law §39 provides as follows:

> Oil wells and all fixtures connected therewith, situate on lands leased for oil purposes and oil interests, and rights held under and by virtue of any lease or contract or other right or license to operate for or produce petroleum oil, shall be deemed personal property for all purposes except taxation.

Thus, the rights granted by the town and received by the private gas company under the "pooling" agreement, that is, the right to include the parklands in the "pooled" acreage and to remove any underlying gas, are deemed to be personal property.

The power to dispose of surplus or unneeded town personal property is a necessary incident to the management and control thereof vested in the town board under Town Law §64(3) (3 Op St Compt 511 (1947). It appears clear that the personal property in this instance is not needed by the town for any governmental purpose. Therefore, it may be conveyed pursuant to the usual procedures with respect to the conveyance of surplus or unneeded personal



property of the town.

The town board must approve and adopt a resolution authorizing the proposed agreement. However, there is no requirement of a public auction or advertisement for bids provided that the town board is satisfied that the consideration to be received in the form of royalties is fair and adequate (1971 Op St Compt #71-777 (unreported); 14 Op St Compt 408 (1958).

**Conclusions:** (1) Absent specific legislative authorization, a municipality may not "lease" municipal parklands to a private natural gas company for the purpose of drilling a specified and limited number of gas wells.

(2) A municipality may enter into a gas pooling or spacing unit agreement whereby municipal parklands are used in such pool, and gas underlying such lands may be extracted in exchange for a portion of royalties, so long as any actual drilling is done on nonparklands.

July 8, 1977.

## OPINION 77-433

**Inquiry:** May a town enact a local law providing that the town shall not be liable for damages caused persons due to the defective conditions of town streets and highways in the absence of prior written notice to the town of the existence of such conditions?

**Statement of Law:** Town Law §65-a(1) provides, in part, as follows:

> 1. No civil action shall be maintained against any town or town superintendent of highways for damages or injuries to person or property sustained by reason of any highway, bridge or culvert being defective, out of repair, unsafe, dangerous or obstructed unless written notice of such defective, unsafe, dangerous or obstructed condition of such highway, bridge or culvert was actually given to the town clerk or town superintendent of highways, and that there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger or obstruction complained of, or, in the absence of such notice, unless such defective, unsafe, dangerous or obstructed condition existed for so long a period that the same should have been discovered and remedied in the exercise of reasonable care and diligence . . . .

Thus, the foregoing statute requires, as a prerequisite to the institution of a lawsuit for damages caused by a defective highway condition, either actual or constructive notice of such condition. The local law under consideration would

eliminate the provision of §65-a(1) relating to constructive notice and preclude a lawsuit for damages unless, in every instance, there was actual notice of the defect.

Municipal Home Rule Law §10(1)(ii)(d)(3) authorizes a town to adopt local laws, not inconsistent with the State Constitution or with a general law, which involve:

> The amendment or supersession in its application to it, of any provision of the town law relating to the property, affairs or government of the town or to other matters in relation to which and to the extent to which it is authorized to adopt local laws by this section, notwithstanding that such provision is a general law, unless the legislature expressly shall have prohibited the adoption of such a local law.

Quite clearly, then, a town by local law may supersede Town Law §65-a by eliminating the provision for constructive notice, unless such a local law is offensive to the State (or federal) Constitution. This very question was involved in *Fullerton v. City of Schenectady* (285 AD 545, 138 NYS2d 916, aff'd 309 NY 701, 128 NE2d 413, rearg den 309 NY 854, 130 NE2d 909, app dis 76 S Ct 468, 350 US 980). The court held therein that a city possesses home rule power to adopt a local law which, in effect, was identical to the one here under consideration, and that such a local enactment was not prohibited on any constitutional grounds (see also *Weingarten v. City of Long Beach*, 154 NYS2d 101 (1956). The rationale of the *Fullerton* case would apply as well to the adoption of a similar local law by a town or other municipality.

**Conclusion:** A town may adopt a local law to provide that no action may be maintained against the town for damages caused by defective conditions of town streets and highways unless prior written notice of such defects was actually given to the town.

June 20, 1977.

## OPINION 77-434

**Statement of Fact:** A plan to compromise delinquent real property taxes owed by the bankrupt Penn Central Railroad was recently approved by the United States District Court for the Eastern District of Pennsylvania. Pursuant to the plan, taxing jurisdictions have been offered (and may accept) 50% of the unpaid taxes, exclusive of interest and penalties, in full settlement of the tax liability of such railroad. The county attorney is concerned as to how the county



will be able to pay the State the full amount of the delinquent grade crossing elimination charges owed by Penn Central if it accepts the 50% compromise plan.

**Inquiry:** Does the county have the authority to compromise delinquent grade crossing elimination charges owed to the State by the railroad?

**Statement of Law:** First of all, it should be noted that certain expenses incurred for the elimination of railroad grade crossings are borne first by the State and then subsequently repaid by the railroad companies involved in accordance with the procedure detailed in Transportation Law §§223 and 224. Section 224 prescribes the method of collecting installments where the railroad is in default of payment. It states in part:

> In the event of the failure or refusal of the railroad company or the successor thereof, to pay the amount or amounts specified and at the times prescribed, or in the event of dissolution of such railroad company or successor, the entire indebtedness of such company in the process of dissolution shall become immediately due and payable and the amount or amounts so due and payable may be recovered as follows:
>
> The comptroller may certify the amount or amounts so due and payable to the governing body of the county or counties in which the crossing is located, whereupon, it shall be the duty of such governing body to apportion the amount or amounts so certified to the several towns and cities in such county according to the assessed valuation of the real property of such railroad company or the successor thereof in such respective towns and cities and to place the several amounts so apportioned on the respective assessment rolls of such towns and cities and to issue its warrant or warrants for the collection thereof. Thereupon it shall become the duty of such towns and cities through their appropriate officers to collect the respective several amounts so apportioned in the same manner as other taxes are collected in such towns and cities and when collected to pay the same to the county treasurer of such county who shall thereupon pay the same into the state treasury. Any amount so levied shall thereupon become and be a first and paramount lien upon all real property of such railroad company or the successor thereof within such respective towns and cities.

Section 224 clearly provides for the collection of delinquent grade crossing elimination charges owed to the State in the same manner as other taxes. However, this Department has previously expressed the view that while the amounts levied by a county pursuant to §224 are required to be collected in the same manner as other taxes, such amounts are *not* a part of the county tax (1976

Op St Compt #76-931 (unreported).

The Comptroller recently rendered an opinion stating that municipalities may accept the previously described plan to compromise delinquent real property *taxes* owed by the Penn Central Railroad (1977 Op St Compt #77-204 (unreported). This opinion was predicated upon the provisions of Laws of 1959 chapter 817 (McKinney's Unconsol L §9351), which relate to the compromise or cancellation of unpaid *taxes*, penalties and interest owed by railroad corporations in receivership.

Inasmuch as the delinquent grade crossing elimination charges owed to the State by Penn Central, and levied by the counties in accordance with the provisions of Transportation Law §224, are not part of the county tax, the views expressed in the above-cited 1977 opinion (*supra*) have no application to this inquiry. Therefore, counties may not compromise claims for delinquent grade crossing elimination charges pursuant to the provisions of McKinney's Unconsolidated Laws §9351.

Furthermore, and of greater significance, is the fact that the grade crossing elimination charges represent moneys owed by Penn Central to the State, not to the counties (see 1971 Op St Compt #71-995 (unreported). In the absence of proper authorization from the State, a county has no authority to compromise a claim of the State against a third party.

In view of the foregoing, it is our opinion that in the absence of proper authorization from the State, a county may not compromise the amount of delinquent grade crossing elimination charges owed to the State by the Penn Central Railroad. Therefore, if a county wishes to accept payment of 50% of the unpaid taxes owed by Penn Central, exclusive of interest and penalties, in full settlement of *such county's* claim for taxes owed by such railroad, the county should take whatever steps are necessary to separate the amount of delinquent grade crossing elimination charges owed to the State from the amount of taxes owed by such railroad to the county. The exact amount of grade crossing elimination charges owed to the State by Penn Central in the various counties may be ascertained by contacting Mr. L. Robert Allen, Supervisor, State Revenues and Receivables, Department of Audit and Control, State Office Building, Albany, New York, 12236.

**Conclusion:** In the absence of proper authorization from the State, a county may not compromise the amount of delinquent grade crossing elimination charges owed to the State by the Penn Central Railroad.

June 2, 1977.



## OPINION 77-436

**Statement of Fact:** The City of Rochester contracts with Rochester Gas and Electric Company, a local public utility company, for the furnishing of a street lighting system for city streets. Increasing costs of extensions to the system and replacement parts and equipment have rendered it such that the city would find it more economical to purchase such replacements and extensions on its own, rather than having the utility make such purchases and transfer the higher cost thereof to the city. The city has no plans to acquire and/or operate such public utility service.

**Inquiry:** Would the purchase of such replacements and extensions by the city require the adoption of a local law and the submission thereof to a mandatory referendum, pursuant to General Municipal Law §360?

**Statement of Law:** General Municipal Law §360(2) authorizes a municipal corporation to construct, lease, purchase, own, acquire, use and/or operate any public utility service for the purpose of furnishing any service which public utility companies may furnish pursuant to Public Service Law Article 4. Subdivision (3) thereof requires that the proposed method of constructing, leasing, purchasing and acquiring such public utility service shall be fixed by ordinance, resolution or local law, as the case may be. Furthermore, subdivision (5) thereof requires that the appropriate legislation be submitted to the electors of the municipality for approval by mandatory referendum.

While §360(1) defines "public utility service" to include, among other things, poles, lines, wires, conduits and all other real and personal property used in connection with the furnishing of such services, we are quite sure that the purchase of extensions and replacements, without more, does not require a utilization of the mandatory referendum requirements of §360(5). The mandatory referendum requirements would be applicable only where the municipality was effecting a complete takeover of the public utility system.

It is assumed, of course, that the city will retain title to any extensions and replacements which it purchases.

**Conclusion:** The purchase by a city of equipment for extensions to, and replacement parts for use in, a public utility system is not subject to referendum requirements where such system continues to be operated by a public utility.

June 28, 1977.

## OPINION 77-444

**Inquiry:** May a town declare that buildings, which are vacant and dilapidated or in a state of disrepair, are unsafe solely because of the danger posed to children who trespass on the premises and require the safeguarding, repair or demolition and removal thereof?

**Statement of Law:** Town Law §130(16) authorizes a town to provide by ordinance for the removal or repair of buildings which are dangerous or unsafe to the public. Local legislation must be adopted implementing the provisions of the said statute. It is interesting to note that the statute authorizes the removal of any buildings which are dangerous or unsafe to the public "from any cause." However, it would seem that contemplated by the statute are buildings which are structually defective or a public hazard by reason of the potential collapse or all or a portion thereof, since paragraph (a) requires an initial inspection of the premises and paragraph (d), following the notice to repair, which has not been complied with, requires a survey of the building to be made by architects, engineers and builders.

The provisions of Town Law §130(16) set forth the sole ordinance-making powers of a town in this regard. Nevertheless, it is our opinion that a town may go beyond the ordinance-making power and may adopt its implementing legislation in the form of a local law which may define other conditions and circumstances under which a building is to be considered unsafe, dangerous and a public hazard (Mun HRL §10(1)(ii)(d)(3). Of course, at all times, the town board must bear in mind that any such legislation must stay within the bounds of due process (see State Const Article I §6).

The question is, therefore, whether the town may determine that a structure is unsafe only because the condition thereof poses a threat to children who might go into the building or onto the premises without the consent of the owner thereof. Municipal police powers are very broad, and a local legislative body is justified, by the enactment of appropriate legislation, in guarding against any evil which fairly may be anticipated. On the other hand, such legislation must not be arbitrary, discriminatory, capricious or unreasonable and must have a real and substantial relation to the object sought to be obtained, namely, the health, safety, morals or general welfare of the public (*Good Humor Corp. v. City of New York*, 264 AD 620, 36 NYS2d 85, 290 NY 312, 49 NE2d 153 (1943); *Monarski v. Alexandrides*, 362 NYS2d 976, 80 M2d 260 (1974); *Tymchuk v. City of Rochester*, 43 M2d 98, 250 NYS2d 202 (1964).

In the instant case, young children well might be attracted to this structure in play, and, unaware of the dangers therein, be injured. It seems that the town board would be justified in recognizing such a possiblity and, for the protection of the youngsters, even though, technically, they would be "trespassers," in requiring the owner to do something to eliminate the hazard. Whether this



would require that the building be safeguarded, by, for example, the erection of barricades or fencing, or whether it would require substantial repairs or even demolition in an extreme case, is necessarily a question of fact, based on attendant circumstances.

In addition to the above-described threat to children playing, it is also possible that the structure might be inviting to teenagers and, perhaps, transients or vagrants. It would be more difficult to justify any very drastic legislation for the *protection* of these persons, but a good argument in justification could be made that the presence of teenagers and vagrants in the structure is not in the interests of public health, morals and safety, especially in view of the increased danger from fire which could be occasioned by smoking therein.

We must point out, however, that unless delay will imperil life and limb, no action could be taken against the building without first giving the owner a sufficient notice, hearing and ample opportunity for him to repair or demolish the building or to do what suffices to make it safe (see discussion in McQuillin Mun Corp, V. 7, §§24.558 *et seq.*, with respect to power of a municipality to require repair or removal of buildings which are public nuisances). We would think that the proposed local law should be patterned after the provisions of Town Law §130(16), with respect to notice, public hearing and the like. Otherwise, a serious question of due process could arise.

Also the town board should not be hasty about legislating demolition of such a building, or even costly repairs, in any case where simple safeguards could be the answer. Again, due process is an important consideration. It is an accepted legal principle that a local law may not be inconsistent with the Constitution (Mun HRL §10(1)(ii).

In summary, a municipality, in the exercise of its police powers, may, by local law, require the safeguarding, repair or demolition and removal of vacant, dilapidated buildings which present a potential hazard to young children who may be attracted to them, and play in and about the premises, or which are inimical to the public health, safety and morals by reason of the frequenting of them by older children or vagrants. Such powers must be exercised within the constitutional boundaries of due process.

**Conclusion:** A municipality, in the exercise of its police power, but subject to principles of due process, may, by local law, provide for the safeguarding, repair or possibly demolition and removal, by the owner, of vacant, dilapidated buildings which are a hazard to young children who enter upon the premises.

August 1, 1977.

## OPINION 77-457

**Inquiries:** (1) Is a county which has not elected to provide disability benefits under Workmen's Compensation Law Article 9 required to pay such benefits for pregnancy?

(2) Is a county which has a sick leave plan required to provide sick leave benefits for pregnancy?

**Statement of Law:** (1) Workmen's Compensation Law Article 9 — the Disability Benefits Law — requires covered employers to provide benefits to employees who are disabled from nonwork-related causes. A county is not a covered "employer" as that term is defined in the Act (Work Comp L §201(4). A county may, however, elect to provide disability benefits to its employees (Work Comp L §212(2). If so, it is subject to the provisions of Article 9.

Since a county's participation in the Disability Benefits Law is optional, a county which chooses not to provide disability benefits is not required to pay such benefits to a woman for disability resulting from pregnancy. The Court of Appeals held on December 20, 1976 that the provision in the Human Rights Law prohibiting discrimination in employment on account of sex (Exec L §296(1)(a) required a *covered employer* to pay disability benefits for pregnancy, even through the Disability Benefits Law in effect at that time excluded such coverage (Work Comp L §205(3); *Brooklyn Union Gas Company v. New York State Human Rights Appeal Board et al.*, 50 AD2d 381, 378 NYS2d 720, rev'd 41 NY2d 84, 390 NYS2d 884 (1976).

The 1977 State Legislature amended Workmen's Compensation Law §205, effective August 3, 1977. The effect of such amendment is to entitle employees to a maximum of eight weeks of benefits for disability (except where due to complications) caused by pregnancy (L 1977, ch 675). Such section now reads in pertinent part as follows:

> No employee shall be entitled to benefits under this article:
>
> * * *
>
> 3. notwithstanding any other provision of law, for a period of disability in excess of eight weeks caused by or arising in connection with a pregnancy except for a period of disability occurring as a result of a complication of such pregnancy, and the liability of the employer or the chairman as provided in this article shall be the exclusive statutory remedy of an employee for disability caused by or arising in connection with a pregnancy.

The effect of this 1977 amendment is to make Workmen's Compensation Law Article 9 the exclusive statutory remedy for the recovery of pregnancy-related disability benefits by an employee. Thus, the amendment supersedes the holding in *Brooklyn Union Gas Company (supra)*, insofar as disability benefits



are concerned, assuming, of course, that the statute is held to be constitutional. The amendment, however, does not change the rule that a municipality which does not provide disability benefits under Article 9 is not obligated to pay such benefits for pregnancy.

(2) With respect to sick leave benefits, the Court of Appeals has held that the Human Rights Law prohibits private and public employers from discriminating against women by denying sick leave benefits for absence caused by pregnancy (*Brooklyn Union Gas Company (supra)*; *Board of Education of City of New York v. State Division of Human Rights*, 42 AD2d 854, 346 NYS2d 843, aff'd 35 NY2d 675, 360 NYS2d 887 (1974); see also *State Division of Human Rights v. Board of Education, Draper School Dist., Town of Rotterdam*, 51 AD2d 357, 381 NYS2d 544, aff'd 40 NY2d 1021, 391 NYS2d 532 (1976).

The court in the *Brooklyn Union Gas Company* case expressly stated that sick leave is a benefit area outside the scope of the Disability Benefits Law in Article 9 of the Workmen's Compensation Law. In our opinion, therefore, the language in the 1977 amendment of Workmen's Compensation Law §205(3) (quoted *supra*), which makes Article 9 of that law the exclusive statutory remedy for employees to recover disability benefits for pregnancy, does not apply to sick leave plans provided by private or public employers. Hence, a county which provides sick leave benefits for its employees is required, under the Human Rights Law, to provide such benefits to women incapacitated as a result of pregnancy. It is unlawful discrimination to treat such incapacity less favorably than other sicknesses. The exact nature and extent of sick leave benefits depends on each individual plan, of course. We advise counties and other municipalities to consult the cases cited above, and the cases cited within those decisions, for the effect of the anti-discrimination provisions of the Human Rights Law on individual sick leave plans.

**Conclusions:** (1) A county which does not elect to provide disability benefits to its employees pursuant to Workmen's Compensation Law Article 9 is not required to pay disability benefits for pregnancy.

(2) A county which has a sick leave plan must grant sick leave benefits for incapacitation caused by pregnancy.

September 22, 1977.

## OPINION 77-463

**Inquiry:** Where a town is purchasing federal government obligations through a brokerage firm, is it necessary that such firm be listed on the resolution designating the depositories for town funds?

**Statement of Law:** Pursuant to Town Law §64(1) a town board is required to designate by resolution the *banks* or *trust companies* of this State in which the supervisor, town clerk, tax collector, tax receiver, and trustees of the free-holders and commonalty of a town must deposit all moneys coming into their hands by virtue of their offices.

General Municipal Law §11 empowers the governing board of a municipal corporation to authorize the chief fiscal officer temporarily to invest certain municipal funds which are not required for immediate expenditure in, among other things, obligations of the United States of America.

Depositories hold town funds in demand accounts (checking accounts) and a depository must be a bank or trust company. The investment of "surplus" town moneys is a separate and distinct transaction from the deposit of town funds in a depository and each is regulated and governed by a different statute.

Thus, a brokerage firm, through which a town purchases federal obligations for investment purposes, would not (and could not) be listed on the resolution designating the depositories for the town.

In regard to the purchase of obligations for investment purposes, General Municipal Law §11(2)(b) requires that such obligations, unless registered or inscribed in the name of the municipal corporation, except for New York City, must be purchased through, delivered to and held in the custody of a bank or trust company in this State. Since the federal obligations in question appear to have been purchased through a brokerage firm and not through a bank or trust company, we assume that for the purposes of this inquiry, the obligations are registered or inscribed in the name of the town.

**Conclusion:** Where a town is purchasing federal government obligations through a brokerage firm, such firm need not and cannot be listed on the resolution designating the depositories for town funds.

June 10. 1977.

## OPINION 77-471

**Inquiry:** May a village sell gravel to a private contractor with whom it has previously entered into a contract for the installation of a sewage collection system?

**Statement of Law:** As a general rule, municipalities, including villages, are not authorized to engage in commercial activities. The sale of gravel from a village gravel pit would, in our opinion, normally come within the prohibition against engaging in a commercial enterprise.



However, Village Law §1-102(1) provides, in pertinent part, that a village may convey such real and personal property as the purposes of the village may require. A condition precedent to the conveyance of any village property, real or personal, is that such property no longer be needed for village purposes.

Accordingly, if the gravel is no longer needed for village purposes, the board of trustees could, by resolution, authorize the sale thereof. While there is no requirement that any such sale be at public auction, the board of trustees would of course be obligated to obtain fair and adequate consideration.

**Conclusion:** A village may not sell gravel from a village gravel pit to a private individual unless such gravel is no longer necessary for village purposes.

July 12, 1977.

## OPINION 77-472

**Inquiry:** Is either public notice or a public hearing necessary before a village may increase its sewer rents?

**Statement of Law:** General Municipal Law §452 contains the provisions of law governing the establishment of sewer rents for use of the village sewer system. Section 452(2), insofar as pertinent to the village in question, provides that "sewer rents may be established or imposed only by . . . local law or ordinance." The village in question adopted a sewer rent ordinance which became effective in November, 1965.

With respect to the requirement that village sewer rents be imposed only by local law or ordinance contained in §452(2), the Appellate Division, Second Department, stated as follows:

> Significantly, the statute does *not* speak of establishing sewer charges pursuant to such local law or ordinance, or in accord with a procedure prescribed by such local law or ordinance. Therefore, giving effect to the plain meaning of the language employed, it must be concluded that *sewer rents can only be validly imposed if actually set forth in such local law or ordinance*. [Emphasis added] *Village of Canastota v. Queensboro Farm Products, Inc.*, 44 AD2d 276, 354 NYS2d 451, aff'd 36 NY2d 793, 369 NYS2d 700 (1975).

We note that the sewer ordinance in question provides for the fixing of sewer rents apart from the provisions of the ordinance itself, and thus would appear to violate the provisions of §452(2) as interpreted in the *Village of Canastota* case (*supra*). However, we would also point out that such ordinance was adopted

nine years prior to such case at a time when the language of §452(2) was subject to several possible interpretations, including one which would have permitted the establishing of sewer rents apart from the actual sewer ordinance.

It is also appropriate to note that §452 pre-dated the repeal of the statutory authorization for villages to adopt ordinances (L 1973 ch 974, eff 9/1/74). Upon the adoption of the current Village Law (L 1974 ch 975, eff 9/1/74), those ordinances adopted under the former Village Law continued in full force and effect (Vill L §§23-2300, 23-2302). However, a village ordinance may now be amended only by the adoption of a local law (1974 Op Atty Gen 327 (informal).

Section 452(2) also provides that any amendment to or other action affecting sewer rents shall be accomplished in the same manner as provided for the original establishment of sewer rents. Notwithstanding the fact that the sewer rents in question were originally established by ordinance, for the reasons just discussed such rents may now be amended only by the adoption of a local law.

Municipal Home Rule Law §20 contains the provisions of law governing procedures for the adoption of local laws. Pursuant to §20(5), a public hearing held after public notice of at least three days must precede the adoption of all local laws. Such hearing must be held before the village board of trustees, unless the mayor has the power to veto local laws, in which case the hearing would be held before the mayor (see 24 Op St Compt 531 (1968). In view of the foregoing, it is our opinion that both public notice and a public hearing are necessary before a village may increase its sewer rents.

**Conclusion:** Since sewer rents may be imposed only by local law or ordinance, village sewer rents may be increased only by the adoption of a local law, and both public notice and a public hearing are required before such schedule may be increased.

August 1, 1977.

## OPINION 77-481

**Statement of Fact:** A private recreational organization donated $500 to the town for recreation purposes in October, 1976. At that time, the 1976 budget was amended to include an additional appropriation for the purchase of equipment and other recreation items with the donated money.

Only $1,700 of the $2,700 appropriated for recreation purposes in 1976 was expended. The private recreational organization, for reasons not relevant to this inquiry, has requested that the town return the $500 donation, claiming that such money was not spent.

**Inquiry:** Must the town honor the request for the return of the donation?



**Statement of Law:** Town Law §64(8) authorizes a town board to accept gifts for any public use upon such terms and conditions as are imposed by the donors and accepted by the town. It is not entirely clear from the letter of inquiry whether specific terms and conditions were imposed with respect to the gift in question, or whether the money was unconditionally donated to the town for any recreation purposes. This question depends upon the intent of the parties at the time of the delivery and acceptance of the gift.

A gift of money for a specific purpose may be used only for that purpose (9 Op St Compt 299 (1953). If the money was donated to the town for a specific project and the project was abandoned or never carried out, the town is obligated to return the gift to the donor (see 32 Op St Compt 114 (1976).

If, on the other hand, the intent of the parties was that the gift was unconditioned and that the moneys should be used for *any* recreational purpose, the town complied with this requirement when it appropriated the money for recreation purposes. If such was the case, the town may not, and indeed cannot, honor the recreational organization's request to return the gift, notwithstanding that the town did not expend the full amount of money budgeted for recreation purposes in 1976. Under these circumstances, the moneys became town moneys when the gift was made.

**Conclusion:** Whether or not a town is obligated to honor a request to return a gift of money depends upon whether such money was donated conditionally or unconditionally and, if donated conditionally, whether such conditions have been complied with.

August 9, 1977.

## OPINION 77-482

**Inquiry:** May a town board on behalf of a park district accept the donation of a clubhouse from a private beach organization where such organization reserves the right to lease or otherwise utilize said clubhouse for a stated period of time?

**Statement of Law:** This Department has previously expressed the view that a town could permit a drama organization to construct, and then donate to the town, a playhouse on park property with the understanding that the drama organization would be scheduled to use the playhouse one-third of the time (26 Op St Compt 221 (1970). Inasmuch as the land and the clubhouse in question are presently owned by the beach organization, the views expressed in the above-cited opinion are not, *per se*, specifically applicable to this inquiry.

However, Town Law §64(8) authorizes a town board to take by gift, grant,

bequest or devise and hold real property absolutely or in trust for park purposes upon such terms and conditions as may be prescribed by the grantor or donor and accepted by the town. Said section permits a town to accept gifts of real property for park purposes upon terms and conditions which are not violative of law or contrary to public policy (*Atlantic Beach Property Owners' Ass'n v. Town of Hempstead*, 142 NYS2d 496, aff'd 1 AD2d 1028, 153 NYS2d 573, rev'd 3 NY2d 434, 165 NYS2d 737 (1957).

It is well-settled that a town may permit an organized league or other group to use a particular park facility at specified times and that these times may be scheduled in advance (26 Op St Compt 221 (*supra*). Since the town board on behalf of the park district could, pursuant to a scheduling arrangement, permit the private beach organization to have exclusive use of the clubhouse for certain limited periods of time if the clubhouse were owned by the district, we can see no legal objection to the town board accepting the donation of the clubhouse with the reservation of the right, by the beach organization, to have exclusive use of the clubhouse for certain periods of time. Furthermore, title never vests in the park district with respect to the interest in the clubhouse retained by the beach organization and, therefore, the question of possible alienation of park property never arises.

We have not been advised of the periods of time for which the beach organization wishes to retain the right to have exclusive use of the clubhouse facilities. Therefore, our opinion should not be considered in any way as passing on the question of authority of the town board, on behalf of the park district, to accept the donation in question. For example, if the retention of the right to use the clubhouse by the beach organization was for such an extended period of time as to deprive the general public of reasonable use of the clubhouse, it would be our opinion that the acceptance of the gift would be improper.

In view of the foregoing, it is our opinion that the inquiry may be answered in the affirmative, provided that the private beach organization would retain the right to use the clubhouse only for limited periods of time.

**Conclusion:** A town board on behalf of a park district may accept the donation of a clubhouse from a private beach organization where such organization reserves for itself the right to have exclusive use of such clubhouse for certain limited periods of time.

August 19, 1977.



## OPINION 77-503

**Statement of Fact:** In certain circumstances, a bidder who has submitted the lowest bid on a purchase contract or public works contract has expressed a desire to negotiate such price.

**Inquiry:** Does the awarding authority or municipality have the right to negotiate with a bidder after his bid has been opened?

**Statement of Law:** The statutes governing competitive bidding, and the court cases and administrative decisions arising thereunder, make no direct reference to negotiations between bidders and awarding authorities. General Municipal Law §103(1) requires that purchase contracts in excess of $1,500 and public works contracts in excess of $3,500 shall be awarded to the lowest responsible bidder furnishing the required security after advertisement for sealed bids. There is nothing contained within §103, or any other law, which specifically bears upon the question of the right to negotiate with a bidder who has submitted the low bid. Despite this lack of relevant statutory authority, however, we are of the opinion that any negotiation, after the submission of bids, is improper.

If a low bidder were permitted to negotiate a contract price after his bid had been submitted, the very purpose of competitive bidding would be defeated. A municipality would never be able to determine if it had been offered the best possible price. It is quite possible, furthermore, that other individuals who had submitted bids, and prospective bidders who, for one reason or another, declined to submit bids, would be or would have been able to offer a lower price to a municipality. Allowing negotiations would frustrate the purposes of competitive bidding, since a bidder could deliberately bid lower than all other competitors, for the purpose of securing the "status" of low bidder and, subsequently, seek an upward revision through negotiations with the municipality.

What if several vendors respond to a bid and none of such vendors are in substantial compliance with the bid specifications? May negotiations be undertaken at that point? General Municipal Law §103(1) provides that the governing board may, in its discretion, reject all bids and readvertise for new bids. This provision has been construed to mean that where no bidders have complied with the specifications, the municipality should reject all bids and readvertise for new bids (*Riester v. Town of Fleming*, 57 M2d 733, 293 NYS2d 176, rev'd 32 AD2d 733, 302 NYS2d 176 (1969); 24 Op St Compt 787 (1968). It is entirely unauthorized and improper for a municipality to enter into negotiations where no bidders have complied with the specifications.

