

MARCELLUS TOWN BOARD/WORKSHOP AGENDA

May 28, 2015

CALL TO ORDER

SALUTE TO FLAG

1. Approve monthly activity and audit of bills
2. Time Warner Contract
3. Security Alarms
4. Well testing proposals discussion
5. Storm Water Educational Review - John
6. Trash – days curb pickup 2 times a year.
7. Intrastate Municipal Aid Program
8. Attorney's Fees
9. Multi-year Cap Plan
10. Reserves, Bank Accounts and Ledger Accounts

Discussion Agenda

- A. Supervisor's Update
- B. Items from the Board
- C. Items from the Floor

Adjournment

NOTE: This is a tentative agenda and is subject to change.

Future Meeting Dates:

Planning/Zoning Board – Monday – June 1, 2015 – 7:00 pm at the Town Hall

Town Board Meeting – Monday – June 8, 2015 – 7:00 pm at the Town Hall

Town Board Workshop Meeting – Thursday – June 25, 2015 – 5:00 pm Welcome Center at Park

*** The June and July Workshop Meetings will be held at 5:00 to that residents can also enjoy the concerts in the Park*****

TOWN OF MARCELLUS FRANCHISE

Time Warner Cable

March 20, 2014

FRANCHISE AGREEMENT
TO PROVIDE CABLE TELEVISION SERVICES

Between

Town of Marcellus, New York

AND

Time Warner Cable Northeast LLC
d/b/a Time Warner Cable

FRANCHISE AGREEMENT

THIS FRANCHISE AGREEMENT (this "Agreement") is made and entered as of _____ between the **Town of Marcellus** (the "Grantor") and **Time Warner Cable Northeast LLC, d/b/a Time Warner Cable**, a limited liability company organized and existing in good standing under the laws of the State of Delaware ("Grantee").

WHEREAS, the Grantee has applied under the provisions of Federal law to Grantor for a renewal of its franchise granting it the right to construct and operate a cable television system and provide cable service; and

WHEREAS, the Company is providing such service pursuant to a franchise dated October 14, 2004 and has substantially complied with the material terms of the franchise and applicable law; and

WHEREAS, the technical ability, financial condition and character of the Grantee and Grantee's plans for constructing and operating the cable system were considered and found adequate and feasible and approved by Grantor at a full public proceeding affording due process; and

WHEREAS, this proposed Franchise Agreement complies with the standards of the New York State Public Service Commission ("NYPSC"); and

WHEREAS, the franchise granted herein is non-exclusive, herein:

NOW, THEREFORE, in consideration of the mutual conditions and covenants contained

IT IS MUTUALLY AGREED AS FOLLOWS:

SECTION 1. SHORT TITLE

This Franchise Agreement shall become known and may be cited as the Town of Marcellus/Time Warner Cable Franchise Agreement.

SECTION 2. DEFINITIONS.

For the purpose of this Agreement, the following terms, phrases, words, and their derivations shall have the meanings given herein. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular number include the plural number. All capitalized terms used in the definition of any other term shall have their meaning as otherwise defined in this Section 2. The words "shall" and "will" are mandatory and "may" is permissive. Words not

defined shall be given their common and ordinary meaning.

- 2.1 "Cable Act" means the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified at 47 U.S.C. §§ 521-611) as amended by the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) and the Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996), as may be further amended.
- 2.2 "Cable Service" shall have the meaning provided under Section 602(6) of the Cable Act (47 U.S.C. §522(6) as may be amended.
- 2.3 "Cable System" or "System" shall have the meaning provided under Section 602(7) (47 U.S.C. §522(7) as may be amended.
- 2.4 "Channel" means a portion of the electromagnetic frequency spectrum or any other means of transmission (including, without limitation, optical fibers or any other means now available or that may become available) which is used in a cable television system and is capable of delivering a television channel as television channel is defined by FCC regulation.
- 2.5 "Effective Date" has the meaning given to it in Section 3.4 of this Agreement.
- 2.6 "FCC" means the Federal Communications Commission, its designee, or any successor thereto.
- 2.7 "Franchise Area" means the territorial area of the Town of Marcellus. Such area shall include all areas annexed by the Town of Marcellus. For purposes of this Agreement, annexations shall be effective upon sixty (60) days notice from the Grantor to Grantee, including a list of affected addresses. If Grantee is operating a cable system in an annexed area immediately prior to the date of annexation under the terms of another franchise, Grantee may, at its option, continue to operate under the terms of such other franchise until any date up to the expiration of said franchise at which time Grantee will operate its system in the annexed area under the terms of this Franchise.
- 2.8 "Grantee" means Time Warner Cable Northeast LLC or any successor thereto.
- 2.9 "Gross Revenues" means all revenue as determined in accordance with generally accepted accounting principles ("GAAP") received by Grantee from Subscribers and derived from the operation of the cable system to provide cable service. Gross Revenues shall not include monies received by Grantee attributable to its payment of franchise fees which it has passed through or any taxes on services or equipment furnished by Grantee which are imposed by the state, county, local or other governmental unit and collected by September 26, 2014 Grantee on behalf of said governmental unit, bad debt or monies received by Grantee that Grantee is required to expend for promotional activities.

- 2.10 "NYPSC" means the New York Public Service Commission or any successor agency.
- 2.11 "PEG Access Channel" or "PEG Channel" means video Channel which Grantee must make available without charge for Public, Educational, or Governmental non-commercial use for the transmission of video programming consistent with NYSPC regulations.
- 2.12 "Person" means any natural person or any association, firm, partnership, joint venture, corporation, limited liability company, or other legally recognized entity, private or public, whether for profit or not-for-profit.
- 2.13 "Public Property" means any real property owned by any governmental unit.
- 2.14 "Streets" means the surface of and the space above and below any public street, public road, public highway, public freeway, public lane, public path, public way, public alley, public court, public sidewalk, public boulevard, public parkway, public drive or any public easement or right-of-way now or hereafter held and/or maintained by the Grantor.
- 2.15 "Subscriber" means any Person who lawfully receives Cable Service provided by Grantee by means of or in connection with the Cable System whether or not a fee is paid for such Cable Service.

SECTION 3. GRANT OF AUTHORITY AND GENERAL PROVISIONS.

- 3.1 Grant of Franchise. Upon the Effective Date and subject to the terms and conditions of this Agreement and of applicable law, Grantee is granted a non-exclusive franchise for the occupation and use of the Grantor's Streets for the installation, operation, maintenance, repair, upgrade, and removal of the Cable System (the "Franchise"). This Agreement specifically gives Grantee the right to provide Cable Service via the Cable System within the Franchise Area.
- 3.2 Authority for Use of Streets.
- A. For the purpose of operating, maintaining, and constructing a Cable System in the Franchise Area, Grantee may erect, install, construct, repair, replace, relocate, reconstruct and retain in, on, over, under, upon, across and along the Streets within the Franchise Area such lines, cables, conductors, poles, ducts, conduits, vaults, manholes, amplifiers, appliances, pedestals, attachments and other property and equipment as are necessary and appurtenant to the operation of the Cable System.
- B. Grantee shall operate and maintain the Cable System so as not to interfere with other uses of Streets. Grantee shall participate and cooperate in any "one-call" or similar system for the exchange of information on the utility location or work to be conducted.
- 3.3 Provision of Cable Service.

With a copy to: Time Warner Cable
 Attn: Law Department/Regulatory
 60 Columbus Circle
 New York, NY 10023

Such addresses may be changed by either party upon notice to the other party given as provided in this Section. In addition, either party may agree to receive certain notices, reports or demands by email at an email address which it provides to other party.

3.8 Franchise -Non-Exclusive.

A. The Franchise granted herein is non-exclusive. The Grantor specifically reserves the right to grant, at any time, additional franchises for a cable television system in accordance with state and federal law. The Grantor agrees that any grant of additional franchises by the Grantor to any other entity to provide cable or video service shall not be on terms and conditions that when taken as a whole are more favorable or less burdensome to the franchisee of any such additional franchise, than those which are set forth herein.

B. If the Grantor grants a cable television franchise or other right to provide cable service to another person on terms which overall provide greater benefits or impose lesser burdens than provided herein, the Grantor agrees to amend this Franchise (effective upon the grant to said other person) to overall provide such greater benefits or lesser burdens.

C. Notwithstanding any other provision in this Franchise: In the event any change to state or federal law occurring during the term of this Franchise eliminates the requirement for any person desiring to construct, operate or maintain a cable system in the Franchise Area to obtain a franchise from the Grantor for the construction, operation or maintenance of a cable system, then, Grantee shall have the right to terminate this Franchise and operate the system under the terms and conditions established in applicable law. If Grantee chooses to terminate this Franchise pursuant to this provision, this Franchise shall be deemed to have expired by its terms on the effective date of any such change in law, whether or not such law allows existing franchise agreements to continue until the date of expiration provided in any existing franchise. Grantee shall not abandon cable service in any portion of the Franchise Area without Grantor's consent and shall remain subject to all applicable laws and regulations with respect to abandonment of service including those of the NYPSC. Furthermore, in the event any change to state or federal law occurring during the term of this Franchise materially alters the regime of cable franchising applicable to any persons desiring to construct, operate or maintain a cable system in the Franchise Area in a way that reduces the regulatory or

economic burdens for such person, then, at Grantee's request, Grantor shall agree with Grantee to amend this Franchise to similarly reduce the regulatory or economic burdens on Grantee. It is the intent of this section that, at Grantee's election, Grantee shall be subject to no more burdensome regulation or provided lesser benefits under this Franchise than any other persons that might construct, operate or maintain a cable system in the Franchise Area. To the extent any acts pursuant to this section, including Grantee's choice to terminate this Franchise, result in an amendment to the Franchise, any such amendment shall be subject to such approval by the NYPSC as required by law and regulation.

- 3.9 Continuing Administration The Supervisor is responsible for the continuing administration of the Franchise.

SECTION 4. TECHNICAL STANDARDS.

- 4.1 Technical Standards. Cable System shall be designed, constructed, and operated so as to meet the technical standards promulgated by the FCC relating to Cable Communications Systems contained in part 76 of the FCC's rules and regulations, as may be amended from time to time. The Grantor may, upon written request, witness tests of the Cable System being conducted pursuant to FCC rules and regulations, and the results of those tests shall be made available to the Grantor free of charge within thirty (30) days of completion of the tests if the Grantor requests them in writing.

SECTION 5. EAS AND PEG.

- 5.1 Emergency Alert System. Grantee shall comply with the Emergency Alert System regulations of the FCC. The emergency alert system shall meet all Federal and State requirements.
- 5.2 PEG Access Channels. Grantee shall make available PEG access and comply with the standards set for PEG as required by the regulations of the NYPSC. Any PEG channel shall be shared with other franchising authorities served by Grantee's cable system. The Grantor shall indemnify, save and hold Grantee harmless from and against any liability resulting from the Grantor's use of the PEG Channels for municipal access.
- 5.3 Parental Controls. Upon request by a Subscriber, and where technologically feasible, Grantee shall provide such requesting Subscriber with a parental control device as provided in Section 624(d)(2) of the Cable Act. Grantee shall bear no responsibility for the exercise of parental controls and shall incur no liability for any Subscriber's or viewer's exercise or failure to exercise such controls.

