To be Argued by:
William J. Keniry, Esq.
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division - Third Department

THEODORE W. RICKET,

Petitioner/Plaintiff-Appellant,

-against-

PAULA A. MAHAN, NANCY R. HERNANDEZ, ROBERT D. BECKER, WILLIAM E. CARL, DANIEL J. DUSTIN, DANIEL A. HORNICK and LINDA J. MURPHY, Members of the TOWN BOARD OF THE TOWN OF COLONIE; THE TOWN BOARD OF THE TOWN OF COLONIE; JOHN H. CUNNINGHAM, individually and as COMMISSIONER OF PUBLIC WORKS OF THE TOWN OF COLONIE; and MICHAEL M. BURICK, individually and as PERSONNEL OFFICER OF THE TOWN OF COLONIE,

Respondents/Defendants-Respondents/Cross-Appellants.

BRIEF OF APPELLANT

Albany County Index No.: 1705-10

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PRELIMINARY STATEMENT

Petitioner-Plaintiff Theodore W. Ricket appeals from a judgment of the Supreme Court, Albany County (McNamara, J.), entered on August 26, 2010, which dismissed the petition/complaint ("Petition") to the extent that it sought to annul the Town Board's appointments of Respondent John H. Cunningham to the position of Commissioner of Public Works ("Commissioner") and Respondent Michael Burick to the position of Personnel Officer.

As set forth below, Mr. Cunningham's appointment should be annulled because he was not a Town resident as required by law. Under the Public Officers Law and the Town Law, the Commissioner must be a Town resident. Respondents below asserted, and the trial court erroneously determined, that the Town eliminated the statutory residency requirement by adopting a local law in 1996 ("Subject Local Law"). As applied to the Commissioner, however, the residency provisions of the Public Officers Law and Town Law are general laws that the Town could not amend. Even if those provisions were special laws, however, the Subject Local Law cannot be read to invoke any supersession powers to amend the statutory residency requirement. The Subject Local Law is silent on residency and contains no language even suggesting the Town's intention to amend the residency requirement.

The appointment of Mr. Cunningham should be annulled for the additional reason that he possessed no engineering degree or license, as set forth in the "minimum qualifications" in the Town's job description. Indeed, he lacked any meaningful knowledge of engineering. The minimum qualifications take into account the Commissioner's responsibilities for, among other things, directing and controlling the Bureau of Engineering and exercising responsibly for the water, sewer and transportation of the Town. Even if the minimum qualifications were construed

to set out non-binding guidelines, the Town's Board's complete disregard of them in the hiring of Mr. Cunningham was arbitrary and capricious.

As to Mr. Burick, the trial court correctly agreed that his appointment was illegal. However, it erroneously failed to correct the illegality. To the contrary, the trial court actually continued the illegality by failing to vacate the position.

Petitioner respectfully requests that the Court modify the judgment accordingly and grant the petition.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On January 7, 2010, Respondent Town Board ("Board") of the Town of Colonie ("Town") (by a 5-2 vote) adopted a resolution appointing Respondent John H. Cunningham as Commissioner of Public Works [34, 114-117, 209].[1] The Board approved the resolution over the concerns expressed by Respondent (Board member) Daniel J. Dustin that Mr. Cunningham was unqualified because he was not a Town resident and lacked any comprehensive knowledge of engineering [114-117].

The Town Board subsequently considered the appointment of Mr. Burick as Personnel Officer to replace the retiring Michael Foley [122-126]. Rather than proposing to appoint Mr. Burick for the remainder of the existing term of Mr. Foley's appointment (approximately 4 years) as required by law, however, the Board instead sought to appoint Mr. Burick for a new term of six years [29-30, 122-126]. Again, Mr. Dustin voiced his concern about the illegality [122-126], but ultimately the Board adopted a resolution appointing Mr. Burick as Personnel Officer [35, 126, 208].

On March 16, 2010, Petitioner-Plaintiff Theodore W. Ricket ("Plaintiff"), a Town resident, commenced this hybrid CPLR article 78 and declaratory judgment action seeking a judgment (1) annulling the resolution of Respondent Board appointing Mr. Cunningham; (2) annulling the resolution of the Board appointing Mr. Burick; (3) declaring the position of Commissioner of Public Works vacant; (4) declaring the position of Personnel Officer vacant; and (5) directing Mr. Cunningham to repay any and all monies and benefits received from the Town [19-42].

[1] Unless otherwise indicated, all page references are to the volume entitled "Record on Appeal."

