

Selling Surplus Gravel

Highway Law §145

Purchase of gravel pits

The town board of a town may contract for and purchase land in the name of the town containing a gravel bed or other material for use on the public highways and bridges of the town. No such land shall be purchased except at an agreed price with the owner. No such land shall be resold to any private corporation. The purchase price of such land shall be a town charge and be paid from moneys levied or collected therefor, as provided by law. All such property so acquired shall vest in and become the property of such town.

Town may purchase gravel bed and cost thereof is general town charge and no referendum is necessary to purchase gravel bed. 1 Op.State Compt. 20, 1945. See, also, 12 Op.State Compt. 282, 1956.

To Residents

1 Opinion State Comptroller 381 (1945)

File Number 811

HIGHWAY LAW, SECTION 145.

A town may not sell gravel from its gravel bed to private persons for adequate consideration nor may it use highway equipment or public employees to perform work for private persons for adequate consideration.

INQUIRY

May a town sell gravel from its gravel bed to private persons for adequate compensation and may a town use highway equipment or public employees to perform work for private persons for adequate consideration?

STATEMENT OF LAW

Section 145 of the Highway Law reads as follows,

§145. Purchase of gravel pits. The town board of a town may contract for and purchase land in the name of the town containing a gravel bed or other material for use on the public highways and bridges of the town. No such land shall be purchased except at an agreed price with the owner and, except in the towns of North Salem, Lewisboro, Somers and Poundridge, at a total cost not to exceed the sum of one thousand dollars. No such land shall be resold to any private corporation. The purchase price of such land shall be a town charge and be paid from moneys levied or collected therefor, as provided by law. All such property so acquired shall vest in and become the property of such town."

This provision restricts the use of gravel or other material obtained from the gravel bed to "use on the public highways and bridges of the town" and sale of materials taken from such a bed to a private contractor has been declared to be illegal. *Tooley v. Town of Wilno* (1933), 148 Misc. 611, 612, 613. In this case the town officials were enjoined from carrying out a contract to

provide such materials to such contractor. The result in this case is in line with other legal authorities on the subject. *Re Municipal Fuel Plants* 182 Mass. 605, 66 N. E. 25, 60 L.R.A. 592 ;)) Dillon, *Municipal Corporations*, Sections 1291-ff; McQuillin, *Municipal Corporations*, 1st Edition-Sections 1806-ff, 2nd Edition-Section 1951-ff.

The reasoning of the *Tooley* case and of the other authorities cited above is equally applicable to the use of highway equipment and public employees to perform work for private persons for adequate consideration.

The opinions herein expressed are not intended to relate to municipal powers to cope with extraordinary emergencies.

CONCLUSION

A town may not sell gravel from its gravel bed to private persons for adequate consideration nor may it use highway equipment or public employees to perform work for private persons for adequate consideration.

September 21, 1945.

33 Opns St Comp, 1977 No. 77-471 p 100 New York State Comptroller

July 12, 1977

Village Law, § 1-102(1)

Village Law, § 4-412(1)

1. MUNICIPAL PROPERTY—VILLAGE GRAVEL PIT—SALES TO PRIVATE INDIVIDUALS

A village may not sell gravel from a village gravel pit to a private individual unless such gravel is no longer necessary for village purposes.

INQUIRY: May a village sell gravel to a private contractor with whom it has previously entered into a contract for the installation of a sewage collection system?

STATEMENT OF LAW: As a general rule, municipalities, including villages, are not authorized to engage in commercial activities. The sale of gravel from a village gravel pit would, in our opinion, normally come within the prohibition against engaging in a commercial enterprise.

However, Village Law § 1-102(1) provides, in pertinent part, that a village may convey such real and personal property as the purposes of the village may require. A condition precedent to the conveyance of any village property, real or personal, is that such property no longer be needed for village purposes.

Accordingly, if the gravel is no longer needed for village purposes, the board of trustees could, by resolution, authorize the sale thereof. While there is no requirement that any such sale be at public auction, the board of trustees would of course be obligated to obtain fair and adequate consideration.