**Conclusion:** Any negotiation, after the submission of bids, is improper, and

it is entirely unauthorized and improper for a municipality to enter into negotiations where no bidders have complied with the specifications.

September 16, 1977.

## OPINION 77-504

**Inquiry:** Does a member of a school district board of education, who is an officer of a bank and is employed at the main office thereof, have a prohibited interest in contract where the board designates a branch office of such bank as the depository of school district funds?

**Statement of Law:** The designation of a bank as the depository of school district funds constitues a "contract" between the bank and the district (Gen Mun L §800(2) in which the board member has a statutory "interest" by reason of his employment as an officer of the bank (Gen Mun L §800(3)(c). Except for the applicability of General Municipal Law §802, he would have a prohibited interest in the contract because, as a member of the board of education, he has the power or duty to designate the depository bank (Gen Mun L §801(1)(a).

However, §801 is rendered inapplicable in the instant case by virtue of §802(1)(a), which states that §801 shall not apply to the designation of a bank or trust company as a depository of municipal (school district) funds, except when the chief fiscal officer, treasurer or his deputy or employee has an interest in such bank or trust company. Furthermore, §802(1)(b) states that §801 shall not apply to:

> A contract with a person, firm, corporation or association in which a municipal officer or employee has an interest which is prohibited solely by reason of employment as an officer or employee thereof, if the remuneration of such employment will not be directly affected as a result of such contract and the duties of such employment do not directly involve the procurement, preparation of performance of any part of such contract;

We are advised that the board member in question, as an employee of the main office of the bank, would never have the occasion to become involved in any school district transactions with the branch thereof which the school board proposes to designate as the district depository. Therefore, the exception contained in §802(1)(b) would be pertinent as well as that contained in subdivision (1)(a).

However, notwithstanding the absence of a prohibited interest, the board member, nevertheless, would be required to disclose his statutory interest as provided in General Municipal Law §803(1).



**Conclusion:** Where a member of a school district board of education is an officer of a bank and employed in the main office thereof, he does not have a prohibited interest in the designation by the school district of a branch office of such bank as the depository of district funds.

August 1, 1977.

## OPINION 77-507

**Inquiry:** Do the competitive bidding requirements of General Municipal Law §103 apply to the purchase, by a municipality, of used equipment from an individual or corporation?

**Statement of Law:** General Municipal Law §103(6) provides as follows:

> Surplus and second-hand supplies, material or equipment may be purchased without competitive bidding from the federal government, the state of New York or from any other political subdivision, district or public benefit corporation.

The above-quoted section would clearly have no application to the purchase of used equipment from a private individual or private corporation. Therefore, the exception contained within subdivision (6) would not be applicable to the situation in question, and competitive bidding would be required (17 Op St Compt 135 (1961); 14 Op St Compt 439 (1958).

With respect to the specificity of bid specifications, we are of the opinion that bid specifications could request bids for a used machine produced or marketed not earlier than a specified year and in good working condition. There could also be contained within such specifications a requirement that the successful bidder furnish a written guarantee that the used machine has been reconditioned and is in good working order.

We do wish to add the possible applicability of the standardization provisions of General Municipal Law §103(5). That section authorizes a municipality to adopt a resolution, by a vote of at least two-thirds of all the members of the governing board, stating that for reasons of efficiency and economy, there is a need for standardization of a particular type or kind of equipment. Assuming that a municipality had previously adopted a standardization resolution, it would seem that the bid specifications could then designate the particular item by its trade name and call for a used machine produced or marketed not earlier than a specific year (see 14 Op St Compt 439 (1958).

**Conclusion:** Competitive bidding is required where a municipality purchases used equipment from a private individual or corporation.

August 17, 1977.

## OPINION 77-508

**Inquiry:** Are competitive bidding requirements applicable to a contract for a food concession in a city-owned convention center?

**Statement of Law:** Two previous opinions state that a contract for a food concession to be operated in a municipally owned facility is not subject to competitive bidding requirements (1970 Op St Compt #70-489 (unreported); 24 Op St Compt 126 (1968). The above-cited opinions state that the granting of a food concession is in the nature of a lease or license of space to carry on an activity of a public or quasi-public nature and would not fall within the category of either a purchase contract or a public works contract.

With respect to the lease arrangement under which the city and the concessionaire are presently operating, we would like to set forth the possibility that the concessionaire might very well have grounds to declare the present contract at an end, based upon the fact that the concessionaire entered into the lease on the assumption, as represented by the city, that the convention center would be staging a far greater number of events than was in fact the case. Such a mistake of fact could be considered to go to the very basis of the agreement, with the result being that continued performance under the present agreement might be excused. A new agreement could subsequently be entered into reflecting a decrease in the fixed percentage that the concessionaire would have to pay, which is, we are informed, the desire of the city.

**Conclusion:** A contract for food concession services in a city-owned convention center is not subject to competitive bidding requirements.

August 12, 1977.

## OPINION 77-515

**Inquiry:** Does the word "retained," as it is used in General Municipal Law §106, refer only to amounts withheld by a municipality from a contractor pursuant to the retained percentage provisions of a public works contract, or does it also include amounts withheld pursuant to other provisions of the contract, such as a provision for the payment of liquidated damages to the municipality in the event of default by the contractor?

**Statement of Law:** General Municipal Law §106 contains the provisions of law governing the withdrawal of retained percentages in public works contracts, and such section provides in pertinent part as follows:



> Notwithstanding any inconsistent provision of any general, special or local law, under any contract heretofore or hereafter made or awarded by any political subdivision . . . the contractor may, from time to time, withdraw the whole or any portion of *the amount retained from payments to the contractor pursuant to the terms of the contract*, upon depositing with the fiscal officer of the political subdivision . . . . [Emphasis added]

The above-emphasized portion of §106 has reference to moneys retained from payments to a contractor, pursuant to contract, by a municipality as security for the proper completion of the contract by the contractor (see 29 Op St Compt 187 (1973). Moneys *not* retained as security for proper completion of a contract, but retained for other reasons in accordance with contractual provisions, could not be withdrawn by a contractor pursuant to the provisions of §106.

An amount of money representing liquidated damages held by a municipality, to which it would become entitled upon default by the contractor, would not, in our opinion, represent an amount retained by a municipality from payments to the contractor. Accordingly, such amount could not be withdrawn upon substitution of proper securities pursuant to the provisions of §106.

**Conclusion:** The word "retained," as it is used in General Municipal Law §106, refers only to amounts withheld by a municipality from a contractor pursuant to the retained percentage provisions of a public works contract and does not include amounts held by the municipality pursuant to other provisions of the contract, such as moneys representing liquidated damages to which the municipality would be entitled in the event of default by the contractor.

August 5, 1977.

## OPINION 77-517

**Inquiry:** Where the improvements (streets, sidewalks and utility lines) would remain in private ownership, may a town require the developer of a 240-unit condominium on a 10-acre site to furnish a long-term (15-20 years) performance bond to insure that improvements are installed and to protect against bankruptcy of the developer?

**Statement of Law:** There is no statutory authority for a town to require a developer to furnish a performance bond for the installation of *private improvements* in a development. Town Law §277(1) authorizes a town to require a subdivider to put up a performance bond to insure the installation of

various public improvements, such as streets, sidewalks, and utilities. Even though the improvements in the condominium in question are the same type of improvements, these improvements would remain in private ownership. Since the improvements would remain private, the town would have no authority to go onto private property to install them with the proceeds of the performance bond should the developer default.

Even if the town were to require a performance bond for the installation of public improvements within the condominium, this Department is of the opinion that the town could not require a long-term (say 15-20 years) bond. The term of the bond would have to bear a reasonable relationship to what is being insured, namely, the installation of various improvements. Thus, Town Law §277(1) places a three-year limit on the term of a bond.

In conclusion, therefore, a town may not require a developer of a condominium to furnish a performance bond, long-term or otherwise, to insure the installation of private improvements.

**Conclusion:** A town may not require a developer of a condominium to furnish a performance bond, long-term or otherwise, to insure the installation of improvements which will remain in private ownership.

October 18, 1977.

## OPINION 77-521

**Inquiries:** (1) Where a tax certiorari award reducing the assessment on a parcel of property is received before town-county or school tax bills are sent out, may the receiver of taxes prepare a new tax bill showing the lower assessment and lower tax, or must he collect the higher tax based upon the original assessment and advise the taxpayer to apply for a refund of the difference?

(2) Where taxes are collected in two installments and a tax certiorari award reducing the assessment on a parcel of property is received after the first installment has been paid but before the second installment is due, may the receiver of taxes prepare a new tax bill for the second installment based upon the reduced assessment, or must he collect the higher tax based upon the original assessment and advise the taxpayer to apply for a refund of the difference?

**Statement of Law:** (1) and (2) Real Property Tax Law Article 7 (§§700 *et seq.*) contains the provisions of law governing judicial review of assessments of real property, or so-called tax certiorari proceedings. Where a final award in a tax certiorari proceeding is not received in time to enable the assessor or other



appropriate officer, board or body to make a new or corrected assessment prior to the levy of a tax based upon the assessment which has been determined to be illegal, erroneous or unequal, a higher tax based upon the incorrect assessment will be levied.

In view of the foregoing, it is apparent that in circumstances where a tax certiorari award reduces the assessment on a parcel of property, whether the taxpayer will pay a reduced tax based upon the original, incorrect assessment, depends, in the first instance, upon whether the award is received before or after the levy of the tax. If the award is received *before* the tax is levied, the assessor or other appropriate officer or board may correct the assessment roll, and proper tax bills, based upon the reduced assessment, can be sent out. If the award is received *after* the tax is levied, it is then too late to correct the assessment roll (since by this time the assessment roll has become the tax roll).

With respect to those instances where a final award reducing an assessment after a tax certiorari proceeding is received after the levy of a tax, two situations are possible. First, the taxpayer may have already paid the tax based upon the incorect assessment, in which case he is entitled to a refund in accordance with the procedures prescribed in Real Property Tax Law §726. In fact, it appears that this is the only situation to which the provisions of Real Property Tax Law Article 7 are specifically applicable.

However, a second situation which frequently occurs where a final award reducing an assessment after a tax certiorari proceeding is received after the levy of the tax, is that the taxpayer will not yet have paid the taxes based upon the incorrect assessment. In these situations, the question again arises as to whether the receiver of taxes may accept a tax payment based upon the corrected assessment, or whether he must collect the higher tax based upon the original assessment which has since been determined to be incorrect and advise the taxpayer to apply for a refund of the amount of overpayment.

It is our view that the principles of equity and common sense militate against requiring an individual to pay a higher tax based on an incorrect assessment and apply for a refund, after such individual has pursued the appropriate administrative and judicial procedures for the sole purpose of reducing his assessment and the amount of the tax based on such assessment. Accordingly, it is our opinion that the receiver of taxes may accept a tax payment based upon the corrected assessment in such situations.

As previously indicated, the provisions of Article 7 do not specifically address those cases where a final award reducing an assessment is received after levy of the tax but before the tax has been paid. Therefore, in such situations, we feel that the receiver of taxes should follow procedures analagous to those contained in Real Property Tax Law §554 relative to correcting clerical errors and certain unlawful entries on tax rolls. Specifically, the tax levying body (in this case the town) should issue an order directing the receiver of taxes to correct the tax roll and tax bill in accordance with the final award and a copy of such

order, as well as the court order, should be attached to the tax roll and warrant.

The principles just discussed are equally applicable to those cases where taxes are collected in two installments. Accordingly, in such cases, it is our opinion that the receiver of taxes may, in accordance with the procedures discussed in the preceding paragraph, correct the tax roll and tax bill and accept payment of the second installment of taxes based upon the reduced assessment.

Summing up, we first would emphasize that the critical date for purposes of this inquiry is the date on which taxes are *levied*. The date when bills are sent out and the date when taxes are due are irrelevant. Court-ordered reductions in assessments received before taxes are levied can be made on the assessment roll without the necessity of correcting the tax roll or tax bill.

Where court-ordered reductions are received after taxes have been levied, and thus after the assessment roll has become the tax roll, two situations are possible. Either the taxpayer will have already paid the tax based on the incorrect assessment, in which case he will be entitled to a refund, or he will not have paid the tax and he will want his tax bill corrected to conform with the court-ordered reduction in the assessed valuation of his property. In such cases, assuming, of course, that the receiver's warrant for the collection of taxes is still in effect, the receiver of taxes may correct the tax bill and tax roll in the manner hereinbefore described to reflect the lower assessment.

**Conclusions:** (1) Where a tax certiorari award reducing the assessment on a parcel of property is received after town-county or school district taxes based upon the incorrect assessment have been levied but before such taxes have been paid, the receiver of taxes may correct the tax roll and tax bill to reflect the lower assessment.

(2) Where taxes are collected in two installments and a tax certiorari award reducing the assessment on a parcel of property is received after the first installment has been paid but before the second installment is due, the receiver of taxes may correct the tax roll and tax bill so that the second installment payment will reflect the lower assessment.

August 3, 1977.

## OPINION 77-524

**Inquiry:** Would the salary and expenses of a town manager, appointed pursuant to Town Law §§58 and 58-a, be a general town charge?

**Statement of Law:** The general rule is that all moneys utilized for town purposes must be raised by taxes levied on the whole area of the town, unless



the Legislature by statute requires or permits any expenditures to be paid from taxes levied only on the unincorporated area of the town (1972 Op St Compt #72-800 (unreported); 26 Op St Compt 215 (1970).

Town Law §116(1) relates specifically to town officers and provides that the compensation and expenses necessarily incurred for the use and benefit of the town or paid by a town officer in the execution of the duties of his office shall be town-wide charges, in the absence of a statutory provision to the contrary. Clearly, a town manager is a town officer (see Town L §§58, 58-a). Since Town Law §§58 and 58-a do not contain provisions authorizing the salary and expenses of a town manager to be a part-town charge and since no other statute contains such authorization, these expenditures are general town charges.

We note that a town may not, by local law, provide that the charge in question be other than a general town charge. Municipal Home Rule Law §10(1)(ii)(d)(3), relating to the supersession of provisions of the Town Law, essentially bars the supersession, by local law, of a State statute relating to town finances as provided in Town Law Article 8 (§§100-125). Thus, a local law could not supersede the provisions of Town Law §116(1).

**Conclusion:** The salary and expenses of the office of town manager are general town charges.

August 1, 1977.

## OPINION 77-531

**Inquiry:** May a town of the first class abolish its police department and replace the police officers with part-time constables, in sufficient number to provide approximately the same police protection as the town now receives?

**Statement of Law:** After reconsidering our earlier opinion stating that a town may not dissolve its police department (1970 Op St Compt #70-1082 (unreported), this Department is now of the opinion that a town may, pursuant to its home rule powers, adopt a local law abolishing its police department (Mun HRL §10(1)(ii)(a)(1); 1975 Op Atty Gen 164 (informal). Under Town Law §150(1), a town has the option of establishing a police department or not. The statute is silent on whether a town may abolish its police department.

Under its home rule powers, however, one of the subjects on which a town may legislate, by local law not inconsistent with the provisions of the State Constitution or any general law, is the following:

> This provision shall include but not be limited to the creation or discontinuance of departments of its government and the prescription

or modification of their powers and duties. (Mun HRL §10(1)(ii)(a)(1).

In reply to the second part of the question, a recent opinion of this Department states that a town of the first class may appoint constables in the exercise of its home rule powers (33 Op St Compt 30 (1977).

If the town does choose to abolish its police department and appoint part-time constables to replace its police officers, these constables do not possess the full powers of police officers (see 1977 Op St Compt #77-176 (unreported); 1972 Op Atty Gen 73 (informal). Consequently, those police functions which the constables may not perform will have to be performed by the county sheriff pursuant to his duties to furnish ordinary police protection throughout the county (County L §650).

**Conclusion:** A town of the first class may, by local law, abolish its police department and provide for the appointment of constables.

September 8, 1977.

## OPINION 77-535

**Inquiry:** May two elected city councilmen, one of whom is a retired police officer from the City of Long Beach and the other of whom is a retired police officer from New York City and who both left their former employment as ordinary retirees, each hold the elective office of councilman at an annual salary of $3,500 without diminution of his respective retirement allowance and without first obtaining the approval of the New York State Civil Service Commission?

**Statement of Law:** Retirement and Social Security Law §101(d)(3) states that the provisions of Civil Service Law §150 shall govern with respect to retirees who are subsequently elected to a local elective public office.

Civil Service Law §150, which provides for the suspension of pension or annuity benefits during public employment, states as follows:

> if any person subsequent to his retirement from the civil service of . . . *any* municipal corporation or political subdivision of the state, shall accept any office, position or employment in the civil service . . . of any municipal corporation . . . *except* . . . *an elective public office*, any pension or annuity awarded or allotted to him upon retirement, and payable by the state, by such municipal corporation or political subdivision, or out of any fund established by or pursuant to law, shall be suspended during such service or employment . . . . [Emphasis added]

It is clear that by virtue of the exception set forth in the underlined portion



quoted above, §150 permits a retired employee of *any* municipality, including New York City, to hold a local elective public office, such as city councilman, and receive the full compensation pertaining to such office without diminution of his retirement allowance (1974 Op St Compt #74-1310 (unreported); 1976 Op St Compt #76-80 (unreported). Section 150 makes no mention of prior approval by the State Civil Service Commission, and, therefore, no such approval is necessary in this instance.

**Conclusion:** A retired police officer who subsequently is elected city councilman is entitled to receive the full compensation of such office without diminution of his retirement allowance and without prior approval by the State Civil Service Commission.

August 4, 1977.

## OPINION 77-540

**Inquiry:** May the same person simultaneously serve as the town supervisor's bookkeeper and the town tax collector?

**Statement of Law:** Whether it is proper for the same person to hold two or more public positions depends upon the nature of the powers, duties and responsibilities of the positions under consideration. The tax collector of a town, among other things, has the duty of paying to the town supervisor tax and assessment moneys collected (Real Prop Tax L §904; Town L §204). The duties of the bookkeeper to the supervisor include assisting the supervisor in the keeping of the town books. We note that the town supervisor is responsible for the accuracy of such books.

In a prior opinion (13 Op St Compt 357 (1957), this Department stated as follows with respect to the propriety of the same person simultaneously holding the two positions at issue herein:

> It would appear then that the check upon the tax collector provided by his having to pay certain [taxes and] assessments to the supervisor would be defeated by his serving as bookkeeper. Therefore, the offices are incompatible . . . .

Thus, we believe that the same person should not serve simultaneously as a town tax collector and bookkeeper to the town supervisor (see also 1975 Op St Comp #75-1047 (unreported).

**Conclusion:** One person may not serve simultaneously as a town tax collector and bookkeeper to the town supervisor.

August 4, 1977.

## OPINION 77-558

**Statement of Fact:** A town has, pursuant to Town Law §41-a, adopted a local law creating the office of director of purchasing, and such purchasing director has been authorized, by such local law, to award and execute all purchase contracts in the name of the town board.

**Inquiry:** Is a prior resolution of the town board still a necessity before a public works contract is competitively bid?

**Statement of Law:** General Municipal Law §103 provides, in part, that all contracts for public works involving an expenditure in excess of $3,500 shall be awarded by the appropriate officer, board or agency of a political subdivision to the lowest responsible bidder furnishing the required security after advertisement for sealed bids. In addition, Town Law §64(6) provides that the town board "may award contracts for any of the purposes authorized by law and the same shall be executed by the supervisor in the name of the town after approval by the town board." We note that neither one of the above-mentioned sections of law specifically sets forth a requirement that a town board resolution is needed before competitive bidding may be authorized.

However, it is a generally accepted principle of municipal law that all official actions of a municipal governing body *must* be undertaken pursuant to a lawfully adopted resolution of such body. There is no authority for a board to act, and to cause its acts to have legal effect, other than by some form of legislative action (see, generally, 31 Op St Compt 106 (1975). This would be so even where a majority of a particular governing board has independently reached agreement on a particular matter. It is important to remember that a resolution is not merely a statement of intention on the part of a municipal governing board, but a form of legislation. Without a prior resolution authorizing the advertisement for competitive bids on a public works contract, competitive bidding procedures may not be undertaken.

Therefore, we are of the opinion that a prior resolution of the town board is required before a public works contract may be competitively bid.

**Conclusion:** A prior resolution of the town board is needed before a public works contract is competitively bid.

October 13, 1977.



## OPINION 77-564

**Statement of Fact:** A collective bargaining agreement between a town and its police officers provides for conversion into cash of unused sick leave upon retirement.

**Inquiry:** Could the town agree to pay such converted, accumulated sick leave to a retired police officer over a period of several years after retirement rather than in a lump sum?

**Statement of Law:** It is our opinion that the actual method used to make payment for accumulated, unused sick leave to retirees should, in the first instance, be a matter left to the parties to the collective bargaining agreement. We find no prohibition against such payments being made to a retiree over a period of several years rather than as a lump sum upon retirement, if both the town and the retired police officers agree to such an arrangement. The terms of such an agreement could be included within the collective bargaining agreement itself, or they could be made part of separate agreements made between the town and each police officer upon his retirement, provided the collective bargaining agreement authorizes such individual agreements.

**Conclusion:** The parties to a collective bargaining agreement which provides for conversion of accumulated, unused sick leave into cash upon retirement should make the determination as to the method for making such cash payments. There is no prohibition against the parties' agreeing to make such payments over a period of several years after retirement rather than as a lump sum upon retirement.

August 9, 1977.

## OPINION 77-567

**Inquiry:** May a town pay policemen who are on military leave the difference between their regular salaries and the amount which they receive as military pay?

**Statement of Law:** Military Law §242(5) provides as follows:

> Every public officer or employee shall be paid his salary or other compensation as such public officer or employee for any and all periods of absence while engaged in the performance of ordered military duty, and while going to and returning from such duty, not

> exceeding a total of thirty days in any one calendar year and not exceeding thirty days in any one continuous period of such absence.

This Department has consistently stated that §242(5) entitles every public officer or employee, including policemen (see 30 Op St Compt 109 (1974), to receive, for a period of up to 30 days' ordered military duty, all of the salary which he would have received if he had been performing the duties of his office or employment, and not merely the difference between that amount and the amount which he receives for his military duty (22 Op St Compt 559 (1966); 28 Op St Compt 77 (1972). In addition, we note that the right of a public officer or employee to receive such full salary pursuant to §242(5) may not be diminished or eliminated under the terms of a collective bargaining agreement (28 Op St Compt 77 (*supra*).

**Conclusion:** A town policeman on military leave must be paid his full salary, for up to 30 days' ordered military duty, and not the difference between that and his pay for military service.

August 9, 1977.

## OPINION 77-569

**Inquiries:** (1) Where real property is acquired by the New York State Urban Development Corporation subsequent to taxable status date but before lien date, does the exemption from real property taxes provided by McKinney's Unconsolidated Laws §6272 take effect immediately upon acquisition, or only at the beginning of the tax year for which the next ensuing taxable status date determines tax liability?

(2) Would the taxable status of such property change if the Urban Development Corporation subsequently conveys the property to a subsidary housing company?

**Statement of Law:** (1) Laws of 1968 chapter 174 §1 (McKinney's Unconsol L §6272) provides as follows with respect to tax liability of the Urban Development Corporation:

> the corporation and its subsidiaries shall not be required to pay any taxes, other than assessments for local improvements, upon or in respect of a project or of any property or moneys of the corporation or any of its subsidiaries, levied by any municipality or political subdivision of the state . . . .

Thus, it is clear that real property acquired by the Urban Development Corporation or its subsidiaries is entitled to an exemption from municipal property taxes.



Pursuant to the provisions of Real Property Tax Law §302(1), the time of the granting of a tax exemption is determined on the basis of taxable status date. It is a well-established principle that property conveyed to a tax-exempt owner *prior* to taxable status date will be exempt from the ensuing year's taxes, while property conveyed to a tax-exempt owner *after* taxable status date remains taxable for the ensuing year. The fact that such conveyance is after taxable status date but before the taxes become a lien is, in most cases, irrelevant to the determination of tax liability; it is the taxable status date rather than lien date which controls tax liability (16 Op St Compt 431 (1960); 30 Op St Compt 99 (1974); 1970 Op St Compt #70-974 (unreported).

Exceptions to the above-stated rule exist with respect to real property acquired by the State or federal government (see 2 Op Counsel SBEA #1-33 (1973) and real property acquired by a municipal housing authority (*Rochester Housing Authority v. Sibley Corporation*, 77 M2d 205, 351 NYS2d 934, aff'd 47 AD2d 718, 367 NYS2d 969 (1975). Real property acquired by these entities after taxable status date but prior to lien date is exempt from taxation as of the date of acquisition.

The exception for real property acquired by the State or federal governments from the general principal that taxable status date is the controlling factor with respect to tax liability, is based upon the doctrine of sovereign immunity, which renders taxes imposed against such entities void and wholly unenforceable. The reason for the exception in the case of property acquired by a municipal housing authority, as stated in the *Rochester Housing Authority* case, is that such entities are required to make payments in lieu of taxes.

In the absence of clear statutory provision to the contrary, it is our opinion that tax liability of the Urban Development Corporation should be determined as of taxable status date. Accordingly, where such corporation acquires real property from a nonexempt owner after taxable status date but before lien date, such property remains taxable for the ensuing year and the exemption provided by §6272 would take effect at the beginning of the tax year for which the next ensuing taxable status date determines tax liability.

(2) Inasmuch as a subsidary housing company of the Urban Development Corporation is also exempt from real property taxes (McKinney's Unconsol L §§6265, 6272), it is our opinion that the taxable status of real property acquired by a subsidiary from the Urban Development Corporation would not change upon such conveyance.

**Conclusions:** (1) Where real property is acquired by the New York State Urban Development Corporation after taxable status date but before lien date, the exemption provided by McKinney's Unconsolidated Laws §6272 would take effect at the beginning of the tax year for which the next ensuing taxable status date determines tax liability.

(2) The taxable status of such property would not change if the Urban Development Corporation conveys the property to a subsidiary housing company.

August 3, 1977.

## OPINION 77-578

**Inquiry:** May a county or other municipality that pays a mileage allowance for the use of private automobiles on municipal business pay parking expenses in addition to the mileage allowance?

**Statement of Law:** For many years, this Department has taken the position that the mileage allowance for private cars authorized by various municipal statutes (County L §203(2); Gen Mun L §77-b (3), (4); Town L §116(1); Vill L §5-524(7) is intended to be in lieu of the normal expenses incidental to automobile travel such as fuel, oil, depreciation, and including parking expenses (1977 Op St Compt #77-371 (unreported); 1969 Op St Compt #69-342 (unreported); 22 Op St Compt 547 (1966); 16 Op St Compt 74 (1960); 11 Op St Compt 16 (1955).

This Department now wishes to reconsider and modify its position concerning the inclusion of parking expenses in the normal mileage allowance. At the time we adopted our previous position, parking charges were not as extensive or expensive as today. A typical mileage allowance today does not reimburse one fairly for many parking charges. Moreover, parking charges are not usually considered when calculating the cost of operating and maintaining a private car. Among the items considered are original purchase price (for depreciation purposes), repairs and maintenance, gasoline, and insurance.

Furthermore, both the State of New York and the federal government reimburse employees for parking expenses in addition to a mileage allowance.

This Department is now of the opinion, therefore, that local governments also may, in addition to paying employees a mileage allowance, reimburse them *only* for those parking expenses which are *actually and necessarily incurred* while on municipal business. We do not believe that municipalities may reimburse employees for parking charges which are not actually necessary. The municipality itself will have to determine whether or not a particular parking charge is necessary when a travel voucher is submitted, or possibly in advance when a particular travel authorization is granted. Prior opinions to the contrary are hereby susperseded.

**Conclusion:** A municipality that authorizes payment of a mileage allowance to its employees for use of private automobiles on municipal business may, in addition to the mileage allowance, reimburse employees only for those parking expenses which are actually and necessarily incurred while on municipal business.



December 22, 1977.

## OPINION 77-582

**Inquiry:** Where a town is contemplating renovation of its town hall and highway garage, would there be a conflict of interest if the town building inspector were to accept the position of clerk of the works for these renovation projects?

**Statement of Law:** If clerk of the works for the town renovation projects in question is an employment and does not involve an independent contract, then the exclusionary provision in the last sentence of General Municipal Law §801 would apply. That provision states that the conflict of interest prohibitions of §801 "shall in no event be construed to preclude the payment of lawful compensation . . . of any municipal officer or employee in one or more positions of public employment the holding of which is not prohibited by law." Accordingly, the town building inspector is not prohibited by that section from holding the second town position or employment of clerk of the works. He would, however, have a statutory interest in his employment contract (see §800(2) which he would have to disclose pursuant to the provisions of General Municipal Law §803.

On the other hand, it is conceivable that the town's engaging of the building inspector as clerk of the works on the renovation projects could be in the capacity of an independent contractor and not an employee. In that case as well, however, the building inspector would have no prohibited interest in such contract because he would have none of the powers and duties described in General Municipal Law §801 in connection with such renovation contracts. He would, nonetheless, once again have to disclose his interest in such contracts pursuant to the provisions of §803.

We are also of the opinion that no other principle of law would prohibit the filling of these two roles by the individual in question. The closest principle we can think of would be that involving incompatibility or incongruity of public offices or employments. Normally, the building inspector's duties would entail the granting of building permits and the ultimate approval of buildings constructed in the town, to ascertain compliance with the town building code. However, both the town hall and town highway garage renovation projects are exempt from the above-mentioned requirements (see 24 Op St Compt 717

(1968); see also *County of Westchester v. Village of Mamaroneck*, 41 M2d 811, 246 NYS2d 770, aff'd 22 AD2d 143, 255 NYS2d 290, aff'd 16 NY2d 940, 264 NYS2d 925 (1965). Thus, this individual, in his role as town building inspector, would not have any right or duty of approval over these projects for which he would be clerk of the works.