Respondents served a Verified Answer and subsequently served an affirmation of the Town Attorney, affidavits of Mr. Cunningham and Mr. Burick, and a memorandum of law [43-47, 48-60, 61-64, 65-67, 68-79]. In response, Petitioner served an affirmation and a memorandum of law [80-94]. After the return date, Respondents served a transcript of the subject Town meeting and the resumes of Mr. Cunningham and Mr. Burick [95-200].

After considering these materials, as well as additional subsequent correspondence [18, 201-210], Supreme Court, Albany County (McNamara, J.), (1) dismissed that portion of the petition/complaint seeking to annul the appointment of Mr. Cunningham; (2) dismissed as academic those portions seeking a declaration that (a) the position of Commission of Public Works is vacant and (b) that Mr. Cunningham repay his salary and benefits; and (3) denied that portion seeking to annul the appointment of Mr. Burick, but directed that the Town amend the subject resolution to provide that the appointment of Mr. Burick was for the duration of the unexpired term of his predecessor [8-18].

Petitioner now appeals from the judgment [3].

ARGUMENT

Where the interpretation of a statute or its application is "one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise" of a town board (Kurcsics v Merchants Mut. Ins. Co., 49 NY2d 451, 459 [1980]). In such cases, "the judiciary need not accord any deference to the [board's] determination, and is free to ascertain the proper interpretation from the statutory language and legislative intent" (Matter of Gruber [New York City Dept. of Personnel – Sweeney], 89 NY2d 225, 231-232 [1996]). "The issue is simply whether the [board] properly analyzed the law" (New York Times Co. v New York Com. on Human Rights, 41 NY2d 345, 349 [1977]).

Similarly, when carrying out its duties, a board may not act in an arbitrary or ignorant manner (see Matter of Kopf v Nulty, 26 AD3d 380, 380 [2d Dept 2006]; Kopf v Nulty, 306 AD2d 483, 483 [2d Dept 2003]; Argyle Zoning Com. v Argyle, 173 AD2d 1060, 1060-1061 [3d Dept 1991]; Crotty v New Windsor, 103 Misc 2d 378, 378-382 [Sup Ct, Orange County 1980]; see also CPLR 7803; Mapes v Swezey, 279 AD 660, 660 [2d Dept 1951]; Sulli v Board of Supervisors, 24 Misc 2d 310, 310-316 [Sup Ct, Monroe County 1960]).

As explained below, the Board erred in its application of law, and its hiring of Mr. Cunningham was arbitrary and capricious. The decision of the trial court denying that portion of the petition that sought to annul his appointment should be reversed.

I. MR. CUNNINGHAM'S APPOINTMENT WAS VOID BECAUSE HE FAILED TO SATISFY THE RESIDENCY REQUIREMENTS

Under Section 3 (1) of the Public Officer's Law, town officers must reside in the town in which they serve. The Commissioner qualifies as an officer and is therefore subject to the residency requirement. Similarly, Section 23 (1) of the Town Law requires town officers to be a town resident. On this ground too, the Commissioner is subject to the residency requirement.

In the face of this authority, the trial court held that the Commissioner was not subject to any residency requirement because the Subject Local Law creating the position contains no such express requirement [9-11]. As explained below, however, the relevant provisions of the Town Law and Public Officers Law are general laws, not special laws, which the Town could not amend without the approval of the State Legislature. Moreover, even if the relevant statutory provisions were considered to be special laws capable of modification by local law, the Subject Local Law does not purport to amend or supersede state law, and the Court of Appeals has made clear that such intent must be expressly declared. Finally, under the trial court's reading, the Subject Local Law imposes no residency requirement at all, which is contrary to State law.

The Board breached and abrogated its obligation to the public. Mr. Cunningham does not and cannot meet the qualifications for the subject position. As such, his appointment was illegal, void and must be reversed.

A. As an Appointed Officer, the Commissioner Must Reside in the Town

1. Background

Prior to 1996, the Town maintained the required position of Highway Superintendent [36] (see Town Law § 20). As a town/public officer, the Highway Superintendent was subject to a residency requirement (see Town Law §§ 20 [1]; 23 [1], [10 (sub 3)]; Public Officers Law §§ 2; 3 [1], [40 (sub 4)]; 30 [1] [d]; Youngman v Oneonta, 204 AD 96, 97 [3d Dept 1923]; Weiler v

Osceola, 51 Misc 2d 163, 165 [Sup Ct, Lewis County 1966], affd 29 AD2d 737 [4th Dept 1967] [Highway Superintendent "is a town officer"]; see also People v Ryan, 12 AD2d 841, 841 [3d Dept 1961]).

