NYCOM Municipal Management Series

The Public's Property: The Constitution's Prohibition Against Gifts and Loans

Revised May 2017

NEW YORK STATE CONFERENCE OF MAYORS AND MUNICIPAL OFFICIALS

The Public's Property: The Constitution's Prohibition Against Gifts and Loans

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How to Use This Guide

Every published Office of the State Comptroller (OSC) or Office of the Attorney General opinion and all relevant case law decided since 1995 have been analyzed to update this guide. These opinions and cases have then been categorized so that users of this guide will be able to more easily answer questions and understand any exceptions to the general rules.

When Opinions of the Attorney General are cited in this manual, all citations, through 1980, refer to year and page number in the official publication. Beginning in 1981, the Attorney General's Office began numbering its published opinions, so our citations for 1981 and beyond include both the Opinion number (for example, 81- 1), and the page number of the publication. In addition, all citations to Opinions of the Attorney General are to "Informal" opinions, unless otherwise indicated (the Attorney General distinguishes between opinions offered to state officials and departments, which are characterized as "Formal" and all others which are termed "Informal" opinions).

With respect to Opinions of the State Comptroller, all Opinions issued through 1978 are identified by Volume number (1 through 34) and page number. For 1979 and thereafter, citations of these opinions are identified by the year of publication, followed by the Opinion number (for example, 1981- 77), and then the page number.

This publication was written primarily for cities and villages. Case law and Administrative opinions which dealt with issues unique to provisions of the Town, County or Education Law, and which would not affect cities and villages, have been omitted from this comprehensive review. If, however, the judicial decision or opinion would apply equally to cities and villages, a discussion thereof and citation to was included as general authority.

Although they are not legally binding, the opinions of the OSC and office of the Attorney General are generally a reliable source of legal advice to government officials and are often cited as controlling authority by the courts in the state. As with any publication, the village or city attorney should always be consulted to determine whether your particular facts fit within the outlined opinions contained in this guide.

INTRODUCTION AND HISTORY

> "No county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking, or become directly or indirectly the owner of stock in, or bonds of any private corporation or association; nor shall any county, city, town, village or school district give or loan its credit to or in aid of any individual, or public or private corporation or association, or private undertaking, except that two or more such units may join together pursuant to law in providing any municipal facility, service, activity or undertaking which each of such units has the power to provide separately."
>
> -- New York State Constitution, Article VIII, Section 1

This provision in the State Constitution "was intended to curb raids on the public purse for the benefit of favored individuals or enterprises furnishing no benefit" or consideration to the municipality.[1] During the 1846 Constitutional Convention, the delegates were concerned with the level of losses incurred by the State through loans given to private corporations.[2] Most of these loans were to railroad corporations and canal developers. The voters approved an amendment to the Constitution prohibiting the State from giving or loaning its credit to or in aid of any individual, association or corporation. Another amendment was approved which authorized the State Legislature to restrict local powers to borrow money and loan credit.

The State Legislature failed to utilize this power to curb loans by municipalities, and municipal debts began to increase due to demands for more public improvements and the shift in railroad financing from the State to local governments. Municipalities then followed the same trail as the State. In 1869, the State Legislature had given towns the authority to lend public monies for the construction of railroad lines. Many railroads were constructed in return for stock issued by the railroads. In some cases, bonds were procured and sold and the railroads never built. In other cases the railroads were sold at foreclosure sales and the stock cut off within a few years. The burden on the municipalities was severe. Two other factors arose during this time which caused concern. Local government funding of charities increased. The charities received the money free from any governmental restrictions or control. In addition, public money was being siphoned off through graft and corruption, as illustrated by the Tweed ring[3] in New York City during this time. Finally, in 1874, the constitutional ban on all gifts and loans was enacted as Article VIII, § 10 of the Constitution. This provision exists today as Article VIII, § 1, but is very similar in purpose and intent to its original enactment.[4]

A **gift** is "a voluntary transfer of money, or property without any consideration or compensation therefore."[5] Consideration is a right, interest, profit or benefit accruing to one party. It may also involve some forbearance, detriment, loss or responsibility, given, suffered, or undertaken.[6]

The gift prohibition in the State Constitution forbids a municipality from giving or loaning its money, services or property to a private individual, corporation or association. It also prohibits a municipality from giving or loaning its credit to a private individual, corporation or association or public entity.

Generally, the gift clause prohibits a municipality from expending municipal money for the benefit of private individuals unless the expenditure is in furtherance of a public purpose. A valid public purpose has been defined as, "necessary for the common good and general welfare of the people of the municipality, sanctioned by its citizens, public in character and authorized by the Legislature."[7] The benefit must be shared by the public at large.[8] A purpose which only incidentally benefits the general public would be considered invalid.[9] However, the courts have also recognized that an expenditure of public monies to accomplish a public purpose will not violate Article VIII merely because the expenditure also confers an incidental benefit on private individuals. A gift cannot be made to support a private activity even if the private activity is not undertaken for profit and serves a laudable purpose.[10]

Even where a public purpose is involved, a municipality may not enter into any contract or incur any liability not permitted by legislative act, either expressly or by fair and reasonable implication.[11] The power of a municipality to expend funds or make contracts is confined to the purposes and manner specifically authorized and prescribed by statute.[12]

Payment of funds may be made if a legal or equitable claim exists. A legal or equitable claim exists when there is, "an obligation which would be recognized, at least, by men with a keen sense of honor and with real desire to act fairly and equitably without compulsion of law. The Constitution does not prohibit the Legislature from doing on behalf of the state what a fine sense of justice and equity would dictate to an honorable individual. It does prohibit the Legislature from doing in [sic] behalf of the state what only a sense of gratitude or charity might impel a generous individual to do."[13]

Payment of funds in violation of the gift prohibition may be restrained and/or recovered in a judicial proceeding instituted by a taxpayer in accordance with the provisions of § 51 of the General Municipal Law.[14]

Article VIII, § 1 does not, however, bar a municipality from <u>accepting</u> a gift, provided that the municipality does not conduct a campaign to solicit the gifts.[15] Villages and cities are generally authorized to accept gifts, donations and the like, conditional or otherwise. Pursuant to Village Law § 1-102(2), villages may accept gifts of real or personal property "absolutely or in trust <u>for any purpose of the corporation or for any public use</u> upon terms and conditions as prescribed by the grantor or donor..." (emphasis added). Villages may also accept gifts "for any purpose" of real or personal property "to hold same for only such time as is reasonably necessary to sell, convey or to dispose thereof, and to so sell, convey or dispose thereof; <u>notwithstanding that the holding of such property would not be for a purpose of the corporation or for a public use</u>" (Village Law § 1-102[3], emphasis added). Similar authority is provided to cities under both the General City Law (§ 20[3]) and the Second Class Cities Law (§ 3[2]).

Additional statutory authority is found in § 73 of the General Municipal Law, which permits villages and cities to accept conveyances of real or personal property and hold same in trust for certain purposes, including "for any purpose of education, or the diffusion of knowledge, or for the relief of distress; or for parks, gardens, or other ornamental grounds, or grounds for the purposes of military parades and exercise, or health and recreation, ... <u>upon such conditions as may be prescribed by the grantor or donor, and agreed to by such corporation</u>... (emphasis added). It should be self-evident that municipal acceptance of a conditional gift of real or personal property obligates the local government to use the property for the stated purpose(s). This is particularly important in the context of a gift, in trust, of real property for park purposes. Parklands in New York State are impressed with a public trust and their use for other purposes – whether for a period of years or permanently – requires the authorization of the State Legislature.[16] Any use which would tend to exclude the public from using the park would be considered an unauthorized alienation of the lands.[17] The Office of the State Comptroller (OSC) has held that actively soliciting donations is against public policy.[18] While a municipality is not authorized to solicit gifts, a private organization could do so on behalf of the municipality.

INTER-GOVERNMENTAL TRANSFERS

The ban on gifts only applies to private undertakings. The Constitution does not prohibit a gift of money or property by one public corporation to another **for a public purpose**,[19] as long as the local government "does not borrow the money so given or loaned."[20] Public corporations include public benefit corporations as defined under General Construction Law § 65;[21] but the term public corporation does not include the State of New York.[22]

Statutorily, the State Legislature has provided specific authority for certain inter-governmental transfers of title to or interest in real property in General Municipal Law § 72-h. Subdivision (a) of this section authorizes counties, cities, town, villages and fire districts (but <u>not</u> school districts)[23] to "sell, transfer or lease to or exchange with" any other such jurisdiction or a school district, BOCES, or the State of New York, the federal government, or an agency or department of either, any real property which it owns "either without consideration or for such consideration and upon such terms and conditions..." as shall be approved by the governing board. In the case of a lease thereof, the statute provides that the term may not exceed 10 years, but does not "prevent the renewal of any such lease."

Examples of such inter-governmental transfers which have been found to be within the terms of § 72-h include the following:

- A lease of municipal lands without consideration to the State University of New York;[24]
- A city transfer of its airport to the county for less than fair and adequate consideration;[25]
- An exchange of parcels between a village and a federal agency, where the village acquired a parcel of real property for the sole purpose of exchanging it for Parks Service property needed for the construction of a village street;[26]
- A conveyance of property, no longer needed for municipal purposes, to a fire district for no consideration;[27] and
- A village authorization to state agencies, by lease or license, to utilize space in the village hall several times per month for little or no consideration.[28]

Note that the foregoing authority is limited by subdivision (b) of § 72-h which makes it inapplicable "to any real property which is made inalienable under the provisions of any general, special or local law or of any charter." Thus, a proposed conveyance of parkland would require prior approval by the State Legislature,[29] and in the opinion of the OSC, so too would a conveyance of title to lands used as a municipal parking lot.[30]

Although the gift prohibition does not apply to gifts from one municipality to another municipality for public purposes, a gift to another municipality where there is absolutely no benefit to be derived from the donor municipality could be construed as waste of public funds because the expenditure of funds by a municipality is subject to the general rule that it be used for municipal purpose.[31] In addition, there must be some authority specified in, or necessarily implied from, a specific statutory grant of power.[32]

Note, in contrast however, that the constitutional ban on loans of a municipality's credit, applies to loans to either private or public corporations.[33]

PRIVATE ORGANIZATIONS OR UNDERTAKINGS

Generally

As a general rule, outright contributions of money, property or services to a private entity even if in furtherance of a proper municipal purpose, are considered a gift under Article VIII, § 1.[34] A municipality may enter into a duly authorized contractual arrangement with a private entity if the municipality receives fair and adequate consideration and the contract is in furtherance of a proper municipal purpose.[35]

In analyzing a situation to determine if a gift is involved, first consider whether a private entity is involved. Remember that a private entity does not become public because it performs a public purpose. If it is a private entity, no money, property or services may be provided by a municipality unless a contract for a legitimate public purpose is entered into. To determine whether a valid contract exists, consider whether the municipality is authorized to contract for the purpose involved. For example, pursuant to General Municipal Law § 122-b, cities and villages may provide, or contract to provide, ambulance and other emergency medical services to persons within their municipal boundaries. In contrast, a municipality may not contract to do or provide a service for which it has no authority, such as providing free telephones to its residents.

A valid public purpose is broadly defined in General City Law § 21 as, "the promotion of education, art, beauty, charity, amusement, recreation, health, safety, comfort and convenience, and the promotion, creation, development or expansion of business, commerce, industry or job opportunities." (The reference in the General City Law to the expansion of business, commerce, industry or job opportunities would only seem to apply to programs which benefit the city generally and would not authorize a city to subsidize a particular private industry). There is no comparable definition in the Village Law. Thus, for villages, the public purpose would have to be found or implied from authority in specific provisions of the Village Law or a similar statute, such as the General Municipal Law or the Municipal Home Rule Law. There are several sections of these laws which establish certain activities as proper municipal purposes.

The headings below identify particular entities or purposes for which municipal governments have been asked, or themselves sought, to provide money, property or services in support. The analysis of each includes those instances where there is, or appears to be, authority for the municipality to provide support or assistance, but also lists circumstances in which the courts, the OSC, or the Office of the Attorney General have concluded that the expenditure of public moneys or the provision of property or services would constitute a gift within the constitutional prohibition.

Patriotic Organizations and Causes

The General Municipal Law contains specific statutory authority for a municipality to support certain patriotic causes. Pursuant to its provisions, a municipality **may:**

1. Acquire lands and erect a veterans' monument;
2. Pay funds for the erection or maintenance of a veterans' monument on public lands to a soldiers' monument corporation pursuant to the guidelines established in the Not-for-Profit Corporation Law § 1405;
3. Acquire land and erect a memorial building, subject to a mandatory referendum; or
4. Lease property for a term not exceeding five years, without expense or at a nominal rent, to certain veteran's organizations specified in the law.[36]

A city may spend $500 per year for maintenance and rental of meeting rooms for veteran's or other patriotic organizations pursuant to General City Law § 13-e.

In the absence of similar authority, providing public money, property or services to patriotic organizations or causes would be considered a gift. For example, opinions of the OSC or the Office of the Attorney General have concluded that a municipality **may not:**

- Donate, or sell for a nominal sum, real property to a veteran's organization,[37] even if the land will be used for the erection of a veterans' memorial.[38] (The aforementioned provisions of the General Municipal Law only allow payment of funds for the erection or maintenance of a memorial to a duly incorporated soldiers' monument corporation, not the gifting of land);
- Donate money to a veterans organization for celebrations or parades,[39] or toward the purchase of real property;[40] or
- Expend public funds to provide gifts for residents called into military service.[41]

Recreation and the Arts

Municipalities may spend funds for municipal recreational programs for its citizens, but cannot give money to private groups for recreational purposes unless a proper contract is entered into. Although funds may not be donated to private groups or organizations, municipalities, where statutorily authorized to provide recreational programs (i.e., as provided for in Article 13 of the General Municipal Law), may contract with such groups or organizations to provide those services. In the opinions of the OSC and the Office of the Attorney General, it is essential, however, that the municipal government retain control of the program and not simply act as a conduit for the pass-through of public funds. In addition, the value of the services provided must be commensurate with the sum paid by the local government. Accordingly, there are opinions concluding that municipalities **may:**

- Spend funds to maintain radio broadcasts if the radio broadcast is in the interest of the municipal government;[42]
- Contract to provide for band concerts to be given annually;[43]
- Contract with a private organization for the operation of an approved municipal youth program;[44] or
- Contract with a private or non-profit foundation for the performing arts for a specific purpose.[45]

Absent a contract with a private entity to provide a statutorily recognized municipal purpose, the OSC or the Office of the Attorney General have opined that municipalities **may not:**