SECTION 6. CONSTRUCTION PROVISIONS.

6.1 Construction Standards.

A. Grantee shall construct and maintain its cable system using materials of good and durable quality. All work involved in the construction, installation, maintenance, and repair of the cable system shall be performed in a safe, thorough, and reliable manner.

B. All construction practices shall be in accordance with all applicable Federal and state law and generally applicable local codes.

C. All installation of electronic equipment shall be of a permanent nature, durable and installed in accordance with the provisions of the applicable National Electrical Safety Code and National Electrical Code.

D. All of Grantee's plant and equipment (a) shall be installed, located, erected, constructed, reconstructed, replaced, removed, repaired, maintained and operated in accordance with good engineering practices; and (b) shall not endanger or interfere with ordinary use of the rights-of-way or unnecessarily hinder or obstruct pedestrian or vehicular traffic.

E. Grantee shall at all times employ reasonable care and shall install and maintain in use commonly accepted methods and devices preventing failures and accidents which are likely to cause damage, injury or nuisance to the public.

F. Grantee has constructed a hybrid fiber/coax cable system capable of providing a minimum capacity of (-78) channels. Grantee shall maintain the system at the same or enhanced level during the term of the franchise.

6.2 Construction Codes.

A. Grantee shall adhere to all building and zoning codes currently or hereafter applicable to construction in the Franchise Area.

B. The Grantor shall have the right to inspect all construction or installation work in the public rights-of-way performed pursuant to the provisions of this Agreement.

6.3 Repair of Streets and Property.

A. Any and all Streets, municipal property, or private property, which are destroyed or damaged by Grantee during the construction, repair, replacement, relocation, operation, maintenance or reconstruction of the Cable System shall be promptly replaced or repaired by Grantee, at its expense, and restored to a serviceable condition as good as that prevailing prior to Grantee's disturbance of, or damage to, the property. If Grantee fails to repair, replace, or otherwise correct a Street or property following

reasonable written notice by the Grantor, the Grantor may complete any repair, replacement, restoration or other correction and invoice Grantee for the same.

6.4 Use of Existing Poles.

A. Poles may be erected by Grantee subject to any generally applicable regulation by Grantor with regard to location, height, type, and any other pertinent aspect. It is the responsibility of Grantee to secure agreements for use of poles or conduits owned by third parties.

B. Where poles already existing for use in serving the Franchise Area are available for use by Grantee, but it does not make arrangements for such use, the Grantor may require Grantee to use such poles if it determines that the public convenience would be enhanced thereby, and if the Grantee can obtain such use on reasonable terms and conditions and at less cost to Grantee than erecting its own poles. No term or condition shall be reasonable if not consistent with pole attachments rates and conditions established by the FCC and/or NYPSC.

6.5 Undergrounding of Cable.

A. ~~A.~~ Cable shall be installed underground where the existing telephone and electrical utilities are already underground. In the event the Grantor reimburses any utility for undergrounding, Grantee shall be similarly reimbursed.

6.6 Reservation of Street Rights.

A. Nothing in this Agreement shall be construed to prevent the Grantor from constructing, maintaining, repairing or relocating sewers; grading, paving, maintaining, repairing, relocating and/or altering any Street; constructing, laying down, repairing, maintaining or relocating any water mains; or constructing, maintaining, relocating, or repairing any sidewalk or other public work.

B. All such work shall be done, insofar as practicable in such a manner as not to obstruct, injure or prevent the free use and operation of the poles, wires, conduits, conductors, pipes or appurtenances of Grantee.

C. If any such property of Grantee shall interfere with the construction or relocation, maintenance or repair of any Street or public improvement, whether it be construction, repair, maintenance, removal or relocation of a sewer, public sidewalk, or water main, Street or any other public improvement, at least thirty (30) days written notice shall be given to Grantee by the Grantor and all such poles, wires, conduits or other appliances and facilities shall be removed or replaced by Grantee in such manner as shall be directed by the Grantor so that the same shall not interfere with the said public work of the Grantor, as reasonably determined by the

Grantor and such removal or replacement shall be at the expense of Grantee, provided, however, if any other right-of-way user is compensated for such work by the Grantor, then Grantee shall be similarly compensated.

D. Nothing contained in this Agreement shall relieve any Person from liability arising out of the failure to exercise reasonable care to avoid damaging Grantee's facilities while performing any work connected with grading, re-grading, or changing the line of any Street or public place or with the construction or reconstruction of any sewer or water system or with any other work.

- 6.7 Trimming of Trees. Grantee shall have the authority to trim trees, in accordance with all generally applicable utility restrictions, ordinance and easement restrictions, upon and hanging over Streets, alleys, sidewalks, and public places of the Grantor so as to prevent the branches of such trees from interfering with the Cable System.
- 6.8 System Abandonment. Grantee may not abandon cable service in any portion of the Franchise Area without the express written consent of Grantor. Grantee shall continue to provide Cable Service to All Subscribers who meet their obligations with respect to such service.
- 6.9 Movement of Facilities. In the event it is necessary temporarily to move or remove any of Grantee's wires, cables, poles, or other facilities placed pursuant to this Agreement, in order to lawfully move a large object, vehicle, building or other structure over the Streets of the Franchise Area, upon two (2) weeks written notice by the Grantor to Grantee, Grantee shall move, such of its facilities as may be required to facilitate such movements. The Person requesting the temporary removal shall pay Grantee in advance the costs Grantee incurs in moving its facilities. Any service disruption provisions of this Agreement shall not apply in the event that the removal of Grantee's wires, cables, poles or other facilities pursuant to this Section results in temporary service disruptions.

SECTION 7. REPORTING PROVISIONS.

- 7.1 Audit and Inspection. The Grantor, its agents and its representatives shall have the authority, during normal business hours, to arrange for and conduct an inspection of the books, records, maps, plans, financial statements and other like materials of Grantee where such inspection is necessary to ascertain Grantee's compliance with the material terms of this Franchise. Grantee will be given reasonable advance written notice of such an inspection request and a description, to the best of the Grantor's ability, of the materials it wants to inspect.
- 7.2 Communications with Regulatory Agencies. Copies of all publicly available petitions, applications, communications and reports submitted by Grantee, to any federal or state regulatory commission or agency relating to the Cable System operated pursuant to this Franchise shall also be made available to the Grantor upon request. Copies of publicly

available responses from the regulatory agencies to Grantee shall likewise be made available to the Grantor upon request.

- 7.3 Confidentiality. Grantor shall maintain as confidential any information provided to it by Grantee under the terms of this Franchise which Grantee has designated as confidential. In the event that Grantor believes at any time that it is required by law to disclose such information to a third party, Grantor will so notify Grantee at a time prior to any such disclosure that affords Grantee a reasonable opportunity to take such action as it deems necessary to prevent such disclosure, including seeking relief in court.
- 7.4 Reporting. Any report required by this Franchise may be satisfied with system-wide statistics, except for reporting requirements related to franchise fees and customer complaints.

SECTION 8. CONSUMER PROTECTION PROVISIONS.

- 8.1 Rate Regulation. Grantee's rate and charges for cable service shall be subject to regulation in accordance with Federal law.
- 8.2 Customer Service.
- A. Grantee shall comply with the cable customer service and consumer protection standards of the FCC and NYPSC.
- B. Any bill, notice or other communication provided or issued by Grantee to any Subscriber may be provided or issued, if such Subscriber so consents, solely by electronic means.

SECTION 9. FRANCHISE FEES.

- A. A.—Grantee shall pay to the Grantor a franchise fee in an amount equal to ~~five~~three percent ~~(5%)~~ Grantee's Gross Revenues.
- B. B.—Payments due the Grantor under this provision shall be computed quarterly. Payments shall be due and payable quarterly for each calendar quarter not later than forty-five (45) days following the end of the calendar quarter. Each payment shall be accompanied by a brief report of Grantee's Gross Revenues for the preceding year.
- C. No acceptance of any payment shall be construed as an accord that the amount paid is in fact the correct amount, nor shall such acceptance of payment be construed as a release of any claim the Grantor may have for further or additional sums payable under the provisions of this Agreement. All amounts paid shall be subject to audit and recomputation by the Grantor.

D. No auditor engaged by the Grantor shall be compensated on a success based formula, e.g., payment based on a percentage of an underpayment, if any.

E. Grantor shall not audit any period earlier than six (6) years prior to the time the audit is conducted.

F. The amount of franchise fee and the method of calculation shall be competitively neutral when compared to the amount or method of calculation of the franchise fee in any other cable franchise granted by Grantor.

G. If Grantee charges a combined or "bundled" rate for a package of services which includes Cable Services subject to the franchise fee and other services which are not subject to the franchise fee, the franchise fee shall be imposed on the portion of the bundled charge applicable to the cable services subject to the franchise fee as reflected in the books and records of Grantee, subject to any applicable laws and regulations.

SECTION 10. INDEMNITY AND INSURANCE.

10.1 Indemnity.

A. ~~A.~~—Grantee shall indemnify, defend, and hold harmless the Grantor, its officers, Boards, elected officials and employees for all liability, costs, expenses, damages, and ~~penalties~~ incurred by Grantor as a result of Grantee's conduct or performance under this Agreement or exercise of the Franchise. These damages and penalties shall include, but shall not be limited to, damages arising out of personal injury, property damage, copyright infringement, defamation, antitrust, errors and omission, theft, fire, and all other damages arising out of Grantee's exercise of the Franchise, whether or not any act or omission complained of is authorized, allowed or prohibited by this Agreement; such indemnification shall include, but not be limited to, reasonable attorney's fees and costs. Grantee's obligations hereunder shall not extend to any claim or loss to the extent arising from the Grantor's negligence; misconduct; the content of programming carried on any channel set aside for public educational or governmental use, or channels leased pursuant to 47 U.S.C. §532; and, the Grantor's use of Grantee's emergency alert system ("EAS") capability.

B. In order for the Grantor to assert its rights to be indemnified and held harmless, the Grantor must:

(1) promptly notify Grantee of any claim or legal proceeding which gives rise to such right; September 26, 2014

(2) afford Grantee the opportunity to participate in and fully control any compromise, settlement, resolution or disposition of such claim or proceeding; and

(3) fully cooperate in the defense of such claim and make available to Grantee all such information under its control relating thereto.

~~B.~~ ~~C.~~—With respect to Grantee's indemnity obligations as set forth herein, Grantee shall provide the defense of any claims brought against Grantor by selecting counsel of Grantee's choice to defend the claim, subject to the consent of the Grantor, which shall not be unreasonably withheld. In the event Grantee fails to retain legal counsel and fulfill its obligations to Grantor or any Indemnitee hereunder, counsel may be selected and retained by Grantor at Grantee's sole cost and expense.

