

**ASSOCIATION OF TOWNS
OF THE STATE OF NEW YORK**

**TOWN LAW MANUAL
For Town Supervisors and Town Boards**

FOREWORD

This publication was initially prepared and distributed in 1962. A second edition was issued in 1972, and it was periodically updated through the preparation of supplements in the intervening years until the present. The preparation of this manual has been a large task in which Association Staff both past and present played a part. Much additional material and sample forms have been included so as to make it as complete and useful for Town Supervisors and Town Boards as possible.

Answers to many of the problems Supervisors and Town Boards face on a daily basis are covered in the pages of this manual. Town Supervisors and Board members have been given important powers and responsibilities. Those responsibilities have increased over the years as the issues and problems facing our society have grown more complex. Given some of the more difficult and unusual problems that surface every day, further study and research will be necessary and the advice of a competent municipal attorney may be required.

This manual, as with all publications prepared by the Association for town officers, is town property. It should be passed on to one's successor in office. The cost for this publication is paid for out of dues each town pays to belong to the Association of Towns.

Certain materials in this manual have been obtained from speeches, articles and publications of several New York State agencies and departments, and we wish to express our genuine thanks for the assistance gained from these sources. We particularly wish to acknowledge the work product of the Office of the State Comptroller and the Division of Regulatory Affairs in the Department of Environmental Conservation.

One of the principal services of the Association of Towns is to answer inquiries from officials and our member towns. We are proud of that service and we hope that this manual will encourage town officers to continue to count on us in solving problems of concern to individual member towns.

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TOWN LAW MANUAL

Chapter 1

GENERAL PROVISIONS

§ 1-1. Distribution of counties, towns and villages.

In New York State, outside of the City of New York, there are 57 counties. All of the territory within each of these counties is made up of either towns or cities. There are 932 towns in the state. Some counties contain as few as three towns; others, as many as 32. Within 433 of these towns, there are located one or more villages. There are 556 villages in the state. This means that there are 499 towns which contain no villages.

§ 1-2. Purpose and responsibilities of towns.

Historically, towns existed as an arm of the state for the purpose of accomplishing locally, and more conveniently, certain functions of the state for the benefit of all its citizens. Towns still continue to perform certain functions for the state, such as conduct of elections and the keeping of vital statistics. With the growth of towns and consistent with the needs and demands of their residents for new and expanded local government services, the Legislature recognized the necessity for conferring additional powers on town governments. These new and expanded powers have allowed towns to meet the service delivery requirements expected of them more effectively and with greater efficiency.

§ 1-3. Evolution of towns.

A. Towns are no longer merely political subdivisions of the state. They have assumed the character and capacity of responsible municipal corporations. They are defined in the Municipal Home Rule Law as one of the four classifications of the state's general purpose local governments along with counties, cities and villages. Today, it is in the 932 towns of the state that nearly 75% of New York State's entire population outside of New York City resides; 45% of the state's population as a whole. The combined population of all of the other 61 cities of the state is less than 2,000,000 people, or only about 12% of the entire state population. In other words, the population of New York State towns is almost four times that of the 61 cities.

B. Of the more than 8.5 million people now residing in towns, 2,000,000 came between 1950 and 1960, creating a severe challenge for town boards in supplying these new residents with the municipal services they needed -- water, sewers, drainage, police, recreation and so on. But our towns met the challenge. A new procedure to initiate the formation and extension of town improvement districts by town board resolution instead of by the clumsy petition method was developed by the staff of the Association. This helped towns substantially in meeting the demands of their new population. The process was further streamlined in 1995 with a reduction in the State Comptroller's involvement in special district formation and extension. Then in the decade 1960-1970, 1.5 million more people moved to our towns. The 1980 and 1990 Censuses showed another 772,000 new town residents. And in 2000, a 4.97% increase meant another 412,000 people, for a total growth of more than 4.25 million people, more than doubling town population in just 50 years. The growth rates in town-outside-village areas are even higher.

C. The population of the towns of our state is greater than the combined population of Wyoming, Vermont, Rhode Island, North and South Dakota, New Hampshire,

Montana, Idaho and Delaware. As a matter of fact, only seven states have populations greater than that of the towns of New York State -- California, Florida, Illinois, Ohio, Michigan, Pennsylvania and Texas. But it is broadly recognized that towns have acquitted themselves admirably -- that the town form of local government is one that functions well, is efficient and economical. Towns have met their massive growth problems without allowing that increase to affect the quality of life which has attracted so many.

Chapter 2

CLASSES OF TOWNS

§ 2-1. "Town" defined; powers.

Town Law § 2 defines a town as a "municipal corporation comprising the inhabitants within its boundaries, and formed for the purpose of exercising such powers and discharging such duties of local government and administration of public affairs as have been, or, may be conferred or imposed upon it by law." Note additionally that under the Municipal Home Rule Law, effective January 1, 1964, the powers of town boards in the area of local legislation were vastly expanded. (See also Chapter 6, Town Legislation.)

§ 2-2. Classes of towns.

A. Each town of the state is, by statutory definition, either a town of the first class or a town of the second class. They are divided into classes according to population as reflected by the latest federal decennial census. Certain towns may optionally become "suburban towns" (see § 2-3C below).

B. Any town which is not a town of the first class is a town of the second class. In addition, all towns in Suffolk and Broome Counties, the Town of Potsdam in St. Lawrence County and the Town of Ulster in Ulster County are defined as such.

C. With the enactment of the Home Rule Amendment to the New York State Constitution and its implementation through the Municipal Home Rule Law, towns now have the ability to use their local law powers to vary their structure so as to achieve the most effective and efficient administration possible. Thus, the classifications are not as important as they once were, nor do they any longer describe accurately the structure of every town within the class.

§ 2-3. Change in classification.

A. Mandatory change. Towns with a population of 10,000 or more and every town in Westchester County are towns of the first class. When a federal decennial census shows that the population of a town of the second class is over 10,000 people, its classification automatically changes to a town of the first class, and at the next biennial town election it must elect the officers required to be elected in a town of the first class. This is referred to as a "mandatory" change of classification. The Secretary of State is required to obtain authenticated statements of population from the proper federal authorities and file a copy of such statement with each town clerk of a town with a population of 5,000 or more as shown by such federal census.

B. Optional change.

(1) Certain towns of the second class are permitted to change their class to that of a town of the first class if so desired. This is referred to as an "optional" change in classification. This can be done by a town of the second class whenever:

(a) Its population reaches 5,000 or more (whether by special or decennial federal census); or

(b) Its assessed valuation exceeds \$10,000,000; or

(c) It adjoins a city with a population of over 300,000.

(2) For those interested in pursuing this matter further to learn how the change is accomplished, which officers must be elected in a town of the first class as opposed to those required to be elected in a town of the second class, and for a discussion of the basic differences between the two classes of towns, see Exhibit A, which contains a review of these considerations, as well as pertinent statutory references.¹

C. Change of classification to a suburban town.

(1) The provisions of the Suburban Town Law may be made applicable to a town which:

(a) Has a population of at least 25,000; or

(b) Has a population of at least 7,500 and is not more than 15 miles from a city having a population of at least 100,000, measured from their respective nearest boundary lines; provided, however, that the population of such town increased at least 65% between 1940 and 1960, or 40% between 1950 and 1960, as shown by the decennial federal census for such years.

(2) Information is available at the office of the Association of Towns as to the transition procedures in changing to a suburban town classification and describing the operation of the town upon becoming a suburban town. This information has been dropped in this revised edition of the Town Law Manual. With the enactment of the Municipal Home Rule Law, there would seem to be no particular advantage to any town becoming a suburban town as such. As noted previously, all towns, regardless of size or classification, possess home rule local law powers which permit restructuring at local option, regardless of size or classification.

Chapter 3

THE TOWN BOARD

§ 3-1. General provisions.

A. Background. In the early days of this nation, many of the colonies established a form of government intimately conducted and controlled by the residents of the towns. All important decisions as to the government, taxes and other matters were actually decided at a meeting of the residents of the town, at which meeting a vote would be taken to determine the proposal at issue. In some states this procedure is still followed. In New York State, our towns have been organized with an elective legislative body, the town board. In this legislative body is placed the responsibility for making the present-day decisions. Only in special instances is a vote of the inhabitants of the town required.

B. Representation and advisory referenda.

(1) Advisory referenda. It is a well-settled rule that advisory referenda are not permitted. (Matter of McCabe v. Voorhis, 243 NY 401; Mills v. Sweeney, 219 NY 213; Kupferman v. Katz, 19 AD2d 824 (1st Dept.); Silberman v. Katz, 54 Misc.2d 956 (Sup. Ct., NY Co.), aff'd 28 AD2d 992) Of these cases, McCabe is the leading authority. The New York Court of Appeals ruled that no referendum can be held by a local government in the absence of the constitutional or statutory authorization. "Government by representation is still the rule. Direct action by the people is the exception." (McCabe at 413) Thus, in the absence of an express statutory provision, the holding of an advisory referendum by a municipality is not authorized. {Meredith v. Connally, 68 Misc.2d 956, 960 [Sup. Ct. Renss. Co., aff'd 38 AD2d 385 (3d Dept.)]; Silberman v. Katz, 54 Misc.2d 956 (Sup. Ct., NY Co.), aff'd without opinion, 28 AD2d 992 (1st Dept.); Matter of Town of Halfmoon, 81 Misc.2d 157 (Sup. Ct., Saratoga Co.)}

(2) Representation. When a town board member votes on a proposal before a town board, he or she is representing, through that vote, the views of all of the residents of the town. Thus, a high personal responsibility rests on individual town board members. It requires that they exercise careful consideration in making important decisions which will affect the lives of town residents and businesses.

C. Town board function.

(1) Purpose. Town government is run by the town board as the executive, administrative and legislative body of the town.

(2) Executive powers. A town board, as a group, is the executive head of the town, there being no true executive in town government comparable with the status of a mayor of a city or village, or with the governor of the state. Thus, while the supervisor presides at town board meetings and may be assigned certain powers of administration and supervision, the additional duties and responsibilities of the supervisor are only those which result from that position's statutory role as town treasurer. See Town Law §§ 29 and 125 for a description of those duties. Many state statutes, despite the distinctions just mentioned, still refer to supervisor of a town as the "chief executive officer" for the limited purposes of the statute in which the reference appears.

(3) Home rule authority.¹

(a) Prior to January 1, 1964, authority for town board action had to be found in specific state legislation or in the Constitution. The grant of power contained in those enabling statutes had been strictly and narrowly construed, and a town board could not assume powers and duties which it had not been specifically given by statute. However, since January 1, 1964, all towns have enjoyed constitutional home rule powers. Towns are now able to enact local laws regarding subjects within the realm of "property, affairs and government" of the town, provided the laws are not inconsistent with the Constitution or a law of general statewide applicability enacted by the State Legislature (e.g., laws on competitive bidding, open meetings, ethics and the like).

(b) In addition, towns may adopt local laws concerning a number of subjects specified in the Constitution and the Municipal Home Rule Law whether or not they are "property, affairs and government," so long as such local laws are not inconsistent with general law applicable to all towns, and provided there has been no statutory restriction against such local legislation. (See Chapter 6, Town Legislation.)

(c) Under this constitutional authority, it is even possible for a town board to adopt local laws which may change provisions of a state law which is not generally applicable to all towns in the state, provided the subject matter comes within "property, affairs and government."

(d) Since 1974, with certain limited exceptions, towns may even supersede provisions of Town Law regardless of their general applicability. For instance, a town may use this local law power to adjust terms of office or the size and membership of various town bodies such as the zoning board of appeals.

(4) Additional authority. Besides the above-described legislative powers of a town board, the Town Law and other state statutes contain authority for town boards to act in a variety of specific areas. These laws have been extensively amended over the years to the point where town boards now have authority to supply almost every public function or service that any other municipality may provide, subject to compliance with any specific rules found therein prescribing methods of procedure, notices, referenda if any, etc.

§ 3-2. Composition.

A. Supervisor and councilpersons. The town board usually consists of the supervisor and four councilpersons. There is specific authority for expanding the number of councilpersons on the town board of a town of the first class to six. To date, this has been done by a relatively few towns in the state.

B. Town justices. At one time, town justices served as members of the town board in some towns. This is no longer the case. Beginning January 1, 1980, all town justices perform judicial functions only (Ch. 739, L. 1976).

C. Change in number of councilpersons. Town Law § 60-a authorizes the town board of a town of the second class to adopt a resolution, subject to permissive referendum, to reduce the number of town councilpersons. The number of town councilpersons in any town may also be increased or decreased by a local law subject to a mandatory referendum pursuant to the Municipal Home Rule Law.

§ 3-3. Qualifications of town board members.

A. Board members must be electors. Town board members, as elected officials of the town, must at the time of election and throughout their terms of office be "electors" of the town. See Town Law § 23 and Public Officers Law § 3. The term "elector" means a person who, if he or she wished, could register as a voter in the town, whether or not that person has, in fact, registered. Residency, age and citizenship are the three key criteria necessary for registration.

B. Residency.

(1) Definition. "Residency" means domicile. The Attorney General has described "domicile" as follows:

The existing domicile, whether of origin or selection, continues until a new one is acquired and the burden of proof rests upon the party who alleges a change. The question is one of fact rather than law, and it frequently depends upon a variety of circumstances, which differ as widely as the peculiarities of individuals. . . . In order to acquire a new domicile there must be a union of residence and intention. Residence without intention, or intention without residence is of no avail. Mere change of residence although continued for a long time does not effect a change of domicile, while a change of residence even for a short time with the intention in good faith to change the domicile, has that effect. . . . There must be a present, definite and honest purpose to give up the old and take up the new place as the domicile of the person whose status is under consideration. . . . A temporary residence for a temporary purpose, with intent to return to the old home when that purpose has been accomplished, leaves the domicile unchanged.

(2) Determination of domicile. The determination of domicile is a question of fact; a determination that must be made locally, based upon the facts of each case. Ultimately, only a court can determine domicile. [1977 N.Y. Op. Atty. Gen. (Inf.) 271; *Hosley v. Curry*, 85 NY2d 447, 626 NYS2d 32]

C. Age qualification. Chapter 868 of the Laws of 1972 reduced the age qualification for holding public office from 21 to 18. U.S. citizenship is required by Election Law § 5-102(1) as well as by Public Officers Law § 3.

D. Property qualification. Town officeholders no longer have to be owners of real property. The New York State Court of Appeals, in a decision handed down on October 26, 1967, declared that former Town Law § 23, which had required that every elected town officer must be an owner of real property located within the town, was unconstitutional; that such property ownership requirement was "invidious discrimination" against non-landowners; and that there was no rational connection between holding public office and owning real property. (*Landes v. Town of North Hempstead*, 20 NY2d 417; 284 NYS2d 441) Chapter 767 of the Laws of 1968 amended Town Law § 23 and repealed Town Law § 23-a to eliminate reference to property ownership as a qualification for any elective town office.

§ 3-4. Oath of office.

A. Oath required. Before entering upon the duties of office, each town board member must take and subscribe the constitutional oath of office. Town Law § 25 provides for taking oaths of office before entering into the duties of office:

Before he enters on the duties of the office, and within thirty days after the commencement of the term of office for which he is chosen, every town officer shall take and subscribe before an officer authorized by law to administer oaths in his county, the constitutional oath of office and such other oaths as may be required by law, which shall be administered and certified by the officer taking the same without compensation, and such oath shall be filed in the office of the town clerk.

B. Filing of oath; term. Public Officers Law § 10 similarly provides for filing the oath of office with the town clerk. The oath is good for the term of the office for which it is taken.

C. Applicability. Please be alert to the fact that all "town officers" are subject to the oath requirement. There is no one listing of which positions are town officers. Thus, any position where the functions and duties directly affect the citizens of the town and involve the exercise of the powers of the town is such a position (i.e., members of planning, zoning and assessment review boards). Also note that the Uniform Justice Court Act (UCJA) requires Justices and Court Clerks to file an oath and faithful performance bond with the County Clerk and Office of Court Administration, in addition to the required filing with the Town Clerk.

§ 3-5. Official undertaking.

A. Undertaking required; filing. Town Law § 25 provides that each supervisor (as well as the town clerk, collector, receiver of taxes, town justice, constable and superintendent of highways), and such other officers and employees as the town board may require, shall execute and file an official undertaking in the town clerk's office, in a form, sum and with sureties directed and approved by the town board as indicated on such undertaking. The official undertaking must also be filed within 30 days of taking office or notification of appointment.

B. Additional bond for highway moneys. The supervisor is not required to give the town an additional bond for highway moneys. However, the general bond should adequately insure both highway moneys and general funds.

C. Blanket undertaking. Public Officers Law § 11(2) provides that in lieu of any individual undertaking as required by law, the town board may approve the procurement of a blanket undertaking from any duly authorized corporate surety covering the officers, clerks and employees of the town. Such blanket undertaking must be approved as to form, manner of execution and sufficiency of surety by the town board and filed in the same manner as individual undertakings. This section further provides that any such blanket undertaking entered into must indemnify against losses caused by the failure of the officers or employees to faithfully perform their duties or by their fraudulent or dishonest acts.

D. Failure to comply. A neglect or omission to take and file an oath or undertaking within the time required results in a vacancy in the office by operation of law. It is, therefore, a matter of utmost importance, for failure to comply cannot be excused.

§ 3-6. Term of office.

A. Length of term of councilpersons, supervisor and justices. Town councilpersons have by state statute a term of office of four years (Town Law § 24). The term of office of the town supervisor, however, is two years. Election of members of the town board is normally staggered, so that the whole town board will not come up for election in the same year. Town justices have a constitutional term of office of four years.

B. Extension of term.

(1) Method for extending term. The town board may extend the term of office of any elected officer from two years to four years. Terms of office may be extended by one of two methods:

(a) First, Town Law § 24-a permits the town board of any town to adopt a resolution, subject to a mandatory referendum, at least 150 days before a biennial election (every odd-numbered year, except in Broome County where it is the even-numbered years), providing a four-year term for any or all elective town officers. The referendum must be held at the biennial election; then the term of office of the elective officer specified in that proposition will be four years, commencing with the next biennial town election.

(b) Second, since January 1, 1964, all towns have had constitutional home rule local law enacting power, implemented by the State Legislature in the Municipal Home Rule Law. Under this law, it is possible for any town to change the term of office of its town officers (with the exception of town justices) by the enactment of a local law, subject to a mandatory referendum in the town [Municipal Home Rule Law §§ 10(1)(ii)(a) and 23(2)(e)].

[1] “Mandatory referendum” means that a proposition must be submitted to the voters of the town to approve or disapprove the local law providing for term extension. The proposition must be submitted at the biennial town election or at any general election held at least 60 days after the adoption of the local law, or at a special election to be held at least 60 days after the adoption of the local law if the local law itself provides for a special election or a petition is filed requesting that the local law be submitted to a special election.

[2] It is advantageous to use the local law option because the town board may include a provision in the local law providing that the new four-year term of office will apply to those officers elected at the same election at which the proposition for the four-year term was approved. (Grant et al. v. Board of Elections of the County of Rockland, 98 Misc.2d 644; Opn. St. Comp. 79-434)

(2) Municipal Home Rule Law §§ 24-a and 10. Use of Municipal Home Rule Law §§ 24-a and 10 to extend terms of office for town supervisors as well as clerks and highway superintendents has been increasing. Using the Municipal Home Rule Law has an advantage in that the referenda can take place in the off election year (i.e., an even-numbered year, except for Broome County). This can often depoliticize the issue and eliminate the uncertainty of having the term question decided at the same time as people are running for an office subject to the potential change in term.

§ 3-7. Authority.

A. Board acts as a body. The town board, as the executive body of the town, acts as a unit and must function as a body (Town Law §§ 60 and 63). An individual board member may not unilaterally act on behalf of the town board. Thus, each town board member has no more or no less authority than any other board member. Therefore, no board member can legally act independently of the others or outside of the board. This means that no single member of the town board can act for or commit the board as a body to any

particular program or policy.

B. Delegation to supervisor. The town board may, by resolution, delegate to the supervisor the power and duties of administration and supervision of town or special improvement district functions to be performed on behalf of the town board [Town Law § 29(16)]. The purpose of this provision is to allow the town to function between town board meetings. A copy of such a resolution is available from the Association offices. By this delegation, however, a town board may not abdicate to the supervisor or surrender to him or her the board's basic statutory responsibilities.

§ 3-8. Committees.

A. Town board committees. Many towns find that there is a considerable amount of work a town board must do between meetings in order to gather the necessary facts on matters requiring town board decisions. The town supervisor may appoint committees of town board members to make studies and report back with recommendations (Town Law § 63). These are committees of town board members and not citizen committees. If a town board committee is appointed, its expenses, mileage and so forth may be authorized in advance to be paid as a proper town charge. The use of the town board committee technique can be a very useful tool towards good local government and can involve the board members more closely and effectively in decision making. Such committees can conduct formal or informal meetings and hearings, but cannot make any decision for the town board. Please note that these committees are considered public bodies and thus are subject to the Open Meetings Law (Comm. on Open Gov't. FOIL-AO-1258). All such decisions must be made at a regular or special meeting of the full board.

B. Citizen committees. Although not specifically authorized by statute, town boards are increasingly opting to appoint one or more citizen committees to advise them on particular matters. The important factor here is that a town board cannot delegate its authority or authorize the spending of public monies by private persons. The role of such committees is advisory only. Their makeup can vary in size, and often includes one or more members of existing boards or bodies of the town. For example, a town may set up a master plan advisory committee of local citizens with expertise in land use issues, and appoint the chairman of the planning board to the committee and a town board member as an ad hoc member.

Chapter 4

TOWN BOARD MEETINGS

§ 4-1. Place of meeting.

A. Location. All meetings of the town board must be held within the territorial limits of the town, except in the case of joint meetings of town boards of two or more towns, as in the case of the establishment of a joint fire district, the consolidation of two or more fire districts, or in the case of a consolidated health district. The State Legislature, by special act, has given permission to a few individual towns to hold town board meetings outside the town.

B. Access. Public Officers Law § 103(b) requires a public body to make all reasonable efforts to hold meetings in facilities that permit barrier-free access to the physically handicapped. Public Officers Law § 74-a imposes a similar duty on public officers scheduling public hearings. The Americans With Disabilities Act (ADA) of 1990

required all local government programs to be accessible to individuals with disabilities. If that necessitated structural changes, they were to be made as expeditiously as possible, but no later than January 26, 1995. Under the ADA, all new construction or alterations to buildings after January 26, 1992, must provide the disabled with access. The New York State Uniform Fire Prevention and Building Code has contained similar requirements for all new buildings or reconstruction activities since its enactment in 1981.

§ 4-2. Frequency of meetings.¹

A. Every town board, in order to perform fully its many powers and duties, should meet periodically. The town board of any town may provide by resolution or by its rules of procedure for the holding of regular meetings at stated intervals. Town boards of every town of the first class are required by statute to hold at least one meeting a month. There is, however, no specific statutory requirement for periodic or regular meetings of town boards of towns of the second class. If a town board of a town of the second class does not establish a regular meeting date, it must nevertheless meet periodically for the purpose of auditing claims. Additional meetings of town boards may be required from time to time to accomplish specific acts necessitated by statutory provisions or to deal with emergencies or other unanticipated exigencies.

B. Meetings for annual accounting. An amendment to Town Law § 123 (Chapter 323 of the Laws of 1971) eliminated the necessity for a town board to convene between December 28 and 31 of each year for the annual accounting by town officers and employees who receive or disburse monies. Instead, such officers and employees must so account on or before January 20 (except in towns of the first class having a town comptroller or in a town which has engaged the services of a public accountant to make an annual audit to be completed within 60 days after the end of the fiscal year). Many towns rely on a comptroller or public accountant to comply with their annual audit requirement.

C. Budget meetings. In the adoption of a legal town budget, a town board must meet within the times specified by statute for the consideration of the tentative budget, the preparation of the preliminary budget, holding a public hearing thereon, and for the adoption of the annual budget. (See Chapter 5, Fiscal Matters.)

D. Organizational meeting. An annual organizational meeting of the town board should be held as soon as possible after the new year begins. The State Comptroller's Office has opined that the town board may conduct the organizational meeting as a special town board meeting or as part of a regularly scheduled meeting (Opn. St. Comp. No. 82-145). Although there is no specific requirement in statute for the holding of this meeting, many matters should be taken up at the organizational meeting in order to get the town government organized to function throughout the year. See Exhibit B, which lists those matters which should be considered at this organizational meeting.²

§ 4-3. Notice of meetings.

A. Regular meetings. When a town board has established by resolution a regular, fixed time and place for its meetings throughout the year, no other "call" or public notice of any such meeting need be given to the members of the town board. This resolution is customarily adopted at the annual organizational meeting of the town board held on or shortly after January 1 each year. Typically, this resolution will establish the time and

place for such regular meetings, such as "7:00 p.m. on the first Monday of each month," or "8:00 p.m. on the second and fourth Thursday of each month," etc., and state the place (i.e., the Town Hall) in the town where such meeting will be held.

B. Special meetings. A special meeting of the town board may be called by the supervisor at any time by giving at least two days' notice in writing to the other members of the board of the time and place where the meeting is to be held. The supervisor may do this on his or her own initiative and shall do so within ten days if requested in writing by two members of the board. Because the town clerk is mandated by law to attend all town board meetings, notice of a special meeting should be given to the clerk as well. The Attorney General and Comptroller have agreed that business conducted at a special meeting held without two days' notice is valid as long as all the councilpersons had actual notice of the meeting and attended and participated therein [1980 Op. Atty. Gen. (Inf) 109; 18 Op. St. Comp. No. 442].

C. Posting.

(1) The Open Meetings Law (Public Officers Law § 104) requires notice of the time and place of a meeting to be posted conspicuously in at least one public location (i.e., the town clerk's bulletin board) and to be given to the news media at least 72 hours prior to any meeting which is scheduled at least a week in advance. Where a meeting is scheduled less than a week in advance, notice to the news media and public posting must be accomplished to the extent practicable.

(2) Notice of town board meetings does not require publication of a legal notice. Posting the notice of time and place of the meeting on the town clerk's bulletin board and notification by letter or telephone to the local news media is sufficient to meet this requirement. It may be advisable to keep a book or log for entry of the date, time and name of the person who actually furnishes the notice to the news media. If you provide the media with copies of your meeting notice, perhaps with a list of tentative agenda items, they may choose to carry a story or notice of the time and place of the meeting as a service to their readers or listeners, which achieves the goal of notice to town citizens without the attendant cost of a legal notice.

§ 4-4. Procedure at Town Board Meeting.

A. Voting. The vote on every question shall be by "ayes" and "noes," and the names of the members present and their votes shall be entered in the minutes of the town board. Voting by proxy, telephone or affidavit is prohibited. A member must be physically present in order to vote on any matter before the board.

B. Role of town clerk. The role of the town clerk as clerk of the board is very important. The clerk must attend every meeting and keep a written record of all proceedings of the board even though he or she is not a member of the board and does not have a vote on matters coming before the board. If for some reason the clerk is not present, the supervisor should designate someone to take minutes.

C. Role of town supervisor; deputy supervisor.

(1) The town supervisor, if present, is required by law to preside at all meetings of the town board. In the supervisor's absence, the members present shall designate one of their members to act as temporary chairperson. However, if the town board has established the office of deputy supervisor and the office has been filled, then the deputy supervisor must preside at town board meetings in the absence of the supervisor.

(2) It should be remembered that the supervisor is a member of the town board and like any other member of the town board must vote on every matter before the town board. He or she may also move or second resolutions. The accepted procedure is for the town clerk to call a roll of town board members on every question before the town board. Having voted with the other members of the town board, the supervisor does not have authority to vote a second time in the case of a tie.

(3) In the absence of the supervisor, the town board member selected as chairperson for that meeting also must vote, but has only one vote to cast. If the town has a deputy supervisor who is required to preside at a town board meeting in the absence of the supervisor, the deputy supervisor has no vote unless he or she is a town board member. In that case, he or she votes by virtue of his or her position as a councilperson, not as deputy supervisor.

§ 4-5. Public participation in town board meetings.

A. A town board meeting is a serious matter. The Open Meetings Law gives the public the right to attend town board meetings and to listen to town board deliberations. All interested persons have a right to attend public hearings of the town, participate freely and make inquiries relating to the purposes thereof. However, the public may not participate in the meeting except upon the invitation of the board and also, except in the case of public hearings called as required by law, for the consideration of special matters.

B. In connection with public participation in town board meetings, the New York State Comptroller has rendered the following Opinion which is of interest:

To what extent may residents of a town participate in meetings of the town board?

(1) A town board has the right to promulgate rules of procedure for the orderly conduct of its meetings and for the proper management of the business and affairs of the town (Town Law § 63).

The town board may invite and permit residents of the town to participate therein so long as such participation is orderly and constructive and does not interfere with the business and purpose of the meeting.

To carry out its purposes, the town board may prepare and circulate an agenda limiting the time and scope of the discussion by persons attending such meetings.

This Department has stated that 'in general, the public is free to attend regular town board meetings,' but does not have a right to speak at a town board meeting except as provided by board rules.³ 'The town board may adopt rules and procedure limiting discussion of matters before the board.' (22 Op. St. Comp. No. 311, 1966)

(2) The term 'public hearing' has been variously discussed or defined as follows:

(a) ' . . . A statutory direction that a notice of public hearing be published means that a

fair and impartial hearing be held pursuant to such notice and that all interested parties attending the hearing be accorded an opportunity to be heard. . . .’

(b) ‘Public hearing’ means a right to appear and give evidence and the right to hear and examine witnesses’

(c) ‘Public hearing.’ Any hearing open to the public, or any hearing, or such part thereof, as to which testimony or other evidence is made available or disseminated to the public by the agency.’

(d) ‘Its very purpose [the public hearing] is to give the public an opportunity to express its views and to make inquiries in respect to budget matters, hence, the public may freely participate in such meetings.’

(From 69-405, Dept. of Audit and Control, 6/6/69)

C. A fair and reasonable interpretation of the discussions and definitions of a "public hearing" creates a positive directive that the public attending a public hearing has the legal right to question the applicant, the petitioner or the proponent relating to the purpose of the public hearing.

§ 4-6. Executive sessions.

A. Defined. Public Officers Law § 102(3) defines "executive session" to mean a portion of an open meeting during which the public may be excluded.

B. Procedure. The town board must strictly comply with the statutory procedure in order to call a valid executive session. [Daily Gazette Co. v. Town of Cobleskill, 111 Misc.2d 303 (Sup. Ct. Schoharie Co. 1981)] The procedure to call an executive session is set forth in Public Officers Law § 105(1). It requires a town board member to make a motion to enter into executive session, which motion must be approved by a majority of the entire town board.

C. Items which can be discussed. The courts have held that the town board motion to enter into executive session must identify with "particularity" the subject to be discussed. As one court stated: "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation.' This boilerplate recitation does not comply with the intent of the statute." [Daily Gazette Co., Inc. v. Town of Cobleskill, 111 Misc.2d 303 (Sup. Ct. Schoharie Co. (1981)] Only the following matters specified in Public Officers Law § 105 may be discussed and acted upon in an executive session:

- (1) A matter which will imperil the public safety if it is disclosed;
- (2) A matter which may disclose the identity of a law enforcement agent or informer;
- (3) Information with respect to investigation or prosecution of a criminal offense which would jeopardize effective law enforcement if disclosed;
- (4) Discussions relating to proposed, pending or current litigation;
- (5) Matters relating to collective negotiations under the Taylor Law;

(6) Medical, financial, credit or employment history of a particular person or corporation, or relating to appointment, promotion, demotion, discipline or removal;

(7) Preparation, grading or administration of examinations;

(8) Acquisition, lease or sale of real property or securities when publicity would substantially affect the value.

D. Personnel matters or litigation. Executive sessions are most frequently used to discuss personnel matters or litigation.

(1) First, Public Officers Law § 105(1)(f) authorizes the town board to enter into executive session to discuss what is commonly referred to as "personnel matters." The statutory language, however, does not include the word "personnel." The actual statutory language (as noted above) reads as follows: "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation." The Committee on Open Government (the state agency that oversees the Open Meetings Law) has offered the following comments regarding the proper language to use when entering into executive session to discuss personnel matters:

Due to the presence of the term 'particular' in § 105(1)(f), it has been advised that a motion describing the subject to be discussed as 'personnel' or as a 'specific personnel matter' is inadequate, and that the motion should be based upon the specific language of § 105(1)(f). For instance, a proper motion might be: 'I move to enter into an executive session to discuss the employment history of a particular person (or persons).' Such a motion would not [in the Committee's opinion] have to identify the person or persons who may be the subject of the discussion. (Comm. on Open Govt. OML AO-2444, 1995)

(2) Second, Public Officers Law § 105(1)(d) authorizes the town board to enter into executive session for the purposes of discussing "proposed, pending or current litigation." In construing this language, one court stated that the purpose of Paragraph (d) is "to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings." [Mtr of Concerned Citizens to Review Jefferson Val. Mall v. Town Board of Town of Yorktown, 83 A.D.2d 612, 613 (2d Dept. 1981)] The belief of the town's attorney that a decision adverse to petitioner "would almost certainly lead to litigation" does not justify the conducting of this public business in an executive session. [Weatherwax v. Town of Stony Point, 97 A.D.2d 840 (2d Dept. 1983)] To validly convene an executive session to discuss "proposed, pending or current" litigation, the town board motion must "identify with particularity the pending, proposed or current litigation to be discussed during the executive session." [Daily Gazette Co. Inc. v. Town of Cobleskill, 111 Misc.2d 303 (Sup. Ct. Schoharie Co. (1981)] Therefore, the town board may discuss litigation strategy behind closed doors but not issues that may only have the potential to lead to litigation.

E. Minutes.

(1) Summary minutes must be made of any final determination taken by formal vote, including the date and the vote thereon; however, such summary should not include any matter which is not required to be made public under the Freedom of Information Law. Such summary minutes shall be available to the public within one week from the date of the executive session.

(2) If no formal action was taken in an executive session, as is often the case, then no executive session minutes need be taken. For example, if the session consisted of a discussion of a personnel matter, but no final action or determination was agreed to or made, then no minutes are required. There would, of course, be minutes of the open meeting at which the motion and vote to go into the executive session was made.

F. Public monies. Public monies cannot be appropriated by formal vote in an executive session.

G. Attendance. The Open Meetings Law provides that attendance at executive sessions must be permitted to any member of "the public body" (that is, the town board members) and any other persons authorized by such body. Therefore, opinions of the State Comptroller (78-254 and 78-462) have concluded that it is clear that the town clerk has no right to attend such sessions but that the town board may, in its discretion, allow the clerk to attend. If the clerk is not allowed to attend, someone should be designated to take any necessary minutes.

§ 4-7. Applicability of Open Meetings Law.

A. Applicability to town board and other bodies. The Open Meetings Law applies not only to town boards and other town bodies and commissions performing a governmental function, but to committees and subcommittees thereof consisting of two or more persons [Public Officers Law § 102(2)].

B. Exceptions. The Open Meetings Law does not apply to any of three enumerated exemptions from the Open Meetings Law:

(1) Judicial or quasi-judicial proceedings, except proceedings of the public service commission and zoning board of appeals;

(2) Deliberations of political committees, conferences and caucuses; and

(3) Any matter made confidential by federal or state law.

§ 4-8. Political caucuses.

A. Statutory provisions. Chapter 136 of the Laws of 1985, effective May 31, 1985, specifically exempted the holding of political caucuses and conferences by a local legislative body from the Open Meetings Law. It added a new Paragraph (b) to Public Officers Law § 108, Subdivision 2, to provide that: "for purposes of this section, the deliberations of political committees, conferences and caucuses means a private meeting of members of the senate or assembly of the State of New York, or of the legislative body of a county, city, town or village, who are members or adherents of the same political party, without regard to (i) the subject matter under discussion, including discussions of public business, (ii) the majority or minority status of such political committees,

conferences and caucuses or (iii) whether such political committees, conferences and caucuses invite staff or guests to participate in their deliberations. . ." This amendment was intended to clarify existing law which had exempted political committees, conferences and caucuses from the provisions of the Open Meetings Law. According to the Governor's Approval Memorandum, some interpretations had misconstrued the original intent of the Legislature, which was that local legislative bodies could hold a political conference in private. Paragraph (b) has been added in an effort to eliminate any doubt that members of a town board or, in fact, the legislative body of any county, city, town or village, may hold a political conference privately outside the requirements of the Open Meetings Law.

B. Caucuses held in private. The political conference or caucus may be held in private even if all of the members of the town board are of the same political party [but see, *Buffalo News v. City of Buffalo Common Council*, 585 NYS2d 275 (1992); *Comm. On Open Gov't. OML-AO-2808* (November 10, 1997)] and even if the subject of the discussions and deliberations include public business. However, while the State Legislature found that a "private, candid exchange of ideas and points of view among members of each political party concerning the public business to come before legislative bodies" promotes the public interest, when what occurs at such a meeting goes beyond a candid discussion and amounts to the conduct of public business, the Open Meetings Law is violated. [*Humphrey v. Posluszny*, 175 A.D.2d 587(1991)]

§ 4-9. Attorney/Client privilege.

Matters made confidential by federal or state law are exempt from provisions of the Open Meetings Law. The attorney-client relationship is considered confidential under Civil Practice Law and Rules § 4503; thus, when attorney and client, which may include town attorney and town board, establish privilege of relationship, communications made pursuant to that relationship are confidential under state law and exempt from the Open Meetings Law. This privilege is, however, applicable only when the client (town board) seeks the professional, legal advice of the attorney acting in his or her capacity as an attorney (*Comm. On Open Gov't. OML-AO-1223 and 1189*). Thus, the board may meet privately with its attorney before or after a town board meeting for the express purpose of securing an opinion of law, legal services or assistance in a legal proceeding (*Comm. on Open Gov't. OML-AO-1189*).

§ 4-10. Work sessions.

The application of the Open Meetings Law to "work sessions," "workshops" or "agenda meetings" often creates some confusion. The statute does not contain any reference whatsoever to work sessions. It merely defines the term "meeting." The Court of Appeals has agreed with lower courts that the definition of "meeting" is broad enough to include a work session or workshop, etc. The important elements of a meeting are the convening of a majority of the members of the public body and the discussion of public business. Even if a vote is not taken at such work sessions, the Court considered them to be meetings and, consequently, open to the public. (*Orange County Publications, Division of Ottawa Newspapers, Inc. v. Council of City of Newburgh*, 60 A.D.2d 409, *aff'd* 45 N.Y.2d 947; *Binghamton Press Co., Inc. v. Board of Ed. of City School Dist. of City of Binghamton*, 67 A.D.2d 797)

§ 4-11. Conducting a town board meeting or hearing.

A. Board meetings. Conducting a routine town board meeting -- as distinguished

from conducting a public hearing -- is a most important local government function. To a supervisor and board keen to present a good image to the public, it is important to give careful thought to the conduct of these meetings. They provide the best opportunity for a supervisor and town board members to introduce themselves to their fellow townspeople. There is no magic formula to guarantee a successful meeting every time, but some ideas or hints can be suggested.

(1) Preparation and outside advice. Be prepared. This can be accomplished in several ways. Have an agenda made out ahead of time. Do not include anything on the agenda for which all the facts and the law have not been obtained in advance. These are the two basic ingredients in any decision. Town board members and town officials should be used to assemble the facts. All the responsibility should not be assumed by the supervisor. He or she should appoint committees of the town board to make periodic written reports to the whole town board. The services of a competent lawyer should be obtained. General advice as to how to proceed on problem-solving can be sought from the Attorney General, the State Comptroller, the Secretary of State or from the Association of Towns. These agencies cannot be asked to prepare legal papers for individual town boards. If they did this, they, in effect, would be practicing law all over the state; but they can and do render opinions as to proper procedures on request from town officers. The Association of Towns will not give opinions to other than town officers. To give an opinion to any town resident would tend to undercut or bypass the town board. It sometimes gets a bit tricky when a town official does not agree with actions of other town officials. Also, if an inquiry is made to more than one of these agencies, this fact should be indicated. This will benefit the town and avoid any conflicting advice.

(2) Rules of procedure.

(a) Every town board may adopt its own rules of procedure. This can be done formally or otherwise. Example rules of procedure can be obtained by contacting the Association offices. These rules should be made known to the public. The statutory provisions as to the legal procedures may not be altered. To avoid any uncertainty, it might be well to repeat in any rules of procedure what the Town Law § 63 mandates as to the running of a town board meeting. It provides:

The supervisor, when present, shall preside at the meetings of the town board. In the absence of the supervisor, the other members shall designate one of their members to act as temporary chairman. A majority of the board shall constitute a quorum for the transaction of business, but a lesser number may adjourn. The vote upon every question shall be taken by ayes and noes, and the names of the members present and their votes shall be entered in the minutes. Every act, motion or resolution shall require for its adoption the affirmative vote of a majority of all the members of the town board.

(b) No rules of procedure adopted by a town board can vary these provisions of law. This is one reason why a town may not adopt, *carte blanche*, Roberts' Rules of Parliamentary Procedure as the rules of procedure for a town board meeting.

(c) A town board meeting is an important legislative session, and it can no more be

disrupted or invaded than can a session of the U.S. Congress or that of a State Legislature. On the other hand, town officers pride themselves that town government is the one government close to the people and available to them. When there is a long agenda and local citizens are in the audience, it may be wise to set the agenda aside and to ask these people if there is some matter they care to take up with the town board. The rules should only be strictly enforced if there appears to be an angry mob present and the board desires that things do not get out of hand.

(d) Any persons speaking to the town board with the consent of the supervisor should address their remarks to the town board, not to other members of the audience in the form of a debate. Also, no person has the right to demand an answer to a specific question from a member of the board. All such questions shall be directed to the supervisor, who may either answer them or refer the questions to the town attorney, if present, or to a town board member.

B. Public hearings.

(1) Good advanced planning is essential if an orderly hearing is to be held on matters such as the adoption of a local law or the town budget. If the subject matter is a "hot one," for instance a proposed moratorium local law, then informal, informational hearings in several areas about the town may be desirable, followed up with news releases in the local news media. Additionally, where a public hearing is to be held on some new, novel or very important topic, you might even consider conducting a rehearsal or "dry run" a few days ahead by those to be involved, just to be sure everybody, town board members included, knows exactly what is involved. At these rehearsals, pretend a full crowd is present and, as supervisor, ask the town clerk to read the notice of the hearing and the proof of posting and publication. Then explain the rules of procedure and ask the town attorney to stand and explain the legal impact of the proposal. The supervisor or the town comptroller should explain the fiscal or tax impact; if an engineering or other professional problem is involved, that should be explained. The use of slides, movies, charts and other visual aids at such hearings is often very helpful. Also, if the town, by virtue of law, must have as its official newspaper a weekly with somewhat limited distribution, then perhaps the notice of hearing should additionally be published in a paper with broader circulation. The law permits such additional publication as the town board considers necessary.

(2) A hearing should not be scheduled at an obviously inconvenient hour, like in the morning or afternoon. Most townspeople work and the best time for such hearings is in the evening.