- Make a charitable donation to a private committee that provides care and recreation to reduce juvenile delinquency;[46]
- Make a gift to a boy's club;[47]
- Aid a privately operated community center;[48]
- Donate money in aid of a private association such as the YMCA;[49]
- Appropriate money for the expense of operating a privately owned community hall aside from those which lawfully may be appropriated to a youth recreation project operated by the municipality;[50]
- Appropriate monies to a "Hi-Teen Club" where the club is not operating a municipally sponsored youth recreation project;[51]
- Appropriate money for the use of a local baseball team;[52]
- Fund a private youth recreation project;[53]
- Finance a little league program, a CYO basketball tournament or a privately sponsored bowling league. Where the athletic program is sponsored by interested individuals and not by the municipal recreation commission, public monies may not be expended for use thereon;[54]
- Appropriate public funds to support boy scout or girl scout programs;[55]
- Appropriate monies for the construction a swimming pool to be owned by a 4-H Club;[56]
- Contribute public funds to help defray the training camp expenses of a heavyweight title contender as a publicity project;[57]
- Make a gift of money to a private philharmonic orchestra;[58]
- Authorize the expenditure of monies to aid an archery program supported by a local sportsmen's club;[59]
- Contribute its money to a recreational program, for both youth and adults, sponsored by the local rotary club and operated jointly with the municipality (the proposed recreational program described was not a municipally sponsored project, but was to be conducted by the local rotary club on premises owned by the rotary club);[60]
- Appropriate money to pay all or part of the debt for swimming pools sponsored by a local chamber of commerce;[61]
- Contribute funds to a cultural group for the purpose of supplying residents with concerts, art exhibits, musical productions;[62]
- Support a local drum and bugle corps;[63] or
- Use funds to fund a hunter safety program undertaken by a Rod and Gun Club.[64]

Municipal funds may not be donated to private groups even if the group would be using the funds to maintain public park property[65] or to sponsor a public arts program.[66] Corporations formed under Article 7 of the General Municipal Law, which authorizes the creation of trusts for public parks, are considered private entities and municipalities cannot donate funds to the trust for maintaining a public park.[67]

Youth Activities

While there is no specific statutory authority for a local government to simply "contribute" public funds to a private athletic association, such as a Little League,[68] local governments do have authority to provide for "playgrounds and neighborhood recreation centers,"[69] and to "undertake and promote ...projects devoted to providing leisure-time activities for youth or assistance to children."[70] Thus, the OSC has said that a municipality could contract with a Little League-affiliated organization, pursuant to which the organization would run a portion of the municipal recreation program under the supervision and control of the municipality. According to this opinion, the program would have to be a legitimate one instituted for the benefit of the municipality and not a device to channel public money to a private organization.[71] The OSC suggests that the parent organization for the Little League (or comparable private youth athletic organization) would have to make the final determination about whether this type of contract would be a violation of its charter and bylaws. In any event, such a contract should be for a fixed sum and should specify for what and how the funds are to be expended.[72]

Historical Associations and Events

New York State Arts and Cultural Affairs Law § 57.07 requires municipalities to appoint a local historian and authorizes them to expend funds to maintain historical edifices, to erect historical markers and monuments, to collect war mementos, and to publish local histories. This section also authorizes a municipality to publish local histories and records in cooperation with a private historical organization and to contract with a private historical organization for the support of historical edifices within the municipality. The cost of maintenance may be shared with the private group or the municipality may enter into a contract with the group to provide maintenance.[73] Therefore, while a municipality cannot make a gift of public funds to a private historical association, it may enter a contract with a historical association for the support or maintenance of any historical edifices in the municipality.[74]

A municipality may expend monies for an historical commemoration only if funds have been appropriated for such and are retained in the control of the governing board. There is no authority for a municipality to turn the money over to an outside group or agency. An outside group may assist in carrying out the commemoration, but the fund must remain in the control of the governing board of the municipality.[75]

Municipalities are not authorized to make outright gifts to private historical associations or societies, or to make gifts or provide services in support of the projects of a private historical association.[76] Thus, the OSC has concluded that municipalities **may not:**

- Offer monies to subsidize the printing of a history of the municipality when such a book is not being published in connection with a program conducted by the municipality commemorating a historical event;[77] or
- Pay the premiums on an indemnity policy protecting a private historical society which has use of the village museum.[78]

Cemeteries

Cemeteries may be publicly or privately owned. Cities and villages are statutorily authorized to acquire lands for cemetery purposes.[79] If a cemetery is privately owned, however, a municipality may not provide assistance to it.[80] In contrast, by amendment in 2010,[81] a municipality may provide financial assistance and/or goods and/or services to a public cemetery association, which by statutory definition "does not include a family cemetery corporation or a private cemetery corporation."[82] While a municipality **may not** contribute to the cost of the maintenance of a cemetery owned by a cemetery association, it may accept a conveyance of the property by the association and maintain it as a municipal cemetery pursuant to General Municipal Law § 162.[83]

Housing

Pursuant to Article XVIII, § 2, of the New York State Constitution, municipalities may be authorized by the State Legislature to provide subsidies of various kinds in support of housing for needy segments of the population. The legislation implementing this authority is found in Article V (§§ 92-102) of the Public Housing Law. Section 93 thereof authorizes a municipality (defined as a city, town or village)[84] to "make or contract to make loans" to a municipal housing authority or to any housing company "operating within the territorial limits of such municipality." In the same vein, section 94 permits a municipality to make "subsidies" to an authority "payable only with moneys locally appropriated therefore from the general fund or other funds available for current expenses of such municipality." Lastly, Article V provides that a municipality "may, upon such terms, <u>with or without consideration,</u> as the local legislative body ...may deem advisable, render or contract to render services to an authority, housing company or a government, or provide and maintain parks, sewerage, or other facilities adjacent to or in connection with a project."[85] Article V of the Public Housing Law thus enables a municipality to provide funding and services to municipal housing authorities and the like without running afoul of the State Constitution's prohibition against gifts and loans of public money. Examples of administrative opinions interpreting the application of Article XVIII of the State Constitution and Article V of the Public Housing Law to particular situations include the following:

- The OSC concluded that, pursuant to section 417 of the Public Housing Law, the town board of the Town of North Hempstead was authorized to turn over to the North Hempstead Housing Authority, in a lump sum, an amount not to exceed $10,000, appropriated by it for such Authority;[86]
- The Office of the Attorney General, citing the constitutional authority to subsidize housing for those in need, concluded that Broome County could donate an outdated nursing facility for the operation of an enriched housing project for the elderly and disabled, without violating the prohibition against gifts and loans;[87]
- The Office of the Attorney General has also opined that, consistent with Article XVIII, a city may donate property for an affordable housing program designed to make housing available to first-time home buyers whose housing needs are not otherwise being met and;[88]
- Finally, the Office of the Attorney General advised that the Town of Hempstead could purchase a school building, and donate it to a not-for-profit corporation, which would renovate the building into housing units for elderly persons of low and moderate income.[89]

Libraries

Municipalities may establish and provide for public library systems under municipal control[90] and may make an annual appropriation to the library board or make a grant to the library.

A municipality may not, however, donate funds to private libraries located within its boundaries, such as free association libraries,[91] unless payment is made as part of a contract with the library for fixed library services to be rendered.[92] The library must be chartered by the Board of Regents in order for the municipality to be allowed to contract with it for services.[93]

Hospitals and Health Services

General Municipal Law § 87 authorizes governing boards of municipalities to make payments to charitable, eleemosynary, correctional, and reformatory institutions wholly or partly under private control, for the care, support, and maintenance of their inmates and outpatients. The OSC has interpreted the words "charitable" and "eleemosynary" as referring to the care of indigent persons.[94] Payments may be made only for such inmates as are received and retained pursuant to regulations established by the State Department of Social Services, or other state departments having the power of inspection thereof. When making such payments a municipality cannot contract to reimburse a private hospital for the difference between payments received by patients and the actual costs of maintaining the ward, because the municipality might then be paying for patients who might not qualify as "needy."[95]

Municipalities may also establish or support public hospitals but may not support private hospitals, unless the private hospital is providing care for the indigent as noted above[96] or pursuant to a contract authorized by local law to provide general medical services to the general public.[97] A municipality may appropriate money to a private charitable institution such as a hospital on a per capita basis for services actually rendered. The payment in a lump sum of the annual appropriation without regard to per capita cost is prohibited.[98]

Volunteer Fire Departments and Emergency Services

Cities [99] and villages [100] may include an appropriation for the expenses of the fire department in their respective budgets. The appropriation may only be for the expenses necessary for the operation of the fire department. Claims must be approved by the legislative body and paid through the municipal treasurer. The OSC has advised that there is no authority for the municipality to simply turn over public funds to the fire department for disposition by the fire department council.[101]

A village may contract for fire protection services with a volunteer fire department and make payments to the fire department pursuant to the contract. The contract should be for a fixed term and value. There should be equal consideration from both parties to the contract. The contract should not be merely a pass-through of funds to the volunteer fire department. A municipality may provide services to the fire department as part of a valid contract.

Municipalities may also contract for emergency ambulance services.[102] In the opinion of the OSC, any fees to be charged to residents must be fixed by and paid to the municipality directly, because "[t]he fees are municipal revenues and should not be handled by anyone other than a public officer or public employee."[103] The contract may not be discriminatory, nor may it provide for a subsidy to the ambulance company or provide for transportation from an institution to an individual's residence.[104] A contract may include provisions for the operation, maintenance and repair of the emergency vehicles and use of municipal gasoline.[105] A municipality may transfer real property to a rescue squad performing services in the municipality, the consideration being the services to be performed.[106]

In addition to payments made pursuant to a contract, the following state statutory provisions **allow** for payment for specific items:

- General Municipal Law § 72-g generally authorizes reimbursement (with certain limitations) of actual and necessary expenses incurred by volunteer members of a fire department to attend training schools for firefighters.
- Volunteer Firefighters' Benefit Law § 3(3) authorizes a municipality to:
    - Reimburse a firefighter for expenses for meals, lodging and actual and necessary travel;
    - Provide a mileage allowance in lieu of travel expenses;
    - Reimburse expenses for registration and tuition fees under General Municipal Law § 72-g; and
    - Provide transportation, food, drink, shelter, clothing and similar items while on duty.
- Village Law § 10-1000 and General City Law § 20(12-a) authorize villages and cities, respectively, to include as part of their budgets an appropriation to fund an annual firefighter's dinner for each fire company within the municipality.
- Under General Municipal Law Articles 11-A and 11-AA, municipalities are authorized to establish service programs for volunteer firefighters and volunteer ambulance workers.

Absent a specific statutory authorization or contract to provide specific services to municipal residents, a volunteer fire department would be considered a private entity, and as such, a municipality would not be authorized to provide money, equipment, real property or services to the fire department. Even if there is a contract with the department to provide firefighting services, a municipality could not provide funds to a volunteer fire department in excess of the contract price.[107]

Opinions issued by the OSC and/or the Office of the Attorney General have advised that, in the **absence of a valid contract**, a municipality **may not:**

- Pay municipal funds directly to a volunteer fire department;[108]
- Furnish free water to homes of volunteer firefighters;[109]
- Make a gift of money to the fire department to be used by the latter in purchasing liability insurance;[110]
- Purchase equipment for a drum and bugle corps composed of members of the fire department;[111]
- Contribute money to a volunteer fire company to defer the expense of a convention and parade;[112]
- Make a gift of its buildings and real property to a volunteer fire corporation;[113]
- Give money to a fire department to be used for the observance of Independence Day[114] or a commemorative celebration;[115]
- Contribute money to help pay the publicity expenses of a volunteer fire department's field days;[116]
- Appropriate and expend funds to assist a fire department in sponsoring the annual convention of the volunteer firefighters' association;[117]
- Contribute to a volunteer fire company for the purchase of a memorial plaque to be installed on fire house premises;[118]or
- Give an annual token sum of money to officers of a volunteer fire department because volunteer firefighters are not employees of the municipality, but rather private citizens who volunteer their services to a private organization.[119]

Selling real property or equipment to a fire department at less than fair market value may also be considered a gift of public property. Thus, opinions of the OSC and the Office of the Attorney General have concluded that a municipality may not convey property for a nominal consideration to a volunteer fire department,[120] nor may it sell an obsolete fire truck to a fire company for a nominal sum.[121]

Economic Development

Article 15 of the General Municipal Law, known as the Urban Renewal Law,[122] authorizes municipalities to provide, among other things, "local grants-in-aid ...in the form of appropriations, cash, municipal services and facilities..."(General Municipal Law, § 503[b]), as part of "[a] program ...for the redevelopment ... of substandard and insanitary areas of such municipalities..." (General Municipal Law § 502[3]). Comparable authority may be found in Article 18-C of the General Municipal Law, commonly referred to as the "Municipal Redevelopment Law."[123]Absent such authority, a municipality may not provide public funds to private industry, in an attempt to attract or retain employment therein. Examples of relevant administrative and judicial opinions to that effect have concluded that a municipality **may not:**

- Enter into an agreement with industry that if the corporation remains in the municipality and furnishes employment to residents, the property owned by the industry will be tax free;[124]
- Appropriate funds to assist in preparing property for occupancy by a desirable industry;[125]
- Contribute monies to the local community development corporation which promotes industrial development;[126]
- Expend money for the purpose of retaining the county courthouse in the village. The fact that business interests would be hurt if the courthouse was relocated does not matter. As one court observed, "[t]hat an enterprise tends indirectly to the benefit of every citizen by the increase in general business activity does not justify expenditures in behalf of such an enterprise as for a public purpose."[127]

Prizes, Rewards and Scholarships

Statutory authority exists in General Municipal Law § 91 to provide for a reward of up to $1,000 for information leading to the detection, arrest and conviction of a person guilty of a misdemeanor, and not more than $25,000 in the case of a person or persons guilty of a felony.[128]

In addition, the OSC has issued opinions advising that prizes may be awarded under the following circumstances because the municipality receives some benefit that involves a proper municipal purpose:

- Awarding prizes for projects conducted by a recreation commission for a lawful public purpose. Municipal monies may be expended to purchase prizes of reasonable value to be awarded by a recreation commission as part of its authorized program, if the intent and plan to award prizes, the number and value of the prizes, and the basis for making the awards have been determined by the recreation commission in the exercise of its statutory authority;[129]
- Conducting a contest for architectural designs for a memorial bridge superstructure and offering a pecuniary prize to the winning designer, provided the municipality is receiving value commensurate with the prize, such as the bridge design;[130]
- Awarding cash prizes to various architects who submit plans for a new cultural center, only one of which is to receive the ultimate contract to design the project, if the municipality has received value in the form of submitted entries;[131] and
- Holding a fishing competition as part of a campaign to publicize the municipality's advantages as a vacation place and to promote its fishing industry using public monies to purchase prizes of nominal value, such as medals and trophies. With a prize of nominal value, the benefit conferred on the winning contestant would remain incidental to the public purpose of promoting the municipality. However, a municipality may not make a substantial cash prize or award, as in one proposal reviewed by the OSC, in which a county proposed a cash prize of $10,000, which the OSC found to be excessive.[132]

As a general rule, however, a municipality is not authorized to award or donate money for prizes, rewards or scholarships. The OSC has advised that the following expenditures **are not** for valid municipal purposes:

- Awarding monetary prizes for the best decorated house at Christmas time;[133]
- Donating money to a private organization for a competition held by the private organization, even if the competition will promote a public purpose;[134] or
- Appropriating monies to provide scholarship grants to residents of a municipality.[135]

In addition, the Office of the Attorney General has concluded that there is no authority for a municipality to offer a bounty to any person who discloses a litterer to the municipal government.[136]

Advertisements

Advertising space has value and therefore a municipality cannot offer free advertising space on municipal property to a private entity.[137] Municipalities may only sell advertising space pursuant to express statutory authority, or in connection with a "proprietary" (as contrasted with a "governmental") activity.[138] In contrasting the two, one noted authority has written: "The object of a municipal corporation is that it may perform certain local public functions as a subordinate branch of the state government, and, while it is invested with full power to do everything necessarily incident to a proper discharge thereof, no right to do more can ever be implied. In the absence of express legislative sanction, it has no authority to engage in any independent business enterprise or occupation such as is usually pursued by private individuals."[139] In other words, a municipality acts in a "proprietary" capacity when it performs functions more commonly associated with a private business operation, such as the operation of a transit system.[140]

A municipality may enter into an agreement with a private firm under which the firm will purchase advertising space so long as the municipality receives fair and adequate consideration under the agreement.