Accordingly, it is our opinion that the town building inspector may properly also serve as clerk of the works for the renovation of the town hall and town highway garage, provided he is able to devote the necessary time to both undertakings without shirking his responsibility to either.

**Conclusion:** A town building inspector does not have a prohibited interest in his own contract of employment with the town as clerk of the works for renovation projects for the town hall and town highway garage, nor is such an arrangement otherwise prohibited.

July 19, 1977.

## OPINION 77-585

**Inquiry:** May a village pay the registration fees of the village fire chief and several fire department officers for attendance at the fire chiefs' convention?

**Statement of Law:** In a current opinion (33 Op St Compt 18 (1977), this Department stated that a village may not give any money or property to members or officers of a volunteer fire department, since volunteer firemen are not employees of the village but rather are private citizens who volunteer their services to the volunteer fire department.

This prohibition, however, would not prevent a village from paying certain registration fees for the fire chief and assistant chief pursuant to the provisions of General Municipal Law §77-b.

Section 77-b authorizes a village to pay up to $50.00 of the actual and necessary registration fees for the chief and assistant chief of its fire department to attend a convention or conference of firemen or firemanic officers if attendance at such convention is believed to be of benefit to the municipality. Attendance at such conference or convention must be authorized by the village board of trustees or, if the board of trustees delegates the power to authorize attendance, by the board of fire commissioners (Gen Mun L §77-b(2).

We note that pursuant to General Municipal Law §72-g, a village may pay up to $10.00 of the actual and necessary registration fees for volunteer firemen to attend fire training schools or courses of instruction for firemen. However, this Department has stated that the New York State Fire Chiefs' Convention is



not considered to be a training school or course and, thus, village payment of volunteer firemen's registration expenses for the convention is not authorized by §72-g (24 Op St Compt 769 (1968).

**Conclusion:** A village may, pursuant to General Municipal Law §77-b, pay up to $50.00 of the registration fees for the village fire department chief and assistant chief's attendance at the New York State Fire Chiefs' Convention, if it is believed that their attendance at such convention may benefit the village.

August 10, 1977.

## OPINION 77-587

**Statement of Fact:** A town superintendent of highways had made a determination that certain highway equipment was in need of repair and had estimated that the cost of such repairs would not exceed $3,500. Accordingly, repairs were undertaken without competitive bidding. During the course of such repairs, it was discovered that additional work was required. It now appears that the total cost of such repairs may well exceed the $3,500 limit.

**Inquiry:** Would it be permissible to pay for the repair work in the event the total cost does, in fact, exceed $3,500, since the repair contract was not competitively bid?

**Statement of Law:** General Municipal Law §103(1) provides that all purchase contracts in excess of $1,500, and all public works contracts in excess of $3,500, are subject to competitive bidding requirements. We have expressed the view that if it is known, or there is reason to believe, that the cost of a particular public works contract will exceed the $3,500 limitation, then such contract must be competitively bid. Conversely, if there is no reason to believe that a particular contract will exceed the dollar limitations set forth in General Municipal Law §103, then competitive bidding is not required (1972 Op St Compt #72-150 (unreported); 1973 Op St Compt #73-717 (unreported).

The good faith of the municipal official or officials responsible for the letting out of contracts is of paramount importance in situations where the cost of particular contracts might possibly exceed the limitations contained within §103. In this situation, if the superintendent's determination that the repair costs would not exceed $3,500 was made in good faith and, if the cost, nevertheless, did exceed $3,500, then we feel that the bill could validly be paid, notwithstanding that competitive bidding procedures were not followed.

We do wish to elaborate with respect to our comments concerning the

question of good faith, referred to above. In our view, where a municipal official honestly believes, after careful investigation of all the relevant facts and analysis of past purchasing procedures, that a particular public contract will *not* exceed either of the dollar limitations set forth in General Municipal Law §103, then the governing board would most probably be justified in auditing and approving any claim submitted pursuant to such contract.

On the other hand, there are certain elements which would tend to militate against a finding that a determination was made in good faith. Among these would be situations where the particular municipality, or officer charged with the responsibility to let contracts, had consistently erred with respect to compliance with competitive bidding requirements, or where there is evidence of flagrant disregard of such requirements. This Department is not in a position to determine good faith or bad faith with respect to any given fact situation, and, consequently, we can neither condemn nor condone specified actions where we are not privy to all essential facts.

**Conclusion:** Where the town superintendent of highways has made a truly good-faith determination that the cost of repairs of highway equipment will not exceed $3,500, and such repairs do exceed $3,500, then the failure to comply with competitive bidding requirements will not prohibit payment under such contract.

October 7, 1977.

## OPINION 77-603

**Inquiry:** May a town expend funds received pursuant to Title II of the Public Works Employment Act of 1976 (United States Public Law 94-369, the "Antirecession Fiscal Assistance Act") for the purchase of a highway truck?

**Statement of Law:** Before proceeding to the specific inquiry, we would like to point out some general guidelines concerning the use of Title II moneys. A recent opinion states that local governments receiving grants pursuant to the federal statute should use such grants for the *maintenance* and *expansion* of basic and essential governmental services (32 Op St Compt 161 (1976). We point out that in the final analysis, the determination of the proper utilization of Title II moneys must be made by the local governing board.

With respect to the specific inquiry, as a general rule, Title II funds may not be used for the purchase of capital assets, such as capital equipment and motor vehicles (Administrative Ruling 77-2, Office of Revenue Sharing; see also 1977 Op St Compt #77-606 (unreported). Clearly, the purchase of a highway truck constitutes the purchase of a capital asset. Therefore, Title II funds may *not* be utilized for the purchase of a highway truck.



We do wish to add that it would be improper for the town to utilize moneys from item 3 of the highway fund (see High L §141(3), in purchasing the highway truck, and subsequently replenish such fund with Title II funds. We have been advised by the Office of Revenue Sharing that such a procedure is improper, since Title II funds would be indirectly utilized for an otherwise impermissible expenditure.

**Conclusion:** Title II funds may not be utilized to purchase a highway truck.

October 13, 1977.

## OPINION 77-604

**Inquiry:** Is it legal to issue bonds, bond anticipation notes, or capital notes for a city-wide program of demolishing unsafe buildings or structures on *privately owned property*?

**Statement of Law:** Local Finance Law §11.00(a)(12-a) establishes a period of probable usefulness for the demolition of *municipally owned* structures or buildings, whenever they are no longer of any use or value or have become dangerous or detrimental to human life, health or safety. That period of probable usefulness is ten years.

However, there is no comparable provision establishing a period of probable usefulness for the demolition of structures or buildings on privately owned property (see 1974 Op St Compt #74-1236 (unreported), which concerns the financing of the demolition of municipally owned and privately owned buildings in the City of Utica).

We note that the letter of inquiry referred to Local Finance Law §11.00(a)(36)(a). Such subdivision, which establishes a period of probable usefulness of five years for temporary financing in anticipation of the collection of real property taxes and assessments levied or to be levied, does not provide authority for the issuance of bonds, bond anticipation notes or capital notes.

State Constitution Article VIII §2 provides that no indebtedness shall be contracted for longer than the period of probable usefulness fixed for such object or purpose by general or special law. Thus, the Constitution requires that before any indebtedness may be contracted (be it bonds, bond anticipation notes, capital notes, tax anticipation notes, revenue anticipation notes or budget notes), a period of probable usefulness must be established for such purpose. Local Finance Law §11.00(a)(36)(a) establishes the constitutionally required

period of probable usefulness for *tax anticipation notes*. Such period does not apply to the issuance of bonds, bond anticipation notes or capital notes.

The fact that the cost of demolishing the privately owned buildings or structures will or may be recouped by the city through assessments on the benefited property does not, of course, provide authority for the issuance of *bonds, bond anticipation notes* or *capital notes* pursuant to such subdivision.

**Conclusion:** There is no period of probable usefulness for the demolition of structures or buildings on privately owned property.

August 25, 1977.

## OPINION 77-613

**Inquiry:** Is a county liable for the cost incurred by village police in transporting a prisoner to the county jail after the prisoner has been arraigned before the village justice and an order of commitment has been signed committing the prisoner to the custody of the county sheriff?

**Statement of Law:** Correction Law §500-c provides for the care and custody of prisoners committed to jail as follows:

> Each sheriff . . . shall have custody of the county jails and shall receive and safely keep, in the county jail of his county, every person lawfully committed to his custody for safekeeping, examination or trial, or as a witness, or committed or sentenced to imprisonment therein, or committed for contempt.

We have stated previously that in light of Correction Law §500-c and County Law §657-a, the latter of which authorizes the board of supervisors to establish a special fund to pay for the sheriff's expenses in transporting prisoners, it can be inferred that the sheriff has the duty and responsibility of transporting prisoners between the county jail and justice court (32 Op St Compt 95 (1976). This duty and responsibility would attach at the time of lawful commitment of the prisoner to the custody of the sheriff (see *Lake Shore Hospital Inc. v. Fries*, 86 M2d 169, 382 NYS2d 638 (1976); 1976 Op St Compt #76-1160 (unreported); 1977 Op St Compt #77-374 (unreported).

In the instant circumstances, we feel that since the county sheriff has refused to transport prisoners to and from the county jail, it was proper for the village police, as enforcement officers of the justice court (UJCA §110), to do so, and it would then be proper for the village to be reimbursed by the county for providing such service.

It should be pointed out that County Law §657-a authorizes the submission of itemized and verified bills for transportation expenses by claimants other than the sheriff, thereby providing a means by which the village may submit its transportation bills to the county for reimbursement (32 Op St Compt 95 (*supra*).



**Conclusion:** The county sheriff has the duty and responsibility of transporting prisoners who have been lawfully committed to the custody of the sheriff between the county jail and justice court. A village which transports such prisoners is entitled to be reimbursed by the county.

August 12, 1977.

## OPINION 77-623

**Statement of Fact:** Certain moneys were lawfully confiscated by law enforcement officers during the commission of a crime and subsequently used as evidence in the ensuing trial. The moneys involved are the proceeds from the illegal sale of drugs.

**Inquiry:** What procedure should be utilized to dispose of these moneys?

**Statement of Law:** We limit our opinion to the disposition of such proceeds only, and we assume that there has been a conviction in connection with the illegal drug sale at issue herein, and that there has been a conclusive adjudication to the effect that these moneys were derived from illegal activities.

Our research has disclosed no statutory authority governing the disposition of the confiscated proceeds of an illegal drug sale. While there are statutory procedures set forth for, among other things, the disposition of certain confiscated vehicles used to transport, conceal or facilitate sales or exchanges of "controlled substances" (Pub Health L §3388) and for the disposition of stolen property which comes into the custody of a peace officer (Pen L §450.10), we find no similar statutory procedure for the disposition of the moneys at issue herein. Therefore, we turn our attention to case law and common law principles.

As a general matter of public policy, no person should retain the "fruits of a crime" or moneys used in the commission of a crime, nor should he acquire property by his own criminal act (see *Stone v. Freeman*, 273 AD 600, 78 NYS2d 745, rev'd 298 NY 268, 82 NE2d 571 (1948); *Riggs v. Palmer*, 115 NY 506, 22 NE 188 (1889); 1966 Op St Compt #66-802 (unreported). In addition, as the court in *Stone v. Freeman* (*supra*) stated:

> It is the settled law of this State (and probably of every other State) that a party to an illegal contract cannot ask a court of law to help him

carry out his illegal object, nor can such a person plead or prove in any court a case in which he, as a basis for his claim, must show forth his illegal purpose.

The Court of Appeals relied on such principles of public policy when it held, in an act brought on by the "owners" to recover moneys seized in a gambling raid, that such moneys may not be returned to the parties involved in such activity (*Hofferman v. Simmons*, 264 AD 884, 35 NYS2d 925, rev'd 290 NY 449, 49 NE2d 523). The court stated that the lack of any statute containing directions as to the disposition of moneys seized from gamblers by law enforcement officers does not enlarge the rights of parties to the crime or confer on them rights which must be recognized as to moneys proved to be the receipts of a crime.

Similarly, in *Carr v. Hoy* (285 AD 968, 138 NYS2d 682, aff'd 2 NY2d 185, 158 NYS2d 572 (1957), an action was commenced to recover moneys collected in connection with the taking of "indecent" photographs. The Court of Appeals, in denying recovery of such moneys, stated that a person could not prove his own wrongdoing as a basis for enforcement of his supposed "right" to retain such moneys. Furthermore, the courts will not serve as the "paymaster" for the fruit of an admitted crime.

In light of the above, it is our opinion that the proceeds from the illegal sale of drugs should not be returned to the "owners" thereof. To do so would be to help carry out the illegal object of an illegal contract, that is, the drug sale, and would be a sanctioning of the retention of moneys used in the commission of a crime. In addition, as in *Hofferman and Carr*, the "owners," in order to establish rights to such moneys, would be required to prove their own wrongdoing, that is, the buying or selling of illegal drugs, as a basis for the enforcement of such rights. Denial of recovery of such moneys would be in order for the further reason that a municipality should not serve as the "paymaster" for the fruits of a crime.

We therefore feel that since, in our opinion, the moneys should not be returned to the "owners" thereof, it would be in keeping with the public policy expressed above for the municipality currently holding the proceeds from the illegal drug sale to apply such moneys to its general fund (1966 Op St Compt #66-802 (*supra*); 25 Op St Compt 209 (1969).

**Conclusion:** Moneys which are the proceeds of an illegal drug sale should not be returned to the "owners" thereof but should be placed in the general fund of the municipality holding such moneys after it has been used as evidence in a trial.

September 8, 1977.



## OPINION 77-626

**Inquiries:** (1) Does the veterans' exemption from taxation apply to the widow of a veteran?

(2) Where a veteran is deceased and title to the property has passed to a relative, is such relative eligible for the veterans' exemption from taxation?

(3) Does the veterans' exemption from taxation apply to property owned but not occupied by the veteran?

(4) Does the veterans' exemption from taxation apply to real property owned by a veteran who resides outside of New York State?

(5) Does the veterans' exemption from taxation apply to unimproved real property?

**Statement of Law:** (1) Real Property Tax Law §458(1) grants an exemption as to real property purchased with eligible funds and owned by the person who rendered the military or naval service, or, among others, by the spouse or unremarried surviving spouse of such veteran.

Thus, an unremarried widow of such a veteran is eligible for the veterans' exemption from real property taxation where title to exempt property has passed to her upon the death of the veteran (27 Op St Compt 43 (1971), or where she purchases real property with eligible funds.

(2) In addition to the veteran, his or her spouse, or unmarried surviving spouse, the only other persons eligible for the veterans' exemption under §458(1) are the veteran's "dependent father or mother, or the children under twenty-one years of age" of such veteran. Thus, only where title to exempt property of a deceased veteran passes to one of the relatives listed above may such relative claim the exemption.

We wish to note several things in connection with these eligible relatives.

First, a veteran's surviving spouse ceases to be a member of the exempt class upon remarriage (1 Op Counsel SBEA #1-63 (1972). In addition, in order for the parents of a veteran to qualify for the exemption, it must appear that the parents continually meet the test of dependency. Generally, this is satisfied if they were not completely self-supporting at the time of the veteran's death and were dependent upon the veteran to support them, at least in part, at that time and if, after the veteran's death, they are not self-supporting. The issue of dependency, however, is a factual one to be determined periodically by the local assessor in light of the existing facts and circumstances in each case (1 Op Counsel SBEA #1-102 (1972). Finally, real property which is owned by children, under age 21, of a veteran is entitled to an exemption, provided such property was purchased with eligible funds, but is exempt only until such time as the child attains the age of 21 (2 Op Counsel SBEA #2-102 (1973).

(3) In a prior opinion (28 Op St Compt 134 (1972), we stated that there is no requirement within the terms of §458(1) that the veteran's property be his

residence or that the property be occupied by the veteran. The statute requires only that the property be owned by the veteran or by one of his relatives listed in the statute.

(4) In 1 Op Counsel SBEA #1-30 (1972), the State Board of Equalization and Assessment stated as follows:

> The statute [Real Prop Tax L §458(1)] does not require that applicants for the veterans' exemption reside in New York State. Therefore, a person residing in another state would qualify for the veterans' exemption, if he is one of the persons specified in the statute and has used eligible funds in purchasing real property in this state.

(5) There is no requirement in §458 that property subject to the veterans' exemption be improved property. The statute merely requires that eligible funds be used to purchase real property on which exemption is claimed, be it improved or not (see 22 Op St Compt 556 (1966).

**Conclusions:** (1) An unremarried widow of a veteran is eligible for the veterans' exemption where title to exempt property has passed to her upon the death of the veteran, or where she purchases real property with eligible funds.

(2) The only relatives of a veteran entitled to the veterans' exemption when exempt property of a deceased veteran passes to them are the unremarried surviving spouse, dependent parents and children under age 21.

(3) The exempt property need not be the residence of the veteran in order to qualify for the exemption.

(4) Persons seeking the veterans' exemption need not be residents of New York State.

(5) There is no requirement that real property subject to the veterans' exemption be improved property.

September 7, 1977.

## OPINION 77-631

**Inquiry:** May a town which is establishing a new town park restrict use of such town park solely to those people who are residents of such town?

**Statement of Law:** Generally, when a municipality establishes a park, it makes a dedication of the property acquired or set aside for public use as such a park and the municipality is said to hold such property in trust for the public at large. In such an instance, the park land may not be alienated without express legislative permission (see *Brooklyn Park Commissioners v. Armstrong*, 45 NY 234, 6 AR 70 (1871), rev'g 3 Lans 429; *Miller v. City of New York*, 39 M2d



424, 240 NYS2d 716, mod 20 AD2d 720, 247 NYS2d 496, aff'd 15 NY2d 34, 255 NYS2d 78 (1964).

In the case of *Gewirtz v. City of Long Beach* (69 M2d 763, 330 NYS2d 495, aff'd 45 AD2d 841, 358 NYS2d 957, mot for lv to app den 35 NY2d 644, 364 NYS2d 1025 (1974), the court expanded on these principles in holding that a city could not, by local law, restrict use of a beach park to city residents and their guests and stated as follows at page 777:

> It is thus clear that municipally-owned property that has been dedicated to use as a public park is held in trust for the public at large and may not be diverted to other uses or sold without express legislative authority. The same principle of a trust for the public prevents the municipality from taking action which operates to exclude the public at large from such a public park and to limit use of the public park to local inhabitants unless the municipality has been granted express legislative authority to do so. To hold otherwise would be to permit the municipality to achieve a result which violates the public trust principle since as to those who are excluded from the public park the exclusionary policy is as much a diversion of use as would be the case if the municipality changed the use of the park or sold it.

It is currently the opinion of this Department that in light of the *Gewirtz* case, where a municipality, either expressly or impliedly by acquiescence in continued public use, has dedicated property to use as a public park, such municipality may not totally exclude nonresidents from such a park.

However, in such an instance, it would be proper for the municipality to charge a fee to nonresidents who use the park. It is not a denial of equal protection for a municipality to favor residents over nonresidents with respect to the charging of reasonable fees for the use of a public facility (*Peo ex rel Village of Lawrence v. Kraushaar*, 195 M 487, 89 NYS2d 685 (1949).

We note that there must be a reasonable basis for any classification of fee-paying nonresidents permitted to use the park in order to avoid being discriminatory (State Const Art I §11). The municipality may, however, limit the total number of nonresidents who may use the park in order to assure the availability of the facilities to residents (29 Op St Compt 124 (1973); 1977 Op St Compt #77-80 (unreported).

Where a municipally owned park is not dedicated for general public use because, for example, the deed from the private owners to the municipality specified that the park be used exclusively by town residents (*Campbell v. Town of Hamburg*, 156 M 134, 281 NYS 753 (1935), or the park, from its inception, was designed and created to serve only that portion of the public consisting of town residents and not the public-at-large, and the facilities have a limited capacity (see *Schreiber v. City of Rye*, 53 M2d 259, 278 NYS2d 527 (1967), then it is our opinion that the municipality may totally exclude nonresidents

from such park (57 A.L.R. 3rd 998; see also *Gewirtz v. City of Long Beach* (*supra*). In those instances, since the park is expressly created and maintained by the municipality solely for its residents with municipal funds, it would be proper for the municipality to limit use of the park to its own residents and there would be no denial of equal protection in so doing (*Campbell v. Hamburg* (*supra*); 29 Op St Compt 124 (*supra*); *Schreiber v. City of Rye* (*supra*).

It appears to us that the statement last set forth above would apply to the present situation, because we have been advised that the town is "interested in establishing a town park." If it is to be a park expressly created and maintained by the town solely for its own residents with town funds, then it is our opinion that it could be restricted to town residents (except that a town taxpayer who is a nonresident could probably not be excluded, under the rationale set forth in an another opinion: 1975 Op St Compt #75-970 (unreported). Reference should be had, however, to the provisions of Parks and Recreation Law §§13.07 and 17.07 concerning such use restrictions where State aid moneys are to be used.

**Conclusion:** Where a park is expressly created and maintained by a municipality solely for its residents with municipal funds, it would not be improper for the municipality to limit use of the park to its own residents.

December 13, 1977.

## OPINION 77-642

**Inquiry:** Is a town obligated to clear or drain natural surface waterways, which become clogged by natural plant growth and other obstructions and flood adjoining properties after heavy rainfalls?

**Statement of Law:** The town superintendent of highways, when directed by the county superintendent of highways and when authorized by the town board, has the right to enter upon private lands for the purpose of clearing obstructions from, or banking up, rivers, streams or creeks to prevent them from overflowing upon highways or bridges (High L §147).

New York courts have stated repeatedly, however, that a municipality does not have a duty to dredge or clear obstructions from natural streams to prevent their overflowing onto private property, unless the municipality causes the obstruction or condition producing the overflow (*O'Donnell v. City of Syracuse*, 102 AD 80, 92 NYS 555, rev'd 184 NY 1, 76 NE 738 (1906); *Coonley v. City of Albany*, 57 Hun 327, 10 NYS 512, aff'd 132 NY 145, 30 NE 382 (1892); *Klein v. Town of Pittstown*, 241 AD 202, 272 NYS 324 (1934); *Annutto v. Town of Herkimer*, 56 M2d 186, 288 NYS2d 79, mod 31 AD2d 733, 297 NYS2d 295, app dis 24 NY2d 820, 300 NYS2d 596 (1969); *McCutchen v. Village of Peekskill*, 167 M 460, 3 NYS2d 277 (1938).



As stated in the *Annutto* case (*supra*, 288 NYS2d 82):

> A municipal corporation is not liable for the overflow of a watercourse in the absence of conditions imposing some duty with respect to the watercourse upon it. It has no duty to restrain waters between the banks of a stream or to keep the channel free of obstructions it did not cause.

Even though a town is not obligated to remove obstructions from natural streams, a town has specific authority to undertake drainage and flood control projects and may acquire or condemn real property for that purpose (Town L §64(11-a). Before a town may dredge or change the course of a *classified stream*, however, the town must obtain approval from, or, in an emergency, give notice to, the Department of Environmental Conservation (Env Conserv L §15-0501).

Three prior opinions of this Department discuss further the principles mentioned herein (32 Op St Compt 100 (1976); 1970 Op St Compt #70-449 (unreported); 25 Op St Compt 291 (1969).

**Conclusion:** A town has no duty to drain or clear obstructions from natural surface waterways to prevent flooding unless the town caused the condition.

November 15, 1977.

## OPINION 77-655

**Statement of Fact:** In January of 1974, the town supervisor appointed one of the town councilmen as deputy supervisor. He died on June 11, 1977, having served as deputy supervisor until that time. On July 28, 1977, the supervisor appointed a new deputy supervisor to fill the vacancy. On August 11, 1977, the three remaining councilmen on the town board declared that the supervisor's July 28 appointment was illegal because he did not make such appointment within five days after the vacancy occurred, in accordance with Town Law §42. Thereupon, the remaining town board members appointed their own deputy supervisor.

**Inquiry:** Which deputy supervisor appointee is entitled to hold office?

**Statement of Law:** Provision is made in Town Law §42 for creating the office of deputy supervisor and for appointment to that office. Insofar as applicable to the inquiry herein, §42 provides as follows:

> The town board of any town may at any time establish the office of deputy supervisor. The deputy supervisor shall be appointed by the supervisor to serve at the pleasure of the supervisor . . . . If the supervisor shall fail to appoint a deputy supervisor . . . within five days after a vacancy occurs in the office, the town board shall have power to appoint such deputy supervisor.

The meaning of the five-day provision above-quoted is, of course, critical to the resolution of this question. There obviously can be no dispute that if the supervisor does not make an appointment to fill a vacancy within five days of the occurring of the vacancy, the town board may make the appointment. Had this town board done so, then clearly its appointee would now be the proper incumbent.

However, that did not happen. The town board made no attempt to fill the vacancy until the supervisor had selected his own appointee. We incline to the view that the five-day provision is directory only. It simply authorizes the town board to act where the supervisor does not act in timely fashion. But where the town board does not exercise its option so to act, we do not believe that the supervisor is forever foreclosed from acting. In short, we believe that the supervisor continues to have the power to appoint a deputy supervisor, even after the five days have elapsed, *provided* the town board has not exercised its prerogative to make the appointment in its own right.

If the intent of the statute were to the contrary — that is, if the supervisor were forever foreclosed after the expiration of the five days — then the town board could simply sit back and make no appointment and effectively deny the supervisor a deputy, notwithstanding the creation and existence of the office. We cannot believe that this would bear out the statutory intent. We believe that the purpose behind the five-day provision is to enable the town board to act in any situation where the supervisor has neglected or refused to appoint a deputy and where the town board sees the need to have one, for example, where the supervisor is to be foreseeably absent or becomes disabled. But we believe, as previously indicated, that the town board must take some affirmative action following the five-day period in order for the supervisor to be barred from appointing his own deputy.

A look at the natural sequence of events flowing from the statutory language does, we think, tend to bear out the foregoing position, Let us assume, as in the fact situation before us, that the supervisor acts after the five days and that the town board has the right to rescind or ignore his appointment and make an appointment of its own. Section 42 states that the deputy supervisor is to serve at the pleasure of the supervisor. Since no distinction is made in this regard between the supervisor's appointee and the town board's appointee, we can only assume that the town board's appointee also serves at the supervisor's pleasure. Hence, the supervisor could, it seems to us, simply terminate the town board's appointee, thus creating a new vacancy in the office, which the supervisor could then fill pursuant to the provisions of §42.



While the above result is a conceivable outgrowth of the statutory provisions, it would also be a rather impractical and unnecessary means of arriving at virtually the same result which would obtain if our initial interpretation were followed. In either event, it would be the supervisor's appointee who would ultimately be the deputy supervisor. Accordingly, we reiterate our conclusion that where the supervisor does not make an appointment to fill the vacancy within five days after it occurs, the town board may do so. But the town board *must act* in order to activate its prerogatives. If it does not do so, the supervisor continues to have the right to make the appointment.

In consequence of the foregoing, we express the view that the supervisor's original appointee to fill the vacancy is the proper office-holder. This is so, we believe, notwithstanding the supervisor's failure to make the appointment within five days.

**Conclusion:** The provision that if the supervisor fails to appoint a deputy supervisor within five days after a vacancy occurs in the office of deputy supervisor, the town board may make an appointment to fill the vacancy, is directory only. If the town board fails to exercise such prerogative and does not make the appointment, the supervisor continues to have the right to do so.

August 23, 1977.

## OPINION 77-657

**Inquiry:** May a town in Suffolk County establish a capital reserve fund for future improvements in the town water district?

**Statement of Law:** The answer to the question is in the negative and is covered by General Municipal Law §6-c(3)(a), which states that the foregoing provisions of that section (generally authorizing municipalities to establish capital reserve funds) shall not apply to:

> a. Capital improvements to be constructed, reconstructed or acquired, or equipment to be acquired, on behalf of an improvement district or other similar district located within such municipality
>
> . . . .

Accordingly, a capital reserve fund may not be established, generally speaking, for a town improvement district, such as the town water district. Exceptions to this general rule are found in Town Law §55-a, in connection with improvement districts in suburban towns, and in the Nassau County Civil Divisions Act, with respect to improvement districts in Nassau County. Obviously, none of these exceptions apply to the present town which is not a

suburban town and which is not in Nassau County.

In the letter of inquiry, there was reference to certain recitations contained in our department's Uniform System of Accounts for Towns, and particularly to certain material appearing on page R-1 dealing with special reserve funds. The special reserve funds referred to therein are those in connection with improvement districts in suburban towns, as indicated in the preceding paragraph. Otherwise, the material referred to on that page in that publication deals with reserve funds generally and is not intended to imply that towns, generally speaking, may have capital reserve funds for their improvement districts. As we have previously indicated, the town is not authorized to establish a capital reserve fund for its water district because of the prohibition contained in General Municipal Law §6-c(3)(a).

**Conclusion:** Except in a suburban town and except pursuant to certain special acts, no capital reserve fund may be established on behalf of a town water district.

August 24, 1977.

## OPINION 77-667

**Inquiries:** (1) Is the rental of a room and the purchase of refreshments for a meeting of town officials and citizens to discuss various town problems including, among other things, sewage disposal and repairing of streets, a proper town charge?

(2) Is the rental of a room and the purchase of coffee and doughnuts for a "breakfast-type meeting" held prior to a normal working day and attended by town department heads and certain other employees to discuss town business a proper town charge?

(3) Is the rental of a room, the purchase of food and alcoholic beverages, and the payment of gratuities for a luncheon or dinner attended by area businessmen for the purpose of discussing, among other things, the possibility of expanding an area business or of locating a new business in the town, a proper town charge?

(4) Is the rental of a room, the purchase of food and beverages, and the payment of gratuities for an annual awards dinner to honor town employees who have attained 25 years of service a proper town charge?

**Statement of Law:** (1) Town Law §116(1) authorizes town charges for actual and necessary expenses when incurred by authority of the town board.



This Department has stated that it would be a proper town function to conduct public meetings for the purpose of informing and discussing with town citizens the various services available to them, and other aspects of government which bear directly on town government, and that the reasonable, related expenditures of such a meeting would be a proper town charge (1973 Op St Compt #73-586 (unreported).