10.2 Liability Insurance.

A. Grantee shall maintain, throughout the term of the Franchise, liability insurance with a company licensed to do business in the State of New York with a rating by Best of not less than "A-," insuring Grantee and the Grantor (wherein the Grantor is named as additional insured) with respect to Grantee's activities in the Franchise Area in the minimum amounts of:

1. One Million Dollars (\$1,000,000.00) for bodily injury or death to any one (1) person;
2. Three Million Dollars (\$3,000,000.00) for bodily injury or death resulting from any one (1) accident or occurrence;
3. One Million Dollars (\$1,000,000.00) for all other types of liability.
4. Five Million Dollars (\$5,000,000.00) excess liability or umbrella coverage.

B. Grantee shall maintain in force, during the term of this Agreement and any renewal thereof, Workers' Compensation Insurance, covering its obligations under the Workers' Compensation statute.

C. Grantee shall furnish to the Grantor a certificate evidencing that a satisfactory insurance policy has been obtained. Such insurance policy shall require that the Grantor be notified thirty (30) days prior to any expiration or cancellation. The certificate of insurance shall not include language which impacts the effectiveness and applicability of such coverage.

D. Upon request, Grantee shall provide blanket additional insured endorsements for the general liability and umbrella policies.

E. Insurance shall be issued on a primary, non-contributory basis.

SECTION 11. REVOCATION AND REMOVAL

11.1. Right to Revoke.

A. If at any time the Grantor believes that Grantee has not complied with the terms of the Franchise, the Grantor shall informally discuss the matter with Grantee. If these discussions do not lead to resolution of the problem in a reasonable time, the Grantor shall then notify Grantee in writing of the exact nature of the alleged noncompliance in a reasonable time (for purposes of this Section, the "noncompliance Notice").

B. Grantee shall have sixty (60) days from receipt of the Noncompliance Notice to: (i) respond to the Grantor, if Grantee contests (in whole or in part) the assertion of noncompliance; (ii) cure such noncompliance; or (iii) in the event that, by its nature, such noncompliance cannot be cured within such sixty (60) day period, initiate reasonable steps to remedy such noncompliance and notify the Grantor of the steps being taken and the date by which grantee projects that it will complete cure of such noncompliance. Upon cure of any noncompliance, the Grantor shall provide written confirmation that such cure has been effected.

C. The Grantor shall schedule a public hearing if the Grantor seeks to continue its investigation into the alleged noncompliance (i) if Grantee fails to respond to the Noncompliance Notice pursuant to the procedures required by this Section, or (ii) if Grantee has not remedied the alleged noncompliance within sixth (60) days or the date projected pursuant to Section 11.1B above. The Grantor shall provide Grantee at least sixty (60) business days prior written notice of such public hearing, which will specify the time, place and purpose of such public hearing, and provide Grantee the opportunity to be heard.

D. Subject to applicable federal and state law, in the event the Grantor, after the public hearing, determines that Grantee is in default of any provision of this Franchise, the Grantor may:

Seek specific performance of any provision, which reasonably lends itself to such remedy, as an alternative to damages; or

Commence an action at law for monetary damages or seek other equitable relief; or
In the case of a substantial noncompliance with a material provision of this Franchise, seek to revoke the Franchise in accordance with the procedures set forth below.

E. Should the Grantor seek to revoke this Franchise after following the procedures set forth above, the Grantor shall give written notice to Grantee of such intent. The notice shall set forth the specific nature of the noncompliance. The Grantee shall have ninety (90) days from receipt of such notice to object in writing and to state its reasons for such objection. In the event the Grantor has not received a satisfactory response from Grantee, it may then seek termination of the Franchise at a second public hearing. The Grantor shall cause to be served upon the Grantee, at least thirty (30) business days prior to such public hearing, a written notice specifying the time and place of such hearing and stating its intent to revoke the Franchise.

F. At the designated public hearing, Grantee shall be provided a fair opportunity for full participation, including the rights to be represented by legal counsel, to introduce relevant evidence, to require the production of evidence, to compel the relevant testimony of the officials, agents, employees or consultants of the Grantor, to compel the testimony of other persons as permitted by law, and to question and/or cross examine witnesses. Grantee shall cause to be made, at its expense, a complete verbatim record and transcript of such hearing.

G. Following the second public hearing, Grantee shall be provided up to thirty (30) days to submit its proposed findings and conclusions to the Grantor in writing and thereafter the Grantor shall determine (i) whether an event of default has occurred under this Franchise; (ii) whether such event of default is excusable; and (iii) whether such event of default has been cured or will be cured by the Grantee. The Grantor shall also determine whether it will revoke the Franchise based on the information presented, or, where applicable, grant additional time to the Grantee to affect any cure. If the Grantor determines that it will revoke the Franchise, the Grantor shall promptly provide Grantee with a written determination setting forth the Grantor's reasoning for such revocation. Grantee may appeal such written determination of the Grantor to an appropriate court, which shall have the power to review the decision of the Grantor *de novo*. Grantee shall be entitled to such relief as the court finds appropriate. Such appeal must be taken within sixty (60) days of Grantee's receipt of the written determination of the Grantor.

H. The Grantor may at its sole discretion, take any lawful action that it deems appropriate to enforce the Grantor's rights under the Franchise in lieu of revocation of the Franchise.

SECTION 12. TRANSFER

12.1 Sale or Transfer of Franchise.

A. Subject to Section 617 of the Communications Act, 47 U.S.C. § 537 as amended, Grantee may not sell, assign or otherwise transfer this Franchise without the consent of Grantor which shall not be unreasonably withheld, except that Grantee may

transfer the Franchise to an entity under common control with Grantee without such consent. In considering an application for the Transfer of the Franchise, the Grantor may consider the applicant's (i) technical ability; (ii) financial ability; (iii) good character; and (iv) other qualifications necessary to continue to operate the cable system consistent with the terms of the Franchise.

B Grantee shall provide at least sixty days notice to Grantor in the event the Franchise is to be sold, assigned or otherwise transferred to an entity under common control with Grantee

C. Within thirty (30) days of the consummation of any Franchise Transfer subject to the provisions of this Section, Grantee shall notify the Grantor of the closing of such Franchise Transfer.

SECTION 13. RIGHTS OF INDIVIDUALS PROTECTED.

13.1 Discriminatory Practices Prohibited.

A. Grantee shall not deny service, deny access, or otherwise discriminate against Subscribers or general citizens on the basis of age, race, creed color, national origin or sex. Grantee shall comply at all times with all applicable federal and state laws relating to non- discrimination.

B. Grantee will not refuse to hire or employ, or bar or discharge from employment, nor discriminate against any person in compensation or in terms, conditions or privileges of employment on the basis of age, race, creed, color, national origin or sex.

SECTION 14. MISCELLANEOUS PROVISIONS.

14.1 Compliance with Laws. Grantor and Grantee shall conform to all applicable state and federal laws and rules regarding cable television as they become effective. Grantee shall also conform with all generally applicable Grantor ordinances, resolutions, rules and regulations heretofore or hereafter adopted or established during the entire term of the Franchise. In the event of a conflict between Grantor ordinances, resolutions, rules or regulations and the provisions of this Agreement, the provisions of this Agreement shall govern.

14.2 Severability. If any provision of this Agreement is held to be invalid or unenforceable, that provision will be ineffective but the remainder of this Agreement will not be affected, and it will in all other respects, continue to be effective and enforceable. If the holding of invalidity or unenforceability is subsequently repealed, unenforceable or otherwise changed so that the provision which had been held invalid is no longer in conflict with the law, rules and regulations then in effect, the provision will return to full force and effect.

- 14.3 Controlling Law. This Agreement shall be construed and enforced in accordance with the laws of the State of New York.
- 14.4 No Third Party Beneficiaries. This Agreement is not intended to, and does not create any rights or benefits on behalf of any person other than the parties to this Agreement.
- 14.5 Captions. The paragraph captions and headings in this Agreement are for convenience and reference purpose only and shall not affect in any way the meaning of interpretation of this Agreement.
- 14.6 Calculation of Time. Where the performance or doing of any act, duty, matter, payment or thing is required hereunder and the period of time or duration for the performance or during thereof is prescribed and fixed herein, the time shall be computed so as to exclude the first and include the last day of the prescribed or fixed period, or duration of time. When the last day of the period falls on Saturday, Sunday or a legal holiday, that day shall be omitted from the computation.
- 14.7 Amendments. This Agreement may be amended only by the mutual consent of the Grantor and Grantee and in accordance with the regulations of the NYPSC. Any amendment must be in writing and executed by the Grantor and Grantee.
- 14.8 Entire Agreement. This Franchise and the Exhibits hereto constitute the entire agreement between Grantee and the Grantor and they supersede all prior or contemporaneous agreements, representations or understandings (whether written or oral) of the parties regarding the subject matter hereof. Any local laws or parts of local laws that materially conflict with the provisions of this Agreement are superseded by this Agreement.
- 14.9 Force Majeure. In no event, and notwithstanding any contrary provision in this Franchise, shall this Franchise be subject to revocation or termination, or Grantor or Grantee be subject to penalty or prejudice or in any way liable for non-compliance with or delay in the performance of any obligations hereunder, where its failure to cure or take reasonable steps to cure is due to reason of Acts of God; acts of public enemies; order of any kind of a government of the United States of America or of the State or any of their departments, agencies, political subdivisions; riots; strikes; failure of suppliers; epidemics; landslides; lightning; earthquakes; fires; hurricanes; tornadoes; volcanic activity; storms; floods; washouts; droughts; civil disturbances; explosions; partial or entire failure of utilities or any other cause or event not reasonably within the control of the party. Neither Grantor nor Grantee shall be deemed to be in violation or default during the continuance of such inability and such party shall be excused from its obligations herein during the course of any such events or conditions and the time specified for performance of the obligations hereunder shall automatically extended for a period of time equal to the period of the existence of any such events or conditions

TOWN OF MARCELLUS FRANCHISE

Time Warner Cable

May 15, 2014

and such reasonable time thereafter as shall have been necessitated by any such events or conditions.



Central Office Monitoring Contract

911 N. Geddes Street
Syracuse, NY 13204
Phone: (315) 422-4141
www.esssecurity.net

License by N.Y.S. Department of State
State License No. 12000049817

Agreement dated 05/19/15, by and between Sonitrol Services of New York, Inc., (hereinafter referred to as "EASTERN" or "ALARM COMPANY" and Town of Marcellus (hereinafter referred to as "Subscriber" or "Buyer").

CUSTOMER INFORMATION:

Customer Name: Town of Marcellus Residential: Yes No

Monitoring Location (the "Monitored Location"): _____ Account Number _____

24 East Main Street Marcellus, NY 13108 Onondaga
(Street Address) (City/State/Zip) (County)

Billing Address (If different from the Monitoring Location): _____

(Street Address) (City/State/Zip) (County)

Special Instructions: Customer owns all equipment after the 36-month monitoring term. Eastern Security Services reserves the sole and exclusive right to deprogram any digital or cellular transmitter upon termination of this agreement. Parts and Labor under warranty for one year. Thereafter, service is provided on a time and materials basis upon customer's request.