The private benefit or use under these circumstances would be simply incidental to the primary legitimate public use.[141]

The OSC has held that a municipality may enter into an agreement where a private firm will build bus shelters in exchange for advertising space, but the contract could not allow the firm to sell advertising space in perpetuity as at some point the municipality will no longer be receiving value.[142]

A municipality may purchase advertising space for a municipal purpose, such as advertising the municipality as a convention site.[143] Cities are statutorily authorized to establish publicity funds to advertise the advantages of the municipality for tourism, or as a convention site, and for such other and additional purposes as may tend to promote the general commercial and industrial welfare of the city.[144]

Note, however, that a municipality may not purchase advertising space in a high school yearbook, as that would be considered a donation to a private entity.[145]

Floral Arrangements

It is not a proper municipal purpose, and there is no statutory authority, for a municipality to purchase flowers for someone in the hospital or for a funeral.[146]

Refreshments

A municipality may expend a reasonable sum of money to provide refreshments for the public at official municipal functions, so long as the refreshments are merely incidental to the effectuation of the lawful municipal purpose of holding such functions.[147]A municipality may not spend funds on entertaining the press though favorable editorials may be received.[148]

Religious Uses

The OSC has advised that, pursuant to a contract for services, a municipality may contract with a parochial school to conduct a municipal program for its residents on the subject of teen "bullying," as long as the municipality retains ultimate supervision and control of the program.[149] Absent a contract to provide services for a valid municipal purpose, however, the OSC has concluded that a municipality may not furnish free water to parochial schools,[150]or render gratuitous services to members of religious organizations as a matter of professional courtesy.[151]

Police Benevolent Associations

Police Benevolent Associations are private entities so payment of public funds to such organizations is unauthorized. Accordingly, the OSC has opined that a municipality has no authority to pay the value of unclaimed, lost property into the Police Benevolent Association Fund,[152]or to turn over to the Police Benevolent Association fees collected by a police department for furnishing copies of documents.[153]

Municipal Publications

A municipality may publish brochures or newsletters which are necessary to accomplish municipal business or forward a municipal purpose.[154]A municipality may, by local law, publish a newsletter for distribution to residents. The content of the newsletter must be intended to inform or educate residents as to the official affairs of the government, and not relate to matters which promote primarily private, partisan or political purposes.[155] A municipality may not sell advertising space in such a newsletter. A municipality may not subsidize the printing of pamphlets or brochures of private entities.[156]

Celebrations

A municipality may sponsor a celebration commemorating a special event in the municipality or a legal holiday and it may contract for services with a private entity to organize a municipal celebration,[157] but it may not contribute funds to a chamber of commerce to underwrite costs for another municipality's celebration.[158]

Statewide Associations

Municipalities **are authorized** to expend public funds to maintain state-wide, non-profit associations of local officials whose activities are designed to improve local administration in the State, such as the New York State Conference of Mayors and Municipal Officials.[159]

Foreign Exchange Students and Ambassador Programs

A municipality may not pay the travel expenses of a foreign exchange student. An expenditure which indirectly or incidentally gives a municipality some publicity is not authorized merely because of the resultant publicity.[160] Nor may public funds be expended to sponsor a child in a foreign country.[161] Furthermore, a municipality has no statutory authority to contribute money through a "community ambassador program."[162]

Tourism and Publicity

The promotion of tourism is a valid municipal purpose. In addition to the specific statutory authority granted to cities to establish a publicity fund "for the purpose of advertising the advantages of such city as a winter and summer resort, or for the commemoration programs of historical events, or otherwise..." (General City Law § 13-b), the Office of the Attorney General has advised that villages have sufficient authority under the Village Law and the Municipal Home Rule Law to adopt local laws providing for the establishment of publicity funds to promote the interests of a village.[163]

The OSC has concluded that:

- A municipality may adopt a local law authorizing itself to contract with a Chamber of Commerce, whereby the latter, upon payment of a reasonable sum, will publicize the municipality as a tourist and convention site;[164]
- A municipality may honor coupons sold by a charitable organization that entitle the holder to a free round of golf at the municipal golf course pursuant to a contract with the organization, the consideration for which would be the organization's agreement to publicize the city golf course in the coupon book;[165] and
- A municipality may establish a publicity fund from which expenditures to promote a privately sponsored boat race could be made if the governing body determines that such race will publicize the municipality as a recreational or resort area.[166]

In contrast, Administrative Opinions have advised that a municipality **lacks authority to:**

- Contribute monies to the local chamber of commerce to help that organization in paying for holiday decorations for the business area: it may, by itself, or pursuant to a contract with an organization equipped to perform the work and/or to furnish the necessary materials, pay all or part of the cost of holiday decorations to be used on streets in such area as a publicity fund expenditure;[167] and
- Make a donation of a sum of money to a not-for-profit association for publicity purposes, unless a duly executed contract is entered into between the municipality and the association; payments under the contract for such services by the municipality to such association are to be made after the rendering of a verified account and audit of vouchers.[168]

Promotion of Legislation

Although a municipality may use public funds to educate and inform the public, it may not use funds to convey favoritism, partisanship, partiality, approval or disapproval of local legislation. In the words of one New York court, "Public funds are trust funds and as such are sacred and are to be used only for the operation of government... People of all shades of opinion and belief contribute to these funds from one source or another. No agency may misuse any such funds for promoting its own opinions, whims or beliefs, irrespective of the high ideals or worthy causes it espouses, promotes or promulgates."[169] This does not prohibit a municipality from using public funds to seek passage of legislation which benefits the municipality on the State or federal levels.

A town may not use public funds or town employees to prepare a proposed budget or other documents for the purpose of showing residents of a proposed village the cost of incorporating or operating a village, since the town has no "standing" to oppose the creation of a village and its intrusion into the incorporation process would be a partisan political act rather than the exercise of its proper governmental powers.[170]

Miscellaneous

Various opinions of the OSC and the Office of the Attorney General have also advised that municipalities have **no statutory authorization** to do the following:

- Prepare a traffic ticket in the form of a business reply envelope which would require the payment of postage by the village,[171] (although payment of postage for voters' return of absentee ballots is not improper);[172]
- Give money to a humane society absent a contract for services;[173]
- Make contributions to a "Citizens Advisory Committee," a private organization formed in connection with a community improvement program under a federal housing program;[174]
- Appropriate funds toward the support of a privately operated day care center for children;[175]
- Purchase a coin-operated photocopying machine for placement in the village office and use by the public;[176]
- Provide extra police services to private persons or organizations on a contract basis;[177] or
- Act as a fiscal agent for a private not-for-profit corporation for which the municipality contracts for community health services.[178]

CONTRACTS, DEBTS AND CLAIMS, AND LEGAL ACTIONS

Contracts

A contract is defined as "an agreement between two or more persons which creates an obligation to do or not to do a particular thing."[179] In order for a contract to be legally enforceable, there must be a "meeting of the minds," which means that the parties to the contract are agreeing to the same bargain at the same time. For example, a village will pay $2,000 for a computer, in exchange for which the vendor will convey ownership of the computer to the village.

Modification of Existing Contracts

A problem arises under the gift prohibition when, after there has been a "meeting of the minds," the municipality agrees to give more than bargained for without receiving any additional consideration in return.

For example, when a town had agreed to purchase certain equipment for the town highway department, and at the time of delivery, the vendor advised of a $545 increase in the purchase price, the Office of the State Comptroller (OSC) advised that payment of the additional monies under those circumstances would constitute an impermissible gift of public funds. [180]

Modifications to a contract may be appropriate, however, under certain circumstances, as one Court has explained, "a municipality, having made a contract, may subsequently bargain, under full legislative authority, for a modification of that contract, so that it will be adjustable to altered and then existing circumstances, paying an adequate consideration, either for what the other party gives up, or for what it secures under the modifications."[181]

Absent such conditions or circumstances, however, a **municipality may not:**

- Increase the purchase price of coal over the price agreed to in the contract, even if the price of coal has increased greatly since the signing of the contract;[182]
- Modify an existing municipal contract for the sole benefit of the private contracting party;[183]
- Execute or release a reverter clause in a deed without additional consideration as a right of reversion is an interest in real property;[184]
- Pay more than the contract price for fuel oil upon the successful bidder's claim that he is losing money;[185]
- Donate an ambulance to the Society for the Prevention of Cruelty to Animals for the seizure and pounding of untagged dogs beyond the fixed sum of money called for in the contract. Any contribution, whether in the form of cash or other personal goods, made in addition to the consideration stipulated in the contract would be an illegal gift;[186]
- Increase the consideration provided for in an existing fire protection contract where no additional increased or improved services are to be rendered by the fire company;[187]
- Pay a contractor more than the agreed amount of a public works contract merely because the contractor has not paid his or her employees the prevailing rate of wages and now must make up the difference;[188]
- Pay a contractor, after completion of a construction contract, an amount over and above the contract price, predicated on the contractor's failure to include sales tax costs in his or her bid;[189] or
- Pay a garbage collector a "bonus" over and above the amount for which he or she contracted to collect garbage, even if the garbage collector is making more collections than he or she thought they would have to make when they entered into the contract.[190]

Payment in Response to Gifts to Local Governments

If something had already been given or performed before the promise was made, it will not satisfy the "bargain" requirement. The courts reason that it was not given in exchange for the promise when made. Thus, a municipality **may not:**

- Reimburse the owner of drained land for expense incurred and paid by her in lowering a culvert across the highway. The municipality agreed to give the landowner permission to lower the culvert in exchange for the owner paying for the shovel operator. The municipality could not thereafter agree to pay a portion of the cost;[191]
- Purchase land as a site for a well and then agree to provide the former owner of the property with free water. Any written agreement with the former owner of such property to supply him or her with free water would be a new contract, not related to the original contract of purchase;[192] or
- Forego something of value for no consideration. Thus, a municipality **may not** release, without consideration, a condition in a deed of its property providing for a forfeiture and reversion of title to the municipality upon breach of a condition.[193]

Advanced Payments

The OSC has recognized that advance payments on a contract may result in a savings of public moneys. The OSC suggests that the municipality should receive a bond or other security guaranteeing performance by the vendor in accordance with the agreed upon terms of the contract.[194] Therefore, a municipality **may:**

- Make advance payments for the estimated amount of fuel oil to be received in a fiscal year;[195] or
- Contract with a public utility corporation providing for annual payments before actual rendition of service in order to obtain a more favorable rate.[196]

A municipality may agree to provide **services as part** of a contract. Thus, the OSC has concluded that a municipality may agree to provide **water for a specified** number of years to the seller of certain land as consideration for the conveyance.[197]

Ordinarily, however, early payment or payment prior to completion of a project is considered a gift. A municipality should not be put into the position of advancing public moneys if there is the possibility that, in the event of a default by the vendor or contractor, the municipality would find it difficult or impossible to obtain a refund.[198] The OSC has advised that a municipality **lacks authority to:**

- Reimburse a contractor for the expenses incurred in the partial performance of an improvement contract where the contract expressly provides that payment is to be made upon completion of performance;[199]
- Pay for services prior to the actual rendition thereof inasmuch as the advance might constitute an unconstitutional loan of monies. However, this does not mean that all payments made by a municipality pursuant to contract must be strictly on a pro rata basis according to the portion of the contract performed. The intent of the parties governs, and an agreement made in the usual course of business providing a reasonable schedule of payments thereunder would not be construed by the courts as an unconstitutional loan of public funds;[200] or
- Offer a bonus of $1,000 per week for early completion of building construction. Where prompt service is necessary, the specifications should so provide. Any bidder unable to meet such specification may be rejected by the awarding board regardless of the submitted price. Also, the contract could contain a penalty specification for failure to complete by specified date.[201]

Debts and Claims

Unless specifically authorized to do so by State statute, a municipality cannot forgive a debt owed to the municipality or pay a claim when they are not legally bound to. For example, Real Property Tax Law § 1182 authorizes municipalities to institute a program for the cancellation or reduction of interest charges due on unpaid real property taxes. General Municipal Law § 84 authorizes a municipality to refund an illegal assessment with interest when the assessment has been annulled by the judgment or order of any court.

In some instances, a municipality **may** pay claims founded upon an equitable or moral obligation.[202] For example:

- One court concluded that a moral obligation would permit a municipality to reconvey property to former owners or lienors whose interests in real property have been foreclosed by in rem proceedings;[203]
- Another court held that a municipality might assume liability for injury to an innocent bystander from an act of a police officer in making an arrest. Protection of people exposed to an injury on streets from police officer is a public purpose and the municipality may assume such a burden if it sees fit;[204]
- An opinion of the Office of the Attorney General advises that although a party to a lawsuit cannot ordinarily recover attorney's fees as part of the costs of the action, a municipal government may, under appropriate circumstances, recognize a "moral obligation" to pay the attorney's fees of an individual hired by it to perform municipal services, who had to sue the municipality to recover payment for those services;[205] and
- Another court concluded that it is not an unconstitutional gift to refund unprotested real property taxes unconstitutionally levied when a legal and equitable claim exists.[206]

A municipality **may not** waive or compromise debts or claims in the following circumstances:

- Claim for water charges with a private corporation;[207]
- A 14-year old tax claim that is barred by the statute of limitations remains a valid debt; the release or compromise of such would constitute a gift. Taxes may only be forgiven pursuant to State statute;[208]

- A utility tax already accrued;[209]
- Water bills owed by a hospital where the amount is not in dispute, nor may a municipality allow a charitable hospital to receive a preferential rate of water rents. However, it may establish a reasonable and nondiscriminatory classification of consumers, with uniformity within each class;[210]
- A right to reimbursement from a third party causing the injury for expenditures made pursuant to General Municipal Law §§ 207-a and 207-c;[211]
- Building and inspection fees already due from a local hospital but, under certain limitations, it may prospectively establish certain classes that are exempt from fees;[212]
- Unpaid tax liens, even for the purpose of expediting the county's sale of land to the fire department;[213] and
- Taxes due, notwithstanding that the owner removed dilapidated buildings and cleared the land from his property, which was seen as a benefit to the municipality.[214]

A municipality has no legal or moral obligation and, therefore, **no authority** to expend money for the following:

- In the absence of a judicial award of costs and attorney's fees to a successful petitioner,[215] reimbursement of legal fees incurred by a municipal legislator claiming a violation of the Open Meetings Law in a proceeding he instituted; the Office of the Attorney General reasoned that "[p]ublic officials have no unique role in the judicial enforcement of the Open Meetings Law. Rather, a public official who commences such a suit has the same status as any other individual who does so…;"[216]
- Paying a retiring high school principal for the value of unused sick leave, where the pertinent collective bargaining agreement made no provision therefor;[217]
- Paying a school employee for unused vacation leave, where prior payments had been made to others as a "school policy," but there was no collective bargaining agreement requiring or authorizing same. The court found that past practice, in the absence of a specific statutory or contractual requirement, was an insufficient basis to continue the "policy;"[218]
- Procuring insurance when the insurance is not dependent upon liability of the municipality;[219]
- Paying a resident for unauthorized services in removing snow from a highway;[220]
- Paying a claim made by a resident for improvements made by mistake upon municipal lands;[221]