In light of the above, we feel that it would be proper for a town to conduct a public meeting for the purposes of discussing with town citizens various town problems, and that if there is no adequate town facility at which such meeting could be held, the expense of renting such a facility would be a proper town charge.

However, the expenditure for refreshments to be served at this meeting would not be a proper town charge. We have stated that the purchase of refreshments, such as coffee and doughnuts, for individuals, including municipal officials, who attend meetings of a municipality, is prohibited by State Constitution Article VIII §1 which prohibits gifts of public funds to private individuals (1975 Op St Compt #75-155 (unreported); see also 1976 Op St Compt #76-600 (unreported); 1974 Op St Compt #74-377 (unreported).

(2) In regard to the purchase of coffee and doughnuts, or breakfast, to be served at a pre-work, morning meeting of certain town employees and department heads, we have stated that an expenditure of town funds for food is proper in instances where an officer or employee is prevented from taking time off for food consumption due to a pressing need to perform the business at hand at that time (1972 Op St Compt 72-175 (unreported).

In another opinion (28 Op St Compt 30 (1972), we applied the above-stated criterion and concluded that a town charge for breakfast consumption in a local restaurant would be improper, except where an early morning meeting was imperative, such as where there is urgent business which must be conducted with a degree of immediacy. Under ordinary circumstances, officers and employees of a town are responsible for providing and paying for their own food.

The same reasoning would apply to the situation at issue herein. Since it has not been indicated that the pre-work meetings in question involve any matters of urgency, or that there is an imperative need for such early morning meetings, it would appear that the "breakfast" expense would not be proper.

While the cost of providing a room in which to conduct such meetings would, in some cases, be a proper town charge, we feel that such an expense should be undertaken only in the unlikely event that there is no adequate town facility available in which such meetings could be held.

(3) Town Law §64(14)(a) authorizes the establishment by a town board of a publicity fund from which moneys may be expended for the purpose of advertising certain advantages of the town, including "such additional purposes as may tend to promote the general commercial and industrial welfare

of the town." Section 64(14)(b) indicates that the instant town may, subject to permissive referendum, appropriate up to $25,000 annually to its publicity fund (see L1960 ch 640).

This Department has previously expressed the view that §64(14) would authorize a town to contract for activities such as the preparation and distribution of brochures pertaining to industrial development in the town (20 Op St Compt 115 (1964) and the arranging of personal meetings between officers or employees of a local development corporation and officials of various industries for the purpose of encouraging such industries to relocate in the town (1976 Op St Compt #76-943 (unreported). Similarly, it is our opinion that it would be proper for a town to expend publicity fund moneys to pay for reasonable and necessary expenses for rental of a room, food, nonalcoholic beverages and gratuities in connection with a dinner or luncheon meeting to be attended by area businessmen and town officials for the purpose of discussing potential business expansion or relocation in the town and other related matters.

We must note, however, that this Department has consistently taken the position that municipal moneys may not be spent for the purchase of alcoholic beverages (see, for example, 1969 Op St Compt #69-522 (unreported). Such an expenditure would not, in our view, be considered a proper or necessary municipal expense and would, accordingly, be improper in this instance.

(4) While we have stated that a town may purchase "award pins" of nominal value for employees who have served the town for a certain number of years (1974 Op St Compt #74-1054 (unreported), this Department has consistently taken the position that the cost of an annual banquet, such as the one proposed here for town employees who have attained 25 years of town service, would not be a proper municipal expense and would constitute a gift of public funds to private persons in contravention of State Constitution Article VIII §1 (1975 Op St Compt #75-1257 (unreported); 1970 Op St Compt #70-554 (unreported); 1969 Op St Compt #69-1003 (unreported).

**Conclusions:** (1) The cost of rental of a room for the purpose of conducting a public meeting to discuss with town citizens various town problems would be a proper town charge. However, the cost of refreshments at such a meeting would not be a proper town charge.

(2) The cost of coffee and doughnuts to be served at a pre-work meeting of certain town officers and employees would not be a proper town charge unless such meeting was imperative and urgent business was being conducted.

(3) A town may expend publicity fund moneys to pay for rental of a room, food, nonalcoholic beverages and gratuities in connection with a dinner or luncheon meeting to be attended by area businessmen and town officials for the purpose of discussing potential business expansion and relocation in the town. However, such moneys may not be expended to purchase alcoholic beverages for such meeting.



(4) A town may not pay for an annual awards dinner to honor employees having 25 years or more of service.

October 19, 1977.

## OPINION 77-668

**Inquiry:** May a town provide school crossing guards to a village located within the town where such town furnishes police protection to the village, which maintains no police department?

**Statement of Law:** General Municipal Law §208-a provides as follows:

> The duly constituted authorities of any . . . town or village . . . may designate, authorize and appoint such a number of persons as such authority shall deem necessary, and at such salaries as such authority shall deem advisable, as school crossing guards . . . .

This Department has stated that the clear intent of §208-a is that a town or village may employ crossing guards only within the area of its primary jurisdiction and that, therefore, a town may not employ crossing guards in a village (25 Op St Compt 82 (1969). It is our opinion that that conclusion applies, notwithstanding the fact that a town provides police protection to a village located within such town.

While the duties performed by school crossing guards may be in the nature of a police function and while these guards are often, in fact, police officers, the furnishing of such guards is in no way an essential element of the normal police protection which a town provides for a village in a situation such as the one at issue herein. Section 208-a contains the only authority for providing crossing guards, and such authorization is separate and distinct from any authorization relating to the furnishing of police protection.

We note that nothing we have stated above should be construed as prohibiting the town and village from entering into an agreement, or amending an existing agreement, pursuant to General Municipal Law Article 5-G, whereby the town's school crossing guards could perform their services in the village in question (Gen Mun L §§119-n(c), 119-o). However, absent such an agreement or amendment, the town may not employ school crossing guards in the village.

**Conclusion:** Absent an Article 5-G agreement, a town may not employ school crossing guards in a village located within the town even where the town is providing police protection to such village.

October 7, 1977.

## OPINION 77-678

**Statement of Fact:** A civil service employee was suspended without pay for a period of 30 days, pending a hearing. The hearing began on the 25th day of the suspension but was then postponed on the same day on the request of the employee that the hearing be changed from a closed to an open hearing.

**Inquiry:** Under these circumstances, if the hearing and determination of the charges is delayed beyond the 30-day period, is the employee entitled to begin receiving pay after the 30-day period expires?

**Statement of Law:** Civil Service Law §75(3) provides that a civil service employee may be suspended without pay for a period of not more than 30 days, pending determination of the charges.

In a prior opinion (25 Op St Compt 320 (1969), we stated as follows with regard to an employee's entitlement to pay beyond such 30-day period:

> It is the opinion of this Department . . . that, when the delay in the hearing and determination of charges of a suspended employee protected by the Civil Service Law is caused by the actions of that employee, the municipal employer may not pay the employee during that period of the employee's suspension which exceeds 30 days and which is caused by said employee's actions.

Thus, where the delay is occasioned by the employee's conduct, such as where motions or requests made by the employee are the cause of the delay, as would appear to be the case in this instance, he should be denied the right to receive his pay for the period involved (see also *Lytle v. Christian*, 47 AD2d 824, 365 NYS2d 865 (1975); *Gerber v. New York City Housing Authority*, 53 AD2d 557, 384 NYS2d 466, aff'd 42 NY2d 268, 397 NYS2d 608 (1977).

**Conclusion:** Where a delay in a hearing and determination of charges of a suspended civil service employee is caused by the actions of that employee, the employee is not entitled to receive pay for that period of his suspension which is beyond 30 days and is caused by the employee's own actions.

October 17, 1977.

## OPINION 77-681

**Inquiry:** Must each newspaper that publishes town legal notices be printed as well as published within the town?



**Statement of Law:** Public Officers Law §70-a must be read together with Town Law §64(11), which authorizes the town to designate an official paper. Section 64(11) sets forth the qualifications which a newspaper must possess to be designated an official paper. In addition, the *last sentence of paragraph one of* Public Officers Law §70-a sets forth certain minimal qualifications for any official newspaper throughout the State as follows:

> Every newspaper printed, published or having its principal office outside of a city having a population of over five hundred thousand inhabitants, as a condition precedent to designation as the official newspaper of any county, city, town, village or other political or civil subdivision of the state or for the making of claim for compensation under the foregoing provisions of this section, must be established at least one year and entered in the post office as second class matter.

The foregoing sentence, therefore, and not the sentence referred to in the letter of inquiry (§70-a, third sentence, second paragraph), is the pertinent one to be read together with Town Law §64(11) in determining the qualifications for an officially designated town paper.

Reading the two statutes together in that fashion, then, neither one requires the official town paper to be *printed* in the town. This Department has consistently taken the position that a newspaper which is published within the town and meets the other statutory qualifications need not also be printed in the town (1976 Op St Compt #76-389 (unreported); 1976 Op St Compt #76-185 (unreported); 1974 Op St Compt #74-86 (unreported); 10 Op St Compt 75 (1954).

The above conclusion, however, does not fully answer the inquiry since the manner of publication of a particular legal notice is determined not by Public Officers Law §70-a, but by the particular statute or local law requiring notice, or, if such legislation is silent in that regard, by Town Law §64(11) (*Town of Almond v. Penfold*, 58 M2d 780, 296 NYS2d 619 (1969); see also 1974 Op St Compt #74-86 (unreported); 24 Op St Compt 814 (1963). Some statutes require publication in the official paper (see, *e.g.*, Town L §§199(2), 200(7), 202-c(1), (2); other statutes may have different publication requirements (see *Penfold* case (*supra*). The town clerk, therefore, must check the particular statute to determine the newspaper(s) in which publication may be made.

Finally, it is not necessary that the newspaper be printed or published in the town in order to be compensated for publishing legal notices. However, it must have been established at least one year and entered in the post office as second-class matter as a prerequisite for making claim for such compensation (Pub Off L §70-a).

**Conclusion:** A newspaper which is published in a town and satisfies the other statutory qualifications to be designated as the town's official paper is not

disqualified because it is actually printed outside the town. Not all legal notices are required to be published in the official paper; the town should comply with the particular statute requiring notice.

November 29, 1977.

## OPINION 77-693

**Inquiry:** May a municipality issue obligations to finance the cost of physical betterments and improvements to a free association library building?

**Statement of Law:** State Constitution Article VIII §2 provides that "No county, city, town, village or school district shall contract any indebtedness except for county, city, town, village or school district purposes, respectively." The statutory embodiment of this constitutional prohibition is Local Finance Law §10.00, which states in part that "a municipality, school district or district corporation shall have power to contract indebtedness respectively for any municipal, school district or district corporation object or purpose set forth in paragraph a of section 11.00 of this chapter." It is our opinion that the construction or improvement of a private building, such as a free association library, is not a proper municipal purpose, and, therefore, the issuance of obligations for such purpose would violate the above-mentioned statutory and constitutional provisions.

We are aware that Education Law §256 authorizes a municipality to enter into a contract with a free association library to pay money for the capital or operating expenses of such library in return for the furnishing of library services to the people of the municipality. However, we interpret such section as authorizing only the use of *current* funds in connection with such a contract. There is no authority for a municipality to issue obligations for that purpose.

**Conclusion:** A municipality may not issue obligations to finance the cost of physical betterments and improvements to a free association library building.

October 4, 1977.

## OPINION 77-697

**Statement of Fact:** Without getting into the specific incidents involved, it is sufficient to say that the present inquiry arises out of one instance where the highway superintendent dismissed an employee and another instance where the



highway superintendent took disciplinary action against certain employees. Thereafter, the employees availed themselves of the grievance procedure provided for in a collective bargaining agreement entered into between the employees' bargaining unit and the town. The grievance procedure provides for the town supervisor to act as hearing officer and to rule on the grievances. In both of the instances in question, the supervisor found in favor of the employees. As a result, the disciplinary action taken by the highway superintendent was reversed and the dismissed employee was reinstated.

**Inquiry:** Is the town highway superintendent bound by the provision of the collective bargaining agreement, regardless of whether he was a party to such agreement?

**Statement of Law:** It is noted that the highway superintendent has the power to hire laborers, drivers and mechanics in the highway department within the limits of the budgetary appropriation for such department (High L §140(4); 30 Op St Compt 186 (1974). The highway superintendent also has the power summarily to dismiss such employees with certain exceptions not applicable to this inquiry (see Civ Serv L §75; 29 Op St Compt 191 (1973). Thus, the question presented for determination is whether the provisions of the collective bargaining agreement entered into between the highway department employees and the town, and specifically the provision thereof providing employees with a right to a hearing of their grievances, is binding upon a town highway superintendent who was not a party to such agreement. Our conclusion is in the affirmative.

In another opinion (25 Op St Compt 284 (1969), we concluded that: (1) a town highway superintendent is not a necessary party to a contract between a town and an employee organization; and (2) a highway superintendent is bound by such a contract to the extent that it affects highway employees. We also point out that a recent decision of the Public Employment Relations Board (8 PERB 3057 (1975) held that a town is the sole employer of highway department blue collar workers for collective bargaining purposes.

In reaching its decision, the Public Employment Relations Board stated in pertinent part as follows:

> Most of the incidents of control over Highway Department employees that . . . are exercised by the Superintendent are exercised by persons who are "appointing officers" within the meaning of that term under the Civil Service Law. Such persons are not usually independent public employers. . . . What remains to distinguish the Superintendent from other department heads of the town is that he alone is elected. We do not find that this circumstance is sufficient to constitute him as a separate public employer or government within the meaning of the Taylor Law.

While the PERB decision was addressed to the question of proper bargaining units for Taylor Law purposes, we think the above-quoted language is significant with respect to the question at issue herein. We agree that there is little to distinguish the highway superintendent from other "appointing officers" apart from his elective status. Since such other appointing officers would not normally be parties to the collective bargaining agreement between the town and employees under their jurisdiction, but would, nevertheless, be bound by the provisions of such agreement, we think it follows that the highway superintendent should be in no different position.

A parallel to the situation at hand exists at the State level with the head of this Department, the Comptroller. The Comptroller is an elected department head who possesses the power to appoint and dismiss personnel (subject to civil service requirements in appropriate cases) within the limits of the budget. While the Comptroller is not a party to the collective bargaining agreement entered into between the State and its employees, he is clearly bound by the provisions of that agreement insofar as they are applicable to employees in his Department.

We wish to emphasize that we do not mean to imply that the highway department *could not* be a party to the collective bargaining agreement entered into between the town and highway department employees. The town could, if it wished, authorize the superintendent to be a party to such agreement or consult the superintendent with respect to its negotiations. Indeed, in the cited PERB opinion, the Board indicated that its decision might have been different if the superintendent had been given veto power with respect to nonfiscal terms and conditions of employment.

In conclusion then, it is our opinion that the highway superintendent is bound by the provisions of a collective bargaining agreement entered into between the town and highway department employees, regardless of whether he was a party to such agreement. Where such an agreement provides for a grievance procedure, highway department employees may utilize such procedure and the superintendent is bound by the determination made following such proceeding.

**Conclusion:** A town highway superintendent is bound by the provisions of a collective bargaining agreement entered into between the town and highway department employees, regardless of whether he was a party to such agreement.

November 1, 1977.

## OPINION 77-699

**Statement of Fact:** A developer petitioned the village board to install center-mall curbing and paving on a street dedicated to the village. An engineering firm estimated the total cost of such installation at $88,600. The matter was duly noticed for public hearing, with the developer being fully notified and aware of all the facts and circumstances. The cost of such installation was to be solely for the benefit of such developer, and the entire cost of the installation was to be assessed against the developer's property.



On November 26, 1973, following the public hearing, the village board adopted a bond resolution in the aforementioned amount of $88,600, and, because the construction was to start at once, a bond anticipation note resolution was also adopted and bond anticipation notes were promptly issued for that amount. The bond resolution and the other procedures were processed through New York City bond counsel.

After the money had been borrowed, the village board met again, on December 6, 1973, and rescinded the initial bond resolution and adopted a new resolution (or an amended version) providing that the project cost and the amount to be financed was not to exceed $72,600. This was not done under the supervision of bond counsel. Subsequently, and in August of 1974, serial bonds were issued in the full amount of $88,600, the amount necessary to redeem the aforementioned bond anticipation notes. However, the actual installation cost turned out to be $67,220.29, or $21,379.71 less than the original estimate. This latter-mentioned amount represented a surplus in bond proceeds. The village treasurer was able to, and did, prepay this amount of bonds, retiring the same and treating this prepayment as if it were one assessment installment on the part of the developer, that is, the developer was not assessed at all for the year 1976.

However, certain interest costs have been incurred in connection with the entire amount of the initial bond and note issue of $88,600, and the claim has been made that the developer's liability for interest should be limited to the interest on the actual installation cost of $67,220.29. The village alleges that since the project was for the developer's exclusive benefit and since the $88,600 issue was based on a good faith engineering estimate, the developer is responsible for the total interest. The village contends that there is no justification for village taxpayers having to absorb the difference.

**Inquiry:** Is the developer responsible for the total interest costs incurred by reason of the amount of the initial borrowing?

**Statement of Law:** We believe that authority for a village to construct center-mall curbing and paving on a village street and to assess the same in full against abutting property is contained in Village Law §6-622. A most significant aspect of that statute, as it relates to this inquiry, is the requirement of a public hearing where all or part of the installation cost is to be assessed against benefited property.

We are advised that in the case at hand, the requisite public hearing was held and that the developer was fully notified and was aware of all the attendant facts and circumstances. Important facts of which the developer was aware were the

engineer's estimate of the project cost in the amount of $88,600 and the fact that the village board adopted a bond resolution in that amount, with notes being issued promptly thereafter. Nothing prevented the developer from engaging another engineer to provide a second estimate for purposes of comparison. But this was not done, nor is there any indication that the developer did anything but acquiesce in village procedures.

It must be remembered that this project was undertaken solely for the benefit of the developer and that it was the developer's petition which initiated it. The engineering estimate was rendered in good faith and was relied on by all of the parties. The bond resolution and the borrowing in the total amount of that estimate were achieved with both the village and the developer firmly believing that the installation cost would be $88,600. The village could not postpone the issuing of the obligations until a later date because the project was to commence at once and moneys would be needed immediately. All this was done for the good and convenience of the developer. As a further point, as soon as the village treasurer realized that the proceeds of the borrowing exceeded the project cost, he immediately applied the excess proceeds to the prepayment and redemption of bonds in that amount, thus saving the developer additional interest costs.

All of the foregoing leads us to the inescapable conclusion that it is the responsibility of the developer to bear the full interest cost. No legal principle would dictate that the remaining village taxpayers should shoulder the burden of paying any part of the interest cost on this project which did not benefit them in any way and which inured exclusively to the developer's benefit. In fact, such taxpayers might well sustain the claim that they were deprived of the constitutional guarantee of due process if they should be called upon to bear any part of the interest payment. It must be remembered that at the public hearing, the whole thrust was upon the total project cost, including interest on borrowings, being assessed against the developer's property. The remaining taxpayers were not, and could not, have been advised at that time that they would be expected to pay a share of the interest. To be advised of this now, well after the fact, would, we reiterate, seem a denial of due process.

We should point out in passing that it is our opinion that the alleged rescinding or amendatory resolution of the village board of December 6, 1973, was a total nullity. It was not attended by the same procedural formalities as the original bond resolution. No public hearing was held on it. And, most significant to our way of thinking, any attempt to reduce the amount of a bond resolution — that is, to reduce the amount to be borrowed — after a larger amount has already been borrowed pursuant to the original resolution, would, as a matter of practical necessity, be wholly null and void.

**Conclusion:** Where a property owner petitions a village for paving and curbing to be wholly assessed against his property, and, because of engineering



estimates, a duly noticed bond resolution is adopted for a sum larger than the eventual cost, and obligations are issued in the larger amount, the property owner cannot escape paying interest on the total amount.

September 6, 1977.

## OPINION 77-714

**Statement of Fact:** A village trustee owns property which adjoins a parcel owned by the village (village firehouse). There is situate between the two properties a strip of land 3.4′ in width by 15.9′ in length which apparently has not been conveyed either to the village or to the trustee by the deeds of their respective properties. Therefore, it is unclear exactly who has title to the parcel under consideration.

The trustee has proposed that the village convey to him by quit claim deed whatever title or interest, if any, the village has in the parcel, as a means of assisting him to obtain clear title thereto. As consideration for such transfer, the trustee would grant to the village: (1) an easement over the subject strip of land; and (2) an easement over an additional 11.5′ of the trustee's property abutting the village property. There would be no exchange of monetary consideration.

**Inquiry:** Under the above circumstances, would the village trustee have a prohibited interest in the exchange of real property interests between himself and the village?

**Statement of Law:** The agreement for the exchange of property interests would constitute a "contract" between the trustee and the village, as that term is defined in General Municipal Law §800(2). The trustee has an "interest" in such contract because he receives a direct material benefit as a result thereof in the form of acquiring the interest of the village, if any, to the parcel of property (Gen Mun L §800(3).

The benefit to the trustee does not necessarily have to be pecuniary in nature in order for him to have a statutory interest in the agreement with the village. This interest is prohibited by General Municipal Law §801(1) because the trustee, as a member of the board of trustees, has the power or duty to approve the agreement (Vill L §4-412(1). In this regard, it is immaterial that the trustee dissociates himself from board proceedings relative to the transaction. The §801(1) prohibition stems from the power or duty of the trustee to approve or authorize the contract, etc., and it is irrelevant that he refrains from the exercise of that power or the performance of such duty.

General Municipal Law §802 affords exceptions to the prohibition of §801 with respect to certain transactions. Subdivision (2)(f) provides that §801 shall not apply to:

> A contract in which a municipal officer or employee has an interest if the total consideration payable thereunder, when added to the aggregate amount of all consideration payable under contracts in which such person had an interest during the fiscal year, does not exceed the sum of one hundred dollars.

It is significant to note that in order for the exception to apply, the *total consideration payable* under the contract, by each party, must be $100 or less. This means that, in actuality, the value of the parcel to be conveyed must not exceed $100 and the value of the easements to be received in return also must not exceed $100. It would seem to us that since no cash is to change hands, this value in each case could be fairly determined by a disinterested, competent appraisal.

There is another provision of §802 which would be pertinent here, and that is subdivision (1)(d), which excepts from §801:

> The purchase by a municipality of real property or any interest therein, provided the purchase and the consideration therefor is approved by order of the supreme court upon petition of the governing board;

The acquisition by the village of the easements in the trustee's adjoining property, of course, constitutes the purchase of an interest in real property within the exception above quoted. Thus, the village may petition the Supreme Court to approve such acquisition and the transfer to the trustee of the parcel in question as consideration for the easements. Presumably, this approach would be utilized, if at all, only in the event that either of the property interests to be transferred is appraised to be in excess of $100 so as to render unavailable the exception contained in subdivision (2)(f). If the transaction is consummated pursuant to the subdivision (1)(d) exception, disclosure of the trustee's statutory interest nevertheless would be required under General Municipal Law §803(1).

Finally, in answer to specific questions:

(1) The proposed transfer would be illegal unless one of the aforementioned exceptions contained in General Municipal Law §802 were applicable. The applicability of §802(2)(f) would depend upon the fair market value of the respective property interests to be conveyed.

(2) The property interests should be valued at fair market value, which is generally defined as the sum which a purchaser who is not compelled to buy would probably pay under fair market conditions to a seller who is not compelled to sell. As previously indicated, this could be demonstrated by an objective, competent appraisal.

(3) If the value of the property interest to be conveyed by the trustee and that to be conveyed by the village does not in each case exceed $100, then the exception contained in General Municipal Law §802(2)(f) would have application.



**Conclusion:** A village may convey its interest in a parcel of land to a village trustee in exchange for the granting to it of an easement over land owned by the trustee, provided the consideration to be paid for the parcel and the value thereof do not, in each case, exceed $100, or, if in excess of said sum, the transaction is approved by the Supreme Court.

October 7, 1977.

## OPINION 77-725

**Inquiry:** Does a village mayor, in his capacity as an ex-officio member of the board of police commissioners, have the authority to issue a summons, and may he, as chief executive officer of the village, fill out, sign and deliver summonses for building violations?

**Statement of Law:** The term "summons," as used in the Criminal Procedure Law Article 130, is defined in §130.10 as a "process issued by a local criminal court directing a defendant designated in an information . . . to appear before it at a designated future time in connection with such accusatory instrument." Clearly, a summons may be issued only by a local criminal court (Crim Proc L §130.20).

The reference to a summons may mean rather an "appearance ticket," which may be issued by certain public servants. An appearance ticket is a "written notice issued and subscribed by a police officer or other public servant authorized by law to issue same, directing a designated person to appear in a designated local criminal court at a designated future time in connection with his alleged commission of a designated offense" (Crim Proc L §150.10). A public servant, other than a police officer, may not issue an appearance ticket unless he is specifically authorized to do so by a State statute (Crim Proc L §150.20(3); 1977 Op St Compt #77-386 (unreported). There is no statute which confers upon a village mayor, in his capacity as executive officer of the village, the authority to issue appearance tickets for alleged violations of building ordinances.

The mayor is an ex-officio member of the board of police commissioners. He, therefore, possesses all of the powers and duties of a police commissioner (see 24 Op St Compt 190 (1968). However, there is no statute which authorizes a village police commissioner to issue appearance tickets and, thus,

the mayor, as an ex-officio police commissioner, also is not empowered to issue appearance tickets.

**Conclusion:** A village mayor, either as executive officer or as an ex-officio police commissioner, is not authorized to issue summonses or appearance tickets.

October 7, 1977.

## OPINION 77-727

**Inquiry:** Can a village issue "advance" refunding bonds as authorized by Local Finance Law §90.10?

**Statement of Law:** Local Finance Law §90.10 was added by Laws of 1977 chapter 264 and took effect June 15, 1977. Briefly, that section provides a means whereby a municipality, school district or district corporation can issue bonds (refunding bonds) to redeem outstanding bonds (refunded bonds) under certain specified conditions.

Because of the present conditions in the municipal bond market and because of new federal arbitrage regulations, it is a practical impossibility (no fiscal advantage) to refund bonds which are not callable. If the village has issued bonds on or after January 1, 1970 which are callable, then it is possible that it might be able to issue "advance" refund bonds.

In order for the village bonds to be callable (redeemable prior to maturity), the bonds would have had to be sold on the condition that they were callable and the bonds themselves would specifically reflect or recite this callable feature. It appears that the village in question has not issued callable bonds since January 1, 1970. If the village has, in fact, issued callable bonds, then the bonding attorneys used by the village should be consulted to determine whether it is feasible for the village to issue refunding bonds. Matters such as the date that the bonds are callable and the interest rate or rates of the bonds to be refunded are important in determining the feasibility of issuing refunding bonds.

**Conclusion:** Local Finance Law §90.10 authorizes the issuance of "advance" refunding bonds under certain specified conditions.

September 26, 1977.



## OPINION 77-735

**Statement of Fact:** Recently, the Legislature enacted General Municipal Law §78-a (L 1977 ch 478) whereunder a municipal corporation is authorized to bring a cause of action in a civil court to recover damages, to the extent of $1000, from the parent or legal guardian of an infant, between the ages of 10 and 18 years, who willfully, maliciously or unlawfully damages or destroys municipal property.

**Inquiry:** May a municipal corporation enact a local law creating liability on the part of parents and legal guardians for the willful destruction of the municipality's property and authorize the municipality to bring an action in a civil court for the recovery of a civil fine in an amount fixed by the local law?

**Statement of Law:** Although a local law of the nature under consideration would concern municipal property, which is, of course, a proper subject for local legislation (Mun HRL §10(1)(i), it would also concern the control of children by parents and legal guardians. Such control, we believe, is clearly beyond the powers of municipal corporations and is a matter in which the State alone can legislate. Thus, it has been written (15 NY Jur, Domestic Relations, §341, pp. 572-573):

> It is indisputable that the custody and control of children are subject to state regulation, the state standing in relation of parens patriae to children.

Further, with respect to the particular subject matter in question, under the common law, a parent, or one standing in the parental relation, is not liable, merely by reason of the relationship, for the torts of his child, whether the torts are negligent or willful, but rather, the child is liable for its own torts (15 NY Jur, Domestic Relations, §389, pp. 627-628). The authority just cited states, however, that liability *may be imposed by statute* and points to General Obligations Law §3-112, which applies to damage to private property by children and formerly applied as well to the destruction of public property before the recent enactment of Laws of 1977 chapter 478, which added §78-a to the General Municipal Law, pertaining to the property of municipal corporations, and also added other sections to the Education Law (§§1604(35), 1709(36), 2503(18), 2554(16-b), 2590-g(15), and to the Executive Law (§171) pertaining to school property and State property.

From the discussion above, we feel it is clearly evident that a municipal corporation may not enact a local law of the particular kind proposed or any local law within the realm of the torts of the child and liability therefor on the part of the parent. Obviously, a municipality is powerless to legislate in derogation of the common law of domestic relations. The power to do so lies with the State, through its status of parens patriae to children, and is exercised

through enactments of the Legislature, such as Laws of 1977 chapter 478, which has been described in detail above. A municipal corporation, being without any status similar to the State, cannot legislate in this area and is limited strictly to exercising only that authority which the State has granted to it, such as the authorization to commence an action pursuant to General Municipal Law §78-a for the recovery of damages from parents for the destruction of municipal property through the willful acts of their children.

And, although it hardly need be mentioned in light of the discussion above, Municipal Home Rule Law §10(4)(b) declares that a municipal corporation may provide for the enforcement of local laws by legal or equitable proceedings which are or may be provided or authorized by law, to prescribe that violations thereof shall constitute misdemeanors, offenses or infractions and to provide for the punishment of violations thereof by, among other things, a civil penalty. There is no authorization in law to allow a municipality to institute legal or equitable proceedings for the enforcement of a local law of the nature under discussion. The absence of authorization is attributable obviously to the total lack of power on the part of municipalities to enact such local laws.