1. DESCRIPTION OF SERVICE AND EQUIPMENT VALUE:

This agreement applies to: (check appropriate categories):

- Burglar Alarm
- Hold-up Alarm
- Temperature
- Sprinkler Supervisory
- Fire Alarm
- Other: _____
- Digital
- Radio/Cell Backup
- Cell Primary
- IP/Internet

2. INSTALLATION, RENTAL AND SERVICE CHARGES:

Down Payment: \$ 199.00
Balance Due Upon Completion: \$ 100.00

(a) INSTALLATION:	\$ <u>199.00</u>	\$ <u>0.00</u>	\$ <u>199.00</u>
		Tax	Total
(b) MONITORING:	\$ <u>29.00</u>	\$ <u>0.00</u>	\$ <u>29.00</u>
	Quarterly	Tax	Total

Monitoring fee payable in for the term of this agreement commencing on the first day of the month next succeeding the date hereof, and continuing quarterly thereafter, all payments being due on the first of the month.

NOTICE OF CANCELLATION (for residential customers only): YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION.

3. COMMUNICATION SOFTWARE REMAINS PERSONAL PROPERTY OF EASTERN: EASTERN shall instruct Subscriber in the proper use of the security system and service in the premises of the Subscriber. Communication software shall remain the sole personal property of EASTERN and shall not be considered a fixture or a part of the realty, and Subscriber shall not permit the attachment thereto of any apparatus not furnished by EASTERN. Communication software is part of the control panel programmed to transmit a signal and shall remain EASTERN's property. Passcode to CPU software remains property of EASTERN. Provided Subscriber performs this agreement for the full term thereof, upon termination EASTERN shall at its option provide to Subscriber the passcode to the CPU software or change the passcode to the manufacturer's default code.

4. TERM OF AGREEMENT: RENEWAL INCREASE: The term of this Agreement shall be for a period of 3 years and shall automatically renew month to month thereafter under the same terms and conditions, unless either party gives written notice to the other by certified mail, return receipt requested, of their intention not to renew the contract at least 30 days prior to the expiration of any term. After one (1) year EASTERN shall be permitted, from time to time, to increase the monitoring charge and Subscriber agrees to pay such increase as invoiced or shall have the right to cancel this agreement with 30 days written notice.

5. CENTRAL OFFICE MONITORING: Upon receipt of a signal from the communication software, EASTERN or its designee communication center shall make every reasonable effort to notify Subscriber and the appropriate municipal police or fire department. Subscriber acknowledges that signals transmitted from Subscriber's premises directly to municipal police or fire departments are not monitored by personnel of EASTERN or EASTERN's designee communication center and EASTERN does not assume any responsibility for the manner in which such signals are monitored or the response, if any, to such signals. Subscriber acknowledges that signals which are transmitted over telephone lines, wire, air waves, VOIP, Radio, Cellular or other modes of communication pass through communication networks wholly beyond the control of EASTERN and are not maintained by EASTERN and, therefore, EASTERN shall not be responsible for any failure which prevents transmission signals from reaching the central office monitoring center or damages arising therefrom. Subscriber agrees to furnish EASTERN with a written list of names and telephone numbers of those persons Subscriber wishes to receive notification of alarm signals. All changes and revisions shall be supplied to EASTERN in writing. Subscriber authorizes EASTERN to access the control panel to input or delete data and programming. If the equipment contains listening devices permitting central office to monitor sound then upon receipt of an alarm signal central office shall monitor sound for so long as central office in its sole discretion deems appropriate to confirm an alarm condition. If Subscriber requests EASTERN to remotely activate or deactivate the system, change combinations, openings or closings, or re-program system functions, Subscriber shall pay EASTERN \$10.00 for each such service. EASTERN may, without prior notice, suspend or terminate its services, in central station's sole discretion, in the event central station facility or communication network is non-operational or subscriber's alarm system is sending excessive false alarms. In the event of a payment or other default in this agreement EASTERN may suspend or terminate services with Ten (10) day notice. Central station is authorized to record and maintain audio and video transmissions, data and communications, and shall be the exclusive owner of such property.

X _____
Subscriber Signature Date

X _____
Eastern's Authorized Representative Signature Date

SEE REVERSE SIDE FOR ADDITIONAL TERMS AND CONDITIONS OF THIS CONTRACT. READ THEM BEFORE YOU SIGN THIS CONTRACT. BUYER ACKNOWLEDGES RECEIVING A FULLY EXECUTED COPY OF THIS CONTRACT AT THE TIME OF EXECUTION.

6. NO WARRANTIES OR REPRESENTATIONS: SUBSCRIBER'S EXCLUSIVE REMEDY: EASTERN does not represent nor warrant that the security equipment and central office monitoring will prevent any loss, damage or injury to person or property, by reason of burglary, theft, hold-up, fire or other cause, or that the security equipment will in all cases provide the protection for which it is installed or intended. Subscriber acknowledges that EASTERN is not an insurer, and the Subscriber assumes all risk for loss or damage to Subscriber's premises or its contents. EASTERN has made no representations or warranties, and hereby disclaims any warranty of merchantability or fitness for any particular use. Subscriber's exclusive remedy for EASTERN's default hereunder is to require EASTERN to repair or replace, at EASTERN's option, any equipment covered by this agreement which is non-operational.

7. EXCULPATORY CLAUSE: Subscriber agrees that EASTERN is not an insurer and no insurance coverage is offered herein. The security equipment is designed to reduce certain risks of loss, though EASTERN does not guarantee that no loss will occur. EASTERN is not assuming liability, and, therefore shall not be liable to Subscriber for any loss, personal injury or property damage sustained by Subscriber as a result of burglary, theft, hold-up, fire, equipment failure, smoke, or any other cause, whatsoever, regardless of whether or not such loss or damage was caused by or contributed to by EASTERN's negligent performance, failure to perform any obligation or strict products liability. Subscriber releases EASTERN from any claims for contribution, indemnity or subrogation.

8. LIMITATION OF LIABILITY: Subscriber agrees that should there arise any liability on the part of EASTERN as a result of EASTERN's negligent performance to any degree, failure to perform any of EASTERN's obligations, equipment failure or strict products liability, that EASTERN's liability shall be limited to the sum of six times the monthly payment at time liability is fixed or the sum of \$250.00 whichever is greater. If Subscriber wishes to increase EASTERN's maximum amount of EASTERN's limitation of liability, Subscriber may, as a matter of right, at any time, by entering into a supplemental contract, obtain a higher limit by paying an annual payment consistent with EASTERN's increased liability. This shall not be construed as insurance coverage.

9. CARE OF EQUIPMENT: Subscriber agrees not to tamper with, remove or otherwise interfere with the communication software which shall remain in the same location as installed and Subscriber agrees to bear the cost of repairs or replacement made necessary as a result of any painting, alteration, remodeling or damage, including damage caused by unauthorized intrusion to the premises, lightning or electrical surge, as well as for ordinary wear and tear.

10. ALTERATION OF PREMISES FOR INSTALLATION: EASTERN is authorized to make preparations such as drilling holes, driving nails, making attachments or doing any other thing necessary in EASTERN's sole discretion for the installation and service of the communication software, and EASTERN shall not be responsible for any condition created thereby as a result of such installation, service, or removal of the communication software, and Subscriber represents that the owner of the premises, if other than Subscriber, authorizes the installation of the communication software under the terms of this agreement.

11. SUBSCRIBER'S DUTY TO SUPPLY ELECTRIC AND COMMUNICATION SERVICE: Subscriber agrees to furnish, at Subscriber's expense, all 110 Volt AC power, electrical outlets, receptacles, telephone hook-ups, RJ31x Block or equivalent, internet connection, high speed broadband cable or DSL and IP Address, as deemed necessary by EASTERN in its sole discretion and to notify EASTERN of any change in such service.

12. TESTING AND SERVICE OF COMMUNICATION SOFTWARE: Communication software, once installed, is in the exclusive possession and control of the Subscriber, and it is Subscriber's sole responsibility to notify EASTERN if it is in need of repair. EASTERN shall not be required to service the communication software unless it has received notice from Subscriber, and upon such notice, EASTERN shall service the communication software to the best of its ability within 36 hours, exclusive of Saturday, Sunday and legal holidays, during the business hours of 9 a.m. and 5 p.m. Any repair or other services provided by EASTERN to Subscriber's alarm or security equipment shall be at EASTERN's option on a per call request by Subscriber, and Subscriber shall pay for such labor and material at time such repair or other service is performed. All such repair or other service shall be governed by the terms of this contract. In the event Subscriber complies with the terms of this agreement and EASTERN fails to repair the communication software, Subscriber agrees to send notice in writing by certified or registered mail, return receipt requested and Subscriber shall not be responsible for payments due while the communication software remains inoperable. Only communication software is covered by service. It shall be Subscriber's sole responsibility to maintain the communication hardware and subscriber's alarm equipment and system in working order.

13. LEGAL ACTION: The parties waive trial by jury in any action between them. In any action commenced by EASTERN against Subscriber, Subscriber shall not be permitted to interpose any counterclaim. Any action by Subscriber against EASTERN must be commenced within one year of the accrual of the cause of action or shall be barred. All actions or proceedings against EASTERN must be based on the provisions of this agreement. Any other action that Subscriber may have or bring against EASTERN in respect to other services rendered in connection

with this agreement shall be deemed to have merged in and be restricted to the terms and conditions of this agreement. Any service of process or papers in any action, proceeding or arbitration may be served by first class mail delivered by the U.S. Post Office or overnight carrier to addresses in this agreement. Any action or dispute between the parties, including issues of arbitrability, shall, at the option of either party, be determined by arbitration administered by Arbitration Services Inc., under its Commercial Arbitration Rules. www.arbitr8ors.com. Subscriber submits to the jurisdiction of New York and agrees that any litigation between the parties must be commenced and maintained exclusively in the State of New York and in the County where EASTERN's principal place of business is located.

14. DELAY IN INSTALLATION: EASTERN shall not be liable for any damage or loss sustained by Subscriber as a result of delay in installation of equipment, equipment failure, or for interruption of service due to electric failure, strikes, walk-outs, war, acts of God, or other causes, including EASTERN's negligence in the performance of this contract. The estimated date work is to be substantially completed is not a definite completion date and time is not of the essence.

15. LIEN LAW: EASTERN or any subcontractor engaged by EASTERN to perform work or furnish material who is not paid may have a claim against Subscriber or the owner of the premises if other than the Subscriber which may be enforced against the property in accordance with the applicable lien laws.

16. INSURANCE: The Subscriber shall maintain a policy of public liability, property damage, burglary and theft insurance. The subscriber agrees to indemnify and hold EASTERN harmless from and against all costs, expenses including attorneys' fees and liability arising out of or based upon any and all claims, injuries and damages arising under this agreement, including, but not limited to, those claims, injuries and damages contributed to by EASTERN's negligent performance to any degree or its failure to perform any obligation. The minimum limits of liability of such insurance shall be one million dollars for any injury or death, and property damage, burglary and theft coverage in an amount necessary to indemnify Subscriber for property on its premises. EASTERN shall not be responsible for any portion of any loss or damage which is recovered or recoverable by the Subscriber from insurance covering such loss or damage or for such loss or damage against which the Subscriber is indemnified or insured.

