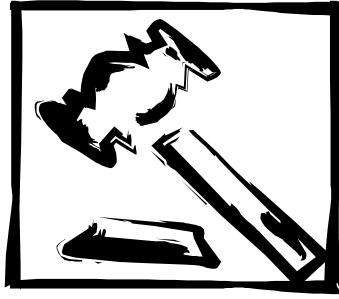


FIRST MEETING OF THE NEW TOWN BOARD



Suggestions for Procedure

The Association of Towns of the State of New York

150 State St.

Albany, NY 12207

Phone: (518) 465-7933

Fax: (518) 465-0724

Web site: www.nytowns.org



G. Jeffrey Haber, Executive Director

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Suggestions for Procedure

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There follows a brief checklist of salient items to be kept in mind on the holding of the vastly important annual Organizational Meeting required to be held by each of the 932 towns of the state.

This is recommended reading for newly elected town board members. It must be kept in mind that only basic and necessary actions are listed herein, actions required for a town government to be organized and to be able to function legally. Other actions may need to be considered or taken at the Organizational Meeting or thereafter.

Though it may be “old shoe” to town officers with long experience in these affairs, it could serve 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 change the official undertaking for some new or incumbent officers.

The First Meeting of the Year

It is 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 of the town board. 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 is required by law to attend every town board meeting.

The formality of this written notice 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 written notice be formally accomplished.

The first meeting of the town board is a meeting as defined by the Open Meetings Law (Public Officers Law, Article 7), and therefore, notice of 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 and the town’s Website, if applicable (Public Officers Law §104[5]).

If a meeting is scheduled more than a week in advance, the notice to the news media and posting must be made 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 method of notification (i.e. telephone) and the date and time thereof.

Additionally, the Public Officers Law requires that the local official who is scheduling the meeting make a reasonable effort to hold it in facilities that permit barrier-free access for the physically handicapped (Public Officers Law, §§74-a, 103(b)).

Town Law, §63 authorizes the town board to determine the rules of its procedure. New town board members should familiarize themselves with the rules of procedure for town board meetings. At the first meeting, it may be opportune to either adopt new, or amend existing, rules as the town board deems necessary for its meetings.

Officers and Employees

1. Eligibility and Qualifications of Town Officers

Section 23 of the Town Law provides, with certain exceptions noted therein, that every officer of the town at the time of his or her election or appointment, and throughout their term of office, shall be an elector of the town. 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. An elector of the town is a person who, if he or she wished, could register as a voter within the town, whether he or she has or has not in fact registered (Election Law, § 5-102(1)).

Oaths and Undertakings

Two matters should be attended to first and foremost; namely that oaths of office have been taken and filed appropriately, and that official undertakings or faithful performance bonds have been executed and filed. Both the oaths and the official undertakings are required for each new term of office, not necessarily every year.

2. Oaths of Office

Section 25 of the Town Law provides for taking oaths of office before entering into the duties of office.

Before he enters on the duties of the office, and within 30 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*. [Emphasis added]

Public Officers Law, §10 similarly provides *for filing the oath of office with the town clerk*.

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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." Thus, any office where the duties involve some exercise of the sovereign power is a public office. Members of planning and zoning boards, boards of assessment review and all deputies would clearly fall within the scope of the oath taking requirements.

Oaths can be administered by any officer authorized to administer oaths in the county *who shall have already taken an oath of office* (Town Law, §25, Public Officers Law, §10 and Real Property Law, §298). This includes:

- (1) the town clerk in whose office the oath is required to be filed, or by his duly designated assistant (i.e., deputy);
- (2) any notary public;
- (3) any judge or justice of the Uniform Court System;
- (4) a town supervisor, but *only* to other members of the town board;
- (5) town councilmen

Oaths of officers appointed or elected to fixed terms are *valid for their entire term*. A new oath must be taken and filed when reappointed or again elected for a subsequent term. (Note that certain town officers such as town justices and court clerks must also file their oaths (and bonds) with the county clerk and court system administrator. See UJCA §104.)

NOTE: Akin to the requirements described above for elected and appointed town officers, all public employees (except those who hold a position in the labor class of the classified service) are also required to take an oath of office and file it with the town clerk before discharging his or her duties.

An employee's neglect to file the oath of office will not terminate his or her employment. A willful refusal to take the oath of office, however, will terminate the employment. The employee's oath has to be taken only once during a continuous course of employment and extends to all positions and titles held by the employee thereafter.