**Conclusion:** A municipal corporation may not enact a local law creating liability on the part of parents and legal guardians for willful acts of children resulting in the damage or destruction of municipal property and subjecting said parents and legal guardians to a civil penalty.

October 7, 1977.

## OPINION 77-738

**Statement of Fact:** A police officer was removed from the police force in 1975 and subsequently reinstated by court order following protracted litigation.

**Inquiry:** Is the officer entitled to take a vacation utilizing the time accrued during the period of his absence from his position, or should the period of his absence be charged against such accrued vacation time?

**Statement of Law:** Civil Service Law §77 provides, in part, as follows:

> Any officer or employee who is removed from a position in the service of the state or of any civil division thereof in violation of the provisions of this chapter, and who thereafter is restored to such position by order of the supreme court, shall be entitled to receive and shall receive from the state or such civil division, as the case may be, the salary or compensation which he would have been entitled by law to have received in such position but for such unlawful removal, from the date of such unlawful removal to the date of such restoration, less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period.



Accordingly, pursuant to the mandate of the above statute, the police officer in question is entitled to be paid his regular salary for the period of his absence from the police force, less any other compensation received during that period. From the tenor of the letter of inquiry, the inquirer appears to presume that in addition to such compensation, the officer also was entitled to continue to accrue vacation credits during such period. However, we would advise that there is a judicial ruling to the contrary. In *Application of Sweeney* (10 M2d 930, 170 NYS2d 5, app dis 11 AD2d 965, 207 NYS2d 446 (1960), an employee of a State hospital was reinstated by a court to his position of employment and sought to receive credit for the vacation time which he would have accrued if he had been on the job. The court, citing Civil Service Law §23, which is now §77, denied his application, stating that "There is no provision in said section allowing petitioner compensation for vacation or pass time that allegedly accrued to him."

Therefore, the police officer in question is not entitled to the accrual of vacation credits during his absence from the force (at least in the absence of a collective bargaining agreement so providing).

On the other hand, the inquiry may have reference to vacation credits which had accrued *prior* to his removal from the police force (or accrued pursuant to a collective bargaining agreement during his suspension) and which were, so to speak, in abeyance, during that time. As to such credits, it is our opinion that they should not be charged for any time during the period of the officer's enforced absence from his job. After all, his absence was not by choice, but rather was mandated by the city, apparently without just cause, as it turns out. We feel that it would be inequitable for the city to charge the officer's duly accrued vacation time for such absence.

**Conclusion:** A police officer who is reinstated in his job after removal is not entitled to vacation credits which might otherwise have been earned during the period of his suspension. Vacation credits accrued *prior* to such removal should not be charged for any time attributable to the officer's enforced absence.

October 7, 1977.

## OPINION 77-747

**Inquiry:** At a county tax sale conducted without competitive bidding (as authorized by Real Prop Tax L §1008(3) is the county treasurer relieved of observing the provisions of §1006(1), which state that the treasurer shall sell "so much of each parcel . . . as will be sufficient to pay the amount due thereon as specified in such notice [of tax sale]"?

**Statement of Law:** The provisions of §1006(1) quoted above have been interpreted quite recently by the Appellate Division (*Van Wormer v. Giovotto*, 42 AD2d 320, 346 NYS2d 624 (1973) and by the Court of Appeals (*Wood v. LaRose*, 67 M2d 597, 324 NYS2d 788, rev'd 39 AD2d 469, 336 NYS2d 795, aff'd 35 NY2d 266, 360 NYS2d 864 (1974) in cases involving tax sales of parcels to third parties rather than to the county. The opinions of the courts in those cases give us insight as to the purpose underlying the provisions of §1006(1) quoted and some direction as to the manner in which the county treasurer is to apply those provisions.

In the *Van Wormer* case, the Appellate Division, Third Department, observed that the purpose of the statute's quoted terms was to provide a means for local governments to collect delinquent taxes rather than a means to aid speculators to make spectacular windfall profits by acquiring an interest in real property by paying the delinquent taxes, generally an amount which is fractional when compared to the fair market value of the parcel. On that premise, that the rights of property owners should be jealously guarded, the court declared that the county treasurer is required to sell as little of each parcel as is marketable and will bring a price sufficient to cover taxes due.

In the *Wood* case, the Court of Appeals noted that it had no quarrel with the decision in the *Van Wormer* case, but it pointed out that that case involved special facts that called for a sale of less than the entire parcel. [In the *Van Wormer* case, the court determined that the county treasurer abused his discretion by selling the entire parcel when he could have sold a portion of the parcel consisting of a vacant lot which was separated from the improved portion of the parcel by a stream, a natural division of the parcel.]

The Court of Appeals then noted that such special facts were not present in the case before it. It went on to state:

> There is no evidence that to satisfy the tax lien in this case the county treasurer should have considered selling less than the whole seven-eighths acre owned by plaintiff. Absent such a showing, the county treasurer had no duty to sell less than all of the taxed property. Nevertheless, when he found that he was able to satisfy the tax lien by selling less than the whole property, he was not only authorized but required by the statute, in reason, to accept such a bid.

There are a number of conclusions that we feel can be drawn from the



opinions of the cited cases. The first of these is that a tax sale of a parcel for tax delinquency involves two interests: the interest of the county in the expeditious collection of delinquent taxes, which is the paramount interest; and the interest of the delinquent taxpayer in his real property which may be lost to him through the administrative tax sale procedure. Next, and we base this on the opinion of the Court of Appeals in the *Wood* case (*supra*), a county treasurer is under no duty to sell less than a whole parcel absent evidence brought to his attention prior to or at the time of the sale which would cause him to consider selling less than the entire parcel. If such evidence should come to his attention, he is not only authorized but required by §1006(1) to accept a bid for the sale of less than the entire parcel.

Now, we will discuss tax sales without competitive bidding under §1008(3). That statute was enacted in 1973 (L 1973 ch 301, eff 5/8/73) and created authorization by which a county governing body could, in its descretion, allow the county treasurer to purchase lands at tax sale, without competitive bidding, for the gross amount due thereon. The purpose behind such authorization (to exclude third party bidders) was to allow counties to prevent abuses resulting from the tax sale procedure which had been practiced throughout the State from time to time by unscrupulous tax sale speculators.

The statute is prefaced by the clause stating that its terms shall apply "Notwithstanding any other provision of law." The purpose of that clause, by our present reading and past interpretation (1975 Op St Compt #75-1092 (unreported), was to overcome the mandate of Real Property Tax Law §1006(1) and of special tax acts which called for competitive bidding at tax sales.

Although the enactment of §1008(3) authorizes counties to conduct tax sales without regard for the provisions of §1006(1), which require that parcels be sold by the competitive bidding of third parties, we are unable to reach the unqualified conclusion that a county treasurer need never consider selling less than the whole parcel when he conducts a tax sale from which third parties have been excluded.

Initially, we note that §1008(3) has never, according to our research, been judicially (or administratively) interpreted as having the effect of relieving the county treasurer of selling, in appropriate circumstances, so much of each parcel as is sufficient to pay the amount due thereon. Secondly, although the *Van Wormer* and *Wood* cases concerned tax sales involving competitive bidding rather than sales under §1008(3), neither of those cases, which were decided after the enactment of §1008(3), included any comment regarding that statute, as a point of reference or otherwise, in their detailed analysis of the provisions of §1006(1) concerning the sale of less than the whole parcel. Next, we feel that those provisions may be viewed as a direction to the county treasurer which is independent of and separable from the provisions of that statute pertaining to competitive bidding and, thus, would be applicable to any tax sale whether it be conducted between competing third parties or pursuant to

§1008(3) where third parties have been excluded from the sale and the county treasurer conducts solitary purchases on behalf of the county. Such a view is based on the fact that §1006(1) does not require that the competitive bidding be based on how much (or how little) of the affected parcel the prevailing bidder will accept. Although the foregoing may be a proper basis for the bidding (as pointed out in the opinion in the *Wood* case), it is not the exclusive basis for bidding on parcels under §1006(1). Section 1006(1) does not prescribe any required basis for the manner of bidding on the delinquent parcels nor does it expressly prohibit any styles or manners of bidding.

Finally, it seems incongruous to us to conclude that in circumstances where competitive bidding is involved less than the whole of the parcel may be sold, while a tax sale pursuant to §1008(3) without competitive bidding must result in a sale of the whole parcel. The incongruity is that by virtue of the format of the tax sale selected by the county in its discretion, the tax delinquent property owner would be subjected to different risks jeopardizing his ownership interest. Under the interpretation of §1008(3) suggested, that the sale of a tax delinquent parcel without competitive bidding requires the sale of the whole parcel, the property owner would, unquestionably, be subjected to a greater risk than if the sale was open to third party bidders and less than the whole of his parcel might be sold. We do not believe that §1008(3) was intended to have that effect or should be interpreted in that manner.

To conclude, the law is unclear on the question at hand, but we do not think, for the reasons stated above, that it may be stated absolutely that a sale of less than a whole parcel need never be considered at a tax sale without competitive bidding. We think that in the vast majority of tax sales conducted without competitive bidding, the county treasurer will, and quite properly we think, be purchasing the whole parcel with respect to each of the parcels being sold at tax sale. While we assume that that is the fact and has been the practice of the counties, including the present county, we feel that a county treasurer may, if evidence is brought to his attention prior to the sale, consider the sale of less than a whole parcel when circumstances indicate that such a sale would be advisable.

As a final note, we have been asked whether subdivision regulations are a related factor to be considered with the subject of the sale of less than the whole parcel at a tax sale. We do not think so. Section 1006(1) does not require that the sales of less than a whole parcel conform with subdivision regulations or other land use restrictions predicated upon lot size. Of course, the fact that a portion of a parcel was sold at tax sale does not relieve the property of land use restrictions. Such restrictions would bind a third party purchaser in the use of such property acquired at tax sale. A county, however, would not be bound by such restrictions if it acquired less than a whole parcel provided it used such property for a governmental function (1972 Op St Compt #72-731 (unreported).



**Conclusion:** Although the point is not clear, it would seem that a county treasurer may, depending upon the circumstances before him, purchase less than an entire parcel at a tax sale where third party bidders have been excluded.

October 25, 1977.

## OPINION 77-749

**Inquiry:** Does an individual who is a member of a volunteer fire company qualify as an exempt volunteer fireman under General Municipal Law §200 where he has spent part or all of his five years of membership required by such section in the emergency rescue and first aid squad (ambulance corps) of the fire company?

**Statement of Law:** General Municipal Law §200 defines the qualifications of an exempt volunteer fireman and, in addition to the five-year service requirement mentioned above, such section provides as follows:

> An exempt volunteer fireman is hereby declared to be *a person who as a member of a volunteer fire company* duly organized under the laws of the State of New York *shall have* at any time after attaining the age of eighteen years faithfully *actually performed service in the protection of life and property from fire* within the territory immediately protected by the company of which he is a member . . . . [Emphasis added]

The individuals at which the inquiry is directed are members of the volunteer fire company. In their capacity as members of the emergency rescue squad and ambulance corps of a volunteer fire company, such individuals are unquestionably engaged in the protection of life in fire-related situations. We think that such activity comes within the ambit of the above-emphasized phrase, "protection of life and property from fire." Therefore, assuming such a member also has met the five-year service requirement, it is our opinion that he would qualify as an exempt volunteer fireman under §200. We feel this conclusion is further supported by the fact that volunteer firemen are covered by the provisions of the Volunteer Firemen's Benefit Law while on call as members of an emergency rescue squad or ambulance corps (23 Op St Compt 878 (1967).

**Conclusion:** An individual who is a member of a volunteer fire company and meets the other requirements of this section qualifies as an exempt volunteer fireman, even though he has spent all or part of his required service period in the emergency rescue and first aid squad (ambulance corps) of the fire company.

October 20, 1977.

## OPINION 77-753

**Statement of Fact:** A city wants to purchase food and beverages to be provided at the scene of a fire for paid city firemen and for volunteer firemen who respond to a fire in the city under a mutual aid agreement. The labor contract between the city and its paid firemen is silent on this matter, but the county mutual aid plan has a provision stating that a fire company or department receiving assistance for "long periods of time" should provide food and beverages for assisting firemen.

**Inquiry:** Under these circumstances, may the city purchase the food and beverages?

**Statement of Law:** We have stated on numerous occasions that a village or fire district may expend village or district moneys to pay for food and nonalcoholic beverages provided to volunteer firemen during a fire (1974 Op St Compt #74-1306 (unreported); 17 Op St Compt 106 (1961); 28 Op St Compt 48 (1972).

Likewise, barring any prohibition of such an expenditure in a city's charter (and we find no such prohibition in this instance), we are of the opinion that a city may properly expend city moneys for food and beverages consumed at the site of a fire by paid city firemen, notwithstanding the fact that the labor contract between the city and the firemen is silent on the matter.

In a recent opinion, we stated that a *county* may not, pursuant to General Municipal Law §209-j, reimburse a volunteer fire department for food expenses incurred in rendering assistance under a county mutual aid program (32 Op St Compt 126 (1976). However, §209-j does permit a city, town, village or fire district participating in such a mutual aid plan to pay necessary and proper expenses incurred in relation to such plan. It is our opinion that it would be proper for a city, which received assistance from outside volunteer firemen under a mutual aid plan, to pay the expense incurred for food and beverages for the assisting firemen who respond to a call for mutual aid, since such firemen were present at the city's request and were serving the needs of the city (see 28 Op St Compt 48 (*supra*).

Thus, the clause in the county mutual aid plan permitting a fire company or department receiving assistance to provide food and beverages for assisting firemen is pertinent, and it would, accordingly, be proper for the city to pay an expense for such refreshments in this instance.

**Conclusion:** A city may purchase food and beverages to be provided at the scene of a fire, for both paid city firemen and for volunteer firemen who respond to a fire under a county municipal aid plan.

October 18, 1977.



## OPINION 77-755

**Statement of Fact:** A school district voted not to grant the so-called "business investment exemption" authorized by Real Property Tax Law §485-b, while the town within which the district is located has granted such exemption.

**Inquiry:** In light of this situation, is the school district bound by the town's determination, and must it also grant the "business investment exemption"?

**Statement of Law:** Real Property Tax Law §485-b provides a partial exemption (the "business investment exemption") from real property taxes for owners of commercial and industrial properties who undertake new construction or alter existing improvements on such properties subsequent to January 1, 1976. Such partial exemption, computed in the manner specified in §485-b(2), is effective automatically unless a tax district takes action pursuant to subdivision (7) of such section to reduce the percentage of the exemption.

Section 485-b(7) gives counties, cities, towns, villages and school districts the power to reduce the percentage of the exemption, including the power to eliminate the exemption entirely by reducing the percentage of the exemption to zero (see 32 Op St Compt 130 (1976). The decision of one tax district as to whether or not to reduce the percentage of the exemption has no effect on any other tax district, since each tax district is given independent power to decide what course of action it wishes to take.

In view of the foregoing, a town's determination to grant to commercial and business properties the full amount of the partial exemption authorized by §485-b has no effect on a school district within that town. Such school district remains free to reduce the percentage of the exemption to zero (thus eliminating the exemption), in which case commercial and business properties lying within the boundaries of the school district would remain fully taxable for school purposes.

**Conclusion:** A school district located within a town is not bound by the town's determination to grant the "business investment exemption" authorized by Real Property Tax Law §485-b(7).

October 19, 1977.

## OPINION 77-757

**Inquiry:** Would an attorney who practices law in a county and is a member of the county bar association be eligible for appointment to the office of county attorney even though he lives over the county line in an adjoining county?

**Statement of Law:** County Law §500(1) requires that the office of county attorney be filled by appointment of "a resident attorney-at-law." Applicable also to an appointment to the office of county attorney are the provisions of Public Officers Law §3(1), which require that a person be a resident of the municipal corporation of which he holds a local office. It has been determined that the term "residence," which is a necessary qualification for holding public office under Public Officers Law §3(1), means the *domicile* of the party in question (1974 Op Atty Gen 213 (informal).

We assume that the attorney in question has his domicile in the adjoining county where he lives. If that is the case, it is our opinion that he is unable to be appointed to the office of county attorney because he does not meet the residency qualifications.

Although there are provisions in law where an attorney is deemed to be a resident of the county in which he maintains an office for the practice of law for the holding of certain offices (*e.g.*, for appointment as a notary public or a commissioner of deeds, Pub Off L §3(3)(3-a)(7), there is no authority for treating an attorney as a resident of the county where he practices law for purposes of his appointment to the office of county attorney. And, as far as we are aware, membership in a county bar association never has the effect in law of creating a residence in the county for any purpose.

**Conclusion:** To be appointed to the office of county attorney, an attorney must have his domicile within the county.

October 13, 1977.

## OPINION 77-760

**Inquiry:** Is a town required to reimburse a town justice for his expenses while attending a training course mandated by law?

**Statement of Law:** Town Law §31 relates to the powers and duties of town justices. Subdivision (4) of that section provides as follows:

> Notwithstanding any other law, actual and necessary expenses incurred by a justice or justice elect in attending a course of training required of him before he can assume the functions of his office *shall be a charge against the town*. [Emphasis added]

As the underlined portion quoted above indicates, the town *must* be responsible for the actual and necessary expenses incurred by a town justice in attending mandated training courses. Thus, the town would be required to reimburse a town justice for such expenses.



This conclusion is fortified by the language in Town Law §116 relating to town charges, which states as follows in subdivision (12):

> the actual and necessary expenses incurred . . . by a justice of the peace in attending a training school for justices provided by the education department or given in his own county, by the county magistrate's association, *shall be a charge against the town of which he is an officer or officer-elect*. [Emphasis added]

We note that while the justice's actual and necessary expenses are reimbursable, any loss of salary sustained by him while attending the required training courses is not considered to be such an actual and necessary expense and is, therefore, not reimbursable (1972 Op St Compt #72-772 (unreported); 20 Op St Compt 224 (1964).

**Conclusion:** A town must reimburse a town justice for the actual and necessary expenses incurred while attending a training course required by law.

November 15, 1977.

## OPINION 77-772

**Inquiry:** May a municipality establish a reserve fund to cover the cost of unemployment compenstion claims arising out of the Federal Unemployment Tax Act (Pub L 94-566)?

**Statement of Law:** By means of Laws of 1977 chapter 616 (eff 8/1/77) the Legislature has amended the General Municipal Law by adding a new §6-m thereto, which authorizes municipalities to establish unemployment insurance payment reserve funds, from which they can reimburse the State Unemployment Insurance Fund for unemployment compensation claims made against them. This new reserve fund would be utilized in situations where a municipality has elected to adopt the benefit reimbursement option whereby such municipalities will reimburse the State Unemployment Insurance Fund for all benefits paid to their former employees.

If there are any further questions concerning the responsibility of local governments with respect to coverage under the State Unemployment Insurance Law, we suggest contacting Mr. Dominic N. Rotondi, Director, Unemployment Insurance Tax Liability and Field Audit, State Campus, Department of Labor Building, Albany, New York 12240.

**Conclusion:** General Municipal Law §6-m authorizes the establishment of an unemployment insurance payment reserve fund in order to finance compen-

sation claims made against municipalities arising out of the Federal Unemployment Tax Act.

October 20, 1977.

## OPINION 77-779

**Inquiry:** May a town pay the monthly cost of renting a typewriter for the town's industrial development agency?

**Statement of Law:** Our response is negative. An industrial development agency is a separate corporate governmental agency (Gen Mun L §856(2) and is not an agency or instrumentality of the municipality for which it was created. Thus, there is no statutory authority for a municipality such as the town in question to pay any of the expenses of an industrial development agency or otherwise subsidize or fund such agency.

The only way in which an industrial development agency could have access to the funds of a municipality would be pursuant to a contract under proper circumstances (Gen Mun L §858(11). We have discussed such contractual relationships in an earlier opinion (1972 Op St Compt #72-984 (unreported).

**Conclusion:** A town has no authority to pay for typewriter rental by an industrial development agency.

October 14, 1977.

## OPINION 77-797

**Inquiry:** May the benefit formula utilized in a town sewer district be changed and, if so, what are the proper procedures with respect thereto?

**Statement of Law:** This Department has on many occasions expressed the view that a town board (or a board of sewer commissioners) may change the formula for determining benefit assessments from year to year (see 1970 Op St Compt #70-144 (unreported). We might also point out that a sewer rent formula could also be changed from year to year (1976 Op St Compt #76-649 (unreported).

With respect to the manner of changing the formula, it is done simply by resolution of the governing body of the sewer district (either the town board or board of sewer commissioners). No public hearing or referendum would be necessary in connection with such change. Of course, the benefit assessment roll itself is subject to a public hearing (Town L §§202-a(5), 239).



**Conclusion:** In a sewer district, the formula for determining annual assessments may be changed from year to year, if the cost is assessed annually.

November 29, 1977.

## OPINION 77-801

**Inquiry:** May a county pay for the purchase of doughnuts and coffee for citizens serving on a grand jury, such food to be served at a morning break while the jury is in session?

**Statement of Law:** County Law §218 relates to a county's responsibilities regarding courthouses, and it sets forth certain authorized expenditures for judicial purposes. With regard to food for grand jurors, that section states as follows:

> When so ordered by the court, the sheriff shall provide food . . . for grand jurors kept together pending an indictment or presentment and their deliberation thereon, and the cost shall be paid by the county treasurer upon order of the presiding judge or justice.

Thus, it is clear that under §218, a county is required to pay for food supplied to grand jurors pursuant to a court order. We feel that §218 envisions a situation where the jurors are sequestered, or required to stay together beyond their normal hours in order to complete their work, and not something like a routine morning coffee break during a normal session.

Aside from the court order provision of §218, there is no authority for a county to pay for the purchase of coffee and doughnuts under the circumstances at issue herein. It is our opinion that such an expenditure would be violative of State Constitution Article VIII §1, which prohibits gifts of public funds to private individuals (1976 Op St Compt #76-600 (unreported).

**Conclusion:** A county may not pay for the purchase of coffee and doughnuts for grand jurors to be served at a routine morning break during one of their sessions.

November 23, 1977.

## OPINION 77-802

**Inquiry:** Must the five-year period of service necessary for qualification as an exempt volunteer fireman pursuant to the provisions of General Municipal Law §200 be served consecutively?

**Statement of Law:** General Municipal Law §200 contains the provisions of law defining the qualifications of exempt volunteer firemen. Said section, as originally enacted by Laws of 1909 chapter 29, provided in pertinent part as follows:

> An exempt volunteer fireman is hereby declared to be a person who as a member of a volunteer fire company duly organized under the laws of the state of New York shall have at any time after attaining the age of eighteen years faithfully performed service in the protection of life and property from fire within the territory immediately protected by the company of which he is a member, and while a bona fide resident and, if of full age, an elector therein for a period of five *consecutive* years. [Emphasis added]

In 1937, §200 was amended by removing the word, "consecutive," underscored above (L 1937 ch 295). The obvious intent of such amendment was to remove the requirement that the five-year service period be served consecutively. Accordingly, it is our opinion that the inquiry must be answered in the negative.

We call attention to the provisions of §200-a dealing with firemen who serve in more than one fire company or fire department. Said section provides that any volunteer fireman in good standing who serves less than five years in a fire company or fire department, upon his resignation or transfer, is entitled to a certificate as provided in §202 for the time he has actually served. Such period of service may then be added to any future period of service as a volunteer fireman for purposes of the five-year service requirement contained in §200.

**Conclusion:** The five-year period of service necessary for qualification as an exempt volunteer fireman pursuant to General Municipal Law §200 need not be a consecutive five-year period of service.

November 15, 1977.

## OPINION 77-807

**Statement of Fact:** Suffolk County has, pursuant to General Municipal Law §119-r, adopted several local laws which authorize the county to enter into



contracts for mass transportation services to be rendered by a privately owned or operated mass transportation facility. The county does not own any equipment or facilities to be used for mass transportation purposes.

**Inquiry:** May the county contract for such services without complying with competitive bidding?

**Statement of Law:** Pursuant to General Municipal Law §119-r, a county is empowered to adopt local laws making provision for and authorizing mass transportation services. Subdivision (1)(d) of that section provides as follows:

> [Such local laws may authorize] . . . The making of a contract or contracts for a fair and reasonable consideration for mass transportation services to be rendered to the public by a privately-owned or operated mass transportation facility. Such power shall include but not be limited to the power to appropriate funds for payment of such consideration, and to provide that all or part of such consideration shall be in the form of capital equipment to be furnished to and used and maintained by such privately-owned or operated mass transportation facility.

Our research has disclosed that the county has, in fact, adopted two local laws (Loc L No. 25 of 1974; Loc L No. 1 of 1975) authorizing the county to enter into contracts for mass transportation services.

At the outset, we note that such contract is unquestionably a "public works" contract in excess of $3,500 and, as such, is subject to competitive bidding requirements, unless such contract falls within the category of contracts which the courts have held are outside the realm of competitive bidding because they involve professional services or services requiring special skills or training. In a prior opinion (1973 Op St Compt #73-1189 (unreported), we stated as follows:

> . . . The management of a bus system does not involve the kind of special skills or training which would except the contract from competitive bidding. While it is undoubtedly true that a background of experience in the field of mass passenger transportation is desirable and may, indeed, be an indispensable requirement, we are of the opinion that this does not of itself justify inclusion in the excepted category . . . .

It is our opinion that a contract for the provision of mass transportation services should be competitively bid. Along these lines, we would like to point out the applicability of certain provisions of the Transportation Law. Article 6 of that law relates to the power of the State Commissioner of Transportation to regulate the operation of bus lines and bus companies. Section 149 thereof provides that no bus company shall operate a bus line without first obtaining the permission and approval of the State Commissioner of Transportation in the form of a certificate of public convenience and necessity. Therefore, the

county, when preparing its bid specifications, should bear in mind that only those bus companies which possess (or which can present evidence of being able to obtain) the required certificate of public convenience and necessity could validly perform the services that the county requires.

**Conclusion:** A contract for mass transportation services to be provided to a county is subject to competitive bidding requirements, and prospective bidders would have to obtain a certificate of public convenience and necessity as required by the State Commissioner of Transportation.

December 16, 1977.

## OPINION 77-813

**Statement of Fact:** A town adopted a bond resolution in the amount of $39,000 for the purchase of a highway truck and, subsequently, in October of 1977, accepted a low bid of approximately $39,000 for the purchase of the truck. The town expects delivery of the truck in December with payment of the $39,000 due and owing in January of 1978. The town has budgeted $40,000 for equipment purchases in its 1978 budget.

**Inquiry:** May the town pay for the truck with money appropriated in the 1978 budget and not issue any bonds or bond anticipation notes?

**Statement of Law:** A prior opinion (19 Op St Compt 45 (1963) involved a somewhat similar question and circumstance. In that situation, the voters of a central school district authorized the purchase of school buses and the issuance of serial bonds to pay all or part of the costs therefor and voted a tax to be collected in installments for the purpose of paying debt service on the bonds. Thereafter, it appeared that the school district was in a position to finance the bus purchase through current funds, and we were asked whether or not, in order to save interest costs, the school district could finance the purchase from such current funds rather than issue the serial bonds as authorized by the voters.

We expressed the opinion that the vote of a tax to be collected in installments for the purpose of paying debt service on a proposed issue of school district obligations does not mandate that such obligations be issued. We stated in the 1963 opinion (*supra*) that the school district could pay for the buses from current funds, notwithstanding the fact that district voters had previously authorized a tax to be collected in installments and the financing of the purchase by issuing serial bonds. We did suggest that the vote for the tax to be levied in



installments should be rescinded as provided by the Education Law.

In the situation in question, we are aware of no provisions which would require the town to issue bonds or notes to finance the purchase of the truck instead of financing the same from current funds. We do suggest that the bond resolution authorizing the issue of bonds to finance the truck purchase in question be repealed (see Loc Fin L §41.00).

**Conclusion:** A town may finance the purchase of a highway truck through current funds, despite the fact that a bond resolution was adopted to finance the purchase of the vehicle.

November 17, 1977.

## OPINION 77-816

**Statement of Fact:** Private property owners residing on private streets have offered to dedicate such streets to the village by means of a limited easement of ingress and egress. Such a limited easement will be for the sole purpose of enabling village highway equipment to enter onto such streets for snow removal.

**Inquiry:** Is such a procedure permissible?

**Statement of Law:** Village Law §6-610 provides a procedure whereby a private property owner may dedicate a private street to a village. That section provides, in part, as follows:

> An owner of land in a village who has laid out a street thereon may dedicate such street, or any part thereof, *or an easement therein, to the village for a public street*, or an owner may dedicate for such purpose land not laid out as a street. [Emphasis added]

While the above-quoted section does speak in terms of the granting of an easement in private streets by private property owners, that section does not contemplate a "limited" easement whereby a street would be public for some purposes and private for other purposes. If a street is dedicated as a public street (pursuant to §6-610), either by means of conveyance of fee ownership or by means of an easement, such street must be considered a public street for *all* purposes, including not only snow removal, but maintenance and repair as well.

We also wish to note that State Constitution Article VIII §1 prohibits a municipality from making a gift or loan of its money or property to or in aid of private individuals or undertakings. The village would be prohibited from

engaging in snow removal on private streets, by reason of the above-mentioned constitutional provision (15 Op St Compt 440 (1959); 24 Op St Compt 777 (1968).

**Conclusion:** A village may not accept dedication of private streets by means of an easement for the sole purpose of providing snow removal services.

October 27, 1977.

## OPINION 77-834

**Inquiries:** (1) May a fire district commissioner who is absent from a regular or special meeting cast his vote thereat by telephone?

(2) May a fire district validly require the volunteer firemen of such district to be fingerprinted for the purposes of the records of such fire district?

(3) May the board of fire district commissioners appoint a deputy commissioner?

**Statement of Law:** (1) Our answer is in the negative. Where a vote is to be taken at a regular or special meeting of the board of fire district commissioners, a board member must be personally present to vote (see Town L §176(1), generally). It is not possible for any member of a governing board to participate at a meeting at which he is not personally present. This, of course, would preclude voting by proxy (1963 Op Atty Gen 207 (informal) and voting by telephone. Therefore, it is our opinion that a member of the board of fire district commissioners, who is not personally present at a validly convened regular or special meeting of the board, may not cast a vote by telephone.

