Discretionary Powers of the Chief Fiscal Officer Under Bond Resolutions

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FINANCING NEW TECHNOLOGY EQUIPMENT IN COUNTIES

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Here is a list of technology capital equipment that can be financed by a town by the issuance of bond anticipation notes or bonds and their statutory periods of probable usefulness ("PPU") which sets the limit for the maximum period of time over which they can be financed:

	Equipment	PPU
(1)	(a) Equipment relating to new or reconstructed sewer or water facility project	(a) 40 years
	(b) Water meters and related communication devices (unless as part of larger project, then 40 years)	(b) 20 years
	(c) Water system replacement equipment only	(c) 40 years
	(d) Sewer system replacement equipment only	(d) 30 years
(2)	Equipment relating to electric light or power facilities, or gas producing or steam producing facilities	30 years
(3)	(a) Sanitary landfill equipment (e.g., monitoring)	20 years
	(b) Equipment for solid waste management/resource recovery	25 years
(4)	Equipment relating to control of lighting, plumbing, air-ventilating, elevators or in-building power plants or systems	10 years*
(5)	Equipment relating to control of heating systems	15 years*
(6)	Either of (4) or (5), but also involving building modifications, additions, and/or reconstruction, or construction of a new building or other facility	10-30 years*
(7)	(a) Police and fire alarm, signal or other communication systems, including computer aided dispatch systems	(a) 20 years
	(b) Medical, communication and other equipment for an ambulance	(b) 10 years (5 years if purchased later, separately from ambulance)

* Can vary depending on whether building is fire proof, fire resistant, or neither.

(8)	Equipment for installation in new motor vehicles, including surface transit vehicles, or ferry boats, or in new highway and other maintenance equipment, as part of original delivery and needed for performance of their function	5-15 years (same useful life as vehicle installed in, as incidental and needed for function of the new vehicle/maintenance equipment)
(9)	New voting machines and related electronic equipment including for personal registration of voters	10 years
(10)	New parking meters and related equipment	5 years
(11)	Equipment for preparation of assessment rolls, tax billing and receipts, and accounting and tabulation	5 years (10 years if computer hardware and software is involved)
(12)	Equipment for digital image preservation of local records	5 years
(13)	(a) New electronic traffic signal equipment and systems (b) New electronic traffic signs including supports (c) County parkway facility equipment	(a) 20 years (b) 10 years (c) 25 years
(14)	Financial management and accounting systems (computer based or assisted)	10 years (software: 5 years)
(15)	911 communication and computer equipment, including cellular emergency 911 program equipment	10 years
(16)	The acquisition or development of an "intangible asset that is classified as a capital asset" under GAAP and has been determined by an engineer or other professional to have a 5-year or longer useful life.	5 years
(17)	Any other equipment, machinery, apparatus or technological/ electronic "furnishings" needed for use in connection with the functions of a physical "public betterment" or improvement (e.g., a building, park or other facility)	5 years (10-15 years may be possible with engineer or other professional determination for a substantial addition to same not covered elsewhere)

Note: This list is not exhaustive in that technological capital equipment may fit in as part of the cost of other types of capital improvements or contexts, as an incidental cost. Contact your bond counsel on this point, and also on what to do when you need to buy a computer and/or related equipment and it just doesn't seem to fit in any of the above noted categories and purposes.

Constitutional and Local Finance Law Considerations in Financing Joint Municipal Projects in New York State

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Introduction. The purpose of this article is to address Local Finance Law ("LFL") and related State Constitutional Law considerations in the financing of joint municipal projects, looking at projects shared by two or more local governmental units as well as projects in which one or more municipalities propose to share a facility with a non-governmental entity on a joint basis. As an example, to illustrate the various considerations, assume the following:

It is proposed that a village purchase a small free standing office building with parking lot at a location within the village ideally suited to its purposes (the "Property") with the proceeds of a village general obligation bond issue and contributed monies from a town and a county to serve as a shared municipal facility with excess space to be leased to for profit and not-for-profit entities and the United States Postal Service (the "Project"). It is reasonably estimated that village use of the Property would not constitute a majority of the available usable built space and that the village would incur some costs in converting the building from its present configuration to its intended municipal and other uses. The Project makes a good deal of sense to the municipalities both for the cost-savings of a shared building and the support for operations and maintenance expenses from leases with retail commercial or office users of excess space. In a time of severe fiscal constraint, many municipalities may be considering such joint projects to ease costs or considering the lease of portions of municipal real property for income. We will look at this from the point of view of the village but the same fundamental rules apply to the other involved municipalities.

Three legal elements will be discussed:

1. Is the Project a valid village purpose?

2. Would a bond-financed funding of the Property be a loan of the credit of the village?

3. If it is a valid village purpose which may be bond-financed, what options would the village and the other municipalities have for bonding the cost of the project?

These same questions would apply equally to a town or county (or a city or school district) participating in the Project and financing its share.

The Brief Answers.

1. The Project is a valid village purpose if the Property is to be predominately used by the village, the town and the county.

2. It would be an impermissible lending of credit to borrow on a village general obligation bond basis for such purpose in the facts and circumstances presented unless the portions to the utilized (a) by the town and county are paid for by the contributions of same, and (b) the use by non-governmental users was incidental to municipal use, was for fair market value and was for a temporary period of time until needed for municipal use.

3. There are three permitted methods of financing the Project plus two additional ways that seem conceptually possible but one of which is unconstitutional in most cases and the other of which is part of a larger difficult decision. Then, depending on the extent of non-governmental use, all or a portion of the financing may have to be done on a federally taxable basis.

   Why?

Constitutional Requirements. Limitations on local government indebtedness are set forth in Article VIII of the New York State Constitution and are implemented by the Local Finance Law. The provisions of Article VIII are generally applicable to all counties, cities, towns and villages in the State and the obligations authorized by their legislative bodies in their capacity as the respective finance board. Each unit of local government has a constitutionally established debt limit and there are constitutionally based rules on the loan of municipal credit, uses of borrowed monies and the pledge of faith and credit to that debt.

Loan of Credit Prohibition

Article VIII, Section 1 of the Constitution provides that no county, city, town, village or school district shall give or loan any money or property to or in aid of any individual or private corporation, association or private undertaking nor shall any such local governmental unit give or loan its credit to or in aid of any of the foregoing or any public corporation. There are limited exceptions to the general rule that local governmental units cannot give or loan money, property or credit for other than governmental purposes, generally relating to health, safety and welfare matters, but one exception is for joint projects involving more than one municipal unit of government (and another is for water, sewer and drainage projects). Incidental private benefit is permissible and there is an abundance of case law on its limitations (hereinafter discussed).

Valid Purpose Requirement

Article VIII, Section 2 of the Constitution provides that no county, city, town, village or school district shall contract indebtedness except for a county, city, town, village or school district purpose, respectively. For example, a village can only borrow money to do things that a village is permitted to do; therefore, a village cannot borrow money to construct an elementary school as that is a school district function or to construct a department store as a village does not have authority to operate a department store. No such indebtedness is to be contracted for longer than the period of probable usefulness of the particular purpose which is legislatively determined by the State in every case (or, in the alternative, the weighted average period of probable usefulness of several purposes if financed in the same obligation) for which it is contracted and in no event may this period exceed forty years.

Pledge of Faith and Credit

Article VIII, Section 2 of the Constitution also provides that each such local governmental unit including villages must pledge its faith and credit and make annual provision for the payment of the principal of and the interest on any of its indebtedness. This is the heart of a "general obligation" bond or note – the ability and promise to tax as necessary to repay the debt. All of the taxable real property within the village is subject to the levy of ad valorem taxes to pay principal and interest without limitation as to rate or amount. Counties, cities, towns, school and fire districts and villages in the State are only authorized to issue general obligation type debt. They cannot issue revenue bonds solely backed by a specific stream of revenue or bonds secured by a mortgage on property or any other type debt instrument including a simple bank loan. (The sole exceptions to the rule are lease-purchase obligations subject to appropriation, including energy performance contracts, which cannot involve the pledge of the faith and credit and therefore are not technically debt yet are generally subject to the same authorization requirements as debt.)

General Implementing Statutory Provisions. Sections 100.00 and 101.00 of the Local Finance Law contain the statutory counterparts of the Article VIII Sections 1 and 2 Constitutional provisions described above. They read simply and clearly:

> "**§100.00 Requirement of pledge of faith and credit**
>
> Every municipality, school district and district corporation shall pledge its faith and credit for the payment of all indebtedness contracted by it."