3. Official Undertaking

Section 25 of the Town Law further provides that each supervisor, town clerk, collector, receiver of taxes, town justice, constable, superintendent of highways and other such 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 and amount, with such sureties as directed and approved, and so indicated by the town board on the 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 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.

4. Vacancies

Another very important matter to be addressed is the filling of vacancies that exist in any town office at the time of the Organizational Meeting. In such instances, the board appoints a qualified person to fill the vacancy.

The town board should fill such vacancies pursuant to §64(5) of the Town Law, which reads:

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.

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.

Vacancies may be the result of the expiration of an existing term of office or may occur during a term of office (e.g. midterm resignation). If the vacancy is the result of the expiration of a term of office for an appointed position, an appointment is made for a full term. If the vacancy occurs during an existing term of office for an appointed office, the appointee will serve for the balance of the unexpired term.

If the appointment is to fill a vacancy in an elective office, the length of the appointment is contingent upon the timing of the vacancy and the amount of time left in the unexpired term. If an elected town officer resigns or vacates office after September 20, the vacancy is filled by town board appointment, and unless the term will expire in the year in which the vacancy occurred, the appointee will serve until the end of the following year. But if an elected town officer resigns prior to September 20, the vacancy is filled by appointment for the balance of the year and a successor is elected at the general election in November (1976, Op.Atty.Gen. (Inf.) 158; Public Officers Law, §42 (1)).

*NOTE: there is pending legislation which could change the September 20th date.

5. Appointments

All appointed officers and employees serve for either a prescribed term of office or at the pleasure of the town board or other appointing authority. Upon the expiration of the term of office, or upon the creation of a vacancy in the office, the

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town board or other appointing authority should fill that office by appointment.

Not all of the following appointments will have to be made at this organizational meeting; only those offices that are left vacant due to expiration of term or otherwise need to be filled at the first meeting. Also, be aware that local civil service rules may apply to these appointments. It is always a good idea to consult with your local civil service commission or personnel officer and review any applicable collective bargaining agreements to identify what, if any, rules may apply to a particular appointment.

Below is a list of common offices for which appointments may be made during the first meeting.

The town board will *most likely* have to make the following appointments:

a. Any officers that are normally elective, but have been made appointive, must be appointed if their term of office has expired. Unless otherwise provided by local law, the **appointed town clerk**, **appointed highway superintendent** and/or **appointed receiver of taxes and assessments**, have a **two-year term** that expires December 31 immediately following a biennial town election (Town Law §24).

b. **Town attorney** or **town engineer**, where these offices have been created by the town board. These officers have a **two-year term** that expires December 31 immediately following a biennial town election (Town Law §24).

c. 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. Members of these boards typically have **terms of office equal to the number of members** on the board, with one term expiring each year. The town board shall also designate the chairman of these boards (Town Law §§267, 271).

d. In towns having elective assessors, a **chairman of the board of assessors**. The chairman of town assessors has a **one-year term** that expires every December 31 (Town Law §22-b).

e. A **town comptroller**, where the office has been established by the town board. The town comptroller serves a **two-year term** that expires every December 31 following a biennial election (Town Law §20(3)(b)).

f. In towns that have established the office of **director of purchasing** (Town Law, §20(3)(e)), The director of purchasing serves a **two-year term** that expires every December 31 following a biennial election.

g. In towns that have established a **recreation commission**, one member annually for a **term of office equal to the number of members** on the commission.

The town board *will possibly* have to make the following appointments:

h. Upon the advice and consent of the town justice, the town board may appoint a **court clerk**.

Note that **the court clerk may only be employed and discharged from service upon advice and consent of the town justice(s)** (Town Law § 20(1)(a),(b)).

i. A **building inspector** or **enforcement officer** and a deputy, if the position was established. These officers serve **at the pleasure of the town board** (Town Law § 138).

j. In a town that is a primary registration district, a **registrar of vital statistics** for a **four-year term of office**. Alternatively, the town board may designate the town clerk to serve as registrar. Where the town clerk is so designated, the **term of office is coterminous** with that of town clerk (Public Health Law §§ 4121, 4123).

k. A **local health officer**, only where local health is not administered as part of a county health district. Term of office of local health officer is **four years** (Public Health Law §§ 320-322).