(3) Some kind of study or report should be prepared by an expert in the subject matter of the hearing, which person can be present to testify in favor of the proposal. If the town board has received a petition asking the board to act on the subject matter of the hearing, then, by all means, the signers of the petition should be contacted and requested to attend the hearing and speak up. These techniques are suggested because often the only people who attend a town hearing are those "opposed." It is tough to approve a proposal when the only people who spoke on it at the hearing were those opposed.

(4) When the hearing opens it is a good idea to have the notice of hearing read aloud by the town clerk, together with the proof of publication and posting. After that the supervisor, town attorney or other town officer or employee called upon by the supervisor should explain in layman's language what the proposal before the hearing is all about; and what the consequences will be if it is approved or not. After that, it is good practice to explain the ground rules of the hearing. These may, in part, be a review of any rules of procedure; but in this case, of course, the people present are expected to express opinions and ask questions. If it appears to be a controversial matter, it might be explained that the town board will not reach any decision at that meeting, but will listen to the testimony and take the matter under advisement, and then approve or disapprove the proposal at a subsequent meeting of the town board.

(5) The supervisor and town board are cautioned against getting caught in the trap of a request for a show of hands, or vote, of those residents present on the matter. Such a vote is meaningless. On the other hand, it should be explained that the decision rests with the town board as the legislative body of the town, and that the town board seeks the help and advice of the town citizens.

(6) Speakers from the floor.

(a) The supervisor should emphasize that anyone choosing to speak should address his or her remarks to the town board only. In this way, any debate between those "for" and those "against" the proposal should be avoided.

(b) It is also suggested that the supervisor advise that no person may speak a second time until everyone who wants to speak has spoken.

(c) If there is a big crowd present, the five-minute rule should be enforced strictly. Otherwise, it might be politic to be more lenient.

(d) An explanation should be given that the town board is there to listen, not necessarily to express its own views or opinions.

(e) Town board members should not feel required to debate with the audience questions like: "Why are you doing this now?" or "Why didn't you do it sooner?" These questions could be answered with a response such as: "This hearing is not being held to debate questions like that. We are here to listen to your opinion on the proposal before us tonight. We want your advice and help in coming to the proper conclusion on the matter concerning which the hearing has been called. If you are in favor of the proposal, simply tell us and give us your reasons why; and likewise, if you are against."

§ 4-12. Tape recording meetings.

A town board has the power and authority to control its own proceedings. The question of whether a member of the public attending an open meeting under the Open Meetings Law (Public Officers Law Article 7) may record it with a cassette recorder had been debated since enactment of such law in 1976. Administrative advisory opinions had concluded that a member of the public has the right to so tape-record (1980 Op. Atty. Gen. 145; Comm. on Open Gov't Op. Nos. 367 and 380 of 1979). A district court in Suffolk County

came to the same conclusion. (People v. Ystueta, 99 Misc.2d 1105; see also Feldman v. Town of Bethel, 106 A.D.2d 695, in which it was held that a reporter had the right to record a town board meeting) The Appellate Division of the Second Department has agreed with the advisory opinions. The Appellate Division stated that a hand-held recording device "is not obtrusive" and does not disrupt from the meeting deliberations. The Court also found that the privilege of recording the meeting is in furtherance of the purposes of the Open Meetings Law. Consequently, the Court voided a school board's resolution which prohibited the use of a tape recorder at public meetings of the school board. (Mitchell v. Bd. of Education of Garden City, NYLJ 10/3/85) For towns this decision seems to settle the issue. Town Law § 63 authorizes a town board to adopt rules for its procedure. A town board also has the power to adopt a local law, not inconsistent with a general law, relating "to the transaction of its business." The Mitchell case, however, indicates that the power of the body to adopt rules for its operations does not extend to banning tape recorders. The Court said that the prohibition is considered "irrational." This decision should serve as a general guide against blanket prohibitions of use of tape or video recorders by persons attending a board meeting. In addition, the town board may not prohibit the use of video cameras at town board meetings. [Peloquin v. Arsenault, 162 Misc.2d 306 (1994, Sup.)] Although the town board cannot ban the use of video equipment at a town board meeting, the board could adopt reasonable rules regarding usage of video equipment so that the deliberative process is not disrupted (Comm. on Open Gov't OML-AO-1062).

Chapter 5

FISCAL MATTERS

ARTICLE I, General Provisions

§ 5-1. Responsibility of town board.

The Town Law places in the town board the responsibility for the general management and control of the finances of the town. An important function of the town board in meeting this responsibility is in connection with the raising of monies to run the town and with the proper and legal expenditures of such monies.

§ 5-2. Definitions.

Several fiscal and budget terms are defined in Town Law § 103 as follows:

ADMINISTRATIVE UNIT -- An office, department, division, bureau, board, commission, district, or other agency of town government, excluding a fire district.

BUDGET OFFICER -- The supervisor or, in towns with more than one, the presiding supervisor, or any person other than a member of the town board whom the supervisor appoints to that office to serve at his or her pleasure.

CAPITAL PROJECT -- Any physical public betterment or improvement, or studies, surveys and related plans or lands or rights in land, or any furnishings, machinery, apparatus or equipment for any physical public betterment or improvement when first constructed or acquired, or any combination of these.

§ 5-3. Budget and fiscal year.

A. Fiscal year; budget. All towns operate on a fiscal year which runs from January 1 to December 31. The monies to run the town government are raised in a budget which is prepared and adopted, as will be seen later, during the fall of the preceding fiscal year.

Taxes collected to raise the monies to be used to run the town government during the fiscal year are those taxes collected during January in each year.

B. Expenditures. Every expenditure or commitment of town monies must be within the provisions made therefor in the annual town budget. No monies may be spent or contracted to be spent, nor any liability incurred, which involves the expenditure of money for any purpose unless provision has been made therefor in the annual budget. It is essential that all town board members have a clear understanding not only as to the techniques of adopting a legal budget, but also as to the rules involved in living within the town budget.

§ 5-4. Town budget calendar.

1. Budget officer furnishes heads of administrative units (departments and officials) with estimate forms

Date

9/1 Westchester
County
Towns Only

10/1

Town Law

Recommended

2. Submission of estimate by 9/20 10/20 § 104

3. Filing of tentative budget with town clerk by 9/30 10/30 § 106(2)

4. Town clerk submits tentative budget to town board by 10/5 11/10 § 106(3)

5. Revision by town board; preparation of preliminary completion of review Upon and modification of tentative budget budget, and prior to public hearing, to be filed in town clerk's office §106(4)

6. Notice of public hearing At least 5 days between

notice publication and hearing date

§ 108

7. Public hearing by Thursday following election 12/10 § 108

May be adjourned, but not beyond

11/15 12/15

8. Final revision of preliminary

budget After public hearing but prior to final adoption

§ 108

9 Adoption of budget by 11/20 12/20 § 109

ARTICLE II, Budgeting Process

§ 5-5. Start of process; procedural requirements.

The first steps in the adoption of a town budget must be taken in September. The adoption of a legal town budget requires that various procedures be accomplished within the very specific time schedule set forth in the Town Law. See the calendar in § 5-4 above. All actions taken by the town board in connection with the budget procedure must be taken at a formal meeting of such town board; that is, either:

A. At a regular meeting held pursuant to a resolution adopted and entered in the minutes of the town board at the annual organization meeting of the town board in January (as previously discussed); or

B. At a special meeting called for such specific purpose.

§ 5-6. Estimates (Town Law § 104).

A. Town officers. The budget officer is authorized to prescribe the forms for the submission of revenues and expenditures for administrative units. Estimates must be submitted to the budget officer on or before September 20 (October 20). If the head of an administrative unit fails to submit the required estimates by that date, the budget officer prepares the estimates for that unit. The sections of law relative to submission of estimates by the town superintendent of highways, town social services officer (if any), and commissioners of improvement districts require their submission to the budget officer by September 20 (October 20). Regarding these officers see also Highway Law § 141; Social Services Law § 89(2); and Town Law § 215(10).

B. Forms. The following forms are illustrative only and may be changed to conform to local conditions. As stated above, the budget officer is authorized to prescribe the forms for revenue and expenditure estimates.

ESTIMATE OF EXPENDITURES

(Administrative Unit)

Unit Code _____

By _____

Date _____

	Actual 20__	Budget as Modified 20__ 20__	Depart- mental Request
.1 PERSONAL SERVICES			
(List all employees giving Title, Number of Persons and Rate of Compensation)			
_____			\$ _____
_____			\$ _____
_____			\$ _____
Total Personal Services	\$ _____		\$ _____

.2 EQUIPMENT			
(Show individual items)			
_____			\$ _____
_____			\$ _____
_____			\$ _____
Total Equipment	\$ _____		\$ _____

.4 CONTRACTUAL EXPENSES			
(List by major items or types)			
_____			\$ _____
_____			\$ _____
_____			\$ _____
_____			\$ _____
Total Contractual Expenses			\$ _____

TOTAL FOR ADMINISTRATIVE UNIT \$ _____ \$ _____ \$ _____

COMPLETE AND RETURN TO BUDGET OFFICER BY _____
(Date)

ESTIMATE OF REVENUES
Unit Code _____
By _____
Date _____

	Actual 20__	Budget as Modified 20__	Departmental Estimate 20__
Code Item* _____			\$ _____
_____			\$ _____

_____	_____	\$ _____	\$ _____	\$ _____
_____	_____	\$ _____	\$ _____	\$ _____
_____	_____	\$ _____	\$ _____	\$ _____
_____	_____	\$ _____	\$ _____	\$ _____
_____	_____	\$ _____	\$ _____	\$ _____
_____	_____	\$ _____	\$ _____	\$ _____
_____	_____	\$ _____	\$ _____	\$ _____
_____	_____	\$ _____	\$ _____	\$ _____
_____	_____	\$ _____	\$ _____	\$ _____
_____	_____	\$ _____	\$ _____	\$ _____
TOTAL FOR ADMINISTRATIVE UNIT		\$ _____	\$ _____	\$ _____

* Show all revenue received directly by the administrative unit. Explain any sales of equipment. Explain any unusual items such as gifts, etc.

COMPLETE AND RETURN TO BUDGET OFFICER BY _____
(Date)

§ 5-7. Tentative budget (Town Law § 106).

A. Review of estimates by budget officer. After estimates are submitted, the budget officer reviews the estimates. He or she may require the head of any unit to furnish additional information and to answer pertinent inquiries.

B. Required items. The budget officer then prepares the tentative budget and includes his or her recommendations. The tentative budget must show by funds:

- (1) Proposed appropriations and estimated revenues;
- (2) Estimated fund balances;
- (3) The amount of taxes to be levied;
- (4) Salaries of elected officers;
- (5) Such other information pertinent to the above as prescribed by the State Comptroller.

C. Budget message; filing. Budget officers may attach a budget message explaining the main features of the tentative budget and include any additional information they deem advisable. On or before September 30 (October 30), they must file in the town clerk's office the tentative budget with the budget message, if any, and the estimates and schedules.

D. Presentation to and review by town board. The town clerk is required to present the tentative budget to the town board at a regular or special meeting held on or before October 5 (November 10). As a practical matter, board members may already have received a copy of the budget from the supervisor as a courtesy, since many release the budget to the press at the same time it is filed with the town clerk.

(1) The town board may call upon the budget officer and the head of any administrative unit to discuss the tentative budget and the estimates as originally submitted. The head of any administrative unit may request in writing that he or she be permitted to explain his or her estimates to the town board.

(2) The board reviews the tentative budget and may make any changes, alterations and revisions it considers advisable which are not inconsistent with law. Upon completion of the review, the tentative budget as modified by the town board becomes the preliminary budget and must be filed in the town clerk's office. The town clerk reproduces as many copies of it for public distribution as the town board directs.

§ 5-8. Preliminary budget (Town Law § 107).

A. Required items. The preliminary budget must be in the form prescribed by the State Comptroller and show by funds:

(1) Proposed appropriations and estimated revenues classified as prescribed by the Uniform System of Accounts for Towns;

(2) Estimated fund balances;

(3) Taxes to be levied;

(4) Salaries of elected officials;

(5) Any other pertinent information prescribed by the State Comptroller.

B. Contingencies. The budget may contain an appropriation for contingencies in both town-wide and town-outside-village funds. A contingent appropriation may not exceed 10% of total appropriations less the amount for debt service and judgments, estimates for special district purposes, and for the repair and improvement of town highways.

C. Highway funds. Amounts to be raised for highway purposes must be within the limitations of Highway Law § 271.

D. Additional information. The preliminary budget shall include any other data which the town board may require.

§ 5-9. Fire district budgets (Town Law § 105).

The boards of fire commissioners must file their estimates with the budget officer by September 20 (October 20). The estimates must be in the same format as the town budget. (See §§ 5-7 and 5-8 above.) The budget officer must affix the fire district budget to the town tentative budget. No changes may be made in the fire district budget by either the budget officer or the town board.

§ 5-10. Interest charges against districts (Town Law § 114).

A. The town board may include in the annual budget of a special district an appropriation for interest on tax or revenue anticipation notes borrowed for district purposes.

B. State and federal aid and gifts which are required to be expended for a particular

object or purpose, and insurance recoveries received for the loss, theft, damage or destruction of real or personal property, may be appropriated by the town board at any time for such objects or purposes.

§ 5-11. Public hearing (Town Law § 108).

A. When hearing must be held. On or before the Thursday following the November general election (on or before December 10 for Westchester County towns), the town board must hold a public hearing on the preliminary budget.

B. Notice.

(1) A notice of the public hearing must be published, with at least five days between the first publication of notice and the date specified for the public hearing. The notice must be published in the official newspaper; or if none has been designated, in any newspaper having general circulation in the town. The town board may, by resolution, require additional publications of the notice of hearing.

(2) The notice must state:

(a) The time and place where the hearing will be held;

(b) The purpose of the hearing;

(c) The statement that a copy of the preliminary budget is available at the town clerk's office where it may be inspected during office hours;

(d) The proposed salary for each member of the town board, an elected town clerk and an elected town highway superintendent.

(3) At least five days before the day designated for the public hearing, a copy of the notice must be posted on the signboard of the town.

C. Adjournment. The hearing may be adjourned from day to day but not beyond November 15 (December 15).

D. Public participation. At the public hearing any person may be heard in favor of, or against, the preliminary budget or any item in it.

§ 5-12. Final revision and adoption of budget (Town Law § 109).

A. After the public hearing, the town board may alter and revise the preliminary budget, subject, of course, to the restrictions of Town Law § 107 (i.e., must be in the prescribed form, appropriations for contingent purposes must be within the 10% limitations, and taxes for highway purposes must be within the limitations of Highway Law § 271).

B. The budget must be adopted by November 20 (December 20) and be recorded in the minutes of the town board. It then becomes the annual budget of the town for the next fiscal year. If the town board fails to adopt a budget by November 20 (December 20), the preliminary budget, with such changes as the town board may have made, will constitute

the budget for the ensuing fiscal year.

§ 5-13. Tax levy (Town Law § 109).

The town clerk is required to prepare and certify in duplicate the annual budget as adopted by the town board, together with the estimates for special improvement districts. Within five days thereof, he or she is required to deliver two copies to the supervisor, who must present such copies to the county legislature within ten days after receipt thereof from the clerk, for levy with county taxes (Ch. 250, L. 1975).

§ 5-14. Benefit districts.

Budgets for special improvement districts are prepared at the same time as the general town budget. An exception to this exists in the case of special improvement districts (outside Westchester County) organized on a benefit basis, in which case the town board (or commissioners if the district is operated by a separate board of commissioners) prepares detailed budget estimates for maintaining these districts for the ensuing year.

A. Preparation of assessment roll. After these estimates are prepared, the town board or the commissioners assess the costs against the real property in the district benefited in proportion to the benefits it determines each will derive, and then prepares an assessment roll listing the properties, their owners and the assessment so levied on each.

B. Filing of estimates and assessment roll; public hearing. These estimates and assessment roll are then filed by the town board with the town clerk between September 1 and 15 each year. Thereafter, the town board must hold a public hearing on the question of the adoption of the assessment roll (Town Law § 239). Notice of such hearing must be published at least 10 and not more than 20 days before the date specified for the hearing.

C. Objections. The town board must meet at the time and place so specified and consider any objections to the assessment roll. It may change or amend the same, or may annul the same and prepare a new roll. If a new roll is prepared, notice must be given of a new public hearing. Notice must also be mailed to each property owner, apprising them of the hearing. (*Garden Homes Woodland Company v. Town of Dover*, 720 NYS2d 79, 2000 NY Slip Op. 10391)

D. Adoption of assessment roll; filing. The assessment roll must be adopted (whether amended, changed or prepared anew) at least 30 days before the annual meeting of the board of supervisors (or county legislative body) at which taxes are levied in the county [Town Law § 202-a(5)]. When finally adopted, it must be filed in the office of the town clerk. The town clerk prepares and certifies duplicate copies at the same time he or she performs this duty in connection with the annual budget. One is filed in the clerk's office, the other is delivered to the supervisor, who transmits the roll to the board of supervisors (county legislative body) along with the annual budget, for levy of taxes against the properties benefited.

§ 5-15. Appropriations and transfers.

A. Supplemental appropriations (Town Law § 112).

(1) During the fiscal year, the town board may, by resolution, make supplemental appropriations from unexpended balances of other appropriations, from an appropriation for contingencies, from unanticipated revenues or from unappropriated cash surplus

within a fund, or from borrowings pursuant to the provisions of the Local Finance Law. However, unanticipated revenues or unappropriated cash surplus may be used only to the extent that the total of all revenues of a fund, together with cash surplus, exceeds the total of all revenues and appropriated cash surplus as estimated in the budget.

(2) The town board may direct the supervisor to pay to the county treasurer monies from any source (except borrowings) not otherwise committed or appropriated to reduce the levy for county purposes. Such monies must be paid to the county treasurer prior to the levy of taxes.

(3) State and federal aid and gifts which are required to be expended for a particular object or purpose, and insurance recoveries received for the loss, theft, damage or destruction of real or personal property, may be appropriated by the town board at any time for such objects or purposes.

B. Transfers (Town Law § 113 and Highway Law § 285-a).

(1) The town board, by resolution, may transfer surplus monies, contingent appropriations and unexpended balances as follows:

(a) From General Fund, Town-Wide to any of the highway funds or accounts for which taxes are levied on the entire area of the town; and

(b) From General Fund, Town-Outside-Villages to any of the highway funds for which taxes are levied solely on the area of the town outside villages; and

(c) Between highway fund accounts authorized by Highway Law § 141, except for a town that has exempted villages from taxes for Items 3 and 4 (machinery and snow removal).

(2) There is no authority for the transfer of funds from any item in the highway fund to the town general fund.

C. Encumbering appropriations (Town Law § 110). Each department head is required to file with the supervisor a list of unpaid obligations as of the close of the fiscal year. In turn, the supervisor is required to encumber the applicable appropriation account balances. If the town board wishes, it may require encumbering appropriations at more frequent intervals. The following form is illustrative only:

Town of _____
Administrative Unit _____

LIST OF UNPAID OBLIGATIONS

TO: Town Supervisor

The following is a list of all unpaid obligations of this administrative unit as of December 31, 20____.

Appropriation		
Code No.	Vendor or Description	Estimated
Amount	For Fiscal Officer's Use Only	

DEPARTMENT HEAD OR
REPRESENTATIVE:
I certify that the above list
is complete.
Signed _____
Title _____

SUPERVISOR:
Except as otherwise indicated,
appropriation accounts have been
encumbered for the above obligations.

Signed _____
Date _____

Completed form to be filed with supervisor's (comptroller's) financial records

D. Lapse of appropriations (Town Law § 111). Balances of appropriations which are not encumbered lapse at the close of the fiscal year, except that an appropriation for a capital purpose continues in force until the purpose for which it was made has been accomplished or abandoned.

ARTICLE III, Compensation of Officers and Employees (Town Law § 27)

§ 5-16. Notice of amounts; increases.

Salaries of the supervisor and town board members, an elected town clerk and an elected town superintendent must be set forth in the notice of public hearing on the preliminary budget. Those salaries cannot be set at an amount greater than that which appears in the notice. There is provision, however, for the town board to increase even these salaries once during the year by adopting a local law subject to permissive referendum pursuant to the Municipal Home Rule Law. These salaries can always be fixed at lesser amounts, however. The salaries of town officers and employees generally may not be fixed at or increased to an amount greater than the amount appropriated for such purpose (Town Law § 117). Proposed salaries of town justices, tax collectors and receivers, a town attorney, a town engineer, an appointed town clerk or an appointed town superintendent of highways are not required to be specified in the notice of public hearing.

§ 5-17. Salaries.

The budgetary provision for salaries of town officers does not of itself establish these salaries at the amounts set forth in the annual budget. Further town board action is necessary to fix these salaries.

A. Establishment; modification. Salaries of town officers (elective and appointive) and of employees and their pay periods are fixed each year by resolution of the town board at its organizational meeting at the first of the year. The Town Law provides that these salaries may be fixed "from time to time," which means that the town board may increase or decrease salaries throughout the year as it chooses, subject to the limitations discussed below [Town Law § 27(1)]. One note of caution: There have been some reported cases in the lower courts which have not read the "from time to time" language literally. Go carefully here. Consult with your town attorney. [See *Sacco v. Maruca*, 175 AD2d 578 (1991) as contrasted with *Opn. St. Comp. No. 84-25*]

B. Yearly changes. Under the budget system, salaries of town officers can be altered from one fiscal year to the next. In this regard, note that recent case law has held that:

- (1) Town justices' salaries cannot be reduced during their term of office; and
- (2) In several other instances involving substantial reductions in the salaries of elected officials, the town board cannot arbitrarily reduce salaries when the effect may be to discourage one from taking office or continuing to hold town office.

C. Specific salaries.

(1) Town justices. The town board may fix the salary of one justice at a larger amount than that of the other.

(2) Town councilpersons or assessors. There is no provision in the town law for fixing the salaries of town councilpersons or assessors (where elected assessors have been retained) in different amounts, except the salary of the chairman of the board of assessors may be in an amount greater than that of the other assessors. However, the State Comptroller has opined that the town board may fix a higher salary for a board member based on additional duties assigned for that office (*Opn. St. Comp. No. 91-53*).

(3) Police department. In towns in which no police department has been established, the town board may compensate its constables and special policemen:

- (a) By a fixed salary for all services, requiring such officers to turn over to the supervisor all fees, per diem or other compensation received by them from any source; or
- (b) It may permit such constables and special policemen to retain fees and other compensation for services rendered by them in civil actions and proceedings only, and fix their salaries for all other services.

(4) Registrar of vital statistics. The town board may fix a salary for the office of registrar of vital statistics, or it may provide that the compensation for such office shall be

the fees authorized under the Public Health Law.

(5) Dog control officer. A dog control officer is compensated on a salary basis fixed by the town board.

(6) Budget officer. The budget officer may receive, in addition to any other compensation, a salary as budget officer.

D. Fees excluded from salary. Aside from the exceptions noted above, the compensation of all town officers is by salary, and that salary "shall be in lieu of all fees, charges or compensation for all services rendered to the town or any district or subdivision thereof" (Town Law § 27). Any fees or monies received by a town officer or employee shall be the property of the town and paid over to the supervisor, except such fees and monies the application of which is otherwise provided by law.

ARTICLE IV, Accounting

§ 5-18. Duties of supervisor (Town Law § 125).

A. Duties enumerated. The supervisor shall:

(1) Keep his records in the manner and form prescribed by the State Comptroller;

(2) Show on every check the fund against which it is drawn and the appropriation chargeable;

(3) Not permit any fund or appropriation to become overdrawn nor charge one fund or appropriation to pay a claim chargeable to another;

(4) Pay out money only upon warrant, order or draft of the town clerk after audit and allowance of the town board, unless there is a town comptroller. Where there is a town comptroller, the supervisor shall pay out money only upon warrant, order or draft of the town comptroller.

B. Payment without prior audit. The supervisor, without prior audit, may pay principal and interest on indebtedness; salaries of officers or employees; and amounts due on contracts for periods exceeding one year. Note that the town board may by resolution also authorize the payment in advance of audit of claims for public utility services such as gas, electric, water, sewer, fuel oil and telephone services, as well as for postage, freight and express charges [Town Law § 118(2)]. Claims for these payments shall be presented at the next regular meeting for audit.

C. Monthly statement required. At the end of each month, the supervisor shall render to the town board a detailed statement of all money received and disbursed for such month, and shall file a copy in the office of the town clerk.

§ 5-19. Comptroller as accounting officer (Town Law § 124).

A. In a town where the office of town comptroller has been established and a comptroller has been appointed, the town board may determine by resolution that he or she shall be the accounting officer and the accounting duties of the supervisor shall be transferred to, and performed by, the comptroller. (Although the supervisor is not relieved

of his or her duties as treasurer of the town, he or she may pay out town monies only upon warrant of the town comptroller, and every officer required to submit a monthly statement to the supervisor pursuant to Town Law § 27 must furnish a copy to the town comptroller.)

B. Record and reporting requirements.

(1) The town comptroller as accounting officer shall:

(a) Keep detailed accounting records.

(b) Render a detailed monthly report to the town board of all receipts and disbursements and file a copy in the town clerk's office.

(c) Prepare and file with the town clerk by January 31 each year an annual financial report of the monies received and disbursed, with bank certifications showing the amount of money on deposit; and shall publish a copy of the report in the official newspaper.

(2) In lieu of preparing the report as described above, within 60 days after the close of the fiscal year, the town comptroller may file with the town clerk a copy of the annual financial report to the State Comptroller.

(3) Within 10 days after receipt thereof, the town clerk shall publish in the official newspaper and in such other newspapers as the town board may direct, either a summary of such report or a notice that the report is available in the town clerk's office for public inspection and copying [Town Law § 29(10-a)].

C. Additional responsibilities. In addition to the above, the town board may also provide (by ordinance or local law) that either or both of the following powers and duties of the supervisor shall devolve upon the town comptroller:

(1) Keeping appropriation accounts and preventing overdrafts;

(2) Drawing upon funds and appropriations, provided checks are countersigned by the supervisor.

D. Town Law § 34(2) provides that the "town comptroller shall furnish the supervisor with such information and data as the supervisor may require for the purpose of enabling him to exercise his powers and perform his duties or make reports required by law."

ARTICLE V, Claims and Payments

§ 5-20. Claims (Town Law § 118).

A. Proper town charges. After its adoption, the annual town budget is the financial yardstick of the town for the ensuing year. As previously explained, the functions of the town must be carried on within the appropriations made in such budget, and the town officers are held strictly accountable in this respect. The purposes for which this money can be spent are only those specified by law or those necessary to carry out a legal power

or duty of the board. Such expenditures are sometimes referred to as "proper town charges" and, as will be seen later, the town board in its audit of claims against the town must, before authorizing payment, determine whether or not such claims represent proper town charges.

B. Itemized vouchers required. No claim shall be paid unless an itemized voucher in the form prescribed by the town board, or the town comptroller, shall have been presented to the town board and shall have been audited and allowed. Vouchers shall be accompanied by a statement by the officer whose actions gave rise or origin to the claim that the officer approves the claim and that the service was actually rendered or supplies or equipment actually delivered. The town board may require by resolution that vouchers be certified or verified.

C. Utility bills. If a utility bill contains a "net" and a "gross" amount when payment is made after a specified date, the town board should consider authorizing advance payment. When payment is made after the "net" date, the town is liable for the "gross" amount even if the "net" payment date is less than 30 days from receipt of the bill (Opn. St. Comp. No. 78-701).

§ 5-21. Audit of claims (Town Law § 119).

A. Town board audit. Claims presented for audit should be numbered consecutively by the town clerk and should be available for public inspection at all times during office hours. The town board is not required to audit any claim until 30 days after presentation to the town clerk. As a practical matter, the board generally audits claims at the same meeting at which they are presented.

(1) In considering a claim, the town board may require the person presenting it to give evidence under oath as to the justness and accuracy of the claim and may subpoena witnesses to give evidence regarding the claim.

(2) After audit, the town clerk must file the claims in the clerk's office in numerical order. He or she must prepare an abstract of audited claims, listing for each the number, name of the claimant, amount allowed and the fund and appropriation account chargeable. The abstract includes a warrant authorizing and directing the supervisor to pay to the claimants the amounts allowed.

(3) The following is a suggested form of Abstract of Audited Vouchers for use in towns.

Town of _____

ABSTRACT OF AUDITED VOUCHERS

FUND

NO. _____

PAGE _____

Voucher

No. Claimant

(name & address) of Check No.	Appropriation ü	Amount		
ü	Encumbrance	Check		
Liquidated	Account	Amount	Number	Amount
Summary of Accounts				
Acct. Code	Amount to be Charged		Totals	

(1)
Totals

To the Supervisor: I certify that the Vouchers listed above were audited by the

_____ on _____ and allowed _____ (Town Board-Comptroller) (Date)

in the amounts shown. You are hereby authorized and directed to pay to each of the claimants the amount opposite his or her name.

_____ Date _____ Town Clerk – Comptroller

(4) No warrant shall be drawn against a fund or appropriation account to pay claims chargeable to another.

B. Role of town clerk. The statutory duties of a town clerk relative to the audit of town claims may be transferred to another town official only by local law subject to mandatory referendum. Ministerial pre-audit functions, such as checking for mathematical accuracy, may be delegated by town board resolution to a town official other than the clerk Opn. St. Comp. No. 91-43).

C. Town comptroller audit. When a town comptroller audits claims, all of the duties and powers listed above for the town clerk and the town board are performed by the comptroller. The comptroller is required to keep a separate account for each budget appropriation. He or she may not allow any fund or appropriation account to be overdrawn or draw against one fund or appropriation account to pay a claim chargeable to another fund or appropriation account.

REJECTION OR ADJUSTMENT MEMO

Date _____

Voucher No. _____ submitted at \$ _____ has been:

· Rejected (see reason below)

· Adjusted to \$ _____

(see reason below)

Agency _____

Additional Documents Required

- .. Purchase Order
- .. P.O. Change Notice
- .. Invoices
- .. Receipts
- .. Subvouchers
- .. Statement-Auto Travel

Reason for Rejection

Error In

Requires: .. Extension .. Footing .. Classification

.. Proper execution

(items must be typed or written in ink)

Reason for Adjustment

.. Contract Number Dates Allowed At

.. Description of Material/Service .. Meals

.. Dates Merchandise Received

.. B _____

.. Correction of Contract Price

.. L _____

.. Correction of Subvoucher

.. D _____

.. Address .. Lodging _____

.. Signature .. Vendor .. Department .. Taxi _____

.. Appropriation Charges and/or .. Tips _____

Expenditure Codes .. Tax (not allowed)

.. Description of Purpose of Travel .. First class RR fare in lieu

.. Time of Arrival and Departure of mileage _____

.. Identification of Means of Transportation .. Cost difference (return home

.. Name of Official Station v. staying on assignment) _____

.. Mileage _____

Remarks:

Leave slip attached when returning Corrected Voucher. NOTE: Make all explanations and corrections on the VOUCHER, not on slip

D. Form of claim. Town Law § 188 requires that each claim against the town which is subject to audit shall be made by a voucher in a form prescribed by the town board or town comptroller. As mentioned previously, the voucher must be approved by the town officer who incurred the obligation. If required by town board resolution, it must be certified (or verified) to be true and correct by or on behalf of the claimant. It must be itemized.

(1) The following is a sample form of voucher which calls for certification by the vendor. Any town which requires verified or notarized claims must, by resolution of the town board, change the format accordingly from certification.

Print name & address of municipality in this space

VOUCHER Space below for municipal use

Purchase
Order No. Voucher No.
Date Voucher
Received

Fund Appropriation Amount

Dept. or Agency

Claimant's name & address

Total

Terms _____

Audited by Check No.

Dates	Quantity	Description of Materials or Services	Unit Price	Amount
-------	----------	--------------------------------------	------------	--------

(See instructions on reverse side)

Total

CLAIMANT'S CERTIFICATION

I, _____, certify that the above account in the amount of \$ _____ is true and correct; that the items, services and disbursements charged were rendered to or for the (Name of Municipality) on the dates stated; that no part has been paid or satisfied; that taxes, from which the (Name of Municipality) is exempt, are not included; and that the amount claimed is actually due.

Date Signature Title

Space below for municipal use

DEPARTMENT APPROVAL
PAYMENT

The above services or materials were rendered paid or furnished to the _____ above. on the dates stated and the charges are correct.

APPROVAL FOR

This claim is approved and ordered from the appropriations indicated

Date Authorized Official Date _____
Auditing Committee

INSTRUCTIONS

DEPARTMENT OR AGENCY: Indicate the department that received the service or supplies. Send one copy of the voucher properly completed to that department. Use a separate voucher for charges against each department.

CLAIMANT'S NAME AND ADDRESS: All claimants must print or typewrite their name and address in the space provided for the purpose. The check will be drawn in that name and mailed to that address.

TERMS: Show any discounts that are allowed for prompt payment.

PURCHASE ORDER NO.: If a purchase order has been issued for the items charged on this voucher, show the number thereof.

VENDOR'S REFERENCE NO.: If the vendor requires a reference number, in order to identify the check in payment of this voucher, show such number.

DESCRIPTION OF MATERIALS OR SERVICES: All charges must be itemized. In the space provided in the body of the voucher, show, where applicable: (1) dates of service or delivery; (2) quantities; (3) description of charges; (4) unit price; (5) amount. If more space is required than that provided, any sheet of paper this size may be used. Bring the total forward to this voucher. Any company that has its own invoice or bill form may refer to it by number or other identification in the body of the voucher and show the total in the amount column. Attach the form to this voucher.

CLAIMANT'S CERTIFICATION: The claimant's certification must be completed. The

date on which the signature is affixed must be given. The title of the person signing must clearly indicate his relationship to the claimant, e.g., sole owner, partner, treasurer, bookkeeper, billing clerk, etc. Notary not required.

DELIVERY RECEIPTS: Where applicable, attach delivery slips signed by the municipal employee receiving the materials.

RETURN VOUCHER PROMPTLY: In order to expedite payment, this voucher should be returned promptly after the services have been rendered or the materials have been furnished.

(2) The degree of itemization of a voucher should be sufficient to permit intelligent examination and understanding of the transaction for which the claim is made.

(a) At a minimum, the following information should be shown:

1. The date the expense was incurred;
2. A description of the nature of each item so that its legality is apparent;
3. The amount.

(b) It has been held by the courts to be incumbent upon persons making charges against a town to make plain that such charge was in all respects a legal one. It is recommended, in relation to town officer or employee expense accounts, for example, that wherever possible paid bills, such as hotel bills, be attached to vouchers.

ARTICLE VI, Payrolls

§ 5-22. Certification or verification.

Town Law § 120 requires that all payrolls or other claims for compensation for personal services shall be certified by the person having supervision of the claimant, unless the town board determines by resolution that such payrolls and claims must be verified. Certification is a much simpler procedure than verification and merely requires the signature of the official possessing knowledge of the facts below the certification statement. A verification, on the other hand, must be notarized after execution by the town official. Penal Law §§ 175.30 and 175.35 provide as follows:

§ 175.30 Offering a false instrument for filing in the second degree.

A person is guilty of offering a false instrument for filing in the second degree when knowing that a written instrument contains a false statement or false information, he offers or presents it to a public office or public servant with the knowledge or belief that it will be filed with, registered or recorded in or otherwise become a part of the records of such public office or public servant.

Offering a false instrument for filing in the second degree is a class A misdemeanor.

§ 175.35 Offering a false instrument for filing in the first degree.

A person is guilty of offering a false instrument for filing in the first degree when, knowing that a written instrument contains a false statement or false information, and with intent to defraud the state or any political subdivision thereof, he offers or presents it

to a public office or public servant with the knowledge or belief that it will be filed with, registered or recorded in or otherwise become a part of the records of such public office or public servant.

Offering a false instrument for filing in the first degree is a class E felony.

ARTICLE VII, Petty Cash Funds [Town Law § 64(1-a)]

§ 5-23. Purpose.

Town boards may by resolution establish petty cash funds for town officers, heads of departments or offices in the town for:

A. The payment, in advance of audit, of properly itemized and verified or certified bills for materials, supplies or services furnished to the town for the conduct of its affairs, which materials and supplies must be paid for on delivery; and

B. The purpose of making change when such is required in the performance of official duties.

§ 5-24. Amount.

The amount of a petty cash fund for a receiver of taxes and assessments in a town of the first class shall not exceed \$1,000, and for any other officer or office or department head, \$200. Of course, a town board may create such a fund in any lesser amount if it sees fit, depending on the size of the town and the complexities of the office. It may also increase such amounts by adoption of a local law.

§ 5-25. Setup and use.

Upon the adoption of the appropriate resolution creating a petty cash fund, the supervisor would draw a check payable to the respective officer for the full amount of the fund as so created. The town officer would then cash the check into the currency denomination needed and place the same in a cash box or cash register in his or her office.

A. If the petty cash fund is used only for the purpose of making change, it should always total the authorized amount.

B. If the petty cash fund is used for paying for small purchases or items for which payment is due on delivery, it will diminish in cash amount and will have to be replenished as described below.

C. When a payment from a petty cash fund is made, evidence or proof that the payment was actually made is required. The law provides that at the time any payment is made from a petty cash fund, "a bill in form sufficient for audit by the town board as required by law" shall be required to be furnished to the officer for whom the fund was created. The phrase "as required by law" refers to Town Law § 118. The portion of that section applicable here requires that the bill be itemized and certified (or, if the town board has so determined by resolution, verified).

No. 276

(Press-Numbered)

PETTY CASH VOUCHER

Expenditures as Authorized by _____

Paid to: _____ Date: _____

Description - Commodity or Appropriation
Service - Itemize Account Amount

Delivery Ticket # _____ Attached hereto
Received Payment _____
Title _____

CLAIMANT'S CERTIFICATION

I, _____, certify that the above account in the amount of \$ _____ is true and correct; that the items, services and disbursements charged were rendered to or for the _____ on the dates stated; that no part has been paid or satisfied; that taxes, from which the _____ is exempt, are not included; and that the amount claimed is actually due.

Date Signature Title
Approved by _____
Title _____

§ 5-26. Claims for reimbursement.
The law requires each town officer for whom a petty cash fund has been created to make a claim for reimbursement at each town board meeting.

A. Form; contents; reimbursement. This claim would be made on a regular town claim form. It would list all the expenditures made since the last meeting of the board. All the bills which were received when these expenditures were made should be attached to this claim. After the town board has audited and allowed the claim, it will direct the supervisor to reimburse the petty cash fund from the appropriate budgetary items. To this extent, the petty cash fund is a revolving, continuous fund.

CLAIM FOR PETTY CASH REIMBURSEMENT

VOUCHER Date Voucher Received
Voucher No. _____
Fund Appropriation Amount _____
Department _____
Claimant's name & address _____

Total \$ 15 47
 Terms _____ Abstract No.
 Vendor's Ref. No.

Dates	Quantity	Description of Materials or Services	Unit Price	Amount
20__				

Jan. 11				
13				
15		Petty Cash Vouchers Attached		

Delivery Charge
 First Aid Supplies
 Postage

Reconciliation January 16, 20__				
Vouchers			\$ 15.47	
Check – Reimbursement			24.74	
Cash – per count			59.79	
Authorized Fund Total			\$100.00	

(See instructions on reverse side)

9
 1
 5

10
 12
 25

Total 15 47

CLAIMANT'S CERTIFICATION

I, _____, certify that the above account in the amount of \$ _15.47_____ is true and correct; that the items, services and disbursements charged were rendered to or for the municipality on the dates stated; that no part has been paid or satisfied; that taxes, from which the municipality is exempt, are not included; and that the amount claimed is actually due.

January 16, 20____

_____	_____	_____
Date	Signature	Title

Space below for municipal use

DEPARTMENT APPROVAL

APPROVAL FOR PAYMENT

The above services or materials were rendered
paid
or furnished to the _____
above.
on the dates stated and the charges are correct.

This claim is approved and ordered
paid
from the appropriations indicated

Date Authorized Official
Auditing Board

Date _____

B. Refused claims. If the town board refuses to audit or allow any of such expenditures from the petty cash fund, they become the personal liability of the town officer and must be paid out of his or her own pocket. If the officer does not so reimburse the petty cash fund for such disallowances, amounts shall be withheld from his or her salary and paid into the petty cash fund until it is completely reimbursed.

C. Cash book. Some town officers feel it desirable to keep a cash-book record of expenditures from petty cash. This is particularly desirable in the case of a large petty cash fund from which many payments are made. The cash book leaves town officers with a record after they have submitted their claims for reimbursement with all the bills attached. There is always the possibility that one of the supporting bills may be misplaced or lost and the cash-book record provides a means of identifying supporting bills and the opportunity to obtain a duplicate.

PETTY CASH RECORD

Amount of Petty Cash Authorized (Res.No. 74, 1-7-57) \$100.00

Date 20__ Name of Vendor or Payee Amount Expended Amount Received
Cash on Hand Appropriation

		Number	Title		
1-2	John Doe, Postmaster	8.75	91.25		
1-4	Richard Roe's Express	3.98	87.27		
1-6	Smith's Department Store	7.82	79.45		
1-7	Richard Brown	4.19	75.26		
1-10	Total 1-2 to 1-7 Voucher submitted for reimbursement			24.74	75.26
1-11	Green's Express	9.10	66.16		
1-13	White's Drug Store	1.12	65.04		
1-15	John Doe, Postmaster	5.25	59.79		
1-16*	Reimbursement				
Check # 8475	24.74			84.53	

*NOTE: At this point, add the amount received (\$24.74) to the cash on hand (\$59.79).
The total,

when added to the amount expended (\$15.47) should equal the amount authorized (\$100).

RECONCILIATION AS OF JANUARY 16, 20__

Amount Received \$ 24.74

Cash on Hand 59.79

 Subtotal § 84.53

Expended

 1-11 9.10

 1-13 1.12

 1-15 5.25

Amount Authorized \$100.00

§ 5-27. Exception in case of petty cash fund for tax collectors in towns of the second class.

The life of a petty cash fund in the case of tax collectors in towns of the second class ends prior to the making of their return to the county treasurer at the end of the collecting period. Before making the return to the county treasurer, the collector in a town of the second class must return to the town supervisor the full amount of any petty cash fund established. In order to be able to do this, the collector should secure full reimbursement from the town board for any expenditures made from the petty cash fund as described above. Upon paying over the full amount of the petty cash fund to the supervisor, the collector should receive in return a receipt from the supervisor. The reason for this provision is quite obvious. Once collectors are finished collecting taxes and are ready to make the return of unpaid taxes, they have no further use for a petty cash fund until the start of the next tax collection period. When they again have use for it, the fund can be reestablished by town board resolution. By that time, a new collector may be in place. (Note: This same provision does not apply to a receiver of taxes whose collecting duties are on a year-round basis.)

ARTICLE VIII, Town Charges

§ 5-28. Charges authorized by statute; other authorized expenses.