- Using proceeds from parking meters to make refunds to taxpayers who paid benefit assessments to build the parking lot;[228]
- Reimbursing residents who guaranteed a municipality's share of a beach erosion control project as a gift to the municipality, when federal grant monies are later found to support the project, unless the terms of the gift included a provision for refunding the contribution in the event federal aid was received;[229] and
- Honoring a claim for damages arising out of an accident with a municipal vehicle occurring while the vehicle was "actually engaged in work on a highway,"[230] in the absence of a finding of "reckless disregard for the safety of others" by the operator of the vehicle.[231]

Legal Actions

A municipality has no general authority to initiate litigation to enforce the rights of individual residents. The OSC has stated that "the ...State Constitution Article VIII § 1..., in effect, prohibits [a] village from suing on behalf of, or intervening in, an action commenced by its inhabitants where they are complaining of some invasion of a private property right."[232]

In litigation in which a governmental or a proprietary right of a municipality may be involved, the municipality may intervene in an action commenced by others to enforce the same. In the aforementioned opinion of the OSC, has stressed that a municipality may intervene in all actions deemed necessary by the legislative body to protect the rights of <u>both</u> the municipality <u>and</u> its inhabitants, <u>not</u> simply the rights of some of its inhabitants.[233]

Accordingly, a municipality **may not:**

- Reimburse a municipal official for defense fees incurred in defending himself or herself against charges arising out of a federal criminal prosecution; [234]
- Institute a proceeding on behalf of its inhabitants from some invasion of a private property right, when such an invasion constitutes a private, rather than a public nuisance;[235]
- Join, as party plaintiff, a taxpayer's action to enjoin the New York State Thruway Authority from collecting certain tolls;[236]
- Contribute money to a private organization that has been formed to bring about an abatement of the nuisance existing in the municipality concerning airplane noise. Instead, the municipality may hire the counsel of this private organization if the abatement of noise was expedient or desirable for the protection of the peace, safety and health of the inhabitants of the municipality;[237]
- Grant funds to a private corporation to be used by such corporation for legal expenses;[238]
- Reimburse a group of private citizens who have incurred legal and other expenses in opposing the establishment of a county landfill operation;[239]
- Grant money to the New York State Consumer Protection Board or to the Board's consulting fund for the purpose of opposing a rate increase request by the New York Telephone Company;[240] or
- Pay a private litigant's expenses.[241]

Public Nuisances

In contrast to the prohibition against enforcing the rights or interests of individual property owners/citizens, when the collective interests of the public at large are involved, a municipality may act on behalf of its constituents. Every city[242] and village[243] is empowered to provide for "the safety, health, comfort, and general welfare of its inhabitants." For example, in the face of a "public nuisance," a municipality is authorized to take the steps necessary to abate the nuisance and, as provided in Article 13 of the Public Health Law, to charge back the costs therefor to the person(s) responsible for creation of same.

Thus, the New York Court of Appeals has determined that a municipal corporation may "bring an action to restrain a public nuisance which allegedly has injured the health of its citizens."[244] The Court reasoned that "it is clear that a public nuisance which injures the health of the citizens of a municipality imperils the very existence of that municipality as a governmental unit."[245]

And what is a "public nuisance?" In New York it has been defined as "conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all, [citation omitted], in a matter such as to offend public morals, interefere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable[246] number of persons."[247]

This authority is not limited to abating nuisances within the particular municipality. The OSC has said that one municipality could prosecute an action for an injunction against a neighboring jurisdiction where the latter was causing the residue from a rubbish fire to fall upon the property of residents of the aggrieved municipality. The OSC reiterated that Article VIII, § 1 of the State Constitution only prohibits a municipality from initiating legal proceedings on behalf of its inhabitants where the claim is based upon invasion of a private property right.[248]

USE AND SALE OF PUBLIC PROPERTY

Generally

Article VIII, § 1 prohibits the use of any governmental property for private purposes without consideration;[249] however, "the consideration may take the form of public benefits or services rendered pursuant to a contract."[250] A municipality may contract with a private organization to allow the latter the use of public property, as long as the municipality is receiving a benefit.

There **may** be a private benefit, however, if the private benefit is incidental to the public benefit.[251] Examples include:

- Installation of a radio tower on a high school roof, pursuant to a contract with a company to provide wireless telecommunication service, the court finding that although the private entity would obtain a clear benefit, there is "the broader benefit to the public, as well as to the school, that delivery of wireless communications services would provide;"[252]
- Installation in a public hospital of a telephone answering service which will be paid for by subscribing physicians and dentists, if necessary to protect the health of the community;[253]
- Where a municipality owns certain lands under "uncertified or polluted waters" (Environmental Conservation Law § 13-0321), it may contract with a private organization for the removal of edible shellfish and clams therefrom, for the purpose of purification and, later, sale, as long as the municipality will receive an equitable distribution of the proceeds of any such sale;[254]
- Participation in a program administered by the NYS Commission for the Blind and Visually Handicapped, permitting blind individuals to operate vending machines and food service facilities on municipal property without charge, to help them in becoming self-supporting;[255] and
- As long as the municipality receives fair and adequate consideration in return, permitting the use of public property for the installation of privately-owned vending machines, which are to be available to municipal employees.[256]

In contrast, a municipality has no authority to allow the use of public property by a private organization for exclusively or primarily private purposes. Examples of circumstances found by the Office of the State Comptroller (OSC) or the Office of the Attorney General to **be improper** include the following:

- Permitting the free use of its property by a private corporation to hold glider soaring meets;[257]

- Accepting a gift of park land and then allowing private use, to the exclusion of the public at large, because of the unique status of public parkland under New York State law;[258]
- Acquiring title to a building and surrounding land from a railroad company, while agreeing to allow the company to use a portion of the building for a ticket office and passenger facilities;[259]
- Making its office space available for private use, free of charge;[260]
- Designating parking spaces on a village street adjacent to doctors' offices for the exclusive use of the doctors and their patients;[261]
- Issuing an exclusive permit to a merchant or a free permit for a senior citizen to park in a metered parking zone;[262]
- Permitting a savings and loan association to use public offices for its banking purposes;[263]
- Allowing a private theater group to use, free of charge, part of the public hall or library to conduct plays for which an admission fee is charged and retained by the group;[264]
- Allowing gratuitous use of a municipal garage for the storage of the equipment of a volunteer fire company,[265] or of a school district garage to store ambulances of a private not-for-profit volunteer ambulance corps (unlike counties, cities, towns and villages, school districts lack authority to contract for general ambulance services under General Municipal Law § 122-b; were that not the case, a contract for such services might include, as part of the consideration, an agreement that the ambulance corps could store its ambulances on the school district's property); and [266]
- Using a public library as a food co-op.[267]

Sale of Municipal Real Property

A village is authorized to "take, purchase, hold, lease, sell and convey such real... property as the purposes of the corporation may require."[268] There are no state statutory guidelines or standards applicable to sales of village-owned real property. Thus, the Attorney General has said that a village board may determine the method of sale, and in its discretion sell real property at public auction or through private negotiated sale.[269]

In contrast, subject to superseding provisions to the contrary in a city charter,[270] the General City Law provides that a sale or lease of city-owned real property requires approval "by vote of three-fourths of all members" of the city legislative body, and "[i]n case of a proposed sale or lease of real estate..., the [city] ordinance must provide for a disposition of the same at public auction to the highest bidder...." [271] The Second Class Cities Law contains virtually the same provisions.[272]

Whether a village or a city, however, such municipality may only sell real property which it no longer needs for municipal purposes,[273] and it must receive fair and adequate consideration in return.[274]

There are recognized exceptions to the rule last stated regarding consideration.[275] For instance, as part of an Urban Renewal project, the courts have acknowledged that the municipality is "not required to sell the land at the highest marketable price, or even at fair market value," citing the provisions of General Municipal Law § 507.2 (d).[276] For example, in two reported cases, the courts sustained sales to private developers of lands acquired by condemnation for purposes of urban renewal projects, at amounts less than those paid by the acquiring municipality, as within the scope of the exception noted above.[277]

Another statutory exception permits a county, when it discontinues a street, to convey title to the property for adequate consideration at a private sale, or to permit title to pass to the adjacent property owners "for such consideration and upon such terms as the board of supervisors of the county shall deem proper."[278]

Real estate must be sold for fair and adequate consideration,[279] even if the municipality originally received the property as a gift.[280] The following transactions have been found to be **improper** in light of Article VIII § 1:

- Sale of real property to the American Legion for nominal consideration;[281]
- Sale of a surplus building to a church when a bid has been received from another organization for 50% more when neither proposed use would be of particular benefit to the municipality;[282]
- A private sale to an individual making the lesser of two offers, solely because the person is the former owner of the property and wants it back;[283]
- Conveyance of a fire hall to a volunteer fire company organized under the Membership Corporations Law (now the Not-for-Profit Corporation Law) for nominal consideration;[284]
- Conveyance of municipal real property to a fire department or fire company for consideration which is less than the actual value of the real property;[285]
- Donation to a private corporation of a parcel of county owned land, now vacant and not presently needed by the county for county purposes;[286]
- A conveyance for less than fair and adequate consideration to a police boy's club;[287]
- Donation of real property to a private nursing home company;[288]
- Conveyance of a building no longer needed for municipal purposes to a not-for-profit corporation for nominal consideration;[289]
- Donation of real property to a private corporation pursuant to an agreement that the property, with the buildings and improvements to be erected thereon, will revert to the municipality after 40 years for a nominal payment of $1.00. The fact that the contemplated agreement would provide for the reversion of the property and buildings to the municipality after 40 years by the payment of $1.00 is not sufficient to overcome the constitutional prohibition against such an arrangement and would not legally justify a present conveyance of the property. Whether a building will ever be erected or whether it would even exist 40 years hence is highly speculative and too remote in time. There must be a present adequate consideration for the conveyance;[290] and
- Transfer of a hospital and assets thereof to a private non-profit organization for nominal consideration.[291]

A municipality cannot sell real property that it still needs to a private entity and then lease back the same premises for the same purpose.[292]

Leases of Real Property

As is true of sales of municipal real property, if there is to be a lease of such property (assuming the property is currently not needed for municipal purposes), it must generally be in return for a fair and adequate consideration.

In the following circumstances, however, leases for no rent, or for nominal amount, have been **deemed proper:**

- Pursuant to specific statutory authorization under General Municipal Law §§ 72-b and 77, a memorial building may be built by the municipality and leased to a veteran's organization without cost or for a nominal rent. These provisions, however, do not authorize a municipality to construct a memorial building and pass title to the veteran's organization;[293]
- Pursuant to General Municipal Law § 77, a public building or part thereof for use by posts of veterans' organizations, organizations of volunteer firefighters, and child care agencies;
- A municipality may purchase a building and lease a portion of that building to an American Legion Post at a nominal rent for a term not to exceed five years, provided there is no interference with the

public use. A lease for a term longer than five years must be supported by fair and adequate consideration;[294]

- As part of the consideration for a contract for general ambulance services, pursuant to General Municipal Law § 122-b, allowing the ambulance service to use village facilities no longer needed for village purposes, for a nominal rent;[295]
- Free use of a municipal recreational building by private groups for recreation purposes, as long as all groups have an opportunity to use the facilities in the same fashion and the municipality does not discriminate between users;[296] and
- A municipality may allow its recreational property to be used by private groups for charitable fund raising purposes provided that such groups obtain a revocable license from the municipality in exchange for adequate consideration, the municipality does not act as a cosponsor of such events, the municipality makes such property available to different groups on an equal basis, and the use does not interfere unreasonably with use of the facilities by the general public.[297]

As stated above, the consideration for the lease must be fair and adequate throughout the life of the lease. Consideration does not necessarily mean monetary consideration but **may** take different forms:

- A building may be leased to a private civic group that will assume its maintenance. In effect, the private group is paying the cost of upkeep into the municipal coffers;[298]
- Use of property in exchange for services rendered to the municipality;[299]
- Percentage lease arrangements, where the payment consists of a definite sum per year plus a percentage of the net proceeds derived from revenue-producing operations;[300] and
- A municipality may agree with a not-for-profit corporation to build a sports complex on municipal property where the municipality will have the right of first use of the building and own it at the end of the lease for nominal consideration.[301] Similar arrangements with a corporation have been upheld where the municipality builds the stadium and retains ownership while the corporation leases the property for 40 years.[302] These arrangements are not seen as a gift in aid of a private corporation as the lease would be incident to providing for the recreation or the pleasure of the public.

If a municipality leases space for fair and adequate consideration, it is not improper for the tenant to sub-lease the space,[303] in accordance with the provisions of General Municipal Law § 72-p.[304]

There are two basic requirements for leasing of municipal real property 1) the space must not be presently needed for municipal purposes, and 2) the consideration received must be fair and adequate.[305]

Leases to the following private entities for fair and adequate consideration have been considered proper: of available space in a town garage to an incorporated fire company;[306] of unused municipal facilities to a political party;[307] of unneeded village lands to a little league baseball club;[308] of village real property as part of the consideration in a contract with a non-profit ambulance corporation;[309] of a waterfront to a private company;[310] of office space to a member of the U.S. Congress;[311] and of a stadium to a professional baseball team.[312]

If the property is needed for governmental purposes, it may not be leased. A municipality that uses certain property only occasionally and intermittently may rent it at other times to private organizations for fair and adequate consideration.[313] The OSC is of the opinion that leases of municipal property should contain a clause which reserves a right of the municipality to use the facilities during the term of the lease if an unanticipated (municipal) need develops.[314]

Park lands held by a municipality are considered to be held in trust for and devoted to the public use and, as such, may not be leased for private use without specific statutory authority enacted by the Legislature.[315]

Citing a non-New York case, the OSC has offered this definition of "fair consideration," to wit: "a value within a range of high and low estimates that are placed on property by reasonably intelligent, experienced, business person [citation omitted]. This means that if premises were to be rented to a private organization there is a range of estimates at which reasonable, intelligent and experienced business person would set the rental price. Fair consideration would exist when the premises are rented at a price not lower than the least of these estimates. If a private organization were renting the meeting hall for only occasional use, no experienced business person would agree to a price that is less than the overhead related to the renting: electricity, heat, and janitorial expenses. However, if the premises are not ordinarily in demand and are unused a good deal of the time, such a person might agree to an amount that is only slightly in excess of the overhead costs. At other times, easy marketability of the premises, because of steady demand, would mean that fair consideration requires substantial profit."[316]

Generally, a municipality may not make improvements to real property with the intent to lease it for private use, as this is not a proper municipal purpose.[317] However, General Municipal Law § 139-c authorizes any municipal corporation to "equip and maintain sheltered workshops" established by certain non-profit organizations "for the purpose of providing suitable training and retraining for work for persons who, because of age, chronic physical illness or impairments, cannot find training, retraining or remunerative work elsewhere."[318]

Once property is leased, the municipality may make improvements and maintain the leased land as long as the costs incurred are consistent with revenues received under the lease.[319] Without a specific provision in a lease, a lessee of municipal property may not be reimbursed by the municipality for the cost of improvements made to the property.[320] Where a private entity, without authorization and in the absence of any express agreement, erects or installs a structure on public lands, the application of common law principles renders the structure the property of the municipality.[321]