> "**§101.00 Giving or loaning of municipal credit and contracting indebtedness other than for municipal purposes prohibited**
>
> a. No municipality, school district or district corporation shall:
>
> 1. Give or loan its credit to or in aid of any individual, or public or private corporation or association, or private undertaking, or
>
> 2. Contract indebtedness except for the purposes of such municipality, school district or district corporation.
>
> Notwithstanding the foregoing provisions of this paragraph:
>
> 1. If any municipality or any county or town on behalf of an improvement district is authorized by a general law or by a special law (a) to provide a supply of water, in excess of its own needs, for sale to any other public corporation or improvement district, (b) to provide facilities, in excess of its own needs, for the conveyance, treatment and disposal of sewage, from any other public corporation or improvement district, or (c) to provide facilities, in excess of its own needs, for drainage purposes from any other public corporation or improvement district, the indebtedness contracted by the municipality for such an object or purpose shall be deemed to be for a county, city, town or village purpose, as the case may be.
>
> 2. If any two or more municipalities and county and town improvement districts are authorized by a general law or by a special law (a) to provide for a common supply of water, (b) to provide for the common conveyance, treatment and disposal of sewage or (c) to provide for a common drainage system, the joint indebtedness, or the several indebtedness for a specific proportion of the cost, contracted by the municipality for such an object or purpose shall be deemed to be for a county, city, town or village purpose, as the case may be.
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> 3. If any two or more municipalities and school districts and county and town improvement districts are authorized by a general law or by a special law to join together to provide any municipal facility, service, activity or undertaking which each of such units has the power to provide separately, the joint indebtedness, or the several indebtedness for a specific proportion of the cost, contracted by the municipality or school district for such an object or purpose shall be deemed to be for county, city, town, village or village district purpose, as the case may be."

It is also worthy of note in the present context of Article VIII, that Section 1 and Section 2-a of the Constitution and Title 1-A of the Local Finance Law specifically permit villages and cities, towns, counties or school districts to enter into joint facilities, services, activities and undertakings and contract joint or several indebtedness therefore, and for water, sewer or drainage projects only to contract the indebtedness of one issuer on behalf of multiple units of local government, as listed in Section 101.00 above, as further described below.

Valid Village Purpose. The first question with regard to a joint project is: Is it a valid purpose of the local governmental unit which wants to be involved? Case law and opinions of the Attorney General and State Comptroller have held that a municipality is authorized to purchase property in excess of immediate needs as a valid purpose, as follows:

(1) General Rules.

(a) A village cannot contract indebtedness except for a village purpose and cannot contract indebtedness for the benefit of any private party[1].

(b) A municipality cannot buy a building with the intent to lease same or a significant portion thereof for the foreseeable future absent special circumstances[2].

(2) Excess Property.

(a) Acquisition of real property in excess of immediate need does not negate a valid public purpose of a village, as to which a village may temporarily lease portions as long as the village reasonably expects to need the present excess in the foreseeable future for its own needs.[3] Absent need, the intentional purchase of real property may be construed as "waste" of public assets.[4]

(b) A local governmental unit may acquire/construct "excess" real property to the extent it reasonably expects to have valid a public purpose for its use within the reasonably foreseeable future. What is reasonably foreseeable? This is a "facts and circumstances" test but a rough rule of thumb would be 10-20 years.[5]

(c) If the "excess property" is such that it can only be purchased as part of a larger transaction which includes the real property required by the local governmental unit, and no other practical alternative exists, then the property may be acquired despite the lack of foreseeable need for the "excess" as long as there is an expectation to need most of the purchased real property within 15-20 years or a plan to sell off the "excess" expeditiously. [6]

(d) Construction or reconstruction of village facilities reasonably expected to be sold, or leased other than on a temporary basis until a village use develops, is not a valid object or purpose of a village. [7]

(e) A village is without authority to specifically acquire or construct or reconstruct real property for the sole intentional purpose of selling or leasing it to any third

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[1] Blomquist v. Orange County, 69 Misc 2d 1077 (1972); See also In re Mayor to Acquire Public Parks, 99 NY 569 (1885); Sun Printing and Publishing Ass'n v. Mayor, 8 AD 230 (1896) affirmed 152 NY 257 (1896); Chapman v. City of NewYork, 168 NY 80 (1901); Admiral Realty Co., v. City of New York, 206 NY 110 (1912); Saltzman v. Impellitteri, 305 NY 414 (1953); Opin. St. Compt. 80-389; 10 Opin St. Compt. 401 (1954). See also Bauer v. City of Niagara Falls, 262 AD 938 (1941) (municipality prohibited by Constitution from using its money for anything other than municipal purposes), Corning v. Village of Laurel Hollow, 48 NY 2d 348 (1979) (same).

[2] 1973 Opin. Atty. Gen. (Inf.) 219; Opins. St. Compt. 81-155, 81-197, 81-320, 80-389 (sale), 23 Opin. St. Compt. 773 (1967), 6 Opin. St. Compt. 284 (1950), 4 Opin. St. compt. 168 (1948).

[3] Op. Atty. Gen. (Inf.) 82-77.

[4] Bauer v. City of Niagara Falls, 262 AD 938 (1941).

[5] 4 Opins. St. Compt. 254, 484 (1948), 7 Opin. St. Compt. 328 (1951), Opins. St. Compt. 81-197, 81-203.

[6] 4 Opin. St. Compt. 254 (1948), Opin. St. Compt. 81-155.

[7] 4 Opin. St. Compt. 168, 254 (1948); 17 Opin. St. Compt. 535 (1961); 27 Opin. St. Compt. 113 (1971); Opins. St. Compt. 81-197, 81-203, 81-155.

party, including not-for-profit entity. Local governmental units are not permitted to be in the land investment business and are only in limited circumstances able to be in the landlord business.[8]

(f) There is an exception to the above rules as to not-for-profits. A temporary lease of acquired real property to a not-for-profit until development by the governmental unit is permitted[9]. A lease of real property to a not-for-profit as part of the consideration for same to provide a service and fulfill a municipal purpose need not be temporary[10]. If the lease of the real property is to a not-for-profit and is in connection with and is in furtherance of a valid public purpose, then the use of the real property can be part of the consideration for the not-for-profit to provide a public service to the governmental unit[11].

(g) Another exception is mandated improvements[12].

(h) And as described further herein, there is an exception for conveyance to other public corporations[13].

(i) Improvement of municipal facilities specifically to the benefit of a user other than the municipality is not permitted; incidental benefit to others is permissible in context of public benefit[14].

(3) Partial Commercial Use.

(a) A municipality cannot construct a bond-financed facility to be used partially for its own public uses, and partially for commercial rental[15].

(b) A municipality cannot repair or reconstruct real property used by or intended to be used by non-municipal entities[16].

(4) Not an Investment Property.

(a) A local governmental unit is without authority to specifically acquire or construct real property for the sole intentional purpose of selling or leasing it to any third party, including a not-for-profit entity. Local governmental units are not permitted to be in the land investment business and are only in limited circumstances permitted to be in the landlord business[17]. Local governmental units may not

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[8] 6 Opin. St. Compt. 124, 285 (1950), 20 Opin. St. Compt. 773 (1967), 30 Opin. St. Compt. 90 (1974), Opins. St. Compt. 67-468, 80-124, 81-320.
[9] 27 Opin. St. Compt. 113 (1971); See County Law Section 215 on lease term limits and 1956 Opin. Atty. Gen. (Inf.) 156, Opins. St. Compt. 80-400, 68-587, and 64-48 on local law options.
[10] 29 Opin. St. Compt. 113 (1973), 24 Opin. St. Compt. 670 (1968).
[11] 29 Opin. St. Compt. 113 (1973), 24 Opin. St. Compt. 670 (1968).
[12] Opin. St. Compt. 78-932 (unreported; Federal and State mandated improvement to Village hospital prior to conveyance permissible).
[13] 23 Opin. St. Compt. 597 (1967).
[14] Bloomquist v. Orange County 1972) 69 Misc. 2d 1077; Imburgia v. City of New Rochelle (3 Dept. 1996), 223 A.D.2d 44 leave to appeal denied 88 NY2d 815. Murphy v. Erie County (1971), 28 NY2d 80 reargument denied 29 NY2d 551; 4 Opin. St. Compt. 168 (1948).
[15] 10 East Realty LLC v. Inc. Village of Valley Stream, 17 AD 3rd 472 (2005); 4 Opin. St. Compt. 254 (1948).
[16] 4 Opin. St. Compt. 168 (1945), Opins. St. Compt. 68-732; 1967 Opin. Atty. Gen. (Inf.) March 15; 18 Opin. St. Compt. 147 (1962); Opin. St. Compt. 68-732; 1 Opin. St. Compt. 287 (1945) (municipality cannot borrow money to remodel portion of town hall to lease to private individual for use as movie theatre). But see Walrath v. City of Salamanca. 255 AD 158 (1938) (permitted so property can be sold or leased; note property never in municipal use); Opin. St. Compt. 78-932 (same).
[17] 6 Opin. St. Compt. 124, 285 (1950), 20 Opin. St. Compt. 773 (1967), 30 Opin. St. Compt. 90 (1974), Opins. St. Compt. 67-468, 80-124, 81-320.

use real property as an investment. General Municipal Law Section 10 and 11; Local Finance Law Section 165.00(b). The intentional purchase of unneeded real property may be construed as "waste" of public assets[18].