It has previously been stated that, in general, proper town charges are expenditures made pursuant to a specific statutory authority, or expenses incurred in the accomplishment of powers or duties given to or imposed upon town boards by statute. Certain fundamental statutory authority for the incurring of proper town charges is found in Town Law §§ 64 and 116. However, in other provisions of the Town Law and in a variety of other statutes of our state, there is authority for the incurring of specific charges against the town and for the accomplishment of a variety of duties and powers by the town board which of necessity involve the expenditure of money in order to be accomplished. Town Law § 116 authorizes towns to incur expenses for such items as: compensation and expenses of town officers and employees; damages recovered against a town officer for any act performed in good faith; insurance for loss of public monies through theft; examination of animals for infectious diseases; sobriety tests for drunken driving; independent audit of town records; fees of court officers; expenses of training schools for town officers and employees; dues for the Association of Towns; publication and distribution of reports of the fiscal affairs of the town; and the purchasing or leasing of labor-saving devices. The purposes for which town funds may be expended are not limited to those specified in § 116. In fact, they represent just a fraction of the typical expenses which are incurred in the operation of town government. Town officers are advised to find some statutory authority

prior to making a determination that a claim presented or anticipated to be presented is a proper town charge. However, in addition to finding statutory authority, it must be repeated that a claim does not represent a proper town charge unless an appropriation has been made for the expenditure

§ 5-29. Prohibited expenditures (Town Law § 117).

Unless provision has been made in the annual budget or a supplemental appropriation has been provided, no officer, board, department or commission may expend, or contract to expend, any money or incur any obligations for any purpose except leases or contracts as may have been entered into by the town for a term exceeding one year. Any contract, either verbal or written, made in violation of this section will be null and void.

§ 5-30. Conflicts of interest (General Municipal Law Article 18).1

A. Types of conflicts; applicability.

(1) General Municipal Law Article 18 defines the area of all conflicts of interest involving transactions between town officers and employees and the town. In general, the law forbids town officers or employees from having an interest in any contract with the town if they:

(a) Have the power or duty to negotiate, prepare, authorize or approve a contract or its payment;

(b) Audit bills or claims under a contract; or

(c) Appoint an officer or employee with any of the foregoing powers or duties.

(2) This prohibition would definitely apply to all town board members and the town comptroller where the office has been established.

B. Exceptions. There are several classes of exceptions, however. For example, a contract between the town and a town officer or employee for payment by the town of a reasonable rental for rooms owned or leased by the town officer or employee is now permitted in instances where the room or rooms are used in the performance of the official duties of such officer or employee and are so designated as an office or chamber.

C. Additional statutory provisions. The prohibition on the use of public monies contained in Article VIII, § 1, of the State Constitution should also be kept in mind. This prohibition relates to the giving or lending of public monies or property to or in aid of any individual, association, corporation, partnership, etc.

D. Prohibited payments and expenditures. In relation to its officers and employees, it has been held that a municipality may not pay bonuses, retroactive pay increases, or salary subsequent to death. Prohibitions of civic expenditures include contributions to private hospitals; contributions to defray expenses of conventions of volunteer firefighters; and contributions to the Little League, Boy Scouts or Girl Scouts.

§ 5-31. Judgments (Town Law § 121).

The town board may provide the money necessary to pay judgments or compromised actions or claims pursuant to Town Law § 68, by taxation or by borrowing pursuant to the

Local Finance Law.

ARTICLE IX, Purchasing and Contracting

§ 5-32. In general.

Sometimes, one of the more troublesome problems faced by municipalities is the necessary legal procedure to be followed in awarding contracts for the purchasing of materials, supplies and equipment or for the accomplishing of public works. This is a subject matter which is frequently a source of criticism of municipalities in the reports of the municipal examiners of the Department of Audit and Control. Careful study should be given to the basic legal requirements as set forth herein and every effort should be made to adhere to the spirit and intent of the law. The New York Court of Appeals has stated that the competitive bidding statutes "evinced a strong public policy of fostering honest competition in order to secure the best work or supplies at the lowest possible price." (*Jered v. NYCTA*, 22 NY2d 187, 192) The spirit and intent of the bidding statutes can perhaps best be described as laws enacted for the benefit of taxpayers, to be construed and administered so as to accomplish that purpose fairly and reasonably with sole reference to the public interest.

§ 5-33. Competitive bidding (General Municipal Law § 103).

A. Public works and purchase contracts. When required by General Municipal Law §103, all contracts for public works and all purchase contracts must be awarded to the lowest responsible bidder after advertising for bids. The State Comptroller's Office has opined that the term "public works" encompasses contracts for services, labor or construction and the term "purchase" applies to the procurement of commodities, materials, equipment and supplies. (Opn. St. Comp. No. 87-46)

B. Town building construction contracts. Town Law § 222 requires the town board to award contracts for the construction, alteration or remodeling of all town buildings to the lowest responsible bidder after advertisement for bids where so required by General Municipal Law § 103.

C. Improvements in special improvement districts. With regard to improvements in special town improvement districts Town Law § 197 requires public bidding after advertisement where the estimated expense of the improvement exceeds the amount specified in General Municipal Law § 103.

D. Contracts for the purchase of materials, supplies and equipment; public works contracts greater than \$20,000. General Municipal Law § 103 requires towns to advertise for bids on all contracts for the purchase of materials, supplies and equipment involving an expenditure of more than \$10,000 and on all contracts for the accomplishment of public works involving an expenditure of more than \$20,000 [General Municipal Law § 103(1)]. In determining whether the formal bidding threshold amounts are triggered, trade-in allowances must be included in the total purchase price. (*Hauger v. Earl*, 275 App. Div. 437)

E. Contracts involving both goods and services. When a contract involves acquisition of both goods and services, such as a commodity which requires installation, the State Comptroller's Office has opined that the "contract should be viewed as a purchase for purposes of the competitive bidding monetary threshold if the services are minor,

incidental or customarily provided by the vendor as a component of the purchase." (Opn. St. Comp. No. 87-46) Conversely, "if the services are extensive, substantial or involve specialized skills so that the acquisition of the commodity is incidental to the work, the contract should be treated as a contract for public work." (Opn. St. Comp. No. 87-46) § 5-34. Procurement policies (General Municipal Law § 104-b).

Legislation which raised the General Municipal Law § 103 bidding limits to \$10,000 and \$20,000 for purchase and public works contracts respectively, effective January 1, 1992, required local governments to adopt procurement policies for purchases and contracts for services that are not subject to competitive bidding. New General Municipal Law § 104-b now requires goods and services not required to be competitively bid to be procured in a manner "so as to assure the prudent and economical use of public monies." To reach that objective, town boards, by resolution, "shall adopt internal policies and procedures governing all procurements not required to be made pursuant to the competitive bidding requirements" of General Municipal Law § 103. The town board must solicit comments on its procurement policy and procedures from any of its officers involved in the procurement process, such as the superintendent of highways and purchasing director. The policies are to be reviewed annually. A basic example procurement policy for your guidance and consideration appears as Exhibit C at the end of this manual. Each town should carefully consider its own particular circumstances in developing its procurement guidelines.

§ 5-35. Exceptions to formal bidding.

There are certain statutory and common law exceptions to the formal bidding requirements. The principal ones are as follows:

- A. If the purchase is on state contract through the Office of General Services (General Municipal Law § 104).
- B. If the purchase or work is required by virtue of a public emergency arising out of an accident or other unforeseen occurrence. A carefully drawn resolution, clearly establishing the facts which bring the emergency within this exception, should be adopted by the town board prior to the purchase or the letting of the work [General Municipal Law § 103(4)].
- C. For purchases of surplus or secondhand supplies, materials or equipment from the federal government, the State of New York or from any other political subdivision, district or public benefit corporation (the Thruway Authority, for example) [General Municipal Law § 103(6)].
- D. For purchases made under county contract [General Municipal Law § 103(3)].
- E. Contracts for professional services or those requiring special or technical skill, training or expertise. Precedent for the application of this exception to specific situations has been set by case law. Many State Comptroller Opinions also outline further examples of the professional services exception. Some general guidelines to be applied in this area have been articulated by the Comptroller as follows:
 - (1) Whether the services are subject to state licensing or testing requirements;

(2) Whether substantial formal education or training is a necessary prerequisite to the performance of the services; and

(3) Whether the services require a personal relationship between the individual and municipal officials.

F. Where the subject of the contract is controlled by a sole source so that there is no possibility of competition, a monopolistic situation exists and the courts do not require the empty formality of seeking bids. (Williams v. Bryant, 53 AD2d 229)

G. Leases are not purchases and, thus, a true lease is not subject to General Municipal Law § 103. Towns should be careful that an agreement with a vendor is not cast in terms of a "lease" when the substance of the contract is really a purchase. The substance of the agreement will prevail over its form. Lease-purchase arrangements as authorized by General Municipal Law § 109-b must be competitively bid.

§ 5-36. Formal bidding procedures.

The General Municipal Law's bidding procedures generally have been strictly construed such that failure to follow them precisely could result in a contract being voided.

A. Bid solicitation. An advertisement must be published in a town's official newspaper. The law requires only a single advertisement. In addition, specifications may also be mailed to prospective bidders so long as it is done in good faith. In other words, it should be sent to all known bidders (not just a favored few) within reasonable limitations. The ad must be published at least five days prior to the scheduled bid opening.²

(1) Purchases. The advertisement should contain a fair description of the article to be purchased and state where the particular specifications can be seen and obtained. If, in the case of machinery, for example, the town proposes to trade in an existing piece of equipment, this fact and where this equipment can be seen should be stated. The above reference to a "fair description" means that the description should be of such a nature as to allow for full and fair competitive bidding by different manufacturers or suppliers of the same product. Advertising for a product manufactured by a particular company is not permitted unless the town board adopts a resolution pursuant to General Municipal Law § 103(5) stating that for reasons of efficiency or economy there is a need for standardization. Such a resolution must be adopted by at least 3/5 of all the members of the town board.

(2) Public works. The advertisement must describe the project and, where required, specify the divisions of work and state where the specifications can be seen. General Municipal Law § 102 contains provisions requiring payment of a deposit for copies of the plans and specifications of public works projects and for the return of such deposits if the plans are returned in good condition within a specified time. Where the cost of the building or structure is over \$50,000, there must be separate specifications and awards for construction, plumbing, heating and lighting [the so-called "Wicks Law," General Municipal Law § 101(1)]. Please note that all public works projects (regardless of their cost) are also subject to prevailing wage requirements as set forth in Labor Law § 220.

More information on prevailing wage may be obtained from the New York Department of Labor, Public Works Bureau.

(3) Improvement district projects. The advertisement must describe the project and state that the plans and specifications for the work shall be exhibited publicly in the office of the town clerk, where all persons desiring to examine the same shall have reasonable opportunity to do so.

B. Ad content. The time (day and hour) and place where the bids will be received, opened and read, must be stated. It is useful to include other general information such as the name of the town and where and when specifications can be obtained.

(1) Purchases and public works. At least five days must elapse between the date of the advertisement and the opening of the bids. On larger public works jobs, a substantially longer period of time should be allowed to permit prospective bidders time to prepare their bids carefully.

(2) Improvement district projects. There must be at least 10 and not more than 30 days between the first publication of the advertisement and the opening of bids.

C. Bid submission. All bids must be submitted in sealed envelopes prior to the time specified in the advertisement.

D. Bid opening. The bids must be publicly opened at the time specified, not before, and read aloud. The opening and reading of bids is a ministerial act which can be delegated by the awarding body.

E. Award. A contract should be awarded to the lowest responsible bidder furnishing the required security. The submission of the lowest bid does not in and of itself create a contractual relationship. None is created until the town actually awards the contract. This is often accomplished by a contract signed by the supervisor as authorized by a town board resolution.

(1) Purchases and public works. The bid should be awarded to the lowest responsible bidder who complies with the specifications as advertised. Whether a bid complies with specifications involves a factual determination by the awarding board or officer, and the courts will generally not upset that determination except where fraud or bad faith are present. A town may decline bids which fail to comply with the literal bid specifications or it may waive a technical noncompliance if it is in the town's best interest. Material variance between specifications and a submitted bid which gives a bidder substantial, unfair advantage cannot be waived.

(2) Improvement district projects. The board shall determine the lowest responsible bidder or bidders whose bid and check or bond have been made and filed in conformity with the law and the published notice, and the contract or contracts shall be awarded to the lowest responsible bidder.

F. Bid deposits. There is no statutory provision requiring bid deposits, but it is good practice to require a bidder to accompany his or her bid with a certified check or bond obligating him to execute the contract if it is awarded to him or her.

(1) Purchases and public works. A certified check, money, bonds or other obligations or security deposited to secure a bid shall be retained under the jurisdiction and control of the chief fiscal officer or other officer of the town or district having custody of its money, until returned to the bidder or forfeited (General Municipal Law § 105).

(2) Improvement district projects. If the bidder fails to enter into the contract or to give further security as above described, the check deposited shall be forfeited to the town as liquidated damages and the supervisor shall collect the same or enforce payment of the bond.

G. Performance bond. Although there is no statutory provision requiring performance bonds, it is wise to provide in the bid advertisement and specifications that a performance bond guaranteeing the completion of the work be furnished by the successful bidder upon awarding of the contract.

H. Security on improvement district projects. For improvement district projects, the advertisement for bids must contain a provision requiring all bidders to file with their bids a certified check for a sum equal to 5% of the estimated expense of the improvement, payable to the supervisor, or a bond with sufficient sureties to be approved by the supervisor, in a sum equal to 5% of the estimated expense of the improvement, conditioned that the bidder will execute such further security as may be required for the faithful performance of the contract.

I. Assignment. A provision prohibiting the contractor from assigning or otherwise disposing of a contract or of his right, title or interest therein without the previous consent, in writing, of the board or officer awarding the contract must be inserted in either the specifications or contracts for all public works (General Municipal Law § 109).

J. Noncollusion bidding certification. Every bid or proposal must contain the following statement subscribed by the bidder and affirmed by such bidder as true under the penalties of perjury:

By submission of this bid, each bidder and each person signing on behalf of any bidder certifies, and in the case of a joint bid, each party thereto certifies as to its own organization, under penalty of perjury, that to the best of his knowledge and belief:

(i) The prices in this bid have been arrived at independently without collusion, consultation, communication, or agreement, for the purpose of restricting competition, as to any matter relating to such prices with any other bidder or with any competitor;

(ii) Unless otherwise required by law, the prices which have been quoted in this bid have not been knowingly disclosed by the bidder and will not knowingly be disclosed by the bidder prior to opening, directly or indirectly, to any other bidder or to any competitor;

and

(iii) No attempt has been made or will be made by the bidder to induce any other person, partnership or corporation to submit or not to submit a bid for the purpose of restricting competition.

K. Progress payments on public works projects. All contracts for public works must contain a clause for making periodic payments by the municipality to the contractor for work performed or materials furnished in accordance with the schedule of progress payments set forth in the contract and in accordance with the detailed provisions of General Municipal Law § 106-b. The contract must also provide for periodic payments by the contractor to the subcontractor.

L. Retained percentages. Where a percentage of progress payments is withheld under a contract as a form of security for the town, the contractor may withdraw the same by substituting therefor U.S. bonds or notes, New York State bonds or notes or bonds or notes of any political subdivision. At the direction of the chief fiscal officer, the bonds and notes can be deposited by the contractor with a designated bank. The political subdivision or the bank is required to clip coupons and remit payment to the contractor. The bank or political subdivision may charge a reasonable fee for this service, which may not exceed the amount ordinarily charged for such service by a bank (General Municipal Law §§ 106, 106-a). General Municipal Law § 106-b places certain limits on the amount which may be retained from each progress payment to a contractor.

M. Recycled products. Pursuant to General Municipal Law § 104-a, a town may award a bid and purchase product from a supplier who is not the lowest bidder when:

(1) The product to be purchased has been manufactured from "secondary materials" [as defined by Economic Development Law § 261(1)] and meets the requirements of Environmental Conservation Law § 27-0717(2);

(2) The product price is "reasonably competitive," which means a price no greater than 10%, or no greater than 15% if at least 50% of the secondary materials used in the product's manufacture come from the New York State waste stream; and

(3) The quality is adequate for the purpose intended.

§ 5-37. General bidding requirements.

A. The provision of law requiring that all purchase contracts involving an expenditure of more than \$10,000 shall be awarded to the lowest responsible bidder after advertisement for sealed bids has caused more difficulties to town officials than any other. Some municipal officials have intentionally purchased smaller amounts than they actually needed at the time, and have entered into separate contracts at different intervals, each one less than \$10,000, in order to avoid the requirement of this section. In some cases, this has been determined to be in violation of the obvious intent of the law. It is certainly not recommended to any town.

B. Specifications. The preparation of specifications can be a difficult matter,

especially on the purchase of larger and more expensive machines. Sometimes the specifications are drawn for a particular piece of equipment which the official who is going to be responsible for its use has decided he or she needs. If this is done, there should be language included that would permit other dealers representing other manufacturers to bid. Words like "or equal" or "similar or equal" should be added. Specifications may not be drawn in such a manner as to effectively exclude all but one bidder, nor may a contract award be made in arbitrary disregard of the bidders' conformance with the specifications.

C. Location of bidders. A town may not restrict its invitation to bid on purchase contracts of more than \$10,000 to suppliers who reside in the town or whose establishments are within the town boundaries. Where the cost of delivery is involved, the town can provide in the advertisement for bids that the supplier must have a place of business within a radius of a certain number of miles from the delivery point in the town. However, in such cases this radius distance should not be drawn arbitrarily so as to exclude a particular place of business just a short distance beyond the line which was drawn.

D. Used equipment. In advertising for used equipment, among the items which may be properly included in specifications are: requirements as to condition of the item; requirements as to mileage or time used; a provision that equipment must be produced or marketed not earlier than a particular year; a requirement that the successful bidder furnish a written guarantee that the equipment has been reconditioned and is in good working order; and a provision for a municipal officer or employee to inspect the item (17 Opn. St. Comp. 1961, p 135).

E. Selecting lowest responsible bidder. Many factors can enter into the town board's decision as to who is the "lowest responsible bidder" and whether or not the bid meets specifications. In a leading case on this point, the court held that "the term 'lowest responsible bidder' does not mean one who is only pecuniarily responsible, but one who also possesses moral worth. It implies skill, judgment and integrity, as well as sufficient financial resources." In the absence of a showing to the contrary, it will be assumed that the discretion exercised by the awarding agency was exercised with an honest desire to award the contract to the lowest responsible bidder. In another case, a court held: "The word 'responsible' is not limited to financial or pecuniary responsibility, but is broad enough to include the bidder's ability to perform the contract according to its terms." The question of the actual financial responsibility of the lowest bidder can be taken care of by requiring that a bid bond or other security be furnished with the bid, along with a performance bond guaranteeing the full completion of the contract. If the lowest bidder is not responsible for any of the reasons suggested herein, the contract may be awarded to the next lowest bidder meeting specifications and found to be responsible. If the town board is in doubt as to either of these facts, it should reject all bids and readvertise.

(1) On the award of a contract to purchase machinery or equipment, the next question to arise is whether or not a bidder's bid meets the specifications. In these cases, it must be determined whether or not the bidder has substantially complied with the specifications. These sometimes are very difficult decisions to make. What is substantial material

compliance? Our only advice in this connection is that the town board should use its best judgment. The difficulty can be compounded when the lowest bidder argues that although their bid does not specifically comply with the specifications, their machinery is better and will do a much better job than the one for which the town advertised.

(2) Where there is some disagreement or argument on the awarding of a contract, the town board should be careful to include in the record the facts and circumstances it considered, and a clear statement as to why the lowest bidder did not comply with the specifications or was not found to be responsible.

(3) A disqualified bidder is entitled to notice and an opportunity to be heard on the issue of whether the town finds the bidder to be responsible or whether the bidder has complied with the bid specifications. (LaCorte Elec. Const. & Maintenance Inc. v. County of Rensselaer, 195 AD2d 923 app. den., 82 NY2d 660; Seacoast v. Lockport Urban Renewal Agency, 72 Misc.2d 372, 339 NYS2d 188; see also Lauvas v. Bovina, 86 AD 2d 694, 446 NYS2d 517)

(4) Frequently a question arises which can be avoided by making provision therefor in the specifications for bids. This happens when the lowest bidder does not have the required piece of equipment on hand and cannot deliver it for six or eight weeks or longer, but the next lowest bidder has the required equipment immediately available and can deliver the same forthwith. Here again is a case where the town board must exercise its judgment. If it actually needs this piece of equipment immediately and the difference in price between the lowest and the next lowest bidder is not substantial, it might be justified in awarding the contract to the next lowest bidder. This situation would be covered if the town board had included in the specifications a statement that any bidder must be able to furnish the required equipment within 10 days or some other reasonable period of time from the date for the opening of the bids.

F. Purchase of specific make or manufacture of equipment, materials or supplies. The town board may adopt a resolution to provide for the purchase of a particular make or manufacture of an item of equipment, material or supplies which will cost more than \$10,000 if, for reasons of efficiency or economy, there is need for standardization. If such a resolution is adopted, the town board still has to advertise for bids, but it may advertise for the particular model desired to accomplish standardization. The resolution adopted must be passed by a three-fifths vote of all of the members of the town board, and it should clearly state the facts which support its reasoning.

Form of Resolution on STANDARDIZATION

WHEREAS, the Highway Department of the Town of _____,
_____ County, New York, presently owns _____ (number) of
trucks all manufactured by the _____ Truck Manufacturing
Company and has on hand a supply of spare parts therefor, and

WHEREAS, to purchase a different model or make truck would be inefficient and uneconomical since alternate and additional supplies of spare parts would have to be

purchased, which would not be interchangeable with the ones already on hand, and

WHEREAS, for other reasons such as handling and operation of the equipment and attaching snow plows and other implements, it is determined by this Board desirable to purchase an additional truck of the same make as the ones presently owned by the Town,

NOW, THEREFORE, BE IT RESOLVED, that for reasons of efficiency and economy and pursuant to the authority conferred by Subdivision 5 of § 103 of the General Municipal Law, it is determined by this Board that there is a need for standardization in the purchase of trucks for the Town Highway Department, and

BE IT FURTHER RESOLVED, that the Superintendent of Highways be and is hereby authorized to contract for the purchase of a _____ truck of the same model as the ones presently owned by the Town Highway Department with the lowest responsible bidder after advertisement for sealed bids, and public bidding in the manner provided by § 103 of the General Municipal Law.

G. Identical or single bids. Where there are identical bids, the town board may award to either bidder or it may reject all bids and readvertise. If there is a single bid received, the town board may likewise award to this bidder, or, if it is not satisfied with the bid, it may reject it and readvertise.

H. Applicability of Conflicts of Interest Law. The Conflicts of Interest Law (General Municipal Law Article 18) applies even if the town officer or employee is the lowest responsible competitive bidder for a municipal contract. However, not every conflict of interest in a contract is prohibited by the law. Some contracts, though not forbidden, must be disclosed. (See Chapter 7, Officers and Employees.)

I. Purchase and financing of town highway machinery. The purchase and financing of town highway machinery is now included as a separate chapter in the Association publication, "The Office of Town Highway Superintendent," available in the offices of all town highway superintendents of member towns of the Association.

J. Errors in bids.

(1) Where a unilateral error or mistake is discovered by someone who has submitted a bid, such bid may be withdrawn after a showing of all the following:

(a) The mistake is known or made known to the town prior to the awarding of the contract or within three days after the opening of the bid, whichever period is shorter;

(b) The bid price was based on an error of such magnitude that enforcement would be unconscionable;

(c) The bid was submitted in good faith and the bidder submits credible evidence that the mistake was a clerical error as opposed to a judgment error;

(d) The error in the bid is actually due to an unintentional and substantial arithmetic error or an unintentional omission of a substantial quantity of work, labor, material, or

services made directly in the compilation of the bid, which unintentional arithmetic error or unintentional omission can be clearly shown by objective evidence drawn from inspection of the original work paper, documents, or materials used in the preparation of the bid sought to be withdrawn; and

(e) It is possible to place the town in status quo ante (i.e., not expose the town to serious prejudice or consequences).

[General Municipal Law §103(11)]

(2) The sole remedy for a bid mistake shall be withdrawal of that bid and the return of the bid bond or other security, if any, to the bidder. Thereafter, the town may, in its discretion, award the contract to the next lowest bidder or rebid the contract. Any amendment to or reformation of a bid or contract in order to rectify such an error or mistake is strictly prohibited.

K. Negotiation following bidding process. As a general rule, a municipality may not negotiate with a bidder after the bidding process. As mentioned, the award creates a contract in accordance with the terms of the bid specifications. However, one Appellate Division decision, for apparently the first time in New York State, recognized the authority to negotiate in limited circumstances. (*Fischbach v. NYC Transit Authority*, 1980, 79 AD2d 14, 435 NYS2d 984) The court stressed three basic elements which must be present in order to uphold a post-bid negotiation: (1) there must be no suggestion of favoritism, fraud or corruption; (2) the public interest must be advanced through an actual or potential savings on project costs; and (3) there must be no material departure from the original specifications and no concessions to the negotiating bidder. In addition, the court indicated that the negotiation may take place only with the lowest responsible bidder who would have been entitled to the award in any event. A municipality may not engage in post-bid negotiations through which a contractor other than the lowest responsible bidder may become the lowest responsible bidder. Otherwise, bidders may become reluctant to participate in the bid process because of lack of confidence that their bids will actually determine the contract award, thereby diminishing competition to the detriment of the public.

L. Award of contract creates binding obligation; change orders. Where a contract is subject to competitive bidding requirements, the award of a contract creates a binding contractual obligation in accordance with the terms of the bid specifications. (*Carroll-Ratner v. City Manager*, 54 Misc.2d 625, 283 NYS2d 218, *aff'd*. 36 AD2d 795, 320 NYS2d 715) Thus, as a general proposition, entering into a contract which materially varies from the bid specifications or materially amending an existing contract would constitute, in effect, a material alteration of the specifications after the bidding process and would give the successful bidder an unfair advantage over other bidders and prospective bidders who did not have the same opportunity (Opn. St. Comp. No. 81-41). In addition, generally, a contractor may not recover for additional work not contemplated by the original contract unless the additional work itself was subject to competitive bidding (16 Opn. St. Comp. 1960, p. 265 and citations therein). Nevertheless, it is recognized that, as work goes forward, it is sometimes necessary to make some changes from the initial plan. Where the change relates to details or relatively minor particulars

and is merely incidental to the original contract, a change order may be issued without competitive bidding even if the increased cost exceeds the bidding limit. However, no important general change may be made which so varies from the original plan or so alters the essential identity or main purpose of the contract as to constitute a new undertaking. (Albert Elia v. New York etc., 54 AD2d 337, 388 NYS2d 462; 16 Opn. St. Comp., p. 265) For example, the State Comptroller has recognized the issuance of change orders without competitive bidding where the existence of unanticipated utility line obstructions was discovered in the course of construction (Opn. St. Comp. No. 80-130; see also Farber v. City of New York, 222 NY 255) and where it became necessary to cover an increased area under a bus transportation contract due to unanticipated increased school enrollment (Opn. St. Comp. No. 77-24, unreported), among other situations. The dollar amount of the change order, while it might be some evidence of whether a new undertaking is involved, would not necessarily be the conclusive determining factor. The propriety of a change order depends on the surrounding facts and circumstances in each particular instance.

M. Interference with competitive bidding. A person or corporation who conspires to prevent competitive bidding on a contract for public work or purchase advertised for bidding is guilty of a misdemeanor as provided in General Municipal Law § 103.

ARTICLE X, Annual Accounting (Town Law §§ 62, 123)

§ 5-38. Required statements, books and records for examination by town board.

On or before January 20, all town officers and employees, except town justices, must file detailed statements of all receipts and disbursements for the fiscal year and must produce all pertinent books and records for audit by the town board. The statements must be recorded in the minutes. On the same day, the town justices must produce their dockets for examination.

§ 5-39. Exception to audit requirement.

The requirement for an annual audit does not apply to towns having a town comptroller or towns which, prior to January 20, engage the services of a certified public accountant or public accountant to make an annual audit to be completed within 60 days after the close of the town's fiscal year.

ARTICLE XI, Borrowing

§ 5-40. Sale of municipal obligations.

A. Budget considerations. Town boards sometimes find themselves in a position where a proposed purchase or contract for public works is too costly to be fully paid for out of a single year's budget. Under certain circumstances, such purchases or contracts may be financed by the sale of town obligations and the cost is thereby spread over a period of years. Where this is done, the budgets of subsequent years must include revenue to pay the principal and interest charges each year until the obligation is paid off.

B. Other considerations. Several factors must be kept in mind on the sale of municipal obligations. We list these questions to illustrate the technical nature of this subject matter and the need for securing the advice and services of a municipal attorney or bond counsel to assist in making these and other determinations, and to draft the necessary resolutions, certificates, notices, note or bond forms, etc.

(1) What type of obligation will be issued?

(2) For how long a period may they be issued? The various items that a town needs to purchase and the different types of public works projects they need to undertake have, under the law, varying "periods of probable usefulness" which determine the time within which the obligation must be paid.

(3) Does the town have the authority to issue obligations to finance the desired object?

(4) Would the proposed sale of obligations be within the town's debt limitation?

(5) Can the obligations be sold at private sale or must a public sale be held?

(6) Would a down payment be required?

(7) Is a referendum required?

ARTICLE XII, Capital Improvements

§ 5-41. Financing capital improvements.

Generally speaking capital improvements are financed by towns through the issuance of the following types of obligations: capital notes, bonds and/or bond anticipation notes. In issuing any of these obligations, it is important to ask the following questions:

A. Whether in some law there exists a power to expend money for the object or purpose.

B. Whether the particular object or purpose to be financed has a period of probable usefulness assigned to it by Local Finance Law § 11.00.

C. Whether the proposed issue plus the town's outstanding debt is within the constitutional debt limit. The debt limit of a town is 7% of the average full valuation of the town, computed by taking the last completed assessment roll and the four preceding rolls, applying to each the equalization rate as determined by the State Board of Equalization and Assessment, and then dividing the result by five. (Few, if any, towns have debt limit concerns.)

D. Whether there is in some law a limitation which would require the particular object or purpose to be financed from current funds or by current appropriation rather than by the issuance of obligations.

§ 5-42. Capital notes.

The capital note is a convenient method of financing any public improvement for which bonds could be issued, assuming the town can afford to pay the principal amount in at least two equal annual installments over a period of two years.

A. Maturity. The maximum maturity of a capital note is not exceeding two years from the date of issue. At least one-half of the total amount of the capital note must be paid in the first fiscal year succeeding the fiscal year in which the note was issued, unless authorized and issued in a fiscal year subsequent to the adoption of the budget for the

next fiscal year. The requirement for maturity by the second fiscal year which succeeds the year in which the note was issued still applies.

B. Sale. Capital notes can be sold at private sale, at not less than par, without any public bidding. No referendum, mandatory or permissive, is required. A two-thirds vote of the town board is required for the adoption of a capital note resolution, but a majority vote is sufficient to authorize the renewal of a capital note.

C. Redemption. The redemption of capital notes can come from revenues of that fiscal year legally available for such purpose (sales tax revenues, for example), as well as out of taxes and assessments levied or to be levied for the fiscal year in which the notes mature.

D. Issuance for more than one purpose. Local Finance Law § 31.00(d) provides that the issuance of serial bonds or capital notes for two or more specific objects or purposes (or classes of objects or purposes) may be authorized by a single bond or capital note resolution when the period of probable usefulness is less than five years, or where the resolution would not be subject to either a mandatory or permissive referendum.
§ 5-43. Bonds and serial bonds.

A. Advantages. Financing public improvements through bonds or serial bonds affords a town a longer time to pay the cost of the capital improvements.

B. Maturity. The maximum maturities of bonds cannot be longer than the period of probable usefulness assigned to the particular object or purpose by Local Finance Law § 11.00, computed from the date of the bonds or the date of the first bond anticipation note, whichever is earlier. Furthermore, no annual installment of serial bonds shall be more than 50% in excess of the smallest prior installment (Local Finance Law § 21.00d). Notwithstanding the foregoing, the town board may determine to issue bonds and provide for substantially level or declining annual debt service.

C. Adoption by town board; referendum requirements.

(1) A town board resolution authorizing the issuance of bonds must be adopted by a two-thirds vote of the entire board unless the bond resolution is submitted to a mandatory referendum, in which case a three-fifths vote of the board is sufficient.

(2) All bond issues of a town are subject to a permissive referendum except:

(a) Bonds with a proposed maturity of not more than five years;

(b) Bonds for any district or special improvement authorized by Town Law Article 3-A (suburban towns), Articles 12 or 12-A (special districts), 12-C (sewer or water improvements); or for any such improvement authorized by any other general or special law where the cost is to be assessed on benefited real property;

(c) Bonds for street or highway improvements where part of the cost is paid by the county or state pursuant to the Highway Law, or is to be levied against property within

any village within the town (Local Finance Law § 35.00);

(d) Bonds for the payment of judgments or compromised or settled claims.

(3) Bond resolutions authorizing bonds for highway improvements not exceeding \$15,000 in any one year are not subject to any referendum (permissive or mandatory) if the maturities are not to exceed five years.

(4) Bond resolutions to finance street and sidewalk improvements under Town Law §§ 200 and 200-a are also exempt from the referendum requirement.

D. Amount of cost to be covered by bonds. Generally only 95% of the total estimated cost can be handled by the issuance of bonds. The other 5% must be made by a so-called "down payment," which can either be made available from current funds or by the issuance of capital notes. There are certain exceptions to the down payment rule in which the down payment rule is not applicable, the two most common being:

(1) Where the bonds have a maximum period not exceeding one-half of the maximum period prescribed by law; or

(2) Where the bonds are issued for a purpose which has a period of probable usefulness of five years or less pursuant to Local Finance Law § 11.00.

E. Sale. In general, all bonds must be sold at public sale, with the award going to the lowest bidder. The sale of bonds at private sale is permitted in the case of issues not exceeding \$1,000,000 or where the sale is to the U.S. government, the N.Y. Municipal Bond Bank, or the N.Y.S. Environmental Facilities Corporation. The total amount of bonds which may be sold at private sale in any fiscal year may not exceed \$1,000,000. However, where a town officer is also an officer of the purchaser, it must be shown that there are at least two other banks unwilling or unable to purchase the bonds at an interest rate equal to or less than that at which the purchaser proposes to buy (Local Finance Law § 60.10).

§ 5-44. Bond anticipation notes.

A. Purpose. Bond anticipation notes have principally been used in the past as a means of financing, on a temporary basis during the period of construction or acquisition, a project undertaken by the town. (They are also often used for large equipment purchases.) Upon the completion of the project, the bonds for the permanent financing are issued, and the bond anticipation notes are paid off. Bond anticipation notes, therefore, have allowed towns to delay the issuance and sale of bonds until the town knew exactly how much money it was going to need to accomplish the project and also to avoid the necessity of paying interest on the full amount of the ultimate obligation until all the money was needed.

B. Issuance; proceeds. Bond anticipation notes (BANS) may be issued by any town in anticipation of the sale of bonds. The proceeds of such notes can be expended only for the same object or purpose for which the proceeds of the bonds may be expended.

C. Maturity; renewal. BANS mature at such time as the town determines and may be renewed from time to time, provided that in no event shall such notes or the renewals thereof extend more than two years beyond such original date of issue unless a portion of such notes or the renewals thereof shall be redeemed from a source other than the proceeds of bonds within two years from such original date of issue, and unless a further portion thereof is redeemed prior to the termination of each twelve-month period succeeding the date such original portion was redeemed, if any of such notes, as renewed, are still outstanding at the termination of each such period. Redemption must be consistent with the amortization requirements of Local Finance Law Article 8. In any event, bond anticipation notes shall not be renewed after the receipt of the proceeds from the sale of the bonds in anticipation of which such notes were issued.

D. Bond resolution. Bond anticipation notes cannot be issued until a proper bond resolution has been adopted. Such bond resolution may include the authorization for the notes, or a separate bond anticipation note resolution may be adopted at the same time. When a separate bond anticipation note resolution is adopted, a majority vote of the members of the town board is sufficient for its approval.

E. Sale. Bond anticipation notes may also be sold at private sale at not less than par, without limitation as to interest rate, except that where a town officer is also an officer of the purchaser, the same conditions must be met as in the private sale of bonds.

§ 5-45. Statutory installment bonds.

The same basic laws and limitations apply generally to statutory installment bonds as apply to serial bonds. Statutory installment bonds, however, are limited to \$1,000,000, subject to the foregoing special requirement where a town officer is also an officer of the purchaser. They are issued in a single bond form with provision for principal and interest payments both to be noted on the bond form or a sheet attached thereto. Such bonds must provide for the payment of both the principal and interest upon presentation of the bond for notations of such payments (except when issued to the U.S. government). The form of statutory installment bond is set forth in full in Local Finance Law § 62.10.

§ 5-46. Registered obligations.

The Federal Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) requires that after July 1, 1983, tax-exempt municipal obligations which mature more than one year after issue be issued in registered form. Failure to comply with TEFRA registration requirements carries penalties against both the issuer and the holder of unregistered securities. Essentially, they lose their tax-exempt and capital gains status. The town board has two options in handling the registration requirement. It can act as its own agent or it may contract with a bank to perform this function. The process of registration and reregistration is complex and requires expeditious return of the reregistered obligation (i.e., 72 hours). The State Comptroller has strongly advised against a municipality acting as its own registration agent.

ARTICLE XIII, Noncapital Financing

§ 5-47. Types of noncapital financing; sale; deposit of proceeds.

Noncapital financing by towns can be divided into three types: budget notes; tax anticipation notes; and revenue anticipation notes. Generally speaking, all budget notes, tax anticipation notes and revenue anticipation notes may be sold at private sale without limitation as to interest. Any town which issues bonds or notes should be aware that the

Local Finance Law also contains various statutory provisions with respect to the deposit of the proceeds from bond or note offerings. Often, deposit in a separate bank account is required.

§ 5-48. Budget notes.

A. Types. There are two types of budget notes: emergency budget notes and deficiency budget notes.

(1) Emergency budget notes. Emergency budget notes may be issued in any fiscal year to finance any unforeseeable public emergency in such year, such as an epidemic, conflagration, riot, storm, flood, earthquake or other unusual peril to the lives and property of the citizens of the town. Emergency budget notes, however, may not be issued by a town on behalf of a town improvement district. The emergency budget notes may be issued in any amount determined necessary by the town board to deal with the particular emergency.

(2) Deficiency budget notes. Deficiency budget notes may be issued for an expenditure for which an insufficient or no provision was made in the annual town budget. Local Finance Law § 29.00 limits the amount of such notes which may be issued to an amount not to exceed 5% of the town's annual budget, excluding amounts levied for improvement district purposes. In addition, towns may issue deficiency budget notes to finance the local share of supplemental appropriations for one or more purposes authorized by or under the Social Services Law, or the local share of financing a Town Highway Improvement Project (Highway Law Article VIII-A). A town may also issue deficiency budget notes on behalf of a town improvement district for expenditures for which no appropriation or an insufficient appropriation was contained in the improvement district's budget. The amount of such notes which may be issued on behalf of an improvement district is subject to a limit of 5% of the district budget.

B. Adoption. A budget note resolution requires the affirmative vote of at least a majority of the town board.

C. Payment. Budget notes must be paid by the close of the fiscal year next succeeding the year in which they were issued, except where authorized and issued in a fiscal year subsequent to adoption of the annual budget for the next year, in which case they must be paid no later than the second fiscal year next succeeding the year of issue. Thus, in either the next year succeeding the year of issue or the following year (depending upon the exact time of issuance of the budget note), the town is going to be faced with a town budget which provides not only for its normal operations for that year, but also for paying off the budget note. It is obvious that the budget for that year will be rather burdensome. Budget note financing is deficit financing -- a type of financing which should be avoided except under the most unusual circumstances.

D. Redemption. The redemption of budget notes can come from revenues of that fiscal year legally available for such purpose (sales tax revenues, for example), as well as out of taxes and assessments levied or to be levied for the fiscal year in which the notes mature.

§ 5-49. Tax anticipation notes.

A. When authorized; amount. A town may borrow against uncollected taxes (1) within ten days prior to the beginning of a fiscal year in anticipation of the taxes levied in such fiscal year, and (2) at any time in a fiscal year against taxes levied for such fiscal year. When borrowing in the pre-fiscal-year ten-day period, the limit of the amount which may be borrowed is the total of the taxes and assessments as fixed in the adopted budget. Where the borrowing is made in the fiscal year against taxes levied for such fiscal year, the limit for towns is the total amount of taxes and assessments levied and remaining uncollected, less any other outstanding tax notes issued against such levy.

B. Maturity; renewal. Tax anticipation notes (TANS) may be issued with a maximum maturity of not to exceed one year, and then may be renewed yearly from time to time for like periods. The last renewal of TANS issued in the ten-day period in advance of a fiscal year must be paid by the end of the fourth fiscal year succeeding the year in which the original note was issued. In the case of TANS issued in a fiscal year against taxes levied for such fiscal year, the TANS or the renewals thereof must be retired within five years after their date of original issue, and in any event not later than five years after the close of the year for which taxes or assessments were levied and against which such TANS were issued.

C. Proceeds. The proceeds of tax anticipation notes generally must be solely for the purpose for which the taxes were levied. It is not legal to use the proceeds of a TAN issued against 1972 taxes to pay 1971 expenditures.

§ 5-50. Revenue anticipation notes.

A. Issuance. Revenue anticipation notes may be issued by a town in anticipation of taxes (other than real estate taxes), sewer or water rents, or monies to be received from the state or the United States government, from county sales taxes or from any type of income-producing facility or operation owned by the town. The revenue anticipation note (RAN) resolution must specify the specific type of revenue the receipt of which is being anticipated by the issuance of the RAN. Since town real estate taxes are received in full early in the year, it would be a rare occasion when a town had to borrow in anticipation of property tax revenues.

B. Limitations. Local Finance Law § 25.00 contains certain limitations on the amount of RANS which may be issued. They cannot exceed the lesser of:

(1) The current year's estimate of the specific revenue against which the note is issued; or

(2) The amount of such revenue collected in the prior fiscal year.

C. Proceeds. The proceeds of revenue anticipation notes may be used only for expenditures payable from the type of revenue for which the RANS were issued.

ARTICLE XIV, Lease-Purchase Financing

§ 5-51. Purpose; advantages; limits.

An alternative means of financing the acquisition of a town's capital equipment needs is through utilization of the installment purchase contract mechanism authorized by General Municipal Law § 109-b. Installment purchase financing may or may not be accomplished

at rates of interest which are better than or competitive with the methods of debt financing discussed previously. It does, however, offer certain other advantages which may be desirable. While the volume of lease-purchase financing is growing nationally, the reasons for its popularity in some states are not present in New York. By statute in New York State, lease-purchase financing cannot (and should not) be used to avoid referenda, competitive bidding or the prevailing wage dictates of the Labor Law. Nevertheless, the flexibility that installment purchase financing offers makes it an option that towns can consider in certain applications. Note that the Legislature inserted limits on the aggregate total of such financing by any one municipality. See General Municipal Law § 109-b(6)(c).

ARTICLE XV, Depositories

§ 5-52. Designation at annual organizational meeting.

One of the suggested functions to be accomplished by the town board at its organizational meeting is the designation of depositories for the deposit and safekeeping of town funds.³

§ 5-53. Conflicts of interest.⁴

The supervisor, town comptroller and their deputies are generally prohibited from having any interest in a bank or trust company designated as a depository. However, if the bank in which such fiscal officers or employees have an interest is the only bank in town, it may be designated as a depository, provided that written disclosure of any such interest is made to the town board. In other words, the conflict of interest law will not force the designation of a bank outside of the town as long as full and complete disclosure of such interest is made known to the town board and incorporated in the town board minutes. If the bank where an interest is held is located outside the town, even though closer than the next nearest bank, it may not be designated as a depository for town funds. (See Chapter 7, Officers and Employees, Article VI, Conflicts of Interest.)