In 1996, the Town sought to "abolish" the elective office of Highway Superintendent [36]. Upon the voters' approval, by Local Law No. 14-1996, the Board created the Department of Public Works ("Department") and the position of Commissioner of Public Works [36-39, 209] (see Town Law §§ 64 [21-a]; 32 [1]; see also Op. Atty. Gen. [Inf.] 94-43 [concluding that towns outside of Suffolk County may authorize their elected highway superintendents to be the administrative heads of their departments of public works]). The Subject Local Law provides that the "Commissioner shall have the powers and duties of the Highway Superintendent, pursuant to the Highway Law" [37] (see Highway Law § 140). The official job description similarly states that the Commissioner is also "the appointed Highway Superintendent of the Town of Colonie. As the 'Highway Superintendent' the incumbent shall exercise all statutory authorities of that position as described in law, rule or regulation" [40].

Mirroring Town Law § 64 (21-a), the Subject Local Law provides that the Commissioner shall be the "administrative head" of the Department "appointed" on the basis of "administrative experience and qualifications for the duties" of the office [37, 209]. It also contains provisions regarding the Department's funding and organization (including the placement of certain bureaus and divisions under its control); the transfer rights of transferred employees; and the non-delegation of the Board's powers [37-39] (see Town Law § 64 [21-a]).

While the Subject Local Law does not mention the Commissioner's term period or salary, the resolution appointing Mr. Cunningham reflects that the term period (two years until the end

of the calendar year) and salary (fixed by the Board at over $100,000) similarly follow Town Law § 64 (21-a) [34, 209] (see also Town Law §§ 53-a; 53-c).

Unlike Town Law § 64 (21-a), however, the Subject Local Law expressly requires the Commissioner to take an Oath before entering office, as is required by other town/public officers [39] (see Town Law § 25; Public Officers Law §§ 10; 30 [h]). While the record fails to disclose the basis for this inclusion, the Oath provision was presumably added to clarify the Commissioner's status as a town/public officer in light of Town Law § 20's failure to expressly reference the position.

The Subject Local Law, like Town Law § 64 (21-a), does not mention residency at all, and it contains no language purporting to set out an exclusive list of minimum qualifications. In fact, the Subject Local Law neither refers to any of the relevant statutory provisions regarding residency [37-39] (see Town Law §§ 20; 23; Public Officers Law § 3), "nor does it contain any declaration of intent to" amend or supersede those statutory provisions (Kamhi v Yorktown, 74 NY2d 423, 435 [1989]; see Municipal Home Rule Law § 22 [1]; Walker v Town of Hempstead, 190 AD2d 364, 373-374 [2d Dept 1993]; Op. Atty. Gen. [Inf.] Nos. 2000-5; 97-11).

2. The Commissioner is an Appointed Officer

Section 3 (1) of the Public Officers Law provides that "[a]n appointed officer of a town must reside within the town at the time of his or her appointment and during his or her tenure in office" (Op. Atty. Gen. [Inf.] No. 95-5; see Public Officers Law §§ 3 [1], [16], [40 (sub 4)]; 30 [1] [d]; Op. Atty. Gen. [Inf.] No. 85-59; 1963 Op. Atty. Gen. [Inf.] 121).

Similarly, Town Law §§ 20 and 23 provide that "[e]very appointive officer of a town at the time of his or her appointment and throughout his or her term of office must be an elector of the town. An elector of the town is a resident of the town who is eligible to register to vote in

town elections" (Op. Atty. Gen. [Inf] No. 97-11 [citations omitted]; see Op. Atty. Gen. [Inf] Nos. 2000-5; 87-52; 1963 Op. Atty. Gen. [Inf.] 121; see also Town Law § 23 [10 (sub 3)]; Matter of Sullivan, 279 NY 364, 368 [1939] ["To be eligible to (serve as a town attorney, the person) was required to be an elector of the town at the time of his appointment and throughout his term of office"]; Matter of Haller, 42 AD2d 829, 829-830 [4th Dept 1973]).

