

Sand and Salt provided to Private parties or residents

1980 N.Y. Op. Atty. Gen. (Inf.) 162

Office of the Attorney General State of New York

Informal Opinion

June 9, 1980

MUNICIPAL HOME RULE LAW, §§ 10(1[i]), 10(1[ii(a[b]])).

A village has no authority to provide snow and ice removal from or to apply salt and sand to private streets even though the owner is willing to pay the village to do this.

Charles V. Martabano, Esq.
Village Attorney
Mount Kisco

We received a request from your predecessor, Mr. Pieragostini, for an opinion whether your village may enter into a contract to provide snow and ice removal and apply salt and sand to private streets in the village, those private streets being owned by the owners of a condominium. Some additional questions were asked but our response to the above disposes of them.

It is a fundamental of municipal law that municipalities have only the powers specifically conferred upon them by the Constitution or statute or those powers which are necessarily implied therefrom (*Seaman v Fedourich*, 16 NY2d 94 [1965]; *Wells v Town of Salina*, 119 NY 280, 287 [1890]; *Scarborough Properties Corp. v Village of Briarcliffe Manor*, 278 NY 370 [1938]; *Marine Midland Trust Co. v Village of Waverly*, 42 Misc 2d 704, 706 [Sup Ct, Broome Co, 1963], *affd* without opn 21 AD2d 753 [3d Dept, 1964]).

Entering into the private business sector is not one of the powers granted to municipalities either specifically or by necessary implication except in rare instances such as the establishment of a municipal electric utility company. There are grants of power to municipalities scattered throughout the statutes, but the broadest grant is contained in Municipal Home Rule Law § 10 which, in subdivision 1, paragraph (i), grants local law powers relating to the 'property, affairs or government' of municipalities and, in paragraph (ii), relating to a long list of subjects whether or not those subjects relate to a municipality's 'property, affairs or government'. One of the listed subjects is 'The acquisition, care, management and use of its highways, roads, streets, avenues and property' (*id.* ii[a(6)]). Note that the power is in relation to 'its' highways, etc. Highways, etc., of others, which happen to be within its boundaries, are not 'its' highways. Doing such work and providing such services within the private sector is not a municipal function.

In our opinion, a village has no authority to provide snow and ice removal from or to apply salt and sand to private streets even though the owner of the streets is willing to pay the village to do this.

If the owners of the private streets want public maintenance of the streets, they may offer to dedicate, or even convey the fee title, of the streets to the village. If the private streets meet the minimum

standards set by law and are satisfactory to the village, then the village, in its sound discretion, may accept them. Traditionally, most village streets have been created by dedication, which is the setting apart of private property to the public use, the owner reserving only such rights as are compatible with the full exercise and enjoyment of the public uses to which the property has been devoted. More recently, many villages have been taking fee title to the streets. This is a matter that the village and the owners of the private streets could decide if they are to be changed to public streets.

Robert Abrams

Attorney General

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Opns St Comp, 1990 No. 90-59

New York State Comptroller

November 13, 1990

DEBORAH FERRO DIMEZZA, ESQ., TOWN ATTORNEY
TOWN OF EDINBURG

STATE CONSTITUTION, ARTICLE VIII, § 1; HIGHWAY LAW, § 140

1. CONSTITUTIONAL LAW—GIFTS AND LOANS—REMOVAL OF SNOW AND ICE FROM PRIVATE ROAD
2. STREETS AND HIGHWAYS—PRIVATE ROADS—REMOVING OF SNOW AND ICE FROM

A town may not regularly plow and sand a private road belonging to a disabled individual, except in an emergency situation.

You ask whether a town may regularly plow and sand a private road belonging to a disabled individual.

A town superintendent of highways has the general care and superintendence of the town highways and bridges and must keep them free from obstructions caused by snow (Highway Law, § 140[1], [2]). For this purpose, towns are authorized to purchase equipment, snow plows and other devices (Highway Law, § 142[1]).