l. A **dog control officer**. In lieu of appointing an individual to fill this office, the town board may contract with another municipality or with a humane society for the services of a dog control officer. The dog control officer serves **at the pleasure of the town board** or as otherwise provided by the contract (Agriculture & Markets Law § 114).

m. One or more **members of the board of ethics**. The board of ethics consists of at least three members, a majority of whom are not otherwise officers or employees of the town. They serve **at the pleasure of the town board** unless otherwise provided by local law (General Municipal Law § 808).

n. **Deputy town attorneys** (in towns of the first class and towns of the second class with a population of over 75,000) and **deputy town engineers** (in towns of the first class), as provided by resolution of the town board. For all other towns, as provided by local law. These officers serve **at the pleasure of the town board** for an indefinite term. (Town Law § 20(2)(a)).

On occasion, the town board *may* have to make the following appointments:

o. An **acting assessor** (in the event that the assessor is unable to perform the duties of the office) who serves **at the pleasure of the town board** (Real Property Tax Law § 314).

p. **Constables** (towns of the second class only) who serve **at the pleasure of the town board** (Town Law § 20).

Chapter 491 of the Laws of 2010 requires the head of each agency, local government or commission to file by January 15th with the Division of Criminal Justice Services, on a form prescribed by the Division, a list of peace (in addition to police) officers; requires such a list for new appointees during the year.

q. Four or fewer **civil officers**, who serve **at the pleasure of the town board**, in towns in which there is a town police department or where such town is part of a county police district (Town Law § 20).

r. **Special town policemen**, when authorized, who serve **at the pleasure of the town board** (Town Law § 158).

s. In towns with no building department, **multiple residence inspector**, who serves **at the pleasure of the town board** (Multiple Residence Law § 303).

t. Members to a **conservation advisory council** for a term **not to exceed two years**, but may be removed for cause after a public hearing (General Municipal Law § 239-x).

u. Members to a **narcotic guidance council** for terms of office that are **not to exceed three years**, but may be removed for cause after a public hearing (General Municipal Law § 239-u).

v. Members to a **landlord - tenant relations council** for a term **not to exceed two years**, but may be removed for cause after a public hearing (General Municipal Law §239-z).

w. One or more **marriage officers**, who shall have the authority to solemnize a marriage within the territory of the town. The marriage officer serves at the pleasure of the board, for a term of office as determined by the town board but shall **not exceed four years**.

The town board is not the only appointing authority in the town. Other town officers are given the power to make certain appointments. Although these appointments do not have to be made at a town board meeting, if the office has not been previously established, the first meeting of the town board may provide an opportune time to do so. These appointments include:

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aa. The **supervisor** may appoint any person (including other town officers) to be the **deputy supervisor** where the position has been established by the town board. If the office of deputy supervisor is vacant for more than five days, the town board may appoint the deputy. Either way, the deputy supervisor serves **at the pleasure of the supervisor** (Town Law, §42).

bb. The **supervisor** may appoint a **confidential secretary** or **bookkeeper** or both, as of right (towns of the first class) or where these positions have been established by the town board (towns of the second class). These officers are entitled to reasonable compensation and serve **at the pleasure of the supervisor** (Town Law § 29(15)).

cc. 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. The budget officer serves **at the pleasure of the supervisor** (Town Law, §103(2)).

dd. The **supervisor** is required to appoint a **local historian** (Arts and Cultural Affairs Law, §57.07), who serves **at the pleasure of the supervisor**.

ee. The **superintendent of highways** may appoint a **deputy superintendent of highways** where the position has been established by the town board. If the office of deputy superintendent of highways is vacant for more than five days, the town board may appoint the deputy. Either way, the deputy highway superintendent serves **at the pleasure of the highway superintendent** (Town Law, §32(2)).

ff. The **superintendent of highways** has the authority to fill vacancies in the positions involving the repair and maintenance of highways.

gg. The **town clerk** may appoint a **first deputy town clerk** to perform duties and responsibilities as assigned by the town clerk. In addition, the town clerk may appoint two **additional deputy town clerks** whose duties and responsibilities may be established by the town board. Unless otherwise provided for by the town board, deputy town clerks serve without compensation and **at the pleasure of the town clerk** (Town Law § 30(10)).

hh. The **receiver of taxes and assessments** or **tax collector** may appoint a **deputy** who serves **at the pleasure of the respective appointing officer**. A deputy tax collector does not receive compensation unless otherwise provided for by the town board (Town Law §§ 35, 37).