While neither Respondents nor the trial court addressed the issue, the Commissioner is plainly an appointed officer of the Town. An "officer" status for residency purposes is not confined to those required officer positions enumerated in Section 20 of the Town Law (see Town Law § 20; Matter of Gaylord Disposal Servs, 175 AD2d 543, 544-545 [3d Dept 1991] [building inspector]; Op Atty Gen [Inf] No. 2006-7). Rather, the determination of who is an officer "requires consideration of the powers, duties, qualifications and other characteristics of the position" (Op Atty Gen [Inf] No. 2006-7). The "indicia of status as an officer," for example, include:

> "the statutory designation of the position as an 'office,' the requirement to take an oath of office or file a bond, the appointment for a definite term, and receipt of a commission of office or official seal. Courts have also noted that a public office is a position created by and the powers and duties of which are prescribed by statute. Most importantly, the duties of a public official involve some exercise of sovereign power. Moreover, in contrast to an employee who acts at the direction of others, a public officer is vested with discretion as to how he performs his independent duties" (id. [citations omitted]; see also Matter of Haller, 42 AD2d at 829-830).

The Commissioner bears all of the indicia of a public officer. The Commissioner must take an oath of office, and he or she is appointed for a fixed term of two years [34, 209] (see Town Law § 53-c). The Commissioner's post, moreover, was created by statute, and the powers

and duties of the Commissioner are prescribed by statute [34, 37-42, 209] (see Town Law §§ 20; 53-a; 53-c; 64 [21-a]; Highway Law § 140).

In addition to these indisputable indicia of officer status, and "most important[]" for consideration (Op Atty Gen [Inf] No. 2006-7), the Commissioner exercises some sovereign power and "is vested with discretion as to how he performs his independent duties" (id.) Most fundamentally, the Commissioner acts as the appointed Highway Superintendent and "shall have the powers and duties of the Highway Superintendent, pursuant to the Highway Law" [37, 40] ["The Commissioner of Public Works is also the appointed Highway Superintendant for the Town of Colonie" and "exercise(s) all statutory authorities of that position as described in law, rule or regulation"]). As such, the Commissioner possesses all the "powers and duties" of the Highway Superintendent, who is indisputably a town/public officer [37, 40] (see Town Law §§ 20; 23; Public Officers Law §§ 2; 3 [1], [40 (sub 4)]; 30 [1] [d]; Youngman v Oneonta, 204 AD 96, 97 [3d Dept 1923]; Weiler v Osceola, 51 Misc 2d 163, 165 [Sup Ct, Lewis County 1966], affd 29 AD2d 737 [4th Dept 1967] [Highway Superintendent "is a town officer"]; see also People v Ryan, 12 AD2d 841, 841 [3d Dept 1961]).

Given the fact that a Highway Superintendent is a town/public officer, the Commissioner, who bears the powers and duties of the Highway Superintendent and other independent duties, a fortiori is a town/public officer (see e.g. Rupert v West Seneca, 293 NY 421, 427 [1944] ["Commissioners of highways, have by the statute, the care and superintendence of highways (and) are independent public officers"]; Wright v Shanahan, 149 NY 495, 495 [1896] [appointed superintendent of public works constituted a public officer]; Robinson v Chamberlain, 34 NY 389, 389 [1866]; Op. Atty. Gen. [Inf.] No. 2006-7; cf. Town of Ramapo, 36 PERB 4006 [2003] [Director of Public Works formulated policy and exercised independent judgment]).

In addition to the full powers and duties of the Highway Superintendent, the Commissioner has even broader responsibilities. Indeed, the Commissioner is the principal executive officer and administrative head of the Department; oversees the Town's engineering, solid waste, highway, water and sanitary sewer function; and directs and controls the five Bureau/Divisions: the Bureau of Engineering, the Division of Environmental Services, the Division of Highway, the Division of Latham Water and the Division of Pure Waters [37-38, 40]. The Commissioner's role in all of these functions is not strictly administrative. To the contrary, the Commissioner has "comprehensive policy responsibility" for these functions [40].

Accordingly, the Commissioner is an officer and, pursuant to Public Officers Law § 3 and Town Law §§ 20 and 23, must reside in the Town.

B. The Subject Local Law Did Not Invalidate the Residency Requirement

1. The Statutes at Issue are General State Laws that the Subject Local Law Could Not Amend

Respondents below asserted, and the trial court implicitly concluded, that Town Law §§ 20 and 23 and Public Officers Law § 3 were "special laws" with respect to the residency requirements for town commissioners of public works and that the Town was therefore free to modify them. Neither Respondents, nor the trial court, however, cited any applicable authority for this proposition.