(2) We have stated that a board of fire district commissioners may require the volunteer firemen of such district to undergo physical examinations, for the purpose of protection to the fire district, the volunteer firemen themselves, and to third parties. Such an examination could disclose heart conditions, poor hearing or eyesight, etc., which would be relevant in determining the kinds of firemanic duties which could be assigned (19 Op St Compt 430 (1963). In this situation, we see no prohibition, either statutory or otherwise, which would prevent the fire district from taking fingerprints of the volunteer firemen of the district. The fingerprints so taken would be for the records of the fire district. We wish to add that, quite frankly, we are not sure of the utility value of having such fingerprints on record. Nevertheless, we feel that the fire district could require that volunteer firemen of the fire district fire department be fingerprinted if it served some relevant purpose.

(3) Our response is in the negative. The powers of fire districts are limited



and defined by the statutes under which they are constituted, and they possess only the powers as are expressly conferred by statute or necessarily implied thereby (Town L §176(21); *Wells v. Town of Salina*, 119 NY 280, 23 NE 870 (1890). There is no authority contained within the Town Law, or any other law, which would permit the appointment of a deputy commissioner.

**Conclusions:** (1) A fire district commissioner who is absent from a meeting may not cast a vote thereat by telephone.

(2) A fire district may take fingerprints of its volunteer firemen for records purposes.

(3) A fire district may not appoint a "deputy commissioner."

November 30, 1977.

## OPINION 77-841

**Statement of Fact:** Certain town highway employees who are out of work due to an illness or accident and who, having used up their accumulated sick leave and vacation time, are currently receiving either Disability Benefits or Workmen's Compensation pursuant to the Workmen's Compensation Law.

**Inquiry:** May such employees continue to accrue sick leave while receiving Disability Benefits or Workmen's Compensation payments, and may payroll deductions for items such as hospitalization or union dues be made from such payments?

**Statement of Law:** With regard to Workmen's Compensation, the collective bargaining agreement between the town and the highway employees states that employees "shall receive their normal full salary for a period not to exceed twenty-six (26) weeks" (Art VIII §3 of agreement). It has been indicated to this Department that both parties to the contract agree that sick leave and payroll deductions continue during such 26-week period. Thus, the question raised in the inquiry concerns sick leave accrual and payroll deductions with regard to statutory Workmen's Compensation benefits received beyond the 26 weeks.

In a current opinion (1977 Op St Compt #77-344 (unreported), we dealt with the question of whether municipal employees continue to accrue sick leave while receiving Workmen's Compensation. In that opinion, we stated that since Workmen's Compensation is defined as a money allowance received in lieu of an employee's regular full salary, it is not considered to be salary or wages *per se* and such an employee would not be deemed to be working. Thus, he would not be entitled to accumulate his sick leave as if he were on the job, unless

express provision permitting such accruals were contained in the municipality's sick leave plan or in a collective bargaining agreement. This conclusion would also apply to Disability Benefits, which are similarly defined as money allowances paid in lieu of salary and which would not be considered to be wages or salary *per se* (see Work Comp L §201(10).

It would appear that the collective bargaining agreement at issue herein does not contain any express provision permitting accruals of sick leave while employees receive statutory Workmen's Compensation or Disability Benefits. Thus, such accruals would be improper in this instance.

For similar reasons, we do not feel that payroll deductions for items such as hospitalization and union dues may be made from Workmen's Compensation or Disability Benefits. In general, municipalities may be authorized to make payroll deductions from the "wage or salary" of municipal employees (see Gen Mun L §§93, 93-b, 93-c). As stated above, both Disability Benefits and Workmen's Compensation are defined as money allowances paid in lieu of an employee's regular salary or wages and are not themselves salary or wages *per se*. Therefore, such payroll deductions would not be proper in this instance.

**Conclusion:** Municipal employees do not continue to accrue sick leave while receiving Disability Benefits or Workmen's Compensation unless an express provision in the individual plan or collective bargaining agreement so authorizes. Neither Disability Benefits nor Workmen's Compensation awards are subject to payroll deductions for items such as union dues or hospitalization.

December 8, 1977.

## OPINION 77-845

**Inquiry:** Must a town which provides disability insurance coverage provide such coverage for all of its elected and appointed officers and employees, or may the town cover only certain classes of officers and/or employees?

**Statement of Law:** Workmen's Compensation Law §212(2) authorizes a municipality to provide disability insurance for its "employees" in accordance with the provisions of Workmen's Compensation Law Article 9. Article 9 does not expressly state whether the term "employees" includes elected and appointed municipal officers (*cf.* Gen Mun L §§92, 92-a; Work Comp L §3). However, the term "employee" is generally defined in §201(5) as "a person engaged in the services of an employer," and is further defined in §355.2 of Volume 12(c) of the Code of Rules and Regulations of the State of New York as follows:



> (a) Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee and if he is in any employment defined in subdivision 6 of section 201 [of the Workmen's Compensation Law] or in employment with an employer who has voluntarily elected to provide for the payment of benefits under this law.
>
> (b) Without limitation, superintendents, managers and other administrative personnel are employees. . . .

While these definitions are primarily designed to cover the realm of private industry, we feel that the language in subdivision (b) quoted above is sufficiently broad to encompass elected and appointed town officers and bring them within the definition of "employee" for the purpose of disability insurance coverage.

Section 212(1) allows an employer to provide voluntary coverage for "his employees, or to any class or classes thereof . . . ." A "class of employees" is described in §355.7 of Volume 12(c) of the Code of the Rules and Regulations of the State of New York as follows:

> In order to constitute a class of employees within the provisions of law, there shall be a reasonable basis of classification including, without limitation, type of work performed, work location, salary or wage scale, seniority or length of service, or other conditions pertaining to employment; or eligibility for and entitlement to benefits under Title XVIII of the Social Security Act.

Thus, the town need not provide such insurance coverage for all of its officers and employees, but could limit coverage to one or more classes of employees, as described above, so long as such classification is not arbitrary and has a reasonable basis (see also State Const Art I §11).

For example, it would appear that the town could choose to cover its full-time employees but not its part-time employees, or its salaried employees but not its unsalaried ones. Similarly, the town could cover appointed but not elected town officers.

Finally, we note that a practical consideration arises in connection with certain elected town officers who serve for a fixed term at an annual salary. In most instances, such officers are compensated whether they are present or absent from their official duties (24 Op St Compt 88 (1968). Thus, in those instances, such officers would be receiving their normal salaries even while disabled and would, apparently, not be eligible to receive disability benefits (Work Comp L §205(6). Furthermore, even if they were eligible, the town would be entitled to reimbursement from the disability benefits under §237, provided it files a proper claim. In view of the foregoing, providing disability insurance coverage to elected officials is, as a practical matter, unnecessary, and also not very feasible.

**Conclusion:** A town which provides disability insurance coverage for its officers and employees need not cover all such officers and employees but may cover only certain classes thereof so long as any such classification is not arbitrary and has a reasonable basis.

December 9, 1977.

## OPINION 77-850

**Statement of Fact:** The city board of fire commissioners advertised for competitive bids for the construction of a firehouse. Several bids were received, yet the low bidder failed to make a timely filing of the certificate of noncollusion, as required by General Municipal Law §103-d. At a later time, but *before* a contract award was made, the low bidder filed the required certificate of noncollusion.

**Inquiry:** May the common council (which, pursuant to the city's charter, is responsible for awarding public works contracts) award the contract to the low bidder, despite the fact that such bidder's noncollusion certificate did not accompany the submitted bid, and that such certificate was not received until a later time?

**Statement of Law:** In a prior opinion (26 Op St Compt 144 (1970), we stated our position regarding the failure of a low bidder to enclose a noncollusion certificate. In that opinion, we concluded:

> A municipality may accept a noncollusion certificate after the bids are opened *but before the contract is awarded*. Such a certificate should be accepted only where the failure to submit the certificate with the sealed bid occurred through inadvertence or mistake and where late acceptance will result in no material advantage to the low bidder and no material disadvantages to the other bidders.

The above-cited opinion establishes a twofold test to determine whether the noncollusion certificate may be submitted after the bids are opened. The first is that the certificate must be supplied prior to the awarding of the contract. There is no authority to award the contract and then receive the certificate. If the contract has not yet been awarded, the second test comes into play. The failure to file the certificate must have been due to inadvertence, and the bidder who failed to file the certificate must not gain an advantage by his failure to file the certificate and his failure to file must not have disadvantaged the other bidders (28 Op St Compt 93 (1972); see also *Bailey v. Colonna*, 73 M2d 299, 341 NYS2d 359 (1972).



In this situation, it seems that since the above-mentioned tests appear to be met, the common council could properly award the construction contract to the low bidder who subsequently filed the noncollusion certificate. We must emphasize that whether the tests set forth above, and in the relevant court decisions, were met is a question of fact upon which this Department cannot pass. It is up to the common council to determine the good faith of the prospective bidder, as well as the other factors set forth above.

**Conclusion:** A determination as to whether a noncollusion certificate may be submitted after the bids are opened must depend upon the particular facts and circumstances of the situation.

December 7, 1977.

## OPINION 77-858

**Statement of Fact:** Local Law No. 2, 1977, for the City of Cohoes increased the mayor's salary and was approved by the voters at the general election held on November 8, 1977.

**Inquiry:** Is the salary increase effective as of the date of the adoption of the law by the common council or as of the date of the approval thereof by the voters on November 8?

**Statement of Law:** Section (1) of the said law provides as follows:

> From and after the effective date of this local law and until the 31st day of December, 1979, the salary of the mayor of the City of Cohoes be, and hereby is fixed at the sum of nineteen thousand dollars per year.

Generally speaking, a local law becomes operative as of the date specified therein, provided that it cannot become effective until it is filed with the Secretary of State. There is no provision in the local law in question stating in express terms when the law is to take effect (become operative). When the effective date of a local law is not specified therein, the date on which it becomes effective is determined in accordance with Municipal Home Rule Law §27. Subdivisions (3) and (4) thereof state as follows:

> 3. Notwithstanding the effective date of any local law, a local law shall not become effective before it is filed in the office of the secretary of state.
>
> 4. Subject to the provisions of subdivision three hereof, every local law shall take effect on the twentieth day after it shall finally

have been adopted unless a different time shall be prescribed therein or required by this chapter or other provision of law.

A local law is finally adopted when all of the procedural steps prescribed by statute for the adoption of such law (with regard to the subject matter thereof) duly have been observed. The law in question was subject to a permissive referendum because it increased the mayor's salary during his term of office. Apparently, a petition was filed requiring a referendum on the adoption thereof, and the referendum on the proposition was held on November 8. The proposition received voter approval. The local law was finally adopted on the date that the appropriate election officials certified that the proposition passed.

Since there was no effective date specified in the local law, it would take effect as provided in Municipal Home Rule Law §27(4), that is, 20 days after its final adoption, or upon filing with the Secretary of State if such filing occurred more than 20 days after such final adoption. Accordingly, if the law was filed within 20 days after final adoption, it became effective to increase the mayor's salary 20 days following the date of certification of passage at the November 8 election. If it was filed more than 20 days after its final adoption, then it became effective on the date of such filing.

**Conclusion:** A local law which increases the mayor's salary, and which was approved by the voters at a general election, takes effect 20 days after the final adoption, or as provided therein, subject to filing thereof.

December 2, 1977.

## OPINION 77-860

**Inquiry:** May a town board grant the elected town superintendent of highways a raise in pay after the commencement of the new fiscal year?

**Statement of Law:** Town Law §27(1) provides as follows:

> The town board of each town shall fix, from time to time, the salaries of all officers and employees of said town, whether elected or appointed, and determine when the same shall be payable. The town board shall not fix the salaries of the members of the town board, an elected town clerk *or an elected town superintendent of highways* at an amount in excess of the amounts respectively specified in the notice of hearing on the preliminary budget published pursuant to section one hundred eight of this chapter. However, the annual salary of any such elected officer may be increased, for not more than one fiscal year, in excess of the amount specified in the notice of hearing on the preliminary budget by local law adopted pursuant to the municipal home rule law. [Emphasis added]



Thus, in this instance, the town board may not grant the superintendent of highways a salary increase to an amount greater than that advertised in the notice of hearing on the preliminary budget, in the absence of a local law (21 Op St Compt 255 (1965); 27 Op St Compt 27 (1971); 30 Op St Compt 36 (1974). If the superintendent is to receive a smaller salary than that specified in the notice of hearing on the preliminary budget, the town board may, even without a local law, raise such salary to an amount not to exceed that specified in said notice of hearing, provided there is money legally available therefor (21 Op St Compt 255 (*supra*). However, once the amount of his salary is set in the notice of hearing for the preliminary budget, it may not be increased in excess of such amount, except by local law adopted pursuant to the Municipal Home Rule Law.

Any such increase by local law must not be for more than one fiscal year and, of course, there must be sufficient town funds available to cover any such increase (Town L §27(1); 30 Op St Compt 36 (*supra*).

We note that Municipal Home Rule Law §10(1)(a)(1) authorizes a town to adopt a local law governing the compensation of its officers and employees. Municipal Home Rule Law §20 spells out the steps that must be taken in the adoption of a local law and §24(2)(h) states that a local law increasing the salary of an elected officer during his term of office is subject to a permissive referendum.

**Conclusion:** In the absence of a local law, the town board may not increase the salary of the elected highway superintendent in excess of the amount specified in the notice of hearing on the preliminary budget.

December 7, 1977.

## OPINION 77-868

**Statement of Fact:** A fire district contracts with a volunteer fire company whereby the district leases company-owned land and buildings for firemanic purposes. Presently, the fire district has expressed a desire to purchase the company-owned land and building and, if the fire company and the fire district cannot agree on a purchase price, the fire district will undertake condemnation proceedings.

The volunteer fire company, at the time that it acquired the land and the building which the fire district seeks to acquire, utilized, to a great extent, moneys which were raised by public contributions and solicitations.

**Inquiry:** Because the funds with which the land and buildings were originally acquired were derived, in large part, from taxpayers located in the

territorial area which the volunteer fire company serves, would the proceeds from the sale of such property to the fire district (or the proceeds from the condemnation proceeding, as the case may be), properly be payable to the volunteer fire company?

**Statement of Law:** The volunteer fire company in question is a not-for-profit corporation, incorporated and organized pursuant to the provisions of the Not-For-Profit Corporation Law (L 1969 chs 1066 and 1067). As such, it possesses the corporate powers and duties set forth therein (see, generally, Not-For-Profit Corp L §§202, 1402). Not-For-Profit Corporation Law §202(a)(5) provides that each corporation to which said law applies shall have the power, in the furtherance of its corporate purposes, "to sell, convey . . . or otherwise dispose of . . . all or any of its property . . . ." This power, if exercised in furtherance of its corporate purposes, clearly authorizes the volunteer fire company to sell the land and buildings in question (1968 Op St Compt #68-926 (unreported); 1973 Op St Compt #73-443 (unreported).

In addition, a fire district is specifically authorized to condemn real property for appropriate fire district purposes (see Town L §176(14). In view of the foregoing, we are of the opinion that where a fire district acquires real property from a volunteer fire company, the proceeds of such transaction (*e.g.*, by sale or condemnation) belong to the volunteer fire company.

It does not make a difference that in this situation the volunteer fire company used, to a great extent, funds solicited from private individuals to purchase the land and buildings which are now sought to be disposed of. A volunteer fire company, organized pursuant to the Not-For-Profit Corporation Law, is an independent corporate entity, and its internal affairs are not subject to the control of the municipality or fire district which effectively "governs" it (see, generally, Not-For-Profit Corp L §1402). The fire district's "control" is necessarily limited to the manner in which a fire corporation conducts its *firemanic* activities (6 Op St Compt 302 (1950); 15 Op St Compt 302 (1959); 29 Op St Compt 66 (1973). The internal affairs of the fire corporation are governed by the statutes under which it is constituted, its certificate of incorporation, its by-laws and its duly adopted rules and regulations. No provision of law would require a fire corporation to turn over the proceeds from the sale or condemnation of its property to the municipality or fire district to which such corporation provides fire protection.

**Conclusion:** Where a fire district acquires real property from a volunteer fire company, either by sale, condemnation or otherwise, the proceeds of such transaction become assets of the fire company, irrespective of the source of funds by which the property disposed of was originally purchased.

January 10, 1978.



## OPINION 77-883

**Inquiry:** Since a town includes a village within its borders, should the town be receiving two separate checks for State aid — one for the town-wide general fund, and the other for the part-town general fund?

**Statement of Law:** This is to advise that State aid payments to the town are made quarterly in two separate checks representing aid for purposes of the town-wide general fund and the part-town general fund, respectively.

The question may be prompted by the fact that one check was sent to the town on October 25. That check was a proportionate amount of the State's share of federal antirecession funds and was in addition to the regular quarterly State-aid payments. Those funds may be used either for specified town-wide or part-town purposes.

**Conclusion:** State aid to a town which includes a village within its boundaries is paid in two separate checks — one for purposes of the town-wide general fund and the other for expenditures from the part-town general fund.

December 14, 1977.

## OPINION 77-889

**Inquiry:** Is it permissible for a town board to set different salaries for its town justices?

**Statement of Law:** The answer to the question is contained in Town Law §27 in which, in subdivision (1) thereof, the second sentence from the end provides as follows: "In all towns the salaries of all town justices shall be equal except that the town board may determine by a majority of vote to pay salaries in different amounts . . . ."

Accordingly, the town board may fix the salaries of its town justices in differing amounts. We might add that this is quite frequently done where one of the justices performs considerably greater services than the other.

**Conclusion:** The salaries of town justices need not be equal.

November 22, 1977.

## OPINION 77-891

**Inquiries:** (1) Does the fact that a "public school library" is excluded, in Education Law §253(2) from the definition of a "public library," intend to exclude only libraries operated within school buildings for students attending thereat, or does it also intend to exclude school district libraries supported by school district taxes raised pursuant to Education Law §259(1)?

(2) If a school district library is a "public library" as such term is used in §259(1), does either the school district treasurer or the board of education have any further responsibilities after tax moneys collected for school district library purposes are turned over to the library treasurer pursuant to the written demand of the library trustees?

(3) Are there any bonding requirements for school district library treasurers who receive school district tax moneys and, if so, does either the school district treasurer or the board of education have any obligation to ascertain that bonding requirements have been met by the library trustees before turning over public funds to the library treasurer?

**Statement of Law:** (1) Education Law §253(2) defines the term "public library" as follows:

> 2. The term "public" library as used in this chapter shall be construed to mean a library, *other than professional, technical or public school library, established for free public purposes by a* municipality or *district* or the legislature where the whole interest belongs to the public; [Emphasis added]

We note that while a "public school library" is specifically *excluded* from the definition of a "public library," a library established by a district for free public purposes is expressly *included* within such definition. The term "district" clearly has reference to a school district and, therefore, a school district library is included within the definition of a "public library" (see also, Educ L §255(1).

We find no provision of the Education Law which clearly defines the term "public school library." However, we interpret such term as having reference to libraries operated within school buildings primarily for the benefit of the students attending such school. In view of the foregoing, it is our opinion that the exclusion of "public school library" from the definition of a "public library" in §253(2) is intended as an exclusion only of libraries operated within school buildings for the benefit of students attending such school. A school district library is included in the definition of a public library.

(2) Education Law §259(1), as amended by Laws of 1973 chapter 200, provides that moneys raised for the support of a public library (such as a school district library) shall be paid over to the library treasurer upon the written demand of the library trustees. We are of the opinion that where such written demand is made by school district library trustees and library moneys are paid over to the library treasurer, the school district treasurer and the board of education have no further responsibilities with respect to such moneys. In a recent opinion, we discussed the responsibilities of a village treasurer for library fiscal matters where village moneys, raised for the village public library, had been paid over to the library treasurer (1976 Op St Compt #76-554 (unreported). The views expressed with respect to the village treasurer apply equally to a school district treasurer and the board of education in circumstances where school tax moneys are paid over to the library treasurer.



(3) We are aware of no provision of law specifically imposing a bonding requirement with respect to school district library treasurers. Presumably, the school district library trustees, in the exercise of their general powers, could, in their discretion, require that the library treasurer file an official undertaking (see Educ L §§226, 260(1). However, we cannot envision any circumstances in which either a school district treasurer or the board of education would have any obligation to ascertain that the library treasurer's bonding requirements, if any, had been met.

**Conclusions:** (1) A school district library is a "public library" as such term is defined in Education Law §253(2).

(2) Where school district library moneys are paid over to the library treasurer pursuant to Education Law §259(1), the school district treasurer and board of education have no further responsibilities with respect to such moneys.

(3) The school district treasurer and the board of education have no duty or obligation to ascertain that the school district library treasurer's bonding requirements, if any, have been met.

December 7, 1977.

## OPINION 77-896

**Inquiry:** May a village board increase the village clerk's salary during the fiscal year, and may it also create a new position of clerk-typist in the village clerk's office and fix a salary for the new appointee, notwithstanding the absence of an appropriation therefor in the village budget for the current fiscal year?

**Statement of Law:** Although Village Law §5-506(1)(f) requires that the tentative budget of a village (and, hence, its final budget) include a schedule of wages and salaries of officers and employees, there is nothing in that statute (or in §5-508, dealing with the adoption of the final budget) which prohibits the

making of supplemental appropriations for additional salaries and other lawful purposes during the fiscal year to which the budget applies.

The fact is that Village Law §5-520(4) specifically authorizes a board of trustees, during a fiscal year, to make additional appropriations or increase existing appropriations. The statute goes on to state that moneys may be provided for such purposes "by transfer from the unexpended balance of an appropriation, from the appropriation for contingencies, from unappropriated cash surplus or unanticipated revenues within a fund or by borrowing pursuant to the local finance law."

The letter of inquiry indicates that for the current fiscal year the village has very considerable general fund revenues over and above those estimated in the budget and obviously also greatly exceeding budgeted expenditures. These moneys would clearly appear to qualify as unappropriated cash surplus or unanticipated revenues within the meaning of the statutory language just quoted from Village Law §5-520(4). Accordingly, the village board may use such moneys for the purpose of making supplemental appropriations to provide a salary increase for the village clerk and to fund the salary for the newly created position of clerk-typist in the village clerk's office.

**Conclusion:** A village board may use legally available moneys to increase the village clerk's salary during the fiscal year and also to fund the salary for a newly created position of clerk-typist in the village clerk's office.

November 23, 1977.

## OPINION 77-924

**Inquiries:** (1) May a town adopt a resolution authorizing conversion of accumulated and unused sick leave into cash upon retirement of town employees?

(2) May a town adopt a local law providing a six-year term of office for the town attorney?

**Statement of Law:** (1) The only ways in which a town board may authorize the conversion of accumulated and unused sick leave into cash upon separation from service for town employees is by the adoption of a local law or pursuant to a collective bargaining agreement (1976 Op St Compt #76-1265 (unreported). In the situation at hand, it appears that the town has not adopted a local law.

In addition, however, a town may, pursuant to an informal, or de facto bargaining method, extend benefits which are provided to union employees pursuant to a collective bargaining agreement (such as commutation of sick



leave credits into cash) to nonunion employees who are not covered by such agreement (1976 Op St Compt #76-449 (unreported). In the situation at hand, we cannot tell whether the resolution authorizing conversion of accumulated and unused sick leave into cash upon retirement of nonunion employees was preceded by some form of informal bargaining agreement. If it was, for the reasons expressed in Opinion 76-449, there would be no impropriety in such resolution. If there was no informal bargaining, the views expressed in another opinion would apply (31 Op St Compt 177 (1975).

(2) With respect to the propriety of a local law providing a six-year term of office for town attorney, we concluded in another opinion (1976 Op St Compt #76-1175 (unreported) that a town may *not* adopt a local law which fixes the term of office of town attorney for a term inconsistent with that provided in the Town Law. In addition to the arguments in support of that conclusion set forth in the said opinion, it should also be pointed out that such a local law could not possibly bind future town board members to the six-year (or other) term of office since, as a practical matter, it could easily be repealed at any time. Therefore, the town may not adopt a local law fixing the term of office of town attorney at six years.

**Conclusions:** (1) The conversion of accumulated and unused sick leave into cash upon separation from service may be provided for only pursuant to formal or informal collective bargaining negotiations.

(2) Notwithstanding Municipal Home Rule Law §10(1)(ii)(d)(3), a town may not fix the term of office of town attorney for a term inconsistent with that provided in the Town Law.

December 20, 1977.

## OPINION 77-925

**Inquiry:** Does a conflict of interest exist where a member of the common council of the city is an employee of a bank that will be designated by the city as one of the city's official depositories?

**Statement of Law:** General Municipal Law Article 18 governs conflicts of interest of municipal officers and employees. The designation of a bank as the official depository of city moneys constitutes a "contract" between the bank and the city (Gen Mun L §800(2) in which the city councilman has a statutory "interest" by reason of his employment as a branch manager of the bank (Gen Mun L §800(3)(c). Except for the applicability of a provision of General Municipal Law §802, the councilman would have a prohibited interest in the

contract because, as a member of the common council, he has the power or duty to designate the depository bank (Gen Mun L §801(1)(a).

However, the prohibition set forth by §801 is rendered inapplicable in the instant situation by virtue of of §802(1)(a), which states that §801 shall not apply to the designation of a bank or trust company as a depository of municipal funds, except when the chief fiscal officer, treasurer or his deputy or employee has an interest in such bank or trust company (see generally 33 Op St Compt 106 (1977).

Notwithstanding the absence of a prohibited interest, however, the member of the common council, nevertheless, would be required to disclose the nature and extent of his statutory interest in writing to the common council (Gen Mun L §803).

**Conclusion:** Where a member of the common council of a city is an employee of a bank, he does not have a prohibited interest in the designation by the city of such bank as one of the city's official depositories.

January 10, 1978.

## OPINION 77-927

**Inquiry:** May a school district lease unneeded school district property located within a residential zone in a town to a nonprofit community service organization as authorized by Education Law §403-a(3) without regard to the town's zoning regulations?

**Statement of Law:** It is a well-established rule that municipal corporations, including school districts, are not subject to local zoning restrictions in the performance of their governmental, as distinguished from corporate or proprietary, activities (*Nehrbas v. Incorporated Village of Lloyd Harbor*, 147 NYS2d 738, mod and aff'd 1 AD2d 1034, 152 NYS2d 28, aff'd 2 NY2d 190, 159 NYS2d 145 (1957).

This Department has expressed the opinion, based on the *Nehrbas* rationale, and on Real Property Tax Law §408, which exempts *all* school district property from taxation, that *all* activities of a school district (unlike a municipality) necessarily are governmental in nature and that, accordingly, all school district property, being governmental in nature, would be exempt from local zoning restrictions and could be leased without regard to such restrictions (1977 Op St Compt #77-149 (unreported).

Thus, in this case, the school district could properly lease the property in question pursuant to Education Law §403-a(3) to the nonprofit community service organization without regard to, or compliance with, the town's zoning regulations.



**Conclusion:** A school district may lease real property not currently needed for school district purposes to a nonprofit community services organization without regard to local zoning regulations.

January 20, 1978.

## OPINION 77-929

**Statement of Fact:** A charge of reckless endangerment in the second degree (Pen L §120.20) was brought against an employee of the county department of public works. Two county residents filed a complaint against the employee, alleging that while operating a county snow plow he attempted to hit them with the vehicle. The employee hired private counsel, and after negotiations and an adjournment, the matter was dismissed on February 28, 1977. The employee now seeks reimbursement from the county for the legal fees he incurred.

**Inquiry:** Is the employee entitled to such reimbursement?

**Statement of Law:** This Department is of the opinion that the county may not reimburse the employee for legal fees and expenses. In general, a municipality may not reimburse an employee for legal expenses incurred in defending a suit against the employee unless a statute authorizes such payment (*Leo v. Barnett*, 48 AD2d 463, 369 NYS2d 789, aff'd 41 NY2d 879, 393 NYS2d 994 (1975). We are not aware of any statute which authorizes a county to reimburse an employee for the expenses of defending a *criminal* action. County Law §409(2) authorizes reimbursement for damages recovered against and expenses incurred by an officer in defense of a *civil* action or proceeding based on acts performed in an official capacity.

Furthermore, a serious constitutional question exists whether a municipality may be authorized by statute to reimburse an employee for legal expenses incurred in defending a criminal action. In the leading case of *Chapman v. City of New York* (57 AD 583, 68 NYS 1135, aff'd 168 NY 80, 61 NE 108 (1901), the Court of Appeals held a statute of that type unconstitutional as a violation of State Constitution Article VIII §10 (now Art VIII §1) (see also *Guarino v. Anderson*, 234 AD 775, 253 NYS 927, aff'd 259 NY 93, 181 NE 60 (1932); *Kilroe v. Craig*, 208 AD 93, 203 NYS 71, aff'd 238 NY 628, 144 NE 920 (1924). That section prohibits "gifts" of property or money by a municipality to a private person. The court held that defense of a criminal charge is a personal matter. The court in *Chapman* (168 NY 88) stated:

> His defense was for his own benefit, not for the benefit of the city. It was a private matter of his own, the same as if he had been sued by the

city in an action at law, and had succeeded in his defense. As we have seen, there was no legal liability or moral obligation on the part of the city to pay his expenses, which were not necessary for the common good and general welfare of the municipality, nor public in character, nor, so far as it appears, sanctioned by its citizens.

In 1962, in *Levine et al v. Miteer et al.* (16 AD2d 990, 229 NYS2d 433 (1962), the Appellate Division of the Third Department stated as follows:

It is well settled that the village could not provide funds for the defense of an official in a criminal action or even in a civil action where no benefit inures to the village [cases cited including *Chapman, supra*].

Apparently, the *Chapman* case has never been overruled. It appears doubtful, therefore, that a statute or local law authorizing reimbursement or indemnification of *criminal* defense expenses would be constitutional.

In conclusion, this Department is of the opinion that the county may not reimburse the highway employee for the legal fees paid by him in successfully defending against a criminal charge.