CONCLUSION: A village may not sell gravel from a village gravel pit to a private individual unless such gravel is no longer necessary for village purposes.

33 Opns St Comp, 1977 No. 77-471 p 100

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Opns St Comp, 1981 No. 81-234
New York State Comptroller

July 17, 1981

TO: ARTHUR M. KAHN, ESQ.
TOWN OF ROCHESTER

Town Law, § 64 (2-a)
State Constitution, Article VIII, § 1

1. PERSONAL PROPERTY—SALE OF—SURPLUS GRAVEL
2. PERSONAL PROPERTY—SALE OF—CONSIDERATION FOR

A town may sell, for a fair and reasonable price, surplus gravel and other materials removed from the ground as incidental to the operation of its sanitary landfill. The price does not necessarily have to coincide with the open market price of the goods sold.

We have received an inquiry asking whether a town may sell to private firms and individuals gravel and other materials removed from the town's sanitary landfill and, if so, what price the town should charge for such materials. Specifically, we are asked whether a price of \$.75 per square yard (approximately \$.50 per square yard below open market price) is appropriate.

Once the gravel and other materials are physically severed from the real property, they become personal property (Opns St Comp, 1969, No. 69-385, unreported). Town Law, § 64 (2-a) provides that the town board of every town may sell and dispose of personal property as the purposes of the town may require, except as otherwise provided by law. Pursuant to this authorization, a town may sell surplus gravel and other by-products removed from the ground as incidental to the operation of its sanitary landfill (Opns St Comp, 1980, No. 80-626, as yet unreported; see also Opns St Comp, 1976, No. 76-583, unreported; 14 Opns St Comp, 1958, p 250 and p 408; *Sengelaub v Town of Smithtown*, 29 Misc 2d 655, 214 NYS2d 573; cf. *Tooly v Town of Wilna*, 148 Misc 611, 266 NYS 177; 31 Opns St Comp, 1975, p 123; 9 Opns St Comp, 1953, p 151).

There is no statute which specifically governs the price which a town must charge when selling such surplus materials. However, as a general rule, a town must receive fair and reasonable value upon the sale of its surplus personal property, although the actual amount of the consideration is within the discretion of the town board (Opn No. 69-385, supra; 24 Opns St Comp, 1968, p 117; *Matter of Ross v Wilson*, 284 App Div 522, 132 NYS2d 760, revd on other grads 308 NY 605). Of course, selling surplus personal property for a nominal or inadequate sum

could result in an unconstitutional gift of public property or constitute an act of waste (NY Const, art VIII, § 1; Matter of Ross, supra; General Municipal Law, § 51).

The open market price of materials is normally a good general indicator of what a town should charge when selling surplus personalty and the fact that the price proposed by the town in this instance is substantially below the market price would seem to suggest that it does not reasonably represent the value of the goods. However, we cannot say that the price suggested would be improper as a matter of law.

Opns St Comp, 1981 No. 81-234

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To Other Municipalities

1972 N.Y. Op. Atty. Gen. No. 91

Office of the Attorney General State of New York

Informal Opinion

February 4, 1972

HIGHWAY LAW, Section 145.

The Town of Lowville in Lewis County is authorized to sell its surplus crushed stone from its quarry to the County of Lewis as well as to towns and villages contained in the County of Lewis.

Joseph W. Singer, Esq.

Town Attorney

This is in response to your letter of January 14, 1972 wherein you ask for my opinion concerning the following. You state that for over 50 years, the Town of Lowville in Lewis County has operated a stone quarry and crusher primarily for the maintenance of its highways and over the years has been selling surplus crushed stone from the quarry to the County of Lewis and other towns and villages contained in said county. You ask whether or not it is legal for the Town of Lowville to make such sales to such municipalities.