Although towns may modify a special State law[2] to some extent, it is well settled that towns may not modify a general State law which in terms and in effect applies alike to all towns (see Brown, 303 NY 484, 488 [1952] ["Inasmuch as (a town) is a creature of the Legislature, the power that the Legislature wields over a (town) is supreme and transcendent"]; Sullivan, 279 NY

[2] As relevant here, a "special law" is "a state statute which in terms and in effect applies to one or more, but not all . . . towns" (Municipal Home Rule Law § 2 [12]).

364, 369 [1939] ["No power was granted to the town board by the Legislature to change the length of the term of office, without which the town board could not affect the duration of the term of the appointee"]; see also see Municipal Home Rule Law § 2 [5] [defining "general law"]).

Applying these principles to the residency provisions, the Attorney General has opined that Town Law §§ 20 and 23 and Public Officers Law § 3 are "rendered [] 'special' law[s] only to the extent of an exception created by the State Legislature for a particular office" (Op. Atty. Gen. [Inf.] No. 89-14 [emphasis added]).

The State Legislature, however, has not created any exceptions to the residency requirement for the position of town commissioner of public works, and neither Respondents below nor the trial court cited any such exception. In the absence of any such exception, Town Law §§ 20 and 23 and Public Officers Law § 3 clearly apply in terms and in effect alike to all towns with respect to the office of town commissioner of public works and are therefore not "special laws" (see id.; compare Op. Atty. Gen. [Inf.] Nos. 2000-5; 88-27; 87-52). Rather, they are general laws that a town cannot amend (see Op. Atty. Gen. [Inf.] No. 89-14).

As support for their assertion below that Town Law §§ 20 and 23 and Public Officers Law § 3 constituted special laws with respect to the residency requirements applicable to the Commissioner, Respondents cited informal opinions of the Attorney General pertaining to town highway superintendents [69-70] (see e.g. Op. Atty. Gen. [Inf.] Nos. 2000-5; 87-52). These opinions were based on a prior amendment that carved out a residency exception for the highway superintendent of the towns of New Castle and Pound Ridge (see Town Law § 23 [2], [10 (sub 3); Public Officers Law § 3 [16], [40 (sub 4)]). As explained above, however, the Commissioner has broader responsibilities than those of the highway superintendent. Even if the residency

requirement as to the town highway superintendent were a special law, it would not support the conclusion that the broader office of the town commissioner of public works is likewise subject to a special law. In any event, the State Legislature's carve-out was not intended to freely permit other towns to broaden the residency requirement. In fact, when the State Legislature provided for a carve out in 1998, it expressly provided that the broadening of the residency requirements for any other town highway superintendents would require an "act of the state legislature" (see Town Law § 23 [10 (sub 3)] ["the person performing the functions of town superintendent of highways in any other town shall be an elector of such town, unless otherwise provided by an act of the state legislature" (emphasis added)]; accord Public Officers Law § 3 [40 (sub 4)]).

The provisions of the Town Law §§ 20 and 23 and Public Officers Law § 3 constitute general laws as applied to town commissioners of public works and even as to town highway superintendents. Given that Respondents below failed to reference any "act of the state legislature" authorizing the Town's purported modification, the trial court's reading is contrary to the State legislative mandates as well as the clear State legislative intent expressed by these provisions. Such an interpretation should not be adopted by this Court.

2. The Subject Local Law Does Not Purport to Invoke the Town's Supersession Powers

Even if Town Law §§ 20 and 23 and Public Officers Law § 3 were read to constitute special laws as to the residency of the commissioner of public works, the Subject Local Law did not purport to amend them for purposes of the residency requirement. Indeed, although Respondents below cited the principle that a town may pass a law inconsistent with a special (as opposed to a general) State law, they ignored the requirement that the municipality "specify the provision it intends to change or supersede" (Op. Atty. Gen. [Inf.] No. 97-11; see Municipal

Home Rule Law § 22 [1]; Kamhi, 74 NY2d at 435; Walker, 190 AD2d at 374; Op. Atty. Gen. [Inf.] No. 2000-5).

The Court of Appeals recently emphasized the need for a municipality "invoking its supersession authority" under Municipal Home Rule Law § 22 (1) to "state its intention with definiteness and explicitness – hardly an insignificant matter, in that there is otherwise no way of knowing what the locality intends, or what law governs" (Kamhi, 74 NY2d at 434-435; see Walker, 190 AD2d at 374). In language particularly applicable here, the Court of Appeals added that a "clear statement avoids the confusion that would result if one could not discern whether the local legislature intended to supersede an entire State statute, or only part of one -- and, if only a part, which part" (Kamhi, 74 NY2d at 435 [internal quotation marks and citations omitted]; see Walker, 190 AD2d at 374; Op. Atty. Gen. [Inf.] Nos. 2000-5; 97-11).

