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February 11, 2015

Randall T. Douglas, Supervisor  
Town of Jay  
P.O. Box 730  
AuSable Forks, NY 12912

**RE: (1) Provision of Sand to Town Residents**  
**(2) Sale of Sand to Town Residents**

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Dear Randy:

You have asked me to give you a legal opinion with respect to whether the Town can (1) provide sand to Town residents and businesses and (2) sell sand to Town residents or Town businesses.

**1. Provision of Sand to Town Residents/Businesses.** Article 8, Section 1 of the New York State Constitution provides “no county, city, town, village or school district shall give or loan any money or **property** to or in aid of any individual, private corporation or association, or private undertaking.....”

This has been interpreted by the New York State Comptroller through numerous opinions to mean that the provision of Town property such as sand or the plowing of individual driveways is a violation of Article 8, Section 1 as an unlawful gift of taxpayers’ money.

The provision of sand is similar to plowing a private individual’s driveway as you are using Town property and services to benefit an individual which is not authorized by statute or law. Most people are commonly aware that the Town cannot plow their driveways. Similarly, the Town cannot provide sand for individual properties, and certainly not for commercial use or resale.

Therefore, in this instance, the provision of sand to residents for purely private purposes is not in furtherance of a proper municipal purpose and is not authorized by statute.

With this being said, there are exceptions:

1. The Town may provide sand or plow private driveways in the event there exists a State of Emergency and there is an imminent and present danger which the provision of sand or plowing would prevent.

2. In the event that there is a present emergency such as an illness, death or fire which would render a home or business inaccessible, the provision of sand for this existing, imminent purpose would be legal.

With this being said, there can be no anticipation of an emergency by the Town or speculation that there may be an emergency.

**2. Sale of Sand to Residents or Commercial Businesses.** It is a general maxim of law that municipal property can only be used for municipal purposes and that municipalities, including towns, are not authorized to engage in commercial activities. The sale of sand from the Town pit is generally prohibited as against engaging in a commercial enterprise. Towns are simply not permitted to sell Town property to make money. Additionally, Towns are not to compete with private enterprise.

Towns are organized for governmental purposes, and their powers are limited and defined by the statutes under which they are constituted. There is no authority for towns in New York State to engage in the selling of sand to individuals or commercial enterprises.

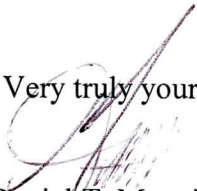
As with the provision of sand to residents, there are exceptions to the sale to residents:

1. In a declared State of Emergency, this could be permissible. However, the provision cannot be based upon speculation or an anticipated problem but must be during a state of emergency.
2. In rare occasions, sand can sold as “surplus property” and can be sold in bulk to the highest bidder. In our case, we do not have surplus sand and therefore this does not apply.

Finally, there are liability concerns with the provision of sand, “*ultra vires.*” The provision or sale of sand would be looked up by courts as outside of the scope of the municipality’s powers and, therefore, any employee, Superintendent of Highways, or the Town Board could be held personally liable and not indemnified, defended or covered under the Town’s insurance policy as they would be providing services outside the scope of their duties.

Based upon the foregoing, it is my recommendation that the Town immediately cease providing sand and/or selling sand to Town residents as it is a clear violation of Article 8, Section 1 of the New York State Constitution, is not a power granted the Town, is in competition with private enterprise which is against the law and opens up the individuals involved to severe liability exposure.

Thank you.

Very truly yours,  
  
Daniel T. Manning

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