§ 5-54. Statutory authority.

The deposit of all town monies is now controlled by General Municipal Law § 10. That statute, which is referenced in Town Law § 64(1), now specifically defines the allowed forms of security and collateral and requires the State Comptroller to develop and provide model custodial agreements for the use of local governments.

§ 5-55. Considerations.

Cash management is a direct function of who is chosen as the depository. A town should select that bank which most efficiently provides effective service at the least cost. Also note that having numerous bank accounts complicates effective control of town finances. While certain laws require separate accounts, bank accounts should otherwise be consolidated to the extent possible.

ARTICLE XVI, Reserve Funds

§ 5-56. Purpose.

Towns, for the most part, are not required to accumulate and set aside funds for future needs and contingencies. In an ideal world, towns could simply enact a balanced budget with annual estimates for revenues equaling anticipated expenditures. However, emergencies and other planned or unplanned contingencies can and do arise for which towns may prepare through the creation of certain legally authorized reserve funds.

§ 5-57. Types and general requirements.

There are various types of reserve funds authorized by statute. Each has its own legal requirements for the establishment of the fund and for the expenditure of monies from it. Generally, all monies in such funds must be deposited and secured in the manner required

by General Municipal Law § 10. The following sections contain a brief description of a few of the more common reserve funds.

§ 5-58. Capital reserve funds.

A capital reserve fund may be established for accumulating funds over a number of years to finance, in whole or in part, the acquisition or construction of a capital improvement. Such a reserve fund may be created by resolution for a specific capital improvement such as a town hall or a snow plow. Alternatively, a capital reserve may be established for a type or general category of capital improvement, such as for town buildings, land or unspecified equipment. A resolution establishing a specific capital reserve fund is subject to a permissive referendum if bonds issued to finance such project would be subject to a permissive referendum. A resolution establishing a general or type capital reserve fund is not subject to referendum, but the resolution authorizing any expenditure therefrom would be subject to a permissive referendum (General Municipal Law § 6-c).

§ 5-59. Insurance reserve funds.

An insurance reserve fund may be established for the payment of all or part of the cost of any loss, action, judgment, or compromised or settled claim, as well as for expert services and the deductible portion of insurance (General Municipal Law § 6-n).

§ 5-60. Reserve funds for payment of unemployment insurance.

Reserve funds for payment of unemployment insurance (General Municipal Law § 6-m), workers' compensation claims (General Municipal Law § 6-j), and for nonrecurring repairs of capital improvements or equipment (General Municipal Law § 6-d) may also be established.

§ 5-61. Tax stabilization and contingency reserve funds.

Effective July 31, 1992, towns are authorized to establish tax stabilization and contingency reserve funds, by resolution subject to permissive referendum. Expenditures from such a reserve need a two-thirds vote of the town board after a recommendation by the town supervisor. Monies can be expended only for unanticipated revenue losses or expenditures, with certain limitations. They may also be used to lessen a property tax levy increase of greater than 5%. The balance in a tax stabilization reserve cannot exceed 10% of the town's annual budget.

ARTICLE XVII, Temporary Investment of Town General Fund Monies

§ 5-62. Purpose; considerations.

Many towns are able to realize substantial revenue from the temporary investment of general fund monies as authorized by General Municipal Law § 11. With this procedure available, town boards would be well-advised to make use of it. Revenue to be received from this source may be applied in town budgets as anticipated revenue and, as such, used to reduce the amount to be raised by tax. Care must be taken, however, to be sure that only the specific obligations prescribed below are bought and also that their redemption periods are such that the invested monies will be available when needed for necessary application to appropriate budget item expenses. Careful thought and planning ahead is imperative because if the town board finds that it must sell these obligations prior to their maturity date, penalties may be imposed or interest forfeited. If this occurs, the budget item of anticipated revenue in this regard would not be available and the town budget could be substantially thrown out of balance.

§ 5-63. Authorized investments.

A. Types.

- (1) General Municipal Law § 11 provides for the temporary investment of general fund monies not required for immediate expenditure. These investments may be:
- (a) Special time deposit accounts or certificates of deposit issued by a bank or trust company located in and authorized to do business in this state;
 - (b) Obligations of the United States of America or in obligations guaranteed by agencies of the United States where the payment of principal and interest is guaranteed;
 - (c) Obligations of the State of New York;
 - (d) Obligations guaranteed by agencies of the United States where the principal and interest are guaranteed by the United States of America; and
 - (e) Tax anticipation notes (TANS) or revenue anticipation notes (RANS) issued by another municipality, school district or district corporation, provided approval is obtained from the State Comptroller.
- (2) In addition, monies in any reserve fund may be invested in obligations of the town which established the reserve.

B. Time deposits and certificates of deposit. Time deposits and certificates of deposit must be payable within such time as the proceeds shall be needed to meet expenditures for which such monies were obtained, and the deposit must be secured by a pledge of eligible securities in the same manner as required by General Municipal Law § 10(3) for all public funds.

C. State, local or federal government obligations. Investments in United States Treasury obligations, obligations of the State of New York, TANS or RANS of other municipalities or in one's own reserve funds must be payable or redeemable at the option of the owner within such time as the proceeds will be needed to meet authorized expenditures, and, in the case of obligations purchased with bond or note proceeds, shall be payable or redeemable in any event, at the option of the owner, within two years of the date of purchase.

D. Custody. In addition, unless these obligations are registered or inscribed in the name of the town, they must be purchased through, delivered to and held in custody of a bank or trust company in New York State, and are to be sold or presented for payment only by the bank or trust company upon receipt of written instructions from the officer of the town authorized to make the investment. The physical custody and safekeeping of the evidence of investments authorized under General Municipal Law § 11 can be held in the custody of certain banks or trust companies, if authorized by the town board [General Municipal Law § 11(4)].

FORMS

The following are two samples or suggested forms of Advertisements for Bids in the case of purchase contracts and Notice to Bidders in the case of public works contracts. Please note that these are only suggested forms and they are not intended to be followed literally,

word for word. However, the general meaning and intent of each paragraph should be covered. Certain optional provisions, as indicated, may be included.

ADVERTISEMENT FOR BIDS

PLEASE TAKE NOTICE that pursuant to resolution of the Town Board of the Town of _____, _____ County, New York, sealed bids for the purchase of _____ will be received at the office of the (Highway Superintendent, if highway machinery), _____ Street, Town of _____, County of _____, New York, until _____ o'clock ____ M. (EST or DST) on the day of _____, 20____, at which time they will be publicly opened and read aloud.

Bids will be submitted in sealed envelopes at the above address and shall bear on the face thereof the name and the address of the bidder.

The item to be bid on will comply with the following general specifications:

_____ Detailed specifications are available to any interested bidder at the office of (Address).

The contract for the purchase of the above item will be awarded by the (Town Board, Superintendent of Highways, Director of Purchasing) to the lowest responsible bidder. In cases where two or more responsible bidders submit identical bids as to price, the _____ may award the contract to either of such bidders. The _____ may reject all bids and readvertise for new bids in (his or her/its) discretion.

(Officer or By Order of Town Board)

Dated _____, 20____

(Optional provisions)

The maximum amount proposed to be spent for the above-described item will be \$ _____.

As part of the contract price to be bid as aforementioned, the bidder will make a dollar allowance on the trade-in of a _____, which may be inspected at the Town Highway Garage, _____, New York, at any reasonable time prior to the bid opening.

Every bid must be accompanied by a certified check payable to the Town of _____ in the amount of _____% of the bid price. Such checks will be returned to the unsuccessful bidders promptly and to the successful bidder (on the execution of the contract of purchase or otherwise on delivery of machinery, etc.) Note: As has been stated above, if this language is included no bidder may withdraw his bid within 45 days of the opening (See General Municipal Law § 105).

No bid received may be withdrawn by any bidder for a period of 30 days from the date of the bid opening. Note: This 30-day period is arbitrary. It could be 10 or 40 or any period which the town board determines, but, as noted above, it cannot be any period the town board determines if a bid deposit is required; in such cases it must be 45 days.

NOTICE TO BIDDER

NOTICE is hereby given that separate sealed bids or proposals covering Construction, Plumbing, Heating and Electric Work for the construction of a _____ in accordance with plans, specifications and accompanying drawings will be received by the Town Board of the Town of _____, New York, at the office of the _____ at _____, New York, at _____ o'clock _____ M. (EST or DST) on the _____ day of _____, 20_____, and read aloud at a meeting of said Board to be held at such time and place.

Proposals must be submitted on the bid forms provided and in a manner designated therein. Copies of such bid forms and of the instructions to bidders may be obtained at the office of the Town Clerk, _____, New York. Each proposal must be accompanied by a bid bond or a certified check made payable to the Town of _____ in an amount equal to 5% of the total bid. The bid bonds or checks of the unsuccessful bidders will be returned as soon as the contracts have been executed. The bid bond or check of the successful bidders will be retained to pay any loss or damages to the Town of _____ in the event that said successful bidders shall refuse or neglect to enter into a contract in accordance with their proposals. Acceptance of the bid will be contingent upon the fulfillment of this requirement by each bidder.

Copies of the plans, specifications and drawings may be examined at the office of the Town Clerk, _____, New York. Each person or corporation desiring a copy of said plans, specifications and drawings shall before taking the same deposit to guarantee the safe return of such plans, specifications and drawings, the sum of _____ Dollars (\$_____) for each copy thereof taken.

Successful bidders will be required to give a bond conditioned for the faithful performance of the contract and for the payment of laborers and material-men in the sum of 100% of the contract price.

The Town Board reserves the right to consider bids for a period of 45 days after their opening, during which time no bidder may withdraw his or her bid, and the right is reserved to the Town Board to accept or to reject any or all bids.

BY ORDER OF THE TOWN BOARD
OF THE TOWN OF _____

Town Clerk

Dated _____, 20_____

Chapter 6

TOWN LEGISLATION

Town boards can today legislate by choosing one of three vehicles:

- A. Ordinances
- B. Local laws
- C. Resolutions

ARTICLE I, Ordinances

§ 6-1. Background.

- A. Early limitations on town legislative authority. Prior to January 1, 1964, town

boards could only legislate within the relatively narrow confines of the specific authority found in the Town Law § 130 and other sections of the Town Law and of other statutes. An early leading case, repeatedly cited and referred to through the years, *Wells v. Town of Salina* [119 NY 280 (1890)] held:

The powers of towns were limited and precisely defined by the statutes under which they were constituted, and they [towns] possessed only such powers as were expressly and specifically conferred by statute or necessarily inferred therefrom.

In effect, if a specific authority to adopt an ordinance on a certain subject matter was not found in some statute, then the town board could not legally adopt an ordinance relating to that subject matter.

B. Expansion of authority. With the growing importance of towns and the added governmental responsibilities assumed by them, this limited ordinance power proved not only restricting but cumbersome. Greater latitude was needed. Recognition of that need culminated in constitutional grants of local law powers to all local governments in 1964. In enacting the Municipal Home Rule Law, the Legislature specifically provided that the Municipal Home Rule Law should be liberally construed, an important departure from the strict rules of narrow construction which apply to ordinances even today.

§ 6-2. Areas of town board ordinance authority.

A. Subject matter. Town Law § 130 contains specific subject areas in which a town board is specifically authorized to enact ordinances. Note that "ordinances" are defined as also including rules or regulations of the town board (Town Law § 131). Those subject areas include:

- Building Code
- Plumbing Code
- Electrical Code
- Housing Code
- Sidewalks
- Fire prevention
- Public dumps and dumping grounds
- Use of streets, highways, sidewalks, public places and waterways
- Driveways
- Smoke, gases and wastes
- Animals
- Malicious mischief
- Peace, good order and safety
- Amusements
- Beverages and eating places
- Slaughtering and rendering works
- Promotion of public welfare
- Unsafe buildings and collapsed structures
- Vessels (boats)
- Shellfish
- Trespass

- Hotels, inns, boarding houses
- House trailer camps, tourist camps and house trailers
- Airports and flying fields
- Riding stables and riding academies
- Building lines
- Loitering

And in certain towns:

- Air guns and firearms
- Screening facilities
- Duck raising

B. Preemption by state law; Fire Prevention and Building Code.

(1) The authority of towns to adopt ordinances in some of the above-listed subject areas has, over time, been preempted by subsequent state legislation. The State Uniform Fire Prevention and Building Code is a good example.

(2) Fire Prevention and Building Code. Pursuant to laws enacted in 1981, a new State Uniform Fire Prevention and Building Code became applicable to all local governments on January 1, 1984, regardless of whether they had previously adopted the State Code or a building or fire prevention code of their own. Each town is responsible for enforcing the new Uniform State Code within its boundaries. Each town government also has the responsibility for enforcing the new Code in its own buildings (as does the county in county buildings and the state in its buildings. While the Education Department is responsible for code enforcement in public school buildings, towns are required to enforce the code against private school buildings). However, a town has the option of declining enforcement jurisdiction by adopting a local law prior to July 1 in any year. Where such a local law is adopted, the enforcement authority will pass to the county starting with the first of January following adoption of the local law. Rules and regulations promulgated by the Secretary of State supply additional procedures concerning enforcement, including required training for code enforcement personnel. The state adopted new "International" model building and fire codes effective January 1, 2003. Administration and enforcement by towns remains unchanged. The 1981 law also required specific firesafety measures for areas of public assembly, which are defined as all buildings or portions used for the gathering of 50 or more persons for amusement, religious, educational, civic, patriotic, political, social, etc., purposes.

§ 6-3. Licenses.

A. Occupations and businesses covered by town ordinance authority. There is another subject area covered by Town Law § 136 which lists businesses or occupations concerning which a town board may adopt an ordinance requiring the licensing and regulation of the conduct of those occupations and businesses. They include:

- Auctioneers, pawnbrokers, junk dealers, taxicabs
- Circuses, theaters, motion-picture houses, shows or other exhibitions
- Plumbing, heating, ventilating and electrical work
- Running of restaurants

- Dance halls
- Hotels
- Tourist camps
- Trailer camps
- Riding academies
- Collection of garbage
- Raising of mink
- Excavations and stripping of top soil
- Laundromats in certain specified towns

B. Fees. In these types of ordinances, the license fees must be reasonable; that is, an amount generally equivalent to the estimated cost to the town in processing the application for the license, issuing the license and for inspection and enforcement to assure compliance with any license conditions. Such fees cannot be set at an amount which would discourage anyone from entering into the activity concerned, nor may the fees be used as a source of revenue covering the general cost of government of the town. § 6-4. Zoning.

A. Historically, the most prevalent use of a town's ordinance powers had been in the adoption of land use regulations. The provisions of the Town Law in this connection, as contained in Article 16, provide a special procedure for initially adopting a town zoning ordinance.

B. Appointment and function of zoning commission.

(1) The town board must appoint a zoning commission for the purpose of recommending the boundaries of various districts of the town to be zoned, and the appropriate regulations affecting building and land use in each district.

(2) The zoning commission will make a preliminary report and hold public hearings on its recommendations before submitting its final report to the town board. The town board is specifically prohibited from holding its public hearing or taking action on the question of initially adopting a zoning ordinance until it has received the final report from the commission.

(3) After filing its final report, the zoning commission's functions are complete.

C. Adoption by town board; notice to abutting property owners. After the zoning commission files its final report, the town board proceeds as in the adoption of any other ordinance; that is, it must hold a public hearing upon published notice. In addition, a written notice of any proposed change affecting property within 500 feet of the boundaries of any other municipality, county or state park or public housing project must be given to the clerk or other person performing like duties of such municipality or government unit at least 10 days prior to the date of the public hearing. All parties in interest, citizens and any municipality or unit served as noted above shall have the right to appear and be heard at the public hearing.

D. Entry in town board minutes; publication; map changes. Every zoning ordinance

adopted by a town board and every amendment thereto must be entered in the minutes of the town board, and a copy thereof (exclusive of any map related thereto) must be published once in the official newspaper of the town or, if there be none, in a newspaper designated by the town board having general circulation in the town. An affidavit of such publication must be filed in the town clerk's office. In addition, the town clerk is required to maintain a separate file or filing cabinet for each map showing a zoning change, the same to be available for public inspection. There is no necessity for entering such maps in the minutes or for posting such ordinances upon adoption.

E. Effective date. As in the case of other town ordinances, the ordinance takes effect ten days after such publication or immediately as against any person upon whom it is personally served.

F. Review by county planning board. The provisions of General Municipal Law Article 12-B give county planning boards certain powers in connection with reviewing certain classes of zoning actions if they affect property within 500 feet of municipal boundaries or county- or state-owned land, parks or rights-of-way. If there is no county planning board, then such review is made by the metropolitan or regional planning board having jurisdiction of the territory of the town, if any (General Municipal Law § 239-l). Notice of proposed zoning regulations or of the proposed issuance of any permits or variances pursuant to a town's zoning regulations must be given to such county planning board, or metropolitan or regional planning board. It will have 30 days to review and make a recommendation thereon. If no recommendation is made in such period, the town agency may proceed without such report. If the county or regional board to which the matter has been referred disapproves of the proposal, the local board of the town which is contemplating action may not proceed contrary to such disapproval except by a majority plus one vote. A resolution setting forth the reasons for such contrary action must be approved and sent on to the county or regional planning agency within seven days (General Municipal Law § 239-m).

G. Violations. A fairly unique enforcement authority exists in the case of a violation of a town zoning ordinance. Three taxpayers of a district may institute an appropriate action or proceeding against a violator if, after 10 days' written request to the proper local enforcement officer or board to so proceed, no such action or proceeding has been started (Town Law § 268).

H. Zoning board of appeals. Upon the adoption of a town zoning ordinance, it is necessary for the town to organize a zoning board of appeals, whose function is to review applications for variances from the ordinance.

§ 6-5. Other subject areas.

It would be virtually impossible to list all of the town ordinance authority contained in the many statutes of our state. We will mention a few as illustrations.

A. Games of chance and bingo. In the General Municipal Law, there is authority for a town board to enact ordinances authorizing games of chance or bingo.

B. Dogs. The Agriculture and Markets Law provides authority for a town to enact an

ordinance imposing restrictions on the keeping and running at large of dogs, and for imposing an alternative civil penalty for the violation thereof. Dog license fees may also be increased by ordinance or local law. (The Agriculture and Markets Law also requires a town to have a dog pound and to appoint a dog control officer, or it may contract for the services of a dog pound and dog control officer.) (Agriculture and Markets Law Article 7)

C. Traffic regulations. The Vehicle and Traffic Law provides for the enactment by town boards of certain specified traffic regulation ordinances, including designation of through highways, stop or yield intersections, no-passing zones, regulation of processions, assemblages and parades, parking meters, removal of abandoned vehicles during emergencies, operation of vehicles on controlled-access highways, prohibition or regulation of the turning of vehicles in certain locations, regulating the crossing of any roadway by pedestrians, authorizing angle parking, designating highways for one-way traffic, excluding trucks and commercial vehicles from designated highways, prohibiting, restricting or limiting stopping, standing or parking of vehicles, designating safety zones, and regulating traffic at shopping centers, etc. (See Vehicle and Traffic Law §§ 1660 and 1660-a.)

(1) Speed limits in suburban towns. In connection with regulating speed limits on highways in towns, only suburban towns (see Chapter 2, Classes of Towns, § 2-3C) and towns with over 50,000 people have the authority to set by ordinance, local law, rule or regulation their own speed limits on highways (other than state highways) within such towns. In no event can those speed limits be set below 25 miles per hour, except in the immediate vicinity of schools (Vehicle and Traffic Law § 1662-a).

(2) Speed limits in all other towns. With respect to towns generally, Vehicle and Traffic Law § 1622 provides that the Department of Transportation, upon the request of the county superintendent of highways of a county and the town board of the town, may, with respect to county roads and town highways in such town:

(a) Establish maximum speed limits at which vehicles may proceed on or along such highways higher or lower than the statutory maximum speed limit of 55 miles per hour. No such limit shall be established at less than 25 miles per hour, except that school speed limits may be established at not less than 15 miles per hour on any portion of a highway passing a school building for not more than 300 feet in either direction from the building line of a school abutting on the highway; and

(b) Establish maximum speed limits lower than 55 miles per hour on or along all highways lying within an area or areas as designated by a description of the boundaries of such area or areas submitted by the county superintendent of highways of a county and the town board of the town or towns affected. No such limit shall be established at less than 30 miles per hour.

D. Environmental quality review. Environmental Conservation Law Article 8, known as the “State Environmental Quality Review Act (SEQR)” as implemented by Part 617 of the Department of Environmental Conservation rules and regulations, allows towns to adopt their own SEQR procedures by ordinance or local law, as long as those procedures

are no less protective than the state statute and regulations. If the town does not adopt its own SEQR regulations, it must follow the procedures of Part 617.

E. Wetlands. Towns are also authorized to adopt ordinances or local laws implementing the Freshwater Wetlands Act (Environmental Conservation Law Article 24), in accordance with the regulations of the Department of Environmental Conservation Parts 663 and 664. Failure by the town to do so will pass this authority to the county, and if the county does not adopt local freshwater regulations, the authority passes to the state. A town may retrieve its prerogative by enacting regulations which meet the prescribed criteria.

§ 6-6. Procedure for adopting an ordinance.

Wherever authority for the enactment of a town ordinance is found, whether in the Town Law or in some other New York State statute, the method and procedure to be followed by a town board in adopting the ordinance is that contained in Town Law Article 9 (except for the additional steps required for zoning ordinances mentioned previously). The town must adhere meticulously to the procedure outlined. If the ordinance is not adopted pursuant to the step-by-step procedure outlined in Article 9, a court might find it unenforceable, either in whole or in part.

A. Introduction of ordinance. After a town board has agreed to the general purpose and intent of a proposed ordinance, the ordinance should be drafted and introduced at a regular or special meeting of the town board. A member of the town board introduces the ordinance by moving the adoption of a resolution introducing it. The resolution should include the proposed ordinance in full. This resolution should be adopted by the affirmative vote of a majority of the town board and should be entered in the minutes of the town board proceedings.

B. Public hearing. After the ordinance is introduced, the Town Law requires that a public hearing on notice must be held on the question of the adoption of the ordinance. The town clerk must publish a notice of the time when and the place where the public hearing will be held. Such notice must describe the ordinance in general terms and be published at least 10 days prior to the date of the hearing. The following is a form of notice of public hearing included as a sample notice in connection with the holding of a public hearing on an ordinance to license and regulate hawkers and peddlers.

NOTICE OF PUBLIC HEARING

TOWN OF _____

Proposed Ordinance Relative to Regulating and Licensing
Peddling and Hawking of Goods, Wares and Merchandise
and Soliciting Orders Therefor.

PLEASE TAKE NOTICE that an ordinance has been introduced in the Town Board of the Town of _____ to regulate and license peddling and hawking of goods, wares and merchandise and soliciting orders therefor in the Town of _____, County of _____ and State of New York.

Said proposed ordinance in general terms provides that certain hawkers and peddlers shall be required to obtain a license from the Town Clerk upon application to said Town Clerk

prior to being permitted to act as a hawker, peddler or solicitor as defined in said ordinance.

Said ordinance provides for a fee and for revocation of said license upon certain conditions. Certain restrictions as to the method of hawking and peddling are provided.

Said ordinance declares that a violation of this ordinance shall be punishable by a fine of not less than \$5.00 or more than \$50.00. A copy of said proposed ordinance is on file in the office of the Town Clerk.

PLEASE TAKE NOTICE that a public hearing upon said proposed ordinance will be held at the Town Hall, _____, New York, on the _____ day of _____, 20____, at _____ o'clock, ____M. (EST or DST), and that an opportunity to be heard in regard thereto will then and there be given to those favoring passage of such proposed ordinance and also to those opposed thereto.

Town Clerk

Dated: _____, 20_____

(1) The town board should meet at the time and place specified in the notice of the hearing on the ordinance. It is recommended that at the time of this hearing, the town clerk read the proof of publication of the notice of hearing on the proposed ordinance. At this time, it is also good procedure, although it is not required by law, to read the ordinance in full to the persons attending the hearing so that they may know exactly what the proposed ordinance contains and its various provisions. If the ordinance is complicated, the supervisor, town attorney or the member of the town board who introduced the ordinance should be ready to discuss the purpose and intent of the ordinance, as well as its numerous provisions.

(2) Persons attending the hearing should be invited to comment on the proposed ordinance so as to give the town board the benefit of their views. The decision whether to enact the ordinance as introduced need not be made at the time of the hearing. Indeed, it might be necessary and better public relations for the town board to defer its decision so as to be able to give careful thought to any suggestions made by the persons who appeared at the hearing.

C. Vote to adopt; changes. The vote on the question of the adoption of an ordinance is a vote by the town board members alone. Whether the ordinance is adopted at the meeting at which the hearing is held or at a subsequent meeting of the town board, the ordinance must be adopted in the form in which it was presented at the hearing. Any substantive changes may not be adopted without the reintroduction of a proposed new or amended ordinance, followed by another public hearing on notice.

(1) When the town board has made up its mind to adopt an ordinance, the adoption of the ordinance is accomplished by the introduction of an additional resolution and its subsequent adoption by a majority vote of town board members.

(2) Ordinance book. After adoption, the ordinance must be entered in full in the town board minutes. In addition, the town clerk must enter a copy of such ordinance in a book known as the "ordinance book." It is permissible to have the newspaper run an extra copy of the print of the ordinance, or the town clerk may cut a copy of the ordinance from the newspaper for insertion in the ordinance book. It must be an exact copy of the ordinance and must be entered immediately after adoption by the town board. [Note: Resolutions and motions are not included in the ordinance book; however, as indicated below, they are all included in the minute book.]

D. Publication following adoption; effective date. To become effective, the text of the ordinance or amendment, or a summary or abstract thereof, must be published in the official newspaper (see Exhibit C), or, if there is none, in a newspaper designated by the town board having general circulation in the town. Affidavits of publication of ordinances are still required to be filed with the town clerk (Town Law §§ 133, 134, 264, 265). The ordinance becomes effective ten days after such publication, but it shall take effect from the date of its service as against any person served personally with a copy thereof, certified by the town clerk under the corporate seal of the town and showing the date of its passage and entry in the minutes.

E. Amendment or repeal. An ordinance, once adopted, is amended or repealed by the adoption of another ordinance amending it or repealing it, following the same procedural steps as are required on the adoption of any other ordinance.

§ 6-7. Enforcement.

An ordinance is only as good as the subsequent effort that goes into its enforcement. There is no sense in going to all the trouble, work and expense involved in drafting and adopting a good ordinance if the town board does not see to it that the ordinance is enforced. This should be carefully considered by the town board prior to the adoption of the ordinance.

A. Types of violations. The various enabling statutes provide for what a violation of an ordinance enacted thereunder shall constitute. For instance, violations of certain town ordinances adopted pursuant to the authority of the Vehicle and Traffic Law constitute traffic infractions, carrying the penalties provided for in Vehicle and Traffic Law § 1800.

B. Methods of enforcement. There are several methods for the enforcement of a town ordinance:

(1) Fines and/or imprisonment. When a violation is declared by the ordinance to be a "misdemeanor" or an "offense" against the ordinance, the most common method of enforcement is for the ordinance to provide for the imposition of a fine, or for imprisonment, or for both, as a criminal penalty in the case of a proved violation.

(2) Civil penalties. The ordinance may provide for a civil penalty instead of a criminal penalty.

(3) Injunctions. A town may maintain an action in court to compel compliance or to restrain further violations.

Form of Town Ordinance
AN ORDINANCE LICENSING AND REGULATING
TRASH REMOVAL AND COLLECTION IN THE
TOWN OF _____

For the purpose of licensing and regulating persons engaged in the business of trash collection within the Town of _____, the Town Board does ordain as follows:

1. It shall be unlawful for any person, firm or corporation to engage in the business of trash removal within the Town of _____ without first obtaining a license therefor from the Town Clerk of the Town of _____.

2. The license shall be issued for a period of one year and shall expire one year from the date of issue and must be renewed at the expiration of said period. [See Note below.]

3. The fee for such license shall be \$100 for each year. Each such license shall entitle the holder thereof to operate and maintain one motor vehicle or truck in the business of trash collection, and an additional fee of \$10 annually shall be charged to each licensee for each additional motor vehicle operated and maintained in such business.

4. All motor vehicles or trucks used in the business of trash collection shall be inspected by the Town Sanitary Inspector or Health Officer, and shall be constructed with a closed body so that waste, trash, garbage or other material collected shall be completely confined therein.

5. All persons, firms or corporations licensed hereunder shall dump within the Town of _____ only at such places as shall be designated from time to time by the Town Board and in the manner directed by the supervisor of such dumping area.

6. Violation of this Ordinance, or any part thereof, shall be a misdemeanor and shall be punishable for each offense by a fine not exceeding \$100, or by imprisonment not exceeding 30 days, or by both such fine and imprisonment.

7. This Ordinance shall take effect after its adoption and upon its publication as required by Town Law § 133.

[Note: Town Law § 137 was amended by Chapter 240, Laws of 1972, to authorize town boards by resolution to provide for the staggering of licensing periods to allow for the issuance of licenses for a period of one year from the date of issuance rather than only to January 1 next succeeding. If any action taken by the town board results in a licensing period shorter than the "regular" licensing period, the town clerk must adjust the license fee proportionately.]

ARTICLE II, Local Laws

§ 6-8. Background.

In the early 1960's, a committee headed by former State Comptroller and Lieutenant Governor Frank G. Moore under-took the task of rewriting the Local Government Article of the New York State Constitution to provide towns with home rule, local law enacting powers. After many months of study, this amendment was completed and was approved by the people of the state at the General Election in November 1963. It, and the statute implementing it, the Municipal Home Rule Law, enacted by the 1963 Legislature, became effective January 1, 1964. Whereas, the cities of the state, its villages with populations over 5,000 and its counties all had some form of home rule powers before

this, it was not until January 1, 1964, that towns were able to enjoy these new powers of local legislation. With these new powers, towns became equal partners with all other units of local government in the state, limited only by being forbidden from adopting "local laws which impair the powers of any other local government," which, of course, towns have no desire to do. Now, each unit of general purpose local government -- the town, the village, the city and the county -- is given certain of the same powers, and each unit has also been given local law powers which are peculiarly their own.

§ 6-9. Advantages of adopting local laws.

There are at least seven advantages to a town board in adopting a local law:

A. A local law has the same prestige and carries the same weight and authority as a state statute enacted by the State Legislature. Local laws adopted by local governments possessing home rule powers have been held "just as binding as the acts of the Legislature of the State of New York." (Mooney v. Cohen, 272 N.Y. 33) In adopting local laws, towns function under constitutional authority, not under narrowly interpreted, strictly construed statutory grants as has been and is the case with the enactment of town ordinances.

B. Local laws are subject to judicial notice without request [Civil Practice Law and Rules, Rule 4511(2)]. Thus, on the trial of matters concerning the violation of a town local law, the necessity for formal proof of legal adoption, such as is required in the case of the trial of a violation of a town ordinance, may be avoided.

C. With home rule local law power, towns may legislate in a vastly broader field of subject matters than by ordinance. Formerly, as has been stated before, towns could legislate by ordinance only within specific grants of power from the legislature.

D. Under this constitutional home rule grant, towns' police powers have been greatly expanded and enlarged over the narrower statutory grant in Town Law § 130(11) and (15).

E. A local law under the procedure outlined in the Municipal Home Rule Law Article 3 can be enacted more quickly and more conveniently than a town ordinance can be under Town Law Article 9. This would not normally be a sufficient reason alone for proceeding by way of a local law rather than by ordinance, but in certain cases it can be an important factor.

F. A local law can be entirely flexible as to its effective date from "immediately" to virtually any future date, as in the case of a state statute. A town ordinance can only be effective "ten days after such publication" (Town Law § 133).

G. After a local law is enacted, it need not be published by the town in the official newspaper or otherwise. It is filed with the New York State Secretary of State as a substitute for publication. This can result in substantial savings to the town.

§ 6-10. Protection of town home rule authority.

A. Restriction on state's ability to pass special laws regarding towns.

(1) The enactment of a home rule article in the State Constitution was of importance to towns for a reason above and beyond the power to enact local laws. The home rule article granted towns immunity from state legislative action, which is also provided in the Constitution, Article IX. This immunity meant that the State Legislature was, for the first time, restrained, except on a certificate of necessity from the Governor, from adopting any law which related to the "property, affairs or government" of a town, whenever that state law did not apply alike to every town of the state (i.e., was not what is called a "general law"), unless the law is requested by the town or towns concerned. Put another way, the legislature is prohibited, except on a certificate of necessity from the Governor or a home rule request from the affected town or towns, from adopting a "special law" affecting only one or more, but not all, towns of the state.

(2) Enactment of special laws. A special law which relates to the "property, affairs or government" of a particular town may be enacted by the State Legislature only in the following ways:

(a) By a home rule request initiated and approved by a two-thirds vote of a town board;

(b) By a home rule request by the town supervisor of the town concurred in by a majority vote of the town board; or

(c) On a certificate of necessity from the Governor of the state.

B. Protection of Statute of Local Governments. The Statute of Local Governments, which became effective July 1, 1965, provides another important safeguard to local governments from state legislation. The Statute is a repository of the basic powers of local governments. A power, once granted in the Statute of Local Governments, may not be diminished or impaired by a single act of the Legislature. Similar to constitutional amendments, action by the Legislature is required in two calendar years in order to repeal, diminish, impair or suspend a power granted in the Statute. It also requires two approvals by the Governor.

C. Regrettably, the courts of New York State have treated the home rule enactments with an unfortunate degree of skepticism and restraint. They have tended to find that certain subject matters -- such as salaries of district attorneys and land use matters in the Adirondack Park -- do not fall within the general ambit of the "property, affairs or government of local government" but, rather, are matters of state concern, thus allowing the Legislature to enact laws without regard to the Article IX protections. Similarly, courts have too readily looked to the innumerable state laws in subject areas such as local highway funding to conclude that a subject area has been "preempted" so that local laws on that same subject may not be enacted by local government without specific enabling authority. Despite the lukewarm treatment of the home rule power by the courts, it still holds great promise for imaginative town governments with problems to solve. It is important to recognize that your town has a source of authority beyond the specific provisions of Town Law or other similar enabling statutes such as the General Municipal Law.

§ 6-11. Areas of town board local law authority.

Town boards may now adopt local laws concerning the following:

A. Property, affairs or government. Town boards may adopt local laws concerning the property, affairs or government of the town, provided such local law is not inconsistent with a general law enacted by the Legislature. "General," in this case, is defined as a law applicable to all towns alike. Under this authority, it is possible for a town board to adopt local laws which may change provisions of state law not generally applicable to all towns in the state, provided the subject matter falls within the ambit of the "property, affairs or government."

B. Additional subjects. In addition, towns may adopt local laws concerning a number of listed subjects whether they are, or are not, property, affairs or government so long as such local laws are not inconsistent with general laws applicable to all towns, and provided there has been no statutory restriction on such local legislation. Briefly, these include:

- (1) Powers, duties, qualifications, number, mode of selection and removal, terms of office, compensation, hours of work, protection, welfare and safety of town officers and employees;
- (2) Membership and composition of town boards;
- (3) Transaction of business;
- (4) Incurring of town obligations (except in connection with financing by issuance of obligations, which must be consistent with the Local Finance Law);
- (5) Presentation, ascertainment, disposition and discharge of claims;
- (6) Acquisition, care, management, and use of highways, roads, streets, avenues and property;
- (7) Acquisition of transit facilities and the ownership and operation thereof;
- (8) Levy, collection and administration of local taxes and assessments; and assessments for local improvements authorized by the Legislature;
- (9) Fixing, levy, collection and administration of rentals, charges, rates or fees, penalties and rates of interest thereon, liens on local property in connection therewith and charges thereon;
- (10) Wages, salaries, hours of work or labor and the protection, welfare and safety of persons employed by any contractor or subcontractor performing work, labor or services for the town;
- (11) Protection and enhancement of its physical and visual environment;

(12) The government, protection, order, conduct, safety, health and well-being of persons or property, including the power to provide for the regulation or licensing of occupations or businesses:

(a) BUT only in the area of the town outside villages.

(b) Where any county is specifically authorized to regulate or license an occupation, the exercise of such power shall NOT relate to a town (outside of any villages therein) during such time as the town is regulating or licensing such business or occupation;

(13) Apportionment of its legislative body, composition and membership, terms of office of members thereof, areas from which representatives are to be chosen and voting powers of individual members;

(14) Powers granted in the Statute of Local Governments.

§ 6-12. Authority to supersede Town Law.

Perhaps the most useful element of home rule local law power is the Municipal Home Rule Law § 10(1)(ii)(d)(3) grant of authority to towns to supersede or amend any provision of Town Law, with certain exceptions. Those exceptions include the provisions in Town Law relating to: (i) improvement districts; (ii) the creation of areas of taxation; (iii) authorizing or abolishing referendum requirements; or (iv) town finances. Thus, the whole structure of town government, even those defined by Town Law, can be dealt with using a town's local law power. Terms of office, abolition or creation of new positions, and the alteration of various procedural mandates can all now be changed by local law. The only caveat is that the local law specify which section and paragraph of the Town Law is being superseded. There may be procedural restrictions on certain of these powers. Some require a mandatory referendum for their exercise; others a permissive referendum; some no referendum at all. The scope of the supersession authority is limited in the case of the standards for a town ZBA granting area or use variances. The Court of Appeals has ruled that for reasons of standardization, the variance standards in the State Village Law, and by extension the Town Law, cannot be superseded. [Cohen v. Board of Appeals of Village of Saddle Rock, 100 NY2d 395, 795 N.E.2d 619, 764, NYS2d 64 (2003)]

§ 6-13. Effect of local laws on ordinances.

Town boards may still legislate by ordinance. The granting to towns of home rule local law powers in no way affected town boards' continuing power to legislate by ordinance. The Municipal Home Rule Law specifically provides, however, that anything a town board is empowered to accomplish by ordinance may now alternatively be accomplished by the enactment of a local law, including the amendment of ordinances previously enacted.

§ 6-14. Restrictions on adoption of local laws.

In addition to the general "preemption" limitation on local law powers mentioned previously, Municipal Home Rule Law § 11 contains certain specific subject areas wherein a local law cannot supersede a state statute. Those areas include local laws which would:

A. Change debt or tax limits;

- B. Remove a restriction regarding the issuance of bonds or other obligations;
- C. Affect the education system or teachers' benefits;
- D. Change the number or term of members of a county board of supervisors chosen in a town, except in the case of an alternative form of county government;
- E. Apply to courts;
- F. Apply to or affect the:
 - (1) Election Law § 8-100;
 - (2) Labor Law;
 - (3) Hours and holidays of certain firemen and policemen;
 - (4) Volunteer Firefighters' Benefit Law;
 - (5) Workers' Compensation Law.
- G. Changes any provision of the Multiple Residence Law;
- H. Affects powers of the State Comptroller relative to auditing or examination of municipal accounts, or approval of districts;
- I. Grade crossings or terminal facilities;
- J. Judicial review of dismissals from civil service.

§ 6-15. Procedure for adopting a local law.

As in the case of the adoption of an ordinance, the procedure to be followed to accomplish the legal adoption of a local law must be meticulously followed, step by step, without deviation from prescribed statutory provisions. In the case of local laws, the prescribed statutory provisions are those contained in Municipal Home Rule Law Article 3 (§§ 20 through 27). Whereas these provisions are briefed below for easy reference and general understanding, the basic text of the pertinent provision of the Municipal Home Rule Law should be studied carefully by anyone guiding a town board on the adoption of a local law.

- A. Checklist of steps.
 - (1) A proposed local law is introduced by a member of the town board:
 - (a) At a town board meeting; or
 - (b) As may be otherwise prescribed by rules of procedure adopted by such town

board.

- (2) A public hearing must be held before the town board on public notice.
 - (a) Five-day notice is required unless the town board by a local law prescribes a different length of notice period which must, however, be at least three days.
 - (b) The local law adopted by the town board prescribing the period of notice for public hearings on proposed local laws must have a five-day notice.
- (3) A proposed local law must be in final form on the desks or table of town board members for seven calendar days, exclusive of Sundays, or be mailed to each member at least 10 days prior to passage unless the town supervisor certifies as to the necessity for its immediate passage. A local law passed immediately upon certificate of necessity by the supervisor requires a two-thirds approving vote by the town board. In ordinary cases, only a majority vote is necessary.
- (4) The vote is by “ayes” and “noes.” Names of members present and their votes must be entered in the town board minutes.
- (5) The local law must be certified by the town clerk and town attorney after passage.
- (6) If the local law is subject to mandatory referendum or submitted to election as a result of petition, the proposition on such local law must be submitted as described below and affirmed by a majority of the electors voting thereon.
- (7) Within 20 days after a local law has finally been adopted, town clerks must file one certified copy in their office and one certified copy with the Secretary of State [Municipal Home Rule Law § 27(1)].
 - (a) If the local law was subject to mandatory referendum, then such local law must be filed as above described within 20 days after approval of electors.
 - (b) If the local law was subject to permissive referendum and no petition is filed, the filing, as above described, must be accomplished within 20 days after the time for filing a petition has expired.
- (8) The certified copies filed as above should contain the text of the local law only (i.e., without brackets or italics that may appear in the original draft). In certain situations it may be useful to describe matter that is being deleted or repealed. For example: “The stop intersection at Main Street and Second Avenue is hereby repealed.”
- (9) No local law is effective until filed with the Secretary of State. Subject to that filing requirement, a local law otherwise takes effect on the 20th day after final adoption unless a different time is specified therein.
- (10) The town clerk must record all local laws filed in his or her office in a separate

book or books, which must be indexed.

B. Local laws subject to mandatory referendum.

(1) A local law which does the following is subject to mandatory referendum:

(a) Changes membership or composition of the town board or increases or decreases the number of votes any member can cast.

(b) Changes the veto power of the chief executive officer. NOTE: Towns do not presently have a chief executive officer as defined in the Municipal Home Rule Law (which means an officer who has veto power). However, it would appear that a town could enact a local law giving the supervisor veto power subject to mandatory referendum because such law would, in effect, be changing the veto power.

(c) Changes the law of succession to the office of town supervisor.

(d) Abolishes an elective office, or changes the method of nominating, electing or removing an elective officer; changes the term of an elective officer, or reduces the salary of an elective officer during his or her term of office. NOTE: Towns would presumably wish to continue fixing salary by resolution (instead of by local law) because no referendum of any kind is ordinarily required and salaries of all town officers can be changed "from time to time." See, however, Town Law § 27, as amended by Ch. 1049, L. 1969, in which it is provided that the annual salary of certain elected town officers may be increased for not more than one fiscal year in excess of the amount specified in the notice of hearing on the preliminary budget by local law adopted pursuant to the Municipal Home Rule Law.

(e) Abolishes, transfers or curtails any power of an elective officer.

(f) Creates a new elective office.

(g) Changes a provision of law relating to public utility franchises.