Aside from these particular appointments, the town board has the authority to appoint other such employees as it deems necessary for the proper conduct of the affairs of the town, including appointments to any locally or regionally created board, committee, council or commission. Rules governing the membership of these public bodies should be contained in the local law, agreement, resolution or other document creating it.

Whenever making any personnel decisions, make sure to consult applicable collective bargaining agreements, town personnel policies, state and federal employment laws and rules, as well as county civil service rules.

Not all of these positions listed above will exist in your town. Naturally, if the office does not exist, an appointment does not have to be made. Town boards interested in establishing any of these offices should direct their questions to the town attorney or the Association of Towns.

Civil Service Considerations:

As noted above, the local personnel officer or Civil Service Commission, typically found at the county level, should have a record of all positions within the town and will likely have rules that apply to the creation of, appointment to and/

or discipline or removal from these offices. It is imperative, therefore, to consult your local personnel officer or Civil Service Commission when creating or making appointments to these offices.

Post-Appointment Responsibilities of the Town Clerk:

On or before January 10, the town clerk shall file a certificate with the Office of the State Comptroller specifying the names and addresses of all town officers, whether elected or appointed, and must also file a certificate with the Office of Real Property Services 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)).

The town clerk must also certify to the county clerk, within 20 days after his appointment, the names and addresses of all appointive town officers, 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, and within five days of filling the vacancy, he must file a certificate thereof with the county clerk, the Office of State Comptroller and, in the case of a vacancy in the office of assessor, with the Office of Real Property Services. 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 resignation of an elective officer and the effective date thereof (Town Law, §30(4); Public Officers Law, §31(5)).

6. Salaries

At the 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 permissive referenda) increasing the salary for one year only (Town Law, §§27). The town board also cannot fix the salary of any elective or appointive town officer or employee at an amount larger than the appropriation made therefore (Town Law, §§27, 117). In addition, the town board cannot decrease the salary of a sitting elected town officer in the middle of his or her term of office except by the adoption of a local law subject to a mandatory referendum (*Sacco v. Maruca*, 175 AD2d 578, 573 NYS2d 787 app den 78 NY2d 862, 578 NYS2d 877 (1991); Opns St Comp, 2006 No. 2006-5). The town board may not decrease the salary of an elected town justice in the middle of his or her term of office (*Catansie v. Town of Fayette*, 148 AD2d 210, 543 NYS2d 825 (1989); Opns St Comp, 2006 No. 2006-5). However, if additional funds become available, the appropriation may be increased during the year. Please see the Town Law Manual for further instructions regarding salaries.

The town board also must decide whether the registrar of vital statistics' compensation will be based upon the statutory fee schedule or a fixed salary; if a salary, the town board should fix such salary (Public Health Law, §4124).

7. Mileage

If any town officers are to be compensated for the use of their automobiles, the

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town board should adopt a resolution establishing a reasonable amount to be allowed for specified town officers and employees for the use of their own automobiles in the performance of their official duties (Town Law, §116).

8. Vacations, Sick Leaves, Holidays, etc.

The town board may establish a plan for granting paid vacations, sick leaves, leaves of absence of officers and employees and adopt rules and regulations in relation thereto, if not previously adopted (General Municipal Law, §§90, 92). Please note that there are many statutory, regulatory and common law rules and regulations that must be complied with regarding leave policies. Therefore, it is important to consult with your town attorney or the Association of Towns' legal staff with any questions regarding leave policies.

9. Health Insurance

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 §92-a of the General Municipal Law, if not previously adopted. The town board may open the town's medical plan to volunteer firefighters and ambulance workers.

Town Board Meetings and Procedures

10. The town board may adopt its rules of procedure and the supervisor may appoint town board committees (Town Law, §63). As all meetings of the town board are open to be photographed, broadcast, webcast, recorded and transmitted by video or audio, the town board may include in its rules of procedure reasonable rules governing the location of equipment and personnel that desire to do so. Any such rules must be conspicuously posted during meetings and written copies made available to the public upon request (Public Officers Law, §103).

11. The town board should adopt a resolution determining when regular meetings of the town board shall be held. If such resolution is adopted, no further notice of regular meetings need be given to town board members, town clerk, etc. (Town Law, §§62, 63). However, notice to the news media and the public must be given in accordance with the Open Meetings Law.