(b) There is an exception to the above rule: if the lease of the real property is to a not-for-profit and is in connection with and is in furtherance of a valid public purpose, then the use of the real property, including long-term management, can be part of the consideration for the not-for-profit to provide a public service to the governmental unit[19].

(5) Sale or Lease at Fair Market Value.

(a) Any sale or lease of "excess" property must be at fair market value, including sale or lease to a not-for-profit. Fair market value may include the provision of services to the municipality in return for use[20].

(b) A municipality is authorized to make a gift of a real property interest to another municipality but not of bond-financed real property[21].

(6) Joint Projects. Local governmental units may jointly acquire real property for a shared valid governmental purpose[22]. More on this shortly.

In our example, the village needs additional office space, the location of the available property is ideal, and it reasonably expects that its use of the property could expand in the foreseeable future.

Having thus established that the Project is a valid village purpose under Article VIII Section 1 and 2 as to Village use and as to joint acquisition with other municipalities and therefore that a village may issue general obligation bonds to finance the acquisition and reconstruction of the Property for its own use, we turn to the loan of credit issue.

Loan of Credit. Despite the determination of the Project as a valid village purpose, would it be a loan of the credit of the village to issue bonds for the purpose of acquiring the Property and reconstructing portions of it if it is reasonably expected that a town, a county, non-profit entities and for-profit entities will use portions thereof? In the balancing of private benefit with public purpose, whether the public purpose is so sufficiently dominant as to overcome what is on its face a loan of credit requires an analysis of all of facts and circumstances. What is clear are the following principles:

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[18] Bauer v. City of Niagara Falls, 262 AD 938, (1941); 4 Opin. St. Compt. 254 (1948) (Reasoning may extend to repair expenses of real property to be sold unless necessary to maintain a wasting asset.)

[19] 29 Opin. St. Compt. 113 (1973); 24 Opin. St. Compt. 670 (1968).

[20] 1968 Op. Atty Gen (Inf.) Mar. 27, 1971 Op. Atty Gen (Inf.) Apr 21, 6 Opin. St. Compt. 124(1950) 9 Opin. St. Compt. 436 (1953), 11 Opin. St. Compt. 394 (1955), 13 Op St. Compt. 6 (1957), 27 Op St. Compt. 178 (1971) 34 Op St. Compt. 150 (1978), Opin. St. Compt. 79-610, Opin. St. Compt. 81-203,81-220, Opin. St. Compt. 67-673, 17 Opin. St. Compt. 53 (1961). See also 1965 Opin. Atty. Gen. (Inf.) 72 (no authority to provide rent free space to federal government).

[21] . Union Free School District of Town of Rye v. Town of Rye, 280 NY 469 (1939); Comerski v. City of Elmira, 308 NY 248 (1955).

[22] 22 Opin. St. Compt. 581 (1966), 27 Opin. St. Compt. 113 (1971).

1. The village can only borrow for a valid object or purpose of a village. The furtherance of a public purpose of the village must be paramount to any another beneficiary[23].

2. A village is not prohibited from making gifts of money or property to another public corporation for a public purpose (but such sums cannot be borrowed proceeds)[24].

3. A village is prohibited from making gifts or loans of money or property or loans of credit to non-profit or for-profit entities, including specifically such transactions involving use of real property at other than fair market value[25].

4. Private benefit of bond-financed facilities is sanctioned in case law, provided it is "incidental" to the governmental "purpose" of the facility.[26]

It is worthy of note that in the recent case of Bordeleau v. State of New York (74 A.D.3d 1688 (2010); Appellate Division, Third Dept. June 24, 2010), the court stated as follows:

> "The Court of Appeals has made it clear that the existence of a public purpose for an appropriation that aids a private undertaking is not the test of whether it is lawful....It will not do to say the character of the act is to be judged by its main object – that because the purpose is public, the means adopted cannot be called a gift or loan." The court does also indicate with approval case law in which "other proper public purposes that only incidentally benefitted private entities."

5. A somewhat broad interpretation of "incidental" has been supported by the courts and counsel to the Attorney General and State Comptroller (but it is a very fact-specific analysis)[27]:

6. a. Incidental private benefit must be proportionate to the public purpose[28].

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[23] See Union Free School District No. 3 of Town of Rye v. Town of Rye, 280 NY 469 (1939); Comerski v. City of Elmira, 308 NY 248 (1955); Grimm v. County of Rensselaer, 4 NY 2d 416 (1958); 4 Opin. St. Compt. 484 (1948); 7 Opin. St. Compt. 328 (1951).

[24] Union Free School District No. 3 of Town of Rye v. Town of Rye, 280 NY 469 (1939); Comerski v. City of Elmira, 308 NY 248 (1955).

[25] Salzman v. Impellitteri (1953) 305 N.Y. 414: Admiral Realty Co. v. City of New York (1912) 206 N.Y. 110; Sun Printing and Publishing Ass'n. v. Mayor of New York (1897), 152 N.Y. 257; 10 Opin. St. Compt. 401 (1954). 1968 Op. Att. Gen (Inf.) Oct. 28 (gift of municipal real property to nursing home company prohibited); Opin. St. Compt. 67-610 and 78-338 (no authority to donate monies to private entity to build senior citizen's center/housing or to a non-profit entity to aid in rehabilitation of low-income housing).

[26] Tribeca Community Ass'n. Inc. v. New York State Urban Development Corp., 200 AD 2d 536 (1994), appeal dismissed 83 NY 2d 905, leave to appeal denied 84 NY 2d 805 (private use of a majority of the space of a government office building); Walrath v. City of Salamanca, 255 AD 158 (1938) (reconstruction of factory for resale purposes); Murphy v. Erie County, 28 NY 2d 280 (1971) (forty year lease of a stadium with a thirty year useful life). See also Murray v. LaGuardia, 291 NY 320 (1943); Grimm v. County of Rensselaer, 4 NY 2d 416 (1958); Imburgia v. City of New Rochelle, 223 AD 2nd 44 (1996); Matter of Schultz v. Warren County Bd. Of Supervisors, 179 AD 2d 118 (1992) lv. denied 80 NY2d 754; Grand Realty Co., v. City of White Plains, 125 AD 2nd 639 (1986); Landmark West A v. City of New York, 9 Misc. 3d 563 (2005); New York Telephone Co. v. Secord Bros., Inc., 62 Misc. 2d 866 (1970). 1976 Op. Atty. Gen (Inf.) 145 (lease of waterfront to developer permitted if benefit accrues to the public); Opins. St. Compt. 2002-16 and 86-70 (no exception from Article VIII Section 1 for not-for-profits, but incidental benefit exception may apply); Opins. St. Compt. 86-40 and 82-190 (stadium lease incidental elements).

[27] Bush Terminal Co. v. City of New York 282 NY 306 (1940)(private use of a majority of the space of a government office building), Murphy v. Erie County, 28 NY 2d 80 (1971) (forty year lease for a stadium with a thirty year useful life); Courtesy Sandwich Shop, Inc., v. Port of New York Authority, 12 NY 2d 379 (1963) (commercial space); Walrath v . City of Salamanca, 255 AD 158 (1938) (reconstruction of factory for purpose of resale); New York Tel. Co. v. Secord Bros., Inc., 62 Misc. 2d 866 (1970) (utilities work); 2002 Op. Atty. Gen. (Inf.) 02-17 (reconstruction of private dam serves public purpose of protection of public health). See also Opin. St. Compt. 79-765; 5 Opin. St. Compt. 508 (1949).

[28] Denihan Enterprises, Inc. v. O'Dwyer, 302 NY 451 (1951); Van Curler Development Corp v. City of Schenectady 59 Misc. 2d 621 (1969). See also Weismer v.Douglas, 64 NY 91 (1876), People v. Westchester Co. National Bank, 231 NY 465 (1921), 1979 Op. Atty. Gen. (Inf.) 60 ("The

b. Incidental private benefit must be consistent with the public purpose[29].

c. Private benefit is not incidental if it is part of the plan of utilization other than on a temporary basis (limited exceptions)[30].

d. Incidental private benefit involving municipal real property requires a fair market valuation standard as to governmental benefit[31].

e. Governmental ownership of the bond-financed object or purpose is not a mandatory component to the status of the private use as incidental[32].

7. Contracting indebtedness to finance construction of a public improvement and subsequent leasing is not per se a loan of credit where improvement reverts to the municipality[33].

The Constitutional and Local Finance Law Issues in Brief. We thus find ourselves in the following Local Finance Law context:

1. A village can acquire the Property as a valid village purpose if it has a valid village need for all or a portion thereof, but it cannot acquire the Property specifically in order to lease portions to for-profit or not-for-profit entities.

2. A village can fund such an acquisition in whole or in part with borrowed monies because it is a valid "object or purpose", and it can reconstruct the building as a valid "object or purpose", but it cannot reconstruct any portion for the specific use of any other user, municipal or otherwise.

3. A village cannot borrow monies for the purpose of providing facilities financed to another governmental entity or quasi-governmental entity because that is not a valid "object or purpose" of the village, but it can offer such facilities at fair market value or for services rendered to for-profit or non-profit users or providers. There is a limited exception to this rule for excess capacity in certain basic infrastructure facilities, but not our project as described here.