(2) If the local law is subject to mandatory referendum the town must adhere to the following procedure:

(a) The local law must be submitted at the general election held not less than 60 days thereafter, unless:

[1] The local law provides for submission at a special election; or

[2] Within 30 days after adoption, a petition is submitted requesting its submission at a special election. Such petition must be:

[a] Signed by 10% of the last gubernatorial vote;

[b] Authenticated;

[c] Filed with the town clerk;

[d] Certified by the town clerk to the town board within 30 days after the date of its filing or 45 days before the day of election, whichever is earlier, to the effect that he or she has examined it and has found that it complies or does not comply with all the requirements of law.

(b) Within five days after the last day the clerk can file his or her certification, objections may be taken to the Supreme Court or any justice thereof.

C. Local laws subject to permissive referendum.

(1) A local law which does the following is subject to permissive referendum:

(a) Dispenses with a provision of law requiring a public notice of hearing as a condition precedent to official action.

(b) Changes a provision of law relating to public bidding, purchase or contract.

(c) Changes a provision of law relating to assessment of real property or benefit assessments for local improvements.

(d) Changes a provision of law relating to the exercise of the power of condemnation.

(e) Changes a provision of law relating to authorization or issuance of bonds or other obligations.

(f) Changes a provision of law relating to the auditing of the accounts of the town.

(g) Changes a provision of law relating to the alienation or leasing of real property of the town.

(h) Increases the salary of an elective officer during his or her term of office.

(i) Concerns reapportionment.

(2) If the local law is subject to permissive referendum:

(a) The local law cannot take effect until 45 days after adoption if no petition is filed; any petition objecting must be filed within 45 days after adoption.

(b) If a petition is filed as described above under Subsection B above, the proposition on such local law must be submitted at a general election held not less than 60 days thereafter; unless

(c) The petition requests and another local law is adopted to submit such proposition at a special election held not less than 60 days after adoption of this latter law.

(3) Differences between Municipal Home Rule Law procedure and Town Law Article 7 procedure. If a permissive referendum follows the procedures established by the Municipal Home Rule Law:

(a) The local law does not become effective for 45 days while a petition may be filed.

(b) Ten percent of the last gubernatorial vote is required to sign any petition [for a reapportionment exception, see Municipal Home Rule Law § 24(2-j)(1)].

(c) The town board can adopt a local law submitting a proposed local law to referendum held not less than 60 days after adoption if the petition so requests; otherwise the local law is to be submitted at a general election held not less than 60 days after the filing of such petition.

(d) The petition must be filed within 45 days after adoption of a proposed local law subject to permissive referendum.

D. Submission of a referendum proposition to election.

(1) The proposition must contain the title of the local law.

(2) The town clerk, with the advice of the town attorney, prepares an abstract, concisely stating the title, purpose and effect of the local law.

(3) The town clerk transmits the abstract to election officers charged with the duty of publishing the notice of and furnishing copies for the election.

(4) Copies of the abstract must be printed and made available at the time of registration or in advance of the election.

(5) Copies of the abstract must be delivered with other election supplies and be distributed to electors at the time of the election.

(6) If there is more than one proposition, they must be numbered consecutively.

E. Reconsideration of a local law subject to referendum. At any time not later than 15 days before an election on a proposition on a local law subject to mandatory or permissive referendum, the town board may reconsider its action and repeal such local law, in which case no proposition for approval shall be submitted, or, if submitted, approval by voters shall be ineffective.

§ 6-16. Filing of local laws.

Please observe these rules for filing local laws with the Secretary of State:

A. Each local law shall be filed with the Secretary of State within 20 days after its

final adoption or approval as required by Municipal Home Rule Law § 27. The cited statute provides that a local law shall not become effective before it is filed in the office of the Secretary of State.

B. Local laws can be mailed or delivered to the State Records and Law Bureau, Department of State, 41 State Street, Albany, New York 12231.

C. Each local law shall be filed on a form provided by the Department of State. In case additional pages are required, they must be of the same size as the form furnished by the Department of State. For convenience, printed, mimeographed or typewritten copies of the local law may be pasted on the form, but these must not be of a size larger than the form. Only true and legible copies will be accepted for filing.

D. Only the number, title and text of the local law should be filed. Be sure to send the copy of law as amended. Do not include in the filed copy parts of any old law to be omitted, and do not italicize new matter.

E. For the purpose of filing with the Secretary of State, number local laws consecutively, and start with number "1" each calendar year. This numbering is independent of any identifying numbers that may be used while a proposed local law is being considered for adoption.

F. Each copy of a local law filed with the Secretary of State shall have affixed to it a certification by the Clerk of the board of supervisors or the city, town or village clerk or other officer designated by the local legislative body. A certification executed by the county attorney, corporation counsel, town attorney, village attorney or other authorized attorney that the local law contains the correct text and that all proper proceedings have been had or taken for its enactment shall also be attached or annexed thereto. Certification forms will be provided by the Department of State.

FORM OF LOCAL LAW
LOCAL LAW No. 1

A local law to authorize the Superintendent of Highways of the Town of _____ to remove vehicles from Town highways and other public property in the Town in certain circumstances.

Be it enacted by the Town Board of the Town of _____ as follows:

Section 1. Removal of vehicles.

A. The Superintendent of Highways of the Town of _____ shall have the power to cause the removal and disposition of any vehicle left unattended for more than 24 hours within the right-of-way of any Town highway of the Town or on any public property of the Town.

B. The Superintendent of Highways shall have the power to cause the immediate removal from the right-of-way of any Town highway of any vehicle which obstructs or interferes with the use of such a highway for public travel; or which obstructs or

interferes with the construction, reconstruction or maintenance of such a highway; or which obstructs or interferes with the clearing or removal of snow or ice from such a highway; or which obstructs or interferes with any operation of the Town Highway Department during a public emergency.

C. The owner of a vehicle removed under any of the provisions of this local law shall be charged the cost to the Town of removal, disposition and storage thereof.

D. The term "vehicle," as used in this local law, shall mean every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks.

Section 2. This local law shall take effect _____

[NOTE: A local law should be typed up on special forms provided by the Secretary of State before being offered for filing in the Secretary's office. See the instructions and forms included at the end of this chapter.]

ARTICLE III, Resolutions

§ 6-17. Background.

Of the three types of formal action taken by a town board in its legislative and administrative capacities, resolutions involve the least amount of formality and routine. For instance, resolutions can normally be introduced and passed at the same meeting.

§ 6-18. Comparison with motions; form.

Resolutions are often confused with motions. The latter are the vehicle (i.e., the tool) by which laws, ordinances and resolutions are brought before a town board for action. Resolutions and motions are often used interchangeably in fulfilling the administrative functions of the board, such as approving claims for payment. For instance, a town board may "adopt a resolution" calling for payment of all claims presented, or a board member may simply "move" their approval for payment. Frequently the town attorney or the supervisor or some member of the town board has prepared the resolution in advance.

Councilman Brown moved that the following resolution be adopted:

[Recite the resolution]

Such motion was seconded by Councilman Smith, and following a discussion of the proposal, the Supervisor instructed the Town Clerk to call the roll of the Town Board, which was done with the following results:

Councilman Brown	Aye
Councilman Smith	Aye
Councilman Black	Aye
Councilman Green	Nay
Supervisor Blue	Aye

The Supervisor declared that the foregoing resolution was duly carried.

§ 6-19. Subject matter covered by resolutions.

When the State Legislature empowers or requires local legislative bodies to take action on a particular matter, it often specifies the form of legislation to be used. Examination of these state laws reveals a pattern in the use of each form. Actions required by statute to be taken by resolution usually concern the day-to-day work of government and do not markedly change governmental operations. Resolutions primarily

serve as the "workhorse" of a legislative body and are used for its more routine actions. Examples include:

- A. Transferring money from one budget account to another;
- B. Establishing a salary;
- C. Approving employee bonds;
- D. Designating depositories.

§ 6-20. Form and process.

A. Sometimes, the specific enabling statutes which authorize a town board to take a particular action through adoption of a resolution require some particular due process with respect to adopting such a resolution, such as the holding of a public hearing after some form of public notice. As stated before, a resolution would be the format used to introduce an ordinance or local law into the town board proceedings and to formalize its ultimate adoption or rejection after the other formalities, such as a public hearing, etc. are taken care of.

B. Preamble. Sometimes it is good procedure to state the reasons for the proposed action. This would be done as a preamble to the resolution in an opening paragraph beginning with the word "WHEREAS." Often the reasons are obvious and the subject matter is not controversial so that no preamble is necessary.

C. Body. The body of the resolution should contain all the details of the issue involved, but eliminate all excessive and difficult wording. If clarity is to be achieved, the essentials must be retained, but the length kept at a minimum. In many instances, a simple resolution will do.

Example #1:

WHEREAS no newspaper is regularly published in the Town of Utopia,

RESOLVED, that the Truthful Tribune, a newspaper regularly published at Menda City in the County of Wolfe and having a general circulation in this Town, being a newspaper entered as second class mail matter, be and it hereby is designated as the official paper of the Town.

Example #2:

RESOLVED, that the Supervisor be and hereby is authorized to make the following budgetary transfer:

From	To
Contingent Purposes \$400.00	Councilmen-Contractual
and Other Expenses	
\$400.00	

D. Bond resolutions. A type of proposal which must comply with strict legal requirements is a resolution authorizing a borrowing. The Local Finance Law sets forth the required form and contents of a borrowing resolution, and this formal resolution should be recorded in the minutes. Generally, a bond resolution is drafted by the bond attorney, and since its provisions cover specific statutory requirements, it should be entered in the minutes without alteration. A bond resolution usually begins by enumerating the date, amount and purpose followed by the specifics required for the particular purpose:

Bond Resolution of February 7, 1968, Authorizing the Issuance and Sale of Serial Bonds of the Town of Utopia, Wolfe County, New York, in the amount of \$10,000.00 for the Purchase of a Road Grader

Be it Resolved this 7th day of February, 1968, by the Town Board of the Town of Utopia, Wolfe County, New York as follows:

1. The specific object or purpose for which obligations are to be issued....
2. The maximum cost....
3. The following determinations are hereby made: (Specifics concerning period of probable usefulness, sections of the law, maturity, etc.)
- 4,5,6 etc.

§ 6-21. Orders.

The other form of determination a town board can make is called an order, which is really a form of resolution. An order prescribed by Town Law § 193 in relation to a special district petition would be set forth as follows:

Whereas a written petition dated February 2, 1968, in due form has been presented to and filed with the Town Board of the Town of Utopia, Wolfe County, New York, for the establishment of a Sewer District (described); and

Whereas the improvements proposed....

Whereas the maximum amount....

Ordered that a Meeting of the Town Board of said Town of Utopia shall be held..... to consider said petition and hear all persons....

Dated

Signed

ARTICLE IV, Documentation of Actions Taken

§ 6-22. Documentation required.

A. Usually resolutions, particularly borrowing resolutions, are prepared in writing and given to the town clerk at some time prior to the meeting. However, even if this rule is not followed, all resolutions of the town board must be duly recorded. The vote of the members of the town board on motions and resolutions must be specifically noted in the minutes. Town Law § 63 provides "that the vote upon any question shall be taken by ayes and noes and the names of the members present and their votes shall be entered in the

minutes." For example:

Adopted	Abel Leader	Aye
	Carrie A. Banner	No
	Ernest Frank	Aye
	Seymour Krimes	Aye

B. Since the minute book contains all the actions of the town board, not just the affirmative dispositions of the majority, the town clerk must also show the vote on those motions and resolutions which were defeated.

C. Ordinances and local laws also must be entered in the minutes and, except for the initial wording, are normally introduced in the same manner as resolutions.

Resolved and Ordained

or

Be it enacted by the Town Board of the Town of Anywhere As Follows:

The latter style is set forth in law (Municipal Home Rule Law § 20) and must be used for local law enactments.

§ 6-23. Documentation of disposition.

A. The various samples above have not indicated the disposition of the several motions and resolutions. The disposition is one of the most important entries to be made. Several opinions have been given by the State Comptroller on the recording of the vote, who must vote, abstaining from voting, etc. While they deal with the particular question in hand, they all point up the necessity of recording the "ayes" and "noes" on the question as required by Town Law § 63.

B. The following minute book entries would not be correct:

Resolution No. 6 . . .

Adopted Unanimously

The Following Resolution was adopted . . .

A Motion was made, seconded and adopted that . . .

C. The fact that all of the members vote the same is no excuse for the failure to record each individual vote. So, after each motion (except those of a procedural nature, such as adjournment), enter:

Adopted	Abel Leader	Aye
	Carrie A. Banner	Aye
	Ernest Frank	Aye
	Seymour Krimes	Aye

or

Defeated	Abel Leader	No	
	Carrie A. Banner	No	
	Ernest Frank	No	
			Seymour Krimes Absent

D. Note that an absent member does not vote. The fact that the member would have voted for or against a measure had he or she been at the meeting is of no importance. No body, no vote. Note also that the questions defeated are also included. The minute book is a compilation of the entire proceedings of the town board, not just the affirmative actions of the majority.

§ 6-24. Unnecessary documentation.

Oftentimes items are unnecessarily included in minute books.

A. General discussions and conversations should not be included verbatim unless the town board desires a detailed record of the discussion. Where the fact that a particular subject was discussed is relevant to the proceedings a simple sentence or so will do. For example:

A general discussion was held on the advisability of . . .

B. Town clerks should avoid interjecting their own feelings or interpretations of the feeling of others into the written record. For example:

Jim and John favored the idea but naturally Mr. Stone seemed to be against it.

ARTICLE V, Voting

§ 6-25. Majority required.

Generally speaking, it takes the votes of a majority of any fully constituted board (i.e., not just a majority of those present) in order for a town board or body to take action (General Construction Law § 41). This means that three “aye“ votes are necessary for five-member boards to take even the most basic action such as the payment of bills. In certain circumstances (i.e., bond resolutions) a two-thirds or other supermajority vote may be required. Note that failure to muster three affirmative votes -- such as with a 2-2 tie -- is effectively a denial. (Tall Trees Construction Corp. v. ZBA of the Town of Huntington, 2001 NY Slip Op 09254)

Sample Local Law Filing Form

(Please Use This Form for Filing Your Local Law with the Secretary of State)

Text of law should be given as amended. Do not include matter being eliminated and do not use italics or underlining to indicate new matter.

County

City

of _____

Town

Village

Local Law No. _____ of the Year 20 _____

A local law _____
(insert title)

Be it enacted by the _____ of the
(name of legislative body)

County
City

of _____ as follows:

Town
Village

[Text of legislation]

(Complete the certification in the paragraph which applies to the filing of this local law and strike out the matter therein which is not applicable.)

1. (Final adoption by local legislative body only.)

I hereby certify that the local law annexed hereto, designated as local law No.

County
City

of 20 _____ of the
passed by the

of _____ was duly

Town
Village

_____ on _____, 20 _____

in

(name of legislative body)

accordance with the applicable provisions of law.

2. (Passage by local legislative body with approval or disapproval by Elective Chief Executive Officer,* or repassage after disapproval.)

I hereby certify that the local law annexed hereto, designated as local law No.

County
City

of 20 _____ of the
the

of _____ was duly passed by

Town
Village

_____ on _____, 20 _____ and

(name of legislative body)

was not disapproved
was approved

by the _____ and was

repassed after disapproval

Elective Chief Elective Officer*

deemed duly adopted on _____, 20____, in accordance with the applicable provisions of law.

3. (Final adoption by referendum)

I hereby certify that the local law annexed hereto, designated as local law No.

_____ of 20_____ of the _____ County City of _____ was duly passed by the _____

_____ Town Village _____ on _____, 20_____ and _____ (name of legislative body)

was not disapproved was approved _____ by the _____. Such local law

repassed after disapproval

Elective Chief Elective Officer*

was submitted to the people by reason of a _____ mandatory _____ permissive referendum, and received the

_____ general affirmative vote of a majority of the qualified electors voting thereon at the _____ special

_____ annual election held on _____, 20____, in accordance with the applicable provisions of law.

4. (Subject to permissive referendum, and final adoption because no valid petition filed requesting referendum.)

I hereby certify that the local law annexed hereto, designated as local law No.

_____ of 20_____ of the _____ County City of _____ was duly passed by the _____

_____ Town Village _____ on _____, 20_____ and _____ (name of legislative body)

was not disapproved was approved _____ by the _____. Such local law

repassed after disapproval

Elective Chief Elective Officer*

being subject to a permissive referendum and no valid petition requesting such referendum having been filed, said local law was deemed duly adopted on _____, 20____, in accordance with the applicable provisions of law.

5. (City, local law concerning Charter revision proposed by petition.)

I hereby certify that the local law annexed hereto, designated as local law No. _____ of 20____ of the City of _____ § 36 having been submitted to referendum pursuant to the provisions of § 37 of the Municipal Home Rule Law, and having received the affirmative vote of a majority of the qualified electors of such city voting thereon at the general special election held on _____, 20____ became operative.

6. (County local law concerning adoption of Charter.)

I hereby certify that the local law annexed hereto, designated as Local Law No. _____ of 20____, pursuant to subdivisions 5 and 7 of Section 33 of the Municipal Home Rule Law, and having received the affirmative vote of a majority of the qualified electors of the cities of said county as a unit and of a majority of the qualified electors of the towns of said county considered as a unit voting at said general election, became operative.

(If any other authorized form of final adoption has been followed, please provide an appropriate certification.)

F I further certify that I have compared the preceding local law with the original on file in this office and that the same is a correct transcript therefrom and of the whole of such original local law, and was finally adopted in the manner indicated in paragraph _____ above.

Clerk of the County legislative body, City,
Town or Village Clerk or officer designated
by local legislative body

Date:

(Seal)

(Certification to be executed by County Attorney, Corporation Counsel, Town Attorney, Village Attorney or other authorized Attorney of locality.)

STATE OF NEW YORK

COUNTY OF _____

I, the undersigned, hereby certify that the foregoing local law contains the correct text and that all proper proceedings have been had or taken for the enactment of the local law annexed hereto.

Signature

Title

Date: _____ County
City
of
Town
Village

* Chief Executive Officer means or includes the chief executive officer of a county elected on a county-wide basis or, if there be none, the chairman of the county legislative body, the mayor of a city or village or the supervisor of a town, where such officer is vested with power to approve or veto local laws or ordinances.

Chapter 7
OFFICERS AND EMPLOYEES
ARTICLE I, General Provisions

§ 7-1. Statutory authority.

A. Municipal Home Rule Law § 10 grants every town the power and authority to adopt and amend local laws not inconsistent with the Constitution or any general law in relation to the powers, duties, qualifications, number, mode of selection and removal, term, compensation, hours of work, protection, welfare and safety of its officers. This provision includes, but is not limited to, the creation or discontinuance of departments of government and the prescription or modification of their powers and duties. (See Municipal Home Rule Law § 10(ii)(a)(1) and Chapter 6, Town Legislation, particularly Article II, Local Laws.)

B. The Town Law also authorizes towns to establish a variety of offices. It is in this regard where the classification of a town may still matter. Of course, given the home rule local law power discussed in the previous subsection, even those provisions restricting the establishment of offices to one or the other classification of town can easily be overcome. That is why it is fair to say that the importance of a town's classification is relatively minimal today. Nonetheless, some of the Town Law provisions on this subject remain noteworthy.

§ 7-2. Assessors.

In towns which have retained the elected three-assessor system, a change to one elected or appointed assessor is possible. This option to change from three elective assessors to a

single assessor is accomplished by the adoption of a local law, and may be made subject to either a mandatory or permissive referendum under the provisions of Municipal Home Rule Law § 23 or § 24. (See Real Property Tax Law §§ 328 and 329.)

§ 7-3. Tax collector.

In a town of the second class, the town board may also, by resolution, adopted at least 150 days prior to any biennial town election, abolish the office of tax collector and combine it with that of town clerk. This procedure is not subject to permissive referendum and is accomplished upon resolution of the town board.

§ 7-4. Additional justices.

The town board of any town having a population of more than 50,000 may, by adoption of a resolution therefor, submit to a mandatory referendum a proposition calling for the establishment of the office of a third town justice. The town board of a town with a population of more than 75,000 may, by the same procedure, propose the establishment of the offices of a third, or a fourth, or of a third and fourth town justice. The referendum must be submitted to the voters at least 120 days prior to the next biennial town election. If the proposition is approved by the voters, then at the next biennial town election thereafter, such additional justice or justices shall be elected for four-year terms beginning on the following January 1 [Town Law § 20(1)(d)]

§ 7-5. Town attorney and town engineer.

A. The appointment of town attorneys and, to a lesser extent, town engineers, is often a matter of some confusion for towns. Town Law § 20 gives the town board two distinct options in this regard:

(1) Appointment for specific matters. Section 20(2)(a) authorizes a town to establish the office of town attorney or town engineer and, in addition, to employ counsel to the town attorney (or engineer) in respect to particular subject matters (e.g., for litigation purposes, or for planning and zoning matters). A second option is provided by § 20(2)(b), which states that the "town board of any town which shall not have established the office of town attorney (or town engineer) may employ an attorney (or engineer) to give it such professional service and advice as it may require..." In the latter instance, the arrangement is often referred to as an "attorney for the town" (or "engineer for the town"). Anyone retained in that capacity is not a town officer but, rather, an independent contractor providing services to the town via a contract which should spell out those services and the agreed-upon compensation.

(2) Establishment of office. Where the town elects to establish the office of "town attorney," whoever is appointed is a town officer and, thus, would be included on the town's payroll as such, file an oath of office and would be required to be a town resident (unless no attorney resides in the town; see Town Law § 23). Where the office of town attorney or town engineer is established, appointees have a two-year term (Town Law § 24).

B. There is probably an even split among towns as to which option they elect for retaining legal advice and counsel. Historically, many towns have gone with the "attorney for the town" approach because it allowed them to go outside the town for a lawyer with municipal law experience and expertise even though they had one or more resident attorneys. With the ability to now use the local law power to supersede the residency

requirement for the office of town attorney or other appointments, that motive no longer controls which approach a town may take.

§ 7-6. Multiple offices.

Town Law § 20, Subdivision 4, prohibits any person from holding more than one elective town office. A town board may, however, for the purpose of consolidating offices and positions, enlarge, increase and impose further and other duties than those prescribed by law upon any elective or appointed officer and employee and fix a single compensation for the performance of all such duties. In exercising this authority, the compatibility of offices must be kept in mind. For example, it has been ruled that a town clerk cannot be appointed bookkeeper to the town supervisor because of an obvious incompatibility in the duties (cosigning checks) to be performed. Similarly, the Town Law itself prohibits any town board member from being appointed a town comptroller.

§ 7-7. Additional employees.

In addition to the officers and employees specifically authorized by law, the Town Law permits a town to have "such other employees as the town board may determine necessary for the proper conduct of the affairs of the town."

ARTICLE II, Eligibility and Qualifications of Town Officers

§ 7-8. Oaths of office and official undertakings required.

Two matters should be checked first and foremost, namely that oaths of office have been taken and filed appropriately and that official undertakings have been executed and filed. Both the oaths and the official undertakings are required for each new term of office (i.e., not necessarily every year).

§ 7-9. Oaths of office.

A. Oath required. Town Law § 125 provides for taking oaths of office before entering into the duties of office.

Before he enters on the duties of the office, and within thirty days after the commencement of the term of office for which he is chosen, every town officer shall take and subscribe before an officer authorized by law to administer oaths in his county, the constitutional oath of office and such other oath as may be required by law, which shall be administered and certified by the officer taking the same without compensation and such oath shall be filed in the office of the town clerk." [Emphasis added]

B. Definition of "public office." Neither the Town Law nor the Public Officers Law contains a listing or definition of which positions are subject to the oath requirements discussed above. In the absence of such a definitive listing, the courts have defined "public office" to include those where "the functions and duties directly affect the citizens of the [town] and involve the exercise of the powers of the political subdivisions." Any office where the duties involve some exercise of the sovereign power is a public office. Thus, members of planning and zoning boards, boards of assessment review and all deputies would clearly fall within the scope of the oath-taking requirements.

C. Filing of oath. Public Officers Law § 10 provides for filing the oath of office with the town clerk.

D. Administering oaths. Oaths can be administered by any officer, who shall have already taken an oath of office, authorized to administer oaths in the county. This

includes:

- (1) The town clerk in whose office the oath is required to be filed, or by his or her duly designated assistant (i.e., deputy);
- (2) Any notary public;
- (3) Any judge of the Court of Appeals or justice of the Supreme Court;
- (4) A town supervisor, but only to other members of the town board;
- (5) Any town councilperson or town justice of the peace, but only within the county containing the town which he or she serves.

E. Term. Oaths of officers appointed to fixed terms are good for their entire term. A new oath must be taken and filed when the officer is reappointed or again elected for a subsequent term.

§ 7-10. Official undertaking.

A. Required. Town Law § 25 provides that each supervisor, town clerk, collector, receiver of taxes, town justice, constable, superintendent of highways and such other officers, and employees as the town board may require, shall execute and file an official undertaking in the town clerk's office, in a form, sum and with sureties directed and approved by the town board as indicated on such undertaking. The supervisor is not required to give the town an additional bond for highway moneys. However, the general bond should adequately insure both highway moneys and general funds.

B. Blanket undertaking. Public Officers Law § 11(2) provides that in lieu of any individual undertaking as required by law, the town board may approve the procurement of a blanket undertaking from any duly authorized corporate surety covering the officers, clerks and employees of the town. Such blanket undertaking must be approved as to form, manner of execution and sufficiency of surety, by the town board and filed in the same manner as individual undertakings. The section further provides that any such blanket undertaking entered into after January 1, 1978, must indemnify against losses caused by the failure of the officers or employees to faithfully perform their duties or by their fraudulent or dishonest acts.

§ 7-11. Electors requirement.

A. All officials of the town must at the time of election and throughout their terms of office be "electors" of the town. See Town Law § 23 and Public Officers Law § 3. Town Law § 23 provides, with certain exceptions noted therein, that:

Every elective office of the town at the time of his election and throughout his term of office, shall be an elector of the town. Every other officer of the town at the time of his appointment and throughout his term of office shall be an elector of the town, except that in towns having no resident attorney, the town attorney and such counsel as may be employed need not be electors and in towns having no resident engineer, the town engineer and such consultant engineers as may be employed need not be electors. No county treasurer, district superintendent of schools, or trustees of a school district shall be

eligible to the office of supervisor.

B. The term "elector" means a person who, if he or she wished, could register as a voter in the town, whether or not that person has, in fact, so registered. Residency, age and citizenship are the three key criteria necessary for registration.

(1) Residency. "Residency" means domicile. The determination of domicile is a question of fact; a determination that must be made locally, based upon the facts of each case. Ultimately, only a court can determine domicile. (1977 N.Y. Op. Atty. Gen. [Inf.] 271). (See Chapter 3, Town Board, § 3-3A and B.)

(2) Age. Chapter 868 of the Laws of 1972 reduced from 21 to 18 the age qualification for holding public office.

(3) Citizenship. United States citizenship is required by Election Law § 5-102(1) as well as by Public Officers Law § 3.

ARTICLE III, Deputies

§ 7-12. Statutory authority.

The Town Law specifically provides for the appointment of deputies in the case of certain town officers described below. When deputies to these offices are appointed, the method of appointment, functioning, powers and limitations of power of such deputies as prescribed should be strictly adhered to. In addition, Public Officers Law § 9 provides as follows in relation to deputies generally:

Deputies, their appointment, number and duties. Every deputy, assistant, or other subordinate officer whose appointment or election is not otherwise provided for, shall be appointed by his principal officer, board or other body, and the number thereof, if not otherwise prescribed by law, shall be limited in the discretion of the appointing power. If there is but one deputy, he shall, unless otherwise prescribed by law, possess the powers and perform the duties of his principal during the absence or inability to act of his principal, or during a vacancy in this principal's office. If there be two or more deputies of the same officer, such officer may designate, in writing, the order in which the deputies shall act, in the case of his absence from the office or his inability to act, or in case of a vacancy in the office, and if he shall fail to make such designation, the deputy longest in office present shall so act. If two or more deputies present shall have held the office for the same period, the senior deputy in age shall so act. Such written designation by a state officer shall be filed in the office of the clerk of the county in which the principal has his office. If a vacancy in a public office shall be caused by the death of the incumbent, the deputies shall, unless otherwise provided by law, continue to hold office until the vacancy shall have been filed in accordance with law.

Several of the more important deputy positions are described in the following sections.

§ 7-13. Deputy supervisor.

A. Establishment; appointment; duties. The town board of any town may at any time establish the office of deputy supervisor. The deputy supervisor shall be appointed by the supervisor to serve at the pleasure of the supervisor, and in case the office of supervisor becomes vacant, any deputy supervisor in office at the time such vacancy occurs shall

continue to serve until the successor of such deputy supervisor is appointed. If the supervisor shall fail to appoint a deputy supervisor within five days after the establishment of the office or within five days after a vacancy occurs in the office, the town board shall have power to appoint such deputy supervisor. During the absence or inability to act of the supervisor, or while the office of supervisor is vacant, the deputy supervisor shall preside, when present, at the meetings of the town board and shall be vested with all of the powers and may perform all of the duties of the supervisor under the Town Law or any other law, except that he or she has no vote in his or her capacity as deputy supervisor on matters coming before the town board, and he or she does not serve as a member of the county board of supervisors.

B. Qualifications. Any person, including a town officer, official or employee, may be appointed deputy supervisor, provided that the person appointed shall possess the same qualifications as an elective town officer. Before he or she can perform any function as such, the deputy supervisor must take and file the constitutional oath of office and execute and file an official undertaking in the manner prescribed in Town Law § 25.

C. Compensation. The town board shall fix the compensation which the deputy supervisor receives, which compensation may be in addition to any other compensation received as a town officer, town official or town employee (Town Law § 42).

§ 7-14. Deputy town clerks.

A. Appointment; compensation; powers and duties. The town clerk may appoint not more than three deputies, whose compensation, if any, must be approved by the town board. If no compensation is provided by the town board, the deputy serves without compensation. The State Comptroller has opined that payments to a deputy by the town clerk personally should be avoided since the legal status of payments by the town clerk is not clear and could give rise to an obligation on the part of the town to pay withholding taxes and workers' compensation benefits, or to make contributions for retirement, social security and other fringe benefits (Op. State Compt. 86-36). The town board also fixes the powers and duties of any deputy or deputies, which may be the full powers and duties of the town clerk or may be limited to certain specified areas.

B. Temporary deputies. If the town clerk is absent or unable to act and there is no duly appointed and qualified deputy present and able to act, the town board may appoint any duly qualified person as deputy town clerk for a period no longer than the absence or incapacity of the town clerk.

C. Oath required; undertaking. A deputy town clerk is a town officer and must also take, subscribe and file the constitutional oath of office before assuming any duties. The law does not require a deputy town clerk to file an official undertaking, although the town board may so require if it desires, in which case the cost of the undertaking is a town charge.

§ 7-15. Deputy highway superintendent.

A. Establishment; appointment. The town board of any town may, at any time, establish the office of deputy town superintendent of highways. The deputy town superintendent of highways is appointed by and serves at the pleasure of the town highway superintendent. If, however, the town superintendent fails to appoint such deputy

within five days after the establishment of the office of deputy, or within five days after a vacancy occurs in the office of deputy, the town board has the power to appoint.

B. Powers and duties. The deputy town superintendent of highways functions during the absence or inability of the town superintendent to act, and at that time is vested with all the powers and duties of the town superintendent.

C. Oath of office; undertaking. Before a deputy can perform any power or duty of the office of town superintendent, he or she must take and file the constitutional oath of office and execute and file an official undertaking approved by the town board.

D. Compensation. The town board fixes the compensation to be received by the deputy [Town Law § 32(2)].

§ 7-16. Tax collection deputies.

A tax collector may appoint, and at his or her pleasure remove, a deputy tax collector, whose compensation, if any, must be approved by the town board. The appointment of a deputy tax collector must be made by an instrument in writing, which shall become effective when filed in the office of the town clerk. Whenever the collector is absent or unable to act, or during a vacancy in the office of collector, the deputy collector assumes the powers and duties of the collector. The collector, however, is liable for the faithful performance of all duties by a deputy, except where such deputy is acting during a vacancy in the office of collector (Town Law § 35).

ARTICLE IV, Vacancies in Office

§ 7-17. In general.

A. One of the areas in which town boards seem to experience difficulty from time to time is in exercising their power and responsibility to fill vacancies in town offices. Town Law § 64, Subdivision 5, confers specific authority on town boards to fill vacancies in town offices. It provides that whenever a vacancy shall occur or exist, the town board or a majority of all the members thereof may appoint a qualified person to fill the vacancy. If the appointment is made to fill a vacancy in an appointive office, the town board appointment is for the remainder of the unexpired term. If the appointment is made to fill a vacancy in an elective office, the town board appointment is until the commencement of the calendar year next succeeding the first annual election at which the vacancy may be filled. The words "annual election at which the vacancy may be filled" do not relate here to the biennial town election for town officers. They relate to the November election held in the year in which the vacancy occurred, except when the vacancy occurs in an elective office after September 20, in which case it may not be filled by election that year (Public Officers Law § 42) because it is difficult for candidates seeking nomination and election to make themselves and their positions known to the electorate.

B. The person appointed by the town board to fill the vacancy must possess the same qualifications for the office as the original electee or appointee. No particular procedure must be followed by a board in determining who that person will be. The Town Law specifically provides that a person, otherwise qualified, who is a member of the town board at the time the vacancy occurs may be eligible for appointment to fill the vacancy, provided that he or she resigns from the board prior to being so appointed. In that situation, he or she clearly cannot participate as a member of the town board in making

the appointment. Care should also be taken lest the town board be reduced to less than a majority of its total membership by such action.

C. The Public Officers Law authorizes the Governor to call a special election to fill a vacancy in an elective office whenever a board vested with the authority to fill such vacancy is unable to do so by reason of a tie vote or if such board neglects to fill such vacancy for any other reason. The Governor has done so on a few occasions involving town elections, but not often.

§ 7-18. Determining whether a town office is vacant.

A. Problems have arisen regarding what circumstances really cause a vacancy in a town office to exist. Every town office becomes vacant upon the happening of one of a number of events before the expiration of the officer's term. These include:

- (1) The death of the incumbent.
- (2) The resignation of the town officer. (See § 7-17, Resignations.)
- (3) Removal from office. This is accomplished by a court upon application for removal made by any citizen-resident or by the district attorney upon notice to the town officer and with a copy of the charges. (The standard is misfeasance, malversion or maladministration of the office. Courts are reluctant to reverse the will of the electorate, so the degree of misconduct shown must be substantial.)
- (4) Ceasing to be a resident of the town. If, while holding office, the town officer moves out of the town and takes up residence elsewhere, the office becomes immediately vacant by virtue of such move. Note that "residency" essentially means domicile. No one factor controls, although intent is key. Thus, temporary absences may not terminate one's residency.
- (5) Conviction of a felony or of a crime involving one's oath of office.
- (6) Entry of a judgment or court order declaring the officer to be insane or incompetent.
- (7) Judgment of a court declaring an election or appointment void or finding that an office is forfeited or vacant.
- (8) Refusal or neglect to file an official oath or undertaking within 30 days after the commencement of the term, in the case of an elective office, or within 30 days after notice of appointment, in the case of an appointive office. The Legislature has given additional time in cases of persons elected or appointed to office on active duty in the armed forces and absent for such reason from the county of residence at the time of such election or appointment.

B. In addition to the above-enumerated events which will create vacancies in town offices, certain other acts will also create vacancies. Our courts have held that where two candidates for the same office receive the same number of votes for an elective town

office, the tie vote creates a vacancy upon the commencement of the term of office for which the election was held. The vacancy is filled by the town board sitting at the time the vacancy occurs (i.e., January 1). Another event which might create a vacancy is the acceptance by a town officer of an office which is, under the law, incompatible with the office held. The acceptance of such a second office creates a vacancy in the office already held.

§ 7-19. Resignations.

Public Officers Law § 31 prescribes the method by which a resignation must be accomplished. A town officer must resign by delivering his or her resignation in writing to the town clerk. If no effective date is specified, the office becomes vacant immediately upon delivery of the resignation to the town clerk. If an officer wishes to resign at some future date, he or she may do so, and the resignation becomes effective on the date specified, except that if the date named is more than 30 days after delivery of the resignation to the town clerk (90 days for justices), the resignation still becomes effective 30 days after such delivery. In the event that a town clerk wishes to resign, he or she may do so by sending a written resignation to the Secretary of State.

ARTICLE V, Compensation and Benefits

§ 7-20. Compensation; hiring of additional employees; employees hired for elections. Fixing of salaries of town officers has been discussed under Chapter 5, Fiscal Matters. It should be sufficient to repeat here that Town Law § 27, Subdivision 1, provides the authority for the town board to fix the salary of all officers, officials and employees of the town and to determine when the same shall be paid. Under these same provisions of law, the town board may hire laborers, clerical assistants and stenographers and compensate them upon an hourly or daily basis if it so desires. The town board is also authorized to compensate officers required for the conduct of elections -- inspectors, ballot clerks and poll clerks -- in such an amount per day for their services on registration, election and primary days as it may determine by resolution.

§ 7-21. "Fringe" benefits.

A. Vacations, sick leaves, leaves of absence, overtime. A town board may provide by resolution for paid or unpaid vacation, sick leave and leave of absence plans for town officers and employees, including all highway employees, and it may adopt rules and regulations in relation thereto (General Municipal Law § 92). A fringe benefit policy could include provisions for payment for unused benefits, but such policy may only apply prospectively. The town board is also authorized to establish the town policy for the payment of overtime compensation. That overtime policy must not be inconsistent with the Federal Fair Labor Standards Act.

B. Work hours of elected officials. In most instances, elected officials are not bound by work regulations and are not required to conform to regular work hours. For similar reasons, they are equally unable to accumulate vacation or sick leave. Elected officials are not restricted to time they must spend on their duties or to regular hours (Ops. State Compt. 80-736 and 78-411).

C. Establishment of benefit policy. A sample form of resolution covering these matters in relation to town highway employees follows:

BE IT RESOLVED, by the Town Board of the Town of,County, New York,

as follows:

1. That the wage schedule of town highway employees in the Town of _____ for the year 20__ shall be as follows:
2. That each town highway employee in the Town of _____ be paid time and a half for emergency work after an eight-hour day.
3. That each town highway employee in the Town of _____ be entitled to receive the following holidays each year; (specify, i.e. New Year's Day, Independence Day, Thanksgiving Day, Memorial Day, Labor Day, Christmas Day, Election Day, etc.) and shall be entitled to receive therefor wages at the regular rate prescribed for his or her classification of work.
4. That each town highway employee of the Town of _____ with not less than five years' service shall be entitled to receive, in addition to said holidays, two weeks' vacation with pay; that each town highway employee with less than five years' service and more than one year's service shall be entitled to one week's vacation with pay, each year to be computed upon the basis of a forty-hour week.
5. That each town highway employee of the Town of _____ with one year's service or over shall be entitled to six paid days for sick leave within each year, not to be carried over the following year and not to be taken along with vacation time.

D. Hospitalization. A town board may also provide medical, surgical and hospital services or insurance for its officers and employees, including retired officers and employees (General Municipal Law § 92-a). This coverage can include any officer or employee or group of officers or employees of the town or of any department or district of the town. The cost of the coverage may be paid either partly by the town and partly by the covered officers and employees, or wholly by the town. If paid partly by the officers and employees, the town may deduct their share from their salaries with their prior written consent. The town's share must be paid from the fund out of which the officers' or employees' salary is normally paid. If circumstances dictate, a town may reduce benefits for current or retired officers and employees (Op. State Compt. 88-5).

E. State retirement system. In considering benefits for town officers and employees, serious thought should be given to the town joining the New York State and Local Employees' Retirement System and providing thereby a means for its officers and employees to enjoy the benefits of this retirement plan. In this connection, it is the town which joins the system, thereby affording its officers and employees an opportunity to become members thereof.

F. Workers' compensation. Towns are responsible for providing the statutory benefits set forth in the Workers' Compensation Law to their employees while engaged in the employments listed in Workers' Compensation Law § 3, Subdivision 1. Reference should be made to these provisions. In general, highway construction work is one of the employments involving workers' compensation benefits. Workers' compensation

insurance may, of course, be purchased from various sources. The Association maintains the COMP ALLIANCE program for member towns. A town may also be a participant in a county self-insurance plan, a town can purchase a policy from the State Insurance Fund or, in the absence of any of these alternatives, the town will be deemed to be a self-insurer for the benefits provided by the Workers' Compensation Law. Proof of financial security is required for self-insurers.

G. Sick leave and disability benefits. A town board may now, on an optional or voluntary basis, choose to provide coverage of employees under the Disability Benefits Law [Workers' Compensation Law § 212(2)]. A town may adopt a sick leave plan for employees either with or without pay pursuant to General Municipal Law § 92. If a town has a sick leave plan and undertakes voluntary coverage under the Disability Benefits Law, it may, either with or without employee contributions, secure insurance to provide the disability benefits. Thus the town, by collecting such disability benefits, may be partially reimbursed for the full salary paid to the employee during his or her period of sick leave or disability.

H. Group life insurance. The Insurance Law and the General Municipal Law authorize municipal corporations to provide, and to allow life insurance companies authorized to do business in this state to write, a group plan of life insurance for municipal employees. A town is authorized, in its discretion, to pay all or any part of the costs of such insurance, provided that a town must have at least 25 employees in order to secure such insurance. Where the town pays the entire cost of the premium, all of its eligible employees must be included in the plan, or at least all employees except those not acceptable to the insurer. Where only a portion of the cost of such group life insurance is to be paid by the town, the policy must cover at least 75% of all eligible employees or any class or classes thereof.

I. Volunteer firefighters' benefits. A town is also responsible for the statutory benefits provided in cases of injuries or death to volunteer firefighters arising in fire protection districts or in unorganized areas of the town outside of villages and fire districts. Protection against this exposure is accomplished generally in the same fashion as above described in the case of workers' compensation.

J. Public Employees Fair Employment Act (The Taylor Law).

(1) The Taylor Law contains the following major provisions:

(a) Right to organize: a declaration that public employees (the employees of the state, the counties, towns, villages, districts and public authorities) have the right of organization and representation for collective negotiations; in other words it grants to public employees the right to join or to refrain from joining any employee organization, the right to be represented by employee organizations of their own choosing, and to negotiate collectively with their public employers.

(b) Recognition: authorization for the state and political subdivisions to recognize, negotiate collectively with, and enter into written agreements with employee

organizations; and requirements that public employers negotiate collectively with recognized or certified employee organizations.

(c) State board: establishment of a Public Employment Relations Board, among whose powers would be the appointment of mediators and fact-finding boards and the resolution of disputes over representation status.

(d) Impasse procedures: establishment of impasse procedures for the resolution of public sector labor disputes.

(e) Strikes: prohibition against strikes by public employees, including sanctions.

(2) In deciding what action it should take under the Taylor Law (hereafter "Law"), a town should take into consideration the number of employees it has, the options available to it under the Law, and the potential costs involved in each of these options.

(3) Organization. If the employees of a town decide that they want to exercise the rights of self-organization guaranteed by the Law, the town must permit its employees to organize and negotiate collectively. If the town and its employees can agree upon the composition of the negotiating units, and if there is no contest among employee organizations seeking to represent the employees, then the town can simply recognize the employee organization which is the obvious choice of its employees. If a dispute arises as to the appropriateness of a negotiating unit or as to which employee organization should represent town employees, the State Board is authorized to resolve the local dispute.

