

May 10, 2016

MINUTES OF THE REGULAR MEETING OF THE TOWN BOARD OF THE TOWN OF THURMAN HELD May 10, 2016 AT THE TOWN HALL, 311 ATHOL ROAD, ATHOL, NEW YORK, COMMENCING AT 6:46 P.M...

PRESENT: Mrs. Evelyn Wood, Supervisor
Mrs. Gail Seaman, Councilwoman
Mr. John Youngblood, Councilman
Mrs. Susan Shepler, Councilwoman
Mr. Michael Eddy, Councilman

RECORDING SECRETARY: Jeanie Sprague, Town Clerk

OTHERS PRESENT: Jamiee Ross, Tax Collector; Joan Harris, Historian

PAYMENT OF CLAIMS

The Meeting was called to order by **Evelyn Wood, Supervisor**

PLEDGE ALLEGIANCE TO THE FLAG

ROLL CALL

RESOLUTION #67:

On a motion by **Councilwoman Seaman**, seconded by **Councilman Youngblood**, the Town Board resolved to approve the Minutes from March 29, 2016 and April 12, 2016 Board Meetings.

Motion Carried: 5 Ayes ~ Youngblood, Wood, Seaman, Eddy, Shepler

CORRESPONDENCES: Letters read from **Sally Wallace** and **Councilman Michael Eddy**. Letter from **Fred Engelmann** was requested to be read by **Ava Ashendorff**. **Supervisor Wood** asked **Ms. Ashendorff** to please sit and be quiet that the floor was not open. **Ms. Ashendorff** refused and **Supervisor Wood** called the police. **Councilman Eddy** sated he would like the letter to be read, **Supervisor Wood** stated "The board already took position on this letter previously."

EMS Report – attached.

Committee Reports:

May 10, 2016

Councilwoman Gail Seaman: Gleaning – Good turnout; The pantry did change the pantry time to 11:00am to 1:00 p.m. People commented on the fact they are not getting as much as they use to. Grant money has been cut.

Councilman John Youngblood: Highway Report – The dump box along with the Dickey John has been ordered and we are hoping that by the end of June that will have arrived and be installed. Not sure on the status of the bid for the truck from Bolton. Highway Superintendent Patrick Wood made the bid but has not heard back. The crew is working on the concrete for the fuel tank. There have been a couple of violations.

Councilwoman Shepler: Sidewalk/Concrete one company has requested an extension on the quote. The youth commission is doing an inventory of supplies and housecleaning in preparation for the summer concerts.

SUPERVISOR'S REPORT: They are ready to pour the pad for the new fuel tank and still working on getting the quotes for the removal of the underground fuel tank. Highway Superintendent Patrick Wood got a list from DEC so he can call around for fuel tank quotes.

Gallup should be finishing up with the salt shed shortly.

Will be meeting with DEC and DOH later this week regarding the water issues.

I appreciate the board coming in on short notice last week. We did go to court on Friday, the town was successful in achieving the town's goals. The remaining issue is still outstanding. The town's attorney has indicated a willingness on the part of the town to resolve the matter in writing a couple times and hopefully by June have that finished up.

OLD BUSINESS: There was a message from DOT regarding the Route 28 bridge replacement. They seem to be under the impression that it was already okayed that Kubricky bring the concrete here. We never took a formal position on it. Highway Superintendent Patrick Wood

May 10, 2016

is meeting with DOT tomorrow. We should give Highway Superintendent Patrick Wood guidance as what to do. (Discussion ensued)

RESOLUTION #68:

On a motion by **Councilwoman Seaman**, seconded by **Councilwoman Shepler**, the Town Board resolved to not accept the concrete from the removal of the bridge.

Motion Carried: 4 Ayes ~ Youngblood, Wood, Seaman, Shepler

1 Abstention ~ Eddy

Supervisor Wood stated that we received the License Agreement for **Mr. Joseph Groff**. He has reviewed it and determined that he is okay with it. Leaving it up to the board if they would like to act on it now or wait until to June. Discussion ensued.

RESOLUTION #69:

On a motion by **Councilwoman Seaman**, seconded by **Councilman Youngblood**, the Town Board resolved to approve the License Agreement Between the Town of Thurman and Joseph Groff.

Motion Carried: 4 Ayes ~ Youngblood, Wood, Seaman, Shepler

1 Abstention ~ Eddy

The License Agreement Between the Town of Thurman and Joseph Groff is attached.