4. A village cannot directly loan borrowed monies to other governmental entities, or non-profit organizations or for-profit entities because that is not a valid "object or purpose", but

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constitution is suffused with prohibitions against the exercise of public power for private benefit, yet it is well established that incidental private benefit will not invalidate a project which has its primary object a public purpose"); 4 Opin. St. Compt. 168 (1948) (Bond proceeds cannot be used for purchasing and reconstructing a building solely for the purpose of lease to private business.)

[29] Union Free School District No. 3 of Town of Rye v. Town of Rye, 280 NY 469 (1939) (general discussion of public purpose); Terminal Co. v. City of New York 282 NY 306 (1940)(private use of a majority of the space of a government office building), Murphy v. Erie County, 28 NY 2d 80 (1971) (forty year lease for a stadium with a thirty year useful life); Courtesy Sandwich Shop, Inc., v. Port of New York Authority, 12 NY 2d 379 (1963) (commercial space); Walrath v. City of Salamanca, 255 AD 158 (1938) (reconstruction of factory for purpose of resale); New York Tel. Co. v. Secord Bros., Inc., 62 Misc. 2d 866 (1970) (utilities work); Op. Atty. Gen. (Inf.) 02-17 (reconstruction of private dam serves public purpose of protection of public health). See also Opin. St. Compt. 63-992, 12 Opin St. Compt. 217 (1956).

[30] 4 Opins. St. Compt. 168 and 254 (1948) and other opinions cited earlier under Valid County Purpose heading.

[31] 1971 Op. Atty. Gen. (Inf.) Apr. 21; Opin. St. Compt. 2004-6; 13 Opin. St. Compt. 6 (1957). But see Landmark West A. v. City of New York, 9 Misc 3d 563 (2005); Grand Realty Co. v. City of White Plains, 125 AD 2d 639 (1986); 1979 Opin. Atty. Gen. (Inf.) 60.

[32] Landmark West A. v. City of New York, 9 Misc. 3d 563 (2005); Opin., St. Compt. 359 (1981). But see Murphy v. Erie County, 28 NY 2d 80 (1971); 10 East Realty Co., LLC., v. Village of Valley Stream 17 AD 3d 472 (2005); 1976 Opin. Atty. Gen. (Inf.) 145.

[33] Sun Printing & Publishing Assoc. v. Mayor, 152 NY 257 (1897); Admiral Realty Co. v. City of New York; 206 NY 110 (1912); Salzman v. Impellitteri; 305 NY 414 (1953). See also 10 Opin. St. Compt. File No. 401 (1954), 25 Opin. St. Compt. 413 (1969).

a village can enter into contracts for the provision of services to the county in return for the use of village financed and owned spaces.

5a. A village can borrow monies to acquire real property and it can transfer a portion of such property for value in furtherance of other municipalities' requirements.

5b. A village can borrow monies for capital improvements ancillary to the acquisition of real property such as village owned and operated roads, water, sewer, sidewalks, parks, pools, other recreational facilities, and similar infrastructure necessary to a municipal facility.

We now turn to the question of how the Project is financeable under the provisions of the State Constitution and LFL.

Permissible and Impermissible Methods for Financing Joint Projects in New York State. Focusing now only on financing for the municipal aspect of the project (it having been established that there is no authority for a municipality to borrow on its own credit to the benefit of a for-profit or non-for-profit entity or the federal government), there are essentially five methods that are conceptually possible for the municipal financing of joint municipal projects, of which two are permitted methods in New York State, one is permitted in certain contexts, one is flat-out unconstitutional no matter how you look at it (except for certain specific infrastructure projects), and one is permitted, indeed, encouraged, but generally not very easy to accomplish in practice. These five methods are:

1. Joint and several indebtedness issued jointly by the municipalities involved in the project, authorized by Articles 2 and 2-a of the State Constitution and Title 1-A of the Local Finance Law (permissible).

In this type of debt obligation, the chief fiscal officer of each of the involved municipalities signs the actual debt instrument and related paperwork and each municipality is fully liable for the entire borrowed amount in the event that any other signatory municipality fails to pay its share. This is true despite the fact that (a) the involved municipalities will have an inter-municipal agreement setting forth their respective shares of the debt, and (b) the closing documentation relating to the debt will specify those intended shares. It is thus self-evident why this type of indebtedness is but rarely issued in the State. You may know and like your neighbor just fine but who knows what things will be like over the course of the term of the debt.

If this type of debt is contemplated, a special form of bond resolution must be adopted by each of the joint obligors.

2. Several indebtedness: indebtedness issued individually by each of the municipalities involved in the project for their pro-rata allocable share of the project (permissible).

In this type of debt, each involved municipality simply issues its own debt for its own allocable share of the project. No municipality has any liability for any other involved municipality's share of the cost. Each municipality follows the rules for debt authorization, sale and issuance applicable to the type of municipality that it is. Each municipality's bond resolution authorizes only its allocable share of the cost of the project, and is either effective immediately or subject to permissive referendum depending on the type of municipality, the type of project and the period of probable usefulness of the project.

3. Sole indebtedness of one of the municipalities involved in the project which municipality retains ownership of the project and for which others agree to pay for use of the project but not ownership (permissible in certain contexts).

In certain limited circumstances, one municipality may retain full ownership of a project to be used, in part, by other municipalities who agree to help pay for it through user fees, water charges, or sewage disposal tariffs. Those other municipalities do not have or accrue any ownership interest. The owing municipality finances its ownership in full based on adoption of a bond resolution authorizing financing of the total cost. The other user municipalities pay fees which are operating expenses, not capital expenditures (they cannot issue bonds for same). As this scenario involves creation of excess capacity by the debt-issuing owner municipality, discussed in some detail earlier, it should be understood that the statutory authority for this method is limited and most typically involves water supply and/or treatment, wastewater treatment, or solid waste management, or in addition, temporary users of other types of facilities.

4. Sole indebtedness of one of the municipalities involved in the project which municipality is only a pro-rata owner with other municipalities involved with the project who by virtue of their contributions for debt service of the bond-issuing municipality, are given a pro-rata ownership interest. (Flat-out unconstitutional except for three types of infrastructure capital projects).

This method of financing of a joint project is similar to the immediately prior method except that an ownership interest is granted at the outset or over time while only one municipality adopts a bond resolution authorizing financing of the total cost and issues debt for the full cost. In most cases, this is a straight forward violation of the constitutional loan of credit prohibition: the bond-issuing municipality is using its credit to finance other municipalities' share of ownership. No. Don't even think about it. Unless the project is for water supply, sewage treatment or drainage purposes.

5. Consolidation of the municipalities into one municipal unit of government under Article 17-A of the General Municipal Law, eliminating the question of multiple users and owners. (perhaps a good idea in theory; not so easy to implement).

This would take an entire article by itself to investigate the ins and outs of municipal consolidation. Perhaps it should not even be listed as an option for joint financing since once consolidated, there is nothing joint about the project. Similarly, with special legislation a public benefit corporation could be formed to finance and/or administer a joint public works (though such entities, as well as local development corporations for such purposes are not favored in Albany in recent times).

Tax Issues Involved in Municipal Debt for Joint Projects.

Since 1986, local governmental issuers have needed to be concerned whenever a bond-financed asset is used, managed or provides some benefit to a non-governmental commercial or not-for-profit entity on a basis different than the general public.

On October 22, 1986, the Tax Reform Act of 1986 was signed into law ushering in a new era for tax-exempt finance, and instituting the new Internal Revenue Code of 1986 (the "1986 Code") to replace the Internal Revenue Code of 1954 as amended up to 1986 (the "1954 Code"). The 1986 Code imposed many new restrictions on the ability of state and local governmental units to finance their facilities and operating expenses on a tax-exempt basis. For the first time, municipalities were forced to employ taxable financing for some operations that have traditionally been thought of as governmental in nature. The 1986 Code also has greatly increased the administrative burdens placed on state and local political subdivisions in maintaining compliance with the rules relating to tax-exempt financing.

The new law changed the rules relating to tax-exempt financing in two major ways. First, it sought to eliminate the "arbitrage" profits that are frequently generated in tax-exempt financings as a result of a municipality's ability to borrow at low tax-exempt interest rates and invest the proceeds of the borrowing

at higher taxable rates. Second, the focus here, it was designed to drastically reduce the ability of state and local governments to undertake tax-exempt financings which benefit nongovernmental entities, regardless of whether the conferring of such benefits is a primary goal (generally not permitted under State law in New York as discussed above) or is merely incidental to a true municipal purpose.

Under the 1986 Code a distinction is made between "governmental bonds" and "private activity bonds". The terms "governmental bonds" and "private activity bonds" are something of misnomers. For example, obligations issued for a number of legitimate governmental purposes in accordance with state statutory and constitutional requirements may, in some instances, be private activity bonds under the 1986 Code. In general terms, private use is use by a nongovernmental entity of more than 5% to 10% of a bond-financed facility. Use is broadly construed and also includes a broad notion of "loan" to such an entity.