17. INDEMNITY/WAIVE OF SUBROGATION RIGHTS/ASSIGNMENTS: Subscriber agrees to and shall indemnify and hold harmless EASTERN, its employees, agents and subcontractors, from and against all claims, lawsuits, including those brought by third parties or by Subscriber, including reasonable attorneys' fees and losses, asserted against and alleged to be caused by EASTERN's performance, negligence or failure to perform any obligation under this agreement. Parties agree that there are no third-party beneficiaries of this contract. Subscriber on its behalf waives any right of subrogation Subscriber's insurance carrier may otherwise have against EASTERN or EASTERN's subcontractors arising out of this agreement or the relation of the parties hereto. Subscriber shall not be permitted to assign this agreement without written consent of EASTERN. EASTERN shall have the right to assign this contract and shall be relieved of any obligations herein upon such assignment.

18. FALSE ALARMS/PERMIT FEES: Subscriber is responsible for all alarm permits and permit fees, agrees to file for and maintain any permits required by applicable law and indemnify or reimburse EASTERN for any fines relating to permits or false alarms. EASTERN shall have no liability for permit fees, false alarms, false alarm fines, police or fire response, any damage to personal or real property or personal injury caused by police or fire department response to alarm, whether false alarm or otherwise, or the refusal of the police or fire department to respond. In the event of termination of police or fire response by the municipal police or fire department this contract shall nevertheless remain in full force and Subscriber shall remain liable for all payments provided for herein. Should EASTERN be required by existing or hereinafter enacted law to perform any service or furnish any material not specifically covered by the terms of this agreement Subscriber agrees to pay EASTERN for such service or material.

19. EASTERN'S RIGHT TO SUBCONTRACT SPECIAL SERVICES: Subscriber agrees that EASTERN is authorized and permitted to subcontract any services to be provided by EASTERN to third parties who may be independent of EASTERN, and that EASTERN shall not be liable for any loss or damage sustained by Subscriber by reason of fire, theft, burglary or any other cause whatsoever caused by the negligence of third parties, and that Subscriber appoints EASTERN to act as Subscriber's agent with respect to such third parties, except that EASTERN shall not obligate Subscriber to make any payments to such third parties. Subscriber acknowledges that this agreement, and particularly those paragraphs relating to EASTERN's disclaimer of warranties, exemption from liability, even for its negligence, limitation of liability and indemnification, inure to the benefit of and are applicable to any assignee, subcontractors and communication centers of EASTERN.

20. NON-SOLICITATION. Subscriber agrees that it will not solicit for employment for itself, or any other entity, or employ, in any capacity, any employee of EASTERN assigned by EASTERN to perform any service for or on behalf of Subscriber for a period of two years after EASTERN has completed providing service to Subscriber.

21. SECURITY INTEREST/COLLATERAL: To secure Subscriber's obligations under this agreement Subscriber grants EASTERN a security interest in the security equipment installed by EASTERN and EASTERN is authorized to file a financing statement.

22. FULL AGREEMENT/SEVERABILITY/CONFLICTING DOCUMENTS. This agreement constitutes the full understanding of the parties and may not be amended or modified or canceled except in writing signed by both parties, except EASTERN's requirements regarding items of protection provided for in this agreement imposed by Authority Having Jurisdiction. Should there arise any conflict between this agreement and Subscriber's purchase order or other document, this agreement will govern, whether such purchase order or document is prior to or subsequent to this agreement. Should any provision of this agreement be deemed void, all other provisions will remain in effect.



104 Eton Lane
Manlius, NY 13104
315.256.5355 (w)
315.295.2641 (f)

edward.hinchey@gmail.com

7 May 2015

Via email: jjg@ccf-law.com

James Gascon, Esq.
Costello Cooney & Feron LLPC
5701 West Genesee Street
Camillus NY 1303

Re: Proposal To Sample Nine Domestic Wells
Town of Marcellus
Marcellus, New York

Dear Attorney Gascon:

As requested, Mr. Edward Hinchey, P.G., a Licensed Professional Geologist and President of Independent Environmental Consultants, Inc. (IEC) attended the Town of Marcellus (the, "Town") Town Board (the "Board") meeting on 23 April 2015 with Supervisor, Ms. Mary Jo Paul presiding, to discuss groundwater sampling at residences located on Pleasant Valley Road east of the Town of Marcellus Highway Garage (Highway Garage). The Board requested a formal proposal to sample the wells in compliance with New York State Department of Environmental Conservation (NYSDEC) and United States Environmental Protection Agency (USEPA) recommended sampling protocol. This document presents a statement of project understanding, scope of services offered and an estimated cost to complete the scope of work.

Project Understanding

IEC reviewed the "Summary Report for the Floor Drain Discharge Modification" prepared by TDK Engineering Associates, P.C. (TDK) and dated 10 April 2015. The report summarizes environmental conditions in the soil at the location of a former underground oil and water separator (OWS) and in the Route 173/174 ditch down gradient of the OWS excavation. The report identifies volatile organic compounds (VOCs) and metals at slightly elevated concentration in the OWS excavation (mostly on the east side of the excavation) and in the drainage ditch on the west side of Route 17/174. The VOCs identified in the excavation and in the ditch are typically associated with gasoline and other petroleum compounds, paint solvents and degreasers. Generally, concentrations identified in the report are higher in the drainage ditch than in the excavation.

Additionally, IEC understands that a former non-regulated landfill (the, "landfill") was located on the east side of Route 173/174 adjacent to the Highway Garage. At first glance, the former landfill is in an "apparent" down-slope and down gradient location of the OWS and in an apparent down gradient location of nine domestic water wells located less than 1000-feet to the north and northwest on Pleasant Valley Road. In this case, the apparent groundwater flow may be variable and change depending on subsurface structure and hydrology. The general area of the Highway Garage, the landfill and the nine domestic wells is located at a geographic feature known locally as Pumpkin Hollow. Pumpkin Hollow is a flat lying area just north of the



surface water flow-divide between the southwest flowing Onondaga Creek in Cedarville Trough and the northerly flowing Nine Mile Creek in Nine Mile Creek Valley. Following spring snowmelt or heavy precipitation events a lake forms in the headwater of Pumpkin Hollow. The lake will persist at an elevation about 10 to 20-feet below the ground elevation at the former OWS at Highway Garage for some time before draining rapidly and completely. The lake is known as Disappearing Lake and has been described in geologic and hydrologic literature. An investigation as part of a Masters Thesis at Syracuse University was conducted on Disappearing Lake in the 1980s. The investigator determined the water in Disappearing Lake drained through the subsurface through the Onondaga Limestone before entering Nine Mile Creek north of the village. Due to the presence of Disappearing Lake, it is extremely difficult to evaluate groundwater flow directions with certainty. Therefore, the Town intends to sample the nine domestic water wells located along Pleasant Valley Road.

Scope of Work

An understanding the well construction methods, total and completion depth, and the nature of the material at the completion depth (either soil or bedrock) is necessary to understand the data provided by the laboratory analyses and estimate risk posed to domestic wells. To assure laboratory quality, all samples will be analyzed according NYSDEC Analytical Services Protocol (ASP), which includes a duplicate sample to confirm reproducibility, and a matrix spike sample to estimate aquifer interference. All laboratory data will be reviewed for quality control purposes and the laboratory will provide Category B deliverable packages; however, a Data Usability Report will not be generated unless requested by the Town. The data package will be saved with project files and provided to the Town upon request.

In order to understand or estimate the source of water to the residence IEC will ask each homeowner to complete a water well questionnaire that seeks to answer the following questions:

- water use habits;
- the number of people living in the house;
- the presence or absence of a garden or swimming pool;
- evaluate the size and quality of their lawn and lawn watering habits;
- the age of the house;
- the age, condition and recent improvements or alterations of their water system;
- the number of bathrooms;
- number of water using appliances;
- the age of the well;
- the depth of the well;
- the depth to water in the well;
- The depth to the well pump;
- determine if they ever run out of water;
- the name of the well driller that installed the well, if known;
- the presence or absence of a basement, does the basement flood;
- the presence or absence of water accumulations on their property during rain events



To estimate well construction depth and source lithology, IEC will inspect each homeowners well and water system for:

- the age and methods used for piping, pressure tank, treatment system (if present) and for construction details and methods as well as state of repair;
- Based on the number of fixtures including hot water heaters, sinks, toilets, showers, wash tubs, washing machines, water supplied refrigerators, dishwashers, etc., IEC will estimate water usage at the residence
- Starting at the point where the supply line leaves the house, IEC will inspect the underground line to the extent possible from the house to the water well;
- The well will be inspected for construction methodology and casing type, if present;
- the presence or absence of a protective well casing or "well house";
- the condition of the well cap and the sanitary seal;
- the condition of the pitless adapter, if present;
- the construction methodology and type of material used for the riser pipe;
- Using a combustible gas meter (CGM) IEC will screen for combustible gas;
- Using a sterilized electronic water level indicator, IEC will collect static water level in the well;
- IEC will estimate the total depth of the well by measuring with a weighted tape:
- IEC will record change in water level during the well purge procedure with an electronic water level indicator paying close attention to the recovery rate at the completion of the purge;
- Following the purge, IEC will collect a water sample from an appropriate location prior to groundwater coming into contact with any household water treatment systems equipment.
- All samples will be analyzed for the following parameters
 - pH (field);
 - temperature (field);
 - electrical conductivity (field);
 - alkalinity;
 - major cations and anions to complete a water fingerprint (field filtered);
 - metals
 - organic compounds described in the Target Compound List (TCL) including all the VOCs identified in previous investigations. It also includes semi-volatile organic compounds (SVOCs) indicative of petroleum;

Following receipt of laboratory results, IEC will prepare a summary report inclusive of all of the data. The report will also report aquifer conditions, such as, flow direction (if reasonably ascertained), and if possible, the source of groundwater to each well.

PROJECT COSTS

IEC will provide the services listed above on a not to exceed time and materials basis for an estimated probable cost of \$11,630.00. To avoid misunderstanding, it should be emphasized that the estimated

Proposal To Sample Nine Domestic Wells

Town of Marcellus

7 May 2015

Page - 4



probable cost is a budget based on current knowledge of the assignment. It is believed to be sufficient to cover the services described herein, but no guarantee is made or implied.

Professional Labor (hydrogeologists)	6,760.00
Laboratory Costs:	\$ 3,700.00
Field Equipment and Expenses	<u>1,170.00</u>
Total Estimated Cost	\$11,630.00

This proposal anticipates one conference call or presentation before the Board following report preparation. This proposal is valid for 60 days from the date of this correspondence.

SCHEDULE

IEC is prepared to commence this work upon receipt of the signed proposal.

ACCEPTANCE OF PROPOSAL

This proposal represents an agreement between the Town of Marcellus and IEC can only be modified in writing with the approval of both Client and IEC. The Town authorizes IEC to provide the services described above at their request, on a time and materials basis. IEC will not initiate these services without written authorization from the Client. All work will be conducted in accordance with this proposal.