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 rare exceptions as to specific matters and in the case of a couple of specific towns, all town board meetings must be held within the town boundaries. Town boards are required to locate their meetings and public hearings in an "appropriate facility" that accommodates members of the public who wish to attend, and that provides barrier-free physical access for persons with disabilities (Public Officers Law, §103). 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 _____.

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 specific 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. Where a town has the ability to do so, it is directed to conspicuously post notice of the time and place of its meetings on its Website (Public Officers Law, §104[5]). In this fashion, the public and the press get to know and rely on the fact that this is when the town board does meet regularly. 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 of their special problems and complaints. This makes for good government and good public relations.

12. The town board may adopt a resolution designating the official newspaper of the town (Town Law, §64(11)).

13. The town board may adopt a resolution delegating to 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)).

New York State and Local Government Retirement System

14. Standard Work Day and Reporting Resolution

The **town board** of a participating employer in the State and Local Government Retirement System shall establish, by resolution, a standard workday for each elective or appointive office or position. Such resolution shall indicate: (i) the number of hours prescribed as a standard workday for each such elective or appointed office or position; (ii) the expiration of the term for each such office or position; (iii) that the employer maintains an actual daily record of time worked for the elected or appointed official or that the official holding the office has recorded and submitted to the clerk his or her work activities for a period of three consecutive months; and (iv) for each elected and appointed official who has submitted a record of work activities pursuant to paragraph (i) of subdivision (a) of this section, the total number of days per month to be reported based upon such record of work activities. For the purpose of determining days worked, no fewer than six hours or more than eight hours shall be established as a full-time standard workday (2 NYCRR 315.4).

15. Filing and Posting Requirements

The resolution must be posted on your public Website for at least 30 days or, if a Website isn't available to the public, on the official signboard or at the main entrance to the clerk's office. An affidavit of the posting and a copy of the resolution must be filed with the Office of the State Comptroller within 45 days of adoption.

16. Record of Work Activities

In the event an employer does not maintain an actual record of time worked on a daily basis for an elective or appointive office, the official holding the office shall record his or her work activities for a period of three consecutive months. In preparing the record, the official may consider factors that require his or her attention outside the normal working hours for the purpose of actually attending to official duties, including responding to an emergency, attending an employer-sponsored event or meeting with or responding to members of the public on matters

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of official business. Such record of activities shall be completed within 150 days of taking the office. The record of activities shall be submitted by the official to the secretary or clerk of the governing board at the first regular meeting held within 180 days of taking office along with a certification, in a form prescribed by the comptroller and signed by such official, that the official has filed the required record of activities with the secretary or clerk. The secretary or clerk shall promptly file the certification with the comptroller. Each such record of activities shall be retained by the employer for a period of 10 years and full and complete copies shall be provided to the comptroller upon his or her request. A record of activities need not be prepared by an elected or appointed official who is not a member of the NYS Retirement System. The failure of the official to maintain and timely file the record of activities shall result in the suspension of service crediting and retirement system membership benefits for the elected or appointed official until such time as the record is maintained and a certification is filed with the comptroller.

Please note that the town clerk must retain each record of activities for a period of at least 10 years and provide full and complete copies to the Office of the State Comptroller upon request.

For more information, sample logs and resolutions you may contact the Association of Towns or the New York State and Local Retirement System Member & Employer Services Bureau by mail at 110 State Street, 5th Floor, Albany, NY 12244-0001 or via e-mail at RTEmpSer@osc.state.ny.us.

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17. Designation of Depositories

This is one of the most important steps to be taken at the first meeting of the town board each year. A resolution should be adopted designating the banks or trust companies in which all town officers shall deposit all money 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)). Amounts deposited beyond the FDIC-insured limit (\$250,000) must be secured by a pledge of eligible securities.

18. 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 contracting bank or another bank as designated by the employee (Banking Law, §96-b; General Municipal Law, §93-d; Town Law, §29(3)).

19. Petty Cash Funds

A petty cash fund may be established by a town board for a receiver of taxes and assessments in any amount up to \$1,000 and for any other town officer up to \$500.

20. 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)).

21. 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).