The 1986 Code prohibits private benefit in excess of 10% of the proceeds of a bond issue. Under the 1986 Code, an issue of municipal obligations will be deemed to constitute "private activity bonds", and therefore generally subject to Federal income taxation, if 10% or more of the proceeds of the bonds is "used", directly or indirectly, in the trade or business of persons other than state or local governmental units or members of the general public on an equal basis and if 10% or more of the debt service on the bonds is secured by funds from private users, (e.g., rental payments for the use of bond-financed facilities). ("Use" includes leasing a bond-financed facility, purchasing output from a bond-financed facility, or certain management contracts. Debt service will be considered to be "secured" by funds of private-users even of there exists no direct link between debt service and monies paid or available from a private user. Thus the fact that debt service is paid from monies in an issuer's general fund is not significant, if monies are paid by the private user to the issuer and applied by the issuer for a purpose other than direct payment of the obligations.)

Continuing the rule of prior law, bonds will also be private activity bonds if 5% or more of the bond proceeds or $5 million, whichever is less, is "loaned" to persons other than state or local governmental units. (For purposes of these tests, the portion of the bond or note proceeds used by all nongovernmental beneficiaries of the obligations is aggregated. Note that Section 501(c)(3) charitable organizations are not exempt users of bond proceeds for purposes of the "use" and "loan" provisions although their use may not require the issuance of federally taxable debt if certain requirements are met.) The term "loan" is to be broadly construed. The only exception to this 5% or $5 million rule is provided for loans which enable the borrower to finance any governmental tax or assessment of general application for an essential governmental function. Thus, the present ability of state and local governmental units to issue tax-exempt obligations to finance tax assessments or certain types of public improvements, such as water and sewer lines, is not impaired so long as the financing is made available to all members of the general public on an equal basis.

Although the legislative history of the 1986 Code states that its provisions were not intended to interfere with traditional municipal financings, lowering the threshold from the previously allowable 25% nongovernmental use to 10% has called many more projects into question than was previously the case.

The 1986 Code imposes additional requirements even if the new 10% rule is not violated. Under the 1986 Code, if over 5% of the proceeds of a bond issue are used by private entities in a way that is not related to the governmental purpose of the rest of the issue, the bonds become taxable. This provision ends the era of consolidated issues in which private uses were "flooded" as part of large issues in which 75% or more of the proceeds would be used for assorted traditional governmental purposes with the financing benefitting "private" entities being limited to 25%. This was the case up through 1985. Now, only 5% of the bond proceeds can be used for the benefit of private entities without any further restrictions. The remainder of the permissible 10% that is used for the benefit of private entities must satisfy two additional restrictions — first, any such additional private financing must be "related" to a governmental facility that

is also being financed with the bond issue; second, the amount of bond financing provided to the private entity with respect to such facility cannot exceed the amount of financing being provided to the governmental entity with respect to the same facility.

In the case of an issue in which more than 5% of the proceeds, but less than 10%, are to be used for an unrelated purpose, the entire issue would be treated as a private activity bond, requiring a public hearing and becoming subject to the alternative minimum tax. Furthermore, if the private use is not one treated as an exempt purpose under the 1986 Code, there is a risk that the whole issue would be retroactively characterized as taxable (even if 90% of the bonds were used for a traditional governmental purpose).

Thus, the basic rules applied to the present context are as follows:

1. The sale or lease of village-owned bond-financed real property immediately raises federal tax law issues relating to "private" use by a non municipal user, including any such use by a not-for-profit entity or the Federal government[34].

2. Borrowings must be for a valid public purpose in order for the interest on the borrowing to be, and remain, federally tax-exempt[35].

3. Any sale or lease of all or any portion of bond-financed real property is a "change in use" under federal tax law, if not originally contemplated and accounted for, and will require "remedial actions" or else the interest on the bonds or notes will be deemed retroactively federally taxable to the issuance date. Remedial actions include public hearings, establishment of escrow funds to pay debt service, immediate redemption of the outstanding debt and/or other elements depending on the character of the new use and of the new user[36].

4. To minimize the impact of the change in use regulations and their resultant remedial action requirements, it is important to ascertain prior to authorization for bonding, whether any proposed not-for-profit entity that is to share or manage all or part of a local governmental facility, holds Section 501(c)(3) status. If so, the necessary additional steps are not arduous – they involve a public hearing on two weeks' notice and the necessity to sell the debt, to the extent related to the not-for-profit use, in a separately identifiable manner. If the use is by a commercial, profit-making entity, the steps are more arduous, unless the relationship between the local governmental unit and the commercial user is a qualified management contract.

5. (a) Tax-exempt bond or note proceeds may not be expended on village facilities if a significant beneficiary of the improvements will be a private business or not-for-profit user or the Federal government. Borrowings must be for a valid public purpose under State law in order for the interest on the borrowing to be, and remain, federally tax-exempt. Internal Revenue Code Section 103(a). Such use cannot exceed 5% of any particular borrowing for a facilities project without causing threat of loss of the tax-exempt status of the borrowing, and the attendant subsequent bondholders lawsuits[37].

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[34] Internal Revenue Code Sections 141ff.

[35] Internal Revenue Code Section 103(a).

[36] Tax Reform Act of 1986 Section 1301; Treasury Regulations Sections 1.141 and 1.145; Revenue Procedures 97-13, 97-14, and 97-15.

[37] Internal Revenue Code Section 141, Treas. Reg. Sec. 1-141ff.

(b) Any sale or lease of all or any portion of bond-financed real property is a "change in use" under federal tax law, if not originally contemplated and accounted for, and will require "remedial actions" or else the interest on the bonds or notes will be deemed retroactively federally taxable to the issuance date. Remedial actions include public hearings, establishment of escrow funds to pay debt service, immediate redemption of the outstanding debt and/or other elements depending on the character of the new use and of the new user[38].

Summary.

1. A village shall not loan its credit to any other municipal governmental unit (limited exceptions for joint governmental undertakings and for water, sewer and drainage), any not-for-profit entity any commercial entity or the federal government. Article VIII, Section 1; Local Finance Law Section 101.

2. A village shall not give a gift of money or property to any not-for-profit entity or any commercial entity. Article VIII, Section 1; Local Finance Law Section 101.

3. A village may be authorized to contract joint or several indebtedness for a joint undertaking. Article VIII, Section 2; Local Finance Law Title 1-A.

4. Any indebtedness of the village must be for a valid public purpose of a village. Private benefit is only permissible on an incidental basis. Private benefit is any benefit by a non-governmental user – e.g., an individual, a corporation, an association, other types of non-profit entities, the federal government. Article VIII, Section 2; Local Finance Law Section 101.

5. Any indebtedness of the village issued to finance facilities used or to be used, in part, by non-profit, for-profit, or federal governmental users may require issuance, in whole or in part, on a federally-taxable basis.

Conclusions in our Case Study.

To the extent that the village reasonably expects to need the Property for village purposes, or for village purposes together with other municipal tenants in or for the reasonably foreseeable future, acquisition of the Property is a valid village purpose. However, for the village to finance the acquisition of the Property through a general obligation bond or note transaction, as a general rule, the financing cannot include any portion to be used by another municipality, or a non-profit organization, a commercial tenant or the federal government. A pro-rata allocation of the floor space of the built portion of the Property and related parking and grounds could be used to determine the financeable portion of the Property.

One possible exception for the financing of the non-village portion of the Property would involve the temporary leasing of excess space to other parties but the reasonable expectations of future village use is key. The village may be able to finance the space it requires as well as excess space but the authority to finance the latter would be dependent on a facts and circumstances analysis that clearly showed foreseeable village need. The leased portions would have to be for temporary uses. While it is true that need in the next 10-15 years may be sufficient to meet the requirements for a valid village purpose, what is important to recognize here is that, for financing purposes, the term of use by others firstly cannot approach the useful life of the Property provided in the Local Finance Law. If a building has a period of probable usefulness

[38] Tax Reform Act of 1986 Section 1301; Treasury Regulations Sections 1.141 and 1.145; Revenue Procedures 97-13, 97-14, and 97-15.

of 20 years, and it is proposed to lease significant portions of it for 15 years, for example, the village has effectively financed the tenants' use of the asset for its useful life, thus leaving little or no significant value for the village itself. It is clear that long term leasing is not permissible. But, secondly any significant lease term would automatically raise loan of credit issues. What lease term for other uses and for how much space would be considered sufficiently temporary and non-significant? There is no clear, simple standard.

An additional possible exception may arise if the particular Property is deemed to be essential for village departmental use(s) but is simply larger than reasonably expected to be needed in the foreseeable future: the case could be made that its site and structure are unique and that the excess is thus incidental to an essential governmental use that needs to be there. It is not clear whether a court, on a loan of credit challenge, would find in that context that long-term non-village use does not violate the Article VIII of the Constitution.