RESOLUTION #70:

On a motion by **Councilwoman Seaman**, seconded by **Councilman Youngblood**, the Town Board resolved to approve the May payment of \$50.00 to Joseph Groff.

Motion Carried: 4 Ayes ~ Youngblood, Wood, Seaman, Shepler

1 Abstention ~ Eddy

Opening of the Bids

The following sealed bid was received for the proposals for providers of IT services for the performance of information technology work including, but not limited to basic troubleshooting with office computers, maintenance of local networks, server maintenance, and security system

May 10, 2016

maintenance:

Stored Technology Solutions Inc. submitted a proposal with a monthly proposed cost of \$799.99 and with a yearly proposed cost of \$9,599.88.

Supervisor Wood suggested that they take a month to review the proposal and come back at the next board meeting.

ITEMS OF INTEREST

Reminder: that the Town Garage Sale is this weekend.

Supervisor Wood did receive a call from DOH and wanted to remind everyone that planned on selling food that they need to contact DOH to get a certificate from them.

PRIVILEGE OF THE FLOOR: Barbara Farrell

State Police Trooper Brian Russell and Warren County Sheriff's Deputy Jesse Pound arrived at 7:14 p.m.

PRIVILEGE OF THE FLOOR CONTINUED: Sally Wallace, Winefred Martin, Cynthia Hyde, Jean Coulard

Supervisor Wood asked if the board would like to close the privilege of the floor?

Councilwoman Seaman said yes and Councilwoman Shepler seconded it. Supervisor Wood stated that "we are closing privilege of the floor."

RESOLUTION #71:

APPROVAL OF CLAIMS: 2016 Abstract 005 (General Fund - \$14,176.23; Highway Fund - \$13,255.96, Capital Fund - \$675.10 and Enterprise Fund - \$1,378.02) for a total of \$29,485.31.

On a motion by **Councilwoman Seaman**, seconded by **Councilwoman Shepler**, the Board approved payment of the claims.

Motion Carried: 4 Ayes ~ Youngblood, Wood, Seaman, Shepler

1 Nay ~ Eddy

RESOLUTION #72:

May 10, 2016

On a motion by **Councilwoman Shepler**, seconded by **Councilwoman Seaman**, the Board resolved to authorize the due to and due from the General Fund to the Capital Fund in the amount of \$675.10.

Motion Carried: 4 Ayes ~ Youngblood, Wood, Seaman, Shepler

1 Nay ~ Eddy

ADJOURNMENT: On a motion by **Councilwoman Seaman**, seconded by **Councilwoman Shepler** the meeting was adjourned at 7:28 p.m.

MOTION CARRIED: 4 Ayes ~Youngblood, Wood, Seaman, Shepler

Eddy no vote recorded

Respectfully Submitted:

Jeanie M. Sprague, Town Clerk

May 24, 2016

WARRENSBURG



EMS

Stephen W. Emerson
Operations Manager

Phone ~ (518) 232-0817
Fax ~ (518) 623-3651
Email ~ tek910@nycap.rr.com

*Our Patients Are Our First Priority
Our Members Are Our Greatest Asset*

May 10, 2016

Thurman Town Board Members,

Attached you will find the run totals for April 2016. We handled a total of 3 calls in town. 2 of the calls were BLS, and 1 was an ALS call. Our average response time to being on scene was 14 minutes.

Our 2016 Open House is this Saturday May 14, 2016 from 10:00 am to 2:00 pm at our building at 3 King Street. We will have a silent auction, free food, a bounce house for the kids, and ambulance and building tours. ALSO, we will be starting our "Lighting the Way to YOU" campaign during the open house This is an excellent program and we are very pleased to be able to bring this program to the Town. Please join us! If you have any questions, please give me a call.

I would like to remind everyone to please make sure that their house numbers can be easily seen. This will help aid all emergency responders find you when you need help.

All Thurman Town Board Members and residents are more than welcome to contact me at any time if you have any questions, comments, or concerns. I can be reached on my cell phone at 232-0817. I would like to thank the Town Board and the Thurman residents for their continued support.

Respectfully Submitted,

Stephen W. Emerson

Stephen W. Emerson
Operations Manager
Warrensburg EMS, Inc.