In *Tooly v. Town of Wilna*, 148 Misc. 611 (Supreme Court, Jefferson County, 1933), the Court held that the act of town officials in entering into a contract for the sale of crushed stone from its quarry to be used for other than town highway purposes was illegal. That conclusion was premised on the provisions of the then Highway Law, Section 51-a, which provided:

“The town board of a town may contract for and purchase land in the name of the town containing a gravel bed or other material for use on the public highways and bridges of the town.”

Highway Law, Section 145, was added by Laws of 1936, Chapter 63, with substance transferred from former Highway Law, Section 51-a and thereafter was amended by Laws of 1939, Chapter

602, Section 2; Laws of 1950, Chapter 170 and Laws of 1953, Chapter 489, Section 1. The 1939 amendment added the wording of the underscored sentence to the present Highway Law, Section 145, which now reads as follows:

“§ 145. Purchase of gravel pits.—The town board of a town may contract for and purchase land in the name of the town containing a gravel bed or other material for use on the public highways and bridges of the town. No such land shall be purchased except at an agreed price with the owner. No such land shall be resold to any private corporation. The purchase price of such land shall be a town charge and be paid from moneys levied or collected therefor, as provided by law. All such property so acquired shall vest in and become the property of such town.” (Emphasis supplied.)

In *Wells v. Town of Salina* (119 N.Y. 280, 287), the Court stated:

“Both towns and other municipal corporations are organized for governmental purposes, and their powers are limited and defined by the statutes under which they are constituted. They possess only such powers as are expressly conferred or necessarily implied.” (Emphasis supplied.)

I interpret the wording of the underscored sentence contained in Highway Law, Section 145, as implying that a town is authorized to convey to another municipality land containing a gravel bed or other material acquired by the town for use on the public highways and bridges of the town when such gravel or material on such land is no longer needed for town highways and town bridges. It follows that surplus gravel or material on such land may likewise be sold to other municipalities.

Accordingly, I conclude that the Town of Lowville in Lewis County is authorized to sell its surplus crushed stone from its quarry to the County of Lewis as well as to towns and villages contained in the County of Lewis.

Louis J Lefkowitz
1972 N.Y. Op. Atty. Gen. No. 91
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To the State

Opns St Comp, 1982 No. 82-63
New York State Comptroller
February 23, 1982

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

Highway Law, § 145
Town Law, § 64(2-a)
General Municipal Law, § 72-h

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

2. PERSONAL PROPERTY—SALE OF—SURPLUS SAND

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

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

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

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

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

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

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

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

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

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

Nevertheless, we are aware that there are situations in which a town may legitimately dispose of surplus or unneeded sand. For instance, a town may sell surplus sand or gravel removed from the ground as incidental to the operation of its sanitary landfill (Opns St Comp, 1981, No. 81-234; *Sengelaub v Town of Smithtown*, 29 Misc 2d 655, 214 NYS2d 573). In addition, we have recognized that in the “unusual circumstances” where a town has acquired, by gift, a far greater supply of sand than needed in the foreseeable future for town purposes, the surplus sand may be sold (Opns St Comp, 1975, No. 75-941, unreported). Similarly, where a town, in good faith and with no intention of reselling the sand, acquires a supply of sand solely for its own highway purposes, and subsequently determines that the amount of sand acquired is far in excess of its foreseeable needs, it is our opinion that, rather than hold surplus or unneeded property in perpetuity, the town could sell the surplus sand without violating the spirit and intent of Highway Law, § 145 and without constituting an illegal commercial venture. However, in these situations, it is our view that the town should divest itself of the unneeded property as expeditiously as possible, at the best possible price. To purposely engage in an on-going course of conduct involving piecemeal sales of sand removed from the land and active competition with private enterprise, such as would be the case if a town were to bid on State contracts over a course of time, would constitute, in our view, engaging in an unauthorized commercial venture.

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

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

above-named entities (cf. Highway Law, § 145, which, as indicated above, prohibits sales to private corporations).

Opns St Comp, 1982 No. 82-63
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