CLIENT:
Town of Marcellus

CONSULTANT:
IEC

Client Name (Print)

Consultant Name (Print)

Client Signature

Consultant Signature

Please call me if you have questions or comments.

Respectfully,

Edward Hinchey, P.G.
President

Attachment A

Sandy Taylor

From: Mary Jo Pau; [maryjo2@twcny.rr.com]
Sent: Sunday, May 10, 2015 5:48 PM
To: Sandy Taylor
Subject: FW: Marcellus Proposal

Sandy—

Please print a copy for me. Thanks.

--MJ

From: James J. Gascon [mailto:jjg@ccf-law.com]
Sent: Saturday, May 9, 2015 10:53 PM
To: Mary Jo Paul; Kevin O'Hara; John Scanlon; karenpollard13@yahoo.com; 'Chris Hunt'; John Scanlon
Subject: Fw: Marcellus Proposal

From: Edward Hinchey
Sent: Friday, May 8, 2015 5:28 PM
To: James J. Gascon
Subject: Marcellus Proposal

Jim,

Did you receive my proposal?

I just reviewed an email from Joe from April. He mentioned an RFP coming out of John Houser's office. Did you send me the RFP? I don't think I saw it.

The email mentioned the RFP was going to labs, my proposal and scope goes way beyond what labs can do. I broke out costs in my proposal so you can see what my lab costs are and what my labor and equipment costs would be.

There is a fundamental difference between how a lab samples and how I sample: the lab will run the faucet in the kitchen sink for a few minutes and fill the sample bottles. I will inspect the water system and the water well to make sure the sample comes from a faucet before the water softener or any other water treatment system. I will guarantee a representative groundwater sample, a lab doesn't. I will let the water run at a low velocity through a sophisticated "flow through cell" that digitally collects temperature, pH, dissolved oxygen, specific conductivity, and oxidation reduction potential. These data are vital to understanding how the groundwater system operates in the vicinity of the former landfill and the highway garages. I will open the well and measure the total depth of the well and monitor water level as the sample is collected. Only by knowing the depth relative yield of the well can you begin to estimate groundwater flow.

I imagine quotes by the labs came in close to my lab costs. My lab costs included ASP protocol, a duplicate and Category B deliverables. If I backed out the higher level of quality control, my lab costs would have been about \$600 to \$800 less, just about the same costs the lab will incur to send a sampler out to collect the samples.

However, their sampler will be a technician without a college degree and very little or no understanding of groundwater systems.

I will not feel snubbed if my costs are "astronomical" compared to the labs and if you are only interested in "checking a box" - a lab is the way to go. I was out there today. I walked the Highway Garage's property. Admired your new fire house. Walked the former landfill. Drove up and down Pleasant Valley Road and got out and inspected the lake and bedrock outcrop at a half a dozen locations. I can say without hesitation, your environmental situation is as complex as the hydrology associated with Disappearing Lake.

Let me know how I can help - I am your servant in this matter.

Respectfully,



Edward Hinchey, P.G.
Independent Environmental Consultants, Inc.
104 Eton Lane

Manlius, NY 13104
P: (315) 256-5355
ehinchey@IC-env.com

----- NOTICE -----

This message may constitute attorney/client privilege and is intended only for the individual or entity to whom it is addressed. This message may contain information that is privileged, confidential and exempt from disclosure under applicable law. If you are not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of the communication is strictly prohibited, and you are requested to please notify us immediately by telephone (315) 422-1152 and return the original message to us at the above address.

IRS Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. Federal tax advice contained in this communication (including any attachments) is not intended or written to be used and cannot be used for the purpose of (1) avoiding penalties under the Internal Revenue Code; or (2) promoting, marketing or recommending to another party any transaction or matter addressed herein. If you would like an opinion upon which you can rely to avoid penalties, please contact the sender to discuss.

----- END OF NOTICE -----

Supervisor
Mary Jo Paul

Councilors
Kevin O'Hara
Laurie Stevens
John Scanlon
Karen Pollard

Town Clerk
Sandy Taylor

Tax Collector
Elaine Potter

Highway Superintendent
Donald MacLachlan

MARCELLUS

New York

PROCUREMENT POLICY PROCEDURE

ITEM:

DESCRIPTION: well water sampling

QUANTITY: 12 properties

2 VERBAL QUOTES OR 3 WRITTEN QUOTES (see below)

1. <u>Life Science Laboratories</u> COMPANY	<u>445-1900</u> PHONE	\$ <u>3,396.00</u> QUOTE
2. <u>Pace Analytical</u> COMPANY	<u>631-694-3040</u> PHONE	\$ <u>3,960</u> QUOTE
3. <u>Accuhest</u> COMPANY	<u>508-481-6200</u> PHONE	\$ <u>6,010.00</u> QUOTE

Less than \$1,000 shall be at the discretion of the purchaser

\$1,000-5,000 requires 2 VERBAL quotes

\$5,000-20,000 requires a written RFP (request for proposal) and 3 written quotes

\$20,000 or more must be formally bid

This includes all aggregate amounts of equipment /supplies/repairs on same or like items in a calendar year.

This excludes goods or services purchased through state & county contracts—include state & county contract numbers

Prevailing wage needs to be included with all service contracts

(only if becomes public works project)

PLEASE ATTACH THIS FORM TO ALL VOUCHERS TO SHOW THE REQUIRED QUOTES WERE RECEIVED.

24 East Main Street
Marcellus, New York 13108

315-673-3269
fax 315-673-9102

John Houser

From: Joseph E. Durand [JDurand@tdkengineering.com]
Sent: Thursday, May 21, 2015 12:16 PM
To: John Houser
Cc: John C. Herrmann; Stephanie J. Place
Subject: RE: well test

John:

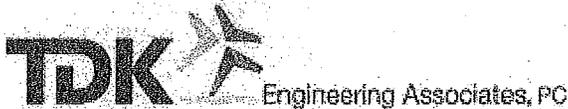
No, if we are reviewing lab results and offering a general summary memo of understanding to the town, it would be in the \$500 to \$750 range (per round). If we end up going to a meeting(s), etc., working on multiple rounds of sampling or have to deal with the residents or regulatory agencies, etc., our time would likely be in the \$2,000 to \$3,000 range, so gauge, accordingly as you and Mary Jo see fit.

Also, it is important that the town bear in mind the "typical" process includes the collection of background samples and possibly a confirmation round of sampling and analysis. The need for a confirmation round may not be warranted, but at least one additional round of S&A is typically how it is done. We have provided a few summary memos to these points previously, so let us know the town's approach when you have a minute.

Thanks,

Joe

Joseph E. Durand, P.E.
Principal, President



19 Genesee Street, Camillus, New York 13031
PH: (315) 672-8726 FX: (315) 672-8732

Celebrating 13 Years of Service!!

 Please consider the environment before printing this email.

From: John Houser [mailto:codes@marcellusny.com]
Sent: Thursday, May 21, 2015 12:07 PM
To: Joseph E. Durand
Subject: well test

Hi Joe,

Sorry to bother but I have to get something to Mary Jo for your interpretation of sampling results and not sure if I am remembering correctly. Did you tell me to figure 2,000 for that work.

John

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Sandy Taylor

From: Mary Jo Pau; [maryjo2@twcny.rr.com]
Sent: Friday, May 22, 2015 7:34 AM
To: Sandy Taylor
Subject: FW: Town of Marcellus - Atty's Fees reimbursement

Looks like Chris wants this on the agenda. You'll also have to print copies of all the attachments

From: Chris Hunt [mailto:huntspainting1@gmail.com]
Sent: Thursday, May 21, 2015 8:02 PM
To: James J. Gascon
Cc: Mary Jo Paul (fwd); karenpollard13@yahoo.com; john.j.scanlon1@gmail.com; oharakevin001@gmail.com
Subject: Re: Town of Marcellus - Atty's Fees reimbursement

I suggest we have this on the agenda for Thursday.
Thanks,

Chris Hunt
Hunts Painting

On May 19, 2015, at 2:38 PM, James J. Gascon <jjg@ccf-law.com> wrote:

By the way, the legislation must be passed before the charges are brought.....that is why I raise the issue now. -Jim

From: James J. Gascon
Sent: Tuesday, May 19, 2015 2:29 PM
To: Mary Jo Paul (fwd); karenpollard13@yahoo.com; john.j.scanlon1@gmail.com; 'Chris Hunt'; oharakevin001@gmail.com
Subject: Town of Marcellus - Atty's Fees reimbursement

MJ and Councilors, at the last Board meeting MJ reported on her contacts with the DEC regarding the ongoing investigation at the Highway Department. The thought has occurred to me as legal counsel to the board that you should be reminded/made aware of legislation that would enable the Town to provide for a possible legal defense to the Highway Superintendent (and other officers) should the DEC decide to charge him (or them) with violations of the law. Pursuant to Public Officer's Law section 18 the Town can pass legislation reimbursing its officers in the event of civil litigation against them and for defense of criminal matters brought against them, provided there is no finding of criminal guilt. I attach some relevant decisions in this regard.

As legal counsel I will not offer an opinion on whether the legislation should be passed. That is a matter of policy which you must decide. I just wanted to let you know this is an option.

Please let me know if you are interested in this sort of legislation and I will prepare a draft for your consideration. If I hear nothing from you then I will take no further action on this issue. -Jim

James J. Gascon
Costello, Cooney & Fearon, PLLC

5701 West Genesee Street

Camillus, NY 13031

Tel: (315) 422-1152

Fax: (315) 422-1139

Email: jig@ccf-law.com

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----- END OF NOTICE -----

129 ("speed bumps are not recommended for street use");⁴ *see also Highway Design Manual, supra*, §25.6, T. 25-1, n.3 (speed bumps and other vertical shifts are not used on state highways in New York to control speed). We note that in certain instances, courts have found the use of speed bumps unreasonable and thus have held government entities liable for resulting injuries to motorists.⁵

The Attorney General renders formal opinions only to officers and departments of State government. This perforce is an informal opinion and unofficial expression of the views of this office.

Requestor: Richard W. Hoyt, Esq.
Town Attorney, Town of Montgomery
43 Orchard Street
P.O. Box 402
Walden, New York 12586

Written by: Laura Etlinger, Assistant Solicitor General
In Charge of Opinions

Issued on: October 28, 2003

Opn. No. I 2003-16

N.Y. CONST., ART. VIII, §1; CIVIL PRACTICE LAW AND RULES, ART. 78; MUNICIPAL HOME RULE LAW §10(1)(ii)(a)(1); PUBLIC OFFICERS LAW § 18, 19(2)(a).

A town may not reimburse the costs incurred by the town supervisor who pled guilty to criminal charges pending against him. The town may not reimburse the legal costs incurred by town employees called to assist in the investigation and prosecution against the town supervisor.

4. The Department recommends that these handbooks be consulted as guidance in highway design until formal standards are adopted by the Department. *See Highway Design Manual, supra*, ch. 25, Appendices-General.