Warrensburg Emergency Medical Services Inc.
PO Box 157
Warrensburg, New York 12885

Thurman calls handled by Warrensburg EMS

April 2016

DATE	PCR #	PRIORITY	CHIEF COMPLAINT	DISPATCH TO ENROUTE	ENROUTE TO ONSCENE
4/3/2016	16-10529	BLS	NON-TRAUMA BACK PAIN	1 MINUTE	17 MINUTES
4/13/2016	16-11752	ALS	SEIZURE	5 MINUTES	6 MINUTES
4/29/2016	16-13627	BLS	BACK/LEG PAIN	6 MINUTES	19 MINUTES

**LICENSE AGREEMENT
BETWEEN TOWN OF THURMAN
AND JOSEPH GROFF**

THIS AGREEMENT, made as of May 10, 2016, by and between the Town of Thurman, a municipality organized and existing pursuant to the laws of the State of New York with a mailing address of PO Box 29, Athol, NY 12810 (the "Town") and JOSEPH GROFF, an individual residing at 151 Valley Rd, Warrensburg, NY 12885 ("Groff"),

WITNESSETH:

WHEREAS, Groff is the owner of property within the Town of Thurman located at 151 Valley Road (the "Property"); and

WHEREAS, the Town has installed internet equipment and related infrastructure (the "Equipment") on a portion of the Property and wishes to have continued access over the Property to install, maintain, repair and replace the Equipment; and

WHEREAS, the Town and Groff wish to set forth their agreement for the Town's use of and access to the Property;

NOW, THEREFORE, the parties agree as follows:

1. **License**. Subject to the terms and conditions set forth in this License Agreement, Groff hereby grants permission to the Town, its agents and employees, to enter upon the Property for the purpose of installing, maintaining, repairing and replacing the Equipment at such times as the Town deems necessary. The Town will give notice by telephone in advance of entering the property.

2. **Term**. This Agreement shall be for a term of three (3) year(s), commencing May 10, 2016 and shall be automatically renewed for an additional five year term upon the same terms unless either party gives notice to the other at least six (6) months prior to the original expiration date.

3. **Consideration**. The Town shall pay to Groff the amount of fifty dollars (\$50.00) per month as consideration for its use of the Property under this Agreement.

4. **Rights Subject to Claims**. The rights described above are given and accepted subject to any and all outstanding leases, tenancies, easements, licenses or other tenures and/or claims affecting the Property or any portion thereof; and subject also to any and all encumbrances, liens, conditions, restrictions and/or reservations under which Groff holds the Property.

5. **Release**. The Town shall be responsible for the care and maintenance of any Equipment or other personal property that it may use, place, maintain or store on the

Property. Groff shall not be responsible for any loss, damage, or injury which may result from or in any way relate to the Town's use of the Property, and the Town hereby releases Groff from and against such liability.

6. Restoration. Any disturbance of the Property by the Town shall be properly repaired and the Property shall be restored to its former condition by the Town to the extent reasonably possible at the Town's sole cost and expense.

7. Indemnification. The Town shall indemnify, defend and hold harmless Groff from any and all claims, injuries and damages resulting from or caused by the Town, its agents and/or employees related to the Town's use of the Property under this Agreement.

8. Waiver. No provision of this Agreement shall be deemed to have been waived unless such waiver is in writing and signed.

9. Amendment. This Agreement contains the entire agreement between the parties and may not be changed or modified except by an agreement in writing signed by both parties.

10. Assignment. This Agreement may not be assigned by either party without the written consent of the other, which consent shall not be unreasonably withheld. If Groff sells, leases or otherwise transfers the Property during the term of this Agreement, it is the intent of the Parties that this Agreement shall be assigned as may be required to maintain the Town's access to the Property.

11. Construction of Agreement. This Agreement shall not be considered as a transfer or conveyance of any interest in real estate and shall be considered only a license. This Agreement shall be construed in accordance with the law of the State of New York.

IN WITNESS WHEREOF, the parties hereto have hereunto subscribed their signatures as of _____, 2016.

TOWN OF THURMAN

By: _____
EVELYN WOOD, Supervisor

JOSEPH GROFF

By: _____

STATE OF NEW YORK)
) ss.:
COUNTY OF WARREN)

On this ____ day of _____, 2016 before me, the undersigned, personally appeared **EVELYN WOOD**, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity, and that by her signature on the instrument, the individual or the person upon behalf of which the individual acted, executed the instrument.

Notary Public

STATE OF NEW YORK)
) ss.:
COUNTY OF WARREN)

On this ____ day of _____, 2016 before me, the undersigned, personally appeared **JOSEPH GROFF** personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual or the person upon behalf of which the individual acted, executed the instrument.