This Office previously has stated that since town property is acquired only for proper town purposes, it may not be used for purely private purposes (1988 Opns St Comp No. 88-41, p 81; 1983 Opns St Comp, No. 83-103, p 127; 23 Opns St Comp, 1967, p 762; 16 Opns St Comp, 1960, p 56). Article 8, § 1 of the State Constitution, which, inter alia, prohibits a municipality from making gifts and loans of its property to or in aid of a private individual, generally prohibits the use of municipal property for the benefit of private parties unless it is primarily in furtherance of a proper municipal purpose and is undertaken pursuant to a statutory or contractual obligation of the municipality. It is well-established, however, that an incidental private benefit will not invalidate an action which has as its primary objective a proper public purpose (see, e.g., *Murphy v Erie County*, 28 NY2d 80, 320 NYS2d 29).

Based on these principles, this Office has stated that generally a town may not use town personnel and equipment to remove snow from private roads and driveways (e.g. 1981 Opns St Comp No. 81–325, p 353; 26 Opns St Comp, 1970, p. 27; 11 Opns St Comp, 1955, p 740). A town, however, may, remove snow from private property in order to provide access to a town official's home which is also used as his or her official office (e.g. 1977 Opns St Comp No. 77–672, unreported). Similarly, we have stated that, in the event of an emergency such as a serious illness or fire, it is within the scope of a town's police powers in the interest of public health, safety and welfare, to plow a private road or driveway if necessary to render private property immediately accessible (26 Opns St Comp, 1970, supra). In these two instances, the private benefit received by the property owner is only incidental to the primary public benefit.

Under the circumstances in the instant case, it appears that the plowing and sanding would not be performed to further primarily a town purpose such as to facilitate public access to a town office or as an exercise of town police powers in an emergency. Rather, it appears plowing and sanding this private road on a regular basis would be in anticipation of a possible emergency and, therefore, would provide primarily a private benefit to the individual. Accordingly, it is our opinion that the town may not plow and sand this private road on a regular basis.

Opns St Comp, 1990 No. 90-59

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Opns St Comp, 1982 No. 82-63

New York State Comptroller

February 23, 1982

TO: DAVID W. JOHNSON, ESQ., TOWN ATTORNEY
TOWN OF ALTAMONT

Highway Law, § 145

Town Law, § 64(2-a)

General Municipal Law, § 72-h

1. STREETS AND HIGHWAYS—SAND AND GRAVEL—SALE TO THE STATE

2. PERSONAL PROPERTY—SALE OF—SURPLUS SAND

As a general rule, a town may not submit formal bids on a State contract for the purchase of sand. However, a town may convey to the State an interest in the real property in which the sand is located.

This is in reply to your letter concerning the sale of sand by a town. In 1981, the town purchased a sand pit for the purpose of supplying the needs of the town highway department. The sand pit was located within a 25 acre parcel which the owner was selling only in its entirety. The town highway superintendent estimates that the sand will supply the town's needs for approximately 150 years. You ask specifically whether, under these circumstances, the town may submit bids to the State of New York for the sale of sand removed from the pit.

An appropriate response requires consideration of broad principles of law and policy concerning town involvement in activities normally reserved to the private sector.

Town boards are authorized to purchase any lands or rights therein, either within or outside the town boundaries, required for any public purpose (Town Law, § 64(2)). Towns are also authorized to sell and dispose of surplus or unneeded personal property as the purposes of the town may require, except as otherwise provided by law (Town Law, § 64(2-a); see Opns St Comp, 1981, No. 81-234). Sand which is physically severed from the real property becomes personal property (Opns St Comp, 1969, No. 69-385, unreported).

Highway Law, § 145 specifically authorizes town boards to contract for and purchase land containing a gravel bed or other material “for use on the public highways and bridges of the town.” However, that section expressly precludes the resale of such land to any private corporation.

In the absence of express Legislative authority, towns may not engage in ventures commercial in nature and usually pursued by private individuals or entities (see, generally, 12 McQuillin, Municipal Corporations, § 36.02). The selling of sand or gravel on a regular basis can, in our judgment, be viewed as such a venture and we find no statutory authority for towns in New York State to engage in the selling of sand or gravel in such fashion.