5. *See Colyer v. State of New York*, 208 A.D.2d 490 (2d Dep't 1994) (State found liable where claimant established that speed bump on roadway was an unreasonably dangerous condition and was proximate cause of claimant's injuries); *Mayor v. Harralson*, 101 So. 713 (Miss. 1924) (installation of speed bump found to be unreasonable method of warning drivers of dangerous intersection and city held liable for personal injuries of motorist); *see also* Op. State Compt. No. 78-837 (concluding that village should not erect bumps on street to encourage the slowing of traffic because, *inter alia*, such bumps could lead to potential tort liability for bump-related mishaps).

You have asked two questions relating to the Town's authority to reimburse legal fees incurred by town officials and employees in connection with an investigation of the town supervisor regarding alleged official misconduct. The first is whether the legal expenses incurred by the town supervisor, in the event that he is acquitted of criminal charges pending against him, may be reimbursed by the Town. The second is whether a town employee may be reimbursed for legal fees associated with being interviewed or being a witness in the criminal prosecution of the town supervisor. We believe that neither the town supervisor nor town employees interviewed or called as witnesses may be reimbursed for their legal expenses under the circumstances presented.

I. Background

We understand the facts of the situation you describe to be as follows: The town supervisor was the subject of a federal criminal prosecution involving alleged acts of official misconduct. The federal government sought interviews with a number of town employees in connection with the prosecution of the town supervisor, and the employees retained private attorneys to accompany them to these interviews. Similarly, a number of town employees were called to testify before a federal grand jury in connection with the same prosecution, and retained and were accompanied by private attorneys. You also were interviewed and/or testified before a grand jury as a part of the prosecution of the town supervisor. We understand that the town supervisor pled guilty to the charges subsequent to your submission of this request for opinion.

II. Analysis

A. Payment of Legal Expenses for Employee Who is a Defendant in Criminal Case

Public Officers Law §18 authorizes a municipality to adopt that section, and thereby provide defense and indemnification to its employees. Public Officers Law §18(2). You have informed us that the Town has adopted section 18 without modification. Section 18 provides that:

Upon compliance by the employee with [statutorily mandated procedures], the public entity

shall provide for the defense of the employee in any civil action or proceeding, state or federal, arising out of any alleged act or omission which occurred or allegedly occurred while the employee was acting within the scope of his public employment or duties. This duty to provide for a defense shall not arise where such civil action or proceeding is brought by or at the behest of the public entity employing such employee.

Public Officers Law §18(3)(a). "Employee" is defined to include municipal officers. *Id.* §18(1)(b).

A municipality providing defense pursuant to section 18 is limited to providing a defense "in any civil action or proceeding."¹ *Id.* Thus, by its plain language, section 18 does not authorize the reimbursement of attorney's fees incurred by the town supervisor defending himself against criminal charges. *See Zimmer v. Town of Brookhaven*, 247 A.D.2d 109, 113 (2d Dep't 1998).

A municipality may, however, enact a local law supplementing the defense and indemnification provisions of section 18. *See* Public Officers Law §18(12) ("Except as otherwise provided in this section, benefits accorded to employees under this section shall be in lieu of and take the place of defense or indemnification protections accorded the same employees by another enactment; unless the governing body of the public entity shall have provided that these benefits shall supplement and be available in addition to, defense or indemnification protection conferred by another enactment."); *see also*, *Op. Att'y Gen. (Inf.) No. 98-4* (local government may supplement provisions of section 18 or replace certain provisions of section 18 with other provisions enacted by local law). The provision of defense for employees may be considered additional remuneration, *see Corning v. Village of Laurel Hollow*, 48 N.Y.2d 348, 354 (1979), and as such, the enactment of local legislation allowing this benefit is authorized by Municipal

1. Section 18 provides that the municipal attorney will represent the public employee in any civil litigation or proceeding unless the municipal attorney or a court determines that a conflict of interest exists and that the employee is entitled to be represented by a private attorney of his choice. Public Officers Law §18(3)(b). In the event of a conflict, the municipality is to pay reasonable fees to the private counsel. *Id.*

Home Rule Law §10(1)(ii)(a)(1) (relating to the compensation of municipal employees). See Op. Att'y Gen. (Inf.) No. 99-33. We have previously concluded that such supplemental protections may include providing reimbursement for legal expenses incurred defending criminal matters where the employee is acquitted of the charges or the charges are dismissed. See Op. Att'y Gen. (Inf.) No. 88-6; cf. *In re Kane v. McClellan*, 110 A.D. 44 (2d Dep't 1906) (upholding constitutionality of statute providing for reimbursement to public officer of reasonable expenses incurred in successfully defending himself against criminal prosecution based upon charge of official misconduct).

With respect to the defense costs incurred by the town supervisor in defending the instant prosecution against him, we have previously concluded that payment of legal fees when an employee is found guilty of criminal charges would constitute an unconstitutional gift of public funds because an employee acting criminally is not acting within the scope of his public employment. N.Y. Const., art. VIII, §1 ("No . . . town . . . shall give . . . any money . . . to or in aid or any individual . . ."); Op. Att'y Gen. (Inf.) No. 88-6; cf. Public Officers Law §19(2)(a) (State employees criminally charged based on acts which occurred while employee was acting within scope of his employment eligible for reimbursement of legal fees by State upon employee's acquittal or upon dismissal of criminal charges).

Therefore, while we are of the opinion that the Town may enact local legislation that would provide for reimbursement of legal costs incurred by an employee defending himself against criminal charges for acts that occurred within the scope of employment, we are of the further opinion that such legislation could not be applied for the benefit of the town supervisor to reimburse the costs of his defense which culminated in his guilty plea.

B. Payment of Legal Expenses for Employees Who Are Called as Witnesses

You have also asked whether a town employee can be reimbursed for legal fees incurred when the employee is accompanied by a private attorney to be interviewed as part of the investigation of the charges against the town supervisor or when called to testify before a grand jury. We are of the

opinion that, in the instant investigation, these expenses may not be reimbursed.

With respect to town employees called as witnesses or being interviewed in connection with the prosecution of the town supervisor, section 18 authorizes the *defense* of a municipal employee in a civil proceeding. A potential or actual witness who is represented by an attorney is not defending himself in an action or a proceeding. Furthermore, the statute authorizes defense in a civil action arising out of an act or omission by the employee himself. Here, the employees seek reimbursement in connection with a case against a town official, not against themselves. For these reasons, section 18 does not provide authorization for the Town to pay the legal expenses of the town employees called to assist in the criminal investigation of the town supervisor.

We believe that local legislation that would provide for the representation or reimbursement of legal fees incurred by a public employee when accompanied by an attorney to be interviewed or to testify before a grand jury would fall within the Town's home rule powers. See Municipal Home Rule Law §10(1)(ii)(a)(1) (municipality authorized to legislate with respect to the compensation of its officers and employees).

To be valid, a local law providing this benefit to its employees would have to be reasonably related to a legitimate public purpose. See *Good Humor Corp. v. City of New York*, 290 N.Y. 312, 317 (1943). We have previously opined that legal costs may be reimbursed to public officials who successfully defend criminal charges brought against them for actions taken within the scope of their employment. Op. Att'y Gen. (Inf.) No. 91-4. Our opinion was based on the assumption that this benefit would be provided to municipal employees as a part of their total compensation package. *Id.* This benefit, we concluded, would not run afoul of the constitutional prohibition on gifts of public funds because it would serve a public purpose: the municipality would receive something in return -- a public workforce. *Id.* The Town may find that the same purpose, or another valid public purpose, would be served by the provision of legal costs for town employees who are called to testify or be interviewed in an investigation against another town employee or official.

We note, however, that the risk of a public employee having to defend himself from unfounded charges for actions arising

out of the public employment has long been recognized. See *In re Chapman v. City of New York*, 168 N.Y. 80, 86 (1901); *Corning v. Village of Laurel Hollow*, 48 N.Y.2d 348, 353 (1979). This risk has been used as a rationale for the provision of defense and indemnification for public officials and employees, to entice people who are reluctant to assume that risk individually to accept public employment. See *In re Kane v. McClellan*, 110 A.D. 44, 47-48 (2d Dep't 1906) ("It is quite conceivable that a man who would otherwise hesitate or refuse to undertake the duties of a public office for the pecuniary compensation attached thereto by law, might be most willing to do so if assured in advance that he would not himself be compelled to pay out of his own pocket for the successful refutation before a criminal court of an unjust accusation affecting his official probity and conduct; and the assurance against such a liability . . . might well operate with many persons as an inducement to enter the public service."); cf. *Wyatt v. Cole*, 504 U.S. 158, 167 (1992) ("[W]e have recognized qualified immunity for government officials where it was necessary to preserve their ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service." (emphasis added)). We have not, however, located comparable case law recognizing that the possibility that a public employee, as a result of his employment, will be called to testify before a grand jury or to be interviewed in connection with a criminal investigation of a third party has kept qualified individuals from accepting positions of public employment. It may be that this possibility is sufficiently remote to have had no detrimental effect on the establishment and maintenance of a public workforce.

In any event, we are of the opinion that such a law could not provide for the reimbursement of legal expenses incurred by the employees called as witnesses in the instant investigation against the town supervisor. This is because any local law providing for defense and indemnification must be prospective in operation to avoid violating the constitutional prohibition against gifts of public funds for private purposes. N.Y. Const., art. VIII, §1; *Corning v. Village of Laurel Hollow*, 48 N.Y.2d 348, 354 (1979) ("This is not to question the power of the municipality to enact an ordinance empowering it to defend its officials who *in the future* may be charged with

violating the law in the performance of their duties. Such a considered policy decision would raise no constitutional objections, for the cost of the defense would simply be considered additional remuneration." (emphasis added)); *In re Guarino v. Anderson*, 259 N.Y. 93, 95-96 (1932) ("In so far as the Legislature attempts to give away or authorize the appropriation of public moneys for expenses theretofore incurred by a public officer in defending himself against false accusations, the act is unconstitutional. This does not, however, follow when the act of the Legislature is not retroactive, but prospective . . . so that an officer holds and continues his position not only for the compensation provided by law, but also with the assurance of the legislative act that he will be compensated for the expense of defending himself against accusations growing out of his official duties.").

In the situation presented in your inquiry, the prosecution against the town supervisor is complete, and thus, a law providing this benefit to its employees, including the employees involved in the investigation of the town supervisor, would not be prospective.² Therefore, we believe that such a law could not be applied to reimburse the employees who have already incurred legal expenses as witnesses in the prosecution of the town supervisor.