In Kamhi, the Court of Appeals invalidated the town's purported supersession of Town Law § 274-a based on its failure to comply with the formal requirements of the Municipal Home Rule Law (Kamhi, 74 NY2d at 435). Critically, like the Subject Local Law, the local law at issue there did not expressly amend or supersede the Town Law and contained no declaration of intent to do so (id.).

Here, the Subject Local Law says nothing about residency [37-39]. In fact, the Subject Local Law contains no mention of any of the relevant statutory provisions regarding residency [37-39] (see Town Law §§ 20, 23; Public Officers Law § 3), "nor does it contain any declaration of intent to" amend or supersede those statutory provisions (Kamhi, 74 NY2d at 435). For example, "[n]owhere does it define by reference to chapter and section number, or by reference to title, or by replication of actual text, the particular provision(s) of the Town Law" or Public Officers Law "to which it purports to apply" (id. [internal quotation marks and citations

omitted]; see Municipal Home Rule Law § 22 [1]; Walker, 190 AD2d at 374). While Section 22 of the Municipal Home Rule Law "provides that failure to comply punctiliously with every specification requirement will not invalidate a local law, here the local law reveals nothing of the Town's intention to amend or supersede and consequently must be declared invalid" to the extent it allegedly seeks to modify the statutory residency requirements (id. [emphasis added]; see also Matter of Charles' Estate, 200 Misc 452, 461 [Sur Ct, New York County 1951], affd 279 App Div 741 [1st Dept 1951], affd 304 NY 776 [1952] ["Exceptions extend only so far as their language fairly warrants, and all doubts should be resolved in favor of the general provision rather than the exception. Where a general rule is established by statute with exceptions, the court will not curtail the former nor add to the latter by implication, and it is a general rule that an express exception excludes all others" (internal quotation marks and citations omitted)]).

Similarly, the Subject Local Law's complete silence as to the extent of the alleged broadening of the residency requirement (for example, from town to county or adjacent county) further belies Respondents' assertion. The Town's silence evidences the fact that the Subject Local Law (modeled after Town Law § 64) was not intended to change the residency requirements. The Subject Local Law, like Town Law § 64 (21-a), does not reference residency for the simple reason that three separate provisions already address it (see Town Law §§ 20; 23; Public Officers Law § 3).

Indeed, in the absence of any language establishing any residency requirement, the reading of the Subject Local Law advanced by Respondents below and adopted by the trial court contravenes even the Attorney General's opinions that approve only the broadening of residency requirements (see Op. Atty. Gen. [Inf.] Nos. 89-14). As construed by the trial court, the Subject Local Law completely eliminates any residency requirement altogether, and could even allow

individuals residing outside the State to hold the Town's officer position (compare Op. Atty. Gen. [Inf.] Nos. 2000-5; 87-52; 88-27 [regarding a town's ability to "broaden" the residency requirements]).

Contrary to the trial court's reading, the State has restrained towns from completely eliminating residency as a qualification (see Public Officers Law § 3; Town Law § 23). For example, Public Officers Law § 3 (16) provides that the town highway superintendent and town engineer of New Castle may reside in the county in which the town is located or an adjoining county within the state of New York. This provision also permits the town of New Castle to broaden these broadened residency requirements even further. However, the provision expressly mandates that the person performing these town positions "must be [at least] a resident of New York state" (Public Officers Law § 3 [16]; see also Public Officers Law § 3 [1]). It is simply unreasonable to assume that the State intended to permit the Town of Colonie to completely eliminate residency as a qualification when it expressly prohibited other towns from doing so (see Public Officers Law § 3 [1], [16]). Indeed, any purported attempt to do so without an act of the State Legislature would be invalid (see Brown, 303 NY at 488; Sullivan, 279 NY at 369; Op. Atty. Gen. [Inf.] No. 89-14; see also Winkler v Spinnato, 134 AD2d 66, 67-68 [2d Dept 1987], affd 72 NY2d 402 [1988] [upholding the State's "traditional policy of requiring certain employees of local governments to reside within or near the political unit in which they serve"]).

3. The Appointment of Mr. Cunningham is Void

Because Mr. Cunningham is not a resident of the Town, his appointment was in violation of the applicable residency requirements and should be void. Accordingly, the decision of the trial court should be reversed, and that part of the petition seeking to annul Mr. Cunningham's appointment should be granted.