The requirement for fair and adequate consideration also applies when a municipality is granting an easement or a license to public property, for example:

- Where a municipality grants the right or privilege to a private entity to place poles, buildings and wires on public streets and places;[322] and
- When granting a license to use municipal property for the purpose of entering and leaving the licensee's property.[323]

Use/Sale of Equipment

When personal property becomes surplus or is no longer needed for public purposes, the municipality may sell or lease such property. Surplus or obsolete property that has no appreciable market value and remains unsold after an attempt to dispose of same at a public or private sale may be discarded, destroyed or donated to a not-for-profit organization.[324]

Personal property that is utilized on a seasonal basis for only several months each year would constitute unneeded surplus for the remaining portion of the year and could be temporarily leased for adequate consideration, as long as use of the property under the lease would not unduly shorten the useful life of the property and the municipality is adequately assured that the property will be returned in good condition.[325]

As a general rule, equipment acquired for municipal purposes may not be used for private purposes, even if fair and adequate consideration for such use is paid to the municipality.[326] In the words of one court, "[m]unicipal property is not purchased at public expense for the personal use of a favored few."[327]

Accordingly, municipal equipment that is used on an intermittent basis (as contrasted with such property which is used on a seasonal basis, as noted above) may not be rented even when not in use for municipal purposes, as "[u]se of personal property by private parties is more likely to produce measurable physical deterioration of the property. Moreover, the risk of loss or damage to personal property is often greater and the consequent inconvenience to the municipality often more severe. Exposure to liability may also be greater in the case of personal property in certain instances. Finally, opening the door to the rental of municipal personal property on a daily or hourly basis creates the necessity to make numerous difficult policy determinations such as which items of personal property not being used for a day or an evening may be rented, and to whom."[328]

The following are examples of use of municipal personal property that were held to be **improper:**

- A "loan" of highway equipment and employees to assist the grading of land in a private cemetery;[329]
- With or without consideration, the use of a cement mixer and a truck with a snowplow by a private citizen;[330]
- The use of parking meters for the collection of money for a private organization, such as the March of Dimes;[331] or for the display of Christmas decorations by a private organization;[332]
- Permitting a private college to use voting machines in student elections or purposes of instruction;[333]
- Allowing the chief engineer of a volunteer fire department to use a municipal vehicle either for commuting to and from his or her place of employment outside the municipality or for personal business;[334]
- Permitting the use of municipal property for washing or servicing the personal vehicles of employees, volunteer firefighters, or other personnel;[335]
- Purchasing an x-ray machine for use by a private doctor or physician;[336]
- Purchasing and then loaning an ambulance for a nominal consideration to a voluntary ambulance corps that serves the municipality, except in the context of a contract with the voluntary ambulance corps to provide general ambulance services in accordance with General Municipal Law § 122-b;[337]
- Loaning equipment to private youth organizations such as Little League baseball or Pop Warner football;[338]
- Permitting a private firm to use a street sweeper needed for public purposes for one day in recognition of past services gratuitously performed by the firm for the municipality;[339] and
- Transferring rights to a computer program to a private party without consideration or for nominal consideration.[340]

Selling Property Online

Selling surplus property is an often cumbersome and sometimes fruitless endeavor. However, the internet is revolutionizing the way municipalities dispose of property which they no longer need. The main marketplace for selling property on the internet is eBay. While eBay is not the only online auction service (other notable online auction services are uBid, Amazon.com, Auctions, and GovDeals), it is the industry leader and is currently being used by New York State's Office of General Services.[341] GovDeals is a company that is specifically dedicated to selling surplus municipal property on the internet. NYCOM does NOT ENDORSE the use of any one online auction service over another.

The benefits of selling property on the internet can be tremendous. By selling property on the internet municipalities reach a far wider market for their property than if they list it in a local newspaper. For example, the La Crosse School District in western Kansas was having difficulty disposing of a recently closed 43,000-square-foot middle school, building and real property combined. A local real estate agent appraised the property at $5,000. Desperate to get the property off of its hands, the school district listed the property on eBay. Over 70 bids were put in on the property and interested buyers traveled to inspect the property from as far away as Louisiana and Wisconsin. The school district finally sold the property for $49,500 to a Phoenix-based business that plans to relocate to the small town and use the building as a distribution center warehouse.[342]

Purchase of Real Property and Construction of Buildings

When purchasing real property, a municipal legislative body has a fiduciary duty to acquire the property by bona fide purchase agreement. Upon the most beneficial terms, including price, in the public interest. A purchase price grossly in excess of a recent appraised value or a recent sale price may be an unconstitutional gift.[343]

In certain instances, municipalities may make improvements to their real property that would benefit private interests, provided that such benefit is only incidental, in contrast to the greater benefit to the public at large. In the case of Oak Beach Inn Corp. v. Town of Babylon,[344] the town constructed a parking lot on town land and was reimbursed the cost by the owner of a restaurant adjacent to the lot. The court held that the expenditures by the town did not violate the prohibition against gifts of public money, since the parking lot was still in the custody and control of the town and the restaurant patrons did not have exclusive control of the use of the lot. The court found that providing additional parking to avoid traffic congestion was a proper public purpose.

Property may be acquired and leased to a private entity if it is to serve a public benefit. For example, the following transactions have been found to be **authorized:**

- Constructing a building for park and recreation purposes and then leasing the building to a not-for-profit corporation to operate a parks and recreation program;[345]
- Acquiring property for use in conducting fire prevention programs and contracting with a private organization for the presentation of the program;[346]
- Constructing a mass transit railroad system and then leasing to a private company to operate;[347] and
- Improving real property acquired by tax deed in order to make the building useable and able to be sold for a higher price.[348]

In contrast, a municipality is **not authorized** to acquire, purchase, construct or finance a building or property for the sole use of a private organization. All of the following transactions were in violation of the Constitution's prohibition against gifts of public money:

- Purchase of a building for the exclusive use of a patriotic organization,[349] although a municipality may purchase a memorial building for the commemoration of the services of veterans pursuant to § 72-b of General Municipal Law, any limitation of its use to veterans alone is not within the contemplation of that statute and would, therefore, be a violation of the Constitution;
- Purchase or construction of a building financed by the issuance of bonds to be used partially for municipal purposes and partially for rental property for a private organization. A municipality may construct a building that is larger than required for its present needs, but in anticipation of future needs, and if constructed, the excess space not needed at present may be leased temporarily, subject to occupancy by the municipality when the need for the space occurs. However, the building may not be built larger with the sole purpose of renting the "excess" space to a private organization;[350]
- Purchasing land and sharing the cost of constructing and operating a facility with a boys club and a child-care day nursery activity;[351]
- Accepting a conveyance of real property from a private flying club for the purpose of expending public funds for its improvement, maintenance, repair and snow removal, and for its reconveyance thereafter to the private flying club;[352]
- Constructing a building for the purpose of sale or lease to a free association library;[353] and
- Constructing a swimming pool with public funds, and then limiting its use to "subscribers" only. Opening use of the pool to the public at large, while charging reasonable admission fees, however, would be permissible.[354]

Improvement or Maintenance of Private Property

Generally

In most circumstances, a municipality may not expend public funds for, or allow public equipment or municipal employees to be used toward the improvement of private lands. Even where the private individual agrees to reimburse the municipality for services rendered on private property, it is still considered a gift. A municipality may not enter into a contract to perform work for private individuals on private property, as performing work for private parties on a contractual basis is not a municipal purpose.[355]

There are limited instances when work may be performed for private individuals, when it can be established that a public purpose exists and that the private benefit is only incidental.[356] An example of the unique circumstances which illustrate this principle is the case of Civil Service Employees Association, Inc. v. Port Washington Union Free School District.[357] The school district had assigned employees to remove trash and debris from a residential street bordering the school district. The court noted that the trash was generated by students who congregated on that street during their lunch break. The court rejected the Union's contention that requiring the district's groundskeepers to clear the trash from the street and/or homeowners' lawns amounted to "a gift of public resources to private individuals."[358] In concluding that the practice did not violate the gift and loan provision of the State Constitution, the court declared that "[t]he homeowners whose property is affected did not create the litter and, ...it is an overstatement to equate [the school district's] efforts to ameliorate a difficult situation with neighboring property owners with a capricious use of public funds and employees to maintain nearby private property."[359]

Additional examples of when a municipality **may** expend public funds on private property include the following:

- Improving private property that has been leased by the municipality if the improvements are for the sole and direct benefit of the municipality;[360]
- Spending federal grant money for the rehabilitation of historically or architecturally significant churches, when such money is obtained by a municipality under the Housing and Community Development Act, because such funds are, in effect, "trust monies" rather than municipal funds per se. In this instance, the municipality merely serves as a conduit through which the federal funds pass on their course from the federal government to the people of the State;[361]
- Making contributions to subsidize the expense of extending cable television service to some residents. The enabling act of the Commission on Cable Television makes clear that the provision of cable television service serves a valid public purpose;[362] and
- Paying for an improvement on private property to alleviate a drainage problem if the improvement furthers primarily a proper public purpose and only incidentally benefits the private owners.[363]

The following are examples of **improper** expenditures on behalf of, or improvements to, private property:

- Contributing to the cost of erecting a fire training tower on land owned by a volunteer fire corporation;[364]
- Purchasing and installing garbage disposal units in private homes, the cost of each unit to be repaid to the village by the property owners over a five-year period;[365]
- Repairing an archway over a drainage ditch in which the municipality has an easement for drainage purposes where the archway has been constructed by the owner of the property;[366]
- Operating a chlorinator for the sole benefit of three property owners. Repairs to a private sewer cannot be undertaken by the municipality simply for the convenience of the owner, even though there may be consideration for services rendered;[367]

- Hiring an architect to draw up plans for renovation of private property to improve the appearance of the approach to the municipality, unless such renovation was undertaken as part of an urban renewal program pursuant to Article 15 of the General Municipal Law;[368]
- Clearing a private lake of weeds or maintaining a private dam,[369] or purchasing a private lake without a municipal purpose solely to clear the lake;[370]
- Purchasing and installing water pumps in individual homes, for the purpose of increasing water pressure therein, at no cost or at a nominal cost to the owner;[371]
- Expending funds to assist individuals in getting rid of old junk cars;[372]
- Installing fences on private property to deny children access to a railroad track;[373]
- Maintaining a privately owned dam in a stream which dam provides swimming, boating, and recreational facilities for a privately conducted children's camp;[374]
- Erecting fences between a highway right of way and an adjoining owner if not for a public purpose;[375]
- Spending monies to establish a "dog clinic" for the purpose of sterilizing and inoculating privately owned dogs and cats;[376]
- Putting gravel on a parking area on private property, notwithstanding that a school bus is parked there;[377]
- Paying for the delivery of fuel-oil on behalf of the tenant/residents of a multiple dwelling, where deliveries have been suspended because of the failure or refusal of the owner to pay for past deliveries, and then seeking reimbursement from the owner by assessing the cost thereof against the property;[378]
- Paying a portion of the cost for providing privately sponsored Christmas decorations and lights. However, a municipality could expend monies from the publicity fund to decorate streets at Christmas time so long as such decorations were for the benefit of the public;[379]
- Paying for the repairs to an automobile owned by a volunteer firefighter, notwithstanding that such repairs are occasioned by an accident occurring while the firefighter was responding to a fire alarm;[380]
- Constructing retaining walls on private property to prevent land surrounding homes in a subdivision from sliding down and threatening the safety of the homes and their occupants;[381]
- Providing an office or home for a physician;[382]
- Performing work on private property to alleviate health hazards to private water supplies, when the particular hazard does not involve a threat to the public health in general;[383]
- Entering into an agreement with a private college to install lights on an athletic field owned by the college in exchange for use of the field at certain times. In this instance, the benefit to the college was not merely incidental but was equal to or greater than the benefit received by the town;[384] and
- Providing snow plowing and sanding services to a volunteer ambulance corps, except in emergency situations.[385]

The relationship between a municipality and its volunteer fire company needs to be more closely examined. Where a fire company owns the fire house, apparatus and equipment, the municipality may appropriate and expend such funds through an implied agreement as may be reasonably necessary and incidental for the operation and maintenance thereof, but may not appropriate funds for extensive and major repairs on such property. A municipality may accept financial responsibility for the incidental expenses occasioned by using company-owned apparatus, equipment and firehouse and appropriate monies therefore, but may not accept responsibility for the cost of major repairs of apparatus, equipment or building owned by the fire company.[386]

Private Roads and Driveways

There are very few instances where a municipality **may** enter onto private land to do work. The exceptions usually require that an emergency or safety hazard exist, such as:

- Using highway equipment to remove snow from private roads to provide access to fire hydrants, pursuant to fire protection contracts, where property within the fire protection district benefited is ultimately charged with the cost of such removal, pursuant to Highway Law § 142-d or Town Law § 184-a,[387] or
- Utilizing employees and equipment to plow snow from private roadways in emergencies, such as illness, death or fire, if necessary to render a home accessible, but only if an emergency actually exists, and not as a precautionary measure in anticipation thereof. A fundamental guiding principle as to whether an emergency exists is that there is a serious and substantial threat to life or property.[388]

The general rule, though, is otherwise. The following are examples of situations where the courts, Office of the State Comptroller (OSC), or the Office of the Attorney General concluded that there was a **gift** of public funds:

- Repaving or filling-in dangerous potholes on a private street, at the request of its owners;[389]
- Repairing, resurfacing, improving, or maintaining a private highway or alley in the municipality at its own expense or by charging the cost to the abutting property owner;[390]
- Erecting gates or warnings at a privately owned railroad grade crossing;[391]
- Maintaining roads in a subdivision before dedication and formal acceptance thereof;[392]
- Removing snow from private properly (driveways, roads, parking lots) with its own equipment, by hiring privately owned equipment, or through financing the removal[393] even if in the interest of fire protection[394] or for a disabled individual;[395]
- Snow-plowing state canal lands,[396] a church parking lot[397] or, absent a contract pursuant to General Municipal Law § 122-b, the parking area of an ambulance corps,[398] forming a district and providing snow removal on private driveways as a public service to all residents,[399] providing a rebate of taxes to persons residing on private streets for the expenses such residents incur for snow removal,[400] accepting an easement on a private street for the sole purpose of snow removal;[401] or
- Spending funds for lights to improve private streets.[402]

Water, Sewer and Electricity

A municipality may contract for services with a private organization and, in return for the services, provide free utilities. However, the contract must provide for some reasonable basis of measurement,[403] such as furnishing water in exchange for a conveyance of title to real property.[404]

Under Village Law § 11-1112, a village is authorized to require certain property owners to repair connecting water pipes on their properties. Where the owner or occupant refuses such direction, the village may enter upon the property, make the repairs, and assess the cost back against the private property.[405]

When an emergency occurs which endangers the public health, safety and welfare, a municipality may perform work on private property, but cannot recoup the cost of such repairs unless there is a previously enacted local law so providing.[406] For example, during a local state of emergency, a municipality might install filters for private wells. Once the emergency ends, the municipality should make all possible efforts to recoup its expenses. If possible, the filters should be removed and, if feasible, sold or used for general purposes in the absence of local law providing that municipalities can recoup costs.[407] Similarly, a municipality may repair a break in a private sewer line when sewage is seeping onto the street.[408]