In short, to the extent a village proposes to lease a portion of the Property to other users, even municipalities, other than on a short-term basis it is doubtful that the allocable portions of the Property for such users can be financed with village bonds or notes. In such circumstances, a request for an opinion of counsel to the State Comptroller might be useful if a village nevertheless wished to pursue financing of the entire Property and leasing to other users.

The clearest alternative would be for each proposed user of the Property to finance or pay for their pro-rata allocable share thereof.

Alternatively, the project could be financed by the issuance of joint indebtedness of the village and any other municipal users of the Property pursuant to an intermunicipal agreement under Article 5-G of the General Municipal Law and Title 1-A of the Local Finance Law to the extent that the village and other municipal users of the Property were providing a "joint service" including any municipal facility, service, activity or undertaking that each of the municipal units has the power to provide separately. The Project used as an example here should qualify for this purpose. Such debt can be issued on a joint or several basis. If issued on a joint basis, the joint faith and credit of the village and any other municipal participant in the Project would be pledged for the payment of the total debt issued on a joint basis. If issued on a several basis, the faith and credit of only the village could be pledged and other municipal users would need to issue their own debt for their allocable share.

Depending on the proposed non-municipal uses of the Property, to the extent that it could be determined that any such uses were permissible, village debt issued to finance acquisition would need to be issued in multiple series: one tax-exempt series allocated to space utilized by the village (and, temporarily possibly other municipal entities), one tax-exempt series allocated to space utilized by non-profits (this would require fulfillment of certain additional federal law requirements such as a public hearing specifying the space, the user(s) and the lease terms and payments involved), and one federally taxable series allocated to commercial and/or federal government tenants.

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FOOTNOTES

1. Blomquist v. Orange County, 69 Misc 2d 1077 (1972); See also In re Mayor to Acquire Public Parks, 99 NY 569 (1885); Sun Printing and Publishing Ass'n v. Mayor, 8 AD 230 (1896) affirmed 152 NY 257 (1896); Chapman v. City of NewYork, 168 NY 80 (1901); Admiral Realty Co., v. City of New York, 206 NY 110 (1912); Saltzman v. Impellitteri, 305 NY 414 (1953); Opin. St. Compt. 80-389; 10 Opin St. Compt. 401 (1954). See also Bauer v. City of Niagara Falls, 262 AD 938 (1941) (municipality prohibited by Constitution from using its money for anything other than municipal purposes), Corning v. Village of Laurel Hollow, 48 NY 2d 348 (1979) (same).

2. 1973 Opin. Atty. Gen. (Inf.) 219; Opins. St. Compt. 81-155, 81-197, 81-320, 80-389 (sale), 23 Opin. St. Compt. 773 (1967), 6 Opin. St. Compt. 284 (1950), 4 Opin. St. compt. 168 (1948)

3. Op. Atty. Gen. (Inf.) 82-77.

4. Bauer v. City of Niagara Falls, 262 AD 938 (1941)

5. 4 Opins. St. Compt. 254, 484 (1948), 7 Opin. St. Compt. 328 (1951), Opins. St. Compt. 81-197, 81-203.

6. 4 Opin. St. Compt. 254 (1948), Opin. St. Compt. 81-155.

7. 4 Opin. St. Compt. 168, 254 (1948); 17 Opin. St. Compt. 535 (1961); 27 Opin. St. Compt. 113 (1971); Opins. St. Compt. 81-197, 81-203, 81-155.

8. 6 Opin. St. Compt. 124, 285 (1950), 20 Opin. St. Compt. 773 (1967), 30 Opin. St. Compt. 90 (1974), Opins. St. Compt. 67-468, 80-124, 81-320.

9. 27 Opin. St. Compt. 113 (1971); See County Law Section 215 on lease term limits and 1956 Opin. Atty. Gen. (Inf.) 156, Opins. St. Compt. 80-400, 68-587, and 64-48 on local law options.

10. 29 Opin. St. Compt. 113 (1973), 24 Opin. St. Compt. 670 (1968).

11. 29 Opin. St. Compt. 113 (1973), 24 Opin. St. Compt. 670 (1968).

12. Opin. St. Compt. 78-932 (unreported; Federal and State mandated improvement to Village hospital prior to conveyance permissible).

13. 23 Opin. St. Compt. 597 (1967).

14. Bloomquist v. Orange County 1972) 69 Misc. 2d 1077; Imburgia v. City of New Rochelle (3 Dept. 1996), 223 A.D.2d 44 leave to appeal denied 88 NY2d 815. Murphy v. Erie County (1971), 28 NY2d 80 reargument denied 29 NY2d 551; 4 Opin. St. Compt. 168 (1948).

15. 10 East Realty LLC v. Inc. Village of Valley Stream, 17 AD 3rd 472 (2005); 4 Opin. St. Compt. 254 (1948).

16. 4 Opin. St. Compt. 168 (1945), Opins. St. Compt. 68-732; 1967 Opin. Atty. Gen. (Inf.) March 15; 18 Opin. St. Compt. 147 (1962); Opin. St. Compt. 68-732; 1 Opin. St. Compt. 287 (1945) (municipality cannot borrow money to remodel portion of town hall to lease to private individual for use as movie theatre). But see Walrath v. City of Salamanca. 255 AD 158 (1938) (permitted so property can be sold or leased; note property never in municipal use); Opin. St. Compt. 78-932 (same).

17. 6 Opin. St. Compt. 124, 285 (1950), 20 Opin. St. Compt. 773 (1967), 30 Opin. St. Compt. 90 (1974), Opins. St. Compt. 67-468, 80-124, 81-320.

18. Bauer v. City of Niagara Falls, 262 AD 938, (1941); 4 Opin. St. Compt. 254 (1948) (Reasoning may extend to repair expenses of real property to be sold unless necessary to maintain a wasting asset.)

19. 29 Opin. St. Compt. 113 (1973); 24 Opin. St. Compt. 670 (1968).

20. 1968 Op. Atty Gen (Inf.) Mar. 27, 1971 Op. Atty Gen (Inf.) Apr 21, 6 Opin. St. Compt. 124(1950) 9 Opin. St. Compt. 436 (1953), 11 Opin. St. Compt. 394 (1955), 13 Op St. Compt. 6 (1957), 27 Op St. Compt. 178 (1971) 34 Op St. Compt. 150 (1978), Opin. St. Compt. 79-610, Opin. St. Compt. 81-203, 81-220, Opin. St. Compt. 67-673, 17 Opin. St. Compt. 53 (1961). See also 1965 Opin. Atty. Gen. (Inf.) 72 (no authority to provide rent free space to federal government).

21. Union Free School District of Town of Rye v. Town of Rye, 280 NY 469 (1939); Comerski v. City of Elmira, 308 NY 248 (1955).

22. 22 Opin. St. Compt. 581 (1966), 27 Opin. St. Compt. 113 (1971).

23. See Union Free School District No. 3 of Town of Rye v. Town of Rye, 280 NY 469 (1939); Comerski v. City of Elmira, 308 NY 248 (1955); Grimm v. County of Rensselaer, 4 NY 2d 416 (1958); 4 Opin. St. Compt. 484 (1948); 7 Opin. St. Compt. 328 (1951).

24. Union Free School District No. 3 of Town of Rye v. Town of Rye, 280 NY 469 (1939); Comerski v. City of Elmira, 308 NY 248 (1955).

25. Salzman v. Impellitteri (1953) 305 N.Y. 414: Admiral Realty Co. v. City of New York (1912) 206 N.Y. 10; Sun Printing and Publishing Ass'n. v. Mayor of New York (1897), 152 N.Y. 257; 10 Opin. St. Compt. 401 (1954). 1968 Op. Att. Gen (Inf.) Oct. 28 (gift of municipal real property to nursing home company prohibited); Opin. St. Compt. 67-610 and 78-338 (no authority to donate monies to private entity to build senior citizens center/housing or to a non-profit entity to aid in rehabilitation of low-income housing).

26. Tribeca Community Ass'n. Inc. v. New York State Urban Development Corp., 200 AD 2d 536 (1994), appeal dismissed 83 NY 2d 905, leave to appeal denied 84 NY 2d 805 (private use of a majority of the space of a government office building); Walrath v. City of Salamanca, 255 AD 158 (1938) (reconstruction of factory for resale purposes); Murphy v. Erie County, 28 NY 2d 280 (1971) (forty year lease of a stadium with a thirty year useful life). See also Murray v. LaGuardia, 291 NY 320 (1943); Grimm v. County of Rensselaer, 4 NY 2d 416 (1958); Imburgia v. City of New Rochelle, 223 AD 2nd 44 (1996); Matter of Schultz v. Warren County Bd. Of Supervisors, 179 AD 2d 118 (1992) lv. denied 80 NY2d 754; Grand Realty Co., v. City of White Plains, 125 AD 2nd 639 (1986); Landmark West A v. City of New York, 9 Misc. 3d 563 (2005); New York Telephone Co. v. Secord Bros., Inc., 62 Misc. 2d 866 (1970). 1976 Op. Atty. Gen (Inf.) 145 (lease of waterfront to developer permitted if benefit accrues to the public); Opins. St. Compt. 2002-16 and 86-70 (no exception from Article VIII Section 1 for not-for-profits, but incidental benefit exception may apply); Opins. St. Compt. 86-40 and 82-190 (stadium lease incidental elements).