**Conclusion:** A county may not reimburse its employee for legal expenses incurred in defending against a criminal charge based on acts allegedly committed while on the job.

January 31, 1978.

## OPINION 77-931

**Inquiries:** (1) May a board of fire commissioners of a fire district pay a claim submitted by a water company for the use of fire hydrants in prior years when no written agreement existed between the parties for such service and the district did use the fire hydrants?

(2) If the district must pay such claim and, if the commissioners subsequently establish a zone of assessment to cover the area in which the hydrants are located, may the district charge back the amount of such claim to such zone of assessment?

**Statement of Law:** (1) Town Law §176(12) authorizes the board of fire commissioners to contract for a supply of water and also for the furnishing, erection, maintenance, care and replacement of fire hydrants. It is our opinion that if a fire district uses fire hydrants of a water company for fire protection pursuant to the authorization contained in this section, notwithstanding that there is no written agreement therefor, the water company, nevertheless, under the theory of *quantum meruit*, is entitled to receive compensation for the use of

such fire hydrants (5 Op St Compt 346 (1949). Therefore, the first inquiry must be answered in the affirmative.

(2) Town Law §176(27) authorizes the board of fire commissioners, after a public hearing, to establish within the district one or more zones in which the rate of tax for fire district purposes is different from the rate of tax for other zones or for the portion of the district not included in any zone. Once such a zone or zones of assessment shall have become established, property owners residing therein may be charged, *on a prospective basis,* for whatever special benefit they are receiving (*e.g.*, their proximity to the firehouse or to the hydrants).

However, there is no authorization to charge back to a zone of assessment, on a retroactive basis, the cost of obligations incurred by the fire district prior to the creation of such zone of assessment. Therefore, the second inquiry must be answered in the negative.

**Conclusions:** (1) Even in the absence of a written contract, the board of fire commissioners of a fire district must pay a claim submitted by a water company for the use of fire hydrants in prior years where the district has actually used such hydrants.

(2) If a zone of assessment is subsequently established covering the area in which the hydrants are located, the district may not charge back the amount of such claim to such zone of assessment.

January 19, 1978.

## OPINION 77-945

**Statement of Fact:** The utility company which supplies electric service to the town charges a late fee for payment not made within 30 days from the date of billing. Bills are generally received by the comptroller several days after the date indicated as the billing date.

The town audit procedure prior to payment of such bills may take up to 30 days, which is the period for audit authorized by Town Law §119. As a result, the payment for utility service is often made more than 30 days from the billing date which appears on the bill, but within 30 days from the date the bill is received by the town comptroller.

**Inquiry:** Is the town responsible for payment of late fees in the described circumstances?

**Statement of Law:** Town Law §119(2) provides that a town comptroller shall not be required to audit any claim until 30 days after presentation to him.

Thus, the town clearly is not required to make payment for electric service until 30 days after the bill for such service is presented to the comptroller for payment.

The question remains of whether the town is responsible for payment of a late fee where the penalty-free period established by the utility company for paying the bill expires prior to 30 days after the bill is received by the comptroller. It is our opinion that the town is not responsible for payment of the penalty in such circumstances.

Town Law §118(1), insofar as pertinent to the question at hand, provides that no claim against a town shall be paid unless an itemized voucher shall have been audited and allowed. It has been held that a town's statutory disability to pay for goods prior to audit *must* be interpreted as an implied term or condition of a contract with a town (*J.C. Georg Service Corporation v. Town of Summit*, 28 AD2d 578, 279 NYS2d 674 (1967).

The holding in the *J.C. Georg Service Corporation* case (*supra*) would logically apply equally to a contract with a town for services, as well as a contract for goods purchased. Accordingly, reading the provisons of §§118(1) and 119(2), together with the holding in the cited case, we are of the opinion that any contract with a town must be deemed to include an implied condition to the effect that the town shall have at least 30 days from the date of presentation of a claim within which to make payment of such claim without penalty.

A town could, pursuant to contract, agree to make payments for goods or services within less than 30 days from the date of submission of a claim for payment for such goods or services. We infer from the inquiry that the town has not made such an agreement in the situation at hand. In the absence of such an agreement, it is our opinion that a town may not be required to pay penalty fees in connection with a claim for services until at least 30 days from the date on which such claim is received by the comptroller.

**Conclusion:** In the absence of an agreement to the contrary, a town has a minimum of 30 days from the receipt of a claim for payment for services rendered within which to audit and pay such claim, and no penalty for late payment may be charged during such 30-day period.

February 6, 1978.

## OPINION 77-946

**Inquiry:** Are payments made pursuant to a school district's established sick leave plan considered as not being wages and, therefore, not subject to FICA taxes?



**Statement of Law:** In a current opinion addressed to a village, we dealt with a similar question (33 Op St Compt 70 (1977). The conclusions reached therein would be equally applicable in the case of a school district.

In that opinion, we stated that, under 26 US Code §3121(a)(2), payment made to employees under a plan established by an employer which makes provision for employees "on account of — (s)ickness . . ." would not be considered "wages" and, therefore, no FICA tax need be deducted from such payment. However, we went on to state that the Social Security Administration has ruled in opinion No. SSR 72-56 that payments made by a municipal employer under such an established sick leave plan would be treated as "wages," unless it is shown that the municipality has statutory or other legal authorization to make payments to employees *solely on account of sickness*, as distinguished from authorization merely to continue salary payments during the period of illness. This opinion was confirmed by the U.S. Court of Appeals, 10th Circuit, in the case of *State of New Mexico v. Weinberger* (517 F2d 989, cert den 423 US 1051 (1976).

General Municipal Law §92(1) authorizes school districts to grant sick leave with pay to their employees. However, as we stated in the above-cited 1977 opinion, with regard to villages, this is merely authorization for a continuation of salary payments and does not authorize payments made on account of sickness. Therefore, such payment is considered to be "wages" for the purpose of Social Security and, accordingly, FICA tax must be deducted therefrom.

**Conclusion:** A school district must deduct FICA tax from sick leave payments to school district employees.

January 3, 1978.

## OPINION 77-958

**Statement of Fact:** Respecting the payment of claims by a village, many vendors now send computer statements which do not contain certifications required by Village Law §5-524(4). These statements are returned to the vendors by the village for certification and, oftentimes, the 30-day interest-free period for payment of the claim (fixed by the vendor) has expired by the time the claims are resubmitted for payment.

**Inquiry:** What is the responsibility of the village, in that event, for the payment of the interest?

**Statement of Law:** Village Law §5-524 relates to the audit and payment of claims by villages. Subdivision (4) thereof, as pertinent here, provides:

> no claim shall be ordered paid unless such claim is in writing and itemized and approved by the officer or employee whose action gave rise or origin to the claim, nor unless it shall be accompanied by the certificate of the claimant or his duly authorized agent showing: that the items of the claim are correct, that the property or merchandise was actually delivered, the services actually rendered or the disbursements actually and necessarily made, as the case may be, and that no part of such claim has been paid or satisfied.

Subdivision (9) states that "any officer of the village who shall knowingly audit, order paid or pay any claim contrary to the provisions of this section shall be guilty of a misdemeanor."

Accordingly, the aforesaid statute imposes as a prerequisite to the payment of a claim that it be certified by the claimant. No claim legally can be paid until it so is certified. The village's statutory disability to honor claims for payment without the accompanying certification required by §5-524(4) must be interpreted as an implied term or condition of the contract (see *J.C. Georg Service Corp. v. Town of Summit,* 28 AD2d 578, 279 NYS2d 674 (1967). Therefore, the uncertified computerized statement cannot serve as a basis for payment of the claim. It follows, of course, that the penalty provision for nonpayment within 30 days similarly is a nullity and is not binding on the village and legally would not be enforceable in a court of law. The 30-day period would commence upon receipt by the village of a voucher or statement in the form prescribed by, and executed in accordance with the requirements of, §5-524.

We suggest that the vendors who are submitting computerized statements be informed that the village legally cannot pay their claims until they are properly certified, and that, as far as the village is concerned, the interest-free period for payment does not commence to run until receipt of claims by it in the proper form.

We note that it would be entirely permissible for the computerized statement to bear a stamped certification containing the information required by §5-524. This form of certification, perhaps, would accommodate the vendors and facilitate disposition of the claims. Certification of this type is considered in a recent opinion (30 Op St Compt 115 (1974). The said opinion relates to a fire district, but the same conclusion would appertain to a village.

**Conclusion:** A village may not legally pay claims submitted by vendors on computerized statements in the absence of an accompanying certificate as required by Village Law §5-524(4).

January 20, 1978.



## OPINION 77-969

**Inquiry:** Can a town supervisor appoint a committee composed of town residents, who would presumably serve without compensation, for the purpose of investigating the operation and procedures of the town police department, without a resolution of the town board?

**Statement of Law:** We are aware of no provision of law which would authorize the creation of the described committee, with or without a resolution of the town board. We have stated that private citizens may not be appointed to serve as members of town board committees (30 Op St Compt 8 (1974). The opinion also sets forth the only provisions of law authorizing the appointment of private citizens to town committees.

**Conclusion:** A town board may not appoint town residents to serve on a committee, the purpose of which is to investigate the operation and procedures of the town police department.

January 9, 1978.

## OPINION 77-972

**Inquiry:** Is the county treasurer required to make periodic payments to the school district of school taxes paid to him prior to the relevy of such taxes, or may he delay payment until April 1 and at that time pay the school district the full amount of returned unpaid school taxes?

**Statement of Law:** There is no requirement within the Real Property Tax Law or elsewhere that the county treasurer make any periodic payments to a school district for returned unpaid school taxes. The subject of payment to the school district is governed by Real Property Tax Law §1330(4), which states, in part, as follows:

> The county treasurer shall, on or before the first day of April . . . pay to the officer charged by law with the custody of school district moneys . . . the amount of returned unpaid school taxes . . . .

In a prior opinion (1974 Op St Compt #74-1294 (unreported), we said the following with respect to payment to the school district of tax moneys received by the county treasurer prior to relevy:

> The county treasurer, however, may remit such moneys to the *school district* as they are received; he does not have to wait until April when

the county pays the uncollected school taxes to the school district. [Emphasis supplied]

In light of the above, it is clear that school taxes paid to the county treasurer prior to relevy may, but need not, be paid to the school district prior to the first day of April.

Town Law §37 prescribes the responsibilities of a town receiver of taxes and assessments as to school district taxes and other taxes. That statute has no bearing on the responsibilities of a county treasurer with respect to unpaid school taxes.

**Conclusion:** A county treasurer is not required to pay a school district the school taxes he receives prior to relevy until the first day of April.

January 11, 1978.

## OPINION 77-974

**Inquiry:** In a town in which the office of tax collector has been abolished and the town clerk had been charged with the duty of collecting taxes, may the town board, by resolution, re-create the office of tax collector and make such office appointive?

**Statement of Law:** Town Law §36(1) contains provisions whereby the town board of a town in which the office of tax collector exists may abolish such office. Upon the abolition of such office, the duties of tax collector devolve upon the town clerk. The town in question has abolished the office of tax collector, and the duties of such office are now performed by the town clerk.

Where the office of tax collector has been abolished, there is no provision of law which authorizes the re-creation of such office (see 1975 Op Atty Gen 207 (informal); 13 Op St Compt 163 (1957). In the absence of any provision authorizing re-creation of the office of tax collector, it is our opinion that the town board may not re-create such office by simple resolution.

Although this question was not addressed in the two cited opinions, we are of the opinion that a town board could, by local law, authorize the re-creation of the office of tax collector, either as an elective or an appointive office (Mun HRL §10(1)(ii)(a)(1). However, in the absence of a local law authorizing the re-creation of the office of tax collector, a town board may not re-create such office, and a resolution purporting to do so would be a nullity. It appears that the town in question has not adopted a local law authorizing re-creation of the office of tax collector, and, therefore, the inquiry must be answered in the negative.

**Conclusion:** In order to re-create the office of tax collector, a town board must do so by local law, and a resolution purporting to do so would be a nullity.

December 23, 1977.



## OPINION 77-984

**Inquiry:** What types of investments, other than moneys representing the proceeds of town bonds and notes, are lawful for idle town moneys?

**Statement of Law:** This subject is covered by the provisions of General Municipal Law §11. That statute authorizes municipalities to invest such moneys in special time deposit accounts in, or certificates of deposit issued by, a bank or trust company (but not a savings bank or savings and loan association) located in this State and authorized to do business herein. Such investments are subject to certain provisos and also to the pledge of collateral as specified in §11.

The same statute also authorizes the investment of town moneys in obligations of the United States government, or in certain obligations guaranteed by federal governmental agencies and also, as to principal and interest, by the United States of America. Furthermore, investments are authorized in obligations of the State of New York and also in certain obligations of political subdivisions within the State, subject to the approval of the State Comptroller (see Gen Mun L §11(2); cf. Loc Fin L §165.00, re investment of the proceeds of bonds and notes and other obligations issued by a municipality).

**Conclusion:** General Municipal Law §11 governs the types of investments that are lawful for idle town moneys.

December 23, 1977.

## OPINION 77-985

**Inquiry:** May a town board authorize a town superintendent of highways to construct bicycle paths along county roads utilizing town highway employees and funds taken from the highway budget?

**Statement of Law:** The Department has previously expressed the view that a bicycle path, assuming its purpose is primarily recreational, may be considered a park facility for which town funds properly may be expended (30 Op St Compt 58 (1974); 1976 Op St Compt #76-1151 (unreported); see also *Rivet v. Burdick*, 137 AD 255, 6 NYS2d 79 (1938).

With respect to the powers and duties of the town superintendent of highways, Town Law §32(1) provides that he shall have the powers and duties conferred or imposed upon him by law, and such further duties as the town board may determine not inconsistent with law. Since the construction of a

bicycle path is a legitimate town purpose, it is our opinion that a town board could, pursuant to §32(1), direct the superintendent of highways to undertake the construction of bicycle paths.

Since a bicycle path is a park facility, the expense of the construction thereof would be a general fund charge. Therefore, it would not be proper to utilize highway funds for such construction. Funds for this purpose could be derived, among other places, from unanticipated revenues or federal revenue sharing moneys.

As a final note, the construction of bicycle paths along county roads is proper, provided that an easement for such purpose is first obtained from the county.

**Conclusion:** A town board may direct the town superintendent of highways to construct bicycle paths utilizing town highway employees, but the expense of such construction is a general fund charge.

January 19, 1978.

## OPINION 77-990

**Inquiry:** May a town clerk handle clerical duties for the town justice in addition to receiving fines levied by the justice and acting as his bookkeeper?

**Statement of Law:** The performance of the aforesaid duties is not expressly contemplated by Town Law §30, the statute which prescribes the powers and duties of the town clerk. However, subdivision (11) of the said statute provides that the "town clerk shall have such additional powers and perform such additional duties as are or hereafter may be conferred or imposed upon him by law, and such further duties as the town board may determine, not inconsistent with law."

It is our opinion that there would be no legal impropriety should the town clerk be directed by the town board to perform the functions under consideration for the town justice. As an alternative, the town board could create a salaried position (clerk of the justice court, for example), and, subject to civil service rules, appoint the town clerk thereto. She then, in effect, would be serving the town in two capacities — one as town clerk and the other as clerk of the justice court.

**Conclusion:** The town board may prescribe that the town clerk perform clerical duties for the town justice as part of her official duties; in the alternative, the board could create the position of clerk to the justice and appoint the town clerk to such position (subject to civil service rules).



February 8, 1978.

## OPINION 77-998

**Statement of Fact:** A town, pursuant to Town Law §§64(2) and 29(11), has granted a temporary easement to a private property owner to allow such owner to travel over the town right-of-way in the course of his farming operation. Such easement is temporary, to the extent that the owner requires such access for only a certain period of time.

**Inquiry:** Could such an easement properly be granted without the consent of the superintendent of highways?

**Statement of Law:** Town Law §64(2) vests in the town board the authority to, among other things, convey land or rights in land, such as an easement, where such land is presently unneeded for town purposes. The resolution authorizing such conveyance is subject to a permissive referendum. Neither that section of law, or any other law, requires that the consent of the superintendent of highways be obtained before such easement be granted. Therefore, it is our opinion that the inquiry must be answered in the affirmative.

**Conclusion:** The consent of the superintendent of highways is not required before a town board, by resolution subject to permissive referendum, may convey an easement on the town right-of-way.

February 8, 1978.

## OPINION 77-1003

**Statement of Fact:** A fire district fire department is composed of a single fire company, and the constitution and by-laws of such company provide as follows:

> Nominations will be held during the two regular meetings preceding the annual election of officers in December, designated as the annual meeting.

Pursuant to the above-quoted provision, nominations for fire company line officers, as well as the chief and assistant chiefs, are made at the October and November meetings of the company. The chief and assistant chiefs to be nominated for approval by the fire commissioners are then selected by ballot in December.

**Inquiry:** Are the nominees selected by ballot in December required to come from the nominees selected in the October and November meetings or, in addition to such nominees, can write-in votes be made for persons not previously nominated at such meetings?

**Statement of Law:** In a prior opinion (1972 Op St Compt #72-357 (unreported), we expressed the view that fire district fire department meetings for the election of fire department officers must be conducted and/or controlled by rules and regulations prescribed by *the board of fire commissioners* of the fire district. The provision at issue herein was adopted by the fire company and, therefore, cannot govern the procedure for nominating the chief and assistant chiefs, since such officers are fire department officers. Such provision would, of course, govern with respect to the manner of nominating fire company line officers.

Town Law §176(11-a) and (11-b) require that nominations for the offices of chief and assistant chiefs of the fire district fire department shall be made by ballot on the Thursday following the first Tuesday in April of each year unless the fire department provides, by resolution, that such nominations shall be made on one of the dates in December specified in subdivision (11-b). There is no requirement for submission of nominations in advance of such date. Accordingly, with respect to the present inquiry, while we see nothing inherently illegal with the provision calling for nomination of a chief and assistant chiefs at the October and November meetings, it is our opinion that the nominees selected by ballot in December need not come *only* from the nominees selected at such meetings. At such December meeting, the fire district fire department may nominate *any* qualified members for the offices of chief and assistant chiefs regardless of whether such members had been nominated previously.

**Conclusion:** Fire district fire department meetings for the election of fire department officers must be conducted and/or controlled by rules and regulations prescribed by the board of fire commissioners of the district.

January 17, 1978.

# *Digests of Comptroller's Opinions*

## BONDS AND OBLIGATIONS

**Advance Refunding Bonds**

**— issuance, statutory directive**

Local Finance Law §90.10 authorizes the issuance of "advance" refunding bonds under certain specified conditions. Op 77-727.

**Depositories**

**— brokerage firm listing**

Where a town is purchasing federal government obligations through a brokerage firm, such firm need not and cannot be listed on the resolution designating the depositories for town funds. Op 77-463.

**Library Building**

**— improvements**

A municipality may not issue obligations to finance the cost of physical betterments and improvements to a free association library building. Op 77-693.

**Paving and Curbing**

**— estimates, bond resolution**

Where a property owner petitions a village for paving and curbing to be wholly assessed against his property, and, because of engineering estimates, a duly noticed bond resolution is adopted for a sum larger than the eventual cost, and obligations are issued in the larger amount, the property owner cannot escape paying interest on the total amount. Op 77-699.

**Probable Usefulness**

**— demolition, private property**

There is no period of probable usefulness for the demolition of structures or buildings on privately owned property. Op 77-604.

## CITY OFFICERS AND EMPLOYEES

**Common Council Member**

**— bank employee**

Where a member of the common council of a city is an employee of a bank, he does not have a prohibited interest in the designation by the city of such bank as one of the city's official depositories. Op 77-925.

**Mayors**

**— compensation, increase**

A local law which increases the mayor's salary, and which was approved by the voters at a general election, takes effect 20 days after its final adoption, or as provided therein, subject to filing thereof. Op 77-858.

## CIVIL SERVICE

**Commissioners**

**— political party committeeman**

A municipal civil service commissioner may not serve as a committeeman of a county committee of a political party. Op 77-279.

**Suspensions**

**— delay, hearing and determination**

Where a delay in a hearing and determination of charges of a suspended civil service employee is caused by the actions of that employee, the employee is not entitled to receive pay for that period of his suspension which is beyond 30 days and is caused by the employee's own actions. Op 77-678.

## CLAIMS AGAINST MUNICIPALITIES

**Audit and Payment**

**— computerized statements**

A village may not legally pay claims submitted by vendors on computerized statements in the absence of an accompanying certificate as required by Village Law §5-524(4). Op 77-958.

**— 30-day period**

In the absence of an agreement to the contrary, a town has a minimum of 30 days from the receipt of a claim for payment for services rendered within which to audit and pay such claim, and no penalty for late payment may be charged during such 30-day period. Op 77-945.



**Damages**

**— basis for liability**

It would be an unconstitutional gift of public funds should a village compromise a claim for damages incurred by a homeowner by reason of a ruptured water main, unless there is a legal basis for village liability for such damages. Op 77-235.

**Federal Unemployment Tax Act**

**— compensation claims, reserve fund**

General Municipal Law §6-m authorizes the establishment of an unemployment insurance payment reserve fund in order to finance compensation claims made against municipalities arising out of the Federal Unemployment Tax Act. Op 77-772.

**Streets and Highways**

**— prior notice of defects**

A town may adopt a local law to provide that no action may be maintained against the town for damages caused by defective conditions of town streets and highways unless prior written notice of such defects was actually given to the town. Op 77-433.

**Tort Claims**

**— reserve fund**

A municipality may not establish a reserve fund to pay tort claims. Op 77-271.

## CONTRACTS AND PURCHASES

**Competitive Bidding**

**— bid security**

Under present law, a certified check deposited to secure a bid must be retained by the chief fiscal officer of the particular political subdivision and may not be deposited in a bank account. Op 77-340.

**— contract extension**

Where a town board has advertised for bids for a one-year contract and awarded the contract to the lone bidder, the board may not subsequently enter into a two-year contract with that bidder. Op 77-77.

**— federal aid**

The expenditure of moneys received by a city pursuant to the Housing and Community Development Act of 1974 is subject to the competitive bidding requirements of the General Municipal Law. Op 77-211.

**— food concession services**

A contract for food concession services in a city-owned convention

center is not subject to competitive bidding requirements. Op 77-508.

**— mass transportation services**

A contract for mass transportation services to be provided to a county is subject to competitive bidding requirements, and propective bidders would have to obtain a certificate of public convenience and necessity as required by the State Commissioner of Transportation. Op 77-807.

**— negotiations**

Any negotiation, after the submission of bids, is improper, and it is entirely unauthorized and improper for a municipality to enter into negotiations where no bidders have complied with the specifications. Op 77-503.

**— noncollusion certificate**

A determination as to whether a noncollusion certificate may be submitted after the bids are opened must depend upon the particular facts and circumstances of the situation. Op 77-850.

**— private collection agency**

Subject to competitive bidding requirements, a county may enter into a contract with a private collection agency for the collection of amounts due the county. Op 77-133.

**— public works projects**

**— public library building**

A public works project to be performed on a town public library building is governed by the provisions of General Municipal Law §103. Op 77-385.

**— retained percentage**

The word "retained," as it is used in General Municipal Law §106, refers only to amounts withheld by a municipality from a contractor pursuant to the retained percentage provisions of a public works contract and does not include amounts held by the municipality pursuant to other provisions of the contract, such as moneys representing liquidated damages to which the municipality would be entitled in the event of default by the contractor. Op 77-515.

**— second-hand and surplus supplies**

The New York State Thruway Authority, being a "public benefit corporation," would come within General Municipal Law §103(6), and, therefore, a town may purchase second-hand and surplus supplies, material or equipment from the Authority without competitive bidding. Op 77-238.

**— specifications, mailing**

A municipality may mail copies of bid specifications to prospective bidders. Op 77-401.

**— used equipment**

Competitive bidding is required where a municipality purchases used equipment from a private individual or corporation. Op 77-507.

**Performance Bond**

**— cash or certified check**

There is no reason why a low bidder on a municipal public works contract cannot furnish cash or a certified check as a performance bond in lieu of a surety company bond. Op 77-273.



**Public Utility System**

**— equipment, referendum requirements**

The purchase by a city of equipment for extensions to, and replacement parts for use in, a public utility system is not subject to referendum requirements where such system continues to be operated by a public utility. Op 77-436.

## COUNTY OFFICERS AND EMPLOYEES

**Attorneys**

**— appointment, domicile**

To be appointed to the office of county attorney, an attorney must have his domicile within the county. Op 77-757.

**Chief Fiscal Officer**

**— voluntary administrator of small estate**

The chief fiscal officer of a county, who acts as a voluntary administrator of a small estate pursuant to Surrogate's Court Procedure Act Article 13, is not entitled to receive commissions for his services. But the chief fiscal officer is not required to act as a voluntary administrator of a small estate pursuant to Article 13. Op 77-270.

**Compensation**

**— snow emergency**

A county may pay salaried employees their regular salaries for days when the county buildings are closed because of a snow emergency. Op 77-190.

**Disability Benefits**

**— pregnancy, sick leave**

A county which has not elected to provide disability benefits for its employees pursuant to Workmen's Compensation Law Article 9 is not required to pay disability benefits for pregnancy. A county which has a sick leave plan must grant sick leave benefits for incapacitation caused by pregnancy. Op 77-457.

**Reimbursements**

**— legal expenses**

A county may not reimburse its employee for legal expenses incurred in defending against a criminal charge based on acts allegedly committed while on the job. Op 77-929.

**— stolen property**

A county may not reimburse an employee for the loss of tools which were owned by him, used in his employment with the approval of his supervisor, stored on county property and stolen therefrom. Op 77-234.

**Sheriffs**

**— mileage fees**

A sheriff is not entitled to mileage fees if the person to be served with a paper cannot be located and no service is actually made. Op 77-196.

**— prisoner transportation**

The county sheriff has the duty and responsibility of transporting prisoners who have been lawfully committed to the custody of the sheriff between the county jail and justice court. A village which transports such prisoners is entitled to be reimbursed by the county. Op 77-613.

## COURTS AND JUDGES

**Family Court**

**— pins, psychiatric exam**

Where an order of the Family Court directs that a person in need of supervision is to be remanded to a hospital maintained by the State of New York for psychiatric examination, the cost of maintenance, care and treatment is a county charge. Op 77-390.

## ENVIRONMENTAL CONSERVATION

**Natural Surface Waterways**

**— obstructions, removal**

A town has no duty to drain or clear obstructions from natural surface waterways to prevent flooding unless the town caused the condition. Op 77-642.



## FEDERAL AID

**Federal Revenue Sharing Funds**

**— capital reserve fund**

Generally speaking, federal revenue sharing funds may be paid into a capital reserve fund. Op 77-226.

**Title II Funds**

**— highway truck purchase**

Title II funds may not be utilized to purchase a highway truck. Op 77-603.

**— ordinance recodification and revision**

A town board must ultimately decide whether Title II funds may be used to pay the costs incurred in connection with the recodification and revision of the town's zoning ordinance. Op 77-147.

**— salaries and fringe benefits**

Title II moneys may be utilized for the payment of employees' salaries and fringe benefits. Op 77-223.

## FIREMEN AND FIRE PROTECTION

**Contracts and Purchases**

**— fire-fighting apparatus**

A county has no authority to purchase fire-fighting apparatus for the purpose of loaning the same to villages and fire districts. Op 77-106.

**— municipal aid plan, food and beverages**

A city may purchase food and beverages to be provided at the scene of a fire, for both paid city firemen and for volunteer firemen who respond to a fire under a county municipal aid plan. Op 77-753.

**District Boundaries**

**— extension, federal property**

When a fire upon unprotected federal land lying immediately adjacent to a fire district threatens homes just within the district's boundary, firemen from the district may enter upon the adjacent federal land to prevent the fire from spreading to such homes. Boundaries of the fire district may be formally extended to include some or all of the federal property. Op 77-14.

**Elections and Meetings**

**— absence, telephone vote**

A fire district commissioner who is absent from a meeting may not cast a vote thereat by telephone. Op 77-834.

**— fire department officers**

Fire district fire department meetings for the election of fire department officers must be conducted and/or controlled by rules and regulations prescribed by the board of fire commissioners of the district. Op 77-1003.

**Fire Protection Contracts**

**— consent of volunteer company**

Consent of a volunteer fire company is necessary to a fire protection contract between a village and a town. Op 77-143.

**Personnel**

**— appointments**

A fire district may not appoint a "deputy commissioner." Op 77-834.

**— compensation**

A village may not give an annual token sum of money to officers of a volunteer fire department. If such officers are compensated by the village for their performance, either partially or fully, they become paid village firemen, and while so serving are not entitled to the benefits accorded volunteer firemen. A paid fireman, whether part-time or full-time, must be a member of the NYS Policemen's and Firemen's Retirement System. Op 77-115.

**— conferences and conventions**

A village may, pursuant to General Municipal Law §77-b, pay up to $50.00 of the registration fees for the village fire department chief and assistant chief's attendance at the New York State Fire Chiefs' Convention, if it is believed that their attendance at such convention may benefit the village. Op 77-585.

**Real Property**

**— acquisition from volunteer company**

Where a fire district acquires real property from a volunteer fire company, either by sale, condemnation or otherwise, the proceeds of such transaction become assets of the fire company, irrespective of the source of funds by which the property disposed of was originally purchased. Op 77-868.

**— effect of codes or ordinances**

A fire district, in constructing a firehouse, is not subject to the town building code or town zoning ordinance. A fire district is required, however, to employ a licensed engineer to prepare plans for a firehouse costing more than $5,000. Op 77-103.



**Volunteer Firemen**

**— emergency rescue and first aid squad service**

An individual who is a member of a volunteer fire company and meets the other requirements of General Municipal Law §200 qualifies as an exempt volunteer fireman, even though he has spent all or part of his required service period in the emergency rescue and first aid squad (ambulance corps) of the fire company. Op 77-749.

**— fingerprints**

A fire district may take fingerprints of its volunteer firemen for records purposes. Op 77-834.