In addition, a municipality may enter into a contract with a private developer to build a sewer line that will allow the municipality and the developer to hook up to an existing sewer system. The primary purpose of the contract is to obtain sewer service for municipal property; the fact that the private developer derives an incidental benefit is insufficient to bring the contract within the prohibition of the Constitution.[409]

A municipality may purchase pumps for installation on private property within the area of a sewer improvement where, due to topographical conditions, the pumps are necessary to enable the homes to connect to the sewer system so long as if the municipality retains ownership of the pumps and has the right to enter the property to maintain and service them.[410]

While the provision of utility services is a proper municipal function, municipalities must receive fair consideration from all private individuals or associations for these services. Thus, a municipality **may not:**

- Offer services for free to a hospital, free association library, veterans organization or church;[411] or
- Construct water supply lines and issue debt with the purpose of conveying title to a private corporation that will pay the debt service.[412]

Very often, water and sewer pipes are located on private lands and run to and connect with water mains and sewer laterals of the municipal water and sewer system situated under the village street. When providing these services, a municipality may not enter private properties and install or repair water mains or sewer lines as a municipal charge or give money or aid to assist in such projects,[413] even if the property owner is willing to reimburse the municipality. Performing such work on private property is not a municipal purpose.[414]

Several opinions have been issued regarding entering onto private land for utility service finding that a municipality **may not:**

- Extend electrical lines to private homes;[415]
- Move a power line it is not required to relocate;[416]
- Install sump pumps on private property to lift sewage from low lying property to the sewer line;[417]
- Maintain private sewer connections under a municipal road;[418]
- Maintain private sewer pumps unless there is a danger to the public health, such as sewage seepage affecting neighborhood;[419]
- Install a storm sewer pipe on private property;[420]
- Enter private land to divert the course of a river that is endangering the waterworks system:[421]
- Pay a homeowner for damages incurred by reason of a ruptured water main, unless there is a legal basis for liability;[422]
- Expend funds to repair a drainage pipe located on private property in a residential area that will benefit only the residents of one street; [423] or
- Pay a monthly cable television fee for residents.[424]

Industrial Development and Business Retention

The enactment of the gift prohibition abolished local authority to spend funds on the retention or attraction of business, as local governments are prohibited from improving private property for the benefit of private individuals. This led to the creation of the industrial development agency, which has the express statutory authority to expend funds for the improvement of private businesses. The General Municipal Law authorizes municipalities to expend public funds in support of certain programs such as the establishment of Business Improvement Districts (Art. 19-A, §§ 980 et seq.), the conduct of urban renewal projects (Art. 15, §§ 500 et seq.), and the implementation of a municipal redevelopment plan (Art. 18-C, §§ 970-a et seq.).

Therefore, municipalities **may not:**

- Appropriate money to assist in financing an airport owned and leased by private individuals,[425] or

- Borrow and use money for the sole purpose of purchasing and remodeling a building to lease to private industry to furnish employment for its citizens.[426]

COMPENSATION OF EMPLOYEES AND OFFICERS

Generally

Under this heading, issues must be examined in the context of a collective bargaining agreement. What might otherwise appear to be an unconstitutional gift of public money may not be if the payment is in accordance with a legally enforceable contractual agreement.

A 1973 New York State Court of Appeals case played a significant role in clarifying the impact of collective bargaining in determining the scope of the Constitution's ban on municipal "gifts" to private persons, etc. In Antonopoulou v. Beame,[427] the Court held that an award arising from a contractual arbitration procedure interpreting provisions of a negotiated agreement was legally enforceable and not a proscribed gratuity. A teacher was improperly prohibited from returning to her job after maternity leave. She successfully pursued her contractual rights and was ultimately awarded full compensation for the time when she had been barred from teaching. Although the result was that she was, in effect, paid for services not rendered, the Court concluded that there was no violation of Article VIII, § 1, since the municipality was under a contractual obligation to make the payment in question. That being the case, what might otherwise be construed as a gift was found to be a legally-binding obligation.

The following sections break down compensation into its various forms and distinguish between those circumstances where the municipality has some statutory or contractual obligation from those where providing the payment, service or other form of compensation would be considered a gift.

Retroactive Salary Increases and Appointments

As noted above, the collective bargaining process can convert what otherwise would be a gift into a legally enforceable contractual obligation. For example, retroactive pay increases have been considered ***permissible*** under the following circumstances:

- The payment was made pursuant to an agreement made before the rendition of services, (e.g., a pay increase upon civil service reclassification);[428]
- Payment is made pursuant to a collective bargaining agreement if the retroactivity was agreed to at any time before the signing of the agreement, since that act by the employees' representative serves as legally sufficient consideration for the granting of a retroactive increase by the municipality;[429]
- Additionally, such increases may be extended to management level employees who are not represented by a bargaining unit, pursuant to a formal agreement or informal understanding; retroactive increases for elected officers and most of those officers appointed for a fixed term would not be permissible, however, because their salaries are not based on a contractual relationship but are an incident of office;[430]
- The latter prohibition would not apply to increasing the salary of a public official during the term of his or her office, provided that the increase is for service not already rendered;[431] and
- There has been a payment of back pay although no services were rendered, as damages for breach of a collective bargaining agreement.[432]

Prior to any increase in compensation becoming effective, the municipal government is under no legal obligation to pay the same. An employee or officer is only legally entitled to such compensation as is fixed for the period during which the services are performed. This rule applies regardless of the form of payment or the purpose. It also applies whether the position is one of employment or a public office. For instance, **absent a collectively negotiated provision,** the following have been deemed to be ***improper*** "gifts" when given retroactively:

- Compensation for accrued, but unused compensatory time; [433]
- Salary increases;[434]
- Bonuses for past services, even if for additional work performed on the employees' own time;[435]
- A payment due to a clerical oversight at the beginning of the year, or an omission from the budget of a salary for the position;[436]
- Cost of living bonuses for past services;[437]
- An increase in salary based on years of service by making a lump sum payment at the beginning of the year (although permissible if done at the end of the year);[438]
- Compensation of an officer for repair work that was voluntarily performed on municipal vehicles;[439]
- Payment to members of the board of assessment review compensation in excess of their salaries for meeting twice in one year to hear complaints in relation to assessments;[440]
- Making a retroactive appointment to an office with a fixed term, with a retroactive payment of salary for the time prior to the date of the actual appointment;[441] and
- Providing additional compensation to one or more employees who are "doing the work" of another vacant position in addition to their own responsibilities by, in effect, using the salary allocated to that unfilled position.[442]

Advances of Salary or Time

A municipality is not generally authorized to make an advance of wages or salary or to provide paid leave, in advance of services rendered, to its employees or officers. This type of payment or benefit would be improper because the individual could resign after receiving the payment or benefit and, thus, the municipality would have received nothing or less than it was entitled to receive in return.

Although this general statement of law reflects the advice given by the Office of the State Comptroller (OSC) and the Office of the Attorney General since the 1940s, at least one court has concluded, based upon the particular facts before it, that an advance payment "was not a loan ... but was a prepayment for services promised to be rendered and the failure to perform the contracted services would constitute a breach of contract."[443] The case involved some decidedly unique facts. A school district had for years followed the practice of paying teachers returning in September a full two weeks' salary on either the day of their return or on the first Friday following their return, resulting in an advance payment of one week's pay or more. While the court held that the practice did not violate the State Constitution,[444] they also found that it did violate Education Law § 3015(3) which "clearly prohibits payment of teachers salaries in advance of services."[445]

The following types of advances have been found to be **contrary** to the prohibition against gifts of public money:

- Payment of salary in advance;[446]
- Advance lump sum payments to officers and employees because of expenses to be incurred by them in the performance of official duties;[447]
- Payments in advance for vacation periods,[448] but not if the vacation time has been earned and credited and the rule is applied uniformly within the various classes of employees to which it is applied;[449]
- Borrowing against sick leave that may accrue in the future;[450] and

- In the case of an employee paid on a quarterly basis, accelerated payment of salary, notwithstanding that the work for the entire year has been completed.[451]

Retirement, Death Benefits, and Severance Pay

Death Benefits

In 1958, 1962, and 1978, the General Municipal Law was amended by the addition of §§ 208-b, 208-c, and 208-f, respectively. The additions authorize the payment of death benefits for police, fire and retired personnel in specific circumstances. Death benefits could also be negotiated as part of a union contract. However, in no circumstances may the death benefits be awarded retroactively.[452]

Payments for Accumulated Leave

Payment for accumulated sick leave may not be made unless it is provided for in a collective bargaining agreement.[453] The rationale for this conclusion is that an employee's salary is fixed and includes pay for vacation and/or leaves of absence. An additional payment would have the effect of increasing the salary for the period in question, beyond the amount fixed by the legislative body.

General Municipal Law § 92, which was enacted in 1952, authorizes each municipal governing body to grant vacations, sick leave and leaves of absence to its officers and employees, with or without pay, and to provide similarly for cash payment of the monetary value (if any) of accumulated and unused vacation time or time allowances granted in lieu of overtime compensation to the officer or employee at the time of their separation from service or, in the case of death in service, to their beneficiaries.[454] This section changed prior law that held that such payments were gifts.[455] There is also case law which holds that if an employee is terminated without an opportunity to use accrued compensatory leave time for which he or she was not compensated, then the employee is entitled to cash compensation for that accumulated leave time.[456]

Severance Pay

Severance Pay or any payment made after the termination of employment may take many different forms, but unless negotiated as part of a collective bargaining agreement, it is in most instances unauthorized.[457] For example, the following have been found to be **improper:**

- Severance pay in the event a department is abolished;[458]
- Paying an official for services rendered after the officer became ineligible to hold office by moving to another municipality,[459]or after it was discovered that he was no the record owner of real property within the village when he was elected,[460]or if the municipality abolishes the office;[461]and
- Terminal leave payments.[462]

It may be proper to pay a lump sum upon receiving a resignation if the payment is considered settlement of a claim. This type of payment was held constitutional in Ingram v. Boone, where an independent contractor agreed to resign after one year.[463] This case involved a school administrator who had a contract with the school district. In a similar case, severance pay was considered a gift when it was paid to a school teacher for her resignation on the condition that charges against her would be dropped.[464] This case turned the fact that State statute provided for a disciplinary hearing to determine the charges, so there could be no settlement without proof of the charges.

Retirement Benefits

Municipal funds may be spent on a dinner to honor retiring employees or officers or on nominal gifts upon retirement.[465] The dinner expenses of the retirees only, as well as the cost of "tokens of appreciation," among which the OSC has identified as "'years of service' pins and medals, plaques or other similar mementos of nominal value, in accordance with a personnel management program..." [466] may be treated as compensation for their years of service. A municipality may not transfer equipment to an employee upon retirement, where the circumstances indicate that the conveyance amounts to "a form of deferred compensation."[467]

Statutes or local laws to grant pensions to persons who, at the time of enactment, have already retired from public employment, are unconstitutional as amounting to gratuities and extra compensation.[468] The same is generally true of increasing pension benefits to those already retired.[469] However, Article VIII, § 1 of the State Constitution was amended in 1959 to enable cities, towns, and counties - but not villages - to increase pensions of widows of retired police officers.[470] The same authority was extended to villages by a similar amendment in 1963.[471]

A municipality may not, as part of a retirement plan, provide for salary increases to employees during their last one or two years of employment, based upon faithful service and attendance.[472] However, this type of benefit could be provided through a collective bargaining agreement.[473]

Defense and Indemnification [474]

It is well established that, in the absence of proper enabling legislation, the public owes no duty to defend or even aid in the defense of a lawsuit against an officer or an employee of a local government charged with misconduct.[475] One of the risks traditionally associated with the assumption of public office is that of defending one's self against charges of misconduct at one's own expense.[476] Thus, any payment by a municipality of the legal fees of an officer personally sued would violate the gift prohibition of the Constitution as a payment to assist a purely private purpose.[477]

In 1981, the State Legislature adopted Public Officers Law § 18 which authorizes municipal corporations to provide for the defense and indemnification of its officers and employees acting within the scope of their official duties.[478] To be effective within a given municipality, Public Officers Law § 18 must be adopted locally by local law, resolution or as part of a collective bargaining agreement. If a municipality had enacted an indemnification law prior to 1981, it could elect to adopt Public Officers Law § 18, continue to provide for defense under the local enactment, or supplement the local enactment with Public Officers Law § 18.[479]

Prior to enactment of Public Officers Law § 18 in 1981, and absent the law being adopted locally, a municipality could not pay a claim unless it was in fulfillment of a moral obligation, as payment was considered a gift.[480]

Pursuant to Public Officers Law § 18, defense and indemnification may only be provided for acts arising out of any alleged act or omission that occurred, or allegedly occurred, while the employee or officer was acting within the scope of his or her public employment or duties. A municipality may not defend and indemnify an individual for acts which occurred outside the scope of employment. For example, in a case where a town councilman sought reimbursement for legal fees he incurred in defending a federal criminal prosecution of him for alleged improprieties connected to his duties as a councilman, the court noted that "intentional wrongdoing" falls outside the scope of these defense and indemnification provisions.[481] The same court noted that any such claim by an employee needs "a pre-existing legislative basis" and thus, "a retroactive authorization has been held to fail."[482]

As such, all defense and indemnification laws must be prospective in operation, or the payment is considered a gift.[483]

A municipality may authorize the reimbursement of legal expenses of an employee incurred in the successful defense of a criminal action resulting in an acquittal or dismissal of the charge. The act resulting in the charges must occur while the employee is acting within the scope of his or her public employment or duties. If the employee is found guilty of the criminal charges, reimbursement of legal costs would be inappropriate because by definition, a criminal act could not have occurred within the scope of the employee's duties.[484]

Compensation in the Form of Personal Property and Services

Use of Offices or Equipment for Personal Benefit

It appears that in certain circumstances, employees may use their offices for their personal benefit, if such use is considered part of their compensation. In Michael v. Communications Workers of America, the court held that a long-established (thirty years, in this case) practice, and recognized in contract, permitting court stenographers to sell transcripts of city agency proceedings was not a gift of municipal property to those stenographers, but rather was a "part of the consideration for the stenographer's salary."[485]

Municipalities may agree in a collective bargaining agreement or agree as part of a compensation package to allow employees or officers to use municipal equipment or receive municipal services. In all instances where employees are allowed to use equipment or obtain services without a charge for a fee therefor, an agreement must be reached prior thereto that the use is considered part of the employee compensation. For example:

- A municipality may contract to provide municipal nurses with free laboratory tests as part of their compensation;[486] or
- A municipality may, under proper circumstances, purchase one or more refrigerators for the convenience of employees while on the job. According to the OSC, "[a] municipality may, either by collective bargaining agreement or by informal arrangement, provide general working conveniences for the good and welfare of its employees." The OSC also advised, however, that the municipality must retain ownership of the property, have no intention of making a gift of the property to the employees, and incur no more than a reasonable expense.[487]

Municipal Improvements to Employee Property

There are very few instances in which a municipality may make improvements or contribute to the costs of a home of an employee or officer. For instance, a municipality:

- May not pay the added cost of installing and maintaining private telephone service in the home of a public official, unless the governing body were to deem it necessary and advisable. However, a telephone to be used exclusively for municipal business may be installed in a private home. If such telephone was listed in the directory in the name of the municipality or the title of the office and, if the telephone was only for municipal purposes, then the cost of installation and the service charges would be proper expense;[488] and
- May not pay an officer's claim for rent of a portion of his or her home as an office in the absence of a specific agreement between the parties.[489]

However, the OSC has concluded that the following would be **exceptions** to the foregoing rule:

- A municipality may build or buy a residence for an employee in lieu of a portion of the salary otherwise payable, provided the residence is the property of the municipality at all times, and that the occupancy of the residence is an incident of employment;[490] and
- A municipality may provide snow clearance for the driveway leading to its clerk's home, where the clerk's home serves as the clerk's office and also as the place where board meetings are held.[491]

Items of Nominal Value

Tokens of appreciation such as parchment paper resolutions or plaques may be given to officers or employees under the following rules: such awards should always be of nominal value and available to all of the officers and employees who qualify for the award.[492] At the time those opinions were issued (in the 1970s), the OSC considered expenditures of $25 per 100 resolutions or $20 per plaque to be nominal amounts.[493]

Prohibited Uses for Personal Benefit or Profit

Unless provided for in a collective bargaining agreement or as part of a compensation package, a municipality may not allow its officers or employees to use their offices or municipal equipment for personal gain or profit. For example, a municipality **may not:**

- Permit a clerk to use his or her office during times when it is not open to the general public to conduct title searches for which he or she will personally receive compensation or profit;[494]
- Permit a clerk to conduct a private insurance business in the same office used for his or her official duties, unless the cost of renting and maintaining such office is wholly at his or her own expense;[495]
- Allow the use of a highway department garage and municipal equipment for private purposes, such as repair of private vehicles;[496] or
- Purchase a copying machine for an officer, with the officer to reimburse the municipality for the cost of the machine. The equipment would be owned privately at all times and would never be subject to the control and supervision of the municipality. There would be a substantial private benefit accruing to the officer by virtue of this transaction and no guarantee of any benefit to the municipality.[497]

Monetary Compensation

In addition to a salary or hourly rate, municipalities may want to compensate employees by waiving fees or paying benefits for employees. Unless part of a collective bargaining agreement or considered part of a salary, these additional forms of compensation are not proper.