II. MR. CUNNINGHAM'S APPOINTMENT WAS VOID BECAUSE HE LACKED ANY ENGENEERING QUALIFICATIONS

The appointment of Mr. Cunningham should be annulled for the additional reason that he lacked the express minimum qualifications for the position [37-38, 40, 42]. The Commissioner directs and controls the Bureau of Engineering. He also assumes responsibly for the water, sewer and transportation of the Town, each of which require technical decisions that Mr. Cunningham is unqualified to make [37-38, 40, 42] (see Education Law §§ 7201; 7202).

Respondents below did not dispute that Mr. Cunningham did not possess the required education or licensing [96-98]. Rather, they disavowed the statutory mandates of Education Law §§ 7201 and 7202 and the plain language of the Town's job description and asked the trial court to hold that these requirements were "merely a suggestion of desired characteristics" [74]. As a fallback, they asserted that the mandates of the Education Law and the job description, published by the Town official empowered to issue such descriptions, were somehow not legally binding on the Town. These arguments are baseless.

A. To Be Qualified and Capable of Fulfilling His Duties as Commissioner, Mr. Cunningham Must Be Capable of Engaging in the Practice of Engineering

Because the Commissioner acts as a supervisor of engineers and participates in making technical decisions, Education Law §§ 7201 and 7202 additionally require the Commissioner to be qualified to engage in the practice of engineering, something which Mr. Cunningham was not qualified to do [96-98].

Section 7201 of the Education Law defines the practice of engineering as follows:

> "Performing professional services such as consultation, investigation, evaluation, planning, design or supervision of construction or operation in connection with any utilities, structures, buildings, machines, equipment, processes, works, or projects wherein the safeguarding of life, health and property is

> concerned, when such service or work requires the application of engineering principles and data."

In addition, Education Law § 7202 forbids individuals from engaging in the practice of engineering or using the title "professional engineer" without being licensed or otherwise authorized by law.

Here, the Town Code requires the Commissioner to perform several duties which, if performed by Mr. Cunningham, would be considered a violation of Education Law §§ 7201 and 7202. For example, the duties of the Commissioner of Public Works involve overseeing the Town's engineering, highway, water and sanitary sewer functions and directing and controlling the powers and duties of the Bureau of Engineering. The Board failed to explain how Mr. Cunningham was qualified in light of these State (general) laws prohibiting him to perform the duties of the office.

B. Mr. Cunningham Lacked the Minimum Qualifications.

Second, apart from the statutory requirement, the plain language of the job description identifies the holding of a degree and license under the heading of "Minimum Qualifications" [40]. The job description goes on to list the skills and abilities to include "comprehensive knowledge of the civil engineering practices and procedures applied in a municipal department of Public Works" [40]. The language establishing minimum qualifications could hardly be clearer.

Respondents below cited the phrase in the job description, "For purposes of salary administration[,]" as evidence that the listed qualifications were merely "credentials to be considered when determining the Commissioner's salary" [74]. Nothing in the job description supports the suggestion that the "minimum qualifications" were in fact solely salary considerations. In fact, the broad range of responsibilities listed in the job description and cited

by the trial court all involve coordination and oversight of projects with the Department of Public Works, including "Direct[ing] activities of Engineering Section" [40].

In the trial court, moreover, Respondents cited no evidence to support their assertion that the minimum qualifications were intended solely for salary considerations. Under Respondents' readings, Mr. Cunningham's lack of an engineering degree and license should have been a negative factor in the setting of his salary. The record, however, is devoid of any evidence of any consideration of Mr. Cunningham's lack of credentials in the setting of his salary. For that matter, the record contains no evidence to suggest that any of the minimum qualifications listed in the job classification were used as salary considerations.

C. The Board's Appointment of Mr. Cunningham was Arbitrary and Capricious

The Board's hiring of Mr. Cunningham in the face of his failure to satisfy the minimum qualifications was arbitrary and capricious. This is true even if the Court were to construe the minimum qualifications as non-binding guidelines. The degree and licensing requirements are relevant because the Commissioner of Public Works oversees the Town's sanitary landfill, public drinking water, the collection and treatment of raw sewage and subsequent discharge of water into the Mohawk River, and the collective safety of the general public on Town roads [37-40, 42]. He also supervises licensed engineers [37-40, 42]. In the absence of an engineering degree and license, Respondent Cunningham cannot perform technical guidance in any of these areas, and he cannot perform any engineering review for these complex departments that affect public health, safety and welfare [42]. These concerns are confirmed by the opinion of the New York State Society of Professional Engineers, which expressed its opinion that Mr. Cunningham's performance of the job "jeopardizes public safety [and] potentially burdens the Town form a liability standpoint" [42].