**— qualifications**

The five-year period of service necessary for qualification as an exempt volunteer fireman pursuant to General Municipal Law §200 need not be a consecutive five-year period of service. Op 77-802.

**— restricted duty**

The mere fact that a volunteer fireman is on restricted duty, standing alone, would not affect his entitlement to benefits under the Volunteer Firemen's Benefit Law. Op 77-88.

**Water Supply and Distribution**

**— hydrants**

Even in the absence of a written contract, the board of fire commissioners of a fire district must pay a claim submitted by a water company for the use of fire hydrants in prior years where the district has actually used such hydrants. Op 77-931.

**— taxes and assessments**

If a zone of assessment is subsequently established covering the area in which the hydrants are located, the district may not charge back the amount of such claims to such zone of assessment. Op 77-931.

## HEALTH AND HEALTH SERVICES

**City Laboratory**

**— bank credit card payments**

There are circumstances under which a city laboratory may accept bank credit cards for payment of laboratory services rendered to outpatients. Op 77-74.

**District Dissolution**

**— surplus funds**

Surplus funds of a part-county health district which has been dissolved and has no outstanding liabilities may not be transferred to the county general fund. Op 77-128.

## INDUSTRIAL DEVELOPMENT AGENCIES

**Contracts and Purchases**

**— use of town funds**

A town has no authority to pay for typewriter rental by an industrial development agency. Op 77-779.

**Property Acquisition**

**— corporate limits**

The City of Hudson Industrial Development Agency may not acquire property owned by the city and located outside the corporate limits of the city. Op 77-166.

## LIBRARIES

**Property**

**— impermissible use**

A town library building may not be used for a "Food Co-op." Op 77-152.

**Public Libraries**

**— board member-treasurer**

A member of a board of trustees of a public library may not be appointed library treasurer. Op 77-125.

## LICENSING AND REGULATORY POWERS

**Municipal Property**

**— damages, liability**

A municipal corporation may not enact a local law creating liability on the part of parents and legal guardians for willful acts of children resulting in the damage or destruction of municipal property and subjecting said parents and legal guardians to a civil penalty. Op 77-735.

**Private Property**

**— potential hazards**

A municipality, in the exercise



its police power, but subject to principles of due process, may, by local law, provide for the safeguarding, repair or possibly demolition and removal, by the owner, of vacant, dilapidated buildings which are a hazard to young children who enter upon the premises. Op 77-444.

## MUNICIPAL FUNDS

**General Fund Revenues**

**— decedent's funds**

Moneys found on a decedent and turned over to the county treasurer by a coroner pursuant to County Law §678 become property of the county as general fund revenue, but subject to demand by the legal representatives of the deceased within six years. Op 77-255.

**— illegal drug sale proceeds**

Moneys which are the proceeds of an illegal drug sale should not be returned to the "owners" thereof but should be placed in the general fund of the municipality holding such moneys after it has been used as evidence in a trial. Op 77-623.

**Investments**

**— idle funds**

General Municipal Law §11 governs the types of investments that are lawful for idle town moneys. Op 77-984.

**Meetings and Gatherings**

**— annual awards dinner**

A town may not pay for an annual awards dinner to honor employees having 25 years or more of service. Op 77-667.

**— jurors' coffee break**

A county may not pay for the purchase of coffee and doughnuts for grand jurors to be served at a routine morning break during one of their sessions. Op 77-801.

**— potential business and expansion relocation**

A town may expend publicity fund moneys to pay for rental of a room, food, nonalcoholic beverages and gratuities in connection with a dinner or luncheon meeting to be attended by area businessmen and town officials for the purpose of discussing potential business expansion and relocation in the town. However, such moneys may not be expended to purchase alcoholic beverages for such meeting. Op 77-667.

**— pre-work meeting, town officers and employees**

The cost of coffee and doughnuts to be served at a pre-work meeting of certain town officers and employees would not be a proper town charge unless such meeting was imperative and urgent business was being conducted. Op 77-667.

**— town problem, discussion**

The cost of rental of a room for the purpose of conducting a public meeting to discuss with town citizens various town problems would be a proper town charge. However, the cost of refreshments at such a meeting would not be a proper town charge. Op 77-667.

**Private Property**

**— retaining walls**

A town may not expend moneys for the purpose of constructing retaining walls to stabilize banks on private property. Op 77-295.

## MUNICIPAL OFFICERS AND EMPLOYEES, GENERALLY

**Disability Benefits**

**— accrued sick leave**

Municipal employees do not continue to accrue sick leave while receiving Disability Benefits or Workmen's Compensation unless an express provision in the individual plan or collective bargaining agreement so authorizes. Neither Disability Benefits nor Workmen's Compensation awards are subject to payroll deductions for items such as union dues or hospitalization. Op 77-841.

**Membership Dues**

**— engineering organization**

A municipality may not pay the membership dues of an engineer in an engineering organization where such organization is not composed exclusively of municipal officials and where the primary objective of such organization is not local government efficiency. However, where a municipality's governing board is of the opinion that joining such an organization would help improve municipal government functions through the receipt of literature, etc., the municipality itself may join and pay the necessary fees. Op 77-399.

**Mileage Allowances**

**— parking expense reimbursement**

A municipality that authorizes payment of a mileage allowance to its employees for use of private automobiles on municipal business may, in addition to the mileage allowance, reimburse employees only for those parking expenses which are actually and necessarily incurred while on municipal business. Op 77-578.

**Separation From Service**



**— accumulated and unused sick leave**

The conversion of accumulated and unused sick leave into cash upon separation from service may be provided for only pursuant to formal or informal collective bargaining negotiations. Op 77-924.

## MUNICIPAL PROPERTY

**Convention Center Construction**

**— public subscription campaign**

A city may not sponsor a public subscription campaign to finance construction of a convention center. Op 77-292.

**Village Gravel Pit**

**— sales to private individuals**

A village may not sell gravel from a village gravel pit to a private individual unless such gravel is no longer necessary for village purposes. Op 77-471.

## NEWSPAPERS

**Designation**

**— editor-village mayor**

A prohibited conflict of interest does not exist where the owner and editor of a local newspaper, which is designated as the official newspaper for the village, is also the mayor of the village. Op 77-334.

**— qualifications**

A newspaper which is published in a town and satisfies the other statutory qualifications to be designated as the town's official paper is not disqualified because it is actually printed outside the town. Not all legal notices are required to be published in the official paper; the town should comply with the particular statute requiring notice. Op 77-681.

## PARKS AND RECREATION

**Bicycle Paths**

**— construction, general fund charge**

A town board may direct the town superintendent of highways to construct bicycle paths utilizing town highway employees, but the expense of such construction is a general fund charge. Op 77-985.

**Donations**

**— conditional v. unconditional**

Whether or not a town is obligated to honor a request to return a gift of money depends upon whether such money was donated conditionally or unconditionally and, if donated conditionally, whether such conditions have been complied with. Op 77-481.

**— private beach organization**

A town board on behalf of a park district may accept the donation of a clubhouse from a private beach organization where such organization reserves for itself the right to have exclusive use of such clubhouse for certain limited periods of time. Op 77-482.

**Gas Wells**

**— gas pooling or spacing unit agreement**

A municipality may enter into a gas pooling or spacing unit agreement whereby municipal parklands are used in such pool, and gas underlying such lands may be extracted in exchange for a portion of royalties, so long as any actual drilling is done on nonparklands. Op 77-430.

**— lease, municipal parklands**

Absent specific legislative authorization, a municipality may not "lease" municipal parklands to a private natural gas company for the purpose of drilling a specified and limited number of gas wells. Op 77-430.

**Municipal Golf Course**

**— reduced fees, senior citizens**

A city may establish a reduced fee schedule for the use of the municipal golf course by senior citizens. Op 77-266.

**Municipal Park**

**— limited use**

Where a park is expressly created and maintained by a municipality solely for its residents with municipal funds, it would not be improper for the municipality to limit use of the park to its own residents. Op 77-631.



**Town-Established Commission**

**— employment of director**

Where a town board has established a recreation commission, the commission and not the town board has the authority to employ a recreation director. Op 77-409.

## POLICEMEN AND POLICE PROTECTION

**Collective Bargaining**

**— accumulated unused sick leave, conversion**

The parties to a collective bargaining agreement which provides for conversion of accumulated, unused sick leave into cash upon retirement should make the determination as to the method for making such cash payments. There is no prohibition against the parties agreeing to make such payments over a period of several years after retirement rather than as a lump sum upon retirement. Op 77-564.

**Personnel**

**— compensation, military leave**

A town policeman on military leave must be paid his full salary, for up to 30 days' ordered military duty, and not the difference between that and his pay for military service. Op 77-567.

**— disability, overtime compensation**

A police officer who is out of work as the result of injury or illness incurred in the line of duty, and who is receiving his full salary during such period of disability, is not entitled to overtime compensation where such officer is subpoenaed to appear in court to testify as a police officer. Op 77-330.

**— off-duty employment**

Even if proposed off-duty employment as a security guard meets the requirements of General Municipal Law §208-d, a police officer should not wear a city uniform and firearm while employed at his off-duty job. And a city may prohibit police officers from wearing city-issued firearms and police department uniforms as a condition to accepting off-duty employment. Op 77-276.

**— reinstatement, earned vacation credits**

A police officer who is reinstated in his job after removal is not entitled to vacation credits which might otherwise have been earned during the period of his suspension. Vacation credits accrued *prior* to such removal should not be charged for any time attributable to the officer's enforced absence. Op 77-738.

**— retiree-city councilman**

A retired police officer who subsequently is elected city councilman is entitled to receive the full compensation of such office without diminution of his retirement allowance and without prior approval by the State Civil Service Commission. Op 77-535.

**— transfers, time credit**

A village policeman transferred to a town police department should receive credit for time served in his former department for purposes of starting grade. Op 77-49.

**— widows' pensions**

A village may not, without State legislative authorization, adopt a local law providing for additional supplemental pension payments to widows of deceased retired policemen which would result in total pensions exceeding $1,200 per year. Op 77-181.

## SCHOOLS AND SCHOOL DISTRICTS

**Board of Education**

**— member, interests in contract**

Where a member of a school district board of education is an officer of a bank and employed in the main office thereof, he does not have a prohibited interest in the designation by the school district of a branch office of such bank as the depository of district funds. Op 77-504.

**Finances**

**— salaries, insufficient appropriations**

Where appropriations in the budget of a union free school district are insufficient to pay for teachers' salary increases negotiated subsequent to the levy and collection of the annual tax, necessary moneys therefor may be obtained either by the issuance of budget notes or by the levy of a supplemental tax subject to the approval of the school district residents. Op 77-284.

**Libraries**

**— bonding requirements**

The school district treasurer and the board of education have no duty or obligation to ascertain that the school district library treasurer's bonding requirements, if any, have been met. Op 77-891.

**— definition**

A school district library is a "public library" as such term is defined in Education Law §253(2). Op 77-891.



**— finances**

Where school district library moneys are paid over to the library treasurer pursuant to Education Law §259(1), the school district treasurer and board of education have no further responsibilities with respect to such moneys. Op 77-891.

**— liability insurance**

The board of trustees of a school district public library possesses implied authority to purchase liability insurance to protect such trustees from claims arising out of the performance of their duties. Op 77-76.

**Real Property**

**— city fire prevention code**

It would seem that the provisions of a city fire prevention code, including restrictions therein with respect to blasting operations, are not applicable to the construction of a new school building for the city school district. Op 77-232.

**— leases, zoning regulations**

A school district may lease real property not currently needed for school district purposes to a nonprofit community services organization without regard to local zoning regulations. Op 77-927.

**Taxes and Assessments**

**— business investment exemption**

A school district located within a town is not bound by the town's determination to grant the "business investment exemption" authorized by Real Property Tax Law §485-b. Op 77-755.

**— sick leave, fica tax deductions**

A school district must deduct FICA tax from sick leave payments to school district employees. Op 77-946.

## SEWERAGE AND DRAINAGE

**Proposed District**

**— permissive referendum**

At a permissive referendum called to vote upon the question of establishing a proposed county sewer district, if a majority of the voters within that area of one of the towns included within the geographical area of such proposed district vote against the establishment of the district, but the proposition passes by a majority vote in the other three municipalities affected, so that the total vote favors the proposition, such town is bound by the majority vote and must remain within the jurisdiction of the district. Op 77-45.

**Taxes and Assessments**

**— formula, annual assessments**

In a sewer district, the formula for determining annual assessments may be changed from year to year, if the cost is assessed annually. Op 77-797.

**— sewer rents**

Since sewer rents may be imposed only by local law or ordinance, village sewer rents may be increased only by the adoption of a local law, and both public notice and a public hearing are required before such schedule may be increased. Op 77-472.

## STATE AID

**Payment**

**— town and village**

State aid to a town which includes a village within its boundaries is paid in two separate checks — one for purposes of the town-wide general fund and the other for expenditures from the part-town general fund. Op 77-883.

## STREETS AND HIGHWAYS

**Collective Bargaining**

**— nonparty superintendent**

A town highway superintendent is bound by the provisions of a collective bargaining agreement entered into between the town and highway department employees, regardless of whether he was a party to such agreement. Op 77-697.

**Contracts and Purchases**

**— gravel pit, financing**

A town is authorized to purchase a gravel pit for highway and town dump purposes and finance the purchase thereof pursuant to the Local Finance Law. Op 77-21.

**— highway equipment repairs**

Where the town superintendent of highways has made a truly good-faith determination that the cost of repairs of highway equipment will not exceed $3,500, and such repairs do exceed $3,500, then the failure to comply with competitive bidding requirements will not prohibit payment under such contract. Op 77-587.

**— highway truck, current funds**

A town may finance the purchase of a highway truck through current funds, despite the fact that a bond resolution was adopted to finance the purchase of the vehicle. Op 77-813.



**Personnel**

**— compensation, increase**

In the absence of a local law, the town board may not increase the salary of the elected highway superintendent in excess of the amount specified in the notice of hearing on the preliminary budget. Op 77-860.

**Private Streets**

**— dedication, snow removal**

A village may not accept dedication of private streets by means of an easement for the sole purpose of providing snow removal services. Op 77-816.

## TAXES AND ASSESSMENTS

**Collection and Compromise**

**— delinquent grade crossing elimination charges**

In the absence of proper authorization from the State, a county may not compromise the amount of delinquent grade crossing elimination charges owed to the State by the Penn Central Railroad. Op 77-434.

**— escrow account**

A town may not accept moneys from town residents to be held in escrow for the future payment of real property taxes. Op 77-63.

**— incorrect assessments**

Where a tax certiorari award reducing the assessment on a parcel of property is received after town-county or school district taxes based upon the incorrect assessment have been levied but before such taxes have been paid, the receiver of taxes may correct the tax roll and tax bill to reflect the lower assessment. Op 77-521.

Where taxes are collected in two installments and a tax certiorari award reducing the assessment on a parcel of property is received after the first installment has been paid but before the second installment is due, the receiver of taxes may correct the tax roll and tax bill so that the second installment payment will reflect the lower assessment. Op 77-521.

**— interest-free period, extension**

There is no authority for extending the time during which real property taxes may be collected without interest beyond January 31, and such

authority may not be provided by the adoption of a local law. Op 77-101.

**— partial payment**

A village treasurer may not accept payment of less than the full amount of taxes and assessments levied against a particular parcel of property. Op 77-274.

**— school taxes, relevy, payment**

A county treasurer is not required to pay a school district the school taxes he receives prior to relevy until the first day of April. Op 77-972.

**Exemptions**

**— business investment**

The exemption provided by Real Property Tax Law §485-b does not include special assessments, water rents or sewer rents. Op 77-137.

**— nys urban development corporation**

Where real property is acquired by the New York State Urban Development Corporation after taxable status date but before lien date, the exemption provided by McKinney's Unconsolidated Laws §6272 would take effect at the beginning of the tax year for which the next ensuing taxable status date determines tax liability. The taxable status of such property would not change if the Urban Development Corporation conveys the property to a subsidiary housing company. Op 77-569.

**— permissive referendum**

A local law amending a local law, adopted pursuant to Real Property Tax Law §467 to amend the maximum income limitation for eligibility for the partial exemption from real property taxes granted to persons 65 years of age or over by such section, is not subject to a permissive referendum. Op 77-81.

**— veterans**

An unremarried widow of a veteran is eligible for the veterans' exemption where title to exempt property has passed to her upon the death of the veteran, or where she purchases real property with eligible funds. Op 77-626.

The only relatives of a veteran entitled to the veterans' exemption when exempt property of a deceased veteran passes to them are the unremarried surviving spouse, dependent parents and children under age 21. Op 77-626.

The exempt property need not be the residence of the veteran in order to qualify for the exemption. Op 77-626.

Persons seeking the veterans' exemption need not be residents of New York State. Op 77-626.

There is no requirement that real property subject to the veterans' exemption be improved property. Op 77-626.



**Foreclosure Proceedings**

**— conveyance of title**

Where a city conveys title to real property acquired through *in rem* foreclosure proceedings brought pursuant to Real Property Tax Law Article 11, the city must sell such property to the highest bidder regardless of the fact that such bidder is a tax-exempt entity. However, a city may not sell such property to a tax-exempt entity subject to certain conditions, such as an agreement that such entity will make payments in lieu of taxes. Op 77-254.

**Personnel**

**— appointments**

In order for a town councilman to be appointed to fill a vacancy as appointive assessor of the same town, he would first have to resign as councilman. Op 77-207.

**— assessors**

There is no legal requirement that an assessor accept appointment as chairman of the assessors, and there is no provision of law that would prevent an assessor who has been designated as chairman from resigning that office. Op 77-101.

An individual appointed to fill a vacancy in the position of appointed assessor may not receive both the salary of assessor and that of her previous position, assessor's aide. The town board may, however, increase the salary of an assessor during the assessor's term of office. Op 77-301.

**— incompatibility of office**

One person may not serve simultaneously as a town tax collector and bookkeeper to the town supervisor. Op 77-540.

**Public Parking Area**

**— operation and maintenance**

Where a city establishes and operates a public parking area, the costs of operating and maintaining such parking area may be assessed and levied against real property deemed benefited by the improvement. Op 77-11.

**Sales and Use Taxes**

**— excess revenues**

When a town's share of county sales tax revenues exceeds the estimate of such revenues applied to reduction of county taxes, such excess must be paid to the town by the county treasurer. Op 77-78.

**Tax Sales**

**— conveyance, installment purchase**

There are circumstances under which a county may convey its tax-acquired property under an installment purchase arrangement. Op 77-272.

**— county treasurer, exclusion of third-party bidders**

Although the point is not clear, it would seem that a county treasurer may, depending upon the circumstances before him, purchase less than an entire parcel at a tax sale where third-party bidders have been excluded. Op 77-747.

**— redemption period**

Where the period for the redemption of real property from a tax sale expires on a Saturday, the provisions of General Construction Law §25-a operate to extend the expiration date to the following Monday, and payment of the amount necessary to redeem the property on Monday constitutes timely redemption. Op 77-67.

## TOWN BOARDS

**Personnel**

**— deputy supervisor, appointment**

The provision that if the supervisor fails to appoint a deputy supervisor within five days after a vacancy occurs in the office of deputy supervisor, the town board may make an appointment to fill the vacancy, is directory only. If the town board fails to exercise such prerogative and does not make the appointment, the supervisor continues to have the right to do so. Op 77-655.

**Powers and Duties**

**— appointments, investigative committee**

A town board may not appoint town residents to serve on a committee, the purpose of which is to investigate the operation and procedures of the town police department. Op 77-969.

**— assessors' valuations**

The town board may not review the actions of the town assessors involving the judgment of such assessors with respect to the valuation of real property within the town. Op 77-333.

**— competitive bidding, prior resolution**

A prior resolution of the town board is needed before a public works contract is competitively bid. Op 77-558.



**— easements, town right-of-way**

The consent of the superintendent of highways is not required before a town board, by resolution subject to permissive referendum, may convey an easement on the town right-of-way. Op 77-998.

**— tax collector's office, re-creation**

In order to re-create the office of tax collector, a town board must do so by local law, and a resolution purporting to do so would be a nullity. Op 77-974.

**— town clerk, additional duties**

The town board may prescribe that the town clerk perform clerical duties for the town justice as part of her official duties; in the alternative, the board could create the position of clerk to the justice and appoint the town clerk to such position (subject to civil service rules). Op 77-990.

**Special Meetings**

**— clerk's absence**

The town clerk's absence from a lawfully convened special meeting of the town board does not render invalid resolutions adopted at such meeting. Op 77-192.

## TOWN OFFICERS AND EMPLOYEES

**Attorneys**

**— term of office**

Notwithstanding Municipal Home Rule Law §10(1)(ii)(d)(3), a town may not fix the term of office of town attorney for a term inconsistent with that provided in the Town Law. Op 77-924.

**Compatibility of Office**

**— councilmen**

In a situation where a fire district is coterminous with the entire unincorporated area of a town, there is no incompatibility between the offices of town councilman and member of the board of fire commissioners. Op 77-332.

The same individual may simultaneously serve as town councilman and administrator in the county department of buildings and grounds. Op 77-360.

**Constables**

**— appointments**

A town of the first class may appoint constables in the exercise of its home rule powers. Op 77-177.

A town of the first class may, by

local law, abolish its police department and provide for the appointment of constables. Op 77-531.

**Disability Benefits**

**— insurance coverage, limitations**

A town which provides disability insurance coverage for its officers and employees need not cover all such officers and employees but may cover only certain classes thereof so long as any such classification is not arbitrary and has a reasonable basis. Op 77-845.

**Elective Officers**

**— compensation**

Elective town officers may not receive extra compensation above the amount of their annual salaries for performing additional services. Op 77-262.

**Incompatibility of Office**

**— elector requirement**

A person may not simultaneously hold the office of town councilman of one town and part-time zoning enforcement officer of another town because a town officer must be an elector of the town and there is no way in which he can be an elector of two towns at the same time. Op 77-373.

**Interest in Contract**

**— building inspector**

A town building inspector does not have a prohibited interest in his own contract of employment with the town as clerk of the works for renovation projects for the town hall and town highway garage, nor is such an arrangement otherwise prohibited. Op 77-582.

**— supervisor**

Where a town is leasing a building from the person to whom the town supervisor has sold it, and where the lease was actually executed and the term began before the supervisor sold the building to the town's lessor, the supervisor may well have a prohibited interest in the lease, depending on underlying circumstances. Op 77-296.

**Justices**

**— commutation expenses**

A town justice may not recover mileage expenses for commuting between his home and court. A supervisor may refuse to sign a check for such travel expenses, even if the claim is audited and approved by the town board. Op 77-322.

**— compensation**

The salaries of town justices need not be equal. Op 77-889.



**— traffic infractions**

Where a town justice has imposed a fine for a traffic infraction against a defendant who has appeared by mail and waived arraignment, the justice may not, at a subsequent time on his own motion, summarily change the sentence to conditional discharge. Op 77-412.

**— training courses**

A town must reimburse a town justice for the actual and necessary expenses incurred while attending a training course required by law. Op 77-760.

**Managers**

**— salary and expenses**

The salary and expenses of the office of town manager are general town charges. Op 77-524.

**Removal From Office**

**— court application**

Where a town officer is guilty of any misconduct, maladministration, malfeasance or malversation in office, he may be removed from office by application to the State Supreme Court. Op 77-101.

**Working Conditions**

**— employees' comfort and convenience**

A town may, under proper circumstances, purchase one or more refrigerators for the convenience of town employees while on the job. Op 77-247.

## TRAFFIC AND TRAFFIC CONTROL

**Generally**

**— local law requirement**

A village may, by local law, adopt traffic regulations and speed limits as authorized by applicable sections of the Vehicle and Traffic Law, and the distribution of fines and penalties to the village for violations of vehicle and traffic laws are governed by pertinent provisions of the Vehicle and Traffic Law and the General Municipal Law. Op 77-138.

**School Crossing Guards**

**— absence of joint agreement**

Absent a General Municipal Law Article 5-G agreement, a town may not employ school crossing guards in a village located within the town even where the town is providing

police protection to such village. Op 77-668.

**— permissive statute**

The provisions of General Municipal Law §208-a are permissive, and a village is not required to provide school crossing guards. In addition, there is no authorization for school districts to provide school crossing guards. Op 77-277.

## VILLAGE OFFICERS AND EMPLOYEES

**Clerks**

**— compensation**

A village board may use legally available moneys to increase the village clerk's salary during the fiscal year and also to fund the salary for a newly created position of clerk-typist in the village clerk's office. Op 77-896.

**Interest in Contract**

**— real property sales**

Where a village sells real property to a not-for-profit corporation and the village mayor, an attorney, is associated in a professional corporation of attorneys with an individual who is both attorney for and director of the not-for-profit corporation, no prohibited interest in contract arises. Op 77-285.

**Justices**

**— abolition of office**

A village may abolish the office of village justice only by a resolution or local law subject to a permissive referendum. Op 77-271.

**— appointment**

There is no legal prohibition against the appointment of an individual as acting village justice when the individual's brother is a police sergeant in the same village, However, if the acting justice must frequently disqualify himself from hearing matters, then it might be impractical for him to serve as acting village justice. Op 77-258.

**Mayors**

**— powers and duties**

A village mayor, either as executive officer or as an ex-officio police commissioner, is not authorized to issue summonses or appearance tickets. Op 77-725.

**Retirees**

**— group life coverage**

A village may not continue group life insurance for its employees after they retire. Op 77-156.



**Sick Leave Payments**

**— fica tax deduction**

A village must deduct FICA tax from sick leave payments paid to village employees. Op 77-326.

**Trustees**

**— conflicts of interest**

A prohibited conflict of interest does not arise where a member of the village board of trustees is also the president of a volunteer fire company which contracts with the village for fire protection. Op 77-334.

**— interest in village-owned property**

A village may convey its interest in a parcel of land to a village trustee in exchange for the granting to it of an easement over land owned by the trustee, provided the consideration to be paid for the parcel and the value thereof do not, in each case, exceed $100, or, if in excess of said sum, the transaction is approved by the Supreme Court. Op 77-714.

**— official use of private car**

The mayor and trustees of a village may be compensated for official use of their private cars only by one of two methods: (1) by reimbursement for actual and necessary expenses; or (2) by a reasonable mileage allowance. Op 77-208.

**— powers and duties**

In the absence of an appointed board of fire commissioners, a village board of trustees performs the functions which would normally be performed by the board of fire commissioners. Op 77-143.

## WATER SUPPLY AND DISTRIBUTION

**Finances**

**— bill payments, bank-agent**

The board of commissioners of a water district may permit district customers to pay their water bills through a bank, acting as their agent, provided there is no charge to the district. Op 77-395.

**— capital reserve fund, town district**

Except in a suburban town and except pursuant to certain special acts, no capital reserve fund may be established on behalf of a town water district. Op 77-657.

**— surplus funds**

Surplus moneys in a village water fund may not be accumulated and carried over from year to year. Op 77-280.

**Joint Agreements**

**— town-village**

A village and a town may enter into an agreement pursuant to which the town will assist the village in the repair and improvement of the village water system, provided the town is reimbursed for its expenses. Op 77-376.

**Personnel**

**— hospitalization and medicare premiums**

A water district may pay the hospitalization insurance premiums for all its active and retired employees either under a local plan or as a participant in the State-wide plan. In addition, a water district may reimburse active and retired employees for medicare premiums where such district pays hospitalization insurance premiums for its active and retired employees either under a local or State-wide plan. Op 77-312.

## ZONING AND PLANNING

**Deeds**

**— recordation, prior stamping**

A town may not require all deeds of land within the town to be submitted to a town official for stamping prior to their recording in the county clerk's office. Op 77-116.

**Finances**

**— modification of annual appropriation**

A participating county in a regional planning board may not modify its annual appropriation for planning board purposes during the fiscal year for which such appropriation was made. Op 77-311.

**Performance and Maintenance Bonds**

**— improvements, private ownership**

A town may not require a developer of a condominium to furnish a performance bond, long-term or otherwise, to insure the installation of improvements which will remain in private ownership. Op 77-517.

**Personnel**

**— compensation**

A village may provide for compensation of the members of the planning board. Op 77-90.

**— residency requirements**

A town planning board member must be a town resident. Op 77-338.

**Subdivision Plats**

**— approval**

A village may not approve a subdivision plat until the specified improvements are completed by the developer or a performance bond is furnished. Op 77-31.



**Subdivision Regulations**

**— deed of record**

When a subdivider conveys a lot without first obtaining approval of the subdivision, a town may not bring an action against the county clerk to remove the deed of record. Op 77-116.

**— enforcement**

A town may, by ordinance, enforce its subdivision regulations against a subdivider, who sells lots without obtaining plat approval, by imposing a civil or criminal penalty or by denying building permits on remaining lots. A town may also enjoin the subdivider from selling additional lots. Op 77-116.

**— noncompliance, innocent purchaser**

It is doubtful that a town may deny a building permit to, or impose other sanctions against, an innocent purchaser for value of a lot from a noncomplying subdivider. Op 77-116.

# *Statutory Reference Table*

## NEW YORK STATE CONSTITUTION

## CONSOLIDATED LAWS

### Civil Service Law



### Correction Law



### County Law



### Criminal Procedure Law



### Education Law



### Environmental Conservation Law



### Executive Law



### General City Law



### General Construction Law



### General Municipal Law







### Highway Law



### Local Finance Law



### McKinney's Statutes



### Mental Hygiene Law



### Military Law



### Municipal Home Rule Law

## COURT ACTS

**Family Court Act**



**Surrogate's Court Procedure Act**



## PRACTICE ACTS

**Civil Practice Law and Rules**



## UNCONSOLIDATED LAWS

**McKinney's Unconsolidated Laws**



## SESSION LAWS



## FEDERAL STATUTES

**Federal Revenue Sharing Act**



**Housing and Community Development Act of 1974**



**Public Works Employment Act of 1976, Title II**



# *Local Charters and Codes*

**Glens Falls City Charter**



**Saratoga City Charter**

# *Table of Opinions*

1977 OPINIONS

END