Notary Public

Sally Jo Wallace 262 Mountain Rd Athol, Ny 12810 (518) 623-2169

To the Thurman Town Board and Taxpayers:
2016

May 10,

An emergency meeting for the town board was called on May 5, 2016. To discuss beginning legal actions against the designer of White Space, Rainmaker Network Services. When asked by legal Board Member Micheal Eddy what constitutes this meeting as an emergency? You answered and I quote "It imperils the safety of the public."

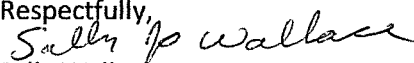
What imperils the Safety of the public? That 2 businesses connected to White Space will not be able to sell Goat Cheese and Lumber?

You Miss Wood have your priorities all confused. You have not yet had the water issue taken care of especially at the Town Hall, and you are on the Warren county soil and water district board of directors. Too Funny. You have neglected the safety of the public by continuously renting the Town Hall out, Using it for Elections and The Jack Wax Party without having the water here tested. You have neglected the Health of your residence by not placing a sign in the Kitchen here to Warn people to not drink or use the water. You still have numerous residents that can not use their water and rotted water heaters due to the contamination. Or is that still the D.E.C.'s fault?

You are taking too many things for granted. The placing of the poles for White Space needed to be Redesigned, because you believed everyone would love your White Space and want a poll on their property. You found out wrong. One more reason to use the town lawyer, costing us our Tax dollars. Or are you still using Peter to pay Paul. You most likely believe that you will still receive the Grant even after all of this turmoil. Step back in to reality. It is time to start paying Peter back before it all blows up in to your face and the residence of Thurman realize you are using our Tax Dollars for White space. Since you will not tell the public exactly where you have taken the \$274,000 from for White Space, Peter may want his money back sooner than you think.

Ms. Wood If I were you, I would use my free time to start working on your resignation letter.

Please attach with your minutes

Respectfully,

Sally Wallace

Michael Eddy
P. O. Box 9
Athol, NY 12810

Town of Thurman Board and Citizens,

May 6, 2016

At the May 5th, 2016 “emergency meeting?”, Seaman adamantly declared that, “By the laws of the State she is a board member.”

If one section, of one sentence, created a legal board member by New York State Law, wouldn't life be simple. “An officer/town board member may hold over.”

But the Laws are not for the simple.

If you think Seaman and Shepler are legitimate board members read and think about the following, and see the attachments to the town board minutes.

From New York Association of Towns: (see attachment) Under Public Officer's Law section 5 an officer/townboard member may hold over and continue to perform the duties of his office until a successor is chosen and qualified; However, the office is **Vacant** for the purpose of selecting a successor (See 1979, Op Attny Gen. (Inf.) 198). Thus the incumbent could hold over, but the seat is still considered **Vacant** and the town board could decide to appoint someone different to the position.

7-17 A (see attached) from Association of Towns: Majority of all the members there of, may appoint a qualified person to fill the **Vacancy**.

7-18 B (see attached) Our courts have held that where two candidates for 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.

(See attached) People of the State of New York ex rel. George Shirey and others, Relators, v. ISAAC E. PEARSON, Defendant Supreme Court, Cayuga County June, 1923. “The defendant, as a public official, could not vote to appoint himself to public office, if such vote were necessary to constitute the majority required to fill the **Vacancy**. It would be contrary to public policy and public decency to permit him to do so.

New York State Attorney Office (see attached) A person named to fill a **Vacancy** of town supervisor or town councilman must receive not less than a majority of the votes of the entire authorized membership of the town board.

On or after January 1, the office is deemed to be **Vacant** for the purpose

~~12/30/15~~
~~12/30/15~~
eddysam@verizon.net

From: "Sarah Brancatella" <sbrancatella@nytowns.org>
Date: Wednesday, December 30, 2015 5:24 PM
To: "Mike Eddy" <eddysam@verizon.net>
Attach: Vacancy in Elected Office Resulting From a Tie Vote.doc; Tie vote results in vacancy Furk v Sullivan county.doc; Roderick B Travis.pdf
Subject: tie votes and holdovers

Hi Mike,

According to the attached court of appeals case and various opinions from the attorney general's office, a tie vote results in a vacancy. However, under Public Officer's Law section 5, an officer / town board member may hold over and continue to perform the duties of his office until a successor is chosen and qualified; however, the office is vacant for the purpose of selecting a successor (see 1979, Op.Atty.Gen. (Inf.) 198.) Thus, the incumbent could hold over, but the seat is still considered vacant and the town board could decide to appoint someone different to the position.