Actions that Need Not Necessarily be Taken at the First Meeting

22. Except as provided below (item 23), 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)).

23. In lieu of the financial report required above, the town board may determine by resolution that the supervisor shall, within 60 days after the close of the fiscal year, submit to the town clerk a copy of his report to the state comptroller and require the town clerk, who shall cause a summary of such report or notice and ensure that a copy of such report is on file and available for inspection and copying and published within 10 days in the official newspaper of the town (Town Law, §29(10-a)). For towns with a population between 5,000 and 19,999, this report must be filed within 90 days, and for towns with a population of 20,000 or more, within 120 days. If the time for filing the annual report is extended 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.

24. 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(6)).

25. 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)).

26. 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 that 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).

27. The town board may adopt a resolution prescribing the form of the monthly report which the supervisor is required to submit (Town Law, §125; Op. State

NOTES

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Comptroller No. 80-309).

28. The town board and the highway superintendent shall 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).

29. 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)).

30. 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 or other reasons (General Municipal Law, §85).

31. 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).

32. 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).

33. 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)).

34. 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)).

35. 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 that exist today (Town Law, §64(3,4); General Municipal Law, §52).

36. 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 Comptroller 80-242).

37. 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 and specify 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).

38. Town 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 Director of the Association of Towns, 150 State Street, Albany, New York 12207-1671. Please also advise of changes when they occur.

39. Association Publications

The supervisor should advise the members of the town board that he, the town clerk, tax collector or receiver, town justices, councilmen, highway superintendent, assessors, town attorney, budget officer, director of finance and comptroller will receive bimonthly Association publications on subjects of interest and importance to the respective officers.

Additionally, the supervisor should advise the town board that procedural manuals for the town board, town clerk, tax collector or receiver and highway superintendent should be in their respective offices. Also, Forms and Outlines of Criminal Procedures for Town Justices & Police should be in the court. If you do not have these publications, contact the Association of Towns. For a complete listing of available Association publications, please see page 18 of this publication.

40. 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 meeting and authorizing the attendance of specified town officers thereat and the 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.

All of the above several actions 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.

Please see pages 16 and 17 for Appendices A and B.

NOTES

Appendix A

Special Note on the Transition to a Town of the First Class

Each town 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. In addition, certain towns may optionally become towns of the suburban class.

Towns of the First Class - Towns containing a population of 10,000 or more, except towns in Broome and Suffolk counties, and except also the town of Potsdam in St. Lawrence County and the town of Ulster in Ulster County, and such other towns as may be determined to become towns of the first class pursuant to the provisions of this article. Every town in the Westchester County shall be a town of the first class (Town Law, §10).

Towns of the Second Class - Towns containing a population of less than 10,000, except towns in Westchester County and such towns as shall have determined to become towns of the first class pursuant to the provisions of this article. Every town in the counties of Suffolk and Broome and the town of Potsdam in the St. Lawrence County and the town of Ulster in Ulster County shall be a town of the second class (Town Law, §10).

Towns of the Suburban Class (Optional Class – Locally Determined) - A town may opt to become a town of the suburban class where the town (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.

Mandatory Change in Classification from a Town of the Second Class to a Town of the First Class

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 2010 census recently completed), the town must become a town of the first class. Under the mandatory change 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 Jan. 1, 2012. 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 2011 town election -- all officers and only such officers as are required to be elected in a town of the first class (Town Law § 11).

At the biennial election immediately preceding the effective date of the mandatory change in classification (November 2011 election), the following officers must be elected: a town supervisor, a town clerk and a town superintendent of highways for a term of two years, and a receiver of taxes and assessments for a term of four years. The change in classification, however, should not operate to decrease terms of these offices where the town board has previously established longer terms, nor should it abridge the term of any of these officers who have been elected for a term of four years. The change in classification does not require the election of a town clerk or town superintendent of highways where the office was appointive on the effective date of the change in classification.

Appendix B

Compatibility of Office

A person may hold more than one public office or position of employment simultaneously unless the positions are incompatible either due to a prohibition in a state statute or a violation of the common law doctrine of compatibility.

Common Statutory Prohibitions:

- a) A person may not hold two elected town offices simultaneously (Town Law, §20 (4)).
- b) A person may not hold an elected county office and an elected town office simultaneously (County Law, §411).
- c) A town board member may not serve on the town planning board (Town Law, §271 (3)) or the town zoning board of appeals (Town Law, §267 (3)).
- d) No county treasurer, district superintendent of schools or trustee of a school district shall be eligible to hold the office of supervisor (Education Law § 2112(3); Town Law § 23(1)).
- e) Neither the assessor nor any member of his or her staff may be appointed to the board of assessment review. A majority of such board shall consist of members who are not officers or employees of the town (Real Property Tax Law, §523 (1)(b)).