27. Bush Terminal Co. v. City of New York 282 NY 306 (1940)(private use of a majority of the space of a government office building), Murphy v. Erie County, 28 NY 2d 80 (1971) (forty year lease for a stadium with a thirty year useful life); Courtesy Sandwich Shop, Inc., v. Port of New York Authority, 12 NY 2d 379 (1963) (commercial space); Walrath v . City of Salamanca, 255 AD 158 (1938) (reconstruction of factory for purpose of resale); New York Tel. Co. v. Secord Bros., Inc., 62 Misc. 2d 866 (1970) (utilities work); 2002 Op. Atty. Gen. (Inf.) 02-17 (reconstruction of private dam serves public purpose of protection of public health). See also Opin. St. Compt. 79-765; 5 Opin. St. Compt. 508 (1949).

28. Denihan Enterprises, Inc. v. O'Dwyer, 302 NY 451 (1951); Van Curler Development Corp v. City of Schenectady 59 Misc. 2d 621 (1969). See also Weismer v.Douglas, 64 NY 91 (1876), People v. Westchester Co. National Bank, 231 NY 465 (1921), 1979 Op. Atty. Gen. (Inf.) 60 ("The constitution is suffused with prohibitions against the exercise of public power for private benefit, yet it is well established that incidental private benefit will not invalidate a project which has its primary object a public purpose"); 4 Opin. St. Compt. 168 (1948) (Bond proceeds cannot be used for purchasing and reconstructing a building solely for the purpose of lease to private business.)

29. Union Free School District No. 3 of Town of Rye v. Town of Rye, 280 NY 469 (1939) (general discussion of public purpose); Terminal Co. v. City of New York 282 NY 306 (1940)(private use of a majority of the space of a government office building), Murphy v. Erie County, 28 NY 2d 80 (1971) (forty year lease for a stadium with a thirty year useful life); Courtesy Sandwich Shop, Inc., v. Port of New York Authority, 12 NY 2d 379 (1963) (commercial space); Walrath v . City of Salamanca, 255 AD 158 (1938) (reconstruction of factory for purpose of resale); New York Tel. Co. v. Secord Bros., Inc., 62 Misc. 2d 866 (1970) (utilities work); Op. Atty. Gen. (Inf.) 02-17 (reconstruction of private dam serves public

purpose of protection of public health). See also Opin. St. Compt. 63-992, 12 Opin St. Compt. 217 (1956).

30. 4 Opins. St. Compt. 168 and 254 (1948) and other opinions cited earlier under Valid County Purpose heading.

31. 1971 Op. Atty. Gen. (Inf.) Apr. 21; Opin. St. Compt. 2004-6; 13 Opin. St. Compt. 6 (1957). But see Landmark West A. v. City of New York, 9 Misc 3d 563 (2005); Grand Realty Co. v. City of White Plains, 125 AD 2d 639 (1986); 1979 Opin. Atty. Gen. (Inf.) 60.

32. Landmark West A. v. City of New York, 9 Misc. 3d 563 (2005); Opin., St. Compt. 359 (1981). But see Murphy v. Erie County, 28 NY 2d 80 (1971); 10 East Realty Co., LLC., v. Village of Valley Stream 17 AD 3d 472 (2005); 1976 Opin. Atty. Gen. (Inf.) 145.

33. Sun Printing & Publishing Assoc. v. Mayor, 152 NY 257 (1897); Admiral Realty Co. v. City of New York; 206 NY 110 (1912); Salzman v. Impellitteri; 305 NY 414 (1953). See also 10 Opin. St. Compt. File No. 401 (1954), 25 Opin. St. Compt. 413 (1969).

34. Internal Revenue Code Sections 141ff.

35. Internal Revenue Code Section 103(a).

36. Tax Reform Act of 1986 Section 1301; Treasury Regulations Sections 1.141 and 1.145; Revenue Procedures 97-13, 97-14, and 97-15.

37. Internal Revenue Code Section 141, Treas. Reg. Sec. 1-141ff.

Tax Reform Act of 1986 Section 1301; Treasury Regulations Sections 1.141 and 1.145; Revenue Procedures 97-13, 97-14, and 97-15.

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JOINT AND SURPLUS MUNICIPAL FACILITIES:
THE GENERAL RULES IN A NUTSHELL

USE

- MUNICIPAL REAL PROPERTY IS HELD IN TRUST FOR PUBLIC USE AND CANNOT BE APPROPRIATED TO ANY OTHER USE WITHOUT GENERAL OR SPECIAL STATE LEGISLATIVE AUTHORIZATION.
- SOME MUNICIPAL REAL PROPERTY, SUCH AS PARKLANDS, IS HELD IN SPECIAL TRUST AND IS INALIENABLE WITHOUT SPECIAL STATE LEGISLATION.
- REAL PROPERTY NOT PRESENTLY NEEDED FOR MUNICIPAL PURPOSES AND NOT HELD IN SPECIAL TRUST FOR THE PUBLIC MAY BE LEASED OR SOLD FOR FAIR CONSIDERATION.
- DIFFERENT UNITS OF MUNICIPAL GOVERNMENT AND SCHOOL DISTRICTS MAY HAVE DIFFERING AUTHORITY WITH REGARD TO ASPECTS OF JOINT FACILITIES.
- MUNICIPALITIES CAN DO JOINTLY ONLY WHAT EACH UNIT HAS AUTHORITY TO DO SEPARATELY BY ITSELF.
- MOST TYPES OF MUNICIPALITIES CAN ACQUIRE OR LEASE REAL PROPERTY JOINTLY, OR SEVERALLY.
- MOST TYPES OF MUNICIPALITIES CAN CONSTRUCT REAL PROPERTY, JOINTLY OR SEVERALLY.
- A MUNICIPALITY CAN MAKE A GIFT OF A REAL PROPERTY INTEREST TO ANOTHER MUNICIPALITY, BUT NOT OF BOND-FINANCED PROPERTY WHILE THE BONDS ARE OUTSTANDING.
- A MUNICIPALITY CANNOT MAKE A GIFT OF A REAL PROPERTY INTEREST TO A PRIVATE COMPANY OR A NOT-FOR-PROFIT ORGANIZATION.
- ACQUIRING OR CONSTRUCTING REAL PROPERTY FOR THE SOLE EXPRESS PURPOSE OF SELLING OR LEASING IT IS NOT PERMISSIBLE.
- ACQUIRING OR CONSTRUCTING REAL PROPERTY IN EXCESS OF THAT NEEDED WITH INTENT TO SELL OR LEASE EXCESS IS NOT PERMISSIBLE.
- ACQUIRING OR CONSTRUCTING REAL PROPERTY IN EXCESS OF CURRENT NEED IS PERMISSIBLE IF REASONABLY EXPECT NEED FOR ALL OR MOST OF CURRENT SURPLUS IN FORESEEABLE FUTURE AND/OR IN CERTAIN CASES NO OTHER PRACTICAL SOLUTION.
- SHORT-TERM USE BY OTHERS OF MUNICIPAL REAL PROPERTY THAT IS IN MUNICIPAL USE, AND REMAINS NECESSARY TO MUNICIPAL PURPOSES, IS PERMISSIBLE IN LIMITED CIRCUMSTANCES.

- LEASING MUNICIPAL REAL PROPERTY NOT IN CURRENT USE INCLUDING UNTIL FORESEEABLE NEED ARISES, IS PERMISSIBLE.
- LEASING MUNICIPAL REAL PROPERTY FOR FREE OR NOMINAL FINANCIAL CONSIDERATION, EVEN FOR WORTHWHILE NOT-FOR-PROFIT PURPOSES, IS NOT PERMISSIBLE (EXCEPT TO ANOTHER MUNICIPAL CORP., FIRE OR SCHOOL DISTRICT, BOCES, THE STATE OR THE UNITED STATES OF AMERICA.) HOWEVER, IF A NFP ORGANIZATION PROVIDES A CONTRACTUAL SERVICE TO THE MUNICIPALITY, THAT MAY SERVE AS SUCH CONSIDERATION.
- IMPROVING MUNICIPAL REAL PROPERTY SPECIFICALLY TO BENEFIT ANOTHER USER IS NOT PERMISSIBLE.
- INCIDENTAL BENEFIT BY A PRIVATE BUSINESS OR A NOT-FOR-PROFIT FROM ACQUIRED OR CONSTRUCTED MUNICIPAL REAL PROPERTY MAY BE PERMISSIBLE. WHAT CONSTITUTES "INCIDENTAL" IS FACT-SPECIFIC TO THE CONTEXT. THE PARAMETERS OF WHAT IS REASONABLE SEEM TO BE EXPANDING, PARTICULARLY WHEN A PUBLIC PURPOSE IS SERVED.