As explained above, the job description, at a minimum, reflects the interpretation of the relevant statutory authority by the Town official empowered to administer it. The Board cannot disavow the minimum qualifications explicitly set out by the Town official empowered to issue such job descriptions.[3] Carried to its logical end, Respondents' position would render the job description superfluous. Moreover, the Town argues not only that the minimum qualifications can be disregarded, but that it need not state why or how. The court below accepted Respondents' invitation to sanction such action. It is respectfully submitted that the judgment should be reversed and that the petition should be granted (see e.g. Matter of Warner v Elmira Coll., 59 AD3d 909, 909 [3d Dept 2009]; Hudson Falls Cent. Sch. Dist. v Saratoga County Indus. Dev. Agency, 217 AD2d 330, 330 [3d Dept 1995]).

[3] Notably, the trial court also reasoned that these minimum qualifications were inapplicable because the position involved the unclassified service [11-12]. The fact that the position was unclassified, however, did not permit the Board to ignore the Town's long-standing interpretation of the qualifications as reflected in the job description.

III. MR. CUNNINGHAM HAS RECEIVED AN UNCONSTITUTIONAL GIFT OF PUBLIC FUNDS

The New York State Constitution prohibits the provision of public funds as a gift to any individual (see Const Art VIII, § 1). As Mr. Cunningham was not legally appointed to the position of Commissioner of Public Works, the Town cannot compensate him. Such compensation is an unconstitutional gift of public funds. The Board must take all actions necessary to dispossess Mr. Cunningham of his office, obtain all Town property and materials in his possession, and recover any salary monies and benefits heretofore paid to him to fairly compensate the residents and taxpayers of the Town for their loss. The Board is obligated to recover said funds.

Accordingly, if the Court reverses the decision of the trial court with respect to the appointment of Mr. Cunningham for the reasons set forth in Section I or II, herein, the Court should further grant that part of the Petition that sought a judgment directing Mr. Cunningham to repay any and all monies and benefits received from the Town.

IV. THE COURT BELOW FAILED TO ADEQUATELY CORRECT THE ILLEGALITY REGARDING MR. BURICK'S APPOINTMENT

Civil Service Law § 15 (1) (b) establishes the (appointive) position of Personnel Officer and sets a six-year term. However, when a vacancy occurs (for example, from retirement), the Town Law permits the Board to "appoint a qualified person to fill the vacancy" for "the remainder of the unexpired term" (Town Law § 64 [5]).

Respondents below did not dispute that Mr. Burick was appointed as Personnel Officer for a term in excess of the unexpired term of his predecessor. Rather, Respondents attempted to justify their action by citing language in Civil Service Law § 15 (1) (a) that states that the commissioner of a municipal civil service commission can only be appointed to the unexpired term of the predecessor, and by then citing the absence of such language in Civil Service Law § 15 (1) (b) as to Personnel Officers.

As the trial court held, however, the language upon which Respondents relied was taken out of context. Section 15 (1) (a) addresses municipal civil service commissioners, who serve on staggered terms. The language clarifies that when a vacancy is filled, the commissioner must serve the unexpired term of the predecessor commissioner. Otherwise, the staggering of terms would be upset. No such concerns apply with regard to Personnel Officers, so the absence of parallel language in Section 15(1) (b) is of no moment. Given the lack of merit regarding Respondents' assertion, the court below correctly ruled that no conflict existed between Civil Service Law § 15 (1) (b) and Town Law § 64 (5) (cf. Civil Service Law § 24 [1], [4]).

However, while the trial court correctly acknowledged the illegally, it nevertheless failed to adequately remedy it. Rather than declaring the position vacant, the trial court simply invited the Board to adopt a new resolution appointing Mr. Burick to the unexpired term. While it might have seemed more convenient to reappoint Mr. Burick, the fact remains that his possible re-

appointment concerns a matter for the Town residents and Board, and not for the judicial branch of government. Moreover, given the passage of time, the record does not reflect whether Mr. Burrick remained the most qualified candidate at the time his position became vacant due to the court's holding. The court should have at least allowed the Board to pass another resolution on its own (or at least discuss the matter) before judicially mandating Mr. Burick's re-appointment. Accordingly, it is respectfully submitted that this Court should declare the position vacant.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that the Court modify the order and grant the petition, together with the costs and disbursements of this proceeding.

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