Moreover, as noted, section 145 of the Highway Law authorizes the purchase of land containing sand, gravel or other highway materials only for use on town highways and bridges. In *Tooley v Town of Wilna*, 1933, 148 Misc 611, 266 NYS 177, a sale of materials taken from such land to a private contractor for use in the construction of a State highway was held to be illegal under the predecessor statute to section 145, even though the materials were in excess of the towns needs. At the time of that case, the statute did not contain language expressly precluding re-sale to a private corporation. The court stated, in part, as follows:

“The crushed stone to be furnished under the Soper contract is not for a town highway purpose, but for a state highway purpose.... The act of the town officials ... in crushing stone and selling it for other than town highway purposes was an illegal act. The town has no power to sell stone.”

This Office has similarly expressed the view that a town may not purchase sand in an amount in excess of its own needs for the purpose of re-sale to private or public entities (Opns St Comp, 1975, No. 75-1347, unreported; 31 Opns St Comp, 1971, p 123; Opns St Comp, 1971, No. 71-977, unreported; 24 Opns St Comp, 1968, p 913).

In light of the principles set forth above, it is our opinion that the town is generally precluded from selling sand or gravel on a regular basis as indicated in the inquiry.

Nevertheless, we are aware that there are situations in which a town may legitimately dispose of surplus or unneeded sand. For instance, a town may sell surplus sand or gravel removed from the ground as incidental to the operation of its sanitary landfill (Opns St Comp, 1981, No. 81-234; *Sengelaub v Town of Smitown*, 29 Misc 2d 655, 214 NYS2d 573). In addition, we have recognized that in the “unusual circumstances” where a town has acquired, by gift, a far greater supply of sand than needed in the foreseeable future for town purposes, the surplus sand may be sold (Opns St Comp, 1975, No. 75-941, unreported). Similarly, where a town, in good faith and with no intention of reselling the sand, acquires a supply of sand solely for its own highway purposes, and subsequently determines that the amount of

sand acquired is far in excess of its foreseeable needs, it is our opinion that, rather than hold surplus or unneeded property in perpetuity, the town could sell the surplus sand without violating the spirit and intent of Highway Law, § 145 and without constituting an illegal commercial venture. However, in these situations, it is our view that the town should divest itself of the unneeded property as expeditiously as possible, at the best possible price. To purposely engage in an on-going course of conduct involving piecemeal sales of sand removed from the land and active competition with private enterprise, such as would be the case if a town were to bid on State contracts over a course of time, would constitute, in our view, engaging in an unauthorized commercial venture.

It should be pointed out that Article 5-G of the General Municipal Law (§§ 119-m-119-oo) authorizes municipalities to enter into agreements for the performance among themselves or one for the other of their respective functions, powers and duties on a cooperative or contract basis (General Municipal Law, § 119-o(1)). Specifically, such an agreement may contain provisions relating to, among other things, ownership, custody, operation, maintenance and sale of personal property (General Municipal Law, § 119-o(2)(e)). Pursuant to these provisions, a town may enter into a cooperation agreement with other municipalities for the cooperative operation of the town's sand pit and for removal and use of surplus sand from the town's land by other municipalities (see Opns St Comp, 1980, No. 80-19, unreported; 32 Opns St Comp, 1977, p 120; Opns St Comp, 1975, No. 75-1347, unreported; 31 Opns St Comp 1975, p 123, supra). While we are aware of no similar express statutory authority for such cooperation arrangements between a town and the State, it is our view that towns would have implied authority to enter into such agreements (Town Law, §§ 64(3),(6) and (23)).

Finally, we also point out that General Municipal Law, §72-h authorizes town boards (among other entities) to sell, transfer, lease to or exchange with any municipal corporation, school district, BOCES, fire district, the State of New York or the Federal government, either without consideration or for such consideration and upon such terms and conditions as shall be approved by the boards, any real property owned by the town. In accordance with this provision, the town could convey an interest in the land containing the sand to any of the above-named entities (cf. Highway Law, § 145, which, as indicated above, prohibits sales to private corporations).

Opns St Comp, 1982 No. 82-63

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