BORROWING

- BORROWING TO ACQUIRE OR CONSTRUCT REAL PROPERTY WITH THE INTENT TO SELL (OR TO LEASE LONG-TERM FOR ITS USEFUL LIFE) ALL OR ANY PORTION OF IT TO A PRIVATE BUSINESS, OR A NOT-FOR- PROFIT IS NOT PERMISSIBLE.
- BORROWING TO ACQUIRE OR CONSTRUCT REAL PROPERTY WITH THE INTENT TO SELL (OR TO LEASE LONG-TERM FOR ITS USEFUL LIFE) ALL OF IT TO ANOTHER MUNICIPALITY IS NOT PERMISSIBLE.
- BORROWING TO CONSTRUCT REAL PROPERTY WITH THE INTENT TO SELL (OR TO LEASE LONG-TERM FOR ITS USEFUL LIFE) A PORTION OF IT TO ANOTHER MUNICIPALITY IS NOT PERMISSIBLE.
- BORROWING TO ACQUIRE REAL PROPERTY WITH THE INTENT TO SELL A PORTION OF IT TO ANOTHER MUNICIPALITY MAY BE PERMISSIBLE UNDER CERTAIN LIMITED CIRCUMSTANCES.
- BORROWING TO ACQUIRE OR CONSTRUCT REAL PROPERTY WITH THE INTENT TO LEASE A PORTION OF IT TO A PRIVATE BUSINESS, A NOT-FOR- PROFIT OR ANOTHER MUNICIPALITY UNTIL LATER USE BY THE BORROWING MUNICIPALITY IS PERMISSIBLE. HOWEVER ALL OR A PORTION OF THE DEBT MAY NEED TO BE ISSUED WITH INTEREST PAYABLE ON A FEDERALLY TAXABLE BASIS.

EXCEPTIONS

- GENERAL RULES USUALLY HAVE EXCEPTIONS.

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JOINT AND SURPLUS MUNICIPAL WATER FACILITIES:
THE GENERAL RULES IN A NUTSHELL

BASIC RULES

- AS A GENERAL RULE, A MUNICIPALITY CAN ONLY AUTHORIZE AND BORROW FOR A VALID MUNICIPAL PURPOSE OF THAT TYPE OF MUNICIPALITY. FOR EXAMPLE, A TOWN CANNOT BORROW TO BUILD AN ELEMENTARY SCHOOL.
- AS A GENERAL RULE, A MUNICIPALITY CAN ONLY AUTHORIZE AND BORROW TO CONSTRUCT, RECONSTRUCT OR ACQUIRE A CAPITAL ASSET FOR ITS OWN NEEDS.
- WATER SUPPLY, SEWER AND DRAINAGE PROJECTS ARE AN EXCEPTION TO THIS CONSTITUTIONALLY BASED OWN-NEEDS RULE. (THERE ARE OTHERS).
- A MUNICIPALITY IS AUTHORIZED TO CONSTRUCT OR RECONSTRUCT FACILITIES OR ACQUIRE EQUIPMENT FOR ITS OWN WATER SUPPLY SYSTEM IN EXCESS OF ITS OWN NEEDS TO PROVIDE A SUPPLY TO OTHER MUNICIPALITIES. NOTE: THE CAPITAL ASSETS THEREFORE MUST ALSO BENEFIT THE MUNICIPALITY AUTHORIZING THE CAPITAL PROJECT AND BORROWING FOR IT.
- AS A RESULT, WHILE SURPLUS CAPACITY FOR ANY WATER SYSTEM IMPROVEMENT OF A MUNICIPALITY CAN BE AUTHORIZED BY THAT MUNICIPALITY, THE RULES GOVERNING A JOINT WATER IMPROVEMENT PROJECT OF TWO OR MORE MUNICIPALITIES BECOME MORE COMPLICATED.
- DIFFERENT UNITS OF MUNICIPAL GOVERNMENT MAY HAVE DIFFERING AUTHORITY WITH REGARD TO ASPECTS OF JOINT FACILITIES.
- MUNICIPALITIES CAN DO JOINTLY ONLY WHAT EACH UNIT HAS AUTHORITY TO DO SEPARATELY BY ITSELF.
- MOST TYPES OF MUNICIPALITIES CAN ACQUIRE OR LEASE REAL PROPERTY JOINTLY, OR SEVERALLY.
- COUNTIES, CITIES, TOWNS, VILLAGES AND CERTAIN SPECIAL ACT IMPROVEMENT DISTRICTS CAN CONSTRUCT WATER IMPROVEMENTS, JOINTLY OR SEVERALLY.

ALLOCATION OF COSTS AND FINANCING

- IN THE CASE OF A MUNICIPALITY BUILDING EXCESS CAPACITY (SURPLUS) INTO ITS OWN MUNICIPAL FACILITIES, THERE ARE TWO BASIC MODELS FOR ALLOCATION OF COSTS:

  (a) The municipality authorizes the project at its total cost, borrows that cost itself and recoups the cost of the excess facilities through water rates charged to outside users, e.g. other municipalities.

(b) The municipality authorizes the project at its total cost but only borrows its share and the upfront excess capacity cost is recouped by an upfront cash payment from the outside users for the contractual right of access to the water supply for a set term. Such outside user can authorize financing for that contractual right as long as the term of the access contract is at least as long as the term of the bond issue. In this method, the outside user does not obtain an ownership interest in the facilities. Note: the outsider user could alternatively authorize and finance its own ownership share of the facility and then own it as a joint facility. Then we are no longer in the realm of surplus facilities and excess capacity of one municipality, we are talking about multi-party ownership.

- IN THE CASE OF TWO OR MORE MUNICIPALITIES CONSTRUCTING OR RECONSTRUCTING WATER IMPROVEMENT FACILITIES FOR JOINT OWNERSHIP USE AND BENEFIT, THERE ARE 3 BASIC MODELS FOR ALLOCATION OF COST:

  (a) Each of the municipalities can authorize the project as a joint project at its total cost and jointly borrow that total cost, being jointly liable on the debt in the full amount but with an allocation of the total cost amongst the joint obligor-owners. Each municipality would be expected to only pay its allocated share (which could change through time based on factors described in a requisite intermunicipal agreement, such as water usage) but would be legally liable if another municipality failed to meet its share of the obligation. Not surprisingly, the use of this method is very rare but it does match well a joint water project in which two or more municipalities want to divide the construction or acquisition costs of a water improvement based on a standardized measure such as EDUs. NOTE: joint facilities must benefit each of joint obligor-owners so it works best for water supply, filtration and storage facilities and for some, but not for all, distribution improvements.

  (b) Each of the municipalities can authorize their pro-rata share of joint facilities and their pro-rata share of that cost. Each municipality then borrows for their share and is only liable on their own debt. This is the most common method of authorizing and financing joint water improvement projects. A typical project might involve construction of a new water tank and reconstruction of water mains. The cost of the tank is allocated amongst the benefitting municipalities. Then each municipality adds to its costs for the project the cost of water main reconstruction within its boundaries because it is the sole beneficiary of those improvements if they are not in joint use providing some benefit to the other municipalities. (NOTE: if certain water transmission lines benefit more than one municipality, then it is appropriate to allocate that cost also on a reasonable basis).

  (c) The municipalities could seek special legislation to form a regional water authority which could authorize and finance any water supply, filtration, storage and distribution improvements and charge regional water rates through a water board to support the debt while the municipalities would not own the facilities (the authority would), they would be beneficiaries.

  (d) Not permissible is sole indebtedness of one of the municipalities involved in the project which municipality is only a pro-rata owner with the other municipalities involved in the project who by virtue of their contributions for debt service of the bond issuing municipality, are given a pro-rata ownership interest.

SOME OTHER BASIC RULES

- A MUNICIPALITY CAN MAKE A GIFT OF A REAL PROPERTY INTEREST TO ANOTHER MUNICIPALITY, BUT NOT OF BOND-FINANCED PROPERTY WHILE THE BONDS ARE OUTSTANDING.
- ACQUIRING OR CONSTRUCTING REAL PROPERTY FOR THE SOLE EXPRESS PURPOSE OF SELLING OR LEASING IT IS NOT PERMISSIBLE.
- ACQUIRING OR CONSTRUCTING REAL PROPERTY IN EXCESS OF THAT NEEDED WITH INTENT TO SELL OR LEASE EXCESS IS NOT PERMISSIBLE.
- ACQUIRING OR CONSTRUCTING REAL PROPERTY IN EXCESS OF CURRENT NEED IS PERMISSIBLE IF REASONABLY EXPECT NEED FOR ALL OR MOST OF CURRENT SURPLUS IN FORESEEABLE FUTURE AND/OR IN CERTAIN CASES NO OTHER PRACTICAL SOLUTION OR FOR WATER, SEWER OR DRAINAGE.
- SHORT-TERM USE BY OTHERS OF MUNICIPAL REAL PROPERTY THAT IS IN MUNICIPAL USE, AND REMAINS NECESSARY TO MUNICIPAL PURPOSES, IS PERMISSIBLE IN LIMITED CIRCUMSTANCES.
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