Pursuant to Public Officers Law § 64, every public officer who is not allowed any compensation for services must be paid the actual expenses necessarily incurred in the discharge of his or her official duties. A public officer who is paid a salary is not entitled to reimbursement for expenses unless a law authorizes such reimbursement. It appears that a municipality could by local law supply the necessary authority to provide for such reimbursement.[498]

Payment of Membership Dues

A municipality may pay the membership dues for any of its officers or employees in various professional societies and associations if such membership is beneficial to the municipality and serves a public purpose. The municipality must be able to point to a reasonable connection between some or all of the activities of the particular society or association and the official duties of the officer or employee.[499] (In contrast, fees for membership in a private, non-professional club or association may not be paid by a municipality, since the benefits of such membership accrue almost entirely to the individual.)[500] In addition, municipalities are required to deduct union membership dues and non-member agency shop fees from the wages or salaries of its employees, pursuant to General Municipal Law § 93-b.[501]

Credits or Reimbursements

Although local real property taxes may never be reduced as a benefit or additionally, services offered free or at a reduced rate, the OSC has said that a municipality could offer a credit to officers and employees as part of compensation up to a specified dollar amount for utility service provided by the municipally-owned utility.[502] This benefit would have to be offered as a credit on the bill and not as a lower rate of service for employees as compared to others.[503] In addition, a municipality **may:**

- Authorize the purchase of uniforms to be worn by officials or employees or reimburse the employee for the uniform, but it may not provide a lump sum payment regardless of cost;[504] or
- Reimburse officers and employees for reasonable tips and gratuities paid by them while engaged in authorized travel on official business.[505]

Performance Evaluation Programs

A municipality may initiate a performance evaluation program for non-union employees pursuant to a local law if there are established and identifiable guidelines that are fixed prior to performance and of which the employees are made aware.[506] The payments may be considered an inducement to continued and faithful municipal service and would discourage unnecessary absenteeism. This type of incentive is distinguishable from an outright bonus payment gratuitously made for past services already compensated. A comparable performance evaluation program may be provided to union employees pursuant to a collective bargaining agreement.

Overtime

An employee may receive overtime pay if the board has authorized such payment pursuant to General Municipal Law § 90. An employee may not contract with a municipality for additional pay for services which are to be performed regularly during work.[507]

Expenses Which May Not Be Compensated

The following are **not** considered to be "reasonable and necessary" expenses payable by a municipality:

- The parking costs of municipal employees;[508]
- Compromise of an officer's damage claim in a condemnation proceeding, but it may pay any judgment obtained by him or her;[509]
- Reimbursement to an employee or officer for damage to eyeglass frames that were broken while at work;[510]
- Reimbursement of an employee who, while acting as collecting officer, inadvertently accepts a counterfeit bill;[511]
- Replacement of monies collected by an officer and subsequently stolen from him or her;[512] the only exceptions to this general rule are loss of monies occasioned by an act of God or by a public enemy;[513]
- The cost incurred by a legislator in personally conducting a bulk mailing to his constituents on a matter having no relationship to municipal business;[514]
- The cost incurred by a public officer in hiring a babysitter;[515]
- A fine and other expenses of an officer incurred as a result of a parking violation while on official business; nor may the municipal attorney be authorized to represent the officer at municipal expense in matters relating to such violation. Traffic violations that occur during travel on official business bear no necessary relationship to municipal business while on such travel;[516] and
- Establishment of a fund to compensate substitute teachers for personal property losses occasioned by acts of vandalism during a school strike.[517]

An officer or employee may not be paid for time prior to the period he or she was appointed and qualified for the position,[518] or be paid for missed work if compensated on a fee basis.[519] Where an employee is paid on a weekly basis and compensation is set at an annual amount, to avoid an overpayment of salary a municipality should determine the amount to be paid for each working day and pay the employee a daily rate times the number of days actually worked.[520] Erroneous payments of salary in excess of the amount set in a collective bargaining agreement would constitute payment for services that were not rendered and, were the employees to retain such monies, would be gifts of public monies in contravention of the constitutional prohibition.[521]

Bonuses may not be paid to municipal employees or officers where such bonuses are not considered an increase in salary, part of an employment contract, or based upon services rendered.[522] This is true regardless of whether the bonus is considered a cost of living bonus[523] or additional compensation for official work, unforeseen, or additional work.[524]

A municipality may not waive its rights under a valid two-year labor agreement and raise the salaries of its police officers in the second year of the contract. If the municipality were to renegotiate the contract and grant any additional compensation without receiving some additional consideration from the police officer, then the municipality would be making an unconstitutional gift.[525]

Leave Time

A municipality may negotiate as part of a collective bargaining agreement to pay for time absent from the job. For instance, a municipality **may** pay union officials for time devoted to union business during working hours, if negotiated as part of a collective bargaining agreement.[526]

The following decisions have authorized payments for leave time. Pursuant to a collective bargaining agreement, a municipality **may** provide:

- For the payment of a cash incentive of one day's pay for an employee who has no absences during a fixed period;[527]
- For the annual exchange of cash for one week of vacation credit accumulated during the year;[528] and
- An extended sick leave benefits plan.[529]

Pursuant to General Municipal Law § 92, a city or village may decide to grant vacations, sick leaves and leaves of absence with or without pay. They may also provide for the cash payment of accumulated and unused vacation time.[530]

A municipality may provide prospectively for full or partially paid leaves of absence to employees engaged in the performance of ordered military duty, during all or part of a period after they have received their full compensation for the maximum period under Military Law § 242, until they are returned to civilian status. Municipalities, in granting paid leaves of absence, including leaves for military service, are not conferring gifts upon their employees, but rather are providing a form of compensation as a condition of employment to induce continued, faithful and competent service. However, the paid leave of absence must operate prospectively; that is, the paid leave plan must be authorized before the time the leave for which payment is to be made is taken.[531]

In the absence of a provision to that effect in a collective bargaining agreement, a municipality **may not** pay an employee for time absent from the job unless accrued paid leave is debited. Thus, for example:

- A full-time employee may not be paid for time taken off from work for the purpose of attending meetings of the county governing board as a member thereof. Paying a municipal employee for time when absent from his or her municipal job is clearly a gift in violation of the Constitution;[532]
- A municipality may not allow employees a quarter-hour time off from work on each payday for purposes of cashing or depositing their paychecks unless the practice requires that the employees use personal leave credits for the period of the absence or the practice is provided for under the terms of the collective bargaining agreement;[533] and
- Where a municipality pays its employees for a full day's work where they report late due to inclement weather, in the absence of a collective bargaining agreement mandating such payment, the municipality is in violation of the constitutional prohibition against gifts.[534]

If a municipality has adopted a plan of vacations with pay, it lacks authority to convert the value of unused vacation time for past years into a cash payment, when such a cash payment plan was not in effect.[535]

Time for sick leave has been authorized by General Municipal Law § 92 and, if properly enacted, is not considered a gift.[536] Employees may not be paid sick leave for days prior to the effective date of a municipal sick leave plan.[537] Prior continuous service may be considered in determining the amount of sick leave to which employees are entitled in a municipal sick leave plan. Prior service is determinative as to the right of an officer or employee to receive a future benefit. The benefit is not compensation for past service. It is in the nature of compensation for future service, eligibility for which is based on prior service.

A number of decisions have been issued regarding payments greater than ordinary sick leave compensation, including the following:

- A municipality may not pay an employee regular salary where the employee has been absent due to illness and has exhausted accumulated sick leave. However, a municipality may adopt an extended sick leave program and, if such a program has been previously adopted, the employee in question could be granted such extended leave and it could make the payments in question;[538]
- In the absence of a sick leave plan, a municipality may not pay a portion of an employee's salary in addition to workers' compensation benefits;[539] and
- In the absence of express terms in a collective bargaining agreement or the existence of an unambiguous practice, an injured police officer receiving his full salary pursuant to General Municipal Law § 207-c may not also receive additional pay for fringe benefits falling during the period of disability.[540]

Meals and Recognition Dinner

Villages[541] and cities[542] are statutorily authorized to include in their budgets an appropriation to fund an annual firefighter's dinner for each fire company within the municipality.

A municipality may hold an annual dinner for unsalaried members of various boards or for community volunteers where only the meals of the members will be paid for as a token of appreciation or compensation for the services rendered by such members to the municipality. According to the Office of the State Comptroller (OSC), the "proper municipal purpose" involved would be a determination by the legislative body that it is in the interest of the public to encourage public spirited citizens to continue to serve on these boards.[543]

Where a municipal governing body has determined that the attendance by its officers at a dinner business meeting with business executives or other municipal or State officers or employees would serve the interest of the municipality, the cost of meals consumed by all persons present may be paid for by the municipality as a proper municipal expenditure. In the discretion of the governing body, meals consumed by business people at a business luncheon or dinner may be reimbursed by the governing body. There must be a reasonable determination that the meeting will promote a valid municipal purpose by discussion or negotiation of a matter properly of concern to the municipality in its governmental or proprietary capacity.

If there is any doubt whether such expenses in a given situation are reimbursable, the officer or employee should obtain board approval prior to inclining the expense.[544] Per diem meal allowances for travel on official business are authorized by General Municipal Law § 77-c.

A municipality may not expend funds for a dinner, picnic or other similar outing for salaried employees or officers unless it is done pursuant to a collective bargaining agreement, or the officer or employee is traveling outside of his or her regular work area on official business for an extended period of time or where he or she is prevented from taking time off for food consumption due to a pressing need to complete the business at hand.

Even if such an activity as a dinner or picnic would serve a public purpose by promoting good relations between employer and employees, promoting inter-employee relations, fostering a sense of community and generally improving the conditions of employment, the public benefit that might be derived from such activities would be too indirect and incidental to warrant expenditure of municipal funds.[545]

In no event may municipal monies be spent for the purchase of alcoholic beverages at dinners.[546]

Use of Automobiles or Mileage Reimbursement

A municipality may provide for a mileage rate to reimburse an employee for expenses incurred in the authorized use of a personal car in the performance of official duties or reimburse the employee based on actual and necessary expenses.[547] A municipal official may be given full-time use of a municipally-owned vehicle as part of compensation in exchange for services. Municipal officials who are subject to being called to perform official duties in emergency situations, during hours other than regularly established working hours may be permitted, in the public interest, to use municipal vehicles on a full-time basis to insure the ready availability of essential personnel during such situations. Reasonable personal use of the municipal vehicle would be a private benefit which is incidental to the legitimate public purpose.[548]

Personal use of automobiles may also be granted as part of a collective bargaining agreement.[549] However, personal use of a municipal vehicle is, in general, non-cash compensation and may create a tax liability for the individual, an issue not intended to be addressed here. The Internal Revenue Service should be contacted for further information.[550]

Although officers and employees may be reimbursed for the official use of their personal automobiles, the municipality must pay particular attention to the method of reimbursement. For example, a municipality may not provide for an arrangement calling for payment of a fixed amount each month or a lump sum allowance for such authorized use of a personally owned car.[551] Furthermore, a municipality may not contribute to the cost of liability insurance for a personal automobile used for official purposes. If the municipality wishes to protect itself by reason of the employee's operation of an automobile on municipal business, it may do so without paying any part of the insurance by merely negotiating a separate contract with an insurance carrier or by including the vehicle under "fleet coverage."[552] The OSC has said that it is highly inadvisable for an employment contract to provide for the use of municipal equipment and employees to repair personal vehicles in lieu of providing the mileage allowance,[553] as it may be difficult, if not impossible, to put a value on unlimited use of equipment and employees for the repair of the private vehicle.

Insurance

A municipality may pay the premiums for medical, surgical and hospital insurance for its officers and employees, whether such officers or employees retired before or after the adoption of a plan to that effect, pursuant to General Municipal Law § 92-a.[554]

A municipality may elect to provide unemployment insurance for its employees, pursuant to Labor Law § 561.[555]

In the absence of express statutory authority or provision in a collective bargaining agreement, a municipality may not contribute to the cost of group life insurance for its employees[556] (although that benefit is available as part of an employee's membership in the State retirement system).

A municipality would not be authorized to make direct payment of premiums for salary reimbursement insurance to indemnify police officers for loss of private, independent salary or income resulting from disability incurred through performance of police duties.[557] The loss of salary from independent sources is in no way related to the salary received from the municipality.

A municipality may not purchase liability insurance to protect officers or employees from liability for libel, slander, false arrest or false imprisonment. The torts of libel, slander, false arrest or false imprisonment embody an element of deliberateness. The very nature of the act in each case takes it outside of the scope of the officers duties and renders it *ultra vires*. Since the individual committing such acts would be, by definition, acting beyond the scope of his or her duties, a municipality may not assume liability for his or her actions.[558]

Education of Employees

Payment may be made toward tuition when it is part of a negotiated contract and considered compensation. A contract between a municipality and an independent contractor which provides that the fees paid by the municipality to the independent contractor be paid to a student as a scholarship is not prohibited. An independent contractor may specify in the contract that any fees be paid to whomever he or she directs.[559] A municipality may pay an individual's college expenses as part of a recruitment program to obtain personnel, in exchange for a promise by the individual to accept employment by the government of the municipality for a specific number of years. The program must contain adequate safeguards and provide for a monetary limit. If there is a surplus or at least an adequate number of skilled individuals to fill such existing vacancies, expenditures for recruitment purposes may no longer be deemed to serve a necessary purpose.[560]

General Municipal Law § 77-b, generally authorizes reimbursement (with certain limitations) of actual and necessary expenses and registration fees incurred in attending "a convention, conference or school conducted for the betterment of any municipality." General Municipal Law § 72-e authorizes the expenditure of funds for the expenses of police department members in attending police training schools. Provisions of state law may allow reimbursement for travel and other actual and necessary expenses incurred in attending training courses.[561]

Absent a provision therefore in a negotiated labor agreement, a municipality may not agree to refund to an employee a portion of tuition cost for completing an approved graduate school course.[562] Graduate school courses taken by an employee inure to personal and private benefit, and payment for tuition cost should be properly considered a personal expense and obligation. It should be noted that such training is clearly not within the scope of the aforementioned General Municipal Law § 77-b.