I hope this information is helpful, and have a wonderful new year.

Best,

Sarah B. Brancatella
Associate Counsel
Association of Towns
150 State St.
Albany, NY 12207

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12/30/2015

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, malversation 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,

PEOPLE OF THE STATE OF NEW YORK ex rel. GEORGE L. SHIREY and Others, Relators, v. ISAAC E. PEARSON, Defendant. Supreme Court, Cayuga County June, 1923.

"...The defendant, as a public official, could not vote to appoint himself to public office, if such vote were necessary to constitute the majority required to fill the vacancy. It would be contrary to public policy and public decency to permit him to do so. Mechem Pub. Off. § 112; People v. Thomas, 33 Barb. 287; State of Oregon v. Hoyt, 2 Or. 246."

mmeddy1@verizon.net

From: "Rachel Clothier-Kocaj" <Rachel.Clothier-Kocaj@ag.ny.gov>
Date: Wednesday, January 6, 2016 1:49 PM
To: <mmeddy1@verizon.net>
Attach: 1955 Atty Gen (Inf) 214.PDF; 1972 Atty Gen (Inf) 248.PDF
Subject: NYS Office of the Attorney General

Hello Mr. Eddy,

I have attached a few opinions that might be helpful in determining your questions regarding the filling of a vacancy due to a tie vote for town board member.

****Please be advised that the opinion reflects the status of the law at the time they were written and, for this reason, the analysis and conclusion does not reflect any subsequent statutory changes or court decisions that may bear on the issues. You may wish to contact the town attorney for further assistance.**

Thank you,
Rachel Clothier-Kocaj
Legal Assistant II
Appeals and Opinions Bureau
(518) 776-2663

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I conclude that where the Town of Schroon adopted a zoning ordinance and subdivision regulations controlling land and development prior to July 1, 1971 but the 10-day period after publication had not expired on or before July 1, 1971, such ordinance was not in effect on July 1, 1971 and was therefore, ineffectual for the purpose of exempting the Town of Schroon from interim development controls as provided for in Executive Law, § 806.

Dated: November 9, 1972

MR. WILLIAM J. FOUNTAIN
Supervisor

GENERAL CONSTRUCTION LAW, § 41, TOWN LAW, §§ 69, 64.

A person named to fill a vacancy in the office of town supervisor or town councilman must receive not less than a majority of the votes of the entire authorized membership of the town board.

This is in reply to your letter dated November 2, 1972 requesting an opinion as to the number of votes which a person must receive to be properly appointed by the remaining members of a town board to fill a vacancy existing thereon due to the resignation of the supervisor and a town councilman therefrom.

Town Law, § 64, subd. 5, provides that 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.

Town Law, § 68, provides that ever: "act, motion or resolution shall require for its adoption the affirmative vote of a majority of all the members of the town board."

General Construction Law, § 41, provides as follows:

"Quorum and majority. Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or committee, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board or committee, or at any duly adjourned meeting of such meeting or at any meeting duly held upon reasonable notice to a

of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words "whole number" shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have if there were no vacancies and were none of the persons or officers disqualified from acting." (Emphasis supplied.)

Inasmuch as the total membership of your town board, a town of the second class, is five, and a majority of such whole number is three, I conclude that a person named to fill a vacancy by such town board must receive at least that number of votes to be properly appointed.

Dated: November 13, 1972

DAVID F. JUNG, ESQ.
Town Attorney

N.Y. CONST., art. VIII, § 1; GENERAL MUNICIPAL LAW, §§ 95, 240, et seq.; VILLAGE LAW, § 89(28).

The Village of Port Henry is not authorized to expend village moneys to award prizes for the best decorated house in the Village at Christmas time.

This is in response to your letter of November 8, 1972, wherein you ask for my opinion as to whether or not the Village of Port Henry is authorized to expend village moneys for prizes for the best decorated house in the Village at Christmas time.

Village Law, § 89(28), authorizes a publicity fund to advertise the advantages of a village as a resort or to promote the commercial and industrial welfare of the village. However, neither this statute nor any other statute authorizes a village to expend village money for prizes to reward owners or occupants of private homes for their Christmas decorations.