(4) Collective negotiations.

(a) The Taylor Law requires that where an employee organization has been recognized or certified, the public employer involved must participate in collective negotiations with the employee organization and must enter into a written agreement with that organization. Failure of a public employer to comply with this obligation or refusal to negotiate in good faith will be treated by the Public Employment Relations Board as creating an impasse.

(b) The Law further provides that public employers and recognized or certified employee organizations may enter into written agreements setting forth procedures to be invoked if disputes between them reach an impasse during the course of collective negotiations. These written agreements may be incorporated in a broader, collectively negotiated contract or may be separate written agreements for the limited purpose of resolving particular disputes. If the agreed-upon machinery for resolving disputes breaks down, or if the parties fail to agree upon such procedures, the Public Employment Relations Board is obliged to invoke procedures detailed in the Law itself.

(5) Strikes. The Law makes it unlawful for any employee organization or agent thereof to engage in, cause, instigate, encourage, or condone a strike. The charge may be made by the chief legal officer of the government involved or the Counsel to the State Board. A hearing is then held by the Board to determine whether there is merit to the

charge. Chapter 24 of the Laws of 1969 amended the Taylor Law to stiffen the penalties and sanctions which can be imposed on employee organizations which violate the no-strike provisions and to impose obligations on public employers to avoid interfering with unions and their right to organize. The Board was authorized to take appropriate action in the event of a strike, and to issue a public report on any strike, including names of those causing or promoting the strike and actions taken or pending against them. The 1969 amendments also authorize voluntary arbitration of issues, such as non-fiscal matters which do not require legislative action.

K. Legal defense and indemnification.

(1) The town board may, by local law or resolution, provide for the legal defense and indemnification of its officers and employees, in any state or federal civil action arising out of any act or omission, while the officer or employee was acting within the scope of his or her duties (Public Officers Law § 18). A 1983 amendment to § 18 permits indemnification of reasonable attorney fees, fines and damages imposed by a court on officers and employees while acting within the scope of their position or employment, for violating, without willful intent, a prior order or stipulation entered in a state or federal court. To our knowledge, all towns have adopted § 18 or a similar local policy for the defense and indemnification of all officials and employees.

(2) All such policies of indemnification require the cooperation of the individual involved as a prerequisite for coverage. They also exclude, as they must, any coverage for punitive damages or for claims arising out of actions of the official or employee which were illegal or outside the scope of their duties (i.e., "ultra vires").

(3) These defense and indemnification policies are necessary because local officials always have been and increasingly are, in fact, subject to being sued individually, as a result of decisions or actions undertaken in fulfillment of the responsibilities of their position or office.

L. Employee protection against retaliatory action. New provisions of the Civil Service Law and Labor Law provide protection to an employee against retaliatory action by an employer because the employee discloses to a governmental body information regarding the employer's violation of law or regulations where the violation presents a specific and substantial danger to public health or safety. This means the employer cannot take disciplinary action against the employee solely for disclosing such violation. This law is commonly referred to as the "Whistle Blower's Protection Act." However, employees must follow a specific procedure in order to avail themselves of this protection. Also, if the disciplinary action is taken pursuant to a procedure in a negotiated labor agreement covering the employee, employees can assert their defense under this protection law. Where a dismissed employee brings an action against the employer and the court finds that the employee's action is without basis in law or fact, the court may award the employer reasonable attorney's fees and costs (Civil Service Law § 75-b; Labor Law Article 20-c).

M. Deferred compensation plans. A public employer is now authorized to establish

for its employees a deferred compensation plan. A deferred compensation plan is an arrangement whereby an employee authorizes the employer to deduct a portion of his or her pay and to invest the same for the benefit of the employee. The employer is required to invest the deducted funds in accordance with the rules and standards adopted by the State Deferred Compensation Board. The investment can be effected by contracting with a financial organization or by participation in an approved plan established for state employees. The amount deducted from the employee's compensation is exempt from federal (not state) withholding taxes. However, it is considered part of compensation for retirement pension purposes. An employee covered by a labor agreement is not permitted to participate until the plan is negotiated between the employer and the employee organization representing the employee (State Finance Law § 5).

N. Binding arbitration for firefighters and police officers. Chapters 724 and 725 of the Laws of 1974 enacted legislation relating to the arbitration of negotiation disputes between public employers and firefighters and between public employers and police officers. The legislation provides, in the case of any unresolved dispute which remains after the exhaustion of the procedural steps following the declaration of an impasse, that the Public Employees' Relation Board shall, on petition of either party after 10 days following the submission of the fact finder's report, refer the dispute to a public arbitration panel, with the determination of such panel to be final and binding and not subject to the approval of any local legislative body or other municipal authority (Civil Service Law § 209).

O. Agency shop fee deduction. Chapter 606 of the Laws of 1992 mandates that public employers deduct union dues from all employees within units or departments represented by a union and to pay same over to the union. Unions must have a procedure for refunding to nonmember employees a pro-rata share of their dues used for activities of a political or ideological nature only incidentally related to terms and conditions of employment [Civil Service Law §§ 201 and 208(3)(b); General Municipal Law § 93-b (3)].

ARTICLE VI, Conflicts of Interest

§ 7-22. In general.

Article 18 of the General Municipal Law defines all conflicts of interest involving transactions between public officers and employees and the municipality which they serve. It expressly provides that it "supersedes any local law, charter, ordinance, resolution, rule or regulation of any municipality to the extent that such local law, charter, ordinance, resolution, rule or regulation is inconsistent with the provisions thereof." In addition: "No local law, ordinance, resolution, rule or regulation shall modify or dispense with any of [its] provisions...." This is a subject area of continuing interest to the Legislature and Governor. Several substantial proposals which would significantly alter the conflict provisions of Article 18 have been and will continue to be considered in upcoming sessions of the Legislature. Thus, local officials should be alert to any changes which may come in the near future.

§ 7-23. "Contract" defined.

Article 18 defines a "contract" as "any claim, account or demand against or agreement with a municipality, express or implied, and shall include the designation of a depository of public funds and the designation of a newspaper, including but not limited to an

official newspaper for the publication of any notice, resolution, ordinance or other proceeding where such publication is required or authorized by law." Thus, it includes any business dealing an officer or employee has with their town arising out of any kind of agreement, verbal or written, express or implied.

§ 7-24. "Interest" defined.

The term "interest" in a contract is also fully defined. It means: "a direct or indirect pecuniary or material benefit accruing to a municipal officer or employee as the result of a contract with the municipality which such officer or employee serves. For the purpose of this article, a municipal officer or employee shall be deemed to have interest in the contract of (a) his spouse, minor children and dependents except a contract of employment with the municipality which such officer or employee serves, (b) a firm, partnership or association of which such officer or employee is a member or employee, (c) a corporation of which such officer or employee is an officer, director or employee and (d) a corporation any stock of which is owned or controlled directly or indirectly by such officer or employee." Thus, town officers and employees have an interest in a contract whenever some financial or other material benefit comes to them from a business or professional transaction with their town. The benefit can be either direct or indirect. The law itself provides that the officer or employee is deemed to have an interest in the transactions of a husband or wife, minor children or dependents, except such officer or employee is expressly deemed not to have an interest in contracts of employment of his or her spouse, minor children or dependents with the town.

§ 7-25. Prohibited transactions.

Not every interest in a contract is prohibited by this law. In general, the law forbids town officers and employees from having an interest in any contract with the town if they have the power or duty to negotiate, prepare, authorize or approve a contract or its payment; audit bills or claims under a contract; or appoint an officer or employee with any of the foregoing powers or duties. This would definitely include all town board members and the town comptroller where the office has been established.

§ 7-26. Exceptions.

There are several classes of exceptions to the general prohibition stated above.

A. Depository institutions. The first exception relates to a bank or trust company named as depository, paying agent, registration agent or for the investment of municipal monies. Any bank may be so named except one in which the supervisor, comptroller or their deputies and employees have an interest. However, as noted in an earlier chapter, if the bank in which such fiscal officers or employees have an interest is the only bank in town, it may nevertheless be designated, provided that written disclosure of any such interest is made to the town board. In other words, the new law will not force the designation of a bank outside of the town because of prohibited conflicts of interest, if full and complete disclosure of such interest is made known to the town board and incorporated in its minutes.

B. Permitted contracts with disclosure. General Municipal Law Article 18, § 802, permits several additional contract situations between town officers and employees and the town, provided that full disclosure is made. It must be emphasized that all of the below exceptions are only permitted if the town officers or employees who have, will have or later acquire any interest in any actual or proposed contract with the town

"publicly disclose the nature and extent of such interest in writing" to the town board as soon as they have knowledge of such interest. Such written disclosure must be made part of and set forth in the official record of the proceedings of the town board. Once such disclosure has been made, no further disclosures need be made by the officer or employee with respect to additional contracts with the same party during the remainder of the fiscal year.

(1) The law does not prohibit a contract with a person, firm, corporation or association in which a town officer or employee has an interest solely by reason of private employment as an officer or employee of any such firm, etc., if the officer's or employee's income, compensation or remuneration from such private employment is not directly affected as a result of the contract, and the duties of such private employment do not directly involve the procurement, preparation or performance of any part of the contract.

(2) While the designation of a newspaper comes squarely within the definition of a "contract," the law does not forbid the designation of any qualified newspaper as the official newspaper of the town because of the interest of any town officer or employee in such newspaper, nor does it prohibit the designation of any newspaper for the publication of any notice, resolution, ordinance or other proceeding where such publication is required or authorized by law.

(3) The law permits the purchase of real property by a town from its officers and employees, provided that the purchase and the consideration therefor are approved by an order of the Supreme Court upon petition of the town board.

(4) Similarly, the town may acquire real property or an interest therein from its officers and employees by means of condemnation proceedings pursuant to the Eminent Domain Procedure Law.

(5) Contracts between the town and a membership corporation or other voluntary nonprofit corporation or association -- a fire company, a voluntary hospital -- in which a town officer has an interest or is a member are permitted.

(6) Private sales of bonds and notes are permitted pursuant to the provisions of Local Finance Law § 60.10. That section also provides that bonds and notes may be sold at private sale to a bank or trust company in which an officer or employee of the town has an interest which is otherwise prohibited by the provisions of General Municipal Law Article 18, provided certain conditions are met with respect to the amount of bonds and notes such bank or trust company may hold and the rate of interest such bonds or notes may bear. The provisions which formerly required a resolution to be adopted by the town board before the section became operative have been deleted. The effect of this amendment is to make the provisions of Local Finance Law § 60.10 self-executing in all municipalities and to harmonize it with the General Municipal Law sections discussed previously in Chapter 5, Fiscal Matters.

(7) Contracts which existed before the town officer or employee was elected or

appointed are not forbidden, but the law does not authorize the renewal of any such contract if the existing interests and conflicts do not otherwise qualify under one of the exceptions.

(8) Purchases or public works contracts in towns from counties with populations of 200,000 or less where:

- (a) The elected board member serves without pay;
- (b) The purchase amount is less than \$5,000 in one fiscal year;
- (c) The town followed its procurement policies and that process indicates that the contract is the lowest price; and
- (d) The contract is approved by each member of the town board with the exception of the interested member, who must abstain.

C. Permitted contracts without disclosure. The preceding discussion pertained to contracts which are permitted provided disclosure is made. The law provides for another class of permitted contracts without the need for any disclosure, although as a practical matter and to avoid even the appearance of impropriety, voluntary disclosure may well be advised.

(1) If the total of all claims, accounts or demands in which a town officer or employee has an interest during one fiscal year is less than \$750, the contract is not prohibited.

(2) If the contract is with a corporation (other than a bank or trust company) in which a town officer or employee has an interest by reason of stock holdings when less than 5% of the outstanding stock of the corporation is owned or controlled, directly or indirectly, by the town officer or employee, the contract is permitted.

(3) An interest that a town official or employee, who is a member of a Private Industrial Council established under the Federal Job Training Partnership Act may have in a training contract between such Council and the town is permissible.

(4) A contract for public utility services when the rates or charges are fixed or regulated by the Public Service Commission is allowed regardless of interest.

(5) A contract between the town and a town officer or employee for payment by the town of a reasonable rental for rooms owned or leased by the town officer or employee is now permitted under the following circumstances:

- (a) The space must actually be used in the performance of official duties; and
 - (b) The space must be so designated as an office or chamber.
- (6) A contract by the town to pay part of the compensation of a private employee of a

town officer is permitted if the private employee performs part-time official service in the respective town office.

§ 7-27. Violations.

Any contract willfully entered into by or with a town in which there is a prohibited interest is null, void and wholly unenforceable. In addition, any town officer or employee who willfully and knowingly violates any provisions of the conflict of interest law is guilty of a misdemeanor.

ARTICLE VII, Ethics

§ 7-28. Code of ethics required; notice of adoption.

A. General Municipal Law Article 18, § 806, mandates the adoption of a Code of Ethics by each town government. That section requires the adoption of a Code of Ethics containing standards for the guidance of town officers and employees so that they may know the standards of conduct reasonably expected of them. Such codes should provide standards for the disclosure of interest in legislation before the town board and for the holding of private employment in conflict with one's official duties. Local codes can be more restrictive than Article 18.

B. Notice of adoption. The supervisor must cause a copy of the local code of ethics to be given to each officer and employee, and the code must be posted in each public building under the jurisdiction of the town. The town clerk is required to file a copy of the adopted code with the State Comptroller within 30 days after adoption or amendment. The State Comptroller is required to report to the State Legislature yearly, on or before February 15, those municipalities which have failed to file such code as of the preceding December 31.

§ 7-29. Financial disclosure.

Effective January 1, 1991, towns with populations over 50,000 had to adopt provisions for the filing of annual statements of financial disclosure by their officers and employees. Those large towns who chose not to do so are subject to the annual disclosure filing requirements and forms as provided in General Municipal Law § 812. Towns with less than 50,000 in population can elect to subject themselves and their officials and employees to annual financial disclosure requirements, including those contained in § 812. That section contains an extensive annual disclosure form.

§ 7-30. Prohibited actions.

Article 18 itself sets forth areas of prohibited actions (General Municipal Law § 805-a), in addition to any provisions of a local code, namely:

- A. Forbidding acceptance of any gift over the value of \$75 in any form as to raise questions of undue influence in official duties;
- B. Forbidding disclosure of confidential information to further personal interests;
- C. Prohibiting the receipt of any payment, direct or indirect, for services in relation to any matter before any municipal agency of which one is an officer or employee or whereby one's compensation is dependent or contingent upon action by such agency (but allowing fixing of fees to be paid upon the reasonable value of the services rendered).

§ 7-31. Boards of ethics.

Article 18 authorizes but does not require the establishment of a local board of ethics. It

provides for a membership of at least three persons to be appointed by the town board, a majority of whom are not officers or employees of the town, but one of whom is an officer or employee. The function of the board of ethics is to render advisory opinions to town officers and employees regarding Article 18 or the local code of ethics. It may also act as the repository of any required annual financial disclosure documents.

§ 7-32. Disclosure in certain applications.

The provisions of General Municipal Law § 809 place responsibility on the applicant for any land use change, permit or variance to disclose the names of any local or state officials who have an interest in the application. Section 809 provides as follows:

§ 809 Disclosure in certain applications.

1. Every application, petition or request submitted for a variance, amendment, change of zoning, approval of a plat, exemption from a plat or official map, license or permit, pursuant to the provisions of any ordinance, local law, rule or regulation constituting the zoning and planning regulations of a municipality shall state the name, residence and the nature and extent of the interest of any State officer or any officer or employee of such municipality or of a municipality of which such municipality is a part, in the person, partnership or association making such application, petition or request (hereinafter called the applicant) to the extent known to such applicant.

2. For the purpose of this section, an officer or employee shall be deemed to have an interest in the applicant when he, his spouse, or their brothers, sisters, parents, children, grandchildren, or the spouse of any of them

(a) is the applicant

(b) is an officer, director, partner, or employee of the applicant, or

(c) legally or beneficially owns or controls stock of a corporate applicant or is a member of a partnership or association applicant, or

(d) is a party to an agreement with such an applicant, express or implied, whereby he may receive any payment or other benefit, whether or not for services rendered, dependent or contingent upon the favorable approval of such application, petition or request.

3. In the County of Nassau, the provisions of subdivisions one and two of this section shall also apply to a party officer. "Party officer" shall mean any person holding any position or office, whether by election, appointment or otherwise, in any party as defined by subdivision four of section two of the Election Law.

4. Ownership of less than five percent of the stock of a corporation whose stock is listed on the New York or American Stock Exchanges shall not constitute an interest for the purposes of this section.

5. A person who knowingly and intentionally violates this section shall be guilty of a misdemeanor.

Chapter 8

SPECIAL IMPROVEMENT DISTRICTS

SEWER AND WATER IMPROVEMENTS

ARTICLE I, General Provisions

§ 8-1. Purpose.

Improvement districts are the means by which a town furnishes special services or functions to taxpayers in specific areas of the town. They are supported solely by the real property taxpayers whose properties are located within the boundaries of the district. Therefore, the costs of operating these districts are not general town charges, but are

special district charges.

§ 8-2. Administration.

Improvement districts are operated and run by the town board. Separate boards were abolished in the early 1930's. Existing boards were permitted to be grandfathered at that time. Thus, a few of the older districts in the state are still operated by separate boards of commissioners.

§ 8-3. Specific types of improvement districts.

A. The following types of improvement districts may be established or extended by a town board: sewer, drainage, water, park, public parking, lighting, snow removal, water supply, sidewalk, fallout shelter, refuse and garbage and aquatic plant control districts. Also, a harbor improvement, public dock or beach erosion control district may be established or extended in any town which borders upon or contains navigable waters of the state. Under certain circumstances and under a special procedure, water storage and distribution districts and sewage disposal districts may similarly be established or extended by a town board.

B. Wastewater disposal. Chapter 388 of the Laws of 1980 authorized the creation and extension of wastewater disposal districts and improvements pursuant to Town Law Articles 12, 12-A and 12-C. These wastewater disposal improvements are intended for operation of on-site private wastewater disposal systems (septic systems) under governmental administration, where it is not feasible to construct a regular public sewer system. The procedure for establishing and operating wastewater disposal systems is basically the same as for a sewer system. A sewer district may also include in its plan a wastewater disposal system (Town Law §§ 190-e, 190-f, etc.).

C. Water quality treatment. Chapter 622 of the Laws of 1984 amended the Town Law generally to authorize the establishment of a water quality treatment district, pursuant to petition only, for the purpose of installing, servicing and monitoring a water treatment device in a private water well. The expense of acquisition, installation and servicing of such water treatment device is chargeable to the benefited property, namely, the property in which such device is installed and maintained.

D. Ambulance. Chapter 24 of the Laws of 1988 made the provisions of Article 12 and 12-A applicable to the formation of ambulance districts.

§ 8-4. Limitations on establishment.

A. No such district may be established or extended in a city.

B. A district may not be established or extended, wholly or partly, in an incorporated village unless the village consents as expressed in a village local law, ordinance or resolution subject to a referendum on petition under Municipal Home Rule Law § 24, or a permissive referendum under Village Law Article 9, and except in the case of a water quality treatment district where the consent of a village is expressed in a local law or resolution not subject to any referendum.

C. Also, a water supply district cannot be established or extended to include lands situated within the boundaries of a water district (Town Law § 190).

§ 8-5. Ad valorem and benefit districts.

There are two basic types of improvement districts: "ad valorem" and "benefit."

A. Ad valorem districts. In ad valorem districts, the cost of constructing and maintaining the facilities and special improvements, or of supplying the services the district furnishes, is paid by taxes assessed, levied and collected from the real property located within the boundaries of the district according to the assessed valuation thereof, that is, "in the same manner and at the same time as other town charges" [Town Law §§ 202(3) and 202-a(1)]. Districts within this category are:

- Park
- Public parking*
- Lighting*
- Water*
- Snow removal
- Refuse and garbage*
- Water supply
- Sidewalk*
- Public dock
- Beach erosion control*
- Fallout shelter
- Water storage and distribution
- Aquatic plant growth control*
- Harbor improvement
- Ambulance

NOTE:

*If the petition or order for their establishment so requires, the district may also be on the benefit basis.

B. Benefit districts. In benefit districts, the cost of constructing and maintaining the facilities and special improvements is paid by local assessments upon the real property located within the boundaries of the district which the town board shall determine and specify to be especially benefited by the improvement. The town board apportions and assesses upon and collects from such property so much and from each as is in just proportion to the amount of benefit which the improvement confers upon the same [Town Law §§ 202(2) and 202-a(2)]. Districts within this category are:

- Sewer (including trunk sewer)
- Sewage disposal
- Drainage (including drainage system)
- Wastewater disposal (septic tank)
- Water quality treatment (private water wells)

ARTICLE II, Establishment or Extension of Districts

§ 8-6. Procedures.

A. Petition or town board motion. Improvement districts may be established or extended by the town board either by the procedure in Town Law Article 12, which provides for the initiation of the procedure by the filing with the town board of a petition, or by the procedure in Town Law Article 12-A which provides for the town board to

proceed on its own motion without a petition. The procedure of Town Law Article 12-A was devised to eliminate the long delays which had been experienced in securing the proper and adequate execution of the petition required under Article 12.

B. Considerations. In deciding under which method to proceed, a town board should consider the size of the district or extension and the number of property owners and residents therein. If these numbers are small, the petition method (Article 12) might be quicker and more convenient. If there is possible controversy as to the desirability of creating the district or extension, the petition method might be better because the persons concerned would have signed "on the dotted line" and should not be heard later to complain. We describe below the circumstances under which the permission of the State Comptroller is required on the establishment or extension of a district. Other approvals of state agencies may be required in the case of the development or expansion of a water supply, in the case of the creation or expansion of sewer facilities, and if the construction of a dam to impound water is involved.

§ 8-7. Article 12 petition method.

A. Boundary description; costs. The petition should describe the boundaries of the district or extension, and if it requests the construction or acquisition of an improvement, such as water mains and appurtenances, it shall state the maximum amount proposed to be expended therefor. If the petition requests the performance or supplying of a service, like street lighting, it may (but need not) state the maximum amount proposed to be expended annually for such service. A petition for the establishment or extension of a park or public parking district must, in addition, describe the property proposed to be acquired for the park or parking district.

B. Signatures.

(1) The petition shall be signed by the owners of taxable real property located in the proposed district or extension owning in the aggregate at least one-half of the assessed valuation of all the real property in the proposed district or extension, and, if there are any resident owners, the petition shall include the signatures of such resident owners owning taxable real property aggregating at least one-half of the assessed valuation of the taxable real property in the proposed district or extension owned by resident owners.

(2) In the case of a petition to establish a water storage and distribution district, the petition must be signed by at least 25 owners of taxable real property situated within each water district or water supply district proposed to be included in the water storage and distribution district, or by 5% of the owners of taxable real property situated within each such district, whichever is less; or in the case of a water district governed by a separate board of water commissioners, the petition must be signed by a majority of the separate board.

C. Supporting documentation. Every petition for the establishment or extension of a sewer, drainage or water district must be accompanied by a map or plan prepared by a competent engineer. Whereas such map and plan is not specifically required in other districts, it is desirable to have some kind of a map showing the boundaries of the district included in every other petition for the establishment or extension of a district. This is to

allow persons asked to sign the petition to know whether or not their property will be benefited by the proposed district or extension. In the case of a sewer, drainage or water district, before the petition is presented, the town board may adopt a resolution, subject to a permissive referendum, appropriating a specific amount for the preparation of the map and plan. This appropriation will be from general town funds, and upon the establishment of the district, the amount so appropriated should be deemed part of the cost of the improvement.

D. Reimbursement. The town shall be reimbursed in the amount paid pursuant to such appropriation or such portion of that amount as the town board, at the public hearing on the question of the establishment or extension of the district, allocates against such new district or extension.

E. Study. Upon petition, the town board must, or may on its own motion after a public hearing, make a study of the proposal and for such purpose:

- (1) Assemble data relating to the water resources available to the town and the possibility of developing such resources.
- (2) Conduct investigations, make inquiries and conduct public meetings upon such notice as it shall deem proper for the purpose of examining whether further action is necessary.
- (3) Cause maps and plans to be prepared. The maps and plans must show:
 - (a) The identity and boundaries of the water districts which the town board considers will be benefited by the establishment or extension of a water storage and distribution district.
 - (b) A written description, as in a deed of conveyance, of the boundaries of the proposed district or extension.
 - (c) The source of water supply and a description of the lands, streams, water and water rights and facilities, if any, to be acquired therefor; the mode of constructing the proposed water works and the location thereof, including reservoirs, water purification or treatment works, standpipes, wells, pumping stations, aqueducts and mains.
 - (d) Estimates of the cost of construction or acquisition of the facilities as shown on the maps and plans.
 - (e) The method of financing the same, including estimates of revenue to be derived annually from the sale of water to water and water supply districts within the water storage and distribution district, and revenue to be derived from the sale of water to a village or from any other source; estimates of the cost of maintenance and operation and of debt service.

F. Acknowledgement. All petitions must be acknowledged or proved in the same

manner as a deed to be recorded.

G. Public hearing; publication of estimated costs; determination.

(1) Order. Whenever a petition for the establishment or extension of a district is presented to the town board, it shall adopt an order reciting the fact that such petition has been presented, the boundaries of the proposed district or extension, the improvements or services proposed, the maximum amount proposed to be expended if a maximum amount is stated in the petition, the estimated cost of hookup fees, if any, and the cost of the district or extension to the typical property and, if different, to the typical one- or two-family home, and specifying the time when and the place where such town board shall meet to consider the petition at a public hearing. Such order shall be published in the official newspaper of the town and also posted on the town clerk's signboard at least once not less than 10 nor more than 20 days before the date set for the hearing.

(2) Estimated costs. Prior to the publication, the town board must cause to be prepared, and file for public inspection with the town clerk, a detailed explanation of how the estimated costs were computed.

(3) Determinations. After the public hearing is held, the town board must make the following four specific determinations by a formal resolution of the board:

(a) Whether the petition is signed and acknowledged or proved as required by law and is otherwise sufficient;

(b) Whether all the property and property owners within the proposed district or extension are benefited thereby;

(c) Whether all the property and property owners benefited are included within the limits of the proposed district or extension; and

(d) Whether it is in the public interest to grant in whole or in part the relief sought.

(4) Special provision is made for an additional hearing in the event the town board finds that any property or property owners in the district are not benefited or that certain property or property owners benefited have not been included in the district.

H. Consent of State Comptroller. In cases where borrowing will be necessary to finance the cost of the improvement proposed, the permission of the State Comptroller to establish or extend the district may be required pursuant to Town Law § 194. This is accomplished by filing in the office of the State Department of Audit and Control a certified copy (in duplicate) of the resolution establishing the district within 10 days after its adoption, together with an application for such permission. In cases where no borrowing will be involved, or where the costs of such financing to typical properties for similar types of districts falls below the average costs for such districts as annually computed by the Comptroller, it is not necessary to obtain the consent of the Comptroller to the formation of the district. If the State Comptroller shall grant permission therefor,

the town board may adopt an order establishing or extending the district. If he or she shall deny permission for the establishment or extension of the district, the town board shall forthwith adopt an order denying the petition.

I. Filing of final order of town board. Within 10 days after the adoption of the final order of the town board establishing the district or extension, the town clerk shall file a certified copy thereof in the office of the clerk of the county in which the town is located and in the office of the State Comptroller.

J. Final plans; estimate of expenses; contracts to perform work. After the final order is filed as required, the town board may proceed with the performance of the work, which involves requiring the engineer to prepare definite plans and specifications and a careful estimate of the expense and, working with the attorney employed by the town, prepare a proposed contract for the execution of the work. Requirements to be followed in connection with advertising for bids and allied matters have been discussed heretofore in this publication.¹ The town board may not award such contracts if the cost of the contract, plus the services of the engineer and attorney and allied expenses, will exceed the estimated maximum costs as stated in the petition (or as stated in the resolution of town board if the procedure described below in Article 12-A is followed). The law provides procedures for increasing the maximum amount to be expended, but this requires:

(1) In the case of construction of improvements, either one of the following two alternatives: (a) the execution of a new petition and the holding of a new public hearing; or (b) an order of the town board on its own motion after a public hearing and subject to a permissive referendum. Both alternatives also require an order of the State Comptroller approving such increase prior to the holding of the public hearing.

(2) In cases involving the supplying of services only, the maximum amount to be expended annually may be increased by an order of the town board, provided the town board shall, after a public hearing, determine that it is in the public interest to authorize the increase. No petition, permissive referendum or order of the State Comptroller is required.

§ 8-8. Article 12-A town board initiative.

A. Similarities with Article 12 procedure. The procedure for the establishment or extension of an improvement district under Article 12-A is basically the same as that described above under Article 12. The requirement for the approval of the various state departments is the same as that described above. The procedure for the filing of the final order and determination of the town board is the same as the provisions in connection with the increase of the estimated maximum amount to be expended, etc. A district with commissioners may not be extended without the prior approval, in writing, of a majority of the commissioners. Other limitations set forth in connection with the establishment or extension of a special district under the provisions of Article 12 apply equally in the case of establishment or extension under Article 12-A; that is, no district can be established or extended in a city; if in an incorporated village, consents are required subject to permissive referendum. The basic difference has to do with the procedural steps involved in initiating the proceeding.

B. Maps, plans and reports. The establishment or extension of an improvement district under Article 12-A, that is by the town board acting on its own motion without a petition, is based in each case on a map, plan and report prepared as determined by the town board. Such map, plan and report, when prepared, is filed in the office of the town clerk.

(1) Maps, plans and reports of a sewer, drainage or water district must be prepared by a licensed engineer and must show the boundaries, the general plan, and the proposed method of operation of the district.

(2) For all other districts, the maps, plans and reports may be prepared by town officials or by an outside firm (Town Law §§ 209-b and 209-c).

(3) In the case of a sewer district, a copy of the map and plan must be submitted to the State Department of Health for its approval before any sewer system is constructed.

(4) The procedure described in connection with Article 12 for the appropriation of general town monies to cover the cost of preparation of maps, plans and reports in connection with sewer, drainage and water districts is extended to allow such appropriations for the preparation of maps, plans and reports for districts proposed to be established or extended under Article 12-A procedure.

C. Order. After the filing of the map, plans and report in the office of town clerk, the town board may adopt an order describing the district or extension, the improvements or services proposed and the maximum amount to be expended, the proposed method of financing, the fact that the map, plans and report have been filed in the town clerk's office and specifying the time when and the place where the town board will meet and hold a public hearing on the proposed district or extension. If the order calls for the performance or supplying of a service only, it may (but need not) state the maximum amount proposed to be expended annually for such service. Publication and posting requirements are the same as described under Article 12.

D. Determinations. After the hearing is held, the town board must make the same determinations as were described under the procedure in Article 12 after the public hearing therein required. The subsequent procedure is the same, except that the resolution of the town board approving the establishment or extension of the district is subject to a permissive referendum in the manner provided in Town Law Article 7.

(1) A petition requesting a referendum must be signed by at least 5% of the owners of taxable real property situated in the proposed district or extension, or by 100 owners, whichever is less (Town Law § 209-e). For the purposes of this subsection, a corporate owner of such taxable real property is considered one owner for the purpose of a petition requesting a referendum and is entitled to one vote to be cast by an officer or agent of the corporation or other duly authorized person designated by appropriate resolution of such corporation.

(2) If a referendum is required to be held and the proposal is approved, or if no petition for referendum is filed within the required time, the town board resolution becomes effective and the town board proceeds in the same manner as discussed in the procedure under Article 12 after the order of the town board following the public hearing. § 8-9. Application for permission of State Comptroller to establish or extend district.

A. Within 10 days after the adoption of a resolution of the town board approving the district, the town clerk must file an application with the State Comptroller for permission to establish or extend the district. (Permission is required only when the cost is to be financed by the issuance of bonds or notes, and that cost to typical properties exceeds the statewide average for that type of district.)

(1) A certified copy of the resolution of the town board, in duplicate, must accompany the application.

(2) The application, in duplicate, must include the following:

(a) A certified copy of the notice of public hearing, with proof of publishing and posting;

(b) In the case of a sewer, drainage or water district, a certified copy of the map, plan and report;

(c) An itemized statement of outstanding indebtedness for all town purposes;

(d) The amount of indebtedness anticipated to be contracted for the proposed district;

(e) A statement of the aggregate assessed valuation of the real property of the proposed district;

(f) A statement of the average full valuation of the taxable real property of the town;

(g) A statement of the proposed method for financing the improvement;

(h) Under Article 12-A, a town clerk's affidavit evidencing that no petition was timely filed requesting a referendum or, if a special election was held, certified copies of the official result.

B. If the State Comptroller grants permission, the town board must adopt an order establishing the district. If the State Comptroller denies permission, the town board shall adopt an order terminating its proceedings. The forms of the town board resolution, the notice of public hearing and the application to the State Comptroller for permission to establish or extend a district should be substantially the same, with necessary modification, as the samples shown hereinbefore under Town Law Article 12.

C. The above is by no means intended to cover all of the many special procedural details provided by law, but is merely intended as an outline to give town board members a general idea as to the basic procedure. After a special district is created, the powers of

the town board in connection with each of such districts is spelled out in the statute.

ARTICLE III, Article 12-C Sewer, Wastewater Disposal, Water and Drainage
Improvements as Town Functions

§ 8-10. Statutory authority.

Town Law Article 12-C authorizes any town board to provide for sewer, water, drainage or wastewater disposal improvements as a town function in the entire area of the town or in an area within the town outside a village. The town board is responsible for the management, maintenance, operation and repair of any such sewer or water improvement acquired, constructed or provided pursuant to Article 12-C. The powers contained in Article 12-C are in addition to, but do not limit or supersede, those in Town Law Articles 12 and 12-A.

§ 8-11. Cost of providing improvements.

The cost of providing such improvements may be, under proper circumstances, raised on a benefit or ad valorem basis. This differs from Articles 12 and 12-A, which provide that the expense of the establishment of a sewer district must be on a benefit basis. No part of these costs may be charged to any property in a village.

§ 8-12. Method of proposal.

Any such improvement may be proposed by a resolution of the town board or by a petition of resident taxpayers.

§ 8-13. Action by town board.

A. Supporting documentation. A proposal for any such improvement by resolution of the town board must be supported by plans, reports and maps, which must conform to the requirements of Town Law § 209-c.

(1) The plans, reports and maps must be filed in the town clerk's office. Thereafter, the town board must adopt an order which shall include:

(a) A recital of the proposed improvement, a description of the boundaries of the proposed benefited area, if any;

(b) The maximum amount proposed to be expended for the improvement;

(c) The proposed method of apportioning the costs;

(d) The proposed method of financing;

(e) A statement that a plan, report and map are on file in the town clerk's office for public inspection; and

(f) The time and place of the public hearing.

(2) A copy of the order must be published in the official newspaper. [See Town Law § 209-q(3) for all of the requirements.] A copy is also required to be posted on the bulletin board in the town clerk's office.

B. Changes to proposal. After the public hearing, the town board may determine to change the proposal if some property in the proposed area will not be benefited, if some

property which will be benefited has not been included, or if the town board determines that the apportionment of costs should be changed. If changes are proposed, another public hearing must be held between 15 and 25 days after the first hearing. The notice of hearing must specify the changes and the time and place for this second hearing [Town Law §209-q(4)].

C. Determination. After the hearings, the town board must determine whether or not to make such improvement.

(1) If the town board determines that it is not in the public interest, the board must adopt a resolution to that effect.

(2) If the town board determines that it is in the public interest, it must adopt a resolution authorizing the sewer or water improvement, subject to the approval of the State Comptroller where the proposal requires that the cost be financed by the issuance of bonds or notes. The resolution must state the manner in which the costs are to be apportioned and, if the board determines that any part of the cost is to be raised by special benefit assessments, the boundaries of the benefited area.

§ 8-14. Proposal by petition.

A. Supporting documentation. Pursuant to Town Law § 209-q(10), a proposal by a petition must be signed by five resident owners of taxable property located within the area of the town outside of the village. The petition must be acknowledged or proved in the same manner as a deed to be recorded. The town board may direct that a plan, report and map be prepared or it may, by resolution, describe in general terms the filing of the petition and the proposed improvement. If the town board determines that the proposed improvement is in the public interest and economically feasible and where a plan, report and map have not been prepared, then it must direct the preparation of a general plan, report and map.

B. Public hearing. A public hearing must be initiated in the same manner as provided in Town Law § 209-q(3).

C. Deposit. The petitioners must deposit \$100 with the petition, to cover the costs of publishing and posting notices of meetings of the town board to consider the petition. If the town board decides to proceed with the proposed improvements, the total deposit shall be returned to the petitioners; if the petition is denied, only the balance shall be returned after expenses have been paid.

§ 8-15. Apportionment of costs.

A. The cost of the improvement shall be borne in the following manner:

(1) Entirely by the area of the town outside the village;

(2) Partly by the area of the town outside the village and partly by the lands benefited;
or

(3) Entirely by the lands benefited.

B. At any time after the completion of the improvement, the town board, by resolution, and after a public hearing, may change the apportionment of the costs as between the benefited area and the area of the town outside the village [Town Law §209-q(8-c)]. The only change authorized in the apportionment of costs shall be an increase in the share borne by the area of the town outside the village, with a corresponding decrease in the share borne by the benefited area.

§ 8-16. Referendum.

A. Referendum required. A resolution adopted by the town board authorizing such an improvement is subject to a permissive referendum if all or any part of the costs are to be borne by the entire area of the town outside of any villages. After the completion of the improvement, a resolution of the town board to change the apportionment of costs is also subject to a permissive referendum.

B. Optional referendum. Except as noted above, the town board may provide that any resolution authorizing such an improvement shall be subject to a mandatory or permissive referendum. The referendum must be held in the entire area of the town outside any villages, except that if the authorizing resolution provides that a part of the cost of the improvement is to be borne by an area less than the entire town outside any villages, the resolution may provide for the referendum to be held in the lesser area.

C. Approval required. A resolution submitted to a referendum must be approved by a majority of the owners of taxable real property located in the area designated by the town board. A petition requesting the referendum must be signed by at least 10% of such owners. The town clerk must have the forms for a petition prepared for distribution to anyone requesting them.

§ 8-17. Approval of State Comptroller.

A. Within 10 days after adoption of a resolution in those situations where approval of the State Comptroller is required, the town clerk must file with the Department of Audit and Control a certified copy of the town board's resolution authorizing the sewer or water improvement. The copy of the resolution must be accompanied by an application for approval. The application must be executed and verified by the supervisor or such other officer as the town board shall determine and must contain the following information:

- (1) If proposed by resolution of the town board, a copy of the resolution.
- (2) If proposed by petition of resident taxpayers, a copy of the petition.
- (3) A certified copy of the plan, report and map.
- (4) Proof of publication and posting of a notice of public hearing on the proposal; if more than one hearing was held, proofs of the notice of each hearing.
- (5) An itemized statement of all outstanding indebtedness of the town and the amount proposed to be expended for the improvement.
- (6) The assessed valuation of the town and the benefited area, if any.

- (7) The average full valuation of taxable real property in the town.
- (8) An itemized statement of the current town tax rates and tax rates in the benefited area, if any.
- (9) The number of residences and the population in the entire town and in the benefited area, if any.
- (10) If the proposal was subject to a referendum, all information and data pertaining thereto.
- (11) A certified copy of the resolution of the town board authorizing the improvement.

B. The responsibility of the State Comptroller is to determine whether the public interest will be served by providing the improvement in the manner proposed and also whether the cost of such improvement will be an undue burden upon the property which is to bear such cost.

(1) The State Comptroller must file with the town clerk an order granting or denying approval for the establishment of the improvement. The town clerk must notify the town board of the receipt of the order and the decision of the State Comptroller.

(2) The forms of the town board resolution, the petition of taxpayers, the notice of public hearings and the application to the State Comptroller for permission to establish the improvement should be substantially the same, with necessary modification, as the samples shown under Town Law Article 12.

(3) Legislation enacted in 1974 eliminates the necessity for obtaining the approval of the State Comptroller in the case of borrowing to finance town improvements on a town-wide-outside-of-village basis, except in cases where the total estimated expense of such improvement (including any increase in the maximum amount) exceeds 1/10 of 1% of the full valuation of the taxable real property in the area of the town outside of villages. This legislation permits a town board to make a determination that the cost of the improvement will include a portion of existing or authorized improvements based on a finding that there is an equitable and a reasonable relationship between the proposed town-wide improvement and such existing or authorized improvements (Town Law §§ 54, 209-q).

ARTICLE IV, Dissolution of Districts
§ 8-18. Statutory authority.

Town Law §§ 57 (Suburban Town Law) and 209-r provide for the dissolution of special improvement districts. It should be noted that the resolution dissolving the districts must provide, among other requirements, that the cost of operation and maintenance of the dissolved districts shall thereafter be a charge upon the entire area of the town outside of any villages and shall be levied and collected in the same manner and at the same time as other town charges. The resolution is subject to a permissive referendum. Should a referendum be called, the cost of conducting the same is a charge on the area of the town outside villages. Under Town Law § 209-r, all of the districts do not have to be dissolved

whereas under § 57, all districts in existence or established for similar purposes must be dissolved.

ARTICLE V, Local Water and Sewer Authorities

§ 8-19. Statutory authority; creation; powers and duties.

Public Authorities Law Article 5, Title 8-A, provides the procedure for creating and operating a local water or sewer authority. Such local authority would be established by special act of the State Legislature upon request and for the benefit of the sponsoring municipality. Such local authority, after creation and appointment of an administering body by the sponsoring municipality, would be empowered to construct and operate a water supply or sewer project, to issue debt and to charge rates and fees for the use of its services and facilities. This authority technique is designed as an alternative to existing authorizations for the purpose of constructing, reconstructing or rehabilitating water supply and/or sewer systems.