2. Courts have established a narrow exception to the requirement that a law be prospective in application to avoid the prohibition against gifts that benefit only private interests. If a payment of public funds is in fulfillment of a "moral obligation," then its retroactivity does not invalidate it. See, e.g., *Ruotolo v. New York*, 83 N.Y.2d 248, 259 (1994) (retroactive compensation of individual does not violate prohibition against gifts if it rests on adequate moral obligation). The standard for determining whether the municipality has a moral obligation to pay a claim against it is that "it must affirmatively appear that not to act would condone a travesty of justice." *Id.* We do not believe that this standard is met in the circumstances you present. See *In re Chapman v. City of New York*, 168 N.Y. 80, 86 (1901) ("There was no moral obligation on the part of the [city] to discharge such a claim [requesting reimbursement of legal expenses incurred by a public officer who successfully defended himself against charges of official misconduct], for it had no foundation in natural or legal right."); *In re Jensen v. City of New York*, 44 A.D. 509, 515 (2d Dep't 1899) ("In the case of the petitioner, and other officers similarly situated, there was no obligation whatever, legal, equitable or moral, on the part of the State or any municipality in the State, to pay to the acquitted individual the expenses which he had sustained by reason of being subjected to an unsuccessful prosecution for official misconduct."); see also Op. Att'y Gen. (Inf.) No. 2002-4 (city's failure to reimburse filing fees incurred by city council member who commenced Article 78 proceeding against city council did not "condone a travesty of justice.").

Statement of Law: In a prior opinion (1971 Op St Compt #71-955 (unreported), the Department expressed the view that the only newsletter a town could publish and distribute was one pertinent to the *fiscal affairs* of the town, and that a town may not publish and distribute a report containing nonfiscal information. In our opinion, the material proposed to be published does not pertain to fiscal matters and, therefore, there is no authority to publish and distribute such information.

As indicated in the above-cited opinion, the authorization to publish and distribute a report relative to town fiscal affairs is contained in Town Law §116(13). Publicity fund moneys could not be used to pay the expense of publishing and distributing a fiscal report, nor could they be used to pay the expense of publishing and mailing information of the type proposed in the situation at hand. This is because, pursuant to Town Law §64(14)(a), publicity fund moneys may be expended only for the purpose of advertising certain advantages of the town and for such additional purposes as may tend to promote the commercial and industrial welfare of the town.

We might point out that the town board is authorized to publish the minutes of board meetings in the official town newspaper, or if no official newspaper has been designated, in a newspaper having general circulation in the town (Town L §64(11-b). In regard to the definition of a newspaper see General Construction Law §60. And, of course, notice of town meetings is required under the Open Meetings Law (Pub Off L §99).

Conclusion: A town may not establish a separate fund, nor may it use its publicity fund, to pay the expense of publishing a summary and condensed notices of forthcoming town board meetings. However, public notice of such meetings must be given.

May 31, 1978.

OPINION 78-419

Statement of Fact: The chief building inspector of a town was informed that the district attorney was conducting an investigation involving the inspector. Such investigation was, apparently, of a criminal nature. The chief building inspector then sought legal advice from the town attorney, was refused such advice, and was advised to obtain private counsel. Subsequently, a grand jury report indicated that no criminal conduct was evident.

Inquiry: In this instance, may the chief building inspector be reimbursed by the town for the legal expenses incurred?

Statement of Law: It is our opinion that the individual in this case may not be reimbursed for the legal expenses incurred. As a general proposition, a municipality may not reimburse an officer or employee for legal expenses incurred unless a statute authorizes such payment (*Leo v. Barnett*, 48 AD2d 463, 369 NYS2d 789, aff'd 41 NY2d 879, 393 NYS2d 994 (1977)). We are not aware of any statute which would authorize a town to reimburse an officer or employee for legal expenses incurred in seeking legal advice with regard to a criminal investigation such as the one at issue herein.

Furthermore, while the courts have recognized an implied authority to employ outside counsel at municipal expense in some instances, including certain situations where a municipal attorney has refused to represent the officer or employee (e.g., *Cahn v. Town of Huntington*, 36 AD2d 737, 320 NYS2d 893, aff'd 29 NY2d 451, 328 NYS2d 672 (1972)), we feel that there is no such authority in this instance. This Department has stated that a municipal officer's or employee's defense in a criminal proceeding is a personal, private matter, as opposed to being in the public interest, and that, therefore, a municipality could not reimburse one of its officers or employees for legal fees paid by him in successfully defending against a criminal charge based on acts allegedly committed while on the job (33 Op St Compt 183 (1977)). Similarly, it is our opinion that the expense for legal advice with regard to an investigation of a criminal nature would be an expense of a personal, rather than public, nature and that, accordingly, in this instance, the town may not reimburse the individual in question. We note that our conclusion is not affected by the fact that no criminal misconduct was ultimately found. That finding does not alter the fact that a criminal investigation, whether or not criminal conduct is found, relates to a municipal officer or employee in a personal manner.

While it appears that the investigation in this instance was of a criminal nature, even if the investigation and report related to misconduct, neglect or nonfeasance of a noncriminal nature (see Crim Proc L §190.85), it is our opinion that it would be improper to reimburse the individual in question. In the case of *Leo v. Barnett (supra)*, it was held that in the absence of statutory authority, a public officer or employee may not recover from his municipality counsel fees incurred in successfully opposing his removal from office. The court indicated that the thrust of such a defense and its attendant expenses are the personal responsibility of the officer or employee. While the situation at issue does not involve a removal proceeding *per se*, it may involve an investigation into matters similar to those which could be grounds for such a proceeding.

Accordingly, under the rationale of *Leo v. Barnett (supra)*, it is our opinion that the expense incurred by an officer or employee in obtaining legal advice in connection with a noncriminal investigation of this sort

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would also be a matter of personal, and not public, responsibility and that no reimbursement for such expense could be made by a municipality.

Conclusion: A town may not reimburse an officer or employee for legal expenses incurred in obtaining legal advice in connection with a criminal investigation, or a noncriminal investigation concerning misconduct, nonfeasance or neglect of such officer or employee.

June 2, 1978.

OPINION 78-433

Inquiry: May a county, by the adoption of a local law, authorize the sale of real and personal property (the county hospital and its equipment) at private sale?

Statement of Law: General Municipal Law §126 authorizes the governing body of a county, by resolution, to provide for the establishment of a public general hospital in such county. While there is no specific provision prescribing a procedure for the discontinuance of a county hospital, a county has the authority to discontinue its operation just as it could with respect to any other county undertaking (11 Op St Compt 445 (1955); 23 Op St Compt 441 (1967).

Upon the discontinuance of the hospital, the county would have the authority to convey the real and personal property of the hospital. We base this conclusion on the county's authority to convey real and personal property no longer needed for public purposes (see County L §215(4), (9); see also 21 Op St Compt 697 (1965).

With respect to the manner of sale of the property in question, County Law §215(6) provides that county-owned real property no longer needed for public purposes may be sold or leased only to the highest responsible bidder after public advertisement. However, this Department has expressed the view that a county may adopt a local law, subject to permissive referendum, authorizing the sale or lease of county real property not needed for county purposes at private sale without competitive bidding (24 Op St Compt 969 (1968); see also Mun HRL §§10(1)(i), 24(2)(g). Of course, any private sale of real property would have to be for fair and adequate consideration.

County Law §215(9) provides that county-owned personal property no longer needed for public purposes shall be disposed of in accordance with rules and regulations adopted by the governing body. Accordingly, the personal property in question, pursuant to a local law so providing, could be sold at private sale. As in the case of real property, such sale would have to be for fair and adequate consideration.

2	2006 New Holland	45000	38,770	500	New Holland
3	1991 Tractor Sweeper		4,730	500	Tractor Sweeper
4	1991 Ford Tractor		10,590	500	1991 Ford Tractor
5	Brush Chipper		15,855	500	Brush Chipper
6	1997 Ford New Holland		26,845	500	Ford New Holland
7	2004 Ford Dump	7000	31,189	500	Ford Dump
8	2005 International Dump	H3225K	128,750	500	International Dump
9	2004 John Deere Mower		12,850	500	John Deere Mower
10	2007 International	7600	100,625	500	International
11	2007 International Dump	5600	134,176	500	International
12	Waikiki Mower	MB	6,265	500	Waikiki Mower
13	Husavarna 27HP		8,999	500	Husavarna 27HP
14	2007 Stealing Dump		156,000	500	Stealing Dump
15	2011 International Dump		158,500	500	International Dump
16	Everest Plo w/ride	6511SISARR3P	6,300	500	Everest Plo w/ride
17	Stump Grinder	SG650	7,452	500	Stump Grinder
18	Peterbilt Mower	4000551	7,850	500	Peterbilt Mower
19	Dynapac Tamper	IF90	1,375	500	Dynapac Tamper
20	2009 Husky Chainsaw	575XP	880	500	2009 Husky Chain
21	2009 2009 Merco Skid Steer	1320RR40 HD CAT	30,200	500	2009 Merco Skid
22	2009 Broeck	SP102	2,600	500	2009 Broeck
23	Stihl Chainsaw	86	475	500	Stihl Chainsaw
24	Snowblower	SB2 10x34	4,500	500	Snowblower
25	Golf Cart		3,025	500	Golf Cart
26	Caterpillar Hydraulic	385DPR	53,916	500	Caterpillar Hydraulic
27	2012 International 4x2 Truck	Terrastar	48,900	500	International 4x2
28	2010 John Deere Gator		6,000	500	John Deere Gator
29	Bobcat Landscape		4,934	500	Bobcat Landscape
30	2013 2013 John Deere	624K	142,000	500	John Deere Gator
31	2013 Bobcat w/Auger	5650	2,335	500	Bobcat w/Auger

NEEDS TO BE ADDED:

*T 770 2015



Multi-year Cap Plan

PROPERTY LOCATION SCHEDULE

Loc #	Bldg #	Location Address (Street, City, St, Zip)		
1	1	Slate Hill Rd. Marcellus, NY 13108	HIGHWAY GARAGE	\$ 658,380
1	2	Slate Hill Road Marcellus, NY 13108	STORAGE BLDG	\$ 151,450
2	1	Platt Hill Rd. Marcellus, NY 13108	PUMP STATION NOW BELONGS TO VILL TOWN HALL	
3	1	24-26 E. Main St Marcellus, NY 13108		\$ 446,675
4	1	Marcellus Park Marcellus NY 13108	WELCOME CENTER	\$ 208,371
4	2	Marcellus Park Marcellus NY 13108	RESTROOMS	\$ 99,906
4	3	Marcellus Park Marcellus NY 13108	5 PAVILIONS	\$ 6,926
4	4	Marcellus Park Marcellus NY 13108	STORAGE BLDG (NEAR ICE RINK)	\$ 10,322
4	5	Marcellus Park Marcellus NY 13108	MASONRY (NEAR GROVE) RESTROOMS	\$ 99,906
4	6	Marcellus Park Marcellus NY 13108	GARAGE @ OFFICE & STORAGE	\$ 134,804
4	7	Marcellus Park Marcellus NY 13108	GAZEBO	\$ 9,733
4	8	Marcellus Park Marcellus NY 13108	CONCESSION STAND	\$ 2,163
5	1	4323 Slate Hill Road Marcellus NY 13108	STORAGE	\$ 87,964
6	1	Lee Mulroy Road Marcellus NY 13108	SALT STORAGE SHED	\$ 29,605
6	2	Lee Mulroy Road Marcellus NY 13108		
7	0	22 E. Main Street (Vacant) Marcellus NY 13108	LAND	