A municipality may not reimburse one of its employees for wages lost from private employment as a result of attending a mandatory school required for the position.[563]

A municipality may not agree to reimburse employees or officials for courses or training they are required to take on their own time, even if a subsequent policy now permits the employee to take such a course during regular hours of duty without loss of salary.[564] As a general rule, time spent in training mandated by an employer constitutes time worked under the Fair Labor Standards Act (FLSA).[565] An exception to this requirement exists for specialized training required by a higher level of government. But a collective bargaining agreement may provide that employees will receive cash bonuses upon their receipt of degrees because this involves a contractual relationship and therefore, the awarding of such payments is not an unconstitutional gift.[566]

A municipality is not authorized to finance a course to prepare individuals to pass a civil service examination necessary for an initial appointment as a police officer. The chief of police may assign a police officer to provide information regarding recruitment or other public relations matters, but the police officer may not teach such a course.[567]

LOANS

Generally

Under Article VIII, § 1, municipalities may not make loans to private individuals or corporation.[568] Similarly, absent express statutory authority, municipalities may not make loans to other municipalities.[569]

These are examples of the subjects of various opinions by the Office of the State Comptroller (OSC) or the Office of the Attorney General, concluding that a municipality had **no** authority to extend its credit under the following circumstances:

- To a private individual to improve a private dock;[570]

- To a physician for the purpose of establishing him or her in private practice within the municipality;[571]
- To a private non-profit organization to aid in the rehabilitation of residential property for the use of low income families;[572]
- To a private entity for the purpose of obtaining financing or any other purpose;[573] or
- To establish a revolving loan fund for the purposes of fostering economic development, promoting job creation and stimulating the local economy, either on its own or by way of a contract with its industrial development agency.[574]

The Constitution also prohibits a municipality from borrowing money for a private purpose or for another municipality. For instance, a municipality **may not:**

- Issue bonds to create mortgage money for private home buyers;[575]
- Issue obligations to finance the purchase of a fire truck for a fire district located within the town;[576]
- Borrow money and use it for the sole purpose of purchasing a building to lease to private industry in order to furnish employment for residents;[577] or
- Borrow money for purposes of remodeling town hall so that the remodeled portion may be leased to a private individual for use in operating a motion picture theater.[578]

Finally, municipalities may not guarantee loans made by private or public entities.[579]

(Note that, if consistent with applicable federal law, a municipality may lend to a private developer monies it has received from the federal government. The federal money retains its identity as federal money and is not subject to the gift and loan provisions of the State Constitution.[580] Local officials should refer to the federal statute and any rules and regulations applicable thereto).

Securities

A municipality is not authorized to acquire stocks of private corporations[581] or securities of a non-profit corporation.[582] Moreover, a municipality may not purchase shares of Savings and Loans Associations.[583] This rule applies regardless of how the municipality obtains the money used for the purchase of the stock.

Therefore, if a municipality receives money as a gift, the money received may not be invested in stocks,[584] even if the donor so requests.[585]

Note that the opinions which form the basis for the principles set forth in the preceding paragraph all involved questions about municipal investments in stocks or securities. In contrast, in a 1973 opinion, the Office of the Attorney General concluded that a municipality may not acquire ownership of stocks even by way of a gift, citing the language of Article VIII, §1, which prohibits a municipal government from becoming "directly or indirectly the owner of stock in, or bonds of, any private corporation or association."[586] Long ago, however, the Court of Appeals considered the same language, which first found its place in the State Constitution in 1874, and said that it "should be construed with reference to the evils it was intended to correct."[587] And that "evil" was the ill-advised investment of public funds in various railroad-building ventures, many of which never came to fruition. Given that long-standing interpretation of the Constitution's ban on municipal stock ownership, we respectfully disagree with the conclusion expressed by the Office of the Attorney General in regard to municipal acceptance of a gift of stocks or securities in a private corporation.[588]

Time Deposits

Investment in time deposits was once considered an unconstitutional loan of public funds.[589] Pursuant to General Municipal Law § 11, deposits in special time deposit accounts or certificates of deposit are now authorized.

Credit Cards/Accounts

Subject to certain limitations imposed by statute and by regulation of the OSC, the General Municipal Law now permits municipalities to adopt a local law, ordinance or resolution, determining that it is in the public interest to permit its officers to accept payment by credit cards (General Municipal Law § 5) and/or via a municipal internet website (General Municipal Law §5-b) of "fines, civil penalties, rent, rates, taxes, fees, charges, revenue, financial obligations or other amounts, including penalties, special assessments and interest... owed."

In addition, the OSC has advised that municipalities may "engage in all commonly accepted business practices when acting in a proprietary capacity," such as when operating an airport. This would extend to the commonly accepted business practice of accepting credit cards in payment for services supplied by the airport.[590]

Purchase-Money Mortgages

A municipality may accept a note and purchase-money mortgage from a private individual buying real property from the municipality. A 1987 Opinion of the OSC held that municipalities may pass a local law to loan money this way and this opinion superseded several earlier opinions that held that municipalities could not enter into such transactions.[591] Previous opinions found that such a transaction was an unconstitutional loan of public funds. However, this opinion reasoned that the State Legislature has passed numerous special acts authorizing specific municipalities to hold purchase-money mortgages and, since all acts of the Legislature carry with them a strong presumption of constitutionality, the practice is not violative of the Constitution.

In 2009, the Court of Appeals, in effect, adopted the OSC's 1987 opinion, in a case involving the Village of Valley Stream.[592] The Village sold a parcel of real property to a private corporation for $275,000, and took back a mortgage interest in the property, to secure payment over a 15-year period. A civic organization and several residents of the Village challenged the transaction claiming, among other things, that the Village loaned its credit to a private entity, in violation of Article VIII, § 1 of the State Constitution. The Court of Appeals disagreed. Citing earlier case law, the Court concluded that "the Village made no loan of money or property to the purchaser. The fact that the consideration in this sale mentions an interest rate and a term of payment, or that a mortgage was taken as a security interest, does not make this transaction involving a deferred payment plan an unconstitutional loan."[593]

ENDNOTES

1 Taylor v. McGuire, 100 Misc.2d 834, at 837 (Sup. Ct., NY County, 1979).

2 Report on State Finance by the Temporary State Commission on the 1967 Constitutional Convention (Pamphlet 8; chapter 5; pp. 105-123).

3 William Magear Tweed, better known as "Boss" Tweed, was an American politician most famous for his leadership of Tammany Hall, the Democratic Party political machine that played a major role in 19th century New York politics. He was elected to the House of Representatives in 1852, and the New York City Board of Advisors in 1856. Two years later, he became the "Grand Sachem" of Tammany Hall. He was elected to the New York State Senate in 1867. By 1870, as Commissioner of Public Works, Tweed led a ring that controlled the government of the City of New York. He and his associates defrauded the taxpayers of millions of dollars. Ultimately, he was tried and convicted (in 1873), of stealing between $40 million and $200 million from City taxpayers through political corruption.

4 A similar prohibition applies to the State government in Article VII, § 8.

5 Lecci v. Nickerson, 63 Misc2d 756, at 758 (Sup. Ct., Nassau County, 1970).

6 LaBarbera v. Town of Woodstock, 29 AD3d 1054 (3d Dept., 2006), lv to app. dsmd., 7 NY3d 844.

7 Sun Printing & Publishing Assn. v. New York, 152 NY 257, at 265 (1897).

8 Smith v. Smythe, 197 NY 457 (1910); see also, Imburgia v. City of New Rochelle, 223 AD2d 44 (3d Dept., 1996), lv to app. dsmd., 88 NY2d 815.

9 Denchan Estates v. O'Dwyer, 302 NY 451 (1951).

10 2002 Op. State Compt., No. 2002-9, p. 21.

11 Piro v. Bowen, 76 AD2d 392 (2d Dept., 1980), app. den., 52 NY2d 702.

12 New Paltz H. & P. Traction Co. v. Ulster County, 202 A.D. 234 (3d Dept., 1922), aff'd 236 NY 630 (1923).

13 Ausable Chasm Co. v. State of New York; 266 NY 326, 331 (1935).

14 General Municipal Law, §51. See, Rampello v. East Irondequoit Central School District, 236 AD2d 757 (4th Dept., 1997); but cf., Sluys v. Holland, 292 AD2d 371 (2d Dept., 2002).

15 33 Op. State Compt. 62 (1977).

16 See, e.g., Williams v. Gallatin, 229 NY 248 (1920); Stephenson v. County of Monroe, 43 AD2d 897 [4th Dept. 1974]).

17 See, 1982 Op. State Compt. No 82-289, p. 364.

18 33 Op. State Compt. 62 (1977).

19 Comereski v. City of Elmira, 308 NY 248 (1955).

20 Union Free School District No. 3, Town of Rye, Westchester County v. Town of Rye, 280 NY 469, at 474 (1939); General Municipal Law; § 72-h; 1962 Op. Atty. Gen. 279; 1959 Op. Atty. Gen. 213.

21 Jo & Wo Realty Corp. v. City of NewYork, 140 Misc.2d 154 (Sup. Ct., NY County, 1988), aff'd, 157 AD2d 205 (1st Dept., 1990), aff'd, 76 NY2d 962 (1990).

22 4 Op. State Compt. 363 (1948).

23 20 Op. State Compt. 423 (1964) .

24 34 Op. State Compt. 104 (1978), the State Comptroller reasoning that "[s]ince the State University is an integral part of the State, a statute authorizing the lease of real property without consideration to the State of New York [i.e.,§72-h] also authorizes such a lease to the State University...".

25 1982 Op. State Compt., No. 82-342, p. 434.

26 1989 Op. State Compt., No. 89-29, p. 69. Ordinarily, a village may not acquire real property for the sole purpose of reconveying it. See, 1981 Op. State Compt. No. 81-203, p. 216.

27 29 Op. State Compt. 142 (1973).

28 1989 Op. State Compt., No. 89-23, p. 52.

29 See, e.g., Op. Atty. Gen. 2008-11, p. 1042.

30 1988 Op. State Compt., No. 88-1, p.1.

31 1982 Op. State Compt., No. 82-209, p. 265.

32 18 Op. State Compt. 77 (1962).

33 Comereski v. City of Elmira, 308 NY 248 (1955).

34 See, e.g., 2005 Op. State Compt., No. 2005-6, p.16.

35 New Windsor Volunteer Ambulance Corps., Inc. v. Meyers. 442 F3d 101 (2d Cir., 2006).

36 General Municipal Law; §§72, 72-b,72-i, 77, 77-a.

37 9 Op. State Compt. 46, and 436 (1953); 1945 Op. Atty. Gen. 97; 1944 Op. Atty. Gen. 58.

38 22 Op. State Compt. 53 (1966); 15 Op. State Compt. 329 (1959).

39 4 Op. State Compt. 345 (1948); 1 Op. State Compt. 458 (1945).

40 5 Op. State Compt. 348 (1949); 3 Op. State Compt. 201 (1947).

41 23 Op. State Compt. 46 (1967); 7 Op. State Compt. 32, and126 (1951).

42 Lewis v. LaGuardia, 172 Misc. 82 (Sup. Ct. N.Y. County 1939), aff'd 258 AD 713 (1st Dept. 1939), aff'd 282 NY 757 (1940).

43 19 Op. State Compt. 24 (1963); 5 Op. State Compt. 90 (1949).

44 25 Op. State Compt. 240, and 288 (1969). Executive Law, section 422.9 authorizes a municipality, subject to the approval of the State Office of Children and Family Services, to enter into contracts to effectuate its youth program, established and provided for in the Executive Law. Necessary precautions to be taken before entering into such a contract include: ensuring the availability of the program to all youth of the municipality, within the designated age group, regardless of race, creed or national origin; municipal supervision and control of the privately-operated program; and enumeration in the contract of the particular services to be provided and the amounts and purposes for which municipal funds will be expended.

45 28 Op. State Compt.185 (1972).

46 1943 Op. Atty. Gen.107.

47 Id. 224.

48 1 Op. State Compt. 450 (1945).

49 2 Op. State Compt. 357 (1946).

50 7 Op. State Compt. 447 (1951).

51 8 Op. State Compt. 166 (1952).

52 12 Op. State Compt. 217 (1956).

53 24 Op. State Compt. 598(1968); 21 Op. State Compt. 117(1965); 13 Op. State Compt. 82 (1957).

54 14 Op. State Compt. 148 (1958).

55 Id. 378 (1958).

56 Id. 382 (1958).

57 15 Op. State Compt. 169 (1959).

58 18 Op. State Compt. 185 (1962).

59 20 Op. State Compt. 90 (1964).

60 Id. 437 (1964).

61 Id. 475 (1964).

62 21 Op. State Compt. 515 (1965).

63 23 Op. State Compt.386 (1967).

64 34 Op. State Compt. 65 (1978).

65 2 Op. State Compt. 394 (1946).

66 5 Op. State Compt. 90 (1949).

67 8 Op. State Compt. 196 (1952).

68 1968 Op. Atty. Gen. 54; 17 Op. State Compt. 388 (1961).

69 General Municipal Law § 241.

70 General Municipal Law § 95.

71 1982 Op. State Compt. No. 82-225, p. 284; 1981 Op. State Compt. No. 81-211, p. 224.

72 15 Op. State Compt. 384 [1st Op.](1959). In a later Opinion, 1980 Op. State Compt., No. 80-204, p. 55, the Comptroller suggested that National Little League and similar organizations would likely not be conducive to a municipally-sponsored operation because "they are limited to one sport, have set formats and are controlled by national parent organizations". In contrast, the earlier Opinion, with which we agree, notes that given the statutory authority for a municipality to provide for recreation and leisure-time activities for the youth of its community, "[t]he municipality could establish its own [athletic] program or contract with a Little League to run a program for the youth of the municipality." (Emphasis ours).

73 20 Op. State Compt. 138 (1964).

74 1982 Op. State Compt. No. 82-283, p. 354.

75 25 Op. State Compt. 396 (1969); 22 Op. State Compt. 613 (1966).

76 17 Op. State Compt. 337 (1961); 14 Op. State Compt. 74 (1958).

77 24 Op. State Compt. 296 (1968); 17 Op. State Compt. 67 (1961).

78 18 Op. State Compt. 29 (1962).

79 General Municipal Law § 160.

80 31 Op. State Compt. 98 (1975); 15 Op. State Compt. 477 (1959); 2 Op. State Compt. 468 (1946).

81 Laws of 2010, chapter 69, effective May 5, 2010.

82 Not-For-Profit Corp[oration Law § 1502(a).

83 21 Op. State Compt. 531 (1965).