As you know, the power of villages is defined and limited by the Constitution and statutes. They possess only those powers expressly conferred or necessarily implied. (Wells v. Town of Salina, 119 N. Y. 280, 287; Scarborough Props. Corp. v. Village of Briarcliff Manor, 278 N. Y. 870; Marina

[View Case](#) [Cited Cases](#) [Citing Case](#)

George H. Rosen and Rose S. Rosen for appellant.

Hyman E. Mintz for Henry P. Furk and others, respondents.

Irving Bershader for Board of Supervisors of the County of Sullivan and another, respondents.

CONWAY, Ch. J., DYE, FULD, FROESSEL, VAN VOORHIS and BURKE, JJ., concur.

[1 N.Y.2d 129]

DESMOND, J.

At the 1955 election for the office of Supervisor, Town of Cohecton, County of Sullivan, there were two candidates: the incumbent supervisor who is appellant here, and respondent. Each received 310 votes. Acting under subdivision 5 of section 64 of the Town Law, the town board on January 3, 1956, filled the resulting vacancy by choosing respondent. Both courts below have held that this was the lawful method, and we agree.

The statute (Town Law, § 64, subd. 5, *supra*) reads in its applicable part, as follows: "Whenever a vacancy shall occur or exist in any town office, the town board or a majority of the

[1 N.Y.2d 130]

members thereof, may appoint a qualified person to fill the vacancy. *** If the appointment be made to fill a vacancy in an elective office, except collector and justice of the peace, 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".

That statutory language (for similar provisions in other States, see 87 C. J. S., Towns, § 69, pp. 65, 66) has been in our laws without substantial change since 1890 (L. 1890, ch. 569, § 65). In *Matter of Smith* (49 Misc. 567, affd. 116 App. Div. 665, affd. 188 N.Y. 549 [1907]) our court assumed, as did all the Judges who sat in both lower courts, that it means that, when there has been a failure because of a tie vote to elect a supervisor at the regular election, the town board is empowered to appoint a supervisor. The precise question in the *Smith* case (*supra*) was as to which town board members were qualified to vote at the meeting, but to reach that question at all the courts had to hold that subdivision 5 of section 65 was applicable to the situation. There is no reported court decision or other authority to the contrary. There are at least seven cases, other than *Smith* (*supra*), which hold or assume that whenever at the time appointed for a town supervisor to take office there is no qualified and elected person available to fill the office, the town board chooses a supervisor (*People ex rel. Hyde v. Potter*, 88 App. Div. 239 [1903]; *Matter of Ellis v. Waldo*, 93 App. Div. 605 [1904]; *People ex rel. Preston v. Keator*, 169 App. Div. 368 [1915]; *People ex rel. Green v. Black*, 229 App. Div. 47 [1930]; *Matter of Crosby v. Van Valkenburgh*, 265 App. Div. 92 [1942]; *People ex rel. Shirey v. Pearson*, 121 Misc. 26; *Matter of Williamson v. Corcadden*, 143 Misc. 249 [1932]). Some of those decisions were made at such times that they were, presumably, known to the Joint Legislative Committee to Recodify the Town Law, which made a series of reports in 1928 (N. Y. Legis. Doc., 1928, No. 86), in 1929 (N. Y. Legis. Doc., 1929, No. 83) and in 1930 (N. Y. Legis. Doc., 1930, Nos. 64, 91) but suggested no change in subdivision 5 of section 64 of the Town Law. Added to all this authority favoring affirmance of the order here appealed from are various Attorneys-General's opinions to the same effect (1911 Atty.-Gen. 520; 1932 Atty.-Gen. [Inf.], 45 N. Y. St. Dept. Rep. 513; 1933 Atty.-Gen. [Inf.], 48 N. Y. St. Dept. Rep. 701, 712, 734). Various text writers have

[1 N.Y.2d 131]

announced the same rule (Gilbert, Supervisors' Manual [3d ed., 1906], pp. 271-272; Gilbert, Bender's Manual for Town Officers [15th ed., 1937], p. 275; Cothran on Law of Supervisors [1881], p. 14).