The following samples of a petition, Town Clerk's Certificate and Engineer's Report were prepared by the Department of Audit and Control and appear in a publication of the State Comptroller entitled "Legal Requirements and Administrative Procedures for Approval of Town Special Improvement Districts, Sewer and Water Improvements." SAMPLE OF PETITION, REPORT, NOTICE, RESOLUTION AND APPLICATION
SAMPLE OF PETITION

IN THE MATTER OF THE ESTABLISHMENT OF [UPDIKE] 1 SEWER DISTRICT
(OR SEWER DISTRICT [No. 1]) 2 IN THE TOWN OF [UTOPIA,] 3
[EDEN] 4 COUNTY, NEW YORK

PETITION FOR THE ESTABLISHMENT OF UPDIKE SEWER DISTRICT IN THE
TOWN OF UTOPIA, EDEN COUNTY, NEW YORK

TO THE TOWN BOARD OF THE TOWN OF UTOPIA, EDEN COUNTY, NEW
YORK:

We, the undersigned, being owners of taxable real property situated in the proposed Updike Sewer District, and owning in the aggregate at least [one-half] 5 of the assessed valuation of all the taxable real property of said district, as shown upon the latest completed assessment roll of said Town, and including [resident owners] 6 of said proposed district owning taxable real property aggregating at least [one-half] 6 of all the taxable real property of the proposed district owned by resident owners, according to the latest completed assessment roll of said Town, do hereby petition your Honorable Board to establish Updike Sewer District, in the Town of Utopia, County of Eden and State of New York, [outside] 7 of any incorporated village and wholly within said Town of Utopia, to be known as Updike Sewer District, and which proposed district is bounded and described as follows:

8 Beginning at a point (1), said point being about 250' south of the intersection of the northerly line of Blossom Road and the centerline of First Avenue on a projection of said centerline;

Thence, northerly about 250' along said projection to a point (2), said point being the aforementioned intersection and also the southeasterly corner of the Village of Anywhere

boundary;

Thence, northerly about 2,270' along the centerline of First Avenue and a projection thereof to an angle point (3) said point also being an angle point on the boundary line of the Village of Anywhere;

Thence, about 545' easterly along the common boundary of the Village of Anywhere and the Town of Utopia crossing Carnation Avenue to an angle point (4), said point being 100' east from the easterly line of Carnation Avenue;

Thence, southerly about 410' parallel to the easterly line of Carnation Avenue to a point (5) said point being on the northerly property line of Brown;

Thence, southerly about 120' to the southeasterly corner (7) of said lands;

Thence, westerly about 100' along the southerly line of Brown to an angle point (8), said point being about 100' east from the easterly right-of-way line of Carnation Avenue;

Thence, southerly, parallel to the easterly line of Carnation Avenue about 1,530' to an angle point (9) said point being about 200' north from the northerly line of Blossom Road;

Thence, easterly about 450' along a line parallel to said northerly line of Blossom Road to an angle point (10);

Thence, northerly to an angle point (11), said point being about 360' north of the northerly line of Blossom Road;

Thence, easterly about 1,440' along a line parallel to the northerly line of Blossom Road to another angle point (12);

Thence, southerly, crossing Blossom Road, to an angle point (13), said point being about 200' south of and perpendicular to the southerly line of Blossom Road;

Thence, westerly parallel to said Line of Blossom Road about 1,190' to an angle point (14) said point being 200± feet east of the easterly line of Rose Avenue, perpendicular thereto;

Thence, southerly parallel to the easterly line of Rose Avenue, 400' to a point (15), said point being also the southeast corner of the lands of Jones;

Thence, westerly across Rose Avenue about 580' to a point (16) on the mutual boundary of the lands of Nash and Lot 112;

Thence, northerly along said boundary to a point (17), said point being 200' south of the southerly line of Blossom Road;

Thence, westerly about 620' parallel to the southerly line of Blossom Road and 200' perpendicular therefrom to a point (1), said point being the point and place of beginning.

The above-described parcel containing 59 acres more or less.

That also attached hereto are a [map and plan], 9 marked Exhibit A and made a part of this petition, showing the boundaries of the proposed district, the force main to be installed, proposed sewers, existing sanitary sewers and a connection point with the sewage disposal system located in the Village of Anywhere with which municipality it is contemplated that this said district will contract for disposal of the sewage collected in said district.

That the said map and plan have been prepared by _____ 10 _____, a competent engineer duly licensed by the State of New York. That attached hereto and marked Exhibit B is the report of the said _____ 11 _____ engineer as concerns

the said sewer district.

The maximum amount proposed to be expended in the construction of the sewer system and/or the acquisition of the land or improvement is \$ _____ 12 _____.

13 That pursuant to Section 202 of the Town Law the cost of construction of the said sewer system shall be assessed by the Town Board, in proportion as nearly as may be, to the benefit which each lot or parcel will derive therefrom.

DATED: _____

Name of Property Owner	In Presence of Assessed Value Residence	Subscribing of Real Property	Witness
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

Note: Signatures must be acknowledged or proved in the same manner as a deed to be recorded.

Requirements and Explanation of Noted Items on Petition

- 1 and 2 Give exact name of proposed district. District must be assigned a number or some specific identifying designation.
- 3 Name of town must be given.
- 4 Name of county must be stated.
- 5 Petition must be signed by the owners of taxable real property representing at least 1/2 of the assessed valuation of the proposed district.
- 6 If there be resident owners, the petition must include the signatures of resident owners owning property aggregating at least 1/2 of the total assessed valuation owned by such resident owners.
- 7 No part of an incorporated village may be included in the proposed district unless the village consents by local law, ordinance or resolution.
- 8 Boundaries must be set forth in detail in a manner sufficient to identify the lands included therein as in a deed of conveyance. If a park or public parking district, the property proposed to be acquired must be described.
- 9 If sewer, drainage or water district, a copy of map and plan must be submitted. If not made part of the petition, the map and plan must be separately certified by the town clerk.
- 10 Name and address of engineer must be shown.
- 11 Name of engineer must be shown.
- 12 Maximum amount proposed to be expended for capital improvements or acquisition must be given.
- 13 Method of assessment: "benefit" or "ad valorem," depending upon statutory requirements.

SAMPLE COPY OF TOWN CLERKS CERTIFICATE (PETITION)

STATE OF NEW YORK
COUNTY OF EDEN
TOWN OF UTOPIA

I, MARY BROWN, Town Clerk of the Town of Utopia, Eden County, New York, DO HEREBY CERTIFY that I have compared the copy of the petition, attached hereto, for the establishment of Updike Sewer District (No. 1) with the original thereof filed in my office at Anywhere, Eden County, New York, on the _____ day of _____, 20____, and that the same is a true and correct copy of said original and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Town of Utopia this _____ day of _____, 20____.

Town Clerk of the Town of Utopia
Eden County, New York

Seal of the Town of Utopia

NOTE: Signatures and acknowledgements or proofs may be omitted [Town Law § 194(3) (a)(1)].

SAMPLE ENGINEERS REPORT
_____, 20_____

TOWN OF UTOPIA, EDEN COUNTY, NEW YORK

ENGINEER'S REPORT
FOR
UPDIKE SEWER DISTRICT

Updike Sewer District was developed by the Town Board at the request of residents in the Carnation Avenue-Blossom Road areas adjacent to the Village of Anywhere. The majority of homes in this area have unsatisfactory household sewage disposal systems and clayey soil and rock makes it impossible to provide adequate facilities within the boundaries of numerous lots. The Town Board prepared a preliminary plan for sewerage this area and held an informal meeting on _____, 20____, at which time those present indicated a definite interest in sewerage for the area and requested the Town Board to prepare a formal petition for consideration of the project.

The construction work for a sewerage system will be performed by Town forces and will require the installation of about 5,700 feet of 8-inch diameter sewer and approximately 51 house service laterals. Each existing home will be provided with a service lateral from the street sewer to the house property line. The estimated cost of the sewer system construction is \$49,000, and it is proposed to finance this cost over a 30-year period at an estimated interest rate of 6%.

The debt will be amortized by charging 1/2 of the debt service on a front-foot basis and the other 1/2 on a per-home basis. This will provide an equitable means for serving vacant property as well as presently occupied lots. The Village of Anywhere will charge each residence connected to the sewer system an annual use charge of \$40, and the Town will charge each residence annual sewer maintenance charge of \$5. The first-year assessment for construction will be \$32 per home plus a front-footage charge of \$0.16 per front foot. The total cost for a residence with 100 front feet would be as follows:

100 front feet @ \$0.16 per front foot	\$16.00
Per house service charge	\$32.00
Total increased taxes	\$48.00
Village sewer use charge	\$40.00
Maintenance charge (town)	\$ 5.00
Total annual cost	\$93.00

Respectfully submitted,

Consulting Engineer

The figures shown here are for illustrative purposes only. The figures which are pertinent to the specific district proposed must be shown. NOTE: In most cases, the engineer's report would be more complex and contain more information than shown in the sample report. The project involved in the sample report was not a large or complex facility.

**SAMPLE NOTICE OF PUBLIC HEARING ON THE
ESTABLISHMENT OF AN IMPROVEMENT DISTRICT
(Town Law § 190-c and 195)**

(This form also covers Notice of Public Hearing on proposal to establish a water storage and distribution district)

At a meeting of the Town Board of the Town of Utopia, Eden County, New York held at the Town Hall in the said [E Town of Utopia, County of Eden,] State of New York on the _____ day of _____, 20____

PRESENT:

JOHN SMITH	WILLIAM DAWES
Supervisor	Councilman
JOHN JONES	JAMES J. DOULE
Town Justice	Councilman
ROBERT BROWN	
Town Justice	

In the matter of the Petition for the Establishment of a Sewer District in the Town of Utopia, Eden County, New York

WHEREAS, a written petition, dated _____, 20____ in due form and containing the required signatures has been presented to and filed with the Town Board of the Town of Utopia, Eden County, New York for the establishment of a sewer district in said town to be bounded and described as follows:

(See description of boundaries on sample petition) and,

WHEREAS, the improvements proposed consist of the installation of about 5,700 feet of 8-inch diameter sewer pipe and approximately 51 house service laterals and each existing home will be provided with a service lateral from the street sewer to the house property line, in accordance with certain plans made a part of such petition and now on file in the office of the Town Clerk of the said town, and

WHEREAS, the maximum amount proposed to be expended for the said improvement, as stated in the said petition. is the sum of forty thousand dollars (\$40,000.00), it is hereby

ORDERED that a meeting of the Town Board of the said Town of Utopia shall be held at the Town Hall in the Village of Anywhere, New York on the ____ day of _____, 20____, at seven o'clock in the afternoon of that day to consider the said petition and to hear all persons interested in the subject thereof concerning the same and for such other action on the vote of said Town Board with relation to the said petition as may be required by law or proper in the premises.

Dated _____, 20_____

s/ John Smith
s/ John Jones
s/ Robert Brown
s/ William Dawes
s/ James J. Doule

Members of the Town Board of the Town of Utopia, Eden County, New York

Requirements and Explanation of Noted Items on Notice of Public Hearing

☒ Name of town and county

☒ Names of town board members present at meeting ordering public hearing

☒ Date of petition

☒ Complete description of boundaries as stated in petition

☒ Materials required for construction and pertinent facts pertaining to installation and operation (This information can be obtained from engineer's report.)

☒ Maximum amount proposed to be expended

☒ Time, place and purpose of hearing

☒ Signature of town board members to minutes of meeting

Two copies of Proof of Publication (Publisher's Affidavit) of the Notice of Public Hearing and two copies of Proof of Posting such notice must be submitted with the application to the State Comptroller.

SAMPLE RESOLUTION

Œ WHEREAS, a petition for the creation of a sewer district to be known as “Updike Sewer District” in the Town of Utopia, Eden County, New York, the said petition being dated the _____ day of _____, 20____, was duly presented to this Town Board together with the necessary map and plan attached hereto and,

W HERERAS, an order was duly adopted by the Town Board on _____, 20____, reciting the filing of said petition, the improvements proposed, the boundaries of the proposed district and the estimated expense thereof and specifying _____, 20____, at _____ o’clock A.M./P.M. as the time and the said Town Hall in the said Town of Utopia as the place where the said board would meet to consider the petition and to hear all persons interested in the subject thereof, concerning the same, and

Ž WHEREAS, such order was duly posted and published as required by law, and

W HERERAS, a hearing in the matter was duly held by the Board on this _____ day of _____, 20____, commencing at _____ A.M./P.M. at the Town Hall in the said town and considerable discussion upon the matter having been had and all persons desiring to be heard having been duly heard (including many of the petitioners in person and various other persons speaking in favor of the establishment of the proposed district;

NO W, upon the evidence given upon such hearing and upon motion of William Dawes, Councilman, seconded by James J. Doule, Councilman and unanimously passed, it is

‘ RESOLVED AND DETERMINED, that (a) the petition aforesaid is signed and acknowledged or proved as required by law, and it duly complies with the requirements of Section 191 of the Town Law as to sufficiency of signers and it is otherwise sufficient; (b) all the property and property owners within the proposed district are benefited thereby; (c) all the property and property owners benefited are included within the limits of the proposed district; and it is in the public interest to grant in whole the relief sought: and it is further

’ RESOLVED AND DETERMINED, that the establishment of a sewer district as proposed in said petition he approved: that the improvement therein mentioned be constructed and the service therein mentioned be provided for upon the required funds being made available or provided for: and that such district shall be designated and known as the “Updike Sewer District” and shall be bounded and described as follows:

(See description of boundaries on sample petition)
and it is further

“ RESOLVED, that the proposed improvement, including costs of rights-of-way, construction costs, legal fees and all other expenses shall be financed as follows: by a bond issue extending over a thirty year life period, and it is further

” RESOLVED, that the Town Clerk of this Town shall within ten days after the adoption of this resolution file certified copies thereof in duplicate in the office of the State Department of Audit and Control at Albany, New York, together with an application by this Board in duplicate for permission to create such district as provided for by the Town Law, Section 194; and that such application shall be executed by and in behalf of the Town Board by the supervisor of the Town.

STATE OF NEW YORK
COUNTY OF EDEN
TOWN OF UTOPIA

SS.: •

I, MARY BROWN, Town Clerk of the Town of Utopia. Eden County. New York, DO HEREBY CERTIFY that I have compared the preceding resolution attached hereto with the original thereof filed in my office at Anywhere, Eden County, New York on the _____ day of _____, 20____, and that the same is a true and correct copy of said original and of the whole thereof.

IN TESTIMONY HEREOF, I have hereunto set my hand and affixed the seal of the said Town of Utopia this _____ day of _____, 20_____.

Town Clerk of the Town of Utopia
Eden County, New York

Requirements and Explanations of Noted Items on Resolution

Ⓒ State purpose of petition showing name, location and date when presented to town board, together with map and plan when required.

Show that an order was adopted by the town board, indicating the filing of the petition and showing the time and place of the public hearing on the petition.

Ž Show that the order (notice) was duly published and posted.

I ndicate that hearing was held, showing time and place and that all persons, so desiring, were heard.

Show that motion was made and seconded and that resolution was passed.

‘ State that petition was in order and meets legal requirements; that all property and property owners in the proposed district are benefited; that all property and property owners benefited are within the limits of the proposed district; that it is in the public interest to establish the district.

’ Show that establishment or extension of district it approved; that the improvement be constructed and the service be provided when the required funds are made available; and show the specific name of the district setting forth in detail a description of the boundaries.

“ Show the details of the bond issue, including cost to be covered.

” Indicate procedure so be followed by the town clerk in regard to the resolution.

- Certification should be executed by the town clerk.

SAMPLE APPLICATION

1 IN THE MATTER OF THE APPLICATION OF THE TOWN BOARD OF THE TOWN OF UTOPIA FOR PERMISSION OF THE STATE COMPTROLLER TO ESTABLISH UPDIKE SEWER DISTRICT (OR SEWER DISTRICT NO. 1) IN THE

TOWN OF UTOPIA, COUNTY OF EDEN AND STATE OF NEW YORK

2 TO THE COMPTROLLER OF THE STATE OF NEW YORK

State Department of Audit and Control
Alfred E. Smith State Office Building
Albany, New York 12225

Sir:

3 The petition of the Town Board of the Town of Utopia. County of Eden, State of New York for permission to establish Updike Sewer District in the

Said Town of Utopia. Eden County, New York, pursuant to Section 194 of the Town Law of the State of New York, respectfully shows:

4 1. This application is made pursuant to a resolutions of the Town Board of said Town of Utopia adopted at a meeting of said Town Board held in said town on the _____ day of _____, 20____, a certified copy of which is hereto annexed and made a part hereof, wherein your petitioner was duly authorized and directed to make this application for permission to establish Updike Sewer District in the said town in compliance with the statutes in such cases made and provided.

5 2. A certified copy of a petition, dated _____, 20____, the original of which was duly filed and presented to the Town Board of said Town of Utopia, requesting the establishment of said sewer district, and of the map and plan accompanying the same omitting therefrom, however, the signatures and the acknowledgements or proofs, is also annexed hereto and made part of this application.

6 3. The aggregate assessed valuation of the taxable real property situate in the proposed district is \$ _____ and the aggregate assessed valuation of the taxable real property situated in said proposed district owned by resident owners is \$ _____ as such assessed valuations are shown on the latest completed assessment roll of the town. The petition is signed by the owners of taxable real property in such proposed district owning in the aggregate the sum of \$ _____ assessed valuation, and also includes the signatures of resident owners owning taxable real property aggregating the sum of \$ _____ assessed valuation.

7 4. The total assessed valuation of all taxable real property in the Town of Utopia. according to the latest completed assessment roll of said town is \$ _____.

8 5. The avenge full valuation of the taxable real property of said Town of Utopia is \$ _____. Such average full valuation was determined in accordance with the provisions of the first paragraph of Subdivision 7-a of Section 2.00 of the Local Finance Law.

9 6. The following is an itemized statement of the outstanding indebtedness for all purposes of the said Town of Utopia. as evidenced by bonds, bond anticipation notes, capital notes and budget notes, to wit:

Big Dipper Serial Bonds	\$300,000.00
Capital Note, Snow Packer	\$ 3,500.00
Serial Bonds, Property Appraisal	\$ 7,375.00
Serial Bonds, Maxie Ski Lift	\$ 5,500.00
Bond Ant. Note, Big Bear Bldg.	\$ 12,500.00
Total Indebtedness	\$338,875.00

10 7. The amount of indebtedness proposed to be contracted for the proposed Updike Sewer District is forty thousand dollars (\$40,000.00).

11 8. The amount of budgetary appropriations for the payment of any of such indebtedness, whether or not such appropriations have been realized as cash, and the amounts, purposes and probable dates of issuance of any bonds, bond anticipation notes, capital notes and budget notes which the said town has authorized to be issued but which in fact have not been issued on the date of this application are, as follows:

12 9. Attached hereto and made a part hereof and marked "Schedule _____ is a certificate of the County Treasurer for Eden County showing the extent of nonpayment of taxes in the area to be included in the proposed district during the three years last past.

12 10. No state lands or institutions are included in the proposed Updike Sewer District.

13 11. It is proposed to construct the Updike Sewer District at a total maximum cost of forty thousand dollars (\$40,000.00), which will include estimated costs of rights-of-way, legal fees and miscellaneous other expenses involved in connection with the construction of said new district and the proposed improvement therein shall be financed by the issuance of serial bonds not to exceed the amount of forty thousand dollars (\$40,000.00) payable with interest over a period of 30 years. The cost of construction of said sewer system shall be assessed by the said town board in proportion as nearly as may be so the benefit which each lot or parcel will derive therefrom.

14 12. The population of the territory embraced in the proposed district is approximately 200 persons and is increasing by reason of recent construction of new homes. The only present means of disposing of sewage is by septic tank, which means is very unsatisfactory, unsanitary and unhealthy because the land area within the district has a small coverage of top soil, no sand and the underlying hard pan is practically non-water absorbent.

15 13. A description of the territory to be embraced in the proposed district is fully set forth in the certified copy of the resolution of the Town Board adopted on _____, 20_____, attached hereto and made a part hereof.

16 WHEREFORE, the Town Board of the Town of Utopia, County of Eden, New York, through its supervisor. John Smith, respectfully prays and requests permission to establish Updike Sewer District in the said Town of Utopia, County of Eden, State of New York.

17 Dated at Anywhere, New York this _____ day of _____, 20_____

TOWN BOARD OF TOWN OF UTOPIA
EDEN COUNTY, NEW YORK Petitioner

By _____
John Smith
Supervisor

16 The town board must request permission to establish or extend the district.

17 Must be signed by Town Supervisor.

18 Verification.

In addition to the mandated information required to be included in the application the Comptroller requires, as a general rule, the following information and data:

1. Tax Rates per \$1,000 assessed valuation (for property in proposed district or extension)
 - General (state, county, town, including highway)
 - School
 - Fire
 - Any other purpose, such as other special district levies and assessments (show each separately)
2. The assessed valuation of the average homeowner in the proposed district or improvement.
3. Estimated annual cost to the average homeowner for debt service and operation and maintenance.
4. Estimated highest annual cost to any real property owner irrespective of whether property is improved or unimproved.
5. A schedule of annual charges to each resident showing the basis for which charges will be made and the charge to be made for service outside the district. For example:

100 front feet @ \$0.16 per front foot	\$16.00
Per house service charge	\$32.00
	\$48.00
Village sewer use charge	\$40.00
Maintenance charge (town)	\$ 5.00
Total annual cost	\$93.00

6. The interest rate on the bond issue. This should be a realistic interest rate.

After the application is approved by the Department of Audit and Control, a copy of the Order of the State Comptroller is sent to the town clerk for presentation to the town board at its next regular meeting.

The figures shown here are for illustrative purposes only. The figures which are pertinent to the specific district proposed must be shown.

Forms from “Legal Requirements and Administrative Procedures for Approval of Town Special Improvement Districts, Sewer and Water Improvements.”

SAMPLE OF COMPTROLLER’S APPROVAL

STATE OF NEW YORK—DEPARTMENT OF AUDIT AND CONTROL

In the Matter
of the

Application of the Town Board of the Town of Utopia, Eden County, New York, for the permission of the State Comptroller to establish Updike Sewer District in said town

WHEREAS, application has been duly made to the undersigned by the town board of the Town of Utopia, Eden County, New York, by its Supervisor, pursuant to Section 194 of the Town Law, for the permission of the State Comptroller to establish Updike Sewer District in said town, in accordance with such application dated March 12, 1969, and a resolution of said board adopted on March 10, 1969, and

WHEREAS, notice of such application to the State Comptroller has been duly given to the Board of Supervisors of Eden County, New York, by the State Comptroller in the manner prescribed by Section 194 of the Town Law, and

WHEREAS, the undersigned has duly examined such application,

NOW, THEREFORE, pursuant to such examination and upon such application of the town board of the Town of Utopia, the undersigned does hereby find and determine after due deliberation:

(1) That the public interest will be served by the establishment of Updike Sewer District in the Town of Utopia in accordance with such application.

(2) That the cost of the proposed district will not be an undue burden upon the property therein.

I, ARTHUR LEVITT, Comptroller of the State of New York, do hereby order that such application of the town board of the Town of Utopia for permission to establish Updike Sewer District be, and the same hereby is, granted, and I do permit the establishment of said district to comprise the area described in the resolution adopted by said town board on March 10, 1969.

Chapter 9

FIRE PROTECTION

§ 9-1. Purpose.

A. The furnishing of fire protection in towns is not a town governmental function or a basic responsibility of town boards. Fire protection is provided in towns outside of villages by means of a fire district or a fire protection district -- the creation, extension and administration of which does involve the town board.

B. It is advisable for town boards to interest themselves in the creation or extension of such districts so as to include as much of the land in the town as possible under some type of fire protection. This is desirable in order to avoid the existence in the town of unprotected areas sometimes referred to as "no man's lands" or "orphan areas." This is important not only to provide the citizens of the town with fire protection, but also to avoid many problems which can arise in relation to liability for negligence, for damage and expense in relation to assistance furnished by "outside" fire departments, and for benefits under the Volunteer Firefighters' Benefit Law.

§ 9-2. Fire districts.

A. Creation or extension. A fire district may be created or extended either on petition

or by the town board acting on its own motion without a petition. In each case, a public hearing before the town board on notice is required. A fire district or an extension thereof must be outside of an incorporated village or city or existing fire, fire alarm or fire protection district. On the creation or extension of a fire district, the approval of the State Comptroller is required. The resolution of the town board to create or extend the district, whether the town board proceeds by petition or by its own initiative, is not subject to a permissive referendum.

B. Status; administration; budget. After a fire district is created, it becomes, in fact, an independent unit of government, possessing independent taxing, borrowing and purchasing powers. It is administered by a separate board of five elected fire commissioners. This board prepares annually the budget for the operation of the fire district during the ensuing year. While such budget must be submitted to the town board and is adopted by the town board as a part of the town budget, the town board may not, even after the public hearing, make any change in the budget submitted by the fire district commissioners.

C. Fire departments within districts. Fire districts generally have their own fire departments, but they do have limited power, in certain cases, to contract for fire protection, emergency service and general ambulance service to be furnished within the district. Their fire companies need not be incorporated, but may be after public hearing and the consent of the board of fire commissioners. The chief officers of the fire department must be approved by the board of fire commissioners, and the volunteer firefighters elected by the fire companies also must receive board approval. The fire districts may contract to furnish fire, emergency and general ambulance service outside the district, and the fire department, subject to any restrictions imposed by the board of fire commissioners, may answer calls for assistance outside the district.

D. Powers. Fire districts have broad powers to act in natural disasters, to contract with cities, villages and fire districts for joint fire training centers and with other villages and fire districts for joint fire alarm centers.

E. Boundary lines. When adjoining fire districts mutually agree to alter their common boundary line, they must obtain town board approval before the alteration takes place. Also, where a dispute arises between two fire districts as to location of their boundary line, the town board makes a decision after a survey and a public hearing on this issue [Town Law §§ 172-a and 176(5)].

§ 9-3. Fire protection districts.

A. Creation or extension. A fire protection district may be created or extended by the town board in the same manner above described in the case of a fire district, except in certain towns in the Adirondack Park. As in the case of a fire district, a fire protection district may not include territory in an incorporated village or city or existing fire, fire alarm or fire protection district.

B. Provision of services. It is not necessary to have a fire company in a fire protection district. The protection is furnished pursuant to a contract and may be for fire protection, emergency service and general ambulance service. The contract may be entered into

either with a fire district or a city, village or incorporated fire company maintaining adequate and suitable apparatus and appliances for the furnishing of fire protection. This contract may be for a period up to five years' duration, and the amount of the contract must be for a definite sum (i.e., a specific dollar amount) and cannot be determined by some formula or other technique which depends on future conditions. That does not mean that a contract could not provide for the town's providing gasoline in exchange for the fire protection services as long as precise, definite terms are used as to dollar value and quantity (Op. State Compt. 83-10). The proposal for the contract must be advertised by the town board, and a public hearing must be held thereon.

(1) If the contract is with a fire company located in the fire protection district, that company must be incorporated. This requires the consent of the town board and a public hearing on notice. The persons named in the certificate of incorporation of such a fire corporation constitute the original membership. Thereafter, other eligible persons may be elected as members of the fire corporation, but such election must be confirmed by the town board. Where any such fire corporation furnishes fire protection outside of the boundaries specified in its certificate of incorporation, it and the members thereof shall be under the exclusive control of the town board of the town in which the fire corporation maintains its apparatus, and the town board may restrict the service of such corporation outside the boundaries described in its certificate of incorporation.

(2) A court decision has held that a town may be liable for the negligence of a volunteer firefighter who was a member of a fire company with which the town board had a fire protection contract on behalf of a fire protection district. At the time of the claimed negligence, the volunteer firefighter was responding to a mutual aid call in his own vehicle. In order to protect the town against possible similar liability, the town board entering into a fire protection contract with a volunteer fire company should consider requiring the fire company to obtain liability insurance naming the town as insured, or else obtain its own insurance coverage at district expense. (Cuddy v. Town of Amsterdam, 62 A.D.2d 119)

(3) A town board may not purchase or authorize the purchase of equipment or apparatus for the fire departments contracting to furnish services in the fire protection district, although the town has broad powers to aid the district in natural disaster cases. A fire protection district has no power to borrow money. The town board, after a public hearing on notice, may contract on behalf of the district for a period not to exceed five years for a supply of water and hydrant service. Where such a water supply cannot be suitably supplied by contract, provision is made for acquisition of water rights and for construction and maintenance of fire suction pools, fire cisterns, fire wells, pipes, pumps, hydrants and other facilities, but money may not be borrowed for that purpose. In certain towns in the Adirondack Park, the above-mentioned contracts, as well as contracts for fire protection, must be approved by the State Comptroller.

§ 9-4. Fire alarm districts.

While the law provides for fire alarm districts, we know of only one in the state. Alarm systems may be provided in these districts and they have many of the powers of fire protection districts.

§ 9-5. Benefits.

Where a fire protection or fire alarm district is furnished service by a fire company or fire department pursuant to a contract with another entity, or by an incorporated fire company located outside of such fire protection or fire alarm district, such contract must include a negotiated amount for the increase in cost of providing the benefits under the Volunteer Firefighters' Benefit Law. If the benefits are provided under a county self-insurance plan, the additional cost is not included in the contract [Volunteer Firefighters Benefit Law § 30(12)].

§ 9-6. Water supply in fire districts.

Instead of charging for water, the town board, in its discretion, may, without charge, permit the use of water from hydrants of a water district for fire purposes in all or any part of the area of a fire district, fire protection district, fire alarm district, or "unprotected area" which is wholly or partly included within the area of the water district.

§ 9-7. Appropriations for forest fires and natural disasters.

A town board is authorized to appropriate not more than \$1,000 in any one year for equipment for the prevention of forest fires. A town may purchase and operate equipment itself for natural disaster emergencies, "such as flood, drought, tidal wave, fire, earthquake, hurricane, windstorm or other storm, landslide or other catastrophe arising from causes other than enemy attack." This authority is separate and apart from a town supervisor's authority in declared emergency situations pursuant to Executive Law Article 2-B.

Chapter 10

MUNICIPAL COOPERATION

§ 10-1. Statutory Authority; Purpose.

General Municipal Law Article 5-G sets forth the procedure under which two or more units of local government may provide jointly any service which each has the power to provide separately. Other sections of our laws contain specific authority for cooperation in particular fields. Many are urging that difficult and costly municipal problems involving the provision of services be approached for solution through cooperation. In considering these matters, care should be taken to be sure that each municipality alone has the statutory authority to provide the service. A special provision is made by Town Law § 56 for town-village cooperation in the case of suburban towns. This statute offers a little more flexibility than Article 5-G.

§ 10-2. Procedure.

Any cooperative effort entered into between two units of local government under General Municipal Law Article 5-G must be accomplished by the consent of the governing bodies of each participating unit, and the consent of each such governing body must be by a majority vote. Whenever the performance of a particular function by one unit alone for its residents would require a public hearing, a mandatory or permissive referendum or other special procedure, the same must be accomplished before such municipality can undertake a joint program to supply such function.

§ 10-3. Agreements.

The agreements between the participating units of government should contain all of the matters involved in the arrangement, such as a method or formula for equitably allocating expenses and revenues both to cover financing costs and operating expenses. The agreement may also cover the method of handling personnel, fixing of responsibility for the establishment, operation and maintenance of the facility, the question of fixing and collecting charges, rates, rents or fees, and establishing necessary rules and regulations,

the keeping of records and the making of reports, as well as any other matters as are reasonably necessary and proper to effectuate the joint service. Since 1996, the duration of such agreements is limited to a term of five years, except where issuance of debt is involved (whereby the agreement may extend up to the period of probable usefulness for the object or purpose for which the debt was issued).

§ 10-4. Subject of cooperation.

Authority exists for the outright contracting between one municipality which does not have any means of providing the particular service with another which has sufficient facilities to justify its sharing by contract this service with a neighboring municipality. There is additional authority for municipal corporations and districts to perform, one for the other, their respective powers and functions on a cooperative or contract basis. Legislation enacted in 1974 authorizes a municipality to contract with another municipality or with a municipal housing authority of another municipality for the construction, maintenance, operation or management of a public housing project (General Municipal Law § 119-o). In 1980, specific authority was enacted for a cooperative agreement between the State Department of Transportation and any municipality for the joint operation and maintenance of a computerized traffic control system, which may include portions of local and state highways [Highway Law § 10(34)].

§ 10-5. Town-village relations.

A. Towns are sometimes referred to as "involuntary" corporations in that they are created by act of the State Legislature. Conversely, villages are "voluntary" corporations created entirely by choice of their residents on petition voluntarily executed by them. The Association of Towns continues to receive inquiries periodically in connection with village taxpayer participation in the cost of town government. The reason, of course, is that the village is also a separate municipality with some of its own municipal services supported by state per-capita aid along with village-imposed taxes. But in actuality, every village is located in some town, as well as in a county and in the state.

B. Each village resident is first and foremost a town resident, eligible to participate fully in all town operations, including public office and the election of all town officers. The pattern in New York State, as in other states, is for village taxpayers to share the cost of operation of each such government in which it is so located. This is not a situation for which the town is responsible, but arises by the very act of village incorporation.

C. One must also keep in mind that village taxpayers have heretofore been relieved of the necessity to support by taxation a variety of town services they normally would supply to themselves through their own village government. Examples are costs for planning, zoning, building departments and similar services which, by law, towns may not render in the village and in connection with which the town has no jurisdiction within village limits. However, if the governing bodies of the town and village so agree, the town may render these services to village residents (General Municipal Law § 119-m, n, o). By similar agreement, town highway machinery may be used at no cost to a village to remove snow and ice from village streets and sidewalks and to otherwise maintain and repair the same (Highway Law § 142-c). Additionally, village taxpayers are not required to pay toward the repair and improvement of town highways (Town Highway Fund Item 1), nor do they pay any of the costs for town health services or for the town registrar of vital statistics. Village taxpayers also enjoy the full use and enjoyment of town recreation

programs, parks, picnic areas, swimming pools, payments towards veterans halls, police protection and dog warden services as needed and desired. It may not, in all cases, be a completely satisfactory answer to those who question these matters to tell them that the creation of villages is a voluntary act on the part of the village residents and that they brought upon themselves any additional tax burden to which they may object. However, it is a fact that a village is a voluntary corporation existing by local choice whereas a town is an involuntary corporation existing as an arm of the state. The true equities, however, run much deeper than may appear on the surface. First of all, the village-town relationship is not unique. As suggested above, similar relationships exist between city and county, town and county, county and state, state and federal. True, we cannot explain away one seeming inequity by citing the existence of others, but in exploring all these examples we begin to sense a clear pattern of government which exists in our state and nation. That pattern helps explain and justify what initially may appear to be an injustice when viewed only from the village taxpayers' vantage point. After all, the only taxpayers available to support our town, county and state governments are the taxpayers who reside within these units, and village residents are very definitely townspeople and they were such before they elected to become villagers as well. This is not to say that the status quo of village-town relations must always remain. As towns level out to more uniform development, they become better able to provide more services on their own on a town-wide basis, and many smaller villages may find that the services they need can now be more economically provided by the town, and that the additional layer of village government is unwarranted. If that proves to be true, and the residents of the village so choose, they have the discretion and the means to cooperate with the town (General Municipal Law Article 5-G) or dissolve their government (Village Law Article 19). Perhaps the foregoing may provide some of the arguments we might use with our village brethren rather than attempting an item-by-item tally sheet of services rendered as against taxes paid.

§ 10-6. Consolidation of towns.

A. Statutory authority. Chapter 690 of the Laws of 1973, enacted a new Article 5-B of the Town Law entitled "Consolidation of Towns." This article, comprising §§ 79-b through 79-o, prescribes the procedure for the consolidation or physical combination of two or more adjoining towns in the same county into one single new town.

B. Authority for "adjoining towns" to consolidate. Any two or more adjoining towns in the same county may be consolidated as provided in the aforementioned article. "Adjoining towns" are defined as two towns having a common boundary line, however small. More than two towns are deemed to adjoin if each of them has a common boundary line with any of the others. Towns are deemed to adjoin where a common boundary line lies along or within a public highway or body of water (Town Law § 79-b).

C. Procedure.

(1) In order to initiate any such consolidation, the town boards of each town contemplating the action must hold a joint public hearing on notice of at least 10, but not more than 20 days, which notice must be published in the official newspaper of each of the towns, or, in the absence of an official newspaper, in one having general circulation in such towns (Town Law § 79-g).

(2) Thereafter, each town board must submit a proposition for consolidation at a general or special election (Town Law § 79-d). (Note that the election must be held on the same day in each of the towns involved in the consolidation.) In addition to the question of consolidation, the proposition must contain the following, where applicable:

- (a) The proposed name of the new town;
- (b) Plans to dispose of property or other assets of the several towns;
- (c) A statement as to how the indebtedness of the several towns shall be allocated;
- (d) A statement of whether a change of classification will occur;
- (e) Proposals for termination or continuance of appointed officers or employees of the several towns;
- (f) Any other relevant or necessary matters (Town Law § 79-e).

(3) If the proposition is approved by a majority of the electors in each of the towns, a certificate of such election must be filed by each town with the Secretary of State, with the county clerk and with the respective town clerk of each of the towns Town Law § 79-d). (Note: A majority vote in each town is required.)

(4) If the proposition is approved in each town, the consolidation takes place at the expiration of December 31 in the odd-numbered year following the year in which the approval occurred (Town Law § 79-f).

(5) The terms of all elected officers in each of the towns involved expire when the consolidation becomes effective.

(6) The town boards of the affected towns, at a joint meeting, must appoint inspectors of election and other election officers at the time and in the manner required by law for a biennial town election.

(7) Election of new officers shall be at large in the total area of the new consolidated town unless otherwise provided in the proposition. The election is held at the general election preceding the effective date of the consolidation.

D. Town board; town justices. The town board of the new town consists of a supervisor, two councilpersons for two-year terms and two councilpersons for four-year terms, initially. After the first election, all councilpersons shall be elected for four-year terms. Additionally, two town justices will be elected for four-year terms, but such justices will not be members of the town board (Town Law § 79-h).

E. Budget. Prior to the effective date of consolidation, the existing town boards are required to meet in joint session at such times and manner as is required for towns to prepare and approve a budget for the new town, to file such budget with each of the

existing town clerks, and to present the budget to the county legislative body (Town Law § 79-i).

F. Debts and obligations.

(1) Outstanding debts and obligations of the several towns shall be assumed by the new town and be a charge upon the real property in the same manner as previously unless the proposition provides otherwise; except that all indebtedness incurred on behalf of a special or improvement district remains a charge upon the real property of such district.

(2) The new town is given all powers to incur and redeem debt (Town Law § 79-j).

G. Books and records. All books, records and other property in custody of the respective officers of the several towns must be turned over to the town board of the new town or to such persons as such new town board directs (Town Law § 79-k).

H. Legislation. All local laws, ordinances, rules or regulations of the several towns, in effect as of the date of consolidation, remain in effect for a period of two years thereafter and shall be enforced by the new town board; except that such new town board has the power to amend or repeal such legislation as if it had enacted it (Town Law § 79-l).

I. Claims and actions.

(1) Unless the proposition provides otherwise, the new town shall succeed to all claims and actions in favor of the individual towns and shall be liable for such claims and actions (Town Law § 79-m).

(2) In the absence of fraud, gross negligence or willful misfeasance, no officer of the several towns or of the new town is to be held personally liable upon any claim arising from consolidation or any circumstance connected therewith (Town Law § 79-n).

J. Special improvement and fire districts. Consolidation shall not affect any village or any fire district, special or improvement district located wholly or partly in any town affected by consolidation (Town Law § 79-o).

Chapter 11

STATE ENVIRONMENTAL
QUALITY REVIEW ACT

No manual for town supervisors and town boards could be complete without some mention of the State Environmental Quality Review Act (SEQR) (Environmental Conservation Law Article 8; 6 NYCRR Part 617).

§ 11-1. Purpose; scope.

A. When SEQR became a law on August 1, 1975, it established a process that requires the consideration of environmental factors early in the planning stages of any action directly undertaken, funded or approved by a local, regional or state agency. By incorporating a systematic approach to environmental review in the early planning stages, projects can be modified as needed to avoid adverse impacts on the environment.

B. The basic purpose of SEQR expressed by the Legislature was: "...to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state."

C. All agencies of government at the state, county and local level within New York, except the State Legislature and the courts, must comply with SEQR.

§ 11-2. Decisions subject to SEQR.

All discretionary decisions of town boards and other agencies and decision-making bodies of a town, to approve, fund or directly undertake an action which may affect the environment, are subject to review under SEQR. Some decisions, however, have been explicitly excluded or exempted from the process or appear on a predetermined list of types of actions ("Type II list") which will never have a significant impact upon the environment.

A. Discretionary decisions are those where there are choices to be made by the decision makers whether and how an action may be taken. Examples of discretionary decisions are zoning changes, preliminary/final plat approval, site plan approval, funding of projects by local/state IDA's and construction of highways/municipal buildings.

B. Nondiscretionary or ministerial decisions are based entirely upon a given set of facts, as prescribed by law or regulation, without use of judgment or discretion. The issuance of a certificate of occupancy or of a hunting license is nondiscretionary or ministerial. If all criteria have been met for issuance (e.g., compliance with codes, fee, age, residency, examination, etc.), such permit must be issued. There is no choice involved.

EXHIBITS

Exhibit A

TRANSITION TO A TOWN OF THE FIRST CLASS

[NOTE: This material has been prepared principally to be of assistance to those towns which were required to become towns of the first class as a result of the 2000 federal decennial census. Specific dates are used for easier illustration. When this material is considered in connection with an "optional" change of classification, the appropriate years should, of course, be substituted.]

§ A-1. The law on mandatory changes of classification.

When the population of a town of the second class becomes 10,000 or more as a result of a decennial federal census (such as the 2000 census recently completed), the town must become a town of the first class (Town Law § 11). In other words, such a change is not mandatory if the population reached 10,000 as a result of a special census requested by the town -- only after a decennial census. Towns in Broome and Suffolk Counties, the

Town of Potsdam in St. Lawrence County and the Town of Ulster in Ulster County are excluded from the requirement. Conversely, all towns in Westchester County are automatically towns of the first class regardless of population.

§ A-2. The law on optional change of classification (Town Law § 12).

Any town of the second class may become a town of the first class if it meets any one of the following three requirements:

1. It has a population of 5,000 or more;
2. It has an assessed valuation of more than \$10,000,000;
3. It adjoins a city having a population of 300,000 or more.

§ A-3. What must be done to accomplish the change.

A. Mandatory changes. Under the mandatory provisions of the Town Law, the change of classification of a town of the second class to a town of the first class becomes effective on the first day of January succeeding the next biennial election after the census, or January 1, 2002. Upon the completion of the federal decennial census, the Secretary of State must obtain from the federal authorities an authenticated statement of the population of each town. If the population is shown to be over 5,000, a copy of the statement is filed with the town clerk. When the population is shown to be 10,000 or more, the classification automatically changes. It requires no specific action to be taken or procedure to be followed by the town board or other town officials, except that the town must elect at the next biennial town election -- here the November 2001 town election -- all officers and only such officers as are required to be elected in a town of the first class (Town Law § 11).

B. Optional changes. In the case of a town desiring to make the optional change, this can be accomplished in two ways: either by the adoption by the town board of a resolution therefor subject to a permissive referendum; or by the adoption of a proposition by a majority of the qualified electors of the town voting thereon at a special biennial town election. If the town proceeds by the first method, the town board resolution must be filed in the offices of the Department of State and the Department of Audit and Control. If no petition for a referendum was filed, there must also be filed in these two offices the affidavit of the town clerk that no such petition was filed. If a petition for a referendum was filed and vote subsequently taken, or if the proposition was initially put to a vote by the town board and the election is held, a certificate of the election inspectors certified by the town clerk must be filed in each and of the two state offices enumerated above (Town Law § 12).

C. Receiver of taxes and assessments. The offices of tax collector and school district collector are abolished in a town of the first class. In their place, the town will elect a receiver of taxes and assessments for a term of four years, beginning on January 1, 2002 (Town Law § 38). The question has previously arisen as to what should be done in the case of a town which had previously abolished the office of tax collector and had imposed the tax-collecting duties on the town clerk. Interpretations of the Town Law state that where once the office of tax collector has been abolished, it cannot thereafter be reestablished. However, it must be pointed out that the office of the receiver of taxes and

assessments is a completely different office.