Common Law Compatibility of Office Doctrine

In addition to various statutory prohibitions, a person may be prohibited from serving in more than one town position due to a common law compatibility prohibition.

In the absence of a constitutional or statutory prohibition against dual-office holding, one person may hold two offices simultaneously unless they are incompatible. The leading case on compatibility of office is *People ex rel. Ryan v. Green*, 58

NY 295 (1874). In that case, the court held that two offices are incompatible if one is subordinate to the other or if there is an inherent inconsistency between the two offices. The former can be characterized as “you cannot be your own boss,” a status normally easy to see. The latter is not easily characterized, for one must analyze the duties of the two offices to ascertain whether there is an inconsistency. An obvious example is the inconsistency of holding both the office of auditor and the office of director of finance (1986 N.Y. Op. Atty. Gen. (Inf.) 140).

There are two subsidiary aspects of compatibility. One is that, although the common law rule of the Ryan case is limited to public offices, the principle equally covers an office and a position of employment or two positions of employment. The other is that, although the positions are compatible, a situation may arise where one has a conflict of interest created by the simultaneous holding of the two positions. In such a situation, the conflict is avoided by declining to participate in the disposition of the matter. If such situations are inevitable as opposed to being possibilities, there is an inherent inconsistency in the positions (1986 N.Y. Op. Atty. Gen. (Inf.) 140).

Common Law Whitehall Doctrine

The Whitehall doctrine, as a matter of public policy, provides that a board may not appoint one of its members to a position (*Wood v. Town of Whitehall*, 120 Misc 124 (Sup Ct Wash Co), affd, 206 App Div 786 (3d Dept 1923)). (See also, *Macrum v. Hawkins*, 261 NY 193 (1933), and *Matter of Brenner v. Vines*, 35 AD2d 536 (2d Dept 1970). In *Wood*, the court decided that it would be contrary to public policy and the general welfare to uphold such an appointment. The recusal of the member of the board to be appointed does not remedy the conflict of interests (1995 N.Y. Op. Atty. Gen. (Inf.) 1074).

When public officers, such as the members of a town board, are vested by the Legislature with power of appointment to office, a genuine responsibility is imposed. It must be exercised impartially, with freedom from suspicion of taint or bias that may be against the public interest. An appointing board cannot absolve itself from the charge of ulterior motives when it appoints one of its own members to an office. It cannot make any difference whether or not his vote was necessary to the appointment. The opportunity to improperly influence the other members of the board is there. No one can say in a given case that the opportunity is or is not exercised. What influenced the other members to vote as they did, no one knows except themselves. Were their motives proper, based solely on the fitness of the appointee? They may have been. Were they improper, based on the promise or expectation of reciprocal favors? (*Wood v. Town of Whitehall*, 120 Misc 124 (Sup Ct Wash Co), affd, 206 App Div 786 (3d Dept 1923)).

This doctrine has been applied to offices and positions of employment (1987 Op Atty Gen (Inf) 167).

Therefore, in the absence of a state law, local law or session law to the contrary, the town board is bound by the common law doctrine of compatibility and the common law Whitehall doctrine.

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Available from the Association of Towns . . .

. . . Training manuals written by our technical and legal staff, and designed to keep town officials updated and informed about the responsibilities of their offices.

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Patricia Kebea
The Association of Towns of the State of New York
150 State Street, Albany, NY 12207

_____ 2010-2011 Directory of Town Officials @ \$25/members, \$50/non-members

_____ Town Law Manual @ \$10/ea (2006 ed.)

_____ Forms & Outline of Criminal Procedure for Town Justices & Police @ \$40/ea (2006 ed.,
Forms CD included)

_____ The Office of the Highway Superintendent @ \$10/ea (2005 ed.)

_____ Office of the Town Clerk @ \$10/ea (1996 ed. available; Next edition TBA)

_____ Tax Collection in Towns @ \$10/ea (2008 ed., CD included)

_____ Small Claims Guide for Town & Village Courts @ \$10/ea (2009 ed.)

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