The argument for reversal is based on section 5 of the Public Officers Law which is, in part, as follows: "Every officer *** shall *** hold over and continue to discharge the duties of his office, after the expiration of the term for which he shall have been chosen, until his successor shall be chosen and qualified; but, after the expiration of such term, the office shall be deemed vacant for the purpose of choosing his successor". But that statute causes no trouble here. Applied to the case of a tie vote for town supervisor, section 5 says that the incumbent continues to hold the office until his successor is chosen by town board vote and qualifies. But section 5 says also that, after the expiration of appellant's elected term on December 31, 1955, the office was "vacant for the purpose of choosing his successor". The method for such choice of a successor supervisor is clearly stated in subdivision 5 of section 64 of the Town Law (*supra*) — that is, by vote of the town board.

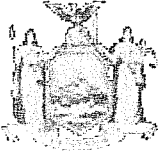
People ex rel. Lovett v. Randall (12 Misc. 619, affd. 91 Hun 266, affd. 151 N.Y. 497) is not pertinent here, although it involves the holding over of an incumbent town officer after an election tie. The difference is that the *Lovett* case (*supra*) was decided on the basis of old section 12 of the Town Law, dropped from later codifications, which section authorized such an incumbent to hold over until his successor should be "elected" (see Judge GAYNOR'S opinion at 12 Misc. 619). After section 12 was removed from the Town Law, the only applicable statute was subdivision 5 of section 64.

The order appealed from should be affirmed.

mmeddy1@verizon.net

From: "Freeman, Robert J (DOS)" <Robert.Freeman@dos.ny.gov>
Date: Thursday, March 3, 2016 2:59 PM
To: <mmeddy1@verizon.net>
Subject: Emailing: Welcome to the Committee on Open Government.htm

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Department of State
Committee on Open Government**

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February 6, 1996

Mr. Daniel R. Sanders
2128 Sterling Station Road
Sterling, NY 13156

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Sanders:

I have received your letter of January 19. You described a situation in which the Sterling Town Board entered into executive session to discuss the selection of a person to fill the unexpired term of the town clerk, even though you read aloud a passage from a decision in which it was held that such a subject must be discussed in public.

You have asked that this office investigate the incident, and you asked what steps can be taken in relation to the matter.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Open Meetings Law. The Committee, whose staff consists of three employees, has neither the resources nor the authority to investigate or compel a public body to comply with law. It is my hope that advisory opinions rendered by the Committee educate, persuade and enhance compliance with the Open Meetings Law, and that judicial decisions provide precedent and guidance. However, if efforts to influence of that nature fail, the remedy involves the initiation of litigation by a member of the public or a group of persons under §107 (1) of the Open Meetings Law. That provision states in part that:

"Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part." In addition, §107(2) authorizes a court to award reasonable attorney fees to the successful party.

With respect to the substance of the matter, by way of background, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted in public except to the extent that an executive session may appropriately be held. Paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered during an executive session.

In my view, the only provision that might have justified the holding of an executive session is §105(1)(f) of the Open Meetings Law, which permits a public body to enter into an executive session to discuss:

"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..."

Under the language quoted above, it would appear that a discussion focusing on the individual candidates could validly be considered in an executive session, for it would involve a matter leading to the appointment of a particular person. Nevertheless, in the only decision of which I am aware that dealt directly with the propriety of holding an executive to discuss filling a vacancy in an elective office, the court found that there was no basis for entry into executive session. As you indicated to the Town Board, in determining that an executive session could not properly have been held, the court stated that:

"...respondents' reliance on the portion of Section 105(1)(f) which states that a Board in executive session may discuss the 'appointment...of a particular person...' is misplaced. In this Court's opinion, given the liberality with which the law's requirements of openness are to be interpreted (*Holden v. Board of Trustees of Cornell Univ.*, 80 AD2d 378) and given the obvious importance of protecting the voter's franchise this section should be interpreted as applying only to employees of the municipality and not to appointments to fill the unexpired terms of elected officials. Certainly, the matter of replacing elected officials, should be subject to public input and scrutiny" (*Gordon v. Village of Monticello*, Supreme Court, Sullivan County, January 7, 1994), modified on other grounds, 207 AD 2d 55 (1994)].

Based on the foregoing, notwithstanding its language, the court in *Gordon* held that §105(1)(f) could not be asserted to conduct an executive session. I point out that the Appellate Division affirmed the substance of the lower court decision but did not refer to the passage quoted above. Whether other courts would uniformly concur with the finding enunciated in that passage is conjectural. Nevertheless, since it is the only decision that has dealt squarely with the issue at hand, I believe that it is appropriate to consider *Gordon* as an influential precedent.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Hon. Nadia Niniowsky, Supervisor
Town Board

5/2/2016

11