(1) The Attorney-General has ruled that in making the change to a town of the first class, a town must elect a receiver of taxes and assessments as outlined above. The town board may, however, adopt a resolution, subject to a permissive referendum, determining that the office of the receiver of taxes and assessment shall be appointive in such town. Such action must be taken at least 90 days before the November 2001 biennial town election. It can be done at any time before a biennial town election, but the latest possible date for such action to be taken would be in August of the year immediately before a November in which biennial town elections would take place.

(2) If town board adopts such a resolution and no petition for a referendum is filed, or if the majority of votes cast on a proposition to approve such a resolution are in the affirmative, the office of receiver of taxes and assessments becomes an appointive office. No receiver of taxes and assessments will be elected, and the town clerk may be appointed as the receiver of taxes and assessments.

(3) An appointed receiver of taxes and assessment in a town of the first class takes office January 1, 2002, just as an elective receiver would, but the term of office is only two years (Town Law § 24).

D. Sole appointed assessor. Chapter 957 of the Laws of 1970, the so-called "Assessment Improvement Bill," required the appointment of a single assessor in each town of the state for a six-year term beginning October 1, 1971 (except in those towns which presently had elected assessors and which adopted a local law to retain such elected assessor on or before April 30, 1971, subject to a mandatory referendum on such local law to be held on or before July 1, 1971). The option to retain elective assessors is not available to towns of the first class. Towns of the first class must have a sole appointed assessor with a six-year term. All appointed assessor terms run concurrently, for a period commencing on October 1, 1971, and every six years thereafter.

§ A-4. Differences between towns of the first class and towns of the second class.

A. Receiver of taxes and assessments. As noted in the previous section, upon becoming a town of the first class, the collector of taxes becomes the receiver of taxes and assessments. Generally, speaking, the receiver of taxes and assessments in a town of the first class receives all taxes and assessments, including school district taxes, all fees thereon prescribed by law, all water rates, sewer rentals, permit fees and other fees and charges payable to the town.

(1) Under Real Property Tax Law § 1328, a fee of 1% is imposed on all school taxes paid within the thirty-day period after the notice is published or posted, and a fee of 5% must be collected on school taxes paid after such thirty-day period. A receiver of taxes and assessments in a town of the first class must collect a fee of 1% on school taxes paid within such thirty-day period, unless the town board, pursuant to authority which is granted in Town Law §37(1), passes a resolution dispensing with such fee. Likewise, the receiver must collect a fee of 5% on school taxes paid after the thirty-day period, unless the town board passes a resolution reducing such fee. The Town Law provision cited above will allow the town board to reduce such fee to not less than 2%. These fees belong

to the town and may not be waived or altered in any fashion other than that described herein.

(2) Where the school district is composed partly of territory in a town of the first class and partly in other towns, the town receiver of taxes and assessments collects only those school taxes upon the property of that portion of the school district located in his or her town [Town Law § 37(2)]. A school district collector for the remainder of the district is appointed by the board of education.

(3) If the town board and the board of education of the school district agree to a different arrangement and if both these boards think it is better to have a separate school tax collector, this can be accomplished by such an agreement, in which case the receiver of taxes and assessments will not collect school taxes.

B. Comptroller. A town of the first class and any town of the second class with 40,000 inhabitants as of the latest federal census may have a comptroller [Town Law § 20 (3)(b)].

(1) In a town which has created the office of the town comptroller and has filled such office, the town board may be relieved of the necessity of auditing claims (Town Law § 34).

(2) Furthermore, such comptroller performs all of the duties which town clerks presently perform in relation to receipt of claims, preparation of abstracts, etc. under Town Law § 119 (formerly § 120). In other words, both the claim and auditing functions are accomplished by the town comptroller, though of course his or her work is done in close relationship with the supervisor, who still signs all of the checks.

(3) The Town Law was also amended in 1960 to provide two additional alternate methods which a town board may follow in connection with the powers and duties of the supervisor and town comptroller. The first of these concerns the fact that the town board by ordinance may provide that certain of the supervisor's duties in keeping separate appropriation accounts and preventing accounts from being overdrawn can be imposed on the town comptroller; and the second is that the town board by resolution may determine that the comptroller shall be the accounting officer of the town, in which case the accounting duties of the supervisor and his or her duties in connection with the preparation of various reports are transferred to the town comptroller [Town Law §§ 34 (2), 124].

(4) In a town having a town comptroller, the annual auditing meeting is not required, nor indeed is it required in any town which has engaged the service of a public accountant to make an annual audit of the moneys of such town received and disbursed by its officers and employees (Town Law §§ 62, 123).

C. Assessor. In a town of the first class, when required by the town board, the assessor shall keep such office hours for public convenience as the town board may determine (Town Law § 33).

D. Deputies. A town board of a town of the first class may appoint deputies in the offices of town attorney and town engineer; the term of office of such deputies is at the pleasure of the town board [Town Law § 20(2-b)]. The town board of a town of the first class may also establish the office of deputy receiver of taxes and may also establish one additional office of deputy receiver of taxes and assessments and prescribe the duties thereof [Town Law § 20(2-c)].

E. Constables. There is no authority for a town of the first class to have town constables. In any such town which has established a police department, however, the town board may appoint not more than four civil officers who shall possess all the powers and duties of constables in civil actions and proceedings only. These civil officers receive no salary from the town, but they may collect the statutory fees allowed by law in such civil actions and proceedings [Town Law § 20(1-a)].

F. Bookkeeper or confidential secretary. In a town of the first class the supervisor may designate a bookkeeper or confidential secretary, or both. In towns of the second class, the supervisor must be authorized by town board resolution to take such action [Town Law § 29(15)].

G. Meetings. The town board of every town of the first class must hold at least one meeting each month of the year (Town Law § 62).

H. Petty cash fund. In towns of the first class, a petty cash fund may be established for a receiver of taxes and assessments, up to \$1,000. Petty cash funds established for any other office, officer or department head and in any other town cannot exceed \$200 [Town Law § 64(1-a)].

§ A-5. Conclusion.

The above list of differences in powers and duties is not intended to be all-inclusive. It will serve to illustrate certain areas where towns of the second class have different powers and limitations on powers and functions when compared with towns of the first class. Since January 1, 1964, the date when all towns acquired home rule local law enacting powers, most of the differences and distinctions (which fall within the scope of a town's "property, affairs and government") can easily be addressed by local law. However, insofar as those differences are deemed to be of "state concern," a town cannot act by local law in this field. For example, a town could not, by its own local law, increase the jurisdiction of its town justices, because the judiciary is a matter of "state concern," as are the Local Finance Law, the Public Health Law, the Agriculture and Markets Law, the Real Property Tax Law, etc.

Exhibit B

SUGGESTIONS FOR PROCEDURE AT THE FIRST MEETING OF THE NEW TOWN BOARD ARTICLE I, General Provisions

Following is a brief checklist of salient items to be kept in mind on the holding of the vastly important annual organizational meeting to be held by each of the 932 towns of the state. This is recommended reading for newly selected town board members. Note that only basic necessary actions are listed herein, actions required for a town government to

be legally organized so as to be able to function legally. Other actions may need to be considered or taken at the organizational meeting or thereafter. The following may be very familiar to town officers with long experience in these affairs, but nonetheless serves as a helpful reminder. For example, the information herein will remind incumbents of the need to take the oath of office for the new term, file an official undertaking, or to change the official undertaking for some new or incumbent officers.

§ B-1. The first meeting of the year.

A. Scheduling; call. It is very important for each town board to start each calendar year with a "special" organizational meeting. This should be held during the first few days of January every year. Technically, this is a "special meeting." As such, it should be held on call of the supervisor in office as of January 1, not on prior call of a supervisor leaving office December 31. The call of the meeting by the supervisor must be on at least two days' written notice to each member of the town board and to the town clerk, who by law is required to attend every town board meeting. The formality of this "call" would normally be no problem where all the board members are notified and do attend. But if a member chooses to be technical, or where there is a "divided" board, it is highly recommended that the "call" be formally accomplished.

B. Notice. The first meeting of the town board is a "meeting" within the meaning of the Open Meetings Law (Public Officers Law Article 7), and, therefore, notice of the time and place of the meeting must be given to the news media and conspicuously posted in one or more designated public locations such as the Town Clerk's Bulletin Board. Thus, if a meeting is scheduled more than a week in advance, the notice to the news media and posting must be performed at least 72 hours before the meeting. In case of other meetings, the notice and posting should be done, to the extent practicable, at a reasonable time prior to the meeting. Notice to the news media does not require publication in the official town newspaper, but may consist of a telephone call, a letter or delivery in person of a notice of time and place of the meeting. It is advisable that someone be assigned to keep a log with entries of who gave notice to whom, the type of notice (i.e., telephone) and the date and time thereof.

C. Barrier-free facilities. Both the Open Meetings Law and the Public Officers Law require that the local official who is scheduling the meeting make a reasonable effort to hold it in facilities that permit "barrier free" physical access to the physically handicapped [Public Officers Law §§ 74-a and 103(b)].

D. Rules of procedure. Town Law § 63 authorizes the town board to "determine the rules of its procedure." One of the first considerations is finding out what rules of procedure for town board meetings have been adopted. At this meeting, it may be opportune to either adopt new or amend existing rules as the town board deems necessary for its meetings.

E. Adoption by resolution. All of the actions listed below should be taken by formal resolution of the town board, duly introduced by a specified member and duly seconded by another. They should be put to long roll call with the vote "aye" or "no" duly recorded. Each such resolution with the vote on it should be in writing and fully set forth in the town clerk's minutes of the meeting.

ARTICLE II, Officers and Employees

§ B-2. Eligibility and qualifications of town officers.

A. Town Law § 23 provides, with certain exceptions noted therein, that:

Every elective officer of the town at the time of his election and throughout his term of office, shall be an elector of the town. Every other officer of the town at the time of his appointment and throughout his term of office shall be an elector of the town, except that in towns having no resident attorney, the town attorney and such counsel as may be employed need not be electors and in towns having no resident engineer, the town engineer and such consultant engineers as may be employed need not be electors. No county treasurer, district superintendent of schools, or trustees of a school district shall be eligible to the office of supervisor.

B. Two matters should be checked first and foremost, namely that oaths of office have been taken and filed appropriately and that official undertakings have been executed and filed. Both, the oaths and the official undertakings are required for each new term of office.

§ B-3. Oaths of office.

Town Law § 25 provides for taking oaths of office before entering into the duties of office:

Before he enters on the duties of the office, and within thirty days after the commencement of the term of office for which he is chosen, every town officer shall take and subscribe before an officer authorized by law to administer oaths in his county, the constitutional oath of office and such other oath as may be required by law, which shall be administered and certified by the officer taking the same without compensation, and such oath shall be filed in the office of the town clerk.

§ B-4. Official undertaking.

A. Required. Town Law § 25 provides that each supervisor, town clerk, collector, receiver of taxes, town justice, constable, superintendent of highways and such other officers and employees as the town board may require shall execute and file an official undertaking in the town clerk's office, in a form, sum and with sureties directed and approved by the town board as indicated on such undertaking. The supervisor is not required to give the town an additional bond for highway moneys. However, the general bond should adequately insure both highway moneys and general funds.

B. Blanket undertaking. Public Officers Law § 11(2) provides that in lieu of any individual undertaking as required by law, the town board may approve the procurement of a blanket undertaking from any duly authorized corporate surety covering the officers, clerks and employees of the town. Such blanket undertaking must be approved as to form, manner of execution and sufficiency of surety, by the town board and filed in the same manner as individual undertakings. The section further provides that any such blanket undertaking entered into after January 1, 1978, must indemnify against losses caused by the failure of the officers or employees to faithfully perform their duties or by their fraudulent or dishonest acts.

§ B-5. Vacancies.

A. Though no order of urgency could be set, a next very important matter to be taken care of would be the filling of any vacancies which may exist in any town office at the time of this organizational meeting. In such instances the board would appoint a qualified

person (normally an elector of the town, property ownership in the town no longer being required) to fill the vacancy. The term of office of such appointee would be for the balance of the unexpired term in case of filling a vacancy in an appointive office. In case of an elective office, the term of office of the appointee is until the start of the calendar year next succeeding the first annual election at which the vacancy can be filled by election.

B. If vacancies exist in town offices, the town board should fill such vacancies pursuant to Town Law § 64(5), which reads:

5. Vacancies. Whenever a vacancy shall occur or exist in any town office, the town board or a majority of the members thereof, may appoint a qualified person to fill the vacancy. If the appointment be made to fill a vacancy in an appointive office, the person so appointed shall hold office for the remainder of the unexpired term. If the appointment be made to fill a vacancy in an elective office, the person so appointed shall hold office until the commencement of the calendar year next succeeding the first annual election at which the vacancy may be filled. A person, otherwise qualified, who is a member of the town board at the time the vacancy occurs may be appointed to fill the vacancy provided that he shall have resigned prior to such appointment.

§ B-6. Appointments.

A. Positions. There are certain appointments which must be made. Others are made depending whether the town board has heretofore created certain town offices, boards and councils or has adopted certain codes, local laws or ordinances. The town board, as well as other officers having appointing powers, should designate the appointive officers and employees of the town authorized by law. Some of these appointments are as follows:

(1) Appointive officers. Any officers which are normally elective but which have theretofore been made appointive in the town, i.e., town clerk, highway superintendent, receiver of taxes and assessments, etc.

(2) Town attorney or engineer. Town attorney or town engineer, if these offices have been created and budgetary provision has been made for their salaries; and in towns of the first class, and towns of the second class having a population of over 75,000, such deputies as provided by resolution of the town board [Town Law § 20(2)(a)]. In all other towns deputies may be authorized by local law.

(3) Chair of board of assessors. In towns having elective assessors, a chair of the board of assessors (Town Law § 22-b).

(4) Acting assessor. In the event that an appointed assessor is unable to perform the duties of the office (usually due to lack of required certification and training), the town board may designate or appoint an acting assessor.

(5) Constables. In towns of the second class, constables. A constable appointed after September 1, 1980, whether full-time or part-time, must successfully complete a training course, a portion of which is prescribed by the Municipal Police Training Council of the State Division of Criminal Justice Services and a portion by the town [Town Law § 20(1)

(b); Criminal Procedure Law § 2.30]. The town board must annually report to the Municipal Police Training Council the names and addresses of all officers who have satisfactorily completed any of its mandated training requirements [Criminal Procedure Law § 2.30(5)].

(6) Civil officers. In towns in which there is a town police department or where such town is part of a county police district, four or less civil officers, if desired [Town Law § 20(1(a)(b))].

(7) Special town police officers. Special town police officers (if authorized by Town Law § 158); in any town which has established a police department, police officers (Town Law § 150).

(a) In any town having a police department of less than 200 full-time members, the town board may, provided a negotiated agreement does not bar such action, adopt a resolution requiring its police officers (other than those appointed before July 1, 1961, or at a time when the department did consist of 200 or more members) to reside:

[1] Within the town;

[2] Within specified areas of the county or certain adjoining counties; or

[3] Within specified distances from those towns so as to be readily available for active duty.

(b) If residency is a qualification for appointment, the appointee needs to be a resident at the time of appointment (Town Law § 151).

(8) Building inspector or enforcement officer. In towns enforcing the New York State Uniform Fire Prevention and Building Code and local safety regulations (i.e., unsafe buildings), a building inspector or enforcement officer, and a deputy if the position was established, subject to fulfilling training requirements prescribed by the Secretary of State.

(9) Multiple residence inspector. In towns with no building department, a multiple residence inspector (Multiple Residence Law § 303).

(10) Planning board and/or zoning board of appeals members. In a town which has established a planning board and/or a zoning board of appeals, the town board appoints at least one member to each board annually. The town board shall also designate the chairman of these boards (Town Law §§ 267, 271, 272).

(11) Registrar of vital statistics. In a town which is a primary registration district, a registrar of vital statistics, or the town clerk may be appointed such officer. [Note: Where the town clerk is not appointed registrar of vital statistics, the term of office of the registrar is four years; where the town clerk is appointed, the term is coterminous with that of town clerk (Public Health Law §§ 4121 and 4123); whoever is appointed as such

registrar needs to file a separate oath of office with the County Clerk.]

(12) Health officer. A town health officer where local health is not administered as part of a county health district. [Note: The local health officer need not be a doctor; the term of office of the local health officer is four years; check the last appointment and also provisions of the State Sanitary Code for qualifications (Public Health Law §§ 320 to 322).]

(13) Dog control officer. The town board must appoint a dog control officer. Another town officer or employee who will be able to perform the duties may be appointed as dog control officer. In lieu of making an appointment individually, the town board may appoint a dog control officer jointly with another municipality or it may contract with another municipality or with a humane society for the services of a dog control officer (Agriculture & Markets Law § 114).

(14) Comptroller. In towns of the first class and towns of the second class with a population of 40,000 or over, the town board may establish the office of and appoint a town comptroller and deputy comptroller, if desired [Town Law § 20(3)(b) and (d)]. In other towns such offices may be established by local law and appointments made thereto.

(15) Director of purchasing. Any town may adopt a resolution establishing the office of and appointing a director of purchasing [Town Law § 20(3)(e)].

(16) Deputy receiver of taxes and assessments. In towns of the first class, the town board may establish the office of deputy receiver of taxes and assessments, if desired; and may also establish one additional office of deputy receiver of taxes and assessments [Town Law § 20(2)(c)].

(17) Deputy supervisor. The town board of any town may establish the office of deputy supervisor, and if within five days thereafter a deputy supervisor is not appointed by the supervisor, the town board shall appoint such deputy (Town Law § 42).

(18) Deputy superintendent of highways. The town board of any town may establish the office of deputy superintendent of highways, and if within five days thereafter a deputy superintendent is not appointed by the superintendent, the town board shall appoint such deputy [Town Law § 32(2)].

(19) Engineer. The town board may authorize the town highway superintendent to employ an engineer, subject to approval by the town board [Highway Law § 140(19)].

(20) Bookkeeper or confidential secretary. In a town of the second class, the town board may adopt a resolution authorizing the supervisor to designate a bookkeeper or confidential secretary, or both, who shall receive a reasonable compensation to be fixed by the town board [Town Law § 29(15)]. In a town of the first class, the supervisor may designate such assistants without town board authorization. If both a confidential secretary and bookkeeper are to be appointed, the bookkeeper position may be subject to civil service requirements. Also, neither the town clerk or deputy town clerk should be

appointed in these positions.

(21) Narcotics guidance council. The town board may create narcotic guidance councils, consisting of not less than three nor more than seven persons and may include as a member thereof a clergyman, an attorney, a physician and persons under 21 years of age. Terms of office are not to exceed three years (General Municipal Law § 239-u).

(22) Conservation advisory council. The town board may create a conservation advisory council consisting of not less than three nor more than nine members for a term not exceeding two years. Up to two members may be between ages of 16 and 21 (General Municipal Law § 239-x).

(23) Board of ethics. The town board may establish a board of ethics and appoint members to serve at pleasure of the town board. The board shall consist of at least three members, a majority of whom are not otherwise officers or employees of the town, including at least one elected or appointed town officer or employee (General Municipal Law § 808).

(24) Landlord-tenant relations council. The town board may create by resolution a landlord-tenant relations council to consist of seven members, three representing landlord interests, three representing tenant interests and one an impartial appointee for a term not exceeding two years (General Municipal Law § 239-z).

(25) Dog-inflicted damage on domestic animals. The town board may designate in writing an individual, in place of the assessor, to determine dog-inflicted damage on domestic animals [Agriculture & Markets Law § 125(4)].

(26) Budget officer. The supervisor may appoint any person, including a town officer or employee other than a town board member, as budget officer. Otherwise, the supervisor serves as budget officer himself [Town Law § 103(2)].

(27) Director of finance. In suburban towns, the supervisor may appoint a director of finance [Town Law § 52(1)]. In other towns, this office may be created by local law.

(28) Historian. The supervisor is required to appoint a local historian (Arts and Cultural Affairs Law § 57.07).

(29) Deputy clerks. The town clerk should advise the town board as to the person or persons (not more than three) whom he or she has designated as deputy pursuant to Town Law § 30(10). If the town clerk designates deputies, the town board should determine by resolutions: (1) the powers and duties of such deputies; and (2) whether they shall be compensated by the town. Whenever the town clerk is absent or unable to act and has not previously appointed a deputy, the town board may appoint a deputy town clerk to hold office at the pleasure of the board, but for no longer than the absence or inability to act of the town clerk [Town Law § 30(10)]. Also, if more than one deputy is to be appointed, the others may be subject to civil service requirements.

(30) Additional employees. The town board may appoint such other employees as it deems necessary for the proper conduct of the affairs of the town [Town Law § 20(1)(a) and (b)]. Depending on specific positions, the appointments may be subject to civil service requirements.

B. List of officers and assessors. On or before January 10, the town clerk shall file a certificate with the State Department of Audit and Control, specifying the names and addresses of all town officers, whether elected or appointed, and must also file a certificate with the State Board of Equalization and Assessment specifying the names of all assessors, with their post office addresses, date of appointment or election and expiration of term of office [Town Law § 30(3)].

List of appointed officers; notification of vacancies and resignations. The town clerk must certify to the county clerk, within 20 days after their appointment, the names and addresses of all appointive town officers, together with certain other information [Town Law § 30(3)]. The town clerk is also required to notify the county clerk immediately of the existence of any vacancy. Within five days of filling the vacancy, he or she must file a certificate thereof with the county clerk, the Department of Audit and Control and, in the case of a vacancy in the office of assessor, with the State Board of Equalization and Assessment, and in the case of an appointment to fill a vacancy in the office of town justice, a duplicate certificate of such appointment must be filed with the Chief Administrator of the Courts. In addition, the town clerk is required immediately to notify the State Board of Elections of receipt of the resignation of an elective officer and the effective date thereof [Town Law § 30(4); Public Officers Law § 31(5)].

§ B-7. Salaries.

At this organizational meeting the town board should adopt a resolution fixing the salaries of all elective and appointive officers (and the rates of wages of hourly employees, including overtime and regular pay rates) and determine whether the same shall be paid annually, semi-annually, quarterly, monthly, semi-monthly, or weekly. In fixing such salaries, the town board is subject to certain limitations. The Town Law prohibits the town board from fixing the salaries of the members of the town board, elected town clerk and elected town superintendent of highways at amounts in excess of the amounts respectively specified in the notice of hearing upon the preliminary budget, unless the town board adopts a local law, subject to a permissive referendum, increasing the salary for one year only. The town board cannot fix the salary of any elective or appointive town officer or employee at an amount larger than the appropriation made therefor (Town Law § 27). However, if additional funds become available, the appropriation may be increased during the year. The town board also must decide whether the registrar of vital statistics' compensation will consist of the fees collected or a fixed salary; if a salary, the town board should fix such salary (Public Health Law § 4124).

§ B-8. Mileage.

If any town officers are to be compensated for the use of their automobiles, the town board should adopt a resolution establishing a reasonable amount to be allowed specified town officers and employees for the use of their own automobiles in the performance of their official duties (Town Law § 116).

§ B-9. Vacations, sick leaves, holidays, etc.

The town board may establish a plan dealing with vacations, sick leaves, and leaves of

absence of officers and employees and adopt rules and regulations in relation thereto, if not previously adopted (General Municipal Law §§ 90 and 92).

§ B-10. Medical coverage.

The town board may establish a plan for coverage of its town officers and employees for medical, surgical and hospital services or insurance pursuant to the provisions of General Municipal Law § 92-a, if not previously adopted.

ARTICLE III, Town Board

§ B-11. Rules of procedure; committees.

The town board may adopt its rules of procedure, and the supervisor may appoint town board committees (Town Law § 63).

§ B-12. Meetings.

A. Establishing when meetings will be held. The town board should adopt a resolution determining when regular meetings of the town board shall be held. If such resolution is adopted, no notice of regular meetings need be given to town board members, the town clerk, etc. (Town Law §§ 62 and 63). However, notice to the news media and the public must be given in accordance with the Open Meetings Law.

B. Fixing "regular" town board meetings. (Note: There are formalities of procedure in calling a "special" meeting of a town board.) Since town boards of towns of the first class by law must meet at least once a month, and since town boards of towns of the second class, as a practical matter, must meet periodically to accomplish certain housekeeping chores like auditing claims, etc., it is advisable for every town board to establish by resolution a fixed day or days each month for the holding of a "regular" town board meeting. Such resolution should specifically state the hour, the day or days of the month and the place of such regular meetings. With the rare exceptions as to specific matters and in the case of some specific towns, all town board meetings must be held within the town boundaries.

(1) This resolution should state that "regular" town board meetings will, throughout the year 20__, be held at ____ o'clock A.M. or P.M. on the (first Wednesday, the second and fourth Thursdays, or otherwise) in the _____ of the Town of _____.

(2) There are several legal and practical advantages of adopting such a resolution. First, when this is done, there is no requirement for the giving of any notice of such meeting to the town board members or to the town clerk. Second, notice of all the regular meetings to the news media and posting can be accomplished at one time, in compliance with the Open Meetings Law. In this fashion, the public and the press get to know and rely on the fact that this is when the town board regularly meets. It is the one time when they know that this is the time and place for them to have access to the town board for the presentation to it of their special problems and complaints. This makes for good government and good public relations.

§ B-13. Official newspaper.

The town board should adopt a resolution designating the official newspaper of the town [Town Law § 64(11)].

§ B-14. Delegation of certain powers to supervisor.

The town board may adopt a resolution imposing on the supervisor powers and duties of

administration and supervision of town or special or improvement district functions to be performed on behalf of such board [Town Law § 29(16)].

ARTICLE IV, Fiscal Matters

§ B-15. Designation of depositories.

Designating depositories is one of the most important steps to be taken at the organizational meeting of the Town Board each year. The town board should adopt a resolution designating the banks or trust companies in which all town officers shall deposit all moneys coming into their hands by virtue of their offices, as well as the security, if any, to be given by the depository for the protection of town funds [Town Law § 64(1)]. The FDIC insures municipal accounts up to \$100,000 per specified account, per bank. This should be checked carefully with each bank. For amounts above \$100,000, the State Comptroller's guidelines on cash management and investment policies and procedure recommend that the town and the depository bank work out a collateral arrangement securing the town deposits.

§ B-16. Payroll services.

The town board may by resolution authorize contracts with commercial banks and trust companies for the performance of payroll services; provide for deposit of payroll moneys with such bank or trust company and distribution by the bank to the employees pursuant to town direction; permit the contract to include withholding for retirement and insurance as well as, on direction of respective employees, disbursing or crediting to a savings or checking account or loan or mortgage account in the contracting bank or another bank as designated by the employee [Banking Law § 96-b; General Municipal Law § 93-d; Town Law § 29(3)].

§ B-17. Petty cash funds.

The procedures for operating and auditing petty cash funds is not discussed here, but a town board may establish such a fund for a receiver of taxes and assessments in any amount up to \$1,000 and for any other town officer up to \$200.

§ B-18. Purchase of equipment by superintendent of highways.

The town board may authorize the town superintendent of highways to purchase equipment, tools and implements during the year without prior approval of the town board in an amount to be fixed by the board [Highway Law § 142(1a)].

§ B-19. Payment of building fees.

The town board of a town of the first class may direct that fees for licenses and permits issued by a building inspector or deputy shall be payable to and collected by such inspector instead of the receiver of taxes and assessments (Town Law § 138).

ARTICLE V, Actions That Need Not Be Taken at Organizational Meeting

§ B-20. Annual financial report.

A. The supervisor shall file with the town clerk, not later than January 30, his annual financial report, and a certified copy of the report must be published in the official newspaper, and in such other newspapers as the town board may require. The town board may adopt a resolution requiring the supervisor to submit to the other members of the town board, at the time of the filing of such report, financial and accounting records required to substantiate the accuracy and completeness of such report [Town Law § 29 (10)].

B. In lieu of the financial report required above, the town board may determine by resolution that the supervisor shall submit to the town clerk, within 60 days after the close

of the fiscal year, a copy of his or her report to the State Comptroller, and require the town clerk to cause a summary of such report or notice, noting that a copy of such report is on file and available for inspection and copying, to be published within 10 days in the official newspaper of the town [Town Law § 29(10-a)]. If the time for filing the annual report is extended 60 days by the State Comptroller, the supervisor's time for filing a copy of the report with the town clerk is extended for a like period.

§ B-21. Fire district financial statements.

Within 60 days after close of the fiscal year, the treasurer of each fire district shall file in the office of the town clerk and State Comptroller a financial statement setting forth in detail the receipts and expenditures of the fire district for the previous fiscal year [Town Law § 181(3)].

§ B-22. Improvement district financial reports.

On or before January 15, the commissioners of each improvement district operated by a separate board of commissioners shall file with the town clerk a financial report for the preceding fiscal year [Town Law § 215(9)].

§ B-23. Annual accounting for officers receiving or disbursing money.

On or before January 20, each town board must meet for the purpose of an annual accounting by each officer or employee who has received or disbursed any moneys, except in towns having a town comptroller or which have engaged the services of a certified public accountant or public accountant to make an annual audit to be completed within 60 days after the close of the town's fiscal year [Town Law §§ 62(1), 123].

§ B-24. Expenditure of highway moneys.

The town board and the highway superintendent should enter into an agreement relative to the expenditure of highway moneys for repair and improvement of town highways. The agreement must be prepared in duplicate, signed by a majority of the town board members and the highway superintendent, and filed in the town clerk's office and in the office of the county superintendent (Highway Law § 284).

§ B-25. Countersigning checks.

The town board may adopt a resolution requiring all checks to be countersigned by the town comptroller or town clerk [Town Law §§ 29(3), 30(9), 34(1)].

§ B-26. Returned check fees.

The town board may adopt a resolution imposing a charge of up to \$20 on each check tendered as payment and returned for insufficient funds (General Municipal Law § 85).

§ B-27. Accounting officer.

The town board may adopt a resolution determining that the town comptroller shall be the accounting officer of the town, in which event all the accounting duties of the town supervisor are transferred to the comptroller (Town Law § 124).

§ B-28. Transfer of certain powers to comptroller.

The town board may, by ordinance or local law, confer on the town comptroller powers exercised by the supervisor in connection with keeping appropriation accounts and preventing accounts from being overdrawn and/or drawing upon funds or appropriations (Town Law §§ 29, 34, 125).

§ B-29. Reproduced signatures.

The town board may adopt a resolution authorizing checks to be signed with the facsimile signature of the supervisor or other town officers whose signatures are required, as reproduced by a check signer [Town Law § 29(3)].

§ B-30. Opening of competitive bids.

The town board may adopt a resolution authorizing any specific town officer or employee to open competitive bids on public works and purchase contracts required to be advertised [General Municipal Law § 103(2)].

§ B-31. Insurance.

The town board should secure full and adequate insurance to protect the property of the town against fire and theft and to protect the town for the many exposures to liability for tort damages and other claims which exist today [Town Law § 64(3), (4); General Municipal Law § 52].

§ B-32. Deposit of tax collections.

The town board may adopt a resolution authorizing the collecting officer to deposit tax collections in interest-bearing accounts as a temporary investment measure (General Municipal Law § 11; Op. State Compt. 80-242).

§ B-33. Contracts.

The town clerk should advise the town board as to existing contracts for lighting, garbage collection, dumping facilities, fire protection, hydrant rental or water supply, ambulance service, hospitalization, and also leases of any property rented by the town, specifying the date of expiration of such contracts [Town Law §§ 64(2), (19), (20-a), 183, 184, 184-a, 193(3), (6), (7), (8), (9), (11); General Municipal Law §§ 92-a, 119-m, n, o, 120-w, 122-b].

§ B-34. Association of Towns information.

A. Names and addresses of officers. For the Association of Towns to give the best service, it is essential that it have the correct names and mailing addresses of all town officers. If it has not been done before this meeting, the town clerk should promptly supply this information to the Executive Secretary of the Association of Towns, 146 State Street, Albany, New York 12207-1671. Please also advise of changes when they occur.

B. Association publications. The supervisor should advise the members of the town board that he or she, the town clerk, tax collector or receiver, town justices, councilpersons, highway superintendent, assessors, town attorney, budget officer, director of finance and comptroller will receive monthly Association publications on subjects of interest and importance to the respective officers.

C. Association of Towns' Annual Meeting. For many towns the organizational meeting will be the last town board meeting before the Annual Meeting of the Association of Towns. Therefore, a resolution should be adopted naming the town's delegate and alternate to this Annual Meeting and authorizing specified town officers to attend, as well as payment of their "actual and necessary" expenses in doing so, all of which are specifically authorized by state law as legitimate and proper town charges.

Exhibit C

DESIGNATION OF OFFICIAL
TOWN NEWSPAPER

Opinions of the State Comptroller
Opn No. 88-28

OFFICIAL NEWSPAPER -- Designation of (criteria for designation in towns)

GENERAL CONSTRUCTION LAW § 60; PUBLIC OFFICERS LAW § 70-a; TOWN

LAW § 64(11): A publication must be a "newspaper" as defined in General Construction Law § 60 and must satisfy the conditions precedent set forth in Public Officers Law § 70-a before it can be designated as "official newspaper" of a town pursuant to Town Law § 64(11). The place of publication of a newspaper is a question of fact [1982 Opns St Comp No. 82-307 superseded in part].

You ask whether a town is required or permitted to designate as its official newspaper or, if no such designation is made, to publish official notices in any of three newspapers which are circulated in the town by subscription and on newsstands, but are not printed in the town. You describe each of the newspapers as follows:

- (1) a daily newspaper with its principal office in, and which is entered as second class mail matter in the post office of a city within the county in which the town is located;
- (2) a weekly newspaper with its principal office in, and which is entered as second class matter in a hamlet outside the town; and
- (3) a weekly newspaper with its principal office in, and which is entered as second class matter in the post office of the town.

Town Law § 64(11) authorizes a town board to designate an "official newspaper." However, in order for a publication to be designated an official newspaper, the publication must constitute a "newspaper" as defined in General Construction Law § 60 and satisfy the conditions precedent to designation as an official newspaper set forth in Public Officers Law § 70-a.

General Construction Law (GCL) § 60(a), with certain exceptions, defines the term "newspaper" as follows:
In any case in which notice of any fact is required by law to be published or advertised in a newspaper, the term "newspaper" shall mean a paper of general circulation which is printed and distributed ordinarily not less frequently than once a week, and has been so for at least one year immediately preceding such publication or advertisement, and which contains news, articles of opinion (as editorials), features, advertising, or other matter regarded as of current interest, has a paid circulation . . . and has been entered at United States post-office as second-class matter. A publication which is distributed or made available primarily for advertising purposes to the public generally without consideration being paid therefor shall not be deemed to be a "newspaper" for the purpose of publication or advertisement of such notice required by law. . . .

Further, Public Officers Law (POL) § 70-a establishes two conditions precedent to the designation of a newspaper as an "official newspaper", as follows:

. . . Every newspaper printed, published or having its principal office outside of a city having a population of over [350,000] inhabitants, as a condition precedent to designation as the official newspaper of any county, city, town, village or other political or civil subdivision of the state or for the making of claim for compensation under the foregoing provisions of this section, must be established at least one year and entered in the post office as second class matter. . . .

Thus in general, pursuant to GCL § 60(a) and POL § 70-a, to constitute a "newspaper" which satisfies the conditions precedent for designation as an "official newspaper" a publication must: (1) be in general circulation; (2) be established and ordinarily printed and distributed at least weekly for at least one year; (3) contain news,

editorials and other matters of "current interest"; (4) have a paid circulation; and (5) be entered as second class mail matter. Any publication which does not satisfy these requirements may not be designated an "official mail newspaper" (see e.g., 1984 Opns St Comp No. 84-58, p. 73; 1981 Opns St Comp No. 81-70, p. 71; 1980 Opns St Comp No. 80-307, p. 93).

Town Law § 64(11) establishes a hierarchy of newspapers which may be designated the "official newspaper" of a town (cf. Town Law § 52-a, relating to the designation of an official newspaper in the Town of Greenburgh). That statute provides that a town board:

May designate as the official paper of the town any newspaper regularly published in the town if such newspaper has been entered as second class mail matter. If no such newspaper is published in the town, and in any town of the second class having population in excess of [60,000] according to the latest federal census if there is no newspaper published in such town having general circulation therein, the town board may designate any newspaper published in the county if such newspaper has general circulation in the town or if no newspaper is published in the county entered in a post office within five miles from the town, any other newspaper published in a city, town or village in an adjoining county and having a circulation in the town. If no official paper has been designated, the town board may authorize the publication of a notice, resolution or ordinance in any newspaper which could be designated as the official newspaper of the town or, if there be no newspaper which is regularly published in the town and entered as second class mail matter, the town board may authorize such publication in any newspaper published and having general circulation in the town. Such authorization shall be deemed a designation of such newspaper as the official paper of the town for the purpose of such publication. . . .

In interpreting this statute, this Office has previously stated that, while a town board is not required by Town Law § 64(11) to designate an official newspaper, it must follow the statutory order of selection contained in that statute if it does designate one. Therefore, if no newspaper is published in the town, the town board must consider any paper published in the county having a general circulation in the town. If there is no such newspaper published within the county which is entered in a post office within five miles from the town, then the town board may exercise a choice and designate as official newspaper either a newspaper published within the county (and having a general circulation in the town), but entered into a post office more than five miles from the town, or any newspaper published in a city, town or village in an adjoining county and having circulation in the town (Opn No. 80-307, *supra.*; 29 Opns St Comp, 1973, p. 112).

As appears from the hierarchy established by Town Law § 64(11), it is necessary to determine where each newspaper is published to determine which of several newspapers meeting the threshold requirements of GCL § 60(a) and POL § 70-a may be designated as the official newspaper of a town. The rule in this State is that a newspaper is deemed "published" in the place where it is first given to the public for circulation. (*Village of Tonawanda v. Price*, 171 NY 415, 64 NE 191; *Loos v. City of New York*, 257 Ad 219, 13 NYS2d 119, reversing 170 Misc. 14, 9 NYS2d 760; *In re Gainsway*, 66 Misc. 521, 123 NYS 966) In accordance with this rule, in *Village of Tonawanda*, *supra.*, the Court of Appeals held that a newspaper was "published" in the City North Tonawanda, the municipality in which the paper was "completely prepared for distribution," rather than the Village of Tonawanda, even though the newspaper was dated in both

municipalities and mailed to subscribers in the village from a post office in the village. In *Loos, supra*, the court held that a newspaper, ultimately circulated throughout the City of New York, was "published" in the Borough of Manhattan, rather than the Borough of Queens, because the newspaper was, printed and "first given to the public" in Manhattan; that is, the newspaper was mailed and shipped by truck and train from Manhattan to central distribution points with the nearest distribution point being Manhattan. Lastly, in *Gainsway, supra*, the court held that a paper was entered as second class matter in the Town of Remsen, and mailed to a large number of subscribers in the post office at the Village of Remsen and distributed, circulated and sold first in that village.

It is evident that the courts consider a number of factors in determining the place where a newspaper is first given to the public, including the place where the newspaper is printed, the place it is mailed, and the manner in which it is distributed. However, none of these factors, by themselves, are determinative. Thus, the place where a newspaper is first given to the public is a question of fact (see 1980 Opns St Comp No. 80-580, unreported; 24 Opns St Comp, 1968, p. 328; 10 Opns St Comp, 1954, p. 75). To the extent that 1982 Opns St Comp No. 82-307 suggests that the place of mailing by itself is determinative of the place where a newspaper is published, that opinion is hereby superseded.

Based on the inquiry's description of each of the three "newspapers" in question, it is not clear whether any of the three newspapers has the requisite content to meet the requirement of GCL § 60(a), nor is it clear whether any of the three has been printed and distributed, and established for at least one year as required by GCL § 60(a) and POL § 70-a. Moreover, we are not in a position to determine the factual question as to the place where each of the three newspapers is "first given to the public for circulation" and, therefore, the place where each is published.

Accordingly, we express no opinion as to whether any of the three newspapers in question may be designated as the official newspaper of the town or, in the absence of such designation, used to published official notices.

June 3, 1988

Frederick H. Monroe, Esq., Town Attorney

Town of Chester

Exhibit D

SAMPLE PROCUREMENT POLICY

WHEREAS, General Municipal Law (GML) § 104-b requires every town to adopt internal policies and procedures governing all procurement of goods and services not subject to the bidding requirements of GML § 103 or any other law; and

WHEREAS, comments have been solicited from those officers of the town involved with procurement; NOW THEREFORE, be it

RESOLVED: That the Town of [name] does hereby adopt the following procurement policies and procedures:

Guideline 1. Every prospective purchase of goods or services shall be evaluated to determine the applicability of GML § 103. Every town officer, board, department head or other personnel with the requisite purchasing authority (hereinafter "Purchaser") shall

estimate the cumulative amount of the items of supply or equipment needed in a given fiscal year. That estimate shall include the canvass of other town departments and past history to determine the likely yearly value of the commodity to be acquired. The information gathered and conclusions reached shall be documented and kept with the file or other documentation supporting the purchase activity.

Guideline 2. All purchases of a) supplies or equipment which will exceed \$10,000 in the fiscal year or b) public works contracts over \$20,000 shall be formally bid pursuant to GML § 103.

Guideline 3.

All estimated purchases of:

- Less than \$10,000 but greater than \$3,000 require a written request for a proposal (RFP) and written/fax quotes from three vendors.
- Less than \$3,000 but greater than \$1,000 require an oral request for the goods and oral/fax quotes from two vendors.
- Less than \$1,000 but greater than \$250 are left to discretion of the Purchaser.

All estimated public works contracts of:

- Less than \$20,000 but greater than \$10,000 require a written RFP and fax/proposals from three contractors.
- Less than \$10,000 but greater than \$3,000 require a written RFP and fax/proposals from two contractors.
- Less than \$3,000 but greater than \$500 are left to the discretion of the Purchaser.

Any written RFP shall describe the desired goods, quantity and the particulars of delivery. The Purchaser shall compile a list of all vendors from whom written/fax/oral quotes have been requested and the written/fax/oral quotes offered.

All information gathered in complying with the procedures of this Guideline shall be preserved and filed with the documentation supporting the subsequent purchase or public works contract.

Guideline 4. The lowest responsible proposal or quote shall be awarded the purchase or public works contract unless the Purchaser prepares a written justification providing reasons why it is in the best interest of the town and its taxpayers to make an award to other than the low bidder. [For example, the second low bidder is a business in town, paying town property taxes, and their quote was within 5% of the low bidder which is an out-of-state business or supplier.] If a bidder is not deemed responsible, facts supporting that judgment shall also be documented and filed with the record supporting the procurement.

Guideline 5. A good-faith effort shall be made to obtain the required number of proposals or quotations. If the Purchaser is unable to obtain the required number of proposals or quotations, the Purchaser shall document the attempt made at obtaining the proposals. In no event shall the inability to obtain the proposals or quotes be a bar to the procurement.

Guideline 6. Except when directed by the town board, no solicitation of written proposals or quotations shall be required under the following circumstances:

- (a) Acquisition of professional services;
- (b) Emergencies;
- (c) Sole-source situations;
- (d) Goods purchased from agencies for the blind or severely handicapped;
- (e) Goods purchased from correctional facilities;
- (f) Goods purchased from another governmental agency;
- (g) Goods purchased at auction;
- (h) Goods purchased for less than \$250;
- (i) Public works contracts for less than \$500.

Guideline 7. This policy shall be reviewed annually by the town board at its organizational meeting or as soon thereafter as is reasonably practicable.